

# **A Guide for the Use of Expert Witnesses in Child Abuse and Neglect Cases**

The Children’s Law Center prepared this information packet as a guide for county South Carolina Department of Social Services attorneys who may proffer expert witness testimony at child abuse and neglect hearings.

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## **Introduction: Lay Witnesses and Expert Witnesses**

Witness testimony is necessary in nearly all contested trial proceedings and hearings. Witnesses may be divided into two general categories: fact witnesses and expert witnesses. Fact witnesses testify as to who, what, when and where based on their personal observations and knowledge. A fact witness can be anyone with personal knowledge of the issues. In child abuse and neglect cases, fact witnesses are often parents, children, school teachers, school nurses, neighbors, daycare providers, case workers, law enforcement officers, and victims. The rules of evidence restrict fact witnesses in providing opinion testimony. Aside from providing an opinion that is rationally based on their personal perception of the events or providing an opinion that may help the court better understand their testimony, fact witnesses are limited to reciting the facts as they observed and know them.

In contrast, expert witnesses are not restricted to testimony about facts observed by or known to the expert but are allowed to provide opinion testimony concerning the meaning of the facts. Experts have knowledge, skill, experience, or training concerning a particular subject matter that is generally beyond the knowledge of the average person. The court may rely on a court-qualified expert to provide meaning to the facts and to put the facts into perspective so that the court can make an informed decision concerning the issues at trial. To put the facts into perspective, the expert is permitted to provide his or her expert opinion to the court.

## **Qualifications and Opinions of an Expert Witness**

Rule 702 of the South Carolina Rules of Evidence (SCRE) sets forth the qualifications for an expert witness and permits an expert witness to provide opinion testimony:

*“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.”<sup>1</sup>*

To be qualified by the court as an expert witness under Rule 702, it is not necessary for the expert to have earned advanced degrees in the subject matter or to have participated in extensive scientific research or study. In 1988, the South Carolina Court of Appeals acknowledged that a social worker may be an expert concerning a psychiatric disorder based on her experience. The Court further acknowledged that a witness may be competent to testify as an expert if the witness acquired specialized knowledge through practical experience.<sup>2</sup> There is no exact requirement prescribing how an expert witness must acquire the knowledge or skill which qualifies the expert witness. The South Carolina Supreme Court summarized the requirements for qualification of an expert witness as follows: “In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to ‘weight, not

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<sup>1</sup> Rule 702, SCRE. Testimony by Experts.

<sup>2</sup> Honea v. Prior, 295 S.C. 536 (Ct. App. 1988).

admissibility' may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.”<sup>3</sup>

Expert testimony in the form of the expert's opinion may be based in part on hearsay and an expert may rely on facts the expert did not observe personally and on data the expert did not assemble. In forming opinions concerning cases of child abuse and neglect, experts may rely on statements or documents that were prepared by a myriad of sources, including: DSS, law enforcement, physicians, hospitals, psychologists, counselors, therapists, and schools. Doctors and therapists may also rely on a child's medical history, provided by a parent or caretaker, to form their opinions.

*The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.*<sup>4</sup>

In many child abuse and neglect cases, experts have firsthand knowledge of the child because the expert treated or examined the child. However, an expert may be permitted to render an opinion concerning a child without personally examining the child<sup>5</sup>. An expert may rely on hearsay evidence in forming an opinion, as long as the hearsay evidence relied upon is the type of information other experts in the same field use to form opinions.<sup>6</sup>

An example of the application of that evidentiary principle is a 1986 Arizona case. Arizona's rules of evidence regarding expert witnesses are identical to South Carolina's rules. In the Arizona case<sup>7</sup>, the defendant argued that a physician's expert testimony should be excluded because the physician had not personally examined the child. After reviewing the records and photographs of the child, the physician testified that the child suffered from Battered Child Syndrome. The court, relying on Rule 703, upheld the expert's testimony, writing “[the physician] was an expert, he understood the [battered child] syndrome, and he knew what factors to look for. He had sufficient evidence before him from which he could formulate his expert opinion.”<sup>8</sup>

### **Expert Opinion: Probative Value v. Prejudicial Effect**

The trial judge, in determining whether to admit evidence including expert witness testimony, must always balance the probative value of the evidence against its prejudicial effect. Evidence has probative value if it establishes, furnishes or contributes to the truth or tends to prove an issue. The probative

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<sup>3</sup> State v. White, 382 S.C. 265 (2009).

<sup>4</sup> Rule 703, SCRE. Bases of Opinion Testimony by Experts.

<sup>5</sup> Rule 703, SCRE. Expert may rely on deposition to form the basis of an opinion. Ellis v. Oliver, 323 S.C. 121 (1996). Expert may rely on medical record to form opinion. Id.

<sup>6</sup> An expert may base his opinion on hearsay evidence so long as it is of a type reasonably relied upon by other experts in the field. State v. Hutto, 325 S.C. 221 (1997). Expert may give opinion based on statements in medical records. Ellis v. Oliver, 323 S.C. 121 (1996).

<sup>7</sup> State v. Moyer, 727 P.2d 31 (Ariz. Ct. App. 1986).

<sup>8</sup> Id. at 34.

value of evidence may be substantially outweighed by its prejudicial effect. All evidence may be considered prejudicial because its purpose is to prove or disprove alleged facts and to influence a court's decision in the proponent's favor. However, not all evidence is unfairly prejudicial. When the evidence tends to cloud the facts and influence the court to make its decision based not on law but on an improper ground, its prejudicial effect outweighs its probative value. As an example, the court in *State v. Alexander* held a rape victim's testimony about her mental trauma unduly prejudicial and explained, "unfair prejudice within [the context of Fed. R. Evid. 403, which the court adopted] means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one."<sup>9</sup>

Although a witness may have been qualified by the court as an expert witness, not all of that expert's testimony may be admissible. The judge will weigh and determine whether the expert's testimony will help to prove an issue or whether it will unfairly sway the court's decision.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule 403, SCRE.

It is important to note significant court-imposed limitations on the opinion testimony of expert witnesses. For example, an expert witness may not opine about the credibility of a child victim, especially as to whether the child told the truth about the abuse and neglect or fabricated the allegations.<sup>10</sup>

### **Determining the Need for an Expert Witness**

When evaluating the need for an expert witness remember that the purpose of an expert witness is to educate the fact finder; "to piece together or interpret data in a manner that would not be readily apparent to the average lay person fact finder."<sup>11</sup> Whether to retain an expert will depend on the facts and circumstances of each case. Consider the evidence and whether a reasonable person interpreting the plain facts would come to the conclusion you are seeking, or whether the "obvious" conclusion is not so obvious and there is the need to educate the fact finder on the meaning of the evidence in order to achieve the desired conclusion. Are there two plausible explanations for the child's injury? Or, is

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<sup>9</sup> *State v. Alexander*, 303 S.C. 377, 382 (1991).

<sup>10</sup> *State v. Dempsey*, 340 S.C. 565 (Ct. App. 2000); *See State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989) (testimony of psychiatrist who treated child victim of sexual assault was improper where psychiatrist answered "yes" to solicitor's question of whether, based on his examination and observations of the victim, he was "of the impression that [the victim's] symptoms [were] genuine"); *State v. Morgan*, 326 S.C. 503, 515, 485 S.E.2d 112, 119 (Ct.App.1997), *overruled on other grounds*, *State v. White*, 382 S.C. 265 (2009) (quoting *State v. Milbradt*, 305 Or. 621, 756 P.2d 620, 624 (1988) ("We have said before, and we will say it again, this time with emphasis--no psychotherapist may render an opinion on whether a witness is credible in any trial in this state. The assessment of credibility is for the trier of fact and not for psychotherapists.")).

<sup>11</sup> Ronald Allen & Richard Kuhns, *An Analytical Approach to Evidence: Text, Problems, and Cases*. Little, Brown & Company (1989).

there only one obvious explanation for the child's injury, which is not the explanation provided by the perpetrator. Either way, based on the individual case facts, expert testimony may be necessary.

Not every DSS case will require the testimony of an expert to explain the facts and help prove the allegations of abuse and neglect. In many instances, the case may be proven by the effective use of fact witnesses, real/demonstrative and documentary evidence. When deciding whether to engage an expert, the attorney should question whether expert testimony is really necessary. In *State v. Douglas*, 380 S.C. 499 (2009) the family court qualified a forensic interviewer as an expert; however, the testimony she provided was based on her personal observations, experiences and interview with the child, and was the type that would be provided by a fact witness. Although the Supreme Court affirmed the result reached by the Court of Appeals, it found that, based on the nature of the witness's testimony, it was unnecessary for the family court to have qualified her as an expert. Unless the subject matter is complicated and thought to be beyond the realm of knowledge or understanding of the general public, there is probably no need for an expert witness to explain to the judge the meaning of the evidence.

For a recent discussion on the use of expert witnesses see *Watson v. Ford Motor Company*, S.C. Supreme Court Opinion No. 26786, September 13, 2010.

In *Watson*, the Court stated that the trial court must make three key findings before a witness is qualified as an expert: 1) the trial court must find that the subject matter is beyond the ordinary knowledge of the trier of fact; 2) the proffered expert has acquired the requisite knowledge and skill to qualify as an expert in a particular subject matter; and 3) the trial court must evaluate the substance of the testimony and determine its reliability.

**The need for an explanation of the evidence which is beyond the ordinary knowledge of the trier of fact:**

Example:

A 2 year old child arrives at daycare with what appears to be a severely swollen black eye. The daycare personnel suspect the child has been abused and report their suspicions to the Department of Social Services. The child's parents insist they have not abused their child and have no explanation for the child's injuries. A law enforcement officer subsequently places the child into emergency protective custody and transports the child to the hospital. At the hospital, "Doctor A" examines the child and determines the child's injuries are consistent with an intentional injury, most likely caused by a blow to the eye/nose area of the face. DSS indicates the case for child abuse; however, the parents emphatically deny the abuse and seek a second medical opinion. They have the child seen by "Doctor B", a pediatrician specializing in child abuse pediatrics. "Doctor B" takes a history from the parents and learns the child recently suffered from a respiratory tract infection. After examining the child and taking a blood culture, the doctor diagnoses the child with periorbital cellulitis (redness and swelling of the eyelid and the surrounding area), subsequent to paranasal sinusitis (inflammation of the sinuses due to an infection), which was caused by Hemophilus Influenza (Hib). The doctor explains that periorbital cellulitis generally occurs in young children and that children who attend daycare or who have younger

siblings who attend daycare, have a higher risk of contracting Hib, which may result in periorbital cellulitis.

The parents intend to introduce “Doctor B” as an expert witness at the merits hearing to explain his diagnosis and the supporting science and refute the diagnosis of “Doctor A”.

The DSS attorney should consider the diagnosis of “Doctor B” and contact “Doctor A” regarding the opposing diagnosis. After speaking to “Doctor A” concerning “Doctor B’s” diagnosis, “Doctor A” may wish to reconsider his diagnosis. “Doctor A” may re-examine the child, consult with the parents, obtain a complete medical history; and/or have another doctor review the evidence. If DSS routinely uses “Doctor A” to examine and diagnose children, DSS may wish to seek “Doctor C” to re-examine the child and review the evidence. “Doctor A” may be a good source for referrals to locate “Doctor C”.

If “Doctor A” changes his diagnosis, or if “Doctor C” corroborates “Doctor B’s” diagnosis, DSS may choose to dismiss the case. Doing so would be consistent with the medical evidence and would save time for everyone, including the court, the attorneys, the witnesses and especially the child and his family.

However, if after DSS’s consideration of “Doctor C’s” opinion, the diagnosis of “Doctor A” appears sound, deposing the doctors may provide a wealth of information and serve to educate the attorneys on the issues. Some South Carolina counties are mediating DSS cases using deposition testimony. Depositions may eliminate the need for a trial, because they provide valuable information which may lead to an agreement or to dismissal of the case.

In a deposition or in court, “Doctor A”, the treating physician, will likely testify. Below is a checklist of suggested questions for direct examination of “Doctor A” after he has been qualified as an expert.

“Doctor A’s” examination of the child

- Maintained records?
  - Method of record maintenance?
- The date child was seen?
- Who brought child to doctor’s office?
- Child’s history
  - How/who provided?
    - (provided by caseworker? Law enforcement officer? Parent? Obtained medical records? etc.)
- Initial physical observations
- Examination of child

- How was examination performed?
- Complaints/symptoms?
- Physical or mental limitations or injuries observed?
- Lab tests performed?
  - Describe type of test
  - How test performed?
  - Purpose of test
  - Lab test findings?
- X-rays?
  - Finding?
- Diagnosis?
  - Was diagnosis tentative (awaiting results) or definite?
  - Opinion about causation of injury?
    - Reasonable degree of medical certainty?
    - Reasoning behind opinion?
  - Other possible diagnosis? (Other possible cause of injury?)
    - Why ruled out?
- Recommended treatment?
  - Required hospitalization?
  - Prescribed drugs?
- Follow up examinations?
- Prognosis?
  - Temporary or permanent physical scars?
  - Temporary or permanent physical disability?
  - Temporary or permanent mental disability?

- Need for future medical services?

### **Finding Experts**

Some of the ways to locate experts are listed below:

- Review published and non-published court opinions concerning child abuse and neglect cases.
  - Cases often name the experts and discuss the testimony of the expert witnesses
- Use the Worldwide web.
  - Hospital and Medical School Websites
  - University Websites (professors often serve as expert witnesses or expert consultants)
  - Professional Organizations
  - Professional Licensing Boards
  - Expert Witness Directories
- Treatment/Service Providers
  - May act as fact witnesses and/or expert witnesses
  - May refer to an expert
- DSS Attorney Listserv
  - Attorneys can provide information about experts they have consulted with or used at trial.

### **Types of Expert Witnesses Routinely Encountered in Child Abuse and Neglect Proceedings**

It is vitally important to ensure that the witness is an expert in the subject area through skill, experience, training, or education, and, if applicable, is current in licensing, certification, training, and practice.<sup>12</sup> The following is list of the minimum qualifications for professionals who are almost always involved in the diagnosis and treatment of the families and child victims of abuse and neglect and are most likely to be called upon to testify as expert witnesses in child abuse and neglect cases.

#### **Physicians**

- **Education:** baccalaureate degree; four years of accredited medical school; three to four years of residency training; and specialty training, the type and length of which varies with the specialty.

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<sup>12</sup> See *SCDSS v. Lisa C.*, 380 S.C. 406 (Ct. App. 2008).



- **License:** physicians must be licensed to practice by an appropriate licensing body (for South Carolina: South Carolina Board of Medical Examiners).

**Certification in a specialty:** a physician may obtain training in a specialty by completing a residency training program accredited by the Accreditation Council on Graduate Medical Education. A physician may obtain Specialty Board Certification by meeting the requirements established by the specialty board. Specialty board requirements vary from specialty to specialty and may include prescribed additional training and successful completion of an examination.

### **Physician Specialties Commonly Involved in Child Abuse Cases**

**Pediatrician:** a pediatrician completes four years of accredited medical school and three years of pediatric residency. The American Board of Pediatrics is the certifying board for pediatricians seeking board certification.

**Child Abuse Pediatrics:** Child Abuse Pediatrics is a new pediatric subspecialty approved by the American Board of Pediatrics in 2006. Child Abuse Pediatrics addresses the comprehensive medical assessment and diagnosis of child maltreatment. To be certified, a physician must have first completed an accredited residency program in General Pediatrics followed by a two year (if entered child abuse pediatrics training before January 1, 2010), or three year (if entered child abuse pediatric training after January 1, 2010) subspecialty fellowship training in child abuse pediatrics.

A Pediatrician may also be certified by the American Board of Pediatrics in this subspecialty by proof of practice experience. To receive certification, the pediatrician must have five years of broad-based practice experience in child abuse pediatrics. A minimum of 50% of full-time focused professional activity averaging 20 hours a week must have been spent in the practice of child abuse pediatrics. The five years of qualifying practice experience may include time spent teaching, performing research and other scholarly work, advocating, multidisciplinary team case reviewing, and/or participating in other activities that are important components of fellowship training. To receive certification through experience, the qualifying practice experience must be accrued in the United States or Canada before December 31, 2013.

For more information on this subspecialty go to the American Board of Pediatrics website at: <http://www.abp.org>.

**Psychiatrist:** a psychiatrist completes four years of accredited medical school and three to four years of psychiatric residency. A physician seeking qualification as a child psychiatrist must complete the same years of accredited medical school and residency training as a general psychiatrist but must also complete two years of psychiatric treatment of children. The American Board of Psychiatry and Neurology is the certifying board for psychiatrists seeking board certification.

**Pathologist:** a pathologist completes four years of accredited medical school and three to five years of residency training. To be certified as a forensic pathologist, the physician must be certified as a pathologist and have additional training of specified duration. The American Board of Pathology is the certifying board for pathologists seeking board certification.

## Nurses

- **Education:** education requirements vary depending on the type of nurse. A registered nurse has an associate or baccalaureate degree and must pass a national licensing examination within three years of obtaining the degree. An advanced practice registered nurse (including nurse practitioner, certified nurse mid-wife, clinical nurse specialist, and certified registered nurse anesthetist) generally has the education required of a registered nurse (an associate or baccalaureate degree) and a doctorate degree, a post-nursing master's certificate or a minimum of a master's degree and supervised clinical practice in a specific area of advanced practice registered nursing. A licensed practical nurse must graduate from an approved nursing education program and pass a licensing examination within three years of graduating from the program.

**Sexual Assault Nurse Examiners (SANE):** While South Carolina has not formally recognized SANEs by statute, regulation or case law, SANEs are increasingly used in the forensic medical examinations of children who are sexually abused. SANEs are certified by the Forensic Nursing Certification Board (FNCB) in two categories: Sexual Assault Nurse Examiner - Adult/Adolescent (SANE-A) and the Sexual Assault Nurse Examiner - Pediatric (SANE-P).

- **License:** nurses must be licensed to practice by an appropriate licensing body (for South Carolina: State Board of Nursing for South Carolina).

## Psychologists

- **Education:** baccalaureate degree and completion of a doctorate in psychology. Psychologists must also pass a national board examination as well as state requirements for the state in which they seek a license.

- **License:** psychologists must be licensed by an appropriate licensing body (for South Carolina: State Board of Examiners in Psychology). South Carolina licenses psychologists in seven specialties: clinical; school; counseling; social; experimental; industrial/organizational; and community.

## Social Workers

- **Education:**

- A **baccalaureate social worker** must have a baccalaureate degree from a social work or social welfare program and must have passed an examination prescribed by the South Carolina Board of Social Work Examiners. For a full list of requirements see S.C. Code Ann. Section 40-63-220.
- A **master social worker** must have a masters or doctorate degree in social work and must have passed an examination prescribed by the South Carolina Board of Social Work Examiners. For a full list of requirements see S.C. Code Ann. Section 40-63-230.
- An **independent social worker – advanced practice (AP)** among other duties, normally performs non-clinical duties including community organization, social policy, and policy development. An AP must have earned a masters or doctorate degree in social work from a program accredited by a nationally recognized accrediting body for social work programs, or from a social work program whose standards are at least equivalent to the minimum standards required by the nationally recognized accrediting body. An AP must also have completed ninety academic contact hours of course work in advanced social

work practice with communities and organizations; and have completed three thousand hours of social work practice under advanced practice supervision, or demonstrate to the board's satisfaction equivalent supervised experience in the practice of advanced practice social work. An AP must have obtained fifteen academic contact hours or twenty continuing education contact hours in professional ethics during the course of the professional supervision period, or have completed a board sponsored specialty course in professional ethics. An AP must also have passed an examination prescribed by the South Carolina Board of Social Work Examiners. For a full list of requirements see S.C. Code Ann. Section 40-63-240(B).

- An **independent social worker – clinical practice (CP)** among other duties, normally performs clinical social work duties including client education, diagnosis, treatment, and follow-up. An independent social worker – clinical practice must have received a masters or doctorate degree in social work from a program accredited by a nationally recognized accrediting body for social work programs, or from a social work program whose standards are at least equivalent to the minimum standards required by the nationally recognized accrediting body as approved by the board. A CP must also have completed forty-five academic contact hours each of psychopathology and psychodiagnostics, and three thousand hours of social work practice under clinical supervision. A CP must have obtained fifteen academic contact hours or twenty continuing education contact hours in professional ethics during the course of the professional supervision period, or have completed a board sponsored specialty course in professional ethics, and have successfully passed an examination prescribed by the South Carolina Board of Social Work Examiners. For a full list of requirements see S.C. Code Ann. Section 40-63-240(A).

- **License:** baccalaureate social workers, master social workers and independent social workers must be licensed by an appropriate licensing body (for South Carolina: State Board of Social Work Examiners).

### **Professional Counselors, Marital and Family Therapists, and Psycho-educational Specialists**

- **Education:**

- A **professional counselor intern** must have a baccalaureate degree and a graduate degree with a minimum of forty-eight graduate semester hours primarily in counseling or a related discipline.
- A **professional counselor** must hold a professional counselor intern license and have completed two thousand hours of supervised clinical experience in the practice of professional counseling performed over a period of not less than two years. The two thousand hours must consist of supervised clinical experience. S.C. Reg. 36-05.
- A **marriage and family therapy intern** must have a baccalaureate degree, and a master's degree, specialist's degree, or doctoral degree and forty-eight graduate semester hours in marriage and family therapy. S.C. Reg. 36-07.
- A **marriage and family therapist** must have a current marriage and family therapy intern license and twelve hundred hours of supervised clinical experience performed over a period of not less than two years. The twelve hundred hours must consist of supervised clinical experience. S.C. Reg. 36-08.
- A **psycho-educational specialist** must have a baccalaureate degree and, a master's degree plus thirty graduate semester hours; or a sixty graduate semester hour master's

degree; or a sixty graduate semester hour specialist degree; or a doctoral degree in school psychology. S.C. Reg. 36-10.

- **License:** all of the above-identified interns, counselors, and therapists must be licensed by an appropriate licensing body (for South Carolina: Board of Examiners for the Licensure of Professional Counselors, Marriage and Family Therapists, and Psycho-Educational Specialists).

### **Types of Expert Witnesses and Cases Recognizing Those Types**

The following is a list of professionals, and noteworthy South Carolina child abuse and neglect cases that involved those professionals as expert witnesses.

#### **Medical Doctors**

➤ **Pediatricians**

- *SCDSS v. Lisa C.*, 699 S.C. 647 (Ct. App. 2008)

➤ **Emergency Room Physicians**

- *State v. McFadden*, 318 S.C. 404 (Ct. App. 1995)

➤ **Intensivists (Intensive Care Unit (ICU) Physicians/Critical-Care Physicians)**

➤ **Neurologists**

- *McMillan v. Durant*, 312 S.C. 200 (1993)

➤ **Orthopedic Specialists/surgeons**

- *State v. Lopez*, 306 S.C. 362 (1991)

➤ **Pathologists/pediatric pathologists/Forensic pathologists**

- *State v. McKnight*, 352 S.C. 635 (2003). Homicide by child abuse. See this case for a good discussion on the effect of cocaine exposure on a fetus.
- *State v. Von Dohlen*, 322 S.C. 234 (1996)

➤ **Psychiatrists**

- *Charleston County DSS v. Father*, 317 S.C. 283 (1995)
- *In Re Care and Treatment of Harvey*, 355 S.C. 53 (2003)

➤ **General Practitioner**

- *Creed v. City of Columbia*, 310 S.C. 342 (1993)

- *State v. Morgan*, 326 S.C. 503 (Ct. app. 1997)
- **Radiologist**
  - *State v. Fowler*, 322 S.C. 157 (Ct. App. 1996)
- **Law Enforcement**
  - *State v. Ellis*, 345 S.C. 175 (2001)
- **Emergency Medical Technicians (EMT)**
  - *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248 (1997)
- **Nurses and Nurse Practitioners**
  - *Crawford v. Henderson*, 356 S.C. 389 (Ct. App. 2003)
- **Psychologists**
  - *Charleston County DSS v. Father*, 317 S.C. 283 (1995)
  - *State v. Hill*, 287 S.C. 298 (1986)
  - *Howle v. PYA/Monarch, Inc.*, 288 S.C. 586 (Ct. App. 1986)
- **Forensic Odontologist**
  - *State v. Jones*, 273 S.C. 723 (1979). (teeth bite impression)
- **Counselors**
  - *State v. Schumpert*, 312 S.C. 503 (1993)
  - *State v. White*, 361 S.C. 408 (Ct. App. 2004)
  - *Gadson v. Mikasa Corp.*, 368 S.C. 214 (Ct. App. 2006))
- **Forensic Interviewers**
  - *State v. Kirton*, 381 S.C. 7 (Ct. App. 2008)
  - *State v. Douglas*, 380 S.C. 499 (2009). In this case the circuit court qualified a victim assistance officer as an expert witness in forensic interviewing over defendant's objection that there is not such field of expertise. The S.C. Court of Appeals affirmed the qualification and found that the trial court had sufficient evidence that forensic interviewing was a recognized field. The Supreme Court found that it was unnecessary for the trial court to have qualified the witness as an expert in forensic interviewing because her testimony was based on her personal observations, experiences and the

interview with the child victim and that it was not the type of evidence required to be given by an expert. Although the Supreme Court did not agree with the necessity of the qualification, the Court affirmed the result reached by the Court of Appeals.

➤ **Forensic Toxicologists**

- *State v. Nathari*, 303 S.C. 188 (Ct. App. 1990)
- *State v. White*, 311 S.C. 289 (Ct. Ap. 2006)

➤ **Social Workers/Caseworkers**

- *State v. Schumpert*, 312 S.C. 502 (1993). Social worker qualified in sexual abuse case.
- *Honea v. Prior*, 295 S.C. 536 (Ct. App. 1988). Social workers qualified as experts based on experience, training and observation.
- *State v. Weaverling*, 337 S.C. 460 (Ct. App. 1999)

(In a recent South Dakota case, the trial court qualified a Department of Social Services caseworker as an expert on the Indian Child Welfare Act (ICWA). The caseworker had worked with children and families for eighteen years and for DSS for six years. The case worker was Native American and the majority of her cases involved Native American families. The caseworker had been trained in cultural issues and had previously been qualified as an ICWA expert. Based on these qualifications, the court determined that the trial court did not abuse its discretion in qualifying the caseworker as an ICWA expert.<sup>13</sup>)

**Compensation for Expert Witnesses**

Section 26.10 of the General Appropriations Bill for 2010-2011<sup>14</sup> sets out the hourly amount DSS may compensate an expert witness.

*Effective July 1, 1994, any monies appropriated for the payment of court testimony in either abuse and neglect, termination of parental rights, or judicial review cases arising under Section 20-7-480, et. seq. of the SC Code of Laws, 1976, as amended, and adult protective service cases under Section 43-35-10(9), et. seq. of the SC Code of Laws, 1976, as amended, shall only be paid in accordance with DSS policy which shall include limits on awards and procedures for payment, in due consideration of the agency budgetary limitations and specific funds allocated for such purposes. **Provided further that DSS shall pay up to a maximum hourly rate to licensed psychologists, social workers, nurses, ministerial counseling, family and marriage counselors of \$60 for counseling and \$60 for expert witness fees, to include travel time and DSS shall pay up to a***

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<sup>13</sup> The People of the State of South Dakota, In the Interest of D.G., minor child, concerning L.G. and N.B.F., Respondents, 2004 S.D. 54, 679 N.W.2d 497 (S.D. 2004).

<sup>14</sup> H. 4657, 2009 – 2010 Leg., 118 Sess. (S.C. 2010).

*maximum hourly rate to physicians of \$125 for expert witness fees, to include travel time.* (Emphasis added.)

### **Trial Preparation for Expert Witness Testimony**

A DSS attorney considering using an expert witness at a hearing or trial should first familiarize himself or herself with the proposed witness's area of expertise. This step is easily facilitated by the amount of information available on-line. However, the attorney should be cautious to identify and read only respected journals and articles on the particular field. The DSS attorney should also discuss with the expert the issues which the expert will address at trial several times prior to trial. Face-to-face meetings with the expert are optimal; however, time and distance restrictions often make face-to-face meetings difficult to schedule. Thus, telephone meetings are acceptable.

Meeting with and discussing the issues with the expert serves many purposes: 1) exchanging information about the case; 2) ascertaining the expert's opinion about the case; 3) obtaining the expert's explanation of the relevant scientific methods and/or technical issues (including the reliability of any scientific methods or technical issues involved in the case); explaining medical and mental health conditions; 4) reviewing and explaining the meaning and impact of the evidence; 5) providing possible alternative explanations of the evidence or findings; 6) critiquing the expert opinion of the opposing party; 7) identifying weaknesses in the DSS case and providing strategic advice for trial; 8) assisting the DSS attorney in preparing questions for direct examination that will best elicit the expert's relevant testimony. Remember: an expert knows more about his or her area of expertise than the DSS attorney. An expert knows what questions should be asked during direct examination and can anticipate questions that may be asked on cross-examination. A DSS attorney should not hesitate to ask the expert for help in developing a strategy and formulating questions for trial.

The DSS attorney should obtain a copy of the expert's curriculum vitae (CV) prior to trial. A CV is generally a longer, more comprehensive document than a resume. Where resumes may be 1-2 pages, CVs can be 2-10 pages in length, or more. CVs are commonly used in academic and medical fields and provide a detailed history of the professional's educational and academic backgrounds, training and work experience, grant and research history, publications, professional affiliations and memberships, board certifications, licenses, presentations, conferences attended, honors and awards, and other career accomplishments. Once a DSS attorney obtains the expert's CV, the attorney should review the CV with the expert to determine which elements of the CV are relevant to the issues in the case and important to highlight during the expert witness qualification phase of the trial.

### **Procedure for Qualifying a Witness as an Expert**

Before a witness can provide expert opinion testimony to the court, the witness must be qualified by the judge as an expert witness on the subject matter. Pursuant to Rule 702, the party offering the witness as an expert must prove to the court that the witness has the requisite knowledge, skill, experience, training, or education to be able to provide an expert opinion on the issue. The decision to qualify a witness as an expert and to admit the witness's testimony is within the sound discretion of the trial judge. Appellate courts will not reverse the trial court's decision unless the appellate court finds an

abuse of discretion. An abuse of discretion occurs when there is no evidence to support the trial judge's factual conclusions or when the ruling is based on an error of law.<sup>15</sup>

*“There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury’s good judgment and common knowledge.”<sup>16</sup>*

- a. To qualify as an expert, a person must have acquired by study or practical experience such special knowledge of the subject matter of his or her testimony as would enable the person to give guidance and assistance to the jury in solving a problem about which the jury's good judgment and average knowledge is inadequate. *Botelho v. Bycura*, 282 S.C. 578 (Ct. App. 1984).
- b. There is no exact requirement concerning how knowledge or skill must be acquired. *Hopkins v. Comer*, 240 N.C. 143, 81 S.E.2d 368 (1954), *Honea v. Prior*, 295 S.C. 526 (Ct. App. 1988).
- c. The qualification of an expert and the admissibility of an expert’s testimony are matters within the discretion of the trial court. *McGee v. Bruce Hosp.*, 321 S.C. 340 (1996).
- d. The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject. *Wilson v. Rivers*, 357 S.C. 447, 593 S.E.2d 603 (2004).
- e. A witness may be competent to testify as an expert although the witness acquired his or her knowledge through practical experience and not by scientific study, training, or research. 31 Am.Jur.2d *Expert and Opinion Evidence* § 27 at 526 (1967). Even where the problem presented may be one that usually requires some scientific knowledge or training, a person with long experience may testify as an expert although he or she did not pursue a special study of the matter. *Id.* at 526-27.
- f. The party offering the expert testimony has the burden of showing the witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony. *State v. White*, 372 S.C. 364 (Ct. App. 1997); *State v. Von Dohlen*, 322 S.C. 234 (1996); *State v. Schumpert*, 312 S.C. 502 (1993).
- g. Defects in the amount and quality of the expert's education or experience go to the weight to be accorded the expert's testimony and not to its admissibility. *State v. Henry*, 329 S.C. 266 (Ct. App. 1997); *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248 (1997). (In *Gooding*, the S.C. Supreme Court found error in the trial court's exclusion of

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<sup>15</sup> *Hedgepath v. Am. Tel & Tel. Co.*, 348 S.C. 340 (Ct. App. 2001); *Bayle v. S.C. Department of Transp.*, 344 S.C. 115 (Ct. App. 2001)

<sup>16</sup> *State v. Henry*, *Supra*.



the testimony of an Emergency Medical Technician ("EMT") regarding intubation procedures, finding the EMT had sufficient knowledge of the procedure to give an opinion on a doctor's performance of the procedure. The Supreme Court found the disparity in training and education between the EMT and the doctor he testified against was relevant to the EMT's credibility as a witness, but found the difference in qualifications affected only the weight, not the admissibility, of the EMT's testimony.)

- h.** A trier of fact is not compelled to accept an expert's opinion, but may give it the weight he determines it deserves. *Berkeley Electric Co-op., Inc., v. South Carolina Public Serv. Comm'n*, 304 S.C. 15 (1991); *Florence County DSS v. Ward*, 310 S.C. 69 (Ct. App. 1992).
- i.** South Carolina recognizes many areas in which an expert "has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." *State v. White*, 372 S.C. 364 (Ct. App. 2007); *State v. Henry*, 329 S.C. 266 (Ct. App. 1997) and citing *Fields v. Regional Med. Ctr. Orangeburg*, 363 S.C. 19 (2005) ; *Ellis v. Davidson*, 358 S.C. 509 (Ct. App. 2004) ; *Burroughs v. Worsham*, 352 S.C. 382 (Ct. App. 2002) ; *Means v. Gates*, 348 S.C. 161 (Ct. App. 2001) ; *Small v. Pioneer Mach., Inc.*, 329 S.C. 448 (Ct. App. 1997).

At trial, the defense counsel may offer to stipulate to the qualifications of the DSS expert witness. Such a stipulation avoids the need for a time consuming voir dire of the witness's qualifications. Unfortunately, DSS cases are afforded very little trial time, so if trial time is limited or if there is concern about the quality of the expert, a DSS attorney may accept the offer to stipulate to the expert's qualifications. If an expert is well qualified and the issues to be tried are difficult, it will likely be beneficial if the offer is rejected and the judge is allowed to hear the witness's extensive qualifications. If DSS rejects the defendant's offer to stipulate to the expert's qualifications, the DSS attorney should explain to the court why the offer was rejected. For example, a DSS attorney may inform the court as follows:

*Your Honor, DSS has rejected defendant's offer to stipulate to the forensic pathologist's qualifications, because we feel that Dr. Greene's extensive knowledge of, and experience in identifying, battered child syndrome, are so relevant to the facts of this case and directly related to the weight of the evidence, that we feel it is important that you hear his qualifications.*

An expert's CV should be offered as an exhibit whether or not the parties have agreed to stipulate to the expert's qualifications. If the defense objects to admission of the CV, the DSS attorney may argue that the CV is as a business record, under Rule 803, S.C.R.E.

Note: If it appears the defense's expert witness is better qualified than the DSS expert witness, the DSS attorney may wish to accept the defense's offer to stipulate to the DSS expert's qualifications but only if the defense agrees to the same stipulation as to the defense expert's qualifications. Such mutual

stipulations save time and allow the court to focus on the quality of the expert witness's testimony rather than on the expert witness's qualifications.

When qualifying an expert witness, the DSS attorney should ask open-ended questions to allow the witness to explain his credentials and establish credibility with the court. However, doing so can become time consuming and tedious so the intermittent use of leading questions to establish the witness's accomplishments may hasten the process. Qualification of an expert witness is a preliminary matter<sup>17</sup> and the use of leading questions on direct examination for the purpose of qualifying an expert witness is permissible.

**Sample: General Qualification Questions**

- State your name.
- State your Address.
- State your current occupation.
  - Name of company or organization
  - Description of occupation
  - How long in current position
    - Description of practice
    - Number of patients
    - Number of examinations of similar type to the instant case
- Please list your educational background including:
  - Degrees
    - Undergraduate degree, date graduated
    - Graduate school, degree, area of study, date graduated
  - Specialized or post graduate training
    - What kind of specialized training--Internship/residency/clinical experience
    - Area of specialized training

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<sup>17</sup> Rule 104(a), SCRE. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

- Where trained
    - How long was training
  - Licenses
    - When licensed
    - Licensing requirements
      - Continuing education requirements
    - How long is license valid
    - Relicensing date
    - Relicensing process
  - Board certifications
    - When certified
    - How long certification is valid
    - Recertification process
- Please provide your employment history
- Please list professional memberships
  - Organizations
  - Advisory boards
  - Committees
  - Commissions
  - Offices held
  - Was membership or office a result of volunteering, appointment or election?
- Have you been awarded any research grants?
  - What research area?
- Have you published or presented papers in the area of \_\_\_\_\_?
  - Please list publications

- Please list presentations
- Have you presented at conferences or workshops on the subject of \_\_\_\_\_?
  - Approximately how many conferences or workshops
  - Name the most recent presentations
- Have you held any teaching, faculty, or academic positions?
  - Where
  - What
  - How long
- Have you qualified in family court or any other court as an expert in the area of \_\_\_\_\_?
  - How many times qualified?

Note: The following examples were created for this document and are not excerpts from real cases.

**Example: Qualification of a Forensic Pathologist**

Q. You're Doctor Mark Greene?

A. Yes

Q. And, you're a forensic pathologist, aren't you?

A. Yes.

Q. Specializing in pediatric pathology and fatal child investigations?

A. Yes.

Q. You're currently employed by Palmetto Health Richland/USC School of Medicine?

A. That's correct.

Q. Can you explain your affiliation with Palmetto Health Richland and USC School of Medicine?

A. Well, the Palmetto Health system is composed of five hospitals: Palmetto Health Richland, Palmetto Health Baptist, Palmetto Health Heart Hospital, and Palmetto Health Children's Hospital in Columbia, and Baptist Easley Hospital in Pickens. Palmetto Health Richland has a renowned children's hospital and Neonatal Intensive Care Unit. Of the five hospitals, Palmetto Health Richland is the teaching facility for medical students attending the University of South Carolina School of Medicine. Through rotations through the various medical specialties, students gain hands-on, real-life experience in diagnosing and treating patients. This experience

helps students decide in which type of medicine they'd like to specialize when they graduate. Because PHR is a teaching hospital for USC, I am on staff at the hospital and have been appointed a clinical professor of pathology for the school of medicine.

Q. How long have you worked for PHR and USC.

A. I was offered a pathology position at PHR in 1996, after I finished my pediatric pathology residency. I went on faculty at USC the same year. The hospital was called Richland Memorial back then.

Q. Can you detail the job of a forensic pathologist?

A. Forensic pathology is a specialized area of pathology. The forensic pathologist performs autopsies to determine the cause and manner of death by utilizing the knowledge of forensic science and medicine. A forensic pathologist is often asked to investigate the possibility of unnatural and suspicious deaths. There are many deaths that can be classified as unnatural or suspicious but, to name a few, unnatural deaths include such things as violent deaths like homicides and suicides, deaths by animal maulings, automobile accidents, unexpected deaths, Sudden Infant Death Syndrome, deaths due to child abuse and neglect, deaths where drugs or alcohol were contributing factors, deaths occurring during surgical procedures, deaths when there is suspicion of a public health threat, and deaths of persons under the care of institutions.

Q. What is an autopsy?

A. An autopsy is a post mortem internal and external examination of the body in order to render an opinion regarding the cause and manner of death. The purpose is to examine the internal and external organs, such as the skin, to identify the presence of any natural disease processes, unnatural injuries, or the presence of foreign substances which may have contributed to the person's demise. The autopsy will also document identifying markings on the body like tattoos, birth marks, scars, freckles, and moles.

Q. About how many autopsies...?

A. Oh, I can't say exactly, but...

Q. But, it would be in the hundreds, thousands?

A. I've performed over 5000 autopsies in my career.

Q. Autopsies on adults and children?

A. Yes, on both. Since PHR has a trauma unit, a children's hospital and NICU, I perform hundreds of autopsies on both, and fatal child investigations on fetuses, infants and children every year.

Q. Have you ever performed autopsies on children suspected of being abused and neglected?

- A. Many, many cases. I have identified hundreds of cases of intentional injuries in child deaths; battered child syndrome; cases where SIDS was suspected, but the identified cause of death was asphyxiation; brain injury due to intentional injury; shaken baby syndrome; internal trauma to organs; or other forms of child abuse and neglect. Likewise, I have worked on hundreds of cases where child abuse and neglect was suspected, but the cause of death was accidental, such as deaths caused by defective cribs, where the child gets lodged between the mattress and the crib's frame; and cases where the cause of death was natural, such as congenital disorders and genetic defects, deaths caused by unknown heart conditions, enlarged organs, pulmonary embolisms, embolisms caused by the presence of errant amniotic fluid; injuries caused during the birthing process, and so on.
- Q. Are you the pathologist who performed the autopsy on little Michael Montgomery?
- A. Yes.
- Q. I see where you graduated from Vanderbilt University in 1980 and Howard University's Medical School in 1984. Where did you do your post graduate training?
- A. I completed a rotating internship at Temple University Hospital in Philadelphia, PA in 1985. In 1990, I completed a residency in anatomic and clinical pathology at Maricopa Medical Center in Phoenix, Arizona. I then completed a year-long training at the Maricopa County Medical Examiner's office. In 1994, I returned to Pennsylvania and completed a one year pediatric pathology residency at the University of Pittsburg Medical Center.
- Q. And, you are licensed to practice medicine in South Carolina and Arizona?
- A. That's right.
- Q. What are the licensing requirements for a forensic pathologist?
- A. You must graduate with a four year college degree, followed by four years of medical school. After medical school, there is a three to five year residency training program, depending on whether the program is in anatomic pathology, or both anatomic and clinical pathology. The anatomic and clinical pathology residency is five years, which is the program I completed. After completing the residency program, the pathologist must complete a one year specialty training program in forensic pathology at a medical examiner's or coroner's office. You must also complete a minimum of 50 autopsies. To be licensed, I had to pass the National Board of Medical Examiner's exam, the FLEX licensing examination, I'm sorry, the Federation Licensing examination, the U.S. Medical Licensing examination, and the American Board of Pathology Specialty Board examination. I also had to submit three letters of recommendation from practicing medical doctors and be interviewed by the South Carolina Board of Medical Examiners.
- Q. Lawyers have to complete so many continuing education hours. Is that also true for doctors?
- A. The South Carolina license must be renewed biennially and doctors must complete a minimum of 40 continuing medical education hours during that time.

- Q. That's a lot of hours. You're also board certified by the American Board of Pathology.
- A. That's correct. I'm also board certified in the subspecialty of Pediatric Pathology.
- Q. What is Pediatric Pathology?
- A. Pediatric pathology is the practice of pathology concerned with the study and diagnosis of human disease manifested in the embryo, fetus, infant, child, and adolescent.
- Q. What does board certified mean?
- A. It means that the forensic pathologist has successfully completed the required years of pathology and forensic pathology training at an accredited institution, and has passed the required exams as set forth by The American Board of Pathology. To be board certified as a pediatric pathologist means that I have completed a subspecialty residency and have met all the requirements of the American Board of Pathology. The American Board of Pathology issues certificates to those doctors who have met the requirements.
- Q. Once board certified, are you always certified?
- A. No, you must renew every 10 years.
- Q. Have you've worked for PRH and USC ever since 1996?
- A. Yes, but during this time, I've also served as a consulting pathologist for Richland, Saluda, Lexington and Newberry County Coroner's offices, the South Carolina Department of Corrections, and the South Carolina Department of Mental Health. I'm also an adjunct professor at the University of South Carolina School of Law, where I have taught "Medicine and the Law" for the past five years.
- Q. Please list some of your professional affiliations and memberships.
- A. The Society of Pediatric Pathology; Diplomat on the American Board of Pathology, Anatomic and Clinical Pathology; American Academy of Forensic Scientists; South Carolina Society of Pathologists; College of American Pathologists; American Society of Clinical Pathologists; American Medical Association, South Carolina Medical Association; Congaree Medical, Dental and Pharmaceutical Association; International Society Laboratory Hematology; and the Medical Society of South Carolina.
- A. Have you ever been awarded any research grants?
- Q. Yes, several. However, most recently, in 2008, I was awarded a \$500,000 grant from the Society of Pediatric Pathology to research the indicators of battered child syndrome and shaken baby syndrome in postmortem examinations, and the effects of battered child syndrome on the organs of the body. I presented the findings to the Society and the results of the study were published in the May 2009 edition of the American Journal of Pathology.

Q. Your CV lists numerous presentations, publications, and awards. You have been published in the Journal of American Medical Association, the Journal of Clinical Pathologists, and the American Journal of Pathology. Just last month you were a guest speaker at the South Carolina Law Enforcement and Public Safety convention in Myrtle Beach, where you spoke on the medical examiner's role in fatal child abuse and neglect investigations. In November 2009, you presented to the South Carolina Coroners and Medical Examiners on the topic of medicolegal scene investigation. And, most recently, you were a speaker at the February 2010 continuing medical education course for pathologists, where you spoke on the subject of post mortem identification of child abuse and neglect and the mandatory reporting laws.

A. That's all correct.

Q. Have you ever been qualified as an expert witness in the area of forensic pathology or pediatric pathology?

A. Yes, I have been qualified as an expert witness in general pathology, forensic pathology and pediatric pathology in circuit and family courts in South Carolina. I've testified as an expert witness in family court maybe 3 times and in circuit court, at least 10 to 12 times. I have also served as a consulting expert on numerous cases for solicitor's offices across the State and private attorneys.

✓ The attorney should then ask the court to enter the curriculum vitae into evidence

Attorney: Your Honor, pursuant to Rule 702 of the South Carolina Rules of Evidence, I am offering Dr. Greene as a qualified expert in the fields of forensic and pediatric pathology.

**Example: Qualification of a Pediatrician**

Q. Dr. Morris, you are a pediatrician, aren't you?

A. Yes.

Q. You've been licensed to practice since 1984, haven't you?

A. Yes.

Q. Can you please tell the court about your educational and training background?

A. I graduated from the University of South Carolina in 1980. I received my medical degree from the Medical University of South Carolina and then completed a three year residency in pediatrics at Rankin Jordan Pediatric Specialty Hospital in Maryland Heights, Missouri. Following that, I completed an additional year of training in ambulatory pediatrics at Richland Memorial Hospital.

Q. What is pediatrics?



- A. Pediatrics deals with the medical and emotional care of infants, children, and adolescents ranging in age from birth to 21. Treatment covers the myriad of childhood medical issues, including: preventive health care, treatment of childhood illnesses, diseases and injuries, and emergency care.
- Q. And, you're employed by Metropolitan University Hospital System, aren't you?
- A. Correct.
- Q. In what capacity?
- A. I am the associate dean of pediatrics at Metropolitan University Medical School. I am associate director of pediatrics at the hospital and director of the pediatric sexual assault division at the hospital.
- Q. What is the pediatric sexual assault division?
- A. Metropolitan is a receiving hospital for pediatric sexual assault victims. The doctors in the division evaluate the children who present to the emergency room with sexual assault complaints to determine if the children are victims of sexual abuse and, if indicated, the method of abuse. We determine the course of treatment and will refer the children for mental therapy, if indicated. We also do follow-up visits with the children after a few weeks.
- Q. How long has the division been in existence?
- A. The hospital created the division in 2001.
- Q. How long have you been associated with it?
- A. I was a member of the original team that created the division, and became its director in 2008.
- Q. What do you do as director of the division?
- A. I supervise the residents who perform the examinations on children.
- Q. What do you mean by "supervise"?
- A. After the doctor completes the examination, I consult with him or her on their findings and the recommended course of treatment for the child. Sometimes, I actually observe the examination and make comments and suggestions, when necessary. I also review the written reports and charts from the initial visits and follow up visits and consult with the doctors on follow-ups.
- Q. Have you ever personally performed examinations on children?
- A. Yes, before I was named director of the division, I regularly performed examinations. I'd say probably 1000 or more between 2001 and 2008. Since 2008, I've been in an administrative position, and mostly supervise other doctors. However, about once or twice a month I will

personally perform an examination at the request of another doctor or when we are short on doctors.

Q. Did you personally perform the examination on Mary Lynn Coaxum?

A. Yes, she was brought in by law enforcement on February 3, 2010. I performed the examination because we were short one doctor who was on schedule that day but was tending to a family emergency.

Q. Have you ever published in the area of pediatrics?

A. Yes, I have been published 15 times in the areas of pediatrics and pediatric sexual assault.

Q. Of those 15 how many specifically cover pediatric sexual assault?

A. Probably 10 or more. Some of the topics I've covered include: indicators of sexually assaulted children; sexually transmitted diseases in sexually abused children; ritualized abuse; incest-intrafamilial vs. extrafamilial sexual abuse; long term effects of child sexual abuse; the window of opportunity for physical proof of sexual abuse; possible lack of physical evidence when treatment is delayed; children and delayed disclosure.

A. How do you keep up with the changes in pediatric medicine?

Q. Well, I subscribe to several medical and pediatric journals, including the Journal of American Pediatrics, the Journal of American Pediatric Research, and the Journal of Child Sexual Abuse. I also attend annual conferences across the nation and try to attend at least one international pediatric conference a year. I do that to keep up with the international advances in pediatric medicine.

Q. Have you lectured at any of these conferences on child sexual assault?

A. Yes, over the past 10 years or so, I have lectured at least 50 times at local and national conferences on the subject of child sexual assault.

Q. Are you affiliated with any professional organizations?

A. Well, I am board certified by the American Board of Pediatrics. I am a member of the South Carolina Chapter of the American Academy of Pediatrics, the Academic Pediatric Association, the Association of Pediatric Program Directors, and the Society for Pediatric Research. I have also served as the chair for Women in Pediatrics for the Federation of Pediatric Organizations.

Q. Have you testified before in the area of child sexual assault?

A. Yes, about 40 times.

Q. And, were you qualified as an expert any of these times?

A. Yes, each time. I've also been qualified numerous times as an expert in pediatric medicine.

Q. In South Carolina Courts?

A. Yes, in both criminal and family courts. I have also testified as an expert in North Carolina and Georgia.

Q. Out of the 40 times, how many times do you think you've testified for South Carolina DSS?

A. I'd say 8 to 10.

Q. Do you always testify for the State?

A. No, I've testified for both sides, meaning for DSS or the Solicitor, and the defense. I've also testified in a private divorce case.

Q. Are you being compensated to appear as an expert witness for DSS?

A. Yes, I think about \$125.00 an hour, which is much less than the going rate for private cases.

Q. Does the fact that you are being paid to testify in anyway affect your medical opinion?

A. No. I am a doctor and my allegiance is to the field of medicine and the children I treat. I would not discount my career or the medical field by offering opinions that have no medical or scientific basis, for anyone's benefit. I make a diagnosis or offer my opinion, and if they don't like it, I won't be subpoenaed to testify.

DSS Attorney: I have no further questions on Dr. Mary Morris's qualifications and offer her as an expert witness in child sexual assault.

Judge: Defense counsel, do you wish to cross examine Dr. Morris on her qualifications?

Defense Attorney: No Your Honor, I accept Dr. Morris's qualifications as an expert in child sexual assault.

Judge: I find that Dr. Morris is qualified as an expert in the field of child sexual assault. Counsel, you may continue with direct examination of the witness.

## **Selected South Carolina Rules of Evidence**

**Rule 701, Opinion Testimony by Lay Witness:** If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which a) are rationally based on the perception of the witness, b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and c) do not require special knowledge, skill, experience or training.

**Rule 702, Testimony by Experts:** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

**Rule 703, Bases of Opinion Testimony by Experts:** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by the experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

**Rule 704, Opinion on Ultimate Issue:** Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

**Rule 705, Disclosure of Facts or Data Underlying Expert Opinion:** The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination.

## **Suggested Reading**

Stephen J. Ceci and Helene Hembrooke, *Expert Witnesses in Child Abuse Cases: What Can and Should Be Said in Court* (American Psychological Association, 1998)

Thomas A. Mauet, *Fundamentals of Trial Techniques* (Little, Brown and Co., 1992)

John E.B. Myers, *Evidence in Child Abuse and Neglect Cases* (Wiley Law Publications, 3d ed. 1997) and 2002 Cumulative Supplement.

Paul Stern, *Preparing and Presenting Expert Testimony in Child Abuse Litigation: A Guide for Expert Witnesses and Attorneys* (Sage Publications, Inc., 1997)

*Investigation and Prosecution of Child Abuse*, American Prosecutors Research Institute (APRI), National Center for Prosecution of Child Abuse, (Sage Publications, 3d ed. 2004)

*Prosecution of Child Abuse in South Carolina: A Manual for Solicitors and Investigators*, A Project of the Children's Law Center, University of South Carolina, (University of South Carolina, 3d ed. 2009)