APPENDIX - B

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1. Beth A. Townsend, *Defending the "Indefensible": A Primer to Defending Allegations of Child Abuse*, 45 A.F. L. Rev. 261, 270 (1998)

2. White, Marvin, *Death Penalty Litigation* in THE ENCYCLOPEDIA OF MISSISSIPPI LAW at § 27:10

3. Myers, EVIDENCE IN CHILD ABUSE & NEGLECT CASES, 3d ed. at 460-61 (1997)

4. Haralambie, CHILD SEXUAL ABUSE IN CIVIL CASES at 208 (1999)

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ARTICLE: Defending the "Indefensible": A Primer to Defending Allegations of Child Abuse

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SUMMARY:
... Defending a case involving allegations of child abuse not only challenges a defense counsel as an advocate, but also tests the ability of a defense counsel to defend a case in spite of personal feelings regarding the case or the accused. ... It is difficult to imagine a child abuse case, whether it involves physical or sexual abuse, where the defense would not be aided by the assistance of an expert. ... Equally challenging to the defense counsel in these kinds of cases is handling cross-examination of the government expert witnesses, as well as the decision regarding whether he will put on expert testimony. "Use of expert testimony in these child sexual abuse cases is another 'legal thicket' for the expert testimony is extremely complex and often novel." The permissible scope of expert testimony in child sexual abuse cases was defined in *United States v. Birdsall*. ... Normally expert testimony that a victim's conduct or statements are consistent with sexual abuse or consistent with the complaints of sexually abused children is admissible and can corroborate an alleged victim in a significant way. ... The Court of Military Appeals held that it was reversible error to allow expert testimony that the accused's family fit the profile of a family experiencing the dynamics of sexual abuse within the family. ... The defense counsel may want to consider consulting the expert concerning the content of the closing argument. ...

HIGHLIGHT: *Perhaps the most valuable result of all education is the ability to make yourself do the thing you have to do when it ought to be done, whether you like it or not; it is the first lesson that ought to be learned; and however early a man's training begins, it is probably the last lesson that he learns thoroughly. -Thomas Huxley*

TEXT:
[*261] **I. INTRODUCTION**

At some point in a tour as a defense counsel, many Air Force attorneys will encounter a client accused of abusing a child, either physically or sexually. These same defense counsel may field questions or remarks from their peers, family and friends, questioning how they could defend such clients. It goes without saying that any abuse of a child is deplorable and that these cases evoke a great deal of strong emotional responses. Defending a case involving allegations

of child abuse not only challenges a defense counsel as an advocate, but also tests the ability of a defense counsel to defend a case in spite of personal feelings regarding the case or the accused. While many counsel will encounter these cases, it is not often that they will have sufficient experience to overcome the steep learning curve involved in mounting a successful defense. The purpose of this article is to provide the "nuts and bolts" for the novice in defending allegations of child abuse. It is designed to take the defense counsel from the initial meeting with the client through the sentencing phase of trial. While not all encompassing, it hopefully provides a basic framework with which to begin preparing a defense of such allegations as well as strategies to consider when reviewing the client's options and various approaches to trial. This article takes the defense counsel through a case beginning with pretrial matters such as initial advice for the client, discovery issues, expert assistance, and the Article 32 hearing. The trial section includes guidance regarding motion practice, voir dire, cross-examination of the child, dealing with expert [*262] testimony and closing argument. The article concludes with a brief review of sentencing strategies and tips on preparing a client for a guilty plea inquiry.

II. PRETRIAL MATTERS

A. First Contact

Once a client enters the defense counsel's office and informs him that he n1 is accused of abusing a child, one of the first things that the defense counsel should do is determine what, if any, statements the client has made to any third party regarding the allegations. At the outset of representation, it is better to wait to ask the client for information regarding the allegations. While the defense counsel is required to ask the client what he knows about the allegations, n2 before those conversations takes place, the attorney can save time and energy by determining the specific allegations and gathering all the information the government has. A prudent defense counsel will wait until later in the process to have these discussions with the accused. This will assist the counsel in asking the relevant and necessary questions.

B. Pretrial Statements

Barring some extraordinary circumstances, the defense counsel should advise the client to remain silent and to refrain from any conversations with any third party about the allegations. This is especially important if the client has not made any previous statements. At this time, the defense counsel should inform the client of the various agencies that will contact him simply as a result of the allegations that have been made. These agencies include the Office of Special Investigation (OSI), Family Advocacy, Mental Health, and various civilian agencies like child protective services. He should inform the [*263] client that while he may be required to attend various appointments with these agencies (other than OSI), anything he says, can and will be used against him, often without Article 31 rights advisement. n3

C. Statements to Mental Health Providers

The client should be advised that statements made voluntarily to mental health providers may be introduced against him. n4 The Air Force has provided limited confidentiality to members through the Limited Privilege Suicide Prevention Program. n5 However, this limited privilege applies only after the commander has offered non-judicial punishment or the preferral of charges n6 and only if a mental health provider n7 determines the members to be a suicide risk. Once the risk of suicide is no longer present, the privilege ceases to [*264] apply. n8 There appears to be a move in the appellate courts to recognize a psychotherapist-patient privilege; n9 however, until that happens, the client is better served to remain silent. Unless the client has already confessed to the OSI or child protective services, or has a strong desire to plead guilty, it may be best for him to refuse to answer questions with regard to the allegations when dealing with any outside agency. The defense counsel should recognize the investigation and legal process could be a long and stressful ordeal for the client. One of the best sources to refer him to for assistance is the Air Force chaplaincy. Chaplains are the only Air Force members, other than the defense counsel, who can provide a recognized privilege n10 as well as invaluable support for the client. However, before sending the client to see the chaplain, the defense counsel should establish the limits of the privilege. n11

D. Pretext Phone Calls

The defense counsel should also advise the client against discussing the allegations with the accusers. One investigative tool used by the OSI is a pretext phone call. Essentially the OSI will have the victim call the client and attempt to obtain incriminating statements from the accused in the course of a taped phone call. Statements obtained in such a manner are generally admissible against the client n12 and can be very damaging, especially if he has not yet made any statements.

[*265] **E. Strategies When The Client Has Provided A Confession**

If the client has made a confession, it will be helpful to ask him at the first meeting exactly what the confession contained and the circumstances surrounding the taking of the confession in order to determine the voluntariness of the statement. Issues to be investigated include whether the interrogation contained discussions regarding civilian prosecution, as well as military action, either by the military law enforcement agents n13 or by social workers. n14 It is important to do the legwork and research ahead of time, as any [*266] challenge to the voluntariness of the confession before the members must first be made on motion to the military judge. n15 The defense counsel may also face a situation where the client has confessed but subsequently recants. While the initial response to the recantation may be skepticism by the defense counsel, there is a developing body of research that addresses situations in which innocent people confess to crimes they didn't commit. n16 This research may be helpful in explaining either to the judge or members why the confession is unreliable. n17

If the client has confessed and there is no issue regarding voluntariness, the defense counsel should begin to evaluate all options available to the client. These include resignation or administrative discharge in lieu of court-martial, and pretrial agreement negotiations. When it appears that the facts will not be disputed in the case, clients should begin therapy, voluntarily, as soon as practicable. Every effort must be made at the earliest date to determine the extent and content of the defense's sentencing case. n18 Any and all actions that the client can take that can be introduced in extenuation and mitigation should be identified, coordinated and undertaken. A client who can demonstrate that he is truly remorseful, has spared the child from going through any public questioning, and who has taken steps to learn to deal with his problem, will only assist himself when it comes to sentencing. This may also help to mend fences within the family and lead to legitimate support from the family at the time of trial.

[*267] **F. Proof Analysis**

Once the charges are preferred, one of the first steps the defense counsel should take is to prepare a detailed proof analysis. If prepared in a format that is workable for the defense counsel, the proof analysis will assist him in all phases of the trial. While preparing for the Article 32 hearing, it may help focus the line of attack. A proof analysis can also assist the defense counsel in identifying the proper discovery to request, assessing the weaknesses in the government case, finding any drafting errors he can exploit, or even providing a tool that can later be used to format the closing argument. The value of a thorough and complete proof analysis will become apparent as he uses it to prepare throughout every facet of the case.

G. Discovery Issues

Discovery issues in child abuse cases can be complex and proper discovery can produce voluminous amounts of records. The defense counsel should take advantage of the military's liberal discovery standard. n19 To facilitate collection of all appropriate discovery, the defense counsel should use a well-conceived and thorough discovery request. A canned discovery request may be insufficient. It may even result in untimely requests and ultimately in not receiving discovery. The request should, to the best of counsel's ability, articulate a basis for the requested records. n20 Records that should be requested routinely include, but are not limited to:

1. All records from child protective services, to include any other records concerning the particular child making the allegations, as well as other children living in the same household; n21

[*268] 2. All records from Family Advocacy concerning this child and family, as well as records

concerning the client;
3. All records from Mental Health concerning this child and family as well as the client;
4. All records kept by any mental health provider, social workers, therapists, counselors, nurses, or doctors, who have seen the child; n22
5. Medical records of the child and any other children in the family.
6. School records;
7. Videotape interviews, whether by OSI agents or civilian agencies;
8. Notes made by interviewers or observers of an interview of the child;
9. Notice of all previous statements made by the victim or any witness; n23
[*269] 10. Notice of all previous statements made by the accused; and,
11. A copy of any photographs taken of the injuries.

One of the easiest ways for the defense counsel to determine the appropriate records to request is to construct a timeline regarding the chronology of the disclosure. The timeline will assist him in determining whether he has requested the right discovery, or what records exist and what agency has them. For instance, if a child reports to a school official that she has been abused by her neighbor, the child is probably then interviewed by her teacher, the school psychologist or guidance counselor, the civilian law enforcement agent and the child protective services worker assigned to the case. In such a case, the defense counsel should request a copy of the records, notes and reports generated by all of these witnesses. He should begin the timeline with the initial disclosure, continuing through trial, annotating each agency and person that had contact with the child and the statements made by the child. This will also assist the defense counsel in ensuring he has received all records that are created during this process up through the time of trial.

When the defense counsel receives the various records, it is important he review them thoroughly. For example, it is important to determine if the child is on any medication that may affect his or her ability to perceive and recall. For instance, the medical records may indicate that the child has been diagnosed with Attention Deficit Disorder (ADD) or Attention Deficit Hyperactivity Disorder (ADHD). Children who have been diagnosed with those disorders may have then been prescribed Ritalin or some other drug to deal with this problem. The defense counsel should carefully review the pharmacology of any medication and the interactions of any medications given to the child before, during or after the time the child disclosed the alleged offenses. n24 The medical records may also indicate that the child has been seen for a medical condition that is relevant to the allegations. For instance, if the child had been diagnosed with a sexually transmitted disease such as chlamydia that predates the allegations (assuming the accused did not have access to the child during this time), the defense counsel now has evidence that the child may have been abused by someone else. n25 If the initial examination of the victim produced evidence of physical findings such as hymeneal tears, notches, or clefts, there is research that indicates the presence of these findings [*270] in nonabused girls. n26 A review of the medical records may show these findings were annotated at a time that predates the allegations. Conversely, the lack of physical evidence can be inconsistent with the child's allegations and the type of injuries one would expect, depending on the timing of the disclosure. n27 Family advocacy or mental health records may indicate a long-standing problem with the child that would also explain the allegations or provide a motive for the child to fabricate. The defense counsel should also check the parents' medical records for any of the child's records that may have been misfiled.

II. Expert Assistance

It is difficult to imagine a child abuse case, whether it involves physical or sexual abuse, where the defense would not be aided by the assistance of an expert. n28 An expert can provide assistance in a number of ways. As stated in *United States v. Turner*, n29

> To assure that indigent defendants will not be at a disadvantage in trials where expert testimony is central to the outcome, the Supreme Court has ruled that a defendant must be furnished expert assistance in preparing his defense . . . . An expert may be of assistance to the defense in two ways. The first is as a

> witness to testify at trial . . . . An expert also may be of assistance to the defense as a consultant to advise the accused and his counsel as to the strength of the government case and suggest questions to be asked of [*271] prosecution witnesses, evidence to be offered by the defense, and arguments to be made. n30

In a case involving physical allegations, the defense counsel should have a dedicated defense expert review the evidence. This expert can assist the defense with cross-examination of the government's expert, provide alternative explanations for the physical findings, and may assist in ensuring the government expert's testimony is accurate. The expert can also provide assistance in evaluating the evidence to determine whether the parental-discipline defense is available. In cases involving parental-discipline, the defense must show three things: the appropriate person administered the discipline or force, for a proper purpose, with a reasonable amount of force. n31 Experts can provide assistance in determining whether the facts of the case, and those disclosed by the client, will satisfy the test and how best to present the case. They may also be required to provide expert testimony on these issues.

I. Expert Consultant

A good rule of thumb for the defense counsel is to request that the expert be appointed as a consultant so that he and the expert will have the benefit of the attorney-client privilege. n32 In *Turner* n33 , the court articulated how the defense counsel can benefit from the privilege given to expert consultants.

> [*272] In performing this function [as a consultant], the expert often will receive confidential communications from the accused and his counsel; and he may have occasion to learn about the tactics the defense plans to employ. If the expert consultant were free to disclose such information to the prosecutor prior to trial, the defense counsel would be placed at a great disadvantage; and, indeed, he might hesitate to consult with the expert. The result would be impairment of the accused's right to counsel, because his attorney would be inhibited in the performance of his duties and unable fully to utilize the assistance contemplated by *Ake*. n34

The defense counsel should be aware that in order to obtain the benefit of the attorney-client privilege, the consultant must be either employed by the accused to assist him or be appointed to provide such assistance. n35 According to Mil. R. Evid. 502, "representative" is specifically defined as ". . . a person employed by or assigned to assist a lawyer in providing professional legal services." n36 In *United States v. Toledo*, n37 the defense counsel asked a clinical psychologist to examine his client "off the record." The psychologist was later called as a government witness to testify as to his opinion regarding the accused's character for truthfulness. The defense objected and asserted a privilege. The Court of Military Appeals held no privilege existed because the defense had not used the proper procedure for making the psychologist a representative of the lawyer.

> Had the defense procured medical assistance for the preparation of its defense at its own expense, we would have held that communications between appellant and that expert were within the attorney-client relationship, at least unless a mental-responsibility defense was presented . . . By the same token, a servicemember has no right simply to help himself to government experts and bring them into the attorney-client relationship, bypassing the proper appointing authorities. n38

J. Making an Adequate Request for Assistance

As with the discovery request, the request for expert assistance must be specific regarding the issues that require expert assistance. In *United States v. Garries*, n39 the Court of Military Appeals held that "When an accused applies for the employment of an expert, he must demonstrate the necessity for the [*273] services." n40 The court further held that it would be inappropriate for the military judge to hold an *ex parte* hearing in order to protect disclosure of defense theories when requesting expert assistance. "Use of an *ex parte* hearing to obtain expert services would rarely be appropriate in the military context because funding must be provided by the convening authority and such a procedure would deprive the Government of the opportunity to consider and arrange alternatives for the requested

expert services." n41 In *United States v. Tornoswski*, n42 the Air Force Court of Military Review addressed the difficulty in articulating a need for expert assistance. Citing *Moore v. Kemp*, n43 the Court stated:

> We recognize that the defense counsel may be unfamiliar with the specific scientific theories implicated in a case and therefore cannot be expected to provide the court with detailed analysis of the assistance an appointed expert might provide. We do believe, however, that the defense counsel is obligated to inform himself about the specific scientific area in question and to provide the court with as much information as possible concerning the usefulness of the requested expert to defense's case. n44

In *United States v. Gonzalez*, n45 the Court of Military Appeals established a three-prong test the defense must meet in order to show necessity for expert assistance. "There are three aspects of showing necessity. First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop." n46 Thus, to the best of his ability, the defense counsel must establish in the [*274] request the necessity of expert assistance. Additionally, the defense is not entitled to a specific expert. n47 However, this does not suggest that it is permissible for the government to provide the defense with an expert who is less qualified than the government expert n48 or one who is unqualified to provide competent assistance to the defense. n49

When the defense counsel requests any expert, it is always helpful if he has done the legwork for the government to find a qualified expert to recommend to the convening authority. The defense counsel should avoid any [*275] potential conflict issues by recommending someone other than a member assigned to the same medical group as the government expert. He should discover the qualifications of the government expert witness and use those as a minimum for the defense requested expert. n50

It is important to remain diligent in defense efforts to obtain expert assistance. The defense counsel should receive a written response to the request. A motion to compel the production of an expert should follow any denial of the request. n51 If the defense counsel believes the proposed expert is not competent to provide adequate assistance, he should begin to address the problem by thoroughly interviewing the proposed expert. Often the trial counsel may not provide the proposed expert adequate information regarding what the defense counsel requires and expects from the expert. Once the defense counsel explains this to the expert, the expert can then tell him whether he believes he has the appropriate qualifications. Before filing a motion to compel, it may be useful for the defense counsel to attempt to work with trial counsel to find another qualified expert.

In the event the defense believes the proposed expert is inadequate and if the government refuses to approve another expert, the defense must then show that the expert is not qualified. In *United States v. Ndanyi*, n52 the Court of Military Appeals held that the defense did not make an adequate showing that the experts the government offered to provide were inadequate. "Absent a showing by appellant at trial that his case was unusual, i.e., the proffered scientific experts . . . were unqualified, incompetent, partial, or unavailable, his motion for government-funded expert assistance was properly denied." n53

The defense counsel should include in his request an appropriate number of days of preparation time with his expert prior to trial. He should also seek to have the consultant present throughout the trial, including sentencing, if the government intends to put on expert testimony. The pretrial preparation with the expert should include a records review prior to the expert's arrival at trial, as well as several days to assist in interviewing the relevant witnesses prior to trial. The relevant witnesses include the government expert witness, the alleged victim, and those witnesses who had initial contact with the child upon disclosure. Generally, the expert does not [*276] need to be present for the interview of all the witnesses, provided the defense counsel gives the expert a good summary of the peripheral witnesses.

K. Potential Issues Requiring Expert Assistance

Issues that arise in a case of sexual abuse allegations that may require the assistance of a psychologist/psychiatrist,

preferably one with forensic experience, n54 include:

a. delayed reporting by the victim;
b. evaluation of cognitive abilities, development of the child, memory capacity; n55
c. analysis of statements by the child for age appropriate vocabulary and whether the child displays age appropriate behavior; n56
[*277] d. effects of family problems including significance of a pending divorce and custody battle;
e. whether the child is susceptible to suggestion or influence by authority figures; n57
f. whether the statements have been tainted by contact with investigators, therapists, doctors, or prosecutors; n58
g. forensic evaluation of the allegations of abuse; n59
h. occurrence of fabrication of allegations by children; n60
i. evaluation of any diagnosis for personality disorders, adjustment disorders, or psychological problems which might indicate an inability to accurately perceive, recall or report;
j. effect of use of anatomically correct dolls by government expert or initial interviewer; n61 and
k. assistance in preparation of how to interview and prepare cross-examination of the child witness.

L. Expert Contact with the Accused - Setting The Boundaries

Once the defense counsel has an expert consultant, he must decide how much contact the expert should have with the client. This may depend in large part on how the defense counsel plans to use his expert. Factors the defense counsel should consider include whether the expert consultant will testify during the trial. If so, the defense counsel should be aware of the limits of what the consultant must disclose. In *United States v. Turner*, n62 trial counsel interviewed the defense expert prior to trial. The Court of Military Appeals held this was error because the defense expert had not been declared as an expert witness prior to trial. In footnote 3, the Court noted the safeguards the defense would have even if they had declared him an expert witness at some point in the trial.

> [*278] If the defense counsel also planned to use [defense expert] as a witness, trial counsel could properly have interviewed him as to the matters about which he could testify. However, in that event, the expert witness should have been advised carefully that he could not reveal any discussions with the accused or with the defense counsel, or impart information to trial counsel which was not already available to him. Moreover, the defense counsel could properly have insisted on being present during the interview of his own expert witness in order to assure that trial counsel did not stray into forbidden territory. n63

In *United States v. Mansfield*, n64 the Court of Military Appeals specifically held that

> When such experts are called as a witness on behalf of an accused and the witness has relied upon statements of the accused in formulating an opinion, the attorney-client privilege terminates with respect to those matters placed in issue by the expert's testimony. Further, any expert who offers a testimonial opinion is subject, at the request of the party-opponent "to disclose the underlying facts or data on cross-examination." n65

Thus, examination of the accused and presentation of evidence on the issue is another factor to be considered. If the expert does examine the accused, as articulated in the request for expert assistance, the defense counsel should know the limits of what the expert must disclose if he later testifies. An alternative to using the expert consultant to examine the accused would simply be to request a sanity board. n66 If the defense counsel has done this, and/or intends to contest the findings of the sanity board to put forward a lack of mental responsibility defense, he must be aware of the exposure of the client's statements when the expert testifies.

M. Article 32 Strategies

The defense counsel should prepare extensively for the Article 32 hearing. The Article 32 hearing is often where the defense counsel lays the groundwork for cross-examination at trial of the alleged victim. This cannot be properly done unless the defense counsel has done his homework first. The hearing will also give him a chance to evaluate how well the child testifies. This will help him to determine his strategy at trial and whether the defense counsel should litigate or pursue other options either to avoid trial, or obtain a favorable pretrial agreement for his client.

[*279] When preparing for the hearing, a good source of information may be the primary caregiver. The defense counsel is looking for indications the child has a problem distinguishing between fantasy and reality, has an overactive imagination, tells lies as a way to get attention, is melodramatic or histrionic, has ADD/ADHD, is physically active and always has bruises, or is difficult to control. Presenting the testimony at the Article 32 that calls into question the reliability of the allegations may result in the government taking a second look at whether the case should be referred to trial. It may also put the defense counsel in a position to obtain an alternative disposition for the client. While the "conventional wisdom" may be to play his cards close to the vest, the astute defense counsel will not overlook any opportunities to keep his client out of the courtroom. If the child has serious problems, like lying or distinguishing between fantasy and reality, or if other plausible explanations for injuries exist, bringing these problems to the attention of the prosecution early on may strengthen the defense position with regard to alternative disposition.

The Article 32 hearing also provides the defense counsel an opportunity to interview the child in person. When interviewing the child, he should avoid suggesting answers to the child or contributing to the taint of the child's testimony by asking leading questions. n67 He should use the interview to gather as much background information as he can about the child and her history with the client, before and after disclosure. The defense counsel should inquire whether the child keeps a journal, diary, or has written anything about the incidents, either before or after the allegations. The child's writings may contain information that is invaluable to the defense. n68

If the victim is going to testify, the defense counsel should request a verbatim transcript. While there is always the concern that the victim may be [*280] unavailable at trial, having a witness declared unavailable is a high standard. n69 A verbatim record is important for the defense counsel because it will help him to develop the inconsistencies in the child's testimony, as well as get the child committed to areas he hopes to use as impeachment at trial. The Investigating Officer (IO) may not recognize the value of areas the defense counsel is examining the witness about and may not incorporate the information into a summary. Because the IO is not obligated to prepare a summary n70 there is essentially no relief for a defense counsel when this occurs. n71 Thus, a verbatim transcript would best ensure that the lines of questioning pursued by the defense counsel are preserved for trial.

If the IO determines that the child is unavailable for the hearing, the defense counsel should make sure the IO has performed the correct analysis. In *United States v. Marrie*, n72 the Air Force Court of Military Review held that R.C.M. 405(g)(1)(A) n73 does not establish a *per se* rule of unavailability if the witness is located more than 100 miles from the site of the hearing. n74 The IO is required to perform a balancing test that weighs the necessity of the witness's testimony against the expense and trouble in producing the witness. n75 In order to preserve the right of personal attendance at an Article 32 hearing the defense counsel must move to take the witness's testimony by deposition. n76 Often, the child is in the local area, but doesn't want to testify. While the IO cannot [*281] compel the witness to attend the hearing, the defense counsel should not agree to a finding of unavailability unless the government has taken sufficient steps to procure the testimony. n77 If the child is legitimately unavailable, or the client has already decided to enter a plea and attempt to negotiate a pretrial agreement with the convening authority, the defense counsel should consider waiving the Article 32 hearing. There is nothing for him to gain by going through the motions of an Article 32. Waiving the hearing may be good extenuation and mitigation at trial if the defense can argue the client waived the hearing in an effort to ease the burden of the ordeal on the child. If the child testifies at the hearing, the defense counsel should object to the child adopting any prior statements as part of the Article 32 testimony n78 unless the statements are inconsistent and consideration by the IO will favor the defense.

Matters that should be presented by the defense at the Article 32 hearing include any and all "atta-boy" papers that the client may have. This is especially important in a "close" case. Generally, the client should not testify at the Article

32 hearing. The risk of committing the client to testimony that is sworn and available to the government, months prior to trial, allows the government to work on discrediting the client. It also provides the trial counsel with a rare opportunity to actually prepare a cross-examination of the accused based on this prior statement. If he wants to make a statement, the rules provide for an unsworn statement n79 and it may not be a bad idea to have the client make a generalized statement denying any wrongdoing.

The responsibilities of the defense counsel do not end after the report is served on the accused. He must file his objections in a timely manner n80 or the issues are considered waived. n81 The defense counsel should ensure that they have carefully read the report, reviewed the summary of testimony, and filed any written objections in a timely fashion.

III. TRIAL

A. Motions To Compel

Motion practice in a case involving child abuse allegations may be complex and require the defense counsel to determine which motions he [*282] intends to file well in advance of the trial. Assuming witness and discovery requests are made in a timely manner, n82 the defense counsel should file a motion to compel as soon as he has notice from the prosecution that the government will not turn over certain documents, produce an expert or other witnesses. n83

In *United States v. Reece*, n84 the Court of Military Appeals held that the military judge abused his discretion by failing, at a minimum, to review the requested records *in camera*. The Court based its ruling on its finding that "Military law provides a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian courts." n85 The Court went on to further hold that "The Military Rules of Evidence establish 'a low threshold of relevance' . . . ." n86

In *United States v. Tangpuz*, n87 the Court of Military Appeals articulated several factors to be considered when determining whether to produce a witness requested by the defense.

> The Court has never fashioned an inelastic rule to determine whether an accused is entitled to the personal attendance of a witness. It has, however, identified some relevant factors, such as: the issues involved in the case and the importance of the requested witness as to those issues; whether the witness is desired on the merits or the sentencing portion of the trial; whether the witness' testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness, such as deposition, interrogatories or previous testimony. . . . If adverse to the accused, the ruling is subject to review and reversal if there has been an abuse of discretion. n88

The Court went on to state that all parties should recognize the need for the accused to have equal access to witnesses and the use of compulsory power. Citing *United States v. Manos*, n89 the court stated

> We are, however, concerned with impressing on all concerned the undoubted right of the accused to secure the attendance of witnesses in his own behalf; the need for seriously considering the request; and taking necessary measures to comply therewith if such can be done without [*283] manifest injury to the service. That is what we meant in *Sweeney*, n90 in speaking of weighing the relative responsibility of the parties against the equities of the situation. n91

Failure to request witnesses or experts in a timely fashion may result in loss of these witnesses. n92 Filing the motion early may help to resolve these issues prior to the trial and avoid undue delay. If not, the defense counsel may face the prospect of a delay in the proceedings because the documents in question may be difficult to obtain quickly, witnesses become unavailable, and experts make other commitments.

B. Motions for a New Article 32 Hearing

One motion for the defense counsel to consider is a motion for a new Article 32 hearing. n93 This will be important if the child witness was not produced at the hearing and the basis for finding him/her unavailable is insufficient. n94 Another issue may be that the IO improperly considered statements or alternatives to evidence over defense objection. n95 The defense counsel should, however, pay special attention to the axiom, "be careful what you ask for, you just may get it." He should carefully weigh the benefit of another hearing with consideration as to how well his client is holding up in the process. If an extended delay will result in further deterioration of the client, the benefits may be outweighed by the risks.

C. Motions in Limine -- Residual Hearsay Issues

In cases dealing with child abuse allegations, the prosecution may seek to introduce hearsay statements of the victim. Motions in limine may prevent [*284] the prosecution from doing this and allow the defense counsel to try his case. One of the more common avenues that the prosecution attempts to take in admitting out of court statements is M.R.E. 803(24). n96 The standard for admissibility of statements under the residual hearsay rules is the United States Supreme Court decision in *Idaho v. Wright*. n97 In *Wright*, The Supreme Court held that a statement offered under the residual hearsay exception should only be admitted "if it bears adequate 'indicia of reliability.'" n98 This requirement can only be met "by a showing of particularized guarantees of trustworthiness." n99 To determine whether these guarantees exist, the court must look at "the totality of circumstances . . . the only relevant circumstances, however are 'those that surround the making of the statement and that render the declarant particularly worthy of belief.'" n100

In *United States v. Kelley*, n101 the Court of Appeals for the Armed Forces n102 addressed the issue of admissibility of statements offered under the residual hearsay exception. "The residual-hearsay rule sets out three requirements for admissibility: (1) materiality, (2) necessity, and (3) reliability." n103 The Court went on to state that the exception should be rarely used, but that in cases involving child abuse allegations, the necessity prong is more liberally construed. The Court explained that:

> [*285] Federal courts have recognized that "one such exceptional circumstance generally exists when a child abuse victim relates to an adult the details of the abusive events." The more liberal approach in child abuse cases extends to the "necessity" requirement. Even though residual hearsay may be "somewhat cumulative, it may be important in evaluating other evidence and arriving at the truth so that the 'more probative' requirement can not be interpreted with cast iron rigidity." n104

Under this standard, it appears that the best line of attack for the defense counsel will be the reliability prong of the test. If the statement is made to a law enforcement agent, the defense counsel can attack the reliability of the statement based on this fact. n105 In *United States v. Hines*, n106 the Court of Military Appeals addressed the issue of reliability of statements of unavailable witnesses made to law enforcement agents and whether the statements would satisfy the Confrontation Clause.

> Our concern . . . is whether *ex parte* statements to law enforcement officers are obtained with such a degree of bipartisanship that an accused cannot reasonably contend that the purposes of cross-examination have not been served? . . . Since [the agent's] questioning is proffered as a replacement for cross-examination, was it equivalent to cross-examination? In other words, was [the agent] as zealous at uncovering the weaknesses in the prosecution's case . . . as defense counsel would have been? Was he intent on exploring all possibilities of reasonable doubt as to guilt, or was he, in effect, content with making out a *prima facie* case? On this record we think that the investigative process was not equivalent to the judicial process, and we would not ordinarily expect it to be. Hence we do not believe that [the agent's] examination of the declarants by itself comported with the substance of the constitutional protection. n107

D. Motions in Limine -- Uncharged Misconduct

In light of M.R.E.s 413 n108 and 414, n109 it may be difficult for the defense counsel to limit uncharged misconduct of sexual assaults by his client. As his [*286] first line of attack, the defense counsel should consider challenging the constitutionality of these rules of evidence. If this fails, he should ask the judge to perform an M.R.E. 403 n110 balancing test. Of course, if the government intends to offer this evidence, make sure they have complied with the notice requirements. If the military judge allows the evidence to be introduced, the defense counsel should seek a limiting instruction regarding how the members can use the evidence. n111

In dealing with uncharged misconduct unrelated to sexual assaults, the defense counsel should move to limit the government's use of the evidence. In determining whether uncharged misconduct is admissible, the courts have established a three-prong test. First, the quality of the evidence must be assessed for its ability to prove the extrinsic offenses; second, is the evidence relevant to prove something other than a predisposition to commit crimes; third, regardless of the findings relating to the first two prongs, a balancing test must be performed under M.R.E. 403. n112 In *United States v. Franklin*, n113 the Court of Military Appeals addressed the issue of whether uncharged misconduct offered to prove intent was properly admitted. The Court recognized the inherent difficulty in distinguishing "between the intent to do an act and the predisposition to do it." n114 In *United States v. Gamble*, n115 the Court of Military Appeals reversed a conviction of rape because the military judge had erroneously admitted uncharged misconduct. The issue in the case was [*287] consent of the victim. The prosecution offered evidence of another assault as evidence of intent, plan, preparation and absence of mistake. The Court, quoting from the Military Rules of Evidence Manual, n116 stated:

> It is common for the prosecution to use short-hand expressions like modus operandi, common plan or scheme, etc., to account for an offer of evidence of other acts. A trial judge must be certain to make the prosecution state exactly what issue it is trying to prove in order to see whether the evidence is probative, how probative it is, and whether it should be admitted in light of the other evidence in the case and the ever present danger of prejudice. n117

While the advent of the new rules of military evidence relating to uncharged misconduct in these kinds of cases may make it more difficult to keep the evidence from the members, the defense counsel should still make every effort and use every avenue to prevent it.

E. Dealing with Statements Offered under Medical Diagnosis Exception

Another avenue prosecutors will commonly use to have out of court statements of the child admitted is the medical diagnosis exception to M.R.E. 803. n118 Statements offered under this exception must meet two requirements. First the person making the statement must have "some expectation of promoting his well-being and thus an incentive to be truthful. Second, the statement must be made by a declarant for the purpose of medical diagnosis and treatment." n119 In *United States v. Siroky*, n120 the Court of Appeals for the Armed Forces affirmed the Air Force Court of Criminal Appeals finding that a child's testimony did not meet the test for admissibility. The Court found that there was insufficient evidence in the record to indicate that the 2 1/2-year-old child had an expectation of treatment when she visited the psychotherapist.

The defense counsel should be alert to situations in which the statements being offered were taken in conjunction with investigations rather [*288] than treatment. In *United States v. Faciane*, n121 the Court of Military Appeals reversed a conviction of indecent acts because statements by the alleged victim were improperly admitted under the medical diagnosis exception. The Court found that there was insufficient evidence to meet the second prong of the test when the child was interviewed by a child protective services worker at the hospital.

> Although the child may have associated a hospital with treatment and may have known that she was in a hospital when she talked to Mrs. Thorton, there is no evidence indicating that the child knew that her

> conversation "with a lady" in playroom surroundings was in any way related to medical diagnosis or treatment. Mrs. Thorton testified that she did not present herself as a doctor or do anything medical. There is no evidence that Mrs. Thorton was dressed or otherwise identified as a medical professional. The interview took place in a room filled with toys. There is nothing suggesting that the child made the statements with the expectation that if she would be truthful, she would be helped. n122

The Court of Military Appeals set out five foundational requirements that may provide additional grounds for the defense to attack admissibility of these statement in *United States v. Quigley*. n123 In *Quigley*, the Court found that:

> The foundational facts required by M.R.E. 803(4) are that a statement (1) was made; (2) near the pivotal time of the events; (3) to an individual who could render medical diagnosis or treatment; (4) by an individual who had an expectation of receiving treatment from the recipient of the statement; and (5) refers to the person's mental and emotional condition. n124

The defense counsel should also be familiar with who was present at the interview and the circumstances surrounding the taking of the statements. In *United States v. Armstrong*, n125 the court reversed a conviction for sodomy that was based on statements made to trial counsel in the presence of a psychologist. The Court found that the statements did not fit the exception because they were made to the trial counsel for purposes of preparing for trial. The Court recognized that the relationship between the witness and the psychologist who was present during the interview was for an appropriate [*289] purpose and the therapeutic value of all the statements made to the psychologist. "However, even untrue statements contribute to the psychologist's understanding of his or her patient's problems; thus the mere fact that a patient made a statement to a psychologist does not necessarily make the statement admissible under this rule." n126 In *United States v. Henry*, n127 the Army Court of Criminal Appeals n128 held that statements of the alleged victim were not made for medical diagnosis "but rather the statements were made for the purpose of facilitating the collection of evidence relevant to the criminal investigation of her rape allegation." n129 In *Henry* the investigators had arranged for the examination after they interviewed the witness. The witness testified that she did not request the examination and her understanding of the reason for the exam was to determine if she had been raped. n130

Cases involving child abuse can raise difficult evidentiary issues. The defense counsel must be vigilant and aggressive to ensure the government operates within, and the courts properly apply, the evidentiary rules. Recently in *United States v. Knox*, n131 the Navy-Marine Corps Court of Criminal Appeals n132 reversed a conviction of rape and forcible sodomy with a child under age 16 in part because of the improper admission of hearsay testimony. At the conclusion of the opinion the Court cautioned trial practitioners about circumvention of the military rules of evidence in the name of justice.

> Optimally, every person who criminally abuses a child, physically or sexually, would be caught, convicted, and punished appropriately for the offense. As a result, the certainty of detection, conviction, and punishment would act as a strong deterrent, protecting children from such abuse. But the rules of evidence have been developed painstakingly over centuries to ensure, to the extent it is humanly possible, the reliability of convictions. The rules of evidence cannot be overlooked, set aside, or circumvented in the zeal to prosecute any crime, no matter how heinous. In a court of law the ends never justify the means. It is our responsibility to overturn the results of well-meaning efforts to use manners of proof which do not meet the standards of admissibility established by the rules of evidence regardless of the nature of the offense. As recently stated by the U.S. Supreme Court: "Courts must be sensitive to the difficulties attendant upon the prosecution of alleged child abusers. In almost all cases a youth is the prosecution's only [*290] eye witness. But 'this Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases.'" n133

F. Developing a Theme and Theory

Developing a theme and theory for the case is critical to defense counsel in cases involving allegations of abuse. As

may often be the case in dealing with child abuse allegations, "The case . . . [is] . . . in essence, the damning accusation of a sympathetic victim cloaked in the presumptive innocence of tender years." n134 Defense counsel need to overcome this presumption by providing the members with a plausible explanation, other than the accused's guilt, to explain the allegations or convince the members the testimony is unreliable. In *United States v. Woolheater*, n135 the Court of Military Appeals discussed theme and theory in defense cases and held that the military judge improperly limited the defense from introducing evidence that would have indicated someone else was responsible for the charged offense. The Court explained how and why the defense develops a case theory and discussed how the defense counsel, in *Woolheater*, attempted to establish the evidence to support the case theory.

> In setting up a defense strategy for a case, counsel adopts a coherent theme and theory under which to present the case. The theme and theory usually take into consideration the strengths and weaknesses of the evidence that is both favorable and unfavorable to the accused. The defense theory of the case can be most helpful in explaining the weaknesses so as to be consistent with all or most of the evidence presented. In this case, the defense counsel was persistent in the defense theory that Shaner committed the arson. The defense also recognized that the most unfavorable and damaging evidence to appellant was his voluntary and detailed confession describing many of the particulars surrounding the cause of the fire. The defense attempted to negate or lessen the impact of appellant's confession by introducing psychiatric evidence of a plausible explanation for the confession. Dr. Parker presented evidence explaining appellant's reaction to stressful situations such as a series of NIS interrogations. . . . Attacking the reliability of the confession was the first prong of a two-pronged defense strategy. Even though the confession was detailed, voluntary, and properly before the finders of fact, the members were still free to determine the reliability of that confession. . . . The second prong was to present plausible evidence that another individual, Shaner, had the motive, knowledge, and opportunity to commit the crime. n136

[*291] As *Woolheater* n137 shows, it is crucial that the defense theory and theme are clear. Thus the defense counsel must start to explain the theory of the case to the members at the earliest possible time.

When developing a theme and theory the defense counsel may want to consider other possibilities besides the oft-used "the child is lying." n138 For instance, the defense counsel may be able to argue that the allegations are a cry for attention because the parents were so caught up in their own problems that they have ignored this child for months. This may be more plausible if the parents are having serious marital problems. Or, the defense counsel may show the jury that the child has a history of problems distinguishing between dreams and reality or is on some type of medication that produces bizarre dreams which the child has confused with reality. From the beginning of the trial, the defense counsel must show that he has a plausible theory, that the evidence will support his theory, and that the theory raises reasonable doubt regarding the allegations.

G. Voir Dire/Challenging Members

While voir dire can be difficult to handle effectively, if done correctly, it can be the "beginning of a beautiful friendship" n139 between the defense counsel and the jury. The purpose of voir dire is to "obtain information for the intelligent exercise of challenges." n140 R.C.M. 912 establishes fourteen separate grounds for challenge against a military member. n141 "Military judges must [*292] follow the liberal-grant mandate in ruling on challenges for cause." n142 In *United States v. Daulton*, n143 a case involving indecent acts with a child, the Court of Appeals for the Armed Forces reversed a conviction in part because the military judge abused his discretion when he denied a challenge for cause against a court member whose sister and mother had been sexually abused. The Court did not rule that members are *per se* disqualified because they, or someone close to them, has been a victim of a similar crime, unless they have been victims of similar violent or traumatic crimes. n144 Instead, the Court's decision was based on implied bias. "Implied bias exists when most people in the same position would be prejudiced. Implied bias is not viewed through the eyes of the military judge or the court members, but through the eyes of the public." n145 Interestingly, the Court held that the judge did not abuse his discretion when he denied a challenge against a medical doctor with some experience dealing with child abuse. n146

The defense counsel should listen carefully to the members' responses. He should also pay attention to the body language and nonverbal cues members may be giving. While the member may be answering the questions in an acceptable manner, his body language may indicate a complete dislike for the subject or the accused, which may evidence an inelasticity for findings or sentencing. This must be explored completely in individual voir dire, which [*293] should enable the defense counsel to establish a sufficient basis for a challenge for cause. n147

Voir dire will requires the defense counsel to pay careful attention to each question asked. One area to consider further questioning may be whether any member knows someone who is a victim or accused of any type of sexual misconduct or assault. Another area the defense counsel may want to address in voir dire concerns members' attitudes regarding whether children lie about these types of allegations. The attorney should ask whether members will consider that children may often be easily influenced and incorporate into the own memory information that they get from the therapists, law enforcement agents, parents, or trial counsel who question them about the incidents. n148 Selecting a fair and impartial panel is crucial, and a defense counsel must be vigilant in his efforts to ensure he has ferreted out any members who should be challenged. n149

H. Opening Statement

In a case involving child abuse, opening statements are critical to the defense. It is easy to imagine the trial counsel's opening statement as it will most likely include a grisly description of the testimony that the trial counsel hopes the child will provide. This type of opening statement can be very effective, dramatic and the members may agree early on that the accused is really a monster sitting at the table with the defense counsel. It is therefore important that the defense counsel diffuse the statement from the beginning. Whatever theory the defense counsel has to explain why the allegations are untrue, he should lay it out for the members and advise them what evidence to look for in support of this theory. This does not mean that the defense counsel should make promises that he can't keep. It is important to review the anticipated evidence to ascertain what he realistically expects the members to hear in order to properly frame the opening statement.

[*294] **I. Cross-Examination of the Victim**

As with all cross-examinations, the only way to do a truly effective job is to prepare, prepare, prepare. Child witnesses present unique issues to the defense counsel, both during the interview process and in cross-examination. n150 To prepare the cross-examination, the defense counsel should know each and every statement that the child has made, to whom and when, so that he can take full advantage of prior inconsistent statements. n151 Constructing a timeline may also be an effective organizational tool when preparing cross-examination. n152 Another useful approach is to do a small chart containing all of the previous statements made by child that the defense counsel can keep at the desk. n153 The defense counsel could break the statements into the different allegations. As the child testifies on direct, he should then write down the statements that are inconsistent with earlier statements. Pointing out the inconsistencies may be more difficult with the child because they can easily become confused and simply may not remember making previous statements. The defense counsel should work with the military judge and trial counsel to determine the best way to present inconsistent statements to the members. If the inconsistent statements are contained in a videotaped interview, this may be easier to do as the statements can be played for the child in court. n154 The important thing is that the defense counsel shows the members the relevant inconsistencies.

The defense counsel should determine the approach he intends to take in cross-examination. For older children, such as teenagers, he may be able to treat them as he would an adult witness. To the extent that he can, the defense counsel should examine a preteen child as he would an adult except that he simplifies his vocabulary. Trial counsel will most likely present the child in a manner that emphasizes the youth and innocence of the child. n155 The defense [*295] counsel should therefore talk to the child like an adult to the extent possible while keeping the examination as emotionless as possible. If the defense counsel becomes visibly agitated or angry, the child may feel threatened and shut down. Or the defense counsel may upset the members and they may shut down. Either way, the defense counsel loses. The defense counsel should be firm in the questioning but not argumentative. The defense counsel will have hard

questions to ask but should do it in a manner that does not antagonize the child, members or military judge.

Cross-examination of a child can be both challenging and intimidating to the defense counsel. Children are unpredictable witnesses and there is a danger that the defense counsel may actually bolster the child's credibility during cross-examination. The defense counsel must be disciplined and prepared. It does not have to be a long examination, nor does it have to be an aggressive one. Like air power, the key to a good cross-examination of a child is flexibility. The defense counsel should remember to ask only the questions that he needs for the closing argument. Once defense counsel obtains the information he needs, end the examination. It is rare that the defense counsel will destroy the credibility of a child through cross-examination. That will come from the other evidence the defense counsel has that supports why the allegations are unreliable.

J. Confrontation Issues

In child abuse cases, the defense counsel may be presented with situations where the government seeks to have the child testify behind a barrier, by closed circuit television, or in some other manner that prevents the child from actually "facing" the accused. The starting point for the defense counsel is whether the government can establish the necessary prerequisites.

> The confrontation Clause [is] satisfied in cases involving child victims where: (1) there [is] a case-specific finding that testimony by the child in the presence of the defendant would cause the child to suffer serious emotional distress such that the child could not reasonably communicate; (2) the impact on the child [is] more than *de minimis*; (3) the child testifie[s] via one-way closed-circuit television, enabling the judge, jury, and the defendant to observe the child's demeanor during testimony; and (4) the child [is] subject to full cross-examination. n156

[*296] In the two recent cases of *United States v. Longstreath* n157 and *United States v. Daulton*, n158 the Court of Appeals for the Armed Forces declined to find that the Comprehensive Crime Control Act of 1990 n159 applied to trials by courtsmartial. The Act authorizes federal courts to order two-way closed-circuit television in cases involving child-abuse. This suggests that the Court is unwilling to establish a "bright line" rule regarding how this situation can be handled during a court-martial. When this issue arises at trial, the defense counsel should familiarize himself with the current state of the law in order to handle the situation appropriately at trial, as well as create a record for appeal. n160

K. Expert Witness Testimony

Equally challenging to the defense counsel in these kinds of cases is handling cross-examination of the government expert witnesses, as well as the decision regarding whether he will put on expert testimony. "Use of expert testimony in these child sexual abuse cases is another 'legal thicket' for the expert testimony is extremely complex and often novel." n161 The permissible scope of expert testimony in child sexual abuse cases was defined in *United States v. Birdsall*, n162 Citing a case from the Eighth Circuit, n163 the Court of Appeals for the Armed Forces had this to say regarding the parameters of expert testimony.

> In the context of a child sexual abuse case, a qualified expert can inform the jury of characteristics in sexually abused children and describe the characteristics the alleged victim exhibits. A doctor who examines the victim may repeat the victim's statements identifying the abuser as a family member if the victim was properly motivated to ensure the statements' trustworthiness. A doctor can also summarize the medical evidence and express an opinion that the evidence is consistent or inconsistent with the victim's allegations of sexual abuse. Because jurors are equally capable of considering the evidence and passing on the ultimate issue of sexual abuse, [*297] however, a doctor's opinion that sexual abuse has in fact occurred is ordinarily neither useful to the jury or admissible. n164

The Court reversed Birdsall's conviction because a doctor and a psychologist testified for the government that in

their opinion the children had been sexually abused.

> Normally expert testimony that a victim's conduct or statements are consistent with sexual abuse or consistent with the complaints of sexually abused children is admissible and can corroborate an alleged victim in a significant way. Nevertheless, to say as a matter of expert opinion that sexual abuse occurred and a particular person did it crosses the line of proper medical testimony and imparts an undeserved scientific stamp of approval on the credibility of the victims in this case. Here the inadmissible testimony came from two doctors, magnifying its impact on the members in an extremely close case. n165

Additionally, profile evidence is inadmissible. The leading case in this area is *United States v. Banks.* n166 The Court of Military Appeals held that it was reversible error to allow expert testimony that the accused's family fit the profile of a family experiencing the dynamics of sexual abuse within the family. n167 As these cases illustrate, the defense counsel must be well aware of the parameters of expert testimony in order to prevent experts from providing impermissible evidence. n168

Cross-examination of an expert witness can be daunting, but with some background work and assistance of the consultant, it can be extremely productive to a defense counsel. One source of information the defense counsel should attempt to obtain is copies of previous testimony by the government expert. This information previews the expert's testimony and helps the defense counsel to prepare a solid cross-examination. Additionally, it may assist the defense counsel to find areas the expert can testify about that are [*298] helpful to the defense. The defense counsel then can minimize anything damaging said by the expert on direct, while obtaining information helpful to the defense (without having to call his own expert).

The decision whether the defense expert will testify may depend in large part on the strength of the government's case. The decision should be based on discussions with the expert regarding what the expert can testify about that is helpful to the defense case. Such discussions should include the issues the expert will have to concede that could harm the defense. Defense counsel should also be sensitive to the limits of the expert testimony it seeks to introduce. However, the appellate courts have noted that "Judges should 'view liberally the question of whether the expert's testimony may assist the trier of fact.' And, 'if anything, in marginal cases, due process might make the road a tad wider on the defense's side than on the Government's.'" n169 In *United States v. Dollente,* n170 the Court of Appeals for the Armed Forces held the military judge erred when he refused to allow the defense to present expert testimony that the alleged victim suffered from Post Traumatic Stress Disorder that could have been caused by other things present in the victim's life other than a sexual assault. This evidence directly contradicted the government's expert opinion that there was no other explanation for the victim's mental state but the trauma of a sexual assault. n171

L. Closing Argument

Closing argument is an opportunity for the defense counsel to weave together all the evidence in the case that supports the defense theory of why his client is not guilty of the offense. While heaven may belong to the meek, courtrooms belong to the bold. The defense counsel should make no apologies for defending his client zealously. Nor should he be afraid to make the hard call, i.e., arguing the child is lying or is unable to accurately perceive and recall. The defense counsel cannot overemphasize the government's burden of proof despite the evidence that cuts against the reliability of the allegations. These may include evidence of motivation of the child or spouse to fabricate, external influences which may have affected the child's memory, prior inconsistent statements, basic improbabilities of the story, and the client's good record.

The defense counsel may want to consider consulting the expert concerning the content of the closing argument. The expert may have more objectivity with regard to the strengths and weaknesses of the defense theory. [*299] The expert may be able to find any faults in the logic or presentation. The expert may also be helpful in assisting the defense counsel in framing his argument relating to the expert testimony.

M. Guilty Pleas

Getting the client through a *Care* n172 inquiry in cases involving child abuse can be difficult. It requires a great deal of preparation and practice with the client. n173 In cases involving child sexual abuse, the most difficult part of the inquiry may be convincing the client to admit that his conduct was "with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both." n174 Obviously, the defense counsel cannot advise the client to plead guilty if he is in fact not guilty. And if the client cannot bring himself to admit this particular element, then he still cannot plead guilty. However, once the defense counsel explains the elements to the client, the defense counsel can help the client provide the relevant information that satisfies the requirements of a guilty plea inquiry.

N. Sentencing

Sentencing is one of the most important, and difficult, portions of any defense case. In a litigated case, sentencing is even more difficult because the defense counsel does not have the arguments he would have had in a guilty plea. However, it is important even in litigated cases to provide perspective to the members. The defense counsel can potentially argue the good military record of the client, the impact of a severe sentence on the family and the member's ability to support them, the devastating effect of a punitive discharge, or the need to help the family recover from the accused's misconduct.

Evidence presented in sentencing by the prosecutor may include victim impact testimony or expert testimony. The defense counsel must be alert to any overreaching by the witnesses in these areas because failure to object waives the issue (absent plain error). n175 He must also be alert to improper [*300] argument by the government. For instance, he should object to any inappropriate government argument regarding the accused's lack of remorse, especially if the case is litigated. The basis for the objection is that the accused may chose to assert his rights and not testify. n176

Even in the most egregious cases of long-term abuse or multiple victims, there are points for the defense counsel to argue in sentencing. If supported by the facts, the defense counsel can argue the value of the guilty plea, the therapeutic needs of the client, any efforts the client has undertaken before trial to deal with the problem, the client's background, the need to provide the client with a motive to get better, the impact on the family if the sentence is unduly severe, or the family's desire to reunite. While all may seem lost at this point in the trial, the defense counsel must redouble his efforts to obtain the best possible punishment outcome for his client.

IV. CONCLUSION

"In many respects, child abuse litigation is a new frontier with a plethora of cases in all jurisdictions addressing provocative issues." n177 Defending a case involving any kind of child abuse, may be personally and professionally one of the most challenging that the defense counsel will face. The defense counsel must remain detached from his own feelings about the case. It is important for him to remember that he is often the only person in the client's world who is offering any kind of support or encouragement for the future. Regardless of the defense counsel's personal views, the client should never feel that the defense counsel also considers him unworthy of human existence because of the allegations, or his confession to such allegations. An accused has every right to expect and demand that his defense counsel will provide the same kind of zealous representation for his case he would provide in any other case. Harper Lee, in her novel, *To Kill A Mockingbird*, n178 touched on the need for meaningful representation even in controversial cases. Although Ms. Lee was talking about racism, her thoughts about defending an unpopular client in an unpopular case are equally applicable to the issues the defense counsel will face in cases involving child abuse.

[*301] "Do all lawyers defend n-Negroes, Atticus?"

"Of course they do, Scout."

"Then why did Cecil say you defend niggers? He made it sound like you were runnin' a still."

Atticus sighed. "I'm simply defending a Negro -- his name's Tom Robinson. He lives in that settlement beyond the town dump. He's a member of Calpurnia's church, and Cal knows his family well. She says they're clean living folks. Scout, you aren't old enough to understand some things yet, but there's been some high talk around town to the effect that I shouldn't do much about defending this man." . . .

"If you shouldn't be defendin' him, then why are you doin' it?"

"For a number of reasons," said Atticus. "The main one is, if I didn't I couldn't hold up my head in town, I couldn't represent this county in the legislature, I couldn't even tell you or Jem not to do something again."

"You mean if you didn't defend that man, Jem and me wouldn't have to mind you any more?"

"That's about right."

"Why?"

"Because I could never ask you to mind me again. Scout, simply by the nature of the work, every lawyer gets at least one case in his lifetime that affects him personally. This one's mine, I guess." n179

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureGuilty PleasGeneral OverviewEvidenceTestimonyExpertsHelpfulnessFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & Neglect

FOOTNOTES:

n1 The author uses the male vernacular because it has been the author's experience that the majority of the accuseds are men. However, the principles are the same for women who are also so accused.

n2 Standard 4-3.2(a) and (b), Air Force Standards for Criminal Justice, The Judge Advocate General (TJAG) Policy No. 26 (6 January 1995). The standard states:

> (a) As soon as practicable the defense counsel should seek to determine all relevant facts known to the accused. In so doing, counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.
> (b) It is unprofessional conduct for the defense counsel to instruct the client or to intimate to the client any way that the client should not be candid In revealing facts so as to afford the defense counsel free rein to take action which would be precluded by counsel's knowing of such facts.

n3 In *United States v. Dudley, 42 M.J. 528, 531 (N.M.Ct.Crim.App. 1995)* statements by the accused to a psychiatrist were held to be admissible without an Article 31 rights advisement despite the psychiatrist's knowledge that the accused was under investigation.

> We believe that although the case at bar involves a closer question . . . due to [doctor] superior military status, the location of the interview aboard ship, [the doctor's] close friendship with

> [NCIS agent], and the fact that the appellant did not seek out the doctor for treatment. Nevertheless, we find that the inquiry did not merge with the law enforcement investigation because it was conducted solely for diagnostic and psychiatric care purposes. [The doctor] was not acting as the alter ego of the NCIS . . . . Moreover, [his] testimony concerning the need for progression in mental health patients to overcome the denial stage convinces us that his question "Well, did you do it?" was motivated for non-law enforcement reasons and to help the appellant psychiatrically through what must have been a difficult period.

Id. at 531. See also United States v. Rios, 45 M.J. 558 (A.F.Ct.Crim.App. 1997) (holding statement made to civilian child protective services worker was admissible because civilian was not subject to UCMJ, not required to give Article 31 rights advisement and not working in connection with military); *United States v. Bowerman, 39 M.J. 219, 221 (C.M.A. 1994)* (stating military physician who suspected abuse not required to give Article 31 rights when questioning accused regarding injuries) ("Even if [doctor] thought that child abuse was a "distinct possibility," her questioning of appellant "to ascertain the facts for protective measures and curative purposes" did not violate Article 31." (cites omitted)); *United States v. Pittman, 36 M.J. 404 (C.M.A. 1993)* (explaining statement by accused to supervisor who was escorting accused home were admissible and were not the product of an interrogation or a request for a statement within the meaning of Article 31).

n4 *See United States v. Raymond, 38 M.J. 136 (C.M.A. 1993)* (holding statements made by the accused who voluntarily sought the services of a psychiatrist were admissible, psychiatrist not required to give Article 31 rights advisement because not acting as an investigator and had no intent of turning over statements).

n5 Air Force Instruction [hereinafter AFI] 44-109, Mental Health and Military Law (1 Mar 97).

n6 *Id.*, para 3.2.

n7 *Id.*, para 3.4.

n8 *Id.*, para 3.4.

n9 *See United States v. Demmings, 46 M.J. 877 (Army Ct.Crim.App. 1997)* (citing *Jaffee v. Redmond, 58 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996))*, (stating psychotherapist-patient privilege could apply to courts-martial, however defense waived the issue by failing to object to applicable statements at trial).

n10 MANUAL FOR COURTS-MARTIAL., United States (1995 ed.) [hereinafter MCM] Military Rules of Evidence [hereinafter Mil. R. Evid.] 503.

n11 *See United States v. Napolean, 44 M.J. 537, 543 (A.F.Ct.Crim.App. 1996), aff'd., 46 M.J. 279 (1997).* Here the court held the privilege did not exist between the accused and a lay minister. "Its foundation contains three elements: (1) the communication must be made either as a formal act of religion or as a matter of conscience; (2) it must be made to a clergyman in his capacity as a spiritual advisor; and (3) the communication must be intended to be confidential." *See also United States v. Coleman, 26 M.J. 407 (C.M.A. 1988)* (holding accused's statements to father-in-law who was also a minister that he had taken liberties with his daughter were not privileged because they were not made for purposes of his religion, but rather to obtain emotional support from his father-in-law).

n12 *See United States v. Rios, 45 M.J. 558, 564 (A.F.Ct.Crim.App. 1997).* The court found that accused's statements during a pretext phone call were admissible and minors can consent to taped phone conversations. "Investigators monitoring a telephone conversation involving a suspect, with the consent of one of the parties, where the party acts as an agent for the AFOSI, is a 'routine and permissible undercover technique.'" quoting *U.S. v. Parillo, 31 M.J. 886 (C.M.A. 1992).* Additionally, with the growth of electronic mail use, clients should be advised not to discuss matters with anyone by e-mail, in electronic chat rooms, etc. This is particularly true if a client uses a government, business, or city/state library computer since use of such systems usually include "prior consent" by the user for monitoring and interception by law enforcement officials. *See* Jarrod J. White, *E-Mail@Work.Com: Employer Monitoring of Employee E-Mail, 48 ALA. L. REV. 1079, 1083-1084 (1997).*

n13 *See United States v. Bubonics, 45 M.J. 93 (1996)* (stating threat of civilian prosecution combined with good cop/bad cop interrogation technique overcame free will of sailor with two years active duty service and no experience with military justice system).

n14 *See United States v. Murray, 45 M.J. 554 (N.M.Ct.Crim.App. 1996)* (holding statement does not become involuntary because interrogator discussed possible loss of unborn child or jailing of spouse as possible adverse consequences facing accused for allegations of child abuse); The court held in *United States v. Moreno, 36 M.J. 107 (C.M.A. 1992)* (Sullivan, Chief Judge, dissenting) that statements of accused were not involuntary when state social worker discussed options and possible adverse consequences if accused did not cooperate with state authorities.

> Admittedly, appellant was faced with a choice. On the one hand, he was offered the opportunity of enlisting the aid and support of the Texas Department of Human Services [DHS] in trying to keep his family together, in helping himself to overcome his personal problem, and in siding with him in the event of a criminal prosecution. On the other hand, as he well knew, by cooperating with DHS he risked the possibility that his statements would be discovered by prosecutorial forces and used against him at a trial. If he did not cooperate with DHS, however, the risk of losing his children was presumably increased and the risk of criminal prosecution remained-without the benefit of significant DHS influence. It is something of a dilemma to be sure, but it was a dilemma of his own causing. When people abuse children in this society, two distinct processes are triggered. One is the criminal process, which focuses on the proper way to deal with the perpetrator. The other is the child protective process, which focuses on the best interests of the child-victim. In appellant's case, both of these processes were well set in motion by the information initially reported to the authorities. Each of these processes is going to play itself out, one way or another, whether appellant wanted it and whether he took affirmative steps to affect the processes. In effect [DHS] merely apprised appellant where he stood in the great flow of things and obviously in the best of faith, she offered him a very plausible scenario that might improve his personal and family prospects.

Id. at 112. However, according to Chief Judge Sullivan: "Substantial constitutional error occurred in this case. (cites omitted) Appellant's incriminating admissions were made in response to direct questioning by [DHS employee]. This deliberate elicitation of incriminating statements occurred after his Sixth Amendment right to counsel had attached and without a proper waiver of that right." (cites omitted).

n15 Mil. R. Evid. 304(a) & (d)(2)(A). MCM, *supra* note 10. Mil. R.Evid. 304(d)(2)(A) provides

> Motions to suppress or objections under this rule or M.R.E. 302 or 305 to statements that have been disclosed shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the

> military judge for good cause shown. Failure to so move or object constitutes a waiver of the objection.

n16 *See generally* Richard J. Ofshe and Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*. 16 STUDIES IN LAW, POLITICS AND SOCIETY, 189 (1997).

n17 Presentation of this evidence will generally require the services of an expert witness with familiarity of the subject and research in this area.

n18 This includes deciding whether to waive the Article 32 hearing, submitting a resignation in lieu of court-martial, production of witnesses to testify on behalf of the accused, and establishing the potential of expert testimony regarding the client's progress in therapy.

n19 MCM, *supra* note 10, Part II, Rules for Courts-Martial [hereinafter R.C.M.] 701(e) states "Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence." *See United States v. Hart, 29 M.J. 407 (C.M.A. 1990)*(explaining discovery available to accused in courts-martial is broader than the discovery provided most civilian defendants). For a good introduction to the discovery process, see LeEllen Coacher, *Discovery in Courts-Martial, 39 A. F. L. Rev. 103 (1996)*.

n20 In *United States v. Reece, 25 M.J. 93, 95 (C.M.A. 1987)*, the defense counsel described medical records and relevancy sufficiently despite not knowing the exact contents. "The Military Rules of Evidence establish 'a low threshold of relevance' . . . ." (citation omitted). *But see United States v. Briggs, 46 M.J. 699, 702 (A.F.Ct.Crim.App. 1996)* (holding military judge did not err by denying defense motion to compel production of rape victim's medical records) ("A general description of the material sought or a conclusory argument as to their materiality is insufficient.").

n21 Records of previous allegations of abuse may provide fertile areas for defense to explore in defending the case by providing other sources of alleged abuse or injuries. For admissibility requirements of such evidence *see United States v. Woolheater, 40 M.J. 170, 173 (C.M.A. 1994)*. In *Woolheater* a conviction was reversed for failure to allow the defense to present evidence that another person had motive, knowledge and opportunity to commit the crime. "The right to present defense evidence tending to rebut an element of proof such as the identity of the perpetrator is a fundamental Constitutional right." In *United States v. Gray, 40 M.J. 70 (C.M.A. 1994)*, a conviction was reversed because the military judge improperly excluded evidence of possible sexual conduct involving the victim and another child.

> A child-victim's sexual activity with someone other than an accused may be relevant to show that the alleged victim had knowledge beyond her tender years before the alleged encounter with the accused. . . . By excluding the evidence, the military judge deprived appellant of evidence which could have made his otherwise incredible explanation believable.

Id. at 80. But see United States v. Shaffer, 46 M.J. 94 (1997); United States v. Gober, 43 M.J. 52 (1995).

n22 *Reece, 25 M.J. at 95 (C.M.A. 1987)*

> At trial, defense counsel established that, as there were no eyewitnesses to the alleged offenses, the credibility of the two girls would be a key issue in the case. He argued that Miss D's history of alcohol and drug treatment was relevant to her ability to perceive and remember events, especially as she had admitted that she had consumed alcohol before each of the alleged incidents. With respect to Miss B, he argued that her counseling records would contain evidence of her behavioral problems. He made as specific a showing of relevance as possible, given that he was denied all access to the documents. Some forms of emotional or mental defects have been held to 'have high probative value on the issue of credibility . . . . [A] conservative list of such defects would have to include . . . most or all of the neuroses, . . . alcoholism, drug addiction, and psychopathic personality'" (citations omitted).

n23 *See United States v. Romeno, 46 M.J. 269 (1997)* (case reversed for failure of the prosecutor to provide discovery of exculpatory statements made by main witness against accused).

n24 A good source for this type of information is The Physicians' Desk Reference. PHYSICIANS' DESK REFERENCE (51<st> ed. 1997). Additionally, most health care providers have access to online services which catalogue published articles relating to the particular drugs being researched. These services are also usually available at larger military medical facilities and local libraries.

n25 *See* Jan Bays and David Chadwick, *Medical Diagnosis of the Sexually Abused Child*, 17 CHILD ABUSE & NEGLECT 91, 99 (1993). "Transmission of sexually transmitted diseases outside the perinatal area by nonsexual means is a rare occurrence."

n26 *See generally* John McCann, MD, et al., *Genital Findings in Prepubertal Girls Selected for Nonabuse: A Descriptive Study*, PEDIATRICS, Volume 86, No. 3, at 428 (3 September 1990); *see also* Bays and Chadwick, *supra* note 25, at 92, 94-97.

n27 Bays and Chadwick, *supra* note 25, at 103-107.

n28 *See United States v. Tornowski, 29 M.J. 578 (A.F.C.M.R. 1989)*

> There is little question that child sexual abuse cases often present a fertile, indeed, a necessary, area for expert assistance (cites omitted). Particularly when . . . the prosecution utilizes the assistance of experts, the defense can make a valid and plausible argument for expert assistance of its own to aid in properly evaluating the factual issues and providing adequate legal representation for an accused . . . . From our review of the record, the defense team in this case articulated a number of areas in which a child psychologist might have provided valuable insights and guidance. For instance, certain information suggested that the seven year old victim might have possessed an unusual degree of sexual awareness for a child of tender years. Might this have caused her to make sexual allegations against the appellant that another child of the same age could not have fabricated? *Id. at 580.*

n29 *United States v. Turner, 28 M.J. 487 (C.M.A. 1989)* (citations omitted).

n30 *Id. at 488.*

n31 *See United States v. Brown, 26 M.J. 148, 150 (C.M.A. 1988); United States v. Robertson, 36 M.J. 190, 191 (C.M.A. 1992).* Both cases adopted the test for the parental discipline defense given in the MODEL PENAL CODE, Section 3.08(1) (1985).

> The use of force upon or toward the person of another is justified if: (1) the actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person and: (a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and (b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation . . . .

n32 *See* Mil. R. Evid. 502, *supra* note 10; *United States v. Turner, 28 M.J. 487 (C.M.A. 1989); United States v. Gordon, 27 M.J. 331, 332 (C.M.A. 1989);* and *United States v. Toledo, 25 M.J. 270, 275 (C.M.A. 1987). See also* Will A. Gunn, *Supplementing the Defense Team: A Primer on Requesting and Obtaining Expert Assistance, 39 A. F. L. Rev. 143 (1996).*

n33 *United States v. Turner, 28 M.J. 487 (C.M.A. 1989).*

n34 *Id. at 488, 489. Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).*

n35 Mil. R. Evid. 502, *supra* note 10.

n36 Mil. R. Evid. 502(b)(3), *supra* note 10.

n37 *United States v. Toledo, 25 M.J. 270 (C.M.A. 1987).*

n38 *Id. at 276.*

n39 *United States v. Garries, 22 M.J. 288 (C.M.A. 1986), cert. denied, 479 U.S. 985, 107 S. Ct. 575, 93 L. Ed. 2d 578 (1986).*

n40 *Id. at 291.*

n41 *Id. at 291.* In *United States v. Kaspers, 47 M.J. 176, 180 (1997),* the appellant asked for an *ex parte* hearing to protect attorney client privileged information which formed the basis of the expert request. The Court explained that:

> Here, we examine our own rule, which requires disclosure by the defense if it desires government funding. See R.C.M. 703(d). Using our rule, the judge did not abuse his wide discretion in denying the *ex parte* hearing because appellant did not establish "unusual circumstances" [cite

> omitted]. . . . We realize that, while our rule may burden the defense to make a choice between justifying necessary expert assistance and disclosing valuable trial strategy, the defense is not without a remedy. The military judge has broad discretion to protect the rights of the military accused.

n42 *United States v. Tornowski, 29 M.J. 578 (A.F.C.M.R. 1989).*

n43 *Moore v. Kemp, 809 F.2d 702, 712* (11<th> Cir. 1987).

n44 *United States v. Tornowski, 29 M.J. 578, 580 (A.F.C.M.R. 1989).*

n45 *United States v. Gonzalez, 39 M.J. 459 (C.M.A. 1994).*

n46 *Id. at 461,* citing *United States v. Allen, 31 M.J. 572, 623 (N.M.C.M.R. 1990), aff'd, 33 M.J. 209 (C.M.A. 1991).*

n47 *United States v. Ingham, 42 M.J. 218, 226 (1995).* "Appellant's right, upon a minimal showing of need, is to expert assistance (cites omitted). He does not have a right to compel the Government to purchase for him any particular expert or any particular opinion." *See also United States v. Garries, 22 M.J. 288 (C.M.A. 1986), cert. denied, 479 U.S. 985, 107 S. Ct. 575, 93 L. Ed. 2d 578 (1986); United States v. Tharpe, 38 M.J. 8, 14 (C.M.A. 1993).*

n48 *United States v. Burnette, 29 M.J. 473, 475-76 (C.M.A. 1990)* (holding the government is required to provide competent expert and simply providing access to government expert may not be sufficient) (citations omitted).

> All that is required is that competent assistance be made available. . . . In retrospect it is clear that [the government expert] would not have been an adequate substitute for such independent assistance . . . . [The government expert] was presenting incriminating evidence against appellant on behalf of the prosecution. If there remained a genuine question regarding the test procedures and conclusions, it would hardly be fair to expect the defense to extract its ammunition from one of the very witnesses whose conclusions it was attacking.

n49 *See United States v. Robinson, 43 M.J. 501, 505 (A.F.Ct.Crim.App. 1995)* (explaining it was not error to deny defense motion for civilian expert who had more experience in treatment of sex offenders than initial defense approved expert). ("An accused is not entitled to have the government pay for the best expert witness available since the government may always provide an adequate substitute. R.C.M. 703(d). Of course, a government-selected expert is not an 'adequate substitute' when that expert and the defense requested one hold divergent scientific views."); *United States v. Van Horn, 26 M.J. 434, 438 (C.M.A. 1988)* (citations omitted) (reversing based on military judge's denial of defense requested expert and erroneous finding that government expert was an adequate substitute).

> We have no doubt that [the government expert] was an expert in his field. However, the fact

> remains that [the defense expert], also an expert, had no connection with the challenged laboratory and had examined its reports which were used by the prosecution. More importantly, he had a contrary opinion concerning reliability of the test procedures used, results reached, and conclusions based thereon. In short, his testimony favored the defense and could not reasonably be considered cumulative of [the government expert] or replaceable by his testimony. . . . To deny the defense a meaningful opportunity to present its evidence, which challenged the Government's scientific proof, its reliability, and its interpretation, denied appellant a fair trial.

n50 Often, the government will use the physician that initially examined the child. This physician may be one with limited experience in the child abuse arena. Finding a physician with more experience and better credentials will impress the members should the defense expert testify. It may also have the effect of educating the government expert regarding the current state of research in the relevant subject area which should keep the government expert from exceeding limits of his/her expert opinion.

n51 R.C.M. 906(b)(7), *supra* note 19.

n52 *United States v. Ndanyi, 45 M.J. 315 (1996).*

n53 *Id. at 320. See also Van Horn, 26 M.J. at 468.*

n54 A forensic psychologist/psychiatrist has experience dealing with legal issues as they relate to the field of psychology, may have previously testified as an expert witness, and should have experience in analyzing evidence in a criminal trial for issues related to his field of expertise. Employing an expert with forensic experience may reduce the amount of preparation time as well as increase the use of the expert given this specialized knowledge.

n55 In *United States v. Sojfer, 47 M.J. 425, 427-28 (1998)* (citations and footnotes omitted) the court discussed admissibility of evidence related to a witness' competency in terms of an ability to perceive a situation.

> There are similarities between bias and capacity to observe, remember and recollect. Both are grounds for impeachment, and both may be proven by extrinsic evidence. However, before the proponent may introduce evidence under either theory, he or she must lay a foundation that establishes the legal and logical relevance of the impeaching. How a witness "views" an event, in terms of her five senses, depends on her background, including family life, education and day-to-day experiences. Witnesses "behave according to what [they] bring to the occasion, and what each of [them] brings to the occasion is more or less unique. In that sense, each witness has a bias. Additionally a witness's interpretation of an event depends on whether her perception is impaired. For example, the individual may be hearing-impaired or may not have been wearing corrective lenses at the time of the crime. A past or present mental condition also may impact on a person's ability to perceive.

This language could also be used to support a motion to compel discovery of certain mental health and medical records.

n56 For a discussion on a suggested approach for assessing the validity of statements regarding sexual

abuse, *see* David R. Raskin and Phillip W. Esplin, *Statement Validity Assessment: Interview Procedures and Content Analysis of Children's Statements of Sexual Abuse*, 13 BEHAVIORAL ASSESSMENT 265 (1991). Concerned over increased questioning of the reliability of assessment procedures for examining abuse, the American Academy of Child and Adolescent Psychiatry (AACAP) issued recommended guidelines in 1988. *See* AACAP, *Guidelines for the Clinical EVALUATION OF CHILD AND ADOLESCENT SEXUAL ABUSE*, 25 J. Am. Acad. Child & Adolescent Psychiatry 655 (1988).

n57 *See generally*, THE SUGGESTABILITY OF CHILDREN'S RECOLLECTIONS: IMPLICATIONS FOR EYEWITNESS TESTIMONY (John Doris ed., American Psychological Association 1991).

n58 For a discussion regarding the possible effects of repeated or leading questions or multiple interviews, see John B. Meyers, et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony, 27 PACIFIC L.J. 1, 12, 25 (1996).*

n59 *See generally*, William Bernet, M.D., *Practice Parameters for the Forensic Evaluation of Children and Adolescents Who May Have Been Physically or Sexually Abused*, 36:3 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY, 423 (March 1997).

n60 *See generally*, DR. STEVEN CECI & DR. MAGGIE BRUCK, JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY 30-33 (1995).

n61 For a review of the pros and cons of the use of anatomically correct dolls in child interviews, see generally CECI AND BRUCK, *supra* note 60, at 161.

n62 *United States v. Turner, 28 M.J. 487 (C.M.A. 1989).*

n63 *Id. at 489 n.3.*

n64 *United States v. Mansfield, 38 M.J. 415 (C.M.A. 1993).*

n65 *Id. at 418.*

n66 R.C.M. 706.

n67 Even the military courts have recognized the difficulty in interviewing child witnesses. In *United States v. Dunlap, 39 M.J. 835, 839 n.6 (A.C.M.R. 1994),* the Army Court of Military Review set aside the conviction because of the improper admission of the child's hearsay statements which were the product of a suggestive puppet show dealing with child abuse. The court noted

> This case points up a very important aspect of developing child abuse cases-the need for a trained professional. If a school or other organization is going to use a puppet show or other device to surface cases of abuse, then it had better also have personnel specifically trained in dealing with child abuse problems to do the follow-up counseling.

n68 If the child indicates that they have such writings, it may be prudent for the defense counsel to call the trial counsel and ask that an adult, other than the parents, accompany the child to pick up the diary. This will avoid destruction of the writings by the child or a misguided parent or social worker.

n69 M.R.E. 804(a) *supra* note 10, and R.C.M. 703(b)(3) *supra* note 19.

n70 R.C.M. 405(j)(2)(B), *supra* note 19. *See also* Discussion to R.C.M. 405(h)(1)(A) at Part II, page 38, which suggests that the IO prepare a summary of the testimony and have the witness swear to it again. However, the analysis acknowledges that the IO is not required to do this to complete the report.

n71 *But see* Discussion to R.C.M. 405(h)(1)(A) at Part II, page 38, *supra* note 19, which indicates that any notes or recordings of the testimony should be preserved until the end of the trial. These recordings should then be available to the defense and could be used to impeach the witness with the prior inconsistent statement.

n72 *United States v. Marrie, 39 M.J. 993 (A.F.C.M.R. 1994), aff'd, 43 M.J. 35 (1995).*

n73 *See supra* note 19. The rule provides

> Except as provided in subsection (g)(4)(A) of this rule, any witness whose testimony would be relevant to the investigation and not cumulative, shall be produced if reasonably available. This includes witnesses requested by the accused, if the request is timely. A witness is "reasonably available" when the witness is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance. A witness who is unavailable under Mil. R. of Evid. 804(a)(1-6) is not "reasonably available."

n74 *Marrie, supra* note 72, at 997.

n75 R.C.M. 405(g)(1(A), *supra* note 19.

n76 *United States v. Simoy, 46 M.J. 592, 608 (A.F.Ct.Crim.App. 1996).*

n77 *See* Discussion to R.C.M. 405(g)(2)(B), *supra* note 19, at Part II, page 36.

n78 *See United States v. Oritz, 33 M.J. 549 (A.C.M.R. 1991)* and *United States v. Rudolph, 35 M.J. 622 (A.C.M.R. 1992).* This is especially important if there are legitimate concerns about the availability of the child at trial.

n79 R.C.M. 405(f)(12), *supra* note 19.

n80 R.C.M. 405(j)(4), *supra* note 19.

n81 *See United States v. Argo, 46 M.J. 454 (1997)* (holding where defense did not raise issue of nondisclosure of impeachment evidence of a government witness in objections to the Article 32 report within 5 days, was waived for the issue at trial).

n82 R.C.M. 703(c)(2)(C), *supra* note 19.

n83 R.C.M. 905(b)(4), 906(b)(7), and 914, *supra* note 19.

n84 *United States v. Reece, 25 M.J. 93 (C.M.A. 1987).*

n85 *Id. at 94,* quoting *United States v. Mougenel, 6 M.J. 589, 591 (A.F.C.M.R. 1978), pet denied, 6 M.J. 194 (1979).*

n86 *Id.* at 95 (citations omitted).

n87 *United States v. Tangpuz, 5 M.J. 426 (C.M.A. 1978).*

n88 *Id. at 429.*

n89 *United States v. Manos, 17 U.S.C.M.A. 10, 15, 37 C.M.R. 274, 279 (1967).*

n90 *United States v. Sweeney, 14 U.S.C.M.A. 599, 605, 34 C.M.R. 379, 385 (1964)* (holding accused prejudiced when the military judge denied motion to compel two character witnesses who would have testified on the merits).

n91 *5 M.J. at 430,* citing *United States v. Manos, 17 U.S.C.M.A. at 15, 37 C.M.R. at 279.*

n92 *See United States v. Brown, 28 M.J. 644 (A.C.M.R. 1989).* "Although timeliness is not *per se* grounds for denying a request for a witness, timeliness of a defense request for a witness may be considered." *Id. at 647.*

n93 R.C.M. 905(b)(1) and 906(b)(3), *supra* note 19.

n94 *See United States v. Marrie, 39 M.J. 993 (A.F.C.M.R. 1994), aff'd, 43 M.J. 35 (1995).*

n95 While the author's research found no cases directly on point, a due process argument could be made based on R.C.M. 405(g)(4)(A), *supra* note 19. *See also United States v. Pazdernik, 22 M.J. 690 (A.F.C.M.R. 1986)* (stating purpose of the Article 32 hearing is to insure the accused receives a thorough and impartial investigation); *United States v. Bramel, 29 M.J. 958* (A.C.M.R.) (stating primary purpose of Article 32 investigation is to obtain impartial recommendation of the charges); and *United States v. Chestnut, 2 M.J. 84, 85*

n.4 (C.M.A. 1976). ("This court once again must emphasize that an accused is entitled to the enforcement of his pretrial rights without regard to whether such enforcement will benefit him at trial.").

n96 M.R.E. 803, *supra* note 10, provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

n97 *Idaho v. Wright, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d. 638 (1990).*

n98 *Id. 497 U.S. at 814-15, 110 S. Ct. at 3141.*

n99 *Id. 497 U.S. at 815, 110 S. Ct. at 3142.*

n100 *United States v. Clark, 35 M.J. 98, 106 (C.M.A. 1992)* citing *Idaho v. Wright, 497 U.S. at 819, 110 S. Ct. at 3142.*

n101 *United States v. Kelley, 45 M.J. 275 (1996).*

n102 Formerly the Court of Military Appeals.

n103 *45 M.J. at 280.*

n104 *Id.* (citations omitted).

n105 *See generally United States v. Cordero, 22 M.J. 216 (C.M.A. 1986); United States v. Murphy, 30 M.J. 1040 (A.C.M.R. 1990)* (citing cases holding that statements made to law enforcement agents are inherently suspect); and *United States v. Quarles, 25 M.J. 761 (N.M.C.M.R. 1987)* (explaining admission of hearsay statements error because they were unreliable).

n106 *United States v. Hines, 23 M.J. 125 (C.M.A. 1986).*

n107 *Id. at 137* (cites omitted).

n108 Mil. R. Evid. 413, *supra* note 10, allows the prosecution, in the case of sexual assault, to present evidence of any other sexual assault committed by the accused for any relevant purpose. The prosecution must provide notice of its intent at least 15 days prior to trial date. (The Air Force has proposed an amendment to the current rules, changing the notice requirement to 5 days. It is expected this change will be approved and implemented in the near future.)

n109 Mil. R. Evid. 414, *supra* note 10, allows the prosecution, in a case of child sexual molestation, to present evidence of any other sexual assault on a child for any relevant purpose. The prosecution must provide notice of its intent at least 15 days prior to trial date. (The Air Force has proposed an amendment to the current rules, changing the notice requirement to 5 days. It is expected this change will be approved and implemented in the near future.) For a good overview of the new rules, see Stephen R. Henley, *Caveat Criminale: The Impact of the New Military Rules of Evidence in Sexual Offense and Child Molestation Cases*, THE ARMY LAWYER, 82 (Mar 1996).

n110 The rule states "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 members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *See also* United States v. Hughes, M.J. , *ACM 32359 1998 CCA LEXIS 227 (AFCCA 1998)* (holding that in cases of evidence offered under Mil. R. Evid. 414, a judge must still find the evidence to be relevant under Mil. R. Evid. 401 and must perform the balancing test under Mil. R. Evid. 403.

n111 Mil. R. Evid. 105, *supra* note 10.

n112 *See generally United States v. Loving, 41 M.J. 213 (1994); United States v. Reynolds, 29 M.J. 105 (C.M.A. 1989); United States v. Mirandes-Gonzalez, 26 M.J. 411 (C.M.A. 1989);* and *United States v. White, 23 M.J. 84 (C.M.A. 1986).*

n113 *United States v. Franklin, 35 M.J. 311 (C.M.A. 1992).*

n114 *Id. at 316.*

n115 *United States v. Gamble, 27 M.J. 298 (C.M.A. 1988).*

n116 S. SALTZBURG, ET AL., MILITARY RULES OF EVIDENCE MANUAL, at 361 (2d ed. 1986).

n117 *27 M.J. at 304.*

n118 Mil. R. Evid. 803(4), *supra* note 10, provides

> (4) *Statements for purposes of medical diagnosis or treatment.* Statements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

n119 *United States v. Armstrong, 36 M.J. 311, 313 (C.M.A. 1993). See also United States v. Quigley, 35 M.J. 345, 346-47 (C.M.A. 1992).*

n120 *United States v. Siroky, 42 M.J. 707 (A.F.Ct.Crim.App. 1996), aff'd., 44 M.J. 394 (1996).*

n121 *United States v. Faciane, 40 M.J. 399 (C.M.A. 1994).*

n122 *Id. at 403.* See also *United States v. Dunlap, 39 M.J. 835 (A.C.M.R. 1994)* (holding it error to admit statements under M.R.E. 803(4) as there was no evidence that witness recognized that person making statement to could provide treatment, or that witness expected to receive treatment).

n123 *Quigley, 35 M.J. at 346-347.*

n124 *Id.*

n125 *United States v. Armstrong, 36 M.J. 311 (C.M.A. 1993).*

n126 *Id. at 314.*

n127 *United States v. Henry, 42 M.J. 593 (Army Ct.Crim.App. 1995).*

n128 Formerly the Army Court of Military Review.

n129 *52 M.J. at 597-98.*

n130 *Id.* at 596.

n131 *United States v. Knox, 46 M.J. 688 (N.M.Ct.Crim.App. 1997).*

n132 Formerly the Navy Marine Court of Military Review.

n133 *Id. at 696,* citing *Tome v. United States, 513 U.S. 150, 165-67, 115 S. Ct. 696, 705, 130 L. Ed. 2d 574 (1995).*

n134 *United States v. Buenaventura, 40 M.J. 519, 528 (A.C.M.R. 1994)* (Hostler, concurring in part, dissenting in part).

n135 *United States v. Woolheater, 40 M.J. 170 (C.M.A. 1994).*

n136 *Id. at 173-74.*

n137 *Id.*

n138 In many instances the child may not so much be lying but rather is being pushed into a story by a parent with their own agenda. This type of false accusation case happens quite often in bitter divorce proceedings. *See* Thomas M. Horner & Melvin J. Guyer, *Prediction, Prevention, and Clinical Expertise in Child Custody Cases in Which Allegations of Child Sexual Abuse Have Been Made: 1. Predictable Rates of Diagnostic Error in Relation to Various Clinical Decisionmaking Srategies, 25 FAM. L. Q. 217, 219-220 (1991).*

n139 Humphrey Bogart, CASABLANCA (Metro-Goldwyn-Mayer 1942).

n140 Discussion to R.C.M. 912(d), *supra* note 19.

n141 R.C.M. 912(f), *supra* note 19, provides

(f) *Challenges and removal for cause.*

(1) *Grounds.* A member shall be excused for cause whenever it appears that the member:
(A) Is not competent to serve as a member under Article 25(a), (b), or (c);
(B) Has not been properly detailed as a member of the court-martial;
(C) Is an accuser as to any offense charged;
(D) Will be a witness in the court-martial;
(E) Has acted as counsel for any party as to any offense charged;
(F) Has been an investigating officer as to any offense charged;
(G) Has acted in the same case as convening authority or as the legal officer or staff judge advocate to the convening authority;
(H) Will act in the same case as reviewing authority or as the legal officer or staff judge advocate to the reviewing authority;
(I) Has forwarded charges in the case with a personal recommendation as to disposition;
(J) Upon a rehearing or new or other trial of the case, was a member of the court-martial which heard the case before;
(K) Is junior to the accused in grade or rank, unless it is established that this could not be avoided;
(L) Is in arrest or confinement;
(M) Has informed or expressed a definite opinion as to the guilt or innocence of the accused as to the offense charged;
(N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.

n142 *See generally United States v. White, 36 M.J. 284, 287 (C.M.A. 1993); United States v. Daulton, 45 M.J. 212, 217 (1996).*

n143 *45 M.J. at 218.*

n144 *Id. at 217. See also United States v. Smart, 21 M.J. 15 (C.M.A. 1985)* (stating military judge abused

his discretion when he failed to grant challenge against a victim of multiple armed robberies in a case of robbery).

n145 *See 45 M.J. at 217.*

n146 *Id.*.

n147 To preserve the issue on appeal, the defense counsel must clearly describe the body language that concerned him, as well as when the member exhibited the body language. For instance "While answering that she could consider all available forms of punishment, MSgt Doe crossed her arms in front of herself and visibly sat back in her chair. Additionally she was shaking her head no, while saying yes."

n148 *See* CECI AND BRUCK, *supra* note 60, at 107.

n149 *See also United States v. Mosqueda, 43 M.J. 491 (1996)* (holding member should have been excused after he consulted a physician about child abuse after trial had begun); *United States v. Kelley, 40 M.J. 515 (A.C.M.R. 1994)* (stating member whose family member had been raped should have been excused because incident left him angry and resentful).

n150 *See generally* John B. Meyers, et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony, 27 PACIFIC L.J. 1, 12, 25 (1996).*

n151 For a discussion on the use of prior inconsistent statements *see generally* Earl F. Martin, III, *Prior Inconsistent Statements and the Military Rules of Evidence*, 39 A.F. LAW REV. 207 (1996).

n152 *See* LARRY S. POZNER & ROGER J. DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES, 137 (1993). Pozner explains cross-examination preparation by using sequence of events charts.

n153 *Id.* at 155. Pozner discusses cross-examination preparation by using witness statement charts.

n154 Introduction of a videotape may also be beneficial to the defense if there is a question of suggestion. *See United States v. Casteel, 45 M.J. 379 (1996)* (allowing defense counsel to play videotape and cross-examined investigator about leading questions used in the interview).

n155 Recent studies have shown a child's age has the greatest impact on both credibility and conviction. Younger children, especially those around nine years old, are viewed by jurors as being more credible than older children, teenagers and adults. *See* Jessica Libergott Hamblen & Murray Levine, *The Legal Implications and Emotional Consequences of Sexually Abuse Children Testifying as Victim-Witnesses, 21 LAW & PSYCHOL. REV. 139, 145-154 (1997).*

n156 *United States v. Longstreath, 45 M.J. 366, 372 (1996)* citing *Maryland v. Craig, 497 U.S. 836, 856-57, 110 S. Ct. 3157, 3169-70, 111 L. Ed. 2d. 666 (1990).*

n157 *Id.* at 366.

n158 *United States v. Daulton, 45 M.J. 212 (1996).*

n159 Comprehensive Crime Control Act of 1990 § 225, *18 U.S.C. § 3509* (1990).

n160 *See U.S. v. Daulton, 45 M.J. 212, 219 (1996)* (holding Confrontation Clause was violated by requiring accused to leave the courtroom during the testimony and watch on closed-circuit television); *United States v. Williams, 37 M.J. 289 (C.M.A. 1993)* (allowing child to testify from a chair in the center of the courtroom where accused could see her profile); *United States v. Thompson, 31 M.J. 168 (C.M.A. 1990)* (stating Confrontation Clause not violated by allowing boys to testify with their backs to accused, facing military judge and counsel).

n161 *United States v. Banks, 36 M.J. 150, 160 (C.M.A. 1992).*

n162 *United States v. Birdsall, 47 M.J. 404 (1998).*

n163 *United States v. Whitted, 11 F.3d 782, 785* (8<th> Cir. 1993).

n164 *See 47 M.J. at 409* (citations omitted).

n165 *Id. at 410* (citations omitted).

n166 *United States v. Banks, 36 M.J. 150 (C.M.A. 1992).*

n167 *Id. at 163.*

n168 *See also United States v. Dollente, 45 M.J. 234 (1996)* (reversing for allowing expert to testify as a human lie detector); *United States v. Cacy, 43 M.J. 214 (1995)* (stating expert went too far when testified that she explained necessity of telling truth to child in order to determine if further treatment was necessary, then recommended further treatment, which were really euphemism for truthfulness of child); and *United States v. King, 35 M.J. 337, 342 (C.M.A. 1992)* (finding it error to permit expert to testify that 5 year old children lack the ability to fabricate allegations because of lack of sophistication) ("This type of testimony illustrates how dangerous it is for judges to receive uncritically just anything an expert wants to say. The evaluation of expert testimony does not end with a recitation of academic degrees. Everything the expert says has to be relevant, reliable, and helpful to the factfinder.").

n169 *United States v. Garcia, 40 M.J. 533, 536 (A.F.C.M.R. 1994)* (citations omitted), *aff'd, 44 M.J. 27 (1996).*

n170 *United States v. Dollente, 45 M.J. 234 (1996).*

n171 *Id. at 238.*

n172 *United States v. Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).*

n173 The defense counsel should consider such things as giving the accused a copy of the proof analysis to familiarize the client with the elements the military judge will talk with him about. The defense counsel may also ask the client to write out a statement explaining the offense. The client could use this as a basis for telling the judge in his own words why he is guilty of the charged offense.

n174 MCM, *supra* note 10, Uniform Code of Military Justice, Part IV paragraph 87, Article 134, Indecent Acts or Liberties With a Child.

n175 *See generally United States v. Williams, 41 M.J. 134* (C.M.A.) (holding expert can testify as to future dangerousness as it relates to relevant rehabilitative potential); *United States v. Prevatte, 40 M.J. 396 (C.M.A. 1994)* (explaining it is not plain error for government experts to recommend confinement as part of sentence).

n176 *But see United States v. Toro, 37 M.J. 313, 318 (C.M.A. 1993)* ("It is proper for the prosecutor to comment on appellant's refusal to admit guilt after the accused has either testified or has made an unsworn statement and had either expressed no remorse or his expressions of remorse can be arguably construed as shallow, artificial, or contrived." (citations omitted)).

n177 *See United States v. Banks, 36 M.J. 150, 160 (C.M.A. 1992).*

n178 HARPER LEE, TO KILL A MOCKINGBIRD (1960).

n179 *Id.* at 83-84.

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Chapter 27

Death Penalty Litigation

Marvin L. White, Jr.[1]

Scope of Chapter

While any work on death penalty litigation could encompass a treatise on criminal law, this chapter is limited to an overview of the criminal law as it applies specifically to the death penalty. The majority of the principles pertaining to the litigation of criminal cases apply to the litigation of capital cases. However, they will only be touched upon where they specifically apply to death penalty litigation.

Research References

Text References

Am. Jur. 2d, Criminal Law §§ 956 to 971

West's Digest References

Sentencing and Punishment ⇐1610 to 1799

Annotation References

Application of Death Penalty to Non-homicide Cases, 62 A.L.R. 5th 121

Sufficiency of Evidence, for Death Penalty Purposes, to Establish Statutory Aggravating Circumstance that Murder was Committed in Course of Committing, Attempting, or Fleeing from other Offense, and the Like-Post-Gregg Cases, 67 A.L.R. 4th 887

Sufficiency of Evidence, for Death Penalty Purposes, to Establish Statutory Aggravating Circumstance that Defendant Committed Murder while Under Sentence of Imprisonment, in Confinement or Correctional Custody, and the Like-Post-Gregg Cases, 67 A.L.R. 4th 942

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[1]Assistant Attorney General, Mississippi Attorney General's Office.

capital defendant choose between competing constitutional rights in order to have counsel appointed.[8]

§ 27:10 —Expert and investigative assistance

A criminal defendant, capital or otherwise, must outline the specific cost, value, and purpose of an expert or investigator to the trial court prior to such assistance being granted. The defendant must also show a substantial need to justify the appointment of an expert or investigator to assist at trial.[1] The granting or denial of expert or investigative assistance is left to the sound discretion of the trial court and the state has no role to play in the determination of the defendant's use of experts.[2] The application for funds to hire experts or investigators is often made *ex parte* defense. However, there is no requirement in state law requiring the trial court to consider these applications *ex parte* so long as the defendant's trial strategy is not prematurely revealed to the state.[3]

When a defense based on the sanity of the defendant is raised, the defendant must be furnished the cost of an examining psychiatrist and/or psychologist of the trial court's

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[8]Howard v. State, 697 So. 2d 415, 420 to 421 (Miss. 1997) (choice between right to speedy trial and right to counsel rendered waiver involuntary).

[Section 27:10]

[1]Burns v. State, 729 So. 2d 203, 223 to 224 (Miss. 1998) (request for independent psychiatrist was vague and therefore properly denied); Harrison v. State, 635 So. 2d 894, 900 to 902 (Miss. 1994) (denial of pathologist reversible error); Butler v. State, 608 So. 2d 314, 321 (Miss. 1992) (defendant evaluated by mental health experts at state hospital not entitled to independent examination); Hansen v. State, 592 So. 2d 114, 125 to 126 (Miss. 1991) (undeveloped assertions for investigator insufficient to require appointment).

See Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985) (Constitution does not require state to furnish investigator absent showing of substantial need).

West's Digest References: Sentencing and Punishment ⇐1746.

[2]Manning v. State, 726 So. 2d 1152, 1190 to 1191 (Miss. 1998).

[3]The trial court did not err in refusing to conduct a hearing on request for psychological evaluation *ex parte*, where the defendant was required by Uniform Rules of Circuit and County Court Practice Rule 9.07 to give notice of insanity defense prior to trial. McGilberry v. State, 741 So. 2d 894, 916 to 917 (Miss. 1999).

choosing.[4] If there is no reliance on the defense of insanity during the guilt phase of a capital murder trial, there is no right to an independent mental health examination.

The fact that a capital defendant meets the requirements to obtain the appointment of expert mental health assistance does not mean that the right is unfettered. The capital defendant does not have the right to a psychiatrist of his or her own choosing or to receive funds to hire the expert of choice. Instead a capital defendant only has the right to a competent mental health expert; the defendant is examined by an expert appointed by the court and has no right to an independent examination.[5] Where a defendant is evaluated by psychiatrist employed by the state mental hospital such an examination will satisfy the requirements of the constitution.[6] When a capital defendant is given the opportunity to be examined at the state hospital and refuses that examination the defendant has been given all that he or she is entitled to in the way of constitutional rights. The court does not have to provide other mental health professionals if the defendant refuses the examination at the state hospital.[7]

When the trial court grants a capital defendant a mental health examination, that examination is all to which a capital defendant is entitled. The trial court is not required to grant multiple psychiatric and psychological examinations

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[4]Miss. Code Ann. § 99-13-11; Willie v. State, 585 So. 2d 660, 671 to 672 (Miss. 1991); Ladner v. State, 584 So. 2d 743, 757 (Miss. 1991); Pinkney v. State, 538 So. 2d 329, 34 to 44 (Miss. 1988); Lanier v. State, 533 So. 2d 473, 480 to 481 (Miss. 1988); Nixon v. State, 533 So. 2d 1078, 1095 to 1097 (Miss. 1987).

[5]Woodward v. State, 726 So. 2d 524, 528 to 529 (Miss. 1997) (no right to mental health expert of choice, only access to competent one).

[6]Butler v. State, 608 So. 2d 314, 321 (Miss. 1992) (examination by doctors at state hospital sufficient to meet constitutional requirement); Willie v. State, 585 So. 2d 660, 671 (Miss. 1991); Cole v. State, 666 So. 2d 767, 781 (Miss. 1995); Lanier v. State, 533 So. 2d 473, 480 to 481 (Miss. 1988).

[7]Woodward v. State, 726 So. 2d 524, 528 to 529 (Miss. 1997) (constitutional requirement met where defendant offered examination at state hospital, but refused).

in efforts by the defendant to secure an expert who will testify favorably for him or her.[8]

Three of the possible mitigating factors in the Mississippi capital sentencing statute can involve factors that could, under the proper circumstances, entitle a capital defendant to the assistance of mental health experts.[9] However, when the state does not present mental health experts during the sentence phase to establish the future dangerousness of the defendant, there is no absolute right to the assistance of independent mental health experts.[10] Mental health experts once appointed, may testify as to what they observed during a competency examination and the testimony does not violate a defendant's Fifth Amendment rights as the expert is testifying to what he or she observed and not what the defendant said.[11] Further, there is no requirement that a mental health expert who is called to testify actually examine the capital defendant.

The expert's opinion may be based on the testimony of other witnesses he or she hears while sitting in the courtroom. The expert may also base his or her expert opinion on facts or data made known to him or her at or before the trial.[12] Finally, a mental health expert whose testimony is offered in mitigation by the defendant can be cross-examined as to his or her belief in the death penalty so

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[8]Willie v. State, 585 So. 2d 660, 671 (Miss. 1991) (not error to deny second mental examination); Hill v. State, 432 So. 2d 427, 437 to 438 (Miss. 1983).

[9]These mitigating circumstances are "(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;" "(e) The defendant acted under extreme duress or under the substantial domination of another person;" "(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Miss. Code Ann. § 99-19-105(6)(b), (e) & (f).

[10]Nixon v. State, 533 So. 2d 1078, 1095 to 1097 (Miss. 1987) (no right to independent mental health expert assistant where no reliance on insanity defense).

See Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087 (1985).

[11]Evans v. State, 725 So. 2d 613, 686 to 688 (Miss. 1997).

[12]It is not error to allow a mental health professional to testify without actually examining the defendant so long as the expert has a factual basis from what he or she has observed and been furnished regarding the defendant. McGilberry v. State, 741 So. 2d 894, 918 (Miss. 1999).

long as it is to determine any bias the expert may have in testifying.[13]

Because of the finality of the punishment in capital cases, experts that may not be allowed in cases carrying a lesser punishment, often become relevant. The court has approved the use of bite mark experts,[14] wound pattern experts,[15] hair and fiber experts,[16] and DNA experts[17] by both the state and the defense in capital trials.

As in all criminal trials, the determination of the necessary qualifications of a witness to be allowed to testify as an expert is left to the sound discretion of the trial court.[18] Once qualified the expert may testify as to his or her expert opinion on the matter for which he or she was called. However, it is error for a person who has not been offered or qualified as an expert wittiness to be allowed to state an opinion that would qualify as an expert opinion.[19]

§ 27:11 Discrimination in the application of the death penalty

In the litigation of death penalty cases, claims that the death penalty is being applied in a manner which discrimi-

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[13]West v. State, 725 So. 2d 872, 886 to 887 (Miss. 1998) (proper to allow defense mitigation witnesses to be questioned on belief regarding death penalty to show bias or interest).

[14]Howard v. State, 697 So. 2d 415, 428 to 429 (Miss. 1997) (bite marks).

[15]Puckett v. State, 737 So. 2d 322, 341 to 343 (Miss. 1999) (wound pattern analysis).

[16]Manning v. State, 726 So. 2d 1152, 1180 to 1181 (Miss. 1998) (hair and fiber analysis); Bevill v. State, 556 So. 2d 699, 707 (Miss. 1990).

[17]Gray v. State, 728 So. 2d 36, 54 to 57 (Miss. 1998) (DNA analysis).

[18]McGilberry v. State, 741 So. 2d 894, 918 (Miss. 1999) (psychiatrist); Puckett v. State, 737 So. 2d 322, 341 to 343 (Miss. 1999) (wound pattern analysis); Brewer v. State, 725 So. 2d 106, 125 (Miss. 1998) (forensic odontology); Davis v. State, 660 So. 2d 1228, 1259 to 1260 (Miss. 1995) (hair and fiber expert); Foster v. State, 639 So. 2d 1263, 1286 to 1287 (Miss. 1994) (pathologist); Jordan v. State, 464 So. 2d 475, 486 (Miss. 1985) (blood spatter expert).

The fact that a testifying expert has had problems with certifying or professional associations of which he is a member does not disqualify him as an expert, it only goes to the weight and credibility of testimony. Brewer v. State, 725 So. 2d 106, 125 to 126 (Miss. 1998).

[19]Walker v. State, 740 So. 2d 873, 881 to 883 (Miss. 1999) (error to allow law enforcement officer to state his opinion of position of victim when shot).

3.

EVIDENCE IN CHILD ABUSE AND NEGLECT CASES

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John E.B. Myers

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Contrast the limited expertise required for rehabilitation testimony with the extraordinary expertise required to provide substantive evidence in the form of an opinion that a child was sexually abused.[266] Only a small fraction of the professionals working with sexually abused children are qualified to provide such substantive evidence. The social worker described above—although qualified to offer rehabilitation testimony—is not qualified to offer an opinion that a child was sexually abused.[267]

Courts should keep in mind the different levels of expertise required for (1) expert testimony offered as substantive evidence of abuse, and (2) expert testimony limited to rehabilitation.[268] Courts should insist on expertise commensurate with the type of testimony offered. The U.S. Court of Appeals for the Armed Forces wisely observed the importance of judicial control of expert testimony on child sexual abuse.[269] The court wrote:

> This type of testimony illustrates how dangerous it is for judges to receive uncritically just anything an expert wants to say. The evaluation of expert testimony does not end with a recitation of academic degrees. *Everything the expert says* has to be relevant, reliable, and helpful to the factfinder. A rational and demonstrable basis is the *sine qua non* of expert opinion.[270]

In the area of child sexual abuse, professionals from several disciplines possess expertise.[271] In determining who is qualified to testify as an expert on child sexual abuse, it is important to emphasize that simply because a person holds a

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[266] See §§ **5.28–5.33.**

[267] There are social workers qualified to provide expert testimony that a particular child was sexually abused. *See* State v. Reser, 244 Kan. 306, 767 P.2d 1277 (1989).

[268] *See* State v. J.Q., 130 N.J. 554, 617 A.2d 1196, 1202 (1993) (court noted difference in qualifications needed for substantive testimony versus rehabilitation).

[269] United States v. King, 35 M.J. 337 (C.M.A. 1992).

[270] *Id.* at 342.

[271] Experts on child sexual abuse are drawn predominantly from psychology, medicine, psychiatry, nursing, and social work. *See* United States v. Lee, 28 M.J. 52 (C.M.A. 1989); People v. Harlan, 222 Cal. App. 3d 439, 271 Cal. Rptr. 653, 657 (1990) (master's-level social worker qualified); State v. Spigarolo, 210 Conn. 359, 556 A.2d 112, *cert. denied,* 493 U.S. 933 (1989) (social worker with master's degree qualified); State v. Reser, 244 Kan. 306, 767 P.2d 1277 (1989) (master's-level social worker qualified); State v. Black, 537 A.2d 1154 (Me. 1988) (nurse with bachelor's degree in nursing and master's in child psychology qualified); People v. Beckley, 434 Mich. 691, 456 N.W.2d 391, 400 (1990) (master's-level social worker, master's-level family counselor, and Ph.D. in psychology all qualified as experts on basis of "extensive firsthand experience with sexually abused children"); State v. McCoy, 400 N.W.2d 807 (Minn. Ct. App. 1987) (master's-level psychologist qualified); Hall v. State, 611 So. 2d 915 (Miss. 1992) (social worker and physician qualified); *In re* Nicole V., 71 N.Y. 2d 112, 518 N.E.2d 914, 524 N.Y.S.2d 19 (1987) (master's-level social worker qualified); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (social worker qualified); State v. Jensen, 141 Wis. 2d 333, 337, 415 N.W.2d 519, 521 (Ct. App. 1987), *aff'd,* 147 Wis. 2d 240, 432 N.W.2d 913 (1988) (master's-level school guidance counselor qualified).

particular degree does not mean the person is an expert.[272] It is clear that most physicians, psychiatrists, nurses, psychologists, and social workers are not qualified in the specialized field of child sexual abuse. Courts should insist on a showing of genuine expertise before allowing an individual to testify as an expert on child sexual abuse.[273]

§ 5.13 Bases for Expert Testimony

Rule 703 of the Federal Rules of Evidence describes the permissible bases for expert testimony. The rule states:

> 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.[274]

The facts and data on which experts on child sexual abuse base opinions come from many sources. Often, the expert has firsthand knowledge of the child from interviewing or treating the child.[275] Firsthand knowledge is not always required, however. In an appropriate case, an expert who has not met a child may testify about the child. For example, an expert might base testimony on videotaped interviews of the child and reports prepared by other professionals. Some forms of expert testimony do not require any knowledge of a child. This is so, for example, when rehabilitation testimony is offered to inform the jury that some sexually abused children recant or delay reporting abuse.

Under Rule 703, an expert may base testimony on information that would not be independently admissible in evidence, provided such information is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."[276] The Alaska Supreme Court observed that "Rule 703 explicitly allows an expert to rely on otherwise inadmissible evidence, so long as the material is of a type reasonably relied on by experts in the field."[277]

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[272] *See* United States v. King, 35 M.J. 337, 342 (C.M.A. 1992); State v. Wood, 194 W. Va. 525, 460 S.E.2d 771, 781 (1995) (not necessary that expert be psychiatrist or psychologist; in this case, social worker was qualified). See also 3 Weinstein's Evidence ¶ 704[04], at 702–61 ("Rule 702 recognizes that it is the actual qualifications of witnesses that matter, rather than titles").

[273] *See* State v. J.Q., 130 N.J. 554, 617 A.2d 1196 (1993); *In re* E.M., 137 Misc. 2d 197, 520 N.Y.S.2d 327 (Fam. Ct. 1987) (court stressed importance of making sure experts are qualified and following proper procedures).

[274] Fed. R. Evid. 703.

[275] *See* 3 Mueller & Kirkpatrick § 355, at 673; 3 *Weinstein's Evidence* ¶ 703[01].

[276] Fed. R. Evid. 703.

[277] Broderick v. King's Way Assembly of God Church, 808 P.2d 1211, 1217 (Alaska 1991).

The potentially inadmissible evidence most frequently relied on by experts on child abuse is written and verbal hearsay.[278] Writings include medical records, psychological reports, police records, social agency reports, and the child's written statements. Verbal statements of the child are often critical. A child's nonverbal conduct may be important. Verbal statements of parents and other adults play a role. Although some of the documents, verbal statements, and nonverbal conduct considered by an expert may be hearsay, Rule 703 permits the expert to rely on such information if reliance is reasonable.[279]

The trial judge determines under Rule 104(a) whether an expert's reliance on hearsay is reasonable.[280] Judge Weinstein and his colleagues write:

> In determining whether an expert's reliance on information is reasonable, the courts evaluate the opinion and its foundation on a case-by-case basis. In applying the second sentence of Rule 703, the decisions appear to be loosely divided between those taking a liberal approach and those taking a more restrictive view. The difference between these approaches is one of emphasis, and the court will admit or exclude the expert testimony under either approach (often without explicit reference to either) based on whether the proponent has shown reasonable reliance.[281]

The trial court in *In re Agent Orange Product Liability Litigation*[282] made an independent inquiry regarding the reliability of hearsay underlying expert testimony. The court wrote:

> Rule 703 permits experts to rely upon hearsay. The guarantee of trustworthiness is that it be of the kind normally employed by experts in the field. The expert is assumed, if he meets the test of Rule 702, to have the skill to properly evaluate the

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[278] *See* Miller v. State, 575 N.E.2d 272 (Ind. 1991). In *Miller*, the Indiana Supreme Court recognized that experts sometimes rely on hearsay. The court held, however, that a testifying expert may not simply repeat the out-of-court statement of another expert, when the other expert's statement does not form part of the basis of the testifying expert's opinion.

See also United States v. Combs, 39 M.J. 288 (C.M.A. 1994) (proper for defense psychiatrist to base opinion largely on hearsay); Hayes v. State, 1997 WL 155275 (Wyo. Apr. 4, 1997); 3 Mueller & Kirkpatrick § 351, at 635 ("hearsay in various forms routinely underlies expert testimony"); 3 *Weinstein's Evidence* ¶ 703[01].

[279] *See* Broderick v. King's Way Assembly of God Church, 808 P.2d 1211, 1217 (Alaska 1991) ("Evidence Rule 703 allows an expert to base an opinion on hearsay evidence"); Norris v. Gatts, 738 P.2d 344, 349 (Alaska 1987) ("Hearsay can be a permissible basis for opinion testimony"); *In re* J.R.B., 715 P.2d 1170, 1174 (Alaska 1986) (social workers could rely on information contained in reports of other workers to formulate opinions).

[280] *See* 3 *Weinstein's Evidence* ¶ 703[03], at 703–18 to 703–20 (1991), where the authors write:

> Before an expert will be permitted to testify upon the basis of facts not admissible in evidence, the court will have to make a preliminary determination pursuant to Rule 104(a) whether the particular underlying data is of a kind that is reasonably relied upon by experts in the particular field in reaching conclusions.

See also 3 Mueller & Kirkpatrick § 357, at 378–82.

[281] 3 *Weinstein's Evidence* ¶ 703[03], at 703–24.

[282] 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987).

> hearsay, giving it probative force appropriate to the circumstances. Nevertheless, the court may not abdicate its independent responsibilities to decide if the bases meet minimum standards of reliability as a condition of admissibility.[283]

Expert testimony based on unreliable hearsay can be excluded because it does not comport with the requirements of Rule 703.[284] Alternatively, the court may employ Rule 403 to exclude expert testimony based on unreliable hearsay.[285]

It is reasonable for experts on child sexual abuse to rely on hearsay. American law has long recognized that some hearsay is reliable. Indeed, out-of-court statements made for purposes of diagnosis or treatment are sufficiently reliable to merit an exception to the hearsay rule.[286] Physicians and other helping professionals routinely and necessarily rely on hearsay to make the most momentous decisions.[287] In the run of cases, reliance on hearsay is reasonable.[288]

§ 5.14 Form of Expert Testimony

Once the court determines that a witness is an expert, attention turns to the form of the expert's testimony. Federal Rule of Evidence 702 states that an expert may testify "in the form of an opinion or otherwise."[289] Expert testimony usually takes one of three forms: (1) an opinion; (2) a lecture providing the jury with background information; or (3) a response to a hypothetical question.

Opinion

The most common form of expert testimony is an opinion. For example, an expert might opine that a child demonstrates developmentally unusual sexual knowledge or awareness. Under the Federal Rules of Evidence, an expert may state an opinion without specifying the facts and data supporting the opinion.[290]

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[283] *Id.* at 1245.

[284] *See* 3 Mueller & Kirkpatrick § 354, at 672, where the authors write:

> FRE 703 does not pass full responsibility to the expert: It leaves room to reject testimony if reliance on the facts or data is unreasonable, in effect directing the trial judge to defer to the expert's explanation, but allowing the trial judge to reject opinion testimony that lacks a reasonable basis.

[285] 3 *Weinstein's Evidence* ¶ 703[03], at 703–40.

[286] Fed. R. Evid. 803(4). See § 7.38.

[287] *See* 3 Mueller & Kirkpatrick § 358, at 690 ("Doctors routinely testify on conventional physical injuries and more complicated diagnoses of ailments on the basis of reports and charts and medical records").

[288] *See* 3 Mueller & Kirkpatrick § 358, at 691 (psychological expert testimony can rest on hearsay).

[289] Fed. R. Evid. 702.

[290] Fed. R. Evid. 705.

As a practical matter, however, the expert is nearly always asked to describe the data on which the opinion rests. Information regarding the basis for the expert's opinion may precede or follow the opinion itself.

An expert's opinion must rest on a reasonable degree of certainty. The normal practice is to ask, "Do you have an opinion, based on reasonable medical [clinical, scientific] certainty, whether this child was sexually abused?" The "reasonable certainty" standard sounds more impressive than it is. Few authorities provide meaningful insight into the degree of certainty required to express an opinion, or on how "reasonable certainty" is defined or assessed.[291] It is clear experts may not speculate or guess.[292] It is equally clear experts do not have to be absolutely certain.[293] Mueller and Kirkpatrick write: "The fact that an expert cannot be categorical, and admits of some uncertainty in his conclusions, does not mean that his testimony fails the helpfulness requirement. Lay witnesses routinely testify to their recollection of events while admitting uncertainty, and at least as much latitude extends to experts."[294]

Locating "reasonable certainty" somewhere between the poles of guesswork and complete certainty adds little to the concept, and, in the end, the reasonable certainty standard fails to provide a meaningful tool to evaluate expert testimony. A more productive approach looks beyond the rubric of reasonable certainty, and asks questions that shed light on the factual and logical strength of the expert testimony. For example, in formulating an opinion, did the expert consider all relevant facts? How much confidence can be placed in the accuracy of the facts underlying the expert's opinion? Did the expert bring to bear an adequate understanding of pertinent clinical and scientific principles? Did the expert employ methods of assessment and analysis that are recognized as appropriate? Are the expert's inferences logical? Are the expert's assumptions reasonable? Is the expert reasonably objective? In the final analysis, the question is whether the expert's reasoning is logical, consistent, explainable, and defensible.

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[291] *See* Bert Black, A Unified Theory of Scientific Evidence, 56 *Fordham Law Review* 595–695 (1988).

[292] *See* 7 Wigmore § 1917, at 2 (discussing the origins of the opinion rule, Wigmore writes "the witness must speak as a knower, not merely a guesser"). *See also* State v. West, 103 N.C. App. 1, 404 S.E.2d 191, 195 (1991) (fact that doctor stated his opinion was educated guess did not render it inadmissible).

[293] *See* People v. Cegers, 7 Cal. App. 4th 988, 9 Cal. Rptr. 2d 297 (1992) ("lack of absolute scientific certainty does not constitute a basis for excluding the opinion"); People v. Mendibles, 199 Cal. App. 3d 1277, 1293, 245 Cal. Rptr. 553, 562 (1988) ("diagnosis need not be based on certainty, but may be based on probability; lack of absolute scientific certainty does not deprive the opinion of evidentiary value"); People v. Jackson, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971); Dupree v. County of Cook, 677 N.E.2d 1303, 1309 (Ill. Ct. App. 1997) ("Although an expert may not guess, conjecture, or surmise as to a possible cause for the injury, she can testify in terms of possibilities or probabilities as long as the opinion is based on a reasonable degree of medical certainty"); State v. West, 103 N.C. App. 1, 404 S.E.2d 191, 195 (1991) ("The existence of this margin of error also does not affect the admissibility of his testimony").

[294] 3 Mueller & Kirkpatrick § 350, at 629–30.

The weight accorded expert testimony derives from the answers to these questions.[295]

Expert witnesses are sometimes asked to express the certainty of their opinion in terms of the three legal standards of proof. Such requests are inappropriate. The degrees of proof are purely legal constructs, foreign to the process of clinical decision making about child abuse.

Lecture to Provide the Jury with Background Information

An expert may refrain from offering an opinion, and testify in the form of "a dissertation or exposition of scientific or other principles relevant to the case, leaving to the trier of fact to apply them to the facts."[296] An example of the lecture format is testimony designed to rehabilitate a child's credibility following cross-examination in which defense counsel points out that the child delayed reporting the abuse. On rebuttal, an expert may inform the jury that quite a few sexually abused children delay reporting.[297]

Turning from rehabilitation to substantive evidence of child sexual abuse, an expert might limit testimony to a lecture on the significance of developmentally unusual sexual behaviors in young children.[298] The expert may decide not to refer to the child in the case at hand, leaving it to other evidence to establish that the child demonstrated the sexual behaviors described by the expert. The jury will apply the information supplied by the expert to the facts of the case.

Hypothetical Question

An expert may answer a hypothetical question propounded by counsel. The hypothetical question was once ubiquitous. In recent years, however, the hypothetical has declined in popularity. Hypothetical questions sometimes confuse the jury and frustrate the expert.[299] Mueller and Kirkpatrick write that hypothetical questions have been criticized for two reasons. "First, they are at best an awkward means to get at the truth because they tend to be long, complicated and hard for everyone to understand. . . . Second such questions often have a distorting effect."[300] Wigmore is stronger in his condemnation:

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[295] *See* Bert Black, A Unified Theory of Scientific Evidence, 56 *Fordham Law Review* 595–695 (1988); Paul D. Reingold, The Basis of Medical Testimony, 15 *Vanderbilt Law Review* 473–534 (1962).

[296] Fed. R. Evid. 702 advisory committee's note. *See* 3 *Weinstein's Evidence* ¶ 702[05].

[297] For discussion of rehabilitation expert testimony, see §§ 5.48–5.49.

[298] See § 5.31.

[299] For a good example of counsel's misuse of the hypothetical question, see *Ingram v. McCuiston*, 261 N.C. 392, 134 S.E.2d 705 (1964).

[300] 3 Mueller & Kirkpatrick § 356, at 676.

§ 5.19 Medical Evidence of Child Sexual Abuse

Expert medical testimony plays an important role in child sexual abuse litigation.[434] Although medical evidence exists in only a minority of cases,[435] when such evidence is available, it is admissible.[436] For the most part, courts do not treat medical testimony as novel scientific evidence.[437]

[434] The material in this section draws heavily on the work of two leading authorities: Jan Bays, M.D., who is the director of the Child Abuse Response and Evaluation Services Program at Emanuel Hospital, Portland, Oregon, and David Chadwick, M.D., who is the former director of the Center for Child Protection, Children's Hospital, San Diego, California.

For discussion of the effect of base rates on the relevance of medical evidence of sexual abuse, see Crayton A. Fargason, Kristin Zorn, Carolyn Ashworth, & Kathy Fountain, Limitations of the Current Child Sexual Medical Literature from A Baysian Perspective, 2 *Child Maltreatment* 73–77 (1977).

[435] Most authors report that physical or laboratory evidence of child sexual abuse is found in 10% to 50% of cases. *See* Jan Bays & David Chadwick, Medical Diagnosis of the Sexually Abused Child, 17 *Child Abuse & Neglect* 91–110 (1993); Allan R. De Jong & Mimi Rose, Frequency and Significance of Physical Evidence in Legally Proven Cases of Child Sexual Abuse, 84 *Pediatrics* 1022–26 (1989); William F. Enos, Theodore B. Conrath, & James C. Byer, Forensic Evaluation of the Sexually Abused Child, 78 *Pediatrics* 385–98 (1986) (of 162 cases evaluated by forensic examiners for child sexual abuse, 26.5% of girls and 23% of boys had positive physical and/or laboratory evidence of abuse); Ellen Gray, *Unequal Justice: The Prosecution of Child Sexual Abuse* 91 (1993) (in this study of prosecution, "In the majority of the cases, there was no medical evidence"); Michael E. Lamb, The Investigation of Child Sexual Abuse: An Interdisciplinary Consensus Statement, 18 *Child Abuse & Neglect* 1021–28, at 1025–27 (1994); Carolyn J. Levitt, Sexual Abuse in Children, 80 *Postgraduate Medicine* 201–15, at 202 (1986) ("if disclosure of the abuse is delayed, which is common, physical findings are present in only 10% to 20% of cases"); William N. Marshall, Terry Puls, & Carol Davidson, New Child Abuse Spectrum in an Era of Increased Awareness, 142 *American Journal of Diseases of Children* 664–67 (1988) (of 382 children evaluated for abuse, 71% had normal findings on examination, including 48% with history of sexual penetration).

See also Mary Ellen Rimaza & Elaine H. Niggemann, Medical Evaluation of Sexually Abused Children: A Review of 311 Cases, 69 *Pediatrics* 8–14 (1982). In this clinical study, genital trauma was found in 16% of 311 children examined for sexual abuse. Nongenital trauma was found in 16%. Findings suggesting penetration were recorded in 32%. Genital trauma was more common in cases involving assault by a stranger (25%) than in assaults involving a known assailant (12%). The differences were attributed in part to greater delay in seeking medical examination for incest victims and victims of known assailants. The greater the delay before medical examination, the less likely the examination will reveal evidence of trauma. Of children with a history of penetration, 36% had genital trauma when examined within 24 hours of the assault, whereas only 13% had such trauma when examined after 24 hours. The need for prompt medical evaluation is clear.

[436] *See* United States v. Rivera, 43 F.3d 1291, 1295 (9th Cir. 1995) ("Dr. Greimann's testimony provided the court with pertinent medical information regarding Natasha's physical condition following the incident with Rivera. Such testimony is proper and helpful to the jury in making a determination of whether sexual intercourse was consensual or nonconsensual, which was an issue in this case"); Jordan v. State, 607 So. 2d 333, 338 (Ala. Crim. App. 1992) ("A physician is qualified to give his opinion regarding the cause of a physiological anomaly"); People v. Rowland, 4 Cal. 4th, 238, 841 P.2d 897, 14 Cal. Rptr. 2d 377 (1992) (adult rape victim; expert testimony that absence of genital trauma is not inconsistent with rape); People v. Cegers, 7 Cal.

App. 4th 988, 9 Cal. Rptr. 2d 297, 303 (1992) ("An expert may always give his opinion as to the cause of a particular injury or condition, and lack of absolute scientific certainty does not constitute a basis for excluding the opinion"); Turner v. Commonwealth, 914 S.W.2d 343 (Ky. 1996); State v. Schaefer, 855 S.W.2d 504 (Mo. Ct. App. 1993) (rape of 15-year-old; examining physician opined victim had been raped; appellate court approved testimony, writing that "[i]t is generally accepted that a physician may give an opinion that a rape victim's wounds were caused by forceful sexual intercourse"); State v. Max, 1 Neb. App. 257, 492 N.W.2d 887 (1992); Commonwealth v. Hernandez, 420 Pa. Super. 1, 615 A.2d 1337, 1343 (1992) ("It is not erroneous for a treating physician to testify that the physical facts he observed were consistent with the allegation of rape"); State v. Elm, 201 Wis. 2d 452, 549 N.W.2d 471 (1996).

See also United States v. Whitted, 11 F.3d 782, 785–86 (8th Cir. 1993), where the court wrote:

> A doctor can also summarize the medical evidence and express an opinion that the evidence is consistent or inconsistent with the victim's allegations of sexual abuse. Because jurors are equally capable of considering the evidence and passing on the ultimate issue of sexual abuse, however, a doctor's opinion that sexual abuse has in fact occurred is ordinarily neither useful to the jury nor admissible. A doctor also cannot pass judgment on the alleged victim's truthfulness in the guise of a medical opinion, because it is the jury's function to decide credibility.

In *Whitted,* the Eighth Circuit ruled that "Dr. Likness's diagnosis of 'repeated child sexual abuse,' however, went too far." *Id.* at 786.

The results of a pilot study indicate medical evidence of sexual abuse does not always increase the likelihood of conviction. *See* Allan R. De Jong & Mimi Rose, The Frequency and Significance of Physical Evidence in Legally Proven Cases of Child Sexual Abuse, 142 *American Journal of Diseases of Children* 406 (1988), where the authors write:

> Clinicians have long recognized that physical evidence of injury, sexually transmitted diseases, or seminal fluid is often absent in cases of child sexual abuse. Some legal experts argue that this clinical observation is based on alleged rather than "proven" cases. To determine the frequency and significance of physical evidence in legally "proven" felony cases, a pilot study was done using a retrospective review of court records of felony child sexual abuse.
>
> Forty-five randomly selected cases were reviewed and abstracted, of which 39 cases (87%) had resulted in conviction of the perpetrator on felony charges. . . .
>
> No significant difference in rate of felony conviction was found in cases with or without physical evidence of injury, sexually transmitted diseases, or seminal fluid. Thirty (94%) of 32 cases without physical evidence resulted in felony conviction; the remaining two cases resulted in a misdemeanor conviction and an acquittal. Only nine (69%) of 13 cases with physical evidence resulted in felony conviction; the remaining four cases resulted in two misdemeanor convictions and two acquittals. Thus an interesting trend was found for a higher rate of convictions in cases without physical evidence. The children's age or sex, the types of sexual contact, the relationship of the perpetrator to the victim, the number of victims or perpetrators involved in a single case, the duration of the abuse, the interval from the time of disclosure to the trial, and the testimony of the examining or an expert physician were not shown to affect the legal outcome of the cases.

Id. at 406. *See also* Allan R. De Jong & Mimi Rose, Legal Proof of Child Sexual Abuse in the Absence of Physical Evidence, 88 *Pediatrics* 506–11 (1991); Allan R. De Jong & Mimi Rose, Frequency and Significance of Physical Evidence in Legally Proven Cases of Child Sexual Abuse, 84 *Pediatrics* 1022–26 (1989).

[437] *See* People v. Rowland, 4 Cal. 4th 238, 841 P.2d 897, 14 Cal. Rptr. 2d 377, 394 (1992). For discussion of novel scientific evidence, see §§ **5.16–5.18.**

When there is no medical evidence of abuse, a physician may assist jurors by informing them that lack of medical evidence does not rule out abuse.[438] Jurors may expect that certain types of sexual abuse necessarily cause physical injury.[439] For example, jurors may believe sexual intercourse necessarily damages the hymen. Although penile penetration past the hymen often injures hymenal tissue, injury is not inevitable.[440] Moreover, smaller objects, such as a finger, may well cause no damage.[441] If the defense argues that abuse did not occur because there was no injury, expert medical testimony may be admitted to help the jury understand that lack of injury does not necessarily mean the child was not abused.[442]

Child sexual abuse is a recognized medical diagnosis.[443] To reach a diagnosis of sexual abuse, a complete medical evaluation is required. The evaluation

[438] *See* Kosbruk v. State, 820 P.2d 1082, 1086 (Alaska Ct. App. 1991) (experienced police officer allowed to testify that "it would not be unusual for a sexual abuse complaint to be uncorroborated by medical evidence"); People v. Rowland, 4 Cal. 4th 238, 841 P.2d 897, 14 Cal. Rptr 2d 377, 394 (1992) (proper for prosecutor to offer expert testimony "to the effect that the absence of genital trauma is not inconsistent with nonconsensual sexual intercourse"; court rejected defense argument that such testimony is admissible only "in response to evidence or argument that 'no genital trauma' means 'no rape'"); Turner v. Commonwealth, 914 S.W.2d 343, 344 (Ky. 1996) (not error to allow two physicians to testify that although their examination was normal, "such negative findings of physical scarring, tears, etc., did not necessarily indicate that the sexual abuse complained of did not occur"); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (physician's testimony describing common behaviors of sex offenders was proper to explain why doctor found only a small tear; doctor was not offering testimony that defendant fit profile of perpetrator; rather, doctor's testimony that many offenders are gentle was needed to explain finding on physical examination).

See Michael E. Lamb, The Investigation of Child Sexual Abuse: An Interdisciplinary Consensus Statement, 18 *Child Abuse & Neglect* 1021, 1026 (1994) ("the absence of physical signs does not prove that no abuse occurred").

[439] *See* Susan Morison & Edith Greene, Juror and Expert Knowledge of Child Sexual Abuse, 16 *Child Abuse & Neglect* 595–613, at 607 (1992) (in this empirical study of persons eligible for jury duty, potential jurors were less knowledgeable than experts "that in the majority of cases there is no physical evidence to substantiate the allegation").

[440] *See* Joyce A. Adams & Sandra Knudson, Genital Findings in Adolescent Girls Referred for Suspected Sexual Abuse, 150 *Archives of Pediatric and Adolescent Medicine* 850–57 (1996) (an intact hymen does not prove no penetration).

[441] *See* Martin A. Finkel & Allan R. De Jong, Medical Findings in Child Sexual Abuse, *in Child Abuse: Medical Diagnosis and Management* 185–247, at 215 (Robert M. Reece ed., 1994) (Philadelphia: Lea & Febiger) ("one would anticipate that if an object the size of a penis was introduced through the hymenal orifice of a prepubertal child, obvious residual should be apparent. . . . Smaller diameter objects, such as a digit, are less likely to result in residual damage").

[442] *See* Turner v. Commonwealth, 914 S.W.2d 343 (Ky. 1996).

[443] *See* State v. Wilson, 121 Or. App. 460, 855 P.2d 657 (1993) ("A medical doctor is not precluded from testifying as to her diagnosis simply because the jury may infer from that testimony that another witness is or is not telling the truth"). *See also* Jan Bays & David Chadwick, Medical Diagnosis of the Sexually Abused Child, 17 *Child Abuse & Neglect* 91–110, at 92 (1993); Dubowitz, Black, & Harrington, The Diagnosis of Child Sexual Abuse, 146 *American Journal of Diseases of Childhood* 688 (1992).

consists of a medical history, a physical examination, and, when appropriate, laboratory tests.

In formulating diagnostic impressions, physicians often consider information that is not strictly medical in nature.[444] The psychological effects of sexual abuse are often as important as the results of laboratory tests and physical examinations.[445] When physicians rely on psychological indicators of abuse, they depart the realm reserved exclusively for medical professionals, and enter the arena of expertise shared by medical and mental health professionals.

§ 5.20 —Medical History

A patient's medical history includes the chief complaint, the history of the present illness, past medical history, family history, psychosocial history, and a review of body systems.[446] With children, much of the historical information is gathered from adults.[447]

The child's medical history is pertinent in several ways to diagnosis and treatment of possible sexual abuse.[448] The history helps the physician exclude or confirm a diagnosis of abuse.[449] The history helps ascertain if a child is at risk of further abuse. For example, the history may reveal that the perpetrator is still in the home, or still has access to the child, or that there are other perpetrators. The history is vital to the physician's decisions about laboratory tests and referral to specialists. The history may determine the physician's recommendations for medical or psychological therapy. Finally, the history assists in determining a prognosis.

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[444] *See* State v. Wilson, 121 Or. App. 460, 855 P.2d 657 (1993).

[445] See **§ 5.3.**

[446] Elmer L. Degowin & Richard L. Degowin, *Bedside Diagnostic Examination* 15–16 (3d ed. 1976) (New York: Macmillan).

[447] *See* Elmer L. Degowin & Richard L. Degowin, *Bedside Diagnostic Examination* 12–13 (3d ed. 1976) (New York: Macmillan), where the authors write:

> The medical history is an account of the events in the patient's life that have relevance to his mental and physical health. Much more than the patient's unprompted narrative, it is a specialized literary form in which the physician composes and writes an account based upon facts, supplied by the patient or other informants, offered spontaneously or secured by skillful probing. Items are accepted for the record only after rigorous evaluation by the physician, who employs his knowledge of the natural history of diseases to secure pertinent details and establish the sequence of events.

[448] *See* Robert M. Reece, Comment, 1 *Quarterly Child Abuse Medical Update* 1 (Mar. 1994) (published by Massachusetts Society for the Prevention of Cruelty to Children) ("It is now generally agreed that the child's history and behaviors are the most important elements in the diagnosis of child sexual abuse").

[449] *See* State v. Wilson, 121 Or. App. 460, 855 P.2d 657 (1993); Commonwealth v. Hernandez, 420 Pa. Super. 1, 615 A.2d 1337, 1343 (1992) ("The medical history of a patient is customarily relied upon in practicing medicine").

> Indeed, in these cases the hymen is usually not torn at all, and penetration occurs at the lateral margins of the labia minora with the wound entering the vagina through its walls rather than through the hymen." . . .
>
> Anal and genital injuries can occur accidentally. Straddle injuries are usually unilateral, external, anterior, and have an associated history of acute, dramatic injury. . . . Children may incur severe genital injuries by falling on sharp, penetrating objects, but there should be a history of acute trauma which all but the youngest infants will readily give.[481]

As Bays and Chadwick observe, there is very little evidence that tampons damage the hymen.[482] Emans and her colleagues write that "[o]nly nonsignificant changes in genital anatomy could be detected in association with tampon use. For physicians testifying in court about sexual assault cases, complete clefts noted in adolescents cannot be attributed to prior tampon use, sports participation, or gynecological examinations."[483]

Finkel and De Jong provide further insight regarding accidental genital injury:

> Accidental injuries to the genitalia do occur and the pattern of trauma and the accompanying history are usually suggestive of its etiology. Most accidental injuries are the result of a child falling on the horizontal bar of a bicycle, jungle gym, or the classic "picket fence." The horizontal bar usually results in a crush injury of the clitoral hood/labia minora between the bar and the inner aspect of the thigh. This injury is usually unilateral. "Picket" injuries are more likely to be impaling. . . . Masturbation is unlikely to result in any injuries to the genitalia other than localized erythema or superficial abrasions as a result of rubbing. Children do insert objects between the labia, but they rarely do so in a forceful way that would result in injury because of the exquisite sensitivity of the hymenal tissue. Any findings of trauma to the hymen should be presumed not to be self-inflicted.[484]

In the absence of congenital deformities of the genitalia, all females are born with a hymen.[485] Finkel and De Jong write:

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[481] Jan Bays & David Chadwick, Medical Diagnosis of the Sexually Abused Child, 17 *Child Abuse & Neglect* 91–110, at 97–98 (1993).

[482] *See* S. Jean Emans, Elizabeth R. Woods, Elizabeth N. Allred, & Estherann Grace, Hymenal Findings in Adolescent Women: Impact of Tampon Use and Consensual Sexual Activity, 125 *Journal of Pediatrics* 153, 159 (1994).

[483] *See* S. Jean Emans, Elizabeth R. Woods, Elizabeth N. Allred, & Estherann Grace, Hymenal Findings in Adolescent Women: Impact of Tampon Use and Consensual Sexual Activity, 125 *Journal of Pediatrics* 153, 159 (1994).

[484] Martin A. Finkel & Allan R. De Jong, Medical Findings in Child Sexual Abuse, *in Child Abuse: Medical Diagnosis and Management* 185–247, at 221 (Robert M. Reece ed., 1994) (Philadelphia: Lea & Febiger).

[485] *See* Jan Bays & David Chadwick, Medical Diagnosis of the Sexually Abused Child, 17 *Child Abuse & Neglect* 91–110 (1993); Carole Jenny, Mary L.D. Kuhns, & Fukiko Arakawa, Hymens in Newborn Female Infants, 80 *Pediatrics* 399–400 (1987); Naomi Mor & Paul Merlob, Congenital Absence of the Hymen Only a Rumor?, 82 *Pediatrics* 679 (1988). In the second and third studies, a total of 26,199 infant girls were examined. All had hymens.

> One misconception is the existence of an entity known as congenital absence of the hymen. . . . Absence of the hymen cannot and does not exist on an embryologic basis as a sole congenital anomaly. It may be absent in the presence of other major urogenital anomalies of which the least significant concern is the presence or absence of the hymen. If the genitourinary tract is normally developed, the hymen is present.[486]

In boys, findings of sexual abuse outside the anal area are rare.[487] Genital injuries that have been described include bruises of the penis or perineum[488] and tears of the foreskin frenulum.[489]

Anal Examination

Damage to the anus occasionally follows sexual abuse.[490] Information concerning the anus is useful.[491] When the buttocks are spread, the folds of skin around the anal verge can be seen. The verge is the anal margin where a transition occurs between the hairy skin and the smooth perianal area. The anal canal begins just inside the anal verge. The anal canal is about one and one-half inches long in an adult and contains the external and internal anal sphincters, the circular muscles which open and shut to allow passage of flatus and stool. If penetration into the anus occurs, damage to tissue or muscle may or may not occur, depending on the size of the child, the size of the penetrating object, and use of force or lubrication.[492] An object the size of a finger or a penis can be passed into the

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[486] Martin A. Finkel & Allan R. De Jong, Medical Findings in Child Sexual Abuse, *in Child Abuse: Medical Diagnosis and Management* 185–247, at 212 (Robert M. Reece ed., 1994) (Philadelphia: Lea & Febiger).

[487] *See* Jan Bays & David Chadwick, Medical Diagnosis of the Sexually Abused Child, 17 *Child Abuse & Neglect* 91–110, at 97–98 (1993).

[488] *See* Mary J. Spencer & Patricia Dunklee, Sexual Abuse of Boys, 78 *Pediatrics* 133–37 (1986).

[489] Hobbs & Wynne, Management of Sexual Abuse, 62 *Archives of Diseases of Childhood* 1182, 1185 (1987).

[490] *See* Martin A. Finkel & Allan R. De Jong, Medical Findings in Child Sexual Abuse, *in Child Abuse: Medical Diagnosis and Management* 185–247 (Robert M. Reece ed., 1994) (Philadelphia: Lea & Febiger). The authors write that the significance of many anal findings remain controversial in the medical community. *Id.* at 217. The authors write that "[o]f all of the physical findings considered to result from chronic anal penetration, the most controversial is the reflexive dilatation of the buttocks with separation. . . . On its own, this sign should not be interpreted as abnormal." *Id.* at 218.

[491] This information was supplied to the author by Jan Bays, M.D., Director of the child protection program at Emanuel Hospital, Portland, Oregon.

[492] *See* Michael E. Lamb, Investigation of Child Sexual Abuse; An Interdisciplinary Consensus Statement, 18 *Child Abuse & Neglect* 1021, at 1027 (1994), where the author writes:

> Perianal injuries caused by sexual abuse occur relatively infrequently and are more difficult to detect [than genital injuries]. Although severe physical injuries can result from a violent act of sodomy, it is less clear what tissue changes should be expected following ongoing, relatively gentle penetration of the anal orifice when a lubricant is

anus without damage. Bays and Chadwick remind us that "the anal sphincter allows routine passage of stools larger than the diameter of a penis without damage."[493]

§ 5.22 —Conditions Mistaken for Abuse

A variety of diseases and conditions can be confused with sexual abuse.[494] For example, "many parents become suspicious of sexual abuse on noting that their child has 'a red bottom.'"[495] Bays writes, however, that "[e]rythema [redness] of the anogenital area is a nonspecific sign with numerous causes: poor hygiene, diaper dermatitis, intertrigo, sensitivity to bubble bath and dyes used in toilet products, pinworms, and candidal infection."[496] Bays and Chadwick write that "[i]n the process of diagnosing a patient, the physician formulates a differential diagnosis to 'determine which one of two or more diseases or conditions a patient is suffering from, by systematically comparing and contrasting their clinical findings.' This process also occurs in the diagnosis of sexual abuse."[497]

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used. As a result, considerable controversy persists concerning the evaluation of perianal signs (including anal dilation reflexes) in a child who may have experienced anal penetration. Other perianal soft tissue damage is similarly difficult to interpret when the history is unclear or the child is very young. As with genital trauma, perianal injuries heal rapidly, leaving little evidence of previous tissue damage.

See also John McCann, Donald Reay, Joseph Siebert, Boyd Stephens, & Stephen Wirtz, Postmortem Perianal Findings in Children, 17 *American Journal of Medical Pathology* 289–98 (1996) (anal dilation by itself not marker of sexual abuse).

[493] Jan Bays & David Chadwick, Medical Diagnosis of the Sexually Abused Child, 17 *Child Abuse & Neglect* 91–110, at 94 (1993).

See Carolyn J. Levitt, Sexual Abuse in Children, 80 *Postgraduate Medicine* 201–15, at 204 (1986), where the author writes:

> Young children, naive about sexual practices, will usually not know that something can penetrate deep into the vagina (or rectum). Their own definition of "inside" as evidenced by their answers or as demonstrated on an anatomically correct doll, may not in fact, turn out to actually mean deep, or even any, penetration. Precise definition of the child's idea of penetration can be arrived at by having her compare the sensations occurring at the time of examination with those felt at the time of abuse.

[494] *See* Jan Bays & David Chadwick, Medical Diagnosis of the Sexually Abused Child, 17 *Child Abuse & Neglect* 91–110, at 94 (1993); Jan Bays & Carole Jenny, Genital and Anal Conditions Confused with Child Sexual Abuse Trauma, 144 *American Journal of Diseases of Children* 1319 (1990).

[495] Jan Bays, Conditions Mistaken for Child Sexual Abuse, *in Child Abuse: Medical Diagnosis and Management* 386–403, at 386 (Robert M. Reece ed., 1994) (Philadelphia: Lea & Febiger).

[496] Jan Bays, Conditions Mistaken for Child Sexual Abuse, *in Child Abuse: Medical Diagnosis and Management* 386–403, at 386 (Robert M. Reece ed., 1994) (Philadelphia: Lea & Febiger).

[497] *See* Jan Bays & David Chadwick, Medical Diagnosis of the Sexually Abused Child, 17 *Child Abuse & Neglect* 91–110, at 95 (1993).

Photographs taken with a colposcope may be used to illustrate medical testimony.[513] In *State v. Noltie*,[514] the Washington Supreme Court ruled that colposcopic photographs were admissible, writing that "[a]ccurate photos are admissible if their probative value outweighs any prejudicial effect. Here, the photos were highly relevant, and no prejudice has been demonstrated."[515]

§ 5.26 —Admissibility of Medical Evidence

Expert testimony regarding medical evidence of sexual abuse is admissible.[516] Although physicians are the most common medical witnesses, nurses and physicians' assistants may provide expert testimony.[517] Medical witnesses may describe injuries and explain their cause.[518] Courts permit experts to state whether injuries could happen in a particular way.[519] Furthermore, experts may state whether a caretaker's explanation of injuries is reasonable.[520]

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[513] *See* Ashcraft v. State, 918 S.W.2d 648 (Tex. Ct. App. 1996) (not error to allow doctor to illustrate her testimony with colposcopic photograph of victim's hymen); State v. Noltie, 116 Wash. 2d 831, 809 P.2d 190, 202 (1991); State v. Stevens, 58 Wash. App. 478, 794 P.2d 38 (1990).

[514] 116 Wash. 2d 831, 809 P.2d 190 (1991).

[515] 809 P.2d at 202–03.

[516] *See* Marcum v. State, 299 Ark. 30, 771 S.W.2d 250, 253 (1980) (not error to admit testimony from physician that physical examination of victim indicated "physical characteristics consistent with prolonged sexual activity"); People v. Mendibles, 199 Cal. App. 3d 1277, 245 Cal. Rptr. 553 (1988); State v. Butler, 256 Ga. 448, 349 S.E.2d 684 (1986); People v. Land, 178 Ill. App. 3d 251, 533 N.E.2d 57 (1988); Owens v. State, 514 N.E.2d 1257 (Ind. 1987); Commonwealth v. Melchionno, 29 Mass. App. Ct. 939, 558 N.E.2d 18, 20–21 (1990); People v. Vasher, 167 Mich. App. 452, 423 N.W.2d 40 (1988); State v. Baker, 320 N.C. 104, 357 S.E.2d 340 (1987); State v. Norris, 101 N.C. App. 144, 398 S.E.2d 652, 655 (1990) (evidence of medical examination conducted two years following abuse admissible); State v. Boston, 46 Ohio St. 3d 108, 545 N.E.2d 1220, 1239–40 (1989); Zuniga v. State, 811 S.W.2d 177 (Tex. Ct. App. 1991); State v. Gribble, 60 Wash App. 374, 804 P.2d 634 (1991); State v. Young, 60 Wash. App. 95, 802 P.2d 829 (1991); Montoya v. State, 822 P.2d 363 (Wyo. 1991).

[517] *See* State v. Benny E., 110 N.M. 237, 794 P.2d 380, 388 (Ct. App. 1990) (nurse practitioner with extensive experience qualified as expert on medical aspects of sexual abuse); State v. Macias, 110 N.M. 246, 794 P.2d 389, 395 (Ct. App. 1990) ("We see no need for Nurse Tulk to have been a physician or to have her diagnosis confirmed by a physician in order for her to qualify as an expert witness in this area").

[518] *See* People v. Mendibles, 199 Cal. App. 3d 1277, 1293, 245 Cal. Rptr. 553, 562 (1988) ("it is settled by 'a long line of California decisions' that an expert medical witness is qualified 'to give an opinion of the cause of a particular injury on the basis of the expert's deduction from the appearance of the injury itself'").

[519] *See* Owens v. State, 514 N.E.2d 1257 (Ind. 1987).

[520] *See* State v. Tanner, 675 P.2d 539, 544 (Utah 1983) (physical abuse case). See also § 4.11.

Friedrich and his colleagues conducted research on sexual behaviors in abused and nonabused children. See § 5.31. It is possible to apply Lyon and Koehler's relevance ratio to some of the sexual behaviors studied by Friedrich.[601] **Figure 5–5** contains relevance ratios based on Friedrich's research. The numerator in each ratio represents sexually abused children. The denominator represents nonabused children. The numbers in each ratio are the frequency at which the sexual behavior was observed in a sample of children, expressed as a percentage. With the behavior "puts mouth on sex parts," for example, the relevance ratio for girls age two to six is 12.2:0.00, meaning that 12.2 percent of the sexually abused girls demonstrated this behavior whereas none of the nonabused girls did so.

The relevance ratio does not make a simple matter out of the complex task of evaluating symptoms and behaviors. It is not a test for sexual abuse. Yet, the relevance ratio helps clarify thinking. Moreover, the ratio keeps the focus squarely on the denominator (percent of *non*abused children) and this focus is essential to avoid the trap of overvaluing symptoms simply because they occur in abused children.[602]

§ 5.33 When Is Evidence of Child Sexual Abuse Strong or Weak?

When evaluating evidence of sexual abuse, one thing seems clear: There are no easy answers. No single symptom or behavior—sexual or nonsexual—is pathognomonic of abuse.[603] Moreover, there is no psychological syndrome or

[601] The relevance ratios contained in **Figure 5** are adapted from data reported in William Friedrich, Sexual Behavior in Sexually Abused Children, 3 *Violence Update* 1 (Jan. 1993). *Violence Update* is no longer published. Readers wishing a copy of the cited article may contact me at Phone: (916) 739-7176; FAX (916) 739-7272. Or write to me at McGeorge School of Law, 3200 5th Ave., Sacramento, CA 95817.

See also William N. Friedrich, Patricia Grambsch, Linda Damon, Sandra K. Hewitt, Catherine Koverola, Reuben A. Lang, Vicki Wolfe, & Daniel Broughton, Child Sexual Behavior Inventory: Normative and Clinical Comparisons, 4 *Psychological Assessment* 303–11 (1992).

[602] *See* Roberta A. Hibbard & Georgia L. Hartman, Behavioral Problems in Alleged Sexual Abuse Victims, 16 *Child Abuse & Neglect* 755–62, at 755 (1992), where the authors write:

> Behavioral indicators of sexual abuse are signs and symptoms that may result from abusive experiences. They are not, however, specific to sexual abuse, as many of these behaviors are nonspecific signs of distress. Some professionals place considerable importance on the presence of an indicator as suggesting sexual abuse. Little attention is paid to the frequency of such behaviors among the population of children at large.

Hibbard and Hartman warn "against over interpreting" symptoms that are seen in nonabused as well as abused children. *Id.* at 760.

[603] *See* Lois B. Oberlander, Psycholegal Issues in Child Sexual Abuse Evaluations: A Survey of Forensic Mental Health Professionals, 19 *Child Abuse & Neglect* 475–90 at 481 (1995) ("In general, however, it has been difficult to isolate pathognomonic psychological reactions to sexual abuse").

	Girls Age 2-6	Girls Age 7-12	Boys Age 2-6	Boys Age 7-12
Puts mouth on sex parts	12.2 / 0.0	4.4 / 0.0	17.1 / 0.4	16.7 / 0.0
Asks to engage in sex acts	10.8 / 0.0	14.2 / 0.6	22.0 / 1.2	20.8 / 0.0
Masturbates with object	21.6 / 0.8	7.1 / 1.7	17.1 / 0.8	4.2 / 0.0
Inserts objects in vagina/anus	28.4 / 2.8	3.5 / 0.6	19.5 / 0.0	10.4 / 0.0
Imitates intercourse	21.6 / 0.4	8.0 / 1.1	19.5 / 0.8	16.7 / 2.4
Sexual sounds	17.6 / 0.8	8.0 / 0.6	14.6 / 0.4	25.0 / 3.9
French kisses	21.6 / 4.0	5.3 / 1.7	19.5 / 1.6	10.4 / 2.4
Initiates sexual behavior with dolls	21.6 / 4.0	15.0 / 7.5	22.0 / 0.8	12.5 / 1.5

Figure 5–5. These data are based on William Friedrich, Sexual Behavior in Sexually Abused Children, 3 *Violence Update* 1 (1993).

profile that can detect or diagnose child sexual abuse.[604] With this in mind, it is appropriate to ask: When is it logical to place the most confidence in evidence of sexual abuse, whether the evidence is presented through lay witnesses or experts? In many cases the greatest confidence is warranted when there is a coalescence of five types of data:

1. Developmentally unusual sexual behavior, knowledge, or symptoms providing relatively strong evidence of sexual experience (for example, four-year-old with detailed knowledge of fellatio, including ejaculation) (**§ 5.31**)
2. Nonsexual behavior or symptoms commonly observed in sexually abused children (for example, nightmares and regression) (**§ 5.30**)[605]
3. Medical evidence of sexual abuse (**§§ 5.19–5.26**)
4. Convincing disclosure by the child (**Chapter 1**), and
5. Evidence that corroborates the abuse (for example, inculpatory statements by the alleged perpetrator) (**§§ 7.51** and **7.52**).

Confidence in the evidence typically—although not invariably—grows as the amount and quality of evidence increases. For example, confidence may grow as the number or persuasiveness of developmentally unusual sexual behaviors increases, as the types of nonsexual symptoms expand, as the strength of medical evidence increases, as the corroborating evidence becomes more convincing, and when there is evidence that the professionals who interviewed the child used proper questioning techniques.

Confidence in the evidence of sexual abuse typically—although not invariably—declines as the amount and quality of evidence decreases. The decline in confidence is sometimes quite precipitous, especially when relatively strong evidence is lacking. For example, suppose there is no medical evidence, the child demonstrates none of the developmentally unusual sexual behaviors that are related to sexual abuse, and there is no corroborating evidence. In such a case, the evidence of sexual abuse consists entirely of nonsexual symptoms (for example, nightmares), and the child's disclosure. Although one may place confidence in such evidence (depending largely on the strength of the child's words), the evidence is less persuasive without the medical evidence, sexualized behavior, and corroboration.

Now, take the process one step further. Imagine a case in which the only evidence of sexual abuse is nonsexual behaviors commonly observed in sexually abused children (for example, nightmares). No longer is there any medical evidence, developmentally unusual sexual behavior, corroboration, or convincing disclosure. In this state of affairs, of course, one can place no confidence in the evidence because of the base rate effect.

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[604] See **§ 5.28**.

[605] Nonsexual symptoms and behaviors shared by abused and nonabused children can be relevant. It is only when such symptoms are considered in isolation that the base rate effect robs them of any probative value.

One should not conclude from the foregoing that quantity of evidence is a satisfactory basis for decision making. In one case, two or three items of evidence provide convincing proof of abuse while, in another case, a plethora of evidence fails to persuade. Decision making rests on careful assessment of the quantity, quality, and context of the evidence.

§ 5.34 Case Law on Expert Psychological Testimony Offered as Substantive Evidence

Sections 5.35 through **5.37** discuss case law on expert psychological testimony offered as substantive evidence of child sexual abuse.

Expert testimony offered as substantive evidence takes several forms. For example, an expert might testify that a child has a diagnosis of child sexual abuse.[606] Alternatively, an expert might opine that a child's symptoms are consistent with sexual abuse.[607] Other permutations are possible.[608] Whatever form the testimony takes, the purpose is the same: To prove that abuse occurred or, if the evidence is offered by the accused, to prove that abuse did not occur.

Among mental health professionals, there is disagreement about expert testimony offered as substantive evidence of sexual abuse.[609] Melton and Limber

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[606] There is some disagreement concerning whether diagnostic terminology should be used to describe psychological determinations of child sexual abuse. Some argue that child sexual abuse is an event, not a diagnosable disease or illness; therefore, it is inappropriate to use diagnostic terminology to describe decisions about sexual abuse. *See* Gloria Babiker & Martin Herbert, The Role of Psychological Instruments in the Assessment of Child Sexual Abuse, 5 *Child Abuse Review* 239–51, at 240 (1996) ("'Sexual abuse' is not a diagnosis. Sexual abuse is an *event* or a series of events which occur within a relationship and in which the child is involved").

The argument against diagnostic terminology is not very convincing. Turning from sexual abuse to physical abuse, physical abuse is an event, yet no one balks at a *diagnosis* of battered child syndrome. When medical or laboratory evidence points to sexual abuse, there is no convincing argument against a physician or nurse testifying that the child's *diagnosis* is sexual abuse. It seems the term *diagnosis* is sufficiently elastic to include psychological judgments about sexual abuse.

[607] What does *consistent with* mean? The Eighth Circuit seems to have put its finger on it when it wrote in *United States v. Denoyer,* 811 F.2d 436, 438 n.3 (8th Cir. 1987) that *consistent with* is the "customary cautious professional jargon" for causation. *See* State v. Cressey, 137 N.H. 402, 628 A.2d 696 (1993) (court saw no appreciable difference between expert opinion that child's behavior was consistent with sexual abuse and opinion that child was sexually abused).

[608] For example, the expert might testify that certain sexual behaviors are uncommon in non-abused children.

[609] *See In re* Gina D., 138 N.H. 697, 645 A.2d 61, 64 (1994) ("Experts in the field of behavioral science dispute the reliability and validity of diagnoses of sexual abuse based on behavioral characteristics of the child"). *See also* Lucy Berliner & Jon R. Conte, Sexual Abuse Evaluations: Conceptual and Empirical Obstacles, 17 *Child Abuse & Neglect* 111–25 (1993); Thomas M. Horner, Melvin J. Guyer, & Neil M. Kalter, The Biases of Child Sexual Abuse Experts: Believing Is Seeing, 21 *Bulletin of the American Academy of Psychiatry & Law* 281 (1993) (negative assessment of mental health expertise); Thomas M. Horner, Melvin J. Guyer, & Neil

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Child Sexual Abuse in Civil Cases

A Guide to Custody and Tort Actions

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Section of Family Law
American Bar Association

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7 MEDICAL AND PHYSICAL EVALUATIONS OF SEXUAL ABUSE ALLEGATIONS

INTRODUCTION

In many sexual abuse cases there are medical examinations or requests for such examinations. It is important to understand the value and limitations of such examinations. For example, where the allegations concern forms of sexual abuse not expected to leave physical findings, it may be unduly traumatic to require the child to submit to a potentially embarrassing physical examination. Similarly, requests for physical examinations long after the alleged abusive acts may be unlikely to yield meaningful information. Where there is a history of sexual assault within the past seventy-two hours or symptoms of genital discharge, bleeding, or pain, a physical examination may be warranted.[1] In determin-

1. *See, e.g.*, S. Jean Emans, *Physical Examination of the Child and Adolescent*, in EVALUATION OF THE SEXUALLY ABUSED CHILD: A MEDICAL TEXTBOOK AND PHOTOGRAPHIC ATLAS 40 (Astrid Heger & S. Jean Emans, eds., 1992); Carole Jenny, *Forensic Examination: The Role of the Physician as "Medical Detective,"* in EVALUATION OF THE SEXUALLY ABUSED CHILD: A MEDICAL TEXTBOOK AND PHOTOGRAPHIC ATLAS 52 (Astrid Heger & S. Jean Emans, eds., 1992) (stating that while sperm may persist in the vagina for up to 17 days, and acid phosphatase has been recovered for up to 5 days, evidence is unlikely to be recovered after a few days; therefore, a reasonable compromise is to perform a forensic examination if the patient is seen within 72 hours of the assault).

ing whether or not to request or agree to such an examination, the realistic possibility of obtaining useful information must be weighed against the effect on the child of the examination itself.

NEGATIVE PHYSICAL FINDINGS

It is important to understand that while the presence of physical (medical) evidence is probative of sexual abuse, negative findings *are not* probative. Positive physical findings are the exception with sexually abused children.[2] History is probably the most important criterion in diagnosing child sexual abuse.[3]

It is not uncommon for sexually abused children to have normal physical examinations, including normal genital examinations.[4] Because the vagina is very vascular, injuries heal quickly, often without leaving behind any medical evidence, even under magnification,[5]

2. *See, e.g.*, Jan Bays & David Chadwick, *Medical Diagnosis of the Sexually Abused Child*, 17/1 CHILD ABUSE & NEGLECT 91 (1993).

3. *See, e.g.*, Elizabeth A. W. Seagull, *Family Assessment* in THE BATTERED CHILD 150, 156 (Mary Edna Helfer, Ruth S. Kempe & Richard D. Krugman, eds., 5th ed. 1997); C. Levitt, *The Medical Examination in Child Sexual Abuse: A Balance Between History and Exam*, 1/4 J. CHILD SEXUAL ABUSE 113 (1992); J. Adams, *Significance of Medical Findings in Suspected Sexual Abuse: Moving Towards Consensus*, 1/3 J. CHILD SEXUAL ABUSE 91 at 97 (1992); D. Chadwick, *Commentary: The Medical Examination in Child Sexual Abuse: A Balance Between History and Exam*, 1/4 J. CHILD SEXUAL ABUSE 123 (1992); D. Runyan, *Commentary: The Medical Examination in Child Sexual Abuse: A Balance Between History and Exam*, 1/4 J. CHILD SEXUAL ABUSE 127 (1992); A. DeJong & M. Rose, *Legal Proof of Child Sexual Abuse in Girls Under Thirteen*, 88 PEDIATRICS 506 (1991); David Muram, *Child Sexual Abuse: Relationship Between Sexual Acts and Genital Findings*, 13 CHILD ABUSE & NEGLECT 211 (1989); J. Myers, *Role of the Physician in Preserving Verbal Evidence of Child Abuse*, 109 J. PEDIATRICS 409 (1986).

4. *See, e.g.*, CAROLE JENNY, MEDICAL EVALUATION OF PHYSICALLY AND SEXUALLY ABUSED CHILDREN 77 (1996); C. Levitt, *The Medical Examination in Child Sexual Abuse: A Balance Between History and Exam*, 1/4 J. CHILD SEXUAL ABUSE 113 at 114 (1992); J. Adams, *Significance of Medical Findings in Suspected Sexual Abuse: Moving Towards Consensus*, 1/3 J. CHILD SEXUAL ABUSE 91 at 95-98 (1992); American Academy of Pediatrics, Committee on Child Abuse and Neglect, *Guidelines for the Evaluation of Sexual Abuse of Children*, 87 PEDIATRICS 254 (1991) [reprinted in app 7-1]; A. DeJong & M. Rose, *Legal Proof of Child Sexual Abuse in the Absence of Physical Findings*, 88 PEDIATRICS 506 (1991); David Muram, *Child Sexual Abuse: Relationship Between Sexual Acts and Genital Findings*, 12 CHILD ABUSE & NEGLECT 211 (1989); DAVID CHADWICK, CAROL BERKOWITZ, D. KERNS, JOHN MCCANN, M. REINHART & S. STRICKLAND, COLOR ATLAS OF CHILD SEXUAL ABUSE 80 (1989).

5. *See, e.g.*, Michael E. Lamb, *The Investigation of Child Sexual Abuse: An International, Interdisciplinary Consensus Statement*, 28/1 FAM. L. Q. 151, 158-159 (1994) (bleeding or redness from hymenal tears usually disappears within 48 hours; the tears heal within 5 to 10 days; the sharp edges of the wounds smooth out and round off over a period of 3 to 6 months; over time the injuries may be difficult, if not impossible, to detect; perianal injuries also heal rapidly, leaving little evidence of previous tissue damage) (this statement is reproduced in its entirety in Appendix 1-1); J. Adams, *Significance of Medical Findings in Suspected Sexual Abuse: Moving Towards Consensus*, 1/3 J. CHILD SEXUAL ABUSE 91 at 97 (1992); John McCann, J. Voris & M. Simon, *Genital Injuries Resulting from Sexual Abuse: A Longitudinal Study*, 89 PEDIATRICS 307 (1989). *Cf.* Martin A. Finkel, *Anogenital Trauma in Sexually Abused Children*, 84 PEDIATRICS 317 (1989) (signs of past abuse may be masked by changes that occur during child's normal sexual development).

and even anal tears from violent abuse can heal completely, without leaving any residual scarring.[6] Therefore, negative medical findings may not be inconsistent with a history of trauma that is not very recent. Pediatrician Jean Emans has written that reports of physical examinations should make this clear, stating:

> . . . when the finding is that of a "normal genital examination," the examiner should note that this "does not rule out a prior history of sexual abuse." A report of nonspecific findings, such as erythema, vaginal discharge, or labial fusion, should note that these are abnormalities that may occur in a number of conditions, including sexual abuse.[7]

Most acts of child molestation would not be expected to leave evidence: fondling, oral-genital contact, digital penetration, exhibitionism, and nude photography. Many children are not injured in any way during the molestation. Young children might not have any sense that the contact is "wrong," and would not be expected, therefore, to exhibit signs of psychological trauma from the abuse. The lawyer must keep in mind the entire context of the molestation and make sure that expert testimony is presented that will focus the judge on what is really relevant information.

POSITIVE PHYSICAL FINDINGS

Positive findings, when they occur, can be powerful evidence of sexual abuse. Some findings in children, including absent hymen, lacerated hymen, notching in the posterior half of the hymen, and scarring, have been considered to be diagnostic of penetrating vaginal injury.[8] However, there are a variety of conditions that can mimic

6. *See, e.g.*, David Muram, *Anal and Perianal Abnormalities in Prepubertal Victims of Sexual Abuse*, 161 Am. J. Obstetrics & Gynecology 278 (1989).

7. *See* S. Jean Emans, *Physical Examination of the Child and Adolescent*, in Evaluation of the Sexually Abused Child: A Medical Textbook and Photographic Atlas 49 (Astrid Heger & S. Jean Emans, eds., 1992).

8. *See, e.g.*, D. L. Kerns, M. L. Ritter & R. G. Thomas, *Concave Hymenal Variations in Suspected Child Sexual Abuse Victims*, 90 Pediatrics 458 (1992); S. J. Emans, E. R. Woods, N. T. Flagg & A. Freeman, *Genital Findings in Sexually Abused, Symptomatic, and Asymptomatic Girls*, 79 Pediatrics 778 (1987).

abuse,[9] so it is important for the physician performing the examination to rule out these other conditions.

There is sometimes medical evidence of vaginal or anal penetration in a child. Very recent traumatic penetration may be revealed by lacerations or bruising. Because the hymen is an elastic tissue, it is possible for there to have been penetration without tearing the hymen or leaving an enlarged opening.[10] There has been some discussion in the medical literature concerning the significance of the size of the hymenal opening in a girl examined for sexual abuse. Differences in degree of the child's relaxation and in the techniques of examination among physicians may be significant, making it difficult to get an accurate size of the hymenal opening. It has been suggested that the only reliable findings are those based on an examination with the child fully relaxed and with the hymenal opening completely open.[11] A number of articles and books have discussed what range of sizes is normal.[12] However, most experts in the field now believe that the size of hymenal opening is not diagnostic of abuse, but rather, must be evaluated in relation to other findings.[13]

9. *See, e.g.*, Jan Bays & Carole Jenny, *Genital and Anal Conditions Confused with Child Sexual Abuse*, 144 AM. J. DISEASES OF CHILDREN 1319 (1990); John McCann, R. Wells, M. Simon & J. Voris, *Genital Findings in Prepubertal Girls Selected for Nonabuse: A Descriptive Study*, 86 PEDIATRICS 428 (1990); J.A. Adams & M. Horton, *Is it Sexual Abuse? Confusion Caused by a Congenital Anomaly of the Genitalia*, 28 CLINICAL PEDIATRICS 146 (1989); John McCann, J. Voris & M. Simon, *Labial Adhesions and Posterior Fourchette Injuries in Childhood Sexual Abuse*, 142 AM. J. DISEASES OF CHILDREN 659 (1988).

10. *See, e.g.*, C. Levitt, *The Medical Examination in Child Sexual Abuse: A Balance Between History and Exam*, 1/4 J. CHILD SEXUAL ABUSE 113 at 116 (1992); J. Adams, *Significance of Medical Findings in Suspected Sexual Abuse: Moving Towards Consensus*, 1/3 J. CHILD SEXUAL ABUSE 91 (1992); A. Heger & S. Emans, *Introital Diameter as the Criterion for Sexual Abuse*, 85 PEDIATRICS 222 (1990).

11. *See*, C. Levitt, *The Medical Examination in Child Sexual Abuse: A Balance Between History and Exam*, 1/4 J. CHILD SEXUAL ABUSE 113 at 116 (1992).

12. *See, e.g.*, S. Jean Emans, *Physical Examination of the Child and Adolescent*, in EVALUATION OF THE SEXUALLY ABUSED CHILD: A MEDICAL TEXTBOOK AND PHOTOGRAPHIC ATLAS 44 (Astrid Heger & S. Jean Emans, eds., 1992); A. Berenson, A. H. Heger, J. M. Hayes, R. K. Bailey & S. J. Emans, *Appearance of the Hymen in Prepubertal Girls*, 89 PEDIATRICS 387 (1992); C. Levitt, *The Medical Examination in Child Sexual Abuse: A Balance Between History and Exam*, 1/4 J. CHILD SEXUAL ABUSE 113 at 116-117 (1992); A. Berenson, A. Heger & S. Andrews, *Appearance of the Hymen in Newborns*, 87 PEDIATRICS 458 (1991); John McCann, R. Wells, M. Simon & J. Voris, *Genital Findings in Prepubertal Girls Selected for Nonabuse: A Descriptive Study*, 86 PEDIATRICS 428 (1990); A. Heger & S. J. Emans, *Introital Diameter as the Criterion for Sexual Abuse*, 85 PEDIATRICS 222 (1990); DAVID CHADWICK, CAROL BERKOWITZ, D. KERNS, JOHN MCCANN, M. REINHART & S. STRICKLAND, COLOR ATLAS OF CHILD SEXUAL ABUSE 2 (1989); David Muram, *Child Sexual Abuse: Relationship Between Sexual Acts and Genital Findings*, 13 CHILD ABUSE & NEGLECT 211 (1989); Adams, Ahmand & Phillips, *Anogenital Findings and Hymenal Diameter in Children Referred for Sexual Abuse Examination*, 1 ADOLESCENT & PEDIATRIC GYNECOLOGY 123 (1988); H. B. Cantwell, *Update on Vaginal Inspection as it Relates to Child Sexual Abuse in Girls Under Thirteen*, 11/4 CHILD ABUSE & NEGLECT 545 (1987); H. B. Cantwell, *Vaginal Inspection as it Relates to Child Sexual Abuse in Girls Under Thirteen*, 7 CHILD ABUSE & NEGLECT 171 (1983).

13. *See, e.g.*, Susan K. Reichert, *Medical Evaluation of the Sexually Abused Child* in THE BATTERED CHILD (Mary Edna Helfer, Ruth S. Kempe & Richard D. Krugman, eds., 5th ed. 1997); CAROLE JENNY, MEDICAL EVALUATION OF PHYSICALLY AND SEXUALLY ABUSED CHILDREN 76 (1996); Martin A. Finkel & Allan R. DeJong, *Medical Findings in Child Sexual Abuse*, in CHILD ABUSE: MEDICAL DIAGNOSIS AND MANAGEMENT 185 (Robert M. Reece, ed. 1994); James A. Monteleone, John R. Brewer & Timothy J. Fete, *Physical Examination in Sexual Abuse*, in CHILD MALTREATMENT: A CLINICAL GUIDE AND REFERENCE 133 (Armand E. Brodeur & James A.

Medical finding
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Findings in Prepubertal Girls Sele

14. *See, generally*, Deborah S
CHILD: A MEDICAL TEXTBOOK AN
Levitt, *The Medical Examination*
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Muram & S. Elias, *Child Sexual*
and Unaided Examinations, 16
BERKOWITZ, D. KERNS, JOHN MC
ch. 4 (1989); John McCann, J. V
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Child Sexual Abuse: The Venereal

15. *See* Charles F. Johnson, *
Response, 2/2 J. CHILD SEXUAL AE

16. *See generally* CAROLE JENN
(1996); *Sexually Transmitted Dise*
& S. Rawstron, *Sexually Transm*
A. Kornberg, eds. 1992); Ameri
Children, 87 PEDIATRICS 254 (199
P. J. WIESNER, W. CATES, Jr., S. *

17. *See, e.g., In re* Philip M., 8
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ment or show how future injury

Medical findings that have been called suggestive of sexual abuse include abrasions, lacerations, swelling, and bruising (only if the abuse was very recent), a significantly enlarged hymenal opening, scarring or tearing of the hymen, absent hymenal tissue, scars, the presence of semen or sperm, bite marks, and the presence of sexually transmitted diseases.[14] A child who has been forcibly sexually abused may have grab mark bruises on the thighs. One physician has listed symptoms that may be diagnostic of penetration as follows:

> new or healed lacerations of the hymen, which are rarely caused by accidental penetration; chlamydia and gonorrhea, which have not been shown to be transmitted in vivo by non-human contact; absent or scarred hymens, hymens that have synechia that are not due to chronic infection; teeth marks; a proctoepisiotomy; and a horizontal hymenal diameter of two standard deviations above the norm for age. . . . [T]he presence of sperm in the vagina or vestibule is diagnostic of sexual abuse.[15]

Unexplained sexually transmitted diseases in children may form the basis for a finding of sexual abuse[16] and consequent state intervention.[17]

Montleone, eds. 1994); Allan R. DeJong, *Genital and Anal Trauma*, in CHILD ABUSE: A MEDICAL REFERENCE 231 (Stephen Ludwig & Allan E. Kornberg, eds. 1992); J. McCann, R. Wells, M. Simon & J. Voris, *Genital Findings in Prepubertal Girls Selected for Nonabuse: A Descriptive Study*, 85 PEDIATRICS 428 (1990).

14. *See, generally*, Deborah Stewart, *Sexually Transmitted Diseases*, in EVALUATION OF THE SEXUALLY ABUSED CHILD: A MEDICAL TEXTBOOK AND PHOTOGRAPHIC ATLAS 145 (Astrid Heger & S. Jean Emans, eds., 1992); C. Levitt, *The Medical Examination in Child Sexual Abuse: A Balance Between History and Exam*, 1/4 J. CHILD SEXUAL ABUSE 113 (1992); American Academy of Pediatrics, Committee on Child Abuse and Neglect, *Guidelines for the Evaluation of Sexual Abuse of Children*, 87 PEDIATRICS 254 (1991) (reprinted at Appendix 7-1); David Muram & S. Elias, *Child Sexual Abuse-Genital Tract Findings in Pre-pubertal Girls-II: Comparison of Colposcopic and Unaided Examinations*, 160 J. OBSTETRICS & GYNECOLOGY 333 (1989); DAVID CHADWICK, CAROL BERKOWITZ, D. KERNS, JOHN MCCANN, M. REINHART & S. STRICKLAND, COLOR ATLAS OF CHILD SEXUAL ABUSE ch. 4 (1989); John McCann, J. Voris & M. Simon, *Labial Adhesions and Posterior Fourchette Injuries in Childhood Sexual Abuse*, 142 AM. J. DIS. CHILD 659 (1988); J. Siedel, *Presentation and Evaluation of Sexual Misuse in the Emergency Department*, 2 PEDIATRIC EMERGENCY CARE 157 (1986); S.M. Sgroi, *Pediatric Gonorrhea and Child Sexual Abuse: The Venereal Disease Connection*, 9 SEX TRANSM. DIS. 154 (1982).

15. *See* Charles F. Johnson, *Use of an M.D.-Social Worker Team in the Evaluation of Child Sexual Abuse: A Response*, 2/2 J. CHILD SEXUAL ABUSE 99, 100 (1993).

16. *See generally* CAROLE JENNY, MEDICAL EVALUATION OF PHYSICALLY AND SEXUALLY ABUSED CHILDREN 89 (1996); *Sexually Transmitted Diseases*, 23 PEDIATRIC ANNALS 329 (Carole Jenny, issue ed.); M. Hammerschlag & S. Rawstron, *Sexually Transmitted Diseases*, in CHILD ABUSE: A MEDICAL REFERENCE 249-63 (S. Ludwig & A. Kornberg, eds. 1992); American Academy of Pediatrics, *Guidelines for the Evaluation of Sexual Abuse of Children*, 87 PEDIATRICS 254 (1991) (reprinted at Appendix 7-1); K. K. HOLMES, P. A. MARDH, P. E. SPARLING, P. J. WIESNER, W. CATES, JR., S. M. LEMON & W. E. STAMM, SEXUALLY TRANSMITTED DISEASES (2d ed. 1990).

17. *See, e.g., In re* Philip M., 82 N.Y.2d 238, 624 N.E.2d 168, 604 N.Y.S.2d 40 (1993) (unexplained presence of chlamydia in children established prima facie showing of sexual abuse; parents did not seek treatment or show how future injury could be prevented).

DIFFERENTIATING PHYSICAL FINDINGS NOT CAUSED BY ABUSE

Sometimes medical findings have causes other than abuse.[18] For example, children may sustain straddle injuries from falling on playground equipment or bicycle bars. The abrasions and bruises resulting from such accidental injuries, however, tend to appear on the more exposed, superficial parts of the body, with areas such as the hymen and vagina not receiving the blunt trauma.[19] Accidental penetrating injuries are much rarer.[20]

Infections may also create genital inflammations, rashes, and even bleeding.[21] Foreign objects in the vagina, such as pieces of toilet paper or feces, may cause vaginal discharge, which may be blood-tinged.[22] Passage of large, hard stools may result in fairly superficial, straight, and narrow anal fissures.[23] However, if the fissures are deep, irregular, extending beyond the rugal folds, or are accompanied by swelling, bleeding, or hematomas, there is some suspicion of an abusive etiology.[24]

COLPOSCOPY

A useful tool for a sexual abuse examination is the colposcope, which provides a greatly magnified and intensely lighted view during a genital examination.[25] Further, the colposcope provides the ability to document the findings photographically. There is now even a video colposcope available. Colposcopic photographs can show minute fis-

18. *See generally*, J. Adams, *Significance of Medical Findings in Suspected Sexual Abuse: Moving Towards Consensus*, 1/3 J. CHILD SEXUAL ABUSE 91 (1992); DAVID CHADWICK, CAROL BERKOWITZ, D. KERNS, JOHN MCCANN, M. REINHART & S. STRICKLAND, COLOR ATLAS OF CHILD SEXUAL ABUSE ch. 3 (1989). Adams, cited in this note, lists the following findings as nonspecific: irregular vascularity, erythema of the vestibule, labial adhesions, urethral dilatation with labial traction, friability of the posterior fourchette, hymenal septa, transverse measurements of the hymenal orifice over 5 mm, using labial separation (supine), and vaginal discharge. *Op. cit.* at 93.

19. *See, e.g.*, DAVID CHADWICK, CAROL BERKOWITZ, D. KERNS, JOHN MCCANN, M. REINHART & S. STRICKLAND, COLOR ATLAS OF CHILD SEXUAL ABUSE 57 (1989).

20. *Id.*

21. *See, e.g.*, DAVID CHADWICK, CAROL BERKOWITZ, D. KERNS, JOHN MCCANN, M. REINHART & S. STRICKLAND, COLOR ATLAS OF CHILD SEXUAL ABUSE 58-59 (1989) (listing vulvovaginitis, streptococcal perianal disease, diaper dermatitis, lichen sclerosis et atrophicus, and postinflammatory labial adhesions).

22. *Id.*

23. *Id.*

24. *Id.*

25. *See generally* John McCann, *Use of the Colposcope in Childhood Sexual Abuse Examinations*, 37 PEDIATRIC CLINIC, NORTH AMERICA 863 (1990); L.R. Ricci, *Medical Forensic Photography of the Sexually Abused Child*, 12/3 CHILD ABUSE & NEGLECT 305 (1988).

sures and scars.[26] Testimony based on colposcopic examinations is properly admissible.[27] It is important to make sure that a physician whose testimony is based on colposcopic examination is properly trained, however.[28] Not many pediatricians have extensive experience in interpreting findings to distinguish between normal variations, congenital abnormalities, and evidence of trauma.[29] If the physician is not properly experienced, it is better not to use colposcopic evidence.

PENILE PLETHYSMOGRAPHY

Some experts, often in the context of therapy groups for incarcerated sex offenders, use a penile plethysmograph, a device that measures arousal by measuring penile tumescence. It is used in treatment to determine what sexually arouses the offender and to measure decreases in arousal during the treatment process. Some experts have attempted to use the plethysmograph as a kind of genital polygraph to determine whether a person is a pedophile or whether a man has molested a particular child. However, there is no strong evidence to suggest that arousal is a good predictor of sexual acting out, and the penile plethysmograph has not been shown to accu-

26. *See, e.g.*, David Muram & S. Elias, *Child Sexual Abuse-Genital Tract Findings in Pre-pubertal Girls-II: Comparison of Colposcopic and Unaided Examinations*, 160 J. OBSTETRICS & GYNECOLOGY 333 (1989); B. A. Woodling, *The Use of the Colposcope in the Diagnosis of Sexual Abuse in the Pediatric Age Group*, 10 CHILD ABUSE & NEGLECT 111 (1986); W. R. Teixeira, *Hymenal Colposcopic Examination in Sexual Offenses*, 2 AM. J. FORENSIC MED PATHOLOGY 209 (1981). For a color atlas showing photographs taken with a colposcope, *see*, DAVID CHADWICK, CAROL BERKOWITZ, D. KERNS, JOHN MCCANN, M. REINHART & S. STRICKLAND, COLOR ATLAS OF CHILD SEXUAL ABUSE (1989).

27. *See, e.g.*, People v. Mendibles, 245 Cal. Rptr. 553, 199 Cal. App. 3d 1277 (1988); State v. Noltie, 786 P.2d 332 (Wash. Ct. App. 1990).

28. *See, e.g.*, C. Levitt, *The Medical Examination in Child Sexual Abuse: A Balance Between History and Exam*, 1/4 J. CHILD SEXUAL ABUSE 113 at 116 (1992).

29. *See, e.g.*, C. Levitt, *The Medical Examination in Child Sexual Abuse: A Balance Between History and Exam*, 1/4 J. CHILD SEXUAL ABUSE 113 (1992); D. Runyan, *Commentary: The Medical Examination in Child Sexual Abuse: A Balance Between History and Exam*, 1/4 J. CHILD SEXUAL ABUSE 127 at 131 (1992); J. Adams, *Significance of Medical Findings in Suspected Sexual Abuse: Moving Towards Consensus*, 1/3 J. CHILD SEXUAL ABUSE 91 at 92 (1992); J. Gardner, *Descriptive Study of Genital Variation in Healthy, Non-abused Premenarcheal Girls*, 120 J. PEDIATRICS 251 (1992); N. Kellogg & J. Para, *Linea Vestibularis: A Previously Undescribed Normal Genital Structure in Female Neonates*, 87 PEDIATRICS 926 (1991); J. Paradise, *The Medical Evaluation of Sexually Abused Children*, 37 PEDIATRIC CLINICS OF NORTH AMERICA 839 (1990); DAVID CHADWICK, CAROL BERKOWITZ, D. KERNS, JOHN MCCANN, M. REINHART & S. STRICKLAND, COLOR ATLAS OF CHILD SEXUAL ABUSE chs. 2-4 (1989). Adams, cited in this note, lists the following findings as normal: periurethral bands, external hymenal ridges, longitudinal intravaginal ridges, clefts in the ventral 180° of hymenal ring (on or above the 9 o'clock–3 o'clock line in supine position), hymenal tags, hymenal bumps, hymenal cysts, and linea vestibularis. *Op. cit.* at 93.

rately discriminate between incestuous molesters and nonmolesters.[30] The American Professional Society on the Abuse of Children (APSAC) has circulated "Proposed Guidelines for Penile Plethysmography,"[31] in which psychologist Dr. Judith Becker states:

> Historically, the penile plethysmograph has been used in research settings and with individuals who admitted paraphilic behavior. Murphy and Barbaree (1988) note in their current extensive review of the use of the plethysmograph, "The currently available evidence on validity and reliability does not provide strong support for the use of this procedure with populations where there are questions regarding whether the individual has engaged in deviant behavior." That is, there is no evidence to support the use of erection measures as a means of determining guilt or innocence in an alleged sex crime. Therefore, *since reliability and validity have not been established to date with non-admitters, there is no empirical data to justify its use in diagnosis, or prediction of treatment outcome or recidivism. . . .*
>
> Especially problematic has been the appearance of penile plethysmography results in the courtroom setting. *The use of penile plethysmography results in the courtroom is strongly discouraged until the validity and reliability of its use in that setting have been established.* [Emphasis added].[32]

There is not yet any standardization in testing or interpretation of plethysmographic assessments, which further limits the usefulness of penile plethysmography as part of a forensic sexual-abuse evalua-

30. However, Prentky, Knight, and Lee recently have stated that plethysmographic assessment "has demonstrated an ability to discriminate between child molesters and comparison groups of nonmolesters, as well as among subgroups of child molesters defined by victim gender preference (same sex vs. opposite sex) and by relationship to victim (incest vs. nonincest)." Robert A. Prentky, Raymond A. Knight & Austin F. S. Lee, *Child Sexual Molestation: Research Issues* 2 (National Institute of Justice 1997) (footnote omitted). *See generally*, Martin L. Lalumiere & Grant T. Harris, *Common Questions Regarding the Use of Phallometric Testing with Sexual Offenders*, 10/3 SEXUAL ABUSE: A JOURNAL OF RESEARCH & TREATMENT 227 (1998). The July 1998 issue of the journal published by the Association for the Treatment of Sexual Abusers, SEXUAL ABUSE: A JOURNAL OF RESEARCH & TREATMENT (volume 10, number 3), has a number of articles dealing with penile plethysmography.

31. *See* 1 THE ADVISOR 7 (Aug. 1988).

32. Quoted in J. E. B. Myers, J. Bays, J. Becker, L. Berliner, D. Corwin & K. Saywitz, *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEBRASKA L. REV. 134-135 n.593 (1989).

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33. *See, e.g.* Richard
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34. *See, e.g.*, R.D. v. S
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v. Powers, 59 F.3d 1460
443 S.E.2d 667 (1994);
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36. *Id.* at 93.
37. *See* Robert A. Pre
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38. *See generally*, Jan L.
Sexual Offenders, 10/4 SEX
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tion.[33] Courts have excluded evidence from penile plethysmography for lack of proof that such evidence is scientifically reliable.[34]

Researcher David Finkelhor has reported findings that in the examination of "the penile responses of a matched sample of sixteen incestuous and sixteen nonincestuous child offenders, they found "that incestuous child molesters have more appropriate sexual age preferences (adults) than those who are nonincestuous."[35] Finkelhor also reports that there is clear experimental evidence of heightened arousal to children among child molesters *except* for incest offenders.[36] Prentky, Knight, and Lee report that "exclusive incest offenders demonstrate far less sexual arousal in response to children than do extrafamilial child molesters."[37] Another problem with using plethysmography results is that some men give a "flat line" response, essentially showing no arousal to any sexual stimuli, including to erotic material most men would find stimulating. Such repressed responses do not provide any meaningful data.[38]

33. *See, e.g.* Richard J. Howes, *A Survey of Plethysmographic Assessment in North America*, 7/1 SEXUAL ABUSE: A J. OF RESEARCH AND TREATMENT 9 (1995).

34. *See, e.g.*, R.D. v. State, 706 So.2d 770 (Ala. Crim. App. 1997) (citing expert testimony that "a plethysmograph is an instrument we use basically to understand the arousal pattern of an individual. A plethysmograph is not an instrument for making judgment about what a person has done"); Garren v. State, 220 Ga. App. 66, 467 S.E.2d 365 (1996); State v. Spencer, 119 N.C. App. 662, 459 S.E.2d 812 (1995); United States v. Powers, 59 F.3d 1460 (4th Cir. 1995) (inadmissible under *Daubert* test); Gentry v. State, 213 Ga. App. 24, 443 S.E.2d 667 (1994); In the Interest of A.V., 849 S.W.2d 393 (Tex. App. 1993), *In re* Mark C., 7 Cal. App.4th 433, 8 Cal. Rptr. 2d 856 (1992); Cooke v. Naylor, 573 A.2d 376 (Me. 1990); Nelson v. Jones, 781 P.2d 964 (Alas. 1989), *cert. denied* 498 U.S. 810, 111 S.Ct. 44, 112 L.Ed.2d 20 (1990); Dutchess County Dept. of Social Services v. Mr. G., 534 N.Y.S.2d 64, 141 Misc.2d 641 (Fam. Ct., Dutchess Cty, 1988); People v. John W., 185 Cal. App.3d 801, 229 Cal. Rptr. 783 (1986). The court in *John W.* pointed out that "it is the proponent of the testimony who has the burden of showing the reliability of the new technique" and that despite the penile plethysmograph's wide use "in many diagnostic and treatment centers which involve sexual offenders . . . such a statement does not satisfy the 'general acceptance' standard. . . ." 229 Cal. Rptr. at 785. The court disallowed the entire report because of its reliance on plethysmography results.

35. *See, e.g.*, DAVID FINKELHOR, A SOURCEBOOK ON CHILD SEXUAL ABUSE at 102 (1986), quoting V. L. Quinsey, T. C. Chaplin & W. F. Carrigan, *Sexual Preferences Among Incestuous and Non-incestuous Child Molesters*, 10 BEHAVIOR THERAPY 562-565 (1979).

36. *Id.* at 93.

37. *See* Robert A. Prentky, Raymond A. Knight & Austin F. S. Lee, *Child Sexual Molestation: Research Issues* 2 (National Institute of Justice 1997).

38. *See generally*, Jan Looman, Jeffrey Abracen, Greg Maillet & R. Difazio, *Phallometric Nonresponding in Sexual Offenders*, 10/4 SEXUAL ABUSE: A JOURNAL OF RESEARCH & TREATMENT 325 (1998). *Cf.* Robin J. Wilson, *Psychophysiological Signs of Faking in the Phallometric Test*, 10/2 SEXUAL ABUSE: A JOURNAL OF RESEARCH & TREATMENT 113 (1998); Judith V. Becker & Vernon L. Quinsey, *Assessing Suspected Child Molesters*, 17/1 CHILD ABUSE & NEGLECT 169 (1993); V. Quinsey & D. Laws, *Validity of Physiological Measures of Pedophilic Sexual Arousal in a Sex Offender Population: A Critique of Hall, Proctor & Nelson*, 58 J. CONSULTING & CLINICAL PSYCHOLOGY 886 (1990); K. Freund, R. Watson & D. Rienzo, *Signs of Feigning in the Phallometric Test*, 26 BEHAV. RESEARCH & THERAPY 105 (1988).

EVALUATING THE EVALUATION

The lawyer should carefully investigate the evaluating physician's experience and training in the specific area of child sexual abuse. Pediatrician Astrid Heger has written:

> The diagnosis of sexual abuse is difficult for medical professionals because their training has traditionally been inadequate with regard to the recognition of sexual abuse or even the evaluation of normal genital anatomy. Pediatric and adolescent patients who present with behavioral changes are diagnosed as going through a "stage," and genital complaints are attributed to poor hygiene or type of underwear worn by the child. This general ignorance is then compounded by fear and an unwillingness to interact with the legal system.[39]

The most useful examinations are forensic examinations that are undertaken with the expectation that legally relevant evidence must be collected. Most physicians are not trained to do forensic examinations. Even physicians trained to do forensic rape examinations may not have particular expertise with child sexual abuse examinations. Therefore, it is important for the lawyer to understand who has done or will do the examination and whether that person has experience with forensic child sexual abuse examinations. Such examinations should proceed according to an established protocol.[40]

Some procedures differ if the sexual abuse victim is an adult or child. For instance, direct fluorescent antibody (DFA) and enzyme immunoassay (EAI) tests for sexually transmitted diseases are not recommended for use with children or adolescents.[41] Prepubertal children generally do not need an internal examination in the

39. *See* Astrid Heger, *Helping the Medical Professional Make the Diagnosis of Sexual Abuse*, in EVALUATION OF THE SEXUALLY ABUSED CHILD: A MEDICAL TEXTBOOK AND PHOTOGRAPHIC ATLAS 3 (Astrid Heger & S. Jean Emans, eds., 1992) (footnote omitted).

40. *See* CAROLE JENNY, MEDICAL EVALUATION OF PHYSICALLY AND SEXUALLY ABUSED CHILDREN 83 (1996); Carole Jenny, *Forensic Examination: The Role of the Physician as "Medical Detective,"* in EVALUATION OF THE SEXUALLY ABUSED CHILD: A MEDICAL TEXTBOOK AND PHOTOGRAPHIC ATLAS 51-61 (Astrid Heger & S. Jean Emans, eds., 1992). Several child sexual abuse protocols are reprinted in EVALUATION OF THE SEXUALLY ABUSED CHILD: A MEDICAL TEXTBOOK AND PHOTOGRAPHIC ATLAS appendices A-D (Astrid Heger & S. Jean Emans, eds., 1992).

41. *See, e.g.*, Deborah Stewart, *Sexually Transmitted Diseases*, in EVALUATION OF THE SEXUALLY ABUSED CHILD: A MEDICAL TEXTBOOK AND PHOTOGRAPHIC ATLAS 147-148 (Astrid Heger & S. Jean Emans, eds., 1992).

absence of upper-tract bleeding, a foreign body in the vagina, or vaginal pathology.[42] Some children will need to be sedated or anesthetized in order to tolerate a physical examination.[43]

Medical records contain differing degrees of detail. It is important to determine which entries in the record are objective descriptions of what the physician observed or the results of laboratory testing. Statements attributed to the child or third persons may be direct quotations or may be paraphrases. A paraphrase may actually reflect a misunderstanding of what was said, which may be crucial to an accurate assessment of the abuse allegations. Therefore, the lawyer should interview the author of the medical records in question to learn as much as possible about the context of the statements, whether the statements were direct quotations, how much time passed between the statement and its recording, and whether anybody else was present when the statement was made. Any person present should be interviewed individually.

CONCLUSION

Medical evaluations may or may not be useful to a court case. They may be forensically dangerous if conducted by physicians who are not experienced with child sexual abuse cases or with lawyers who do not understand the limitations of such evaluations. In almost all cases, the lawyer should consult an expert in child sexual abuse to review any medical evaluations and to prepare to meet or offer medical testimony. If other professionals, such as mental-health professionals or social workers, are basing their opinions in part on the medical evidence (or lack of evidence), it is also important to ensure that they properly understand it.

42. *See, e.g.*, A. S. Botash, *What the Office-Based Pediatricians Need to Know About Child Sexual Abuse*, 34 CONTEMPORARY PEDIATRICS 275 (1994).

43. *See, e.g.*, CAROLE JENNY, MEDICAL EVALUATION OF PHYSICALLY AND SEXUALLY ABUSED CHILDREN 75 (1996).