

# EXPERT TESTIMONY IN CHILD SEXUAL ABUSE CASES

Mark Montgomery

PO Box 161  
Durham, North Carolina 27702  
(919) 680-6249  
mark.montgomery@mindspring.com

## I. HEARSAY FROM THE COMPLAINANT UNDER THE "MEDICAL TREATMENT" HEARSAY EXCEPTION

### A. BACKGROUND.

For the past fifteen years, the prosecution has been able to introduce out of court statements from alleged sex abuse victims under the "medical treatment" hearsay exception. That is, whenever a kid has been taken to a doctor, or psychologist, social worker, etc. following an allegation of sexual abuse, the adult has been allowed to testify, as substantive evidence, to what the kid said, or what she did with the "anatomically correct" dolls. *See, e. g., State v. Jones*, 89 N.C. App. 584, 367 S.E.2d 139 (1988).

### B. WHAT HAPPENED

All of a sudden in *State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000), the Supreme Court realized that what gives statements to doctors reliability is the "treatment motive" of the kid; not the prosecution motive of the adult. Because the state did not show that the complainant had any such motive, new trial for Mr. Hinnant.

Soon after *Hinnant*, the Court of Appeals went back to business as usual. In *State v. Lewis*, 172 N.C. App. 97, 616 S.E.2d 1 (2005), it held that all the prosecution has to do to show a "treatment motive" is to show that the kid knew she was talking to a doctor, or a nurse who was going to be talking to a doctor. Left untouched, the Court of Appeals will eviscerate the rule set out by *Hinnant*.

### C. WHAT TO DO.

1. Move for discovery of hearsay that the state intends to introduce. The state only has to give you notice of "residual" hearsay, but it doesn't hurt to ask for all hearsay.
2. Make a motion *in limine* to exclude hearsay from the child complainant, and for a hearing on the motion before the state attempts to introduce the evidence. At the hearing, argue that the kid had no treatment motive for talking to the adult, and that the "medical treatment" exception does not apply.
3. When the prosecutor of the judge brings up *Lewis*, argue that whether a child has a treatment motive is determined on a case-by-case basis. Argue that the fact that the kid knows he is talking to a doctor is not enough to show that he has any particular reason to be truthful.

4. When you move for your own psychological examination of the complainant, *see infra.*, say you need an expert to determine if the child had a treatment motive (or is capable of having a treatment motive) in talking to the state's expert.
5. Present the testimony of your psychological witness that the complainant did not have a "treatment motive" in talking to the state's expert.
6. Watch out for the prosecution to try to introduce the hearsay under one of the other exceptions, like the "excited utterance" or "residual" exceptions. *See infra*
7. If the kid does not testify, argue that his statement to the nurse/doctor was "testimonial" and inadmissible under the Confrontation Cause regardless of whether it fits the statutory Medical Treatment" hearsay exception. *See infra.*

## **II. HEARSAY FROM THE COMPLAINANT UNDER OTHER HEARSAY EXCEPTIONS**

### **A. BACKGROUND**

In *State v. Hinnant, supra.*, the Supreme Court closed down the medical treatment exception, by requiring the state to show that the kid had a treatment motive in making the declaration. Ex Chief Justice Lake wrote a concurring opinion solely to signal to judges (and DA's) that the hearsay might be admissible under other exceptions, like the excited utterance or residual exception

The Court of Appeals got it immediately. In *State v. McGraw*, 137 N.C. App. 726, 529 S.E.2d 493 (2000), the Court of Appeals held that certain testimony had been improperly admitted under *Hinnant*, but noted that the evidence was admissible under the "excited utterance" exception.

### **B. WHAT TO DO**

1. Assume that the prosecutor will try to get in the hearsay under both the Medical Treatment exception and either the excited utterance or residual exceptions.
2. Move for pre-trial discovery of hearsay from the complainant the state intends to introduce. The state does not have to give it to you, unless it is "residual exception" hearsay, but it doesn't hurt to ask for all hearsay.
3. Have the state specify on the record which hearsay exception it is relying on, and have the judge make a specific ruling as to the admissibility of the hearsay under that exception. Otherwise the Court of Appeals may find the evidence admissible under a theory that was neither argued nor ruled on. *See McGraw, supra.*
4. For the excited utterance exception be ready to demand that the state show that the statements was "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2); that it was "spontaneous and sincere." *State v. Reid*, 335 N.C. 647, 440 S.E.2d 776 (1994); that is "suspended reflective thought". *State v.*

*Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985)(but kids stay startled longer than adults; 2-3 days)

5. For the residual exception, remember that the state must show six things:
  - a) the proponent has given written notice
  - b) the statement is not admissible under any other hearsay exception
  - c) the statement has “circumstantial guarantees of trustworthiness” equivalent to other exceptions
  - d) the statement is material
  - e) the statement is more probative than other available evidence
  - f) the purposes of the rules of evidence and the interest of justice will be served by admission

*State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985).

6 Be ready to argue that the statement lack reliability because of the way the interview was conducted, the bias of the interviewer, etc. *See infra*.

7. If you have an expert, see if she will testify about the circumstances under which the child made the alleged statement, and whether those circumstances were such as to give the statement conclusive reliability. Remember that the expert can sit in the courtroom and listen to the adults’ testimony about the hearsay, and base opinions from the testimony about the mental state of the child at the time of the declaration.

8 If the kid does not testify, move to exclude the hearsay under the Confrontation Clause.

### **III. THE CONFRONTATION CLAUSE AND HEARSAY FROM THE COMPLAINANT.**

#### **A. BACKGROUND**

In *Crawford v. Washington*, 541 U.S. 36, 158 L.Ed.2d 77 (2004), the United States Supreme Court held that “testimonial” statements made out-of-court violate the Confrontation Clause when introduced in a criminal prosecution.

Other jurisdictions have held that statements by a child to a police investigator or social worker are testimonial where “the government was purposefully creating formalized statements for potential use at trial.” Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich L. Rev. 511, 538 (2005); *see, e.g., Snowden v. State*, 846 A.2d 36, 47 (Md. App. 2004)(statement to social worker gathering prosecutorial information was testimonial).

In North Carolina, a social worker interrogating a suspect in collaboration with law enforcement is a government agent, who must *Mirandize* the suspect. *State v. Morrell*, 108 N.C. App. 465, 424 S.E.2d 147 (1993).

#### **B. WHAT TO DO:**

1. Move for discovery of hearsay that the state intends to introduce. The state only has to give you notice of “residual” hearsay, but it doesn’t hurt to ask for any hearsay.

2. Make a motion *in limine* to exclude hearsay from the child complainant, and for a hearing on the motion before the state attempts to introduce the evidence.
3. At the hearing, establish the relationship between the adult witness (nurse, social worker, etc) and the prosecution.
4. Argue that the witness was a government agent. Cite *Morrell*. Argue that the resulting statement by the kid was testimonial under *Crawford*. Make sure you mention the CONSTITUTION.

#### **IV. MEDICAL EXPERT TESTIMONY THAT THE COMPLAINANT HAS BEEN ABUSED.**

##### **A. BACKGROUND**

By statute, a party may not introduce expert testimony on a character trait of another. N.C. Gen. Stat. § 8C-1, Rule 405 (a). In cases of child sexual abuse, an expert may not testify that the prosecuting child-witness in a sexual abuse trial is believable, *State v. Aguallo*, 318 N.C. 590, 350 S.E.2d 76 (1986), or that the child is not lying about the alleged sexual assault, *State v. Heath*, 316 N.C. 337, 341 S.E.2d 565 (1986)

Most jurisdictions exclude expert testimony that a child has been sexually abused if that opinion is based on the child's "history." Some do so because it constitutes expert vouching for the credibility of the complainant. *See, e.g., Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 424 (5th Cir. 1987)("doctor's opinion based solely on patient's oral history is nothing more than patient's testimony dressed up and sanctified"). Other jurisdictions exclude opinion testimony that a child has been abused based on her accusation because it lacks scientific reliability. *See, e.g., State v. Cressey*, 137 N.H. 402, 628 A.2d 696 (1993)

In North Carolina, the rationale for exclusion a medical opinion that a child has been abused is based on the vouching concern. *See State v. Stancil, supra*. [NOTE: the concern over expert testimony based on psychological characteristics is also based on a perceived lack of scientific reliability. *See State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992). The latest case to reach the Supreme Court on this issue was *State v. Hammett*, 361 N.C. 92, 637 S.E.2d 518 (2006). There, a doctor testified that there was definitive evidence of penetration of the complaining witness' vagina by some object. Indeed, there was no argument that somebody abused the girl; the defense was that another person was the culprit. On those facts, the Supreme Court approved of medical testimony that the girl had been abused by somebody (not necessarily the defendant), and that the complainant's physical symptoms were caused by penetration. However, the witness went too far when she testified that, even with no physical evidence at all, she would have concluded that the complainant had been abused because of her "history," *i.e.* her accusation of the defendant.

##### **B. BLACK LETTER LAW**

Whether a particular witness' testimony constitutes expert vouching must be determined on a case-by-case basis. *Hammett*, 361 N.C. at 94.

If there is no physical evidence "diagnostic for abuse" (*i.e.* eliminating other cases) the witness may not testify that the child has been abused. *State v. Hammett*, 361 N.C. at 99

(Court approves of Court Appeals granting new trial in *State v. Couser* because there was no diagnostic physical evidence in that case; did not overrule *Ewell*, where child had sexually transmitted disease).

The witness may not testify that a child has been abused based solely on history. *Hammett*, 361 N.C. at 97.

The testimony must not implicate the defendant as the abuser. *Id.* at 96.

### C. WHAT TO DO.

1. Move to discover the expert's report, and all of the underlying data (e.g. interviews, tests)
2. Make sure you know specifically what she will testify to. Interview the witness if possible.
3. Make a pre-trial motion for a *voir dire* hearing on the foundation for the expert's testimony.
4. If there is physical evidence and the witness wants to testify that the kid "has been abused," argue to the judge that, unless the witness can show that the physical evidence itself is *diagnostic* of abuse, (*i.e.*, eliminating other causes) the witness is still basing her opinion on the credibility of the kid (the kid's "history") and her opinion is without an adequate foundation. Point out that, in several cases, there was plenty of physical evidence. *See State v. Couser*, 163 N.C. App. 727, 594 S.E.2d 420 (2004) (abrasions on the introitus); *State v. Ewell*, 168 N.C. App. 98, 606 S.E.2d 914 (2005) (sexually transmitted disease); *State v. Parker* 111 N.C. App. 359, 432 S.E.2d 705 (1993) (damaged hymen); *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987) (missing hymen). All of those cases were cited by *Hammett*; none were overruled. It was the witness's opinion as to the cause of the physical evidence that courts found to be improper. Note that *Hammett* says that the physical evidence must be diagnostic for sexual abuse. Note also that the opinion must not implicate the defendant as the abuser.
5. Argue that, aside from the opinion being expert vouching, it is not scientifically reliable. Unless the witness uses techniques that have been proven (through scientific studies) to reliably distinguish abused from non-abused children, her testimony is not helpful to the jury. *Howerton v. Arai Helmet*, 358 N.C. 440, 597 S.E.2d 674 (2004)

The prosecution may point out that, in *State v. Spencer*, 119 N.C. App. 662, 459 S.E.2d 812 (1995), the Court of Appeals said, in *dictum*, that an expert's opinion that a child has been abused is presumptively reliable. If so, argue 1) that was *dictum* rather than holding, 2) it does not survive the later cases and 3) each expert has his or her own methodology for determining if a child has been abused; the state has the burden of showing that this witness is accurate in distinguishing abused from non-abused children.

6. If the witness is allowed to testify, cross-examine her on the [lack of] foundation for her opinion. *See* "Cross-examination" attachment.

7. Make a motion for a medical examination of the kid. *See* attached goby. Argue that it is fundamentally unfair (say "Constitution") for a state's witness to testify that a child has been abused without your expert having a chance to rebut that with his own examination. [The law is dead against us, but the issue needs to be raised in order to get the

appellate courts to change the law].

**V. PSYCHOLOGICAL EXPERT TESTIMONY THAT THE COMPLAINANT HAS BEEN ABUSED.**

**A. BACKGROUND**

In *State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992), three experts testified that the complainant suffered from Post Traumatic Stress Disorder and Conversion Reaction as the result of sexual abuse. The Court of Appeals found no error in the testimony. This Supreme Court reversed, holding that such evidence was not admissible, at least as substantive evidence of the crimes. This Court emphasized that it is the jury, rather than the expert, who is in the better position to evaluate the truthfulness of the complainant. 330 N.C. at 822, 412 S.E.2d at 891.

Despite *Hall*, the state has, for the most part, gotten away with presenting expert testimony that, because a child acts in certain ways, she has been abused. *State v. Figured*, 116 N.C. App.1, 446 S.E.2d 838 (1994); *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002).

## **B. WHAT TO DO.**

1. Get your own expert if possible, or other assistance if necessary
2. Make a pre-trial motion to discover the opinion testimony and its foundation. *See* attached goby.
3. Make a pre-trial motion for a *voir dire* hearing on the foundation for the expert's testimony. *See* attached goby.
4. Make a motion for an independent psychological evaluation of the kid. *See* attached goby.
5. Move to exclude the testimony for lack of foundation. The state will argue that *Hall* only forbids "syndrome" testimony. Point out that a syndrome is nothing more than a collection of symptoms. It would be absurd to say that the witness cannot say that a child has been abused because she has a syndrome, but can say she has been abused because she has certain symptoms. The state will argue that *State v. Kennedy* 320 N.C. 20, 357 S.E.2d 359 (1987) said that a witness may testify to the symptoms of abuse and that a child has symptoms consistent with abuse. Argue that even the "consistent with" language is improper vouching. *See* next section.
6. If you have an expert, have her testify in the *voir dire* that there are no set of psychological or behavioral symptoms that distinguish abused from non-abused children.
7. If the state's opinion comes in anyway, continue to object for lack of foundation.
8. Cross-examine the witness about the foundation. *See* "Cross-examination" attachment.
9. Have your witness testify that the symptoms described by the state's witness do not distinguish abused from non-abused children. [As a precaution, you should make a motion in limine to order the prosecution not to follow up the above with "You did not even examine the child, did you?"]
10. During the charge conference, ask the judge to instruct that the evidence of the complainant's psychological condition is not substantive evidence that she was abused. *See* Pattern Jury Instruction -- Crim. 104.96. If the state argues that there was only evidence about symptoms, not "syndromes," point out that a syndrome is only a term for a collection of symptoms.

## **VI. EXPERT TESTIMONY THAT THE COMPLAINANT'S SYMPTOMS ARE "CONSISTENT WITH" ABUSE.**

### **A. BACKGROUND**

All prosecutor's most judges, and too many defense lawyers believe that, even without physical evidence, an expert may testify that a kid's psychological symptoms and [lack of] physical symptoms are "consistent with" abuse. *State v. Fuller*, 166 N.C. App. 548, 603 S.E.2d 569 (2004). If that notion is not challenged, we will be stuck with experts continuing to vouch for the credibility of the kid.

### **B. WHAT TO DO**

1. When you move to discover the state's expert's opinion, ask specifically if the witness will be testifying that the child "has been abused" or that the child's symptoms are "consistent with abuse" or both.
2. Make a motion for a medical examination of the kid. *See* attached goby.

3. Move for a *voir dire* on the witness's opinion testimony. See attached goby. Point out specifically that you want an opportunity to challenge the opinions the child's symptoms are "consistent with abuse." You need a *voir dire* so that the judge can hear what "consistent with abuse" sounds like coming from the witness; chances are it will sound like "has been abused."
4. In arguing to exclude the "consistent with" opinion, argue that the jury will be confused; tricked into thinking that the opinion is "has been abused." Point out that, in several cases, the experts themselves have confused the terms "consistent with" and "has been." See *State v. Cleveland*, 154 N.C. App. 742, 572 S.E.2d 874 (2002)(unpublished)(expert asked if symptoms consistent with abuse; answer, "He has probably been abused."); *State v. Givens*, 158 N.C. App. 745, 582 S.E.2d 82 (2003)(unpublished)(expert asked if she had an opinion as to whether the child's symptoms were "consistent with a child who has been abused;" answer, "she has been abused."); *State v. Thornton*, 158 N.C. App. 645, 582 S.E.2d 308 (2003) (expert asked if complainant exhibited symptoms of an abused child; answer: "[she] has absolutely been sexually abused").
5. If the "consistent with" opinion does come in, cross-examine the expert on what "consistent with" means (and does not mean). See "Cross-examination" attachment.

## **VII. AN INSTRUCTION ON "INTERESTED EXPERT WITNESSES."**

### **A. BACKGROUND.**

Often the expert witness testifying for the prosecution has an obvious personal bias. That is, the pediatrician who testifies that your client battered a two year old child, or the social worker who testifies that your client sexually molested a young girl, believes that your client is a monster, and wants him to be locked up for a long time. However, the court has qualified them as experts, creating the impression that these witnesses are detached scientists, merely reporting their objective findings.

### **B. What to do.**

There is a Pattern Jury Instruction on interested witnesses. See N.C. P. I --Crim 104.20. Ask the judge (in writing) to modify the pattern to include a reference to the potential interest of expert witnesses. It can be as simple as "You may find that an *expert* witness is interested . . ." Or you could ask the judge to add a little bit to the Pattern Instruction on expert witnesses. See N.C. P. I -- Crim. 104.94. Something like, "You may consider any personal or professional interest or bias of the expert witness in determining how much weight to give her opinion."

## **VIII. EXAMINATION OF THE COMPLAINANT BY YOUR EXPERT.**

### **A. BACKGROUND.**

North Carolina and Texas are the only states that do not allow the defense to conduct a court-ordered examination of a state's witness. Our Supreme Court has held that a trial court has no authority to order such an examination because here is nothing in the discovery statutes authorizing it. See *State v. Fletcher*, 322 N.C. 415, 368 S.E.2d 633

(1988). In child abuse cases, this means that the defense is not able to conduct a medical or psychological examination of the prosecuting witness to contradict the state's expert opinion that the child has been abused. This puts the defense in an unconstitutional disadvantage.

**B. WHAT TO DO**

In order to get this issue back before the Appellate Division, make a motion in the trial court to have the prosecuting witness examined by your expert. Cite to both the Due Process and Confrontation Clauses of both constitutions.

**IX. TESTIMONY THAT THE DEFENDANT DOES NOT HAVE ABUSIVE TRAITS.**

**A. BACKGROUND.**

It should be possible to introduce expert evidence that the defendant does not have the psychological makeup of an abuser. *See State v. Spencer*, 119 N.C. App. 662, 459 S.E.2d 812 (1995)(assuming such evidence admissible, but disapproving opinion based on penile plethysmograph)

**B. WHAT TO DO.**

If you have an expert witness who can testify that the defendant does not fit the characteristics of an abuser, pedophile, etc, prepare her to so testify. Also prepare her to support what she says about the defendant with a reliable scientific foundation. It is also worth re-litigating the admissibility of penile plethysmograph evidence under *Howerton v. Arai Helmet*. 358 N.C. 440, 597 S.E.2d 674 (2004). *See State v. Spencer*, 119 N.C. App. 662, 459 S.E.2d 812 (1995)(inadmissible under the more rigorous standard set out in *Daubert v. Merrill Dow*, 509 U.S. 579 (1993).

**B. WHAT'S NEW**

Our Supreme Court decided that the "*Daubert*" standard is too high. The new standard only requires the proponent to make a showing that the expert testimony is relevant, that the witness is qualified and that the methods employed by the witness are "reliable."

**X. EXCLUSION OF THE COMPLAINANT'S TESTIMONY AS UNRELIABLE.**

**A. BACKGROUND.**

Many child abuse complainants have been interviewed by a number of adults prior to trial. Many of these interviews are unrecorded; often conducted by overzealous, undertrained child advocates who use a number of techniques that contaminate the results of the interview. At least one state, New Jersey, has done something about that. When the defendant makes a preliminary showing that a child-complainant has been subjected to improper interviews, he makes a motion to exclude the child's testimony as unreliable. At a pre-trial hearing, the state must show that the child's testimony is reliable, by showing,

*inter alia*, the interview questions and answers so that the court can see whether the interviews were suggestive. *See State v. Michaels*, 642 A.2d 1372 (N.J. 1994).

**B. WHAT TO DO.**

1. Make a motion for a pre-trial *voir dire* on the reliability of the child's testimony. This can be combined with the motion for a *voir dire* on the prosecution's opinion testimony.
2. Issue subpoenas *duces tecum* to the custodian of the records compiled on the kid.
3. Have your expert review the records, listen to the testimony of the state's witnesses and testify that the kid's testimony has been so contaminated by the interviewing techniques of the state's witnesses that he or she is no longer reliable as a witness.
4. At the end of the hearing, move to exclude the kid's testimony. Cite the Due Process and Confrontation Clauses of both constitutions.