

Legal Letters by Andrew Agatston-The Legal List 2/22/13

Forensic Interviewers as Expert Witnesses Part II

Last week, we described details of the opinion set forth in the recent S.C. Supreme Court's *State v. Kromah* decision. At its core, it was a routine "don't bolster the credibility of another witness" appellate opinion. But the underpinnings included criticism directed both toward forensic interviewers and forensic interviewing. All such criticism must be diligently examined with an open mind, just as with any critiques directed toward those who work in child maltreatment. For me in my review of appellate decisions it was such a striking critique -- most of which was set out in one footnote -- that it's worth reprinting almost in full:

*"In this case, there was no objection made to [the forensic interviewer's] qualification as an expert, but we have previously observed that such qualifications may not be necessary. . . In considering the ongoing issues developing from their use at trial, we state today that we can envision no circumstance where their qualification as an expert at trial would be appropriate. Forensic interviewers might be useful as a tool to aid law enforcement officers in their initial investigative process, but this does not make their work appropriate for use in the courtroom. The rules of evidence do not allow witnesses to vouch for or offer opinions on the credibility of others, and the work of a forensic interviewer, by its very nature, seeks to ascertain whether abuse occurred at all, i.e. whether the victim is telling the truth, and to identify the source of the abuse. Part of the RATA method, which is not without its critics, involves evaluating whether the victim understands **the importance of telling the truth** and whether the victim has told the truth, as well as the forensic interviewer's judgment in determining what actually transpired. For example, an interviewer's statement that there is a 'compelling finding' of physical abuse relies not just on objective evidence such as the presence of injuries, but on the statements of the victim and the interviewer's subjective belief as to the victim's believability. However, an interviewer's **expectations or bias**, the **suggestiveness** of the interviewer's questions, and the interviewer's examination of **possible alternative explanations** for any concerns, are all factors that can influence the interviewer's conclusions in this regard. Such subjects, while undoubtedly important in the investigative*

process, are not appropriate in a court of law when they run afoul of evidentiary rules and a defendant's constitutional rights. (Emphasis mine.)

Again, laying aside the court's concern regarding witness bolstering or vouching -- which are valid concerns for *any* witness, forensic interviewer or otherwise, the Court's analysis is problematic. I first note that there is **no** academic or scholarly authority in support of its highly critical comments.

Indeed, going through the Court's cataloging of points (some of which I highlighted in the opinion), there has been extensive research done and papers written on the issue of having the child promise to tell the truth. Additionally, forensic interviewers are forever trained on the twin evils of "interviewer expectations" and "interview bias." Next, the need for an interviewer's testing for alternative hypothesis or alternative explanations is well-understood in the field. As an example, the State of Michigan's Forensic Interviewing Protocol requires the interviewer to generate alternative hypotheses and alternative-hypothesis testing questions. It explicitly states: "*Forensic interviews are hypothesis-testing rather than hypothesis-confirming. Interviewers prepare by generating a set of alternative hypotheses about the source and meaning of the allegations.*" And of course, suggestive questioning and suggestibility of children are at the very top of an interviewer's radar.

My points are not to be dismissive of the Court's criticism because they are firmly held in some quarters and are important to understand and recognize as valid critiques. However, they are very "1995," as in the year that "*Jeopardy in the Courtroom*" was written, and should not with good legal research and lawyering win the day. Indeed, much has transpired in the almost 20 years since *Jeopardy*, including researchers across the spectrum understanding each other's criticisms, and even sometimes working together to create and refine better interviewing techniques.

David Finkelhor wrote in the preface to the *APSAC Handbook on Child Maltreatment* (3rd Edition) that even where there is controversy in some of the professional responses to child maltreatment, it pales in significance to the cumulative knowledge gained over many years.

“While the child maltreatment field has had its controversies over matters such as . . . child interviewing techniques . . . these controversies have not led to lasting division and alienation. The field -- after more than 30 years -- looks mature, self-critical, truly multidisciplinary, and broadly based.”

A good legal assignment for the competent and qualified lawyer of your organization’s choice is to research your state’s jurisdiction. Find the cases that cite with approval that a forensic interviewer is (1) able to be tendered as an expert in (2) specific areas of expertise where (3) the prosecutor laid a specific foundation showing the forensic interviewer’s expertise that (4) properly defined the scope and extent to which the forensic interviewer could testify.

We know, of course, that the specialized training of forensic interviewing is extensive and even cross-disciplined. We know that there are some states, Michigan, Tennessee and others that have written the necessary qualifications of forensic interviewers into their state’s laws. This is an area where we cannot afford to allow an outdated and/or incomplete legal analysis to carry the day. As I noted already, I heartily embrace the Court’s ruling that one witness cannot bolster the credibility of another witness. It is the sowing of the seeds of dismissing forensic interviewing as expert material that we must address.

Going north, to North Carolina, we now examine *State v. Barrett*, North Carolina Court of Appeals, Case No. COA11-932 (Decided March 6, 2012). There, a 14-year-old female resident of New York was spending the summer in Durham, N.C. with her aunt and the Defendant (who was her uncle).

She testified that one night she had gone to sleep on the couch, and awoke to the Defendant carrying her to the bedroom. She thought the Defendant was going to work, so she went to sleep. She testified that she woke up to the Defendant licking her vagina. Her shirt was pulled up and her bra unhooked. Her underwear and shorts were at the side of the bed. She was able to get off the bed, and lock herself into the bathroom.

Eventually, the Defendant left the apartment, and the victim called her mother and her grandfather, and then called 911. At that time, she heard the Defendant re-enter the apartment but was able to leave the apartment and find a stranger, who waited with her for the police. The victim gave a statement to the police, and then left for New York the next day.

In New York, she underwent a forensic interview, using RATAAC. The forensic interviewer testified at trial regarding RATAAC; regarding the details that the victim provided to her; regarding the victim's demeanor; and regarding the range of demeanors that may be observed in victims of sexual abuse. The forensic interviewer ultimately testified that the victim's demeanor was consistent with what the forensic interviewer had previously observed in other sexual abuse victims. The jury convicted the Defendant of one count of statutory sexual offense against a victim who was 14 years old. On appeal, he raised multiple issues including the trial court qualifying the forensic interviewer as an expert pursuant to North Carolina law.

Result: Conviction affirmed.

Discussion: We focus on the appellate court's analysis as to whether the forensic interviewer's testimony was properly admitted as expert material. The first place to begin is at your state statute regarding expert testimony, and how your state's appellate courts evaluate the admissibility of expert testimony under this statute.

In North Carolina, there is a 3-prong test which mirror many states:

1) **Is the expert's proffered testimony sufficiently reliable?** The Appellate Court in today's case recognized that the assessment of reliability does not *"require the expert's testimony to be proven conclusively reliable or indisputably valid before it can be admitted into evidence."* In today's case, the interviewer testified that she used the RATAAC method to interview the child; that the method was designed to elicit information without being leading; that the method may be adjusted depending on the age of the child; and that the method is peer-reviewed and been in use for more than 10 years.

- 2) **Is the witness qualified to be an expert in the area of testimony?** Here, the witness was also a licensed social worker with 10 years of experience, and had conducted approximately 1,600 interviews of children, and had testified as an expert in the past
- 3) **Is the expert's testimony relevant?** First, a tip: "relevant evidence" is going to be defined in your state evidence code. In North Carolina, "relevant evidence" means "*evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.*"

Here, the witness testified that her interview was done in a manner where the victim would be less afraid and distracted when recounting what occurred. She testified that children often will not reveal all pertinent details of an event in initial interviews. This was supported by the victim's mother and the police investigator, each of whom testified that they were not comfortable trying to obtain information from the victim regarding the Defendant's alleged actions. For example, the investigator testified that she stopped asking the victim questions because she was concerned the child "was at her breaking point." Thus, the interviewer's testimony was relevant.

Laying the foundation of expert testimony is multi-dimensional. Knowing the jurisdiction's statutes and case law, and applying them to the technical and specialized knowledge of forensic interviewer, is a great start.

Best regards.

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