

SLEEPING WITH THE ENEMY:
HOW NOT TO HELP THE DEFENSE ATTORNEY IN
CHILD SEXUAL AND PHYSICAL ABUSE CASES

Multidisciplinary Training
KwaZulu Natal
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Presented by:

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1. PRELIMINARY PREPARATION

A. Every case has a theory

- 1. Is It Plausible?**
- 2. Is the Witness Lying or Mistaken?**
- 3. Does the Evidence Fit?**
 - a. What is the context of the allegations?**
 - 1. Custody/Divorce dispute**
 - 2. Excuse/story to cover-up consensual relationship**
 - b. What is the relationship between complainant and accused?**
 - c. A trial is a puzzle-Do all the pieces fit?**

B. Evaluation of the evidence

- 1. Interview of police, CPS, teachers, coaches, pediatrician**
- 2. Disclosures/Statements**
 - a. Strange disclosures/details**
 - b. Idiosyncratic statements**
 - c. Nature of language used**
 - d. Sensory detail**
 - e. Detail as to time, place, clothing**
- 3. Listening to the Language of Children**

- 4. Physical evidence**
 - a. Physical examination**
 - b. Clothing, bedsheets**
 - c. Medical test results**
 - d. Marks on body**
 - e. Strange physical evidence (seemingly unrelated to the case)**

2. INVESTIGATIVE TECHNIQUES

A. For the accused:

- 1. Polygraph test**
- 2. Penile Plethysmograph**
- 3. MMPI, other psychological tests**

B. To prepare for trial:

1. Issuance of subpoenas for information regarding the complainant:

- a. School records**
- b. Pediatrician's records**
- c. Hospital records**
- d. Psychological/Psychiatric records**
- e. Drug/alcohol treatment records (subject to federal laws)**

2. Interviews of:

- a. Teachers**
- b. Coaches**
- c. Activity counselors (girl/boy scouts, etc.)**
- d. Housekeepers/babysitters**
- e. Clergy**
- f. Neighbors**
- g. Scout Leader/Music teacher**

3. Visit scene of occurrence

- a. Prepare drawings of scene/location**
- b. Photographs of location**

3. PRE-TRIAL MOTION PRACTICE

- A. Motion *In Liminae*- application to the Court to exclude evidence**
- B. Demand for Bill of Particulars- to receive detail as to dates, times, places, etc.**
- C. Demand for Discovery and Inspection**
 - 1. DNA and other scientific test results**
 - 2. Bite mark tests**
 - 3. Police reports**
 - 4. Witness statements**
 - 5. Hospital/Medical examination records and reports**
 - 6. Psychological/Psychiatric examination records and reports**
- D. Taint Hearing (with respect to reliability of child's statement)**

4. OTHER DISCOVERY DEVICES

- A. Examination Before Trial/Deposition**
- B. Notice to Admit**

5. TRIAL

- A. Burden of Proof**
 - 1. Criminal- Beyond a reasonable doubt**
 - 2. Civil- Preponderance of the evidence**
- B. Jury Selection (Voir Dire)**
 - 1. Explore hidden biases of potential jurors**
 - a. Jury questionnaire regarding allegations**
 - b. Individual juror questioning**
 - 2. Juror familiarity with child sex abuse**
 - a. Knowledge**
 - b. Involvement**
 - c. Personal experience**

3. Specific questions regarding the case

a. How could child have age inappropriate knowledge of sex?

- 1. TV/Cable**
- 2. Movies/Videos**
- 3. School Sex Education**
- 4. Child Abuse Education**
- 5. Good/Bad Touch Education**
- 6. Magazines**
- 7. Computer/Internet**

b. Do children lie?

- 1. Under what circumstances**
- 2. Coaching/Brainwashing**
- 3. Have your kids ever lied to you?**
- 4. Can kids be believable but still not be telling the truth?**
- 5. The "child's" reality vs. "real" reality**
- 6. Parental Alienation "Syndrome"**

c. Context of the allegations/Relationship of the parties

- 1. Divorce**
- 2. Custody litigation**
- 3. Visitation litigation**

d. What would make this complainant believable?

- 1. Sensory detail**
- 2. Affect**
- 3. Appropriate language**

C. OPENING STATEMENTS

- 1. Outline/Roadmap of the case**
- 2. Do not promise what you cannot deliver**
- 3. Prosecution must make one/Defense not obligated to make one**
- 4. Burden of Proof**
- 5. Two sides to every story**

D. CROSS EXAMINATION OF PROSECUTION WITNESSES

1. The Child Witness

- a. In Court or Closed Circuit TV?**
- b. How to Cross Examine without abusing the child in the eyes of the jury**

2. The Expert Witness

- a. Positive Cross Examination**
- b. Destructive Cross Examination**

E. DEFENSE PRESENTATION OF ITS OWN WITNESSES

F. SUMMATION

6. EFFECTIVE PRESENTATION OF EVIDENCE

A. Testimonial Evidence

B. Demonstrative Evidence

- 1. Charts**
- 2. Overheads**
- 3. Photographs: Scale size vs. enlargements**
- 4. Computer generated graphics (morphs)**
- 5. Clothing**

7. COURTROOM PSYCHOLOGY

A. What to do with the victim and the victim's family if they are in Court

- 1. As a prosecutor do you want them in Court?**
 - a. When does the victim testify?**
 - b. Does the victim leave after testifying?**
- 2. As a defense attorney what to do with them if they are in Court.**

B. What to do with the accused's family if they are in Court

- 1. How to handle the situation as a defense attorney**
 - a. Family Support sends a powerful message**
- 2. How to handle the situation as a prosecutor**

C. Courtroom Terminology

- 1. The Defendant/The Accused/My client**
- 2. The Victim/The Complainant/The Accuser**
- 3. How to Refer to the Defense Attorney**

D. Stay Awake in the Courtroom: Things that happen in the Courtroom, that you don't even realize are happening, and that have a huge impact on the case

8. HOW BEST TO PRESENT THE EVIDENCE

1. Jury Trial v. Bench Trial

- a. The best lawyers were the best kindergarten students**
- b. Show and tell works best:**
 - 1. Medical evidence**
 - a. slides v. prints (enlarged v. actual size)**
 - b. Anatomical models**
 - c. Charts/drawings**

2. Psychological evidence

- a. Caseworker's notes**
- b. Therapists notes**
- c. Syndrome testimony**

9. KNOW YOUR CASE (AND YOUR ADVERSARY'S)

A. Your case (and your theory):

- 1. It's strengths**
- 2. It's weaknesses (always expose your known weaknesses yourself)**

B. Your adversary's case (and your theory):

- 1. It's strengths**

2. It's weaknesses

10. HOW TO WIN ON APPEAL (IF YOU CAN'T WIN AT TRIAL)

- A. Pre-trial motions**
- B. Trial rulings**
- C. Making a record**
- D. Put everything in writing**

11. USE AND MISUSE OF THE MEDIA

- A. Trying your case in the media**
- B. Avoiding the circus by involving the Court**
- C. The media theory of “You can’t un-ring a bell”**