

CHAPTER 48
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Cases Alleging Child Abuse

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In cases alleging sexual abuse of a child, defense counsel must assume that the fact finder will seek the answer to two questions: (1) Why would the child make such allegations unless the crime actually occurred? (2) How did the child acquire knowledge of sexual acts unless the abuse happened? The defense will be hard pressed to win an acquittal in any case without providing, or at least suggesting, the answers to these two questions, either through direct evidence or cross-examination of Commonwealth witnesses.

In addition, although child sexual abuse has given rise to most prosecutions involving abuse of children, the legislature has recognized a series of other offenses involving abuse of a child. These include commission of assault and battery causing bodily injury and of assault and battery causing substantial bodily injury, as well as the wanton or reckless permitting, by a person with care and custody of a child, of assault and battery causing bodily injury or of assault and battery causing substantial bodily injury.¹

This chapter will address these and other issues that typically arise in child abuse cases. It begins with the steps the Department of Social Services² may take before charges are filed and suggests methods by which counsel may intervene to forestall a complaint. The chapter then continues with a discussion of particularly important discovery and investigation steps, and concludes by considering recurrent issues of witness competency, confrontation rights, and expert testimony.

¹ G.L. c. 265, § 13J.

² In 2008, extensive changes were made to child protection laws in Massachusetts, which included changing the name of Department of Social Services (DSS) to Department of Children and Families (DCF). *See* St. 2008, c. 176. Both names may appear in this chapter. They are interchangeable.

§ 48.1 ROLE OF THE DEPARTMENT OF SOCIAL SERVICES IN CHILD ABUSE CASES ³

§ 48.1A. THE 51A REPORT AND SOCIAL WORKER INVESTIGATION

Prosecutions involving child abuse, most notably child sexual abuse, usually arise from allegations of child abuse or neglect that are part of a “51A report” filed with the Department of Children and Families.⁴ This report must be filed by a specified mandated reporter⁵

who, in his professional capacity has reasonable cause to believe that a child [under the age of eighteen years] is suffering physical or emotional injury resulting from: (i) abuse inflicted upon him which causes harm or substantial risk of harm to the child's health or welfare including sexual abuse; (ii) neglect, including malnutrition; (iii) physical dependence upon an addictive drug at birth . . . or (iv) being a sexually exploited child; or (v) being a human trafficking victim as defined by section 20M of chapter 233.⁶

³ This chapter contains references to regulations of the Department of Social Services/Department of Children and Families and policies published by the Department to augment and implement those regulations. The Department from time to time amends either or both to reflect or incorporate legislative or agency practice changes. Practitioners should take care to ensure that they are aware of the most current effective policies.

⁴ G.L. c. 119, § 51A.

⁵ As used in G.L. c. 119, § 51A, a “mandated reporter” is:

[any] person who is: (i) a physician, medical intern, hospital personnel engaged in the examination, care or treatment of persons, medical examiner, psychologist, emergency medical technician, dentist, nurse, chiropractor, podiatrist, optometrist, osteopath, allied mental health and human services professional licensed under section 165 of chapter 112, drug and alcoholism counselor, psychiatrist or clinical social worker; (ii) a public or private school teacher, educational administrator, guidance or family counselor, child care worker, person paid to care for or work with a child in any public or private facility, or home or program funded by the commonwealth or licensed under chapter 15D that provides child care or residential services to children or that provides the services of child care resource and referral agencies, voucher management agencies or family child care systems or child care food programs, licenser of the department of early education and care or school attendance officer; (iii) a probation officer, clerk-magistrate of a district court, parole officer, social worker, foster parent, firefighter, police officer; (iv) a priest, rabbi, clergy member, ordained or licensed minister, leader of any church or religious body, accredited Christian Science practitioner, person performing official duties on behalf of a church or religious body that are recognized as the duties of a priest, rabbi, clergy, ordained or licensed minister, leader of any church or religious body, accredited Christian Science practitioner, or person employed by a church or religious body to supervise, educate, coach, train or counsel a child on a regular basis; (v) in charge of a medical or other public or private institution, school or facility or that person's designated agent; or (vi) the child advocate.

G.L. c. 119, §21.

⁶ G.L. c. 119, § 51A(a). The “reasonable cause to believe” standard is “merely [a] ‘threshold determination[]’”, *Care & Protection of Inga*, 36 Mass. App. Ct. 660, 661 n.5 (1994)

This report requirement applies even though the information reported consists of otherwise privileged or confidential communications by an individual to a psychotherapist, certain categories of social workers, or priests, rabbis, clergy members, ordained or licensed ministers, leaders of a church or religious body or accredited Christian Science practitioners, except that such religious personnel “need not report information solely gained in a confession or similarly confidential communication in other religious faiths”.⁷

A mandated reporter with reasonable cause to believe that a child has died as a result of such abuse or neglect⁸ must report the death to the district attorney for the

(citing Care & Protection of Robert, 408 Mass. 52, 64 (1990)), which is “easily achieved.” The Department's regulations define “reasonable cause to believe,” in the context of a determination whether to support or “unsupport” the report after investigation, as:

a collection of facts, knowledge or observations which tend to support or are consistent with the allegations, and when viewed in light of the surrounding circumstances and credibility of persons providing information, would lead one to conclude that a child has been abused or neglected.

Factors to consider include, but are not limited to, the following: direct disclosure by the child(ren) or caretaker; physical evidence of injury or harm; observable behavioral indicators; corroboration by collaterals (*e.g.*, professionals, credible family members); and the social worker and supervisor's clinical base of knowledge.

110 C.M.R. 4.32(2).

In addition, several older Opinions of the Attorney General construed the phrase “reasonable cause to believe” to refer to “known or suspected instances of child abuse or neglect” and indicated that it is not intended to restrict the filing or acceptance of 51A reports. Op. Atty. Gen., p. 140 (May 27, 1975), and Op. Atty. Gen. p. 157, (June 16, 1975). The phrase “serious physical or emotional injury” includes all but the most negligible or “de minimus” injuries. *Id.* However, the Appeals Court has stated that § 51A, while not requiring the reporting of every injury, does require reporting “on the basis of indicators which give reasonable cause to believe that a child is being abused [which] conclusion requires an element of judgment to separate an incident from a pattern, the trivial from the serious.” *Mattingly v. Casey*, 24 Mass. App. Ct. 452, 456 (1987); *compare* *April K. v. Boston Children's Serv. Ass'n*, 581 F. Supp. 711, 713 (D. Mass. 1984) (suspected incidents of child abuse and neglect subsumed within the phrase “reasonable cause to believe”). *See also infra* note 8.

⁷ G.L. c. 119, § 51A(j). *See also* *Commonwealth v. Souther*, 31 Mass. App. Ct. 219, 222–24 (1991).

⁸ The Department's regulations define the following relevant terms:

“Abuse” is the “non-accidental commission of any act by a caretaker upon a child under age 18 which causes, or creates a substantial risk of, physical or emotional injury, or constitutes a sexual offense under the laws of the Commonwealth or any sexual contact between a caretaker and a child under the care of that individual. Abuse is *not* dependent upon location (i.e., abuse can occur while the child is in an out-of-home or in-home setting).” 110 C.M.R. 2.00 (emphasis added).

“Neglect” means “failure by a caretaker, either deliberately or through negligence or inability, to take those actions necessary to provide a child with minimally adequate food, clothing, shelter, medical care, supervision, emotional stability and growth, or other essential care; provided, however, that such inability is not due solely to inadequate economic resources or solely to the existence of a handicapping condition. This definition is *not* dependent upon location (i.e., neglect can occur while the child is in an out-of-home setting).” 110 C.M.R. 2.00 (emphasis in the original).

county in which the death occurred and to the office of the chief medical examiner.⁹ In addition to the mandated reporters, any other person may file a 51A report if that person “has reasonable cause to believe that a child is suffering from or has died as a result of abuse or neglect.”¹⁰ However, anyone who “knowingly and willfully files a frivolous” report of child abuse or neglect” may be punished by a fine of up to \$2,000 for the first offense.¹¹

Department of Children and Families regulations indicate it will not investigate but will rather “screen out” § 51A reports of abuse or neglect allegedly caused by a person who is not a “caretaker,”¹² as well as reports of old events and “demonstrably unreliable or counterproductive multiple reports.”¹³ In addition, if the department determines “during the initial screening period” that a § 51A report is “frivolous,” or if “other absolute determination that abuse or neglect has not taken place [sic],” the report must be designated “allegation invalid” and names and identifying characteristics of the child, parents, guardian, or “other person relevant to the report” may not be placed in the central registry or other computerized system used by the department.¹⁴ Finally, “counterproductive multiple reports” which may be screened out applies to reports of the same incident by different reporters, for example, reports from two medical

“Physical injury” is: “(a) death; or (b) fracture of a bone, a subdural hematoma, burns, impairment of any organ, and any other such non-trivial injury; or (c) soft tissue swelling or skin bruising depending upon such factors as the child's age, circumstances under which the injury occurred, and the number and location of bruises; or (d) addiction to drug [sic.] at birth; or (e) failure to thrive.” 110 C.M.R. 2.00.

“Emotional injury” means “an impairment to or disorder of the intellectual or psychological capacity of a child as evidenced by observable and substantial reduction in the child's ability to function within a normal range of performance and behavior.” 110 C.M.R. 2.00.

⁹ G.L. c. 119, § 51A(e). *See also* G.L. c. 38, § 3 (regarding reports to medical examiner). Failure to make any of these reports may result in a fine of no more than \$1,000. G.L. c. 119, § 51A(e).

¹⁰ G.L. c. 119, § 51A(f).

¹¹ G.L. c. 119, § 51A(c).

¹² A caretaker is defined as a child's parent, step-parent, or guardian, “any household member entrusted with the responsibility for a child's health or welfare [or] any other person entrusted with the responsibility for a child's health or welfare” whether in the child's or a relative's home, school, day care including babysitting, a foster home, group care facility “or any other comparable setting.” Caretakers include schoolteachers, babysitters, school bus drivers, and camp counselors, and the term is “meant to be construed broadly and inclusively to encompass any person who is, at the time in question, entrusted with a degree of responsibility for the child” including a caretaker who is also a child. 110 C.M.R. 2.00. The screener is instructed to identify all “family members,” defined to include “all family members and other individuals residing in the home, children in DCF placements, children residing out of the home, and any parent/parent substitute living out of the home.” 110 C.M.R. 4.24A.

¹³ 110 C.M.R. 4.21 and commentary.

¹⁴ G.L. c. 119, § 51F. However, the statute provides that “[n]othing in this section shall prevent the department from keeping information on unsubstantiated reports to assist in future risk and safety assessments of children and families”, and the Department's regulations still require entry into its centralized computer system of every § 51A report and all identifying data relating to each child, whether or not “screened out” (110 C.M.R. 4.23 and 12.03), subject to expungement. 110 C.M.R. 12.04–12.05.

professionals who serially treated a child's injuries resulting from a single abusive episode.¹⁵

If, upon receiving a §51A report, the Department has "reasonable cause to believe a child's health or safety is in immediate danger from abuse and neglect," it must commence an investigation and evaluation of the reported abuse within two hours of the report's receipt. Within twenty-four hours, the Department must make an interim, written determination regarding the child's safety and custody and whether the suspected child abuse or neglect is substantiated, and it must make a final, written determination in that regard within five business days of the initial contact.¹⁶ For all other §51A reports, the Department must begin an investigation and evaluation within two business days and, within fifteen business days, make a written determination concerning the safety of and risk posed to the child and whether the suspected child abuse or neglect is substantiated.¹⁷ The investigation is conducted by a social worker employed by the Department or a private child welfare agency under contract with the Department. It must include a home visit and "viewing" of the child who is the subject of the report, a determination of the nature, extent and cause of the injuries, the identity of the person responsible, a determination of the condition of other children in the household, an evaluation of the of the parents and home environment, and all other pertinent facts including: consultation with the reporter, a review of the Department's files and central computer registry, arrangement of medical examinations where appropriate and contact with "collaterals" such as physicians, teachers or day care providers.¹⁸ An individual undergoing questioning by a social worker during this investigation is not entitled to *Miranda* warnings.¹⁹ However,

[a]t the time of the first contact with the parent(s) or caretaker(s), the investigator shall deliver to said individual a statement of rights which shall include written notice that a 51A report has been made, the nature and possible effects of the investigation, and that information given could and might be used in subsequent court hearings.²⁰

¹⁵ 110 C.M.R. 4.21 and commentary.

¹⁶ G.L. c. 119, § 51B(c). *See also* 110 C.M.R. 4.25–4.26, 4.31.

¹⁷ G.L. c. 119, § 51B(d). *See also* 110 C.M.R. 4.25, 4.27, 4.31.

¹⁸ G.L. c. 119, § 51B(b)); 110 C.M.R. 4.26, 4.27. Although juvenile, and presumably district, courts lack jurisdiction to order parents to submit to a nonemergency home visit by a department social worker investigating a § 51A report, *Parents of Two Minors v. Bristol Div. of Juvenile Court Dep't*, 397 Mass. 846, 853 (1986); 110 C.M.R. 4.27(3), in reports requiring an emergency investigation, departmental regulations contemplate seeking police assistance to verify allegations and to enter the home or otherwise view the child who is the subject of the report. In addition, the investigator may seek legal advice of a staff attorney or "use the 24-hour Judicial Hotline to obtain judicial assistance" which is unspecified. 110 C.M.R. 4.26(2), (3).

¹⁹ *Commonwealth v. Morais*, 431 Mass. 380, 382–383 (2000); *Commonwealth v. Berrio*, 407 Mass. 37, 41 (1990).

²⁰ 110 C.M.R. 4.27(5). The Department uses a form "entry letter" which generally gives little information to the parent. *See* "Notice to Parents of a Child Abuse and Neglect Investigation" in DSS Policy No. 86-015: Protective Intake, revised 2/10/98, at 89, accompanied by a brochure, entitled "A Parent's Guide", *id.* at 87-89, outlining the investigative process. Practice varies as to whether and when parents or caretakers receive copies of either document; in most circumstances, if they receive them, the investigator hands the documents to the parents or caretakers when he arrives to conduct the interview of them.

This warning is only required for “parent(s) or caretaker(s),”²¹ however, and failure to give it in accordance with DSS regulations would not, by itself, mandate suppression in any subsequent criminal proceeding of any statements made.²² Nevertheless, in some situations, the totality of circumstances may give rise to a violation of the due process standard of voluntariness in making statements to a DSS investigator, rendering them inadmissible in subsequent criminal proceedings.²³ Such circumstances may arise where the investigator is working in tandem with the police and affirmatively misrepresents the nature and consequences of the interview with the result that the interviewee’s “will was overborne in that he was lulled into a false sense of security.”²⁴

If contacted by a client at this early stage, counsel should intercede with the investigator where tactically appropriate by presenting a coherent version of the client's story, giving sources of information helpful to the client, attending any interviews of the client and discussing with the client any existing privileges and the advisability of waiving them. Counsel and client both should be aware that notwithstanding any statutory or common law privilege “relat[ed] to confidential communications or any statute prohibiting the disclosure of information,” a person designated as a mandatory reporter under § 51A²⁵ must disclose otherwise privileged or confidential information when requested to do so by the department during an investigation whether or not that person filed the 51A report. Although such statutory or common law privileges will not preclude admission of any such information in civil proceedings regarding abuse or neglect, placement, or custody of a child, the statute is silent regarding criminal proceedings.²⁶ However, police involvement may occur at this stage, especially in the case of emergency screening and investigative responses.²⁷

On completion of the investigation, the investigating social worker makes a decision to “support” or “unsupport” the report.²⁸ To “support” a report, a social worker must find “after an investigation that there is reasonable cause to believe a report that a child has suffered abuse or neglect inflicted by a caretaker.”²⁹ To reach the

²¹ 110 C.M.R. 4.275(5); *Commonwealth v. Morais*, 431 Mass. 380, 382 n.3 (2000).

²² *Commonwealth v. Carp*, 47 Mass. App. Ct. 229, 234–35, *rev. denied*, 430 Mass. 1106 (1999).

²³ *Id.* at 232–34.

²⁴ *Id.* at 234 (DSS worker said the interview was not a criminal investigation, that *Miranda* warnings were not required, that defendant did not need an attorney, and did not inform defendant until after the interview that incriminating evidence would be given to police or district attorney). *Compare* *Commonwealth v. Morais*, 431 Mass. at 383–84 (statements not involuntary where, although investigator did not warn of possibility that incriminating evidence could be used against person interviewed, she was not working in tandem with police and made no misrepresentations and interviewee appeared and spoke freely and voluntarily and appeared lucid and unconfused); *Commonwealth v. Berrio*, 407 Mass. 37, 41-42 (statements admissible when they “were prompted not by coercion but by defendant’s decision that cooperation would best serve his own interests”).

²⁵ *See supra* note 5.

²⁶ G.L. c. 119, § 51B(m).

²⁷ *See* 110 C.M.R. 4.26(2), (3).

²⁸ *See* 110 C.M.R. 4.32(1). The use of the “support/unsupport” terminology represents a change from the previous “substantiate/unsubstantiate” terminology. However, the definitions remain the same. 110 C.M.R. 2.00.

²⁹ 110 C.M.R. 2.00 (emphasis in original), 4.32(2), and 4.33(4). The Department's regulations further state that “[t]o support a report means that the Department has reasonable

support/unsupport decision, the investigator must determine (1) the existence, nature, extent, and cause of the alleged abuse or neglect; (2) the identity, to the extent possible, of the person(s) alleged responsible for it; (3) the name, age, and condition of other children in the home; and (4) any other pertinent information that the investigator determines necessary to making a support/unsupport decision.³⁰

The Department defines “reasonable cause to believe” as

a collection of facts, knowledge or observations which tend to support or are consistent with the allegations, and when viewed in light of the surrounding circumstances and credibility of persons providing information, would lead one to conclude that a child has been abused or neglected. Factors to consider include, but are not limited to, the following: direct disclosure by the child(ren) or caretaker; physical evidence of injury or harm; observable behavioral indicators; corroboration by collaterals (*e.g.*, professionals, credible family members); and the social worker and supervisor's clinical base of knowledge.³¹

A support decision does not, by itself, identify any perpetrator of the alleged abuse or neglect; it only means that there is reasonable cause to believe that a caretaker inflicted abuse or neglect. However, the investigator may additionally designate the “alleged perpetrator” of the abuse or neglect.³² Such a designation automatically occurs when “[t]he incident of child abuse or neglect has been supported and referred to the District Attorney pursuant to G.L. c. 119, 51B(k) and there is substantial evidence indicating that the alleged perpetrator was responsible for the abuse or neglect.”³³ “Substantial evidence” is defined in accordance with G.L. c. 30A, § 1(6) as “such evidence as a reasonable mind might accept as adequate to support a conclusion.”³⁴ In sum, as the SJC has made clear, before a person can be listed on the Registry of Alleged Perpetrators, there must be “reasonable cause” to believe abuse or neglect occurred coupled with “substantial evidence” that he or she was responsible for that

cause to believe that an incident (reported or discovered during the investigation) of abuse or neglect by a caretaker *did* occur. To support a report does *not* mean that the Department has made any finding with regard to the perpetrator(s) of the reported incident of abuse or neglect. It simply means that there is reasonable cause to believe that *some caretaker* did inflict *abuse or neglect* upon the child in question.” 110 C.M.R. 4.32(2) (emphasis added). A determination to “unsupport” a § 51A report occurs where the investigation does not establish such “reasonable cause,” such as when there is no reasonable cause to believe the perpetrator is a caretaker. 110 C.M.R. 2.00, 4.33(4).

³⁰ G.L. c. 119, § 51B(b); 110 C.M.R. 4.27(6). *See also supra* note 24.

³¹ 110 C.M.R. 4.32(2). The “reasonable cause to believe” standard is “merely [a] ‘threshold determination[],’” *Care & Protection of Inga*, 36 Mass. App. Ct. 660, 661 n.5 (1994) (citing *Care & Protection of Robert*, 408 Mass. 52, 64 (1990)), which is “easily achieved.”

³² 110 C.M.R. 4.32(2).

³³ 110 C.M.R. 4.33(1), 4.37.

³⁴ 110 C.M.R. 4.37. For a discussion of what constitutes “substantial evidence” and the limitations on reliance on hearsay in the context of a G.L. c. 30A appeal of a fair hearing decision supporting a § 51A report, *see Covell v. Department of Social Services*, 439 Mass. 766, 783 (2003); *Cobble v. Comm’r of Department of Social Services*, 430 Mass. 385 (1999); *Arnone v. Commissioner of Dep’t of Social Servs.*, 43 Mass. App. Ct. 33 (1997); *Wilson v. Department of Social Services*, 65 Mass. App. Ct. 739 (2006); *Edward E. v. Department of Social Servs.*, 42 Mass. App. Ct. 478 (1997).

abuse or neglect.³⁵ Where no reasonable cause exists “to believe that a caretaker³⁶ was the perpetrator of abuse or neglect, the Department will ‘unsupport’ the report” but may nevertheless refer the matter to appropriate law enforcement agencies.³⁷

§ 48.1B. ADMINISTRATIVE REVIEW OF SUPPORT AND PERPETRATOR LISTING

The Department must inform the child's parents of its decision to “support” or to “unsupport” the allegations in the § 51A report within forty-eight hours of making that determination.³⁸ In addition, whenever the investigation results in the designation and listing on the Department's central registry of an “alleged perpetrator,” the Department must give the person so designated written notice that his name will be so listed and advise him of his right to an administrative review via the fair hearing process to appeal the listing decision. In the event the person designated as an “alleged perpetrator” is a minor, the Department must provide this notice to the child's parent or guardian as well.³⁹ Because a required element of the listing decision involves referral of the matter to the district attorney,⁴⁰ the Department may not notify the “alleged perpetrator” of the listing decision until twenty working days after that referral has occurred.⁴¹

DCF provides administrative appeal procedures, called “fair hearings,” to review determinations supporting a § 51A report and to review the designation of an individual as an “alleged perpetrator of an incident of abuse or neglect”.⁴² To initiate the fair hearing process, the aggrieved party must file a written request for a fair hearing with the fair hearing office and the area director of the office which made the decision “within 30 *calendar* days from the decision complained of.”⁴³ For individuals appealing an “alleged perpetrator” listing, this time period can in fact be extremely short because listing decisions involve referrals to the district attorney⁴⁴ but the Department must wait twenty *working* days after that referral is made to notify the “alleged perpetrator” that his name will be listed on the central registry.⁴⁵ For a general overview of the administrative review process and its problems, *see* Volterra, *A Massachusetts Star Chamber in Process*, 83 Mass. L. Rev. 347 (1998). The fair hearing process must address and adjudicate the following questions:

- (1) whether the Department's or provider's decision was not in conformity with its policies and/or regulations and resulted in

³⁵ *See* Covell v. Department of Social Services, 439 Mass. 766, 779-82 (2003).

³⁶ *See* 110 C.M.R. 2.00.

³⁷ 110 C.M.R. 4.33(4), 110 C.M.R. 4.50, and 110 C.M.R. 4.52(2).

³⁸ *See* 110 C.M.R. 4.32(3), (4).

³⁹ 110 C.M.R. 4.33(3).

⁴⁰ 110 C.M.R. 4.37.

⁴¹ 110 C.M.R. 4.33(3).

⁴² 110 C.M.R. 10.06(8), (9). The full procedures and time lines for pursuing a fair hearing of decisions to support a § 51A report or to list an individual as an alleged perpetrator of abuse or neglect are detailed at 110 C.M.R. 10.01 et seq.

⁴³ 110 C.M.R. 10.08(1) (emphasis added).

⁴⁴ 110 C.M.R. 4.37.

⁴⁵ 110 C.M.R. 4.33(3).

substantial prejudice to the aggrieved party; (2) whether the Department's or provider's procedural actions were not in conformity with its policies, regulations, or procedures and resulted in substantial prejudice to the aggrieved party; or (3) if there is no applicable policy, regulation or procedure, whether the Department or provider acted without a reasonable basis or in an unreasonable manner which resulted in substantial prejudice to the aggrieved party.⁴⁶

To prevail in such an appeal, the aggrieved party must demonstrate one of these elements by a preponderance of the evidence.⁴⁷ However, additional standards govern reviews of support and perpetrator listing decisions. A decision to support § 51A reports will be reversed if:

1. Based on information available during the investigation and/or new information not available during the investigation, the Department's decision was not in conformity with the Department's policies and/or regulations and resulted in substantial prejudice to the aggrieved party; or

2. The Department's procedural actions were not in conformity with the Department's policies and/or regulations and resulted in substantial prejudice to the aggrieved party.⁴⁸

A decision to designate and list an individual as an “alleged perpetrator” will be reversed if:

1. Based on information available during the initial investigation and/or any new information not available during the investigation, the Department's decision was not in conformity with 110 C.M.R. 4.33, i.e., the incident of child abuse or neglect was supported and referred to the district attorney and substantial evidence exists indicating the alleged perpetrator was responsible; or

2. The Department's procedural actions were not in conformity with the Department's policies and/or regulations, and resulted in substantial prejudice to the aggrieved party.⁴⁹

Once a request for a fair hearing is received, the area director of the office which made the decision has twenty calendar days from its receipt, or from the completion of the assessment after an initial support decision, to review the matter. This review may include meeting with the aggrieved party to resolve disputes or to limit or clarify issues with a goal of obviating the need for a fair hearing. The area director possesses the authority to reverse the decision that led to the request for a fair hearing.⁵⁰ A reversal of a support decision will result in reversal of any listing decision, that is, a decision listing an individual as an alleged perpetrator of abuse or neglect, arising out of the same decision making process.⁵¹

If, however, the Department has referred a matter to the district attorney and the agency “receives a written request from any District Attorney, stating that in a particular matter referred to the District Attorney's Office by the Department, there is an open criminal investigation pending or formal criminal charges have been instituted

⁴⁶ 110 C.M.R. 10.05, 10.23.

⁴⁷ 110 C.M.R. 10.23.

⁴⁸ 110 C.M.R. 10.06(8)(c).

⁴⁹ 110 C.M.R. 10.06(9)(a).

⁵⁰ 110 C.M.R. 10.08(2), (3).

⁵¹ 110 C.M.R. 10.06(9)(b), 10.08(3).

(i.e., indictment or complaint returned or issued),” the Department must stay the fair hearing review of the alleged perpetrator listing for six months.⁵²

In addition, special procedures govern listing decisions in the event that the area director determines not to reverse the listing decision. Within the first ten calendar days of the review period, the area director must refer the decision to a Clinical Review Team, consisting of at least five persons, including the Area Director, with extensive social work experience, which must report its findings within ten calendar days to the Area Director.⁵³ The Team possesses authority to remand the matter to the office that made the appeal listing decision to (1) “gather[] further information”; (2) support the decision; or (3) reverse the decision. If, however, the Team recommends reversal over the Area Director's objection, the dispute must be resolved by the Deputy Commissioner of Field Operations within the twenty-calendar-day review period.⁵⁴ If a support decision is reversed, any determination that a particular person was responsible for the abuse or neglect involved must also be reversed, and the DCF records must be adjusted to reflect that there was no reasonable cause to believe that this person was responsible for the abuse or neglect.⁵⁵ All decisions reversed by an Area Director or Clinical Review Team under this process must be documented by the Area Office which vacated the decision.⁵⁶

If the listing decision is not reversed or remanded during this review process, the appeal and fair hearing will proceed.⁵⁷ Attendance of agency personnel and other witnesses may be requested or sought under subpoena.⁵⁸ It is, however, DSS policy that child victims will not be compelled to testify at fair hearings “unless a compelling reason can be shown as to why the child's testimony is essential,” but in no event will such testimony be required “if . . . testifying will harm the child.”⁵⁹

The aggrieved party may also obtain limited discovery. This may include (1) examination of those “portions of the aggrieved party's file which relate or pertain to the issues raised by the claimed appeal prior to or during the hearing, subject to the confidentiality requirements which govern the Department”;⁶⁰ (2) the § 51A and § 51B reports “which form the basis of the appeal” subject to redaction of “the name of (and any other reasonably identifying data concerning) the reporter,” any privileged

⁵² 110 C.M.R. 10.06(9)(c). *See also* 110 C.M.R. 10.06(8)(d) (relating to stays of appeals of “support” decisions).

⁵³ 110 C.M.R., 10.08(2). A Clinical Review Team cannot include anyone, including the Area Director, who “has had any direct or indirect personal interest, involvement or bias” concerning the matter under review. If the Area Director is thus disqualified, he or she will be replaced by the Regional Director, unless the Regional Director is similarly disqualified (in which case the Deputy Commissioner for Field Operations shall review the matter). *Id.* *See also* 110 C.M.R. 10.02 for a definition of the composition of the clinical review team. The clinical review team must report its findings in writing, and in considering the listing decision, the clinical review team “will” also consider the underlying support decision. 110 C.M.R. 10.08(2).

⁵⁴ 110 C.M.R. 10.08(2).

⁵⁵ 110 C.M.R. 10.08(3).

⁵⁶ 110 C.M.R. 10.08(4).

⁵⁷ 110 C.M.R. 10.10–10.35.

⁵⁸ 110 C.M.R. 10.13.

⁵⁹ 110 C.M.R. 10.13(2)(a).

⁶⁰ 110 C.M.R. 10.14(1), referencing 110 C.M.R. 12.00.

information, and any information the release of which “would be contrary to the best interest of the child”;⁶¹ and (3) requests for any other discovery made in writing to the hearing officer up to ten days prior to the scheduled hearing.⁶² However, the Department’s “specific intention” is to prevent use of the fair hearing process as an “opportunity for criminal discovery,” and it empowers the hearing officer to limit the fair hearing to prevent any such abuse.⁶³

The hearing officer must render a written decision within twenty-one calendar days of the close of the record unless the appealing party is notified that more time will be needed, and he or she may affirm or reverse the challenged decision or remand it to the area office “to obtain additional information.”⁶⁴ However, a fair hearing officer cannot reverse a decision of an area director or clinical review team without the approval of the Commissioner of DCF⁶⁵ and “shall not recommend reversal of the clinical decision made by a trained social worker if there is a reasonable basis for the questioned decision.”⁶⁶ No further administrative appellate procedures exist beyond the fair hearing, and all decisions issued by the hearing officer must notify the aggrieved party of the right to seek review under G.L. c. 30A.⁶⁷

Whenever there is reasonable cause to believe removing the child is necessary to protect the child from abuse or neglect, the Department may take the child into immediate temporary custody.⁶⁸ Should this occur, counsel should maintain close contact with the client’s attorney in the custody action to coordinate representation and ensure that the client’s rights are not abridged.

§ 48.1C. REFERRALS TO THE DISTRICT ATTORNEY

In certain circumstances the Department must give written notification to the district attorney for the county in which the child resides of a “support” finding by transmitting to the district attorney a copy of the § 51A report and 51B investigation.⁶⁹ Section 51A reports and the resultant § 51B investigations are normally confidential by statute, subject to release upon approval of the Commissioner of the Department or in certain circumstances by court order or permission of parent, guardian, or counsel.⁷⁰

⁶¹ 110 C.M.R. 10.14(1).

⁶² 110 C.M.R. 10.14(3).

⁶³ Commentary to 110 C.M.R. 10.14.

⁶⁴ 110 C.M.R. 10.29.

⁶⁵ 110 C.M.R. 10.05(c). *Compare* 110 C.M.R. 10.29, which applies this requirement to all decisions.

⁶⁶ 110 C.M.R. 10.05(c). *Compare* 110 C.M.R. 10.23, which establishes a preponderance of the evidence burden of proof.

⁶⁷ 110 C.M.R. 10.30. *See also* *Covell v. Department of Social Servs.* (“Covell I”), 42 Mass. App. Ct. 427 (1997), for considerations involving the timeliness of filing an appeal under c. 30A, and *Cobble v. Com’r. of Dep’t. of Social Services*, 430 Mass. 385 (1999), *Arnone v. Commissioner of DSS*, 43 Mass. App. Ct. 33 (1997), *Wilson v. Department of Social Services*, 65 Mass. App. Ct. 739 (2006), and *Edward E. v. Department of Social Services*, 42 Mass. App. Ct. 478 (1997) for discussion of review standards.

⁶⁸ *See* G.L. c. 119, §§ 51B(c) and (e).

⁶⁹ *See* G.L. c. 119, § 51B(k).

⁷⁰ G.L. c. 119, §§ 51E, 51F; 110 C.M.R. 12.08. *See also* G.L. c. 66A (the Fair Information Practices Act or “FIPA”) and *compare* G.L. c. 112, §§ 135, 135A, and 135B, which establish social worker-client confidences and testimonial privileges and numerous exceptions

However, the governing statutes create certain exceptions to these confidentiality restrictions for the purposes of transmitting copies of those reports and investigations to the district attorney, and to certain enumerated state agencies whose regulatory authority may be implicated.⁷¹

The Department must notify the district attorney of a finding of “reasonable cause to believe that any of the following conditions has resulted from abuse or neglect”:

1. A child has died;
2. A child has been sexually assaulted;⁷²
3. A child has suffered brain damage, loss or substantial impairment of a bodily function or organ, or substantial disfigurement;
4. A child has been sexually exploited in violation of sections 4A, 4B or 29A of chapter 272, or is a sexually exploited child, or is otherwise a human-trafficking victim;⁷³
5. A child has suffered serious physical abuse or injury that includes, but is not limited to: (a) a fracture of any bone, severe burn, impairment of any organ, or any other serious injury; (b) any injury requiring the child to be placed on life support systems; (c) any other disclosure of physical abuse involving physical evidence which

to them, and especially § 135B(f) which creates an exception to the testimonial privilege to prevent disclosures of social worker communications (but not an exception to the confidentiality of communications protected by § 135A) where the social worker has acquired the information while conducting an investigation pursuant to § 51B.

Chapter 12 of the Department's regulations governs procedures for release of information. 110 C.M.R. 12.01 et seq.

⁷¹ G.L. c. 119, § 51B(k) and (l); *see also* 110 C.M.R. 4.53 (referral of information to the District Attorney); 110 C.M.R. 4.45 (referral of information to other state agencies which own, operate, fund, license or approve a facility against which a § 51A report is filed) *and* 110 C.M.R. 4.48 (provision of information where §§ 51A and 51B reports involve abuse or neglect in a child care institutional setting).

For discussion of privilege and confidentiality issues under these provisions, see text on “Confidentiality and Privilege Issues” accompanying notes 76–81 *infra*.

As to the ability of criminal defense counsel to obtain § 51B reports, *see* discussion at § 48.2B, *infra*.

⁷² This category includes the crimes of indecent assault and battery on a child under 14, G.L. c. 265, § 13B; indecent assault and battery on a child under 14 while committing another offense or by a mandated reporter, G.L. c. 265, §13B ½; indecent assault and battery on a child under 14 by a previously convicted offender, G.L. c. 265, §13B ¾; indecent assault and battery on a child over 14, G.L. c. 265, § 13H; rape by force or threat of bodily injury if the act results in or is committed with acts resulting in serious bodily injury, G.L. c. 265, § 22; rape of a child under 16 by force, G.L. c. 265, § 22A; rape of a child under 16 by force or threat of bodily injury during the commission of another offense, G.L. c. 265, §22B; rape of a child under 16 by force or threat of bodily injury by previously convicted offenders, G.L. c. 265, §22C; rape and abuse of a child under 16, G.L. c. 265, § 23; rape and abuse of a child under 16 which is aggravated by an age difference between the defendant and victim, or is committed by a mandated reporter, G.L. c. 265, §23A; rape and abuse of a child under 16 by previously convicted offenders, G.L. c. 265, §23B; assault with intent to commit rape, G.L. c. 265, § 24; and assault of a child with intent to commit rape, G.L. c. 265, § 24B. G.L. c. 119, § 51B(k)(2)..

⁷³ This means encouraging a child to engage in prostitution or living off of a child prostitute's profits, G.L. c. 272, §§ 4A and 4B, or in the obscene or pornographic photographing, filming, or depicting of a child, G.L. c. 272, § 29A. G.L. c. 119, §51B(k)(3).

may be destroyed; (d) any current disclosure by the child of sexual assault; or (e) the presence of physical evidence of sexual assault.⁷⁴

In the case of these mandated reports, the Department must transmit to the district attorneys, both of the county in which the child resides and the county in which the alleged offense occurred, copies of any § 51A report or § 51B investigation report no later than five working days after the Department makes the decision to support the § 51A report. In the case of a report of serious physical injury, the Department may refer the matter to the district attorney immediately on receipt. The Department must in addition forward copies of any reports sent to the district attorney to the local law enforcement authorities for both the town in which the child resides and the town in which the alleged offense occurred.⁷⁵

Additionally, the Department must refer to the district attorneys, both of the county in which the child resides and the county in which the alleged offense occurred, copies of any § 51A report or § 51B investigation report in which the Department screens the § 51A report out or does not “support” the report after the § 51B investigation because the alleged perpetrator does not fall within the definition of a “caretaker”⁷⁶ but the allegations nevertheless fall into one of the categories that must be reported.⁷⁷ This referral must occur within five working days after the Department makes the decision to screen out or “unsupport” the § 51A report and may occur immediately on receipt of a report in the case of allegations of serious physical injury. As with other mandated reports, the Department must also forward copies of any reports sent to the district attorney to the local law enforcement authorities for both the town in which the child resides and the town in which the alleged offense occurred.⁷⁸

*The Department may notify the district attorney of any other incidents reported to the Department pursuant to § 51A.*⁷⁹ No time limit exists for these discretionary referrals, and they may occur even though a § 51A report is screened out and regardless of whether the Department, after investigation, enters a finding supporting or unsupporting the § 51A report.⁸⁰ The actual decision to make the discretionary referral to the district attorney rests with the area director,⁸¹ and the referral is accomplished by forwarding the §51A and §51B reports to the District Attorney of the county in which the child resides.⁸²

Confidentiality and privilege issues: For purposes of referrals to the district attorney, § 51B(k) rescinds the confidentiality and privacy provisions and rights created by c. 119, §§ 51E and 51F and the Fair Information Privacy Act.⁸³ Although it references c. 112, § 135-135B as well, the 1989 amendment to the social worker

⁷⁴ G.L. c. 119, § 51B(k); 110 C.M.R. 4.51(1) and (2). *See also* G.L. c. 265, § 13J (defining crime and penalties for assault and battery of a child causing bodily injury).

⁷⁵ 110 C.M.R. 4.51, 4.52(1) and (2). *See also* G.L. c. 119, § 51B(k).

⁷⁶ *See discussion supra* in § 48.1A, relating to the § 51A report and § 51B investigation.

⁷⁷ *See* G.L. c. 119, § 51B(k); 110 C.M.R. 4.51(3).

⁷⁸ 110 C.M.R. 4.51(3), 4.52(1). *See also* G.L. c. 119, § 51B(k).

⁷⁹ G.L. c. 119, § 51B(k); 110 C.M.R. 4.50, 4.52.

⁸⁰ 110 C.M.R. 4.52. *See also* 110 C.M.R. 4.50, 4.21 and commentary.

⁸¹ 110 C.M.R. 4.52.

⁸² 110 C.M.R. 4.52

⁸³ G.L. c. 66A.

privilege statutory scheme made § 135 definitional only.⁸⁴ Section 51B(k) similarly does not create an exception to the psychotherapist privilege,⁸⁵ or any other statutory or common law privileges⁸⁶ insofar as dissemination of the § 51B reports to the district attorney is concerned.⁸⁷ Despite this fact, the Department's regulations permit any

social worker or other Department employee [to] discuss with the District Attorney any information obtained by the social worker in connection with the § 51A report or § 51B investigation. Further documents (other than the completed § 51A report and § 51B investigation already furnished to the District Attorney) from the Department's files shall be released to the District Attorney upon request, if the Commissioner or his/her designee determines that such documents are directly relevant to the investigation or prosecution of

⁸⁴ St. 1989, c. 535.

⁸⁵ G.L. c. 233, § 20B.

⁸⁶ See, e.g., *Alberts v. Devine*, 395 Mass. 59, 67–68, *cert. denied sub nom.*, *Carroll v. Alberts*, 474 U.S. 1013 (1985) (physician-patient confidences); G.L. c. 112, § 129A (licensed psychologist-patient confidences).

⁸⁷ Compare G.L. c. 119, § 51B(l) governing transmittal of 51A and B reports to the Office of the Child Advocate and other state agencies that may have licensing or care taking responsibilities regarding children. In both cases, the statute provides:

No provision of chapter 66A, sections 135 to 135B, inclusive of chapter 112, or sections 51E and 51F, or any other provision of law, shall prohibit: (i) the department from transmitting copies of reports filed under section 51A or its written evaluations and written determinations to the office of the child advocate or the affected departments; (ii) the department, the office of the child advocate and the affected departments from coordinating activities and sharing information for the purposes of this section or for investigating a licensing violation; or (iii) the department's employees from testifying at administrative hearings held by the affected department in connection with a licensing violation. (Emphasis added).

The catch-all “or any other provision of law” is absent from § 51B(k) governing transmission of 51A and B reports to district attorneys and law enforcement agencies.

Compare also G.L. c. 119, § 51B(m), which requires a mandated reporter who holds privileged information to give that information to DSS during an investigation and does not preclude the admission of this information in a civil proceeding about abuse or neglect of the child, placement or custody of the child. See also *Commonwealth v. Berrio*, 407 Mass. 37, 42–43 (1990) (defendant's acquiescence in psychotherapist conveying his communications to DSS and district attorney would arguably not amount to irrevocable relinquishment of privilege to prevent psychotherapist's testimony at trial; however, in the circumstances, the statement was not privileged because the defendant did not consult the psychotherapist for treatment or diagnosis incidental to treatment); *Adoption of Carla*, 416 Mass. 510, 515 n.5 (1993). But see *Commonwealth v. Brandwein*, 435 Mass. 623 (2002) (psychotherapist's unauthorized conveyance to police of privileged communications made by defendant leading to investigation and his questioning, confession and arrest, while presumably unethical, civilly actionable and inadmissible at the criminal trial, could nevertheless properly form basis of police investigation and questioning of defendant, and his confession was not suppressible due to improper disclosure by psychotherapist).

the matter referred to the District Attorney, and that release would not be contrary to the best interest of the child(ren) in question.⁸⁸

Effect of referral: The referral to the district attorney triggers the creation of a “multi-disciplinary service team” appointed by the regional director of the department and consisting of the Department's case worker assigned to the case, a representative of the district attorney and a third member who may not be an employee of either the Department or the district attorney but must have experience and training in child welfare and criminal justice.⁸⁹ The district attorney and regional director may mutually agree to waive the multidisciplinary team procedure.⁹⁰ Within thirty days of the selection of this team, it must meet to discuss the status of the child and family and any intervention initiated; review any existing service plan developed by the department for the family and make recommendations for amendments to the plan; and make recommendations regarding the advisability of prosecuting family members, including the effects of prosecution on the child, efforts to minimize the number of interviews and the possibility of using diversionary alternatives.⁹¹ The team must also forward a copy of the service plan for the child and family to the district attorney within fifty-five working days of the referral of the case to the district attorney,⁹² and it may report to the district attorney any failure by the family to participate in the service plan promulgated by the department.⁹³ Because the team may make recommendations to the district attorney regarding prosecution of family members and use of services and diversionary programs, counsel should become aware of any such recommendations and to the extent possible be involved in negotiations regarding them.⁹⁴

§ 48.2 DISCOVERY AND INVESTIGATION AFTER INITIATION OF CRIMINAL PROCEEDINGS

It is essential that discovery requests in child sex abuse cases not be limited to routine requests for grand jury testimony, police reports, and statements of witnesses. Specific requests for exculpatory information typically relevant in such cases should be made. In addition, the defense should seek to obtain the reports of every agency and individual that has participated in the investigation of any present or prior abuse of the alleged victim. In some instances, it is necessary to make a specific showing of need in order to overcome certain statutory privileges.

⁸⁸ 110 C.M.R. 4.53(1). As to the ability of criminal defense counsel to obtain § 51B reports, *see* 110 C.M.R. 4.53(3), (4) and discussion *infra* § 48.2B.

⁸⁹ G.L. c. 119, § 51D; 110 C.M.R. 4.54(1).

⁹⁰ 110 C.M.R. 4.54(1).

⁹¹ G.L. c. 119, § 51D; 110 C.M.R. 4.54(3).

⁹² 110 C.M.R. 4.54(4). *Compare* G.L. c. 119, § 51B(k), which requires the department to “notify the district attorney of the service plan, if any” within forty-five days of making the district attorney referral.

⁹³ G.L. c. 119, § 51D; 110 C.M.R. 4.54(6). *See also* G.L. c. 119, §51D, 110 C.M.R. 4.54(5), regarding availability of services.

⁹⁴ *See* G.L. c. 119, § 51D; 110 C.M.R. 4.54; 110 C.M.R. 6.01–6.08 (describing service plan development process).

§ 48.2A. THE QUEST FOR EXCULPATORY INFORMATION⁹⁵

Any information showing bias or motive on the part of either the child or any individual in a position to influence the child is helpful to the defense. Once obtained, the right to present such information has a constitutional basis both in article 12 of the Declaration of Rights and in the confrontation clause of the Sixth Amendment.⁹⁶ For example, evidence that the child may have been coached to testify in a particular manner is relevant and admissible.⁹⁷ Use of vocabulary inappropriate to the child's age is one clue that a small child has been coached; and improper interviewing techniques may provide a potent exculpatory explanation for a child's allegations of sexual abuse.⁹⁸ Children may have specific motives for lying;⁹⁹ and requests for discovery in cases

⁹⁵ See also *infra*, § 48.4A.

⁹⁶ See, e.g., *Commonwealth v. Pratt*, 42 Mass. App. Ct. 695, 700-02 (1997); *Commonwealth v. Sugrue*, 34 Mass. App. Ct. 172, 175-78 (1993) (both holding that statutory privileges at issue in child sex abuses must yield to defendant's right of confrontation) (citing *Commonwealth v. Stockhammer*, 409 Mass. 867, 883-84 (1991)). Cf. *Commonwealth v. Maxwell*, 441 Mass. 773, 779-81 (2004) (statutory privilege applying to HIV testing records is trumped by defendant's right to fair trial when defendant shows a good faith, specific, and reasonable basis for believing that the records will contain exculpatory evidence that is relevant and material to issue of defendant's guilt); *Commonwealth v. Dwyer*, 448 Mass. 122, 143-147 (2006) (establishing a new protocol for pretrial inspection of statutorily-privileged third-party records, abrogating *Commonwealth v. Bishop*, 416 Mass. 169 (1993) and *Commonwealth v. Fuller*, 423 Mass. 216 (1996).

⁹⁷ See *Commonwealth v. Nicholas*, 15 Mass. App. Ct. 354, 355-56 (1983) (reversible error to preclude counsel from cross-examining child as to whether mother had coached her; reasonable to believe that mother potentially biased because "any mother would [naturally] be hostile" toward individual accused of sexually molesting her child). *But see Commonwealth v. Thibeault*, 77 Mass. App. Ct. 419, 432, *rev. denied*, 458 Mass. 1107 (2010) (holding that absent evidence of coercion, suggestion, or coaching of child's testimony, there is no need for a hearing to determine if the child's testimony was tainted).

⁹⁸ See *Commonwealth v. LeFave*, 430 Mass. 169, 177-180 & n.9 (1999) (discussing scientific evidence that suggestive interviewing techniques can cause children to believe, falsely, that they have been sexually abused, and stating that admissibility of such testimony "remains an open question"); *Commonwealth v. Pare*, 427 Mass. 427, 431 (1998), S.C. 43 Mass. App. Ct. 566, 578-79 (1997); *Commonwealth v. Amirault*, 424 Mass. 618, 647-48 (1997); *Commonwealth v. Allen*, 40 Mass. App. Ct. 458, 459-62 (1996) (discussing defendant's right to present evidence that interview techniques resulting in "disclosure" of child sex abuse were suggestive or coercive); *Commonwealth v. Baran*, 74 Mass. App. Ct. 256, 274-76 (2009) (ineffective assistance in part because had defense counsel viewed unedited videotapes, counsel would have seen the children being coached; had defense counsel used expert testimony, these experts would have been able to rebut prosecution's expert testimony and testify that the facts that parents were given suggestions on how to question children, that there were multiple interviews, that interviewers posed leading questions, and that interviewers with preconceived agendas, all suggested coaching of the child victims).

⁹⁹ See, e.g., *Commonwealth v. Fitzgerald*, 412 Mass. 516, 525 (1992) (evidence that complainant in conflict with her mother relevant and admissible on issue of complainant's motive to fabricate rape accusation "to avoid parental disapproval of her misconduct"); *Commonwealth v. Polk*, 462 Mass. 23, 37 (2012) (evidence that presented a possibility that victim suffered from dissociative memory was admissible because it showed possible confabulation). *But see Commonwealth v. Bougas*, 59 Mass. App. Ct. 368, 376 (2003) (proffered expert testimony that children embroiled in family controversy often make up allegations of sexual abuse was inadmissible).

involving older children should routinely include a request for juvenile records.¹⁰⁰ On making a preliminary showing on voir dire, the defendant is entitled to demonstrate that a child was previously abused if that abuse may explain how a child acquired personal knowledge of sexual acts and terminology.¹⁰¹ In any sexual assault case, a defendant is entitled to introduce evidence of prior false allegations of sexual assault made by the alleged victim.¹⁰²

Specific requests for exculpatory evidence should always include requests for inconsistent statements, details of prior allegations of sexual assault, medical records, and details of each interview with the alleged victim concerning the case. Additional requests for exculpatory evidence should be tailored to the particular facts as developed through traditional discovery and investigation.

§ 48.2B. RECORDS OF THE DEPARTMENT OF SOCIAL SERVICES AND OTHER AGENCIES AND INSTITUTIONS

A written motion must be filed seeking disclosure of Department of Social Services records. The prosecution typically has in its possession the “51A” and “51B” reports¹⁰³ and can provide them to the defense on order of the court. If the prosecutor does not have these reports, or if discovery of additional documents is sought, a subpoena must be issued to the Department of Social Services to compel the production of the documents in court on the day the discovery motion is heard. Department of Social Services records may contain both privileged and nonprivileged materials. Information gathered pursuant to investigations required by G.L. c. 119, § 51B is exempted by statute from the social worker's privilege.¹⁰⁴ Therefore, the defense is entitled to obtain relevant investigation and evaluation reports without any showing of particularized need.¹⁰⁵ At a minimum, all reports prepared by a social worker pursuant to G.L. c. 119, §§ 51A and 51B should be obtained.

¹⁰⁰ *Commonwealth v. Carty*, 8 Mass. App. Ct. 793, 795 (1979) (precluding cross-examination of 14-year-old complainant in child rape case regarding her probationary status denied defendant his constitutional right of confrontation) (citing *Davis v. Alaska*, 415 U.S. 308, 320 (1974)); *Commonwealth v. DiRusso*, 60 Mass. App. Ct. 235, 239 (2003) (defendant able to cross-examine victim about pending charges against him at the time he first implicated defendant in statement to the police).

¹⁰¹ *Commonwealth v. Ruffen*, 399 Mass. 811, 815 (1987); *Commonwealth v. Owen*, 57 Mass. App. Ct. 538, 544-45 (2003).

¹⁰² *Commonwealth v. Bohannon*, 376 Mass. 90, 94-95 (1978), S.C. 385 Mass. 733 (1982). However, a victim's failure to prosecute or confirm prior allegations, or the Commonwealth's decision not to move forward with charges is not enough to infer that the prior allegations were false. *Commonwealth v. Costa*, 69 Mass. App. Ct. 823, 831 (2007). *See also Commonwealth v. Talbot*, 444 Mass. 586, 590-91 (2005) (holding *Bohannon* standard not satisfied; mere fact that 7 year old daughter said she was joking about “having sex with [her] old boyfriend]” did not mean that the statement was false).

¹⁰³ G.L. c. 119, § 51B(k). *See supra* § 48.1.

¹⁰⁴ G.L. c. 112, § 135B(f), inserted by St. 1993, c. 339, §2. *See* discussion of legislative history in *Commonwealth v. Pratt*, 42 Mass. App. Ct. 695, 697 n.4 (1997).

¹⁰⁵ *Commonwealth v. Jones*, 404 Mass. 339, 341 (1989); *Commonwealth v. Pratt*, 42 Mass. App. Ct. 695, 699-700 (1997); *Commonwealth v. Arthur*, 31 Mass. App. Ct. 178, 182 n.7 (1991); *Commonwealth v. O'Brien*, 27 Mass. App. Ct. 184, 186-87 (1989). *See also Commonwealth v. Pelosi*, 55 Mass. App. Ct. 390, 396-7 & n.10 (2002).

The Department of Children and Families or other institutions or agencies may possess additional relevant records beyond those prepared by a social worker as part of the 51B investigation. The defense is entitled to all relevant, nonprivileged information contained in such reports¹⁰⁶ and to all exculpatory material whether privileged or not.¹⁰⁷ While the U.S. Supreme Court has upheld as constitutional the practice of a judge's in camera review of assertedly exculpatory records to determine if they contain privileged information and, if so, whether that information should nevertheless be disclosed,¹⁰⁸ the Supreme Judicial Court has found that approach wanting. Because trial judges do not, and cannot, have complete information about the facts or the defense theory in a case, they are institutionally ill-equipped to strike the balance between protecting the privilege on the one hand and assuring the defendant's right to present a full defense on the other.¹⁰⁹ The SJC thus adopted the following protocol for dealing with a defense subpoena of records as to which a statutory claim of privilege might apply:¹¹⁰

1. The defense must file and serve on all parties a Rule 17(a)(2) motion seeking a summons for particular records, naming the custodian of the records and the name(s) of the person(s) who is/are the subject of the records.¹¹¹ The Commonwealth then must forward copies of the papers to the custodian(s) and third-party subject(s) of the records so that each has notice of the request, an opportunity to confer with the prosecutor, and an opportunity to address the court at the hearing on the motion in order to oppose production of the records. Although this hearing is the only opportunity for custodians and/or the third-party subjects to be heard, a third-party subject's failure to appear does not constitute a waiver of any statutory privilege.

2. The court must hold a hearing at which all parties, the record holder, and the third-party subject of the record(s) shall be heard on any issues concerning compliance with Rule 17(a)(2) (as explicated in *Commonwealth v. Lampron*¹¹²) and/or any privilege issues, following which the court must make findings (1) that the defendant has or has not satisfied the requirements of Rule 17(a)(2), and (2) that, based on the circumstances in which the records were prepared, the records are or are not presumptively privileged.¹¹³

¹⁰⁶ *Commonwealth v. Clancy*, 402 Mass. 664, 668-69 (1988); *Commonwealth v. Pelosi*, 55 Mass. App. Ct. 390, 398 (2002) (in addition to being non-privileged, evidence must meet a threshold standard of relevance).

¹⁰⁷ *Commonwealth v. Dwyer*, 448 Mass. 122, 143 (2006) (citing and quoting *Commonwealth v. Two Juveniles*, 397 Mass. 261, 269 (1986)). Common privileges that may be involved in child sex abuses cases are the social worker/patient privilege, G.L. c. 112, § 135, see *Commonwealth v. Collett*, 387 Mass. 424 (1987), the psychotherapist/patient privilege, G.L. c. 233, § 20B, see *Commonwealth v. Souza*, 39 Mass. App. Ct. 103, 107 (1995), and the allied-mental-health-professional/patient privilege (*e.g.*, mental health counselors), G.L. c. 112, §172, see *Commonwealth v. Vega*, 449 Mass. 227, 234 (2009). School records are not privileged. See *Commonwealth v. Beauchemin*, 410 Mass. 181, 185 (1991).

¹⁰⁸ *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

¹⁰⁹ See *Commonwealth v. Dwyer*, 448 Mass. 122, 144-145 (2006).

¹¹⁰ *Id.* at 145-146 & Appendix at 147-150.

¹¹¹ *Id.* at 147. See Mass. R. Crim. P. 17(a)(2), 378 Mass. 885 (1979). The motion must comply with Rule 13(a)(2)'s requirements, including an affidavit. See *Commonwealth v. Lampron*, 441 Mass. 265, 270-271 (2004).

¹¹² 441 Mass. 265 (2004).

¹¹³ *Dwyer* (Appendix), 448 Mass. at 148.

3. If Rule 17(a)(2)'s requirements are met and absent a finding that the records in question are presumptively privileged (or if any privilege has been waived), a summons shall issue directing production of the records to the clerk of court, who shall maintain them and make them available for inspection by counsel as provided in 4(a) below. If any of the records are found to be presumptively privileged, the summons must so indicate to the holder. The holder must produce such records in a sealed container marked "privileged" to the clerk, who shall separately maintain the records for inspection by defense counsel as set forth in 4(b) below.¹¹⁴

4(a). Non-presumptively privileged records must be made available to defense counsel for inspection and copying; the court has discretion to permit the Commonwealth to inspect or copy such records.¹¹⁵

4(b). Presumptively privileged records must be made available to defense counsel who summonsed the records, but only if counsel executes and files with the court a protective order in a form approved by the SJC.^{116 117}

5. If, based on his or her inspection of presumptively privileged records, defense counsel concludes that any part of them is not privileged, counsel may move to release these specified parts of the records from the protective order, providing notice of the motion to all parties. Prior to the hearing on the motion, the Commonwealth, subject to signing and filing a protective order, may inspect those parts of the records in question and prepare a response. If the court determines that any part of the presumptively privileged records is not privileged, it must release such records from the protective order, thus permitting inspection and copying of those records as provided in 4(a) above.¹¹⁸

6. If defense counsel who summonsed presumptively privileged records concludes that preparation for trial necessitates copying – or disclosing to third parties (e.g., the defendant or an investigator) – some part or all of those records, counsel must file a motion so to modify the protective order, attaching an affidavit specifically explaining why such disclosure or copying is necessary (but without disclosing the content of the presumptively privileged record). Counsel must provide notice to all parties, the judge must hold a hearing, including if necessary in camera inspection of the records in question. If, after the hearing, the court makes oral or written findings that such copying or disclosure is necessary to adequate trial preparation, the court may order copying or disclosure to specific persons, subject to each such person signing a copy of the court's order, which shall explicitly provide that a violation of its terms is punishable as criminal contempt. All copies of documents subject to the protective order must be returned to the court once the case is finally resolved.¹¹⁹

7. If a defendant seeks to introduce presumptively privileged material at trial, he or she must file a motion in limine at or before the final pretrial conference. Subject to signing and filing a protective order as set forth in 4(b) above, the Commonwealth must be allowed to inspect that part of the records in question in order to be able adequately to respond to the motion. After hearing the motion and considering

¹¹⁴ *See id.* at 148-149.

¹¹⁵ *See id.* at 149.

¹¹⁶ *See id.*

¹¹⁷ *See id.* at 148 n. 1 (referencing model notices and orders for use in cases in which a criminal defendant seeks to inspect statutorily privileged records).

¹¹⁸ *See id.* at 149-150.

¹¹⁹ *See id.*

alternatives to introduction of the records at trial, the court may allow the motion only upon making oral or written findings that the records are necessary to defendant's obtaining a fair trial.¹²⁰

8. All records produced in response to a Rule 17(a)(2) summons must be retained by the clerk until final resolution of the case, by direct appeal following trial or by dismissal.¹²¹

This protocol, applicable "in every criminal case ... where a defendant seeks pretrial inspection of statutorily privileged records of any third party,"¹²² is, in the words of the SJC, "designed to give the fullest possible effect to legislatively enacted privileges consistent with a defendant's right to a fair trial that is not irreparably prejudiced by a court-imposed requirement all but impossible to satisfy."¹²³

§ 48.2C. RECORDS OF SEXUAL ASSAULT COUNSELORS

Confidential communications made by sexual assault victims to sexual assault counselors may not be disclosed without the written consent of the victim.¹²⁴ Although this privilege is written in absolute language, the Supreme Judicial Court has affirmed a defendant's right of access to such records under the *Dwyer* protocol set forth above.¹²⁵ See discussion *supra* at §§ 16.3C & 48.2B.

§ 48.2D. INDICTMENT AND BILL OF PARTICULARS

Many indictments charging sexual assaults on children do not specify the date(s) of the alleged assault but rather allege that the criminal acts occurred on "diverse dates" over a lengthy period of time. Prosecutors also frequently allege multiple acts of child sexual abuse by drafting numerous, generic indictments, differentiated only by the number assigned to the charge. Such charging practices have withstood constitutional challenges despite the substantial practical problems they create in determining precisely what the defendant is alleged to have done and in formulating an appropriate defense.¹²⁶

In the context of an allegation described as "resident child sexual abuse," involving multiple, identical indictments, the Supreme Judicial Court held in

¹²⁰ See *id.*

¹²¹ See *id.*

¹²² *Id.* at 139. In *Dwyer*, the SJC also made it clear that – as did the more stringent *Bishop-Fuller* protocol that it replaced – the new protocol extended to all statutorily privileged records. See *id.* at 144 n. 26.

¹²³ *Id.* at 144.

¹²⁴ G.L. c. 233, § 20J.

¹²⁵ See *Commonwealth v. Dwyer*, 448 Mass. 122, 139, 142-144 & nn. 25-26 (2006).

¹²⁶ See *Commonwealth v. Hrycenko*, 417 Mass. 309, 312-13 (1994) (holding that identically worded indictments alleging multiple acts of child sex abuse are not defective as a matter of law); *Commonwealth v. Erazo*, 63 Mass. App. Ct. 624, 629 (2005) (sufficient when complainant was able to supply any information that Commonwealth may have failed to disclose). See also *Commonwealth v. LaCapruccia*, 429 Mass. 440, 446 (1999) (acknowledging that multiple, generic indictments alleging child sexual abuse "always" create the "risk that jurors may vote to find the defendant guilty on a particular indictment, but with different incidents or conduct in mind").

Commonwealth v. Kirkpatrick,¹²⁷ that a defendant's right to due process is not violated by the prosecution's inability, by way of a bill of particulars or even through the child's trial testimony, to provide any specific dates or other identifying characteristics of the criminal acts.¹²⁸ In so ruling, the Court stated that to require the prosecution to elect specific, identifiable acts on which to proceed would make it too difficult to obtain convictions in cases where a child complainant is able to recount allegations of sexual abuse "in generalities" only.¹²⁹

Kirkpatrick represents an extreme extension of the Court's willingness to dispense with traditional due process guarantees in order to accommodate the perceived special needs of children who allege long-term, incestuous sexual abuse. It had long been held that, in such cases, the time of the alleged offense is not an element of the crime and need not be precisely alleged.¹³⁰ Such an indictment will not be dismissed if the information needed to prepare a defense can be obtained by a bill of particulars.¹³¹ But a bill of particulars may yield little additional information, and providing full discovery (grand jury minutes, police reports, medical records, and a list of witnesses) may well be deemed to be an adequate response to a request for particulars.¹³² A defendant seeking further particulars pursuant to the statute and the rule must establish that failure to provide more information would deprive him of an alibi or other substantive defense.¹³³ The Commonwealth is not, however, precluded from obtaining new indictments alleging different dates for the commission of the crime after a notice of alibi is given.¹³⁴

If a meaningful bill of particulars is obtained, however, its effect is to "bind and restrict" the scope of the indictment;¹³⁵ and the prosecution may not go beyond the scope of the indictment without violating the defendant's right, guaranteed by article 12 of the Declaration of Rights, to stand trial for a felony only after indictment by a grand jury.¹³⁶

¹²⁷ 423 Mass. 436, *cert. denied*, 519 U.S. 1015 (1996).

¹²⁸ *Commonwealth v. Kirkpatrick*, 423 Mass. 436, 440–44, *cert. denied*, 519 U.S. 1015 (1996), *overruled on other grounds*, *Commonwealth v. King*, 445 Mass. 217, 242 (2005) (displacing "fresh-complaint" doctrine with "first-complaint" doctrine). *See also* *Commonwealth v. Medina*, 64 Mass. App. Ct. 708, 717 (2005) (in cases involving resident child molesters the issue is the credibility of the complainant and whether a consistent and repetitive pattern of abuse occurred, rather than when one specific act occurred).

¹²⁹ *Commonwealth v. Kirkpatrick*, 423 Mass. 436, 443, *cert. denied*, 519 U.S. 1015 (1996).

¹³⁰ *Commonwealth v. King*, 387 Mass. 464, 467 (1982); *Commonwealth v. Miozza*, 67 Mass. App. Ct. 567, 573 (2006).

¹³¹ *Commonwealth v. King*, 387 Mass. 464, 468–69 (1982); G.L. c. § 277, 34; Mass. R. Crim. P. 13(b)(1).

¹³² *Commonwealth v. Baran*, 21 Mass. App. Ct. 989, 990 (1986); *Commonwealth v. Vernazzarro*, 10 Mass. App. Ct. 897, 897 (1980). *See also supra*, § 20.5.

¹³³ *Commonwealth v. King*, 387 Mass. 464, 468 (1982); *Commonwealth v. Baran*, 21 Mass. App. Ct. 989, 990 (1986).

¹³⁴ *Commonwealth v. Atkinson*, 15 Mass. App. Ct. 200, 203 (1983); *Commonwealth v. Bougas*, 59 Mass. App. Ct. 368, 370 (2003).

¹³⁵ *Rogan v. Commonwealth*, 415 Mass. 376, 378 (1993).

¹³⁶ *See Commonwealth v. Smith*, 459 Mass. 538, 543–45 (2011) (motion to dismiss indictment as defective should have been allowed where impossible to tell which of several acts

Moreover, while generic indictments are not inadequate as a matter of law, if the prosecution elects to employ them, then it must “bear the risk” that its charging decision may create a double jeopardy bar in the event a retrial becomes necessary.¹³⁷ Furthermore, even where charges have been brought pursuant to a generic indictment, if the evidence at trial could reasonably be seen as identifying more than one act of abuse, the defendant will be entitled upon request to a “specific unanimity” instruction.¹³⁸

Reliance on videotaped hearsay testimony to obtain an indictment is acceptable, though disfavored.¹³⁹

§ 48.2E. INVESTIGATION¹⁴⁰

No amount of sophisticated motions practice can obviate the necessity for traditional, thorough investigation in child sex abuse cases. Valuable information about the alleged victim, her access to sexually explicit material, and any motive to fabricate may be obtained from the defendant, relatives of the child, and neighbors and acquaintances of the family. These sources may also provide accounts of behavior inconsistent with abuse or consistent with abuse by a person other than the defendant and insight into family dynamics, such as custody disputes, that may be relevant on the issues of bias and coaching.

§ 48.3 COMPETENCY OF THE CHILD WITNESS

presented to grand jury formed basis of one count indictment). *Compare* Commonwealth v. Swain, 36 Mass. App. Ct. 433, 435–36 (1994) (where defense had not moved to dismiss indictments or requested particulars, permissible to “amend” indictments at conclusion of Commonwealth’s evidence to conform dates to child’s testimony).

¹³⁷ Commonwealth v. Hrycenko, 417 Mass. 309, 310, 315 (1994) (holding that double jeopardy will bar retrial where defendant is acquitted of some identically worded child rape indictments, others are reversed on appeal, and another trial would expose defendant to the risk of being placed in jeopardy for an offense of which he has previously been acquitted). *See also* Commonwealth v. LaCapruccia, 429 Mass. 440, 445–448 (1999) (permitting retrial only on those identically-worded indictments which encompassed conduct that could be ascertained to be “sufficiently distinguishable” from acquitted conduct).

¹³⁸ *See, e.g.,* Commonwealth v. Zane Z., 51 Mass. App. Ct. 135, 138–141 (2001) (judge erroneously refused to give specific unanimity request, where conviction for rape of an eight year-old child could have been based on an act allegedly occurring in the woods or an act allegedly occurring in the juvenile defendant’s bedroom), citing Commonwealth v. Conefrey, 420 Mass. 508, 514 (1995). *See also supra*, at §36.5B. *But see* Commonwealth v. Medina, 64 Mass. App. Ct. 708, 717 (2005) (in cases involving a resident child molester, a specific unanimity instruction is not required if the victim testifies to a pattern of repetitive and abusive conduct by the defendant).

¹³⁹ Commonwealth v. Bishop, 416 Mass. 169, 173–74 (1993), *abrogated on other grounds*, Commonwealth v. Dwyer, 448 Mass. 122, 139 (2006) (amending protocols for permitting pretrial inspection of statutorily privileged records); Commonwealth v. Spence, 38 Mass. App. Ct. 88, 91 (1995). *See also* Commonwealth v. Fleury, 417 Mass. 810, 816–17 (1994) (videotape of child complainant did not mislead grand jury into false belief that videotape account was under oath).

¹⁴⁰ *See also* discussion *supra* at ch.11 (investigation and interviewing).

Any person of sufficient understanding may testify in a criminal proceeding.¹⁴¹ Age is not the test of competency; the witness's "capacity to observe, remember, and give expression to that which she [has] seen, heard, or experienced [is] the crucial consideration."¹⁴² In light of the "explosion" in child sex abuse prosecutions, the Appeals Court has emphasized the duty of the trial judge to "carefully craft questions posed to child witnesses to ensure that they are indeed competent."¹⁴³ It is "preferable" for a judge determining the competency of a child witness to ask a "specific question" as to whether the child "underst[ands] the consequences of telling a lie."¹⁴⁴

Whether a prospective witness is competent to testify is a decision within the discretion of the trial judge, which will rarely be faulted on appeal.¹⁴⁵ The issue of competency must, of course, be determined before the witness testifies. The judge may, however, reconsider the ruling either *sua sponte* or on motion of counsel if subsequent developments during the trial or hearing suggest that the witness is not competent to testify.¹⁴⁶

§ 48.3A. VOIR DIRE EXAMINATION

A written request for a voir dire of the witness on the issue of competency should be made in every case where doubt exists as to the competency of a child witness. It is within the discretion of the trial judge to conduct the competency hearing with or without interrogation by counsel.¹⁴⁷ If one side is permitted to interrogate the prospective witness, fairness dictates that the other side be given an equal opportunity.¹⁴⁸ Regardless of the decision as to whether counsel will be able to

¹⁴¹ G.L. c. 233, § 20. *See generally supra* § 32.7 (competence of the witness).

¹⁴² *Commonwealth v. Tatisos*, 238 Mass. 322 (1921).

¹⁴³ *Commonwealth v. Monzon*, 51 Mass. App. Ct. 245, 253 (2001).

¹⁴⁴ *Commonwealth v. Ike I.*, 53 Mass. App. Ct. 907, 909 (2002) (rescript). *See Commonwealth v. Thiebeault*, 77 Mass. App. Ct. 419, 428-31 (2008).

¹⁴⁵ *See Commonwealth v. Adkinson*, 442 Mass. 410, 421 (2004); *Commonwealth v. Brusgulis*, 398 Mass. 325, 239-30 (1986); *Commonwealth v. Whitehead*, 379 Mass. 649, 656 (1980); *Commonwealth v. Reagan*, 175 Mass. 335, 336 (1900); *Commonwealth v. Thiebeault*, 77 Mass. App. Ct. 419, 424 (2010); *Commonwealth v. Tang*, 66 Mass. App. Ct. 53, 62-66, *rev. denied*, 447 Mass. 1103 (2006); *Commonwealth v. Lamontagne*, 42 Mass. App. Ct. 213, 216-19 (1997).

¹⁴⁶ *See Commonwealth v. Monzon*, 51 Mass. App. Ct. 245, 252 (2001) (judge's determination on voir dire that six year-old complainant was competent vitiated by child's later response before the jury that she did not know the difference between the truth and a lie; judge erred in failing to revisit the competency question); *Commonwealth v. Brusgulis*, 398 Mass. 325, 331 (1986);

¹⁴⁷ *Commonwealth v. Doucette*, 22 Mass. App. Ct. 659, 662 (1986), S.C. 400 Mass. 1005 (1987).

¹⁴⁸ *Commonwealth v. Massey*, 402 Mass. 453, 454-55 (1988) ("Once a judge has permitted the prosecution to examine a prospective witness as to competence . . . it offends fairness to allow one side to draw out that which is favorable for its purposes, but to bar inquiry by the other side entirely") (internal quotation omitted).

interrogate the prospective witness, the right to confrontation requires the presence of the defendant and defense counsel at the competency hearing.¹⁴⁹

If counsel is not permitted to question the witness at the competency hearing, requests for specific questions should be submitted to the judge.¹⁵⁰ Counsel should ask (or suggest that the judge ask) the witness nonleading questions in order to determine his understanding of the obligation to tell the truth, and his capacity to observe, remember, and communicate details.

It can be anticipated that the child will have been coached by members of the prosecution team to answer questions pertaining to truthfulness. Typically, a prosecutor may question the witness by pointing to an object such as a red tie, and asking whether it would be the truth or a lie if he said the tie were blue. Such concrete questions should be avoided by defense counsel. Better questions relate to the child's understanding of whether the truth is good or bad and why; whether it is sometimes okay to lie; whether there is a difference between a big lie and a little lie; whether the child has ever lied; whether it is okay for the child to lie if the child does not get caught; whether the child must tell the truth when the prosecutor asks questions; whether the child must tell the truth when defense counsel asks questions; and whether the child is able to explain and understand punishment.

In appropriate cases, counsel should consider whether coercive or suggestive interviewing techniques have so distorted a child's memory as to raise an issue of competency to be explored at a pretrial hearing, a possibility left open by the Appeals Court.¹⁵¹

§ 48.3B. DEPARTMENT OF MENTAL HEALTH EXAMINATION

In most cases the issue of competency will be resolved at a voir dire hearing. The judge may, however, order that the witness be examined by a physician assigned by the Department of Mental Health if a medical or psychiatric evaluation is deemed necessary to resolve the issue of competency.¹⁵² Such an examination *must* be preceded by an evidentiary hearing in which the need for the examination is established.¹⁵³ Where the evidence is insufficient to raise a competency issue, however, the court is without power to order a psychiatric examination of a child witness for the purpose of possibly impeaching his testimony at trial.¹⁵⁴

¹⁴⁹ Commonwealth v. Doucette, 22 Mass. App. Ct. 659, 663 (1986), S.C. 400 Mass. 1005 (1987).

¹⁵⁰ Commonwealth v. Doucette, 22 Mass. App. Ct. 659, 662 (1986), S.C. 400 Mass. 1005 (1987).

¹⁵¹ Commonwealth v. Allen, 40 Mass. App. Ct. 458, 459–63 (1996). *See also* Commonwealth v. Baran, 74 Mass. App. Ct. 256, 274–76 (2009) (finding a basis for ineffective assistance of counsel where not only had defense counsel failed to view unedited videotapes which showed the children being coached but defense counsel failed to secure expert testimony which would have rebutted prosecution's expert testimony and would have pointed out that the facts that parents were given suggestions on how to question children, that there were multiple interviews, that interviewers posed leading questions, and that interviewers had preconceived agendas, all suggested coaching of the child victims).

¹⁵² G.L. c. 123, § 19.

¹⁵³ Commonwealth v. Gibbons, 378 Mass. 766, 772–73 (1979).

¹⁵⁴ *See* Commonwealth v. Polk, 462 Mass. 23, 33–34 (2012); Commonwealth v. Widrick, 392 Mass. 884, 888–89 (1984).

§ 48.4 CONFRONTING THE CHILD COMPLAINANT ¹⁵⁵

§ 48.4A. CREDIBILITY OF THE ALLEGED VICTIM

A defendant in a child sex abuse case has the same right to expose the potential bias and motive of a child witness as any other witness.¹⁵⁶ Thus, under *Commonwealth v. Bohannon*,¹⁵⁷ the defendant is permitted to introduce evidence of false allegations of sexual assault whether made before¹⁵⁸ or subsequent to¹⁵⁹ the allegation in his case, but requirements for demonstrating that the prior allegation was actually false are stringent.¹⁶⁰

Under *Commonwealth v. Ruffen*,¹⁶¹ a proffer that a young child complainant has been sexually abused by someone other than the accused and in a manner similar to the way in which the defendant is alleged to have abused the child will entitle the defense to a voir dire to determine whether the child may have acquired “personal knowledge of sexual acts and terminology”¹⁶² by virtue of the collateral abuse.

¹⁵⁵ See also *supra* § 32.6A, regarding the confrontation clause generally.

¹⁵⁶ See, e.g., *Commonwealth v. Barboza*, 54 Mass. App. Ct. 99, 109-110 (2002) (in prosecution for rape of fifteen-year old boy, judge erred in precluding cross-examination of complainant and his mother as to whether family had contacted a civil attorney: “If the family hoped to sue the defendant in a civil suit and thereby win money damage, that fact was relevant to the jury’s determination of any bias on the family’s part that could shade their testimony against the defendant”); *Commonwealth v. Nichols*, 37 Mass. App. Ct. 332, 337–38 (1994) (“[The defendant had a right under the confrontation clause of the Sixth Amendment to the United States Constitution to present to the jury evidence to support his theory that [the child complainant] was a wilful adolescent prepared to manipulate those who had custody of her and controlled her activities ... and that her testimony was tinged with bias”) (citing *Davis v. Alaska*, 415 U.S. 308, 318 (1974)).

¹⁵⁷ 376 Mass. 90 (1978).

¹⁵⁸ *Commonwealth v. Reed*, 444 Mass. 803, 808 n.6 (2005); *Commonwealth v. Bohannon*, 376 Mass. 90, 95 (1978).

¹⁵⁹ *Commonwealth v. Nichols*, 37 Mass. App. Ct. 332, 335–37 (1994) (collateral false allegation made subsequent to allegation against defendant “has no less bearing on” child’s credibility).

¹⁶⁰ See e.g., *Commonwealth v. Scanlon*, 412 Mass. 664, 675–76 (1992), *overruled on other grounds*, *Commonwealth v. King*, 445 Mass. 217, 242 (2005) (displacing “fresh-complaint” doctrine with “first-complaint” doctrine), (prior allegation of sexual assault inadmissible where defendant unable to establish that allegation was indeed false). See also *Commonwealth v. Nichols*, 37 Mass. App. Ct. 332, 335 (1994) (collecting cases that failed under *Bohannon* because proffer did not adequately establish that collateral allegation was false); *Commonwealth v. Costa*, 69 Mass. App. Ct. 823, 831-32 (2007) (victim’s failure to prosecute or confirm prior allegations, or the Commonwealth’s decision not to move forward with the charges is not a reason for inferring that the allegations were false).

¹⁶¹ 399 Mass. 811 (1987).

¹⁶² *Commonwealth v. Ruffen*, 399 Mass. 811, 814–15 (1987) (involving 10-year-old complainant). See also *Commonwealth v. Scheffer*, 43 Mass. App. Ct. 398, 400-01 (1997) (defendant charged with digital rape of five-year-old complainant entitled to *Ruffen* voir dire regarding child’s similar prior allegations); *Commonwealth v. Owen*, 57 Mass. App. Ct. 538,

Logically, a child's collateral allegation of sexual abuse must be either true or false; if the strict *Bohannon* standard for falsity cannot be met, counsel is obligated to consider whether the prior allegation would be admissible under *Ruffen* as explanatory of a young child's otherwise incriminatory knowledge of sexual terms and behavior;¹⁶³ and the prosecution in such a case should not be permitted to avoid *Ruffen* on the rationale that the collateral incident never occurred.

It is error to exclude evidence that the child knows, based on prior experience, that an allegation of sexual assault will result in the removal of the defendant from the home.¹⁶⁴ It is also reversible error to preclude an accused child sex abuser from showing that the child did not make a complaint to a DSS caseworker in circumstances where it would have been natural for the complainant to have "disclosed."¹⁶⁵

The term *disclosure* is often used in child sex abuse cases to refer to a child complainant's report of sexual abuse.¹⁶⁶ The term carries considerable potential for prejudice because it plainly suggests that the allegation "disclosed" is in fact true. Inasmuch as the truth of the allegation is the very issue in dispute, counsel should object to, or move in limine to prohibit, use of the term *disclosure* or consider ways to expose the bias inherent in its use.¹⁶⁷

§ 48.4B. FIRST COMPLAINT ISSUES

Stemming from an ancient common-law rule, originally requiring proof that a rape complainant promptly complained of the rape but subsequently modified to permit evidence of a "fresh complaint," the prosecution has long been allowed to present testimony that an alleged victim of a sexual assault made an out-of-court complaint

544-46 (2003) (ineffective assistance of counsel to fail to pursue motion in limine to introduce evidence that victim had prior exposure to sexual abuse which could have shown that victim had knowledge about fondling of breasts and familiarity with a penis from another source). *Compare* Commonwealth v. Pyne, 35 Mass. App. Ct. 36, 37 (1993) (*Ruffen* voir dire not required where fifteen year-old complainant's knowledge of sexual terms and behavior not extraordinary); Commonwealth v. Beaudry, 445 Mass. 577, 580-84 (2005) (child's sexual knowledge could have come from defendant's prior sexual abuse of an older sister) . *See also* Commonwealth v. Walker, 426 Mass. 301, 306-08 (1997) (recognizing possible relevance of evidence that child obtained "indirect knowledge about sexuality based on information from a secondary source," e.g., a parent).

¹⁶³ *See* Commonwealth v. Scheffer, 43 Mass. App. Ct. 398, 399-401 (1997) (counsel ineffective for seeking admission of child's collateral allegations of abuse under *Bohannon* rather than *Ruffen* where those allegations were not demonstrably false but were potentially explanatory under *Ruffen* of child's knowledge of sexual terms and behavior).

¹⁶⁴ Commonwealth v. Civello, 39 Mass. App. Ct. 373, 376-78 (1995) (where defense proffered evidence that 12-year-old complainant had previously accused her mother's ex-husband of rape, resulting in his conviction, and had accused a foster sibling of sexual abuse, resulting in complainant's move to new home, reversible error to foreclose cross-examination on complainant's familiarity with the "DSS reporting system and the legal system").

¹⁶⁵ Commonwealth v. Pratt, 42 Mass. App. Ct. 695, 700-02 (1997) (reversible error to exclude evidence of 14-year-old's lack of fresh complaint to DSS caseworker).

¹⁶⁶ *See e.g.*, Commonwealth v. Halsey, 41 Mass. App. Ct. 200, 204 (1997).

¹⁶⁷ *Cf.* Commonwealth v. Krepon, 32 Mass. App. Ct. 945, 947 (1992) (recognizing that, where issue is whether alleged incident in fact occurred, complaining witness should "at all times" be referred to as the "alleged" victim, not "victim").

regarding the assault. Until fairly recently, such evidence was limited to reports made reasonably promptly after the alleged sexual assault under the theory “that jurors may ... believe that a rape victim will promptly disclose a sexual assault to someone; that jurors may draw adverse inferences from the absence of evidence suggesting such a prompt complaint; and that jurors continue to be skeptical of allegations of rape.”¹⁶⁸ This “fresh complaint” evidence was not received for its truth, but rather for the limited non-hearsay purpose of showing that the complaints were seasonably made, thereby answering the supposed inferences that jurors would otherwise make.¹⁶⁹

By the turn of the 21st century, however, this fresh-complaint doctrine was showing increasing signs of strain. Quite apart from the dubious, sexist rationale for this practice,¹⁷⁰ there was an increasing concern that the “piling on” of such evidence might cause a jury to use it not for its limited purpose of showing that the alleged victim’s reaction was consistent with that of a “real” victim, but as substantive proof that the sexual assault occurred.¹⁷¹ Moreover, mounting social-science research showed that victims of sexual assault, particularly children, do not respond in a uniform manner to such assaults, many saying nothing of the assault to anyone for lengthy periods of time.¹⁷² In 2005, the SJC thus modified the fresh-complaint doctrine, announcing in *Commonwealth v. King*¹⁷³ a “first complaint” rule.¹⁷⁴

Under the “first complaint” rule, the prosecution may offer evidence that a sexual-assault complainant made an out-of-court statement reporting the alleged assault, but that evidence is limited to the first such complaint, i.e., the testimony of the first person to whom the alleged victim reported the assault.¹⁷⁵ The relative “freshness” of the complaint no longer has a bearing on its admission, the complaint’s timing going only to its weight.¹⁷⁶ The first-complaint witness may testify as to the details of what the alleged victim said and the circumstances in which he or she said it,¹⁷⁷ but, as was so with “fresh complaint” evidence, it is not substantive evidence of the assault. As before, its sole purpose is to “refute any false inference that silence is evidence of a lack of credibility on the part of rape complainants.”¹⁷⁸ That limited purpose is satisfied by the testimony of the person to whom the alleged victim first reported the assault, and, other than the complainant him or herself, only that witness may testify to the fact or content of the complaint.¹⁷⁹

¹⁶⁸ *Commonwealth v. King*, 445 Mass. 217, 230 (2005).

¹⁶⁹ *Id.* See *Commonwealth v. Licata*, 412 Mass. 654, 656–60 (1992) (reviewing fresh complaint doctrine in Massachusetts).

¹⁷⁰ See *Commonwealth v. Lavalley*, 410 Mass. 641, 646 & n. 7 (1991) (noting the doctrine’s shortcomings and inviting parties to give the SJC an opportunity to reassess the rule).

¹⁷¹ *Id.*

¹⁷² See *Commonwealth v. King*, 445 Mass. 217, 237–240 (2005).

¹⁷³ 445 Mass. 217 (2005).

¹⁷⁴ *Id.* at 237.

¹⁷⁵ *Id.* at 242–243.

¹⁷⁶ *Id.*

¹⁷⁷ *King*, 445 Mass. at 243.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 242–243. This marks a departure from the prior fresh-complaint rule. See *Commonwealth v. Parent*, 465 Mass. 395, --, SJC No. 11131 Slip Op. at 5 (2013) (error to permit

In limited circumstances, where it is not feasible to call the actual first-complaint witness – because, for example, that person is “unavailable, incompetent, or too young to testify meaningfully”¹⁸⁰ or because the first-complaint witness is biased or has a motive to minimize or distort the alleged victim’s remarks¹⁸¹ – the judge has discretion to permit another first-complaint witness to testify in lieu of the witness who received the “very ‘first’ complaint.”¹⁸² However, the prosecution must seek permission for such a substitution, and justify it, in a pre-trial motion in limine.¹⁸³ If at the hearing on the motion in limine the judge allows the prosecutor to call a “substitute” first-complaint witness, defense counsel must renew any objection to that substitution at trial in order to preserve defendant’s appellate rights.¹⁸⁴

As noted, the first-complaint witness may testify to the details of the complainant’s report as well as the circumstances of that report. The theory is that such detail “gives the fact-finder ‘the maximum amount of information with which to assess the credibility of the ... complaint evidence as well as the overall credibility of the victim.’”¹⁸⁵ Further, again as noted, if a first-complaint witness testifies, the complainant may also testify as to the out-of-court complaint, giving the details of his or her report and the reasons for making that statement at the particular time he or she did.¹⁸⁶ However, if the first-complaint witness does not testify at trial, the complainant may not testify concerning either the fact of the first complaint or its content unless the judge finds that the first-complaint witness is deceased or that there is some other compelling reason justifying his or her absence for which the Commonwealth is not responsible.¹⁸⁷ This requirement of the first-complaint witness as a necessary predicate to the complainant’s testimony about such out-of-court statements should be taken seriously. It is an important safeguard against the complainant’s bolstering his or her testimony with his or her own prior consistent statements about the alleged assault

police officer to whom juvenile complainant had reported sexual assault where complainant had first reported the assault to her friend); *Commonwealth v. Aviles*, 461 Mass. 60, 67-68 (2011) (impermissible to permit child sexual-assault complainant to testify that she had told other persons in addition to the first-complaint witness of the assault, even though she did testify as to the content of those other reports); *Commonwealth v. Lyons*, 71 Mass. App. Ct. 671, 672-673 (2008) (911 recording constituted first-complaint evidence and thus error to admit police officer’s testimony of complainant’s subsequent report). *Contrast* *Commonwealth v. Kebreau*, 454 Mass. 287, 289 (2009) (permitting two first-complaint witnesses where the testimony of each related to complaints of different and escalating child sexual abuse occurring over a lengthy period of time).

¹⁸⁰ *Id.* at 243-244.

¹⁸¹ *See, e.g.,* *Commonwealth v. Murungu*, 450 Mass. 441, 445-447 (2008) (upholding judge’s substitution of first-complaint witness where the actual first-complaint witness was defendant’s sister).

¹⁸² *Id.*

¹⁸³ *Id.* at 244.

¹⁸⁴ *See* *Commonwealth v. Aviles*, 461 Mass. 60, 66 (2011) (noting the requirement of trial objection to preserve appellate rights but holding that where, at the motion hearing, defense counsel objected and the trial judge noted the objection, explicitly stating that defendant’s rights were preserved, such a trial objection was unnecessary). But better to be safe than sorry.

¹⁸⁵ *King*, 445 Mass. at 244.

¹⁸⁶ *See id.* at 243; *Aviles*, 461 Mass. at 68.

¹⁸⁷ *See King*, 445 Mass. at 245 n. 6; *Aviles*, 461 Mass. at 68 n. 6.

without any opportunity for the defense to test those purported statements through cross-examining the person to whom they were ostensibly made.

Finally, as noted, the first-complaint doctrine's sole purpose is to provide the jury with facts to assess the credibility of a complainant's testimony that a sexual assault occurred. If neither the fact of the alleged sexual assault nor the complainant's consent is at issue, for example, the only issue is the identity of the perpetrator, the need for first-complaint evidence disappears, and it is inadmissible.¹⁸⁸ On the other hand, a complainant's out-of-court reports of the alleged sexual assault which do not qualify as first-complaint evidence are not barred if they are admissible on another basis, e.g., a spontaneous utterance reporting the assault or a prior consistent statement offered to rebut a claim of recent fabrication. As with all evidence that is relevant and admissible on one basis but inadmissible on another, the judge has discretion to admit it after engaging in the familiar balancing of probative value and prejudicial effect.¹⁸⁹ In appropriate cases, counsel should take care to articulate the particular unfair prejudice that the defendant will suffer from the repetition of the details of the assault.

In spite of the relatively bright lines that govern the admissibility of first-complaint evidence, meant to confine it to its narrow purpose and to prevent unfair, spill-over prejudice to those accused, the SJC has observed that there is a need for flexibility to permit trial judges "to deal with the myriad factual scenarios that arise in th[is] context."¹⁹⁰ The Court thus has suggested treating this doctrine "as a body of governing principles to guide a trial judge on the admissibility of first complaint evidence" rather than an evidentiary rule, going on to hold that appellate courts should review admissibility determinations under an abuse of discretion standard.¹⁹¹ At the same time, recognizing the potential for unfair prejudice to the defendant that "repeating for the jury the often horrific details of the alleged crime" presents, the Court stated that this more forgiving standard of appellate review "in no way should be considered as a relaxation of our first complaint jurisprudence."¹⁹² To make sure that this relaxation does not occur, counsel must be vigilant in making timely objections to evidence outside the rule and to ensuring that such objections are supported by sound arguments and a full record. In dealing with allegations of sexual abuse of a child, a judge may feel substantial pressure to push the doctrine to, maybe even beyond, its limits, and is essential that counsel argue forcefully for judicial restraint.

§ 48.4C. SPECIAL SEATING ARRANGEMENTS

Prosecutors and judges will sometimes seek to alter the traditional courtroom seating arrangements in child sex abuse cases in order to make it easier for the child to testify. For instance, such special arrangements may seek to have the child testify from some place less imposing than the witness stand.¹⁹³ While the Supreme Judicial Court

¹⁸⁸ See *King*, 445 Mass. at 247.

¹⁸⁹ See *Aviles*, 461 Mass. at 69.

¹⁹⁰ *Id.* at 72.

¹⁹¹ *Id.* at 73.

¹⁹² *Id.*

¹⁹³ See, e.g., *Commonwealth v. Amirault*, 424 Mass. 618, 621–22 (1997); *Commonwealth v. Spear*, 43 Mass. App. Ct. 583, 590–92 (1997) (both involving arrangements whereby child complainant permitted, erroneously, to testify from chair placed directly in front of jury box).

“has been sensitive toward meeting the needs of . . . young witnesses,”¹⁹⁴ and accorded trial judges discretion to adopt an array of special procedures to accommodate the special needs of child witnesses,¹⁹⁵ including the discretion to alter the traditional courtroom seating arrangements,¹⁹⁶ such procedures may risk interference with fundamental rights, particularly the right of the accused, guaranteed by the specific language of article 12, to “meet the witnesses against him face to face.”

Therefore, before any alternative arrangements are put in place, counsel should insist on compliance with the procedures set forth in *Commonwealth v. Johnson*,¹⁹⁷ and should object, on article 12 grounds, to any arrangements that permit witnesses, child or adult, to testify “comfortably and naturally without ever having the accused in their field of vision.”¹⁹⁸

For special seating arrangements to be permissible, the prosecution must first make a preliminary showing, by “more than a preponderance of the evidence” that there is a “compelling need” for them.¹⁹⁹ The judge should not permit special seating arrangements to be put into effect without having heard evidence and without having made specific findings as to need.²⁰⁰

Even if there has been compliance with the standard and procedures set forth in *Johnson*, the Supreme Judicial Court has made crystal clear that the “face to face” language of article 12 “unequivocally . . . requires a judge to refrain from designing seating configurations which comfortably shield a witness from a face to face meeting” with the accused.²⁰¹ Inasmuch as a face-to-face meeting with the accused is often

¹⁹⁴ *Commonwealth v. Hatch*, 438 Mass. 618, 625 (2003) (quoting *Commonwealth v. Bergstrom*, 402 Mass. 534, 552 (1988)).

¹⁹⁵ *See, e.g., Commonwealth v. Lamontagne*, 42 Mass. App. Ct. 213, 216-19 (1997) (discussing judge's discretion to permit leading questions to be put to child complainant); *Commonwealth v. Bonner*, 33 Mass. App. Ct. 471, 473-76 (1992) (discussing judge's discretion to exempt parent of child complainant from sequestration order). *But see Commonwealth v. Quincy Q.* 434 Mass. 859, 870-71 (2001), *over-ruled in part on other grounds*, *Commonwealth v. King*, 445 Mass. 217 (2005) (modifying fresh complaint rule), (where child complainant had difficulty answering questions on direct examination, judge erroneously allowed prosecution a “brief break,” during which prosecutor was permitted to read prior statements to child: this atypical method of “refreshing recollection” carries too great a risk that the prosecutor, “inadvertently or not,” will “suggest[] to the child the desired substance of her testimony,” with no opportunity for the jury to assess whether the child “actually remembered the statement or was being prompted to give a particular answer”).

¹⁹⁶ *See Commonwealth v. Amirault*, 424 Mass. 618, 635 (1997) (discussing permissible special arrangements, including use of “special furniture” and having judge sit at same level as child).

¹⁹⁷ 417 Mass. 498, 504 (1994).

¹⁹⁸ *Commonwealth v. Amirault*, 424 Mass. 618, 632 (1997). In *Amirault*, the Court specifically repudiated previous suggestions (*see Commonwealth v. Conefrey*, 410 Mass. 1, 14 (1991)), that it would be permissible to seat the child complainant at a 45 degree angle to the defendant. *See Amirault, supra*, 424 Mass. at 632 & n.9 (all argument about precise angles of visibility “miss the point” because art. 12 requires that the witness give his testimony “to the accused”).

¹⁹⁹ *Commonwealth v. Johnson*, 417 Mass. 498, 504 (1994).

²⁰⁰ *See Commonwealth v. Spear*, 43 Mass. App. Ct. 583, 591-92 (1997).

²⁰¹ *Commonwealth v. Amirault*, 424 Mass. 618, 632 n.9 (1997).

precisely what such seating configurations are designed to avoid, article 12, if raised,²⁰² imposes a substantive limitation on the extent to which the courtroom can be altered for the benefit of witnesses.

§ 48.4D. VIDEOTAPING OR ELECTRONIC TRANSMISSION OF TESTIMONY

Legislation enacted in 1985²⁰³ purported to establish alternative procedures for obtaining the testimony of a child witness in order to alleviate trauma to the child caused by testifying in court or by testifying in the presence of the defendant. Both the Supreme Judicial Court²⁰⁴ and the U.S. Supreme Court²⁰⁵ have issued decisions that limit the ability of the prosecution to invoke these procedures.

The statute would permit the use of an alternative procedure for testifying if, after hearing, the court finds by a preponderance of the evidence that a child under the age of fifteen is likely to suffer psychological or emotional trauma as a result of (1) testifying in open court, (2) testifying in the presence of the defendant, or (3) both.²⁰⁶ Alternative procedures which may be ordered include recording the testimony on videotape for later viewing by the jury; simultaneous transmission to the courtroom of testimony taken at another location; and taking of testimony in a courtroom setting in which provisions are made so that the child witness cannot see or hear the defendant.²⁰⁷ If the testimony is videotaped or simultaneously transmitted to the courtroom from another location, the defendant is permitted to be present at the taking of the testimony unless the court's order permitting alternative procedures is based in whole or in part on trauma to the child caused by testifying in the presence of the defendant.²⁰⁸

It was the exclusion of the defendant from the presence of the child witness that led the Supreme Judicial Court to invalidate portions of the statute under article 12 of the Massachusetts Constitution Declaration of Rights which requires that a defendant “meet” his accusers “face to face.”²⁰⁹ The court reversed a conviction in which testimony of the child witness was simultaneously transmitted to the courtroom from another location while the defendant and jury remained in the courtroom. The court suggested that even the defendant's presence (along with the judge and counsel) at the location where the testimony was taken would not have saved the conviction because there is a “question whether a fair trial can be realized when the judge is physically

²⁰² The Court has likewise made clear that, if not timely asserted, the right to a face-to-face meeting will be deemed to have been waived. *See* *Commonwealth v. Amirault*, 424 Mass. 618, 642–45 (1997); *Commonwealth v. Souza*, 44 Mass. App. Ct. 238, 242 (1998); *Commonwealth v. LeFave*, 430 Mass. 169, 173 (1997) (all three holding that objection to unconstitutional seating arrangements had been waived by defendants in child sex abuse cases). *Compare* *Commonwealth v. Spear*, 43 Mass. App. Ct. 583, 589 n.8 (1997) (face-to-face claim preserved by defendant's objection to prosecution's motion for special seating arrangements).

²⁰³ G.L. c. 278, § 16D, enacted by St. 1985, c. 682.

²⁰⁴ *Commonwealth v. Bergstrom*, 402 Mass. 534 (1988).

²⁰⁵ *Coy v. Iowa*, 487 U.S. 1012 (1988).

²⁰⁶ G.L. c. 278, § 16D(a)–(b)(1).

²⁰⁷ G.L. c. 278, § 16D at (b)(2), (b)(4).

²⁰⁸ G.L. c. 278, § 16D(b)(3).

²⁰⁹ *Commonwealth v. Bergstrom*, 402 Mass. 534, 546–47 (1988).

absent either from the courtroom or from the place where testimony is given during trial.”²¹⁰

The Supreme Judicial Court gave some guidance on how videotaped testimony might be used consistent with the mandates of article 12. The court indicated that the Commonwealth would have to show by proof beyond a reasonable doubt²¹¹ that testifying in the courtroom would cause severe and long lasting emotional trauma to the child.²¹² On such a showing, the Commonwealth would be able to proceed with videotaped testimony taken in the presence of the defendant provided that the videotapes were of sufficient quality to allow the jury properly to fulfill its responsibilities.²¹³

Using a similar line of analysis, the U.S. Supreme Court found error in the use of a procedure by which a screen was erected between the defendant and the child witnesses so that the children could not see the defendant as they testified.²¹⁴ The court construed the confrontation clause of the Sixth Amendment as conferring the right to meet face-to-face all those who appear and give evidence at trial. The Iowa statute at issue, unlike the Massachusetts law, permitted the use of such a procedure in any case in which children testified, without requiring case specific findings of necessity as a preliminary matter. A concurring opinion suggested that statutes such as that of Massachusetts might pass constitutional muster where a case-specific finding of necessity is required.²¹⁵

§ 48.4E. HEARSAY TESTIMONY OF CHILD UNDER TEN

A statute enacted in 1990²¹⁶ authorizes the substantive use of hearsay statements by children under ten years old if certain conditions are met. Deemed admissible are statements describing the sexual contact with the child, the circumstances under which it occurred, and the identity of the perpetrator. The statement must be relevant to a material fact and more probative than other evidence that can reasonably be obtained. The person to whom the statement was made must testify. In addition, the judge must make preliminary findings that the child is unavailable as a witness and the statements are reliable. Situations that constitute “unavailability” are specifically defined in the statute. Reliability may be established by showing that the statements were made under oath with an opportunity to cross-examine and were accurately recorded or by showing that the statements were made “under circumstances inherently demonstrating a special guarantee of reliability.” Factors relevant to a determination of reliability are set forth in the statute.

²¹⁰ Commonwealth v. Bergstrom, 402 Mass. 534, 551 (1988).

²¹¹ The statute sets forth a lower standard, requiring only proof by a preponderance of the evidence. G.L. c. 278, § 16D(b)(1).

²¹² By contrast, the statute requires no more than finding that the child would suffer psychological or emotional trauma; it need not be “severe” or “long lasting.” G.L. c. 278, § 16D(b)(1).

²¹³ Commonwealth v. Bergstrom, 402 Mass. 534, 550–51 (1988).

²¹⁴ Coy v. Iowa, 487 U.S. 1012, 1020-21 (1988).

²¹⁵ Coy v. Iowa, 487 U.S. 1012, 1022–26 (1988) (O'Connor, J., concurring).

²¹⁶ G.L. c. 233, § 81, enacted by St. 1990, c. 339.

Additional requirements have been articulated by the Supreme Judicial Court. These include: (1) prior notice to the defendant of the prosecutor's intention to offer such hearsay; (2) proof beyond a reasonable doubt that the use of such hearsay is essential to prevent severe and long-lasting emotional trauma to the witness; (3) a record of any hearing regarding reliability, which must include the judge's specific findings supporting reliability; (4) presence of defendant and defense counsel at such hearing unless severe emotional trauma to the child would result; (5) judicial skepticism that a witness incompetent because of inability to tell the truth could be found to have reliably reported the event; and (6) independent corroboration of the out-of-court statements.²¹⁷

The constitutionality of this statute has not yet been tested, but it is almost certainly unconstitutional as applied to statements made in response to questioning by police or other law enforcement investigators. In the landmark case of *Crawford v. Washington*,²¹⁸ the Supreme Court held that the Sixth Amendment's confrontation clause bars out-of-court testimonial statements made by persons not present at trial unless two conditions are satisfied. First, the person who made the statement(s) – the declarant – must be unavailable to testify at the trial, and, second, the defendant must have had the opportunity to cross examine the declarant at the time he or she made the statement(s).²¹⁹

This interpretation of the confrontation clause, which replaced the reliability-based test announced in *Ohio v. Roberts*,²²⁰ applies only to statements offered for their truth, but that is the purpose of G.L. c. 233, § 81, which provides that the statements in question shall be admissible as substantive evidence in a criminal trial.²²¹

On its face, the statute applies to both formal and informal statements, and insofar as it provides for the admissibility of recorded statements made under oath with sufficient opportunity for cross examination,²²² such out-of-court statements would likely satisfy *Crawford*'s confrontation requirements. However, the statute's principal application is presumably to less formal statements given in circumstances in which there was no opportunity for cross examination. As to these, assuming that the trial court finds under the statute that the child declarant is unavailable,²²³ the critical question is whether the statement is "testimonial," that is, whether the statement was made with the apparent "purpose of bearing testimony against the accused."²²⁴ If it is testimonial, the statement is barred by the confrontation clause; if not, the statement satisfies the confrontation clause.²²⁵

²¹⁷ *Commonwealth v. Colin C.*, 419 Mass. 54, 64–66 (1994).

²¹⁸ 541 U.S. 36 (2004).

²¹⁹ *Id.* at 54–55.

²²⁰ 448 U.S. 56 (1980).

²²¹ G.L. ch. 233, § 81(a).

²²² *See* G.L. ch. 233, § 81(c)(1).

²²³ *See* G.L. ch. 233, § 81(b).

²²⁴ *Commonwealth v. Gonsalves*, 445 Mass. 1, 11 (2005), *cert. denied*, 548 U.S. 926 (2006).

²²⁵ The SJC has held that article 12 provides no confrontation protection beyond that offered by the Sixth Amendment. *See Commonwealth v. DeOliveira*, 447 Mass. 56, 57 n. 1 (2006).

While a final, definitive meaning of “testimonial” has yet to emerge, both the Supreme Court and the Supreme Judicial Court have extended its reach beyond formal testimony to include statements made in response to police questioning²²⁶ as well as, in some instances, statements made to persons not connected to law enforcement.²²⁷ The key to whether such an informal statement is testimonial is the purpose of the statement. Statements made for the primary purpose of assisting a criminal investigation and/or prosecution are testimonial; statements made for other purposes, e.g., to help resolve an on-going emergency, are not.²²⁸ Early on, the SJC fashioned the following two-part test for making this critical distinction:

First, “statements made in response to questioning by law enforcement agents are per se testimonial, except when the questioning is meant to secure a volatile scene or to establish the need for or provide medical care.”²²⁹

Second, “[a]n out-of-court incriminating statement that is not per se testimonial may still be testimonial in fact. The proper inquiry is whether a reasonable person in the declarant’s position would anticipate the statement being used against the accused in investigating and prosecuting a crime.”²³⁰

The first part of the test – sorting out statements that are per se testimonial from those meant to address on-going emergencies – can in some cases be difficult to apply, but when this part of the test is applied to statements covered by G.L. ch. 233, § 81, the result seems clear. Law enforcement questions put to children under ten relating to the child’s prior sexual contact with a suspect almost certainly will not constitute emergency “questioning ... to secure a volatile scene or to determine the need for or provide medical care.”²³¹ Any statements resulting from such questioning thus should be regarded as testimonial per se.²³²

²²⁶ See *Davis v. Washington*, 547 U.S. 813, 822 (2006); *Michigan v. Bryant*, -- U.S. --, 131 S.Ct. 1143 (2011); *Commonwealth v. Middlemiss*, 465 Mass. 627, 633-636 (2013); *Gonsalves*, 445 Mass. at 3.

²²⁷ See *Commonwealth v. DeOliveira*, 447 Mass. 56, 64-66 (2006) (considering whether a child-rape-complainant’s statements to a doctor unconnected to law enforcement were testimonial and thus barred by the confrontation clause).

²²⁸ See *Davis*, 547 U.S. at 822; *Bryant*, -- U.S. at --, 131 S.Ct. at 1160-1161.

²²⁹ *Gonsalves*, 445 Mass. at 3. This two-part approach to defining testimonial as it applies to police questioning while investigating reported crimes preceded the primary-purpose test announced by the Supreme Court in *Davis v. Washington*, 547 U.S. 813, 822 (2006), but it is consistent with the *Davis* approach, and the SJC continues in effect to employ it. See, e.g., *Commonwealth v. Simon*, 456 Mass. 280, 297-298 (2010); *Middlemiss*, 465 Mass. at 634 (noting that although the Supreme Court in *Bryant* broadened what constitutes emergency questions and thus nontestimonial statements, the analytic touchstone is the purpose of the questioning and statements at issue).

²³⁰ *Id.* at 12-13.

²³¹ See *Commonwealth v. Simon*, 456 Mass. 280, 297 (2010) (quoting *Gonsalves*, 445 Mass. at 13). This exemption from per-se treatment for statements made in response to police questions “to determine the need for or provide medical care” is limited to questions and answers relating to emergency, on-scene medical care. See *Gonsalves*, 445 Mass. at 9 (characterizing the exceptions to testimonial-per-se treatment as “emergency questioning” which are part of community caretaking by police, a function “inapplicable in the absence of the need for immediate assistance”); *Commonwealth v. Tang*, 66 Mass. App. Ct. 53, 59, *rev. denied*, 447 Mass. 1103 (2006) (on-scene emergency questioning to provide medical care is not interrogation, and statements thus elicited are not testimonial per se). See also *Davis*, 547 U.S. at 822 (limiting testimonial exemption to statements made in response to police questions addressing an on-going

If a statement is not testimonial per se, it still could be testimonial in fact, an inquiry to which the second part of the test is directed. This part of the test applies both to statements made to law enforcement agents (statements to police that are not per se testimonial either because they were spontaneous or because they were made in response to emergency questions) and to statements made to persons unconnected with law enforcement, e.g., relatives, friends, social workers, teachers, health professionals and the like.²³³ Here, the question is whether a reasonable person in the child declarant's position would anticipate the statement being used against the accused in investigating and prosecuting a crime.²³⁴ In answering this question,²³⁵ the SJC has mandated that the trial court make a "careful assessment of all the circumstances in which [the] statement is made,"²³⁶ including age of the child and "the particular declarant's lack of knowledge or sophistication that is attributable to age."^{237 238} It thus falls to counsel arguing under this second part of the test that statements are "testimonial in fact" to gather and present evidence that the child declarant understood that the sexual contact about which he or she spoke was, if not a crime, at least something that could get the accused in trouble and that by making the statement, the child was in effect "telling on" the accused. Otherwise, the statement may well be deemed non-testimonial and thus not subject to exclusion under the confrontation clause.

In sum, counsel opposing the Commonwealth's effort to introduce hearsay under G.L. ch. 233, § 81 should initially challenge the prosecution's arguments that the

emergency). Statements made by a child to a law enforcement agent in response to questions related to possible non-emergency medical treatment cannot thus avoid categorization as testimonial per se. *See Commonwealth v. DeOliveira*, 447 Mass. 56, 64 (2006) (holding that a child's statements to a doctor acting "entirely independent from law enforcement" were, for that reason, not testimonial per se).

²³² *See id.*; *Commonwealth v. Lao*, 450 Mass. 215, 226 (2010) (holding statements made in 911 call and to responding police officer were testimonial per se where both statements reported defendant's attempt to run declarant over with his car and neither related an on-going emergency).

²³³ *See DeOliveira*, 447 Mass. at 63.

²³⁴ *Id.* at 64 (citing and quoting *Gonsalves*, 445 Mass. at 12-13).

²³⁵ The SJC conceded that as a practical matter young children almost certainly do not comprehend that their words might be introduced in a criminal proceeding against the accused but went on to observe that this fact cannot result in every child's statement being "nontestimonial" and thus not covered by the confrontation clause. *Id.* at 64.

²³⁶ *See id.* at 64.

²³⁷ *See id.* at 65 n. 11.

²³⁸ *See id.* at 64-65 (holding that statements of a six-year-old to a doctor to whom she was taken for treatment for sexual abuse were not testimonial because, under the circumstances a reasonable person in the child's position, "armed with her knowledge, could not have anticipated that her statements [describing a penis being put 'here, here, and here,' indicating her mouth, vagina and anus] might be used in a prosecution against the defendant"). *See also Tang*, 66 Mass. App. Ct. at 60-61 & n. 10 (Lenk, J.) (collecting cases and holding that statements to a police officer by a "frantic" five-year-old child in the aftermath of a shooting not testimonial in fact, noting that in such circumstances it is "inconceivable" that the child "could have spoken in contemplation of a future legal proceeding").

statement(s) satisfy the statute.²³⁹ In many cases, in making this argument it may be necessary to consult expert witnesses and present their testimony. If a judge rules that the statute's conditions of admissibility have been satisfied, counsel should then argue that such testimony is testimonial and that its use thus violates article 12 of the Massachusetts Constitution Declaration of Rights and the Sixth Amendment to the U.S. Constitution.

§ 48.4F. SPONTANEOUS UTTERANCES

The Supreme Judicial Court has, at least in one case, upheld the admission of incriminating out-of-court statements by a child under the "spontaneous utterance" exception to the hearsay rule.²⁴⁰ Following the lead of the Supreme Court,²⁴¹ the SJC has also rejected any requirement that the declarant be "unavailable" in order for an out-of-court statement to be admissible as a spontaneous utterance.²⁴² The parameters of this exception to the rule against hearsay appear to be expanding rapidly, and out-of-court statements that would be inadmissible as corroborative "first complaint" may now be offered substantively as spontaneous utterances.²⁴³

²³⁹ See *Commonwealth v. Joubert*, 38 Mass. App. Ct. 943, 944-46 (1995) (findings required by statute were not made at probation revocation hearing where hearsay was admitted).

²⁴⁰ *Commonwealth v. Fuller*, 399 Mass. 678, 682-83 (1987). See also *Commonwealth v. Capone*, 39 Mass. App. Ct. 606, 609-10 (1996). Cf. *Commonwealth v. Ruiz*, 442 Mass. 826, 832 (2004) (allowing 12 year old girl's out-of-court statements in as spontaneous utterance in the murder trial of her mother because girl was "visibly shaking" and "upset" when she made the statement and said it shortly after the incident). But see *Commonwealth v. Trowbridge*, 419 Mass. 750, 758 (1995) (rejecting argument that child's out-of-court statement to first grade teacher — "I don't want to go visit my daddy. I don't like my daddy" — made under circumstances that sufficiently negated premeditation); *Edward E. v. Department of Social Servs.*, 42 Mass. App. Ct. 478, 484-85 (1997); *Commonwealth v. Joubert*, 38 Mass. App. Ct. 943, 945 (1995).

²⁴¹ See *White v. Illinois*, 502 U.S. 346, 357 (1992).

²⁴² *Commonwealth v. Whelton*, 428 Mass. 24, 29 (1998) (concluding that art. 12, like the Sixth Amendment, "does not require a showing that the declarant is unavailable to testify at trial before a statement is admitted under the spontaneous utterance exception to the rule against hearsay"), citing *White v. Illinois*, 502 U.S. 346, 356 (1992); *Commonwealth v. Correa*, 437 Mass. 197, 202 (2002).

²⁴³ See *Commonwealth v. McCutcheon*, 51 Mass. App. Ct. 715, 720-721 (2001) (fourteen year-old complainant's statement to neighbor that she "had been having sex with" defendant admissible as spontaneous utterance even if statement did not qualify as fresh complaint). Cf. *Commonwealth v. Kastner*, 76 Mass. App. Ct. 131, 137-39 (2010) (allowing in evidence of two adult witnesses under excited utterance exception instead of only one witness under the first complaint rule). Compare *Commonwealth v. Almeida*, 433 Mass. 717, 718-720 & n.4 (2001) (child complainant's statement — "Jorge, get off me" — made while child was sleeping inadmissible in prosecution for indecent assault and battery either as fresh complaint or as spontaneous utterance: "sleep talk" is inherently unreliable and hence inadmissible); *Commonwealth v. McGee*, 75 Mass. App. Ct. 499, 503-04 (2009) (explaining that after replacing the fresh complaint doctrine with the first complaint doctrine, greater caution needs to be taken in admitting testimony of spontaneous utterances in addition to first complaint evidence, or as substitution of first complaint evidence).

Of course, even if an out-of-court statement qualifies as a spontaneous or excited utterance and thus avoids exclusion under the hearsay rule, it still is subject to exclusion under the confrontation clause. If such a spontaneous utterance is testimonial, as such statements often may be,²⁴⁴ unless the declarant is available for cross examination at trial, the statement will almost certainly be excluded under the confrontation clause. Given that the statement was spontaneous, it is highly unlikely that the defendant would have had the opportunity to cross examine the declarant at the time he or she made the statement. *See supra* Section 48.4E.

§ 48.5 EXPERT TESTIMONY ²⁴⁵

It is a common practice for prosecutors to offer expert testimony at the trials of child sex abuse cases. Such proffered expertise is usually purported to relate to “general behavioral characteristics”²⁴⁶ of sexually abused children, including the ways that children typically “disclose” sexual abuse.²⁴⁷ As such, the subject matter of such expertise may aptly be characterized as “profile testimony,” which the courts, as a general matter, have scrutinized carefully.²⁴⁸

²⁴⁴ While statements in response to police questions are not, for that reason, excluded from the category of spontaneous utterances, *see, e.g.*, *Commonwealth v. Fuller*, 399 Mass. 678, 682-683 (1987), they are testimonial per se unless made in response to questions asked to secure a volatile scene or establish the need for or provide emergency medical care. *See supra* Section 48.4E. Even if the statements are volunteered, as most spontaneous utterances are, they still are testimonial in fact if a reasonable person in the declarant’s position would anticipate that the statement might be used in investigating or prosecuting the accused for a crime. *Id.* Given the accusatory nature of spontaneous utterances offered substantively against the defendant, that often might be the case.

²⁴⁵ *See supra* ch. 12 (forensic science and expert testimony).

²⁴⁶ *Commonwealth v. Dockham*, 405 Mass. 618, 627–29 (1989); *Commonwealth v. Deloney*, 59 Mass. App. Ct. 47, 54 (2003). *See also* *Commonwealth v. O’Brien*, 35 Mass. App. Ct. 827, 832 (1994) (discussing expertise regarding the “distinctive signs and symptoms” of child sexual abuse).

²⁴⁷ *Commonwealth v. Montanino*, 409 Mass. 500, 504 (1991), *overruled on other grounds*, *Commonwealth v. King*, 445 Mass. 217, 242 (2005) (substituting doctrine of first complaint for that of fresh complaint). *See also* *Commonwealth v. Rather*, 37 Mass. App. Ct. 140, 143, 147-49 (1994) (discussing expertise relating to patterns of delayed or gradual “disclosure,” retraction, and recantation in child sex abuse cases); *Commonwealth v. Poitras*, 55 Mass. App. Ct. 691, 693 (2002) (allowing this type of testimony because it did not link expert’s opinions to complainant, either implicitly or explicitly, and did not compare the behaviors testified to with those of the complainant).

²⁴⁸ *See, e.g.*, *Commonwealth v. Day*, 409 Mass. 719, 723 (1991) (expert opinion that defendant fit profile of individual who abused children deemed inadmissible because mere fact that defendant fits profile does not tend to prove he committed the crime); *Commonwealth v. Poitras*, 55 Mass. App. Ct. 691, 693-95 (2002) (same, citing *Day*); *Commonwealth v. Deloney*, 59 Mass. App. Ct. 47, 57 (2003) (profile of victims of child sexual abuse was impermissible); *Commonwealth v. Morris*, 82 Mass. App. Ct. 427, 431-37 (2012) (discussing admissibility of expert testimony on domestic violence in general and on “battered woman’s syndrome”); *Commonwealth v. Caraballo*, 81 Mass. App. Ct. 536, 536-40 (2012) (discussing admissibility of street level drug dealer profile testimony).

In the context of child sex abuse cases, the proffered expert witness is usually a social worker,²⁴⁹ child psychologist²⁵⁰ or psychiatrist,²⁵¹ but the scope of the expertise that might potentially be proffered is broad.²⁵²

Although judges have discretion even to admit expert testimony that approaches the “ultimate issue before the jury,”²⁵³ that discretion is, as a practical matter, substantially limited in child sex abuse cases by the countervailing “fundamental principle” against the admissibility of “opinion testimony,”²⁵⁴ which bars any witness, lay or expert, from commenting on or endorsing the credibility of another witness.²⁵⁵ “Whether a witness testifies truthfully or according to some fictional script is for the jury to decide.”²⁵⁶

The prohibition against “opinion testimony” applies whether the comment on credibility is direct²⁵⁷ or, as is more likely to be the case, implied.²⁵⁸ The test for

²⁴⁹ See, e.g., *Commonwealth v. Frangipane*, 433 Mass. 527, 535 (2001).

²⁵⁰ See, e.g., *Commonwealth v. Polk*, 462 Mass. 23, 27 (2012).

²⁵¹ See, e.g., *Commonwealth v. Baran*, 74 Mass. App. Ct. 256, 266 n. 15 (2009).

²⁵² See, e.g., *Commonwealth v. LeFave*, 407 Mass. 927, 931-38 (1990) (postal inspector permitted to testify that child pornography was motive for sexual abuse of children).

²⁵³ *Commonwealth v. Tolan*, 453 Mass. 634, 647 (2009) (citing and quoting *Commonwealth v. Colin C.*, 419 Mass. 54, 59 (1994)).

²⁵⁴ *Commonwealth v. Montanino*, 409 Mass. 500, 504 (1991), *overruled on other grounds*, *Commonwealth v. King*, 445 Mass. 217, 242 (2005) (substituting doctrine of first complaint for that of fresh complaint).

²⁵⁵ *Commonwealth v. Baran*, 74 Mass. App. Ct. 256, 279 (2009).

²⁵⁶ *Commonwealth v. Brusgulis*, 398 Mass. 325, 331 n.12 (1986), *quoted in* *Commonwealth v. Colin C.*, 419 Mass. 54, 60 (1994). See also MARK BRODIN & MICHAEL AVERY, *HANDBOOK OF MASSACHUSETTS EVIDENCE* § 6.12, at 315 (8th ed. 2007) (“It is improper to ask a witness to comment (positively or negatively) on the credibility of another witness”). For cases in which lay rather than expert testimony was held inadmissible as opinion evidence, see *Commonwealth v. Powers*, 36 Mass. App. Ct. 65, 67 (1994), and *Commonwealth v. Lorette*, 37 Mass. App. Ct. 736, 739-40 (1994), S.C. 419 Mass. 1110 (1995) (both involving impermissible credibility endorsement by child's mother).

²⁵⁷ See, e.g., *Commonwealth v. Quincy Q.* 434 Mass. 859, 873-874 (2001) (testimony of child complainant's father that father had said to another, "You've known [the complainant] since she could talk.... [S]he'll tell you the truth" constituted an improper affirmation by father “that the complainant was truthful”), *overruled on other grounds*, *Commonwealth v. King*, 445 Mass. 217, 242 (2005) (substituting doctrine of first complaint for that of fresh complaint); *Commonwealth v. Powers*, 36 Mass. App. Ct. 65, 67 (1994) (holding that reversible error occurred where witness was permitted to opine there was “no doubt in my mind” that child was “telling . . . the truth about what the defendant did to her”).

²⁵⁸ See, e.g., *Commonwealth v. Trowbridge*, 419 Mass. 750, 759–60 (1995) (child's behavior [avoidance of eye contact and clinging to mother] and physical condition [absence of physical evidence of violence] were “consistent with” sexual abuse having occurred in manner alleged, i.e., nonviolently); *Commonwealth v. McCaffrey*, 36 Mass. App. Ct. 583, 591 (1994) (improper for expert to describe child's conduct in terms that jury “could not have failed to note resembled the behavior the expert had earlier testified to as characteristic of sexually abused children”); *Commonwealth v. Velazquez*, 78 Mass. App. Ct. 660, 666-67 (2011) (expert noted that child was able to show with anatomically correct dolls “what happened to her” and explained why she, the expert, was not surprised by the absence of physical trauma);

determining whether testimony that falls short of an explicit opinion that the child's allegation of sexual abuse is credible is nonetheless impermissible as opinion testimony is whether the jury would “reasonably . . . conclude[] that the witness had implicitly rendered an opinion as to the general truthfulness” of the child,²⁵⁹ or whether the evidence amounts in essence to testimony that the child's accusation is “likely true.”²⁶⁰

Thus, even if an expert is permitted to testify about the general behavioral characteristics of sexually abused children, counsel should object to: (1) questioning that seeks to have the expert “refer[] or compar[e] the child to those general characteristics”;²⁶¹ (2) hypothetical questions put to the expert that fit evidence descriptive of the child;²⁶² (3) use of a treating professional as an expert,²⁶³ which creates “serious . . . danger”²⁶⁴ that the profile testimony will be taken as an endorsement of credibility; (4) final argument by the prosecutor that attempts to link the alleged victim to the profile evidence;²⁶⁵ or (5) any other attempt by the prosecution to utilize the expert profile ‘evidence regarding sexually abused children as “affirmative[]” or “‘substantive’ ” evidence that the complainant in the case “was in fact sexually abused.”²⁶⁶ Inasmuch as the primary issue typically in dispute in child sex abuse cases is precisely whether or not the child's allegations are true, the rule barring

Commonwealth v. Calderon, 65 Mass. App. Ct. 590, 592 (2006) (victim's exam was “consistent with her disclosures”).

²⁵⁹ Commonwealth v. Rather, 37 Mass. App. Ct. 140, 149 (1994).

²⁶⁰ Commonwealth v. Colin C., 419 Mass. 54, 61 (1994). *See also* Care & Protection of Rebecca, 419 Mass. 67, 83 (1994); Commonwealth v. LaCaprucia, 41 Mass. App. Ct. 496, 497-99 (1996).

²⁶¹ Commonwealth v. Trowbridge, 419 Mass. 750, 759-60 (1995) (doctor impermissibly testified that child's behavior and physical condition were “consistent with the type of non-violent sexual abuse that the child alleged in this case”); Commonwealth v. Calderon, 65 Mass. App. Ct. 590, 592 (2006) (statement that victim's exam was “consistent with her disclosures” was improper).

²⁶² Commonwealth v. Federico, 40 Mass. App. Ct. 616, 618 & n.2 (1996), S.C., 425 Mass. 844 (1997); Commonwealth v. Rather, 37 Mass. App. Ct. 140, 148-49 (1994); Commonwealth v. Trowbridge, 419 Mass. 750, 759 & n.5 (1995); Commonwealth v. Perkins, 39 Mass. App. Ct. 577, 582-83 (1995).

²⁶³ *See* Commonwealth v. Velazquez, 78 Mass. App. Ct. 660, 666-68 (2011); Commonwealth v. Brouillard, 40 Mass. App. Ct. 448, 451-53 (1996), *overruled on other grounds*, Commonwealth v. King, 445 Mass. 217, 242 (2005) (substituting doctrine of first complaint for that of fresh complaint); Commonwealth v. McCaffrey, 36 Mass. App. Ct. 583, 592-93 (1994).

²⁶⁴ Commonwealth v. Rather, 37 Mass. App. Ct. 140, 148 n.4 (1994). *Compare* Commonwealth v. Malchionno, 47 Mass. App. Ct. 73, 75-77 (1999) (social worker who interviewed child complainants properly permitted to opine that it was “very common” for “young girls to hide incidents of sexual abuse against them,” where defendant, who called social worker as impeachment witness, elicited fact that children told social worker that defendant had not committed acts alleged, creating a “serious need” for the Commonwealth to “rehabilitate” child complainants, and justifying opinion testimony).

²⁶⁵ Commonwealth v. Rather, 37 Mass. App. Ct. 140, 149 (1994).

²⁶⁶ Commonwealth v. Hudson, 417 Mass. 536, 541 (1994) (quoting *State v. J.Q.*, 130 N.J. 553, 563-64 (1993)).

“opinion testimony” raises substantial practical difficulties for prosecutors in using expert testimony permissibly in such cases.²⁶⁷

Indeed, it might be said that the courts will permit child abuse profile expertise to be admitted but only if it is made to appear irrelevant.²⁶⁸ The origin of this paradox, which should be pressed in a motion to exclude the proffered testimony, is that such expertise *is* irrelevant: Child abuse experts agree that behavioral profiles do *not* reliably predict whether sexual abuse has in fact occurred, and, indeed, do not purport to do so. Rather, such expertise “*assumes* [sexual abuse] has occurred and seeks to describe and explain common reactions of children to the experience.”²⁶⁹ Thus, while presumably useful for the psychiatric purpose of treating emotionally troubled children, profile expertise has no reliable application to the legal task of determining whether a child's allegation of sexual abuse is in fact true. The problem is not so much that such expertise is “soft science” but rather that because its methodology begins with the assumption that the “disclosure” is true, child abuse profile expertise is incapable of reliably assisting the fact finder in resolving whether abuse actually occurred.²⁷⁰ Inevitably, such expertise will appear to endorse the claim of abuse, the credibility of which is the ultimate, if not sole, issue in dispute.

It is incumbent on defense counsel to ascertain through discovery the identity, qualifications, and proposed testimony of expert witnesses to be called by the

²⁶⁷ In contrast to testimony regarding behavioral characteristics of sexually abused children, the courts have been less critical of expert medical testimony regarding physical attributes alleged to be typical of such children. *See* Commonwealth v. Quincy Q., 434 Mass. 859, 871-872 (2001) (pediatrician could permissibly testify that child rape complainant's physical presentation – “completely normal” – was consistent with that of the majority of girls examined for possible sexual abuse: such testimony may disabuse jurors of the mistaken assumption that sexual abuse of a child almost always causes physical injury or scarring), *overruled on other grounds*, Commonwealth v. King, 445 Mass. 217, 242 (2005) (substituting doctrine of first complaint for that of fresh complaint); Commonwealth v. Lawton, 82 Mass. App. Ct. 528, 539 (2012), *rev. denied*, 464 Mass. 1102 (2013) (permissible for expert to testify that, in high percentage of cases where anal penetration has occurred, it cannot be detected during an examination; that doctor would not expect to find evidence of penetration when tongue is alleged to have been the penetrating object; that any bruising would go away within four days to a week; and that a rape kit is not used if child was not brought in for an examination within 72 hours); Commonwealth v. Velazquez, 78 Mass. App. Ct. 660, 666-67 (2011) (expert was not surprised by the lack of physical trauma). Counsel should nonetheless remain alert to the conclusory and prejudicial assumptions that underlie such medical opinion testimony. *See, e.g.*, Commonwealth v. Colon, 49 Mass. App. Ct. 289, 291 (2000) (endorsing pediatrician's testimony that only fifteen to twenty percent of physical examinations among girls with “confirmed sexual-abuse histories” showed physical evidence of penetration).

²⁶⁸ *See, e.g.*, Commonwealth v. Swain, 36 Mass. App. Ct. 433, 445 (1994) (child abuse profile expert may not opine as to whether child's behavior or condition “in any way conformed to or was consistent with” characteristics of sexually abused children generally); Commonwealth v. Deloney, 59 Mass. App. Ct. 47, 58 (2003) (expert gave eight characteristics of child abuse victims, painting a portrait of one of the child victims).

²⁶⁹ *People v. Bowker*, 203 Cal. App. 3d 385, 394 (1988) (emphasis in original). *Cf.* *State v. Alberico*, 861 P.2d 192, 210 (N.M. 1993) (PTSD expertise admissible because it has some probative value that abuse in fact occurred); *State v. Paiz*, 149 P.3d 579, 585 (2006) (N.M. App. 2006).

²⁷⁰ *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993) (“‘Fit’ is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes”).

Commonwealth.²⁷¹ The defense can then counterattack by calling its own expert witnesses at trial²⁷² or by moving in limine to exclude the proffered testimony of the Commonwealth's experts.

§ 48.6 SCOPE OF CHILD SEX ABUSE LAWS

Statutory rape²⁷³ indecent assault and battery on a child under fourteen,²⁷⁴ and kidnapping a child of “tender years,”²⁷⁵ are strict liability crimes, that is, consent, reasonable mistake of fact as to age, and mistake as to the identity of the complaining witness are not defenses.²⁷⁶ The age of the complainant, however, is an element to be proved.²⁷⁷

A defendant may not be excused from criminal liability because he himself had no actual sexual contact with a child but instead forced the child to participate in sexual activity with another person.²⁷⁸ It is a crime in Massachusetts to pose a child under eighteen years of age “in a state of nudity,”²⁷⁹ to disseminate material depicting a minor in a state of nudity,²⁸⁰ and to possess child pornography, which includes “depiction by computer.”²⁸¹ These statutes are “intended to protect minors from exploitation,” but, if

²⁷¹ See Rule 14(a)(1)(A)(vi) (mandating such discovery).

²⁷² See *Commonwealth v. Allen*, 40 Mass. App. Ct. 458, 463-65 (1996) (discussing admissibility of expert testimony regarding suggestiveness of interview techniques). See also *supra*, § 48.2A at n.88.

²⁷³ G.L. c. 265, § 23.

²⁷⁴ G.L. c. 265, § 13B, as amended by St. 1986, c. 187.

²⁷⁵ *Commonwealth v. Colon*, 431 Mass. 188, 191-93 (2000) (defining “tender years” as “under fourteen,” and construing kidnapping statute, G.L. c. 265, § 26, as making consent irrelevant in cases where alleged victim is of such an age, despite statutory language requiring that kidnapping be “against [the alleged victim’s] will”). See *Commonwealth v. Rivera*, 460 Mass. 139, 142 (2011).

²⁷⁶ *Commonwealth v. Knap*, 412 Mass. 712, 714-15 (1992). See also *Commonwealth v. Disler*, 451 Mass. 216, 226 (2008) (discussing strict-liability crimes enumerated by child enticement statute, G.L. c. 265, § 26C).

²⁷⁷ *Commonwealth v. Traynor*, 40 Mass. App. Ct. 527, 528-29 (1996); *Commonwealth v. Lawton*, 82 Mass. App. Ct. 528, 533 (2012).

²⁷⁸ *Commonwealth v. Nuby*, 32 Mass. App. Ct. 360, 361-62 (1992). See also *Commonwealth v. Davidson*, 68 Mass. App. Ct. 72, 72-73 (2007). Compare *Commonwealth v. Raposo*, 413 Mass. 182, 183-88 (1992) (defendant's failure to prevent boyfriend from sexually abusing defendant's minor daughter did not make defendant liable as an accessory); *Commonwealth v. Harris*, 74 Mass. App. Ct. 105, 114-15 (2009) (defendant was guilty for statutory rape under presence theory of joint-venture liability when he obtained the hotel room and drove the acquaintance and the victim, who “looked kind of young,” to the hotel room).

²⁷⁹ G.L. c.272, §29A.

²⁸⁰ G.L. c.272. §29B.

²⁸¹ G.L. c.272, §29C. See *Commonwealth v. Hinds*, 437 Mass. 54, 63-64(2002) (upholding defendant’s conviction for possession of child pornography under §29C, where police found unopened graphic image file on defendant’s computer hard drive: “‘depiction by computer’ includes graphic computer images stored in the form of data”); *Commonwealth v. Hall*, 80 Mass. App. Ct. 317, 325-27 (2011) (statute applies to cell phone camera images).

construed too broadly, may be directed at material and activities that are protected by the First Amendment.²⁸² Thus, to permissibly criminalize the posing or photographing of a naked child, the child must be in a state of “nudity” as that word is defined by the statute,²⁸³ the defendant must have actual or constructive knowledge that the child is in fact under eighteen years of age,²⁸⁴ and the posing must have been done with “lascivious intent.”²⁸⁵

A defendant is also criminally liable for enticing a child under sixteen to commit certain crimes, whether or not the crimes actually occurred or were even possible.²⁸⁶ The statute defines “entice” as “to lure, induce, persuade, tempt, incite, solicit, coax or invite,” providing that “[a]ny one who entices a child under the age of 16, or someone he believes to be a child under the age of 16, to enter, exit or remain in any vehicle, dwelling, building, or other outdoor space with the intent that he or another person” will commit any one of a list of crimes – including various forms of indecent assault, rape and other sexual crimes or crimes involving force or the threat of force – is guilty of a felony.²⁸⁷ Although some of the enumerated crimes covered by this statute, such as indecent assault and statutory rape, have age and consent elements as to which strict liability applies, the SJC has held that the enticement statute’s specific-intent provision requires proof in such cases that an accused intended to commit the crime in question, including all of its elements (even those elements as to which strict liability applies).²⁸⁸ So, in a case charging one with enticing a child under sixteen to

²⁸² *Commonwealth v. Bean*, 435 Mass. 708, 711-712 (2002).

²⁸³ G.L. c.272, §31 (defining “nudity” as “uncovered or less than opaquely covered human genitals, pubic areas, the human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernibly turgid state. For purposes of this definition, a female breast is considered uncovered if the nipple or areola only are covered”).

²⁸⁴ *Compare Commonwealth v. Wright*, 60 Mass. App. Ct. 108, 110-12 (2003) (holding evidence that defendant had a relationship with the victim’s mother and lived in victim’s home off and on prior to posing her for nude photographs was insufficient evidence that he knew, or had reason to know, she was 17 when he took the photographs) *with Commonwealth v. O’Connell*, 432 Mass. 657, 661-663 (2000) (jury could permissibly conclude that defendant knew or should have known that person depicted in inculpatory photograph was under eighteen where there was circumstantial evidence that the photograph depicted the genitalia of the defendant’s eight year old niece, and where an expert testified that the genitalia depicted in the photograph “in all likelihood” belonged to a girl “under eleven and a half [years old]”).

²⁸⁵ *Compare Commonwealth v. Bean*, 435 Mass. 708, 711-16 & n.17 (2002) (insufficient evidence that defendant posed bare-breasted fifteen-year “with lascivious intent” where, notwithstanding the subject’s state of nudity, the photographs did not show or reasonably suggest sexual behavior: “The depiction of mere nudity is not enough to support a conviction under G.L. c. 272, §29A”) *with Commonwealth v. Sullivan*, 82 Mass. App. Ct. 293, 304-07 (2012) (sufficient evidence that photograph was a “lewd exhibition” where the photograph was found on a Russian photo-sharing website rather than a textbook or museum, the focal point was on the girl’s genitalia, pubic area, and breasts, and the pose could have been seen as “sexually suggestive”).

²⁸⁶ G.L. c. 265, § 26C. *See Commonwealth v. Disler*, 451 Mass. 216, 223 (2008) (no defense to child enticement where the “child” the defendant sought to entice on-line was actually a police officer; factual impossibility not a defense).

²⁸⁷ G.L. c. 265, § 26C.

²⁸⁸ *See Disler*, 451 Mass. at 227-228.

commit the crime of statutory rape,²⁸⁹ the Commonwealth would have to prove that the accused enticed the child intending to have sexual intercourse with a child under sixteen, even though the crime of statutory rape itself is strict liability with respect to the child's age.²⁹⁰ If the crime which was the subject of enticement is one that applies to child victims under 14, for example indecent assault,²⁹¹ the Commonwealth must prove that the accused "*intended that his advances be directed to an underage person (i.e., under the age of fourteen for purposes of [the indecent assault statute].*"²⁹²

§ 48.7 PREDISPOSITION TO SEXUALLY ASSAULT CHILDREN

Testimony purporting to show that a defendant is predisposed to commit sexual assaults has been strictly scrutinized.²⁹³ When the prosecution offers evidence of sexual conduct with a child other than the alleged victim, the court may admit it only if it so closely related in time, place, and form of acts as to show a common course of conduct and if the probative value outweighs the prejudice to the defendant.²⁹⁴ Although the factors to be considered are the same, the result of the balancing test may be different where collateral sexual misbehavior is alleged to involve the victim named in the indictment rather than another child.²⁹⁵

Admission of evidence of possession of incestuous reading material had necessitated reversal of a conviction for rape and abuse of a child.²⁹⁶ Reversal was also required when evidence was admitted that the defendant made statements of incestuous intent several years prior to the time of the alleged assault,²⁹⁷ and, in another case, when the judge admitted evidence that the defendant bullied the alleged victim into an abortion several years after the alleged abuse ended.²⁹⁸ It is also impermissible for the

²⁸⁹ G.L. c. 265, § 23.

²⁹⁰ *See* Disler, 451 Mass. at 227-228.

²⁹¹ G.L. c. 265, § 13B.

²⁹² *Commonwealth v. Filopoulos*, 451 Mass. 234, 238 (2008) (emphasis in original).

²⁹³ *See, e.g., Commonwealth v. Johnson*, 35 Mass. App. Ct. 211, 217-18 (1993) (evidence of sexual touching occurring 40 months after incident for which defendant was on trial inadmissible).

²⁹⁴ *See Commonwealth v. Barrett*, 418 Mass. 788, 793-95 (1994); *Commonwealth v. Hanlon*, 44 Mass App. Ct. 810, 819-21 (1998); *Commonwealth v. Whiting*, 59 Mass. App. Ct. 104, 108-10 (2003).

²⁹⁵ *Compare Commonwealth v. Frank*, 51 Mass. App. Ct. 19, 23-24 (2001) (evidence of defendant's "misbehaviors" toward child complainant prior to the time period specified in the indictment admissible to show "entire relationship" between defendant and child, and to show defendant's "sexual desire for the victim") *with Commonwealth v. Dwyer*, 448 Mass. 122, 127-30 (2006) (unfairly prejudicial to admit detailed evidence of seven uncharged acts of sexual abuse by defendant of victim where the detailed evidence dominated trial, jury's attention was repeatedly drawn to the uncharged conduct, and the uncharged conduct was emphasized in prosecutor's closing argument) .

²⁹⁶ *Commonwealth v. LaSota*, 29 Mass. App. Ct. 15, 25-28 (1990).

²⁹⁷ *Commonwealth v. Gillette*, 33 Mass. App. Ct. 427, 429-32 (1992).

²⁹⁸ *Commonwealth v. Almeida*, 42 Mass. App. Ct. 607, 611-13 (1997).

prosecutor to imply through her cross-examination that the defendant has engaged in acts of sexual misconduct unrelated to those with which he is charged.²⁹⁹

On the other hand, bad acts of the defendant, whether sexual in nature or not, may be admitted to show the relationship of the defendant to the complainant and the pattern or consistency of his behavior.³⁰⁰ Uncharged misconduct has also been admitted to explain a child's delay in reporting sexual assault.³⁰¹

§ 48.8 JURY SELECTION

Among the many difficulties in trying a child sex case is the fact that jurors abhor the charges and that many jurors have, directly or indirectly, come into contact with child sexual abuse or other forms of sexual assault. Trial judges are required, on the request of the defendant, to interrogate each potential juror individually as to whether she experienced sexual abuse as a child,³⁰² and a judge's failure to ask the required questions individually will be viewed as presumptively prejudicial.³⁰³ It remains within the discretion of the judge to conduct more extensive individual voir dire. Counsel should request the judge to ask each juror individually whether the juror or any close friends or family members have been the victim of any form of sexual assault (as a child or an adult); whether the juror has been employed by or affiliated with any agency (including hospitals, law enforcement agencies, or rape crisis centers) that counsels or assists sexual assault victims;³⁰⁴ whether the juror would believe the testimony of a child over that of other witnesses because of a belief that children do not lie; and whether the nature of the charges makes it difficult for the juror to remain impartial.

²⁹⁹ *Commonwealth v. DeMars*, 38 Mass. App. Ct. 596, 597–98 (1995); *Commonwealth v. DeMars*, 42 Mass. App. Ct. 788, 790, 790-99 (1997), S.C. 426 Mass. 1008 (1998) (prosecutor improperly asked defendant in child abuse case whether his wife was 16 years old when he married her).

³⁰⁰ *See Commonwealth v. Holloway*, 44 Mass. App. Ct. 469, 474–77 (1998) (evidence that defendant gave alcohol to teenage complainant and showed her pornographic movies admissible); *Commonwealth v. Jaundou*, 64 Mass. App. Ct. 56, 61-64 (2005) (evidence that defendant showed victim pornographic videos and testimony about pornography in defendant's possession was admissible, but admitting a substantial quantity of pornographic materials for the jury to view was error). *Compare Commonwealth v. Yetz*, 37 Mass. App. Ct. 970, 971 (1995) (evidence that defendant had consensual sex with minor in past should not have been admitted in case alleging that defendant forcibly raped another minor).

³⁰¹ *Commonwealth v. Richardson*, 38 Mass. App. Ct. 384, 391–92 (1995), S.C., 423 Mass. 180, 187–88 (1996); *Commonwealth v. McKinnon*, 35 Mass. App. Ct. 398, 404–05 (1993).

³⁰² *Commonwealth v. Flebotte*, 417 Mass. 348, 353 (1994); *Commonwealth v. Whiting*, 59 Mass. App. Ct. 104, 107 (2003); *Commonwealth v. Vickery*, 82 Mass. App. Ct. 234, 235 (2012).

³⁰³ *Commonwealth v. Holloway*, 44 Mass. App. Ct. 469, 473-74 (1998).

³⁰⁴ *See Commonwealth v. Fruchtman*, 418 Mass. 8, 11 n.5, 13 (1994) (upholding trial judge's denial of peremptory challenges in child sexual abuse case assertedly because of jurors' employment where there was no evidence that the jurors in question had any contact with children at their respective jobs and where the challenges, all used to strike prospective women jurors, were not supported by legitimate gender-neutral reasons).