

**INVESTIGATION AND DISCOVERY vs ASSUMPTIONS:  
The dual process of effecting systemic change  
while building a defense in a child sex abuse case**

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# **INVESTIGATION AND DISCOVERY vs ASSUMPTIONS:**

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### **I. THE PLAYERS**

Absent any compelling reason, attorneys and other professionals from a variety of fields, including the judicial, medical, psychological, social work, law enforcement, and other professions, would avoid involvement in cases where child sexual abuse has been, is being, or is expected to be alleged. Though the reasons for this disdain are many and varied, one of the reasons is that the area of child sexual abuse claims is one which lends itself to criticism of the most personal kind; professional incompetence. Unfortunately, most of the players in these dramas bring such claims upon themselves through their reliance upon their own, personal, beliefs about such cases and the assumptions they make in playing their parts.

Ultimately, the beliefs and attitudes of all players must change, but meaningful, systemic, change can only be brought about by the defense attorney who undergoes a personal metamorphosis and adopts a system calculated to investigate and fully discover all he or she can about every child abuse case. The defense attorney who does not undergo the requisite change is doomed to repeat the same mistakes over and over again to the detriment of his client.

#### **A. Defense Counsel.**

Poorly trained, and often misinformed, defense attorneys stumble into such cases and then bumble their way through them with no direction, plan, or goal other than to collect a fee and plead a client out to some "lesser" offense.

The comprehensive investigation of any particular, or every, case is avoided, or excused, because either the client does not have the financial resources to fund such an investigation, the attorney has either no time or no idea about where to start or how to conduct such an investigation, or because the assumptions made by the attorney, the client, the prosecutor, the judge, the social workers, the victims, the police, the public or any combination of these groups or people operate to cast such a haze over the case that the investigation process is abandoned because its value is believed to be minimal, if of any value at all.

In the end, feeling cheated or shortchanged by the attorney in whom he or she placed their trust, the client makes allegations of ineffective assistance of counsel, malpractice, or both. The attorney responds by saying there was nothing more to do or that the case was a loser from the start. The judicial system answers by finding that the evidence against the accused was great and any claimed error was "harmless."

**B. The Judiciary.**

The judiciary is, likewise, not exempt from the claims of professional incompetence in cases of child sexual abuse. Even judges who are viewed within the legal community as being fair and impartial often take on the role of advocate for children who bring sometimes fantastic and impossible allegations against family members and strangers alike. In trying to "comfort" the children, or to make their court experiences "less traumatic," judges often, and often unwittingly, strengthen the arguments of the prosecutors by making it appear as if the child is afraid or in need of special protection when, in fact, just the opposite is true.

Frequently, judges are as poorly informed and trained in the area of the allegations

of child sexual abuse as are defense counsel. Judges who measure the relevancy of evidence not by reference to the current scholarly research or to scientific theory, or, even the issues raised by a particular case, but by reference to long-held beliefs and incorrect assumptions, do so because they do not have the time to keep-up with the latest research and lack any reliable source of such information; such as well-prepared defense counsel.

Over the course of time, some judges will, as a result of the advocacy of well-prepared lawyers, abandon their personal beliefs and no longer rely on what they assume to be true. However, most will not. Whether because of a fear of change, a belief that the "science" involved in analyzing issues central to a reasoned analysis in these matters is nothing more than "voodoo" or because of reasons which bear no rational relationship to the issues involved, some judges remain steadfast in their darkness and, shunning the light, cast a shroud over all they do.

Occasionally, though not nearly enough, when a court of appeals or a state supreme court peers into this darkness, they find that the judge did not afford an accused a fair trial, violated some constitutional right of the accused, or in some other way committed reversible error. When the appellate opinion is written, a public statement, of sorts, appears and the professional standing of the judge is tarnished to a measurable degree; though, just how much often depends on whether the judge really cares what the appellate court, the legal profession, or the general public thinks. For a judge who does care, true change is possible if there is a guide. For those who do not care, real and substantive change is not going to occur.

**C. Prosecutors, Child Protective Services Workers and Police Any**

picture of how the legal profession deals with allegations of child abuse, sexual or physical, would be incomplete without at least a short glimpse into the world of the prosecutor. However, any such glimpse, by necessity, must include a discussion of both child protective services (CPS) workers and the police; the two main vehicles by which prosecuting attorneys gather information in child sex abuse cases.

It would be incorrect to say that prosecutors are any more informed than any other lawyer; be they judges, defense counsel, or even civil attorneys. In fact, generally speaking, it may be that they are less informed. The prosecutor's reliance on the CPS worker for the initial interview of the complaining child and the scientific theory surrounding abuse allegations, and on the police for the accumulation of additional factual data, creates in the prosecutor a false sense of professional competence in this area.

CPS workers, especially those who are "state-sponsored," generally see their role as advocates for the children involved in making abuse allegations rather than in any neutral capacity.

CPS workers also carry their own set of beliefs and assumptions into the investigation process. Coupled with relatively little and, oftentimes, inferior training, and a failure to stay current in their field, the CPS workers' ability to do great harm, both to a child who has been abused and to a person who has been falsely accused, is magnified.

Additionally, the police officers who are called upon to investigate the allegations of the child bring their own set of assumptions and beliefs with them when they investigate allegations of abuse. Unfortunately, what training the police receive in this area is usually limited to the same information the CPS workers receive, and officers do not make even

the most cursory of attempts to stay current with the research and literature in the field of child physical and sexual abuse.

"Investigations" by such ill-trained and misinformed professionals, are hardly more than (1) the taking of statement(s) from (a) the complaining child and (b) his or her parent; (2) the sending of the child to the doctor for a confirming diagnosis; (3) the referral of the child to counseling; and, (4) the subsequent arrest of the person accused. Sometimes, a fifth step will be to try and extract a confession from the arrested individual; though the failure to obtain a confession rarely mandates further investigation or results in the release of the accused.

The statements of the child are, oftentimes, gathered through improper interrogation techniques. These improper techniques come in many shapes and sizes. For example, some of the more common errors made are:

- (1) the failure to video tape investigative interviews;
- (2) the inability and failure to perform "criterion-based content analysis" on the statements of the child;
- (3) the failure to elicit a complete social history from the parent(s) of the child;
- (4) the effects of poor interviewing skills on the part of the investigating social worker and/or the police officer;
- (5) failure to understand that children are very suggestible and to compensate for the suggestibility of the child being interviewed;
- (6) the use of improper interviewing techniques such as anatomically incorrect dolls or pictures;
- (7) failure to account for the effects of psychotherapy on the story of the child;
- (8) the failure of the investigator to eliminate the effects of

confirmatory bias from the interview process;

(9) source monitoring problems;

(10) the belief that interviewers can recall specifics of interviews in the absence of verbatim recordings or note-taking; and,

(11) the belief on the part of the interviewers that they have some special expertise in the field.

The accumulation of "data"--see page 12 for the distinction--in the investigation and discovery phases of the case becomes crucial in order to ferret-out these errors and improprieties. Unless the case is fully investigated and all relevant sources of information are mined, any defense will soon become a house of cards.

A spill-over effect of steps 1(a) and (b), above is that, in states where the CPS workers and the police are actually allowed to testify to what the child told them in their offices, it becomes necessary for defense counsel to be able to cross-examine these witnesses about the improprieties of their "investigations." Counsel must be familiar enough with the relevant social science research and concepts in order to do so.

An indirect benefit of Steps 2 and 3, above, is that the doctor and the counselor can have the child repeat the story the child told to the social worker and the police, thereby reinforcing the sequence of events and the generalities of the story while developing the details through the use of leading questions and suggestive procedures. The doctor and the counselor will be allowed to testify about what the child said to them under federal Rule of Evidence 803(4), or the state equivalent, where those statements were made to a "treating professional." Defense counsel needs to be familiar with cases like Idaho v Wright, 497 U.S. 805 (1990), in order to know under what circumstances this hearsay

exception does not apply.

Finally, in order to bolster the credibility of the child, which may or may not have been tested through the cross-examination of that child, the doctor may testify that his or her findings "are consistent with abuse" as described by the child, and the counselor will testify that the problems the child was having at the time the alleged abuse took place, for which the child needed to be counseled, "are consistent with the pattern of abuse" as described by the child.

Prosecutors, having all of this "evidence" at their disposal, and being told that such "evidence" is entirely, and scientifically, consistent with the story of the child, vigorously undertake the prosecution of the accused individual. All the while, they either ignore, or feign ignorance of, the scientifically demonstrable flaws in their case. It is enough for them that they "can get the case to the jury" in order to let them decide what "the truth" is by their verdict.

Despite this, claims of professional incompetence levied at prosecutors are rare, though they are more frequently made when a prosecutor is perceived as being unable to obtain a conviction in a "big" case or over time in a series of "small" cases. However, when the label of "professionally incompetent" adheres to a prosecutor, it can be personally devastating because she may find herself voted out of office in the next election.

The charge of professional incompetence is even rarer for CPS workers. Generally, the states that train CPS workers provide exemptions from personal liability for their misfeasance or malfeasance and individual complaints to licensing boards often fall on

deaf ears. While it may be true that most people are distrustful of social service agencies or child protective services because of their distrust for government in general, most people do not have any idea how poorly trained or informed any particular CPS worker may be in the area of investigating claims of child abuse. Hence, individualized allegations of incompetence from the public are rare.

Professional incompetence allegations against police officers are almost non-existent. Since there are no standards to which the public holds police officers in investigating allegations of crime, there are no standards to which the police feel compelled to hold themselves. The main goal of the police seems to be to collect evidence and make arrests in order to clear cases. Assessing the "evidence" collected is the job of prosecutors, defense lawyers, judges, and juries.

It, therefore, becomes incumbent upon the defense attorney, or, on rare occasion, the judge, to point-out the professional incompetence of the prosecutor, the CPS workers, and the police. Unfortunately, most defense counsel are utterly ill-equipped to do so. Without a proper investigation, conducted within and without the framework of the discovery rules, claims of incompetence by defense counsel sound like whining and fall on deaf ears. But, where defense counsel is able to conduct a full and proper investigation, not only are claims of professional incompetence able to be proven, but the weaknesses of the prosecution's case are likely to emerge.

## **II. THE SOLUTION**

Everyone in the legal system operates on a set of basic assumptions that they make, and within the context of their own beliefs and value systems, as those beliefs and values are shaped by their life's experiences. A justifiable goal of every defense attorney

in every case is to try to lessen the number of assumptions made, and to modify or shape the beliefs and values held, by the other players involved in order to achieve the best results for the accused. In fact, the **only** player in the process who can achieve these ends is the defense attorney. The only player in the system with a motivation to make the other players see the necessity for, and the benefits of, change is the accused's counsel. Unless defense counsel serves as a catalyst for change, no change will occur because the other players are content to maintain the status quo. In other words, all the other players believe that they can continue to function effectively in their roles without such change. It is up to the defense attorney to show the other players that fundamental changes must be made and to convince them that such changes are best in the long-term for everyone involved. However, in order to do that effectively, the defense attorney must first make such changes in himself.

The first part of this process is education. Naturally, education in "the law" or "trial advocacy," is an important first step. It is also important that a lawyer spend time learning how to cross-examine the child, or a CPS worker; how to effectively negotiate with the prosecutor; and, how to file and argue motions within the context of the strategy of persuasion and advocacy specific to the case. However, these basic skills are insufficient to enable the defense attorney to progress to the higher level of advocacy necessary for the representation of persons accused of the sexual or physical abuse of children.

The attorney who makes a conscientious effort to improve herself in this field will attempt to obtain the leading research and articles in the literature and to study these scholarly writings in order to familiarize herself with the current thinking on both sides of the aisle. A basic familiarity with the names and positions of the leading, or even the most

prolific, authors in the various areas which surround the analysis of these cases should be the starting point for most attorneys new to this area of criminal law.

It is imperative that the defense attorney engage in this systematic review of the literature. First, no one else in the process is going to do so; not even the social workers. Second, it allows counsel to establish a base of information against which the child's claims, the state's investigation, and the accused's defense can be analyzed. Third, it allows counsel to have a feel for those instances when one or more of the other players in the proceedings is relying upon their own assumptions or beliefs and not on factual information which has been properly developed.

The second step in being better able to effectively represent persons accused of the physical or sexual abuse of children is for the attorney to abandon his own assumptions and beliefs forever. This must, of necessity, be the second step. It is nearly impossible, in the absence of science, to abandon those things in which one believes and those assumptions on which one relies to tell them how or why things are as they are in the world. With the scientific background of the journal articles and the published research, it becomes easier to let go of the ideas defense counsel may have adopted which are incorrect and preclude them from understanding and embracing the truth. Defense counsel must understand that they need to know more about the case than the prosecutor, more than the judge, more than anyone else involved in order to effect the kind of attitudinal change already discussed.

Preconceptions of every kind poison the defense counsel and can lead her into the trap of complacency. Biases lead to the trap of self-satisfaction. Prejudgments lead to disaster for the accused. It is only with the understanding of the underlying science that

the defense attorney can abandon her assumptions and beliefs, and it is with the understanding that such must be abandoned that the attorney can be free to fully explore and develop "the data" and "the facts" of the case.<sup>1</sup> In short, once counsel has begun to grasp the scientific and the spiritual levels of advocacy in this area, she must move to a more practical level to craft the advocacy which will serve her best in the particular case upon which she is working.

### **III. METHODS OF INVESTIGATION AND DISCOVERY**

#### **A. Investigation.**

The old saying that "no stone should be left unturned" is helpful as a general rule, but impractical if the lawyer does not know where to find the stones to turn over. Additionally, even if the attorney knows where all the stones are, where the cost of overturning them is prohibitive, choices must be made. The general rule offers no assistance to the attorney in deciding which stones to turn over and which stones to leave as they are. Further, the general rule offers little, if any, aid when time is factored into the equation of how much and what kind of investigation is to be done.

Questions concerning the scope and method of investigation can only be answered

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<sup>1</sup> "Data" is used to represent every piece of information counsel might gather, or be provided with during the course of his or her investigation. "Facts" is used to represent those pieces of data which a jury, upon hearing the case, will most certainly find to be true.

after the attorney and the accused meet to discuss the case and how the attorney should, or will, proceed. In most cases, the client is a valuable source of data or information. They are generally not a reliable source of facts except as they can discuss the mundane details of their lives: birth date, marital status, family members, military service, schooling, past record, identifying who is who in the case, etc. However, information should be garnered from the client first, even if the information obtained is of marginal value or is likely to change at a later date.

The information provided by the client should be corroborated wherever possible. Statements from corroborating witnesses and corroborating documentary evidence should be gathered where such exists and placed in the file. It is imperative to have this information at the time of trial, especially if the client is going to testify because it can be placed into the record ahead of the accused's testimony thereby making it harder to cross-examine the accused later in the trial. In addition, if enough corroborating evidence can be marshaled, it may be possible to tell the client's story without directly imperiling the client.

In seeking to corroborate the client's story, pro-active defense counsel will come upon many leads, either the form of witnesses to be interviewed, documents to be obtained, or avenues to be explored. Time and money will dictate how much can be done to scout all of these trails. However, the innovative attorney will always remember to keep one eye on the allegations against her client while working to investigate and develop information for use in the defense.

Two of the primary questions which will need to be decided between lawyer and client will be whether an investigator should be retained to gather information from

whatever sources are deemed necessary and whether an expert will be retained. Again, the decision is usually a function of the money available from the client. Some attorneys have investigators on staff, others hire people for a particular case or phase of a case. Experts are always retained on a case-by-case basis.

For those attorneys whose clientele cannot afford to hire an investigator, or for those whose limited funds would be better spent on an expert of one kind or another, the attorney may need to turn to the court for funding assistance or, in the case of an investigator, may assign a paralegal or law clerk to do certain tasks.

In the case of a solo practitioner with a single secretary, the attorney herself may have to investigate the case. However, this method is generally regarded as the worst of all possible worlds especially in cases where a statement is to be taken from a potential witness. If no one accompanies the attorney when she takes the statement, there is a chance that the attorney would have to take the stand to impeach the witness if the witness changes his story at trial. This may raise a conflict of interest on the part of the attorney and require the attorney to step down from the case. In any event, tape recording the witness interview is a must regardless of who conducts the interview.

Once the attorney has exhausted, or very nearly exhausted, the above procedure, the time will come to begin a new phase of the investigation. The next phase involves conducting "discovery." Depending upon the timing of the attorney's entry into the case, the first phase and the second phase may need to be conducted simultaneously. However, both phases must be conducted in order to fully investigate the case and discover all the relevant data.

Sherlock Holmes said that it was error to theorize before all the facts were known. Once all of the facts were gathered, those theories which were impossible, given the facts, would be discarded. Whatever remained, however improbable, was the truth. The attorney who is not making assumptions about where the case is "supposed to go" will be better able to develop information as he encounters it and to see where the case is actually heading, and to learn and understand the truth.

Because data is neither good nor bad unless and until it rises to the level of a "fact," one cannot begin to construct a theory of the case with its attendant themes and images until all the relevant data is accumulated and the facts are known. At that time, the attorney will be able to construct a theory of the case which accounts for all facts, both good and bad, in a way which turns bad facts into good ones and melds them together into a cohesive and persuasive argument for the client's benefit.

**B. Discovery.**

In a phrase, the discovery process in a criminal case involves the continuous seeking of information from the state by the defense, ostensibly which the state should provide, and the refusal of the state to provide such information, ostensibly because it has no obligation to do so, or because the state does not have such information in its possession.

By implication, then, the second phase of the investigation of the case is going to involve the court at least to a minimal degree. How involved the court will need to become is a function of the imagination and aggressiveness of the defense attorney; the willingness of the prosecutor to allow the defense to gather information on its own which might, ultimately, prove harmful to the state's case; the ability of the judge to see the need

for the defense to obtain the information requested; the existence of statutes or regulations which impede the free flow of information to a requesting accused; the rules of criminal procedure in the particular jurisdiction; and the local rules of court.

**1. Criminal Rules of Procedure.**

Every state has its own rules of criminal procedure which are designed to allow counsel on both sides of a case to discover some, and in some cases all, aspects of the opposing party's case. Some states (e.g., Ohio and Kentucky) are more restrictive, while others (e.g., Indiana, Florida, and Missouri) are much more open. Some states and the federal courts allow the use of pre-trial subpoenas for records, while that procedure is disallowed by other states.

Generally speaking, the rules of criminal procedure should be utilized as fully as possible in order to minimize conflicts about what is readily obtainable and what is not. However, the rules, especially in restrictive, closed-discovery states, are of marginal help. In any case, all information obtained through the use of the discovery rules should be shared with the client in order to keep him fully informed regarding the progress of the investigation.

**2. Bills of particulars.**

Because of the hazy nature of many allegations of sexual or physical abuse made by children, or others on their behalf, an accused will frequently find himself facing a charge that covers multiple acts over a multi-year period. In this instance, a "Bill of Particulars" can be of some assistance in pinning down the allegations to specific times, dates, or places. Thus, an attorney is able to focus his investigation on the charges as they are particularized in the Bill.

Additionally, a Bill of Particulars constitutes a statement by the attorney for a party and is admissible against the party, under F.R.E. 801(d)(3), or the state equivalent. Frequently, what is written in the Bill of Particulars is at variance with at least some of the prior statements the child made to the variety of people who have interviewed him or her.

Since courts tend to limit the kinds of information which the attorney for an accused can obtain in a Bill of Particulars, they need to be used, or be perceived to be used, properly. The specifics of the crimes charged can and should be obtained. Other information, such as information which tends to discredit or impeach the state's witnesses, to exculpate the accused, or to mitigate a possible sentence should be obtained through other pre-trial motions and procedures.

### **3. Brady material.**

Under the rulings in Brady v Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), and Kyles v Whitley, \_\_\_ U.S. \_\_\_, 115 S.Ct. 1555 (1995), a state has an obligation to provide to the defense information which it has in its possession which is exculpatory and which is material either to guilt or punishment. Most states have adopted the Brady approach in one way or another.

Because of the necessity that the prosecutor be "in possession" of the requested material, and the requirement that the defense request must be specific in order to trigger the highest review on appeal, it is difficult to obtain quantities of information by use of this method. Additionally, the decision of whether the discovery requested is exculpatory or material to either guilt or punishment is left to the prosecutor. Except in rare and obvious cases, the prosecutor will not know whether the requested evidence is either exculpatory or material.

Nonetheless, requests should be made under Brady even if counsel merely submits a general request for "all Brady material." In addition, a motion to compel the state's agents to turn over all information obtained during the course of their investigation to the prosecutor, a companion motion to the Brady motion, should be filed in order to assure that the prosecutor obtains all of the information from the police, CPS workers, labs, etc., so that a knowing and intelligent response to the Brady motion can be made.

#### **4. Giglio material.**

In addition to the Brady requests, exploration must be made into areas of possible impeachment of the state's witnesses. Various cases can be cited in support of such a motion, but the main one is Giglio v United States, 405 U.S. 150, 92 S.Ct.763 (1972). The gist of a Giglio motion is the seeking of information from the prosecutor which serves, or could be viewed, as consideration for the witness' testimony. In addition, information which tends to impeach the state's witnesses is also available through the use of this motion.

The main benefit of the Giglio motion in cases of alleged sexual or physical abuse of a child is that it can sometimes be used to obtain the prior statements of witnesses before trial where such is not possible through the ordinary use of the criminal rules of procedure.

For example, in many states, the defense can obtain the prior statements of witnesses the state calls in the trial prior to their being called as witnesses. However, in practice, this usually means once they have been actually called to the stand. This practice roughly approximates the practice in federal court under the Jencks Act, 18 U.S.C.

3500; except that, under the federal rule, the witness' prior statement is not provided until after the witness testifies on direct examination. Other states' rules may differ, allowing pre-trial disclosure of the statements or they may be more restrictive. Regardless, it is imperative that every effort to obtain such statements be made prior to trial. A Giglio motion, properly timed, can allow access to these statements well ahead of the trial.

The filing of the motion puts the burden upon the prosecutor to read, or otherwise review, the statements of the complaining witnesses. To the extent that these statements contain internal or external inconsistencies, they are required to be produced; as such inconsistencies can be used to impeach the state's witnesses.

Frequently, prosecutors will not want to spend the time reviewing the statements and will agree to turn them over to the defense to review on its own. This is, of course, what the defense is seeking and should be welcomed.

Less frequently, the prosecutor will discover inconsistencies, and will decide to produce only the inconsistent statements. If this should occur, a motion in limine should be filed to determine the admissibility of the inconsistency. At a hearing on this motion, or in a memorandum in support of the motion, the defense should seek to have the entirety of the statement disclosed in order to be able to see how the inconsistent portion of the statement fits into the rest of the writing or recording. Evidence rules requiring completeness, such as F.R.E. 106 or the state equivalents, should be cited as authority in connection with the rules governing relevancy and party admissions, (F.R.E. 401-403 and 801, or the state equivalents, respectively) in order to convince the court that the entire statement should be produced.

The full scope of a Giglio motion, like that of a Brady motion, is limited only by the attorney's imagination. However, counsel should not file one broad motion if it is clear, or will become so by looking at the motion, that counsel is engaging in a fishing expedition. It is probably better to make multiple requests under the same authority for different materials if counsel can, through the course of the discovery and investigatory processes, discover a factual or arguable basis for the specific requests to be made. In this way, defense motions build upon one another as the investigation progresses; one thing leading to another. Counsel will need to make this assessment in each case.

**5. Records relating to the complaining juvenile.**

In every case there is one witness who, if he or she leaves the witness stand believed, will bring about the destruction of the opposing party. In child abuse cases, this person is usually the child. It is not always the child, however. Assuming that it is the child before fully investigating, discovering, and analyzing one's case violates Holmes' rule of theorizing before all of the facts are known.

In every child abuse case, there is one witness who, more than all the rest, is fully prepared to testify. Again, it is usually the child. This is true 99.44% of the time because of the numerous interviews the child has had with social workers, police, prosecutors, family, other children, and other people who " help" the child remember her story. But, again, it is important that this not be assumed in any case.

Because, on the odds, defense counsel is going to have to at least neutralize the testimony of the child--if not take it out completely--all information which relates to the complaining juvenile, and is available, must be obtained. The availability of this

information varies with the type of information sought and which people who have significant parts in the juvenile's life are on the side of the defense.

For example, in a case where the mother of a juvenile who claims to have been sexually abused by her step-father does not believe the child and wants her family to be re-united, access to even the most secret and statutorily-protected records is fairly easy to obtain. The mother will sign whatever release is placed in front of her by defense counsel, who can then write or have a subpoena issued to obtain the records.

On the other hand, where the mother of the complaining juvenile spends most of her free time plotting the disemboweling of the accused, chances are good that the defense attorney will not be able to count on much support. In these cases, most requests will need to be made through the court.

Still, even in the worst case scenario, aggressive, imaginative defense counsel should be able to acquire most of what she desires. The question remains, what records exist that counsel should attempt to acquire. Individual cases may require special requests; i.e., records that were generated specifically for that case or by agencies which do not usually generate records in such cases. However, a general rule of thumb is that counsel should attempt to gather all the data possible on the child.

The following is a partial list:

1. Child Protective Services records, including all records generated as a result of the present allegations, all records generated as a result of prior claims of abuse by the child involved in this case against the accused in this case **or any other person**, and all records generated as a result of any prior claim made against this accused by **any other person**.

2. Rough notes of all persons who interviewed the child during the course of the investigation.
3. The records kept by any doctor who examined the child at the request of the state, including all rough notes and duplicate copies of all colposcopic photographs;
4. Pediatric records;
5. School records, including preschool and day-care records;
6. Counseling and therapy records, including the hand-written notes of the counselor and therapist if they are available;
7. Police records;
8. Records of prior psychiatric or psychological treatment of the child, including all hospitalizations; and,
9. Court records which relate to either the accused and his family, the child and his family, or other persons who are relevant to the particular case and their families, including divorce records, domestic violence records, prior juvenile court appearances by the complaining child, and civil lawsuits against the accused by the family of the complaining child.

In addition, defense counsel will want "real time" copies of all audio or video taped conversations with the child. Counsel should be prepared to provide blank audio or video tapes to the state for their use in duplicating the originals. These tapes should be transcribed by defense counsel for review. These are critical especially if defense counsel hopes to challenge the reliability of the investigatory process and any "taint" the process caused to the memory of the child under the procedures enunciated in State v Michaels, 642 A.2d 1372 (N.J. 1994) and those other states which have begun to adopt similar due process protections.

Additionally, counsel must keep in mind that the key witness in the case may not be the juvenile. In that event, the background and motivations of the person counsel identifies as the key witness must be examined. The above list can also be used when investigating other witnesses, including other key witnesses, in the case.

**a. Objections by the prosecutor.**

It is important to understand that not every other player is always against everything defense counsel is trying to do. At any particular phase of the case counsel may find himself in alliance with any or all of the players. But, alliances are fleeting. It is best to try to effect change in another player when they are allied with you.

Occasionally, defense counsel will run across a prosecutor who is actually concerned with learning as much about his cases as he can in order to fulfill his primary obligation to do justice in every case for the people of the state he represents. In such instances, the prosecutor will place very few, if any, obstacles in the path of defense counsel who is trying to investigate and discover all the facts in a particular case. Indeed, the prosecutor may even join the search for information if she believes that the police and other investigating personnel have not performed a thorough and/or professionally competent investigation.

In these situations, defense counsel should be glad to have a partner in the search for the truth and make all information obtained available immediately upon receipt to the prosecutor. Such cooperation is rare in our adversary system of justice and both sides should be rewarded for their willingness to work in harmony with each other. Dishonesty,

or anything less than forthrightness by defense counsel in such situations is madness and will beget distrust and a spirit of mendacity on the part of prosecutor in future cases. Where a relationship of mutual respect and accord exists, it should be nurtured and developed positively.

On the other hand, one more frequently comes across prosecutors who believe that the only thing important in the case is what happened on the day the "perpetrator molested the victim." All other information is irrelevant and should not be allowed to be obtained by defense counsel. This type of "thinking in a vacuum" results in every motion being opposed, every request being resisted, and every investigatory avenue being blocked by the prosecutor. Regardless of why this attitude exists, and it can exist for many reasons, it is difficult, at best, for the defense attorney to deal with it effectively.

Nevertheless, counsel for an accused must not allow the prosecutor to dictate whether, or how, defense counsel investigates the case. If the prosecutor cannot be convinced that defense counsel should be able to obtain what he seeks, then it is incumbent upon counsel to convince the judge that there is a right to have the information sought.

Motions need to be filed and evidentiary hearings need to be held in order to establish counsel's legal and factual basis for the granting of counsel's requests. The filing of motions requires some measure of work in order to research and write the motions; to phrase the requests in a way best calculated to convince the court that granting the motion is the right thing to do. The conducting of hearings requires some modicum of preparation in order to know what to say and how best to say it. Witnesses

need to be interviewed and prepared. Beliefs and assumptions have no place in this process. That is why it was necessary to abandon them and to undergo a metamorphosis before undertaking the case.

**b. Motion strategy.**

Because the possibility exists that a real dogfight will break out with regard to the defense counsel's requests for information, or the right to obtain information, counsel needs to analytically consider what motions to file and when. The timing of what is done can be just as important as doing it.

The more that counsel can point to other information that he has already gathered, the more that motions for further information can be bolstered, and the chances for having the motions granted, increased. For example, if counsel is able to learn--perhaps through a bill of particulars--that an alleged episode of abuse consisted of the insertion of a foreign object into the child's vaginal area, and can point to the medical report which can find no evidence of trauma days, weeks, or months later, counsel can make a strong case for being provided with the pediatric records of the child. Either the records will provide other scientific evidence of the proof of the child's claims--and be obtainable through the usual discovery rule requiring the disclosure of scientific tests or examinations--or the records will show nothing--and be obtainable as Brady, and perhaps Giglio, material. Additionally, such a situation might obviate the need for the accused to have the child examined by an expert of his choosing. This latter benefit is also used as the justification for obtaining colposcopic pictures from the state's examining doctor.

Another example would be where the child protective services records for the

specific case are obtained and on them there is a notation that the complaining juvenile has a pre-existing mental infirmity. That notation should serve as the catalyst for the further discovery of information about the child.

Without trying to delineate all of the situations which can arise during this investigatory and discovery process, the reader can see that the interplay between the investigation done and the investigation yet to do is a cumulative one. It is the process of "building a case." It is what a defense attorney is supposed to do, but generally fails at because of his or her misguided reliance on beliefs and assumptions.

#### **6. Civil lawsuits and administrative hearings.**

If an accused should find himself sued civilly over the actions which have been alleged in the criminal case, during the pendency of the criminal proceedings, defense counsel will be able to discover virtually everything about the criminal charges through the use of the civil discovery rules; especially the rules allowing depositions of parties and witnesses, and the rule authorizing the use of subpoenas *duces tecum*. While there is a legitimate strategy decision to be made in whether to ask that the civil proceedings be stayed until the criminal case is over, the reasons for doing so are generally not compelling and rarely outweigh the benefit of allowing the civil proceedings to continue.

One such reason would be if the accused could be forced to give a deposition or face the loss of the case on its merits. However, even this has to be balanced against the right to take the statement of every fact witness against the accused. It is up to counsel for the accused to discuss the client's options with him. In the end, the client should decide.

Counsel, even public defenders, should seek to join the pending civil litigation as

co-counsel for the defendant. If counsel for the accused is unfamiliar with the civil rules of procedure, co-counsel should be secured to conduct the discovery phase of the civil case in order to take maximum advantage of the open discovery rules. Additionally, since it is not a party, there is no requirement that the state be given an opportunity to take part in the discovery phase of the civil proceedings.

However, Federal Rule of Evidence 804(b)(1), and its state equivalents, must be looked at and considered if it is believed or expected that a witness, who is to be deposed in a civil action, may be unavailable for the criminal trial. Counsel for the accused may want to invite the state to participate in the deposition of the person in order to have the benefit of the use of the deposition at the trial of the criminal case.

If the case against the accused involves administrative hearings, such as in the case of allegations against a day-care or school, etc., the accused's counsel must play an active role in the ancillary proceedings. Again, if counsel is unfamiliar with the procedures to be followed in the administrative hearings, he should secure co-counsel. But, the proceedings should be used, at least in part, as a vehicle to discover as much about the charges as possible.

In either case, if the accused has retained separate counsel for the purpose of handling the civil suit or the administrative hearing, defense counsel should make contact with the other attorney and offer whatever assistance she can. It is also imperative that defense counsel obtain copies of all transcripts of testimony, depositions, records produced, etc., which are generated through these additional proceedings. In most cases,

where the accused has independent counsel for the ancillary proceedings, copies of this material can be obtained, typically for only a copying fee, from the other attorney.

#### **IV. CONCLUSION.**

Every player within the framework of the criminal justice system operates on a set of assumptions and beliefs which are as individualized as their fingerprints. Many players have their own agenda. It is the role of the defense attorney to try to minimize the impact of these beliefs, assumptions, and agendas on his or her client. It is the obligation of the defense attorney to refuse to operate on this level of advocacy. Defense counsel must abandon their reliance on beliefs and assumptions in favor of scientific theory and factual observations.

One of the advantages of this metamorphosis is that counsel will be better able to conduct a thorough investigation of the case. This will lead counsel to better determine what the facts of the case are. This, in turn, will lead counsel to be able to formulate a theory of the case that accounts for all of the facts, both good and bad. This will maximize the attorney's opportunities for achieving positive results for the client.

Unfortunately, no hard and fast rules apply to the investigation of a case, whether that investigation is conducted within or without the framework of the discovery process. Although, it is safe to say, the more information counsel obtains from her investigation and in the discovery process, the more prepared counsel will be at the time of trial.

The processes of investigation and discovery compliment each other, with one step building on the last and leading to the next. With the accumulation of information comes knowledge and with knowledge comes strength. With strength comes the ability to

successfully negotiate a resolution to the case and the security of knowing that the client will receive the best, most effective, defense possible if trial is, ultimately, necessary.

Additionally, the chances that claims of professional incompetence or malpractice will be made are lessened. The client feels that he has been a part of the defense team throughout the proceedings and has been included in the decision making process. The client can see tangible results of counsel's investigation and observes that counsel is fighting for him at all stages of the case.

Lastly, the client is provided with a basis for making informed choices about matters of real importance during the case. Whether to plead or to go to trial; testify or remain silent; offer character evidence or not raise the character issue; are all matters in which the client should or, in some cases, must have the final decision. The client needs to feel that he can make the decisions intelligently. If counsel has been working hard on the client's behalf throughout the case, and not simply making assumptions based upon what counsel believes, but does not know, is true, then the client will be able to participate with counsel in an intelligent fashion. Having done so, the client will feel satisfied with the representation afforded him, complaints will be minimized and, possibly, eliminated altogether.

The willingness of defense counsel to undergo such a personal metamorphosis, and to make the long-term commitment to engage in aggressive and innovative discovery and investigatory techniques, in order to better serve those who are accused, results in permanent, lasting, and beneficial change in the attitudes of those other players in the criminal justice system. Most importantly, however, it guarantees that the light of the truth

will continue to shine on the land and that the darkness shall gain no foothold on freedom.