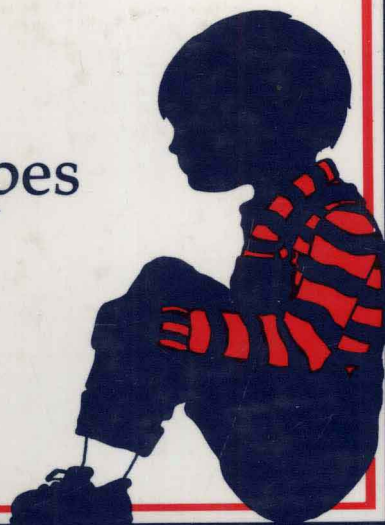


CHILD
EYEWITNESS
TESTIMONY
IN
SEXUAL ABUSE
INVESTIGATIONS

Bruce E. Mapes



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Bruce E. Mapes, Ph.D.



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*To Maryhelen, Rob, and Jeff,
whose love, patience, support, and encouragement
continue to be an inspiration.*

INTRODUCTION

In 1968, the author was employed as a special education teacher/counselor for emotionally disturbed and learning disabled adolescents. During his tenure he developed a close relationship with an 11-year-old girl, who one day related she had been sexually abused by her stepfather. Concerned about the girl, the author discussed the allegations with one of the school's clinical psychologists, who explained the girl's allegations in terms of psychoanalytic thinking about children's sexual fantasies. Because the author believed the child may not have been fantasizing but may have actually been abused by her stepfather, he discussed the situation with a police officer whom he knew and respected. The police officer stated that, because of her age, the girl probably would not be a credible witness and there was nothing he could do. Although the author believed the child, he felt relatively helpless because of the predominant legal and professional thinking at the time. Unfortunately, this thinking continued to dominate professional and legal circles until the mid-1980s.

As public concern over child sexual abuse blossomed, our courts, law enforcement agencies, and child welfare agencies were confronted with issues for which they were not prepared and with a population they knew little about. Consequently, they turned to the experts for assistance. It was not long before the agencies and courts found themselves in the middle of emotionally driven debates resulting from the informed speculation of "dueling experts," who relied heavily upon theoretical and clinical arguments in the absence of sound empirical

research. The controversies that developed can best be illustrated by reviewing the polar positions concerning the appropriateness of children testifying in court (Goodman, Levine, & Melton, 1992; Underwager & Wakefield, 1992).

Defense attorneys also found themselves with a dilemma. Because of the emotional impact a child's testimony can have upon the court, the attorneys did not want to antagonize the court or further harm the child through aggressive cross-examination; however, they needed to assure the credibility of the evidence against their clients. They resolved this dilemma by focusing their attacks upon the credibility of the investigative processes, particularly the interview techniques used with children. Armed with over a century of research on children's memory as well as research on the eyewitness testimony of children, they successfully challenged investigators who were unaware of the research and, therefore, could not refute alternative explanations for the child's allegations. The end result has been that prosecution has become more difficult; courts have found themselves questioning the credibility of the children, of the investigations, and of the experts; and many highly publicized cases have bordered upon becoming three-ring circuses which seriously threaten to divide public opinion.

Successful attacks on the credibility of sexual abuse investigations can have serious ramifications for the welfare of abused children. First, such attacks can foster a skepticism about the credibility of children's allegations that may result in people not taking children's statements seriously and in the subsequent underreporting of children's allegations. Second, as the skepticism grows, a higher level of proof may be necessary before appropriate steps can be taken to protect the child, before appropriate interventions can be initiated, and before the perpetrator's risk of future abuse can be adequately contained. Third, the public's skepticism may lead to a minimization of the magnitude and seriousness of the problem, which can result in the diversion of resources necessary to develop a better understanding of sexual abuse, to improve our identification of abused children, and to improve the efficacy of our treatment of all parties. Within the limitations of our current knowledge and investigative techniques, we must assure that our investigations of sexual abuse are conducted in a manner that minimizes the opportunities for successful attacks upon the credibility of our investigations and, ultimately, upon the children's allegations.

The forensic assessment or investigation of child sexual abuse is a complex process that may involve several different professionals and investigative techniques. Because of the multitude of idiosyncrasies

presented by each individual case, this book will not attempt to define the *ideal* investigative team nor the *ideal* investigative protocol, a task that would be very difficult, if not impossible. Instead, this book will provide the reader with a representative cross-section of current research from different fields that can guide the credible forensic investigation of child sexual abuse.

The forensic investigation of sexual abuse is conducted to collect information that will assist child welfare agencies and our courts in determining whether a child was sexually abused, whether the defendant is guilty of abusing the child, and, sometimes, to assist in the identification of necessary interventions. Chapter 1 presents an overview of the informational needs of child welfare agencies and the courts, of the scope of the forensic assessment, and of the standards and guidelines governing forensic investigations.

Because sexual abuse is unlikely to be videotaped and physical evidence of abuse is rare, the primary sources of information are the memories of the child and of the alleged perpetrator. Memory is neither consistent across ages nor between individuals; memory is not perfect, but rather is an amalgamation of a variety of experiences. Chapter 2 introduces the reader to the major developmental changes in memory as well as the reconstructive nature of memory. The ways in which the forensic investigation may impact the child's allegation(s) and memory of an alleged abuse are discussed in Chapter 3, while Chapter 4 discusses some of the major environmental influences upon children's allegations and memories, as well as the major controversies concerning children's memories of sexual abuse.

Sexually abused children are likely to interact with a variety of well-intentioned individuals who are either reacting to the child's allegations or who are attempting to obtain information necessary to facilitate the forensic investigation and to assure that appropriate interventions are provided. In spite of their intentions, some individuals ask questions or use techniques that may result in the child's allegations or descriptions of his or her memories being more an artifact of the investigative process than of events actually experienced. Chapter 6 discusses the *Nonleading-Leading Continuum* of investigative techniques in order to help the investigator recognize techniques that might modify a child's memory of an event or facilitate false allegations.

The forensic investigation of child sexual abuse involves more than having a conversation with the child and the perpetrator. It requires an understanding of human development, the skillful use of appropriate interviewing techniques, the availability of a healthy support

system for the investigator, and a basic understanding of the legal process and relevant legal procedures. Chapter 7 describes the basic knowledge, competencies, and support systems the forensic investigator should have.

Child sexual abuse does not occur in isolation but rather within the context of the child's life. In order to assess the validity of the child's allegation(s), in order to understand the abuse that has occurred, and in order to develop appropriate and comprehensive treatment plans, it is important to understand fully the context within which the alleged abuse occurred. Chapter 7 discusses the major environmental factors that can impact the child's allegation(s), that may influence the child's reconstruction of the event(s) from memory, and that must be considered in the formulation of appropriate interventions.

Although there is no single correct protocol for conducting forensic investigations of child sexual abuse, there are issues common to nearly all investigations and these are discussed in Chapter 8.

Once all of the interviews are completed and all corroborating and collateral information has been collected, the forensic investigator must assess both the credibility and the validity of the child's allegations. Chapter 9 differentiates between these two very important concepts and describes a process for assessing the credibility and validity of the child's allegations.

Regardless of how objective and comprehensive the forensic investigation, it is rare, if ever, that the investigator will be *100% certain* about his or her final conclusions. Consequently, the conclusions reached are most likely to be expressed in terms of probability rather than in dichotomous statements. Chapter 10 presents a four-step decision-making process to assist the forensic investigator in reaching the decision that is most strongly supported by the existing evidence.

In spite of the large public concern over child sexual abuse and the volume of information that has been published during recent years, there remain many unanswered questions. Chapter 11 highlights some of the important issues that need further exploration in order to improve both our identification of sexually abused children and the efficacy of our interventions.

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1 THE FORENSIC ASSESSMENT

The assessment of human behaviors and qualities has become a routine part of our lives; an effort to list the various combinations of all assessment procedures, processes, and subject matter would constitute a massive undertaking. In spite of the diversity that exists, however, all assessments have four common elements: (1) the assessment is precipitated by a specific referral question; (2) the referral question defines the scope of the assessment process in terms of what information is relevant; (3) the procedures used to collect the relevant information are guided by various professional and ethical standards, as well as by applicable legal guidelines; and (4) the role of the evaluator is determined by the nature of the referral question and by the nature of the setting within which the evaluator is functioning (e.g., the evaluator may have sole responsibility for collecting all information and making all decisions or the evaluator may only collect and integrate information from other sources).

Most readers may be familiar with educational and clinical assessments, two of the more common types of assessments. Educational assessments collect information concerning educational achievement, intellectual functioning, and various neuropsychological and developmental factors in order to answer questions about educational strengths and weaknesses, the most appropriate educational program, and ways to enhance educational development. The nature and scope of the assessment is determined by the referral question, ethical and professional standards, existing philosophies, and existing state and

federal regulations (e.g., special education standards). Clinical assessments are conducted to obtain information about personality dynamics, impulse control, social-emotional adjustment, and other factors of relevance to questions concerning diagnosis and treatment. The nature and scope of the clinical assessment is determined by the referral question, professional and ethical standards, the evaluator's theoretical orientation, and different mental health regulations.

In order to conduct a competent assessment or investigation, it is important for the evaluator to understand fully the referral question, the types of information relevant to the referral question, the rules or guidelines for collecting the relevant information, and the role of the evaluator.

THE FORENSIC REFERRAL QUESTION

Forensic assessments are conducted in order to collect information necessary to answer questions of concern to courts and to institutions such as child welfare agencies. Some of the more common forensic questions are *the best interests of the child* in child custody cases, *the competency of an individual to manage his or her own finances or affairs*, one's level of *criminal responsibility*, and *parenting capacity* in cases involving the termination of parental rights. In sexual abuse cases, the forensic assessment is conducted to *assist* an agency or court in determining *whether a child was sexually abused, whether a situation poses a sufficient risk to warrant some type of protective service for the child* (e.g., foster care placement), and *whether a specific individual sexually abused the child*.

When one conducts an educational or clinical assessment, the evaluator may have full responsibility to answer the **ultimate issue question** (e.g., "*Yes, the child has a learning disability*"; or, "*The child is not depressed*"). If the forensic assessment is being conducted for a child welfare agency the evaluator may be responsible for answering the ultimate issue question. However, when an assessment is conducted for the court, the evaluator's primary responsibility is to provide information that will assist the **trier of fact** (judge or jury) to better understand the meaning of the evidence or the individuals involved in the case, **not** to answer the ultimate issue question.

In some cases, the court may qualify the forensic evaluator as an **expert witness**. Federal Rule of Evidence 702 defines an expert as someone who is qualified to speak on a given issue by "knowledge, skill, experience, training, or education." Federal Rule of Evidence 403 states

that expert testimony will only be allowed when it helps the trier of fact to better understand an issue rather than misleading or confusing the court. When one has been qualified as an expert he or she *may* be allowed to offer an **opinion**, but only the trier of fact can decide whether the child **was** sexually abused and whether the alleged perpetrator **is/is not** guilty. Although this may appear to be a trivial matter of semantics, within a court of law it can be a critical issue:

During a complicated child custody case, the author observed a frustrated psychologist attempting to convince the court that the father had sexually abused his daughter and, therefore, should only be granted supervised visits with her. Seven different times the psychologist was asked by the mother's attorney whether the father had sexually abused his daughter and each time the judge would not allow the psychologist to answer the ultimate issue question. Although the psychologist did have an opinion, her continued effort to provide a definitive answer to the legal question (Was the child sexually abused?) prevented her from providing information that may have been relevant to the court. In the end, the preponderance of evidence did not support the allegation, and the father was granted liberal, unsupervised visitation with his daughter.

It is important for forensic evaluators to be fully cognizant of the fact that their primary responsibilities are to collect relevant information to assist the court or agency to understand issues that may not be normally understood by a layperson, to offer treatment recommendations when requested to do so, and, if qualified as an expert, to offer an opinion or hypothesis concerning the implications of the assessment. However the forensic evaluator should avoid definitive conclusions or attempting to answer dichotomous questions (*"Yes, the child was sexually abused by her father"*).

THE SCOPE OF THE FORENSIC ASSESSMENT

The comprehensive forensic assessment is a broad-based process that involves the careful interviewing of many witnesses and individuals familiar with the subjects of the investigation, as well as the assessment of the credibility of each interviewee. All available records and reports, including police reports, are reviewed and the evaluator assesses the accuracy and completeness of the documents, as well as the appropriateness of the means by which the information was collected. Depending upon the nature of the forensic question, collateral data may be obtained from medical examinations, psychological testing, school records, employment records, rap sheets, and arrest records (Shapiro, 1991).

One of the ways in which forensic assessments can be distinguished from other types of assessments is the former's thorough investigation of issues of malingering, deceit, and false allegations. In sexual abuse cases, the child as well as the child's significant others are likely to be as thoroughly assessed as is the alleged perpetrator.

The final impressions reached in many assessments, particularly clinical assessments, are often developed within the framework of theoretical constructs and concepts. Although theoretical formulations are sometimes presented as though they were facts, our courts generally view theoretical formulations as little more than **informed speculation** lacking solid empirical support. Consequently, impressions resulting from forensic assessments must be based upon **facts** and methodologically sound research. Theoretical and speculative formulations should not be a part of the forensic assessment process (Grisso, 1988).

Another major point of departure from many assessment procedures is the forensic assessment's relative lack of concern with issues of diagnosis and treatment. Even in those cases where the court recognizes the importance of a diagnosis and commits an individual for treatment, the courts are rarely concerned with improving the individual's overall life adjustment. Instead, the court is concerned with bringing an individual to a level whereby he or she can understand the legal process, the nature of the charge(s) against him or her, and the range of possible pleas and sentences, and with bringing the individual to a level where he or she can assist his or her attorney with his or her defense (Grisso, 1988). In most cases, the legal process can be divided into two phases. The first phase is concerned with determining whether a crime was committed (Was the child sexually abused?) and whether a specific individual is guilty of committing the crime. The second, or dispositional phase, is concerned with interventions for the child, the perpetrator, and perhaps the child's significant others. When the forensic assessment is limited to assisting the court in determining whether a crime was committed and/or whether a specific individual is guilty, it is quite possible that the assessment will not include the procedures necessary to address issues of diagnosis and treatment. However, these procedures are relevant when, and if, the court or agency requests diagnostic impressions or treatment recommendations.

The forensic evaluator must clearly define the purpose of the assessment. In other words, the evaluator should clarify ahead of time whether he or she is collecting information to assist the court or agency in determining whether a crime was committed, whether a specific individual is guilty of committing the crime, what treatment alternatives

would be most appropriate, or a combination of these questions. Offering specific treatment recommendations requires the evaluator to draw conclusions about the individual (i.e., a sex offenders program would not be recommended if the evaluator did not conclude that the defendant sexually abused the child). Such a conclusion might enable a competent defense attorney to raise questions successfully concerning evaluator bias that might reduce the weight the trier of fact gives to the assessment. As a general rule, it is probably best for the forensic evaluator first to collect information relevant to the questions of whether a crime was committed and whether the defendant committed the crime, and later to collect the kinds of information relevant to the formulation of treatment recommendations.

GUIDELINES FOR CONDUCTING FORENSIC ASSESSMENTS

All assessments are conducted according to guidelines that establish minimal standards for the assessments, help to ensure the adequacy and appropriateness of the assessment procedures, and protect the rights of those being assessed. Generally, any evaluator is guided by various ethical and professional standards, standards relevant to the institution or setting within which the evaluation is being conducted, as well as different state and federal regulations. In addition to the guidelines applicable to most assessments, forensic assessments are guided by existing case law and various legal procedures or **rules of evidence**. Although a comprehensive discussion of these guidelines is not possible within the scope of this book because of the many variations between local, state, and federal jurisdictions, some of the important rules for sexual abuse evaluations will be highlighted.

Earlier in this chapter it was emphasized that only the trier of fact can answer the ultimate issue question. Following the famous Hinkley case involving the attempted assassination of then-President Reagan, Congress passed Federal Rule 704b which clearly states that an expert **cannot** answer a question of whether someone did or did not do something because ultimate issue questions are the **sole** responsibility of the trier of fact. Failure to understand this issue fully can result in the forensic evaluator not being able to provide valuable information to the court.

During a clinical assessment, the patient's history is often important in formulating a diagnostic impression and developing appropriate treatment recommendations. For example, if the patient has a history of brief decompensations requiring hospitalization and the current

evaluation reveals a similar pattern of decompensation, then the history may warrant a specific decision concerning the patient's diagnosis and immediate treatment needs. However, although a history of child abuse or a potential for child abuse suggested by testing may be relevant at the time of sentencing, this information often cannot be referenced until the court has determined whether a crime has been committed and/or whether the defendant is guilty. Essentially, the position of the court is that this historical information does not assist the trier of fact to address the immediate question before the court. In other words, even though the defendant may have a diagnosis of *Pedophile* and a history of abusing other children, this does not mean the defendant is guilty of the charges for which he or she is currently appearing before the court. It is generally felt by the court that this information may unfairly bias the jury. However, relevant historical information is admissible at the time of sentencing and may have a significant impact upon the final disposition. The forensic evaluator who does not understand this issue might unwittingly make a statement during a trial that could result in a competent defense attorney successfully requesting a mistrial.

The Fifth Amendment of the United States Constitution protects one against self-incrimination. Consequently, a defendant has the right to refuse to answer the evaluator's questions, the defense counsel may instruct the client not to answer certain questions, or the court may order the evaluator not to explore certain issues. As a result of the defendant's assertion of the *Fifth*, the evaluator may be denied the opportunity to collect relevant information and this will compromise the adequacy of the assessment. Because physical evidence of sexual abuse may not exist and because competent forensic assessment requires the thorough evaluation of all parties, the defendant's assertion of the right to avoid self-incrimination may prevent the evaluator from being able to offer an opinion. The ethical codes of most professions do not allow one to formulate an impression about a person whom the professional has not appropriately evaluated.

It is well known that police officers must read the Miranda Rights to a suspect at the time of questioning or arrest. Likewise, many professionals are bound by the concept of **informed consent**. Accordingly, all individuals assessed must be warned about the limits of confidentiality, how the information collected will be used, the potential positive and negative consequences from participation in the evaluation process, who has access to the information, and so on. Specifically, all parties must be informed that all information obtained may be shared