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December 2017



**POLICE**

**Challenging Police Officer Credibility  
at Motions to Suppress**

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*By Jennifer Sellitti*

Police officers are viewed as inherently trustworthy, especially when attorneys argue a motion to suppress evidence seized in searches. To have a fighting chance at winning the motion, defense attorneys must strip away the presumption of trustworthiness that comes with a badge and a gun.



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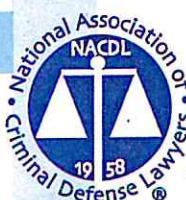
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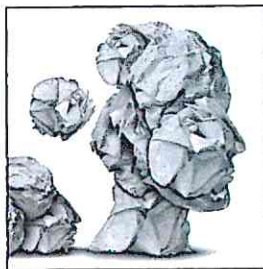
Publisher Norman L. Reimer  
 Editor Quintin Chatman  
 Associate Executive Director for  
 Strategic Marketing Jessica Stepan  
 Art Director Catherine Zlomek  
 1660 L Street, NW, 12th Floor, Washington, DC 20036  
 The Champion® welcomes articles for publication.  
 Please contact editor@nacdl.org for more information.

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## 34 **Competent on Competence** Understanding Duties and Approaches to Effectively Lawyering Competence to Stand Trial

By John T. Philipsborn

Lawyers have an obligation to investigate a client's possible incompetence and to bring the issue to the attention of the trial court when necessary. John Philipsborn writes that defense lawyers should resist attempts by trial courts to marginalize lawyers' stated concerns about the client's competence. Lawyers should be prepared to argue that rulings from the U.S. Supreme Court explain the utility of information on competency. Although some courts have ruled that there may be instances in which the lawyer is not considered ineffective when he or she decides, for "tactical reasons," not to raise a question about the client's possible incompetence, other courts have ruled differently. Finally, the lawyer should consider possible negative consequences when deciding how much information to provide regarding the client's competence.

## 48 **Defending Sexual Assault Allegations by Children** Using Forensic Interview Protocols to Your Advantage

By Randall Levine and Rachel Gruetzner

The goal of forensic interviewing is to ensure that statements from a child accuser are obtained in an unbiased manner. Social scientists have performed experiments to pinpoint how to minimize child suggestibility. To attack a forensic interview, defense lawyers should do the following: (1) become familiar with the jurisdiction's protocols for forensic interviews, (2) examine statutes and rules regarding protocols and admissibility of child witness statements, (3) engage an expert and identify places where the protocols were not followed, (4) move to suppress when the protocols were not followed, and (5) decide how to highlight the failure of the forensic interviewer.



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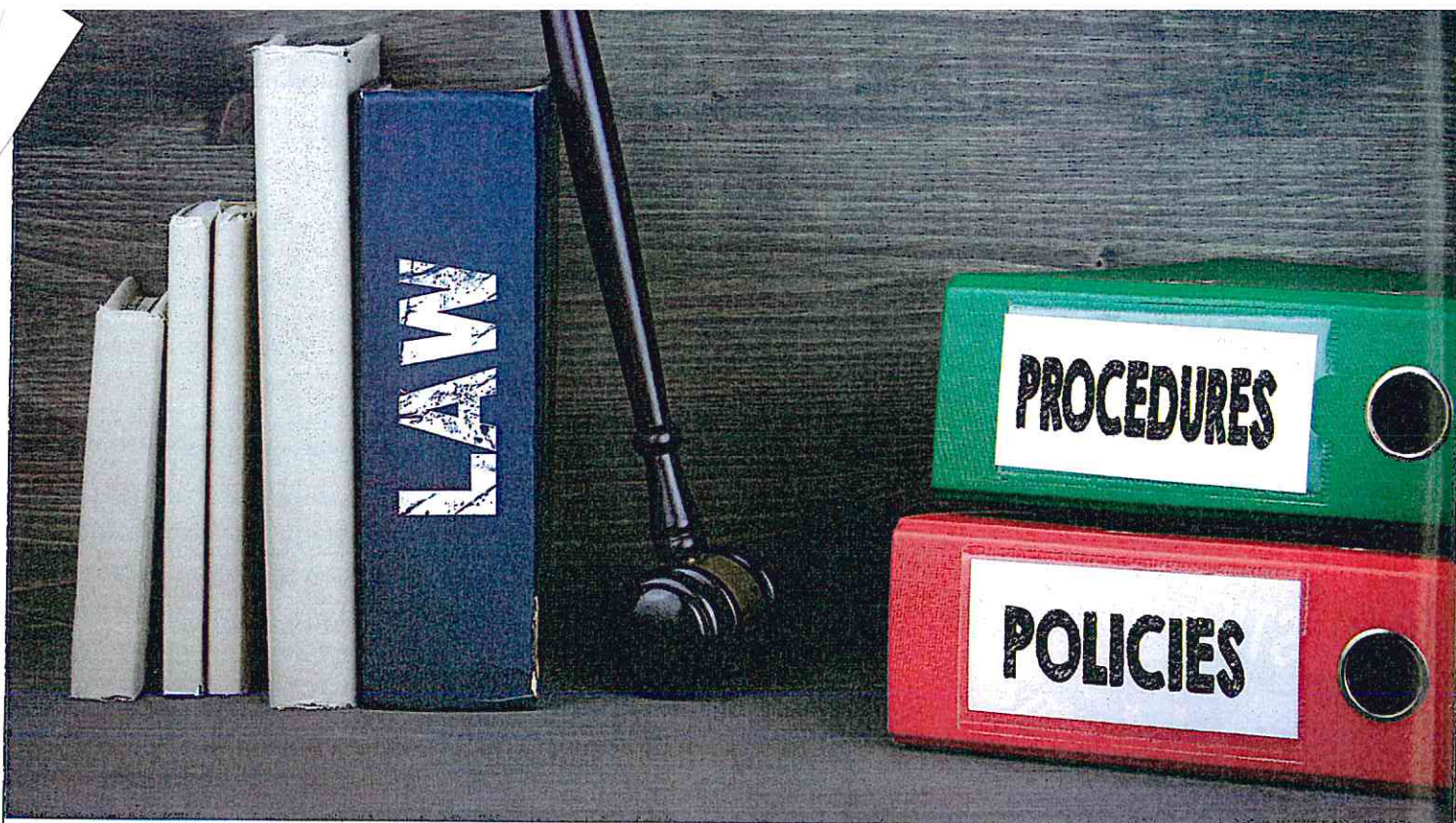
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## Defending Sexual Assault Allegations by Children

### Using Forensic Interview Protocols to Your Advantage

It has been nearly 35 years since prosecutors brought Raymond Buckey and Peggy McMartin-Buckey to trial over allegations of sexual abuse at the McMartin Preschool in 1983.<sup>1</sup> The three-year trial, which ultimately led to acquittals for both defendants,<sup>2</sup> was one in a series of high-profile cases that spurred changes in how the criminal justice system views children's allegations of abuse, and importantly, how such allegations should be investigated.<sup>3</sup> Since the issues came to light in the 1980s, social scientists and psychologists have performed hundreds of experiments to pinpoint how to minimize child suggestibility. The result: nearly standardized forensic interviewing protocols<sup>4</sup> that offer "empirically supported guidelines to forensic interviewers."<sup>5</sup> But, like any other mechanism in police work, there is the policy, and then, of course, there is the practice.<sup>6</sup> Despite that decades have passed since the McMartin mess, law enforcement still struggles to ensure that child accusers are properly protected from suggestibility.

### The Policy

The federal Child Abuse Prevention and Treatment Act (CAPTA) was "designed to influence state law by denying states federal funding if they do not meet federal standards related to the prevention, investigation, assessment, and prosecution of child abuse."<sup>7</sup> Thus, every state enacted a statutory scheme that requires alleged victims of child sexual abuse to be interviewed pursuant to a forensic interview protocol, although these statutes are not created equal.

The goal of forensic interviewing is to ensure that statements from a child accuser are obtained in an unbiased and "truth-seeking manner," to attempt to determine whether the child's reports are real, imagined, or the product of suggestion by another, and further, to avoid suggestion to a child through the interview itself.<sup>8</sup> While forensic interview guidelines vary from program to program, there are some universal guidelines. All forensic interviews should be child focused, tailored to the child's age and development, and should occur in a comfortable, neutral location free from outside influence. Forensic interviews then proceed in phases.

Different schools of thought teach different phases, but the phases can be summarized as follows: (1) Introduction, including an establishment of ground rules for the interview; (2) Rapport Building, during which the interviewer makes the child comfortable with the interview setting and makes clear to the child that the goal of the interview is for the child to talk, not the interviewer; (3) Practice Interview, where the interviewer elicits information from the child about a neu-

BY RANDALL LEVINE AND RACHEL GRUETZNER



tral event, to help the child understand and learn that the child is to provide the information and reinforce the ground rules; (4) Transition to Substantive Issues by Asking Open-Ended Questions, which protects the child from suggestion by the interviewer, and allows the child to explain the event in his or her own words; (5) Clarification Phase, where the interviewer can clarify the child's comments and seek legally relevant information, while still avoiding leading or specific questions; and (6) Closing the interview, by allowing the child to ask questions, reverting to a neutral topic, and thanking the child.<sup>9</sup>

## The Practice: How to Attack a Forensic Interview

### Step One: Become Familiar with the State's Protocols for Forensic Interviews

While every state requires that child accusers be interviewed pursuant to a forensic interview protocol, there can be distinctions from state to state. It is imperative that defense counsel obtain a copy of the protocols, and if possible, the training materials provided to child interviewers in defense counsel's state. A Freedom of Information Act request should yield results for these materials.

### Step Two: Learn Statutes and Rules Concerning Interview Protocols and Admissibility of Child Witness Statements

Defense lawyers must familiarize themselves with the statute that requires the government to employ the protocols in their state, and answer the question of whether the state has rules of evidence or a statute that permits admission of statements made in forensic interviews. The question of admissibility varies greatly among the states.

For example, Michigan created a task force to craft protocols for child advocates and law enforcement engaging in forensic interviews of children alleging abuse.<sup>10</sup> Then, Michigan enacted a statutory scheme that requires all law enforcement interviews of children under 18 years of age to be conducted pursuant to these protocols.<sup>11</sup> Yet despite that the implementation of the forensic interviewing protocol is nearly 20 years old, there are *no* tailored statutory or evidentiary rules regarding the question of admissibility of the interview content, and there are no rules concerning what remedies are available

to a criminal defendant if the protocols are not followed.

This is not uncommon. Many state statutes require forensic interviewing but define neither the requirements that must be met for the interview evidence to be admitted at trial nor what should occur if protocols were not followed. Some states have rules of evidence or statutes that define whether video tape of forensic interviews may be introduced as evidence.<sup>12</sup> However, many of these same states do not *require* forensic interviews to be videotaped,<sup>13</sup> leaving courts to grapple with the effect failure to adhere to the forensic interview protocols has on the admissibility of out-of-court statements by child accusers and their testimony at trial.

The intersection of the statutory requirements of interviewers' use of the protocols, and the possible admissibility of the statements made to those interviewers at trial, is key, as the practitioner must identify where one does not support the other. For example, in Michigan, the rules of evidence provide a hearsay exception to allow for out-of-court statements of children under 10 regarding a sexual act, but arguably, the rule does not extend to statements made during forensic interviews. By design, statements elicited in forensic interviews are not spontaneous, and the evidentiary rule requires that the statement must be "shown to be spontaneous and without indication of manufacture[.]"<sup>14</sup> It is imperative that defense counsel identify these gaps in the law before approaching each individual case, as these gaps can inform creative requests for relief.

### Step Three: Identify Places Where the Protocols Were Not Followed

While protocols vary state to state, there are certain areas of a forensic interview to which all interviewers should adhere.

#### A. Was the interview video or audio recorded? If not, are notes from the interviewer available?

Obviously, video or audio recording of an interview is a "best practice," but it is one that is regularly ignored.<sup>15</sup> If video or audio of an interview is not available, subpoena the notes from the interviewer. While note taking has been shown to be unreliable,<sup>16</sup> at the least, a copy of notes from an interviewer can help defense counsel identify other deficiencies in the interview. Further, a lack of notes can indicate a

greater problem in the investigation of the crime, completely, which could provide support for defense counsel's requested relief or provide an additional defense theory.

#### B. Where was the child interviewed?

The environment of the interview is very important. The child should be interviewed in a neutral location, where the child feels comfortable and free of outside influence.

#### C. Was the interviewer known to the child, or was there a "social support" person present?

It is generally preferred that a forensic interview be conducted by a single person that was not previously known to the child. However, some agencies have a standard practice of involving more than one interviewer, allowing law enforcement officials to watch the interview through a two-way mirror and interject questions, or allow a support person to be present for the child. These circumstances are important points that can be used to attack the reliability of the statements made in the interview.

#### D. When and how many times was the child interviewed?

Research suggests that an interview should occur as soon as allegations are made, and that multiple interviews should be minimized. The concern is not necessarily about the number of interviews, but that children are impacted by repeated, suggestive questioning.<sup>17</sup>

#### E. Were open-ended questions used?

In general, forensic interviewers should use open-ended questions as much as possible. If a suggestive question must be asked, then the interviewer should ask an open-ended question to follow up on the child's response.<sup>18</sup> Even federal courts have acknowledged that research supports that the use of "yes" or "no" questions when interviewing children alleging sexual abuse yields less reliable responses.<sup>19</sup>

#### F. Were alternative hypotheses tested?

The purpose of forensic interviewing is to test hypotheses as opposed to confirm hypotheses. For that reason, interviewers should ask questions regarding alternative hypothesis to rule out alternative explanations for the allegations.<sup>20</sup> Failure to do so necessari-



ly indicates a concern with the training of the interviewer, and the reliability of the interview.

#### Step Four: Engage an Expert on Child Suggestibility

It is imperative that practitioners engage an expert in the areas of forensic interview protocols and child suggestibility. The expert should work with defense counsel closely from the creation of pretrial motions to the end of trial, depending on the defense strategy as discussed below.

#### Step Five: When Interview Protocols Are Not Followed, Move to Suppress and Request a Hearing

An expert can help counsel determine whether the interview has material violations that warrant suppression. How should counsel proceed when there were violations? In a pretrial motion, defense counsel should (1) argue that the government's failure to follow forensic interview protocols requires suppression of the unreliable evidence, and (2) request an evidentiary hearing at which counsel will present the defense expert. For example, it is likely a material violation of the protocols that an interview occurs at a child's home, with the child's mother sitting next to the child. However, in some factual circumstances, it could be a material violation if alternate hypotheses were not tested, such as in the case of a contentious divorce between parents with

the child accusing one parent of criminal sexual conduct.

In the motion, the defense should argue that the failure to follow the forensic interview protocols indicates that the evidence is unreliable, and thus, suppression of the evidence is required. There are several legal avenues to make this claim. Suggestion in identification is not a novel legal concept. Counsel can correlate the situation to a situation in which a lineup is ruled suggestive or an identification coerced.<sup>21</sup> The U.S. Supreme Court's jurisprudence suggests that *even adults* are susceptible to suggestibility when it occurs in certain contexts. Thus, it is not a leap for a trial court to consider that children interviewed by law enforcement may have been subjected to suggestion.

However, note every point where the forensic interview failed to comply with the state's protocols, whether these failures are material or not. If the forensic interview had several problems, rank them in order of importance, but do not leave out any point. Use the expert to help include citations to research in the defense brief to support the arguments as to specific points. If defense counsel's state has a rule of evidence or statute that allows for admissibility of statements made in forensic interviews, focus the attacks of the interview on the reliability questions posed by the rule or statute.

Although suppression is a drastic remedy that is likely to be imposed only in the most egregious circumstances, the opportunity always exists for favorable alternative relief. In most jurisdictions, investigators are either statutorily mandated to follow forensic interview protocols, or administrative rules require use of the protocols. There *must* be a remedy for blatant disregard for these authorities specifically enacted to moderate police conduct. Find case law in the local jurisdiction regarding remedies considered when statutes, administrative rules, or regulations have been violated by the government that do not rise to the level of a constitutional violation.<sup>22</sup> Then, argue that even if suppression is not warranted, at the least, the trial court should be required to give a cautionary jury instruction on the matter.

This argument has been successful, and the judge read the following cautionary instruction to the jury:

Michigan law requires children under 16 years of age who

make allegations of sexual assault to be interviewed by law enforcement in accordance with forensic interviewing protocols adopted by Kalamazoo County and modeled on Task Force publications. It is up to you to decide what effect, if any, a failure to adhere to the protocols might have had on a witness's credibility.<sup>23</sup>

Furthermore, there may be secondary gain achieved in litigating the issue of noncompliance. Requesting an evidentiary hearing, at which the forensic interviewer is required to testify, may yield fruits in cross-examination. Use the cross-examination for discovery on the circumstances surrounding the interview and any deficiencies that exist in the compliance with the protocols. Even if the court refuses to grant the motion to suppress, at a minimum the defense team is likely to obtain some information that will allow it to bolster a defense theory at trial.

#### Step Six: Question Defense Expert About Purpose of the Protocols

Counsel should question the defense expert at the evidentiary hearing, primarily about what the protocols are and their purpose, but counsel should put less emphasis on how the protocols were not followed in the client's case. It is not permitted for any expert to testify regarding the veracity of another witness, i.e., a child suggestibility expert cannot testify whether a child's statements are truthful, just as a forensic interviewer cannot testify as to whether the child being interviewed was telling the truth about the alleged abuse.<sup>24</sup> If an expert's testimony comes too close to a commentary on the veracity of the witness, then there is a risk that the court will severely limit the testimony of the expert based on its belief that the expert's testimony is too close to a comment on the veracity of the accuser.

However, an expert can testify regarding whether forensic interview protocols were followed, and why it is important that forensic interview protocols be followed. The key for the defense expert is to explain what the best practices are, and what the dangers are if they are not followed. After doing this, the expert can opine as to whether there were failures in the forensic interview in defense counsel's case.

When defense counsel engages an expert in forensic interviewing, the

## The Forensic Interview

Was the interview recorded?

Are the interviewer's notes available?

Where was the child interviewed?

Did the child know the interviewer?

Was a "social support" person present?

When was the child interviewed?

Did the interviewer ask open-ended questions?



government generally counters. However, the government is in the habit of asking the forensic interviewer who interviewed the witness in the case to testify as an expert regarding the protocols. This is a gift to the defense team. Instead of requiring the defense expert to testify at length about the failures to adhere to the protocols of the interviewer, defense counsel can draw out those failures on cross-examination of the government's witness.

Further, consider attacking the forensic interviewer's bias and training in cross-examination. Often, a forensic interviewer is not necessarily trained in how suggestibility works — his or her training may be limited exclusively to how to avoid suggestion. That is important because the purpose of forensic interviewing is not simply to collect evidence for the government. Its primary purpose is to ensure that the child accuser's statements are true, and not imagined, falsely implanted by suggestion, or purposely false for some other reason (e.g., suggestion by a mother to make accusations against a father during a contested divorce). Forensic interviewers who are also law enforcement officials, or work exclusively with law enforcement, are not necessarily as likely to approach the interview from this perspective, and routinely fail to apply the methods that are designed to avoid suggestion.<sup>25</sup>

In a recent case, at an evidentiary hearing on a motion to suppress, defense counsel presented testimony of Dr. Katherine Jacobs, a psychologist with vast experience in the creation of the forensic interview protocols and the importance of their application during interviews of alleged sexual abuse victims.<sup>26</sup> The protocols had been materially violated in this case: the investigator interviewed the child at her home (with parents in the next room), did not audio or video tape record the interview, and took no notes of the interview. The government took very few steps to ensure the protocols had been followed.

Although Dr. Jacobs' testimony touched briefly on the ways that the protocols were not followed, her testimony focused primarily on the purpose of the protocols and the dangers associated with not following them. The decision to focus Dr. Jacobs' testimony on the importance of the protocols was two-fold. First, defense counsel wanted to educate the court about the protocols. Second, the defense wanted to avoid case law in Michigan

that excludes experts like Dr. Jacobs from testifying due to concern that the expert's testimony is construed as an expert opining on the credibility of the accuser.<sup>27</sup> Instead, defense counsel questioned the forensic interviewer about his failures in following the protocols, and asked him to explain why he did not follow them.

After the evidentiary hearing, the court made various findings regarding the failures of the government to follow the forensic interview protocols. Nonetheless, the court declined to grant defense counsel's requested relief to suppress the accuser's testimony. It instead ruled that the defense expert could testify at trial regarding the protocols, but that the expert could not testify about where the interviewer or interviewers failed to adhere to the protocols, and reserved on whether a jury instruction was appropriate. It reiterated that the jury could draw its own conclusions about what effect any failure to adhere to the protocols might have had on the witness's credibility.<sup>28</sup> This clued the defense team in to how a court might respond during trial to an objection that the defense expert's testimony came too close to commenting on the veracity of the witness.

### Step Seven: Decide How to Highlight the Failures of the Forensic Interviewers at Trial

The credibility of investigators in any criminal case is key. Lawyers have several ways to attack the credibility of a forensic interviewer. And, although defense counsel will have been working with an expert closely in this type of case, it may not be the best tactic to attack the forensic interviewer's credibility through the defense expert at trial. First, the risk of mistrial exists if an expert's testimony is perceived as being too close to a commentary on the veracity of the witness. Second, the defense risks a court severely limiting the expert's testimony to address that concern. Finally, the jury may not see the defense expert as neutral, and may mistrust him or her. Thus, it may be more appropriate to simply highlight the failures of the interviewer to follow the protocols in defense counsel's cross-examination.

At trial in the case discussed above, the defense attorney raised the issue of the protocols not being followed, not through the defense expert, but through cross-examination of the investigator who had performed the

forensic interview. The investigator was presented with sections of the protocols and asked to describe whether they were followed during the interview, as the investigator had been trained in the protocols. Defense counsel asked the investigator to explain why there were no notes of the interview, why the interview was taken at the accuser's home rather than in the appropriate neutral location, why no hypothesis testing was performed, and why the interview had not been recorded. After this line of questioning, the court determined that it was appropriate for the jury to receive the cautionary instruction discussed in step five.

The defense focused on the ineptitude of the state's forensic examiner, who was unable to offer any reasonable explanation to the jury for the failure to follow the protocols. After a two-week trial, the jury delivered a "not guilty" verdict in two hours.

## Conclusion

While this article focuses on forensic interview protocols, its concepts can be applied in any situation in which the government fails to meet a statutory or regulatory mandate. When the government has a mandate to follow, defense lawyers should hold its feet to the fire. Defense lawyers should always reach for suppression of evidence, but they should not be afraid to request alternative, lesser relief when appropriate. Even something that seems like a minor hiccup in an investigation may very well hold the key to acquittal.

## Notes

1. Clyde Haberman, *The Trial That Unleashed Hysteria Over Child Abuse*, N.Y. TIMES, March 9, 2014, available at <https://www.nytimes.com/2014/03/10/us/the-trial-that-unleashed-hysteria-over-child-abuse.html>.

2. *Id.*

3. See *Kennedy v. Louisiana*, 554 U.S. 407; 128 S. Ct. 2641, 2663 (2008), citing Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 539-40 (2005).

4. The most famous of these is surely the protocols created by the National Institute of Child Health and Human Development (NICHD). Michael E. Lamb, David J. La Rooy, Lindsay C. Malloy & Carmit Katz, *Children's Testimony: A Handbook of Psychological Research and Forensic Practice* (2d ed. 2011), <http://nichdprotocol.com/NICHDProtocol2.pdf>.

5. Julie A. Buck et al., *Expert Testimony*



*Regarding Child Witnesses: Does It Sensitize Jurors to Forensic Interview Quality?* 35 LAW & HUM. BEHAV. 152, 153 (April 2011).

6. Despite voluminous research, media attention and even a documentary on this point, law enforcement agencies throughout the United States are simply reluctant to employ forensic interviewing methods. Even more alarming is the fact that there are thousands of cases in which prosecutors show zero concern when children have been blatantly manipulated. Demosthenes Lorandos, *Saving Tonya Craft: An Integration of Science and Law*, THE CHAMPION, January/February 2011, at 24, provides an excellent case study of one such case.

7. Orly Bertel, *Let's Go to the Videotape: Why the Forensic Interviews of Children in Child Protective Cases Should Be Video Recorded*, 50 FAM. CT. REV. 344, 345 (April 2012).

## About the Authors

Randall Levine, an NACDL Life Member, has defended criminal cases in both state and federal courts since 1982. He is AV rated by Martindale Hubbell and recognized as a member of Super Lawyers, Best Lawyers, and Leading Lawyers.



**Randall Levine**  
Levine & Levine  
Kalamazoo, Michigan  
269-382-0444

WEBSITE [www.levine-levine.com](http://www.levine-levine.com)

EMAIL [rlevine@levine-levine.com](mailto:rlevine@levine-levine.com)

Rachel Gruetzner is an Associate at Levine & Levine in Kalamazoo, Michigan. She graduated summa cum laude from Michigan State University College of Law in 2014. Her practice focuses on family law, criminal defense, and appeals.



**Rachel Gruetzner**  
Levine & Levine  
Kalamazoo, Michigan  
269-382-0444

WEBSITE [www.levine-levine.com](http://www.levine-levine.com)

EMAIL [rgruetzner@levine-levine.com](mailto:rgruetzner@levine-levine.com)

8. See, e.g., State of Michigan Governor's Task Force on Child Abuse and Neglect and Department of Human Services, *Forensic Interviewing Protocol* at 1 (3d ed. 2011), [https://www.michigan.gov/documents/dhs/DHS-PUB-0779\\_211637\\_7.pdf](https://www.michigan.gov/documents/dhs/DHS-PUB-0779_211637_7.pdf).

9. This is a summation of the eight phases of forensic interviewing per the state of Michigan's Forensic Interviewing Protocol, see *id.* at 6, the 11 phases of forensic interviewing per the NICHHD protocol, see *supra* note 4, and the five phases of interviewing per the CornerHouse Forensic Interviewing RATAAC Training, see Anderson, Ellefson, et al., *The CornerHouse Forensic Interview Protocol: RATAAC*, 12 T.M. COOLEY J. PRAC. & CLINICAL L. 193, 202 (2010).

10. Initially published in 1998, this publication is now in its Third Edition. See *supra* note 8.

11. MCL 722.628(6) and MCL 600.2163a(8) ("In a video recorded statement, the questioning of the witness should be full and complete; shall be in accordance with the forensic interview protocol implemented as required by Section 8 of the child protection law, 1975 PA 238, MCL 722.628, or as otherwise provided by law...") (emphasis added).

12. See, e.g., ARIZ. ADMIN. CODE § R6-5-5516(C) (2011); COLO. REV. STAT. ANN. § 19-3-308(4.5)(a), 19-3-308.5 (West 2011); IND. CODE ANN. § 35-37-4-6 (West 2011); LA. REV. STAT. ANN. § 15:440.5 (2011); MINN. STAT. ANN. § 595.02(3) (West 2011); MO. ANN. STAT. § 492.304 (West 2011); N.Y. CRIM. PROC. LAW § 190.32, 190.30(4) McKinney 2011) (grand jury only); N.D. CENT. CODE ANN. § 31-04-04.1 (West 2011); R.I. GEN. LAWS ANN. § 11-37-13.1 (West 2011) (grand jury only); TENN. CODE ANN. § 24-7-117 (West 2011); UTAH CODE ANN. 15.5 (West 2011); WIS. STAT. ANN. § 908.08 (West 2011); S.C. CODE ANN. § 17-23-175.

13. For example, a Colorado statute provides for a mechanism for admissibility of a video recorded statement made to a forensic interviewer, but forensic interviews are not required to be video recorded. Bertel, *supra* note 7, at 351.

14. Michigan Rules of Evidence, 803A (2017).

15. See, e.g., *Commonwealth v. Niels*, 73 Mass. App. Ct. 689, 901 N.E.2d 166, 177 (2009) ("On appeal, the juvenile argues that federal and state due process principles required the Commonwealth to videotape the MIT interview of Norma, and that it was error to deny his motion to dismiss. We disagree. Although we have acknowledged that the electronic recording of Sexual Abuse Intervention Network (SAIN) interviews (comparable to MIT interviews) is 'good practice,' neither we nor the Supreme Judicial Court has 'required that such records be made.'").

16. See Bertel, *supra* note 7, at 348-349, for a greater discussion on the limitations of note taking during a forensic interview.

17. John E.B. Myers, *Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion*, 14 U.C. DAVIS J. JUV. L. & POL'Y 1, 51-53 (2010).

18. *Id.* at 53 n.168 (citing Lindsay C. Malloy & Jodi A. Quas, *Children's Suggestibility: Areas of Consensus and Controversy*, in Kathryn Kuehnle & Mary Connell (eds.), *THE EVALUATION OF CHILD SEXUAL ABUSE ALLEGATIONS* 267-97, 274 (2009); Kamala London, Maggie Bruck & Laura Melnyk, *Post-Event Information Affects Children's Autobiographical Memory After One Year*, 33 LAW & HUM. BEHAV. 344 (2008); Yael Orbach & Michael Lamb, *Young Children's References to Temporal Attributes of Allegedly Experienced Events in the Course of Forensic Interviews*, 78 CHILD DEVELOPMENT 1100-20, 1104 (2007); Michael E. Lamb, Yael Orbach, Irit Hershkowitz, Dvora Horowitz & Craig B. Abbott, *Does the Type of Prompt Affect the Accuracy of Information Provided by Alleged Victims of Abuse in Forensic Interviews?* 21 APPLIED COGNITIVE PSYCHOL. 1117, 1117-18 (2007) (quotations omitted); and *id.* at 54 n.171, citing Alison R. Perona, Bette L. Bottoms & Erin Sorenson, *Research-Based Guidelines for Child Forensic Interviews*, 12 J. AGGRESSION, MALTREATMENT & TRAUMA 81, 87 (2006) ("Directed or specific questions are sometimes necessary, however, because children — especially young children — have difficulty reporting experiences because they lack 'metamemory' skills such as how to search for knowledge stored in memory and how to report knowledge in a structured manner.")).

19. See *United States v. Cano*, 61 M.J. 74, 78 (C.A.A.F. 2005) ("There is a good deal of scholarly debate in the area of child suggestibility and its effect on the reliability of the testimony of a child victim. However, scholars agree that the danger of false testimony from a child is greater when the child is subjected to highly suggestive interviewing techniques such as 'closed' (yes/no) questions and 'multiple interviews with multiple interviewers.'").

20. See note 8, *supra*.

21. We lean on Supreme Court precedent that convictions based on unduly suggestive identifications can be reversed when the defendant was denied a fair trial and due process, such as *Stovall v. Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967); and *Coleman v. Alabama*, 399 U.S. 1, 3-6, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970); and *Foster v. California*, 394 U.S. 440, 442-443, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969).

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## LEGISLATIVE UPDATE

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### Conclusion

With efforts for criminal justice reform on the federal level uncertain in Congress, NACDL is encouraged by state legislative victories in 2017. The commitment of the advocacy community will ensure continued progress toward a fairer and more equitable system that also ensures public safety.

For the 2018 legislative sessions, NACDL is tracking two additional criminal justice issues — *protest* (legislation that seeks to criminalize acts of protest) and *sousveillance* (legislation that seeks to criminalize recording law enforcement officers in public).

Advocates seeking assistance with legislative needs can contact NACDL's State Advocacy Team at [advocacynetwork@nacdl.org](mailto:advocacynetwork@nacdl.org). ■

### Competent on Competence

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42. *Practice Guideline: Evaluation of Competence to Stand Trial*, 35 AAPL JOURNAL SUPPLEMENT S25-26 (2007).

43. *United States v. Duhon*, 104 F. Supp. 2d 663, 669-70 (W.D. La. 2000), citing Michael Burt & John Philipsborn, *Assessment of Client Competence: A Suggested Approach*, THE CHAMPION, June 1998, at 18.

44. *Strickland v. Washington*, 466 U.S. 668, 691 (1984) (citations omitted) (emphasis added).

45. *Godinez v. Moran*, 509 U.S. 389, 398 (1993).

46. Patricia Zapf, et al., *Have the Courts Abdicated Their Responsibility for Determination of Competency to Stand Trial to the Clinicians?* 4 J. FORENSIC PSYCHOL. PRAC. 27-44 (2004).

47. Zapf & Roesch, *supra* note 38, at 90.

48. See notes 1, 18, and 26.

49. See, for example, CAL. PENAL CODE § 1370.

50. *Estelle v. Smith*, 450 U.S. 454, 461-69 (1981).

51. *Buchanan v. Kentucky*, 483 U.S. 402, 424 (1987).

52. See generally *Baqleh v. Superior Court*, 100 Cal.App.4th 478 (2002); *Centeno v. Superior Court*, 117 Cal.App.4th 30, 33-34 (2004).

53. See *United States v. Merriweather*, 921 F. Supp. 2d 1265 (N.D. Ala. 2013) and

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22. In our practice, we have premised this argument on *People v. Anstey*, 476 Mich. 436, 449; 719 N.W.2d 579 (2006). In that case, the Michigan Supreme Court ruled that when law enforcement violated a criminal defendant's statutory right for an independent chemical test after an arrest for operating a motor vehicle while under the influence of an intoxicating liquor, the appropriate remedy was neither dismissal of charges nor suppression of the results of the police-administered blood test, but rather, that the trial court should give a "permissive jury instruction" on the officer's violation of the statute.

23. Transcript of Record at 74, *People of the State of Michigan v. Kevin Doerfler*, (No. 2015-0925FH).

24. See Victor I. Vieth, *The Forensic Interview at Trial: Guidelines for the Admission and Scope of Expert Witness Testimony*

*United States v. Duhon*, 104 F. Supp. 2d 663 (W.D. La., 2000). Both of these federal trial court decisions reflect a competency related pleading — the first a competency determination, and the second a restoration to competence determination in which the defense called a criminal defense lawyer as an expert to testify about aspects of competency. ■

### About the Author

John Philipsborn has been a criminal defense lawyer since 1978, and has defended many capital and non-capital cases that involved questions about competency. For more than 30 years, he has presented to and lectured for groups of mental health professionals and lawyers on the subject of competence to stand trial. California Attorneys for Criminal Justice and the Forensic Mental Health Association of California have recognized Philipsborn for his significant work on the subject.

John T. Philipsborn  
San Francisco, California  
415-771-3801

EMAIL [jphilipsbo@aol.com](mailto:jphilipsbo@aol.com)

*Concerning an Investigative Interview in a Case of Child Abuse*, 36 WM. MITCHELL L. REV. 186, 206-210 (2010).

25. A study in 1996 found, for example, that more than half of forensic interviewers introduced abuse in a suggestive manner. See, *supra* note 5, at 154.

26. The Levine & Levine law firm represented the defendant in the case.

27. See, e.g., *People v. Douglas*, 496 Mich. 557, 583; 852 N.W.2d 587 (2014).

28. Transcript of Record at 8, *People of the State of Michigan v. Kevin Doerfler*, (No. 2015-0925FH). ■

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## ERRATUM

In: Colin Fleman, *Inside 'Operation Pacifier' and the FBI's Global Computer Hacking*, THE CHAMPION, November 2017 at 20-33.

In referring to a manual titled *Challenging Government Hacking in Criminal Cases*, Colin Fleman indicated that the Electronic Freedom Foundation was one of the authors. The name of the organization is the Electronic Frontier Foundation.

