

## **OPINION TESTIMONY INADMISSIBLE AS A MATTER OF LAW**

### **If there is no physical evidence of sexual abuse:**

They cannot testify that the child has been abused. *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002)

They cannot testify that the child has probably been abused. *State v. Couser*, \_\_\_ N.C. App. \_\_\_, 594 S.E.2d 420 (COA 03-611, filed 20 April 2004)

They cannot testify that the child suffers from any particular emotional problems as the result of abuse. *State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992)

You should argue that they should not be able to testify that the child's history is "consistent with" abuse. Rule 401 (because "consistent with" is meaningless, it is irrelevant and not helpful to the jury); Rule 403 (because jurors are going to misunderstand what consistent with means (and what it does not) it would be confusing and unfairly prejudicial to the defendant. *See State v. Cleveland*, 154 N.C. App. 742, 572 S.E.2d 874 (2002)(unpublished)(expert asked if symptoms consistent with abuse; answer, "He has probably been abused."); *State v. Givens*, 158 N.C. App. 745, 582 S.E.2d 82 (2003)(unpublished)(expert asked if she had an opinion as to whether the child's symptoms were "consistent with a child who has been abused;" answer, "she has been abused."); *State v. Thornton*, 158 N.C. App. 645, 582 S.E.2d 308 (2003)(expert asked if complainant exhibited symptoms of an abused child; answer: "[she] has absolutely been sexually abused")

### **If there is some ambiguous physical evidence (could be from sexual activity, could be from something else):**

They cannot testify that the child has been abused. *State v. Couser*; *State v. Parker*, 111 N.C. App. 359, 432 S.E.2d 705 (1993)

They cannot testify that the child probably has been abused. *Couser*

You should argue that they should not be able to testify that the child's symptoms are "consistent with" abuse. *See supra*.

### **If there is evidence that is diagnostic for sexual activity:**

They cannot testify that the activity was what the complainant said. *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987);

You should argue that they cannot testify that her physical symptoms are consistent with her story. *See supra*; *but see Stancil* (dictum)