

July 1993

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Recommended Citation

Melissa Harrison, *Expert Testimony in Child Sexual Abuse Cases in Montana: A Proposal for Change*, 54 Mont. L. Rev. (1993).

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EXPERT TESTIMONY IN CHILD SEXUAL ABUSE CASES IN MONTANA: A PROPOSAL FOR CHANGE

Melissa Harrison*

I. INTRODUCTION

In 1991 the Montana Supreme Court reversed the conviction of Ricky Scheffelman for sexually abusing his step-daughter.¹ At Scheffelman's trial, the victim testified that he inserted his fingers into her vagina and masturbated in front of her on repeated occasions.² The Montana Supreme Court ruled that Scheffelman's conviction required reversal because Clinical Social Worker Linda Crummet was not properly qualified as an expert witness.³ Therefore, the court reasoned that she should not have been allowed to testify about whether the victim had been sexually abused and whether the victim was credible.

Joseph P. Hensley was convicted of sexually abusing his daughter between the time she was seven and twelve years old.⁴ The victim testified that Hensley digitally penetrated her vagina, performed oral sex on her, and made her massage his penis.⁵ The Montana Supreme Court reversed Hensley's conviction in an opinion issued one day after the *Scheffelman* decision. Hensley's conviction was reversed because a social worker testified that she believed the victim was telling the truth.⁶ The court acknowledged that it had previously allowed expert testimony on the credibility of child witnesses.⁷ However, it found that the rule should not have been applied in Hensley's case because the victim "was sixteen years old [at the time of trial], was a competent witness, and was

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1. *State v. Scheffelman*, 250 Mont. 334, 344, 820 P.2d 1293, 1300 (1991).

2. *Id.* at 337, 820 P.2d at 1295. *See also* Trial Transcript of District Court Proceedings Before Judge G. Todd Baugh at 31, 33, 36, & 38, *State v. Scheffelman* (Mont. Dist. Ct., Yellowstone County, 1989) (Docket Number 89-004) [hereinafter Transcript].

3. *Scheffelman*, 250 Mont. at 343, 820 P.2d at 1299.

4. The victim was nearly seventeen at the time of trial. *State v. Hensley*, 250 Mont. 478, 481, 821 P.2d 1029, 1031 (1991).

5. *Id.* at 479, 821 P.2d at 1030.

6. *Id.* at 480, 821 P.2d at 1031.

7. *Id.* at 481, 821 P.2d at 1031.

under no physical or mental disability.”⁸ Thus, the court concluded that the expert should not have expressed an opinion as to the victim’s credibility. For that reason, Hensley’s conviction was reversed.

This Article argues that *State v. Scheffelman* and *State v. Hensley* were reversed for the wrong reasons and that they indicate jurisprudential problems that the Montana Supreme Court should examine. In the mid-1980s, the Montana Supreme Court faced a growing number of child sexual abuse cases.⁹ This growth parallels an increased reporting of child sexual abuse¹⁰ and a concurrent public recognition that child sexual abuse is a serious problem.¹¹ In the Montana Supreme Court, as elsewhere, the first response to the growing awareness of this problem was extreme flexibility in evidentiary rulings that facilitated the prosecution of this serious crime.¹² However, in more recent cases such as *Scheffelman*,¹³ *Hensley*,¹⁴ and *State v. Harris*,¹⁵ the court reversed convictions due to errors in admission of expert testimony. Do these later opinions suggest a reaction on the court against its earlier flexibility? If so, this also may parallel a more general backlash against the increased reporting and prosecution of child sexual abuse. David Hechler in his book, *The Battle and the Backlash: The Child Sexual Abuse War*,¹⁶ reports on this phenomenon:

But one thing is clear: There *is* a war. There are those who feel that the country is suffering from an epidemic of child sexual abuse and those who feel . . . [t]he pendulum has swung too far, . . . and what we see now is a blizzard of false accusations.¹⁷

The Montana Supreme Court’s rulings on expert testimony in child sexual abuse cases are still among the most flexible and inclu-

8. *Id.* at 482, 821 P.2d at 1032.

9. See *State v. Clark*, 209 Mont. 473, 682 P.2d 1339 (1984); *infra* text accompanying notes 149-285.

10. See John E.B. Myers, *The Child Sexual Abuse Litigation: A Call for Greater Objectivity*, 88 MICH. L. REV. 1709, 1709 n.2 (1990) (citing AMERICAN HUMANE ASSOCIATION, HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING at 11, 22-24 (1988)).

11. For a description of the battle for recognition of child abuse as a serious problem, see DAVID HECHLER, *THE BATTLE AND THE BACKLASH: THE CHILD SEXUAL ABUSE WAR* (1988).

12. See, e.g., *State v. Geyman*, 224 Mont. 194, 729 P.2d 475 (1986); *In re J.W.K.*, 223 Mont. 1, 724 P.2d 164 (1986).

13. 250 Mont. 334, 343, 820 P.2d 1293, 1299 (1991).

14. 250 Mont. 478, 480, 821 P.2d 1029, 1031 (1991).

15. 247 Mont. 405, 410, 808 P.2d 453, 456 (1991).

16. See HECHLER, *supra* note 11.

17. *Id.* at 3 (quoted in Myers, *supra* note 10, at 1718) (emphasis in original). John Myers believes that the Hechler book is the most objective of recent books on the subject of child sexual abuse. Myers, *supra* note 10, at 1711.

sive in the country. The Montana court has consistently allowed experts to testify in ways that most other courts, legal commentators and, in fact, most behavioral scientists in the area find inappropriate. This Article suggests that *Scheffelman* and *Hensley* were a response by the court to its earlier flexibility and inclusiveness. The court must now look at the assumptions underlying its basic rules in the area of expert testimony in child sexual abuse cases.

Part II of this Article provides background information on the *Scheffelman* and *Hensley* cases. Part III canvasses the legal literature on expert testimony in child sexual abuse cases, points out the areas in which Montana is in the minority, and discusses what the experts in the field contend is appropriate expert testimony in these cases. Part IV surveys Montana cases on expert testimony in child sexual abuse and discusses the court's reasoning in each case. Finally, Part V suggests a new framework for analyzing expert testimony in child sexual abuse cases.

II. BACKGROUND: THE *Scheffelman* AND *Hensley* CASES

At Ricky Scheffelman's trial, Clinical Social Worker Linda Crummet was qualified as an expert witness in child sexual abuse, and she testified about what the victim had told her regarding the abuse.¹⁸ These statements were allowed into evidence under the prior consistent statement exception to the hearsay rule.¹⁹ Crummet also testified that the victim was truthful and that she had been sexually abused.²⁰

The Montana Supreme Court held that Crummet's testimony about the prior statements of the victim was properly allowed into evidence under the prior consistent statement exception to the hearsay rule.²¹ The court ruled, however, that Scheffelman's conviction required reversal because Crummet was not properly qualified as an expert witness.²² Therefore, the court concluded that Crummet should not have been allowed to testify about whether the victim had been sexually abused and whether the victim was credible.

Montana follows the minority view that allows expert witnesses to testify directly about the credibility of a victim who testi-

18. *Scheffelman*, 250 Mont. at 341, 820 P.2d at 1297-98.

19. *Id.* at 338, 820 P.2d at 1295.

20. *Id.* at 341, 820 P.2d at 1298.

21. *Id.* at 341, 820 P.2d at 1297 (citing MONT. R. EVID. 801(d)(1)(B)).

22. *Id.* at 343, 820 P.2d at 1299.

fies in a child sexual abuse trial.²³ According to *Scheffelman*, “[s]uch testimony is properly admissible when the child victim testifies and her credibility is attacked.”²⁴ To give this opinion, however, the expert must be properly qualified.²⁵ Citing a Nebraska Law Review article, the *Scheffelman* court stated that the critical factors in qualifying an expert witness are:

- (1) extensive firsthand experience with sexually abused and non-sexually abused children;
- (2) thorough and up-to-date knowledge of the professional literature on child sexual abuse; and
- (3) objectivity and neutrality about individual cases as are required of other experts.²⁶

The court concluded that Crummet was not qualified to testify as an expert because, under the first prong, there was no indication that Crummet had worked with non-sexually abused children.²⁷

In addition to finding that Crummet was not properly qualified as an expert, the court also appeared to question the substance of her testimony. Crummet testified about the symptoms which the victim exhibited. The court commented on these symptoms in the following way:

Indeed many of the symptoms that the victim experienced were general disturbances that are often present in children who experience traumatic events other than sexual abuse. . . . Crummet affirmed that the victim had experienced a number of anxiety symptoms that commonly result from such abuse. . . . [T]hese symptoms included anxiety, having a hard time sitting still, having a hard time staying on a task and some sleep disturbance. It is true that such symptoms often result from sexual abuse; however, it is also true that children who have experienced disruptive events, such as separation from a parent, can experience elevations in these anxiety symptoms.²⁸

According to the court, the victim had experienced a number of anxiety-producing events such as “living in an alcoholic household and separation from her parents who were incarcerated in the

23. *Id.* at 342, 820 P.2d at 1298. See also *State v. Geyman*, 224 Mont. 194, 200, 729 P.2d 475, 479 (1986).

24. *State v. Scheffelman*, 250 Mont. 334, 342, 820 P.2d 1293, 1298 (1991). See also *State v. Harris*, 247 Mont. 405, 410, 808 P.2d 453, 455 (1991).

25. *Scheffelman*, 250 Mont. at 342, 820 P.2d at 1298.

26. *Id.* (quoting John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 11-12 (1989) (footnote omitted)).

27. *Id.*

28. *Id.* at 342-43, 820 P.2d at 1298 (citing Myers et al., *supra* note 26, at 60-61).

Montana State Prison.”²⁹ The court concluded that in order to establish that the victim’s symptoms of anxiety did not result from disturbances other than sexual abuse, “the expert testifying on behalf of the State must have experience in treating both sexually and non-sexually abused children.”³⁰

Despite reservations about the substance of Crummet’s testimony, the court never questioned whether general symptoms such as anxiety and embarrassment are an accurate assessment of whether sexual abuse occurred, regardless of the qualifications of the expert witness.³¹ Moreover, the court did not question the propriety of its former decisions allowing experts to testify as to whether the victim is telling the truth.³² The court did observe that it sides with a minority of courts in allowing this sort of testimony.³³ Six other jurisdictions allow an expert to express an opinion about the victim’s credibility.³⁴

Justices Trieweiler and Weber wrote separate dissents in *Scheffelman*. Justice Trieweiler’s dissent focused on two issues. First, the state had the right to rely on the court’s prior decisions in *State v. French*³⁵ and *State v. Geyman*.³⁶ In *French*, a school counselor with a master’s degree in counseling and a bachelor’s degree in education was qualified as an expert witness and testified that the victim’s testimony was truthful.³⁷ Justice Trieweiler stated that lawyers “have a right to know the rules . . . in advance,” and the court should only change these rules prospectively.³⁸ Second, Justice Trieweiler also expressed his opinion that the issue had not been preserved for appellate review, nor was it raised by the defendant on appeal.³⁹

29. *Id.* at 343, 820 P.2d at 1299.

30. *Id.*

31. Crummet testified at trial that the victim experienced anxiety and embarrassment. See Transcript, *supra* note 2, at 308.

32. See, e.g., *Geyman*, 224 Mont. at 200, 729 P.2d at 479.

33. *Scheffelman*, 250 Mont. at 342, 820 P.2d at 1298.

34. Myers et al., *supra* note 26, at 126 n.560 (The five jurisdictions include Louisiana, Minnesota, North Carolina, Oklahoma, and Hawaii.).

35. 233 Mont. 364, 760 P.2d 86 (1988).

36. 224 Mont. 194, 729 P.2d 475 (1986).

37. *Scheffelman*, 250 Mont. at 345, 820 P.2d at 1300 (Trieweiler, J., dissenting in part) (discussing *French*, 233 Mont. at 366, 368, 760 P.2d at 87, 89).

38. *Id.* at 346, 820 P.2d at 1301 (Trieweiler, J., dissenting in part).

39. According to Justice Trieweiler, the defendant raised no objection on appeal to Crummet’s qualifications for expressing these opinions. *Id.* at 346, 820 P.2d at 1300 (Trieweiler, J., dissenting in part). The defendant’s argument was limited to his claim that Crummet should not have been allowed to relate the victim’s prior statements. *Id.* Trieweiler also noted that the defendant did not object at trial to this testimony based on the fact that the expert was not properly qualified. *Id.* at 345-46, 820 P.2d at 1300 (Trieweiler, J., dissenting in part). The majority believed that the issue was properly pre-

Justice Weber based his dissent on a different reading of the transcript than the majority's. He emphasized that Crummet testified that, at Eastern Montana College where she worked twenty hours per week, approximately forty to fifty percent of her cases were not sexual abuse cases.⁴⁰ She also testified that, in her private practice, about ten percent of her cases were not sexual abuse cases.⁴¹ Therefore, according to Justice Weber, the transcript indicated that in fact she did have experience with non-sexually abused, as well as sexually abused children.

Why did the court in *Scheffelman* reverse this conviction when the issue of the expert's qualification was arguably not raised on appeal, not preserved for appellate review, and the record arguably supports a different factual conclusion? There are indications in the opinion that the court had reservations about the outcome of the case. At the beginning of the opinion, the court recites the facts of the case in the following manner:

The victim did not report these incidents to anyone until the spring of 1988,⁴² when she was living with her grandmother, Loyce Smith. At this time [her grandmother] questioned the victim about sexual abuse. Initially, the victim denied that any abuse occurred. However, after several discussions of the matter, the victim recanted her earlier denials and told her grandmother that she had, in fact, been sexually molested by the defendant. She told the Pastor that the defendant had sexual intercourse with her. She later admitted that she lied about that part.⁴³

On the day after *Scheffelman*, the court also reversed the child sexual abuse conviction of Joseph Hensley. In *Hensley*, a social worker testified that she believed that the victim was telling the truth.⁴⁴ The court acknowledged that it had previously allowed expert testimony on the credibility of child witnesses.⁴⁵ The majority in *Hensley* stated, however, that "[h]ere, E.H. was sixteen years old, was a competent witness, and was under no physical or mental disability. A jury is capable of assessing the credibility of such a

served because defendant objected when Crummet was asked whether she had formed an opinion about whether the victim had been sexually abused. *Id.* at 343, 820 P.2d at 1299. Defendant's reason was that the expert was not qualified to render such an opinion. *Id.* The majority did not respond to Justice Trieweiler's allegation that the defendant did not raise this issue on appeal.

40. *Id.* at 348-49, 820 P.2d at 1302 (Weber, J., dissenting).

41. *Id.* at 349, 820 P.2d at 1302. See also Transcript, *supra* note 2, at 291.

42. The abuse allegedly occurred from 1985-86. *Scheffelman*, 250 Mont. at 337, 820 P.2d at 1295.

43. *Id.*

44. *State v. Hensley*, 250 Mont. 478, 480, 821 P.2d 1029, 1031 (1991).

45. *Id.* at 481, 821 P.2d at 1031.

witness. We conclude the admission of this testimony was erroneous and is reversible error."⁴⁶ The court promulgated no rule on the cut-off age for such testimony.

Justices Trieweiler and Weber dissented in *Hensley* as they had in *Scheffelman*. Justice Weber criticized the viability of the court's decision:

I further suggest that the standard we are setting here will be of questionable value in the future. How is the age standard to be applied? Is it to be based upon an after-the-fact evaluation of a complaining witness? If we have a brilliant 12 year old, capable of good self expression, should a conviction be reversed because of the use of an expert witness? Basically I question the theory of using age alone as a disqualifying factor.⁴⁷

As in *Scheffelman*, the majority's description of the facts in *Hensley* seems to indicate suspicion regarding the victim's testimony:

The victim did not report these instances to anyone until 1989 when, after arguing with her mother, her mother threatened to send E.H. to live with her father in California. Because E.H. and her mother were not getting along at the time, E.H. was living with another woman in the community. This woman encouraged E.H. to report the incidents because E.H. was having trouble sleeping at night. . . .

. . . .
. . . E.H.'s mother testified on cross-examination that she thought E.H. was lying about the allegations E.H. made against her father.⁴⁸

The social worker testified that she had no reason to doubt E.H.'s truthfulness.⁴⁹ The court cited to the Myers law review article on expert testimony in child sex abuse cases which states that, "[w]hile qualified experts possess specialized knowledge regarding certain aspects of credibility, expert capacity to detect lying and coaching is too limited to justify admission of generalized credibility testimony."⁵⁰ In fact, the law review article concludes that the same type of testimony that the expert gave in *Hensley* is improper not because of the age of the victim but because "expert capacity to detect lying and coaching is too limited to justify ad-

46. *Id.* at 482, 821 P.2d at 1032.

47. *Id.* at 488-89, 821 P.2d at 1035-36 (Weber, J., dissenting).

48. *Id.* at 479-80, 821 P.2d at 1030.

49. *Id.* at 480, 821 P.2d at 1031.

50. *Id.* at 481-82, 821 P.2d at 1031 (alteration in original) (quoting Myers et al., *supra* note 26, at 127).

mission of generalized credibility testimony."⁵¹ However, the court did not question whether this type of expert testimony on credibility is proper in any case. This Article suggests that the court should reconsider whether such testimony is ever proper.

III. THE LEGAL LITERATURE ON EXPERT TESTIMONY IN CHILD SEXUAL ABUSE CASES

In recent years, legal literature on expert testimony in child sexual abuse cases has proliferated. Despite the fact that authors fail to agree on all issues, a consensus exists that some types of expert testimony are proper and that other types are improper. Several authors have attempted to categorize the types of expert testimony in child sexual abuse cases. The most well known and extensive article on the subject is that of John E.B. Myers et al., entitled *Expert Testimony in Child Sexual Abuse Litigation*.⁵² Myers and his fellow authors⁵³ categorize the types of expert testimony in child sexual abuse cases in the following way:

A. Medical evidence of child sexual abuse.

B. Expert testimony on behaviors commonly observed in sexually abused children.

C. Expert testimony on whether a child was sexually abused.

D. Expert testimony to rehabilitate a child's credibility following impeachment in which the defendant asserts that behaviors such as recantation and delay in reporting are inconsistent with allegations of sexual abuse.

E. Expert testimony to rehabilitate a child's credibility following impeachment in which the defendant argues that developmental differences between adults and children render children less credible witnesses than adults.

F. Expert testimony that a particular child or sexually abused

51. Myers et al., *supra* note 26, at 127.

52. See Myers et al., *supra* note 26.

53. John E.B. Myers is Professor of Law at University of the Pacific, McGeorge School of Law, Sacramento, California. The other authors of the article are Jan Bays, M.D., Medical Director of Child Abuse Programs at Emanuel Hospital and Health Center, Portland, Oregon; Judith Becker, Ph.D., Professor of Clinical Psychology, Columbia University and Director of the Sexual Behavior Clinic, New York Psychiatric Institute, New York, New York; Lucy Berliner, M.S.W., Assistant Clinical Professor of Social Work, College of Social Work, University of Washington, and Research Director, Harborview Sexual Assault Center, Seattle, Washington; David L. Corwin, M.D., a child psychiatrist in private practice and psychiatric consultant to the Multidisciplinary Child Abuse Team at Children's Hospital, Oakland, California; and Karen J. Saywitz, Ph.D., Assistant Professor of Psychiatry, UCLA School of Medicine, and Director of Child and Adolescent Psychology Service in the Division of Child and Adolescent Psychiatry, Harbor/UCLA Medical Center, Los Angeles, California.

children as a class generally tell the truth about sexual abuse.

G. Expert testimony identifying the perpetrator.

H. Expert testimony describing the profile of persons who abuse children.⁵⁴

This Article surveys the categories that Myers employs, restates the conclusions Myers draws about whether a certain category of testimony should be allowed, contrasts Myers' conclusions with those of other writers in the field, and considers whether Montana allows that type of testimony. The Myers article is a polestar for this Article for several reasons. First, the Myers article is the most complete discussion of the issues surrounding expert testimony in child sexual abuse cases and supports its reasoning with extensive behavioral science evidence. Second, it takes a very even-handed approach to the issues. Third, it generally supports the use of expert testimony in child sexual abuse cases. This Article seeks to demonstrate that Montana allows more types of evidence in child sexual abuse cases than even the Myers article sug-

54. See generally Myers et al., *supra* note 26. Other authors have categorized in other ways. David McCord, in his article, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1 (1986) [hereinafter McCord, *Expert Psychological Testimony*], divides expert testimony into four types:

[(1)] offering an expert diagnosis that the complainant is a victim of child sexual abuse to prove that the abuse occurred, [(2)] use of experts to vouch for the complainant's credibility regarding the sexual abuse allegation, [(3)] offering expert testimony to enhance the complainant's credibility by explaining the "unusual" behavior of the complainant that the defendant has highlighted, [and (4)] using an expert to enhance the complainant's credibility by explaining the capabilities of children as witnesses.

Id. at 5.

Veronica Serrato, in her note, *Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses*, 68 B.U. L. REV. 155, 164-65 (1988), places the types of testimony along a spectrum from low impact on ultimate issue to high impact on ultimate issue. The categories are as follows: (1) refutation of defense counsel's claims, (2) common characteristics of sexually abused children, (3) general veracity of children alleging sexual abuse, (4) veracity of a particular child-witness, (5) matching general characteristics of sexually abused children with those of a child-witness, (6) common characteristics of sexual child abusers, and (7) expert testimony on the abuser's identity. *Id.*

Rebecca J. Roe, in *Expert Testimony in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 97, 102-03 (1985), divides the views on admissibility of testimony into liberal, moderate, and conservative. The liberal view "would permit calling an expert to render an opinion as to the truthfulness or credibility of a witness." *Id.* The moderate view "would attempt to bolster the victim's testimony without direct comment as to the victim's credibility." *Id.* The conservative view would allow expert testimony "only to explain or rebut a defense argument, such as the typical defense argument that a delay in reporting means that the child fabricated the crime." *Id.* See also Elizabeth MacEwen & Peter Tamigi, *A Three Prong Approach to the Admissibility of Expert Testimony on Child Sexual Abuse Syndrome*, 2 J. LEGAL COMMENTARY 140, 145 n.13 (1987) (adopting Roe's liberal, moderate, and conservative typology).

gests. Fourth, the Montana Supreme Court relied on the Myers article in both *Scheffelman*⁵⁵ and *Hensley*.⁵⁶

A. *Medical Evidence of Child Sexual Abuse*

Medical evidence of child sexual abuse is generally admissible in most courts.⁵⁷ Montana law allows testimony about medical evidence of child sexual abuse,⁵⁸ however, medical evidence exists in only a small percentage of child sexual abuse cases.⁵⁹ The most common reason for a lack of medical evidence is delay in reporting sexual abuse.⁶⁰

B. *Expert Testimony Describing the Symptoms of Child Abuse and Whether a Particular Child Exhibits Those Symptoms*

Myers concludes that testimony about behaviors commonly observed in sexually abused children is proper with certain limitations. He states that, over time, a consensus has developed "about the way children who have been sexually abused react emotionally and behaviorally."⁶¹ Myers reports that data are available from approximately a dozen major investigations into the characteristics and behavior of sexually abused children.⁶² Myers draws a number of conclusions from these studies. First, "sexually abused children . . . differ behaviorally from nonabused children."⁶³ Within the range of abused children "there is a broad range and degree of disturbance."⁶⁴ Myers states that age-inappropriate sexual behavior is the most reliable indicator of sexual abuse.⁶⁵ "Examples of behaviors that have greater specificity for sexual abuse include age-inappropriate knowledge of sexual acts or anatomy, sexualization of play and behavior in young children, the appearance of genitalia in young children's drawings, and sexually explicit play with anatomically detailed dolls."⁶⁶ Other more general symptoms such as fear,

55. 250 Mont. 334, 820 P.2d 1293 (1991).

56. 250 Mont. 478, 821 P.2d 1029 (1991).

57. See Myers et al., *supra* note 26, at 35. Medical evidence of child sexual abuse may include, for example, physical evidence such as vaginal scarring, hymenal opening, or abnormal reflex anal dilation. *Id.* at 41-44.

58. *State v. Laird*, 225 Mont. 306, 311, 732 P.2d 417, 420 (1987).

59. Myers et al., *supra* note 26, at 34.

60. See generally *id.* at 34 n.120.

61. *Id.* at 55.

62. *Id.* at 56.

63. *Id.* at 58.

64. *Id.*

65. *Id.* at 59.

66. *Id.* at 62-63. But see Robert Levy, *Using "Scientific" Testimony to Prove Child Sexual Abuse*, 23 FAM. L.Q. 383, 397-407 (1989); Diana Younts, Note, *Evaluating and Ad-*

anxiety, avoidance, regression, and nervousness may also be present but these symptoms are consistent with other trauma as well.⁶⁷

Myers concludes that the presence of such symptoms is sometimes probative of abuse and that testimony explaining these behaviors can assist the jury.⁶⁸ He also insists that "there is a meaningful distinction between expert testimony that a particular child was sexually abused, and expert testimony that a child demonstrates behaviors commonly observed in the class of sexually abused children."⁶⁹ The latter is appropriate, the former is not. A substantial number of courts, including Montana,⁷⁰ allow testimony regarding typical symptoms of child sexual abuse.⁷¹

Some authors suggest excluding testimony about general symptoms such as fear and anxiety because these symptoms are not specific enough to indicate sexual abuse. As one author emphasized: "The list of symptoms described by some experts as typical of sexual abuse victims is long and broad enough to encompass the experience of nearly all children who may be troubled by the turbulence of growing up, whether or not that turbulence entails sexual abuse."⁷² The author criticizes expert testimony that describes these symptoms as "[n]ightmares, anxiety, and bedwetting."⁷³ Extremely broad symptoms are not, without additional evidence, a reliable indication of child sexual abuse.⁷⁴ The only reliable symptoms for sexual abuse are age-inappropriate sexual behaviors.⁷⁵

Even though it may be appropriate to admit testimony regarding symptoms of child sexual abuse, testimony that a child sex

mitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions, 41 DUKE L.J. 691, 707 (1991) (both criticizing the use of anatomically correct dolls).

67. Myers et al., *supra* note 26, at 60-61.

68. *Id.* at 69.

69. *Id.* at 65.

70. See *State v. Geyman*, 224 Mont. 194, 200, 729 P.2d 475, 479 (1986).

71. Myers et al., *supra* note 26, at 65. See also Serrato, *supra* note 54, at 171 n.101.

72. Andrew Cohen, Note, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims*, 74 GEO. L.J. 429, 442 (1985).

73. *Id.* at 447.

74. *Id.*

75. Myers et al., *supra* note 26, at 61-62. See also Marian D. Hall, *The Role of Psychologists as Experts in Cases Involving Allegations of Child Sexual Abuse*, 23 FAM. L.Q. 451, 462 n.28 (1989) (citing Lucy Berliner, *Deciding Whether a Child Has Been Sexually Abused*, in *SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES* 48, 55 (E. Bruce Nicholson & Josephine Bulkley eds., 1988)) (criticizing the use of such symptoms as fear, anxiety, withdrawal, regression, acting out or being upset, or sleep disruption because they may be caused by a variety of known traumatic events); Josephine Bulkley, *Legal Proceedings, Reforms, and Emerging Issues in Child Sexual Abuse Cases*, 6 BEHAV. SCI. & L. 153, 175 (1988) [hereinafter Bulkley, *Legal Proceedings*] (noting "many of the common effects of abuse may be attributed to other emotional trauma").

abuse syndrome exists is inappropriate because “[a]t the present time, experts have not achieved consensus on the existence of a psychological syndrome that can detect child sexual abuse.”⁷⁶ Most courts reject syndrome testimony.⁷⁷ Montana allows it.⁷⁸

C. *Expert Testimony on Whether a Child Was Sexually Abused*

Courts are divided about whether an expert should be able to testify that sexual abuse occurred. Most legal commentators believe that such testimony should not be allowed.⁷⁹ Myers believes that experts can often determine whether abuse has occurred, but concludes that:

[b]ecause of disagreement among experts on child sexual abuse, and because of the consequences of criminal conviction, it may be appropriate in criminal jury trials to eschew behavioral science testimony cast in terms of a direct opinion that sexual abuse occurred. However . . . it may be appropriate to permit a properly qualified expert to testify that a child demonstrates age-inappropriate sexual knowledge or awareness . . . [and that] a child's symptoms and behavior are consistent with sexual abuse.⁸⁰

Montana, however, allows experts to testify as to whether a child was sexually abused.⁸¹

76. Myers et al., *supra* note 26, at 69.

77. *Id.* at 68.

78. *State v. Walters*, 247 Mont. 84, 91, 806 P.2d 497, 501 (1991); *State v. Donnelly*, 244 Mont. 371, 378, 798 P.2d 89, 93 (1990).

79. See Bulkley, *Legal Proceedings, supra* note 75, at 179 (no reliable test or method to determine abuse); Hall, *supra* note 75, at 463 (“[B]ehavioral science research to date does not support . . . the conclusion that an expert in the field of child sexual abuse has any accurate way to diagnose a particular child as a victim of sexual abuse.”); Thomas M. Horner and Melvin J. Guyer, *Prediction, Prevention, and Clinical Expertise in Child Custody Cases in Which Allegations of Child Sexual Abuse Have Been Made: Prevalence Rates of Child Sexual Abuse and the Precision of “Tests” Constructed to Diagnose It*, 25 FAM. L.Q. 381, 387 (1991) (“Mental health fields lack a set of clear and convincing indicators to show that sexual abuse has occurred in a young child.”); David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19, 42 (1987) [hereinafter McCord, *Syndromes*] (stating that courts equally divided on issue of whether experts should be able to testify that sexual abuse occurred); Christopher B. Mueller, *Meta-Evidence: Do We Need It?*, 25 LOY. L.A. L. REV. 819, 834-35 (1992) (stating that experts not qualified to render professional opinion on whether abuse occurred).

80. Myers et al., *supra* note 26, at 85. See also Serrato, *supra* note 54, at 185.

81. *State v. Scheffelman*, 250 Mont. 334, 342, 820 P.2d 1293, 1298 (1991).

D. *Expert Testimony in Rebuttal to Explain Behaviors Such as Recantation and Delay in Reporting*

Experts and courts agree that expert testimony explaining recantation and delay in reporting is proper.⁸² The scientific information supports it.⁸³ In this situation, the expert testifies that recantation and delay in reporting occur in the great majority of child sexual abuse cases and explains the reasons why delay and recantation occur. This type of expert testimony is not a direct opinion about whether the child is telling the truth. It is general testimony "designed to explain why behavior by the complainant that might appear on its face to be unusual behavior by the complainant may not in fact be unusual."⁸⁴

Myers concludes that testimony to rebut evidence of recantation and delay in reporting should be admitted. "The defense invites such rebuttal testimony by its attack on the child's credibility. The state has a legitimate need to inform the jury about the dynamics of child sexual abuse so that jurors can fairly and accurately evaluate the child's credibility."⁸⁵ According to David McCord in his article, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray Into the Admissibility of Novel Psychological Evidence*, testimony to rebut evidence of recantation and delay in reporting should be admitted because it covers an area in which the jury may not be aware. In addition, it is reliable and understandable, but would not be dispositive to the case.⁸⁶ Most experts caution, however, that such testimony should be received only after there has been some form of impeachment. Otherwise, the "testimony constitutes improper bolstering."⁸⁷ Montana allows testimony that rebuts evidence of recantation and delay in reporting.⁸⁸

82. See Hall, *supra* note 75, at 455; McCord, *Expert Psychological Testimony*, *supra* note 54, at 62-63; Myers et al., *supra* note 26, at 86-92; Roe, *supra* note 54, at 111; Serrato, *supra* note 54, at 170.

83. McCord, *Expert Psychological Testimony*, *supra* note 54, at 60-61; Myers et al., *supra* note 26, at 86-88.

84. McCord, *Expert Psychological Testimony*, *supra* note 54, at 58.

85. Myers et al., *supra* note 26, at 92.

86. McCord, *Expert Psychological Testimony*, *supra* note 54, at 63.

87. Myers et al., *supra* note 26, at 92.

88. *State v. Clark*, 209 Mont. 473, 489, 682 P.2d 1339, 1348 (1984).

E. Expert Testimony in Rebuttal About the Developmental Capabilities of Children After the Defense Asserts that Developmental Differences Between Children and Adults Render Children Less Credible Witnesses than Adults

A recent note in the *Duke Law Journal* asserts that children are highly suggestible. The author states that:

[C]areful review of the social science literature indicates that children are susceptible to suggestive interviewing techniques and that such techniques can render children's accounts of abuse unreliable. A number of studies have shown that children will lie when they have a motivation to lie, that they are susceptible to accommodating their reports of events to fit what they perceive the adult questioner to believe, and that inappropriate post-event questioning can actually change a child's cognitive memory of an event.⁸⁹

According to the authors of the Myers article, children have both strengths and weaknesses as witnesses, and it is wrong to say that they are uniformly less reliable than adults.⁹⁰ Most research indicates children ten to eleven years of age are no more suggestible than adults, and that four to nine-year-olds are sometimes more suggestible than older children.⁹¹ Myers asserts that "[m]odern research suggests that children are less likely than adults to differentiate fact from fantasy in some situations, but not others."⁹² Myers concludes that expert rebuttal testimony which acquaints jurors with developmental capabilities and limitations is proper.⁹³ For ex-

89. Younts, *supra* note 66, at 692. The research on which this opinion is based can be criticized, especially as compared with the extensive research upon which Myers relies. Most of the research on suggestibility that Younts relies on is taken from an unpublished work by Stephen J. Ceci, *The Suggestibility of the Child Witness: A Synthesis Emphasizing the Most Recent Research* (1990), which concluded that children will lie when they have a motive to lie, that they can modify their stories to fit what the adult questioner believes to have happened and that, in some instances, post-event suggestions can change a child's cognitive memory of an event. Younts also relies on HOLLIDA WAKEFIELD & RALPH UNDERWAGER, *ACCUSATIONS OF CHILD SEXUAL ABUSE* (1988). This book has been criticized by Myers for its "abdication of objectivity." Myers, *supra* note 10, at 1712. In addition, Myers states that "[t]he authors cite no authority for the bald assertion that professionals routinely prejudge allegations of abuse and refuse to keep an open mind." *Id.* at 1713. For example, Wakefield & Underwager "criticize professionals who cooperate with the state, but express no self-reproach when they boast of the hundreds of cases they have evaluated for defense counsel." *Id.* at 1712.

90. Myers et al., *supra* note 26, at 97. See also Steven Penrod et al., *Children as Observers and Witnesses: The Empirical Data*, 23 *FAM L.Q.* 411, 427 (1989) (research on suggestibility far from conclusive).

91. Myers et al., *supra* note 26, at 101.

92. *Id.* at 103.

93. *Id.* at 107-08. See also McCord, *Expert Psychological Testimony*, *supra* note 54,

ample, if the defense challenges the child's credibility by asserting that inconsistencies in testimony mean that the child is lying, jurors could benefit from expert testimony that "inconsistency is developmentally normal in young children."⁹⁴ This type of testimony has been allowed into evidence in Montana.⁹⁵

F. Expert Testimony Giving an Opinion That a Particular Child is Telling the Truth About Sexual Abuse, or Sexually Abused Children as a Class Generally Tell the Truth About Sexual Abuse

There are two types of testimony covered in this section. The first is testimony that a particular child is telling the truth. The second is testimony that sexually abused children as a class generally tell the truth about sexual abuse.

1. Testimony that a Particular Child is Telling the Truth

Most legal commentators, including Myers, agree that it is inappropriate for an expert to testify that he or she believes that the particular child is telling the truth about the abuse.⁹⁶ Myers concludes that:

It is appropriate to prohibit expert testimony that a child told the truth on a particular occasion. There is considerable intuitive appeal to the notion that jurors defer too quickly to expert assessment of credibility. . . . [W]hile qualified experts possess specialized knowledge regarding certain aspects of credibility, expert capacity to detect lying and coaching is too limited to justify ad-

at 66. At the time McCord was writing, he believed that research had not been done which would make the testimony reliable. *Id.* However, he seems to support the idea of testimony about the general capabilities of child witnesses if future research were to bear out the conclusions. *Id.* Myers notes that there has been significant research since McCord wrote his article. Myers et al., *supra* note 26, at 106.

94. Meyers et al., *supra* note 26, at 106-07.

95. State v. Hall, 244 Mont. 161, 173-74, 797 P.2d 183, 191 (1990).

96. Myers et al., *supra* note 26, at 127; McCord, *Expert Psychological Evidence, supra* note 54, at 44; Mueller, *supra* note 79, at 834; Dirk Lorenzen, *The Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child*, 42 U. MIAMI L. REV. 1033, 1066-67 (1988) ("[I]t can be argued that the reliability of the evaluative skills of psychologists in determining the occurrence of a past event has not been established. . . . The qualifications of psychologists as expert witnesses, in both clinical and scientific capacities, do not encompass the ability to detect lies."); Bulkley, *Legal Proceedings, supra* note 75, at 174 (expert should not be allowed to express opinion on truthfulness); Thomas M. Horner et al., *Prediction, Prevention, and Clinical Expertise in Child Custody Cases in Which Allegations of Child Sexual Abuse Have Been Made: III. Studies of Expert Opinion Formation*, 26 FAM. L.Q., 141, 144 (1992) (fallacy that experts are better than ordinary persons in discerning truth); MacEwen & Tamigi, *supra* note 54, at 165.

mission of generalized credibility testimony.⁹⁷

Scholars and courts give various reasons for such an exclusion. First, no evidence exists that experts on child sexual abuse have any specialized expertise in the area of credibility. According to McCord, behavioral scientists themselves recognize that they have no particular expertise in evaluating credibility.⁹⁸

Second, it invades the province of the jury, and the jury may defer too quickly to the expert's opinion. Some authors feel that expert testimony on the credibility of a child witness "is tantamount to expert evidence on the ultimate question of guilt or innocence, a matter reserved exclusively to the fact finder."⁹⁹ Myers seems to fear that the jury will defer too quickly to such expert opinions.¹⁰⁰ McCord believes that the testimony should not be admitted because the importance is very high while the reliability is very low, and that it is the type of testimony to which the jury would defer too quickly.¹⁰¹

Courts have almost universally excluded this kind of testimony. Only six state courts allow expert testimony that the victim is telling the truth.¹⁰² Montana is one of them.¹⁰³

The rationale behind the view that this testimony invades the province of the jury is clearly set forth by the Eighth Circuit Court of Appeals in *United States v. Azure*.¹⁰⁴ In *Azure*, the appellate court found that the trial court had abused its discretion in allowing the doctor to state that he could "see no reason why [the victim] would not be telling the truth in this matter."¹⁰⁵ The court in *Azure* rejected the testimony for two reasons. First, such a statement from the expert would have "too powerful an influence on the jury and may cause the jury to rely on the expert rather

97. Myers et al., *supra* note 26, at 127.

98. McCord, *Expert Psychological Testimony*, *supra* note 54, at 44.

99. Serrato, *supra* note 54, at 179.

100. Myers et al., *supra* note 26, at 127.

101. McCord, *Expert Psychological Testimony*, *supra* note 54, at 52. See also Elaine R. Cacciola, Note, *The Admissibility of Expert Testimony in Intrafamily Child Sexual Abuse Cases*, 34 UCLA L. REV. 175, 203 (1986) (states that such testimony tends to vouch too much). Roe worries that the result would be a battle of experts. Roe, *supra* note 54, at 103. See also Lorenzen, *supra* note 96, at 1066 (such testimony invades the province of the trier of fact); Mueller, *supra* note 79, at 835 ("[C]ourts . . . seem wise in concluding that expertise on the general subject does not qualify even professional observers to tell lay fact finders whom to believe or what inferences to draw from the evidence.").

102. See Myers et al., *supra* note 26, at 126 n.560 (citing case law from Louisiana, Minnesota, Montana, North Carolina, Oklahoma, and Hawaii).

103. Scheffelman, 250 Mont. at 342, 820 P.2d at 1298; *State v. Geyman*, 224 Mont. 194, 200, 729 P.2d 475, 479 (1986).

104. 801 F.2d 336 (8th Cir. 1986).

105. *Id.* at 339.

than its own intuition with regard to the credibility of the witness."¹⁰⁶ Second, the court stated that no reliable test for truthfulness exists, thus an expert witness could not be qualified to testify about the truth of the child's testimony.¹⁰⁷

Several state courts have relied on *Azure* in rejecting such testimony.¹⁰⁸ The Oregon Supreme Court in *State v. Milbradt* clearly stated, "[w]e have said before, and we will say it again, but this time with emphasis—we really mean it—no psychotherapist may render an opinion on whether a witness is credible in any trial conducted in this state. The assessment of credibility is for the trier of fact and not for psychotherapists."¹⁰⁹

Despite a widespread view that this type of testimony should not be allowed, a few courts and a few commentators suggest that it should. The best-known case allowing expert testimony on witness credibility is *State v. Kim*.¹¹⁰ In *Kim*, the court permitted a psychiatrist to state his opinion as to whether a thirteen-year-old victim of sexual abuse was truthful in her account.¹¹¹ The court stated that "[w]hen . . . the nature of a witness' mental or physical condition is such that the common experience of the jury may represent a less than adequate foundation for assessing the credibility of a witness, the testimony of an expert is far more likely to be of value, and thus more likely to be admissible when its probative value is measured against its prejudicial effects."¹¹² In addition to simply allowing credibility testimony, the court in *Kim* set forth a specific framework for deciding when it is proper to allow testimony that a particular child victim is credible.¹¹³

This framework provides that:

[1.] testimony be based on a sound factual foundation[;]

106. Linda Anderson, Note, *United States v. Azure: Admissibility of Expert Testimony in Child Sexual Abuse Cases*, 15 J. CONTEMP. L. 285, 287 (1989).

107. *Azure*, 801 F.2d at 341. See also *State v. Moran*, 728 P.2d 248, 255 (Ariz. 1986) (reasoning that "[e]xperts called to testify about behavioral characteristics that may affect an alleged victim's credibility may not give an opinion of the credibility of a particular witness. Psychologists and psychiatrists are not, and do not claim to be, experts at discerning truth. Psychiatrists are trained to accept facts provided by their patients, not to act as judges of patients' credibility.") (emphasis omitted).

108. See *Moran*, 728 P.2d at 252; *People v. Oliver*, 745 P.2d 222, 225 (Colo. 1987); *Scadden v. State*, 732 P.2d 1036, 1047 (Wyo. 1987).

109. *State v. Milbradt*, 756 P.2d 620, 624 (Or. 1988).

110. 645 P.2d 1330 (Haw. 1982).

111. *Id.* at 1338-39.

112. *Id.* at 1337.

113. *Id.* at 1336, cited in Elizabeth Vaughan Baker, Comment, *Psychological Expert Testimony on a Child's Veracity in Child Sexual Abuse Prosecutions*, 50 LA. L. REV. 1039, 1054 (1990) (arguing that such testimony should be allowed if the above foundation from *Kim* is laid).

- [2.] opinions or inferences be based on an explicable and reliable system of analysis[;]
 [3.] the opinion adds to the common understanding of the jury[;]
 [4.] probative value is not outweighed by prejudice, confusion or waste of time[;]
 [5.] the expert had sufficient contact with the victim to make a thorough and objective assessment[;]
 [6.] the method by which the conclusion was reached is reliable methodology and is presented to the jury[; and]
 [7.] the inferences or conclusions are sufficiently precise, so that they meaningfully contribute to the assessment of the witness' credibility.¹¹⁴

Some authors have challenged the assumption that testimony about the credibility of the victim usurps the function of the jury. These authors reason that "expert testimony invades the province of the jury only when the jury is instructed that it must agree with the expert's testimony."¹¹⁵ Professor Toni Massaro finds the law's resistance to admitting expert psychological testimony on credibility "ironic."¹¹⁶ If jurors and judges make decisions that are based on inferences, speculation, and intuition, why is the law suspicious of testimony from persons who have special training in human behavior? She argues:

If the substantive law compels the fact finder to assess how people think and behave in certain situations and psychology can offer information about that thought and behavior, it seems unreasonable to exclude expert evidence that might help the fact finder, forcing untrained jurors to draw conclusions based on untested hunches and intuition.¹¹⁷

Those authors who favor including this evidence point to Federal Rule of Evidence 704(a), which states that an opinion can embrace an ultimate issue.¹¹⁸ Professor Margaret Berger approves of the *Kim*¹¹⁹ holding, finding it in accord with the Federal Rules:

114. Baker, *supra* note 113, at 1055.

115. Serrato, *supra* note 54, at 184 (citing Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 443 (1985)). See also McCord, *Syndromes*, *supra* note 79, at 76-77 ("[T]he province of the jury simply cannot be 'invaded' because the jury is always free to accept or reject any witness' testimony . . .").

116. Massaro, *supra* note 115, at 445.

117. *Id.* See also Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 210-11 (1989-90) (challenging whether jurors are very good at assessing credibility and suggesting that they might need help in this area).

118. Serrato, *supra* note 54, at 184.

119. Margaret A. Berger, *United States v. Scop: The Common-Law Approach to An Expert's Opinion About A Witness's Credibility Still Does Not Work*, 55 BROOK. L. REV.

The Federal Rules of Evidence do not prohibit a qualified expert from expressing an opinion about the credibility of a witness who has been impeached . . . [if] it would aid the jury in making its determination.

. . . .

. . . Rather than worrying about invading the province of the jury, the court should concentrate on allowing an expert to give an opinion in a forthright manner that gives the jurors the most assistance possible.¹²⁰

Berger concludes that this type of testimony should be admissible if the court finds that the expert's testimony is sufficiently reliable, and if the expert adequately explains the factual basis for the conclusion.¹²¹

These arguments are persuasive. However, many of these writers do not deal with the primary reason for excluding testimony that the victim is credible. It is not reliable. The data do not show that psychologists have a particular expertise in saying who is credible and who is not credible.¹²² The second reason to exclude testimony about the credibility of the victim is because it may have an undue influence on the jury.¹²³ This creates a special danger when one considers the first reason. If experts in child sexual abuse cases really have no special expertise in credibility, but they are testifying as experts and testifying that a particular witness is credible, there is a danger that the jury will assume that they do have a special expertise in this area. Common sense suggests that the jury will believe that, if the witness is an expert, he or she must know whether the person is telling the truth. Massaro simply says that no data supports this assumption.¹²⁴ Myers, however, concedes the appeal of such an argument: "There is considerable intuitive appeal to the notion that jurors defer too quickly to expert assessment of credibility."¹²⁵ In conclusion, most but not all scholars writing about expert testimony in child sexual abuse cases believe that testimony about the credibility of the victim should be excluded. In addition, the vast majority of courts disallow this testimony. Montana, however, allows it.¹²⁶

559, 620-21 (1989).

120. *Id.* at 621-22.

121. *Id.* at 620.

122. *See supra* notes 96-101 and accompanying text.

123. Myers et al., *supra* note 26, at 127.

124. Massaro, *supra* note 115, at 444.

125. Myers et al., *supra* note 26, at 127.

126. *State v. Geyman*, 224 Mont. 194, 729 P.2d 475 (1986).

2. *Testimony that Sexually Abused Children as a Class Generally Tell the Truth About Sexual Abuse*

Evidence that it is rare for children to fabricate or fantasize a claim of sexual abuse has been allowed in several Montana cases.¹²⁷ On this matter, Myers states that "clinical experience and research disclose that children rarely fabricate false allegations of sexual abuse."¹²⁸ He cites several systematic studies of suspected child abuse victims. The percentages of false reports ranged from five to six and one-half percent.¹²⁹ Myers does admit that evidence of higher rates of fabrication appears in cases involving child custody and visitation disputes. There are studies involving very small samples which found very high rates of false accusations.¹³⁰ These studies, however, have been criticized for their small samples. In one study, eighteen children were studied, in another, only eleven.¹³¹ Myers has concluded that "even the most methodologically rigorous studies indicate that in divorce litigation the incidence of fabricated allegations of child sexual abuse may be as high as twenty percent."¹³² Thus, while it is correct to assert that

127. See, e.g., *State v. Walters*, 247 Mont. 84, 89, 806 P.2d 497, 499 (1991) (stating that expert testified that "three to four-year-old child is incapable of fabricating such an incident"); In re J.W.K., 223 Mont. 1, 4, 724 P.2d 164, 165-66 (1986) (stating that expert testified that "five and six year old children are unable to sustain a lie about sexual abuse").

128. Myers et al., *supra* note 26, at 111.

129. *Id.* at 112.

130. *Id.* at 113.

131. *Id.* It is these same small studies that the author of the student note in the Duke Law Journal relies upon to conclude that high rates of false accusations exist. Younts, *supra* note 66, at 734.

132. Myers, *supra* note 10, at 1726 (citing the research of Jones & Seig, *Child Sexual Abuse Allegations in Custody or Visitation Disputes*, in *SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES* (E. Bruce Nicholson with Josephine Bulkeley eds., 1988). See also Nancy Thoennes, *Child Sexual Abuse: Whom Should a Judge Believe? What Should a Judge Believe?*, 27 *JUDGE'S J.* 14, 15-16 (1988). Her two-year study explored the incidence and validity of sex abuse allegations in custody cases. She surveyed juvenile and family court judges and other court personnel and looked at 9,000 cases involving custody disputes. Cases where sexual abuse of children was raised are only slightly less than 2% of those cases. Of those 169 cases, the number found not to involve abuse was approximately 30%. However, Thoennes notes that in most of these cases, the evaluator believed that the suspicion was genuine. *Id.* at 15-17. This research also appears in NANCY THOENNES & JESSICA PEARSON, *Summary of Findings from the Sexual Abuse Allegations Project*, in *SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES* (E. Bruce Nicholson ed., 1988).

The fact that this research shows that sexual abuse allegations in child custody disputes are rare (less than 2%) belies the perhaps growing belief that women are often raising such claims in custody disputes. See Meredith Sherman Fahn, *Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter*, 25 *FAM. L.Q.* 193, 200-01 (1991) ("The mass media has popularized an image of the mother in a custody dispute who raises allegations of child sexual abuse in order to hurt the father rather than out of a legitimate need to protect the child. . . . In this way, the media sends a message that a mother who accuses her ex-husband of sexually abusing their child has made up a terrible and fantastic

fabricated allegations are uncommon, they are not extremely rare.¹³³

Myers states that, if the defense asserts that children as a group lie about sexual abuse, an expert should be allowed to testify in rebuttal and draw from the clinical and scientific literature for the conclusion that fabricated allegations of sexual abuse are rare.¹³⁴ The opinion should not be couched in terms of the percentage of children who tell the truth.¹³⁵ "Quantification of credibility runs too high a risk of misleading or confusing the jury."¹³⁶ Most courts do not allow testimony that children as a class are truthful for the same reasons that they exclude evidence that a particular child is telling the truth.¹³⁷

Testimony about fabrication should be distinguished from testimony that children rarely lie. According to Myers, "some professionals went too far . . . asserting that children never lie, and that allegations should always be believed. Such overstatement invites criticism and skepticism of professional knowledge and motives."¹³⁸ Therefore, Myers would criticize testimony such as that

tale in a desperate attempt to deny him access to their child.") Fahn posits two reasons why sexual abuse of a child by a father may be more likely to happen and be raised when a marriage is breaking up: (1) After parents separate, the abusive parent may be "lonely for emotional and sexual companionship, and the child is vulnerable and accessible" and (2) "[w]here the abuse was ongoing while the family was intact, the separation creates an opportunity for disclosure." *Id.* at 203. See also Thoennes, *supra*, at 17 (agreeing that post-separation and post-divorce is a time when abuse is likely to begin).

Thoennes reports that a number of legal professionals interviewed in the course of her study expressed skepticism about allegations arising in divorce cases. *Id.* at 18. Her data "suggest that the stereotype that mothers falsely and maliciously accuse fathers of abuse is unwarranted." *Id.* Her work concluded:

The results of this two-year investigation into sexual abuse allegations arising in the context of custody and visitation disputes refute the notion that such cases are now epidemic, as well as the idea that those cases are most commonly motivated by a reporting parent who is vindictive or seriously impaired.

Id. at 49.

133. Myers, *supra* note 10, at 1726. See also Kathleen M. Quinn, *The Credibility of Children's Allegations of Sexual Abuse*, 6 BEHAV. SCI. & L. 181, 193 (1988) (Children rarely make false allegations but there are a variety of reasons why they sometimes do.).

134. Meyers, *supra* note 10, at 1726.

135. *Id.*

136. *Id.*

137. Myers et al., *supra* note 26, at 121-22 (citations omitted). These reasons include the following: (1) expert may not express an opinion on truthfulness, (2) Rule 405(a) states that only general reputation for truthfulness may be testified to, (3) testimony concerning victim veracity does not assist the jury, (4) testimony concerning victim veracity will over-que the jury, (5) testimony concerning victim veracity invites battle of the experts, and (6) assessment of credibility is jury function. *Id.* at 122.

138. *Id.* at 110 n.468. See also Levy, *supra* note 66, at 391 (criticizing "children never lie" testimony).

allowed in *In re J.W.K.*¹³⁹ and *State v. Walters*¹⁴⁰ where experts testified unequivocally that children of that age either cannot or do not lie.¹⁴¹

The two final forms of expert testimony that Myers discusses are expert testimony identifying the perpetrator and expert testimony describing the profile of persons who abuse children.¹⁴² Myers states that no scientific research exists to support either type of testimony.¹⁴³ In addition, virtually all courts disallow expert testimony identifying the perpetrator and expert testimony describing the profile of persons who abuse children.¹⁴⁴ The Montana Supreme Court held in *State v. J.C.E.* that testimony that identified the defendant as the perpetrator was improper.¹⁴⁵ In *State v. Donnelly*,¹⁴⁶ although the expert witness did testify about the profile of persons who abuse children,¹⁴⁷ the Montana Supreme Court refused to consider the issue because the defendant did not object at trial.¹⁴⁸

IV. THE MONTANA SUPREME COURT'S JURISPRUDENCE ON EXPERT TESTIMONY IN CHILD SEXUAL ABUSE CASES

Beginning in approximately 1984, child sexual abuse cases began to reach the Montana Supreme Court with some regularity.

A. *State v. Clark*

In 1984 the Montana Supreme Court held in *State v. Clark*¹⁴⁹ that rebuttal testimony by a psychiatrist concerning why a child sexual abuse victim might recant was admissible.¹⁵⁰ In *Clark*, the expert witness was a psychiatrist. Dr. Stratford "testified that it is not unusual for a child initially to deny the number of times she has been sexually assaulted."¹⁵¹ He explained that "[d]enial occurs because 'oftentimes children feel filthy, dirty, ashamed, they feel

139. 223 Mont. 1, 4, 724 P.2d 164, 165-66 (1986).

140. 247 Mont. 84, 88-89, 806 P.2d 497, 499 (1991).

141. *J.W.K.*, 223 Mont. at 4, 724 P.2d at 165-66; *Walters*, 247 Mont. at 88-89, 806 P.2d at 499.

142. Myers et al., *supra* note 26, at 127-28.

143. *Id.* at 128, 144.

144. *Id.* at 144; Serrato, *supra* note 54, at 190.

145. 235 Mont. 264, 270, 767 P.2d 309, 313 (1988) (ruling that the identity of the alleged perpetrator was a jury question and not a question requiring expert opinion).

146. 244 Mont. 371, 798 P.2d 89 (1990).

147. *Id.* at 378, 798 P.2d at 93.

148. *Id.*

149. 209 Mont. 473, 682 P.2d 1339 (1984).

150. *Id.* at 496, 682 P.2d at 1352.

151. *Id.* at 495, 682 P.2d at 1351.

often guilty, responsible—they're basically afraid of upsetting the family constellation and they're afraid of what their parents—mother or step father—may do to them.'"¹⁵² A defense witness had earlier testified that the victim denied that any abuse occurred.¹⁵³ The court stated that "Dr. Stratford's explanation of children's denial or avoidance tactic directly contradicts the direct testimony of this defense witness. It indicates that [the victim's] denial reaction was typical of children who are sexual assault victims."¹⁵⁴

This kind of testimony is the type that most courts and commentators agree is proper expert testimony. It falls into Myers' category D: "Expert testimony to rehabilitate a child's credibility following impeachment in which the defendant asserts that behaviors such as recantation and delay in reporting are inconsistent with allegations of sexual abuse."¹⁵⁵

B. *In re J.W.K.*

In *J.W.K.*¹⁵⁶ a juvenile court proceeding, a thirteen-year-old was found guilty of sexually assaulting a five- and a six-year-old while babysitting.¹⁵⁷ The expert witness, a clinical psychologist, "testified that five and six year old children are unable to sustain a lie about sexual abuse."¹⁵⁸

First, the defendant challenged the qualifications of the expert.¹⁵⁹ Dr. Hossack was a licensed psychologist who had conducted hundreds of psychological evaluations—fifteen to twenty of his cases per year were related to sexual abuse. At the time, he was employed as a consultant for two public school systems and had previously worked with two pediatricians doing psychological exams for fifteen years.¹⁶⁰ The supreme court held that the district court did not abuse its discretion in qualifying Dr. Hossack as an expert.¹⁶¹

Second, the defendant challenged Dr. Hossack's testimony concerning whether the children could have fabricated their testi-

152. *Id.* at 496, 682 P.2d at 1351.

153. *Id.*

154. *Id.*

155. *See supra* text accompanying notes 82-88.

156. 223 Mont. 1, 724 P.2d 164 (1986).

157. *Id.* at 3-4, 724 P.2d at 165-66.

158. *Id.* at 4, 724 P.2d at 165-66.

159. *Id.* at 4, 724 P.2d at 166.

160. *Id.* at 4-5, 724 P.2d at 166.

161. *Id.* at 5, 724 P.2d at 166.

mony.¹⁶² The supreme court found that the victim's credibility was an issue because the defendant "denied the charge of sexual assault."¹⁶³ The court cited *State v. Brodniak*¹⁶⁴ for the proposition that "[a]n expert may not testify concerning the credibility . . . of a particular witness."¹⁶⁵ The court in *J.W.K.* said, however, that "testimony concerning the reliability of a particular class of witnesses, such as juvenile victims of sexual abuse, is admissible."¹⁶⁶ The Montana Supreme Court cited *Colorado v. Ashley*¹⁶⁷ and *Oregon v. Middleton*¹⁶⁸ as support for this proposition. In *Middleton*, the experts did not testify that children do not lie about sexual abuse. Rather, the experts gave testimony about reasons why children may recant or deny sexual abuse.¹⁶⁹ Thus, the supreme court's reliance on *Middleton* is misplaced.

The expert testimony in *J.W.K.* is category F under the Myers schema—"testimony that sexually abused children as a class, generally tell the truth about sexual abuse."¹⁷⁰ While Myers would allow rebuttal expert testimony that fabricated allegations of abuse are rare,¹⁷¹ the data do not support a statement that five- and six-year-olds cannot sustain a lie.¹⁷² The court in *J.W.K.*, in allowing expert testimony that five- and six-year-olds cannot sustain a lie, failed to cite any data showing that this type of testimony is reliable, which is required before the testimony may be admitted.¹⁷³

C. *State v. Geyman*

In *Geyman*¹⁷⁴ the court held that an expert could testify that in her or his opinion a particular victim was telling the truth.¹⁷⁵ In fact, the court permitted the expert witness, Dr. Jenni, to testify to a number of very controversial things which the supreme court did not discuss. Dr. Jenni testified that "children don't make up such

162. *Id.*

163. *Id.*

164. 221 Mont. 212, 222, 718 P.2d 322, 329 (1986).

165. *J.W.K.*, 223 Mont. at 5, 724 P.2d at 166.

166. *Id.*

167. 687 P.2d 473 (Colo. Ct. App. 1984). In *Ashley*, the court allowed the expert to testify that "sexual assault is not something that children fabricate." *Id.* at 474.

168. 657 P.2d 1215 (Or. 1983).

169. *Id.* at 1218-19.

170. *See supra* text accompanying notes 127-38.

171. *See supra* text accompanying notes 133-37.

172. *See supra* text accompanying note 138.

173. MONT. R. EVID. 702.

174. 224 Mont. 194, 729 P.2d 475 (1986).

175. *Id.* at 200, 729 P.2d at 479. The rule in *Geyman* has been characterized by two commentators as the "liberal view." MacEwen & Tamigi, *supra* note 54, at 148 n.37.

stories, and the research also backs that up. That it's like well under five percent of the cases that it's ever found out not to be true."¹⁷⁶ She also testified that she believed that the victim was sexually assaulted.¹⁷⁷ When asked on what she based that opinion, she testified that:

I base that on the story that he told me and that it was very credible. It was consistent. It was very anxiety producing for him. I mean he—he was not lying, and my general impression was that he was telling me the truth. That was a very painful story. That he would not have made up a story that was so painful to him.¹⁷⁸

The court in *Geyman* stated that the issue presented was “whether expert testimony concerning the credibility of a child alleged to have been the victim of a sexual assault should be admitted into evidence.”¹⁷⁹ Dr. Jenni gave three types of testimony: (1) that “children don’t make up such stories,” (2) that, in her opinion, the victim had been sexually abused; and (3) that she believed the victim was telling the truth.¹⁸⁰ The justices seemed to merge the different types of testimony that Dr. Jenni gave under the rubric of “testimony about credibility,” failing to analyze each type of testimony separately. However, as discussed in the previous section of this article, these types of testimony have been treated differently by courts and commentators.¹⁸¹ The court allowed all three types of testimony and stated that “expert testimony was admissible for the purpose of helping the jury to assess the credibility of a child sexual assault victim.”¹⁸²

What is even more puzzling about the *Geyman* opinion is that some of the cases the court relied upon were not cases in which this type of testimony was allowed. The justices placed special reliance on *Minnesota v. Myers*.¹⁸³ The Montana court stated that in *Myers* “[t]he court held that it was within the trial court’s discretion to admit testimony describing the psychological and emotional characteristics typically observed in sexually abused children and those observed in the complainant.”¹⁸⁴ The court stated that this type of testimony gives the jury information that it would not oth-

176. *Geyman*, 224 Mont. at 200, 729 P.2d at 479.

177. *Id.*

178. *Id.*

179. *Id.* at 196, 729 P.2d at 477.

180. *Id.* at 200, 729 P.2d at 479.

181. See *supra* text accompanying notes 79-81 (discussion of *Myers* Category C); *supra* text accompanying notes 96-141 (discussion of *Myers* Category F).

182. *Geyman*, 224 Mont. at 200, 729 P.2d at 479.

183. 359 N.W.2d 604 (Minn. 1984).

184. *Geyman*, 224 Mont. at 197-98, 729 P.2d at 478.

erwise have to help it evaluate the victim's credibility.¹⁸⁵ The problem with the court's analysis is that testimony about the characteristics observed in sexually abused children and those of the complainant is very different from testimony in which the expert witness says either "I believe the victim was sexually abused" or "I believe the witness is telling the truth;" both of these occurred in *Geyman*. Most courts and commentators favor the former type of testimony but not the latter.¹⁸⁶

The court in *Geyman* also relied on *Oregon v. Middleton*.¹⁸⁷ The evidence allowed in *Middleton*, however, was of quite a different sort. In *Middleton*, the victim had recanted her testimony.¹⁸⁸ The State's expert testified that the "stress on a child from an intra-family sexual assault can cause denial to occur."¹⁸⁹ Everyone agrees that testimony to rebut charges of recantation is proper. The Montana Supreme Court had already found testimony to rebut evidence of recantation admissible in 1984, in *State v. Clark*.¹⁹⁰ Expert testimony to rebut evidence that the victim recanted, however, is very different from an expert expressing her personal opinion that the victim is telling the truth.

The court in *Geyman* also relied on *State v. Kim*,¹⁹¹ which did allow an expert to testify as to his personal opinion of the witness's credibility.¹⁹² The court in *Geyman* quoted the following from *Kim*:

When . . . the nature of a witness' [sic] mental or physical condition is such that the common experience of the jury may represent a less than adequate foundation for assessing the credibility of a witness, the testimony of an expert is far more likely to be of value, and thus more likely to be admissible when its probative value is measured against its prejudicial effects.¹⁹³

Kim has been criticized for not addressing the basic issue of whether witness credibility is a proper subject of expert testimony.¹⁹⁴

The problem with the *Geyman* and *Kim* opinions is that neither distinguishes between testimony to acquaint the jury with

185. *Id.* at 198, 729 P.2d at 478.

186. *See supra* text accompanying notes 61-78 and 96-125.

187. 657 P.2d 1215 (Or. 1983).

188. *Id.* at 1216.

189. *Geyman*, 224 Mont. at 199, 729 P.2d at 479.

190. 209 Mont. 473, 682 P.2d 1339 (1984). *See also* text accompanying notes 82-87.

191. 645 P.2d 1330 (Haw. 1982).

192. *Id.* at 1339.

193. *Geyman*, 224 Mont. at 199-200, 729 P.2d at 479 (quoting *Kim*, 645 P.2d at 1337).

194. *See Baker, supra* note 113, at 1050.

behaviors that are common to victims of child sexual abuse, and of which the jury may not be aware, and testimony which expresses an opinion such as, "I believe the witness." The latter type of evidence is improper because no reliable data exist to support the reliability of expert opinions on credibility. The evidence cannot be proven reliable because there is no evidence that child abuse experts have particular expertise in the area of general credibility.¹⁹⁵ Another reason this testimony is improper is because it may sway the jury.¹⁹⁶ The court in *Kim* set out a framework that requires an explanation of the basis of such testimony,¹⁹⁷ while the court in *Geyman* required no such foundation. Myers would prohibit such testimony.¹⁹⁸

D. *State v. French*

In *French*¹⁹⁹ a school counselor with a master's degree in counseling and a bachelor's degree in education was permitted to testify as an expert.²⁰⁰ The school counselor would clearly not have been qualified under the guidelines set forth in *Scheffelman*²⁰¹ and should not have been qualified as an expert here.²⁰² The issue of expert qualification, however, was not directly before the court in *French*. The defendant did, however, appeal the issue of whether the expert should have been allowed to testify that the victim was telling the truth.²⁰³ The school counselor testified that "[t]here is no question in my mind that what she told me was the truth."²⁰⁴

The supreme court relied on *Geyman* and cited the following: "An expert witness's testimony merely aids the jurors in assessing a child's credibility."²⁰⁵ The problem is that the above statement, "[T]here is no question in my mind that what she told me was the truth,"²⁰⁶ does not aid the jury in any way. Testimony about why children who have been abused may recant or may delay reporting or about what children's perception and memory is like can aid the jury. It explains something about which the jurors may not be fa-

195. See *supra* text accompanying notes 96-101.

196. See *supra* text accompanying notes 99-109.

197. *Kim*, 645 P.2d at 1336-37.

198. Myers et al., *supra* note 26, at 127. See *supra* text accompanying notes 110-14.

199. 233 Mont. 364, 760 P.2d 86 (1988).

200. *Id.* at 366, 760 P.2d at 87.

201. *State v. Scheffelman*, 250 Mont. 334, 342, 820 P.2d 1293, 1298 (1991).

202. At least one commentator has criticized *French* for qualifying a school counselor. See Baker, *supra* note 113, at 1051.

203. *French*, 233 Mont. at 367, 760 P.2d at 87.

204. *Id.* at 368, 760 P.2d at 88.

205. *Id.* at 368, 760 P.2d at 89 (citing *Geyman*, 224 Mont. at 200, 729 P.2d at 479).

206. *Id.* at 368, 760 P.2d at 88.

miliar. The court in *French* could have disregarded the testimony issue altogether by simply deciding that school counselors have no particular qualifications to testify about credibility. As in *Geyman*, this is testimony on credibility which most legal commentators believe should be excluded.²⁰⁷

E. *State v. Eiler*

In *Eiler*²⁰⁸ the defendant directly challenged the qualifications of the expert.²⁰⁹ The defendant alleged that because Dr. Jarvis did not have a degree in child psychology, he was not an expert in child psychology.²¹⁰ Dr. Jarvis held a Ph.D. in psychology and a masters degree in counseling and guidance.²¹¹ Seventy percent of his practice involved children who allegedly had been sexually abused and he had attended several workshops on child psychology and sexual abuse.²¹² Furthermore, he was clinical director of a sexual abuse clinic in Havre, Montana.²¹³ The district court found Dr. Jarvis to be an expert.²¹⁴ The court in *Eiler* obviously did not apply the strict standards for admissibility which the Myers article suggests.²¹⁵

F. *State v. J.C.E.*

In *J.C.E.*²¹⁶ the court cut back slightly on the rule that an expert can give an opinion that the victim is telling the truth. In *J.C.E.* the State attempted to admit the testimony of an expert who planned to say that she believed the victim's story.²¹⁷ The four-year-old victim was found not competent to testify.²¹⁸ The court excluded the expert's opinion precisely because the victim was not going to testify and thus her credibility would not become an issue. For that reason, the court found the testimony irrelevant.²¹⁹

The court in *J.C.E.* also prohibited the expert from identifying

207. See *supra* text accompanying notes 96-109.

208. 234 Mont. 38, 762 P.2d 210 (1988).

209. *Id.* at 51, 762 P.2d at 218.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. See *infra* text accompanying note 296.

216. 235 Mont. 264, 767 P.2d 309 (1988).

217. *Id.* at 269, 767 P.2d at 312.

218. *Id.* at 267, 767 P.2d at 311.

219. *Id.* at 269-70, 767 P.2d at 313.

the defendant as the perpetrator.²²⁰ The court relied on *Townsend v. State*,²²¹ which held that testimony identifying the perpetrator “transcended the test of jury enlightenment and entered the realm of fact-finding that was within the capacity of a lay jury.”²²² The court observed that “[e]xpert testimony involves a witness rendering an opinion using their superior knowledge of a subject not commonly understood by lay persons.”²²³ Myers and most other legal commentators would exclude testimony identifying the perpetrator.²²⁴

G. *State v. Hall*

*State v. Hall*²²⁵ presented different facts than the usual child sexual abuse case. Hall accosted a six-year-old, whom he did not know, in the public library.²²⁶ The child victim reported the abuse to her mother the same day as the incident, and medical evidence was subsequently obtained.²²⁷ Two experts, both psychologists, testified in the case.²²⁸ The victim also testified, and defense counsel challenged her ability to identify the abuser and raised the possibility of undue influence.²²⁹ The two experts, in order to rehabilitate the victim’s credibility, testified that the victim’s account was “a consistent coherent story,”²³⁰ that she was telling the story “as it occurred to her,”²³¹ and that she “could pick out that individual that offended her.”²³² One of the experts also offered an opinion on the ability of children to be accurate eyewitnesses.²³³

The defendant, relying on *State v. J.C.E.*, argued that this was testimony identifying the defendant as the perpetrator and thus was not admissible.²³⁴ The court in *J.C.E.* disallowed that type of testimony.²³⁵ The court in *Hall* distinguished *J.C.E.* and stated that the doctors were not allowed to testify as to the identity of

220. *Id.* at 270, 767 P.2d at 313.

221. 734 P.2d 705 (Nev. 1987).

222. *J.C.E.*, 235 Mont. at 270, 767 P.2d at 313 (quoting *Townsend*, 734 P.2d at 708).

223. *Id.* at 268-69, 767 P.2d at 312.

224. See *supra* note 144 and accompanying text.

225. 244 Mont. 161, 797 P.2d 183 (1990).

226. *Id.* at 163, 797 P.2d at 184-85.

227. *Id.* at 163, 797 P.2d at 185.

228. *Id.* at 172, 797 P.2d at 190.

229. *Id.* at 173, 797 P.2d at 191.

230. *Id.* at 172, 797 P.2d at 190.

231. *Id.*

232. *Id.*

233. *Id.* at 173, 797 P.2d at 190.

234. *Id.* at 173, 797 P.2d at 191.

235. *J.C.E.*, 235 Mont. at 269-70, 767 P.2d at 313.

the defendant but were allowed to testify whether the victim was capable of identifying her offender because the defendant placed the matter in dispute.²³⁶ The court decided that “[a] subissue of the identity issue was the ability of a child of tender age to be accurate in identification. Expert testimony on the subissue was especially valuable here, as a matter helpful to the jury to understand the evidence, and to determine a fact in issue”²³⁷

The testimony about children’s ability to be eyewitnesses was completely proper. The statements that the victim was telling “a consistent coherent story”²³⁸ and she was telling her story “as it occurred to her”²³⁹ approached the bounds of inadmissible testimony just as do statements that “the victim was credible.” The experts in *Hall*, however, seemed much more careful in their testimony than the experts in *French*, *Geyman*, and *Scheffelman*. In addition, the defendant did not expressly challenge the fact that the experts were commenting on credibility. The type of testimony offered in *Hall* is type E in the Myers’ typology, “expert testimony to rehabilitate a child’s credibility following impeachment in which the defendant argues that developmental differences between adults and children render children less credible witnesses than adults,” and Myers would admit it.²⁴⁰

H. *State v. Donnelly*

In *Donnelly*²⁴¹ the expert was allowed to testify that the victim was a sexually abused child.²⁴² At trial, the expert, a child psychologist

testified concerning general symptoms often found in children who have been sexually abused, including disruption in development, acting out, withdrawal or aggression, low self-esteem, nightmares and flashbacks, depression, antisocial behavior, and self-destructive behavior. . . . [and] that there is a direct link between severe sexual trauma in childhood and the development of multiple personality disorder.²⁴³

The expert concluded that the victim fit the profile of a sexually

236. *Hall*, 244 Mont. at 173, 797 P.2d at 191.

237. *Id.* at 174, 797 P.2d at 191.

238. *Id.* at 173, 797 P.2d at 190.

239. *Id.*

240. See *supra* text accompanying notes 89-95.

241. 244 Mont. 371, 798 P.2d 89 (1990).

242. *Id.* at 374, 798 P.2d at 91.

243. *Id.*

abused child.²⁴⁴

Courts and commentators have criticized this type of testimony. Under the Myers analysis, this type of testimony, category C, should be excluded.²⁴⁵ The symptoms that the victim exhibited were quite general. In addition, the statement that the victim fit the profile of a sexually abused child is improper. Although the expert did not say "I believe that the victim was sexually abused," she did testify that the victim fit the "profile"²⁴⁶ of a sexually abused child. Most commentators and psychologists doubt that there is a "profile of the sexually abused child."²⁴⁷

The expert in *Donnelly* also testified as to the characteristics of sex offenders.²⁴⁸ On appeal, the supreme court refused to consider the issue because the defendant failed to object at trial.²⁴⁹ Nevertheless, commentators agree that no basis exists for testimony about the profile of a sex offender.²⁵⁰

In a very curious part of the opinion, the court in *Donnelly* states that "[t]he district court allowed expert testimony as to whether Janey Doe had been subject to sexual abuse, but ruled that the precise issue of credibility could not be addressed in a final conclusion of the expert."²⁵¹ It is difficult to determine what this means. Perhaps the district court ruled that the expert could testify that Janey Doe had been the subject of sexual abuse but that the expert could not say "I believe that Janey is telling the truth." The supreme court stated that the district court order was consistent with the supreme court's opinion in *Geyman*.²⁵² However, if the district court meant that the witness could not express an opinion as to Janey Doe's credibility, then the order conflicts with *Geyman*.

I. *State v. Harris*

The *Harris*²⁵³ case may signal a change in the court's attitude toward child sexual abuse cases. Prior to *Harris*, the court generally included expert testimony in child sexual abuse cases. *Harris* represents the first major limitation on expert testimony in child

244. *Id.*

245. See *supra* text accompanying notes 79-81.

246. *Donnelly*, 244 Mont. at 374, 798 P.2d at 91.

247. See *supra* text accompanying notes 76-77.

248. *Donnelly*, 244 Mont. at 378, 798 P.2d at 93.

249. *Id.*

250. See *supra* text accompanying note 144.

251. *Donnelly*, 244 Mont. at 378, 798 P.2d at 93.

252. *Id.*

253. 247 Mont. 405, 808 P.2d 453 (1991).

sexual abuse cases in Montana; it expresses skepticism of therapists and expert testimony in general.

In *Harris* the psychotherapist testified that the victim "was 'a little, honest, open country boy [H]e's a pretty trustworthy child [He] is very honest.'"²⁵⁴ Defendant challenged this testimony as an improper comment on the victim's credibility.²⁵⁵ The court first observed that "[e]xpert testimony regarding credibility improperly invades the jury's function by placing a stamp of scientific legitimacy on the victim's allegations."²⁵⁶ Citing *State v. Brodniak*,²⁵⁷ the court held that generally such testimony is not permitted,²⁵⁸ but that the court had earlier carved out child sexual abuse as the sole exception to that rule.²⁵⁹ The court noted, however, that it had narrowed the exception in *J.C.E.* to only those cases where the victim testified at trial.²⁶⁰ The court in *Harris* said that in *State v. Hall*, the court had narrowed the exception even further by limiting testimony about the credibility of the victim to those instances where the victim's credibility was brought into question.²⁶¹ Whether *Hall* actually placed this limitation on expert testimony is unclear. The court in *Harris* stated that in *Hall*, the victim's credibility was called into question.²⁶² However, the *Hall* court did not hold that it was necessary in all cases that credibility be called into question first.²⁶³ In *Harris* the court concluded that because the victim's credibility was not called into question by the defense, the testimony was improper.²⁶⁴ This interpretation of the record can also be questioned because, during cross-examination of the victim's mother, defense counsel asked whether the victim initially denied the abuse.²⁶⁵

According to scholars in the field of expert testimony in child sexual abuse cases such as Myers, the testimony in *Harris* was improper.²⁶⁶ The statement that the victim is "an open country

254. *Id.* at 409, 808 P.2d at 455.

255. *Id.*

256. *Id.*

257. 221 Mont. 212, 718 P.2d 322 (1986).

258. *Harris*, 247 Mont. at 409-10, 808 P.2d at 455 (citing *Brodniak*, 221 Mont. at 222, 718 P.2d at 329).

259. *Id.* at 410, 808 P.2d at 455 (citing *State v. Geyman*, 224 Mont. 194, 200, 729 P.2d 475, 479 (1986)).

260. *Id.* (citing *State v. J.C.E.*, 235 Mont. 264, 269, 767 P.2d 309, 312-13 (1988)).

261. *Id.* (citing *State v. Hall*, 244 Mont. 161, 173, 797 P.2d 183, 191 (1990)).

262. *Id.*

263. *Hall*, 244 Mont. at 173, 797 P.2d at 191.

264. *Harris*, 247 Mont. at 410, 808 P.2d at 455-56.

265. *Id.* at 410, 808 P.2d at 456.

266. See *supra* note 96 and accompanying text.

boy"²⁶⁷ who is "very honest"²⁶⁸ is not a statement based upon scientific data or a statement based upon the expert's special expertise.²⁶⁹ Testimony about the honesty of the victim is very different from testimony that describes symptoms of sexual abuse or discusses the data on whether children have the ability to separate fantasy from reality. Thus, the *Harris* court correctly excluded testimony about the credibility of the victim. The testimony in *Harris* concerning the honesty of the victim obviously displeased the court—and for good reason. However, instead of completely banning testimony about the victim's credibility, the court stated that the victim's credibility had not been questioned.

The court's displeasure with testimony about victim credibility is evident later in the *Harris* opinion on the issue of when hearsay statements of the victim are allowed. The court concluded "that only in an extraordinary case will hearsay testimony by a therapist concerning the identity of the perpetrator or the nature of the abuse possess sufficient circumstantial guarantees of trustworthiness to be admissible into evidence."²⁷⁰ The court mentioned the following about therapists:

A therapist does not see a child for treatment of the effects of sexual abuse unless there has been a claim that the child has been sexually abused. The therapist is therefore arguably predisposed to confirm what he or she has been told. We conclude that the nature of the relationship between a therapist and a child client has a negative impact on the trustworthiness of the hearsay statement. We further conclude that, in general, the circumstances in which a therapist hears a child's statement about sexual abuse are not such that a hearsay statement by the therapist will possess circumstantial guarantees of trustworthiness.²⁷¹

There were two strong dissents in *Harris*. Justice Weber, referring to the majority opinion, stated that "I am shocked that such statements are made in this case."²⁷² Justice Harrison was also shocked by the majority's statement that a therapist is predisposed to find abuse.²⁷³

267. *Harris*, 247 Mont. at 409, 808 P.2d at 455.

268. *Id.*

269. See Myers et al., *supra* note 26, at 127; *supra* notes 96-98 and accompanying text.

270. *Harris*, 247 Mont. at 415-16, 808 P.2d at 459.

271. *Id.* at 415, 808 P.2d at 459.

272. *Id.* at 420, 808 P.2d at 462 (Weber, J., dissenting) (regarding statements about therapist-client relationship).

273. *Id.* at 426, 808 P.2d at 466 (Harrison, J., dissenting).

J. State v. Walters

In *Walters*²⁷⁴ the victim was a three-year-old girl.²⁷⁵ At trial, a social worker for the Department of Family Services who interviewed the victim once after the incident testified that the victim "was a verbal three-year-old girl who was able to relate a truthful story."²⁷⁶ A psychologist to whom the victim was referred testified that the victim's "behavior was consistent with that of a sexually abused child . . . [and] that a three- to four-year-old child is incapable of fabricating such an incident."²⁷⁷

The defendant challenged only the testimony concerning the child victim meeting the profile of a sexually abused child,²⁷⁸ not the testimony relating to credibility. The defendant argued that the testimony was unreliable and that the court should have used the *Frye* test²⁷⁹ to determine reliability because expert testimony about the profile of a sexually abused child is novel.²⁸⁰ The court rejected this argument, stating that testimony about the profile of a sexually abused child is not novel in Montana.²⁸¹ The court held that it had "sanctioned expert testimony concerning sexual abuse and specifically has allowed expert testimony concerning a child fitting the profile of a sexually abused child."²⁸²

Most commentators, including Myers, agree that testimony about the "profile" of a sexually abused child is improper because no general agreement exists about what the profile is.²⁸³ Testimony that a child has certain characteristics which indicate sexual abuse differs from testimony that a child fits the profile of a sexually abused child.²⁸⁴ It is difficult to determine from the *Walters* opinion whether the psychologist testified that there was a child sexual abuse syndrome. If so, the testimony should not have been admitted. The court said, however, that it had previously held that syn-

274. 247 Mont. 84, 806 P.2d 497 (1991).

275. *Id.* at 86, 806 P.2d at 498.

276. *Id.* at 88, 806 P.2d at 499.

277. *Id.* at 88-89, 806 P.2d at 499.

278. *Id.* at 90, 806 P.2d at 500-01.

279. The *Frye* test refers to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (requiring that scientific evidence be generally accepted in the particular scientific field). For discussion of the *Frye* test, see McCord, *Syndromes*, *supra* note 79, at 82-86; Myers et al., *supra* note 26, at 23-29.

280. *Walters*, 247 Mont. at 91, 806 P.2d at 501.

281. *Id.*

282. *Id.*

283. See *supra* text accompanying notes 76-77.

284. See *Walters*, 247 Mont. at 88-89, 806 P.2d at 499 (determining that symptoms displayed in *Walters* were classic).

drome evidence was admissible and cited *Donnelly* for support.²⁸⁵

K. *State v. McLain*

In *McLain*²⁸⁶ the court allowed an expert to testify that the victim was credible in her reporting of the event.²⁸⁷ Relying on *Harris*, *Geyman*, and *French*, the court held that “[g]enerally, such testimony is admissible when the child testifies at trial and the child’s credibility is brought into question.”²⁸⁸ In this case, after the victim testified, the defendant’s counsel attempted to impeach her testimony by setting forth inconsistencies between her testimony and other statements she had previously given.²⁸⁹ The expert explained the reasons why inconsistencies often occur in the context of child sexual abuse.²⁹⁰ Myers and almost all legal commentators in the area believe that evidence used to explain why there may be inconsistencies in a child’s testimony should be admissible.²⁹¹ The comment that the witness was credible is a comment on credibility—one of which most commentators disapprove.²⁹²

In summary, the Montana Supreme Court has historically been extremely liberal in admitting almost all types of expert testimony in child sexual abuse cases. Cases such as *Harris*, *Scheffelman* and *Hensley* may, however, indicate a change in how the court views these cases.

IV. A PROPOSAL FOR CHANGE

In *State v. Scheffelman* the Montana Supreme Court correctly tightened the rules on the qualification of experts in the area of child sexual abuse in Montana. The court in *Scheffelman* quoted Myers for the critical factors needed to qualify an expert witness.²⁹³ Those factors are: “(1) extensive firsthand experience with sexually abused and non-sexually abused children; (2) thorough and up-to-date knowledge of the professional literature on child sexual abuse; and (3) objectivity and neutrality about individual

285. *Id.* at 91, 806 P.2d at 501 (citing *State v. Donnelly*, 244 Mont. 371, 378, 798 P.2d 89, 93 (1990)).

286. 249 Mont. 242, 815 P.2d 147 (1991).

287. *Id.* at 245, 815 P.2d at 150.

288. *Id.*

289. *Id.* at 246, 815 P.2d at 150.

290. *Id.*

291. See *supra* text accompanying notes 82-88.

292. See *supra* text accompanying notes 96-126.

293. *State v. Scheffelman*, 250 Mont. 334, 342, 820 P.2d 1293, 1298 (1991) (citing Myers et al., *supra* note 26, at 11-12).

cases, as are required of other experts."²⁹⁴ According to Myers,

not all physicians, psychiatrists, psychologists, and social workers are qualified in the highly specialized field of child sexual abuse. In actuality, only a small fraction of professionals in these disciplines possess sufficient knowledge and experience to qualify as experts. Courts should insist on a thorough showing of expertise before ruling that an individual is qualified to testify as an expert on child sexual abuse.²⁹⁵

The Myers article also suggests a more complete list of questions which should be answered before an expert is qualified. The following list provides the Montana Supreme Court with a clear set of guidelines for qualifying potential experts:

1. Educational attainments and degrees.
2. Specialization in a particular area of practice.
3. Specialized training in child sexual abuse.
4. Extent of experience with sexually abused and non-sexually abused children.
5. Familiarity with relevant professional literature.
6. Membership in professional societies and organizations focused on child abuse.
7. Publications regarding child sexual abuse.
8. Whether the person has been qualified as an expert on child sexual abuse in prior court proceedings.²⁹⁶

The court should make clear, as does Myers, that a witness need not be the foremost authority in the field to be an expert.

The court's jurisprudence in this area and its discomfort in recent cases such as *Harris*,²⁹⁷ *Scheffelman*,²⁹⁸ and *Hensley*²⁹⁹ demonstrate that the court should clearly formulate rules for what experts may testify to in child sexual abuse cases in Montana. The court should promulgate rules following the schema created by Myers and his fellow authors in the Nebraska Law Review article. This Article now will follow that schema, make recommendations, and demonstrate how the recommendations will change existing case law in Montana.

294. *Id.*

295. Myers et al., *supra* note 26, at 12 (footnotes omitted).

296. *Id.* at 10.

297. 247 Mont. 405, 808 P.2d 453 (1991).

298. 250 Mont. 334, 820 P.2d 1293 (1991).

299. 250 Mont. 478, 821 P.2d 1029 (1991).

A. *Medical Evidence of Child Sexual Abuse*³⁰⁰

No dispute exists among courts or legal commentators that testimony about medical evidence of child sexual abuse should clearly be allowed. This would not be a change from current Montana practice.

B. *Expert Testimony Describing Behaviors Commonly Observed in Sexually Abused Children*³⁰¹

Testimony which describes behaviors commonly observed in sexually abused children should be allowed with certain caveats. Myers believes that a clinical consensus has developed about the way children react emotionally and behaviorally to sexual abuse.³⁰² General symptoms such as fear, anxiety, or avoidance, however, also relate to other traumatic experiences and may not be attributable to sexual abuse alone.³⁰³ Experts should generally be allowed to testify about behaviors commonly observed in sexually abused children.³⁰⁴ Myers cautions, however, that it is vitally important not to allow "syndrome" testimony because "[a]t the present time, experts have not achieved consensus on the existence of a psychological syndrome that can detect child sexual abuse."³⁰⁵ Forbidding syndrome evidence would change Montana law, since the Montana Supreme Court allowed syndrome testimony in *State v. Donnelly*³⁰⁶ and *State v. Walters*.³⁰⁷

C. *Expert Testimony on Whether a Child was Sexually Abused*³⁰⁸

Montana case law currently allows an expert both to testify about whether the child exhibited symptoms of sexual abuse and to express an opinion about whether the child was sexually abused.³⁰⁹ The most prudent course here is to allow testimony that a child's symptoms are consistent with sexual abuse;³¹⁰ since schol-

300. See *supra* notes 57-60 and accompanying text.

301. See *supra* notes 61-78 and accompanying text.

302. Myers et al., *supra* note 26, at 54-55.

303. *Id.*

304. *Id.*

305. *Id.*

306. 244 Mont. 371, 378, 798 P.2d 89, 93 (1990).

307. 247 Mont. 84, 91, 806 P.2d 497, 501 (1991).

308. See *supra* notes 79-81 and accompanying text.

309. See generally Scheffelman, 250 Mont. at 342, 820 P.2d at 1298-99; *Donnelly*, 244 Mont. at 378, 798 P.2d at 93; *State v. Geyman*, 224 Mont. 194, 200-01, 729 P.2d 475, 479-80 (1986).

310. See Myers et al., *supra* note 26, at 75 ("Recent research lends empirical support

ars disagree about whether experts can determine if abuse occurred.³¹¹ Myers suggests that “[b]ecause of disagreement among experts on child sexual abuse, and because of the consequences of criminal conviction, it may be appropriate in criminal jury trials to eschew behavioral science testimony cast in terms of a direct opinion that sexual abuse occurred.”³¹² Myers suggests that testimony that the particular child exhibits certain symptoms of child sexual abuse and statements “that a child’s symptoms and behavior are consistent with sexual abuse” be allowed.³¹³ Although some would argue that this is a distinction without a difference, it is more prudent considering the concerns expressed by some that experts in the field are not qualified to express a direct opinion that abuse occurred. Thus, the Montana Supreme Court should adopt a rule that experts can testify that a child exhibits certain symptoms of child sexual abuse and that these symptoms are consistent with sexual abuse, but that it is not proper for an expert to testify that, “I believe that the child was a victim of sexual abuse.” This would change Montana practice by overruling those respective parts of *Scheffelman*,³¹⁴ *Geyman*,³¹⁵ and *Donnelly*³¹⁶ that currently allow experts to testify that they believe that a victim experienced sexual abuse.

*D. Expert Testimony to Rehabilitate a Child’s Credibility Following Impeachment in Which the Defendant Asserts that Behaviors such as Recantation and Delay in Reporting are Inconsistent with Allegations of Sexual Abuse*³¹⁷

Rehabilitation testimony to explain recantation and delay in reporting is almost universally allowed elsewhere as it is in Montana.³¹⁸ The Montana Supreme Court approved of this testimony in *State v. Clark*.³¹⁹ Testimony of this nature should continue to be allowed and would not require a change in current Montana practice.

to the clinical conclusion that properly qualified professionals can determine whether a child’s symptoms and behavior are consistent with sexual abuse.”).

311. See *supra* note 79 and accompanying text.

312. Myers et al., *supra* note 26, at 85.

313. *Id.*

314. 250 Mont. 334, 820 P.2d 1293 (1991).

315. 224 Mont. 194, 729 P.2d 475 (1986).

316. 244 Mont. 371, 798 P.2d 89 (1990).

317. See *supra* notes 82-88 and accompanying text.

318. See *supra* note 82 and accompanying text.

319. 209 Mont. 473, 496, 682 P.2d 1339, 1350-51 (1984). See *supra* notes 146-52 and accompanying text.

*E. Expert Testimony to Rehabilitate a Child's Credibility Following Impeachment in Which the Defendant Argues that Developmental Differences Between Adults and Children Render Children Less Credible Witnesses than Adults*³²⁰

Rehabilitation testimony following testimony that children are less credible witnesses than adults should be allowed as rebuttal evidence if the defense challenges the ability of a child witness to either tell a credible story or to identify the perpetrator. It acquaints jurors with developmental capabilities and limitations of children as witnesses.³²¹ Testimony that children are not necessarily less credible witnesses than adults was properly allowed in *State v. Hall*³²² and would not change Montana law.

*F. Expert Testimony that a Particular Child or Sexually Abused Children as a Class Generally Tell the Truth About Sexual Abuse*³²³

Expert testimony that a particular child victim is credible should not be permitted for two reasons. First, there is no data that psychologists are particularly qualified to judge credibility or, in any event, are any more qualified than jurors.³²⁴ Moreover, the possibility that jurors will give too much credence to the opinion of an expert that a particular child is telling the truth militates against admission.³²⁵ Second, it is not particularly helpful to the jury. It does not tell jurors anything about sexual abuse that the jurors do not already know. This type of testimony is currently allowed in Montana³²⁶ and should be changed.

Expert testimony that it is unusual for children to fabricate a claim of sexual abuse, however, should be allowed to rebut a defense assertion that children generally lie.³²⁷ Experts should not be allowed to make statements such as "children don't fabricate." The data do not support these statements.³²⁸ Montana district courts have previously allowed testimony that "children don't lie" or that "children of a certain age are "incapable of fabrication."³²⁹

320. See *supra* notes 89-95 and accompanying text.

321. See Myers et al., *supra* note 26, at 108.

322. 244 Mont. 161, 173-74, 797 P.2d 183, 190-91 (1990).

323. See *supra* notes 96-141 and accompanying text.

324. See Myers et al., *supra* note 26, at 127.

325. *Id.*

326. See *State v. McLain*, 249 Mont. 242, 245-46, 815 P.2d 147, 150 (1991); *Geyman*, 224 Mont. at 200-01, 729 P.2d at 479-80.

327. See Myers, *supra* note 10, at 1726-27.

328. See Myers et al., *supra* note 26, at 127.

329. See *Walters*, 247 Mont. at 89, 806 P.2d at 499; *In re J.W.K.*, 223 Mont. 1, 4, 724

The Montana Supreme Court should change this standard and prohibit such testimony.

*G. Expert Testimony Identifying the Perpetrator*³³⁰

Expert testimony that identifies the perpetrator of the crime is not currently allowed in Montana and should remain inadmissible.³³¹

*H. Expert Testimony Describing the Profile of Persons who Abuse*³³²

Testimony that describes the profile of a child abuser should not be permitted. The Montana Supreme Court has never ruled on this specific issue. Testimony describing the profile of abusers was permitted by the district court in *State v. Donnelly*.³³³ The supreme court, however, refused to consider the issue on appeal because the defendant had not objected at trial.³³⁴

VI. CONCLUSION

This Article proposes changes in the court's jurisprudence regarding testimony in child sexual abuse cases. The following types of testimony should be disallowed:

1. Testimony about child sexual abuse "syndromes."
2. Testimony concerning a personal belief that a child was sexually abused. However, an expert could testify about the particular child's symptoms and that those symptoms are consistent with sexual abuse.
3. Testimony that the expert believes that the child was telling the truth.
4. Testimony that children never lie.
5. Testimony describing a profile of a child abuser.

In addition, the court should continue to disallow testimony that identifies the perpetrator of the crime.

The following types of testimony should still be allowed:

1. Medical evidence of child sexual abuse.
2. Expert testimony about the symptoms of sexual abuse

P.2d 164, 165-66 (1986).

330. See *supra* note 138-41 and accompanying text.

331. See *State v. J.C.E.*, 235 Mont. 264, 269-70, 767 P.2d 309, 313 (1988). See also Myers et al., *supra* note 26, at 144.

332. See *supra* notes 138-40 and 142-44 and accompanying text.

333. 244 Mont. 371, 378, 798 P.2d 89, 93 (1990).

334. *Id.*

which the particular child may exhibit. This testimony should be allowed with the caveat that extremely general symptoms such as anxiety are not probative in and of themselves of abuse.

3. Expert testimony in rebuttal to explain behaviors such as recantation and delay in reporting after the defense asserts that these behaviors imply that the child is not telling the truth.

4. Expert testimony in rebuttal about the development of capabilities of children after the defense asserts that such developmental differences between children and adults render children less credible.

5. Expert testimony on rebuttal that false accusations are statistically rare if the defendant asserts otherwise.

The Montana Supreme Court, like courts nationwide, has struggled with the difficult issue of child sexual abuse. The Montana Supreme Court's opinions in sexual abuse cases demonstrate an attempt to balance the needs of the child victim with the defendant's right to a fair trial. The court has been extremely liberal in the types of expert testimony that it has held to be admissible in child sexual abuse cases. However, the court's more recent opinions in *Harris*, *Scheffelman*, and *Hensley* indicate a departure from that liberal trend.

The time has come for the court to systematically review the entire area of expert testimony in child sexual abuse cases. This Article suggests modest changes in the court's jurisprudence in this area and a more conservative approach to the admissibility of expert testimony in child sexual abuse cases.

Stricter evidentiary rules will foster confidence in the legal system. This Article proposes a middle-of-the-road position. Useful expert testimony should still be allowed, but testimony for which no basis in behavioral science exists should be excluded. This Article calls for objectivity in the issue of expert testimony in child sexual abuse cases. Child sexual abuse is a tragic problem, but no one is helped by uncertainty as to what evidence will be admissible and what will not. Everyone, including the victims, will benefit from clear rules on the subject of expert testimony in child sexual abuse cases.

