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# FAMILY ADVOCATE

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## Addiction and Other Impairments

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FAMILY ADVOCATE, AMERICAN BAR ASSOCIATION, 321 N. CLARK STREET, CHICAGO, IL 60654-7598



# Sexual Addiction and Custody Disputes

BY ELLIOT J. WIENER

If an “addiction” is a chronic condition that involves an inability to control behavior despite its negative consequences, then sexual conduct fits this category no less than an addiction to substances. But, for purposes of a child custody dispute, the issue is whether the addictive behavior (a) has in fact negatively affected a parent’s ability to care for a child, and (b) is likely to affect that parent’s current or future ability to care for a child. It is vital that the client understand that the main issue before any custody court is the child’s best interests. When it comes to addictive behavior, the issue is what consequences flow for parenting. The analysis should be on the parenting issue and not on diagnosis or personal judgments regarding the behavior. Judges, other lawyers, and the other party could have their own responses to the description of the behavior and the label, so prepare the client for these reactions. It’s important for you and the client to stay focused on the main issue and to weather the storm of adverse personal judgments.

The client needs to “own” the issue by showing recognition of the problem and taking steps to address it. Denial is the client’s worst enemy because many actors in the legal setting will want to know that the client has taken responsibility for their behavior. Contrition is expected, perhaps demanded. Blaming the other person for the behavior will sound the death knell of client’s case. The client needs to speak from the “I” posture.

It is vital for you to get a professional assessment of the

client so you have an objective idea of the client’s issues and their impact on parenting. The expert’s evaluation can include the use of psychosexual evaluative instruments as a risk assessment guide. This is an internal evaluation, undertaken to help the lawyer represent the client. You should assume that this expert is not going to testify since they are part of the client’s “team” and, therefore, are subject to obvious lines of impeachment for bias. But be careful because the expert’s opinion could be discoverable. Be prudent in written communications to and from this expert as a hedge against possible discovery. The client must be prepared to testify that this assessment was solely for the attorney’s use and does not involve treatment. Consider using a *Kovel* retainer (*United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961)). Check the rules in your jurisdiction.

The client should also begin treatment if they have not already done so. This can be a powerful form of “owning” the issue. This treating provider may testify about the client’s treatment and progress, so be sure the person has the credentials and adequate experience to treat the client and is willing to testify. Beware of treating providers who become “cheerleaders” for your client.

You may need a rebuttal witness to offset testimony of a court-appointed expert or the other side’s expert. As noted, this should not be your team expert and, of course, this expert must be adequately credentialed and experienced.

Develop a plan for overcoming what may be adverse

negative judgments of the judge, the other lawyers, and the other side, not through arguing that they're wrong, but by showing that the client recognizes the issues and is taking concrete, articulable, measurable steps to ameliorate them. Collect, from your client, documentation showing each step they are taking to ameliorate the issues. Develop a parenting plan that allows the client to increase their time with the child if that time has been restricted. The plan should also show how the client—at least when they are with the child—will not be able to engage in the addictive behavior, e.g., they have no computer or the computer is not connected to the internet.

*Be very careful if your client is accused of having child pornography. Do not view it or receive it on your computer or phone without consulting with a criminal lawyer who is very knowledgeable about the handling of this material.*

The court may require supervised parenting time. Develop a list of supervisors. Family members have their advantages, but they may reinforce the client's reliance on blaming others and may defer to the client, whose judgment may be impaired.

It's possible, perhaps likely, that the court will want to undertake a forensic custody evaluation. Educate your client as to what that entails. There is some dispute in the professional literature over how far this "education" can go. For example, you shouldn't give your client a sample Minnesota Multiphasic Personality Inventory-2 to take, but you can explain to the client what the forensic process entails. Let the client know that there are "validity" scales on some tests that are designed to identify a client who is understating their problem. Cross-examiners often use these scales as evidence that a client was untruthful to the forensic evaluator. Remember, you can educate your client, but you can't change them. Emphasize to your client that they must be compliant with court orders and with instructions from the forensic evaluator and any supervisors. Passive resistance to the process, e.g., being late to appointments, will be reported and will be used against them.

Investigate the facts against your client. Be sure you know the witnesses, documents, and media recordings, e.g., audio, video, screenshots, and social media postings. Make sure your client knows the rules of attorney-client privilege, and get their side of the story, warts and all. Is there any allegation or evidence that the child has been affected by the addictive behavior? Has a child been exposed to pornography, been involved in parental disputes, or witnessed sexual behavior by your client either person-to-person or via media, e.g., computer images or phone sex? What are the claims of what your client was doing when with the child? They left the child alone, were in another room or part of the residence for long periods of time, or were behind locked doors? Don't forget the positive aspects of your client's parenting. It's possible that the addictive behaviors are merely punctuated moments in an otherwise steady history of proper parenting.

If the court appoints an attorney or a guardian for the child, a forensic evaluator, or parenting supervisor, and if you have any input into the selection process, do what you can to ensure that this person is fair and unbiased. Sometimes it's hard to get reliable information on this point, but ask colleagues. If your client believes any of these individuals are biased, have the client maintain contemporaneous notes (not taken during their session with the individual, but immediately afterwards). If the client claims bias, have them explain in detail, just as they would have to in testimony. Cross-examine the client to test the story.

Be very careful if your client is accused of having child pornography. Do not view it or receive it on your computer or phone without consulting with a criminal lawyer who is very knowledgeable about the handling of this material. You can't help your client if you're sharing a jail cell together.

Emphasize to your client that predicting how another person is going to react to a fact pattern is nothing more than futile guesswork; there are too many variables, not the least of which is that the client is asking you to predict how someone else will react. All you can control is what you do; so, make sure the client is in control of what they do and that they exercise that control in a positive, constructive way that is focused on the child and not on the other spouse. **FA**



**ELLIOT J. WIENER** ([ewiener@phillipsnizer.com](mailto:ewiener@phillipsnizer.com)) is a partner with Phillips Nizer LLP and chairs the firm's New York Matrimonial & Family Law Department. A Fellow of the American Academy of Matrimonial Lawyers with more than 40 years of experience practicing family law, he concentrates his practice in the areas of matrimonial and family law including divorce, custody/visitation, support, and related matters. He has a particular interest in child custody and visitation issues and in trial work.