Overcoming Untrue Defenses in Sexual Abuse Cases

Rami Badawy
Senior Attorney
NDAA’s National Center for Prosecution of Child Abuse

NCPCA
• 44 Canal Center Plaza, Suite 110
• Alexandria, VA 22314 PH:703-549-9222
• Please visit our website
• www.ndaa.org
• 1. Updates
• 2. Defense Expert Database
• 3. Technical Assistance
• 4. National Trainings

Defenses Sexual Abuse Cases
• Memory
• Suggestibility
• Retaliation
• Custody
• Recantation
• Mental Illness
• SODDI
• Reasonable Doubt

Defenses Physical Abuse Cases
• Accident
• Self Inflicted
• Medical Condition
• SODDI
• Cultural Defense

Preparation
• Analyze the case for probable defenses
  – Defendant’s statements
  – Defense attorney’s motions
  – Suspect/Victim/Family Dynamic
• Look for weaknesses in your case
  – Victim’s statement
  – Recantation

Preparation
• Training
• Develop knowledge of:
  – Specific case law
  – Literature (NCPCA, other research)
  – Learn general methods and approach for attacking research
• Attend critical portions of the investigation (autopsy, interviews, scene)
• Learn usage of proper terms
Memory/Suggestibility

Memory

• Code
• Retain
• Retrieve

What is suggestibility?

• The degree to which one’s memory or recounting of an event is influenced by suggested information or misinformation
  – Actual changes or distortions in memory
  – Alterations in the recounting of the event without an actual change in memory

Children and History

• Highly suggestible
• Wholly unreliable
• Salem witch trials 1692

Salem Witch Trials

• “The prevailing legal attitude for the following 300 years has been one of skepticism about the testimony of child witnesses” Stephen Ceci & Maggie Bruck, Suggestibility of the Child Witness: A Historical Review and Synthesis, 113 Psychological Bulletin 403, 405 (1993)

Children Ten+ Not More Suggestible Than Adults

• “[P]rosecutors are reluctant to bring to court cases that rely primarily on a young child’s eyewitness testimony, presumably because of burden-of-proof problems and a suspicion that jurors have negative stereotypes about children’s memories” S.J. Ceci, D.F. Ross, M.P. Toglia, EDS Perspectives on Children’s Testimony 101 (1989)

• By the time children reach approximately age 10 to 12, they appear to be generally no more suggestible than adults (Saywitz & Snyder, 1993; Saywitz, Goodman, & Lyon, 2002; Cole & Loftus, 1987).
Memory/Suggestibility

Research

• Prior to 1979, a shortage of research
• From 1979-1992, more than 100 studies
• Much of the literature was pro-child

Clown Study

• Pairs of kids, ages 4-7 sent into trailer
• One child watches and the other interacts with a clown
• Kids asked leading questions such as "he took your clothes off, didn't he?"


Memory/Suggestibility

Clown Study

• Not one of the kids who interacted with the clown made a false report
• Only one of the "bystander" kids made a false report of abuse (spanking)


Medical Exam Study

Study Parameters:
• 5 and 7 year old girls
• ½ had a scoliosis exam & ½ had an external genital exam
• Interviewed 1 week or 1 month later

Study Methodology:
• Interviewers used free recall, anatomical dolls, direct, and misleading questions
  – "Did the doctor put something in your mouth?"
  – "Did you take your clothes off?"
  – "How many times did the doctor kiss you?"
  – "Did the doctor touch you there?" (while pointing to vagina on doll)
  – "Did the doctor ever touch you before that day?"


100's of kids having a medical examination
Memory/Suggestibility
Medical Exam Study
Results:
• Children reported twice as much correct information when demonstrating on dolls
• None of the children demonstrated sexually explicit behavior with the dolls

Memory/Suggestibility
Medical Exam Study
Results (cont.):
• Not one of the seven year old children made a false report
• Only 3 out of 215 of the five year old children made a false report

False Sense of Security
• Multiple pre-school victims
• Michaels convicted of 115 counts
• Convictions reversed

Memory/Suggestibility
Inappropriate Interview
Michaels (cont.)
• 4 1/2 year old told “lots of other kids” revealed abuse
• Child told the interview would end once the child “cooperated”
• When child announced he “hated” the investigator, the investigator told the child that the child “secretly” liked the investigator

Memory/Suggestibility
Inappropriate Interview
Michaels (cont.)
• The sooner you cooperate the sooner you can leave
• “Do you want to help us keep her in jail”
Investigator: Your mommy tells me that you guys are interested in busting this case wide open with us, is that right? That’s why I need your help, especially you older kids … because you can talk better than the younger kids … and you will be helping to keep her in jail longer so that she doesn’t hurt anybody.

Investigator: Come on, do you want to help us out?
Child: No!
Investigator: Tell me what happened…I’ll make you fall on your butt again.

Investigator: I’ll let you play with the tape recorder. I need your help again, buddy. Come on.
Child: No.

The cat’s out of the bag. Child testimony viewed with suspicion
In a child abuse case, it is reversible error not to allow a defense expert to testify “regarding the techniques employed by (the police officer) and the prosecutor in their examinations of the child.” Pyron v. State, 237 GA. App. 198, 514 S.E. 2d 51, 1999

The Defense Attorney Backlash
Second Wave of Research
• Defense Attorneys attaching research to motions
• Research reflects high profile cases
• Some courts give this research great weight

Sam Stone Study
Ceci & Bruck, 113 Psychological Bulletin 403 (1993)
Memory/Suggestibility
Sam Stone Study
- Researchers “tell” 3-6 year old kids about Sam Stone
- Stereotype SS as “clumsy”
- SS visits the classroom
- The next day, kids given fictitious evidence

Results
72% of the 3 & 4 year olds claimed SS ruined at least one of the items
45% of the 3 & 4 year olds actually claimed to have witnessed SS ruin an item
11% of the 5 & 6 year olds claimed to have observed SS damage one of the items

Ceci & Leichtman concluded, “[W]hen the context of a child’s reporting of an event is free of the strong stereotypes and repeated leading questions that may be introduced by adults the odds are tilted in favor of factual reporting” The Effects of Stereotypes and Suggestions on Preschooler’s Reports, Dev. Psych. 1995 Vol. 31, No. 4

Mousetrap Study

Memory/Suggestibility
Mousetrap Study
- Kids ages 3-6 interviewed
- Kids given a list of events
- Kids encouraged to try to recall
- By the 7th week, 1/3 of kids “remembered” a false event
Memory/Suggestibility
Mousetrap Study
- Children ages 3 to 6
- 12 interviews of 30 minutes each
- Children told about a fictional event and then told to picture it in their head
- Initially 23% remembered the fictional event
- By interview 12, 43% remembered the fictional event

Memory/Suggestibility
Inoculation Study

Memory/Suggestibility
Inoculation Study
- Kids (ages 4-5) receive a medical exam by pediatrician
- After exam, researcher stays during oral vaccine and inoculation
- RA removes child and plays
- 11 months later, kids interviewed

Memory/Suggestibility
Inoculation Study
Results
- Kids interviewed four times over a two week period
- The interviewer lied to the kids about RA and pediatrician duties
- In the 4th interview, 40% of kids falsely reported the duties of one of the players

Memory/Suggestibility
The Jack O’Mack Study
- Jack “tested” toys, measured feet, and painted faces on toenails
- Four months later, kids were told to take the process seriously
- After ten suggestive interview sessions, only one child falsely accused Jack of yelling
- Serious atmosphere
- Serious allegation

Memory/Suggestibility
False Touches Study
- Study examines children’s ability to maintain a false statement about body touch

Bhavna Shyamalan & Sharon Lamb, The Effects of Repeated Questioning on Preschoolers’ Reports of Abusive Behavior
Memory/Suggestibility
False Touches Study

• 1 to 3 weeks later the investigator interviewed the children
• Children who lied about being touched were able to accurately maintain the lie during repeated, direct questioning
• Children who lied were less accurate than truth tellers when answering questions about surrounding details

• Children who answered truthfully about being touched were significantly less accurate and less consistent than those who lied
• Children who answered truthfully about not being touched were both accurate and consistent in their statements

Memory/Suggestibility
Research vs. The Real World

What do We Know:
• Average age of victims is 10 years old
• Most interviews occur soon after disclosure
• Interviewers use non-suggestive techniques
• Victims are most often abused by close family members
• Usually one, not multiple victims

Conclusion:
• Real World: Children interviewed after they reveal abuse
• Research World: Children interviewed repeatedly after they deny an event

Other Defenses

Mental Illness

• Does the child have a history of mental illness?
• Defendant may be the reason
• Bring in the family dynamics
• Bring in the defendant's psychological manipulation
• Victim was targeted because she was vulnerable
Mental Illness
• Psychological symptoms may be the result of abuse
• Expert testimony about victim’s particular condition
• Victim is a good historian about other events
• Victim’s abilities in school/home okay

Retaliation
• Parent/Stepparent, New Partner, Baby Sitter, Teacher, Counselor
• Authority Figure
• Usually Older Child
• Discipline

Retaliation
• Desired Result vs. Actual Result
  – Foster Care
  – Ostracization/Embarrassment
  – Financial hardship for family
  – Painful and embarrassing exam
  – Testify before twelve strangers and all of the other people that victim had to tell
  – If it were a lie, s/he’d have bailed

Retaliation
• Expose how the victim would have to know about and manipulate the entire criminal justice system
• Establish history of discipline without allegations resulting

Custody/Divorce
• Confirm Chronology
  – Disclosure prompts divorce
  – Divorce prompts disclosure
  – What/who prompted disclosure (common prompts, e.g., dad filing for visitation, may be a motive for mom to lie, but it is also a prompt for true disclosure)
  – Get police reports and court records for dates

Custody/Divorce
• To whom did victim disclose initially and under what circumstances?
  – Language at disclosure?
  – Ability of child to disclose peripheral and sensory details
  – Was non-offending parent initially supportive?
### Custody/Divorce
- Public perception
- Reality: 2% of cases involve custody
- Same validation rate within that 2% as with other sexual abuse allegations

### Recantation
- Can’t have it both ways
- The child has lied
- Explain why kids recant:
  - Secrecy
  - Lack of support
  - Pressure to recant
  - Fear of repercussions
  - Threats

### Recantation
- Assess recantation by:
  - To whom it was made?
  - Demeanor/Exact words
  - Surrounding circumstances
  - Obviously false statements within recantation?
  - Expert testimony: Child Sexual Abuse Accommodation Syndrome (CSAAS)

### Recantation CSAAS
- Pattern of five behavioral characteristics often observed in child victims of sexual abuse:
  - Secrecy
  - Helplessness
  - Accommodation
  - Delayed disclosure
  - Recantation

*Roland Summit (1983)*

### Illinois Case Law
"Child sexual abuse accommodation syndrome is a recognized and accepted form of post-traumatic stress syndrome."


See also:
Recantation
CSAAS
“In a prosecution for an illegal sexual act perpetrated upon a victim...testimony by an expert, qualified by the court relating to any recognized and accepted form of post-traumatic stress syndrome shall be admissible as evidence.”

SODDI
• Review state laws regarding rape shield/third party defense
• DNA testing
• STD testing
  – Timing of symptoms with assault
  – Defendant’s medical records
  – Remission

Reasonable Doubt
Lack of Medical/Physical evidence
• Call a doctor anyway (studies show that 85%-95% of confirmed abuse cases have no medical findings)
• “Normal is normal”
• No trauma to female sexual organ after a vaginal canal birth
• Age/sexual development of child

Reasonable Doubt
• “I know he did it, you just didn’t prove it.”
• Address in voire dire – victim’s testimony is enough
• Child is credible
  – Consistent testimony vs. identical testimony
  – Delay in disclosure understandable
  – Demeanor
  – Corroboration of victim’s statement
    • Clothes, photos of the room where abuse took place
    • Suspect interview/statement

For when you need us
Rami Badawy
rbadawy@ndaa.org
Direct Dial: 703-519-1648

Justin Fitzsimmons
jfitzsimmons@ndaa.org
Direct Dial: 703-519-1695

Robert Giles
rgiles@ndaa.org
Direct Dial: 703-519-1656

“I think back to what Camus wrote about the fact that perhaps this world is a world in which children suffer, but we can lessen the number of suffering children, and if you do not do this, then who will do this? I’d like to feel that I’d done something to lessen that suffering.”
- Robert F. Kennedy