

**CROSS EXAMINATION OF AN EXPERT WITNESS
IN A CHILD SEXUAL ABUSE CASE**

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Opinion Testimony by a Nurse/Counselor/Social Worker/Psychologist: Tiffany was evaluated for possible sexual abuse by a team, of which I am a member. Based on the interviews conducted with child and family members, we concluded that Tiffany has been sexually abused [or that Tiffany's "history" is "consistent with" sexual abuse].

Cross-Examination:

1) You followed a protocol in this case.

That protocol is made up of interviews, tests, etc. performed by a variety of people.

Based on the sum total of the tests and interviews, you and the others decided that the child had been abused.

This protocol is loosely based upon the APSAC guidelines.

The APSAC guidelines are really just a lot of recommendations.

Different people might interpret or apply them in different ways.

There is no standardized checklist, or format that every person following the guidelines uses.

The guidelines allow you to use your own judgment in a lot of ways.

And you did that.

And each case is different.

You might ask different questions to different children; give different tests, etc.

You make up a new protocol to fit each new case, making whatever changes you feel are necessary.

You use your personal judgment based on your experience.

Different investigators might ask different questions.

Different investigator might ask the same questions, get the same answers, but disagree about whether the child was abused or not.

Argument: She doesn't have any standards. She relies on her own judgment.

2) It is generally agreed among professionals that a child should not be subjected to repeated interviews.
You knew that Tiffany had already been interviewed several times before you talked with her.
It is generally agreed among professions that there are two distinct kinds of interviews: therapeutic and forensic
Your concern was for Tiffany's welfare.
Your role was primarily to provide therapy or treatment rather than to investigate a possible crime.
You didn't do any investigation to determine if the things Tiffany said were true.
It is generally agreed upon by professionals that it is good to record the interviews.
You did not tape record or videotape your interviews.
Sometimes children make up stories of abuse.
Sometimes children can be led by adults to make up claims of abuse.
Sometimes children exaggerate things that happen.
Sometimes children say things are true that they have just imagined or fantasized about.
It is generally agreed among professionals that it is important to exclude the possibilities of false reports.
You don't have any reliable way of distinguishing a false report from a true report.
She doesn't follow accepted standards.

3) The APSAC guidelines are really just a lot of recommendations or general principles. Different people might interpret or apply them in different ways.
There is no standardized checklist, or format that every person following the guidelines uses.
The guidelines have never been subjected to any study to see how they compare to any other set of guidelines.
[If the witness says "Yes, they have.": "What studies have been conducted? By whom? What were the results?" If the witness can't or won't come up with them, argue later that the state has not carried its burden of establishing the foundation. It would also be nice if you have moved for discovery of the studies that support her opinion.]
There is no way to know how effective these guidelines are in distinguishing an abused from a non-abused child.
She doesn't know how good the standards are that she does go by.

4) You meet with other professionals to determine whether or not a child has been abused.
Everybody has input.
The final decision is a consensus.
And your opinion that the child has been abused is based in part on the opinions of the others.
And your opinion is based in part on what you've heard and read about sexual abuse, in textbooks, seminars, workshops, etc.
Her opinion is based on somebody else's opinion.

5) You don't know how accurate [named member of the evaluation team] is in distinguishing abused from non-abused kids.

Nobody is infallible

He's not infallible.

If his opinion were different, yours would be too.

You don't know how the textbook editor (college professor, conference speaker, etc) formed his opinions.

He's not infallible.

A lot of his opinions are based on his own professional experiences.

His ideas have not been subjected to scientific study.

[If witness says they have: "What specific studies? Not opinion pieces, case studies or anecdotal reports, but empirical studies showing that his methods are accurate in distinguishing abused from non-abused kids?" If witness can't name any: "So you think his methods have been studied, but you don't know who, when, or how the methods were evaluated, or what the results were."]

If his opinions were different, yours would be too.

The opinions of others are not a reliable foundation,

6) You observed the child during your interviews.

You had her manipulate the dolls, draw stick figures, etc.

She told you things about herself; the way she felt; things she had done, etc.

You talked to her mother (grandmother, teacher, etc.)

They told you about how the child acts.

Based on your experience, you thought that these behaviors and characteristics meant that she had been abused

Even if the child had never said she was abused, you would think she was because of how she acted.

[She will probably say "no." In which case: "So you can't tell that a child has been abused just because she acts in certain ways. The behaviors just confirmed in your mind her claim that she had been abused. You really relied on the fact that she said she had been abused to from your opinion."]

She based her opinion on the fact that the child acts in certain ways.

7) You've studied the psychological and behavioral characteristics of sexually abused kids.

You've seen and been told how this child has acted.

The way she acts is consistent with children who have been sexually abused.

So you concluded that she was sexually abused.

It's sort of like this: a) Abused children have certain characteristics, b) Tiffany has these characteristics, therefore c) Tiffany was abused.

It's a matter of logic; what's called a syllogism.

It's like a) lawyers are tricky, b) Joe is tricky, therefore, c) Joes is a lawyer.

But we don't know Joe is a lawyer just because he's tricky. That would be illogical

And we don't know that Tiffany was abused just because she wets the bed. that would be illogical too.

You say that you compared Tiffany to other abused children, to see if she acts like them.

Who are the supposedly sexually abused children you compared her with? Were they other patients of yours? Other kids you have read about? Kids in studies about sexual abuse?

But you don't know that those other kids were abused.

So you are really comparing this child to other children who somebody thought were abused.

And because she acts like those kids, she must have been abused.

Her opinion is illogical.

8) Children react in a lot of different ways to being abused.

Some children are severely traumatized'

Some children take it in stride.

Some children act out.

Some children become withdrawn.

Some children tell right away.

Some children never tell.

Some children tell a little and then tell more later.

Some children make up stories of abuse.

Some children have very accurate memories of being abused.

Some children have false memories of being abused.

Some children display psychological symptoms of abuse.

Some children act perfectly normal.

And children can be traumatized by a lot of things.

They have nightmares for all sorts of reasons.

They wet the bed for all sorts of reasons.

They do poorly in school for all sorts of reasons.

There have been no studies to show that, because a child acts in certain ways, she has been abused.

[If the witness says "Yes, there are.": "What studies have been conducted? By whom?

What were the results?" If the witness can't or won't come up with them, argue later that the state has not carried its burden of establishing the foundation. It would also be nice if you have moved for discovery of the studies that support her opinion.]

So there is no reliable way to say that because a child acts in certain ways she has been abused.

Nobody can determine that a child has been abused because she acts in certain ways.

9) You interviewed the child.

When you say you relied on her "history" you are really just talking about what she told you.

She told you she had been abused.

You believe that claims of abuse by children are usually true.

You don't have any studies showing that children's claims of abuse are usually true.

But you generally believe the children.

So you believed that she was probably abused just because she said she was.

She based her opinion on what the child told her.

10) Some children tell right away.

Some children never tell.

Some children tell a little and then tell more later.

Some children make up stories of abuse.

Some children have very accurate memories of being abused.

Some children have false memories of being abused.

It's not easy to tell whether a child is telling the truth about abuse or not.

You rely on things like consistency, detailed accounts, etc.

And there's been no scientific investigation into whether these factors can distinguish between a child who is accurately relating real abuse and one who is imagining or making up a story of abuse.

[If the witness says "Yes, there are.": "What studies have been conducted? By whom? What were the results?" If the witness can't or won't come up with them, argue later that the state has not carried its burden of establishing the foundation. It would also be nice if you have moved for discovery of the studies that support her opinion.]

Nobody can determine that a child has been abused based on what she says.

11) It is the generally accepted professional practice to gather data from a variety of sources, not just the child and her family.

You relied only on what Tiffany and her mother said.

You did no investigation to see if what they said is true.

You did not review Tiffany's school records.

You did not review Tiffany's medical records.

It is generally accepted professions practice to consider explanation for Tiffany's psychological symptoms other than abuse by my client

Other explanations might include fabrication, abuse by someone else, exposure to domestic violence, etc.

You did nothing to exclude other causes for Tiffany's symptoms.

She did not follow accepted practice.

12) You relied on her mother (grandmother, teacher, etc.) to tell you what she told them. And you believed that they were giving you accurate information about what the child said.

She based her opinion on what other people have told her about what the child says and how she acts.

13) But you did not investigate to find out whether the mother (grandmother, teacher, etc.) was a reliable source of information.

In fact, sometimes mothers (grandmothers, teachers, etc) are not reliable sources of information.

They are not professional interviewers or evaluators like you

They may misinterpret what the child said

Sometimes they report what they think the child meant to say rather than the child's actual words.

And sometimes they can't tell you exactly what they asked the child before she said whatever they remember her saying.

They may exaggerate the story of abuse so you'll take them seriously.

They may have their own agenda.

They may dislike the defendant.

They may have been themselves abused, and are overly sensitive to this issue.

Nobody can determine that a child has been abused based on what other people have said about what the child says and how she acts.

14) You based you opinion in part on the Acme Child Abuse Test.

That test is not reported in "Mental Measurements Yearbook"

It is not to be found in "Tests in Print."

It was developed as a therapeutic tool rather than a diagnostic test.

It has not been standardized.

It has not been validated.

It has not been validated on children of this age.

It has not been validated on children of this race.
There have been no studies assessing the accuracy of this test.
It cannot accurately distinguish between a child who has been abused, and a child who has not been abused.

Nobody can determine that a child has been abused based on the test she used.

15) When you form your opinions that a child has been abused, you are relying in large part on your clinical experience and training.

There are no hard and fast procedures, no sure fire way of objectively determining whether a child has been abused or not.

It's as much of an art as a science.

Child A may act one way, and you believe she's been abused; Child B might act completely different, and you still believe she has been abused.

Child X says she's been abused, and you believe her. Child Y says she has not been abused, but you think she has.

Each investigator brings something unique to the evaluation.

Her own experience, techniques, favorite methods, etc.

All the guidelines give you that flexibility

So it's really up to your own judgment, relying on the opinions of others, guidelines from APSAC, etc., but in the final analysis, your own judgment that tells you whether or not a child has been abused.

You've been trained in detecting abuse.

You got good grades in graduate school.

You got a degree.

You went to workshops, seminars, etc.

You think you are good at distinguishing abused from non-abused children.

But you're not infallible.

You can make mistakes.

You have made mistakes.

You have never been tested on how good you are at distinguishing abused from non-abuse children.

You know you are capable of mistakes.

But you don't know how often you make mistakes.

She doesn't know how accurate she is. There is no way for the jury to evaluate her opinion.

16) You saw behaviors that seemed to you to be consistent with sexual abuse.

But they could also be consistent with other things.

You didn't investigate to see if there might be some other explanation for the way she acts.

And nobody ever gave you any other explanation.

So your conclusion was that her behavior must have been the result of abuse.

She is basing her opinion on the fact that she doesn't know of any alternative explanation.

17) "Certain" means 100 percent.

It means that there is no chance that the child has not been abused.

There's a zero chance that she is exaggerating.

No chance that she is one of the children who has a false memory.

No chance that she is one of the children who has been coached.

No chance that all these interviews, by you and several others, the interviews have subtly suggested to her to say something that is not accurate.

You've said you're not infallible.

You've said the evaluation team is not infallible.

You can't really be completely certain that the child has been abused.

[I guess she could say, "Oh yes, I am 100 percent sure." The only thing I can think of to do with that is to argue later to the judge that the answer is inherently incredible, and reveals the bias of the witness.]

There is no basis for saying that the abuse is "certain" or "definite"

(If the witness says only that abuse is "probable" or "likely"):

18) Probabilities range from zero to 100 percent.

A 100 percent probability means certain, definite.

A zero percent probability means no chance.

A fifty percent probability means a flip of the coin; maybe yes maybe no.

Anything above 50 percent probability means more likely than not.

51 percent means only a little more likely than not.

99 percent probability means almost certain.

On the range of probabilities, from zero to 100 with 50 being the middle, how probable is it that the child has been abused? [If witness gives any number: "Where does that figure come from?" If witness can't give a number: "So you don't know if it is a one in ten chance or a nine in ten chance of a flip of the coin chance whether she has been abused or not."]

When she says the abuse is "probable" or "likely," she doesn't know what she's talking about.

19) (if the witness says only that Tiffany's "history" is "consistent with" sexual abuse):

What she told you could be true.

There is nothing about her story that it impossible.

There is nothing that others told you about Tiffany that is impossible.

So you concluded that her "history" is "consistent with" the possibility that she was abused.

Claims of abuse are consistent with abuse.

Denial of abuse is consistent with abuse.

So if Tiffany had said it did not happen, that would be consistent with abuse.

Delayed or incomplete reporting is consistent with abuse.

So if Tiffany waited months or years and then said something happened, that would be consistent with abuse

Lots of things are consistent with abuse

Children respond to abuse in a variety of ways.

Sexually acting out is consistent with abuse.

Sexual repression is consistent with abuse

Acting perfectly normally is consistent with abuse.

So when you say "consistent with" you really just mean that it could have happened.

"Consistent with" is meaningless"

20) You interviewed the child; read reports, talked to others, etc.

She told you a consistent story.

Her story to you was consistent with her stories to others.

And that consistency is one of the reasons you believed her story.

She gave some detail about the incident.

And that detail was another reason you believed her.

It wasn't that she acted in certain ways, because there is no particular way that abused kids act.

Your assessment was largely based on the fact that you personally believed her.

In fact, if you did not believe her, you would not have decided that she had been abused.

Her opinion is based on "common sense."

21) You relied on articles, textbooks and studies published in journals to help you formulate your opinion.

Some of these were just opinion pieces by authors.

Some of these are just theory.

Some of these are just anecdotal case studies by therapists.

A few of these are actual empirical studies.

These studies are not published in a peer-reviewed journal.

They have never been replicated by other investigators.?

They have been criticized by reviewers.

They have been contradicted by other studies.

You don't know how many subjects were involved in the study.

You don't know if there was a strategy to isolate the variable to be examined? (e.g. control group, random selection)

The subject characteristics were not similar to Tiffany.

There was no strategy to guard against investigator bias (e.g., double blind, cross-checking)

The data collection techniques (e.g. tests, interview protocols) have never been subjected to validation studies.

The studies she relied on were not an adequate foundation for her opinion.

22) You believe it is unlikely that a child would make a false claim of abuse.
You tend to believe the children.
You believed the child in this case.
You still believe the child.
You believe that she is a victim of child abuse.
You believe that my client is a child molester.
You would like to see my client convicted.
You are actively involved in child advocacy efforts.
You believe that child abuse is a serious problem.
You want to do something to correct this problem.

She is biased/interested.

Argument to Judge in Moving to Exclude (or to the Jury in Closing):

There are several problems with her opinion. First, we don't know exactly what her opinion is. She started off by saying that abuse was "definite." Then she backed off and said it was "probable." But she can't say how probable.

Second, her opinion is based on several things, none of which is a reliable foundation:

To the extent her opinions are based on the opinions of others, there has been no showing that the opinions of those people are based on a reliable foundation.

To the extent that her opinion is based on reports from family members, there's been no showing either that parents generally are reliable informants of abuse, or that these parents specifically are reliable.

To the extent that her opinion is based on how the child acts, she's said that there are no behaviors that can reliably distinguish abused from non-abused children. All she can say is that some children thought to have been abused act sort of like this child. So it's sort of like a syllogism: Abused kids act in certain ways, this kid acts like that. Therefore she was abused. That is not a logical conclusion. It would be like this: Lawyers are skeptical. John Smith is skeptical. Therefore John Smith is a lawyer. It just doesn't follow. But that's exactly the kind of logic that this witness is applying. Nobody can say that because a person is skeptical, he is a lawyer. And nobody can say that because a child acts in certain ways, she has been abused.

The real basis for her opinion is that the child said she had been abused. Even though this witness has admitted that some children make up claims of abuse, she believes that this child did not. She believes that this child was victimized, and victimized by my client. She wants my client convicted. And she knows that her testimony will go a long way toward making that happen.

But what is her opinion based upon other than her personal belief? Nothing. She doesn't follow any specific procedures. What procedures she does follow are themselves vague and untested. It is up to her – personally – to decide what questions to ask, how to

ask them, and how to interpret the answers. No science. No specific criteria. Just personal judgment. Personal judgment by a person who wants my client convicted.

At bottom, she believes the child. She has determined that the child is telling the truth. But how did she determine that? Some test, like a polygraph? Some scientifically valid procedure for determining the truth? No. Or is the witness herself sort of a lie-detector? Is she able to somehow divine accurately whether or not a child is telling the truth? No, she's not. At least, the state has not shown that this witness has any particular skills at distinguishing abused from non-abused children. What she relied on was not science, not expertise in truth-detecting. She relied on common sense. She relied on the fact that, according to her, the child told consistent stories, and gave some detail. That's the kind of thing that the jury is here for. Having this witness, as a thirteenth juror, assure the jury that the child is telling the truth is not helpful to the jury in performing its function. It takes the truth-finding function away from the jury. Blah. Blah. Blah.