WORKING WITH EXPERTS IN ARTICLE 10 AND TPR CASES

SUPPLEMENTAL MATERIALS

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Working With Experts in Article and TPR Cases:
The Applicable Law
Supplemental Materials

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CONSULTING WITH/RETAINING AN EXPERT

EXPERT CONSULTATION AGREEMENT

Dear Dr. [expert]:

This letter will confirm the agreement between ----------, ("Counsel") attorneys for ---------- [name of client], a respondent in this proceeding ("the client"), and yourself, who has been retained to provide consulting services and possibly written or oral testimony concerning allegations of abuse and related subjects in connection with Counsel's representation of the client.

As requested by Counsel, you will assist in Counsel's efforts to determine the validity of [scope of expert opinion. For example: "the medical tests and related opinions and diagnoses that have been presented in evidence by the Administration for Children's Services"] in the litigation to which the client is a party, and with regard to related matters. It is also understood that it is possible that in the future, Counsel may request that you formulate and express an expert opinion for purposes of testifying at court proceedings, or of providing your opinion in writing, as to matters that you have considered, and you hereby agree to render your expert opinion and provide such testimony or writing if so requested by Counsel.

Counsel has retained you in order to obtain independent consultant services and advice regarding allegations of abuse and related subjects and, if requested, an objective expert opinion on matters relevant to the litigation. Counsel seeks your independent judgment and objective analysis, whether it is favorable or unfavorable to the client.

In order for you to carry out your responsibilities under this agreement, Counsel and the client (and possibly co-counsel and other experts retained by Counsel and/or the client) will disclose to you various legal theories or confidential work product, as well as other privileged or confidential information. You agree that during and after the period of this engagement, you will not disclose any privileged or confidential information, attorneys' work product, opinions, facts, data or other information or theories disclosed to or discovered by you in connection with or during the course of this engagement, or any information derived therefrom, to any person or entity to whom disclosure has not been expressly authorized by Counsel.

All written or oral communications, and any written reports, documents, notes, summaries or other materials (including materials assembled, created or developed by Counsel) generated by or for, or provided to, you in connection with your activities under this agreement are intended to be and will be confidential attorney work product and protected by the attorney-client privilege. Any documents or other materials generated by or for, or provided to, you in connection with your activities hereunder shall be marked "Privileged and Confidential Attorney Work Product," shall become and remain the property of Counsel, and shall be segregated and maintained by you in secure and separate files and not copied onto outside or publicly accessible servers, websites, or computers. The inadvertent omission of the statement "Privileged and Confidential Attorney Work Product" shall not constitute a waiver of any privilege.

If any person or entity to whom disclosure has not been authorized requests, subpoenas, or otherwise seeks to obtain from you theories, opinions, facts, data, information, testimony, reports, documents or other materials which relate to or refer in any way to Counsel's or your work pursuant to this agreement, you shall immediately inform Counsel and cooperate with

Counsel to resist or seek protection against disclosure of any such theories, opinions, facts, data, information, testimony, reports, documents or other materials which relate to or refer in any way to your work pursuant to this agreement.

Payment: *The parties agree that you shall provide an initial consultation to Counsel without any compensation.* In the event that Counsel requests that you prepare a written report and/or testify by deposition or in court in connection with the litigation or any related matters, Counsel shall pay you $200 per hour for your work associated with reviewing records, interviewing Client and collaterals, consulting in person or by phone, testing, scoring, writing reports, preparing for testimony or offering testimony – although the listing of these various types of work does not mean that you will be asked to undertake them. In addition to these fees, you shall be entitled to be reimbursed for all out-of-pocket expenses reasonably and necessarily incurred in connection with the performance of your duties under this agreement. You shall consult with Counsel before incurring any expenses. You shall submit monthly invoices to Counsel. In consideration of the payment to you set forth herein, you waive your right to work for, consult with, or otherwise advise any other party to the litigation, and any other related matter, during the period of time prior to the resolution of the litigation or related matters.

Each of the parties has the right to terminate this agreement and the subject engagement immediately upon delivery of written notice. Your obligations regarding confidentiality under this agreement shall survive the termination of this agreement. In addition, any work outside of the primary contractual relationship shall be accompanied by an independently executed and accepted agreement, including the appropriate confidentiality and exclusivity terms and conditions contained herein, and provisions of a separate retainer. This agreement is governed by the law of the State of New York.

If this letter is consistent with your understanding, kindly execute and date the letter and return it to the undersigned.

Very truly yours,

Name of Attorney
Title

Expert Name/Signature
Date:

DEFENSE PRACTICE TIPS

Getting the Expert Funds You Need Under County Law §722-c

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Defense Practice Tips

Getting the Expert Funds You Need Under County Law § 722-c

by Stephanie Batcheller*

The right to expert and auxiliary services for those charged with crimes and unable to secure these services on their own is a matter of due process, fundamental fairness, and equal protection. *See Ake v Oklahoma*, 470 US 68 (1985); *Tyson v Keane*, 991 F Supp 314 (SDNY 1997) (magistrate judge's report and recommendation). It has been held that the assistance of experts and other ancillary services may be considered among the "basic tools" needed for meaningful representation. *Tyson*, 991 F Supp 314 (*citing Britt v North Carolina*, 404 US 226, 227 [1971]).

In New York, the right is governed by provisions of County Law § 722-c. This section does not limit funding to litigation in criminal cases. It also applies to the application for funds for expert assistance for persons described in Family Court Act §§ 249 (minors represented by Attorneys for the Child) and 262 (adult respondents in Family Court); Corrections Law article 6-c (litigants in Sex Offender Registration Act proceedings); and Surrogate's Court Procedure Act § 407 (respondents in proceedings involving the voluntary or involuntary surrender of children into foster care; parents in adoption proceedings; parents in custody proceedings). While many of the cases discussed herein are criminal cases, and therefore the text used to describe some issues centers on criminal defense, this article is intended to help lawyers and litigants in all applicable cases and courts.

The statute does not restrict the availability of funds for expert services to those defendants represented by appointed counsel. Any defendant who cannot afford supplemental services, even those represented by retained counsel, may receive funding under § 722-c with the proper showing. *See People v Smith*, 114 Misc 2d 258 (County Ct, Dutchess Co 1982); *see also* ABA Standards for Criminal Justice, Providing Defense Services, Standard 5-1.4 and commentary at 22 (3d ed 1992).

I. Standards of Review

The threshold for obtaining funds is the need for the services and financial inability to pay. *Johnson v Harris*, 682 F2d 49 (2d Cir 1982); *People v Dove*, 287 AD2d 806 (3d Dept 2001). Applications for § 722-c services are left to the discretion of the trial court. *Johnson*, 682 F2d 49; *but see People v Christopher*, 65 NY2d 417, 425 (1985) (in most circumstances, the number of experts on an issue to be heard will be a matter of discretion, but refusal to hear any expert witness on behalf of the defendant in competency hearing is a violation of the statutory requirement, not a matter of discretion).

Denials of applications for expert services are reviewable on appeal for abuse of discretion. *People v Cronin*, 60 NY2d 430 (1983); *People v Mooney*, 76 NY2d 827 (1990). A trial court's error in granting an application for funds under § 722-c is subject to harmless error analysis. *Tyson*, 991 F Supp 314. Denial of access to an expert is not necessarily reversible under the federal constitution. *Tyson v Keane*, 159 F3d 732 (2d Cir 1998).

Generally, CPLR article 78 proceedings for orders mandating the granting of a motion for § 722-c funds will not lie. *Brown v Rohl*, 221 AD2d 436 (2d Dept 1995) (mandamus will not lie to compel a trial court to grant funds in excess of the statutory limit); *De Jesus v Armer*, 74 AD2d 736 (4th Dept 1980) (review on direct appeal is an adequate remedy for propriety of denial of § 722-c funds; therefore action under article 78 will not lie).

II. The Application Process

The procedure for authorizing funding for expert or other auxiliary services in New York is set forth in County Law § 722-c:

> Upon a finding in an ex parte proceeding that investigative, expert or other services are necessary and that the defendant or other person described in section two hundred forty-nine or section two hundred sixty-two of the family court act, article six-C of the correction law or section four hundred seven of the surrogate's court procedure act, is financially unable to obtain them, the court shall authorize counsel, whether or not assigned in accordance with a plan, to obtain the services on behalf of the defendant or such other person. The court upon a finding that timely procurement of necessary services could not await prior authorization may authorize the services nunc pro tunc. The court shall determine reasonable compensation for the services and direct payment to the person who rendered them or to the person entitled to reimbursement. Only in extraordinary circumstances may the court provide for compensation in excess of one thousand dollars per investigative, expert or other service provider.
>
> Each claim for compensation shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source.

The basic requirements are that the application must be made in an ex parte proceeding; must be in writing; must demonstrate the financial inability of the person to pay for the expert services; must demonstrate the necessity of the requested services; and should identify the

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projected costs of obtaining expert assistance, including hourly rates or full cost and existing extraordinary circumstances if it is anticipated that funds over the statutory cap will be required. Each of these factors is discussed below.

A. *The Importance of Ex Parte Applications*

The statute specifically authorizes an ex parte application for expert and auxiliary services. This is an important feature because an accused cannot be forced to choose between obtaining services needed to prepare an adequate defense and safeguarding the confidentiality of emerging defense strategy. *See Marshall v United States*, 423 F2d 1315, 1318 (10th Cir 1970) ("The manifest purpose of requiring that the inquiry be ex parte is to insure that the defendant will not have to make a premature disclosure of his case.").

Ex parte applications generally take the form of a motion, with a Notice and Affirmation of Counsel supported by any other pertinent documentation, such as an affidavit from the expert or the expert's curriculum vitae. Written applications are not only required by the statute, but also ensure that the application is complete and preserves all issues for later review if such application is denied. Samples of applications are available from the Backup Center. Counsel should request an ex parte hearing at which issues can be further addressed. Counsel may also wish to ask the court to seal the application and order in the court's files to protect the continuing confidentiality of the defense strategy. Judiciary Law § 2-b(3).

B. *The Application Must be in Writing and Should be Prior to Engagement of Services*

Applications for funds under § 722-c must be made in writing and oral requests may be denied. *Dove*, 287 AD2d 806; *Matter of Brittenie K.*, 50 AD3d 1203 (3d Dept 2008).

Further, although the statute provides for the availability of *nunc pro tunc* authorization where circumstances require, attorneys should seek authorization prior to hiring the expert or risk the denial of compensation. *People v Barber*, 60 AD2d 747 (4th Dept 1977) (absent showing that expenses incurred for expert witnesses and investigation were necessary and that the timely procurement of such services could not await prior authorization, the court did not err in denying defendant's post-trial application for the payment of such expenses by the county).

C. *Specific Showing of Financial Inability to Obtain Services*

The right to funds under § 722-c is not limited to defendants who have appointed counsel. Any defendant who cannot afford the services may invoke the statutory mechanism for obtaining them. *People v Ulloa*, 1 AD3d 468 (2d Dept 2003); *Smith*, 114 Misc 2d 258. It is necessary to demonstrate that the client's financial status is such that the client cannot afford to pay for the services of the expert, even if counsel may have been retained. *People v Pinney*, 136 AD2d 573 (2d Dept 1988); *People v Hatterson*, 63 AD2d 736 (2d Dept 1978).

When counsel has been assigned, presenting the court with a copy of the Order of Assignment may suffice in demonstrating financial inability. However, the assignment of counsel will not always suffice to establish financial need. *People v Jackson*, 80 Misc 2d 595 (County Ct, Albany Co 1975); *People v Lowery*, 7 Misc 3d 1032A (White Plains City Ct 2005); *but see* ABA Standards for Criminal Justice, Providing Defense Services, Standard 5-1.4 and commentary at 23 (3d ed 1992) ("Inability to afford counsel necessarily means that a defendant is unable to afford essential supporting services, such as investigative assistance and expert witnesses.").

Whether institutional assigned counsel may apply for § 722-c funding is somewhat unclear. Most public defender offices and legal aid societies will have funds budgeted for the hiring of experts, but if the occasion arises where the funds are depleted or a provider does not have such a budget item, the wording of the statute is open to some interpretation. The issue presented itself in *People v Stott*, 137 Misc 2d 896 (County Ct, Sullivan Co 1987), with mixed results. The County Court initially granted § 722-c funds to the local Legal Aid Society to obtain a transcript for an appeal, but when the allotted amount proved to be too little and the Court was asked for additional funds to meet the difference, the Court reversed itself finding that the section was directed only at attorneys working with an Assigned Counsel Plan and that the Legal Aid Society was required to pay the expense from their own budget. The statute provides that where a defendant is financially unable to obtain necessary services "the court shall authorize counsel, whether or not assigned in accordance with a plan" to procure such services. This language is not as clear as the Sullivan County Court suggests. If an institutional provider is unable to independently hire a needed expert, it would seem to be a matter for the attorney-in-charge to seek the funds either directly from the county administration or the court. If the county fails to grant the funds, the court should protect the defendant's rights by authorizing the funds under § 722-c. Public defenders have succeeded in obtaining funds via § 722-c when institutional budgets could not cover the cost of hiring a necessary expert.

Local rules and practice may impact what the court requires for applications for § 722-c services by assigned counsel and whether it is necessary to file any supplemental financial information. Where counsel has been retained, at the very least, a financial statement that demonstrates the client's lack of additional funds to hire an expert is required. In any event, an affirmation of coun-

sel asserting the client's financial need is not sufficient. The application must include a verified statement of financial need submitted by the client. *See Cynthia H. v James H.*, 117 Misc 2d 474 (Family Ct, Queens Co 1983); *People v Powell*, 101 Misc 2d 315 (County Ct, Tompkins Co 1979); *Jackson*, 80 Misc 2d 595. In this regard, it should be the defendant's financial status that is dispositive in assessing ability to afford auxiliary services, not the resources of friends or relatives: "[I]ndigence is personal. The State is not entitled to treat the funds of others, over which a defendant has no control, as assets of the defendant." *Fullan v Commissioner of Corrections*, 891 F2d 1007, 1011 (2d Cir 1989); *Ulloa*, 1 AD3d 468.

D. *Showing of Necessity*

A thorough knowledge of the case is key to making the requisite showing of necessity. The most common reason for the denial of a § 722-c motion, and the affirmance of such denials on review, is the failure to demonstrate necessity for the particular expert. To avoid denial based on failure to establish necessity, papers must be carefully and thoroughly drafted, and should provide "specific factual details which show to a reasonable probability that the forensic services would aid in the defense or produce relevant evidence." *Lowery*, 7 Misc 3d 1032A.

The pleadings must show that the need for the expert assistance is relevant to a significant issue at trial. *See People v Lewis*, 93 AD3d 1264 (4th Dept 2012) (defense counsel's failure to call ballistics expert not ineffective assistance of counsel given failure to demonstrate expert's testimony would have assisted the trier of fact or that the defendant was prejudiced by the absence of such testimony); *People v Oquendo*, 250 AD2d 419 (1st Dept 1998) (denial of the application for an expert to testify at trial regarding hand-to-hand drug transactions upheld where the request failed to establish that the testimony was relevant to a significant issue at trial).

Bare bones allegations of relevance or helpfulness to the defense are not sufficient to establish necessity. *People v Rockwell*, 18 AD3d 969 (3d Dept 2005) (no error in denying funds for investigator where the defendant only asserted that an investigator would be helpful); *Matter of Jack McG.*, 223 AD2d 369 (1st Dept 1996) (denial of funds to hire a defense psychiatrist affirmed where the claim that such testimony might "add insight" into the court-appointed psychiatrist's evaluation was insufficient to require granting of request); *People v Gallow*, 171 AD2d 1061 (4th Dept 1991) (the fact that proposed testimony would be relevant to issue in case is not by itself sufficient, a showing must be made that expertise is necessary for resolution of the issue); *People v Moore*, 125 AD2d 501 (2d Dept 1986) ("Since the defendant did not demonstrate the necessity for the appointment of a fingerprint expert on his behalf under County Law § 722-c, the trial court did not abuse its discretion in denying his request to appoint such expert."); *People v Pride*, 79 Misc 2d 581 (Supreme Ct, Westchester Co 1974) ("[D]efendant's moving papers are of little help to the court in the resolution of [the] question [of necessity].").

Pleadings must establish that there are challengeable conclusions made by witnesses or to be drawn from evidence that is material to the defense. In *Hatterson*, 63 AD2d 736, the court held that the denial of funds under § 722-c for a physician and a psychiatrist was an improvident exercise of discretion where the prosecution offered expert psychological testimony in the case in chief and on rebuttal regarding duress the victim endured and the defense sought to hire an expert to challenge these assertions.

Denials of requests for expert assistance have been authorized based on findings that there already exists sufficient information to proceed without employing another expert *See, e.g., People v Brand*, 13 AD3d 820 (3d Dept 2004) (not necessary to provide second defense expert where the defendant was able to challenge prosecution's assertions through testimony of the first defense psychiatric expert); *c.f. People v Seavey*, 305 AD2d 937 (3d Dept 2003); *People v Paro*, 283 AD2d 669 (3d Dept 2001).

Denials have also been authorized where the issue is determined to be not significant or material enough to warrant the funding of an independent expert. *See, e.g., Johnson*, 682 F2d 49 (The prosecution's expert testimony on hair identification was brief, communicated in non-technical language, and readily understandable by the defense and the jury. In addition, upon cross-examination by the defense, the prosecution's expert stated that no hair comparison can prove identity positively.); *People v King*, 111 AD2d 1043 (3d Dept 1985) (since the prosecution called a witness who saw the defendant endorse the check, there was no error in denial of funds for a handwriting expert); *People v Stamp*, 120 Misc 2d 48 (Starkey Town Ct 1983) (court denied request for expert to testify as to inadequacies of breath test machine where issues raised of improperly tested breathalyzer instrument, outdated ampoules, and inaccuracies attendant to readings are not uncommon and counsel is fully capable of thoroughly exploring any anomalies which may have been present during the breathalyzer test and to bring them to the attention of the jury through cross-examination).

Despite possible resistance to applications for expert assistance by courts seeking to safeguard funds or expedite proceedings, counsel should not be discouraged from moving for funds by presuming that an application will fail. Much of the case law related to denials presents situations where the applications were inadequate or abandoned. Perseverance and carefully drawn pleadings will often overcome perceived obstacles, and also preserves any denial for appellate review.

In *People v Jones*, 210 AD2d 904 (4th Dept 1994) *affd* 85 NY2d 998 (1995), the Appellate Division held that the County Court abused its discretion in denying the defendant's application for authorization to have neurological testing conducted based on reports that, as a child, the defendant sustained a traumatic head injury that caused permanent brain damage where the defendant's expert physician recommended tests based upon his belief that the defendant's cognitive limitations were a result of brain damage and a 30-year history of alcoholism. In that case such testing was crucial to the defendant's asserted defense of justification. In *People v Keane*, 209 AD2d 354 (1st Dept 1994), the Appellate Division held that the trial court erred in denying the defendant's application to hire an expert in voice identification because expert testimony proving that the defendant was not the person heard on the tape admitting to the crime would seriously damage the complainant's credibility, obviously a key issue in a date rape case.

"Likelihood of success" is an erroneous standard for deciding § 722-c applications. In *People v Vale*, 133 AD2d 297 (1st Dept 1987), the First Department reversed the defendant's conviction, deeming the denial of the defendant's § 722-c application for psychiatric assistance "most improvident." Citing *Ake v Oklahoma*, the court stated:

> [W]hen a state undertakes to prosecute an indigent defendant, it must also take whatever measures are necessary to assure that the defendant is able to participate meaningfully in the proceeding. The proceeding will otherwise be fundamentally unfair and offensive to the due process guarantees of the Fourteenth Amendment .... [A]n indigent need not show that an insanity defense "might succeed" to obtain access to expert psychiatric assistance, but only that the issue of the defendant's sanity will be an important factor at trial.

Vale, 133 AD2d at 299-300.

Admissibility may become an issue in determining necessity, although the ultimate admissibility of, or the intent to introduce, expert testimony should not be dispositive of the request. Since expert assistance may be critical to the evaluation of evidence and counsel's understanding of the import of evidence in preparation of the defense case, not just to secure testimony at trial, funding should not be denied simply because particular evidence ultimately may be deemed inadmissible at trial or because the use of the expert is not necessarily intended to develop evidence to be admitted at trial. *But see People v Brown*, 136 AD2d 1 (2d Dept 1981) (court did not err in denying the defendant's request to retain the expert services at public expense where it appropriately exercised discretion in determining that desired expert testimony on the defendant's behalf would be inadmissible); *People v Hinson*, 2001 NY Slip Op 40357U (Supreme Ct, Kings Co 9/4/2001) (denial of funds for polygraph expert based on the defendant's failure to establish that lie detector tests have gained general scientific acceptance).

Where necessity or viability has not been settled under *Frye*, or has been called into question, especially in circumstances where the issue is new, it may be helpful to submit a Memorandum of Law setting forth the fundamental elements of the forensic issues and ask for a hearing to establish the validity of the use of expert testimony. In recent years, traditional forms of forensic evidence that have been accepted virtually without challenge for decades have received some judicial scrutiny, and the number of successful defense challenges is starting to grow. *See, e.g., Maryland v Rose*, Case No. K06-0545 (Circuit Ct, Baltimore Co 10/19/2007); *Commonwealth v Patterson*, 445 Mass. 626 (Mass 2005) (fingerprints); and *United States v Green*, 405 F Supp 2d 104 (D Mass 2005) (ballistics); *United States v Hines*, 55 F Supp 2d 62 (D Mass 1999) (handwriting analysis). Further, in light of the National Academy of Sciences study and report set forth in *Strengthening Forensic Science in the United States: A Path Forward* (2009) ("NAS report"), in any case where so-called "forensic sciences" are implicated, the defense should seek the assistance of an expert to determine whether the science involved is truly valid and what procedures must be followed for application of that science or expertise in the particular case to be reliable.

E. *Investigators and Necessity*

Establishing necessity is an especially critical task when seeking funds to employ an independent investigator. In such instances, the application should explain the circumstances supporting necessity, including that there are no reasonable alternatives or that all other reasonable alternatives have been exhausted. *See, e.g., Rockwell*, 18 AD3d 969 (denial of funds not an abuse of discretion where the "defendant only asserted that an investigator would be helpful.... Moreover, County Court adjourned the impending trial to allow defense counsel additional time to conduct whatever investigation he deemed necessary."); *People v Allen*, 28 Misc 3d 1226A (Albany City Ct 2010) (affidavit failed to demonstrate that the defense has exhausted other investigative avenues).

Examples of the requisite necessity for the services of an investigator may include the fact that there are too many witnesses to be located and interviewed by counsel; or that it is important that counsel has independent corroboration of witness interviews; or there is evidence that must be located and retrieved and counsel does not have time, resources, or investigative expertise to do so; or there are witnesses and/or evidence outside the jurisdiction that require an independent investigator to travel and investigate. In many cases, the cost of hiring and deploy-

ing an investigator will be more cost-effective than compensating counsel for the work at assigned counsel rates.

It may also be helpful in securing the services of an investigator to include in the application information such as the nature and difficulty of the problems and issues involved; the professional and/or educational qualifications of the investigator, and whether or not the investigator is licensed in the State of New York. *See People v Baker*, 69 Misc 2d 882 (Supreme Ct, New York Co 1972).

F. *Necessity and Forensic Consultants*

Necessity for expert assistance may be legitimately established to assist in the review and understanding of evidence or records in preparing for confrontation or investigation. In *Matter of Rosalie S.*, 172 Misc 2d 176, 177 (Family Ct, Kings Co 1997), the court stated that "the ability to consult with experts to prepare a complete defense is a key element of due process. To undermine the ability of litigants freely to engage experts in a confidential manner would have a chilling effect on their use and, therefore, impair the fundamental fairness of the litigation process." *See also Lisa W. v Seine W.*, 9 Misc 3d 1125A (Family Ct, Kings Co 2005) (§ 722-c application granted to hire expert to act as consultant and conduct peer review of the opposing party's expert report); *People v Roraback*, 174 Misc 2d 641 (Supreme Ct, Sullivan Co 1997) (§ 722-c order authorizing consult with an expert in infrared microscopy in preparation for *Frye* hearing challenging the prosecution's expert); *People v Santana*, 80 NY2d 92 (1992), *quoting Ake*, 470 US at 82 ("'[W]ithout the assistance of a psychiatrist to ... present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high'....").

This is especially true in regard to forensic fields. For example, when a case involves medical reports of physical injuries or an autopsy report in a homicide the defense should be entitled to an expert to help interpret the full import of the details of the records. *See, e.g., People v Bryce*, 287 AD2d 799 (3d Dept 2001) ("[T]he failure of the defense experts to timely examine this critical evidence prevented timely disclosure of 'a serious flaw' in the prosecution's case ...."). Similarly, when a case involves DNA evidence, the defense should be entitled to consult with an expert to review, interpret, and prepare to confront the prosecution's evidence, even if the expert may not be called as a defense witness. *But see People v Robinson*, 70 AD3d 728 (2d Dept 2010) (The defendant failed to demonstrate the necessity of the appointment of a DNA expert.).

In *Tyson v Keane*, 159 F3d 732 (2d Cir 1998) *affg* 991 F Supp 314 (SDNY 1998), the Second Circuit discussed the nature of expert assistance in cases where forensic analysis is the basis for seeking expert assistance. Citing *Ake v Oklahoma* and *United States v Durant*, 545 F2d 823, 829 (2d Cir 1976), the Court acknowledged that the importance of providing such experts rests on the fact that experts in these circumstances offer information and analysis that a non-expert cannot provide:

> Although the jury remains the ultimate judge of sanity, without expert assistance "the risk of an inaccurate resolution of sanity issues is extremely high." Ake, 470 U.S. at 82. Similarly, a jury cannot discern whether a fingerprint from the scene matches defendant's prints without expert assistance.

Tyson, 159 F3d at 738.

The more critical the forensic evidence is to proving the case, the greater the need for expert assistance to help the defense interpret and assess the evidence.

G. *The Rate and Projected Cost of Retaining the Expert*

A § 722-c application is not statutorily required to include the amount of funds necessary, but be aware that the statutory cap is $1,000.00, and if the final compensation will exceed that amount extraordinary circumstances must be established, if not at the outset then at the end when a voucher is submitted. Local practice will dictate whether an initial application must include the actual amount requested if less than the statutory cap. If it is anticipated from the outset that more funds will be required, or simply to strengthen the application, it may be best to include as much information as possible about the exact amount needed and to explain any attendant extraordinary circumstances. *People v Dearstyne*, 305 AD2d 850 (3d Dept 2003) ("In order to prevail on a motion pursuant to County Law § 722-c, a defendant must show both necessity and, if the compensation sought is in excess of [the statutory limit], extraordinary circumstances....").

The statute does not define extraordinary circumstances, nor is there any case law on point. By common usage of the term, extraordinary circumstances may include factors such as the need for a great amount of time to review and assess the evidence, that the expertise is unique and specialists are rare, or that the only available expert is from a distant jurisdiction. *See Dove*, 287 AD2d 806, 807 (The "application failed to address details concerning the necessity for the expert, the time to be expended by the expert, the precise services to be rendered by the expert, or the extraordinary circumstances which would warrant expenditure in excess of [the statutory limit].").

Working with the court may increase the likelihood of ultimately gaining the needed funds. There are cases in which the trial court's initial denial without prejudice or leave to renew was affirmed, the issue being lost on appeal because the defense failed to follow up. *Id.* ("[A]lthough the initial application was denied, defendant failed to seek an adjournment of the trial in order to locate an expert who could examine the recordings at a

more reasonable sum ...."); *see also Matter of Brittenie K.*, 50 AD3d 1203; *People v Graves*, 238 AD2d 754 (3d Dept 1997); *People v Lane*, 195 AD2d 876 (3d Dept 1993).

Where a court is hesitant to grant funds, obtaining more information to satisfy the prongs of nexus and necessity and thereafter renewing a request can often turn the tide. Locating an expert closer to the jurisdiction, providing more details as to a particular expert's credentials where a specialty is in question, better defining how the expert will be used; any of these may be enough to persuade a court to grant an application previously denied. *See People v Koberstein*, 262 AD2d 1032 (4th Dept 1999) (Before his prior trial, "defendant received $1,150 to retain an odontologist who was never called as an expert witness at that trial. Although the court initially denied defendant's request for funds [in the amount of $4,200], when defense counsel renewed his request for the lesser amount of $3,000, the court noted that it was 'receptive' and told defendant to confer with the court prior to making any expenditures. Defendant never raised the issue again. In the circumstances of this case, the court did not abuse its discretion in denying defendant's inflated request to retain a new expert after the court had previously allocated funds to obtain the services of an expert who did not testify at defendant's prior trial .... Moreover, defendant never pursued the matter after the court expressed its receptiveness to the retention of an expert at a more reasonable cost ....").

If the assistance sought is outside the bounds of reasonableness, the court will likely deny the § 722-c application. In *People v Thomas*, 139 Misc 2d 158 (County Ct, Schoharie Co 1988), the defense sought an order directing the county to pay for costs associated with transporting the defendant to Ottawa for a particular examination to obtain an expert opinion relative to his culpability, including having the sheriff provide transportation over a 72-hour period. The court found that "[t]he cost would not only be extraordinary, but phenomenal...., and [the] application fails to sufficiently convince the court that such expert services are truly necessary within the meaning and intent of County Law § 722-c. In addition, because of the logistics, security risk, and huge expense involved, this court holds and determines that the defendant's application should be and is hereby denied in all respects." *Id.* at 160.

This situation presents the opportunity for counsel to persevere in prevailing upon the court to reconsider where the expertise is critical and there are no other available alternatives. Some issues where an expert is needed may be novel or complex and therefore qualified experts may not be readily accessible. Counsel should not abandon efforts in this regard, but rather continue to seek assistance and return to the court with renewed and updated requests where it can be shown that costs can be reduced or qualified experts have refused to accept the case because the fees are unacceptably low. As discussed above, making a record for appeal to establish on review the importance of the expertise and diligent efforts to secure assistance will avoid findings of abandonment of the issue and may help to gain a reversal where the expert was denied.

III. Stages of Proceedings

Section 722-c does not limit expert or other assistance to certain types of cases, levels of seriousness, or to any particular stage of the proceedings (*e.g.*, only after arraignment on indictment). *But see Stamp*, 120 Misc 2d 48 (request for expert assistance on breath test machine inadequacies denied in non-felony DWI case). *Stamp* stands alone and in the years since that decision, the collateral consequences of even less serious convictions such as non-felony DWI can be devastating. Where an application is resisted because of an asserted lack of importance of the case or potential conviction, it is incumbent upon counsel to press the issue as a matter of due process and fundamental fairness to ensure that a person does not suffer undue consequences for the lack of ability to thoroughly examine the evidence and present a defense.

The importance of being allowed to hire experts in the early stages of a case relates to their use as consultants: the need for assistance in evaluating evidence to make reasonable strategic decisions, including whether to accept or reject a plea offer. *See People v Bennett*, 29 NY2d 462 (1972) (It is well settled that the defendant's right to effective representation entitles him to have counsel "'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself time for reflection and preparation for trial.'"); *People v Reed*, 152 AD2d 481 (1st Dept 1989) (noting counsel's obligation to convey accurate information in consideration of plea negotiation). The United States Supreme Court's 2012 decisions in *Lafler v Cooper*, 566 US __, 132 S Ct 1376 (2012) and *Missouri v Frye*, 566 US __, 132 S Ct 1399 (2012), regarding the critical nature of effective assistance counsel in plea cases, underscores how important it is that attorneys seek to use every available resource to investigate and properly counsel clients in the disposition of their cases.

Similarly, the use of mitigation experts has been accepted in cases where a defendant's history presents issues requiring evaluation. *See People v Louis*, 161 Misc 2d 667 (Supreme Ct, New York Co 1994) (approval of fees in excess of statutory amount based on extraordinary circumstances for mitigation expert in pre-plea investigation).

IV. Types and Independence of Experts

The defense entitlement to funding for experts is not limited to the same types of experts being used by the prosecution. In *Smith*, 114 Misc 2d 258, the court granted

§ 722-c funds to the defense in accordance with the Special Prosecutor's intent to use experts in particular fields. This case by no means should be considered to stand for the proposition that the defense is *only* entitled to the same types of experts that the prosecution intends to use. The need for expertise must be determined in accordance with the evidence and demands of the defense case, which may include assistance in refuting expert testimony presented by the prosecutor, but may also be needed to explore other issues that the defense can identify. Prosecutors may well not seek experts relating to potential defenses until after the defense makes these defenses known. Examples include mental health defenses; challenges to eyewitness testimony, and challenges to the prosecution's theory of how an incident unfolded (which may require a scene reconstruction expert, an expert on the physical limitations imposed by a defendant's disability, or one of many other types of experts).

Ample support exists for the proposition that the right to experts to assist the defense can only be meaningful if the experts employed have sole allegiance to the defense. "The essential benefit of having an expert in the first place is denied the defendant when the services ... must be shared with the prosecution." *United States v Sloan*, 776 F2d 926, 929 (10th Cir 1985); *Cowley v Stricklin*, 929 F2d 640, 644 (11th Cir 1991); *Smith v McCormick*, 914 F2d 1153 (9th Cir 1990); *Marshall v United States*, 423 F 2d 1315, 1319 (10th Cir 1970) (an expert who shares "both a duty to the accused and a duty to the public interest" is burdened by an "inescapable conflict of interest"); *People v McLane*, 166 Misc 2d 698 (Supreme Ct, New York Co 1995).

There is some case law that holds where the issues have been addressed by court-ordered experts or by experts previously engaged in the matter, the court may refuse funds to hire an additional expert solely for use by the defense. *Matter of Garfield M.*, 128 AD2d 876 (2d Dept 1987) (The court did not abuse its discretion in concluding that there was no need to provide an independent psychological expert because of "the extensive evaluation and psychological examination of the appellant by the Family Court Mental Health Services and the Probation Department."). However, it is critical to review such evidence carefully to determine whether independent expertise is necessary to assess the reliability of previous expert review.

Sometimes it is not possible to find an independent expert who has the expertise needed. In such instances, a court may order public experts to assist the defense as a matter of due process. In *People v Evans*, 141 Misc 2d 781 (Supreme Ct, New York Co 1988), the trial court ordered the New York Police Department Auto Crimes Unit experts to assist the defense in examining non-public Vehicle Identification Numbers. Finding that the expertise did not widely exist elsewhere and that the defense had exhausted efforts to obtain cooperation from private sources, the court held that "[w]hether or not [the defendant] has funds to hire an expert, if the only source of expertise that may reasonably be necessary to his defense resides with the government, the government must give him access. This is the essence of fairness. Due process mandates no less." *Id.* at 784.

V. Raiding the Public Treasury

Courts may cite the desire to preserve government funds as a basis for denying applications for services under § 722-c. *See, e.g., Pride*, 79 Misc 2d at 582 (stating that the defense should not be allowed to "raid the public treasury"). However, where the defense makes the appropriate showing of financial inability and necessity, budgetary constraints cannot form the sole basis for denial of funds. *See Ake*, 470 US at 78-80; *Matter of Director of Assigned Counsel Plan of the City of New York*, 159 Misc 2d 109, 123 (Supreme Ct, New York Co 1993) *affd sub nom People v Townsend*, 207 AD2d 307 (1st Dept 1994) *affd* 87 NY2d 191 (1995) (Economic issues "cannot be the overriding concern when the ability of the court to carry out its essential function of assuring justice and due process is implicated.").

VI. § 722-c and Systemic Reform

From a systemic standpoint, § 722-c motions for auxiliary services can be utilized as a means of developing authority supporting parity of resources for the defense. In the area of forensics, the NAS report decrying the scientific validity of forensic evidence as a whole should lay the groundwork for a standard practice of obtaining expert assistance in any case where the prosecution intends to use forensic evidence. Prosecutors have access to state forensic services and law enforcement databases to assist in the preparation of cases. To ensure that a person accused of a crime has a fair opportunity to meet and challenge this wide range of evidence, defenders must be diligent in seeking similar qualified assistance.

It has been held that a defense attorney is not excused from adequately investigating a client's case even though an investigator was not available. *Thomas v Kuhlman*, 255 F Supp 2d 99 (EDNY 2003). Where counsel cannot adequately perform the required investigation because time and resources prevent it, an application for investigative assistance should be made and renewed as necessary. Defenders in offices without investigators, and other assigned counsel working under onerous conditions of limited resources and overly burdensome caseloads, should cite overall constraints of time and resources as part of the showing of necessity.

This strategy serves a twofold purpose. First, it makes a solid record on appeal if the lack of investigative assistance plays a part in preventing the preparation and pres-

entation of a defense. Second, the regular filing of such applications will help establish the systemic need to ensure that needful clients and assigned counsel have investigators and other expert assistance available to fulfill their constitutional rights and obligations.

The ability to secure qualified expert assistance to examine, assess, and prepare a defense is bound up with the constitutional right to present a defense. Once counsel carefully investigates cases, reviews evidence, and develops definitive theories and themes of defense, § 722-c applications for experts may virtually write themselves. It then becomes the task of defenders to encourage judges and the trial and appellate courts to fulfill the demands of due process and fundamental fairness by granting these applications. ⚖

Quick Reference List: Cases Supporting § 722 Funds for Particular Experts

The following are cases that may provide support for, or a starting point for research about, requests for specific types of experts:

Ballistics expert *People v Jenkins*, 98 NY2d 280 (2002) (preclusion of prosecution ballistics evidence not warranted where defense declined opportunity to obtain independent expert); *Barnard v Henderson*, 514 F2d 744 (5th Cir 1975)

Battered woman's syndrome *Dunn v Roberts*, 963 F2d 308 (10th Cir 1992)

Prepleading Report Preparer *People v Louis*, 161 Misc 2d 667 (Supreme Ct, New York Co 1994)

"EEG" examination *United States v Hartfield*, 513 F2d 254 (9th Cir 1975) (to determine if the defendant has epilepsy)

Eyewitness reliability *People v LeGrand*, 8 NY3d 449 (2007)

Fingerprint expert *United States v Patterson*, 724 F2d 1128, 1130-31 (5th Cir 1984); *United States v Durant*, 545 F2d 823 (2d Cir 1976)

Firearms expert *People v Hull*, 71 AD3d 1336 (3d Dept 2010)

Forensic medicine *People v Smith*, 114 Misc 2d 258 (County Ct, Dutchess Co 1982)

Forensic pathologist *Williams v Martin*, 618 F2d 1021 (4th Cir 1980) (on cause of death); *People v Smith*, 114 Misc 2d 258 (County Ct, Dutchess Co 1982)

Handwriting expert *People v Mencher*, 42 Misc 2d 819 (Supreme Ct, Queens Co 1964) (authorized under former Code of Criminal Procedure § 308)

Hypnotic expert *Little v Armontrout*, 835 F2d 1240 (8th Cir 1987); *People v Smith*, 114 Misc 2d 258 (County Ct, Dutchess Co 1982)

Infrared Microscopy [Fourier Transform Infrared Spectrophotometry or FTIR] *People v Roraback*, 174 Misc 2d 641 (Supreme Ct, Sullivan Co 1997)

Interpreters/Translators

- **—Right to assistance at any stage of criminal proceeding** *People v Robles*, 86 NY2d 763 (1995)
- **—Right to meaningfully participate in trial and assist in defense** *People v Ramos*, 26 NY2d 272 (1970)
- **—Right to assistance to review documents in preparation for trial** *People v Rodriquez*, 247 AD2d 841 (4th Dept 1998) (denial abuse of discretion)

Investigator *People v Irvine*, 40 AD2d 560 (2d Dept 1972); *Marshall v United States*, 423 F2d 1315 (10th Cir 1970)

Narcotics *People v Mencher*, 42 Misc 2d 819 (Supreme Ct, Queens Co 1964) (authorized under former Code of Criminal Procedure § 308)

Neurological testing for Traumatic Brain Injury *People v Jones*, 210 AD2d 904 (4th Dept 1994) *affd* 85 NY2d 988 (1995)

Second neurologist *People v McClane*, 166 Misc 2d 698 (Supreme Ct, New York Co 1995) (to assist defense counsel and psychiatrist who admitted he lacked ability to evaluate relationship between brain structure, behavior, and emotions)

Odontologist *People v Koberstein*, 262 AD2d 1032 (4th Dept 1999)

Photogrammetry experts *People v Smith*, 114 Misc 2d 258 (County Ct, Dutchess Co 1982)

Physician and psychotherapist *People v Hatterson*, 63 AD2d 736 (2d Dept 1978)

Psychological automatism *People v Brand*, 13 AD3d 820 (3d Dept 2004)

Psychiatric expert on ability to form requisite intent following drug and alcohol consumption *People v Cronin*, 60 NY2d 430 (1983); *People v Donohue*, 123 AD2d 77 (3d Dept 1987)

Psychiatric expert to assist with seeking SORA downward depature *People v Linton*, 94 AD3d 962 (2d Dept 2012)

Second validator in child sex abuse case *Matter of Tiffany M.*, 145 Misc 2d 642 (Family Ct, Queens Co 1989)

Social worker *Matter of Director of Assigned Counsel Plan of the City of New York*, 159 Misc 2d 109 (Supreme Ct, New York Co 1993) *affd sub nom People v Townsend*, 207 AD2d 307 (1st Dept 1994) 134 Misc 2d 34 *affd* 87 NY2d 191 (1995)

Transcript in lieu of testimony to avoid fee *Palma S. v Carmine S.*, 134 Misc 2d 34 (Family. Ct, Kings Co 1986) (Court denied funds to pay witness fees to compel opinion testimony but granted § 722-c funds to order and admit transcript of expert's testimony in a prior proceeding.)

[*Ed. Note: The decision in this case disappointingly, but unequivocally expresses the trial court's lack of interest in the particular expert testimony, but the holding is worthy in its support for the granting of funds for transcripts and the statement that "this court will not penalize a party for whom it has appointed counsel for her financial inability to pay a witness' fee ...."*]

VIN Inspection by Auto Crime Division of New York City Police Department to assist in defense of car arson case *People v Evans*, 141 Misc 2d 781 (Supreme Ct, New York Co 1988)

Voice spectrography *People v Tyson*, 209 AD2d 354 (1st Dept 1994) ⚖

Quick Reference List: State and National Standards on Defense Access to and Funding for Experts

Below is a list of New York and national standards regarding public defender access to independent experts, including investigators, interpreters/translators, forensic scientists, and medical and mental health professionals, and funding to retain such experts.

New York Standards

New York State Office of Indigent Legal Services, *Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest* (eff. July 1, 2012, January 1, 2013 [standards and criteria made applicable to all mandated representation])
www.ils.ny.gov/files/Conflict%20Defender%20Standards%20and%20Criteria.pdf
"Counties must ensure, through their plans for providing public defense representation and other provisions, that attorneys and programs providing mandated legal services in conflict cases: ... 4. Have access to and use as needed the assistance of experts in a variety of fields including mental health, medicine, science, forensics, social work, sentencing advocacy, interpretation/translation, and others. See *NYSBA Standard* H, Support Services/Resources."

Indigent Defense Organization Oversight Committee (First Department), *General Requirements for all Organized Providers of Defense Services to Indigent Defendants* (July 1, 1996 [as amended May 2011])
www.nycourts.gov/courts/ad1/Committees&Programs/IndigentDefOrgOversightComm/general%20 requirements.pdf
"VII.B.3.a: Lawyers should have access to the professional services of psychiatrists, forensic pathologists and other experts at all stages of the case, and should be able to rely upon such experts not only to serve as trial witnesses, but also to provide pre-trial analysis and advice. Quality representation requires that defense lawyers have the services of interpreters to assist in communicating with their non-English speaking clients and witnesses at all stages of the case."

New York State Bar Association, *Revised Standards for Providing Mandated Representation* (2010)
www.nysba.org/AM/Template.cfm?Section=Special Committee to Ensure Quality Mandated Representation Home&Template=/CM/ContentDisplay.cfm&ContentID=54163
"H-5. Assigned counsel plans shall ensure that assigned counsel have the investigatory, expert, and other support services, including, but not limited to, social work, mental health and other relevant social services, and facilities necessary to provide quality legal representation...."

"H-6. Because persons eligible for mandated representation have the right to all appropriate investigatory and expert services, courts should routinely grant requests for such services made by assigned counsel. In Family Court expert services, including social worker, family treatment, and forensics, are often crucial at the outset and should be requested by counsel prior to fact finding...."

See also Standard H-1.

NYSDA, *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State* (2004)
www.nysda.org/docs/PDFs/Pre2010/04 NYSDAStandards ProvidingConstitutionallyStatutorilyMandatedReprsntatn.pdf
VII. "E. Publicly-funded services, including but not limited to transcription of court proceedings, investigators, interpreters, and experts, should not be denied to a person who is financially eligible for publicly-provided legal services but is represented by counsel acting pro bono or paid by a third person. Nor should publicly-funded auxiliary services be denied to a person whose financial condition after payment of a reasonable fee to retained counsel makes that person unable to obtain necessary auxiliary services without substantial hardship to themselves or their families."

VIII.A. "6. Unless inconsistent with the best interest of the client, counsel should conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible. Counsel should secure the assistance of investigators and/or other experts, including providers of social services, whenever needed for preparing any aspect of the defense, including but not limited to bail applications, pretrial motions, plea negotiations, defense at trial including developing an understanding of or rebuttal of the prosecution's case, and sentencing."

VIII.A.8. "c. Should fully prepare for pretrial proceedings and trial .... Counsel should obtain expert assistance whenever it is needed for any aspect of case preparation and presentation, including but not limited to the assistance of mental health experts, forensic scientists, and persons knowledgeable about any aspect of the case that counsel cannot adequately understand or present without assistance."

See also Standards VIII.B.6 and VIII.B.8.c, which are Family Court counterparts to the two standards above. And see also Standard III "C. ...Salaries and fees should be sufficient to compensate attorneys, other professionals (such as investigators, social workers, sentencing experts, expert witnesses, and consultants), and support staff commensurate with their qualifications and experience, and should be at least comparable to compensation of their counterparts in the justice system...."

National Standards

American Bar Association (ABA), *Ten Principles of a Public Defense Delivery System* (2002)
www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf
"8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system." *See* Commentary to this standard, which says in relevant part: "There should be parity of workload, salaries and other resources (such as ... access to forensic services and experts) between prosecution and public defense ...." [Endnote omitted]

ABA, *Standards for Criminal Justice: Providing Defense Services*, 3d ed., (1990, 1992)
www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_blk.html#1.4
"Standard 5-1.4 Supporting services
The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process. In addition, supporting services necessary for providing quality legal representation should be available to the clients of retained counsel who are financially unable to afford necessary supporting services."

See also Standard 5-3.3 Elements of the contract for services, subparagraph (x).

National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976)
www.nlada.org/Defender/Defender_Standards/Guidelines_For_Legal_Defense_Systems#threeone
Guideline "3.1 Assigned Counsel Fees and Supporting Services ...Funds should be available in a budgetary allocation for the services of investigators, expert witnesses and other necessary services and facilities...."

See also Guidelines 1.5, 3.4, 4.3, and 5.8.

National Advisory Commission on Criminal Justice Standards and Goals — *Courts, Chapter 13, The Defense* (1973)
www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense
Standard 13.14
"The budget of a public defender for operational expenses other than the costs of personnel should be substantially equivalent to, and certainly not less than, that provided for other components of the justice system with whom the public defender must interact, such as the courts, prosecution, the private bar, and the police. The budget should include:
...
3. Funds for the employment of experts and specialists, such as psychiatrists, forensic pathologists, and other scientific experts in all cases in which they may be of assistance to the defense ...." ⚖

Defender News *continued from page 9*

NYSDA—she contributed both shrewd advice and a much-needed element of fun. Those at NYSDA who

worked with Lenore will miss her greatly, and offer sympathy to her family, colleagues at the League, and all who loved her.

Ciulla Retiring as Saratoga County Public Defender

John Ciulla announced in December that he is stepping down as Saratoga County Public Defender, a position he has held since 1989. Ciulla became a member of NYSDA's Board of Directors in 1992, and currently serves as its Treasurer. Our Executive Director said, on hearing the news:

> John has been a tireless worker for justice and a politically able champion on behalf of the poor. His departure from the Public Defender Office will leave a large hole in the Saratoga legal landscape after his more than 2 decades shaping the face of justice there. NYSDA takes solace in the fact that we anticipate his continued presence on our Board of Directors as he begins this new phase of life—a phase for which we wish him great joy and health.

The *Saratogian* showcased Ciulla's retirement announcement at http://saratogian.com/articles/2012/12/17/news/doc50cfe3a1c3383918010827.txt?viewmode=fullstory. ⚖

SAMPLE EX PARTE APPLICATION TO RETAIN AN EXPERT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____: PART
----------X
THE PEOPLE OF THE STATE OF NEW YORK, :

: **EX PARTE APPLICATION TO RETAIN AN EXPERT**

-against- : Ind. No.

_____, :

Defendant. :

----------X

PLEASE TAKE NOTICE, that upon the annexed affirmation of _____, supported by the annexed exhibits, and the prior proceedings hereto, the undersigned will move this Court, at Part ___, on the ___ day of _____ 20__, at __ a.m./p.m., or as soon thereafter as counsel can be heard, for an order authorizing funds, pursuant to County Law § 722-c, to retain an expert in the field of **[field]** to **[work to be performed]** and consult with counsel about the various factors that affect the admissibility and reliability of the **[particularized]** evidence, and for such other and further relief as justice may require.

Dated:

_____
[attorney's name]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____: PART
----------X
THE PEOPLE OF THE STATE OF NEW YORK, :

: **AFFIRMATION**

-against- : Ind. No.

_____, :

Defendant. :

----------X

STATE OF NEW YORK)
) ss.:
COUNTY OF _____)

[Name], an attorney duly admitted to practice before the courts of this State, hereby affirms under penalty of perjury that the following statements are true, except those made upon information and belief, which **[s]**he believes to be true:

1. I am an attorney duly licensed in the State of New York, and am attorney of record for **[defendant]**. I am familiar with the facts of this case and the prior proceedings held in it.

2. This affirmation is made in support of defendant's motion for the authorization of funds to retain an expert to consult with defense counsel about **[nature of evidence]**.

3. The defendant does not possess the funds to retain his own expert. **[In accordance with local practice, state facts to support finding of financial inability to afford services AND attach Order of Assignment if counsel has been assigned AND attach verified financial statement by client]**

4. Unless otherwise specified, all allegations of fact are based upon investigation and review of the available the records in this case.

5. The defendant is charged with **[list offenses charged]** pursuant to P.L. § **[sections].**

6. According to the discovery that has been served in this case and information available **[insert pertinent facts supporting allegations]**.

7. According to the **[describe evidence, notice, reports, conversations with the assistant district attorney, related to evidence at issue]** available in this case the prosecution will seek to introduce evidence of **[describe nature of evidence]**.

8. Upon information and belief, the prosecution's case is based solely or substantially on **[evidence]**.

9. In order to prepare an adequate defense, it is necessary for counsel to have access to an expert who can review the pertinent evidence and advise counsel as to the weaknesses and dangers inherent in the reliance of this evidence in support of a conviction, and for purposes including but not limited to: forensic analysis the evidence; assistance in the evaluation plea negotiations, assistance in the preparation of motions to suppress, preclude, or limit the use of such evidence; assistance in preparation for confrontation of prosecution witnesses; and if required, be available to testify at a hearing or trial to refute the evidence presented against the defendant.

10. Specifically, the expert would conduct the following **[particularize work to be performed]**.

11. Where, as here, the evidence in question is material to the prosecution's case in that it **[describe connection and weight of evidence to case]**, denial of this application it would be an abuse of discretion as a matter of law and would deny defendant's due process right to present

a defense. *Chambers v. Mississippi*, 410 U.S. 284 (1973); **[citations of support where available]**.

12. Based on the foregoing, the defense wishes to hire **[insert name of expert]** whose expertise is established by **[insert basic facts of expert's qualifications in field]**. **[Attach expert's CV as exhibit]**.

13. It is anticipated that the cost of hiring the expert **will/will not** exceed the statutory limit of $1000. **If will exceed limit add:** The extraordinary circumstances supporting the need for funds in excess of the statutory maximum are **[set forth extraordinary circumstances: extent of review, time needed to review and research, time needed to consult, time needed to testify, travel and/or other expenses, inability to find other competent expert at lesser cost, etc]**.

WHEREFORE, it is respectively urged that this Court grant defendant's application and authorize the expenditure of funds as requested, conduct an *ex parte* inquiry in which counsel can offer further information if so desired, and grant any such other and further relief as justice may require.

DATED:

_____

[attorney's name]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____: PART
----------X
THE PEOPLE OF THE STATE OF NEW YORK, :

: **ORDER**

-against- : Ind. No.

_____, :

Defendant. :

----------X

The Defendant, **[Name]**, by his attorney, **[Counsel's Name]**, having duly moved for an Ex Parte Order pursuant to Section 722-C of the County Law for leave to employ such necessary **[Type of expert]** services as may be required to enable counsel to adequately prepare and conduct the defense, and for the cost of such **[Type of Expert]** service to be paid by the County of **[County]**, and it appearing that the Defendant is without means with which to employ and obtain said services to assist his attorney in the preparation and conduct of the defense of the charges herein, now upon motion of **[Counsel's Name]**, counsel for the Defendant

It is herby ORDERED pursuant to the provisions of the Criminal Procedure Law and the County Law of the State of New York that **[Counsel]** is granted leave to employ the **[Type of expert]** services as in his discretion may be required to enable him to adequately prepare and conduct the defense of the Defendant, [**name],** and

It is further ORDERED that the cost of such services to be rendered up to a maximum of **[Amount]** be and the same hereby declared to be a charge against the County of **[County]**, to be paid by the County Treasurer thereof upon Affidavit of **[Counsel's Name]** that such services so rendered are material and necessary to the preparation and conduct of the defense of the charges herein, and any sums in excess of **[Amount]** subject to further order of this Court.

E N T E R

HON.
Judge of the _____Court
County of **[County]**

EXPERT WITNESS CHECKLIST

EXPERT WITNESS (EW) CHECK LIST

Have EW sign confidentiality/retainer agreement

EW has reviewed a complete record

All medical records

- Certified and Delegated, via release or judicial subpoena

All relevant digital imaging scans from radiology depts

All opposing expert opinions/reports/testimony

- File 3101 Discovery Demand on opposing counsel

ACS records

Relevant client statements

EW has spoken to necessary parties:

Client or discuss why not necessary

Other experts in case/outside case

EW has considered relevant articles/medical treatises:

Discuss whether these can form basis of opinion

Discuss articles raised by ACS's experts

Review with EW Opinion/Basis of Opinion

Share EW Opinion/Basis of Opinion

Serve counsel with 3101(d) expert disclosure

Trial Prep: Review EW's Qualifications

Obtain updated CV

Provide to opposing counsel in advance

Westlaw/google searches

Review CV carefully with EW

Anticipate problems

Review qualification questions/voir dire

Discuss with EW qualifications/ specialties

Trial Prep: Provide/Practice Direct Examination Questions

make sure expert knows records and reviews them right before trial

has clean copies at trial of all medical records needed

review transcripts of opposing expert testimony or reports

review fact witness testimony

explain why ACS's theory is wrong if relevant

Trial Prep: Prepare EW for Anticipated Cross/Weaknesses

Review weaknesses in facts, in their knowledge, what they did not do

DEMAND FOR DISCOVERY AND INSPECTION

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CITY OF NEW YORK

In the Matter of		Docket Numbers
John Doe	(D.O.B. MM/DD/YYYY)	
Jane Doe	(D.O.B. MM/DD/YYYY)	NN-XXXXX-XX
Jane Doe	(D.O.B. MM/DD/YYYY)	O-XXXXX-XX
Jane Doe	(D.O.B. MM/DD/YYYY)	V-XXXXX-XX

Child(ren) Under Eighteen Years of Age
Alleged to be Neglected by

Janet Doe Respondent.

DEMAND FOR DISCOVERY AND INSPECTION

PLEASE TAKE NOTICE that pursuant to Rule §3120(1)(i) of the New York Civil Practice Law and Rules ("CPLR") and Family Court Act §1038(b), respondent **Janet Doe** by his/her attorney, John Smith, BROOKLYN DEFENDERS SERVICES, FAMILY DEFENSE PRACTICE, 180 Livingston Street, Suite 300 Brooklyn, New York, 11201, demands that petitioner ADMINISTRATION FOR CHILDREN'S SERVICES ("ACS"), by its attorneys, produce and permit discovery by the respondent's attorneys, or another acting on the respondent's behalf, of the following documents for inspection, copying, and reproduction:

1. The documents comprising the casework records of the subject child(ren) and the respondent, made or kept by ACS, its agents, employees, or sub-contractors, including but not limited to all progress notes, Family Assessment and Service Plans, evaluations, assessments, correspondence and any other documents in your custody;
2. Any and all medical records of the subject child(ren) and the respondent made or kept by ACS or the agency, their agents, employees, and sub-contractors, concerning or pertaining to said child(ren) and the respondent, including but not limited to all reports, evaluations, test results, charts, memoranda, diagnostic and progress notes, and all similar documents;
3. Any and all psychiatric, psychological, or social work records of the subject child(ren) and the respondent made or kept by ACS or the agency, their agents, employees, and sub-contractors, concerning or pertaining to said child(ren) and the respondent, including but not limited to all reports, evaluations, test results, charts, memoranda, diagnostic and progress notes, and all similar documents;

4. All prior petitions, with their docket numbers, filed against the respondent, including all orders, findings, and dispositional orders;
5. All notes and reports from every service planning conference related to this matter, which concerns the respondent, the subject child(ren), or any person legally responsible for the subject children regardless if they were present at the conference;
6. All school records for the subject child(ren), in the possession of the petitioner, including but not limited to, report cards, attendance records, school performance reports, guidance counselor reports, medical reports, disciplinary actions, suspension and counseling;
7. All documents in petitioner's possession that relate to the allegations in the petition, including police reports;
8. All other documents and information relevant to this petition, which the foster care agency, ACS, or the Law Guardian have in their possession or can obtain, that do not appear in their case records or files;
9. A copy of the current Comprehensive Annual Social Services Program Plan currently in effect for New York City, pursuant to 18 N.Y.C.R.R. §§401.1; 407.5(c)(2)(ii); and 407.1(a).

PLEASE TAKE FURTHER NOTICE, that the undersigned hereby serves the following demands upon you, pursuant to CPLR §§3101 and 3120 et. seq., and the Family Court Act 1038(b), returnable at the offices of the Brooklyn Defenders Services, Family Defense Practice, 180 Livingston Street, Suite 300, Brooklyn, NY 11201.

C.P.L.R. §3101(h) provides that a party shall amend or supplement a response previously given to a request for disclosure promptly upon the party's thereafter obtaining information that the response was incorrect or incomplete when made, or that the response, through correct and complete when made, no longer is correct and complete, and the circumstances are such that a failure to amend or supplement the response would be materially misleading.

1. Set forth in writing and under oath the names, addresses and telephone numbers of each person claimed by you to be a witness in this proceeding. For each witness, state with reasonable detail the subject matter upon about which the witness will be asked to testify at trial. If no such witnesses are known to the petitioner, state this in the sworn reply to this demand. The undersigned will object at trial to the testimony of any witnesses not so

identified.

2. Pursuant to C.P.L.R. §3101(d), please set forth the following:
    i. the name and address and telephone number of each person you expect to call as an expert witness at the fact finding hearing;
    ii. the qualifications of each such expert witness;
    iii. in reasonable details, the subject matter on which each expert is expected to testify;
    iv. the substance of the facts and opinions on which each expert is expected to testify; and
    v. a summary of the grounds for each expert's opinion.
3. Please produce and/or permit respondent to inspect, copy, test, or photograph any document, record, report, photograph, or other exhibit which petitioner will seek to introduce at the fact finding trial, including but not limited to: police reports, case records, court ordered investigations, social worker's reports, hospital records, medical records, psychiatric records, dental records, laboratory reports, test results, x-rays, photographs, and videotapes.
4. Please produce, without limitation: any signed statements, unsigned statements, and any other form of statement such as tape recordings or recordings by others of such a statement, by the petitioner or respondent or by any other party or witness that will be relied upon or introduced at trial.

DATED: Brooklyn, New York
Month XX, 20XX

Attorney, Esq.,
BROOKLYN DEFENDERS SERVICES
FAMILY DEFENSE PRACTICES
Attorney for **Janet Doe**
180 Livingston Street, 3rd Floor
Brooklyn, NY 11201
Phone: 347-592-2500

EXPERT DISCLOSURE PURSUANT TO CPLR §3101(d)

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CITY OF NEW YORK

In the Matter of an Abuse Proceeding	:	
	:	Docket Nos.
MW	:	
	:	**EXPERT DISCLOSURE**
Children Under Eighteen Years of Age	:	**PURSUANT TO CPLR**
Alleged to be Abused By	:	**SECTION 3101(d)**
	:	
----------,	:	
Respondents.	:	

_____, an attorney duly licensed to practice law before the Courts of the State of New York, affirms the following:

1. I am an attorney at_____, attorneys for _____, the respondent mother/father.

Expert Witness

2. Respondent father intends to call Dr. S as an expert witness in the fact-finding hearing in the above-captioned case. Respondent will seek to have Dr. S qualified as an expert in pediatric neuroradiology, diagnostic neuroradiology, neurology, and/or radiology.

3. **Subject matter:** Dr. S will testify about his interpretation of the child MW's diagnosis and his opinion that M's injuries were likely to have been caused by accidental trauma.

4. **Substance of Expert's Testimony:** Dr. S will testify in his professional medical opinion that, to a reasonable degree of medical certainty, MW's injuries, including a rapidly resolving subdural hematoma, unilateral preretinal hemorrhages, and

bruising next to his left eye, are most consistent with him having suffered a short fall, as described by his mother, rather than non-accidental head trauma.

5. **Summary of Sources of Expert's Opinion:** Dr. S's opinion is based on his review of M's medical records, including medical records from Lutheran Hospital and Northshore – Long Island Jewish Hospital; radiology reports from Northshore – Long Island Jewish Hospital; radiology slides from Northshore – Long Island Jewish Hospital; Kings County Family Court Petition; ACS case records; consultation with colleagues; and review of medical literature.

6. Attached to this Expert Disclosure as Exhibit A is Dr. S's Curriculum Vitae.

7. Attached to this Expert Disclosure as Exhibit B is a letter from Dr. S discussing his findings and opinions based upon the record.

Respondent father reserves the right to amend this Expert Disclosure pursuant to CPLR § 3101 upon reasonable notice to the parties.

Dated: Brooklyn, New York
, 2015

_____

----------, Esq.
Attorneys for
Address
Brooklyn, NY 11201
Phone

CHALLENGING THE OPPOSITION'S EXPERT

CROSS EXAMINING MENTAL HEALTH EXPERTS

Cross examining mental health experts

I. As with any cross…

a. Know your **theory of the case**; cross-examination and every single question should be directly tied to your theory of the case.
b. Know the **purpose of your cross** – are you going to try to challenge credibility? Is the witness helpful/harmful to your case? Can the witness help prove facts that are useful?
c. Ask **leading** questions
d. **Know the answers** to the questions (unless no harm done either way)
e. You can **organize questions differently** than how their testimony was organized if it better fits your theory
f. Challenge credibility based on **prior inconsistent statements**

II. As with any cross of an expert…

a. Use cross to **bring out motive, bias or interest**
b. **Challenge credibility (**Google the person and see what you find. Look them up on the office of professional misconduct.)
c. If appropriate, **undermine assumptions** - the **materials/facts** they rely on (eg, you assumed the truth of x court report, y statement from relative or z in forming an opinion about…),
d. Challenge the **data expert relied on**
e. Point out what expert **did not do or rely on** (interview of parents, examination of child, specific testing, etc.)
f. Use expert to **confirm facts that support your theory**.
g. Rely on treatises/articles accepted by medical profession to challenge expert's theory

III. Voir Dire/limit expertise

a. Make sure you have examined CV in detail and have researched specialties;
b. Challenge expertise, eg. If not a psychiatrist or psychologist, can't give opinion about medication
c. Establish their level of experience/ credentials Eg. Can treat independently or only with supervision (some social workers require supervision);
d. Practicing vs. non-practicing (number of patients in a year)

e. Stress missing credentials/specialties not trained in a particular area (eg. Dv, substance abuse)

IV. **Cross Examining Mental Health Experts**

Cross examinations of mental health experts vary greatly depending on theory/proceeding: eg, cross of psychiatrist from a hospital who interviewed your client one time for a 1028 hearing; could be an MHS psychologist at disposition or at TPR based on mental illness. In most cases there will be a written evaluation and your cross will rely on that. **Know the report thoroughly**.

a. Establish whether evaluation **was forensic (for the purpose of litigation) or clinical (for the purpose of treatment.)** If forensic, should follow the APA guidelines.

b. **Use the APA guidelines for psychological evaluations in child protective matters to show weaknesses in how the evaluation was conducted.** The most recent guidelines were issues in 2013. Guidelines state they are not standards (ie not mandatory), but *aspirational*, suggestions for a high level of practice. See Introduction.

   Most important APA guideline points:

   1. Evaluations should provide **professionally sound** results: opinions must have reliable basis in the knowledge and experience of psychology (Guideline #1) (evaluation process must be based on established scientific and professional knowledge in psychology);
   2. Evaluations may include the adult's capacities for parenting, including attributes, skills, and abilities (Guideline #3)
   3. Psychologists should be **unbiased** and **impartial** (Guideline #4) (opinions must arise from evaluation data gathered impartially from reliable methods that reflect the knowledge and experience of psychology);
   4. Psychologists should be aware of **personal biases and societal prejudices**(Guideline #6) (psychologists should be aware of diverse cultural and community methods of child rearing; seek to remain aware of stigma associated with disabilities often found in child protective cases, such as intellectual disabilities and psychiatric disabilities)
   5. Psychologists should avoid offering opinions regarding the personal credibility of evaluation participants or asserting truthfulness of statements (Guideline #8)
   6. Psychologists should us **multiple methods of data gathering**. (Guideline #10) Psychologists should make efforts to observe **parent-child interactions in natural settings as well as structured setting** unless contra-indicated; psychologists should

rely on **collateral information** (Guideline #10) (documentary information as well as interviews)

c. What are the **limits of the exam? (**eg amount of time spent in exam; number of patients seen that day; failure to speak to treating providers; failure to see parent/child and assess parental functioning)

d. If your evaluation involves your client's **psychiatric diagnosis**, review diagnosis carefully in **Diagnostic and Statistical Manual on Mental Disorders, 5th Edition (DSM-V);** DSM-V says not for forensic evaluations; cross about limits of diagnosis; DSM is descriptive does not indicate functional impairment

Examples of theories of cross of two experts called by ACS at a Permanency Hearing where father is seeking unsupervised visits.

<u>Cross of child psychologist from foster care agency who evaluated child one time</u>

Establish bias (paid for by foster care agency, has consultant agreement with agency, worked with them for years); spoke to foster mother/ spoke to case worker and informed her that TPR filed/ didn't speak to father)

Establish purpose/forensic - told it was for PH; not for treatment; child has treating therapist; spoke to therapist one time

Establish limits of examination – didn't meet with father, didn't observe visits between father and child; didn't know father was requesting unsupervised visits; met with child only once (had met with him when he first went into care too)

Reinforce positive facts that help case – children look forward to visits; not afraid of father; child examined by psychiatrist and has not symptoms of PTSD; no risk of harm to children (except with respect to Tymel's fear of leaving FH);

Undermine negative: visits would be harmful if Tymel thought it meant he was leaving foster home; no evidence that father has discussed the case with Tymel or leaving the foster home;

<u>Cross of MHS psychologist</u>

Establish purpose/forensic - conducted for disposition, whether child was supposed to be placed in foster care, not for purpose of whether father should have unsupervised visits; forensic, not clinical,

Establish limits of examination: didn't make an assessment about whether safety risk to children with unsupervised visits; met with father only one time; didn't observe father with his children; didn't meet with father's live in partner of five years; report doesn't discuss strengths (review in a long term relationship, completed services, visits regular)

Reinforce positive facts in report that help case reviewed court reports, visits go well, children happy to see father; has been in a long term relationship with someone, no evidence of any violence or instability in their relationship; no psychiatric diagnoses;

Undermine negative findings: findings re: cognitive limitations (not comprehensive test; brief); not relevant to unsupervised visits;

hasn't been able to maintain consistent source of income, but doesn't know how long he's worked at his present job, how much he earns;

prior criminal history, crime took place when he was 17, he's 30 now, no criminal history since then, he was forthcoming, not relevant to whether he should have unsupervised visits

he doesn't have a clear understanding of children's emotional needs pg. 9, hasn't sought out therapy for himself/children (never recommended/requested therapy; therapist requested that it wait until he testified etc.)

SAMPLE ORDER TO SHOW CAUSE TO PRECLUDE AN EXPERT WITNESS OR FOR A *FRYE* HEARING IN A SEX ABUSE CASE

At Part 10 of the Family Court of the State of New York, held in and for the County of Kings located at 330 Jay Street, Brooklyn, New York on the 10th day of March, 2015

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CITY OF NEW YORK

In the Matter	:	
	:	
AALIYAH Z.	:	**Docket No. NA-[redacted]**
	:	
	:	
A Child Under Eighteen Years of Age	:	
Alleged to be Abused by	:	**ORDER TO SHOW CAUSE**
	:	
ROSE Z.,	:	
ALBERT N.	:	
	:	
Respondents.	:	

Upon the affirmation of AVI SPRINGER, ESQ., affirmed on the 10th day of March, 2015, and upon all papers and proceedings heretofore filed herein,

IT IS HEREBY ORDERED that the petitioner New York City Children's Services ("NYCCS") show cause before this Court at Part 10 of the Kings County Family Court, 330 Jay Street, Brooklyn, New York, on the 11th day of March, 2015, at 11:30 am, or as soon thereafter as the parties can be heard, why an order should not be made precluding the expert testimony of Michelle Joaquin, or in the alternative, scheduling a hearing pursuant to *Frye v. U.S.*,

293 F. 1013 (D.C. Cir. 1923).

SUFFICIENT CAUSE THEREFORE APPEARING, let personal service on the parties or service by email or fax, on or before the 11th day of March, 2015, be deemed sufficient service.

ENTER:

_____

Judge of the Family Court

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CITY OF NEW YORK

In the Matter	:	
	:	
AALIYAH Z.	:	**Docket No. NA-[redacted]**
	:	
	:	
A Child Under Eighteen Years of Age	:	
Alleged to be Abused by	:	**AFFIRMATION IN SUPPORT**
	:	**OF ORDER TO SHOW CAUSE**
ROSE Z.,	:	
ALBERT N.	:	
	:	
Respondents.	:	

AVI SPRINGER, an attorney duly admitted to practice law in the Courts of the State of New York, hereby affirms the truth of the following facts and sets forth the following propositions of law:

1) I am an attorney at the BROOKLYN DEFENDERS SERVICES, FAMILY DEFENSE PRACTICE, 180 Livingston Street, Brooklyn, New York, the attorneys for the respondent, Albert N., the father of Aaliyah Z., the child who is the subject of this proceeding. As such, I am fully familiar with all of the facts and circumstances of this case.
2) I make this affirmation in support of Albert N.'s order to show cause precluding petitioner's proposed expert witness, Michelle Joaquin, from providing expert testimony at the fact-finding proceeding or, in the alternative, holding a *Frye* Hearing to determine whether Ms. Joaquin's expert testimony is admissible.

BACKGROUND

3) On August 8, 2014, the Administration for Children's Services ("ACS" or "petitioner") filed a petition pursuant to Article Ten of the Family Court Act against Albert N. and

Rose Z., alleging that their then four year old daughter, Aaliyah Z., disclosed that Mr. N. had sexually abused her by licking her vagina. *See* Abuse Petition, dated August 8, 2014, annexed hereto as Exhibit A. The petition further alleged that Ms. Z. allowed the abuse to occur. *Id.* Aaliyah was removed from the care of her mother, and placed in the kinship foster home of her maternal grandmother.

4) On September 17, 2014, the undersigned served petitioner with a Demand for Discovery and Inspection. *See* Discovery Demand, dated September 16, 2014, annexed hereto as Exhibit B. The Discovery Demand included a demand that petitioner identify in writing each witness it intended to call at the fact finding hearing and, pursuant to N.Y. C.P.L.R. § 3101, disclose the identity of any expert witness it intends to call; the qualifications of the expert; in reasonable detail, the subject matter on which the expert is expected to testify; the substance of the facts and opinions on which the expert is expected to testify; and a summary of the grounds for the expert's opinion. *Id.*

5) On February 18, 2015, one day before the fact finding hearing was scheduled to begin, petitioner provided me with a Notice of Expert Witness Disclosure. *See* Expert Disclosure, dated February 18, 2015, annexed hereto as Exhibit C. The disclosure stated, in pertinent part, that "Ms. Joaquin will testify as to her therapeutic treatment of the subject child Aaliyah Z., which commenced in or around August of 2015, after the child was sexually abused by the respondent Albert N. Ms. Joaquin will further testify as [to] the symptoms that the child Aaliyah has exhibited and the causation of those symptoms." *Id.* The disclosure did not "disclose in reasonable detail the subject matter on which the expert is expected to testify, the substance of the facts and opinions on which the expert is expected to testify. . . [or] a summary of the grounds for the expert's opinion."

C.P.L.R. § 3101(d)(1)(i). Petitioner also provided a copy of Ms. Joaquin's curriculum vitae and of Aaliyah's therapeutic records from the Child Advocacy Center. *See* Joaquin C.V., annexed hereto as Exhibit D.

6) On February 19, 2015, the fact finding hearing began. After the Court heard testimony from ACS Child Protective Specialist Bernadette Jean-Louis and NYPD Detective Cheryl Blackwood, I provided the court with a copy of the February 18 expert disclosure and asked that petitioner be ordered to provide a more detailed report in conformity with the requirements of C.P.L.R. § 3101(d)(1)(i). The Court ordered petitioner to have Ms. Joaquin herself prepare a written report summarizing the substance of her anticipated testimony and to provide counsel with a copy of the report within one week. As of the filing of this Order to Show Cause, petitioner has not provided a report written by Ms. Joaquin.

7) On March 5, 2015, petitioner provided the parties with a second Notice of Expert Witness Disclosure, drafted by counsel for petitioner. *See* Expert Disclosure, dated March 5, 2014, annexed hereto as Exhibit E. In pertinent part, the second disclosure states:

    a. Ms. Joaquin will testify as to her therapeutic treatment of the subject child Aaliyah Z., who commenced services in or around August of 2014, at the Jane Barker Child Advocacy Center, after the child [] disclosed that she was sexually abused by the Respondent, Albert N.
    b. Ms. Joaquin will further testify as [to] the nature of the treatment provided to the subject child Aaliyah, through Child Family Trauma Stress Intervention (CFTSI) program. Ms. Joaquin will testify as to the nature of the CFTSI program, which is offered to children who have disclosed physical or sexual abuse after they are interviewed forensically at the Jane Barker Child Advocacy Center.
    c. Ms. Joaquin will testify that through her treatment of the subject child, she was able to formulate an opinion within a reasonable degree of therapeutic certainty that the child exhibited symptoms of trauma caused by the child's abuse.

ARGUMENT

THE COURT SHOULD PRECLUDE MS. JOAQUIN'S EXPERT TESTIMONY BECAUSE CFTSI IS NOT GENERALLY ACCEPTED AS A METHODOLOGY FOR DETERMINING WHETHER OR NOT A CHILD WAS SEXUALLY ABUSED, OR, IN THE ALTERNATIVE, THE COURT SHOULD HOLD A FRYE HEARING.

8) New York courts adhere to the *Frye* standard for determining admissibility for scientific theories and methodologies. *People v. Wesley*, 83 N.Y.2d 417, 422-23 (2004) (citing *Frye v. U.S.*, 293 F. 1013, 1014 (D.C. Cir. 1923)); *New York Practice*, Expert Testimony, New York - Novel scientific theories and methods, §7:5 (2013). The purpose of the test set forth in *Frye* is to ensure that scientific evidence is reliable and is generally accepted in the scientific community. *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 446 (2006); *New York Practice* §7:5. "[T]he Frye test asks 'whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally.'" *Parker*, 7 N.Y.3d at 446 (quoting *Wesley*, 83 N.Y.2d at 422). Under *Frye*, scientific evidence will only be admitted at trial if the procedure and results are generally accepted as reliable in the scientific community. The *Frye* test is applicable to Article 10 proceedings in Family Court. *See Matter of Jennie EE*, 210 A.D.2d 744 (3d Dep't 1994).

9) A *Frye* hearing is required when there is an issue of fact as to the general acceptance of a scientific theory. *Cf. Saulpaugh v. Krafte*, 5 A.D.3d 934 (3d Dep't 2004). A theory may be novel or experimental even if not recently coined. *See Frye*, 293 F. at 1013 (the relevant distinction is between scientific principles which are "experimental" and those which are "demonstrable"). *See, e.g., People v. Anderson*, 13 Misc. 3d 1242(A), No. 06060051, 2006 WL 3452407, at *3 (N.Y. Just. Ct., Monroe Co. Nov. 30 2006) (holding that the proper foundation for the reliability of a sobriety test had not been established,

even though other courts had ruled on that sobriety test as early as 2001); *cf. U.S. v. Lewis*, 220 F. Supp. 2d 548, 554 (S.D. W. Va. 2002) ("If courts allow the admission of long-relied upon but ultimately unproven analysis, they may unwittingly perpetuate and legitimate junk science.").

10) The burden of proving "general acceptance" is borne by the party offering the testimony. *Saulpaugh*, 5 A.D.3d at 935. Importantly, "[b]road statements of general scientific acceptance, without accompanying support, are insufficient to meet the burden of establishing such acceptance." *Id.* at 935-936 (citing *Stanski v. Ezersky*, 228 A.D.2d 311, 312 (1st Dep't 1996)). General acceptance of a theory must be demonstrated by "controlled studies, clinical data, medical literature, peer review or supportive proof." *Saulpaugh*, 5 AD.3d at 936 (citations omitted).

11) In applying the *Frye* standard to validation testimony in child protective proceedings involving allegations of sexual abuse, New York courts have found that such testimony may be admissible where proffered by a qualified expert who adhered to an accepted protocol for the forensic evaluation of child witnesses. *See, e.g., Matter of Nikita W.*, 77 A.D.3d 1209, 1210-11 (3d Dep't 2010) (Family Court properly admitted the testimony of petitioner's validation expert where the expert utilized the Yullie Step Wise Protocol, a generally accepted protocol used for forensic interviews of alleged victims of sexual abuse); *Matter of D.M.*, 29 Misc. 3d 1220(A), 2010 WL 4485873, at *4 (Fam. Ct., Bronx Co. Nov. 8, 2010) (Gribetz, J.) ("Courts have upheld validators usually when they strictly follow accepted protocols.").

12) By contrast, courts have rejected validation testimony where the proffered experts failed to follow an accepted forensic interviewing protocol. *See, e.g., Matter of Nicole V.*, 105

A.D.3d 956, 957 (2d Dep't 2013) (petitioner's expert could not corroborate child's out-of-court sex abuse allegations because she "failed to identify the generally accepted professional protocols adhered to in the mental health and medical communities and compare them to the protocol she employed"); *Matter of R.M.*, 165 Misc. 2d 441, 442 (Fam. Ct., Kings Co. 1995) (conducting hearing on adequacy of the foundation for validation evidence and excluding expert testimony where petitioner failed to establish that validator was an expert and that validator's assessment "comported with the specific procedures accepted as reliable within the field").

13) In the instant case, petitioner's expert disclosure does not claim that Ms. Joaquin used an accepted protocol for the forensic evaluation of alleged victims of sexual abuse, such as the Yullie Protocol. *See* Exhibits C and E. Instead, petitioner's disclosure states only that Ms. Joaquin provided therapeutic treatment to Aaliyah using the Child Family Trauma Stress Intervention (CFTSI) program. *See* Exhibit E.

14) CFTSI is "a brief, early acute intervention for families with children (ages 7-18) who have either recently experienced a potentially traumatic event or have recently disclosed the trauma of physical or sexual abuse." *See* National Registry of Evidence-based Programs and Practices: Child and Family Traumatic Stress Intervention, available at http://www.nrepp.samhsa.gov/ViewIntervention.aspx?id=305. "CFTSI aims to reduce early posttraumatic stress symptoms, to decrease the likelihood of traumatized children developing long-term posttraumatic psychiatric disorders, and to assess children's need for longer term treatment." *Id.* "The intervention focuses on increasing communication between the caregiver and child about the child's traumatic stress reactions and on providing skills to the family to help cope with traumatic stress reactions." *Id.* In other

words, CFTSI is a therapeutic model used to help reduce post-traumatic stress symptoms in children by working together with their caretakers on communication and coping skills.

15) Based upon the program descriptions and evaluations of CFTSI, it was not developed for the purpose of forensic evaluations. *Id.*; *see also*, Berkovitz, Steven J. et al. "The Child and Family Traumatic Stress Intervention: Secondary Prevention for Youth at Risk of Developing PTSD," 52 J. Child Psychol. Psychiatry 676 (2011), available at https://www.med.upenn.edu/traumaresponse/documents/cftsi.pub.pdf. There is no indication that professionals in the field generally accept it as a reliable methodology for determining whether or not a child was sexually abused. Tellingly, petitioner's expert disclosure states that CFTSI "is offered to children who have disclosed physical or sexual abuse *after* they are interviewed forensically." *See* Exhibit E (emphasis added). Petitioner does not claim that a forensic evaluation is part of the CFTSI methodology, or that Ms. Joaquin conducted a forensic evaluation of Aaliyah before commencing CFTSI.

16) Because petitioner's expert disclosure does not indicate that Ms. Joaquin used a generally accepted methodology for determining whether or not Aaliyah was sexually abused, the Court should preclude her from offering an expert opinion on that subject. In the alternative, the Court should hold a *Frye* hearing and preclude this expert testimony if petitioner fails to meet its burden of showing that CFTSI is a generally accepted methodology for evaluating whether or not a child was sexually abused.

WHEREFORE, your affiant respectfully requests the relief requested herein.

Respectfully submitted,

_____

Avi Springer, Esq.
BROOKLYN DEFENDER SERVICES
FAMILY DEFENSE PRACTICE
Attorney for ALBERT N.
180 Livingston Street, 3rd floor
Brooklyn, NY 11201
Phone: 347-592-2545

Dated: Brooklyn, New York
March 10, 2015

REPLY AFFIRMATION

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CITY OF NEW YORK

In the Matter	:	
	:	
AALIYAH Z.	:	**Docket No. NA-[redacted]**
	:	
	:	
A Child Under Eighteen Years of Age	:	
Alleged to be Abused by	:	**REPLY AFFIRMATION**
	:	
ROSE Z.,	:	
ALBERT N.	:	
	:	
Respondents.	:	

AVI SPRINGER, an attorney duly admitted to practice law in the Courts of the State of New York, hereby affirms the truth of the following facts and sets forth the following propositions of law:

1. I am an attorney at the BROOKLYN DEFENDERS SERVICES, FAMILY DEFENSE PRACTICE, 180 Livingston Street, Brooklyn, New York, the attorneys for the respondent, Albert N., the father of Aaliyah Z., the child who is the subject of this proceeding. As such, I am fully familiar with all of the facts and circumstances of case.

2. I make this affirmation in reply to ACS' affirmation in opposition ("ACS Aff."), which was filed in response to Mr. N.'s order to show cause precluding petitioner's proposed expert witness Michelle Joaquin from providing expert testimony at the fact-finding proceeding or, in the alternative, holding a *Frye* Hearing to determine whether Ms. Joaquin's expert testimony is admissible.

ARGUMENT

I. Ms. Joaquin's Testimony Must Be Precluded Because CFTSI Is Not Generally Accepted as a Methodology for Determining Whether or Not a Child Was Sexually Abused, or for Diagnosing Symptoms of Sexual Abuse.

3. In its affirmation in opposition, ACS concedes that the methodology on which Ms. Joaquin would base her testimony, Child and Family Traumatic Stress Intervention ("CFTSI"), is *not* "used for diagnostic or forensic purposes." *See* ACS Aff. at ¶ 17. Nevertheless, ACS argues that Ms. Joaquin should be allowed to testify because CFTSI is a "nationally used treatment program." *Id.* at ¶ 16. ACS's argument is premised on a fundamental misunderstanding of the *Frye* standard for the admissibility of scientific methodologies. *See Frye v. U.S.*, 293 F.1013, 1014 (D.C. Cir. 1923). The *Frye* standard requires that, in order to be admissible as a basis for expert testimony, a methodology must be generally accepted not just for *some purpose*, but for the *specific purpose* that the expert seeks to use it in his or her testimony. As the Court of Appeals has stated, the *Frye* test "poses the . . . question of whether the accepted techniques, when properly performed, *generate results accepted as reliable* within the scientific community generally." *People v. Wesley*, 83 N.Y.2d 417, 422 (2004) (emphasis added). In other words, just because x-rays are recognized as providing reliable images of human bones for the purpose of diagnosing fractures and other physical injuries, this does not mean an expert would be permitted to testify in court that an x-ray allowed him to conclude that a patient suffers from mental illness; rather, x-ray imaging may only serve as the basis for expert testimony where it is used to produce the type of results generally accepted as reliable.

4. ACS cannot and does not contend that CFTSI "generate[s] results accepted a reliable" with regard to determining whether or not a child was sexually abused or diagnosing whether certain symptoms are likely to have been caused by sexual abuse. *Id.* According to the

SAMSHA National Registry of Evidence Based Programs and Practices report upon which ACS relies, CFTSI is "a brief, early acute intervention for families with children (ages 7-18) who have either recently experienced a potentially traumatic event or have recently disclosed the trauma of physical or sexual abuse." *See* Exhibit C to ACS Aff. More specifically, CFTSI is an intervention used to help reduce post-traumatic stress reactions in children by working together with their caretakers on communication and coping skills. *Id*. Importantly, the intervention is designed for children who have reported experiencing traumatic events of any kind, not just sexual abuse. Furthermore, there is no claim that CFTSI has any value in determining whether a traumatic event reported by a child actually happened, or in distinguishing between symptoms caused by different types of traumatic events. Tellingly, the SAMSHA report indicates that the studies examining the effectiveness of CFTSI have measured the intervention's effectiveness in reducing potential symptoms of post-traumatic stress disorder, and *not* in diagnosing the causes of those symptoms. *See id.* Accordingly, ACS has failed to demonstrate that the scientific community generally accepts that CFTSI, when properly applied, can be used to "formulate an opinion within a reasonable degree of therapeutic certainty that the child exhibited symptoms of trauma *caused by* the child's abuse." *See* Notice of Expert Witness Disclosure, attached as Exhibit E to Order to Show Cause (emphasis added).

5. Even if CFTSI were generally accepted as a methodology for determining whether or not a child was sexually abused or for diagnosing the causes of post-traumatic stress symptoms more generally, it would not be a valid methodology in this case since Aaliyah was four years old when Ms. Joaquin used CFTSI with her. According to the SAMSHA report, CFTSI was designed for use with children ages 7-18, and the studies evaluating its effectiveness have been limited to children in that age range. *See* Exhibit C to ACS Aff.

6. Forced to concede that CFTSI is not generally accepted as a reliable methodology for determining whether or not a child was sexually abused or for diagnosing the causes of post-traumatic stress reactions in children, ACS appears to suggest that the *Frye* test should not apply with full force in child protective proceedings. In particular, ACS urges the Court to admit Ms. Joaquin's testimony because "testimony as to a child's psychological or emotional state may be the only way to avoid testimony by the child." ACS Aff. at ¶ 6. ACS's argument is misguided for a number of reasons. First, Mr. N. seeks preclusion of Ms. Joaquin's testimony not because he wishes to force his daughter to testify in this proceeding, but because Ms. Joaquin's opinion is not based upon her use of a generally accepted forensic or diagnostic methodology and would therefore be unreliable.[1] More to the point, there is no authority to support the proposition that the Family Court Act authorizes courts to apply a watered-down version of the *Frye* test in child protective proceedings or otherwise relieves this Court of its obligation to perform its gatekeeping function of precluding expert testimony that is not based on a reliable methodology. *See Matter of Jennie EE.*, 210 A.D. 744, 745 (3d Dep't 1994) ("Family Court held . . . that the *Frye* test was applicable" in child protective proceeding).

7. ACS's reliance on *Matter of Wendy P. & Valeria S.*, No. NA-27180-1/13 (Fam. Ct. Bronx Co. 2015), is unpersuasive. *See* Exhibit D to ACS Aff. In that case, the Court rejected the respondent's request for a *Frye* hearing where the expert witness, who held a Ph.D. in psychology, conducted a "sexual abuse assessment" of the subject child. *Id.* at 4. The Court found that the expert's alleged deviations from accepted evaluation protocols during the assessment should be explored on cross-examination rather than in a *Frye* hearing. The case is distinguishable from the instant case because Ms. Joaquin does not claim that she conducted a

[1] To be clear, Mr. N. does not want his daughter to have to go through the experience of testifying in this proceeding. Moreover, based upon Detective Blackwood's testimony that Aaliyah was determined to be "unswearable," it does not appear that she could properly testify.

"sexual abuse assessment" or otherwise used a forensic or diagnostic methodology to evaluate the subject child. *See* Notice of Expert Witness Disclosure (CFTSI "is offered to children who have disclosed physical or sexual abuse *after* they are interviewed forensically") (emphasis added).

8. Although ACS attempts to rely on *Matter of Wendy P. & Valeria S.* for the proposition that "there is no reported case in which a family court or appellate court has required or recognized the need for a *Frye* hearing in an article 10 proceeding for the admissibility of expert validation in sexual abuse matters," this statement is misleading. ACS Aff. at ¶ 18 (quoting *Matter of Wendy P. & Valeria S.*). In *Matter of R.M.*, the Kings County Family Court held a separate hearing pursuant to CPLR 4011 to determine both whether the proffered validator was sufficiently qualified to testify as an expert and whether the validator's assessment "comported with [] specific procedures accepted as reliable within the field." 165 Misc.2d 441, 442 (Fam. Ct., Kings Co. 1995) (citing *Wesley*, 83 N.Y.2d 417). The Court excluded the validator from testifying at the fact finding hearing both because she lacked sufficient qualifications and because she did not testify that she used a methodology that met "the requirements of *People v. Wesley*," the leading Court of Appeals applying the *Frye* standard in New York. Accordingly, there is precedent for applying the *Frye* test before allowing a validator who did not employ a generally accepted evaluation protocol to testify.

9. Because ACS has conceded that CFTSI is not generally accepted as a methodology for determining whether or not a child was sexually abused or otherwise diagnosing symptoms of sexual abuse, and because Ms. Joaquin did not use any other methodology, this Court should preclude Ms. Joaquin's testimony without a hearing.

II. Ms. Joaquin Is Not Qualified to Testify as a Treating Therapist.

10. In its response to the order to show cause, ACS argues that even though Ms. Joaquin did not evaluate Aaliyah using a generally accepted validation protocol, she may still be qualified to provide expert testimony as Aaliyah's "treating therapist." *See* ACS Aff. at ¶¶ 9-10. In support of this argument, ACS cites several cases in which treating therapists were permitted to testify that their patients exhibited symptoms they believed were attributable to sexual abuse. *See*, *e.g.*, *Matter of Nicole V.*, 71 N.Y.2d 112, 119-22 (1987); *Matter of Kerri K.*, 135 A.D.2d 631 (2d Dep't 1987); *Matter of Ryan D.*, 125 A.D.2d 160 (4th Dep't 1987). Mr. N. does not contest that treating therapists have been permitted to testify as to the causation of symptoms associated with sexual abuse based upon their diagnostic expertise. However, Ms. Joaquin is not qualified to provide this type of testimony because she is not qualified to make diagnoses.

11. According to Ms. Joaquin's curriculum vitae, she holds a masters degree in forensic psychology, but she is not licensed either as a psychologist or as a social worker or otherwise certified as a mental health professional. *See* Exhibit B to ACS Aff. Although she states that she "provide[s] trauma focused crisis intervention and support[s] the child and non-abusing parent(s) in the process of making effective linkages to mental health treatment," she does not claim that she is qualified to make diagnoses or provide treatment herself. *Id.* In New York, a psychologist may be licensed to diagnose and treat after earning a doctoral degree in psychology and performing two years of full-time supervised experience. *See* N.Y. Educ. L. §§ 7601, 7601-a, 7603. To engage in diagnosis and treatment as a social worker, one must either be a Licensed Clinical Social Worker ("LCSW") or a Licensed Master Social Worker ("LMSW") acting under the supervision of a LCSW. *See* N.Y. Educ. L. §§ 7701, 7704; 8 N.Y.C.R.R. § 74.1 *et seq.*

Because Ms. Joaquin is not authorized to provide diagnosis and treatment under New York law, she is not qualified testify as to the causation of any symptoms exhibited by Aaliyah.

12. Even if Ms. Joaquin were qualified to make diagnoses, she could not have properly diagnosed Aaliyah using CFTSI, the only methodology the expert disclosure indicates she used. As ACS concedes, CFTSI is "not used for diagnostic . . . purposes," and is implemented at the Child Advocacy Center only after a child has undergone a separate forensic evaluation. ACS Aff. at ¶ 17; Notice of Expert Witness Disclosure.

13. Furthermore, even if CFTSI were an accepted diagnostic tool, it does not appear that Ms. Joaquin has been properly trained in the use of CFTSI. According to the SAMSHA report, new CFTSI implementers "are required to participate in an introductory 2-day training" on the intervention. *See* Exhibit C to ACS Aff. Ms. Joaquin's curriculum vitae does not indicate that she ever participated in that training program. *See* Exhibit B to ACS Aff.

CONCLUSION

14. Because there is no dispute that Ms. Joaquin failed to use a methodology generally accepted for the purposes of determining whether or not a child was sexually abused or diagnosing symptoms of sexual abuse, this Court should preclude her from testifying.

WHEREFORE, your affiant respectfully requests the relief requested herein.

Respectfully submitted,

_____

Avi Springer, Esq.
BROOKLYN DEFENDER SERVICES
FAMILY DEFENSE PRACTICE
Attorney for ALBERT N.
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Brooklyn, NY 11201
Phone: 347-592-2545

Dated: Brooklyn, New York
April 6, 2015

SAMPLE MOTION TO PRECLUDE OR FOR *FRYE* HEARING IN MENTAL HEALTH EVALUATION CASE

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF Bronx, Part __

_____

In the Matter of

_____,

A Child Under 18 Years of Age Alleged to be Neglected by

_____,

Respondent.

_____

NOTICE OF MOTION
Docket No.: _____

PLEASE TAKE NOTICE that upon the annexed affirmation of _____ of The Bronx Defenders, 360 E. 161st Street, Bronx, New York 10451, Attorney for Respondent _____, dated _____, and upon all papers and proceedings previously filed and had herein, the undersigned will move this Court, Part __, at the Family Court of Bronx County, 900 Sheridan Avenue, Bronx, New York 10451, on _____ at _____ a.m./p.m., or as soon thereafter as the case can be heard, for an Order:

A. Precluding [EVALUATOR'S] opinion from being entered into evidence in the fact-finding proceeding under the above docket; or, in the alternative,

B. Granting a hearing pursuant to Frye v. United States, 293 F. 1013 [D.C. Cir. 1923], concerning the admissibility of [EVALUATOR'S] opinion; and

C. Providing such other and further relief as the Court deems just and proper.

Dated: _____
Bronx, New York

_____
_____, ESQ.
The Bronx Defenders
Attorney for _____
360 E. 161st Street
Bronx, New York 10451
(718) 838-7878

To:

Clerk of Court
Bronx Family Court
900 Sheridan Avenue
Bronx, NY 10451

[ADDRESSES FOR ALL COUNSEL]

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, Part __

In the Matter of

_____,

AFFIRMATION & MEMORNADUM OF LAW IN SUPPORT OF MOTION
Docket No.: _____

A Child Under 18 Years of Age Alleged to be Neglected by

_____,

Respondent.

_____, an attorney admitted to practice, affirms under penalty of perjury and pursuant to CPLR § 2106, the truth of the following:

1. I am associated with The Bronx Defenders, and am the attorney of record for _____. I submit this affirmation and memorandum of law in support of Mr./Ms. _____'s motion requesting that the Court preclude [EVALUATOR'S] opinion from being entered into evidence in the fact-finding proceeding under the above docket, or, in the alternative, requesting a hearing pursuant to Frye v. United States, 293 F. 1013 [D.C. Cir. 1923] concerning the admissibility of [EVALUATOR'S] opinion.

2. [PROCEDURAL HISTORY, INCLUDING EVALUATION AND ISSUANCE OF REPORT CONTAINING OBJECTIONABLE OPINION]

3. The expert Affidavit of [OUR EXPERT] ("____ Affidavit") outlines the proper methods for performing forensic psychological evaluations for the purposes of TPR proceedings. *See* ___ Affidavit attached hereto as Exhibit B.

4. On its face, the [EVALUATOR] Report and [EVALUATOR'S] opinion

contained therein are based upon methods that are unreliable and not accepted by the scientific community.

5. For the reasons detailed in the attached memorandum of law, Ms. ____ asks this Court to preclude [EVALUATOR'S] opinion from being entered into evidence in the TPR fact-finding proceeding as a matter of law or, in the alternative, order a Frye hearing to determine the admissibility of [EVALUATOR'S] opinion.

MEMORANDUM OF LAW

I. PRELIMINARY STATEMENT

[RESPONDENT] is facing the termination of her parental rights to her children, an outcome that has been described as the civil death penalty because of its permanence and severity. As in every termination of parental rights case filed on the basis of a mental health cause of action, the petitioner must prove by clear and convincing evidence that Ms. _____ has a mental health affliction, and that the condition has manifested itself to such a degree that if her children were returned to her, they would be at risk at present and in the foreseeable future.

A central issue in this case, therefore, is whether Ms. _____ suffers from a mental health affliction that places the child at risk at present and for the foreseeable future. [PETITIONING AGENCY] is calling [EVALUATOR] to provide this opinion. However, [EVALUATOR'S] opinion was generated without due regard for the standards, generally accepted in the relevant scientific community, that govern the rendering of such an opinion. [EVALUATOR'S] own report makes clear that his opinion was formed using incomplete and unreliable methodologies, rather than the generally accepted guidelines set forth by the APA and by relevant studies.[1]

The burden falls on [PETITIONING AGENCY] to show that [EVALUATOR'S] opinion was generated in accordance with the generally accepted standards in the relevant scientific community. These are preliminary questions of admissibility of evidence, rather than ones of weight. Yet Petitioner cannot meet this burden. Therefore, the Court should

[1] The affidavit of _____, attached at Exhibit B, explains in detail the proper methodologies for this type of forensic evaluation.

either preclude [EVALUATOR'S] opinion outright, or hold a hearing pursuant to Frye to determine its admissibility.

II. WHEN A PARENT'S FUNDAMENTAL RIGHTS ARE AT STAKE, THIS COURT HAS A UNIQUE AND HEIGHTENED RESPONSIBILITY TO PERFORM A GATEKEEPING ROLE

Trial courts must perform a vital gatekeeping role when considering scientific evidence. The trial court's function is to carefully control the admission of proffered expert testimony, rather than merely admitting whatever is offered and later determining what weight it should be given. See, e.g., Nonnan v. City of New York, 32 A.D.3d 91, fn. 18 [1st Dept. 2006] (affirming that "the trial court must assume the role of 'gatekeeper' for the admission of expert evidence"); Wahl v. American Honda Motor Co., 181 Misc.2d 396 [Suffolk Cty. Sup. Ct. 1999] ("It is for the Court to screen expert testimony for trustworthiness and reliability to determine whether such evidence may be presented to, and considered by" the finder of fact); DeMeyer v. Advantage Auto, 9 Misc.3d 306, 310 [Wayne Cty. Sup. Ct.] (noting that "courts, in effect, perform a gatekeeper function by making an initial determination as to whether or not the basis of expert opinion has gained sufficient general acceptance in a particular field in order to be considered reliable, and to justify admission at trial").

The gatekeeping role of a trial court is especially critical when an individual's fundamental rights are at stake. Accord United States v. Fabrizio, 445 F. Supp. 2d 152, 159, n.7 [D. Mass. 2006] (finding that courts "must be especially vigilant in applying evidentiary rules" when those determinations will affect a criminal defendant's liberty interests), citing Michael H. Gottesman, Admissibility of Expert Testimony After

Daubert: The Prestige Factor, 43 EMORY L.J. 867, 877 [Summer 1994] (observing that "[t]he standards for admitting expert opinion testimony must be calibrated" to the relevant standard of proof); Bonnis J. Davis, Admissibility of Expert Testimony After Daubert and Foret: A Wider Gate, A More Vigilant Gatekeeper, 54 LA. L. REV. 1307, 1333-34 ("The prejudicial effect against the defendant of expert testimony presented by the prosecution is very high, and thus this testimony should be very reliable before it could pass the balancing test" for admissibility).

Parenting is also a protected fundamental right; parents enjoy a "fundamental right. . . to make decisions concerning the care, custody, and control of their children." Troxel v. Granville, 530 U.S. 57, 66 [2000]. Particular attention must therefore be paid to the rigorous application of the rules of evidence in cases where an individual's parental rights are at stake.

III. THIS COURT SHOULD PRECLUDE [EVALUATOR'S] OPINION OR ORDER A FRYE HEARING

To guide trial courts considering the admission of an expert opinion or scientific evidence, New York courts have adopted the test set forth in Frye v. United States, 293 F. 1013 [D.C. Cir. 1923]. People v. Wesley, 83 N.Y.2d 417, 422-23 [2004], citing Frye, 293 F. at 1014. Frye applies to Article 10 proceedings in Family Court. See Matter of Jennie EE, 210 A.D.2d 744 [3d Dep't 1994]; Matter of Luz P., 189 A.D.2d 274, 280 [2d Dep't 1993]. The Frye test poses the elemental question of "whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally." People v. LeGrand, 8 N.Y.3d 449, 457 [2007] (internal

citations omitted).[2] Under Frye, therefore, scientific evidence may only be admitted at trial if the procedure *and* results are generally accepted as reliable in the scientific community.

A Frye hearing is required where there is an issue of fact as to the general acceptance of a scientific theory. Cf. Saulpaugh v. Krafte, 5 A.D.3d 934 [3d Dep't 2004]. A theory may be novel or experimental, even if not recently coined. See Frye, 293 F. at 1014 (the relevant distinction is between scientific principles that are "experimental" and those that are "demonstrable"). See, e.g., People v. Anderson, 13 Misc. 3d 1242(A), No. 06060051, 2006 WL 3452407, at *3 (Just. Ct., Monroe Co. Nov. 30, 2006) (holding that the proper foundation for the reliability of a sobriety test had not been established, even though other courts had ruled on the issue as early as 2001); cf. United States v. Lewis, 220 F. Supp. 2d 548, 554 (S.D. W.Va. 2002) ("If courts allow the admission of long-relied upon but ultimately unproven analysis, they may unwittingly perpetuate and legitimate junk science") (rev'd by U.S. v. Crisp, 324 F.3d 261 [4th Cir. 2003], holding expert testimony admissible).

Under the Frye standard, the burden of proving "general acceptance" rests upon the party offering the disputed expert testimony. Saulpaugh v. Krafte, 5 A.D.3d 934, 935 [3d Dep't 2004]. "Broad statements of general scientific acceptance, without accompanying support, are insufficient to meet the burden of establishing such acceptance." Id., citing Stanski v. Ezersky, 228 A.D.2d 311, 312 [1st Dep't 1996]. General acceptance of a theory must be demonstrated by "controlled studies, clinical

[2]The New York Court of Appeals has noted that Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 [1993], which relaxed the rule of Frye and the "traditional barriers to [] 'testimony' under the Federal Rules of Evidence, is not applicable in New York." Wesley, 83 N.Y.2d at 422 (quoting Daubert, 509 U.S. at 588-89); see also Zito v. Zabarsky, 28 A.D.3d 42, 43-44 & n.1 [2nd Dep't 2006].

data, medical literature, peer review or supportive proof." Saulpaugh, 5 A.D.3d at 936 (citations omitted).

General acceptance of novel scientific evidence may be demonstrated through expert testimony, judicial opinions, and/or scientific and legal writings. See Lahey v. Kelley, 71 N.Y.2d 135, 144 (1987); People v. Middleton, 54 N.Y.2d 42, 49-50 (1981). The determination under the Frye test of whether a scientific principle or technique is generally accepted in the relevant scientific community "emphasizes counting scientists' votes, rather than ...verifying the soundness of a scientific solution." Wesley, 83 N.Y.2d at 432 (Kaye, Ch. J., concurring); see LeGrand, 8 N.Y.3d at 457 (same); see also Martin, Capra & Rossi, New York Evidence Handbook, § 7.2.3 at 586 (2d Ed.) ("[U]nder Frye, the trial judge does not determine whether a novel scientific methodology is *actually* reliable. Rather, the judge determines whether most scientists in the field believe it to be reliable.") (emphasis supplied). Thus, "Frye is not concerned with the reliability of a certain expert's conclusions, but instead, with whether the experts' deductions are based on principles that are sufficiently established to have gained general acceptance as reliable." Nonnon v. City of New York, 32 A.D.3d 91, 103 [1st Dept.2006], (internal quotations and citations omitted). The proponent of the disputed evidence shoulders the burden of proving general acceptance in the relevant scientific community. People v. Rosado, 25 Misc.3d 380, 384 [Bronx Cty. Sup. Ct. 2009], citing Zito v. Zabarsky, 28 A.D.3d 422 [2d Dept. 2006].

A history of past admission in a particular field does not preclude a subsequent request for a Frye hearing. Courts must revisit the reliability of proffered "scientific evidence" with the understanding that acceptance of forensic techniques and expert opinions may change over time. See generally People v. Mooney, 76 N.Y.2d 827 [1990];

People v. Lee, 96 N.Y.2d 157 [2001]; People v. LeGrand, 8 N.Y.3d 449 [2007] (illustrating the progression of acceptance of expert testimony on eyewitness identification over time, evolving from *per se* inadmissible, to discretionary, to *per se* admissible). A Frye hearing is thus appropriate even if the Court of Appeals and other New York courts have already permitted similar testimony. See LeGrand, 8 N.Y.3d at 449 (no error where trial court conducted Frye hearing in 2002, even though Court of Appeals had ruled on the scientific technique at issue in 1990). The key inquiry under Frye is not the newness of a scientific principle, but whether it is "demonstrable." Frye, 293 F. at 1014 (the relevant distinction is between scientific principles which are "experimental" and those which are "demonstrable"); see also Anderson, 13 Misc. 3d 1242(A), No. 06060051, 2006 WL 3452407, at *3 [N.Y. Just. Ct., Monroe Co. Nov. 30, 2006] (holding that the proper foundation for the reliability of a sobriety test had not been established, even though other courts had ruled on the issue as early as 2001). Again, "if courts allow the admission of long-relied upon but ultimately unproven analysis, they may unwittingly perpetuate and legitimate junk science." Lewis, 220 F. Supp. 2d at 554.

Based on the clear case law, as well as the methodologies and case-specific reasons outlined herein, this Court should preclude [EVALUATOR'S] proffered opinion outright or, in the alternative, order a Frye hearing to test both the reliability of the procedures and methodologies [EVALUATOR] used in formulating his opinion (as laid out in the [EVALUATOR] Report), as well as whether those methodologies are generally accepted by the relevant scientific community as accurate predictors of a child's risk of harm in the care of a parent with a given mental health condition.

A. [EVALUATOR'S] OPINION MUST BE EXCLUDED BECAUSE HIS METHOD OF EVALUATION DID NOT FOLLOW GENERALLY ACCEPTED PROTOCOLS

In order for the court to accept the opinion of an expert in an established scientific field, the court must determine whether the proffered expert has *actually employed the accepted techniques* in the case in which that expert's testimony is being offered. People v. Middleton, 54 N.Y.2d 42, 45 [1981].

In Wesley, the Court noted that "the particular procedure need not be 'unanimously indorsed' by the scientific community but must be 'generally accepted as reliable.'" People v. Wesley, 83 N.Y.2d at 423, quoting People v. Middleton, 54 N.Y.2d at 49 [1981].

1. GENERALLY ACCEPTED METHODOLOGIES EXIST FOR FORENSIC EVALUATIONS

Forensic mental health evaluations are solicited and used by courts to offer insight into a given family's circumstances. Such evaluations are typically conducted over more than one session, but are done for the purpose of providing information to the court, rather than for clinical intervention. (See Exhibit B, _____ Affidavit).

The American Psychological Association (APA) is a scientific and professional organization that represents psychologists in the United States.[3] The APA, as part of its mission, promulgates guidelines for practicing psychologists, for use by both its member psychologists and by non-member psychologists. The APA is widely regarded as the generally accepted authority on psychology. (See Exhibit B, _____ Affidavit).

[3] See www.apa.org. The American Psychological Association "is the largest scientific and professional organization representing psychology in the United States. APA is the world's largest association of psychologists, with more than 134,000 researchers, educators, clinicians, consultants and students as its members." Its mission is to "advance the creation, communication and application of psychological knowledge to benefit society and improve people's lives."

Of particular relevance to this proceeding are the APA Guidelines for Psychological Evaluations in Child Protection Matters.[4] The APA last updated these Guidelines in October 2012 (attached as Exhibit C, also available at http://www.apa.org/practice/guidelines/child-protection.pdf). Prior to this update, the most recent version of the Guidelines had been issued in 1998 (attached as Exhibit D).

At the time that [EVALUATOR'S] evaluation took place, the APA Guidelines from 1998 were in effect. (See Exhibit A, [EVALUATOR] Report). Both versions, the 1998 Guidelines and the 2013 Guidelines, are attached to this Motion. The most significant difference between the 1998 and the 2013 Guidelines is that the 2013 version provides practice examples.

Because the 1998 Guidelines were in effect when [EVALUATOR'S] evaluation took place, they will be primarily referenced in this Motion. However, where the 2013 Guidelines provide relevant examples, they will also be referenced.

The 1998 Guidelines provide three groups of guidelines that should be followed when conducting a mental health evaluation of parent for the purpose of a court proceeding. Those groups are as follows:

1. Orienting Guidelines. This section of guidelines begins by emphasizing that the purpose of the evaluation is to provide relevant, professionally sound results or opinions. This section also specifically notes that in a termination of parental rights proceeding, one of the goals of the psychologist should be to identify whether rehabilitation efforts by and for the parent have resulted in a safe environment for the child.

[4] See http://www.apa.org/practice/guidelines/child-protection.pdf*;* see also Exhibits C and D, Guidelines for Psychological Evaluations in Child Protection Matters 1998 and 2013 (hereinafter 1998 Guidelines and 2013 Guidelines, respectively).

Next, this section identifies that the child's interest and well-being are paramount. Included in that paramount interest, according to this section, is an assessment of whether the parent can be or has been successfully rehabilitated.

Finally, this section indicates that the particular needs of the parent and child involved in the proceeding should be addressed. This may involve an assessment of the following: (a) the adult's capacities for parenting, including those attributes, skills and abilities most relevant to abuse and/or neglect concerns; (b) the psychological functioning and developmental needs of the child, particularly with regard to vulnerabilities and special needs of the child as well as the strength of the child's attachment to the parent(s), and the possible detrimental effects of separation from the parent(s); (c) the current and potential functional abilities of the parent(s) to meet the needs of the child, including an evaluation of the relationship between the child and the parent(s); (d) the need for and likelihood of success of clinical interventions for observed problems, which may include recommendations regarding treatment focus, frequency of sessions, specialized kinds of intervention, parent education and placement.

The 2013 Guidelines elaborate on this last point by identifying that the "fit" between the parent and child should be assessed as well. This means that the particular needs of the child may be assessed with reference to the particular skills of the parent. See Exhibit C, 2013 Guidelines.

2. General Guidelines: Preparing for a Child Protection Evaluation. This section lists preparations that should be done prior to an evaluation. They are: maintain an unbiased, objective stance; guard against factors that might lead to misuse of their findings; gain specialized competence by engaging in continuing education and

maintaining current knowledge of scholarly and professional developments, and become familiar with the law; be aware of personal biases; and avoid multiple relationships.

3. Procedural Guidelines: Conducting a Psychological Evaluation in Child Protection Matters. This section identifies nine specific procedures related to conducting their evaluations.

One of the guidelines in this third section is particularly relevant; the section states that psychologists are to use multiple methods of data gathering. Some of those methods are: clinical interviews, observation and/or psychological testing, reviewing relevant reports, observing the child and parent together, and interviewing other family members and individuals such as caretakers or teachers. This section emphasizes the need for corroboration of any information gained from one source.

Regarding observation of the parent and child together, the section reads:

> In evaluating parental capacity to care for a particular child or assessing the child–parent interaction, psychologists make efforts to observe the child together with the parent and recognize the value of these observations occurring in natural settings. This may not always be possible, for example, in cases where the safety of the child is in jeopardy or parental contact with the child has been prohibited by the court.

See Exhibit D, 1998 Guidelines.

The Guidelines are promulgated to help psychologists conduct the most informed and accurate evaluations possible. They help ensure that a psychologist is relying on the most complete set of data possible, and they ensure that psychologists are all using the same methods, and thus yielding reliable results to the greatest extent possible. (See Exhibit B, _____ Affidavit). As such, a psychologist should make every effort to follow the Guidelines. (See Exhibit B, _____ Affidavit).

If an evaluating psychologist deviates from the Guidelines, she should note that she is deviating from them in the report, and provide the reason for the deviation, such as the unavailability of the information, or that, for clinical reasons, following a particular guideline would be detrimental to the person being evaluated. (See Exhibit B, _____ Affidavit).

A recent report from the National Council on Disability, dated September 24, 2012, specifically criticized mental health evaluations that do not follow the APA Guidelines, noting:

> One problem in the evaluations for child welfare and family court is particularly critical. Many of these evaluations do follow the APA guidelines regarding multiple methods of data gathering, including clinical interviews, observations, and psychological assessments. However, observation, if it is included, is often minimal, done in clinical offices, or only during interviews. Studies of child custody evaluation practices with parents in general rank clinical observation of parent and child ahead of psychological testing.

See Exhibit E, excerpt of Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children, at 166 (full report available at http://www.ncd.gov/publications/2012/Sep272012). The report emphasized that parent-child observation and home visits are underutilized by evaluators, despite evidence suggesting that the functioning of the parent and child may vary dramatically between a clinical setting and a home setting. See id. at 166-67.

The child custody context also provides some insight into forensic evaluations; even though child custody evaluations serve a different purpose, many of the generally accepted procedures are the same. Of particular importance is that the forensic evaluator's observation of a parent with his or her child is considered to be of paramount importance.

For example, in Matter of W. J., 8 Misc.3d 1012(A) [2005, unreported], the New York Family Court had to determine whether to accept a forensic evaluation by a particular expert. The court did accept the report, noting that the evaluator had used the proper techniques, because "[h]e interviewed the mother, the father, and he observed the interactions of the parents with the subject child." Id at *10.

Furthermore, in SC v. HB, 9 Misc.3d 1110(A) [Rockland County, 2005], the court acknowledged a "recognized need to scrutinize forensic evaluations to ensure their scientific validity." The court noted that "[t]here is a significant need to ensure that the court receives scientifically valid mental health information, and the court must have the ability to evaluate the validity of the expert's opinion." Id. at *1.

2. [EVALUATOR] DID NOT FOLLOW THE GENERALLY ACCEPTED APA GUIDELINES FOR CONDUCTING A MENTAL HEALTH EVALUATION

It is clear from the face of the [EVALUATOR] Report that [EVALUATOR], in conducting his evaluation in this case, deviated substantially from the generally accepted APA 1998 Guidelines in numerous ways.

The most noticeable omission from [EVALUATOR'S] report is the lack of any collateral interviews. Guideline 10 of the 1998 Guidelines indicates that collateral contacts with other family members, community supports such as counselors and teachers, and other members in the parent's life should be interviewed where possible.[5] [EVALUATOR] interviewed one person only: Ms. _____. There is no indication in the

[5] "Multiple methods of data gathering serves three ends: It broadens the information base upon which evaluators will base their opinions and recommendations; it provides information to challenge biases that may compromise evaluators' opinions and recommendations; and it contributes to building a quality evaluation that will support ethical and legally reliable expert opinions." Ex. D at 27.

report that he made any effort to identify and interview any other collateral resources in Ms. _____'s life. [EVALUATOR] provided no explanation for this omission.

Similarly, [EVALUATOR] offered no reason for his lack of observation of Ms. _____ and her children, or even the children by themselves. The Guidelines described above clearly state that if possible, the psychologist should observe the parent and child together, for a whole host of reasons bearing on the reliability of the evaluator's opinion. The Guidelines contemplate scenarios in which a parent-child observation might not be possible because of a court order barring contact; however, there is no such order in this case. In fact, Ms. _____ visits with both children several times per month. The [EVALUATOR] report offers no alternative reason, clinical or legal, why [EVALUATOR] could not observe Ms. _____ with her children. [EVALUATOR] simply failed to follow this Guideline without explanation.

Moreover, the Orienting Guidelines indicate that one potentially important factor to be considered is "the psychological functioning and developmental needs of the child, particularly with regard to vulnerabilities and special needs, including any disabilities, of the child as well as the strength of the child's attachment to the parent(s) and the possible detrimental effects of separation from the parent(s)." See Ex. D. [EVALUATOR] made only cursory mention of possible, unconfirmed mental health diagnoses of the children, without elaborating or pursuing collateral information on that subject. He made no mention of the questions of the children's attachment and the impact of separation.

It must be noted that there are examples of much more robust forensic mental health evaluations conducted in the context of termination of parental rights proceedings. In in re Faith D.A., 2012 NY Slip. OP 50313(U), the Bronx Family Court found that a mental health evaluation provided by Dr. Trungold of Family Court Mental Health

Services was not sufficient to terminate the parental rights of the respondent parent. In deciding that case, the court relied on Nassau County Dept. of Social Servs. (B.M.) v. (D.M), 31 Misc.3d 1210 (A) [Nassau Cty. Fam. Ct. 2011], for contrast. The mental health evaluation in Nassau County Dept. of Social Servs. was much more comprehensive than that in either Faith D.A. or in this matter, including:

> . . . two (2) court appointed psychologists who conducted comprehensive forensic evaluations of the respondents consistent with the APA guidelines and methodology . . . . Based upon the extensive and thorough forensic evaluation each of the court appointed psychologists conducted as to each parent and the parents' interactions with their child, and an in-depth analysis detailing how the mental illness of each parent affected his/her ability to adequately parent, the trial court adopted their expert testimony . . . .

Matter of Faith D.A., at *18, *supra*. Although Matter of Faith D.A. was overturned on appeal, see 99 A.D.3d 641 [1st Dept. 2012], the case upon which it relied, Nassau County Dept. of Social Servs. (B.M.) v. (D.M), remains good law. The comprehensive evaluation in that case shows that it is possible and realistic to expect that a forensic mental health evaluation be held to the standards of the APA Guidelines.

3. **WHEN GENERALLY ACCEPTED PROCEDURES ARE NOT FOLLOWED IN AN EVALUATION, THE RESULTING OPINION IS NOT ADMISSIBLE EVIDENCE AT TRIAL**

As detailed above, generally accepted procedures exist for forensic mental health evaluations in the child welfare context. Those procedures should be followed in every case, and if they are not followed, there should be a clear, cogent clinical or logistical reason provided for not following them.

[EVALUATOR] neither followed these procedures nor provided a reason for not doing so in his report. Because he did not follow the generally accepted procedures, his opinion – in the form of testimony or a written report – is not admissible.

In termination of parental rights proceedings that involve a mental health cause of action, the New York Social Services Law requires the court to appoint a psychologist or psychiatrist to examine the parent and order the parent to submit to such an evaluation. However, the statute does not require the court to accept a resulting opinion that fails to meet the standards for admissibility. Section 384-b 6(e) of the Social Services Law reads:

> In every proceeding upon a ground set forth in paragraph (c) of subdivision four the judge shall order the parent to be examined by, and shall take the testimony of, a qualified psychiatrist or a psychologist licensed pursuant to article one hundred fifty-three of the education law as defined in section 730.10 of the criminal procedure law in the case of a parent alleged to be mentally ill or retarded, such psychologist or psychiatrist to be appointed by the court pursuant to section thirty-five of the judiciary law. The parent and the authorized agency shall have the right to submit other psychiatric, psychological or medical evidence. If the parent refuses to submit to such court-ordered examination, or if the parent renders himself unavailable therefor whether before or after the initiation of a proceeding under this section, by departing from the state or by concealing himself therein, the appointed psychologist or psychiatrist, upon the basis of other available information, including, but not limited to, agency, hospital or clinic records, may testify without an examination of such parent, provided that such other information affords a reasonable basis for his opinion.

N.Y. S.S.L. § 384-b [6] [e].

Although the statute requires that the court take the testimony of a qualified psychiatrist or psychologist, it is silent on the issue of what an evaluation provided by that psychologist or psychiatrist to the court must look like, simply requiring that the evaluator must have "a reasonable basis for his opinion." Id. When the statute is silent on the definition of 'reasonable,' it can be presumed that the guidelines of the governing professional organization fill in the gap. In this case, the profession of the expert is a psychologist, and so the guidelines of the APA should apply.

B. IF THE COURT FINDS THAT THE RELIABILITY AND ADMISSIBILITY OF [EVALUATOR'S] TESTIMONY IS AN ISSUE OF FACT, THE COURT SHOULD ORDER A FRYE HEARING

If any factual question exists regarding [EVALUATOR'S] adherence to generally accepted procedures in his evaluation of Ms. _____, then this Court must conduct a Frye hearing to determine whether his opinion is admissible. The purpose of a Frye hearing is to settle just this type of factual dispute.

It is important to emphasize that voir dire and cross examination of this expert witness are not enough to cure the defects in admissibility of this expert's opinion. The purpose of voir dire is to examine the credentials of an expert. However, the respondent does not contest [EVALUATOR'S] credentials as a psychologist. The purpose of cross-examination is to determine the weight of the evidence that has been admitted. However, this evidence is not admissible at all. The court should consider what weight it should be given, but should rather exclude it as inadmissible.

III. CONCLUSION

[EVALUATOR'S] failure to follow the established set of procedures for forensic evaluations, as outlined in this memorandum, the attached materials and expert Affidavit, renders his opinion unreliable, and the Court, in performing its vital gatekeeper function, should exclude the unreliable opinion from this proceeding. If this Court finds that there remains a question of fact as to whether [EVALUATOR'S] opinion is reliable, the court should order a Frye hearing in order to make that determination.

WHEREFORE, the affirmant respectfully requests that the Court grant the instant motion.

Dated: Bronx, NY
[DATE]

_____
_____, ESQ.
Attorney for _____
The Bronx Defenders
360 East 161st Street
Bronx, NY 10451
(718) 838-7878

SAMPLE *VOIR DIRE* OF A SOCIAL WORKER AS AN EXPERT WITNESS IN A SEX ABUSE CASE

Voir Dire

EXPERT IN SOCIAL WORK

YOU GRADUATED FROM SOCIAL WORK SCHOOL IN 2012?

TWO YEARS AGO?

YOUR RESUME INDICATES THAT YOU ARE AN LMSW? LICENSED MASTER SOCIAL WORKER?

YOU BECAME AN LMSW IN SEPTEMBER 2012?

BUT YOU ARE NOT A LICENSED CLINICIAL SOCIAL WORKER (LCSW)?

AGREE THAT AS AN LMSW YOU CANNOT DIAGNOSE A PATIENT UNLESS YOU ARE SUPERVISED BY AN LCSW?

AGREE THAT AS AN LMSW YOU CANNOT PRACTICE PSYCOTHERAPY, UNLESS SUPERVISED BY AN LCSW?

AGREE THAT AS AN LMSW YOU MUST DISCUSS EACH AND EVERY CLIENT'S DIAGNOSIS AND TREAMENT WITH A SUPERVISOR?

ISN'T IT TRUE THAT AS AN LMSW YOU MUST MEET REGULARLY WITH AN LCSW FOR GUIDANCE AND OVERSIGHT ON EVERY CLIENT YOU WORK WITH?

WHO, IF ANYONE, SUPERVISED YOU REGARDING YOUR ASSESSMENT IN THIS CASE? (REVIEWED YOUR REPORT? WHEN?) **TRAUMA FOCUSED THERAPY**

YOU CURRENTLY ARE THE CO-DIRECTOR AND SOMATIC EXPERIENCING PRACTITIONER AT MINDFUL PARENTING BROOKLYN?

MINDFUL PARENTING HAS AN OFFICE IN BROOKLYN?

YOU HAVE HAD THIS OFFICE SINCE 2012?

FOR A LITTLE LESS THAN TWO YEARS?

AGREE THAT AS A SOMATIC EXPERIENCE PRACTITIONER YOU MUST BE SUPERVISED BY A SENIOR SETI FACULTY MEMBER?

AS A SOMATIC EXPERIENCING PRACTITIONER, YOU TREAT INDIVIDUALS WHO COME TO YOU WITH A REPORTED HISTORY OF TRAUMA?

EXPLAIN WHAT IS INVOLVED IN BEING A SOMATIC EXPERIENCING PRACTITIONER?

- (short-term naturalistic approach to the resolution and healing of trauma developed by Dr. Peter Levine. It is based upon the observation that wild prey animals, though threatened routinely, are rarely traumatized. Animals in the wild utilize innate mechanisms to regulate and discharge the high levels of energy arousal associated with defensive survival behaviors. These mechanisms provide animals with a built-in ‘’immunity’’ to trauma that enables them to return to normal in the aftermath of highly ‘’charged’’ life-threatening experiences.

TREAT BOTH CHILDREN AND ADULTS?

YOU ASO PROVIDE SENSORY MOTOR AROUSAL REGULATION? SMART?

APPROXIMATELY HOW MANY PEOPLE HAVE YOU TREATED IN SOMATIC EXPERIENCES?

HOW MANY IN SENSORY MOTOR AROUSAL REGULATION (SMART)?

OF THOSE HOW MANY WERE CHILDREN? HOW MANY OF THESE CHILDREN WERE BEING TREATED FOR INTRAFAMILIAL ABUSE?

MOTOR AROUSAL REGUATION TREATMENT?

EXPLAIN WHAT THIS IS?

THESE ACTIVITIES INVOLVE TREATMENT OF TRAUMA?

WOULD YOU DESCRIBE THEM AS TRAUMA-FOCUSED THERAPY? ISN’T IT TRUE THAT TRAUMA FOCUSED THERAPY IS CLINICAL?

ISN’T IT TRUE THAT IT IS FOR THE PURPOSE OF TREATMENT?

TRAUMA FOCUSED THERAPY IS NOT SUPPOSED TO BE USED AS A FORENSIC TOOL?

SMART AND SOMATIC EXPERIENCING DO NOT INVOLVE ASSESSING WHETHER TRAUMA HAS OCCURRED IN CHILDREN?

IF YES, DO YOU USE ANY ASSESSMENT INSTRUMENTS?

ARE YOU FAMILIAR WITH ANY TRAUMA ASSESSMENT INSTRUMENTS?

CHILD BEHAVIOR CHECK-LIST? PTSD INSTRUMENTS?

STARFISH BODY AND SOUL

FOUNDER AND DIRECTOR OF STARFISH BODY AND SOUL?

STARFISH BODY AND SOUL IS A THERAPY PROGRAM FOR TRAUMA SURVIVORS? DANCE? PLAY? MOVEMENT? YOGA ? TALK THERAPY? SPOKEN AFFIRMATIONS? IMPROVISATIONS? CREATIVE ARTS? MEDITATION?

FAIR TO SAY THAT THE WORK HERE INVOLVES TREATMENT OF INDIVIDUALS WHO IDENTIFY AS HAVING BEEN ABUSED?

APPROXIMATELY HOW MANY PATIENTS HAVE YOU SEEN THROUGH STARFISH BODY AND SOUL?

HOW MANY OF YOUR PATIENTS THROUGH THIS PROGRAM WERE CHILDREN?

HOW MANY OF THESE CHILDREN WERE BEING TREATED FOR INTRAFAMILIAL ABUSE?

YOU DON'T PERFORM FORENSIC ASSESSMENTS FOR ABUSE IN THIS PROGRAM?

DURING SOCIAL WORK SCHOOL YOU INTERNED FOR ONE YEAR AT BELLVUE IN THE CHILD AND ADOLESCENT PSYCHIATRIC CLINIC?

YOUR RESUME SAYS/ YOU TESTIFIED THAT YOU WERE TRAINED IN TRAUMA ASSESSMENT AND EVIDENCE BASED TREATMENT?

EXPLAIN TRAUMA ASSESSMENT?

IS THIS THE ONLY FORMAL TRAINING YOU HAD IN TRAUMA ASSESSMENT?

WHAT IS THE METHODOLOGY FOR TRAUMA ASSESSMENT IN WHICH YOU WERE TRAINED? PROTOCOL?

HOW MANY CHILDREN/ADOLESCENTS DID YOU ASSESS FOR TRAUMA?

FORENSIC INTERVIEWING

Agree that the treatment you provide, Sensory Motor Arousal Regulation Treatment was developed by the Boston Trauma Center

Did you train with the Boston Trauma Center?

Follow the Boston Trauma Center's protocols in working with your clients?

Agree that that Boston Trauma Center follows certain protocols developed by the American Professional Society on the Abuse of Children (APSAC)

Familiar with that organization?

You are not a member of that organization?

Why not?

Familiar with the protocols for evaluating child sexual abuse developed by the American Professional Society on the Abuse of Children (APSAC)?

Use them in your work?

(http://www.apsac.org/practice-guidelines)

YOU ARE FAMILIAR WITH THE TERM FORENSIC INTERVIEWING?

ARE YOU FAMILIAR WITH ANY PROTOCOLS FOR FORENSIC INTERVIEWING?

WHAT ARE THEY?

YOU HAVEN'T RECEIVED ANY TRAINING IN FORENSIC INTERVIEWING?

NO CERTIFICATON LISTED ON CV?

ARE YOU FAMILIAR WITH THE YUILLE/STEP-WISE PROTOCOL? EXPLAIN

ARE YOU FAMILIAR WITH THE NATIONAL CHILD ADVOCACY CENTER INTERVIEW PROTOCOL? EXPLAINWHEN YOU INTERVIEW CHILDREN DO YOU USE FORENSIC INTERVIEWING TECHNIQUES?

WHAT INTERVIEWING PROTOCOLS DO YOU FOLLOW WHEN YOU INTERVIEW CHILDREN (PROTOCOLS REQUIRE OPEN ENDED QUESTIONS,)

HAVE YOU EVER BEEN CERTIFIED AS AN EXPERT IN COURT BEFORE?

IF YES, HOW MANY TIMES? IN WHAT AREA OF EXPERTISE

CROSS EXAMINATION OF A A SOCIAL WORKER AS AN EXPERT WITNESS IN A SEX ABUSE CASE

Cross examination of same witness

INTRO

YOU INTERVIEWED W IN MARCH 2013?

INTERVIEWED HER ONLY ONCE?

THE INTERVIEW WAS AN HOUR?

SHE WAS FIVE AT THE TIME?

SHE DID NOT CONTINUE IN TREATMENT WITH YOU CORRECT?

YOU WROTE A REPORT REGARDING YOUR INTERVIEW?

WROTE THE REPORT IN APRIL 2014?

A YEAR LATER?

THAT WAS AT THE REQUEST OF ACS?

YOU DID NOT PROVIDE W WITH A DIAGNOSIS CORRECT?

REVIEW HER CASE WITH YOUR CLINICAL SUPERVISOR?

WHEN?

YOU FOUND W TO BE A BRIGHT CHILD? ENERGETIC? CONFIDENT?

SHE CHATTED EASILY WITH YOU?

YOU ASKED HER QUESTIONS?

SHE RESPONDED TO YOUR QUESTIONS?

SHE DID NOT DISCLOSE BEING ABUSED?

YOU DIDN'T ASK HER ABOUT THAT BECAUSE IT WAS THE FIRST TIME YOU MET HER?

IT TAKES TIME TO BUILD REPORE WITH CHILDREN?

YOU DID NOT VIDEOTAPE YOUR CONVERSTAION WITH W CORRECT?

STRETCHY BALL

YOU TESTIFIED/WROTE IN REPORT THAT THERE WERE TWO THINGS THAT "RAISED QUESTIONS FOR YOU" IN YOUR MEETING WITH W?

YOU TESTIFIED/WROTE IN YOUR REPORT THAT SHE HAD A REACTION TO A BALL?

BALL HAS A BALLOON LIKE QUALITY?

THE BALL WAS STRETCHY AND YOU CAN INFLATE IT BY SQUEEZING IT?

W SAID "THIS CREEPS ME OUT" AND THREW IT INTO A CONTAINER?

YOU DIDN'T HAVE A CONVERSATION WITH HER ABOUT WHY THE BALL CREEPED HER OUT?

THAT WAS ALL SHE SAID ABOUT THE BALL?

HOW DID YOU COME TO HAVE THAT BALL?

HOW MANY CHILDREN HAVE YOU INTRODUCED TO THE STRETCHY BALL?

YOU HAVE NEVER CONDUCTED A STUDY YOURSELF CONNECTING THE BALL WITH CHILDHOOD SEXUAL ABUSE HAVE YOU?

PRIOR TO PURCHASING THE BALL, DID YOU REVIEW ANY PEER-REVIEWED ACADEMIC PUBLICATIONS CONNECTING REACTIONS TO THE BALL WITH CHILDHOOD SEXUAL ABUSE?

IF SO, WHAT DO PUBLICATIONS SAY IS THE ERROR RATE? HOW OFTEN IS REACTION TO THE BALL NOT INDICATIVE OF ABUSE?

IN INTRODUCING W TO THE STRETCHY BALL, WHAT PROTOCOLS DID YOU USE?

YOU CAN'T SAY WITHIN A REASONABLE DEGREE OF CERTAINTY THAT A CHILD'S REACTION TO A BALL ON A SINGLE VISIT IS A SYMPTOM OF CHILDHOOD SEXUAL ABUSE?

KOMOCHI STUFFED OCTUPUS

YOU TESTIFIED/WROTE THAT W. DISCOVERED A KOMOCHI STUFFED OCTUPUS IN THE OFFICE?

THE OCTUPUS HAS PILLOWS STUFFED IN ITS MOUTH?

SHE SAID 'LOOK! IT HAS ALL THOSE THINGS IN ITS MOUTH THAT DON'T BELONG THERE"

AS FAR AS YOU COULD OBSERVE SHE WAS REFERRING TO THE PILLOWS IN THE OCTUPUS'S MOUTH?

SHE SAID THE OCTUPUS WAS “CREEPY” AND “GROSS” AND SHE DIDN’T WANT TO SEE IT?

AS A RESULT OF THAT REACTION YOU DETERMINED THAT SHE HAD AN INVASIVE ORAL EXPERIENCE?

WHAT DO YOU BASE THAT ON?

YOU DIDN’T ASK HER ANY MORE QUESTIONS ABOUT WHY SHE THOUGHT IT WAS CREEPY OR GROSS?

YOU INDICATE THAT MOST CHILDREN FIND BOTH THE STRETCHY BALL AND THE OCTUPUS BENIGN?

IS THAT CONCLUSION BASED ON A SCIENTIFIC STUDY?

THE OCTUPUS DOESN’T USUALLY HAVE THINGS IN ITS MOUTH WHEN CHILD SEES IT? THIS COULD BE WHY W. HAD A REACTION RIGHT?

WHEN YOU SAY MOST CHILDREN FIND THESE TOYS BENIGN YOU MEAN THE CHILDREN THAT YOU TREAT IN YOUR OFFICE? AREN’T MOST OF THEM BEING TREATED FOR TRAUMA?

BUT THEY DON’T HAVE A REACTION?

YOU DON’T KNOW WHY W SAID IT WAS CREEPY/GROSS?

YOU SAY THAT CHILDREN YOU’VE WORKED WITH WHO HAVE THIS REACTION WERE CHILDREN WHO WERE SEXUALLY ABUSED?

WHICH CHILDREN ARE YOU REFERRING TO? HOW MANY CHILDREN?

YOU CANNOT POINT TO ANY SCIENTIFIC STUDIES OR ARTICLES WHICH DISCUSS CHILDREN’S REACTIONS TO THE OCTOPUS AS BEING INDICATIVE OF HAVING BEEN ABUSED?

THERE ARE NO SCIENTIFIC STUDIES THAT SPECIFICALLY CONNECT CHILDREN’S REACTIONS TO THE OCTOPUS WITH “INVASIVE ORAL EXPERIENCES”

[If she says she did, ask her about the error rate, how often is the reaction to the octopus indicative of nothing?]

IN INTRODUCING W TO THE OCTOPUS, WHAT PROTOCOLS DID YOU USE?

CAN YOU SAY WITHIN A REASONABLE DEGREE OF CERTAINTY THAT A CHILD'S REACTIONS TO AN OCTOPUS ON A SINGLE VISIT IS A SYMPTOM OF CHILDHOOD SEXUAL ABUSE?

YOU SAID THESE REACTIONS TO THE TOYS RAISED QUESTIONS?

BUT YOU CAN'T SAY WITH CERTAINTY THAT THESE REACTIONS MEAN SHE WAS ABUSED?

YOU DIDN'T DISCUSS THESE REACTIONS WITH HER MOTHER?

YOU WROTE THIS REPORT WITHOUT TALKING TO HER MOTHER FIRST?

OTHER THAN THESE REACTIONS, SHE DIDN'T EXHIBIT ANY SYMPTOMS OF CHILD ABUSE?

YOU SAID SHE WAS OTHERWISE HAPPY AND NON FEARFUL?

MOTHER

W'S MOTHER BROUGHT HER TO THE INTERVIEW?

BEFORE YOU INTERVIEWED W, YOU SPOKE TO M?

DID MOTHER TELL YOU THAT SHE BROUGHT W BECAUSE ACS TOLD HER TO GET THERAPY FOR HER DAUGHTER? (EXCEPTION TO HEARSAY; NOT FOR THE TRUTH BUT GOES TO WHAT THERAPIST UNDERSTOOD TO BE PURPOSE OF INTERVIEW)

DID HER MOTHER TELL YOU THAT SHE HAD SAID SHE KISSED HER FATHER ON THE PENIS?

DID SHE ALSO TELL YOU SHE LATER RECANTED?

THE MOTHER TOLD YOU THAT W HAD NO BEHAVIORAL ISSUES?

BROTHER

YOU INTERVIEWED W.'S BROTHER?

YOU ASKED HIM QUESTIONS AND HE RESPONDED?

HE DIDN'T REPORT SEEING ANY ABUSE OF W. BY THIS FATHER?

SAMPLE CROSS EXAMINATION OF A RADIOLOGIST IN ABUSIVE HEAD TRAUMA CASE

Sample Cross of Radiologist in Abusive Head Trauma Case

Q'S ABOUT BACKGROUND?

- You are the division chief of radiology at LIJ?
- And in your Division are Craig Warshall, Craig Horenstein, and Vinh Nguyen?
- And they are the radiologists who provided the readings contained in Matthew's medical records from Cohen's correct?
- And in preparing for your testimony, how much time did you spend reviewing the scans?
- And besides reviewing the scan, what other medical records did you look at?
    - Lutheran records?
    - LIJ records?
    - Pediatrician's records?
- And in preparing for your testimony today, what if any additional research did you do?
    - Review any literature or medical journals?

Q'S ABOUT CT SCANS?

- CT scan is a map of how different tissues absorb X-rays?
- The map is then converted for grey-scale display on a monitor?
- And the type of grey an area is, will vary based on how Xrays are absorbed?
- Agree degree of Xray absorption is measured in Hounsfield Units?
- And the higher the Hounsfield Unit, the brighter the structure [area] will appear on a CT scan?
- Water has a HU of 0.
- Meaning it is dark;
- What is CSF?
- Agree CSF has a Hounsfield unit of 5-10
- Meaning it is also dark;
- Bone has an HU range much higher than that?
- 700-3000
- Meaning that bone appears extremely bright on CT scan
- Want to ask some questions about how blood is measured on CT scan
- Agree blood is composed of many components?
- And depending on combination of those components, will appear more or less bright or dark on CT scan?
- And agree that measuring the HUs is how dating occurs with CT scans?
- Agree that hematomas in the brain do not simply disappear?
- Normal course is that the body's blood clot break systems break up the hematoma over time?
- And agree that the normal process can take 2-4 weeks?
- Or more?
- And that as the body breaks up the hematomas, the HUs change.

- [OR And the difference in the HU is because of how the blood is broken up by the body's natural blood clot breaking systems?]
- Blood that comes back "bright" on a CT scan is thought to be "fresh"
    - So less broken down;
- And blood that comes back increasingly [hypoattenuating] dark on a CT scan is thought to be older?
    - So more broken down;
- Agree that the dating with CT scan is generally thought to be more reliable than dating solely from MRI?
- Agree that CT scan is reliable at identifying subdural hematomas that are mid-to large?
- Agree that a small subdural hematoma would be one of a mm to a few mm
- And a hematoma more than 4 mm would be a mid-size hematomas?
- Agree that it is more likely that a CT scans are very good at picking up "acute" blood products?

Q'S ABOUT CT SCANS IN THIS CASE.

- Doctor, I have some questions about the CT scans done in this case.
- Testified that you reviewed the CT scans from Lutheran?

COMMIT TO SHRINKING HEMATOMA SIZE:

- Agree that Lutheran performed 2 CT scans of Matthew's head;
    - [expect him to say only reviewed 1]
- And that LIJ performed 2 CT scans of Matthew's head

FIRST CT SCAN

- **First scan** at Lutheran conducted at 2:42 p.m. on March 16, 2013, correct? [elsewhere page 37 I see it at 15:28]
- Report identifies a left frontotemporoparietal subdural hematoma as being around 1 centimeter
- Lutheran report of first scan does not identify the hematoma's signal types as having differing characteristics?
- You reviewed this CT scan?
- And you agree that the Hematoma does not have different signal characteristics?
- Agree that on this CT scan the hematoma presents as "bright"
- And bright means, fresh, correct?
- So, there is nothing in this 1st Lutheran CT scan to suggest blood products of different ages, right?
- And other than this left front o tempo parietal subdural hematoma, no other hematomas in this CT scan?
- And nothing about 1st Lutheran scan that is inconsistent with a fall as reported by Ms. Bao, correct?

SECOND CT SCAN

- Agree that a **Second CT scan** was done a Lutheran shortly after the first
- At 16:40 p.m. on 3/16/13 (page 38)
- About an hour later
- 2d CT scan report identifies same left frontotemporoparietal subdural hematoma
- This time, report indicates that the size was 9-10 mm in thickness, correct?
- So, smaller than the report only an hour before?
- This report also does not note the hematoma as having differing signal characteristics?
- Nothing about this 2d CT report at Lutheran to suggest blood products of differing ages, correct?
- Did you have an opportunity to review this CT scan?
- Agree that this hematoma again presented as uniformly bright?
- Meaning that in your review of the CT scan, suggests a fresh injury?
- And, other than left front temporoparietal subdural hematoma, No other hematomas found in this CT scan?

THIRD CT SCAN WAS AT LIJ

- **Matthew's THIRD CT SCAN** was done at LIJ Hospital, right?
- After he was transferred from Lutheran
- Scan was done the same day, right?
- So, also on March 16, 2013, right?
- Taken around 9:46 p.m. right? [pg. 529the report of Dr. Horenstein is signed at 10:44 p.m. on 3/16/14, where does 9:38 come from?, see 278, says 21:46]
- So about 5 hours later than the previous CT scan at Lutheran
- This hematoma was only 3 mm right?
- And, this scan revealed some "isodense and hyperdense" signal areas in the SDH.
- Some are dark and some are light, correct?
- Agree that this CT scan does not identify <u>any other</u> hematomas in the brain?

FOURTH CT SCAN

- **The Next CT scan that LIJ did was at** 10:35 p.m. the next day, correct?
- March 17, 2013
- Agree that this CT scan does not demonstrate a hematoma at all;
- Report indicates that something is "not well appreciated"
- That means it can't be seen, correct?
- Simply gone from the CT scan;
- Hematoma can't be measured;
- And no signal characteristics to detect
- Because you can't find it at all on this CT scan
- And, agree that you do not see <u>any</u> additional hematomas in this 4th CT scan?

RAPIDLY RESOLVING

- Agree that this is unusual for a hematoma to resolve this quickly;
- In fact, you have never seen a hematoma resolve this rapidly before?
- Normally, 1 cm hematomas do not resolve and go away this quickly on their own, correct?
- And, normally, 6 mm hematomas do not resolve and go away this quickly on their own, correct?
- In fact, subdural hematomas often require surgery, correct?
- But when they do not require surgery, they can last 2-4 weeks, correct?
- Or even months?
- In Matthew's case, no surgery was required
- And that's because his hematoma resolved itself;

RAPIDLY RESOLVING HEMATOMA

- **Now, previously testified that CT dating works because blood changes characteristics as it is broken down, and that this is a process that can take weeks or more, correct?**
- Agree that blood does not simply disappear instantly from the brain?
- Either it is broken down
- Or it redistributes?
- Also agree that there is no known mechanism for a SDH to "dissolve" within a course of hours?
- Familiar with concept of rapidly resolving hematomas?
- Mechanism is that an arachnoidal tear allows cerebrospinal fluid into the subdural space
- The cerebrospinal fluid washes out the subdural space
- And, in washing, the CSF can result in redistribution;
- Dr Craig Warshall interpreted Matthew's 3/17/13 CT scan correct?
- That was the CT that identified the differing signal characteristics, correct?
- And Dr. Warshall in addressing the rapid diminishment in size of the hematoma, said that "the decrease could be due to redistribution," correct? (517)
- Agree that only way Matthew's hematoma could disappear so quickly is bc CSF came in and washed it out?
- Agree that CSF is dark on CT scans?
- So, if CSF was mixing with an acute hematoma, agree that there would be dark CSF mixing with bright blood products?
- And agree that if CSF was mixing with acute hematoma, there would be light and dark signals?

MRI's

- **<u>DR. Johnson, I want to ask you a few questions about the MRI that was done for Matthew in March 2013</u>**
- Matthew had an MRI done at LIJ on March 18, 2013, correct?
- Day after the CT scans
- He also had a second MRI at a follow up appointment in July 2013, correct?

DIFFERENCES BETWEEN MRI AND CT SCAN

- I have some questions about the March 18, 2013 MRI
- Report done by Dr. Vinh Nguyen
- You reviewed the report of MRI?
- And you also reviewed the MRI itself, correct?

POSTERIOR FALX AND POSTERIOR FOSSA HEMORRHAGES

- Now, in this MRI, it identifies a "thin subdural hematomas agains the posterior falx and posterior"
- That means the lower back of the brain, correct?
- And it was seen "bilaterally", which means that it is on both sides of the brain, correct?
- Previously testified that this is the kind of hematoma that would not necessarily show up on a CT scan, because it is small, correct?
- But there is a crude method for dating blood with MRI's correct?
- And using that method, the blood could be a couple of days old, correct?
- So, only in terms of dating, the blood in the posterior falx and fassa could be blood that resulted from an injury on 3/16/13, correct?
- Now, you aren't saying that you can tell that prior to the 3/18/13 MRI, there was a SDH in the posterior sections of the brain, right?
- You are simply saying that, if it existed, this kind of hematoma would not likely be picked up by a CT scan?
- And you also testified that that this hematoma could not be the product of redistribution because of its location in the bottom of the brain, right? And the fact that the hematoma was bilateral, correct?

Q'S ABOUT REDISTRIBUTION

- When you mentioned redistribution as the reason behind the front Left hematoma's change in size, you meant that blood products that start in one place in the brain can move to other parts of the brain, correct?
- And in a radiological scan, if blood appears in a new section of the brain, not picked up on prior radiological scans, it could represent redistribution of an injury as opposed to a blood product that started there?
- Agree that the fluids follow shape of brain as they redistribute?
- And would follow the curvature of the brain?

- And also agree that as fluids redistribute in a brain, they are affected by gravity?
- Now, previously testified that blood does not rapidly disappear?
- And also testified that Matthew's hematoma was shrinking, correct?
- And the only way that it could shrink so rapidly, was that it redistributed, correct?
- And we are talking about a hematoma that Lutheran measured as 1 cm, right?
- It covered almost the entire left hemisphere of brain, correct?
- So we are talking about a reasonable amount of blood, correct?
- So, where did it go?
- Agree that [X place] no indication that there was any blood there?
- Now, is it your opinion that the SDH found in the posterior part of the brain could not be the result of redistribution?
- And that is because the SDH found in the posterior part of the brain was in the bottom of the brain?
- And the SDH first found in the CT scan was in the top of the brain?
- And it is your opinion that blood can't redistribute from the top side of the brain to the bottom side of the brain, correct?
- And your opinion is that the SDH found in the posterior part of the brain could not be because of redistribution because it was seen to be bilateral, correct?
- And bilateral means on both sides of the brain, correct?
- Now, it is your yesterday that blood can't redistribute from the right side of the brain to the left side of the brain, right?
- Including in the posterior areas?
- And your testimony is that blood can't redistribute in those manners because it can't cross the dura?
- So, your testimony is that blood cannot redistribute from the fronto-temporal region of the brain to the posterior fossi bilaterally, right?

IMPEACHMENT WITH ARTICLES:

- Dr. Johnson, agree it is be important to keep up to date on medical journals and publications?
- And agree that you sometimes rely on medical journals and publication for your own consultation, correct?
- And there are certain journals that are well-recognized within your profession, correct?
- And these are from journals that are peer-reviewed, right?
- And what does it mean for an article in a journal to be peer-reviewed?
- And, if there was an article in a peer-reviewed publication that observed blood could moving from top-to-bottom, that could affect your opinion about redistribution in this case, correct?
- And if there was an article in a peer-reviewed publication that observed blood moving from right of the brain to left of the brain, that could change your opinion about redistribution in this case, correct?
- Familiar with the **Journal of Neurosurgery**?

- Familiar with the **Spine section of the Journal of Neurosurgery**?
- Agree this is a peer-reviewed publication?
- Familiar with a 2004 case report from the Journal of Neurosurgery by Drs. Bortolotti, Wang, Frazer and Lanzino rapid redistribution of a SDH from the top of the brain to the bottom of the brain and then the spine, and also from the left of the brain to the right of the brain?
    - of a large acute left subdural hematoma from the patient's head that redistributed first along the tentorium, and then into the spine? [Bortolotti]
- Familiar with the **European Journal of Radiology**?
- Agree this is a peer-reviewed journal?
- Familiar with a 2000 case report from the European Journal of Radiology by Drs, Tsui, Ma, Cheung, Chan and Yuen that discusses the rapid redistribution of a large SDH that described a redistribution from the top of the brain to the bottom of the brain, and also from the left of the brain to the right of the brain?
    - rapid redistribution of a large right parietal subdural hematoma that then redistributed along the tentorium, posterior inter-hemispheric fissure, and middle cranial fossa bilaterally? [Tsui]
- Familiar with the **Neurologia Medico-chirurgica**?
- Agree this is a peer reviewed publication?
- Familiar with a 2010 article in that journal by Drs Watanabe, Omata and Kinouchi that reported the rapid redistribution of a SDH from the top of the brain to the bottom of the brain?
    - that reported the rapid redistribution of a left frontotemproal hematoma to the supratentorial subdural space?

Isn't it correct that ___[articles] demonstrate case studies of rapidly resolving SDH draining into other parts of the brain?

If that were the case here, wouldn't that explain this clinical picture?

Wouldn't it explain why the SDH resolved unusually rapidly

Wouldn't it explain why we have small, diluted blood appearing in other parts of the brain and spine 48 hours after

BACK TO MRI START 9-10-14

DR. JOHNSON, I HAVE SOME MORE QUESTIONS ABOUT THE MRI IN THIS CASE:

- Dr. Nguyen was radiologist who created the report for Matthew's brain MRI, correct?
- In Dr. Nguyen MRI report, she identified a left frontal temporal hematoma of 4.5 mm.
- But the 4th LIJ CT scan couldn't find a left front hematoma at all, right?
- And the 3rd CT scan, the one before that, that only measured the SDH at 3 mm, right?
- So, in this MRI, if the left front temporal hematoma existed, it would have grown since the last CT scan?
- Dr. Nguyen also identified a **right frontal convexity subdural hematoma** as well, right?
- And Dr. Nguyen says that it "demonstrates acute hemorrhage product."
- And acute means "recent" hemorrhage product.
- Now, agree that acute hematomas on CT scans are bright?
- Agree that CT scans are good at picking up acute hematomas?
- Agree that a 4.5 mm hematoma is not a small size?
- Expect to see an acute 4.5 mm hematoma on a CT Scan, right?
- Now, you testified that you had opportunity to view the Lutheran and LIJ CT scans?
- Agree that none of the 4 CT scans identified a hematoma on Matthew's front right side of the brain?
- In fact, agree that all 4 the CT scans do not reveal any bright collections of any fluids on the right side of the brain, correct?

MRI'S GENERALLY

- MRI scan is a kind of radiological scan, correct?
- Agree that it takes a bit longer than a CT scan?
- How long take for MRI scan to be done?
- So agree that MRI is not a snapshot, but a measurement over [X] time

MOTION ARTIFACT

- And, agree that it is not always easy to get infants to keep perfectly still for X time;
- And can be very hard to keep infants that still in MRI's
- They can move around a bit;
- Agree that this can cause the resulting image to be distorted?
- Call this distortion motion artifact?
- When somebody moves during an MRI, can create motion artifact across the entire "phase and coding direction,"
- And, the "phase and coding direct" with an MRI for the head is always left to right, correct?
- So, motion artifact can affect the way a scan reads from left to right?
- And agree that if there is motion artifact on the left side of a scan, you would likely see motion artifact on the right side of the scan as well, correct?

- And your testimony is that that the SDH identified in the fronto-temporal regions were on both the left and the right, correct?
- And that the SDH identified in the fronto-temporal regions were both 4.5 mm, correct?

<u>SUSCEPTIBILITY WEIGHTED IMAGES</u>:

- Dr. MRI is a very powerful instrument to detect blood, and blood product correct?
- Agree MRI is very sensitive for blood product?
- And agree that MRI is more powerful instrument to detect blood than CT scan?
- Agree that with an MRI, image contrast may be Image contrast may be weighted to demonstrate different anatomical structures or pathologies
- T1 weighted
- And T2 weighted
- Flair, is a mix of T1 and T2
- Familiar with the Susceptibility weighted imaging (SWI)?
- Agree that susceptibility weighted imaging is extraordinarily sensitive to tiny blood products?
- Agree that is the most senstive of the MRI sequences to detect blood?
- Agree that the dot found in the cerebellum that you testified about, that this was identified using the susceptibility weighted sequence.
- And the slide you created of that dot in the cerebellum was a slide from a susceptibility weighted sequence.
- Now, you would agree that in the powerpoint you put together, you did not collect every image from the MRI done of Matthew's brain in March, correct?
- Only chose certain images to show to the court, correct?
- And you did not show the court susceptibility weighted images that demonstrate a right fronto-temporal hematoma, correct?
- And that's because you DO NOT SEE ANY SDH in the right fronto temporal area using susceptibility weighted imaging, right?
- And did not show the Court susceptibility weighted images that demonstrate a left fronto-temporal hematoma either, correct?

VEINS VS. OLD BLOOD

- Can you define Hemosideran?
- So, hemosiderin is basically stuck old blood products?
- Indicating a place where bleeding may have been?
- Agree that part of what MRI does is detects hemosiderin?
- And signs of hemosiderin are signs of old bleeding?
- Agree hemosideran not a uniform shape?
- Agree hemosiderin are not symmetrical?
- Agree hemosiderin are not "tube like"
    - [if she hedges, Hemociteran do not run in a symmetrical cylindrical path]
- Agree that veins are tube like?

- Agree veins are dark on T1 imaging in an MRI?
- ~~Review the July 2013 MRI scans?~~
- ~~[q about hemociterarin being a different brightness in July but veins would not change in brightness]~~
- **Questions about the composition of the head**
- Made up of layers
    - Skull-- bone
    - Dura matter or membrane
    - Arachnoid membrane
    - Pia
    - Then Brain Matter
- Area under the Dura is the subdural area, correct?
- And area under the arachnoid membrane is the subarachnoid space, correct?
- ~~Are there veins in the subdural space of the brain?~~
- What is a pial artery?
- True that Pial Arty is a brach of the the middle cerebral artery?
- More than one pial artery correct?
- True that pial arteries run through the subarachnoid space?
- True that pial arteries do not run through the subdural space?
- Agree that blood in arteries moves?
- Agree that blood moves in arteries with the pumping of the heart?
- Not a constant stream or even force?
- There is pulsation?
- Moves at different speeds with the pulses, correct?
- And as the blood moves through the artery, it changes the shape of the artery correct?
- They expand as the blood pulses through?
- How long an MRI takes of an infant?
- Agree that in that time, x time, your heart beats more than once;
- And so an infant's veins would pulse more than once in X time;
- Agree that the MRI can image the blood in your arteries?
- And depending on technique and how your heart pulses, might affect the picture that is taken by the MRI?
- Familiar with the term pulsation artifact?
- It's a distortion that is caused by the expansion of your arteries as blood pulsing through them
- And the distortion can create darkly colored areas around where the arteries are, correct?

BEH QUESTIONS

- Familiar with term extra-axial space?
- And what is extra-axial space?
- And you would agree that the extra-axial space on the CT scans are all enlarged?

- And it is enlarged on the right, correct?
- And the left?
- Also agree that the extra-axial space on the right on the MRI is enlarged;
- And agree that extra axial space on left in MRI is enlarged, correct?
- Your testimony is that can't actually measure the extra axial space [SAS] from these scans because they are complicated by the identification SDH's, correct?
- But, hypothetically, if you were to assume that the MRI mistakenly identified SDHs in both the right and left fronto-temporal areas, you would agree that it would be possible to measure the extra axial space, correct?
- And the SAS?
- Said that BEH is about rapidly enlarging HC and Subarachnoid spaces, correct?

- Not about a large body, right?

- It's about the rapid growth of the head?

SPINAL ISSUE:

WHO IS IN CHARGE:

- Now, when a radiological report is created it is sent for review by the person in charge of Matthew's medical treatment, correct?
- And in this case, that would be the attending physician for Matthew?
- Or?
    - A pediatric neurologist?
    - Pediatrician?
    - Neurosurgeon?
- So, any radiological report would be reviewed by Matthew's medical team;
- And, if something especially dangerous found, would be reviewed by the entire team;
- Pulling up the actual scans;
- Reading the actual scans with a radiologist?
- And reviewing them again, correct?
- Including the neurosurgeon
- And if any follow up tests were ordered as a result of radiologist's report, who would be the Dr. ordering those follow up tests?
- And if any follow up procedures were ordered as a result of the radiologists report, who would be the Dr. ordering those follow up tests?
- And if no follow up tests were ordered, would indicate that the team did not consider further tests necessary?
- And if no follow up procedures ordered, would indicate that team did not consider further procedures necessary?
- **Dr. Johnson, I want to ask you some questions about the MRI of Matthew's spine**
- The MRI was done along the thoracic spine
- That is the upper spine correct?
- Dr. Nguyen is the radiologist who interpreted the MRI correct?
- Dr. Nguyen identified a "hypointense T1 and T2 signal along the dorsal thecal sac from the approximate T3-T4 level downwards," 519
- Dr. Nugyen says that it might "represent a thoracic subdural hematoma with heosideran [chronic] products" 519
- So, Dr. Nyugen identified was a possible issue with a hematoma in Matthew's spine?

SCARY

- Agree that blood in the spinal column can compress the spinal cord and cause serious injury?
- Agree that blood products in the spine can be a life threatening issue?
- Can be dangerous when there is bleeding in the spine?
- Fresh bleeding is very dangerous?
- And old bleeds in the spine can be very dangerous too?
- So blood products in the spine can also be extremely dangerous?

- Agree that a spinal subdural is a potential medical emergency?
- You would also agree that a spinal sdh could be difft thicknesses in different parts of the spine, correct?
- And, if see a spinal SDH that runs off the chart, very important to check throughout the spine to see where it actually runs and its thickness in other parts of the spine, right?

NOTHING DONE

- Agree that March MRI was of thoracic spine:
- And that a potential hematoma was identified going downwards from T3-T4, correct?
- Agree that no scan done to observe if the alleged hematoma went below the section of the spine scanned in the March 18, MRI?
- And that is because no doctor at LIJ ordered a follow up scan?
- And that would mean that Matthew's clinical team did not believe it was necessary?
- Agree that LIJ performed no surgical intervention on the alleged the identified hematoma in the spine?
- Or any medical treatment;
- And that would be because Matthew's treatment team at LIJ did not believe that any further treatment or procedures were necessary, correct?
- And, Matthew was sent for follow up MRI's in July, correct?
- And agree that NO MRI scans performed on the spinal area in July
- Explain why not even imaged in July to see if that alleged hematoma was even there?
- Because Matthew's treatment team did not believe that the hematoma existed in Matthew's spine, right?

SPINAL ARTIFACT--PULSATION ARTIFACT

- Agree that there is fluid in the spinal column?
- Called cerebrospinal fluid, right?
- Agree that fluid runs from the brain through the spinal column?
- Agree that inside the spinal column the fluid is contained within the thecal sac?
- Agree that CSF moves, correct?
- In fact, it pulses, right?
- Not a steady stream;
- Also agree that MRI takes about X time,
- So MRI would be imaging the spine at the same time that the spinal fluid is pulsing?
- And, similar to blood, as the CSF pulses, it can distort the image of areas around the thecal sac, correct?
- **Dr. Johnson**, you did not write a written report summarizing your opinions about Matthew Wang's medical condition, correct?
- You spoke with Ms. Clarry, correct?
- Agree that your opinion about Matthew's medical condition would take longer than 5 or 6 sentences, correct?

- Reviewed reports of Dr.'s Shalhein and Gardner, correct?
- And, after reviewing report of Dr. Sahlein, had questions about whether they had accounted for certain aspects of Matthew's case, correct?
- For example, you testified that you had a question about what Dr. Sahleni's opinion was about the blood found in the cerebellum, b/c not in his report, correct?
- But never contacted him to ask about his opinion on this fact, correct?
- Never even tried to, correct?
- And you never tried to contact Dr. Gardner either, correct?

Conclusion→

- If only Lutheran CT scans, not inconsistent with parent's explanation of short fall, correct?
- If had only Lutheran and LIJ CT scans, not inconsistent with parent's explanation of a short fall, correct?
- Agree that it is the addition of the MRI that raises the concern in this case of non-accidental injury?
- ~~But if the MRI was misread, that would affect your opinion about whether the parents provided a reasonable explanation for the injury, correct?~~
- Agree that shrinking of the hematoma means that there had to be redistribution of the left fronto temporal hematoma in this case?
- And under your theory, we simply do not see where the blood redistributed, it just disappeared from the scans?

CALLING YOUR EXPERT AS A WITNESS

PRESENTING EXPERT TESTIMONY

by

James H. Seckinger
Professor of Law
University of Notre Dame

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PART I

SEVEN TOUCHSTONES FOR A PERSUASIVE DIRECT EXAMINATION OF AN EXPERT WITNESS

Of all the advocacy skills and techniques used by an advocate during trial, direct examination is the most underrated. A trial lawyer, basking in the glory of a recent victory, almost never regales the audience at a bar association meeting, the law firm, or the local watering hole with the exploits and drama of the direct examination during the trial. Many trial lawyers and teachers of advocacy view direct examination as the least glamorous part of the trial and it is too often ignored in preparation and execution. (After all it is easier to blame the witness when the direct examination goes badly.) Yet the direct examination of an expert witness, or indeed any witness giving complex testimony, is often the most important part of the trial. Cases are won on the facts as presented on direct examination, not on the histrionics of the lawyer, no matter how brilliant.

During cross-examination, however, the trial lawyer is the star. Think of the number of war stories you have heard regarding brilliant cross-examinations. Most trial lawyers view cross-examination as glamorous, and all lawyers aspire to be great cross-examiners. But cases are not usually won on cross-examination. The cross-examination can weaken an opponent's case, gain agreement on facts that help your case, or let a little wind out of the expert's sail, but very seldom does the fact-finder's decision rest on the cross-examination. The corollary, however, is that an ineffective cross-examination that repeats and enhances the direct examination can add to the opponent's case in chief and thereby lay the foundation for losing the case.

In summary, a well prepared and competent direct examination, particularly of an expert witness, can win a case as it gives the fact-finder a basis for the decision. Great cross-examinations do happen, but seldom, if ever, do they win the case alone, as the cross-examination is usually most effective at poking holes in the opponent's case in chief or gaining agreement on issues that help your case.

An Organizational Structure for Direct Examination of an Expert Witness

One of the most effective tools for preparing a competent direct examination is an organizational structure for the examination. This is particularly apt for the direct examination of an expert witness where the subject matter of the testimony is the witness' expertise, which is by definition beyond the understanding of lay persons. An organizational structure will assist the lawyer and the witness in presenting persuasive and effective expert testimony.

The following seven touchstones provide an organizational structure for the direct examination of an expert witness:

- Introduction _ Identification and Relationship to the Case
- Qualifications
- Tender Witness as an Expert
- Assignment and Overview of Basis for Opinion
- Opinion
- Explanation of Opinion _ Teaching
- Conclusion _ End Strong

Each of the seven touchstones will now be discussed in detail.

TOUCHSTONE #1
INTRODUCTION -- IDENTIFICATION AND RELATIONSHIP TO THE CASE

The introduction should identify the witness, and then right at the very beginning of the examination set forth the witness' relationship to the case. Thus, the introduction should set forth who is the witness, what is the witness' profession, how did the witness come to be called, and what will be the subject matter of the witness' testimony.

Furthermore, an introduction that includes a succinct statement of the expert's opinion will (1) inform the fact-finder why the witness is testifying and his relationship to the case and (2) encourage the fact-finder to listen more carefully to the witness' qualifications and investigation.

SAMPLE QUESTIONS:

1. Name

2. Occupation/Profession

3. Business Address

4. Area of Expertise or Specialty

5. Have you been asked to (*insert a summary statement describing the investigation or examination that the expert was retained to perform*)?

6. Have you prepared an opinion on (*insert a summary statement of the expert's opinion*)?

7. Before we get to your opinion in this case, let's look at your qualifications and expertise to give such an opinion.

8. Then go directly to the witness' qualifications.

The traditional practice in the examination of expert witnesses is to elicit the name, occupation and profession, and the business address, and then go directly to the witness' qualifications.

Without questions 5, 6, and 7, the witness may testify for a substantial period of time (eliciting qualifications and the basis for the opinion) before the fact-finder knows why the

witness is testifying or how the witness is important to the case. Including questions 5, 6, and 7 provides a contextual framework for the witness' testimony at the very beginning of the examination, thus enhancing the fact-finder's interest in the testimony that is to come on the witness' qualifications and basis for his opinion.

TOUCHSTONE #2
QUALIFICATIONS

Eliciting the qualifications of the expert witness lays the foundation for the witness' expertise and also establishes the credibility of the witness with the fact-finder. In most cases the credibility factor is the most important aspect of the qualifications process.

An outline for eliciting the expert's qualifications by topic areas can be as follows:

1. Education
2. Special Training
3. Experience
4. License - Certification
5. Publications
6. Teaching Experience
7. Experience as an Expert Witness/Prior In-Court Testimony

TIE THE EXPERT'S QUALIFICATIONS INTO THIS CASE

As much as possible for each topic area listed above, elicit information on qualifications that is related to the issues involved in the case.

PRIORITY OF PERSUASIVENESS OF THE QUALIFICATIONS

Many lawyers will focus a great deal of attention in the qualifications process on the witness' educational and academic credentials. While such credentials are important, the priority focus should be on the witness' practical training and experience. For example, would the fact-finder prefer to have a major surgical procedure performed on her by a recently graduated medical student with excellent educational and academic credentials or by a surgeon with extensive practical training and experience?

EXPLANATION OF EXPERTISE OR SPECIALTY

Medical and scientific experts typically have specialties and even sub-specialties, and their particular area of expertise should be explained to the fact-finder. In fact, all

expert witnesses should spend some time explaining their area of expertise and how it relates to the case in question.

Stipulating to the Expert's Qualifications

In some instances, particularly with a very well qualified expert witness, opposing counsel will attempt to cut off any testimony about the witness' qualifications by offering to stipulate to the witness' qualifications and expertise. It is rarely appropriate for the proponent of an expert witness to accept such a stipulation. Counsel for the expert witness wants the fact-finder to hear and be persuaded by the expert's qualifications. Furthermore, the expert's credibility is at issue and the fact-finder should have the opportunity to hear the expert's qualifications and any other evidence on credibility.

If the court, in the spirit of judicial economy, presses the examining counsel to accept opposing counsel's stipulation on qualifications, then the examining counsel should request a stipulation that includes not only qualifications but also credibility. The underlying issue is really one of the credibility of the expert witness, including the credibility of her opinions. Thus, if there is going to be a stipulation on the witness' qualifications, then the examining counsel should request that the stipulation include that the witness is qualified as an expert, the credibility of the expert is undisputed, and the expert's opinions must be accepted by the fact-finder. This inclusive statement of all the factors involved in a stipulation on an expert witness' qualifications usually forces the opposing counsel to back off on the request for a stipulation, and it also forces the court to consider all of the ramifications of such a stipulation.

If the court continues to press examining counsel to accept opposing counsel's stipulation on the qualifications of the expert witness, then discretion and respect for the court, of course, must prevail. Accepting opposing counsel's stipulation to the qualifications of your expert can have a silver lining because it permits counsel to note in final argument that opposing counsel has accepted and stipulated to the qualifications and expertise of the expert witness. The ability to argue the stipulation on final argument is the reason trial counsel may accept the stipulation even without being pressed by the court to do so.

TOUCHSTONE #3
TENDER WITNESS AS AN EXPERT IN A PARTICULAR FIELD

In some courts, the lawyer at this point in the direct examination of an expert witness has the opportunity to tender the witness to the court as an expert within a particular field of expertise. After the witness' qualifications have been elicited, the lawyer tenders the witness as an expert by making the following statement to the court:

May the court please, I tender John Doe as an expert in (*insert area of expertise*).

The court will then turn to opposing counsel to inquire whether or not counsel has any objections to the witness testifying as an expert.

Opposing counsel then has the choice of (1) objecting and stating the grounds, (2) conducting a *voir dire* of the witness on qualifications before deciding whether to object, or (3) stating that there is no objection to the witness' qualifications. If opposing counsel decides to conduct a *voir dire* on the expert's qualifications at this point in the examination, then most courts will preclude counsel from inquiring into the same areas during the cross-examination of the expert witness. Thus, if opposing counsel wants to challenge the witness' qualifications, counsel must decide whether to do it on a *voir dire* during the direct examination or during her cross-examination. The court will not permit the witness' qualifications to be cross-examined twice, because counsel only gets one bite at the apple.

If there is no objection to the witness' qualifications or if the court overrules the objection, the court will accept the witness as an expert in the particular field of expertise as stated by counsel in tendering the witness to the court.

There are distinct advantages to tendering the witness at this point in the direct examination. First, the witness is formally recognized as an expert before the basis for the opinion and the opinion itself are presented to the fact-finder. Second, the issue of whether a witness is qualified as an expert witness is resolved early in the examination rather than at the point where the opinion question is being asked and an interruption by a *voir dire* on qualifications could be very disruptive. This tendering procedure avoids any disruption by objections and *voir dire* at the opinion stage of the examination.

TOUCHSTONE #4
ASSIGNMENT AND OVERVIEW OF BASIS FOR OPINION

The witness has been qualified as an expert, tendered and received by the court, and now the direct examination should focus on what the expert did in the case. This part of the examination can be broken down into two major categories: (1) the expert's assignment and (2) an overview of the basis for the expert's opinion.

EXPERT'S ASSIGNMENT

The first step is to elicit why the expert witness is in court and to handle the issue of compensation. A sample series of questions are:

1. Have you been retained to examine/investigate/evaluate the (*insert a summary of the expert's assignment*) in this case?

2. Are you being compensated for your time?

3. Is that compensation arrangement the usual and regular fee for these types of matters?

   or

   Is that compensation arrangement the usual and regular fee in your field of expertise?

4. What was your assignment in this case?

OVERVIEW OF BASIS FOR EXPERT'S OPINION

The Federal Rules of Evidence permit an expert to give an opinion before providing the underlying basis for it.[1] Thus, the organization of the direct examination is left to the discretion of the trial lawyer.

In many cases, stating the expert's opinion before discussing the underlying data will provide a useful frame of reference for the fact-finder. This is especially true when a financial consultant/accountant testifies, since the financial data will not mean much

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[1] Rule 705 provides: "**Disclosure of Facts or Data Underlying Expert Opinion.** The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of 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."

without a preliminary statement of the conclusion that the financial data supports.

In other cases, it may be more appropriate to provide at least an overview of the basis for the opinion before eliciting the opinion. This procedure provides the fact-finder, before hearing the opinion, with a frame of reference for the work done by the expert. This makes the opinion more credible.

The key point is, under Rule 705, that critical trial strategy decision is left to the trial lawyer, who is ultimately charged with presenting the most persuasive case for the expert, rather than being mandated by a rigid rule.

A method that will permit the expert's testimony to be presented persuasively and effectively under *either* organizational structure (basis for the opinion being given before or after the opinion) is to use an *overview approach* to present the basis for the expert's opinion at this point in the examination. The *overview approach* can then be used in *all* direct examinations of expert witnesses rather than having two organizational structures _ one when the basis is required before the opinion and a different structure when the basis is permitted after the opinion.

The thrust of the *overview approach* is to set forth the underlying basis for the expert's opinion only to the extent necessary to: (1) introduce the fact-finder to what the expert did (methodology used and data analyzed) and (2) lay the foundation for making the expert's opinion credible to the fact-finder. In this portion of the direct examination the *overview approach* focuses solely on the methodology used and the data analyzed by the expert in reaching his opinion. It is important that the examining lawyer *not* let the fact-finder's attention wander or get lost in a maze of data and information before the expert's opinion is elicited, as the fact-finder needs the opinion as a framework for the underlying information. Reserve to the teaching portion of the direct examination the explanation and explication of the methodology and data used by the expert (see Touchstone #6, Explanation of Opinion _ Teaching, p. 17, *infra*).

When presenting an overview of the basis for the expert's opinion, the focus should be on what the expert did in terms of the methodology used and the data analyzed. A sample series of questions are:

1. You have told us that your assignment in this case was to (*insert a summary of the expert's assignment*).
   How did you carry out that assignment?
   or
   What investigation/research did you do for that assignment?

2. What methodology did you use for your investigation/ research?

3. Is that methodology customarily used by experts in your field? (see Rule 703, FRE)

4. Explain the methodology used and why it is applicable to this case.

5. What data did you analyze?

6. Is that type of data customarily relied on by experts in your field? (see Rule 703, FRE)

7. Was the data analyzed sufficient for the methodology used on this project?

Note how simple, clear, and straightforward the above sample topics for questions are for both the expert's assignment and the overview of the basis for the opinions. Keep it that way in this portion of the direct examination before the opinion is elicited. Although the methodology chosen by the expert goes to the expert's core thesis in the case, which is very important for the validity of the expert's opinion, the detail should be left for later. In the overview portion of the direct examination bring out the methodology chosen but save the explanation and explication of the methodology for later in the teaching section of the examination (see Touchstone #6, Explanation of Opinion _ Teaching, p. 17, *infra*). Likewise for data collection, which also requires data explanation, save the explanation for the teaching section of the examination.

Assumptions – Save for Later

The assumptions made by the expert in the investigation/research process leading up to the expert's opinion: (1) are critical to the validity of the opinion, (2) are obvious targets for cross-examination, and (3) must be thoroughly brought out and explained during the direct examination. I recommend, however, that the assumptions made by the expert *not* be discussed in this section of the direct examination, but rather be fully explained in the teaching portion of the examination (see Touchstone #6, Explanation of Opinion – Teaching, p. 17, *infra*).

Evidentiary Principles Regarding Basis for an Expert's Opinion

The examining lawyer must determine what data may be relied upon by the expert in reaching an admissible opinion. Thus, the admissibility of the expert's ultimate opinion must be analyzed carefully regardless of where in the examination the underlying data for the opinion is discussed. If certain data may not be used by the expert in formulating an admissible opinion, then it may not be elicited in any portion of the examination.

In order to determine the admissibility of the underlying data and thus the expert's opinion, the examining lawyer must have an excellent working knowledge of the rules of evidence, specifically the rules governing expert witnesses. The permissible data that may be used by an expert in reaching an admissible opinion can be divided into two major categories: (1) what the expert personally did (personal knowledge) and (2) what the expert relied on (done by others).

What the expert personally did is admissible data under the rules of evidence in even the most restrictive common law jurisdiction, because the expert has personal knowledge and there are no hearsay problems. Even then, however, the underlying data should be carefully analyzed to determine if there are implicit hearsay or double hearsay problems. For example, the expert performed the test, but in so doing she relied on tests performed by other scientists and a journal article on the procedures to be followed in conducting the tests. In a restrictive common law jurisdiction a hearsay exception would need to be found for the admissibility of that data, while in a more liberal jurisdiction the data would be admissible if it was of the type customarily relied upon by experts in that field (see Rule 703 of the Federal Rules of Evidence).[2]

The second major category of data used by experts in reaching an opinion is information on which the expert relied. This type of data is information received by the expert from others either orally or in writing, which by definition presents classic hearsay problems under the common law rules of evidence. To avoid such hearsay problems, the other individuals who supplied the information had to be called as witnesses or a hearsay exception had to be found. To alleviate undue expense both in terms of cost and time, the courts often strained the limits of the hearsay exception to accommodate testimony by experts in a modern technological society.

To accommodate the hearsay rule for information that the expert relied on but received from others, the other individuals had to be called as witnesses and the testifying expert had to sit through the trial to listen to the "other evidence" or receive the "other evidence" in the form of a hypothetical question. This procedure is not only cumbersome, it is a fiction. It is a fiction in that it assumes the expert listens to the "other evidence" at trial, and then formulates an opinion which he presents at trial. Obviously the expert has done all his work before trial and listening to the "other evidence" is merely a fiction to

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[2] Rule 703 provides: "**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."

accommodate the hearsay rule.

The hypothetical question can be extremely cumbersome. Strictly enforced, the hypothetical question must include *all* of the relevant facts relied on by the expert in reaching an opinion *and* it may not assume facts that are not already received in evidence. In the practice under the pre-federal rules, there were numerous instances in which the stating of a hypothetical question, and re-stating after objection, took days. Furthermore, there were countless appeals on the sufficiency of the hypothetical question. The practice then developed of requiring the hypothetical question to be written out in advance to be approved by the court at a pretrial conference. Even that procedure did not solve all the difficulties. The demise of the hypothetical question under the Federal Rules of Evidence has not been lamented by either judges or trial lawyers. It has been acclaimed as one of the great steps forward in modern evidence law with respect to the testimony of expert witnesses.

Rule 703 of the Federal Rules of Evidence met head-on the problems associated with the application of the hearsay rule to expert testimony in a modern technological society. Rule 703 basically abolished the hearsay rule and all other evidence rules denying admissibility, if the data is of the kind customarily relied on by experts in that particular field. The drafters of the Federal Rules of Evidence decided that if the underlying data was good enough for the experts in a particular field, then it should be sufficient for the courts. For example, if a medical doctor in the course of making life and death decisions relies on medical tests performed by others in making a diagnosis and prescribing treatment, then that information should be a sufficient basis for the expert's opinion in court. Furthermore, the drafters recognized the important role that cross-examination could play in attacking the validity of the underlying data.

Rule 703 entitled, **Bases of Opinion Testimony by Experts**, provides:

1. The facts or data in the particular case upon which an expert bases an opinion or inference may be those:

(a) perceived by the expert before trial;

(b) perceived by the expert at trial;

(c) made known to the expert at trial; or

(d) made known to the expert *before* trial.

2. If the facts or data upon which an expert bases an opinion are 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.* (Emphasis added.)

Thus, under the Federal Rules of Evidence, the data that may be used by an expert in reaching an opinion is any and all data (1) the expert personally collected and (2) the expert relied on which was received from others, if it is the type of data customarily relied on by experts in a particular field of expertise. Therefore, hypothetical questions are no longer required and the fiction of having the expert sit through the entire trial and then use the facts perceived as a basis for his opinion is alleviated. Under the Federal Rules of Evidence, judicial acceptance of expert testimony is in step with modern society.

TOUCHSTONE #5
OPINION

Now is the time in the organizational structure of the direct examination for the expert to do what she has been retained to do: testify in the form of an opinion. No other witnesses are permitted to testify in the language of opinions, and this should be a special moment in the trial. Organizationally it should be set off to show its uniqueness, and the language used by the examining lawyer should also demonstrate its specialized nature.

CONCEPTS APPLICABLE TO OPINION QUESTIONS

Multiple Opinions

In many cases, the expert will be testifying to more than one opinion. Separate out each opinion and elicit them seriatim _ opinion #1, opinion #2, opinion #3, etc. For example, when a medical expert witness testifies about an injury to a person there are four opinion questions that are typically asked: (1) diagnosis, (2) condition, (3) causation, and (4) prognosis.

Two Questions for Each Opinion

Traditionally two questions are asked for each opinion:

1. Do you have an opinion as to (_____)?

2. What is that opinion?

This procedure was developed so that opposing counsel would have an opportunity to object to the opinion question and the court would have an opportunity to rule before the opinion evidence is presented to the fact-finder. The two-question format also demonstrates the uniqueness of the opinion portion of the trial, which is one of the goals for the examining lawyer.

Reasonable Degree of Certainty

Traditionally, an expert's opinion to be admissible in court must be an opinion that the expert holds to a reasonable degree of certainty within the expert's profession. The common law rationale for the "reasonable certainty" requirement was that it (1) prevented speculation by the expert and (2) ensured that the expert's opinion was one that was generally accepted within that area of expertise.

Preventing speculation by the expert is a necessary requirement, but that can be readily handled by the court applying a relevance test to the expert's opinion, rather than relying on the phrase "reasonable degree of certainty within the expert's profession" which is mouthed as part of the standard opinion question.

Requiring that the expert's opinion be one that is generally accepted within a particular area of expertise is commonly referred to as the *Frye* standard. This standard is derived from the language in *Frye v. United States*, 293 F 2d 1013,1014 (D.C. Cir. 1923) in which the court held that the test for the admissibility of an expert's opinion is whether the process, system, or theory on which the expert's opinion is based is "sufficiently established to have gained general acceptance in the particular field in which it belongs." Thus, the *Frye* standard has been used to preclude polygraph evidence and hypnotically refreshed memory. Rule 702 of the Federal Rules of Evidence, however, does not refer to a "general acceptance" standard nor does it refer to a "reasonable degree of certainty" standard. Rule 702 requires only that the expert testimony "assist the trier of fact." Some commentators and courts very persuasively contend that Rule 702's silence on the matter repeals the *Frye* standard and that the test is now based on relevance.

Preventing speculation by applying a relevance test and the possible demise of the *Frye* standard under the Federal Rules of Evidence probably eliminates the need for inclusion of the phrase "to a reasonable degree of certainty within the expert's profession."

In addition to looking at the evidentiary requirements, the examining lawyer should also evaluate trial tactics and persuasion in deciding whether to include the phrase "to a reasonable degree of certainty within the expert's profession" within the opinion question. This language signifies that the opinion question is different and sets it apart from all other testimony during the trial. As mentioned earlier, the opinion question should be set off from other parts of the expert's testimony, and use of the phrase "reasonable degree of

certainty" may be an excellent way to accomplish that goal. Furthermore, the "reasonable degree of certainty within the expert's profession" phrase builds up the expert's opinion by making it not solely the individual expert's opinion but enveloping the expert within his entire profession.

If the "reasonable degree of certainty" phrase is used, I recommend that it be done as follows:

> Do you have an opinion (*pause*) to a reasonable degree of certainty within your profession (*pause*) as to (*insert the opinion requested*)?

Hypothetical Question

In some jurisdictions, a hypothetical question must be used when the expert relies on inadmissable evidence in reaching her opinion. If a hypothetical question is required, I strongly recommend that each hypothetical question be written out in advance and approved by the court prior to trial (see the discussion on p. 11, *supra*).

Opinion on an Ultimate Issue

At common law an expert witness was not permitted to give an opinion on an ultimate issue in the case, and when strictly applied this prohibition precluded opinions on ultimate issues of *fact* as well as of *law*. The underlying rationale for the rule was that the expert, or any witness, should not be permitted to usurp the function of the jury or the judge by making the decision for the fact-finder.

The ultimate opinion rule at common law prohibited opinions on both ultimate issues of fact and law, and since ultimate issues of fact necessarily involve corollary and subsidiary issues of fact the rule was very difficult to apply for both trial lawyers and judges. As was noted by the Advisory Committee on the Federal Rules of Evidence, the "ultimate opinion rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information." Advisory Committee's Notes, Rule 704.

The Federal Rules of Evidence have abolished the ultimate opinion rule. Rule 704 provides:

Opinion On Ultimate Issue

> (a)...[T]estimony 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.

Rule 704 implicitly distinguishes between opinions upon ultimate issues of fact and ultimate issues of law.[3] Rule 704 requires that an opinion on an ultimate issue must be "otherwise admissible," which means that it must be *helpful to the fact-finder* under Rule 702.[4] Opinions on fact issues, be they ultimate facts or not, are helpful to the fact-finder in understanding the evidence or deciding a fact in issue, while opinions on matters of law are essentially conclusions on how the case should be decided which are not helpful to the fact-finder in understanding the evidence or deciding a fact in issue.

Thus, under the Federal Rules of Evidence opinions on ultimate facts are permissible while opinions on questions of law are not. For example, whether the defendant was negligent is an opinion on an ultimate issue of law and is not permissible, but an opinion on whether the defendant was exceeding the speed limit is a question of fact and permissible. An opinion on whether the testator had the capacity to make a will would be excluded as an ultimate opinion on the law, while an opinion on whether the testator had sufficient mental capacity to know the nature and extent of his property, the natural objects of his bounty, and to formulate a rational scheme of distribution would be permissible.

Opinions which assist the fact-finder to understand the evidence or to determine *a fact* in issue are permitted under Rule 702 entitled "Testimony by Experts" and thereby "otherwise admissible" under Rule 704 authorizing opinions on an ultimate issue. Opinions which basically state that the plaintiff should win or the defendant should win are not helpful to the fact-finder, as they are nothing more than the old oath-swearers, and thus are not permitted under Rules 702 and 704 of the Federal Rules of Evidence.

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3 See Advisory Committee Notes, Rule 704.

4 Under Rule 702 an expert may testify in the form of an opinion if it "will assist the trier of fact to understand the evidence or to determine a fact in issue."

TOUCHSTONE #6
EXPLANATION OF OPINION _ TEACHING

The goal of this portion of the direct examination is to help the fact-finder understand how the expert arrived at her opinion so that the fact-finder may adopt the opinion as his own. Thus, this section of the examination should focus on educating the fact-finder on the reliability of the opinion and also the credibility of the expert teacher.

This is the time for the expert to be a teacher and to fully elucidate the underlying data, core thesis, and methodology for each opinion. See the Basis for Opinion discussion, supra, at p. 10, which advocates reserving a full explanation of the underlying basis for the opinion to this stage of the direct examination. Also see Part II, Five Keys for Presenting Expert Testimony, the Quality of the Expert's Opinion, at p. 41 on the importance of the expert's core thesis and methodology to the credibility of the opinion.

If the expert has given multiple opinions, then each opinion should be explained and taught, using the following organizational framework.

CONCEPTS APPLICABLE TO EXPLANATION OF EACH OPINION

How Expert Arrived at the Opinion

The expert should educate the fact-finder by clearly explaining (1) the thesis and methodology used by the expert in reaching the opinion, (2) the expert's investigation and the data relied on by the expert, and (3) the expert's analysis of the data, particularly how the data relates to the thesis and methodology and thus supports the opinion.

Topics that should be covered in explaining how the expert arrived at the opinion are:

1. **Introduction**. You have told us your opinion is that (*insert a summary of the opinion*); now let's look at how you arrived at that opinion.

2. **Thesis and Methodology Used**. The expert should fully explain the thesis and methodology used in arriving at the opinion. Sample topics for questions are:

   (a) What thesis/methodology did you use for your investigation and research in this case?

   (b) Why did you choose that thesis/methodology?

(c) Is that thesis/methodology customarily used by experts in your field?

(d) Was that the best thesis/methodology for this project? Why?

(e) Clearly and persuasively explain the thesis/methodology used. This is a critical element of the teaching process as the fact-finder must understand and adopt the expert's core thesis and methodology as a prerequisite to accepting the expert's opinion.

3. **Investigation and Data Relied On.** The expert should explain her investigation and the data relied on in reaching her opinion. Sample topics for questions are:

(a) What did you do to start your investigation/research for this project?

(b) What were the parameters of your investigation/ research?

(c) Explain the investigation and data collection process _ basically what the expert did to implement the thesis and methodology chosen.

(d) List the data collected *and* relied on by the expert.

(1) To satisfy Rule 703, point out that this type of data is customarily relied on by experts in this field of expertise.

(2) Lawyers typically use charts, graphs, and other visual aids to summarize and effectively present the data relied on by the expert.

(e) If there was data not collected or not relied on by the expert, explain what it was and why it was not used.

(f) Explain that the data used by the expert was sufficient for the analysis involved in this case.

4. **Analysis of Data.** The expert should explain her analysis of the data relied on and how it interfaces with the thesis and methodology and thus supports the ultimate opinion.

For each category or type of data relied on by the expert in reaching an opinion, there should be:

(a) data explanation;

(b) analysis of how the data relates to the expert's thesis and methodology; and

(c) analysis of how the data supports the ultimate opinion.

Lawyers universally rely heavily on the use of charts, graphs, and other visual aids to assist the expert in data explanation and analysis. For lawyers, the use of visual aids is an integral part of the teaching process.

5. **Theory Differentiation - Save for Later**. Trial lawyers very strongly believe in the psychological principle of primacy[5] and therefore, trial lawyers generally present their strongest argument first. It is recommended that the same approach be applied to theory differentiation. Differentiating the opposing expert's theory is an important concept that must be included in the direct examination, and it may seem to fit logically in this portion of the examination. Under the doctrine of primacy, however, it is best to explain and persuade with your expert's theory first, and then in a separate organizational segment to distinguish and differentiate the opposing expert's theory.

Assumptions

The assumptions made by an expert witness are critical to the validity of the expert's opinion and the credibility of the expert to the fact-finder. In every case, the expert witness should expect to be vigorously cross-examined not only on what the expert did, but more importantly on what the expert did *not* do. The same vigorous cross-examination should be expected on the expert's assumptions, or lack thereof, and how they interface with what the expert did or did not do.

In this portion of the direct examination, the expert should very clearly explain:

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[5] The psychological principle of primacy is that persons will believe and hold onto most strongly their initial beliefs. Trial lawyers have adapted this psychological principle to form the organizational technique of presenting first their best and most persuasive facts, issues, or argument. This adaptation of the psychological principle of primacy is uniformly referred to by lawyers as the "doctrine of primacy."

1. what assumptions were made;

2. why those assumptions were made;

3. how reliable those assumptions are;

4. what assumptions were *not* made;

5. why those assumptions were not made;

6. whether the assumptions made and not made were of the type generally made by experts in that particular field of expertise.

Anticipating Cross-Examination

At some point during the direct examination, the lawyer should anticipate the ensuing cross-examination and make every attempt to deflate it by taking the sting out of it in advance. This section focuses on anticipating the cross-examination that attacks your expert's opinion as opposed to theory differentiation among competing experts, which is discussed in the next section.

Areas that should be anticipated being covered during cross-examination of your expert witness are:

1. **Credibility of the Witness**

   (a) technical expertise and qualifications;

   (b) relationship to the party and/or lawyer;

   (c) difficulty in communication _ scientist/technical person and not a public speaker, researcher not an actor, or little experience in testifying and therefore nervous.

2. **Validity of the Expert's Thesis and Methodology**

   (a) whether the expert is within his area of expertise;

   (b) integrity of the thesis and methodology within the profession;

   (c) applicability of the thesis and methodology to this fact situation.

3. **Quality of Investigation and Research**

(a) data collection process and its validity and reliability - what expert did;

(b) data relied on and why - what expert did;

(c) data not collected nor analyzed and impact on opinion _ what expert did not do. If expert would have considered "X," then that would change the opinion.

4. **Validity of Assumptions**

(a) propriety of each assumption made by the expert;

(b) reliability of each assumption made by the expert;

(c) if each assumption was not made, then that would change the opinion;

(d) propriety of assumptions *not* made;

(e) reliability of assumptions *not* made;

(f) if any of these assumptions were made, then that would change the expert's opinion.

5. **Prior Writings and/or Testimony**

Does the expert have any prior writings and/or courtroom testimony which relate in any way to this case?

To the extent that the expert witness has a valid and defensible opinion, all of the above areas of potential cross-examination can be effectively handled during the direct examination by placing them in their proper contextual framework and thereby diffusing the ensuing cross-examination.

Theory Differentiation

If the opposing party has retained an expert witness, it is essential at some point during the direct examination of your expert witness to differentiate and attack the underlying theory for the opposing expert's opinion. This process will be referred to as *theory differentiation* and it is a critical part of presenting persuasive and effective expert

testimony. The fact-finder will believe the expert who presents the most persuasive "theory" supporting his opinion. "Theory" is used here in an expansive sense to encompass the thesis and methodology chosen by the expert, what the expert did (investigation and data analysis), and the assumptions made by the expert.

Theory differentiation requires a clear and careful analysis of the two competing expert opinions and the underlying basis for each in order to determine:

1. how they are similar;

2. where they diverge;

3. the rationale for the divergence; and

4. a method to attack and discredit the divergences.

This theory differentiation process will require perspicacious preparation and clear, lucid presentation by both the lawyer and the expert; the lawyer and the expert must work closely together in this critical part of the examination.

In conducting this theory differentiation analysis as a means for exposing the flaws in the opposing expert's theory, the lawyer and the expert should very carefully examine the opposing expert's anticipated testimony. For each of the following topics, it should be determined why the opposing expert's work product is flawed and why yours is better:

1. opinion;

2. thesis and methodology;

3. investigation and research;

4. data relied on;

5. data not analyzed - what expert did not do;

6. analysis of data;

7. assumptions made and not made;

8. prior writings or testimony by the expert - can they be used against the expert's analysis in this case?

With regard to where theory differentiation should be placed in the organization of a direct examination, the structure of the trial suggests that the plaintiff's expert witness should do this at the end of the testimony, while the defendant's expert witness might be better off explaining the theory differentiation immediately following the qualifications and before presenting her own opinion and methodology. This decision is a matter of judgment and therefore, the ultimate decision will depend upon many factors including the experience level of both the examining lawyer and the expert witness. Experienced trial counsel and experienced experts are capable of handling the testimony and the structure in an unconventional manner.

Most Persuasive Rationale/Basis for Opinion

Where possible an effective advocate will "start strong and end strong." Thus, the expert's explanation of his opinion should end on a high note. As the conclusion for the explanation of the opinion, the expert should state the principal reasons why he is confident of his opinion including the underlying thesis and methodology, investigation and research, data analysis, and assumptions. To be persuasive and effective, this concluding rationale for the opinion must be a precise and succinct synthesis and not simply a rehash of prior testimony.

A question to begin the concluding rationale for the expert's opinion is:

You have given us your opinion that (*insert a summary of the opinion*). Why are you so confident of that opinion?

Go to Next Opinion and Follow Same Outline

If the expert has more than one opinion, go on to the next opinion and use the same outline for explaining that opinion.

It is quite common for an expert to give more than one opinion in a case. For example, most experts will give an opinion on the condition of a person, business, or object and also an opinion on causation for what happened to the person, business, or object. Typically, when a medical expert witness testifies about an injury to a person, there will be four opinions - diagnosis, condition, causation, and prognosis.

TOUCHSTONE #7
CONCLUSION -- END STRONG

As noted earlier, whenever possible an examination should start strong and end strong. Thus, the direct examination of an expert witness must end on a high note.

If the expert has given only one opinion, then see the discussion above for the concluding rationale that will end the examination on a high note.

If, however, the expert has given more than one opinion, then the entire direct examination should end on a high note with a review of the expert's most significant contribution to the case and the most persuasive rationale and basis for the expert's opinions.

SUMMARY

Although the seven touchstones for expert witnesses have been presented in the framework of a direct examination at trial, they can be effectively implemented only through careful and diligent pretrial preparation. This is analogous to the process undertaken by the skilled trial advocate who can give the closing argument on the key elements in the case before preparing the cross-examinations at trial.

The trial lawyer and the expert must engage in rigorous and comprehensive preparation for the examination at trial using the seven touchstones presented herein. When the direct examination has been prepared and rehearsed once, do it again and again within the constraints of the litigation budget and the importance of the case. The examination at trial can be practiced so that there are no surprises and the examination does, in fact, accomplish its goal of educating the fact-finder.

When practicing the direct examination of an expert witness, it is important to make it as realistic as possible. Bring in two lawyers, who are not associated with the case, to serve as the judge and the cross-examining lawyer. Bring in someone senior to you to serve as judge as that will most closely simulate reality, if not in age then in attitude; bring in someone junior to do the cross-examination as it will be an opportunity for that person to impress a senior lawyer. After the practice examination, have a freewheeling and comprehensive debriefing session with the expert present during the discussion. Some lawyers are even videotaping this practice examination, and then having the expert review it to see how she appears (credibility), how she communicates (information), and to evaluate the persuasiveness of the substance of the testimony. A picture *is* worth a thousand words, and the videotape has proven to be a very effective means of preparing expert witnesses for their testimony at trial.

In sum, practice makes perfect and the preparation should be commensurate with the complexity of the case.

Many trial lawyers develop their own personal trial notebook as a means to compile and codify their experience. Trial lawyering is a constant learning experience and the trial notebook is an excellent way to preserve that experience for future reference.

A summary of the seven touchstones is set forth in Appendix II so that all or a portion of them may be integrated into a trial notebook.

PART II
PRIMER ON EXPERT WITNESSES

Case Analysis

The first step in the process of presenting expert testimony is to determine whether to use an expert witness in the case. In determining this, the advocate should engage in rigorous case analysis very early in the case. The case analysis discussed in this paper is limited to that pertaining to the use of expert witnesses.

Macro Case Analysis

Ultimate Request for Relief

When engaging in case analysis pertaining to the use of an expert witness, the first thing the advocate should do is look at the request for relief in the complaint and/or the denials or affirmative defenses in the answer. What does the advocate ultimately want in this case, or stated another way _ what is the best case scenario for winning? The questions to be addressed in the macro case analysis of what the advocate wants in the request for relief or defense are: (1) is an expert witness absolutely necessary; (2) will an expert witness be of some assistance to the fact-finder; or (3) is an expert witness not needed?

Issues in the Case

The advocate should look at the issues in the case through an analysis of the causes of action/claims for relief and the affirmative defenses in the case. In conducting this case analysis, the advocate should diagram out the elements of each cause of action and defense. Once again, the same three questions arise: (1) is an expert witness absolutely necessary; (2) will an expert witness be of some assistance to the fact-finder; or (3) is an expert witness not needed?

An example of this case analysis process in a toxic tort case is: (1) an expert is absolutely necessary in determining causation; (2) an expert may be of some assistance in determining the damages to the plaintiff; and (3) an expert may be needed on the issue of the duty owed by the defendant to the plaintiff because of human factors and/or industry standards.

Another example is a claim for damages in a construction cost overrun case: (1) expert testimony may be absolutely necessary on the issue of the cause for the cost overrun; (2) expert testimony will be of some assistance to the fact-finder in determining the total amount of costs incurred by the plaintiff during the overrun; (3) expert testimony may or may not be of assistance to the fact-finder on the interpretation of terms of the contract; and (4) expert testimony is not necessary nor will it be permitted on the legal duties and responsibilities of each party under the contract.

In criminal cases, identification is an essential element of the crime and expert testimony is absolutely necessary to interpret fingerprints, voice prints, DNA testing, and other forensic tests. Furthermore, some courts have permitted expert testimony on whether the eyewitness had the ability to perceive and identify the defendant because such expert testimony was of some assistance to the fact-finder.

Micro Case Analysis

Issues and Sub-Issues

When looking at each element in a cause of action or defense, the advocate should examine all of the issues and sub-issues within each element to determine whether expert testimony is absolutely necessary, will be of some assistance to the fact-finder, or is not needed. Within this process, the advocate should also look at how the various issues and sub-issues are related and whether expert testimony is needed or helpful in assisting the fact-finder to understand the relationship among the various issues.

In a toxic tort case, expert testimony will be needed to show that substances within the defendant's control contaminated the soil in a particular area, how the ground water passing through the soil became contaminated, how the contaminated ground water came in contact with the plaintiff's person or property, and finally the damages caused by the toxic substance as it passed through the environmental chain. Persuasive expert testimony is essential for all of these issues, sub-issues, and their interrelationship.

Facts in the Case

Certain facts in a case may be of such a technical or specialized nature that they cannot readily be understood by a layperson and expert testimony will be permitted to assist the fact-finder. Examples are scientific or technical terms within the prior art in a patent case or a licensing agreement; slang or words of art in drug deals or other criminal activities; and terms or words of art as used in commercial or business transactions. In addition to individual terms, there can be a collection of facts which require technical or specialized knowledge for their interpretation. Examples are custom in the industry in product liability or business cases, and a series of activities viewed as a whole in gambling or other criminal enterprises. All of these examples illustrate that expert testimony may be absolutely necessary or will assist the fact-finder in understanding the evidence or deciding an issue in the case.

Overview of Case Analysis Pertaining to Expert Witnesses

Under Rule 702 of the Federal Rules of Evidence, testimony by an expert witness is permitted "if scientific, technical or other specialized knowledge will assist the trier of fact

to understand the evidence or to determine a fact in issue...." The focus of Rule 702 is to "assist the trier of fact" and the scope of the rule is to permit expert testimony whenever it "will assist the trier of fact to understand the evidence *or* to determine a fact in issue." Rule 702 provides very broad authorization for the use of expert testimony and today trial lawyers are making imaginative and innovative use of expert testimony. Thus, case analysis relating to the use of experts is now a critical part of the pretrial process.

Although a careful and thorough analysis of the need for expert testimony is required, the effective and responsible advocate must always concentrate on an overall analysis of the case. As the old maxim goes, do not get so lost in the trees that you cannot see the forest. The advocate should look at the overall analysis of the case to determine the "cutting edges" in the case that will most significantly affect the fact-finder at trial. The "cutting edges" that most significantly affect the ultimate decision in the case can be issues, sub-issues, or facts. This question must be repeatedly asked throughout the case preparation _ "What aspects of the case will be the 'cutting edges' upon which the case will turn and ultimately be decided?" The advocate should thoroughly analyze and question all of the facts and issues in the case as a means to find the "cutting edges" for a particular case. Every case has them, and locating them depends upon the advocate's experience, skill, analytical abilities, hard work, and imagination.

Good lawyering skills, protection of the litigation budget (client's pocketbook), and fostering judicial economy require the advocate to concentrate the use of expert testimony on those facts and issues that are the "cutting edges" in the case. The only exception may be when the use of expert testimony in either the preparation stage or the trial stage may make a contested fact or issue into an undisputed fact or issue that will ultimately save money and foster judicial economy.

Thus, case analysis is the first and most critical step in the process of presenting expert testimony.

RETAINING AN EXPERT WITNESS

This section will deal with the process of retaining the right expert witness for a particular case. Each case is unique and the ability of an expert witness to provide assistance relating to the particular facts and issues in a case must be of paramount concern in the selection process. Do not choose a particular expert just because he has done research in the field or has testified in a similar case. Conduct an analysis of your needs and the expert's ability to meet those needs. You can apply the case analysis techniques discussed earlier to the process of selecting an expert witness for your case. Some of the factors that should be examined in the process of retaining the best expert for a particular case will now be discussed.

Do You Need an Expert?

Expert testimony necessarily involves scientific, technical, or specialized knowledge that is outside the lawyer's sphere of expertise. Sometimes expert testimony is needed in a case and the lawyer does not know it, or the lawyer thinks that expert testimony is needed but it is not.

Assuming that the lawyer has conducted a case analysis on the need for expert testimony in her case, the process should be taken one step further. Consult with an expert in the field to determine if expert testimony is needed in your case. Sometimes you need to consult with an expert to know what you want. Early in the case, you can meet with an expert on an informal and preliminary basis to go over the facts and issues of the case and then later receive her advice and assistance on how best to proceed with regard to expert testimony. This initial meeting with an expert need not be expensive nor unduly time consuming. The client may have an expert within the company that may be used, or if not, the client may know of or have a relationship with an outside expert.

As an example take a lawsuit for business losses from a breach of contract. The business losses may be proven by lay persons within the company, profit and loss statements, and the balance sheet, but the controller should also be interviewed to determine that all of the areas of damage are taken into account. The controller is an expert in accounting and financial dealings and may prove to be a very valuable resource to explain aspects of the case and to ensure that all the areas of damages are analyzed. The controller may also lead you to an outside financial consultant who has a specialized area of expertise in damage and loss analyses.

In some big cases, experts are retained solely for the purpose of providing litigation consulting and advice to the lawyers on the management of the lawsuit. A litigation consulting expert can work freely and independently with a lawyer in providing expert analysis during the preparation, planning, and trial stage of the lawsuit. The consulting expert will not testify at trial and thus, all of the expert's work with the lawyer is considered to be part of the lawyer's work product and not discoverable.[6]

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[6] Counsel should be aware, however, that an exception has evolved to the prohibition against discovery of a non-testifying expert's work in a case. It is a narrow exception that must meet a two-pronged test of (a) extraordinary need by the opponent and (b) the information is not available through other means.

Thus, there will be two sets of experts – a litigation consulting expert and a trial testifying expert. The value and effectiveness of such an arrangement will depend on the nature of the lawsuit, the potential financial impact, and the costs in retaining the experts.

Finding an Expert

Once it is determined that an expert is needed in a particular area of expertise, the next step in the process is to find the best expert for your particular case. There is a skill involved in finding experts, particularly the most appropriate expert for your case. That skill is developed and refined through experience and the use of investigative techniques. It is a very valuable skill and should be honed and developed throughout your legal career.

When searching for an expert, the following sources should be investigated:

1. **Your Client.** Although you may not want your client's employees or associates testifying in the case, they may be a ready source for contacting experts outside of the organization.

2. **Your Law Firm or a Law Firm with which You are Associated for the Case.** Most litigation law firms have developed a wealth of experience with regard to experts and this source should be tapped.

3. **Other Lawyers Within Your Practice Area.** Through this source you may receive names of experts and also information on how they performed in other cases. You may end up with names and references in one fell swoop.

4. **Surveying the Literature in a Particular Area of Expertise**

5. **Universities**

6. **Research Institutes and Laboratories**

7. **Professional Organizations for a Particular Area of Expertise**

8. **Consulting Groups.** Some experts have formed consulting groups to assist lawyers in litigation.

9. **Imagination and Investigation.** The sources for finding experts are limited only by a lawyer's imagination and investigative skills. If you are having trouble finding the appropriate expert, use your imagination and stretch yourself to think of possible new sources for an expert.

SELECTING THE BEST EXPERT

In some litigation settings, there is no choice as to who the expert will be because the expert essentially came along with the litigation. Examples of the "no-choice" expert situations are:

1. the treating physician for an injured person will be an expert on plaintiff's injuries and damages;

2. the designer of a product that is now subject to a dispute;

3. in-house financial person in business cases;

4. examining psychiatrist in criminal cases and other forensic experts for the government in criminal cases;

5. court appointed experts.

In most litigation settings, however, the lawyer can choose the expert witness who will testify in the case. Assuming that the lawyer has done a thorough search of the candidates, there will then be a pool of experts to choose from and the next step in the process is to select the best possible expert for the case.

Selection of the expert is one of the most important parts of the case, as an expert's testimony at trial can often determine the outcome of the case. Selecting an expert should be a thoughtful and careful process _ the time spent at this stage of the case is well worth it and if carefully done, it will pay many dividends in case preparation and at trial.

There are six factors to consider in the process of selecting the best expert for a particular case:

1. **Technical Expertise**. First and foremost, the expert should be an expert by qualifications, education, training, and experience. The person should have excellent credentials and the respect of her peers. Furthermore, the expert's training and experience should have a relationship or nexus to the facts in the particular case, so that the expert's qualifications can be tied into the particular case.

   Professional writings add to the witness' credentials, but they are also available to the opponent for cross-examination. A careful review of the witness' professional writings should be undertaken to determine if the witness' expertise fits the area in question, and to ensure the prior writings

do not provide too much ammunition for cross-examination.

The technical expertise of a potential expert is the most basic element in the selection process, because ultimately at trial the validity and persuasiveness of the expert's opinion will be a function of the expert's technical expertise and competence. What you get at the end of the process most definitely depends on what technical expertise goes in at the beginning of the process; that is, to get a good opinion that will withstand the rigors of litigation, you need to have good expertise at the beginning of the process.

2. **Open-Minded and Independent**. For litigation purposes, one of the essential elements of a good expert is an open mind and a willingness to conduct an independent investigation. Although the lawyer in the case is an advocate, the expert should not be.

When initially contacted, the expert should be open-minded about the case and should insist that she have the opportunity to conduct the investigation and research freely and independently. If the investigation and research is conducted thoroughly and independently, the expert's opinion will have a much better chance of holding up during the rigors of the litigation process, particularly cross-examination at trial.

To ensure an open, thorough, and independent examination by the expert, the lawyer should *not* give the expert pre-conceived notions, ideas, or opinions, and most certainly should not ask for a particular result. Let the expert look at the facts freely and independently and then give you the benefit of his expertise. Giving the expert marching orders to arrive at a given result will preclude objectivity and independence and ultimately will be a liability at trial.

If after a thorough and independent investigation the expert's opinion helps the case, the lawyer has a very powerful and effective opinion for use at trial. If, however, the expert's opinion does not help the case, or even worse hurts the case, then the lawyer does not use the expert to testify at trial and the expert's damaging opinion is kept within the lawyer's work product. An expert's advice and opinion given solely to a lawyer is considered to be part of the lawyer's work product and is not usually discoverable.[7] Information

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[7] As noted in footnote #6, there is an exception to the prohibition against discovery of a non-testifying expert's work in a case. It is a narrow exception that must meet a two-pronged test of (a) extraordinary need by the opponent and (b) the information is not available through other

pertaining to an expert becomes discoverable only when the expert is expected to testify at trial.

3. **Communication Skills**. Although the independence, integrity, and strength of the expert's opinion is critical, the value of the opinion is diminished significantly if it cannot be effectively communicated to the fact-finder at trial. The expert must be technically competent but also a teacher. The role of the expert is to educate and an educator must have sufficient communication skills.

Thus, the expert must be technically competent *and* also be able to effectively communicate her technical competence. The expert's communication skills play a major role in three distinct areas:

(a) ability to educate the lawyer;

(b) ability to educate the fact-finder;

(c) ability to withstand cross-examination.

In addition to preparing an opinion, one of the expert's primary roles is to educate the trial lawyer in the technical areas in the case. The trial lawyer must become totally conversant with the technical aspects of the case and the expert is the teacher. After the trial lawyer is educated on the technical aspects, the expert should also assist the lawyer in preparing for cross-examination of the opponent's expert. This process of educating the trial lawyer requires that the expert have a basic level of communication skills and, it is hoped, some teaching skills. If not, it will be a frustrating experience for both the expert and the lawyer.

At trial the expert must use basic communication skills to educate the fact-finder on the validity of the expert's opinion, and also to withstand the attack on her opinion during cross-examination. A simple recitation of the expert's opinion is not helpful to the fact-finder as he may simply reject the opinion on its face. The expert must explain and elucidate the opinion so that when the expert is finished, the fact-finder understands the basis and rationale for the opinion as well as the expert does. That is communication.

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means.

On cross-examination, the expert must communicate with both the cross-examining lawyer and the fact-finder. When being tested by the cross-examiner, the expert must be able to communicate the underlying basis and rationale for the opinion and show that all of the necessary factors were considered in reaching the opinion. The expert cannot become rattled, nervous, or unsure of herself because of a discomfort with the communication process. Any such negative communication traits will almost certainly spill over and taint the expert's opinion. Thus, to be an effective and persuasive expert witness at trial, the expert must have both technical competence and acceptable communication skills.

4. **Prior Litigation/Courtroom Experience.** There are several factors to consider when evaluating the prior litigation/courtroom experience, or lack thereof, of a potential expert witness. Some experts suffer from the professional witness syndrome. Others come across on the stand as forthright or naively charming and persuasive. Still others are consumed by terror when they testify. It is essential to evaluate the expert's manner. All of these traits have been seen in individual expert witnesses and the likelihood of any one of the traits appearing in a witness should be very seriously evaluated.

While prior courtroom experience is helpful in making a witness feel comfortable in the courtroom, it should not be conclusive in the selection process. Some witnesses have testified so much that they become professional witnesses. Although some professional witnesses are very effective even after hundreds of appearances, others become too comfortable in the courtroom and it shows as they become adversaries rather than independent experts. The inappropriate professional witness syndrome describes the expert who has become so comfortable that he slacks off on the preparation, appears over confident or flippant in the courtroom, and seems to enjoy sparring with the lawyer on cross-examination. None of these traits enhance the credibility of the expert to the fact-finder.

On the other hand, an expert witness who is testifying for the first time may turn out to be the best possible expert you could have in your case, as the expert prepares rigorously (partly out of fear), the lawyer prepares the witness even more rigorously, and the witness has a certain apprehension and naivete in the courtroom that can enhance the credibility of the witness. However, another witness with substantial courtroom experience can have the same persuasive traits. Each expert, therefore, must be evaluated independently and the critical question is not prior courtroom experience, but rather the validity and strength of the expert's opinion and the expert's ability to communicate and teach.

Finally, if a potential expert witness has testified in prior cases, it would be most helpful to obtain the names of the lawyers involved in the case and, if possible, a transcript of the examination at trial, particularly the cross-examination. The lawyers in the other cases can be consulted to obtain information on the strengths and weaknesses of the witness as well as information on how the witness reacts at trial. The transcript of the trial examination is a dry record, which does not clearly depict the credibility aspect of the witness' performance, but it will give the lawyer an idea of how the expert handled questions at trial.

5. **Cost.** One of the factors to consider in selecting an expert is cost. Each case has a litigation budget and it may be the controlling factor in the final selection of an expert witness. For example, the pre-eminent expert in the field for your particular case may be a great distance from your office and/or the trial site thereby making travel costs prohibitive.

6. **In-House Versus Outside Experts**. Corporate clients usually have experts within the organization. In-house experts are easy to locate, readily accessible, and usually too willing to please their boss, the corporate client. Although in-house experts can be used effectively on factual matters, they should not be used for opinions which significantly affect the outcome of the case. In-house experts are too closely tied to one of the parties and thereby, their credibility is severely compromised.

   For critical issues in the case, the in-house experts can be used to assist the lawyer in understanding the case, help in the process of finding a suitable outside expert, and assist in the preparation of the case for trial. Retaining an outside expert will lend credibility to the expert's opinion and also provide an external and independent look at the operations of the company pertaining to the areas involved in the lawsuit. The independence of the outside expert is almost always worth the extra cost involved.

These six factors should help the trial lawyer in selecting the best possible expert for each individual case. The expert's technical expertise and ability to communicate/teach are the most important attributes of an expert witness, but all of the factors must be taken into account in the final selection process. Selecting an expert is a skill and like any trial skill, a lawyer gets better at it with time and experience and also by learning from past mistakes.

Five Keys For Presenting Expert Testimony

Award-winning plays do not just happen. Likewise, effective and persuasive expert testimony does not just happen at trial, even with a brilliant expert and a brilliant lawyer.

There are five key elements that are always present when the expert's testimony is effective and persuasive at trial. They are:

- Pretrial Preparation;
- The Expert's Technical Expertise/Specialized Knowledge;
- The Quality of the Expert's Opinion;
- The Organization of the Expert Testimony;
- The Expert's Ability to Educate the Fact-Finder.

Let's look at each of these elements as a means for the effective and persuasive presentation of expert testimony at trial.

Pretrial Preparation

After the advocate has conducted a thorough case analysis to determine whether expert testimony is needed and on what issues and after the appropriate expert has been retained, the advocate must work with the expert to prepare the case for trial. The pretrial preparation process with an expert witness can be broadly categorized into six distinct areas. This analytical framework should assist the lawyer in the preparation process and may also encourage the experienced lawyer to develop and refine these categories and, perhaps, add new categories.

Assignment

The lawyer informs the expert of the assignment and supplies the expert with the information necessary for the expert to conduct the investigation. The lawyer should also inform the expert of the scope of the assignment and the specific matters to be investigated. At this stage of the lawyer/expert working relationship, the lawyer should provide only broad guidelines to the expert so that the expert has the freedom to conduct a thorough and independent investigation. The lawyer's assignment to the expert should not be too narrow so as to cut off a potential source of valuable information, nor should it be so broad that it does not provide sufficient guidance to the expert. It is anticipated, of course, that the lawyer and expert will meet frequently to refine the scope of the investigation,

exchange materials and background information, and discuss legal issues.

Independent Investigation

After receiving the assignment, the expert should conduct a totally independent investigation without any preconceived notions as to the result to be achieved. At this stage of the preparation, the lawyer should be careful not to implicitly or explicitly require the expert to reach a certain conclusion. To withstand the rigors and test of the litigation process, it is important that the expert's initial investigation be as thorough and independent as possible.

Lawyer Educates Expert

After the expert has conducted an initial investigation, the expert provides the lawyer with the expert's preliminary analysis and conclusions. The lawyer then thoroughly discusses the legal ramifications with the expert. The lawyer educates the expert on the legal issues and legal requirements for the data, analysis, and conclusions.

Expert Educates the Lawyer

In the working relationship between the lawyer and the expert, the expert also educates the lawyer on the technical matters involved in the case. The lawyer needs to be educated on the technical matters so that he can better understand the case and also to prepare cross-examination of the opponent's expert. The lawyer must become totally conversant with the technical information and for the purposes of the narrow confines of a particular case, become an expert in his own right. Trial lawyers are often referred to as having "bathtub minds." A lawyer gets into a case involving expert engineers and learns everything there is to know about that particular area of engineering _ the bathtub is filled. The case is tried, and with time the information slowly drains away leaving a ring of technical expertise for future cases or cocktail discussions. It is then on to another case with experts and another ring is added to the bathtub.

Lawyer and Expert Work Together

The lawyer and expert must work together to organize the follow-up investigation and research, analyze the data, and refine the opinion. The expert's work must be analyzed and reanalyzed, examined and cross-examined, so that the expert's opinion and underlying basis for that opinion may be persuasively presented at trial and also survive the rigors of cross-examination.

Final Trial Preparation

After the lawyer and the expert have worked together analyzing the data and refining the opinion, the expert's investigation and research is completed, and it is time to prepare the expert for trial. The final trial preparation for the expert should revolve around the seven touchstones discussed in Part I of this paper.

An experienced trial lawyer has described trial work as preparation, preparation, preparation, with a little time in court. Expert testimony that is both helpful and persuasive for the fact-finder must be carefully and painstakingly prepared and then presented in a clear and cogent fashion. That just does not happen by itself; it takes long hours of careful preparation.

The Expert's Technical Expertise/Specialized Knowledge

An expert's technical expertise or specialized knowledge is the central element qualifying the person to be an expert witness at trial. Competence and specialized knowledge or expertise is essential for any expert witness.

The expert witness is only as valuable to your case as the expert's technical expertise or specialized knowledge. It is imperative that the expert witness has sufficient qualifications and experience in the specialized area in which the expert is testifying. The expert's qualifications and experience will be the foundation upon which the expert's investigation, research, and opinion are judged. Furthermore, the expert's technical expertise, qualifications, and experience are relevant to the credibility of the witness and are significant factors that will be evaluated by the fact-finder in determining the credibility of the expert witness. (See Part I, Touchstone #2, Qualifications. pp. 6-7, *supra.*)

In summary, the expert's technical expertise or specialized knowledge is significant in two respects: (1) the validity of the expert's investigation, research, and opinion; and (2) the credibility of the expert at trial. The techniques for eliciting the expert's technical expertise, qualifications and experience at trial are discussed in Part I, Touchstone #2, Qualifications, pp. 6-7, *supra* on qualifying the witness at trial.

Having retained an expert with technical expertise or specialized knowledge within a specific area, it is absolutely essential that the expert's work in the case stay within the scope of the expert's field of expertise. Avoid the temptation to let the expert stray outside his area of expertise and never specifically ask the expert to perform work or prepare an opinion outside the expert's specific area of expertise.

At times it is very tempting to let the expert stray outside the narrow confines of his expertise, because he is already working on your case, knows everything about the case,

the new area is closely related to his field of expertise, and the expert feels confident in handling the matter even though it is technically outside his area of expertise. Do not be tempted; require the expert to stay within his field of expertise. The efficiency in having the expert work on the additional matters is not worth the risk of the potential damage to the case in either pretrial preparation or on cross-examination at trial. Every time an expert strays outside his field of expertise, the pretrial preparation diminishes in quality, the expert is less comfortable with the material at trial, and the cross-examination can potentially be devastating. A predictable maxim of litigation is that whenever an expert strays outside of his area of expertise, it almost always results in failure at trial. Furthermore, the expert's failure in a tangential area can taint all of the expert's opinions and work in the case. Thus, we come back to the original point that the lawyer should never let the expert stray out of his specific area of expertise. Do not risk all of the expert's work and opinions for such little benefit.

The Quality of the Expert's Opinion

"Garbage in and garbage out." The first principle with regard to expert testimony is that the quality of an expert's opinion is directly proportional to the quality of the expert's investigation and research. If the expert does quality work, then she will produce a quality opinion.

The major focus with regard to the quality of an expert's opinion should be on the expert's thesis and methodology. Every opinion has at its base a thesis and methodology. If the expert's thesis and methodology are valid and are understood and believed by the fact-finder, then that particular expert's testimony will be persuasive.

The facts, figures, tests, or other data and the expert's analysis leading up to the opinion are but appurtenances which flesh out the core thesis and methodology for the opinion. The advocate wants the fact-finder to accept the result of the expert's work – the opinion. To achieve that goal, the advocate must persuade the fact-finder of the validity of the thesis and methodology underlying the expert's opinion. An analysis of the expert's core thesis and methodology for the opinion should also be used when cross-examining the opponent's expert. Go for the jugular by preparing the cross-examination to attack the expert's thesis and methodology which underlie the expert's opinion. If there are other factors in the expert's opinion that need to be included in the cross-examination of an expert witness, they can be more readily handled on cross-examination within a structure or framework where the primary attack is on the expert's core thesis and methodology.

The importance of the core thesis and methodology for an expert's opinion is seen most clearly in cases where there is a battle of experts from both sides. Whenever there is a battle of experts, the ultimate resolution of the conflict between the experts will depend upon thesis and methodology differentiation. How is one expert's thesis and methodology

different from the other expert's, and which expert will be believed by the fact-finder?

An example of an expert's core thesis and methodology as it relates to the quality of the expert's opinion and also the process of theory differentiation is illustrated in the *Pierce Electric v. Smith Construction Company* case file. The *Pierce Electric Company* case is a lawsuit over damages caused by a construction cost overrun of significant magnitude. The cost overrun is admitted and the issue for the fact-finder is the determination of damages due to the plaintiff for the overrun.

The plaintiff's financial analyst uses a "total cost" approach as its core thesis and methodology for arriving at a total damage calculation, while the defendant's financial analyst uses a "specific cost itemization" approach as its core thesis and methodology for arriving at a total damages calculation. Thus, the underlying data, the calculations, and the analysis by each of the accountants for both of the parties are not significant as they are only a product of the experts' choice of approach, thesis, or methodology. The key factor in this case is for the experts and the lawyers to engage in a critical analysis of theory differentiation. How the underlying theories are different and which is more credible are the essential questions in the case.

Another example of the importance of the expert's thesis or methodology and theory differentiation is a case for damages due to a breach of contract. An operator of vending stations had a contract with a state to provide and maintain vending machines at rest stops along the state's roadways. The contract was breached by the state and now the question is damages suffered by the vending operator during the remaining period of the contract. There are experts for both the vending operator and the state with an opinion on total damages by the plaintiff's expert of $1,200,000 and by the defendant's expert of $160,000. The plaintiff's expert's core thesis and methodology was to use a "revenue per vending station" approach, while the defendant's expert used a "revenue per mile" approach. The resolution of the case by the fact-finder will depend on which expert's core thesis and methodology are most credible and the process of theory differentiation between the two experts.

Thus, one of the essential keys to presenting effective and persuasive expert testimony is for the lawyer to carefully analyze and organize the preparation around the expert's core thesis and methodology. An analysis of the expert's theory and also the process of theory differentiation is critical for both the direct examination of your expert and the cross-examination of your opponent's expert.

The Organization of the Expert Testimony

The lawyer has the best expert for the case, the expert's technical expertise and specialized knowledge is superb and without question, the expert has conducted a very

thorough and careful investigation, and the expert's opinion is first-rate quality. Is the lawyer now ready for the direct examination of the expert witness at trial? No! The expert's testimony must be very carefully organized so that the expert will not only disclose the opinion to the fact-finder, but will also educate and persuade the fact-finder so that the opinion of the expert will be adopted by the fact-finder.

Earlier it was noted that good plays do not just happen. Effective and persuasive expert testimony does not just happen either, even with a brilliant lawyer and a brilliant expert because the expert's testimony must capture the audience. This cannot be done by sailing over the fact-finder's capabilities to absorb the technical data or specialized knowledge. Good organization will point the way for the fact-finder to reach the desired result rather than leaving it to the innate abilities of the expert to explain her work and opinions. Without proper organization, the fact-finder will get bogged down in a quagmire of technical data and specialized knowledge.

The expert's testimony should be organized to educate the jury by starting with basic concepts and building on them until the expert's opinion can be readily understood by the fact-finder. Organization and explanation are the keys to educating the fact-finder and thereby persuading the fact-finder that the expert's opinion is to be adopted in the case.

I have seen direct examinations organized in many different ways - some successful and some not. The test of a successful direct examination is to view the expert's testimony from the perspective of the fact-finder. The fact-finder does not have technical expertise nor specialized knowledge like the expert, has not lived with the case or thoroughly understood it like the lawyer, and must make a decision based upon what she hears and sees in the courtroom. The expert and the lawyer should not talk down to the fact-finder but rather start with basics and build. Even a modest level of technical expertise or specialized knowledge should not be assumed, but rather the fact-finder's level of understanding should be raised through the education process. How information is presented in terms of organization and structure significantly affects the fact-finder's ability to comprehend and understand.

From the perspective of the fact-finder, let's look at the organizational structure and persuasiveness of a few examples for the direct examination for an expert witness.

Example #1. The lawyer qualifies the witness as an expert in his particular area of expertise; the court accepts the witness as an expert in that field; and then the

lawyer tenders the expert's written report.[8] The organization in this instance is very simple and straightforward -- qualify the expert, offer the report, and then let the fact-finder sort it out. The quality of the result in this instance will probably be directly proportional to the quality of the organization and explanation.

Example #2. The lawyer qualifies the witness as an expert in her particular area of expertise; the court accepts the witness as an expert; the lawyer offers the expert's written report into evidence and then asks the expert to explain her research and findings. This inevitably results in a long, rambling, and disjointed discourse by the expert. The testimony is not organized to educate and explain. The judge mentally gives up and either tunes out or forces the examination to a halt. The judge is essentially in the same position as having just received the report with the exception that the judge's time has been wasted. Maybe this is why simply offering the expert's report and getting on with the trial has received some support.

Example #3. The lawyer qualifies the witness as an expert in his particular field of expertise; the court receives the witness as an expert; the expert explains what he did in the case in terms of his investigation and research; the expert introduces basic concepts on the core thesis involved in the expert's approach; the expert explains and clarifies the methodology used; and finally the expert explains his opinion. The examination is organized to educate and persuade the fact-finder. There are many examples of an organization that will educate and persuade. The key element is that the lawyer wants it to be organized, takes the time to organize it, and has the discipline to implement the organization with the expert and at trial. A critical element in an effective organization of the direct examination is the importance of concepts as opposed to details. Stress concepts and minimize details.

A sample organizational structure for the direct examination of an expert witness is presented in Part I of this paper on the "Seven Touchstones for the Direct Examination of an Expert Witness."

The Expert's Ability to Educate the Fact-Finder

Assuming that the expert's and the lawyer's pretrial preparation has been thorough and careful, the expert has the requisite technical expertise or specialized knowledge, the expert's opinion is of first-rate quality and validity, and the expert's testimony at trial has been carefully organized and structured in a framework to persuade, it is then the time to

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[8] In the United States and some other common law jurisdictions, the report is not accepted as evidence; it is only the expert's oral testimony of her opinion that is evidence in the case.

concentrate on the final mode of trial preparation, which is preparing the expert to educate the fact-finder. The expert's primary role at trial is to educate the fact-finder so that the expert's opinion, with the advocate's help, will persuade the fact-finder to reach the desired result.

Thus, in preparing the expert for her trial testimony, the lawyer should focus on educational concepts and view it from the perspective of the student rather than the teacher. The goal is to assist and help the fact-finder, and therefore the focus should be on the needs of the fact-finder/student rather than on the needs of the expert/teacher.

When preparing the trial testimony with the expert witness, keep in mind the educational process, but also reflect back on things that you have learned from the educational process, particularly those teaching/learning techniques that were helpful and those that were not. We have all been through the educational process from calculus to law school. We have had great teachers, good teachers, and bad teachers. In those courses with bad teachers, some students learn and some do not. The amount of learning by the students depends on each person's work ethic, interest quotient, and intelligence. In the fact-finding process at trial some judges work hard, some do not, and some cannot because of time pressure. Some judges may be particularly interested in your case and some may not. Some judges are bright, some are not, and most are somewhere in the spectrum in between. The same analysis is true for jurors in a jury trial, and although they might not be as bright as the judge, there are more of them. The quality of teaching does affect the learning process, and judges and juries are no different than students when it comes to understanding and comprehending expert testimony.

In presenting expert testimony, the advocate has the duty to educate the fact-finder on the expert's opinion, and thus the advocate cannot responsibly leave the educational process solely to chance. The advocate must plan and carefully prepare the testimony so that it does, in fact, educate and persuade the fact-finder.

APPENDIX I
FEDERAL RULES OF EVIDENCE
PERTAINING TO EXPERT TESTIMONY

FEDERAL RULES OF EVIDENCE PERTAINING TO EXPERT TESTIMONY[9]

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.

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.

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.

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 prior disclosure of 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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[9] The text of these rules is as amended through April 1, 1990. The Federal Rules of Evidence govern all judicial proceedings for the United States Courts and Magistrates. The Federal Rules of Evidence have now been adopted, in whole or in part, by almost all of the states, and therefore these provisions will most likely govern local state court proceedings.

APPENDIX II
SUMMARY OF SEVEN TOUCHSTONES FOR PRESENTING EXPERT TESTIMONY

SUMMARY OF SEVEN TOUCHSTONES FOR PRESENTING EXPERT TESTIMONY

A summary of the seven touchstones is presented here so that all or a portion of them may be integrated into a trial notebook.

SEVEN TOUCHSTONES FOR PRESENTING EXPERT TESTIMONY

Introduction _ Identification and Relationship to the Case
Qualifications
Tender Witness as an Expert
Assignment and Overview of Basis for Opinion
Opinion
Explanation of Opinion _ Teaching
Conclusion _ End Strong

SEVEN TOUCHSTONES WITH SUBTOPICS FOR PRESENTING EXPERT TESTIMONY

TOUCHSTONE #1
INTRODUCTION _ IDENTIFICATION AND RELATIONSHIP TO THE CASE

Name

Occupation/Profession

Business Address

Area of Expertise or Specialty

Have you been asked to (*insert a summary statement describing the investigation by the expert*)?

Have you prepared an opinion on (*insert a summary statement of the opinion*)?

Before we get to your opinion in this case, let's look at your qualifications and expertise to give such an opinion.
Then go directly to the witness' qualifications.

Touchstone #2
Qualifications

Topic Areas for Qualifications

- Education
- Special Training
- Experience
- License/Certification
- Publications
- Teaching Experience
- Experience as an Expert Witness/Prior In-Court Testimony

Tie the Expert's Qualifications into this Case

Priority of Persuasiveness of the Qualifications

Explanation of Expertise or Specialty

Stipulating to the Expert Witness' Qualifications

Touchstone #3
Tender Witness as an Expert in a Particular Field

May the court please, I tender John Doe as an expert in (*insert area of expertise*).

Touchstone #4
Assignment and Overview of Basis for Opinion

Expert's Assignment

- Have you been retained to examine/investigate/evaluate the (*insert a summary of the expert's assignment*) in this case?

- Are you being compensated for your time?

- Is that compensation arrangement the usual and regular fee for these types of matters?
or
Is that compensation arrangement the usual and regular fee in your field of expertise?

- What was your assignment in this case?

Overview of Basis for Expert's Opinion
(What the expert did _ methodology used and data analyzed)

- You have told us that your assignment in this case was to (_____). How did you fulfill that assignment?
or
What investigation/research did you do for that assignment?

- What methodology did you use for your investigation/research?
- Is that methodology customarily used by experts in your field? (See Rule 703, FRE)

- Briefly explain the methodology used and why applicable to this case.

- What data did you analyze?

- Is that type of data customarily relied on by experts in your field? (See Rule 703, FRE)

- Was the data analyzed sufficient for the methodology used on this project?

Assumptions _ Save for Later

TOUCHSTONE #5
OPINION

Multiple Opinions

Separate out each opinion and elicit them seriatim _ opinion #1, opinion #2, etc.

Two Questions for Each Opinion

- Do you have an opinion as to (_____)?
- What is that opinion?

Reasonable Degree of Certainty

Do you have an opinion (*pause*) to a reasonable degree of certainty within your profession (*pause*) as to (*insert the opinion requested*)?

Opinion on an Ultimate Issue

An expert is permitted to give an opinion on an ultimate issue of fact.

TOUCHSTONE #6
EXPLANATION OF OPINION -- TEACHING

How Expert Arrived at the Opinion

- **Introduction**. You have told us your opinion is that (*insert a summary of the opinion*). Now let's look at how you arrived at that opinion.

- **Thesis and Methodology Used**. The expert should fully explain the thesis and methodology used in arriving at the opinion. Sample topics for questions are:

  1. What thesis/methodology did you use for your investigation and research in this case?

  2. Why did you choose that thesis/methodology?

  3. Is that thesis/methodology customarily used by experts in your field?

  4. Was that the best thesis/methodology for this project? Why?

  5. Clearly and persuasively explain the thesis/methodology used. This is a critical element of the teaching process as the fact-finder must understand and adopt the expert's core thesis and methodology as a prerequisite to accepting the expert's opinion.

- **Investigation and Data Relied On**. The expert should explain her investigation and the data relied on in reaching her opinion. Sample topics for questions are:

  1. What did you do to start your investigation/research for this project?

  2. What were the parameters of your investigation/research?

3. Explain the investigation and data collection process _ basically what the expert did to implement the thesis and methodology chosen.

4. List the data collected *and* relied on by the expert.

    • To satisfy FRE Rule 703, point out that this type of data is customarily relied on by experts in this field of expertise.

    • Lawyers typically use charts, graphs, and other visual aids to summarize and effectively present the data relied on by the expert.

5. If there was data not collected or not relied on by the expert, explain what it was, and why.

6. Explain that the data used by the expert was sufficient for the analysis involved in this case.

- **Analysis of Data**. The expert should explain her analysis of the data relied on and how it interfaces with the thesis and methodology and thus supports the ultimate opinion.

  For each category or type of data relied on by the expert in reaching an opinion, there should be:

  1. data explanation;

  2. analysis of how the data relates to expert's thesis and methodology;

  3. analysis of how the data supports the ultimate opinion.

  Lawyers universally rely very heavily on the use of charts, graphs and other visual aids to assist the expert in data explanation and analysis. For lawyers the use of visual aids is an integral part of the teaching process.

- **Theory Differentiation _ Save for Later**

- **Assumptions**. In this portion of the direct examination, the expert should very clearly explain:

  1. what assumptions were made
  2. why those assumptions were made
  3. how reliable those assumptions are

4. what assumptions were *not* made
5. why were those assumptions were *not* made
6. whether the assumptions made and not made were of the type generally made by experts in that particular field of expertise

• **Anticipating Cross-Examination**. Areas that should be anticipated being covered during cross-examination of your expert witness are:

1. Credibility of the Witness

    - technical expertise and qualifications
    - relationship to the party and/or lawyer
    - difficulty in communication - scientist/technical person and not a public speaker, researcher not an actor, or little experience in testifying and therefore nervous

2. Validity of the Expert's Thesis and Methodology

    - whether or not the expert is within her area of expertise
    - integrity of the thesis and methodology within the profession
    - applicability of the thesis and methodology to this fact situation

3. Quality of Investigation and Research

    - data collection process and its validity and reliability - what expert did
    - data relied on and why - what expert did
    - data not collected nor analyzed and impact on opinion _ what expert did not do. If expert would have considered "X," then that would change the opinion

4. Validity of Assumptions

    - propriety of each assumption made by the expert
    - reliability of each assumption made by the expert
    - if each assumption was not made, then that would change the opinion
    - propriety of assumptions *not* made
    - reliability of assumptions *not* made
    - if any of these assumptions were made, then that would change the expert's opinion

5. Prior Writings and/or Testimony

   Does the expert have any prior writings and/or courtroom testimony which relate in any way to this case?

- **Theory Differentiation**. Theory differentiation requires a clear and careful analysis of the two competing expert opinions and the underlying basis for each and in order to determine:

  1. how they are similar;

  2. where they diverge;

  3. the rationale for the divergence; and

  4. a method to attack and discredit the divergences.

  In conducting this theory differentiation analysis as a means for exposing the flaws in the opposing expert's theory, the lawyer and the expert should very carefully examine the opposing expert's anticipated testimony. For each of the following topics, it should be determined why the opposing expert's product is flawed and why yours is better.

  1. opinion

  2. thesis and methodology

  3. investigation and research

  4. data relied on

  5. data not analyzed - what expert did not do

  6. analysis of data

  7. assumptions made and not made

  8. prior writings or testimony by the expert

- **Most Persuasive Rationale/Basis for Opinion**. Where possible an effective advocate will "start strong and end strong." Thus, the expert's explanation of his opinion should end on a high note. As the conclusion

for the explanation of the opinion, the expert should state the principal reasons why he is confident of his opinion including the underlying thesis and methodology, investigation and research, data analysis, and assumptions. To be persuasive and effective, this concluding rationale for the opinion must be a precise and succinct synthesis and not simply a rehash of prior testimony.

A question to begin the concluding rationale for the expert's opinion is:

> You have given us your opinion that (*insert a summary of the opinion*), why are you so confident of that opinion?

- **Go to Next Opinion and Follow Same Outline.**

TOUCHSTONE #7
CONCLUSION -- END STRONG

If the expert has given only one opinion, see above for the concluding rationale that will end the examination on a high note.

If, however, the expert has given more than one opinion, the entire direct examination should end on a high note with a review of the expert's most significant contribution to the case and the most persuasive rationale and basis for the expert's opinions.

SAMPLE DIRECT EXAMINATION OF PSYCHOLOGIST

Sample Direct Examination of Psychologist

- Please state your name for the record.
- Where are you employed?
- For how many years have you worked there?
- What is your position (or title)?
- What are your duties at the Association for the Help of Retarded Children?
- What are your duties at Neuropsychiatry, LLP?
- What are your duties at SAE and Associates LLP?
- Can you tell me about your credentials?
- Degrees?
- Licenses?
- Certification?
- Special training?
- Publications?
- [Where have you worked in the past? In what capacity?]
- What were your duties at the Kennedy Child Study Center?
- As part of your current duties, do you see patients?
- Do you administer cognitive evaluation tests? What type of tests?
- How often do you see conduct evaluations? How many do you conduct on a yearly basis?
- How many evaluations have you conducted during your career?
- Do you conduct trainings on cognitive evaluations? How often? On what topics?
- Have you testified in court before? How often? Which courts? Have you been qualified as an expert? In what?

[Your Honor, we tender Dr. RH as an expert in the field of Psychology and Cognitive Evaluations]

- Are you familiar with the Wechsler Adult Intelligence Scale?
- What does this test measure?
- Are you familiar with the Vineland Adaptive Behavior Scales?
- What does this test measure?

- Are you familiar with the Stanford Binet Intelligence Scale?
- What does this test measure?
- Are you familiar with client?
- How do you know her? / In what capacity do you know her?
- Why did you evaluate her?
- When, approximately, was this?

[I ask that this document be marked for identification as Respondent's Exhibit #1]

[For the record, I am now counsel Respondent's Exhibit #1]

[Your Honor, may I approach the witness?]

[Dr. Roth-Hauptman, I am handing you Respondent's Exhibit #1]

[Do you recognize this document?]

[What do you recognize it to be?]

[Is this document a true and accurate copy of the report that you wrote after having evaluated client on February 7, 2011?]

[**Your Honor, we offer Respondent's Exhibit #1 into evidence.]**

- What tests did you administer ? [WAIS-IV and the Vineland]
- Can you describe the administration of the WAIS-IV?
    - Who did you interview for this test?
    - What kinds of questions were asked?
    - How long does the administration take?
    - How long does each component of the test take?
    - How often do you administer this particular test?
- Can you describe the administration of the Vineland?
    - Who did you interview for this test?
    - In what setting did you interview her?
    - Can you give some examples of the types of questions you asked her?
    - How long does the test administration take?
    - Why did you write, in your report, "She often does not think about what could happen before making important decisions" ?
- Did you evaluate client's parental capacity on that day?
- Does the WAIS-IV measure parental capacity?

- Does the Vineland measure of parental capacity?
- Do you have an opinion about client's parental capacity?
    - Why not?
- Do you have an opinion as to whether client has neglected her children?
    - Did you see any evidence of neglect when you were evaluating client?
- If you were to review another psychologist's Vineland evaluation of client from before her children were born, could you form an opinion about her parental capacity from that report?
- If you were to review a report of an evaluation in which the Stanford-Binet was administered to client, could you form an opinion about her parental capacity from that report?
    - Why not?
- Why isn't an intelligence test [OR: use whatever language she has been using - cognitive test, whatever] an appropriate way to measure parental capacity?
- What would need to be done to evaluate someone's parental capacity?

ANTICIPATED RE-DIRECT

- You recommended parenting skills classes?
- What is your assessment of client's ability to learn new information?
- Did you ask her about her children's doctor's appointments?
- Where did you get that information?
- Who told you that client needed supervision to take/administer medication?
- Why did you state that client is "in need of appropriate housing for herself and her children?"
- **GOOD FACTS FROM THE TEST:**
    - Clientcan:
        - "(reportedly) read the newspaper"
        - say her complete address and phone number
        - listen to a story/informational talk for at least a half hour
        - carry a conversation for several minutes
        - understand expressions that are not meant to be taken word-for-word
        - usually demonstrate understanding of the concepts of money, time and travel
        - usually dress, feed, bathe and toilet independently
        - usually cleans the kitchen and bathroom

        - sometimes uses the stove to cook
        - perform maintenance tasks like changing a light bulb
        - make telephone calls
        - travel to familiar destinations within 5-10 miles
        - "usually" choose to avoid dangerous or risky activities
        - "sometimes" go out with friends unsupervised at night
    - Client"appeared to be very proud of being a mother"
    - Client"listened to directions and followed instructions"
    - Client"was found to be capable of handling the responsibilities associated with becoming her own payee."
        - What does this mean? What do those responsibilities entail?

ANTICIPATED CROSS-EXAMINATION

- Didn't you write in your report that the evaluation was made "in part [for the court] to make a determination about client's fitness to regain custody of her three children"?
    - So you knew that your report would be used in this way, right?
- Didn't you write that client:
    - can't reliably make or go to medical appointments
    - can't take medicine without supervision
    - can't earn money at a part time job for at least one year
    - can't plan and prepare the main meals of the day
    - would benefit from parenting skills classes
    - is in need of appropriate housing "for herself and her children"?
    - OBJECTION: restating what the report says.
- Don't you think that XYZ is a skill that is important to parenting?
    - OBJECTION: Not an expert on parenting assessments, already testified that she isn't qualified to evaluate that here
- You wouldn't trust your own child with a babysitter who can't plan and prepare the main meals of the day, would you?
- Why did you say she would benefit from parenting skills classes?
- Why did you say she is in need of appropriate housing?

SAMPLE DIRECT OF DR. IN *RES IPSA* CASE

Sample Direct of Dr. in res ipsa case

Introduction – ID relationship to case

- Name
- Occupation?
- Business Address?
- Area of Expertise or Specialty
- Have you been asked to review medical and social services records regarding the child A. Hall and come to an opinion regarding whether A.'s injury was accidental or non-accidental?
- Have you prepared an opinion on whether A.'s injury was accidental or non-accidental?
- Before we get to your opinion, let's look at your qualifications and expertise to give such an opinion.

Qualifications

- Did you bring a current CV today?
- Education & Special Training
    - Where did you attend Medical School?
    - What about internship?
    - Residency? Length?
    - Fellowship? Length?
    - What is your particular education in diagnosing child abuse?
    - What is your particular training in diagnosing child abuse?
- License/Certification
    - Where are you licensed to practice medicine? When did you obtain those medical licenses?
    - Are you Board Certified in any area of Medicine?
    - How does one become Board Certified in an area of Medicine?
    - What is the difference between a pediatrician, a radiologist and a pediatric radiologist?
        - Are you trained to evaluate xrays? How often do you evaluate xrays?
        - Are you trained to evaluate MRIs? How often do you evaluate MRIs?
        - Are you trained to evaluate radiology studies for other physicians who aren't radiologists?
            - How often?
            - What type of doctors consult you?
- Experience
    - How long have you been practicing as a pediatrician?
    - How long have you been practicing as a radiologist?
    - How long have you been practicing as a pediatric radiologist?
    - In your experience as a pediatrician, radiologist and pediatric radiologist, how many times have you diagnosed femur fractures in non-ambulating children?
    - In your experience as a pediatrician, radiologist and pediatric radiologist, how many times have you been called upon to determine whether an injury was the result of non-accidental trauma?

        - How many times have you diagnosed abuse
    - Where have you been employed?
        - What positions have you held?
        - Have you held any other positions outside the field of medicine?
            - Committee Assignments?
    - In your work at Hospitals, have you been consulted by the child protective team?
        - How many times? How often?
    - What if any Memberships in Professional Societys?
- Teaching experience
    - What is your experience in teaching related to the subject of radiology?
    - What is your experience in teaching related to the subject of pediatrics?
    - What is your experience in teaching related to the subject of pediatric radiology?
    - What is your experience in teaching related to the subject of child abuse?
- Experience as an Expert Witness
    - Have you testified previously as an expert in the areas of pediatrics? Radiology? Pediatric radiology?
    - Where have you testified? What types of cases?
    - In those cases did you testify at the request of the Prosecution or at the request of the Defense?

Tender Witness as an Expert

Move to have Dr. certified as an Expert in Pediatrics, Radiology, and Pediatric Radiology.

MARK DR. 's CV AS RESPONDENT'S A FOR IDENTIFICATION PURPOSES

Can you look at the document and identify it for the court?

Did you prepare it?

Does it completely and accurately reflect your professional and educational background?

Assignment and Overview of Basis for Opinion

- **Assignment**
    - Are you familiar with the A. Hall case?
    - How did you become familiar with A. Hall?
    - What were you asked to evaluate?
- **Overview of Basis for Opinion –**
    - When you are presented with a femur fracture in a child and you are asked to evaluate whether or not the fracture was caused by non-accidental means, How do you differentiate between accidental injuries and those caused by abuse?
        - Is that the methodology customarily used by experts in your field?
        - Is that the methodology you used to evaluate A.'s injury?
    - In consulting on this case, what documents and records, if any, did you review? (woodhull/NYU records, xrays and MRIs, ACS records, records from primary care physician)

        - What if any medical literature did you rely on in coming to your opinion?
        - Is there any information that you were not able to consider in coming to your opnion?
    - Is that the type of information customarily relied on by experts in your field?
    - Was the information you analyzed sufficient to be able to form an opinion under the methodology used on this project?

Opinion

- Do you have an opinion with respect to A.'s diagnosis of injury in December 2013?
    - What is that opinion?
    - Do you hold this opinion to a reasonable degree of medical certainty?
- Do you have an opinion with respect to what caused A.'s femur fracture in December 2013?
    - What is that opinion?
    - Do you hold this opinion to a reasonable degree of medical certainty?
- Is there any other mechanism other than a fall that could cause a single midshaft transverse minimally displaced femur fracture with no bruising in a 7 month old?
    - Do you hold this opinion to a reasonable degree of medical certainty?
- Do you have an opinion as to whether A.'s injury in December 2013 was accidental?
    - What is that opinion?
    - Do you hold this opinion to a reasonable degree of medical certainty?
- When evaluating fractures, is it possible for you to offer an opinion concerning the timing of a fracture?
    - What is your opinion regarding when A.'s injury occurred?
    - Why?
- Based on your review of the Woodhull and NYU records and radiological studies, did the doctors at NYU that treated A. exhibit any medical findings regarding her injury?
    - Can you describe the findings?
    - Did the radiologists come to any conclusions regarding whether the injury was child abuse?
- Can you state the reasons for your opinions?

Explanation of Opinion – Teaching

- You have told us about your opinion regarding A.'s injury in December 2013; I'd like to turn now to how you arrived at that opinion
- You diagnosed A. with a single, mid-shaft, transverse, minimally displaced fracture of the left femur
    - What is the significance of a single fracture?
    - What does mid-shaft mean? What is the significance, with respect to diagnosing child abuse, of a mid-shaft fracture?
    - What does transverse mean? What is the significance, with respect to diagnosing child abuse, of a transverse fracture?
    - What does minimally displaced mean? What is the significance, with respect to diagnosing child abuse, of a minimally displaced fracture?
- With respect to the cause of A.'s fracture, you told us that her injury was accidental.
    - What factors did you look to in making this determination?

        - In your medical opinion, what is the significance of the fact that that the skeletal survey conducted on A. did not reveal any other injuries or fractures?
        - In your medical opinion, what is the significance of the fact that the retinal exams conducted on A. were clear?
        - In your medical opinion, what is the significance of the fact that the MRI conducted on A. did not reveal any fractures of the skull or bleeding in the brain?
        - In your medical opinion, what is the significance of the fact that there were no bruises on A.?
- You told us that there is no other mechanism other than a fall that would cause the injury like A.'s – Why?
    - Is there any other mechanism, other than a fall, that could cause an injury like the one A. had in Dec 2013?
        - Why?
- What if any medical literature supports your opinion?
    - What does the Kemp article say?
    - What does the Flaherty article say?
- Hypotheticals
    - If you were presented with the injury under consideration here, with all the same test results (skeletal survey, MRI, retinal exam, no OI) and the child's caretaker told you the baby fell or was dropped, what would your opinion be regarding whether the injury was a result of child abuse?
    - If a 7 month old baby is hit on the leg with a heavy object, what kind of injury would you expect to see? How does that differ from the injury here?
    - If a 7 month old baby's leg was physically bent by the caretaker, what kind of injury would you expect to see? How does that differ from the injury here?
    - If the child's caretaker told you that they shook the baby, what kind of injury would you expect to see? How does that differ from the injury here?
    - Is there any information which you did not have access to that would change your opinion?

Conclusion

You have given us your opinion that A.'s injury was a single, mid shaft, transverse, minimally displaced fracture of the left femur – why are you so confident of that opinion?

You have also given us your opinion that A.'s injury could only be caused by falling – why are you so confident of that opinion?

You have given us your opinion that A.'s injury was not child abuse – why are you so confident of that opinion?