

Mark Montgomery Presents...



JUNK SCIENCE IN CHILD SEXUAL ABUSE CASES

- Attacking their expert

Making Their Expert Show Her Work

- and hoping she can't!

What she will testify to:

- Tiffany has been sexually abused.
- Tiffany has probably been sexually abused.
- Tiffany's history is consistent with sexual abuse.
- Tiffany has characteristics of a sexually abused child.
- There are well known characteristics of sexually abused children.

The proponent of expert opinion testimony has the burden of showing its reliability, considering *inter alia*:

- Whether the theory or technique has been tested.
- Critical review of the theory by other scientists.
- Whether there is a known rate of error.
- Standards controlling data collection and analysis.
- General acceptance by the scientific community.
- *Daubert v. Merrill Dow*



The bottom line. . . .

- The trial judge is required “to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Kumho Tire Co. v. Carmichael*.

OVERVIEW

- I. Understanding the difference between junk and science.
- II. The basic idea: exposing opinions as being based on junk.
- III. Making the basic idea work.

OVERVIEW

- I. Understanding the difference between junk and science.

Is it Junk or is it Science?

JUNK

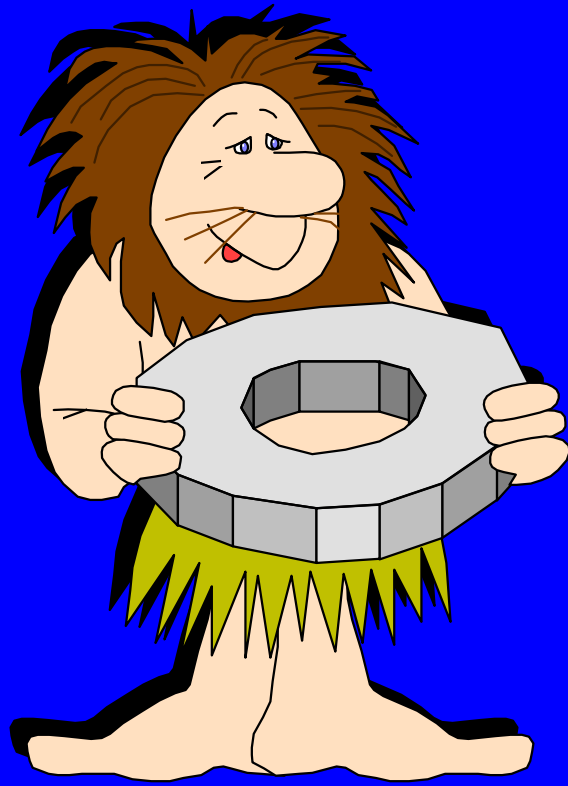
- ILL-DEFINED
VARIABLES AND
RELATIONSHIPS

SCIENCE

- DEFINED
VARIABLES AND
RELATIONSHIPS

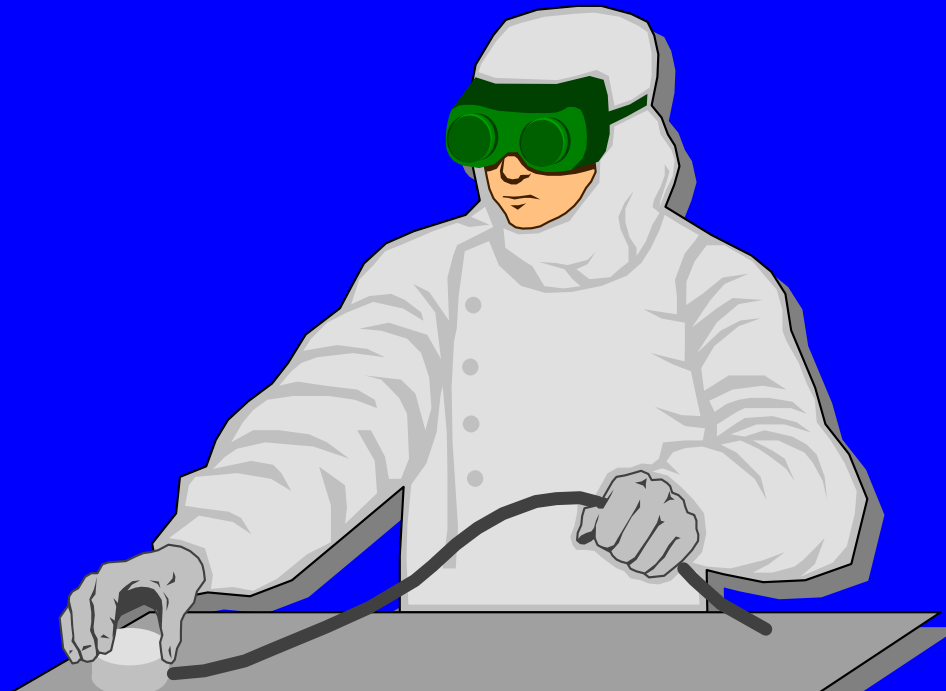
JUNK

- "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"



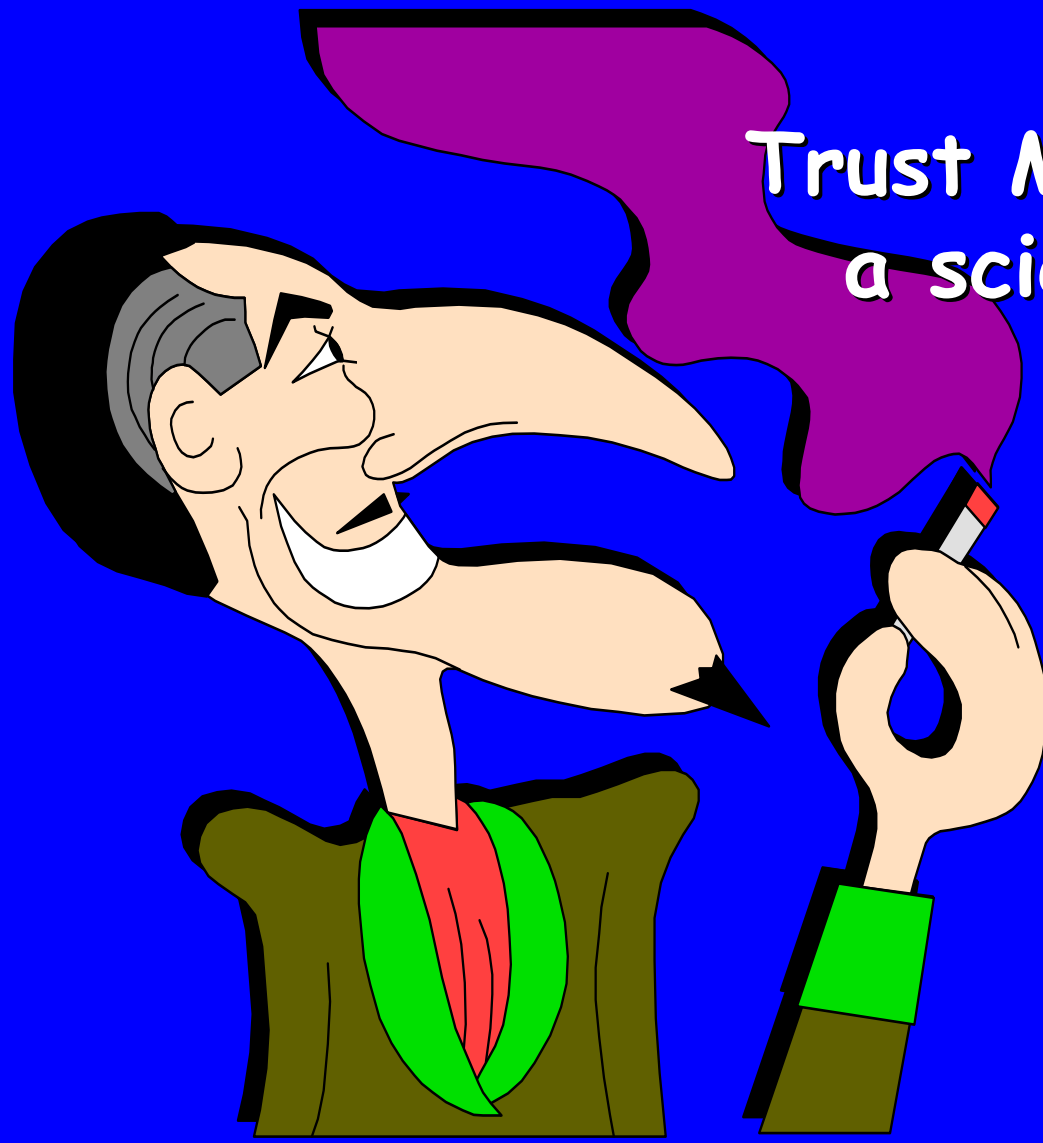
JUNK

- SUBJECTIVE

SCIENCE

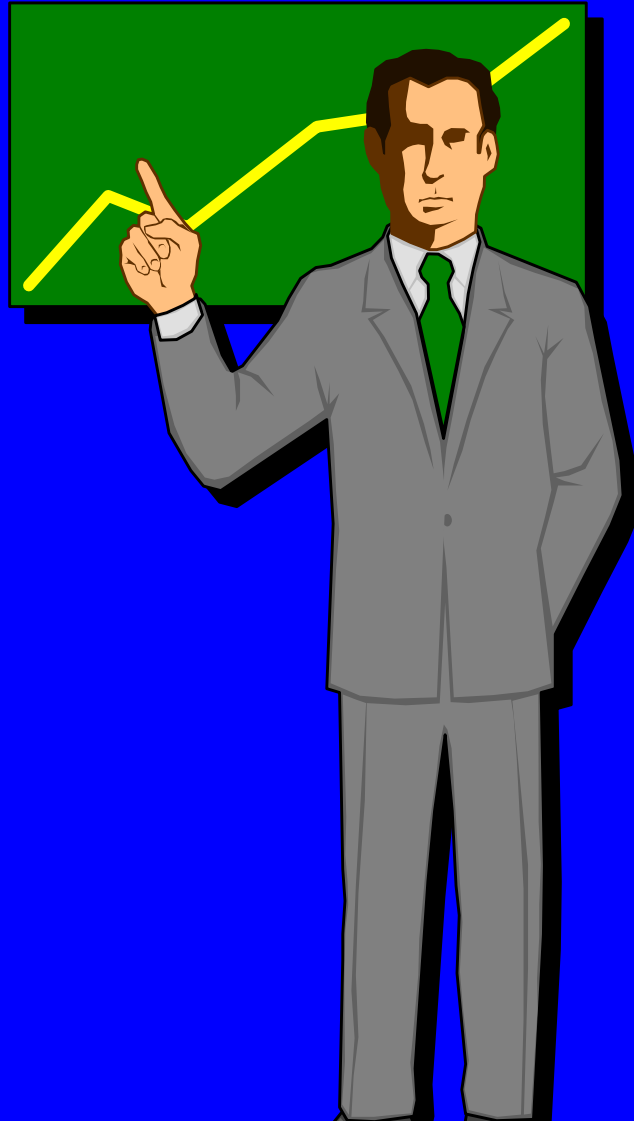
- OBJECTIVE

Junk



Trust Me. I'm
a scientist

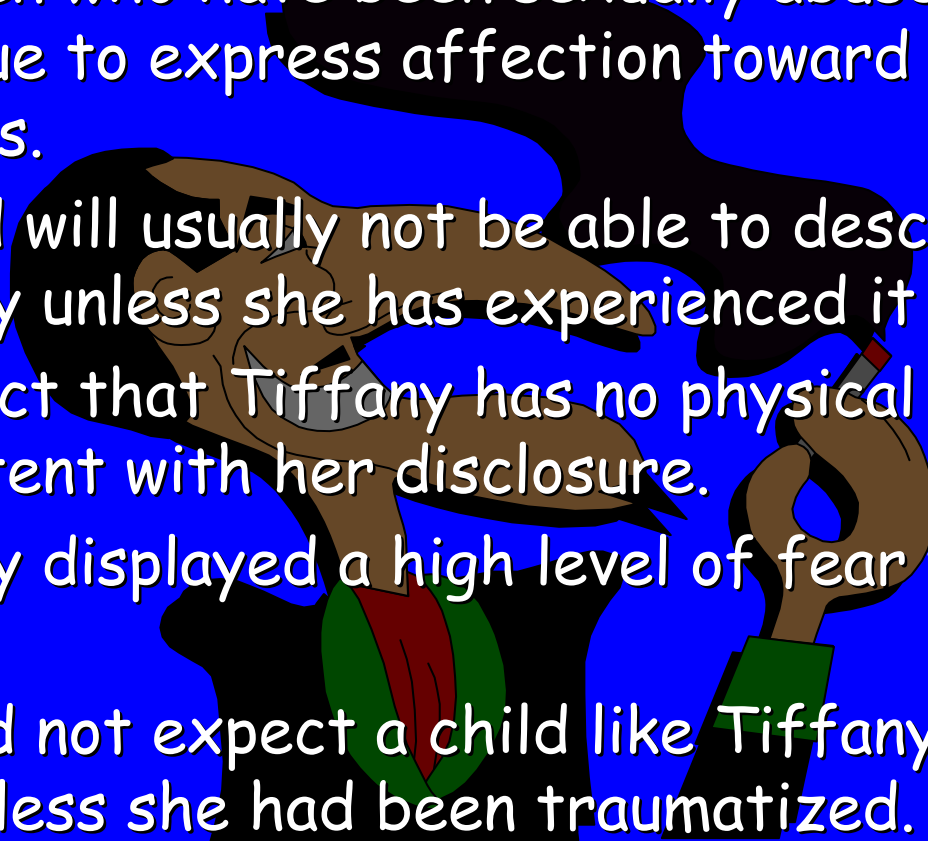
Science



Here's my data.

What's wrong with this?

- Children who have been sexually abused often continue to express affection toward their abusers.
- A child will usually not be able to describe sexual activity unless she has experienced it herself.
- The fact that Tiffany has no physical symptoms is consistent with her disclosure.
- Tiffany displayed a high level of fear towards Mr. Jones.
- I would not expect a child like Tiffany to wet the bed unless she had been traumatized.



II. THE BASIC IDEA: EXPOSING OPINIONS AS BEING BASED ON JUNK

EXPOSING OPINIONS AS BEING BASED ON JUNK

- 1) Get all the opinions.
- 2) Make her be scientific.
- 3) Move to strike if she can't/won't.
- 4) Demand the scientific foundation for each opinion.
- 5) If she can't provide the foundation, move to strike the opinion.
- 6) If she can provide one, attack it.
- 7) If she tries to be her own foundation, attack her.

What she will testify to:

- Tiffany has been sexually abused.
- Tiffany has probably been sexually abused.
- Tiffany's history is consistent with sexual abuse.
- There are well known characteristics of sexually abused children.
- Tiffany has characteristics of a sexually abused child.

3) *Get all the opinions.*

- Ultimate Opinion

- Underlying Opinions.

- Tiffany Has been abused.

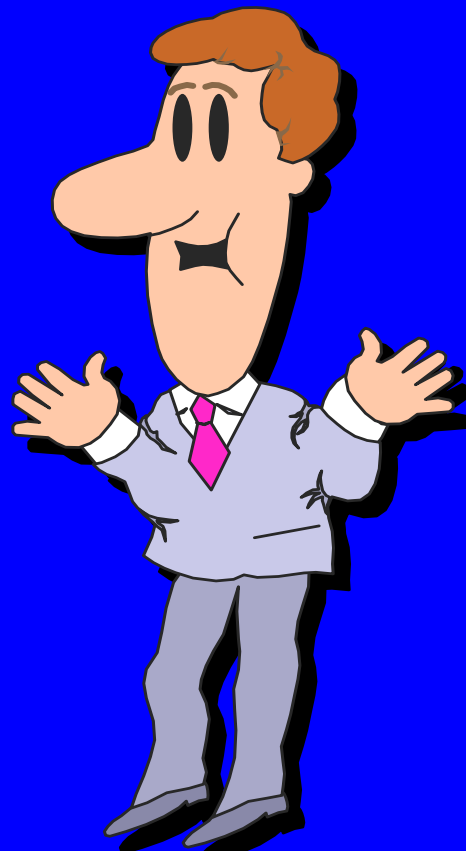
- Abused children have certain characteristics.

- Tiffany has certain characteristics.

- I can accurately determine whether or not a child has been abused.



"What are you saying?"



1) *Get all the opinions.*

- You must be saying that there are characteristics of abused children that reliably differentiate them from non-abused children.
- You must believe that Tiffany would not have acted the way she did, or said what she did if she had not been abused.
- You believe that you can accurately determine whether or not a child has been abused.

2) Make her be scientific.

"Be specific, please."

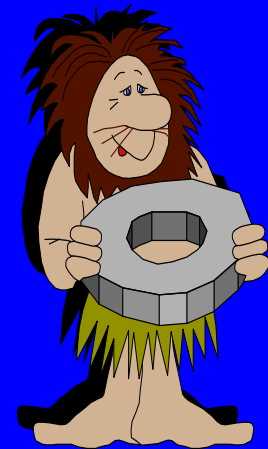
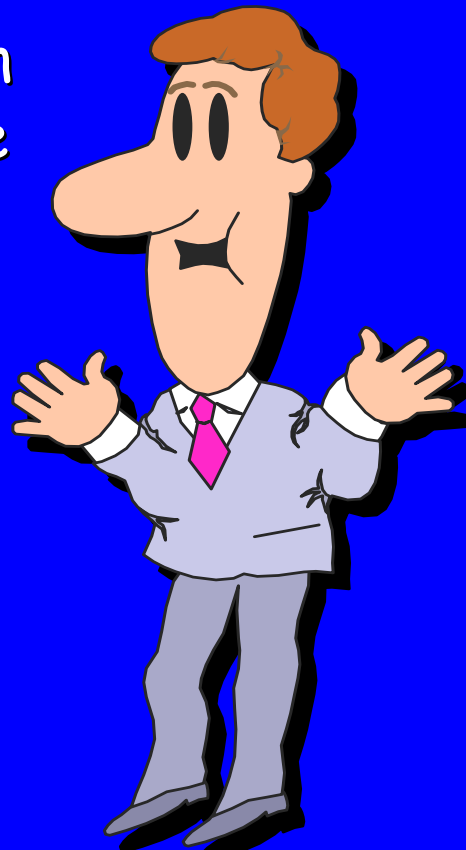


2) Make her be scientific.

- By "her disclosure," you really mean "her story."
- By "consistent with," you really mean "is correlated to" to some degree (from 0.00 to 1.00).
- You say you've interviewed 200 children suspected of sexual abuse. Can you say what percentage of them were confirmed to have been abused? How were they confirmed?
- How often often do children make false claims of abuse?

3) If she cannot be
scientific, move to strike.

Move to strike,
your Honor.
Irrelevant.
Unless she can
give us some
specifics, she
cannot be
helpful to you in
determining the
facts.



Move to strike,
your Honor.
Irrelevant.
Unless she can
give us some
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facts.





Denied

4) Make her reveal the foundation for each opinion.

"Where's your data?"



The foundation should be a combination of

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

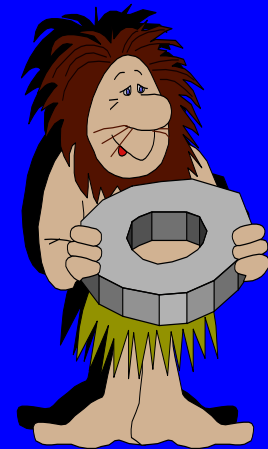


4) Make her provide a foundation for each of her opinions.

- Who says that here are characteristics of abused children that reliably differentiate them from non-abused children?
- Can you cite us to any studies that have found such characteristics?

5) If she cannot provide a foundation for an underlying opinion, move to strike.

Move to strike,
your Honor. No
foundation. She
has not shown
that her
opinions are
based on sound
science or
reliably
collected data.



Move to strike,
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Denied

6) If she can provide a foundation for an underlying opinion, attack it.

Attack the studies.

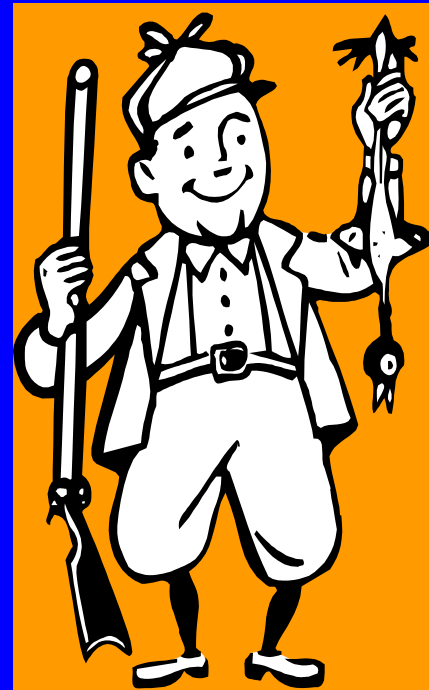


- Show that the studies are poorly designed.
- Show that the studies do not support the witness.
- Introduce studies (through “treatise cross-examination”) that contradict those relied upon by the witness.

7) If she tries to be her own foundation, attack her.

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 particular protocol in evaluating children for abuse, do you?
- You say that you've evaluated 300 children suspected of being abused, and diagnosed 25% of them as having been abused. But you don't know how many times you were right, do you?

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.
- Memberships
- Papers and presentations

What she will testify to:

- Tiffany has been sexually abused.
- Tiffany has probably been sexually abused.
- Tiffany's history is consistent with sexual abuse.
- Tiffany has characteristics of a sexually abused child.
- There are well known characteristics of sexually abused children.

1) *Get all the opinions.*

- Are you saying that most children who act like Tiffany have been abused?
- Are you saying that some children who act like Tiffany have not been abused?

2) Make her be scientific.

- Probabilities are described in percentages from zero to 100% aren't they.
- How probable (from zero to 100%) is it that Tiffany was abused?

3) If she cannot be specific,
move to strike.

4) Challenge the foundation.

- You have not counted the number of sexually abused children who act like Tiffany?
- There are no studies that say that ____% of children who act like Tiffany have been abused?
- So your guess that there is a ____% chance that Tiffany has been abused is just a guess?

5) If she cannot provide a foundation for an underlying opinion, move to strike.

6) If she can provide a foundation for an underlying opinion, attack it.

7) If she tries to be her own foundation, attack her.

What she will testify to:

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1) *Get all the opinions.*

- You cannot say for sure that Tiffany was abused.
- You cannot say that there is a ____ percent probability that Tiffany was abused.
- All you can really say is that, based on the information you have (mostly from Tiffany and her step-mother), you cannot eliminate the possibility that Tiffany was abused.

2) Make her be scientific.

- By "history," you mean her story don't you?
- By saying that her history is "consistent with" abuse, you are really just saying that there's nothing about her story that you found to be impossible.
- So it's possible that she's been abused.
- When you say she gave a "detailed and consistent" story, did you have any sort of rating system to evaluate how detailed or how consistent?

3) If she cannot be specific,
move to strike.

4) Challenge the foundation.

- You did nothing to verify her "history" did you?
- Sometimes children give false "histories" don't they?
- There is nothing about Tiffany, other than her story, that is "consistent with" abuse, is there?
- You can't say how Tiffany's story compares to other children's stories in terms of the degree of detail or consistency, can you?

5) If she cannot provide a foundation for an underlying opinion, move to strike.

6) If she can provide a foundation for an underlying opinion, attack it.

7) If she tries to be her own foundation, attack her.

What she will testify to:

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1) Get all the opinions.

- What characteristics do you believe identify someone as having been abused?
- Are you saying that you can reliably identify Tiffany's psychological and behavioral characteristics?
- Are you saying that the characteristics you found "matched" those of a sexually abuse child?

2) Make her be scientific.

- What did you do to determine Tiffany's characteristics?
- What characteristics did Tiffany display that you believe to be indicative of abuse?
- What did you do to measure the degree of her depression?
- What did you mean when you testified that Tiffany matched the profile of sexual abuse?
- Where did you learn about this "profile?"

3) If she cannot be specific,
move to strike.

4) Challenge the foundation.

- There is no psychological fingerprint for abuse is there?
- You learned about these characteristics from Tiffany and her step-mother.
- You did not administer any sort of standardized test to Tiffany.
- You did nothing to verify Tiffany's "history."
- You have no idea how reliable you are as an examiner, do you?

5) If she cannot provide a foundation for an underlying opinion, move to strike.

6) If she can provide a foundation for an underlying opinion, attack it.

7) If she tries to be her own foundation, attack her.

What she will testify to:

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1) Get all the opinions.

- What is the list of symptoms that sexually abused children display?
- Can you name a single characteristic that abused children and only abused children have?
- If there is some special combination of factors that distinguish abused from non-abused children, what is it?

2) Make her be scientific.

- Have there been any studies to show that abused children display some sort of “profile” of abuse?
- Do you have a standardized protocol for conducting your evaluations? Has it been validated?
- Have you been evaluated on how accurately you can identify psychological characteristics like those you’ve testified to?

3) If she cannot be specific,
move to strike.

4) Challenge the foundation.

- You can't cite a study that says that there are characteristics that abused and only abused children have?
- Children who have been abused react in different ways, don't they.
- Do you agree with Professor Smith, who says in his textbook that there is no "psychological or behavioral fingerprint" of abuse?

5) If she cannot provide a foundation for an underlying opinion, move to strike.

6) If she can provide a foundation for an underlying opinion, attack it.

7) If she tries to be her own foundation, attack her.

III. Making the Basic Idea Work: Pre-trial Preparation

- Discovery
- Research
- Motions

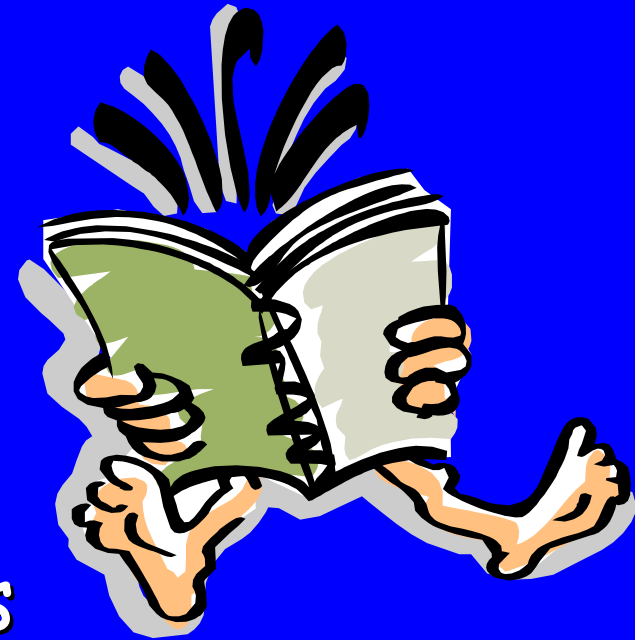
Discovery

- Opinions
- Data
- Studies relied on
- Curriculum vita of witness
- Written report
- Protocols; standards
- Examination of their witnesses



Research

- Expert assistance
- Non-expert Assistance
- Treatises
- Journals
- Prior testimony by witness
- Other activities of witness



Motions

- Expert Assistance
- Discovery
- To exclude, strike or limit



CONCLUSION

- Before trial, get discovery, make motions, do research.
- At trial 1) make the witness show the foundation for each opinion, 2) attack whatever foundation she shows, and 3) move to strike her testimony.



Granted!!

Trust me. I'm a
scientist.

