LESSONS FROM FORMER PUBLIC DEFENDERS: HOW TO CONDUCT AN IMPARTIAL FAIR INVESTIGATION

Catherine Berryman, J.D., Chamberlain Hrdlicka & Nyssa Taylor, J.D., Title IX Manager at Rowan University
Introduction

WHO ARE YOU?
Overview

1. Broad impact of trauma
2. Crucial defender perspectives
3. Tips for conducting investigations
4. Understanding defense counsel
5. Scientific research
6. Case scenarios
7. Q & A
What is trauma?

**Definition of Psychological Trauma:**
“An event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual’s functioning and mental, physical, social, emotional, or spiritual well-being” (Substance Abuse and Mental Health Services Administration [SAMHSA], 2012, p.7).
How does trauma impact your investigation?

- Neurobiological impact of trauma on the brain and body
- Memory fragmentation
- Disclosure becomes a process

Huge topic. For more information visit jimhopper.com
Who experienced trauma?
Crucial Defender Perspectives- Insights for remaining neutral

- Always maintain the ability to change your mind
- Clear-eyed assessment of facts
- Remain open and non-judgmental
- Sensitivity to wealth disparities
Crucial Defender Perspectives cont.

- Different people - different truths
- People may not understand which facts are important
- Discrepancy does not necessarily indicate deception
- Do not expect gratitude
Crucial Defender Perspectives cont.

- Awareness of implicit and explicit bias
Defenders can quickly develop working relationship

- Be courteous, respectful and professional
- Show respect and sympathy for what happened
- Not an advocate, not a friend
- Explain the process
- Discuss explicit matters straightforwardly in direct clear language
Interviewing: Gathering the facts

- Open-ended questions
- Detailed non-judgmental questions
- Ask hard questions bluntly
- Do not interrupt – kind stillness and silence
- Interview people more than once
Understanding Defense Counsel
Understanding Defense Counsel cont.

- Awareness of the criminal process
- Reluctance to participate does not equal guilt
- Impact of putting someone on the stand
- Cross examination = shifting the burden
- Collateral consequences
Scientific research that PDs & Title IX Investigators should be aware of

- Polygraphs
- Fragility of memory
- Alcohol’s impact on the brain
Polygraph Examinations

Not permitted in criminal courts because NOT reliable

- Easy to learn how to pass
- Not generally accepted in the scientific community

See American Psychological Association, The Truth About Lie Detectors, available at
www.apa.org/research/action/polygraph.aspx

Or How to Cheat a Polygraph Test on Wikihow
www.wikihow.com/Cheat-a-Polygraph-Test-(Lie-Detector)
“Every time we bring back an old memory, we run the risk of changing it. It’s more like opening a document on a computer – the old information enters a surprisingly vulnerable state when it can be edited, overwritten, or even deleted. It takes a while for the memory to become strengthened anew, through a process called reconsolidation. Memories aren’t just written once, but every time we remember them.”

“When Memories are Remembered They Can be Rewritten” - [http://phenomena.nationalgeographic.com/2013/05/20/when-memories-are-remembered-they-can-be-rewritten/](http://phenomena.nationalgeographic.com/2013/05/20/when-memories-are-remembered-they-can-be-rewritten/)


**Elizabeth Loftus**
- TED Talk: How Reliable is Your Memory
- More information and articles available at: [http://faculty.sites.uci.edu/eloftus/](http://faculty.sites.uci.edu/eloftus/)
Alcohol’s Impact on the Brain

Brownouts & Blackouts.


National Institute on Alcohol Abuse and Alcoholism and Duke Institute for Brain Sciences

2015 Study: Intoxicated participates could accurately retain information from the event as well as those who were sober. While intoxicated participants reported fewer pieces of information - than those who were sober - the accuracy of what was recalled “did not differ.”

- FLOWE, H.D. ...et al., 2015. Alcohol and remembering a hypothetical sexual assault: Can people who were under the influence of alcohol during the event provide accurate testimony? MEMORY, 24(8), pp 1042-1061.
Case Scenarios
Case Scenario 1 – Jane and Joe

Jane, a student, reports to the school that she believes that she was sexually assaulted by fellow student, Joe. Her initial report comes through the school’s electronic reporting system and contains the following information from Jane:

A few weeks ago, I went to a party, became intoxicated and woke up the next morning in Joe Smoe’s bed. When I woke up, I was wearing Joe’s t-shirt and shorts. The dress that I wore to the party was on the floor.

The investigators meet with Jane. She reports fragmented memories from that night but shares the following:

I have a fuzzy memory of Joe penetrating my vagina. I recall being in his bed and I felt something go between my legs. Maybe twice. I was too intoxicated to consent to sexual activity.

What follow up questions do you ask Jane?
Case Scenario 2 – Jessica & James

Jessica comes into the Title IX Coordinator’s office and reports the following.

My friend James sexually assaulted me after a night out. We have been friends for 3 years, we are all part of this big friend group. That night a bunch of us went out to dinner. My boyfriend is friends with James and the rest of this group as well, but he was out of town for an away game that night. After dinner, James and I went to a bar and had a few more drinks on our own. I lost my keys and James told me his roommate was out of town and I could stay in his roommate’s room. James lives in a 3-bedroom apartment with two other guys. When we got to James’ apartment, he gave me some clothing to sleep in and showed me to the roommate’s empty room. I had just changed my clothes when James walked into the room. We began to kiss. We moved to the bed and James performed oral sex on me. We spoke intermittently during the sexual contact. I asked James, “Why are you doing this?” and at times I said, “No I don’t want this.” My memory of the sexual contact is fuzzy because I had a lot to drink that night. Here is a screenshot of a text message that James sent me the next morning.

“I hate that you feel bad. I wish that I stopped for a moment and thought about everything. I should have known this would happen. But I didn’t stop and now I am ashamed.”

What would you ask Jessica?
Scenario 2 Cont.

You talk to James, he tells you the same information about their friends, about what they did that night, and about how Jessica came to his apartment because she lost her keys and needed a place to crash. He tells you,

Yes, I went into the room where she was staying. We talked for a bit and then we started kissing. Then we you know “did it.” We were talking through the whole thing. Mostly it was things like, “I think you are so hot.”

What would you ask James?
Scenario 2 Cont.

James shows you phone with following text messages:

[A series of exchanges about Jessica’s attempts to track down the missing keys at the bars and then contacting her landlord for a new set of keys] [The next day]

Jessica: I think we should talk
James: Yeah probably.
Jessica: I feel so bad.
James: I feel bad too. You are not a bad person Jess. We made a mistake, but it does not make you bad.
Jessica: I think I just need some time.

[an hour later]
James: I hate that you feel bad. I wish that I stopped for a moment and thought about everything. I should have known this would happen. But I didn’t stop and now I am ashamed.
Jessica: I wish I had done the same. This is going to be hard.
James: Let me know if I can help in anyway

[an hour later]
Jessica: Can I ask you a question?
James: Sure. Ask me anything.
Jessica: I am confused about last night. I know you were drinking but you said somethings to me last night. I need to know if you just wanted to hook up or if you have feelings for me. I’m not upset either way, I just need to know.
James: It really was an ‘in the moment thing.’ I think you are an amazing friend and I really like you and [your boyfriend] so much that I never thought of us as more than friends. I’m really sorry.
Jessica: Ok, good to know. I value you as a friend. Thanks for being honest, I hope that we can move past this.

What do you do now?
Scenario 3 – Terrance and Thomas

Sandra reports that her friend Terrance told her that Thomas sexually assaulted him. Sandra included the following in her report:

*Me and my friend Terrance went to a party last night. When we got there, Thomas was at the party with his friends Sam and Stephen. I saw Terrance speaking with Thomas, Sam, and Stephen throughout the night. I left the party around midnight because I had a volleyball game the next day but Terrance and the others stayed.*

*The next day, Terrance called me. He told me he got wasted at the party after I left. He said he and Thomas went back to Thomas’s apartment and Thomas had sex with him. Terrance told me he was so drunk he had no idea what was going on. After Thomas finished, Terrance left Thomas’s apartment and went home.*

The school decides to conduct an investigation. Terrance refuses to participate. What do you do? Who do you contact?

Thomas refuses to participate. What do you do? Who do you contact?
Questions?

Catherine Berryman
610-772-2308
cberryman@chamberlainlaw.com

Nyssa Taylor
856-256-5831
taylorny@rowan.edu