



INTRODUCTION

A pretext communication is an investigative tool that has been used in a wide array of criminal investigations, and shown to be particularly effective in sexual assault and rape investigations.¹ A pretext communication can be a critical investigative element in unique and difficult cases such as those involving delayed reporting, sexual assault by an intimate partner, brief encounter, and drug and alcohol facilitated sexual assaults. Investigators utilizing this tool should do so in consultation with victim services and advocacy to ensure its use will not unduly impact the victim's mental and/or physical well-being. The **ultimate purpose** of a pretext communication is to obtain information and evidence that may corroborate other evidence and statements made by the victim and/or witnesses. In sexual assault or rape investigations, the information obtained may establish if sexual contact occurred and if that contact was consensual or not. Incriminating statements made by a suspect in pretext communications can be powerful evidence during a suspect interview and in court.

While the logistics of conducting a pretext communication may change depending on what form of media is being used, the method of conducting the actual communication remains the same. Below are some common elements of pretext communications.

- The communication is usually initiated by the victim to the suspect under the supervision of, and with, a law enforcement officer in a controlled environment.
- The suspect is unaware that the communications are being recorded and can occur via a telephone call, phone texts, email, social media platforms, or instant messaging programs.
- Often a suspect will talk to a victim about the incident if the suspect believes the victim is alone and no one else is listening.
- Many suspects believe they can explain away their behavior and/or convince a victim he/she had consented.

¹ This guidance is for campus law enforcement. Due to the laws surrounding students' privacy/confidentiality rights, campus staff should not engage in pretext communications. Pretext communications are law enforcement tools for gathering evidence in an official criminal investigation and should never be used by campus conduct boards, hearing panels, victim advocates or other non-law enforcement personnel working with victims of sexual assault.

DECIDING TO CONDUCT A PRETEXT COMMUNICATION

Before attempting a pretext communication, the case agent must consider certain factors:

- 1) Whether the pretext communication can be conducted legally.
 - a. Every law enforcement professional must be familiar with the laws in their jurisdiction concerning recording a phone conversation that only one party is aware is being recorded. They also need to be familiar with the laws related to using a different medium such as phone texts, emails, social media communication, and instant messaging programs. While it is illegal in some jurisdictions to record a one party phone call, there may be exemptions if law enforcement is involved.
 - b. If a law enforcement professional is unsure about the legality of conducting a pretext communication they should **research their state and federal laws** and **confer with their local prosecutor before proceeding**. If a suspect is represented by an attorney or there is a protective order in place, no pretext communication should be attempted without first consulting with the local prosecutor.

- 2) How this pretext communication will affect the victim.
 - a. Although the information gathered in a pretext communication can be invaluable in a subsequent suspect interview and in court, a victim's communication with the suspect may re-traumatize the victim. Law enforcement professionals and victim advocates need to discuss the benefits, challenges, and potential negative effects when deciding if a victim should participate in a pretext communication with the suspect.
 - b. Educate the victim about pretext communication, how it works, how it can benefit the case, and the steps in the planning and implementation of the communication. The victim, **accompanied by an advocate**, should be consulted about the pros and cons of attempting the communication and be given the chance to make a fully informed decision about participating before the communication is ever attempted, and before the next stage of planning begins.

- 3) The complexity and uniqueness of the case.
 - a. Sexual assault investigations are complex; each is unique and presents challenges and safety concerns. While this guide provides suggestions for how to use best practices when conducting a pretext communication, it is impossible to cover every potential scenario associated with conducting pretext communications. Investigators should use their best judgment and confer with their supervisor(s) if need be.
 - b. **Of foremost concern should be the physical and mental well-being and safety of the victim**. Law enforcement officers should use this tool as any other

investigative tool and proceed with caution, taking into account, each step of the process, the victim's personal safety as well as their emotional safety.

PREPARING/GATHERING NECESSARY EQUIPMENT

Phone calls: When conducting a recorded phone call, a standard audio recorder, a speaker microphone, or telephone pick-up microphone is needed. Due to their usage often resulting in poor quality recordings, the use of suction cup devices should be avoided. There are many communication technologies available to record both the victim and the suspect's conversations while on the phone, including an app that can be downloaded on the calling phone to record the conversation. Whichever device or app you use, it is critical to capture both the suspect and victim's sides of the conversation. A headphone plugged into the recorder's ear jack will allow the investigator to listen to both sides of the conversation and provide guidance to the victim. It will also allow the investigator to monitor the conversation and end the call if it becomes too traumatic for the victim.

Phone texts: A phone with texting capabilities will be needed. When doing a pretext communication via text the case agent must capture all of the texts communicated between the suspect and victim. This can be accomplished several ways. An investigator could download the victim's phone after the communication is over (if forensic equipment to do so is available). If this technique is utilized, the program used to download the phone may also capture private information unrelated to the case. This information may be discoverable to the defense. It is crucial to discuss this possibility with the victim before downloading their phone. Screen shots of the texts, showing the content of the communication with the phone numbers, dates and times, or photographs of the text messages on the victim's phone could also be sufficient. Note that obtaining texts from the victim's phone can be considered a search and therefore, obtaining the victim's written consent will be necessary. Investigators will need to verify that the text communication came from the suspect and their phone. This can be accomplished a number of ways including court orders and search warrants for the suspect's phone and phone records, surveilling the suspect while the communication is taking place, or verifying in an interview that the suspect sent the texts.

Email: A device that can communicate via email, a phone, computer, tablet, etc. will be needed. Again, as with phone texts, the investigators will need to capture and document the conversation on the victim's device. Case agents will also need to verify by a search warrant or court order that the suspect is the one who sent the communication or investigators can verify in an interview that the suspect sent the emails.

Social media and Instant Messaging platforms: A device that can communicate with these sites or phone apps will be needed. As with text messages or email, it is critical to capture and document the conversation on the victim's device. Investigators will also need to verify by search warrant or court order that the suspect is the one who sent the communication or verify in an interview that the suspect sent the communication. Verifying the communication came from the suspect's social media site or an instant messaging app may require more work due to the fact that some sites do not store content. Another challenge is that both social media sites

and instant messaging profiles can be under a fake name. However, the companies that manage these programs can verify who the account holder is or provide the Internet Protocol (IP) address that communicated the messages. Law enforcement can then follow up on this information to verify who created the account. In order to capture the conversation, it may be necessary to have a camera focused on the device as the communication happens so no content is lost.

COMMUNICATION PLANNING, DEVELOPMENT, AND IMPLEMENTATION

Generally, pretext communications will occur between individuals who know each other. Attempting a pretext communication with a suspect who is unknown to the victim may not be productive, as the suspect may become suspicious. However, if there is no other evidence in the case, there may be nothing to lose in attempting pretext communication. Law enforcement should meet with the victim and their advocate before attempting any pretext communication and discuss what could be gained from the communication.

CREATING THEMES AND STRUCTURING THE COMMUNICATION

In order to obtain the most information, a structured communication is necessary. Thus, the case agent should be very familiar with all aspects of the case including all statements, crime scene information, and suspect's history. The victim and case agent should be in agreement on what direction the conversation will go and what will be discussed. Victim advocates should be used before, during, and after the conversation to provide support for the victim.

As natural conversations are dynamic and changing, it is virtually impossible to **script** every word of the pretext communication. Yet, **outlining** of the conversation is important. Case agents should be creative in developing the theme for the communication and be willing to adapt as the conversation unfolds. It is recommended that prior to the conversation the case agent write down possible questions or an outline as to what information you are trying to elicit from the suspect. Victims may understandably become anxious during the communication and may even forget what questions to ask.²

A plausible introduction is key. Discuss opening questions to start the conversation. The phrase used at the beginning of the call needs to encourage the suspect to feel compelled to talk about the event. It should be something the victim is comfortable with and it should be practiced with the case agent. Depending on the circumstances of the case, examples of introductions could include:

- *"We didn't use protection and now I am worried that you got me pregnant (or...) gave me an STD."*

² "Pretext" Phone Calls In Sexual Assault Investigations. Detective Harold Eisenga, San Diego, PD, <https://www.ncjrs.gov/pdffiles1/nij/179946.pdf>

- *“Wow. You saw how messed up I was. I know we had sex, but how did I get from the _____ to the _____?”³*

During the conversation, the victim should avoid harsh questions like, “Why did you rape me?” Many suspects will not admit they raped someone. Instead better questions would be, “*Why did you continue to have sex with me when I told you to stop?*” or “*What made you believe I wanted to have sex after I told you to stop?*” or “*I was passed out and didn’t know what was going on. Why did you think it was okay to have sex with me?*”

At times it might be necessary for the victim to use deception or a misrepresentation with a suspect if they ask questions like, “Are you going to the police?” or “Are you going to file charges on me?” The appropriate response may be to tell them no. However, the victim should refrain from using threats or promises to the suspect about filing charges if they would only admit to the rape. Discuss with the victim how you will confront the suspect if need be and when that might be appropriate.

PRACTICE/ROLE PLAY

Law enforcement should role play with the victim (with victim advocate present) prior to conducting the communication as this will help them formulate their thoughts and anticipate what the suspect may say. The case agent should explain to the victim that the suspect needs to do the majority of the talking with limited interruptions. Discuss with the victim how to ask open ended questions of the suspect so you may obtain the most information. Be observant and aware of signs of trauma/re- traumatization in victim behavior (let the victim know that if they are feeling overwhelmed and or traumatized they may unilaterally stop the conversation at any point). Stop and take a break, ask the victim if they want to continue practicing. Ultimately, be aware that at this point, the victim may want to **discontinue the plan for pretext communication**.

Most victims are going to be nervous when conducting the interview. As the interview proceeds, the case agent should be listening in and assisting the victim in following the aforementioned script/written questions and/or communicate to the victim through additional written notes as necessary. Additionally the case agent should be listening to and/or monitoring other forms of communication including conversation in texts, emails, or social media. Here too the case agent can help alleviate nervousness while coaching or providing direction to the victim.

PREPARATION OF THE VICTIM TO CONDUCT THE COMMUNICATION

Law enforcement agencies should make contingencies for when normally utilized victim advocacy services are unavailable. These contingencies should include ongoing communication, collaboration and cooperation with other local trauma informed service providers who can likewise provide advocacy and supportive services. Local service providers

³ Adapted from The Pretext Call in Sexual Assault Investigations. Sgt. Eli Umpierre, Rochester, MN. Minnesota Coalition Against Sexual Assault, http://www.mncasa.org/assets/PDFs/pretext_calls.pdf.

include, but are not limited to, shelters and victim services, health & mental health care providers, neighboring law enforcement, and clergy.

Pretext phone calls **should not be made** when it is clear that engaging in such an activity would further traumatize the victim, when making such a call would place the victim in undue physical danger, when the victim does not fully understand the consequences of their actions due to mental capacity, the influence of drugs/alcohol, or is being coerced, and/or when the victim does not want to participate in making such a call.

PLANNING THE LOGISTICS OF THE COMMUNICATION

When planning the communication, consider the time of day that would be best to reach the suspect. If the suspect is at work and can't talk during his work hours, consider conducting the communication when they are not working. Preferably, the communication should occur prior to the suspect knowing about the investigation. However, if there is not enough evidence in the case to charge the suspect, this may be the best investigative tool available to law enforcement.

The communication should occur in a controlled environment such as a police station or office setting. The only persons in the room should be the victim, an advocate (recommended for every case), the case agent, and possibly one other law enforcement personnel. The area needs to be free of distractions and loud noises. Everyone in the room should silence their cell phones, pagers, police radios, alarms, or any other device that could create a distraction. The room should be equipped with audio and video so the pretext communication is captured in its entirety from start to finish.

Testing the equipment prior to making the communication with the suspect is important. Make a test phone call and record it to verify the recorder and microphones are working properly. Practice with the devices that will be used for the pretext communication so the victim is comfortable with them. Make sure recording devices are functioning correctly and have fully charged batteries. Be mindful of the placement of recording devices so they are not compromised by electronic interference.

Discuss the logistics of how the equipment will work and the possibilities of not reaching the suspect or getting their voicemail. Discuss how to handle communication if the suspect calls, texts, emails, or instant messages back. The suspect may not be reachable at the time the communication is attempted. What will be next steps? Discuss how the victim and case agent will converse during the pretext communication (i.e. hand written notes, sticky notes, hand gestures, etc.).

CLOSING COMMENTS

As has been discussed, pretext communications can be a valuable tool in sexual assault investigations. Many factors need to be considered and the decision to go forward with these forms of communication should be made in conjunction with the victim and their advocate.

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ECU is the campus law enforcement technical provider, funded by the Office of Violence Against Women. The program's goal is to provide training, networking, collaboration, and technical assistance to college and university governing boards, presidents, administrators, and campus law enforcement/security departments. ECU's Campus Program is founded on over twelve years of focused experience, success in partnerships, and solid expertise in training of law enforcement. Through collaboration and partnership with other TA teams, existing programs, national agencies, and external consultants, the program provides technical assistance and serves as a mentor to campuses and their law enforcement / security departments in a targeted approach to OVW campus programs and the Law Enforcement Training minimum standard. ECU promotes best practices founded on current and valid research, informs grantees regarding new and creative ways to present relevant topics, assists grantees in determining specific needs of their programs, and connects grantees with national training resources.

For additional information, please see: Michigan Model Policy: The Law Enforcement Response to Sexual Assault <http://www.bwjp.org/assets/documents/pdfs/2015-michigan-model-policy-the-law-enforcement-respo.pdf>

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