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The Forensic Interviewer at Trial: Guidelines for the Admission and Scope of Expert Testimony Concerning a Forensic Interview in a Case of Child Abuse (Revised and Expanded)

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THE FORENSIC INTERVIEWER AT TRIAL: GUIDELINES FOR THE ADMISSION AND SCOPE OF EXPERT TESTIMONY CONCERNING A FORENSIC INTERVIEW IN A CASE OF CHILD ABUSE (REVISED AND EXPANDED)[1]

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[1] This Article was originally published in 2009 in the Mitchell Hamline Law Review. The original article has been widely used in the field and cited by trial and appellate courts. *See, e.g.*, State v. Maday, 892 N.W.2d 611, 624 (Wis. 2017). However, there has been additional case law, research, and significant developments in the field of forensic interviewing. Accordingly, this Article updates and modifies the original Article to reflect these developments.

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"If we could first know where we are, and whither we are tending, we could then better judge what to do, and how to do it."
--Abraham Lincoln[2]

I. INTRODUCTION: THE DEVELOPMENT OF THE FORENSIC INTERVIEWER PROFESSION

The field of forensic interviewing is approaching five decades[3] and is an integral part of a multidisciplinary response to a report of child maltreatment.[4] 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.[5] In some cases, children were interviewed on multiple occasions by several persons.[6] In an attempt to improve the response to these cases, Children's Advocacy Centers (CAC) began to emerge and spread across the country.[7]

Today, there are over 900 CACs accredited by the National Children's Alliance (NCA),[8] which is funded by the United States Department of Justice pursuant to the Victims of Child Abuse Act.[9] One of these NCA accreditation standards involves the forensic interviewing of

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

[3] Kathleen Coulborn Faller, *Forty Years of Forensic Interviewing of Children Suspected of Sexual Abuse, 1974–2014: Historical Benchmarks*, 4 SOCIAL SCIENCES 34, 34–65 (2015) [hereinafter Faller, *Forty Years*].

[4] "Forensic interviews are the foundation for multiple CAC/MDT functions including child abuse investigation, prosecution, child protection, and implementation of appropriate services, and may also be the beginning of the road toward healing for many children and families. The manner in which a child is treated during the initial forensic interview may significantly impact the child's understanding of, and ability to respond to, the intervention process and/or criminal justice system." NAT'L CHILDS.' ALL., STANDARDS FOR ACCREDITED MEMBERS 2017 EDITION 20 (2017).

[5] *See generally* ROSS CHEIT, THE WITCH-HUNT NARRATIVE: POLITICS, PSYCHOLOGY, AND THE SEXUAL ABUSE OF CHILDREN 181 (2014); DAVID HECHLER, THE BATTLE AND THE BACKLASH: THE CHILD SEXUAL ABUSE WAR (1998) (reviewing a number of sexual abuse cases using an investigative reporting technique and style).

[6] Nancy Chandler, *Children's Advocacy Centers: Making a Difference One Child at a Time*, 28 HAMLINE J. PUB. L. & POL'Y 315, 323–25 (2006).

[7] *Id.* at 321–22.

[8] NAT'L CHILDS.' ALL., ONE VOICE, STRONGER ANNUAL REPORT 2 (2019), https://www.nationalchildrensalliance.org/wp-content/uploads/2020/04/AR2019-web.pdf [https://perma.cc/HG89-FUXS].

[9] *Victims of Child Abuse Act*, 34 U.S.C. §§ 20301–20304 (2018).

children, including the requisite basic and advanced training for those conducting this work as well as ongoing peer review.[10]

A number of state and national forensic interview training programs have been approved by the NCA as meeting this educational requirement.[11] In 2015, the United States Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention (OJJDP) published a document written by representatives of many of the nation's leading forensic interview training programs[12] that set forth agreed upon best practices in the field of forensic interviewing.[13]

The OJJDP publication noted that although "national training programs are generally based on the same body of research, some differences exist."[14] However, focusing on the variations among these forensic interview training programs "obscures consistencies within the various forensic interview models."[15] Moreover, in some cases, "the veracity of the child's statement" or the work of the forensic interviewer "has been questioned solely on the basis of the model being used."[16]

The OJJDP best practices guide defined a child forensic interview this way:

> A forensic interview of a child is a developmentally sensitive and legally sound method of gathering factual information regarding allegations of abuse or exposure to violence. This interview is conducted by a competently trained, neutral professional utilizing research and practice-informed techniques as part of a larger investigative process.[17]

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[10] According to one national survey, ninety-four percent of forensic interviewers subject their work to ongoing peer review, averaging 5.12 hours per month in peer review. Melanie B. Fessinger & Bradley D. McAuliff, *A National Survey of Child Forensic Interviewers: Implications for Research, Practice, and Law*, 44 LAW AND HUM. BEHAV. 113, 123 (2020).

[11] *See infra* notes 30–34 and accompanying text for additional information about these approved programs.

[12] Representatives of the following forensic interview training programs drafted the document: American Professional Society on the Abuse of Children (APSAC), CornerHouse Interagency Child Abuse Evaluation and Training Center, NCA, the National Institute of Child Health and Human Development (NICHD), and Gundersen National Child Protection Training Center. The latter organization has subsequently merged into the Zero Abuse Project and oversees the national and state ChildFirst training programs.

[13] CHRIS NEWLIN, LINDA CORDISCO STEELE, ANDRA CHAMBERLIN, JENNIFER ANDERSON, JULIE KENNISTON, AMY RUSSELL, HEATHER STEWART & VIOLA VAUGHAN-EDEN, OJJDP, CHILD FORENSIC INTERVIEWING: BEST PRACTICES 5 (Sept. 2015), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/248749.pdf [https://perma.cc/UD7P-JU7Y].

[14] *Id.* at 2.

[15] *Id.*

[16] *Id.*

[17] *Id.*

The growth of the profession of forensic interviewing in the past fifty years, the development of standards governing this work, and the significant research influencing this work are all factors courts must consider when prosecutors seek to utilize a forensic interviewer as an expert witness or when defense attorneys call experts completely outside of this field to critique the work of an interviewer or the credibility of a child's statements.

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.[18] The Article also offers guidelines for challenging the testimony of those called as experts to critique a forensic interview.[19]

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 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.[20]

In applying this rule to both scientific and non-scientific evidence, the United States Supreme Court 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.'"[21]

With respect to the general acceptance standard, the United States Supreme Court noted that, although not required, "[w]idespread acceptance can be an important factor in ruling particular evidence and a 'known technique which has been able to attract minimal support within the

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[18] *See infra* Part IV.

[19] *See infra* Part V.

[20] FED. R. EVID. 702.

[21] 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)).

community' . . . may properly be viewed with skepticism."[22] 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 his testimony."[23]

The rule is not as complicated as it may appear on the first reading. Essentially, an expert witness needs to have more knowledge than the judge[24] 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 also on the witness's experience. A witness with a bachelor's degree who has conducted 100 forensic interviews may be more credible than a witness with a Ph.D. who has merely read research on forensic interviewing and never actually conducted a forensic interview.[25] 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.[26]

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 most courts examining the issue have 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.

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

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

[24] A survey of 2,240 judges found that barely fifty percent of them had received any child welfare training before hearing child protection proceedings. *View from the Bench: Obstacles to Safety & Permanency for Children in Foster Care*, CHILD. & FAM. RSCH. CTR., SCH. OF SOC. WORK, UNIV. OF ILL., URBANA-CHAMPAIGN (July 2004).

[25] Forensic interviewers are taught and rely on "research-based and practice-informed techniques." Julie Kenniston, *The Evolution of the Childhood Trust Child Forensic Interview Training*, 32 APSAC ADVISOR 48 (2020). Those who do the work of interviewing children who may have been abused do not always have the luxury of waiting for the ideal laboratory study to determine the best means of interviewing a child in a particular context. Many practices that are today considered best practice, such as CACs, were developed in the field long before researchers were able to assess their efficacy.

[26] *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.").

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

In the wake of the high-profile daycare cases of the 1980s, there was a demand to improve the training of those who conduct forensic interviews[27] and, when possible, to interview children in "child-friendly" environments, including CACs.[28] As a result, hundreds of CACs were developed,[29] and several national and state forensic interview training programs were established.[30]

National and state organizations that offer quality forensic interview training include the American Professional Society on the Abuse of Children (APSAC);[31] the National Children's Advocacy Center in Huntsville, Alabama;[32] CornerHouse;[33] the Childhood Trust forensic interview training program in Cincinnati, Ohio;[34] NICHD;[35] RADAR;[36] and the ChildFirst (sometimes referred to as "Finding Words") forensic

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[27] *See* MINN. ATT'Y GEN.'S OFF., 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.").

[28] *See* Chandler, *supra* note 6, at 321–22.

[29] *Id.* at 322.

[30] In 2003–2004, the American Professional Society on the Abuse of Children (APSAC) published a series of articles detailing these various forensic interviewing training programs. In 2020, APSAC again published a series of articles detailing these programs. *See supra* note 29 and *infra* notes 30–35. The 2004 articles are as follows: 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 APRI'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 Structure, National Children's Advocacy Center*, APSAC ADVISOR, Fall 2003, at 2 (all discussing national forensic interview training programs).

[31] Patti Toth, *APSAC's Approach to Child Forensic Interviews: Learning to Listen*, 32(2) APSAC ADVISOR 9, 15 (2020).

[32] This program offers basic and advanced forensic interview training. *Forensic Interviewing of Children Training*, NAT'L CHILDS.' ADVOC. CTR., https://www.nationalcac.org/forensic-interviewing-of-children-training/ [https://perma.cc/V33H-HFNJ].

[33] Julie Stauffer, *A Look Inside the CornerHouse Forensic Interview Protocol™*, 32(2) APSAC ADVISOR 19, 25 (2020).

[34] Kenniston, *supra* note 25, at 48.

[35] Heather Steward & David La Rooy, *NICHD: Where We've Been and Where We Are Now,* 32(2) APSAC ADVISOR 30, 33 (2020).

[36] Mark D. Everson, Scott Snider, Scott M. Rodriguez & Christopher T. Ragsdale, *Why RADAR? Why Now? An Overview of RADAR Child Interview Models*, 32(2) APSAC ADVISOR 36 (2020).

interview training program offered at the national level by Zero Abuse Project and at the local level through twenty states.[37]

Each of these programs meets the NCA educational component to work as a forensic interviewer in an accredited CAC.[38] This means they "adhere to research-based forensic interview guidelines that create an interview environment that enhances free recall, minimizes interviewer influence, and gathers information needed by all MDT members in order to avoid duplication of the interview process."[39]

Each of these courses teaches methods rooted in hundreds of peer-reviewed articles and dozens of books outlining acceptable methods for interviewing children who may have been abused.[40] Perhaps most significant, National Institute of Child Health and Human Development (NICHD) researchers have been able to conduct field research, as opposed to analogue research, on forensic interview practices, which produced more than 100 peer-reviewed studies and five books.[41] As a result of this large body of research, "many other protocols have relied on the NICHD research and incorporated components of the NICHD protocol into their interview structures."[42]

At its core, NICHD emphasizes narrative practice, utilizing techniques to elicit narrative accounts from a child that "are more accurate

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[37] ChildFirst is taught at the national level and at the state level in the following states: Arkansas, Connecticut, Delaware, Georgia, Illinois, Indiana, Kansas, Maryland, Minnesota, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Virginia, West Virginia. The course is also taught in the nations of Japan and Colombia. Rita Farrell & Victor Vieth, *ChildFirst Forensic Interview Training Program*, 32(2) APSAC ADVISOR 56, 57 (2020). The replication of the course at the state level made *ChildFirst* a "very influential" forensic interview training model that is "among the most widely trained interview structures in the United States." Faller, *Forty Years*, *supra* note 3, at 49.

[38] *See infra* notes 65–74 and accompanying text.

[39] NAT'L CHILDS.' ALL., STANDARDS FOR ACCREDITED MEMBERS 20 (2017), https://www.nationalchildrensalliance.org/wp-content/uploads/2015/06/NCA-Standards-for-Accredited-Members-2017.pdf [https://perma.cc/643F-KDSN]. "MDT" stands for multidisciplinary team. When a case of child abuse is reported, law enforcement officers and child protection workers often coordinate their investigations and may also involve medical and mental health providers, prosecutors, and other experts as the case may need. Often these functions are coordinated through a CAC.

[40] *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 (2006); 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).

[41] Faller, *Forty Years*, *supra* note 3, at 51–52.

[42] *Id.* at 52

than responses to more close-ended inquiry, for example yes/no questions."[43] All of the major forensic interview training programs have incorporated narrative practice into their models.[44] For instance, the OJJDP *Best Practices* guide, written by representatives of the nation's leading forensic interview training program, outlines evidence-based interview approaches for eliciting narratives during the forensic interview.[45]

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."[46] 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."[47] This consensus in the field is reflected in OJJDP's *Child Forensic Interviewing Best Practices* publication—a document drafted by representatives of nearly all of the nation's major forensic interview training programs.[48] Even interviewing programs that did not contribute to the drafting of the OJJDP publication have stated they agree and adhere to the best practices summarized in the article.[49]

Although best practices are not always adhered to,[50] it is clear 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."[51] Even on issues that continue to be

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[43] *Id.*

[44] *See supra* notes 30–34 and accompanying text.

[45] NEWLIN ET AL., *supra* note 13.

[46] Wiley, *supra* note 40, at 276; NEWLIN ET AL., *supra* note 13, at 5.

[47] Perona et al., *supra* note 40, at 84; *see also* Kathleen Coulborn Faller, *Forensic Interview Protocols: An Update on the Major Forensic Interview Structures*, 32 APSAC ADVISOR 4, 5 (2020) [hereinafter Faller, *Forensic Interview Protocols*] (noting "significant cross-pollination has occurred among the developers of these interview structures.").

[48] NEWLIN ET AL., *supra* note 13, at 5.

[49] Everson et al., *supra* note 36 ("RADAR adheres to the best practice standards published by the Office of Juvenile Justice and Delinquency Prevention (OJJDP)").

[50] *See* Irit Hershkowitz, Yael Orbach, Kathleen J. Sternberg, Margaret-Ellen Pipe, Michael E. Lamb & Dvora Horowitz, *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).

[51] *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).

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,[52] the available research supports this widespread practice.[53] Similarly, although some experts continue to question the utility of anatomical dolls, the majority of studies support their use.[54] The few studies that express concerns are best read as a caution against the inappropriate use of dolls and the need for interviewer training prior to using the dolls.[55]

With respect to the forensic interview as a whole, researchers 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 conditions*."[56] 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.[57] In a

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[52] *See, e.g.*, KENNETH V. LANNING, NAT'L CTR. FOR MISSING & EXPLOITED CHILD., CHILD MOLESTERS: A BEHAVIORAL ANALYSIS FOR LAW-ENFORCEMENT OFFICERS INVESTIGATING THE SEXUAL EXPLOITATION OF CHILDREN BY ACQUAINTANCE MOLESTERS 107 (4th ed. 2001) (stating "it is still my opinion that the disadvantages of taping generally outweigh the advantages.").

[53] *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 PSYCH. 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).

[54] 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) [hereinafter Faller, *Anatomical Dolls*] (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"); *see also* Victor I. Vieth, *Anatomical Diagrams and Dolls: Guidelines for their Usage in Forensic Interviews and Courts of Law*, MITCHELL HAMLINE L. REV. (forthcoming 2021).

[55] Faller, *Anatomical Dolls*, *supra* note 54, 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").

[56] Tonya Lippert, Theodore P. Cross, Lisa M. Jones & Wendy Walsh, *Telling Interviewers About Sexual Abuse: Predictors of Child Disclosures at Forensic Interviews*, 14 CHILD MALTREATMENT 100, 111 (2009) (emphasis added).

[57] *See* Bette L. Bottoms, Jonathan M. Golding, Maggie C. Stevenson, Tisha R.A. Wiley & John A. Yozwiak, *A Review of Factors Affecting Jurors' Decisions in Child Sexual Abuse Cases*, *in* HANDBOOK OF EYEWITNESS PSYCH. 509 (M. Toglia et al. eds., 2006).

review of sixteen studies in which children were diagnosed with sexually transmitted diseases, only 42% of these children disclosed sexual abuse in an initial forensic interview.[58] In a review of cases for which there was substantial corroborating evidence of physical or sexual abuse, 49.7% of these children did not disclose abuse during an interview with the NICHD protocol, and 40.7% did not disclose abuse with the NICHD revised protocol.[59]

3. There Are Standards and Guidelines Governing Forensic Interviewing

In addition to the OJJDP *Child Forensic Interviewing Best Practices* guidelines,[60] APSAC promulgated guidelines for forensic or investigative interviewing,[61] as well as separate guidelines for the usage of anatomical dolls.[62] In addition, APSAC has developed an ethical code, which also applies to members who are forensic interviewers.[63] This code obligates forensic interviewers to interview children "in a manner consistent with the best interests of the child."[64]

The NCA, a 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.[65] These "essential components" include:

- **Specialized Training.** The NCA requires the individual conducting

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[58] Thomas D. Lyon, *False Denials: Overcoming Methodological Biases in Abuse Disclosure Research*, *in* DISCLOSING ABUSE: DELAYS, RETRACTIONS, AND INCOMPLETE ACCOUNTS 41–62 (Margaret-Ellen Pipe, Michael E. Lamb, Yael Orbach & Ann-Christin Cederborg eds., 2007).

[59] Mark D. Everson & Scott M. Rodriguez, *Why Forensic Balance Should be Recognized as a Foundational Best Practice Standard-A Commentary on the State of Child Forensic Interviewing*, 32 APSAC ADVISOR 92, 95 (2020); *see also* Irit Hershkowitz, Michael E. Lamb & Carmit Katz, *Allegation Rates in Forensic Child Abuse Investigations: Comparing the Revised and Standard NICHD Protocols*, 2 PSYCH. PUB. POL'Y & L. 336 (2014).

[60] NEWLIN ET AL., *supra* note 13, at 5.

[61] APSAC, *Practice Guidelines: Forensic Interviewing in Cases of Suspected Abuse* (2012), https://2a566822-8004-431f-b136-8b004d74bfc2.filesusr.com/ugd/4700a8_06b064b4cc304ccc97be55a945acd90d.pdf [https://perma.cc/3NDA-G4ZF].

[62] 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*].

[63] *Practice Guidelines: Code of Ethics*, APSAC (1997), http://www.ncdsv.org/images/APSAC_Code-of-Ethics_1997.pdf [https://perma.cc/69ZT-LCK9]; Toth, *supra* note 31, at 10.

[64] Toth, *supra* note 31, at 10.

[65] *See generally* NAT'L CHILDS.' ALL., *supra* note 4.

the forensic interview to have received "specialized training in conducting forensic interviews."[66] To this end, each CAC "must demonstrate that all forensic interviewer(s) have successfully completed training that includes the following elements:"[67]

1. "Minimum of 32 hours of instruction and practice"
2. "Evidence-supported interview protocol"
3. "Pre-and post-testing that reflects understanding of the principles of legally sound interviewing"
4. "Content that includes: child development, question design, implementation of protocol, dynamics of abuse, disclosure process, cultural competency, suggestibility"
5. "Practice component with a standardized review process"
6. "Required reading of current articles specific to the practice of forensic interviewing"[68]

- **Ongoing education**. The NCA requires "individuals with forensic interviewing responsibilities" to "demonstrate participation in ongoing education in the field of child maltreatment and/or forensic interviewing consisting of a minimum of 8 contact hours every 2 years."[69]
- **CAC/MDT protocol**. The NCA requires the CAC/MDT protocol to "reflect the following items:"
    1. "Case acceptance criteria"
    2. "Criteria for choosing an appropriately trained interviewer (for a specific case)"
    3. "Personnel expected to attend/observe the interview"
    4. "Preparation, information sharing and communication between the MDT and the forensic interviewer"
    5. "Use of interviewer aids"
    6. "Use of interpreters"
    7. "Recording and/or documentation of the interview"
    8. "Interview methodology (i.e., state or nationally recognized forensic interview training model(s))"
    9. "Introduction of evidence in the forensic interviewing process"
    10. "Sharing information among MDT members"
    11. "A mechanism for collaborative case coordination"
    12. "Determining criteria and process by which a child has a

[66] *Id.* at 21.
[67] *Id.*
[68] *Id.*
[69] *Id.*

multi-session or subsequent interview"[70]

- **Presence of MDT members at the forensic interview.** The NCA requires MDT team members with "investigative responsibilities on a case" to "observe the forensic interview(s) to ensure necessary preparation, information sharing, and MDT/interviewer coordination throughout the interview and post-interview process."[71]
- **Interviews routinely conducted at the CAC.** The NCA requires forensic interviews to be conducted at the CAC at least seventy-five percent of the time.[72]
- **Peer review.** The NCA requires forensic interviewers to "participate in a structured peer review process for forensic interviewers a minimum of 2 times per year, as a matter of quality assurance."[73] The NCA requires "structured peer review" to include:
    1. "Ongoing opportunities to network with, and share learning and challenges with peers"
    2. "Review and performance feedback of actual interviews in a professional and confidential setting"
    3. "Discussion of current relevant research articles and materials"
    4. "Training opportunities specific to forensic interviewing of children and the CAC-specific methodologies."[74]

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

With numerous national and state forensic interviewing courses in place,[75] 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. According to the NCA, forensic interviews "are the foundation for multiple CAC/MDT functions including child abuse investigation, prosecution, child protection, and implementation of

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[70] *Id.* at 21–22. For a discussion as to why some children may need a second or multi-session forensic interview process, see Everson & Rodriguez, *supra* note 59 (arguing the field has inadequately recognized some children's need to be interviewed more than once and arguing for greater balance between the "competing interests" of protecting children from abuse and adults from being falsely accused).

[71] NAT'L CHILDS.' ALL., *supra* note 4, at 22.

[72] *Id.*

[73] *Id.*

[74] *Id.* at 22–23.

[75] *See supra* notes 31–37 and accompanying text.

appropriate services, and may also be the beginning of the road toward healing for many children and families."[76] Indeed, the "manner in which a child is treated during the initial forensic interview may significantly impact the child's understanding of, and ability to respond to, the intervention process and/or criminal justice system."[77]

Since the practice of forensic interviewing has gained "general acceptance" in the child protection field, courts can consider this fact in admitting these practitioners as expert witnesses.[78] Although not required, the United States Supreme Court has noted that "widespread acceptance can be an important factor" in admitting expert testimony.[79]

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.[80] It is equally true that an exceptional forensic interview may result in inaccurate information.[81] 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.[82]

Some courts have held that a rigid application of "error rate" or other *Daubert/Kumho Tire* standards should not apply to all expert testimony but only to that testimony involving "innovative scientific techniques."[83] The Mississippi Court of Appeals has noted the "accuracy of forensic interviewing is largely untestable"; researchers cannot have controlled studies in which children are sexually abused and then observe their responses to myriad questioning techniques.[84] Accordingly, the question of an "error rate" should not be applied when considering the admissibility of a forensic interviewer as an expert witness.[85]

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[76] NAT'L CHILDS.' ALL., *supra* note 4, at 20.
[77] *Id.*
[78] 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).
[79] *Daubert*, 509 U.S. at 594 (citing United States v. Downing, 753 F.2d 1224, 1238 (3d Cir. 1985)).
[80] *See generally* Amy Russell, *Assessing Children's Statements for Investigative and Court Purposes*, 1 CTR. PIECE 1, 1 (2009) (discussing various methods of determining abuse).
[81] *Id.*
[82] *See generally* Lippert et al., *supra* note 56 (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 rather 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.
[83] State v. Griffin, 869 A.2d 640, 647 (Conn. 2005).
[84] Carter v. State, 996 So. 2d 112, 117 (2008).
[85] *Id.*

In another Mississippi case, the court discussed the flexibility of the *Kumho Tire* standards for admitting expert testimony:

> It might not be surprising that in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may not have ever interested any scientist. Nor, on the other hand, does the presence of *Daubert's* general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999). Therefore, the Court determined that it could "neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*" because "[t]oo much depends upon the particular circumstances of the particular case at issue." *Id.* at 150. Thus, the trial court has "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id.* at 152. That is, the *Daubert* factors should be considered "where they are reasonable measures of the reliability of expert testimony." *Id.*[86]

The Connecticut Supreme Court contends trial judges should be less rigid in admitting expert testimony in cases where:

> [T]he 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.[87]

Applying this language to a forensic interview, the jury can likely understand expert testimony concerning what is or is not a suggestible question, or any number of other practices that take place in a forensic interview of a child, without resorting to highly technical scientific theories. Jurors will likely have had interactions with children in their role as parents

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[86] Mississippi Transp. Comm'n v. McLemore, 863 So. 2d 31, 37 (Miss. 2003).

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

or in other contexts. For these reasons, courts may be less rigid in the 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.[88] 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."[89] "Although these structures vary, there is also uniformity in these structures."[90] 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.[91]

In commenting on the various forensic interview training programs and protocols, Linda Cordisco Steele noted in 2003 that these "models possess many more similarities than differences."[92] Writing in the same year, Dr. Erna Olafson concluded the variations within these protocols are forensically defensible:

> 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.[93]

The fact that the leading forensic interviewing courses and protocols have many more similarities than dissimilarities was underscored in 2015, when the nation's most widely used forensic interviewing training

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[88] Kathleen Coulborn Faller, *Interview Structure, Protocol, and Guidelines*, *in* INTERVIEWING CHILDREN ABOUT SEXUAL ABUSE, *supra* note 40, at 66–67 [hereinafter Faller, *Interview Structure, Protocol, and Guidelines*]. According to Faller, the "simplest structure" would have three phases—an initial phase for rapport building, an information-gathering phase, and a closure phase. *Id.* at 67.

[89] *Id.* at 68.

[90] *Id.* at 88.

[91] *Id.* at 67.

[92] Steele, *supra* note 30, at 2.

[93] Olafson & Kenniston, *supra* note 30, at 2.

programs drafted a best practices guide published by OJJDP.[94] In addition to the OJJDP publication, the APSAC forensic interviewing guidelines have also been incorporated into many forensic interviewing training programs and protocols.[95]

In 2020, each of the nation's national forensic interview training courses published articles detailing their respective programs, and, again, it was clear that the programs bear many similarities. When there are programmatic differences, it is in areas where the research is not yet fully settled.[96] In the introduction to this series of articles, Dr. Kathleen Coulborn Faller summarizes variations in these models, but she also notes "significant cross-pollination has occurred among the developers of these interview structures."[97]

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. At least one scholar has 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).[98] 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."[99]

Some commentators have noted the practical difficulties in implementing this recommendation. For example, Kathleen Colbourn Faller notes, "[m]ost high-volume interviewing programs will likely have

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[94] NEWLIN ET AL., *supra* note 13.

[95] Toth, *supra* note 31, at 10 ("Numerous other child interview protocols recognize the value and validity of the APSAC Guidelines and point out that their approach is consistent with them.").

[96] See the following list of APSAC Advisor articles: Toth, *supra* note 31, at 15; Stauffer, *supra* note 33, at 25; Kenniston, *supra* note 25, at 48; Farrell & Vieth, *supra* note 37, at 61; Everson et al., *supra* note 36.

[97] Faller, *Forensic Interview Protocols*, *supra* note 47, at 5.

[98] *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).

[99] 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) [hereinafter Lamb et al., *Effects of Intensive Training*].

difficulty finding resources for such procedures for supervision."[100] Michael Lamb and his colleagues from the NICHD agree with Faller's assertion. However, they 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."[101]

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—few of which specifically teach the NICHD structured protocol[102]—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 and, pursuant to the NCA accreditation standards, these courses often require students to read much of the pertinent research.[103] 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.[104]

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.[105] This is a legitimate concern, and as noted earlier, accredited CACs are required to have their forensic interviewers

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[100] Faller, *Interview Structure, Protocol, and Guidelines*, *supra* note 88, at 88.

[101] Lamb et al., *Effects of Intensive Training*, *supra* note 99, at 124.

[102] *See supra* notes 31–37 and accompanying text.

[103] The NCA specifies the forensic interview training programs it approves must include "[r]equired reading of current articles specific to the practice of forensic interviewing." NAT'L CHILDS.' ALL., *supra* note 4, at 21.

[104] *See* Olafson & Kenniston, *supra* note 30, 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 30, at 2 (noting the NCAC forensic interviewing course exposes students to a formal interview 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, *Interview Structure, Protocol, and Guidelines*, *supra* note 88, at 89.

[105] Michael E. Lamb, Kathleen K. Sternberg, Yael Orbach, Phillip W. Esplin & Susanne Mitchell, *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.").

participate in peer review.[106] A national survey published in 2020 found that ninety-four percent of frontline forensic interviewers were subjecting their work to ongoing peer review, averaging 5.12 hours per month of peer review.[107]

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. This is precisely what happens when a sexual abuse case comes to trial, and 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,[108] the ultimate test of any interviewer, and the particular interviews, is being accepted in court.

III. CASE LAW ON FORENSIC INTERVIEWERS AS EXPERT WITNESSES

As the Wisconsin Supreme Court noted, the "forensic interview techniques used today are accepted among experts and courts as effective tools for investigating child sexual assault allegations because these methods minimize the risk of false allegations of abuse that result from a child's vulnerability."[109] This acceptance is because "forensic interview techniques are marked by some common characteristics," including the use of "open ended questions."[110]

Although a growing body of case law confirms the Wisconsin Supreme Court's view that forensic interviewers are recognized as experts, courts vary as to what is permissible testimony in educating a jury or judge.[111]

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[106] NAT'L CHILDS.' ALL., *supra* note 4, at 22–23.

[107] Melanie B. Fessinger & Bradley D. McAuliff, *A National Survey of Child Forensic Interviewers: Implications for Research, Practice, and Law*, 44 LAW & HUM. BEHAV. 113, 123 (2020).

[108] NAT'L CHILDS.' ALL., *supra* note 4, at 20.

[109] State v. Maday, 892 N.W.2d 611, 618 (2017). Although it is true that, historically, forensic interviews were focused on child sexual abuse, we now know that approximately two-thirds of maltreated children are violated in at least two ways and approximately one-third of abused children are violated in five or more ways. Heather A. Turner, David Finkelhor & Richard Omrod, *Poly-Victimization in a National Sample of Children and Youth*, 38(3) AM. J. PREVENTIVE MED. 323 (2010); David Finkelhor, Richard K. Omrod & Heather A. Turner, *Poly-Victimization: A Neglected Component in Child Victimization*, 31 J. CHILD ABUSE & NEGLECT 7 (2007). As a result of this research, forensic interviewers such as those trained through ChildFirst are instructed to screen for multiple forms of abuse irrespective of the initial report. Farrell & Vieth, *supra* note 37, at 59–60.

[110] *Maday*, 892 N.W.2d at 619.

[111] Even in a trial to a judge, many judges need expertise—most know little about child abuse.

The qualifications that make a forensic interviewer an expert witness and the scope of potential expert testimony are considered below.

A. Qualifications as an Expert Witness in Forensic Interviewing

There are two types of expert witnesses that may testify about a forensic interview. First, the prosecutor may have the forensic interviewer who conducted the interview offer expert testimony to assist the jury in understanding the procedures utilized when speaking with a child. A prosecutor might also call a separate forensic interviewer or another expert to offer testimony that may assist the jury in understanding how the interview was conducted or the information collected in the interview.

Second, a defense attorney may also call an expert to testify about the forensic interview. In most cases, the defense attorney calls a professional from outside of the field of forensic interviewing, typically a psychologist, who critiques the manner in which the interview was conducted as well as the information received from a child. A summary of case law on prosecution and defense experts on forensic interviewing is provided below.

1. Prosecution Expert

In *Mooneyham v. State*, a forensic interviewer was qualified as an expert witness based on the completion of a forty-hour forensic interview training course that was "nationally recognized and accepted in the field," as well as an additional 126 hours of additional forensic interview training and 215 hours of training on child abuse.[112] The court also noted the witness' experience in conducting 134 forensic interviews.[113]

In *Lattimer v. State*, the Mississippi Court of Appeals concluded that a forensic interviewer employed at a local children's advocacy center was an expert on the subject of forensic interviewing.[114] The forensic interviewer received a bachelor's degree from William Carey University and a master's degree from the University of Southern Mississippi.[115]

In terms of his forensic interview training, the expert in *Lattimer* completed forensic interview training at CornerHouse. The course content included "child development, child psychology, linguistics, how kids view life, how they experience reality, how they experience abuse, [and] how they go about telling about abuse."[116] The expert testified:

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[112] Mooneyham v. State, 915 So. 2d 1102, 1104 (Miss. Ct. App. 2005).
[113] *Id.*
[114] Lattimer v. State, 952 So. 2d 206, 216–22 (2006).
[115] *Id.* at 216.
[116] *Id.* at 217.

> [T]he 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.[117]

The witness also testified that the utilized forensic interviewing techniques "have been researched thoroughly and are continuously researched."[118] The expert also said he utilized forensic interviewing techniques consistent with recommendations from APSAC.[119]

At the time of his testimony, the forensic interviewer in *Lattimer* had been employed at the CAC for two years working as both a therapist and a forensic interviewer.[120] From these facts, the Mississippi Court of Appeals concluded that the witness was an expert because he "had specialized knowledge through his education, training, and his professional experience in the field of forensic interviewing."[121]

In a more recent Mississippi case, the court of appeals found a forensic interviewer was qualified to testify as an expert about the importance of sensory details and the characteristics the child displayed, which were consistent with having been abused.[122] The forensic interviewer's credentials included obtaining a master's degree in social work, serving as an instructor in the ChildFirst forensic interview training program, and having conducted over 900 forensic interviews.[123]

In *State v. Douglas*, a South Carolina trial judge concluded that a forensic interviewer without a college degree was an expert witness because she had completed a five-day forensic interview training course, completed two weeks of additional training, and interviewed hundreds of children.[124] However, the appellate court noted that the forensic interviewer's only testimony was that, based on the child's statements during the forensic interview, the child needed a medical examination.[125] Since the court did not consider this to be expert testimony, there was no need to qualify the witness as an expert.[126]

Although it did not appear the forensic interviewer was utilized as an expert witness in *Douglas*, a Georgia appellate court rejected a defense

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[117] *Id.*
[118] *Id.*
[119] *Id.* at 219.
[120] *Id.* at 216.
[121] *Id.* at 221.
[122] Daniels v. State, 242 So. 3d 878, 882 (Miss. Ct. App. 2017).
[123] *Id.* at 882–83.
[124] State v. Douglas, 671 S.E.2d 606, 608 (S.C. 2009).
[125] *Id.*
[126] *Id.*

claim that a deputy sheriff trained through Finding Words[127] was insufficiently trained to conduct a forensic interview.[128] 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" taught by the CornerHouse forensic interview training program.[129]

In another Georgia case, a CAC forensic interviewer and therapist was deemed to be an expert.[130] Her credentials included a master's degree in child and family studies, a master's degree in social work with "16 months of specialized training on child maltreatment with an emphasis on child sexual abuse," training on interviewing children, and experience in interviewing over 300 children.[131]

In Louisiana, an appellate court allowed a forensic interviewer employed at a CAC to testify as an expert witness.[132] With respect to the witness's credentials, 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.[133]

In another Louisiana case, the court held that although the forensic interviewer lacked any formal "college coursework" pertaining to

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[127] "Finding Words" is the original name for a national and state forensic interview training program that is now called "ChildFirst," though some of the state programs retain the original name. At the outset, these programs used the CornerHouse forensic interview training program but now have a protocol developed by these various state and national programs. *See* Farrell & Vieth, *supra* note 37, at 56, 61.

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

[129] *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 CornerHouse protocol, had the "'requisite degree of trustworthiness' to be admitted at trial."). It should be noted that the CornerHouse protocol used in these cases has since undergone some modifications. *See* Julie Stauffer, *A Look Inside the CornerHouse Forensic Interview Protocol™*, 32(2) APSAC ADVISOR 19 (2020).

[130] Siharath v. State, 541 S.E.2d 71, 74 (2000).

[131] *Id.*

[132] State v. Hilton, 764 So. 2d 1027, 1033 (La. Ct. App. 2000).

[133] *Id.*

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."[134]

2. Defense Expert

In cases in which a defense expert is permitted to critique a forensic interview, courts do not always list what, if any, credentials the expert has to render this testimony.[135] It is rare, though, for the defense expert to have worked as a forensic interviewer in an accredited CAC. Typically, the defense expert is a psychologist or a researcher.[136]

B. Scope of Expert Testimony

If a court concludes that a witness is qualified as an expert in forensic interviewing, the remaining issue is the scope of the testimony from the expert. As discussed below, some courts allow great latitude in aiding the jury in understanding the forensic interview process, while other courts are extremely restrictive. These variations in court rulings, and the reasons for the variations, are considered below.

1. A Forensic Interviewer May Be Able to Testify on the Issue of Coaching

In *State v. Krueger*, the Wisconsin Supreme Court said that a forensic interviewer could testify about the "typical signs of whether a child has been coached or evidences suggestibility" and whether the "child exhibits such signs."[137] However, the court concluded the forensic

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

[135] *See* State v. Speers, 98 P.3d 560, 564–65 (Az. Ct. App. 2004). The court simply noted "the material provided to the trial court in support of the expert testimony . . . reflects that [the defense expert] possesses the necessary qualifications to testify as an expert on interview techniques and their impact on children." *Id.* at 565. There was also a comment in the opinion in which the defendant's counsel stated the expert, Dr. Ralph Underwager, "came with some baggage." *Id.* at 564. The opinion does not state what this baggage may have been. However, in 1993, Underwager gave an interview to the Journal of Paedophilia in which he stated, "Paedophiles can boldly and courageously affirm what they choose. They can say that what they want is to find the best way to love. I am also a theologian and as a theologian, I believe it is God's will that there be closeness and intimacy, unity of the flesh, between people. A paedophile can say: 'This closeness is possible for me within the choices that I've made.'" *Interview: Hollida Wakefield and Ralph Underwager*, 3 PAIDIKA: J. PAEDOPHILIA 2, 4 (1993). Underwager received his Ph.D from the University of Minnesota and his Master of Divinity degree from Concordia Seminary in St. Louis, Missouri. *Id.* at 2.

[136] This conclusion is based on the author's consulting on numerous cases across the country during the past twenty-three years.

[137] State v. Krueger, 762 N.W.2d 114, 120 (Wis. 2008).

interviewer went too far in contending the child was not sophisticated enough to maintain a fabricated story, and therefore, it must have been "something that she had experienced."[138] This had the effect of offering an opinion on the truthfulness of the child's allegation of abuse.[139]

In *State v. Maday*, the Wisconsin Supreme Court found it permissible for a forensic interviewer to testify about the issue of potential coaching because the interviewer "provided testimony grounded in her training as a forensic interviewer."[140] Also, because she limited "her testimony to the indications she is trained to look for and, by testifying to a lack of any indications of coaching or dishonesty," the interviewer "avoided giving an opinion as to whether [the child's] allegations were, in fact, true."[141]

In *Lattimer v. State*, the forensic interviewer was qualified as an expert witness to discuss the details provided in the forensic interview and the challenges a young child would have in fabricating credible details of sexual activity, even if someone told them to, because "children don't know about our interview process and they don't know what questions are going to be asked."[142]

In South Carolina, the supreme court stated that "[u]nder certain circumstances, it may be proper for the State to ask an expert" such as a forensic interviewer "about coaching."[143] Such expert testimony would be appropriate "if defense counsel accused the child's mother or father in opening statement or on cross-examination of coaching the child to make an accusation they knew to be untrue," or when "coaching is implied, or otherwise becomes an issue without such a direct accusation."[144]

2. A Forensic Interviewer May Not Bolster the Victim's Testimony, but Some Courts Allow Testimony on Characteristics Consistent with Abuse

In *Lattimer*, the Mississippi Court of Appeals concluded it was impermissible to offer an opinion that a witness is telling the truth but that the forensic interviewer in that case "was suitably positioned to opine that characteristics" of the child during the interview "are consistent with [that of] sexually abused children."[145]

In *Golden v. State*, the court held the prosecutor "permissibly offered the following testimony that she found [the child victim's] rendition of events consistent with a child who has been sexually abused:

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[138] *Id.* at 120–21.
[139] *Id.*
[140] State v. Maday, 892 N.W.2d 611, 621 (Wis. 2017).
[141] *Id.*
[142] Lattimer v. State, 952 So. 2d 206, 220–21 (Miss. Ct. App. 2006).
[143] Briggs v. State, 806 S.E.2d 713, 718 (S.C. 2017).
[144] *Id.*
[145] *Lattimer*, 952 So. 2d at 221.

> Q. Ms. Sample, after interviewing [the child victim], have you formed an expert opinion as to whether or not she was sexually abused?
> A. Yes.
> Q And what is that opinion?
> A. The details are consistent with a child that has been sexually abused.
> Q. What are you basing your decision—basing your opinion on?
> A. The consistency of her report. I asked her the same question several times in a lot of different ways, and she kept saying the same thing over and over, and she [was] able to give details. . . . And then her whole demeanor."[146]

In *State v. Kromah*, a mother was convicted of child physical abuse for lacerating her three-year-old son's scrotum with the right testicle "hanging outside of the scrotum," necessitating emergency surgery.[147] The child did not testify at trial, and his forensic interview was not admitted into evidence, nor was the interviewer allowed to speak about the contents of the child's statements.[148] However, the interviewer was allowed to inform the jury she made a finding that was "compelling" for "child physical abuse."[149] The South Carolina Supreme Court concluded this was an error because the court believed it is tantamount to the interviewer testifying the child "was telling the truth."[150] The court went on to give a list of statements "a forensic interviewer should avoid at trial:

- that the child was told to be truthful;
- a direct opinion as to a child's veracity or tendency to tell the truth;
- any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a 'compelling finding' of abuse;
- any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or
- an opinion that the child's behavior indicated the child was telling the truth."[151]

However, the court in *Kromah* stated a forensic interviewer "may properly" testify about the following:

- "the time, date, and circumstances of the interview;

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[146] Golden v. State, 984 So. 2d 1026, 1033 (Miss. Ct. App. 2008).
[147] State v. Kromah, 737 S.E.2d 490, 492 (S.C. 2013).
[148] *Id.* at 495–96.
[149] *Id.*
[150] *Id.* at 500.
[151] *Id.*

- any personal observations regarding the child's behavior or demeanor; or
- a statement as to events that occurred within the personal knowledge of the interviewer."[152]

Kromah stated these lists are "not exclusive," and the "testimony will of necessity vary in each trial."[153] Other South Carolina decisions have similarly limited the words or phrases used by forensic interviewers in an attempt to prevent bolstering a child's statements about being sexually assaulted or otherwise abused.[154]

The Colorado Supreme Court has held that a forensic interviewer's analysis of a child reproducing the abuse on her own body or the interviewer informing the jury that sexual assault victims often give "conflicting details" had "no proper purpose" other than to show the children "were telling the truth."[155] When carried to its logical end, this would mean a defense attorney could cite a victim's inconsistent or conflicting statements, and the prosecutor may have little recourse to counter this contention.[156]

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[152] *Id.* In a footnote, the court in *Kromah* referenced the CornerHouse protocol "RATAC" and stated, "Somehow RATAC is supposed to convert the interviewer into a human truth-detector whose opinions of the truth are valuable and suitable for the jury's consumption." *Id.* at 498 n.4. The court did not cite any trial testimony or any peer-reviewed literature to support this harsh rhetoric. Indeed, the scholarly literature in print at the time would refute the claim. In 2010, three years before *Kromah*, forensic interviewers from CornerHouse detailed the RATAC protocol and cited the peer-reviewed research utilized in the protocol. At no point was there a suggestion that simply using the protocol will enable anyone to determine if a child is telling the truth. Instead, the focus was to gather information that takes into account the child's developmental level and reduces suggestive practices. *See* Jennifer Anderson, Julie Ellefson, Jodi Lashley, Anne Lukas Miller, Sara Olinger, Amy Russell, Julie Stauffer & Judy Weigman, *The CornerHouse Forensic Interview Protocol: RATAC*, 12 THOMAS M. COOLEY J. PRAC. & CLINICAL L. 193 (2010). The court in *Kromah* also failed to note that in 2012 CornerHouse made modifications to its protocol and no longer used the acronym RATAC. Julie Stauffer, *A Look Inside the CornerHouse Forensic Interview Protocol*, 32 APSAC ADVISOR 19 (2020). It is also noteworthy that four years prior to *Kromah*, the South Carolina Court of Appeals described RATAC in a more neutral manner, noting it "was developed in response to concerns about child victims' testimony being tainted by police suggestiveness." State v. Douglas, 626 S.E.2d 59, 72 (S.C. Ct. App. 2009), *aff'd in part, rev'd in part*, 671 S.E.2d 606 (2009).

[153] *Kromah*, 737 S.E.2d at 501.

[154] *See* State v. Anderson, 776 S.E.2d 76, 80 (S.C. 2015); State v. Chavis, 771 S.E.2d 336, 340 (S.C. 2015); State v. Whiter, 732 S.E.2d 861, 867 (S.C. 2012); State v. Jennings, 716 S.E.2d 91, 94–95 (S.C. 2011).

[155] Venalonzo v. People, 388 P.3d 868, 878 (Colo. 2017).

[156] There may, though, be some options available to the prosecutor, such as having the victim explain any differences in seemingly inconsistent statements. What if, though, the victim does not know why she was unable to give details on one occasion and not another? What if the answer lies in research on trauma or the type of questions posed to him or her, or issues of fatigue or other factors she cannot adequately convey to a trier of fact?

3. A Forensic Interviewer May Be Able to Testify About the Dynamics of Child Abuse

In *Carter v. State*, two experts in forensic interviewing (one of whom interviewed the child victim) testified as to various child abuse dynamics.[157] These dynamics included how trauma may impair memory,[158] the role of the child's developmental age in limiting how many details the victim may be able to provide,[159] and why peripheral details, such as what a victim was wearing during an assault, may not be recalled.[160] There was also a discussion of the process by which some children disclose abuse, including the difference between a tentative disclosure and an active disclosure.[161]

In Texas, forensic interviewers have been qualified as experts to explain why an "abused child may temporarily recant a claim of abuse."[162] In Virginia, a graduate of four forensic interview training programs was also qualified to educate jurors on issues pertaining to recantation.[163]

In *State v. Thompson*, a man was convicted of luring a child into his basement where he licked the child's vagina, penetrated her with his fingers, and attempted to penetrate her with his penis.[164] The victim was "fearful and started crying," but the perpetrator told her "everything was okay and normal."[165] When the sexual assault was over, the offender "threatened that if anyone knew about it, they would think she was a whore and he would kill her."[166] Under these circumstances, a Connecticut court upheld the decision of a trial judge to permit "an expert in the area of forensic interviews and child sexual abuse investigations" to testify about delayed disclosure.[167] Specifically, the expert cited research on delayed reporting and said it is "atypical for children to report an assault immediately 'to somebody who [is] able to do something about it.'"[168] The witness also

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[157] Carter v. State, 996 So. 2d 112, 115 (Miss. Ct. App. 2008).
[158] *Id.* at 120.
[159] *Id.* at 121, 124.
[160] *Id.* at 124.
[161] *Id.* at 120, 121.
[162] Campos v. State, No. 02-19-00122-CR, 2020 Tex. App. LEXIS 4690, at *3 (Tex. App. June 25, 2020).
[163] Kilby v. Commonwealth, 663 S.E.2d 540, 547–48 (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 Windona, Minnesota, and the American Professional Society of Abused Children." *Id.* at 544 n.3. The witness also received "advanced training" at the NAC in Huntsville, Alabama and attended many national symposiums on forensic interviewing. *Id.*
[164] State v. Thompson, 799 A.2d 1126, 1129 (Conn. App. Ct. 2002).
[165] *Id.*
[166] *Id.*
[167] *Id.* at 1134.
[168] *Id.*

testified that "there is nothing unusual or uncommon about a child's reporting an assault to a friend or peer promptly, but not to a parent or close relative for as long as two years."[169]

In *State v. Ganoa*, the Supreme Court of Kansas did not allow a forensic interviewer and seasoned criminal justice professional to testify about delayed disclosure, piecemeal disclosure, or issues pertaining to coaching because the interviewer was "neither statutorily qualified nor licensed to diagnose any particular interview subject as a trauma victim suffering from any particular psychological or psychiatric malady."[170] If a forensic interviewer also worked as a mental health provider, however, she or he would presumably be permitted to speak to these dynamics.

A weakness in the *Ganoa* court's analysis is that forensic interviewers are taught about delayed disclosure and other aspects of trauma that are relevant to the process of interviewing children who may have been abused.[171] In contrast, licensed psychologists or other mental health professionals may know very little about these aspects, and what they do know may be wrong.[172]

4. A Forensic Interviewer May Be Able to Testify About the Process of Forensic Interviewing and Respond to a Defense Expert's Critique of the Interview

In *State v. Ganoa*, the Kansas Supreme Court held a forensic interviewer could testify as an expert "on the procedures followed and the pitfalls to be avoided in [forensic] interviews" because "[j]urors do not possess this information," and such "testimony was helpful to their understanding of the case."[173] This may be particularly true when, as in *Ganoa*, the defense attorney calls a defense expert to critique the forensic interview.[174]

In *State v. Ballou*, the government called a forensic interviewing expert to review the forensic interview and to respond to an extensive

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[169] *Id.*

[170] State v. Ganoa, 270 P.3d 1165, 1177 (Kan. 2012).

[171] NEWLIN ET AL., *supra* note 13, at 5.

[172] *See infra* notes 232–35 and accompanying text. For an overview of research documenting the need to improve the undergraduate and graduate training of psychologists and other professionals who may intersect with cases of child abuse, as well as pioneering efforts to address these issues, see Victor I. Vieth, Betsy Goulet, Michele Knox, Jennifer Parker, Lisa B. Johnson, Karla Steckler Tye & Theodore P. Cross, *Child Advocacy Studies (CAST): A National Movement to Improve the Undergraduate and Graduate Training of Child Protection Professionals*, 45 *MITCHELL HAMLINE L. REV.* 1129 (2019).

[173] *Ganoa*, 270 P.3d at 1177.

[174] The defense expert was a psychologist who criticized the forensic interviews conducted in the case. *Id.*

critique by a defense expert.[175] Although the defense and prosecution expert testimony was discussed in the case, the opinion did not specifically address the scope of the testimony.[176] However, in addressing the admission of the forensic interview itself, the court found that a forensic interviewer who testified as to her credentials, including her forensic interview training and experience in conducting forensic interviews, was not, on that basis alone, providing expert testimony.[177]

In *Venalonzo v. People*, the Colorado Supreme Court also found that a forensic interviewer is allowed to describe the protocol used, her training, her experience in conducting interviews, the number of times she has testified in court, and that testimony along these lines is "not expert testimony because any ordinary person is capable of describing her own credentials."[178] Similarly, the forensic interviewer's testimony that children "are not very good at understanding physical measurements, that they often use generalities when speaking, and that they often reveal secrets to other children before they tell adults" was also not expert testimony because the "ordinary person has spent time with children and could reasonably be expected to know" these things.[179]

5. Admissibility and Scope of Defense Expert's Testimony

Although the scope of the State's expert witness on forensic interviewing is more clearly delineated in the case law, the scope of the defense expert's critique of the forensic interview has not been thoroughly discussed. This is likely because when the State obtains a conviction, it is not challenging the defense expert's testimony on appeal but is instead responding to the appeal of the defense attorney. When a case results in an acquittal, the State is likely unable to appeal a judge's ruling regarding the scope of a defense expert's testimony.

In *State v. Speers*, a second grade school teacher was charged with crimes related to the possession of sexually exploitive images on his computer.[180] The prosecutor offered as propensity evidence the testimony of four girls who alleged Speers had sexually molested them.[181] Although the Arizona Court of Appeals found it proper to admit the testimony of these children, they concluded it was an error to exclude the testimony of a

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[175] State v. Ballou, 448 P.3d 479, 491–92 (Kan. 2019).
[176] *Id.*
[177] *Id.* at 491.
[178] Venalonzo v. People, 388 P.3d 868, 876 (Colo. 2017).
[179] *Id.*; *see also* State v. Howling, 448 P.3d 409, 412, 414 (Kan. 2019) (finding that a forensic interviewer's description of her credentials and summary of the child's disclosure as foundation for admitting a recorded forensic interview did not constitute expert testimony).
[180] State v. Speers, 98 P.3d 560, 563 (Ariz. Ct. App. 2004).
[181] *Id.* at 564.

defense expert who was called to critique the forensic interviews of the girls.[182] According to the court, the "purpose of expert testimony concerning interview techniques is not to show that the child witness is not telling the truth, but to question whether the facts believed to be true by the witness are reliable."[183]

> However, *Speers* "limited" the defense expert's testimony to
> [E]xplaining to the jury the dangers of . . . interviewing children and discussion of the particular practices employed in the instant case. It must be confined to providing the jury information 'which it may use in weighing the evidence to determine accuracy or credibility of a witness' and may not include any opinion regarding the accuracy, reliability or credibility of any particular witness.[184]
> In a dissenting opinion in *Speers*, the court wrote,
> [T]hough the proposed expert went on to claim that "[m]y testimony will not comment on the children's credibility," it is difficult to imagine how testimony that is intended to point out how a witness' testimony has "problems" and may be "contaminated" cannot be viewed by the trial judge as going to the credibility of that witness.[185]

In *State v. Ballou*, a defense expert critiqued the interview protocol even though "a lot" of the protocol used in the case was "entirely valid." However, the defense expert was concerned that many interviewers did not adhere to the protocol.[186] The expert also opined that the interviewer approached the interview with the belief that the child was abused and thus failed to explore "alternative hypotheses."[187] The defense expert also concluded some questions were "leading" and that one of the forensic interviews in the case was too long.[188] Although these and other opinions are contained in the *Ballou* decision, the court did not consider whether any of these statements unfairly commented on the veracity of the victim.

In *Darst v. State*, a child abuse conviction was overturned on the basis of ineffective assistance of counsel for not consulting and offering defense expert testimony as to the problematic nature of interviews of the

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[182] *Id.* at 564, 567.
[183] *Id.* at 566.
[184] *Id.* at 567 n.3 (quoting State v. Lindsey, 720 P.2d 73, 75 (Ariz. 1986)).
[185] *Id.* at 571.
[186] State v. Ballou, 448 P.3d 479, 488 (Kan. 2019).
[187] *Id.*
[188] *Id.*

alleged victims "instead of ensuring that forensic interviews of the children were conducted without unnecessary delay."[189]

In *People v. Hooker*, a defendant's claim of ineffective assistance of counsel for not calling an expert witness to critique a forensic interview was denied because the forensic interviewers were properly challenged on cross examination.[190] Although the Michigan Supreme Court declined to review the decision, one justice dissented because of the departures in the interview from the State's forensic interviewing protocol.[191]

In *State v. Colburn*, the trial judge excluded a defense expert who intended to critique the forensic interview and comment on how the questions may have impacted the child's statements.[192] On appeal, the decision was reversed because forensic interviewing technique is a proper subject for expert testimony that may assist the jury,[193] and, given the importance of the videotaped forensic interview in this case, excluding the defense expert was a significant error.[194]

C. Commentary on the Permissible Scope of the Forensic Interviewer's Testimony

As can be seen from the overview of cases described in this Article, there is variation in the scope of expert testimony permitted by a forensic interviewer. Some courts, such as the Alabama Court of Appeals, have 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.[195]

In Minnesota, an appellate court also allowed an expert to render an opinion that a child was sexually abused, but the court stated that the interviewer did not express an opinion as to the identity of the perpetrator.[196] More recent Minnesota decisions, however, are more restrictive.[197] As previously discussed, Mississippi courts have allowed forensic interviewers to testify that a child's statements are "consistent" with sexual abuse.[198]

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[189] Darst v. State, 746 S.E.2d 865, 875 (Ga. Ct. App. 2013).
[190] People v. Hooker, No. 340271, 2019 Mich. App. LEXIS 3692, at *9 (Mich. Ct. App. July 9, 2019).
[191] People v. Hooker, 950 N.W.2d 57, 58 (Mich. 2020).
[192] State v. Colburn, 366 P.3d 258, 260–61 (Mont. 2016).
[193] *Id.* at 261.
[194] *Id.* at 262.
[195] Sanders v. State, 986 So. 2d 1230, 1232–33 (Ala. Crim. App. 2007).
[196] *See* State v. Hollander, 590 N.W.2d 341, 344–45 (Minn. Ct. App. 1999).
[197] *See, e.g.*, State v. Wembley, 712 N.W.2d 783, 792 (Minn. Ct. App. 2006) (allowing a forensic interviewer to testify as to criteria for evaluating a child's statement, provided the interviewer does not offer an opinion as to the child's actual credibility).
[198] *See, e.g.*, Golden v. State, 984 So. 2d 1026, 1033 (Miss. Ct. App. 2008) (stating that the forensic interviewing expert "permissibly offered" testimony that the details provided by a child in the interview are "consistent with a child that has been sexually abused" but could

Law professor John Myers has criticized these decisions, calling them a "disturbing development."[199] Although it may be 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.[200]

Moreover, it is not simply doctors and psychologists who 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:

> [I]t [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.[201]

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 . . . ."[202] 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

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not give a "direct opinion" on the child's truthfulness); Williams v. State, 970 So. 2d 727, 735 (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, 1103–04 (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). In *Mooneyham*, the forensic interviewer testified the information received from the child was "consistent with a child who had been sexually abused." *Id.* at 1106.

[199] JOHN E.B. MYERS, MYERS ON EVIDENCE OF INTERPERSONAL VIOLENCE 524 (2011).

[200] JOHN E.B. MYERS, MYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES 393–94 (2009).

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

[202] FED. R. EVID. 702.

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.[203] Without this knowledge, judges and jurors 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.[204] 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 that the penis looked like a "power ranger" as an indication of fantasy or lack of intelligence.

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.[205] 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 boy's 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

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[203] For an overview of the research on anatomical dolls, see Faller, *Anatomical Dolls*, *supra* note 54, at 7; *see also* Vieth, *supra* note 54 (forthcoming 2021).

[204] This is a case that was related to me by a colleague who is a forensic interviewer.

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

usage, and the fact that the usage in this particular case fell within the APSAC national guidelines.[206]

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."[207] Given the high-profile nature of sexual abuse cases in the 1980s, many of which received significant media attention and became the subject of documentaries and movies,[208] it is critical for the State to offer evidence showing that steps were taken to minimize suggestibility practices in interviewing a child. This type of testimony 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. Such testimony is no different 'from an investigator testifying as to the steps he or she took at a crime scene to minimize the chances of blood, semen, or other evidence collected from being 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.[209]

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, a forensic interviewer's expert testimony 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."[210] A forensic interviewer should consult with the prosecutor before testifying to make sure he or she does not offer impermissible testimony. Unless the interviewer is practicing in a state where this testimony is specifically allowed, it is best to avoid rendering an opinion that a child

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[206] *See* APSAC, *The Use of Anatomical Dolls in Child Sexual Abuse Assessments* (1995), https://2a566822-8004-431f-b136-8b004d74bfc2.filesusr.com/ugd/4700a8_e70d997a77bf4334bef8b97c55cc82bf.pdf [https://perma.cc/4MK2-ZTAN]. For an analysis of how anatomical dolls may be used in interviews, see Heather A. Hlavka, Sara D. Olinger & Jodi Lashley, *The Use of Anatomical Dolls as a Demonstration Aid in Child Sexual Abuse Interviews: A Study of Forensic Interviewers' Perceptions*, 19 J. CHILD SEXUAL ABUSE 519, 535 (2010).

[207] *See* FED. R. EVID. 702.

[208] *See* CHEIT, *supra* note 5.

[209] MARGARET-ELLEN PIPE, YAEL ORBACH, MICHAEL LAMB, CRAIG B. ABBOTT & HEATHER STEWART, DO BEST PRACTICE INTERVIEWS WITH CHILD ABUSE VICTIMS INFLUENCE CASE PROCESSING? (November 2008), https://www.ncjrs.gov/pdffiles1/nij/grants/224524.pdf [https://perma.cc/76PP-B7NV].

[210] State v. Douglas, 626 S.E.2d 59, 72 (S.C. Ct. App. 2006), *rev'd on other grounds*, 671 S.E.2d 606 (S.C. 2009).

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 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, "[T]he best forensic interviews are conducted by the most well-trained interviewers . . . [and] the key to ensuring the success of the forensic interview portion of a CSA investigation is in having well-trained forensic interviewers follow research-based guidelines and stay current with developing recommendations."[211] At a minimum, the forensic interviewer should have completed a comprehensive forensic interviewing course in which the interviewer demonstrates his or her skills and is tested on his or her 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."[212] 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."[213] This study supports the practice in many forensic interview training programs, including CornerHouse and ChildFirst, of using trained actors in practice scenarios.[214]

After completing 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.[215]

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[211] Wiley, *supra* note 40, at 277–78.
[212] Martin B. Bowell, 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).
[213] *Id.* at 1014.
[214] 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).
[215] Farrell & Vieth, *supra* note 37 (describing advanced forensic interview training courses).

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 the NICHD, Step Wise, the Poole and Lamb "flexible protocol," and CornerHouse's RATAC protocol.[216] Experts in the field have noted that "[t]hese and other protocols have similar characteristics and are based upon research."[217] 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."[218]

An interviewer must understand the research that supports his or her forensic interviewing protocol and be able to articulate this in court.[219] This is one reason attendees of an NCA approved training program are required to read pertinent research impacting the field and are otherwise trained to base their interview on practices supported by research.[220]

C. The Forensic Interviewer Should Participate in Peer Review

The importance of peer review cannot be overstated. As Michael Lamb noted, "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."[221]

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

At a minimum, the forensic interviewer should be fluent with the forensic interviewing best practices drafted by representatives of all of the major forensic interview training programs in the United States and published by the United States Department of Justice.[222] In addition, interviewers should be familiar with the guidelines promulgated by APSAC.[223] If the interviewer uses anatomical dolls as part of the investigative

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[216] Perona et al., *supra* note 40, at 91.
[217] *Id.*
[218] *Id.* at 84.
[219] *See, e.g.*, *id.* at 91 (emphasizing that the components of the forensic interview are based upon empirical research).
[220] NAT'L CHILDS.' ALL., *supra* note 4.
[221] 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, 1210 (2007).
[222] *See* NEWLIN ET AL., *supra* note 13, at 2.
[223] *See* APSAC *Practice Guidelines: Forensic Interviewing in Cases of Suspected Child Abuse* (2012).

interview, it is essential to also be familiar with and to work within the APSAC guidelines for the use of these interview aids.[224] Whether or not the forensic interviewer works as part of a CAC, he or she should be familiar with the accreditation standards of the NCA for forensic interviewers working within a CAC[225] and comply with all of these standards. Lastly, forensic interviewers should understand and apply the APSAC Code of Ethics, which obligates interviewers to conduct interviews "in a manner consistent with the best interests of the child."[226]

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.[227]

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 take 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, "[I]t really stunk."[228] 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 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 situation

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[224] APSAC, *Practice Guidelines: Anatomical Dolls*, *supra* note 62, at 78–91.
[225] NAT'L CHILDS.' ALL., *supra* note 4.
[226] Toth, *supra* note 31, at 9, 10.
[227] Vandervort, *supra* note 53, at 1415.
[228] This was a case the author handled when serving as a prosecutor.

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.[229]

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.[230]

H. The Forensic Interviewer Should Function as Part of a Multidisciplinary Team

It is not enough that the interviewer follows 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.[231] 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.[232] 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

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[229] Victor Vieth, *Investigating and Prosecuting Child Abuse*, 3 CHADWICK'S CHILD MALTREATMENT 179, 188–91 (2014).

[230] *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 (Nat'l Ctr. for Prosecution of Child Abuse et al. eds., 3d ed. 2004) (explaining the federal rules of evidence concerning prior consistent statements) [hereinafter INVESTIGATION AND PROSECUTION].

[231] INVESTIGATION AND PROSECUTION, *supra* note 230, at xxix-xiiv.

[232] *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).

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 primarily 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,[233] 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 five criteria for discrediting, if not disqualifying, an expert called by the defense.

A. Forensic Interviewing Credentials

Defense experts, many of whom are psychologists, have little, if any, training in the field of child abuse, much less in 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.[234] The study found the lack of graduate training for psychology students "contradict[ed] the rapidly expanding literature on responding to maltreatment and the demands of

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

[234] 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).

this interdisciplinary, professional endeavor."[235] Twelve years later, researchers reached a similar conclusion.[236] Discussing her educational background, psychologist Anna Salter wrote:

> 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.[237]

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

> 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 shameful, it is also puzzling. Hostility toward child victims and adult women leaks through this literature like poison.[238]

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 or she 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 or she should not be addressing the jury as to the specifics of any interviewing protocol he or she

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[235] *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.*

[236] Maureen C. Kenny & Roberto L. Abreu, *Training Mental Health Professionals in Child Sexual Abuse: Curricular Guidelines*, 24 J. CHILD SEXUAL ABUSE 572, 578 (2015).

[237] ANNA C. SALTER, PREDATORS: PEDOPHILES, RAPISTS, AND OTHER SEX OFFENDERS 2 (2003).

[238] *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, Susan E. Diedrich, Devon Lee, Kelly Fincher & Rachel M. Stern, *Prosecution of Child Sexual Abuse in the United States*, *in* CRITICAL ISSUES IN CHILD SEXUAL ABUSE: HISTORICAL, LEGAL, AND PSYCHOLOGICAL PERSPECTIVES 27, 41 (Jon R. Conte ed., 2002).

has not been trained in, much less commenting on acceptable standards in a profession he or she 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."[239] Similarly, if a witness understands the theory behind forensic interviewing but has never actually practiced the craft, his or her 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 or her 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 APA require psychologists to be competent in the area he or she is practicing in or is otherwise offering expertise.[240] These rules also require a psychologist to "undertake ongoing efforts to develop and maintain competence."[241] Accordingly, if a psychologist testifies as an expert in a case of child abuse, the expert must be competent in this area and 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, or has never been part of a multidisciplinary team or a CAC, the witness may be hard-pressed to meet these ethical standards. This is because work in the field of forensic interviewing requires those who interview children to not utilize research but also to be "practice-informed."[242]

C. Disclosure of Research Supporting Testimony

Although the state's forensic interviewer 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 or she 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,

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[239] DAVID J. MONGE, LIFE-CHANGING FAITH FOR TODAY: WHY LUTHER'S THEOLOGY STILL MATTERS 92 (2003).

[240] AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT § 2.01 (2017).

[241] *Id.* § 2.03.

[242] NEWLIN ET AL., *supra* note 13, at 3.

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 government's ability to respond to this attack on the interview, which, in many cases, is ultimately an attack on the credibility of the child. As Justice Cardozo once noted, "[J]ustice, 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."[243]

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 or her testimony. For example, if the defense expert cites a handful of studies condemning the usage of anatomical dolls but fails to reference the large body of studies supporting their usage,[244] 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.

E. An Awareness of Sensitivity Versus Specificity Bias

In the field of forensic interviewing, sensitivity bias "emphasizes minimizing false negative errors or errors of undercalling abuse" whereas specificity bias "focuses on preventing false positive errors or errors of overcalling abuse."[245] As a result of high-profile daycare cases of the 1980s, Mark Everson and Scott Rodriguez argue the field of child protection "pivoted sharply from a focus on sensitivity and child protection to a sustained embrace of specificity and adult protection."[246] Everson and Rodriguez describe the impact on forensic interviewing this way: "Interview protocols became more structured, if not scripted, to reduce room for interviewer error. To overgeneralize only slightly, the implicit attitude in interview methodology changed from 'Tell me if you have a secret, so I can help.' to 'Convince me, if you say you were abused.'"[247]

Everson and Rodriguez note:

> The imbalance of specificity over sensitivity can be seen in the relative emphasis placed in interview design,

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[243] Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).

[244] Faller, *Anatomical Dolls*, *supra* note 54, at 6–8 (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).

[245] Everson & Rodriguez, *supra* note 59, at 92.

[246] *Id.* at 93.

[247] *Id.*

> instruction, and practice on preventing interviewer suggestion while virtually ignoring the effect of perpetrator "suggestion." The interviewer's access to the child is most often limited to a single, one-hour, videotaped interview. In contrast, the perpetrator may have 24/7 access to the child for years to manipulate, threaten, and intimidate the child into silence.[248]

Everson and Rodriguez cite an article summarizing sixteen studies involving children identified as child sexual abuse victims because of sexually transmitted diseases who nonetheless failed to disclose sexual abuse in forensic interviews involving the NICHD protocol.[249] Driving this point home, Everson and Rodriguez write that "[u]p to 50% of true cases of abuse may fail to disclose their abuse in the forensic interview process because of interview methodology that has prioritized specificity over forensic balance for at least the last 25+ years."[250] As a result, Everson and Rodriguez call for a "forensically balanced" interview process that will combine "both sensitivity and specificity methodology to elicit a full and detailed account from the child."[251]

Everson and Rodriguez's critique of the current state of forensic interviewing is a critical issue to bear in mind as courts grapple with the admission and scope of expert testimony on forensic interviewing. Any expert, for either the State or the defense, who swings too far in one direction or the other may improperly influence our judicial system to over or under-call cases of child maltreatment.

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

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[248] *Id.* at 94.
[249] *Id.* at 95.
[250] *Id.*
[251] *Id.* at 97.

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.

Courts will make these decisions in light of research and concerns that the field has swung too far and is unduly emphasizing concerns for suggestiveness in the interview process while failing to recognize the opportunities for suggestion by perpetrators of child abuse.