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TOP 10 REASONS WHY CHILD SEX CASES ARE DIFFERENT

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PRESENTED BY BRUCE M. LYONS, ESQ.

INTRODUCTION.

THE UNIQUE FEATURES IN CHILD ABUSE CASES. The child victims, almost certainly, engage the sympathy of the jury and the court. This disposition to sympathy inevitably colors every aspect of the case and tends to preclude all but the most delicate efforts to impeach prosecution witnesses. The witness roster typically includes mothers, teachers, child care, and health professionals.

THE TABLEAU BEFORE THE JURY may look like this: 1) An earnest prosecutor, representing society; 2) A defense attorney, perhaps seen as society's adversary, standing beside; 3) A defendant, under grave suspicion of heinous offenses; 4) Against an extraordinarily sympathetic victim; 5) A judge, fair-minded, but pressured by time. The juror wants to help the victim and the judge—and, probably, the prosecutor.

THE CHILD VICTIM IS THE PRINCIPAL WITNESS, and most, if not all, of the substance of the charges issues from the child's mind and memory. That spring will almost certainly will be muddied by the time you become involved.

REASON #10. Attorney feels overwhelmed by media frenzy, public outcry—stacked deck in court.

MORE HEINOUS THAN MURDER. No rational person can be in favor of any form of child abuse, whether sexual, physical or emotional. However, as attorneys we are often called upon to represent a client accused of child sexual battery, a crime perceived by many as more heinous than murder. Because of the emotional nature of the public's reception of these cases, attorneys often feel overwhelmed when undertaking to defend an accused child abuser.

> "The last 3 years have brought the public to a state of awareness, often bordering on hysteria concerning child sexual abuse. As the media uncovers new scandals throughout the country, increasing numbers of concerned citizens press prosecutors and legislators to take action." Graham 40 University of Miami Law Review (1985).

INTRODUCE RATIONALITY TO THE COURTROOM. Because of the problems inherent in defending child sexual abuse cases, special efforts are required by defense counsel.

Defense attorneys must seek to introduce rationality back into the courtroom. We must not allow feelings of sympathy for the victims of child abuse to overwhelm the law or our client's right to a fair trial under the law.

REASON #9. Investigator/Interviewer biased—"train" the child—force confessions.

INVESTIGATORS FEEL EMPOWERED BY THE CIRCUMSTANCES. Typically, the investigation depends almost entirely on the child's memory, plus admissions or confessions by the defendant. As a result, investigators may put extraordinary pressure on both the defendant and the child. History shows that either may prove susceptible to persuasion.

THE CHILD'S LEARNING CURVE.

PROTECT THE CRIME SCENE—THE MIND OF THE CHILD. In most cases, the most important evidence will be in the mind of the child. Even the youngest child understands the benefits of cooperating with adults and providing the expected response.

Police Investigators make no attempt to preserve that evidence. Instead, it is likely that the child will be questioned by a series of police investigators who—by custom and training—interrogate by leading questions. The havoc that results when a suggestible child is questioned in this way can often be traced by the changes in the child's vocabulary with each successive interrogation. A child who first talks about "pee-pee" may later say "thing" and—after several sessions—use "penis" or "vagina." If a new vocabulary has been "planted," what other "training" may have occurred?

Suggestibility - The Poisoned Spring. It is commonly accepted that memory is not only unreliable but is also malleable--susceptible to modification by out side influence. Many go further to hold that false memories may be planted. Because each of these potentials is vastly facilitated in the accepting mind of a child, all contacts especially interviews should be controlled. Courts have been willing to limit the number and methods of interviews, but that begs the question because the essential risk relates to the attitude of the interviewer.

Psychologist Professionals may be no better. It appears that many clinicians acting on a report, symptom profile, or history that is merely suggestive of trauma will press relentlessly for such memories and—in repressed memory cases—advise patients that they have detected trauma as a premise to eliciting proof of that same trauma. Aggressive approaches are common - some won't take no for an answer. In one case, law enforcement employed a Play Therapist who repeatedly "interviewed" the child. The sessions were taped. Usually the child was rewarded for "right" answers by being allowed to play with toys. After each interview, the therapist conducted a paid therapy session where mother and the child discussed the same incidents. That child's initial response to the officer who responded to her home was, "Mommy said that [the boy-friend , defendant] touched me." After several "interviews" and therapy sessions, the child was able to give an extended account that closely paralleled mother's version.. Later at deposition, that therapist could not define a leading question.

REASON #8. Relaxed rules of evidence without confrontation—or thru hearsay.

PROSECUTOR'S MANEUVER - FIT EVIDENCE TO A FIRMLY ROOTED HEARSAY EXCEPTION. For Example: White v. Illinois, 502 U.S. ___, 112 S.Ct. &36, 116 L.Ed.2d 848 (1992) hearsay statements of child were permitted under "spontaneous declaration" and "medical examination" exceptions even though the child was available but did not testify. Both satisfy the reliability requirements of the Confrontation Clause and, under the Florida Code, the availability of the declarant is immaterial.

FACE-TO-FACE COMMUNICATION issues are broadly controlled by two federal cases:

Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988). Confrontation clause provides the right to confront face to face witnesses giving evidence at trial. Physical confrontation between accused and accuser is a "core guarantee" with a strong historical foundation. The court left the door open for exceptions to "be allowed only when necessary to further an important public policy," and said, "something more than the type of generalized finding [of necessity] underlying [the Iowa] statute is needed."

Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 3169, 111 L.Ed.2d 666, 685 (1990), particularized the requisite findings, holding that the Confrontation Clause requires that the trial court must conduct an inquiry on whether the closed-circuit procedure is necessary to protect the welfare of the particular child and "must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present."

The Craig court also approved a Maryland statute that in pertinent part required instantaneous electronic communication between defendant and defense counsel during closed-circuit testimony.

ADMISSIBLE HEARSAY IN LIEU OF OR TO AUGMENT TESTIMONY OF CHILD.

Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). Confrontation Clause two part test of admissible hearsay:

First, prosecution must either produce or demonstrate the unavailability of the declarant;

Second, the hearsay ". . . is admissible only if it bears adequate `indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."

Hearsay Exceptions by State Statutes and the Interplay of Federal Rules of Evidence 703 and 803(4). Lawyers and experts have used the open door of rule 703 as a "back door" exception to the hearsay rule and have treated rule 803(4) as a broad, residual exception to the hearsay rule. Many states have enacted statutory exceptions for testimony of children, elderly, and disabled adult. For a general discussion, see Expert Witnesses Under Rules 703 and 803(4) of the Federal Rules of Evidence: Separating the Wheat from the Chaff, L. Timothy Perrin, www.law.indiana.edu/ilj/v72/no4/perrin.html.

Tome v. U.S., No. 93-6892, January 10, 1995, construed Fed. R. Evid. 801(1)(B) admitting prior consistent statement to rebut suggestion of recent fabrication or improper influence or motive as follows:

Admissible to rebut certain impeachment, not to bolster testimony.

Upheld strict pre-motive requirement. Rule is grounded in common law like most hearsay rules. Contrary to government argument that rule is a function of relevancy. AAntecedent declaration@ is the essence of the common law rule.

Brush up your Cleary. Justice Kennedy declared Edward Cleary=s writings persuasive as to the rules. He was the Reporter of the Advisory Committee, drafted rules, and did >72 revision of McCormick.

FINDINGS OF RELIABILITY: The requirement that the court specifically find reliability is not eliminated because the child testifies. Failure to conduct the hearing is error. Confrontation Clause does not require an additional showing of reliability before a child's statements may be introduced Idaho v. Wright, supra. United States v. Nick, 604 F.2d 1199 (9th Cir. 1979), insofar as it could be read to require an additional inquiry into the reliability of the child declarant's statements as a precondition to admission of the testimony, does not survive Idaho v. Wright and Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)).

COMPETENCY DETERMINATION is of increased significance when the critical facts are totally dependent on the child's ability to observe and recollect.

SPECIFIC FINDINGS AS TO BASIS OF INCOMPETENCE MAY BE VITAL because the incompetent child may be unavailable for the purposes of child hearsay rules. As an example, Florida's Child Hearsay statute, 90.803(23), allows for admission of a "statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less." The terms are not defined. Nonetheless, the prominent Florida evidence expert who drew the statute has

said that he believes that the testimony of a person of adult years—with a mental age less than 11—can be admitted under the statute. The question has not been tested by appeal and other analysis as to reliability will apply.

"ADVERSARIAL TESTING WOULD ADD LITTLE TO ITS RELIABILITY," Wright, 497 U.S. at 818, is arguably the ultimate test, but there are many steps along the way.

TRUTHFULNESS IS ULTIMATE QUESTION. Not even an expert witness may offer an opinion as to this ultimate question of fact. DON'T OPEN THE DOOR. For example, it was held that the defendant clearly opened the door for the prosecutor's question concerning the credibility of the victim's accusation against the defendant, by eliciting from the same witness testimony that the child victim was the kind of child who would lie to get her way.

ADMISSIBLE WITHOUT LIMITATION AS TO THE NUMBER of hearsay witnesses who may testify, subject to the defendant moving for exclusion of the evidence under Fla. '90.403.

SIMILAR FACT EVIDENCE is to be treated "as simply relevant to corroborate the victim's testimony, and recognize in such cases the evidence's probative value outweighs its prejudicial effect.

ALL RELEVANT EVIDENCE IS ADMISSIBLE unless specifically excluded by a rule of evidence. The requirement that similar fact crimes contain similar facts to the charged crime is based on the requirement to show relevancy. This is merely a special application of the general rule. Be aware of the Federal Crime bill which opens the door to all this evidence in federal court and which is being added to many state evidence codes.

THE LIMITS OF ADMISSIBILITY—Improper procedure, prosecutorial overreaching

TIMELY AND PROPER OBJECTION IS CRUCIAL.

REASON #7. Dare not attack Sympathetic child-victim.

IF YOU DARE NOT ATTACK YOU MUST EXPLORE DEFENSES. Look for ways to excuse or avoid the child's accusation. Do not present or picture the child as an active participant in developing a fabricated accusation. Show that the child is the victim of adult social influences, adult agendas, and adult purposes.

BE THE CHAMPION OF THE CHILD. Do not accept the adversary's picture of the Defense attorney as a mean, hostile, aggressive bastard who attacks little children to impeach, discredit, and confuse them. Attempt to frame your role as a champion of the child, protecting the child from harmful and pernicious adult social influences, even if it may be well intentioned.

INVESTIGATE, PROBE, DISCOVER. Structure discovery to reveal the behaviors and actions of all adult interactions with the child.

LEARN ABOUT THE CHILD ACCUSER.

Sexual history. How did child obtain knowledge of sexual acts?

Motive of child (or influential adult) to make false allegations: Manipulate adults? Protect actual abuser? Revenge for punishment? Broken relationships? Religious disputes? MONEY disputes?

Prior accusations by child—no matter that they did not include sex abuse.

Reputation for truth and veracity? Propensity to lie? Reputation for aggressive or disruptive behavior? Where the child is the principal witness against the accused, propensity to lie may be admissible. Others depend upon your creativity in tailoring for admission.

Drug use? Alcohol? Admissible evidence if occurred at relevant times: When the alleged acts happened. When child=s statements were taken. When child testifies in court.

Caution. Discoverable records such as Guardianship records, Child Protection Team (CPT), and similar are sometimes withheld. Make specific request for these statements in addition to requests for exculpatory material.

AMASS THE DATA:

Documents/Records: foster homes, adoption, school, psychological, juvenile, or police. Depositions of police and others who interviewed child. Get them to commit to proper approach in questioning child (no leading questions). Use that to compare with actual techniques which were employed.

Interview or depose others the child told about the acts: siblings, friends, law enforcement officials, doctors, etc.

Actual copies of statements made by the child. Transcripts sometimes include surprising errors. Tone and style in questioning can reveal emphasis not on the face of the transcript. Listen for signs the child is influenced, e.g. adopting the questioners speech mannerisms, especially sexual vocabulary. Is the child being educated (even unwittingly)? Does the range of the child=s knowledge of sexual practices grow with each added interview?

Learn about the accused. Don=t stop until you=re certain you know everything the prosecutor knows or is likely to discover, and MORE!
Learn about the investigators: Background? Qualifications, especially as to questioning children? Do they meet the standards of their agency? Have they followed policy and guidelines?

BEGIN NOW - PREPARE YOURSELF. If you are not well grounded on that day when you client is arrested and the press is clamoring for a statement, your work will be vastly complicated. Ground yourself in the literature and psychological lore, syndromes, and myths. Review techniques in questioning a child. Review criteria for the use of experts.

REASON #6. Syndromes galore! Post Traumatic Stress , Parental Alienation, Child Sexual Abuse Accommodation.

EXPERTS IN THE SCIENCE OF PSYCHOLOGY are a central feature of these cases. They come to explain. They are non-threatening, dispassionate. Each appears to have unimpeachable motives and impeccable credentials. Our society is sensitized to crime, and trained by the media to expect instant, "bite-size," solutions. The experts not only offer that "quick fix" but include the one comfort each juror unconsciously craves - an easy way to do the right thing. Unfortunately, these experts may operate on hidden agenda which are hostile to the defendant. In this, they are facilitated by the special privileges and powers afforded in our system.

> **The expert witness is a phenomenon of the trial courts.** Occupying a position not open to other witnesses, the expert may recite, analyze, and comment upon the facts at issue in the case on trial, recite other facts not even admissible in evidence as such to illustrate or expand the basis for the opinions expressed, controvert argumentatively the opinion testimony of opposing experts, include summations of the factual evidence with otherwise inadmissible commentary, and often invade the province of court ant jury by expressing judgments upon the ultimate issues. Moreover, the expert stands immune from personal attack by counsel for the opposing litigant, for it is considered to be as repugnant for counsel to impugn the expert's character as it would be to assail that of a fellow officer of the court in the person of the other side's lawyer. The expert may indeed become an officer of the court in the cases of court-appointed experts. These experts occupy a still more exalted status which at times, even improperly, enables them to communicate in camera with the appointing jurist.

Mulligan, Expert Witnesses: Direct and Cross-Examination, ix (Supplemented 1991)

THE SCIENCE AND THE EXPERTS.

VALIDITY OF EXPERT OPINIONS may depend on the particular mental health discipline involved. It is not safe to assume that practitioners in the so-called "soft" areas of the science of psychology; (clinical, counseling, community, social, trauma, personality, developmental) share the same information. Moreover different concepts of psychology may range from high to doubtful validity, but many psychologists ignore these distinctions.

SCIENTIFIC METHOD CONTRASTED TO LEGAL METHOD. The science of psychology tries to explain how men behave. Law seeks facts about specific behaviors of a

man. For that, psychology can properly offer no more than a rather low order of probability that a given act occurred. For a light-hearted treatment of the problem, See, Large, P.W., & Mitche, P. (1981) Proving that the strength of the British Navy depends on the number of old maids in England: A comparison of scientific proof with legal proof. Environmental Law 11(2) 557-638.

PSYCHIATRIC DIAGNOSES. Certain groups of symptoms are identified with a given diagnosis - a syndrome or profile. There are published standards of practice which attempt to regularize these findings, it appears they are often ignored or misunderstood. Some you may encounter are:

CHILD SEXUAL ABUSE SYNDROME. The symptoms: low self-esteem, suicidal or self-destructive thoughts, depression, sexual dysfunction, among others. To recant accusations is symptomatic of abuse while standing firm supports the same diagnosis. Call it the palindrome syndrome: no matter which way you read the symptoms, the diagnosis is the same.

POST TRAUMATIC STRESS DISORDER. This diagnosis cannot be made solely on the basis of current symptoms. There must be independent evidence of a highly traumatic event outside the usual range of human experience.

PARENTAL ALIENATION SYNDROME. An explanation for false accusations by the child.

MUNCHAUSEN SYNDROME BY PROXY. A complex type of emotional abuse responsible for some false accusations of child abuse.

CHILD MOLESTER TYPOLOGY OR PROFILE. No valid profile exists, but it appears possible to identify characteristics consistent with an abuser and abuses inconsistent with an individual. Testimony couched in such terms may be admissible. See, People v. Stoll, 49 Cal.Rptr 1136, 738 P.2d 689 (1989), The state supreme court ruled that a psychologist could testify the defendant showed no signs of deviancy or abnormality, based on interviews and personality tests. The testimony was held to be expert opinion admissible as character evidence.

REPRESSED MEMORIES. There is well founded body of opinion which denies there is empirical proof of repressed memory. Nonetheless, most mental health and legal scholars accept the theory that repression is common, particularly in cases of sexual abuse. Apparently the theory did not find its way into court until the 1990 murder trial of George Franklin. He was convicted of the 1969 murder of a child on the testimony of his daughter who was eight at the time of the crime and who said her memory of the murder began to return in 1989. Since 1990, a plethora of public figures have revealed that they were abused and, in many cases, alleged the memory was repressed.

NO TALE IS TOO BIZARRE TO BE ACCEPTED: There has been so much popular examination of the phenomena related to sex abuse that every person in court may be disposed to

accept even the most fanciful allegations including repressed memories or Satanic Ritualistic Abuse (SRA). In this they merely reflect the attitude of mental health clinicians. Loftus and Herzog (1991) suggest that 81% of the clinicians invariably accept repressed memories relying only on the accompanying symptoms of stress and pain for validation. At least 30% readily accept as true SRA reports involving highly bizarre, heinous, ritualistic criminal abuse in a context of a vast, covert, highly organized, transgenerational network of satanic cults. Loftus, Elizabeth F., The Reality of Repressed Memories. (1993). Tests show that jurors accept sex abuse accusations with only a modest increase in skepticism when the are based on repressed memories and, when they do question such memories, they prefer to approach then as mistakes rather than as deliberate lies.

THE INCEST PRESS. In the popular press, The Courage to Heal, Bass and Davis (1988), is known as the "bible" of the incest book industry, it advises, "If you are unable to remember any specific instances [of sexual abuse] like the one mentioned above, but still have a feeling that something abusive happened to you, it probably did." p.21. "If you think you were abused, and your life shows the symptoms, then you were." Amazingly, therapists frequently recommend books such as The Courage to Heal in the course of treatment.

REASON #5. Your only witness maybe shrink. Do juries believe them?

ADMISSIBILITY OF EXPERT TESTIMONY - TO FRYE OR NOT? Since June, 1993, Federal Courts have followed the *Daubert* standard for admitting expert scientific testimony, but some states such as Florida cling to the *Frye* test. The continued struggle of the courts as to the proper application of *Daubert* is beyond the scope of this presentation.

DISTINGUISH THE LEVEL OF EXPERTISE. Courts have tended to be generous in admitting the testimony of socio/mental experts, usually without much distinction between their levels of expertise in the field. Your burden is to convince the jury that, for example, your forensic psychologist trumps their social worker with a degree in psych. You should subject every expert and every expertise to the most rigorous inquiry. Many precedents may be in doubt because they derive from or were informed by *Frye* and post-*Daubert* rulings are often inconsistent.

CATEGORIES OF TYPICAL EXPERT TESTIMONY: Although there are other systems, the following categories are convenient[0]

> **Type 1. CREDIBILITY.** Expert evaluates the credibility of the child and asserts that the child's allegations of abuse are truthful. RESULT: Universally excluded.

[0]Lisa R. Askowitz, Restricting the Admissibility of Expert Testimony in Child Sexual Abuse Prosecutions: Pennsylvania Takes It to the Extreme, 47 Mia.L.Rev. 201 (1992)

Type 2. ABUSE. Expert offers a direct opinion that the child has been abused. RESULT: Admitted in a few courts. May become Type 3 by omitting the direct opinion of abuse. But see Brown v. State 523 So. 2d 729 (Fla. 1st DCA 1988) which evidence of guilt of was overwhelming.

Type 3 CONSISTENT WITH ABUSE. Expert describes certain behaviors as being consistent with being abused. RESULT: Courts are split. Ward v. State, 519 So.2d 1082 (Fla. 1st DCA 1988) If offered against Defendant as having a particular character trait it does not come in. See Erickson v. State 565 So. 2d 328 (Fla. 4th DCA 1990)

Type 4 INCONSISTENT WITH ABUSE. Expert explains behaviors such as recanting that are seemingly inconsistent with abuse in order to rebut the implication that the child's allegations are false. Conceptually this is similar to the Child Sexual Abuse Syndrome. RESULT: Usually admitted. But some courts are reversing the liberal trend. e.g. Type 4 testimony was rejected as impermissible infringing on the credibility-determining function of the jury in Commonwealth v. Garcia, 588 A.2d 951 (Pa.Super.Ct. 1991), appeal denied, 604 A.2d 248 (Pa. 1992).

SPECIAL VULNERABILITIES OF THE EXPERT: In preparing your expert—and in preparing to cross-examine opposed experts—be aware of the typical vulnerabilities of an expert.

MAY BE LIMITED BY FACTS AVAILABLE. "Were you informed of (x, y, or z) facts?" Jurors may infer that lack of knowledge of facts will change, or alter the experts testimony.

MOST FACTS ADMIT MORE THAN ONE INTERPRETATION. There are certain symptoms on which psychological experts may rely and which may form a basis for cross-examination: e.g.

NIGHTMARES. "Could they be normal or stem from causes unrelated to your diagnoses?

WITHDRAWAL. "Might this be a normal stage in development?"

AGGRESSIVE BEHAVIOR. "Could this behavior be neurological or related to other trauma.

LACK OF APPETITE. "Are there possible physical causes of this problem?"

LYING. "Is this a developmental stage?"

BED WETTING. "Can this be caused by stress at home or in school?"

MANY DISCIPLINES DO NOT ADMIT EMPIRICAL PROOF.

MAY BE LIMITED BY BLUNDERS OF OTHERS. "Are leading questions an appropriate method to examine a child?" "With that in mind let's look at the actual questions used in the investigation?"

MAY DEPEND ON TRUTH OF TESTIMONY. "Do your conclusions depend substantially on what you were told by the victim (or other testimony)?" "What change in your opinion if (testimony) is not true?"

MAY HAVE BECOME A PARTICIPANT. "In your many interviews with the victim, was it important to be supportive? " . . . to reduce anxiety?" "Is it possible that your concern for the victim affects your interpretation of the facts?"

PROCEDURES MAY HAVE BEEN INAPPROPRIATE. If the subject receives a reward or benefit for answers or for attending sessions? Other? "What record of the interview was kept?"

DID TOO MUCH/TOO LITTLE. "Did you not consult with other experts." "Why so many (so few) interviews?"

TIME/MONEY CONSTRAINTS. Would you have preferred to be able to spend more time on the problems presented? Why didn't you?

PREPARATION FOR CROSS-EXAMINATION OF EXPERT.

ASSEMBLE YOUR EXPERT TEAM: Experts must be retained by you so the attorney/client privilege applies. Whomever you select must be, at least: 1) Well qualified, 2) Personable, 3) Available to testify and assist in preparation. Instead, use a team approach and refer to your team of experts before the jury. One-on-one confrontations of experts invite jurors to decide "their guy beat your guy." Certain types of expert testimony are broadly applicable and may be needed on your team:

Psychologists/psychiatrists can air out things "everybody knows" e.g. Children don't ever lie about sexual abuse. Memories of traumatic events may be totally repressed for many years. Sex abusers were abused as children.

Criteria-based statement analysis experts can deconstruct interviewing techniques to give an alternative explanation to the responses elicited by the interviewer. Wells and Loftus, "Commentary: Is the Child Fabricating? Reactions to a New Assessment Technique" The Suggestibility of Children's Recollections: Implications for Eyewitness Testimony.

Various medical experts will refute traditional interpretations, e.g. there are certain circumstance in which pre-adolescent girls can contract gonorrhea without sexual contact, and certain other findings do not necessarily support sexual abuse. Perianal Findings in Prepubertal Children Selected for Nonabuse: A Descriptive Study, Child Abuse & Neglect, Vol 13, pp. 179-193, 1989.

ASSEMBLE INFORMATION:

Opposing expert's curriculum vitae.

Expert's testimony in prior cases. Contact counsel for comments, transcripts, etc.

Depositions, reports in present case as available.

Chronology to show if expert's actions were always consistent with present opinion.

WHAT TO EXPECT FROM YOUR EXPERT:

Preliminary evaluation of case.

Educate and advise you what to read—locate published materials of opposing expert and published criticism, if any.

Evaluation of credentials of opposing expert and compare them to his own.

Suggest potential lines of cross-examination.

Warn you of vulnerable areas in your defense.

Prepare to be cross-examined on the concerns considered here.

Attend, at least, the testimony of those he is retained to refute.

REASON #4. In the beginning there was . . . Pre-trial Motions.

PRETRIAL MOTIONS. Strategy - sensitize the judge, limit the prosecutor.

CAVEAT - BOILERPLATE IS AN INSULT TO YOURSELF AND THE JUDGE.

MOTION FOR DISCLOSURE OF EVIDENCE (Brady Motion): Now even more powerful after Kiyes v. Whitley, No. 93-7972, April 19, 1994, which interpreted U.S. v. Bagley, 474 U.S. 687 in four aspects as follows:

Favorable evidence is material therefor it is error if government suppresses and there is a Areasonable possibility@ that the result of the proceeding would have been different.

Materiality is not question of sufficiency of evidence. The question is whether favorable evidence could put the whole case in light which casts doubt on the verdict.

If a reviewing court finds Bagley constitutional error there can be no question of harmless error because Bagley is a higher burden.

Prosecutor is responsible (even if police fail) to disclose favorable evidence when the cumulative (not point by point) net effect reaches the level of Areasonable probability.@

MOTION FOR BILL OF PARTICULARS - TIME FRAME: Excellent analysis is found in State v. Dell'Orfano, 616 So.2d 33, (Fla. 1993), concluding that the exact date of the offense need not be alleged; the exact time is not ordinarily an element of an offense and a defendant can not so make it by presenting a "possible" defense of alibi; but said, A[A] trial court on a proper motion is required to dismiss an information or indictment involving lengthy periods of time if the State in a hearing cannot show clearly and convincingly that it has exhausted all reasonable means of narrowing the time frames further.@

MOTION TO DISMISS FOR FAILURE TO ALLEGE NARROW ENOUGH TIME. It now appears this motion will require a showing of actual prejudice. Dell'Orfano, supra, the burden of the State is mere good faith effort, but that must be shown clearly and convincingly as to Atime frames.@

MOTION IN SUPPORT OF DISCLOSURE OF GRAND JURY PROCEEDINGS.

EXAMPLE: The interplay of these four motions forced the state to a very favorable bargain in a case where the accuser after 20 years Aremembered= abuse by her step-father before she was twelve-- a capital crime in Florida. The State alleged acts committed on "one or more occasions" over a period of 968 days which ended with her 12th birthday. Many motions and arguments, urging that people tell time by references, other than calendars and clocks, produced the following sweeping order over the State=s vehement objection:

> ORDER and ADJUDGE that the State shall prepare and file a new Answer to Defendant's request for a Bill of Particulars. Said answer to specifically include those witnesses the State will rely on to establish the time frame and the location of the alleged incidents. Time frames, dates, and locations are to be set forth with particularity and with special effort to provide any reference upon which the State relies to prove that the alleged incidents occurred prior to the twelfth birthday of the alleged victim. For each of these particulars, the State shall specify the evidence or witness by which it is to be established. At trial, the State will be bound by the matters specifically disclosed to the Defendant and evidence of incidents at other times will not be admitted. The State shall make the disclosures provided in each part of this Order prior to the depositions of the alleged victim or any mental health professional so that the Defendant may have the information available as discovery proceeds . . .. [Emphasis Supplied].

MOTION TO APPOINT A GUARDIAN AD LITEM,

Defense might welcome the appointment of a guardian if the child is being pressured into making the accusations by someone in a custodial or familial position. However, use caution because many guardian ad litem programs tend to see themselves as an arm of the prosecution.

MOTION IN LIMINE TO PRECLUDE CHILD ABUSE SYNDROME TESTIMONY.

Such evidence is usually rejected on theory that it bolsters credibility of the victim.

Is unreliable.

Invades jurors province. See California v. Bledsoe, 36 Ca. 3d 236, 681 F. 2d 291 (1984); Minnesota v. Soldana, 324 N.W. 2d 227 (Minn. 1982); Missouri v. Taylor, 663 S.W. 2d 235 (Mo. 1984); Contra Kansas v. Marks, 231 Kan. 645, 647 P. 2d 1292 (1982).

MOTION IN LIMINE TO PROHIBIT TESTIMONY OF STATEMENTS OBTAINED WITH USE OF SO-CALLED "ANATOMICALLY CORRECT" DOLLS. This technique has been widely discredited but still may be encountered.

MOTION IN LIMINE TO PRECLUDE SIMILAR FACT EVIDENCE - must be renewed at the time the evidence is presented at trial.

MOTION FOR INDIVIDUAL VOIR DIRE AND SEQUESTRATION OF JURORS DURING VOIR DIRE.

MOTION TO SUBMIT JURY QUESTIONNAIRE.

MOTION FOR A TAINT HEARING. Testimony of child is tainted by interviews, coaching, etc. as appropriate to the particularized circumstances of your case.

REASON #3. Jury Questionnaire. –Weed out the whackos.

QUESTIONNAIRE FACILITATES JUDICIAL ECONOMY by providing an efficient and accurate method of determining juror relationships to parties, law firms, and witnesses, thus facilitating removal for cause in some instances based on written responses alone. Both sides profit from the information, and the elimination of repetitive questions is welcomed by all. Although some oral voir dire will always be necessary, a written questionnaire can significantly reduce the amount of court time required for the jury selection process.

ADEQUATE JUROR INFORMATION IS A PREDICATE TO MEANINGFUL EXERCISE OF JURY CHALLENGES. Questionnaires provide a superior means of obtaining a general background information, determining prior knowledge of the case, a bad experience with weapons, or any particular bias or prejudice inconsistent with a juror's ability to serve as impartially. Only with such information can challenges for causes and preemptory strikes be exercised in a meaningful fashion. The "right to be tried by an impartial jury" includes "the right to an examination designed to ascertain possible prejudices of the veniremen. . ." United States v. Lewin, 467 F2.d 1132, 1138 (7th Cir. 1972).

PEER PRESSURE AND THE FEAR OF PUBLIC SPEAKING ARE INHIBITING FACTORS. Most jurors find the courtroom procedures and physical environment unfamiliar and perhaps somewhat threatening. Yet, they are asked to disclose sensitive or personal details about themselves and even about their deepest biases and prejudices before a group.

People in our society have significant fear of speaking in public. This general fear is heightened in the courtroom situation, when they are questioned by the judge, an authority figure and a stranger, in front of their peers—and where their answers may result in the "rejection" of a challenge for cause.

People want to please their peer group. By listening to others respond in a group, they learn what are the "right" responses to render them acceptable jurors. Peer pressure makes prospective jurors less likely to be candid and more likely to provide the socially acceptable answer, even if it is not accurate.

The problems of embarrassment and concealment of prejudice are heightened when voir dire is conducted in a non-sequestered fashion. Courts have consistently recognized that jurors are often unaware of their own prejudices and preconceptions, and do not acknowledge them when publicly asked general questions on voir dire such as whether there is any reason they cannot be fair and impartial. Moreover, jurors may conceal prejudice out of a desire to avoid embarrassment, or to conform to expected responses, or even for more sinister reasons.

FEARS ARE HEIGHTENED NOT MINIMIZED WHEN VOIR DIRE IS CONDUCTED BY THE COURT. Venirepersons questioned by the judge, who--robed and physically elevated, deferred to and addressed as "Your Honor"--is the most powerful figure in the courtroom, will tend to conceal prejudice in order to avoid embarrassment and disapproval. The great social distance between venirepersons and the judge places an undue burden on them in communicating their true feelings and they will tend to agree with what they imagine the judge wants them to say.

QUESTIONNAIRES REVEAL MORE, AVOID JUROR EMBARRASSMENT. Those who would be most distressed at having their private opinions displayed in public may be among those subject to excusal or challenge almost solely on the basis of their written answers. Questionnaires protect juror privacy and avoid the embarrassment of public revelation of sensitive matters. As a result, information provided by private responses to questionnaire is likely to be much more honest and revealing than their oral responses in the public setting of the courtroom.

REASON #2. Draconian Punishment—Corollary Consequences.

COROLLARY CONSEQUENCES IN SEX ABUSE DEFENSE:

Ethical and professional pitfalls.

DIVORCE:

DEPENDENCY:

MENTAL HEALTH ISSUES:

MULTIFACETED COURTS i.e.: family court handling divorce, dependency and the criminal matter all together. The concept of parallel proceedings.

REASON #1. It aint over when its over—Megan's Law imposes post-conviction civil penalties.

Megan's Law was signed by President Clinton on May 17, 1996. It requires the following two components: 1) sex offender registration, and 2) community notification.

The 1994 Jacob Wetterling Act requires the States to register individuals convicted of sex crimes against children. Supporters of sex offender registration laws offer the following justifications:

> Sex offenders pose a high risk of re-offending after release from custody
>
> Protecting the public from sex offenders is a primary governmental interest
>
> The privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety
>
> Release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety

Criteria For Disclosure May Be Established by the States under Megan's Law, but they are compelled to make private and personal information on registered sex offenders available to the public. Community notification is justified as follows:

> Assists law enforcement in investigations;
>
> Establishes legal grounds to hold known offenders;
>
> Deters sex offenders from committing new offenses;
>
> Offers citizens information they can use to protect children from victimization.

As an example, in 1997, Florida became one of the first states to put information about sexual offenders and predators on the Internet through the passage of the Public Safety Information Act.

This Act allowed the Florida Department of Law Enforcement to give public access to information important to their ability to protect themselves and their families against sexual offenders. Visitors to the department's Sexual Offenders/Predators Search System website will find the following:

The designation of a person as a sexual predator is neither a sentence nor a punishment but simply a status resulting from the conviction of certain crimes.

What

Kansas v. Crane, the Supreme Court confirmed an earlier holding that sexual offenders, even after being released from prison, could be confined under civil law, in essence as a result of the same offenses. But an opinion by Justice Stephen Breyer, the Court held that such confinement can take place only after the state has shown "proof of serious difficulty in controlling behavior" by a sexual offender whose "serious mental illness, abnormality, or disorder subjects him to civil commitment" and distinguishes him from "the dangerous but typical recidivist convicted in an ordinary criminal case."

MEGAN'S LAW TESTS IN SUPREME COURT.[1]

Connecticut Department of Public Safety v. Doe, from the 2nd U.S. Circuit Court of Appeals, and Smith v. Doe, from Alaska and the 9th Circuit, are scheduled for oral arguments in the Supreme Court on Nov. 13. Both deal with sexual offender registration acts.

Alaska and Connecticut, like many other states, release the information from the registries on the Internet. In Alaska, sexual offenders must register up to four times per year, in person, at a police station.

In Smith v. Doe, the 9th Circuit held that Alaska's law violates the ex post facto clause of the Constitution despite the fact that Alaska's legislature intended its Megan's Law to serve as a public safety measure, rather than as a means to mete out additional punishment. But the court also held that, in its effect, the law was simply too harsh. The in-person registration requirement was too burdensome, and "this disability is exacerbated by the public notification provisions that exposes all registrants to world-wide obloquy and ostracism," according to the 9th Circuit's opinion.

The 2nd Circuit arrived at a similar conclusion in Connecticut Department of Public Safety v. Doe, for a different reason. Connecticut's version of Megan's Law doesn't require any ranking as to how dangerous each offender is presumed to be. It also doesn't require individualized hearings to determine whether particular sexual offenders are safe enough to be kept off the list. The Web site does, however, post a disclaimer that the state "has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry ... ."

1 **Evil and Eviler?** Evan P. Schultz, Legal Times, 10-28-2002

The appellate court held that this structure deprives some of the people on the registry of a "liberty" interest without sufficient due process—meaning that the state has stigmatized those nondangerous offenders by lumping them together in the registry with the dangerous ones. To fix the law, the state might need to hold hearings to determine the dangerousness of each offender, as a means of deciding whether to include the offender on the list.

The Supreme Court stated, in Weaver v. Graham (1981), that the Framers enacted the ex post facto clause to guard against "arbitrary and vindictive lawmaking."

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