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## *Avoidable Legal Mistakes Child Protective Services Investigators Make*

By Daniel Pollack



**T**here seems to be no function of departments of human services that elicits stronger feelings from the public than Child Protective Services (CPS). It is seen as a savior by some, a villain by others. What avoidable legal mistakes do CPS investigators make? This question was posed to seven experienced attorneys from around the country. Here are their thoughts:

**1. CPS INTERVIEWERS SOMETIMES VIEW A CHILD'S ANTI-SOCIAL OR HURTFUL BEHAVIOR AS EVIDENCE THAT THE CHILD IS NOT A TRUST-WORTHY REPORTER OF ABUSE.**

While this may be the case in some instances, the child-victim's misbehavior is more likely to be evidence of the abuse itself. It is common for a child who has been a victim of sexual abuse to have a downward spiral in their life after the abuse. Following the abuse, a child victim may engage in anti-social behavior, criminal behavior, drug use, truancy, or dishonesty. This downward spiral really should come as no surprise, particularly when the child's abuser is an authority figure. In those situations, the abuse is a betrayal of trust and can alter the child's moral compass and result in mixed messages. The child often believes that the anti-social and hurtful behavior he or she is engaging in is acceptable or has no consequences because the abusive authority figure was doing it, too.

Rather than write off the child's misbehavior as evidence that the child is not trustworthy, CPS interviewers should dig a little deeper and try to look at the root causes of the child's anti-social or hurtful behaviors before dismissing the child's report.

—Adam D. Horowitz, Esq., Florida

**2. ASSUMING THAT THE CPS INVESTIGATOR WILL BE ALLOWED TO TESTIFY IN PLACE OF THE CHILD AT A CRIMINAL TRIAL IS AN AVOIDABLE LEGAL MISTAKE.**

Prosecutors put CPS investigators on the stand to convict a child molester. Given the choice between the testimony of a scared, confused child or a polished professional, it's easy to see why. And sometimes there is no choice. By the time a criminal trial takes place, a young child may have forgotten the events or recanted, and the CPS interview may be the best evidence of the abuse the prosecutor has. And, CPS investigators make excellent witnesses. The best ones are caring, trained, and certified in interview techniques guaranteed to elicit accurate, trustworthy information from even very young children. They can rule out any negative influences on the child's story, such as coaching or a motive to fabricate. Moreover, they can present the jury with the reasonable, scientifically sound conclusion that the child was molested by the defendant, because that is what the child described in the interview.

But then the conviction is overturned on appeal—why? Because the CPS interviewer vouched for the credibility of another witness, the child victim. It doesn't matter if the victim actually testifies or not. Appellate courts find vouching when an interviewer explains that a child did not appear to be fantasizing, to have been coached, or to be repeating words suggested to him or her. Many appellate courts treat vouching as "plain error," meaning a criminal defendant does not have to

object to the vouching testimony during the trial. If the trial judge does not prevent the vouching testimony—even without a request from the criminal defendant to do so—the appellate court could overturn the conviction.

This necessitates that CPS investigators walk a fine line between providing the jury with evidence of what the child said and vouching for the credibility of the child's story. The safest course may be to simply show a video of the interview with little opinion from the interviewer and let the jury reach its own conclusions.

—Gilion C. Dumas, Esq., Oregon

**3. EVEN THOUGH CPS INVESTIGATORS ARE INVARIABLY WELL-MEANING, THEY TEND TO FORM AN OPINION QUICKLY AS THEY INVESTIGATE A CASE AND TO NEGLECT ALTERNATIVE EXPLANATIONS AND MOTIVES TO FABRICATE.**

For example, I have dealt with many cases in which a child accuses a family member of sexual misconduct. While many of these cases are straightforward and the alleged perpetrator gives a detailed confession, a small number lead to legitimate factual disputes. In cases where the alleged perpetrator denies wrongdoing, investigators would do well to look into the alleged victim's motives to lie or exaggerate as well as the motives their family members and friends might have to induce them to fabricate.

One motive that has come up on more than one occasion is the desire to receive a "U Visa." A U Visa gives legal status to immigrants who have been victims of certain crimes. If a child can convince an investigator that he or she has been assaulted, they may qualify for legal status for themselves and for certain family members.

CPS workers are in a difficult position. They do not want to re-victimize the young people who claim

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**Daniel Pollack** is a professor at the School of Social Work, Yeshiva University in New York City. He can be contacted at [dpollack@yu.edu](mailto:dpollack@yu.edu), (212) 960-0836.

to be victims of abuse. At the same time, they must keep an open mind throughout the investigation and consider all possible explanations.

– Joshua S. Baron, Esq., Utah

**4. ONE AVOIDABLE MISTAKE CPS INVESTIGATORS MAKE IS HARBORING UNINTENDED BIAS, PARTICULARLY IN THE SENSE THAT INVESTIGATORS MAY HAVE A TENDENCY TO BE LESS THAN OBJECTIVE DUE TO A PRIOR RELATIONSHIP.**

For instance, there is often a conflict of interest that the agency as a whole, or just an individual worker, may have regarding the oversight of a child's foster care placement. The agency, or one of its workers, may have selected the placement as appropriate in the first place, and may have a degree of reluctance to substantiate allegations of neglect or abuse. In California, as I assume in many other jurisdictions, CPS investigators are immune from liability for discretionary decisions and acts. Bias as a factor affecting a discretionary decision would not result in the imposition of liability unless it is accompanied by a breach of a prescribed mandatory duty. In practice, an investigator who has a bias in favor of a caretaker is less likely to attend to "red flags" that may amount to violations.

– Jack H. Anthony, Esq., California

**5.** When a child dies or suffers an injury while in a foster placement, state statutes typically mandate an investigation to determine if the harm resulted from abuse or neglect. **DESPITE THE OBVIOUS POTENTIAL FOR CIVIL OR CRIMINAL LITIGATION, INVESTIGATORS OFTEN PREPARE REPORTS THAT SUMMARIZE WITNESS ACCOUNTS RATHER THAN OBTAIN VERBATIM RECORDED STATEMENTS.** An investigation is inherently flawed and suspect if the investigator does not obtain recorded or signed statements from the witnesses.

In contrast, the standard practice of auto insurance carriers is to obtain

recorded statements of all involved drivers and witnesses within days of even the most minor wreck. This practice occurs despite the fact that only a minority of "fender benders" result in injury claims, much less litigation. Insurers require recorded statements for the simple reason that an investigator's condensed summary of a participant's version of events is always subject to later denials or explanation.

A judicial fact-finder typically places great weight on a witness's first version of an event. The obvious explanation for this reliance is that memories dim with the passage of time. Moreover, juries hold the general (albeit cynical) opinion that a participant's initial accounting of an event is inherently more credible than a later version given after retaining counsel.

– David B. Wilson, Esq., Indiana

**6. TOO OFTEN CPS INVESTIGATORS DO NOT TAKE INTO ACCOUNT CONTEXTUAL INFORMATION OR ACTUALLY INVESTIGATE TO FIND COLLATERAL WITNESSES.** In one such case, a client was substantiated for abuse because of silence in the face of the allegations. The investigator did not take into account that during the investigation there were criminal charges pending and that the client had been advised by a criminal attorney to remain silent. In this instance, the person was misinformed about the consequences of being put on the child abuse registry. Years later, the long-term consequences were dire and could not be undone. Had CPS factored in Fifth Amendment rights, educated the criminal attorney on the actual consequences of a substantiation, or worked with counsel to understand the context of the individual's silence, the outcome could have been quite different and still successful for all parties. In fact, there was another reasonable explanation for the child's injuries. Tragically, CPS did not pursue that avenue nor seek to interview the other parties involved.

Collateral sources can be quite enlightening in any investigation.

Having tunnel vision allows gaps in the investigation that can lead to children being left in dangerous situations and innocent adults being put on a child abuse registry.

– Emily A. Hartz, Esq., Kansas

**7.** When an allegation of child abuse is made, especially at the hands of a foster caregiver, discretion and variability in CPS protocol can result in questionable investigations. Suspected abuse, once reported to the state agency, is sometimes investigated by an investigator from outside the jurisdiction. It might also be sent to a state regional office for assignment to either a state investigator or caseworker or to the local agency. If the investigation is assigned to the local agency, the report might be investigated by a city or county caseworker, or by the case's active caseworker through the city, county, or a contract agency.

**THE PROBLEM WITH ASSIGNING A CASEWORKER TO INVESTIGATE CHILD ABUSE IS THAT A CASEWORKER HAS A CONFLICT OF INTEREST.** Be it to aid in family reunification, to facilitate an adoption, or to monitor a child's long-term needs, the caseworker's purpose is to build relationships, not explicate them. Caregivers who actually do perpetrate child abuse are well-versed at deception. They are often considered state actors, legally held to the most stringent standards of child care and protection. Such high standards should likewise apply to the investigators of potential wrongdoing. Abuse investigations should only be performed by trained investigators, in an arms-length manner, but in no instance by an active caseworker on the case itself.

– Michelle S. Payne, Esq., Pennsylvania

As we constantly strive to evaluate programs and services to advance the quality of our overall child welfare system, the CPS investigatory process is a logical starting point. We hope that some of the insights provided by our seven contributing attorneys will aid in that effort. 