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# Update

## Introducing Grooming as 'Other Acts' Evidence

by Gabriela D. Manero, J.D.<sup>1</sup>

Offenders engage in an elaborate process of grooming which culminates in the sexual assault of a child. The sinister intent behind these seemingly innocuous acts, however, is not often readily apparent. This article will help prosecutors identify and properly admit grooming as "other acts" evidence under the Federal Rules of Evidence 404(b)<sup>2</sup>, which all states have adopted in a complete or modified version.

### What is Grooming?

Grooming is "the process of cultivating trust with a victim and gradually introducing sexual behaviors until reaching the point where it is possible to perpetrate a sex crime against the victim."<sup>3</sup> It can also be explained as "the process of eroding a victim's boundaries to physical touch and desensitizing them to sexual issues."<sup>4</sup>

Once evidence of grooming is uncovered during an investigation a prosecutor must go through a checklist of possible grounds for admissibility. Considering the evidence for multiple purposes is critical when using grooming evidence in a criminal proceeding. Often, the proposed evidence will meet more than one category of 404(b) evidence.

### Grooming as a Process

A tactical decision to consider is whether to admit grooming evidence as probative of a specific 404(b) other acts exception or to admit it to demonstrate the grooming process as a whole. In *State v. Berosik*, the Supreme Court of Montana found the lower court did not err in admitting grooming evidence, including testimony of prior sexual contacts, sexually suggestive comments, books on incest, and sex toys the defendant had given his stepchildren.<sup>5</sup> The defendant alleged

that his stepdaughters had fabricated their accusations. He claimed they wanted to get rid of him for restricting their freedom and because they were afraid he would expose the sexual relationship between one of the daughters and her boyfriend.<sup>6</sup>

The state's expert witness testified generally about grooming, and specifically as to progressions in the grooming process.<sup>7</sup> The Court found the state expert's testimony was relevant because it provided the jury with a comprehensive understanding that abuse of a child does not always occur at one time, presented evidence that young victims sometimes delay in disclosing, and explained different reactions of children after sexual abuse.<sup>8</sup> An expert would have also been able to testify to behaviors consistent with grooming.<sup>9</sup> This understanding of the grooming process refuted the defendant's allegation that his stepdaughters fabricated their testimony, and could assist the jury in judging the credibility of the stepdaughters.

### Probative vs. Prejudicial

In order to admit other acts evidence at trial, the other act(s) must be relevant and probative of the crime for which the defendant is charged, and not unduly prejudicial.<sup>10</sup> Evidence will be deemed unfairly prejudicial if it distracts the jury from the material issues, and would likely cause them to decide the case on an improper basis.<sup>11</sup> To determine the probative value of other acts evidence, the trial court should consider whether the defendant disputed the issue for which the state is offering the other act, whether the evidence is unnecessarily cumulative, and how much time elapsed between the charged crime and the other act.<sup>12</sup> Prosecutors should weigh the "comparative enormity"<sup>13</sup> of the charged act and the other act,

keeping in mind that courts are concerned with the amount of time and possible confusion the other act may cause the jury. Still, neglecting to view any piece of testimony as part of the whole theory upon which the evidence is being admitted could result in exclusion of acts that would otherwise be critical to achieving the conviction.

### Preparation and Planning

When specific acts of grooming demonstrate the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident they should be charged as 404(b) evidence. One of the more common ways to admit grooming evidence is to use it to demonstrate preparation and planning of the crime. A 404(b) motion must demonstrate a link between the other act and the crime charged. Although similar, in a planning analysis the other act and charged act should be mutually dependent while in a preparation analysis, the other act should expose a progression towards the fulfillment of the charged act.

In *State v. Castine*<sup>14</sup>, the child victim testified that the defendant began showing her adult pornographic magazines when she was eight or nine years old, specifically calling her attention to pictures depicting oral sex.<sup>15</sup> Over time the defendant's behavior advanced from merely showing the victim the magazines, to placing her hand on his penis and showing her pornographic videotapes.<sup>16</sup> The fondling progressed to demands for fellatio culminating in weekly assaults of the child.<sup>17</sup> The Supreme Court of New Hampshire found the uncharged acts were clearly part of the defendant's deliberate plan to groom the victim for long term sexual exploitation; "[s]imply put, the acts were cognizable stages in the execution of a readily discernable plan. The calculated progression of each stage of abuse insured that the existence of a plan could be objectively determined by looking at the prior acts themselves, thereby foreclosing reliance on the prohibited inference that because the defendant was predisposed to abusing the victim, he must have had a plan."<sup>18</sup>

Additionally, the Court found the evidence was admissible to show the defendant's preparation in committing the charged acts, stating "the evidence, objectively viewed, was admissible to demonstrate that the defendant's gradually escalating abuse led to the fulfillment of his plan to commit the charged offenses by preparing the victim for later assaults."<sup>19</sup> In finding the prejudicial effect of the evidence did not substantially outweigh its probative value, the Court concluded the victim's testimony regarding the prior assaults was not "extensive or repetitious" but was rather "properly limited to only those acts that were a part of the progressive steps in the defendant's plan."<sup>20</sup>

### Intent and Motive

Prosecutors may also consider the other acts of intent and motive when deciding how to admit grooming evidence. In *State v. Sena*, the Supreme Court of New Mexico held that the trial court properly admitted grooming evidence to show the defendant's intent under a 404(b) analysis.<sup>21</sup> The defendant was convicted of two counts of criminal sexual contact of a minor.<sup>22</sup> In *Sena*, the victim's grandparents were responsible for applying a medicinal ointment to a rash that covered the back of the child's waist to the back of her knees.<sup>23</sup> Although the rash never appeared on her vagina the child disclosed that her grandfather, the defendant, touched her 'privates' while helping her apply the lotion to herself.<sup>24</sup>

The trial court admitted the grooming evidence, including testimony that the defendant walked around naked in front of the child, showed her a pornographic video, showered naked with her, and showed her his wife's thong underwear.<sup>25</sup> The court explained

that the unlawfulness element necessary to prove criminal sexual contact of a minor could be met by establishing that the "defendant's behavior was done to arouse or gratify sexual desire."<sup>26</sup> The court reasoned that the grooming actions taken by the defendant suggested an attempt to familiarize the child with sexuality and desensitize her to the defendant's sexual contact.<sup>27</sup>

The grooming evidence was not only relevant but critical to countering the inference that the defendant touched the child's vagina solely for medical purposes. The grooming evidence, the Supreme Court of New Mexico articulated, could not have been offered to prove the defendant's propensity to "act like a pervert on occasion," but it was properly admitted under FED. R. EVID. 11-404(B) as proof of the defendant's intent in touching the child's vagina.<sup>28</sup> The Court's reasoning could have also been used to admit the evidence to demonstrate absence of mistake or accident.

Consider this application in a case involving primarily digital evidence. In a case out of the Seventh Circuit, *United States v. Chambers*, the defendant was convicted under 18 U.S.C. § 2422(b), of attempting to persuade, induce, entice, or coerce an individual under the age of eighteen to engage in a sexual activity, after spending over a year chatting online with undercover officers posing as a fourteen-year-old girl named Kendal.<sup>29</sup> He appealed, arguing in pertinent part that his failure to have face-to-face contact with Kendal after fourteen months of chatting with her indicated a lack of intent to meet her.<sup>30</sup> The Court looked to the evidence, including numerous sexually explicit chats, communications of past sexual assaults to another minor, e-mailed adult and child pornography, instructions to Kendal on how to sexually arouse herself, inquiries into her use of birth control, and discussions on where to meet, and agreed it unquestionably accumulated to evidence of grooming.<sup>31</sup> The Court found the evidence, including twenty-two images of child pornography found on the defendant's computer, admissible as probative of the defendant's motive and intent to meet Kendal.<sup>32</sup> This finding supported the prosecutor's argument that the defendant had in fact taken the substantial step necessary to be charged with the attempt crime under 18 U.S.C. § 2422(b).

In *State v. Borck*, the Oregon Court of Appeals found that letters written by the defendant to his niece were properly admitted as evidence of the defendant's motive.<sup>33</sup> Borck was convicted of first-degree sexual abuse for touching the breasts and buttocks of his niece, and endangering the welfare of a minor for permitting another niece to watch the assault.<sup>34</sup> The Court of Appeals affirmed.

In *Borck*, the state offered letters into evidence to refute the defendant's claim that the touching of his niece was innocent and had occurred during "horseplay."<sup>35</sup> The defendant began writing his eleven-year-old niece when he was incarcerated. The letters included explicit sexual matters, such as direct questions to his niece about her sexual experiences. The letters also instructed the victim to include photographs that would not violate the correctional facility rules, such as her wearing a "Bikini" or a "G-string," in "underwear," or "in a bubble Bath Covered By Bubbles."<sup>36</sup>

Significantly, the letters were written to the niece who was forced to watch the assault of her sister, not the niece who was actually assaulted. The Court found that even though the letters were not written to the niece who had been assaulted they were probative of the defendant's conscious motive in touching that niece's breasts and buttocks. The grooming evidence exposed the defendant's sexual interest in the niece recipient of his letters, indicating that the assault she was forced to witness was intended to desensitize her to sexual touching so that she would become more susceptible to his sexual

advances.<sup>37</sup> Therefore, the pattern of grooming directed at one niece was also probative of the defendant's motive in committing the sexual assault towards a different niece.

Notably, the Court did not admit the letters arbitrarily, but purposefully excluded portions regarding the defendant's incarceration. "That exclusion evinces a conscious, nuanced, consideration of the unfairly prejudicial potential of certain aspects of the letter's contents."<sup>38</sup> The trial court admitted the letters into evidence as relevant and probative of defendant's intent, motive and absence of mistake or accident.<sup>39</sup> The Court of Appeals, however, concluded that because they found the evidence to be relevant of defendant's motive they did not need to address whether the letters were also relevant for other proffered non-propensity purposes.<sup>40</sup>

Prosecutors should note that in cases with prior sexual assaults involving the same or different victims, evidence of those acts may be admissible as probative of motive or intent.<sup>41</sup> Consider the evidence in *Chambers*, where the defendant, in chatting with his intended victim, explicitly described prior sexual acts with another fourteen-year-old girl. Citing another Seventh Circuit decision the Court reiterated that "prior instances of sexual misconduct with a child victim may establish a defendant's sexual interest in children and thereby serve as evidence of the defendant's motive to commit a charged offense involving the sexual exploitation of children."<sup>42</sup> When deciding if a prior sexual act with the same or a different victim could tend to prove the motive or intent of the defendant in the charged act, prosecutors should compare the similarity of the acts, the frequency of their occurrence, and their relationship in time.<sup>43</sup>

### Technology and Grooming

With the increase of technology-facilitated exploitation the means by which to groom a child has dramatically increased. Through the use of technology, perpetrators can now engage in grooming behavior by identifying a child from the comfort of their home, and under a perceived blanket of anonymity. Through social networking sites, offenders have immediate access to their victim's favorite movies, books, best friends, photographs, even their daily, if not hourly, state of mind. Offenders use information gained from social networking sites to build rapport, assess the potential risks in targeting a specific child, and to communicate with and progressively groom their victim.

In a child sexual abuse case, it is increasingly likely that an offender will use technology such as a computer or cell phone to groom a child. Consider a case where the defendant traveled to meet the minor with the intent to engage in sexual activities. To counter the argument that the defendant believed the victim was above the age of consent, the state could seek to introduce chats with a discussion of the victim's actual age, or the defendant's comments in choosing age appropriate topics, or asking age appropriate questions of a minor.

Technology should not be something that a perpetrator employs to commit offenses against children without repercussions. A thorough investigation should utilize forensic interviews that elicit information about the role of technology in the abuse process, as well as search warrants with sufficiently particularized language inclusive of such technology since these items may contain evidence in the form of texts, chats, emails, photographs or videos exchanged with the victim that can be used to support and corroborate the child's disclosure.

### Who Qualifies as an Expert Witness?

Once the state's theory has been determined, it is imperative to understand when an expert witness is necessary, and what qualifies

an expert witness in child sexual abuse cases. The Court in *Sena* found that an expert witness was not necessary for the jury to infer that the defendant acted with sexual intent. An expert witness, the Court reasoned, is necessary to provide testimony indicative of a scientific, technical or otherwise specialized knowledge.<sup>44</sup> While lay witnesses may have been unable to decide whether the defendant had groomed the child, their common knowledge and experience of what it means to act with sexual intent was sufficient to properly admit the grooming evidence as probative of intent under 404(b).

To testify as an expert on grooming, courts have held that a combination of education, experience, training and recognition in the area of child sexual abuse is sufficient. In an Ohio Court of Appeals case, *State v. Poling*, Dr. McPherson testified to the process and theory of grooming and why children's memory and their mental process differs from adults.<sup>45</sup> The defense challenged Dr. McPherson's lack of training on adult or child psychology, arguing that his testimony regarding grooming behavior, and labeling of the defendant's actions as grooming, was inappropriate. Dr. McPherson testified that he was a physician at Akron Children's Hospital, had completed a residency in pediatrics, was specially trained in child abuse, trained other medical professionals, was board eligible in pediatrics, served as medical director of a child advocacy center, published articles about child abuse, and was a member of professional associations concerning child abuse.<sup>46</sup> The Court concluded that Dr. McPherson's training and experience exposed him to the mental processes of adults and children, specifically to behavioral aspects of children's testimony, and that his testimony demonstrated his opinions were sufficiently based on the behavior of other children in comparable situations.<sup>47</sup>

Similarly, in *State v. Berosik*, the Supreme Court of Montana found the lower court did not abuse its discretion in allowing a nurse practitioner to testify as an expert on the grooming process. The Court found the witness's Masters degree, license in marriage and family counseling, commencement of her dissertation on disclosure of child sexual abuse, experience working with convicted sex offenders, and the thousands of forensic interviews she performed was sufficient to properly qualify her as an expert in a case involving child sexual abuse.<sup>48</sup>

It should be noted that while rare, courts have rejected testimony from even the most qualified experts. In a First Circuit case, *United States v. Raymond*, the Court granted the defendant's motion in limine to exclude Kenneth Lanning's<sup>49</sup> testimony on the grooming process.<sup>50</sup> The Court specifically found that Lanning's reliance on his own experience which included "more than 27 years of experience studying the criminal aspects of deviant behavior and interacting with investigators and prosecutors,"<sup>51</sup> and the book and article he wrote and relied upon, did "not satisfy the fit or reliability requirements of Federal Rule of Evidence 702 and *Daubert*."<sup>52</sup> The Court heavily critiqued Lanning's book, *Child Molesters: A Behavioral Analysis*, finding it to be a practical behavioral analysis written for law enforcement officers investigating child sexual exploitation but not sufficient to demonstrate that "the principles and methods he used in arriving at his opinions for investigative techniques are reliable for the purposes of admitting them as evidence in court under Rule 702."<sup>53</sup> The Court further critiqued Lanning's grooming article, arguing that it supported the premise that his opinions were common sense observations and "expert testimony about matters of common sense is not helpful to a jury and carries the risk of unfair prejudice."<sup>54</sup> The Court further emphasized the lack of information on whether these writings underwent a peer-review process, whether his opinions are generally accepted in the community of psychologists and behavioral scientists, and whether

his “professional field reaches reliable results beyond suggesting useful leads for law enforcement investigation[s].”<sup>55</sup>

While it is improbable that testimony by experts with the experience and qualifications of Kenneth Lanning would be commonly excluded, defense attorneys will likely rely on this case as a road map to excluding expert testimony of grooming evidence. In order to negate this approach, it becomes critical to focus foundational questions on qualifications that have been demonstrated to pass appellate scrutiny, including: the number of years the expert worked in the field; reliance on research that utilizes reliable methods and principles with demonstrated reasonable error rates, standards, and controls; and any peer-reviewed publications the expert authored.

## Conclusion

Properly admitting grooming evidence can have a critical role in securing a conviction in a child sexual abuse case. In addition to the support it lends to proving requisite elements of the charge(s), understanding the grooming process can help explain the dynamics of victimization to the trier of fact.<sup>56</sup> Prosecutors must review cases with a particular focus on possible grooming evidence to support a child’s disclosure, develop arguments for admission at trial, and ultimately secure a conviction.

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2 FED. R. EVID. 404(b) (dictates that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.”).

3 *Piercefield v. State*, 877 N.E.2d 1213, 1216 (Ind. Ct. App. 2007).

4 *State v. Berosik*, 214 P.3d 776, 782 (Mont. 2009).

5 *Id.* at 783 (although the grooming evidence in this case was not admitted under a 404(b) exception, but rather the transaction rule pursuant to M.R. EVID. 403, the case illustrates when expert testimony to the grooming process may be necessary).

6 *Id.*

7 *Id.* at 782.

8 *Id.* at 782-783.

9 *State v. Bork*, 216 P.3d 915, 920-921 (Or. Ct. App. 2009) (where the state’s expert testified that “the offender may do a lot of wrestling or physical touching with a child that is suppose[d] to indicate \*\*\* accidental touching, \*\*\* accidentally in the process of this wrestling or playing around. . . . And so the child kind of learns to ignore the touching in that context.” The expert testified that the letters written by the defendant could qualify as grooming behavior, and that the questions “if she was a virgin or had a boyfriend” were typical entry level questions of grooming behavior).

10 FED. R. EVID. 401 (sets forth that “[e]vidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”).

11 FED. R. EVID. 403 (provides that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”).

12 *Wease v. State*, 170 P.3d 94, 112 (Wyo. 2007).

13 *Id.* at 112.

14 *State v. Castine*, 681 A.2d 653 (N.H. 1996); accord. *State v. Poling*, No. 2008-A-0071, 2010 WL 1057456, at \*1-3 (Ohio Ct. App., Mar. 19, 2010) (reasoning that the defendant had shown the child victim pornographic movies in an effort to desensitize her to his planned future sexual abuse. The evidence was admitted as probative of preparation and planning under Ohio Evidence Rule 404(b); accord. *Piercefield*, 877 N.E.2d at 1215-1216 (where the defendant demanded that his stepchildren massage his feet, back, and buttocks in exchange for privileges such as playing videogames, the court found the defendant was familiarizing the children with touching his body, as part of his preparation and plan to heighten their physical relationship)).

15 *Castine*, 681 A.2d at 655; see also *Poling*, 2010 WL 1057456 at \*2 (citing *State v. Crotts*, 820 N.E.2d 302 (Ohio 2004) (where the court “demonstrated a

skillful application of the evidentiary rules” when it permitted “testimony that [a child] viewed child pornography on [the alleged abuser’s] computer” which was consistent with the state’s desensitization theory of the case.”).

16 *Castine*, 681 A.2d at 655.

17 *Id.*

18 *Id.* at 656.

19 *Id.*

20 *Id.* at 657.

21 *State v. Sena*, 192 P.3d 1198 (N.M. 2008).

22 *Id.* at 1200.

23 *Id.*

24 *Id.* at 1201.

25 *Id.*

26 *Id.* at 1202 (quoting *State v. Kerby*, 156 P.3d 704 (N.M. 2007) (where evidence that the defendant created a peephole into the victim’s bathroom was proper to counter the defendant’s assertion that he had touched the victim’s buttocks merely as a fatherly pat and supported the inference that the defendant touched the victim with criminal intent relevant to the unlawfulness element)).

27 *Id.* at 1203.

28 *Id.* at 1201.

29 *United States v. Chambers*, 642 F.3d 588 (7th Cir. 2011).

30 *Id.* at 592.

31 *Id.* at 593 (discussing the common grooming methods the defendant employed in his communications with the fictional minor).

32 *Id.* at 595.

33 *Bork*, 216 P.3d at 916.

34 *Id.* at 921 (defendant was found guilty of three counts of first-degree sexual abuse, three counts of endangering the welfare of a minor, and three counts of harassment).

35 *Id.* at 918.

36 *Id.* at 919.

37 *Id.* at 923.

38 *Id.* at 925.

39 *Id.* at 920 (reasoning that the letters allow for the inference of sexual intent because they provide a reason as to why the defendant would be taking pictures of her, subjecting her to sexually specific questioning, and discussing condoms and orgasms).

40 *Id.* at 923.

41 *See Riegler v. State*, 941 P.2d 734, 738 (Wyo. 1997) (where evidence of a similar previous sexual misconduct with a different victim was admissible to prove modus operandi, preparation, plan, intent, and credibility of victim); see also *Mitchell v. State*, 865 P.2d 591, 596 (Wyo. 1993) (during trial for second-degree sexual assault of a ten-year-old girl, defendant’s admission of sexual arousal during prior sexual activity with a three-year-old niece, for which the defendant was convicted, was admissible to prove motive).

42 *Chambers*, 642 F.3d at 595 (citing *United States v. Sebolt*, 460 F.3d 910, 917 (7th Cir. 2006)).

43 It should be noted that these are just some of the characteristic that courts look for, but are not required in every case nor is one more controlling than any other.

44 *Sena*, 192 P.3d at 1204.

45 *Poling*, 2010 WL 1057456 at \*5.

46 *Id.* at \*8.

47 *Id.* at \*6-8 (additionally holding that Nurse Gorus, a nurse practitioner called by the state, who worked at a child advocacy center, had specialized training from a national organization, and was licensed as a clinical counselor, was properly qualified as an expert).

48 *Berosik*, 214 P.3d at 782.

49 *United States v. Raymond*, 700 F.Supp. 2d 142, 143 (D. Me. 2010) (Kenneth Lanning worked twenty years in the FBI’s Behavioral Science Unit and National Center for the Analysis of Violent Crime at Quantico).

50 *Id.* at 156.

51 *Id.* at 147.

52 *Id.* (reasoning that these statements, along with his assertions that his “database is the thousands of cases on which I have consulted or studied” and the “validity” of his opinions is “the fact that its application has worked for all these many years”, do not allow for a “meaningful evaluation of Lanning’s facts or data or the reliability of Lanning’s opinions. . . .” Citing the Advisory Committee’s notes on Fed.R.Evid. 702, the Court elaborates that even if a witness relied “solely or primarily on experience, [he] must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.”).

53 *Id.*

54 *Id.* at 150.

55 *Id.* at 152.

56 The following literature provides further reference on grooming and the dynamics of victimization, including: compliant victims, recantation, delayed disclosure, learned helplessness, secrecy, etc. – Kenneth Lanning, *Child Molesters: A Behavioral Analysis*; Anna Salter, *Predators, Pedophiles, Rapists, & Other Sex Offenders*; and the APRI, *Investigation and Prosecution of Child Abuse*, Third Edition.