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CHILD SEXUAL ABUSE CASES: REESTABLISHING THE BALANCE WITHIN THE ADVERSARY SYSTEM

Mary Christine Hutton*

Child advocates—social workers, psychologists, physicians, attorneys—have played a powerful role in drawing the focus of American society to the vulnerable situation of children in our culture. From notices on milk cartons and in newspapers to scholarly discussions in professional journals, advocates address the unique problems of children. The public may not consciously distinguish among the types of violence towards children, but it is more aware of adult mistreatment of children than ever before. Particularly in the area of child sexual abuse, advocates have achieved remarkable success in destroying many of the myths surrounding children’s experience and veracity and in educating the public about their situation.

1. Even with increased awareness, however, the public may not distinguish different types of violence toward children. See R. Kempe & C. Kempe, Child Abuse (1978); Critical Perspectives on Child Abuse (R. Bourne & E. Newberger eds. 1979); Pfohl, The “Discovery” of Child Abuse, 24 Soc. Probs. 310 (1976-1977); see also The History of Childhood (L. deMause ed. 1974) (survey of the abuse of children throughout history).


The extent of child sexual abuse is unknown, although estimates have been made. Russell, The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children, 7 CHILD ABUSE & NEGLECT 133 (1983) (random sample of 930 women in San Francisco revealing that 38% had experienced abuse before age 18).

3. See D. Finkelhor, CHILD SEXUAL ABUSE 87-106 (1984). Finkelhor notes that a survey of Boston parents in 1981 revealed that many of the past myths and misconceptions about child sexual abuse no longer exist. Approximately 93% of the respondents had been exposed to a discussion of child sexual abuse within the last year. Many respondents still maintained the belief, however, that the child bore some responsibility for the sexual contact if he or she did not object strenuously. See also Berliner, The Child Witness: The Progress and Emerging Limitations, 40 U. MIAMI L. REV. 167, 178-79 (1985).
In addition to their efforts to eliminate inappropriate and unfounded attitudes towards children through public awareness and education, child advocates have lobbied for legislation to assist children, particularly in the criminal justice system. To accomplish their lobbying objectives, the advocates have exposed some of the system’s past failures in dealing with children as victims and witnesses.\(^4\) Child advocates have also provided the impetus behind amendments to the rules of evidence,\(^5\) videotaping of children’s statements,\(^6\) proposals to remove the child from courtroom proceedings,\(^7\) and the use of supportive courtroom techniques for the child.\(^8\) Perhaps more importantly, psychiatrists, psychologists, and other professionals who have studied the problem have added a dimension of expertise, and have provided valuable insight into the extent of child sexual abuse and the symptoms of abused children.\(^9\)


8. E.g., Whitcomb, Assisting Child Victims in the Courts: The Practical Side of Legislative Reform, in Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases 13 (National Legal Resource Center for Child Advocacy & Protection 1985) [hereinafter Papers from National Policy Conference] (recommending techniques that do not rely on advanced technology, such as the use of dolls and child-sized chairs in the courtroom, and demystification of the courtroom prior to trial); see also J. Bulkley & H. Davidson, Child Sexual Abuse (1981).

9. See infra notes 122-51 and accompanying text. Experts in the field of child sexual abuse are developing a wealth of literature. Among the most useful are D. Finkelhor, supra note 3; Handbook, supra note 2; and The Dark Side of Families, supra note 2.
Operating the criminal justice system with more sensitivity toward children and with a greater role for child advocates has resulted in major departures from the traditional adversarial methods of trial. In the past, cases involving child victims proceeded along the same lines as other criminal trials, with in-depth and vigorous cross-examination of the victim, skepticism toward the child's account, and little psychiatric or psychological expertise in the field to support the child's claim. Now that child advocates have modified the adversary process to accommodate child victims, the impact of those modifications on the goals of the adversary system should be examined.

This Article begins with an overview of the adversary process and how it has changed in recent years to respond to the needs of children. The Article highlights two of the goals of the adversary process—(1) testing and probing of two sides to a story, and (2) refraining from a decision until the complete story is told—to examine how they can be retained in spite of these changes. Part II pinpoints the assignment of multiple or poorly-defined roles to the child sexual abuse professionals as one of the potential impediments to preserving the goals of the adversarial system. The performance of multiple roles occurs when the legal system asks these professionals to perform four functions: to evaluate whether the alleged acts have occurred, to chronicle the child's account of events, to serve as an expert witness on the problem of child sexual abuse, and to act as an advocate and supporter for the child. The assignment of a poorly-defined role occurs when the intervener is asked to perform one function, such as therapy, and the legal system misuses the results. Although these problems with assigned functions are not

The classic study in the field is V. De Francis, Protecting the Child Victim of Sex Crimes Committed by Adults (1969).

10. See F. Bailey & H. Rothblatt, Crimes of Violence: Rape and Other Sex Crimes § 333 (1973) (recommending that cross-examination of the child should not be brutal, so as to arouse sympathy, but should be designed to lead the child into traps).

11. 3A J. Wigmore, Evidence in Trials at Common Law § 924(a) (Chadbourn rev. ed. 1970 & Supp. 1987) (suggesting that a young girl or woman complainant who charges a sexual crime should have a psychiatric examination because of the proclivity of contriving false charges against men: "[t]heir psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, [and] partly by temporary physiological or emotional conditions"); M. Guttman & H. Weihofen, Psychiatry and the Law 374 (1952); Goodman, Children's Testimony in Historical Perspective, J. Soc. Issues, Summer 1984, at 9.

12. This generic term includes protective service workers, child psychologists, and other professionals who are asked to intervene to assist children alleged to have been abused sexually. The terms "intervenor" and "child sexual abuse professional" are used interchangeably throughout this Article.
present in every case, they arise frequently enough to warrant scrutiny of their effect on the adversary nature of criminal proceedings and on the checks built into the system. Finally, Part III concludes that if multiple functions have been assigned to an intervenor or if the potential for misuse of the intervenor's work exists, the court should limit the scope of the intervenor's testimony to avoid its misapplication or should appoint an independent expert to evaluate and critique the intervenor's work.

I. THE ADVERSARY SYSTEM

An adversarial process and the availability of trial by jury characterize the American system of adjudication in criminal cases. The adversarial model anticipates each litigant will have a theory of the case and will present evidence and witnesses who support that position to a neutral fact finder. The latter will hear the testimony, judge the credibility of the witnesses, and decide which party will prevail. The underlying theory is that the interested parties, motivated by the desire to win, will marshal the forces needed to convince the fact finder. In the process, it is hoped, truth will be determined and justice achieved.


15. C. Rembar, supra note 13, at 321. But see Frankel, The Search for Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031, 1037 (1975) (criticizing the adversarial "winning" approach); contra Freedman, Judge Frankel's Search for Truth, 123 U. Pa. L. Rev. 1060 (1975) (arguing that the "winning" approach of the adversary system works well not only in establishing truth but also in protecting basic rights).

16. E.g., United States v. Nixon, 418 U.S. 683, 709 (1974) (applying a theory of the adversary system in which parties contest all issues before a court of law, the need to develop all facts is fundamental, and to ensure justice, the process must be available for the production of evidence for both sides). Whether the system actually functions according to the theory behind it is a matter of debate. L. Forer, The Death of the Law 131-54 (1975) (critiquing the adversary process); J. Frank, supra note 13, at 80-102 (noting that "fighting" theory of the adversary system, when excessive, disserves the "truth"-seeking process); Frankel, supra note 15; Freedman, supra note 15.

Some have argued that the adoption of a neutral posture by the fact finder results in an emphasis on dispute resolution between the parties rather than a search for truth. This argument is addressed in S. Landsman, The Adversary System 3 (1984).
The adversarial process is characterized in large part by the division of functions performed by the participants. The fact finder, either judge or jury, is a passive participant in the case, relying on the evidence as it is presented by the parties and controlled by the rules governing its admissibility and use at trial. In addition, the fact finder must be neutral; decisions in the case should be objective and free from bias.

The function of the fact finder sharply contrasts with that of the advocate. Each litigant in the case is entitled to have a representative who will present that party's theory as forcefully and persuasively as possible. The advocate embraces the client's position and does what is needed, within ethical constraints, to win.

The tools of the advocate vary depending on the case. One of the most powerful in a criminal trial is the accused's right to confront and cross-examine the witnesses against him or her. The use of leading questions in cross-examination exposes to the fact finder the witness's faulty perception, fading memory, bias, motive, and lack of opportunity to observe. One witness's perceptions may differ radically from another's—each believing his account is the truth. Cross-examination points out the discrepancies and gives the fact finder the opportunity to evaluate which version more closely approximates reality. At the same time...

18. C. Rembar, supra note 13, at 321.
19. Fuller, supra note 14, at 30. The following is typical of instructions to the jury on its duty in reaching a verdict:

Consider this case carefully and honestly with due regard for the interests of society and the rights of the defendant. You should decide the case fairly and impartially without fear or favor upon the evidence produced and the instructions of the court. It must not be decided from any feeling of bias or prejudice against or sympathy for the defendant. Your duty upon such fair consideration of the case is to determine whether the defendant is guilty or not guilty of the offense charged in the information.


time, leading questions enable the advocate to suggest his or her client’s theory of the case to the fact finder.24

The third important participant in the adversary process is the witness. In theory, witnesses are called not to advocate one side or the other, but to tell the truth as they know it.25 Although a party may call a witness who is hostile to his or her case, for the most part, a party will call witnesses who help to establish his or her point of view.26

The functions and types of witnesses have undergone dramatic changes over time with the refinement of the adversary system.27 In general, witnesses now can be categorized as follows: (1) occurrence witnesses (those who have observed an event in the case or one relevant to the case),28 (2) expert witnesses (those who have knowledge that will help jurors to understand relevant evidence),29 (3) reputation and opinion witnesses (those who offer reputation or opinion evidence on character or credibility),30 and (4) hearsay witnesses (those who give accounts not based on firsthand knowledge).31 In a typical case, it is unlikely that a single witness will fall into multiple categories, but this possibility exists, and nothing in the system prevents it from occurring.


25. A typical oath or affirmation for a witness requires that the person tell “the truth, the whole truth and nothing but the truth.” E.g., S.D. CODIFIED LAWS § 19-14-3.1 (1979); see also Dunn v. Sears, Roebuck & Co., 639 F.2d 1171, 1173 (5th Cir. 1981) (stating that witnesses do not belong to parties, and the jury is entitled to hear all relevant evidence, so any attempt to exclude such evidence by settlement agreement is improper).

26. This is in contrast to the operation of the continental systems. See generally Damaska, Presentation of Evidence and Factfinding Precision, 123 U. PA. L. REV. 1083, 1088, 1090-95 (1975) (noting that all witnesses are evidentiary sources for the bench and there are no separate witnesses for prosecution and defense).

27. In the early days of the common law, “compurgators” (“oath-helpers”) were called, not to give substantive evidence, but to swear the defendant was truthful in denying his guilt of the offense. Compurgators eventually were replaced by witnesses who could testify about the facts at issue in the case, based upon hearsay and, later, upon personal knowledge. See generally C. REMBAR, supra note 13, at 100-01, 144-52. In some jurisdictions, the defendant was excluded as a witness because he was deemed incompetent to testify under oath, yet was permitted to make an unsworn statement. E.g., Ferguson v. Georgia, 365 U.S. 570 (1961).


30. FED. R. EVID. 404, 405, 608, 609. See generally 2 J. WEINSTEIN & M. BERGER, supra note 29, ¶¶ 404[01]-405[03]; 3 J. WEINSTEIN & M. BERGER, supra note 29, ¶¶ 608[03]-[04], 608[08]; McCORMICK ON EVIDENCE 100, 550 (E. Cleary 3d ed. 1984).

31. FED. R. EVID. 801-806. See generally 4 J. WEINSTEIN & M. BERGER, supra note 29, ¶¶ 801[01]-806[02].
Traditionally, occurrence witnesses have been the mainstay of
criminal cases. The prosecutor calls the victim and whomever
else observed the alleged acts to describe what happened, and,
on cross-examination, the defense probes and challenges the wit­
nesses' accounts. The legal system disfavors hearsay accounts of
the alleged acts because of the bias against rumor and unfounded
assertions as the basis for a criminal conviction. Despite the general
disfavor in which hearsay testimony is held, however, numerous exceptions have developed over the years be­
cause, in theory, the testimony in question is reliable and
trustworthy.

Why has the adversary system continued in this basic form
with these settled role assignments? Tradition, habit, and fear of
change offer a partial explanation. Proponents of the system,
however, offer two more fundamental rationales. First, they ar­
gue that truth is elusive and can best be determined by explor­
ing multiple versions of events as exposed by the advocate's pos­
ing of difficult and probing questions. Second, the proponents
claim that such a presentation is the most effective way of pre­
cluding judgments made too swiftly, in reliance on what is famili­
ar to the fact finder. Forcing the decision maker to delay pass­
ing judgment on the case until both sides have presented their
evidence precludes reaching conclusions based on the fact
finder’s own biases and preconceptions. The presentations of
counsel should comprise a full and zealous version of events,
which will enable the fact finder to view the case through the
eyes of each litigant and piece together the fragments presented
by the witnesses into an overall picture of what occurred.

33. This is also the genesis of the defendant's right to confront and cross-examine
witnesses. U.S. CONST. amend. VI; 5 J. WIGMORE, supra note 11, § 1364.
34. FED. R. EVID. 803, 804.
35. Frankel, supra note 15, at 1052-55.
36. J. TANFORD, supra note 20, at 5.
37. Uviller, The Advocate, the Truth and Judicial Hackles: A Reaction to Judge
Frankel’s Idea, 123 U. PA. L. Rev. 1067, 1067-68, 1076-77 (1975) (stating that the juxta­
position of two contrary perspectives and the impact of challenge and counterproof often
disclose to neutral intelligence the most likely structure of truth; also noting the differ­
ence between legal truth and factual truth). But see Damaska, supra note 26, at 1090-95;
38. See Fuller, supra note 14, at 39-40.
39. Id.; see also Handler, The Juvenile Court and the Adversary System: Problems
of Function and Form, 1965 Wis. L. Rev. 7, 29-31 (arguing that the adversary process
should be employed in adjudications of delinquency to maintain the testing of both sides
and to avoid jumping to conclusions).
In response to a deeply-rooted dissatisfaction with the workings of the adversary process in cases with child victims, certain changes have been made to accommodate children. The reforms are particularly relevant in cases of child sexual abuse, because the traditional form of adjudication has changed radically. In the past, the fact finder relied primarily on the testimony of the child. This testimony was corroborated by any physical evidence and by the credibility of the child and reinforced by the fact finder's own view of the likelihood that child sexual abuse occurred. Revisions to hearsay rules in some jurisdictions have eliminated the testimony of the child as a necessary part of the government's case. As a result, someone to whom the child has related the story may substitute for the child in court and explain the child's version of events. That person is called as a proxy for the child, or as a supplemental witness to reaffirm the child's testimony. This new approach is a response to the perception that the process of cross-examination confuses and traumatizes children and that the benefits of such

40. See Parker, supra note 4.

41. This, of course, assumes that the child was found competent to testify. See Melton, Children's Competency to Testify, 5 LAW & HUM. BEHAV. 73 (1981).

42. See Goodman, Golding & Haith, Jurors' Reactions to Child Witnesses, J. SOC. ISSUES, Summer 1984, at 139 (reviewing factors that influence jurors' perceptions of the credibility of child witnesses); see also Cohen & Harnick, The Susceptibility of Child Witnesses to Suggestion, 4 LAW & HUM. BEHAV. 201 (1980) (study of the reliability of children as witnesses); Loftus & Davies, Distortions in the Memory of Children, J. SOC. ISSUES, Summer 1984, at 51 (regarding the suggestibility of children).

43. In some cases, juries convicted on the word of the child, but legal rules required reversal of the conviction. See, e.g., State v. Quinlild, 231 Minn. 99, 42 N.W.2d 409 (1950) (holding that the statements of a 13-year-old boy two hours after sexual assault are not properly admitted as res gestae; conviction reversed; no expert testimony); State v. Michael, 37 W. Va. 565, 18 S.E. 803 (1893) (reversing conviction for carnal knowledge of a five-year-old girl; child's testimony was "prattle"); Rex v. Coyle, N. Ir. 208 (C.A. 1926) (holding that the unsworn testimony of a young child was not corroborated by the unsworn testimony of other children or by her statements to her mother). But see State v. Fisher, 222 Kan. 76, 563 P.2d 1012 (1977) (convicting defendant in a case where the only evidence was that an 11-year-old girl reported incidents of sexual abuse to her mother, who took her to the police where she repeated her account; child testified consistently at preliminary hearing; at trial, child recanted and said she had lied; defendant denied the allegations); State v. Gorman, 229 Minn. 524, 40 N.W.2d 347 (1949) (affirming conviction for indecent assault on four-year-old boy; statements to mother describing event admissible as res gestae; no expert testimony).

Expert testimony seems not to have been widely used in cases of child sexual abuse before the late 1970's when research in the area developed to a sophisticated level. State v. Kim, 64 Haw. 598, 645 P.2d 1330 (1982), was among the first to employ such testimony. See Goodman, supra note 11, at 18-24 (describing psychological research on children in the twentieth century).

44. E.g., S.D. CODIFIED LAWS § 19-16-38 (1987); WASH. REV. CODE § 9A.44.120 (Supp. 1987); see supra note 5.
questioning do not outweigh the costs of harming the child or obscuring the truth.\footnote{45}

In the process of "piecing together" the case, the fact finder may not be given the opportunity to view the child and hear his or her account firsthand, but instead, may have to rely on secondary sources such as the child's proxy. In addition, the fact finder may have to rely on the explanations of expert witnesses about child sexual abuse. Although the use of expert witnesses in adversary proceedings is far from new, their use in sexual abuse cases for the government is a relatively recent development.\footnote{46} In many courts, they are given wide latitude to explain sexual abuse and how children react to it.\footnote{47} Government counsel seeks their explanations particularly when the defense alleges fabrication or fantasy by the child. In effect, they are given the opportunity to explain the facts of the case in a coherent manner to the fact finder.

How does the adversary process work once these reforms have been made? The functions of the fact finder and advocate remain the same, but the information presented to the jury or judge differs in content and form, and the presentation is accomplished with different types of witnesses. The expert witness and hearsay witness may replace or supplement the occurrence witness—the child—as the primary source of information for the fact finder. The need to judge the credibility and reliability of the occurrence witness's account at trial lessens because substitutes for that evidence have been adopted. Credibility need not be evaluated solely through the occurrence witness's demeanor; the emphasis is on the fact finder's assessment of the hearsay

\footnote{45. \textit{E.g.}, \textit{State v. McNeely}, 314 N.C. 451, 454-57, 333 S.E.2d 738, 740-42 (1985) (providing an example of cross-examination of a child that convinced the court she was not qualified to be a witness); \textit{State v. Sheppard}, 197 N.J. Super. 411, 416, 484 A.2d 1330, 1332 (1984) (psychiatrist testifying that a 10-year-old child's testimony should be presented by videotape because it would improve its accuracy, and providing his opinion that children and adults react in opposite ways to the courtroom's trappings and formalities—adults are more likely to be truthful and children are less likely because they are fearful, guilty, anxious, and traumatized). \textit{See generally} Goodman & Helgeson, \textit{Child Sexual Assault: Children's Memory and the Law}, 40 U. MIAMI L. REV. 181, 201 (1985); Pierron, K.S.A. 60-460(dd): The New Kansas Law Regarding Admissibility of Child-Victim Hearsay Statements, 52 J. KAN. B.A. 88, 89 (1983) ("A gap between what is reliable and what is admissible has developed. Children may often be able to tell who brutalized them with great believability and truthfulness. However, the information is not always admissible if the child is not qualified as a witness."); Skoler, \textit{New Hearsay Exceptions for a Child's Statement of Sexual Abuse}, 18 J. MARSHALL L. REV. 1, 37, 47 (1984); \textit{Note, A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases}, 83 COLUM. L. REV. 1745, 1751 (1983).}

\footnote{46. \textit{See supra} note 43; \textit{infra} notes 122-51 and accompanying text.}

\footnote{47. \textit{See infra} notes 122-41 and accompanying text.}
witness's account of events, bolstered by the expert witness's description of the general nature and pattern of child sexual abuse.\textsuperscript{48}

The change in witnesses necessarily has modified the tools of the advocate. Cross-examination of the victim-witness to test perception, bias, and motive may not be available in the case.\textsuperscript{49} Although the hearsay witness and expert can be cross-examined, the focus of the cross-examination is different: the inquiry is not directed at an occurrence witness's observation of events, but at the hearsay witness's or expert witness's interpretation of what the child has told them. The advocate tests and probes these witnesses' accounts of and conclusions about what happened, rather than the facts that comprise the incident, as is done with an occurrence witness. Thus, a buffer has been placed between the victim-witness and the fact finder.

Modification of the adversary system to accommodate children has been hailed as an important means of ensuring the vindication of children's right to be free from abuse.\textsuperscript{50} How these changes work in practice must be examined closely to be certain that the goals of the adversary system—scrutiny of evidence and impartiality before the time of judgment—have been preserved.

The fact finder may be less able and less likely to act in accordance with the goals of the adversary process as a result of the reforms. Eliminating the ability to probe a firsthand account results in the presentation of a sanitized version of those observations to the fact finder. Often, the system has asked the person who gives that presentation to decide whether sexual abuse occurred.\textsuperscript{51} The fact finder may take the witness's affirmative re-

\textsuperscript{48} E.g., State v. McCafferty, 356 N.W.2d 159 (S.D. 1984).

\textsuperscript{49} The child's statement describing an act of sexual contact or rape is admissible if certain conditions are met. \textit{See supra} note 5; \textit{infra} note 111. If the child is unavailable as a witness, his or her statement is admissible if there is corroboration of the act. \textit{See} State v. Spronk, 379 N.W.2d 312, 313-14 (S.D. 1985).

\textsuperscript{50} Skoler, \textit{supra} note 45, at 38-46 (arguing that new hearsay exceptions for child victims of sex crimes are needed because the out-of-court statement of a child may be more reliable than an in-court statement). \textit{But see} Schultz, \textit{The Child Sex Victim: Social, Psychological and Legal Perspectives}, 52 \textit{Child Welfare} 147, 150 (1973) (stating that the trauma to a child is caused not only by society's use of the victim to prosecute the offender, but also by parents' reactions; i.e., parents may need to prove to themselves and to society that their child did not participate in sexual activity voluntarily and that they were not failures as parents).

\textsuperscript{51} E.g., State v. McCafferty, 356 N.W.2d 159 (S.D. 1984) (admitting the account of a clinical psychologist, who had been asked to validate the claim of abuse, because the child was unavailable); \textit{see also} Skoler, \textit{supra} note 45, at 17; \textit{infra} notes 83-91 and accompanying text (discussing guidelines for expert investigation of abuse).
sponse as conclusive on that question of fact. In effect, the affirmative response tells the fact finder that the alleged events occurred, so there is no need to await the complete presentation of the evidence.

In which cases does the potential undercutting of the goals of the adversary process occur? The most likely situations are those where the checks built into the adversary system are not able to function: when testing and probing are impossible or ineffective, or when the testimony is presented in such a manner that the fact finder is permitted to reach a conclusion without hearing the full presentation. Although this can occur in any factual situation, it is most likely when the system asks the intervenor to perform multiple or poorly-defined roles and places heavy reliance on the intervenor because of the lack of physical or other corroborating evidence.

II. THE INTERVENOR IN CHILD SEXUAL ABUSE CASES

Although the courts generally embrace innovative theoretical developments concerning the dynamics of child sexual abuse and admit expert testimony describing it, some courts express reservations about the evidence and how it has been derived.

A. Recent Cases

In People v. Roscoe, the court refused to allow a psychologist to testify in the government's case-in-chief about the specific facts of a child sexual abuse case or to inform the jury of his diagnosis that the complainant was the victim of sexual abuse.


54. E.g., Colgan v. State, 711 P.2d 533 (Alaska Ct. App. 1985) (stating that the validation of child sexual abuse by a therapist may not have gained scientific acceptance, but it was not reversible error to admit); Hall v. State, 15 Ark. App. 309, 692 S.W.2d 769 (1985).


56. In Roscoe, the victim was a 15-year-old boy who allegedly was molested by his neighbor on several occasions. Although the defendant did not testify, he denied culpability through his attorney. Id. at 1096, 215 Cal. Rptr. at 47. The government called the boy's therapist in its case-in-chief to discuss in detail the account given by the victim.
In reaching this determination, the court relied heavily on People v. Bledsoe, which it interpreted as establishing a broad prohibition against "misuse of psychologists' testimony." The misuse refers to the introduction of the diagnosis of a psychologist who is engaged in a therapeutic relationship with the victim and thus has a professional duty to help him. The Roscoe court characterized testimony of this type as an effort by the government to have the psychologist decide the case for the jury—that

and to explain why he concluded that the boy was a victim of ongoing molestation. Id. at 1098 n.2, 215 Cal. Rptr. at 49 n.2. The court ruled that the admission of the testimony was error, although not one requiring reversal. The court added that expert testimony would have been admissible as rebuttal evidence or to describe child sexual abuse in general terms. Id. at 1100, 215 Cal. Rptr. at 50.

57. 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984). The question presented in Bledsoe was the admissibility of evidence of rape trauma syndrome in the government's case-in-chief as substantive evidence to prove a rape had occurred. The court rejected the use of rape trauma syndrome evidence for that purpose, although it reserved judgment on the evidence's admissibility for other purposes.

In Bledsoe, the court focused on whether rape trauma syndrome testimony would meet the tests for admissibility of new scientific evidence set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). It acknowledged that such testimony had been offered in numerous cases to rebut the defense of consent, but distinguished these cases by noting that in the case at bar, the evidence was not offered to rebut misconceptions about the presumed behavior of rape victims, but to prove that a rape had occurred. The court distinguished evidence of rape trauma syndrome from other scientific methods of proof, such as battered child syndrome, and concluded that rape trauma syndrome

was not devised to determine the "truth" or "accuracy" of a particular past event—i.e., whether, in fact, a rape in the legal sense occurred—but rather was developed by professional rape counselors as a therapeutic tool, to help identify, predict and treat emotional problems experienced by the counselors' clients or patients.

36 Cal. 3d at 249-50, 681 P.2d at 300, 203 Cal. Rptr. at 459. The court emphasized that the role of the counselor is to provide services to the client, not to make a judgment about whether a "real" rape occurred or the victim's credibility. Id. at 251, 681 P.2d at 300, 203 Cal. Rptr. at 459.

The court went on to remark that rape counselors normally do not probe inconsistencies in their clients' descriptions of the facts or conduct independent investigations to confirm the allegations, id., for their function is merely to help their clients. Therefore, the historical accuracy of the client's account is not of great importance to them. The court concluded that because rape trauma syndrome was developed for purposes different from those of the battered child syndrome and does not consist of a narrow set of criteria or symptoms whose presence demonstrates the client has been raped, it is inadmissible to prove the witness was raped. Id. at 251-52, 681 P.2d at 300-01, 203 Cal. Rptr. at 460; see also State v. Saldana, 324 N.W.2d 227 (Minn. 1982); State v. Taylor, 663 S.W.2d 235 (Mo. 1984). But see State v. Marks, 231 Kan. 645, 647 P.2d 1292 (1982). Cf. State v. McQuillen, 236 Kan. 161, 175, 689 P.2d 822, 832 (1984) (Schroeder, C.J., dissenting) (urging the court to reexamine its decision in Marks allowing the testimony of rape trauma syndrome). See generally Massaro, Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony, 69 MINN. L. REV. 395 (1985); Note, Rape Trauma Syndrome, 7 HARV. WOMEN'S L.J. 301 (1984).

58. 168 Cal. App. 3d at 1100, 215 Cal. Rptr. at 49.
is, to tell the jury to accept the doctor's diagnosis and then conclude the defendant is guilty. 69

The court's underlying concern in Roscoe was that a jury would defer to a mental health professional who was not under a duty to investigate the accuracy of the patient's account. The court theorized that the professional's task was to assist the complainant with his emotional needs, not to make a judgment that an offense occurred in a legal sense. Thus, although an expert's description about characteristics and behavior of abuse victims in general would be proper, especially as rebuttal evidence, the use of the testimony as substantive evidence in the case-in-chief was not appropriate. 60

People v. Payan 61 also analyzed the misuse of testimony given by an expert who stands in a therapeutic relationship with the purported victim. In Payan, the trial court permitted a physician to testify that three children had been sexually molested. The physician's opinion was based on a review of police and medical reports and a preliminary hearing transcript, not on interviews with the children. The appellate court noted that the physician did not have a patient-therapist relationship with the children and referred to the victims as a class in reaching the conclusion, 62 thus overcoming two hurdles set by Bledsoe. The court expressed some reservations about the doctor giving an opinion on whether the children had been molested, 63 but con-

59. Id. at 1100-01, 215 Cal. Rptr. at 50.
60. Id.
62. Id. at 130. As the court explained in People v. Roscoe, 168 Cal. App. 3d 1093, 1099, 215 Cal. Rptr. 45, 49 (1985):

The language [of Bledsoe] suggests—although it does not explicitly require—that the opinion testimony must be based upon the literature in the field and the general professional experience of the witness rather than upon an analysis and diagnosis based upon a review and evaluation of the facts in the case at hand. Thus, for example, a victim whose credibility is attacked for initially denying that he had been molested could be rehabilitated by expert testimony that such denials are more likely than not in molestation cases. The testimony would not be that this particular child was a victim of molestation, causing him to react in a certain way, but rather that as a class victims of molestation typically make poor witnesses, and are reluctant to disclose or discuss the sordid episodes.

63. In resolving the problem of admitting the physician's opinion about children whom she had never seen, the court noted that an expert may base an opinion upon hearsay and may rely on reports and opinions of other physicians. 220 Cal. Rptr. at 132. It commented that simply because the expert opinion coincides with an ultimate issue of fact, including the credibility of a witness, that would not make it inadmissible: Id. at 133. The court cautioned that expert testimony on child sexual abuse may not always be admissible, but that it is properly admitted if it will aid the jury in understanding factors that influence a child's behavior or in explaining the presence or absence of medical findings. Id.

In Payan, the three children testified about the abuse, several witnesses related hearsay statements made by the children, and a second physician testified about their physi-
cluded the trial court’s “careful admonishments” to the jury had cured any error.64

Roscoe and Payan highlight an unspoken concern that is developing in some circles about the limits of expert testimony in child sexual abuse cases.65 Although these courts described the problem as a potential misuse of expert testimony, other courts are less specific in their rationale for disapproving the use of such testimony. For example, in State v. Logue,66 the trial court permitted a social worker to testify that, in her opinion, the four-year-old complainant had gained his sexual knowledge through his experience with the defendant. The South Dakota Supreme Court held that the possibility of unfair prejudice outweighed the probative value of the testimony, and that the trial court had abused its discretion in admitting the opinion.67 The

cal condition. The expert testified in detail about child sexual abuse and about the child sexual abuse accommodation syndrome in general terms before being asked her opinion about whether or not these children had been molested. The court took great pains to discuss the general testimony on sexual abuse and to describe its importance for cases of this type. Id. at 128. The court’s conclusion that the admission of the opinion on molestation was not error seems to have been compelled more by the quality of the other evidence in the case than by the propriety of such an opinion in itself.

The court did not address whether the physician’s opinion would have been given credence in the medical community. The “validation” process—determining the validity of a complaint of sexual abuse—seems to anticipate a combination of investigative interviewing and credibility assessment of the child. Sgroi, Porter & Blick, Validation of Child Sexual Abuse, in HANDBOOK, supra note 2, at 39, 40. Personal interviews are described as the preferred method for accomplishing this, because of the difficulty in assessing the factual basis of the allegations and fitting them into the patterns and dynamics of sexual abuse. It appears inconsistent to have developed a detailed method for validation of child sexual abuse claims that relies on the child as the primary data source, and then to circumvent it in the manner employed in Payan. Reliance on secondary sources is appropriate for some aspects of managing child sexual abuse cases, such as peer review. But permitting this kind of expert opinion in the setting of a criminal case appears to weaken the foundation of reliability and helpfulness that is the prerequisite to admissibility. The limiting instructions given in Payan and the quality of other evidence in the case appear to have been the basis for the court’s refusal to find error. 64. The instructions were that the physician had not personally interviewed the children, that her opinion was based solely on her review of the records, and that the jury must determine for itself whether the facts assembled by the doctor in reaching her conclusions were supported by the evidence. 220 Cal. Rptr. at 128.

Importantly, the court distinguished testimony on child sexual abuse accommodation syndrome, see infra note 125, from that on rape trauma syndrome, see supra note 57, arguing that the former describes a method of clinically diagnosing abuse and is not a therapeutic tool, so its admission into evidence would not be a misapplication of medical findings. 220 Cal. Rptr. at 129.

66. 372 N.W.2d 151 (S.D. 1985).
67. Id. at 157.
court expressed general discomfort with the evidence because it was not, and could not be, supported by any claim of scientific exactitude or empiricism. It agreed that jurors are at a disadvantage in judging the credibility of children in such cases, but concluded that couching the social worker's assessment in the guise of an expert opinion "lent a stamp of undue legitimacy to her testimony." A complicating factor not specifically addressed by the court was that the social worker served as the investigator, hearsay chronicler, and expert witness.

The themes developed in these cases reveal some of the difficulties courts experience with the participation of professionals as witnesses in child sexual abuse cases. Potential misuse of the expert testimony is at the center of the controversy, with some courts emphasizing the therapeutic relationship, and other courts expressing a more generalized fear that the expert's non-scientifically-based conclusions will improperly sway the jury. In expressing concern over the misuse of expert testimony, the courts hint at a potential impediment to the resolution of child sexual abuse cases in court: the performance of multiple or poorly-defined roles by the intervenors. This concern over the functions performed seems to be grounded in a commitment to the proper working of the adversary system—a commitment that the system maintain the testing and probing of the evidence on both sides of a dispute and preclude the fact finder from reaching premature conclusions on only a partial or biased presentation of evidence.

B. Functions Performed by the Intervenor

In recent years, the legal system has asked intervenors to perform any or all of four distinct functions in cases alleging child sexual abuse. First, the individual conducts an investigation to determine whether or not the acts occurred. In the past, law enforcement officials performed this task, with occasional advice from protective service workers. Now, in many jurisdictions, po-
lice departments defer to a child sexual abuse professional who performs the investigation for the state. Second, the child sexual abuse professional preserves in some fashion the child's account of events. 72 If allowed by the hearsay rules of the jurisdiction, the professional may be asked to recount the child's story at the trial of the alleged perpetrator. Third, the intervenor serves as an expert witness at trial to explain objectively to the fact finder what child sexual abuse is and how it occurs. 73 Frequently, this amounts to a description of the circumstances under which abuse ordinarily takes place, thus destroying myths about sexual abuse. Finally, the professional may serve as an advocate for the child. 74 Frequently, he or she will be an intermediary between the child and the prosecution, court, and jury. When needed, the advocacy role includes physical protection as well as emotional support. In effect, the professional becomes the representative and spokesperson for the child.

1. Investigative function—Traditionally, the police have investigated alleged criminal acts of any type. 75 Investigation permits a societal response to the allegations through apprehension and punishment of the offender or a determination that no crime has been committed. Police investigators ordinarily use a number of methods to determine what happened, including:

the search and recording of the crime scene, the collection and preservation of evidence, the application of modus operandi techniques, the uncovering of all sources of information, the surveillance of suspects, their interview and interrogation, the interview of witnesses and victims, and the obtaining of search and arrest warrants through the courts. 76

Experience with cases of child sexual abuse has led to a re-evaluation of the roles of law enforcement officers in such investigations. The facts of child sexual abuse cases often do not fit the pattern of traditional crimes, so many investigative methods

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72. See infra notes 93-121 and accompanying text.
73. See infra notes 122-41 and accompanying text.
74. See infra notes 177-90 and accompanying text.
75. Responsibility for investigating criminal acts generally is assigned by statute. E.g., S.D. Codified Laws § 22-1-1(20) (Supp. 1986) (defining law enforcement officer as one "who is responsible for the prevention or detection of crimes"); id. § 23-3-12 (1979) (duty of the division of criminal investigation to prevent and detect violations of the laws of the state).
are ineffective. Physical evidence may have disappeared; the crime scene may yield nothing of importance, making a search warrant unnecessary; and the surveillance of suspects is irrelevant if the child knows the identity of the perpetrator.\textsuperscript{77} In such cases, the interviews of the victim, witnesses, and the victim's family become much more important than in cases that do not involve sexual abuse.\textsuperscript{78}

Police techniques for interviewing victims of all types of sex crimes have been criticized in recent years. In children's cases, the insensitivity and frequency of the interviews are the most often cited problems.\textsuperscript{79} Motivated in large part by the complaints of adult rape victims that they have been revictimized by the investigative process,\textsuperscript{80} police departments have sought alter-

\textsuperscript{77} Compare State v. Garay, 453 So. 2d 1003 (La. App. 1984) (case based on the child's testimony about defendant whom she knew and the testimony of social workers in orphanage where the victim resided; no crime scene evidence or medical evidence; identification not in issue) and State v. Wrightington, 323 N.W.2d 793 (Minn. 1982) (child reported the incident to her mother who failed to act; five days later, the child informed a school counselor who told police; case based on circumstantial evidence not derived from police investigation) and Commonwealth v. Brenner, 18 Mass. App. Ct. 930, 465 N.E.2d 1229 (1984) (indecent assault report made by a seven-year-old girl three to four months after the incident; case was based on a fresh complaint of child to mother, friend, and friend's mother) with State v. Williams, 598 S.W.2d 830 (Tenn. 1980) (complaint was made shortly after the incident; police search of the crime scene revealed physical evidence (tissues) and a medical exam of the victim showed anal intercourse had occurred) and State v. R.H., 683 P.2d 269 (Alaska App. 1984) (police interviews of 13-year-old girl).

Often the police will retain the task of questioning the defendant, \textit{see}, e.g., State v. Bounds, 71 Or. App. 744, 694 P.2d 566 (1985), although the intervenor may do so in some circumstances, \textit{e.g.}, State v. Neblock, 75 Or. App. 587, 706 P.2d 1020 (1985) (social worker who received the complaint interviewed the child and then interviewed the alleged perpetrator; at trial, the defendant argued that the social worker's statement to him, saying that he had to take responsibility for his actions and get treatment, was a promise of treatment instead of incarceration in return for a confession).

\textsuperscript{78} Berliner & Barbieri, \textit{The Testimony of the Child Victim of Sexual Assault}, J. Soc. Issues. Summer 1984, at 125; Sgroi, Porter & Blick, \textit{supra} note 63, at 48 ("[I]nvestigative interviewing is the most important component of the validation process. It . . . affords the best opportunity to collect pertinent information . . . [because in most cases,] there will be little or no physical evidence . . . to support the allegation").

\textsuperscript{79} \textit{See} J. Bulkley & H. Davidson, \textit{supra} note 8, at 9-13 (discussing negative aspects of legal intervention and suggesting more sensitive techniques); V. De Francis, \textit{supra} note 9, at 4 (stating that repeated police interviews and the fervor of investigators to apprehend the offender may cause little or no concern to be shown for the child victim); Porter, Blick & Sgroi, \textit{Treatment of the Sexually Abused Child}, in \textit{HANDBOOK}, \textit{supra} note 2, at 115-16 (skepticism by police and others in authority is a problem for the child); \textit{Comment, Incest and the Legal System: Inadequacies and Alternatives}, 12 U.C. Davis L. Rev. 673, 680-84 (1979); \textit{see also} Graves & Sgroi, \textit{Law Enforcement and Child Sexual Abuse}, in \textit{HANDBOOK}, \textit{supra} note 2, at 321 (advising law enforcement officers how to conduct interviews with children, emphasizing establishing rapport, interviewing for facts, and evaluating victims).

\textsuperscript{80} \textit{See} S. Brownmiller, \textit{Against Our Will} 364-66 (1975); Berger, \textit{Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom}, 77 Colum. L. Rev. 1, 41 (1977);
natives to their traditional involvement in such sex crime investigations. One option has been to provide special training for officers who interrogate victims of sex crimes. One option has been to provide special training for officers who interrogate victims of sex crimes. Other departments have elected to conduct a joint investigation or to defer to social service agencies, particularly where a child victim is involved. Thus, in many cases, intervenors have become adjuncts or replacements for the police in this stage of the investigative process.

Faced with the challenge of investigating allegations of child sexual abuse, experts in the field have developed guidelines to be followed. The focus differs markedly from the traditional police investigation—the statement of the victim and the investigator's familiarity with theories about the dynamics of child sexual abuse are the key factors. Validation by the intervenor of a complaint of child sexual abuse often begins with an investigative interview with the child for purposes of both fact-finding and creating a therapeutic effect on the child. The interview provides the opportunity to obtain the child's account of the sexual abuse and to allow the interviewer to observe and evaluate the child's demeanor.


81. E.g., Boerma, How to Overcome Barriers and to Develop Creative and Innovative Approaches in the Prosecution of Child Sexual Abuse Cases, in Papers from National Policy Conference, supra note 8, at 35.

82. For example, in State v. Logue, 372 N.W.2d 151 (S.D. 1985), the social worker acknowledged that she had conducted the investigation for the state. Id. at 154-55; see also J. Bulkley & H. Davidson, supra note 8, at 9-13; Graves & Sgroi, supra note 79, at 310.


Certainly, in a traditional police investigation, interviews with the victim are of paramount importance. But with allegations of child sexual abuse, the other evidence normally found to support the claim is absent, and the investigator is forced to rely on his or her knowledge of the dynamics of sexual abuse as supporting evidence. This is analogous to the use of modus operandi techniques. See infra note 92.

84. See Sgroi, Porter & Blick, supra note 63, at 40; Sgroi, supra note 83, at 91.

85. See Sgroi, Porter & Blick, supra note 63, at 48 (arguing that although the primary purpose of the interview is fact-finding, there will be a clinical effect on the child that can be either traumatic or therapeutic, so the interviewer should structure the interview to be therapeutic).

86. See id. at 69. Dr. Sgroi explains that in conjunction with the fact-finding task, the intervenor must assess the credibility of the child. In Dr. Sgroi's framework:

[d]etermining the validity of an allegation of child sexual abuse is first and foremost a matter of belief. You either believe the child's story or you do not. If you require that there be corroboration of the child's story by physical evidence, wit-
In conjunction with assessing the credibility of the child through his or her demeanor and response to questions, the interviewer should review the child's account in light of the commonly described behavioral indicators of child sexual abuse. There must also be an analysis of the dynamics of abuse, including the pattern of abuse, the behavior of the abuser, the possibility of multiple incidents over time, a progression of sexual activity, elements of secrecy, pressure or coercion by the abuser, and detailed descriptions of sexual behavior. There is no precise formula for measuring the existence of abuse based on these factors. The presence or absence of one or more indicators is not conclusive, but is only one piece of evidence for the investigator to consider.

Investigators have an immensely difficult task when the only pieces of evidence are the child's allegation and an account that fits a recognized pattern, unaccompanied by physical evidence or other factors to support the claim. In such cases, the conclusion that the allegation is founded rests in large part on factors that are not independently verifiable. More importantly, the inves-

87. The behavioral indicators of child sexual abuse include: (1) overly compliant behavior; (2) aggressive behavior; (3) pseudomature behavior; (4) hints about sexual activity; (5) sexually aggressive behavior or persistent and inappropriate sexual play with peers, toys, or themselves; (6) detailed and age-inappropriate understanding of sexual behavior; (7) early arrival and late departure from school; (8) poor peer relationships; (9) lack of trust; (10) nonparticipation in school and social activities; (11) inability to concentrate in school; (12) sudden drop in school performance; (13) extraordinary fear of males; (14) seductive behavior; (15) running away from home; (16) sleep disturbances; (17) regressive behavior; (18) withdrawal; (19) clinical depression; and (20) suicidal feelings. Sgroi, Porter & Blick, supra note 63, at 40-41; see also R. Kempe & C. Kempe, supra note 1, at 51-53; Berliner, Blick & Bulkley, Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Development, in CHILD SEXUAL ABUSE AND THE LAW 166, 171-72 (J. Bulkley 4th ed. 1983).

88. Dr. Sgroi has summarized the dynamics of abuse as follows:

Child sexual abuse nearly always involves a known perpetrator who uses nonviolent means (pressure, persuasion, bribery) based on his or her position of power or authority to engage a child in sexual behavior. The sexual activity will probably begin with less intimate behavior (exposure, masturbation, fondling) and progress to various types of sexual penetration.... There will probably be multiple episodes of sexual activity between the perpetrator and the child over time. The perpetrator is likely to pressure or persuade the child to keep their sexual activity a secret from others. The child is likely to maintain the secrecy over a long period of time....


89. Sgroi, Porter & Blick, supra note 63, at 40.

90. Id. at 69.
tigator's judgment that the complaint is truthful takes on greater significance as the case proceeds through the criminal justice system, for that conclusion may singularly determine the case outcome. Such a result is especially likely where other evidence at trial is minimal.\footnote{E.g., State v. Logue, 372 N.W.2d 151 (S.D. 1985) (social worker gave her opinion that the child had gained his sexual knowledge from experience with the defendant).}

The methods used by the child sexual abuse professional as investigator have been a marked departure from investigative methods of the past. The challenging, probing police officer, who exhibits skepticism toward the victim's account and seeks corroboration of it through physical evidence, has been replaced by a person with an accepting, supportive demeanor, who may be satisfied that the complaint is validated if the child is believable and the account fits a recognized pattern of sexual abuse. Moreover, the use of the intervenor's judgment that a crime has been committed as evidence in the prosecution of the case is a significant change as compared to the impact of an investigating officer's conclusion. Ordinarily, the police investigator is limited to fact-based testimony at trial, not opinion testimony that the crime occurred as the victim has alleged.\footnote{A law enforcement officer may be qualified to give an expert opinion on certain issues—e.g. modus operandi—that would be beyond the experience of most jurors. \textit{E.g.}, United States v. Maher, 645 F.2d 780 (9th Cir. 1981). Ordinarily, that testimony is restricted to a general description of methods and techniques, and does not include the officer's opinion on the credibility of specific witnesses in the case. Testimony on the dynamics of sexual abuse may be analogous to the law enforcement officer's description of modus operandi, but the addition of an opinion on credibility by the child sexual abuse intervenor is a significant departure from the limits of that testimony. \textit{Compare} People v. McDaniels, 107 Cal. App. 3d 898, 902-05, 166 Cal. Rptr. 12, 14-16 (1980) \textit{with} People v. Brown, 116 Cal. App. 3d 820, 827-29, 172 Cal. Rptr. 221, 224-25 (1981). \textit{See also} Note, \textit{Police Expert Witnesses and the Ultimate Issue Rule}, 44 La. L. Rev. 211 (1983).}

The tenor of the investigation has changed as child sexual abuse professionals have become involved in the process. Investigation is but one of the tasks that the system has assigned them, however, and the intertwining of the investigative role...
with their other functions should be explored to develop a full picture of their participation in child sexual abuse cases.

2. **Chronicler**— Generally, statutes assign the duty to investigate allegations of child sexual abuse to a state agency. As a practical matter, the intervenor conducts an extensive interview not only to discover the child’s version of events, but also to transcribe it in some form for later use in the criminal process. Preserving the child’s account may be by a method as sophisticated as videotaping, or as mundane as written notes.

The interviewer’s version of the child’s account may be used in pretrial proceedings or in the trial itself. In many cases, the statement is repeated in front of a grand jury and at the preliminary hearing. Occasionally, the interviewer uses the child’s statement informally to convince the defendant to attend treatment or to enter a guilty plea. At trial, the role of the interviewer in testifying about the child’s statements will depend on the statutes in the jurisdiction that admit hearsay and on the availability of the child to testify. If admitted, the interviewer’s testimony may be offered in addition to other hearsay versions of the events in question or may be the sole account, depending on how the events were reported and investigated.

a. **Hearsay rules**— The statements of child witnesses in sexual abuse cases may fall under the residual exceptions to...
Moreover, if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness, if she has sense and understanding to know the nature and obligations of an oath; or even to be sensible of the wickedness of telling a deliberate lie. Nay, though she hath not, it is thought by Sir Matthew Hale that she ought to be heard without oath, to give the court information; and others have held, that what a child told her mother, or other relations, may be given in evidence, since the nature of the case admits frequently of no better proof.

4 W. BLACKSTONE, COMMENTARIES *214. Blackstone concedes that such a proposal had not received wide acceptance in his day, and, in fact, hearsay testimony of the account of a child not competent to take an oath would not be permitted in such a situation. He advises that if a child is permitted to testify about such an offense, there "should be some concurrent testimony of time, place and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion." Id.; see also Goodman, supra note 11, at 9.

101. FED. R. EVID. 803(24) (declarant available); FED. R. EVID. 804(b)(5) (declarant unavailable). The catchall exceptions to the hearsay rule were enacted to codify the discretion that judges had claimed over issues of admissibility before the enactment of the Federal Rules of Evidence. The Rules provide that, where evidence is proffered, but does not fit into the specific categories delineated in Rules 803 and 804 as exceptions to the prohibition against hearsay, the judge is granted discretion to admit the testimony if it has circumstantial guarantees of trustworthiness equivalent to the listed exceptions. Then the court must determine that (a) the statement is offered as evidence of a material fact, (b) it is more probative on the point for which it was offered than any other evidence that the prosecution could secure through reasonable means, and (c) the general purposes of the rules and the interests of justice would best be served by admission. The proponent must also give notice to the defendant of an intention to offer the hearsay under a residual exception. See 4 J. WEINSTEIN & M. BERGER, supra note 29, ¶ 803(04); Imwinkelried, The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence, 15 SAN DIEGO L. REV. 239 (1978); see also State v. Bounds, 71 Or. App. 744, 694 P.2d 566 (1985) (holding that the mother's account of an unavailable four-year-old child's statement was admissible under the residual exception); State v. Taylor, 103 N.M. 189, 704 P.2d 443 (Ct. App. 1985) (holding that although part of a three-year-old child's statement was admissible under the residual exception, identification of the defendant as perpetrator did not meet the tests for admissibility and must be excluded).

102. Only about half of the states have adopted the Federal Rules of Evidence. Those that have not adopted these rules rely on statutory or common law evidentiary principles to resolve questions of admissibility. In many instances, the common law rules overlap exceptions listed in the Federal Rules. See supra notes 103-06 and accompanying text. See generally Graham, supra note 6, at 22.


statement made for medical diagnosis, or fresh complaint. Although many courts have relied on these provisions to admit children's statements, critics charge that they are inadequate for sexual abuse cases. Several commentators argue that the residual exceptions are unsatisfactory because (1) courts interpret them to apply only in unusual cases; (2) they were not intended to create a new class of exceptions; and (3) courts still must make the determinations specified in the hearsay rule, so they will not necessarily admit the statements. Likewise, the specific exceptions listed in the hearsay rule have been found ineffective. The language and the purpose of the exceptions have posed barriers to the admission of testimony in many cases,
although, in many others, the courts have given the rules an expansive interpretation in order to admit the evidence.\textsuperscript{109}

Recently, several states have adopted the suggestion that hearsay testimony in child sexual abuse cases be admitted pursuant to a specific rule.\textsuperscript{110} This new exception has been in lieu

treats children as if they were adults because it is built on the premise that they will have the psychology, behavior, and experience of adults, and will react accordingly).

\textsuperscript{109.} \textit{E.g.}, People v. Stewart, 39 Colo. App. 142, 568 P.2d 65, 68 (1977) ("Moreover, as regards sex crimes against children there is authority that the rule be applied more liberally."); State v. Smith, 315 N.C. 76, 86-90, 337 S.E.2d 833, 841-43 (1985) (approving a "broad and liberal" interpretation of what constitutes an excited utterance when applied to young children); State v. Ramos, 203 N.J. Super. 197, 496 A.2d 386 (1985); State v. Logue, 372 N.W.2d 151 (S.D. 1985) (where the declarant is a young child, the mere lapse of time does not disqualify the statement as an excited utterance); see also 2 C. Torcia, \textit{Wharton's Criminal Evidence} § 300 n.31 (13th ed. 1972).

\textsuperscript{110.} A typical statute reads:

\textbf{STATEMENT OF SEX CRIME VICTIM UNDER AGE TEN.} A statement made by a child under the age of ten describing any act of sexual contact or rape performed with or on the child by the defendant, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings against the defendant in the courts of this state if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or
(b) Is unavailable as a witness.

However, if the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

No statement may be admitted under this section unless the proponent of the statement makes known his intention to offer the statement and the particulars of it, including the name and address of the declarant[,] to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.


Kansas has enacted a different type of statute altogether. It creates an exception for the statements of a child in a criminal proceeding or in a proceeding to determine whether the child is deprived or in need of care. It reads:

Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible except: ... (dd) In a criminal proceeding or in a proceeding pursuant to the Kansas juvenile offender's code or in a proceeding to determine if a child is a child in need of care under the Kansas code for care of children, a statement made by a child, to prove the crime or that the child is a juvenile offender or a child in need of care, if: (1) The child is alleged to be a victim of the crime or offense or a child in need of care; and (2) the trial judge
Such "child hearsay" statutes express a legislative intent that statements of young children that describe acts of sexual abuse and that meet the threshold requirements—the time, content, and circumstances of the statement must provide sufficient indicia of reliability—should be admitted at trial. These statutes, regardless of their efficacy, establish the ideological foundation for the admission of children's accounts of sexual abuse.

b. Obtaining and using information—The child sexual abuse professional is one of many sources for obtaining information about sexual abuse from a child. With the renunciation of this function by many law enforcement agencies, however, the

finds, after a hearing on the matter, that the child is disqualified or unavailable as a witness, the statement is apparently reliable and the child was not induced to make the statement falsely by use of threats or promises.

If a statement is admitted pursuant to this subsection in a trial to a jury, the trial judge shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, any possible threats or promises that might have been made to the child to obtain the statement and any other relevant factor.


111. WASH. REV. CODE § 9A.44.120 (Supp. 1987).
113. See, e.g., State v. Thompson, 379 N.W.2d 295 (S.D. 1985), where the defendant was convicted of rape and sexual contact with his son. The state relied on the child hearsay exception, S.D. CODIFIED LAWS § 19-16-38 (1987), to introduce statements of the child made to his mother and to a police officer. The state made an offer of proof of the contents of the statements. The defense was permitted to cross-examine the officer, but not the mother. The defense motion to exclude the statements was denied. Accordingly, the state offered them as substantive evidence in its case-in-chief. On appeal, the supreme court reversed and remanded, stating that the hearsay statute contemplates a trial court determination of the reliability of the statements, including an assessment of the age and maturity of the child, the nature and duration of abuse, the relationship of the child to the offender, the reliability of the assertions, and the reliability of the child witness. 379 N.W.2d at 297. It may not simply issue a perfunctory denial of the defense motion to exclude without making the requisite findings. Id. at 298; accord State v. Spronk, 379 N.W.2d 312 (S.D. 1985).
114. Courts generally have adopted the ideological foundation of these statutes. See, e.g., State v. Myatt, 237 Kan. 17, 22, 697 P.2d 836, 841 (1985) (declaring that a child's statements about sexual abuse are inherently reliable; children will not persist in lies about sexual abuse and do not have enough information about sexual matters to lie about them); State v. McCafferty, 356 N.W.2d 159, 164 (S.D. 1984) (concluding that a young child is unlikely to fabricate a graphic account of sexual activity because such activity is beyond the realm of the child's experience).

Courts have not specifically relied on expert testimony at trial to support their justifications for finding the information reliable. Apparently, they have relied on their own research into child sexual abuse literature. See infra notes 122-41 and accompanying text for a discussion of the courts' use of expert testimony.
child sexual abuse professional has become the most important official agent for discovering and preserving the child’s account. Unofficial sources, such as parents and siblings, also are critical participants in the gathering of information about the events that may be used in court as hearsay testimony. In many cases, these unofficial sources obtain a preliminary account and the official agent conducts a further investigation and questioning of the child.\textsuperscript{115} It is important to keep in mind that the intervenor’s function at this point is not only to investigate what happened, but also to preserve in some fashion the substance of the child’s account for use in subsequent proceedings.

In an effort to preserve the child’s account accurately and completely, and to preclude challenges to the interviewer because of bias, several states have enacted legislation authorizing the videotaping of the interviews between the intervenor and child.\textsuperscript{116} Such statutes anticipate that these tapes might be used at trial instead of or in addition to the child’s testimony.\textsuperscript{117} In most jurisdictions, sophisticated recording methods may be an option, but are not employed routinely.\textsuperscript{118} The usual procedure is for the intervenor to conduct one or more interviews with the child to establish a relationship that will enable the child to confide in the interviewer about the abuse.\textsuperscript{119} The interview or series of interviews then will be condensed into a narrative report that will be the source of the hearsay testimony given at trial.

The function of gathering and preserving the child’s account appears at first blush to fit neatly into the investigative service performed by the intervenor. The dual roles of investigator and hearsay recorder often have been accomplished by the same individual with little potential for undermining the goals of the

\textsuperscript{115} See Sgroi, Blick & Porter, supra note 2, at 17-21 (describing the typical circumstances of the disclosure of abuse).

\textsuperscript{116} See supra note 6.

\textsuperscript{117} But cf. Graham, supra note 6, at 62-67 (arguing that videotaping creates not only confrontation issues, but problems with distortion and exclusion of evidence).

\textsuperscript{118} Some child advocates have argued that technological innovations in child sexual abuse cases generally are not as effective as, for example, the use of the child sexual abuse hearsay exception. A videotaped deposition may place the child and defendant in close proximity without the judge being present, so the child’s trauma may be increased. The child still may have to testify at trial. Whitcomb, supra note 8, at 18-21.


\textsuperscript{119} See Sgroi, Porter & Blick, supra note 63, at 48-69.
adversary system or the integrity of the functions being performed. This is not all the system demands of child sexual abuse intervenors, however; these individuals are expected to serve as experts and advocates as well. Potential problems become apparent when the interplay of the four roles is examined. If the expert and advocacy roles are combined to too large an extent, they will tend to overshadow the neutrality the adversary system asks of an investigator and recorder.

3. Expert— As research into child sexual abuse has become more sophisticated, prosecutors have developed creative ways to take advantage of such research at trial. If the facts of the case warrant it, the government prosecutor will call an expert witness to describe the dynamics of child sexual abuse and child sexual abuse accommodation syndrome, on the theory the fact finder is not familiar with these concepts and the expert testimony will aid in its decision. In some instances, this testimony occurs in the government’s case-in-chief; in others, it enters as rebuttal evidence or in response to cross-examination.

120. See infra notes 122-52 and accompanying text.
121. See infra notes 176-93 and accompanying text.
122. Federal Rule of Evidence 702 provides: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”
123. Expert testimony ordinarily is not needed if the physical evidence is conclusive or if other evidence exists so that the case is not simply the child’s word against the defendant’s. See supra note 78 and accompanying text.
124. E.g., State v. Myers, 359 N.W.2d 604, 608-10 (Minn. 1984); see supra note 88.
125. E.g., State v. Myers, 359 N.W.2d 604, 608-10 (Minn. 1984). See generally Summit, The Child Sexual Abuse Accommodation Syndrome, 7 CHILD ABUSE & NEGLECT 177, 181 (1983). Dr. Summit explains that child sexual abuse accommodation syndrome includes five categories: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, conflicted, and unconvincing disclosure; and (5) retraction. Categories (1) and (2) are preconditions to the occurrence of sexual abuse. The remaining three categories are consequences that will vary with each case. See infra notes 132-33, 135 and accompanying text.
a. **Subject matter**—Substantively, the testimony of the expert will include a brief summary of the professional research into child sexual abuse and will emphasize the factors that are important to the case at hand. Thus, if the case involves sexual abuse by a parent or someone in a parental role, the testimony may cover the influence of that relationship, especially over a young victim. The expert may relate that abuse takes place over time, that normally it is not just a single incident, and that delays in reporting are common. The witness may state that it is usual for a child initially to deny the number of times he or she was assaulted because of feeling guilty, filthy, and afraid of upsetting the family. In addition, experts generally comment that it is unusual for children to fabricate graphic accounts of sexual activity and that often the children's stories...

129. *E.g.*, D. FINKELHOR, *supra* note 2, at 53-72 (discussing factors relevant to describing the abusive experience); Berliner, Blick & Bulkley, *supra* note 87, at 171; Sgroi, Blick & Porter, *supra* note 2, at 12-34 (explaining dynamics of child sexual abuse encounters and profiling participants); see also Roe, *supra* note 65.


131. See, e.g., State v. Myers, 359 N.W.2d 604, 608 (Minn. 1984); Maule, 35 Wash. App. at 289-90, 667 P.2d at 97. This raises the problem of the introduction of other acts of misconduct. Many courts liberally admit evidence of other acts of misconduct in cases involving sexual abuse of children. See, e.g., State v. Keithley, 218 Neb. 707, 358 N.W.2d 76 (1984); State v. Thomas, 381 N.W.2d 232 (S.D. 1986); DeClouette v. State, 699 S.W.2d 341 (Tex. Crim. App. 1985); State v. Fishnick, 127 Wis. 2d 247, 378 N.W.2d 272 (1985) (finding that in the prosecution of sexual abuse of a three-year-old, evidence that the defendant tried to entice a 13-year-old a week earlier was admissible, and noting that there is greater latitude in admitting evidence of other acts in sexual abuse cases to corroborate the victim's testimony against a credibility challenge). But see Weiner v. State, 55 Md. App. 548, 464 A.2d 1096 (1983) (holding that it was error for the state to introduce through the direct examination of complainant her sister's statement that defendant had abused her). See generally Comment, Other Crimes Evidence to Prove the Corpus Delicti of a Child Sexual Offense, 40 U. MIAMI L. REV. 217 (1985).


133. See, e.g., State v. Myers, 359 N.W.2d 604, 608 (Minn. 1984); State v. Clark, 682 P.2d 1339, 1351 (Mont. 1984).

134. See, e.g., W.C.L. v. People, 685 P.2d 176, 177 (Colo. 1984); State v. Myers, 359 N.W.2d 604, 609 (Minn. 1984); State v. Dale, 75 Or. App. at 455, 706 P.2d at 1010; State
are inconsistent or confused. In some cases, there is a poor relationship between the mother and daughter, a fear of men, and a victim who experiences nightmares with assaultive content. The testimony may indicate that the victim often looks and acts older than he or she is, and that the victims of child sexual abuse have an unusual amount of sexual knowledge for their age. Finally, the expert may testify about the ability of a child to perceive and to describe a sexual contact.

The testimony of child abuse experts is not admitted without reservation. Some courts have expressed discomfort with admitting testimony about child sexual abuse as a general phenomenon because it distracts the jury from the facts of the case it is hearing. Other courts have commented that the scientific community has not yet generally accepted “validation” and other bases of the expert’s testimony, so the testimony should not be allowed. Nevertheless, when the child’s account of abuse has

v. Maule, 35 Wash. App. at 290, 667 P.2d at 97. But see State v. Myers, 382 N.W.2d 91 (Iowa 1986) (holding that it was error for the state to introduce opinion evidence that young children do not lie about sexual abuse).

See, e.g., State v. Myers, 359 N.W.2d 604, 608 (Minn. 1984) (the child may become confused when she feels it isn’t right, but the adult says it is); State v. Caulder, 75 Or. App. 457, 706 P.2d 1007 (1985).

See, e.g., State v. Myers, 359 N.W.2d 604, 609 (Minn. 1984). See generally D. Finkler, supra note 2, at 93-94, 120; Sgroi, Blick & Porter, supra note 2, at 28-29.

See, e.g., State v. Myers, 359 N.W.2d 604, 609 (Minn. 1984).


See, e.g., Myers, 359 N.W.2d at 609; see also Sgroi, Blick & Porter, supra note 2, at 31.

See, e.g., Myers, 359 N.W.2d at 609; State v. Dale, 75 Or. App. 453, 454, 706 P.2d 1009, 1010 (1985) (expert commenting that a child victim of sexual abuse may act sexually with others and may be highly curious about sexual anatomy).

See, e.g., Commonwealth v. Carter, 9 Mass. App. Ct. 680, 403 N.E.2d 1191 (1980), aff’d, 383 Mass. 873, 417 N.E.2d 438 (1981) (the victim was an 11-year-old, mildly retarded girl; pediatrician testified about reality testing—how children see the world and fantasize—and concluded that the more limited the intelligence, the less ability there is to fantasize); State v. Padilla, 74 Or. App. 676, 704 P.2d 524 (1985).


For an explanation of the “validation” process, see supra note 63.

But see Payan, 220 Cal. Rptr. at 128-30 (rejecting the defendant’s argument that child sexual abuse accommodation syndrome is not generally accepted in the medical community).
been impeached with prior inconsistent statements\textsuperscript{145} or challenged in cross-examination, the courts are more likely to admit the expert testimony on the dynamics of sexual abuse\textsuperscript{146} as rebuttal evidence.

If the court permits the expert to recite in general terms the types of conduct to look for in verifying a child sexual abuse complaint, it may then allow him or her to relate specific conduct in the complainant's case.\textsuperscript{147} Whether the expert then may offer an opinion that the child has been sexually abused is a question that has created difficulty for courts. At least one court has resolved the question by permitting the expert to give an opinion on the credibility of the child.\textsuperscript{148}

Some courts, although rejecting an outright opinion by the expert on credibility, have allowed the expert to give what is in essence such an opinion. Usually this opinion is couched in terms of the symptoms of child sexual abuse and how the dynamics of abuse operate to make the child appear less reliable then he or she is.\textsuperscript{149} The courts acknowledge that such commen-

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\item \textsuperscript{146} See, e.g., Smith v. State, 100 Nev. 579, 688 P.2d 326 (1984).
\item \textsuperscript{147} See, e.g., State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983). The literature indicates that a variety of symptoms might be indicators of child sexual abuse, but does not quantify which symptoms must be present to establish a case of abuse. In addition, because the symptoms listed are not necessarily the result of sexual abuse, the expert must make the inductive leap from the existence of symptoms to a conclusion that child sexual abuse occurred by incorporating other factors—for example, the child's complaint, the quality of the symptoms, or a combination of symptoms in one child. See Sgroi, Blick & Porter, supra note 2, at 10-27.
\item \textsuperscript{148} State v. Kim, 64 Haw. 598, 602, 645 P.2d 1330, 1334 (1982). But see Roe, supra note 65, at 104 (opposing the introduction of expert opinion on credibility because of the potential adverse impact on child-victims resulting from repetitious accounts of the abusive experiences and the possible inference that the child is mentally or emotionally impaired).
\item Traditionally, the testimony of an expert on the credibility of a witness has not been allowed because credibility is a matter within the expertise of the jury. The theory behind permitting such an opinion in a case of child sexual abuse appears to be the necessity of demonstrating to the jury that the account is believable because it is in accord with symptoms that the expert would expect to find, and no other factors exist to rebut the claim of abuse. This provides a link that otherwise might be absent—the child's symptoms could be indicative of other problems or nothing at all, or the child could have fantasized the incident. See, e.g., Middleton, 294 Or. at 435-37, 657 P.2d at 1219-20. This theory overlooks the possibility that the expert is relying on his or her assessment of the child's credibility as part of the validation process. Thus this process "bootstraps" the expert's assessment into substantive evidence presented to the jury.
\item \textsuperscript{149} See, e.g., State v. Myers, 359 N.W.2d 604, 609-10 (Minn. 1984); Middleton, 294 Or. at 435-37, 657 P.2d at 1219-20.
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tary has the effect of bolstering the child’s credibility, but because it is only an indirect result, they are willing to accept it.\(^\text{150}\)

Other courts have rejected this testimony altogether and have adhered to the traditional rule that expert opinion on the credibility of a witness is not allowed.\(^\text{151}\) These courts point out that credibility is the crucial question in many child sexual abuse cases and that the danger of unfair prejudice from the expert opinion outweighs its probative value.\(^\text{152}\) They appear satisfied that the jury will have the ability to sort out and resolve questions of credibility without hearing the expert’s conclusions that the child is believable.

b. Assessment— Although the foregoing summarizes the courtroom treatment of expert testimony in cases of child sexual abuse, it by no means captures the depth and breadth of the influence of experts in such cases. Not only is their testimony presented to juries, but appellate courts have made liberal use of expert research on child sexual abuse in writing judicial opinions on the subject.\(^\text{153}\) Thus, expert opinions have been used to determine the admissibility of children’s hearsay statements,\(^\text{154}\) other acts of misconduct by the defendant,\(^\text{155}\) and expert testimony itself.\(^\text{156}\)

Despite the widespread impact of expert research and testimony on child sexual abuse, the method of presentation of the

\(^{150}\) See, e.g., State v. Myers, 359 N.W.2d at 609; Middleton, 294 Or. at 435-36, 657 P.2d at 1219-20.


\(^{152}\) FED. R. EVID. 403; see, e.g., State v. Logue, 372 N.W.2d 151 (S.D. 1985); State v. Fitzgerald, 39 Wash. App. 652, 694 P.2d 1117 (1985) (holding that an expert witness generally may give an opinion on the ultimate issue, but not on the credibility of the victim; the opinion that the children were molested was, in essence, an opinion on their credibility because the physical evidence was inconclusive; it was improper for the expert to base an opinion on the ultimate issue solely on her determination of the witness’s veracity).


\(^{155}\) See, e.g., Covington v. State, 703 P.2d 436, 440 (Alaska Ct. App. 1985) (using expert’s testimony in sex crimes involving children to corroborate the child’s testimony and to negate inferences of fantasy, unreliability, or vindictiveness).

\(^{156}\) See supra notes 129-41.
evidence may result in a superficial or sanitized version of abuse being presented to the fact finder. Normally, the gaps in data or theory on child sexual abuse that the experts themselves acknowledge are ignored in the courtroom. In addition, although the testimony focuses on the dynamics of child sexual abuse, the expert's opinion on how to respond to the abuse is not sought. Although this is not unusual when mental health professionals testify in court, it does illustrate that the legal system seems to want only a part of the total picture the expert might offer. Finally, the intervenor's theoretical perspective and its influence on his or her description of child sexual abuse to the fact finder are rarely discussed.

Although there is no legal requirement that testimony of an expert include a thorough discussion of all theoretical issues in the field—and, ordinarily, theory discussion is limited—child sexual abuse cases pose a unique problem. Coupled with the mechanics of the presentation of the evidence, the omission of theory discussion from the expert's testimony creates the erroneous impression that sexual abuse has a single and all-encompassing interpretation. The "mechanics" are more easily understood when contrasted to the previously used method of submitting such testimony in child sexual abuse cases.

157. See, e.g., D. Finkelhor, supra note 3, at 221.

158. If the expert proffers an opinion on how to respond to abuse, it may be ignored. See, e.g., S.B. v. State, 706 P.2d 695 (Alaska Ct. App. 1985). Ordinarily, the expert's opinion is developed as part of the overall assessment of the facts of the case and how best to deal with the problem. See D. Finkelhor, supra note 3, at 4, 201 (indicating that some intervenors emphasize family treatment programs that include reconciliation with the offender, while others emphasize criminal justice sanctions).

159. The theoretical orientation of the intervenor may result in differing approaches to child sexual abuse cases. The most common orientations view child sexual abuse as either rape or a symptom of family dysfunction. See D. Finkelhor, supra note 3, at 4.

160. The purpose of theory discussion is to assist the jury in determining how much weight to give the expert's practical conclusions.

161. An additional adjunct to the role of psychiatrists, see infra notes 162-64 and accompanying text, was the performance of a psychiatric evaluation of the victim of the alleged crime. This was in keeping with Wigmore's exhortation that females who claimed they had been raped or abused should not be believed and should be examined by a psychiatrist to determine whether they were telling the truth or merely fantasizing. 3A J. Wigmore, supra note 11, § 924(a), at 736-37. But see Comment, Psychiatric Examinations of Sexual Assault Victims: A Reevaluation, 15 U.C. Davis L. Rev. 973 (1982) (assessing a California statute eliminating the use of court-ordered psychiatric evaluations of victims of sex crimes; concluding that the statute strikes the proper balance between victims' rights and defendants' rights).

In some respects, the role of the expert in child sexual abuse cases is similar to that urged by Wigmore—that is, the expert is called upon to testify that the victim is being truthful or that the acts described are consistent with the dynamics of sexual abuse. See Roe, supra note 65, at 108-11.
Prior to the recent increase in the use of expert testimony, mental health professionals, particularly psychiatrists, were the experts of choice in child sexual abuse cases. In keeping with their role in most criminal prosecutions, the mental health professionals usually assessed the defendant’s mental state at the time of the criminal behavior to see if he or she was responsible for it, the mental state at the time of examination to see if he or she was competent to stand trial, and perhaps the person’s potential for future dangerousness. Controversy surrounded

One major difference in the performance of this role by the expert appears to be an ideological one. As Finkelhor has noted, the Freudian influence on psychiatrists was one of the major impediments to the recognition of child sexual abuse as reality. With the increase in mental health intervenors who reject Freud’s premises about sexual abuse, experts may be less skeptical and become more of an ally than an adversary to the child. See D. FINKELHOR, supra note 3, at 11; infra notes 176-93 and accompanying text.


163. Dr. Alan Stone has offered an insightful analysis and critique of the psychiatrist’s performance of these functions in A. STONE, MENTAL HEALTH AND LAW (1976). In brief, the legal system required the psychiatrist to examine the defendant’s functioning in the past, present, and future. The demand to look backward to explain the defendant’s state of mind and to look forward to make predictions about future conduct were responsibilities that many psychiatrists shouldered. Others, claiming that the expertise of a psychiatrist lay in explaining present and immediate past behavior, not behavior in the distant past or future, argued that the legal system was requiring what could not be accomplished.

Dr. Stone and other authors also have pointed out that asking psychiatrists to make decisions about the defendant’s responsibility for a crime is, in reality, a moral judgment that society should not delegate to them because their expertise in the mental health area does not necessarily aid them in making those kinds of judgments. Cf. id. at 218-30 (discussing this theory in the context of the insanity defense); D. ROBINSON, PSYCHOLOGY AND LAW 3-11 (1980). See generally W. BROMBERG, THE USES OF PSYCHIATRY IN THE LAW (1979); J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY (3d ed. 1981).

Congress apparently has adopted that viewpoint in enacting the most recent amendment to Federal Rule of Evidence 704, which reads:

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

The rule change eliminates the need for the psychiatrist to make the “leap” from answering a medical question to answering a question concerning free will and responsibility under the law. 3 J. WEINSTEIN & M. BERGER, supra note 29, ¶ 704(03); see also Appelbaum, The Supreme Court Looks at Psychiatry, 141 AM. J. PSYCHIATRY 827 (1984); Bazelon, The Role of the Psychiatrist in the Criminal Justice System, 6 BULL. AM. ACAD. PSYCHIATRY & LAW 139 (1978).

164. Courts have recognized the fragile ground on which predictions of future conduct rest, but apparently see no way to avoid requiring such predictions. E.g., Ake v. Oklahoma, 470 U.S. 68, 83 (1985); Schall v. Martin, 467 U.S. 253, 278-79 (1984); Estelle v. Smith 451 U.S. 454, 472-73 (1981). Congress incorporated the requirement of a predic-
the psychiatrists who tried to perform these functions for the system. Frequently, in attempting to comply with the system's demands, psychiatrists found themselves in disputes with their colleagues as "battles of the experts" developed over these issues. The battles took the form of testimony from equally qualified psychiatrists who would present disparate and irreconcilable points of view on the questions posed in the case. Resolution of the contradictions was left to the fact finder.

In child sexual abuse trials, the battle of the experts rarely occurs. In the typical case, the prosecutor will introduce expert testimony to describe the phenomenon of child sexual abuse. The defense generally does not offer a contradictory version. More importantly, the expert for the prosecution may have discussed the allegation with the child and validated the claim of abuse. The courts ordinarily deny defense experts access to the child unless some special showing of need is made.

In conjunction with the elimination of professional dispute in a case, courts have revised the questions the experts are expected to answer. Courts no longer ask the expert to step into the defendant's mind to explain his or her conduct at the time of the crime. Instead, courts want the expert to describe general

165. See 3 J. Weinstein & M. Berger, supra note 29, ¶ 702[04]; see also Fed. R. Evid. 704(b) advisory committee's note.


167. Defendants who have tried to introduce a contradictory version of the phenomenon of child abuse have been largely unsuccessful. See, e.g., State v. Miller, 709 P.2d 350, 353-54 (Utah 1985). In Miller, the defendant attempted to offer the expert testimony of a clinical psychologist to describe the typical psychological profile of individuals who sexually abuse children. The testimony was excluded because it was speculative and would have shifted the jury's attention to whether the defendant fit the pattern, and away from the issue of whether he committed the crime. See supra note 142 and accompanying text; see also Hampton v. Commonwealth, 666 S.W.2d 737 (Ky. 1984).


169. E.g., State v. Sullivan, 360 N.W.2d 418, 423 (Minn. App. 1985) (holding that a psychiatric exam to determine the child's competency is within the discretion of the trial court); State v. Logue, 372 N.W.2d 151, 155-56 (S.D. 1985) (psychiatric examinations of complaining witnesses in sexual offense cases may be ordered upon a substantial showing of need; the purpose of such an examination is to detect mental or moral delusions or tendencies that would distort complainant's imagination and affect credibility); State v. McCafferty, 356 N.W.2d 159 (S.D. 1984).
patterns of abuse so the jury can decide whether the substance of the child’s account fits those patterns. The focus is completely different in such a case: it is on the child-victim, not the defendant. The mental health professional is not interviewing someone to see if he or she has a mental disease or defect as a prerequisite to deciding whether the person was responsible for past actions. Instead, the expert is interviewing a presumptively mentally-healthy person to see whether he or she was the victim of a crime. This eliminates many of the potential impediments that exist when a psychiatrist examines the alleged offender in a criminal case.

Analyzing the differences between the role of psychiatrists and the role of child sexual abuse professionals in cases, it appears that the controversial aspects of the medical model have disappeared. Battles of the experts will neither consume court time, nor confuse the jury. The burden associated with a post hoc determination of the defendant’s state of mind has decreased; with child sexual abuse, the professional merely asks the child about events and validates the complaint. Thus, when these specific factors are considered, it is likely that child sexual abuse professionals will escape the criticism experienced by their psychiatric counterparts.

But in eliminating the controversy, has the legal system lost more than anticipated? Streamlining the process to dispose of a second point of view and framing questions the professional feels capable of answering may be deceptive in their simplicity.

Despite the problems associated with the medical model, it fits reasonably well within the adversary system in the sense that there is a testing of experts by both sides in the case.
Even if this probing establishes that there is neither a single version nor a simple answer, it is clear that both parties to a dispute have the opportunity to press their arguments to achieve their desired result. This benefit of traditional psychiatric testimony is lacking in most adjudications of child sexual abuse.

Even though the inquiry has shifted from the state of mind of the defendant to the account given by the child, the issue of the child's credibility still remains important. Child sexual abuse cases now incorporate a presumption of truth on the part of the child. Although that presumption may be appropriate in certain cases, such a system overlooks the need for courts not merely to have the expert employ a presumption, but make a judgment about credibility as well. Courts want the child sexual abuse professional to defer a decision about credibility until the case is evaluated and to make that judgment based on the facts in the specific case, not on cases in general. Ignoring that demand allows the professional to reach early, uninformed conclusions and to perpetuate them during the remaining process of resolving the case.

Allowing experts to be tested in court and disallowing the presumption that the child is telling the truth will promote sys-

Id. at 81.

173. See supra notes 145-52 and accompanying text.
174. See supra note 134 and accompanying text; see also supra note 5.
175. The intervenors' use of the presumptions discussed in the professional literature is illustrative. For example, in State v. Myers, 382 N.W.2d 91 (Iowa 1986), the government called as witnesses the principal of the alleged victim's elementary school and a child abuse investigator. Both testified that children generally tell the truth when they report that they have been sexually abused. The first witness stated that she learned of statistics on this issue at training sessions and that, in particular, the statistics from one county indicated that of 75 cases prosecuted, only one involved a child who was not telling the truth. Id. at 92. The second witness stated that in her 16 years of working with abused children only one had lied to her about sexual abuse. She added that statistics from the Giaretto Program in San Jose, California revealed that only about one in 2500 children did not tell the truth. Id. The use of statistics to prove guilt has been criticized in other contexts. See supra note 129.

More importantly, the use of the presumption that the child is not lying can create problems when we ask the intervenor to evaluate the case at hand. Employing a presumption eliminates the need even to consider alternative explanations, though ultimately they might be rejected. It fosters conclusions based on what is familiar without close scrutiny of the facts at hand. See supra text accompanying note 38.

See also State v. McCafferty, 356 N.W.2d 159 (S.D. 1984), Record of Remand Hearing 107-09, where the trial judge quizzed the defense psychiatrist about whether he believed the state supreme court pronouncement that children rarely lie about sexual abuse. The psychiatrist responded that although as a general proposition that might be true, the facts and circumstances of each incident have to be examined to see if the generalization is true in that case.
temic integrity as well as avoid a vulnerability of child sexual abuse professionals. This vulnerability manifests itself when the intervener performs not only the roles of expert and investigator, but also those of advocate and supporter of the child. The interdependence of these roles, and the lack of an adversarial process, create the potential for overreaching without meaningful checks in the process. The import of this is more clearly apparent when considering the extent of the professional's advocacy role.

4. Advocate/therapist— The relationship between the intervener and the child-victim takes a variety of forms. As seen in the case law, the professionals most often involved in child sexual abuse cases are (1) those who are given a statutory duty to investigate child maltreatment178 and (2) those who are in a therapist-patient relationship with the child.177 The professional-child relationships of the two groups differ significantly in theory, but, in practice, they can merge in ways that are important to the criminal justice system and its handling of these cases. In effect, the nontherapist intervener may assume the role of advocate, which in turn becomes the functional equivalent of the professional therapist's role.

a. Advocate— The intervener may assume the role of advocate for the child, even where neither statute nor professional position imposes that duty. Pressures from society and from other child sexual abuse professionals may require this of the intervener.178

In its narrow sense, the advocacy role exists as an extension of the intervener's participation in child sexual abuse cases.179 The

176. See supra note 75.


178. Professional literature advising intervenors how to validate cases cautions them not to adopt the role of advocate or to jump to conclusions. J. SELINSKE, supra note 91, at 10; Sgroi, Porter & Blick, supra note 63, at 40. Yet the literature in general fosters that approach. See Conte & Berliner, Sexual Abuse of Children: Implications for Practice, 62 Soc. CASEWORK 601, 604-06 (1981); see also J. SELINSKE, supra note 91, at 10-11.

Many authors have recognized the difficulty in divorcing oneself from personal ideologies when called upon to evaluate a situation objectively, see Bonnie & Sloboigin, supra note 151, at 512-14, and have recommended procedures to minimize that influence. See infra notes 231-42 and accompanying text for suggested ways of enhancing expert objectivity. See also J. SELINSKE, supra note 91, at 3 (stating that pressures on the social worker, rescue fantasies, and the emotion-laden character of child sexual abuse can trigger various emotional reactions by intervenors).

179. This is in contrast to the advocacy role in its broad sense, that also may affect an intervener's approach to child sexual abuse cases. For example, social workers, who serve as intervenors in many child sexual abuse cases, have a tradition of both advocacy for an individual client and advocacy for a class of people who are "social victims." In
intervenor participates in every stage of the victim's treatment and preparation for trial. It is the intervenor who listens to the victim’s account of sexual abuse, offers personal support, and provides needed services. The professional also acts as the victim’s advocate by consulting with prosecutors on how to resolve the case and by assisting the victim with confusing legal procedures. At trial, the intervenor will testify as an expert and will provide the child’s account to the fact finder to achieve vindication for the individual child.

The performance of the advocacy function has appeal partly because it reverses the past tendency to “revictimize” the child while resolving his or her case. It indicates to the child that responsible adults believe the claim of abuse and are willing to help. The intervenor’s service as an advocate, however, is troubling. When the investigative process begins, the system asks the intervenor to question the child in order to validate the claim. At the same time, the system asks the intervenor to ensure that the interview has a therapeutic effect on the child and that the child understands that the interviewer believes and

one role, the social worker supports, advises, and, if need be, represents the individual client in dealing with the social organizations that affect his or her life. In the other role, the social worker focuses on systemic reforms to alleviate the victimization of the particular class of people. In many cases, the two advocacy roles will overlap.

This model of the advocacy function appears to have been adopted by child sexual abuse intervenors, regardless of whether they are social workers. The social advocacy role is one that many child sexual abuse professionals have embraced in an effort to change the system’s handling of these cases. The professionals have been among the most influential groups seeking legislative reform in the criminal justice system to accommodate child abuse cases. They have drawn the attention of the public to the scope and dynamics of the problem and have worked to eliminate the myths about it. They have endeavored to develop creative ways of rehabilitating offenders and strengthening their families, or in the alternative, to ensure punishment for offenders where appropriate. E.g., D. FINKELHOR, supra note 2.

The philosophy of advocacy has been incorporated into the National Association of Social Workers (NASW) Code of Ethics. Section F of the Code states that the social worker’s primary responsibility is to clients, and § F1 declares that “[t]he social worker should serve clients with devotion, loyalty, determination, and the maximum application of professional skill and competence.” Section P encourages the social worker to promote the general welfare of society, including, in accordance with § P6, advocating “changes in policy and legislation to improve social conditions and to promote social justice.” NASW CODE OF ETHICS (July 1, 1980). See also Ad Hoc Comm. on Advocacy, The Social Worker as Advocate: Champion of Social Victims, SOC. WORK, Apr. 1969, at 16; Paul, A Framework for Understanding Advocacy, in CHILD ADVOCACY WITHIN THE SYSTEM 11 (J. Paul, G. Neufeld & J. Pelosi eds. 1977).

182. See supra notes 122-52 and accompanying text.
183. See supra notes 93-119 and accompanying text.
184. J. BULKLEY & H. DAVIDSON, supra note 8, at 10.
185. Sgroi, Porter & Blick, supra note 63, at 60.
supports him or her. Although it is not usually acknowledged, there may be difficulty in maintaining a friendly, therapeutic, and supportive relationship with the child while engaging in an investigative process that necessitates asking difficult questions to test the reliability of the child’s account. If probing these issues will disrupt the supportive nature of the encounter, the advocate-intervenor may be less willing to press the child for answers. Likewise, the advocate’s inability to hear anything but a consistent or believable statement from the child may influence the intervenor’s function of chronicling the child’s account. Finally, when the interviewer testifies as an expert at trial or advises criminal justice personnel about the proposed disposition of the case, the advocacy function may shape his or her statements to make them consistent with the information gleaned from the child.

Though elusive, one goal of the investigative process is to ensure that, on some level, it is conducted by someone neutral. Likewise, experts and hearsay witnesses preferably should have no personal stake in the outcome of the criminal proceeding that could bias their work. Once advocacy exists as an extension of

186. Id. at 48, 60.


188. See generally C. LEVY, SOCIAL WORK ETHICS (1976). Levy notes that the social worker has considerable power in dealing with the client. Use of such power to serve the client’s interest may lead him or her to proceed “with a self-righteous lack of restraint” and may be an abuse of power. Id. at 77. He cautions social workers to address their attitudes—favorable or not—toward clients so they can serve them properly. Id. at 123-27. Excessive identification with the clients may be a hindrance and may have detrimental effects on third parties who are in a position to be adversely affected by the social worker’s judgments. Id. at 136, 150; see also Krell & Okin, Countertransference Issues in Child Abuse and Neglect Cases, 5 Am. J. Forensic Psychiatry 5 (1984).

189. See supra notes 94-119 and accompanying text.

190. This problem may occur because of the requirement that the professional “validate” the complaint, at least in part, based on his or her familiarity with the dynamics of sexual abuse. Sgroi, Porter & Blick, supra note 63, at 40, 70. In addition, the behavioral indicators of abuse vary and may be contradictory, so the intervenor has to employ his or her professional judgment to reach a conclusion that abuse did or did not occur. Id. at 40-41. Validation is not a “neat” process—experts recognize the difficulty of piecing together the child’s account. See supra text accompanying notes 129-41. Many cases cannot be resolved conclusively. Sgroi, Child Sexual Assault: Some Guidelines for Intervention and Assessment, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS, supra note 2, at 140.

191. The preference for an unbiased expert clearly is just a preference, not a prerequisite to the expert’s testifying. E.g., Dunn v. Sears, Roebuck & Co., 639 F.2d 1171, 1174 (5th Cir. 1981) (holding that a witness who is employed by a party is not precluded from
the investigative/expert/chronicler functions, the possibility of neutrality diminishes considerably.

Admittedly, in many circumstances, neither investigators nor experts are neutral.192 The inconsistent functions that the system asks the professionals in child sexual abuse cases to perform, however, go far beyond an occasional overlapping of roles. In its endeavor to address the problem of abuse, the system has determined that these professionals can perform many roles. Professionals have taken on these responsibilities without full consideration of whether the roles might conflict or whether the method of performing one role might undercut the proper performance of another.193

The multiplicity of functions performed by child sexual abuse professionals is by no means part of a sinister endeavor to disrupt the criminal justice process. They are doing exactly what the system asks them to do. The burden lies not only on these professionals, but also on others in the legal system to examine the implications of performing potentially conflicting tasks to see what problems are created and what solutions are available.

b. Therapist—In theory, the duties of the therapist differ markedly from those of other intervenors in child sexual abuse cases. The therapist’s duty is to help the child, regardless of the validity of the complaint of sexual abuse.194 The therapist addresses the myriad consequences of abuse experienced by the child-victim through individual therapy, group therapy, or other appropriate treatment.195

testifying as an expert). See generally 3 J. Weinstein & M. Berger, supra note 29, ¶ 702[04].


193. One indicator of the ability of intervenors to adequately perform the tasks assigned them is the number of successful lawsuits that have challenged their handling of sexual abuse cases. Comparatively few such suits have been brought. See D. Besharov, Criminal and Civil Liability in Child Welfare Work: The Growing Trend 15 (1983) (citing Martin v. Weld, 598 P.2d 532 (Colo. 1979), and Hale v. City of Virginia Beach, Fed. Dist. Ct., Eastern Dist. of Va., Norfolk Div., Civ. S0-151-N); see also Silas, Would a Kid Lie?, A.B.A. J., Feb. 1985, at 17 (reporting on multimillion-dollar civil suits filed against prosecutor, county officials, and therapists involved in child sexual abuse cases in Jordan, Minn.). Loss of insurance coverage is another potential problem with the delivery of services in these cases.


In practice, the legal system may call upon the therapist to perform other functions as well. Because the diagnosis of the complainant is an initial step in preparing a treatment plan, prosecutors have sought to use the therapist's conclusions about abuse as substantive proof of its existence. Likewise, they have endeavored to use the therapist as an expert in the case. In this respect, the therapist performs roles similar to those of other, nontherapist intervenors.

Because in theory the therapist's role is to "help" the child, at least one court has taken steps to limit the roles the therapist may perform at trial. The limitation precludes the therapist from presenting fact-based conclusions to the fact finder. Thus, if the therapist determined the facts of the case with virtually the same information that will be presented to the fact finder, his or her conclusions about those facts will not be admitted. The therapist may discuss child sexual abuse in general, but may not introduce his or her diagnosis about the particular case as a matter of substantive evidence.

C. Impact of the Intervenor's Approach

The courts in Roscoe and Logue sensed some of the potential problems with the role of the professional in child sexual abuse cases. The Roscoe court responded to these concerns by prohibiting the intervenor from giving an opinion on whether the child had been molested if that intervenor had (1) developed a therapeutic relationship with the child that created a duty to help him or her and (2) based the opinion on information derived from the therapeutic relationship. The Logue court disallowed similar testimony not because of the existence of a therapeutic relationship but rather because the opinion, given in the

198. Id. at 1100, 215 Cal. Rptr. at 50.
199. Id.
200. Id.
language of expert testimony and not supported by scientific data, was unfairly prejudicial.\(^{203}\)

One problem presented by these cases is that a type of therapeutic relationship—one in which the intervenor sees himself or herself with a duty to help the victim—exists in virtually all child sexual abuse cases where the intervenor personally assists the child. The "therapeutic" aspect of the role may be more akin to advocacy,\(^{204}\) and although it may not exist by virtue of a statutory duty, it permeates the case nevertheless. Although the courts have focused on the presence of a formal, therapeutic relationship, the multiplicity of roles played by an expert in the case may be equally problematic as the courts endeavor to sort out potential conflicts of interest and misuses of experts. Thus, in Logue, where the social worker investigated the complaint, obtained the hearsay account, testified as an expert based primarily on her decision that the child's statement was believable, and served in a supporting role for the child,\(^{205}\) the court should have examined the manner in which she participated in the case as an additional basis for assessing the probative value of her testimony.

Problems emerge, however, when some of the goals of the adversary system\(^{206}\) are evaluated in light of the actual handling of child sexual abuse cases. The idea of an intervenor serving as a therapist/advocate and also as an expert witness on behalf of the client seems peculiar in a system that expects neutral witnesses to submit to testing and probing. In a similar vein, when the expert is also the investigator, chronicler, and advocate for the child, confidence in impartiality and scrutiny of the evidence diminishes.\(^{207}\)

When searching for ways to diffuse authority and responsibility for the resolution of child sexual abuse cases, it is useful to examine some of the mechanisms already in place in the system. The use of a court-appointed expert\(^{208}\) to implement a "team

\(^{203}\) Logue, 372 N.W.2d at 157; see supra notes 66-69 and accompanying text.

\(^{204}\) See supra note 180 and accompanying text.

\(^{205}\) Logue, 372 N.W.2d at 154, 156, 159; State v. McCafferty, 356 N.W.2d 159 (S.D. 1984), Record of Remand at 246-48 (Nov. 20, 1984) [hereinafter Record of Remand] (copy on file with U. Mich. J.L. Ref.)

\(^{206}\) See supra notes 36-39 and accompanying text.

\(^{207}\) Id.

\(^{208}\) The defendant has the option of employing his own expert to perform the functions described herein. If the defendant elects to do so, the defense expert would function in the same manner as any other party's expert.

The rationale for seeking a court-appointed expert is that the performance of multiple or poorly-defined roles may result in the intervenor reaching unreliable conclusions that will be perpetuated throughout the case. This undermines the proper working of the
approach” to child sexual abuse cases has the most potential for relieving the problem of multiple or ill-defined functions and enhancing the benefits of the adversary process.

III. PROPOSAL

When the government seeks to introduce the testimony of an expert or intervenor in a child sexual abuse case, upon motion of the defense, the court should determine whether the individual has the same relationship with the child as did the psychologist in People v. Roscoe, or its functional equivalent. The court should inquire (1) whether the proposed witness has a therapist-patient relationship with the child or (2) whether the individual has assumed the equivalent of that relationship indirectly as an extension of the advocacy function.

Upon finding a therapist-patient relationship, the court has several options. The court could prohibit the expert from testifying about his or her diagnosis of the child—as it did in Roscoe—but allow the expert to testify about child sexual abuse based on the professional literature and experience. Alternatively, if the intervenor assumes the role of the child's advocate, which precipitates an informal, therapist-patient relationship, or if the intervenor performs multiple functions that could undermine the reliability of any one of those functions, there are two options. First, the court could follow the lead of Roscoe, allowing testimony about child sexual abuse in general, if the intervenor is qualified to give such information, and preventing any testimony on the intervenor's conclusions about the specific child or adversary process, so the response of the system should not be couched in adversary terms. That is, if the process itself has been impeded, responding in an adversary manner may not be an effective means of exposing the unreliability that the system has fostered.

209. See J. Bulkley & H. Davidson, supra note 8, at 18; The Child Protection Team Handbook (B. Schmitt ed. 1978); J. Selinske, supra note 91, at 4; Boerma, supra note 81, at 34; Cramer, The District Attorney as a Mobilizer in a Community Approach to Child Sexual Abuse, 40 U. Miami L. Rev. 209, 211 (1985); see also Sgroi, Multidisciplinary Team Review of Child-Sexual-Abuse Cases, in Handbook, supra note 2, at 335; infra notes 238-39 and accompanying text.

210. As a practical matter, expert testimony as rebuttal evidence is given wider deference by the courts. See, e.g., State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983); State v. Petrich, 101 Wash. 2d 566, 683 P.2d 173 (1984). If, however, the proposed expert or intervenor has performed multiple or poorly-defined functions in the case and, thus, has created the potential for misuse of the testimony, the approach discussed herein should be employed to try to limit or exclude the evidence.


212. See infra text accompanying note 247.
the factors supporting his or her conclusions because they are the functional equivalent of a therapist's diagnosis. Second, the court could appoint an independent expert to ascertain whether the intervenor's conflicting roles tainted any conclusions reached during the investigation of the case.

A. Therapist-Patient Relationship

The Roscoe court expressed discomfort with the use of a therapist's diagnosis of a patient as substantive evidence offered to prove the allegations against the defendant. The court feared the misuse of psychological testimony through the introduction of conclusions reached by the therapist during a process not designed to determine the truth or accuracy of the particular past event. The court also feared the introduction of the patient's account of events derived during that process and used to support the therapist's conclusions. Thus, according to Roscoe, evidence obtained in a noncritical therapeutic setting may not be introduced as proof that the events took place.

In deciding whether particular evidence fits within the rubric established in Roscoe, one must look at the nature of the evidence and the context in which it was derived. Analogies to rape trauma syndrome and battered child syndrome evidence are instructive. Rape trauma syndrome evidence is a description of an individual's reactions to trauma. As a general proposition, the conclusion that an individual is experiencing rape trauma

214. The encounter in Roscoe can be characterized as "noncritical" therapy because the purpose was not to challenge the child's account, but to provide support and assistance to him. In People v. Payan, 220 Cal. Rptr. 126 (Ct. App. 1985), the court noted the distinction, apparently assuming a "critical" therapeutic interview with an intervenor would yield information that would be more reliable in a criminal prosecution. Id. at 133. Whether the usual interview between intervenor and child falls into the former or latter class is a question that should be analyzed not just by examining the formal relationship of the parties (e.g., therapist-patient), but by asking whether in fact the encounter is a "noncritical" one. The role of the intervenor as advocate may preclude the existence of a "critical" therapeutic relationship.
216. See Bledsoe, 36 Cal. 3d at 249, 681 P.2d at 299-300, 203 Cal. Rptr. at 458; Kempe, Silverman, Steele, Droegemueller & Silver, The Battered Child Syndrome, 181 J. A.M.A. 17 (1962) (advising physicians to look for poor health, poor hygiene, or soft tissue injury, and for discrepancies in what the parents say happened and the extent of the injury); see also supra note 1.
217. Bledsoe, 36 Cal. 3d at 246, 681 P.2d at 297, 203 Cal. Rptr. at 456-57; see supra note 57.
syndrome is made by a counselor engaged in providing support and therapy to a rape victim. The primary purpose of the counselor-client relationship is to provide services to the client, not to derive proof that a crime occurred.\textsuperscript{218} In contrast, evidence of battered child syndrome ordinarily is obtained through a physical examination that searches for bone injury, subdural hematomas, and other serious injuries.\textsuperscript{219} The principal purpose of the inquiry is not to provide emotional support for the child, but to determine whether the child's injuries are intentional or accidental so further intervention can be planned if necessary. Because of the different context in which the information is acquired, the evidence is treated differently; usually, the court does not admit the rape counselor's conclusion that a rape occurred, but does admit the medical examiner's conclusion that the child was battered.

Applying the two-part inquiry\textsuperscript{220} into the nature of the evidence and how it was derived can be useful in determining what portion of the expert testimony should be admitted in a child sexual abuse case. In \textit{Roscoe}, for example, the court concluded that expert testimony about molestation, at least as rebuttal evidence, that was based on professional literature and experience\textsuperscript{221} satisfied the first prong of the two-part test. The second prong of the test was not met, however: derivation of the evidence in the therapist-patient setting blocked admissibility because of the nonchallenging, noncritical character of the encounters and their primary purpose as therapeutic sessions for the child.\textsuperscript{222}

Moreover, not only does this two-part assessment resolve the issue of admissibility where a formal, therapist-patient relationship exists, but by requiring an analysis of the context in which the expert reached the conclusion and an examination of the expert's relationship with the child, it also has implications for cases where a formal, therapist-patient relationship does not exist.\textsuperscript{223}

\textit{Roscoe}'s two-part test is flawed, however, and \textit{People v. Payan}\textsuperscript{224} demonstrates the extent of the problem. If the nature of the evidence meets the first prong—that the evidence about

\begin{footnotesize}

\textsuperscript{218} \textit{Bledsoe}, 36 Cal. 3d at 250-51, 681 P.2d at 300-01, 203 Cal. Rptr. at 459-60.

\textsuperscript{219} \textit{Id.} at 249, 681 P.2d at 299-300, 203 Cal. Rptr. at 459; \textit{see supra} note 214.

\textsuperscript{220} \textit{See supra} text accompanying note 202.


\textsuperscript{222} \textit{Id.}, at 1099-1100, 215 Cal. Rptr. at 49-50.

\textsuperscript{223} \textit{See infra} text accompanying notes 224-29.

\textsuperscript{224} 220 Cal. Rptr. 126 (Ct. App. 1985).

\end{footnotesize}
child sexual abuse is in itself reliable and useful to the fact finder—then, by implication, if the expert has not reached his or her conclusions in a therapeutic setting, the conclusion that the child was molested would be admissible.225 Allowing the expert to offer such conclusions when he or she has not even interviewed the child, however, does not comport with accepted practice among experts dealing with child sexual abuse.226 In addition, admitting such a conclusion appears to be an unwarranted deviation from the rule prohibiting expert testimony on the credibility of a witness. For both reasons, the type of evidence offered in Payan, which would be admissible under the Roscoe two-prong test, should be excluded.

B. The Advocacy Role or Performance of Multiple Functions

Although the role is not part of a statutory or other officially defined description of duties, the intervenor in a child sexual abuse case might become the advocate for the child, either intentionally or unintentionally.227 In an effort to improve upon investigative techniques used with children, experts in the field of child sexual abuse have recommended an interviewing process that will have a "therapeutic" effect on the child.228 While this recommendation does not mean that the intervenor will literally engage in therapy with the child, it does convey the overall nature of the relationship as a helping, supportive one. Even though the primary task of the intervenor might be to investigate and determine the facts,229 this recommendation considers the creation of a supportive atmosphere for the child equally important. As a matter of policy, the "therapeutic" approach might be the preferred route; but once we create that relationship, we must examine how the intervenor should function for the remainder of the case. The key inquiry should be whether the "helping" aspect of the relationship has overshadowed the investigative function to the extent that the intervenor has assumed a role equivalent to that of a "noncritical" therapist.

The question becomes particularly compelling where the intervenor performs several functions. If, as a general proposition, the intervenor is to investigate the facts, but the advocacy role

225. Id.
226. See supra note 63.
227. See supra notes 178-93 and accompanying text.
228. See Sgroi, Porter & Blick, supra note 63, at 48.
229. Id. at 39-40.
has become of paramount importance to him or her, the integrity of the investigative process may be questionable. This is particularly important when the government seeks to introduce the testimony of the intervenor as an investigator and expert witness who will conclude that the child was molested.

At least two methods are available to address this situation. The first is to analogize to Roscoe and allow the intervenor to testify about child sexual abuse in general, but not to permit an opinion that the complainant was molested or to relate in detail the underlying facts supporting such an opinion. The rationale for this standard is that the proffered evidence was derived in a setting in which the intervenor assumed a role equivalent to a therapist, so it should be treated in a like manner.

The second option should be exercised in those situations where the intervenor has assumed multiple, overlapping, or poorly-defined roles that call into question the integrity of the fact-finding aspect of the investigation itself. In such situations, a more radical alternative is appropriate because of the weight accorded the intervenor's assessment. Such an alternative is the use of a court-appointed expert.

The case law and the Federal Rules of Evidence both recognize the power of a trial judge to appoint an expert of his or her selection. The most frequently cited reason for giving the judge this power is to eliminate the battle of experts, in the hope that a neutral appointee will enhance the fact finder's ability to determine the truth in the case.

This option has considerable potential for child sexual abuse cases but for different reasons than anticipated by the drafters of Federal Rule of Evidence 706. If we recognize that some of the benefits of the adversary system have been sacrificed in the

231. See supra note 123.
232. E.g., People v. Roscoe, 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45; State v. Logue, 372 N.W.2d 151 (S.D. 1985). The expert evidence is introduced to assist the jury in resolving the disputed issues of fact in the case. Presumably, the jury will give a fair amount of weight to the expert's testimony even if an instruction is given advising the jury that it may accept or reject the expert opinion in reaching its conclusions.
233. Fed. R. Evid. 706; McCormick on Evidence, supra note 30, § 17. Procedurally, the appointment may be by the court's own motion or at the request of either party. An expert appointed by the court must be informed of his or her duties in writing or at a conference in which both parties may participate. At trial, the expert may be called by the court or by either party.
234. Fed. R. Evid. 706 advisory committee's note; 3 J. Weinstein & M. Berger, supra note 29, ¶ 706[01].
effort to mitigate harshness in child sexual abuse cases,\textsuperscript{235} a means of recapturing some of those benefits is appealing. The most noteworthy benefit of the adversary system that is lost is the injection of a second point of view into a case. This benefit was lost when the system delegated multiple functions to a single individual or relied on the child's advocate for expert testimony. The court-appointed expert should conduct a critical evaluation of the investigation and of the conclusions reached whenever an expert's roles overlap. In particular, the evaluation should determine whether an important and relevant viewpoint was omitted, whether the procedures served the truth-seeking function, and whether the performance of multiple functions has undermined the conclusions in the case.\textsuperscript{236} Additional inquiries based on the specific fact pattern could be requested.\textsuperscript{237} If the court appointee determines that there are important flaws in the

\textsuperscript{235} See supra notes 40-47 and accompanying text.

\textsuperscript{236} See, e.g., State v. McCafferty, 356 N.W.2d 159 (S.D. 1984). In that case, the state supreme court remanded the case to the trial court to determine whether the child's statements to two intervenors demonstrated circumstantial guarantees of trustworthiness sufficient to qualify for admissibility under the residual exception to the hearsay rule, \textit{Fed. R. Evid.} 804(b)(5). The defendant called as an expert witness a psychiatrist who critiqued the circumstances under which one of the intervenors obtained the statements from the child. The psychiatrist pointed out that if an intervenor had had a prior therapeutic relationship with the child, as had one intervenor, then this relationship should have caused the intervenor to disqualify herself. His reasons were that serving as an intervenor might disrupt any future therapeutic relationship with the child, and, more importantly, that the relationship might create a bias in conducting an objective evaluation. Record of Remand, \textit{supra} note 205, at 102. The psychiatrist pointed out that the client, fearful of rejection and losing a relationship with the intervenor, might tell the intervenor things to please him or her. He concluded that the problems caused by the manner of conducting the evaluation raised a serious question about its validity, and, in fact, that the results of the interview were invalid and unreliable. \textit{Id.} at 105-07.

The trial judge responded to the psychiatrist's testimony by citing the South Dakota Supreme Court opinion that remanded the case, State v. McCafferty, 356 N.W. 2d 159, 164 (S.D: 1984), in which the court commented that a child is unlikely to fabricate a graphic act of sexual activity because it is beyond the realm of his or her experience. The psychiatrist stated his general agreement with that view, but pointed out that the inquiry should be whether the particular child has had such an experience, not whether children in general do. Record of Remand, \textit{supra} note 205, at 107-09.

Interestingly, the defense also produced evidence from a friend of the child's mother that the child had observed him engaging in sexual intercourse with the mother. Record of Remand, \textit{supra} note 205, at 95. Neither the original intervenor nor the trial judge seemed to have found that information determinative.

The trial court found that the child's statements demonstrated circumstantial guarantees of trustworthiness and, based on that determination, affirmed the defendant's conviction. \textit{McCafferty}, 356 N.W.2d at 167.

\textsuperscript{237} In \textit{McCafferty}, the intervenor had a prior therapeutic relationship with the child. 356 N.W.2d at 161. An inquiry to determine the effect that might have on the investigation and validation process would be appropriate.
case based on these criteria, the court should grant the defense motion to restrict the role of the intervenor in the case. 238

Why is the inclusion of another layer of expertise warranted in child sexual abuse cases? Modifications to the adversary system in such cases have been made to eliminate the trial of the child-victim. Revamped hearsay rules, a more humane investigative process, and the assistance of experts and advocates have accomplished this goal in many respects. The defense of child sexual abuse cases formerly focused on the victim and his or her capacity to endure cross-examination at trial—if the case even progressed that far. The system now in many respects has substituted adults, such as parents and child sexual abuse professionals, for the child. The defendant's focus also must shift; now he or she must be prepared to respond to the child's claims as expressed not only by the child, but also by the adults in the case. Because any experts that the defendant wishes to engage will not have access to the child, 239 and because the validation process normally takes place long before trial without the defendant's participation, 240 there is virtually no opportunity to challenge either the investigative process or the conclusions except at trial. By the time of trial, however, the child sexual abuse professional will be expected to serve as a government witness in the adversary process, and the defendant will have little or no basis on which to challenge the witness's conclusions. Inserting a check through the use of a court-appointed expert ensures the integrity of the process to a greater extent than presently exists. 241 This additional factor, coupled with more humane treatment of the child, creates a more equitable balancing of the interests of the disputants and of society.

In essence, this is a formal, court-sponsored implementation of the team review process 242 that has been recommended for

238. See supra notes 227-34 and accompanying text.
239. See supra note 169 and accompanying text.
240. See supra note 207.
241. In those jurisdictions where court appointees are used to review cases, an added benefit would be the avoidance of conflicting and poorly-defined roles by intervenors at the outset. Preempting undesired conduct by experts is touted as one favorable side-effect of the rule permitting court appointments. See Fed. R. Evid. 706 advisory committee's note.
242. Implementation of a team approach to case management has been suggested in similar contexts. See Bonnie & Slobogin, supra note 151, at 514-20. These authors argue that a structured decisionmaking process is essential so that forensic clinicians may reduce error and promote consistency in their evaluations of defendants in the criminal justice system. Use of a team of professionals from various disciplines, who are instructed to consider as many hypotheses as possible in resolving the questions presented by the case, is one method of achieving the goal. Bonnie and Slobogin acknowledge this
child sexual abuse cases by experts in the field.\textsuperscript{243} The experts recognize their own shortcomings in handling such cases and appreciate the potential of multidisciplinary team review to improve the quality of case management and to provide expertise that otherwise might be absent. This preferred method of case analysis is one that should be incorporated into the legal system.

What showing should be required to obtain a court-appointed expert? The defense counsel should examine how the intervenor has functioned in the case to see if he or she has performed conflicting roles. Of particular concern are activities\textsuperscript{244} or influences that might have interfered with the investigative role of the intervenor, because the “validation” process relies so heavily on the intervenor’s subjective evaluation of the situation.\textsuperscript{245} Examples of problematic influences are preconceived notions about child sexual abuse and its dynamics,\textsuperscript{246} which impede the intervenor’s investigation to see whether the case at hand actually fits the patterns that the intervenor expects to find. When facts exist to rebut the generalizations about sexual abuse\textsuperscript{247} but the intervenor has dismissed them as nondeterminative, further inquiry is appropriate. In the alternative, if the child’s account is confused and corroborating evidence is not apparent, an independent probing of the intervenor’s investigation is warranted to test the validity of the conclusion that abuse exists.

A related inquiry should be made to determine what the intervenor has done to assist the child personally and to evaluate what type of relationship the intervenor has developed with the child. If the intervenor has assumed an advocacy or therapy function, then outside scrutiny is warranted to see if the results of the intervenor’s work are reliable enough for use in the criminal process.\textsuperscript{248}

\textsuperscript{243} See supra note 209. A less radical alternative to the use of a court-appointed expert to provide the team review function is to grant defense motions to discover reports prepared by a child sexual abuse team already in place in the jurisdiction, if one exists.

\textsuperscript{244} See supra note 179.

\textsuperscript{245} See supra notes 83-91 and accompanying text.

\textsuperscript{246} For example, children do not lie about sexual abuse or children do not have sexual knowledge. See supra notes 86-87.

\textsuperscript{247} E.g., Record of Remand, supra note 205, at 95 (child had observed acts of sexual intercourse between her mother and a man other than the defendant prior to making a statement about the defendant’s conduct).

\textsuperscript{248} A conclusion that the results of the investigation are unreliable for a criminal prosecution does not necessarily preclude their use in an administrative proceeding where the government’s burden of proof would be lower. See, e.g., S.D. CODIFIED LAWS
Recent modifications to the adversary system to accommodate child victims reflect a recognition of their needs and the importance of vindicating their rights. The participation of experts on behalf of children has enhanced the ability of the legal system to respond to the needs and rights of the child victim. That expertise should be critically evaluated to ensure it is being employed in child sexual abuse cases in an appropriate manner. In those situations where the expertise might be misused because of the performance of a therapeutic or advocative role by the intervenor, the court should limit the testimony to exclude an assessment of the validity of the prosecuting witness’s claim. Where the integrity of the investigation is called into question, the court should exercise the option of using a court-appointed expert. Adding these checks should serve to maintain the influence of intervenors in child sexual abuse cases without jeopardizing the benefits of an adversary adjudication of guilt or innocence.

§ 26-8-22.5 (1984) (requiring only a preponderance of the evidence to support a finding that a child is dependent or neglected).