University of the Pacific
Scholarly Commons

McGeorge School of Law Scholarly Articles | McGeorge School of Law Faculty Scholarship

2014

# "Testilying" in Family Court

John E.B. Myers
*Pacific McGeorge School of Law*

Follow this and additional works at: https://scholarlycommons.pacific.edu/facultyarticles

 Part of the Evidence Commons, and the Family Law Commons

Recommended Citation
John E.B. Myers, Testilying" in Family Court, 46 McGeorge L. Rev. 499 (2014).

This Article is brought to you for free and open access by the McGeorge School of Law Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in McGeorge School of Law Scholarly Articles by an authorized administrator of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

# "Testilying" in Family Court

John E.B. Myers*

TABLE OF CONTENTS



A small gaggle of lawyers chats in the hallway at family court, waiting for the afternoon calendar to begin. The clock strikes 1:30 p.m., and courtroom doors swing open. A stream of dour, frightened, and angry litigants trudge in. As the lawyers bid each other adieu, one quips, "Time to listen to more testilying." Colleagues chuckle as they disperse.

Was the lawyer's remark nothing more than the grousing of a cynic, or is testilying[1] common in family court? Is it *more* common in family court than elsewhere? There is no way to know. Ask a prosecutor or defense attorney whether witnesses lie in criminal court, and you are likely to be met with a wry smile, and the reply, "Obviously, you don't spend much time in criminal court. Of course witnesses lie. It's my job to catch them in the lie." I suspect similar sentiments would flow from attorneys in other spheres of practice.

Don't get me wrong. I'm not suggesting that most, or even many, parties and witnesses lie in family court. But it is naïve to think deliberate lying is rare. Some family law litigants are mentally ill, or nearly so, and lying is part and parcel of

* Professor of Law, University of the Pacific, McGeorge School of Law.

1. *See* Larry Cunningham, *Taking on Testilying,* 18 CRIM. JUST. ETHICS 26, 26 (1999) (describing the origins of the term "testilying" in the criminal justice context).

their tenuous grip on reality. The stakes in family court are so high, especially in child custody cases, that parents sometimes justify lying "for the good of the kids." If you want to see people who hate each other, spend time in family court—the hostility is so thick you can cut it with a knife. Unbridled animosity breeds lying.

Is deliberate lying the only explanation for testimony falling short of truth? Hardly. It is amazing to sit in family court and listen to two people who experienced the same event give diametrically opposite versions of reality. It happens all the time, and it must drive judges crazy. Are both parties lying? Is one party lying and the other telling the truth? Is it possible both parties are telling the truth—*their* version of the truth? I'm convinced the latter scenario occurs often. Indeed, it is probably more common than intentional testilying. Both parties tell the truth, but the vagaries of human memory, coupled with the emotions and motives rife in family court, distort memory. This is hardly news. If there are five witnesses to a car accident, there are likely to be five versions of what happened. Sometimes, witnesses to the same event have remarkably different memories of what transpired. Yet, everyone is telling some version of the truth.

## I. SKEPTICISM ON STEROIDS

In family court, skepticism about credibility—concern about testilying—reaches its zenith when one parent accuses the other of child abuse, particularly child sexual abuse. "Skepticism on steroids" is not too strong.

Everyone agrees that sexual abuse is serious and that victims must be protected. So, why does an accusation of sexual abuse in family court so often meet with disbelief? There are several reasons.

## II. "FALSE" ALLEGATIONS OF CHILD ABUSE IN FAMILY COURT

False allegations of sexual abuse occur, and a small body of empirical research suggests that false allegations are more common in family court than elsewhere.[2] But what is a "false" allegation? Is it a deliberate lie? Is it a report of abuse that is made in good faith, that turns out to be wrong? Frances Sink observed, "The broadly defined category of 'false allegations' includes almost

2. *See* Nico Trocmé & Nicholas Bala, *False Allegations of Abuse and Neglect When Parents Separate*, 29 CHILD ABUSE & NEGLECT 1333 (2005) (providing results of a nationwide study in Canada of intentionally fabricated accusations of child abuse in 7,600 child welfare cases. "There is a widespread misperception that there is a high incidence of intentionally false allegations of child abuse made by mothers in the context of parental separation and divorce in order to gain a tactical advantage or to seek revenge from their estranged partners." *Id.* at 1334. "The rate of intentionally false allegations is relatively low, though it is somewhat higher in cases of parental separation than in other contexts." *Id.*). Despite the importance of the subject, there is little empirical research on fabricated allegations. The paucity of research stems in part from the difficulty of studying the subject. How does one design research to evaluate deliberate lies about sexual abuse?

any situation in which an abuse report cannot be substantiated. The term fails to differentiate situations of intentional falsification from situations of misunderstanding or situations where inadequate information is available to determine the true or false nature of a report."[3]

The term "false" is ambiguous, leads to confusion, and should be avoided. A more accurate term is "fabricated." A fabricated allegation is a lie; a deliberate misstatement. Fabricated reports are distinguishable from Sink's "situations of misunderstanding or situations where inadequate information is available . . . ."[4] It is reasonable to blame someone who fabricates a report of abuse, and to question the fabricator's fitness as a parent. By contrast, it is unreasonable to blame or doubt the parenting of someone who makes a good faith report that cannot be proven or is mistaken.

California's child abuse reporting law contributes to the confusion caused by the word "false." The reporting law, Penal Code § 11165.12(a), defines an "unfounded" report of abuse as "a report that is determined by the investigator . . . to be false . . . ."[5] Section 11165.12(b) of the reporting law defines a "substantiated" report as one where a preponderance of the evidence suggests abuse happened, and the report is not "false." Section 11165.12(c) of the reporting law defines an "inconclusive" report as a report that is not "false," but that is not supported by sufficient evidence. This statutory language contributes to misunderstanding of the distinction between fabricated reports and reports that are made in good faith, but that cannot be proven.

The reporting law should be clarified by eliminating the word "false." Replace "false" with "fabricated," and define "fabricated" as an intentionally untrue allegation where the person knows the allegation is untrue. The terms "substantiated" and "inconclusive" can be retained, but should not be defined by reference to the word "false."

The reporting law should make clear that a report that is unsubstantiated or inconclusive is *not* fabricated. Use of the word "false" to describe unsubstantiated and inconclusive reports causes confusion.

Concern about words like "false" is no matter of trivial semantics. Real injustice flows from failing to distinguish lies from honest mistakes, and from labeling both "false." In too many cases, parents who *honestly* suspect sexual abuse, but cannot prove it, are labeled "false accusers." Once a parent is branded a "false accuser," his or her credibility is shot. In case after case, parents who are simply trying to protect their kids end up losing custody because they allege sexual abuse, cannot prove it, and are branded a "false accuser."

---

3. Frances Sink, *Studies of True and False Allegations: A Critical Review*, *in* SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES 37, 38 (E. Bruce Nicholson & Josephine Bulkley eds., 1988).

4. *Id.* at 38.

5. CAL. PENAL CODE § 11165.12(a) (West 2011).

The scarlet letter of "false accuser" is often accompanied by the conclusion that the villain is an "alienator," and probably mentally ill. These added stigmas seem especially likely when the accuser is a woman. One of the ironies of this area of family law is that when a loving parent honestly alleges sexual abuse, and is disbelieved, she may take actions that are mislabeled as alienation, and she may in fact act irrationally *because* she is not believed, and cannot protect her child.

In addition to reports that are "fabricated," "substantiated," or "inconclusive," it is important to understand another kind of report: a report that is best described as a "misperception" report. A parent's initial suspicion of sexual abuse arises in several ways. Often, children disclose what happened. Some children come right out with it. Others drop subtle hints that something is wrong. Some children are too confused, frightened, or young to disclose incidents of abuse, and a parent's suspicion is aroused by changes in the child's behavior. Regardless of how the possibility of sexual abuse arises, the parent gets a horrible sinking feeling: "Oh dear God. Could this be true? What should I do?" It is perfectly normal for a parent to react emotionally to the thought that her child might be sexually abused. Some parents were victims themselves, and the idea that her own child is also a victim is devastating. The mind is flooded with thoughts and emotions, including hope that it is not true, fear that it is, outrage, doubt about what to do and who to talk to, and desperation to protect the child.

The emotions stirred up by possible sexual abuse have effects that are positive and negative. On the positive side, fear starts the parent on the road to protection. On the negative side, the natural emotional reaction of a loving parent can cloud judgment and cause parents to jump too quickly to conclusions and accusations. The danger of jumping to premature conclusions is particularly pronounced when parents are embroiled in divorce or custody litigation.

Consider the case of Brenda and Fred, who divorced a year ago, after Fred had an affair. The divorce was bitter, with Brenda and Fred fighting over the house, spousal support, and especially, custody of their three-year-old daughter, Heather. After a nasty custody trial, Brenda got custody and Fred got weekend parenting time. One Sunday, Fred returned Heather from a visit. The little girl seemed unusually quiet. Brenda gave Heather a bath and noticed Heather's genitals were red and irritated. Brenda asked, "How come you're red down there, honey?" Heather replied, "Owie cause daddy hurted me." Brenda asked, "What did daddy do?" Heather said, "Finger owie." Alarms sounded in Brenda's mind. Heather seemed to be saying that her father hurt her genitals with his finger. Could this be sexual abuse? Brenda got that sinking feeling. She was ready to think the worst of Fred, and she quickly concluded he sexually abused their daughter. Brenda thought, "That bastard. He'll never do this again. I'll take away his visitation."

The emotions that overwhelmed Brenda were a combination of anger from a bitter divorce and Brenda's understandable reaction to what her daughter said.

Brenda jumped quickly to the conclusion that Heather was sexually abused. But did Brenda jump too quickly? Was Brenda's thinking clouded by the divorce? Is there an innocent explanation for Heather's redness and "owie" words? If Brenda rushes to family court with accusations of sexual abuse, will she be able to prove it? Once a parent launches the "atomic bomb" of sexual abuse, the parent *has* to prove it—something that is often difficult to do—or be branded a "false accuser." It is nearly impossible to withdraw an unprovable accusation of sexual abuse without looking like a fool or worse.

Would you like to know what happened at Fred's house? Fred gave Heather a bubble bath. He put far too much bubble solution in the tub—the more bubbles the better, right?—and the solution irritated Heather's genitals. Later, Heather told Fred her "privates" hurt. Fred saw the redness and said, "Daddy's sorry you got an owie. We'll make it better with salve." Fred used his finger to apply soothing ointment to Heather's irritated genitals. By the time Fred returned Heather to Brenda, he had forgotten the whole thing. Brenda misinterpreted what happened. When she saw the genital irritation and heard Heather's words, Brenda's animosity toward Fred kicked in. Sexual abuse was the *only* explanation she could see.

Brenda's case exemplifies a recurring scenario: A well-intentioned parent, trying to do the right thing, *misinterprets* innocent or ambiguous behavior as evidence of sexual abuse. The consequences can be disastrous for the accusing parent if she goes to court with accusations she cannot prove. The accused parent will be madder than a hornet, and will accuse the accuser of lying, destroying the parent-child relationship, alienating the child, etc. Brenda can try to explain herself, but I don't give her much chance of success.

## III. LAW OF UNINTENDED CONSEQUENCES: CALIFORNIA LEGISLATURE ENSHRINES SKEPTICISM IN THE FAMILY CODE

Fabricated allegations of sexual abuse are atrocious, and merit a punitive response. In an effort to fix the problem, the California Legislature made it worse. The Legislature added sections to the Family Code that do little to distinguish fabricated from truthful accusations, but that go far toward institutionalizing skepticism of *any* accusation.

Family Code § 3022.5 provides: "A motion by a parent for reconsideration of an existing child custody order shall be granted if the motion is based on the fact that the other parent was convicted of a crime in connection with falsely accusing the moving parent of child abuse." This section almost never applies, but the message is clear: "We will not tolerate 'false' accusations of abuse. False allegations occur so often that we need a statute to penalize them."

In custody litigation, Family Code § 3011 enumerates factors that are relevant to determining the best interests of the child. Section 3011(b)(3) provides:

> As a prerequisite to considering allegations of abuse, the court may require substantial independent corroboration, including, but not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of sexual assault or domestic violence.

This language is intended to reduce fabricated allegations of child abuse, but it casts a pall over all allegations, including many that are honest. The message of section 3011(b)(3) is clear: "Do not trust parents who allege child abuse. Treat such allegations with suspicion. Put very little stock in the testimony of an accuser. She—it is usually a she—is probably lying. Believe an accuser only if there is 'substantial independent corroboration' from outsiders we trust. Moreover, corroboration is not enough; the corroboration must be '*substantial*.'"[6] This corroboration requirement harkens back to the days when the testimony of women in rape and sexual assault cases was considered so dubious that a conviction could not be based on the uncorroborated testimony of the victim.[7]

Section 3011(b)(3) undermines truth finding because it suggests that any accusation that lacks *substantial* corroboration from *outside authorities* is unworthy of belief. Only if police, child protective services, doctors, or other professionals give their stamp of approval should a parent—again, almost always a woman—be believed. Yet, in some cases, the authorities are not involved—there are no reports from trusted outsiders. Woe be unto the parent who shows up in court without a cadre of professionals to back her up.

Family Code § 3027 speaks to the importance of protecting children from sexual abuse. But lest we forget the danger of fabrication, the next section, 3027.1, authorizes the court to impose sanctions and attorney's fees on fabricators. Of course, the court had this power without adding section 3027.1, but the Legislature wanted to re-re-emphasize its concern about fabricated allegations.

Family Code § 3027.5(a) provides that a parent shall not be denied custody or visitation solely because the parent lawfully reports child abuse or seeks

---

6. It is interesting that the subsection immediately following the one quoted in the text deals with allegations of drug or alcohol abuse. *See id,* § 3011(d). The Legislature recommends requiring "corroboration" of such accusations, but unlike sexual abuse, where the corroboration should be "substantial," the corroboration to prove drug abuse does not have to be "substantial." Again, the message is clear: Do not trust parents who allege child abuse.

7. *See* People v. Barnes, 42 Cal. 3d 284, 298 (1986); John E.B. Myers et al., *Professional Writing on Child Sexual Abuse from 1900 to 1975: Dominant Themes and Impact on Prosecution*, 4 CHILD MALTREATMENT 201, 205–206 (1999).

treatment for her child. But what the Legislature giveth to credibility with one hand, it taketh away with the other. Section 3027.5(b) emphasizes once again the Legislature's concern about fabricated allegations, authorizing courts to limit the custody of false accusers.

Finally, Family Code § 3118 discusses court-ordered custody evaluations when there are "serious" allegations of child sexual abuse. An allegation is "serious" only if it is based on statements by a child to law enforcement, child protective services, or a person required by law to report abuse, or if there is substantial independent corroboration. Once again, the message is clear: "Do not trust parents, almost all of whom are mothers. Believe a woman only if outside professionals back up her story. Absent professional back up, believe her only if there is *substantial* corroboration. If there is no corroboration or professional support, the accusation is not worthy of belief; it is not 'serious.'"

I am sure the Legislature did not set out to undermine the credibility of honest parents trying to protect their children. I am equally sure it was not the Legislature's intent to push the skepticism meter into the danger zone. I am completely confident the Legislature did both. The Legislature's legislation designed to combat "false" accusations had the unintended consequence of undermining the credibility of *all* parents who allege sexual abuse.

## IV. SEXUAL ABUSE IS HARD TO PROVE

Sexual abuse is often difficult to prove. In *Pennsylvania v. Ritchie*,[8] the U.S. Supreme Court wrote, "Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim."[9] In a similar vein, the California Supreme Court observed in *In re Cindy L.*,[10] "there are particular difficulties with proving child sexual abuse: the frequent lack of physical evidence, the limited verbal and cognitive abilities of child victims, the fact that children are often unable or unwilling to act as witnesses because of the intimidation of the courtroom setting and the reluctance to testify against their parents."[11]

Unlike physical abuse, where the child's injuries often provide powerful evidence, medical evidence is lacking in most sexual abuse cases. Lawrence Ricci and Joyce Wientzen write, "The physical examination is often normal or otherwise noncontributory to the determination of sexual abuse. In a review of medical findings in 2384 children, only 4% had findings diagnostic of sexual abuse."[12]

8. 480 U.S. 39 (1987).

9. *Id.* at 60.

10. 17 Cal. 4th 15 (1997).

11. *Id.* at 28.

12. *See* Lawrence R. Ricci & Joyce Wientzen, *Sexual Abuse: Overview, in* CHADWICK ET AL., CHILD MALTREATMENT: SEXUAL ABUSE AND PSYCHOLOGICAL MALTREATMENT 5 (4th ed. 2014).

In most child sexual abuse cases, the child is the most important witness. Some kids are great witnesses; others not so hot. Of course, some children are too young to testify, and some are too shy to talk in court. Family courts, unlike criminal courts, seldom listen to children.

If physical evidence is typically wanting, and some kids cannot testify, can the evidentiary gap be filled by mental health professionals describing psychological evidence of abuse? This question is controversial among experts on child sexual abuse, with strong opinions on both sides.[13] Psychologist Gary Melton, for example, argues that mental health professionals cannot diagnose sexual abuse with sufficient reliability to justify expert testimony that a child was sexually abused.[14] Melton writes, "There is no reason to believe that clinicians' skill in determining whether a child has been abused is the product of specialized knowledge."[15] Melton is joined by other experts.[16] On the other side of the debate, many mental health professionals believe it is possible, in some cases, to conclude that sexual abuse is the most likely explanation for a child's symptoms.[17] Kathleen Faller argues that this is the majority position in the United States.[18] Faller is supported by her own cadre of experts.[19]

This is not the place to declare a winner in the debate over whether mental health professionals can diagnose sexual abuse. Three things are relatively clear. First, *if* it is possible for mental health professionals to diagnose abuse in some cases, only the most knowledgeable experts would be qualified to render such opinions. Second, in the "real world," professionals who lack the necessary expertise opine on this issue every day! Third, most parents cannot afford to hire a knowledgeable expert.

Given the difficulty of proving sexual abuse, it is hardly surprising that many parents fail to establish the abuse they believe occurred. As soon as proof fails, the specter of the "false accuser" is near at hand.

---

13. *See, e.g.*, Steve Herman, *Improving Decision Making in Forensic Child Sexual Abuse Evaluations*, 29 LAW & HUM. BEHAV. 87 (2005); THE EVALUATION OF CHILD SEXUAL ABUSE ALLEGATIONS: A COMPREHENSIVE GUIDE TO ASSESSMENT AND TESTIMONY 491 (Kathryn Kuehnle & Mary Connell eds., 2009); JOHN E.B. MYERS, MYERS ON EVIDENCE OF INTERPERSONAL VIOLENCE: CHILD MALTREATMENT, INTIMATE PARTNER VIOLENCE, RAPE, STALKING, AND ELDER ABUSE §§ 6.10–6.11 (4th ed. 2011); John E.B. Myers, *Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion*, 14 U.C. DAVIS J. JUV. L. & POL'Y 1 (2010).

14. GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 516 (3d ed. 2007).

15. *Id*.

16. *See, e.g.,* THE EVALUATION OF CHILD SEXUAL ABUSE ALLEGATIONS, *supra* note 13, at 497.

17. *See e.g.,* KATHLEEN COULBORN FALLER, UNDERSTANDING AND ASSESSING CHILD SEXUAL MALTREATMENT (2d ed. 2003).

18. *Id.*

19. *See, e.g.,* Mark D. Everson & Kathleen Coulborn Faller, *Base Rates, Multiple Indicators, and Comprehensive Forensic Evaluations: Why Sexualized Behavior Still Counts in Assessments of Child Sexual Abuse Evaluations,* 21 J. CHILD SEXUAL ABUSE 45 (2012).

## V. LACK OF A SCREENING MECHANISM IN FAMILY COURT

Accusations of sexual abuse are litigated in criminal trials, in juvenile court, and in family court. Often, the evidence is weakest in family court. Why? The answer is not hard to find. Prosecutors don't bring criminal charges without strong evidence. Indeed, they aren't supposed to. Police investigation weeds out weak cases. Because of the screening mechanisms in criminal law, cases that *are* charged usually rest on strong evidence. Much the same occurs in juvenile court. Child protective services (CPS) social workers—often working with police—investigate reports of sexual abuse. CPS does not file in juvenile court when the evidence is too weak to stand up. In family court, there is *no* screening mechanism to eliminate weak cases. A parent who believes her child was abused often feels she has no choice but to seek relief in family court. As a result, many accusations of sexual abuse that are filed in family court are based on flimsy evidence—evidence that would never see the light of day in criminal or juvenile court.

## VI. OVERVALUING THE EVIDENCE

The paucity of evidence in many family court sexual abuse cases combines with an error made by many parents: overvaluing evidence. It is common for parents to believe their evidence is much stronger than it is.

As for the accused parent, he will mount a spirited defense, beginning with an indignant denial, and then charge that the accuser is lying, seeking an unfair advantage, and alienating the child from the innocent accused. (Note that the defense is the same whether the allegations of abuse are true or untrue). Often, the accused parent combines denial with a request for full custody.

The accusing parent, especially if she lacks a lawyer, has no understanding of the burden of proof. When the dust settles, and the judge rules against the accuser, she is stunned. She can't believe it. "But what about my evidence?" Sadly, some accusing parents conclude the judge is incompetent or corrupt. Usually, the court made the right decision based on the evidence. Yet, the accusing parent is devastated, while the accused is victorious. But that's not the end of it. The vindicated parent is in an excellent position to press the case that custody should be awarded to him, and removed from the vindictive, falsely accusing, lying, alienating, crazy mother.

## VII. CHILD ABUSE REPORTING LAWS SOMETIMES WORK AGAINST PARENTS WHO BELIEVE THEIR CHILD WAS MOLESTED

Earlier, we saw that terminology in the child abuse reporting law causes confusion. That is not the only problem unwittingly caused by the reporting law. When a mother comes to believe her child has been molested by the child's

father, what are her first steps? Common options include: calling the police, CPS, or the pediatrician; going to the hospital; consulting the child's or parent's therapist; and telling her lawyer (if she has a lawyer).

If the parent turns to police or CPS, an initial investigation ensues. If the evidence is weak, the case goes no further. If the officer or social worker is knowledgeable, the concerned parent may be reassured that things are normal. If the evidence is strong, law enforcement and CPS may align with the accusing parent.

What if the accusing parent's first act is to visit a hospital, call the pediatrician, or make an appointment with a therapist? The parent may not want to involve the authorities, at least not yet. However, the parent does not realize that doctors, nurses, and therapists are mandated reporters. When a mandated reporter has reasonable suspicion—a low threshold—that a child has been abused, he *must* report his suspicion to law enforcement or CPS. In many cases, professionals inform parents of two things. First, as a mandated reporter, the professional is going to file a report of suspected abuse. Second, the parent herself should report the suspected abuse to CPS or police. Because mandated reporters have no discretion whether to report, many reports are made on weak evidence—little more than a vague suspicion that something is wrong. As for the parent, she reports because a professional *told her to*, but her report is based on the same thin evidence.

The result of the reporting law is that weak cases—cases that cannot be proven—are reported to CPS and law enforcement. The accusing parent is stuck with the report, and, when she cannot prove the accusations, she is branded a "false accuser." Her protestation that she was only doing what the professional told her to do falls on deaf ears. The report is used against her.

## VIII. MOST ATTORNEYS KNOW JUST ENOUGH ABOUT SEXUAL ABUSE TO MAKE MATTERS WORSE

No offense to my colleagues at the bar, but most attorneys know precious little about child sexual abuse, including how to prove it in court and how to effectively cross-examine experts. As a prime example of where lawyers go astray, consider: What is the knee-jerk reaction of many attorneys when a parent comes to the office with suspicions of sexual abuse? File an emergency Request for Order to cut off the offending parent's custody or parenting time, right? This is a seemingly sensible idea, but often the worst possible course of action. Marching to court prematurely, before conducting a thorough assessment of the evidence, can prove disastrous. A lawyer who charges sexual abuse and cannot prove it brands the client a fabricator, and it is downhill from there.

## IX. RECOMMENDATIONS

Steps should be taken to improve the family court response to allegations of sexual abuse. At present, family court is so suspicious of such allegations that the court is dysfunctional—broken.

All professionals working in family law—especially judges, mediators, and attorneys—need to reboot their credibility meters and set the needle to neutral. As things stand now, the needle *starts* at, "It's probably a lie." Repositioning the needle to, "It could be true—let's find out," would do wonders.

In the 1980s, when child sexual abuse exploded into the national consciousness, the mantra was: "Believe the children." In those days, it was politically incorrect to be skeptical. Things have come full circle. Today, skepticism is the norm, especially in family court. Of course, there's nothing wrong with skepticism. Skepticism in moderation is a good thing. In family court, however, skepticism is out of control and is damaging the search for truth.

In today's climate, a parent who alleges sexual abuse faces a wall of disbelief. Breaking through the skepticism so that professionals are at least willing to consider allegations with an open mind is a Herculean task. The accusing parent has *two* burdens of proof. First, the burden of rebutting what has become a virtual presumption that accusations of sexual abuse are lies. It would be an exaggeration to call this presumption conclusive, but rebuttal seems to require proof beyond a reasonable doubt. Second, if the parent can get professionals to take her seriously, she faces the burden of proving sexual abuse, which is no mean feat.

Lawyers need training on child sexual abuse so they can offer wise counsel to terrified clients, understand the difficulties of proving sexual abuse, and appreciate the danger of going to court too quickly.

Mental health professionals receive training on sexual abuse. I am afraid, however, that quite a few mental health professionals, including mediators in court-connected Family Court Services (FCS), have been bitten by the bug of extreme skepticism. Being a full time FCS mediator, and dealing every day with parents who are hurt, scared, and angry, is a difficult job. On the bright side, FCS mediators often help parents find middle ground. On the dark side, FCS mediators see so much half-truth and outright lying that some become jaded. FCS mediators are regularly exposed to allegations of child abuse. The accused parent always responds with, "It's a lie. She's alienating the children from me with these false charges." Of course, sometimes it *is* a lie. Other times it is true. More often than not, the truth is elusive. It is not surprising that some FCS mediators get "battle fatigue;" losing their neutral stance and professional balance. These mediators, often unconsciously, come to believe that many allegations of sexual abuse are lies. Reports by FCS mediators carry enormous weight with family court judges. When an FCS report improperly or prematurely contains the words "alienation" or "false report," the case is over for the accusing parent.

Judges, too, need time at the training table. The vast majority of California's judges are fair, honest, and intelligent. They do their best to decide cases on the evidence, and to keep personal opinion out of it. Unfortunately, the air is so thick with skepticism about allegations of sexual abuse that judges cannot help but absorb some of the doubt. The message should not be: "Believe the children." The message should be: "Keep an open mind. Don't *pre*judge."

Finally, anyone who thinks there is not an element of sexism here either is not paying attention or has no understanding of history. The vast majority of parents who raise suspicions of sexual abuse are mothers. The over-the-top skepticism is directed at women. There is a long tradition in law and culture of *not* believing women, and of attributing women's claims of sexual abuse to fantasy, vindictiveness, or mental instability. Is history repeating itself?