Approved February 25, 1987
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Representative Robert S. Wunsch at
Chairperson

3:30 ~~xxxx~~ ~~a.m.~~p.m. on February 11, , 1987 in room 313-S of the Capitol.

All members were present except:
Representative Duncan, Peterson and Solbach, who were excused.

Committee staff present:
Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes Office
Mary Jane Holt, Secretary

Conferees appearing before the committee:
Representative Frank Buehler
Representative Eugene Shore
Jerry Slaughter, Kansas Medical Society
Sherman Parks, Jr. Executive Director, Kansas Chiropractic Association
Derenda Mitchell, Health Care Stabilization Fund, Kansas Insurance Department
Harold Riehm, Kansas Association of Osteopathic Medicine
Ron Smith, Kansas Bar Association
Jerry Hanna, Kansas Trial Lawyers Association
Vivian Hedrick, Concerned Parent
Commissioner Robert Barnum, Youth Services, Social and Rehabilitation Services
Sherry Lewis, VOCAL, Burrton
Keven Pellant, Kansas Children's Service League
Elsia Cosgrove, VOCAL, Kansas City
Shirley Wilson, VOCAL, Burrton
Winnie Cline, Concerned Parent

Hearing on H.B. 2052 - Medical Malpractice screening panels, assessment of costs and attorney fees.

Representative Buehler stated the high cost of health care is attributable, in part, to law suits without merit. Insurance premiums increase, whether the case goes to court, or not. If the suits do not go to trial the health care providers still have to defend themselves and maybe make out of court settlements to resolve the situation, which the insurance company pays. He offered this same legislation as an amendment to the Interim Committee on Medical Malpractice in 1985. It was not voted on due to a substitute motion that passed. He said he hoped this Committee would take a serious look at this bill and pass it out favorably.

Representative Shore stated he supported this legislation for the same reasons stated by Representative Buehler. He said the pretrial screening panels are a very important part of the medical liability act, as they help separate the frivilous law suits from those that have merit. If, after a unanimous vote by the screening panel that the health care provider did not depart from the standard of care, the plaintiff goes to court and loses the case, he will be assessed court costs and the defendant's reasonable expenses, including attorney fees. He urged the Committee to recommend H.B. 2050 favorably for passage.

Jerry Slaughter testified in support of this bill. He said the frequency of claims is a problem. This bill addresses this problem and will cut down on the number of suits. In answer to questions from the Committee, Mr. Slaughter replied either side may request a screening panel and the costs of the panel are paid for by the winning side.

Sherman Parks stated he was appearing in support of H.B. 2050. He said the plaintiff and the defendant both choose an expert for the screening panel.

Derenda Mitchell testified that H.B. 2052 would be helpful to the Health Care Stabilization Fund. She recommended an amendment on line 49 to read that the provisions apply if the defendant prevails in a subsequent civil action. The amendment precludes the defendant from having to go to trial to be allowed fees and protects the plaintiff by recognizing any appeal to which plaintiff may be entitled, (see Attachment I).

Harold Riehm testified in support of H.B. 2052. He said it maintains the integrity of the process as well as enhancing the effort of preventing frivolous lawsuits.

Ron Smith testified the Kansas Bar Association generally is opposed to changes to the adversarial practice of law unless the public approves of such change, and unless the public gains some benefit from the change. He said this bill tries to shut off access to a jury and shut down the "remedy" of medical malpractice, (see Attachment II).

Jerry Janna informed the Committee the Kansas Trial Lawyers Association agrees with the Kansas Bar Association's position on this bill. He said the bill will have to face the test of equal protection, due process and the denial of right of trial by jury. He stated there were already enough penalties for frivolous lawsuits.

The hearing was closed on H.B. 2052.

Hearing on H.B. 2136 - An act concerning the code for care of children relating to termination of parental rights

Vivian Hedrick referred to different parts of the bill. She especially questioned the language contained in (9), the number of times the child has been placed outside the home, and (10), the length of time the child has been placed outside the home. She also stated "property" is not defined in line 26.

Robert Barnum testified in support of the amendment to the code for care of children. This change would make it easier to terminate the parent's legal rights to their children when the parent's behavior shows no sign of real change and their children are in danger of future abuse and neglect. A June 1986 S.R.S. study recommended a change in state law that would make it easier to terminate parental rights of parents after their children had been frequestly placed in foster care. The court makes the determination on whether to terminate parental rights, (see Attachment III).

Sherry Lewis stated she was a victim of child abuse laws and her children are victims also. The number and length of time children are placed outside the home is irrelavant and she was opposed to the amendment.

Keven Pellant spoke in support of H.B. 2136 and believes the amendment is necessary.

Winnie Cline said the amendment is unnecessary as everything is already covered under the code.

Elisa Cosgrove stated VOCAL has numerous problems with S.R.S. She said the definition of physical, mental and emotional neglect is not precise enough. S.R.S. has more authority then they should have, (see Attachment IV).

Shirley Wilson said she was also a victim of child abuse laws. She said there was a petition pending in court to end her parental rights and explained what had prompted this action by S.R.S.

The hearing was closed on H.B. 2136.

The meeting was adjourned at 5:30 p.m.

The next meeting will be Thursday, February 12, 1987 at 3:30 p.m. in room 313-S.

Testimony of Derenda J. Mitchell, Attorney
Health Care Stabilization Fund

Before The House Judiciary Committee

CONCERNING HOUSE BILL 2052

1987 SESSION

Attachment I
House Judiciary 2/11/87

February 11, 1987

TESTIMONY OF DERENDA J. MITCHELL, ATTORNEY
HEALTH CARE STABILIZATION FUND
BEFORE THE HOUSE JUDICIARY COMMITTEE
KANSAS LEGISLATURE
CONCERNING HOUSE BILL 2052
1987 SESSION

February 11, 1987

The Health Care Provider Insurance Availability Act was passed in 1976 at the behest of physicians in Kansas who were unable to obtain medical malpractice liability insurance. The Act created the Health Care Stabilization Fund which attempts to protect the liability insurance mechanism by providing payment to persons injured in cases involving an allegation of medical malpractice.

Throughout the history of the Fund, solvency has been threatened. In 1986, the Kansas Legislature, by adopting House Bill 2661, attempted to redress the solvency problems of the Fund as they pertained to large future awards. The frequency problems of the Fund, or in other words, the increase in the number of claims being brought against the Fund, were not directly addressed in the 1986 legislation. The frequency figures of the Fund show a constant increase in the number of claims being brought against the Fund.

CASES OF WHICH THE FUND WAS NOTIFIED BY FISCAL YEAR:

FISCAL YEAR	NUMBER	PERCENT OF INCREASE PER YEAR
1977	2	
1978	18	800%
1979	50	178%
1980	84	68%
1981	101	20%
1982	127	26%
1983	148	17%
1984	175	18%
1985	245	40%
1986	272	11%

House Bill 2052 (1987 Legislative Session) addresses the frequency issue, and furthermore, House Bill 2052 addresses that aspect of the frequency issue which surely no individual can condone--the frivolous, nonmeritorious, or abusive claim. Frivolous litigation foists unjust expense on defendants, discourages otherwise legitimate claims, and obstructs and delays our civil justice system. In short, frivolous litigation discredits our system of justice. House Bill 2052 attempts to discourage the frivolous lawsuit in medical malpractice cases.

The approach contained in House Bill 2052 is not unique. Our laws are replete with examples of provisions comparable to House Bill 2052. For example, Kansas law provides that an insurance company shall pay attorney fees when the company has failed to pay a loss to which the claimant is entitled (K.S.A. 40-256). K.S.A. 60-2007 provides that attorney fees and other expenses should be awarded if a prevailing party can show litigation was totally without merit. Kenneth W. Star, Circuit Judge for the United States Court of Appeals for the District of Columbia notes that there are approximately 2,000 state fee shifting statutes and over 150 federal fee shifting statutes on the books. Starr, "The Shifting Panorama of Attorney Fees Awards: The Expansion of Fee Recoveries in Federal Court", 28 South Texas Law Review 189, 195 (1986).

House Bill 2052 would be helpful to the Health Care Stabilization Fund.

Our records indicate that of 43 closed screening panel decisions of which the Fund was notified since 1976, approximately 25 resulted in unanimous decisions for the health care provider. Of those 25 unanimous decisions, five, nonetheless, were later filed as lawsuits. Of those five, one was ultimately dismissed with prejudice against the plaintiff. The other four did not involve the Fund. Although help of the nature provided by House Bill 2052 would be significant in even one case, House Bill 2052 would most likely have a psychologically favorable impact on all cases involving the Fund. The figures are actually somewhat misleading for three reasons. First, the mechanism for notification of screening panel decisions to the Fund has not been fully implemented. We suspect that not all panel decisions have been brought to our attention. Second, we do not always know what happens to a case after the screening panel decision is made. Third, the

screening panel procedure was not extensively utilized before the enactment of House Bill 2661 last session. While we have approximately 43 closed screening panel reports on file since 1976, we have approximately 35 open screening panel files, most of which were opened since House Bill 2661 became law. House Bill 2661 encourages the use of the screening panel system. Consequently, House Bill 2052 should have a favorable impact on the increasing number of cases being brought into the civil justice system.

House Bill 2052 provides fairness.

The screening panel mechanism helps to screen claims and provides an even-handed analysis of the issues before it. One of the panel members is selected by the plaintiff, one by the defendant, and the third is agreed upon between the parties.

A fee shifting provision could not be fairly imposed upon the defendants in this context because House Bill 2052 relates only to the merits of the claim being asserted. Bringing a claim is unique to plaintiffs. In other words, House Bill 2052 gives the plaintiff two chances to assert a successful claim. Any mechanism imposed upon defendants would speak to failure to settle for a just amount and would not give the defendant two chances. Fees, moreover, are generally calculated differently for plaintiffs than for defendants. As a practical manner, when the plaintiff is successful, the defendant pays the fees and expenses of the plaintiff anyway.

As it stands under the present system, a health care provider can never win a medical malpractice case. Even if a health care provider obtains a defense verdict, he loses the time and expense of adjudicating his case. Two very important examples should be noted. One is the example of a small rural community whose doctor is a defendant in a medical malpractice action. The action could be pending in Federal Court necessitating travel away from the local rural community. All the health care professionals in town would likely be witnesses in the case. The case may involve a complicated procedure and could be expected to take in excess of one month to try. Health care services to that rural community

would, thereby, be threatened during the pendency of trial. The health care provider "wins" the case, but the community, the Fund, and the provider have undoubtedly suffered through the ordeal.

A second example is the example of a health care provider involved in an extensive and complicated products liability trial. Products liability trials have been known to extend for months on end. Again, the health care provider may be successfully defended, but the costs are enormous.

The average cost of defense for an inactive health care provider which includes defending the inactive for everything from sitting in on a single deposition to defending a health care provider through trial and appeals, is just over $8,000. Naturally, that figure varies from case to case and is much higher when the case goes to trial. In one case, our cost to defend a health care provider exceeded $75,000.

I would, therefore, recommend that House Bill 2052 be amended at line 49 on the second page to read that the provisions apply if the defendant prevails in a subsequent civil action. The amendment precludes the defendant from having to go to trial to be allowed fees and it protects the plaintiff by recognizing any appeal to which plaintiff may be entitled. As an example, a defendant health care provider would be entitled to fees and expenses under House Bill 2052 if after receiving a unanimous screening panel decision he then obtains a summary judgment or a dismissal with prejudice.

House Bill 2052 clearly defines when costs and fees are to be shifted.

The Honorable District Court Judge of the State of Kansas, Judge Terry Bullock, testified before the Citizens Committee on Legal Liability that judges were reluctant to impose attorney fees under present law. Judge Bullock suggested more clearly defined instances when a fee shifting statute should apply. House Bill 2052 would help to resolve the problems Judge Bullock addressed.

In conclusion, House Bill 2052 provides a clear, less complicated method of fee shifting which would discourage frivolous claims, conserve resources for the Health Care Stabilization Fund, and promote an equitable system of justice.

KANSAS BAR ASSOCIATION

1200 Harrison
P.O. Box 1037
Topeka, Kansas 66601
(913) 234-5696

February 11, 1987
HB 2052

Mr. Chairman. Members of the House Judiciary Committee. I am Ron Smith, KBA Legislative Counsel.

> KBA has no specific position on this bill. However, we generally oppose changes to the adversarial practice of law unless the public approves of such change, and unless the public gains some benefit from the change.
>
> In 1985 and 1986, none of the medical malpractice reforms created a penalty for taking a case to a trial by jury. No one is deprived of a remedy; they are deprived of certain evidentiary matters and perhaps an upper limit. HB 2052 goes beyond this concept, and effectively tries to shut off access to a jury, and shut down the "remedy" of medical malpractice.

The courts exist for the resolution of disputes. Within bounds, persons are entitled to litigate their dispute. They cannot maintain either a frivolous claim or frivolous defense, however. If they do, current statutes give an excellent remedy including fee shifting of attorney fees and costs. [KSA 1986 Supp. 60-211].

KBA supported the mandatory use of screening panels with results being admissible. We do think such panels can weed out some less meritorious claims. However:

Attachment II
House Judiciary 2/11/87

1. In 1986, even the Kansas Medical Society never maintained that the screening panel's decision should be a substitute for the jury decision.

2. Evidence presented to the panel, by law, is quite limited. KSA 1986 Supp. 65-4903 limits the consideration of the panel to only medical records, hospital records, contentions of the parties, examination of X-rays, test results, and treatises. Obviously, if the medical records are missing some information, the "second-guess diagnosis" that the panel engages in becomes flawed.

3. The clinical expertise of possible expert witnesses for the plaintiff and the defense is not considered by this panel. Most medical malpractice cases turn on the views of these expert witnesses.

4. K.S.A. 60-211 still exists for those litigants that will use this penalty. If a claim is frivolous and shouldn't be maintained, if the plaintiff persists with the action, right now the defendant can move for attorney fees and costs. What HB 2052 does is effectively say that (a) a 3-0 finding by the panel plus (b) a defense verdict at trial equals a statutory finding of frivolousness. If due process is going to apply, that must also apply to the defendant as well.

5. The weakness in the penalty imposed by HB 2052 is that the penalty is applied against the plaintiff only. The advantage of the fee-shifting penalty in KSA 60-211, if applied, is that the attorney is jointly and severally liable for the fee penalty.

6. If what the proponents are seeking is a method of insuring that both parties reasonably settle, this can be done with fee shifting

incentives through the offer of judgment statute, K.S.A. 60-2002 and 60-2007.

The Bar Association is not opposed to fee shifting principles in appropriate situations. We supported strengthening KSA 60-211 for frivolous lawsuits. For example, we favor a form of fee shifting called prejudgment interest -- if the statute is drawn appropriately so that penalties were imposed upon any party, plaintiff or defendant, that does not make meaningful efforts to settle cases.

Finally, Mr. Chairman, if nothing else HB 2052 is premature. We have had mandatory use of screening panels only since July 1, 1986. They are being used now. The insurance department and the insurance industry do not yet have statistics to know yet how many unanimous panel approvals there are, to what degree the plaintiffs continue the litigation after the unanimous finding of the panel, and what percentage of those cases are successful for the plaintiff.

Without that kind of data, it is hard to imagine how this legislation would be classified as anything but arbitrary and capricious under our substantive due process - equal protection arguments of constitutional law.

STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES

Statement Regarding H.B. 2136

1. Title

An Act concerning the code for care of children; relating to termination of parental rights; amending K.S.A. 1985 Supp. 38-1583 and repealing the existing section.

2. Purpose

This bill adds two additional considerations the court may use in determining whether or not to terminate parental rights: number of times the child has been placed outside the home, and length of time the child has been placed outside the home.

3. Background

In June 1986, the SRS office of Analysis, Planning and Evaluation issued a report on the Family Services Program. It was the conclusion of this study that SRS should consider proposing a change in state law that makes it easier to terminate the parental rights of parents after their children have frequently been placed in foster care.

4. Effect of Passage

Such a change would make it easier to terminate the parents' legal rights to their children when the parents' behavior shows no sign of real change and their children are in danger of future abuse or neglect. Under such circumstances the termination of parental rights need not be mandatory but must be at least seriously considered during a court hearing. Such a change may help prevent the use of scarce agency resources on families who do not respond after repeated delivery of Family Services.

Since the SRS Child Tracking System does not show how many children are coming into foster care for a second or third time, it is not known at this time how many children this legislation would affect.

5. SRS Recommendation

SRS recommends passage of this bill.

Robert C. Harder, Secretary
Office of the Secretary
Social & Rehabilitation Services
296-3271
February 11, 1987

Attachment III
House Judiciary 2/11/87

Have you been FALSELY accused of child physical abuse, child sexual abuse, and/or child neglect?

Have you felt abused by a system that treats accused persons as guilty until proven innocent?

Have you felt you were the victim of an "investigation" that was prejudicial and lacked objectivity?

ave you been fearful that a child that you love has been "victimized" by ill informed officials of the state?

Have you been publicly shamed for a crime you did not commit?

Have you felt overwhelmed by the combined resources of the state?

YOU ARE NOT ALONE!

WE ARE VOCAL

VICTIMS OF CHILD ABUSE LAWS, INC.

and we wish to be of service to all innocent persons who have become "VICTIMS OF CHILD ABUSE LAWS".

VOCAL (Victims of Child Abuse Laws) is a non-profit organization and its members recognize that the greatest resource the world has it its children.

We believe children need to have all their physical needs met, need to receive and return love, and need to learn to respect the rights of others.

We recognize, and respect the fact that our society is made up of a variety of people, with a multitude of beliefs, and that there is no "one right way" to raise a child.

We further believe the family is the foundation upon which American society rests, and any activity which weakens the family is a threat to our entire society.

However, while we wish that all children would mature via a happy childhood, we are aware that some children are raised with neglect, and/or abuse.

We believe many of the laws designed to protect children were motivated with a sincere interest in the well being of our society.

However, any law that is the product of the human mind is subject to imperfections.

We believe many laws designed to protect individuals and families, and to insure that members of our society would receive "due process", are either misunderstood or ignored.

We believe other laws, and some social service policies and procedures encourage public hysteria, foster a denial of human rights, and have promoted a bureaucratic nightmare.

The members of VOCAL believe:

- All laws designed to end child abuse, and/or neglect, should be build on a foundation of "due process".
- Investigation should be completed in a thorough, non-prejudicial manner, with full regard for the belief that all persons deserve to be treated as innocent until proven guilty.
- Government intervention in the function of a family should be encouraged ONLY when there is clear, current, and compelling need.
- Family services should not be set up in such a manner as to foster another bureaucracy.
- Governmental employees should be held accountable for their conduct, and must not be granted "immunity" when they conduct themselves in an unprofessional manner.
- The legal process should be set up so as to allow a person to be able to afford a reasonable defense. Too often the current legal process demands that one must match limited assets against the resources of the state.
- Family courts must be given a prudent amount of authority.

-AND-

- Judicial decisions must be reached

within a reasonable amount of time.

The members of VOCAL are opposed to the cliches of the "witch hunters". We believe that comments like "children NEVER lie about sexual abuse" are generalizations based upon misinterpreted data from unscientific studies, and have NO place in an intelligent court of law.

The members of VOCAL believe it is inexcusable for anyone to physically abuse a child, or have any form of sexual interaction with a child, or to neglect a child; and we fully support all laws that seek to address these concerns in a constructive manner.

If you would like to know more about VOCAL, please contact us. Our address is:

VOCAL
National Office
P.O. Box 8536
Minneapolis, MN 55408
Phone (612) 521-9714

Attachment IV
House Judiciary 2/11/87

VOCAL
National Office
P.O. Box 8536
Minneapolis, MN 55408
(612) 521-9714

Kansas Coalition
for
Parents & Children
10308 Metcalf Suite 262
Overland Park, KS 66212
(913) 829-5509
Elisa Cosgrove
Coordinator
356-3017

WE ARE VOCAL

VICTIMS OF CHILD ABUSE LAWS, INC.

AND WE OFFER YOU, AND YOUR COMMUNITY; INFORMATION, RESEARCH DATA, VALUABLE REFERRALS, AND EMOTIONAL SUPPORT.

An Overdose of Concern

Child Abuse and the Overreporting Problem

Douglas J. Besharov

FOR TWENTY YEARS, children's advocates have struggled to get child abuse recognized as a serious social problem requiring a sustained governmental response. As we all know, they have succeeded beyond their wildest dreams. Every day seems to bring a new public outcry over a child who has been brutally beaten or sexually abused. Over forty child abuse bills were introduced in the New York legislature last year, and over fifty in California.

Ironically, this very success in gaining public attention has led to a wild overreaction whose effects have actually been counterproductive. Back in 1975, about 35 percent of all reports turned out to be "unfounded," that is to say, they were dismissed after investigation. Now, ten years later, about 65 percent of all reports nationwide prove to be unfounded. This flood of unfounded reports is overloading the system and endangering the children who really are being abused. And the rules and regulations prompted by federal solicitude are a major part of the problem.

The Background

The federal Child Abuse Prevention and Treatment Act of 1974 created a small program of federal grants (about $3.7 million per year) to states that met specified eligibility requirements. Only three states were able to satisfy these requirements in 1973, but in the following six years, state after state passed new child protection laws and established the comprehensive child protective systems needed to qualify for federal aid. By 1984, all but four states had done so.

What accounts for this rapid advance in state activity? Certainly it was not the amount of money involved. In the relevant years, the average federal grant to states was a mere $80,000—far less than the cost of expanding the programs. Instead, the grants, along with the other activities of the National Center on Child Abuse and Neglect (created by the 1974 legislation), served as a catalyst for making improvements long advocated by child protective specialists.

In a well-meaning effort to identify the greatest number of endangered children, one of the eligibility criteria in the 1974 legislation was a requirement that states broaden their laws on reporting of child abuse. In particular, all forms of child maltreatment had to be reported, whether or not the child had been physically harmed. As a result, nearly all states now require the reporting not only of suspected physical abuse and sexual abuse and exploitation, but also physical and emotional neglect, and even of children who have not yet been either abused or neglected. Typical legislation requires a report in cases where the child's "en-

Douglas J. Besharov directs the Social Invention Project at AEI. He prosecuted child abuse cases in New York before becoming the first director of the U.S. National Center on Child Abuse and Neglect (1975–79). *This is adapted from an article in the* Harvard Journal of Law and Public Policy.

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vironment is injurious to his welfare," where the parents are "unfit to properly care for such child," or, in a blatant tautology, where the child is suffering from "abuse or neglect." Many of these crucial terms either are never exactly defined at all or are defined using pat phrases and ambiguous indicators that do nothing to help professionals and the public decide whether to file a report. One state, for example, defines emotional abuse to include the failure to provide a child with "adequate love."

Under these state laws, medical, educational, social work, child care, and law enforcement professionals face civil and criminal penalties if they fail to report suspected cases. The laws also include provisions that encourage all and sundry—including relatives, neighbors, and friends of the family—to report suspected maltreatment. In fact, nineteen states even require perfect strangers to report suspected child abuse.

These mandatory reporting laws and associated public awareness campaigns have been strikingly effective. In 1963, about 150,000 children came to the attention of public authorities because of suspected abuse or neglect. By 1972, an estimated 610,000 children were reported each year, and in 1984 the figure was above 1.5 million. The level of federal and state expenditures for child protective programs and associated foster care services now exceeds $3.5 billion a year.

Does this vastly increased reporting signal a rise in the incidence of child maltreatment? Some observers think so, and attribute the rise to what they see as deteriorating economic and social conditions. But there is no way to tell for sure. So many maltreated children previously went unreported that earlier reporting statistics do not provide a reliable baseline against which to make comparisons. However, one thing is clear. The great bulk of reports now received by child protective agencies would not have been made but for the passage of mandatory reporting laws and the media campaigns that accompanied them.

The media have given substantial coverage to the dramatic increase in abuse reports, contributing to the sense of a "child abuse crisis." What they rarely mention is that as the number of reports has soared, so has the so-called unfounded rate. For example, in New York state, which has one of the highest unfounded rates in the nation, the number of reports received by the state Department of Social Services increased by about 50 percent between 1979 and 1983 (from 51,836 to 74,120). Yet the percentage of *substantiated* reports fell by almost 20 percent (from 43 percent to 36 percent). In fact, the *absolute number* of substantiated reports actually fell by almost 100. Thus nearly 23,000 additional families were investigated—while fewer children were aided.

Sometimes, of course, child protective workers wrongly determine that a report is unfounded, and sometimes they declare a report unfounded as a means of caseload control. However, the great bulk of today's reports involve situations that do not amount to child maltreatment or that cannot be substantiated by "credible evidence," the legal test for determining the validity of a report. Few of these reports are made maliciously; most involve an honest desire to protect children coupled with confusion about when reports should be made. A child has a minor bruise and, whether or not there is evidence of parental assault, he is reported as abused. A child is living in a dirty household and, whether or not his basic needs are being met, he is reported as neglected.

Some child protective specialists defend the current high rates of unfounded reports on the ground that a degree of overreporting is necessary to identify children in danger. To an extent, of course, they are correct. That is why the law mandates the reporting of "suspected" child abuse. But unfounded rates of the current magnitude go beyond anything reasonably needed. Other specialists seek to minimize the problem by claiming that overreporting is not so bad because, if child protective agencies had more investigative staff, they would find that more reports now labeled unfounded are, in fact, valid. But they do not have more staff, and the fact remains that these cases are accepted, investigated, and then closed.

Multiplied by the thousands, these unfounded reports have created a flood that threatens to inundate the limited resources of child protective agencies. Forced to allocate a substantial portion of their limited resources to unfounded reports, these agencies are increasingly unable to respond promptly and effectively when children are in serious danger. As a result, children in real danger are getting lost in the press of inappropriate cases.

Callers attempting to report suspected child abuse to New York's statewide hotline, for example, are often placed on hold for ten or fifteen minutes; about half hang up before a hotline worker answers the phone. Across the country, staff shortages delay the initiation of investigations, and it is not unusual to see reports left uninvestigated for one and even two weeks after they are received. The scope of investigations is also limited, so that key facts often go undiscovered in the caseworker's rush to clear the case. Dangerous home situations likewise receive inadequate supervision, as workers let pending cases slide as they investigate the new reports that daily arrive on their desks. Again, statistics from New York show the extent of the problem. Forty days after the oral report, New York City workers still have not visited the child's home in 11 percent of all cases; they have not yet seen 22 percent of reported children; and they have not yet interviewed 17 percent of alleged perpetrators.

Decision making also suffers. Staggering caseloads breed errors in judgment. After dealing with so many cases where there is no real danger to children, caseworkers are desensitized to the real warning signals of imminent and serious danger. Thus many children are left in the custody of parents who have repeatedly abused them, even when their siblings have previously died of abuse. Nationwide, from 35 to 55 percent of all child abuse fatalities and tens of thousands of injuries involve children previously known to the authorities.

Child protective proceedings are confidential, so few of these tragedies come to public attention. But enough do so that every community has had its news story about a child who has been "allowed" to die. What follows is a spate of editorials calling for action to protect children, more TV and radio spots calling on people to report suspected abuse, another brochure or conference for professionals describing their legal responsibility to report, and, perhaps, a small increase in agency staffing. The main result of these periodic flurries of activity is to increase the number of unfounded reports.

Unfortunately, the determination that a report is unfounded can be made only after an unavoidably traumatic investigation that is inherently a breach of parental and family privacy. To determine whether a particular child is in danger, caseworkers must inquire into the most intimate personal and family matters. Often it is necessary to question friends, relatives, and neighbors, as well as school teachers, day care personnel, doctors, clergymen, and others who know the family.

Laws against child abuse are an implicit recognition that family privacy rights are not absolute. But as Supreme Court Justice Brandeis warned in a different context, "experience should teach us to be most on guard to protect liberty when the government's purposes are beneficent." It is all too easy for courts and social agencies, in seeking to protect children, to trample on the legitimate rights of parents.

Each year, over 500,000 families are put through investigations of unfounded reports.

Each year, over 500,000 families are put through investigations of unfounded reports. This amounts to a massive and unjustified violation of parental rights.

This amounts to a massive and unjustified violation of parental rights. As more people realize that hundreds of thousands of innocent people are having their reputations tarnished and their privacy invaded while tens of thousands of endangered children are going unprotected, a backlash is sure to develop that will erode continued support for child protective efforts at federal and state levels.

Already, a national group of parents and professionals has been formed to represent those falsely accused of abusing their children. Calling itself VOCAL, for Victims of Child Abuse Laws, the group publishes a national newsletter and has about 3,000 members in nearly a hundred chapters formed or being formed, including ten in California alone. In Minnesota, VOCAL members collected 2,000 signatures on a petition asking the governor to remove Scott County prosecutor Kathleen Morris from office because of her alleged misconduct in bringing charges, subsequently dismissed, against twenty-four adults in the town of Jordan. In Arizona, VOCAL members were temporarily able to sidetrack a $5.4 million budget supplement that would have added seventy-seven investigators to local child protective agencies.

What Must Be Done

So far, most child welfare officials in federal, state, and local agencies have lacked the courage to speak up publicly about the inflation of abuse statistics by unfounded reports, fearing that such honesty will discredit their efforts and lead to budget cuts. But unless things change, the potentially valuable force of public concern will serve only to increase the number —and proportion—of reports ineffectually and harmfully processed through the system.

First, we need a more realistic definition of child abuse. We regularly hear that there are upwards of a million maltreated children (including those that are not reported). This is a reasonably accurate estimate. But the word "maltreatment" encompasses much more than the brutally battered, sexually abused, or starved and sickly children that come to mind when we think of child abuse. A federal study found that only 3 percent of these "maltreated" children are physically abused to the extent that they require professional care. And only about 7 percent are sexually abused. The remainder are either victims of unreasonable corporal punishment, emotionally abused (mainly "habitual scapegoating, belittling and rejecting behavior"), or neglected (mainly educational neglect and emotional neglect, such as "inadequate nurturance" and "permitted maladaptive behavior"). Recognizing that these other serious but in no way life-threatening problems are lumped under the term "child abuse" would go a long way toward reducing current hysteria.

In addition, state reporting laws and associated educational materials and programs must be improved to provide practical guidance about what should and should not be reported. The current approach in training sessions is to tell potential reporters to "take no chances" and to report any child for whom they have the slightest concern. This ensures that child abuse hotlines will be inundated with inappropriate and unfounded reports. Laws and educational materials should be modified to require reporting only when there is credible evidence that the parents have already engaged in seriously harmful behavior toward their children or that, because of severe mental disability or drug or alcohol addiction, they are incapable of providing adequate care.

Child abuse hotlines, another key link in the system, are currently in the position of a 911 service that cannot distinguish between life-threatening crimes and littering. Afraid that a case they reject will later turn into a child fatality, most hotlines shirk their central responsibility to screen reports and decide which to accept and assign for investigation. According to the American Humane Association, only a little more than half the states even allow their hotline workers to reject reports, and those that do usually limit screening to cases that are "clearly" inappropriate. Many hotlines will accept reports even when the caller can give no reason for suspecting that the child's condition is due to the parent's behavior. This writer observed one hotline accept a report that a seventeen-year-old boy was found in a drunken stupor. That the boy, and perhaps his family, might benefit from counseling in such a case is indisputable. But that is hardly a reason to start an involuntary child abuse investigation.

Finally, the federal government must rethink its own policies. Since the passage of the Child Abuse Prevention and Treatment Act in 1974, it has mandated state programs that seek the reporting of ever-greater numbers of abused children—without regard to the validity or appropriateness of reports. While this one-dimensional approach may have been justified ten years ago when few reports were made, the requirements have remained essentially unchanged in the face of ever-increasing numbers of unfounded reports.

The Reagan administration has voiced its strong commitment to family rights, but bureaucratic unresponsiveness and fear of being labeled as "for" child abuse (or at least insensitive to it) have apparently prevented it from taking action on this problem. (Instead, it has funded three small research projects to explore why so many unfounded reports are being made.) While further research may shed additional light on the problem, the plain fact is that we already know enough about the problem, and its tragic consequences, to take action now. Amending the federal child abuse regulations in the way described above would establish a combination of incentives and penalties that would encourage states to be more careful about the reports they receive. The alternative is a growing burden of unfounded reports that harms the very families we are trying to help. ■

LEARNING FROM THE McMARTIN HOAX

By Dr. Lee Coleman

Slowly, begrudgingly, more and more people are beginning to recognize that the wild charges against th staff of the McMartin pre-school are without foundation. Even more important, the cause of this tragedy is also being acknowledged in some circles. Others, however, despite being in a position to see how the hoax developed, refuse to face up to the truth.

If what the children have said is not true, why would they say these things? The answer is both simple and terrible. They were trained. Trained by the "experts" our law enforcement agencies trustingly allowed to "evalute" the children.

Most influential among those defending the way in which the children were interviewed is Psychiatrist Roland Summit. Recently, Summit has written that the McMartin children were in fact the victims of sexual abuse, that social worker Kee MacFarlane and the children's Institute International used proper, up-to-the-minute techniques to interview the children, and that the crumbling of the prosecution merely points to weaknesses in the criminal justice system.

Summit argued that "there was both reason and precedent for the methods used in the initial interviews with children." Macfarlane practiced "the state of the art...highly evolved, intensely specific and largely unknown outside the fledgling specialty of child abuse diagnosis." This new art form, Summit continued, was "an amalgam of several roles...the knowledge of a child development specialist to understand and translate toddler language, a therapist to guide and interpret interactive play, a police interrogator to develop evidentiary confirmation and a child-abuse specialist to recognize the destinctive and pathetic patterns of sexual victimization." We evidently need such artists to assist police investigators because their "specialist understanding is both unexpected and counterintuitive."

Summit doesn't tell us whether he has viewed any of the videotaped interviews done by Macfarlane and her proteges, but either way his defense of the techniques used is itself indefensible. I don't known which is worse -- defending interviews which he has studied and which so clearly show that the children were trained by the interviewers to believe they were molested, or defending interviews which he has not studied.

That the children, and their parents, were horribly victimized by the interviews is a conclusion which is inescapable. So far, I have watched the interviews of thirteen children. In some, Kee Macfarlane is the interviewer. In others, those she has taught faithfully practice the new "art" Summit so highly praises. In each and every session I have seen so far, an outrageous pattern emerges, one in which the children are systematically manipulated and indoctrinated until they finally give the interviewer what he or she wants, ... some "yukky secrets."

Let us look at a few examples.

1. A five year old girl is introduced to hand puppets which can "speak for the child." MacFarlane tells the girl that "we can pretend." She goes on to tell the girl, "I think that something happened to you at school with Mr. Ray (Buckey) that you don't want to talk about." "No," the child responds. "I think it's true," MacFarlane answers. "I talked to lots of your friends. All of them are telling me the things that Mr.

Ray did." When the child still has no "secrets" to tell, MacFarlane is not deterred. She tells the child, "He told you not to talk, didn't he...But all the kids are telling...You could just show me with the dolls. You don't even have to use words."

Even if it were true that the other children had in fact told of these things, rather than been manipulated into saying them, is this the way to find out if a particular child has been victimized or witnessed other being victimized? Hardly.

2. A four year old girl is asked by MacFarlane, "Do you like Ray?" She responds, "No, he's bad." What did he do?" MacFarlane asks. The girl responds, "My mom said he tied up kids." Instead of helping the child understand the difference between what her mother or anyone else may have told her, and what she could actually remember from her own experiences at school, MacFarlane proceeds to ask the child to demonstrate, with dolls and rope, how the children were tied! Not surprisingly, the child complied. After all, children regularly use dolls to tell stories. By the time the session was over, the child was tying dolls to legs of chairs with the rope, and using handcuffs which were also handy. At one point in this "factfinding" process, the child said that after Mr. Ray tied kids, her mother came and tied up kids too! When MacFarlane asked if this was just a story, the child agreed that she was just pretending.

Armed with these profound insights into the operations of the McMartin school, MacFarlane and her colleagues then proceeded to tell subsequent children that they knew kids were being tied up at the school. Other children had said so.

3. An eight year old boy is interviewed by Kee MacFarlane. It has been several years since this boy attended the school, so his memory will need an extra bit of jogging. He is told that a lot of other kids have told about the secrets. The ones who tell are "a big help in figuring things out." He is told that some of the teachers did yukky things. When he asks which teachers, he is told that the puppets know and they can tell the "secret machine" (microphone). When the child, even with the puppets, fails to come forth with a secret, the puppet on his hand is asked by the puppet on MarcFarlane's hand, "Are you dumb or smart?" The boy's puppet responds, "I'm smart."

The boy is nudged further by being told that because the youngest children are sometimes unable to talk, "we're talking to the older kids, cause they're the smartest. They can help. We can figure out these games,if you're smart." The boy responds,once again, "I'm smart." MacFarlane says, "It was a long time ago, you might not remember... We can pretend." Now the boy says, "I remember, but the best he can do is talk about beating up puppets. MacFarlane, via the bird puppet on her hand, tells the child, "Bird says some of them are naked games." The child
asks why they played naked games. MacFarlane responds, "It was a special school where they play naked games. Remember?" With MacFarlane doing the "telling," the boy will obviously need even more encouragement. She tells him, "We had a meeting of the mommies and daddies of the kids. They said how proud they were that their children had told (the secrets). But some parents said their kids didn't tell any secrets, so we said "sorry". Your parents talked to the other parents, so they know the secrets and your parents said, "We don't know if Bill [pseudonym] has a good enough memory". To this the boy immediately blurts out, "well, I have a good enough memory." To

which MacFarlane responded, "oh, great. Was that you, Mr Monkey/ o.k. Lets figure out a naked game... Later we can tell the mommies and daddies. Oh, they will be so happy."

With this, the child began to talk about games he supposedly "remembered." But, alas, none of the teachers were naked in the games he described. That would never do.

MacFarlane: "I thought that was a naked game."
Boy: "Not exactly"
MacFarlane:"Did somebody take their clothes off?"
Boy :"When I was there no one was naked."
MacFarlane: "We want to make sure you're not scared to tell."
Boy: "I'm not scared."
MacFarlane: Some of the kids were told they might be killed.It was a trick. All right Mr. Alligator, are you going to be stupid, or are you smart and can tell. Some think you're smart."
Boy: "I'll be smart."
MacFarlane: "Mr. Monkey [the puppet the child had used earlier] is chicken. He can't remember the naked games, but you know the naked moveie star game, or is your memory too bad?"
Boy: "I haven't seen the naked movie star game."
MacFarlane: "You must be dumb."
Boy: "I don't remember."

Sooner or later, most children will buckle under this kind of onslaught, as they did in the McMartin case. This, I submit, is child (and parent) abuse.

The techniques used on the McMartin children point dramatically to one conclusion: MacFarlane and her trainees had decided, **before the very first interview,** that children were molested at the McMartin preschool. However they now try to rationalize their interview techniques, their behavior with the children looks like an attempt to squeeze from the children "evidence" of what the interviewers were sure must have taken place.

Summit defends this by writing, "If a child suspected of being abused is unable to volunteer information, it must be elicited with warm reassurance and specific, potentially leading questions" This seems to assume that a molestation has taken place, despite the fact that the interview is supposed to discover **whether** molestation has occurred. Tragically, this assumption of sexual abuse is precisely the attitude that Summit, MacFarlane and other leading lights in child sexual abuse have promoted, through countless workshops for police, protectice service workers, mental health professionals, and district attorneys. It is this belief that if an allegation is raised, regardless of the circumstances, it must true because "children don't lie about sexual abuse," which explain the irresponsible investigations in the McMartin case, and the hundreds of other false allegations throughout the country.

This raises other serious question. Where does the claim that "children don't lie about sexual abuse" come from? Are there only two choices, that the child is either lying or telling the truth, or does this ignore the possibility that a child may be manipulated into an accusation , and with sufficient training eventually come to sincerely believe in things which never took place? With the answers to these questions comes the recognition that in defending Kee MacFarlane and the children's Institute International, Summit is defending himself and the other leaders of the "fledgling specialty" of child sexual abuse.

In a highly influential article, Summit has written, "It has become a maxim

among child sexual abuse intervention counselors and investigators that children never fabricate the kinds of explicit sexual manipulations they divulge in complaints and interrogation." Unaided by adults with axes to grind, this is probably true most of the time. But the evidence is now overwhelming that children may be coaxed, prodded, and indoctrinated until they tell not only of sexual abuse which never took place, but about virtually any fantasy imagineable.

Take, for example the child repeatedly interviewed as part of the string of cases in Bakersfield, case based on the same irresponsible interview techniques used on the McMartin children. Eventually the child told how a mother and father had sexually abused and then murdered their two year old son. I am happy to report that the "murdered" child is alive and well. Another child, subjected to the same indoctrination technques, added the district attorney and the child protection worker to the long list of child molesters.

The Minnesota Attorney General investigated the sex abuse hoax in Scott county, where children told of sex rings and murders, and accused their own parents of these heinous acts. A major conclusion of the investigation was that "prologed interrogation of children may result in confusion between fact and fantasy."

For Summit to ignore such evidence, and the obvious implications for the McMartin interviews, is irresponsible. It seems that rather than face up to the nightmare which the "experts" have promoted by their highly aggressive and manipulative techniques, they are determined to confuse the issuses by claimimg that (quoting Summit) "if there is a danger out there...we must look to sources apart from the criminal justice system to show us the danger... Rather than discredit MacFarlane, the criminal justice system needs to better understand the problem of child sexual abuse and make accomdations to new sources of evidence."

This means more puppets, more "anatomically correct dolls," more testimony from three, four or five year olds who have been so badly manipulated by interviewers that they no longer can differentiate what they remember from what has been suggested to them by overzealous adults.

Recently we learned of yet one more perversion being foisted on us by the "experts": Some of the leading authorities in child sexual abuse have been given hundreds of thousands of federal and state dollars to study the impact of sexual abuse on the McMartin children! Among the investigators receiving these funds are the very persons who indoctrinated the childern in to believing they **were** molested.

Summit has, however, made one worthwhile recommendation. He has urged that the videotapes of the interviews be carefully studied, no matter what happens in the criminal case. This is precisely what needs to happen. The hundreds of hours of videotaped interviews are indeed the key to understanding how the children could come to sincerely believe things that never happened. These tapes must not be allowed to gather dust merely because the district attorney's office finally gathered the courage to admit that it was a terrible mistake to trust MacFarlane and the children's Institute International.

Indeed, these tapes are a key not only to understanding the McMartin hoax but the thousands of smaller but otherwise similar debacles unfolding throughout the country. If, as I have seen from my own viewing of the McMartin tapes,

and listening to nearly two hundred hours of audio and video tapes in other case, the "best and the brightest" have created the current mess in investigations of alleged child sexual abuse, then some basic lessons emerge:

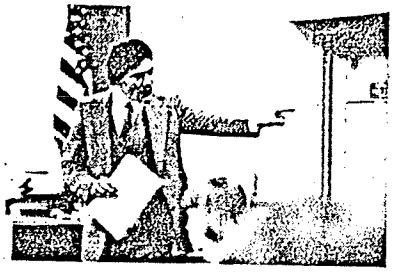
First, we have once again made a terrible mistake by turning to mental health professionals for advice in delicate and difficult issues of law and social policy. Mental health professionals are no more qualified to investigate whether a child has been sexually molested than to determine if a murderer knew right from wrong, or predict if a prisoner is safe for release.

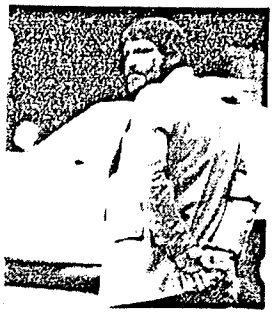
Second, police and child protection workers throughout the country will need to be re-trained. The ideas and methods of Summit, MacFarlane, and their closest colleagues, which now pervade child sexual abuse investigations, will need to be exposed and discarded in favor of careful and responsible investigations which do not turn to "experts" for insights which we mistakenly assume they can provide. We will do far better without them.

I join hands with Dr. Summit in calling for the most thoroughgoing study of the McMartin tapes, by the widest possible audience. Let transcriptions (with names and identifying data removed, of course) go forth, across the land. Once the public sees these tapes, experts will not be needed to tell us where the "secrets" came from, and who is to blame.

VOCAL Kansas City Chapter
10308 Metcalf Suite 262
Overland Park Kansas 66212
(816) 3563017

They Threw The Book At Him





Now This Accused Father-Psychologist Is Throwing The Book At Us

Child, 4, to Testify of Alleged Sex Abuse
"She spent most of the time crying or waving at her father across the courtroom." ***The Washington Post,*** June 16, 1985

Some Child-Abuse Charges Held False
"The childrens' mothers, said a psychologist and a writer, had reported the alleged sexual abuse to the state's Division of Youth and Family services during or just before divorce or custody hearing." ***The New York Times,*** October 13, 1985

Psychologist Acquitted of Child Abuse
"A jury has acquitted a psychologist of sexual abuse charges after hearing his 4-year-old testify . . . ." ***The Washington Post,*** January 22, 1986

Child Abuse Reports Explode – 669,000 cases were reported in 1976. Reported cases skyrocketed to 1.7 million in 1984, cramming state agencies and courts. But in hundreds of thousands of these cases, innocent people are being traumatized by false accusations. Child abuse laws are being used as a weapon to destroy lives. What's worse; it's an easy thing to do. This true story documents a modern tragedy. Even more startling – It can easily happen to you.

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