

# “I have an ‘owie’”

Health Care Providers’ Roles after Crawford, Davis & Hammon

BY

ALLIE PHILLIPS, J.D.<sup>1</sup>

With the issuance of *Crawford v. Washington*<sup>2</sup> by the United States Supreme Court over two years ago, widespread confusion and concern swept through the nation’s prosecutorial community. The new rule announced in *Crawford* left open far too many questions and few answers by the Court. Over the past two years, one question has arisen: Are statements by children to health care providers<sup>3</sup> during an abuse examination “testimonial” according to *Crawford*, thus requiring the child to take the witness stand?

To complicate matters, the first cases by the U.S. Supreme Court to interpret *Crawford* were issued on June 19, 2006. Although *Davis v. Washington* and *Indiana v. Hammon*<sup>4</sup> provided additional guidance on what is deemed a “testimonial statement,” they caused additional confusion as to cases and situations where *Davis* and *Hammon* apply. This article will analyze: (1) whether statements by children to health care providers are testimonial statements under the *Crawford* and *Davis/Hammon* rules or can be admitted through the medical diagnosis/treatment hearsay exception<sup>5</sup>; (2) how courts across the country are analyzing *Crawford* in relation to the medical hearsay exception; and (3) what prosecutors can do to ensure that a child’s statements to health care providers are allowed into evidence if the child is unable to testify.

## THE CRAWFORD AND DAVIS/HAMMON RULES

The U.S. Supreme Court announced a new rule in *Crawford* which held that testimonial statements are no longer admissible in court unless the witness testifies and there is an opportunity to cross-examine by the defendant. However, if the witness is unavailable<sup>6</sup> and there has previously been an

opportunity to cross-examine the witness, all admissible hearsay statements previously made by that witness may be introduced at trial since the defendant’s right of confrontation was satisfied by the prior cross-examination. However, if a statement is deemed nontestimonial, the traditional hearsay exceptions apply for purposes of admitting those nontestimonial out-of-court statements at trial, and the appearance of the witness at trial is immaterial. Although the *Crawford* Court opted not to define “testimonial,” language from the *Crawford* opinion, as well as over 2,000 post-*Crawford* cases, has addressed these two questions in determining whether a statement is testimonial: (1) Was a governmental agent involved in creating the testimony or taking a formalized statement from the witness? and (2) Would an objective person in the declarant/witness’s position reasonably believe that the statement may later be used in court?

The *Davis/Hammon* Court addressed the admission of excited utterances provided to a 911 operator in a cry for help stemming from a domestic disturbance (*Davis*) and to police officers who were called to a home after a domestic disturbance (*Hammon*). In the U.S. Supreme Court’s first opportunity to provide guidance since *Crawford*, the Court limited its ruling in *Davis/Hammon* to situations involving interrogations by law enforcement.<sup>7</sup> In ruling whether an excited utterance is testimonial, the Court held:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no

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such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.<sup>8</sup>

Thus, the question after *Davis/Hammon* becomes what is the primary purpose of the interrogation by law enforcement, and how does this work with the Crawford objective reasonable person standard?<sup>9</sup> Due to the *Davis/Hammon* “primary purpose” rule being limited to law enforcement interrogations, that analysis should not apply to medical examinations or testimony provided for medical purposes.

### **THE MEDICAL HEARSAY EXCEPTION AFTER CRAWFORD**

Federal Rule of Evidence 803(4) is the medical diagnosis and treatment exception to the hearsay rule, which allows health care providers to testify to statements made by a patient during a medical examination. FRE 803(4) states:

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.

Statements by a victim<sup>10</sup> during a medical examination are allowed into evidence for the reason that statements made to a health care provider are presumed inherently truthful. A patient is expected to be honest with a health care provider in order to receive an accurate diagnosis and appropriate treatment. FRE 803(4) allows these statements into evidence regardless of whether the patient testifies. In cases involving very young children who are too young to testify, these statements can be crucial to the success of a criminal prosecution.

Statements provided by the victim are admissible in court if the health care provider performs his/her primary duties in gathering information for the diagnosis and treatment of the patient, and does so regardless of prosecution

or the investigation. Doctors and nurses do not possess the “government agent” label as law enforcement does, and if allowed to perform their medical duties without direction or interference from law enforcement, this agency status will not transfer to the health care provider. Accordingly, these non-governmental agents do not meet the parameters outlined in Crawford and, therefore, statements of the victim relevant to diagnosis and treatment will be admissible through the health care provider’s testimony.<sup>11</sup>

Similarly, statements made to emergency medical technicians (EMTs) have also been permitted into evidence through the medical hearsay exception, even after Crawford, since their role in gathering immediate medical information on the scene to assist the victim does not cross over into investigating for law enforcement.<sup>12</sup> They are not governmental agents and they are often addressing emergency crime-scene medical situations and not asking questions for prosecution.

Psychological professionals have also been permitted to testify concerning statements made by victims as these statements relate to diagnosing and treating the patient, and are not obtained for purposes of investigating for law enforcement.<sup>13</sup> However, the murky waters of Crawford are now concerning Sexual Assault Nurse Examiners (SANE), Sexual Assault Forensic Examiners (SAFE) and other health care providers who are primarily or exclusively working with a child abuse multi-disciplinary team (MDT), and/or are required to collect evidence and statements from victims as part of a law enforcement investigation. Will the victim’s statements to these specialized health care providers be admitted into evidence after Crawford if they are working on behalf of law enforcement?

### **THE ROLE OF SANE, SAFE AND HEALTH CARE PROVIDERS AFTER CRAWFORD**

There has been great concern about the role of SANE<sup>14</sup> and SAFE directly working with a child abuse MDT in a post-Crawford world. SANEs are specially trained in taking a history for

purposes of diagnosis and treatment and the collection and preservation of evidence. SANEs have four primary goals: 1) To take a history for the purpose of diagnosis and treatment; 2) To provide a head-to-toe assessment for trauma; 3) To perform a detailed genital examination; and 4) To collect evidence. All of this is conducted in a compassionate and caring medical-legal evaluation that should include diagnosis of and treatment for the sexual assault, crisis intervention, and referrals for follow-up care.<sup>15</sup>

If a victim (whether child or adult) is examined by a trained SANE or SAFE professional for purposes of gathering evidence of a crime, will statements by the victim be deemed testimonial thus requiring the victim to testify? There are no clear answers to these questions as the case law following Crawford continues to develop. However, we can gain some insight in how to proceed with these medical interviews based on the following cases.

In *Commonwealth v. Brown*,<sup>16</sup> the Court of Appeals of Virginia concluded that the medical notes and records created by a SANE (who was deceased at the time of trial) were non-testimonial for the reason that the trial court redacted any accusatory statements from the report and that the remainder of the report was as a result of a physical examination and not created in an adversarial setting. In clarifying its ruling, the court compared SANE records to laboratory results, which have been held to be non-testimonial in other jurisdictions. “Critically, such laboratory reports do not involve statements to the police or other government agents acting in their stead, which accuse another person of a crime. (citations omitted) Such reports are, moreover, not prepared in an adversarial setting.”<sup>17</sup> The court noted that SANE reports are not created for the benefit of prosecution and that medical examination is conducted “before a suspect is identified or even before a homicide is suspected.”<sup>18</sup>

Similarly, *Ohio v. Lee*<sup>19</sup> addressed statements made by an adult sexual assault victim to a SANE. The Ohio Court of Appeals found that the statements of the victim to the SANE during the examination were non-testimonial.

However, there is no reason for a rape victim to believe that when she reiterates those same statements to a sexual assault nurse that they will be used for anything other than treatment. As such, upon being referred to DOVE and signing a medical consent form, a reasonable person would believe that DOVE served two functions: 1) providing medical treatment to the victim; and 2) preserving physical evidence of the crime. The “white smock of a medical professional” is indeed relevant to our analysis. The victim in these cases is being treated by a nurse. In the instant case, no law enforcement officials were present at any time before, during, or after the examination. As such, there is no reason to conclude that a reasonable person under the same circumstances confronting the rape victim would believe that her nurse is acting as an investigatory arm of the State when questioning the victim about details of the crime.<sup>20</sup>

*State v. Stahl*, 2005 Ohio 1137 (2005), also held that statements to a nurse by a sexual assault victim can be properly admitted under the medical hearsay exception as they are non-testimonial statements not intertwined with law enforcement’s investigatory duties.

However, a troubling decision by the Nevada Supreme Court in *Medina v. State*<sup>21</sup> held that statements made by an adult sexual assault victim to a SANE were testimonial. The court affirmed the conviction and found admission of the victim’s statements to be harmless error. Nonetheless, the court’s reasoning is important to understand why the statements were testimonial.

During trial, [the SANE examiner] testified as to what [the victim] told her about the rape during the sexual assault examination. [The SANE examiner] testified that [the victim] stated that “she was choked, that she was hit, that [Medina] put his penis into her mouth, into her vagina, he put his penis into her rectum. [The victim] stated that [Medina] put his

mouth on her vagina and then he put his penis in her mouth.” In *Flores*, this court held that the witnesses’ hearsay testimony violated the Confrontation Clause because the witnesses were either police operatives or were tasked with reporting instances of child abuse for the prosecution. Here, [the SANE examiner] was a police operative. She testified that she is a “forensics nurse” and that she gathers evidence for the prosecution for possible use in later prosecutions. As such, the circumstances under which [the victim] made the statements to [the SANE examiner] would lead an objective witness to reasonably



believe that the statements would be available for use at a later trial. [The victim] was not available for trial, and *Medina* had no prior opportunity to cross-examine her regarding the statements to [the SANE examiner]. Therefore, the district court manifestly erred when it admitted the statements [the victim] made to [the SANE examiner] during the sexual assault examination.<sup>22</sup>

In this case, it is unknown what the precise duties of the SANE were or what the protocol in the jurisdiction was regarding these examinations. Nonetheless, the *Medina* court noted that SANE examiners do not provide medical treatment and the purpose was to take a statement from the victim-patient and collect evidence. This made

the victim’s statements testimonial.

The reasoning by the *Medina* court is concerning for the reason that any health care provider who is primarily or exclusively working with a MDT and/or law enforcement will likely be labeled a “governmental agent” or “police operative” when physical evidence is gathered from the victim. If the health care provider, however, does diagnose and treat the patient, even if working to collect evidence to provide to law enforcement, it is important to emphasize this duty to the court and then focus on the second factor of *Crawford* to determine whether an objective person in the victim’s position would have understood that his/her statements would be used in court. If the child is young, the court may rule that the statements are non-testimonial in spite of the health care provider’s duty in gathering evidence for the police.<sup>23</sup>

Similarly, in *State v. Romero*,<sup>24</sup> the defendant was convicted of several domestic violence and rape charges against his wife. Before trial, the defendant killed his wife and was subsequently convicted of her murder (but the conviction was reversed). In the subsequent domestic assault trial, the prosecutor admitted several statements of the deceased victim, one being to a SANE examiner. On appeal, the court found that the statements to the SANE were testimonial. The court reasoned that the victim had not been medically examined until she reported the incident to the police and the police made an appointment with the SANE for her. The court solely relied on the “reasonable expectation” prong in *Crawford* and found that a reasonable person in the victim’s position would have understood that her statements to the SANE might later be used in court due to the SANE’s training and expertise in evidence collection. The court failed to address whether the health care provider was a governmental agent acting at the request of law enforcement. This case is currently on appeal to the New Mexico Supreme Court.

What can be learned from these cases is that if you have a health care provider who is primarily or exclusively

working with a governmental MDT or with law enforcement for purposes of gathering evidence of criminal activity, and if the health care provider does not engage in diagnosis or treatment of the victim, then the statements made by the victim during the examination will likely be deemed testimonial and will not properly fit under the medical diagnosis/treatment hearsay exception. The victim will then be required to testify and, subsequently, all hearsay statements made by the victim that are admissible under the Rules of Evidence will then be allowed into evidence since the confrontation issue of Crawford was satisfied.

### **CHILDREN'S STATEMENTS DURING MEDICAL EXAMINATIONS**

Several courts have held that children's statements to health care providers during a medical examination are non-testimonial and can be admitted at trial regardless of whether the child testifies.<sup>25</sup> This is so even if the health care provider obtains statements from the child regarding the crime. Supporting this are the cases of *Ohio v. Edinger*,<sup>26</sup> *Ohio v. Muttart*,<sup>27</sup> *Minnesota v. Scacchetti*,<sup>28</sup> *Colorado v. Vigil*.<sup>29</sup>

In *Edinger*, the child was interviewed by a social worker employed by Children's Hospital in the Child Advocacy Center. At trial, the social worker testified that the sole purpose for the interview with the child was for medical diagnosis and treatment. The role of the social worker was not to report to the police or be involved in removing the child from the home. Although the police were allowed to observe the interview via closed circuit television, the police did not arrange the interview and the child was not aware that the police were observing. The child's statements to the social worker were deemed non-testimonial and allowed into evidence.

*Ohio v. Muttart* addressed statements of children ages five and six to health care providers. The court found their statements to medical personnel to be non-testimonial. In this case, three separate interviewers/ counselors obtained statements from the children solely for medical and psycho-

logical purposes. One interviewer worked at Children's Hospital and obtained the medical and social history from the child before a medical exam. The other two interviewers were licensed clinical counselors: one conducted the initial assessment in order to make a diagnosis, and the second conducted play therapy. The court noted that with one child, there was no police involvement prior to the counselors' speaking with the child and that all three counselors acted independent from any subsequent police involvement. These therapeutic interviews with the child had no law enforcement involvement and, therefore, were not testimonial.

In *Scacchetti*, the three-year-old child was not competent to testify, but statements made by the child to a nurse during a medical assessment were admitted at trial. This court held that the child's statements were non-testimonial and provided important language about the testifying duty of a nurse examiner. In this case, the nurse followed a protocol that consisted of a verbal exam and physical exam. The exam was videotaped according to protocol which allows for subsequent review by a physician. The nurse saw the child twice: once for an exam and then for a follow-up assessment. The court relied on eight factors that were set forth in *Minnesota v. Wright*<sup>30</sup> and clarified in *Bobadilla v. Minnesota*:<sup>31</sup> "We clarified that, of the factors, the central considerations are 'the purpose of the statements from the perspective of the declarant and from the perspective of the government questioner,' in other words, 'whether either a declarant or government questioner is acting, to a substantial degree, in order to produce a statement for trial.'"<sup>32</sup>

The *Scacchetti* court found that the nurse was not a governmental agent since the child did not come for her assessment via a governmental agent. However, the court noted:

Even if we had concluded that [the nurse] was acting in concert with or as an agent of the government, our conclusion that [the child's] statements to [the nurse] are not testimonial would not change. The record here indi-

cates that [the nurse's] purpose in interviewing and examining [the child] was to assess her medical condition. Both [the nurse and physician] testified that their purpose in evaluating children such as [this child] is to determine whether the child has been abused and, if necessary, to connect the child and family to appropriate services. There is no evidence or other testimony in the record to the contrary. The fact that [Mid-west Children's Regional Center] generally does not have ongoing contact with the child after the assessment does not minimize the medical purpose for which the assessment is conducted.

\* \* \*

[T]he mere fact that [the nurse] may be called to testify in court regarding sexual abuse cases does not transform the medical purpose of the assessments into a prosecutorial purpose, nor is there any evidence that [the nurse] had a prosecutorial purpose here. \* \* \* Thus, even if we were to conclude that [the nurse's] assessments of [the child] had, as a secondary purpose, the preservation of testimony for trial, [the child's] statement would still not be testimonial. Because the broad purpose of [the nurse's] assessments was [the child's] medical health, any subsequent testimony that [the nurse] was required to give did not change her assessment purpose.<sup>33</sup>

Another case that provides guidance on admitting child victim statements made to health care providers is *Colorado v. Vigil*.<sup>34</sup> This case directly addresses the second prong of Crawford in relation to children's understanding of medical examinations and the court process. This case involved statements made by a seven-year-old child abuse victim to a doctor. "As the doctor testified at trial, his purpose in questioning the child was to determine whether the child would 'say something that could help [the medical personnel] understand what the poten-

tial injuries were.”<sup>35</sup> Statements made by the child helped the doctor develop his opinion regarding whether a sexual assault had occurred and how best to treat the child. The court found that the physician was not an agent of the police because the doctor’s duty involved identifying and treating sexual abuse.

The Vigil court also held:

We hold that the ‘objective witness’ language in Crawford refers to an objectively reasonable person in the declarant’s position. Applying this test to the instant case, we determine that an objectively reasonable person in the declarant’s position would not have believed that his statements to the doctor would be available for use at a later trial. \*\*\* An objective seven-year-old child would reasonably be interested in feeling better and would intend his statements to describe the source of his pain and his symptoms. In addition, an objectively reasonable seven-year-old child would expect that a doctor would use his statements to make him feel better and to formulate a medical diagnosis. He would not foresee the statements being used in a later trial. Thus, from the perspective of an objective witness in the child’s position, it would be reasonable to assume that this examination was only for the purpose of medical diagnosis, and not related to the criminal prosecution. No police officer was present at the time of the examination, nor was the examination conducted at the police department. The child, the doctor, and the child’s mother were present in the examination room.<sup>37</sup>

The important language of Vigil is that in spite of the physician’s membership on a MDT, this did not change the physician’s primary duty which was to identify and treat sexual abuse. If this is the primary duty of a health care provider, it must be effectively conveyed to the court in order for a proper determination to be made as to whether the child’s statement will

be admitted through the health care provider’s testimony.

Other courts have analyzed the objective reasonable standard in relation to children’s medical examinations and held that an objective child in that position would not understand that statements made during a medical examination might later be used in court.<sup>38</sup> This is an important argument to make, especially if you believe that a health care provider has become an agent of the police. If the court rules that an objective person in the victim’s position would not have believed that his/her statements to the health care provider would be used in court, then the statement should be deemed non-testimonial.<sup>39</sup>


The rulings in these cases can also be utilized in situations where a health care provider is employed at a children’s advocacy center (CAC), along-side law enforcement investigators and other governmental agents. When a health care provider is employed by a CAC that also employs governmental agents (such as police and child protection investigators), it is important for the prosecutor and the medical witness to distinguish the medical role from the investigatory role. Although the health care provider may obtain information concerning criminal conduct and may gather evidence, the health care provider will need to clearly testify if the focus of a medical examination is to treat the health and welfare of the victim regardless of gathering evidence or information for purposes of potential prosecution.

## CONCLUSION

All health care providers should be aware that their duties in obtaining information from a victim for purposes of medical diagnosis and/or treatment must remain separate from any law enforcement evidence-gathering purpose if the victim’s statements are to be admitted in court. Although many health care providers will gather physical evidence of crimes during a physical examination, their testimony must explain that their role as a health care provider is separate from the duties of law enforce-

ment. Allowing the performance of medical duties to remain independent from the investigatory duties of law enforcement will allow medical witnesses to testify to their objectivity regarding their discussions with the victim and that they were not controlled or directed by law enforcement in the performance of their duties. Regardless of the duties of the health care provider and whether the health care provider is acting as a governmental agent, it is important to remember the second factor of Crawford. If your case involves a young child, a viable argument can be made that the child did not reasonably believe that his/her statements would be used in court.

Law enforcement and other investigators should also be aware of the complications after Crawford, Davis and Hammon so as to avoid transferring their governmental agent status to health care providers. If a law enforcement or other governmental investigator requests a health care provider to ask certain questions of the victim in order to develop the investigation, this may transfer the investigator’s governmental status to the health care provider and prohibit the introduction of any statements by the victim through the health care provider. Although jurisdictions may have differing protocols regarding forensic medical examinations of victims, including which members of the MDT will be present, law enforcement officers should remain out of the medical examination room in order to avoid any Crawford issues with the examination. The goal is to provide the best service to crime victims, as well as to allow for each victim to be heard in court even if that victim is unable to testify during trial. Allowing our health care providers to perform their duties on behalf of child and adult victims will aid in this effort and keep the courtrooms open to our most vulnerable victims.

For additional information and assistance regarding Crawford, Davis and Hammon’s impact on child abuse and other cases, please contact the author or APRI’s National Center for Prosecution of Child Abuse. ■ 

## What Can You Do?

In all criminal prosecutions, whether with child or adult victims of violence, prosecutors must prepare their health care providers before testifying. In order to properly admit a victim's statement to a health care provider through the medical hearsay exception, and to assist courts in ruling appropriately (particularly if the victim does not testify), the medical witness should be prepared to answer these questions:

- (1) What was the purpose of seeing the victim?
  - (a) Although the Davis/Hammon "primary purpose" rule appears to be limited to interrogations by law enforcement, the court may still inquire into whether the primary purpose of the medical examination was to gather information for a police investigation. If the health care provider's primary purpose is to gather evidence and statements for law enforcement and prosecution purposes, then the witness should be forthright in his/her testimony, thus potentially making all statements made by the victim testimonial. If this is a current protocol in your jurisdiction and the courts are prohibiting the health care provider from testifying to statements from the victim, then restructuring the protocol for the health care providers to focus on their role as treatment providers may help address this Crawford issue.
  - (b) However, if the primary purpose of the examination was not to gather information for law enforcement, but rather to diagnose and treat the victim, then the statement should be non-testimonial since the health care provider is not a governmental agent. In making this determination, the health care provider should be prepared to testify that an examination will assess whether the patient suffered injuries, requires medical care (e.g., surgery, stitches, pregnancy/STD testing, medication, etc.), needs a referral for mental health services (e.g., rape crisis counseling, mental health intervention, in-patient services, etc.), or other assistance related

to the medical or psychological injuries.

- (2) Did the health care provider follow a standard protocol of questions and procedures regardless of law enforcement involvement?
  - (a) In other words, did the health care provider allow law enforcement or another governmental agent to dictate how they performed their medical duties or what questions to ask to the patient? If so, this may transfer the law enforcement governmental agent status to the health care provider and make statements by the victim testimonial under Crawford.
  - (b) Or, did the health care provider ask necessary questions, regardless of potential or existing law enforcement involvement, in order to properly diagnose and treat the patient? If the health care provider performed his/her job duties according to his/her medical training, and asked questions of the patient in order to properly diagnose and treat the patient, then the victim's statements will be non-testimonial and should be admitted in court whether the victim testifies or not.
- (3) When a health care provider questions the victim (e.g., "Who was the perpetrator/ assailant?") be prepared to answer why the health care provider must know that information in order to properly treat the victim.

Although each state differs on whether the identity of the perpetrator can be admitted through the medical witness's testimony, if the medical witness can explain why the identity of the assailant is necessary for the medical examination, that may assist the court in allowing this evidence to be introduced at trial. For instance, all health care providers are mandated reporters of child abuse. Therefore, asking the victim who committed the abuse will then require the health care provider to make a report to child protective services under the state mandated reporting statute and CPS will need information on the assailant in order to determine placement issues for the child victim. This information may

also be needed in order for the health care provider to properly treat the victim and perform certain medical tests (STD tests, pregnancy tests), address safety issues (Should the child be returned home? Is the alleged offender waiting in the lobby?), consider placement issues if the offender lives in the child's home, and make referrals for counseling or therapy.

- (4) Did the health care provider document answers from the patient, and observations made regarding the patient's demeanor and physical injuries, in a medical report under a protocol regardless of the possibility of criminal prosecution?
  - (a) If the health care provider asked medical/social history questions of the patient, regardless of law enforcement involvement and the possibility of future criminal prosecution, and if the answers provided by the patient are relevant to the diagnosis and treatment, then this information should properly fall under the medical hearsay exception, be deemed non-testimonial, and be admitted in court whether the victim testifies or not.
  - (b) If the health care provider is asking the medical/social history questions for the primary purpose of gathering evidence for law enforcement to create a case for prosecution, even if the information aids in the diagnosis and treatment of the victim, the court may deem these statements to be testimonial because the primary purpose of obtaining the information was for prosecution and not for medical treatment. The health care provider must clearly delineate his/her role versus the role of law enforcement.
- (5) The health care provider should not advise or inform the patient-victim regarding the possibility of court testimony or court appearance.
  - (a) If a health care provider informs a victim that s/he is collecting statements and physical evidence for purposes of the law enforcement investigation and potential prosecution of the assailant, then the court will likely rule that all statements made by the victim are

testimonial and require the victim to testify. If this occurs with a very young child, an argument should be made that in spite of the statements of the health care provider about court, young children do not understand the nature of court or that what occurs in the medical examination room could be transferred to a court setting.

(b) If a victim asks the health care provider about whether s/he has to go to court, the health care provider should refrain from answering the question and should refer the victim to the investigating officer (if there is one). The health care provider should not speculate on the possibility of criminal prosecution or court appearances since, oftentimes, an arrest warrant has not been issued at the time of the medical examination. A question as to whether the victim will need to testify should only be answered by the prosecutor. Keeping comments

about court testimony out of the medical examination room is not only essential for purposes of Crawford, but is also important to avoid misleading the victim.

(6) Is the health care provider employed in a jurisdiction where victims of sexual assault are required to file a police report and/or cooperate with law enforcement in order for the sexual assault examination to be paid for with state dollars?

If a health care provider works in a jurisdiction or state that mandates that the victim cooperate with law enforcement in order for the medical facility to receive reimbursement for the cost of a sexual assault kit,<sup>40</sup> this may intertwine the governmental status of the state and the investigation with the examination. A health care provider should clarify during testimony that his/her performance of the examination on the victim, including the diagnosis and treatment,

was not influenced by the payment or non-payment of the examination through state dollars.

(7) How is the health care provider paid? How is the hospital or sexual assault program funded?

If a hospital or sexual assault program is funded through government (federal, state or local) funds, it is important to clarify that although the funds pay for the health care provider's time and the procedures conducted, the health care provider still adheres to his/her medical duties and medical ethical rules regardless of the presence of governmental funds. Allowing the health care provider to explain that the performance of medical duties is the primary focus (and not promoting the government's interests) will help to alleviate any ruling that the professional's role is that of a government agent. ■

## FOOTNOTES

<sup>1</sup> Allie Phillips is a Senior Attorney with the American Prosecutors Research Institute's National Center for Prosecution of Child Abuse in Alexandria, Virginia. The author wishes to thank Roger Canaff, Assistant District Attorney with the Bronx District Attorney's Office and former Senior Attorney with the National Center for Prosecution of Child Abuse, and Diana Schunn, SANE/SART Director with Via Christi Regional Medical Center in Wichita, Kansas and faculty member with Finding Words Kansas, for their expertise and assistance in reviewing this article.

<sup>2</sup> 514 U.S. 36 (2004).

<sup>3</sup> For purposes of this article, the term "health care provider" will refer to physicians, nurses, physician assistants, sexual assault nurse examiners (SANE), and sexual assault forensic examiners (SAFE).

<sup>4</sup> 126 S. Ct. 2266; 165 L. Ed. 2d 224; 2006 U.S. LEXIS 4886 (2006).

<sup>5</sup> Fed. R. of Evid. 803(4).

<sup>6</sup> FRE 804(a) defines unavailability of a witness as any of the following: "(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or (3) testifies to a lack of memory of the subject matter of the declarant's statement; or (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying."

<sup>7</sup> 2006 U.S. LEXIS 4886, at \*16 (footnote 1).

<sup>8</sup> 2006 U.S. LEXIS 4886, at \*16.

<sup>9</sup> For an in-depth analysis of Davis/Hammon, please see Allie Phillips, "The Luxury of Indecision: Child Forensic Interviews after Crawford, Davis & Hammon," APRI Update Newsletter, Vol. 19, No. 6 (2006).

<sup>10</sup> For purposes of this article, the term "victim" will be utilized instead of the term "patient" which is what a health care provider would call an individual presenting him/herself for an examination after an assault.

<sup>11</sup> Commonwealth v. DeOliveria, 849 N.E.2d 218 (Mass. 2006) (medical doctor worked independently from the police in questioning the child); Griner v. Maryland, 899 A.2d 189 (Md. Spec. Ct. App. 2006) (child's statements to a nurse); People v. Purcell, 846 N.E.2d 203 (Ill. App. Ct. 2006) (adult victim speaking with a physician); Colorado v. Vigil, 127 P.3d 916 (Colo. 2006) (child's statements to a physician); State v. Fisher, 108 P.3d 1262 (Wash. Ct. App. 2005) (child speaking with a physician); United States v. Peneaux, 432 F.3d 882 (8th Cir. S.D. 2005) (child's statements to physician); State v. Johnson, 2005 Del. Super. LEXIS 253 (Del. Super. Ct. 2005) (elderly victim's statement to physician); State v. Stahl, 2005 Ohio 1137 (2006) (adult victim's statements to physician); People v. West, 2004 Ill. App. LEXIS 1536 (Ill App Ct 2004) (adult victim's statements to an ER nurse and physician); People v. Cage, 120 Cal. App. 4th 770 (2004) (child's statement to a physician); State v. Davis, 2005 Ohio 6224 (Ohio Ct. App. 2005) (statements to a paramedic and physician); State v. Molina, 2005 Wash. App. LEXIS 2058 (Wash. Ct. App. 2005) (adult victim's statements to a physician); State v. Vaught, 268 Neb. 316 (Neb. Sup. Ct. 2004) (child's statements to a physician).

<sup>12</sup> State v. Saunders, 132 P.3d 743 (Wash. Ct. App. 2006) (The identity of her assailant was allowed into evidence through the testimony of the paramedics since it related to the paramedic's diagnosis and treatment of the victim.)

<sup>13</sup> State v. Sheppard, 2005 Ohio 6065 (Ohio Ct. App. 2005).

<sup>14</sup> A Sexual Assault Nurse Examiner (SANE) is a registered nurse who is specially trained to provide comprehensive care to the sexual assault patient and demonstrates competency in conducting a forensic examination.

<sup>15</sup> Sexual Assault Nurse Examiner Development and Operation Guide, U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime, P. 8.

<sup>16</sup> 2006 Va. App. LEXIS 152 (Va. Ct. App. 2006).

<sup>17</sup> Id., \*7-9.

<sup>18</sup> Id., \*9 (citing footnote 3).

<sup>19</sup> 2005 Ohio 996 (2005).

<sup>20</sup> 2005 Ohio at P8.

<sup>21</sup> 131 P.3d 15 (2006).

<sup>22</sup> Id. at 20-21.

<sup>23</sup> See, Allie Phillips, "Child Forensic Interviews after Crawford v Washington: Testimonial

or Not?" in *THE PROSECUTOR*, Volume 39, Number 4 (July–August 2005).

<sup>24</sup> 133 P.3d 842 (N.M. Ct. App. 2006).

<sup>25</sup> However, in *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. SD 2005), the court found that although the forensic interview of the child was performed at a child evaluation center followed immediately by a medical examination, the statements were testimonial since the purpose of the interview was to collect evidence for law enforcement regardless of the fact that the statements were also made for medical purposes.

<sup>26</sup> 2006 Ohio 1527 (Ohio Ct. App. 2006).

<sup>27</sup> 2006 Ohio 2506 (Ohio Ct. App. 2006).

<sup>28</sup> 711 N.W.2d 508 (Minn. 2006).

<sup>29</sup> 127 P.3d 916 (Colo. 2006).

<sup>30</sup> 701 N.W.2d 802, 812-813 (Minn. 2006), vacated, 126 S. Ct. 2979; 2006 U.S. LEXIS 5197 (2006). "(1) whether the declarant was a victim or an observer; (2) the declarant's purpose in speaking with the officer (e.g., to obtain assistance); (3) whether it was the police or the declarant who initiated the conversation; (4) the location where the statements were made (e.g., the declarant's home, a squad car, or the police station); (5) the declarant's emotional state when the statements were made; (6) the level of formality and structure of the conversation between the officer and declarant; (7) the officers' purpose in speaking with the declarant (e.g., to secure the scene, determine what happened, or collect evidence); and (8) if and how the statements were recorded."

<sup>31</sup> 709 N.W.2d 243 (Minn. 2006).

<sup>32</sup> 711 N.W.2d 508, 513 (Minn. 2006).

<sup>33</sup> *Id.*

<sup>34</sup> 127 P.3d 916 (2006).

<sup>35</sup> *Id.* at 923.

<sup>36</sup> *Id.* at 923-24.

<sup>37</sup> *Id.* at 926.

<sup>38</sup> *State v. Muttart*, 2006 Ohio 2506 (Ohio Ct. App. 2006) (a five- and six-year-old child would not expect their statements to a medical professional to be used in court); *State v. Brigman*, 629 S.E.2d 307 (N.C. Ct. App. 2006) (a child not quite three years old cannot understand that statements made to a doctor may later be used in court); *Miller v. Fleming*, 2006 U. S. Dist. LEXIS 17284 (W.D. Wash. 2006) (a seven-year-old would not believe that statements to a doctor might later be used in court); *Colorado v. Vigil*, 127 P.3d 916 (Colo. 2006) (a seven-year-old would not believe that statements to a doctor might later be used in court); *In Re D.L.*, 2005 Ohio 2320 (Ohio Ct. App. 2005) (a three-year-old would not understand that statements made during a medical exam might later be used in court); and *State v. Krasky*, 696 N.W.2d 816 (Minn. Ct. Ap. 2005) (a seven-year-old would not believe that her statements to a nurse practitioner would be used in court).

<sup>39</sup> See, Allie Phillips, "Child Forensic Interviews after *Crawford v. Washington*: Testimonial or Not?" in *THE PROSECUTOR*, Volume 39, Number 4 (July–August 2005).

<sup>40</sup> For a detailed listing of state statutes that may require a rape to be reported before a forensic examination is paid for, please see Teresa Scalzo, "Rape and Sexual Assault Reporting Laws" in *THE VOICE*, Vol. 1, No. 3 (2006).

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American Prosecutors Research Institute  
National Center for the Prosecution  
of Violence Against Women  
99 Canal Center Plaza, Suite 510  
Alexandria, VA 22314

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