From Chat Room to Courtroom: The Internet, Experts, and Entrapment

By Jason B. Sheffield and Douglas N. Peters

For many people email, text messaging, instant messenger, video chat channels (iChat or Skype) and online chat rooms or forums, i.e., computer-mediated communications (CMCs), have provided new and exciting ways to communicate sexually. Reports indicate that these technologies also have led to sexual risk-taking wherein people play out deviant sexual desires and fantasies in CMCs. From teenagers and one U.S. congressman taking risqué smartphone “selfies” to the behaviors portrayed on “To Catch a Predator,” everyday people are turning to the Internet and to CMCs for sexually exploration in ways they never would do in face-to-face (FTF) interactions. While playing out sexual fantasies is not illegal, CMCs that are sexual in nature can lead to problems in life and may have dire legal consequences.

CMCs are also a new way for real child predators to find children to sexually exploit. The rise of such activity has spawned a new type of police investigation called the “Proactive Sting Operations,” where police actively solicit sexual communications from unsuspecting members of the public. Now, federal and state law enforcement agencies claim they can use CMCs to *find* actual child predators in cyberspace and subsequently convict them with little effort or cost. In these proactive stings, there is no actual child – just the officer pretending to be a child or claiming to have access to a child for sexual purposes.

Most of the cases begin with the officer taking on the persona of an adult female looking for a “good time” in an adult chat room. The officer begins by claiming that she is 18 or older, and then confesses to being “a bit younger” than advertised after she has engaged a suspect. Another trend involves an officer pretending to be a parent interested in watching and/or participating in sex with his or her coming-of-age child. This tactic has morphed over the years, so that it is typical now for the “parent” to insist they are not interested in sex for themselves, thus removing any confusion in the mind of the defendant about whom he is going to engage with sexually.

Individuals who continue to chat are subsequently arrested at their own home or at an agreed upon “meeting location.” The government’s case-in-chief is made by (1) having the officer show the CMC wherein the officer stated he or she was a “child,” and (2) the defendant’s continued sexual communication despite the warning.

Due to the embarrassing nature of the graphic chats and the appearance of overwhelming evidence against the defendant, coupled with the state’s threat of 20 years in prison should the defendant be found guilty at trial, 91 percent of defendants plead guilty. [[1]](#endnote-1) Most serve time and have extended periods of probation (up to 20 years or longer).[[2]](#endnote-2) All must register on the Sex Offender Registry for life. Of those that go to trial, few, if any, win. One poll of 612 prosecuted cases revealed that no defendants won at trial.[[3]](#endnote-3)

For defense lawyers, the goal in a proactive sting case is to stop it in its tracks. Although the odds always seem to be stacked in the government’s favor, defense counsel can convince the government that the defense will win.

The Law

Georgia’s Computer Exploitation statute, called the “Computer or Electronic Pornography and Child Exploitation Prevention statute,” (O.C.G.A. 16-12-100.2) is an example of the type of statute at the heart of these cases. It proscribes the following conduct:

[I]ntentionally or willfully utilize[ing] a computer wireless service or Internet service, including, but not limited to, a local bulletin board service, Internet chat room, email, instant messaging service, or other electronic device, to seduce, solicit, lure, or entice … a child *[or] another person believed by such person to be a child* … to commit any illegal act by, with, or against a child … relating to the offense of sodomy or aggravated sodomy … child molestation or aggravated child molestation … enticing a child for indecent purposes … public indecency, or to engage in any conduct that by its nature is an unlawful sexual offense against a child.

When a person travels in an attempt to be in the presence of the child, the charges include Criminal Attempt of the aforementioned offenses,[[4]](#endnote-4) and there may be interstate implications. An individual may also be charged with Electronically Furnishing Obscene Materials to Minors, which prohibits sending obscene material (defined by statute) to a child or person the accused believes to be a child. Oftentimes, the defendant in these cases sent nude pictures of himself or masturbated on webcam.

A defendant can be charged with multiple counts, one for each of the sexual conversations he had with the officer on separate dates and an additional count of Criminal Attempt to commit Enticing a Minor where he takes "substantial steps" to meet. All charges are felonies. The indictment alleges that the defendant "believed" he was talking to a child (under 16 years old) during the course of these conversations with the officer. If convicted, the defendant faced up to 20 years per count and a lifetime on the Sexual Offender Registry.

Jurisdiction lays in potentially three places simultaneously in these cases: (1) the location where either the defendant or (2) the officer used “an Internet service provider” or (3) the location to which the defendant traveled in an alleged attempt to commit the acts discussed via CMC.[[5]](#endnote-5)

A Defendant’s Online Sexual Behavior

Persons charged in these types of case share a common profile: They are typically well educated and professionally accomplished men, holding upper-level management jobs in corporate America. Similarly, they are married and have children and are considered upstanding members of their secular and religious communities. They have no criminal history, convictions, or arrests.

The first order of business is to understand the nature of the defendant’s Internet usage. Is he someone who mostly used the Internet to shop or to obtain directions or for email, or is he someone who regularly used the Internet for sexual purposes, including looking at and downloading pornography or to meet other adults online to engage with sexually in chat rooms or through instant messenger?

The Science of Internet Sexual Behavior

The Next Battlefield

Beginning with studies in the early 1980s, researchers examined nonverbal electronic communications and found that people communicated differently with one another when communicating electronically.

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BLOCK STYLE

Unlike FTF [face-to-face] or audio communication, the medium in CMCs is primarily textual. There are no nonverbal cues to embellish meaning or social context cues regarding gender, age, or status. Not only can the absence of cues hamper communication efficiency, but is seems to create a semblance of anonymity and lack of awareness of the social context. These conditions, in turn, have been held responsible for a perceived higher incidence of rude, offensive, and uninhibited behavior.[[6]](#endnote-6)

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From there grew three decades of research wherein sociologists, psychologists, psychiatrists, other treatment providers, and medical doctors attempted to understand online communications, including online sexual communications, and how it created or impacted behavior. The Internet became not only the next sexual revolution but also the battlefield, in many ways supplanting smoky bars, social mixers, and blind dates. It became the most immediate and plentiful forum for sexual connection and sexual experimentation without the awkward social hindrances of face-to-face interactions.

The Disinhibition Effect

In 2001, Dr. John Suler wrote about his observations with his patients and a growing collection of research articles regarding people who “act out” sexually online.[[7]](#endnote-7) Essentially, Dr. Suler reported in a general sense that, behind the cloak of the computer screen, people behaved uncharacteristically sexual in ways they would never do in in-person interactions.

Dr. Suler’s writing explored six factors that interacted with each other to create what he termed the "disinhibition effect.” The six factors were (1) *anonymity*, i.e., the Internet gave people the ability to separate their actions online from their in-person identity, and as a result, they felt anonymous and less vulnerable about acting out; (2) *invisibility*, i.e., that people could visit new risqué sites and never be visible to others, which encouraged them to go places and do things they normally would not do; (3) *asynchronicity*, i.e., people did not have to cope with someone's immediate reaction to their comments or actions, which gave people more confidence to proceed however they desired; (4) *it’s all in my head*, i.e., the silence of Internet chat allows individuals to play out the conversation in their minds, which makes it a safe place to explore and disinhibits them; (5) *it’s just a game*, i.e., when online, all one has to do is click off to end the session; and (6) *minimization of authority*, i.e., people are more willing to speak out and misbehave because no physical cues exist in cyberspace, which reduces the impact of another’s authority, fear of disapproval, and punishment or rejection.

The Convenience of Sex

The Internet also provides a veritable playground of sexual topics and people who are willing to engage, literally, at a person's fingertips.[[8]](#endnote-8) No matter the desire, it is not only easy to find the subject matter but also to find a willing partner. Over a thousand forums and chat rooms are available where people can meet and engage in typical or atypical sexual fantasies. "Normal" is not applicable in the realm of sexual fantasy, i.e., there is no such thing as a normal fantasy.

Chat Rooms

Many places are available online for engaging in “cybersex” and come under the heading of "romance,” which is a euphemism for sex. Adult romance chat rooms are much like adult sexual costume parties: People enter the chat room “in character” with thematic names – “discreet wife," "Abadpastor," "blowjobqueen," “domF4subM” (dominant female for submissive male), etc. – and post their sexual desires in the form of a request to others in the room.

Chat rooms can have themes and/or topics of interest. Sexual chat rooms can be fetish-based as well. They have "rules of engagement," including people being told not to use their real identities for purposes of security. Many chat rooms have a disclaimer that they are for *adults* only. Most people who communicate in sexual romance chat rooms use *fake profiles* in which they lie about their age, social status, sexual prowess, and sometimes even their gender. When communicating with others, they post graphic requests for cybersex (masturbation during CMCs) and ask to play out fantasies. After members of the chat room engage one another, “anything goes” sexually.

In trying to understand a client’s behavior in a chat room, it is critical to understand that participating members[[9]](#endnote-9) in the chat room behave in the same sexual way as the client. The question remains: Were these people sexual predators or were they everyday people living a fantasy life?

Deception

Researchers have conducted numerous studies about the use of deception by Internet users, including their motivations for deception and the types of deception used.[[10]](#endnote-10) As noted, people lie about their age, gender, and socioeconomic status, among other things. They do so for range of reasons including safety and identity protection, but they also do it for exploration, fun, and sexual play/fantasy. And people believe and expect that others use similar deceptions as well.

Of particular significance is a peer-reviewed study in which researchers examined the importance of officer training in online sting operation cases.[[11]](#endnote-11) It was called "No One Knows You’re a Dog on the Internet" and looked at two groups of people. Researchers instructed the first group, the deceivers, to pretend they were 13-year-old girls – to use all of the language identifiers and ways of communicating that they believed 13-year-old girls would use – in order to convince the person with whom they were chatting that they were actually 13 years old. Researchers instructed the second group, the guessers, to identify the age of the person with whom they were communicating. The ages of the participants in each group varied from 18 to 70. What was the result? None of the deceivers were able to convince the guessers that they were 13 years old. In fact, the guessers were able to identify the actual age of the deceivers within five years, give or take. The researchers concluded that if law enforcement officers were going to pretend they were teenagers, they needed to take extreme steps to understand the world of teenage girls and train themselves accordingly.

While a small sample group, this study was the first of its kind to address the issue of whether a person will believe that another person is the “real age” they profess online, where deception is so rampantly expected or experienced by Internet users. The study allows defense attorneys to address the state’s argument that just because the officer *said* he was “15” did not mean that the defendant would *believe* it and allows the defense to educate the jury about a *pattern of disbelief* communicators in the CMC environment hold.

Sexual Fantasy

Sexual fantasy had long been studied before the advent of the Internet. While a top 10 list of typical fantasies exists, there is no limit. Typical fantasies range from being with one's own partner to being with a stranger or a virginal teenager, to various fetishes that include S&M, rape, and incest fantasies such as “daddy-daughter.” The spectrum of these typical fantasies flourish online and in adult chat rooms. And while there are “rules of engagement” in chat rooms, when it comes to the sexual fantasies of the participants, no rules exist.

Predatory Behavior

The Internet is, in fact, a vehicle for predatory sexual behavior. Forums are available for trading child pornography and discussing how to create and disseminate child pornography. Additionally, child and teen predators can easily go into teen and adolescent chat rooms in order to observe and engage children.

The concept of "grooming" is seen online where predators pretend to be younger, using the anonymity of the Internet, to create friendships with their victims.[[12]](#endnote-12) Their goal is to slowly develop exclusivity and secrecy in their relationship and test the boundaries of the child's willingness to protect that relationship. Finally, they introduce sexual themes and explore the idea of being sexual with their victims. It is only then that the predator will reveal his true identity and try to convince the victim to meet offline to engage in contact sexual behavior. The very nature of law enforcement proactive investigation is meant to capture this type of predator. It is of great significance in a defendant’s case when this pattern of predatory behavior is not seen.

A defense attorney must pay close attention to where the client is looking for sexualized play. Adult chat room or teen chat room? Is his chat immediately graphic and sexually aggressive? If so, his conduct and behavior does not resemble the calculated process of bringing a child into sexuality. This is significant and needs to be developed further.

Defendant’s Statement to Police

Under the guilt of the situation and believing that they have not committed any crime, most defendants make a remorseful inculpatory statement to police. And while part of the statement may appear exculpatory – he never intended to do anything illegal – many defendants say they knew they should not have been talking this way. The arresting officers usually have a copy of the chat conversations with them and will point out the times during the conversation when they told the defendant that they were underage. The officers also will read back the explicit portions of the chat or portions when the defendant said he could “get in trouble.” They will deride the defendant for saying such disgusting things to a child. Because this most intimate “pillow talk” is being discussed between officers and defendant, most defendants feel totally ashamed no matter what they believed.

Similarly difficult for the defense is the fact that practically no defendant coherently explains to the officer that no matter what the “girl” said or how they communicated to one another, it was all just fantasy chat and that the defendant believed he was talking to an adult who was pretending to be a child.

Online Sexual Behavior Experts

It is critical to understand the online sexual environment and the defendant’s conduct and behavior in that environment. For more than 20 years, psychiatrists, psychologists, and therapists have studied the conduct and behavior of Internet users to understand the spoken and unspoken “rules of engagement” between participants online. They have visited all the various locations, forums, and chat rooms not only to understand the way consenting adults behave online, but also to understand the behavior of true sexual predators. Because their practice also involves the treatment of sexual offenders and sexual predators, the therapists have been able to bridge that experience with what they have observed online. Ultimately, they have been able to delineate between the typical behavior of online sexual predators and the behavior of consenting adults who enter into these environments simply for fun, play, and sexual fantasy. The two are not mutually exclusive. And they have been able to develop appropriate treatment regiments based on the characteristics of the Internet user.

It was this platform that gave rise to their ability to look at proactive sting cases and assess the conduct and behavior of the defendant as predatory or not, and thus, problematic or not.

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Was the defendant’s behavior predatory or was it consistent with the behavior of consenting adults engaged in fantasy?

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Elizabeth Griffin, a licensed marriage and family therapist, specializes in the treatment of sexual offenders, which includes Internet sexual offenders.[[13]](#endnote-13) Approximately 15 years ago, Griffin began to see a difference between online offenders who simply engaged in sexual communications online versus the in-person or “off-line” hands-on offenders who made the decision to offend in the physical presence of a child. What was the difference between the two? Online sexual offenders did not exhibit the same type of conduct and behavior as the traditional predator or pedophile. Griffin observed that Internet users were “under the influence of” the disinhibiting nature of the Internet and were simply exploring sexual fantasy.

Most people – including practitioners, judges, lawyers and the general public – are *unaware* of the nature of the online sexual environment between consenting adults as compared to the nature of online predatory behavior. Jurors and judges must be educated about the sexual nature of the Internet and how consenting adults engage with one another in sex fantasy. Without this information, jurors and judges will not have the opportunity to understand the defendant’s behavior on the spectrum of typical fantasy behavior versus the predatory behavior the government alleges. Experts can testify about the general nature of the Internet sexual environment and the adult romance chat room environment. A defense lawyer can draw comparisons between the testimony of experts and the facts of a client’s case and argue the similarities.

The defense attorney should also consider having experts evaluate the evidence in the defendant’s case to obtain their interpretation of the conversation between the defendant and the undercover officer in the adult romance chat room. Specifically, the defense lawyer should ask them to read the chats and look at all of the evidence the state collected, including the defendant’s statement, the search and seizure of particular items of interest, and his historical behavior online. One objective in asking the experts to look at this evidence is to obtain their opinion of whether or not the defendant was *behaving* in a way that was “consistent with” behavior between consenting adults engaged in fantasy or whether his behavior was predatory.

Many men lie about their age, their looks, their sexual prowess, and their professional accomplishments – just as the police officer does. The defense lawyer should ask the experts to opine whether it is typical for one adult to lie about his age or social status and another adult pretend to be a 15-year-old girl and still have a situation *consistent with what consenting adults do* in adult romance chat rooms for purposes of fun and fantasy play.

Expert Opinion on the Evidence

Computer Forensics

In addition to the chats, the defense attorney should consider doing a forensic examination of the defendant’s computer hard drive. The defense in a criminal case can be as much about the absence of evidence or the absence of particular conduct and behavior as it is about the evidence found and what in fact occurred. With this in mind, a computer forensic expert can make a mirror image of the hard drive to preserve the integrity of the data. The expert needed is one who specializes in computer crimes and has developed expertise in (1) the dynamics of how sexual predators behave online and (2) the ways in which predators and pedophiles use their computers to facilitate their desires or as instrumentalities of certain crimes themselves.

The computer is the ultimate voice of criminality in these particular cases because it saves all information, even if deleted. If law enforcement officials do not seize the computer, they miss a critical opportunity to bring additional evidence against a defendant. The defense attorney must proceed with caution, however, and find out from the client if the computer contains any child pornography. Otherwise, the defense attorney would seek a forensic evaluation to demonstrate the *absence of* (1) child pornography, (2) searches for teen material, (3) connection to teen chat rooms, (4) teens chats, and (5) the logging of actual teen chats. The defense can also show that the defendant has entered into other adult chats and has traded pictures or videos with other adults because those types of interactions are his true intent.

 Fantasy Behavior

Ultimately, the defense is seeking an expert opinion that supports its theory of defense: that the defendant believed he was engaging with another adult who was pretending to be a child within the fun, sexually charged atmosphere of *adult* romance chat rooms. The following are several conclusions that the defense wants its experts to reach:

* The chats in this case were consistent with the typical conduct and behavior of consenting adults who meet in online adult romance chat rooms for purposes of fun, play, fantasy, and cybersex.
* The defendant’s conduct and behavior during the chats were consistent with the typical conduct and behavior of consenting adults who meet in online adult romance chat rooms for purposes of fun, play, fantasy, and cybersex.
* The defendant’s use of deception during the chat is consistent with the typical conduct and behavior of consenting adults who meet in online adult romance chat rooms for purposes of fun, play, fantasy, and cybersex.
* The use and type of deception in the chat is consistent with how consenting adults who meet in online adult romance chat rooms use deception for purposes of fun, play, fantasy, and cybersex.
* The defendant’s conduct in the chat is not consistent with grooming behavior.
* The defendant’s behavior of going to meet offline is consistent with adult consensual sexual behavior after meeting in an adult romance chat room.

Defense counsel and the defense experts should look to several factors to support the experts’ decision: that the defendant began his chat in an adult romance chat room, where the purpose was for consenting adults to engage in sexual play, including age and gender play to facilitate sexual fantasy; that the “girl” conducted herself as an adult, by using adult phrases, by being sexually aggressive bordering on predatory herself, and using adults language and phrases; that the defendant had experienced deception from other consenting adults before about their age and their looks; that the defendant himself was using age deception and looks deception to facilitate fantasy; that the type of deception used in the case was the type seen in adult chat rooms; that his discussions with the "girl" were immediate and graphic and did not follow the pattern of "grooming.”

These factors – combined with computer forensics demonstrating the absence of inculpatory material and the experts’ understanding of the research about Internet sexual behavior – can lead to the final opinion that the defendant’s behavior was typical sexual fantasy play.

‘Successive Approximation’ and Entrapment

Successive approximation or "shaping" is another important psychological principle. Essentially, by saying and doing certain things, individual A can "shape" individual B’s behavior and get B to do things A wanted B to do. Much like Pavlov's dog or a parent and child or a relationship between a woman and a man, people shape the behavior of others on a daily basis. This principle is of primary importance to undercover officers who are trying to get a defendant to agree to meet them in person.

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“Shaping” is a method used to develop a behavior that is not presently performed by an individual.

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Officers can use successive approximation to motivate a defendant to do more than he would normally be willing to do. In the environment known to produce the disinhibition effect, people easily can be led through this process. An officer can use shaping as a way to convince the defendant to take his sexualized behavior online to travel offline to meet. This is a critical part of Internet-based cases because many treatment providers, and some literature, suggest that taking sexual behavior from the online world to the “offline” world is extremely problematic. An analysis of how shaping impacted the defendant can soften the true meaning behind the defendant’s decision to be “in the presence” of a “child.” It is yet another layer of expert opinion the defense should consider educating the jury and judge with to combat the argument that the defendant is an actual child predator simply using the Internet as a new vehicle to meet children.

Pretrial Hearings

Training Records

The defense lawyer’s pretrial efforts should include subpoenaing the training records of the undercover officer from the agency that trained the officer and maintained the records. The federal government, through the Department of Justice and the Internet Crimes Against Children Task Force, created training materials for the Federal Bureau of Investigation, who then trained various state bureaus. The course is called Undercover Chat.

Legal counsel for the various bureaus will file a motion to quash defense counsel’s subpoena and the defense will be required to have a pretrial hearing on the matter. During the hearing, it is important to establish the nature of the course and type of training. The goal is to show that the agent was educated on the statutes, how to effectively portray a child or teenager, what sites were good sites to engage and search for suspects, and how to avoid defenses such as entrapment and fantasy. This way, the defense can look to see all the ways the agent did not follow his training and all of the ways that agent ignored innocent behavior. The defense most likely will be denied access to the training materials. If so, defense counsel must ask the court to make the training records part of the record of the case for purposes of appeal, should appeal be necessary.

Outrageous Government Conduct

When a state official’s conduct rises to the level of "outrageous government conduct" there is a Due Process violation and the defense can file a pretrial motion for dismissal of the formal charge.[[14]](#endnote-14) The benefit of filing this motion is that defense counsel can cross-examine the officer who conducted the undercover chat about his conduct and decision-making during the *entirety* of the investigation. It is an opportunity to “try” the entire case before trial.

Because the remedy to government action in this type of case is often the affirmative defense of entrapment, courts have found that the defendant’s opportunity to raise this defense alleviates any necessity by the court to dismiss the case altogether.

Camtasia Recordings and Chat Logs

When making the case against suspects, government agents have desktop recording equipment called “Camtasia,” which makes a recording in real time of the officer’s entire desktop while he is using his computer and while he communicates with other suspects. Watching the Camtasia video is akin to standing over the officer’s shoulder watching while she is using her computer.

Oftentimes the government will not provide a defendant with the Camtasia recording because it shows the mouse movements of the officer, all of the programs saved on his or her computer, the way that officers log into the chat room and how they maneuver in the chat room.

Camtasia also shows what other people are doing in the chat room, the sexually explicit names that they use, and the sexually graphic posts that they make about their sexual desires. All of this can be illuminating to jurors who have never been in an adult chat room before. It also can be problematic because many people say “no thank you, you're too young” after hearing from the officer that he is an underage girl. This is obviously a moral judgment or recognition by them of a potentially problematic legal situation. Their statements to the officer work against defense counsel because, if the jury sees it, it improperly comments on the defendant’s failure to log off like the other users.

Defense counsel can take his own “screen captures” of *portions* of the Camtasia video that illuminate how the room itself works and how the officer engaged the defendant. Defense counsel can move in limine to exclude the rest as prejudicial. It is a good idea to prepare slides of the sexual names of other chat room users, the sexual posts by other users, and the officer’s first post in the room that was a sexual request to the other users. The defense should show how the defendant responded to this sexual request, demonstrating that the officer initiated the idea of sex and not the defendant. This is important when considering using the entrapment defense.

State Challenge to the Science of Internet Psychology

The state may file a pretrial challenge to exclude the experts’ testimony. Its attack may be on four fronts: (1) the experts were not qualified experts under the rules of evidence because they did not possess the knowledge and skill to testify; (2) the information about which the experts were going to testify was not “outside the ken of the jury,” i.e., the jury can understand the issues for themselves and does not need an expert to further explain the meaning of the evidence or the nature of the Internet; (3) the experts should not be allowed to comment on the defendants’ conduct and behavior as consistent or inconsistent with fantasy behavior because the opinion is the "ultimate issue" in the case and invades the province of the jury; and (4) the foundation of the experts’ opinions regarding Internet sexual behavior is not supported by a scientific procedure or technique that has reached "a scientific stage of verifiable certainty."

When facing a challenge of this sort, the defense attorney must respond with a meta-analysis of the field of Internet psychology. In Georgia, *Harper v. State* [[15]](#endnote-15) established what a trial court should consider when making a decision about an expert and the expert’s opinion. Prior to 2013, the issue of Internet sexual behavior and Internet communication had never been raised in Georgia.[[16]](#endnote-16) Additionally, the issue of whether or not an expert could comment on the conduct and behavior of the defendant as being consistent with or inconsistent with predatory behavior or “fantasy" behavior was an issue of first impression in Georgia.

In order to properly educate the court, defense counsel must provide a detailed overview of the nature of the science itself through the testimony of experts who can give a history of the field and can cite to peer-reviewed articles and publications from the last 30 years. Similarly, the defense experts can testify about their history as researchers, lecturers, and treatment providers/consultants on Internet sexual cases, and their treatment of sexual offenders for sexual compulsive disorders and problematic sexual behavior (behavior that leads to unintended consequences, but not necessarily legal consequences).

Defense experts’ testimony and the articles they provide will support the view that the science of Internet sexual behavior is neither an emerging science nor one that is unaccepted within the scientific community. The defense should tender all of the peer-reviewed studies to the court as exhibits. Counsel also should provide the court with federal case law from circuits around the country that have previously allowed expert testimony about Internet sexual behavior or fantasy behavior online or that in any way supported the admissibility of the testimony.[[17]](#endnote-17)

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Helping Prosecutors Understand the Internet Environment

Jason Sheffield and Doug Peters have handled three cases in which they tried to explain to prosecutors that some people use the Internet as an environment for sexual exploration and fantasy. While prosecutors do not always accept this theory of innocence, Sheffield and Peters still endeavor to understand how the research about this environment can support a client’s simple expression of his own innocence.

In two of the cases, the state agreed to allow the defendant serve his sentence on probation for a nonsexual offense. The explicit agreement between the state and the defendants provided that they would not have to register as sex offenders. The court also granted them first-offender status. In the third case, the state dismissed the charges altogether.

“Undercover agents generally do not go into teen chat rooms to find predators,” Sheffield points out. “Instead, they go directly to the place of fun, fantasy, and fiction and use deception in ways that consenting adults are already using to fulfill their own sexual desires. If they really want to catch child predators, why don’t they go where children go?”

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The defense lawyer also provides the court with federal and state case law that supports the admissibility of the testimony. In these cases, federal courts and Georgia courts have held it was permissible for an expert to comment on the conduct and behavior of alleged victims and defendant. In particular, in child molestation cases, experts have been allowed to comment that the child’s behavior was consistent with or inconsistent with the child being molested. In those cases, the Georgia Court of Appeals and the Georgia Supreme Court supported the position that this was not ultimate issue testimony, although it may incidentally comment on the ultimate issue, as the same was permissible.[[18]](#endnote-18) A defendant should be allowed to offer evidence on the defendant's conduct and behavior in a similar fashion. Several federal courts have allowed experts to comment on the defendant's conduct and behavior in child pornography cases, molestation cases, and drug cases.[[19]](#endnote-19)

If the court allows anything, defense counsel should consider it a win. When the court only allows the experts to educate the jury about the nature of the consenting adult environment and does not allow the experts to comment on the defendant, defense counsel can still argue to the jury that the defendant’s conduct and behavior are consistent with adult fantasy behavior.

Mock Trial

The defense team should present these unique and untested issues to a mock jury. In its simplest form, the defense team should provide the mock jurors with the chats so that they can read them. Then the defense lawyer should present opening and closing and argue the competing interpretations of the evidence. Several things may be illuminated.

None of the jurors may have ever visited an adult romance chat room. If true, this underscores the importance of educating the jury to this environment. If the defense attorney does not do it, jurors will have no way to understand that this type of graphic sexual chat between consenting adults is typical sexual behavior online.

Many of the jurors may be outraged by the state’s actions in the case. While they will certainly be disgusted with the nature of the chats themselves and their graphic nature, they might feel as though the officer was essentially manufacturing a crime and wonder if the officer’s conduct constitutes entrapment.

Entrapment and Shaping

Most often in these cases the action starts with the government, the government uses deception, and the defendant has no propensity to commit the crime. In the traditional sense of the defense, however, the defendant typically must admit he committed the crime before he can get the entrapment charge. If he admitted that he committed the crime, then under the statute he would be saying that he *believed* he was talking to a child. But what if he never says this?

Consider *Cosmo v. State* – a 2013 Georgia Court of Appeals case. The court of appeals held that when the defendant can establish the primary elements of entrapment from the state's case-in-chief and does nothing to present evidence inconsistent with his defense that he did not commit the crime, the defendant is entitled to the entrapment charge, *even if he denies committing the offense*.[[20]](#endnote-20) *Cosmo* went up to the Supreme Court of Georgia and was reversed in part, but the Supreme Court of Georgia did not disturb the court of appeal's decision regarding entrapment.[[21]](#endnote-21)

The *Cosmo* case allows a defendant to maintain his innocence but also comment on the government's conduct, which allows the defendant to argue to the jury several reasons for acquittal. If the jury does not want to acquit him on his actual innocence, then it can accept the charge on entrapment and find him not guilty based on the government's action and his lack of propensity. It is a powerful combination to consider. Also, the disinhibition effect makes the entrapment defense more palatable: *but for* the Internet’s sexually permissive environment, the defendant never would have entertained the fantasy chat.

Lesser Included Offense

Adultery is a criminal offense in many states. As a final measure to appeal to a potentially hostile jury, the defense should consider asking the court for a charge on the lesser-included offense of Attempt to Commit Adultery. People commit adultery when they have sexual intercourse with another person to whom they are not married. In Georgia, for example, it is a misdemeanor. This would allow jurors to punish him for his decision to step outside his marriage and give them a way out of the other more serious charges.[[22]](#endnote-22)

Jury Selection

There is a real risk that defense counsel may alienate jurors by getting too personal, even if counsel has the ability to question the jurors on an individual basis. A juror questionnaire can be used to test the attitudes of the jurors about *others’* use of the Internet for purposes of sexual exploration, connection, and as a vehicle to meet others to engage sexually offline. Much like a child molestation case, counsel must test the attitudes of the jurors about child sexual issues even though there was no actual child in the case.

Conclusion

It is up to criminal defense attorneys to try to open a door for the presentation of compelling, admissible evidence regarding the nature of sexual interaction online. The defense should strive to establish that there is a science of the “psychology of the Internet” and “Internet sexual behavior.” Juries need to understand that these types of conversations are *typical* in these environments.

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3. . *Id*. [↑](#endnote-ref-3)
4. . S*ee* *generally* *Selfe v. State*, 290 Ga. App. 857 (2009). [↑](#endnote-ref-4)
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14. . *See generally* *Giraldo v. State*, 249 Ga. App. 178 (2001). [↑](#endnote-ref-14)
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16. . *State v. Godina*, Barrow County Superior Court, Georgia. [↑](#endnote-ref-16)
17. . *United States v. Long*, 328 F.3d 655 (D.C. Cir. 2003); *United State v. Hite*, 918 F. Supp. 2d 58 (D.D.C. 2013); *United States v. Joseph*, 542 F.3d 13 (2d Cir. 2008); *United States v. Bennett*, 161 F.3d 171 (3d Cir. 1998); *United States v. Grauer*, 805 F. Supp. 2d 698 (S.D. Iowa 2011) *aff’d*, 701 F.3d 318 (8th Cir. 2012); *United States v. Hofus*, 598 F.3d 1171 (9th Cir. 2010); *United States v. Curtin*, 588 F.3d 993 (9th Cir. 2009). [↑](#endnote-ref-17)
18. . *Smith v. State*, 247 Ga. 612 (1981); *Hall v. State*, 201 Ga. App. 626 (1991); *Rolader v. State*, 202 Ga. App. 134 (1991); *Odom v. State*, 243 Ga. App. 227 (2000); and *Mullis v. State*, 292 Ga. App. 218 (2008). [↑](#endnote-ref-18)
19. . *United States v. Hitt*, 473 F.3d 146 (5th Cir. 2006); *United States v. Romero*, 189 F.3d 576 (7th Cir. 1999); *United States v. Cross*, 928 F.2d 1030 (11th Cir. 1991); and *United States v. Kalaycioglu*, 210 F. App’x. 825 (11th Cir. 2006). [↑](#endnote-ref-19)
20. . *Cosmo v. State*, 230 Ga. App. 397 (2013). The court held: “As a general rule, in order to raise the defense of entrapment, the defendant must first admit the commission of the crime and then show that he did so because of the unlawful solicitation or inducement of a law enforcement officer. *Gregoroff v. State*, 248 Ga. 667, 669-670, 285 S.E.2d 537 (1982). *St. Jean v. State*, 255 Ga. App. 129, 130, 564 S.E.2d 534 (2002). The Supreme Court of Georgia, however, has also recognized the following exception to the general rule: [W]hen the state's case shows evidence of entrapment and the defendant offers no evidence of entrapment inconsistent with his defense that he did not commit the crime, the defendant is not required to admit the commission of the crime in order to be entitled to a charge on entrapment.” [↑](#endnote-ref-20)
21. . *State v. Cosmo*, S13G1070 (2014). [↑](#endnote-ref-21)
22. . Defense counsel may want to move to exclude any evidence from the trial that the defendant was married, as the same may be prejudicial and not relevant to the issue of whether or not he committed the crime. Conversely, the defense may choose to inform the jury that he is married, that his wife is standing by him despite his mistake, and to ask the jury to forgive him. This may be better than leaving the jury with the impression that he was an unattached man who was looking to fulfill his sexual desires at any cost. [↑](#endnote-ref-22)