

Chapter 2

The Purpose of the Forensic Interview: A Lawyer's Perspective

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From the legal perspective the forensic interview of a child who may be the victim of a sexual assault serves numerous important purposes. In order for a prosecutor to file charges the prosecutor has to know where to file the charges, who to file the charges against, how many charges to file, and many other things.

Jurisdiction

The first issue in a legal matter is whether or not the court has jurisdiction to hear the case. The modern concept of jurisdiction has its roots in the American Revolution. Prior to the American Revolution and the subsequent adoption of the constitution there were few limits on the power of the court in this country. Historically a court was nothing more than an extension of the crown and the court was expected to do the crown's bidding. The American revolutionaries and in particular the Federalists sought to impose limitations on the government's power over people and their lives. It was from this desire that modern jurisdiction evolved.

There are many kinds of jurisdiction. The two most fundamental and which you are most likely to hear about are jurisdiction over the person and jurisdiction over the subject matter. Lawyers and judges more often refer to these two kinds of jurisdiction as *in personam* [jurisdiction over the person] and *in rem* jurisdiction [jurisdiction over the subject matter].

In a case where a person is suspected of molesting a child, personal jurisdiction asks whether or not the court has jurisdiction over the suspect. If the suspect lives in the state in which the case arose or traveled to that state the court has personal jurisdiction. If a person is accused of committing a crime within the boundaries of

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a state or federal district the court will have personal jurisdiction over the suspect. It doesn't matter whether or not the suspect is legally in the state. In other words if someone is an undocumented immigrant and their right to be present in any given state is unclear, a court still has personal jurisdiction over them so long as they are or were physically present in the state. Issues involving personal jurisdiction are rare in criminal cases but they can arise when a suspect has diplomatic immunity and is beyond the reach of the court.

Subject matter jurisdiction addresses whether or not the court has the authority to decide the issue. In all legal cases the case begins when the plaintiff, or in a criminal case, the prosecutor, files a legal document alleging some legal wrong. In a civil case it could be that a person's civil rights were violated or a contract was breached. In a criminal case it is always that the defendant allegedly violated a specific law. Subject matter jurisdiction is whether or not the court may hear and decide the issue in controversy. This is an area where the principles of Federalism had a major impact on the operation of the American legal system.

Federalists wanted the states to retain the power to govern themselves with as little interference from the federal government as possible. Therefore state courts are courts of general jurisdiction, meaning they have subject matter jurisdiction over everything that occurs in that state except for controversies the state itself decides it does not want to hear or for issues which are exclusively the province of federal court. Federal courts are courts of limited jurisdiction and can only hear cases which fall in the scope of Article III, Section 2 of the constitution and congressional statutes. It is possible for state and federal courts to have concurrent subject matter jurisdiction and, in fact, that is frequently the case when criminal allegations are made.

During the course of a forensic interview of a child among the things, the prosecutor is listening for who allegedly committed the crime? What is the alleged crime? If a state court prosecutor thinks there is concurrent federal jurisdiction that prosecutor may decide to include a federal prosecutor in the investigation.

Venue

The next thing a prosecutor is listening for during a forensic interview in information about where the alleged crime occurred. Location is important because location determines venue. A case is normally venued in the county in which the criminal acts allegedly occurred. In other words if a crime was committed in Teton County, Wyoming it cannot be prosecuted in Park County. There are occasions in which venue is proper in multiple counties or even multiple states.

When the Crime Allegedly Occurred

Prior to beginning a forensic interview prosecutors often remind the mental health professional conducting the interview to ask the child about when the conduct occurred. Prosecutors often urge interviewers to obtain as much date specific

information as possible. When the conduct occurred is especially important. When a prosecutor files criminal accusations, the law requires the prosecutor include the date the conduct allegedly occurred. The law allows the prosecutor plead a range of time and not just a specific day. In other words the prosecutor could plead something like "on or about and between January 1, 2010 and December 31, 2010." The law requires dates be plead for several reasons.

A defendant in a criminal case has a constitutional right to know with what he or she is being charged. That constitutional right includes being on notice of when the conduct allegedly occurred. If the crime was alleged to have occurred during 2010 and the defendant was traveling overseas for some or all of that year the defendant would have an alibi defense. It would be almost impossible for a defendant in a criminal case to build a defense if the defendant and the defendant's lawyers didn't know when the conduct was alleged to have occurred.

Another reason the dates the conduct allegedly occurred is important has to do with sentencing and punishment. The law changes, sometimes rapidly. When a defendant is convicted and sentenced the defendant has to be sentenced under the laws as they existed when the conduct occurred. Consider the following: a defendant committed a crime in 2010. At that time the crime carried a maximum sentence of 5 years. In 2011 the law changed and made the punishment for the defendant's conduct much more severe and the maximum sentence became 15 years. In 2012 the defendant went to trial, was convicted and sentenced. If the defendant was sentenced consistent with the change in the law that occurred after the conduct occurred and given 15 years that sentence would violate the *ex post facto* clause of the constitution. The *ex post facto* clause prohibits the government from making criminal laws apply retroactively, in other words criminalizing conduct that was legal when it was originally performed. The *ex post facto* clause also prohibits retroactively applying a greater punishment for a crime.

A final reason it is important to know when criminal conduct occurred has to do with the statute of limitations. The government has a specific period of time after the commission of a crime during which criminal charges must be brought. The statute of limitations is best thought of as a clock. If charges are not brought during that period of time and the clock expires the charges are forever barred. The statute of limitations defines what the time period is for any given crime. Some crimes have very short statutes of limitations, other crimes have no statute of limitations meaning charges could be brought for as long as the defendant is alive.

The specific statute of limitations for crimes such as child molest vary greatly from state to state. In 2007 the federal government abolished the statute of limitations for most sex crimes. Many, if not all states, have some form of tolling or revival of the statute of limitations. If a statute of limitations is tolled that means there is certain conduct which essentially pauses the clock. Revival statutes apply when the clock runs out and certain conduct adds more time to the clock. Applying the statute of limitations can be very complicated, often times determining when the statute started running and when it expired can be difficult. For purposes of a forensic interview of a child it's important to get as much detailed information about when the alleged conduct occurred.

Exactly What Happened

Perhaps the most important part of a forensic interview of a child is finding out exactly what happened in as much detail as possible. First and foremost the prosecutor needs this information to figure out what crimes to charge. The statute criminalizing consensual sex with a minor is very different than the statute criminalizing forcible sex with the same minor. In some circumstances it can be difficult for prosecutors to change the charges if the prosecutor obtains more detail about the alleged conduct and wants to allege a violation of a different statute.

Prosecutors also have to decide how many counts to charge. In order to do so they need to know how many separate times specific conduct allegedly occurred. Conduct that occurred over a period of time can also give rise to different crimes in some states. For example in California if a child was sexually abused on two occasions a prosecutor would charge those two occasions, perhaps under Penal Code section 288, lewd act upon a child. If the same child was sexually assaulted on three or more occasions over several months by someone who lived in the home the prosecutor might charge Penal Code section 288.5, continuous sexual abuse of a child. The criminal penalties for these two code sections are very different. The maximum sentence for each violation of Penal Code section 288 is 8 years. The maximum sentence for a violation of Penal Code section 288.5 is 16 years.

Both prosecutors and defense lawyers want to hear a child describe the conduct in detail in part as a test of whether or not they believe the child is telling the truth or has been coached about their testimony. While children, particularly young children, are not expected to be able to relate the same kind of collateral details an adult might be expected to relate the complete inability to relate any collateral details can be an indicator that the allegations may not be truthful. Collateral details can be almost anything such as which room of a house the conduct occurred in, what colors the walls were, some detail about the furniture or other verifiable information that tends to prove the child was present.

Identify the Defendant

It sounds obvious that the forensic interview would have to identify the alleged perpetrator but it's important to mention. If a prosecutor is going to file charges based on the information gained from a forensic interview they have to know who to file charges against. Ideally children provide the name of the person who assaulted them, such as John Doe. If a child can identify their assailant from a photograph this can be sufficient identification. Problems can arise when a child can only provide a nickname and cannot identify their assailant. For example a child said they were walking home in the dark when they were grabbed by a person and assaulted. Because it was dark the child didn't get a look at their attacker so the child cannot identify the person. The child said some other people shouted at the attacker and called him TJ. Because TJ is a nickname even if law enforcement thinks they know

which TJ was the attacker this is generally not a sufficient identification on which to support a prosecution. In most situations children know their assailant so these issues don't arise.

Although rare, there are cases in which more than one person may be criminally liable. For example often times in cases involving the production of child pornography two or more adults are involved in the abuse. In this kind of case it is important not only for the child to identify all the perpetrators of abuse but, to the extent possible, distinguish which individual engaged in what conduct.

Competence to Testify

Among the goals of a forensic interview of a child is to establish whether or not the child has the ability or the capacity to testify. Interviewers question children about their ability to distinguish between the truth and a lie, they ask about the consequences of a lie. Particularly in the case of young children it's important to establish the child knows the difference between real and make-believe. Competency-oriented questions during a forensic interview are legally significant. Fortunately the bar to establish the competency of child witnesses has been lowered.

The competence of children to testify is a concept that has evolved consistent with the evolution of how children are viewed and treated in society. In order to testify in court every witness has to be competent. Each state has its own statute defining competence but generally those statutes say a person is competent to testify as a witness if they can perceive, remember, communicate, and believe they are legally or morally obligated to tell the truth. In most circumstances adults are presumed competent to testify. The rules are different when dealing with children, particularly young children.

Historically most children were considered incompetent to testify. *R. v. Brasier*, 1 Leach 199, 168 E.R. 202 is a case decided in England in 1779. In *Brasier* the defendant was accused of assault with intent to commit rape of a 7-year-old girl. The girl did not testify at trial but her mother and another woman who lived with the child testified. The defendant was initially convicted but his conviction was overturned. The court overturned the conviction because the child did not testify. The court also wrote that while it is possible for children to take the oath to testify in a criminal case the child must prove they possess sufficient knowledge of the nature and consequences of taking an oath. The court wrote:

...[T]here is no precise or fixed rule as to the time when infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take an oath their testimony cannot be received.

American courts took the same view of child witnesses at the time. Children's testimony was viewed with even greater suspicion when the child was to testify about their own victimization.

More than 100 years after the decision in *Braiser* the United States Supreme Court formally adopted a similar standard in *Wheeler v. U.S.*, (1895), 159 U.S. 523, 524–525:

While no one should think of calling as a witness an infant only 2 or 3 years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath.

The effect of this standard was that children under the age of 14 were presumed incompetent to testify. This presumption was rebuttable. Normally a child would be placed on the witness stand outside the presence of the jury and questioned. The judge typically asked the questions and made the final decision as to whether or not the child was competent to testify. The result was predictable, children frequently were not allowed to testify.

In recent years there have been significant changes in how the testimony of children is treated. There is no modern definition of competence that applies to all states. The Federal Rule of Evidence is contained in Rule 601 which states “[e]very person is competent to be a witness except as otherwise provided in these rules.” A significant number of states including Mississippi, Minnesota, Iowa, Florida, Michigan, New Jersey, Pennsylvania, Wisconsin, Alaska, Montana, Nebraska, North Carolina, Ohio, Texas, Utah, and Wyoming have modeled their statute on the federal statute.

Some states still require a hearing be held to determine whether or not a child is competent to testify but the presumption has shifted toward permitting children to testify. Other states reach the same presumption as the federal rule but state it somewhat differently in that they presume all people, children included, are competent to testify unless the contrary is proven. Even though different states approach the issue differently the frequency with which children have been permitted to testify has greatly increased in recent decades.

Courts have held that most testimonial competency issues affect the weight not the admissibility of evidence. In other words the presumption has shifted to the point where courts err on the side of allowing a child witness to testify and issues which previously led to the exclusion of the child’s testimony are now a basis for cross examination and impeachment.

Consider the case of *Halloway v. State*, 312 Ark. 306, 849 S.W.2d 473 (1993). In *Halloway* the defendant and his wife ran a day care center. A number of children accused the defendant of molesting them. On appeal the defendant argued that two children, identified as L.S. and Je.Ca., ages four and six respectively, were not competent to testify. The defendant claimed L.S. was not competent because she could not demonstrate that she knew the difference between the truth and a lie. She also lacked good recall of events, she could not remember anything that happened while she was at the day care center other than the defendant forced her to perform oral

sex on him. L.S. could not remember how the sexual contact occurred and, if she remembered the circumstances she refused to describe them.

The defendant argued Je.Ca. was not competent because she could not give an example of a lie to demonstrate that she knew the difference between the truth and a lie. Je.Ca. also changed the location of where the defendant sexually molested her, she could not remember what the defendant was wearing or many other details.

Under the historical rule such as the one from *Wheeler* neither of these children would have been permitted to testify. The Arkansas court that heard this case allowed both of these children to testify. On appeal the Supreme Court of Arkansas found that while there was imprecision in the children's testimony and an inability to define concepts such as truth these issues did not warrant a finding of testimonial incompetence but rather were issues for the jury to resolve. The court also wrote that children are competent to testify even when their testimony is not the "model of lucidity." (*Halloway v. State*, 312 Ark. 306, 317.)

Even very young children have been found competent to testify. In *Escamilla v. State*, 334 S.W.3d 263 (Tex. App. San Antonio, 2010) the defendant was convicted of molesting his daughter when she was two. The daughter, identified as D.A.E., made the accusations against her father close in time to when the conduct occurred and was interviewed at the Children's Advocacy Center. On one occasion the interviewers at the center were unable to interview D.A.E. because she was not verbal enough. D.A.E. took medication for attention deficit hyperactivity disorder and there was a history of mental illness in the family although no direct evidence that D.A.E. herself suffered from any mental illness. The trial occurred when D.A.E. was 3 years and 9 months old. The trial court found D.A.E. competent to testify and the appellate court affirmed that ruling. In this case, just as in *Halloway*, the court wrote that confusing and inconsistent responses from a child are not a basis on which to determine the child is incompetent to testify, rather those responses go the credibility of the testimony and the weight the jury should give the testimony.

If, during the course of a forensic interview, a child starts giving nonsensical, fantastic or nonresponsive answers it's important to delve into these areas. Sometimes nonresponsive answers are nothing more than evidence that a child is bored with an interview or doesn't want to talk about what happened to them. In other instances fantastic details can be indicative of children not telling the truth. The classic example of this is the McMartin Preschool abuse case.

In the McMartin case children claimed that in addition to having been sexually abused they saw witches fly, traveled in hot air balloons and were taken through underground tunnels. There were also claims that orgies occurred at car washes and airports and children were flushed down toilets to secret rooms. Ideally the forensic interview is the only time a child has to recount the entire story of their abuse prior to trial. In many ways the forensic examiner serves a sort of gate keeper function—just as it is important to establish what happened it's equally as important to establish if something didn't happen. It's the role of the forensic examiner to question things that don't make sense. Fortunately with the modernization of competency standards, forensic examiners can ask these questions without fearing it may lead to the child ultimately being barred from the witness stand.

Anatomy of a Trial

Forensic mental health professionals are frequently called as witnesses in criminal trials. Because of the frequency with which mental health professionals are called to court it's important to have an understanding of how the jury trial process works and what happens both before and after the mental health professional testifies.

Jury Selection

Jury selection is often referred to as voir dire. The term voir dire can refer to two very different events in a trial. When the term voir dire is being used to describe jury selection it refers to the process whereby community members are summoned to court and questioned about their suitability to serve as jurors. The process of questioning the prospective jurors is formally known as voir dire. (We will discuss the other meaning of voir dire later in the sections about competency hearings and qualifying experts.) The group of prospective jurors called in a case are collectively referred to as the venire.

During voir dire there are strict rules about what questions can be asked and who can ask the questions. In some states only judges are allowed to voir dire prospective jurors. In other states the prosecutor and the defense attorney conduct voir dire. In other states and many federal jurisdictions it's a combination—both the judge and the lawyers voir dire jurors.

The purpose of voir dire is to select jurors who are not already familiar with the case and who are open minded and willing to listen to all the evidence before making up their minds. What is appropriate to ask on voir dire changes based on the specific circumstances of the case. In a child molest case it's appropriate to ask jurors if they or anyone close to them has been the victim of molest. Most, if not all, courts will allow jurors to answer these kinds of questions out of the hearing of other prospective jurors. It is appropriate to question jurors about any biases they may have. For example if the defendant is a member of a racial minority questions about stereotypes of that racial minority are generally appropriate.

It's generally impermissible to ask jurors about their religion, political views, age, or sexual orientation. At the conclusion of voir dire both the prosecutor and the defense are allowed to excuse or challenge jurors. There are two kinds of challenges, for cause and peremptory. A challenge for cause means the lawyer making the challenge believes there is a specific legal reason why a prospective juror cannot sit on the jury. It could be because the prospective juror already knows about the case or has said or done something that indicates a bias against one side or the other. When a challenge for cause is made typically the arguments about whether or not the legal standard has been met are held outside the presence of all prospective jurors. The court rules on the challenge for cause after hearing each party's reasons why a certain prospective juror should be excused or should remain. If the challenge

is granted the prospective juror is excused from service on that particular jury. If the challenge is denied the prospective juror remains as part of the venire. The side that lost the challenge for cause is allowed to use a peremptory challenge to excuse the prospective juror. The parties, the prosecutor, and the defense have an unlimited number of challenges for cause.

A peremptory challenge is a challenge whereby a prospective juror can be excused and the party excusing that juror does not have to give a reason. The number of peremptory challenges is limited and varies depending on the rules in each state as well as the nature of the changes. Generally the parties will have a greater number of peremptory challenges the more serious the potential penalty. While the lawyer using the peremptory challenge does not have to state a reason for excusing a particular juror, there are strict rules about why prospective jurors can be excused. Prospective jurors cannot be excused because of their race, religion, age, sexual orientation, or political affiliation. If one party, say the defense, believes the prosecutor improperly used a peremptory challenge the defense can raise that issue to the trial judge. The remaining venire is excused and the prosecutor can be required to explain why certain jurors were excused. The trial court then rules on whether or not the peremptory challenges were used properly. If they were used properly jury selection continues. If the peremptory challenges were used improperly the entire venire is dismissed and the process starts over. In addition in some states the improper use of peremptory challenges must be reported to the state bar and can be the basis for discipline against the lawyer.

Competency Hearings

Competency hearings are formal hearings held outside the presence of the jury to determine whether or not a witness is competent to testify. Courtrooms are intimidating places to many adults—they are much more so to children. Many courts allow child witnesses to come into the courtroom when court is not in session and get familiar with the courtroom. The child can sit in the witness box, look at and even sit on the bench (the bench is where the judge sits), go in the jury box, sit at counsel table, etc.

Under the constitution the defendant in a criminal case has the right to be present at all phases of the proceedings against him or her. A defendant also has a right to confront the witnesses and evidence against them. Both of these rights stem from the right to due process of law and to be allowed to assist in their own defense. There are many exceptions to a defendant's right to be present. For example if a jury goes out to view a crime scene a defendant does not have the right to go with the jury.

During competency hearings and indeed during trial many children do not wish to face the person who assaulted them. It can make it much more difficult for the child to qualify as a competent witness. There is some evidence that suggests the child is traumatized all over again if forced to see their abuser and recount the abuse in front of that person.

For years the law has grappled with the tension between a defendant's right to be present and a child's desire not to face the defendant. Some jurisdictions have addressed this issue by allowing competency hearings to be conducted via closed circuit camera. The defendant can see and hear the child's testimony but the child cannot see or hear the defendant. Other jurisdictions exclude the defendant although under the somewhat questionable theory that the right of confrontation is a trial right and competency is not formally part of the trial.

When the child is on the witness stand in a competency hearing the child is voir dired. In this context it means the judge or the lawyers are asking the child questions to establish the child's competency to testify as a witness.

Qualifying as an Expert

When mental health professionals are called to the witness stand, either due a forensic interview or to render an opinion, the lawyer calling them to the witness stand will likely qualify the mental health professional as an expert. Most witnesses who take the stand are fact witnesses; they are permitted to testify about what they saw or what they heard. Expert witnesses are different because they are allowed to render an opinion. When a witness is qualified as an expert it means the court accepts the witness's educational and professional credentials as sufficient to allow the expert witness to give opinion testimony.

The parties often disagree about potential expert testimony. Either one party does not believe the individual has the necessary qualifications to make that person an expert witness or one party does not believe the opinion the perspective expert would like to render is appropriate. If there is a dispute over whether or not a witness can or should qualify as an expert a hearing is held outside of the presence of the jury. The prospective expert is voir dired; questioned on their training and experience and the court ultimately rules whether or not the witness can testify as an expert.

The United States Supreme Court has decided two different cases which provide the framework for resolving disputes about proposed expert testimony. Those cases are *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). Both *Daubert* and *Kumho Tire* are case names frequently discussed in courtrooms across the country. An understanding of these cases is helpful for mental health professionals likely to testify.

In *Daubert* two minor children and their parents' alleged prenatal ingestion of Merrell Dow's prescription drug, Bendectin, caused serious birth defects. Each side had multiple expert opinions to support their position. At the trial court level the trial court refused to admit the testimony of the children's experts because the methodology employed by their experts was "not sufficiently established to have general acceptance in the field to which it belongs." (*Daubert* at 583.) Prior to the decision in *Daubert* "general acceptance" was the test for all proposed scientific expert testimony. In *Daubert* the court rejected the "general acceptance" test. The Supreme Court ruled that expert testimony is admissible only if the opinion rests on a reliable

foundation and is relevant to the case at hand. In order to determine whether or not the opinion “rests on a reliable foundation” the high court stated that specific things like testing, peer review, error rates, and acceptability in the scientific community were all things that would help determine the reliability of a particular theory or technique. (*Daubert*, at 593–594.) In *Daubert* the court stated that trial courts are the gatekeepers tasked with the duty to ensure pertinent evidence based on scientifically valid principles is admitted into evidence.

The decision in *Daubert* initially only applied to scientific expert testimony. *Kuhmo Tire* extended the reach of the *Daubert* decision. In *Kuhmo Tire* a tire on a vehicle driven by Patrick Carmichael blew out causing the vehicle to overturn. One passenger died and others were injured. The survivors brought a lawsuit against Kuhmo Tire, the distributor of the tire, claiming that tire was defective. The survivors sought to introduce the testimony of a tire failure analyst. A dispute arose among the parties regarding whether or not *Daubert* would apply to nonscientific testimony.

The United States Supreme Court held that the rule in *Daubert*, that all expert testimony is admissible so long as the opinion rests on a reliable foundation and is relevant, extends to all expert testimony and is not limited to scientific experts. These two rulings, *Daubert* and *Kuhmo Tire*, opened the door to many more types of expert testimony that were previously inadmissible.

Mental health professionals have always been allowed to testify about a forensic interview but now they can also testify about a much wider array of topics. It is unlikely a mental health professional would be called to testify about a forensic interview and render an expert opinion in the same case. A more likely scenario is that a forensic interview is conducted. A different forensic mental health professional is retained by the lawyers for the defense to review the video of the forensic interview. This mental health professional is asked to consider the factors that have been identified in empirical research related to potential bias in forensic interviews of children. (Fanetti, M. & Boles, R. (2004). Forensic interviewing and assessment issues with children.) In W. O'Donohue and E. Levensky, *Handbook of Forensic Psychology: Resource for Mental Health and Legal Professionals*. Elsevier Academic Press: New York. Those factors are:

1. The child, due to rapport problems, may not have been comfortable and therefore may not have answered in a complete and accurate manner.
2. The child did not know that she could say, “I don't know” when she did not know the truth.
3. The child did not understand what it means to tell the truth.
4. The child did not know the importance of telling the truth.
5. The child did not understand her role in the interview or the purpose of the interview and therefore her answers may have been distorted.
6. The child might have felt uncomfortable discussing certain topics with the interviewer, therefore may not have answered in a complete and accurate manner.
7. The child had experienced some sort of externally derived threatening experience, which may have served to distort answers (e.g., fear of threats to self, loved ones, or property).

8. The child did not feel as though she had a choice in the type of responses she provided.
9. The child answered in a certain way in an attempt to please an authority figure.
10. There were leading questions.
11. The child's verbalizations at times were disconfirmed.
12. The interviewer inappropriately reinforced certain types of answers.
13. There were repetitive and perhaps coercive questions.
14. There were aspects of the child's total response (e.g., body posture, facial expressions, etc.) that gave a different interpretation to the child's answer.
15. The interviewer encouraged the child to speculate about important details, after the child had indicated that she was not sure about an answer or did not have the information.
16. The interviewer referenced the fact that other individuals (e.g., peers) had been interviewed regarding the interview topic and/or indicated what the other individuals' responses were.
17. The interviewer focused or redirected the child toward information about a specific detail or individual.
18. The child's report has been contaminated by some outside source, such as experience with another professional (e.g., retroactive interference from some other interviews).

After reviewing the forensic interview for these factors the expert is often asked to write a report and testify about their opinions. What experts should expect when they testify is discussed in more detail later in this chapter.

There are no set rules for when a court has to conduct hearings regarding witness competency and/or admissibility of expert testimony. In most cases the court will make any necessary rulings about the admissibility of expert testimony and the competency of witnesses prior to the parties selecting a jury or giving their opening statements. The reason for this is that the lawyers need to know what to voir dire the jury on and what to say in their opening statements. The lawyers therefore need to know how the court is going to rule on these issues in advance.

Opening Statements

An opening statement is the first time the jury really gets to hear from the lawyers about the case. While the lawyers for each side may have spoken with the jurors during voir dire, the lawyers are not allowed to preview the facts of the case or their theory of the case during voir dire. Opening statements are when each side gets to outline what evidence they expect the jury to hear and the lawyers' theories for why the jury should decide the case one way or another.

Opening statements serve as road maps for the jury. This is important for a couple of reasons. Jurors are not supposed to have any advance knowledge of what a case is about. This is next to impossible to accomplish in high profile trials or in small communities; in those instances the judge instructs the jury prior to opening

statements that they are not to consider information from any outside source or preconceived notions about the case. The opening statement is intended to be the jury's first introduction to the facts of the case.

Trials rarely proceed with a chronological recitation of the facts. The realities of witness availability and the court's schedule means the order in which witnesses are called is often random. The opening statement provides a framework for the jury so they can understand how the different pieces of evidence fit, or don't fit, together.

Opening statements can be dramatic, they can be very vivid. They cannot be argumentative. Opening statements are not supposed to suggest the inferences the lawyers want the jury to draw from the evidence. In reality the line between a "statement" and an "argument" can be difficult to draw. Most experienced lawyers know how to state their "arguments" in a manner that makes them into statements. For example depending on the situation the phrase "John Smith is a liar" could be considered argumentative. Most lawyers would restate this as "the evidence will show John Smith is a liar." This change has removed any objectionable qualities from the statement.

In a criminal case the prosecution gives their opening statement first because they bear the burden of proof. The defense gives their opening statement second. The defense has the option of giving their opening statement after the close of the prosecution's case and before the defense starts putting on its case. Few defense lawyers elect this option because the jury goes for so long without hearing the defense's version of events. Neither side is technically required to give an opening statement however opening statements are rarely, if ever, waived.

The Taking of Evidence

The bulk of the trial is spent taking evidence. "Taking evidence" means the process where witnesses are called to the witness stand, questioned, cross-examined and physical or demonstrative evidence is admitted. Physical or demonstrative evidence cannot just be presented to the jury—it has to be admitted by the court.

In order to admit evidence, say a copy of a forensic interview, the party seeking to introduce the interview first has to lay a foundation. In order to lay a foundation the prosecutor might call the forensic mental health professional who conducted the interview to the stand. The witness would then be asked questions such as where do they work, how many years have they worked in this profession, are they acquainted with the alleged victim, does the room the interview occur in contain video recording equipment, etc. Laying a foundation means introducing sufficient preliminary evidence regarding the authenticity and relevance of the evidence sought to be admitted.

Different courts handle formal rulings on the admissibility of evidence differently. Normally after the lawyer for one side has asked what they believe to be enough questions in order to admit evidence they will say something like "the prosecution moves to admit [name of item]" and the court will rule on whether or not the item

is admitted into evidence. The formal rule is that the lawyers may not show any item of evidence to a jury, even those that have been admitted into evidence, without the court's permission. If a lawyer wants to show the item to the jury they ask something like "permission to publish." If the court grants permission the item is then shown to the jury. This formal rule is not followed in many courtrooms for several reasons. One, because once evidence is admitted it is assumed the jury can see it. Two, because asking this question after every item of evidence has been admitted is tedious and redundant for the jury.

Witness testimony is rarely the dramatic, flashy experience depicted on television. Examining witnesses can go on for hours, sometimes days. The side calling the witness gets to question that witness first on direct examination. When the direct is done, the lawyer for the side gets to cross-examine the witness. When cross is done the first lawyer is entitled to redirect, then there is recross. During the course of witness testimony the side not questioning the witness can object both to the questions being asked and the answers being given. The list of possible objections is far too lengthy to cover here. Most objections are ruled on instantly by the trial judge. For more complicated issues the lawyers for both sides are called to the judge's bench and the issue is discussed outside the presence of the jury and the witness. In some instances the objection is so important or the issue so complex that the judge will order the jury and the witness into the hall way while the lawyers and the judge hash the issue out. Once the issue is resolved and the court has ruled, the judge calls the jury and the witness back into the courtroom.

Closing Arguments

Once the prosecution has called all of its witnesses, the prosecution rests. This is a formal announcement and goes something like this:

Judge: Madame prosecutor, please call your next witness.

Prosecutor: Your honor, the prosecution rests.

Once the prosecution has rested the defense is allowed to start calling their witnesses. A defendant in a criminal case is not required to present evidence and in fact, frequently defendants do not present their own evidence.

Once both sides have rested closing arguments are heard. Closing arguments are truly arguments. Lawyers try to sway the jurors to agreeing with their side. In a criminal case the prosecution always bears the burden of proof; the law requires the prosecutor prove the accused is guilty beyond a reasonable doubt. Often times large parts of both the prosecution and defense closing arguments are devoted to discussions about whether or not the prosecution has met its burden. There are few rules governing arguments other than the lawyers must accurately restate the evidence presented in court and must accurately state the law.

Many courts set time limits for how long the parties can argue during their closing arguments. Typically the longer and more complex a case, the longer time the parties

will be allotted. Years ago lawyers would argue their closing arguments for hours, sometimes even several days. Courts rarely permit such lengthy arguments except in the rarest of instances.

Jury Deliberations and Verdict

Either before the closing arguments or after them, the court will instruct the jury on the law. The court is required to actually read the law aloud to the jury. Once the jury has heard the arguments and the law, they retire to the jury room for deliberations. Jury deliberations are secret. No one other than the jurors is allowed to be present. Except for some very limited exceptions, no one is allowed to ask the jury about their deliberations. The secrecy of jury deliberations is necessary to preserve the integrity of the jury process. No one other than the 12 people who heard all the evidence, heard the arguments of counsel, and who heard the law as announced by the judge should be able to influence the jury's verdict. Jury tampering is extremely rare. More common is the situation in which jurors decide to look something up on their phones or computers or attempt to visit a crime scene on their own. This is juror misconduct and while it is often done with the best of intentions, it can and frequently does result in a mistrial being declared. When a mistrial is declared the jurors are dismissed without rendering a verdict and the entire trial process, starting with selecting a jury, has to start over.

There is no limit to how long a jury can deliberate or what form their deliberations must take. Jurors are allowed to ask questions of the court during deliberations. If the jury wants to ask a question they write the question down on paper and the question is sent to the judge. The judge's clerk contacts the lawyers and tells them to come to court. The question as well as the proposed answer is discussed before being provided to the jury. If the parties cannot agree on the answer the court decides the answer.

Once the jury reaches their decision they send a note to the court announcing that they have a verdict. The parties are contacted and summoned to court. The verdict is then read aloud in open court. Once the verdict has been read the jury is dismissed. If the defendant has been acquitted the defendant is free to leave and the case is over. If the defendant is convicted a date and time for sentencing is set.

Sentencing

Sentencing is the formal process whereby the defendant is ordered to serve a specific amount of time in jail or in prison for their conduct. Forensic mental health professionals often serve a role in the sentencing process. Defense lawyers frequently hire psychologists to conduct forensic evaluations of their clients. Those evaluations are often used by the defense in court as part of an argument for a lesser sentence and/or for treatment for their client.

Sentencing is perhaps the one time when a judge's true opinion of a case becomes relevant. Prior to sentencing judges try very hard to be unbiased and to not be swayed either way by the evidence. At sentencing, after they have heard a forensic interview and they have heard a child witness testify, some judges are free with their opinions about the case and the defendant.

In cases where there are child victims of sex crimes, sentencing can be complicated and frustrating for everyone involved. There has been a push over the past several decades for longer and longer sentences in these cases. Judges have largely been stripped of their discretion to fashion appropriate sentences for defendants in these cases—instead the courts are forced to issue mandatory sentences because of legislative agendas. There are instances where justice dictates an individual receive a lesser or different sentence because of some factor specific to that individual but in many cases judges are prohibited from issuing the sentences they believe just.

What to Expect on The Witness Stand

Mental health professionals conducting forensic interviews of children will almost always be called to the witness stand by the prosecution. Often the prosecutors arrange meetings with their witnesses a week or so prior to trial. The purpose of these meetings is to discuss the questions the prosecutor anticipates asking the witness at trial. To the extent the prosecutor knows, the prosecutor will often inform the witness of the defense's theory or of any potential weaknesses in the prosecution's case that the prosecutor expects the defense to exploit.

On direct examination, when the prosecutor is questioning their witnesses, the questioning is straight forward and the tempo of the questions is about the speed of a normal conversation. Most lawyers do not write out individual questions in advance, they work from outlines that go through the subject areas they want to cover with each witness. This means the lawyers are formulating the precise questions as they go. Trials, particularly long or extremely contentious ones are exhausting for the lawyers involved. Asking consistently intelligent questions under these circumstances can be challenging even for the most seasoned of trial lawyers. If a lawyer asks a question, on cross or on direct, that doesn't make sense say so. It's perfectly acceptable to ask a lawyer on either side to rephrase their question.

Cross examination is very different than direct. On direct examination the questions have to be open-ended—they cannot be leading. On cross examination lawyers are allowed to use leading questions. In fact most lawyers will only ask leading questions on cross examination. Lawyers often try to change the tempo on cross. They will rapid fire questions at a witness as fast as they can and then they will slow down and take a very long time between each answer and the next question. Direct examination is normally chronological or follows some other internal order than makes sense under the circumstances. Cross is rarely chronological. Lawyers ask questions out of order intentionally. Lawyers are allowed to be pretty aggressive on cross examination—they cannot ask questions that are argumentative, but they can

be intense and intimidating. The purpose of all of this is to test the veracity and reliability of the witness. A witness who is lying or hiding something is likely to slip up under these circumstances. Mental health professionals testifying about a forensic interview that was properly conducted have little to worry about on cross. The best lawyer in the world cannot impeach or undermine the testimony of a witness who is unbiased, did their job properly and is telling the truth.

Legal Issues

There are a number of legal decisions over the years that affect the forensic interviews of children. An exhaustive list would be nearly impossible to prepare but a summary of some of the major ones are presented below.

Taint Hearings

A taint hearing is typically a pretrial hearing used to determine whether or not the statements from alleged child abuse victims should be excluded. The argument is that the child's testimony is tainted because of improper law enforcement interview techniques, improper forensic interviews, and/or bias or influence from another source that has significantly affected the child's testimony.

Among the best known cases discussing a taint hearing is *State v. Michaels*, 136 N.J. 299, (1994). In September 1984, Margaret Kelly Michaels was hired by Wee Care Day Nursery as a teacher's aide for preschoolers. Michaels had no prior experience as a teacher at any level.

During the 7-month period that Michaels worked at Wee Care, she performed satisfactorily. Wee Care never received a complaint about her from staff, children, or parents. On April 26, 1985, the mother of M.P., a 4-year-old in Michaels's nap class, noticed he was covered with spots. She took the child to his pediatrician and had him examined. During the examination, a pediatric nurse took M.P.'s temperature rectally. In the presence of the nurse and his mother, M.P. stated, "this is what my teacher does to me at nap time at school." M.P. indicated to the nurse that his teacher, Kelly (the name by which Michaels was known to the children), was the one who took his temperature. M.P. added that Kelly undressed him and took his temperature daily.

M.P. was questioned by his mom some more and eventually told his mom that Kelly did the same to S.R. M.P.'s mother contacted the New Jersey Division of Youth and Family Services to inform them of her son's disclosures. The Prosecutor's office ultimately assumed investigation of the complaint.

The Prosecutor's office interviewed several Wee Care children and their parents. During that period of investigation, Michaels was submitted to approximately nine hours of questioning. Additionally, Michaels consented to taking a lie detector test,

which she passed. Extensive additional interviews and examinations of the Wee Care children by the prosecutor's office followed. By the time the trial concluded Michaels was charged with 131 counts of child molest. The majority of the state's evidence was the testimony of children. Limited physical evidence supported the contention that the children had been molested. Michaels was convicted on numerous counts and sentenced to 47 years in prison.

On appeal the issue before the court was the interview techniques employed in both law enforcement and forensic interviews of the children involved. The court wrote:

That an investigatory interview of a young child can be coercive or suggestive and thus shape the child's responses is generally accepted. If a child's recollection of events has been molded by an interrogation, that influence undermines the reliability of the child's responses as an accurate recollection of actual events.

A variety of factors bear on the kinds of interrogation that can affect the reliability of a child's statements concerning sexual abuse. We note that a fairly wide consensus exists among experts, scholars, and practitioners concerning improper interrogation techniques. They argue that among the factors that can undermine the neutrality of an interview and create undue suggestiveness are a lack of investigatory independence, the pursuit by the interviewer of a preconceived notion of what has happened to the child, the use of leading questions, and a lack of control for outside influences on the child's statements, such as previous conversations with parents or peers. [Citation omitted].

The use of incessantly repeated questions also adds a manipulative element to an interview. When a child is asked a question and gives an answer, and the question is immediately asked again, the child's normal reaction is to assume that the first answer was wrong or displeasing to the adult questioner. (See Debra A. Poole and Lawrence T. White, *Effects of Question Repetition on Eyewitness Testimony of Children and Adults*, 27 *Developmental Psychology*, November (1991) at 975.) The insidious effects of repeated questioning are even more pronounced when the questions themselves over time suggest information to the children. [Citation omitted].

The explicit vilification or criticism of the person charged with wrongdoing is another factor that can induce a child to believe abuse has occurred. (*Ibid.*) Similarly, an interviewer's bias with respect to a suspected person's guilt or innocence can have a marked effect on the accuracy of a child's statements. [Citation omitted]. The transmission of suggestion can also be subtly communicated to children through more obvious factors such as the interviewer's tone of voice, mild threats, praise, cajoling, bribes and rewards, as well as peer pressure.

The Appellate Division recognized the considerable authority supporting the deleterious impact improper interrogation can have on a child's memory. [Citation omitted]. Other courts have recognized that once tainted the distortion of the child's memory is irremediable. (See *State v. Wright*, 116 Idaho 382, 775 P.2d 1224, 1228 (1989) ("Once this **tainting** of memory has occurred, the problem is irredeemable. That memory is, from then on, as real to the child as any other.")) The debilitating impact of improper interrogation has even more pronounced effect among young children. (Maryann King and John C. Yuille, *Suggestibility and the Child Witness*, in *Children's Eyewitness Memory*, 29 (Stephen J. Ceci et al. eds., 1987) and Stephen J. Ceci, *Age Differences in Suggestibility*, in *Children's Eyewitness Memory* 82 (Stephen J. Ceci, et al. ed., 1987).)

The critical influence that can be exerted by interview techniques is also supported by the literature that generally addresses the reliability of children's memories. Those studies stress the importance of *proper* interview techniques as a predicate for eliciting accurate and consistent recollection. (See, Gail S. Goodman, et al., *Optimizing Children's Testimony: Research and Social Policy Issues Concerning Allegations of Child Sexual Abuse in Child Abuse, Child Development, and Social Policy* 1992, Dante Cicchetti & Sheree L. Toth (Eds.).)

The conclusion that improper interrogations generate a significant risk of corrupting the memories of young children is confirmed by government and law enforcement agencies, which have adopted standards for conducting interviews designed to overcome the dangers stemming from the improper interrogation of young children.

(*State v. Michaels* 136 N.J. at 309–311.)

The *Michaels* court issued a resounding criticism of the interviews conducted in the case. The court characterized them as cajoling, biased, and improper among other things. The court's criticism of the interview techniques went on for several pages and concluded a taint hearing must be held.

Given the training that modern forensic interviewers receive as well as the training received by many law enforcement officers, fewer taint hearings are held. More recently taint hearings tend to occur mainly because of prejudice and influence exerted on a child witness because of family members. Defense lawyers have no small burden persuading a court to hold a taint hearing—the defense has to produce evidence, not just speculation, that the child witness' memory has been improperly and unduly influenced before the court will hold a taint hearing.

A Little Less Hearsay

Until 2004 the law in many states permitted the introduction of the entire forensic interview of a child in many circumstances. Defense lawyers objected to this practice because it violated the rules prohibiting the introduction of hearsay and it violated the Confrontation Clause in the United States Constitution. Hearsay is any statement made outside of court, repeated in court and is offered for the truth of the matter asserted. In a forensic interview the interview [the statements] was done at a child safety center [outside of a courtroom] and the contents of the interview would be offered in court for proof of what the child alleged to have occurred. There are numerous exceptions to the hearsay rule. Forensic interviews were admissible under the exception which allowed in statements that have a “sufficient indicia of reliability.” The Confrontation Clause is contained in the Sixth Amendment to the constitution and states a defendant in a criminal trial has the right to confront and cross-examine the witnesses against him or her. If a forensic interview is introduced into evidence, the defendant cannot interject and ask questions, the interview already occurred, and it occurred when neither he nor his lawyer was present. The Confrontation Clause also encompasses the notion that the jury is entitled to see how a witness reacts to a question. Again something that cannot occur when a taped interview is involved. There have always been recognized exceptions to the Confrontation Clause.

In 2004 the United States Supreme Court issued a ruling in a case called *Crawford v. Washington*, 541 U.S. 36 (2004). In that case the high court held that hearsay statements generally cannot be used in court if the person who made the statement is unavailable to be cross-examined. While there are exceptions to this rule the net effect of the rule has been to require more children to testify in cases where

previously they may not have been required to testify. Fewer forensic interviews can be admitted into evidence at trial.

Consider the Michigan case *People v. Douglas*, 496 Mich. 557 (2014). In that case the defendant was accused of making his daughter, KD, perform fellatio on him and touch his penis. The allegations arose approximately 1 year after KD's parents split up. KD made the allegations first to her mother. In response her mother moved up KD's preexisting appointment with a therapist. The therapist contacted CPS after speaking with KD. KD participated in a forensic interview at Care House and during the interview discussed the alleged fellatio and touching. KD was 3½ years old at the time the alleged abuse occurred, four when she reported it and five by the time she actually testified. (*People v. Douglas*, 496 Mich. At 561–562.)

At trial KD testified. The prosecutor introduced testimony from forensic interviewer Jennifer Wheeler who testified about the contents of the forensic interview. The jury was shown a video recording of the interview. The defendant was convicted. On appeal the Michigan Supreme Court ruled that the hearsay statements introduced by the forensic interviewer as well as the playing of the forensic interview were in error and the defendant was entitled to a new trial because of the error. (*People v. Douglas*, 496 Mich. at 600–601.) The ruling in this case was highly influenced by the United States Supreme Court's decision in *Crawford* and is indicative of how forensic interviews have been handled in the wake of that decision.

Failure to Protect

All states have laws that require parents or other adults with the care and custody of a child to protect that child. These laws require one parent to protect the child from another parent if the other parent is abusive or neglectful.

Some years ago there was a case in California in which a couple had three children; a 3-year-old and infant twins. The parents were both developmentally disabled and numerous county agencies were involved with the family. The parents were probably not capable of caring for three young children on their own. The infants suffered from severe diaper rash and were malnourished. Both the father and the mother very much wanted to keep their children and, probably because they wanted their children, social services continued to work with the family instead of attempting to remove the children from the home. There were notations in the CPS worker's file that she told the father they were doing a good job of caring for the twins but needed to work harder at resolving their diaper rash and generally keeping the twins cleaner.

Unrelated to the care of the children, the father was convicted of a misdemeanor for taking money from an employer and sentenced to perform community service. It was summertime and very hot. One day while the father was performing his court ordered community service the mother left the infant twins in the upstairs of an apartment that had no air conditioning. That afternoon a CPS worker stopped to check in on the twins. The mother refused to allow the CPS worker in the house. The CPS

worker became concerned and contacted local police and fire. When the fireman gained entry into the home they found the twin girls had died from heat exposure.

The mother was prosecuted and convicted for the murder of her children. The father was prosecuted and convicted for failing to protect the children from their mother.

Compare that case to the following: A husband and wife had two biological children. They were asked by family members to take in a 4-year-old niece whose mother was unable to care for her. The niece had developmental and emotional disabilities. The husband was a construction worker who left before the children got out of bed in the morning and frequently returned after they had gone to bed at night.

The wife physically abused the niece. The young girl was ultimately brought to the hospital when a glass shower door allegedly fell off of its hinges hitting the girl in the head. Medical workers found severe burns on the palms of her hands and bruising that appeared unrelated to the incident involving the shower door. Because of her disabilities the niece was unable to communicate to medical workers or law enforcement how she had received her injuries. The husband and wife were prosecuted and convicted; the wife for the abuse and the husband for failing to protect the child from the wife.

The men in both scenarios were sentenced to fairly similar prison terms, each received about 2 years in prison. In both cases there was little direct evidence that the men were aware of the dangers to the children. Certainly the father in the first example was aware the twins had diaper rash and social services was concerned with the children's failure to gain weight. The husband in the second scenario brought the child to hospital but it was unclear whether or not he knew or should have known about the abuse prior to that night.

While the legal standard in both of these cases demanded proof beyond a reasonable doubt that these men had failed to protect the children involved the reality is that each jury required relatively little evidence in order to return convictions. People who have the care and custody of children are legally required to protect them—the law is willing to place a high burden on those in the best position to uncover and address child abuse.

Conclusion

The modern forensic interview of a child bears on an entire criminal prosecution. Because of that the role of the forensic interviewer has become increasingly important—they are the one person who talks with the child pretrial. The forensic interviewer has to be at least minimally familiar with the basics of the criminal process and with developments that may affect the scope of their testimony.