



# CENTER PIECE

The Official Newsletter of the National Child Protection Training Center

## When the Smoke Clears: Cross-Examining the Defense Expert's Attack on a Forensic Interview

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### Introduction

In cases of child sexual abuse in which a forensic interview is a critical part of the prosecutor's case, defense attorneys often call a defense "expert" to critique the child's statement and the manner in which this evidence was collected. Although these "experts" often have a PhD, typically in psychology, they have little or no experience or training in forensic interviewing and they frequently do not understand even the most fundamental principles of forensic interviewing. Although they are often aware of a handful of studies addressing one or more issues relating to a forensic interview, such as interview instructions or the usage of anatomical diagrams, they rarely know how to apply this research to an actual fact pattern. Accordingly, if a prosecutor is well prepared, it is often very easy to discredit these witnesses. In some cases, the prosecutor can even use the defense "expert" to support the credibility of a child's statement.

### Preparing for Cross-Examination: The Importance of Pre-trial Motions

In preparing for cross examination, the prosecutor should closely review the defense expert's curriculum vitae or resume and also the defense expert's report. If the facts warrant, a prosecutor should consider filing at least two pre-trial motions.

First, a prosecutor should consider filing a pre-trial motion to limit or exclude the defense expert's testimony. Review closely the defense expert's report to determine

what he is purportedly going to testify to. Compare this purported testimony with the expert's curriculum vitae. If the expert is going to testify that the forensic interviewer's methodologies are not widely accepted in the field or that a particular forensic interviewing protocol is invalid or flawed, the expert should have some experience or training that allows him/her to render such an opinion. Many "experts" have never attended a forensic interview training conference, have never conducted a forensic interview, and have never published an article on a topic related to forensic interviewing. Even many psychologists called as defense experts have only a tangential knowledge of the field. It may be difficult to exclude the testimony altogether, but it may be possible to limit the range of testimony. For example, if an "expert" is going to critique the forensic interviewing protocol taught by the National Children's Advocacy Center in Huntsville,<sup>2</sup> the expert should have attended that course or at least reviewed the course material. In Kansas, a defense expert was not allowed to testify about the CornerHouse forensic interview training protocol RATA<sup>®</sup> because the interviewer had never attended a course in which this protocol was taught and otherwise had very little knowledge of the protocol or the research that supports the model.<sup>3</sup> This does not mean the defense expert cannot testify about other matters. A psychologist, for example, may be qualified to speak about the impact of child abuse on a child emotionally and the possible diagnosis that can result (PTSD, etc), but should not render opinions about forensic interview protocols or procedures she has no training or experience with.

## UP COMING conferences

*When Words Matter*  
July 12-15, 2010

Location: Savannah, Georgia

*When Words Matter* is a 4-day National Conference hosted each year in a state that has implemented the ChildFirst<sup>®</sup> Forensic Interview Training Program. This year it will be held in beautiful Savannah, Georgia. *When Words Matter* brings together nationally recognized experts from all areas of the child protection field for this informative and innovative conference. The topics covered will be useful for prosecutors, law enforcement officers, child protective service workers, forensic interviewers, child counselors/psychologists, medical professionals, victim advocates, and anyone else who interviews children or prepares them for court.



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Second, if it is not clear from the expert's report, file a motion for a court order requiring the defense "expert" to provide a listing of the articles, treatises or other literature he/she is relying on in attacking the forensic interview. As will be discussed below, finding out exactly what literature the expert is relying on can be helpful during cross-examination. Defense "experts" like to speak in generalities. The key to a successful cross-examination is to attack these experts on the specifics of the literature or the case in question. In addition to, or instead of filing a motion, have your forensic interviewer or investigator call the defense expert and make this inquiry. This is a legitimate inquiry. If the forensic interviewer did make an error, he or she should be willing to concede the error at trial. If, however, the defense expert is unable to disclose specific research or specific errors in the interview, the interviewer can have even greater confidence in the quality of the interview. In most jurisdictions, a prosecutor may also call the defense witnesses including any experts. If the defense expert refuses to speak with the state's forensic interviewer or with the prosecutor, the government has a good cross examination on the issue of bias (i.e. "You spoke with defense counsel? You spoke with the defense investigator? You refused to speak with the investigating officer? You refused to speak to me, the prosecutor?").

### **Preparing for Cross-Examination: The Importance of the Direct Examination of the State's Forensic Interviewer**

Once a prosecutor has received and reviewed the report and curriculum vitae of the defense expert, sit down and discuss these documents with the forensic interviewer. It may be that errors were made in the forensic interview. If so, concede these errors as part of direct examination. This makes the interviewer look more human and draws the sting out of the defense attorney's cross examination. Equally important, this approach may persuade the defense counsel not to call the defense expert or, at the very least, steals his or her thunder. Many of the defense expert's attacks, though, will be illegitimate and can be addressed on direct examination of the

state's forensic interviewer. For example, the defense report may claim the forensic interviewer failed to explore alternative hypothesis. If the interviewer did explore alternative hypothesis but it wasn't recognized by the defense expert, point out those moments in the interview where this was done. If the defense expert claims the interviewer did not employ forensic interview instructions, but the interviewer incorporated these instructions throughout the interview, the forensic interviewer can explain this decision and research that supports it.<sup>4</sup>

A prosecutor, working with the forensic interviewer, should do more on direct examination than simply respond to the defense report. Assess what it is that makes the forensic interview of a high quality. For example, if there are a lot of open-ended questions, highlight them. It is also important to highlight the credentials of the forensic interviewer—credentials that very few, if any defense experts will have. To this end, highlight the following six areas on direct examination:

**1. Forensic interview training.** Unlike the defense expert, the government's witness has gone through training specifically on conducting a forensic interview. Highlight this training in great detail. How many days? What topics were covered? Were you required to read pertinent literature in the field? Did you have to take a test? Did you pass the test? Did you have to demonstrate your expertise and be critiqued? Who critiqued you?

**2. Ongoing training.** The National Child Protection Training Center, as well as other national organizations, offer advanced courses on forensic interviewing. Continue to access these courses and keep track of them. If, for example, a forensic interviewer attends *When Words Matter* every year, the interviewer is accessing 3.5 days of continuing, specific training on forensic interviewing. Chances are the defense expert has never attended a course specifically focused on forensic interviewing, much less an advanced course.

**3. Practical experience.** Unlike the defense expert, the government's forensic interviewer actually conducts forensic interviews. Keep track of the number of interviews and be able to cite that number to the court. Many interviewers

have conducted hundreds, even thousands of forensic interviews.

**4. Peer review.** It is critical that forensic interviewers continue to participate in peer review and that interviewers keep track of this. In this way, the interviewer can testify that not only does he/she continue to practice in the field but subjects him or herself to ongoing review of their work by professionals in the field.<sup>5</sup>

**5. Membership in APSAC and adherence to professional guidelines.** It is helpful if the interviewer is a member of the American Professional Society on the Abuse of Children (APSAC). Membership in a professional society boosts the credentials of the interviewer. Moreover, APSAC has guidelines for forensic interviewers and for the usage of anatomical dolls. Review these guidelines before testifying and be prepared to say that the forensic interview, and any usage of dolls, was consistent with these national guidelines. If and when forensic interviewers choose to develop an association to determine standards for their field, referencing membership in such an association and adherence to any forthcoming ethical or other standards will also bolster the interviewer's expertise and further highlight that the defense "expert" is completely outside the field of forensic interviewing.<sup>6</sup>

**6. Discuss the science behind the interviewing protocol.** All of the leading interviewing protocols are "research-based" in that they are rooted in research. Defense attorneys attack many of the leading forensic interviewing courses because there is little research that graduates of these courses are properly conducting interviews once in the field. In response, the forensic interviewer should be prepared to summarize the research supporting the protocol used in a particular case. The CornerHouse protocol RATAAC, for example, is based on the review of hundreds of peer-reviewed articles<sup>7</sup> and almost everything done in the interview is supported by research. Some aspects of the model, such as the use of anatomical dolls, are supported by a review of more than 100 studies.<sup>8</sup>

A forensic interviewer who testifies along the lines outlined above not only firmly establishes his or her credentials but helps the prosecutor in setting the stage for the cross-examination of the defense expert.



## Eleven Tips for the Successful Cross-Examination of the Defense Expert

If a prosecutor thoroughly reviews the defense expert's report, files the appropriate motions, and reviews any literature pertinent to a particular fact pattern, the possibilities for a successful cross examination are endless. In most cases, there will be at least eleven areas in which a prosecutor can expose the defense expert's analysis as deeply flawed and with little basis in science, experience, or common sense.

**1. Cross heavily on the credentials of the expert—or lack thereof.** Many defense "experts" have never conducted a forensic interview and have never attended even one of the major forensic interviewing courses. To the extent these "experts" have any experience of working directly with children, it is typically in another context—such as a psychologist or perhaps purely as a researcher. Moreover, the experiences these experts may have had with children are often a long time ago. The National Child Protection Training Center has a number of sample cross-examinations of these experts on their noticeable lack of credentials. We are also available to work with prosecutors and child protection attorneys in drafting possible cross examinations.

**2. Examine the ethical guidelines pertaining to the profession of the expert called by defense counsel.** Most ethical codes prohibit members of their profession from offering opinions outside their area of expertise. If, for example, the defense expert is a psychologist and yet is testifying as to the field of forensic interviewing—something he likely knows

little about, the following cross-examination might be appropriate: "Are you familiar with the ethical guidelines of the American Psychological Association? You recognize that these rules require you to be competent in the areas you are practicing in or are otherwise offering your expertise? (APA Rule 2.01) These rules also require you to 'undertake ongoing efforts to develop and maintain (your) competence?' (Rule 2.03) And yet you have never attended a basic, much less advanced course on forensic interviewing?"

**3. Cross-examine the defense expert on specifics—don't let the "expert" get away with a broad critique of the interview or interviewer.** Defense experts often speak in generalities (i.e. there were "too many interviews", "not enough open-ended questions", the "child made contradictory statements." In most instances, the expert's report provides, at best, only one or two examples from the record to support these statements. When this happens, the prosecutor has at least two options:

- **On cross-examination, ask the witness to provide examples to support his claim.** This is, of course, a risk. If the defense expert can back up the statements with myriad examples from the forensic interview, the witness becomes this much stronger. If, though, the defense expert had a lot of examples to support such broad claims, why didn't he raise them in the report or on direct examination? Accordingly, it may be worth the risk and put the witness on the spot. In all likelihood, he will only be able to come up with one or two examples. Moreover, the prosecutor, in consultation with the forensic interviewer, should be able to assess whether or not there are many examples in the record on which the defense expert can likely hang his/her hat. If not, cross-examination on this subject may be worth any risk.
- **Ask the witness what the forensic interviewer did correctly.** This is a "win-win" question. If the expert concedes there were some things done correctly, this boosts the credibility of the interviewer. If he says the interviewer did *nothing* correctly, it shows the witness is biased. After all, very few things in life can be cast in such absolute terms. If the expert does, in response to cross, articulate things the interviewer did

correctly, you may want to point out that none of these positive things were mentioned in the report nor on direct examination—and would not have come up if you had not inquired about them on cross examination. This might be particularly helpful if the "expert" paints a picture of him or herself as neutral.

**4. Box the witness into a corner by getting him to define the components of a competent forensic interview—and then cross him on the specific examples from your fact pattern showing these components were present.** If, as suggested above, you get the witness to articulate the treatises or articles he is relying on, utilize quotes from these articles as to the components of a good forensic interview. Once he agrees with these definitions, cross him on specific examples in the case file showing the standards were followed. These points may include:

- **Child friendly environment.** Get the expert to agree that, generally speaking, it is advisable to conduct the forensic interview in a child friendly environment. If the defense expert agrees with this premise, and if your child victim was interviewed in a Child Advocacy Center (CAC), the follow up question may be "And you agree that, in this case, the child was interviewed in a child-friendly environment?"
- **Small number of interviews.** Ask the defense expert if he will agree that, generally speaking, the fewer number of interviews the better. If your victim was only interviewed once, your follow up question is "in this case, the child was only interviewed once?"
- **Alternative hypothesis.** Ask the expert if he will agree that, generally speaking, an interviewer should explore alternative hypothesis in the interview. If he agrees, and if your interviewer did this, cross the defense expert on the alternatives explored. For example, assume a child disclosed to her day care provider, "Daddy put his pee on my pee." If the interviewer explored multiple hypothesis (sexual abuse, playing with blocks, a reference to alphabet soup, helping the child spell her name by drawing a capital "P", or the father peeing in the toilet following the child), highlight each of the hypothesis explored as part of the cross-examination.

- **Open-ended questions.** Get the expert to define an “open-ended question.” Offer as an example the question “tell me about that?” Once you box the witness into the corner, be prepared to cross examine the witness on all the open-ended questions posed by the interviewer. For this cross to be successful, it is essential that you transcribe the interview and highlight a great many open ended questions. The more of these the better but, as a general rule, ask the defense expert to acknowledge at least 20 obvious open ended questions. If the questions are obviously open ended and the defense “expert” starts to fight with you on these, this can also be helpful. Simply plow ahead and then, in closing argument, point out that the defense expert doesn’t really define *anything* as open ended—and ask the jury to apply their common sense in examining the interview.

**5. Cross-examine the expert on any prior inconsistent statements.** If the expert has testified before, or has published anything, review as many of these writings and transcripts as possible. Call the National Child Protection Training Center and/or the National Center for Prosecution of Child Abuse for help.<sup>9</sup> Many of these witnesses make inconsistent statements from trial to trial and from writing to writing.

**6. Point out research that contradicts the defense expert’s report or claims.** For example, if the defense expert cites the handful of studies condemning the usage of anatomical dolls, be prepared to cite the large body of studies supporting their usage. The cross may look something like this: “In the report you prepared for defense counsel, you discuss the literature on the usage of anatomical dolls. You are familiar with this literature? Do you agree there are well over 100 published studies on anatomical dolls? Are you familiar with Dr. Kathleen Colburn Faller from the University of Michigan? Are you familiar with a peer reviewed article Dr. Faller published in the *Journal of Child Sexual Abuse* in 2005 providing a comprehensive literature review of the research on Anatomical Dolls? According to Dr. Faller, ‘(t)he majority of studies indicate they (anatomical dolls) can be a useful tool, but there are also a few studies which do not support their use.’<sup>10</sup> Is that an accurate summary of the state of the research on anatomical dolls?”

**7. Use memory and suggestibility research to the state’s advantage.** Defense experts are tending to shy away from a specific discussion of memory and suggestibility research. The reason, perhaps, is that the research generally supports the proposition that children are not necessarily that suggestible. If the expert goes down this path in his/her report or on direct examination, be prepared to cross on a handful of points from the literature.<sup>11</sup>

**8. Cross-examination on the victim’s alleged “inconsistent statements.”** If the defense “expert” contends the child victim(s) made “inconsistent statements” in an interview or through several statements, the prosecutor can respond in several ways. First, the prosecutor can address this through his or her forensic interviewer who, on direct or rebuttal can offer several possibilities for an inconsistent statement other than the child lied or was led. Second, these additional possibilities can also form the basis of a cross-examination along the following lines:

- **Multiple possibilities for inconsistent statements.** The prosecutor’s cross examination may include the following questions: “There are multiple possibilities for a child making inconsistent statements? For example, a child’s memory fades over time? The question or questioner focuses on a different aspect of the event? The child is tired and doesn’t want to give all the details of a prior event? Perhaps the child is perfectly consistent and we adults misunderstand what she is saying? The child misunderstood a question? The child didn’t fully hear a question?” You may also want to cross-examine in a way that highlights the absurdity of demanding a child be consistent on peripheral details, as opposed to the core nature of a sexually abusive relationship. This cross is an example: “Doctor, if you were working with an adult who had been married for a number of years, would you expect him/her to recall the number of times he/she had been intimate with their partner? Would you expect them to have a clear memory of the details of every sexual encounter with their partner? You would, however, expect them to know whether or not they had sex with their partner? You would expect him/her to have clear memories of certain sexual experiences with their partner—such

as the honeymoon or the last time he/she was intimate with their partner?”

- **Evidence of consistent statements.** Develop a string of *consistent* statements the child made. A cross examination might look like this: “Molly (whoever the victim is) told the forensic interviewer that her father sexually abused her? Molly also told this to a therapist? Molly also told this to a medical doctor? Molly also told this to the jury? Molly has said the abuse involved oral sexual activities? She has been consistent in this allegation? Molly has always claimed, in each of her statements, that there were no other witnesses? Molly’s demonstration of abuse with anatomical dolls is consistent with her verbal description of abuse?”

**9. The “downside of sexual abuse therapy.”** Sometimes, a defense “expert” expresses concern that a child has been in therapy following a disclosure of sexual abuse and argues that therapy should be delayed until after a trial or the criminal case is otherwise concluded. If this approach is taken, a prosecutor may be able to cross-examine the “expert” on the cruel nature of such a suggestion. If the defense expert is a psychologist who purports to be an expert on child sexual abuse, the cross can be particularly effective. Consider this approach: “Is child sexual abuse harmful to a child? Why is child sexual abuse harmful to a child? Child sexual abuse often contributes to serious psychological problems including Post Traumatic Stress Syndrome or PTSD? (Bring to court your copy of the DSM-IV and have the PTSD section marked so that you can easily cross-examine him from the DSM-IV if he starts to stray on you). PTSD is the sort of trauma often experienced by soldiers who have faced combat? Many prisoners of war, particularly those who have endured torture may suffer from PTSD? In such a case, would you delay diagnosis and treatment for a soldier? However, in the case of children who may have been sexually violated or otherwise maltreated, you would delay therapy? How long would you delay therapy? In other words, if the trial was delayed for up to a year, would you wait that long? Would you wait until the appellate process was exhausted? Doctor, what are some of the potential problems a child may encounter if therapy for sexual abuse is delayed for months or even years?”

**10. The existence of corroborating evidence.** If there is corroborating evidence, you can use that information to cross-examine the defense expert. Any peripheral detail that is corroborated can be used in cross examination. For example, if the child said she was sexually abused in the “room with the giant eagle” and the subsequent search warrant finds a bedspread of a giant eagle, this information can be used to cross examine the defense expert. The cross can be as simple as this: “Doctor, in this case Molly told the forensic interviewer she was sexually touched in the room with a ‘giant eagle’? Are you aware that, in this case, the investigator found a bedspread in the defendant’s room that did, indeed, have a diagram of giant eagle?” If the expert says he wasn’t aware of this, cross examine him on what information, or lack of information, he was given. If the expert admits he is aware of this fact, ask him if corroborating evidence is a relevant factor in assessing a child’s statement.

**11. The money questions.** Although defense experts are used to this, it can still be effective to ask them how much they are getting paid and by whom they are getting paid. If, though, you are calling an outside expert to testify in rebuttal or as part of your case in chief, the effectiveness of the cross is muted. In such a scenario, both the state and the defense retained and paid for outside expertise. If, though, the government is relying only on the expertise of the forensic interviewer, someone who truly is impartial and is not paid to get a certain result, cross-examining the defense expert on his or her compensation is legitimate.

## Conclusion

Although defense experts often couch their testimony in terms of educating judges and jurors as to the proper or improper method of interviewing children, it is critical to understand the true reason they are paid for their testimony: to undermine the credibility of a child’s disclosure of sexual abuse. The boy or girl they are attacking lacks the education and maturity to respond to such an attack. Accordingly, it is essential that prosecutors attend forensic interviewing courses, stay abreast of the literature, and otherwise be fully prepared to respond to unwarranted attacks on the credibility of a child or the child’s outcry of abuse. This can be done by conducting a proper direct examination of the government’s forensic interviewer and through a rigorous cross-examination of the defense expert.

## End Notes

- <sup>1</sup> Director, National Child Protection Training Center
- <sup>2</sup> Linda Cordisco Steele, *Child Forensic Interview Structure, National Children’s Advocacy Center*, 15(4) APSAC ADVISOR 2 (FALL 2003)
- <sup>3</sup> *State v. Wells*, 289 Kan. 1219, 221 P3d 561 (2009). In *Wells*, the Kansas Supreme Court found that a defense expert, Kathie Nichols, was not qualified to comment on the CornerHouse forensic interviewing protocol used in that state’s “Finding Words” course. This is because Nichols’ only knowledge of the protocol was a review of the website and discussions with a colleague. Id. at 578-79. As general support for limiting the testimony of defense experts called to critique a forensic interview, see Victor I. Vieth, *The Forensic Interviewer at Trial: Guidelines for the Admission and Scope of Expert Witness Testimony Concerning an Investigative Interview in a Case of Child Abuse*, 36(1) WILLIAM MITCHELL LAW REVIEW 186 (2009).
- <sup>4</sup> See Amy Russell, *Best Practices in Child Forensic*

*Interviews: Interview Instructions & Truth-Lie Discussions* 28 HAMLIN JOURNAL OF PUBLIC LAW & POLICY 99 (2006).

- <sup>5</sup> Victor Vieth, *In the Shadow of Defense Counsel: Conducting Peer Review in an Age of Discovery*, 1(10) CENTERPIECE (2009) (available online at [www.ncptc.org](http://www.ncptc.org) under “publications.”)
- <sup>6</sup> For a discussion of the value of establishing a national association of forensic interviewers to develop a credentialing system and ethical code, see Victor Vieth, *Setting Course: The Case for the Credentialing of Forensic Interviewers*, 2(2) CENTERPIECE (2010) (available online at [www.ncptc.org](http://www.ncptc.org) under “publications.”)
- <sup>7</sup> Jennifer Anderson, Sara Olinger, Julie Ellefson, Jodi Lashley, Anne Lukas Miller, Julie Stauffer, Judy Weigman, & Amy Russell, *The CornerHouse Forensic Interview Protocol: RATAc*, 22 THOMAS M. COOLEY JOURNAL OF PRACTICAL AND CLINICAL LAW (forthcoming fall 2010).
- <sup>8</sup> Kathleen Coulborn Faller, *Anatomical Dolls: Their Use in Assessment of Children Who May Have Been Sexually Abused*, 14(3) JOURNAL OF CHILD SEXUAL ABUSE 2, 5 (2005) (noting the “majority of studies indicate they (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 (1994) (noting that “in the proper hands, anatomical dolls are a highly efficient and effective tool for helping young children disclose and describe their sexual experiences.”)
- <sup>9</sup> The National Center for Prosecution of Child Abuse is a program of the National District Attorneys Association and can be reached at 703-549-9222 or by visiting their website at [www.ndaa.org](http://www.ndaa.org). The National Child Protection Training Center can be reached by calling 507-457-2890 or by visiting the Center’s website at [www.ncptc.org](http://www.ncptc.org)
- <sup>10</sup> *Id.*
- <sup>11</sup> For an excellent overview of the limitations of suggestibility research and how many of the studies actually demonstrate the strengths of most children, see generally Thomas D. Lyon, *The New Wave in Children’s Suggestibility Research: A Critique*, 84 CORNELL LAW REVIEW 1004 (1999).

## For More Information

The National Child Protection Training Center (NCPTC) at Winona State University provides training, technical assistance and publications to child protection professionals throughout the United States. In addition, NCPTC assists undergraduate and graduate programs seeking to improve the education provided to future child protection professionals. In partnership with CornerHouse, NCPTC also assists in the development and maintenance of forensic interview training programs utilizing the RATAc® forensic interviewing protocol. For further information, contact NCPTC at 507-457-2890 or 651-714-4673. Please visit our website at [www.ncptc.org](http://www.ncptc.org).

