Commentary

Gretel Fights Back:
Representing Sexual Harassment Plaintiffs
Who Were Sexually Abused as Children

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I. INTRODUCTION

In the children's story *Hansel and Gretel*, Hansel and Gretel overhear their father and stepmother plotting to kill them by abandoning them in the middle of the woods, leaving them to die by slow starvation, wild animal attack, or other gruesome means. Keeping his wits about him, Hansel stuffs his pockets with pebbles and drops them along the path to the woods. When their parents do abandon the children in the forest, Hansel and Gretel follow the pebbles home. Again the parents plot their children's murder, again the children overhear, and again they leave a trail to follow home—this time of bread crumbs. Unfortunately, birds eat the bread crumbs and Hansel and Gretel are lost in the woods. Another adult, a witch living in a cottage with a deceptively child-friendly, candy-covered exterior, lures them in and tries to kill them. This time it is Gretel who outsmarts the evil adult, pushing the witch into the oven and rescuing Hansel from a cage. Somehow the children find their way back home, giving the story a "happy" ending.

What is remarkable about this classic fable is that even though Hansel and Gretel know that their parents twice tried to kill them, and even though both children are quite brave and intelligent, their only goal (to which they devote all their cleverness and energy) is to get back home to those same...
abusive parents. In their view, it is better to be in the home with parents who repeatedly plot their murders than anywhere else. Escape is never contemplated. Reporting is never contemplated. Confrontation with their parents is never contemplated. Hansel and Gretel only want to go home, doubtlessly hoping, in the tragic universal hope of abused children everywhere, that if only they are good enough Mommy and Daddy will finally love them.

It is even more remarkable that we, the adult readers of this fable, buy the notion that Hansel and Gretel's return home at the end of the fable is a "happy" ending. We, who are not fictional children but presumably intelligent adults who would never condone child abuse, find the story neatly tied up when the second abuser—the witch—is conquered, only to have the children return to their primary abusers—their murderous parents. So ingrained in each of us is the family reunification goal, and so agreeable to us is the concept of abuse victims returning to their abusers, that we accept this frightening conclusion to the fable without question.

The myths and psychological baggage of child abuse run deep in each of us, abused or not. Researchers know well that abused children, especially sexually abused children, will make superhuman efforts to stay with, to be loved by, and to please abusive adults, especially parents. They will often avoid conscious thought of the abuse, yet be plagued by recurrent intrusive flashbacks, dreams, or other reminders of the abuse as part of the common survivor affliction, Post-Traumatic Stress Disorder (PTSD). While abuse survivors may be high achieving, like the valiant Gretel, they will also engage in mysterious self-defeating behavior, such as returning to the site of the abuse for further mistreatment or becoming repeat victims later in life.

Thus by early adulthood, the psychological mechanisms abuse victims learned and honed in childhood may have become an uncomfortable way of life, disserving them in their adult functioning. Although approximately 25% of all adult women in the United States were sexually abused as children, there is strong evidence that the percentage is substantially higher.

2. See, e.g., Roland Summit, M.D., The Child Sexual Abuse Accommodation Syndrome, 7 CHILD ABUSE & NEGLECT 177, 184-85 (1983) (describing the extreme psychological mechanisms a sexually abused child may utilize in order to cope with an ongoing abusive situation); Bessel van der Kolk, M.D., The Compulsion to Repeat the Trauma, 12 PSYCHIATRIC CLINICS N. AM. 389, 394 (1989) (noting that "abused children often cling to their parents and resist being removed from the home").


4. See generally van der Kolk, supra note 2, at 389 (describing the re-enactment of the trauma and revictimization of sexual abuse survivors).


among sexual harassment plaintiffs.\textsuperscript{7} While many defense attorneys argue that this indicates that these plaintiffs intentionally subjected themselves to revictimization or otherwise “asked for” the harassment, the reality is far more complex. Most psychological researchers agree that child sexual abuse survivors are less likely to recognize danger signs in hostile situations, less likely to confront the perpetrator, less likely to report sexual harassment, and less able to extricate themselves from a hostile work environment.\textsuperscript{8} Put another way, the psychological mechanisms learned in an abusive childhood, such as denial, detachment, dissociation, and reattribution, are utilized again when the victim finds herself as an adult in another abusive setting.

Since it seems that a large number of sexual harassment plaintiffs were sexually abused as children (and my practice confirms this high percentage, albeit with only anecdotal information), it is important for attorneys representing sexual harassment plaintiffs to understand the psychological and legal issues affecting this class of clients in order to best protect the clients’ rights, to best make tactical decisions for their cases, and ultimately to avoid revictimizing the plaintiffs. As attorneys, we must assist Gretel in reaching freedom and self-autonomy, not perpetuate a life history of abuse.

\textbf{II. THE CLIENT’S CHOICE TO TELL OR NOT TO TELL}

From the very beginning of a sexual harassment case in which the plaintiff has a history of child sexual abuse, the client must decide whether and how to allow information about her child sexual abuse to be used in the litigation. Although one might wonder at first glance why a plaintiff would want to permit evidence of her abuse history into her sexual harassment case, the benefits to the plaintiff can be significant in both psychological and practical terms. This Commentary will explore the advantages and disadvantages of using evidence of the plaintiff’s prior child sexual abuse in sexual harassment litigation, as well as the legal means and strategies to consider when deciding to exclude prior child sexual abuse evidence or to use it offensively in discovery and at trial.

\textsuperscript{7} Although it appears no studies have been done directly assessing the rate of child sexual abuse among sexual harassment plaintiffs, there is very strong research supporting the proposition that those who have suffered incest are more likely to be victims of later acts of sexual abuse, exploitation, or unwanted sexual advances than nonincest victims. See van der Kolk, supra note 2, at 391 (noting studies that show that among incest survivors, more than twice as many suffered unwanted sexual advances by an unrelated authority figure; 68% were later victims of rape or attempted rape, compared with a norm of 38%; incest survivors are at high risk of becoming prostitutes; and survivors of father-daughter incest are four times more likely than nonincest victims to be asked to pose for pornography). See also BLUME, supra note 6, at 177 (noting that twice as many incest survivors report marital rape than the norm and 82% of incest survivors have experienced “some kind of sexual assault” compared to a norm of 48%).

\textsuperscript{8} See generally van der Kolk, supra note 2; BLUME, supra note 6.
A. The Choice Belongs to the Client

First, it is essential that the decision to allow disclosure and use of child sexual abuse evidence be the client's choice, and that neither the attorney, the treating psychotherapist, nor anyone else (such as a spouse or partner) make the decision for her. A woman who was sexually abused as a child and then sexually harassed as an adult has had choice stolen from her twice. The essence of abuse and harassment is the robbery of choice. Due to the power imbalance between adults and children, an abused child is trapped in the home and stripped of her right to consent to sexual activity. Due to the power imbalance between employer and employee, a harassed employee is often trapped by economic circumstances in a hostile work environment and finds it difficult to assert her right to say no to unwelcome sexual conduct. By the time this woman enters litigation, she sorely needs people to respect her right to make fundamental decisions regarding her lawsuit.

It is therefore essential that the client be fully presented with all information regarding the pros and cons of allowing her history of child sexual abuse into the litigation, and that she be permitted, with the advice of her attorney and psychotherapist, to make the call. One of the most common complaints about attorneys is that they railroad clients into decisions. When the client is an abuse survivor, this error can compound the psychological injury. The decision of whether to disclose the secret of molestation (molestation cannot happen without secrecy) is an important, deeply personal choice for the client to make for herself.

B. The Choice Must Be Made Before Filing Litigation

Second, the decision must be made before filing a lawsuit and before any substantive negotiations take place. Once the case begins, either formally through commencement of the action or informally through negotiations or mediation, any decent defense attorney will seek the plaintiff's psychotherapy records, investigate the plaintiff's background, and talk to her friends, family, and co-workers. Once information pertaining to child sexual abuse is discovered, the defense will usually aggressively seek more information. This may be because it is either helpful to the defense, intimidating and embarrassing to the plaintiff, or both. Many defense attorneys will take the position that once they have obtained some information about child sexual abuse, the plaintiff has waived her right of privacy as to remaining information. The plaintiff's attorney must, therefore, take an aggressive position with regard to this sensitive information at the outset. If it is to be suppressed, she must modify or quash subpoenas and arrange protective orders limiting areas of inquiry of plaintiff and other witnesses with knowledge of the child sexual abuse.

9. See BLUME, supra note 6, at 61 ("The secret completes the trap. In fact, Judith Herman [a doctor who specializes in treating child sexual abuse victims] defines child sexual abuse as 'any physical contact that had to be kept a secret.'").
abuse. If the information is to be used, the plaintiff’s attorney must know exactly what information is out there. She must obtain all therapy and court records pertaining to the child sexual abuse (if any), and interview witnesses\(^\text{10}\) who have knowledge of the child sexual abuse to learn what they will say before defense counsel does so.

### C. Form a Team Among the Attorney, Client, and Psychotherapist

Third, the plaintiff’s psychotherapist must be contacted from the beginning of the representation. The attorney, client, and therapist should form a team approach toward the litigation. The attorney must advise the client and therapist that there is no privilege or confidentiality in either the attorney’s or the client’s communication with the therapist.\(^\text{11}\) Only the client’s communication with the attorney is privileged, and the presence of the therapist destroys the privilege.\(^\text{12}\) Nevertheless, even lacking the cloak of confidentiality, the attorney must consult the therapist as to the client’s full psychological and social history, diagnosis, medication (if any), and prognosis. The therapist must explain his or her view as to the emotional impact of the child sexual abuse, its current effect on the client, the relationship between the child sexual abuse and the workplace dynamics surrounding the sexual harassment, and the impact of disclosure of the child sexual abuse on the plaintiff at this point in her treatment.

It is hoped that the therapist understands the psychological implications of disclosure or non-disclosure by the plaintiff at the time of litigation. For many plaintiffs, keeping the molestation secret has been a painful fact of life for many years:

Most incest victims both long and fear to reveal their secret. In childhood, fear usually overcomes any hope of relief; most girls dread discovery of the incest secret and do not reveal it to anyone outside the family. They believe that no recourse is available to them and that disclosure of the secret would lead to disaster. But as the daughters grow up, the burden of secrecy becomes increasingly difficult to endure. The child who has remained silent for many years may finally be driven to seek outside help.\(^\text{13}\)

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\(^{10}\) In light of \textit{Nacht & Lewis Architects, Inc. v. Superior Court}, 54 Cal. Rptr. 2d 575 (Cal. Ct. App. 1996), it is best for the attorney or her staff to interview witnesses, keeping either attorney notes on the interviews or drafting witness statements for signature. If the witness drafts his or her own statement, it is discoverable by the defense; the attorney’s notes or attorney-drafted statements are probably not discoverable as they are protected under the attorney work-product doctrine. \textit{See id.} at 577.

\(^{11}\) \textit{See Vinson v. Superior Court}, 740 P.2d 404, 409-10 (1987) (holding psychotherapist-patient privilege generally waived when plaintiff seeks damages for emotional distress); \textit{CAL. EVID. CODE} §§ 950-962 (Deering 1996) (codifying attorney-client privilege); \textit{CAL. EVID. CODE} § 1016 (West 1997) (waiving psychotherapist-patient privilege when put in issue by the patient). As I am a California practitioner, I have focused primarily on California law. However, most of the concepts in this Commentary are universally applicable.

\(^{12}\) \textit{See CAL. EVID. CODE} §§ 950-962 (Deering 1996).

\(^{13}\) \textit{Judith Lewis Herman, M.D., Father-Daughter Incest} 129 (1981).
If the therapist refuses to get involved or is unsupportive of the litigation, the client must inevitably relinquish either the therapist or her case. Not only would the antagonistic nature of litigation overwhelm a client with an unsupportive therapist; such a therapist would make a terrible witness, and could harm the plaintiff’s case more than help it.

D. There Is No Middle Ground

Finally, the practitioner should be aware that there is no middle ground. The worst possible approach would be to hope that some information about the child sexual abuse may be used while shielding other information from discovery or admissibility. For example, the client should not be led to believe that she could raise the abuse and PTSD to show pre-existing vulnerability, yet duck questions regarding the details of the molestation incidents, the perpetrator’s denial, prior therapy history regarding the molestation, or other facts pertaining to the child sexual abuse. The widely acknowledged evidentiary rule of “opening the door” means simply that if the plaintiff raises the issue, the defense will almost certainly be entitled to explore it and respond. Therefore, the decision whether to use the evidence of childhood sexual abuse in the sexual harassment case should be made by the client up front, with careful advice from counsel and therapist regarding the risks of each approach. The client should choose one of the two options set forth below in Parts IV and V, and stick to it throughout the litigation.

III. UNDERSTANDING POST-TRAUMATIC STRESS DISORDER (PTSD)

Many adult survivors of child sexual abuse who have not fully recovered (and most have not) continue to suffer from Post-Traumatic Stress Disorder (PTSD). PTSD is a well-accepted, recognized psychological disorder. In reaching a diagnosis of PTSD, the mental health care provider must assess the applicability of specific criteria set forth in the psychiatric handbook, the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV).

Because there is a great deal of confusion and misunderstanding regarding the diagnosis of PTSD, it is important for the plaintiff’s attorney to understand at the outset the DSM-IV criteria and their application to the plaintiff’s disorder. The defense will, of course, hire one or more experts in an effort to

14. See CAL. EVID. CODE § 356 (West 1997) (“Where part of an act . . . is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party.”).
15. See, e.g., BLUME, supra note 6, at xiii-xiv (noting that most incest survivors have trouble even acknowledging the abuse; actually confronting the damage from it is even more difficult).
16. See ANNA C. SALTER, TRANSFORMING TRAUMA, 193-95 (1995) (citing various studies and stating that a review of the literature indicates that approximately half of all sexual abuse survivors meet the criteria for PTSD).
17. DSM-IV, supra note 3.
refute the plaintiff’s claims. These defense therapists commonly and wrongly assert either that PTSD is over-diagnosed or that it is easily misdiagnosed. Therefore, it is important that plaintiff’s counsel has a firm grasp of the *DSM-IV* criteria.

**A. The *DSM-IV* Criteria**

To diagnose a patient with PTSD, the mental health practitioner must carefully assess the patient’s symptoms in connection with the following medically accepted criteria for diagnosing this disorder set forth in the *DSM-IV*. First, there must be an antecedent trauma:

A. The person has been exposed to a traumatic event in which both of the following were present:

1. the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others
2. the person’s response involved intense fear, helplessness, or horror. Note: In children, this may be expressed instead by disorganized or agitated behavior.\(^{18}\)

While PTSD originally was used to diagnose “shell shock” in combat veterans, it is now well-accepted that PTSD also can apply to survivors of child sexual abuse trauma. The *DSM-IV* itself expressly states: “For children, sexually traumatic events may include developmentally inappropriate sexual experiences without threatened or actual violence or injury.”\(^{19}\) Thus, child sexual abuse survivors will easily meet the first criterion.

Next, the *DSM-IV* requires a “persistent reexperiencing” of the traumatic event:

B. The traumatic event is persistently reexperienced in one (or more) of the following ways:

1. recurrent and intrusive distressing recollections of the event, including images, thoughts or perceptions. Note: In young children, repetitive play may occur in which themes or aspects of the trauma are expressed.
2. recurrent distressing dreams of the event. Note: In children, there may be frightening dreams without recognizable content.
3. acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated). Note: In young children, trauma-specific reenactment may occur.

\(^{18}\) *Id.* at 427-28.

\(^{19}\) *Id.* at 424.
(4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event

(5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.20

In an abuse survivor who has been sexually harassed in the workplace, items (4) and (5) will often be present.21 A good expert can thus explain why a plaintiff may seem to have "overreacted" to the sexual harassment, when in fact her pre-existing PTSD is causing her to react strongly to a situation analogous to her childhood sexual abuse. In one of my sexual harassment cases, for example, the plaintiff, a child sexual abuse survivor, stoically endured eighteen months of explicit and degrading verbal sexual harassment from her boss, a powerful authority in the workplace. When her boss made physical sexual contact with her for the first time, however (by grabbing her crotch), she immediately punched him in the arm with all of her strength. Although the plaintiff herself was unable to articulate why she suddenly snapped, the expert psychologist explained that the plaintiff's reaction was natural given the sexual abuse she had experienced as a child. The harasser had triggered plaintiff's "psychological reactivity" to an external cue which symbolized, to plaintiff, re-enactment of her childhood trauma.

Psychologists treating sexual harassment complainants have found such reactivation of prior trauma to be common and quite disturbing to the victim:

Both the discrimination itself and the "second injury" embodied in the complaint process, appear to reactivate previous experiences of gender-based abuse for victims of child sexual abuse, rape, and spousal abuse such as battering (cf. Crull, 1984). In our experience, for example, the abuse of power by a respected official felt like incest to a former incest victim. And a former rape victim reported feeling that the only experience emotionally comparable to her victimization by the complaint process was when she had been physically raped. Given the relatively high prevalence of child sexual abuse and rape reported by Russel (1984), the reactivation of prior experiences of abuse may be common.22

Interestingly, the DSM-IV also notes that for individuals suffering from PTSD, "[p]hobic avoidance of situations or activities that resemble or symbolize the original trauma may interfere with interpersonal relationships and lead to marital conflict, divorce, or loss of job."23 That is, the DSM-IV itself recognizes that a pre-existing vulnerability from PTSD can cause significant employment problems, a fact that seems self-evident.

Next, there must be a finding of "persistent avoidance":

20. Id. at 428.
21. See generally van der Kolk, supra note 2.
23. DSM-IV, supra note 3, at 425 (emphasis added).
Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:

1. efforts to avoid thoughts, feelings, or conversations associated with the trauma
2. efforts to avoid activities, places, or people that arouse recollections of the trauma
3. inability to recall an important aspect of the trauma
4. markedly diminished interest or participation in significant activities
5. feeling of detachment or estrangement from others
6. restricted range of affect (e.g., unable to have loving feelings)
7. sense of a foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span).

This factor will often explain the plaintiff's avoidance of dealing with the sexual harassment, such as failure to confront the perpetrator, failure to timely report the workplace harassment, or even dissociation, which is quite common as a coping mechanism in abuse survivors as indicated in items (1) through (5) above. In my experience reviewing hundreds of sexual harassment cases, child sexual abuse survivors are less likely to report harassment on the job or otherwise confront the harasser, and more likely to stay in the abusive environment and simply try to endure even severe sexual harassment. This coincides with mental health literature in which “[r]evictimization is a consistent finding.”

The next factor is “increased arousal,” explained by the DSM-IV as follows:

Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:

1. difficulty falling or staying asleep
2. irritability or outbursts of anger
3. difficulty concentrating
4. hypervigilance
5. exaggerated startle response.

Here too the behavior of the sexual harassment plaintiff may be explained by a thorough psychologist with reference to the plaintiff's pre-existing PTSD. Sexual harassment plaintiffs are often criticized for poor

24. Id. at 428.
25. Van der Kolk, supra note 2, at 391.
26. DSM-IV, supra note 3, at 428.
work performance, when that performance deficit may be caused by the PTSD as triggered by the sexual harassment itself. Put simply, it is hard to concentrate when one's job is tied to sexual objectification, hard to sleep when sex is made a condition of employment, and hard to control outbursts of anger when the economic well-being of one's family is tied to daily humiliation and sexual denigration.

Finally, the DSM-IV specifies the severity of the symptoms required for the diagnosis, which will rarely be difficult to show for a sexually abused plaintiff:

E. Duration of the disturbance (symptoms in Criteria B, C, and D) is more than 1 month.

F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.27

B. The Sources of PTSD

A key issue to sort through with the psychotherapist prior to filing suit or commencing settlement negotiations is the source(s) of the PTSD. Was it initially caused by the child sexual abuse and exacerbated by the sexual harassment? Did the molestation cause other psychological disorders along with PTSD? Is the patient's current PTSD at root caused 50% by the child sexual abuse and 50% by the workplace misconduct, or would the percentages be higher for one cause than the other? Many therapists will be reluctant to put these kinds of numbers on a patient's condition, yet for legal purposes it is essential. The plaintiff's attorney must be able to provide the court with a solid expert opinion based upon reasonable information in order for the jury to both assess liability and apportion damages.

With a firm grasp of the PTSD criteria in mind, the attorney should assist the client to decide whether and how to introduce the evidence of child sexual abuse into the sexual harassment action. Together the attorney and client should carefully weigh the pros and cons of each option outlined below as applied to the particular facts of that case.

IV. Option One: Protecting the Client's Privacy Regarding Child Sexual Abuse

Reasons to forcefully oppose all attempts to permit introduction of evidence of the plaintiff's child sexual abuse might stem from the plaintiff herself, the circumstances of the molestation, or the attorney's assessment of how this information will play out in the sexual harassment case. In any event, at least in California, the client clearly has the right to exclude evidence regarding prior child sexual abuse. This right exists despite inevitable

27. Id. at 429.
defense arguments that it has been waived by bringing an emotional distress claim, that the evidence is relevant to plaintiff’s alleged “hypersensitivity,” and so on.

A. California Plaintiffs May Almost Always Exclude Evidence of Prior Child Sexual Abuse

In California, the sexual harassment plaintiff clearly has the right to block discovery of child sexual abuse, at her option. In *Knoettgen v. Superior Court*, Ms. Knoettgen sued her employer for sexual harassment, including a “blatant hands-on” attack by a co-worker. In investigating her claims, the employer “learned petitioner had been attacked by men twice in her childhood.” The decision gives no details regarding the childhood attacks, but indicates that they were sexual in nature. Plaintiff refused to answer questions about the child sexual abuse at her deposition. The trial court ordered her to answer, but the court of appeal issued a writ of mandate reversing this order partly based upon plaintiff’s right of privacy.

The *Knoettgen* court first looked to California Code of Civil Procedure Section 2017(d), which provides that any party seeking discovery regarding the plaintiff’s sexual conduct with individuals other than the alleged perpetrator must establish specific facts showing good cause for that discovery. The party must also show that the information is relevant to the current action, reasonably calculated to lead to the discovery of admissible evidence, and must make the showing by noticed motion.

Knoettgen’s employer argued that this section applied to prior consensual sexual activity only, not prior sexual assaults on plaintiff. The *Knoettgen* court disagreed, relying on the legislative history for this section. In the history, the legislature expressed that this discovery into the sexual past of a plaintiff is “unnecessary . . . and deplorable” and could discourage complaints by unjustifiably and offensively intruding into plaintiffs’ intimate lives. The legislature compared the potential of harm in these cases to the problems that once confronted victims in criminal rape prosecutions. They stated that the potential for prejudice outweighs whatever probative value the evidence may have, and therefore it should only be permitted under “extraordinary circumstances.”

29. Id. at 637.
30. Id.
31. See id. at 637-38.
32. See id. at 638.
33. See CAL. CIV. PROC. CODE § 2017(d) (West 1997).
34. See id.
35. See Knoettgen, 273 Cal. Rptr. at 637.
36. See id. at 638.
37. See id. at 637-38.
38. See id. at 638.
The court concluded, "We reject the employer's suggestion this protection should be withheld when the plaintiff's prior experience consists of being the child victim of a crime of sexual violence."\textsuperscript{39}

Further, the \textit{Knoettgen} court rejected the standard arguments offered by the employer in its attempt to gain discovery of the child sexual abuse: (i) plaintiff's history may affect her perceptions of what happened in the workplace; (ii) plaintiff waived her privacy rights by bringing the employment action; and (iii) the defense psychologist needed this important background information in order to do a full and complete assessment.\textsuperscript{40} In stinging language worthy of quotation by plaintiffs' attorneys, the \textit{Knoettgen} court concluded:

A case based on the conduct of a plaintiff's coworkers should not be turned into an investigation of plaintiff's childhood. Sexual harassment in the workplace is no trifle. As the Chief Justice of the United States has written, "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." When an employee seeks vindication of legal rights, the courts must not be party to the unnecessary infliction of further humiliation.\textsuperscript{41}

Under \textit{Knoettgen} and the California Code of Civil Procedure section 2017(d), therefore, it is crystal clear that a plaintiff may block all inquiry into her childhood history of sexual abuse, whether in discovery or at trial. The attorney's job is to advise whether to assert this right.

\section*{B. Factors Weighing in Favor of Excluding Prior Child Sexual Abuse Evidence}

In my experience representing many sexual harassment plaintiffs and sexual abuse victims, the following factors tend to indicate that the attorney should recommend exclusion of the evidence of child sexual abuse. Obviously each case should be decided on its own, yet the plaintiff's attorney must consider at least the following four factors.

\begin{enumerate}
  \item \textbf{The plaintiff may be emotionally overwhelmed by constant litigation references to her child sexual abuse.}
  \begin{quote}
  The plaintiff herself will be the most likely reason the attorney will advise her to shield all mention of the child sexual abuse in the sexual harass-
  \textsuperscript{39} \textit{Id.}
  \textsuperscript{40} \textit{See id.}
  \textsuperscript{41} \textit{Id. at 638-39} (citation omitted) (quoting \textit{Meritor Savings Bank v. Vinson}, 477 U.S. 57, 67 (1986)).
\end{quote}
\end{enumerate}
ment litigation. Many victims of childhood trauma have not adequately contended with the profound effects the trauma has had on them. Mere mention of child sexual abuse, or other triggers as common as the color of the walls or the smell of the room where the abuse took place, can reduce an untreated or undertreated survivor to tears, depression, rage, agoraphobia, panic or anxiety attacks, sleeplessness, nightmares, eating disorders, sexual dysfunction, or other terrors. A plaintiff in this condition may appear initially to be a fully functioning, even highly functioning, adult. Yet when the history of child sexual abuse is raised, she may enter a realm of misery that is difficult to escape. In other words, her level of post-abuse PTSD may be so severe that she does not have the emotional resources to cope with both the sexual harassment action and litigation references to her child sexual abuse. I have watched intelligent, highly functioning women utterly fall apart upon repeated questioning regarding their molestation histories. These women were simply emotionally unprepared for the psychological devastation resulting from being forced to confront their child sexual abuse experiences in the context of a hostile litigation process.

This plaintiff will have an extraordinarily difficult time in the sexual harassment lawsuit if the defense can raise this highly sensitive issue over and over again in discovery and at trial with plaintiff and other witnesses. Sexual harassment litigation is very difficult to undertake as a plaintiff in any circumstances. If the mere mention of the plaintiff’s child sexual abuse will demoralize or terrorize her, the attorney should work to keep it out. If it is allowed in, it will be raised, and raised often and unexpectedly. The client must be prepared for this.

2. The background and circumstances surrounding the abuse would have a negative impact on the primary sexual harassment litigation.

If the plaintiff feels she can competently handle discovery questions and references regarding her history, then the attorney should next consider the background and circumstances surrounding the abuse. The sexual harassment case may generate a "mini trial" within the sexual harassment trial regarding the child sexual abuse. Hence, the child sexual abuse case must be evaluated as if it were being tried separately. The ultimate question is: Is it winnable? The best possible factual background would entail a criminal conviction of the childhood abuser. However, this is also least likely to exist, since only a tiny fraction of child molesters are reported, and only a tiny fraction of those are prosecuted and convicted. If there has been a criminal conviction, the jury will probably believe that the abuse occurred, and that is one less issue for plaintiff’s counsel to prove.

42. The best full account of the effect of childhood trauma is LENORE TERR, M.D., TOO SCARED TO CRY (1990).
43. See SALTER, supra note 14, at 5-19.
If no conviction exists, however, does any evidence corroborate the abuse? Corroboration might include another victim (sadly, this factor is often present); a witness (rarely present, for obvious reasons); an admission by the perpetrator (rare); or a childhood report by the victim to someone, whether law enforcement, a trusted family member, or friend.

If no conviction or corroboration exists, then the plaintiff must assume that the jury will be highly skeptical of the abuse. The scenario leading to the most jury skepticism would result from introducing into evidence a plaintiff’s repressed memory of the child sexual abuse. Repressed memory is the popular term for a type of dissociative amnesia in which a victim pushes her recollection of the incidents out of her conscious memory. A victim then may recall her memories later due to a triggering event. This event may be a psychological trauma similar to her abuse, such as sexual harassment in the workplace. Unfortunately for molestation victims at this point in time, popular opinion reflected in jury verdicts deems many such reports of child sexual abuse false, perhaps because of misconceptions regarding the reliability of repressed memories or the rising popular acceptance of the idea of a “false memory syndrome.” Juries are also far less likely to render a substantial plaintiff’s verdict in some sex discrimination cases than claims based on race or age discrimination. When the jury is faced with two unpopular claims, the plaintiff’s burden of proof and persuasion may become insurmountable.

The inability to unequivocally prove her history of child sexual abuse, however, may not sound the death knell for the plaintiff’s use of this information in her sexual harassment case. In making this decision, the attorney

44. What has been called “the most comprehensive study” of sex offender recidivism found that of the 561 studied, those who molested female children averaged 19.8 victims; those who molested male children averaged 150.2 victims. Id. at 10.
45. See supra note 9.
46. Only 65% of criminally convicted sex offenders admit to committing the offense for which they are incarcerated. See SALTER, supra note 14, at 5.
47. For an excellent overview of repressed memory, see LENORE TERR, UNCHAINED MEMORIES (1994).
48. See id. at 12-13.
49. In Ramona v. Ramona, a case tried in the Superior Court of the State of California for the County of Napa, a father accused of molestation by his daughter successfully obtained a verdict of $500,000 against his daughter’s therapists and hospital for negligently implanting false memories of child sexual abuse. See Christine Gorman, Memory on Trial, TIME, Apr. 17, 1995, at 54.
50. A detailed discussion of “false memory syndrome” is beyond the scope of this Commentary. Suffice it to say that this “syndrome,” while it may sound scientific, is not recognized by the psychiatric community in its detailed handbook of all recognized psychological disorders, the Diagnostic and Statistical Manual, Fourth Edition by the American Psychiatric Association. This “syndrome” is offered only by a political advocacy group called the FMS Foundation, whose mission is to defend those accused of child sexual abuse through the propagation of their theory of “false memory syndrome,” a term they themselves coined. See FALSE MEMORY SYNDROME FOUNDATION, MISSION AND PURPOSE (n.d.). Two members of the advisory board of this group have openly advocated pedophilia as “God’s will.” Interview: Hollida Wakefield & Ralph Underwager, 3 PAIDIKA: THE JOURNAL OF PAEDOPHILIA 2, 5 (1993).
51. See 6 Empl. Discrimination Rep. (BNA) 743-45 (May 29, 1996) (finding that in wrongful discharge cases in California from 1989-1995, those involving sex discrimination had a median jury verdict award of $94,767, the median jury verdict award on race claims was $542,500, and age discrimination verdicts had an average award of $544,239).
should first weigh the evidence in the sex harassment action. Perhaps the harasser confessed, or the company's investigation found that the harassment occurred and the plaintiff's version of events is substantially true. In that case, liability is fairly clear and only damages are at issue. Then for the reasons set forth under "Option Two" below, it may be strategically best to include the child sexual abuse to truly explain plaintiff's emotional damages, which otherwise may be unexplainable or may appear to be malingering. When plaintiff's credibility is no longer at issue, including her molestation history could increase her award.

3. The child sexual abuse will cause the plaintiff to appear hypersensitive.

Another factor to consider is whether the plaintiff will appear "hypersensitive" by virtue of the child sexual abuse. As distasteful as this may seem (ought not a woman be entitled to decide based upon her own experience whether conduct is offensive?), the courts do require a sexual harassment plaintiff to establish that the harasser's conduct was both subjectively and objectively hostile and offensive. In other words, a "hypersensitive" plaintiff may not recover. The defense may argue that the plaintiff is just such a hypersensitive plaintiff because of her history of child sexual abuse. The sexual harassment allegations must therefore be sufficient in terms of quantity and severity to make it clear that the harasser's actions would be hostile and offensive to a reasonable woman, not only a plaintiff who was sexually abused as a child. In other words, the plaintiff may not introduce her child sexual abuse history to argue that defendant is liable to her for conduct that a woman who had not suffered abuse would find inoffensive; she may only introduce such evidence to show why, when subjected to objectively offensive conduct, she reacted differently or suffered more damages than another woman might.

4. Introduction of the molestation history will cause a disadvantageous apportionment of damages.

The final factor to consider in determining whether to fight introduction of evidence of prior sexual abuse is the legal issue of apportionment. California state law requires that the jury apportion liability among various tortfeasors, whether these tortfeasors are named defendants or not. Typically,
therefore, the special verdict form in a sexual harassment case will list the plaintiff, the harasser, the corporate defendant, and any others for whom there is some evidence of having caused emotional distress to the plaintiff. Naturally, if evidence of child sexual abuse is admitted at trial, the molester's name will also be on this list. The defense may strongly assert in closing argument that the molester, having violated the sanctity of an innocent child, is far more responsible for causing PTSD or any other psychological disorders suffered by the plaintiff than the harasser, who may have "only" verbally harassed the plaintiff as an adult. Jurors may feel that the molester's proportionate share of liability ought to be more than 50%. As a practical matter, the plaintiff has probably not sued the molester. Therefore, she is not going to collect anything against him regardless of the jury's assessment of his responsibility for her injuries. As a result, if the plaintiff were to receive a $500,000 jury verdict for her injuries, assessed 50% to the molester, 10% to plaintiff, and 40% to the harasser and company, she would actually receive only $200,000, less attorneys' fees, costs, and taxes.\footnote{See I.R.C. § 104(a) (amended 1995).} Sadly, the plaintiff would probably end up with less than $60,000 in her pocket out of this total $500,000 award,\footnote{40% of $500,000, or $200,000, payable to the plaintiff; subtract one-third for standard attorney contingent fees, leaving $133,334; subtract one-third more for taxes, leaving $88,890; subtract court costs, assuming $30,000 through trial; this leaves $58,890 for the plaintiff.} and she would have lost the great majority of the gross award because she was a victim of child sexual abuse. This is a sobering calculation which cannot be ignored in determining whether to permit use of evidence of childhood molestation.

\section*{V. Option Two: Seeking Increased Damages from Sexual Harassment Defendants for Exacerbating Plaintiff's Pre-Existing Injury from Child Sexual Abuse}

If after reviewing all the issues set forth above under "Option One"\footnote{See supra Part IV.} the attorney, client, and psychotherapist agree that evidence of child sexual abuse could be introduced in the sexual harassment litigation, then the attorney should consider how it may be used and the ultimate impact it will have on the outcome of the case.

\subsection*{A. Factors Weighing in Favor of Introducing Evidence of Prior Child Sexual Abuse}

\begin{enumerate}
\item \textbf{It could be used to explain plaintiff's unusual reaction to the harassment.}

In spite of the apparent negatives discussed above, the introduction of child sexual abuse evidence can have a very positive effect on the sexual
harassment case. As noted in the earlier discussion of PTSD, such evidence may allow, via expert witness testimony, explanations of behavior that otherwise may seem odd to a jury, such as denial, dissociation, and outbursts of anger. A survivor of child sexual abuse is much less likely to recognize a potentially dangerous situation (such as a supervisor creating a sexually hostile work environment, insisting on dates, or even stalking her), less likely to confront the situation by reporting the harassment to the company (even where there may be a clear sexual harassment reporting policy or procedure), and less likely to extricate herself from the situation (by asking for a transfer, leave of absence, or quitting).

The psychological explanation for this, again brought into evidence via the testimony of a skilled psychotherapist, is that having learned the psychological defenses of avoidance, denial, and dissociation as a child during molestation, the adult victim of sexual harassment will often subconsciously revert back to these familiar mechanisms. While some women might oppose sexual harassment immediately (although most will not because of the economic power imbalances), a child sexual abuse survivor will likely pretend it is not happening, blame herself, and just hope and wait for the unwelcome conduct to end. She may even deal with egregious conduct such as physical attacks in this way. It is difficult for a jury to understand why a woman would not immediately report a rape by her supervisor, for example. Yet a history of child sexual abuse may explain this conduct well, especially where the plaintiff, as a child, suffered retaliation for reporting. In the plaintiff’s experience, doing nothing may have been a necessary childhood survival skill.

Clearly, then, the plaintiff will need a good expert who understands the interrelationships between child sexual abuse, PTSD, and sexual harassment. The plaintiff’s attorney must discuss the case and facts at length when interviewing a potential expert, and ask tough defense questions to gauge the expert’s qualifications, experience, knowledge, and ability to convey important information clearly. Also, as it is important to be able to present a neutral evaluation to the court, the expert should be a different person than the plaintiff’s treating therapist.

2. The child sexual abuse caused PTSD, a pre-existing injury exacerbated by the sexual harassment.

A history of child sexual abuse is relevant to show a pre-existing vulnerability on the part of the plaintiff. When the defendant harasser exacerbates this pre-existing injury by sexually harassing the plaintiff, he is

59. See supra Part III.
60. See supra notes 5, 7, 25, and accompanying text.
61. See generally TERR, supra note 42; van der Kolk, supra note 2.
63. See id.
responsible for her increased harm. This is true whether or not the defendant was aware of the pre-existing injury of child sexual abuse.\textsuperscript{64}

The analogy in these situations is to the classic example of the "eggshell-skull plaintiff," the plaintiff who is only tapped by a car in an automobile accident and yet suffers horrible injuries all out of proportion to what one might expect. Tort law recognizes that a wrongdoer takes his victim as he finds her,\textsuperscript{65} and that is no less true in an emotional distress case such as a sexual harassment action than in a physical injury case such as an automobile accident.\textsuperscript{66} If the plaintiff's pre-existing PTSD is made worse by unlawful sexual harassment, this damage is attributed to the harassment defendant. In addition, if the perpetrator of the harassment was aware of this vulnerability and nevertheless egregiously harassed the plaintiff, the plaintiff may well be entitled to punitive damages for such malicious behavior.

For many sexual harassment plaintiffs, the simple truth is that the sexual harassment causes extreme emotional damage. This extreme level of damage may only make sense to the trier of fact in the context of the plaintiff's prior sexual victimization. Without this context, the trier of fact is likely to wonder, for example, why the plaintiff "allowed" the sexual harassment to continue, why the sexual harassment caused the severe damage that the plaintiff claims, or why the plaintiff did not react strongly when her company failed to protect her.\textsuperscript{67} If her sexual abuse or pre-existing PTSD is kept secret, the trier of fact may think she is exaggerating to increase her damages, and doubt her credibility. The plaintiff's credibility is of \textit{utmost importance} in every sexual harassment action. Gaps in the plaintiff's story may generate suspicion that spreads to other aspects of her case, seriously endangering her ability to recover. If all of her circumstances can be explained, therefore, her story may make more sense, be even more powerful, and preserve her credibility. This factor alone, assuming plaintiff's ability to bear open discussion of her child sexual abuse, may warrant disclosure.

\textsuperscript{64} See, e.g., Brackett v. Peters, 11 F.3d 78, 81 (7th Cir. 1993) ("If for example the victim is predisposed to schizophrenia, and the tortfeasor inflicts a minor injury which precipitates the schizophrenia, he is liable for the entire consequences even though they were both highly unlikely and unforeseen." (citations omitted)).


\textsuperscript{66} See, e.g., Brackett, 11 F.3d at 81 ("It has long been the rule in tort law (the 'thin-skull' or 'eggshell-skull' rule) not only that the tortfeasor takes his victim as he finds [her], but also that psychological vulnerability is on the same footing as physical.").

\textsuperscript{67} Several parallels (of sexual discrimination and harassment) to incest may be useful. As with incest, the victim of employment discrimination is economically, if not emotionally, dependent on the aggressor. In both cases, the gender-based attack is an abuse of power, and a betrayal of trust, which confuses the victim. As with physical and sexual violence against women within the family, sexualized abuse against women in the workplace is often \textit{humiliating}, which encourages women to keep it a secret.

Unfortunately, in the case of discrimination, the administration or legal complaint process may replicate the harm that occurs in the incestuous family or the community—where other adults are indifferent to or actually perpetuate the harm.

Hamilton et al., \textit{supra} note 22, at 175 (citations omitted) (italics in original).
VI. CONCLUSION

The knee-jerk reaction of many plaintiff's attorneys is to suppress all mention of child sexual abuse, pre-existing PTSD, or other trauma in a sexual harassment case. While in many cases such suppression will ultimately be appropriate, that decision should not be made until the attorney carefully assesses all of the factors set forth in this Commentary. Where the information will benefit the client and her case, the attorney should not be afraid to use it aggressively to explain the plaintiff's conduct during and reaction to the harassment, to show the maliciousness of the harasser in using this information to humiliate the plaintiff, and to achieve substantial damages in the harassment action.

So much in the field of child sexual abuse is done unthinkingly, by rote, like Gretel going home again. As professionals, it is our job to update our knowledge and revise our thinking. For the first time in history there is a group of child sexual abuse survivors who are not ashamed to disclose their abuse. Nor should they be. As advocates, we should not advise them to retreat into silence when they have the courage to speak out. Instead, our job should be to advise them of the consequences of disclosure or nondisclosure in litigation, and empower them to make educated choices about what are after all their histories, their rights, and their cases.

68. This is demonstrated by the fact that some adult women are now coming forward to file civil suits against their alleged child sexual abusers. See, e.g., Ault v. Jasko, 637 N.E.2d 870 (Ohio 1994); Vesecky v. Vesecky, 880 S.W.2d 804 (Tex. App. 1994), rev'd sub nom. S.V. v. R.V., 933 S.W.2d 1 (Tex. 1996).