

# A MULTIDISCIPLINARY TEAM APPROACH TO THE INVESTIGATION AND PROSECUTION OF CHILD ABUSE CASES INVOLVING RECANTATION

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## A Multidisciplinary Team Approach to the Investigation and Prosecution of Child Abuse Cases Involving Recantation

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## INTRODUCTION

The investigation of cases of child sexual abuse can be particularly challenging due to the weight of children's disclosures and, in many cases, the lack of evidence to support their statements. Coupled with delayed disclosure, the dynamics of child sexual abuse, and the child's relationship with the alleged perpetrator, who oftentimes is a family member or someone close to the family, children can be reluctant to share details of the abuse during the investigative process. And in some cases, these dynamics may lead a child to subsequently recant their statements of abuse.<sup>1</sup>

Multidisciplinary teams (MDTs) are responsible for providing a trauma-informed, victim-centered response to allegations of child sexual abuse, and most teams, especially those affiliated with an accredited Children's Advocacy Center (CAC), do so as part of their investigative protocol. Evidence-based practices are required in the provision of therapeutic and medical services. It is critical that MDT investigative team members utilize evidence-informed practices based on research in their response to child sexual abuse as well. By becoming aware of the research related to children's disclosure of sexual abuse and risk factors for recantation, MDTs can more effectively bridge the gap between research and their own investigative process, provide a more supportive response, and hopefully prevent recantation from occurring in the aftermath of their intervention.<sup>2</sup>

The purpose of this monograph is to provide information grounded in research to child abuse professionals in an effort to reduce the risk of recantation in cases of child sexual abuse, and to assist professionals in addressing recantation when it does occur. This includes the investigation of recantation cases and keys to successful prosecution.

## MULTIDISCIPLINARY TEAM APPROACH TO RECANTATION

### Recantation in the Real World

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*To help illustrate the complex dynamics associated with recantation cases, a real life example will be interwoven throughout this monograph. The names of all parties have been modified.*

For almost two years, the facts never changed. The 7-year-old victim, Jane, made the initial outcry about her cousin to her family, provided specifics during her medical examination, gave a thorough forensic interview at a CAC within days of the abuse that was rich with contextual details, received the benefits from an initial MDT response, and met with district attorney personnel on multiple occasions in preparation for trial. Each time, she was detailed and consistent. Her statements matched the physical evidence found during the medical examination. She was emotional when she discussed the abuse and the trust that her cousin violated, and was extraordinarily credible. For almost two years, the case against the defendant was strong.

On the night of the abuse, Jane was at home with her family. Since her cousins were staying over, the kids stayed up a bit late watching television in the den, which is where the victim fell asleep. She recalled that at some point in the night, she awoke as she was being carried by her adult cousin, the defendant, into another room. Having fallen back asleep while being carried, she next remembers being placed on the floor in her own bedroom. After pulling her pants down, he began to place his penis inside of her anus. She described the pain that she felt during the abuse, and that he tried to place his penis inside of her mouth, but she closed her mouth tight.

The next day, Jane's five-year-old cousin advised his mother he saw the defendant on top of the victim. Distraught, her mother examined her and observed redness in her buttocks region. A medical examination found a small tear and a tiny amount of male DNA that was so small it could not be further identified to a particular person or lineage.

After arrest, the defendant was initially released on bond. During this two-year period, despite the extended family's ability to care for the victim and her siblings, the victim was living with a family friend due to her mother's unrelated incarceration. She had limited contact with the defendant's immediate family, and the family never showed an interest in her placement or well-being. During this time, her caregiver never described a time when the victim altered the facts.

After missing court on numerous occasions, the defendant was remanded into custody. Also of importance, shortly before the defendant was re-arrested, Jane's mother returned home from jail. Always on the periphery of the family, her mother and the victim became much more important when the family came to believe that recantation would result in the dismissal of charges. This began a series of jail telephone calls over two-months discussing the pressure that needed to be placed on Jane and her mother to allow the defendant to return home.

It was almost two years to the day after the abuse that the defense attorney called indicating that the victim had recanted. The State obviously wanted to hear directly from Jane and her mother, who up until this point had also been consistent. Several weeks later, they came to the district attorney's office, but appeared along with members of the defendant's family. They refused to let the prosecution staff speak to the victim, refused to let Jane have another forensic interview, and at first did not want to disclose who the victim now stated abused her. Since there was physical evidence of abuse, they had no choice other than to inculcate someone else. Ultimately, that time, they blamed the senile grandfather with dementia.

As the trial date approached, realizing that the vague recantation story did not end the prosecution, the family began taking steps to actively avoid subpoena service, and further engage in a coordinated effort to perpetrate a lie upon the court. This active avoidance allowed for the issuance of a material witness warrant for the mother's arrest,

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<sup>1</sup> London, K., Bruck, M., Ceci, S. J., & Shuman, D. W. (2005). Disclosure of child sexual abuse: What does the research tell us about the ways that children tell? *Psychology, Public Policy, and Law*, 11(1), 194-226. <sup>2</sup> Sites, J., & Southern Regional Children's Advocacy Center (2017). *Considerations for the Multidisciplinary Team / Children's Advocacy Center Approach to Recantation: A Research-to-Practice Summary*. Huntsville, AL: Southern Regional Children's Advocacy Center.

as she was the victim's legal guardian. Simultaneously, investigators learned Jane and her siblings had not been in school for several months, likely in an attempt to hide Jane from the State. Child protective services (CPS) took custody of the children, including Jane, when her mother was arrested on the outstanding warrant.

When she was initially outside the custody of her mother, the victim maintained the recantation. To understand the genesis of the recantation, a second forensic interview was scheduled. Over the 90-minute interview, she was unable and unwilling to provide any new details other than the perpetrator being "the man upstairs," not the senile grandfather her mother previously declared. She denied anyone told her what to say, but at one point slipped and used the defendant's name when describing one of the acts, catching herself quickly and saying, "Oh, I'm trippin'."

The victim remained in foster care. Over a few months, as she began to trust her foster mother, she opened up about the truth. She talked about the pressure that she felt, and even talked about the abuse itself. While Jane was in foster care, the extended family was allowed supervised visitation. During one of the visits, the family passed a cell phone to her, and started communicating directly with her unbeknownst to either her foster mother or CPS. Not surprisingly, the victim began to recant once again. And this time, the recantation continued through the remaining legal proceedings.

The case was tried three times, the first two resulting in a mistrial after the jury could not reach a unanimous verdict. At the first trial, Jane maintained the recantation, and for the first time provided a name for "the man upstairs." The family also persisted with the recantation, this time maintaining that the victim had disclosed from early on that someone else molested her. Thus, the defense argued, the investigators and district attorney staff conspired to convict an innocent person. The jury hung. While the majority of the jurors did not believe the recantation, two were concerned that the chaos instigated by the family created reasonable doubt, and were reluctant to convict. The second trial ended in the same manner, with three jurors indicating they could not convict.

The third trial had several important distinctions. Because the family had testified twice before, they started to waver in the details. Additionally, the victim during this trial refused to testify, thus making her legally unavailable and allowing the reading of her prior testimony. As the case occurred in Georgia, the jury not only saw both forensic interviews, but was allowed to consider the narrative in the forensics as substantive evidence. The details from her prior testimony and the forensic interviews conflicted with the changing family narrative, making the collusion even more apparent. This time, the jury quickly determined the recantation and the surrounding spectacle created by the family to be a ruse and instead focused on the original outcry and investigation. After two hours of deliberations, and nearly four years after the abuse, they convicted the defendant.

This example illustrates the reality of recantation and the impact it can have on the child victim and the case. It is important to note that the original investigation was thorough and timely, which saved this prosecution, and more importantly, saved the child from further victimization. The prosecutors were diligent in not dropping the case even though the victim recanted. However, the traumatic effect three trials had on the child was undeniable. Furthermore, there was a breakdown in communication between MDT members, resulting in further pressure from her family. The team also did not follow through with ensuring therapy for the child once her living situation became less stable while her mother was incarcerated. Without an emotionally healthy child, the likelihood of recantation will undoubtedly increase. As will be discussed, by incorporating research and training into a MDT model, the team may have been able to prevent recantation from occurring altogether, and if it did occur, address it more effectively while minimizing trauma to the victim.

## Variables that Influence Disclosure Patterns & Risk Factors for Recantation

Significant research has occurred over the past three decades regarding children's abuse disclosure patterns and the dynamics of child abuse cases. In their review of the literature, Olafson and Lederman identified variables that influence disclosure patterns, which include: victim's age, maternal/parental support, fear of consequences, relationship/love of perpetrator, gender, culture, stigmatization, dissociation, domestic violence, and post-traumatic stress.<sup>3</sup> The purpose of their article was to educate the judicial system in an effort to gain better outcomes for child abuse victims in court proceedings. The overview of the research as it relates to disclosure patterns and how they interact with recantation is helpful for child abuse professionals as well.

Risk factors for recantation illustrate that it is imperative for child abuse professionals to explore potential influences on the child's disclosure and wellbeing at the outset of the investigation and throughout the criminal justice process. This provides assurances for the safety of the child and continued cooperation from the family. Each case should be evaluated for possible recantation, no matter how slight, and an awareness of the prevalence must be known by all team members, as research has shown the rates of recantation range from 23.1 to 27%.<sup>4</sup>

Top risk factors for recantation include the non-offending caregiver being unsupportive of the allegation or prosecution, the individual child's vulnerability to adult familial influences, the age of the child at the time of the recantation, whether the perpetrator remains in the household, and the child's placement after disclosure.<sup>5</sup> Child abuse professionals who observe one of these risk factors should immediately consider the likelihood of recantation, either acutely or as the case progresses, and take meaningful steps to minimize the possibility, as discussed below.

<sup>3</sup> Olafson, E., & Lederman, J. S. (2006). The state of the debate about children's disclosure patterns in child sexual abuse cases. *Juvenile & Family Court Journal*, 57(1), 27-40. <sup>4</sup> Malloy, L. C., & Lyon, T. D. (2006). Caregiver support and child sexual abuse: Why does it matter? *Journal of Child Sexual Abuse*, 15(4), 97-103.; Malloy, L. C., Mugno, A. P., Rivard, J. R., Lyon, T. D., & Quas, J. A. (2016). Familial influences on recantation in substantiated child sexual abuse cases. *Child Maltreatment*, 21(3), 256-261. <sup>5</sup> Malloy, L. C., Lyon, T. D., & Quas, J. A. (2007). Filial dependency and recantation of child sexual abuse allegations. *Journal of American Academy of Child Adolescent Psychiatry*, 46(2), 162-170.



## TOP RISK FACTORS FOR RECANTATION

### Predictors for recantation:

- Unsupportive caregiver
- Children's vulnerability to adult familial influences
- Age of the victim, with younger victims being more susceptible
- Perpetrator in the household
- Child placement after disclosure

### The reaction (or anticipated reaction) of the involved caregiver directly impacts:

- Child's willingness to disclose
- Timing of disclosure
- Concerns of recantation

### Children are also more likely to recant when:

- Family members (other than the involved caregiver) disbelieve them
- When subjected to contact with the alleged perpetrator after their disclosure<sup>6</sup>

### Caregivers are less likely to support the child when the alleged perpetrator is a family member or romantic partner<sup>7</sup>

The reaction of non-offending caregivers or others who are close to the victim significantly impacts the child's initial willingness to disclose and the timing of their disclosure.<sup>8</sup> Furthermore, supportive caregivers and supportive extended family members are the best predictor for the child's adjustment after abuse occurs. Professionals must understand that it is common for some caregivers to vacillate between believing and not believing their child throughout the investigation and intervention. Research indicates unsupportive caregivers are least supportive when they first learn about the abuse. Therefore, immediate support through advocacy and therapeutic intervention are necessary to empower the involved caregiver to protect their child throughout the process.<sup>9</sup>

The majority of mothers do believe their children, but may need professional assistance and time to effectively plan for protection. Often mothers feel marginalized by child protection workers when making protection decisions.<sup>10</sup> Professionals must keep in mind that a child's disclosure of abuse, especially at the hands of a family member or loved one, can catapult a family into crisis. Thus, it is recommended that early intervention, immediate mental health support, and inclusion in protection decision making is paramount in empowering involved caregivers to protect and support their children.<sup>11</sup>

However, family dynamics and support can shift over time. This is why it is important that the MDT continually evaluate the victim's situation to determine if risks of recantation are changing. In Jane's

case, she was related to the alleged offender and, at least initially, her mother was supportive. It wasn't until after her mother was released from jail and the offender was arrested that external pressure from the suspect's family forced Jane and her mother to back down from the allegations, resulting in Jane's recantation at trial. Continued follow-up by the CAC Advocate, therapy for both Jane and her mother, continued monitoring and discussion at MDT meetings, and an open CPS case would have been helpful under these circumstances.

## EVOLUTION OF THE CAC MODEL & SERVICES

The CAC model has evolved over the course of the past two decades. Originally, CACs were generally known as the child-friendly, neutral location where children were referred for forensic interviews in the course of an investigation. Due to the strengthening of the National Children's Alliance Accreditation Standards, other direct services provided by accredited CACs (Mental Health Services, Victim Advocacy, and the MDT Approach) have greatly improved:

- Therapists are now required to be trained in and provide trauma-focused therapies that are proven to have measurable results. Therapists are expected to have an active role on the MDT and participate in case review.
- The advocate position has evolved from receptionist/data entry/scheduler to providing advocacy throughout the life of the case and beyond. Advocates now receive specialized training and provide comprehensive, coordinated victim support and advocacy services. Advocates are expected to have an active role on the MDT and participate in case review.
- The MDT approach is now recognized as the accepted standard nationwide by child abuse professionals.

## Multidisciplinary Team / Children's Advocacy Center Response to Cases with Recantation Risk Factors

Research has shown the MDT model to be quite effective. In general, MDTs typically have highly successful outcomes, including higher rates of prosecution of both physical and sexual abuse cases, and the reduction of additional trauma that is often associated with inappropriate system responses to abuse.<sup>12</sup> Professionals who are part of an active MDT report that the team structure provides improved communication and information sharing among professionals, improved service delivery and client outcomes, and the availability of support among professionals.<sup>13</sup> The MDT model also promotes joint and cross-training opportunities, allowing team members to understand to a greater degree the intricacies of the work of other child abuse professionals.<sup>14</sup>

<sup>6</sup> Malloy and Lyon (2006). <sup>7</sup> Malloy, Mugno, Rivard, Lyon, and Quas (2016), finding that 68% of the victims who remained in the home recanted their allegations, and among cases with siblings present, children initially placed separate from siblings were less likely to recant than children who were not initially placed apart from their siblings. <sup>8</sup> Malloy, Lyon, and Quas (2007). In one study that examined 58 cases involving independently substantiated cases of child sexual abuse where the victims ultimately recanted, 28% of those cases involved at least one family member who expressed disbelief. The rate of recantation was 66% among those children. Malloy et al. (2016). <sup>9</sup> *Id.* <sup>10</sup> Lovett, B. B. (2004). Child sexual abuse disclosure: Maternal response and other variables impacting the victim. *Child & Adolescent Social Work Journal*, 21(4), 355-371. <sup>11</sup> *Id.* <sup>12</sup> Herbert, J., & Bromfield, L. (2017). Better together? A review of evidence for multi-disciplinary teams responding to physical and sexual child abuse. *Trauma, Violence and Abuse*, 1-15. <https://doi.org/10.1177/1524838017697268> <sup>13</sup> Lalayants, M. (2008). Interagency collaboration approach to service delivery in child abuse and neglect: Perceptions of professionals. *The International Journal of Interdisciplinary Social Sciences: Annual Review*, 3(1), 225-236. <sup>14</sup> Lalayants, M. (2013). Multidisciplinary collaboration in child protective clinical consultations: Perceptions of best practices. *Journal of Public Child Welfare*, 7(3), 253-274.

Furthermore, the likelihood of substantiating child abuse was also found to be higher in the MDT model versus CPS determinations alone.<sup>15</sup> Interestingly, some studies have shown that some MDT members, such as CPS workers, are sometimes more skeptical of child disclosures than other MDT professionals, including law enforcement, attorneys, and forensic interviewers.<sup>16</sup> These studies illustrate the importance of varying perspectives from other professionals and their areas of expertise as to whether an allegation of abuse should proceed further.<sup>17</sup>

By taking research into consideration during the intervention of child sexual abuse, MDTs can implement strategies to diminish the risk of recantation, such as recommending no contact with the alleged perpetrator and unsupportive family members until the investigation is concluded. It is important to assess for recantation risk factors at the beginning of the investigation to ensure that immediate provision of advocacy and therapy for the involved caregiver and child are in place in an effort to increase support and education. Children's advocacy centers and their MDTs should consider creating criteria for emergency or Priority 1 forensic interviews in their investigative protocol to include cases with elements that increase the risk for recantation. Suggested criteria should be based on research and include cases in which: the alleged child victim is younger; the alleged perpetrator is a family member or romantic partner of the involved caregiver; the child is in an unsupportive environment; and where there is a history of domestic violence. By immediately interviewing children who are at risk for recantation, professionals can possibly capture the child's disclosure before the child is influenced by other parties or factors. More importantly, this mobilizes the MDT and begins access to CAC services, which will provide the opportunity for therapy, advocacy, education, and support to be put in place for the involved caregiver and child at the onset of the investigation.

## Assessing the Need for Minimal Facts Interview

Many first responders believe it is either required or their responsibility to interview the child when initiating the investigation. This is not true in every situation. It is part of the CAC model and the duty of the MDT to minimize the number of times children are required to speak to different professionals about the abuse allegations.<sup>18</sup> First responders will need to establish the safety of the child, verify that the caregiver is supportive and cooperative, and ensure there will not be a delay in scheduling the CAC forensic interview. In these situations, the responding professionals can still meet with the child, and instead of interviewing them about the allegations, explain the CAC process and that the child will be interviewed at the CAC.

Conversely, there are times when it is necessary to conduct a minimal facts interview. For example: 1) If there is any indication

that the caregiver may be unwilling to protect their child or becomes uncooperative with the team; 2) If there is concern that physical evidence may be destroyed or compromised; or 3) If there is concern that the child may be influenced to change their statement. Of course, the immediate safety of the child must always be a priority.

When a minimal facts interview is conducted, the professional conducting the interview should be trained in a nationally recognized forensic interviewing model, or have attended a minimal facts interview training based on the tenets of a nationally recognized model. Ideally, these interviews should be video or audio recorded to truly capture the abuse-related details as well as the full extent of the questions and answers; however, if that is not an option, they should be documented verbatim in written notes.<sup>19</sup> The team must take careful consideration in deciding where the minimal facts interview is conducted. It should take place in the least stressful environment for the child. It should preferably be in a quiet, private location, and not where the alleged abuse occurred. All distractions should be removed (i.e. people who are not a part of the investigation, phones, pets, television). Most importantly, the interviewer must conduct the interview with the same integrity as those conducted in a forensic interview setting, without leading questions. Those conducting these interviews should assume that they will be cross-examined at trial about their questions and interview protocols. Their focus should be on gathering minimal facts (who, what, when, where - not why or how), leaving the details to be gathered by the forensic interviewer in the CAC setting. Once the minimal facts interview is completed, the interviewer should explain the CAC process to the child, as well as the caregiver.

The minimal facts interview is not a substitute for a traditional forensic interview. The victim should still be scheduled for a forensic interview in accordance with team protocols, and the interview should ideally occur as soon as practicable. The forensic interview will be a more thorough interview of the child, exploring in greater detail the allegations of abuse. The person who conducted the minimal facts interview in the field must be prepared to explain why they conducted the interview, and the differences between that interview and the more in-depth forensic interview. The key contention at trial is often that the child provided new or conflicting information during subsequent interviews. But this is to be expected, given the nature of the limited and brief interview conducted in the field versus the traditional forensic interview.

Outlining parameters for the prioritization of forensic interview referrals and conducting minimal fact interviews in the CAC/MDT protocol is key in guiding MDT members in their decision making during this critical phase of the investigation.

<sup>15</sup> Brink, F. W., Thackeray, J. D., Bridge, J. A., Letson, M. M., & Scribano, P. V. (2015). Child advocacy center multidisciplinary team decision and its association to child protective services outcomes. *Child Abuse & Neglect*, 46, 174-181. <sup>16</sup> Everson, M. D., & Sandoval, J. M. (2011). Forensic child sexual abuse evaluations: Assessing subjectivity and bias in professional judgments. *Child Abuse & Neglect*, 35(4), 287-298. <sup>17</sup> Cole, J. (2016). Structural, organizational, and interpersonal factors influencing interpersonal collaboration on sexual assault response teams. *Journal of Interpersonal Violence*, 1-22. <https://doi.org/10.1177/0886260516628809> <sup>18</sup> National Children's Alliance. (2016). Healing, justice, & trust: A national report on outcomes for children's advocacy centers. Washington, DC: Author.; Newlin, C., Cordisco Steele, L., Chamberlin, A., Anderson, J., Kenniston, J., Russell, A., Stewart, H., & Vaughn-Eden, V. (2015). Child forensic interviewing: Best practices. *Juvenile Justice Bulletin*. NCJ 248749. Washington, DC: Office of Juvenile Justice and Delinquency Prevention. <sup>19</sup> Studies have shown that even when a person attempts to make verbatim notes, many details are neglected. One study found that 25% of the abuse-related details were not included in the notes when compared to the videotaped interviews. First responders and child protective service workers need to be aware of these limitations when conducting limited fact interviews in the field. Lamb, M. E., Orbach, Y., Sternberg, K. J., Hershkowitz, I., & Horowitz, D. (2000). Accuracy of investigators' verbatim notes of their forensic interviews with alleged child abuse victims. *Law and Human Behavior*, 24(6), 699-708. See also, Cauchi, R., & Powell, M. B. (2009). An examination of police officers' notes of interviews with alleged child abuse victims. *International Journal of Police Science & Management*, 11(4), 505-515.



## ADVOCACY FOR THE CHILD & CAREGIVERS

It is critical for professionals to respectfully engage and begin providing support to caregivers at the front end of an investigation. Additionally, child abuse investigators and CAC Advocates are in a position to enlighten parents by assisting them in identifying ways they can support their child in their disclosure. This can be accomplished by:

- Describing the investigative/CAC process to the parent so they have a clear understanding of what to expect
- Explaining the importance of encouraging their child to tell the truth
- Educating the caregiver regarding the dynamics of abuse, process of disclosure, and when appropriate, offender manipulation
- Assisting the caregiver in identifying supportive and unsupportive people in their lives
- Advising the caregiver to limit contact with unsupportive people
- Advising the caregiver on how to support their child and explain the process to their child

## Conducting the Initial Investigation in All Cases with Possible Recantation

Corroboration is important in all child abuse investigations, but it is especially crucial in cases of child sexual abuse due the prevalence of delayed disclosure and lack of physical evidence. And if there is a serious risk of recantation from the beginning, law enforcement should be keenly aware of its importance. Although it has been shown that cases with corroborating evidence experienced roughly the same rate of recantation as cases without corroborating evidence, investigators should perform their due diligence in looking for corroboration in all cases.<sup>20</sup> Corroboration, no matter how slight, becomes especially critical when prosecutors weigh the available evidence and make their decision to move forward. When considering Jane's scenario, prosecutors were able to proceed due to corroborative evidence and the reliability of Jane's original forensic interview. Additionally, they were able to juxtapose the circumstances of the recantation and the lack of contextual details in Jane's subsequent interview in making their decision.

Often colloquially referred to as the "CSI Effect," jurors are looking for scientific or other evidence to support a guilty verdict, despite there not being a legal requirement for such evidence in most cases. A 2006 study found that 46% of jurors surveyed expected scientific evidence in every criminal case, despite the nature of the charges. Twenty-two percent of prospective jurors expected DNA in every criminal case, and when those charges were sexual in nature, 73.4% expected DNA evidence.<sup>21</sup> When the only evidence of the abuse is the child's statement, and the child then recants that statement, it is a difficult task for jurors.

Sometimes it is the attempt to locate corroborating evidence itself that becomes important, even if nothing is found. For example, if the child mentions in her forensic interview that the defendant videotaped the abuse, law enforcement must make the attempt to locate those videos, even if it is a tedious and time-consuming task. If nothing is found, the fact that an attempt was made by law enforcement will stave off defense attacks that the government may have had inculpatory evidence at its fingertips, but did not take the initiative to pursue it. A recanting victim coupled with an investigation that exhibits minimal effort is almost certain death for the case.

Corroboration doesn't necessarily need to be abuse related. Obviously, abuse related corroboration remains extremely important, and should be sought. But perhaps there is evidence to support what occurred before or after the alleged abuse. For example, in the initial disclosure, the child talks about the defendant, the mother's boyfriend, picking her up from school. That day, he surprised her by taking her to McDonalds and buying her a Happy Meal. Investigators pull the video surveillance from the restaurant that day, and use it to verify her statements. Later, the team learns that the mother has elected to remain in a relationship with the defendant, and subsequently, the child recants. While it is true in this scenario that there is not any corroborating evidence of the abuse itself, there is evidence that the child was telling the truth about other aspects of the event. Taken in totality, this may be enough to proceed, at least through a thorough investigation of the circumstances surrounding the recantation.

Lack of motivation should be explored in every child abuse case as corroboration of the abuse itself. And in recantation cases, the lack of motivation to lie about the initial outcry may become some of the strongest evidence at trial, especially if there is a clear motivation to lie regarding the recantation. It is imperative to explain to the jury that if there is a lack of motivation to lie about the initial outcry, that itself can be the corroborating evidence they are looking for.

## MDT Response to Recantation

Undoubtedly, recantation can occur at any time during the investigative and criminal justice process. With recantation, several outcomes may happen. If it occurs during the minimal facts interview, it is likely the investigation will not go forward. If recantation occurs during the investigation, it can end in the case being unsubstantiated and dismissed. These situations can result in the offender not being held accountable, remaining in contact with the child and family, possibility revictimizing the child, and ultimately preventing the child's ability to heal from the abuse.

The main question that must be answered when the child recants is, "Why?" It is a simple question with an often complicated answer. However, this simple question will guide the remainder of the investigation and prosecution. Is the child recanting because she is now telling the truth? This is a real consideration that each team must

<sup>20</sup> Hershkowitz, I., Lamb, M. E., & Katz, C. (2014). Allegation rates in forensic child abuse investigations: Comparing the revised and standard NICHHD protocols. *Psychology, Public Policy, and Law*, 20(3), 336-344. <sup>21</sup> Shelton, D. E., Kim, Y. S., & Barak, G. (2006). A study of juror expectations and demands concerning evidence: Does the 'CSI Effect' exist? *Vanderbilt Journal of Entertainment and Technology Law*, 9, 330-368.

consider. Is the child recanting because of a weak system response and a lack of support from the MDT? Or is the child recanting because of external pressure from family or friends who have an interest in protecting the defendant? The answer to this question will drive any subsequent investigation, treatment, or other response from the MDT.

But how can the MDT response to recantation produce a different result? The best-case scenario may be for the prosecuting attorney to delay prosecution, for investigators to reassess the case, and for the team to put supports in place to encourage reaffirmation of the original allegations, if true. It is critical for teams to have a process in place so that cases of recantation are immediately brought to the team's attention and steps are taken to determine the cause.

MDTs may have specific protocols in place to address recanting victim cases. Some jurisdictions engage in the routine practice of automatically scheduling a "recantation interview" of the child. This decision should be made with great care and input from the entire investigative team with consideration of the purpose of the recantation interview. If the purpose is to re-interview the child about the original allegations or to challenge the child's recantation, this contradicts the goal of child forensic interviewing, which is to collect accurate, factual elements of the child's experience in a manner that is sensitive to the child's needs.<sup>22</sup> In an effort to avoid re-traumatizing children who recant, MDTs should consider developing guidelines within their existing investigative protocol to outline steps for addressing recantation:

- Provide training for all MDT professionals regarding dynamics of abuse, process of disclosure and recantation
- Provide immediate therapeutic intervention for children post disclosure, with involved caregiver participation
- Provide involved caregivers increased support and education regarding how to support their child post disclosure
- Assess existing support systems and offer support services as needed (i.e. basic needs, childcare, transportation)
- Assess involved caregiver for current and/or past trauma and refer for trauma focused therapy if needed
- Develop guidelines within MDT protocol to outline immediate response to cases that have a high risk for recantation
- Develop guidelines within MDT protocol to outline steps team should make to respond to recantation when it occurs<sup>23</sup>

## Practical Considerations for the Multidisciplinary Team

When recantation occurs, no matter at what stage in the process, it is critical for the team to come together (including the prosecutor and therapist if involved) to staff the case and strategize how they will move forward. Ideally, this should occur immediately after a team member is made aware of recantation. During the staffing, the team should:

- Discuss reassessing safety/protection of the child (consider placement/protective custody)
- Discuss how to proceed with respect to the child's needs (i.e. therapy vs. forensic interview)

<sup>22</sup> Newlin et al. (2015).

<sup>23</sup> Sites, J., and Southern Regional Children's Advocacy Center (2017).

The team must shift the focus of the investigation to determine the cause of recantation:

- Identify the circumstances of recantation by interviewing the person to whom the child recanted
- Determine whether contact has occurred between the alleged perpetrator and child and/or family
- Determine whether involved caregiver and family believe child
- Determine whether circumstances after initial disclosure influenced recantation
- Determine whether child was influenced by other people
- Explore victim/witness tampering by alleged perpetrator
- Explore victim/witness tampering by others
- Explore whether original statement was false

By looking at the circumstances surrounding the recantation and what occurred in the child's life after their initial disclosure, the team will be able to unlock the clues to the discrepancies in the child's statements. The next step should be to interview the recantation outcry witness, followed by collateral witnesses. The team may be able to discern the cause of the recantation with this information alone and avoid re-interviewing followed by the child. It is imperative at this stage to assess the safety of the child, and determine if they are in need of a more protective environment. This may include a safety assessment interview of the child, after exhausting other efforts by interviewing collateral witnesses beforehand.

## The Decision to Re-Interview a Child Who Recants

If the team decides to re-interview the child, this should occur after the investigation and interviews of collateral witnesses regarding the cause of the recantation. However, proceed with caution. An automatic reaction to interview the child before additional investigation is conducted may subject the child to increased trauma, unnecessary interviews, incomplete interviews, or ineffective interviews.

The team should first consider whether the reason for another forensic interview meets at least one of the objectives below:

- To document the circumstances of the recantation from the child's perspective
- To provide possible evidence of victim/witness tampering
- To explore false allegations/alternative explanations for original disclosure
- NOT to challenge the child's current or original statements

If it is determined that a forensic interview will take place:

- It should be conducted in the same manner, same location, by the same interviewer (when possible)
- MDT investigators assigned to the original case should be present to observe the interview and participate in pre- and post-interview discussion
- The same advocate should be present to engage and support the involved caregiver
- The forensic interviewer and team should review the original forensic interview and case notes before the second interview

## The Interview:

- During introductory phase, review the same “interview guidelines” discussed in the first interview
- Remind child that interview is being recorded and MDT is observing just as occurred in the original interview
- Spend time building rapport, inviting narrative practice regarding safe, neutral topics or events
- If the child doesn't reference the allegation or recantation on their own, transition by acknowledging the initial forensic interview disclosure and ask what happened afterward in the least leading manner possible
- Use narrative inviting, open-ended questions
- Increased cued-recall may be necessary if child is reluctant
- Remain neutral, respectful, and offer reassurance
- Use minimal yes/no or multiple choice (only for clarification when necessary)
- Do not ask the child to repeat the original disclosure or challenge what is being said now compared to what was previously disclosed

Maintain focus on what has happened since the original forensic interview:

- Explore the circumstances of recantation (who was present, what was said)
- Determine whether contact has occurred between the alleged perpetrator and child and/or family
- Ask whether involved caregiver and family believed the child originally
- Ask how the involved caregiver and family reacted to the child's original disclosure
- Explore whether circumstances after initial disclosure influenced recantation
- Explore whether the child has recanted to others
- Explore whether someone talked to the child about what to say
- Determine whether child was influenced by other people
- Explore victim/witness tampering by alleged perpetrator
- Explore victim/witness tampering by others
- Explore whether original statement was false
- Close the interview according to forensic interviewing protocol
- Ask child about feelings, concerns, and thoughts
- Ask child if they feel safe, supported, and believed (by involved caregiver and family members)
- Have or help child identify trusted adults they can turn to if they need help<sup>24</sup>

## Additional Investigation

As discussed, the focus of the post-recantation investigation must answer the question as to why the victim recanted. Developing a detailed picture of what occurred for the jury will be key to the eventual prosecution if it is determined that the victim is recanting because of external pressure or reasons other than the abuse not

actually occurring. The more evidence that can be collected showing the reasons for the recantation, the better.

A practical consideration that challenges many recantation investigations is whether to investigate every aspect of what the child now says. On the one hand, if the child's new version is clearly erroneous and in complete contradiction to physical evidence, should a team expend valuable time and resources to chase ghosts? On the other end of the spectrum, should it be up to the sole discretion of the detective or other team members to determine what is and isn't a valid investigative lead? Ethical considerations require that the correct person is prosecuted for the correct crime, and that is a standard that the jury will uphold.

The answer is easy when physical evidence such as DNA, physical trauma, or even confessions point squarely at the defendant. The team can use its learned judgment to determine which, if any, new details need follow up. For example, if the victim gave birth to the defendant's child, proven by DNA evidence, there is no need to investigate the recantation story involving being raped by a stranger. That would be a waste of time and resources. Rather, the team may want to spend that time investigating the reasons why the victim recanted, and ultimately paint that picture for the jury. However, if the defendant has a twin brother, and the victim now alleges the twin committed the assault, then the investigation should obviously continue to determine the correct perpetrator.

But these cases will generally lie somewhere in between. In Jane's case, during her initial recantation, the victim said it was the “man upstairs.” The only identifying information she could provide at that time was that he, conveniently, moved to California the day after the assault. She was unable to provide his name, despite claiming to know him for quite a while. She couldn't provide the specific apartment. At the first trial, and for the first time, she provided the name of “Brandon.” When the jury hung, the team went back before the next trial and found a man who lived in that apartment complex named Brandon. Not surprisingly, he denied any knowledge of this incident, or even having the victim in his apartment at any time. He also never moved to California. There was nothing whatsoever that tied Brandon to the crime, aside from the bare assertion from a recanting victim. But at subsequent trials, Brandon was presented so that the jury could judge his credibility in denying involvement, and to demonstrate that the investigation was not one-sided with the sole intent of convicting this particular defendant. Rather, this was a team that sought the truth.

It is important that the investigation remain neutral and unbiased. It is critical for the administration of justice to explore all reasonable and rational alternative explanations. Jurors will expect that investigators and prosecutors don't make assumptions about one version over another without compelling evidence. To assume, without more, that the first version is the true version will play directly into defense strategy. In recantation cases, the defense will exploit any opportunity to paint the prosecution as one-sided and unwilling to

<sup>24</sup> *Id.*

explore the recantation. However, the fact that it was not possible to corroborate any of the recantation, despite best efforts, may actually strengthen the credibility of the initial outcry.

Some areas to explore when conducting the additional investigation include the basics of speaking with any witnesses who are named in the recantation, attempting to secure any evidence disclosed, discussing the recantation with the person(s) to whom the child has directly recanted, interviewing supportive and unsupportive family members, and following any leads that could conceivably result in additional information that might assist investigators in understanding the circumstances of the recantation. Other sources of information that may shed light on the circumstances include:

- **School Records:** These documents may provide insight into how the child is performing in school. Does a decline in grades correspond with a period in which the investigation shows the child was receiving pressure to reverse her story? Go beyond the records themselves and speak with the teachers and administrators, and to the extent necessary, and with parental notification, other students to explore whether there has been a noticeable change in the child's behaviors, emotions, and social relationships.
- **Counseling Records:** To the extent they are available by consent or by law, counseling records may provide insight into what has led to a recantation. Has the child disclosed to a counselor regarding lying about what happened with the defendant? Or has the child been talking about problems at home leading up to the recantation?
- **Social Media:** Investigators should not limit the investigation to the social media accounts of the child and the defendant. Other family members or friends may be openly commenting about the allegations. Or witnesses could be making more veiled – yet public – statements that give insight into the recantation. Look at both supportive and non-supportive family members. And while some people may communicate via private messaging, often people have open commentary in a public forum. To the extent probable cause exists, consider obtaining search warrants for the social media accounts themselves. Even if the account does not belong to the charged defendant, other family and friends could be engaging in criminal obstruction behavior, so search warrants versus court orders or subpoenas are advisable.

## Educating Criminal Justice Partners

Educating criminal justice partners is critical to the successful investigation and prosecution of recantation cases. If the frontline workers who initially interact with victims do not understand the risk factors associated with recantation, a case could end before it ever begins.

Consider the following scenario. An eight-year-old child makes an outcry to her teacher that her step-father, with whom she lives, molested her. Law enforcement and child protective services are immediately called, as is the victim's mother. Victim's mother reluctantly agrees to take the child to the hospital, where no medical findings are noted. A forensic interview is scheduled two weeks later, but in the interim, the child's mother calls the detective to inform her that the child recanted, and said she told the teacher she was molested to get attention. The detective speaks with the child,

who indicates that she lied and nothing happened. The detective cancels the forensic interview and closes the case, believing she has insufficient evidence to proceed.

Scenarios like this play out like this across the country on a regular basis. Decisions are made and the cases are closed before a full investigation can be completed, and before all members of the multidisciplinary team, including the prosecution, can be heard. To be fair, it could very well be the case that the child initially lied, and the recantation was in fact the truth. But the problem lies in making the decision without all the facts. At the very least, perhaps the detective should have kept the pre-scheduled forensic interview.

Education of the criminal justice partners could have avoided the recantation of a true account of abuse by identifying the risk factors. While over 90 percent of offenders are known to the child, a review of other possible risk factors could have been considered to minimize the likelihood of recantation.<sup>25</sup> The alleged offender was a family member who lived in the same home, the victim was a young eight-year-old child, and the child's mother was possibly unsupportive from the beginning. These are among the biggest risk factors for recantation.<sup>26</sup> Properly trained front-line responders may have made different initial decisions, such as seeking a forensic interview as soon as possible to memorialize the child's statement before any outside influences could have impacted her disclosure. Additionally, identifying risk factors could lead to providing immediate support and advocacy to the mother, promptly referring the child and mother for therapy, and, if the mother is unable to protect, allow for protective custody of the child victim.

If front-line responders are making case determinative decisions without the proper education and training, then abusers are not being held accountable, and even worse, victims may remain in a harmful environment. It is imperative that first responders, as well as detectives and CPS investigators, are informed of the dynamics of abuse, the process of disclosure, and the risk factors for recantation. Continued education does not end with first responders. Ultimately, when the criminal case proceeds through the system, it will appear before a judge. Laws are only as good as the people who rule upon

## RECOMMENDATIONS

- Develop standardized state and local trainings provided to MDTs on a regular basis
- Incorporate child abuse investigative training, including recantation risk factors, into basic police academy curriculum, as it may be a responding patrol officer who makes a decision affecting further investigation
- Attend webinars focusing on the process of disclosure, risk factors, and recantation (preferably required)
- Incorporate steps in local CAC/MDT protocols to reduce the risk for recantation, and provide MDT investigative protocol training/ orientation on a regular basis
- Provide routine feedback to all MDT members about previous cases when recantation occurs after the initial investigation

<sup>25</sup> 2015 US National Statistics on Child Sexual Abuse ([www.nsopw.gov](http://www.nsopw.gov)). <sup>26</sup> Malloy, Lyon, and Quas (2007).



them, and judges who are not familiar with the process of disclosure and recantation may rule in ways that undermine the prosecution's case. Again, imagine the above scenario of the young girl who almost immediately recanted the allegations against her step-father. Even a well-meaning, yet uninformed, judge could view the case with severe suspicion, questioning why charges were brought when the complaining witness said it never happened. That suspicion could affect pre-trial motions, evidentiary rulings, and qualifications of potential expert witnesses to explain these complex issues to the jury.

Outreach to the judiciary is key. All judges undergo continuing education that should ideally include child abuse cases. Teams should work with the state and local judicial education agencies to include the process of disclosure and recantation into the curriculum. But education also lies with each prosecutor, investigator, forensic interviewer, child protection worker, and therapist who enters the courtroom. Judges who can rely upon the knowledge and professionalism of the witnesses who testify before them, and the prosecutors who practice in their courtrooms, are likely to adopt their expertise in the instant case and future cases. It is important not to forget that each case affects the perception of all subsequent cases.

## When the Team Breaks Down

One of the best ways to highlight the importance of working as a team and taking a multidisciplinary approach to recantation cases is to describe how things can go wrong. As mentioned, Jane was eventually placed into foster care during the course of the case. Initially, she had absolutely no contact with her family, except her siblings in foster care with her. To everyone's delight, she initially flourished. She was doing well in school, she was well behaved and had a great attitude about the situation. She even began to bond with her foster mother. Her placement in a permanent foster home was after the second forensic interview, when she perpetuated the recantation that lacked details aside from "the man upstairs." But eventually, Jane began to talk about the abuse to her foster mother, saying things like, "I don't know why my cousin did this to me," and, "I don't like that my family wants me to lie."

But then came a critical breakdown in communication between the prosecutors and child protective services. There were several staffing changes for Jane's case worker, with each subsequent worker knowing very little outside the written file. Child protective services believed it was in the child's interest to attempt to keep contact with her family, with a goal of reunifying the children eventually. To that end, they wanted to start supervised visitation. During one of those visits, the family slipped the victim a cell phone. At first, neither the foster mother, nor CPS, knew of this. Almost immediately, the victim began to recant once again. It's not hard to imagine what the defendant's family was saying to this now nine-year-old child in an attempt to protect the abuser.

The fault in the breakdown of communication lies with both parties. The DA's office should have maintained better communication with the case workers, especially knowing the complexity of the family dynamic

that may not have been readily apparent. Interacting with members of the family, both immediate and extended, they outwardly seemed caring and competent to care for children, yet the prosecutors knew their true intentions and should have conveyed those in full.

In turn, given the circumstances of how the children came into contact with CPS, they had a base knowledge that the offender was a family member, and therefore other family members were possibly unsupportive of the prosecution - especially given the lengths to avoid compliance with legal service. Knowing this, it should have been incumbent upon them to reach out to other team members to determine the status of the criminal case and learn additional information before attempting reunification. Unfortunately, with this breakdown, it was the victim who ultimately suffered, being subjected to intrafamilial trauma and the upcoming trials.

It is worth noting that different team members and agencies may have competing priorities.<sup>27</sup> The prosecutor is obviously concerned with the successful prosecution of the case and protecting both the victim and the community at large. Child Protective Services, however, will have as their chief priority the well-being and placement of the child, and generally the family court system favors reunification with parents or family when possible. Sometimes those priorities will not align. But in Jane's case, it was the lack of communication, not competing interests, that ultimately caused damage to both the victim and the criminal case.

## Uncooperative Witnesses & Compulsory Process

Oftentimes, when the child recants, family members supportive of that recantation believe the case will be over. Every prosecutor is familiar with the layperson's belief that the prosecution cannot proceed without the victim. In most jurisdictions, that simply is not true. While prosecution is certainly easier with victim cooperation, it is ultimately the state's decision whether to prosecute. Producing uncooperative victims and witnesses in court against their will can be a herculean effort. But what is the best, and most effective, way to ensure your witnesses are present when needed to testify? That decision is often a mixture of both available legal process and trial strategy.

Obviously, the prosecutor must begin with proper subpoena service pursuant to local law. Witnesses under subpoena can be arrested and forced into court against their will, but oftentimes just the suggestion of that possibility will prompt most witnesses to comply. However, the likelihood that they will then become a cooperative witness in court is small. Prosecutors must be ready to impeach the uncooperative witness, including the victim, with prior inconsistent statements.<sup>28</sup> This can be a tedious task, going line by line with each inconsistency, but critical to painting the picture of the recantation, and why the new narrative should not be believed when viewing all the evidence as a whole.

<sup>27</sup> Lalayants (2008). <sup>28</sup> See Fed. R. Evid. 801(d)(1)



Most jurisdictions allow for the issuance of a warrant for essential witnesses who are purposefully avoiding subpoena service. But simply because the State can seek the compulsory attachment of a witness doesn't necessarily mean that it should. In Jane's situation, the team made a conscious decision that the evidence was overwhelming and compelling that the recantation was fabricated. Furthermore, there was a real concern that should the defendant be released, he would have access to the victim on a regular basis. The MDT determined that continued prosecution, despite the recantation and despite the multiple hung juries, was absolutely necessary. The family then went to great lengths to hide the victim and her mother from the State, requiring investigators to go undercover in their attempts to locate relevant individuals. Ultimately, with the assistance of federal authorities, the victim's mother was located outside of the Atlanta metro area, hiding in a motel with her children.

The human toll of exercising that power was real. The victim, as well as her siblings, were present when the authorities appeared on scene en masse. They cried as their mother was taken away in handcuffs, and the children were placed once again in the custody of child protective services. They undoubtedly wept for their mother as they were placed with foster parents, and moved to yet another town and another school. These are the real-world consequences of what State action can cause. Were the State's actions in this case valid? Given the circumstances outlined above, one might argue they absolutely were. The State must be concerned with the safety of the victim as well as the safety of the community at large. But the team must never forget the trauma that children may face as a result of these decisions, and weigh that against the other factors in the case.

## Forfeiture by Wrongdoing

The defendant, however, may be successful in deliberate attempts to hide the victim or other witnesses during the pendency of the trial. To that end, what about the defendant's Sixth Amendment right to confront his or her accuser? If the defendant had a part in the victim not appearing, then the hearsay statements may come in as substantive evidence. Under the doctrine of forfeiture by wrongdoing, it is a longstanding principle of constitutional law that a defendant cannot benefit from purposefully causing, or sometimes even encouraging, a witness to fail to appear in court.

Codified under Section 804(b)(6) of the Federal Rules of Evidence, as well as similar state statutes, rules or common law principles, if the prosecution can show by a preponderance of the evidence that the defendant acted wrongfully or acquiesced in wrongful acts that resulted in the witness' unavailability at trial, and the defendant intended to prevent the witness from testifying, then traditional testimonial hearsay statements may be admitted at the trial without the defendant enjoying the benefit of cross-examination. The nature of the hearsay statements, and their importance at trial, is immaterial.<sup>29</sup> The United States Supreme Court upheld the

applicability of forfeiture by wrongdoing in their landmark Sixth Amendment case, *Crawford v. Washington*.<sup>30</sup> They reiterated their support of the doctrine in *Davis v. Washington*.<sup>31</sup>

Gathering evidence of the defendant's efforts, or acquiescence, to cause the witness to be absent from the court proceedings is key to a successful argument under the forfeiture by wrongdoing doctrine. Simply conveying suspicions to the court will not pass constitutional muster, as the government bears the burden of proof by a preponderance of the evidence.<sup>32</sup> Threats and intimidation of witnesses have been held sufficient for a defendant to forfeit their right to confront that witness' testimony at trial.<sup>33</sup> Even "bribery, guilt, and various forms of psychological intimidation" can be valid waivers of the Sixth Amendment right.<sup>34</sup>

Given the current state of technology at many jails, recorded telephone calls by incarcerated defendants can be a treasure trove of information. But even if the defendant is not in custody and talking freely on the recorded lines, there may be ways to prove the defendant's role in the absence of the witness. Family and friends who are supportive of the prosecution may be willing to testify about the activities of the defendant and his cohorts, or perhaps there is a trail of evidence left on social media or legally obtained emails and cell phone records. If there is suspicion of threats or intimidation, the team must take the steps to allow for the admission of the hearsay statements over defense objection.

## Obstruction of Justice

Prosecutors may also consider bringing charges against the defendant and other individuals who have a part in deliberately influencing or concealing a witness. While these charges, and the required evidence, would vary by jurisdiction, the key tenets are the same: it is illegal to deliberately influence or conceal a witness from the courts in an effort to obstruct justice. And depending on the jurisdiction, it may be permissible to include those additional charges in the trial for the underlying criminal act that was the subject of the initial outcry. If allowed, those charges inherently paint a powerful picture of the true extent of the deception that the defendant and other individuals undertook to subvert justice.

But when deliberating whether to bring additional charges, the prosecutor must also consider the counterargument. The defense will likely attempt to portray additional charges against the defendant or other individuals as vindictive prosecution, suggesting that the case became weaker with the recantation, and the only way to strengthen the underlying charges is to inflame the jury. That is to be expected, and can be easily addressed under the correct circumstances. But looking at the case as a whole when making strategic decisions is essential to determine how each piece will ultimately fit into the puzzle.

<sup>29</sup> *United States v. Gray*, 405 F3d 227 (4th Cir. Md. Apr. 29, 2005). <sup>30</sup> 541 U.S. 36 (2004). <sup>31</sup> 547 U.S. 813 (2006). <sup>32</sup> *United States v. Dhinsa*, 243 F3d 635 (2d Cir. N.Y. Mar. 21, 2001); *United States v. Rivera*, 292 F Supp 2d 827 (E.D. Va. Nov. 13, 2003); *United States v. Lentz*, 384 F Supp 2d 934 (E.D. Va. Aug. 29, 2005); *United States v. Johnson*, 403 F Supp 2d 721 (N.D. Iowa Dec. 16, 2005). <sup>33</sup> *United States v. Zlatogur*, 271 F3d 1025 (11th Cir. Ga. Oct. 31, 2001); *United States v. Scott*, 284 F3d 758 (7th Cir. Ill. Mar. 26, 2002). <sup>34</sup> *United States v. Jonassen*, 759 F3d 653 (7th Cir. Ind. July 16, 2014).

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## TRIAL

The overall goal of the trial is to paint the complete picture of the recantation, allowing the jury to make an informed decision as to the guilt of the defendant. These cases involve proving more than just the underlying facts that support the charging document, but explaining why the jury should wholly or in part ignore what a child victim subsequently said about the facts of his or her abuse. Obviously, this section of the monograph assumes that the prosecution believes that the recantation was false, and justice demands that the case proceed to trial.

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### Trial Preparation

Not surprisingly, trial preparation will likely look vastly different with an actively recanting victim. Perhaps the family will be unwilling to bring the child in to meet with prosecutors. Or if the child is made available prior to the trial, he or she is unlikely to miraculously start confirming the facts of the initial outcry. The prosecution team will need to adapt to the dynamics presented to conduct the best trial preparation that can be accomplished under the circumstances.

Sometimes the most important part of trial preparation in these cases is to simply minimize the trauma associated with testifying. The MDT may never understand the true extent of the pressure that has been placed upon the victim by those supporting recantation. It may be most beneficial to spend any trial preparation time discussing courtroom procedures, answering questions truthfully, building some semblance of rapport, and eliminating to the extent possible any anxiety associated with the process of testifying itself with the goal of minimizing trauma.

By the time the third trial occurred in Jane's case, the victim was deeply entrenched in the recantation. While she was back in foster care, she was told by the family that she would be able to come home once the charges were dropped. There was no possibility that she was going to retreat from the recantation. The team met with her in foster care, but made the conscious decision to not discuss the facts of the case or the upcoming court date unless she broached the topic. They played cards, asked her about school, and simply spent time with her to mitigate any anxiety about the upcoming court appearance. During court hearings, the team attempted to keep the victim away from the courtroom as much as possible to minimize the stress.

The degrees of success fluctuated between trials. During the first trial, Jane was taken out the front of the courtroom, where unbeknownst to her and the victim advocate, her mother was waiting to testify. Not surprisingly, this was extremely traumatic for the victim, who

clearly still loved her mother and wanted to be back with her. And it highlighted for the team, once again, that considerations to reduce the stress and trauma associated with these cases must always be at the forefront, and the team must be vigilant of situations that may undermine that goal. Going forward, the victim was always taken into the courtroom through the judge's chambers.

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### Voir Dire

It is often said in trial advocacy that cases are won or lost in jury selection.<sup>35</sup> To a great extent, this is true. If the prosecutor gets even one juror who will not consider convicting a defendant when the victim has recanted, then securing a conviction is impossible. The goal in recantation cases must be to get jurors who can "see the forest through the trees," and look at the case as a whole.

It is extremely important to let the jurors talk. The State must learn about the jurors' life experiences versus painting them into categories with broad strokes. A juror who on first glance may seem state-friendly could easily not be fair and impartial on this case. Juror A may come from a long line of police officers, skew conservatively politically, is employed in a profession that deals with children, and lives in an affluent part of town. But without truly discussing the juror's life experiences as related to these types of charges, one might miss that her best friend's husband was falsely accused of rape in college. That may make this otherwise appealing juror more likely to believe that the recantation should be reasonable doubt, because of a specific experience.

Conversely, jurors who prosecutors may typically strike in other types of cases may be more receptive to recantation cases. Juror B may have a brother who went to prison for a crime that he committed, grew up in a lower-income household with various parental figures coming in and out of his life, and had friends he felt were treated unfairly by the criminal justice system. But perhaps the discussion with the juror reveals that his family dynamic growing up may lend him to understand how a child could be pressured in the family dynamic to recant truthful statements, and may in fact be an important voice on the jury to explain those dynamics to those who may not understand the concept. A juror cannot be defined by a few answers on a juror questionnaire. Rather, they are defined by the sum of their life experiences, and it is the lawyer's role to understand how those experiences affect their attitudes on the subject at hand.

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<sup>35</sup> Mulvaney, M. D., & Little, J. A. (2015). The importance of Voir Dire: Essential techniques for choosing finders of facts. *American Journal of Trial Advocacy*, 39, 313-338.

## SAMPLE QUESTIONS

Jury selection can take vastly different forms from state to state, county to county, or even judge to judge. So the extent that these sample questions are admissible will vary greatly, and prosecutors are encouraged to be as creative as possible to elicit the necessary information to secure a jury that will fairly judge all of the facts presented. But the overall intent is to identify potential jurors who will be open to considering that the charged crimes were committed by the defendant, and not shut down once they learn that the child victim has recanted. Furthermore, it is important to identify those jurors who believe that family matters should be handled within the family, and the State should refrain from involvement.

- Can you understand why a victim of a crime may not want to testify against a loved one? Why?
- Can you understand why a child victim of a crime may not want to testify against an alleged abuser? Why?
- Can you understand why a child victim of a crime may change their story against an alleged abuser?
- Do you think there are situations where external pressure from family or friends could prompt a child victim to take back or change their initial account of what occurred to them?
- Do you believe that the State should not prosecute if the victim is not present in court to testify?
- Would it affect your ability to deliberate if the victim in this case was not present in court to testify?
- Do you feel that family issues should be handled in the home, and not in the criminal courts?
- If a family does not want to prosecute, but rather deal with the allegations within the family unit, do you believe that the state should allow them to do so?
  - Are there any limits to that?
  - What do you think those limits should be?
- Does anyone believe that the State should not proceed with prosecution because a victim does not want to prosecute?
- Do you understand that the State has a responsibility to prosecute a person who it believes has committed a crime, even though the victim does not want to proceed?
- Have you, or a close family member or friend, ever had Child Protective Services conduct an investigation?
- Do you have any strong feelings one way or the other about Child Protective Services?

### PHYSICAL ABUSE CASES:

- Do you believe that domestic violence issues, including corporal punishment, should be handled in the home, and not criminal courts?
- Do you believe that a physical assault in the home is different than a physical assault in a public space?
- Do you believe that a person has the right to use physical force on his/her child?
- Are there limits to that physical force that can be used?
- Does it make a difference if the force is used for punishment versus non-punitive reasons?

- Do you, or someone close to you, utilize corporal punishment as a means of discipline?
  - The purpose of this question is not only to identify potential jurors who utilize corporal punishment, but also start a conversation about the difference between corporal punishment that is non-abusive and what the State is maintaining is criminal abuse in this case.

## Opening Statements

While all aspects of the criminal trial are critical, the importance of opening statements cannot be understated, and is backed by research. Known as the primacy effect, once people form an opinion or develop a theory, even if based on incomplete or inaccurate information, they are far less likely to change their minds when later confronted with contradictory information. "[The] opening statement marks the beginning of the attorney's efforts to help the jurors construct a mental image [of the events]. This mental image, in turn, influences the way in which the jurors receive and interpret the evidence."<sup>36</sup> Additionally, at the beginning of a trial, jurors are more attentive, engaged, curious and open minded. As the trial proceeds, they become tired, overwhelmed, disinterested, and can begin to process secondary information to a lesser degree. The information they do receive later in trial will be viewed through the prism of the opinion already formed, a phenomenon known as confirmation bias.<sup>37</sup>

Understanding this, the prosecutor can thoroughly and effectively paint the picture of the entire case – the good, the bad, and the ugly. This is the opportunity to make the jury understand the evidence of the abuse and the circumstances surrounding the recantation, and begin to answer the question of why the State is proceeding if the child now says nothing happened. An effective method is starting with the original outcry, detailing the strengths of that outcry and the subsequent investigation. To the extent possible, highlight facts that can be juxtaposed against the recantation. For example, if the original forensic interview is admissible and contained a great deal of detail about the abuse, highlight all of those examples. Then, tell the jurors that they will see a second interview with a different narrative, but this time, those rich details won't be present.

Don't be afraid of the "negative" facts, including the recantation.<sup>38</sup> It is always best to take the sting out of anything the defense may wish to highlight. To the extent court rules allow, discuss the anticipated expert testimony, and how that may interact with other facts in the case. Expanding on the example above, perhaps the prosecutor discusses the differences between the two interviews, and then mentions that the jurors will hear from an expert who will explain why those differences are significant for a child witness. By explaining why the recantation occurred, and yet why the evidence will show they should still believe the initial outcry, jurors will be primed to receive the evidence more openly.

<sup>36</sup> Lubet, S., & Lore, J. C. (2015). *Modern Trial Advocacy: Analysis and Practice (5th ed.)*. Boulder, CO: National Institute for Trial Advocacy. <sup>37</sup> Dubin, J. (2015). Incorporating memorable demonstratives into opening statements, *Champion*, 39, 54. <sup>38</sup> American Bar Association (2003). *Effective Opening Statements*. Retrieved from <https://apps.americanbar.org/labor/lel-aba-annual/papers/2003/mcwilliams.pdf>.

If the circumstances surrounding the recantation are especially egregious, don't shy away from taking the time to detail those facts to the jurors. In Jane's case, it was especially important for the jurors to know that the family did not care about the victim until they needed her. When her mother was in jail, they let her live in poverty with a family friend, having little communication and providing no support. It wasn't until the seriousness of the situation became real, when the defendant was re-arrested and they needed her to recant, that they even began to care about the victim or her siblings. It was important for the jury to know that the family went to extreme lengths to hide her from the State, attempting to prevent her in-court testimony, such that they kept her out of school and stunted her education. And it was important for them to know that the first chance they got to interact with her after she was placed in foster care, they gave her the cell phone so they could continue their unrelenting pressure to lie. These details are important, because it is from these details that the jurors will evaluate both the original allegations and the subsequent recantation. It was these details that let the jurors know from the beginning that this family only used this child for their own selfish interests.<sup>39</sup> And it was these details that primed the jury to evaluate their testimony at trial. Embrace the recantation as a continuation of the victimization of this child.

While the attorney should not be afraid of the negative facts, they must also never over-promise. Studies have shown that prosecutors generally start the trial with the perception of honesty. When one study asked jurors if they believed the prosecutor was "honest with the jury at all times," 84.6% of the respondents agreed or strongly agreed, with 35.8% out of all respondents strongly agreeing. Defense attorneys did not fare quite as well. While 71.3% of jurors agreed that the defense attorney was honest with them at all times, only 18.7% strongly agreed with that statement.<sup>40</sup> If prosecutors lose this perception of truthfulness, by overpromising or outright lying, the chances of conviction will be seriously diminished.

Because of the complexity of these cases, prosecutors will want to do whatever they can from the beginning to simplify the facts. Visual aids become a phenomenal resource to accomplish this goal. Perhaps it is helpful to establish a visual timeline for the jurors, highlighting the important facts prior to the recantation, and what influenced the recantation at a certain time. Or perhaps the family dynamics are important, yet complicated. A family tree may help the jurors to understand the complicated subtleties. A recent study examined the effectiveness of opening arguments delivered both with and without visual aids. Mock jurors were not only more often persuaded when an attorney used the visual aids, but they also reported higher levels of recollection of evidence and had more positive perceptions of the lawyers.<sup>41</sup>

## Presenting Recanting Victims / Hostile Witnesses

Because the rules of evidence vary so widely among jurisdictions, this monograph will not examine the intricacies of

how to impeach a victim or other State witness. But in jurisdictions where the party can impeach their own witness, the prosecutor must be ready and able to do so. Prosecutors must also be prepared to address the witness who is physically present in the courtroom, and while not recanting, is refusing to answer questions. In these situations, the universal truth is that the prosecutor will need to be armed with the relevant statutes and case law, as well as the transcripts of any prior statements.

Impeaching a child is a different skill set from impeaching other types of uncooperative witnesses. The prosecutor must not only be skillful and meticulous in the examination, but must also consider the dual challenges of not emotionally harming the child and not alienating the jury. "If you have no choice other than to impeach your child witness, it is important not to evince frustration or hostility in the tone of your questioning. Berating her with what you perceive to be a major inconsistency will not win you points with the jury, and likely will cause the jury to overlook potentially important evidentiary facts. The key is to be respectful and even somewhat gentle while pursuing an important line of questioning, and also to avoid asking insignificant questions that bring up irrelevant or collateral inconsistencies."<sup>42</sup>

Not all impeachment will be in the form of the prior inconsistent statements themselves. If the theory of the case is that the recantation is false, it can be easy to dismiss the statements of the witness and not follow up on the new details provided. But some of those details may be easily verifiable as true or false with extrinsic evidence. The multidisciplinary team must be able to, in real time, investigate new facts that are presented during the course of the trial. Perhaps a new person is identified as the perpetrator, as occurred in Jane's case. The team can seek to identify that person, and determine any validity to that account. Wouldn't it be powerful if extrinsic evidence could be shown that the person was deployed overseas at the time of the offense? Or perhaps the victim states, for the first time, that she told her teacher from the beginning that she was lying. Finding that teacher and potentially presenting the jury with the absence of that statement to her could be just enough to convince jurors that the recantation is false. Children who are lying will often not understand that their statements may be independently verifiable, and the cognitive limitations of younger children will prevent them from maintaining a lie.<sup>43</sup>

Experts are crucial when a prosecutor is in the position of impeaching a child witness. Experts can aid in juror perceptions of the child witness' overall veracity, explaining why jurors should feel confident in believing one version of the child's allegations and not another. "Regardless of which side does the impeaching, the impact of impeaching a child through inconsistent statements is often reduced when courts allow expert... testimony to explain weaknesses in the

<sup>39</sup> It is important to note, however, that the prosecutor must always be cognizant of the jury pool, and must take into account how the jury may react to this family pressure. In jurisdictions where the jury may be more distrustful of the criminal justice system, prosecutors must be careful not to accidentally alienate jurors with righteous indignation if those jurors believe the prosecutor may be passing judgment on the socioeconomic or societal pressures that the family may face. The prosecutor must always build trust with the jury. And to that end, the prosecutor must judge the best time to highlight the depravity of the family's actions. <sup>40</sup> Frank, M. J., & Morera, O. F. (2012). Professionalism and advocacy at trial - Real jurors speak in detail about the performance of their advocates. *Baylor Law Review*, 64, 1-47. <sup>41</sup> Park, J., & Feigenson, N. (2013). Effects of a visual technology on mock juror decision-making. *Applied Cognitive Psychology*, 27(2), 235-246. <sup>42</sup> Murray, C. H. (2005). Nuts & bolts, child-witness examination. *Litigation*, 31, 16-20. <sup>43</sup> Lyon, T. D., Malloy, L. C., Quas, J. A., & Talwar, V. A. (2008). Coaching, truth induction, and young maltreated children's false allegations and false denials. *Child Development*, 79(4), 914-929.



child's testimony, including inconsistencies and recantations." This testimony should be in conjunction with the process of disclosure and the dynamics of recantation.<sup>44</sup>

## The Forensic Interview

In jurisdictions where the forensic interview is introduced as substantive evidence, the prosecutor is bestowed with a powerful tool. Prosecutors can essentially ask the jury to disregard the new statements and instead return a conviction based on the original statements alone. In this situation, prosecutors must take painstaking efforts to show why the original forensic interview has high indicia of reliability, and the recantation interview should be disregarded as an attempt to cover or minimize the defendant's actions.

But what if the original interview is not substantive evidence, but rather can only be used for impeachment evidence only?<sup>45</sup> Even some jurisdictions that allow for the impeachment of the party's own witness limit the use to impeachment value only. All is not lost. Cases like Jane's could have proceeded to trial because there was physical evidence that the abuse had occurred. And while Jane and the family recanted the identity of the perpetrator, there was sufficient circumstantial evidence for the jury to convict, specifically the fact that the defendant was the only adult male in the home, this person "Brandon" was found and denied his involvement, and the 5-year-old cousin testified that he saw the defendant and the victim together (though in subsequent trials, he also conveniently had little to no recollection of the events).

Prosecutors should note the nuances of their laws regarding impeachment. While sometimes a regular witness' original statements will be limited to their impeachment value, child hearsay statutes may be more permissive as to the type and weight of the original evidence.

## Expert Witnesses

Not surprisingly, it will be hard for some jurors to understand why a child would recant true allegations of abuse. Or even if they can understand why this may happen, it may be difficult for them to discount the recantation and trust the veracity of the child's first statements. In a 2005 study that evaluated preconceptions that individuals have about child abuse cases, 71% of respondents believed children are sometimes led by an adult into falsely reporting abuse, and 70% believed most kids can be manipulated into making false allegations of abuse.<sup>46</sup>

In another study, researchers compared knowledge of children's reactions to and disclosure of abuse among college students, community members, and child sexual abuse experts. "Most community and college students were accurate in agreeing that children may retract true reports of sexual abuse and that children can distinguish between fantasy and reality." However, 53% of the

student respondents agreed with the statement, "Children are easily manipulated into giving false reports about sexual abuse." Only 20% of the experts surveyed agreed with that statement, and undoubtedly had much greater insight into how to evaluate such situations than the college students.<sup>47</sup> This highlights the importance of educating the jury with the tools necessary to evaluate the facts of the case.

Without guidance, jurors are likely to impose their own preconceptions, which are often incorrect. "Several legal scholars [have] advocated the use of such expert testimony to inform jurors about psychological studies indicating that children above 3 or 4 years of age are capable of distinguishing fact from fantasy, are not unduly suggestible, often delay reporting abuse, [and] sometimes recant truthful charges."<sup>48</sup> The importance for jurors to know that this case is not an anomaly cannot be overstated.

The prosecutor must also decide if the forensic interviewer will be utilized as the expert witness for the recantation, or whether an outside expert should be retained. Some of that evaluation goes to the level of experience that the forensic interviewer has with testifying in general, as well as testifying specifically in recantation cases. An external expert may be best if the forensic interviewer is inexperienced with these types of cases, as the cross-examination is likely to be thorough and sifting, exploring in detail the concepts of children lying, the process of disclosure, suggestibility and coaching. An external expert may also be important in jurisdictions that cannot introduce the forensic interview itself, and the purpose of the expert testimony becomes solely to educate the jury with objective and neutral knowledge that they will use to evaluate the child's in-court testimony.

In jurisdictions where both the original forensic interview and a recantation interview (or in-court testimony) will be viewed and evaluated as substantive evidence, the expert essentially holds the keys for the jury to properly evaluate the various statements. Experts should help guide the jury in understanding which statements have greater indicia of reliability. The presence or lack of sensory details, consistency of one statement over time, children's developmental limitations associated with lying, the process of disclosure, and factors affecting recantation should all be discussed at length.

Obviously, the defense may choose to present their own expert. Prosecutors should be cognizant of motions that can be made in court to challenge the extent of the defense expert's testimony. In jurisdictions that follow a Daubert-type analysis or have evidence rules that mirror the federal rules of evidence, challenges can be made as to the relevance of the expert's testimony.<sup>49</sup> If the evidence at trial does not cover an area on which the defense expert plans to opine, pre-trial motions should be filed to attempt to limit the scope of the testimony.

<sup>44</sup> Wendel, P. T. (1999). The case against plea bargaining child sexual abuse charges: "Deja vu all over again". *Missouri Law Review*, 64, 317-381. <sup>45</sup> Van Arsdale, B. J. (n.d.) Proprietary, under Uniform Rule of Evidence 607, of impeachment of party's own witness. *American Law Reports*, 3(6). <sup>46</sup> Quas, J. A., Thompson, W. C., & Clarke-Stewart, K.A. (2005). Do jurors "know" what isn't so about child witnesses? *Law and Human Behavior*, 29(4), 425-456. <sup>47</sup> Kovera, M. B., & Borgida, E. (1997). Expert testimony in child sexual abuse trials: The admissibility of psychological science. *Applied Cognitive Psychology*, 18(6), 653-674. <sup>48</sup> Quas, Thompson, and Clarke-Stewart (2005). <sup>49</sup> *United States v. Reynolds*, 77 F.3d 253 (8th Cir, 1996).



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## Closing Arguments

The closing argument is exactly that - an argument meant to persuade the jury. "An effective closing argument should attack the serious problems in a case and put them in the most favorable light for the judge or jury. Merely reviewing the evidence does not attack, analyze, or solve the real issues that must be resolved by the fact-finder."<sup>50</sup> This is especially true in recantation cases, where you are essentially asking the jury to believe that at some point the victim was lying, while simultaneously asking them to believe other statements as proof beyond a reasonable doubt. It is the goal of the closing argument to tie the investigation and the evidence at trial to the reasons behind the new false testimony as well as the trustworthiness of the original statements, ultimately convincing the jury to believe the original allegations.

The closing argument does not begin when the evidence is closed and the lawyer stands up for the last time to address the jury. "A [case] is won during the trial, not at the conclusion of it. It is won by the witnesses and the exhibits and the manner in which the lawyer paces, spaces, and handles them. The likelihood of a lawyer's snatching victory from the jaws of defeat with his or her closing argument is so slight that it hardly warrants consideration."<sup>51</sup>

This is not to diminish the importance of the closing argument. "Closing argument is the time to integrate the component pieces of the trial into a finished product; to give perspective, meaning, and context to the evidence introduced throughout the trial; to weave the sometimes disparate and conflicting pieces of evidence into a clear statement that explains what transpired and who is responsible."<sup>52</sup> The trial lawyer must maintain credibility with the jury.<sup>53</sup> Credibility is key, especially for the jurors that may be on the fence. If the advocate is convinced that the conflicting evidence presented leads to only one true set of facts, and has maintained credibility from opening statements all the way through closing arguments, then perhaps borderline jurors will also be convinced.

Timelines are often very helpful in recantation cases. Timelines provide a logical way for jurors to think about the initial allegations and the facts and circumstances surrounding that outcry. Jurors can then juxtapose the facts and circumstances that occurred before, during and after the recantation. Like in opening statements, visual aids, such as PowerPoint presentations or boards, will allow the jury to more easily follow the complicated narrative, and cater to jurors who are visual versus audible learners.

In Jane's case, the argument was that there were two distinct timelines: one that led up to the defendant's arrest where the victim was consistent for two years, and then everything that occurred after the pressure was placed on the victim to recant. By making a clear distinction, the argument was that the jury should essentially discount everything that occurred after the recantation, and instead focus on the facts leading up to the recantation. In the end, the final jury did just that. They focused on the trustworthiness of the original

statement, the quality of the police investigation, and the physical evidence supporting the allegations. In the end, they focused on seeking the truth.

## ETHICS

*The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done...He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.*<sup>54</sup>

It is well known that prosecutors have a high ethical burden. Prosecutors must ensure that the community they serve is protected and those who commit crimes are held accountable. But simultaneously, they must always ensure that the correct person is prosecuted for the correct crimes. This can become complicated in some recantation cases.

The American Bar Association (ABA) has outlined special responsibilities for a prosecutor in Rule 3.8.<sup>55</sup> Among them, a prosecutor shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. The ultimate question, then, is whether recantation means that one or multiple charges are no longer supported by probable cause. This will ultimately revert back to the recantation investigation. And the prosecutor must make the difficult choice of whether the evidence will allow the case to proceed.

Sometimes the lines can be quite blurry. What if the prosecutor isn't sure if the child is outright recanting versus suffering from an inability to recall certain facts? Any seasoned child abuse prosecutor can detail situations when a child's memory simply fades or multiple incidents become conflated. The cleanest and most ethical approach to these situations is to disclose the development to the defense. Aside from the requirements of *Brady*, the ABA rules call on prosecutors to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."<sup>56</sup>

If the prosecutor believes that probable cause still exists, but perhaps the defects in the child's memory can be explained through an expert witness, then disclose the information to the defense and address admissibility in court. Just because evidence must be disclosed to the defense as part of a discovery obligation does not necessarily mean that the evidence will be admissible at trial. Or if it is admissible at trial, it may be easily explained by the expert. But appellate courts may be highly suspicious when the prosecutor makes the judgment call of whether to disclose the information for everyone involved.

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<sup>50</sup> Seckinger, J. H. (1995). Closing argument. *Scholarly Works*. Paper 11, Notre Dame Law School. 51-86. <sup>51</sup> Broun, K. S., & Seckinger, J. H. (1990). *Problems and Cases in Trial Advocacy* (4th ed.). Boulder, CO: National Institute for Trial Advocacy. <sup>52</sup> Caldwell, H. M., Perrin, L. T., Frost, C. L. (2002). The art and architecture of closing argument. *Tulane Law Review*, 76, 961. <sup>53</sup> *Id.* <sup>54</sup> *Berger v. United States*, 295 U.S. 78 (1935). <sup>55</sup> American Bar Association (2018). *Model Rules of Professional Conduct*. Chicago, IL: ABA Book Publishing. <sup>56</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

Plea bargaining is a daily occurrence in criminal practice. The strength of the case is a significant factor in deciding whether to offer a plea, perhaps to drastically reduced charges or sentencing, or proceed to trial. But prosecutors must remember that attempting to “dump” a case when a recantation occurs, without advising the defense, runs afoul of the high ethical obligations. Appellate courts have held that in situations where the prosecution has withheld *Brady* material, such as recantations, the guilty plea was not “voluntary and intelligent,” and therefore the cases were reversed.<sup>57</sup>

## POST-CONVICTION

Ethical obligations don’t end when the defendant is convicted. As prosecutors are encountering across the country, newly discovered evidence could cast doubt upon a conviction. Different states have developed different standards and procedures for handling newly discovered evidence post-conviction, but the ABA Rules regarding a prosecutor’s obligation are clear.

When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

- (1) promptly disclose that evidence to an appropriate court or authority, and
- (2) if the conviction was obtained in the prosecutor’s jurisdiction,
  - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
  - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
  - (iii) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.<sup>58</sup>

Recantations may fall within this realm. Take, for example, the case of the “San Antonio Four.” In the summer of 1994, four openly gay women were accused of sexually assaulting the seven- and nine-year-old nieces of one of the defendants in San Antonio, Texas. The incident was speculated to be satanic-related, and as such, related to the daycare hysteria cases that swept the country throughout the late 1980s and early 1990s. In addition, homophobic bias permeated many of the aspects of the trial.<sup>59</sup> Based upon the testimony of the two child witnesses, all were sentenced to 15 years in prison, with the exception of one defendant who received a 37.5 year sentence. However, in 2012, one of the nieces admitted to having been pressured by her father to make the false accusations. Her recantation was extremely detailed. The second niece neither recanted nor reaffirmed her allegations, but the allegations were always conflicting between the two victims from the beginning. This recantation was coupled with compelling evidence about her father’s motivations, which was

corroborated with extraneous evidence, and the pressure the alleged victims felt as young children. In addition, the child abuse physician who testified at the original trial admitted that her evaluation of the medical evidence was based upon scientific theory that was since proven incorrect, resulting in a complete lack of any evidence outside the inconsistent statements of the alleged victims.

But how should trial and appellate courts evaluate recantations that come years, sometimes decades, after the conviction? The Texas Court of Criminal Appeals wrote a lengthy evaluation of the San Antonio Four case in its entirety, as well as how recantations may be examined by appellate courts. They wrote, in part:

Although courts must carefully examine claims of actual innocence—even one made many years after the alleged crime—recantations in sexual assault cases are not rare. Such post-conviction claims should not be accepted without close scrutiny nor, generally, without strong corroboration by independent evidence. *Ex parte Thompson*, 153 S.W.3d 416, 420-21 (Tex. Crim. App. 2005) (granting relief on the basis of actual innocence where complainant’s recantation was corroborated by normal medical examination results and evidence of manipulated allegations of abuse). For instance, even in a case where the trial court found a complaining witness’s recantation credible we have nevertheless denied relief to an applicant convicted of aggravated sexual assault of a child because of “(1) the lack of detail in the complainant’s recantation testimony at the habeas hearing and the jury’s rejection of evidence of the complainant’s pre-trial recantation, and (2) the existence of inculpatory medical testimony that has not been otherwise explained by the complainant’s recantation.” *Navarajo*, 433 S.W.3d at 568. To support a finding of actual innocence, a recantation must be direct, specific and certain. *Franklin*, 72 S.W.3d at 678; *Brown*, 205 S.W.3d at 547 (emphasis added).<sup>60</sup>

The court also specifically noted that the State, “did not recommend denying or granting relief on actual innocence, but rather stated that [after other scientific evidence presented at trial was without question incorrect], what is left is ‘purely the credibility of the witnesses, which is for the Court to determine.’”<sup>61</sup> In the end, the appellate court found all four defendants, after spending over ten years of their lives in prison, to be not merely “not guilty,” but rather innocent of all of the crimes for which they were convicted.

It can be easy to question a recantation that comes years, perhaps decades, after a conviction. But the evaluation should be the same, by investigating the recantation to determine its validity. Like the San Antonio Four case, perhaps a child who has been pressured and coached into perpetuating a false narrative has since been freed of that pressure or come to the realization that their actions were wrong and they wish to rectify the situation. However, it does not take a cynic to think that the converse of this rationale could be true - that the recantation is itself the perpetuation of a fraud to perhaps aid the defendant in getting out of jail. The motivation for coming forward must also be evaluated along with the recantation in the context of the case as a whole. As the Texas court points out, the criminal justice system should look to extraneous evidence in conjunction with the recantation to determine its validity.

<sup>57</sup> See *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998); *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995); *White v. United States*, 858 F.2d 416, 422 (8th Cir. 1988); *Campbell v. Marshall*, 769 F.2d 314, 321 (6th Cir. 1985); Petegorsky, M. N. (2013). Plea bargaining in the dark: The duty to disclose exculpatory brady evidence during plea bargaining. *Fordham Law Review*, 81, 3599-3650. <sup>58</sup> Rule 3.8(g), American Bar Association (2018). <sup>59</sup> Esquenazi, D. (Producer and Director), & Tabet, S. (Producer). (2016). *Southwest of Salem: The Story of the San Antonio Four* [Motion Picture]. United States of America: Sam Tabet Pictures, Motto Pictures & Naked Edge Films.

<sup>60</sup> *Ex Parte Mayhugh*, 512 S.W. 3d 285 (2016). <sup>61</sup> *Id.* at 23.

How is a prosecutor to ever know with absolute certainty that the recantation is valid and the defendant was convicted in error? One hundred percent certainty is not a luxury often afforded to the State. This is a compelling concern that any diligent prosecutor will wrestle with during their evaluation of the case. In doing so, consider this closing statement by the Texas Court of Appeals:

**It has been suggested that the term “actual innocence” is inappropriate because applicants who are successful when raising a claim of actual innocence never truly prove that they did not commit the offense. But when the presumptions are reversed, the State does not have to prove that a defendant is definitively guilty. The State does not prove that a person has committed a crime beyond all doubt, or even beyond a shadow of a doubt. By proving its case at trial according to the applicable standard, the State secures the ability to proclaim to the citizens of Texas that the person responsible for a crime has been brought to justice, that the person is guilty. When defendants have accomplished the Herculean task of satisfying their burden on a claim of actual innocence, the converse is equally true. Those defendants have won the right to proclaim to the citizens of Texas that they did not commit a crime.<sup>62</sup>**

## WHEN THE MULTIDISCIPLINARY TEAM APPROACH WORKS

Eleven-year old Tara lived with her biological father and stepmother since the age of five. Allegations of severe physical abuse by her stepmother were reported to CPS by Tara's stepmother's parents. During the investigation, Tara was placed with her biological mother. Tara was referred by CPS in her mother's county of residence to be interviewed at the local CAC. Tara's mother requested Tara's stepmother's parents to be present at the CAC for support during the forensic interview. During the pre-interview meeting, Tara's mother revealed an extensive history of domestic violence with Tara's biological father, and shared that after she left him when Tara was 5 years old, he gained full custody of Tara because Tara's mother had no money to litigate a custody dispute. Tara's step-grandparents were present during the pre-interview meeting as well and shared their eyewitness account of abuse to Tara by her stepmother.

During Tara's forensic interview she made a disclosure regarding physical and emotional abuse to her by her stepmother. Child Protective Services (CPS) recommended Intensive In-home Services (IIS) for Tara's father and stepmother and for Tara to remain with her mother until they completed those services. Tara and her mother were referred to and participated in trauma-focused therapy at the CAC. Six months later, Tara's father and stepmother completed IIS, and CPS recommended that Tara begin home visits. Tara then disclosed in therapy her fear of going back to her dad's due to her father doing “sexual things” to her. The therapist reported the allegation to CPS. A priority 1 interview was scheduled at the CAC due to Tara's relationship with the alleged perpetrator, and the reported history of domestic violence. Law enforcement and CPS were present for the forensic interview. Tara disclosed sexual abuse in detail alleging her father forced her to perform oral sex on him on a regular basis. Tara described an incident that occurred nine months

prior to the interview in which her father ejaculated into a coffee pot in the garage. She drew a diagram of the garage and indicated where the coffee pot was located.

Law enforcement obtained a search warrant. The coffee pot was located exactly where Tara described and sent to the lab. The lab results showed semen with her father's DNA. Law enforcement was able to corroborate other facts Tara shared including pornography her father had shown her, time frames when she was alone with her father, and an incident in which her aunt stopped by and almost witnessed the molestation.

Tara remained in her mother's custody, and both she and her mother continued with therapy. Tara maintained contact with her stepmother's supportive parents, but had no contact with her father, stepmother, or her three half-brothers. When the case went to trial, Tara's therapist worked with Tara to prepare her for trial. Tara testified in court. Her stepmother was still supportive of her father, but her stepmother's parents were present on Tara's behalf. Tara's father was convicted and sentenced to 125 years in prison.

Five months later, Tara's stepmother reconciled with her parents and started therapy. Six months after that, Tara and her stepmother reconciled and Tara was reunited with her beloved half-brothers. At age 18, Tara graduated from high school with honors. She scored a 31 on her ACT and received a full scholarship to a small university near her hometown. To this day, she attributes her ability to heal and her resilience to the support of her step-grandparents, her mother, and the services of the Children's Advocacy Center.

### Lessons Learned

In Tara's case, several risk factors for recantation existed. The alleged perpetrator was her father, her stepmother was unsupportive, and there was a history of domestic violence. The MDT response, support, and therapy were key to preventing recantation. What wasn't shared was the fact that CPS had had several prior reports of physical abuse of Tara that were treated as assessments and did not rise to the level of an investigation. Tara reported in her first (physical abuse) forensic interview that she was interviewed about the prior allegations in front of her parents and she had no choice but to deny the abuse occurred.

Upon being referred to the CAC for the forensic interview, Tara and her mother were supported by the CAC Advocate who referred them for trauma-focused therapy. When CPS recommended Tara go to her father's home for visits, Tara then confided to her therapist about her fear of going back due to the sexual contact.

Tara was then immediately interviewed at the CAC, and the team assigned was well-versed in the dynamics of abuse and process of disclosure. Law enforcement did not hesitate to apply for a search warrant that day, even though the coffee pot incident was reported to have occurred 9 months prior to the interview.

<sup>62</sup> *Id.* at 57.

The elements of this case relate directly to the research previously cited. The immediate MDT response to allegations with risk factors for recantation; immediately conducting the forensic interview; corroborating facts from the forensic interview; providing immediate support and therapy for the caregiver and child; identifying supportive family members; recommending no contact with unsupportive family members; and continued follow-up with the family were all factors in preventing recantation, and contributed to Tara's ability to heal. It is evident that Tara shows tremendous resiliency. Her step-grandparents were instrumental in Tara getting out of the abusive situation, and were supportive throughout her entire experience. In spite of the abuse by her father and stepmother, Tara followed through with therapy, was able to excel in school, and was eventually able to reconcile with her loved ones.

With high rates of recantation and numerous risk factors present in many of the cases that a MDT will encounter, the effort to ensure protection, support and therapy for children who are at risk is imperative. This case and the research cited demonstrate that a high functioning multidisciplinary team with access to the services of a children's advocacy center has the ability reduce the risk of recantation by implementing simple steps in their response protocol. Safe and healthy children will in turn lead to more successful prosecutions, ensuring those who offend against the most vulnerable in our society are held accountable. If we don't work together, child abuse can last a lifetime.

## CONTRIBUTORS

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