

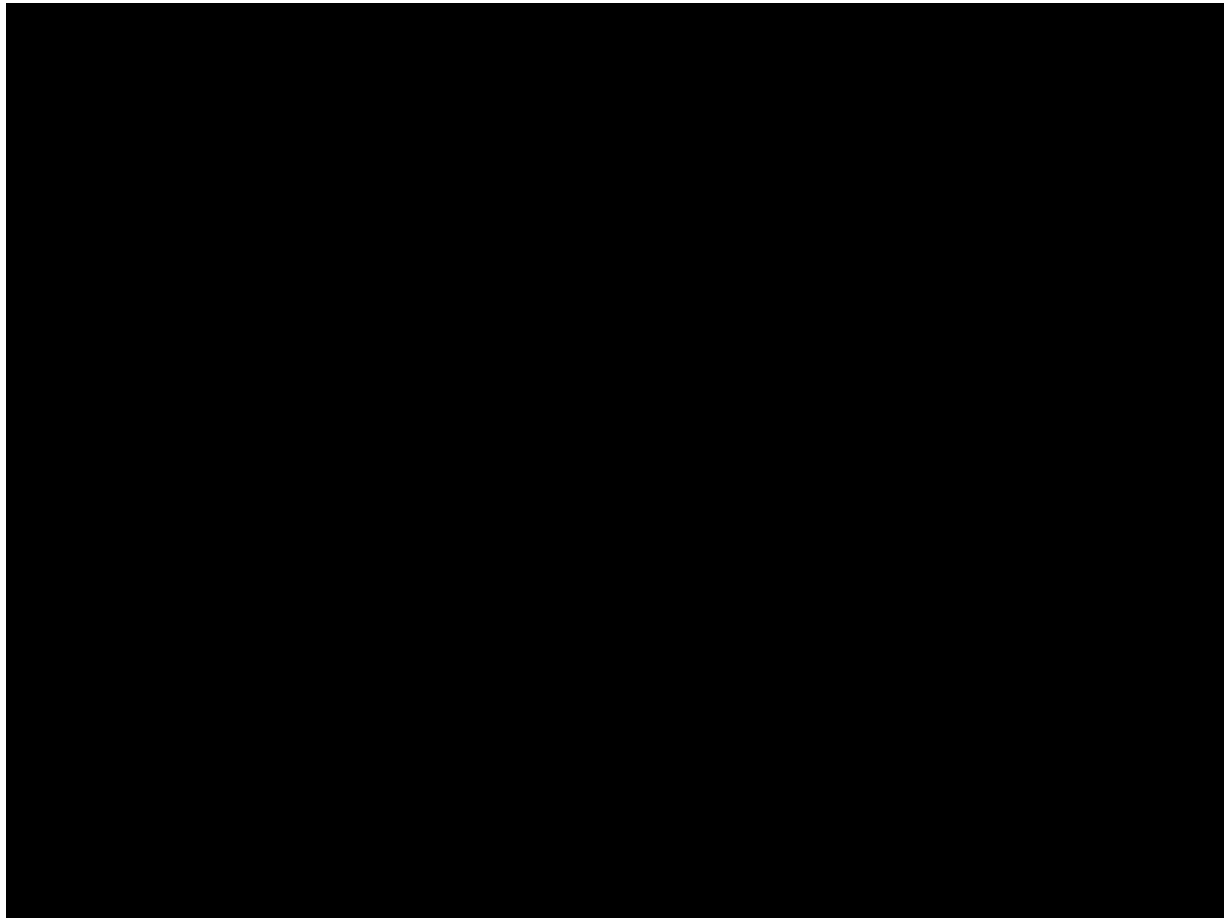


Anatomy of a Criminal Sexual Conduct Case

CAP

February 23, 2018

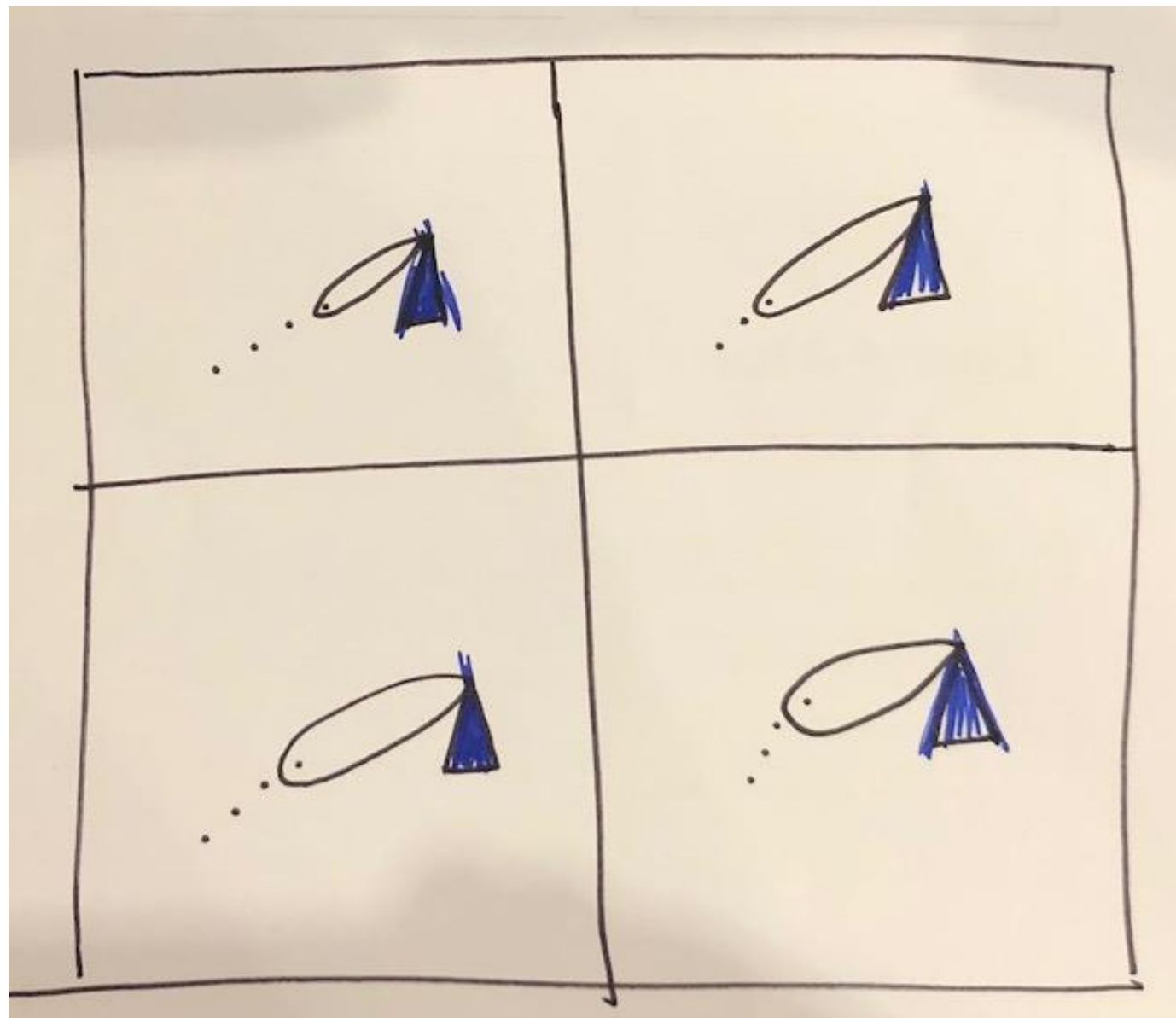
Lisa B. Kirsch Satawa



ASSIGNMENT

COMPETENCE

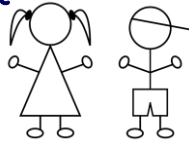
Why CSC is
different?



Vocabulary: It's all in what you call it

Coochie Potty
Cookie Private Parts
Crotch Privacy
Down there Cat

Pussy Cat
The V Thing



Bunny Vulva
Spots Box
Ta Ta Gina
Coo Coo Boobies

Va-Jay Jay Think
China Wee Wee
Titties Pickle
Pocket Rocket

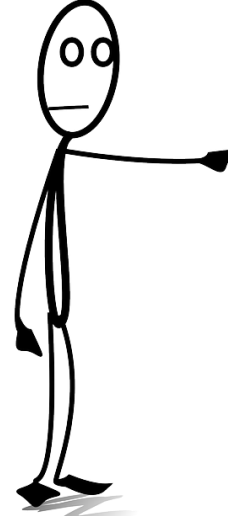
Bunny Pocket Book
Spots MoMa

Dick Nuts Peenee
Ding a ling Peter
Johnson Balls Snake
Meat Pee Pee Stuff

V word rhymes with China
C word rhymes with Porous

P word rhymes with Venus

Tail Thing Thingy
Wee Wee
Weiner Meatloaf Willie
Worm Turtle Stiffy Lizard



Labia
Semen
Hard
Erect

Schwanz Wang Twig Berries Sucker
Woody Bid Daddy Tower Monkey
Dingy



Moist

Dolls, Dogs and other Two Legged Beings

- Dolls
- Dogs
- Support People
- Victim Advocates

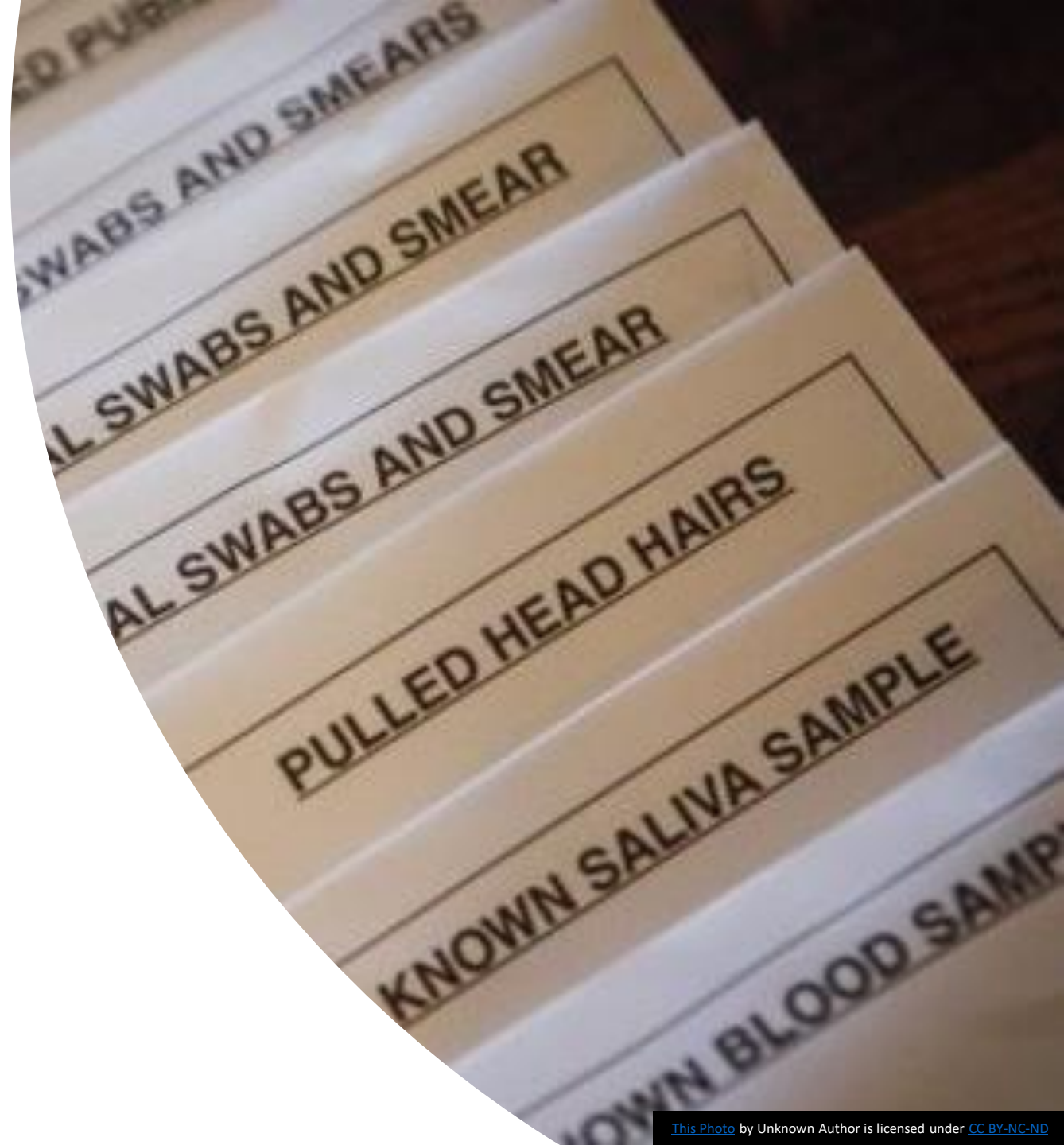


Evidence

Collection and Preservation

Context

Time Lines



Evidence Rules

Rape Shield

404b

768.27

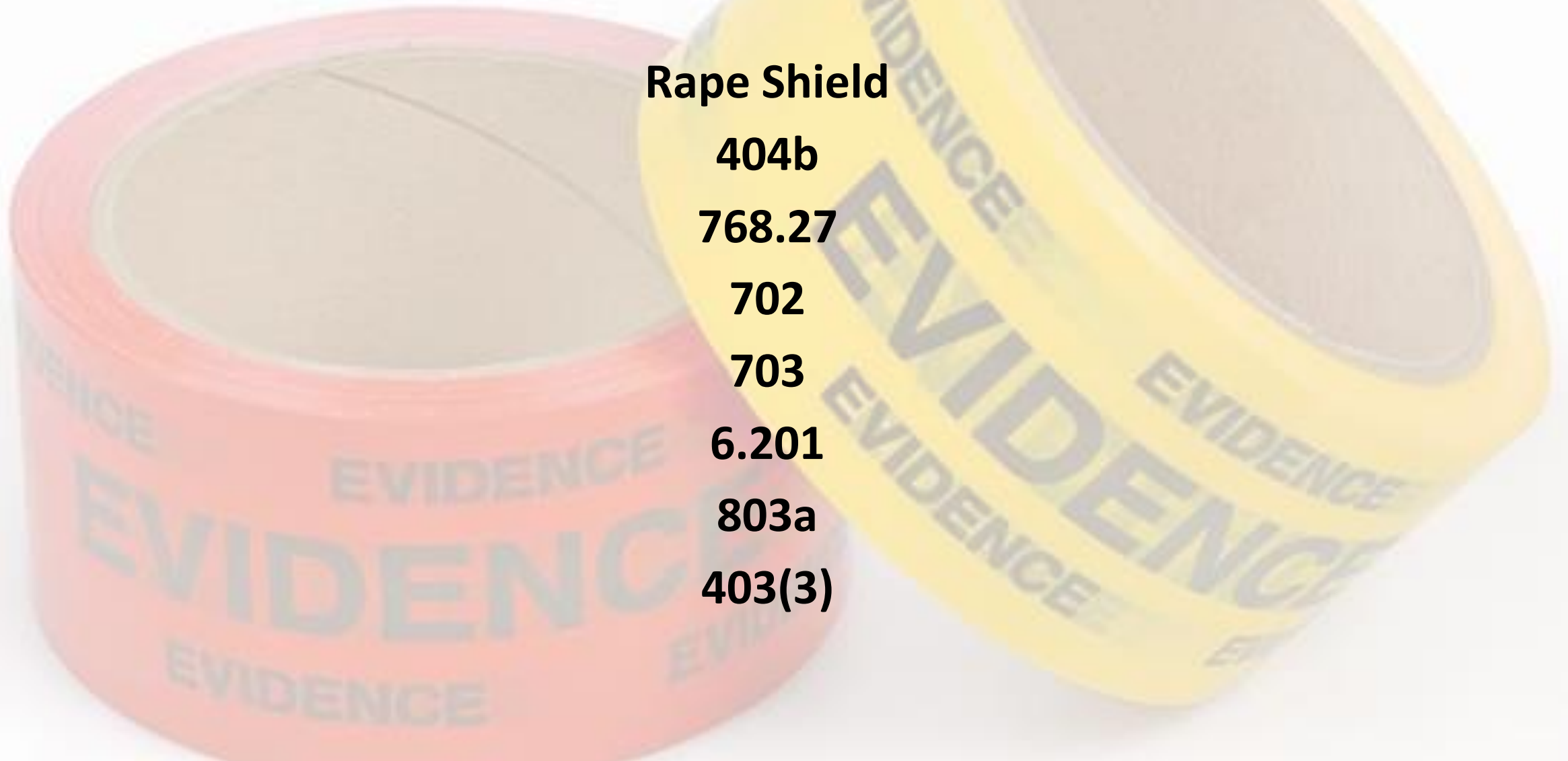
702

703

6.201

803a

403(3)



Stories

He said/ She said

Consent

Incapacitated

DNA not mine

DNA mine

but not from sex

Misinterpreted

Misbelieved

Liar

False Allegation

No explanation

I am guilty

Collateral Consequences

- IMMIGRATION: CSC = DEPORTATION
- MDOC program disqualification
- The sentencing range minimum is not realistically the minimum.
- SORA MCL 28.721
 - Photo, Employment, School Activities, School Zones,



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Experts:
What kind?
What purpose?

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3/27

“I know nothing about the subject,
but I’m happy to give you my expert opinion.”

This Photo by Unknown Author is licensed under [CC BY](https://creativecommons.org/licenses/by/4.0/)

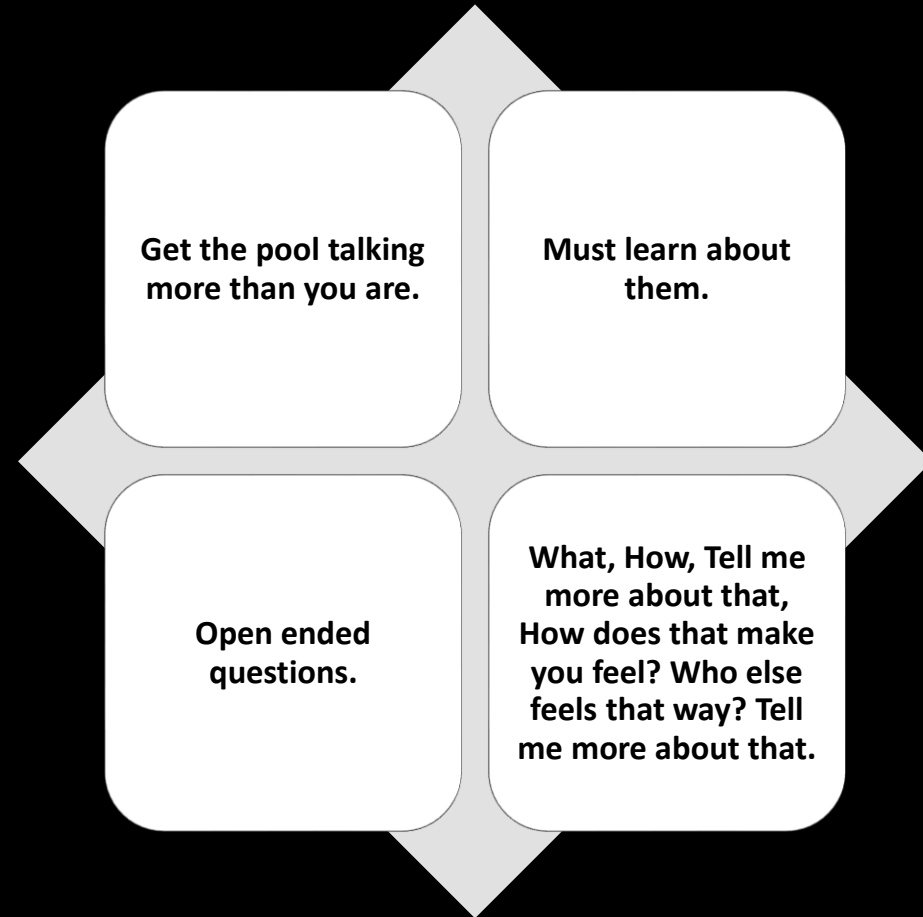
It's a Jury State of Mind: Me Too

- **Dinner table justification;**
- **Dealing with beyond a reasonable doubt;**
- **Of course I am telling the truth, why else would I put myself through this.**
- **Of course I am telling the truth I am adorable.**

Me Too

- "Me Too" spread virally in October 2017 as a hashtag used on social media to help demonstrate the widespread prevalence of sexual assault and harassment, especially in the workplace. It followed soon after the public revelations of sexual misconduct allegations against Harvey Weinstein.
- #metoo. 6.5K likes. 17,700,000 women have reported a sexual assault since 1998
- Metoo facebook page has over 7000 likes

Voir Dire



Voir Dire Questions/ Jury Questionnaires

BAD QUESTIONS

Who thinks he looks guilty?

Who thought oh shit when they heard the charge?

Who thinks police officers are more truthful?

Who is a victim of a crime?

GOOD QUESTIONS

Mr. X, what popped in your head when you heard the charges against my client?

How did that make you feel?

In this country sexual assault allegations are rampant at this time. Mrs. O, do you believe them all to be true? Why or why not? How could you tell?

Miss V, what are your thoughts? Do you know anyone who has made an allegation? Tell me about that? I see this is sensitive, would you prefer to discuss this in private?

Discovery

Kids Talk

DNA/School Records

First Responder LE Protocol

Medical Records

Experts

Police Reports/ Supplemental Discovery

Facebook

Snapchat

Instagram

Vine

Finsta

Twitter

Psychological Records

SANE/ Rape Kit

Digital Evidence

FOIA

Subpoena

Investigators

Direct and Cross with Care

Don't do it unless you have a reason.

Don't do it if its already been said.

Don't do it if it opens a door you don't want opened.

Don't freak on new information. Stay in control, stick to the plan.

Don't forget your client.

Cross Examination/ What is the goal?

Preliminary Examination

Nail the Facts- create the story



Trial

Tell the story

Expose inconsistencies

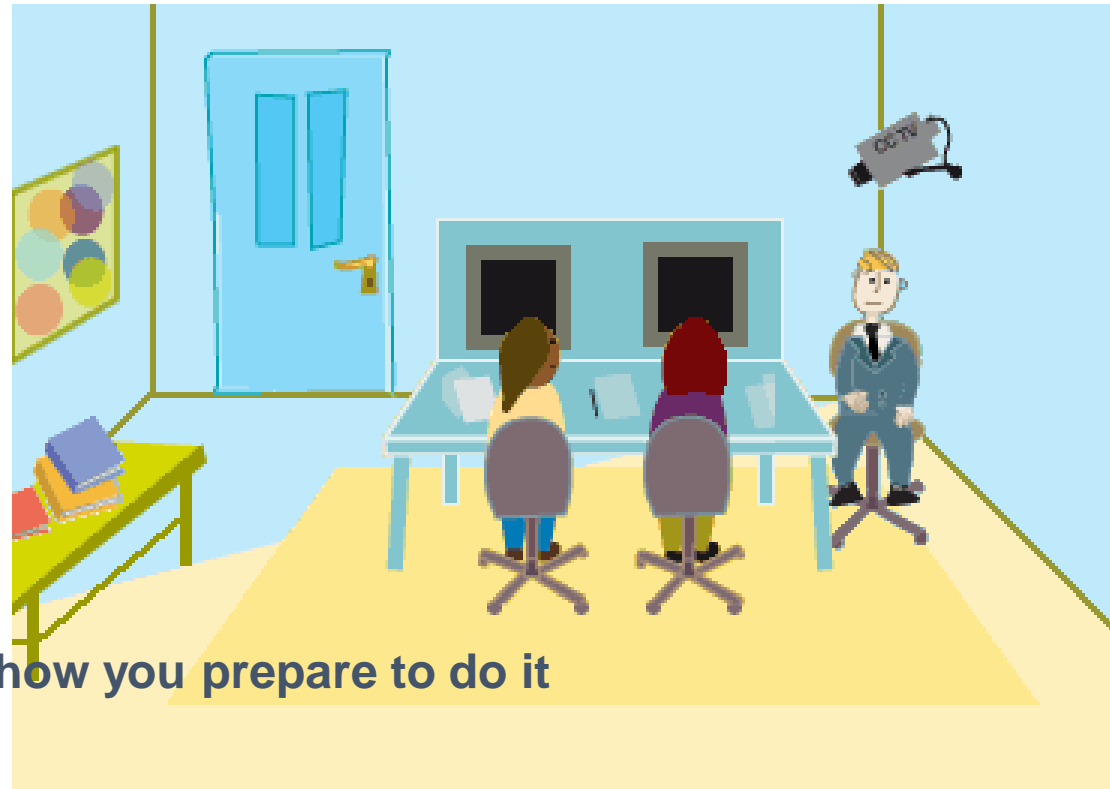


Special Courtroom Issues

Prejudice..... Be client minded.

PROTECTIONS FOR WITNESSES

- Closed Circuit TV
- Support People
- Mannequins
- Video-recorded Statements



All impact examination and how you prepare to do it

Voir Dire and Jury Selection

Plan, Prep and Don't Pontificate

Jury Reaction to Cross of a Child

Jurors have noted that cross-examination appears very difficult for child witnesses. In Cashmore and Trimboli's (2006) Australian survey, for example, **jurors in child sexual assault cases believed that defense lawyers treated the child complainants less fairly than did judges or prosecutors. Jurors tended to be critical of the questions that defense lawyers asked children, saying that many were not appropriate for the child's age or intellectual functioning.** The behavior of the defense lawyers also came under fire from many jurors. In particular, jurors condemned defense lawyers who upset the child or accused him or her of lying. Jurors also identified children as being more distressed and less confident when they answered cross-examination questions, relative to direct examination questions. Given that jurors acknowledge that children find cross-examination difficult, does this influence their evaluation of children's evidence? Several **studies suggest that potential jurors take into account the questioning style used to interview children** (e.g., Castelli, Goodman, & Ghetti, 2005; Schmidt & Brigham, 1996; Tubb, Wood, & Hosch, 1999), although these studies have focused on children's primary evidence, where inappropriately suggestive questioning could lead to a false allegation. In Tubb et al. (1999) study, for example, mock jurors in a simulated case of child sexual abuse were **less likely to convict when the child's primary evidence was elicited through the use of suggestive questioning.**

Evidence Rules

MRE 404b/ MCL 768.27b

MRE 803A

MRE 803(4)

Rape Shield Laws

MRE 702

MRE 703

Rape Shield Laws

MCL 750.520j & MRE 403(a)(3)

Goal to prevent introduction of the complainant's **past sexual conduct** in a prosecution for CSC except in two circumstances:

1. When the evidence pertains to the complainant's past sexual conduct with the defendant; and
2. When the evidence pertains to a specific instance of sexual activity; even if unrelated to the defendant, that shows the source or origin of semen, pregnancy, or disease.

Rape Shield Case Law

People v. Arenda, 416 Mich 1 (1982) (designed to exclude)

People v. Sharpe, 319 Mich App 153 (2017) (sexual subjects ok if 403)

People v. Adair, (consensual sex with Defendant)

People v. Benton, (294 Mich App 191)2011 (balance rights of C and D)

People v. Shaw, 315 Mich App 668 (2016) (bring it if Px opens the door)

Notice of Intent to Offer Sex Conduct Evidence

A defendant must provide notice to the People within 10 days **after arraignment on the information** shall file a written motion and offer of proof.

The Court may order an *in camera* hearing to determine whether the proposed evidence is admissible under subsection (1). If the information is discovered during trial and may be admissible under subsection (1)(a) or (b) the judge may order an *in camera* hearing.

Failure to provide notice excludes the evidence unless it infringes on the Defendant's 6th Amendment Rights. *People v. Lucas*, 193 Mich App 298 (1992).

Types of Evidence re: C's Character in a CSC

- Flashing breasts in a bar *P v. Wilhelm* 190 Mich App 574 (1991) IA
- Specific instances of c's sexual activity / hymen and opening
P v. Mikula, 84 Mich App 108 (1978)) A
- Being on the pill/ telling friend ready to have sex/ telling another friend to find her a guy (*P v. Ivers*, 459 Mich 320 (1998) A
- *People v. Shaw*, 315 Mich App 668 (2016) evidence of sex conduct not with D. Sex with boyfriend before examined by pediatrician.
- Homosexuality, *People v. Hackett*, 421 Mich 338 (1984) A
- Virginity, Pregnancy, Abortion *People v. Sharpe*, 319 Mich App 153 (2017) A

False Allegations of Sexual Assault

People v. Williams, 191 Mich App 269 (1991)

People v. Nicholas Jackson, 477 Mich 1019 (2007)

MRE 404b

HOW SIMILAR
IS SIMILAR???

WHAT IS A
PROPER
PURPOSE?????

PREJUDICIAL V
PROBATIVE??



Effective Jan 1, 2018

**Prosecutor must provide
notice
at least 14 days before trial.**

MCL 768.27a

Overlaps but not interchangeable with MRE 404b P v Timothy Jackson, 498 Mich 246 (2015) admissible other acts for same purposes when one or more of the matters is **material**.

Uncharged Conduct

Propensity evidence admissible in cases of csc against a minor if evidence is a listed offense.

Notice 15 days before trial

Cross Examination

Attorney tells the story

The Challenge is ours

Delaware v Van Arsdall, 475 US 673 (1986)

“Trial judges retain wide latitude to impose reasonable limits on defense counsel’s inquiry into the potential bias of a prosecution witness during cross examination, and such limits may be based on concerns about, among other things, harassment, prejudice, **confusion of the issues, the witness’ safety** or interrogation that is repetitive or only marginally irrelevant”

Delaware v Van Arsdall, 475 US 673 (1986)
cont.

The Supreme Court went on to say that the 6th Amendment guarantees an opportunity “for effective cross-examination, **not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.**”

What is Cross Examination?

*“**Preparation**, mastery of **technique**, and execution of a solid game plan underlie more courtroom victories than all the flash and glitz and strokes of brilliance combined.”*

*“Cross is no longer a defensive maneuver in the courtroom. It is an **offensive** series of tactics designed to advance your theory of the case.”*

Pozner & Dodd, *Cross-Examination: Science and Techniques*

Cross Examination of the Complainant

Be Kind, Be Courteous, Be Prepared

Exam v. Trial

Discover Discover Discover

Adult discloses abuse as a child

London, et al studies

92%

*Difficult because childhood behavior is being relayed through an adult lens

*Inanimate object interpretation of events

*Cross on all times complainant could have told and didn't tell

*Show they know how to report

Cross Examination of a Child Complainant

DON'T BE AFRAID!



Child witnesses are just like any other complaining witness or are they?



- There is an allegation
- Need a tool to promote your theory through an adversarial person

Difference:

Shot gun questions don't work

- Need to get our story in his/her words
- Need to look at allegation from the outside in.
- Cross is language driven not fact driven
- Have to show the jury why what he/ she is saying is not plausible or is a misbelief/ lie
- Seem credible when recall of events is unreliable
- Need to understand not just what they say happened but why they are saying it and why it was disclosed when it was
- Need to build rapport
- Need to give jury justification not to believe a child
- Voir Dire is critical
- WE HAVE TO BE DIFFERENT

They are still just kids

We do not question children....

We question **one child** at a time.



They are all different! Need to know them, think like them and understand their view of the world.

What is cross exam of a child???

A verbal exchange *usually* beyond a child's conversational experience

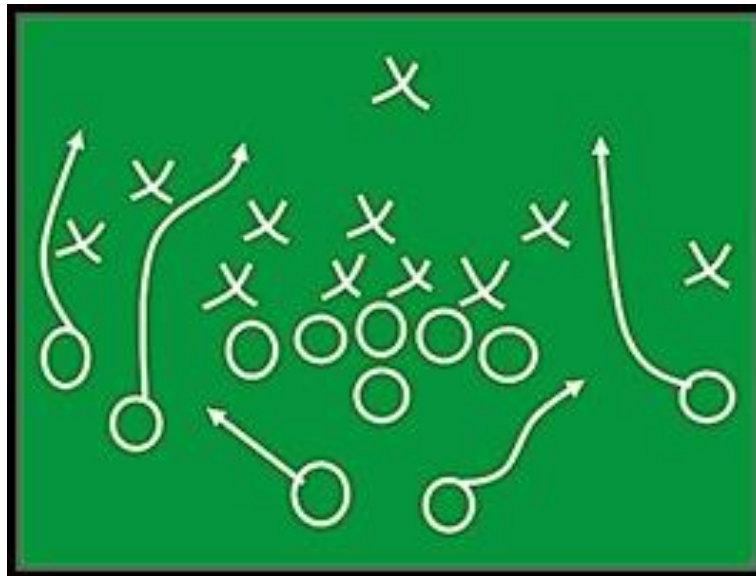
Testimony of a child witness is challenged by their perceptions or understanding of an event, memory for details or ability to communicate

Developmental Review 32(2012) 181-204

Disorder in the courtroom? Child Witnesses under cross examination

Preparation

- Get to know the child/ Discovery/Rapport
- Get to know your Court/Judge
- Rules – “I don’t know,” big words, new words
- Physical position of lawyer to witness



CHILDREN ARE NOT JUST LITTLE ADULTS!

- Attention spans are different
- Ability to process information and provide information about their experiences is different.

(Source Monitoring and Source of Truth: Fact v Fiction)

- Each of these change with age!
- Suggestibility/ External influences

Relevant Developmental Issues to develop cross

- Concept of Time
- Concept of Distance and Size
- Attention
- Cognitive Development
- Memory Development
- Sexual Development
- Language/ Linguistic Development
- Kinship
- Literal Understanding
- Age-inappropriate questions
- Repetition of questions

Cross Examination of the Detective



Overrated.....

Don't Argue

Know your cop

Figure out the relationships

Bias

Confirmatory Bias

Faulty investigation

Shortcuts

Lack of knowledge of protocol

Source of knowledge (no first hand knowledge)

NOT AN EXPERT/ Grooming



Michigan Model Policy: The Law Enforcement Response to Sexual Assault

- Released in April 2015
- The Process of writing it
- Policy v. Law
- How we can use it/ Policy/ Best Practice/ Do's/ Dont's
- Daubert Issues

Dispatch/ Call Taker Response



Immediate Law Enforcement Response



Interviews

- **Forensic interviewing protocol**
- **Page 5 Minimal Fact Interview**
- **Page 13-14 Trauma Informed Follow Up Victim Interview**
- **Page 15 Defense Challenges**
- **Page 22 Suspect Interviews/ Interrogation**
- **Witness interview section**
- **Videotaping**

Report Writing

Officer Responsibilities

Documenting the Original Response

Excited Utterance Training Page 9

Sexual Assault Evidence Kit and Exam

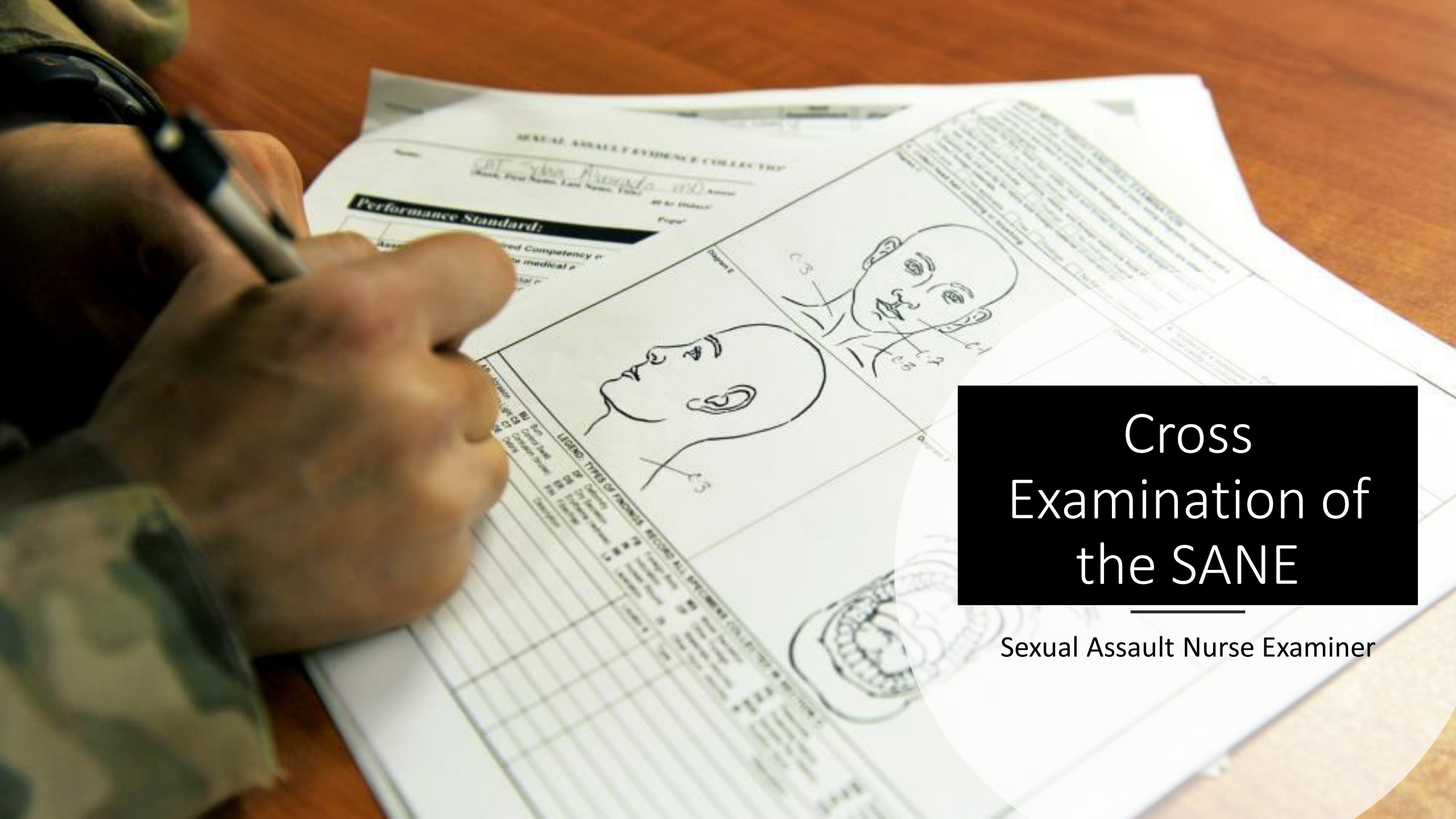
SAEK v. SANE

Crime Scene(s) and Other Evidence

- DNA
- Electronic Evidence
- Crime Scene Evidence
- Suspect Forensic Examination/ Search Warrant

Find it online

https://www.michigan.gov/documents/dhs/MM-Policy_Sexual-Assault_494482_7.pdf



GENERAL ASSAULT EVIDENCE COLLECTOR
Name: *Dr. Yvonne Aronoff, MD*
(Block, First Name, Last Name, Title) M.D. Nurse
M to H (Block)
Page: 1

Performance Standard:

Assess and Document Competency in
the medical e
...
...

LEGEND, TYPES OF INJURIES

Code	Description
1	Contusion
2	Ecchymosis
3	abrasion
4	laceration
5	fracture
6	burn
7	scald
8	bruise
9	hematoma
10	hemorrhage
11	teeth
12	other



Cross Examination of the SANE

Sexual Assault Nurse Examiner

A close-up photograph of a person wearing black-rimmed glasses and white nitrile gloves. The person is holding a pair of silver tweezers in their right hand, which are positioned over a red ladder-like structure. In their left hand, they are holding a blue DNA double helix model. The background is a plain, light-colored surface.

Cross Examination of the PX Expert

Who are they and what can they really opine about?

4 Steps for the Lawyer

1. Determine whether the witness is qualified as an expert by knowledge, skill, experience and training, or education
2. Determine whether the expert's methods follow applicable professional standards of the relevant professional specialty
3. Evaluate the empirical and logical connections between the data arising from the expert's methods and the expert's opinions/ conclusions
4. Gauge the connection between the expert's conclusions and the proffered expert opinion



~~inference
based on
an
inference~~



Focus on Lawyer Step 3....

Evaluate the empirical and logical connections between the data arising from the expert's methods and conclusions aka the analytical gap

Data from unreliable methods cannot lead to reliable conclusions.

How does the “research” apply to the specific individual?

How does the “research” NOT apply to this specific individual?

Gap of knowledge between what expert states is “so” and actual case facts.

What makes an expert an expert??

- Degrees
- Experience
- Studies
- Training
- Qualified Before
- Codes/ Rules/ Guidelines
- Is this expert qualified for a purpose relevant to this case?
- Is there an essential link between the data (facts) and the conclusions?
- Google Scholar/ Google

Credentials and Degrees: What's in the letters?

See the Cat? See the Credentials?

MD

PhD

PsyD

LLP

MSW (NASW)

LSW

Therapist

Counselor

Licensed Professional Counselor

Trained Forensic Interview



**Is Experience Enough?
Be careful what you ask for!**



Is experience enough? It depends....

1 if any.

2 Q Are any interviews at Care House recorded?

3 A Yes.

4 Q And you said you were working at October -on October

5 31, 2008, you were still working at Care House?

6 A Yes.

7 Q Do you recall conducting a forensic interview of an

8 interview of an individual by the name of Samantha

9 ██████████

10 A I do.

11 Q And did you follow the forensic interviewing protocol

12 when you interviewed Samantha?

13 A Yes, I did.

14 Q And how can -how can not following the protocol -well,

15 what is the importance of following the protocol when

16 interviewing them?

17 A Sure. The protocol was designed so that in Michigan

18 that we are trying, as forensic interviewers, to elicit

19 as much--what we call free narrative (ph) information

20 from a child. So that you eliminate taint. Meaning

21 that you eliminate my question being affirmed by a

22 child.

23 So you're asking children to make sta -if

24 there's any statements to make, to make those

25 statements in all of their own words. So everything is

1 done very open-ended. The goal is that the child talks

2 most of the time, and the interviewer is only leading

3 the child, asking them open-ended questions to talk.

4 The best illustration of that is, we don't ask

5 yes or no questions. A yes or no question is a

6 terrible question, because the answer is enclosed in

7 the question. So you don't ask children to affirm or

8 deny things. You ask them to tell you about events and

9 then linguistically, you ask open-ended questions to

10 continue that conversation.

11 Q And in your training and experience in conducting over

12 a period of time, have you made observations about

13 character -those characteristics of children who report

14 sexual abuse?

15 A Yes.

16 Q And have you made observations about their patterns of

17 disclosure or non disclosure?

18 A Yes.

19 Q Does the age or maturity of a child affect how or when

20 they may disclose?

21 A Absolutely.

22 Q How does that?

23 A One of the -when you say how or when they do disclose,

24 one of the most common characteristics of children who

25 allege sexual abuse, is that the most common is that

How do you know what you say you know?



What do we need experts for?

- Disclosure
- Fingerprints/ Dog Sniffing/ Eyewitness/ Voice/ Bruises/ Source of injury/ Gynecology
- DNA/ Hair/ Source of Semen/ Alcohol/ Drugs/Guns
- Computer Forensics/ Cell Phone Forensics/ Cell Site Analysis/ Stingray
- Forensic Interviewing
- Suggestibility
- Memory
- Child development
- Linguistics
- Adolescent Behavior
- Offender Behavior
- Science

Making theirs your own!

BUZZ WORDS:

1. Reliable
2. Peer Reviewed
3. Confirmatory Bias
4. The “only” basis of your opinion
5. You don’t know.....

USE THE PROSECUTOR’S PEEPS

OPPOSING EXPERTS

- How do you know what you say you know?
- How do you know it's not something else?
- How did you rule out "X"? (Alternative Hypothesis)
- What are the empirical bases for your knowledge?
- What research/ resources can you cite to support your opinion in THIS case?
- Identify limitations of knowledge or conclusions based on ethics codes (not a human lie detector)
- Distinguish clinical, scientific or anecdotal sources of information
- Distinguish validity, statistical data, appropriate methodology, generalizability?
- What scientific journals do you subscribe to? Which do you read?
- What was the last study in your expertise that you read?
- How do you control your bias? Do you ever consider false allegations?
- Can you identify any research that conflicts with your opinion?

ATTACKING THE REPORT

Prepare * Prepare * Prepare * Prepare * Prepare * Prepare

What info did the expert fail to review?

What info did the expert not have?

Where did the expert get the information reviewed?

Did all info come from the non-offender or the px?

Are there conclusions without data or facts to support

Are there conclusions based on collateral adversarial interviews only?

Is there scientific research to support the conclusions?

Is the expert within the scope of his/her training and professional guidelines or standards? Conflict in role?

ATTACKING THE DATA

(An APA Journal Article)

3 types:

1. Empirical Studies: original research
2. Review Articles: critical evaluations of material that has already been published
3. Theoretical Articles: draw on existing research to advance in an area of psychology

Peer Reviewed: All ABA Journal articles are peer reviewed before publication.

Abstract: Found on the first page of an article just below the title and listing of authors. It is a brief, comprehensive summary of article contents, including the components, conclusions, and implications of the study.

**IS IT THE RIGHT STUDY FOR YOUR CASE?
WHY OR WHY NOT?**

Where to Aim!

1. **Methods**
2. **Participants (gender, age, race, social class) Do sample correspond to legal issue? How chosen?**
3. **Materials or Apparatus**
4. **Procedures**
5. **Results**
6. **Discussion (how experts use research and the professional literature to support conclusions)**

16

Being qualified as an expert before does not make you an expert now!!!

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Cross Examination: The Forensic Interviewer



http://www.michigan.gov/documents/dhs/DHS-PUB-0779_211637_7.pdf

Forensic Interviewing Protocol This Photo by Unknown Author is licensed under [CC BY](#)

National Standards and Best Practice Guidelines

Ethics Rules

CANNOT BE THE COMPLAINANT'S THERAPIST

STATE OF MICHIGAN
GOVERNOR'S TASK FORCE ON CHILD ABUSE AND NEGLECT
AND
DEPARTMENT OF HUMAN SERVICES

FORENSIC INTERVIEWING PROTOCOL

Third Edition



Phased Interview/ NIH

1. Preparing the environment
2. Introduction/ Rapport
3. Establishing the ground rules
4. Completing rapport building with a practice interview
5. Introducing the topic
6. Free Narrative
7. Questioning and clarification
8. Closure

COPY

ALTERNATIVE HYPOTHESES PLANNING FORM

Child's Name: Devin Spence CH Case #: 2013-55 Date: 2/15/13
Interviewer: TS

Allegation:

physical abuse allegation

Hypothesis:

Tool for Cross

Possible Alternative Hypotheses:

- Devin doesn't want to live w dad.
- Malicious Report

Test Questions:

tested through narrative

Do you remember going to a place to talk about these things with a lady?

Your mom drove you there?

Your mom told you to tell the lady what you told her?

Your mom told you to tell about daddy?

You told the lady daddy made you sad?

Sometimes that happens with parents?

Sometimes Mommy makes you feel sad?

Did you tell the lady that?

Did she ask you?

You wanted to tell her about your?

In the car, your mom told you only to tell about daddy?

Your mom also told you if you talked about daddy she would take you to McDonalds.....

What were you talking about before you drew this picture????

Lori

Alli, 6 years old



Family Circles

Identify who the child lives with and/or who is in the child's family.

Family – Who child lives with



Alli, 6

Mark



Mom, Sarah



Sister, 2
Janice



Brother, 14
Jack



Step-dad,

Family – Who child lives with sometimes



Alli, 6



Dad, Matt



Dad's girlfriend,
Shelly



Patty, 3



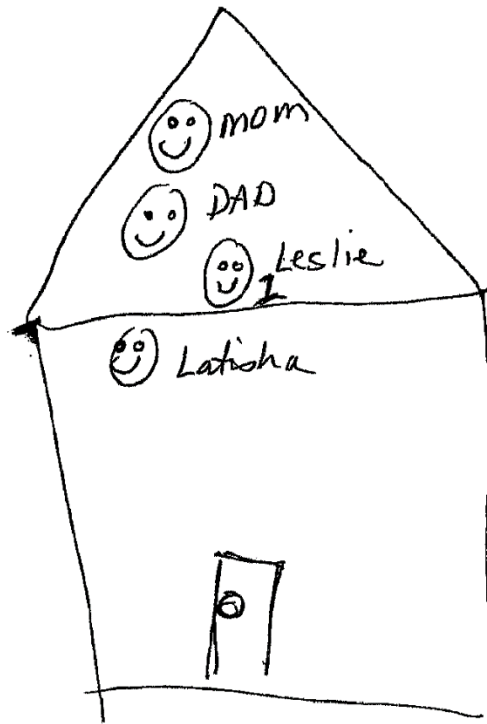
Daniel, 8

(Shelly's kids)

Skill Building Exercise: Rapport



Latisha 5





Cross Examination: The Therapist

Conflict in Role
P v. Stanaway
Subjective beliefs
Testimony anecdotal

Cross Examination:

The PS Worker

<http://dhhs.michigan.gov/olmweb/ex/PS/Public/PSM/000.pdf>



Cross Examination: The Other Acts Witness

Voir Dire

Stress the Dissimilar

Criminal History, Substance Abuse, Inhibitors to interpretation aka alcohol



Direct Examination:

W tells the story

Defendant

Expert

Character Witnesses

To Testify or Not to Testify:

- And here ladies and gentlemen is the only evidence you will remember, will the man shackled to the floor, previously wearing a jumpsuit, come on down!
- Deal with it in Voir Dire
- Plan, prepare and help your client to make a game-time decision
- What does the jury still need to hear that you cannot get from any other witness?



MCR 6.201(A)(1) and MCR 6.201(A)(3)

.... A party upon request **must** provide:

(1) the names and addresses of all lay and expert witnesses whom the party may call at trial;

...

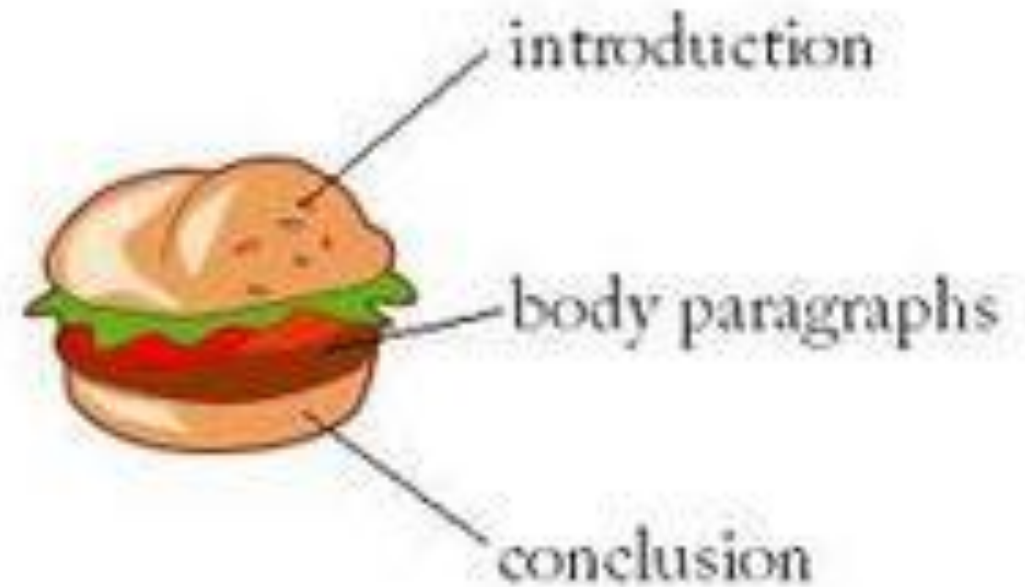
(3) the curriculum vitae of an expert the party may call at trial and **either a report the expert or a written description** of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion;

HOW TO AVOID PRECLUSION OF YOURS



**MUST STRESS
HOW THE
EXPERT
ASSISTS THE
TRIER OF FACT**

Report v. Offer of Proof



My Expert Won't Say.....

CREDIBILITY

TRUTH/LIE

I AM CERTAIN



Tie it all together

Theme, Theory, Beyond a Reasonable Doubt, Verdict



Resources

Forensic Protocol

First Responder Protocol

MJI Benchbook

ME

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