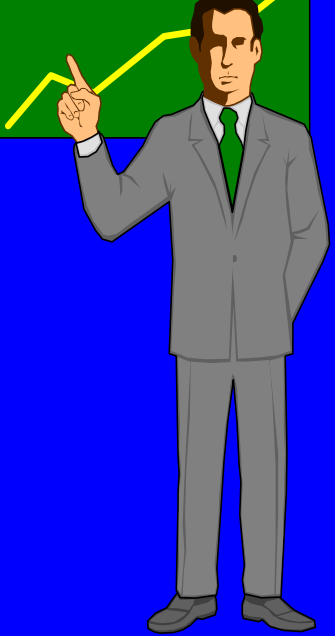
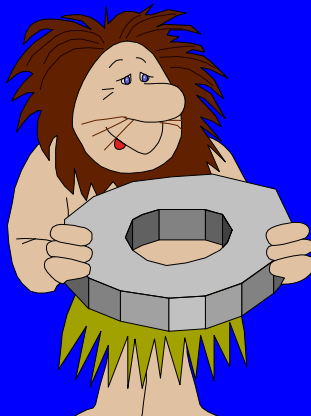


A Mark Montgomery Production





Junk Science in child abuse cases



A Little Law



Expert testimony as vouching

Aguallo (1986)

Kennedy (1987)

Trent (1987)

The Dark Ages (1988-2000)

Bates and Youngs (2000)

Stancil (2002)

Hammett (2006) +



Expert testimony as junk science

Bullard (1984)

Trent (1987)

Pennington (1990)

Hall (1992)

Daubert (1993)

Goode (1995)

Spencer (1995)

Erosion of Daubert/Goode

Howerton (2004)



Howerton:

DSS has the burden of showing:

- That the opinions are relevant.
- That the witness is qualified as an expert to give opinion testimony.
- That the methods employed by the witness were reliable.



What she will testify to:

- Tiffany has been abused, has characteristics of an abused child, etc.
- Tiffany's history is consistent with sexual abuse.
- Tiffany's physical examination was consistent with abuse.
- Tiffany said she was abused.+



The basic idea:

- Showing that her opinions are not reliable; they are junk.



OVERVIEW

- Understanding the difference between science and junk.
- Exposing opinions as being based on junk.



I. Understanding the difference between science and junk



JUNK

- ILL-DEFINED VARIABLES AND RELATIONSHIPS

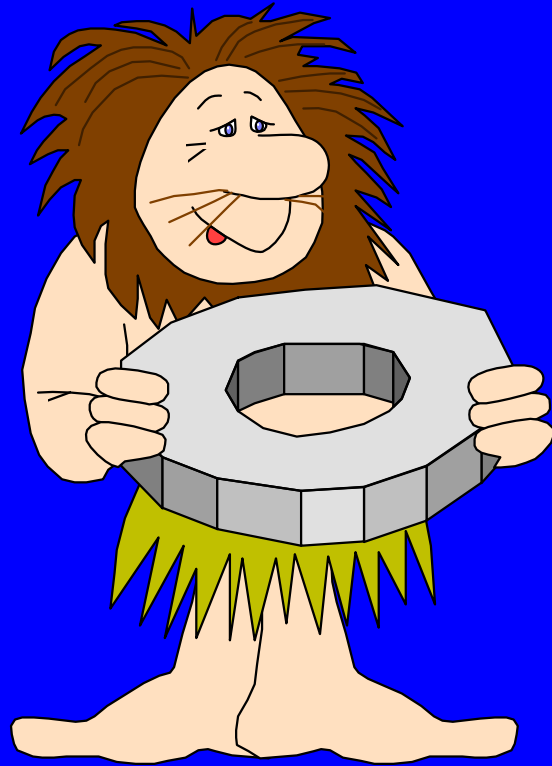
SCIENCE

- DEFINED VARIABLES AND RELATIONSHIPS



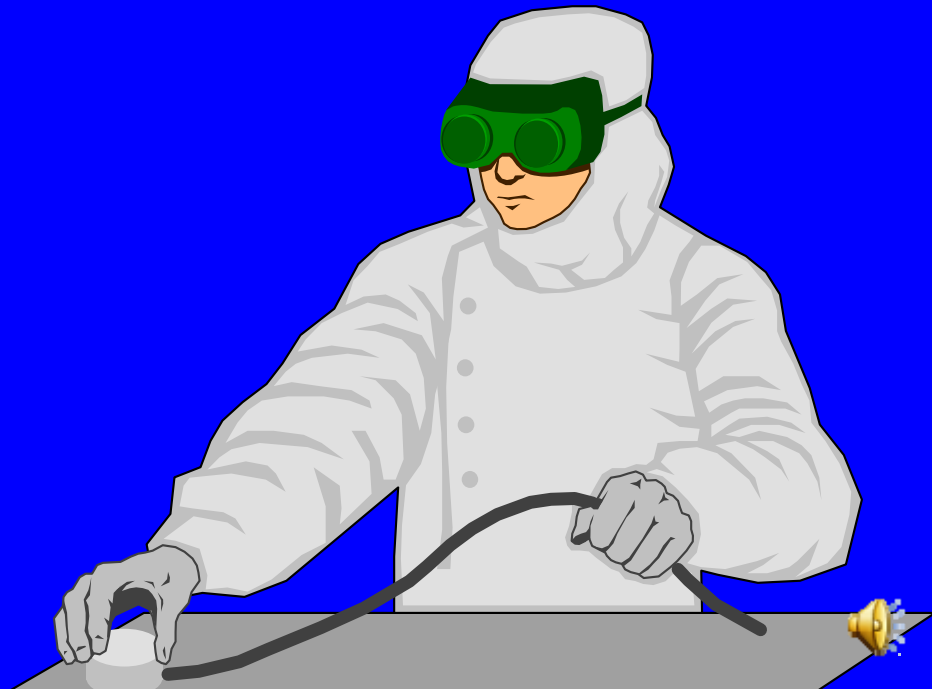
JUNK

- "injuries like this"
- "X is consistent with Y"



SCIENCE

- "injuries characterized by A, and B, but not X"
- "There is a .86 correlation between X and Y."



JUNK

- UNQUANTIFIED
TERMS

SCIENCE

- QUANTIFIED
TERMS



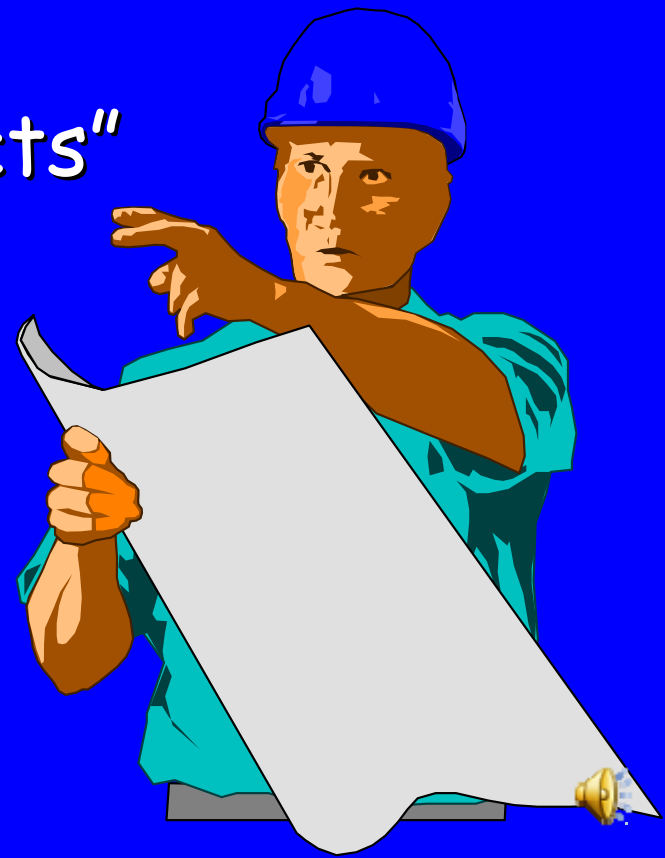
JUNK

- “highly unlikely”
- “most of the time”
- “a very large tumor”



SCIENCE

- "93.4 percent of the time"
- "a 2cm by 3.5cm tumor"
- "one out of twenty subjects"



JUNK

- SUBJECTIVE

SCIENCE

- OBJECTIVE

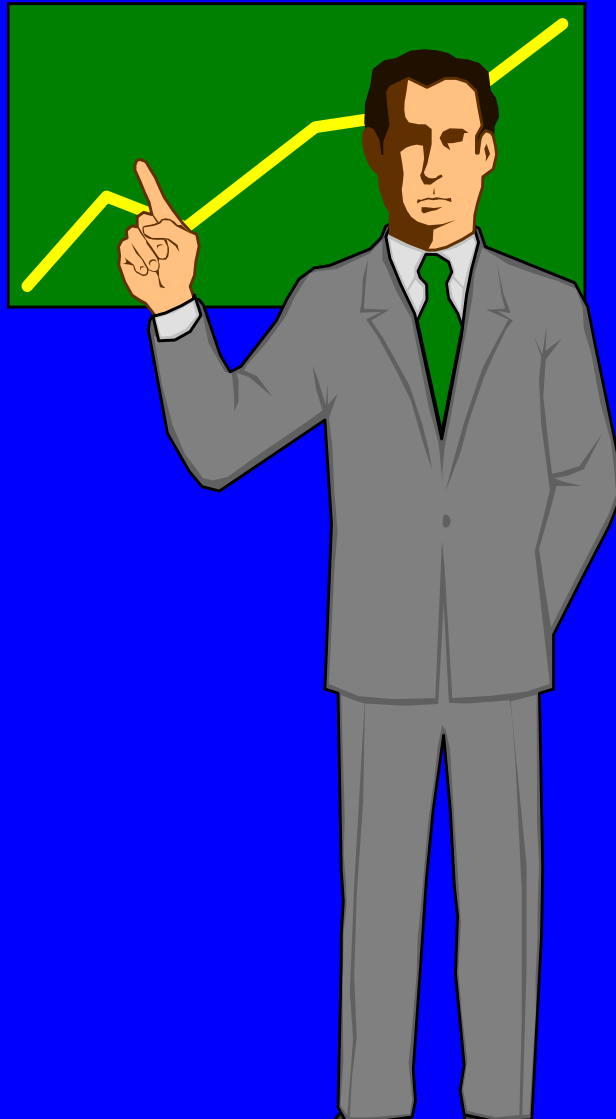


Junk

Trust Me. I'm
a scientist



Science



Here's my data.



II. EXPOSING OPINIONS AS BEING BASED ON JUNK



Challenging the DSS expert's testimony

Without your own expert

With your consulting expert

With your testifying expert



Challenging the DSS expert without you own expert

Discovery

Pre-hearing

Hearing



Discovery

- Opinions
- Data
- Studies relied on
- Curriculum vita of witness
- Protocols; standards +



Pre-hearing

Meeting with DSS witness

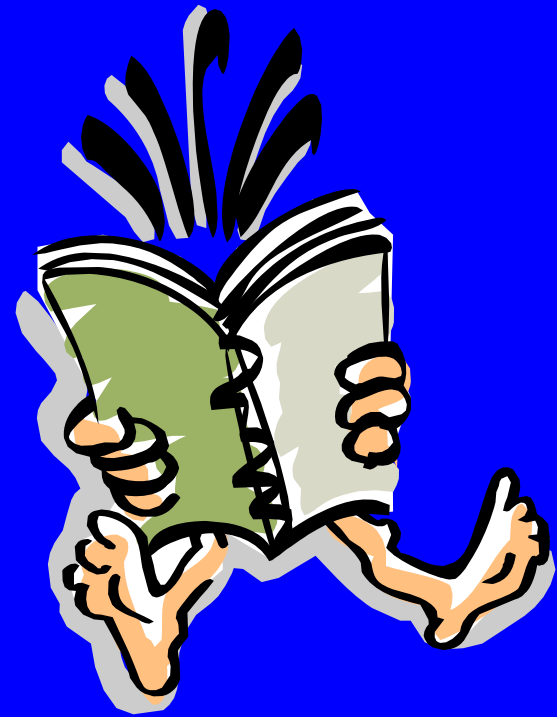
Previous testimony of witness

Studies, treatises, etc.

Non-expert assistance

Alternative explanation for child's
symptoms

Character witnesses +



Hearing

Cross-examination

Your case

Argument



Cross examination: Exposing the witness' opinions as being based on junk

- 1) Get the opinions she did not testify to on direct.
- 2) Demand the scientific foundation for each of her opinions.
- 3) Attack the foundation.
- 4) If she tries to be her own foundation, attack her. +



1) Get the opinions she did not testify to on direct.



- Opinion on direct
- Underlying Opinions.



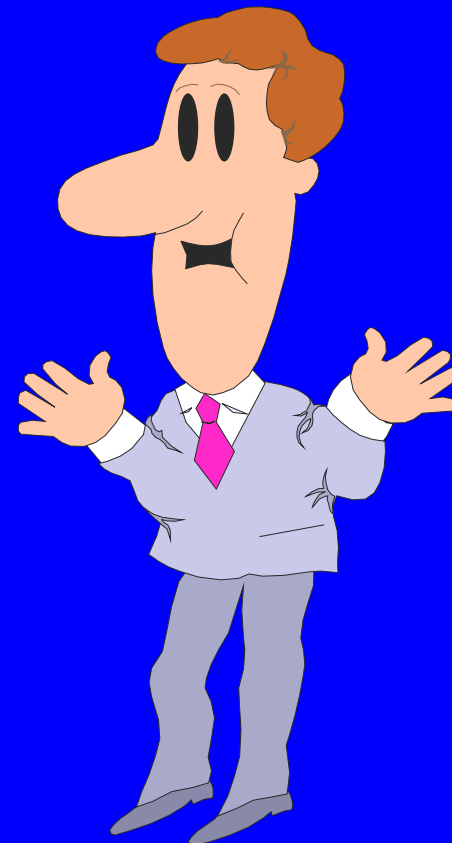
- Tiffany Has been abused.
- Abused children have certain characteristics.
- Because Tiffany has some of these symptoms she has been abused.
- I can accurately determine whether or not a child has been abused.



2) Demand the foundation
for each opinion.



"Where's your data?"

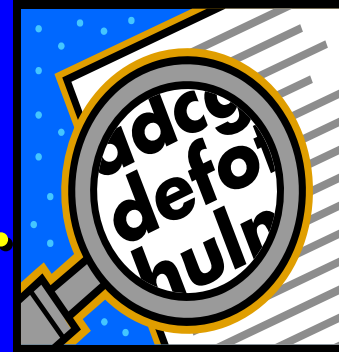


The foundation should be a combination of

- Studies published in scientific journals.
- Reliably collected data.



Attack the foundation.



- Show that the studies are poorly designed.
- Show that the studies do not support the witness.
- Introduce studies (through "treatise cross-examination") that contradict those relied upon by the witness. +



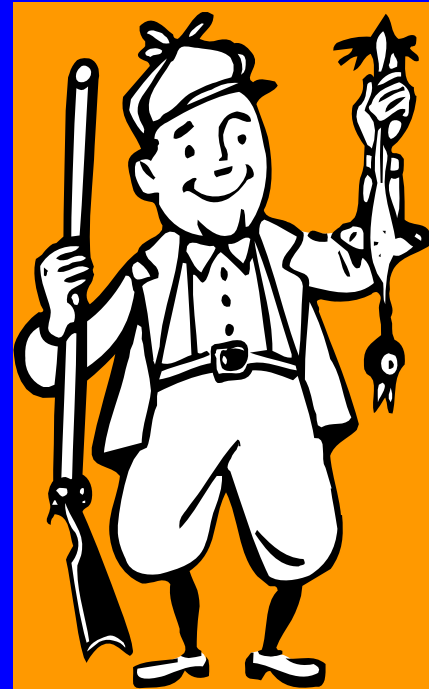
Treatise Cross-Examination

- "To the extent called to the attention of an expert witness . . . statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice."
- Rule 803 (18)(hearsay exceptions)



Attack the witness.

- Qualifications
- Accuracy
- Logic
- Objectivity



Qualifications

- Degrees
- Publications
- Work experience
- Prior testimony +



Accuracy

- Peer review
- Quality control
- Protocol
- Error rate +



Accuracy

- You have never been evaluated on your ability to reliably determine whether or not a child has been abused, have you?
- You do not follow a validated protocol in evaluating children for abuse, do you?
- You did nothing to verify Tiffany's "history."
- You say you have identified 300 children as having been abused, but you don't know how often you were right. +



Logic

- Does the ultimate opinion follow from the underlying opinions?



The Diagnostic Fallacy

- Abused children have "the symptoms."
- Tiffany has "the symptoms."
- Therefore, Tiffany has been abused.
- **INVALID**



Objectivity

- Different testimony in previous trials
- Papers and presentations
- Memberships +



- The CME or Child Medical Examination Program is an advocacy program for children that helps in investigating and determining if the child has suffered abuse, assisting in providing them treatment, assisting the non-offending family members this [with?] treatment and counseling, and then helping to identify the individual responsible for the abuse and finding them guilty and the punishment for that.
- *State v. Bush*, 164 N.C. App. 254, 257(testimony of Dr. Kathleen Russo)



What she will testify to:



“Based on the physical exam, history and behavior, I concluded that Tiffany has been abused. ”

- The physical exam was normal.
- Some abused kids have normal physical exams.
- The fact that the exam was normal does not mean Tiffany was not abused.
- The fact that the exam was normal does not means Tiffany was abused either. +



- You found erythema and increased vascularity.
- According to the Adams Scale, these are nonspecific findings?
- According to Dr. Heger's study, in the *Journal of Pediatrics and Gynecology*, almost half of non-abused girls have these symptoms? +



- You testified that Tiffany wet the bed and had nightmares.
- Children who have been abused react in different ways.
- Children wet the bed and have nightmare for all sorts of reasons.
- There are no characteristics that abused and only abused children have.
- You didn't see Tiffany wet the bed or have nightmares; her mother told you about that. +



"Tiffany's examination and history were consistent with abuse."

- Abused children have normal exams; a normal exam would be consistent with abuse.
- Abused children deny abuse; if Tiffany had denied that would be consistent with abuse.
- Abused children react in a variety of ways; any abnormal behaviors, or the absence thereof, would be consistent with abuse. +



- "Tiffany has vaginitis. Although this can be contracted in several ways, it is most often the result of sexual activity. Based on this finding and Tiffany's history, it is highly likely that Tiffany was abused."
- *In re Mashburn*, 162 N.C. App. 386 (2004) (testimony of Dr. Cynthia Brown)



- "Tiffany has vaginitis. Although this can be contracted in **several** ways, it is **most often** the result of sexual activity. Based on this finding and Tiffany's **history**, it is **highly likely** that Tiffany was abused."
- *In re Mashburn*, 162 N.C. App. 386 (2004) (testimony of Dr. Cynthia Brown)



"Tiffany told me she was abused."



A Little Law



The “medical treatment” hearsay exception

- *Aguallo* (1986)
- *The Dark Ages* (1986-2000)
- *Hinnant* (2000)
- *In re Mashburn* (2004)
- *Lewis* (2005)



Other hearsay exceptions

- Excited utterance:
 - spontaneous
 - without reflective thought
- Residual:
 - circumstantial guarantees of trustworthiness



"Tiffany told me she was abused."

- She did not seek you out to get help.
- She had no particular reason to be truthful to you.
- She told you this a long time after it supposedly happened.
- She was not particularly upset or excited at the time.
- She has changed her story. +



Your case

Alternative explanation for symptoms

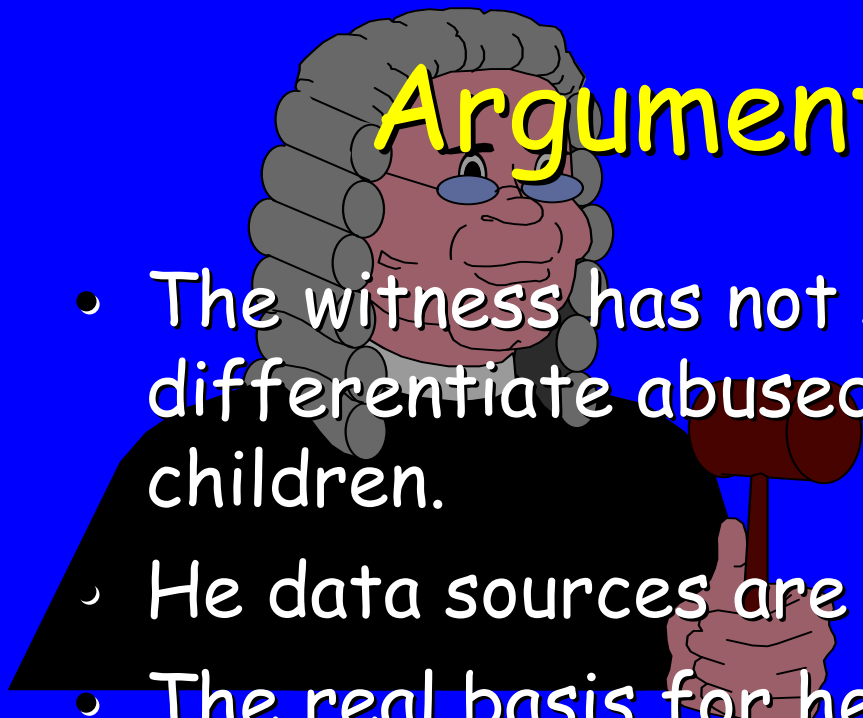
Child's behavior inconsistent with abuse

Character witnesses +



Argument themes:

- The witness has not shown she can reliably differentiate abused from non-abused children.
- Her data sources are unreliable.
- The real basis for her opinion is Tiffany's "history;" it's your duty to decide if Tiffany is telling the truth, not the witness's.
- The witness's professional judgment is colored by her personal opinion.



Hmmmm...



Challenging the DSS expert
with your consulting expert.



Pre-hearing

Assisting with research

Assistance in reviewing discovery

Meeting with DSS expert

Help prepare cross-examination +



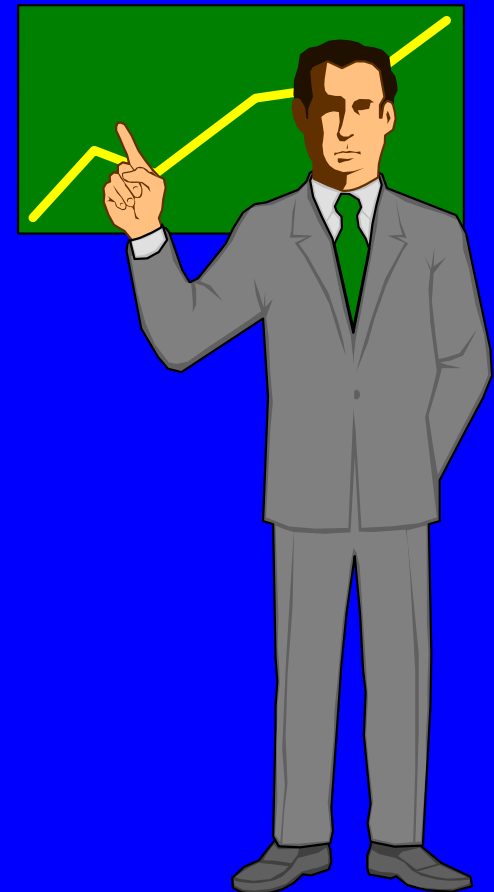
Hearing

Be in court to hear DSS case.

Advise you on cross-examination



Challenging the DSS expert with your testifying expert



Pre-hearing

Consultation as above

Evaluation of your client

Examination of the child +



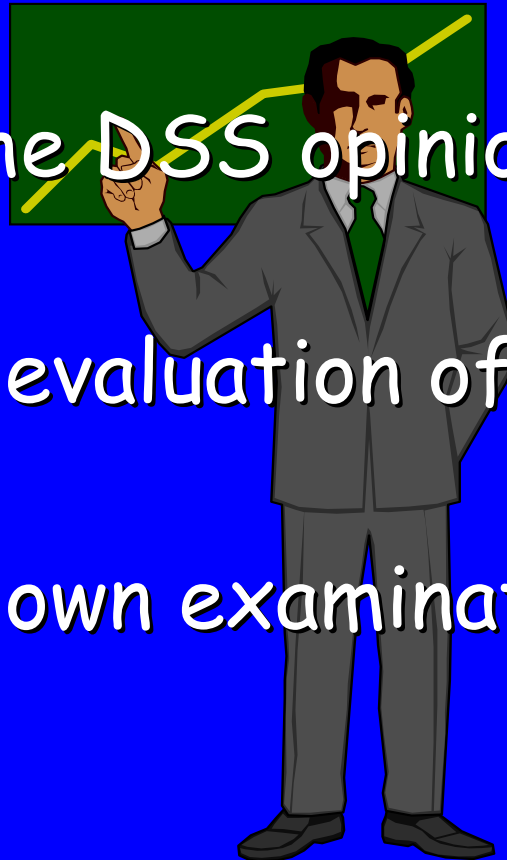
Hearing

Testifying that the DSS opinions are not reliable.

Testifying that the DSS opinions go too far.

Testifying to her evaluation of your client.

Testifying to her own examination of the child. +

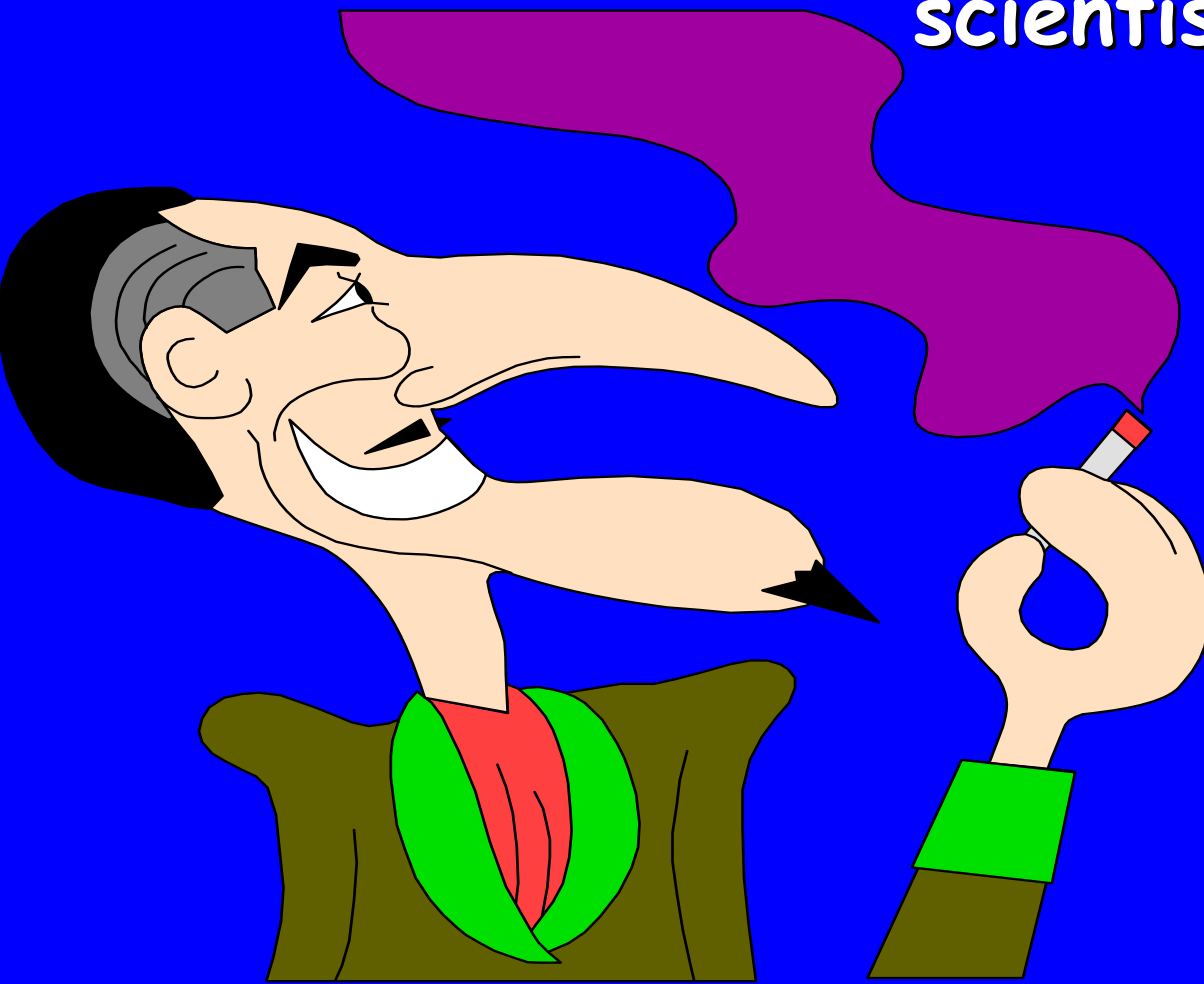


CONCLUSION

- Before trial, get discovery, do research.
- Get an expert if you can.
- At trial make the witness show the foundation for each opinion and attack whatever foundation she shows. +



Trust me. I'm a
scientist.



Mark Montgomery
Attorney at Law
PO Box 161
Durham, NC 27702

(919) 680-6249
mark.montgomery@mindspring.com