

Use of Experts in Child Abuse Case



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The Children's Law Center designed this information packet for lawyers, child protection workers, and others involved in the processing of child abuse cases. This information packet provides information on expert witnesses in general, on expert witnesses in specific subject matter, and on appellate case law concerning expert witness testimony. This information packet was prepared by the Children's Law Center in collaboration with the Children's Justice Act Task Force.

General Summary of the Law on Expert Witness Testimony

Witness testimony is necessary in child abuse and neglect cases, in delinquency proceedings, and in criminal prosecutions. 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 the witness' personal knowledge of the facts. Fact witnesses may include parents, teachers, daycare providers, child protection case workers, police officers, and other victims. Fact witnesses are very restricted by the rules of evidence in providing opinion testimony.

Expert witnesses are allowed to provide opinion testimony. Expert witnesses are also allowed to rely on facts the expert did not observe and on data the expert did not assemble in providing expert opinion testimony to the court.

The South Carolina Rules of Evidence (SCRE) in Rule 702 provide the definition of an expert witness:

"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."

Even if an expert witness is properly qualified, the trial judge must balance the probative value of the expert's testimony against the prejudicial effect of the testimony. In one case decided by the South Carolina Supreme Court¹, an FBI lab examiner offered an opinion about mtDNA in a pubic hair sample. The Court reiterated the general requirements that a trial judge, considering the admissibility of expert witness testimony, must determine if the requisites of Rule 702 are met and if the probative value of the evidence is outweighed by its prejudicial effect. The South Carolina Supreme Court reversed the Court of Appeals in a case² because the testimony of an expert in biomechanics should have been excluded when the prejudicial effect of the testimony outweighed the probative value of the testimony. The Court of Appeals and the Supreme Court opinions in that case provide good examples of how two courts assess probative value and prejudicial effect.

An expert witness does not require advanced degrees or participation in extensive scientific research and study in order to be qualified as an expert under Rule 702. For example, the South Carolina Court of Appeals in a case³ acknowledged that a social worker may be an expert concerning a psychiatric disorder. The Court further acknowledged that a witness may be competent to testify as an expert if the witness acquired specialized knowledge through practical experience. There is no exact requirement concerning how an expert witness may acquire the knowledge or skill which qualifies the expert witness. Generally, the amount of education or experience or the quality of education or experience does not affect the admissibility of an expert's testimony. Those factors go to the weight of an expert's testimony.

Expert witness opinion testimony in a scientific discipline must meet several requisites: the evidence must assist the trier of fact; the expert must be qualified; and the underlying science must be reliable. The South Carolina Supreme Court recognized the opinion of a forensic odontologist concerning bite mark evidence⁴ and set forth the standard South Carolina courts must apply in considering the reliability of the science underlying a scientific expert's opinion:

“ . . . (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.”

In subsequent cases, the South Carolina Supreme Court recognized that some areas of expertise are not subject to the four part test. For example, the Court found admissible the expert witness testimony of a psychologist concerning eyewitness reliability.⁵ The Court distinguished the testimony of the expert witness psychologist from an expert witness concerning scientific evidence such as DNA test results, blood splatter interpretation, and bite mark comparison. The Court found the testimony of the expert witness psychologist was not subject to the four-part test for scientific evidence.

The party who offers the witness as an expert witness must demonstrate to the court that the witness has the necessary knowledge, skill, experience, training, or education to qualify as an expert under to Rule 702. For example, a mental health counselor may offer an expert opinion on sexual abuse.⁶ Should the admissibility of an expert's qualification or testimony be challenged on appeal, South Carolina appellate courts apply an abuse of discretion standard. The decision to admit the testimony is within the discretion of the trial judge, and the appellate court will not reverse the trial court's decision unless the appellate court finds an abuse of discretion.

“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.”

South Carolina appellate courts have placed limits on the use of expert testimony. An expert may testify as to a child's behavior following abuse but may not vouch for the credibility of the child.⁸ If the defense opens the door for an expert's opinion on the credibility of a witness, the expert may opine that the expert believed the witness.⁹

Types of Expert Witnesses Routinely Encountered in Child Abuse Cases

Physicians

Qualifications

- **Education:** baccalaureate degree; four years of accredited medical school; three or four years of residency training; and specialty training, the type and length of which varies with the specialty.
- **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 obtains specialty training when the physician attends residency training in a program accredited by the Accreditation Council on Graduate Medical Education. A physician may seek additional Specialty Board Certification and must meet the specialty 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.

Psychiatrist: a psychiatrist completes four years of accredited medical school and three or 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 two or three 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.

For cases recognizing physicians as expert witnesses and for South Carolina statutes governing physicians, please turn to the References section of this information packet.

Nurses

Qualifications

- **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.

While South Carolina has not formally recognized Sexual Assault Nurse Examiners (SANE) by statute, regulation or case law, SANEs are increasingly used in the forensic medical examinations of children who are sexually abused.

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

For cases recognizing nurses as expert witnesses and for South Carolina statutes governing nurses, please turn to the References section of this information packet.

Psychologists

Qualifications

- **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 may be licensed by an appropriate licensing body (for South Carolina: State Board of Examiners in Psychology) and whether a psychologist must obtain a license depends on the type of work a psychologist does. South Carolina licenses psychologists within seven categories of practice: clinical; school; counseling; social; experimental; industrial/organizational; and community.

For cases recognizing psychologists as expert witnesses and for South Carolina statutes governing psychologists, please turn to the References section of this information packet.

Social Workers

Qualifications

- **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 Social Work Board.
A master social worker must have a masters or doctorate degree in social work and must have passed an examination prescribed by the Social Work Board.
An independent social worker must: have a masters or doctorate in social work; have been a master social worker for a minimum of two years and a maximum of four years; have one hundred hours of face to face meetings between the social worker and clinical supervisor; have completed three thousand hours of social work practice under clinical supervision; and have fifteen academic contact hours or twenty hours of continuing education contact hours in professional ethics.
An independent social worker – advanced practice (AP) normally performs non-clinical duties including community organization, social

policy, policy development, and many other duties.

An independent social worker – advanced practice must have advanced practice as follows: ninety hours of course work in advanced social work practice.

An independent social worker – clinical practice (CP) normally performs clinical social work duties including client education, diagnosis, treatment and follow-up, and many other duties.

An independent social worker – clinical practice must have clinical practice as follows: forty-five hours of psychopathology and forty-five hours of psycho-diagnostics.

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

For cases recognizing social workers as expert witnesses and for South Carolina statutes governing social workers, please turn to the References section of this information packet.

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

Qualifications

- **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 as specified in the S.C. Reg. 36-05(3).

A marriage and family therapy intern must have a baccalaureate degree, a master's degree, specialist's degree, or doctoral degree and forty-eight graduate semester hours in marriage and family therapy.

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 as specified in S.C. Reg. 36-08(3).

A psycho-educational specialist must have a baccalaureate degree and: a master's degree plus thirty hours; or a sixty graduate semester hours master's degree; or a sixty graduate semester hour specialist degree; or a doctoral degree in school psychology.

- **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).

For cases recognizing professional counselors and therapists as expert witnesses and for South Carolina statutes governing professional counselors and therapists, please turn to the References section of this information packet.

Other Professionals Recognized as Expert Witnesses

South Carolina courts have recognized that a variety of professionals may be qualified as expert witnesses. Statutes and regulations may not require education or licensing for those experts, and courts evaluate those experts using the criteria set forth in Rule 702.

A forensic toxicologist is an example of a professional who may be a witness in a child abuse case. A forensic toxicologist may testify concerning the effects of alcohol or drugs on a person. The American Board of Forensic Toxicologists certifies professionals in forensic toxicology. To be certified, the professional must: have completed an

earned doctor of philosophy or doctor of science degree; have specific undergraduate education in the sciences; have completed three years of full-time professional experience; and be able to document a record of appropriate professional activities in forensic toxicology. The professional must also pass an examination.

For cases recognizing other professionals as expert witnesses, please turn to the References section of this information packet.

Resources for Using Expert Testimony at Trial

The following publications are excellent resources for evidentiary issues concerning expert witness testimony. Each publication has a number of samples and examples for handling expert witness testimony, and those samples and examples provide a good start for witness preparation.

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

Investigation and Prosecution of Child Abuse (APRI, National Center for Prosecution of Child Abuse, 3d ed. 2004)

Prosecution of Child Abuse in South Carolina: A Manual for Solicitors and Investigators (Children's Law Office, University of South Carolina School of Law, 2d ed. 2005)

References

Cases Recognizing Physicians as Expert Witnesses

Physician:

State v. Lopez, 306 S.C. 362, 412 S.E.2d 390 (1991)(pathologist and neurosurgeon on shaken baby syndrome)

Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992)(physician opinion on physical injuries consistent w/child sexual abuse)

McMillan v. Durant, 312 S.C. 200, 439 S.E.2d 829 (1993)(neurosurgeon testifying on nursing standard of care)

Creed v. City of Columbia, 310 S.C. 342, 426 S.E.2d 785 (1993)(general practitioner may offer expert opinion on mental and emotional injuries)

State v. McFadden, 318 S.C. 404, 458 S.E.2d 61 (Ct. App. 1995)(ER doctor opinion on rape based on physical evidence)

State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997)(family practice doctor on sexual abuse)

Psychiatrist:

Charleston County DSS v. Father, 317 S.C. 283, 454 S.E.2d 307 (1995)(psychiatrist explaining recantation of accusations by victims of intrafamilial sexual abuse)

In re Care and Treatment of Harvey, 355 S.C. 53, 584 S.E.2d 893(2003)(forensic psychiatrist opinion on pedophilia)

Forensic pathologist:

State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996)(forensic pathologist opinion on pain and suffering prior to death)

South Carolina Code Sections on Physicians

S.C. Code 40-47-5 physicians and surgeons, definitions

S.C. Code 40-47-40 practice of medicine defined

S.C. Code 40-47-60 practice of medicine or osteopathy restricted

S.C. Code 40-47-200 suspension or revocation of license; other disciplinary action

Cases Recognizing Nurses as Expert Witnesses

Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204 (Ct. App. 2003)(nurse practitioner opinion on diagnosis in personal injury case)

SANes: There are no South Carolina appellate court decisions on SANes but there are two informative opinions from other states and those opinions recognize nurses testifying as SANes.¹⁰

South Carolina Code Sections and Regulation on Nurses

S.C. Code 40-33-10 nurses, definitions

S.C. Code 40-33-730 licensing of practical nurses

S.C. Reg. 91-1 and following

Cases Recognizing Psychologists as Expert Witnesses

State v. Hill, 287 S.C. 398, 339 S.E.2d 121 (1986)(battered spouse syndrome)

Howle v. PYA/Monarch, Inc., 288 S.C. 586, 344 S.E.2d 157 (Ct. App. 1986)(psychologist once qualified as an expert witness is competent to testify as to diagnosis, prognosis, and causation of mental and emotional disturbance)

State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991)(eyewitness reliability)

Charleston County DSS v. Father, 317 S.C. 283, 454 S.E.2d 307 (1995)(child psychologist explaining recantation by child victim of intrafamilial sexual abuse)

State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (Ct. App. 2003)(battered spouse syndrome)

South Carolina Code Sections and Regulation on Psychologists

S.C. Code 40-55-50 acts constituting practice as a psychologist

S.C. Code 40-55-60 code of ethics; limits of psychological practice; list of licensed psychologists

S.C. Reg. 100-4 ethics

App. B to S.C. Reg. ethics principles of psychologists

Cases Recognizing Social Workers as Expert Witnesses

Honea v. Prior, 295 S.C. 536, 369 S.E.2d 846 (Ct. App. 1988)(social worker on psychiatric disorder)

State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997)(social worker as psychotherapist on post traumatic stress syndrome)

State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999)(social worker on rape trauma syndrome)

South Carolina Code Sections and Regulation on Social Workers

S.C. Code 40-63-20 social workers, definitions

S.C. Code 40-63-230 license requirements, masters social worker

S.C. Code 40-63-240 license requirements, independent social worker – clinical practice

S.C. Reg. 36-01 regulations on social workers
S.C. Reg. 110-20 principles of ethics

Cases Recognizing Professional Counselors as Expert Witnesses

State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993)(mental health counselor w/MSW as expert on sexual abuse)

State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997)(licensed professional counselor on post traumatic stress syndrome)

State v. White, 361 S.C. 408, 605 S.E.2d 540 (2004)(psychotherapist on rape trauma evidence)

Gadson v. Mikasa Corp., 368 S.C. 214, 628 S.E.2d 262 (Ct. App. 2006)(expert certified rehab counselor and certified in voc rehab qualified to render opinion on employability of worker in workers comp case)

South Carolina Code Sections and Regulations on Professional Counselors

S.C. Code 40-75-20 professional counselors, marriage and family therapists, and licensed psycho-educational specialists, definitions

S.C. Code 40-75-30 general license requirements

S.C. Code 40-75-220 licensure requirements for professional marriage and family therapists

S.C. Code 40-75-280 ethical obligations

S.C. Code 40-75-530 application procedures and qualifications

S.C. Reg. 36-19 code of ethics for professional counselors

S.C. Reg. 36-20 code of ethics for marriage and family therapists

S.C. Reg. 36-21 code of ethics for psycho-educational specialists

Cases Recognizing Other Professionals as Expert Witnesses

Bloodhound handler

State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989)

Blood splatter evidence

State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990)

DNA

State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990)(lab examiner on DNA)

State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999)(lab examiner on mtDNA)

State v. McFadden, 458 S.E.2d 61 (Ct. App. 1995)(SLED microbiologist on DNA)

Engineer

Small v. Pioneer Machine, Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997)

Forensic experts

State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979)(forensic odontologist on bite mark evidence)

State v. Nathari, 303 S.C. 188, 399 S.E.2d 597 (Ct. App. 1990)(forensic toxicologist)

State v. White, 311 S.C. 289, 428 S.E.2d 740 (Ct. App. 1993)(forensic toxicologist on effects of benzodiazepine and alcohol)

State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006)(forensic interviewer in child sex abuse case)

Law school professor

Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004)(law professor affidavit in legal malpractice case concerning breach of lawyer's duty to client)

Police officer

State v. Goode, 305 S.C. 176, 406 S.E.2d 391 (Ct. App. 1991)(expert in line of impact evidence; and in post impact speed)

State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001)(expert in crime scene processing and fingerprint identification)

Endnotes

- 1 State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999)
- 2 Wilson v. Rivers, 357 S.C. 447, 593 S.E.2d 603 (Ct. App. 2004)
- 3 Honea v. Prior, 295 S.C. 536, 369 S.E.2d 846 (Ct. App. 1988)
- 4 State v. Jones, 273 S.C. 723, 259 S.E.2d 120, 124 (1979)
- 5 State v. Whaley, 305 S.C. 138, 142, 406 S.E.2d 369, 371 – 72 (1991)
- 6 State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993)
- 7 State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997)
- 8 State v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000)(child sex abuse counselor)
- 9 State v. White, 361 S.C. 407, 605 S.E.2d 540 (2004)
- 10 State v. Fuller, 603 S.E.2d 569 (N.C. App. 2004)(nurse with bachelor's degree qualified to testify as expert concerning examination of eleven year old); Gregory v. State, 56 S.W.3d 164 (Tex. Ct. App. 2001)(registered nurse allowed to testify as to her examinations of victims aged nine and eleven)

