Navigating the Landscape of Sexual Assault

Chief Mike Milnor, Ret.
Nancy Oglesby, Esq.

Justice 3D Training and Consulting is offered as guidance for clients to consider based on the clients request for services. The guidance offered for consideration is not intended to constitute legal advice, or to create a legal standard of care. All consulting and training is designed based on professional experience and input from multi-disciplinary partners to reflect examples of promising practices, alternative approaches, and lessons learned. Participants should follow their own policies, procedures, and guidance from their respective institution’s assigned legal counsel. All copyrights and trademarks of images, videos and sound belong to their respective IP owners and are used under Fair Use for educational purposes.

OUT OF EVERY 1000 SEXUAL ASSAULTS, 995 PERPETRATORS WILL WALK FREE
WHY THESE #S?
Rape Culture
What is Rape Culture?

**NOT** a claim that:

- All men are rapists, or that all are capable of rape (95% / 5%)
- Women or men are incapable of lying about sexual assault

More than anything else......

A tolerance of behaviors that *minimize, trivialize* and *normalize* sexually assaultive behaviors and abusive attitudes

“Facebook Didn’t Seem To Care I Was Being Sexually Harassed Until I Decided To Write About It”
“There is no vulnerability without danger.”

CONSENT IS REALIZING VULNERABILITY IS NOT AN OPPORTUNITY

DR. GAIL STERN

WHY THESE #S?
Rape Myths
What are they?

- Mostly strangers in the dark
- Rapists are easy to spot
- Most women give "mixed messages" – "no" really means "yes"
- A victim who is drinking or dressed seductively is partially to blame
- Sexual assault victims remember every detail
- "Date rape" is not as bad as "real rape"
- Men can’t be raped
- Sexual assault is a crime of passion and lust
- A person who is sexually assaulted will fight back
- A person who is sexually assaulted will be hysterical
- Only young, pretty women are assaulted
- Sexual assault victims always report
- A real victim will always tell the truth

82% LITTLE OR NO PHYSICAL INJURY NEVER REPORTED – OR DELAYED GAPS IN MEMORY PERCEIVED CREDIBILITY ISSUES OMIT, EXAGGERATE, FABRICATE AND EVEN RECANT

Why Do Victims Come Forward?

- Safety
- To Be Believed
- To Hold Offenders Accountable
- Someone Else Reports Encourages them to Report
Internal Influences
Embarrassment, Shame, Self-Blame, Fear they won't be believed

External Influences
Pressure from family, friends, hide certain behaviors

Why might they recant?

Socio-Cultural Influences
Uncomfortable about specific acts, isolation from community, fear of the system

System Influences
Lengthy investigations, Non-belief, Interrogation/Polygraph, Trial

Why THESE #S?
False Reports

How many sexual assault allegations are false?
So how many reports are false?

20 published studies, however, most profoundly flawed

- Clark and Lewis (1977): 116 cases
  10% (12 cases) classified as false
- Kelly, Lovett & Regan (2005): 2,643 cases
  2.5% (67) classified as false
- Lisak et al., (2009): 136 cases
  5.9% (8) classified as false

Why doesn’t everyone know that?

Confusion in Terminology

- Case Unfounded / False Allegation
- Victim Recanted
- Pending / Unsolved
- Prosecution declined
- Suspicious circumstances
- Exceptional clearance
Uniform Crime Report (FBI)

UCR states that a case can only be unfounded if it is "determined through investigation to be false or baseless." In other words, no crime occurred.

Media Doesn't Help

DUKE LACROSSE

2006

2015

ROLLING STONE – "Jackie"

There is no credible evidence that false allegations are widespread

False Reports are LOW

most allegations are true

It remains a task for trained investigators to make the determination – treat each case initially as valid
WHY THESE #S?
Law Enforcement Training

The Policing Culture

“Old Warhorses”

WHY THESE #S?
Failure of the Court System
Faced up to 14 years in prison
DA asked for 6 years
Probation officer recommended less than a year
Judge sentenced him to 6 months
Released in 3 months

Judge James Troiano – NJ
2019

• 16-year-old filmed himself raping an extremely intoxicated teenager at a party
• Sent the video to friends with the text “When your first time having sex was rape”
WHY THESE #S?
Pornography and the Internet

In 2016 -
Pornhub alone showed
4.6 billion hours of pornography viewed on its site

Meta-analysis of different studies shows "clear and consistently" that repeated exposure to pornography puts people at increased risk for accepting rape myths and/or committing sexual offenses.
Exposure at a young age

Studies show 93% of boys, 62% of girls exposed in adolescence

49% of males were exposed before age 13

Teenage girls and young women are significantly more likely to view porn regularly than women 25 and above

Intimate partner violence and pornography

Use of pornography by batterers significantly increased the odds of the victim also being sexually abused 2xs.
When alcohol was also present, the factor increased 3xs.

Changing the System

Community Advocates
Community Perception
Prosecutors Pushing the Envelope
Training of Law Enforcement
Understanding the Neurobiology of Trauma

Trauma applies to all cases – but the misunderstanding has had significant impact in our sexual assault cases.

Takes a team approach – everyone needs to understand the science.

This is just an overview.

Let’s Talk Brain Science

Trauma causes physical changes in the human brain.
Prefrontal Cortex
Limbic System
Reptilian Brain
Defense Circuitry

Always Assessing For Danger

Limbic System (Hippocampus and Amygdala)

Less than a second...
Survival Reflexes

Why didn't you... FIGHT SCREAM RUN ??????

FIGHT > FLIGHT > FREEZE
Reflexes & Habits

All that is left when defense circuitry takes over

Training is to keep prefrontal cortex “on”, then to have habits burned in when it becomes impaired

Why was I so polite???
What about childhood trauma??

Extreme Survival Reflexes

FREEZE
(Tonic and Collapsed Immobility)  

FLIGHT  

FIGHT
Tonic Immobility
• Fixed or unfocused staring
• Feeling Cold
• Rigid or trembling muscles
• Rapid Blinking
• Numbness to pain

Collapsed Immobility
• Extreme drop in BP and Heart Rate
• Loss of muscle tone “went limp”
• Sleepiness
• Total loss of consciousness

Perpetrator
• No threat – Not stressed
• Pre-frontal cortex is “on”
• Planned - habitual
• In control
• Memory is “normal”

Victim
• Terrified
• Defense circuitry in control
• Focused on perceived threat, survival
• Habits & reflexes
• Memory impaired

People respond to sexual assault involuntarily
Memory & Trauma

What we want...

Beginning, Middle, End
Who, What, Where, When, Why, How???
Concise & to the Point

Pre-Frontal Cortex
Logic Choices
Focus is on Survival
Sensory experiences are strong
Peripheral details are not important
Trauma-informed interviewing is about figuring out what the attention was focused on or where they checked out to...

A mess of a memory

- Feeling
- Image
- Strongly ENCODED
- Body Sensation
- Thought
- Weakly Encoded
- Behavior
- Sound

What we get...

- Not Chronological
- Flashbulb
- Weak narrative

You can’t force it...
Memory
Time & Stress

Peripheral details are lost as time passes

Stress impairs retrieval
Central details usually remain more reliable

Changing the Script

Inconsistent Statements & Unusual Behavior
ARE NOT ALWAYS
Lies / False Allegations

Trauma-Informed Interviewing
What happens when we misunderstand trauma??

- Victim-Blaming
- Disbelief of victim
- Ask “report” driven questions
- Misinterpret behaviors and body language

Reactions of doubt and blame increase the trauma victim’s negative experience and decrease the likelihood they will stay engaged in an investigation

Our #s will only improve when responders start from a place that sexual assault reports have merit - and then follow the evidence through a fair, impartial and thorough investigation

This does not mean “always believe victims” or “believe everything a victim says” or pursue corroborative evidence more than exculpatory evidence
Thoughts for Prosecutors

- Prosecutors were over 5xs more likely to file charges if there were no questions about the victim's moral character.
- 2.5xs more likely to file charges if the victim did not engage in any "risky" behavior at the time of the assault.
- 4xs more likely to file charges if the victim reported to the police within an hour of the assault.
- 2019 study – 3269 cases from 6 jurisdictions – only 1.5% resulted in a trial

[Spears & Spohn, 1997]
Melissa S. Morabito, Linda M. Williams, April Pattavina

“Ask the right questions...create the right space”

Dr. James Hopper

Approach interviews through a trauma lens...
Prepare

Know your case – talk to:
- initial responding officer(s)
- Initial witnesses that were present
- SANE/Forensic Nurse
- paramedics or first responders – (if involved)

Timing considerations – should you delay the full interview?
- Is there an immediate threat to the public?
- Did the victim just go through a physical exam?
- Has the victim had time to sleep?
- Is the victim under the influence of alcohol/drugs?

Arrange to have an advocate present
- Get to know each other before an investigative situation
- Help with advocate training
- Build TRUST
- Understand confidentiality
Physical Comfort

• Victim must feel safe
• Private
• Free from distractions
• Think about logistics
  • transportation
  • childcare

What about a regional room?

Time

• Recognize that these interviews can be lengthy
• Address possible distractions so the victim can be completely “present”
  • Child pickups / activities
  • Job schedule
  • Etc.
How can you begin to give back control?

"You" Statements

- How are YOU feeling?
- Is there anything YOU need to feel more comfortable?
- May I call YOU by your first name?
- Where would YOU like to do this interview?
- Do YOU have any questions?
- Do YOU have any concerns?

"We" Messages

- Establish the victim as an important and central member of the investigative team process.
- One of the most important parts of rapport and relationship building
"We" Messages

We are going to take time to talk about what happened.

We will review all the information together.

We will discuss all aspects of the case as it progresses.

We will go over all the options available.

Things NOT to Say

Everything is going to be alright.

Don’t cry

Time heals all wounds

I know exactly how you feel

It could have been worse

Just try to get on with your life

When the victim is empowered, it starts building rapport and trust with the investigator.
Build Trust

Good interviewers do it intuitively
• Patience
• Compassion
• Empathy
• Flexible

Recognize that your actions directly affect the victim’s healing

The Right Person

Empathy

Can you teach empathy?

• Empathy is not sympathy
• Empathy is the ability to understand and SHARE the feelings of another.

It doesn’t require malicious intent to do great harm.
Allow the victim to vent

Psychological first aid

Assure them that these emotions are normal and appropriate

Tone, Body Language, & Eye Contact

Tone

Express patience and support

Calm and reassuring
### Body Language

<table>
<thead>
<tr>
<th>Open body language projects empathy, care and builds rapport</th>
<th>Sit with victim in a relaxed manner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Victim physically higher if possible</td>
<td>One to two arm lengths away</td>
</tr>
</tbody>
</table>

Acknowledge conversation with nods and verbal encouragers

---

### Monitor the victim’s body language

May indicate when a break is needed

May indicate the need to skip an area of questioning and come back later

---

### Eye Contact

**Shows emotion, attention and interest**

**Communicates you are listening**
Maintain appropriate eye contact without staring
  • While speaking - maintain eye contact 50% of the time
  • While listening - maintain eye contact 70% of the time
  • Maintain for 4 to 5 seconds, then slowly glance to the side, and then back
  • Look side to side, down indicates a lack of confidence in what is being said

Michigan State University (2012) Eye Contact: Don’t make these mistakes.

Getting Started – Setting the Stage
Let the victim know that it is ok for them to interrupt you at any time with a correction, thought, or question
Let them know that they can decide if/when a break is needed and can stop the interview at any point

Full Disclosure
Explain that disclosing and “getting in front” of some behaviors reinforces credibility
Remind that the truth about all behavior WILL come out
Reinforce what you are investigating
Remember, the victim, not the investigator has the most vital information about the sexual assault, therefore the victim should be the one with primary control during the interview process.

EVAWI, (2019) Interviewing the Victim: Techniques Based on the Realistic Dynamics of Sexual Assault

---

### How to Begin

**Introduce**

I’m Investigator Smith, but feel free to call me Jim. I’m sorry we are meeting under these circumstances.

**Explain**

I have worked many cases like this – I speak to lots of people in similar situations.

**Encourage**

You can tell me anything that you feel is important.

---

**Permission not to remember**

Begin by saying something like...

“Share with me anything you can remember about this experience. You can start wherever you want...”
Permission not to remember

Gives them permission to not remember details
Communicates it is ok and expected that they won’t remember things
Never “force” a victim to dwell or focus on a point they cannot remember

let the victim go at their own pace and use their own words - fight the urge to interrupt, clarify or redirect...

• Open-ended questions & prompts
• Sensory questions
• Clarification questions – carefully
• No leading questions
• No “why” questions
Open-ended prompts
- And then what happened?
- Tell me more about that...
- Can you tell me what you were thinking at this point?
- Can you tell me what you were feeling when he did that?

Establishing Force, Threat & Intimidation
- When did you first feel afraid?
- What changed at that point for you?
- What was going through your mind then - compared to before?
- Compared to ______, were you feeling more or less afraid? Why?
- Tell me more about what made you feel forced
- Tell me more about him - his demeanor, his size, his strength...

Take the time to explore each one
Senses trigger memories
Central Details

What is the one thing you remember the most about this event?

What stands out in your mind the most when you talk about this event?

What is the one thing that you cannot forget about this event?

Finding Corroboration

What was your most significant physical feeling?

Who have you told about what happened to you? When did you tell?

Finding Corroboration

Is there anything that you can't do anymore?

Is there anything that you have lost interest in?

Is there anything you do now that you didn't before?

How has this changed your day to day life?
When a “Triggered” Report...

Many people wait to report what has happened to them, what made you choose to report now?

How did your life change immediately after this happened?

Can you tell me what you remember about the first 3 days after this happened?

Avoid Leading Questions

Did he hold you down?

Was he bigger than you?

Did you hit him?

Did you bite him?

Tell me more about him

What did you do?

How did you feel?
Avoid the "Why"s

- Why didn't you fight the suspect?
- Why didn't you scream for help?
- Why didn't you just leave?
- Why did you kiss him?
- Why did you leave with him?

INSTEAD...

Help me understand your perspective... What was going through your mind when...

Can you elaborate on...

Clarification

Explain why the questions are needed
- one of the biggest complaints of victims is not feeling informed through the interview
- especially important when dealing with sexual acts or high-risk activities of the victim
**Clarification**

- Explain to the victim an overview of the legal requirements of the offenses.
- Remind that they are not in any legal trouble for drugs or alcohol use.
- This continues to establish rapport, trust, and that the victim is a partner in the process.

**Be Careful**

- Studies find that detectives ask questions in the order that they appear in report forms.
- This may not be in the sequence of memory that the victim is relaying and can disrupt the victim's thought process.
- Memory is not usually stored in the order that an assault occurs.

**Sexual Terminology**

Difficult for detectives and victims.
- Ask the victim to clarify what terms they use for male and female intimate parts.
- Evaluate their knowledge of different types of sexual activity.
- Victim will often be relieved when this conversation is initiated by the detective.
- Use the terms the victim uses for the duration of the interview.
- Avoid law enforcement / legal jargon.
Record the Interview

Allows the detective to listen in-depth to the victim - only needing to take minimal notes during the interview

Best for evidence and court

Consider having another detective observe through video for feedback

The “Prosecution” Question

This question should never be asked during the interview phase – only when the investigation is complete, and prosecutor is consulted

If asked by the victim - be completely honest - never promise that the suspect will be arrested, prosecuted, or convicted

Reassure that a thorough investigation will happen and reassure the victim will continue to be kept informed

Next Steps

Answer
- any questions or concerns

Inform
- more memories may develop

Encourage
- documentation and sharing of new info

Reassure
- that an investigation will follow

Explore
- potential support and/or barriers

Request
- time and date for follow-up
Disclosure is a process

Follow-up interview(s)

New information will develop, and this often means speaking to your victim for clarification/elaboration

Science has brought us a long way but... trauma symptoms do not PROVE or DISPROVE sexual assault

"Such gaps and inconsistencies are never, on their own, proof of ANYONE's credibility, innocence, or guilt."

- Dr. Jim Hopper

"Why do you need a weapon if you have alcohol?"

- Teresa Scalzo

If the victim is incapacitated by voluntary alcohol or drug use, tell how this in increased VULNERABILITY not CULPABILITY!
Steps of Impairment

Cognitive
- Judgement, Emotions and Inhibitions

Voluntary Movement
- Coordination and Balance

Involuntary Movement
- Breathing and Heartbeat

What Determines the Effect?

Body Weight

Energy and Rest Level

Emotional State

Food Consumption

Level of Tolerance / Exposure

How Drunk is Too Drunk?
How Does Alcohol Impact Your Case?

- Force, Threat or Intimidation
  - Goes to vulnerability and credibility
- Unconscious – Passed Out
  - Physical Helplessness
- Too Intoxicated to Legally Consent
  - Mental Incapacity

“Pass Out” vs. “Blackout”

- Passing Out
  - Losing consciousness
  - Going to sleep
- Blacking Out
  - Complex and specific neurological phenomenon
  - Interruption of hippocampus activity

Interrupted hippocampus activity

- Interferes with ability to form new long-term memories
- Impairment increases with consumption
- Leaves intact ability to keep new information active in memory for brief periods
- Might remember small things during blackout (brownout)
- Leaves intact previously established long-term memories
Blackout

Rarely beer alone

Preceded and followed by signs of extreme intoxication

Very close to either passing out or vomiting (body's methods of preventing alcohol poisoning)

"Alcohol can disrupt the encoding or organizing process of memory. Encoding the context of a sexual assault is impaired, so details such as time, place, and sequence of events may be further fragmented or not encoded at all.

However, the hippocampus can often still encode sensory details (smells, sounds, etc.)."


Blackout as a Defense

Make sure the defense is correctly defining "blackout"

Before the defense can use an expert – make sure the foundation has been correctly laid

Blackout is usually not an option for the defendant
Use of an Expert – No Blood Test

Toxicologist – Widmark Formula

Estimated BAC

Timeline for Absorption
• What time they started drinking & what alcohol they consumed
• What time the assault happened
• Weight / Sex (body h2o)
• Effect of interaction with food – not important

Drinking Pattern
Can give a range

Use of an Expert – Blood Test

Back Extrapolation
Need to know time of assault
No other alcohol consumed since assault
Weight/sex doesn’t matter
Food doesn’t matter
Reported in range

Sexual Assault Investigations
Victim centered – what does it mean?

If we don’t investigate through a trauma-informed lens we will likely damage our most important piece of evidence

_We will do more harm than good_

The Initial Response

Minimal Fact-Finding Interview

What type of crime?
Who is the victim?
Who is the perpetrator?
Where did it happen?
When did it happen?

_Does this information have to come from the victim?_
Investigator ALWAYS Responds

Sexual offenses treated with same attention as homicide

Policy!

What is the minimum number of crime scenes you will always have?

There are always at least 3 crime scenes – Location of Crime Victim Suspect
Why is this important in cases where consent is a defense?

Pretend it is a stranger rape...

Photos and Video  Clothing (even if washed)  Sheets & Comforter

Towels  Trash  Recent laundry vs. dirty clothes

Birth Control, Lubricants, Sex Toys  Alcohol Drugs  Document anything out of order

What about DNA?
Forensic Exam
Understand your resources

What is an acute case?
Description-driven or complete exam?
Time involved, location and payment

Does the nurse need to interview?
Impartiality is key

Lack of physical injury SHOULD NOT be viewed as disproving the victim's account of the assault
**Suspect PERK exam**

**Strategic factors:**
- Length of time since the assault
- Timing
- Search warrant? Consent?

**Considerations**
- Police department v. hospital
- SANE/FNE or Forensic tech
- What if combative?
- Cross contamination
- SART should discuss protocol and policies

- Buccal swabs
- Penile and scrotal swabs
- Pubic, chest, and facial hair
- External examination of the anal area
- Photographs
- Injuries
- Hygiene details
- Foreign debris or material

Still a patient if done by a nurse
Jury expectations and bias

Win the numbers game

Where did the trauma manifest?

Think about your victim's interview(s):

- Document lifestyle changes?
- Work Records
- School Records
- Friends & Family
- Lack of texts or social media
- Can you create a timeline?

Corroboration

- Photographs
- Security videos
- Traffic cams
- Bar tabs, ABC receipts
- Texts & Emails (Preservation Letters)
- Social Media
- Witnesses Phones
- GPS records
Why this Victim?

• How was trust built?
• How was trust tested in the past?
• Why this specific location?
• Factors to reduce the victim's credibility? Vulnerabilities?
• Drugs? Alcohol?
• Does it fit past behaviors with exes?

---

The Report

Vital Part of your Case

Details of ALL the evidence in the investigation

Speaks for all witnesses

Prosecutors rely on them and make decisions based on them

---

Accuracy is Critical

---
Preserve the details of the sexual assault using the EXACT words of the victim

Don’t:
- sanitize
- use passive voice
- use consensual terms

had sex with
oral sex
fondle
kiss
performed

raped
forced his penis,
tongue
grabbed
forced his tongue
was made to

Open-ended questions, accurately reported answers:
- What thoughts did you have when...?
- How were you feeling when...?
- When do you remember first being afraid? What caused those first feelings of fear?
- Compared to before he said/did that - were you feeling more or less afraid?
Document all factors of force, threats and intimidation

- Suspect was - older, larger, stronger
- Victim was - vulnerable, *i.e.* immigration status, employee, student, patient, etc.
- History of domestic violence, past victimization
- Fear for children or others

I seized a green leafy substance

...that *in my training and experience* appeared to be marijuana

When I spoke with Ms. Doe I used an interview technique based on my training and experience known to be effective in interviewing people who have experienced trauma

or

A full trauma-informed interview was conducted with Ms. Doe – statement was recorded.
What about the “Why did you/didn’t you” questions??

In my training and experience people who experience trauma sometimes have a fright, flight or freeze response. When Ms. Doe said she couldn’t feel her legs I followed up with specific questions about that sensation.
What about the gaps??

For your report consider...

I began my interview by telling Ms. Doe that she could begin with whatever she thought was important for me to know and I then asked her to share with me what she was able to tell me about what she experienced.

How do you deal with inconsistencies??

VERY ACCURATELY
Suspect Interview

Empathy Based Interview (EBI)

Remember - they WANT to tell you a story... Let them!

Problem Solving Environment

Creativity
Flexibility
Patience
Empathy

Atmosphere
Interview “Ops” Plan

What are your goals for the interview?
- Elements that need to be corroborated?

Conversation Points

Let the suspect tell their story
- No interruptions
- No judging
- Minimal encouragers
- Then establish conversation points of common interest between suspect and interviewer

Risk Levels

- Low Risk
- Medium Risk
- High Risk
Strategic Introduction of Evidence

Least threatening to most damning
• Photos
• Records
• Victim/Witness Statements
• Video
• Medical

Flip the Perspective

References


References

• Archambault, J. Lonsway, K. (2019) Interviewing the Victim: Techniques Based on the Realistic Dynamics of Sexual Assault.
• False Allegations, Case Unfounding and Victim Recantations: Presentation by Deputy Chief Bellshaw, Salem Police Department and Christine Herman, JD, Oregon Attorney General’s Task Force. (2009)

References

• Lonsway, K., Hopper, J., Archambault, J. (2019) Becoming Trauma – Informed: Learning and Appropriately Applying the Neurobiology of Trauma to Victim Interviews
• Russell Strand, Ret. SA Army CID, Consultant and Pioneer in Trauma-Informed Interviewing

References