

INVESTIGATION

The Telephone: Tool or Tort?

—by Ray Rawlins and
Dana Gassaway

Allegations of sexual abuse of children are extremely difficult to prove in criminal proceedings. Sometimes the only evidence is the statement of the child victim. Often there is no corroborating evidence. In many of these cases, the offender is not prosecuted because of the lack of evidence and the belief that the offense cannot be proven beyond a reasonable doubt. Often the police charged with investigating the allegations do not submit the case to the prosecuting attorney because a successful prosecution is doubtful. If the police find no corroborating evidence such as eye witnesses, medical evidence, or photographs, they may simply give up.

Investigators know that if they obtain a confession from the perpetrator the likelihood of a conviction increases ten fold. In fact, in most cases, if police

have a legally obtained confession the defendant will plead guilty, thus eliminating the need for a trial and testimony by the victim. Unfortunately, a confession is not always obtained. The perpetrator may deny the allegations or invoke his right to remain silent and make no statement.

Although the perpetrator may not talk to the police, he* will almost always speak to the victim. He will speak to the victim about things that he would never discuss with anyone else. The investigator should consider the possibility that the child victim can elicit incriminating statements from the suspect over the telephone, while the investigator records the conversation. This article will address the technical, legal, and ethical considerations in utilizing this technique.

Decision-making

In the past the idea of using the telephone to record confrontations between the victim and the perpetrator of sexual abuse was very controversial. Today, however, the value this piece of evidence plays during the prosecution has made the practice of recording conversations between the victim and the perpetrator commonplace in some jurisdictions. The risk of potential trauma to the victim must be weighed against the impact this piece of evidence can have on the outcome of the case. The possible trauma associated with this procedure must also be weighed against the potential trauma the victim could suffer trying to prosecute an offender successfully without a confession.

Administered properly, the recording of a conversation between the victim and the perpetrator can benefit both law enforcement and the victim. To law

enforcement there isn't a better piece of evidence than having the perpetrator admitting what he did, why he did it, or that he is sorry for what he has done. For the victim, these admissions assure that people will believe his or her word. Many times the confrontation with the offender can be therapeutic. Victims often feel that they have had no control over what has happened to them. With the investigator's support and guidance, the victim can say no to the offender and take control of the situation.

Consideration should also be given to the relationship between the victim and the perpetrator. In an incest case, the potential trauma to the victim may outweigh what is gained, and it may not be wise to have the victim make the call. The investigator must always consider the victim's welfare in making the decision to go forward.

Procedure

Preparation

Know who and what you are dealing with. Interview the victim and witnesses, and if possible profile the offender. Know what his basic characteristics are, how he manipulated the victim, and his relationship with the victim. How did they talk about what was occurring between them? Did the suspect ever tell the victim that he felt guilty for what he was doing? Are there any more victims? Was the victim ever threatened? Did the suspect threaten suicide if he was reported? What was their routine? Has the victim ever run away from home or threatened to run away, and did the offender know? Does the perpetrator know that the molestation has been reported? Is there any evidence such as letters, diaries, or pictures? Did the perpetrator give the victim gifts or did they go places together? Would the perpetrator think it unusual to receive a phone call from the victim? If so, what excuse can be used so the call does not raise suspicion?

If the child is in counseling, the investigator should contact the child's therapist. This can give insight to the investigator as to the victim's well being and his or her ability to make the call. If the primary caregiver is not the perpetrator, obtain his or her permission as well before making the call.

After obtaining the above information, let the victim know that you have some understanding of what has happened to her. Discuss with her some of the feelings she may be having at the moment. Explain to the child how many offenders use denial as a means to avoid prosecution. Talk about guilt reversal—how the perpetrator sometimes shifts the guilt for what has happened from himself to the victim. Tell the victim what some offenders have said when confronted with the possibility of disclosure. Basically, let the victim know that you know what has happened and that it isn't the victim's fault.

Based upon what you have learned from the victim, the victim's therapist, and the victim's caregivers, decide whether or not you feel the victim is capable of making a phone call to the offender

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* We use the masculine pronoun throughout the article to refer to offenders, and the feminine pronoun occasionally to refer to victims. We understand, however, that some offenders are female and many victims are male.

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Discuss the subject with the victim and see how he or she feels about making the call. If the victim is not sure, consider playing tapes of other victims making calls. Sometimes this gives victims ideas as to how to act in dealing with the perpetrator. Ask the victim if he or she wants to make the call. If victims say no, do not force them to make the call. If the victim agrees to make the call, discuss what approach you feel would best elicit a favorable reaction on the part of the suspect. Rehearse with the victim what is going to be said and what the responses might be. Make sure that the victim is prepared for the following questions the suspect may ask:

Where are you?
Are you alone?

Can I meet with you and discuss this in person?
Can I call back?

Can someone (sister, friend, etc.) pick you up and talk with you?

Always give the victim a way to terminate the call. Tell the victim that he or she can end the call by saying, "I have to go, someone is here," "I can't talk anymore, I'll call you back," or some other statement that allows the victim to hang up. This allows the victim to be in control of the call.

Execution

To properly conduct this procedure the following equipment is suggested:

An in-line telephone recording device.

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News

-Theresa Reid

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Private Financial Partners. The exhibitors listed below also made a significant financial contribution to the Colloquium, and we thank them for joining us in this exciting first year.

• **Sage Publications**, publishers of professional social science books, Newbury Park, California.

• **KidsPeace**, a national program based in Philadelphia which offers comprehensive services for children in crisis.

• **Charter Barclay Hospital in Chicago**, a mental health and addictions treatment facility for inpatient and outpatient adolescents and adults.

• **Mt. Sinai Medical Center's Under the Rainbow: Program for Assessment, Treatment, and Prevention of Child Abuse and Neglect**, based in Chicago.

• **The Center for Trauma and Dissociation** in Denver, Colorado, which specializes in the treatment of adults, adolescents, and

children who have suffered severe trauma.

• **Wallach Surgical Devices** in Milford, Connecticut, which combines innovation in colposcopic examination with advanced digital image technology for a new detection and documentation system aimed specifically at the problem of child abuse.

• **Cabot Medical Corporation** of Langhorne, Pennsylvania, which develops, manufactures, and markets medical devices and systems for minimally invasive surgical and diagnostic procedures.

APSAC Staff. APSAC did not have sufficient staff to put on a major national conference, but the staff we have did it anyway, giving extraordinary amounts of time and effort, and smiling almost all of the time. I am proud to thank for their exceptional work APSAC staff members *Betty Johnson*, *Latrice Woods*, and *Catherine Crino*, MDiv

We are all delighted and relieved that APSAC's First National Colloquium was an unqualified success. We look forward to future years of Colloquia which—with your input—we hope will distinguish APSAC as the source of the most rigorous professional training in the field.

Colloquium Overview

APSAC's major goal is to improve interdisciplinary professional practice and communication in the field of child maltreatment. A national conference is one natural means of achieving that goal. Vigilant of APSAC's fiscal health, APSAC's Board of Directors was cautious about taking the risk before we were ready. We are all delighted and relieved that APSAC's First National Colloquium was an unqualified success. We look forward to future years of Colloquia which—with your input—we hope will distinguish APSAC as the source of the most rigorous professional training in the field.

Welcome to New APSAC Staff Members

The success of APSAC's First National Colloquium was instrumental in creating both the need and the means to hire new staff

Claudia Soldano, MSW, MBA, joined us on September 13 as Director of State Chapter Development, a new full-time position which will be a boon to all of those dedicated members who are working to begin or maintain viable APSAC state chapters. Claudia received her joint master's degree in business administration and social work from Washington University. During the last three years, Claudia established and directed an award-winning program of more than 100 volunteers for a Chicago-based hospice for AIDS patients.

Jennifer Martin joined APSAC on September 13 as Secretary and Office Manager. Jennifer has just completed her bachelor's degree from University of Illinois in political science and women's studies, and is interested in domestic violence, rape, and child abuse law.

I hope you will join me in welcoming Claudia and Jennifer to APSAC's staff. Henceforth, *Betty Johnson* will serve as APSAC's Membership Services Manager and Editorial Assistant for *The APSAC Advisor*. *Latrice Woods*, who joined us last February as secretary, has been promoted to Conference Manager. I am confident that APSAC's remarkable growth is in very capable hands.

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Cassette tape recorder with external microphone jack.

Any telephone with a modular phone jack.

Earphones to overhear both sides of the conversation.

It is best to choose equipment that is adaptable to most telephones so as to allow some flexibility in choosing the location from which to make the call. Care should be given that whatever location you choose, it is free from distractions and outside interruptions. If made from the police station, make sure the business phones and intercom speaker cannot be overheard. If the victim is pretending to call from home, ask if he or she normally has music playing in the background. In case the suspect suggests calling the victim back at a later time, have a telephone available whose number is not traceable to the police station. Remember, it is your job to set the scene for whatever role the victim is assuming during the call. If you are having the victim call from a pay phone make sure there is appropriate background noise. Decide who will be present during the call. Ask the victim privately if he or she wants a parent present. Many times children may not want their parents present because they

haven't told them about everything that has occurred.

The tape recording of the conversation should be identified for evidentiary reasons. An announcement at the beginning of the recording providing the date and time along with the names of the persons to be recorded usually is sufficient to meet this requirement. Treat the recording and any notes taken during the call as evidence.

It is best not to write a script for the victim. If you do, the child most likely will read from it. The call then might not sound natural to the suspect. It is acceptable to write out important points that you want the child to talk about to the suspect. You should also have a list of statements or questions that the victim can use to help in eliciting incriminating statements. It is extremely important for the investigator to be present when the phone call is made. This allows the investigator to control the direction of the call. The victim may become frightened when speaking to the suspect. It is important to be present to support the victim and help her overcome her fears. The investigator should always monitor both sides of the conversation. This allows you control over the call and enables the you write out additional questions for the victim to ask the suspect.

Be alert to the fact that the suspect may make incriminating statements without issuing a full con-

fession. It is not always necessary for the perpetrator to be specific about the acts that occurred. Statements such as, "It won't happen anymore," or, "I could go to jail," can be just incriminating as a confession.

Follow-up

Upon conclusion of the call, discuss with the victim how he or she feels. Counter any negative comments the perpetrator made that might have hurt the victim. Ask if the victim wants to hear the recording of the call. If so, play it and clear up any further questions you or the victim have.

There is always the possibility that victims will have second thoughts about having made the call. Assure them that they made the right decision. Tell them they were instrumental in "solving" the case. Let them know how they can reach you if they start having fears at a later date.

The investigator should also consider leaving the tape recorder attached to the victim's phone. Many times the suspect will call the victim back. If the suspect has been arrested, he may attempt to contact the victim from the jail. The suspect could make additional incriminating statements or threats toward the victim.

Once the recording is obtained, the investigator should consider whether or not to use it when interviewing the perpetrator. Letting the suspect listen to the recording can be very helpful in obtaining a confession.

Legal issues

Laws vary from state to state and investigators should research the laws that pertain to their jurisdiction before attempting to use this technique. Some states prohibit the tape recording of any phone conversation. Others allow one party consent recording of the conversation. Some of the most common questions that investigators and lay people ask about the recording of the call are:

Is the victim a police agent?

Yes. The victim is making the call at the investigator's direction and thus becomes the investigator's agent.

Does the suspect need to be advised of his rights?

No. Even though the perpetrator is a suspect and he is being asked questions by the investigator's agent, he is not in custody nor is his movement restricted by the police. No Miranda warning is necessary unless the perpetrator has been indicted or arraigned.

Isn't this entrapment?

No. The suspect has already committed the crime. In order to constitute entrapment, the police must encourage someone to commit a crime who would not normally do so.

Can the recording be used in court?

The investigator should check the laws that pertain to their jurisdiction. In most states, if the recording is obtained legally, then it can be used as evidence in court.

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Can someone else make the phone call?

Yes. Anyone can call the offender and attempt to elicit incriminating statements. This technique has proven to be successful when the victim's mother or protective parent makes the call or the investigator has called the suspect acting as the child's counselor.

The call should always be done at the direction of law enforcement, however In many states, it is illegal for non-law enforcement personnel to record telephone conversations.

Is it legal to lie to the suspect?

You may deceive the suspect, just don't fabricate evidence.

With adequate preparation on the part of the investigator and the victim, this technique can go a long way in helping to prove a defendant's guilt or innocence. When used properly, the evidence obtained can greatly enhance criminal cases and reduce the possibility of the victim having to testify in court.

PRETEXT CONVERSATION RECORDINGS AND FEDERAL LAW

(Oral, telephonic or electronic communications)
Below is a list of federal law pertaining to the recording of pretext conversations.

Title 18 U.S. Code 2510 through 2520. describes Federal restrictions on recording, monitor-

ing, etc. of oral, telephonic and electronic communications.

Title 18 U.S. Code 2511(2)(c). It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

CASE LAW re 18 U.S.C. 2511(2)(c)

White 401 US 745 (1971). Monitoring body transmitter (with consent of wearer).

Caceres 440 US 741 (1979). IRS agent recorded bribe offer (legal even though department regulations required superior's authorization which was not obtained).

Jernigan 582 F2 1211 (9th Circuit)(1971). DEA agent recorded telephone conversation between informer, the agent and defendant.

Puchi 441 F2 697 (9th Circuit)(1972). Customs agent recorded telephone conversation with one party consent.

Howell 470 F2 1064 (9th Circuit)(1972). Defendant tried to set up the recording by agents in an effort to establish a phony story. Conversation admitted—court held that the defendant had consented.

Holmes 486 F2 55 (9th Circuit)(1973). Attorney suspected of crime is called by client and call is recorded with client's consent by state agents.

Little 753 F2 1420 (9th Circuit) (1983). IRS agent's recorded conversations with defendants admissible.

Ray Rawlins is a detective with the San Diego County Sheriff's Department. Dana Gassaway is an investigator in the San Diego District Attorney's Office, and a member of APSAC's Board of Directors.

Be alert to the fact that the suspect may make incriminating statements without issuing a full confession. It is not always necessary for the perpetrator to be specific about the acts that occurred. Statements such as, "It won't happen anymore," or, "I could go to jail," can be just incriminating as a confession.

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