

Chapter 4

Forensic Interviewing and Charging: A Prosecutor's Perspective

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A report of child sexual abuse may occur at any time and may be made in a variety of ways. A child may report sexual abuse at the time of the abuse, shortly following the abuse, days, weeks, months, or even years later. Or, the child may never report the abuse. When a child delays in reporting sexual abuse, it is referred to as “delayed reporting.” If a child reports sexual abuse, the report may be made in a variety of ways and under nearly any circumstance imaginable. The report could be spontaneous, blurted out, reasoned, made in response to a question, totally unrelated to an incident or conversation, or simply as a result of a stimuli or trigger. It can be made orally, in writing, by way of a drawing, or through action. There is simply no gauge or label that can be placed upon the manner, time, place, or event in which a report is made.

All reports of child sexual abuse, whether immediate or delayed, should be treated by law enforcement, social workers, persons conducting a forensic interview with the child, and all persons who interact with the child, as the report being a truthful report. The function of the forensic interview is to objectively gather evidence in the forms of statements by the victim, to arrange a forensic examination if appropriate to determine the existence or absence of any physical evidence, and to provide information to the victim about treatment programs and funding sources for victims of violent crimes. Available treatment programs include counseling which is often available and beneficial to the child and immediate household members or relatives.

The person conducting a forensic interview should remain neutral and unbiased throughout the interview and investigation. The person conducting the forensic interview should not judge the child or reporting party or make any conclusions or inferences simply because a child has reported sexual abuse. The report of child sexual abuse is a serious matter for everyone involved, the child, the perpetrator, household members, relatives, friends, volunteers, the community, law enforce-

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ment, social services, medical providers, counselors, schools, etc. Accordingly, every report of child sexual abuse should be handled and investigated seriously, even if it turns out the report is a false report.

Often times the person conducting a forensic interview of the child reporting sexual abuse is not the initial responder in the case. It is important that only persons trained in forensic interviewing in cases of child sexual abuse actually conduct an interview with the child or children who report sexual abuse. In most instances, persons trained in forensic interviewing of children reporting child sexual abuse are local investigating law enforcement officers, usually detectives. However, some social services case workers, nurses, or other specialists are trained in forensic interviewing of children reporting child sexual abuse. It is recommended that local agencies work with law enforcement to develop a plan, education, and training, to establish and coordinate who or which agency will be responsible for conducting the forensic interview when there is a report of child sexual abuse.

Irrespective of who conducts the forensic interview, it is very important that the person conducting a forensic interview remains objective in gathering information and evidence about the report of child sexual abuse. Interviewers, especially law enforcement, that do not approach the cases objectively, will undermine their own investigation and ultimately circumvent the search for the truth about what, if anything, happened. In addition, persons who conduct forensic interviews who do not remain objective lose credibility when testifying; not only for the current case but also for all other cases they investigate.

Crimes of sexual abuse against a child are generally referred to as crimes of secrecy. What this means is that sexual abuse against children are generally committed by a perpetrator when there are no witnesses to see the abuse. This does not mean that persons who could potentially be persons who could potentially be witnesses are not in the immediate vicinity where the abuse occurred. Often, the abuse occurs any time the perpetrator gets an opportunity; for example, a stepfather lies down with a stepdaughter for purposes of putting the child to bed and takes that opportunity to commit sexual abuse against the stepdaughter while in the bed. The mother of the child may be only a few feet away in the very next room. As will be explored later, it is a misnomer to think that a child will respond by calling for help or even voicing an objection when the sexual abuse occurs even if the help is nearby, such as in the next room.

The fact that a crime of sexual abuse occurs in secret is the reason why it is critical that the forensic interview and law enforcement's investigation are conducted in a manner that collects the most reliable evidence. At the conclusion of a trial, but before closing arguments, a jury is read specific instructions about the law they must apply in the case. One of the legal instructions in a child sexual abuse case informs the jury that they may convict the defendant based solely on the testimony of the victim alone. In short, that means that if the jury believes the child victim's testimony that the sexual abuse occurred by the defendant, the jury can find the defendant guilty of child sexual abuse without considering any other evidence. As will be discussed later in this chapter and throughout this book, in the majority of cases of sexual abuse against a child, the only evidence of sexual abuse is the statements by the victim describing the abuse that occurred.

In this chapter, we will explore the prosecutor's role in making charging decisions in cases of child sexual abuse. We will discuss the importance of the forensic interview in investigating reports of child sexual abuse, and law enforcement's investigation for purposes of a prosecutor's charging decision. We will also examine charging considerations, and issues concerning the prosecution of a case through a jury trial.

Charging Decision

Prosecutors take an oath to uphold the Constitution and laws of the USA as well as the laws of the State and jurisdiction in which they prosecute. The American Bar Association has promulgated standards by which a prosecutor should adhere to in conducting the prosecutorial function. Those standards include:

Standard 3- 1.1 The Function of the Standards

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

Standard 3- 1.2 The Function of the Prosecutor

- (a) The office of prosecutor is charged with responsibility for prosecutions in its jurisdiction.
- (b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.
- (c) ***The duty of the prosecutor is to seek justice, not merely to convict.***
- (d) It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action.
- (e) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction....

ABA Standards for Criminal Justice: Prosecution and Defense Function, 3d ed., ©1993 American Bar Association, emphasis added. In short, a prosecutor has a duty to seek justice. As will be examined more fully, that duty begins at the time the prosecutor reviews a report of investigation of allegations of child sexual abuse.

A prosecutor generally relies on various agencies, usually law enforcement agencies, to investigate cases. A prosecutor generally becomes involved at the time the prosecutor receives a report of investigation from a law enforcement agency. It is important to note that on occasion, a law enforcement official may seek legal guidance or assistance from the prosecutor on a case they are investigating to ensure they are following lawful procedures and protecting the rights of all the parties involved. An example of this is when a law enforcement officer contacts a prosecutor for assistance in obtaining a search warrant during the investigation of a case. That interaction may, and often does, occur before the prosecutor receives the full report of investigation from law enforcement.

When a prosecutor receives a report of investigation, a prosecutor begins with a review of the report, including supporting materials which may be in the form of recordings, photographs, statements, admissions, test results, etc. In reports of investigation containing allegations of child sexual abuse, a prosecutor in most instances, will likely have very little additional evidence supporting the allegations that a child sexual abuse has occurred other than the statements of the victim. It cannot be stressed enough that during the process of reviewing the report, a prosecutor must remember and adhere to the ABA standard: the prosecutor has a duty to seek justice.

That duty has a heavy emotional burden for the prosecutor. On one hand, child sexual abuse is a horrific crime and justice and the law dictate that the victim must be protected and the perpetrator be held accountable. On the other hand, filing charges that accuse an innocent person of the crime of child sexual abuse can have a lasting impact on a person which can affect that person's ability to live life peacefully in the pursuit of happiness without peer scrutiny and societal deprivation or scorn.

An overzealous prosecutor may be inclined to file charges immediately. An overly cautious prosecutor may be reluctant to file charges at all, or may delay in filing charges. In many instances, before making a decision to charge a crime, prosecutors will request that additional investigation, generally referred to as "follow-up" be conducted by law enforcement. The follow-up may include a request that law enforcement conduct additional interviews with witnesses or the victim, gather additional evidence, or obtain and provide the results of testing or examinations. The prosecutor may even discuss the case with experts, such as medical doctors, nurses, or other forensic experts, for opinions regarding the evidence in the case. However, at some point, the prosecutor must make a decision to either charge a crime of child sexual abuse, a different crime, or decline to charge any crime at all.

Forensic Investigation

A person who interviews a child that reports sexual abuse should be trained in the proper method of conducting a forensic interview before attempting to interview a child victim, or any victim, of sexual abuse. There is a vast body of literature and trainings on what is considered to be the appropriate technique for conducting forensic interviews of children that report sexual abuse. The techniques for conducting forensic interviews of children reporting sexual abuse used in the past are different

from those used today, so it is important that persons conducting these interviews have current training.

The shift in the way forensic interviews of children are conducted today take into account skepticism, case law, criticism, challenges, and developments that professionals and persons conducting forensic interviews of children have encountered throughout time in interviewing and investigating reports of child sexual abuse. However, the goal of a forensic interview has remained the same: to objectively obtain factual statements from the child victim about the sexual abuse that occurred. Objective factual statements are unbiased and strive to be in the words of the child victim without fear, anticipation of reward, coaching or suggestibility. Today, experts generally agree that persons conducting forensic interviews of child victims of sexual abuse, referred to as forensic interviewers, should use a phased interview approach.

Forensic Phased Interview

In simple terms, a phased interview approach is an interview that is broken into several phases the forensic interviewer moves through in conducting the forensic interview with the child victim. There are multiple resources that address the number and types of phases that are recommended to be used for forensic interviewing of children, but there is no consistency in exactly which of these phased interview approaches is the best or most reliable one to use. Perhaps this is because the phases by themselves must be utilized on a case-by-case basis, most often depending on the development of the child and the facts in the case. As the interviewer moves through the interview with the child victim, certain phases may be skipped, addressed quickly, addressed out of order, or may take additional time.

Prior to beginning a forensic interview using a phased interview approach, the forensic interviewer should address certain pre-interview considerations. As is the case with the varying opinions as to the phases of the forensic interview itself, there are multiple resources that address pre-interview considerations. However, generally children that report being victims of sexual abuse fall into approximately four categories to be considered. The importance of understanding these categories provides guidance for the considerations and decisions an interviewer must make prior to conducting the forensic interview and during the forensic interview itself. We will discuss these categories and several of these considerations keeping in mind that this is simply a general discussion and not an exhaustive list of considerations.

The first category is children of approximately 1–2½ years of age. Most experts agree that children at this age are too young to be interviewed. While it is highly unlikely a forensic interview would elicit any statements from children of this age, experts generally agree that a child of this age would not be competent to testify. Moreover, most prosecutors or judges would not allow a child of this age to testify in any court proceeding. Accordingly, it is recommended that a forensic interviewer not attempt to interview a child in this category unless the development of the child is such that the child fits more properly into a different category.

The second category is children of approximately 2½–7 years of age. In this category, children can generally describe concepts of whom, what, and where. However, they have difficulty describing concepts of time or the ability to describe past tense events. This is particularly important to understanding how a child in this category may, during the interview, be able to describe the sexual acts themselves but have difficulty describing how many times the acts occurred or even how much time passed between the occurrence of multiple acts. Sex is a learned behavior. The child in this category would not likely have knowledge of sexual acts unless they occurred. Moreover, the reliability of the child's report increases if the child relates details about the acts that are perpetrated upon them, the child describes who perpetrated those acts upon them, and relates generally where the acts occurred.

The third category is children of approximately 7–10 years of age. Generally, children in this age group have begun learning sexual concepts and terms from various sources, often times in a school environment. They may have also begun sexual exploration or had discussions with parents, family members, friends, counselors, nurses, or doctors about sex. Some female children may also have begun menstruation and may have had discussions about their menstrual period and sex in general. This information does not decrease the reliability or accuracy of the child's report, but must be considered in light of the details contained in and surrounding the child's report. In short, the fact that a child has knowledge of or discussed sex and sexual behavior does not by itself tend to support or abrogate the accuracy of the child's report of sexual abuse in this category. However, it is important that the forensic interviewer obtains information about who perpetrated the abuse, where it occurred, what abuse occurred, and the time frames in which the abuse occurred.

The fourth category is children of approximately over 10 years of age to adulthood, otherwise known in simple terms as teenagers. In this category, sex has generally been discussed or learned through education, and even consensual acts. As in category three, the information the child has about sexual acts or sexual behavior does not decrease the reliability or accuracy of the child's report, but must be considered in light of the details contained in and surrounding the child's report. Lying is also a learned behavior and it is critical that the forensic interviewer recognizes that there may be additional motive to fabricate, but continue to treat the report as truthful. Again, it is important that the forensic interviewer obtains information about who perpetrated the abuse, where it occurred, what abuse occurred, and the time frames in which the abuse occurred.

The following represents a general list of the phases of a phased interview approach. It is important to remember that expert opinions vary as to the title, topic, and purpose of each phase. Some experts consolidate the purpose of the phases, or change the title of the phases. Some experts opine that the order of the phases should vary. However, as a general guideline, the phases of a forensic interview of a child reporting sexual abuse are as follows:

- Phase 1—Preparing the interview
- Phase 2—Introduction and developing rapport
- Phase 3—Establishing legal competency

- Phase 4—Establishing an interview structure
- Phase 5—Introducing the topic and information gathering
- Phase 6—Questioning and clarification
- Phase 7—Closing the interview

Each phase will be briefly addressed keeping in mind that this discussion does not include an exhaustive list of suggestions and prohibitions for each phase. However, it is intended to provide a general understanding of each phase of the interview taking into account a few considerations for the interviewer while conducting the phased interview. Again, as the interviewer moves through the interview with the child victim, certain phases may be skipped, addressed quickly, addressed out of order, or may take additional time. An example of this is where a child may skip prior phases and move right into phase 5, information gathering. In this case, the forensic interviewer will want to complete phase 5, and perhaps phase 6, questioning and clarifying, before moving back to phase 3, establishing legal competency.

It is also recommended and important that forensic interviewers attend and successfully complete current law enforcement recognized and approved forensic interview training or trainings in order to fully understand and apply each phase of the interview before attempting to conduct a forensic interview of a child who reports being a victim of sexual abuse.

Phase 1: Preparing the Interview

Many advocates adhere to the outdated philosophy that a child should have an attendant during a forensic interview. It is recommended that forensic interviews be conducted with one forensic interviewer with the child and without the presence of any other person. It should be noted that generally advocate groups become politically charged about being excluded from the interview. It is recommended that advocates be placed in an adjoining or nearby room to observe the interview through a one-way mirror or via live video. The forensic interview should be recorded, both audio and video if available. If there is no ability to record the interview, a second interviewer should be present simply as a witness but should not be involved in the interview in any way other than to witness and document the interview.

The room should be simple and friendly. There should be no distractions, toys, stuffed animals, food, or like objects. There should be a simple desk and comfortable chairs. Objects that may be used in the forensic interview should be stored in the room with easy access by the interviewer. The objects should not include anatomical dolls, which are not recognized as reliable and can be suggestive. Anatomic drawings may be necessary to be used on a case-by-case basis as will be discussed. The interviewer should not place the desk between the interviewer and the child, but should be comfortably arranged to facilitate discussion by the child. The interviewer should turn off all cell phones and other electronic equipment and ensure any weapons are not visible.

A therapy animal, usually a dog, also known as a service or courthouse dog, may be used depending on the laws and policy of the jurisdiction and if the child requests the animal after being offered the use of the animal. This prosecutor encourages the use of therapy dogs in interviews. Therapy dogs have been proven to provide a sense of comfort and friendliness to victims of any crime and assist the child in stating and describing the factual events about the sexual abuse. While therapy dogs are becoming more and more accepted in forensic interviews of child victims and during courtroom proceedings, their use, and legal concerns regarding their use in the courtroom, are still being vetted through the court systems in the United States.

It is important in this phase of the interview that the interviewer gathers as much information about the child from family and sources surrounding the report. The amount of time that should be dedicated to this task will vary on a case-by-case basis. Safety of the child and addressing any medical concerns is of paramount importance before any interviewing occurs. An interviewer should carefully evaluate the appropriate time and place in which to conduct a forensic interview on a case-by-case basis. Background information gathered should include, but is not limited to, information about the child such as age, date of birth, nicknames, developmental progress or delays, medical conditions, languages spoken, pets, the child's behaviors, the child's description of body parts if known, prior disclosures if any, family composition, household members, family dynamics, relatives, friends of the child, friends of the household members, household domestic violence, household drug use, household pornography, and possible motivations for false allegations.

Finally, it is important to remember that the overall length of an interview will vary depending on the category, development of the child, facts of each case, and the interview itself. However, as a general rule, children can become emotionally exhausted and wary during an interview and therefore it may be necessary to take breaks or schedule additional interviews. As a word of caution, too many interviews with a child can cause legal concerns for the prosecution and appeal of any conviction in a case.

Phase 2: Introduction and Developing Rapport

During the interview, the interviewer should be respectful of the child at any age, use simple terms, ask open-ended questions, and avoid legal, technical, or investigatory jargon. The interviewer should refrain from showing emotional reactions, making physical contact with the child, or making any promises to the child. The interviewer should not make negative statements about anyone. The interviewer should not make suggestive statements or statements that encourage or coach responses from the child. The interviewer should not reward the child or reinforce responses. The interviewer should refrain from asking "why" questions and should avoid excessively correcting the child. And perhaps one of the most difficult tasks to learn, the interviewer must exercise patience and refrain from interrupting a child. The interviewer should allow the child to answer open-ended questions.

During this phase of the interview, the interviewer should begin by introducing themselves and their job in a neutral manner. The interviewer should begin developing rapport with the child. Too often, interviewers spend entirely too much time developing rapport. The amount of time necessary to adequately develop rapport will vary with every case, every child, every interviewer, and every interview. The interviewer should ask open-ended questions that elicit responses that are generally comfortable for the child to speak about. For example, asking about pets, family, teachers, and school classes. During these questions, the interviewer must constantly assess the child's developmental level, ascertaining whether or not the child understands the interviewer's questions and is providing appropriate responses.

Phase 3: Establishing Legal Competency

In many cases the transition from one phase of the interview to the next will present itself naturally. However, in some cases, it may be necessary for the interviewer to force the transition from one phase to the next. While assessing the child's developmental level the interviewer will typically determine when to transition to establishing competency. Legal competency is generally a child's ability to "receive just impressions and articulate the difference between a truth and a lie." In layman's terms, the interviewer should be satisfied that the child understands questions, conduct, and consequences, and is able to discern and describe the difference between a truth and a lie.

There are many ways to accomplish this objective and it is recommended that an interviewer uses a variety of tasks depending on the age and developmental level of the child. For example, in interviewing a child from category two, the interviewer may hold up a blue piece of paper and ask the child what color the paper is. The interviewer may then ask "if I said the paper was yellow, would that be a truth or a lie?" Colors are generally learned early and therefore are a good reference; however, the interviewer should be cautious about using red or green in the event the child is colorblind.

In this phase, the interviewer can also ascertain information from the child that will assist the interviewer in later phases. For example, for a prosecutor to make certain charging decisions, it is necessary for the prosecutor to know whether or not there was actual penetration during the sexual abuse. It is therefore recommended that an interviewer takes the opportunity during this phase to covertly determine the child's understanding and description of penetration. This task is easily accomplished using a tissue box or envelope. For example, using a tissue box, the interviewer simply asks the child to place their hand on top of the tissue box, under the tissue box, and inside the tissue box. Nothing more is asked. The result confirms the child has the ability to receive just impressions and relate the information by action. Moreover, the child has just demonstrated that the child understands what it means to have something inside and therefore if the child later describes penetration that occurred during the sexual abuse, the interviewer already knows that child understands and is accurately describing penetration.

Phase 4: Establishing an Interview Structure

In this phase, the interviewer must establish certain ground rules that empower the child to be able to inform the interviewer they do not understand a question or may correct the interviewer. As previously stated, the goal of the forensic interview is to objectively obtain factual statements from the child victim about the sexual abuse that occurred. Objective factual statements are unbiased and strive to be in the words of the child victim without fear, anticipation of reward, coaching or suggestibility. Therefore it is important that the child not only understand but also accept that the child may not know an answer, may not understand a question, or may simply not remember a fact. Accordingly, it is recommended that the interviewer encourages the child to be truthful, not guess, and inform the interviewer if they do not understand a question.

Phase 5: Introducing the Topic and Information Gathering

Even the most trained professionals have difficulty introducing the topics of sexual abuse and transitioning to gathering information about the specific details about the abuse from the child. It is recommended that the forensic interviewer introduces the topic gently by prompting the child in a neutral manner. An example is as simple as asking the child to tell the interviewer why the child is there to talk to the interviewer. The interviewer should keep in mind that the child has been silent about the abuse until the report. This silence may have gone on for years with the abuser exercising authority over the child. That authority is best articulated by Leonardo da Vinci who is credited for stating “nothing strengthens authority so much as silence.” A simple neutral prompt most often aids the child in overcoming reluctance and anxiety and allows the interviewer to transition into gathering the pertinent information from the child about the sexual abuse.

The interviewer should be cautious about their body language and responses. The interviewer should note any change in the child’s affect that is exhibited, but should be careful to not react to the information from the child or any change in the child’s affect the interviewer observes during the interview. There is no specific methodology, practice, checklist, or example that can be provided for gathering information from a child about the specific instances of abuse. In some cases, the child will remember the last or first incident with great detail, in other cases the child will remember something tangential to the abuse. In some cases, the child will remember specific details surrounding the abuse, such as the house they lived at, the room it occurred in, a vehicle, article of clothing, friend, season, birthday or other event that occurred surrounding the incident of abuse. In other cases, the child may remember only parts of the abuse or events surrounding the abuse. The interviewer should be patient, ask open-ended questions, encourage a free recall of the events, wait for the child to respond fully, and avoid suggestibility.

Phase 6: Questioning and Clarification

During this phase of the interview, the interviewer should transition into clarifying details the child provided during the information gathering phase. The interviewer should use developmentally appropriate words and use the child's descriptors of body parts or sexual acts. The interviewer should focus on details that will support a prosecutor's ability to charge and prosecute the case. During this phase, as previously discussed, the interviewer should establish jurisdiction, or in other words, where the crime occurred. It is recommended that even if the acts of abuse, or some of them, occurred outside the jurisdiction of the interviewer, the interviewer completes the interview fully obtaining as much information about the abuse irrespective of the jurisdiction in which the acts of abuse occurred.

The interviewer should determine whether or not there was penetration during the sexual abuse, how many times the abuse occurred, and the time line in which the abuse occurred. The interviewer should get as many details as possible about the abuse, including sensory details, and whether lotions, rags, or objects were used. The interviewer should get details about grooming, bribes, or threats. The interviewer should use open-ended questions. If the interviewer must ask direct questions to focus the child's memory, it is recommended that the interviewer follows up with open-ended questions. The interviewer should attempt to get clarification of any inconsistencies. Again, the interviewer should exercise patience, ask one question at a time and wait for the child to answer the question.

The interviewer should use appropriate protocols and tools. This may vary by jurisdiction and law enforcement policy. However, again, it is recommended the interviewer not use anatomical dolls as they are not proven reliable and could be subject to suggestibility. Anatomical drawings may be used. However, when used, the interviewer should follow policy, introduce the drawings only after disclosure of abuse has occurred, and have the child identify the body parts of the child. The drawings should be marked and retained by the interviewer as evidence.

Phase 7: Closing the Interview

Often neglected, this phase is important for the child, the interviewer, and the prosecutor. It is recommended that to the extent possible, the interviewer closes the interview on a positive note with child. To the extent the child had become upset or the interviewer noticed a change in the child's affect, closing the interview provides an opportunity for the interviewer to bring the child out of the traumatic event and for the child to regain composure. The interviewer should thank the child for participating, allow the child an opportunity to ask any questions or voice any concerns. In addition, the interviewer should provide an opportunity for the child to add anything they think is important that the interviewer had not asked. Closing the interview properly continues the rapport the interviewer developed with the child at the beginning of the interview. This rapport will provide the foundation for additional interviews the interviewer or any other experts may have with the child

should it become necessary. The interviewer should leave that opportunity open with the child so that the child understands that there will be the possibility that they will have to speak more about the report of child abuse.

Charging and Prosecuting Considerations, Concerns, and Dynamics

Time

The single most difficulty a prosecutor faces in cases involving allegations of child sexual abuse is simply time. Generally, from the moment a report is made, child welfare services, law enforcement, household members, family, relatives, and friends of the child, will work closely to ensure the child's safety and maintain a distance from the suspect while the investigation is open. However, family composition, household members, family dynamics, domestic violence, relatives, friends of the child, friends of the household members, and the community play an important role in a child's fortitude in what will in almost every case, be a long time before the case is fully prosecuted.

Pressure

There is always a propensity and eagerness for volunteers, advocates, social workers, household members, family, relatives, friends of the child, teachers, counselors, clergy, and even community members, to want to discuss the facts of the report with the child. These individuals often mean well and in some ways it is simply human nature to want to help a child who has been hurt. In other cases, there may be a motive for others, such as family members or the suspect, to pressure the child to recant. Often times monetary concerns and stress created by the report, investigation, and possibly arrest of the suspect creates fear for family members and the victim. Fear, often times misplaced, may include the idea that the family will not have the ability to obtain food, shelter, or necessities, or may even face deportation. These have the potential to create pressure on the victim to falsely recant. These propensities and concerns only increase as time passes while the case is being investigated, charges are being considered, and if charges are filed, the time the case is pending in the court system.

Delay

If the prosecutor files charges, the case generally will not be tried for at least approximately a period up to an additional 2 years after the length of time it takes for law enforcement to investigate the case and the prosecutor files charges. Additional

delays may be caused from the time charges are filed, an arrest warrant is issued, and the defendant is arrested. In addition, the court's busy calendar, prosecutor and defense calendar conflicts, expert calendar conflicts, and other factors contribute to the reasons for the delay. However, too often, the defense will simply state that they cannot possibly be prepared to go to trial for a variety of reasons, effectively forcing the court to postpone the trial or face reversal of any jury conviction for ineffective assistance of defense counsel.

The simple truth is that the persons involved in cases of child sexual abuse have an understanding and awareness that time affects the case for all the reasons discussed. In addition, the child is growing older, developing, healing, and becoming more reluctant to speak about the incident. With time, witnesses can become difficult to find and will forget details which affects their credibility when testifying. Moreover, financial hardship or fear can pressure the child to recant. Time can also affect how jurors perceive how the criminal system works and may question the time between the incident, investigation, and trial.

Victim Impact

It should be noted that victims of child sexual abuse can manifest a reaction to the abuse they endured in any number of ways. They may become increasingly promiscuous, begin or increase drug or alcohol use, run away, endanger themselves, become withdrawn or remissive, become argumentative or combative, become silent or distant, have or increase nightmares, physical ailments, show a marked change in behavior, change in grades, to name only a few reactions or symptoms. However, these reactions, behavioral changes, or symptoms, denoted hereafter as "symptoms," alone are not indicative of child sexual abuse as there may be many other factors that could cause these same manifestations.

When considering a report of child sexual abuse and the presence of one or more of these symptoms, there is a strong indication that some if not all of the symptoms could be linked to the child sexual abuse. These factors should be considered, but not solely relied upon, in the totality of the prosecutor's evaluation of the case and charging decision. However, as time passes, these symptoms may manifest themselves in addition ways that affect the prosecutor's ability to proceed through trial. One such example that arises often is a female victim, who is well too often still a child herself, becoming pregnant through consensual sex. The prosecutor is often faced with having to now explain the victim's promiscuity to the jury to ensure the jury does not adversely judge the pregnant victim when testifying about being sexually abused.

Victim–Witness Advocates

For all of these reasons, it is important and recommended that jurisdictions utilize victim–witness advocates if available. Some victim–witness advocates work for the prosecution and are a liaison between the prosecutor and the victim, and often

the victim's family. These advocates provide a source of comfort, resources, and communication for the victim and the family. The advocates provide a person who can speak with the victim and explain the legal process. The advocates provide information and resources about funding for victims of violent crime as well as other funding sources that can help defray concerns about housing, food, and other necessities. The advocates provide information about available counseling at little or no cost, to address ways to cope or heal from the abuse and emotional or physical damage the victim has suffered. The advocates also provide information, if necessary, about special visas to remain in the country as a victim of a violent crime. The advocates also provide communication between the victim and the prosecutor. Finally, the advocates provide a source of emotional comfort to the victim and their family as the long legal process proceeds.

Collateral Evidence

Child sexual abuse is a traumatic event for the child victim. Too often, prosecutors, the defense, courts, and juries become focused on intricate details surrounding the sexual abuse rather than the abuse itself. Those details include challenging and questioning the child about the child's memory as to the day, time, month, or even season of the abuse. They challenge and question the child's memory about the clothes the child was wearing when the abuse occurred, the clothes the perpetrator was wearing when the abuse occurred, or the physical description of the perpetrator's sexual organs. They may draw into question what the child ate the day of the abuse, or what bed sheets the child had, or what car a parent may have owned. However, a child may or may not remember these collateral details during the traumatic event of the sexual abuse itself. The fact that a child does not recall these details does not by itself abrogate the fact that the sexual abuse occurred.

In addition to the symptoms the victim may be exhibiting, the prosecutor should equally consider and balance other collateral evidence from the report of the sexual abuse. It may be necessary for the prosecutor to request that law enforcement follow-up and collect collateral evidence. For example, if the child reported that just prior to the abuse, the perpetrator showed the child pornography on a computer, law enforcement should attempt to obtain the computer for forensic examination for the existence or absence of pornography. Again, the existence or absence of pornography may or may not assist the prosecutor or jury in determining whether the abuse occurred, especially if the report is years later and a length of time passed allowing pornography to be deleted or destroyed. However, it can be extremely probative if the pornography does exist and corroborates the child's statements about the events surrounding the sexual abuse.

Case Example of the Use of Collateral Evidence

In one report of child sexual abuse, the victim, an 8-year-old, reported that the perpetrator gave the victim a choice on how to be abused, either orally, vaginally, or anally. The perpetrator used a lubricant when abusing the victim anally. The victim reportedly chose to be abused anally because of the use of the lubricant. The victim was able to describe the bottle of lubricant and draw a picture of the bottle. When questioned, the defendant admitted to possessing and using lubricant when having intercourse with the victim's mother. By itself, the lubricant carries little evidentiary value as lubricant is readily available and can be found in numerous households in the United States. However, in connection with the report that lubricant was used in the sexual abuse, the lubricant becomes important collateral evidence that should be collected by law enforcement. A prosecutor can further use the lubricant as a demonstrative tool during trial by showing the lubricant to the victim who can identify it and testify whether it was used and if so, how it was used. However, failure of law enforcement to collect or even attempt to collect the lubricant will leave law enforcement open to criticism and may become a challenge to the sufficiency or veracity of their investigation or testimony.

Equally important for law enforcement is the collection of evidence they find that may contain traces of bodily fluids, such as sexual fluids, semen, saliva, urine or blood. This evidence may be clothes, washcloths, tissue paper, napkins, etc. The bodily fluids may contain DNA of either the suspect or the victim or both. On their surface, the item may contain no evidentiary value. However, after forensic testing, the item may be direct evidence or contain collateral evidence of the sexual abuse.

For example, in a report of child sexual abuse by an adult male against a 12-year-old male child, the victim reported the suspect cleaned up the suspect's semen after he ejaculated with tissue. The victim likewise never reported that he ejaculated. However, law enforcement collected a washcloth from the location of the sexual abuse and had it analyzed for DNA. At the time of collection, the suspect admitted that the washcloth was his and was used to clean himself after he masturbated. The result of the DNA analysis was that the victim's DNA in the form of his semen was present on the washcloth. There was also the presence of another person's DNA. The washcloth becomes an important piece of evidence taken in conjunction with the report of abuse and the admission by the suspect that the washcloth would contain the suspect's DNA. The jury will be able to infer the unknown DNA is the suspect's and can confirm that while the victim was mistaken that the washcloth was a tissue, the victim was correct in that the perpetrator cleaned himself after ejaculating the victim. The victim can also be asked in front of the jury whether or not he had ejaculated. That simple question often, and in this case did, trigger the memory for the victim that the perpetrator had ejaculated him.

In another example, a victim asserted that the perpetrator ripped a hole in her pajamas during the abuse. Law enforcement should make every effort to collect the pajamas and examine them to verify the presence of a hole. Law enforcement may

even consider sending the pajamas for forensic testing to determine the presence of DNA. Again, the fact that DNA is not present does not abrogate the fact that abuse occurred, but depending on the facts, should be considered by the prosecutor in making a charging decision.

Failure of law enforcement to collect bodily fluids will affect the prosecutor's ability to prove a case of child sexual abuse. Moreover, failure of law enforcement to lawfully collect bodily fluids may cause evidence to be suppressed, which can prevent a prosecutor from proving the case. For example, in one case a mother walked in on her husband performing cunnilingus on her daughter. Her husband stopped immediately and spit on the floor. Law enforcement photographed the saliva but did not collect it or process it for the presence of DNA. To make matters worse, law enforcement obtained a buccal sample from the defendant without first obtaining a warrant after the defendant had retained an attorney. Law enforcement's errors not only thwarted justice, but also impacted the credibility of the testimony by the law enforcement officials.

In another example, a female victim, age 11, was told to go with the perpetrator in his truck in the evening after dark where the perpetrator gave her a lubricant he called "sperm killer" and instructed her to put it in her vagina. After which, the perpetrator put his penis in the child's vagina. The fact that the child did not remember the color of the truck or where the perpetrator took her when he committed the sexual abuse does not by itself abrogate the fact that the abuse occurred. An 11-year-old child would not be expected to know where she was taken in a truck in the dark. In contrast, the very collateral bazaar facts of the abuse itself, the use of "sperm killer," and the fact that the child remembered that it was a truck, irrespective of the color, makes the child victim's rendition of the abuse more probable that it occurred.

In some cases, the household continued to move and live in various locations, but the abuse assaults continued in every location in which they lived. It may be difficult for the victim to remember precisely what abuse occurred and in which location, especially if the abuse occurred essentially in the same manner each time it occurred. Law enforcement, and especially the forensic interviewer, should make every attempt to determine the specifics about the abuse in each location. Often times there may be details not associated with the abuse that will assist law enforcement in narrowing the time frame of the abuse. For example, obtaining school records if the victim changed schools or rental or lease agreements if the victim lived in a household that was rented or leased. In one case, the victim stated that one incident of abuse occurred the night before they painted her uncle's house. Law enforcement investigation should include interviews to determine what day, month, and year the house was painted and a search for store receipts to support purchase of painting materials. In some cases, it may be helpful to attempt to get photographs or apartment diagrams of the living quarters. These can be used by law enforcement with the victim for follow-up investigation or the prosecutor during the trial.

Issues Concerning the Prosecution of a Case Through a Trial

Jurisdiction and Time

A forensic interviewer and the prosecutor are faced with the challenge of determining jurisdiction and some degree of reliability as to the time the event occurred. Jurisdiction is essentially whether or not the sexual abuse occurred within the authority of the court in which the prosecutor is charging the crime. For example, determining whether the crime occurred within the county limits in which the prosecutor has authority to charge a crime.

Time is not an element of the crime of child sexual abuse. In simple terms, what that means is that the time of year, month, or day the sexual abuse occurred is not an element of the offense that the prosecution has to prove. However, the courts have determined that there must be some reliability as to the time the abuse occurred or the defense will not be in a position to defend against the charges. There is no general rule for the prosecution to establish a time frame. Some jurisdictions allow a prosecutor to charge an act over a 2-year time frame. Others are narrower. However, all parties are interested in being able to narrow the time frame to as close to the date the abuse occurred as possible in order to maintain fairness in the trial and judicial process.

Sometimes a victim will know the exact date the abuse occurred. However, often times there is a report of multiple instances of abuse occurring over a long span of time, often years. It is imperative that a forensic interviewer determines with as much detail from the child about each act of sexual abuse. This is done through the phased interview as discussed previously.

Prosecutors Versus Investigators

During the judicial process, it is important to note that prosecutors must remain in their role as prosecutors and not become investigators. What this means is that the role of a prosecutor is to seek justice and prosecute the case, not investigate and receive evidence in a case. Too often, prosecutors desire to discuss details and information with the victim and in so doing unwittingly begin an investigation into a case. Meeting and preparing a victim for testimony is acceptable practice for an attorney, and therefore a prosecutor. However, the line between witness preparation and investigation in cases of child sexual abuse can easily become blurred. The primary reason for this tenuous dynamic is the fact that the crime is one of secrecy. While preparing a victim to testify, the victim may suddenly remember a fact or event and blurt it out. The prosecutor will then find themselves in the awkward position of being required to turn that information over to the defense and potentially becoming a witness in the case.

To avoid these conflicts, it is recommended that the prosecutor meet with the victim only with the presence of a witness such as a victim–witness advocate or another prosecutor. Moreover, in preparing the victim to testify, it is recommended the prosecutor not delve into the specifics of the case with the victim, but simply provide general guidance about testifying and answer any questions or concerns the victim may have. Many prosecutors provide the following advice to all witnesses, including victims: “Tell the truth. Do not guess when answering a question. If you do not understand a question, simply state that you do not understand the question.”

Juries and Considerations in Presenting a Child Sexual Abuse Case to a Jury

Each prosecutor will develop their own style in presenting a case to a jury. The jury is perhaps the most important factor in every case involving child sexual abuse. This is because crimes of child sexual abuse are crimes of secrecy and therefore in nearly every case, the jury will ultimately decide the credibility of the victim. If the jury does not believe the victim’s testimony about the crime, the jury will acquit the defendant. Accordingly, every case is dependent on the selection of a neutral and impartial jury.

During the trial, a prosecutor will develop a strategy in presenting the case to the jury. That strategy will include the order of witnesses and other key decisions. One witness that must in almost every case testify is the victim. The victim’s testimony will be difficult and emotional. Imagine being a young child and having to face a courtroom full of people. Now imagine being a young child that was sexually abused and having to face these same people and tell them how the defendant hurt you, often over and over again.

The people in the courtroom are a jury of approximately 14 people, usually 12 jurors who will decide the case and two alternate jurors, the judge, the court clerk, the court reporter, a bailiff, perhaps a few law enforcement officers, the prosecutor or prosecutors, the defense attorney or attorneys, the defendant who is the person who abused the child, and most likely a courtroom full of observers that may include the defendant’s family who may be well known to the child. In face of all these people, the prosecutor will take the victim through their testimony in much the same manner that the forensic interviewer interviewed the child. Considerable time has passed by the time the child is testifying in front of the jury. The child is exhausted, tired of speaking about the sexual abuse, and now in face of all these people, must once again discuss what happened to him or her.

In one case example, a child was sexually abused repeatedly by the defendant and testified at trial when she was 8 years old. The defendant was convicted, but after the verdict and at the time of sentencing, a juror pronounced that the juror did her own independent investigation on an issue in the case and the verdict was reversed. The appeal took 4 years and the child, now 12 years old, testified again at the second trial. The child had already begun to heal, and when testifying about the abuse that occurred was distant and emotionally detached. The prosecutor made a

decision to ask her a single question: "What did you think about when he did these things to you?" The reaction by the child was sudden, emotional, and nearly overwhelming. The victim froze, as if she had been hit and was stunned, tears welled in her eyes, she shook and blurted out "I put myself in a fantasy land and I had a pet dragon and the dragon's name was ..." and she went on and on. The jury convicted the defendant. The victim's testimony demonstrated an overwhelming conviction that these crimes occur and the proper investigation and prosecution of them, ever mindful of error, results in justice.

Use of Expert Witnesses

The use of expert witnesses in a criminal jury trial is at the discretion of the prosecutor and the defense. Today, most likely from the influence of television programs and movies about crime scene investigation, courtroom antics, and legal conundrums, juries have become almost complacent in their expectation that there will be scientific or expert testimony in every jury trial. In some cases, as discussed previously, there is an obvious need for the prosecutor to introduce scientific evidence through expert testimony, such as the results of DNA testing. However, in other cases, where there is often no scientific evidence, the prosecutor may be prevented or limited in introducing expert testimony, or may risk introducing testimony that may cause the jury to become distracted from the testimony of the victim about the abuse that occurred.

Expert testimony is defined in legal jargon as:

Opinion evidence of some person who possesses special skill or knowledge in some science, profession or business which is not common to the average [person] and which is possessed by the expert by reason of [the expert's] special study or experience.

Black's Law Dictionary, Black, Henry Campbell, 6th Edition, St., 1990, West Publishing Co., St. Paul, Minn. Essentially, an expert is a person, who has been trained, studied, or has experience in a particular field, and by way of that training, study, or experience, is permitted under the law to give an opinion relevant to an issue in the case during the expert's testimony. Other than through the testimony of an expert, there is simply no legal authority that allows a witness to give an opinion during a trial. This has the potential of giving the expert's testimony great deference for consideration by the jury. Moreover, the expert witness has the ability to explain their opinion on the relevant issue by providing hypothetical examples. Therefore, the introduction of expert testimony in a criminal jury trial concerning allegations of child sexual abuse is generally considered carefully by the prosecutor and the defense under the facts of each case and strategy of each party.

The prosecution will generally use the expert testimony of witnesses who conducted physical examinations, if any, of the victim reporting child sexual abuse. If an examination was conducted, the examination may or may not result in physical findings, and indeed in most cases do not result in physical findings. The statistics regarding physical findings have changed over the years as case studies are conducted and

results analyzed. However, one fact that has remained constant is that there are very rarely any physical findings in children who are sexually abused. Physical findings include the obvious, such as semen, DNA, saliva, other bodily fluids, open wounds, abrasions, and like anomalies, if the abuse occurs within a short period of time of the physical examination. However, physical findings also include scarring and other anomalies that may be found during the examination when there is a lapse in time between the reported abuse and the examination. This information is critical for the prosecution to provide to the jury through the opinion testimony of the expert witness. A jury must understand that just because there are no physical findings does not mean the sexual abuse did not occur.

In addition, the prosecution will attempt to introduce statements made by the child during the examination through the expert witness that conducted the examination, usually a nurse, nurse practitioner, or medical doctor. These statements are generally considered to be “hearsay” statements, statements the child told the expert during the examination but outside of the courtroom, and as such are not permitted to be told to the jury. As a general rule, called the hearsay rule, a witness is not permitted to tell a jury what someone else said to them outside of the courtroom. However, courts often allow the testimony of statements made to an expert during a medical examination because they are statements made in furtherance of medical diagnosis and treatment. This is important because society teaches children to be truthful in explaining to medical professionals what happened to them in order for the medical professionals to properly diagnose and treat the child. Therefore, there is a certain degree of reliability in the statements that are made by a child to a medical professional during an examination and for this reason the jury is often permitted to hear those statements. For the prosecution, the statements are important for the very same reason, they are reliable. The statements impress in the minds of the jury that the sexual abuse occurred or the child would not be telling the medical professional about the sexual abuse that occurred, and often, who and what hurt them.

A prosecutor is generally prohibited by the court from introducing excessive expert testimony that a child acted in conformity with a victim of sexual abuse. The reason for this is simply that courts are generally concerned about the reliability of the conduct and its relation to the sexual abuse. As discussed earlier, psychological, emotional, or physical reactions by a child to sexual abuse can manifest in a variety of ways, however those same reactions may also be attributable to other issues the child may be having, or both. If courts consistently or excessively allowed this opinion testimony, it could create an unfair advantage to the prosecution to convince a jury that the abuse must have occurred simply because the child has manifested certain conduct that can be consistent with sexual abuse.

The defense will use testimony of their retained experts to highlight any mistakes or failings of law enforcement, forensic interviewers, and other persons involved in the report and investigation of child sexual abuse allegations, which mistakes or failings impact the objectivity of the investigation, testing, and forensic interview or interviews. After highlighting these mistakes or failings, the expert will be able to testify to an opinion about the impact to the objectivity of the process which may cause the jury reasonable doubt as to whether the prosecution proved the abuse occurred.

It is important to remember that the standard the prosecutor has to prove is “beyond a reasonable doubt.” These words, often heard and said with little gravity, create a very difficult burden for the prosecution to prove. It is for this reason one often sees statues, depictions, or other artwork of a scale or the famous “lady justice” holding a scale that is off balance. The reason for this representation is that the prosecution has the increased burden of not only showing evidence to level the scale but also to show evidence which will tip the scale in favor of the prosecution. This also makes sense from the other side of the courtroom as our system of justice is one where the accused has a presumption that he or she is not only innocent, but also innocent until proven guilty beyond a reasonable doubt.

The most difficult task a prosecutor has to learn in the courtroom is cross examination. This is simply because the prosecutor, as the moving party, is most often in the position of being the side to call witnesses and therefore the prosecutor does not gain a lot of experience quickly in the art of cross examination. It should be noted that the defense is not required to call a single witness during the trial, the defendant has a constitutional right not to testify, and the prosecution is prohibited from making any comments or inferences about the defense not calling witnesses or the defendant not testifying. In addition, the jury is read a legal instruction that reminds them the defense is presumed innocent until proven guilty beyond a reasonable doubt and that no inferences may be drawn by the jury if the defense does not call any witnesses or the defendant does not testify.

It therefore follows that prosecutors can easily make mistakes in cross examination of expert witnesses. The propensity is for a prosecutor to try to “trip” the expert witness or “discredit” the expert witness. However, it is recommended that prosecutors understand that expert witnesses are generally skilled in testimony and are not subject to being tripped or discredited easily. To the contrary, it is recommended that prosecutors equally rely on the expertise of the defense expert witnesses in much the same manner as they rely on the expertise of their own expert witnesses. Generally, all expert witnesses will agree on certain issues, concerns, facts, elements, ideas, etc. A prosecutor should develop those agreed upon issues, concerns, facts, elements, ideas, etc. with the defense expert witness. Where the prosecutor, in consultation with their own expert, disagrees with the defenses expert, the prosecutor should simply call their own expert to establish the State's position with respect to the issues, concerns, facts, elements, ideas, etc. in which the two experts do not agree. It should be noted here that in nearly every state, expert witnesses for both the prosecution and defense are permitted to hear each other's testimony.

Defendant's Testimony

The prosecutor must also present their case with the knowledge that the defendant may or may not testify. The defendant has a constitutional right not to testify in a jury trial. If the defendant chooses not to testify, the prosecutor may not comment about the fact that the defendant did not testify. Therefore, the prosecutor must

introduce evidence about any statements the defendant may have made to law enforcement and must further prepare to cross examine the defendant if the defendant testifies.

Conclusion

All reports of child sexual abuse should be treated as being truthful reports. As discussed, the primary function of the investigation and interviews that follow from the report is to objectively gather evidence. All interviews of children who report sexual abuse should be conducted by a person trained in forensic interviewing, in an established and coordinated manner, and following agency policy. Moreover, it is recommended that forensic interviewers use a phased interview approach to conduct a forensic interview of children who report child sexual abuse. Whenever possible, the use of therapy or service animals, usually dogs, in forensic interviewing of children reporting sexual abuse is encouraged if the child elects to have the animal during the interview.

A prosecutor's role in making charging decisions of child sexual abuse is to seek justice, not merely to convict. Prosecutors have a heavy emotional burden in making decisions to charge crimes of sexual abuse. However, prosecutors must be cognizant that the passage of time is the foremost difficulty a prosecutor faces in reviewing, charging, and prosecuting cases involving allegations of child sexual abuse.

Pressure from a multitude of sources as well as delays in prosecution will have an effect on the prosecution of cases involving child sexual abuse. Victims of child sexual abuse can have a variety of reactions and be impacted in many ways. Some of the impacts cause symptoms which can also affect the prosecution of the case; others will manifest themselves in a plethora of ways and create lasting effects for everyone involved. Treatment and counseling are recommended for the victim and household members in cases of reported sexual abuse. The use of a victim-witness advocate is important to provide a source of comfort, resources, and communication for the victim and the family, to understanding the legal process, providing information and resources about funding for victims of violent crime, and to bridge communication between the victim, victim's family, and the prosecutor.

Collateral evidence and follow-up should be performed by law enforcement. Prosecutors must develop skills in identifying and requesting the collection of evidence and follow-up. However, prosecutors should be mindful to not immerse themselves into an investigative role in examining and reviewing cases of child sexual abuse. Whenever meeting with a victim, prosecutors should utilize a witness, preferably a victim-witness advocate.

While each prosecutor will develop their own style for jury trial, the most important factor in every case involving child sexual abuse is selecting a jury. A crime of child sexual abuse is referred to as a crime of secrecy, which means there are generally no witnesses to the crime, and the jury will ultimately decide the credibility of

the victim. In addition to the testimony of the victim, prosecutors often use expert witnesses in proving a crime of child sexual abuse.

The burden a prosecutor has is to prove the crime occurred is beyond a reasonable doubt. However daunting that task may appear, prosecutors must endeavor to bring justice to perpetrators who commit sexual abuse against children. Past successful prosecutions, appeals, skepticism, case law, criticism, challenges, developments, medical advancements, history, education, and human dignity constantly evolve to ensure the process is and remains fair.