

## Chapter 1

### Management of Sex Cases

- § 1:1 Set an early status conference
- § 1:2 Set realistic dates
- § 1:3 Appoint experts early in the process
- § 1:4 Set regular status conferences to monitor discovery
- § 1:5 Set standard protocols for the handling of sensitive evidence and for facilitating the exchange of scientific evidence between experts
- § 1:6 Handle sex crimes vertically and in specialized departments
- § 1:7 Prepare for self-represented defendants

#### APPENDIX 1A. SAMPLE FARETTA WAIVER

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

Cases involving sex crimes are complex. The trial judge immediately is faced with competing demands for discovery, often involving privileged medical records of the victim or the defendant. The scientific examination of materials possibly containing serological evidence is lengthy and expensive. Because of the potential length of prison terms, sex cases can take on a complexity rivaling that of a death penalty trial. Competing with the desire of the attorneys to be as thorough as possible are the needs of the victims for timely resolution. It goes without saying that sexual assault crimes can be extraordinarily traumatic to victims. Children particularly are subject to competing pressures and stress when the trial date is continued further and further from the event. Judges are in a unique position to balance the needs of the defendant to properly prepare a defense against the needs of the prosecution and victim for a speedy resolution.

The following is a list of areas in which the court can assert control of cases to balance the foregoing interests. Undoubtedly creative minds could generate more. Much will depend on the local legal culture and the degree of rapport between the bench and bar. Probably with no other criminal

case can it truly be said that in a sex crime case “justice delayed is justice denied.”

**§ 1:1 Set an early status conference**

Court and counsel should meet within the first two weeks of the defendant’s initial arraignment to review the basic circumstances of the case and to outline the anticipated discovery and motion schedule. In certain cases it may be possible to resolve the case at the earlier stages of the process before time and expenses are incurred. It may be evident very early in the proceedings that the case will focus on disposition rather than proof of the crime.

**§ 1:2 Set realistic dates**

To the extent possible, dates should be set far enough out to adequately reflect the needs of the parties to obtain discovery, conduct analysis of materials, and run motions. Continuances should be granted only with good cause shown in a written motion under Penal Code section 1050. Setting of realistic dates, particularly the trial date, will minimize the number of times the victim and other witnesses will need to emotionally gear up for the trial.

**§ 1:3 Appoint experts early in the process**

Clearly the most lengthy part of pretrial preparation of a sex case is the testing of serological evidence. The initial delay comes with the Department of Justice. Demands on that department are significant, frequently resulting in a delay in testing of many months. Often preliminary hearing or trial dates must be set to give a particular case priority with the Department of Justice. A second delay comes with the defense request for referee analysis of the results obtained by the state. Responsible laboratories must be located, evidence exchanged and tests performed. The earlier this process can be started, the earlier the court will be able to set a trial date with some assurance that it will go as scheduled.

**§ 1:4 Set regular status conferences to monitor discovery**

The court should insist on regular status conferences to ensure that discovery is proceeding properly and to quickly resolve any disputes that arise. Left to themselves, attorneys frequently will let cases drift until the eve of a critical hearing. Unresolved discovery disputes inevitably force a continuance of the hearing, one that may have been avoided had the court been adequately supervising the case.

**§ 1:5 Set standard protocols for the handling of sensitive evidence and for facilitating the exchange of scientific evidence between experts**

Delay frequently occurs because the court and parties have no standard procedures for handling physical evidence. The defense should have prompt and complete access to evidence seized by the prosecution, subject to a standard protective order. (See discussion in Chapter 5.) There should be no dispute over obtaining referee analysis of physical evidence, particularly regarding issues relating to the chain of custody. All these procedures should be in a uniform protocol to minimize the need for direct court involvement in settling these kinds of disputes.

**§ 1:6 Handle sex crimes vertically and in specialized departments**

It takes but a glance at these materials to realize that the management of sex crime cases involves a degree of specialized knowledge not normally associated with other criminal cases. It only stands to reason that judges who become familiar with these cases generally will carry greater credibility with the bar and will become more proficient in handling them. Maximum benefit can be obtained if a particular court can routinely assign these cases to a single judge or a small group of judges. Not only will an assigned judge be able to better manage cases because of greater expertise, but the attorneys also will tend to group into teams. As the players become more familiar with each other, there will be more opportunities to resolve cases early and with consistent results. Disputes will be minimized.

If it is not possible to assign all cases to one judge, the court at least should try to assign each case to a single judge for vertical handling. The more a judge becomes familiar with the parties and circumstances of a particular case, the more likely the judge will be able to manage the case effectively.

**§ 1:7 Prepare for self-represented defendants**

Self-represented defendants present a particular challenge to the court in sex cases. As with many persons who choose to represent themselves, they can be very bright, but they clearly lack the necessary understanding of the law and legal system to represent a person charged with crimes that could have triple-digit consequences.

1) It is critical that the court obtain a well-documented waiver of the right to an attorney. (*Faretta v. California*, 422

U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).) The court should clearly advise the defendant regarding the maximum punishment and whether the offense mandates a state prison sentence. (For a sample *Faretta* waiver, see Appendix 1-A.)

2) Special arrangements will be needed for discovery. There is considerable information the defendant should not have or should be provided only in limited circumstances. The name, address, and telephone number of the victim should not be given directly to the defendant in discovery. (Pen Code, § 1054.2; see discussion in these materials in Chapter 5.) In most situations the court must insist that discovery be made only through a properly licensed investigator; if the defendant cannot afford one, the court must appoint one. (Pen Code, § 1054.2, subd. (b).) The investigator should be served with a protective order that outlines with specificity the circumstances under which the defendant is to have access to any sexually explicit material, and that access is to occur only when supervised by the investigator or a responsible expert. (See Pen. Code, § 1417.8, subd. (a); see Appendix 5-A.)

The defendant should have access to the victim and sensitive material regarding the victim only through the investigator. The court should enter a protective order prohibiting all contact with the victim except as authorized by a protective order issued under Penal Code section 136.2. (See discussion in these materials in Chapter 7; for a sample order prohibiting contact with the victim, see Appendix 7-A.)

3) The court must carefully monitor the defendant's conduct during trial. It will be particularly helpful for the court and defendant to have an on-the-record discussion regarding the procedural aspects of the case such as sidebar conferences, approaching (or not approaching) the witnesses, handling of any physical evidence (including weapons), and where to stand when giving opening statements and closing arguments.

The court must clearly instruct the defendant on the permissible limits of voir dire, particularly when dealing with sensitive juror information. Whether inadvertently or otherwise, a defendant may start discussing material properly reserved for a closed court session.

The court also must put limits on the proper questioning of experts and other witnesses, particularly experts who testify regarding any of the sex offense syndromes. Particular attention must be given to the proper questioning of the victim to avoid an argumentative or threatening inquiry. The defendant should not be permitted to approach the witness without first obtaining the permission of the court. To

the extent possible, physical evidence should be passed to the witness through a court attendant or bailiff.

The defendant must be instructed on the proper handling of scientific evidence, particularly evidence that might suffer from contamination if not handled correctly.

4) With all arrangements made on behalf of a self-represented litigant, the court must constantly balance the right of such a defendant to properly prepare a defense, the right of the victim to be free of fear or intimidation by the defendant, and the right of the defendant to due process during the trial. The court must not allow the need to protect the victim to override the needs of the defendant to due process.

# APPENDIX 1A

## SAMPLE FARETTA WAIVER

SUPERIOR COURT OF \_\_\_\_\_ COUNTY

*Waiver of Right to Counsel (Faretta v. California (1975)  
422 U.S. 806)*

People v. \_\_\_\_\_ Case No. \_\_\_\_\_

	<b>Initial Answer</b>	
	<b>Yes</b>	<b>No</b>
Can you read and write?	_____	_____
If so, what language? _____		
Do you understand that you have the right to a lawyer and, if you cannot pay for one, the court will appoint one to represent you at no cost?	_____	_____
Do you understand that there are certain dangers and disadvantages to you when you act as your own lawyer, some of which are:		
It is almost always unwise to act as your own lawyer;	_____	_____
You may do more harm than good for yourself by acting as your own lawyer;	_____	_____
You will be given no special treatment from the court and you will be required to follow the same rules and procedures that a lawyer would be required to follow;	_____	_____
The prosecuting attorney (the DA) in your case will be an experienced lawyer, and it is this lawyer's duty to give you no special treatment or consideration, and you, therefore, will be in an unfair fight because the DA is more experienced and skilled than you;	_____	_____
A lawyer representing you will have the knowledge and experience to file proper pretrial motions and to investigate your case;	_____	_____

**Initial Answer**

By acting as your own lawyer, you will not have the sound advice of an experienced criminal lawyer helping you to make decisions about your case; \_\_\_\_\_

How much education have you completed?  
\_\_\_ Elementary School \_\_\_ Junior High School \_\_\_ High School \_\_\_ College \_\_\_ (years)

Are you aware of the elements of the offense or offenses of which you are charged? \_\_\_\_\_

Are you aware of the possible defenses to the charge that could lead to a verdict of “not guilty”? \_\_\_\_\_

Do you understand that if the court allows you to represent yourself, you cannot later claim that you received “ineffective assistance of counsel” or claim you should have been represented by a lawyer? \_\_\_\_\_

Do you understand that because the DA will be reluctant to talk directly to you, you will be much less likely to be able to negotiate a favorable resolution of your case? \_\_\_\_\_

Do you understand that you will not have special law library privileges merely because you represent yourself? \_\_\_\_\_

Do you understand that you are not automatically entitled to “advisory” or “standby counsel”? \_\_\_\_\_

Do you want to speak to a lawyer about the problems in acting as your own lawyer and what other choices you might have? \_\_\_\_\_

After considering all these questions, do you still want to act as your own lawyer? \_\_\_\_\_

Date \_\_\_\_\_ Defendant’s signature \_\_\_\_\_

**FINDINGS**

After making inquiry into the defendant’s legal background, training, and knowledge, the court hereby determines that the defendant \_\_\_ does \_\_\_ does not have the ability to act as his/her own lawyer. The court finds that the defendant has knowingly, intelligently, and voluntarily chosen to act as

**App. 1A**

SEX CRIMES: CALIFORNIA LAW & PROCEDURE

his/her own attorney, with full knowledge of the risks and dangers of doing so.

Date \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court