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## A Three Prong Approach to the Admissability of Expert Testimony on Child Sexual Abuse Syndrome

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## ARTICLES

# A THREE PRONG APPROACH TO THE ADMISSIBILITY OF EXPERT TESTIMONY ON CHILD SEXUAL ABUSE SYNDROME

Although courts generally disallow witnesses to state their "opinion,"<sup>1</sup> an important exception has developed in the area of

<sup>1</sup> E. CLEARY, *MCCORMICK ON EVIDENCE* § 11 at 26 (3d ed. 1984). At common law, the term opinion implied the formulation of an idea without an adequate foundation for support. *Id.* In the mid-eighteenth century, Lord Mansfield opined that "'It is mere opinion, which is not evidence.'" *Id.* at n.7. This statement has been interpreted as a criticism of opinion testimony which lacks the element of personal knowledge. *Id.* § 11 at 26.

In contemporary American usage, the definition of opinion includes any belief, inference, or conclusion regardless of whether it has developed as a result of personal exposure to a particular set of circumstances. *Id.* The authors adopt this definition for use in this article.

A peculiar result of the American application of the rule is the exclusion of inferences drawn by witnesses possessing personal knowledge. *Id.* See 3 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES* § 701[01] (1987). The English courts excluded statements of belief not based on personal knowledge, while American courts extended this notion to exclude inferences irrespective of whether they were based on personal knowledge. *Id.* See also 7 J. WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW*, § 1917 at 8 (1940) (this exclusion of inferences drawn by witnesses has failed to occur in substantial degree in England). According to Dean Wigmore's interpretation of historical evidence, such inferences were not excluded until the eighteen hundreds. 7 J. WIGMORE, *supra*, § 1917 at 1-10. The court in *Donnell v. Jones*, 13 Ala. 490 (1848) stated that the general rule requires witnesses to testify only to those facts within the realm of their personal knowledge. *Id.* at 511. It explicitly rejected the idea that deductions by witnesses based upon facts are a proper form of evidence, since such deductions invaded the province of the jury. *Id.* See *Baltimore & O. R. Co. v. Schultz*, 43 Ohio 270, 283, 1 N.E. 324, 332 (1885). The court in *Baltimore* stated: "[W]itnesses should have been restricted in their testimony to the facts, and the jury left free to form an opinion upon them . . ." *Id.* In fact, Dean Wigmore's major criticism of the opinion rule pertains to the scientific impossibility of distinguishing between statements which represent fact and those which represent

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expert testimony.<sup>3</sup> The general rule regarding the admissibility of opinion testimony provided by an expert dictates that whenever the expert's knowledge concerning the issue exceeds that of the jury and assists them in reaching a final determination, then such evidence should be admitted.<sup>3</sup>

opinion. 7 J. WIGMORE, *supra*, § 1919 at 14. See 3 J. WEINSTEIN & M. BERGER, *supra*, at § 701[01]. It is impossible to make a clear distinction between fact and opinion. *Id.*

<sup>3</sup> Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 416 (1952). Such a departure from the general rule is warranted in only two instances. *Id.* The first involves a scenario in which a non-expert witness is incapable of detailing the pertinent facts in the manner necessary to provide the jury with a clear image of the witness' observation. *Id.* As the court noted in *Grismore v. Consol. Prod. Co.*, 232 Iowa 328, 5 N.W.2d 646 (1942), it is sometimes impractical to require the witness to recall and state all the minute details embodying her observation. *Id.* at 344, 5 N.W.2d at 655. Under these limited circumstances the non-expert witness will be permitted to resort to opinion in describing her observations. *Id.* The second instance triggering admissibility of opinion testimony occurs when testimony is being elicited from an expert witness. Ladd, *supra*, at 416. See E. CLEARY, *supra* note 1, § 14 at 35-38.

<sup>3</sup> *Grismore*, 232 Iowa at 344, 5 N.W.2d at 654-64. The court in *Grismore* recognized that the acceptance of opinion evidence, irrespective of its source, is a matter residing solely within the discretion of the court. *Id.* at 342, 5 N.W.2d at 654. The *Grismore* court exercised its discretion and permitted the introduction of the proffered evidence stating that the "witness . . . was better qualified to answer the question than the ordinary juror." *Id.*

Under the traditional view, an expert is permitted to state an opinion when "the issue to which the testimony would be directed is 'not within the common knowledge of the average layman.'" 3 J. WEINSTEIN & M. BERGER, *supra* note 1, § 702[02] at 702-8 n.1 (quoting *Bridger v. Union Ry. Co.*, 355 F.2d 382, 387 (6th Cir. 1966)). Such opinion must be based upon personal knowledge of the facts, facts stated in the record, or a combination of both factors. E. CLEARY, *supra* note 1, § 14 at 35. If the opinion is premised upon facts recited in the record, then the witness is required to have been present when the testimony pertaining to the relevant facts was delivered. *Id.* Alternatively, if she was not present at the relevant time, then the facts may be provided to the witness in the form of a hypothetical question that requires her to assume the veracity of the facts and state an opinion based on such an assumption. *Id.* The danger arises when the attorney, seeking to circumvent the lengthy process which is involved in formulating a hypothetical question, simply asks that the expert state her opinion on the basis of testimony previously presented to the court. Note, *Expert Testimony As An "Invasion of the Province of The Jury"*, 26 IOWA L. REV. 819, 821 (1941).

Under the modern Federal Rules of Evidence, an expert is permitted to state an opinion where her "knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702. This is true regardless of whether the subject matter resides within the common understanding of the average individual juror. 3 J. WEINSTEIN & M. BERGER, *supra* note 1, § 702[02] at 702-09 - 702-10. Furthermore, Rule 703 provides:

[T]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 703.

One of the dangers, however, is that the expert's opinion will "invade the province of the jury."<sup>4</sup> Traditionally, the jury's province includes evaluation of the credibility of witnesses<sup>5</sup> and the resolution of the ultimate facts in issue.<sup>6</sup> If the court decides that the witness is being asked to weigh conflicting testimony and determine the credibility of a party or other witness, the testimony may be prohibited.<sup>7</sup> Similarly, the common law Ultimate Fact Doctrine prohibits the use of testimony expressed in the form of an opinion based upon an ultimate fact in issue.<sup>8</sup>

<sup>4</sup> See Note, *supra* note 3, at 821; 3 JONES, COMMENTARIES ON EVIDENCE § 1321 at 2417-18 (2d ed. 1926). This phrase, alternately referred to as "usurping the function of the jury", is used as justification for refusing to admit into evidence certain types of testimony which, it is believed, will cause the jury to yield too readily to opinions elicited from expert witnesses. 7 J. WIGMORE, *supra* note 1, § 1920 at 17. See E. CLEARY, *supra* note 1, § 12 at 30. A witness's statement indicating his belief with respect to the outcome of the case, if admitted, "would tend to suggest that the judge and the jury may shift responsibility for decision to the witnesses . . . ." *Id.*

<sup>5</sup> See Note, *supra* note 3, at 820. See also E. CLEARY, *supra* note 1, § 12 at 30 (responsibility for decisions resides with the jury, not the witness); 7 J. WIGMORE, *supra* note 1, § 1920 at 17 (quoting Chief Justice Nelson in *Lincoln v. Ry. Co.*, 23 Wend. 432 (N.Y. 1840)) ("When . . . the judgment, belief, and inferences of a witness are inquired into as matters proper for the consideration of a jury . . . the judgment of witnesses is substituted for that of the jury").

<sup>6</sup> See Note, *supra* note 3, at 820. See also E. CLEARY, *supra* note 1, § 12 at 30 n.3 (a witness could not offer his opinion or conclusion on an ultimate fact in issue); 7 J. WIGMORE, *supra* note 1, § 1921, at 18 (quoting Justice Elliott in *Yost v. Conroy*, 92 Ind. 464, 471 (1883)) ("It is a general rule that a witness cannot be allowed to express an opinion upon the exact question which the jury are required to decide").

<sup>7</sup> See Note, *supra* note 3, at 821. See also *United States v. Azure*, 801 F.2d 336, 339 (8th Cir. 1986) (a pediatrician's opinion as to believability of child's story of sexual abuse invaded jury's domain); *United States v. Samara*, 643 F.2d 701, 705 (10th Cir.) (quoting *United States v. Ward*, 169 F.2d 460, 462 (3d Cir. 1948)) (impermissible for expert to "weigh the evidence and determine credibility"), *cert. denied*, 454 U.S. 829 (1981); *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973) (the jury, as a "lie detector", determines credibility), *cert. denied*, 416 U.S. 959 (1974); *People v. Reid*, 123 Misc. 2d 1084, 1087-88, 475 N.Y.S.2d 741, 743 (Sup. Ct. Crim. Term Kings County 1984) (court permitted expert witness to explain rape trauma syndrome to jury and express her opinion that victim suffers from that syndrome; jury's responsibility to assess the credibility of the victim's testimony); *Commonwealth v. Seese*, 512 Pa. 439, 443, 517 A.2d 920, 922 (1986) (the task of determining a witness' credibility has been traditionally delegated to jury). *But see State v. Kim*, 64 Haw. 598, 608-10, 645 P.2d 1330, 1338-39 (1982) (court allowed expert to testify that "he 'found her (child victim's) story believable'"); *State v. Marks*, 231 Kan. 645, 654, 647 P.2d 1292, 1298-99 (1982) (court allowed expert testimony that victim suffered from rape trauma syndrome); *State v. Geyman*, 729 P.2d 475, 479 (Mont. 1986) (a comment from expert witnesses bearing upon credibility of a child does not invade the province of jury).

<sup>8</sup> See Note, *supra* note 3, at 825. Although a precise definition of an "ultimate fact" has eluded scholars, the phrase is used to convey the idea of a "fact the establishment of which is one of the issues in the case and which when decided leaves nothing more for the jury to

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This article addresses one of the most delicate issues of expert testimony to confront courts today<sup>9</sup>: whether experts should be

determine with regard to that issue." *Id.*

A tendency towards a more liberal approach with respect to the admissibility of expert opinions based upon ultimate facts in issue appears to have begun with the *Grismore v. Consol. Prod. case*, 232 Iowa 328, 5 N.W.2d 646 (1942). In *Grismore*, a poultry farmer sued to recover damages for the death and injury to turkeys caused by feeding them a product prepared by the defendant in accordance with instructions provided by defendant's agent. *Id.* at 334, 5 N.W.2d at 650. A witness who was experienced in raising turkeys was asked to state his opinion based upon a hypothetical question as to the cause of their death and injury. *Id.* at 340-41, 5 N.W.2d at 654. An objection was raised on the grounds that the admission of the opinion of the witness invaded the province of the jury. *Id.* at 341, 5 N.W.2d at 654. In contemplating a ruling on the objection, the court recognized the "complexity of modern life" and the need to mold the rules to satisfy the changing needs of society. *Id.* at 343, 5 N.W.2d at 655. Although it reiterated the rule that receipt of opinion evidence lies within the discretion of the court, it observed that "[f]or too many years too many courts have so frowned upon expert opinion testimony and have so restricted its admission and consideration that the triers of facts have been denied aid that was essential to a proper determination of litigated causes." *Id.* Accordingly, the court followed "the modern tendency . . . to take a more liberal and rational view", and permitted the witness to testify as to her opinion. *Id.* See E. CLEARY, *supra* note 1, § 12 at 30 n.7.

This liberalization of the law resulted in the adoption of Federal Rules of Evidence 704. E. CLEARY, *supra* note 1, § 12 at 30-31. Rule 704 reads as follows: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Id.* This rule effectively abolishes the ultimate issue doctrine. 3 J. WEINSTEIN & M. BERGER, *supra* note 1, § 704 at 704-3 - 704-4. Currently, a majority of state courts allow into evidence expert opinions based upon ultimate facts in issue. E. CLEARY, *supra* note 1, § 12 at 30 n.8.

When considering the application of Rule 704, courts will simultaneously consider Rules 403 and 702. 3 J. WEINSTEIN & M. BERGER, *supra* note 1, § 704 at 704-4. Rule 403 permits the introduction of relevant material while Rule 702 requires that the expert's opinion "assist the trier of fact to understand the evidence or to determine a fact in issue." See FED. R. EVID. 403, 702. The interplay among these rules "afford(s) ample assurances against the admission of opinions which would merely tell the jury what result to reach." 3 J. WEINSTEIN & M. BERGER, *supra* note 1, § 704 at 704-4. See *DiBella v. State*, 574 F. Supp. 151, 152 (E.D.N.Y. 1983), *aff'd*, 762 F.2d 990 (2d Cir. 1985). In *DiBella*, a civil rights action was brought against police officers alleging that they did not have reasonable cause to believe that plaintiff was engaged in illegal bookmaking. *Id.* The court held inadmissible expert testimony as to the factors suggesting the existence of probable cause for arrest in bookmaking activities since such testimony would only give the jury an opinion as to how the case should be decided. *Id.* at 154.

<sup>9</sup> See Slicker, *Child Sexual Abuse: The Innocent Accused*, 91 CASE & COM. 12 (1986). "Until the 1950's child abuse was unrecognized or ignored. With respect to sexual abuse the prevailing view was that it was the product of the child's fantasy." *Id.* Historically, this view makes sense in light of the fact that children were viewed as unreliable witnesses. *Id.* See generally Ingulli, *Trial by Jury: Reflections On Witness Credibility, Expert Testimony, and Recantation*, 20 VAL. U.L. REV. 145, 161-71 (1986) (child's competence had to be established in every case).

Recently, however, heightened public awareness of the frequency with which children are victims of abuse has necessitated a reevaluation of the traditional view. See Notes, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims*, 74 GEO. L.J. 429, 429-30 n.3 (1985). See also McCord, *Expert Psychological Testimony About Child Com-*

permitted to give opinion testimony as to the credibility<sup>10</sup> of sexually abused children<sup>11</sup> in criminal trials against the children's alleged assailants. A recurring area of concern for the courts is that a defendant's constitutional right to have a jury determine the facts in issue, which includes determining the credibility of a witness, is not violated by the admission of expert testimony as to such credibility.<sup>12</sup> While a body of case law dealing with this issue has begun to amass, no uniform theory exists among the various jurisdictions.

*plaints In Sexual Abuse Prosecutions: A Foray Into The Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 4 (1986) (author estimates using "conservative figures" that two percent of all boys and ten percent of all girls are victims of sexual abuse, amounting to 210,000 new cases of child sexual abuse every year); Notes, *supra*, at 430 n.4 (quoting a number of recent articles and surveys on incidents of child sexual abuse).

<sup>10</sup> See *United States v. Awkard*, 597 F.2d 667, 669 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979); *United States v. Rosenberg*, 108 F. Supp. 798, 806 (S.D.N.Y.), *aff'd*, 200 F.2d 666 (2d Cir. 1952). Typically the credibility of a victim is intertwined with the guilt or innocence of the defendant. Both matters, credibility of a witness and the determination of guilt or innocence of the accused, are reserved solely for the fact finder. *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974). Most jurisdictions hold that it is improper to express an opinion as to whether another witness is telling the truth. See, e.g., *State v. Sullivan*, 2 Conn. Cir. Ct. 412, 417-18, 199 A.2d 709, 713 (1964) (impermissible for doctor to opine as to the reliability of lay witness's opinion regarding defendant's sobriety); *Commonwealth v. Carter*, 9 Mass. 680, 682, 403 N.E.2d 1191, 1193 (Mass. App. Ct. 1980) (doctor's opinion that mildly retarded individual was telling the truth held inadmissible), *aff'd*, 383 Mass. 873, 417 N.E.2d 438 (1981); *Beishir v. State*, 522 S.W.2d 761, 765 (Mo.) (expert testimony that witness is not truthful held inadmissible), *cert. denied*, 423 U.S. 946 (1975); *State v. Williams*, 34 N.C. App. 408, 414, 238 S.E.2d 668, 672 (1977) (psychiatrist's opinion that he considered defendant reliable properly excludable), *appeal dismissed*, 293 N.C. 743, 241 S.E.2d 72, *cert. denied*, 436 U.S. 906 (1978); *State v. Corraera*, 430 A.2d 1251, 1255 (R.I. 1981) (issue of whether defendant is lying, is within the "exclusive province of the jury"). *But see United States v. Smith*, 736 F.2d 1103, 1108 (6th Cir.) (questioning whether expert opinion on eyewitness credibility invaded the province of the jury), *cert. denied*, 469 U.S. 868 (1984); *United States v. Hiss*, 88 F. Supp. 559, 560 (S.D.N.Y.) (psychiatrist's opinion as to the sanity of witness admissible to impeach credibility), *aff'd*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951); *People v. Cowles*, 246 Mich. 429, 431, 224 N.W. 387, 388 (1929) (expert testimony admissible to show sexual conduct of a rape victim).

<sup>11</sup> See Notes, *supra* note 9, at 429 n.1 (quoting the National Center on Child Abuse and Neglect which defines child sexual abuse as "contacts or interactions between a child and adult when the child is being used as an object of gratification for adult sexual needs or desires"). *But see McCord*, *supra* note 9, at nn.31-42 and accompanying text (no consensus as to the definition on child sexual abuse).

<sup>12</sup> See U.S. CONST. art. III, § 2, cl. 3 ("[T]he trial of all crimes . . . shall be by jury . . ."). See also Mlyniec & Dally, *See No Evil? Can Insulation of Child Sexual Abuse Victims be Accomplished Without Endangering the Defendant's Constitutional Rights*, 40 U. MIAMI L. REV. 115, 118 (1985) (ignoring importance of procedural guarantees to protect the accuser "may hinder the search for truth and lessen the accuracy of fact-finding").

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### I. THREE APPROACHES

Generally, the courts take one of three approaches.<sup>13</sup> First, some courts follow a moderate approach. Jurisdictions that adhere to this view allow an expert to give an opinion on characteristics observed in sexually abused children but hold that an expert may not give testimony that a jury may construe as an opinion about the credibility of a child.<sup>14</sup> Other courts take a liberal stand and hold that expert testimony on both typical characteristics of sexually abused children and on the believability of the child complain-

<sup>13</sup> See Roe, *Expert Testimony in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 97 (1985). Several jurisdictions, however, have avoided addressing the issue. For instance, in *State v. Colgan*, 711 P.2d 533 (Alaska Ct. App. 1985) the court stated that it was inappropriate for it to decide the admissibility of testimony of a family therapist that the victim's account of sexual abuse by defendant was credible. *Id.* at 534. The court in upholding the defendant's conviction simply stated that even if the expert testimony was improperly admitted it did not constitute reversible error. *Id.* In *State v. Snapp*, 110 Idaho 269, 273, 715 P.2d 939, 943 (1986), the Idaho Supreme Court refused to pass judgment on the admissibility of expert testimony where "the guilt of a defendant is sought to be established by testimony which describes the 'child sexual abuse syndrome', finds typical characteristics of such syndrome in the alleged victim, and thus suggests that the victim indeed has been sexually abused." *Id.* at 273, 715 P.2d at 943. In this case, the defendant was convicted through testimony of the victims (his children) without any reliance on the testimony of an expert being necessary for the conviction. *Id.*

<sup>14</sup> See *State v. Moran*, 151 Ariz. 378, 728 P.2d 248 (Ariz. Ct. App. 1986); *State v. Lindsey*, 149 Ariz. 472, 720 P.2d 73 (Ariz. Ct. App. 1986); *Hall v. State*, 15 Ark. App. 309, 692 S.W.2d 769 (1985); *People v. Matlock*, 153 Mich. App. 171, 395 N.W.2d 274 (1986); *State v. Myers*, 359 N.W.2d 604 (Minn. 1984); *Smith v. Nevada*, 100 Nev. 570, 688 P.2d 326 (1984); *State v. Middleton*, 294 Or. 427, 657 P.2d 1215 (1983); *State v. Pettit*, 66 Or. App. 575, 675 P.2d 183 (1984); *State v. Petrich*, 101 Wash. 2d 566, 683 P.2d 173 (1984); *State v. Haseltine*, 120 Wis. 2d 92, 352 N.W.2d 673 (Wis. Ct. App. 1984).

There has only been one federal case on this issue to date. *United States v. Azure*, 801 F.2d 336 (8th Cir. 1986). Federal jurisdiction was proper since the federal government has jurisdiction over the crime of carnal knowledge committed by an Indian within Indian country. 18 U.S.C. § 1153 (1984).

*Azure* involved an allegation that the defendant sexually abused the eleven year old daughter of his common law wife. 801 F.2d at 337-38. At trial a pediatrician who was an expert on child sexual abuse was allowed to testify that "he could see no reason why [the child] would not be telling the truth in this matter." *Id.* at 339.

In reversing, the Eighth Circuit Court of Appeals held that the testimony invaded the province of the jury. *Id.* at 340-41. Though the court conceded that the area of child sexual abuse demanded special attention, it feared the jury may have relied on the expert's opinion and "surrendered their own common sense in weighing the testimony." *Id.* at 340 (quoting *United States v. Barnard*, 490 F.2d 904, 912 (9th Cir. 1973), cert. denied, 410 U.S. 959 (1974)).

The court acknowledged in dictum, however, that the expert could have assisted the jury without invading its province by testifying generally on the characteristics of victims of child sexual abuse as compared to the child's story. *Id.*

ant is admissible.<sup>15</sup> Finally, at least one jurisdiction has indicated it would disallow both opinion as to the credibility of the child as well as background information.<sup>16</sup> This view has been termed the conservative approach.

#### A. *The Moderate View*

In *State v. Middleton*,<sup>17</sup> the Oregon Supreme Court upheld a lower court decision allowing a juvenile counselor and a social worker to explain that the particular victim's behavior was typical of sexually abused children.<sup>18</sup> The state questioned these witnesses in order to elicit testimony which would provide a counter argument to the defendant's allegation that the child's account of abuse was a fabrication.<sup>19</sup> The juvenile counselor testified that she found the child's behavior much in keeping with children who complained of sexual molestation.<sup>20</sup> The social worker stated that incidents of guilt, anxiety, running away, delayed reporting of the occurrence, and retracting accusations are characteristics of sexually abused children.<sup>21</sup> This testimony has become known as "profile" or "syndrome" evidence.<sup>22</sup>

The court reasoned that if a qualified expert offers testimony on whether the reactions of the child in the case at hand are similar to that of other children who have been sexually abused, then the testimony would help the jury to understand<sup>23</sup> the psychologi-

<sup>15</sup> See *State v. Butler*, 178 Ga. App. 110, 349 S.E.2d 684 (1986); *State v. Kim*, 64 Haw. 598, 645 P.2d 1330 (1982); *State v. Geyman*, 729 P.2d 475 (Mont. 1986).

<sup>16</sup> *Tennessee v. Curtis*, No. 114, slip op. (Tenn. Crim. App. Nov. 5, 1981).

<sup>17</sup> 294 Or. 427, 657 P.2d 1215 (1983).

<sup>18</sup> *Id.* at 438, 657 P.2d at 1221.

<sup>19</sup> *Id.* at 429-30, 657 P.2d at 1216.

<sup>20</sup> *Id.* at 432 n.5, 657 P.2d at 1218 n.5.

<sup>21</sup> *Id.* at 433-34 n.6, 657 P.2d at 1218-19 n.6.

<sup>22</sup> Wells, *Expert Testimony: To Admit or Not to Admit*, 57 FLA. B.J. 673 (1983). A syndrome is characterized by a cluster of signs and symptoms which occur simultaneously thereby indicating a specific abnormality. *Id.*

<sup>23</sup> *Middleton*, 294 Or. at 435-36, 657 P.2d at 1220. As the Supreme Court of Minnesota stated in *State v. Myers*, 359 N.W.2d 604 (Minn. 1984):

The nature . . . of sexual abuse of children places lay jurors at a disadvantage.

Incest is prohibited in all or almost all cultures, and the common experience of the jury may represent a less than adequate foundation for assessing the credibility of a young child who complains of sexual abuse.

*Id.* at 610. As Justice Roberts said in a concurring opinion in *Middleton*: "[W]hile jurors may be capable of personalizing the emotions of victims of [other crimes] and of assessing



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cal aftermath occasioned by sexual abuse.<sup>24</sup> However, the court specifically stated that this holding would not "open the door widely."<sup>25</sup> An expert witness could not give an opinion on whether she believes the victim is telling the truth.<sup>26</sup>

witness credibility accordingly, tensions unique to the trauma [of sexual abuse] . . . have remained largely unknown to the public." *Middleton*, 294 Or. at 440, 657 P.2d at 1222 (Roberts, J., concurring).

<sup>24</sup> *Id.* at 436, 657 P.2d at 1219-20. As Justice Coyne states in *State v. Myers*:

In the case of a sexually abused child consent is irrelevant and jurors are often faced with determining the veracity of a young child who tells of a course of conduct carried over an ill defined time frame and who appears an uncertain or ambivalent accuser and who may even recant. Background data providing a relevant insight into the puzzling aspects of a child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and appropriate in cases of sexual abuse of children . . . .

*Myers*, 359 N.W.2d at 610. In sum, the expert adds an "indicia of reliability" to the facts and brings consistency to a situation where there is inconsistency. *Middleton*, 294 Or. at 440, 657 P.2d at 1222 (Roberts, J., concurring). See also *People v. Matlock*, 153 Mich. App. 171, 178, 395 N.W.2d 274, 277 (1986) (rape counselor permitted to testify on whether it was typical for children to delay reporting the abuse or change their minds); *Smith v. Nevada*, 100 Nev. 570, 572, 688 P.2d 326, 327 (1984) (expert permitted to explain the reasons for delays in reporting by sex abuse victim); *Commonwealth v. Baldwin*, 348 Pa. Super. 368, 373-74, 502 A.2d 253, 254 (1985) (testimony of social worker explaining dynamics of child sexual abuse is admissible due to the distinctive nature of the crime and the effects on complainants); *State v. Petrich*, 101 Wash. 2d 566, 576, 683 P.2d 173, 180 (1984) (expert permitted to testify that a delay in reporting was found in fifty percent of sexual abuse cases); *State v. Haseltine*, 120 Wis. 2d 92, 94, 352 N.W.2d 673, 676 (Wis. Ct. App. 1984) (psychiatric testimony held admissible for explaining instances of recantation).

In *Middleton*, the court rejected the defendant's argument that such testimony invades the province of the jury: "[I]t is impossible to usurp the jury's function. Even if there is uncontradicted expert testimony, the jury is not bound by it . . . ." *Middleton*, 294 Or. at 435, 657 P.2d at 1219. While it is true that if the jury believed the expert they would also likely believe the victim, here neither expert testified directly as to the truth of the victim's account. *Id.* "Much expert testimony will tend to show that another witness either is or is not telling the truth (citation omitted). This, by itself, will not render evidence inadmissible." *Id.* "[T]he test is whether expert's testimony, if believed will be of help . . . to the jury." *Id.* (quoting *State v. Stringer*, 292 Or. 388, 391, 639 P.2d 1264, (1982)). Wigmore has suggested that the notion of jury usurpation is so misleading it ought to be repudiated. 7 J. WIGMORE, *supra* note 1, § 1920 at 17.

<sup>25</sup> *Middleton*, 294 Or. at 438, 657 P.2d at 1221.

<sup>26</sup> *Id.* See also *State v. Moran*, 151 Ariz. 373, 380, 728 P.2d 248, 255 (Ariz. Ct. App. 1986) (expert testimony that victim was telling the truth about molestation was held prejudicial and inadmissible); *People v. Matlock*, 153 Mich. App. 171, 177, 395 N.W.2d 274, 277 (1986) (rape counselor's testimony that none of her patients ever lied amounted to an impermissible vouching for the complainant's credibility); *State v. Haseltine*, 120 Wis. 2d 92, 95, 352 N.W.2d 673, 676 (Wis. Ct. App. 1984) (opinion of psychiatrist that defendant's daughter was victim of incest was equivalent to saying that the victim told the truth: such testimony held inadmissible).

B. *The Liberal View*

Some jurisdictions permit the expert to comment both directly on the credibility of the child victim as well as offer syndrome evidence.<sup>27</sup> The seminal case adhering to this approach is *State v. Kim*.<sup>28</sup>

In *Kim*, the defendant was accused of raping his thirteen year old step-daughter.<sup>29</sup> At the trial, the state called a pediatrician who had examined the child one week after the incident.<sup>30</sup> The pediatrician testified as to the general characteristics of a sexually abused child and that the complainant shared several of these characteristics.<sup>31</sup> Then, the doctor concluded that her account was believable.<sup>32</sup> Guided by the liberal approach to admissibility of expert testimony in the Hawaii Rules of Evidence,<sup>33</sup> the court allowed the pediatrician's testimony since it helped the jury to assess the victim's credibility.<sup>34</sup> The court stressed that the doctor's testimony was not a "naked conclusion"<sup>35</sup> on his part, but in fact offered the jury some factual basis from which to assess the foundation of the doctor's opinion.<sup>36</sup> It was considered unnecessary "to establish specific fixed requirements to deal with such testimony."<sup>37</sup>

<sup>27</sup> See *supra* note 15.

<sup>28</sup> *State v. Kim*, 64 Haw. 598, 645 P.2d 1330 (1982).

<sup>29</sup> *Id.* at 599, 645 P.2d at 1332-33.

<sup>30</sup> *Id.* at 599-600, 645 P.2d at 1333.

<sup>31</sup> *Id.* at 600-01, 645 P.2d at 1334.

<sup>32</sup> *Id.* at 601, 645 P.2d at 1334.

<sup>33</sup> *Id.* at 603-04, 645 P.2d at 1335. See HAWAII REV. STAT. § 626 (1985).

<sup>34</sup> See *Kim*, 64 Haw. at 602, 645 P.2d at 1335 (quoting Goldstein, *Credibility and Incredibility: The Psychiatric Examination of the Complaining Witness*, 137 AM. J. PSYCHIATRY 1238, 1240 (1980)). The *Kim* court found that: "[T]he purpose underlying the testimony of an expert is not to substitute his or her estimation of credibility for that of the jury. Rather, it is to provide a scientific perspective for the jury according to which it can evaluate the complainant's testimony for itself." *Id.* at 602-04, 645 P.2d at 1334-35.

<sup>35</sup> See *id.* at 608, 645 P.2d at 1338. Chief Justice Richardson stated that in order to assist the jury an expert "must base his testimony upon a sound factual foundation; any inferences or opinions must be the product of an explicable and reliable system of analysis; and such opinions must add to the common understanding of the jury." *Id.*

<sup>36</sup> *Id.* The court found the physician's testimony not "so inherently lacking in usefulness . . . that permitting its use constituted an abuse of discretion." *Id.*

<sup>37</sup> *Id.* at 603, 645 P.2d at 1335.

Several states have decided to let an expert testify as to the believability of the victim on the ground that the jury does not possess the knowledge to evaluate these matters. See, e.g., *State v. Geyman*, 729 P.2d 475, 478 (Mont. 1986). The court here held testimony as to the

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### C. *The Conservative View*

In *Tennessee v. Curtis*,<sup>38</sup> the Court of Criminal Appeals of Tennessee ruled that an expert could not give testimony that young children knew the distinctions between right and wrong or were more credible than adults or older children.<sup>39</sup> While only dealing with expert testimony as to child complainants in general terms,<sup>40</sup> the court harkened back to a time when it was believed that children were subject to "flights of fantasy."<sup>41</sup>

credibility of a child's allegations to be admissible, as long as the jury remained free to accept or reject an expert's opinion. *Id.* at 480. In fact, such testimony enlightens the jurors on matters unfamiliar to them. *Id.* at 479-80. See *State v. Butler*, 178 Ga. App. 110, 111, 349 S.E.2d 684, 685-86 (1986). In *Butler*, a pediatrician testified that children of a certain age who are able to distinguish between truth and falsity cannot lie about anything they do not have knowledge of. *Id.* at 111, 349 S.E.2d at 685. The court held this testimony to be admissible because the pediatrician's opinion was one which the jury would not normally be able to draw for themselves. *Id.*

<sup>38</sup> No. 114, slip op. (Tenn. Crim. App. Nov. 5, 1981).

<sup>39</sup> *Id.* at 13-14.

<sup>40</sup> *Id.* at 14. *Curtis* involved a four year old girl who witnessed a neighbor kill her mother. *Id.*

<sup>41</sup> *Id.* See *Roe*, *supra* note 13, at 105. The authors are in agreement with *Roe* who believes that Tennessee's approach in *Curtis* would be devastating to the prosecution of child sexual abuse cases:

The implication that the victim imagined or fantasized the sexual abuse is an undercurrent in every case involving very young children. Expert witnesses are needed in this area not to render opinions as to whether a child is telling the truth but to generally describe the principles of the emotional development of children and to counter the implicit defense of fabrication or imagination.

*Id.*

While the authors have focused on the three major views, the views of several jurisdictions fail to conform. See *State v. Myers*, 382 N.W.2d 91 (Iowa 1986). In *Myers*, the court held inadmissible the testimony of a child abuse investigator and a high school principal that children generally tell the truth when they report they have been sexually abused. *Id.* at 92-93, 97-98. See also *State v. Logue*, 372 N.W.2d 151 (S.D. 1985). In *Logue*, the court held inadmissible a social worker's opinion that the alleged victim gained his sexual knowledge from having sex with the appellant because the matter here was not so complex as to be beyond the jury's understanding. *Id.* at 157-58. Neither case, however, elaborated on whether syndrome evidence was admissible.

Both California and New York rank high among states in reported incidences of child sexual abuse. See *Notes*, *supra* note 9, at 430 n.4. To date, however, the high court of both these jurisdictions have yet to give a definitive answer as to the extent of expert testimony in child sexual abuse cases. A number of lower court decisions do exist on this issue.

From these cases, it is submitted that New York is headed towards a liberal approach. For instance, several courts have approved the use of expert testimony to corroborate the otherwise unverifiable acts of sexual abuse of children. See, e.g., *Matter of Michael G.*, 129 Misc. 2d 186, 191, 492 N.Y.S.2d 993, 997 (Family Ct. Westchester County 1985); *Dutchess County Dep't of Social Services v. Bertha C.*, 130 Misc. 2d 1043, 1046-47, 498 N.Y.S.2d 960, 962-63 (Family Ct. Dutchess County 1986). Other courts have determined that it is proper for the jury to consider expert testimony which had been based upon observation

## II. SUGGESTED GUIDELINES

Given the difficulties in prosecuting a child sexual abuse case,<sup>42</sup> it is submitted that the admission of expert testimony is warranted. Using the Federal Rules of Evidence as the key to providing uniformity among the various jurisdictions, it is submitted that the following guidelines should be implemented by the courts: (a) the expert should be permitted to testify as to whether or not the alleged victim possesses characteristics similar to those exhibited by actual victims of child sexual abuse, that is, syndrome evidence;

of reactions and sexual acting out of the subject child. See *Matter of Tara H.*, 129 Misc. 2d 508, 514-16, 494 N.Y.S.2d 953, 959-60 (Family Ct. Westchester County 1985). Among the various factors considered significant in *Tara H.* was the child's extensive and detailed knowledge of and preoccupation with sexual matters to a degree far beyond a normal individual of her age. *Id.*

In *People v. Benjamin R.*, 103 App. Div. 2d 663, 481 N.Y.S.2d 827 (4th Dep't 1984), an expert was permitted to explain why a victim is often reluctant to reveal the crime, particularly when the acts are committed in a family setting. *Id.* at 669, 481 N.Y.S.2d at 831-32. The court found such testimony admissible for a number of reasons: (1) crimes involving sexual abuse are complex because they often involve young victims unable to articulate the details of the act; (2) the average juror does not have the general awareness of a child's reaction to sexual abuse and hence expert testimony assists the juror in determining what effect to give the child's allegation; (3) the defense counsel is free to impeach the expert or offer a different opinion through his qualified witnesses. *Id.* at 668-70, 481 N.Y.S.2d at 831-32.

In *re Cheryl H.*, 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (1984), a California court allowed an expert who had examined the victim to testify that the victim had been sexually abused, but forbade the expert to testify that the victim's father was the abuser. *Id.* at 1115-18, 200 Cal. Rptr. at 799-801. As to the testimony on whether the child had been sexually abused, the court reasoned that evidence of sexual abuse was a matter beyond common experience, and a non-expert observing the same behavior as an expert would have difficulty interpreting the data. *Id.* at 1118, 200 Cal. Rptr. at 801. However, when the expert testified that the victim's father was the perpetrator, such testimony amounted to hearsay. *Id.* at 1118-20, 200 Cal. Rptr. at 801-02. The court would have allowed opinion based on hearsay so long as it was confined to aspects of the patient's mental state and not as the basis for opinion about the conduct of the third party. *Id.* at 1119, 200 Cal. Rptr. at 801-02. See also *People v. Dunnahoo*, 152 Cal. App. 3d 561, 577, 199 Cal. Rptr. 796, 804 (1984) (testimony of two police officers qualified as experts in the field of child molestation, that it was difficult for a child victim of molestation to talk about the incident, was admissible because subject was not within common experience of jury). But see *People v. Bledsoe*, 36 Cal.3d 236, 251, 681 P.2d 291, 301, 203 Cal. Rptr. 450, 460 (1984) (expert testimony as to rape trauma syndrome held inadmissible to prove that a rape had occurred); *People v. Roscoe*, 168 Cal. App. 3d 1093, 1100, 215 Cal. Rptr. 45, 50 (1986) (psychologist's testimony concluding that complainant was victim of molestation held inadmissible, although expert could have relied on various studies without relying on a detailed analysis of the facts at hand).

<sup>42</sup> See Notes, *supra* note 9, at 431 n.20. The various reasons for these difficulties include no direct evidence- either eyewitness, physical, or medical; belief that adults do not commit such acts; no testimony of the child victim; inconsistent behavior by the complainant. *Id.*

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(b) appropriate jury instructions should be given to reinforce the fact that the jury is not required to believe any or all of the expert's testimony, and that they are the sole judge of the child's credibility; (c) an expert in the field of child sexual abuse should be agreed upon by both parties, or in the event no agreement can be reached, one should be appointed by the court.

### A. *Acceptable Contents of Expert Testimony*

A basic tenet in both case law and the Federal Rules of Evidence is that absent an attack on credibility no bolstering evidence is allowed.<sup>43</sup> The issue addressed in this article is not simply a matter of rehabilitating a child once she has been impeached.<sup>44</sup> The focus here is on the extent that basic principles of evidence law will permit an expert to help the fact finder draw conclusions about the child's allegations of sexual abuse. Syndrome evidence

<sup>43</sup> See FED. R. EVID. 608(a)(2). Under 608(a), the credibility of any witness may be attacked by evidence in the form of opinion or reputation testimony as to the character of the witness for truthfulness. FED. R. EVID. 608(a). If a witness's character for truthfulness has been attacked then it likewise may be supported by an opinion for reputation for truthfulness. FED. R. EVID. 608(a)(2). See also M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 608.3 (1986) (a character witness testifying in the form of an opinion may be asked whether or not he would believe the witness under oath); 3 J. WEINSTEIN & M. BERGER, *supra* note 1, § 608[04] at 608-25 ("witnesses may now be asked directly to state [their] opinion of the principal witness's character for truthfulness and [they] may answer, for example, 'I think X is a liar.'").

Thus, the admissibility of evidence in the form of an opinion pursuant to Federal Rule of Evidence 608(a) removes an obstacle to the use of testimony, expert or otherwise, concerning the veracity of a witness. In *State v. Myers*, 359 N.W.2d 604, 611 (Minn. 1984), the expert was permitted to testify that he believed the victim's allegations were truthful. *Id.* However, the court was quick to point out that as a general rule it would reject expert opinion regarding the truth of witness' allegations because it would "lend an unwarranted single 'stamp' of scientific legitimacy to the allegations" (citation omitted). *Id.* The court reasoned however, that once the defense discredited the child's credibility by showing the child's mother (the "ultimate expert" on a child's credibility) did not believe her, it thereby waived any objection to bolstering opinion testimony even though it was given by an expert. *Id.* at 611-12.

<sup>44</sup> See *State v. Petrich*, 101 Wash.2d 566, 574, 683 P.2d 173, 179 (1984). "The rules relating to character evidence are not pertinent here." *Id.* Here a shadow is cast on the victim's credibility because of her conduct. Even if this evidence properly cast doubt on her credibility, "it did not attack her character for truthfulness." *Id.* In other words, expert testimony enhancing the credibility of the complainant child is not to be likened to expert testimony vouching for the complainant's credibility. See, e.g., *People v. Grady*, 133 Misc. 2d 211, 213, 506 N.Y.S.2d 922, 924 (Sup. Ct. Bronx County 1986) ("evidence [of child sexual abuse syndrome] is not admissible to bolster the testimony of a young victim, but rather to understand the psychological aftermath occasioned by the trauma . . .").

offered by an expert in child sexual abuse cases has its purpose in explaining the behavior of the complainant which on its face appears to be unusual. Although such testimony may ultimately affect the jury's assessment of credibility, the testimony by the expert is not a direct opinion on whether or not the child is telling the truth.<sup>45</sup>

It is apparent that the legal community is currently divided over the admissibility of all types of syndrome evidence.<sup>46</sup> In *United*

<sup>45</sup> See *State v. Myers*, 359 N.W.2d 604, 609 (Minn. 1984). Much expert testimony tends to indirectly bolster the complainant's credibility but that alone does not render it inadmissible. *Id.* The key is if it will help the jury. *Id.* See also *State v. Middleton*, 294 Or. 427, 435, 657 P.2d 1215, 1219 (1983) ("[I]t is true that if the jurors believed the experts' testimony, they would be more likely to believe victim's account . . . . Much expert testimony will tend to show that another witness either is or is not telling the truth"); *Roe*, *supra* note 9, at 108-11 (favors admitting expert testimony of syndrome evidence to assist the jury).

<sup>46</sup> See *Wells*, *supra* note 22, at 673. Child sexual abuse syndrome is only one type of syndrome which attorneys frequently attempt to introduce into evidence. *Id.* Others include battered spouse syndrome, battered child syndrome, post traumatic stress syndrome, and rape trauma syndrome. *Id.*

Battered spouse syndrome is characterized by a pattern of severe physical and psychological abuse which is inflicted upon a spouse by another spouse over a substantial period of time. Notes, *supra* note 9, at 450 n.135. Typically, the female spouse finds herself in a situation where she subjectively believes that her life is being threatened. *Id.* She responds by killing the spouse and then pleading self-defense to the crime that she has perpetrated. *Id.* Evidence of this syndrome can be relevant to explain to the trier of fact the woman's state of mind and subsequent conduct. *Id.* See *Ibn-Tamas v. United States*, 407 A.2d 626, 633-35 (D.C. Cir. 1979). The *Ibn-Tamas* court held that the trial court's decision to exclude expert testimony on the "battered women" syndrome on the basis that such testimony invaded the jury's province was error as a matter of law. *Id.* at 635. *But see State v. Thomas*, 66 Ohio St. 2d 518, 521-22, 423 N.E.2d 137, 139-40 (1981) (the trial court's refusal to admit expert testimony on "battered wife syndrome" not reversible error).

Battered child syndrome is characterized by several specific symptoms which are primarily physical in nature. See Notes, *supra* note 9, at 448-49. See *State v. Wilkerson*, 295 N.C. 559, 569, 247 S.E.2d 905, 911 (1978). The *Wilkerson* court held admissible expert medical opinion on "battered child" syndrome. *Id.* See also *State v. Mulder*, 29 Wash. App. 513, 516, 629 P.2d 462, 463 (1981) (the trial court did not commit reversible error by allowing expert testimony on "battered child syndrome").

Battering parent syndrome refers to a profile of characteristics typically shared by parents who are prone to abusing their offspring. Annotation, *Admissibility at Criminal Prosecution Of Expert Testimony On Battering Parent Syndrome*, 43 A.L.R. 4th 1203, 1204 (1986). See *State v. Conlogue*, 474 A.2d 167, 172-73 (Me. 1984). Reversible error was committed when the trial judge excluded expert testimony on battering parent syndrome. *Id.* *But see State v. Maule*, 35 Wash. App. 287, 293, 667 P.2d 96, 99 (1983) (reversible error to admit expert testimony identifying defendant "as a member of a group having a higher incidence of child sexual abuse").

Rape trauma syndrome is defined as "the acute phase and long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape." Massaro, *Experts, Psychology, Credibility, and Rape*, 69 MINN. L. REV. 395, 425 n.127 (1985) (quoting Burgess & Holmstrom, *Rape Trauma Syndrome*, THE RAPE VICTIM, at 121). See *State v.*

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*States v. Amaral*,<sup>47</sup> the Court of Appeals for the Ninth Circuit established a four prong test which operates as a guide to the admission of various forms of expert testimony.<sup>48</sup> First, the witness must be qualified as an expert by the court.<sup>49</sup> Second, the court must determine whether the expert testimony will aid the jurors in understanding matters not within their common experiences.<sup>50</sup> Third, the theory upon which the expert testimony is based must be one that is generally accepted by the relevant scientific community. It must, therefore, satisfy the *Frye* standard.<sup>51</sup> However, subsequent to the *Amaral* decision, the Federal Rules of Evidence were adopted [hereinafter Federal Rules].<sup>52</sup> Federal Rule 702

Marks, 231 Kan. 645, 655, 647 P.2d 1292, 1299-1300 (1982). The *Marks* court refused to find that the trial judge abused his discretion by permitting expert testimony as to the existence of rape trauma syndrome. *Id.* But see *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982) (erroneous to admit expert testimony on rape trauma syndrome).

Cases dealing with child sexual abuse syndrome are typically separated into two separate categories. See Wells, *supra* note 22, at 673. One category includes victims of child rape. *Id.* This type of crime is characterized by a violent attack on the victim, sometimes resulting in death. *Id.* The other category of abuse includes children who have been sexually victimized over a period of time. *Id.* Statistically, the greatest number of these latter type of cases involve family members as perpetrators, for example, stepfathers, mothers' boyfriends. *Id.* This type of abuse, known as intrafamilial sexual abuse, refers to "any contacts or interactions between a child and [other family members in a position of power or control over the child, where] the child is being used for the sexual stimulation of the perpetrator or another person." I. SLOAN, PROTECTION OF ABUSED VICTIMS: STATE LAWS & DECISIONS: OVERALL TABLE OF CONTENTS INTRODUCTION 6 (1982). Some indicators of sexual abuse include "difficulty in walking or sitting; torn, stained, or bloody underclothing; complaints of pain or itching in genital area; venereal disease . . . [and the] display [of] bizarre sexual knowledge." *Id.* at 6-7.

<sup>47</sup> 488 F.2d 1148 (9th Cir. 1973).

<sup>48</sup> *Id.* at 1152-53.

<sup>49</sup> *Id.* at 1153. See *Ellis v. K-Lan Co., Inc.*, 695 F.2d 157, 162 (5th Cir. 1983); *Grindstaff v. Coleman*, 681 F.2d 740, 742-43 (11th Cir. 1982). See also FED. R. EVID. 702 ("a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise").

<sup>50</sup> *Amaral*, 488 F.2d at 1152-53. See FED. R. EVID. 702: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.* See also *Kline v. Ford Motor Co., Inc.*, 523 F.2d 1067, 1070 (9th Cir. 1975) (expert testimony admissible where jury can derive assistance from it); *Holmgren v. Massey-Ferguson, Inc.*, 516 F.2d 856, 858 (8th Cir. 1975) (trial court's exclusion of expert testimony reversible error where such testimony would have aided the jury).

<sup>51</sup> *Amaral*, 488 F.2d at 1152. See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). See also *United States v. Stifel II*, 433 F.2d 431, 441 (6th Cir. 1970) (court found that scientific evidence met test of admissibility as set forth in *Frye*), *cert. denied*, 401 U.S. 994 (1971).

<sup>52</sup> FED. R. EVID. 702. These uniform rules did not become effective until July, 1975, approximately one and one half years after the *Amaral* decision. *Id.* See *Kline*, 523 F.2d at

abandons the rigid *Frye* test in favor of a more relaxed standard for determining the admissibility of expert testimony.<sup>53</sup> If such knowledge will "assist the trier of fact to understand the evidence or to determine a fact in issue,"<sup>54</sup> then a witness who has been qualified as an expert by the court may testify in the form of an opinion.<sup>55</sup> Most federal courts currently apply this relaxed standard when determining whether expert testimony should be admitted.<sup>56</sup> Finally, the probative value of the proffered testimony must outweigh the potential prejudicial effect presented by the testimony.<sup>57</sup> It is submitted that, in appropriate cases, expert testimony relevant to the existence and characteristics of child sexual abuse syndrome (syndrome evidence) satisfies the rigid test set forth in *United States v. Amaral*.<sup>58</sup>

The first obstacle to be overcome when dealing with the admissibility of expert testimony involves qualifying a witness to testify as an expert.<sup>59</sup> Under Federal Rule of Evidence 702, the qualification of a witness as an expert "is a question which lies within the sound discretion of the trial judge."<sup>60</sup> She will determine the witness's ability "to draw inferences from facts which a jury would

1070. *But see* *United States v. Brown*, 557 F.2d 541, 556-59 (6th Cir. 1977) (no error to reject evidence that did not meet the *Frye* standard).

<sup>53</sup> See FED. R. EVID. 702. Expert testimony is discussed in terms of "scientific, technical, or other specialized knowledge." *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See *Viterbo v. Dow Chemical*, 826 F.2d 420, 422 (5th Cir. 1987). See also *Lu Metta v. United States Robotics*, 824 F.2d 768, 771 (9th Cir. 1987) (discussion of Federal Rule of Evidence 702 with respect to expert testimony as to "reasonable finder's fees"); *United States v. Kozminski*, 821 F.2d 1186, 1194 (6th Cir. 1987) (application of Federal Rule of Evidence 702 to expert psychological testimony); *Karns v. Emerson Elec., Co.*, 817 F.2d 1452, 1459 (10th Cir. 1987) (expert testimony inadmissible if it confuses or misleads the jury).

<sup>57</sup> *United States v. Amaral*, 488 F.2d at 1152. See FED. R. EVID. 403. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* See also *United States v. Schmidt*, 711 F.2d 595, 599 (5th Cir. 1983) (district court's determination that the prejudicial effect of expert testimony outweighed its probative value held not to be an abuse of discretion), *cert. denied*, 464 U.S. 1041 (1984).

<sup>58</sup> 488 F.2d at 1148 (9th Cir. 1973).

<sup>59</sup> *Id.* at 1153. See *supra* note 49 and accompanying text. See also *Wells*, *supra* note 22, at 675 (judge determines whether expert witness has ability to make inferences which jury would not be able to make when deciding on witness's qualifications).

<sup>60</sup> 3 J. WEINSTEIN & M. BERGER, *supra* note 1, § 702[04] at 702-22.



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not be competent to draw."<sup>61</sup>

Once the court has qualified a witness, it must then determine whether the subject of inquiry lends itself to the use of expert testimony.<sup>62</sup> In those jurisdictions that follow the Federal Rules of Evidence, such testimony will be permitted where it provides assistance to the trier of fact.<sup>63</sup> It is submitted that evidence as to whether or not an alleged victim possesses characteristics similar to those exhibited by actual victims of child sexual abuse is a proper subject for expert testimony since the average juror is unfamiliar with the emotional and psychological factors which motivate the child to subsequently act as she does.<sup>64</sup>

<sup>61</sup> E. CLEARY, *supra* note 1, § 13 at 33. Factors affecting this determination include the expert's level of education as well as her exposure to the particular field that is the subject of inquiry through work-related activities. FED. R. EVID. 702 advisory committee note. The advisory committee determined that "the expert is viewed, not in a narrow sense, but as a person qualified by 'knowledge, skill, experience, training, or education'." See *United States v. Rose*, 731 F.2d 1337, 1346 (8th Cir.), *cert. denied*, 469 U.S. 931 (1984). The court determined that a witness was qualified to testify as an expert on the subject of shoe and print analysis based upon the following factors: at the time of trial, the witness worked at a crime laboratory as a fire arms and tool mark examiner; he earned an associate degree and a bachelor's degree and, also at the time of trial, was working on a master's degree in criminal justice administration; he had studied fire arm and tool mark identification; his expertise in regard to shoeprint examinations was obtained through contact with associates in the profession and from on-the-job training; he had previously performed shoe print analysis on some thirty cases over a six-year period. *Id.* at 1345. See also 3 J. WEINSTEIN & M. BERGER, *supra* note 1, § 702[04] at 702-22 (indicating a reluctance on the part of appellate courts to disturb a trial judge's finding with respect to the admissibility of expert testimony).

It is submitted that case law demonstrates the availability of individuals suitable to offer expert testimony on child sexual abuse syndrome. See, e.g., *State v. Petrich*, 101 Wash. 2d 566, 575, 683 P.2d 173, 180 (1984) (witness qualified as an expert to testify to delayed reporting patterns of child sexual abuse victims). See also *State v. Myers*, 359 N.W.2d 604, 608-09 (Minn. 1984) (clinical psychologist who worked at a mental health center, held a doctorate in psychology and had a caseload of sixty familial sexual abuse cases at the time of trial was qualified by the court as an expert); *Willaims v. State*, No. 01-85-00960-CR slip op. (Ct. App. Texas Sept. 11, 1986) (the court qualified a witness as an expert to testify to the effect of sexual abuse upon children based upon the following factors: the expert witness had earned a bachelor of arts degree in psychology and sociology and a masters degree in educational psychology; she had six years work experience with the State Department of Human Services as a psychologist and case worker; she had investigated approximately 200 incidents of child abuse and sexual molestation). Cf. *State v. Marks*, 231 Kan. 645, 653, 647 P.2d 1292, 1298-99 (1982) (board certified neurologist and psychiatrist who practiced psychiatry and taught at an institution was qualified to testify as to rape trauma syndrome).

<sup>62</sup> *Amaral*, 488 F.2d at 1152-53. See *supra* note 49 and accompanying text.

<sup>63</sup> *Amaral*, 488 F.2d at 1152-53. See FED. R. EVID. 702. See also *supra* note 56 and accompanying text.

<sup>64</sup> See *Myers*, 359 N.W.2d at 610-11. "The cause of many physical and emotional ail-

Numerous characteristics indicative of child sexual abuse have been identified by experts.<sup>65</sup> Two traits which cause difficulty to lay persons are delayed reporting patterns<sup>66</sup> and recantations.<sup>67</sup> When the presence of these traits are revealed to jurors who are unaware that these are typical responses of child sexual abuse victims, they might consider such inconsistencies as evidence that the child is lying.<sup>68</sup> Allowing the expert to testify as to these matters

ments and even the existence of those conditions which are identified chiefly by subjective complaints cannot be demonstrated to an absolute certainty; they are, nevertheless, the subject of expert testimony." *Id.* See also *United States v. Azure*, 801 F.2d 336, 340 (8th Cir. 1986) (the court stated, in dicta, that expert testimony as to syndrome evidence may assist the jury); *State v. Lindsey*, 149 Ariz. 472, 473-74, 720 P.2d 73, 74-75 (1986) (allowed expert testimony on behavioral characteristics of child molestation victims to assist jury in "weighing the testimony of the alleged child victim"); *State v. Middleton*, 294 Or. 427, 436-37, 657 P.2d 1215, 1220 (1983) (18 prospective jurors were questioned during voir dire as to their personal familiarity with a child victim of sexual abuse; 15 responded that they were unfamiliar with anyone suffering from such abuse; two reported having heard stories; one juror was excused because of her knowledge of sexual abuse). *Cf. Massaro*, *supra* note 46, at 442-43 ("expert testimony about RTS (rape trauma syndrome) can assist in overcoming this tendency of jurors to blame and disbelieve the victim; it may reveal the psychological trauma, suffered by a victim . . . Jurors are not trained to identify trauma or evaluate the extent of a victim's psychological injuries . . .").

<sup>65</sup> See Notes, *supra* note 9, at 442. Symptoms often exhibited are depression, extreme sexual curiosity, sexual aggression, sudden nightmares, bedwetting, crying, and fear. *Id.* at 442-43 n.94. Other characteristics which experts have identified are fatigue, weakness, headaches, stomach aches, ringing in ears, concentration difficulties, allegations by siblings of similar mistreatment. See Sloan, *supra* note 46, at 111-12.

<sup>66</sup> See *State v. Petrich*, 101 Wash. 2d 566, 570, 683 P.2d 173, 180 (1984). An expert witness was permitted to testify that victims of child sexual abuse typically report abuse a substantial period of time after its occurrence. *Id.* See also *State v. Myers*, 359 N.W.2d 604, 610 (Minn. 1984) (a child sexual abuse victim will often delay in reporting an abuse due to feelings of "confusion, shame, guilt, and fear"); *State v. Middleton*, 294 Or. 427, 435-36, 657 P.2d 1215, 1219 (1983):

If the complaining witness in a burglary trial, after making the initial report, denied several times before testifying at trial that the crime had happened, the jury would have good reason to doubt seriously her credibility at any time. However, in this instance we are concerned with a child who states she has been the victim of sexual abuse . . . It would be useful to the jury to know that not just this victim but many child victims are ambivalent about the forcefulness with which they want to pursue the complaint, and it is not uncommon for them to deny the act ever happened.

*Id.*

<sup>67</sup> See *Middleton*, 294 Or. at 429, 657 P.2d at 1216. A 14 year old daughter retracted statements, made several months earlier, accusing her father of rape. See also *People v. Grady*, 133 Misc. 2d 211, 213 (Sup. Ct. Bronx County 1986) (syndrome evidence is admissible to aid the jury in understanding "false recantations and feelings of guilt and apprehension about the trial").

<sup>68</sup> See *Petrich*, 101 Wash. 2d at 576, 683 P.2d at 180 (1984). There was no abuse of discretion by the trial court when it allowed expert testimony that delayed reporting is not unusual. See also *Middleton*, 294 Or. at 430, 657 P.2d at 1221 (1983) (testimony as to frequency of inconsistent statements made by sexually abused child allowed).

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will enable the jury to better determine the credibility of the child.<sup>69</sup>

Critics question the reliability<sup>70</sup> of syndrome evidence. Their argument is that characteristics such as delayed reporting patterns, recantations, and more general traits of anxiety, fear, and depression are not exclusively indicative of sexual abuse but rather may be symptomatic of other stresses.<sup>71</sup> It is submitted that the existence of more than one explanation for the development of these manifestations does not render the evidence unreliable and therefore inadmissible.<sup>72</sup> The proper method of revealing alternative theories is through cross-examination,<sup>73</sup> not exclusion.

The third prong of the *Amaral* test refers to the application of the *Frye* standard.<sup>74</sup> In *Frye v. United States*,<sup>75</sup> the court determined that scientific evidence was admissible only if the theory upon which the evidence was based had "gained general acceptance in

<sup>69</sup> See, e.g., *State v. Myers*, 359 N.W.2d 604, 610 (Minn. 1984) (background information helpful to jury to understand uncertain behavior of child); *Petrich*, 101 Wash. 2d at 510, 683 P.2d at 180 (1984) (expert's information likely to help jury understand the evidence). Cf. *Middleton*, 294 Or. at 430, 657 P.2d at 1221 (1983) (testimony of an expert that would assist the jury to decide if a rape had actually occurred may be admitted).

<sup>70</sup> See, e.g., *Slicker*, *supra* note 9, at 12 (suggesting that social workers have a bias towards believing everything a child says); Notes, *supra* note 9 (discussing the unreliability of expert testimony on typical characteristics of child sexual abuse victims). See generally *McCord*, *supra* note 9, at 34 ("framework for analyzing admissibility [applied to] expert testimony diagnosing a complainant as a victim of sexual abuse").

<sup>71</sup> See Notes, *supra* note 9, at 441-43. See also *Jorne, Treating Sexually Abused Children*, 1 THE ABUSED CHILD IN THE FAMILY AND THE COMMUNITY 285 (1980) (discussing symptoms which could be attributed to situations other than those of sexual abuse). Cf. *People v. Bledsoe*, 36 Cal. 3d 236, 241 n.4, 681 P.2d 291, 294 n.4, 203 Cal. Rptr. 450, 453 n.4 (1984) (the court reviewed the literature referred to by the parties and determined that symptoms of a "rape trauma syndrome" were not "as universal as the witness' testimony indicated"); *Massaro*, *supra* note 46, at 447 (recognizing that although "rape trauma syndrome symptoms" may be similar to symptoms of various "post-traumatic stress-disorder[s]", they are not identical).

<sup>72</sup> Cf. *Massaro*, *supra* note 46, at 447 (where symptoms of rape trauma syndrome were identical to those of other stress disorders, evidence of such would still assist the jury in determining whether the victim had been raped).

<sup>73</sup> See FED. R. EVID. 705, advisory committee note. "If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion." *Id.* Cf. *Massaro*, *supra* note 46, at 441 ("proper cross-examination of an expert about a victim's RTS symptoms can elicit whether other explanations for the trauma symptoms exist. . .").

<sup>74</sup> See *United States v. Amaral*, 488 F.2d 1148, 1153 (9th Cir. 1973).

<sup>75</sup> 293 F. 1013, 1014 (D.C. Cir. 1923).

the particular field of study in which it belongs."<sup>76</sup> Therefore, despite a finding by the court that a witness is qualified to testify as an expert to a subject which is proper for expert testimony, such testimony may still be deemed inadmissible in jurisdictions that apply the *Frye* standard if the theory to which the expert subscribes is not generally accepted by that particular field of study.<sup>77</sup> It is submitted that the child sexual abuse syndrome theory satisfies the *Frye* standard of admissibility.

The idea that children are capable of detailing false complaints of sexual abuse has been abandoned by today's psychiatric field.<sup>78</sup> Commentators,<sup>79</sup> notably psychiatrists<sup>80</sup> and sociologists,<sup>81</sup> have begun to place credence in children's complaints of sexual abuse. The experts have found that the independent stories of these children share common behavioral responses which are considered characteristic of victims of sexual abuse.<sup>82</sup> Such responses com-

<sup>76</sup> *Id.*

<sup>77</sup> See, e.g., *State v. Saldana*, 324 N.W.2d 227, 229-30 (Minn. 1982). The *Saldana* court refused to admit expert testimony on rape trauma syndrome because the syndrome "is not the type of scientific test that accurately and reliably determines whether a rape has occurred." *Id.* at 229. See also *United States v. Kilgus*, 571 F.2d 508, 510 (9th Cir. 1978) (*Frye* test applicable to a detection and tracking system); *United States v. Brown*, 557 F.2d 541, 557 (6th Cir. 1977) (procedure for comparing human hair samples subject to *Frye* test); *Prewitt v. State*, 460 So.2d 296, 302 (Ala. Crim. App. 1984) (*Frye* standard applied to hypnotically induced testimony); *United States v. Atwood*, 39 Conn. Super. 273, 284, 479 A.2d 258, 264 (1984) (hypnotism and narcoanalysis have not yet gained "general acceptance in the scientific community"); *State v. Marks*, 231 Kan. 645, 654, 647 P.2d 1292, 1299 (1982) (the basis of a psychiatric diagnosis must satisfy the *Frye* standard of admissibility).

<sup>78</sup> See Sloan, *supra* note 46, at 88. Most states have eliminated corroboration of child sexual abuse testimony. *Id.* See also McCord, *supra* note 9, at 38, 55 (generally accepted by scientific community dealing with sexually abused children that false reports are rare).

<sup>79</sup> See McCord, *supra* note 9, at 38, 55.

<sup>80</sup> See Sloan, *supra* note 46, at 88.

<sup>81</sup> See Slicker, *supra* note 9, at 12.

<sup>82</sup> See Sloan, *supra* note 46, at 7. See, e.g., McCord, *supra* note 9, at 23. McCord has compiled a list of typical common behavioral responses as:

for children under five - developmental regression, clinging to mother, recurring night terrors; for school-age children- gain or loss of weight, drop in academic performance, insomnia, depression, anxiety, fears, conversion, hysteria and running away; for older adolescents - social isolation[,] delinquent behavior, depression, separation from important males, suicide, and aggressive behavior towards the mother.

*Id.* See also Wells, *supra* note 22, at 674 (discussion of behavioral responses in context of intrafamilial sexual abuse); Summit, *The Child Sexual Abuse Accomodation Syndrome*, 7 CHILD ABUSE AND NEGLECT 177, 181 (1983) (list of elements comprising "child sexual abuse accomodation syndrome"); Mele-Sernovitz, *Parental Sexual Abuse of Children: The Law As A Therapeutic Tool For Families*, NATIONAL ASSOCIATION COUNCIL FOR CHILDREN, LEGAL REPRESENTATION

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prise the child sexual abuse syndrome.<sup>83</sup> This evidence of general acceptability of such characteristics among psychiatrists and sociologists should satisfy the requirements established by *Frye*.

Assuming, *arguendo*, that a jurisdiction normally applying the *Frye* standard<sup>84</sup> determines that this evidence of behavioral responses does not satisfy the standard, it is submitted that expert testimony as to such behavioral responses should nevertheless be admitted because of the unique nature of the evidence in question.

Expert testimony as to characteristics typically demonstrated by sexually abused children has been categorized as " 'novel' psychological evidence."<sup>85</sup> The application of the *Frye* standard to this type of evidence is problematic<sup>86</sup> because it is unclear whether psychological evidence can be properly classified as scientific.<sup>87</sup> The *Frye* standard of admissibility is inappropriate if psychological evidence cannot be properly characterized as scientific.<sup>88</sup> Assuming that the psychological evidence can be classified as scientific and the *Frye* standard is applied, there still exists the problem of a delay before the theory, scientific or otherwise, is generally ac-

SENTATION OF THE MALTREATED CHILD 70, 81-82 (1979) (list of behavioral responses suggesting high probability of sexual abuse).

<sup>83</sup> See Mele-Sernovitz, *supra* note 82; Summit, *supra* note 82; Wells, *supra* note 22, at 674-75.

<sup>84</sup> See Gianelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half Century Later*, 80 COLUM. L. REV. 1197, 1228 n.233 (1980). See *supra* note 77 and accompanying text.

<sup>85</sup> See McCord, *supra* note 9, at 28-29. Experts in the field of child abuse have no accurate manner of proving to a court that a child is a victim of abuse. *Id.* See generally Gianelli, *supra* note 84, at 1198-1231 (general discussion of the *Frye* standard in practical application).

<sup>86</sup> See McCord, *supra* note 9, at 27-30; See also Gianelli, *supra* note 84, at 1204-31 (discussion of various difficulties encountered in applying the *Frye* standard, i.e. determining the type of evidence which should be subjected to the test). Cf. *People v. Bledsoe*, 36 Cal. 3d 236, 251, 681 P.2d 291, 301, 203 Cal. Rptr. 450, 460 (1984) ("[T]he literature does not even purport to claim that the syndrome is a scientifically reliable means of proving that a rape occurred . . .").

<sup>87</sup> See Gianelli, *supra*, note 84, at 1219; McCord, *supra* note 9, at 24. See, e.g., *United States v. McBride*, 786 F.2d 45, 50-51 (2d Cir. 1986) (court of appeals reversed district court's decision to exclude psychiatric testimony; the district court's decision was based, in part, on a finding that " 'psychiatry is still in its infancy' " and therefore not yet generally accepted in the medical field).

<sup>88</sup> See McCord, *supra* note 9, at 24. See also McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879, 905-16 (1982) (suggesting approaches other than the *Frye* standard); Note, *Changing The Standard For The Admissibility of Novel Scientific Evidence: State v. Williams*, 40 OHIO ST. L.J. 757 (1979) (discussion of relevancy approach).

cepted.<sup>89</sup> During this interim period, jurors may be deprived of evidence which would enable them to reach a more informed decision.<sup>90</sup> Finally, it may prove more difficult for psychological evidence, as opposed to "objective, mechanical techniques,"<sup>91</sup> to gain general acceptance because of its subjective nature.<sup>92</sup> It is suggested that psychological evidence is unique because of its subjective nature and therefore requires a less rigid standard of admissibility. It is further suggested that Federal Rule 702 should be adopted as the new standard governing expert testimony in child sexual abuse cases.

Under Federal Rule 702, admissibility depends upon whether the expert's testimony will *assist* the jury in comprehending the evidence.<sup>93</sup> It is suggested that testimony which is relevant to a determination of the issue, and reliable, satisfies this standard.

The Federal Rules of Evidence define "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."<sup>94</sup> It is submitted that expert testimony as to child sexual abuse syndrome is relevant as it affects the issue of whether the child complainant was sexually abused. Furthermore, it is submitted that such testimony is reliable because it is based on independent accounts of child sexual abuse which share common behavioral responses.<sup>95</sup>

Once a court has qualified the witness, approved the subject of

<sup>89</sup> See McCord, *supra* note 9, at 30. See also Giannelli, *supra* note 84, at 1223 (discussing the problem with delay that exists before a theory is generally accepted); *People v. Kelly*, 17 Cal. 3d 24, 31, 549 P.2d 1240, 1245, 130 Cal. Rptr. 144, 149 (1976) (the Supreme Court explained that "*Frye* was deliberately intended to interpose a substantial obstacle to the unrestrained admission of evidence based upon new scientific principles"); *State v. Marks*, 231 Kan. 645, 654, 647 P.2d 1292, 1299 (1982) ("rape trauma syndrome" has acquired general acceptance). *But see* *United States v. McBride*, 786 F.2d 45, 50-51 (2d Cir. 1986) (psychiatry not a field of study which has acquired general acceptance).

<sup>90</sup> See *supra* notes 3 & 8. Not admitting such evidence contradicts the helpfulness standard set forth in the Federal Rules. FED. R. EVID. 702. Under this standard, expert testimony is admissible even if the issue is within the ordinary, unaided comprehension of the jury provided that it will be of assistance to the jury in deciding the case. *Id.*

<sup>91</sup> McCord, *supra* note 9, at 30.

<sup>92</sup> *Id.*

<sup>93</sup> See FED. R. EVID. 702; *supra* note 61.

<sup>94</sup> FED. R. EVID. 401.

<sup>95</sup> See *supra* note 82 and accompanying text.

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expert testimony, and acknowledged compliance with the appropriate standard, it must then engage in a balancing test.<sup>96</sup> The court will weigh the probative value of the evidence against the potential prejudice to the defendant resulting from the admission of such evidence.<sup>97</sup> If the probative value outweighs the prejudicial effect, the evidence will be admitted.<sup>98</sup> It is submitted that the probative value of an expert's testimony as to the existence and characteristics of child sexual abuse syndrome exceeds any prejudicial effect to a defendant and therefore should be admitted.

The probative value of this evidence has already been discussed in the guise of relevancy and reliability. It is suggested that the probative value is very strong. The potential danger which arises from the use of expert testimony is that the jury will overemphasize the importance of the testimony and accept it as an absolute truth.<sup>99</sup> However, expert testimony is to be given the same weight as other evidence of sexual abuse: it may be accepted or rejected by the jury.<sup>100</sup> In order to avoid this potential hazard, it is suggested that the court administer to the jury limiting instructions.

### B. *Jury Instructions*

Since it has been advocated that the expert be permitted to express an opinion as to the characteristics and factors involved in child sexual abuse, it is very important that adequate instructions are presented to the jury.<sup>101</sup> The purpose of the instructions

<sup>96</sup> FED. R. EVID. 403. This rule states the following: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* See *United States v. Abel*, 469 U.S. 45, 54 (1984). According to the *Abel* Court, "a district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules." *Id.* See also *Cleveland v. Cleveland Elec. Illuminating Co.*, 734 F.2d 1157, 1163 (6th Cir.) ("the trial court is to be given 'very substantial discretion' in balancing between 'probative value on the one hand' and 'unfair prejudice' on the other . . ."), *cert. denied*, 469 U.S. 884 (1984).

<sup>99</sup> See CLEARY, *supra* note 1, at 37; McCord, *supra* note 9, at 33. See also Gianelli, *supra* note 84, at 1237 (scientific evidence has tendency to "mislead the jury").

<sup>100</sup> See, e.g., *State v. Middleton*, 294 Or. 427, 431, 657 P.2d 1215, 1219 (1983) (jury not bound by expert testimony even if uncontradicted).

<sup>101</sup> See 1 J. WEINSTEIN & M. BERGER, *supra* note 1, § 107[04] at 107-49 - 107-50. According to Judge Weinstein "[T]he court properly exercises its responsibility to guide the jurors in their search for the truth if it confines its remarks on credibility to those areas where the

should be to assist the jury<sup>103</sup> in considering the facts so that its "findings are within the bounds of reason."<sup>103</sup> The instructions should point out that the expert's testimony is not to be considered an absolute truth<sup>104</sup> but as a piece of evidence which must be weighed by the jury and which can be rejected if not believed.

The testimony of an expert will not invade the province of the jury if the appropriate instructions are given.<sup>105</sup> A proper charge directing the jury to use and weigh the expert's testimony like all other evidence will result in such testimony not receiving "the stamp of scientific legitimacy."<sup>106</sup>

### C. Court Appointed Experts

Expert testimony is essential in establishing the credibility of a

practical experience of the jurors may be an inadequate yardstick to measure the veracity of a witness." *Id.* McCord states that "To most people the topic of child sexual abuse is unfamiliar and mysterious. There is no reason to believe that most people would understand what effects sexual abuse has on a child and how those effects might be detected." McCord, *supra* note 9, at 34.

<sup>103</sup> See 1 J. WEINSTEIN & M. BERGER, *supra* note 1, § 107[04] at 107-48. Weinstein in this situation found:

Where the trial judge undertakes to spell out his view of the probative force of the evidence, drawing the attention of the jury to that which he considers more important and pointing out that which is extraneous, the jury becomes the beneficiary of the insight and analysis of one who has presided over many trials and whose legal experience and training has sharpened his ability to sort out the significant from the meaningless, the relevant from the immaterial.

*Id.*

<sup>104</sup> *Id.* § 200[07] at 200-36.

<sup>105</sup> See PATTERN JURY INSTRUCTIONS, CRIMINAL CASES, 5th Cir. § 8 at 20 (1978):

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

*Id.* See, e.g., *United States v. Johnson*, 575 F.2d 1347, 1361 (5th Cir. 1978) (jury need not accept testimony of expert), *cert. denied*, 440 U.S. 907 (1979). See also PATTERN JURY INSTRUCTIONS, CRIMINAL CASES, 11th Cir. § 7 at 20 (1985) ("[m]erely because an expert witness has expressed an opinion, however, does not mean that you must accept that opinion"); 1 CRIMINAL JURY INSTRUCTIONS: NEW YORK § 7.113 at 280-81 (1st ed. 1983).

<sup>106</sup> See *People v. Reid*, 123 Misc. 2d 1084, 1087, 475 N.Y.S.2d 741, 743 (Sup. Ct. Kings County 1984) (expert testimony "on rape trauma syndrome" is "no more inflammatory, nor more intrusive into the province of the jury than other expert testimony, assuming adequate and proper instructions are provided").

<sup>107</sup> See *State v. Saldana*, 324 N.W.2d 227, 231 (Minn. 1982) (quoting *People v. Izzo*, 90 Mich. App. 727, 730, 282 N.W.2d 10, 11 (1979)).



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child's allegations of sexual abuse. However, a number of problems commonly associated with the expert witness raise questions as to the value of the testimony in aiding the fact finder in evaluation of the fact in issue. Among these are: (1) inability to procure the assistance of an expert, either because the litigant cannot afford one or locate one willing to testify;<sup>107</sup> (2) improper qualifications;<sup>108</sup> (3) intentional dishonesty;<sup>109</sup> (4) bias;<sup>110</sup> (5) confusion in trying to reconcile conflicting opinion;<sup>111</sup> and (6) delays in the administration of justice.<sup>112</sup>

It is submitted that absent an agreement between the parties, the court should appoint an expert<sup>113</sup> to testify in child sexual abuse cases. The use of the court appointed expert will "restore impartiality, eliminate venality, . . . and most importantly assist . . . the jury to reach a meaningful decision."<sup>114</sup>

<sup>107</sup> See Myers, "The Battle of the Experts:" A New Approach to an Old Problem in Medical Testimony, 44 NEB. L. REV. 539, 557 (1965). Even if a litigant can afford to bring in highly touted experts, there is a reluctance on the part of many to take part in a battle of experts. *Id.*

<sup>108</sup> M. GRAHAM, FEDERAL RULES OF EVIDENCE IN A NUTSHELL 246 (1981); Myers, *supra* note 107, at 549.

<sup>109</sup> *Id.* at 550.

<sup>110</sup> *Id.* at 551. The bias of an expert is the problem most often cited in connection with the rendering of expert testimony. Lawyers are traditionally expected to be advocates; but experts, especially medical experts, are expected to remain neutral. *Id.* "A substantial number [of expert witnesses, though they may start out neutral,] become infected with bias when called as witnesses in the conventional way." *Id.* See Levy, *Impartial Medical Testimony Revisited*, 34 TEMP. L.Q. 416 (1961). "Cast in the role as partisans, subjected to hostile cross-examination, and paid by one side, they tend to color their testimony." *Id.* at 416.

<sup>111</sup> See J. BROOKE, IN THE WAKE OF TRAUMA 460 (1957). The author finds that different experts given the same set of circumstances but judging from different backgrounds of experience may honestly and competently arrive at different conclusions. *Id.* See also Myers, *supra* note 107, at 548 (different "schools of thought" exist on significant issues).

A jury may be helpless to decide which of two theories presented by competing experts is correct. 3 J. WEINSTEIN & M. BERGER, *supra* note 1, § 706[01] at 706-7. Judge Weinstein states that "[I]t is naive to expect the jury to be capable of assessing the validity of diametrically opposed testimony." *Id.* Graham, *supra* note 108, at 246. Since the jury depends upon the experts themselves to explain propositions with which they are dealing absent the use of a court appointed expert there is no independent means of measuring the reliability of experts. *Id.*

<sup>112</sup> See Myers, *supra* note 107, at 559-60. There is a necessary connection between the backlog of cases and the battle of the experts. *Id.*

<sup>113</sup> See *id.* at 589. Myers suggested that other approaches include the establishment of a panel of outstanding specialists who would be available at the call of the court. *Id.* Needell, *Psychiatric Expert Witness: Proposals for Change*, 6 AM. J. L. & MED. 425, 435 (1980). The author favors the establishment of a psychiatric jury: a jury composed solely of psychiatrists who would decide all issues of psychiatric facts. *Id.*

<sup>114</sup> 3 J. WEINSTEIN & M. BERGER, *supra* note 1, § 706[07] at 706-7.

In appointing an expert, it is suggested that Rule 706 of the Federal Rules would provide courts with a workable guideline.<sup>115</sup> It is flexible enough to overcome many of the criticisms<sup>116</sup> against court appointed experts. Furthermore, it is submitted that these criticisms do not withstand close scrutiny in the child sexual abuse context. First, such an expert witness would not have allegiance to either party; she would not be compelled to maintain a particular view. Hence, she would be able to discuss dispassionately the theories that would explain the child's behavior, even if she subscribed to a particular theory. Moreover, considering the gravity of the matter, that is balancing the protection of the child versus the rights of the accused, it is suggested that it is unlikely that the court appointed expert will forsake objectivism in order to support the virtues of a favored theory. Finally, the judge can insure that objectivity is maintained by informing the expert of her proper role.<sup>117</sup>

<sup>115</sup> See FED. R. EVID. 706(a). The authors of this article agree that Rule 706(a) provides the proper procedure for expert testimony by a court appointed expert:

A witness so appointed shall be informed of the witness' duties by the court in writing . . . [a] witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

*Id.* See, e.g., *Smith By And Through Smith v. Armontrout*, 604 F. Supp. 840, 844 (W.D. Mo. 1984) (court appointed expert required to prepare and file with the court and parties a written report describing his psychiatric examination and his findings).

<sup>116</sup> See, § J. WEINSTEIN & M. BERGER, *supra* note 1, § 706[01] at 706-9 to 706-11. Generally, four arguments against court appointed experts have been advanced:

(1) [t]he expert deprives the parties of their constitutional right to trial by jury; (2) court appointment of experts substitutes an inquisitory approach for the traditional adversary system in which the responsibility for developing facts lies with the parties; (3) [i]f there is more than one school of thought about the subject of the expert testimony, or the subject involves theoretical approaches as well as factual material, it is impossible to obtain a neutral expert; (4) [a] court appointed expert, especially if the funds for compensation are limited, may do only a 'kind of routine job' instead of the job in depth that a party's expert would produce.

*Id.* See also Myers, *supra* note 107, at 577-89 (testimony on a theory which yields no certain resolution; totally impartial expert is unattainable; subversion of the adversary system); Gardner, *The Myth of the Impartial Psychiatric Expert - Some Comments Concerning Criminal Responsibility and the Decline of the Age of Therapy*, 2 LAW & PSYCHOLOGY REV. 99, 107 (1976) (experts are neither impartial nor do they have any special expertise with respect to criminal matters).

<sup>117</sup> See FED. R. EVID. 706(a). An expert may be advised of her role by the court. *Id.* See also FED. R. EVID. 702 (if expert's specialized knowledge will help the jury understand the evidence, then a qualified expert may give his opinion); Note, *The Doctor in Court: Impartial Medical Testimony*, 40 S. CAL. L. REV. 728, 734 (1967) ("[t]he arguments proposed against

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In addition, the court's appointment of an expert does not bar parties from calling expert witnesses of their own selection.<sup>118</sup> However, the presence of an independent expert, by exposing adversary witnesses to criticism, would strongly encourage them to take greater care in offering their testimony.<sup>119</sup>

### III. CONCLUSION

It is a tragic fact that many children in America have been victims of sexual abuse. These incidents may not have been reported until weeks or months after they occurred due to fear or confusion experienced by the child victim. By this time, little physical evidence remains. The only remnants of the abuse are the testimony of the child and evidence of the child's psychological suffering. Such evidence is insufficient to provide the jury with a basis for making an informed decision because average lay persons are unaware of the elements of child sexual abuse syndrome. Expert testimony will enlighten them as to the characteristics of child sexual abuse. However, we must be concerned with the possibility that admitting such testimony will infringe upon the rights of the accused.

The approach suggested in this article, that the expert be permitted to testify to the existence and characteristics of child sexual abuse as well as to characteristics demonstrated by the alleged victim, while not being permitted to state her personal opinion as to the credibility of the victim, protects the rights of both parties.

*Elizabeth MacEwen & Peter Tamigi*

the use of impartial . . . witnesses have not been persuasive . . .").

<sup>118</sup> FED. R. EVID. 706(d).

<sup>119</sup> See FED. R. EVID. 706, advisory committee note. The advisory committee felt that "[T]he ever-present possibility that the judge *may* appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services (emphasis added)." *Id.*