

## UPDATE FOR SOUTH CAROLINA FORENSIC INTERVIEWERS

The Children’s Law Center prepared this update for forensic interviewers in South Carolina to provide information on the efforts of the National Child Protection Training Center in support of ChildFirst South Carolina and on developments in South Carolina law pertaining to forensic interviewing.

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### National Child Protection Training Center

South Carolina’s forensic interview training began in 2001 with the assistance of the National Child Protection Training Center (NCPTC) and CornerHouse, a children’s advocacy center in Minnesota. At the time the NCPTC was associated with the National District Attorneys Association and the training format was Finding Words.

In November 2007, Winona State University in Minnesota contracted with the National Association to Prevent the Sexual Abuse of Children to be the managing agent for NCPTC. While the format of the forensic interview training changed from Finding Words to ChildFirst, NCPTC and CornerHouse have continued to support the forensic interview training in South Carolina and seventeen other states.

NCPTC offers a number of resources including a web site, <http://www.ncptc.org>, which supports the efforts of forensic interviewers. Resources available on the web site include information on conferences, trainings and publications. Included among the publications is the *Center Piece* newsletter which contains articles providing best practice and legal

update information to assist and support the efforts of forensic interviewers. *Center Piece* is available for downloading at the NCPTC web site.

Also located on the NCPTC web site is an article written by Victor Vieth, Director of the NCPTC. The article provides a proposed framework for credentialing forensic interviewers. It includes a discussion of proposed underlying principles as well as specific proposed credentialing standards. Forensic interviewers should read the article and should begin the discussion of credentialing standards and of meeting credentialing standards should they be adopted in the future.

NCPTC also has a training complex located at Winona State University. The complex is designed for hands-on training for professionals committed to ending child abuse; and it is also designed to handle conferences. The complex has five moot courtrooms, four forensic interview rooms, a specialized classroom designed for training on-line crimes against children, and a “mock house” for simulation training in child abuse investigations. NCPTC plans to host up to fifteen training sessions and conferences annually at the training complex.

### **ChildFirst South Carolina**

In January 2009, the forensic interview training program for South Carolina, formerly known as Finding Words South Carolina, was renamed ChildFirst South Carolina. The Children’s Law Center in coordination with the Assessment and Resource Center of Richland County conducts ChildFirst South Carolina training. Participants include solicitors, law enforcement officers, child protection case workers, and children’s advocacy center workers who conduct multidisciplinary team investigations of child abuse. From the beginning of South Carolina’s program in 2001 through the April 2009 training, South Carolina has trained 617 professionals as forensic interviewers including:

- 183 children’s advocacy center workers
- 201 DSS case workers
- 195 law enforcement officers
- 38 solicitors

Training schedules, registration information, and registration forms are available on the Children’s Law Center web site, <http://childlaw.sc.edu>, link to training and then to ChildFirst South Carolina.

### **Significant Recent Cases**

#### **Forensic Interviewers as Expert Witnesses in South Carolina**

In *State v. Douglas*, 626 S.E.2d 59 (S.C. Ct. App. 2006) *affirmed in part, reversed in part*,

671 S.E.2d 606 (2009), the South Carolina Court of Appeals recognized a victim assistance officer employed by a county sheriff as an expert in the field of forensic interviewing. As noted in the citation to the South Carolina Court of Appeals decision, the South Carolina Supreme Court reversed the Court of Appeals decision in part in *State v. Douglas*, 671 S.E.2d 606 (S.C. 2009).

The pertinent facts in *Douglas* were that the victim assistance officer interviewed an eight year old concerning the child's allegations that her stepfather sexually assaulted her when she was seven. In reversing the court of appeal's decision upholding the trial court's qualification of the witness as an expert witness, the South Carolina Supreme Court decided that the testimony provided by the witness was not required to be presented by an expert witness. In footnote 2 of the opinion, the court noted that appellate courts in six other states have upheld qualification of expert witnesses in the field of forensic interviewing. With respect to qualification of forensic interviewers, the court concluded in footnote 2: "Although there may be a case in which qualification of an expert in this field is proper, we find no necessity in the present case."

It is important to note that, while recognizing that the courts of other states recognized forensic interviewers as expert witnesses, the South Carolina Supreme Court's decision did not decide whether forensic interviewing was a valid field of expertise.

While the court of appeals decision in *Douglas* may no longer be cited as precedent for recognition of forensic interviewing as a valid field of expertise in South Carolina, the decision nonetheless provides useful guidance for South Carolina's forensic interviewers and for attorneys who proffer the testimony of forensic interviewers as expert witnesses. That guidance includes a review of the law on expert witnesses, including South Carolina case law. It also includes a discussion of case law in other states which have recognized forensic interviewers as expert witnesses. The opinion provides a detailed summary of the evidence presented at the *Douglas* trial to qualify the expert witness including: testimony concerning the RATAC method of forensic interviewing; experience of the witness as an expert witness; and the initial training and continued efforts of the witness to keep current in the field of forensic interviewing.

In coordination with NCPTC and CornerHouse, ChildFirst South Carolina training will continue to train forensic interviewers so that they have the initial training necessary to be qualified as expert witnesses. Whether a forensic interviewer should testify as a fact witness or as an expert witness in a particular case is the decision of the solicitor in a criminal proceeding or a delinquency proceeding or of the attorney representing DSS in a family court abuse and/or neglect proceeding. That decision will be made based on the facts of each case and on the guidance in the *Douglas* opinions and other precedent.

In determining whether an expert witness in the field of forensic interviewing or another relevant field of expertise may be necessary, the following factors, among others, should be considered: the need for testimony on memory and suggestibility; the need for testimony concerning research supporting the RATAC protocol used in South Carolina

forensic interviews; and the need for testimony and behavioral evidence as rape trauma evidence such as permitted by *State v. Schumpert*, 435 S.E.2d 859 (S.C. 1993).

### **S.C. Code § 17-23-175 (Child Hearsay Statute for Criminal Court)**

The South Carolina Court of Appeals in *State v. Bryant*, \_\_\_ S.E.2d \_\_\_, 2009 WL 813573 (S.C. App.) filed on March 23, 2009, rejected appellant's challenges to S.C. Code § 17-23-175 which became effective on July 1, 2006. Appellant was convicted of three counts of first degree criminal sexual conduct with a minor and three counts of lewd act on a minor. His sentence included 30 years for each CSC charge and 15 years for each lewd act charge. Appellant challenged admission of videotaped interviews of the three child victims. The court rejected appellant's challenges which were based on the savings clause contained in the statute and on the ex post facto clause of the Constitution.

The savings clause in the statute provides: "The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, liabilities founded thereon, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide." In rejecting appellant's challenge, the court found that the statute neither repealed nor amended any existing law.

The ex post facto clause of the Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed." In rejecting appellant's ex post facto challenge, the court found that the statute did not violate the ex post facto clause as the statute concerned procedure and did not change a substantial personal right of appellant.

### **Forensic Interviewers in Family Court Abuse and Neglect Proceedings**

In *South Carolina DSS v. Lisa C. et al.*, 669 S.E.2d 647 (S.C. Ct. App. 2008), the South Carolina Court of Appeals considered the provisions of S.C. Code § 19-1-180. S.C. Code § 19-1-180 provides for the admission of out of court statements of children under twelve years of age or who function under twelve years of age in family court abuse and neglect proceedings.

The portion of S.C. Code § 19-1-180 at issue in *Lisa C.* was subsection (G) which provides:

(G) If the parents of the child are separated or divorced, the hearsay statement shall be inadmissible if (1) one of the parents is the alleged perpetrator of the alleged abuse or neglect and (2) the allegation was made after the parties separated or divorced.

Notwithstanding this subsection, a statement alleging abuse or neglect made by a child to a law enforcement official, an officer of the court, a licensed family counselor or therapist, a physician or other health care provider, a teacher, a school counselor, a Department of Social Services staff member, or to a child care worker in a regulated child care facility is admissible under this section.

The pertinent facts in *Lisa C.* include the following. A witness who had a master's degree and a Ph.D. in clinical psychology but who was not licensed in psychology until the Friday before trial conducted a forensic interview of a child allegedly sexually abused by her father. DSS had filed an intervention action based on allegations that the father posed a threat of abuse or neglect to the child and her sibling. By the time of trial, mother and father had been living separate and apart for approximately three years. At trial, the child revealed no sexual abuse by her father. The child had, however, made disclosures of abuse during a forensic interview which had been conducted after the mother and father separated.

DSS offered the witness who conducted the forensic interview of the child in order to prove the alleged abuse by the father. Although DSS moved to have the witness who conducted the forensic interview qualified as an expert witness and laid a foundation for such qualification, including the witness' education and experience, the court did not qualify the witness as an expert witness.

The court of appeals held the trial court erred in admitting the forensic interviewer's testimony concerning the child's forensic interview. The court's decision was based on its interpretation of S.C. Code § 19-1-180(G). Section (G) applied because the parties were separated and the allegations which led to the DSS intervention were made against the father after the parties separated. The statutory exception for admission in those circumstances requires the statement to be made to a "licensed family counselor or therapist" or other specified categories of professionals. The witness who conducted the forensic interview was not licensed at the time she interviewed the child and did not otherwise fit into a specified category of professionals listed in subsection (G).

*Lisa C.* is a narrow holding that **does not** apply to all forensic interviews. First, it does not apply to forensic interviews which may be introduced in criminal prosecutions. Footnote 1 of the court's opinion makes that clear:

Before we begin our analysis, we emphasize this case involves the interpretation of a very specific statute dealing with the introduction of a child's hearsay statements in the context of a DSS intervention action. **Any conclusions should be strictly ascribed to the applications of this statute and should not be extrapolated with respect to the admission or exclusion of hearsay statements in the criminal context.** (emphasis added)

Second, the limitations of *Lisa C.* do not apply in a family court case involving the out of court statement of a child under twelve pursuant to S.C. Code § 19-1-180 in circumstances where the provisions of S.C. Code § 19-1-180(G) are not involved.

For example, if the parents of the child are not separated or divorced, section (G)'s requirements for a licensed family counselor or therapist would not apply. Even if the parties are separated or divorced, the section (G) requirements for a licensed family counselor or family therapist apply only when the alleged perpetrator is one of the parents AND the allegation is made after the parents separated or divorced.

Assuming a professional interviewing a child becomes involved in a situation controlled by *Lisa C.* (that is, a situation involving the provisions of S.C. Code § 19-1-180(G)) and the interviewer is not a licensed family counselor or therapist or other professional specified in the section (G), the interviewer may seek the assistance of a multidisciplinary team (MDT) which has members who have the qualifications specified in S.C. Code § 19-1-180 (G). As set forth above, Section (G)'s list of professionals includes: law enforcement official; officer of the court; licensed family counselor or therapist; physician or other health care provider; teacher; school counselor; DSS staff member; or child care worker in a regulated child care facility.

While *Lisa C.* involved S.C. Code § 19-1-180 which controls admission of out of court statements of certain children under twelve in family court abuse and neglect cases, S.C. Code § 17-23-175 controls admission of such statements in general sessions court and in juvenile proceedings. For quick reference to both laws, the appendix to this infopac has a side by side comparison of the statutes.

### **Testimony on the Credibility of a Child Witness**

The opinions in both *Douglas* and *Lisa C.* addressed issues raised by testimony of the forensic interviewer concerning the credibility of child victims. The general rule in South Carolina is that a professional such as a forensic interviewer may not improperly vouch for a victim's credibility. Cases applying that rule include *State v. Dempsey*, 532 S.E.2d 306 (S.C. Ct. App. 2000) and *State v. Dawkins*, 377 S.E.2d 298 (S.C. 1989).

In *Douglas*, the alleged vouching testimony on the part of the forensic interviewer included:

I'm introducing myself to her, telling her what my role is and going over the rules of the interview, we talk a lot about telling the truth and telling a lie and we make an agreement with each other that I will tell her the truth and that she will tell the truth, if we get past that, if the child agrees to do that, we go on.

Following the description of the interview process, the forensic interviewer testified that she met with the investigating officer and recommended that the victim "be taken for a medical exam at the Durant Center."

With respect to that testimony, the court of appeals stated, "Although the jury could infer that [the witness] thought the victim told her the truth about being molested . . . [The witness] did not express her opinion as to whether or not the victim told her the truth during the interview." With respect to the court of appeals statement concerning the inference a jury could draw from the witness' statement, the South Carolina Supreme Court stated, "There is no evidence whatsoever that [the witness] believed the Victim to be telling the truth. Accordingly, the Court of Appeals' holding that the only reasonable inference is that [the witness] believed Victim was telling the truth is reversed."

Following *Douglas*, a forensic interviewer may explain the interview process and may testify as to referring a child for a medical examination following an interview. *Douglas* cautions, however, against a forensic interviewer testifying that the interviewer believed the child victim's disclosures during the interview.

In the *Lisa C.* case discussed above, the court addressed alleged vouching testimony which included: forensic interviewer testimony that, "the child had no apparent motivation ... to have a false allegation"; and the child gave a "consistent disclosure". While noting that it is improper under South Carolina law for a psychologist to comment on the truthfulness of a child's accusations of abuse, the court in *Lisa C.* held that the father waived any impropriety by failing to object.

The forensic interviewer in *Lisa C.* also testified that the child gave a "consistent disclosure about her putting a card in her vaginal area biting [sic] her butt and putting a car in her rectum". The forensic interviewer testified that, based on the consistent disclosure, she recommended therapy for the child. The court held such testimony was inadmissible, noting "[The witness] testimony seems to fill the inferential gap that made Herod's testimony in *Douglas* admissible. There is little doubt [the witness] found the Child's testimony to be credible, and testimony to that effect is inadmissible."

South Carolina case law does recognize an exception to the prohibition against commenting on the credibility of a victim when the defense opens the door for such testimony. In *State v. White*, 605 S.E.2d 540 (S.C. 2004), a psychotherapist who counseled the adult victim of sexual assault was qualified as an expert in post-traumatic stress disorder and the assessment and treatment of sexual abuse. In response to cross-examination questions, the expert testified that she had cases in which she did not believe the victims. The expert testified on redirect that she believed the victim in this case. The South Carolina Supreme Court upheld admission of the expert's testimony that she believed the victim because the cross-examination questions opened the door for that testimony.

### **Rule of Evidence 801 South Carolina Rules of Evidence**

*State v. Kirton*, 671 S.E.2d 107 (S.C. Ct. App. 2008) addressed the appeal of a conviction for criminal sexual conduct with a minor in the second degree. In that case, a medical doctor conducted a forensic interview of the thirteen year old child victim as well as a medical examination of the child.

Appellant challenged his conviction on several grounds including that the forensic interviewer's testimony went beyond the corroborative testimony allowed by Rule 801(d)(1)(D), SCRE. The rule states in pertinent part:

(d) Statements Which Are Not Hearsay. A statement is not hearsay if –

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and

the statement is . . . (D) consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the **statement is limited to the time and place of the incident** . . . (emphasis added)

One portion of the challenged testimony included the forensic interviewer testifying concerning when the abuse began. The child victim informed the forensic interviewer that the first time the abuse occurred was when the child was seven and the last time was about four weekends before the interview. The forensic interviewer's trial testimony included those statements of the child. The other portion of the challenged testimony included the forensic interviewer's testimony that her medical findings were consistent with the forensic interview conducted with the victim.

The court of appeals found that the challenged statements were not improper hearsay testimony. The first challenged statement was not improper hearsay because it contained only the date or time frame of the abuse. The second challenged statement was not hearsay because, as explained by the court:

The second instance involved testimony regarding the medical findings by [the witness]. This testimony was properly admitted as evidence used by the expert witness in forming her opinion that the medical findings were consistent with the interview conducted with the Victim. [The witness] explained why the statements and medical findings were significant. The testimony was admitted as forming the basis of her opinion and not for the truth of the matter asserted.

## **Summary**

The cases discussed above highlight the need for conscientious pretrial preparation between the forensic interviewer and the attorney responsible for trying the case (in criminal prosecutions and delinquency proceedings the attorney will be the solicitor; in family court abuse and neglect cases the attorney will be the DSS county attorney or a contract attorney). As demonstrated by the cases recently decided by the South Carolina Supreme Court and South Carolina Court of Appeals, legal issues involved in the testimony of forensic interviewers may be complicated. The attorney and forensic interviewer must have a common understanding about the testimony to be presented through the forensic interviewer, including whether the forensic interviewer will be offered as an expert witness. The attorney and the forensic interviewer must also be mindful of the limitations upon expert witness testimony, including limitations imposed by rules of evidence and case law.

**APPENDIX: COMPARISON OF S.C. CODE § 19-1-180 WITH S.C. CODE § 17-23-175**

Comparison of child hearsay statute for criminal court and delinquency proceedings with child hearsay statute for family court abuse and neglect proceedings

S.C. Code § 17-23-175	S.C. Code § 19-1-180
<p>Court:</p> <p>general sessions and delinquency proceeding in family court</p>	<p>Court:</p> <p>family court abuse and neglect proceeding pursuant to S.C. Code § 63-7-20</p>
<p>Age of child:</p> <p>under twelve or functions cognitively, adaptively, or developmentally under age 12 at the time of making the statement</p> <p>AND</p> <p>the child is the alleged victim of or witness to a criminal act for which the defendant upon conviction would be required to register as a sex offender</p>	<p>Age of child:</p> <p>under twelve or functions cognitively, adaptively, or developmentally under age 12 at the time the family court proceeding is brought</p>
<p>Child's out of court statement is admissible if:</p> <ul style="list-style-type: none"> <li>◆ statement was given in response to questioning conducted during an investigative interview of the child</li> </ul> <p>Investigative interview is questioning of a child by a law enforcement officer, a DSS case worker, or other professional interviewing the child on behalf of law enforcement or DSS or in response to a suspected case of child abuse</p> <ul style="list-style-type: none"> <li>◆ an audio and visual recording of the statement is preserved on film, videotape, or other electronic means except as set forth below</li> <li>◆ child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out of court statement</li> <li>◆ the court finds in a hearing conducted outside the presence of the jury that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness</li> </ul>	<p>Child's out of court statement is admissible if:</p> <ul style="list-style-type: none"> <li>◆ child testifies at the proceeding or testifies by means of videotaped deposition or closed circuit television, and, at the time of the testimony of the child is subject to cross-examination about the statement</li> </ul> <p>OR</p> <ul style="list-style-type: none"> <li>◆ the child is found by the court to be unavailable to testify on any of the following grounds: <ul style="list-style-type: none"> <li>- the child's death</li> <li>- the child's physical or mental disability</li> <li>- the existence of a privilege involving the child</li> <li>- the child's incompetence, including the child's inability to communicate about the offense because of fear <ul style="list-style-type: none"> <li>- substantial likelihood that the child will suffer severe emotional trauma from testifying at the proceeding or by means of videotaped deposition or closed-circuit television</li> </ul> </li> </ul> </li> <li>AND</li> <li>- the child's out of court statement is shown to possess particularized guarantees of trustworthiness</li> </ul>

<p>Particularized guarantees of trustworthiness, factors to consider include but not limited to:</p> <ul style="list-style-type: none"> <li>◆ whether the statement was elicited by leading questions</li> <li>◆ whether the interviewer has been trained in conducting investigative interviews of children</li> <li>◆ whether the statement represents a detailed account of the alleged offense</li> <li>◆ whether the statement has internal coherence</li> <li>◆ sworn testimony of any participant which may be determined necessary by the court</li> </ul>	<p>Particularized guarantees of trustworthiness, factors to consider include but not limited to:</p> <ul style="list-style-type: none"> <li>◆ child's personal knowledge of the event</li> <li>◆ age and maturity of child</li> <li>◆ certainty that the statement was made, including the credibility of the person testifying about the statement</li> <li>◆ any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion</li> <li>◆ whether more than one person heard the statement</li> <li>◆ whether the child was suffering pain or distress when making the statement</li> <li>◆ the nature and duration of any alleged abuse</li> <li>◆ whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience</li> <li>◆ whether the statement has a ring of verity, has internal consistency or coherence, and uses terminology appropriate to the child's age</li> <li>◆ whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement</li> </ul>
<p>Rule 5, SCRPC:</p> <p>The contents of the statement offered pursuant to the statute are subject to discovery pursuant to Rule 5, SCRPC</p>	<p>The proponent of the statement must inform the adverse party of the proponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the defendant with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered</p>
<p>If a child is twelve or older, an adverse party may challenge the finding that the child functions cognitively, adaptively, or developmentally under the age of twelve</p>	<p>If a child is twelve or older, an adverse party may challenge the finding that the child functions cognitively, adaptively, or developmentally under the age of twelve</p>
<p>Determination of use of out of court statement which is not visually and auditorily recorded:</p> <p>Visually and auditorily recorded statement are always preferred but, if an electronically unrecorded statement is made to a professional in his professional capacity by a child victim or witness regarding an act of sexual assault or physical abuse, the court may consider the statement in a hearing outside the presence of the jury to determine:</p> <ul style="list-style-type: none"> <li>◆ the necessary visual and audio equipment was unavailable</li> <li>◆ the circumstances surrounding the making of the statement</li> <li>◆ the relationship of the professional and the child and</li> <li>◆ if the statement possesses particularized guarantees of trustworthiness</li> </ul>	<p>No equivalent provision</p>

After considering these factors and additional factors the court deems important, the court will make a determination whether the statement is admissible pursuant to the statute	
No equivalent provision	The court shall support with findings on the record any rulings pertinent to the child's unavailability and the trustworthiness of the out of court statements
No equivalent provision	Any hearsay testimony admissible under this statute is not admissible in any other proceeding
No equivalent provision	<p>If the parents of the child are separated or divorced and one of the parents is the alleged perpetrator of the alleged abuse or neglect and the allegation of the abuse or neglect is made after the parties separated or divorced, the hearsay statement is not admissible</p> <p>EXCEPT</p> <p>A statement alleged abuse or neglect made by a child to a law enforcement official, an officer of the court, a licensed family counselor or therapist, a physician or other health care provider, a teacher, a school counselor, a Department of Social Services staff member, or to a child care worker in a regulated child care facility is admissible</p>