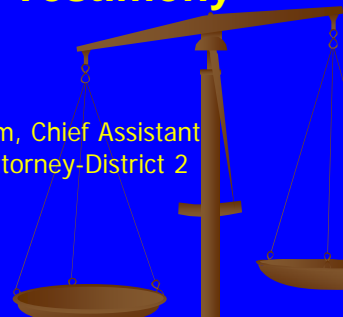



Expert Testimony

Tom Anglim, Chief Assistant
District Attorney-District 2



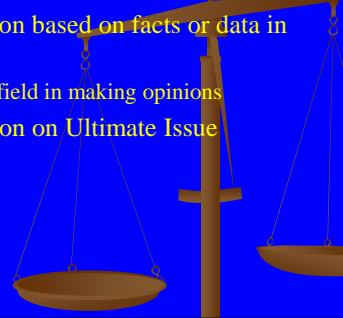
An Expert?

- Rule: 702(a): Assist Trier of fact?
 - Testify in the form of an opinion
- Ultimate Issue?
 - Yes



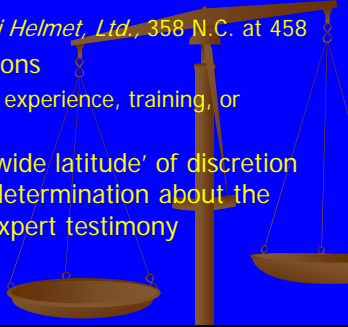
What can an expert testify about?

- Rule 703: Opinion based on facts or data in case
 - Relied upon in field in making opinions
- Rule 704: Opinion on Ultimate Issue



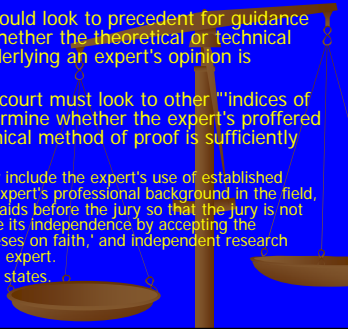
Case Law

- Admissibility
 - *Howerton v. Aral Helmet, Ltd.*, 358 N.C. at 458
- Expert Qualifications
 - knowledge, skill, experience, training, or education
- Trial courts get 'wide latitude' of discretion when making a determination about the admissibility of expert testimony



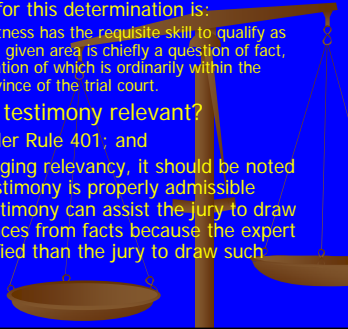
Howerton three step process:

1. Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony?
 - a. The trial court should look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable.
 - b. If none, the trial court must look to other "'indices of reliability' to determine whether the expert's proffered scientific or technical method of proof is sufficiently reliable."
 - (1) Such indices may include the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked "to sacrifice its independence by accepting the scientific hypotheses on faith," and independent research conducted by the expert.
 - (2) Cases from other states.



Howerton three step process:


2. Is the witness testifying at trial qualified as an expert in that area of testimony?
 - a. The standard for this determination is:
 - (1) Whether a witness has the requisite skill to qualify as an expert in a given area is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial court.
3. Is the expert's testimony relevant?
 - a. Relevancy under Rule 401; and
 - b. Further, in judging relevancy, it should be noted that expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified than the jury to draw such inferences.



Qualifying Process

Areas to Cover: John Tierney's "Six E's"

1. Education
2. Experience
3. Esteem
4. Examination
5. Expert Opinion
6. Explanation



Qualifying Process

- Education
- Experience
 - Academic
 - Informal, real life experiences
 - Details are Important
- Esteem
 - Things beyond Education and Experience
 - Examples
 - Associations, real jobs, publications
 - Specifics



Qualifying Process

- Examination
 - What, Where, When
 - Protocols
 - Scientific Theory
- Expert Opinion
 - What is it?
 - Impact?
 - Strengths & Weaknesses
 - Ultimate Issue
 - Corroborative



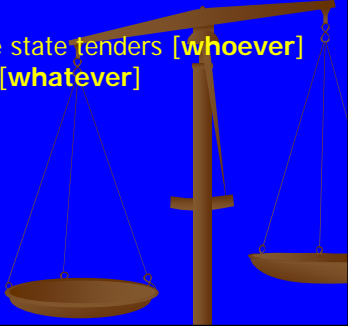
Qualifying Process

- Explanation
 - Relative
 - Simple Words
 - Demonstrative
 - Distinguish opposing opinions
 - Basis of Opinion
 - Facts & Data
 - Experience
 - Treatises



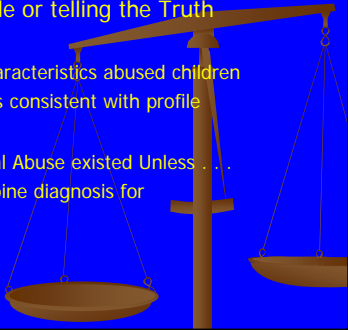
Magic Words

- Your Honor, the state tenders [whoever] as an expert in [whatever]



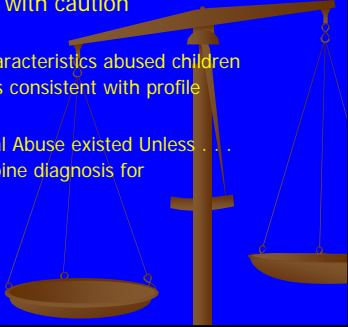
DOs and DON'Ts Generally

- Credible, Believable or telling the Truth
- Do
 - Profile general characteristics abused children
 - Victim's symptoms consistent with profile
- DON'T
 - Opinion the Sexual Abuse existed Unless
 - Allow Expert to opine diagnosis for
 - PTSD
 - CAAS
 - Unless



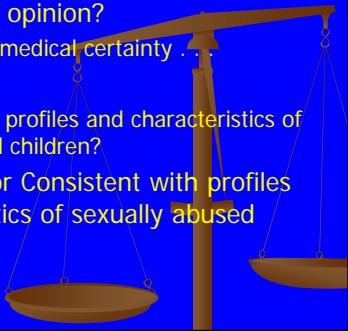
DOs and DON'Ts Sexual Abuse

- Warning: Proceed with caution
- Do
 - Profile general characteristics abused children
 - Victim's symptoms consistent with profile
- DON'T
 - Opinion the Sexual Abuse existed Unless
 - Allow Expert to opine diagnosis for
 - PTSD
 - CSAAS
 - Unless
 - BUT



OPINIONS

- Do you have an opinion?
 - To a degree of medical certainty
- Findings
 - Consistent with profiles and characteristics of sexually abused children?
- Victim's behavior Consistent with profiles and characteristics of sexually abused children?



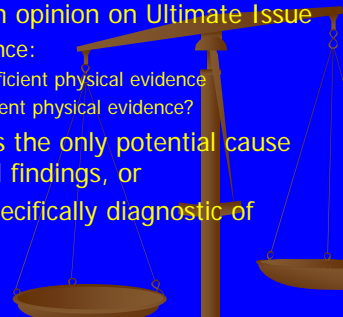
Opinions

- Do you have an opinion?
 - Source of Injury?
 - Force required for Injury?
 - Consistent with BCS



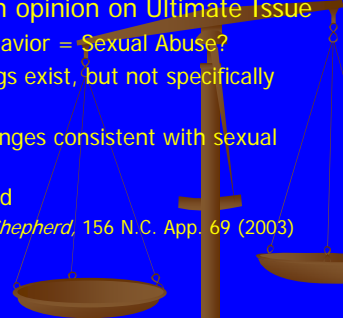
Opinions

- Do you have an opinion on Ultimate Issue
 - Physical Evidence:
 - Is there is sufficient physical evidence
 - What is sufficient physical evidence?
 - Sexual Abuse is the only potential cause for the physical findings, or
 - Findings are specifically diagnostic of sexual abuse



Opinions

- Do you have an opinion on Ultimate Issue
 - Physical + Behavior = Sexual Abuse?
 - Physical findings exist, but not specifically diagnostic,
 - Behavioral changes consistent with sexual abuse
 - Opinion allowed
 - See *State v. Shepherd*, 156 N.C. App. 69 (2003)



Opinions

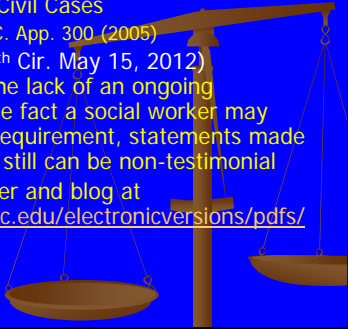
WHEN IN DOUBT . . .

AVOID OPINIONS ON ULTIMATE ISSUE



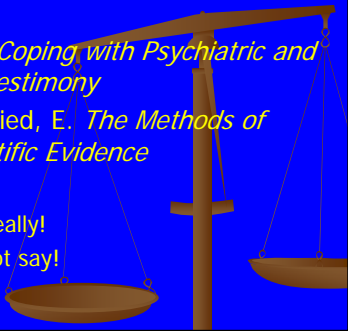
Crawford

- Not Applicable to Civil Cases
 - *In re D.R.* 172 N.C. App. 300 (2005)
- *U.S. v. DeLeon* (4th Cir. May 15, 2012) notwithstanding the lack of an ongoing emergency and the fact a social worker may have a reporting requirement, statements made to a social worker still can be non-testimonial
- See *Crawford* paper and blog at <http://sogpubs.unc.edu/electronicversions/pdfs/aojb1002.pdf>



Attacking Their Expert

- Research
- Text: Ziskin, J. *Coping with Psychiatric and Psychological Testimony*
- Text: Imwinkelried, E. *The Methods of Attacking Scientific Evidence*
- Report
 - What it says, really!
 - What it does not say!



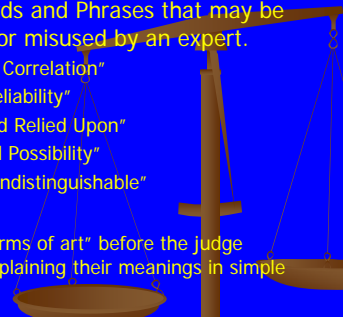
Attacking Their Expert

- The Expert
 - Clinical v. Real Life Experience
- Theme
 - Relative to case
- Multiple Diagnoses
 - Will the real diagnosis manifest itself!



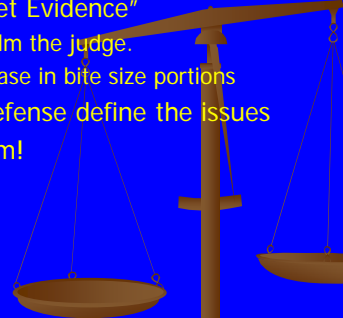
General Principles

- Three times heard Rule
- Be Wary of Words and Phrases that may be misunderstood or misused by an expert.
 - "Causation and Correlation"
 - "Validity and Reliability"
 - "Considered and Relied Upon"
 - "Probability and Possibility"
 - "Identical and Indistinguishable"
- Some "DON'TS"
 - Don't utilize "terms of art" before the judge without fully explaining their meanings in simple terms



General Principles

- "Chicken Nugget Evidence"
 - Don't overwhelm the judge.
 - Present your case in bite size portions
- Don't let the defense define the issues
- You define them!



Where do you Look?

- NC IOG
- DA's Conference/Office
- Internet:
 - American Academy of Forensic Sciences - www.aafs.org
 - Accreditation Commission for Traffic Accident Reconstruction - www.actar.org
 - Internet Legal Research Group - www.ilrg.com
 - Medscape - www.medscape.com
 - NC IOG - <http://nccriminallaw.sog.unc.edu/?p=3666>
 - Michigan State University Library www.lib.msu.edu/harris23/crimjust/assn.htm
- State & Local Contacts
- Colleges/Universities
- Hospitals



QUESTIONS?