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- ▶ Under FRE 602, in general a witness can only testify to facts; *i.e.*, to matters within her personal knowledge.
- ▶ This means that witnesses in general are allowed to testify only to those “facts” which they perceived with their own bodily senses; *i.e.*, what the witness herself actually saw, heard, smelled, felt, *etc.*
- ▶ As a predicate of admission, the proponent must prove that the witness has personal knowledge.
- ▶ A fact witness ordinarily cannot testify to “factual” conclusions; *e.g.*,
 - “They way that driver was talking on the cell phone, she just was not paying sufficient attention.”
 - Contrast with the same factual testimony:
 - ▶ “What did you see?”
 - ▶ “I saw the driver of the green car with a cell phone to her left ear. She was very animated and I saw her using her hands as if to explain what she was saying.” (Note, is the latter actually a factual conclusion?)

2  **FRE 602**

- ▶ A fact witness ordinarily cannot testify to a “legal conclusion,” *e.g.*, “The defendant personally guaranteed the debt.”
 - Contrast with same factual testimony:
 - ▶ “What is exhibit 2?”
 - ▶ “That is a personal guaranty form.”
 - ▶ “Do you recognize the signature at the bottom?”
 - ▶ “Yes, that is Mr. Jones’ signature.”
 - ▶ (Note, does the latter actually express an opinion or conclusion with regard to whose signature appears at the bottom of the form, if the execution was not actually witnessed by the testifying witness?)
- ▶ *Note this rule is contrasted from – and expressly subject to – admissible lay and expert opinion testimony.*

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- ▶ Rule 702. Testimony by Experts
- ▶ If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

4  **FRE 702**

- ▶ Expert testimony. Most controversial topic in evidence law today, state and federal.
- ▶ Only allowed if scientific, technical, or other specialized knowledge would assist jury to understand the evidence or determine a fact in issue. Query: when is this likely to be disputed?
 - When the matter is within the common knowledge of lay persons, such as a “human factors engineer” testifying that a woman wearing high heels is at higher risk of falling off a raised curb.
- ▶ Only a witness qualified by knowledge, skill, experience, training, or education can provide her opinions.

- This is where fights often occur.

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▶ Rule 703. Bases of Opinion Testimony by Experts

- ▶ The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

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▶ Permissible factual bases and form of expert testimony.

▶ FRE 703. Expert can rely on facts perceived by him or made known to him prior to trial.

- *E.g.*, expert can review medical records, depositions, *etc.*, or can be shown documents or objects at trial.
- Data relied on by expert need not be independently admissible, but must be of the type typically relied on by experts in the field.

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▶ Rule 704. Opinion on Ultimate Issue

- ▶ (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

- ▶ (b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

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▶ FRE 704

- ▶ Expert can testify on ultimate question of fact. However, expert cannot testify to mental state of defendant in a criminal case when *mens rea* is an element of crime charged or of defense thereto.

▶ FRE 705

- ▶ Expert can testify to opinions without disclosing bases therefor.

- However, expert must provide bases for opinions if asked on cross-examination.

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▶ Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

- ▶ The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

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▶ Important contrast TRE 705:

- - (a) *Disclosure of Facts or Data. ...* The expert *may in any event disclose on direct*

examination, or be required to disclose on cross-examination, the underlying facts or data.

- (b) *Voir dire*. --Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be permitted to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury. (Consistent with *Daubert* hearing.)
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- (c) *Admissibility of opinion*. --If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible. (Same.)
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- (d) *Balancing test; limiting instructions*. --*When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.*

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- ▶ Are experts limited to scientists, medical doctors, those with professional certifications?
- ▶ No. Anyway qualified by education, background, training, and experience, such that allowing that person to testify in the form of opinions would assist the jury in determining an issue of fact, can be qualified as an expert.
- ▶ Can uneducated folks, like gardeners, be experts?
- ▶ Yes, if they can meet the 702 test.
- ▶ What then are the limitations on the fields that can be addressed by experts?
 - Generally, opinions are not allowed if the expert would not be reasonably expected to have any greater insight on the issue than the jury. E.g., improper for an expert to testify that a woman in high heels is more likely to trip than a woman wearing flats.
 - Interesting application with "human factors engineers." Often not allowed to testify as to what reasonable people would do when confronted with various dangerous condition, etc.
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- ▶ Does a lawyer need to pose "hypothetical questions" to an expert?
 - ▶ No. See FRE 705 (expert may give opinions without stating basis therefor).
- ▶ Why would a lawyer generally not want to use hypothetical questions to an expert?
 - Too difficult for jury to follow.
 - Expert loses credibility because it sounds like lawyer is testifying, rather than expert.
- ▶ Under what circumstances might a lawyer want to use hypothetical questions to an expert?
 - To give the jury a preview of documents or testimony not yet admitted into evidence.
 - In cross-examination to undercut the opinion of the expert. E.g., "Doctor, in giving that opinion you relied on the statement in the medical records indicating X, correct? Assume with me that the facts prove that instead of X it was Y. Would that change your

opinion?

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- ▶ Does a lawyer have to ask the court to recognize an expert as such to elicit opinions?
 - No. Contrary to book assertion, extremely rare today for any court to require such. Usually wait until objection is lodged to expert providing opinions to address, if raised.
- ▶ Can opposing counsel cut off questioning of expert as to qualifications by stipulating to same?
 - No. Okay to try if qualifications are strong, but jury has the right to know the qualifications of the expert to assess credibility of her opinions.
- ▶ Can a lawyer ask an expert whether, in his opinion, the defendant was negligent?
 - Yes. Can ask opinion on ultimate issue. FRE 704(a).
- ▶ What if the expert defines negligence differently from how it is defined under applicable law?
 - Usually good objection. Need to define negligence and ask expert to assume that definition to meet the objection.

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- ▶ Can a lawyer read statements from a text or article to an expert in direct examination and ask if the expert agrees or disagrees, and why?
 - Yes. Recall FRE 803(18): (18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

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- ▶ Can a lawyer interrupt opponent's questioning of an expert to "voir dire" the expert?
 - Yes. However, courts are very reticent to allow opponent to interrupt expert's examination under this ruse. If allowed, court will generally require lawyer requesting voir dire to identify precisely what she is contesting and strictly limit the questioning to that point.
 - Voir dire of an expert does not necessarily have to be done outside the presence of the jury. Court discretionary call pursuant to FRE 103(c). However, when allowed, more often than not it is done with jury out so as not to influence jury improperly.
 - This practice has mostly been done away with since *Daubert*, and most courts now require pre-trial challenge to expert's qualifications or opinions, on penalty of waiver. Also affected by FRE 26, which requires full disclosure of expert's qualifications, opinions, etc., long prior to trial.

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- ▶ Prob. 9-C. Med mal case in Tampa, FL. Plaintiff calls two doctors from Ohio to testify to standard of care breach by Florida doctor. Can they do so?
 - ▶ Yes, if they can testify they are familiar with the SOC in Florida or that there is a national standard that does not vary from locale to locale.
- ▶ Defense expert wants to testify that he got supportive opinions from colleagues. Can he do so?
 - No. Basically, three reasons:
 - ▶ Opinions of other experts are not "facts" or "information" learned by expert outside

of courtroom, thus not in compliance with FRE 703.

- ▶ Plaintiff's counsel would be deprived of opportunity to cross-examine other experts.
- ▶ Would be misleading to the jury.

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- ▶ The *Frye* Test. Standard for admissibility of proposed scientific testimony from 1923-1993. Arose from a challenge to the admissibility of a crude predecessor to the polygraph.
 - Required the trial court to determine that the scientific principle was sufficiently established to have gained general acceptance in the particular field to which it belongs.
 - Was considered difficult because:
 - ▶ Relevant scientific community was ill-defined.
 - ▶ No objective basis for court to determine whether the scientific principle was "generally" accepted in the scientific community.
 - ▶ It was difficult to identify the "scientific principle" in issue; and
 - ▶ It was not clear whether the test applied to anything other than scientific testimony.
 - However, some state courts have reaffirmed *Frye*, rejecting *Daubert*.

18  ***Daubert v. Merrell Dow Pharm. 1993***

- ▶ Arose over Bendectin leading to birth defects. MSJ, plaintiff responds with affidavits from experts stating Bendectin can cause birth defects. Trial court rejects, under *Frye*, and Ct App affirms. USSC reverses for reconsideration, setting a new standard for admissibility of expert opinion.
- ▶ USSC said *Frye* did not survive FRE.
 - True. FRE 702 adopts a more liberal standard than *Frye*.
 - To be admissible under 702, must only be specialized knowledge that would assist factfinder, furnished by qualified expert. FRE 702 makes no mention of "generally accepted in relevant scientific community."
 -

19  ***Daubert***

- ▶ Trial court is now "gatekeeper" to prevent "junk science" from going to the jury. Query:
 - Is the judge qualified to make the determination? Does this force the judge to become an amateur scientist, judging from a critical perspective the believability of scientific evidence?
 - Does this ignore the effectiveness of cross-ex?
 - Does this underestimate the ability of jurors to weed out unreliable evidence?

20  ***Daubert***

- ▶ Question of whether testimony will assist trier of fact is one of "fit." Does the testimony "fit" the case?
 - Example by the Court: phases of the moon may be able to assist the jury in determining whether a particular night was dark, but not helpful in determining whether an individual was behaving irrationally on the night of a full moon.
 - The former "fits" with the rational conclusion that it was light or dark, but does not "fit" with the irrational conclusion that phases of the moon affect human behavior.

21  ***Daubert***

- ▶ Next question is reliability. Court focuses on the "falsifiability" of the testimony, or the ability of the opponent to prove the results are false. In other words, if it is just an opinion, "based on my experience," how could the opponent possibly disprove the opinion?
- ▶ Court also looks at other vague criteria, whether the proposition has been reported in the

peer-reviewed publications, the known or potential rate of error, and the “general acceptance” of the proposition.

- ▶ Rehnquist concurs and dissents, noting that the “general observations” of the court regarding publication, peer review, error rates, *etc.*, are not particularly useful, and the concept of “falsifiability” will be difficult for the courts to decide.

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- ▶ *Kumho Tire Co. v. Carmichael*. USSC 1999.
- ▶ Tire blowout case. Expert Carlson wants to testify that, by visually inspecting the tire wear pattern of a badly worn tire, he could opine that tread separation was caused by manufacturing defect if there were at least 2 of 4 types of wear found. Trial court excludes on basis of *Daubert*.
- ▶ USSC affirms that *Daubert* applies to all “scientific” and “technical” evidence.

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- ▶ Most important holding of *Kumho*: Factors of *Daubert* (falsifiability, whether technique tested, peer-reviewed, known rate of failure, and general rate of acceptance), not exhaustive and not even necessarily applicable. May be that some scientific issues have never been addressed in the publications due to lack of interest.
- ▶ In this case, trial court was concerned over reliability of expert’s methodology.
- ▶ Appellate review on abuse of discretion standard. Here, trial court weighed evidence and determined expert’s methodology was insufficiently reliable. Therefore no abuse of discretion.
- ▶ However, importantly, trial court has discretion to determine how reliability will be determined. Means very limited evidentiary hearing sometimes acceptable.

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Texas Cases

- ▶ *Robinson*. 1995 Tx S Ct case. Involved allegation that fungicide damaged pecan crops. Expert wanted to testify to scientific causation.
 - Basically adopted *Daubert* standards for Texas.
 - Based on risk of undue influence of expert’s credentials on lay jury.
 - Factors for trial court to consider:
 - ▶ Extent to which theory has been tested;
 - ▶ Extent to which technique relies on subjective interpretation of the expert;
 - ▶ Whether theory has been subjected to peer review;
 - ▶ Whether the underlying theory or technique has been generally accepted by the scientific community as valid (*Frye*);
 - ▶ The non-judicial uses of the theory or technique. (In other words, was it developed just for litigation?)

25 


- ▶ *Robinson* Court rejects (unidentified) teleological causation argument as inconsistent with “scientific method.”
 - Teleological argument assumes order in the universe. Accordingly, if a particular odd result is observed and there is a coincidental event which logically could have caused the odd result, reasonable conclusion is that the event probably did cause the odd result. In other words, the analyst works from an observation to a causation probability conclusion, rather than a hypothesis of causation supported by repetition of proposed hypothesis from controlled experiments, and a systematic exclusion of other possible explanations (scientific method).
- ▶ Expert in *Robinson* observed that unusual damage to pecan crops was coincident with

Benlate spraying, therefore Benlate probably caused damage. But did no testing to duplicate results. Also developed theories solely for litigation, which weighed against admissibility.

- ▶ Interestingly, court recognized that teleological approach might be acceptable when “obvious result explains the etiology (for example where a fractured bone accompanied by bruised outer skin and flesh demonstrate that some type of physical contact caused the injury....”)
 - Query: logically what distinguishes expert’s theory in *Robinson* from the quoted example?

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- ▶ In considering the decision to severely restrict what expert testimony to admit, consider the inevitable tension between –
 - Necessity of restricting some classes of evidence so that cases are not decided on an improper basis.
 - ▶ With
 - Clear presumption liberally favoring admissibility of evidence in FRE;
 - Effect of cross-examination enabling factfinder to weed out unreliable testimony;
 - Underlying presumption that jurors are unlikely to “get it right” without the court restricting what the jury can hear; and
 - Preservation of right to trial by jury;
- ▶ Does the basis for *Daubert*, *Robinson* withstand scrutiny?
- ▶

27  ***Merrell Dow v. Havner*, Tx S Ct 1997**

- ▶ Another Bendectin-birth defect case, just like *Daubert*. Court notes that in determining causation, courts look at “general causation” and “specific causation.”
 - General causation means evidence that the event does sometimes cause the result in the general population.
 - Specific causation means evidence that the event caused this particular patient’s disorder.
- ▶ However, in dealing with birth defects, impossible to test for specific causation, therefore no choice but to prove by scientific probability evidence, which is the focus of *Havner*.

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- ▶ *Havner*. To prove scientific probability without specific causation evidence, experts must use “epidemiologic studies.”
 - Epidemiologic studies examine patient populations in general compared to patient populations who had the exposure, and come up with a standard statistical probability model that the odd result was caused by the exposure.
- ▶ Traditional test for sufficiency of general scientific probability evidence was whether the evidence sufficiently established that it was “more likely than not” that the result was caused by the triggering event (a >50% test).

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- ▶ Court does not outright reject epidemiologic causation evidence. Instead adopts standard for sufficiency on appeal:
 - Scientifically reliable studies must demonstrate at least a doubling of the risk of the result from a population exposed to the substance compared to a general unexposed population.
 - The doubling of the risk must be demonstrated with a 95% confidence interval.

- ▶ Very complex (and probably incorrect), analysis as to how a 95% confidence interval is statistically determined.

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- ▶ *Havner*. Even if the evidence satisfies these requirements, the plaintiff must still show:
 - She is similar to those in the study;
 - Conditions are similar to those affected in the study;
 - Exposure occurred prior to onset of injury;
 - Timing of injury is consistent with timing of injuries in study; and
 - If there are other possible causes of the injury with this patient, *which are capable of being ruled out*, all other possible causes must be ruled out by valid expert testimony *with reasonable certainty*.

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- ▶ *Havner* leads to absurd result, as predicted.
- ▶ In *Helm v. Swan*, defendant nurses failed to timely notify physician of patient deterioration after ERCP. Resulted in untimely hydration, and significant worsening of resulting pancreatitis.
- ▶ Court holds that plaintiff's 2 qualified experts, because they could not rule out with reasonable certainty that Helm would not have been one of the unlucky few who would have developed severe pancreatitis even with prompt hydration, no legally sufficient evidence of causation.
- ▶ But how could that ever be proved? And how could we ever get any literature to support the proposition?
 - 100% of physicians believe outcome will likely be better with earlier hydration; and
 - No study could ever be done where treatment was withheld.

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- ▶ Should *Daubert/Robinson/Havner* be applied equally to all parties?
- ▶ If the trial court is the "gatekeeper" to prevent jury from being persuaded by unreliable expert testimony, shouldn't the jury also be protected from hearing unreliable defense expert opinions on causation?
- ▶ On its face, the answer in the case law unavoidably must be "yes." Curiously, though, because of the placement of the burden of proof, the answer arguably is "no."
- ▶ Because the plaintiff has the burden of proof on causation, the plaintiff must have sufficient probative evidence in the record to support the submission of a causation issue to the jury.
- ▶ However, because the defense has no such burden, arguably the defense experts can testify that the plaintiffs' expert was in error in ruling out other possible causes with reasonable certainty because in their opinion, the other possible causes are, in fact, the probable causes of the injury!
- ▶ If the jury finds in favor of the defense, on appeal the defense can (and will) contend that the jury simply was unpersuaded by the plaintiff's experts. The defense has no burden to show evidence in the record to support the jury's failure to find any fact on which the plaintiff had the burden of proof. Thus, a trial court's failure to keep the defense experts from offering unreliable opinions on causation is effectively exempted from appellate review. *See, e.g., Cruz v. Paso del Norte Health Foundation*, 44 S.W.3d 622 (Tex.App.-El Paso 2001, pet. denied).

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- ▶ Misc. expert cases – Texas.

- ▶ Permissible for expert to reach opinion on causation simply by testifying that plaintiff's theory is scientifically plausible and eliminating all other possible causes. *Doyle Wilson Homebuilder, Inc. v. Pickens*, 996 S.W.2d 387 (Tex.App.-Austin 1999).
- ▶ *Robinson* analysis applies to all types of expert testimony. *Gammill v. Jack Williams Chev., Inc.*, Tx S Ct 1998.
 - But remember, different types of opinions compel different types of considerations by the trial court. *Kumho*.

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- ▶ Misc. expert cases – Texas.
- ▶ Objection to expert opinion must be made before trial or when evidence is offered or it is waived. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 702 (Tex. 1998) (“Without requiring a timely objection to the reliability of the scientific evidence, the offering party is not given an opportunity to cure any defect-that may exist, and will be subject to trial and appeal by ambush.”). However...
- ▶ Moving to strike expert's testimony at conclusion of same held sufficient, limiting *Ellis*, in *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245 (Tex. 2004); and
- ▶ *Ellis* limited to challenges to an expert's methodology. If the expert's opinion on its face is no evidence (here a conclusion that defendant was “consciously indifferent”), the failure to object to expert's opinion before or during trial does not mean that record contains evidence to support the finding. *Coastal Transp. Co. v. Crown Central Petr. Co.*, 136 S.W.3d 227 (Tex. 2004).

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- ▶ Bottom lines on *Daubert/Robinson/Havner* issues:
 - Burden on opponent to challenge expert testimony with specificity.
 - Once challenged, burden on proponent to prove reliability.
 - Based on the evidence presented, trial court must determine that:
 - ▶ Expert is sufficiently qualified.
 - ▶ Underlying data is reliable.
 - ▶ Methodology is reliable. (This includes analysis by reference to inclusion in literature, repeatability of results, whether reported outside scope of litigation, etc.)
 - ▶ Conclusions reached must be logical and appropriate area for expert opinion.
 - If evidence is as to causation and is based on epidemiologic evidence:
 - ▶ Must have admissible testimony that exposure at least doubles risk of occurrence with 95% confidence interval; and
 - ▶ Plaintiff must fit pattern of studies; and
 - ▶ Expert must eliminate all other possible causes with reasonable certainty, if susceptible to doing so.
 - Evidentiary hearing required, but what is considered at the hearing is determined by the nature of the opinion and the challenge.

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- ▶ Prob. 9-E. Milton charged with sexual assault on his 14 yr old daughter. Prior to trial she provided a written statement recanting the claim of abuse. Also admitted she was being vindictive and was pressured by others to “stick to the story.” Psychologist Barton wants to describe victims of “abused child syndrome,” to explain why she would retract the allegations. Can an expert testify that a victim fits the pattern of Abused Child Syndrome (ACS), Battered Child Syndrome (BCS), Child Sexual Abuse Accommodation Syndrome (CSAAS), Rape Trauma Syndrome (RTS), or Battered Woman Syndrome (BWS)? First objection “no generally accepted behavioral models.” Good?

- Essentially claiming does not meet validity standard, because not uniformly accepted standards. Not good objection, so long as expert can establish that standards are widely accepted, in peer-reviewed publications, not developed for litigation, etc.
- ▶ Second, invades province of the jury.
 - Not good objection pursuant to FRE 704.
- ▶ Third, jury does not need help.
 - Actually, they probably do. Few jurors would have experience with such victims, and not a matter of common knowledge.
- ▶ Fourth, essentially she is testifying that victim is being truthful, and that is solely for the jury to determine.
 - Arguable, but expert is not testifying complaining witness is being truthful. She is merely testifying that battered children will often feel compelled to recant, but court might prevent her from saying this victim fit the patten exactly.
- ▶ Fifth, expert will snow the jury.
 - Arguable. May be closer to a 403 objection than 702.
 -