FEAR AND LOATHING: WHEN THE DSS GETS INVOLVED IN YOUR CASE

By Victoria Jayne

We can all agree that the sexual abuse of a child is a loathsome crime. The sexual abuse of a child by a "caretaker" is particularly unconscionable. Those of us who have spent any time in juvenile court have borne witness to shocking cases of the exploitation of innocent victims. Often these victims are too young and unsophisticated to remember exact dates and times that assaults occur and thus statements to teachers, doctors----social workers become crucial pieces of evidence. Rules of Evidence are relaxed to allow hearsay and allowances are made to accommodate a young witness. These allowances include leading questions during direct examination, in-camera examinations and other limitations on the confrontation of the young witness, all to protect the young victim from direct confrontation with the alleged perpetrator.

It is against this backdrop of procedures promulgated to ease the stress and trauma for the young victim of alleged abuse that the defense attorney finds him or herself. It is within these special rules for these special cases that the defense attorney must evaluate the evidence against the client charged with this hideous crime and deal with the plethora of statements, opinions and investigators
that usually are involved in this type of case.

These cases often originate in the jurisdiction of the juvenile court arena, i.e.-- the hive of the Department of Social Services, the Guardian Ad Litem, and all of their well meaning, worker bee volunteers and social workers.

As hideous as the actual crime of sexual abuse is, the jump to judgment and hysteria that builds when such an accusation is brought against an adult is not unlike the recent hurricanes that swept through Florida to our mountains, gathering wind speed and torrential rains to bring destruction almost beyond repair to anything or anyone in its path. Once a man or woman is accused by someone who claims that have reliable information that they have "molested" a child, the storm begins. Once DSS "substantiates" that sexual abuse has happened, the category of the storm increases and often causes such destruction of reputation, family ties, and personal integrity that the meager defense attorney brought in to advocate for his client's constitutional right to a fair trial and to innocence until proof of guilt, might as well be trying to avert the rains of the hurricane with an umbrella and without a paddle in his little canoe swimming upstream.

In my opinion, based solely on professional experience over the last 16 years, for as many actual perpetrators that I have represented or prosecuted, there are equally as many
innocent men and women, falsely accused of this hideous
offense. The damage caused by the **accusation** not to mention
the inquisition that often follows by DSS and the hoard of
"professional" investigators they bring into the situation
all promote an atmosphere of distorted facts, exaggerated
statements and tainted testimonies. It is those falsely
accused, innocent, unfortunate individuals who mandate our
relentless efforts to fight and insist on fairness and
objective reasoning and common sense for all who may be or
have been charged as a sexual predator of the young.

**BASIC DSS AND GAL INFO 101**

For those of you who do not practice in the twilight
world of juvenile court some basic information may be
helpful when you find yourself either appointed or retained
to represent an adult charged with sexual abuse of a child.

**FIRST,** Chapter 7B of the North Carolina General
Statutes grants ,"EXCLUSIVE ORIGINAL JURISDICTION OVER ANY
CASE INVOLVING A JUVENILE WHO IS ALLEGED TO BE ABUSED,
NEGLECTED OR DEPENDENT," (7B-200) and an abused juvenile is
defined to be "any juvenile less than 18 years of age" who
is , in the context of this discussion, sexually abused by
a"**parent, guardian, custodian, or caretaker**" (7B-101 see
definitions). Note that if there is a report of alleged sexual abuse of a child while in a child care facility, 7B-301 requires that DSS notify the SBI within 24 hours of the initial report. Further, §7B-307 requires the DSS to "make an immediate oral and subsequent written report" to the district attorney and law enforcement when they "find evidence" of abuse. Then law enforcement has 48 hours to initiate a criminal investigation based on the report. Often, when an allegation of sexual abuse is made, the social worker and law enforcement investigator conduct the investigation together initially.

What this all means to a defense attorney is that MANY people are involved from the beginning scurrying around conducting interviews, talking to the child, sharing information AND opinions, and comparing stories. Although a competent investigation can result in competent reliable interviews and a thorough investigation, as often as not, you are handed a discovery file containing contaminated interviews and tainted statements. By the time you are in the case, the damage caused by incompetent, over zealous interviewers has happened and often, even if law enforcement wants to conduct an objective investigation, the child victim has already been interviewed and prompted and reminded and educated as to sex to the point that the truth may never set anyone free-- especially your client.
SECOND, the *files* of DSS including names, interviews, information etc. as to their investigation of your client are "confidential" as are the *hearings* in juvenile court regarding any juvenile petitions filed alleging that your client abused a child in his or her care. The standard of proof is that of a civil case and the rules of evidence are often relaxed even though they are supposed to apply during the adjudication phase of a juvenile hearing. Even though attorneys representing your client in juvenile court may request discovery, they are often denied even the knowledge of certain interviews, background information and prior investigations or complaints germane to the case against your client.

Neither the DA nor the Superior Court judge have unfettered access to the juvenile court proceedings or to the file of DSS. What this means for you as defense attorney is that you must make a formal request through motion and subpoena for statements, transcripts, investigation notes and all other information which is otherwise confidential and not a part of the District Attorney's "OPEN FILE" to you.

THIRD, the testimony in juvenile court as to the alleged abuse often comes in with no regard for competency requirements. That is to say DSS and the GAL will fight to
have their social workers and DSS paid experts testify as to the child's statements without a competency hearing for the child and without the notice and other requirements of 803(24) and 804(b)(5). What this means for you as defense attorney is that you must evaluate each statement allegedly made by the child as to time, place, and circumstance. If possible insist that the juvenile court adhere to the same standards for competency that every other court adheres to. It also helps to realize that, unfortunately, the agenda of DSS is not necessarily to get at the truth of what did or didn't happen but to validate the filing of the petition and justify the taking of the child from the home, sometimes the home of your client. Also know that even if the juvenile hearing results in a finding of NO sexual abuse by your client that this does NOT close the DSS file or dismiss the charges against your client. On the contrary, once DSS is in your client's life they are loath to leave if sexual abuse allegations have been made and they will continue to interview the child, demand that your client enter a "service agreement" if he or she ever wants to see the child, and have unauthorized contact with your client under the pretext of trying to work towards reunification for your client and the child.

Of course if your client is facing the criminal charges while the juvenile hearing is going on, you must advise your
client whether or not to testify in this pseudo-civil hearing. Since this is a civil hearing and if your client opts not to testify, it is much more difficult for the juvenile court attorney to disprove the claims of DSS. Ask anyone who has represented parents or other "caretakers" in the DSS courtroom and I am sure they will agree that the prevailing opinion of DSS and the GAL is that your client is guilty if accused and still guilty even if the petition is not proved by clear cogent and convincing evidence.

**SIMPLE STEPS TO DEAL WITH NOT SO SIMPLE SITUATIONS**

1. Did DSS interview the child? Your client? Other people?

   A. Since they have original jurisdiction, DSS should have interviewed the child and even your client unless client refused.

   B. How many times and by whom was the child interviewed? Who was in the room each time? How long was interview? Was it taped? Where are the notes of the interview? Who did the interview? Did they use anatomical dolls or "play therapy"

   C. What training did the interviewer have? What information did the interviewer receive before the interview? REMEMBER THE FIRST INTERVIEW IS THE MOST CRUCIAL.
D. MAKE A MOTION AND SUBPOENA THE ENTIRE FILE, ALL
NOTES AND TAPES OF INTERVIEWS -- be prepared for a motion to
quash from DSS-- ask for an in camera view from the Superior
Court judge. Of course, whatever you receive may also be
made available to the DA. It is IMPERATIVE that you know the
content and extent of all interviews with the child. It is
IMPERATIVE that you receive the actual tape recording or
videos if they are available. Do not agree to just accept a
transcript.

2. Was there a hearing in Juvenile Court? Was your client
represented? Did he or she testify?

   a. Contact the attorney for your client in juvenile
court and if possible attend the juvenile court proceedings.

   B. Work with your client’s attorney in this court to
declare whether or not your client should testify.

   C. Use the juvenile proceeding to do discovery of
potential witnesses.

   D. MAKE A MOTION FOR THE TRANSCRIPT OF THE JUVENILE
PROCEEDING. TAKE IT BEFORE THE DISTRICT COURT JUDGE THAT
HEARD THE CASE. If he or she will not authorize the
transcript, then go the superior court judge. Even though
the hearing is closed and can not be introduced in the
criminal trial insist that the statements of the alleged
victim and witnesses is BRADY and important for your
investigation of the case. You may or may not be successful— all the more reason to attend the juvenile hearing and hear the testimony against your client.

3. Is the child going to testify? How many potential corroborating witnesses are there? Was or has there been notice under 803(24)?

   a. Remember competency of the witness is in the discretion of the judge. Read the competency statutes so you know what the judge will look for in determining if the child can testify. It does not take much to be a competent witness— does not mean the child has not been led or manipulated or convinced that something happened.

   B. If the child testifies, statements to social workers and all their "experts" become corroborating and should be confined to only statements that corroborate, MAKE A MOTION IN LIMINE TO EXCLUDE OR LIMIT TESTIMONY TO CORROBORATE ONLY.

   C. If child is found incompetent to testify, then BEWARE— all those eager social workers and their paid experts will be ready to testify as to SUBSTANTIVE evidence of what they say the alleged victim said your client did. If this happens, YOU ARE ENTITLED TO NOTICE OF EACH AND EVERY STATEMENT PURSUANT TO RULE 803(24) AND /OR 804(D)(5) OF THE
NORTH CAROLINA RULES OF EVIDENCE AND ENTITLED TO THE REQUIRED INFORMATION IN THESE SECTIONS.

D. Do not take the statements of experts and social workers at face value as to the credibility or reliability of the statements of the alleged victim. Get your own expert to review the interviewing techniques of the many professionals who have interviewed the child. And observe the child’s demeanor when testifying -- including who she or he appears to be afraid of during testimony, if anyone, and if the child will say anything to get off the stand. (there is the time honored technique of asking the child what color the sky is, tell her she can get down if she says the sky is green, then ask again what color is the sky) it is usually GREEN!

CONCLUSION : BEWARE THE WITCH HUNT

Of Course the child accuser is not to be blamed for the over zealousness of the adults. The best a defense attorney can do is to keep a cool objective head when all those around you are ready to throw your client in the river and see if he drowns -- in which case he or she may be innocent. But woe to him if he can swim! Or dares to fight DSS!

Ask for everything; make your motions and look for tainted statements, contaminated interviews, inconsistent
statements, incompetent investigators and experts and junk science. You may be the only person who believes in your client so you are the only one to buffer him or her from the incessant questions and requirements and judgment of DSS.

As in the case of the hurricane, there is an end and a calm after the storm. Stay the course, question the obvious and trust your own instincts. The DSS storm is fierce and unyielding, and your boat is small--- the best you can do is to gather all the information, beware of well meaning social workers and do not let anyone make you think you are the bad guy.