



CENTER PIECE

The Official Newsletter of the National Child Protection Training Center

Testifying in Court as a Forensic Interviewer: Defending an Investigative Interview from the Witness Stand

By Victor I. Vieth¹

Introduction

The field of forensic interviewing is a relatively new profession. The concept of a "forensic interview" was necessitated by high profile child sexual abuse cases from the 1980's. In these cases, children were interviewed by professionals with little or no training in the art and science of eliciting information from children.² In some cases, children were interviewed on multiple occasions by multiple persons.³ In an attempt to improve the response to these cases, children's advocacy centers (CAC) began to emerge and spread across the country.⁴

In addition to children's advocacy centers, a number of specialized programs began to develop. In Minnesota, a CAC called *CornerHouse* developed one of the nation's first forensic interview training programs.⁵ As of this writing, there are 17 state programs teaching the *CornerHouse* interviewing model.⁶ Largely as a result of the spreading of the *CornerHouse* model, a number of appellate courts have begun to address the issue of when a "forensic interviewer" can testify as an expert witness and, assuming such testimony is allowed at all, how far the witness can go.

This article fully explores this issue and offers forensic interviewers, and the attorneys who call them to the witness stand, concrete suggestions for offering expert testimony and in otherwise defending these interviews in court.

Court preparation begins the day the case is reported

For most child protection professionals, testifying in court is stressful and otherwise unpleasant. The process of reducing this anxiety begins the moment the case is reported into the system. If the interviewer and the other members of the team respond to the report

professionally and thoroughly, the stronger the evidence will be and the less likely the case is to go to trial. Even if the case does result in a trial, a thorough, professional investigation will better equip the interviewer to defend her interview in court. A forensic interview is most likely to be accepted in court if it is conducted with the following factors in place.

First, the forensic interviewer must be well-trained – and must continue to improve his skills and knowledge. At a minimum, the forensic interviewer should have completed a five day forensic interviewing course in which the interviewer must demonstrate his skills and be tested on his knowledge. After the course, the interviewer must continue to have his interviews critiqued as part of an on-going peer review process, must periodically attend advanced forensic interview training, and must otherwise stay abreast of developments in the field.⁷

Second, the interviewer must use an interviewing protocol supported by research. There are a number of acceptable models for forensic interviewing that are rooted in research. These protocols include the NICHHD, Step Wise, the Poole & Lamb "flexible protocol" and *CornerHouse's* RATA[®] protocol.⁸ Experts in the field have noted that "(t)hese and other protocols have similar characteristics and are based upon research."⁹ Indeed, there is "consensus among researchers and practitioners on the underlying principles that should guide interviews with children who might have been a victim or witness to a crime."¹⁰

An interviewer must understand the research which supports his or her forensic interviewing protocol and be able to articulate this in court.¹¹ This is one reason why graduates of a training program utilizing the *CornerHouse* model are required to read pertinent research impacting the field and otherwise are trained to base their interview on practices supported by research.

UP COMING conferences

*When Words Matter:
Emerging Issues in
Forensic Interviewing*

May 4-7, 2009 • St. Louis, MO

When Words Matter is ideal for child protection professionals who conduct forensic interviews or who defend them in court. *When Words Matter* will feature nationally recognized experts on forensic interviewing including Mark Everson, Tom Lyon, Allison DeFelice, Chris Newlin, Mike Johnson, Mindy Mitnick and Victor Vieth. In addition to a review of the latest research impacting the forensic interview, there will be presentations on interviewing children who make "fantastic statements", on cross examining defense "experts", conducting interviews in cases with repeated allegations, and on the potential impact on the forensic interview of a child's immigration status. For a full agenda, or to register for the course, call the National Child Protection Training Center at 507-457-2890 or visit our website at www.ncptc.org Register soon – this course fills up early and our space is limited.

 National Child Protection
TRAINING CENTER
NCPTC is a training program of NAPSAC



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Third, document the forensic interview. The available research on videotaping suggests that the recording of these interviews reduces the number of times a child must speak about the abuse, and increases the chance of a conviction. As summarized by Frank E. Vandervort:

Our findings suggest that, at least when used as part of a carefully thought-out investigative protocol, videotaping has a deleterious impact upon defendants' interests and a very positive impact on prosecutors' efforts to successfully prosecute child sexual abuse cases. Furthermore, such an approach serves the interests of the community, as it achieves a fair and just result for victims, suspects, and defendants.¹²

If, for any reason, a team decides not to audio and video-record the interview, it is imperative to document the interview to the greatest extent possible. This can be as simple as having other team members watch the interview from behind a two way mirror and taking diligent notes. The problem with notes, though, is they can never fully capture a child's facial expressions and demeanor during an interview. For example, I was involved in a case in which a child, describing how she had to lick her perpetrator's anus, wrinkled her face and said "it really stunk." A mere verbal description of the child's facial expression can never duplicate a visual recording of that same expression.

In addition to documenting the forensic interview, be thorough in documenting all other aspects of the investigation. Some argue that the more an investigator

documents, the more ammunition defense counsel has in preparing cross-examination. In reality, it is just the opposite. For example, a doctor once testified as to her medical examination of a child sexual abuse victim. As part of her direct examination, the doctor testified that the child's demeanor was distraught. On cross examination, defense counsel noted that the child's demeanor was never discussed in the doctor's notes during the examination or in the doctor's final report. Noting the physician had conducted a number of examinations since then, the defense attorney planted a seed with the jury that perhaps the doctor's memory was inaccurate. If the doctor had simply noted the child's demeanor as part of the medical report, the defense attorney would have been unable to make these points.

Fourth, never rely exclusively on the forensic interview. A forensic interview is most likely to be the subject of a defense attack when that is the only evidence the government has. This should never be the case. Instead, the forensic interviewer should, during the abuse scenario of the interview, obtain as much detail as is developmentally appropriate. It is essential that the investigators scrutinize the child's verbal statements during the interview and then attempt to corroborate as much as possible. If, for example, the child described "sticky, white stuff" coming from the perpetrator's penis, the interviewer may want to ask what happened to the "sticky, white stuff" and, based on this information, the investigators should attempt to find semen stains.

Fifth, be cognizant of the rules of evidence when interviewing children. Although CornerHouse trained interviewers follow a "child first doctrine" which places the needs of the child ahead of the investigators, this does not mean the interviewer should not be well-versed in the rules of evidence applicable to his or her jurisdiction. When the interviewer understands that information such as "sensory detail" may determine the admissibility of the forensic interview into evidence, the interviewer is more likely to seek this information during the interview.¹³

Sixth, function as part of a multi-disciplinary team. It is not enough that the interviewer follow a forensic

interviewing protocol. It is equally important that the entire investigation be conducted by a multi-disciplinary team functioning pursuant to a jurisdiction-wide protocol.¹⁴ There are a number of examples documenting that a community-wide protocol improves the quality of not only the forensic interview but the investigation as a whole.¹⁵ Functioning as part of a team makes the interviewer, and every other potential witness, look more professional. For example, let's say a teenage victim discloses during the interview that he received alcohol and drugs prior to the sexual assault. The lead investigator shares this information with a toxicologist or other expert who advises that, based on the child's description of when the alcohol and drugs were consumed that there would be no basis to assume the substances were still in the child's system. When the case comes to trial and the investigator or interviewer is challenged as to why blood or urine was not seized from the child to corroborate this part of the statement, the investigator can respond: "Pursuant to our jurisdiction-wide protocol, I defer to the medical expert on our team. That expert will testify later on and will be able to explain why he concluded there would be no value in seizing blood or urine from the child." Functioning as part of a team makes each witness look more professional.

Seventh, each team member should be pro-active in educating other team members about developments in the field which may impact the team as a whole. In 2004, a United States Supreme Court decision entitled *Crawford v. Washington*¹⁶ had a dramatic impact on the ability of investigators to admit into evidence child hearsay statements.¹⁷ Because this decision impacted forensic interviewers as well as medical and mental health professionals who may take a statement from the child, it was incumbent on the prosecutor on each MDT to alert other members as to the impact of the decision. In the same vein, if a forensic interviewer learns of new research that may impact the quality of an interview, this information should be shared with other members of the team. In this way, each team member helps to ensure that the knowledge base of every other team member continues to grow.



Eighth, team members should be proactive in educating the community. When CACs and MDTs are proactive in educating the public about their work, community members gain a deeper appreciation of the professionalism in which child abuse investigations are conducted. This is important because these community members make up the jury pool who may one day listen to the testimony of an MDT member. Accordingly, educate the community through press releases and public speaking opportunities about the training you have been through and the skills your team possesses in conducting a child abuse investigation.

Court preparation: after the subpoena

In preparing for court, a witness must determine three things. First, know what type of court you will be testifying in. Second, know your case file. Third, determine the type of witness you will be.

Know the type of court

When a forensic interviewer or other witness receives a subpoena or is otherwise noticed that their testimony is required, the first step is to determine what type of proceeding is involved. The proceeding may be a divorce/custody hearing, a civil child protection proceeding, or a criminal trial. It is important to determine the type of proceeding because the standard of proof will be different as will the sort of evidence and testimony that is allowed. For example, a custody proceeding may have as its standard of proof “preponderance of the evidence” whereas a civil child protection hearing may have as its standard “clear and convincing evidence.” A criminal trial will have as its standard “beyond a reasonable doubt.”

The issue before the court will also be different. A case of sexual abuse presented to a custody court will simply be to determine the best interests of the child. In a civil child protection case, the government may only have to prove the child was sexually abused with the identity of the actual perpetrator and the location of the actual abuse being irrelevant. In a criminal case, though, the prosecutor will have to prove a specific act in a specific location at the hands of a particular individual.

The rules of evidence will also be different. In a civil child protection case, for example, a child’s hearsay statements will be more freely allowed. In a criminal case, because of the confrontation clause to the United States Constitution, the admission of hearsay will be more problematic.

Know the case file

A witness should thoroughly review his case file and any documentation of the investigation as a whole. For forensic interviewers, this means reviewing your forensic interview and other information relevant to your work on the case. A witness who fails to review their file will be tripped up on cross examination. Even simple errors such as the date of the interview or the name of a child’s parent will be brought out on cross examination and will be used by defense counsel in closing argument to suggest the witness is not credible.

Know the type of witness you will be

A witness may be asked to testify as a lay witness, an expert witness, or both. A lay witness testifies as to what he saw, heard or felt. A forensic interviewer testifying as to the time of the interview, the location of the interview, and what was said during the interview, is testifying as a lay witness. When, however, a forensic interviewer is asked to educate the jury or judge as to the appropriateness of interviewing techniques, the suggestibility of a particular question, or the utility of aids such as anatomical dolls, that witness is testifying as an expert. In most instances, a forensic interviewer will be testifying as both a lay and an expert witness.

The forensic interviewer as expert witness

The federal rules of evidence define an expert witness this way:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliable to the facts of the case.¹⁸

The rule is not as complicated as it may appear on first reading. Essentially, an expert witness needs to have more knowledge than the judge or jury on relevant issues – enough knowledge to allow the witness to “educate” the court on a particular matter.

The forensic interviewer can help the prosecutor in qualifying him or herself as an expert witness. Simply start a file on the computer in which you will store all the information that qualifies you as an expert. In addition to your resume, record all the trainings you have attended, particularly those pertaining to forensic interviewing. It is equally important to record the number of interviews that you have conducted, the number of peer reviews in which you have participated, and any other activity that keeps you abreast of latest developments in the field.

Remember, a witness is qualified as an expert based not only on training received, but on the witnesses’ experience. A witness with only a bachelor’s degree, but who has conducted 100 forensic interviews, may be more credible than a witness with a PhD who has conducted research on forensic interviewing but who has never actually conducted a forensic interview.

Indeed, in cases of child abuse, the following professionals have been qualified as expert witnesses on one or more issues: police officers, psychologists/psychiatrists, rape crisis/sexual assault counselors, teachers, victim witness coordinators, social workers, physicians/nurses, and probation officers.¹⁹



Case law on the forensic interviewer as an expert witness

Given the relative newness of the profession of forensic interviewer, courts are only now beginning to address this area of expertise. In Minnesota, where CornerHouse has been conducting interviews and training professionals for nearly two decades, there are dozens of appellate opinions holding that forensic interviewers utilizing the RATA^C® protocol are qualified as expert witnesses.²⁰

Cases not discussing RATA^C®

In Florida, a court found there was an insufficient record to qualify a forensic interviewer as an expert witness.²¹ Since the court did not elaborate on what forensic interviewing protocol was used or the level of training the interviewer had, it is difficult to speculate on what was missing.²²

In Louisiana, with very little discussion, an appellate court allowed a forensic interviewer employed at a CAC to testify as an expert witness.²³ Specifically, the court said:

Cheri Staten, the director of the Jefferson Parish Children's Advocacy Center, was qualified as an expert in forensic interviewing in the area of child sexual abuse. She testified that she does forensic interviews for Washington Parish and explained that a forensic interview is an interview with children used to gather information, not to conduct therapy. The children are given an opportunity to talk and are asked general questions, without discussing the allegations of the abuse. She also indicated that she wears an earpiece so that law enforcement officers can speak to her while they monitor the interview.²⁴

Cases discussing RATA^C®

As of this writing, the appellate courts from five different states have analyzed forensic interviews conducted by professionals trained in the CornerHouse model and using the CornerHouse protocol RATA^C®. In each of these cases, the appellate court has found the interviewer to be qualified as an expert witness, although there is disagreement among the courts as to how far a forensic interviewer can go in educating the judge or jury.

In South Carolina, a social worker who conducted a forensic interview using RATA^C offered her opinion that, based on the forensic interview, "further medical investigation was necessary."²⁵ The appellate court found the forensic interviewer was qualified to render this opinion because the interviewer "received specialized training on the RATA^C method, which is used on a nationwide basis and is nationally recognized for interviewing child victims of sexual crimes."²⁶ The court rejected a defense claim that the expert testimony was offered to bolster the victim's credibility, finding the testimony was offered "as a measure to prevent a defense or argument that the victim's testimony was the result of police suggestiveness. The RATA^C method was developed in response to concerns about child victims' testimony being tainted by police suggestiveness, as exemplified by *State v. Michaels*..."²⁷

In Georgia, the appellate court rejected a defense claim that a deputy sheriff trained through *ChildFirst* was insufficiently trained to conduct a forensic interview. The court found the investigator had "taken specialized training courses in interviewing children in sex abuse cases...conducted the interview in a specialized, 'child-friendly' environment...and he employed a known method for interviewing child victims, the RATA^C method..."²⁸

In Mississippi, the appellate court found that a graduate of that state's *ChildFirst* program was qualified to testify as an expert on forensic interviewing, agreeing with the state that the interviewer's testimony was "the product of reliable principles and methods..."²⁹ In a concurring opinion, the court noted that RATA^C is a protocol for interviewing suspected victims of child abuse in a

manner that is neutral and non-leading" and cited notes from North Carolina commentators concluding that the *ChildFirst* courses are a "gold standard" for "training in forensic interviewing."³⁰

In Texas, the Court of Appeals upheld the ruling of a trial court judge that the RATA^C® protocol developed by CornerHouse was "generally accepted in the scientific community for conducting forensic interviews of children."³¹

In Minnesota, the home of CornerHouse, there are over three dozen appellate opinions discussing interviews conducted by CornerHouse or those trained through CornerHouse. Several of these cases note the expertise of the interviewers.³²

How far can a forensic interviewer go when testifying as an expert?

In Minnesota, an appellate court allowed an expert to render an opinion that a child was sexually abused provided the interviewer does not express an opinion as to the identity of the perpetrator.³³ In Mississippi, courts have allowed forensic interviewers to testify that a child's statements are "consistent" with sexual abuse.³⁴

Law professor John Myers has criticized these decisions, calling this a "disturbing development."³⁵ Indeed, Myers finds it problematic if a forensic interviewer, prior to a clear attack on the interview, describes the interview techniques or the credentials or training of the interviewer. Myers claims "it is difficult to see any legitimate relevance of such expert testimony."³⁶

Although it is problematic for any witness to bolster a child's credibility by rendering an opinion the child was abused or shares characteristics of abuse, it is not always clear where the line is drawn. For example, Myers notes that:

A large number of decisions allow one form or another of psychological testimony as substantive evidence. Thus, some decisions permit an expert to describe symptoms and behaviors observed in sexually abused children. A number of decisions allow an expert to testify that the child in the case at hand demonstrated such symptoms and behaviors.³⁷



Moreover, it is not simply doctors and psychologists that are qualified to testify as expert witnesses in child abuse cases. Commenting on evidentiary rules allowing expert testimony, the Ohio Supreme Court correctly notes that it is “obvious that expert testimony is not limited only to those who might be trained in the fields of medicine, law, real estate, engineering or other sciences. In an appropriate case, a bank president could be an expert witness—and in child abuse cases, experts, properly qualified, might include a priest, a social worker or a teacher, any of whom might have specialized knowledge, experience and training in recognizing occurrences of child abuse.”³⁸

Accordingly, a forensic interviewer with expertise based on training and/or *experience* may be able to educate the jury as to various subjects relevant in a case of child maltreatment. Expert testimony is permitted if “specialized knowledge will assist the trier of fact to *understand the evidence* or to determine a fact in issue...”³⁹ In order to properly evaluate a forensic interview admitted into evidence the judge or juror will be aided in understanding what is or is not a developmentally appropriate question, the various types of interviewing questions posed in a forensic interview, the reason for using interviewing tools such as anatomical dolls and any research supporting these tools.⁴⁰ Without this knowledge, jurors and judges may unfairly denigrate answers a child provides in a forensic interview.

For example, in one case⁴¹ in which a forensic interview was admitted under the residual exception to the hearsay rule, a child who indicated seeing her father’s penis was asked to describe the penis. The child became frustrated and said “it looks like a power ranger.” On direct examination, the prosecutor asked the forensic interviewer if, based on her training and experience, she made any errors in the interview. The interviewer said there were several times she pushed the child beyond her developmental capabilities. The interviewer explained that descriptive questions can be difficult for young children and that questions such as asking the child to describe her father’s penis went too far. Without this explanation, the jurors may have interpreted the child’s claim the penis looked like a “power ranger” as an indication of fantasy or lack of intelligence.

Testimony along these lines is not improper bolstering of the child’s credibility but is instead simply helping the trier of fact to “understand the evidence.”⁴² Given the high profile nature of sexual abuse cases in the 1980’s, cases that received significant media attention and became the subject of documentaries and movies, it is critical for the state to offer evidence showing that steps were taken to minimize suggestibility practices in interviewing a child. This does not go to the ultimate issue of whether or not the child is telling the truth but allows the jury to assess how, if at all, the manner in which the interview took place may have influenced the child’s answers. This is no different than an investigator testifying as to the steps he took at a crime scene to minimize the chances that blood, semen or other evidence that was collected may have been contaminated by the process.

When, of course, a defendant specifically raises concerns about suggestible practices, the state is clearly permitted to address the issue. As noted by the South Carolina Court of Appeals, expert testimony from a forensic interviewer is not bolstering when offered “as a measure to prevent a defense or argument that the victim’s testimony was the result of police suggestiveness.”⁴³

A forensic interviewer should consult with the prosecutor before testifying to make sure he or she does not offer

testimony that is impermissible. Unless the interviewer is practicing in the states of Minnesota or Mississippi, it is best to avoid rendering an opinion that a child was sexually abused or that the child’s statements are consistent with abuse. Instead, the interviewer should focus on helping the judge or jury understand the process for taking a child’s statement and helping the jury to understand why various questions were posed and to understand developmental factors in evaluating a child’s answers. Helping the jury to understand various tools used in the interview, such as anatomical dolls, will also be of assistance since this expertise is beyond the common experiences of most jurors.

Testifying on direct examination

In order to qualify as an expert witness, the prosecutor must ask a series of questions to establish the credentials of the witness. Again, an expert witness is qualified not only through education but through practical experience. Indeed, it is the experience of the witness that may be more important to the jurors. In the case of a forensic interviewer, these “qualifying” credentials may include the following:

- Occupation
- Education and continuing education hours
- Training specific to the field of forensic interviewing (the number of hours, the nature of the course, testing, etc)
- An explanation of the protocol used in the forensic interview
- An explanation of the preferred setting for a forensic interview as well as any tools used in the interview process (anatomical dolls, etc)
- Experience in conducting forensic interviews
- Ongoing training (peer review, advanced courses, remaining current with the literature, etc)

This is why, as discussed earlier, it is essential for a witness to keep track of his/her credentials and be able to answer these and other questions precisely. It sounds more professional to say “I’ve conducted 123 forensic interviews” as opposed to “I think I’ve probably done about 100 or so.”



Preparing for cross-examination

Acknowledge errors during direct examination

In preparing for trial, review your forensic interview as if you were conducting a peer review. Indeed, you may want to have a colleague also examine the interview and assist you in locating any weaknesses. If you made errors in the interview such as asking a developmentally inappropriate question, alert your prosecutor. The errors you uncover may be the very areas a defense attorney will cross examine you on. If so, these errors can be addressed during direct examination. The prosecutor can simply ask you on direct examination if, upon reviewing the video or DVD of the interview, you detected any errors. There is no such thing as a perfect interview and acknowledging errors up front shows the jury you are human. Moreover, it draws the sting of the cross examination. If the defense attorney still cross-examines you on these errors, he or she is, at best, redundant.

Consider addressing defense theories of the case during direct examination

Although it is important to acknowledge errors, it is also important to consider any illegitimate defense theories of the case and, if possible, to begin to address these issues during your direct examination. For example, if you know defense counsel is going to contend that your use of anatomical dolls or diagrams is in some way suggestive or inappropriate, discuss with the prosecutor the research you rely on in using these tools. The prosecutor, as part of your direct examination, may want to ask you about concerns the dolls are suggestible, etc. Again, in addressing these issues on direct examination, the defense attorney may, at best, appear to be redundant in addressing these issues on cross examination.

Use language a lay person can understand

It is important to explain every term of art to the jury. Jurors will not understand protocol acronyms such as “Step Wise”, “NICHD”, and “RATAC” or phrases such as “continuum of questioning.” When educating the jurors about relevant issues, think of common examples that will drive a point home. Let’s assume the forensic interviewer is attempting to explain why it is difficult for young children to answer questions calling for a number (i.e. “how many times did this happen?”). In addition to explaining that, based on your training and experience, young children often can’t appreciate the value associated with a particular number, provide an illustration to highlight this point. For instance, when my son was four years old we were at a pie auction at our church. My son figured out that if he shouted out a big number, he would get a pie. Accordingly, when a pecan pie came up for auction he shouted out “seventy-eight dollars.” At that age, he knew “seventy eight” was a big number but he had no comprehension of the value associated with the number. Discuss with the prosecutor illustrations such as this which can be used to educate jurors or to better understand a child’s answer. If the prosecutor understands in advance that you have such illustrations, he will likely make a point of asking you to provide them to the jury.

Tips for handling cross-examination

Don’t go out on a limb

When testifying, it is critical to stay within your field of expertise and to avoid extreme statements that are not supported by research or common sense. Let’s assume, for instance, the defense attorney asks “children lie, don’t they?” It might be tempting to say that children never lie but such a statement is contradicted by research and human experience. Every parent on the jury, no doubt, has caught their child in a fib. Accordingly, the correct answer would be “yes” or something to the effect “in my experience, all human beings are capable of lying.”

“Just answer the question ‘yes or no”

The job of the defense attorney is to control the witness through leading or other questions that limit the ability of the witness to provide a narrative. Many witnesses are frustrated when the defense attorney directs them to answer a question “yes or no.” This is because some questions can’t be answered “yes or no.” For example, let’s assume the defense attorney asks “are children suggestible—yes or no?” This is not a question that can be answered with a simple yes or no. Suggestibility is determined by multiple factors (age of the child, the child’s relationship to the perpetrator, the closeness in time of the interview to the incident, the nature of the question, the location of the interview, etc). When the defense attorney asks a question that cannot be answered yes or no, simply say “I’m sorry counsel, I can’t answer that question yes or no. May I explain?” The defense attorney will almost certainly not allow you to explain. However, on re-direct, the prosecutor can re-visit the issue and ask you to explain why you could not answer the question with a simple yes or no.

Remember the phrase “of course not”

Some questions can be answered with a yes or no—but the questions themselves are silly or misleading. Let’s assume the defense attorney asks “there were no witnesses to verify the child’s claims were there?” Although this question can be answered with a simple “no” the question and answer are misleading to the jury. Accordingly, you may want to say “of course not.” This should be a clue to the prosecutor to ask you to explain your statement. On re-direct, then, the prosecutor may ask you “why did you say ‘of course not’ when asked about the absence of other witnesses?” This will then give you the opening to explain the dynamics of abuse to the jury. Under such a scenario, you could say “I’ve investigated hundreds of child sexual abuse cases in the past 15 years and, so far, I have never had a case where the alleged incident took place on the front lawn or in some other setting in which there would be eyewitnesses. In my experience, these crimes happen in private settings and the only eyewitnesses are the alleged victim and the alleged perpetrator.”



Cross-examination on interview protocols

Because there is not a universally accepted forensic interviewing protocol, a defense attorney may ask you about the various models in use in the country (RATAC, Step-Wise, NICHHD, etc). The point the defense attorney is attempting to make is that “forensic interviewing” is a fluid field with an absence of well-established principles. Discuss this issue with the prosecutor in advance and determine how best to respond. Here, though, are several points to make:

- There are a number of models and they share many common characteristics
- All of the major models are based on research and are accepted within the field, though there is professional disagreement as to which is the “best”
- At least one forensic interviewing protocol, RATAC®, has been accepted by a number of appellate courts and, since many protocols share similar characteristics with RATAC®, prosecutors can likewise argue for their acceptance in court as well

Responding to defense “experts” on forensic interviewing

There are a number of defense “experts” who attack forensic interviews for a fee. If a defense expert is hired to attack your forensic interview, work with your prosecutor and obtain the resume of this expert. This resume will likely reveal that he or she has a prestigious degree and may even have some relevant publications. In many cases, though, the “expert” will have never conducted a forensic interview or even worked directly with a child victim in their life. Moreover, the “expert” will probably have never attended a course on RATAC or any of the other leading protocols, much less have any familiarity with the course binder, the testing process, or the

infrastructure providing ongoing support to the course.⁴⁴ In such a case, it is essential to highlight your practical, front line experience during your testimony so that the prosecutor can make this distinction when cross-examining the defense expert. In addition, make sure the prosecutor obtains a report from the defense expert or asks the court to order the expert to supply a list of the research studies he or she is relying on in critiquing your interview. Read or re-read these articles and make sure the prosecutor understands why these articles are not applicable to this particular interview. For example, the defense expert may be relying on suggestibility studies done on pre-school children but the victim in your case is a teenager.

Call the National Child Protection Training Center for Assistance

NCPTC has successfully helped a number of prosecutors defend in court forensic interviews that utilize the RATAC®, NICHHD, or other leading models used by front line professionals. Given our personal involvement in actually teaching these two leading models,⁴⁵ we have a unique ability to assist prosecutors facing these issues in court. We also closely monitor defense “experts” who receive a great deal of money to attack forensic interviewers and their interviewing protocols in court. Indeed, NCPTC has been successful in working with prosecutors to keep some of these witnesses from testifying at all. Many defense experts have very few credentials that would allow them to critique a forensic interview and some widely used “experts” have demonstrated a clear bias by allowing themselves to be marketed on “false allegation” websites.⁴⁶

Conclusion

When the trial is over, make sure you “de-brief” with the prosecutor and ask him or her to critique your testimony. Just as forensic interviewing is both a science and an art, so is testifying in court. Enlist the support of the prosecutor in helping you to understand what you did that was effective or ineffective.

Although testifying is rarely enjoyable, it is an important part of our profession. It is a skill we can, and should develop. In developing this skill, we increase the chance the jurors will have a full, and fair presentation of the evidence and will maximize the chance of obtaining a just verdict.

End Notes

- ¹ Director, NAPSAC's National Child Protection Training Center, Winona State University.
- ² See generally, DAVID HECHLER, *THE BATTLE AND THE BACKLASH* (1988).
- ³ Nancy Chandler, *Children's Advocacy Centers: Making a Difference One Child At a Time*, 28 *HAMLIN JOURNAL OF PUBLIC LAW & POLICY* 315, 316-321 (2006).
- ⁴ *Id.* at 321-322.
- ⁵ Erna Olafson, *Introduction to New Series of Papers by Major Trainers About Child Forensic Interview Training Programs*, 15(1) *APSAC ADVISOR* 2(Winter 2003) (noting that the CornerHouse training program is one of the “earliest programs developed.”)
- ⁶ In addition to Minnesota, where CornerHouse is located, the following states have a program centered around the CornerHouse interviewing program and its protocol RATAC®: South Carolina, Indiana, Mississippi, New Jersey, Georgia, Missouri, West Virginia, Maryland, Illinois, Kansas, Ohio, Arkansas, Delaware, Virginia, Connecticut, and Oklahoma.
- ⁷ In partnership with CornerHouse, NAPSAC's National Child Protection Training Center offers advanced forensic interviewing courses, provides graduates with a bulletin board in which they can interact with others utilizing the same model, and provides a newsletter and other resources in which graduates can stay abreast of developments in the field.
- ⁸ Allison R. Perona, Bette L. Bottoms, & Erin Sorenson, *Research-Based Guidelines for Child Forensic Interviews*, 12(3/4) *JOURNAL OF AGGRESSION, MALTREATMENT & TRAUMA* 81, 91 (2006).
- ⁹ *Id.*
- ¹⁰ *Id.* At 84.
- ¹¹ See e.g. Alison R. Perona, Bette L. Bottoms and Erin Sorenson, *Research-Based Guidelines for Child Forensic Interviews*, 12(3/4) *JOURNAL OF AGGRESSION, MALTREATMENT & TRAUMA* 81, 91 (2006).
- ¹² Frank E. Vandervort, *Videotaping Investigative Interviews of Children in Cases of Child Sexual Abuse: One Community's Approach*, 96 *THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY* 1353, 1415 (2006).
- ¹³ See generally, *Idaho v. Wright*, 497 U.S. 805 (1990); *INVESTIGATION AND PROSECUTION OF CHILD ABUSE* 369-372 (THIRD ED. 2004)
- ¹⁴ *The Benefits of working as a Multidisciplinary Team, INVESTIGATION AND PROSECUTION OF CHILD ABUSE* xxix-xliv (THIRD ED. 2004)
- ¹⁵ Victor I. Vieth, *In My Neighbor's House: A Proposal to Address Child Abuse in Rural America*, 22 *HAMLIN LAW REVIEW* 143 (1998) (noting the success of a jurisdiction-wide protocol in dramatically improving a rural county's response to cases of child maltreatment).
- ¹⁶ 514 U.S. 36 (2004).
- ¹⁷ See generally, Allie Phillips, *Child Forensic Interviews after Crawford v. Washington: Testimonial or Not?*, 38(4) *THE PROSECUTOR* 17 (September/October 2004).
- ¹⁸ FEDERAL RULES OF EVIDENCE 702.
- ¹⁹ *State v. Boston*, 545 N.E.2d 1220 (1989).
- ²⁰ See e.g. *State v. Hollander*, 590 N.W.2d 341 (Minn. Ct. App. 1999).
- ²¹ *Lena v. State*, 901 So.2d 227, 233 (Fla. Dist. Ct. App. 2005)
- ²² *Id.* What the court did say is: “The record does not demonstrate the existence of a recognized field of expertise in forensic interviewing, such that a person can be qualified as an expert in it. It was ... perfectly acceptable to present Ms. Silverman's educational background and work experience, but she should not have been presented to the jury as an expert in forensic interviewing.”

²³ State v. Hilton, 764 So.2d 1027 (La. Ct.App. 2000).

²⁴ *Id.*

²⁵ State v. Douglas, 626 S.E.2d 59 (S.C. Ct.App. 2006)

²⁶ *Id.* At 1033.

²⁷ *Id.*

²⁸ *In re AH*, 578 S.E.2d 247, 250 (Ga. Ct.App. 2003); See also, *Baker v. State*, 555 S.E.2d 899, 902 (2001) (finding that a videotaped forensic interview, conducted using the RATAc protocol, had the "requisite degree of trustworthiness to be admitted at trial.")

²⁹ *Mooneyham v. State*, 915 So.2d 1102 (Miss. Ct.App. 2005).

³⁰ *Id.*

³¹ *Wright v. Texas*, No. 2-86-219-CR Tex.App. LEXIS 4700 (Tex. Ct.App., June 14, 2007) (Unpublished opinion).

³² See e.g. *State v. Hollander*, 590 N.W.2d 341, 344-345 (Minn. Ct.App. 1999) (detailing the expert opinions rendered by CornerHouse interviewer).

³³ *Id.*

³⁴ See e.g. *Williams v. State*, 970 So.2d 727 (Miss. Ct. App. 2007); *Hodgin v. State*, 964 So.2d 492 (Miss. Ct.App. 2007); *Mooneyham v. State*, 915 So.2d 1102 (Miss. Ct.App. 2005).

³⁵ JOHN E.B. MYERS, MYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES 112 (2008 CUMULATIVE SUPPLEMENT).

³⁶ *Id.*

³⁷ *Id.* at section 6.17(C) (2005) (citations omitted).

³⁸ *State v. Boston*, 545 N.E.2d 1220, 1231 (Ohio 1989)

³⁹ Federal Rule of Evidence 702.

⁴⁰ For an overview of these issues, see generally, Myers, Saywitz and Goodman, *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PACIFIC LAW JOURNAL 3 (1996).

⁴¹ This is a case that was related to me by a colleague who is a forensic interviewer.

⁴² Federal Rule of Evidence 702.

⁴³ *State v. Douglas*, 626 S.E.2d 59, 68 (S.C. Ct.App. 2006)

⁴⁴ For a discussion of the infrastructure surrounding the CornerHouse, ChildFirst and Finding Words interviewing courses, see Victor, V, *Re: The development of forensic interviewing training models*. A reply to Lamb, Orbach, Hershkowitz, Esplin and Horowitz (2007), *Child Abuse & Neglect*, doi: 10.1016/j.chiabu.2008.01.004

⁴⁵ In partnership with CornerHouse, NCPTC assists states in establishing and maintaining forensic interviewing courses utilizing CornerHouse's RATAc® protocol. In partnership with Winona State University, we have assisted that institution in teaching the NICHD, as revised by Tom Lyon of the University of Southern California, as part of the child protection minor offered here at the university.

⁴⁶ For example, the website for the National Child Abuse Defense and Resource Center, lists a number of "experts" who can be utilized to assist alleged sex offenders. This same organization also makes this remarkable assertion: "In child abuse cases, there is the continued working hypothesis among professionals charged with protecting children that if the allegation is made, abuse must have occurred and that the accused person must have perpetrated the abuse. Further, it becomes the responsibility of the accused to prove otherwise." See www.falseallegation.org (last visited December 3, 2008). This assertion contradicts what is actually taught in the nation's leading forensic interviewing courses. In *ChildFirst* courses, for example, students are taught to determine whether sexual abuse has occurred and to always explore alternative hypothesis. Even more remarkable is the assertion that the accused has the responsibility to prove his innocence - something that would necessitate a dramatic alteration of the Constitution of the United States. Although there is no question we need to continue to improve the children protection system, the fact that some experts allow themselves to be associated, at least indirectly, with such exaggerated claims, is concerning.

INSIDE the next issue

The January issue of *CenterPiece* will feature an article entitled *A Possible Framework for the Certification of Forensic Interviewers*. There is a growing movement to develop certification procedures for forensic interviewers in the United States. This explore explores the move in this direction and offers suggestions for developing and maintaining such standards.

For More Information

The National Child Protection Training Center (NCPTC) at Winona State University is a training program of the National Association to Prevent Sexual Abuse of Children (NAPSAC). NCPTC provides training, technical assistance and publications to child protection professionals throughout the United States. In addition, NCPTC assists undergraduate and graduate programs seeking to improve the education provided to future child protection professionals. In partnership with CornerHouse, NCPTC also assists in the development and maintenance of forensic interview training programs utilizing the RATAc® forensic interviewing protocol. For further information, contact NCPTC at 507-457-2890 or visit our website at www.ncptc.org. For further information about NAPSAC, call 651-340-0537 or visit our website at www.napsac.us.

