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# CHILDREN IN THE COURTS: RETHINKING AND CHALLENGING OUR TRADITIONS

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## I. INTRODUCTION

More and more children are entering courtrooms as a result of the dramatic increase in reports of child abuse and neglect.<sup>1</sup> Generally, these cases would be addressed within the juvenile court process.<sup>2</sup> However, in cases of alleged child sexual abuse, criminal charges may also be filed against the alleged offender. This has resulted in the appearance of children as victims and witnesses of crime in open and public courtrooms.<sup>3</sup>

This article examines data regarding the type of clinical and legal interventions that can be effective in professionals' work with alleged child sexual abuse victims. The discussion also focuses on an historical analysis of the legal system and its involvement in the child welfare arena and the issues surrounding children as witnesses in the courts. In addition, this article provides an analysis of the social worker's role in cases of alleged child sexual abuse, the attorney's role in preparing social workers as witnesses, and considerations for the attorney when representing children in the court process. Finally, recommendations are provided regarding legal and social service intervention to assist children in the courtroom.

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1. See J. Garbarino, *The Incidence and Prevalence of Child Maltreatment*, in FAMILY VIOLENCE 224-40 (L. Ohlin & M. Loncy eds., 1989). *Highlights of Official Child Neglect and Abuse Reporting 1984*, at 8 (1986). This study estimated that in 1983, nearly 74,000 children were reported as sexually maltreated by a parent or person residing within the home. *Id.* at 17. This report states that there was a 35% increase in reports of child sexual maltreatment between 1983 and 1984. *Id.* at 16. See also *Official Highlights of Child Abuse and Neglect Statistics* (1989) (provides current statistical information for each state regarding reports of suspected child abuse and neglect from 1976-87).

2. See N.D. CENT. CODE § 27-20 (1960 & Supp. 1989) (defines the jurisdiction of the district court over deprived, unruly, and delinquent children in North Dakota).

3. See J. MYERS, *CHILD WITNESS LAW AND PRACTICE* at IX (1987) (a treatise on working with child witnesses pretrial, in the courtroom and in general throughout the legal process).

## II. HISTORY SURROUNDING THE EXPLOITATION OF CHILDREN

During the first century of this nation's history there were no agencies or entities offering protective services available to intervene on behalf of abused and neglected children.<sup>4</sup> As a result, parents were allowed to exploit the labor of their children.<sup>5</sup> In 1874, New York citizens became so outraged by the severe physical abuse and neglect of an eight-year-old child named Mary Ellen Wilson that concerned individuals pursued legal efforts to protect her. This was the catalyst which resulted in the child protection movement in the United States.<sup>6</sup> Mary Ellen's abusive stepmother and guardian, Francis Connolly, was subsequently brought to court and imprisoned.<sup>7</sup> Because there was no legal organization to protect the legal rights of children, the attorney for the American Society for the Prevention of Cruelty to Animals brought the court action against Connolly.<sup>8</sup> This dramatic case resulted in the forma-

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4. 2 G. ABBOTT, *THE CHILD AND THE STATE* 22-71 (1968). This section described, "the development of special care for children" before 1900. *Id.* The author discussed colonial attitudes toward dependent children and techniques that were used to deal with dependent children, i.e., apprenticeship, almshouses, auctioning off of dependent families to the lowest bidder and general poor relief. *Id.* at 3-4. See also S. Watkins, *The Mary Ellen Myth: Correcting Child Welfare*, 35 HIST. SOC. WORK 500, 501 (1990). The author provides a history of reported cases of child abuse dating back to 1655 in Massachusetts.

5. E. LUNDBERG, *UNTO THE LEAST OF THESE: SOCIAL SERVICES FOR CHILDREN* 102 (1947). The colonial system of care for children was based on a philosophy of indenture and apprenticeship. *Id.* Thus, poor children paid for their own care. *Id.* When children were unable to pay for their own care by performing tasks of labor, they were placed in almshouses. *Id.* This philosophy of care was based on an attitude that society should be relieved of providing funds to care for poor and destitute children. *Id.* Lundberg discussed a 1866 Massachusetts law that allowed the state to "place" children under the age of 16 who were without parental control or education, in an appropriate place (almshouses) developed to care for children. *Id.* In early United States history treatment of children focused on capitalizing on children's labor. J. HOUSDEN, *THE PREVENTION OF CRUELTY TO CHILDREN* 81 (1955). Housden provided historical evidence, stating that colonial children were regarded as chattel of their parents; however, there was some societal concern for neglected and abused children. *Id.* Therefore, from 1790 to 1825, relief agencies identified families who required resources from public or voluntary relief programs and made services available to the children. LUNDBERG, *supra* at 103. These services were intended to rescue the child from inhumane conditions in the home. *Id.* However, there were no formal organizations established to enforce the laws to protect children. *Id.* Consequently, volunteer societies for the prevention of cruelty to children sprung up throughout the United States. *Id.*

6. 2 R. BREMNER, *CHILDREN AND YOUTH IN AMERICA 1866-1932*, at 185-88 (1971)(citing N.Y. Times, Apr. 10, 1874); E.A. WHEELER, *THE STORY OF MARY ELLEN* 12 (1910). Mary Ellen was found in a New York apartment by a Methodist missionary, Mrs. Etta Angell Wheeler, who had been informed that Mary Ellen had been brutally beaten.

7. BREMNER, *supra* note 6, at 189. Mary Ellen's guardian, Francis Connolly, was sentenced to one year imprisonment with hard labor. *Id.*

8. *Id.* An appeal was made to the President of the New York Society for the Prevention of Cruelty to Animals, Henry Bergh, to intervene on behalf of Mary Ellen Wilson. WHEELER, *supra* note 6, at 40. This resulted in Mary Ellen's removal from the home of her stepmother; Watkins, *supra* note 4, at 502. This outlines the events surrounding the Mary Ellen Wilson case and corrects a misconception identified in social work literature that Mary Ellen was identified as a "member of the animal kingdom" by the

tion of the New York Society for the Prevention of Cruelty to Children and the establishment of similar organizations in other large cities.<sup>9</sup>

During the late 1800s and early 1900s, the child welfare system focused on rescuing children from abusive parents.<sup>10</sup> These early practices eventually shifted and a system of child protection was developed, emphasizing the support of families and recognizing the need for preventing cruelty to children in the familial context.<sup>11</sup>

With an increased public awareness of the incidents and effects of child abuse, the focus of child welfare services changed in the late 1960s from a psychoanalytic approach in child welfare service delivery to an emphasis on the battered child.<sup>12</sup> The public became more aware of the problem of child abuse, primarily as a result of additional academic research<sup>13</sup> and the development of

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courts. This myth was perpetuated because of the involvement by the New York Society for the Prevention of Cruelty to Animals. R. MCCREA, *THE HUMANE MOVEMENT* 135 (1910). The Society took the case to court and was successful in removing Mary Ellen Wilson from the care of her parents. *Id.*

9. LUNDBERG, *supra* note 5, at 103-04. Because the American Society for the Prevention of Cruelty to Animals was successful in its efforts to protect Mary Ellen, several similar complaints on the behalf of abused children were brought to the Society. *Id.* Other cities, including Rochester, Portsmouth, San Francisco, Philadelphia, Boston, Baltimore, Buffalo, Wilmington, and Brooklyn established an organization similar to the New York Society for the Prevention of Cruelty to Children. *Id.* Ten years later, the American Humane Association established a Children's Division. *Id.* According to one author:

The society was formed to rescue children from vicious and immoral surroundings and to prosecute offenders, to prevent the cruel neglect, beating or other abuse of children, to prevent the employment of children for mendicant purpose or in theatrical or acrobatic performances, and for the enforcement of all laws for the protection of minors from abuse.

MCCREA, *supra* note 8, at 135-36.

10. H.R. FOLKS, *The Care of Destitute, Neglected, and Delinquent Children* 103 (1900); LUNDBERG, *supra* note 5, at 104. The early focus was on enforcement of the laws to protect children from abuse, with the purpose of "rescuing" children and "prosecuting" parents. *Id.* The Society for the Prevention of Cruelty to Children was active in protecting children from blatant harm and unfair child labor practices. *Id.* For example, the New York Society directed action against the "padrone" system of importing children who had been sold by their parents in Italy. *Id.* Watkins, *supra* note 4, at 501 (states that the New York Society for the Prevention of Cruelty to Children (NYSPCC) established a "law enforcement" approach to child protection with a focus on "child rescue").

11. MCCREA, *supra* note 8, at 142-43. Eventually, the various societies for the prevention of cruelty to children held differing philosophies regarding how to intervene on behalf of children. *Id.* at 145-46. For example, the New York Society focused on prosecuting parents, while the Massachusetts Society believed that prosecuting parents was "a diminishing phase of anti-cruelty work" and that society should attempt to reconstruct families and enhance services to families. *Id.* at 146.

12. H. KEMPE & R. HELFER, *THE BATTERED CHILD* 18 (3rd ed. 1980). See also L. GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* 177-81 (1988) (discusses the connection between child abuse and household violence, as well as the connection between abuse and punishment).

13. R. HELFER & H. KEMPE, *CHILD ABUSE AND NEGLECT: THE FAMILY AND THE COMMUNITY* 163-68 (1976). In the late 1960s, experts began to acknowledge the critical problems that child abuse and neglect created for children, families, and communities. *Id.*

procedures for reporting cases of suspected child abuse and neglect in all fifty states.<sup>14</sup> Public awareness was heightened in 1962 when H.C. Kempe, M.D., and his colleagues institutionalized the diagnostic term "battered child syndrome."<sup>15</sup> Dr. Kempe, through his extensive research of abused children and subsequent publications, called for national recognition and action regarding child abuse.<sup>16</sup> This initiative resulted in the development of state and federal programs for the protection of children.<sup>17</sup> Today, all

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Child welfare experts began to research the extent and the effect of child abuse and to discuss the need for a "system-wide" response to meeting the needs of abused children. *Id.* at 165-66.

14. See ALA. CODE § 26-14-3(a) (1986); ALA. CODE § 26-14-4; ALASKA STAT. § 47.17.020(a) (1962); ARIZ. REV. STAT. § 13-3620(a) (1990); CAL. PENAL CODE § 11166(a)(b) (1982); COLO. REV. STAT. § 19-104(10)(3) (1986); CONN. GEN. STAT. § 17-38a(b), 17-38b (1988); DEL. CODE ANN. tit. 16, § 903 (1983); D.C. CODE ANN. § 2-1352(a) (1988); FLA. STAT. ANN. § 415.504 (1986); HA. REV. STAT. § 350-1.1(a) (1986); IDAHO CODE § 16-1619 (1979); ILL. ANN. STAT. ch. 23, para. 2054 (1988); IOWA CODE ANN. § 232-69(1) (1985); KAN. STAT. ANN. § 38-1522(A) (1986); KY. REV. STAT. § 199.335(2) (1982); LA. REV. STAT. ANN. § 14:403(C)(1) (Supp. 1990); ME. REV. STAT. ANN. tit. 22, § 4011 (1984); MD. FAM. LAW CODE ANN. § 5-704(a), § 5-903(a) (1984); MASS. GEN. LAWS ANN. ch. 119, § 51A (Supp. 1990); MICH. COMP. LAWS ANN. § 722.623(1) (Supp. 1990); MINN. STAT. ANN. § 626.556(3) (1983); MISS. CODE ANN. § 43-21-353 (1981); MO. REV. STAT. 210.115(1) (1983); MONT. CODE ANN. § 41-3-201 (1990); N.H. REV. STAT. ANN. § 169-C:29 (Supp. 1989); N.J. STAT. ANN. § 9-6-8.10 (Supp. 1990); N.M. STAT. ANN. § 32-1-15(A) (1989); N.Y. SOC. SERV. LAW § 413 (Supp. 1990); N.C. GEN. STAT. § 7A-543 (1989); N.D. CENT. CODE § 50-25.1-03(1) (Supp. 1989); OHIO REV. CODE ANN. § 2151.421 (1990); OKLA. STAT. ANN. tit. 21, § 846(A) (Supp. 1990); OR. REV. STAT. § 418.750 (1989); PA. STAT. ANN. tit. 11, § 2204(a) (Supp. 1990); S.C. CODE ANN., § 20-7-510(A) (1985); S.D. CODIFIED LAWS ANN. § 26-10-10 (Supp. 1990); TENN. CODE ANN. § 37-1-403(a) (Supp. 1990); TEX. FAM. CODE ANN. § 34.01 (Supp. 1990); UTAH CODE ANN. 62A-4-501, 78-39-63 (1989); VT. STAT. ANN. tit. 33, § 683(a)(b) (1989); VA. CODE § 63.1-248.3(a) (1987); WASH. REV. CODE ANN. § 26.44.030(1) (Supp. 1990); W. VA. CODE § 49-6A-2, § 49-6-1(a) (1986); WIS. STAT. ANN. § 48.981(2) (Supp. 1990); WYO. STAT. § 14-3-205(a) (1986).

15. H. Kempe, Silverman, Steele, Droegemueller, & Silver, *The Battered Child Syndrome*, 30 J.A.M. MED. A. 17-18 (1962). The "Battered Child Syndrome" was a medical term used to describe severe physical child abuse, primarily abuse of children under the age of three. *Id.* at 17.

Dr. Kempe and his colleagues noted that some children admitted to a hospital in Denver, Colo., displayed "evidence of neglect including poor skin hygiene, multiple soft tissue injuries, and malnutrition." *Id.* at 17-18. The medical professionals also noted a chronic history of health related problems and injuries to the children. *Id.* The health problems initially observed were found to dissipate while the children were hospitalized. *Id.* at 18. Also, the parents' version of how the children's injuries occurred could not be supported by the clinical findings. *Id.* at 18.

Significant pioneering research efforts on child abuse include the work of Vincent de Francis. See V. de Francis, *Protecting the Child Victim of Sex Crimes Committed by Adults*, 1969 AM. HUMANE A. Dr. de Francis asked communities to respond to children who have been sexually abused. *Id.* at 20. He discussed the serious repercussions that abused children face and also reminded communities that this was a serious and pervasive problem occurring in all communities. *Id.* at 19-20.

16. R.J. Gelles, *Violence Toward Children in the United States*, 48 AM. J. OF ORTHOPSYCHIATRY 580-92 (Oct. 1978). Dr. Gelles reported on the results of a survey designed to determine the incidences, modes, and patterns of parent-inflicted violence on children. *Id.* at 580. Survey results indicated that this was a serious problem. *Id.*

17. The Federal Child Abuse and Neglect Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 5 (codified as amended as Pub. L. 100-294 tit. 1, § 101 (1988), 102 Stat. 102, 42 U.S.C. § 5101-05). This act established a federal mandate for every state to develop a network of child protective services and a child abuse and neglect reporting law. *Id.*

fifty states and United States protectorates have statutes that mandate the reporting by a cadre of professionals of suspected child abuse and neglect and penalties for failing to report cases of suspected child maltreatment.<sup>18</sup> Consequently, the reports of child abuse and neglect incidents have dramatically increased in the past fifteen years.<sup>19</sup>

The American Humane Association, the national clearinghouse for gathering data on child abuse and neglect, recorded a 225% increase nationwide of reports of child abuse and neglect between 1976 and 1987.<sup>20</sup> There were 2.4 million reports of child maltreatment in 1989 alone.<sup>21</sup>

Another serious problem professionals are now addressing is the incidence of child sexual abuse. Statistics show that approximately 25% of adult women and 10% of adult men in the United States have been victims of some type of sexual exploitation some time in their childhood.<sup>22</sup> Complicating this is the problem professionals experience in clearly defining child sexual abuse.<sup>23</sup> The

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18. For the laws in a majority of states, see *supra* note 14. North Dakota's law, as the law requires in many states, mandates that the following professionals report cases of suspected child abuse or neglect: physicians, nurses, dentists, optometrists, medical examiners or coroners, or any other medical or mental health professionals, religious practitioners or the healing arts, school teachers or administrators, school counselors, addiction counselors, social workers, day care centers or any other child care workers, police or law enforcement officers. N.D. CENT. CODE § 50-25.1-03 (1989). Davidson, *Failure to Report Child Abuse: Legal Penalties and Emerging Issues*, printed in PROFESSIONAL RESPONSIBILITIES IN PROTECTING CHILDREN 93-101 (1988) (discusses issues surrounding failure to report child abuse by mandatory reporters and provides suggestions for system improvements).

19. *Id.* at 5. See *Official Highlights*, *supra* note 1. The American Humane Association is the clearinghouse for national data regarding child maltreatment. This report stated that between 1976 and 1987 reports of child abuse and neglect have increased 225% nationwide. *Id.* This report, compiled at the request of a 15-member advisory board appointed by Congress in 1988, states that in recent years reported cases of child maltreatment have dramatically increased from 60,000 in 1974 to 1.1 million in 1980 to 2.4 million in 1989. Statistics from the North Dakota Department of Human Services indicate that in 1978 there were 831 reports of substantiated child abuse and neglect in North Dakota. Between July of 1987 and June of 1988, there were 1,403 reports of child abuse and neglect in North Dakota. See *Child Abuse and Neglect in North Dakota*, 8 N.D. DEP'T OF HUMAN SERVICES, July 1987-June 1988.

20. *Official Highlights*, *supra* note 1, at 4. Of 2.4 million reported cases of child abuse in 1989, 900,000 cases were officially substantiated. *Id.*

21. *Id.*

22. S. PETERS, E. WYATT & D. FINKELHOR, SOURCEBOOK OF CHILD SEXUAL ABUSE 20-21 (1986) [hereinafter FINKELHOR]. This statistical percentage includes all forms of sexual molestation including sexual assaults perpetrated by strangers. *Id.*

23. R. KRUGMAN & D. JONES, INCEST AND OTHER FORMS OF SEXUAL ABUSE 287 (1987) (citing R. HELFER & R. KEMPE, THE BATTERED CHILD (4th ed. 1987)). Researchers often discuss the critical problems they encounter in gathering reliable statistical data regarding the incidents of child sexual abuse because reports often come to the attention of medical and human service professionals years after the incidents. See also FINKELHOR, *supra* note 22, at 22-27 (discusses the difficulties researchers encounter in conducting empirical research on the prevalence and incidents of sexual abuse and the shame and stigma that encompasses victims, offenders, and their families); J. GIOVANNONI & R. BECERRA, DEFINING CHILD ABUSE 242-43 (1979).

techniques researchers use to define sexual abuse determine the research methodology used to collect the data.<sup>24</sup> This methodology, in turn, affects the number of victims identified in any given study.<sup>25</sup> Reports generally indicate that child sexual abuse is a grossly underreported crime, particularly in cases of intrafamilial sexual abuse.<sup>26</sup>

The dynamics of secrecy surrounding cases of intrafamilial abuse also limit the number of reports.<sup>27</sup> Children are often told to maintain secrecy surrounding the sexually abusive acts and are threatened that if they tell anyone about their "secret" they, or someone they love, will be harmed.<sup>28</sup> Therefore, it is very difficult to state the incidence of child sexual abuse with statistical certainty or to gather clear and empirical data surrounding the repercussions of abuse. A general milieu of confusion surrounds the definition of child abuse; and the secrecy abusers seek, particularly within the family, enhances this confusion.<sup>29</sup>

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24. See M. DE YOUNG, *THE SEXUAL VICTIMIZATION OF CHILDREN* 1-2 (1982)(a general discussion regarding the fact that researchers use various definitions of child sexual abuse and defining the type of methodologies used in conducting research and how these methodologies change statistical outcomes).

25. D. FINKELHOR, *CHILD SEXUAL ABUSE* 107-08 (1984)(the public does not agree on a definition of sexual abuse and therefore this affects the number of incidents or acts of exploitation reported).

See D. RUSSELL, *SEXUAL EXPLOITATION, RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT* 193 (1984)(a discussion on how the methodology used by a researcher affects the number of reported incidents of child sexual abuse); R. GOLDMAN & V. WHEELER, *SILENT SHAME* 20 (1986)(statistics on the prevalence of incest vary depending upon the definition; for example, some researchers define the act of incest only when sexual intercourse has occurred, while other researchers define incest as any inappropriate sexual interest in or exploitive activity with a child).

26. See FINKELHOR, *HOTALING & SMITH*, 14 *CHILD ABUSE & NEGLECT* 19 (1990)(33% of females and 42% of males questioned as adults did not disclose childhood abuse until adulthood); G. WYATT & S. PETERS, *Issues in the Definition of Child Sexual Abuse in Prevalence Research*, 10 *CHILD ABUSE AND NEGLECT* 231-40 (1986)(research study on examining how the definition of sexual abuse affected the outcome of statistics surrounding the prevalence of child sexual abuse); G. Wyatt & S. Peters, *Methodological Considerations in Research on the Prevalence of Child Sexual Abuse*, 10 *CHILD ABUSE AND NEGLECT* 241-51 (1980)(research study discussed how the methodology the researcher used to gather data affected the results surrounding the prevalence of child sexual abuse); KRUGMAN, *supra* note 23, at 198 (data gathering surrounding sexual exploitation of children is impaired by the secrecy of intra-familial abuse).

27. See GOLDMAN, *supra* note 25, at 26-27 (describes stages of incest from the secrecy stage to disclosure); T. KEMPE & H. KEMPE, *THE COMMON SECRET — SEXUAL ABUSE OF CHILDREN AND ADOLESCENTS* 15 (1984)("sexual abuse of children and adolescents may be more common than physical abuse").

28. *Child Sexual Abuse: Incest, Assault, and Sexual Exploitation, A Special Report from the National Center on Child Abuse and Neglect*, 1978, U.S. Dept. of Health, Educ., and Welfare. Children's Bureau, DHEW Publication No. 79-30166 (OHDS). See also D. GLASER & S. FROSH, *CHILD SEXUAL ABUSE* 95 (1988)(general discussion regarding the secrecy surrounding incest and the accompanying threats).

29. Some theorists contend that because of the sensitive nature of gathering research surrounding the incidents of child sexual abuse, there may be an under-reporting of the incidents. Diane Russell conducted an empirical study measuring the incidents of sexual abuse in women. D. Russell, *The Incidents and Prevalence of Intrafamilial and*

Although there is increased knowledge and concern about the incidents of child sexual abuse, there is further concern regarding the appropriate legal interventions to protect child victims.<sup>30</sup> Reports of abuse and neglect have not only challenged the legal system but have also created a challenge for human service and mental health professionals to examine appropriate ways to respond to these vulnerable children.<sup>31</sup> As programs are developed to protect children from unlawful acts, issues of proof regarding guilt and innocence of alleged offenders are becoming more significant, and the role of professionals in proving sexual abuse has been enhanced.<sup>32</sup> The legal process also necessitates bringing children into the courtroom as witnesses in civil and criminal court cases.<sup>33</sup>

### III. CHILDREN IN THE JUSTICE SYSTEM

Courts and legislatures have begun to examine techniques to

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*Extrafamilial Sexual Abuse of Female Children*, 7 CHILD ABUSE AND NEGLECT 133-146 (1983). Russell, a sociology professor at Mills College, conducted face-to-face interviews with 930 women over the age of 18 who resided in San Francisco. *Id.* at 134. The women were selected at random to participate and Russell was interested only in experiences involving sexual contact. *Id.* at 144. Of the 930 women interviewed, 38% reported at least one incident of sexual abuse before the age of 18. *Id.* at 137. When the definition of sexual abuse was expanded to include other forms of sexual abuse, such as exhibitionism, the data indicated that 54% of the women had been abused by the age of 18. *Id.* at 138. The study also revealed that only two percent of the cases of intrafamilial abuse and six percent of the cases of extrafamilial sexual abuse were reported to law enforcement. *Id.* at 142. See also L. Schultz, *The Child Sex Victim: Social, Psychological, and Legal Prospectus*, 52 CHILD WELFARE 147-57 (March 1973).

30. B. DZIECH & C. SCHUDSON, ON TRIAL: AMERICA'S COURTS AND THEIR TREATMENT OF SEXUALLY ABUSED CHILDREN 53-72 (1989) (discusses issues surrounding children's testimony and issues of child witnesses in sexual abuse cases). See also J. Myers, *Protecting Children from Sexual Abuse: What Does the Future Hold?* 15 J. CONTEMP. L. 31, 45-50 (1989) (discusses the backlash of child sexual abuse and promotes a renewed vision for professionals working with child sexual abuse victims); K. Bores, *Syndrome Testimony in Child Abuse Prosecutions: The Wave of the Future?*, 8 ST. LOUIS U. PUB. L. REV. 207 (1989) (reviews the elements of the battered child syndrome and the child sexual abuse accommodation syndrome and discusses the necessity to offer syndrome testimony to enhance the prosecution of child abuse cases).

31. K. FALLER, *Understanding Child Sexual Abuse* 14-16 (1990) (asserts that mental health professionals should advocate a "victim-centered approach" to deal with cases of child sexual abuse).

32. Apparently, it was not until 1881 that the New York appellate court applied an 1876 state legislative act that prevented and punished wrongs to children. *Cowley v. People*, 83 N.Y. 464 (1881). The court was confronted with the admissibility of photographs taken before and after a neglected child was placed in the custody of an abusive adult. *Id.* at 471. The earliest photograph showed the child in a healthy state, while the subsequent photos showed the child in an emaciated state due to neglect. *Id.* at 471. The court's discussion, concluding that photographs were admissible evidence, spanned three and one-half pages and emphasized the importance of evidentiary issues in the successful prosecution of child abuse and neglect cases. *Id.* at 471-74. See also DZIECH, *supra* note 30.

33. See DZIECH, *supra* note 30, at 30-40; S. DAVIS & M. SCHWARTZ, CHILDREN'S RIGHTS AND THE LAW 1-3, 201, 202 (1987) (discusses treatment of the child's state of minority and issues of autonomy versus paternalism).

accommodate the child witness in the court system.<sup>34</sup> Additionally, the effects of public perception and media influence on parental and agency reactions have influenced children, their families, and the people in the justice system.<sup>35</sup> Challenges facing the judicial system with child witnesses include the credibility of child witnesses in the courts, the potential of revictimizing the child in the court process, and the balance between accommodation of the child victim in the courts and the defendant's rights.<sup>36</sup>

A great deal of concern has been expressed regarding whether children tell the truth about sexual abuse.<sup>37</sup> Child development specialists and social workers recognize that generally children's accounts of exploitation are accurate and that children tend to accommodate the exploitation.<sup>38</sup> Not everything children say about sexual abuse may be accurate, and professional writers have acknowledged that some degree of falsity may exist.<sup>39</sup> The

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34. D. WHITCOMB, *WHEN THE VICTIM IS A CHILD* 27-29 (1985); DZIECH, *supra* note 30, at 173-79. See also N.D. CENT. CODE § 12.1-34 (Supp. 1989) (fair treatment standards for victim/witness); N.D. CENT. CODE § 12.1-35 (Supp. 1989) (fair treatment standards specifically addressing special child victim needs in the legal process). The North Dakota statutes were proposed by the North Dakota Governor's Task Force on Witnesses and Victims of Crime. Both authors of this article were members of this committee, and prepared legislation to address the needs of children who are victims of crime.

35. DZIECH, *supra* note 30, at 22, 26, 81 (discussing the influence of the media on the general public, the justice system and how our society perceives child sexual abuse and receives information on these types of cases). See also C. TOWER, *UNDERSTANDING CHILD ABUSE AND NEGLECT* 256 (1989) (potential for revictimization of child abuse victims when media coverage is insensitive).

36. See, e.g., D. Whitcomb, *Prosecuting Child Sexual Abuse — New Approaches*, in NATIONAL INSTITUTE OF JUSTICE 1-6 (1986) (summarizes the problems children face in the courtroom and provides summary recommendations regarding courtroom accommodations for children); J. BULKLEY & H. DAVIDSON, *CHILD SEXUAL ABUSE: LEGAL ISSUES AND APPROACHES* (Sept. 1980) (provides techniques to help attorneys to respond in cases of alleged sexual abuse).

37. K. MEISELMAN, *RESOLVING THE TRAUMA OF INCEST* 199-202 (1990). Review of the literature regarding indicators raises suspicion that reports of incest are false. These indicators appear when: the account of incest does not fit the typical pattern, the child uses age-inappropriate terminology, the child is unable to describe the details of sexual activity, and the accusing parent behaves atypically. See also K. WALKER, *HANDBOOK ON SEXUAL ABUSE OF CHILDREN* 112-19 (1988) (accuracy and inaccuracies of children's eyewitness reports).

38. See Bores, *supra* note 30, at 214-15 (discusses a phenomenon entitled the child sexual abuse accommodation syndrome); R. Summit, *The Child Abuse Accommodation Syndrome*, 7 *CHILD ABUSE AND NEGLECT* 177-93 (1983) (children who are sexually abused often display characteristics such as secrecy, helplessness, entrapment, accommodation, delayed unconvincing disclosure, and retraction). See also K. Faller, *Is the Child Victim of Sexual Abuse Telling the Truth?*, 8 *CHILD ABUSE AND NEGLECT* 474-75 (1984) (discusses why it is generally not in the child's perception of their best interest to make false allegations of child sexual abuse while it is often in the alleged offender's best interest to fail to disclose the exploitive act because of the inherent consequences).

39. Berliner, *Sexual Abuse Allegations in Custody and Visitation Cases*, A.B.A. NAT'L LEGAL RESOURCE CENTER 49 (1988).

THE NEW CHILD PROTECTION TEAM *HANDBOOK* 78-79 (D. Bross, ed., 1988). This book provides information regarding reasons for false reports of child sexual abuse; the authors state:

In the rare instance when children do make false accusations, it is generally for

adequacy of a child's memory and the element of suggestibility is often an additional concern in these cases.<sup>40</sup>

Another reaction concerning alleged false reports of child sexual abuse has been the creation of a national group called Victims of Child Abuse Laws (VOCAL). This group consists of individuals who allege that they have been falsely accused of child abuse by child welfare professionals and prosecutors.<sup>41</sup>

One of the most perplexing issues that prosecutors, defense counsel, and judges face is whether the child is harmed or traumatized by sexual abuse investigations and litigation.<sup>42</sup> Some experts

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one of the following reasons: (1) to protect themselves from things that incriminate them when they perceive themselves to be in trouble, (2) to obtain an objective (secondary gain) that is important to the child (dating privileges, custody change) often within the context of marital separation or divorce between parents, or (3) to please or anger the parent(s).

*Id.* at 78. False accusations are more commonly generated by parents than by children. The reasons for this may be related to child custody issues in the case of a divorce, harassment of a noncustodial parent, or the desire to terminate a partner's parental or visitation rights. Such accusations may be made by the parent (usually when the child is semi-verbal) or by parental coaching of the child. *Id.*

40. A recent study by Saywitz, Goodman, and Meyers found that young children are not as proficient at "free-recall" as are older children, which they theorize explains why young children spontaneously recall less information than older children might when asked an open-ended question. K. SAYWITZ, G. GOODMAN & J. MEYERS, 1 VIOLENCE UPDATE 199 (1989). They argue that the form of the question, or the process of questioning might enhance a young child's ability to deliver more information. *Id.* The authors report that children age 10-11 are no more suggestible than adults, while children ages 4-9 are sometimes more suggestible. Children's suggestibility under age four seems to be related to the surrounding atmosphere and the questioner's reliance on peripheral details. *Id.* (citing G. Goodman & R. Reed, *Age Differences in Eyewitness Testimony*, 10 LAW & HUMAN BEHAVIOR 317-332 (1986)). The more familiar the event, particularly if the child participated in the event, the higher the resistance to suggestibility. *Id.* In a study done with children regarding genital touching during a routine pediatric exam, the authors found that in free recall and demonstration, there is a high risk that children who have been genitally touched (examined) often will not reveal it (as they did not in this study unless specifically asked) and there is less risk of false reports than previously considered. *Id.* When questioned *specifically* about the touching, children were more likely to reveal the event, however, the researchers found that this procedure increased the error rate on details for younger children. *Id.* The authors conclude that questions must be asked in a form and language the children can developmentally understand.

41. Victims of Child Abuse Laws (VOCAL) was created in Minneapolis, Minnesota, on October 18, 1984. The idea of a support group for alleged victims of child abuse laws in Minneapolis resulted in active chapters of VOCAL with thousands of members in all 50 states. H. WAKEFIELD & R. UNDERWAGER, ACCUSATIONS OF CHILD SEXUAL ABUSE 414 (1988). There are currently VOCAL chapters in Mercer County and Fargo, North Dakota. See also P. EBERLE, THE POLITICS OF CHILD ABUSE 121-69 (1986) (discussion regarding how the "politicizing of child abuse" issues has hurt families and resulted in false allegations).

42. DZIECH, *supra* note 30, at 19-20. Judge Charles B. Schudson co-authored this book and lectures nationally on child witness issues and the legal system's need for special adaptations to accommodate child witnesses in court. See also 68 M.E. ELWELL & P. EPHROSS, INITIAL REACTIONS OF SEXUALLY ABUSED CHILDREN IN SOCIAL CASEWORK 116 (Feb. 1987) (based on research findings, the authors summarize that "a negative definition" of child sexual abuse occurs through inappropriate handling of cases of alleged child sexual abuse; this anticipates a court appearance and frequent interviews of the child involving numerous professionals); J. Conte, *The Justice System and Sexual Abuse*, 58 SOC. SCI. REV. 551, 557 (1984) (discussion regarding the role of the courts in protecting children in cases of child sexual abuse); Berliner, *The Child Witness: The Progress and Emerging Limitations*,

argue that the court process can be therapeutic because the children are afforded the opportunity to tell their account of the incident.<sup>43</sup> Others believe there are reasons for not using children as witnesses, including the potential for traumatizing the child.<sup>44</sup> Trauma may occur in the pre-trial examination and preparation, as well as the actual experience of being a witness in a formal court proceeding and undergoing rigorous cross-examination.<sup>45</sup> There are many reasons why a child victim's testimony is crucial evidence, including the fact that the child is often the only witness to the alleged crime.<sup>46</sup> Many child advocates, however, contend that child witnesses can be severely traumatized and in effect be revictimized by the confrontational experience.<sup>47</sup> Therefore, numerous states have passed legislation to ameliorate some of those effects, and the United States Supreme Court has addressed these

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40 U. MIAMI L. REV. 167, 175 (1986) (discussed child witnesses in general and reforms; suggested that keeping children out of the courtroom may perpetuate the perception that children, in general, are incompetent as witnesses). See also N. King, *Going to Court: The Experience of Child Victims of Intrafamilial Sexual Abuse*, 13 J. OF HEALTH, POL., POL'Y & L. 4 (1988) (a study of 100 child victims of intrafamilial sexual abuse and the accompanying legal process over an eighteen month period). The authors of this study found that testifying in and of itself was not the harmful event, if appropriate support and accommodations were available and the resolution was speedy. *Id.* They determined that testifying in juvenile court may be empowering for the child victim. *Id.* The key to the most successful and least traumatic process seemed to be the presence of a support person, specifically a guardian ad litem, and the authors recommend that such a person be available in all criminal court proceedings. *Id.*

43. See J. Tedesco & S. Schnell, *Children's Reactions to Sex Abuse Investigation and Litigation*, 2 CHILD ABUSE AND NEGLECT 267-72 (1987) (presented research on children in Iowa courtrooms; a survey questionnaire completed by 48 professionals who worked with children in the courts indicated that 53% of the respondents believed that the legal process was helpful to the child). See also King, *supra* note 42, at 708.

44. See DZIECH, *supra* note 30, at 73-125, 173-79 (a case analysis of how preschool children were treated in the court room in a sexual abuse case; discusses how children may be revictimized by the legal process and the authors recommend techniques for eliminating trauma to these children). See also D. BROSS, FOUNDATIONS OF CHILD ADVOCACY 117-21 (1987) (issues surrounding protection of child witnesses; offers documented materials supporting a premise that appropriate court intervention can occur without calling children as witnesses).

45. R. GEISER, HIDDEN VICTIMS 44, 160 (1979) (general discussion regarding the hazards of exposing children to a justice system that further traumatizes a child).

46. DAVIS, *supra* note 33, at 177-81 (presents two alternatives to prosecutors when the child cannot testify or is incompetent; using extrajudicial statements and taking steps to reduce trauma so that a child is able to testify). See also DZIECH, *supra* note 30, at 131 (describing the necessity for children to provide testimony to support a criminal action for sexual assault or child maltreatment); WHITCOMB, *supra* note 34, at 112-19 (describing innovative courtroom procedures to lessen the trauma to the child of the court proceedings); MYERS, *supra* note 3, at 509-18 (child victim/witness trial or hearing innovations and strategies).

47. Perry, *Interviewing, Counseling, and In-Court Examination of Children: Practical Approaches for Attorneys*, 18 CREIGHTON L. REV. 1369, 1421-22 (1985). Perry and Teply note that the victim often "re-lives" the experience of the act or molestation when they testify and this can cause trauma, fear, and psychological harm. *Id.* See also MYERS, *supra* note 3, at 511-12, 515-16 (strategies for working with traumatized children in the courtroom).

issues in recent opinions.<sup>48</sup>

The word "trauma" lacks a suitable definition and there is very little empirical research available to assist the courts in arriving at a workable definition. A commonly held perception of the justice system is that "trauma" is synonymous with punishment; and, therefore, children who testify in child sexual abuse cases punish their abusers.<sup>49</sup> As research indicates, most offenders are known to the child and are often family members.<sup>50</sup>

Thus, the child who testifies against an alleged abuser must bear the pressure and stigma resulting from a close relationship with the alleged abuser.<sup>51</sup> The report of sexual abuse may result in removal of the offender from the home.<sup>52</sup> There appears to be less

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48. *Coy v. Iowa*, 487 U.S. 1012, 1021, 108 S. Ct. 2798, 2803 (1988)(O'Connor J., concurring). The Court recognized that the right of confrontation is not absolute and may give way to more important interests. *Id.* at 1020, 108 S.Ct. at 2802. Justice O'Connor, in her concurrence, specifically stated that "certain procedural devices [could be] designed 'to shield a child witness from the trauma of courtroom testimony' and still protect the accused's right of confrontation. *Id.* at 1021, 108 S.Ct. at 2803. In particular, Justice O'Connor suggested that she would uphold the constitutionality of closed-circuit televisions to present the child's testimony in court. *Id.* at 1023, 108 S.Ct. at 2804. She advocated that the court must make a factual determination of whether there is likely to be trauma to the child witness and whether the procedure offered to protect the child is necessary to further that goal. *Id.* In *Maryland v. Craig*, 110 S. Ct. 3157 (1990), the Supreme Court allowed the use of closed-circuit television testimony for a 6-year-old girl in a child sexual abuse case. The Court upheld Maryland's statute and lower court decision allowing this type of testimony when the court "adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live in-person testimony." *Id.* at 3159. In the trial, the lower court allowed this procedure after expert testimony offered that if the child was required to testify in the traditional manner she would experience "serious emotional distress such that [she could not] reasonably communicate." *Id.* at 3159. The court went on to say that for this procedure to be necessary in a case, the trial court must find that: 1) the procedure is necessary to protect that specific child; 2) the child must be traumatized by the defendant's presence, not the legal process in general; and that 3) the child's harm will be greater than "de minimus." *Id.* at 3160.

49. WALKER, *supra* note 37, at 127-28. Studies indicate that it is stressful for children to be involved in the legal process as an alleged victim of sexual abuse. *Id.* See also J. SELKIN & P. SCHAUTEN, *THE CHILD SEXUAL ABUSE CASE IN THE COURTROOM: A SOURCE BOOK* 95-96 (1987)(victims of sexual abuse in the courtroom).

50. GOLDMAN, *supra* note 25, at 19. From 35% to 75% of the cases of sexual abuse involve offenders who are family members and from 65% to 95% of the cases involve offenders known to the victim. *Id.* See also B. GOMES-SCHWARTZ, J. HOROWITZ & A. CARDARELLI, *CHILD SEXUAL ABUSE* 62-63 (1990)(recent research supporting prior research studies which state that the alleged offender is most often known to the victim). This study states that nearly one-half of sexual abuse offenders live in the same home as the victim and 40% of these offenders performed the role of parent. *Id.* Only 3% of all offenders were strangers to the victims. *Id.*

51. This author recalls a case of alleged child sexual abuse where a child refused to discuss the incidents of incest in the home until the offender left the geographical area. The child displayed numerous behavioral characteristics that indicated sexual abuse may have occurred. Because of extreme child neglect which resulted in a finding of deprivation, the child was placed in foster care prior to the disclosure of sex abuse.

52. N.D. CENT. CODE § 27-20-17 (Supp. 1989); N.D. CENT. CODE § 14-07.1-02 (Supp. 1989). Both statutory provisions offer victim protection by removing or restricting an offenders presence in the child's home or contact with the child. In addition, a domestic violence protection order, pursuant to section 14-07.1-13 of the North Dakota Century

resulting stigma and pressure when a child testifies against an alleged abuser who is a stranger.<sup>53</sup> Many experts believe that "system induced trauma" can be reduced by sensitive handling of cases of alleged child sexual abuse, although more adequate research is necessary.<sup>54</sup>

The role of the courts in protecting children is complex; specifically, the court has a dual responsibility of protecting children and the rights of the accused.<sup>55</sup> Determining whether a child has been sexually abused is important because that determination dramatically affects the life of the child and the alleged offender. This determination is not only the responsibility of the courts, but also the responsibility of many other human service and medical professionals who are also concerned about serving the best interest of the child and serving as advocates for the children in the justice system.

Child welfare professionals' determinations regarding alleged sexual abuse cases have brought children into the courtroom as witnesses.<sup>56</sup> This has resulted in extensive debate among professionals regarding the reliability of children as witnesses,<sup>57</sup> specifi-

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Code, may be available to protect a child and restrain an offender from a home or contact with the child or non-offending parent/caretaker. N.D. CENT. CODE § 14-07.1-13 (Supp. 1989). Prosecutors commonly use Rule 46 of the North Dakota Rules of Criminal Procedure to attach a no-contact provision to a release from custody or as a condition of bail. N.D.R. CRIM. P. 46.

53. SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES 67 (P. Mrazek & C. Kempe eds. 1981)(specific problems which victims of child abuse encounter when the alleged perpetrator is a relative or a family friend; there is more pressure to recant their original testimony or refuse to testify at subsequent hearings).

54. Conte, *supra* note 42, at 556. This article discussed how the justice system can assist in addressing the needs of sexually abused children. *Id.* at 556. The author strongly encourages human service professionals to coordinate the investigation and treatment services for sexually abused children with the law enforcement system in preparing for and entering the legal system. *Id.* at 567. See also G. Goodman, *The Child Witness: Conclusion and Future Directions for Research and Legal Practice*, 40 J. OF SOC. ISSUES 2 (1984)(the role of human service and medical professionals in assisting the legal system to respond appropriately to the particular needs of child witnesses); King, *supra* note 42, at 716-19; K. FALLER, CHILD SEXUAL ABUSE: AN INTERDISCIPLINARY MANUAL FOR DIAGNOSIS, CASE MANAGEMENT AND TREATMENT 74-78 (1988). The author provides eleven suggestions which may enhance the protection of child witnesses in the courts. *Id.*

55. DZIECH, *supra* note 30, at 19. Child advocates do not argue that American courts should abandon traditional and constitutional protections for defendants. *Id.* Nor do they assert that defendants be denied the right to confront their accusers. *Id.* Child advocates argue, however, that in some cases to facilitate discovery of truth, confrontation of a child must occur in ways not usually employed in courtrooms. *Id.* See also *Maryland v. Craig*, 110 S. Ct. 3157 (1990).

56. S. VUNIKKA, CHILD SEXUAL ABUSE AND THE LAW 141-54 (1989). The author provides statistics regarding the number of child sexual abuse cases which enter the criminal court system. The role of the child witness in these proceedings is discussed and an analysis is provided regarding the limitations of the court process in protecting children.

57. See S. CECI, M. TOGLIA & D. ROSS, CHILDREN'S EYEWITNESS MEMORY 180 (1987)(a collection of significant empirical research articles regarding children's recollection).

cally their cognitive abilities to recall information regarding alleged sexual abuse incidents.<sup>58</sup> Furthermore, the role of expert witnesses has taken on an enhanced and renewed meaning in regard to child witness evaluations.<sup>59</sup>

Another important variable is the role of the media in covering cases of child sexual abuse. Of concern for the justice system is the influence that media reports may have on jurors.<sup>60</sup> Media involvement in these cases can be both positive and negative.<sup>61</sup> The positive effect is that media attention can create important public awareness regarding the serious problems of child sexual

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58. D. Raskin & P. Esplin, *Assessment of Children's Statements of Sexual Abuse*, in *THE SUGGESTIBILITY OF CHILDREN'S MEMORY* (1991). Because there is often a lack of medical evidence in child sex abuse cases, the child's testimony often will determine the outcome of the case. *Id.* There is, however, a general concern about the credibility of child witnesses, therefore, experts are frequently employed to assess the child's cognitive abilities. *Id.* Drs. David Raskin and Phillip Esplin believe that children do not misrepresent an event if they do not have a motive; the central issue is not the child's ability to recall an event, it is the child's motivation to recall the incident and, therefore, the central issue becomes the credibility of their account. *Id.* The Raskin & Esplin scale is designed to assess the credibility of the child's statements, as well as the potential motivation behind the statement. *Id.* See also CECI, *supra* note 57, at 36-50.

59. See J. Meyers, *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 5 (1989)(describing the categories of expert witness testimony most often presented and the accompanying scientific and clinical basis each category relies upon); *Sexual Abuse Allegations in Custody and Visitation Cases*, *supra* note 39, at 48-69 (factors to consider when deciding whether a child has been molested); G. Melton, *Psychologists' Involvement in Cases of Child Maltreatment*, 44 AM. PSYCHOLOGIST 1225-1233 (1989)(discussing involvement of a psychologist in the adjudicatory and dispositional phases of child abuse and neglect cases with a focus on protecting rights of the parties and the purpose of the legal process); R. Roe, *Expert Testimony in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 97 (1986)(an early article discussing the assistance psychological expert witnesses can provide in sexual abuse cases); E. Bordiga, *Expert Testimony in Child Sexual Abuse Cases: An Empirical Investigation of Partisan Orientation*, 23 FAM. L.Q. 433 (1989)(discussing research and results on the partisan predisposition of a pool of potential experts witnesses toward victim characteristics and other factors generally found in sexual abuse cases); M. Hall, *The Role of Psychologists as Experts in Cases Involving Allegations of Child Sexual Abuse*, 23 FAM. L.Q. 451 (1989)(a psychologist's role in assessing behavior and characteristics of children and how to integrate the disciplines of law and psychology to present information to the legal system).

60. D. GRABER, *CRIME NEWS AND THE PUBLIC* 49-54 (1980). Research conducted showed that in a sampling of a general panel of citizens (analogous to a jury in that it was a cross-section), they learned about crime from mass media sources 95% of the time. *Id.* The panel also reported that 38% of the time they received information from other sources. *Id.* See also INVESTIGATION AND PROSECUTION OF CHILD ABUSE V-9 (Nat'l Center for the Prosecution of Child Abuse)(the influence of media on potential jurors and voir dire considerations); R. DRECHSEL, *NEWS MAKING IN THE TRIAL COURTS* 11-27 (1983)(discussed the relationship between the media and the judicial system, particularly the effects of media coverage on the public's awareness of issues before the court and the influence of media on social thought and trend).

61. GRABER, *supra* note 60, at 54. The criminal justice system is often unfairly judged by the media on the factors of apprehension and punishment rather than reform and societal elimination. *Id.* See also GORDON, *supra* note 12, at 50-51 (describing the media's influence on public perception in the historical recognition of child and family violence); R. Weinbach, *Public Awareness of Sexual Abuse: Costs and Victims*, 32 SOCIAL WORK 532-33 (1987)(discusses problems associated with the media presentation of dramatic cases of child sexual abuse).

abuse.<sup>62</sup> However, media attention may revictimize the child when the public is present for the child victim's testimony in open court. This testimony often discloses intimate details of an incident involving the child victim.<sup>63</sup> Further, Gail Goodman's study demonstrates a general bias against child witnesses by potential jurors who may be receiving information through media accounts.<sup>64</sup>

Recent cases in which the media have played a critical role include the Scott County case in Jordan, Minnesota;<sup>65</sup> the McMartin Preschool case in Los Angeles;<sup>66</sup> the Hilary Morgan case in Washington, D.C. and Christ Church, New Zealand;<sup>67</sup> and, the Lisa Steinberg case in New York.<sup>68</sup> The media played a significant role in the general public's perception of what happened to the alleged child victims in these cases. The media also played an important role in providing a forum for the North Dakota chapter of VOCAL to express their views and concerns regarding false

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62. J. CREWDSON, *BY SILENCE BETRAYED* 12-23 (1988). This book discusses the effects of the made-for-television movie "Something About Amelia" on the public's perception of child abuse, the prevalence of media coverage on child sexual abuse cases and the media's responsibility and role in these cases. *Id.* See also GRABER, *supra* note 60, at 54.

63. Unlike juvenile courts, criminal courts allow access to the media and members of the public. Therefore, when cases of child sexual abuse are prosecuted, spectators are often present and many of the cases are emotionally charged and become both politicized and followed by the media. Victim identification is inevitable in such cases, as well as wide reporting on the details of the maltreatment. See DZIECH, *supra* note 30, at 26; CREWDSON, *supra* note 62, at 182.

64. Goodman, *When a Child Takes the Stand*, 11 L. AND HUM. BEHAV. 27, 36-39 (1987) (study concluded that jurors were biased against children and found children to be less credible eye-witnesses than adults).

65. Minneapolis Star and Tribune, May 26, 1985, at 1, col. 1. In Jordan, Minnesota, charges were filed against 24 adults in Scott County; complaints were then dropped against 21 of them after two parents (husband and wife) were acquitted and another defendant pleaded guilty to a reduced charge. *Id.*

66. Los Angeles Times, Nov. 3, 1989, § B1, col. 1. The McMartin Preschool case of alleged multiple child molestation is the longest and most expensive legal case in history, costing at least 15 million dollars, in a trial that occurred six years after the original arrests. *Id.* at § B4, col. 1. Initially seven daycare teachers were indicted on 115 counts of sexual molestation by a grand jury. *Id.* Charges were dropped against five of the seven defendants because of insufficient evidence. *Id.* Two individuals, Ray Buckey and Peggy Buckey, were indicted on 64 counts of sexual molestation and one count of conspiracy. *Id.* Ray and Peggy Buckey were acquitted on all counts except seven counts. *Id.* The jury could not reach a decision on 13 counts. Ray Buckey was retried on 8 counts in July of 1990. This article provides a cursory analysis of what went wrong in the McMartin Preschool Trial. *Id.* at 28-29.

67. The Washington Post, Sept. 26, 1989, at A1. Dr. Elizabeth Morgan, mother of seven-year-old Hilary, refused to obey a court's visitation order allowing her ex-husband, Eric A. Foretich, visitation rights with their daughter, Hilary. *Id.* Dr. Morgan was jailed in August 1987 for contempt of this court order. *Id.* Dr. Morgan refused to obey the court order because she alleged that her former husband, Eric Foretich, sexually abused Hilary. *Id.* Dr. Morgan was released from jail on Sept. 25, 1989, after President Bush signed a congressional bill tailored to address her situation. *Id.*

68. N.Y. Times, March 25, 1989, at 1. Joel Steinburg was found guilty of second degree murder in the death of his eight-year-old adopted daughter, Lisa Steinburg. *Id.* at 1, 32. This was a highly visible 12-week trial which received a great deal of national publicity. *Id.*

accusations of child abuse.<sup>69</sup>

#### IV. THE SOCIAL WORKER'S ROLE

In North Dakota, social workers, like a variety of other professionals, are required by law to report incidents of suspected child abuse and neglect to appropriate authorities.<sup>70</sup> In situations where the alleged offender is acting as a custodian for the child, the suspected abuse must be reported to the appropriate child welfare authorities located in the county seats.<sup>71</sup>

Child welfare professionals, referred to as "child protection workers" must, under North Dakota law, conduct an initial "assessment" or "investigation," to determine if probable cause exists for alleged abuse or neglect.<sup>72</sup> When it appears that a criminal act has been committed, child protection workers cooperate with law enforcement officials in gathering evidence to assist courts in determining if child abuse has occurred.<sup>73</sup>

Information for the investigation of sexual abuse is generally gathered from a variety of persons who have knowledge of the alleged child victim's actions and behavior.<sup>74</sup> These individuals

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69. See, e.g., Bismarck Tribune, July 19, 1987, at 1A, and 1D (an overview of the issues that VOCAL represents through a discussion of one family's accusations that child protective services mishandled their case and they were falsely accused of child sexual abuse); Affidavit of Tara Lea Muhlhauser at 1, State of North Dakota v. Hansana, (S.C.J.D. N.D. 1987)(Crim. No. D-1189)(documents contained in the court file of the case demonstrate the impact that the media has on child abuse cases. The venue of the case was changed from Hazen, North Dakota to another community because the court concluded that media coverage was highly damaging to the prosecution).

70. N.D. CENT. CODE § 50-25.1-03(1) (1989).

71. N.D. CENT. CODE § 50-25.1-04 (1989); K. FALLER, UNDERSTANDING CHILD SEXUAL MALTREATMENT 74 (1990)(child protective services agencies are mandated by all state statutes to investigate cases of child maltreatment by caretakers).

72. N.D. CENT. CODE § 50-25.1-05 (1989); L. McCarty, *Investigation of Incest: Opportunity to Motivate Families to Seek Help*, 60 CHILD WELFARE 680-82 (1981)(provides information regarding guidelines for interviewing the child victim, techniques to providing emotional support to victims of sexual abuse, and securing a statement from the child victim); FALLER, *supra* note 54, at 80-83 (describes the role of law enforcement in investigating cases of child sexual abuse, typically including interrogating suspects, giving polygraph examinations, and collecting physical evidence). See also FALLER, *supra* note 71, at 79-83 (describes the role of law enforcement in conducting assessments of child sexual abuse cases with mental health professionals).

73. N.D. CENT. CODE § 50-25.1-05 (1989)(mandates cooperation and a joint investigation between the Department of Human Services and the law enforcement agency when a report of child abuse or neglect alleges a violation of a criminal statute, involving sexual or physical abuse). See also WHITCOMB, *supra* note 34, at 26, 99-101; D. BESHAROV, COMBATING CHILD ABUSE: GUIDELINES FOR COOPERATION BETWEEN LAW ENFORCEMENT AND CHILD PROTECTIVE SERVICES 1-5 (1990)(discussing the necessity for law enforcement and protective services to form a cooperative response to child abuse and neglect). Citing the U.S. Attorney General's Task Force on Family Violence, the author quotes "no agency or program can be successful working in isolation. Each must recognize the interrelationship among the legal, health, social service, and education responses to family violence." *Id.*

74. D. EVERSTINE & L. EVERSTINE, SEXUAL TRAUMA IN CHILDREN AND

may include school personnel, neighbors, child care providers, friends, physicians, therapists, and other allied professionals who have knowledge regarding the child.<sup>75</sup> Obviously, information is also gathered by interviewing the alleged child sexual abuse victim, family members, and alleged offenders. Alleged offenders are asked to provide a statement in criminal investigations.

#### A. SOCIAL WORKER AS FACT-FINDER

The primary goal of an initial interview of the alleged child victim is to assess the safety of the child and gather information to determine if legal action is appropriate and to design a treatment plan, if necessary.<sup>76</sup> Individuals who investigate cases of alleged child sexual abuse are compelled to minimize the trauma to the child by minimizing the number of interviews.<sup>77</sup> Further, the interview process must be sensitive to the developmental stage<sup>78</sup> and the cultural needs of the child.<sup>79</sup> An interpreter should be available for the interview if there is a serious language barrier.<sup>80</sup> There are helpful protocols that recommend use of multidisciplinary teams of experts. These teams can design an approach to

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ADOLESCENTS 30 (1989). This book provides professionals with a systematic approach to assessing whether or not a child has been molested.

75. *Id.* See also H. Giaretto, *A Comprehensive Child Sexual Abuse Treatment Program*, in *SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES* (P. Mrazak & C. Kempe eds. 1981).

76. A. Tyler & M. Brassard, *Investigation and Treatment of Intrafamilial Child Sexual Abuse; Child Abuse and Neglect*, in *SEXUAL ABUSE OF YOUNG CHILDREN* 47-52 (1986). This book provides a thorough overview of the issues surrounding the assessment of children and the family in cases of alleged sexual abuse as well as techniques for interviewing children; J. Orten & L. Rich, *A Model for Assessment of Incestuous Families*, 69 *SOCIAL CASEWORK* 611-19 (1988) (provides a format for conducting an assessment, which evaluates the risk of leaving the victim and alleged offender in the same home); FALLER, *supra* note 71, at 76-77 (discusses the initial goals of the protective service worker, determining if the sexual abuse occurred and if the child is safe at home or in their present location) (protocols are provided by the author); *Id.* at 115-29, 150-57. See also MEISELMAN, *supra* note 37 (discusses the importance of assessing the family to determine if the child is in immediate emotional or physical danger following the child's disclosure of sexual abuse).

77. See N.D. CENT. CODE § 12.1-35-04 (Supp. 1989) (limits multiple interviews).

78. 6 D. JONES & M. MCQUISTON, *INTERVIEWING THE SEXUALLY ABUSED CHILD* 1-29 (2nd ed. 1986). This book provides general information on how to interview a sexually abused child. It offers suggestions on the type of setting in which to interview the child, who should conduct the interview. *Id.* See also A. Burgess, A. Groth, L. Holmstrom & S. Sgroi, *Interviewing Young Victims*, in *SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS* 143-57 (1987) (a guideline for interviewing young children who are alleged sexual abuse victims); S. Sgroi, F. Porter, & L. Blick, *Validation of Child Sexual Abuse*, in S. SGROI, *HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE* 39-79 (1983) (techniques for determining if reports of alleged child sexual abuse are valid or invalid; discussed behavioral indicators of child sexual abuse, investigative interviewing, credibility assessment, physical indicators of child sexual abuse, and medical examination); M. DeYoung, *Disclosing Sexual Abuse: The Impact of Developmental Variables*, 66 *CHILD WELFARE* 219-21 (1986) (discusses the importance of examining the child's developmental stage and how this may affect the nature of the disclosure).

79. J. GREEN, *CULTURAL AWARENESS IN THE HUMAN SERVICES* 4 (1982).

80. I. Glasser, *Guidelines for Using an Interpreter in Social Work*, 62 *CHILD WELFARE* 468-70 (1983) (concise guidelines for using a translator in human services work).

minimize the trauma to the child during the investigatory process.<sup>81</sup>

Social workers are trained to maintain psychological contact with the client (child) during the interview by focusing on the client's concerns and feelings while gathering assessment information.<sup>82</sup> As a result, several interviews may be conducted before the child is comfortable enough to discuss the alleged abuse.<sup>83</sup> Children who have been threatened with harm if they disclose the abuse tend not to disclose the victimization willingly or easily.<sup>84</sup> As a social worker, it has been my experience that the interviewer should let the children recount the situation or facts of the alleged incidents in their own manner without asking leading questions, particularly in the initial phase of the interview. The interview should be conducted in a comfortable surrounding for the children.<sup>85</sup> Using techniques such as allowing the children to draw pictures and play with toys, puppets, and dolls will help the young children to express themselves.<sup>86</sup>

Another resource frequently used in child sexual abuse investigations is anatomically correct dolls. Anatomically correct dolls

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81. S. Sgroi, *Multidisciplinary Team Review of Child Sexual Abuse Cases*, in *HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE* 335-43 (1983); *HANDBOOK*, *supra* note 39, at 345-444. This book provides an overview of the legal system and child protection teams. It addresses the legal basis for teams, the child protection liability issues, the attorney's role in working with teams, and expert and child witness testimony.

82. D. HEPWORTH & J. LARSEN, *DIRECT SOCIAL WORK PRACTICE THEORY AND SKILLS* 193-216 (3rd ed. 1990)(basic information on conducting multidisciplinary assessments; the role of a social worker in preparing the assessment); FALLER, *supra* note 54, at 156-57 (discusses the importance of establishing a positive relationship with the child when interviewing the child about a report of suspected sexual abuse).

83. In my social work experience, I recall investigating a case of alleged child sexual abuse of a five-year-old child who had been severely isolated. The child had deficient language development and communicated primarily through play activities. A trusting relationship was required before the child could reveal her secret in her own language. This would not occur in one interview and in this case the child refused to discuss the abuse even after several interviews.

84. F. RUSH, *THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN* 1-10 (1981)(secrecy surrounding child sexual abuse).

85. EVERSTINE, *supra* note 74, at 27. See also K. MACFARLANE, J. WATERMAN, S. CONERLY, L. DAMON, M. DURFIE, & S. LONG, *SEXUAL ABUSE OF YOUNG CHILDREN* 67-100 (1986) (provides a thorough analysis of interviewing techniques); MEISELMAN, *supra* note 37, at 183-95 (review of the literature surrounding techniques for interviewing victims of child sexual abuse and guidelines for the interview); FALLER, *supra* note 54, at 134-41 (also provides guidelines for the sequence of an interview including who should conduct the interviews and where).

86. WALKER, *supra* note 37, at 182-85. See also C. Stember, "Art Therapy: A New Use in the Diagnosis and Treatment of Sexually Abused Children" in *SEXUAL ABUSE OF CHILDREN: SELECTED READINGS* 59-63 (K. MacFarlane ed. 1980); A. Clark, J. Bingham, *The Play Technique: Diagnosing the Sexually Abused Child*, in *OUT OF HARM'S WAY* 108-12 (D. Haden ed. 1986)(provides a list of behaviors that may result from sexual abuse and discusses play therapy techniques interviewers can use in communicating with young children); FALLER, *supra* note 54, at 158-63 (describes play therapy techniques which can be used while interviewing young children).

are cloth dolls that have a closer approximation of breasts and genitalia than traditional dolls. Anatomically correct dolls can serve as a resource for interviewing young children with limited language skills, and using the dolls provides a basis for assessing behavior.<sup>87</sup>

The interviewer should accommodate the child's uncooperative or difficult behavior that may include hyperactivity, withdrawal, fear, or hostility.<sup>88</sup> Initially, the social worker should approach the interview with an assumption that the child is telling the truth.<sup>89</sup> Young children are without a base of reference and do not recognize that sexual exploitation is abnormal, hence, children have no reason to lie about abuse.<sup>90</sup>

## B. THE SOCIAL WORKER AS A WITNESS

Preparing a witness for a court appearance is a primary aspect of the attorney's role in civil and criminal cases.<sup>91</sup> As the attorney

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87. FALLER, *supra* note 54, at 169 (describes the use of anatomically correct dolls with both children who have been sexually abused and children who have not been sexually abused). The author concludes that children who have been sexually abused respond differently to the dolls than children who have not been sexually abused. *Id.* See also B. Boat & M. Everson, *Use of Anatomical Dolls Among Professionals in Sexual Abuse Evaluations*, 12 CHILD ABUSE AND NEGLECT 171-79(1988); L. Jampole & M. Weber, *An Assessment of Behavior of Sexually Abused and Non-Sexually Abused Children with Anatomically Correct Dolls*, 11 CHILD ABUSE AND NEGLECT 187-92 (1987); S. White, G. Storm, G. Santilli & B. Haplin, *Interviewing Young Sexual Abuse Victims with Anatomically Correct Dolls*, 10 CHILD ABUSE AND NEGLECT 519 (1986); D. Schor & A. Swan, *Interpreting Children's Labels for Sex-Related Body Parts of Anatomically Explicit Dolls*, CHILD ABUSE AND NEGLECT INT'L J. 523-31 (1989).

88. When interviewing young children who are alleged victims of sexual abuse the interviewer may need to conduct the interview while sitting on the floor engaging in play activities with the child. This interview requires patience and an ability to speak the child's language. Children have a much shorter attention span than adults, requiring a brief interview in a non-threatening setting. A guide to conducting interviews can be found in *Establishing Local Child Abuse Protocols*, National College of District Attorneys, 1 (1986). See also MYERS, *supra* note 3, at 509-25 (working with children who are behaviorally and/or emotionally disturbed and children who have other special and disabling conditions); Perry, *supra* note 47, at 1371-1380, 1417-1421 (cognitive development of children and its effect on recall and verbal recitation ability, and effects of maltreatment trauma on a child's ability to testify). *Sexually Abused Children*, *supra* note 53, at 114-17 (guidelines for assessing cases of child sexual abuse; initial interviews with alleged victims are critical in determining if the child is being truthful); TREATING INCEST, A MULTIPLE SYSTEMS PERSPECTIVE 1-18 (T. Trepper & M. Barrett eds. 1986)(a framework for assessing cases of intrafamilial child sexual abuse is provided in the first chapter of this book).

89. Faller, *supra* note 38, at 476 (interviewer should determine if the child's explanation of the abuse is consistent with the child's developmental stage); McCarthy, *supra* note 72, at 680 (supports the premise that the worker must begin the interview with the premise that the victim is telling the truth). D. Jones & J. McGraw, *Reliable and Fictitious Accounts of Sexual Abuse in Children*, 2 J. OF INTERPERSONAL VIOLENCE 27-45 (1987). This article stated that there is little evidence showing the unreliability of children's reports of sexual abuse. *Id.* at 27. See also THE SEXUALLY ABUSED CHILD AND HIS FAMILY (P. Mrazek & C. Kempe eds. 1981).

90. R. CASE, *INTELLECTUAL DEVELOPMENT: BIRTH TO ADULTHOOD* (1985); K. Fischer, "A Theory of Cognitive Development: The Control of Hierarchies of Skills", 87 PSYCHOLOGICAL REV. 477-531 (1980).

91. See INVESTIGATION AND PROSECUTION OF CHILD ABUSE, *supra* note 60, at V-225 (expert witness preparation).

prepares a social worker for his/her role as a witness in a child victim case, anecdotal information may surface that often is not part of the social worker's report or case file. In addition, the attorney may evaluate the social worker's subjective information or inferences that may not be appropriately included in the case or agency documents. This information can assist in determining whether to call the social worker as a witness for observation purposes or to call the social worker as an expert witness, if credentials and experience allow. If the social worker is to be an expert witness, he or she must be informed of the foundational line of questioning<sup>92</sup> and the topic on which he or she will be asked to give an opinion. Further, social workers called as experts must be prepared regarding the applicable documentation they will use at the hearing/trial and regarding their involvement in the case.<sup>93</sup>

Another consideration gaining increasing importance in child maltreatment and sexual exploitation cases is the political climate surrounding the social worker or his/her agency.<sup>94</sup> The attorney must be aware of community perceptions and the politics surrounding general issues and agency involvement. These perceptions may affect the theory of the case and preparation of the social work witnesses.

The social worker's simultaneous roles as a witness and fact-gatherer working with a child or family can be frustrating. Frequently, a social worker's involvement and relationship with the

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92. It is as important that the attorney plan for the necessary documentation, as a subpoena duces tecum must be anticipated before the necessary agency records may be available. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (defendants have a due process right to discover information in child protection agency records in criminal pre-trial discovery, but the state may request an in camera review to limit the information to what the court determines to be material to the defense).

93. *FOSTER CHILDREN IN THE COURTS* 353-354 (M. Hardin ed. 1983) (preparing the social worker for a court hearing in a child dependency/deprivation case). Prior to beginning witness preparation of a social worker, the attorney should understand the role the social work witness has played in a case. This would include how the social worker's agency became involved in the case and the basis for intervention. To select the appropriate witnesses, the attorney must understand how that child protection agency operates. For example, if a witness is needed to present investigatory information, the witness should be a social worker who has an investigatory role. Social workers may be specialists in an agency or area, therefore, the attorney must define the type of information needed and consider the division of roles among social workers and their specialization. Most frequent roles include investigator, often referred to as a child protection social worker; follow-up worker or case manager who follows the family's progress and monitors the safety of and risk to the child(ren); and less frequently, a child victim advocate. Social workers, like other professional witnesses, are uncomfortable when asked to provide information or testimony beyond the scope of their role or expertise. See also FALLER, *supra* note 71, at 104-105 (discussing the importance and necessity of a preparatory interview between the attorney and social worker, therapist, or expert witness).

94. *INVESTIGATION AND PROSECUTION OF CHILD ABUSE*, *supra* note 60, at V-49; see also CREWDSON, *supra* note 62, at 12-23 (media's involvement in maltreatment and exploitation cases).

family will generally transcend the legal action. Therefore, the attorney must understand that a social worker may be reluctant or refuse to give certain supportive testimony in an effort to maintain a therapeutic relationship with the family.<sup>95</sup> The attorney may avoid the conflict by understanding the social worker's need for client cooperation and soliciting testimony by carefully phrasing questions or finding another witness. The alternative witness should not be responsible for ongoing therapy or treatment of the child/family.

The attorney should also recognize that the therapeutic relationship between client and social worker may suggest a position of advocacy for the social worker. If the social worker's position contrasts the theory of the case, the charge, or the process, the attorney must realize this will affect the attorney's ability to secure information from the social worker.<sup>96</sup>

## V. CHILDREN LACK UNDERSTANDING OF THE COURT SYSTEM AND NEED SPECIAL PROTECTION IN THE LEGAL PROCESS

It is difficult for a child to understand legal terminology. Terms such as "allegations," "charges," "competence," "defendant," "plaintiff," and "jury" mean nothing to a young child witness who is a victim of a crime and who may be fearful of the court process. Consequently, prosecutors and defense attorneys must be committed to adequately preparing children for the court process. They must work directly with the child to familiarize the child with the physical tenets of the courtroom and explain the court process and the role of each person involved.<sup>97</sup> Preparation must also include attention to linguistic considerations and semantic form for direct and cross examination.<sup>98</sup> The examination and cross-examination of the child must be presented in a context the

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95. FALLER, *supra* note 71, at 87-91 (considerations for therapist when giving testimony while continuing a therapeutic relationship with the victim, alleged offender, or family member(s)).

96. See "Code of Ethics of the National Association of Social Workers" as adopted by the 1979 NASW Delegate Assembly, effective July 1, 1980. The ethical standards of the social work profession emphasize maximizing client self-determination and safeguarding client's rights. *Id.*

97. See N.D. CENT. CODE § 12.1-34 (Supp. 1989) (fair treatment standards for victim/witnesses). See also King, *supra* note 42, at 4, 716-19 (findings and recommendations of a study chronicling traumatic junctures in criminal child sexual abuse proceedings from the child's perspective).

98. RICHARDSON, *Talking to Abused Children: Insights from the Field of Linguistics* (presentation at the Eighth National Conference on Child Abuse & Neglect, Oct., 1989).

child can understand.<sup>99</sup>

It is not unusual for sexually abused children to remain bonded to their parents although their parents may have sexually abused them.<sup>100</sup> Therefore, attorneys may be required to impeach or discredit a child who appears uncooperative because of this parental loyalty.<sup>101</sup>

A critical component in child sexual abuse cases is the manner in which children are interviewed about the alleged sexual abuse incidents. Like the social worker interview, the interviews conducted by law enforcement officials, guardians ad litem, prosecutors, defense attorneys, and judges should be conducted in a manner responsive to the developmental stage of the child.<sup>102</sup> This intervention should be conducted to coordinate the efforts of all professionals working with the family.<sup>103</sup>

There are reasonable accommodations courts can make that do not erode the constitutional protections of the accused.<sup>104</sup> Courtroom accommodations may include a child-size witness

99. See Perry, *supra* note 47, at 1369 (article describing the developmental stages of children, the linguistic limitations of each state or age, and suggestions for attorneys questioning children in direct and cross-examination).

100. A. MALUCCIO, E. FEIN & K. OLMSTEAD, *PERMANENCY PLANNING FOR CHILDREN* 141 (1986). This book discusses the importance of working with abusive parents in the development of treatment plans for their children because of the significant parent-child bonding that generally occurs.

101. Loyalty must also be scrutinized when children recant in light of a strong evidentiary basis to believe that the abuse occurred. See MYERS, *supra* note 3, at 156-167 (discussing the sexually abused child syndrome and recantations that may occur as a component of this syndrome).

102. See Perry, *supra* note 47, at 1375-1386 (a discussion regarding issues to consider when interviewing, examining, and cross-examining child witnesses).

103. S. SGROI, *supra* note 78, at 81-108. Susan Sgroi recommends what she describes as a case management approach to coordinating the investigation and interventions surrounding reports of child sexual abuse. *Id.* at 81.

104. D. Eddy, *Proposed Model Legislation to Protect Child Victims* in AMERICAN BAR ASSOCIATION LEGAL ADVOCACY FOR CHILDREN AND YOUTH, REFORMS, TRENDS AND CONTEMPORARY ISSUES 75-82 (1986); S. Gothard, *The Admissibility of Evidence in Child Sexual Abuse Cases*, 66 CHILD WELFARE 14-21 (1986) (reviews of changes in the Rules of Evidence in various states drafted to protect child victims in the courtroom); L. Berliner and M. Barbieri, *The Testimony of the Child Victim of Sexual Assault*, in OUT OF HARM'S WAY: READING ON CHILD ABUSE, ITS PREVENTION AND TREATMENT 119 (D. Haden ed. 1986) (describes an approach to developing a successful program for handling of child sexual assault cases which has three features: appropriately trained personnel, a criminal justice system which responds to the needs of children, and procedures which give support to the child victim).

The courtroom accommodations can include, but are not limited to: (1) a witness chair that is child-size; (2) use of terminology understandable to the child in direct and cross-examination (see Perry, *supra* note 47); (3) scheduling the testimony so it does not conflict with the child's lunch, nap, or dinner time; (4) use of emotional support props such as a stuffed animal or blanket for young children (see WALKER, *supra* note 37, at 128-29); (5) limiting the length of time a child will testify according to the child's developmental stage (see Perry, *supra* note 47; MYERS, *supra* note 3); (6) allowing the child to have an advocate or guardian ad litem present while testifying (see *Establishing Local Protocols*, *supra* note 88; MYERS, *supra* note 3; King, *supra* note 42, at 717; M. Hardin, *Guardians ad Litem for Child Victims in Criminal Proceedings*, 25 J. FAM. L. 687, 694 (1986); D. WHITCOMB,

chair, use of terminology understandable to the child in direct and cross-examination, and the availability of a support person or guardian ad litem to accompany a child to the witness stand or act as an advocate through the court process.<sup>105</sup>

## VI. CONCLUSION

The responsibility is burdensome for all professionals involved in providing resources to assist in the legal process, including social workers, psychologists, law enforcement personnel, attorneys, and judges. The protection of individual rights, including the right not to be sexually assaulted or not to be falsely accused, requires a trained and knowledgeable legal system. The body of literature on this topic is relatively new, and professionals are constantly discovering more effective techniques for dealing with child abuse cases. Individuals involved in making assessments and providing legal services to children must be vigilant in remaining abreast of the issues and techniques that assist the system in providing justice to the child and the accused.

The role of prosecutors and defense counsel is to present information to the courts that supports the position of their respective clients. They also have a general interest in protecting their witnesses because the witnesses deliver the information to the court. At the same time, prosecutors and defense counsel must

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GUARDIANS AD LITEM IN THE CRIMINAL COURTS 40-45 (1988)); and (7) whenever possible, limiting media coverage surrounding the child's testimony (see MYERS, *supra* note 3).

105. MYERS, *supra* note 3, at 417-32 (accommodating children in the courtroom with specific suggested physical alterations); DZIECH, *supra* note 30, at 170-71 (adjusting court environments to children); INVESTIGATION AND PROSECUTION OF CHILD ABUSE, *supra* note 60, at V-16, 17 (accommodating children in the courtroom environment and creative supports for the prosecutor to consider). Judge Schudson, co-author of DZIECH, *supra* note 30, is a nationally recognized expert on innovations and adaptations for child witnesses facing courtroom testimony. His concept of the "lap law" is one of the most accessible innovations available. The concept is well supported in case law; State v. Dunbar, 566 A.2d 970 (Vt. 1989)(allowed a five-year-old child witness to sit at floor level with two support persons at her side); State v. Johnson, 528 N.E.2d 567 (Ohio App. 1986)(an eight-year-old child was allowed to testify while sitting on her aunt's lap); Mosby v. State, 703 S.W.2d 714 (Tex. App. 1985)(guardian ad litem's presence 15-20 feet behind witness chair and physical "cuddling" and "handling" of witness by prosecutor and guardian ad litem did not violate or prejudice defendant's rights); State v. Rogers, 692 P.2d 2 (Mont. 1984)(a four-year-old child was allowed to testify while sitting on the prosecutor's lap). The Hawaii Supreme Court has taken a divergent approach in State v. Suka, 777 P.2d 240 (Hawaii 1989)(defendant's due process rights were violated when the victim witness advocate sat next to and put her hands on the 15-year-old victim's shoulders) and State v. Rulona, 785 P.2d 615 (Hawaii 1990)(while a Hawaii statute allows for a support person to be at the side of a child in a judicial proceeding, the court held that the lower court erred by allowing the eight-year-old child to sit on the lap of her sexual abuse counselor). See also King, *supra* note 42 (strongly recommends use of a support person based on an empirical study of the experiences of children who have been in court) and Hardin, *supra* note 104.

zealously represent their clients.<sup>106</sup> Are these dichotomous positions and, if so, who will strike the balance? Courts can be responsive to this dilemma regarding how we accommodate the special needs of a child witness in the courtroom and also protect the due process rights of the accused. Judges have been and will continue to be the individuals who are in the best position to provide direction regarding alleviating this dilemma in the courts. Social workers, attorneys, and judges must work together to rethink our traditions and meet new challenges by designing a system that is responsive to the needs of child witnesses in all cases.<sup>107</sup>

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106. VUNIKKA, *supra* note 56, at 138-69. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.2, 1.3 (1989)(zealous representation of client).

107. DZIECH, *supra* note 30, at 177-78.

