

Seminar 2 Coerced Confessions and Investigations

Today we're going to talk about police interrogations and defense investigations. Psychlaw is proud to present the faculty for today: Attorney Patrick Clancy, Retire Sherriff's Detective Harvey Shapiro, Professor Richard Leo from the University of California at Irvine and myself, Dr. Demosthenes Lorandos.

We're going to talk about defending against our own client's statements either in police interrogations or worse, in coerced confession circumstances. We'll also discuss pretext phone calls and things of that nature. We're also going to talk about the proper investigation of cases of alleged child abuse. We'll discuss the investigations that we conduct and key on how proper investigation is critical to the development of the natural history of an allegation. We will show how these circumstances are critical to an understanding of the strength and weaknesses of our client's case.

The first thing that you need to do in circumstances such as these - when you're thinking about interrogations or things that the police have done - is to find out: has the client talked to the police. In fact, we need to find out immediately all of the people the client talked to right at the outset of our representation.

You really need to grill them about this because often they will think that benign conversations don't hurt them. They don't know about admissions. It's important that they understand this. Also, it is important that we understand the difference between an interview by the police and an interrogation. Both certainly have the capacity for admissions against interest, but the difference you will learn - is really important.

To get right into this - I'd like to introduce Professor Richard Leo. Professor Leo did his doctoral degree on police interrogations, on witnessing them, on researching them and he has published a number of articles in this field. In fact, professor Leo is one of the foremost investigators of police investigation techniques in the United States today. He teaches interrogation techniques to police, to judges, and to attorneys. He testifies as an expert witness for both the prosecution and the defense on the issue of proper and improper interrogation techniques. We're very pleased that Richard is going to speak to you about this important subject right now.

I'm Dr. Richard Leo. I want to thank those at Psychlaw for inviting me to speak as part of their continuing education program for criminal law specialists. I'm an associate professor of criminology and psychology at the University of California at Irvine. I'm obtained by PhD doctorate degree from the University of California, Berkeley. My doctoral thesis was a study of the techniques used by American police agencies in the interrogation of suspects.

In brief, I was allowed to attend 122 police interrogations at the Oakland Police Department in Northern California and witnessed another 60 interrogations by video tape in two other Bay Area police departments. I also attended five introductory and advanced interrogation training courses, including an advanced interrogation training

course at the federal law enforcement training center in Glencoe, Georgia where all federal police, with the exception of the FBI are trained as well as the introductory and advanced interrogation training courses from the Chicago based training firm Reed and Associates. I have published numerous research articles, book chapters and books on police interrogation and confession. It was because of one of those articles that I was invited to attend the federal law enforcement training center.

My research has been found to be scientific in numerous state, federal and military courts. As of July, 2004 I have testified more than 100 times in 17 different states. On each occasion I have been required to establish the scientific foundation for my research. On two occasions I have testified for the California state attorney general's office for a case in which the defense was alleging that their client was innocent because three juveniles had confessed to the same crime. My role was to explain to the jury how police interrogation works and can lead to false confession from factually innocent individuals. I have given dozen of lectures on police interrogation and false confession to numerous professional organizations, including judges, prosecutors, police, psychologists and criminal defense attorneys. I have taught interrogation training courses to police investigators in Florida, Louisiana and Texas.

The Reed method is the primary method of interrogation in the United States. It was created by an individual named John Reed in the 1940's who co-wrote a textbook entitled Criminal Interrogation and Confessions which has become the bible of all interrogation training in America. It is now in it's fourth edition. The Chicago based training firm Reed and Associates goes around the country putting on seminars to teach police officers and detectives the Reed method of interrogation. Virtually every detective in America has either been trained in the Reed method directly through Reed and Associates or through similar interrogation training put on by someone else or by the police department to which they belong. The Reed method was not based upon scientific or systematic research, it was created to replace the third degree or the rubber hose in the basement of a police station when the courts put an end to the third degree in the early 1940's.

Now, the first thing to know about the Reed method is that there is a big difference between interviewing and interrogation. Interviewing is something police do to witnesses, victims and potential suspects. It involves asking friendly open ended questions in a non-accusatorial and non-confrontational manner. The purpose of an interview is to get the truth and as much information as can be helpful in figuring out the truth and investigative leads. The idea is ask questions in a manner that is not leading, suggestive or manipulative. The interviewee should feel at ease and should do most of the talking in an interview.

By contrast an interrogation is a very different activity. Police interrogate criminal suspects only when they presume the guilt of a suspect and the purpose of the interrogation is to get incriminating statements, an admission or a confession. It is not necessarily to get the truth. Remember, the idea is that police detectives already know the truth or the detective thinks he knows the truth, i.e. that the suspect is guilty and so the purpose of interrogation is to confirm what the interrogator believes.

As a result, the interrogation is accusatorial and confrontational. The detective is supposed to do most of the talking and the detective uses specialized interrogation techniques whose purpose is to manipulate a suspect's perception and includes leading and suggestive, sometimes even coercive questioning methods. The ultimate goal of an interrogation is to move the suspect from denial to confession. The Reed method is simple to understand. The main idea as put forward by the Reed school is that the interrogator needs to change the suspect's mind set by raising their anxiety and changing their perceptions about what will happen to them depending on whether they confess or not. The Reed method seeks to accomplish through a few primary interrogation techniques.

First, the interrogator seeks to isolate the suspect from the environment in which the suspect feels comfortable and from any social networks or outside support. So the interrogator takes the suspect to the interrogation room, which is typically in a remote room in the police station and sometimes lets him stew before questioning. The idea here is to isolate the suspect and eventually to show the suspect that he, the interrogator, dominates and controls the interaction.

Second, the interrogator accuses the suspect of committing the crime in a confident unwavering manner. As mentioned earlier, once the detective decides to interrogate, he has made up his mind that the suspect is guilty and the sole purpose of the interrogation is to get incriminating statements, an admission, and/or a confession. Not to entertain the suspect's alibi, denial or even reconsider whether the suspect is innocent or guilty. As a result, the interrogator will not only repeat his accusations often, but he will also cut off the suspect's denials, the idea being that the less the suspect is able to verbalize his denials, the more likely he will eventually be able to break.

Third, the interrogator will attack the suspects alibis or denials as illogical, impossible, inconsistent and/or contradicted by case facts even if it is not and confront the suspect with real or fabricated evidence, a technique that is known as the "evidence ploy". The purpose of attacking the suspect's alibi or denial and confronting the suspect with real or fabricated evidence is to convince the suspect that he is caught. That there is no way to escape the fact that everyone will think he is guilty and no one will believe his alibis or denials. In short, is to convince the suspect that he has no choice but to cooperate with the interrogator.

Fourth, the interrogator in the Reed method confronts the suspect with what are called "themes". A theme is a psychological excuse or justification for why someone would have committed an act. So, for example, in a murder case the interrogator may suggest the theme of an accident or self defense. That the suspect committed the crime accidentally or in self-defense to make the suspect feel that he is less blame worthy or culpable for the underlying act, i.e., the death of the victim and therefore make it easier for the suspect to admit to the killing. The technique of using a theme culminates in the use of a good theme and bad theme which in some ways is like the technique good cop/bad cop. The idea is to contrast the good theme, for example killing in self defense

or as an accident with the bad theme, for example, being a first degree premeditated cold blooded murder, to give the suspect the sense that there are only two choices in terms of how the crime will be defined and what will be the consequences to the suspect and that is in his best interest to take the good choice. Sometimes the good theme and bad theme even imply that if you accept the good theme you might have no culpability or minimal culpability. For example, the officer will state that all he needs to know is whether the defendant raped the woman or was it consensual sex. The officer will want to know if you molested the child intentionally or were you so drunk that you weren't aware of what you were doing and it was unintentional. The officer keeps repeating that if you chose the good theme we can understand. Everyone makes those kinds of mistake or accidents. The officer never offers the choice that the alleged event didn't occur. He keeps portraying the good thing as being in the suspect's best interest.

The Reed method of interrogation can lead individuals who are completely innocent to sometimes either come to doubt themselves and their memory and/or to make false statements, false admissions or false confessions. When an innocent individual comes to doubt their memory or make a false confession it is of course highly counter-intuitive. What can clearly see how this can happen if one understands the process of interrogation because the Reed method of interrogation if misused on an innocent suspect can lead the innocent suspect to perceive their situation in a way that makes sense to question their memory or agree to a false account. How can this happen? It happens because the Reed method of interrogation is intended to cause a suspect to think they are caught, they are trapped and there is no way out of the interrogation. They will inevitably be arrested, prosecuted and convicted no matter what they say or do in the interrogation room. This is why the interrogator exudes confidence, repeats the accusations often, cuts off or rejects any denials, attacks the suspect's alibi, sometimes relentlessly or explanations and confronts the suspect with real or false evidence. The idea is to convince the suspect that the case against him is air tight, objective and irreversible. No matter what the suspect says or does he is going to be arrested and prosecuted. Individuals who are naive or inexperienced with the police or who have no idea that police can lie and make up evidence as well as individuals low intelligence or high suggestibility may come to doubt their memories in the interrogation room especially in response to false evidence ploys because they may come to believe that despite the fact that they have no memory of committing the crime they must have done something because the police are unrelenting, attacking their explanations and alibis mercilessly and the police say they have all the objective evidence that everybody is going to believe, makes them look guilty.

Common false evidence ploys include the police having the suspect's fingerprints or saying that they have the suspect's fingerprints, the suspect's DNA was found on the alleged victim or telling the suspect that his DNA was found on the alleged victim, telling a suspect that an eyewitness can identify him or her, telling the suspect that their alleged accomplice has blamed them to the police, or whatever else the police want to make up and insist falsely incriminates the suspect. The reason the Reed method can lead innocent suspects not only to doubt their memory, but also to make false statements or a false confession is because once a suspect is moved to the point of hopelessness as a result of the accusations, attacks on his alibi and explanations and the evidence ploys. He

may come to perceive he really has very little choice in the matter. If the suspect believes the interrogator, whether or not he continues to deny committing the crime, he will perceive that he is trapped, caught and powerless that no matter that he is innocent he will get convicted. If a suspect believes this then the good choice and bad choice offered by the interrogator's use of themes may be persuasive. Given the fact that the suspect perceives he is caught and there is no way out even if he is innocent he may feel compelled to take the good choice making him appear less culpable in order to avoid the bad choice which would make him appear more culpable since he believes he is going to get convicted anyway and as the interrogator is either implying or explicitly suggesting the good choice will lead to less punishment, a lower a charge and/or a lower sentence or possibly no charges at all, than the bad choice which will lead to more punishments, for example a higher charge and/or higher sentence. If the detective's use of the Reed method of interrogation is successful in moving someone to this mind set then it may make sense indeed the suspect may perceive it as in his self interest to make a false admission or confession to avoid an inevitably higher charge or sentence even though he or she is completely innocent.

An innocent suspect can be led to say and possibly believe that it must have happened while he was asleep because he has no memory of it, it must have happened while he was blacked out drunk because he has no memory of it or is led to believe or can be made to believe that if he just agrees that something accidentally happened it will be in his self interest. The Reed method of interrogation can be very psychologically coercive on both suspects that are guilty and suspects that are innocent.

Thank you Richard that was really informative. It's particularly important when you have the first opportunity with your client's admissions that you transcribe that tape. If you've got a tape of the interview get it transcribed. Mark out the evidence ploys in the tape, Mark the themes, with different color sticky notes or put them in a different color marker, if necessary, but mark them as distinct from the evidence ploys. Mark the implied or overt offers of leniency as distinct from the themes or the evidence ploys that you notice in your transcript. Mark the implied or overt threats that you find in the transcript. Make sure that you've got each one of those things, evidence ploys, themes, implied or overt offers of leniency, implied or overt threats, distinctly set aside and marked.

What if you don't have a tape? Well, debrief your client immediately. Make sure that your client takes notes in their own handwriting. I had a circumstance once where I took notes when an expert was talking and then the expert lost his and took a copy of mine up on the stand - The other side tried to pretend that I was telling the expert what to say. Mr. Clancy had a circumstance in which he took notes when the client was talking and the client used his notes to refresh his memory. The prosecutor tried to make it seem that Mr. Clancy was putting words in the client's mouth. Don't do that.

Have the client take notes in his own handwriting, but debrief him, ask the client every single question that was asked of him. Ask the client how he responded, try to get the client to tell you about themes, ploys, overt and covert offers of leniency, overt and

covert threats, but don't put words in his mouth. First try to get the information directly from him or her and try to make sure that you understand how the client responded to each of those themes, or evidence ploys or overt offers of leniency or threats.

It's important that you understand that to get an expert in on coerced confessions or on the confession process in general - you face Daubert and/or Frye issues. Dr. Leo has qualified for his testimony under both the Daubert standard and a Frye standard in California and in a variety of courts around the country.

The motions located in our californiamotions.com website will help you get an expert like Dr. Leo or Dr. Leo if you're lucky enough to get him - involved in your case, on the stand - to offer testimony and into evidence.

Mr. Clancy has made a video for you about how to access these motions and others.

Okay now in order to get testimony in concerning police interrogations, we need a motion that shows why that's admissible. We go to californiamotions.com, you can obtain a password here if you don't already have one. I have mine so we come over and enter my address, my password logs in automatically and there we are. Now using the drop down we're talking about the admissibility of a defense expert and it's right here in three formats. Admissibility of expert witness on coerced confessions, it can be done in wpd wordperfect or word. Let's take a look at it as a pdf file in Adobe and that's what it looks like and then you can just hit save a copy and you can put it directly on your own computer wherever you want it. That's it.

What happens if you can't get these motions granted before trial? Salt the record - talk about this outrageous confession - talk about this outrageous process every chance you get. Bring it up in opening, bring it up in your examination of witnesses, talk about it, beat it to death and then run your motions again.

There are a number of judges, whose persuasion we all know about, who are not going to give us any help whatsoever pretrial. So you make your record and make it appear so clearly that they are going to be reversed for denying this crucial evidence - that they begrudgingly let you get an expert like Dr. Leo on the stand. So if you don't win in pretrial, salt the record, bring it up every chance you get.

It's important to realize that there are other opportunities for your client to step on his own case.

Several times we have to defend against our own client's statement. One of those is when he undergoes an interrogation by the police, but the other one is called a pretext phone call. What is a pretext phone call. Well it is legal to have an individual call the suspect and question him. Usually this is done by the a child, if the child's old enough, if not by a relative of the child. They then call and confront and try to get the defendant or the suspect to make incriminating statements.

If you just say you're sorry we won't go to the police, my daughter is upset we know it's true, why did you do this, things of that nature. The theory behind it is that the individual is caught off guard and does not have time to fabricate a story and will give admissions to try to avoid this going to the police. What do you do with this type of statement? Well several things.

The first thing is you have to look at it as to whether or not it is a coerced statement. Most people, most attorneys do not realize that private parties, not just the police, have been held to be the cause of coerced statements and the statements have to be suppressed. We have been successful in getting a number of pretext phone calls suppressed, we have even gotten a pretext phone call which was done when the defendant was a police officer. Why, because there are cases which have held that in the area of coercion under unlike search and seizure that a private individual can also be the cause of coerced statement and coerced statements are inherently unreliable and therefore are not used.

The second theory, in looking at a pretext phone call and doing a coerced statement analysis, is that a private party can also be held to be the agent of the police. One of the things that you want to do when looking at a pretext phone call is subpoena the notes of the police officer. I've gotten notes of police officers where they have written down-- jack him up, threaten him with this, you know, make him think he is going to get away with it, -- all sorts of statements that prove that the statements that were being made were intended, either as threats or as offers of leniency. So go for those notes. Then you need to analyze the statement as you would any other coerced statement. You would also take a look within the pretext statement the same type of techniques that are used in police interrogations. Look for the same types of themes, look for evidence ploys, things of that nature, look for offers of leniency, express or implied, look for threats, express or implied. You can then run a motion to suppress the statement if you believe that it a coerced statement. Here is some help for you...

Okay we want to keep a statement out of evidence, we believe it that it's been coerced. This can be from a police interrogation or it can actually occur even during a pretext phone call. So we go to californiamotions.com, you can obtain your password here, I already have a password and I have memorized my password, now using the drop down category this was an in limine that was miscellaneous and what we're looking for is a motion to exclude coerced confession and that's right here. Let's take a look at it's in pdf and word document and wordperfect, let's look at the pdf, there it is and you can scroll through it and the points and authorities. To save a copy to your own computer, there's your own computer. All you have to do is pick out a location where you want it and save it.

The second thing in analyzing a pretext phone call is that it can be used as an open door. Many times these statements are ambiguous. The individual says when confronted, I'm sorry. Well what does I'm sorry mean. If somebody says if you do it again I'll go to the police, if you don't say you're sorry I'll go to the police -- well I'm sorry. Well why did they make that statement. You are allowed to introduce the suspect's or the defendant's state of mind.

Let me give you an example. One time I had a case where a U.S. Air Force Sgt made one of these statements of I'm sorry. His commanding officer was the father of the child. So things that would not normally be allowed in I was able to get in this through this open door. Why did you say you were sorry? Well he's my commanding officer, if I talk back to him I could get in trouble. I could lose my position in the Air Force, I could lose my pension. I was within a couple of months of retiring and getting my pension. I was afraid I was going to lose everything unless I said yes sir, yes sir. Well normally you're not allowed to talk about the consequences of a charge of this nature with the jury, but here his state of mind was placed into issue and we were able to show he was conforming to the military commander that he was afraid of the loss of his pension, that he was close to retirement, all sorts of additional things that we could not normally be able to get into evidence, we were able to get into evidence through this open door. And think of a pretext phone call as an open door. You get to explain what you said and why you said it and that gets in a lot of very favorable material that you would not be able to introduce otherwise.

The next area that I want to talk about is investigations. With investigations we have a system to keep track of what we're doing on a number of different cases. Now, we have a color coding system and a means of communicating with our investigator so that we don't have to drive 30 miles to be at each other's office and a client doesn't have to drive a couple hundred miles to be with us. Let me show you a video on how we conduct our investigation, work list or our investigation meetings with the attorney, the investigator and the client.

Part of being properly prepared is coordinating your investigation meetings. Because my investigator lives about 30 miles from where I do, we're doing this on the internet. What I suggest you do is go to GotoMeeting.com and download their program. It's very reasonable, they charge about \$40 a month.

This program will allow you to have ten people looking at the same screen at the same time. We have multiple investigators, so I call and have two investigators in on the meeting and we actually have the client who may be in another part of the state in on the meeting.

Now I already have that on my computer so let's go down here and launch gotomeeting. I'm going to host a meeting and show you what it looks like. I log in with my e-mail and I log with my private password. Now I can schedule a meeting to happen in the future and send out notices to people or I can do it now. We're going to go ahead and do it now and we're going to start the meeting.

Okay this is the screen of the host. I want people to join my meeting and so I can send them an e-mail and when they click on the e-mail they see the same screen that I see. They then call in at 641-497-7010, that is a toll free number, and a computer will answer and ask for the meeting number. There is the meeting number, you punch that in and you are connected. Ten people can be in on it at the same time. I then click show my screen so that others can see my screen and one other thing, I can give people access to use the

keyboard and the mouse, I can pick one person to have access or everyone or two or three, whatever I want. Then by hitting this little button everything goes out of the way. Now what's on the screen is seen by everybody whose in the meeting and we're all talking on the phone through a conference number. What we do then is we go over the investigator checklist that we have for each client. A few things, all our ideas that everyone has is put on one document. This way there is no misunderstanding about what it is I'm looking for in the investigation. Recently I had to testify at a writ hearing and a testimony wanted to know wanted to know if I had done certain investigations, it was four or five years later and I couldn't remember if I had thought of an idea and then cancelled it so we came up with color coding, green we cancelled that part of the investigation, maybe for tactical reasons, maybe for other reasons. We yellow color code anything that's a high priority and when it's done we red color code it without deleting it. Then if years later you are required to testify as to what went on you know exactly what happened with your investigation. Remember, each person can type on this so I may talk about a neighborhood canvas and my investigator may have a few ideas he can take over the keyboard and the mouse, hit it, right down his ideas of what he would like to do under that. Records that we are going to have the client, issues on alibi, other things of that nature. So everyone sees the same screen at the same time, everyone can modify it, the client's love it because they understand what's going on and we can coordinate multiple investigations then we have that client or we disconnect them and have another one come online and we have another meeting. That's how we conduct our investigation meetings.

You've now seen how we have investigation meetings. We have our clients involved in it, we have the investigator and the attorney, sometimes we have two investigators that are located in different parts of the state, all working together on the investigator checklist. By doing this everyone knows precisely what it is that we're looking for, what the theories are and the types of questions that I want to have handled. Too many times I have seen cases where an attorney goes to the investigator and just says well go out and investigate this, you know it's one of the first of these types of cases I've done, see what you can find. Well that is the misuse of your investigator. There are certain areas that have to be investigated in a child molestation allegation case and in particular if it's a false allegation.

The first place we can start with is not what you would normally expect. We investigate our own clients. Since the passage of evidence code section 1108 the prosecution has been able to introduce other allegations of sexual molestation made against the client or rape or any other type of sex crimes. Sometimes the clients get a little upset that we are investigating them, but we have to explain to them that the DA will eventually get around to investigating their background. We start this investigation out with our intake form and on the back of it we have a series of questions for the client to tell us about any prior allegations. Now they don't want to disclose this to you, so the form covers it in many ways. Have you ever been accused before, have you ever been falsely accused before, have you ever been accused of something you didn't do and no charges were filed. By asking it a number of different we hope that they will disclose to us if there were any allegations every made. Further, if they fail to tell you about it and this pops out in a later part of the trial and they tell that they did inform you, you can take out the form and show

them that you had not. You need to know what's bad out there that you can bump into. Now where do we look when we're looking at our own client. Well the first place is we look at our client's other children. Many times I have found that a client has two or three former wives and there is only one child accusing, an offer has been made, it's a bad case, it's a reasonable offer and the client says I didn't do anything. We've gone out and we've investigated the prior marriages and the children from the prior marriages and the stepchildren and lo and behold what do we find out, same types of accusations were made. Well I want to know that before the DA knows it, if possible. It can definitely affect how the case proceeds. We want to know about these other allegations whether they are false and whether or not they were ever filed because under 1108 they could still come into evidence and in evaluating your case this is an important thing to know up front. Now, good character witnesses, you don't need a private investigator to investigate them. If they are good character witnesses they are willing to come to your office and you can interview them and evaluate them yourself. Or if they are from out of state you can talk to them on the phone.

The next part of the investigation is we investigate the alleged victim. There are two major questions that must be answered by the defense in one of these cases. If you don't answer these questions before a jury, your client is going to be found guilty. By knowing what these questions are it helps direct your investigation. The first is sexual knowledge. What if a four year old makes a statement about oral copulation. The jury will believe that it's true because how would a four year old know about oral copulation. Well you're going to need to establish through an investigation whether or not they heard it from other little children, maybe somebody that they knew that had been molested, maybe another brother talked about it, maybe a concerned parent questioned them about it. You need to do an investigation to determine where they got their sexual knowledge. As the child gets older you know especially if they are up 16 or 17 years old, that's not as important. But it's important with the younger ones up to even 13, 14, sometimes 15. It's amazing how some older jurors believe that a 13 or 14 year old knows nothing about sex. We need to establish that they know.

The most important thing that you have to show a jury is the motive for a false allegation. Now, when you're doing a case this is really the key to the case. What is the motive, there could be hundreds of different motives. I can't give you a list that would even begin to include all of the motives. But that is what you must be looking for. Now, suggestibility is a motive. It explains why the false allegation was made. Third party culpability -- maybe it's a 15 year old that thought they were pregnant by a boyfriend and want to blame someone else so that their boyfriend doesn't get in trouble. The alienation of one of the parents by the other parent during a divorce is a motive. In fact, it is probably the single most common motive. There are adult type of motives, hate, jealousy, maybe the person accused married the child's parent and they didn't want the loss of the other parent. Another motive which I've seen in a number of cases is children that are neglected who are seeking attention. We have done cases of that nature numerous times and in fact what you are doing then is showing the lack of attention, the lack of concern of the relatives, the child reaching out and trying to find attention by acting out negatively. That is way of doing it.

Another type of motive is the “me too” motive. I had a case in Modesto where 13 girls in a kindergarten class accused the teacher of molesting them. The actual defense had to do with the kids basically all going “me too, me too”, all of these little girls, a group hysteria. We were able to show this because the 13 girls also saw each other being touched day after day after day. What was surprising to me is that there were no statements from the 13 boys. We went and got the 13 boys and they said they had never seen anything. Finally one of the girls cracked, one of the 13 came forward and said that she had just gone along with it because everyone else was and it was fun,-- “me too”. There can also be a situation in which you have what I would call children type of motives. I had a case in which a day care provider was accused of putting a lotion on a child’s penis from a green bottle. We found out through our investigation that a week before this child had been out on a camping trip with his parents and his sister. The sister had gotten into some poison oak or poison ivy and had touched herself in her private area and the mother had applied lotion on the child to get the child cured. The lotion had come from a green bottle. The other little child had seen it. Well parents know that if a young child falls down and scuffs their knee and you have two young children-- you get out two band aids. You put one on the knee of the child who was scuffed and you put one on the knee of the other child. I had loaded the jury with parents. When I made this argument the DA, who was a single person, laughed. She laughed right up until the not guilty verdict came back. Motives have to be viewed through the eyes of a child, not through eyes of an adult.

The next thing I would like to talk about is what I call specific investigations. Why is it that you can win a trial in which 13 people are accusing your client, which I have done, and lose a trial in which two people are accusing him. It has to do with whether or not you have independent sources or are the sources linked. In the example of the 13 children they all knew each other. They were in the same class, they all talked, that’s one form of linkage. In the case where it was lost there were two children – independent-- at other ends of the state who had never met and who were not interviewed by the same interviewer and they told nearly identical stories of having been molested. You therefore must determine whether or not the sources are independent or if they are linked. If they know each other as in a class it’s easy. There are other ways that there can be linkage though. We had a case in which there were five students in one class, seven in another and there was no showing that there was any cross-contamination between them. During the course of the trial we found out the children in the earlier year class went to a swimming pool party which was attended by the students in the other class and that they had talked about the teacher and that the rumors had spread. In essence, we had one source, not two sources. We didn’t find this out until the middle of trial.

The other way that you can have linkage and in essence have one source rather than multiple sources is the investigator. Take the classic case of the McMartin case. There were hundreds of different children interviewed, from a number of different years of attending the school. What do they have in common, they were all interviewed by Key McFarland who used suggestive and leading interview techniques.

Are there other ways that you can link what might appear to be independent sources. Well, another one I can think of is therapists. Now especially in adult cases-- we had cases where there were 10,000 reports of satanic cults and people were being molested by satanic cults across the United States and baby sacrifices. This was investigated by the FBI and found to be totally bogus, but during their investigation, what they found out was that the accusers all went to therapists who had all received training about satanic cults and how to interview your clients about satanic cults. The common factor was the story was being spread by the therapists and training manuals and courses. The individuals had never met each other.

Okay, what would you look for next in terms of guiding your investigation. Corroboration. You must check out all allegations that have some means of corroboration. You need to know both the good and the bad. Recently I had a case where a child was claiming this neighbor saw a certain touch, that neighbor saw a certain touch, another one saw porno videos, the story was just overwhelming until we went and interviewed all of these children who said they had never see any such thing and the little girl had a tendency of making up stories. We had one in which an e-mail was sent in which our client was professing love and wanting to be with her and a whole number of other things. When we went to check the corroboration we went to our client's send folder in his e-mail and found out that he had sent an e-mail --one sentence long. She had added two or three more sentences and then saved it. When confronted with the original e-mail and the fact that we could prove that it was original from the computer hard drive she confessed to adding statements to the e-mail, the corroboration in fact did not exist.

You also must look for the lack of corroboration where there should be corroboration. If the person claims that an event occurred and there were witnesses present, there should be corroboration even if the police haven't interviewed them. If you go out and find out that there is no corroboration, it undermines the credibility of the complainant.

The next area I would like to talk about is investigating the alleged victim's background. A case we handled at trial was just recently overturned after a conviction based upon a writ. And in doing that a complete background investigation was done. As it turns out the 15 year old had lied about a rape, a molestation. What was discovered after the trial is that she had admitted that she had lied to a friend of hers who at the time of the trial was stationed overseas in the military. A year later when a follow up investigation was being done on the writ going down lists and lists of names of people who knew her, literally 30, 40, 50 people were interviewed, the individual had returned from Saudi Arabia and Iraq and was there and had the story, not only, that she had admitted that she had fabricated the rape but also why she had done it.

She was upset because the person had used her. She had voluntarily had sex with this young man, but then when he left the party and went off with someone else she was mad. She actually told somebody about this. It was turned up through a background investigation. The other thing that we have found out is that they definitely will talk

about the events different to their friends than to their parents. So find the friends that they have talked to.

There is another type of background investigation. You can almost spot it, it's need. I hear that the child came forward because she was afraid that she was pregnant and that she was molested by her next door neighbor and she was a virgin. Then I looked through reports and statements and she mentions she was a virgin again and then she mentions she was a virgin again and I think about she has protested too much. We went out and did an investigation and within one day we found out that on Tuesdays and Thursdays she was with a young little boyfriend having sex while mom was at work and she didn't want him to get in trouble. We found the boyfriend and he owned up to it. Was that an isolated case, no. We've had that five or six different times where third party responsibility has been the defense. What's nice about those cases is they normally never go to trial. Find their friends and more importantly children have enemies, find their enemies, they will tell you what's going on.

Next, I'd like to introduce you to our investigator, Harvey Shapiro. Mr. Shapiro teaches POST, advanced officer courses. POST as you know is Police Officers Standard of Training. He was a consultant on the latest POST training video on the investigations of allegations of child molestation. He's handled a couple of thousand child molestation allegations in his career because he was a child molest investigator for the Riverside Sheriff's department. Not only that he was trained by Steven Ceci himself on issues of suggestibility. Harvey is going to talk to you about what the role of a investigator is. I'm proud to introduce to you Harvey Shapiro.

My name is Harvey Shapiro and I'm an investigator for the Clancy Litigation Group. I want to thank Psychlaw for inviting me to speak here today. From 1974 until I retired, I was a detective in the Riverside California Sheriff's Department assigned to the Crime Pattern Analysis unit, the Law Enforcement Intelligence Unit, and the Crimes Against Person's Unit. Child molestation cases were handled by the Crimes Against Person's Unit.

During this time the country was rocked by sensational cases such as the McMartin Preschool case, the Bakersfield Sex Ring cases, and many more. These cases were based on investigations that were out of control.

Fortunately, we didn't have problems like these in Riverside County. Certainly we had our share of accusations. So how did we avoid the problems created by investigations that were out of control?

Command instructed us to do investigations as if we were "defense investigators". That's right - - I was told to conduct my investigations as if I were the defense investigator. If you are searching for the truth you must be as concerned about those that are innocent as you are about those that are guilty. This is that attitude that helped us avoid approaching a case with a single hypothesis and not exploring other possibilities of how something could have occurred.

Today, I do investigations for the defense. I am encouraged by the law firms I work for to conduct an investigation as if I were the police. Why? Because good defense attorneys are concerned with what is out there and what facts a good investigation will uncover.

Good defense counsel wants to know what is out there that can effect their case - - and they want to know ASAP. They want the bad news as well as the good news. Today, I want to talk about what a competent investigation entails, whether the investigation is conducted by law enforcement or by the defense.

The information I'm going to give you today comes from, in large part, from the presentation that I give to law enforcement when I do training programs for the Police Officers' Standards of Training. It doesn't matter whether the audience is made up of law enforcement professionals or defense investigators, the message is the same. The investigator is supposed to be the finder of fact in the search for the truth. It is important that the investigator assist the attorney at trial, whether that attorney is the defense attorney that he/she is assisting or the district attorney that he/she is assisting. This assistance is based on the investigator's search for truth. In the search for truth - - RELIABILITY is the key.

For us, reliability means:

1. Are there sufficient corroborating facts supporting a conclusion?
2. Will it hold up to scrutiny?
3. Will it hold up over time?

It's important to understand that when any investigator looks at a case, they want to look at and be concerned with the reliability of the information contained in the case file. Bias affects that reliability. One of the most important kinds of bias an investigator needs to watch for is called "confirmatory bias". In its worst form, this means driving towards a specific conclusion - no matter what the evidence may be. Confirmatory bias or confirmation bias is widespread. It can be overcome only with specialized training. It is especially important to learn to ask the right questions. We must guard against focusing only on "he did it" or "he didn't do it" kinds of information. We can guard against confirmatory bias by trying to look at the whole picture.

1. Who made the initial allegation?
2. What were the circumstances of the initial allegation?
3. Who stands to gain by the allegation and so on.

This is the groundwork an investigator will lay down to help guard against confirmatory bias. We must also consider "coercion". This can mean "manipulation" by someone with something to gain by the allegation. It can mean an overzealous interviewer miss-hearing a child or worse, It can mean covert threats - which almost any investigator will work to uncover.

Investigators should also carefully review audio or video taped interviews, whether they be of witnesses or of the victim or of the suspect.

I teach that good investigators must interview the suspect to see if confessions may or may not have already been made, either in the interrogation arena or in the pretext arena. The pretext arena refers to a "pretext" telephone call made by the alleged victim to the suspect that is recorded by police investigators. The competent investigator must cover the possibility of confessions or admissions in both of these areas.

We find that chronologies and witness lists are of great value. It is the client and the investigator that put the chronology of relevant facts together for the trial attorney. This helps create a context for events and serves to guide the investigation and the trial preparation process. This is of great importance because, absent the context of how and when something occurs, it is very difficult to form an accurate picture.

Another important factor in any good investigation is to investigate the credibility of the key witnesses. Do they have any motives to lie? Do they have any motives to get back at someone?

We also take a look at issues of source monitoring, and this generally goes to source attribution and source mis-attribution. Dr. Lorandos talks more about this in the seminar on suggestibility. Let me just say here that source monitoring refers to the process of identifying the origin of one's knowledge of events.

Maybe someone has a memory, but did that memory come from an actual event or from just thinking about the event or being repeatedly told about an event? My friend Dr. Elizabeth Loftus has done a great deal of important research in this area.

It is also very important to remember that as people, we tend to look for things that support our personal point of view. As investigators, we must look at the interviews that have occurred for indications of such a bias. These indications of confirmatory bias will become apparent by a complete lack by the interviewers - of any attempt to think about any alternative hypothesis. Is he guilty? Is he innocent? Remember I talked about guarding against focusing only on "he did it" kinds of information. It is critical in a good investigation to determine whether interviewers looked at any hypothesis other than "he did it."

We look for as we say in psychology "the pursuit of alternate hypotheses". Are there other possibilities of how this event could have occurred? In general, we try in our interview process, to examine all other possibilities.

The investigator will also consider confessions and ask: "Do we have a coerced confession?" Professor Leo has spoken a good deal about this. I would add that the objective investigator will not take a "confession" at face value but will investigate whether the suspect was scared? Or look into the possibility that maybe they said what they said because they thought they would have less jeopardy. Is there any information in the interrogation that came only from the suspect? If not, how do we know that the information we are getting is from the suspect rather than the interrogation process?

These are but a few of the important issues for psychologists - and good investigators to answer.

Let me also say - that we must carefully look at medical reports. Medical reports may or may not confirm that which is alleged. We maintain a strong medical library which we use to examine medical reports. Don't be misled by the phrase "consistent with". "Consistent With" does not mean "proof of". I have seen too many investigators not realize the difference. Why does that cause a problem. Having heard that the medical examination is "consistent with" child molestation, many investigators stop looking for the alternative hypothesis. This is a mistake.

We all know that a good investigator will investigate issues of opportunity - motivation and sexual knowledge. It's how an investigator looks into these important concerns that I want to talk about now.

When conducting interviews, the skilled investigator will be concerned with the RELIABILITY of information provided.

There is significant research regarding issues of memories and the malleability of memory. One of these important malleability issues is coercion. An investigator should work to determine if coercion was used with any witness and if so, as a result, the individual may assent or accommodate and give the story that they gave to minimize a possible negative outcome.

The concerned investigator will also work to determine whether the information provided by any of the witnesses or victim was based in any way on the suggestibility of that person. Also, the investigator should look at the possibility of implantation of non-events.

Analyzing interviews, the objective investigator will look at issues of misunderstanding that which may have occurred, or the misinterpretation of what actually did occur. Cultural differences should be explored and how events might be viewed differently or misinterpreted by other nationalities.

Remember, it's important to maintain excellent communication with the family, the accused, the witnesses and their family. When interviewing people, we need to show empathy and sensitivity to their situation.

It's important to stay in contact with the defense attorney when working with the defense or if you're law enforcement officer to stay in contact with the district attorney. Let me talk a little more specifically about FORENSIC interviewing. The role of the forensic interviewer is to be objective, and that means that the interviewer is committed to eliciting facts without imposing his or her own beliefs on the person being interviewed. The objective interviewer needs to be neutral and consider alternative hypotheses. The interviewer needs to be friendly, and not present as an authoritarian or a disciplinarian. This will aide in free recall of the interviewee.

It's important to attempt to interview the alleged victim or victims. This may not be allowed or available to the defense, but it's important for the law enforcement to maintain excellent communication with those folks.

In these important interviews, some helpful things to say are:

1. I wasn't there, so....
2. Even if you think I know it, tell me anyway.
3. Even if you think it does not matter, tell me anyway.
4. It is ok to tell me that you do not remember.
5. It is ok to say that you do not want to answer my question.
6. If I make a mistake, please correct me.

Note – the questions are designed to start the flow of information. It is actually easy to do a neutral interview but you must control yourself and not allow leading questions based upon your own bias to ruin the interview.

Another very important issue for the competent investigator is the difference between the therapeutic interview and the forensic interview. There is an enormous difference between a forensic interviewer and a therapeutic interviewer. Here are some examples:

1. A therapeutic interviewer assumes the child is telling the truth. The forensic interviewer interviews for the purpose of fact finding.
2. In a therapeutic interview, the interviewer is an advocate.
3. In a forensic interview, the interviewer must be neutral.
4. In a therapeutic interview, subjective reality is accepted.
5. In forensic interviewing, alternative explanations are explored.
6. In a therapeutic interview, accepting of general descriptions of abuse are accepted.
7. In forensic interviewing, details of abuse are imperative.
8. In therapeutic interviews information can be obtained by using a variety of techniques.
9. In the forensic interview, the interviewer follows a set of guidelines that are generally accepted within the interview community.

What we do as interviewers, whether we be law enforcement or the defense interviewers, is to attempt to find out how people know or what they think they know. Just because they think they know something is so, doesn't make it a fact. What's important to understand is that if a person doesn't know what the truth is, how can they possibly tell a lie?

Remember - RELIABILITY is the key issue. And don't forget that the thorough investigator will also carefully review the work of all previous investigators. The investigator, along with the attorney, should review the training records of law enforcement officers and child protective service people to see if they have had the specialized training as required by law in California under Penal Code 13516. As you know, this law requires law enforcement people to have specialized training on sex crimes.

When we review the medical and psych reports, as well as any photographs, we may find that there is conflict between what the reports show and what the evidence shows. While interviewing, it's important to get as much information as you possibly can. Like the little dots or pixels of a picture, the more pictures that you have and the more pixels in those pictures, helps determine how clear the story will become. So, it's important to get as much information as you can, with as much detail as you possibly can. Remember, the greatest impediment to progress is not ignorance, but the illusion of knowledge. Just because someone thinks that they are correct does not mean that they are.

Let me give you an example with a few slides. Take a look at this slide, it's called the "sign painter". In viewing the first slide, I want you to think about what the sign painter is painting. You will see on the left there is some information, and on the right, the sign painter has provided additional pieces suggesting a vivid idea of what is to come.

Now we take a look at the second slide, and we see the picture on the left with more detail and more information. Now we're getting a clearer idea of what the sign painter is painting. Take a look again, on the right hand side, more detail, a better look at what the picture is all about.

Taking a look at slide three, we see a lot of detail, and now we probably have a good idea of what this sign painter is painting. All too often we stop at this level, and we do not wait to get more information. We proceed with a single hypothesis.

If we would have continued further without forming an opinion, we would see that what we thought the sign painter was painting, was in fact not what he was painting at all! So, as we can see by this example, the details are very important for investigators, whether they be defense or whether they be prosecution. It's important to obtain the most pixels of information that you possibly can so that you can see the clearest picture. You cannot do this if you are following a single hypothesis.

Most importantly, the investigator is not an advocate. The competent and thorough investigator must look at both inculpatory and exculpatory information. This means we must look for information that tends to show that a crime has been committed and information that tends to show that a crime has not been committed in a search for the truth.

In my observation as a retired detective and my observation as a private investigator doing child abuse cases for many years, when the investigator keeps an open mind, tries to obtain as much information as possible, investigates all reasonable alternative hypotheses, they will get the information they need to help prove or disprove that the one that has been arrested is innocent or guilty. What is done with that information is up to the attorney, it is our job to make sure that the attorney, whether for the defense or for the prosecution, knows the truth.

THANK YOU!

We want to thank Harvey for explaining to you the role of the defense investigator. And in fact it really even shouldn't be called a defense investigator because a true investigator goes after the truth, goes after the facts, whether they are a police investigator or whether they are hired by the defense. Now you should realize that an investigation is the backbone of the case. It's not attorneys, it's not expert witnesses, it's investigators.

On behalf of Harvey Shapiro, Professor Leo and Dr. Lorandos, I want to thank you very much.