When "Be Quiet" is Not The Response You Want To Hear:

Getting a Child's Out-Of-Court Statement into Evidence: Using the South Carolina Rules of Evidence, Statutes and Case Law To Lay the Proper Foundation or To Attack An Improper Foundation When Such Evidence Is Offered During Trial.[1]

It's All a Game: Top Trial Lawyers Tackle Evidence

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SC Bar CLE

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Calling a child witness at trial is a decision most lawyers weigh heavily. Since the experience is stressful for most adults, the emotional impact upon the child is even greater and the chances of frightening or upsetting a child are likely. Therefore, using other means to admit a child's testimony into evidence without calling the child as a witness is a serious consideration experienced litigators make during the trial preparation.

The impact of testifying upon a child, though, largely depends upon the nature of the case and whether the child fears giving her[2] testimony might negatively impact her in some way. Studies show children's memories and testimony are negatively impacted by the environment of the courtroom.[3] Even South Carolina's Family Court rules recognize that "where the conduct of either parent is an issue, the children should not be allowed in the courtroom during the taking of testimony."[4] This rule does recognize, though, that while "[c]hildren should not be offered as witnesses as to the misconduct of either parent," there is an exception and that is "when, in the discretion of the court, it is essential to establish the facts alleged."[5] Thus, our own court rules recognize negative impact upon the child but also occasions where such testimony is necessary. In these situations, the proponent should not throw up his hands in defeat, but instead, explore whether other evidentiary rules allow for the introduction of the child's statements through another witness so the child is not called to the stand.

Criminal defense attorneys face different considerations when viewing a child witness. If

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[2] For ease of reference single pronouns will refer to the child as "she".

[3] *See*, Melton, G. & Thompson, R. *"Getting out of a Rut: Detours to Less Traveled Paths in Child-Witness Research,"* in CHILDRENS EYEWITNESS MEMORY 209 (S. Ceci, M. Toglia & D. Ross. Eds. 1987) (suggesting that testifying in a courtroom in itself impairs a child's memory.) See also, Karen Saywitz & Rebecca Nathanson, *Children's Testimony and Their Perceptions of Stress in and Out of the Courtroom,* 17 CHILD ABUSE & NEGLECT 613 (1993) (One study involved having weight to ten-year-old children watch a staged event involving teaching them about body parts and functions, with half of the children questioned about it in a courtroom setting and the other half questioned at their schools.)

[4] SCRFC 23 (a).

[5] SCRFC 23 (b).

the child/witness is the victim whose statements to the police brought about the Defendant's arrest, the defense attorney wants to confront the witness whose statements affect his client's rights and freedoms. Thus the criminal defense attorney's main concern is his client's rights not the well-being of the child/witness whose testimony potentially could negatively impact the Defendant's fate.

Since the conflict between the accused's right to confront his witness[6] and the society's duty to protect children[7] exists, the United States Supreme Court, in Crawford v. Washington[8] created "a line of demarcation between confrontation jurisprudence and the law of hearsay."[9] [10]

Civil attorneys may view calling a child/witness through a different lens. Their test is usually more black and white, and it tends to give greater weight to whether or not the child's testimony is reliable and whether the child is credible rather than the potentially traumatic and harmful effect upon calling the child to the witness stand.

Family Court attorneys' cases frequently focus upon the best interests and welfare of children. Even if the child is not the focus of the matter, most adult clients' goals put the welfare of their children above their own. Thus, the Family Court litigator may give much greater weight to the decision of whether or not to call a child to the witness stand.

Clearly these perspectives are broad generalizations, but they recognize mindsets that exist depending upon the nature of the case. On the other hand, civil attorneys and criminal attorneys cannot ignore the potential harmful effect upon their case if the jury negatively views

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[6] U.S. CONST. Amend VI., (The Sixth Amendment states, in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.")
[7] Major Rebecca K. Connally, "'Out of the Mouth[s] of Babes' Can Young Children even Bear Testimony?" Army Lawyer, March 2008, citing *Washington v. Crawford*, 541 U.S. 34 (2004), *See also* John Robert Knoebber, "Say That to My Face: Applying an Objective Approach to Determine the Meaning of Testimony in Light of *Crawford v. Washington*," 51 Loy. L. Rev. 497 (Fall 2005).
[8] *Washington v. Crawford*, 541 U.S. 34 (2004)
[9] Id.
[10] The Confrontation Clause is discussed in greater detail further in the article.

their treatment of a child/witness. Thus, the need to identify a variety of methods to introduce children's testimony into evidence without calling the child as a witness is a strategy wise litigators practicing in all areas of the law should prepare to argue.

This article, therefore, discusses a number of methods to circumvent calling a child into court while successfully introduce a child's out of court statements through another witness. The article sets for the foundational requirements for the various methods, which, in turn, also provide a means to attack the opposing counsel's attempts to introduce such evidence if she fails to lay a proper foundation when she attempts to use one of these tools.

South Carolina's Statute Allowing the Admission of Children's Out-of-Court Statements

Under certain specific, limited situations involving the abuse and neglect of children, S.C. Code §19-1-180 allows for the admission of otherwise inadmissible out-of-court statements by children under the age of twelve in a family court proceeding. This statute was recently cited in the case of *DSS v. Lisa*.[11] The statute also applies to children who function cognitively, adaptively or developmentally under the age of twelve[12] at the time the Family Court proceeding was brought.

South Carolina Code Section § 63-7-20[13] broadly defines the definition of an abused or neglected child as a child whose physical or mental health or welfare is harmed or threatened with harm, by the acts or omissions of his parent, guardian or other person responsible for his welfare. It also refers to post-separation or divorce situations. Since there are no cases limiting this statute to the Department of Social Services (DSS) cases, arguably, one may use this statute to introduce a child's out-of-court statement in private custody and visitation disputes, as well as

[11] *DSS v. Lisa*, 380 S.C. 406, 669 S.E. 2d 647, 650 (Ct. App. 2008).
[12] If the child is twelve years of age or older, the adverse party may challenge the professional decision that the child functions cognitively, adaptively, or developmentally under the age of twelve. S.C. Code §19-1-180(C).
[13] Formerly, S.C. Code § 20-7-490.

cases involving DSS as long as the facts involve abuse and neglect as defined in the statute.

Assuming the Court determines the child was subjected to an act of abuse or neglect, the statute requires the proponent to meet other factors before the out-of-court statement is allowed into evidence. Subsection (a), requires the child to testify;[14] subjected to cross-examination about the statement; or if the Court finds the child *unavailable* to testify; and (b) the child's out-of-court statement possesses particularized guarantees of trustworthiness,[15] it is admissible. A Court can find a child unavailable under the following circumstances:[16]

i) The child's death;

ii) The child's physical or mental disability;

iii) The existence of a privilege involving the child;

iv) The child's incompetency, including the child's inability to communicate about the offense because of fear; or

v) Substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of videotaped deposition or closed-circuit television.

Second, the proponent ***must*** provide ***notice*** to the adverse party before trial that he intends to introduce such statements to provide the opposing party with a fair opportunity to prepare their response.[17] Subsection (G) provides that the statements are inadmissible if the case involves post-separation or divorce issues and (1) one of the parents is the alleged perpetrator of the alleged abuse or neglect; and (2) the allegation was made after the parties separated or divorced.

Subsection (G), contains an exception. If the statement was made to a law enforcement

[14] S.C. Code § §19-1-180(B) (1) requires the child testify.
[15] The court may consider factors outlined in subsection §19-1-180 (D) of this statute in determining whether statement possesses particularized guarantees of trustworthiness of this subsection.
[16] S.C. Code § 19-1-180(B) (2) (a) (i-v).
[17] S.C. Code§ 19-1-180(C).

official, an officer of the court, a licensed family counselor or therapist, a physician or other health care provider, a teacher, a school counselor, a DSS staff member or a child care worker in a regulated child care facility, the statement is admissible. If the GAL is also licensed as an attorney, arguably, the GAL is an officer of the Court because of his law license, and the child's statements to the GAL/Attorney are admissible if they meet the statute's requirements.

Another approach is to rely upon South Carolina Rules of Evidence 801 and 803. 801(C) states that " '[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(a) adds that "[a] 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." With the exception of Rule 801(d), SCRE 801 is the same as the Federal Rule 801.

> "Under the Federal Rules, evidence constitutes hearsay only if three conditions are present: (1) the evidence is an assertive statement or act; (2) the statement was made or the act committed out of court; and (3) the evidence is being used to prove the truth of the assertion. Evidence falls within the hearsay definition only when all three elements are present; if any element is missing, the evidence is not hearsay, and there is no need to search for a hearsay exception."[18]

The hearsay rule is actually relatively narrow in scope. Hearsay statements are declarative statements and offered for the truth of the matter asserted. Considering that there are essentially four types of sentences: declarative, imperative, exclamatory and interrogatory, the last three technically fall outside the hearsay definition. Imperative sentences give orders; exclamatory statements are those stated with excitement or surprise; and interrogatory sentences ask questions.

Another argument is to offer a statement for a reason other than the truth of the matter asserted. For example, in a child custody hearing where a mother wants to prove that her

[18] Imwinkelreid, Edward J., Evidentiary Foundations, 6th Ed. Aug. 2005, pp. 402 – 403.

daughter is fearful of her father, the mother's attorney may seek to introduce the child's statement to the counselor that every time the child goes to daddy's house, he locks her in a closet with a purple monster. In this situation, the mother's attorney may argue that the counselor's restatement of the child's comments is not offered to prove that the father locks the daughter in a closet with a purple monster, but such testimony is offered to show that the daughter is fearful of her father.

Consider the scenario where a little boy plays on the monkey bars at the town playground and is injured. Prior to his injury, another child tells the playground supervisor that the monkey bars make "funny, creaky noises." The other child's babysitter is present when the child talks to the playground supervisor. Arguably, the child's statements to the supervisor as retold by the babysitter are introduced as evidence of notice of the equipment's damage rather than offered as proof she the noises were funny and creaky.

Consider where a child asks her mother, "Why does Daddy ask me to let him touch me 'down there'?" If the mother repeats the child's question in court, is it not possible for the proponent to successfully argue the question is not an assertion but instead an interrogative statement outside the definition of hearsay.

What if a child screams, "Mom, that big, red truck is going to hit us?" A second later, a red truck hits the car, and then, it leaves the scene of the accident. If the child's statement is deemed exclamatory, it, too, does not meet the definition of hearsay and the mother could repeat it even if it proves the truth of the matter asserted that the truck was red. If the judge disagrees, one might argue that the exclamation is an excited utterance, and while hearsay, it is an exception to the rule.[19]

To offer a statement on the theory that it is non-assertive and non-hearsay, one must

[19] SCRE 803(2) Excited Utterance is discussed later in the article.

establish the following elements to lay the proper foundation:

1. Where the statement was made;

2. When the statement was made;

3. Who was present;

4. The tenor of the statement;

5. In and offer of proof outside the jury's hearing, the proponent states that the tenor of the statement is nonassertive; and

6. In the same offer of proof, the proponent shows that the nonassertive statement is logically relevant to the material facts of consequence in the case.[20]

If all else fails, ask a different question and frame it so it is not offered to "prove the truth of the matter asserted. For example, argue that the statement is offered to show how the witness perceived the child's demeanor as the child spoke or to explain why the witness took certain actions based upon the child's statements such as taking the child to the emergency room.

Whether or not a statement meets the definition of hearsay is ultimately left to the judge's discretion. Thus, a successful trial attorney has an arsenal of other prepared arguments to admit critical evidence in case the initial argument fails.

Exceptions to the Hearsay Rule: [21]

To overcome hearsay arguments when introducing children's out of court statements, useful hearsay exceptions include: Present Sense Impression; Excited Utterance; Then Existing Mental, Emotional, or Physical Condition; Statements to Physicians for the Purpose of Diagnostic or Treatment Services; and Business Records.

a. Present Sense Impression, SCRE 803(1):

[20] Imwenkelreid, at 403, 409.
[21] The Hearsay Exceptions are intentionally presented out of numerical order with the Excited Utterance Exception, 803(2), discussed last.

A present sense impression is a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. Non-excited contemporaneous statements are admitted based upon the belief that a contemporaneous statement describing an event is likely trustworthy.[22] Factual events between spouses or their children that lack the element of "excitement" are potentially admissible under the present sense impression exception.

For example, if a child makes a statement during or very shortly after an event, the statement is admissible under this exception if the child had personal knowledge of the event and the statement lacked the element of excitement. [23] An example is when three-year-old child states that her father hit her within one minute of the incident. Such statement is admissible as a present sense impression and possibly as an excited utterance as well.[24] However, "[s]tatements made days or weeks after an incident are not admissible as present sense impressions because the statements were not made while the child was perceiving the event or immediately thereafter."[25]

b. Then Existing Mental, Emotional, or Physical Condition, SCRE 803(3):

Then existing mental, emotional, or physical condition is defined as a statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health). This statement does not include a memory or belief that proves a fact remembered or believed *unless it relates to* the execution, revocation, identification, or terms of declarant's will. Relevant statements from a child in a child abuse case may fall within this exception.[26] A "child's statement asking another child to "give me your doll, and I'll show you with mine how daddies sex their little girls" was

[22] Ike Van Eykel, Getting Evidence Admitted Using the Exemptions and Exceptions to the Rule Against Hearsay, (South Carolina Bar CLE 2003).
[23] Id.
[24] *Skidmore v. State*, 838 S.W.2d 748 (Tex. Ct. App. 1993).
[25] *In Interest of C.B.*, 574 So.2d 1369 (Miss. 1990).
[26] Id. at 1372.

admissible as a statement of the child's then existing emotional condition and state of mind.[27]

c. Statements to Physicians for the Purpose of Diagnostic or Treatment Services, SCRE 803(4):

Statements to physicians for the purpose of diagnostic or treatment services is defined as statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of the statements made after commencement of the litigation is left to the court's discretion**.** For example, in *United States v. Reinville,*[28] a statement by an allegedly sexually abused child to the doctor that identified the step-father as the abuser was admissible under this exception. Statements to therapists or psychologists regarding abuse and related issues might be admissible as a statement for purposes of medical diagnosis or treatment.[29]

Other examples from South Carolina cases include the following:

1. "A patient's statement to a physician consulted for treatment is generally admissible as evidence of the facts stated."[30]

2. "A doctor's testimony as to history should include only those facts related to him by the victim upon which he relied in reaching his medical conclusions."[31]

3. [Statements must be] "reasonably pertinent" to the victim's diagnosis or treatment.[32]

d. Recorded Recollection, SCRE 803(5):

To introduce past recorded recollections, the preparer or custodian of the document must

[27] *Posner v. Dallas County Child Welfare Unit of Texas Dept. of Human Services*, 784 S.W.2d 585 (Tex. Ct. App. 1990).
[28] 779 F.2d 430, 435-36 (8th Cir. 1983)
[29] Ike Can Eykel, Getting Admitted Using the Exemptions and Exceptions to the Rule Against Hearsay 14, 21 (South Caroline Bar CLE 2003.)
[30] *Cowley v. Spivey*, 285 S.C. 397, 329, 329 S.E.2d 774, 783 (S.C. App. 1985).
[31] *State v. Brown*, 286 S.C. 445, 447, 334 S.E.2d 816, 817 (1985).
[32] *State v. Burroughs*, 328 S.C. 489, 492, S.E.2d 408 (S.C. App. 1997).

testify, and the records must reflect information recorded while the events about which the recorder received first hand are fresh in the mind of the recorder. Thus, even if the witness can no longer recall the past event or its details, the notes may be admitted to refresh the witness' recollection. Therefore, notes of professionals who spoke to the child whose records may not be admitted under 803(4) for purposes of a diagnosis or treatment or if the person was not qualified as an expert under SCRE 702 for admission may be introduced under this exception.

Other scenarios where one might use recorded documents include police officers who prepared reports and need to rely upon their report to refresh their memory.[33] The report may contain information from children and one might argue to allow the officer to read his notes to explain the actions he took. Other witnesses one is likely to encounter using this exception include social workers, Guardian *ad litems*, babysitters and others whose notes, diaries and the like are contemporaneous with their discussions with the child about information that is later found relevant to introduce as evidence in court.[34]

e. <u>Business Records, SCRE 803(6)</u>:

Records of regularly conducted activity are not excluded by the hearsay rule even though the declarant *is available as a witness*. Business records are defined as a memorandum, report, record, or data compilation in any form of acts, events, conditions, or diagnoses, made at or near the time, by or from information transmitted by, a person with knowledge, *if* kept in the course of a regularly conducted business activity. Situations include when records are kept in the regular practice of business activity unless there is a lack of trustworthiness. Subjective opinions and judgments in business records are not admissible.

[33] *State v. Alatorre*, 191 Ariz. App. 208, 953 P.2d 1261 (1998)(An "eight-year-old child's statements to police detective admissible where child no longer remembered the details but testified that she had truthfully told them to the officer during a tape recorded interview.")
[34] Haralambie, Ann M., <u>Child Sexual Abuse in Civil Cases</u>, 1999, p. 324.

Medical records, school records, church records, scout records, and sports records may contain statements by children. If these organizations are deemed businesses, one might argue the child's statements in the records are admissible under this exception. Additionally, South Carolina Family Court Rule 7 allows for the admissibility of certain documents and written statements such as school attendance records, report cards, physician's statement(s), and DSS investigation records without requiring the persons or institution issuing the document(s) or statement(s) to appear in court.[35] However, an Oklahoma court held that "[t]he business-records exception may not apply to records created at the request of the court for use in the pending proceeding."[36]

e. Excited Utterance, SCRE 803(2):

An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. A child's "out cry" when sexually or physically abused is likely admissible under this exception.[37] Another example is a child's "exclamation" after witnessing his parent's arguments during visitation exchanges or other heated events involving children.[38] This exception also includes a child's exclamation after witnessing spousal abuse or any sort of family violence.[39]

Other examples include the following:

1. "4-year old child's statements to her mother concerning abuse by her babysitter's son which occurred several weeks earlier were admissible; the child had begun screaming in the car when told she was going to go back to her father"[40]

[35] SCRFC 7
[36] *In re M.A.*, 832 P.2d 437 (Okla. Ct. App. 1992).
[37] Id. at 16
[38] Ike an Eykel, Getting Evidence Admitted Using the Exemptions and Exceptions to the Rule Against Hearsay 14, 16 (Couth Carolina Bar CLE 2003).
[39] Id.
[40] *In re Troy P.*, 114 N.M. 525, 842 P.2d 742 (1992).

2. A "three-year-old child's statement late at night following a nightmare admissible as excited utterance."[41]

3. A "four-year-old child's statement several days after the abuse but following viewing photographs of the abusers [was] admissible as excited utterance."[42]

Our Supreme Court analyzed the excited utterance exception and set forth its position in the criminal case titled *State v. Ladner*.[43] The Defendant, Ladner, appealed the jury's guilty verdict of criminal sexual conduct with a two and a half year old minor by claiming the child victim's out of court statement was improperly allowed into evidence. Since this testimony sealed his fate, Ladner argued that the admission was an error of law and argued that his conviction be reversed. Our Supreme Court disagreed with Mr. Ladner's argument and not only affirmed his conviction but also confirmed the admission of the child victim's out of court statement under the excited utterance exception to the hearsay rule.

A. Ladner's Facts and Procedural History

On Halloween 2003, at approximately 7:00 pm, Bryan Ladner picked up the victim and others from a house owned by Marla Jackson. He drove them to a nearby subdivision to trick-or-treat. Between 7:45 pm and 8:00 pm, Ladner returned to Ms. Jackson's home to drop off the victim, stating to others that he brought her back early because she was crying and throwing a temper tantrum. Thereafter, the victim sang a couple of songs, karaoke-style, to Ms. Jackson and her mother.

Approximately 45 minutes after returning to Ms. Jackson's home, the victim had "to pee." Her mother took her to the bathroom and noticed blood on the toilet paper. Ms. Jackson looked at the victim and observed that she "was all red in her crotch area and swollen and she

[41] *George v. State*, 306 Ark. 360, 813 S.W.2d 792 (Ark. 1991).
[42] *People in the Interest of O.E.P.*, 654 P.2d 312 (Colo. 1982).
[43] *State v. Ladner*, 373 S.C. 103, 644 S.E.2d 684 (2007).

had scratches all behind her legs. She had a hand print – large hand print on her arm, a larger hand print on her leg. She had scratches around her wrist."[44] The victim also complained about pain in her vaginal area.

When Ms. Jackson asked the victim what had happened, the victim stated, "Bryan [Ladner] did it." Then, the victim said, "No, Bryan [Ladner] didn't do nothing." Ms. Jackson and others immediately took the victim to the emergency room where the treating physician opined that the injuries were consistent with sexual abuse within the prior 12 to 24 hours.

Before trial, the State advised the Court that it would not call the victim as a witness. Instead, the State informed the Court that it intended to implicate Ladner with the victim's statement utilizing the excited utterance exception. Ladner's defense counsel filed a Motion in Limine to exclude the victim's statement as hearsay. The Trial Court denied Ladner's Motion in Limine and ruled that the victim's statement was admissible under the excited utterance exception.

On appeal, Ladner's attorney argued that the victim's statement was testimonial, and, therefore, inadmissible because he had had no prior opportunity to cross-examine the victim, which was a violation of his Sixth Amendment rights.[45] Ladner's attorney also argued that the excited utterance hearsay exception did not apply (1) because the victim was not under the influence of a startling event when the statement was uttered; and (2) since the victim was declared incompetent to testify at trial, her hearsay statement made over one year prior to trial was, in his opinion, unreliable. The South Carolina Supreme Court disagreed with both arguments.

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[44] Id.

[45] U.S. Const. Amend. VI: Rights of Accused in Criminal Prosecutions: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

In analyzing Ladner's Confrontation Clause argument, the South Carolina Supreme Court relied upon the United States Supreme Court case, *Crawford v. Washington*.[46] *Crawford* held that testimonial hearsay statements against an accused violate the Confrontation Clause if: (1) the declarant is unavailable to testify at trial, and (2) the accused has had no prior opportunity to cross-examine the declarant.[47] In civil cases, parties have similar rights under the Due Process clause.[48]

The *Crawford* Court held the following statements are testimonial and banned by the Confrontation Clause and hearsay rule:

1. *Ex parte* in-court testimony or its functional equivalent such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;

2. Extrajudicial statements contained in formalized testimonial materials such as affidavits, depositions, prior testimony or confessions;

3. Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial; and

4. Statements taken by police officers in the course of interrogations.[49]

According to the *Crawford* Court, testimony "is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" [50] The *Crawford* Court added that a formal statement to a government officer is testimony where a casual remark to an acquaintance is not.[51]

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[46] *Crawford v. Washington*, 541 U.S. 36 (2004)
[47] Id. at 54.
[48] *Goldberg v. Kelly*, *See* 397 U.S. 254, 90 S.Ct. 1011 (1970).
[49] Id. at 51-52.
[50] Id. at 51, quoting 2N. Webster, An American Dictionary of the English Language (1828).
[51] The *Crawford* Court overruled *Ohio v. Roberts*, 448 U.S. 56 (1980) to the extent that it held that a hearsay statement is admissible if it bears adequate "indicia of reliability," i.e. it falls under a firmly rooted hearsay exception or there is an adequate showing of "particularized guarantees of trustworthiness." *See Crawford* at 60; *Ohio v. Roberts*, 448 U.S. at 66. The Court expressed that the test in *Ohio v. Roberts* was inappropriate to

In *Davis*,[52] the U.S. Supreme Court further elaborated about testimonial statements holding that a victim's identification of her abuser in a 911 call was not testimonial but that a woman's identification of her abuser to a police officer while he was taking her statement and the abuser was in the other room, is testimonial.[53]

A 1999 South Carolina Supreme Court case[54] held that generally, statements made outside of an official investigatory or judicial context are nontestimonial. Therefore, *Ladner*, found the child victim's out of court statement was clearly nontestimonial because it was made to Ms. Jackson a friend of her mother. The *Ladner* Court found that the statement was more akin to a remark to an acquaintance than a formal statement to government officers, and the Court held that the statement did not amount to a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."

As additional support for the nontestimonial nature of the statement, the Court found that the interchange between Ms. Jackson and the victim was designed to ascertain the nature of the injury, not to implicate a criminal assailant especially considering the location and circumstances when the child made the statement to Ms. Jackson. The Court also cited cases from other states to support its position that statements made by a child-victim to persons unconnected with law enforcement are non-testimonial, and therefore, such statements do not violate the Confrontation Clause.[55]

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determine admissibility because it was too narrow on the one hand but too broad, on the other. *Crawford* at 60-61.

[52] *Davis v. Washington*, 547 U.S. 813 (U.S. Wash 2006).

[53] The *Davis* Court explained that statements are nontestimonial when they are made in the course of police interrogation when the circumstances indicate that the interrogation's purpose is to assist with an ongoing emergency. On the other hand, a statement is testimonial when there is no such emergency, at the time of the statement. The Court noted that the holdings related to police interrogations. Id. at 2273-74.

[54] *State v. Davis*, 337 S.C. 275, 283-84, 523 S.E.2d 173, 177 (1999).

[55] *See Purvis v. State*, 829 N.E.2d 572 (Ind. Ct. App. 2005) (finding that a 10 year old victim's statement to his mother and her boyfriend, identifying the perpetrator of his molestation, immediately after it occurred was not testimonial); *State v. Aaron L.*, 865 A.2d 1135 (Conn. 2005) (finding that the statement of a two and a half year old, "I'm not going to tell you that I touch daddy's pee-pee," was nontestimonial); and *Herrea-Vega v. State*, 888 So.2d 66 (Fla. Dist. Ct. App. 2004) (finding that the statement of a three year old girl that defendant had placed his tongue

Ladner's attorney also argued that the child victim's statement was improperly admitted by the trial judge for two reasons: (1) the victim was no longer under the influence of a startling event at the time she made the statement; and (2) the victim was declared incompetent to testify at a pre-trial hearing, thereby making her hearsay statement unreliable.

The Court also quickly disposed of Ladner's argument that the victim's statement was not an excited utterance because she was no longer under the influence of a startling event at the time the statement was made. The Court opined that the victim's statement clearly related to the startling event of being injured in her vaginal area; she complained of pain when the statement was made; and she made the statement while under stress of the attack. Since the stress and the statement were caused by the startling event itself, the Court reasoned that the requirements of S.C.R.E. 803(2) were easily satisfied. The Court also cited the *Purvis* case for support wherein the Court found that a 10-year-old's statement about molestation made immediately after the molestation and while "plainly upset" also met the excited utterance criteria.

While the Court in *Ladner* did not specifically address the time lapse of 45 minutes (or more) between the event and the victim's statement, or the child victim's return to "normalcy" by singing and eating candy, other courts have addressed the time lapse in conjunction with excited utterances. The Courts that have addressed the issue found that a time lapse between the event and the statement will not, in and of itself, bar the admission of the statement into evidence.[56] Ladner appears to have left the door open regarding the amount of time between the

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in her private parts was nontestimonial).

[56] *See United States v. Hefferon*, 314 F.3d 211, 222 (5th Cir. 2002) (statement of child victim made one to two hours after event was admissible); *United States v. Rivera*, 43 F.3d 1291, 1296 (9th Cir. 1995) (statement made a half hour after an assault occurred qualified as an excited utterance because other factors such as the age of the declarant, the characteristics of the event and the subject matter of the statements are considered); *United States v. Farley*, 992 F.2d 1122, 1123 (10th Cir. 1993) (statement made the day after molestation could have been admitted as an excited utterance); *Morgan v. Foretich*, 846 F.2d 941, 947 (4th Cir. 1988) (statement made within three hours of returning from sexually abusive father's home fell within exception because that was the first opportunity to report); *United States v. Iron Shell*, 633 F.2d 77, 85-86 (8th Cir. 1980) (statements elicited by a police officer between forty-five

event and the statement, and arguably the statement can come in as long as one can show it was made while declaring was still under the stress of the startling event.

Ladner's attorney requested a competency hearing for the victim before trial and even he had to concede the victim was incompetent to testify at trial. On appeal, Ladner's attorney argued that the victim's statement was unreliable if she was found clearly incompetent to testify at trial, but our Supreme Court, following the majority of other state courts, disagreed. The Court held that while a child may be incompetent to testify, a child's "spontaneous declarations and *res gestae*" are nonetheless admissible as excited utterances.[57]

> The legal rationales underlying the rules about both competency and the excited utterance hearsay exception make plain that one ruling has little to do with the other. The competency of a witness depends solely on the facts as they exist when the testimony is given.[58] Conversely, the intrinsic reliability of an excited utterance derives from the statement's spontaneity which is determined by the totality of the circumstances surrounding the statement when it was uttered. [59]

(Emphasis added.)

Our Court also made clear that "when a statement is admissible because it falls within a Rule 803 exception, it may be used substantively, that is, to prove the truth of the matter asserted. . . . [I]f the victim's statement qualifies as an excited utterance, the State properly admitted it to prove that the appellant committed the assault."[60] Thus, *Ladner*, in accord with many other states' rulings, holds that if a hearsay statement meets the definition of an excited utterance and does not violate the Confrontation Clause, the competency of the witness is

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minutes and one hour and fifteen minutes after an assault considered excited utterance); *United States v. Nick*, 604 F.2d 1199, 1202 (9th Cir. 1979) (statements within hours of molestation were excited utterances).

[57] *State v. Ladner* (*Citing* Jay M. Zitter, Annotation, Admissibility of Testimony Regarding Spontaneous Declarations Made by One Incompetent to Testify at Trial, 15 A.L.R. 4th 1043 (1982)).

[58] *State v. Ladner*, 373 S.C. at 119, 644 S.E.2d at 692 (*Citing* 81 Am. Jur. 2d Witnesses § 160 (2004)).

[59] *State v. Ladner*, 373 S.C. at 119, 644 S.E.2d at 692 (*Citing State v. Sims*, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002)).

[60] *State v. Ladner*, 373 S.C. at 116, 644 S.E.2d at 691 (*Citing State v. Dennis*, 377 S.C. 275, 283-84, 523 S.E.2d 173, 177 (1999)).

irrelevant, and the statement may be used to prove the truth of the ultimate matter asserted.[61]

Civil law practitioners should cite *Ladner* when arguing for the admission of a child's out-of-court excited utterance because its ruling is applicable in a variety of situations, including divorces, custody/visitation disputes, child support matters, wreck cases, and worker's compensation matters, among others.[62]

Lay Testimony, Expert Testimony and Interviews with Forensic Evaluator:

SCRE Rule 701 provides for the admissibility of lay witness' opinions. SCRE Rules 702 through 705 provide guidelines for the admissibility of expert's testimony. Ultimately, the admissibility of these matters is within the trial court's discretion. *Fields v. Regional Med. Ctr. Orangeburg,* 363 S.C. 19, 609 S.E.2d 551 (1990). According to *State v. Henry*, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997), there is no abuse of discretion as long as the witness has acquired by study or practical experience knowledge of the subject matter that would enable him to guide and assist the jury to resolve a factual issue beyond the scope of the jury's good judgment and common knowledge.

Recently, the South Carolina Supreme Court[63] [64] held that a Victim's Assistance Officer who was testifying in a child sexual abuse case was not an expert witness but her testimony was admissible under the SCRE 701 as a lay witness. The Court held that "lay witnesses are permitted to offer testimony in the form of opinion or inferences if the opinions or inferences are rationally based on the witness' perception, and will aid the jury in understanding testimony, and

[61] Nothing in the opinion suggests that the ruling would not also apply to the excited utterances of an incompetent adult.

[62] This author recognizes the potential for the abuse of the use of excited utterance exception by claiming children made certain statements as a result of coaching because of children's suggestability. While this concern is real, this article is article is limited to methods to introduce out-of-court statements and leaves the argument for trustworthiness and reliability for another day.

[63] *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009).

[64] The trial court and Court of Appeals found the Victim's Advocate Officer an expert whose testimony qualified under S.C. Code §19-1-180, discussed earlier, but the Supreme Court found this witness was not an expert, but her testimony was allowed under SCRE 702.

do not require special knowledge."[65] The Court based its opinion on its rationale that the officer relied upon her "personal observations and experiences" and not her role as a Victim's Assistance Officer when she testified.[66] The Court also reversed the Court of Appeals whose holding upheld the qualification of the officer as an expert. While the Court reversed the holding of the Officer's qualification as a witness, they, nevertheless, upheld the testimony because it did not unduly influence the jury by vouching "for the veracity of the Victim, and was not prejudicial to [the Defendant]."[67]

Where a witness is qualified as an expert, SCRE 703 permits the expert to repeat a child's statements in court provided the child's statement is of a type reasonably relied upon by the expert in his particular field. Circumventing the hearsay rule through 703 is often invoked by litigators in other states because it is one of the best methods to get the child's statement into evidence.

In *Decker v. Hatfield,*[68] an expert witness opined in a child custody suit that the parties' child should live with his mother because the child wanted to live with his mom. The Trial Court permitted the expert to testify that his opinion was based upon the child's statements to him expressing a desire to live with his mother. The court stated, "If an expert has relied upon hearsay in forming an opinion, and the hearsay is of a type reasonably relied upon by such experts, the jury should ordinarily be permitted to hear it."[69] However, SCRE 703 "does not allow for the unqualified admission of hearsay evidence merely because an expert has used it in forming an opinion."[70] The Court, however, qualified its holding stating that the "[e]xpert may

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[65] Id.
[66] Id.
[67] Id.
[68] *Decker v. Hatfield,* 798 S.W.2d 637 (Tex. App. Eastland 1990)
[69] Id. at 638.
[70] *Jones v. Doe*, 640 S.E.2d 514 (S.C. Ct. App. 2006).

testify to evidence even though it is inadmissible under the hearsay rule, but allowing the evidence to be received for this purpose does not mean it is admitted for its truth; it is received only for the limited purpose of informing the jury of the basis of the expert's opinion and therefore does not constitute a true hearsay exception."[71]

Other methods to consider using to convince a judge to allow a child's out-of-court statement into evidence without subjecting the child to testify at trial include Depositions, In-Chambers Interviews between the child and the judge and the GAL's discussion with the child.[72]

a. Depositions:

Depositions avoid the courtroom's formality and can provide an environment where a child can testify with less apprehension. Nevertheless, depositions are still grounded soundly within the adversarial system, and such situations may intimidate or cause the child to feel pitted against one of his parents.[73] As with live courtroom testimony, the probative value of this method is also affected by the degree of parental influence upon the child so one must again consider whether the child's statement is truly trustworthy.[74]

b. In-Chambers Interviews with the Judge:

S.C. Family Court Rule 22 allows Family Court judges to interview a child individually or together in private conference.[75] If a timely request is made and granted by the Judge, the guardian *ad litem* and parents are permitted to sit in on the interview.

c. Guardian *Ad Litem*:[76]

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[71] Id.
[72] This method is explored further in this Section of the paper.
[73] 65 TXBJ 882, 888 (2002).
[74] Id.
[75] In all matters relating to children, the family court judge shall have the right, within his discretion, to talk with the children, individually or together, in private conference. Upon timely request, the court, in its discretion, may permit a *guardian ad litem* for a child who is being examines, and/or the attorneys representing the parent, if any, to be present during the interview. *Dodge v. Dodge*, 332 S.C. 401 (Ct. App. 1998).
[76] This particular method was explored in more detail earlier in the paper.

A Guardian *ad litem* (GAL) is appointed to protect and promote the child's best interests. The GAL provides the child with an outlet to express the child's observations, thoughts and opinions without forcing the child to testify in open court. As an officer of the court, assuming the GAL is also an attorney, the GAL may be in a position to offer the child's out-of-court statements for the court's consideration under S.C. Code 19-1-180.[77] The GAL must prepare a report and provide information to the court to protect the best interests of the child. This responsibility may require the GAL to discuss the child's statements made to the GAL during their investigation. Unless the case involves abuse and neglect and the proponent of the evidence invokes S.C. Code § 19-1-180, the proponent should prepare other means discussed herein to admit a child's out-of-court statement through the GAL.

Conclusion

In custody, visitation, abuse and neglect cases, the controlling factor for the Family Court is promoting the best interests and welfare of a child and if calling a child as a witness impedes the Court's mandated goals to promote a child's best interests and welfare, the Family Court judges can bar the child from the witness stand. In General Sessions, Common Pleas and other administrative hearings, the judges are not bound by this requirement. Instead, their role is the protection of due process and the parties' Constitutional rights.

The underlying principle of our adversarial system is to get to the heart of a matter and see justice done. Finding the truth and protecting children sometimes creates an untenable dilemma for the court and the litigators because the harm to the child/witness may outweigh the benefit of obtaining their testimony from the stand. Therefore, the prepared trial attorney should recognize this inherent tension, address it head on and prepare a variety of strategies to introduce

[77] The question of whether non-attorney guardian *ad litem's* are officers of the court is unclear as there is no South Carolina case that answers this question.

critical information that came out of "the mouths of babes" without actually putting the child on the witness stand.

Exhibit A

SCRE 803 (1): **Present Sense Impression**.

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Predicate: To Establish Foundation for SCRE 803(1)

1. An event occurred;
2. The declarant had personal knowledge of the event;
3. The declarant made the statement *during or very shortly after* the event; and
4. The statement relates to the event.[78]

Example: A statement made by a child during or very shortly after the event as long as the child had personal knowledge of the event.[79]

EXHIBIT B

[78] Edward Imwinkelried, Evidentiary Foundations Book

[79] Ike Van Eykel, "Getting Evidence Admitted Using the Exemptions and Exceptions to the Rule Against Hearsay" 16 (South Carolina Bar CLE 2003).

SCRE 803 (2): **Excited utterance**.

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Predicate: To Establish Foundation for F.R.E. 803(2)

1. An event occurred;
2. The event was startling or at least stressful;
3. The declarant had personal knowledge of the event;
4. The declarant made a statement about the event;
5. The declarant made a statement while he was in a *state of nervous excitement*; and
6. The nervous excitement was caused by the startling event.

Example: Child's frantic call for help to 911.

Example: Child's subsequent retelling while still upset and "in a state of nervous excitement" such as his out-cries while being sexually or physically abused.

Example: A child's exclamation after witnessing his parent's arguments during visitation exchanges or other heated events involving children.[80]

Example: This exception would also include a child's exclamation after witnessing spousal abuse or any of family violence.[81]

Lapse of Time In Relation to Excited Utterance:

The important factor is that the declarant must still be under the stress or excitement of the event and thus not have an opportunity for reflection or fabrication**.**

1. The lapse of time between the event and the declarations;
2. The age of the declarant;
3. The physical and mental state of the declarant;
4. The characteristics of the event; and
5. The subject matter of the statements.[82]

[80] Ike Van Eykel, "Getting Evidence Admitted Using the Exemptions and Exceptions to the Rule Against Hearsay" 16 (South Carolina Bar CLE 2003).
[81] Id. at 16.
[82] *United States v. Iron Shell*, 633 R.2d. 77, 85 – 86, (8th Cri. 1980)), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981)).

EXHIBIT C

SCRE 803 (3): **Then Existing Mental, Emotional, or Physical Condition**.

A statement of the declarant's *then existing* state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but *not* including a statement of memory or belief to prove the fact remember or believed *unless* it relates to the execution, revocation, identification, or terms of declarant's will.[83]

Predicate: To Establish Foundation for SCRE 803(3)

1. Where the statement was made;
2. When the statement was made;
3. Who was present;
4. The tenor of the statement;
5. In an offer of proof, the proponent states that he or she intends to use the statement for a nonhearsay purpose; and
6. In the same offer of proof, the proponent shows that on that nonhearsay theory, the statement is logically relevant. **[84]

Example: A relevant statement in a child abuse case from the child might fall within this exception.

Example: Cards, letters, or statements to show intention to make a gift or loan.

[83] Ike Van Eykel, "Getting Evidence Admitted Using the Exemptions and Exceptions to the Rule Against Hearsay" 16 (South Carolina Bar CLE 2003).

[84] Edward Imwinkelried, Evidentiary Foundations Book.

EXHIBIT D

SCRE 803 (4): **Statements for Purposes of Medical Diagnosis or Treatment**.

A statement made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion.

Predicate: To Establish Foundation for SCRE 803(4)

1. A statement was made to another (not necessarily a physician);
2. The declarant made the statement for the purpose of medical diagnosis or treatment; and
3. The statement concerns post or present symptoms or sensations or the inception, cause or source of the condition.[85]

Example: Statement by sexually abused child to doctor identifying the abuser;

Example: A child's statement to a psychologist or therapist regarding treatment for psychological trauma as a result of sexual abuse, car accident, parent's illness.

[85] Ike Van Eykel, "Getting Evidence Admitted Using the Exemptions and Exceptions to the Rule Against Hearsay" 16 (South Carolina Bar CLE 2003).