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COURT APPOINTED FORENSIC INTERVIEWERS OF NON-VICTIM CHILD

WITNESSES:

WEIGHING THE NEEDS OF RELIABILITY, CHILD PROTECTION, AND
LITIGANT'S RIGHTS

BY

JOSEPH J. TAYLOR

BA, University of New Hampshire, 2007

Thesis

Submitted to the University of New Hampshire

in Partial Fulfillment of

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Master of Arts

In

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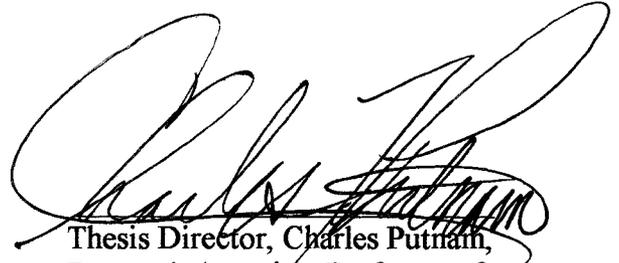
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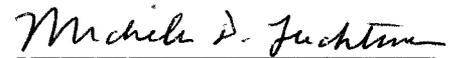
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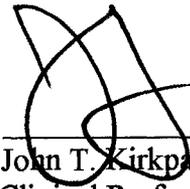
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DEDICATION

I dedicate this thesis to my family. Your encouragement of my academic work has inspired me to make great accomplishments. Thank you for being there through the tough times. Thank you for all your love and support.

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ABSTRACT

COURT APPOINTED FORENSIC INTERVIEWERS OF NON-VICTIM CHILD

WITNESSES:

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LITIGANT'S RIGHTS

BY

Joseph J. Taylor

University of New Hampshire, December, 2008

A child can be caused great harm by multiple interviews and the trauma associated with testifying in court. A child's statements may be inaccurate due to suggestive interview methods and trauma. Despite these facts children find themselves involved in the court system every day. The testimony of children cannot be ignored just as their testimony cannot be given too much weight without infringing the rights of litigants. More specialized procedures can be developed to give children's testimony its proper weight while ensuring reliability, child protection, and litigant's rights. A specialized procedure such as a Court Appointed Forensic Interviewer of non-victim child witnesses can be created to aid the fact finder, limit the harm and trauma associated with children involved in the court system, and offer the proper protection to litigants' rights.

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INTRODUCTION

Many would argue that the justice system partly exists to find the truth, to sift through the murky waters of fallacy in order to find the human virtue of justice.¹ The justice system not only punishes the unjust in criminal actions but also addresses wrongs in civil matters where wrongdoing and injury are often dealt with by compensation. We have all heard of or seen just men being punished and unjust men going free. Because not all unjust men are punished and not all just men are compensated, it is evident that the justice system is not perfect. Humans would like to believe that we are governed by truth and facts and come to conclusions accordingly and not by emotion and prejudice. This is not the case and emotion and predisposition also weigh our decision making process. Since the decision making process is not always reliable, one goal of humanity is to look for ways to make the system of finding justice, punishing the unjust, and compensating the wronged or injured, more reliable.

We cannot ignore the testimony of a child just as we cannot give it too much weight. We can, however, develop more specialized procedures to give children's testimony its proper weight. The goal of this thesis is not to discredit the justice system or to do injustice to children but rather to add a small thread to the blindfold of reliability of the justice system. This thesis posits that specialized procedures can be created to aid the fact finder and avoid improper suggestion. The specialized procedure suggested would necessitate a national program to establish court appointed forensic interviewers of

¹ The Republic of Plato

children. The forensic interviewer would work to a national standard and be skilled in the procedures for interviewing children. Being nationally based would allow for federal funding. By being skilled in the most up to date interviewing procedure, this position would be more reliable in ascertaining reliable child testimony. In addition, these court appointed experts would help prevent children from being at the mercy of adversarial tactics. The courts would save time and money by limiting expert “battles” regarding the reliability of children’s testimony. All of these factors would ease the work of fact finders. In making child testimony evidence more reliable we make the overall outcome or decision more reliable. This court appointed position will make the Justice System one step closer to reliability and finding the truth. The testimony of these court appointed experts would be unbiased and more reliable than that of ‘hired gun’ experts. The testimony of the court appointed experts would aid the fact finder to reach trustworthy conclusions in contested cases where children’s testimony is required.

When one thinks of the justice system, the image of Lady Justice often comes to mind. The image of Lady Justice conveys a message that the outcomes of the justice system will embody a classical and universal truth. The image of Lady Justice is based upon Themis, the goddess of law and justice in Greek Mythology. The Greeks believed that Themis protected the just and punished the unjust.² Her embodiment of classical and universal truth is based upon Universality beliefs that there is the/one truth that governs humanity and is consistent throughout the universe. Inherent in her image are additional symbols; scales, a blindfold, and the sword.

² Hartzell, Gail, *The Reporter*, Valparaiso University School of Law Library, 2004, Vol. 13, number 3.

Lady Justice holds a balance scale in her hand. The scale stands for weighing out the evidence presented. The balancing scale ‘weighs’ out the unreliable facts from the reliable and in doing so makes the truth more apparent to the fact finders. Unlike the role of lawyers who convey the best truth to their story using the facts that best suit their case, the fact finders find the “truth” by finding the reliable facts. They view and hear evidence from both sides of a dispute. They realize as we do that in most cases a dispute is between parties and each party has its own story to tell. Logic suggests that both stories cannot be correct; either one side or a combination of the two is the true story. It is up to the fact finders to search for the truth using the facts given to them. The facts found within the justice system like everything else, comes down to reliability. To hear a blind person say it was a dark night is far less reliable than hearing a blind man say that he heard a scream on a particular night.

Lady Justice is blindfolded. Contrary to popular to belief, the blindfold was not included in the image of Lady Justice until the 16th century.³ Her temporary, self imposed blindness allows her to be unbiased and unprejudiced to the accused and judge reliably. The saying “our eyes can deceive us” is most true here. Without her blindfold she is unreliable, she is human, subject to prejudices and biases that can cloud her judgment and by doing so do harm her judgment. Lady Justice holds a sword that is unsheathed. The sword stands for power, authority, swiftness, and a just outcome. The sword that Lady Justice holds allows her to execute her judgments. As German jurist, Rudolph von Jhering explained in his book *The Struggle for Law*,

³ Hartzell, Gail, *The Reporter*, Valparaiso University School of Law Library, 2004, Vol. 13, number 3.

“Justice which, in one hand, holds the scales, in which she weighs the right, carries in the other the sword with which she executes it. The sword without the scales is brute force, the scales without the sword is the impotence of law. The scales and the sword belong together, and the state of the law is perfect only where the power with which Justice carries the sword is equaled by the skill with which she holds the scales.”⁴

It is through reliability, lack of prejudice, swiftness, and weighing that we find the truth.

Laws are amended and changed; procedures are added to the Justice system to aid in the reliability of the process of judging or compensating someone. Federal Rules of evidence exist to allow only reliable facts to enter as evidence. FRE Rule 102 states “These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.” Hearsay rules govern which statements can be deemed reliable and which cannot. The admissibility of expert testimony is based upon reliability rather than believability. We humans establish ideals and in doing so attempt to amend laws and procedures in order to make the outcomes of the system more reliable.

In the pursuit of reliability we try to reduce unreliability. One problem that has existed in the justice system is the reliability of children’s testimony and the predicament that their statements may be unduly influenced by others. How children tell the truth, how reliable their memories are, how their testimony changes and how their testimony can be affected are several factors that can create unreliability in the Justice system. In addition, children’s testimony is received in the context of an adversarial system that

⁴ Rudolph von Jhering, *Struggle for Law* Hartzell, Gail, The Reporter, Valparaiso University School of Law Library, 2004, Vol. 13, number 3.

doesn't even view adult testimony as infallible. These issues have caused the Justice system to create more specialized procedures relating to children's testimony.

CHAPTER 1:

LITERATURE REVIEW

Since the 1980s there has been an explosion of research regarding the reliability of children's memories and testimony. As the research on child suggestibility has evolved, scholars discovered that interviewer technique can suggest memories to children and in so doing call into question the reliability of a child's testimony within court cases and the admissibility of the evidence that those children can provide to the legal system. The number of children testifying in court has also posed serious practical problems for the judicial system. These problems have included how to protect children from the trauma of testifying in front of a defendant who may have physically or mentally harmed the child, how this trauma may impact the accuracy of the child's testimony, and how the trauma may affect the child's willingness to disclose the truth.⁵ Due to the research of child suggestibility, several changes have been implemented at the state and federal level in how children are to be interviewed and how information or testimony is to be gathered and investigated.⁶

It has been suggested in the past, through the Cornell Proposal, that a national system of experts could provide the courts with expert knowledge and opinions regarding

⁵ Marsil, F. Dorothy, Montoya, Jean, Ross, David, Graham Louise, Child Witness Policy: Law Interfacing With Social Science, Law and Contemporary problems: Children as Victims and Witnesses in the Criminal Trial Process, School of Law Duke University, Vol. 65 No. 1 p 209

⁶ Ceci Stephen J. & Bruck, Maggie *The Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 PSYCOL. BULL. 403 (1993)

technical matters.⁷ The problems with experts “could be remedied if courts developed procedures for inviting nonpartisan experts, much in the way that the French system does.”⁸ The Cornell proposal is a national “Amicus Institute that would provide nonpartisan, not for profit opinions and analyses for courts upon request.”⁹ The best minds in scientific areas, both in Europe and North America, would be available by database to court systems. A panel of scholars would be selected and they would review evidence, reports, and other materials provided by the court. The scholars would discuss the case and comprise a summary brief to the court. A representative would be available to the court for cross examination purposes. The idea behind the Cornell Proposal is to limit party bias, adversarial expert witnesses, litigation costs and promote out of court settlements¹⁰. By having a panel of scholars discussing a case, all available data would, in theory, be critiqued and fully disclosed to the court.

Despite research, advances in interview procedure, and court room protocol, child suggestibility remains a problem within the Legal system.¹¹ As Dezwirek, and McMahon, said in their study, “the legal system may need to recognize that, in the long run using protective measures such as shielding or hearsay may not be as effective as more time-consuming and expensive methods like court preparation techniques and court schools,

⁷ Ceci Stephen J. & Bruck, *Maggie Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, Ethical and Professional Issues, American Psychological Association, 1995

⁸ Ceci Stephen J. & Bruck, *Maggie Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, Ethical and Professional Issues, American Psychological Association, 1995

⁹ Ceci Stephen J. & Bruck, *Maggie Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, Ethical and Professional Issues, American Psychological Association, 1995 p 287

¹⁰ Ceci Stephen J. & Bruck, *Maggie Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, Ethical and Professional Issues, American Psychological Association, 1995

¹¹ Warren Amye R. & Marsil, Dorothy F. *Why Children's Suggestibility Remains a Serious Concern*, Law and Contemporary Problems, VOL 65, 2002

which have the potential to empower some child witnesses.”¹² Doubts about the reliability of a child’s accusation can destroy confidence in any verdict and in the fundamental fairness of a trial.¹³ Because of these facts there has been an effort to increase the professionalism of the court personnel who deal with children. Guardian ad Litem, Children advocates and CASA for instance, already exist to help children victims deal with the trauma of testifying and the judicial process.

When looking at children’s testimony, scientific and legal questions are shared when addressing legalities such as hearsay, relevance, and expert testimony. Whatever justification may have once existed for ignoring special needs and the fragility of child witnesses, interviewing them like adult witnesses is no longer “good enough for government work.”¹⁴ An interviewee can be influenced to make false statements by an interviewer depending upon a variety of factors. Factors such as interviewer bias, repeating questions, repeating misinformation, emotional tone and language, adult high status, peer pressure and outside influence can affect a child’s testimony.¹⁵ How one acts or carries oneself can effect how a child may answer relevant questions. The adversarial method that our justice system employs tends to develop starkly different versions of the

¹² Marsil, F. Dorothy, Montoya, Jean, David Ross, Graham Louise, Law Interfacing with Social Science Law and Contemporary problems: Children Witness Policy, School of Law Duke University, Vol. 65 No. 1 p 240; and Louise Dezwirek-Sas, Sexually Abused Children as Witnesses: Progress and Pitfalls in Child Abuse: New Directions in Prevention and Treatment Across the Lifespan 248-267, (David A. Wolfe and Robert Joseph McMahon eds., 1997)

¹³ Kyles v. Whitley, 514 U.S. 419, 439 (1995); United States v. Bagely, 473 U.S. 667, 682 (1985)

¹⁴ McGough S. Lucy, Good Enough for Government Work: The Constitutional Duty to Preserve Forensic Interviews of Child Victims, Law and Contemporary problems: Children as Victims and Witnesses in the Criminal Trial Process, School of Law Duke University, Vol. 65 No. 1 p 208

¹⁵ Johnson, Barbara C. The Committee of Concerned Social Scientists, *The Suggestibility of Children: Evaluation by Social Scientists*, Amicus Brief for the Case of State of New Jersey v. Michaels

central narrative in every dispute. In doing so, the lines between fact and fallacy may be blurred and the attempt to find truth through testimony may prove to be less reliable.

Countless studies and experiments have been conducted on children, their memories, their testimony, and the suggestibility that may arise from the event of testifying. Studies and experiments conducted look at the problems that are associated with child suggestibility and what factors can influence it in and out of the courtroom.

Leichtman & Ceci, 1995 examined the effects of stereotypes and suggestions on preschooler's reports. They found that young children, at times, can use suggestions in highly productive ways to reconstruct and distort reality.¹⁶ Goodman & Quas, Pynoos et al., and Yuille & Tollstrupmas all conducted studies dealing with children and the trauma that may arise from testifying in court. The studies used children from age three to twelve. Using data from mock trials and mock jurors they all found that in court testimony, the increasing tension and terror provoked by trauma may inhibit a child's internal information processing and general focus of attention. In such instances, the child may be preoccupied with his or her safety, bodily sensations, terror, rage, or hatred and not adequately attend to relate the details of the event as it unfolded.¹⁷ Michael E. Lamb et al. conducted a study examining the accuracy of professional interviewers of children. The study examined verbatim notes vs. audio and video recordings of the same interview.

¹⁶ Leichtman, Michelle D. & Ceci, Stephen, J, The Effects of Stereotypes and Suggestions on Preschooler's Reports, *Developmental Psychology*, (American Psychological Association, Inc. Vol. 31, No. 4, 568-578, 1995)

¹⁷ McGough, Lucy, S., *Child Witnesses: Fragile Voices in the American Legal System, Confabulation and Trauma*, 34-77, (York University Press, 1994)

Lamb et al. found that interviewers reported less than was found in the video taped session. No errors were found when video taping was present.¹⁸

Mathew K. Pathak & William C. Thompson conducted a study examining the accuracy of an adult hearsay witness reporting an observed interview with a child using mock jurors. The study used a janitor either cleaning or playing with toys and the observations that children made about the janitor. Each child's interview was videotaped. Pathak and Thompson found that children could recall well in neutral settings. In suggestive settings the children's testimony was significantly influenced by an adult.¹⁹

Kay Bussey et al. 1993 in their study examined the impact that a defendant's presence may have on the child's ability to provide accurate testimony. That study used children ages three, five, and nine. Each child witnessed a man break a glass. The researchers found that the younger children, aged three to five, were significantly less likely to testify about the event in the presence of the man who broke the glass. They further found, that the children when testifying in front of the man experienced much higher levels of anxiety. They found that high levels of trauma can impair memory or willingness to disclose the truth.²⁰ Goodman et al. in press; Melton et al., 1992, Saywitz (1989) found that "on top of multiple interviews, appearances, and cross examination there is general lack of knowledge of legal procedures, long pretrial waiting periods,

¹⁸Marsil, F. Dorothy, Montoya, Jean, David Ross, Graham Louise, Law and Contemporary problems: Law Interfacing with Social Science, School of Law Duke University, Vol. 65 No. 1 , Michael E. Lamb et al., Accuracy of Investigators' Verbatim Notes of Their Forensic Interviews with Alleged Child Abuse Victims, 24 Law & Hum. BEHAV. 699 (2000)

¹⁹ Maithilee K. Pathak & William C. Thompson, From Child to Witness to Jury: Effects of Suggestion on the Transition and Evaluation of Hearsay, 5 PSYCHOL. PUB. POL'Y & L. 372, 374 (1999)

²⁰ Bussey et al. Lies and Secrets Implication for Children's reporting of sexual abuse (Gail S. Goodman & Bette L. Bottoms eds., 1993)

postponements and continuances and the formality of the courtroom may pose serious complications for the introduction of a child as a key witness.”²¹

Interviewers are not the only people to have preconceived notions about child witnesses. Yarmey and Jones (1983) conducted a study using a sixteen question questionnaire asking persons in the legal profession their position on how believable child witnesses are. Close to half of the legal profession used within this study, believed that a child would answer questions depending on how the interviewer wanted the questions to be answered. Less than half of the legal profession interviewed in this study believed that children would speak the truth despite what answer the interviewer wanted.²² Brigham and Wolfskeil (1983) conducted a study questioning public defenders and prosecutors about their beliefs regarding child eye witness testimony. In their study they found a common split between public defenders and prosecutors, where prosecutors, were more apt to believe and stand by child eye witnesses, while public defenders were less likely to believe child eye witnesses. In their discussion, Brigham and Wolfskeil suggested that defense attorneys were in the best position to judge the accuracy of a child eye witness because of their closeness to the defendant.²³ Assuming that the defendant was telling the truth, the defense attorney would be privy to information that only the defendant knew. With that insight, the defense attorney would be able to compare the accuracy of the child’s testimony to the information that the defendant provided. With

²¹ Batterman-Faunce, Jennifer Marie, Goodman, S. Gail, *Child Victims, Child Witnesses, Effects of Context on the Accuracy and Suggestibility of Child Witnesses*, p 311, (Goodman & Bottoms, The Guilford Press, 1993)

²² Leippe Michael R. et al., *Opinions and Practices of Criminal Attorneys, Perspectives on Children’s Testimony*, p 104, (S. J. Ceci, D.F. Ross, M.P. Toglia, Springer-Verlag, eds., 1989)

²³ Leippe Michael R. et al., *Opinions and Practices of Criminal Attorneys, Perspectives on Children’s Testimony*, p pp 103-104, S. J. (Ceci, D.F. Ross, M.P. Toglia, Springer-Verlag, eds.,1989)

this added insight, the defense attorney, in theory, would be in the best position to judge the accuracy of a child eye witness because of their closeness to the defendant.

Scholars repeatedly have found that trauma can be detrimental to the accuracy of a child's testimony. The trauma that may be experienced by a child can occur in and out of the court room. It is the trauma, whether associated with testifying in court, speaking to a biased attorney, or being interviewed that can cause a child's testimony to be discredited. Despite the demands of the adversarial process, lawyers would benefit from fewer traumas to children. At the very least the bias that many lawyers have about child testimony would be altered. The evidence attorneys would provide in court would be much more reliable. From a judicial perspective, it is evident that the child ideally must not experience high levels of trauma in order to ensure the accuracy and reliability of the child's testimony. The case is the same from the child's perspective as well, as high levels of trauma have been demonstrated to cause serious mental and psychological effects to the child.

CHAPTER 2

CHILDREN'S TESTIMONY: AN ANALYSIS OF EVIDENTIARY RULES

The admissibility of a child's testimony can rest upon several factors: these factors usually include suggestibility, relevance, hearsay, and opinions of experts. Due to these factors "child witness innovations [have] proliferated through the United States."²⁴ The Federal Rules of Evidence outline procedural aspects of court proceedings. Over the years have passed the rules have been adapted to include provisions regarding child testimony. "Federal Rule of Evidence 401 (FRE) provides that, in a case that involves forensic assessment of a child's report, the assessment must be relevant to the issues at bar material to the case."²⁵ Rule 403 goes on to say "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury..."²⁶ This fact is brought up often in cases of child witnesses in that the testimony of a child can create an unfairly

²⁴ Marsil, F. Dorothy, Montoya, Jean, Ross, David, Graham Louise, Child Witness Policy: Law Interfacing With Social Science, Law and Contemporary problems: Children as Victims and Witnesses in the Criminal Trial Process, School of Law Duke University, Vol. 65 No. 1 p 209; (Mosteller Eds, 2002)

Westcott L Helen et al., Children Hearsay and the Courts: A Perspective from the United Kingdom, 5 PSYCHOL. PUB. POL'Y & L 282 (1999)

²⁵ Walker, Nancy E. *Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility*, Law and Contemporary Problems, (VOL 65, Robert P. Mosteller Eds, 2002)

²⁶ Federal Rules of Evidence 403

prejudicial emotional impact. Having forty children speak of the same event can be extremely cumulative and unfair to the defendant.

Two other rules often brought up in child suggestibility cases are rules relating to expert testimony under FRE 702 and 703. FRE 702 provides that

“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 reliably to the facts of the case.”²⁷

What is most often discussed in many cases of child suggestibility is FRE 702 (2). If proper interviewing techniques are not conducted as the jurisdiction of a particular court requires, then the testimony of that particular expert is oftentimes inadmissible along with the testimony of the child in question. If proper interviewing techniques are not conducted then the testimony and evidence obtained in the interview are not as reliable. This is one of the reasons why proper interviewing techniques are imperative, not just for the admissibility of the actual testimony but for its reliability as well. FRE 703 provides:

“The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.”²⁸

²⁷ Federal Rules of Evidence 702

²⁸ Federal Rules of Evidence 703

In essence, this rule is needed because much of the data that experts rely on would not normally be admissible in court. Often an expert will rely upon statements from witnesses to form expert opinions. Those statements would usually be hearsay and would be excluded under the hearsay rule.

Hearsay, according to FRE 801, is any out of court statement offered for the truth of the matter asserted therein. There are, of course, many exceptions to the hearsay rule, numbering close to twenty six in many jurisdictions.²⁹ Hearsay is not one, but a set of rules that collectively recognizes an order of reliability among testimony given by a witness. The problem that arises with children's testimony is the idea of suggestibility itself. As discussed below, experts are often allowed to rely on hearsay to form opinions. This is not generally the case with lay opinions.³⁰ John Doe cannot testify in a case that in his opinion the defendant killed the victim because Jane Doe and Ralph Jones told him that. The same principle in most cases applies to children. Neither lay nor expert witnesses are usually allowed to testify to an opinion that a child has been abused. Despite this fact there has been some relaxing of the lay opinion rule seen on the testimony of children.³¹ The problem is the Federal Rules of Evidence were written with adults in mind and the question is, should the same rules apply to the testimony of children? On the one hand, if a child's testimony is excluded due to hearsay an abuser may be free to abuse others. On the other hand, if unreliable testimony is used to convict, an innocent man may be sent to jail. As will be discussed below, it may be possible to

²⁹ Federal Rules of Evidence 801-807

³⁰ Federal Rules of Evidence 701

³¹ Friedman, Richard D. *The Conundrum of Children Confrontation, and Hearsay*, Law and Contemporary Problems, VOL 65, No. 1 (Mosteller Eds, 2002)

avoid this conundrum by using scientifically verifiable techniques of witness interviewing to come into the adjudicative process through the “filter” of a qualified court officer. Before doing that, however it will be helpful to consider how current models for treating such testimony are used.

CHAPTER 3

CHILDREN'S TESTIMONY: AN ANALYSIS OF EXPERT TESTIMONY

In determining which expert opinion may be heard by the fact finder, most courts apply the rule formulated in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). An expert witness is one who testifies to specialized information that is not known to the average person. The court conducts a two pronged test under Daubert to assess whether an expert may be heard.³²

The Daubert standard was intended to help courts assess when expert testimony from the behavioral sciences should be admitted. It held that judges were like referees or gatekeepers regarding scientific expert testimony. Judges have to assess whether scientific testimony is both relevant and reliable to the case at hand. The first part of the test is the relevancy aspect. Relevance applies to materials pertinent to the case itself and allows the fact finders to make a decision about the disagreement. The relevancy prong first establishes whether or not the evidence being presented by an expert will aid the fact finders in their decision of the disagreement of the matter.³³ For instance if John Doe is accused of murdering Jesse Doe and a biologist is called to testify about the mating season of geese at the time, the biologist's testimony would not be relevant to the case. A

³² *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)

³³ *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)

blood spatter analysis testifying about blood spatter caused by a knife in a murder by knife trial would be relevant expert testimony

The second part of the Daubert standard is reliability. The reliability of expert testimony relates to the scientific method. If an expert's conclusions are reached by using the scientific method then there is a good chance that it will be admissible. To establish if experts have used the scientific method their conclusions must be falsifiable, testable, and refutable³⁴. If conclusions did not have to be testable, refutable, or falsifiable, then almost any conclusion would be possible. Further, evidence that experts have relied on the scientific method comes from having their conclusions subjected to peer review. This helps to ensure that the conclusions are accurate and trustworthy and accepted by the general scientific community. If accepted the expert opinions of a soft science are more refutable. These factors that expert opinions can be subjected to are only to ensure that an expert opinion of a soft science be more reliable.³⁵

³⁴ Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)

³⁵ Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)

CHAPTER 4

GUARDIANS AD LITEMS AND CASA

The judicial system today regularly uses court appointed witnesses to aid the fact finding process in several types of civil cases. These witnesses increase the reliability of judicial outcomes by helping children through the judicial process and by aiding fact finders in discovering the truth and reaching a verdict. These witnesses are “court appointed” because the judicial officer in a particular matter will choose a person to act in that case in a specific way. Appointed witnesses are seen primarily in cases where the possibility of infringed constitutional rights may exist on the part of a defendant or party. These defendants or parties are in many cases incapable of caring for themselves or knowing their constitutional rights.³⁶ Court Appointed witnesses may provide lay opinion, meaning they testify to what they heard or saw or expert opinion as professionals in their field. Appointed witnesses are not always allowed to provide expert opinion and can be objected to by opposing counsel depending upon what evidence they can provide to the fact finders. For instance, an expert in oil refineries would hold no bearing or relevance in a stalking matter.

Nevertheless, a court appointed witness doesn't participate in the adversarial

³⁶ National Guardianship Association, Standards of Practice, 2000, 3rd Edition, <http://www.guardianship.org/pdf/standards.pdf> , retrieved August, 2008

process as lay opinion witnesses or expert witnesses do. Unlike lay opinion witnesses and expert witnesses, trial counsel has difficulty quashing entire testimony of a court appointed witnesses. By being court appointed rather than a “hired gun”, employed by an attorney, the witnesses are perceived as less biased and more reliable. “Hired guns” are paid to testify in court. Expert witnesses in many cases are employed to portray the “truth” as best they can to suit whichever side employs them.

One kind of a court appointed witness is the Guardians ad Litem or GAL. In many states there are statutory pre-requisites to being a Guardian ad Litem. In most systems GALs undergo training, reach certification requirements, take prescribed courses, and meet continuing education requirements. These standards exist in order to make GALs more reliable. GALs may interview witnesses, report their findings to the court, and participate in court hearings or mediation sessions. Guardians ad Litem are officers of the court. The Guardian ad Litem has to rise above their pre-conceived notions or biases and report to the court what is reliable, what is the truth. GALs are often lawyers and therapists who are appointed in order to act in the best interests of children and to provide independent advice, by investigating to the court as compared to attorneys who advocate for one side.³⁷ Guardians ad Litem are often appointed in divorce cases or in parenting disputes to represent the interests of minor child.³⁸

Similar to guardians or parents, a Guardian ad Litem’s decision is often not what the child wants; rather the GAL’s decisions are made in the child’s best interests. A lawyer for a child would act in conformance with the child’s wishes. As an example a

³⁷ Guardian ad Litem for Incapacitated Persons, Virginia State Courts, <http://www.courts.state.va.us/gal/home.html> , retrieved August, 2008

³⁸ National Guardianship Association (USA) 2007, (<http://www.guardianship.org/>), retrieved August, 2008

child may have two parents that are divorced. Parent A may be an upstanding citizen, who works, pays taxes, and does not use narcotics or alcohol. Parent B may have five drug related convictions, use and abuse controlled substances, and may be unsuitable for that child's development. An attorney for that child would act as that child demands, so if the child wanted to reside with Parent B, that lawyer would adopt that argument and make it to the court. A Guardian ad Litem acting in the best interests of the child would be free to argue against the child's expressed wishes and could advocate for the child to reside with Parent A. Guardians ad Litem literally means "guardian for the suit."³⁹

Another kind of court appointed witness within the judicial system is Court Appointed Special Advocates. CASA is a nationally based program that began in Seattle, in 1977. Faced with a shortage of GALs, it was found that having specially trained laypersons offering trusted information to the court was worthwhile. Judges in abuse and neglect cases were concerned about ruling without adequate information.⁴⁰ The idea of having trained citizens acting in the interests of the court and children slowly spread nationally in 1990 when congress enacted the Victims of Child Abuse Act that created CASA.⁴¹ CASA often acts as Guardian ad Litem for children. Like the Guardian ad Litem, CASA volunteers are court appointed and are viewed as investigators of the court. The CASA volunteer, like a GAL, acts in the child's best interests. It is common for "Judges to refer the most serious cases of child abuse and neglect to CASA

³⁹ Guardian ad Litem for Incapacitated Persons, Virginia State Courts, Our Story <http://www.courts.state.va.us/gal/home.html>, retrieved August, 2008

⁴⁰ National Casa, About us, History of the CASA Movement, 2007, http://www.nationalcasa.org/about_us/history.html, retrieved August, 2008

⁴¹ National CASA, About us, Overview, 2007, http://www.nationalcasa.org/about_us/index.html retrieved August, 2008

so that one volunteer can consistently spend time with one child, building a relationship and ensuring that each child is receiving the support and attention he or she needs and deserves while going through the foster care process.”⁴² The CASA volunteer investigates the facts and submits a report to the court without adopting the positional bias of either party. By adopting an unbiased stance the CASA volunteer improves the chances that the court will reach a reliable outcome. The volunteer’s “third” point of view aids the fact finder. CASA provides support to hundreds of thousands of children each year. Without bias from outside parties they “independently monitor the child’s circumstances and provide fact based information to the court in the best interests of the child.”⁴³

There are many similarities between the GAL and CASA volunteers. They are both court appointed officers and share no ties to either party. They offer a third viewpoint to the fact finder, stand outside the adversarial process to a degree, and thus assist fact finders to reach more reliable results. Under adversarial theorem, attorneys may “spin” the truth and obscure facts that are detrimental to their party. These court appointed witnesses, however, report everything discovered in their investigation, and increase the reliability of adjudicative outcome. To be eligible to be a GAL or CASA volunteer, one has to be educated and trained within the field of child development, investigation process, and court procedure.

⁴² Court Appointed Special Advocates for Orange County, About Casa, Our Kids, <http://www.casaoc.org/about.php>, retrieved August, 2008

⁴³ Court Appointed Special Advocates for Orange County, About Casa, Our Kids, <http://www.casaoc.org/about.php>, retrieved August, 2008

CHAPTER 5

DEFENDANT'S RIGHTS AND CHILD TESTIMONY: A CONSTANT BALANCE

There is a delicate balance that exists between child testimony and the rights of a defendant. For years the justice system has sought to ensure that children's testimony be reliable and trustworthy and that children will be protected from further harm without infringing the rights of a defendant. On the one hand, a child's statements can be intimidated through suggestive techniques by a defendant or his attorney. Courts have sought to limit that intimidation and suggestibility from defendants in the past, but in doing so defendants' rights have sometimes been infringed or violated. On the other hand a child's testimony can be affected and suggested by interviewers and attorneys if proper procedure is not followed in those interviews. The following court cases illustrate the difficult task of balancing a defendant's rights and the reliability of a child's testimony

Idaho v. Wright

One case that outlines the importance of proper procedure in interviewing young children, confrontation clause problems and hearsay statements is *Idaho v. Wright*. A hearsay statement, as stated above, is any out of court statement offered for the truth of the matter asserted therein. The rules of evidence establish the hearsay rule. In order for hearsay testimony to fall under an hearsay exception it must be both trustworthy and

reliable. In *Idaho v. Wright*, Wright was charged with two counts of lewd conduct with a minor. The two counts dealt with his 5 ½ year and 2 ½ year old daughters. It was agreed upon by both parties that the younger of the two daughters was not capable of communicating to the jury. Prior to the case going to trial the 2 ½ year-old's pediatrician had heard statements made by the 2 ½ year old. The statements made by the child suggested that the lewd actions by Mr. Wright were possible. The pediatrician had past experience testifying in child abuse cases. The pediatrician testified about the statements made by the 2 ½ year old in court. Despite the 2 ½ year old reluctantly releasing information about her own abuse, she volunteered information about her sister's abuse. The doctor interviewed the young child without procedural safeguards. The doctor failed to use a videotape for the interview. During the interview the doctor asked leading questions. Before and during the interview the doctor had a preconceived idea of what the child should be disclosing. The statements nevertheless were allowed onto the record under an exception to the hearsay rule.⁴⁴ The defendant was found guilty on both counts of lewd conduct with a minor.⁴⁵

The defendant appealed. The defendant only appealed on the lewd conduct with a minor involving the 2 ½ year old. The defendant challenged the court's decision that the hearsay statements made by the 2 ½ year old did not fall within the hearsay exception. The defendant also challenged the courts decision in that his 6th amendment right to confront was violated. The State Supreme Court reversed the decision holding that the admission of the doctor's testimony violated the defendant's rights under the

⁴⁴ *Idaho v. Wright* (89-260), 497 U.S. 805 (1990)

⁴⁵ *Idaho v. Wright* (89-260), 497 U.S. 805 (1990)

Confrontation Clause. The court noted that the child's statements did not fall within a traditional hearsay exception and lacked a guarantee of trustworthiness.⁴⁶

It is important to note that the 2 ½ year old's statements to her doctor about her own experience might well be admissible under an exception to the hearsay rule for statements given for the purposes of obtaining medical diagnoses or treatment.⁴⁷ The statements could not be guaranteed as trustworthy because proper safeguards to protect trustworthiness were not in place. Safeguards such as videotaping the interview, asking non-leading questions during the interview, and not having a preconceived idea of what the child should be disclosing were not implemented in this case.⁴⁸ Because the proper procedures that guarantee reliability and trustworthiness were not respected, what the doctor heard from the child was not admissible.⁴⁹

Coy v. Iowa

Coy v. Iowa is a case that also demonstrates the delicate balance to be struck between constitutional rights and the goal of protecting a child from further trauma. In *Coy v. Iowa* the defendant was charged with sexually assaulting two thirteen year old girls. At trial the court granted a motion from the prosecution under a state statute that allowed the girls to testify behind a screen. It had been documented that testifying before a defendant could cause trauma as well as inaccuracies in testimony.⁵⁰ The screen was

⁴⁶ Abrams, E. Douglas, Ramsey, H. Sarah, *Children and the Law: Doctrine, Policy and Practice*, Idaho v. Wright , 497 U.S. 805 (1990), 3rd Edition, Thomson West, 2003

⁴⁷ Idaho v. Wright (89-260), 497 U.S. 805 (1990), Federal Rules of Evidence 803 (4)

⁴⁸ Idaho v. Wright , 497 U.S. 805 (1990)

⁴⁹ Abrams, E. Douglas, Ramsey, H. Sarah, *Children and the Law: Doctrine, Policy and Practice*, Idaho v. Wright, 497 U.S. 805 (1990), 3rd Edition, Thomson West, 2003

⁵⁰ Bussey et al. *Lies and Secrets Implication for Children's reporting of sexual abuse* (Gail S. Goodman & Bette L. Bottoms eds., 1993

intended to limit that trauma and inconsistency. The screen blocked the defendant from view of the witness, but allowed the defendant to dimly see the silhouette of the witness. The defendant was convicted on both counts of lascivious acts with a child.

On appeal, the defendant challenged the verdict, claiming that the screen was a violation of his 6th Amendment right to confront. He asserted that because he could not see the witnesses testifying against him he was not able to confront them and thus violated his rights under the confrontation clause as found within the Sixth Amendment. The 6th amendment provides that the defendant

“in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”⁵¹

The court held that the Confrontation Clause did provide the defendant the right to confront the witnesses presenting evidence against him in a face to face setting. This right to confront ensures trustworthiness and accuracy of incriminating statements made by witnesses. Similar to *Idaho v. Wright*, where both trustworthiness and accuracy had to be seen for hearsay statements to be reliable; the screen did not provide the accuracy and trustworthiness needed to ensure reliability. The court also held that the defendant’s right to confront was violated in that the veil or screen prevented it. The trauma that may be associated with children testifying in court did not outweigh the constitutional rights of the defendant.⁵²

⁵¹ United States Constitution, 6th Amendment

⁵² Abrams, E. Douglas, Ramsey, H. Sarah, *Children and the Law: Doctrine, Policy and Practice*, *Idaho v. Wright* (89-260), 497 U.S. 805 (1990), 3rd Edition, Thomson West, 2003; *Idaho v. Wright*, 497 U.S. 805 (1990)

The Kelly Michaels Case

In 1988 Kelly Michaels found herself charged with over 131 counts of child sexual abuse regarding twenty-two children. Children, who attended the day care center where Michaels worked, found themselves being interviewed multiple times, by various staff members from the Division for Youth and Family Services. The children's ages ranged from age three to seven. During the first interviews many of the children said that they "like[d] Ms. Michaels" and made no statements or allegations of sexual abuse. This was defined by the interviewers as the "denial phase"⁵³. As the number of interviews and interviewers increased, so did the allegations from those children. The interviewers suggested to the children that they had been abused through graphic and disturbing questions. Eventually the children were recorded making statements such as Ms. Michaels "made us eat boiled babies", "put swords in my rectum", and "played the piano naked."⁵⁴ Kelly Michaels found herself at trial.⁵⁵

Despite the fact that "eating boiled babies" sounds outlandish and the idea that a three year old would use the term "rectum" instead of "bum" these statements were taken seriously by prosecutors. Ms. Michaels allegedly raped and assaulted her three to five-year-old students with knives, spoons, and Lego blocks. Prosecutors also contended, through a variety of sources, that she licked peanut butter off of the children's genitals, played piano in the nude, and made the kids drink her urine. All of this abuse, according

⁵³ Ceci, J. Stephen, Bruck, Maggie, *Jeopardy in the Court Room: A Scientific analysis of Children's Testimony, Children as Witnesses: Seven Case Descriptions*, pp 11-13

⁵⁴ The Kelly Michaels Case, <http://www.law.umkc.edu/faculty/projects/ftrials/mcmartin/michaelsevil.html>, Famous Trials, University of Missouri-Kansas School of Law

⁵⁵ Ceci, J. Stephen, Bruck, Maggie, *Jeopardy in the Court Room: A Scientific analysis of Children's Testimony, Children as Witnesses: Seven Case Descriptions*, pp 11-13

to prosecutors, somehow went unnoticed by other teachers, parents, or administrators during the seven months Ms. Michaels worked at the Wee Care Nursery. There was no medical or physical evidence to confirm the abuse.⁵⁶ The investigators were poorly trained. The investigators did not appreciate the number of multiple interviews, multiple interviewers, or the need to avoid suggestion. The investigators did not allow video taping or audio taping of interviews, and they saw no need to use age appropriate terminology during interviews.⁵⁷

“Believe the children” became the motto at this trial.⁵⁸ And the children were believed. Ms. Michaels was convicted of 115 counts of sexual abuse against 20 children. No real control existed to establish reliable statements. There was no medical or physical evidence to confirm the abuse. Five years later the New Jersey court of appeals reversed the decision. The court ruled “that if the prosecution decided to retry the case, they must first hold a pretrial taint hearing and show that despite improper interviewing techniques, the statements and testimony of the child witnesses [were] sufficiently reliable to admit them as witnesses at trial.”⁵⁹

The Fredrico Macias Case

The Frederico Macias Case was a situation where a child served not as a

⁵⁶ The Kelly Michaels Case, <http://www.law.umkc.edu/faculty/projects/ftrials/mcmartin/michaelsevil.html>, Famous Trials, University of Missouri-Kansas School of Law

⁵⁷ The Kelly Michaels Case, <http://www.law.umkc.edu/faculty/projects/ftrials/mcmartin/michaelsevil.html>, Famous Trials, University of Missouri-Kansas School of Law, Ceci, J. Stephen, Bruck, Maggie, Jeopardy in the Court Room: A Scientific analysis of Children’s Testimony, Children as Witnesses: Seven Case Descriptions, pp 11-13

⁵⁸ The Kelly Michaels Case, <http://www.law.umkc.edu/faculty/projects/ftrials/mcmartin/michaelsevil.html>, Famous Trials, University of Missouri-Kansas School of Law

⁵⁹ The Kelly Michaels Case, <http://www.law.umkc.edu/faculty/projects/ftrials/mcmartin/michaelsevil.html>, Famous Trials, University of Missouri-Kansas School of Law, Ceci, J. Stephen, Bruck, Maggie, Jeopardy in the Court Room: A Scientific analysis of Children’s Testimony, Children as Witnesses

victim but as a key witness. On January 5, 1984 Frederico Martinez Macias was charged with the armed robbery and second degree murder of an elderly couple in Texas. Pedro Luevenos was arrested for the crime before Macias. Luevenos told authorities that he was merely an accomplice and Macias committed the actual crime. In addition, another witness who was serving time in a Texas prison testified against Macias for a reduced sentence. The state's case was weakened by the fact that two felons were serving as lead witnesses in return for a reduced sentence.⁶⁰ The state needed a stronger witness.

Five days before Macias's trial, Texas authorities found a nine year old girl who had been playing in the vicinity of the murder at the time of the crime. From the time she was found until the time of the trial, the girl was questioned vigorously on numerous occasions. She was questioned by many different detectives. The decision to put Jennifer on the witness stand as a key witness did not occur until the night before trial. Prosecutors told defense counsel that the girl would testify, forty minutes before the start of the trial.⁶¹ Jennifer's pretrial statements were "riddled with contradictory and implausible claims."⁶² By the time of her actual examination, however, she managed to provide a coherent story of what she witnessed.⁶³

The girl testified that she was playing near the defendant's trailer on the day of the crime. She recalled that 6 months earlier, Macias was in the vicinity covered in

⁶⁰ Ceci, J. Stephen, Bruck, Maggie, *Jeopardy in the Court Room: A Scientific analysis of Children's Testimony, Children as Witnesses: Seven Case Descriptions*,

⁶¹ Ceci, J. Stephen, Bruck, Maggie, *Jeopardy in the Court Room: A Scientific analysis of Children's Testimony, Children as Witnesses: Seven Case Descriptions*,

⁶² Ceci, J. Stephen, Bruck, Maggie, *Jeopardy in the Court Room: A Scientific analysis of Children's Testimony, Children as Witnesses: Seven Case Descriptions* p 18

⁶³ Ceci, J. Stephen, Bruck, Maggie, *Jeopardy in the Court Room: A Scientific analysis of Children's Testimony, Children as Witnesses*

blood. Her account told of his shirt and hands being splattered with blood. In addition, Jennifer also recalled Mr. Macias holding what looked to be either a BB gun or rifle. The defense had two alibi witnesses claiming that Macias was somewhere else on the day of the murders. The defense expert was not allowed to interview the child, nor to testify about the phenomenon of suggestibility. Mr Macias was convicted of felonious murder and sentenced to death by lethal injection.⁶⁴

Three years later the US Court of Appeals granted a stay of execution plea. “Depositions by the foreman of the jury as well as counsel for both sides indicated that the girl provided the critical testimony that led to Macias’s conviction.”⁶⁵ The appeals court ruled that trial court erred by, among other things, not allowing the defense’s expert witness to testify on child suggestibility. The appeals court ordered that Macias receive a new trial.⁶⁶ The conviction of Frederico Macias was influenced to a great degree by a single child witness. A nine year old testified to specific observations that had occurred six months before she testified. She was questioned vigorously for five days by multiple detectives using questions that caused her to change her testimony. In one instance Jennifer claimed that she saw Macias around 6 o’clock because it was dark out. One of the investigators then asked if Jennifer was sure that it was six o’clock and not two

⁶⁴ Ceci, J. Stephen, Bruck, Maggie, Jeopardy in the Court Room: A Scientific analysis of Children’s Testimony, Children as Witnesses

⁶⁵ Ceci, J. Stephen, Bruck, Maggie, Jeopardy in the Court Room: A Scientific analysis of Children’s Testimony, Children as Witnesses

⁶⁶ Ceci, J. Stephen, Bruck, Maggie, Jeopardy in the Court Room: A Scientific analysis of Children’s Testimony, Children as Witnesses, Seven Case descriptions

o'clock. Jennifer then changed her answer to two o'clock.⁶⁷ Her testimony during the pretrial hearing was scattered and incoherent.⁶⁸

Four years after her testimony and 2 weeks before Marcia's execution, the now 14 year old girl stated:

"...Because different people asked me so many different questions about what I saw, I became confused. I thought I might have seen something that would be helpful to the police. I didn't realize that it would become so important. I thought they wanted me to be certain, so I said I was certain even though I wasn't. Originally I think I told the police what I saw. But the more questions I was asked, the more confused I became. I answered questions I wasn't certain about because I wanted to help the adults."⁶⁹

When improper interviewing techniques are used the possibility of suggesting false statements to children heightens. In the Macias case, Jennifer's testimony was the result of suggestive questioning and improper interviewing techniques. In this case, because improper interviewing techniques were used, the fact finding process was impaired.

North Dakota v. Blue

On December 3, 2003 a mother brought her four year old daughter to the hospital, concerned that the child was the victim of sexual abuse. A doctor found evidence to support the mother's beliefs. On December 11, 2003 a forensic interviewer conducted a video taped interview of the four year old child with a police officer present. The child told the interviewer that she had been abused by the mother's boyfriend, Mr.

⁶⁷ Ceci, J. Stephen, Bruck, Maggie, Jeopardy in the Court Room: A Scientific analysis of Children's Testimony, Children as Witnesses

⁶⁸ Ceci, J. Stephen, Bruck, Maggie, Jeopardy in the Court Room: A Scientific analysis of Children's Testimony, Children as Witnesses

⁶⁹ Ceci, J. Stephen, Bruck, Maggie, Jeopardy in the Court Room: A Scientific analysis of Children's Testimony, Children as Witnesses: Seven Case Descriptions, p 19

Blue. After the interview the video tape was given to the police officer.⁷⁰

Mr. Blue was charged with gross sexual imposition. At the evidentiary hearing, the now five year old girl testified on the stand. The child answered very few questions verbally, instead shook her head up and down or side to side to answer questions and demonstrated a poor memory of the assault. The court decided that the child was “unavailable” due to her inability to remember and admitted the video under an exception to the hearsay rule for “unavailable” witnesses. The video taped interview was entered into evidence and shown to the jury. The child did not testify in court. The jury heard testimony from the interviewer, saw the video taped interview, saw photographs of the child, and received medical reports. The jury convicted Mr. Blue and sentenced him to ten years.⁷¹

Mr. Blue made three arguments on appeal. First he claimed that his sixth amendment right to confront adverse witnesses was violated because his lawyer was unable to cross examine the daughter. Second, the decision to admit the video tape into evidence caused serious and irreparable harm to his case and was not harmless error. Third, he claimed that the video taped interview of the daughter was testimonial evidence and cross examination of the daughter was not present. The court found that Mr. Blue’s Sixth Amendment right to confront was violated. The court also found that “The statement of the four-year-old to ... the forensic interviewer... was testimonial, the child was not unavailable for cross-examination purposes, and Blue did not have an

⁷⁰ State v. Blue N.D.,2006. 20050187, Abrams, E. Douglas, Ramsey, H. Sarah, Children and the Law: Doctrine, Policy and Practice, State v. Blue N.D.,2006. 20050187, 3rd Edition, Thomson West, 2003

⁷¹ Abrams, E. Douglas, Ramsey, H. Sarah, Children and the Law: Doctrine, Policy and Practice, State v. Blue N.D.,2006. 20050187, 3rd Edition, Thomson West, 2003

opportunity to cross-examine the child at trial. If the videotape is to be introduced as evidence, Blue must have an opportunity to cross-examine the child at trial. The appeals court reversed and remanded the decision.⁷²

In most cases testimonial evidence cannot be entered into evidence unless the declarant is unavailable and the accuracy and trustworthiness of the statement are unaffected. Testimonial statements often are inadmissible because they may be the product of a bias detective. To reiterate, a police officer interviewing a witness is not usually looking to prove the suspect's innocence. That investigator is looking to prove guilt. The purpose of receiving that testimonial statement is for court purposes; ideally as proof against that suspect. The key thing here is the investigator may not be conducting the interview objectively, and the interview subject generally must come before the court, be examined, and be cross examined in order for the statement to be admitted into evidence.⁷³

The appellate court adopted a distinction in *North Dakota v. Blue* between testimonial statements and non testimonial statements in regard to admitting video taping child interviews. It found that testimonial statements are made for the purposes of trial. "They are testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."⁷⁴ In that case the court held that a statement made to government officials in a non-emergency situation

⁷² State v. Blue N.D.,2006. 20050187

⁷³ Abrams, E. Douglas, Ramsey, H. Sarah, Children and the Law: Doctrine, Policy and Practice, State v. Blue N.D.,2006. 20050187, 3rd Edition, Thomson West, 2003

⁷⁴ *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165L.Ed.2d 224 (2006)

during an investigation would be testimonial in nature. The court went on to observe that non-testimonial statements are statements not made in anticipation of a trial. They usually are "...out-of-court statement[s] by a victim to a friend, family member, coworker, or non-government employee, without police involvement."⁷⁵ The purposes behind the video taped interview of the child in the Blue case were for prosecution and investigation of a non emergency event.

Maryland v. Craig

Unlike the screen technique as used in *Iowa v. Coy*, some procedures that attempt to shield children from intimidation or suggestive techniques in the court room are legal. *Maryland v. Craig* is an example of a technique that protects a defendant's 6th amendment right to confront adverse witnesses. In that case, Sandra Ann Craig, the operator of a kindergarten and pre-school facility, was accused of sexually abusing a six-year-old child. Over Craig's objections, a trial court allowed the victim to testify via one-way closed circuit television. The child testified outside the courtroom while Mrs. Craig, through electronic communication with her lawyer, could make objections. The judge and jury also viewed the child's testimony in the courtroom. This was done in order to avoid the possibility of serious emotional distress to the child witness.⁷⁶

Craig was convicted and he appealed on Sixth Amendment grounds. The US Supreme Court held that the Confrontation Clause of the Sixth Amendment was not absolute. The Court observed that "in certain narrow circumstances, 'competing interests,

⁷⁵ *People v. Griffin*, 33 Cal.4th 536, 15 Cal.Rptr.3d 743, 93 P.3d 344, 372 n. 19 (2004)

⁷⁶ *Maryland v. Craig*, 497 U.S. 836, 1990

if closely examined, may warrant dispensing with confrontation at trial.”⁷⁷ The State's interest in protecting the physical and psychological well-being of children, the Court held, could be sufficiently important to outweigh defendants' rights to face their accusers in court. In this case the defendant was found to be able to confront the adverse witnesses in that she was able to view the child testify and was able to communicate with her lawyer to enable the lawyer to make objections. The jury was able to view the witness testify and could judge the testimony as it was received. In addition, there was testimony in the court record from a therapist who insisted that the child's testimony would be altered without this technique, because the young child was frightened of the defendant.⁷⁸

This case shows that a reliable procedure that protects children from the full rigors of the adjudicative process may be admissible. The case also illustrates the importance of striking a careful balance between the defendant's rights and the interests of child's witness.

⁷⁷ Abrams, E. Douglas, Ramsey, H. Sarah, *Children and the Law: Doctrine, Policy and Practice, Maryland v. Craig*, 497 U.S.836, 1990, p 560 3rd Edition, Thomson West, 2003

⁷⁸ Abrams, E. Douglas, Ramsey, H. Sarah, *Children and the Law: Doctrine, Policy and Practice, Maryland v. Craig*, 497 U.S.836, 1990, 3rd Edition, Thomson West, 2003

Chapter 6

Preventing Suggestive Phenomena from Contaminating Children's Statements

As seen in the cases and studies described above, the method of interviewing a child strongly influences the content and reliability of the resulting statement. At its worst, the interview process can have an overbearing effect on a child and render the resulting statement unreliable. On the other hand, the interview can ensure the reliability and trustworthiness of the child's statements necessary to be accepted by the court⁷⁹.

There are a number of techniques that must be implemented in the interview of a child and there are suggestive methods and techniques that must be avoided at all costs. We will consider how recency, rapport, interviewer bias, the effect of adult high status and peer pressure and emotional tone all may impugn or impair the reliability of a child's statements.

When an adult witnesses an event, be it a crime or car accident, statements are usually taken as soon as possible after the event to insure that it is fresh in the witness's mind. Witnesses are interviewed, and their statements are recorded in a permanent form to insure accuracy. The sooner a statement can be taken and turned into an affidavit the more reliable it is thought to be. As time progresses a person's memory of an event can deteriorate depending on cognitive ability, age, the type of event they attempt to recall,

⁷⁹ Farrar, Michael J, Goodman, Gail S. Developmental Differences in Relation between Script and Episodic Memory: Do they Exist? In Knowing and remembering, in Young Children, 30 *Robyn Fivush & Judith Hudson eds., 1990)

and the delay between the event and the time the event is recalled.⁸⁰ The litigation process can take weeks, months, and even years. It is not unheard of for witnesses to finally testify about an event that occurred years prior to their day in court. When a statement is being taken momentarily after an incident, a witness and counsel is not just dependant upon current memory at trial, but on the witness' recorded recollection as well. Similarly, when a child witnesses an event, the child's statements should be recorded as soon as possible. Like an adult's memory, a child's memory can deteriorate over time, and it is imperative to conduct a prompt interview.⁸¹

There are other interview phenomena that also must be carefully considered. Children do not have the same cognitive abilities as adults.⁸² A child's memory of an event can deteriorate faster over time and is likely to be affected by outside influences⁸³. A child's ability to recall events through memory is also less accurate and less reliable than an adult⁸⁴. Further, children can be affected by the interview process, more than adults. A child's memory of an event can be skewed, depending on how that child is interviewed. When interviewing children, an interviewer must be careful to phrase questions in ways that do not directly or implicitly suggest a preferred answer.⁸⁵

⁸⁰ Brainerd, Charles & Ornstein, Peter A., Children's Memory for Witnessed Events: The Developmental Backdrop, in *The Suggestibility of Children's Recollections* 10.

⁸¹ Brainerd, Charles & Ornstein, Peter A., Children's Memory for Witnessed Events: The Developmental Backdrop, in *The Suggestibility of Children's Recollections* 10. (John Dorris ed., 1991)

⁸² Goodman, G.S., Bottoms, B.L., Helgeson, V. Haith, M., & Michelli, J. When a Child Takes the Stand: Juror's perceptions of children's Eyewitness Testimony. *Law and Human Behavior*, 11, 27-45, (1987)

⁸³ Poole, Debra A., & White Lawrence T. Two years Later: Effects of Question Repetition, and Retention Interval on the Eye Witness Testimony of Children and Adults. (29 *Dev. Psychol.* 844-854, 1993)

⁸⁴ Turtle, John, W., Wells, Gary, L., Setting the Stage for Psychological Research on the Child Eyewitness. In *Children's Eyewitness Memory*, 230-48 (S.J. Ceci, M.P. Toglia, & D.F. Ross, eds., 1987)

⁸⁵ Ceci Stephen J. & Bruck, Maggie ,*Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, American Psychological Association, 1995 pp 87-139

There are outside influences that can affect the accuracy of a child's testimony, too. It is important to limit the number of people who speak with the child about the event. It is important to recognize that multiple interviews by multiple interviewers may confuse even the most sophisticated witnesses⁸⁶. Police officers, lawyers, child protection workers, teachers, clergy, relatives, and family friends all may try to speak to the child about the event.⁸⁷

Before an interview of a child can even begin the interviewer must create rapport. Rapport helps the interviewer establish a relationship with the interviewee so that the child is no longer scared or trying to impress. As suggested by Johnson, the outline and objectives of the interview for both the interviewer and interview subject should be clearly outlined.⁸⁸ Although the outline may not be set in stone, it is imperative for both parties to the exchange to know where the interview is going to go. It may prove much more difficult when interviewing small children to outline the interview and have objectives but it is still necessary. It is important to let the child know that he or she can control the circumstances of the interview.⁸⁹ By creating rapport and allowing the child to know the true reason of the interview, several influences that may cause the child's testimony to be inaccurate can be taken removed.

⁸⁶ Perry, N. W., & Wrightsman, L.S., *The Child Witness*, Newbury Park, CA: Sage. (1991)

⁸⁷ Ceci Stephen J. & Bruck, Maggie, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, Other Suggestive Interviewing Techniques, pp139-161 (American Psychological Association, 1995)

⁸⁸ Johnson, Barbara C. ,The Committee of Concerned Social Scientists, *The Suggestibility of Children: Evaluation by Social Scientists*, Amicus Brief for the Case of State of New Jersey v. Michaels

⁸⁹ . Johnson, Barbara C The Committee of Concerned Social Scientists, *The Suggestibility of Children: Evaluation by Social Scientists*, Amicus Brief for the Case of State of New Jersey v. Michaels

Interviewer bias is when interviewers have already made up their minds about the results of the interview before the actual questioning begins.⁹⁰ For instance, in a child abuse case, interviewer bias would be seen if questions are posed only about the abuse, rather than exploring the possibility that the alleged abuse did not actually occur.⁹¹ Interviewer bias can occur⁹² even without misleading questions.⁹³ Leichtman & Ceci, 1995 found that children could be suggested through negative stereotypes even without misleading questions.

Several instances of interviewer bias were seen in the Kelly Michael case. The following dialogue is from that case between an interviewer and child. One can see that the interviewer failed to acknowledge statements that contradicted her own preconceptions.

Interviewer: Do you think that Kelly was not good when she was hurting you all?

Child: Wasn't hurting me. I like her.

Interviewer: I can't hear you, you got to look at me when you talk to me. Now when Kelly was bothering kids in the music room....

Child: I got socks off...

Interviewer: Did she make anybody else take their clothes off in the music room?

Child: No.

Interviewer: Yes?

Child: No...

Interviewer: Did Kelly ever make you kiss her on the butt?

Child: No...

⁹⁰Ceci, Stephen J & Bruck, Maggie, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, The Role of Interviewer Bias, pp 87-107 (American Psychological Association, 1995)

⁹¹ Ceci Stephen J. & Bruck, Maggie *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, The Role of Interviewer Bias, pp 88 (American Psychological Association, 1995)

⁹² Leichtman, Michelle D. & Ceci, Stephen, J, The Effects of Stereotypes and Suggestions on Preschooler's Reports, *Developmental Psychology*, (American Psychological Association, Inc. Vol. 31, No. 4, 568-578, 1995)

⁹³ Leichtman, Michelle D. & Ceci, Stephen, J, The Effects of Stereotypes and Suggestions on Preschooler's Reports, *Developmental Psychology*, (American Psychological Association, Inc. Vol. 31, No. 4, 568-578, 1995)

Interviewer: Did Kelly ever say--- I'll tell you what. When did Kelly say these words? Piss, shit, sugar?

Child: Piss, shit sugar?

Interviewer: Yeah, when did she say that, what did you have to do in order for her to say that?

Child: I didn't say that

Interviewer: I know, she said it, but what did you have to do?⁹⁴

The child did not volunteer any of the information in that dialogue. Even when the child disagreed with the interviewer, she still pressed the information that she assumed to be true as if it were true. Experts today claim that much of the interviewer bias may have resulted from the fact that there was a small, closed group of interviewers that often shared information about their interviews with each other.⁹⁵

Another suggestive technique to avoid is repetition. When this occurs the same questions are posed over and over again, until the desired answer is elicited. Repeating misinformation can prove to be especially detrimental to a child's testimony in that repeating false information begins to create a false memory or belief that can be shared down the road with other interviewers or in court.⁹⁶ The following is an excerpt from transcripts of the Kelly Michael's grand jury hearing:

Prosecutor: Did she touch you with a spoon?

Child: No.

Prosecutor: "No?" Ok. Did you like it when she touched you with the spoon?

Child: No.

Prosecutor: "No?" Why not?

Child: I don't know.

Prosecutor: You don't know?

⁹⁴ Ceci Stephen J. & Bruck, Stephen J. *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, The Role of Interviewer Bias, p 100 (American Psychological Association, 1995)

⁹⁵ The Kelly Michaels Case, <http://www.law.umkc.edu/faculty/projects/ftrials/mcmartin/michaelsevil.html>, Famous Trials, University of Missouri-Kansas School of Law

⁹⁶ Ceci Stephen J & Bruck, Maggie *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, The Effects of Repeated Questioning , pp 107-127 (American Psychological Association, 1995)

Child: No.
Prosecutor: What did you say to Kelly when she touched you?
Child: I don't like that.⁹⁷

It is easy to see from the exchange how the child witness switched his answers due to the prosecutor's repeated questions.

Emotional tone and language can also be suggestive. If an interviewer asks questions angrily in a leading fashion the child often times will give the answer the leading question suggests despite possible fallacy.⁹⁸ If language the child does not understand is used, the child will then look at mood and what type of answer the question is attempting to reach and answer accordingly.⁹⁹ An example of emotional tone would be when a parent raises his or her own voice to a younger child. The reason the parent raises his or her own voice is to get the child to do what that parent wants.

"Adult high status" is also relevant. Most children appropriately identify adults who possess high social status. When a child realizes that the interviewer is an important person the child may want to please the interviewer and is more likely to give socially desirable answers.¹⁰⁰ Children may even feel somewhat intimidated and therefore may

⁹⁷ Ceci Stephen J. & Bruck, Maggie *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, The Effects of Repeated Questioning , p 121 (American Psychological Association, 1995)

⁹⁸ Johnson, Barbara C. The Committee of Concerned Social Scientists, *The Suggestibility of Children: Evaluation by Social Scientists*, Amicus Brief for the Case of State of New Jersey v. Michaels

⁹⁹ Johnson, Barbara C. The Committee of Concerned Social Scientists, *The Suggestibility of Children: Evaluation by Social Scientists*, Amicus Brief for the Case of State of New Jersey v. Michaels

¹⁰⁰ Johnson, Barbara C. The Committee of Concerned Social Scientists, *The Suggestibility of Children: Evaluation by Social Scientists*, Amicus Brief for the Case of State of New Jersey v. Michaels, Stephen J. Ceci & Maggie Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, Other Suggestive Interviewing Techniques, pp139-161, (American Psychological Association, 1995)

seek to please a high status adult.¹⁰¹ Attorneys, judges, or police officers are high status figures because they wear suits, robes, and uniforms. A robe and uniform that a judge or police officer may wear is for status. Children recognize this status and act to please that person.

Peer pressure and outside influence are related phenomena that may improperly suggest the content of a child's statement. Outside influence is difficult to control for and sometimes difficult to recognize. It often occurs with parents. Parents will explain to the child what they believe happened to the child. Upon hearing it from the parent, the child may recite to the interviewer what their parents said despite the fallacy that may be seen.¹⁰² Parent's influence and outside influences are commonly seen in divorce or custody disputes. Parents may feed their child false stories about the other parent so that when interviewed, the child will recount what the parent has suggested. Peer pressure was prevalent with the Kelly Michael case because children were not cautioned or discouraged from talking to one another about the investigation. Peer pressure can work in two ways. Children may testify to what their friends say or have said or interviewers may use peer pressure on children to get answers they desire to conform to friend's answers. For instance, many of the questions posed in the Kelly Michael case were similar to: Did he touch you? Because all of your friends said he did.¹⁰³

¹⁰¹ Ceci, Stephen J. & Bruck, Maggie *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, Other Suggestive Interviewing Techniques, pp139-161, (American Psychological Association, 1995)

¹⁰² Stephen Ceci & Bruck, Maggie *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, Other Suggestive Interviewing Techniques, pp139-161, (American Psychological Association, 1995),

Johnson, Barbara C. The Committee of Concerned Social Scientists, *The Suggestibility of Children: Evaluation by Social Scientists*, Amicus Brief for the Case of State of New Jersey v. Michaels

¹⁰³ Ceci Stephen J. & Bruck, Maggie *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, Other Suggestive Interviewing Techniques, pp 149-150 American Psychological Association, American Psychological Association, 1995

The successful interviewer must consider all these things when speaking with a child. Taken together, these methods outline the importance of being highly trained in interviewing children. Many things can alter or even suggest a memory to a child. Even if a child's ability to recall past events is high, there is a possibility that the statement may be inaccurate and unreliable if improper techniques are used.

CHAPTER 7

ANALYSIS

The needs of justice demand reliable facts in the adjudicative process. Reliable facts permit the truth to be ascertained and they are the foundation on which the accused may be judged and victim compensated. The justice system needs to employ methods to increase the reliability of children's testimony.

There is a delicate balance between reliability and protecting children from intimidation in the adversary process. On the one hand, the reliability of a child's statements can be impaired by a party's or lawyer's behavior. Courts have sometimes attempted to avoid this particular problem by adding court procedures such as the veil seen in *Coy v. Iowa*, or the video link used in *Craig v. Maryland*. In other instances, courts have tried to guide interview procedure to increase reliability and avoid suggestion. This was seen in the *Kelly Michael's Case*, *Frederico Macias case*, and *Idaho v. Wright*. Further, scholars have established that a variety of influences such as parents, attorneys, judges, and other children can affect the reliability of a child's statement or testimony. Can the justice system balance all of these factors and ensure the reliability of children's statements while protecting both the rights of the litigants and the wellbeing of the child? There is reason to hypothesize that by joining the responsibilities of the interviewers, and experts into one position, these factors can be successfully managed. Court appointed forensic interviewers of non-victim child witnesses, in theory, may be capable of controlling

these factors successfully while ensuring the reliability of children's statements.

Great responsibility and skill would be required of court appointed forensic interviewers of non-victim child witnesses. As it would be necessary for these interviewers to use non suggestive interviewing in order to ensure reliability, a control to mandate all interviewers to do so would be necessary. It is hypothesized that a program that is nationally based would be capable of ensuring the use of the most up to date, non suggestive interviewing techniques. Further, it is hypothesized that a nationally based program could offer set procedures, guidelines, and education for all interviewers to adhere to. These prerequisites would further establish the reliability of children's statements.

Organizational Makeup

Dezwirek and McMahon have noted, "The legal system may need to recognize that, in the long run using protective measures such as shielding or hearsay may not be as effective as more time-consuming and expensive methods like court preparation techniques and court schools, which have the potential to empower some child witnesses."¹⁰⁴ Forensic interviewers and child advocacy centers support children who are crime victims in a growing number of jurisdictions. The nationally based CASA program is capable of providing support to hundreds of thousands of children in child protection and divorce actions each year. A similar program should be established to supply the necessary support to the courts for cases involving non-victim child witnesses. To be eligible interviewers in the program would be educated and trained within their field in

¹⁰⁴: Marsil, Dorothy F., Montoya, Jean, Ross, David, Graham, Louise, Children Witness Policy, Law and Contemporary problems School of Law Duke University, Vol. 65 No. 1 , p 240, Louise Dezwirek-Sas, *Sexually Abused Children as Witnesses: Progress and Pitfalls*, in CHILD ABUSE: NEW DIRECTIONS IN PREVENTION AND TREATMENT ACROSS THE LIFESPAN 248-67 (David A. Wolfe & Robert Joseph McMahon eds., 1997

order to be court appointed. The program would establish national standards for the certification of forensic interviewers. A roster of trained and certified forensic interviewers would be maintained and provided to the courts so that so that trained interviewers could be appointed as needed in litigation disputes. For purposes of this thesis a working title for the program would be “Court appointed forensic interviewers” (CAFI).

Court Appointed

One way that the justice system promotes reliability is to require unbiased procedures. Like CASA volunteers and GALs, the CAFI would be without bias or personal interest as they would be viewed as investigators of the court. CAFI, similar to GALs and CASA would be “court appointed” because the judicial officer in a particular matter would choose CAFI when there was a non-victim child witness identified in a matter. By being court appointed the CAFI would most likely not be objected to as lay opinion or expert witnesses often are.

Unlike experts employed by an attorney, the CAFI would be neutral. “Hired guns” are paid to testify in court. Expert witnesses employed by attorneys are in many cases employed to portray the “truth” as best they can to suit the party that employs them. CAFI, however, would act for the court, not the parties. CAFI would hold no economical or personal ties to either party. Like GALs and Casa Volunteers; CAFI would have to rise above their pre-conceived notions or biases and report to the court what is reliable or face vigorous cross examination that would explore their bias. CAFI would report to the court and the parties everything uncovered during the interview of a child witness. CAFI would offer a third viewpoint to the fact finder, thus assisting fact finders to make

findings regarding the facts of the case more easily while sparing the child witness the full brunt of the machine used in the modern adversarial process. More viewpoints offered to the fact finders may enhance the likelihood of finding the truth.

Forensic Interviewers

Since a court appointee is not something taken lightly, CAFI would be held to certain standards of training, certification requirements, prescribed courses, and continuing education requirements like GALs, CASA, and statutory pre-requisites. These requirements would be in order to make CAFI more reliable in their interviewing of children.

The CAFI would have a background in child development, cognitive psychology, developmental psychology, evidentiary law, legal principles, and forensic interviewing. Cognitive and developmental psychology skills would enable CAFI to make expert opinions regarding the child's ability to recall events as well offer opinion regarding the reliability of a child's statements. Forensic interviewing skills would allow CAFI to conduct accurate interviews without suggestive techniques. While an understanding of evidentiary law and legal principles would better CAFI as a court appointed figure the CAFI would also be trained in the most up to date forensic interviewing techniques and would be required to stay abreast of the advancement of the above mentioned knowledge similar to medical and legal credit that are required of attorneys and physicians.

Once a child witness was identified in a matter, the court would mandate that a CAFI be appointed to the case to interview the child. By being brought in as soon as possible, the CAFI would reduce or eliminate the multiple interviews that the witness often experiences. Instead of talking to multiple investigators and interviewers from the

competing parties, the child would be speaking with one interviewer. The CAFI would be trained in techniques for developing rapport with the child. By being trained in forensic interviewing techniques CAFI would avoid repeating and leading questions and use a comfortable tone and age appropriate language. The CAFI would also be trained to avoid high status interview effect. By taking all these things into consideration and realizing the problems that may arise, the CAFI would be limiting the possibility of suggestibility greatly and would increase the reliability of the child's account of relevant events.

As was seen in the *Kelly Michael* and *Frederico Macias* cases, multiple interviews can impair the reliability of children's statements. CAFI would reduce or eliminate that problem by limiting the number of interviewers the child sees and by standardizing interview techniques. CAFI, by being court appointed, would be trained and held to high standards. This would help reduce interviewer bias. The interviewer would look at the situation objectively and report everything conducted in the interview. If the interview was not objective, repercussions would follow. As depicted earlier in *Idaho v. Wright*, it is important to enter an interview without bias. *Idaho v. Wright* not only showed how a child's statement can be altered due to interviewer's bias, but it also showed how a case can be reversed and remanded when bias is present within an interview. When questions are repeated to a child in an interview, the child will often change his or her answers. The child is capable of sensing what answer the interviewer or questioner is seeking. This was best seen in the excerpt of the prosecutor examining the child in the *Kelly Michael's case*.

CAFI would supply the court and the parties with a forensic assessment and report of the information disclosed by the child that would be relevant to the case at hand.

CAFI's testimony and assessment of the child's interview would not be excluded or quashed entirely by counsel regardless of its findings. Federal Rule of Evidence 401 provides: "in a case that involves forensic assessment of a child's report, the assessment must be relevant to the issues at bar material to the case."¹⁰⁵ At the same time, in jury cases relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.¹⁰⁶ Since the CAFI would be appointed by the court the danger of unfair prejudice would also be limited.

Additional procedural protection would safeguard the reliability of CAFIs interview. All interviews involving CAFI and a child would be video taped. Today it is the standard for many interviews to be video taped. Video tape recording further ensures reliability not only of the interview method but the accuracy of the child's statements as well. Michael E. Lamb et al. conducted a study examining the accuracy of professional interviews of children. The study compared verbatim notes against audio and video recordings of the same interview. Lamb et al. found that handwritten reports contained less detail than was found in the video taped session. If parties to the litigation were concerned that the interviewer consciously or unconsciously used suggestive techniques, the video taped interview can be watched again and analyzed by outside experts to see if such techniques were used or if false memories were imprinted during the interview. In *Idaho v. Wright*, the interview of the child was not video taped. The failure to record the interview contended to the court's suspicion of the reliability of the interview.

¹⁰⁵ Walker, Nancy E. *Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility*, Law and Contemporary Problems, VOL 65, 2002

¹⁰⁶ Federal Rules of Evidence 403

This thesis posits that CAFI as court appointed officers would be free from party bias, thus contributing to, if not ensuring reliability. The CAFI interview would eliminate the need for multiple interviews of the child. Expert witnesses that would normally be called by opposing sides to contest the content and manner of obtaining a child's statement would not be needed. The video taping of an interview would protect both the defendant's rights as well as CAFI.

If the parties to a litigated matter were to contest the reliability of the CAFI interview, a separate hearing would be held to weigh whether the CAFI adhered to accepted standards for forensic interviews. If the CAFI was found to have acted improperly the statement could be redacted or the CAFI would be immediately removed. The video taped interview would then provide the basis for cross examination. If the CAFI used improper interviewing techniques this could be brought up during cross examination for the fact finder(s) to consider when looking at the reliability and trustworthiness of the child witness. If the defendant were to be found guilty the defendant would have the right to appeal on the issue of the CAFI, as the possibility of irreparable harm had been laid on the record.

Experts

The CAFI would be qualified to testify on children's ability to perceive, relate, and recall. CAFI would be an expert in interviewing children, child suggestibility and memory. The training that CAFI would receive from the national certification program, and prerequisites mandated, would ensure the necessary abilities to be viewed as an expert. CAFI could testify to the interview, what was discovered in the interview of the child, the extent, if any, that suggestive interview techniques were used, and offer opinion

relating to the accuracy of the child's testimony.

Such an opinion would be allowed due to FRE 702 which allows for expert opinion if "[the] ...scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue..."¹⁰⁷ The CAFI would be qualified to offer such opinion in virtue of being trained in the cognitive and behavioral tendencies of young children and interviewing protocol.

The CAFI would be treated as an expert witness and would be required to use reliable, scientifically based methods subject to testing under the Daubert Standard and the Federal Rules of Evidence. CAFI's testimony and assessment of the child interview would be required to be the product of reliable principles and methods reliably applied to the facts of the case."¹⁰⁸ If scientific interviewing techniques were not conducted then the testimony of the CAFI could be excluded as inadmissible under the Daubert Standard, together with any hearsay statements of the child in question.

By having a single expert instead of many to testify to a child's testimony the need for the parties to hire experts to contest the reliability of a child's statement would be greatly reduced. In the past multiple experts often were called at trial to ensure reliability of a child's statement. The evidence and opinions of two experts would be supplied to the court. The evidence of both experts was weighed by the fact finder to reach a result. By having a single unbiased court appointed expert testifying, multiple expert witnesses would be largely unnecessary. Time and money would be saved by the courts, allowing the docket to be free for other kinds of cases. More importantly, the

¹⁰⁷ Federal Rules of Evidence 702

¹⁰⁸ Federal Rules of Evidence 702

time saved would be beneficial for the child. As stated above, Goodman et al. in press; Melton et al., 1992, and Saywitz (1989) found that:

“On top of multiple interviews, appearances, and cross examination there is general lack of knowledge of legal procedures, long pretrial waiting periods, postponements and continuances and the formality of the courtroom may pose serious complications for the introduction of a child as a key witness.”¹⁰⁹

CAFI would not be able to excuse a child from testifying entirely; rather other traumas associated with testifying would be greatly reduced. The accuracy of the child’s testimony is likely to be much more reliable by limiting the amount of time that child has to wait before testifying.

Courts should not ignore the testimony of a child just as they cannot give such testimony too much weight. The appointment of a CAFI would allow for the proper weight to be given both to expert opinion and child testimony. This specialized procedure would help ensure that children’s testimony receives proper weight. Fact finders would be aided to make their verdicts in cases concerning child testimony. The facts found by them and the verdicts reached by them would be more reliable. Federal funding would be required to start up the CAFI program and would provide for the continuing education necessary for CAFI to sustain their expert status. The courts would save time and money by limiting the amount of experts testifying in court and could recover part of the program costs as court costs. Since the reliable facts would be more readily ascertainable, the reliability of child testimony would be strengthened and allow

¹⁰⁹ Batterman-Faunce, Jennifer Marie, Goodman, S. Gail, Child Victims, Child Witnesses, Effects of Context on the Accuracy and Suggestibility of Child Witnesses, p 311, (Goodman & Bottoms, The Guilford Press, 1993)

the Justice System to reach more reliable conclusions in civil and criminal cases where children are key witnesses.

CHAPTER 8

DISCUSSION

Why Non-Victims?

The CAFI program would deal primarily with non victim child witnesses in civil and criminal cases. Guardians ad Litem, CASA volunteers, and child advocates exist currently to provide children with various forms of legal assistance and support in the judicial process. These programs deal primarily with child victims or in specialized court proceedings. Guardians ad Litem and CASA are employed in family court usually in child abuse and neglect matters or divorce. In many divorce cases the child is heavily affected by the divorce and in some divorces the child has to deal with physical or mental trauma. In abuse or neglect cases the child is the victim. CASA volunteers, GALs, Child advocacy centers and Child Protection Service Workers protect either the child or represent the child's best interests. These workers are trained and educated in the necessary, most up to date methods to assist the child in that specialized setting. In particular, these actors are trained to offer great care when interviewing children. It is thus apparent that the CAFI posited in this thesis would be duplicative in these circumstances. It is possible that child suggestibility may exist in the family court system today. Despite that fact, it is probably not feasible to use CAFI in family court. Perhaps in the future, if further research was conducted and CASA was revamped to include

CAFI, there may be a possibility of CAFI in family court.

Most often when a child is a witness to a crime the child is a victim. Only about twenty percent of cases involve a key witness that is a non victim child.¹¹⁰ In sexual abuse cases or sexual assault cases there are trained individuals to interview the child on the part of the prosecution as well as defense. Child Advocacy centers are often involved in these matters as well. Since the problem of suggestibility is so well known throughout the criminal justice system, experts in that field take suggestibility and the memory imprinting problem very seriously. Procedures and laws regarding the accuracy of child testimony have been amended and changed to deal with the problem of false memories and suggestibility. Again, since the problem of inaccuracies in child testimony seems to be dealt with on a fairly frequent basis, and problems like those seen in the Kelly Michael's case appear to be infrequent today, it would appear that children's testimony is being dealt with appropriately. Could CAFI be included in criminal cases where a child is a victim? It is possible but at this time not likely. Further research would have to be required to see the CAFI would work better than child advocacy centers and victim advocates. On top of that, prosecutors, child advocacy centers, and Defense attorneys would oppose such a model due to its non adversarial nature.

Funding

It is claimed that an organization such as CAFI would be funded through donations and federal money. It is realized that CASA, a similar program, receives its funding that way. CASA although is non-profit. It does not seem feasible that a position such as CAFI would be non-profit. Even if adequate personnel could be found to act for

¹¹⁰ Leippe, Michael R. et al., *Opinions and Practices of Criminal Attorneys, Perspectives on Children's Testimony*, p 108, S. J. Ceci, D.F. Ross, M.P. Tolia, Springer-Verlag, 1989

non-profit purposes, the odds of having the necessary amount of personnel is unlikely. It is possible that CAFI could be partially funded through client and court costs in some cases. It is difficult to tell if the necessary amount of funding could be received that way. Even CASA, as well known as it is, has difficulty filling up its ranks. Given the amount of education and training that would be required for a position such as CAFI, a person qualified to fill such a position would be capable of making a significant amount of money as an expert witness rather than supplying their knowledge for the good of children and the court system.

It has been suggested in the past, through the Cornell Proposal that a nationally based system comprised of experts could frequent the court systems providing their knowledge and opinions to the courts¹¹¹. The problems with experts “could be remedied if courts developed procedures for inviting nonpartisan experts, much of the way that the French system does.”¹¹² The Cornell proposal is a national “Amicus Institute” that would provide nonpartisan, not for profit opinions and analyses for courts upon request.¹¹³ This proposal although, has been acted upon rarely, primarily due to lack of manpower, funding issues and its non-adversarial nature.

¹¹¹Ceci, J. Stephen & Bruck, Maggie *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, Ethical and Professional Issues, American Psychological Association, 1995

¹¹² Ceci, J. Stephen & Bruck, Maggie, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, Ethical and Professional Issues, American Psychological Association, 1995

¹¹³ Ceci, J. Stephen & Bruck, Maggie, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*, Ethical and Professional Issues, American Psychological Association, 1995

CHAPTER 9

CONCLUSION

A child can be caused great harm by multiple interviews and the trauma associated with testifying in court¹¹⁴. Further, a child's statements may be inaccurate due to suggestive interview methods¹¹⁵. Ultimately it would be beneficial for a child to avoid having to testify in court entirely. Traditionally, this has been impossible except when exception to the hearsay rule allows the statement into evidence. The problem arises in criminal cases with the defendant's sixth amendment's right to confront. If a child's statements are testified about by a third party or shown in video taped interview, it is traditionally impossible for defense counsel to cross examine those statements?

The reason for the inadmissibility of testimonial statements is due to bias. A police investigator is attempting to make a case. That is why the police investigator's questions and investigation may come across as biased. A child testifying about an event may be biased. The Sixth amendment right to confront helps to ensure accuracy and reliability, in protecting a criminal defendant from biased claims. The defendant can call

¹¹⁴ Bussey et al. Lies and Secrets Implication for Children's reporting of sexual abuse (Gail S. Goodman & Bette L. Bottoms eds., 1993

¹¹⁵ Batterman-Faunce, Jennifer Marie, Goodman, S. Gail, Child Victims, Child Witnesses, Effects of Context on the Accuracy and Suggestibility of Child Witnesses, p 311, Goodman & Bottoms, The Guilford Press, 1993

into question the bias and show inaccuracies and lies to the fact finders through cross examination.

CAFI on the other hand, would be unbiased. Since the opinion and video taped interview is not for the purposes of establishing guilt, the CAFI's opinion and video taped interview could be categorized as non-testimonial. Since CAFI would be trained to supply the court all details about the child's statements regardless of any party to the litigation, the video taped interview and opinion would be seen as unbiased. CAFIs would be experts in obtaining accurate statements from children and in avoiding suggestive interview methods. The statement of the child could be introduced through the CAFI's testimony, without cross examining the child, especially if "...competing interests, if closely examined, warrant[ed] dispensing with confrontation at trial."¹¹⁶ The CAFI of course would still be subjected to cross examination like any other expert witness.

In conclusion the CAFI can be hypothesized in a thorough way. Whether or not such a program will be adopted by the justice system is unknown. At this point in time, the program could be made to work consistently with scientific research and case law. If CAFI were actually to be implemented one could hope it would effectively increase the reliability of adjudicated proceedings and protect child witnesses from some of the harsher impacts of providing testimony. Court Appointed Forensic Interviewers could help restore Lady Justice's promise to achieve fair, unbiased, accurate findings in the cases brought before her.

¹¹⁶ Abrams, E. Douglas, Ramsey, H. Sarah, *Children and the Law: Doctrine, Policy and Practice*, Maryland v. Craig, 497 U.S.836, 1990, p 560 3rd Edition, Thomson West, 2003

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