

The Fallibility of Forensic Interviewing

Understanding the Michaels Decision and the Taint Hearing

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Abstract

Due to allegations of physical, emotional, and sexual abuse, millions of American children are interviewed each year by law enforcement, child protective services, mental health, and other professionals. The outcome of these interviews is frequently tendered as uncorroborated, yet compelling evidence in a criminal trial, increasing its significance and the need for dependability. With 30 years of experience in this field, this author realizes that child sexual abuse (CSA) is a horrific crime and this paper is in no way an attempt to ignore or minimize its importance. The purpose of this short report is to 1) review an investigative case of child abuse biased by flawed interviewing that resulted in a wrongful jury verdict and 2) outline one of few existing remedies; the taint hearing.

Key Words: Child Sexual Abuse, Forensic Interviewing, Michaels Decision, Taint Hearing

Learning Objectives: The readers of this article will better understand the fallibility of forensic interviewing, the concept of the taint hearing, and the need for a specialized forensic examiner to aid defense and prosecution.

CAPTA and NCCAN

Until 1961, when the medical field first recognized the “Battered Child Syndrome,” child sexual abuse was a relatively silent issue in American society. Paradoxically, within two decades, medical opinions were of no great importance and almost anything was considered a sign of abuse. In 1974, the passage of the Child Abuse Prevention and Treatment Act (CAPTA) (Federal law, P.L. 93-247) established a National Center on Child Abuse and Neglect (NCCAN). The many aims of CAPTA included starting child maltreatment programs and establishing standards by which states could become eligible for federal money to help them establish their own child protective agencies. One of the measurable effects of CAPTA was the increase in reports: In 1976, about 6,000 confirmed reports of abuse were made to child protective agencies. By 1985, the number had risen to about 113,000 each year. And, in 1993, the number had risen to about 152,000. (Besharov, 1994)

The Flood of Unfounded Allegations

Douglas Besharov, the first director of NCCAN (1975-1979) reported in 1994 that depending on the community, as many as 65% of all CSA reports were closed after an initial investigation revealed no evidence of maltreatment. (Besharov, 1994) He wrote in an article: “We now face an imminent social tragedy: the nationwide collapse of child protective efforts caused by a flood of unfounded reports.” In testimony before Congress, Besharov stated: “For fear of missing even one abused child, workers perform extensive investigations of vague and apparently unsupported reports . . . As a result; children in real danger are getting lost in the press of inappropriate cases.” (Besharov, 1994)

Innocent until proven guilty or guilty until proven innocent?

It is true that the presumption of innocence, an ancient principle of criminal law, is actually a misnomer. According to the U.S. Supreme Court, the presumption of the innocence of a criminal defendant is in fact an assumption of innocence that is “indulged in the absence of

contrary evidence” (*Taylor v. Kentucky*, 1978). Nonetheless, what some see as a righteous attempt to protect children is seen by others as a disregard for the presumption or assumption of innocence. And, in my opinion the notion of ‘innocent until proven guilty’ has gone out the window in child sexual abuse cases.

How many falsely accused people must be sacrificed to protect innocent children?

According to Blackstone’s formulation, the legal system should be more concerned with the accused than the children, but we all know that the reverse is true. Is this a catch-22 – a situation where the innocent must be ignored to protect the innocent? While this dilemma exists today, a powerful example comes from 25 years ago:

The Kelly Michaels Case

In September 1984, twenty-five year-old Margaret Kelly Michaels was hired by Wee Care Day Nursery in Maplewood, New Jersey. Located in St. George’s Episcopal Church, Wee Care served approximately fifty families with an enrollment of about sixty children, aged three to five. Michaels had recently moved from Pittsburg, was a few credits shy of a degree in drama and planned to get into the theater business in nearby Manhattan. She started as an aide at Wee Care and within three weeks became a teacher. Her classroom was located in the Church basement -- separated from an adjacent class by a vinyl curtain. Michaels resigned on April 22, 1985 and later told how she disliked taking children up and down stairs to the bathroom at Wee Care.

On April 26, 1985, the mother of four-year-old “Jonathan” was preparing him for Wee Care; noticed that he was covered with spots and took him to his pediatrician to be examined. During the examination, a pediatric nurse rubbed the boy’s back as she took his temperature rectally. In the presence of the nurse and his mother, the boy stated, “this is what my teacher does (to) me at nap time at school.” Whether he was referring to the back rubbing or rectal penetration was unclear. He indicated that his teacher (Kelly Michaels) did this to him and two other boys at Wee Care daily. The pediatrician was not told of the remark and no further examination was done.

The Investigation

Jonathan's mother took him home, questioned him further, and then contacted his grandfather -- a prominent local judge. Both Wee Care and the Department of Youth and Family Services (DYFS) were contacted and Jonathan was soon repeating his allegations to Sara McArdle, an assistant District Attorney (D.A) at the Essex County Prosecutor's Office.

McArdle and Lou Fonolleras, an investigator with the DYFS, then interviewed the other two boys, "Evan" and "Sean". Evan denied that Michaels had put anything in his rectum or had abused him in any other way and Sean also denied having his temperature taken. But Sean, described as "agitated, hostile, rushing around the room, almost trapped," during questioning, came up with a new charge -- he alleged that Kelly Michaels had touched his penis. (State v Michaels, 1993)

The news of these allegations spread like wildfire in the Maplewood community and parents were concerned, regardless of the fact that Michaels no longer worked at Wee Care. At the onset of this firestorm Dr. Susan Esquilin, a child therapist, presided over two heavily attended parent meetings. Esquilin suggested group therapy for the children and stated that her goal was to induce the children to discuss sexual abuse. In the first group therapy session, she told the children that they were assembled together 'because of some of the things that had happened at Wee Care and with Michaels'. She conducted five group therapy sessions with the Wee Care children and eventually assessed or treated 13 of the 20 child witnesses. Based on courtroom testimony, it seems that four children made allegations after their contacts with Esquilin (Campbell, 1998). Consequently, there were repeated interviews of children by their parents, by DYFS, and by investigators for the prosecution.

On May 1, 1985, the Essex County Prosecutor's office officially took over the investigation. The Prosecutor's office interviewed several Wee Care children and their parents, concluding their initial investigation on May 8, 1985. Also, Michaels submitted to approximately nine hours of questioning and took a polygraph examination. The prosecution found there had been no prior complaints about Michaels and the polygraph test verified her denial of sexual molestation at Wee Care. The only incriminating "evidence" was gathered during interviews with parents and children and that was more than enough.

The week after Kelly Michaels was first questioned, Peg Foster of the Child Abuse Diagnostic and Treatment Center at Children's Hospital of New Jersey, in Newark, met with

Wee Care parents. In her presentation Foster warned parents that their children would probably deny being molested “until they trusted the interviewer.” Foster then provided the parents with “symptom charts” -- a listing of “behavioral indicators” such as stomach aches and bedwetting, which children might display if they had in fact been sexually abused. Subsequently, when children denied being sexually abused by Kelly Michaels, the concerned parents now had reason to believe that this was a scientifically proven indicator of the opposite.

In his book, “Smoke and Mirrors,” Campbell describes the “leveling and sharpening” that takes place when concerned parents compare notes during an investigation. When Foster met with parents during the Michaels’ investigation and showed them her 32 behavioral indicators their memories improved and they began to recall ordinary behaviors and realized they were actually symptoms of abuse. (Campbell, 1998) This phenomenon can also apply to the interviewer who listens to a policeman, a parent and then to one or more children. The interviewer sees that stories differ, re-interviews the children and by “leveling and sharpening” is able to put the proverbial “square peg in a round hole.” While forensic interviewers are capable of avoiding this by limiting communications with third parties and maintaining objectivity within the interview, the social structure outside the interview is likely to increase susceptibility to suggestive interviewing techniques (Poole, 1998).

On June 6, 1985, Michaels was charged in a three-count indictment involving the alleged sexual abuse of three Wee Care boys. The interviewing continued with Lou Fonolleras, the DYFS investigator, conducting 82 interviews with Wee Care children and 19 interviews with Wee Care parents, between May 22 and July 8, 1985. It is also important to note that Fonolleras was himself abused as a child, and in at least one recorded interview he used this to lead the child’s testimony. His personal background may explain his bias and pursuit of a single hypothesis. At least 10 children made initial allegations after their interviews with Fonolleras (Campbell, 1998).

During these interviews the children were repeatedly told that “Kelly is in jail because she was bad.” They were also given specifics as to “what the other kids told us she did.” During the upcoming trial Fonolleras justified his telling children about other children’s allegations with . . . (The children) needed some reassurance . . . (that) they were not alone” (State v Michaels, 1995).

Positive reinforcement was then given when children made statements about Kelly Michaels. For example, they were told that the investigators "needed their help," that they could be "little detectives," and were given mock police badges when they cooperated. Children were also introduced to the police officer who had arrested Kelly, shown the handcuffs used during her arrest, and told that 'this is what happens when you don't cooperate.'

A second indictment was returned July 30, 1985, containing 174 counts of various charges involving twenty Wee Care boys and girls. A third indictment on fifty-five counts was filed November 21, 1985, involving fifteen Wee Care children.

The bulk of the State's evidence supporting these charges consisted of a high volume of testimony (actual number is unknown to this author) accumulated over a 28-month period (April 1985 – June 1987). Initial interviews were not recorded, only half of the interviews were recorded and the state had no witnesses and no corroborating physical evidence. Coarse behavior that reportedly took place behind a vinyl curtain was never witnessed – alleged acts such as urination on the piano bench or eating a cake made of feces had left no physical evidence. Disclosures like "*she cut off my penis*" . . . "*stuck a sword in my rectum*" . . . "*made us eat boiled babies*" were also unsupported by physical evidence.

The Trial

By June 22, 1987 the prosecution had dismissed seventy-two counts and Kelly Michaels was prosecuted on the remaining 163 counts in what was a ten-month long trial.

The state's main expert witness, Eileen Treacy, testified for 8 days. Treacy worked as a therapist in New York at a clinic for sexually abused children. She was 8 years away from obtaining her PhD in psychology and was not licensed as a therapist, either in New York or New Jersey. In a gross conflict of interest, Treacy helped the prosecutor choose which of the children would testify and then presented herself as an "independent" expert as to their credibility.

During the resultant trial, another thirty-two counts were dismissed, leaving 131 counts. On April 15, 1988, after thirteen days of deliberation, the jury returned guilty verdicts on 115 counts, including aggravated sexual assault (thirty-eight counts), sexual assault (thirty-one

counts), endangering the welfare of children (forty-four counts), and terroristic threats (two counts).

The trial court sentenced Kelly Michaels to a term of forty-seven years with a minimum of fourteen years of incarceration.

The Appeal

Kelly Michaels was incarcerated and an appeal was immediately pursued. Attorneys were aided by forty-five social scientists: they studied the forensic interviewing and demonstrated the causative link between suggestive interview techniques and the malleable memories of children. In an amicus brief these social scientists (Ceci, 1995) wrote:

“In the past decade, there has been an exponential increase in research on the accuracy of young children's memories and the degree to which young children's memories and reports can be molded by suggestions implanted by adult interviewers. As will be explained, these same interview conditions, which have a high risk of contaminating young children's reports, characterize the available investigative interviews carried out with the 20 child witnesses in the Kelly Michaels case . . . “

The Appellate Court's decision was consistent with the amicus brief. *“Our decision today should make clear that the investigatory techniques employed by the prosecution in this case are unacceptable and that prudent prosecutors and investigatory agencies will modify their investigatory practices to avoid those kinds of errors . . . “*

In its ruling the Court noted numerous faults in interviews of Wee Care students -- for example; a failure on the part of the interviewer to challenge outrageous claims. Another weakness cited was an obvious lack of objectivity and impartiality on the part of the interviewer. In example: Investigator Fonolleras testified that his interview techniques had been based on the premise that the *"interview process is in essence the beginning of the healing process"* and that it was his *"professional and ethical responsibility to alleviate whatever anxiety has arisen as a result of what happened to them."*

On January 6, 1993 -- after five years in prison -- with 18 months in solitary confinement for her own safety -- the Appeals Court of New Jersey reversed the conviction of Kelly Michaels without prejudice. In effect, the New Jersey Courts ordered that if the State decided to retry the Michaels case, a pretrial “taint hearing” would be necessary to determine whether the statements and testimony of the alleged victims were contaminated.

New Jersey’s Appeal

On January 31, 1994, the State of New Jersey appealed to the State Supreme Court, seeking review of the Appellate Division's adverse rulings. The Appellate Court’s ruling was upheld on June 23, 1994. Essex County chose to drop the indictments and Kelly Michaels was as free as any wrongly accused and convicted person can be. On February 27, 1995 she filed a tort claim against several defendants and her claim was denied. This effort ended with the U.S. Supreme Court rejecting her claim on January 16, 2001.

Taint Hearings

The New Jersey Supreme Court held in the Michaels decision that (1) interrogations of alleged child sex abuse victims were improper and (2) given substantial likelihood the evidence derived from them was unreliable a pretrial hearing was required. At that “taint hearing” the state would be required to prove by clear and convincing evidence that statements and testimony retained sufficient degree of reliability to warrant admission at trial. (*State v. Michaels*, 1994, p. 1372)

The court laid out the following parameters for a taint hearing:

1. When a defendant has made a showing of "some evidence" that the alleged victim's statements were a product of suggestive or coercive interview techniques, a taint hearing will be held.
2. At the taint hearing, the burden of proof will be on the state to prove the reliability of the proffered statements by clear and convincing evidence.

3. Such proof may include the testimony of experts which may be countered by defense expert testimony. Such testimony may not extend to the ultimate issue which is the credibility of the child.

4. If under the totality of the circumstances, the statements do not retain a sufficient degree of reliability, the statements will not be admissible at trial.

5. If under the totality of the circumstances, the statements retain a degree of reliability sufficient to outweigh the effects of the improper interview techniques, then the statements may be introduced at trial. The duty will therefore be on the jury to weight the statements' probative value and credibility.

6. If the statements are introduced at trial, experts may be called to aid the jury by explaining the coercive or suggestive propensities of the interviewing techniques employed.

Taken from (Underwager & Wakefield, 1997) the above parameters show that the ultimate issue of credibility is not to be addressed at the taint hearing. The court was clear that the issue was one of reliability and the purpose of the taint hearing was to establish the reliability of evidence admitted at trial. *"Experts may thus be called to aid the jury by explaining the coercive or suggestive propensities of the interviewing techniques employed, but not of course, to offer opinions as to the issue of a child-witness's credibility, which remains strictly a matter for the jury."* (State v Margaret Kelly Michaels)

Precursors to Taint Hearings

The United States Supreme Court has long recognized that pretrial inquiry may be made when certain challenges are asserted to the reliability of evidence for which the government seeks introduction at trial. The Supreme Court has acknowledged that once an identification has been derived from coercive or suggestive police action, such perception is unlikely to be changed or altered at a later date: "Once the witness has picked out the accused . . . he is not likely to go back on his word later." U.S. v. Wade, 388 U.S. 218, 229 (1967).

Hawaii vs. McKeller (1985) In this case, Judge Klein, the trial court judge stated that he doubted whether the alleged incident ever happened and that the girls' accusations more likely were the result of "layers and layers of interviews, questions, examinations, etc., which were fraught with textbook examples of poor interview techniques."

Idaho vs. Wright (1990) In this case the prosecution sought the admission of statements made by a 2 ½ year old child to a pediatrician. The trial court admitted the statements by finding that the doctor's testimony of the child's statements satisfied the requirements of the residual hearsay exception. The United States Supreme Court affirmed the state Supreme Court's finding that the child's statements did not fall within a traditional hearsay exception and lacked "particularized guarantees of trustworthiness". The admission of such statement was determined to be in violation of Wright's confrontation clause guarantees.

Minnesota vs. Huss (1993) In this case, after the mother made allegations of sexual abuse during a custody dispute; she took her three-year-old daughter to a psychologist. The psychologist questioned the child about the alleged abuse and used a book and tape about sexual abuse. The mother then checked out the book and the tape from the library, used it often and encouraged her child to say that her father had abused her. After six months, the child made an allegation of abuse. The Minnesota Supreme Court held that because of the highly suggestive book and tape and inappropriate interview techniques, there was sufficient reason to question the reliability and validity of the statements such that the evidence was insufficient to be sent to the jury.

Felix vs. Nevada (1993) The Nevada Supreme Court held that statements of children about alleged sexual abuse in a day care center were unreliable because of numerous interviews, the use of leading questions, allegations never being made to the child's parents but only to a therapist, and several of the allegations being clearly false or incredible. The Court determined that the trial court had failed to adequately assess the reliability of the statements before allowing their admission.

Taint Hearings – Advantages and Disadvantages

The taint hearing is intended to provide a forum to review possibly flawed interviews and many people believe that these hearings provide a much-needed safeguard to defendants. Dugas (1995) reported that the Due Process Clause of the Fourteenth Amendment protects the defendant by ensuring he receives a fair trial. He used the due process concept to show how the procedures used against Kelly Michaels violated her fundamental fairness rights. Another advantage is that the knowledge of the possibility of a taint hearing may increase the quality of interviews by decreasing the likelihood of coercive interviews, assuming the interviews are documented by audiotape or videotape.

Some, however, worry about negative effects. Myers (1995, 1996, 1996a), for example, feared that taint hearings would be overused by defense attorneys and generate unwarranted skepticism. This would, in his opinion, weaken the state's ability to protect children. He believed that taint hearings would create new avenues for appeal and felt they were unnecessary because the defense has ample opportunities to challenge suggestive interviews in trial.

Experts and Taint Hearings

Taint hearings will involve expert testimony by investigators and mental health professionals. As in all evidentiary hearings, the success or failure of the taint hearing will normally rest with the quality of the expert who will offer testimony. The burden of proof and rules of evidence differ per jurisdiction. Some states follow the Daubert standard, some pursue the Frye rule, and some have their own version or mixture of the two (Kelly), but in any case, that expert must be knowledgeable as to the technique used; whether it has been “subjected to peer review and publication, its known or potential error rate, and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community.” (Daubert, 1993)

The Analysis of Child Interviews

The New Jersey Supreme Court found nine factors sufficient to justify a pretrial taint hearing:

- (a) Absence of spontaneous recall;
- (b) Interviewer bias against defendant - a preconceived idea of what the child should be disclosing;
- (c) Repeated leading questions;
- (d) Multiple interviews;
- (e) Incessant questioning;
- (f) Vilification of defendant;
- (g) Ongoing contact with peers and references to their statements;
- (h) Use of threats, bribes and cajoling; and
- (i) Failure to videotape or otherwise document the initial interview sessions.

The above factors were to be considered, if a hearing is held, in determining whether a child's testimony is tainted and should be suppressed. Other indicators of faulty interviewing not only exist, but they can be quantified – allowing for an objective analysis.

The Schreiber Analysis

One of the more recent studies on child interviewing is a 2006 paper entitled “Suggestive interviewing in the McMartin Preschool and Kelly Michaels daycare abuse cases: A case study.” The Schreiber analysis compared two of the most notorious cases in child sexual abuse to unrelated CPS interviews. Both were day care cases during the Satanic Scare and both were based on forensic interviewing that generated a mass of allegations and alleged victims. (Nathan, 1995)

The most costly criminal case in the history of the United States, the McMartin case was based on the multiple interviews of 400 former students - 384 of whom were diagnosed by the same Los Angeles agency (Children’s Institute International) as having been sexually abused. The Michaels case was based on multiple interviews of over a two-plus year period. This analysis reviewed and compared a total of 54 transcripts - 20 from the Michaels case, 14 from the McMartin Preschool case, and 20 from the Child Protective Service of a city in the western

United States. The ages of the 14 children in the McMMartin sample ranged from 4 to 9.5 years. The mean age was 6.89. A total of 36% (5) of the sample was male and 64% (9) was female. The ages of the children in the Michaels sample are unknown, although apparently all or nearly all were less than 7 years old. A total of 50% (10) of the sample was male and 35% (7) was female. The gender of the remaining three children was not clear from the interview transcripts. (Schreiber, 2006)

Scores in this quantitative analysis fell into 3 previously researched categories: (1) interview length, (2) form of questions, and (3) suggestive techniques (Schreiber, 2006; Warren, 1996; Ceci, 1993; Myers, 1996).

Interview Length

The length of interview time studied in the Schreiber analysis was an estimate due to the fact that transcripts were used, but it is interesting to note how the McMMartin interviews were more than three times as long (1 hour, 14 minutes) as the Michaels (24 minutes) and CPS (22 minutes) interviews (Schreiber, 2006). This difference can be explained by the “let’s have fun and play with puppets” atmosphere in the McMMartin interviews where play therapy was used for supposedly forensic purposes.

Form of Questions

The form of questions used in the McMMartin, Michaels and CPS interviews can be categorized as (1) open-ended questions, (2) yes/no questions, (3) multiple-choice questions, and (4) focused/specific questions. These four categories partially reflect the way that an interviewer has exerted control and influence during the interview by limiting the conversation to certain topics and constraining responses to questions (Schreiber, 2006). In the Schreiber study it appeared that the McMMartin interviewers used a significantly higher proportion of yes/no questions and a lower proportion of focused/specific questions, than the Kelly Michaels and CPS interviewers. Other differences regarding the form of question used in each group were not statistically significant (Schreiber, 2006). While studies have shown that law enforcement and CPS personnel tend to rely heavily on yes/no, choice, and focused/specific questions, open-ended questions are deemed more desirable because they are less likely to be suggestive than

other forms of questions and are more likely to be answered accurately by children (Campbell, 1998; Underwager, 1990).

Suggestive Interviewing

When compared to the CPS interviews, the McMartin and Michaels interviewers were significantly more likely to use five suggestive interview techniques. These interviewers were more likely to (a) introduce suggestive information into the interview, (b) provide reinforcement (negative or positive), (c) repeat questions that have been asked and answered, (d) exert conformity pressure, and (e) invite children to pretend or speculate about supposed events. Schreiber compared the two day-care cases and found that they were identical as to introduction of information. The McMartin interviewers were more likely to use positive reinforcement, conformity pressure, and invitation to speculate, while the Michaels interviewers used more repeated questions and more negative reinforcement. (Schreiber, 2006)

It has also been suggested that a high ratio of interviewer words to child words may serve as a rough indicator of unskillful or suggestive interviewing (Sternberg, 1996). The ratio of interviewer words to child words was approximately twice as high for the McMartin (ratio = 4.60) and Michaels (ratio = 4.67) as for the CPS interviews (ratio = 2.31) (Schreiber, 2006; Hershkowitz, 1997; Lamb 1996).

Has the climate changed since 1985?

The National Child Abuse and Neglect Data System (NCANDS) is a national data collection and analysis system created in response to the amended Child Abuse Prevention and Treatment Act (Public Law 93-247) and it serves as an excellent source of statistics. The number of reported incidents of child abuse in the United States is now roughly about 3.6 million assaults per year (Pangborn 2009) and child sexual abuse is one of the greatest problems in today's society. In 2007 CPS agencies received an estimated 3.2 million referrals, involving the alleged maltreatment of approximately 5.8 million children. NCANDS reported that 794,000 children were confirmed victims of abuse in fiscal year 2007, with 7.6 % (6,034) being victims of sexual abuse. All 50 states have mandatory reporting laws and over 57% of these referrals came from professionals (teachers, doctors, police, and social service.) Nonetheless, approximately 38

percent of the initial referrals were screened-out. Of the remainder, approximately 25 percent of the investigations or assessments determined at least one child who was found to be a victim of abuse or neglect. (Child Maltreatment, 2007)

Remember, CPS may act as an arm of the police, but being screened-out or “unfounded” by an agency does not erase the possibility of prosecution. The greater majority of child sexual abuse cases I am involved in started with a CPS investigation and more than half of them were ruled as “unfounded.” This, however, did not stop the police from making an arrest and re-interviewing the child.

Conclusion

As a result of faulty interviewing, Kelly Michaels was convicted and served five years in prison. Everyone who has seen the transcripts of these interviews since the conviction agrees that the children’s statements were unreliable because of suggestive and coercive interviews and as a result, her conviction was overturned.

Why was this not seen before her trial?

While the Kelley Michaels case was a horrible miscarriage of justice, it was not exclusive; anyone can be falsely accused of a sexual offense against a child and no falsely accused person is immune to poor interviewing techniques. In Joseph Heller’s novel “Catch 22” the catch was that "anyone who wants to get out of combat duty isn't really crazy". (Heller, 1999) Today, the ‘catch’ is that anyone accused of child sexual abuse is guilty if they deny it.

Are interviewers improving?

Although some professional organizations such as the National Center for Prosecution of Child Abuse have produced guidelines for proper child interviewing (Carnes, 2000, 2001) there is no mechanism beyond integrity to enforce their use. The training of police and child protective investigators has improved with respect to the decrease of overt, heavy-handed questioning and badgering that was common a decade ago, but confirmatory bias, while less obvious today, continues and innocent persons continue to be charged. (Pangborn, 2009)

Many jurisdictions, in a laudatory effort to increase objectivity, have adopted the RATAC protocol recommended by Walters, et al (2003) in “Finding Words”. (Campbell, 2009) RATAC is an acronym for different interview stages: **R**apport, **A**natomy Identification, **T**ouch Inquiry, **A**buse Scenario, and **C**losure. Lamb, et al, (2007) suggest that forensic interviews require a structure and standardization and the National Institute of Child Health and Human Development (NICHD) approach appears to be a well-researched protocol, but “no research has been done regarding what interviewers actually do who have been trained in this approach” (Lamb, 2007 p. 1211).

Do Defense Attorneys need to be specialized in this area?

Regardless of the setting, criminal or civil, child sexual abuse cases require a specific expertise to develop both a case theory and a defense strategy to reach a favorable outcome. It is this author’s opinion that child sexual abuse cases are unique in that they require a special burden of proof of the defense. In these cases the defense must be aggressive and show:

- that the alleged victim's testimony is false
- how the false allegations were developed, and
- why the false allegations were made

While all interviews will have some elements of suggestiveness in them; defense attorneys must persuade the judge that the interview was so unnecessarily suggestive that the child's statements cannot be considered reliable and prosecutors must present evidence that the interview was not so suggestive as to make the child's statements unreliable. To provide the best possible representation, defense teams need to incorporate specialized forensic examiners.

How common are taint hearings?

While the practice of taint hearings started in New Jersey, it has spread into Federal and military courts as well as into a number of other states. Several states have considered the propriety of conducting a pretrial taint hearing; some have adopted and some declined the procedure and instead rely on preliminary hearings to afford due process. In *Fishbach v. Delaware* (1996), for example, the court declined to adopt the formal procedures mandated in

Michaels. In that decision the court determined that if the witness's statement was obtained by use of impermissible interviewing techniques, the trial court must determine whether the statement is reliable after considering the totality of the circumstances.

While there is a dearth of statistical information specific to taint hearings, it appears that states with legislation supporting taint hearings are a minority. However, attorneys in all states are able to address forensic interviewing; either in a taint hearing or in a preliminary hearing that concentrates on motions to exclude evidence.

Can interview errors be eliminated?

With proper videotaping (Ceci, 2000, Davies, 1995, McGough, 1995) errors such as suggestive questioning can be categorized, quantified, and therefore controlled, but confirmatory bias, in this author's opinion, is the root of all interviewing errors for it prompts an interviewer to become a "validator" on a mission to extract information necessary to successfully prosecute the accused. (Pangborn, 2009) In so doing the interviewer takes the role of interrogator and ignores information that does not fit into a preconceived notion.

For example; I recently watched an interviewer who repeated the same question 11 times during an 18 minute interview, even though she got a clear No answer each time. The interviewer later reported that "based on scientifically-based techniques" she had "concluded that the child was in denial because she was afraid."

Shouldn't good investigators see through poor interviewing?

Investigators should be able to screen out 1) allegations that are untrue, and 2) poor interviewing, but the above mentioned factors tend to encourage false allegations that misdirect investigators and eventually lead to a fraudulent conviction.

Why do children make false allegations?

There is no universal answer, but when you combine the biological, cognitive and social immaturity of children with suggestive, repetitive and otherwise contaminating questioning techniques, you have a constellation of factors that can damage, if not destroy, the ability of a

child to disclose the truth. When you multiply these factors by society's hatred for perpetrators of child sexual abuse the likelihood of a false accusation increases even more.

Today, the legal system's only quality assurance mechanism is the taint hearing and defense attorneys should request a taint hearing whenever they believe suggestive and coercive interviews may have destroyed the child's ability to testify truthfully or when they believe that the child's statements to others are unreliable because of defective interviewing.

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Biography

A Life member of ACFEI and a Diplomate of the ABFE, Mr. Blackstone is recognized as an expert in the field of sexual offense investigation, proper forensic interviewing techniques, pre-conviction testing of alleged offenders, and post-conviction management of sex offenders. A certified forensic consultant, Mr. Blackstone is licensed in several states as a polygraph examiner and has testified as an expert witness in federal and state courts regarding the proper use of polygraph in civil, clinical and criminal testing settings -- with a focus on child molestation and

other sexual offenses. With over thirty years of experience, involvement in over twenty thousand examinations and over one hundred court appearances as an expert witness, Mr. Blackstone's expertise is well respected.

Multiple Choice Questions:

1. What Court Decision provided the foundation for Taint Hearings?
 - a. U.S. v Wade
 - b. U.S. v Michaels
 - c. New Jersey v. Michaels
 - d. U.S. v. Harris

2. Of the following, which is not a common defect in child interviewing?
 - a. repetitive questioning
 - b. objectivity
 - c. play therapy
 - d. failure to challenge illogical responses

3. How long did it take for Kelly Michaels to have her conviction overturned?
 - a. It wasn't
 - b. Fifteen years
 - c. One year
 - d. Five years

4. How many social scientists signed the Amicus Brief that preceded Kelly Michael's appeal?
 - 7
 - 10
 - 25
 - 45

5. Four-hundred children were interviewed by CII prior to the McMartin trial. How many of them were diagnosed as "sexually abused."
 - 3
 - 100
 - 384
 - 255

6. The taint hearing is intended to:
 - Focus on mitigating circumstances
 - Determine competency
 - Determine reliability
 - Determine credibility