

1 **CLANCY LITIGATION GROUP**
Patrick E. Clancy, SBN 60805
2 Dr. Demosthenes Lorandos, SBN 177644
1600 S. Main St., Suite 185
3 Walnut Creek, CA 94596
Tel:(925)256-4600
4 eFax:(888) 802-5089

5 Attorneys for Defendant

6 SUPERIOR COURT OF CALIFORNIA, COUNTY OF

7
8 PEOPLE OF THE STATE OF) Case No.
CALIFORNIA,)
9) MOTION IN LIMINE:
Plaintiff,) MUNCHAUSEN BY PROXY SYNDROME
10) OR FACTITIOUS DISORDER BY
PROXY
11 vs.)
12)
Defendant.) Date:
13) Time:
14) Dept:

15 TO: All parties and to their attorneys of record, and to the
16 Honorable Judge of the Superior Court:

17 The defense moves for a protective order that:

18 1. The prosecution not be allowed to introduce Munchausen
19 by Proxy Syndrome or Factitious Disorder by Proxy as an indicator
20 of child abuse as charged in the **Information/Indictment**.

21 2. The prosecution not be allowed to introduce Munchausen
22 by Proxy Syndrome or Factitious Disorder by Proxy as Character
23 Evidence on the issue of motive.

24 3. The prosecution not be allowed to introduce the
25 diagnostic criteria or elements of Munchausen by Proxy Syndrome
26 or Factitious Disorder by Proxy.

27 4. In the alternative, if the prosecution is allowed to
28 introduce Munchausen by Proxy Syndrome that the testimony be

1 limited to the concept in general terms and not as it applies to
2 the present case and that the jury be instructed that the
3 principle assumes the act in question rather than attempts to
4 explain why such an act occurs and not as an indicator or
5 scientific proof that the alleged act did in fact occur.

6 **MUNCHAUSEN BY PROXY SYNDROME OR FACTITIOUS DISORDER BY PROXY**
7 **FAILS KELLEY/FRYE AS AN INDICATOR OF PAST ABUSE.**

8 **A - RAPE TRAUMA SYNDROME**

9 In **People vs. Bledsoe** (1984) 36 Cal.3d 236, the California
10 Supreme Court held that evidence that a victim was suffering from
11 Rape Crisis Trauma Syndrome was not admissible for the purpose of
12 proving that a rape had occurred. As a final witness to its case
13 in chief, the prosecution had called a rape counselor who had
14 treated the victim after the incident and who the prosecution
15 indicated would testify that the victim was suffering from "rape
16 trauma syndrome". The trial court found the evidence relevant on
17 the issue of whether a rape occurred and determined that a
18 showing of the victim's continuing condition and strife was
19 further evidence of the fact that a rape occurred as opposed to
20 evidence that a rape did not occur. (**Id.**, 36 Cal.3d 241.) The
21 counselor testified at length that 99.9% of the rape victims fall
22 into the "rape trauma syndrome", and to its various aspects.
23 Ultimately she expressed an opinion based on her experience and
24 past training in interviews and her contact with the victim, that
25 the victim was suffering from rape trauma syndrome. (**Id.**, 36
26 Cal.3d 243-244.)

27 The Court stated:

28 "...rape trauma syndrome was not devised to determine

1 the truth or accuracy of a particular past event--that
2 is, whether in fact, a rape in the legal sense
3 occurred-but rather was developed by professional rape
4 counselors as a therapeutic tool to help identify,
5 predict and treat emotional problems experienced by the
6 counselors clients." (**Id.**, 36 Cal.3d 248 to 250,
7 emphasis added.)

8 The court went on to note that rape trauma counselors, by
9 their training, are particularly required not to judge the
10 credibility of their clients and not to pass judgment. Thus, "as
11 a rule, rape counselors do not probe inconsistencies in their
12 client's descriptions of the facts of the incident, nor do they
13 conduct independent investigations to determine whether other
14 evidence corroborates or contradicts their clients renditions."
15 (**Id.**, 36 Cal.3d 250.)

16 The court squarely held that expert testimony that a
17 complaining witness suffers from rape trauma syndrome is not
18 admissible to prove the witness was raped "[b]ecause the
19 literature does not even purport to claim that the syndrome is a
20 scientifically reliable means of proving that a rape occurred."
21 (**Id.**, 36 Cal.3d 251.)

22 **B - CHILD MOLEST SYNDROME**

23 In **In re Sara M.** (1987) 194 Cal.App.3d 585, the Court of
24 Appeal held that evidence that a victim was suffering from Child
25 Molest Syndrome was not admissible for the purpose of proving
26 that a child molest had occurred.

27 The trial court allowed two expert witnesses to testify to
28 the "Child Molest Syndrome" but did not allow the experts to
29 testify to his opinion that a molest had in fact occurred.

30 According to one psychologist who had treated Sara M., the
31 common characteristics of child molest victims included:

- 1 1. Consistency in recounting the molestation to different
2 people;
- 3 2. Denial the molestation occurred;
- 4 3. Sexual knowledge beyond that usually associated with the
5 victim's age;
- 6 4. The ability to recall the molestation over an extended
7 period of time;
- 8 5. A feeling of loss of control over their life. (**Id.**, at
9 p. 589.) Another psychologist who treated Sara elaborated on the
10 symptoms of child molest syndrome:
- 11 6. They often are angry or depressed;
- 12 7. They often exhibit a variety of behavioral problems;
- 13 8. They suffer from sleep disturbances or eating disorders;
- 14 9. They show a false sense of maturity;
- 15 10. They may trust too much or too little;
- 16 11. They are fearful of the purported molester;
- 17 12. They consistently name one person as the molester, and;
- 18 13. Details of the incident may be revealed only over time.
19 (**Id.**, at p. 589.)

20 **In re Sara M.**, supra, the court held that the Child Molest
21 Syndrome's primary purpose at trial in that case was as evidence
22 that the molest did in fact take place and its admission was
23 therefore reversible error. (**Id.**, at p. 592, 595.)

24 Why Syndromes and Predictors are Inadmissible:

25 The fatal defect in the Child Molest Syndrome was the same
26 defect in the Rape Trauma Syndrome: child molestation was
27 presumed!
28

1 "Psychologists testified the syndrome is neither
2 included in the DSM nor recognized by the American
3 Psychological Association or any other professional
4 organization. They described the syndrome as being in
5 the beginning stages of development and acceptance. No
6 treatises on the syndrome were introduced into
7 evidence. The psychologists further testified they did
8 not know how the symptoms of the syndrome were
9 developed; they knew of no studies comparing the
10 reactions of children known to be molested with those
11 who claimed to be molested or with those who were not
12 molested. A basic defect of the syndrome is thus
13 apparent: the syndrome was developed on the assumption
14 the children studied were in fact molested. Moreover,
15 while no one at the hearing testified directly
16 concerning the reason for the syndrome's development,
17 it appears to be a tool for therapy and treatment, much
18 like the rape trauma syndrome. Consequently, the same
19 problem discussed in Bledsoe may be present in the case
20 of the child molest syndrome: if it was not developed
21 as a truth-seeking procedure but rather as a
22 therapeutic aid, it cannot be used for a different
23 purpose, i.e., to prove a molestation occurred." **In re**
24 **Sara M.** (1987) 194 Cal.App.3d 585, 594, 239 Cal.Rptr.
25 605-611.

14 In **People vs. Roscoe** (1985) 168 Cal.App.3d 1093, the
15 prosecution introduced opinion testimony of the child's therapist
16 that the child was a victim of molest. The prosecution tried to
17 distinguish the case from **Bledsoe** by arguing that the therapist
18 never mentioned Child Molest Syndrome. The court held the impact
19 of his testimony was such even if he didn't use the term and held
20 the testimony inadmissible, relying on **Bledsoe**. (**Id.**, at pp.
21 1098-1100.)

22 See also **People vs. Jeff** (1988) 204 Cal.App.3d 309, holding
23 testimony concerning the victim's post-molest symptoms
24 inadmissible to prove a molest has occurred.

25 In **People vs. Stoll** (1989) 49 Cal.3d 1136, the Supreme Court
26 reaffirmed its holding in **Bledsoe** but clarified the rationale.
27 The court held that the issue of whether or not Kelly/Frye
28 applied to evidence of Rape Trauma Syndrome had never been raised

1 in **Bledsoe**. It went on to conclude the rationale of **Bledsoe** was
2 not based on Kelly/Frye and should not have been based on
3 Kelly/Frye. The court stated:

4 "On appeal, the parties debated whether the evidence
5 satisfied the Kelly-Frye test, with no one disputing
6 that such test was the appropriate standard. (See *id.*
at pp. 245-247 & fn. 7, 203 Cal.Rptr. 450, 681 P.2d
291.)

7 In *Bledsoe*, we first noted that other evidence at trial
8 had established that the victim promptly reported the
9 attack, immediately displayed emotional upset, and bore
10 bruises and other signs of injury. We therefore
11 inferred that the expert's testimony was not offered
12 for the limited purpose of explaining any post-rape
13 conduct (e.g., delayed reporting) which a lay jury
might otherwise view as inconsistent with a forcible
rape claim. Under our view of the facts, expert
testimony describing the syndrome and applying it to
this victim was used to prove that 'a rape in the legal
sense had, in fact, occurred.' (36 Cal.3d at p. 248,
203 Cal.Rptr. 450, 681 P.2d 291, italics added.)

14 *Bledsoe* understandably concluded that the counselor's
15 testimony was erroneously admitted for this purpose. A
16 careful reading of *Bledsoe* reveals that our primary
17 concern was the logical irrelevance of the evidence:
18 (1) the 'syndrome' was designed solely as a
19 nonjudgmental means by which to 'identify, predict and
20 treat' the victim's emotional problems; (2) since
21 counselors rarely question the victim's factual
22 account, the syndrome is an inappropriate means of
23 deciding the intricate legal issue of consent (i.e.,
24 whether the defendant reasonably, and in good faith
25 believed that the victim consented despite her good
26 faith belief that she did not); (3) the syndrome is
27 characterized by a 'broad range of emotional trauma'
28 not limited to victims of rape; and (4) a counselor's
assessment of the victim's feelings is not necessarily
an accurate measure of whether a third party, namely
the defendant, acted in legally culpable manner. (36
Cal.3d at pp. 249-250, & fn. 12, 203 Cal.Rptr. 450, 681
P.2d 291.)

25 *Bledsoe* acknowledged a handful of out-of-state cases
26 applying the Frye test to evidence of 'rape trauma
27 syndrome' on grounds that juries might view this
28 therapeutic diagnosis as 'scientific' proof a rape had
occurred. (See 36 Cal.3d at p. 248, 203 Cal.Rptr. 450,
681 P.2d 291.) However, *Bledsoe* did not hold that the
Kelly-Frye test applied to the expert opinion in that
case, nor did we discuss the test's relationship to

1 'syndrome' or other expert psychological evidence in
2 general. Assuming, like the parties, that the test did
3 apply, we simply concluded that the prosecution would
4 not be able to prove that rape trauma syndrome was
5 generally accepted by the counseling community to prove
6 criminal guilt." (*Id.*, at pp. 1160-1161.)

7 It should be noted that the Child Sexual Abuse Accommodation
8 Syndrome, articulated by Dr. Roland Summit, was not accepted by
9 the Revision Committee of the DSM III-R as it was without
10 scientific basis. See, Issues in Child Abuse Accusations, Vol.
11 3, No. 1, Winter 1991.

12 **C - EXPERT TESTIMONY THAT A CHILD IS A VICTIM**
13 **OF CHILD MOLEST, BASED UPON OBSERVATIONS**
14 **WITH ANATOMICAL DOLLS, IS INADMISSIBLE.**

15 In the case of *In re Amber B.* (1987) 191 CA3d 682, 236
16 Cal.Rptr. 623, the court held that the Kelly-Frye test applied to
17 the psychological technique of detecting child sexual abuse by
18 observing the child's behavior with anatomically correct dolls
19 and analyzing the child's report of abuse. The court ruled that
20 such a technique failed the Kelly-Frye test of reliability and
21 its wrongful admission into evidence compelled reversal:

22 "We conclude that the practice of detecting child
23 sexual abuse by (1) observing a child's behavior with
24 anatomically correct dolls, and (2) analyzing the
25 child's reports of abuse, is what Shirley characterizes
26 as 'a new scientific process operating on purely
27 psychological evidence' (31 Cal.3d at p. 53, 181
28 Cal.Rptr. 243, 723 P.2d 1354) and is subject to the
Kelly-Frye test. The specific causes of age-
inappropriate child sexual behavior, and indeed the
entire field of child sexuality since the theories of
Sigmund Freud, are beyond the scope of critical
analysis by the average lay person. Thus a
psychologist's examination and analysis employed the
technique used by Dr. Raming may be surrounded by an
'aura of infallibility', and a trier of fact would tend
to ascribe 'an ordinatedly high degree of certainty' to
the technique. (*People vs. McDonald*, supra, 37 Cal.3d
at p. 372, 208 Cal.Rptr. 236, 690 P.2d 709.) Unlike
with expert testimony where a witness gives a personal
opinion, triers of fact are in no position to temper

1 their acceptance of the psychological evidence 'with a
2 healthy skepticism born on their knowledge that all
human beings are fallible.' (Ibid.)

3 The trial court therefore erred when it failed to
4 require a showing of general acceptance in the relevant
scientific community in accordance with Kelly-Frye."
5 (Id., at p. 692.)

6 (See also **United States vs. Gillespie** (9th Cir. 1988) 852 F.2d
475,

7 481 [adopting the reasoning of **Amber B.**, supra, and finding
8 reversible error in the wrongful admission of expert opinion
9 testimony based on play therapy with anatomically correct dolls];
10 **In re Christine C.** (1987) 191 Cal.App.3d 676, 680, 236 Cal.Rptr.
11 630 [error in allowing expert testimony regarding minor's
12 behavior with anatomically correct dolls.]

13 In **In re Christie D.** (1988) 206 CA3d 469, 253 Cal.Rptr. 619,
14 the court held evidence of an alleged child victim's behavior
15 with anatomical dolls without the use of expert opinion equally
16 inadmissible because the effect was to make the trier of fact the
17 expert on an unproven technique. In other words, the deletion of
18 the expert's opinion does not cure the problem noted in **In re**
19 **Amber B** (1987) 191 CA3d 682, 236 Cal.Rptr. 623 and **In re**
20 **Christine C.** (1987) 191 CA3d 676, 236 Cal.Rptr. 630.

21 The use of anatomical dolls as an indicator of abuse is
22 without scientific merit. Anatomical dolls are likely to elicit
23 sexual reenactment in older children even if they have not been
24 abused. (Everson, M. & Boat, B. (1990), "Sexual doll play among
25 young children: Implication for the use of anatomical dolls in
26 sexual abuse allegations," Journal of American Academy of Child
27 and Adolescent Psychiatry, 29, 736-742.)

28 Within the scientific community the use of anatomical dolls

1 is questioned because they are sensitive but lack specificity of
2 the information obtained. Specificity is the ability to identify
3 persons who do not become abusive, so called true negatives.
4 Sensitivity is the ability of the information to identify people
5 who actually become abusive, so called true positive.
6 (Schneider, C., Helfer, R., & Hoffmeister, J. (1980) Screening
7 for the potential to abuse: a review. In C. Kempe & R. Helfer
8 (Eds.), The Battered Child, 3d Ed. (pp.420-430). Chicago:
9 University of Chicago Press.

10 **MUNCHAUSEN BY PROXY SYNDROME OR FACTITIOUS DISORDER BY PROXY**
11 **IS INADMISSIBLE CHARACTER EVIDENCE.**

12 Evidence Code Section 1101 precludes evidence of character
13 to prove conduct:

14 "Except as provided in this section and in sections
15 1102 and 1103, evidence of a person's character or a
16 trait of his character (whether in the form of an
17 opinion, evidence of reputation, or evidence of
18 specific instances of his or her conduct) is
19 inadmissible when offered to prove his or her conduct
20 on a specified occasion."

21 Evidence Code Section 1102 provides:

22 "In a criminal action, evidence of the defendant's
23 character or a trait of his character in the form of an
24 opinion or evidence of his reputation is not made
25 inadmissible by section 1101 if such evidence is:

26 (a) Offered by the defendant to prove his conduct
27 in conformity with such character or trait of
28 character.

(b) Offered by the prosecution to rebut evidence
addressed by the defendant under subdivision (a).

24 **PROFILES AND COMMON CHARACTERISTICS OF**
25 **CHILD MOLESTERS ARE CHARACTER EVIDENCE.**

26 In the case of **U.S. vs. Gillespie** (9th Cir. 1988) 852 F2d
27 475, the court found evidence of characteristics common to child
28 molesters to be inadmissible character evidence. It further held

1 that introduction of the defendant's general background does not
2 put his character into evidence:

3 "The government called Dr. Maloney allegedly to rebut
4 what it termed the appellant's testimony he could not
5 have molested the child. Dr. Maloney testified that
6 the characteristics of a molester include an early
7 disruption of the family environment, often with one
8 parent missing; a relationship with the parent of the
9 opposite sex who is dominant; unsuccessful
10 relationships with women; a poor self-concept; and
11 general instability in the background.

12 The trial court's admission of the testimony was an
13 abuse of discretion. Neither the appellant, his
14 witnesses, nor his lawyer put his general character at
15 issue or testified he had any specific character traits
16 that rendered him incapable of molesting a female
17 child. The appellant's testimony as to his childhood
18 was general background information, which did not put
19 his character at issue. See *McLister*, 608 F.2d at 789.

20 We have stated in dictum that testimony of criminal
21 profiles is highly undesirable as substantive evidence
22 because it is of low probativity and inherently
23 prejudicial. See *Hernandez*, 717 F.2d at 554-55
24 (testimony of the profile of a drug courier ordinarily
25 inadmissible as substantive evidence of guilt). The
26 jury's perception of the appellant's character and
27 credibility are crucial to the outcome of this case;
28 therefore, admission of Dr. Maloney's testimony was not
harmless error." (*Id.*, at pp. 479-480.)

1 The California Supreme Court has also ruled that evidence of
2 sexual deviancy or non-sexual deviancy is character evidence. In
3 the case of **People vs. Stoll** (1989) 49 C3d 1136, 265 Cal.Rptr.
4 111,, the court held admissible as character evidence psychiatric
5 testimony of defendant's absence of sexual deviancy.

6 "We decide whether a criminal defendant charged with
7 committing lewd and lascivious acts upon a child may
8 introduce a psychologist's opinion testimony, based
9 upon an interview and professional interpretation of
10 standardized written personality tests, that defendant
11 displays no signs of 'deviance' or 'abnormality'.
12 Under existing law and the facts of this case, the
13 evidence bears on a defense claim that the charged acts
14 did not occur. Professional testimony regarding the
15 absence of sexual deviance also is authorized under
16 statutory rules permitting a criminal defendant to

1 introduce evidence of his 'good character'." (*Id.*, at
2 p. 1140.)

3 "At the outset, defendant's claim that the testimony is
4 relevant character evidence must be sustained." (*Id.*,
5 at p. 1152.)

6 The Supreme Court found the admissibility of the character
7 evidence controlled by Evidence Code Section 1102:

8 "Section 1102 allows an accused to present expert
9 opinion testimony of this kind to indicate his
10 nondisposition to commit a charged sex offense. This
11 section was enacted in 1965, after *People vs. Jones*,
12 *supra*, 42 Cal.2d 219, 266 P.2d 38, was decided.
13 (Stats.1965, ch. 299, Sec. 2, p. 1336.) As the
14 accompanying Law Revision Commission Comment makes
15 clear, the statute codified Jones's rule permitting
16 introduction of defense expert opinion of 'good
17 character' to show noncommission of charged crimes.
18 (29B West's Ann.Evid.Code (1966 ed.) pp. 12-13.) The
19 Legislature thus implicitly endorsed 'lack of deviance'
20 as a relevant character trait in a lewd and lascivious
21 conduct case, even though the 'sexual psychopathy'
22 provisions cited in Jones were overhauled in the same,
23 as well as prior, years. (See, e.g., former Welf. 7
24 Inst. Code, Sec. 5501, amended by Stats.1963, ch. 2913,
25 sec. 5, p. 3907, repealed by Stats.1965, ch. 391, sec.
26 3, p. 1630, replaced by Stats. 2965, ch. 391, sec. 5,
27 p. 1643 [mentally disordered sex offender (MDSO)
28 provisions; later revised and repealed].)" (*Id.*, at p.
1153.)

18 "We see no reason to depart from this settled approach.
19 As discussed, criminal defendants are authorized to use
20 character evidence, including expert opinion, to prove
21 'conduct in conformity'. (Sec. 1102, italics added.)
22 This principle applies where lack of deviance is
23 offered as circumstantial evidence that a defendant is
24 unlikely to have committed charged acts of
25 molestation." (*Id.*, at p. 1158.)

23 "Expert opinion that defendants show no obvious
24 psychological or sexual problem is circumstantial
25 evidence which bears upon whether they committed sexual
26 acts upon children, and is admissible 'character'
27 evidence on their behalf." (*Id.*, at p. 1161.)

26 In **People vs. Ruiz** (1990) 222 Cal.App.3d 1241, the court
27 held that based upon **People vs. Stoll**, *supra*, that profile
28 evidence of a pedophile may be admissible. However, since the

1 profile had not been standardized against a population group of
2 pedophiles it was not admissible. (*Id.*, at pp. 1245-1246.)

3 **THERE IS NO "TYPICAL" CHILD MOLESTER.**

4 In **People vs. McAlphin** (1991) 53 Cal.3d 1289, the Supreme
5 Court held it was proper to admit expert testimony that, under
6 the current state of scientific knowledge, there was no profile
7 of a "typical" child molester, and that such persons are instead
8 found in all walks of life. (*Id.*, at pp. 1302-1303.)

9 The admissibility of "profile" evidence was considered in
10 **People vs. Stoll**, supra:

11 "The Attorney General argues that, under Bledsoe,
12 supra, 36 Cal.3d 236, 203 Cal.Rptr. 450, 681 P.2d 291,
13 use of 'syndrome' or 'profile' terminology by a mental
14 health professional makes the diagnosis seem
15 'scientific' to a jury, and thus invokes Kelly/Frye.
16 We adopted no such per se rule in Bledsoe, despite its
17 reference to concerns raised in out-of-state cases. We
18 are not persuaded that juries are incapable of
19 evaluating properly presented references to
20 psychological 'profiles' and 'syndromes'." (*Id.*, at p.
21 1161, fn. 22.)

22 **People vs. Harlan** (1990) 222 Cal.App.3d 439, 448-449 quotes
23 **Stoll** with approval on the subject of allowing profiles although
24 that case did not contain a profile issue. In **People vs. Ruiz**,
25 supra, the court found profile evidence can be admissible but
26 found the particular profile evidence proffered in that case to
27 be inadmissible because of the defendant's failure to demonstrate
28 the reliability of the material on which his expert based his
29 opinion. (222 Cal.App. 3d at pp. 1245-1246.)

30 However, as stated above, **People vs. Stoll**, supra, 49 Cal.3d
31 at p. 1159, held that the psychological evaluations or
32 personality evaluations was CHARACTER EVIDENCE! Also see **People**
33 **vs. Ruiz**, supra, wherein the court held that these opinions were

1 character evidence:

2 "It is now settled that psychological opinions based
3 upon personal examination and analysis of accepted
4 psychological tests, such as the MMPI and MCMI, may be
5 admitted as character evidence...." (*Id.*, at p. 1243.)

6 The defendant's and the victim's character can only be
7 placed in evidence by the defendant. (Evidence Code sections
8 1101, 1102, 1103.)

9 **STUDIES ON RELIABILITY OF PROFILES REQUIRED**
10 **BEFORE ADMISSIBLE AS "PREDICTORS."**

11 In *People vs. Ruiz*, supra, the court held that based upon
12 *People vs. Stoll*, supra, that profile evidence of a pedophile may
13 be admissible. However, since the profile had not been
14 standardized against a population group of pedophile it was not
15 admissible. The court stated:

16 "Still, it is not enough to determine that certain
17 material--here, profile evidence--might be admissible.
18 Evidence Code section 801, subdivision (b) requires
19 that the matter underlying an expert's opinion be of `a
20 type that reasonably may be relied upon by an expert in
21 forming an opinion upon the subject to which his
22 testimony relates.' Thus there must be some showing
23 that the material on which the expert bases his or her
24 opinion--here the profiles of the primary types of
25 pedophile--is reliable.

26 As discussed, supra, there was no such showing in the
27 present case. There was no evidence that the
28 scientific community had developed any standard profile
of a pedophile. Indeed, Dr. Berg explained that the
tests he used were not designed to elicit that
information and had not been standardized against a
population group of pedophile. Dr. Berg said that the
disorder usually manifests itself in persons who have
become fixated on children or on persons who have
experienced some recent stress, but there was no
showing that Dr. Berg was stating anything other than
his personal opinion, nor was there any showing that
his personal opinion in such matters was reliable.

We conclude that in this case, at least, the evidence
properly was excluded." (*Id.*, at pp. 1245-1246.)

An Expert's Personal Opinion About a Defendant is Inadmissible:

1 Other cases hold that it is error for an expert to express a
2 personal expert opinion that the defendant is what he is accused
3 of being. In **People vs. McDonald** (1984) 37 Cal.3d 351, 208
4 Cal.Rptr. 236, the court ruled that the expert should have been
5 permitted to testify about psychological factors affecting the
6 reliability of eyewitness identification. It did not hold that
7 the expert could give an opinion on the reliability of particular
8 eyewitness testimony. (Also see **People vs. Page** (1991) 2
9 Cal.App.4th 161.) In **People vs. Brown** (1981) 116 Cal.App.3d 820,
10 172 Cal.Rptr. 221, the court found error where a police officer
11 testified as to the definition of a heroin "runner" and then went
12 further to render an opinion that the defendant in the case was
13 in fact a runner. The court held that the jury was qualified as
14 the witness to determine whether the defendant worked as a
15 runner. Finally, in **In re Cheryl H.** (1984) 153 Cal.App.3d 1098,
16 1118-1125, the court held that the opinion of a psychiatrist who
17 had examined a suspected victim of sexual molest as to the
18 identity of the defendant as the abuser was inadmissible

19 **MUNCHAUSEN BY PROXY SYNDROME OR FACTITIOUS DISORDER BY PROXY**
20 **IS INADMISSIBLE CHARACTER EVIDENCE ON THE ISSUE OF MOTIVE.**

21 **PEOPLE v. PHILLIPS DISTINGUISHED**

22 *Add in appropriate argument*

23 **PEOPLE v. BLEDSOE DISTINGUISHED**

24 *Add in appropriate argument*

25 **IN THE ALTERNATIVE, IF THE COURT HOLDS THAT PEOPLE v.**
26 **BLEDSOE IS CONTROLLING THE PROSECUTION IS LIMITED TO GENERIC**
TESTIMONY.

27 In **People vs. Roscoe** (1985) 168 Cal.App.3d 1093, the court
28 established rules on the use of experts to rehabilitate alleged

1 victims:

2 "The Bledsoe court would permit the expert to tell the
3 jury about `recent findings of professional research on
4 the subject of a victim's reaction to sexual assault'
5 to rehabilitate the complaining witness. (People vs.
6 Bledsoe, supra, 36 Cal.3d at p. 247, 203 Cal.Rptr. 450,
7 681 P.2d 291.) The language suggests-although it does
8 not explicitly require-that the opinion testimony must
9 be based upon the literature in the field and the
10 general professional experience of the witness rather
11 than upon an analysis and diagnosis based upon a review
12 and evaluation of the facts in the case at hand. Thus,
13 for example, a victim whose credibility is attacked for
14 initially denying that he had been molested could be
15 rehabilitated by expert testimony that such denials are
16 more likely than not in molestation cases. The
17 testimony would not be that this particular child was a
18 victim of molestation, causing him to react in a
19 certain way, but rather that as a class victims of
20 molestation typically make poor witnesses, and are
21 reluctant to disclose or discuss the sordid episodes.

22 Since the language used by the court does not clearly
23 proscribe testimony in support of credibility based
24 upon a diagnosis of the victim, we must consider
25 Bledsoe further.

26 Credibility questions arise whenever the defendant
27 denies the victim's story, explicitly or implicitly
28 suggesting misrecollection or fabrication. If, in
every such case, the jury could be informed that a
doctor had diagnosed the complainant, based upon the
specific facts in the case, as a child molest victim
(or rape victim, or whatever), then the protection
against misuse of psychologists' testimony erected by
Bledsoe would be largely dismantled.

29 Where the expert refers to specific events, people and
30 personalities and bases his opinion as to credibility
31 on his diagnosis of this witness, then the conclusion
32 that the witness is credible rests upon the premise
33 that the diagnosis is accurate, and that in fact
34 molestation had occurred. The jury in effect is being
35 asked to believe the diagnosis, to agree that the
36 doctor's analysis is correct and that the defendant is
37 guilty. Such a result would subvert the sound rule
38 adopted by a unanimous Supreme Court in Bledsoe. It
39 follows, therefore, that the expert testimony
40 authorized by Bledsoe to permit rehabilitation of a
41 complainant's credibility is limited to discussion of
42 victims as a class, supported by references to
43 literature and experience (such as an expert normally
44 relies upon) and does not extend to discussion and
45 diagnosis of the witness in the case at hand." (Id.,

1 at p. 1099-1100.)

2 The court also held that the doctor/expert should not be
3 allowed to discuss the facts of this particular case under
4 Evidence Code Section 352.

5 "While we believe that this reading of Bledsoe is
6 proper, we find as an independent ground of decision
7 that all of the above considerations required the trial
8 court to exclude this testimony under Evidence Code
9 Section 352, even though this was not specifically
10 urged in support of defendant's various objections. It
11 would be possible for an expert witness to tell the
12 jury about various studies showing typical responses of
13 victims in molest situations without relying on a
14 detailed analysis of the facts in the case at hand.
15 All of the 'probative value' that the prosecution was
16 entitled to could have been preserved by so limiting
17 the doctor's testimony, without creating any
18 'substantial danger of undue prejudice'. (Evid. Code
19 Section 352). The doctor's discussions of specific
20 facts of this case in support of his conclusion that
21 the complainant was indeed a victim of molestation by
22 the defendant had all the force of a district
23 attorney's closing argument, and even greater impact
24 since it was delivered in clinical terms by a 'doctor'
25 purporting to make an objective scientific analysis."
26 (*Id.*, at p. 1100.)

16 The Correct Procedure for Dispelling Myths:

17 In **People vs. Gray** (1986) 187 Cal.App.3d 213, 218, the court
18 allowed an expert witness to testify regarding the child abuse
19 accommodation syndrome. It was made clear to the jury that this
20 was not a diagnosis or a test for child abuse. The expert did
21 not form any opinions that the child had been molested. The
22 expert confined his remarks to behavioral traits of child abuse
23 victims as a class nor did he rely on a detailed analysis of the
24 facts in the case at hand. The expert's testimony was allowed to
25 explain that late reporting is not unusual and disclosure of
26 details over time is not unusual.

27
28 **PEOPLE v. BLEDSOE:
LIMITING A SUBTERFUGE AROUND BLEDSOE**

1
2 **USE OF EXPERT TESTIMONY TO DISPEL MYTHS**

3 In the wake of **Bledsoe** reviewing courts have held valid the
4 use of expert testimony to dispel myths about child molest
5 victims. However, the testimony is limited to victims as a class
6 and not a particular alleged victim. **People vs. Roscoe**, supra,
7 168 Cal.App.3d at pp. 1098-1100; **People vs. Gray** (1986) 187
8 Cal.App.3d 213, 218; **People vs. Coleman** (1989) 48 Cal.3d 112,
9 144; and **People vs. Stark** (1989) 213 Cal.App.3d 107, 116-117. In
10 addition, testimony not properly limited is excludable pursuant
11 to Evidence Code section 352. (**Roscoe**, supra, at p. 1100.)
12

13 **LIMITS ON EVIDENCE TO DISPEL MYTHS**

14 In **People vs. Bowker** (1988) 203 Cal.App.3d 385, 394, 249
15 Cal. Rptr. 886, 891, the court considered whether or not the
16 testimony of a child abuse accommodation syndrome expert fell
17 within the **Bledsoe** exception permitting such testimony for the
18 narrow purpose "of disabusing the jury of misconceptions as to
19 how child victims react to abuse." (Id., at p. 392.) The court
20 reaffirmed that "**Bledsoe** must be read to reject the use of CSAAS
21 evidence as a predictor of child abuse," and found the expert's
22 testimony had exceeded the **Bledsoe** exception holding that "at a
23 minimum the evidence must be targeted to a specific 'myth' or
24 'misconception' suggested by the evidence." (Id., at pp. 393-
25 394.) The court further held:

26 "In the typical criminal case, however, it is the
27 People's burden to identify the myth or misconception
28 the evidence is designed to rebut. Where there is no
danger of jury confusion, there is simply no need for
the expert testimony." (Id., at p. 394.)

1 In determining that the expert's testimony erroneously
2 exceeded the permissible limits of the **Bledsoe** exception, the
3 **Bowker** court found that the expert's testimony was tailored to
4 fit the children in that particular case, asked for sympathy,
5 asked that children be believed and by describing each aspect of
6 CSAAS theory provided a scientific framework the jury could use
7 to predict a molest occurred. The court ruled that this evidence
8 should have been excluded. (Id., at pp. 394-395.)
9

10 JURY INSTRUCTION

11 When testimony is introduced to dispel a myth the jury must
12 be instructed not to use that evidence to predict a molest has
13 been committed.
14

15 "Beyond the tailoring of the evidence itself, the jury
16 must be instructed simply and directly that the
17 expert's testimony is not intended and should not be
18 used to determine whether the victim's molestation
19 claims is true. The jurors must understand that CSAAS
20 research approaches the issue from a perspective
21 opposite to that of the jury. CSAAS assumes a
22 molestation has occurred and seeks to describe and
23 explain common reactions of children to the experience.
24 (See *In re Sara M.*, *supra*, 194 Cal.App.3d at p. 593,
25 239 Cal.Rptr. 605.) The evidence is admissible solely
26 for the purpose of showing that the victim's reactions
27 as demonstrated by the evidence are not inconsistent
28 with having been molested." (**Bowker**, supra, at p. 394;
People vs. Housley (1992) 6 Cal.App.4th 947, 958-959
[such instruction required sua sponte.]

24 EVIDENCE CODE §352

25 Evidence Code section 352 requires the trial court to
26 balance any asserted probative value of a particular piece of
27 evidence against its prejudicial value and exclude evidence the
28 prejudice of which outweighs its probative value or has a

