

## **Forensic Interview Attacks, Part II**

Legal Eagles – I’m still on an “attack the forensic interview analysis” tear.

For those of you who are not forensic interviewers, this involves you, too. For example, one of the case strategies involves examining anyone who speaks to the child at any time after the child’s initial outcry to determine whether their discussion with the child could have “tainted” the ultimate disclosure during the forensic interview, if there was one. It can also involve therapists who provide therapy to a child after disclosure, and who report either additional details of the initial disclosure, or new details altogether.

Today’s case is fairly recent, from November 2009, and while the case facts are unusual, the end points that I want to make are not.

**Facts:** The Defendant was convicted of first degree cruelty to children and aggravated battery for removing his daughter’s clitoris. When the victim was two years old, the Defendant moved out of the house. Several months later, he called the victim’s mother (his ex-wife at the time of trial) and wanted to pick up their daughter, but she refused. The mother explained that because the Defendant was born in Ethiopia and “because of his culture,” she believed that he wanted to have their daughter circumcised. As such, she refused to allow him to pick up their daughter. He answered, “How do you know I haven’t already done it?” and added, “What’s done is done.”

That prompted the mother to take her daughter to medical exams, which confirmed that the child’s clitoris had been removed. The child at the time was 3 years old.

Her mother took her to a psychotherapist, who testified at trial. He was tendered as an expert in child trauma and child memory, as well as forensic interviewing and evaluating. The Court opinion stated that ***“During a forensic interview in March 2003, the child disclosed that her father had cut her ‘lun-lun,’ a word the child used to refer to her private area.”***

The expert then testified that it was possible for the then 3-year-old to have an accurate memory of something that had been done to her more than a year earlier, which was the time-frame alleged at trial. According to the Court of Appeals opinion, the expert testified that ***“[C]hildren about two years old ‘can remember impactful episodes more acutely than they can remember ordinary episodes.’”***

Finally, the expert testified that during the next two years of therapy, the child never recanted her disclosure.

At trial, the victim (who was then 7 years old) testified that ***“[My father] cut my private part.”***

The defense theory was that the Defendant didn’t do it; instead, the victim’s maternal grandmother did. The jury convicted the Defendant. On appeal, he argued that the trial court was in error for rejecting his claim of ineffective assistance of counsel.

Remember that such a claim means that the Defendant believes that his trial counsel’s performance at trial was not only deficient, but that the alleged deficient performance was prejudicial to his defense.

**Result:** Conviction affirmed.

**Topics for you to consider:** One of Defendant's complaints on appeal was that the defense lawyer should not have called a clinical psychologist who testified as a defense expert, because the lawyer failed to adequately investigate the psychologist's background. More on that later.

First, let's review what the defense psychologist testified about, and why he was called. He was called to attempt to discredit what had been presented to the jury by the State about the child's memory. In this regard, the Court accepted the psychologist as an expert in (1) child psychology; (2) forensic interviewing of children; (3) memory recall in children; (4) false memories; and (5) false beliefs.

As to the forensic interview, the Court of Appeals highlighted two criticisms advanced by the defense expert: (1) interviewer bias, and (2) suggestive comments and questioning.

Specifically, according to the Court of Appeals the defense expert testified that the forensic interviewer displayed bias against the father and in favor of the mother in his questioning, and ***“had made impermissible suggestions to the child that her father had hurt her. In addition, the expert cited areas that he claimed the interviewer should have explored with the child, given her responses and emotional reactions during the interview.”***

As to a child's memory, the defense expert stated that children such as the victim, at the age she was interviewed, have “very unreliable, very inconsistent” memories. They hear what adult authority figures say, and this “becomes their memory.” According to the Court of Appeals opinion, he testified that ***“there appeared to a great possibility that the child's allegations made during the forensic interview had been contaminated by improper influences, including ‘something that was told to her prior to the interview,’ as well as ‘leading questions and words that were fed her during the forensic interview.’”***

There was no discussion in the Court of Appeals opinion about how the State addressed these opinions of the defense expert. Suffice it to say that there are highly credible opposing views and theories to the defense expert's opinions.

But intertwined with the defense expert's opinions was the defense expert's professional background, which was striking enough to lead the defendant to claim that his lawyer should not have called the expert as a witness in the first place. Specifically, the psychologist had been suspended from his profession, and also had written a book titled, ***“Screw Your Spouse, Win the Kids, and Make Money Doing It.”***

As to the suspension, the expert testified that he had once been ordered to suspend giving testimony in child custody cases, but that the order had been subsequently vacated. As to the book title, he testified that it was “satirical” and “a parody” of “the way the system works right now, how you can help plant false accusations and allegations.” He said the book dealt with ***“suggestibility and describes the strategies of winning children in custody battles by setting of false memories and suggestibility.”***

An expert witness's background including the pitfalls of having, shall we say, a checkered resume can be a topic of a Legal Letter all on its own. But in short, we know that a witness's credibility in every regard is the key to being a SuperWitness.

But let's take the variable of this particular defense expert being so full of himself out of the equation, and instead make him a professor at a prestigious university, or a psychologist affiliated with a prestigious healthcare organization.

Now we get to the heart of the matter, with no unnecessary credibility distractions. Now, instead of dealing with a self-inflicted defense mistake that likely flattened the expert's effectiveness, you're having to deal with impeccable expert credentials and professional theories that have been widely peer reviewed, and endorsed in many quarters.

The answer? Whenever you hear, or read, or listen to these theories that are now routinely discussed in child molestation matters, you ***must*** find the reputable articles that describe them, and then find the articles that offer both critical evaluations of them and opposing viewpoints.

Just in this Legal Letter, we mentioned "interview bias," "false memory," "child memory," "suggestibility," "recant," and "false belief." My one lawyer viewpoint is that when someone affiliated with a CAC sees a term of art, ***locate the journal articles that relate to the topic, the research and studies and read them.*** Additionally, when you see terms such as "interview bias," "suggestibility," etc., then you know the topic also includes, generally, how children disclose, if they in fact do disclose. There are journal articles and frankly books on this topic.

Consider having a person at the CAC responsible for creating the library for everyone at the Center. Then make the results in your Center's library ***required reading*** for everyone at the Center who interacts with children and non-offending caregivers. If you want to go to the next level, which is a very good place to be, then have regular staff meetings to discuss the various journal topics, so that everyone has a firm understanding about what this literature, which can be convoluted and complex, means.

This information is easily found. One place to start is the CALiO library on the National Children's Advocacy Center website, [www.nationalcac.org](http://www.nationalcac.org). It is my understanding that it is the largest online child abuse library in the U.S., with the most such resources, anywhere. Information about the requirements for accessing CALiO by CACs can be obtained by contacting the National CAC in Huntsville, Alabama.

I believe over the last several Legal Letters I've made my position clear that the criminal defense is becoming more adept at understanding CACs, understanding the many variables that go into interviewing children, and finally understanding that there is research on the topics that the defense can attempt to use to defend their clients. Without knowing this research, and knowing the abundant research that credibly and critically analyzes the research that the defense champions, you're going to Court lacking a very important tool for your toolbox.

Best regards.

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