

**THE FORENSIC INTERVIEWER AT TRIAL: GUIDELINES  
FOR THE ADMISSION AND SCOPE OF EXPERT WITNESS  
TESTIMONY CONCERNING AN INVESTIGATIVE  
INTERVIEW IN A CASE OF CHILD ABUSE**

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*“If we could first know where we are, and wither we are tending,  
we could then better judge what to do, and how to do it.”*

*Abraham Lincoln*<sup>1</sup>

## I. 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 1980s. In these cases, children were interviewed by professionals with little or no training in the art and science of eliciting information from children.<sup>2</sup> In some cases, children were interviewed on multiple occasions by multiple persons.<sup>3</sup> In an attempt to improve the response to these

1. GENE GRIESSMAN, THE WORDS LINCOLN LIVED BY: 52 TIMELESS PRINCIPLES TO LIGHT YOUR PATH 34 (1997).

2. See generally DAVID HECHLER, THE BATTLE AND THE BACKLASH: THE CHILD SEXUAL ABUSE WAR (1988) (reviewing a number of sexual abuse cases using an investigative reporting technique and style).

3. Nancy Chandler, *Children’s Advocacy Centers: Making a Difference One Child*

cases, children's advocacy centers (CAC) began to emerge and spread across the country.<sup>4</sup>

In addition to children's advocacy centers, a number of specialized training programs began to develop. In Minnesota, a CAC called CornerHouse developed one of the nation's first forensic interview training programs.<sup>5</sup> As of this writing, there are seventeen state programs teaching the CornerHouse interviewing model.<sup>6</sup> The state programs teaching the CornerHouse protocol are called ChildFirst or Finding Words.<sup>7</sup>

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.<sup>8</sup> This article 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.<sup>9</sup> The article also offers guidelines for challenging the testimony of those called as experts to critique a forensic interview.<sup>10</sup>

## II. THE FORENSIC INTERVIEWER AS EXPERT WITNESS

### A. *Legal Standards for the Admissibility of Expert Testimony*

The federal rules of evidence define an expert witness as follows:

If scientific, technical or other specialized knowledge will

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at a Time, 28 HAMLINE J. PUB. L. & POL'Y 315, 323–25 (2006).

4. *Id.* at 321–22.

5. Erna Olafson, *Introduction to New Series of Papers by Major Trainers about Child Forensic Interview Training Programs*, APSAC ADVISOR, Winter 2003, at 2 (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. *See generally ChildFirst State Updates*, CHILDFIRST (National Child Protection Training Center, Winona, Minn.), Spring 2009, at 6–9 [hereinafter *ChildFirst State Updates*].

7. *Id.*

8. *See infra* Part III.

9. *See infra* Part IV.

10. *See infra* Part V.

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.<sup>11</sup>

In applying this rule to both scientific and non-scientific evidence, the United States Supreme Court has cited five factors that may be considered. These factors are (1) whether the theory or technique can be and has been tested, (2) whether it “has been subjected to peer review and publication,” (3) whether “there is a high ‘known or potential rate of error,’” (4) “whether there are ‘standards controlling the technique’s operation,’” and (5) “whether the theory or technique enjoys ‘general acceptance’ within a ‘relevant scientific community.’”<sup>12</sup> With respect to the general acceptance standard, the United States Supreme Court noted that, although not required, “widespread acceptance can be an important factor in ruling particular evidence and a ‘known technique which has been able to attract minimal support within the community’ . . . may properly be viewed with skepticism.”<sup>13</sup> These factors are non-exclusive and non-exhaustive and their applicability in a particular case “depend[s] on the nature of the issue, the expert’s particular expertise, and the subject of the testimony.”<sup>14</sup>

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. A witness is qualified as an expert based not only on training received, but on the witness’s 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 Ph.D. who

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11. FED. R. EVID. 702.

12. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149–50 (1999) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–94 (1993)).

13. *Daubert*, 509 U.S. at 594 (quoting *United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir. 1985)).

14. *Kumho Tire*, 526 U.S. at 150 (quoting language from a brief of *amicus curiae*).

has merely read research on forensic interviewing but 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.<sup>15</sup>

*B. Applying FRE 702 and Daubert to the Field of Forensic Interviewing*

In applying the *Daubert/Kumho Tire* factors to the field of forensic interviewing, it is understandable why nearly every court examining the issue has allowed expert testimony in this area. The factors pertaining to the admission of expert testimony, and their applicability to the field of forensic interviewing are considered more fully below.

*1. Forensic Interviewing Techniques Can Be, and Have Been, Tested*

In the wake of the high profile day care cases of the 1980s, there was a demand to improve the training of those who conduct forensic interviews,<sup>16</sup> and, when possible, to interview children in “child-friendly” environments including Children’s Advocacy Centers.<sup>17</sup> As a result, hundreds of CACs were developed<sup>18</sup> and several national and state forensic interview training programs were established.<sup>19</sup> National and state organizations that offer quality

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15. See, e.g., *State v. Boston*, 545 N.E.2d 1220, 1231–32 (Ohio 1989) (“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 teacher, any of whom might have specialized knowledge, experience and training in recognizing occurrences of child abuse.”).

16. See MINNESOTA ATTORNEY GENERAL’S OFFICE, REPORT ON SCOTT COUNTY INVESTIGATIONS 21 (1985) (recommending “more extensive training” for law enforcement officers conducting sexual abuse investigations and stating that this “includes a need for training in child development and psychology and interviewing techniques”).

17. See Chandler, *supra* note 3, at 321–22.

18. *Id.* at 322.

19. See, e.g., Kathleen Coulborn Faller & Patricia Toth, *APSAC Forensic Interview Clinics*, APSAC ADVISOR, Spring 2004, at 2; Lori S. Holmes & Victor I. Vieth, *Finding Words/Half a Nation: The Forensic Interview Training Program of CornerHouse and APRF’s National Center for Prosecution of Child Abuse*, APSAC ADVISOR, Winter 2003, at 4; Erna Olafson & Julie Kenniston, *The Child Forensic Interview Training Institute of the Childhood Trust, Cincinnati Children’s Hospital*, APSAC ADVISOR, Winter 2004, at 11; Linda Cordisco Steele, *Child Forensic Interview*

forensic interview training include the American Professional Society on the Abuse of Children (APSAC),<sup>20</sup> the National CAC Academy in Huntsville,<sup>21</sup> CornerHouse,<sup>22</sup> the Cincinnati Children's Hospital Medical Center,<sup>23</sup> and First Witness.<sup>24</sup> Equally important, hundreds of peer-reviewed articles and dozens of books have been published outlining acceptable methods for interviewing children who may have been abused.<sup>25</sup>

## 2. *Forensic Interviewing Practices Have Been Published and Subjected to Peer Review*

As noted by one commentator, "there is a great deal of research to help understand the factors that influence children's disclosures of abuse, factors that affect accuracies and inaccuracies in their reports, and the best techniques for interviewing children."<sup>26</sup> Not only have forensic interviewing practices been subjected to peer review, but there is a significant "consensus among researchers and practitioners on the underlying principles that should guide interviews with children who might have been a victim or a witness to a crime."<sup>27</sup>

Although best practices are not always adhered to,<sup>28</sup> it is clear

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Structure, National Children's Advocacy Center, APSAC ADVISOR, Fall 2003, at 2 (all discussing national forensic interview training programs).

20. American Professional Society on the Abuse of Children, <http://www.apsac.org> (last visited Aug. 28, 2009).

21. This program offers basic and advanced forensic interview training as well as a course on Spanish speaking forensic interview training. National Children's Advocacy Center, <http://www.nationalcac.org> (last visited Aug. 28, 2009).

22. See CornerHouse, <http://www.cornerhousemn.org> (last visited Aug. 28, 2009).

23. See Cincinnati Children's Hospital Medical Center, <http://www.cincinnatichildrens.org> (last visited Aug. 29, 2009).

24. See First Witness, <http://www.firstwitness.org> (last visited Aug. 28, 2009).

25. See, e.g., Kathleen Coulborn Faller, *Interviewer Objectivity and Allegations of Sexual Abuse*, in INTERVIEWING CHILDREN ABOUT SEXUAL ABUSE: CONTROVERSIES AND BEST PRACTICE 44 (Kathleen Coulborn Faller ed., 2007); Alison R. Perona, Bette L. Bottoms & Erin Sorenson, *Research-Based Guidelines for Child Forensic Interviews*, 12 J. AGGRESSION, MALTREATMENT & TRAUMA 81, 94 (2005); Tisha R. A. Wiley, *Legal and Social Service Responses to Child Sexual Abuse: A Primer and Discussion of Relevant Research*, 18 J. CHILD SEXUAL ABUSE 267, 275-78 (2009) (outlining generally accepted principles for conducting forensic interviews).

26. Wiley, *supra* note 25, at 276.

27. Perona et. al., *supra* note 25, at 84.

28. See Hershkowitz et al., *Suspected Victims of Abuse Who Do Not Make Allegations: An Analysis of Their Interactions with Forensic Interviewers*, in CHILD SEXUAL ABUSE: DISCLOSURE, DELAY, AND DENIAL 97, 109-10 (Pipe et al. eds., 2007).

that a competently conducted forensic interview will assist maltreated children in disclosing their experiences. For example, a number of studies have found that “interviewer supportiveness has a positive effect on the amount of information provided by children.”<sup>29</sup> Even on issues that continue to be debated, the evidence is heavily weighted on one side or the other. For example, although some experts continue to express concerns about videotaping forensic interviews,<sup>30</sup> the available research supports this widespread practice.<sup>31</sup> Similarly, although some experts continue to question the utility of anatomical dolls, the majority of studies support their use<sup>32</sup> with the few studies expressing concerns being best read as a caution against the *inappropriate* use of dolls and the need for interviewer training prior to using the dolls.<sup>33</sup>

With respect to the forensic interview as a whole, researchers

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29. *Id.* at 109 (finding that interviewers trained in the NICHD protocol did not always adhere to the model and this failure impaired the ability of some maltreated children to disclose their abuse).

30. *See, e.g.*, KENNETH V. LANNING, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS FOR LAW-ENFORCEMENT OFFICERS INVESTIGATING THE SEXUAL EXPLOITATION OF CHILDREN BY ACQUAINTANCE MOLESTERS 107 (4th ed. 2001), available at [http://www.missingkids.com/en\\_US/publications/NC70.pdf](http://www.missingkids.com/en_US/publications/NC70.pdf) (stating “it is still my opinion that the disadvantages of taping generally outweigh the advantages”).

31. *See generally* Frank E. Vandervort, *Videotaping Investigative Interviews of Children in Cases of Child Sexual Abuse: One Community's Approach*, 96 J. CRIM. L. & CRIMINOLOGY 1353, 1415 (2006) (stating that “[videotaping] serves the interests of the community, as it achieves a fair and just result for victims, suspects, and defendants”); *see also* Amye R. Warren & Cara E. Woodall, *The Reliability of Hearsay Testimony: How Well Do Interviewers Recall Their Interviews with Children?*, 5 PSYCHOL. PUB. POL’Y & L. 355, 369 (1999) (finding that interviewers’ memories degraded following interviews with children and they had difficulty recalling with specificity the questions asked of children and the responses children provided during interviews).

32. Kathleen Coulborn Faller, *Anatomical Dolls: Their Use in Assessment of Children Who May Have Been Sexually Abused*, 14 J. CHILD SEXUAL ABUSE 1, 8 (2005) (noting the “majority of studies indicate [anatomical dolls] can be a useful tool, but there are also a few studies which do not support their use”). *See also* Mark Everson & Barbara Boat, *Putting the Anatomical Doll Controversy in Perspective: An Examination of the Major Uses and Criticisms of the Dolls in Child Sexual Abuse Evaluations*, 18 CHILD ABUSE & NEGLECT 113, 114 (1994) (noting that “in the proper hands, anatomical dolls are a highly effective and efficient tool for helping young children disclose and describe their sexual experiences”).

33. Faller, *supra* note 32, at 7 (noting that some of the research that criticizes the use of dolls “confound the study of doll efficacy with leading, presumptive, and speculative questions and with the distraction of doctor toys”).

have concluded that “child abuse investigators and evaluators should have confidence that they can assist most child victims to disclose sexual abuse *under the right condition*.”<sup>34</sup> This comment, though, must be read with a great deal of caution. Irrespective of the technique or interviewing methods employed, many maltreated children will never disclose their abuse.<sup>35</sup>

### 3. *There Are Standards and Guidelines Governing Forensic Interviewing*

The American Professional Society on the Abuse of Children (APSAC) promulgated guidelines for forensic or investigative interviewing<sup>36</sup> as well as separate guidelines for the usage of anatomical dolls.<sup>37</sup> The National Children’s Alliance (NCA), the federally funded organization that accredits CACs, published standards for the minimum training required of forensic interviewers as well as ongoing training and participation in peer review.<sup>38</sup> There are six essential components necessary to meet the NCA’s standard of a “legally sound” forensic interview as well as three items of “rated criteria.” These essential components and rated criteria include:

- **Specialized Training.** The NCA requires the individual conducting the forensic interview to have received “specialized training in conducting forensic interviews.”<sup>39</sup> To this end, each CAC

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34. Tonya Lippert et al., *Telling Interviewers About Sexual Abuse: Predictors of Child Disclosures at Forensic Interviews*, 14 CHILD MALTREATMENT 100, 111 (2009) (emphasis added).

35. See Bette Bottoms et al., *A Review of Factors Affecting Jurors’ Decisions in Child Sexual Abuse Cases*, in HANDBOOK OF EYEWITNESS PSYCHOLOGY 509 (M. Toglia et al. eds., 2006).

36. A copy of the APSAC Practice Guidelines called “Investigative Interviewing in Cases of Alleged Child Abuse” can be purchased from the APSAC website. APSAC, <http://www.apsac.org/mc/page.do?sitePageId=54514> (last visited Oct. 10, 2009).

37. APSAC Practice Guidelines, *Use of Anatomical Dolls in Child Sexual Abuse Assessments* (APSAC 1995), in John E.B. Myers, Karen J. Saywitz, & Gail S. Goodman, *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L.J. 3, 78–91 (1996) [hereinafter APSAC Practice Guidelines: Anatomical Dolls].

38. National Children’s Alliance Membership Standards, Forensic Interview, <http://www.nationalchildrensalliance.org/index.php?s=76&cat=4> (last visited Aug. 30, 2009).

39. National Children’s Alliance Membership Standards, Forensic Interview, Specialized Training in Conducting Forensic Interviews, <http://www>



“must demonstrate” that its forensic interviewer(s) meet at least one of the following criteria: (1) “[d]ocumentation of satisfactory completion of competency-based child abuse forensic interview training that includes child development;” or (2) “[d]ocumentation of 40 hours of nationally or state recognized forensic interview training that includes child development.”<sup>40</sup>

- **Written documentation describing the “general forensic interview process.”**<sup>41</sup> A CAC must have written guidelines or agreements for selecting a forensic interviewer for a particular case, for the sharing of information, and for the presence of various team members at the interview.<sup>42</sup>
- **Legally sound.** NCA requires its accredited members to conduct forensic interviews that are “legally sound, non-duplicative, non-leading and neutral.”<sup>43</sup> To this end, the standard encourages the use of “research-based” guidelines.<sup>44</sup>
- **Presence of MDT members at the forensic interview.** NCA requires core MDT team members to be “routinely present for the forensic interview” to “fulfill their professional role” and ensure “their respective informational needs are met.”<sup>45</sup>
- **Child-friendly.** NCA requires forensic interviews to be “routinely conducted at the CAC.”<sup>46</sup>

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.nationalchildrensalliance.org/index.php?s=76&item=78 (last visited Aug. 25, 2009).

40. *Id.*

41. National Children’s Alliance Membership Standards, Written Documents Describe the General Forensic Interview Process, <http://www.nationalchildrensalliance.org/index.php?s=76&item=79> (last visited Aug. 30, 2009).

42. *Id.*

43. National Children’s Alliance Membership Standards, Forensic Interview, Interviews are Legally Sound, Non-duplicative, Non-leading and Neutral, <http://www.nationalchildrensalliance.org/index.php?s=76&item=80>, (last visited Aug. 30, 2009).

44. *Id.*

45. National Children’s Alliance Membership Standards, Forensic Interview, MDT Members are Present for the Forensic Interview(s), <http://www.nationalchildrensalliance.org/index.php?s=76&item=81>, (last visited Aug. 30, 2009).

46. National Children’s Alliance Membership Standards, Forensic Interview, Forensic Interviews are Routinely Conducted at the CAC, <http://www.nationalchildrensalliance.org/index.php?s=76&item=82>, (last visited Aug. 30, 2009).

- **Ongoing training and peer review.** NCA requires forensic interviewers to receive “ongoing education in the field of child maltreatment and/or forensic interviewing consisting of a minimum of 3 hours per every 2 years of CEU/CME credits” and “participation in a formalized peer review process for forensic interviews.”<sup>47</sup>

#### *4. Forensic Interviewing is Widely Accepted in the Field of Child Protection*

With numerous national and state forensic interviewing courses in place,<sup>48</sup> and with national guidelines and actual accreditation standards applying to forensic interviews conducted within CACs, it is fair to say the concept of forensic interviewing is widely accepted in the child protection community in the United States. What is true generally about forensic interviewing is equally true about specific practices or models. For example, several leading researchers have noted the CornerHouse RATAC protocol has been “officially adopted by many jurisdictions” and is “very popular” among front line forensic interviewers.<sup>49</sup> Accordingly, at least with respect to the RATAC interviewing protocol and accompanying courses, this practice has gained “general acceptance” in the field—a relevant consideration for admitting these practitioners as expert witnesses.<sup>50</sup> Although not required, the United States Supreme Court has noted that “widespread acceptance can be an important factor” in admitting expert

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[www.nationalchildrensalliance.org/index.php?s=76&item=82](http://www.nationalchildrensalliance.org/index.php?s=76&item=82) (last visited Aug. 30, 2009).

47. National Children’s Alliance Membership Standards, Forensic Interview, Ongoing Training and Peer Review, <http://www.nationalchildrensalliance.org/index.php?s=76&item=84> (last visited Aug. 30, 2009).

48. See, e.g., *ChildFirst Training Calendar*, CHILDFIRST (National Child Protection Training Center, Winona, Minn.), Spring 2009, at 5 (listing state and national training opportunities in forensic interviewing).

49. Michael E. Lamb, Yael Orbach, Irit Hershkowitz, Phillip W. Esplin & Dvora Horowitz, *A Structured Forensic Interview Protocol Improves the Quality and Informativeness of Investigative Interviews with Children: A Review of Research Using the NICHD Investigative Interview Protocol*, 31 CHILD ABUSE & NEGLECT 1201, 1211 (2007).

50. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152–55 (1999); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–94 (1993).

testimony.<sup>51</sup>

##### 5. *The Known or Potential Error Rate*

The concept of an “error rate” is difficult to apply to the field of forensic interviewing. For example, a poorly conducted forensic interview may nonetheless result in an accurate disclosure of abuse.<sup>52</sup> It is equally true that an exceptional forensic interview may result in inaccurate information.<sup>53</sup> Nonetheless, there is evidence that properly conducted forensic interviews lessen the possibility that a child’s statement is contaminated by suggestive or otherwise improper practices.<sup>54</sup>

Some courts have held that a rigid of application of “error rate” or other *Daubert* standards should not apply to all expert testimony but only that which involves “innovative scientific techniques.”<sup>55</sup> The Connecticut Supreme Court is less rigid in admitting expert testimony in cases where:

the jury is in a position to weigh the probative value of the testimony without abandoning common sense and sacrificing independent judgment to the expert’s assertions based on his special skill or knowledge. . . . Furthermore, where understanding of the method is accessible to the jury, and not dependent on familiarity with highly technical or obscure scientific theories, the expert’s qualifications, and the logical bases of his opinions and conclusions can be effectively challenged by cross-examination and rebuttal evidence.<sup>56</sup>

Applying this language to a forensic interview, the jury can likely understand more easily expert testimony concerning what is

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51. *Daubert*, 509 U.S. at 594 (citing *United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir. 1985)).

52. See generally, Amy Russell, *Assessing Children’s Statements for Investigative and Court Purposes*, CENTER PIECE (Nat’l Child Protection Training Center, Winona, Minn.), vol. 1(6) 2009, at 1 (discussing various methods of determining abuse).

53. *Id.*

54. See generally, Lippert et al., *supra* note 34 (examining characteristics that facilitate children’s disclosure of sexual abuse during a forensic interview). Perhaps it is better not to address whether the process of forensic interviewing results in erroneous disclosures, but whether or not the interviewing model or course is designed to graduate interviewers who make a low, acceptable number of errors in terms of question types, etc.

55. *State v. Griffin*, 869 A.2d 640, 647 (Conn. 2005).

56. *State v. Borelli*, 629 A.2d 1105, 1111 (Conn. 1993) (quoting *State v. Hasan*, 534 A.2d 877, 880 (Conn. 1987)).

or is not a suggestible question or any number of other practices that take place in a forensic interview. Jurors will likely have had interactions with children in their role as parents or in other contexts. For these reasons, courts may be less rigid in analysis of “error rates” or other factors that may be critical when analyzing novel scientific theories.

#### 6. *The Commonality of Forensic Interviewing Protocols*

There are a number of forensic interviewing protocols in place in the United States, with most of these protocols calling for a “phased interview” with the number of phases ranging from three to nine.<sup>57</sup> The reason for the different phases is that some “protocols attend to issues not addressed in others” and “some writers combine several components into a single phase.”<sup>58</sup> Although “these structures vary, there is also uniformity in these structures.”<sup>59</sup> Specifically, advising a phased interview allows for consistency. It begins with orienting the child to the interview and allowing the interviewer to gather information about how the child functions. The next phase considers the abuse experienced by the child. The final phase allows the child closure.<sup>60</sup>

In commenting on the various forensic interview training programs and protocols currently in place, Linda Cordisco Steele notes these “models possess many more similarities than differences.”<sup>61</sup> Moreover, the variations within these protocols are forensically defensible. Dr. Erna Olafson writes:

It is important to emphasize . . . that there is no single child forensic interview model or protocol that must be used in order to be forensically defensible. Structured interview protocols that guide interviewers to ask open questions in order to invite free recall narratives from children are solidly grounded in the research, but in the real world of child interviewing, flexible guidelines can also be necessary.<sup>62</sup>

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57. Kathleen Coulborn Faller, *Interview Structure, Protocol, and Guidelines, in* INTERVIEWING CHILDREN ABOUT SEXUAL ABUSE: CONTROVERSIES AND BEST PRACTICE 66, 66–67 (Kathleen Coulborn Faller, ed. 2007).

58. *Id.* at 68.

59. *Id.* at 88.

60. *Id.* at 67.

61. Steele, *supra* note 19, at 2.

62. Olafson, *supra* note 5, at 2.

Although the interviewing protocols in use in the United States are more similar than dissimilar, and all of the leading models are based in research, there has not been systematic research on course *graduates* of any of these courses. Some have suggested there is an “urgent need” for these courses to be evaluated in a manner similar to what was done by the National Institute of Child Health and Human Development (NICHD).<sup>63</sup> The NICHD partnered with investigative programs in England, Israel, and Salt Lake City, Utah in teaching and monitoring a scripted protocol. Not surprisingly, the researchers found that “intensive training in the use of a highly structured . . . protocol, followed by continuing supervision in the form of monthly[,] day-long seminars, supplemented in some cases by detailed individual feedback on recent interviews, yielded dramatic improvements on these measures of interview quality.”<sup>64</sup> Some commentators have noted the practical difficulties in implementing this recommendation. For example, Kathleen Colbourn Faller, from the University of Michigan, notes, “Most high-volume interviewing programs will likely have difficulty finding resources for such procedures for supervision.”<sup>65</sup> Michael Lamb and his colleagues from the NICHD agree with this but conclude that, although it is “costly to continue providing intensive support and training to interviewers . . . researchers have yet to identify any less costly techniques that are equivalently effective and we have shown that the termination of continuing supervision is associated with rapid declines in the quality of forensic interviewing.”<sup>66</sup>

In considering the NICHD recommendations, there are several points that need to be emphasized. First, it is erroneous to suggest that graduates of the nation’s leading forensic interviewing training programs—none of which specifically teach the NICHD

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63. See generally, Nancy E. Walker, *Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility*, 65 LAW & CONTEMP. PROBS. 149 (2002) (discussing, among other things, the necessity of establishing and maintaining standards for quality control in conducting and evaluating forensic interviews of children).

64. Michael E. Lamb, Kathleen J. Sternberg, Yael Orbach, Irit Hershkowitz, Dvora Horowitz & Philip W. Esplin, *The Effects of Intensive Training and Ongoing Supervision on the Quality of Investigative Interviews with Alleged Sex Abuse Victims*, 6 APPLIED DEVELOPMENTAL SCI. 114, 114 (2000).

65. Faller, *supra* note 57, at 88.

66. Lamb et al., *supra* note 64, at 124.

structured protocol<sup>67</sup>—are not supported by research. All of the major forensic interview training programs utilize the extensive body of research in this field in providing instruction with some courses, such as the state and national courses teaching the RATAC protocol, requiring students to read much of the pertinent research.<sup>68</sup> Indeed, most, if not all of the major national and state forensic interview training programs rely on NICHD research in developing their protocols and in teaching these skills to practitioners.<sup>69</sup>

Second, the essential point Lamb and his colleagues make is not that the major courses are failing to teach interviewing practices rooted in research, but that, without ongoing training and supervision, these courses are inadequate by themselves.<sup>70</sup> This is a legitimate concern and, in response, courses such as CornerHouse and ChildFirst teach the necessity of ongoing training and participation in peer review.<sup>71</sup> Moreover, the National

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67. See Faller & Toth, *supra* note 19, at 2 (noting the “APSAC Forensic Interview Clinic is unique in that it does not advocate, and is not meant to teach, a particular interview protocol or single approach”); Holmes & Vieth, *supra* note 19, at 4 (noting the courses teach the RATAC protocol); Olafson & Kenniston, *supra* note 19, at 11 (noting the course provides instruction in the “Childhood Trust Flexible Guidelines” and Thomas Lyon’s “adaptation” of the NICHD protocol); Steele, *supra* note 19, at 2 (describing the “stages” of the NCAC model).

68. Holmes & Vieth, *supra* note 19, at 4 (noting the child protection professionals attending these courses study research on their own: “All *Finding Words* students must study several hundred pages of homework assignments. The purpose behind the homework is to empower students to testify in court that they have not only attended lectures about pertinent research but they have also read much of this research themselves.”).

69. See Olafson & Kenniston, *supra* note 19, at 11 (noting the course provides instruction in the “Childhood Trust Flexible Guidelines” and Thomas Lyon’s “adaptation” of the NICHD protocol); Steele, *supra* note 19, at 2 (noting the NCAC forensic interviewing course exposes students to an interview format that “follows the work and directive of Michael Lamb and colleagues . . .”). As noted by Dr. Faller, findings on the NICHD protocol “have greatly enhanced professional knowledge about how to elicit accurate and detailed information from children who may have been maltreated and have informed most of the interview structures employed in forensic interviews of children.” Faller, *supra* note 57, at 89.

70. Michael E. Lamb et al., *Is Ongoing Feedback Necessary to Maintain the Quality of Investigative Interviews with Allegedly Abused Children?*, 6 APPLIED DEVELOPMENTAL SCI. 35, 40 (2002) (“[M]any workshops and training programs have been designed to improve adherence to professionally endorsed practices. Unfortunately, training programs of this sort typically have little impact on the investigative techniques employed by forensic investigators.”).

71. For example, students attending a CornerHouse or ChildFirst forensic

Children's Alliance mandates some level of ongoing training and peer review for forensic interviewers working in Children's Advocacy Centers.<sup>72</sup> Forensic interviewers trained in one of the state or national courses teaching the CornerHouse RATAC protocol<sup>73</sup> receive ongoing support which includes peer review,<sup>74</sup> technical assistance,<sup>75</sup> participation in a listserv,<sup>76</sup> advanced forensic interview training including webinars,<sup>77</sup> and annual

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interview training program are not only taught the importance of ongoing peer review; this is a skill they are required to practice as part of the instruction. Holmes & Vieth, *supra* note 19, at 4 (noting that "[t]he purpose behind the peer critiques is to get each community comfortable with ongoing peer review. We teach students that no ego should stand in the way of protecting a child and that we have a moral responsibility to be vigilant in improving one another's skills.").

72. The National Children's Alliance requires forensic interviewers to receive "ongoing education in the field of child maltreatment and/or forensic interviewing consisting of a minimum of 3 hours per every 2 years of CUE/CME credits" and "participation in a formalized peer review process for forensic interviews." National Children's Alliance Membership Standards, Forensic Interview, Interviews are Legally Sound, Non-duplicative, Non-leading and Neutral, <http://www.nationalchildrensalliance.org/index.php?s=76&item=80>, (last visited Aug. 30, 2009).

73. For a list of states participating in the program, and a description of each state's program, see *ChildFirst State Updates*, *supra* note 6, at 6–9.

74. Students are trained as teams and taught to provide ongoing peer review of their forensic interviews. All state and national faculty teaching the RATAC protocol are able to participate in national peer review of their interviews. Telephone Interview with Jennifer Anderson, Assistant Executive Director, CornerHouse (Sept. 21, 2009). For a general discussion of the importance of conducting peer review of forensic interviewers, see Victor Vieth, *In the Shadow of Defense Counsel: Conducting Peer Review of Forensic Interviews in an Age of Discovery*, CENTERPIECE (National Child Protection Training Center, Winona, Minn.), vol. 1(10) 2009, at 1–6.

75. Any course graduate of a CornerHouse or ChildFirst program, or other forensic interview training programs, can contact both CornerHouse and the National Child Protection Training Center for ongoing advice or other assistance in conducting interviews and defending their work in court. Telephone Interview with Jennifer Anderson, Assistant Executive Director, CornerHouse (Sept. 21, 2009). See generally National Child Protection Training Center, <http://www.ncptc.org> (last visited Aug. 30, 2009) (containing several sections on training and publications designed to teach techniques of the program).

76. Graduates are enrolled in a bulletin board listserv which allows them, on a daily basis, to continue to draw on the expertise of the national and state CornerHouse and ChildFirst faculty as well as the 8,000 graduates of the program. Telephone Interview with Jennifer Anderson, Assistant Executive Director, CornerHouse (Sept. 21, 2009).

77. CornerHouse, which developed the protocol used in ChildFirst, teaches an intensive, advanced course for forensic interviewers that is open to any CornerHouse or ChildFirst graduate who has used the protocol in at least fifteen

updates on recent research or other developments in the field.<sup>78</sup>

Third, and most importantly, regardless of supervision and ongoing training, there is no guarantee that a forensic interviewer will perform at a high level in a particular case. The only way to evaluate the quality of a particular interviewer in a particular case is to assess the *actual* interview in that case. This is precisely what happens when a case of child sexual abuse comes to trial where the forensic interviewer and an actual forensic interview are scrutinized by judges, juries, defense attorneys and defense experts. Because a forensic interview is designed to be a “legally sound” method for generating evidence,<sup>79</sup> the ultimate test of any interviewer, and the particular interviews, is acceptance in court.

### III. CASE LAW ON FORENSIC INTERVIEWERS AS EXPERT WITNESSES

Given the relative newness of the profession of forensic interviewer, courts are only now beginning to address this area of expertise. Nonetheless, appellate courts in at least ten different states have addressed the issue.<sup>80</sup>

#### A. *Cases Not Discussing a Forensic Interviewing Protocol*

In Florida, a court found there was an insufficient record to qualify a forensic interviewer as an expert witness.<sup>81</sup> Because the

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interviews of children reported as being maltreated. Several of the state ChildFirst programs have also developed advanced courses for their students. The National Child Protection Training Center also offers an advanced course, entitled the *Forensic Interviewer at Trial*, which is designed for teams of forensic interviewers and child protection attorneys. Moreover, the National Child Protection Training Center offers a series of advanced workshops that are free and available online. See National Child Protection Training Center, <http://www.ncptc.org> (last visited Aug. 30, 2009) (containing more complete information and course descriptions).

78. Once a year, hundreds of CornerHouse and ChildFirst graduates attend *When Words Matter*—a national course in which students review the latest research and emerging trends in the field of forensic interviewing. For more information, see the National Child Protection Training Center’s website at <http://www.ncptc.org>.

79. The National Children’s Alliance requires its accredited members to conduct forensic interviews that are “legally sound, non-duplicative, non-leading and neutral.” National Children’s Alliance Membership Standards, Forensic Interview, Interviews are Legally Sound, Non-duplicative, Non-leading and Neutral, <http://www.nationalchildrensalliance.org/index.php?s=76&item=80> (last visited Oct. 10, 2009).

80. See *infra* Part III. A–B.

81. *Lena v. State*, 901 So.2d 227, 233 (Fla. Dist. Ct. App. 2005).



court did not elaborate on what forensic interviewing protocol was used or the interviewer's level of training, it is difficult to speculate on what was missing.<sup>82</sup>

In Louisiana, with very little discussion, an appellate court allowed a forensic interviewer employed at a CAC to testify as an expert witness.<sup>83</sup> 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.<sup>84</sup>

In another Louisiana case, the court held that although the forensic interviewer lacked any formal "college coursework" pertaining to child abuse, she was nonetheless qualified as an expert witness based on her "extensive formal training in forensic interview and sex-crime investigation and her years of experience."<sup>85</sup>

In Alabama, a forensic interviewer at the Bessemer Child Advocacy Center, was not only allowed to testify as an expert witness but also to offer an opinion that a child had been sexually abused.<sup>86</sup> The appellate court did not discuss the credentials of the interviewer or any other criteria that rendered the interviewer capable of offering such testimony.<sup>87</sup>

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82. *Id.* The court said that because there is no recognized field of expertise in forensic interviewing, the witness should not have been presented as an expert. Her educational background and work experience were allowed to be presented. *Id.*

83. *See* State v. Hilton, 764 So.2d 1027, 1033 (La. Ct. App. 2000).

84. *Id.*

85. State v. Lofton, No. 2008 KA 0747, 2008 WL 4190572, at \*3 (La. Ct. App. Sept. 12, 2008).

86. Sanders v. State, 986 So. 2d 1230, 1232 (Al. Crim. App. 2007).

87. *Id.* at 1232-34.

*B. Cases That Also Discuss a Forensic Interviewing Protocol*

As of this writing, dozens of appellate courts from at least seven different states have analyzed forensic interviews conducted by professionals trained in the CornerHouse model and using the CornerHouse protocol RATAc.<sup>88</sup> At this time, it appears that RATAc is the *only* forensic interviewing protocol specifically analyzed by *any* appellate court in the United States.<sup>89</sup> In one case, though, the court noted that an interviewer trained in the RATAc protocol had also received forensic interview training through two of the other national forensic interview training programs.<sup>90</sup>

In Georgia, the appellate court rejected a defense claim that a deputy sheriff trained through *Finding Words* was insufficiently trained to conduct a forensic interview.<sup>91</sup> The court found that the investigator had “taken specialized training courses in interviewing children in sex abuse cases,” “conducted the interview in a specialized, ‘child-friendly’ environment,” and “employed a known method for interviewing child victims, the RATAc method.”<sup>92</sup>

In Mississippi, the appellate court found that a graduate of that state’s ChildFirst program was qualified to testify as an expert

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88. See, e.g., *Kilby v. Commonwealth*, 663 S.E.2d 540 (Va. Ct. App. 2008) (discussing testimony of Minnesota-trained forensic expert).

89. It may be that other protocols were used in cases in which forensic interviews were admitted into evidence or even in cases where a forensic interviewer was qualified as an expert witness. In none of these instances, though, was the actual protocol analyzed by an appellate court. For example, some commentators contend “[o]ne can easily identify cases in which NICHD-trained interviewers conducted admissible interviews . . . .” T.D. Lyon et al, *Legal and Psychological Support for the NICHD Protocol: Author’s Response to Vieth*, J. CHILD ABUSE & NEGLECT 4 (2008) available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1065&context=thomaslyon> (last visited Oct. 10, 2009). However, the only case these commentators cite involves a forensic interview that was admitted into evidence. *Id.* (citing *State v. Quinonez-Gaiton*, 54 P.3d 139, 142 (Utah Ct. App. 2002)). However, the specific protocol was not discussed or analyzed, and the forensic interviewer was not utilized as an expert witness. *Id.*

90. *Kilby*, 663 S.E.2d at 544 n.3 (noting the credentials of the expert witness including forensic interview training through two courses teaching the RATAc protocol: First Witness in Duluth, Minnesota, and ChildFirst, offered through the National Child Protection Training Center). The witness also attended the forensic interview training courses of APSAC and the National Children’s Advocacy Center in Huntsville, Alabama. *Id.*

91. *In re A.H.*, 578 S.E.2d 247, 250 (Ga. Ct. App. 2003).

92. *Id.* See also *Baker v. State*, 555 S.E.2d 899, 902 (Ga. Ct. App. 2001) (finding that a videotaped forensic interview, conducted using the RATAc protocol, had the “requisite degree of trustworthiness to be admitted at trial”).

on forensic interviewing, agreeing with the state that the interviewer's testimony was "the product of reliable principles and methods."<sup>93</sup> In a concurring opinion, the court noted that RATAc "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."<sup>94</sup> In subsequent years, other Mississippi appellate courts have admitted graduates of ChildFirst Mississippi as expert witnesses educating jurors on issues such as the difficulties a child may have in remembering dates or times.<sup>95</sup> Indeed, at least one Mississippi case provides a comprehensive recitation from a CornerHouse graduate detailing the intensity of the course, his continuing access to yearly training, and his familiarity with research supporting the procedures used in the RATAc protocol.<sup>96</sup>

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93. *Mooneyham v. State*, 915 So. 2d 1102, 1104 (Miss. Ct. App. 2005).

94. *Id.* at 1107–08 (Chandler, J., concurring).

95. *Smith v. State*, 925 So. 2d 825, 835 (Miss. 2006).

96. *Lattimer v. Mississippi*, 952 So. 2d 206, 217 (2006). This case includes the following testimony from Keith Stovall, a forensic interviewer trained by CornerHouse:

We have trainings that we go to, annual conferences. I go to at least two or three a year. But the training that I rely on the most is CornerHouse. CornerHouse is a child evaluation center in Minneapolis, Minnesota. And I went there for a week when I first began. And there we receive graduate level instruction on child development, child psychology, linguistics, how kids view life, how they experience reality, how they experience abuse, how they go about telling about abuse.

As well as physical, we also, we hear medical information about kids and their bodies and development and about the effect of sexual abuse on children.

But the central issue at CornerHouse is interviewing kids. And so we interview adults who are acting as children who have been abused, trained actors, professional actors. And we are critiqued by the class. The class is watching via closed circuit television. And also we are critiqued by the instructor. So it's an intensive forty-hour course.

Afterwards, the prosecution asked Stovall about "forensic interviewing."

The following exchange ensued:

Q. Now, this area you called forensic interviewing?

A. Uh-huh.

Q. What is it? When you say the word forensic, what do you mean?

A. Forensic interviewing is, it's an investigative interview. Although my background and training is in therapy and I do employ a lot of therapeutic techniques with kids, primarily it's an investigative interview. It's not my investigation. The child who I interview is brought to me by an investigator, whether that be DHS or law enforcement. And they bring the child to me to get a non-biased interview. I am not affiliated with

In Texas, the court of appeals upheld the ruling of a trial court judge that the RATAC protocol developed by CornerHouse was “generally accepted in the scientific community for conducting forensic interviews of children.”<sup>97</sup> In Virginia, a graduate of four forensic interview training programs, including two teaching RATAC, was qualified to educate the jurors on issues pertaining to recantation.<sup>98</sup> In a family court decision in Maryland, the appellate court found that experts, whose qualifications included training and the actual usage of RATAC, used “more acceptable forms of fact-gathering.”<sup>99</sup>

In South Carolina, a social worker who conducted a forensic interview using RATAC offered her opinion, based on the forensic

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their organization, so I don't benefit from proving that this child has or has not been abused. My job simply is to get the information as best as possible and to make an evaluation of that.

And so it is forensic in the sense that it is in the context of an investigation.

Q. And do you indeed interview children where you do not substantiate what it is that the children are telling you?

A. I do

Q. Are you familiar with literature and research regarding the techniques and procedures and protocols that you use?

A. We do. We refer to them quite frequently.

Q. And have there been any studies that relate to those techniques?

A. Yes, all of the techniques that we are employing have been researched thoroughly and are continuously researched. And part of the reason why I go to these conferences is to get updates on the literature, to get updates on the research, to make sure that the interviewing that we are doing at the center is the best practice.

97. *Id.*; Wright v. Texas, No. 2-06-219-CR, 2007 WL 1726253, at \*3 (Tex. App. June 14, 2007).

98. *See* Kilby v. Commonwealth, 663 S.E.2d 540, 548 (Va. Ct. App. 2008). In *Kilby*, the court noted the credentials of the expert witness, including forensic interview training through two courses teaching the RATAC protocol: “First Witness Program in Duluth, Minnesota, Finding Words in Winona, Minnesota, and the American Professional Society of Abused Children.” *Id.* at 544 n.3. The witness also received “advanced training” at the National Advocacy Center in Huntsville, Alabama and ChildFirst, offered through the National Child Protection Training Center. *Id.* The witness also attended the forensic interview training courses of APSAC and the National Children’s Advocacy Center in Huntsville, Alabama. *Id.*

99. *Tarachanskaya v. Volodarsky*, 897 A.2d 884, 900 (Md. Ct. Spec. App. 2006). In another case, the Supreme Court of Connecticut declined to set aside a verdict based on an allegation that the use of anatomical diagrams and an inquiry about touches were inappropriate, the court noting these specific approaches did not produce a disclosure in this particular case. *See* State v. Michael H., 970 A.2d 113, 118 n.5 (Conn. 2009).

interview, that “further medical investigation was necessary.”<sup>100</sup> The appellate court found the forensic interviewer was qualified to render this opinion because the interviewer “received specialized training on the RATAC method, which is used on a nationwide basis and is nationally recognized for interviewing child victims of sexual crimes.”<sup>101</sup> 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 RATAC method was developed in response to concerns about child victims’ testimony being tainted by police suggestiveness.”<sup>102</sup> On appeal, the South Carolina Supreme Court found that, because the interviewer only offered an opinion that the child required a medical examination, there was no need to qualify the interviewer as an expert.<sup>103</sup>

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.<sup>104</sup>

### C. *The Scope of the Forensic Interviewer’s Testimony*

The Alabama Court of Appeals allowed a forensic interviewer to offer an opinion as to whether a child was sexually abused, provided there was no opinion as to the perpetrator.<sup>105</sup> In Minnesota, an appellate court has 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.<sup>106</sup> More recent Minnesota decisions, however, appear to be more restrictive.<sup>107</sup> In Mississippi, courts have allowed forensic

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100. State v. Douglas, 626 S.E.2d 59, 69 (S.C. Ct. App. 2006).

101. *Id.* at 70.

102. *Id.* at 72.

103. State v. Douglas, 671 S.E.2d 606, 609 (S.C. 2009).

104. See, e.g., State v. Wembley, 712 N.W.2d 783, 796 (Minn. Ct. App. 2006) (permitting a CornerHouse interviewer to offer expert testimony as to the criteria for assessing a child’s statement provided the testimony did not include an opinion on the credibility of the child); State v. Hollander, 590 N.W.2d 341, 344–45 (Minn. Ct. App. 1999) (detailing expert opinions rendered by CornerHouse interviewer).

105. Sanders v. State, 986 So. 2d 1230, 1236 (Ala. Crim. App. 2007).

106. See *Hollander*, 590 N.W.2d at 344–45.

107. See, e.g., State v. Wembley, 712 N.W.2d 783, 792 (Minn. 2006) (allowing a

interviewers to testify that a child's statements are "consistent" with sexual abuse.<sup>108</sup>

Law professor John Myers has criticized these decisions, calling them "disturbing development[s]."<sup>109</sup> Although a forensic interviewer's opinion that a child has been sexually abused is of questionable assistance to the jury, Myers also 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.<sup>110</sup> Myers claims: "It is difficult to see any legitimate relevance of such expert testimony."<sup>111</sup>

Although it is problematic for *any* witness to bolster a child's credibility by rendering an opinion that 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.<sup>112</sup>

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,

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forensic interviewer to testify as to criteria for evaluating a child's statement provided the interview does not offer an opinion as to the child's actual credibility).

108. See, e.g., *Hodgin v. State*, 964 So. 2d 492 (Miss. 2007) (holding that testimony of an expert in the field of child abuse concerning opinion that child was molested should be allowed); *Williams v. State*, 970 So. 2d 727 (Miss. Ct. App. 2007) (holding that forensic interviewer's knowledge, in the form of her opinion, could have been helpful to the jury in deciding whether child was sexually abused); *Mooneyham v. State*, 915 So. 2d 1102 (Miss. Ct. App. 2005) (holding that the admission of the testimony from a forensic interviewer, classified as an expert, was within the sound discretion of the trial court).

109. 1 JOHN E.B. MYERS, MYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES § 6.17(C)(1) (4th ed. Supp. 2009).

110. *Id.*

111. *Id.*

112. *Id.*

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.<sup>113</sup>

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 . . . .”<sup>114</sup> 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.<sup>115</sup> Without this knowledge, jurors and judges may unfairly denigrate answers a child provides in a forensic interview.

For example, in one case 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.<sup>116</sup> 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.

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113. State v. Boston, 545 N.E.2d 1220, 1231–32 (Ohio 1989).

114. FED. R. EVID. 702 (emphasis added).

115. See generally, Myers et al., *supra* note 37 (providing an overview of the issues and possible solutions for evaluating forensic interviews admitted into evidence).

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

In another case, an eight-year-old boy told a forensic interviewer that he was lying naked on his bed with his belly flat against the mattress.<sup>117</sup> The boy said the perpetrator, also naked, laid on top of him and “butt fucked” him from behind. The boy contended this went on until “sticky, white stuff” came out of the perpetrator’s penis. The boy said the semen “ended up on my belly.” Although the boy gave a detailed description of abuse, it is confusing how semen ended up on his belly, which was flat against the bed, if the perpetrator was, indeed, anally penetrating the child. Moreover, if there was anal penetration, the absence of medical evidence may be concerning. This is a perfect example of the value of anatomical dolls as a demonstration aid. When asked to demonstrate the abuse with the dolls, the child showed that the perpetrator’s penis was not in the boy’s anus but rather was being pushed in and out of the boys legs from behind. If the interviewer had not employed the dolls, the child’s statements might have been misinterpreted by the jurors and resulted in an acquittal. Moreover, if the dolls had not been used, the government might have over-charged the case, concluding there was sexual penetration when, in fact, there was only sexual contact. In a case like this, it would be appropriate for the forensic interviewer to assist the jury in understanding this evidence by explaining her reasons for using the dolls, the research supporting their usage, and the fact that the usage in this particular case fell within the APSAC national guidelines.<sup>118</sup>

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.”<sup>119</sup> Given the high profile nature of sexual abuse cases in the 1980s, 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

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117. This scenario is based on an actual case the author handled as a prosecutor. The perpetrator pled guilty.

118. See APSAC Practice Guidelines: Anatomical Dolls, *supra* note 37.

119. See FED. R. EVID. 702.



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. Indeed, just as the government does not introduce DNA evidence without providing expert testimony as to the collection and preservation of the samples tested, the government should also be able to offer expert testimony that the taking of a child's statement was not done in a way that contaminates the process. This, perhaps, is why some experts have called the forensic interview the "DNA" of a child sexual abuse case.<sup>120</sup>

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."<sup>121</sup> 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, Mississippi, or Alabama, 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 because this expertise is beyond the common experiences of most jurors.

#### IV. GUIDELINES FOR FORENSIC INTERVIEWERS WHO MAY BE CALLED AS EXPERT WITNESSES

##### A. *The Forensic Interviewer Should Receive Basic and Advanced Training*

As noted by one commentator, "the best forensic interviews

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120. MARGARET ELLEN PIPE ET AL., DO BEST PRACTICE INTERVIEWS WITH CHILD ABUSE VICTIMS INFLUENCE CASE PROCESSING? (November 2008), <http://www.ncjrs.gov/pdffiles1/nij/grants/224524.pdf>.

121. *State v. Douglas*, 626 S.E.2d 59, 68 (S.C. Ct. App. 2006), *rev'd on other grounds*, 671 S.E.2d 606 (S.C. 2009).

are conducted by the most well-trained interviewers . . .[and] the key to ensuring the success of the forensic interview portion of the CSA investigation is in having well-trained forensic interviewers follow research-based guidelines and stay current with developing recommendations.”<sup>122</sup> At a minimum, the forensic interviewer should have completed a comprehensive forensic interviewing course in which the interviewer demonstrates his skills and is tested on his knowledge. There is research demonstrating that “practice opportunities using trained respondents are more effective in improving the performance of investigative interviews than those using untrained fellow participants.”<sup>123</sup> Stated differently, the researchers found that “[a]lthough the performance of all participants improved with practice, the beneficial effect of having trained actors play the role of a child was robust.”<sup>124</sup> This study supports the practice in many forensic interview training programs, including CornerHouse and ChildFirst, of using trained actors in practice scenarios.<sup>125</sup>

After the completion of an initial forensic interview training program, the interviewer should, on a regular basis, attend advanced forensic interview training, and must otherwise stay abreast of developments in the field.<sup>126</sup>

*B. The Forensic Interview Should Use Protocol Supported by Research*

There are a number of acceptable models for forensic interviewing that are rooted in research. These protocols include

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122. Wiley, *supra* note 25, at 277–78.

123. Martin B. Howell, Ronald P. Fisher & Carolyn H. Hughes-Scholes, *The Effect of Using Trained Versus Untrained Respondents in Simulated Practice Interviews About Child Abuse*, 32 CHILD ABUSE & NEGLECT 1007, 1015 (2008).

124. *Id.* at 1014.

125. John Weiss, *An Act That Could Save a Life*, ROCHESTER POST BULL., Dec. 17, 2008, at B4; John Weiss, *Acting as A Child Can be Difficult*, ROCHESTER POST BULL., Dec. 17, 2008, at B3 (discussing the role of actors in *ChildFirst* forensic interview training programs).

126. 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. The Center also offers free webinars, with many of the workshops covering advanced forensic interviewing issues. National Child Protection Training Center Partnerships, [http://www.ncptc.org/index.asp?Type=B\\_BASIC&SEC={67032EB6-93EA-4A11-ACC2-3D14F588E8DC}](http://www.ncptc.org/index.asp?Type=B_BASIC&SEC={67032EB6-93EA-4A11-ACC2-3D14F588E8DC}) (last visited Aug. 23, 2009).

the NICHD, Step Wise, the Poole & Lamb “flexible protocol” and CornerHouse’s RATAc protocol.<sup>127</sup> Experts in the field have noted that “[t]hese and other protocols have similar characteristics and are based upon research.”<sup>128</sup> 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.”<sup>129</sup>

An interviewer must understand the research which supports his or her forensic interviewing protocol and be able to articulate this in court.<sup>130</sup> 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.<sup>131</sup>

*C. The Forensic Interviewer Should Participate in Peer Review*

The importance of peer review cannot be over-stated. As noted by Michael Lamb, “interviewers continue to maintain or improve their skills *only* when they regularly review their own and others’ interviews closely, discussing their strategies, successes and mistakes with other interviewers”<sup>132</sup>

*D. The Forensic Interviewer Should be Familiar With and Work Within Nationally Accepted Guidelines and Standards*

At a minimum, the forensic interviewer should be familiar with the forensic interviewing guidelines promulgated by the American Professional Society on the Abuse of Children (APSAC).<sup>133</sup> If the interviewer uses anatomical dolls as part of the investigative

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127. Perona et al., *supra* note 25, at 91.

128. *Id.*

129. *Id.* at 84.

130. *See, e.g., id.* at 91 (emphasizing that the components of the forensic interview are based upon empirical research).

131. *See generally* NATIONAL CHILD PROTECTION TRAINING CENTER, CHILDFIRST: INTERVIEWING CHILDREN AND PREPARING FOR COURT, TRAINING MANUAL (2008) (on file with the author) (listing required reading material for each topic covered in the training).

132. Lamb et al., *supra* note 49, at 2010 (emphasis added).

133. *See* APSAC Practice Guidelines, *Investigative Interviewing in Cases of Alleged Child Abuse*, on file with the author (emphasizing that inadequate or improper interviewing can lead to errors and decision-making about child safety and criminal prosecution). A copy of these guidelines can be purchased through the APSAC website at <http://www.apsac.org/mc/page.do>.

interview, it is essential to also be familiar with and to work within the APSAC guidelines for the use of these interviewer aids.<sup>134</sup> Finally, whether or not the forensic interviewer works as part of a Children's Advocacy Center, he or she should be familiar with the accreditation standards of the National Children's Alliance for forensic interviewers and forensic interviews<sup>135</sup> and should comply with all of these standards.

*E. The Forensic Interviewer Should Document the 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.<sup>136</sup>

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 documentation 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, however, is that they can never fully capture a child's facial expressions and demeanor during an interview. In one case, for instance, a child, describing how she had to lick her perpetrator's anus, wrinkled her face and said "it really stunk."<sup>137</sup> A mere verbal description of the child's facial expression can never duplicate a visual recording of that same expression.

*F. The Forensic Interviewer Should Not Rely Exclusively on the Forensic*

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134. Myers et al., *supra* note 37, at 78–91.

135. See National Children's Alliance, Standards for Accredited Members (revised 2008), <http://www.nationalchildrensalliance.org/index.php?s=76> (requiring programs in accredited membership to meet ten standards) (last visited August 20, 2009).

136. Vandervort, *supra* note 31, at 1415.

137. This was a case the author handled when serving as a prosecutor.

*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. In nearly all cases, the forensic interview should enable investigators to examine and photograph one or more crime scenes.<sup>138</sup>

*G. The Forensic Interviewer Should be Cognizant of the Rules of Evidence*

To the extent the purpose of the forensic interview is to collect evidence in a legally sound manner, it is essential that interviewers become familiar with pertinent rules of evidence and other legal standards. For example, 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.<sup>139</sup>

*H. The Forensic Interviewer Should Function as Part of a Multidisciplinary 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 multidisciplinary team functioning pursuant to a jurisdiction-wide protocol.<sup>140</sup> There are a number of

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138. See Victor Vieth, *Picture This: Photographing a Child Sexual Abuse Crime Scene*, CENTER PIECE (Nat'l Child Prot. Training Ctr., Winona, Minn.), vol. 1(5) 2009, at 1.

139. See generally *Idaho v. Wright*, 497 U.S. 805 (1990) (holding that a child's hearsay statements made to her doctor violated the defendant's confrontation clause rights); INVESTIGATION AND PROSECUTION OF CHILD ABUSE 369-72 (National Center for Prosecution of Child Abuse et al. eds., 3rd ed. 2004) (explaining the federal rules of evidence concerning prior consistent statements) [hereinafter INVESTIGATION AND PROSECUTION].

140. INVESTIGATION AND PROSECUTION, *supra* note 139, at xxix-xiiv.

examples documenting that a community-wide protocol improves the quality of not only the forensic interview but the investigation as a whole.<sup>141</sup> Functioning as part of a team makes the interviewer, and every other potential witness, look more professional. Assume, for example, 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, 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.

#### V. GUIDELINES FOR CHALLENGING THE ADMISSION AND SCOPE OF DEFENSE EXPERTS

Thus far, this article has focused exclusively on the admission and scope of the forensic interviewer as an expert witness. It is also essential that courts consider the admission and scope of the testimony of defense experts who may be called to attack a forensic interviewer's questions or other techniques. Although some appellate courts have held it is reversible error not to allow a defense expert to critique the techniques used in a forensic interview,<sup>142</sup> this does not mean that a particular witness is qualified to offer this expertise to a jury or that the scope of the testimony is without limitation. There are at least four criteria for discrediting, if not disqualifying, an expert called by the defense.

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141. See generally Victor I. Vieth, *In My Neighbor's House: A Proposal to Address Child Abuse in Rural America*, 22 HAMLINE L. REV. 143 (1998) (noting the success of a jurisdiction-wide protocol in dramatically improving a rural county's response to cases of child maltreatment).

142. See, e.g., *State v. Hakala*, 763 N.W.2d 346, 352 (Minn. 2009) (determining that the refusal to allow defendant to have an expert witness testify concerning the interview protocol was not a harmless error).

A. *Forensic Interviewing Credentials*

Defense experts, many of whom are psychologists, have little, if any, training in the field of child abuse, much less the more specific field of forensic interviewing. A study of American Psychological Association (APA) accredited graduate programs found that many of the programs “fall far short” of guidelines proposed by the APA for minimal levels of competence in handling child maltreatment cases.<sup>143</sup> The study finds the lack of graduate training for psychology students “contradicts the rapidly expanding literature on responding to maltreatment and the demands of this interdisciplinary, professional endeavor.”<sup>144</sup> Discussing her educational background, psychologist Anna Salter writes:

In the two years I spent at Tufts getting a Masters degree in Child Study and the five years I spent at Harvard getting a Ph.D. in Psychology and Public Practice, there was virtually nothing on child sexual and physical abuse in any course I took. I had one lecture on the victims of child abuse, but not a single lecture anywhere on offenders. Ironically, many of the lectures were on maladies so rare I’ve yet to see them in twenty years of practice.<sup>145</sup>

Not only do many psychologists lack any meaningful training in child abuse, they are part of a profession which has historically been slow to acknowledge the seriousness, even the existence of child sexual abuse. Commenting on this history, Dr. Salter notes:

The history of psychology in the past one hundred years has been filled with theories that deny sexual abuse occurs, that discounts the responsibility of the offender, that blame the mother and/or child when it does occur, and that minimize the impact. It constitutes a sorry chapter in the history of psychology, but it is not only

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143. Kelly M. Champion, Kimberly Shipman, Barbara L. Bonner, Lisa Hensley & Allison C. Howe, *Child Maltreatment Training in Doctoral Programs in Clinical, Counseling, and School Psychology: Where Do We Go From Here?*, 8 CHILD MALTREATMENT 211, 215 (2003).

144. *Id.* at 215. To improve graduate training of psychologists, the authors recommended “team-taught classes, visiting instructors, and class visits by outside professionals” as “means by which to increase interdisciplinary training without developing entirely new programs.” *Id.*

145. ANNA C. SALTER, PREDATORS: PEDOPHILES, RAPISTS, AND OTHER SEX OFFENDERS: WHO THEY ARE, HOW THEY OPERATE, AND HOW WE CAN PROTECT OURSELVES AND OUR CHILDREN 2 (2003).

shameful, it is also puzzling. Hostility toward child victims and adult women leaks through this literature like poison.<sup>146</sup>

Even if a psychologist or other defense expert is not overtly biased against any allegation of child sexual abuse, and has kept current on child development or other pertinent literature, he may nonetheless lack the credentials to testify as an expert on *forensic interviewing*. If the psychologist has never attended any of the major forensic interviewing courses, much less conducted a forensic interview, he should not be addressing the jury as to the specifics of any interviewing protocol he has not been trained in, much less commenting on acceptable standards in a profession he is not part of. Stated differently, “[o]ne can attempt to learn to swim by reading books about the techniques involved in swimming, but at some point one simply has to get wet to find out what swimming is really about.”<sup>147</sup> Similarly, if a witness understands the *theory* behind forensic interviewing but has never actually practiced the craft, his credentials as an expert are limited if not completely absent. This may still allow the witness to testify as to issues, such as the process by which a child may code or retrieve a memory, or aspects of the forensic interview process that fall within his expertise, but he or she should refrain from commenting on appropriate standards for conducting an *investigative* interview as a whole.

#### B. Ethical Guidelines

The ethical guidelines of the American Psychological Association require psychologists to be competent in the area he or she is practicing in or is otherwise offering expertise.<sup>148</sup> These rules also require a psychologist to “undertake ongoing efforts to

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146. *Id.* at 57. Other commentators have echoed similar sentiments. Law professor John Myers notes that, prior to the mid-1970s, the “legal, mental health, and medical literatures contributed to a legacy of skepticism about allegations of rape and sexual abuse.” JOHN E.B. MYERS ET AL., *Prosecution of Child Sexual Abuse in the United States*, in CRITICAL ISSUES IN CHILD SEXUAL ABUSE: HISTORICAL, LEGAL, AND PSYCHOLOGICAL PERSPECTIVES 27, 41 (J. Conte ed., 2002).

147. DAVID J. MONGE, LIFE-CHANGING FAITH FOR TODAY: WHY LUTHER’S THEOLOGY STILL MATTERS 92 (2003).

148. AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT § 2.01 (2003), available at [http://www.apa.org/ethics/code2002.html#2\\_01](http://www.apa.org/ethics/code2002.html#2_01) (last visited Oct. 10, 2009).



develop and maintain [his or her] competence.”<sup>149</sup> Accordingly, if a psychologist testifies as an expert in a case of child sexual abuse, the expert must be competent in this area and must remain current with the literature. If the expert offers expertise specifically on issues pertaining to forensic interviewing, the expert must demonstrate knowledge or experience with this specific topic. If the expert has never attended a major forensic interviewing course, has never worked as a forensic interviewer, has never been part of a multi-disciplinary team or a children’s advocacy center, the witness may be hard-pressed to meet these ethical standards.

*C. Disclosure of Research Supporting Testimony*

Although the state’s forensic interview may qualify as an expert based on training or experience, many defense experts have had no training or experience as a forensic interviewer but are instead relying on their reading of the literature. When this is the case, it is essential that the witness disclose the study or studies he is relying on in rendering an opinion. If, for example, the witness contends that a forensic interview was leading and suggestive, the prosecutor should request, and the court should require the witness to specify, what in the interview is suggestive—and the specific research that is being relied on in rendering this opinion. Failure to do so impairs the ability of the government to respond to this attack on the interview, and ultimately the child. As Benjamin Cardozo once noted, “justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.”<sup>150</sup>

*D. An Acknowledgement of Contradictory Research*

If the expert is truly well-versed on the literature on one or more issues pertaining to forensic interviewing, it is incumbent upon him or her to disclose research that contradicts as well as supports his testimony. For example, if the defense expert cites the handful of studies condemning the usage of anatomical dolls, but fails to reference the large body of studies supporting their

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149. *Id.* at § 2.03, available at [http://www.apa.org/ethics/code2002.html#2\\_03](http://www.apa.org/ethics/code2002.html#2_03) (last visited Oct. 10, 2009).

150. *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

usage,<sup>151</sup> the competence and ethics of such a witness may be appropriately challenged. When a defense expert is unaware of or purposely fails to disclose contradictory research, the court should, at the very least, give the prosecutor considerable latitude in cross-examining the witness.

## VI. CONCLUSION

As a direct result of the high-profile daycare cases of the mid-1980s, the United States has moved rapidly toward the development of forensically defensible investigative interviews. There is considerable consensus on proper interviewing methods, and these methods are taught in major forensic interviewing courses. Although there remains a concern as to whether trained interviewers retain or apply this knowledge, the growing emphasis on continual training and peer review bodes well for the field. Obviously, the appropriateness of a particular forensic interview and the weight it should be accorded in considering the evidence against an accused is an issue for the judge or jury. In assessing this evidence, expert testimony can and should aid the trier of fact. This article offered guidelines for the admission and scope of this evidence when presented by the state and set forth criteria for challenging the admissibility and scope of testimony when offered by the defense—especially when the defense expert is from outside the field of forensic interviewing. Because the field remains relatively new, these guidelines are merely a reference point. Appellate courts, which have already begun to consider this issue, will ultimately decide the admission and scope of expert testimony on the subject of forensic interviewing.

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151. See, e.g., Faller, *supra* note 32, at 6–7 (noting that although the majority of studies indicate anatomical dolls can be a useful tool, there are also a few studies which do not support their use).