

Can I Say That in Court?

What Forensic Interviewers Need to Know About Testifying

NANCY LAMB

CAC Attorney, Southmountain Children and Family Services

nlamb@southmountain.org

YOU'VE BEEN SUBPOENAED!!!!



STATE OF NORTH CAROLINA

File No.

_____ County

In The General Court Of Justice
☐ District ☐ Superior Court Division

	Additional File Numbers
VERSUS	SUBPOENA G.S. 1A-1, Rule 45; 8-59, -61, -63; 15A-801, -802

Party Requesting Subpoena
☐ State/Plaintiff ☐ Defendant

NOTE TO PARTIES NOT REPRESENTED BY COUNSEL: Subpoenas may be produced at your request, but must be signed and issued by the office of the Clerk of Superior Court, or by a magistrate or judge.

TO	Name And Address Of Person Subpoenaed	Alternate Address
	Telephone No.	Telephone No.

YOU ARE COMMANDED TO: (check all that apply)

- ☐ appear and testify, in the above entitled action, before the court at the place, date and time indicated below.
☐ appear and testify, in the above entitled action, at a deposition at the place, date and time indicated below.
☐ produce and permit inspection and copying of the following items, at the place, date and time indicated below.
☐ See attached list. (List here if space sufficient)

Name And Location Of Court/Place Of Deposition/Place To Produce	Date To Appear/Produce, Until Released
	Time To Appear/Produce, Until Released <input type="checkbox"/> AM <input type="checkbox"/> PM
	Date
Name And Address Of Applicant Or Applicant's Attorney	Signature
	<input type="checkbox"/> Deputy CSC <input type="checkbox"/> Assistant CSC <input type="checkbox"/> Clerk Of Superior Court <input type="checkbox"/> Magistrate <input type="checkbox"/> Attorney/DA <input type="checkbox"/> District Court Judge <input type="checkbox"/> Superior Court Judge
Telephone No. Of Applicant Or Applicant's Attorney	

RETURN OF SERVICE

I certify this subpoena was received and served on the person subpoenaed as follows:

- By ☐ personal delivery. ☐ registered or certified mail, receipt requested and attached.
☐ telephone communication by Sheriff (use only for a witness subpoenaed to appear and testify).
☐ telephone communication by local law enforcement agency (use only for a witness subpoenaed to appear and testify in a criminal case).

NOTE TO COURT: If the witness was served by telephone communication from a local law enforcement agency in a criminal case, the court may **not** issue a show cause order or order for arrest against the witness until the witness has been served personally with the written subpoena.

☐ I was unable to serve this subpoena. Reason unable to serve: _____.

Service Fee \$ <input type="checkbox"/> Paid <input type="checkbox"/> Due	Date Served	Name Of Authorized Server (type or print)	Signature Of Authorized Server	Title/Agency
---	-------------	---	--------------------------------	--------------

NOTE TO PERSON REQUESTING SUBPOENA: A copy of this subpoena must be delivered, mailed or faxed to the attorney for each party in this case. If a party is not represented by an attorney, the copy must be mailed or delivered to the party. This does not apply in criminal cases.

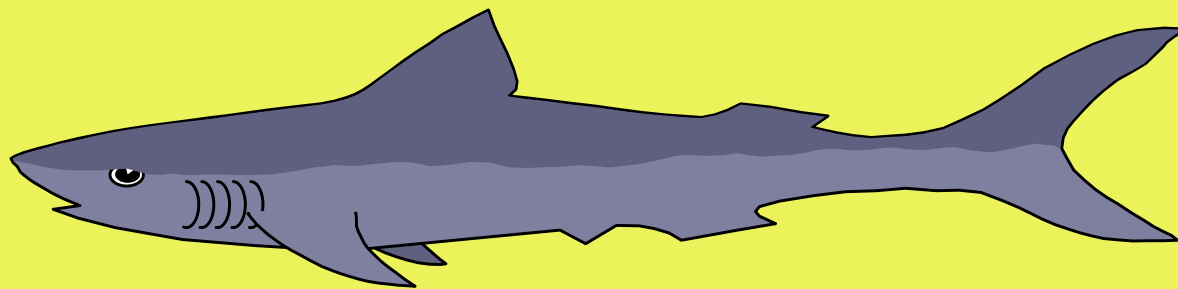
**THE STANDARD IN
CRIMINAL COURT:**

**PROOF BEYOND A
*REASONABLE DOUBT***

The Standard in Civil Court

**Proof by a
*Preponderance of the
Evidence***

**IS WHAT I AM
DOING(_{NOW})
LEGALLY
DEFENSIBLE IN
COURT(_{LATER})?**



**The defense attorney is always
looking over your shoulder.....**

Arming yourself!!

- Training and continuing education
 - Keep up with it.....in detail
- Peer review and supervision

Know your stuff!!

- This is an ever changing field
- You must be aware of emerging issues and research in this field
- Know what current best practices are
- What are the national standards governing forensic interviews

This goes without saying.....

- CAC model: understand how your CAC works and who does what
- Know the policies and procedures of your MDT
- Interview process: how we obtain untainted information from children: the reasons behind the protocol
- Literature: educate yourself on literature supporting your protocol

Preparing to testify

It's done in phases



**PRE-TRIAL
PREPARATION:
CREDIBILITY IS CRUCIAL**

MAINTAIN A CURRENT CV OR RESUME

- DEGREES
- EMPLOYMENT
- EXPERIENCE
- TRAINING
- AWARDS
- LICENSES
- PRIOR COURT APPEARANCES
- ADVISORY BOARDS
- PRESENTATIONS

Prepare yourself for direct and cross exam

- Watch the recorded interview
- What are the strengths
- What are the weaknesses
- Take notes

Start with the recorded interview

- Child promised to tell the truth and understood what that meant
- Child friendly setting without introducing play or fantasy
- Types of questions asked during substantive portion of interview: Number of invitations(input free prompt) and open ended follow ups vs. focused(W questions: what was he wearing) vs. forced choice(yes/no/something else) vs. leading questions

Check out this article

- Henderson HM, Russo N, Lyon TD. Forensic Interviewers' Difficulty With Invitations: Faux Invitations and Negative Recasting. Child Maltreat. 2020 Aug;25(3):363-372. doi: 10.1177/1077559519895593. Epub 2019 Dec 26. PMID: 31876172; PMCID: PMC7997731.

Start with the recorded statement

- Facts supporting abuse allegation came from child, not interviewer : note the types of questions asked to elicit allegations
- Number of times child corrects adult/asks for clarification
- Demeanor clues
- Followed the protocol//if deviations, take note and be prepared to explain

REMEMBER....

THERE IS NO SUCH THING AS A
PERFECT INTERVIEW

*THE QUESTION IS ...*CAN THE TECHNIQUES
USED FOR GATHERING THE INFORMATION
BE DEFENDED IN COURT?

Testimonial Preparation

- Who issued the subpoena?
- Contact the lawyer who issued it
 - Type of case
 - Status of the case
 - What's expected of you
 - If/when you'll really be needed:
telephone standby
 - If going to trial, demand a
meeting

PRETRIAL PREPARATION:

A MEETING OF THE MINDS

- **What is the interviewer's purpose as a witness?**
- **What questions will be asked to elicit the desired information?**
- **What are the potential problem areas of the witness's testimony?**
- **Can these problems be overcome to the jury's satisfaction and if so how**

What is attorney's purpose in calling the interviewer?

Fact Witness?
Expert Witness?

Expert Witness v. Fact Witness



What kind of testimony: Expert or Factual?

- **EXPERT** Testimony

Information and opinions based on scientific, technical or other specialized knowledge

- **FACTUAL** Testimony

What the witness ***did, saw, heard, said, etc.***

WHAT TO EXPECT AS AN EXPERT



Qualifying the interviewer as an expert witness

- Is this really necessary....?
- Areas of emphasis
- An expert in the field of?

Expert topics for forensic interviewers

- Interview protocol: yours
- Interview process: how children disclose; why children may deny abuse or delay telling someone they trusted even for months or years
- Memory/suggestibility issues
- Symptoms/characteristics that may commonly be observed in sexually abused children
- Interplay of any symptoms/characteristics that affected child's ability to disclose abuse in this case

What is the most common
reason child sexual abuse
cases get reversed on appeal??

Improper Expert testimony



We go back to.....



Phase 2

- At the Courthouse



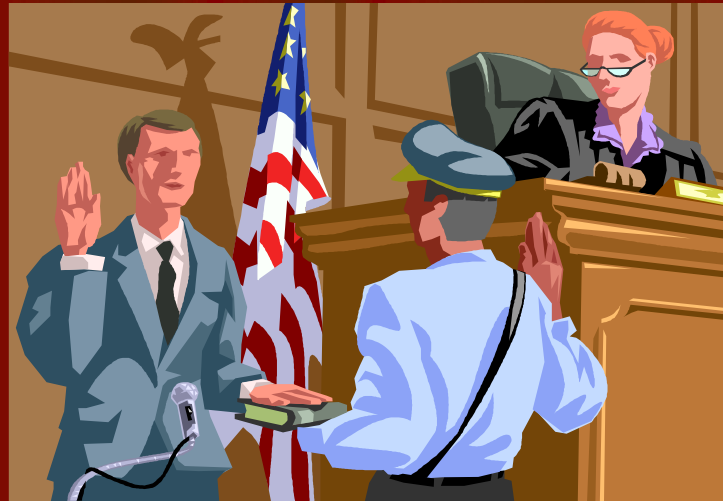
At the Courthouse

- Presentation begins when you approach the courthouse
- Be aware of who is around you
- Be familiar with your surroundings
- Be respectful of others in the case always

At the Courthouse

- Be prompt
- Be professional
 - Appearance
 - Demeanor on and off the stand
- Waiting is an art
- Know where to go after testifying

Phase 3: ON THE WITNESS STAND



Courtroom Demeanor

IT IS YOUR CREDIBILITY ON
THE LINE AT ALL TIMES:

Can you keep it at 100%?

**CREDIBILITY MEANS
MORE THAN TAKING THE
OATH AND TELLING THE
TRUTH: YOU MUST NOT
ONLY *BE HONEST*, YOU
MUST BE *PERCEIVED* BY
THE JURY AS BEING
HONEST**

TWO TYPES OF CREDIBILITY

- **PERSONAL CREDIBILITY**

- How you present yourself

- **TESTIMONIAL CREDIBILITY**

- How you did your job

Stay in your own lane

- First and foremost, remember your role
 - You are neutral
 - You are impartial
 - You gather information
 - Others decide what to do with that information
 - You aren't responsible for making recommendations about next steps

**THE HALLMARK OF THE
CREDIBLE EXPERT WITNESS IS**

IMPARTIALITY

A few general tips on testifying

MAXIMIZING YOUR CREDIBILITY

- **LISTEN TO THE QUESTION**
 - Narrative questions:
What did you do next?
 - Directed questions:
What time did you . . . ?
- **ANSWER THAT QUESTION**
 - Narrative answers:
Chronological, concise, complete
 - Directed answers:
"yes", "yes, plus"

MAXIMIZING YOUR CREDIBILITY ON THE WITNESS STAND

- **Sit calmly on the stand: use hands, eyes, posture to convey credibility and confidence**
- **Be polite no matter who is asking the question**
- **Make eye contact with the factfinder**
- **Word choice: think KISS!!!! And remember your audience!**
- **Don't assume**

MAXIMIZING YOUR CREDIBILITY

- **ALWAYS TELL THE TRUTH!**

“I don’t know”

“I don’t recall”

“I don’t understand the question”

Maintain a professional tone

"OBJECTION!"

- Stop talking ... right away
- Let the lawyers make their arguments to the judge, and listen to what they say (especially the prosecutor)
- Listen to the judge's ruling:
 - "Sustained"
 - "Overruled"
- Ask if you should answer
- It's okay to ask for the question to be repeated

First: DIRECT EXAM—the party calling you asks you questions

- Qualifications

- Education
- Current employment
- Training
- Experience : number of interviews conducted
- Peer review

- What happens when a child comes to the CAC: the process in general from what is a CAC to what happens inside one

DIRECT EXAM

- How we talk to children who are suspected abuse victims and get clean, reliable information: the interview process; protocol
- Why victims may be reluctant to report sexual abuse if applicable to case, and dynamics of situation that affect disclosure process relevant to this case... "symptoms and characteristics of victims in general"

DIRECT EXAM

- Now, this case and this child
- The FI: accompanied by the recording
- Explanations for any “problematic” disclosure issues affecting your case
 - Delayed disclosure
 - Inconsistencies
 - Denials
 - Developmental issues that may affect child’s ability to clearly understand and reliably provide some types of information: dates, times, places

**"IT IS THE JOB OF THE EXPERT
WITNESS TO *EXPLAIN*; IT IS THE
JOB OF THE ATTORNEY TO
CONVINCE."**

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

Expert Testimony in child abuse cases:

THE DO'S AND THE DON'TS

Permissible Uses of Expert Testimony

THE DO'S

- Testimony About Profiles and Characteristics of Sexually Abused Children *in general, such as:*
- Delays in reporting or denials
- Unusual behaviors/unusual fears
- Nightmares, sleep disruption, physical ailments or complaints
- School problems or other life problems

It's well settled law.....

- An expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.
 - *State v. Stancil*, 355 N.C. 266, 267 (2002)(citing *State v. Hall*, 330 N.C. 808, 818 (1992); *State v. Aguallo*, 322 N.C. 818, 822-23(1988); *State v. Kennedy*, 320 N.C. 20, 32 (1987); *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598, aff'd, 356 N.C. 428, 571 S.E.2d 584 (2002);
 - *State v. Purcell*, __ N.C. App __ (2015)
 - *State v. Chavez*, __ N.C. App __ (2015)
 - *State v. Khouri*, 214 N.C. App 389 (2011)

Expert Testimony: THE DO NOTS

DO NOT give testimony that can be construed as an opinion that the victim is credible, believable, or telling the truth.

Big Points

- A witness cannot “vouch for the credibility of a witness”
 - This means no testimony that an expert “believes” the victim or that they find their story to be credible or any version of that
 - It must be left up to the factfinder to decide if a victim’s story is credible
 - For an expert to give a definitive diagnosis or opinion that sexual abuse occurred without physical findings amounts to “vouching” for the credibility of the victim’s disclosure

A Note on the Word “Disclose”

Popular defense argument: the word “disclose” implies that an event happened

Courts have roundly dismissed this argument, stating nothing about the word, alone, implies credibility or vouching

It is possible that the word could be used in a way that IS improper but the common use of the word is ok

State v. Collins (April 4, 2023)

- The forensic interviewer testified that she saw no indication Carol had been “coached.” Our Supreme Court has held that “an expert may not testify that a prosecuting child-witness in a sexual abuse trial is believable [or] is not lying about the alleged sexual assault.” *State v. Baymon*, 336 N.C. 748, 754, 446 S.E.2d 1, 4 (1994).
- However, in *Baymon*, the Court stated “a statement that a child was not coached is not a statement on the child’s truthfulness.” *Id.* See also *State v. Ryan*, 223 N.C. App. 325, 333-34, 734 S.E.2d 598, 604 (2012).

State v. Owens (Jan. 17, 2023)

Defendant argues the following two lines of questioning during the State's direct examination of Detective Greene constitutes impermissible bolstering:

[The State]: Was her disclosure on that day consistent with what you heard her testify to today?

[Greene]: It was.

[The State]: Each time that you have heard [Sue] disclose what happened, has she been consistent in her disclosure?

[Greene]: Yes, ma'am.

CROSS-EXAMINATION

**“FEAR IS A
GOOD THING”**

Always remember.....

STAY IN THE MOMENT!!!

Common Guiles of Cross

- Distract the Witness
 - Fast paced questions
 - Loud voice
 - Misstating the answer or prior testimony
 - Taking information out of context
 - Compound questions

Common Guiles of Cross

- Intimidate the Witness
 - Sarcasm
 - Hostility
 - Forcing a yes or no answer
 - Cutting off or interrupting the witness
 - Anything necessary to make witness lose cool, become angry or defensive

Being cross-examined about an article or book

- Ask to see it
- Read the pertinent section
 - Does it say what the defense attorney says it does?
 - Has the defense attorney taken something out of context?
- Think - what would you do in real life, outside the courtroom?

If defense is.....

- Child not telling the truth
 - Interviewer impressed on child seriousness and importance of interview
 - Child understood same: the “rules” and could articulate understanding of truth vs. lie
 - Child promised to tell the truth
 - Interviewer did not foster a fantasy or play atmosphere
 - Child was able to apply interview instructions: be able to articulate this

If defense is.....

- Interviewer not impartial
 - Knew before interview what allegations were
 - Never met child before, don't know anything other than what you were told by others
 - Emphasize the normal practice of the CAC with regards to any child referred there
 - Emphasize you ask questions same way and according to protocol you follow every time you interview a child
 - Emphasize what your role is as a forensic interviewer

If defense is.....

- The child told no one for months/years
- The child denied....when you asked but now says.....
 - Symptoms, characteristics of sexually abused children/delayed disclosures, denials common
 - Your experience as an interviewer
 - Evidence in this case that would explain delay or denial

If defense is.....

- Well meaning interviewer caused child to give unreliable information
- Interviewer equalized power with language and setting
- Interviewer engaged in narrative practice to maximize child's free recall ability, and child was able to use free recall
- Interviewer used an open ended non suggestive transition to topic of concern

If defense is...the interviewer only focused on abuse

- Innocent or accidental touch ?
 - child able to describe context of touching: details that refute innocent touch
- No motive to lie: child expressed feelings of affection for person who abused her

Maintaining Credibility

- You already have it!
- Handle cross examination wisely
- Listen carefully to question and answer only that question: yours ears are your best weapons
- Be courteous and polite
- Answer questions with a declarative statement
- Control your position as a witness

REMEMBER.....

**CREDIBILITY
CONCERNS WHAT
SOMEONE ELSE
THINKS ABOUT YOU:
IT'S ALL A MATTER OF
*PERCEPTION***

..a final word about credibility

**CREDIBILITY IN COURT
HINGES ON DOING YOUR
JOB OUT OF COURT IN
ACCORDANCE WITH BEST
STANDARDS OF
PRACTICE!**

CONTACT ME!

NANCY LAMB

nlamb@southmountain.org

nblada@aol.com