Defending Sexual Offenses in PA

Guide to Understanding the Criminal Process in Pennsylvania

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Shaffer & Engle, LLC
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Defending Sexual Offenses

A Non-Lawyer's Guide to Understanding the Criminal Process in Pennsylvania

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The purpose and intent of this book is to provide anyone facing investigation and criminal prosecution with a quick guide and easy reference to the Pennsylvania criminal justice system. Further, to render a basis for understanding some of the intricacies of such a system. It is *not* intended to be a substitute for the knowledge and facility with the justice system possessed by a licensed and practiced defense attorney. *It is essential to consult with an attorney at your first opportunity*.

We decided to write the book as if we were responding to the routine questions asked by many clients. It is intended to be a quick read and therefore, it does not thoroughly delve into any one topic. Where appropriate we have provided the appropriate legal citation to case law, rule and statute– not that you become intimately familiar with the citation's contents, but that you can appreciate that there is legal authority for the information being provided to you. It may help separate what has become "urban myth" from reality. This will help you to sharpen your understanding of the process so that you may become more intelligent about your defense. The assistance that you provide to yourself by reading this book and your chosen counsel will invariably serve you well.

Chapter Number One

Pre-Charge

What to Do and Not to Do

The ideas and concepts stated throughout Chapter One are easily translatable throughout the entire criminal process for almost any crime and should be used by those suspected of sex crimes as a guide for behavior. They are not, however, a substitute for legal advice specific to your case.

If You Think You May be a Suspect– Cease All Contact with the Alleged Victim

Q: What should I do if I find out that I'm suspected of a sex crimes offense?

A: Anyone who believes that they may be a suspect of a sex crimes offense should immediately end any and all conversations, either directly or indirectly, with the alleged victim. This includes telephone contact, texting, instant messaging, and social media accounts such as Facebook, Twitter, Instagram, Snapchat and Tinder. Do not contact their friend(s) about them. Do not contact their family, even if they are calling you. **Note that we aren't stating for you not to safely store the information that is coming from them** (evidence of calls, contents of texts, messages, posts, any electronic outbursts or photos).

Q: Why is that? They have been trying to contact me and I want to discuss what they are accusing me of, ask why they are doing it, and tell everyone that I am innocent!

A: There is almost no chance at all that the victim is going to confess to you that they are lying. There is a greater chance that the alleged victim is attempting to gain useful information against you. Moreover, a police officer may be listening to and recording the conversation to use against you. Note that an alleged *victim* is also a Commonwealth's *primary witness*. If you have heard you are accused, then presume that the police have heard as well. The accusations have likely been reported to the police by the alleged victim, a friend, family member, or a mandated reporter[1]. If not yet reported, it is only a matter of time before the police will become involved.

Once they are involved, the alleged victim will provide them with a statement about the offense and the police will take it from there. Because the majority of sex crimes come down to issues of "he said/she said," police rely heavily on statements made by defendants either admitting guilt or "sounding guilty." Before they show up unexpectedly at your house to ask you a few questions- just *casually*, the police can execute a consensual wiretap with the victim and record any call that is placed to you. Any statement you make to the victim over a phone can be recorded by the police. Even if you do deny the events, you may have "sounded" guilty over the phone. Jurors have expectations about what they believe an innocent person would have done and said in response to an accusation. It is nearly impossible to convince any of them, much less all of them, of your innocence during a conversation with your accuser. Do you want a jury hearing your less than convincing denial of the incident? NO.

You have a constitutional right to remain silent during a jury trial. Sometimes, it is best for a defendant not to testify. The fact that someone elects to have a jury trial sends a loud and clear message from you that you are not guilty. If you make statements to the alleged victim – or anyone else other than your lawyer, you might have to get on the stand to explain your statements to the jury and be subject to cross examination. It is one thing to elect to testify after you have been thoroughly prepared, it is another to be forced to testify to explain your incriminating or sketchy statements to the jury.

You want them to know, see and hear the truth. Which is why the only time the jury hears from you should be on the witness stand after being properly prepared by counsel.

Don't Try to Tell Your Story to the Alleged Victim's Friends and Family

Just as the accuser and police can testify about any statement you make, so can anyone else. As tempting as it may be to tell your version of the story to Aunt Sarah, the accuser's relative, or a mutual relation or friend– *just don't do it*. The risks are far too great. Someone who might "be on your team" today, may switch sides tomorrow. Even if the person believes you and is trying to help you, they can still

[1] A mandated reporter is any individual that is required by law to report the incident to the authorities- such as a teacher, guidance counselor, therapist, caseworker, or probation officer for example.

be called as a witness by the other side and used against you. Witnesses can be turned upside down during a good cross examination. While it is a powerful weapon for your attorney to use, it can also be a powerful weapon for the prosecution to use against you.

Preserve Your Own Evidence

Q: If I don't have contact with the victim either directly or indirectly, how can I collect any evidence?

A: With a friend present (so they could introduce how the evidence was preserved at trial instead of you having to do it), download and back up your cellphone to a hard drive, flash drive, or external hard drive. Be aware that if the victim has been texting you, collecting or attempting to collect any texts from your wireless provider becomes almost impossible within a day or two after they are sent. You will likely only be able to get information from a major provider that a text has been sent. However, the actual message will be lost, so take a screen shot to preserve it. Evidence that a call was made to your cell phone by the alleged victim's phone is far easier to get. Other people's phone records generally require a court order pursuant to the 1986 federal law called the Stored Communications Act to get accuser's records. Yours, however, you can obtain directly from your provider.

Similarly, you can download and preserve everything you have ever sent, received, or posted on Facebook (that hasn't already been deleted) in a few easy steps.

You can download your information from your settings. To download your information:

1. Click ▾ at the top right of any Facebook page and select **Settings**
2. Click **Download a copy of your Facebook data** at the bottom of General Account Settings
3. Click **Start My Archive**

Facebook will send you a series of emails which contain the complete contents of your account, including photos, messenger, and posts. Save them and then DEACTIVATE YOUR ACCOUNT! Just as you will want to save the accuser's social media to comb through and possibly use in your defense, the accused and the police will be combing through yours. Shut down your social media outlets. That way, the government needs a subpoena, or the police need a search warrant to access your information.

What Can I Do to Save the Accuser's Social Media?

Oftentimes, immediately before or immediately after an accusation, an accuser will unfriend, unfollow, or otherwise block a defendant from accessing the accuser's social media. In the off chance they haven't deleted you – **DO NOT** delete them. We can't tell you how often we hear, "the accuser is a liar, crazy, vindictive, delusional" – or any other derogatory word, and "everyone knows it from their Facebook, Instagram," or whatever else. Our first question is always, "[C]an you show us?" Nine times out of ten, a client tells us that we can't actually see for ourselves because they deleted and blocked the accuser. We understand the instinct you completely cut someone out of your life who is making terrible accusations against you, but please, please, *please*, don't deprive your attorney of valuable tools to use in your defense. By the time any court order is procured to get the requested social media, those great posts for the defense will be long gone and irretrievable. If someone has it in for you bad enough to make false accusations about you, you can be assured they are going to clean up their social media to portray themselves in the

best possible light. ***Immediately*** go painstakingly back through each of their social media accounts and take screen shots. If you are blocked but have someone else who is still a Facebook friend of the accuser, a Twitter follower, engaged in Instagram, Snapchat, Tinder or *any* type of social media with your accuser or any possible witness– save it! Download it, print it, send it to someone else for storage or have them print it out. Once the post, tweet, chat or other electronic blurb, photo or spontaneous outburst is taken down or erased, it may be gone forever. We've had success obtaining usernames and passwords through a court order, but there's no absolute way of making sure the original media is proper.

Common hypothetical:

The victim appears for court and is traumatized at the site of you. A game that a victim often plays after being questioned again and again by police, caseworkers, children's resource center forensic examiners, an assistant district attorney, and a trundle full of victim-witness advocates. The victim-witness folks can be quite fanatical as well. That's because all they do is support the story of the victim. They are there to connect the dots; not to tell all sides of the story.

Now, wouldn't it be nice to have texts, posts, chats and photos of the victim on social media sharing information with you *after* the accusation is made? Or, better yet, that type of information being made to the entire world?

"Here, look, it's you just an hour or two after you accused my client of raping you…you're at a party, laughing with your friends. I thought you were too traumatized to do anything but cry in a corner?"

How much better does this sound and look to a jury as a big 2-foot x 3 foot poster, rather than a rather blah cross-examination question about a random text they sent to you after the alleged incident occurred– which, by the way, they can deny ever sending. Without proof of the existence of the text, you could be prohibited from even questioning the witness about it.

Do not go into the police station for an interview! If they come to your door politely decline to be interviewed and ask for an attorney.

At some point you may be contacted by the police and asked to come into the police station to "tell your side of the story." Alternatively, they may just show up at your home or place of employment. Do not be fooled. The police have already made a preliminary determination that you should be charged and are looking for your full confession, partial confession, or affirmation of some of the events. They will tell you that you shouldn't be afraid to talk to them if you have nothing to hide or have done nothing wrong. They will try to shame you, intimidate you, and otherwise cajole you into speaking with them without having an attorney present. ***They will make you think that if you ask for a lawyer, then the police will believe you are guilty. Don't be fooled. They already think you are guilty, that is why they want to speak with you in the first place.***

A savvy detective or police interviewer will ask you many questions from many different angles about the alleged event. They will ask you if it is "possible" that maybe something happened that someone misconstrued. "Could you have touched her breast by accident?" "Is it possible that you both were drinking

so much that maybe you don't remember what happened?" They may even ask you questions that lead you to a certain conclusion–"If your ex-girlfriend said you used to beat her up so she broke up with you…" or "Several people have come forward with similar complaints about you..." **The police are allowed to make up facts about the case and lie to you.** They can tell you they won't charge you, you can go free, that your mother said you confessed to everyone at church, or that something isn't a crime in order to get you to talk to them. This type of questioning has been challenged in some jurisdictions but is **completely legal** in Pennsylvania.

Q: But they can't use those statements against me unless they read me my *Miranda* rights…right?

A: Not so fast. You voluntarily[2] went into the police station to answer some questions. You voluntarily (even if you secretly didn't want to) let them into your home when the asked to step inside and speak with you for a few minutes. Under the *Miranda* decision[3] you have to be in custodial detention and be subject to police interrogation. '**Custodial detention**' is the equivalent of an arrest. This means that you are subject to the will and control of the police. You are in cuffs, locked in a room or a car, and have no right to leave.

But, if you walked into the police station and the police discuss with you that you are not under arrest and are "free to leave" at any time, you are not in custody. The door to the interrogation room may be opened slightly or closed firmly– it doesn't matter because you are there voluntarily, and you are free to leave at any time… they will offer you something to drink or eat and make you feel at ease (as much as possible, anyway). They will tell you that you should tell your side of the story if you don't have anything to hide. *Miranda* does not apply. In most cases where you voluntarily speak with police and in nearly all cases where you are in police custody and subject to questioning, they will often provide you with a written statement of your *Miranda* rights and advise you that you should read and sign the sheet indicating that you understand your rights. Therefore, insulating themselves from the claim made by an overly-aggressive defense attorney that you were forced to provide an involuntary statement that violated *Miranda*.

Police officers are required to provide *Miranda* warnings only where a suspect is subjected to custodial interrogation. Thus, *Miranda* is not implicated unless the individual is in custody and subjected to interrogation. "**Custodial interrogation**" is police conduct that is calculated to, expected to, or likely to evoke admissions by a suspect. Note– even if you are in custody and have not been read your *Miranda* rights– anything you say NOT in response to a police question can still be used against you. For example, you are sitting in the interrogation room scared out of your mind before you are read your rights and you just blurt out "I didn't mean to do it!" "He was okay with what we did" or anything else not in response to a question from the police is fair game to use against you.

Words to live by ***"In a pickle, take the nickel…"*** (ie: "the 5th")

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[2] Com. v. DiStefano, 2001 PA Super 238, 782 A.2d 574 (2001) (no custodial detention where accused voluntarily appears at police station).

[3] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Do not voluntarily surrender your cell phone, password, or any of its information – It can be just as bad as making a statement.

Q: The police said that if I have any information that I can show them that will contradict what the victim has told them, then they will not charge me. Should I let them see my cell phone?

A: No. Absolutely not. Again, the police are looking for information to help them corroborate what the victim has told them. They are not necessarily looking for exculpatory evidence. If you have any information on your cell phone, computer, laptop, iPad or PC you need to share it with your counsel first. Let them look at it and make the determination on whether or not it should be provided to the police. Do not hand over the best piece of defense evidence to the police without first reviewing it with counsel. The Commonwealth has a mandatory duty to provide any evidence that is exculpatory to the defense. The defense has no duty to provide any such evidence to the Commonwealth, except in limited circumstances, such as in the case of an alibi.

In 2012, the United States Supreme Court held that a warrant is required to place a GPS tracking device on a vehicle. Two years later, the Court said police need a warrant to search a cellphone that is seized during an arrest.[4] The U.S. Supreme Court recently ruled that tracking an individual's location using cell-site location information ("CSLI") runs afoul of the 4th Amendment.[5]

Do not fall for the lie detector/polygraph fallacy

Q: The police want me to come in and take a lie detector; if I pass it, then I'm ok, right? They aren't going to charge me?

A: False. By passing a lie detector or a polygraph test, you have proven only one thing…you can pass a lie detector test. Every statement that you have made pursuant to the questions asked may now be used against you in court. They will provide you with *Miranda* warnings prior to taking the test, which you will gladly waive in writing because this is your time to prove yourself innocent. Not at all. Whether the results of your test are conclusive that you are lying about the incident, you are telling the truth about the incident or possibly they are inconclusive– meaning the police polygrapher doesn't really know how you did- you may still be charged.

Lie detector test results are not admissible in court. Every case is like a snowflake. They are all different. Each case has its own facts and circumstances and the mere passing of a lie detector may not detract from the prosecution's case that they have a consistent story from the victim and evidence that ties you to the case.

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[4] Riley v. California, 134 S.Ct. 2473, 189 L.Ed.2d 430, 82 USLW 4558.

[5] Carpenter v. U.S., 138 S.Ct. 2206, 86 USLW 4491 (June 22, 2018).

Pennsylvania courts have consistently held that evidence of the results of polygraph or lie detector tests is inadmissible in court because such evidence does not meet the "general acceptance test" required for admissibility of scientific evidence.[6]

Pennsylvania courts have been so concerned about lie detector evidence that they have excluded just about any reference to or use of it. For example, the courts have held that such evidence is inadmissible *even where* there was a pretest stipulation that the test results would be admissible. The courts have reasoned that the stipulation does nothing to assure the reliability of the test.[7]

So, even if you passed the lie detector test, the court isn't going to accept that fact into evidence or let a jury hear it– no matter what. *Even if* the prosecutor agrees that the jury should hear about it.

Why would you submit yourself to a lie detector done by the police polygrapher? Wouldn't it be better to have your own test conducted by a polygrapher of *your* choosing; that *you* paid for and the Commonwealth will *never* know about? At least then your defense team can go to the prosecutor and tell them *"Well, we had our own done by Mr. Smith, who your office formerly employed and [s]he passed with flying colors."* This may be possible leverage for a resolution and/or cast seeds of doubt into the prosecution's mind about how consistent the victim *really* may be.

We can show the prosecutor and/or the police polygrapher the empirical data from the polygraph that your test results were non-deceptive. All polygraphers rely on a review of the questions, the hand scores, and the charts from every examination done.

Every good prosecution has at least two of the following three parts

I. A consistent accounting of the events of the crime by the victim.

The victim will have provided their side of the events to the first person that they reported it to and many subsequent individuals thereafter. The list of whom they have provided a statement to may be very long, including, but not limited to:

1) Police detective or officer;
2) Family and friends;
3) Teachers;
4) Counselors;
5) A forensic examiner;
6) A victim-witness advocate;

[6] Com. v. Marinelli, 547 Pa. 294, 690 A.2d 203 (1997).

[7] Com. v. Watts, 319 Pa. Super. 179, 465 A.2d 1288 (1983), affirmed 507 Pa. 193, 489 A.2d 747 (1985); Com. v. McIntosh, 291 Pa. Super. 352, 435 A.2d 1263 (1981); Com. v. Pfender, 280 Pa. Super. 417, 421 A.2d 791 (1980).

7) Caseworker(s);
8) Foster family members; and
9) An assistant district attorney

The victim's statement will often be in their own writing if an adult. If a child, then they will have likely provided their statement about the events to a forensic examiner or interviewer that will have been video and audio recorded. The police too will likely maintain their own written report based upon their notes about the event relayed to them by the victim. The police will type a report and destroy their notes in most cases.

II. Corroborating physical evidence.

The finding of [on the victim or defendant] or determination that one of the following exists from the suspect: Cuts, scrapes, bruises, abrasions, ligature marks, DNA, saliva, semen, blood, skin under the nails, or pubic hair to name a few. In today's age of CSI everything, juries expect corroborating physical evidence– DNA testing, fingerprints, electronic tracking data, gynecological testing, etc. In cases where there was contact but it was non-consensual, the lack of certain physical evidence is of paramount importance– you were strangled– where are your bruises? In others, corroborating physical evidence isn't important if it doesn't corroborate that a crime occurred– who cares if semen was present because the act was consensual.

III. An incriminating statement by the suspect.

A full confession, partial confession, or any affirmative statement from a suspect that confirms any of the details about the victim's account or the physical evidence. It is very easy and law enforcement and prosecutors often try to build credibility for their witness by getting a defendant to confirm non-essential details ("yes, I had a red shirt on that day and it was cloudy…") about an event as proof that the accuser is telling the truth. "He confirmed her testimony that he was wearing a red shirt and it was cloudy that day, therefore you can rely on the accuser to tell the truth because she told the truth about those details…" Recall what we discussed earlier about not having any contact with the victim, their friends, or family. The police may have already recorded a statement that you unknowingly provided while on the telephone with the victim. The police are permitted to get a consensual wiretap with one party consent. So, don't have any contact with the victim or anyone other than counsel about your case, especially not electronically.

Chapter Number Two

A Criminal Complaint is Filed

What's a Complaint?

A criminal complaint is a charging document that is filed in court cases[8] with an issuing authority (a district magistrate or a judge of the court of common pleas) that contains the following information:

1) The name of the affiant (the officer, trooper, detective or other law enforcement individual that is filing the complaint);

2) The name and address of the defendant, or if unknown, a description of the defendant as nearly as may be;

3) A direct accusation to the best of the affiant's knowledge, or information and belief, that the defendant violated the penal laws of the Commonwealth of Pennsylvania;

4) The date when the offense is alleged to have been committed; provided, however:

(a) If the specific date is unknown, or if the offense is a continuing one, it shall be sufficient to state that it was committed on or about any date within the period of limitations; and

(b) If the date or day of the week is an essential element of the offense charged, such date or day must be specifically set forth;

5) The place where the offense is alleged to have been committed;

[8] A "court case is a case where one or more of the offenses charged is a misdemeanor, felony, or murder of the first, second or third degree." Pa.R.Crim.P. 103.