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Psychological Expert Testimony on a Child's Veracity in Child Sexual Abuse Prosecutions

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The anger is beginning to rise. We have programs all over the country that tell children to run and tell when somebody hurts them, and our children told. Some of them spent 35 days on the stand and they get a "not guilty." It shows that our justice system needs a revamp for kids.

Mary Mae Cioffi, parent.[1]

This comment focuses on the question of whether an expert should be allowed to give an opinion on the veracity of a child-complainant's allegations in criminal prosecutions[2] for child sexual abuse.[3]

As the tide of reported incidents of child sexual abuse rises, prosecutors and child protection advocates have sought more effective ways to increase conviction rates by modifying and liberalizing traditional rules of evidence. One of the more controversial methods is the modification of general rules on the extent of expert opinion testimony in child sexual abuse prosecutions. A few states—Hawaii, Montana, Minnesota and Ohio—allow expert witnesses, within certain limitations, to say whether or not they believe the child victim.[4] Most states, however,

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1. Morning Advocate (Baton Rouge, La.), Jan. 19, 1990, at 8A, col. 1 (statement made at the end of the three-year McMartin Pre-School trial after the defendants were cleared of 52 sex counts).

2. This comment addresses the admissibility of expert testimony on the veracity of child victims of sexual abuse in criminal prosecutions. It will not address the use of such testimony in custody or juvenile court proceedings. Whether such evidence is admissible in criminal proceedings is the more difficult question because of the penalties which accompany conviction.

This comment also only deals with admissibility of such evidence before juries. Where the trial is a bench trial, the judge presumably has enough experience to place such testimony in its proper perspective or reject it altogether when making a final decision. Colgan v. State, 711 P.2d 533 (Alaska App. 1985). The Louisiana Code of Evidence supports this view. G. Pugh, R. Force, G. Rault & K. Triche, Handbook on Louisiana Evidence Law, Author's Notes (1) to La. Code Evid. art. 702 (1990).

3. There is no uniformly-accepted definition of child sexual abuse. See Comment, The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims, 74 Geo. L.J. 429, 429 n.1 (1986).

La. R.S. 14:403B (1986 and Supp. 1989) defines sexual abuse for purposes of reporting, and La. R.S. 14:403G (1986 and Supp. 1989) defines sexual abuse for purposes of investigation and screening.

4. See State v. Kim, 64 Haw. 598, 645 P.2d 1330 (1982); State v. Myers, 359 N.W.2d 604 (Minn. 1984); State v. Geyman, 224 Mont. 194, 729 P.2d 475 (1986); State v. French, 233 Mont. 364, 760 P.2d 86 (1988); State v. Timperio, 38 Ohio App. 3d 156, 528 N.E.2d 594 (1987).

still refuse to allow expert testimony to go that far.[5] A separate question is whether experts should be allowed to testify at all about child victims of sexual abuse.[6] This comment is limited to discussing issues involved

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5. Courts have rejected such testimony for a variety of reasons, including that it invades the province of the jury, that it is an opinion on guilt or innocence of the accused, that it does not assist the jury, or that it is overly prejudicial. Most courts will allow general testimony on behavioral characteristics of sexually-abused children as a class. See People v. Gray, 187 Cal. App. 3d 213, 231 Cal. 658 (Ct. App. 1986); State v. Spigarolo, 210 Conn. 359, 556 A.2d 112, cert. denied, 110 S. Ct. 322 (1989); State v. Lawrence, 112 Idaho 149, 730 P.2d 1069 (Ct. App. 1986); State v. Myers, 382 N.W.2d 91 (Iowa 1986); State v. Garden, 404 N.W.2d 912 (Minn. App. 1987); State v. Milbradt, 305 Or. 621, 756 P.2d 620 (1988); Kirkpatrick v. State, 747 S.W.2d 833 (Tex. App. 1987); Stephens v. State, 774 P.2d 60 (Wyo. 1989). Some courts allow an expert to explain particular findings or to compare the particular child's behavior. See State v. Moran, 151 Ariz. 378, 728 P.2d 248 (1986); People v. Payan, 220 Cal. 126 (Ct. App. 1985); Wheat v. State, 527 A.2d 269 (Del. 1987); State v. Oliver, 188 Ga. App. 47, 372 S.E.2d 256 (1988); Allison v. State, 256 Ga. 851, 353 S.E.2d 805 (1987); State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983). The most restrictive courts refuse to allow expert testimony that is even an indirect opinion on the child's credibility, see State v. Lindsey, 149 Ariz. 472, 720 P.2d 73 (1986); *Myers*, 382 N.W.2d at 91; Commonwealth v. Ianello, 401 Mass. 197, 515 N.E.2d 1181 (1987), or that is offered only to enhance the victim's credibility. See Commonwealth v. Seese, 512 Pa. 439, 517 A.2d 920 (1986).

Authors have attempted to categorize the courts' holdings in these cases in an attempt to sort out the various decisions. One writer divides the cases into three approaches: liberal, conservative and moderate. MacEwen & Tamigi, A Three Prong Approach to the Admissibility of Expert Testimony on Child Sexual Abuse Syndrome, 2 J. of Legal Commentary 140 (1987). Another writer breaks down cases along a "spectrum of uses." Note, Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses, 68 B.U.L. Rev. 155 (1988).

The problem with categorizing or attempting to place the decisions into an organized pattern is that they do not follow any organized pattern. Two results—the admission or non-admission of the testimony—are the only categories into which cases may fall because the rationales for the results the courts reach are so different.

6. One of the particular problems courts face concerning the nature of testimony allowed arises when experts attempt to describe general characteristics of an abused child. Experts agree that child sexual abuse does affect the child victim, but disagree on how. The traits to which experts testify are often vague reactions that could be attributed to some other traumatic experience, and several authors reject any attempt to make general statements about the effects of child abuse. See Rosenfeld, The Clinical Management of Incest and Sexual Abuse of Children, 22 Trauma 2, 3 (Oct. 1980).

As an outgrowth of the generalization trend, the phrase "child abuse syndrome" began creeping into case law and writings on child sexual abuse. For a thorough assessment of this and other "syndromes," see McCord, Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence, 77 J. Crim. L. & Criminology 1 (1986) [hereinafter McCord, Novel Psychological Evidence]; McCord, Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Non-traditional Psychological Evidence in Criminal Cases, 66 Or. L. Rev. 19 (1987) [hereinafter McCord, Syndromes]; Comment, supra note 3; Bulkley, Psychological Expert Testimony in Child Sexual Abuse Cases, in Sexual Abuse Allegations in Custody and Visitation Cases, ABA 48 (Nicholson & Bulkley eds. 1988) [hereinafter Bulkley, Sexual Abuse Allegations]. Bulkley opposes allowing experts to give their opinion on a particular child's veracity.

when the expert is allowed to testify and is asked whether or not he believes the child.

The first section contains an overview of child sexual abuse, the problems courts face with child witnesses, and specific problems that arise when child victims of sexual abuse serve as witnesses. Next is a review of the traditional approach to expert opinion testimony, followed by a discussion of issues and questions courts face when determining whether such an expert opinion would assist the jury. A framework for a legislative amendment to the Louisiana Code of Evidence follows. The conclusion of this comment is that experts should be allowed to testify on the veracity of a particular child witness under limited circumstances in criminal prosecutions for child sexual abuse.

Child Sexual Abuse: A General Overview

As the number of reported incidents of child sexual abuse increases, the need to find more efficient ways of verifying allegations also increases.[7] Statistics show 200,000 reports of child sexual abuse per year.[8] Researchers say the frequency of official reports of sexual abuse has increased to the point where, nationally, reports of sexual abuse out-

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7. Officials have taken new approaches in dealing with the increased reporting and with problems created by child witnesses, including: (1) reducing multiple interviews with children by different professionals through joint interviewing, using one-way mirrors, or videotaping interviews; (2) establishing interdisciplinary teams; (3) coordinating criminal and juvenile court proceedings; (4) establishing special child abuse prosecution units and assigning the same prosecutor to all stages of a case; (5) expediting cases set for trial; (6) closing the courtroom to the public and permitting alternatives to a child's testimony in open court (e.g. closed-circuit television, videotaped depositions, use of one-way mirrors or screens to hide the defendant from the child). Reforms in the courtroom include eliminating competency requirements, admitting expert testimony, extending statutes of limitations, and abolishing corroboration requirements. Bulkley, The Impact of New Child Witness Research on Sexual Abuse Prosecutions, in New Perspectives on the Child Witness (Ceci, Toglia & Ross eds. 1988) [hereinafter Perspectives]. The Supreme Court recently decided two cases concerning related issues: Idaho v. Wright, 110 S. Ct. 3139 (1990) and Maryland v. Craig, 110 S. Ct. 3157 (1990). Both cases involved challenges under the confrontation clause.

Germany has taken an alternative approach. For 30 years, Germany has required that an expert psychologist or psychiatrist assess the truthfulness of children's testimony if that is the major evidence in the case and it is uncorroborated. Under the German system, a court-appointed expert makes a "statement validity assessment" using various types of information and procedures to arrive at a conclusion regarding the validity of an allegation of sexual abuse of a child. Raskin & Yuille, Problems in Evaluating Interviews of Children in Sexual Abuse Cases, in Perspectives, supra; Undeutsch, Courtroom Evaluation of Eyewitness Testimony, 33 Int'l Rev. of Applied Psychology 51 (1984). Sweden has a similar approach. Bulkley, supra.

8. Berliner and Barbieri, The Testimony of the Child Victim of Sexual Assault, 40 J. Soc. Iss. 125 (1984); Berliner, Deciding Whether a Child Has Been Sexually Abused, in Sexual Abuse Allegations, ABA 48 (Nicholson & Bulkley eds. 1988).

number reports of serious physical injuries.[9] One researcher cites estimates based on conservative figures that 10% of all girls and 2% of all boys are victims of sexual abuse.[10] Even so, experts say child molestation is one of the most under-reported crimes in the nation.[11]

Despite these statistics, studies citing the rates of fictitious reports cause concern. One study shows 8% or more of investigated cases may be fictitious.[12] A report from the 1970s indicates 6% of the accusations of sexual abuse among children brought to a hospital emergency room and child abuse agency are false.[13]

More disturbing are the reported statistics of false reports in cases involving custody and visitation disputes. One recent study was unable to confirm 55% of a sample of cases involving custody and visitation disputes.[14] Another study reported a 36% rate of documented false

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9. Eckenrode, Munsch, Powers & Doris, The Nature and Substantiation of Official Sexual Abuse Reports, 12 Child Abuse and Neglect 311 (1988) (citing American Association for Protecting Children, Highlights of Official Child Neglect and Abuse Reporting 1984, American Humane Association (Denver 1986)).

Louisiana alone showed a 190% increase in investigations of general child abuse allegations from 1980 to 1988. Statistics from the Louisiana Department of Social Services, Division of Children, Youth and Family Services, show the following number of investigations of child abuse allegations: 7,964 in 1980; 11,094 in 1981; 15,383 in 1982; 18,607 in 1983; 20,943 in 1984; 28,528 in 1985; 26,950 in 1986; 23,153 in 1987; and 23,165 in 1988.

10. McCord, Novel Psychological Evidence, supra note 6, at 4.

11. Experts estimate 90% of sexual abuse victims are female. Jaffe, Dynneson & ten Bensel, Sexual Abuse of Children: An Epidemiologic Study, 129 Am. J. Diseases of Children 689 (1975). The American Humane Association estimates 78% are female and the average age is 9.3 years. Cerkovnik, The Sexual Abuse of Children: Myths, Research, and Policy Implications, 89 Dick. L. Rev. 691 (1985).

Research also shows that the view of the child molester as a sexually-frustrated old man lurking behind bushes with candy is a myth. Seventy percent are well-known to their victims. Forty-three percent of abused females and 17% of abused boys were abused by actual family members. Most sexual assaults occur among family and friends in their own homes. Id.

One researcher found: young to middle aged offenders are most common; female perpetrators are rare (1% to 5% of cases reported); most offenders victimize people of their own ethnic background; interracial abuse is indicated in less than 5% of reported cases; many sex offenders are socially and sexually immature, therefore docility and fear make children likely victims. Id. (citing Swift, Sexual Assault of Children and Adolescents, in testimony for presentation to the Domestic and International Scientific Planning Analysis and Cooperation Subcommittee of the Committee on Science and Technology of the U.S. House of Representatives on Jan. 11, 1978).

12. Raskin & Yuille, supra note 7. The authors project that 8% of the investigated cases may be fictitious, which could result in 8,000 or more serious actions and false prosecutions.

13. Id.

14. Id.

allegations by children who reported sexual abuse by a non-custodial parent, again in the context of child custody and visitation disputes.[15] But experts dispute statistics on the number of false reports,[16] maintaining that "the best available data supports the contention that false reports from children are rare."[17] Most studies show very low percentages of actually fictitious allegations, while reporting significant percentages of reports unable to be substantiated.[18]

There are several ways to arrive at the conclusion that a child has been sexually abused. Obviously, the easiest situation would be when relatively undisputed evidence is present, such as photos, videos or eyewitnesses. Sometimes medical evidence is present, such as sperm or sexually-transmitted disease. In rare cases the accused may confess. But in most cases the allegations or actions of the child are the only indicators.[19] Often in such situations, the first and primary goal of social workers and investigators is to determine whether the child is telling the truth and telling it accurately. From the very moment allegations are made by a child, those who must act on them are assessing credibility in order to decide what action to pursue.[20]

The Child Witness

> *In all the child's world of dim sensations, play is all in all. "Making believe" is the gist of his whole life . . . [W]hatever we are to expect at the hands of children, it should not be any*

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15. Id.

16. Berliner contends that official statistics contain many cases that are not really reports of abuse, but vague complaints or legitimate suspicions. When a report of abuse is actually made by a child, it appears that the child is very rarely lying or mistaken, while a somewhat larger percentage of reports from adults are considered false. Berliner, supra note 8.

One author notes that the "category 'false accusations' includes almost any situation in which an abuse report cannot be substantiated. 'The term fails to differentiate from situations where inadequate information is available to determine the true or false nature of the report.'" Sink, Studies of True and False Allegations: A Critical Review, in Sexual Abuse Allegations, ABA 48 (Nicholson & Bulkley eds. 1988) at 38.

17. Berliner, supra note 8.

18. Sink, supra note 16.

19. Id.

20. S. Sgroi, "Validation" and "Case Management," in Handbook of Clinic Intervention in Child Sexual Abuse 39-41, 69-73, 81, 91-96 (1982), reprinted as Validation of Child Sexual Abuse, in Sexual Abuse Allegations, ABA 48 (Nicholson & Bulkley eds. 1988). Individuals who must investigate the case, either for law enforcement purposes or social services, go through an initial process of determining if the complaint is valid called "validation." Validation involves an interpretation by a case worker of physical signs, behavior and information from investigative interviews. "Credibility Assessment" follows the fact-finding phase.

peddling exactitude about matters of fact. They walk in a vain show, and among mists and rainbows; they are passionate after dreams and unconcerned about realities. . . .

Robert Louis Stevenson, 1881[21]

Stevenson was not alone in thinking children's imaginations control their minds. Wigmore[22] and Freud[23] also were skeptical of children and their competency to differentiate between fact and fantasy. One author states, "Wigmore seems to have been so convinced that female children fantasize about sexual assault that he went out of his way to recommend a special, radical change in the rules of evidence to discredit their complaints."[24] Despite his misgivings, Wigmore still advocated putting children on the witness stand to "let it tell its story for what it may seem worth."[25]

Skeptical about child witnesses, many courts refused to accept Wigmore's suggestion and set age, competency, and other limits on children before they could be allowed to testify. Gradually, however, some roadblocks began to fall. Like many jurisdictions today, Louisiana has no age requirement. It retains, however, the requirement that a witness in any proceeding must be a "person of proper understanding."[26]

Prejudice, however, is not as easy to change as a statute. Studies show jurors are more likely to believe adult rather than child and teenage witnesses. In one study using mock jurors, researchers found that testimony from an adult witness would more often be considered sufficient to find a defendant guilty than would the same testimony if it came from a child. In effect, the jury would give less credence to the testimony

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21. Robert Louis Stevenson, Child's Play, in "Virginibus Pueresque" (1881). 3A J. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 509 (J. Chadbourne rev. ed. 1978). Stevenson was also a lawyer.

22. Wigmore said of young girls: "[t]heir psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men." 3A J. Wigmore, supra note 21, at § 924a.

Wigmore's famous comment was that "[n]o judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician." Id. at 460. See also Bienen, A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence, 19 Cal. W.L. Rev. 235 (1983).

23. Freud suppressed his own discoveries about incest and instead publicized a different theory about children's sexual fantasies. See J. Masson, The Assault on Truth: Freud's Suppression of the Seduction Theory (1984).

24. Bienen, supra note 22.

25. 2 J. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law § 509 (1940).

26. La. Code Evid. art. 601.

of children and would only convict if the child's testimony was corroborated by other evidence.[27] Thus, depending on the factual situation, skepticism may run high. Jurors may be critical of the teenage witness who initially reports to a teacher and others, then recants.[28] Similarly, when the defendant accuses the alleged victim of fabricating the story to "get out on her own," perceived victim credibility is low.[29] Added to such skepticism about the range of children's imaginations have been attacks on their ability to recall information and on their susceptibility to suggestion.[30] So, even if the court accepts the premise that children do not usually lie about sexual abuse, other factors may still erode trust in the child's statement. *State v. Logue*[31] exemplifies this lack of trust. The court noted that the four-year-old child's "age and immaturity reflect upon his credibility."[32] In another case, the court stated:

> Obviously, there are types of sexual offenses, notably incest, in which, by the very nature of the charge, there is grave danger of completely false accusations by young girls of innocent appearance, but unsound minds, susceptible to sexual fantasies and possessed of malicious, vengeful spirits.[33]

Some research suggests these concerns are not well-founded—that children actually remember quite well and are no more "suggestible" than

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27. Goodman, Golding & Haith, Jurors' Reactions to Child Witnesses, 40 J. Soc. Iss. 139 (1984). See Yarmey & Jones, Is the Psychology of Eyewitness Identification a Matter of Common Sense?, in Child Sexual Abuse and the Law 13-40 (J. Bulkley ed. 1983) for a study in which several groups were asked to study a hypothetical eight-year-old child's testimony. Fewer than 50% felt the child would respond accurately to questions by police or in court.

Studies also show jurors may view younger sex offense victims as more credible than teenagers because younger children lack certain cognitive abilities, particularly knowledge of sexual acts and ability to act out of revenge. Bulkley, supra note 7, at 208-29. Indeed, a three-year-old is not likely to gain sufficient knowledge from television to accurately describe vaginal, anal, and oral intercourse with anatomically correct dolls. State v. Timperio, 38 Ohio App. 3d 156, 528 N.E.2d 594 (1987). With older children, however, the chances are greater that the child could have gained such knowledge from a variety of sources—friends, television, sex education courses in school, older siblings, or perhaps from observing older children.

28. State v. Moran, 151 Ariz. 378, 728 P.2d 248 (1986).

29. State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983).

30. Raskin & Yuille, supra note 7. The authors assert that recall tends to increase with age as attention span increases. They also note that investigators sometimes lead children to certain answers and that with younger children the desire to please affects the suggestibility of the child.

31. 372 N.W.2d 151 (S.D. 1985).

32. Id. at 158.

33. State v. Looney, 294 N.C. 1, 18, 240 S.E.2d 612, 622 (1978).

adults.[34] Nevertheless, attitude studies show that on the scales that measure credibility in a juror's mind, the weight is stacked against child witnesses before they ever open their mouths to speak.

The Child Victim of Sexual Abuse as a Witness

Certain behavior of child victims of sexual abuse can compound the problems that arise. Victims can undermine their credibility if jurors do not understand that the child's behavior is consistent with that of verified child sexual abuse victims.

Two reactions in particular often need explanation to the jury—recantation and delayed reporting. For example, in one case the victim made an allegation of sexual abuse, afterward recanted, then later reasserted the allegation. The victim explained in court that her stepfather's first wife scared her when they were alone together and threatened her.[35] The expert in that case explained to the jury some of the factors that cause recantation.[36] In a delayed reporting case, the three-year-old victim reported that her father threatened to burn the house down if she told anyone about his acts.[37] As one judge has noted, such behavior requires an expert to place it in perspective:

> The nature . . . of the sexual abuse of children places lay jurors at a disadvantage. Incest is prohibited in all or almost all cultures, and the common experience of the jury may represent a less than adequate foundation for assessing the credibility of a young child who complains of sexual abuse. . . . By explaining the emotional antecedents of the victim's conduct and the peculiar impact of the crime on other members of the family, an expert can assist the jury in evaluating the credibility of the complainant.[38]

Many courts accept this rationale, allowing an explanation of certain behavior and even allowing testimony on hypothetical behavior. Courts do not seem to struggle with the relevance of such testimony and its ability to assist the jury. An opinion on the particular child's truthfulness, however, goes beyond mere explanation of behavior.

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34. Johnson & Foley, Differentiating Fact From Fantasy: The Reliability of Children's Memory, 40 J. Soc. Iss. 33 (1984); Loftus & Davies, Distortions in the Memory of Children, 40 J. Soc. Iss. 51 (1984) and Ingulli, Trial by Jury: Reflections on Witness Credibility, Expert Testimony, and Recantation, 20 Val. U.L. Rev. 145 (1986).

35. Wheat v. State, 527 A.2d 269, 270 (Del. 1987).

36. Id. at 271 n.1. The factors include pressure on the complainant by family members, fear of the legal process, the child's conflicting feelings toward the abuser, a desire to prevent the withdrawal of affection that may accompany allegations of abuse, and fear of retribution.

37. State v. Timperio, 38 Ohio App. 3d 156, 528 N.E.2d 594 (1987).

38. State v. Myers, 359 N.W.2d 604, 610 (Minn. 1984).

Opinion Testimony by Experts

At one time, American courts were reluctant to trust juries with any expert testimony at all. An Iowa judge in 1876, for example, commented that "the evidence of experts is of the lowest order and of the most unsatisfactory character."[39] McCormick explains that such hostility was an outgrowth of judicial fear that expert testimony would take over an essential jury responsibility—independent analysis of the facts.[40] As McCormick notes, the trend has been to expand admissibility, allowing opinion testimony even if it embraces an ultimate fact.[41] Louisiana Code of Evidence articles 702 and 704 codify the Louisiana rule on admissibility of expert opinion. These articles allow expert testimony that will assist the trier of fact in determining a fact in issue or in understanding the evidence.[42] A practical test for allowing expert testimony, according to Wigmore,[43] is a simple question: On this subject, can a jury receive appreciable help from this person? Applied in the context of an expert opinion on the veracity of a child witness in a sexual abuse prosecution, this test raises important issues: when is such help allowed? On what subject will the expert be allowed to testify and what kind of expert is an expert on that subject? How much help is "appreciable help?"

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39. Whitaker v. Parker, 42 Iowa 585, 587 (1876).

40. C. McCormick, McCormick on Evidence § 12, at 30-31 (3d ed. E. Cleary 1984).

41. Id. Fed. R. Evid. 704 and its Louisiana counterpart, La. Code Evid. art. 704, embody this more liberal approach.

La. Code Evid. art. 704 provides:

> Testimony in the form of an opinion or inference otherwise admissible is not to be excluded solely because it embraces an ultimate issue to be decided by the trier of fact. However, in a criminal case, an expert witness shall not express an opinion as to the guilt or innocence of the accused.

The federal rule does not exactly correspond. The federal rule provides:

> (a) Except as provided in subdivision (b), 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.
>
> (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

42. See supra note 41 and accompanying text. La. Code Evid. art. 702. The full text reads: "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."

43. 3A J. Wigmore, supra note 21, § 1923.

When to Admit

The prosecution may offer expert testimony at two stages of trial: in the primary presentation of the case or as rebuttal. Under the present Louisiana rules of evidence, an expert cannot voice an opinion on the veracity of any witness. Furthermore, no testimony establishing a witness' credibility[44] is admissable unless the witness' credibility has been attacked.[45] This limitation rules out admitting the opinion in the primary presentation of the case.

On rebuttal of evidence attacking the witness' credibility, the testimony would be limited to general testimony on the witness' reputation for truthfulness.[46] An expert usually cannot testify as to general reputation for truthfulness because the expert usually lacks a sufficient foundation on which to base such testimony. The expert is not likely to have known the child long enough or have had enough contact with the child before the time abuse was alleged to satisfy the foundation requirement. Thus, in Louisiana a legislative amendment to the Code of Evidence for this particular situation would be necessary in order to admit this kind of opinion.

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44. See comments (c) and (d) to La. Code Evid. art. 607. Comment (c) states: "The term 'credibility' is used in this paragraph and throughout this code in a broad sense, and includes not only the witness' subjective truthfulness but also his capacity, accuracy of perception, and any other factor affecting the determination of whether the testimony accords with reality." Comment (d) states:

> No attempt has been made in this Code to regulate with specificity the nature of evidence admissible to support the credibility of a witness. The matter is left to the traditional principles of relevancy embodied in Article 403. The general rule, of course, is that evidence supporting credibility must be logically relevant in meeting the thrust of the attack on credibility. (citation omitted).

45. La. Code Evid. art. 607 in part provides:

> A. Who may attack credibility. The credibility of a witness may be attacked by any party, including the party calling him.
>
> B. Time for attacking and supporting credibility. The credibility of a witness may not be attacked until the witness has been sworn, and the credibility of a witness may not be supported unless it has been attacked. However, a party may question any witness as to his relationship to the parties, interest in the lawsuit, or capacity to perceive or to recollect.

46. The pertinent portion of La. Code Evid. art. 608 reads:

> A. Reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of general reputation only, but subject to these limitations:
>
> (1) The evidence may refer only to character for truthfulness or untruthfulness.
>
> (2) A foundation must first be established that the character witness is familiar with the reputation of the witness whose credibility is in issue. The character witness shall not express his personal opinion as to the character of the witness whose credibility is in issue.

The result should be the same under the Federal Rules of Evidence. Although, according to the Federal Rules, any witness may express an opinion[47] when testifying, the expert would not qualify as an expert on a particular child's reputation for truthfulness.[48] Thus, he would be barred from expressing his opinion on that issue.

The Subject

Two issues arise concerning the subject on which the expert will be allowed to testify. First, is credibility of another witness the proper subject of expert testimony? And second, can anyone be an expert on truthfulness?

As to the first question, judging witness credibility generally has been viewed strictly as a jury function.[49] The Supreme Court of Arizona likened such testimony to expert testimony on whether the crime occurred or whether the defendant was the perpetrator.[50] "[E]xpert testimony on who to believe is nothing more than advice to jurors on how to decide the case."[51] Federal Rule of Evidence 704 allows expert opinion testimony even if it embraces an ultimate issue, but rejects testimony of experts as "oath helpers."[52] The Advisory Committee Notes state that the rule is not intended to allow experts "to tell the jury what result to reach."[53] Louisiana follows the federal approach in Louisiana Code of Evidence articles 702 and 704.[54] Although no cases interpret the scope of Louisiana's codified rule, cases reported before the adoption of the Code found that the only test of competency of an expert witness is his knowledge of the subject[55] and that experience may be enough to qualify as an expert.[56]

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47. See supra text of Fed. R. Evid. 704 at note 41. Fed. R. Evid. 702 provides: "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."

48. See State v. Azure, 801 F.2d 336 (8th Cir. 1986), in which the Eighth Circuit considered this issue.

49. State v. Shepherd, 332 So. 2d 228 (La. 1976); State v. Bell, 315 So. 2d 31 (La. 1975); State v. Cathey, 493 So. 2d 842 (La. App. 5th Cir. 1986), writ denied, 500 So. 2d 419, cert denied, 481 U.S. 1049, 107 S. Ct. 2181 (1987); State v. Sorina, 499 So. 2d 376 (La. App. 4th Cir. 1986).

50. State v. Moran, 151 Ariz. 378, 728 P.2d 248 (1986).

51. Id. at 383, 728 P.2d at 253.

52. Advisory Committee Notes to Fed. R. Evid. 704.

53. Id.

54. See supra text accompanying notes 41 and 42.

55. State v. Trosclair, 443 So. 2d 1098 (La. 1983), cert. denied, 468 U.S. 1205, 104 S. Ct. 3593 (1984); State v. Williams, 353 So. 2d 1299 (La. 1977), cert. denied, 437 U.S. 907, 98 S. Ct. 3098 (1978); State v. Rogers, 324 So. 2d 358 (La. 1975); State v. Collins, 535 So. 2d 973 (La. App. 2d Cir.), writ granted, 536 So. 2d 1200 (1988).

56. State v. Myles, 432 So. 2d 1018 (La. App. 1st Cir. 1983).

In *State v. Azure*, the Eighth Circuit Court of Appeals rejected expert testimony on the veracity of a child sexual abuse victim, relying on *U.S. v. Barnard*, a Ninth Circuit decision.[57] "[C]ompetency is for the judge, not the jury," according to *Barnard*. "Credibility, however, is for the jury—the jury is the lie detector in the courtroom."[58]

The prosecution in *Azure* urged a special exception for child sexual abuse cases, but the Eighth Circuit rejected the argument, finding an opinion on the victim's credibility an impermissible opinion that the defendant was guilty. The court refused to relax the Federal Rules of Evidence for child sexual abuse cases.[59]

The Hawaii Supreme Court in *State v. Kim*,[60] the seminal case allowing an expert to state an opinion on a particular child's veracity, did not address the issue of whether truthfulness of a witness is the proper subject of expert testimony. Courts subsequently following *Kim*[61] have similarly skirted the issue.

Can anyone be an expert as to the truthfulness of a witness? Should a pediatrician be allowed to state he believes the child? Should a psychologist or psychiatrist or social worker? The child's mother? The child's school teacher? As the court in *Azure* stated, "[n]o reliable test for truthfulness exists."[62] Another court provides the reason: "Psychologists and psychiatrists are not, and do not claim to be, experts at discerning truth. Psychiatrists are trained to accept facts provided by their patients, not to act as judges of patient's credibility."[63]

A somewhat different criticism is that social workers and therapists commonly feel children do not lie about sexual abuse and "after one or more sessions with the child, the therapist almost always concludes that the allegations or suspicions are true."[64] If true, this attitude would cloud the expert's objectivity and render the opinion useless.

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57. 490 F.2d 907 (9th Cir. 1973), cert. denied, 416 U.S. 959, 94 S. Ct. 1976 (1974).

58. Id. at 912.

59. *Azure*, 801 F.2d 336, 340. The court stated:

> We agree that in these types of special circumstances some expert testimony may be helpful, but putting an impressively qualified expert's stamp of truthfulness on a witness' story goes too far in present circumstances. . . . [B]y . . . putting his stamp of believability on Wendy's entire story, Dr. ten Bensel essentially told the jury that Wendy was truthful in saying that Azure was the person who sexually abused her. No reliable test for truthfulness exists and Dr. ten Bensel was not qualified to judge the truthfulness of that part of Wendy's story.

60. 64 Haw. 598, 645 P.2d 1330 (1982).

61. State v. Myers, 359 N.W.2d 604 (Minn. 1984); State v. Geyman, 224 Mont. 194, 729 P.2d 475 (1986); State v. French, 233 Mont. 364, 760 P.2d 86 (1988); State v. Timperio, 38 Ohio App. 3d 156, 528 N.E.2d 594 (1987).

62. U.S. v. Azure, 801 F.2d 336, 341 (8th Cir. 1986).

63. State v. Moran, 151 Ariz. 378, 385, 728 P.2d 248, 255 (1986).

64. Raskin & Yuille, supra note 7. The authors note:

Social workers, however, are required to follow certain procedures to verify allegations of child sexual abuse. The reality is that those who investigate initial complaints are required to judge the veracity of a child complainant from the outset. These officials could arguably be considered experts at judging credibility of a child sexual abuse complainant, a more limited proposition than perceiving the opinion simply as an opinion on credibility generally.

According to Wigmore, expertness is relative to a particular topic about which a person is asked to make a statement.[65] Wigmore suggests that there are no fixed classes of experts and that it is misleading to think of some witnesses as experts and some as non-experts.[66] Theoretically, then, anyone could be qualified to express an opinion on a child-complainant's credibility, if under the circumstances of the case the judge felt the person had enough expertise and enough contact with the child to make a judgment.[67] Furthermore, deciding whether one can be an expert at discerning truth is not necessarily the same as deciding one has expertise in judging the veracity of a child's statement that he or she is a victim of sexual abuse. The latter inquiry is much more narrow, and this comment suggests some individuals would qualify based on their experience in the field and contact with the victim in question and others.

The fear is that a broad interpretation of "expert" may result in qualifying as experts school teachers, guidance counselors and other officials with limited knowledge in the field of child sexual abuse and minimal experience with victims. Such was the case in *State v. French*, in which the Montana Supreme Court allowed a school counselor to testify that she believed the child was truthful.[68] The court may prevent

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> Many social workers, psychiatrists, and psychologists assume that certain behaviors of the child are definite indicators that abuse has occurred. Their goal is to provide an atmosphere of support and encouragement in order to assist the child in describing the abuse that the therapist is certain has occurred. Almost anything the child says and does is interpreted as being consistent with the trauma associated with sexual abuse, including repeated and strong denials or recantations by the child.

In a recent Mississippi custody dispute, the supreme court approved the lower court's rejection of three out of four experts' testimony because of "a 'snowball effect' at work among the doctors." Newsom v. Newsom, 557 So. 2d 511, 515 (Miss. 1990).

65. 2 J. Wigmore, supra note 25, at § 555.

66. Id.

67. The court in Wheat v. State, 527 A.2d 269 (Del. 1987), found a social worker could qualify as an expert in child sexual abuse cases if the person possessed "satisfactory educational and occupational experience in the area of child behavior . . . ." The court also required that the expert demonstrate sufficient knowledge of, and contact with, victims of child abuse to be able to explain behavior and psychological characteristics that are material issues in the case.

68. State v. French, 233 Mont. 364, 760 P.2d 86 (1988).

such a result by requiring that the "expert" be qualified as an expert in the field of child sexual abuse *and* have extensive experience dealing with the victims of child sexual abuse *and* have had sufficient contact with the child. If all three requirements are met, the expert should be sufficiently qualified.

Many courts also share the fear that the subject of the victim's truthfulness will become a "battle of the experts." As one author states, "for every expert who will say black, another will say white."[69] A corollary problem is that the defense will not be sophisticated, experienced, or wealthy enough to hire an expert of equal caliber to rebut the prosecution's expert. Court-appointed experts offer one solution to this problem.[70]

Appreciable Help

Wigmore would allow expert testimony when it will "assist" the jury.[71] A typical formulation of when information will be of assistance is when jurors lack specialized knowledge, skill, or experience and, thus, are incapable of drawing either a correct inference or, indeed, any inference at all without assistance.[72] This formulation, however, provides no test for such juror incompetency.

The Hawaii Supreme Court in *Kim* allowed the expert to say he believed the child because the court felt that the jurors lacked a proper basis of understanding to make that assessment[73] and because the court felt child sexual abuse was "unfamiliar and mysterious."[74] The court, however, did not explain how an expert's statement assists the jury. It also failed to explain why an expert's belief that the child is telling the truth provides any aid. The Minnesota Supreme Court, which allows experts to say whether they believe child witnesses, also fails to explain how such an opinion is of any assistance.[75]

Implicitly, these courts seem to feel that the jury does not have an adequate foundation through common experience to make a valid assessment of an allegedly sexually abused child's credibility. One reason courts may use to justify their holdings is simply to balance the scales. The child victim of sexual abuse is at a disadvantage before he or she

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69. Roe, Expert Testimony in Child Sexual Abuse Cases, 40 U. Miami L. Rev. 97, 104 (1985).

70. La. Code Evid. art. 706 provides for court-appointed experts.

71. 2 J. Wigmore, supra note 25, at § 555.

72. Smith v. State, 259 Ga. 135, 377 S.E.2d 158, 161, cert. denied, 110 S. Ct, 88 (1989).

73. State v. Kim, 64 Haw. 598, 645 P.2d 1330 (1982).

74. State v. Castro, 69 Haw. 633, 648, 756 P.2d 1033, 1044 (1986).

75. State v. Garden, 404 N.W.2d 912, 915 (Minn. Ct. App. 1987) (psychologist allowed to say he thought the 12-year-old victim was truthful).

ever climbs onto the witness stand. Jurors are more skeptical of child witnesses and are very conscious of the damage caused by false accusations. The fact that the expert believes the child gives additional fighting power to the uncorroborated victim who participates in this battle, but has no weapons. Had the courts above used this justification, their opinions would be of greater value because they would provide more insight as to how the expert's opinion is of assistance.

McCord contends that the "will assist" inquiry often is improperly applied because courts only skim psychological research and rarely examine in detail the circumstances of the particular case to determine if particular testimony would assist. Whether the information will assist is not the dominant inquiry; it is the only inquiry.[76] "Will it assist" subsumes questions of relevance, unfair prejudice and reliability, as well as concerns expressed by "beyond the ken," "invades the province of the jury," and "improper comment on witness credibility" objections.[77] Thus, if properly applied,[78] the only necessary rules are those on relevancy. The admissibility of testimony will always be subject to this "initial sieve" through which evidence must pass.[79] Any evidence may be excluded if it is unfairly prejudicial, confusing, or wastes time.[80]

A Solution: The Kim *Approach*

Perhaps it is true that "[t]here is no acid test for veracity."[81] In some circumstances, however, certain experts may be justified in giving

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76. McCord, Syndromes, supra note 6, at 91.

77. Id.

78. McCord states:

> A correct analysis involves a great deal of perception and hard work. The psychological research literature must be exhaustively examined. The circumstances of the particular case, including the facts surrounding the crime, the actions of the parties at trial, and societal attitudes which may influence the jury, must be scrutinized. This comes as harsh news to courts that are used to resolving evidentiary objections by resort to relatively clear precedent, time-honored bits of phraseology, or deference to the discretion of the trial court.

Id. at 92.

79. Rault, An Overview of the New Louisiana Code of Evidence—Its Imperfections and Uncertainties, 49 La. L. Rev. 697 (1989). La. Code Evid. art. 401 defines relevancy:

> "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.

La. Code Evid. art. 403 provides:

> 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, or waste of time.

80. La. Code Evid. art. 403.

81. Kirkpatrick v. State, 747 S.W.2d 833, 837 (Tex. App. 1987).

an "informed speculation"[82] on veracity. The *Kim* court set forth a specific framework for allowing an assessment of credibility. This framework provides that:

* testimony be based on a sound factual foundation.
* opinions or inferences be based on an explicable and reliable system of analysis.
* the opinion adds to the common understanding of the jury.
* probative value is not outweighed by prejudice, confusion or waste of time.
* the expert had sufficient contact with the victim to make a thorough and objective assessment.
* the method by which the conclusion was reached is reliable methodology and is presented to the jury.
* the inferences or conclusions are sufficiently precise, so that they meaningfully contribute to the assessment of the witness' credibility.[83]

Within the requirements set forth in *Kim*, the defendant should be safeguarded against possible misuse of an exception to the general rules. A key aspect of the framework deserving special attention is the requirement that the expert reveal the foundation on which his opinion is based. None of the courts allowing an expert to state an opinion on the victim's veracity addressed the foundation requirement, which is critical. In a criminal prosecution for child sexual abuse, the importance of the opinion lies not in the opinion itself, but in the reasons for it—the foundation. This aspect of the expert's testimony is essential to assisting the jury and making the opinion relevant.

Kim's framework of admissibility is workable and provides a useful guide for a legislative amendment to the Louisiana Code of Evidence. The *Kim* court failed only in its inadequate explanation of why the exception is useful and necessary.

CONCLUSION

Children matter for what they tell us about ourselves. They cannot defend their rights; such rights as they enjoy must be

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82. Bonnie & Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427 (1980).

83. The *Kim* court stated:

> [A]n expert must base his testimony upon a *sound factual foundation*; any inferences or opinions must be the product of an explicable and reliable system of analysis; and such opinions must add to the common understanding of the jury. . . . Moreover the probative value of such testimony must not be outweighed by the likelihood of prejudice, confusion or waste of time. . . . (emphasis added).

State v. Kim, 64 Haw. 598, 604, 645 P.2d 1330, 1336 (1982).

> *freely given to them. Thus, the care children receive in a society is a sensitive index of its morality. I leave it to each of us to judge for ourselves how well our nations measure up to this standard.*
>
> —Leon Eisenberg[84]

Because child sexual abuse is not easily understood by the average person and in light of the marked increase in reports of such abuse, the judicial system must alter traditional rules in order to face this particular problem. But traditional rules develop over time based on experience and cannot be easily discarded. Grappling with the choice of whether to alter its own rules, the Iowa Supreme Court stated:

> Such crimes are indeed detestable and society demands prosecution of these abusers. However, a sexual abuse charge alone carries a large stigma on the accused and conviction provides a serious penalty. In interpreting our Rules of Evidence, we must not only be aware of the needs of society but also the defendant's right to a fair trial.[85]

The choice is ultimately one of policy. Who needs more protection: the accused or the uncorroborated victim of child sexual abuse? This comment suggests that an expert should be allowed to give his opinion on the veracity of a particular child witness in criminal prosecutions for child sexual abuse, within certain limitations. As set forth by the Hawaii Supreme Court, the expert should have sufficient experience dealing with child victims of sexual abuse and sufficient contacts with the child, both of which should be revealed to the jury. The method by which the expert reaches his conclusion also should be revealed. But most importantly, the reasons why the expert believes the child should be explained. The statement "I believe this child" is not necessarily helpful to a jury. But "I believe this child" accompanied by reasons why allows the jurors to take into account the same factors as the expert and then make their own assessment.

The Hawaii Supreme Court's approach establishes a fair framework of admissibility, while protecting concerns over reliability and prejudice to the defendant. This framework would be a solid basis for a legislative amendment to the Louisiana Code of Evidence.

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84. Eisenberg, Cross-Cultural and Historical Perspectives on Child Abuse and Neglect, 5 Child Abuse and Neglect 299, 306 (1981), concluding thoughts in an address to the U.S. National Conference on Child Abuse and Neglect.

85. State v. Myers, 382 N.W.2d 91, 97 (Iowa 1986).

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