

# Expert Witnesses and Child Witnesses in Article 10 Cases

NYC Administration for Children's Services

Vineet Chawla, Esq.

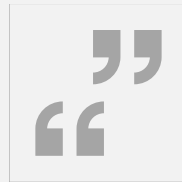
Jennifer Sadaka, Esq.

# When is Expert Testimony Permissible



“Expert testimony is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror.”

De Long v. County of Erie,  
60 N.Y. 2d 296, 307 (N.Y.  
1983)



“A predicate for the admission of expert testimony is that its subject matter involve information or questions beyond the ordinary knowledge and experience of the trier of facts.”



“The expert should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable.”

Matott v. Ward, 48 N.Y.2d  
455, 450 (N.Y. 1979)

## DETERMINING WHEN TO CALL AN EXPERT WITNESS

*Where could it help in CPS cases?*

- **Nature and extent of an injury:** When needing to establish an impairment to a child's physical, mental or emotional health; or establishing that an injury caused or created a substantial risk of death, or serious or protracted disfigurement...
- **Opinion Testimony:** Expert opinions can cover whether an injury was caused by other than accidental means, whether there was imminent danger of impairment, or if an injury was inflicted
- **Causation:** Experts can draw connections between the impairment and the parent's acts or omissions or identify injuries that are of a nature that would not ordinarily be sustained absent the acts or omissions of the parent
- **Clarifying Complex Issues:** Experts can provide insight and explanation to concepts, terms, etc. that are not ordinarily known
- **Rebuttal Testimony**
- **Corroboration**

# How to Find the Expert



## **Review Progress Notes and Medical Records**

Records will contain physicians, professionals and specialist already involved in the case

Treating physicians and professionals have inherent benefits – the witness has worked on the case, already conducted analysis and usually doesn't have a financial interest in the outcome



## **Colleagues/Supervisors**

DSS colleagues and supervisors can provide expert options



## **LEXIS Searches**

Search for local cases addressing the issues in your case for names of testifying experts

Use search terms related to your case in the Expert Witness Directories

Search for expert to find cases where they were credited and discredited in published cases

# Preparing to Call and Question Experts



## Learn the Substantive Area

You need to know the area that you will be questioning about

Use your expert, review articles and texts, ask questions



## Know Expert's Qualifications

Training, hands on experience, subspecialties, etc

In what field have they been certified as an expert? Have they been denied?

Look at LinkedIn



## Ascertain All Prior Litigation

How many times have they testified? In what areas? On what types of cases?

Lawsuits, depositions, trials, legal consultations



## Ensure Expert Reviews All Material

Experts can be challenged on things they did not review. Consider Confidentiality issues.

Case records, medical records, scans, other expert 3101 disclosures



## Understand Basis for Expert's Opinion

All facts relied on and how they support the conclusion

Medical or scientific information or theories used

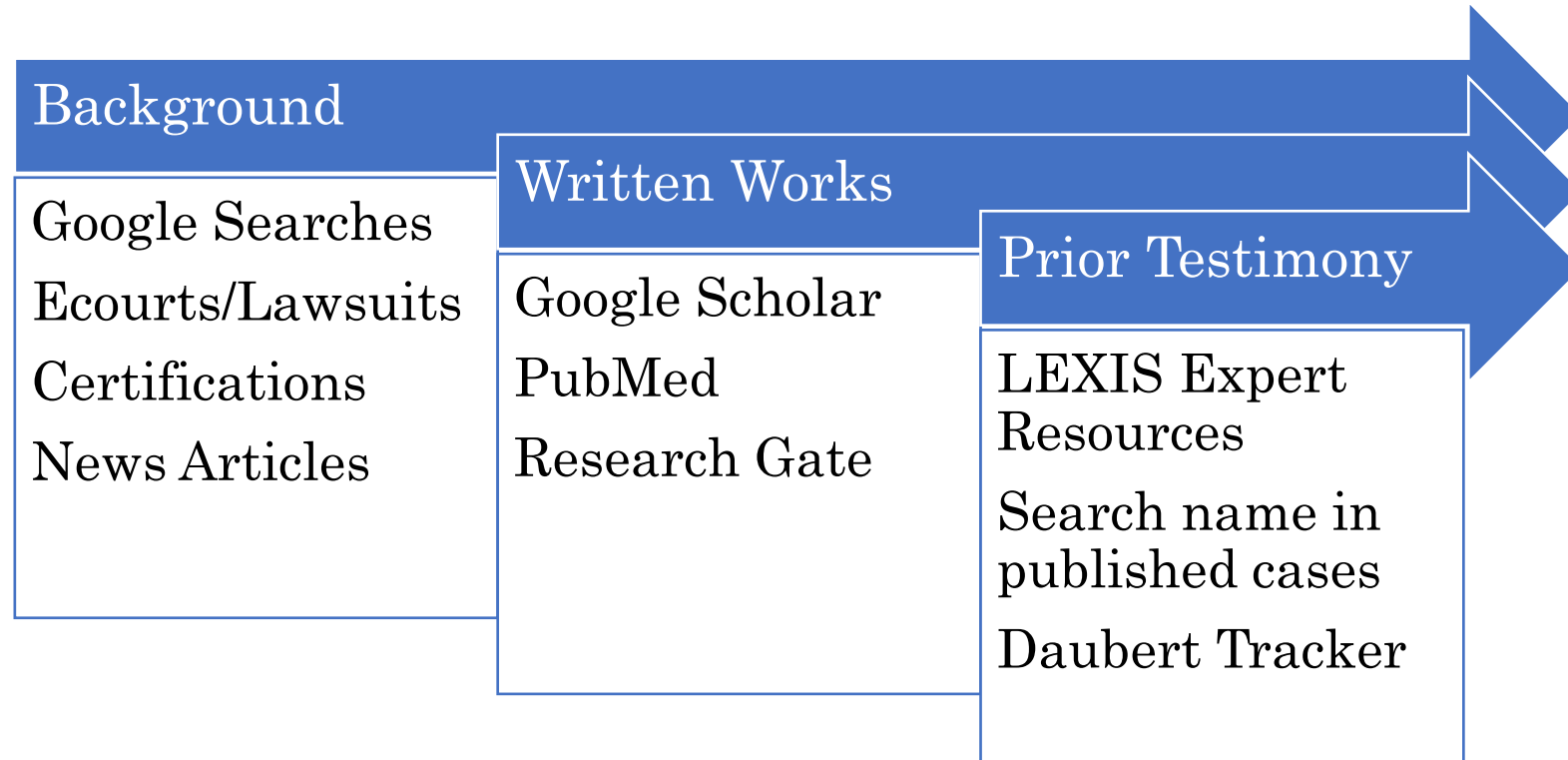


## Identify Weak Points

What assumptions are made

Facts not used and how to explain it or exploit it

# EVALUATING THE EXPERTS



Thoroughly researching the experts is good practice and necessary; it will make your questioning easier.

## Google Searches

- Or just Ask Jeeves
- Or Bing
- Or Alexa, can you find me...
- Point is, just put the name of the expert into Google, and something may come up



# Look for *Litigation* Involving the Expert

[WebCivil Supreme](#)  
Medical Malpractice  
Cases  
Depositions

New York State Unified Court System



### WebCivil Supreme - Case Search

Search All New York State Civil Supreme Court Cases for:

**What to Search:**

Enter name to search for:  
**Party Name:**   
**Party Represents:**  Plaintiff  Defendant  Either

**Limit Search (if desired) by:**  
To make your search faster you may wish to limit your search by Court(s) or Year of Filing.

**Court(s):**   
Albany Supreme Court  
Allegany County Court

To search multiple Court(s) press and hold the Ctrl key and select the Court you wish to include.  
Note that adding more Court(s) will result in a longer search time.

**Year of Filing:**   
**Case Status:**  Open (Active, Restored)  All  No

**Return only Cases with Future Appearances:**  Yes  No

**Sort Results (if desired) by:**  
**Sort By:**

**Output Selection:**  
Create output as:  HTML  PDF

**Make sure to search ALL**

<https://iapps.courts.state.ny.us/webcivil/FCASMain>



# SOME WAYS TO SEARCH FOR *WRITTEN WORKS*

## Google Scholar

“From one place, you can search across many disciplines and sources: articles, theses, books, abstracts and court opinions, from academic publishers, professional societies, online repositories, universities and other web sites.”

<https://scholar.google.com/>

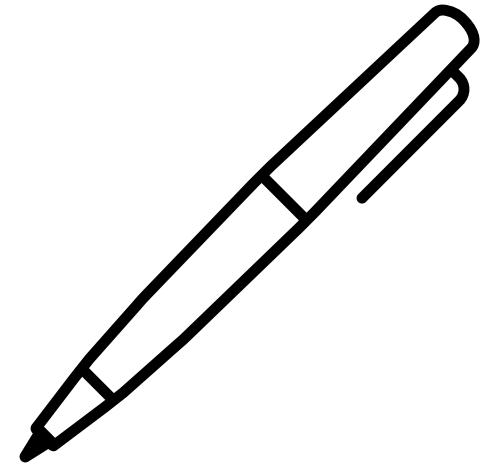
## ResearchGate

Search by Author or Subject Matter

<https://www.researchgate.net/directory/profiles>



[PubMed](#) comprises more than 29 million citations for biomedical literature from MEDLINE, life science journals, and online books.



# *VERIFY & CHECK CERTIFICATIONS*

- American Board of Pediatrics - <https://www.abp.org>
- American Board of Radiology - <https://www.theabr.org/myabr/find-a-radiologist>
- American Board of Psychiatry and Neurology - <https://www.abpn.com/check-physician-status>
- NYS Medical License - <http://www.op.nysed.gov/opsearches.htm>
- Certifications - <https://www.certificationmatters.org>
- NYS Doctor Profiles - <https://www.nydoctorprofile.com>
- Links to Other State DocFinder - <http://docfinder.docboard.org/docfinder.html>

# CERTIFICATION WEBSITES

The screenshot shows the top navigation bar of the American Board of Pediatrics website. It includes links for ABOUT, NEWS, RESEARCH, FOUNDATION, and QUICK LINKS, along with a LOG IN button and a SEARCH BY KEYWORD search bar. Below the navigation is the organization's logo and name: THE AMERICAN BOARD of PEDIATRICS, with the tagline "Certifying excellence in pediatrics – for a healthier tomorrow". Three main navigation buttons are visible: BECOME CERTIFIED, MAINTAIN CERTIFICATION, and APPLY FOR EXAM. The main content area features a banner for "Earn MOC Credit for CME Activities" with a "LEARN MORE" button. Below this is a "WELCOME TO THE AMERICAN BOARD OF PEDIATRICS" section with a "VERIFY CERTIFICATION" button. A large black arrow points from the "VERIFY CERTIFICATION" button towards the left. A vertical "FEEDBACK" button is located on the right side of the page.

ABOUT NEWS RESEARCH FOUNDATION QUICK LINKS LOG IN SEARCH BY KEYWORD

THE AMERICAN BOARD of PEDIATRICS  
*Certifying excellence in pediatrics – for a healthier tomorrow*

BECOME CERTIFIED MAINTAIN CERTIFICATION APPLY FOR EXAM

**Earn MOC Credit for CME Activities**  
But not all activities eligible for CME credit are also eligible for MOC credit.  
LEARN MORE

**WELCOME TO THE AMERICAN BOARD OF PEDIATRICS**  
Is your Pediatrician Board Certified? **VERIFY CERTIFICATION**

FEEDBACK

Last Name:

scheller

First Name:

joseph

Search

Print

The name and information provided below indicate only those certificates awarded by the ABP as of March 18, 2019. All certification information is drawn directly from our certification database and is updated each business day.

ABP ID #: 207290  
Scheller, Joseph Menachem  
Baltimore, MD  
United States of America

Certification Area	Certified	Currently Practicing in this Area of Certification	Meeting the Requirements of Maintenance of Certification in this area <a href="#">(Learn more)</a>
General Pediatrics Certificate# 36991	Yes 1988 - No Expiration <a href="#">What does this mean?</a>	Not Known <a href="#">(Learn more)</a>	No

**Permanent Certification**

Prior to 1988, certification by the American Board of Pediatrics was granted for life. These certified pediatricians are not required to recertify or to meet the requirements of Maintenance of Certification in this area, but are strongly encouraged to do so in the area of their general or subspecialty practice(s).

# Questions to Ask About Certifications

- Research the affiliated agencies and certifications
- What is the specialty? Is it relevant to the issue at trial?
- What are the certification requirements?
- Is there a selective process or is it open to anyone willing to pay?
- Are certifications up to date?
- What does continued certification/recertification require?
- Also: Is Certification required to be an expert in N.Y.?

# Obtain All Cases Involving Expert

Basic State Case Searches will get you cases that contain the expert's name. Also conduct searches in other states that the expert has been affiliated with and check federal cases.

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Enter a source name, a citation, terms or shep: [citation] to Shepardize®. Search: Everything

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Statutes & Legislation   i			Treatises & Practice Guides   i	Legal News   i
Statutory Codes   i			Law Reviews & Journals   i	Dockets   i
Administrative Codes & Regs   i				Scientific   i
Administrative Codes   i			Forms   i	Company & Financial   i
Jury Instructions   i			Briefs, Pleadings & Motions   i	
Administrative & Agency Materials   i			Jury Verdicts & Settlements   i	
			Expert Witness Materials   i	

# Conduct a search in the Expert Witness Directories

Expert Witness Materials

Lexis Advance® Research

Browse Rectangular Snip

Client: -None- History Help More

Home / Expert Witness Materials

Expert Witness Materials Actions

Advanced Search | Tips

Enter a source name, a citation, terms or shep: [citation] to Shepardize®.

Expert Witness Materials

Content Type

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California New Jersey

Colorado New Mexico

Connecticut New York

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Expert Witness Directories

Expert Witness Directories 

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Directories (45)  



Sort by: [Relevance](#) 

1. [Weiner, Phyllis Dunn M.D.](#)

Courtroom Insight

... the testimony of their own child abuse specialist, Dr. **Phyllis** Dunn **Weiner** (hereinafter Dr. **Weiner** ). Both the respondent mother and respondent father testified. Ultimately ...  
... 2017 Exp. Wit. Dir. LEXIS 6490 **Weiner, Phyllis** Dunn M.D. **Phyllis** Dunn **Weiner** M.D. No education information is available for this expert. Not ...  
... approximately 2:09pm on April 4, 2012. Dr. **Weiner** also minimized Xavier's injuries consistently throughout her testimony, which ...  
... two days after Xavier's surgery. Dr. **Weiner** agreed with Dr. Hoffman-Rosenfeld that the fluid removed at ...  
... fresh blood and was "at least weeks" old. Dr. **Weiner** concluded that there is nothing that supports the diagnosis ...  
... hemorrhage was found prior to the surgery?" Dr. **Weiner** responded: "Not the records that I read." ...  
... In rejecting a diagnosis of abusive head trauma, Dr. **Weiner** seemed to place a significant amount of weight on ...



Content  
Expert Witness  
Directories

2. [Hoffman-Rosenfeld, Jamie M.D.](#)

Courtroom Insight

... the testimony of their own child abuse specialist, Dr. **Phyllis** Dunn **Weiner** (hereinafter Dr. **Weiner** ). Both the respondent mother and respondent father testified. Ultimately ...  
... 159 ( Kings County Family Court 2014), Dr. **Weiner** asserted that babies who have normal bone strength can ...  
... one episode of abusive head trauma. Dr. **Weiner** agreed with Dr. Hoffman-Rosenfeld that the fluid removed



Content  
Expert Witness  
Directories



# What is Daubert Tracker?

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- <https://www.dauberttracker.com> (Paid Service)
- “The Daubert Tracker provides litigators, judges, legal researchers and testifying experts with “fingertip” access to information associated with reported and unreported “evidentiary gatekeeping” cases. The product tracks cases from both federal and state jurisdictions going back to 1993 and is updated daily. For the first time, legal professionals can “Daubertize” experts in the same way they Shepardize cases”.

# EXPERT DISCLOSURE

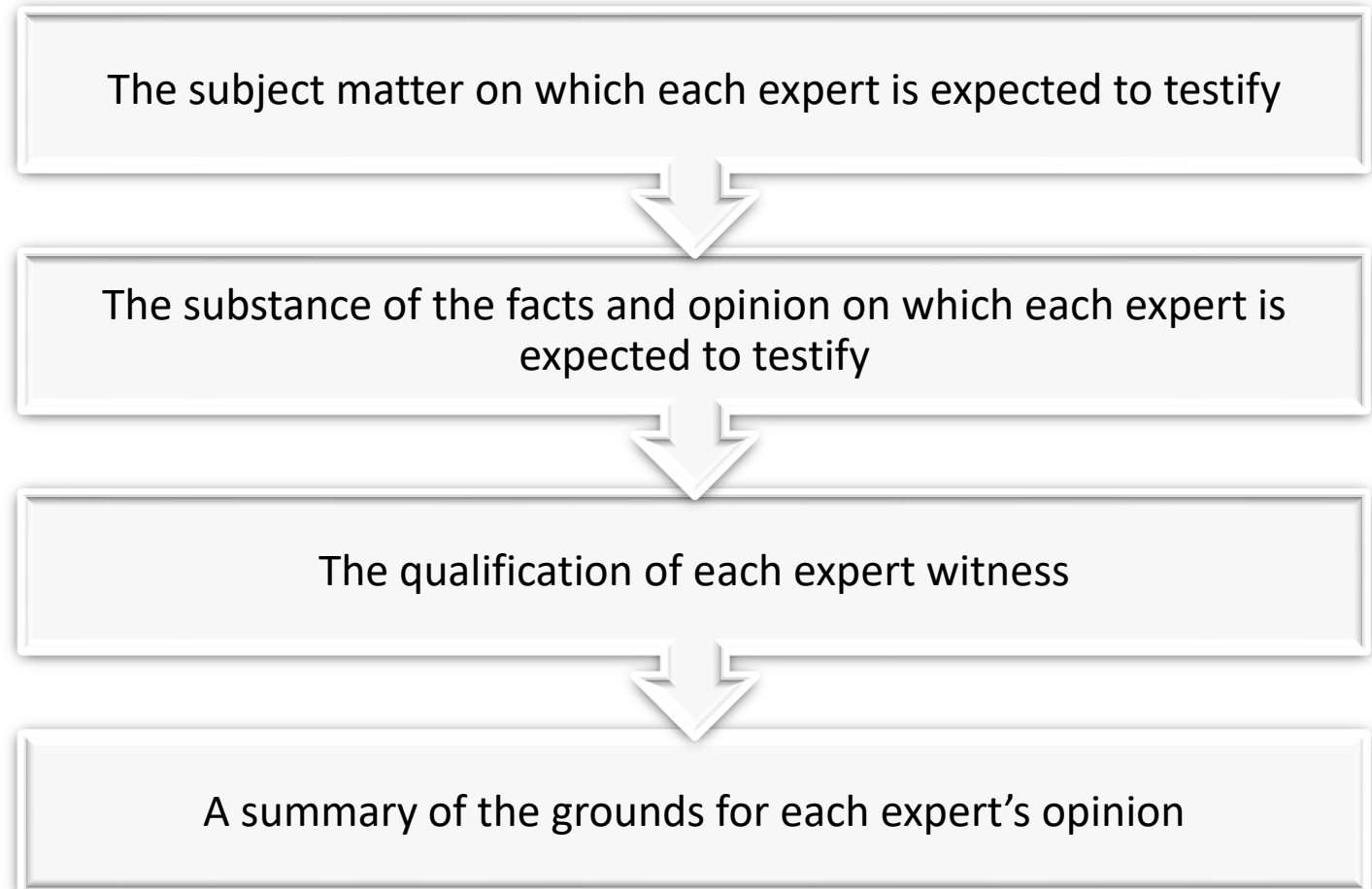
The CPLR requires disclosure upon request or when it is court ordered

Make sure your disclosure covers all that the expert will address and use adversary's disclosure to limit the testimony of their expert

There is no duty to disclose experts who are only consulted during the case and not expected to testify

Be aggressive in pursuing discovery from adverse experts who will testify

**CPLR §3101(d)(1):** Each party shall identify each person they expect to call as an expert witness at trial and shall disclose in reasonable detail:



# Can your Expert be Deposed?

CPLR 3101(d)(1)(iii)

An opposing party's expert may only be deposed "by court order upon a showing of **special circumstances** and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate."

Parties to litigation can depose their own expert witness.

# What is a "special circumstance"?

- Must be extenuating Beauchamp v. Riverbay Corp., 156 A.D2d 172 (1st Dept 1989)
- "Such circumstances exist where physical evidence is 'lost or destroyed' or 'where some other unique factual situation exists' ... such as proof that 'the information sought to be discovered cannot be obtained from other sources.'" Matthews v. St. Vincent's Hosp. And Medical Ctr of New York, 6 Misc.3d 1009(A) (Sup. Ct. NY. Co 2004);

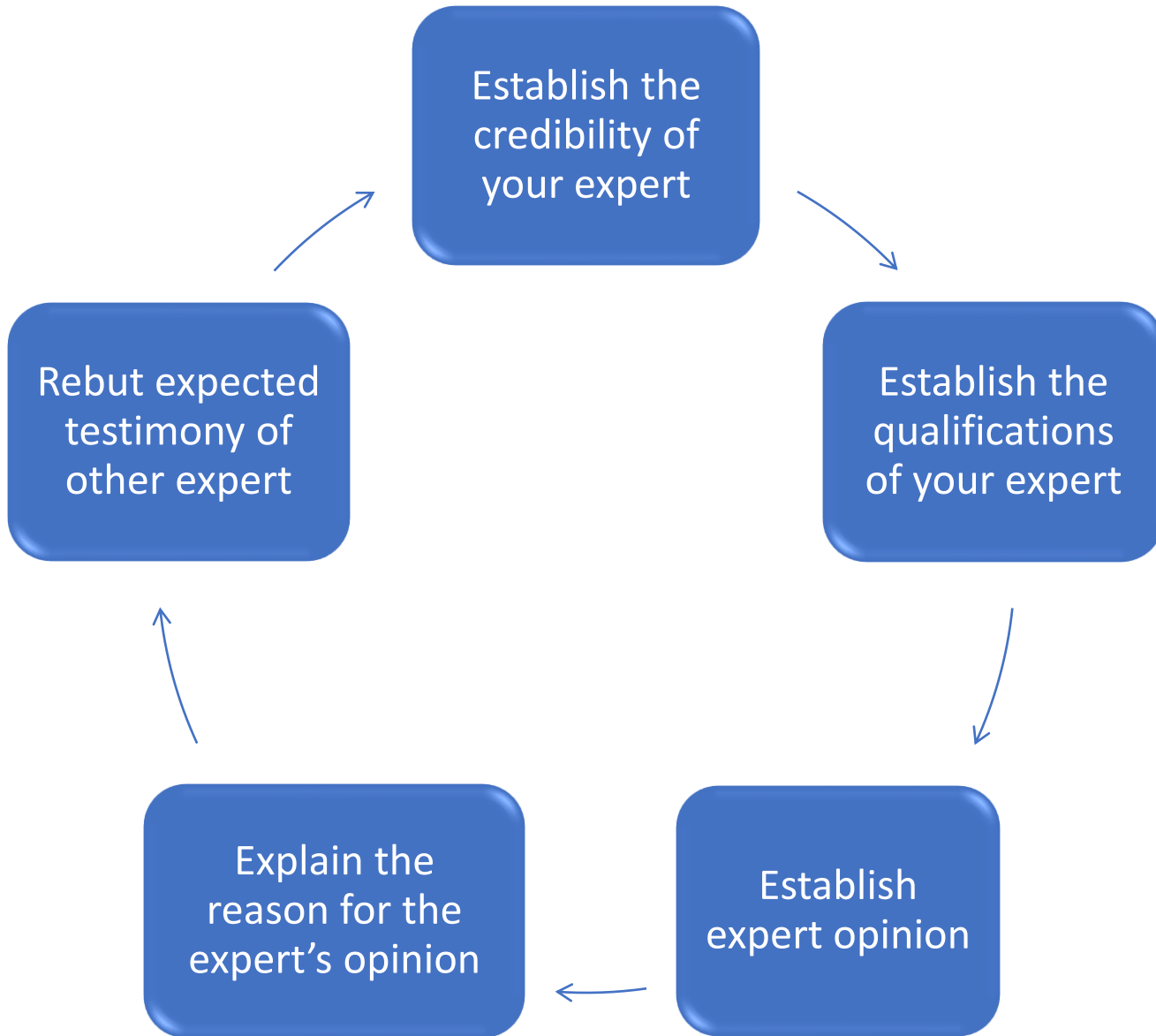
# Special Circumstances Exist When...

“The father met his burden of demonstrating special circumstances warranting the grant of his motion to subpoena and depose ACS's expert medical witness, given ACS's failure to oppose the application and its concession that it does not know whether the doctor's testimony at the fact-finding hearing will support its allegations of child abuse.”

Matter of Aliyah N., 171 AD3d 563 (1<sup>st</sup> Dept 2019)

# What is NOT a "special circumstance"?

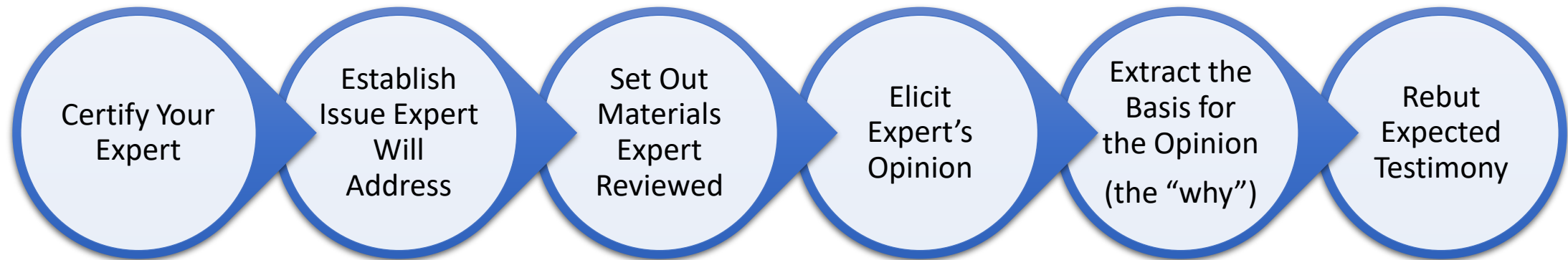
- Did not exist based on the novelty of the scientific evidence to be testified to where all parties were given access to all the expert's records regarding the plaintiff's diagnosis and treatment. Hallahan v. Ashland Chem. Co., 237 AD2d 697 (3d Dept 1997); see also Weinberger v. Lensclean, Inc., 198 AD2d 58 (1<sup>st</sup> Dept 1993)
- All material physical evidence was equally available for any party's expert to inspect, thus a deposition of plaintiff's expert was not warranted. Generali Ins. Co. Of Trieste and Venice v. Honeywell, Inc., 194 AD2d 442 (1st Dept 1993)



## Preparing your **direct examination**

What are you trying to accomplish?

# Organizing Your Direct Expert Case





# Qualifying the Expert

- Why are they qualified?

In what field are they qualified?

What have they been qualified in previously?

- Most cases involve the admission of a curriculum vitae and stipulation to expertise

Don't forego the opportunity for the judge to hear those factors that differentiate your expert

Some Medical Specialties (ABMS)	
Emergency Medicine	Pediatric Emergency Medicine Emergency Medical Services
Family Medicine	Adolescent Medicine
Pediatrics	Adolescent Medicine Child Abuse Pediatrics Developmental – Behavior Pediatrics Neonatal – Perinatal Medicine Pediatric Critical Care Medicine
Orthopaedic Surgery	
Radiology	Neuroradiology Pediatric Radiology
Surgery	Pediatric Surgery
Psychology and Neurology	Special Qualification in Child Neurology Child and Adolescent Psychiatry Clinical Neurophysiology Forensic Psychiatry

# PEDIATRIC CHILD ABUSE SPECIALTY

- Is a specialty within the Pediatric specialty given by the American Board of Pediatrics.
- There are approximately 342 Child Abuse Pediatric Specialists as of June 2023
- Certification requirements:
  - passed the boards for pediatrics specialty,
  - participate in a 3 year fellowship
  - Sit for the child abuse board exams.

# *Eliciting the Expert Opinion*

- Opinions and conclusions are not admissible if based upon mere supposition or speculation – an “acceptable level of certainty” is required.

**Matott, 48 N.Y.S.2d 455**

- What issue was the expert ask to evaluate?
- What materials did the expert review in evaluating the issue?
- Did they form an opinion within a reasonable degree of medical certainty?
- What is that opinion?
- What is the basis for that opinion?

# “Reasonable Degree of Medical Certainty”

Matott v Ward, 48 NY2d 455 (Court of Appeals 1979)



What is the “certainty with which the opinion of an expert must be expressed for it to have probative force?”

What degree of confidence does the witness have in their conclusion?

Reasonably apparent that the witness intends to signify a probability supported by some rational basis

Should not be based on “supposition or speculation”

Does NOT have to be an opinion offered with “scientific certainty”



the reasonable degree of medical certainty formula is helpful in eliciting that evidence, it is not essential



"a reasonable degree of medical certainty" is one expression of such a standard



... it is not, however, the only way in which a level of certainty that meets the rule may be stated. ... an overview of New York case law reveals that the requirement is not to be satisfied by a single verbal straightjacket alone, but, rather, by any formulation from which it can be said that the witness' "whole opinion" reflects an acceptable level of certainty

# Reasonable Degree of Medical Certainty

- [\*Knoll v Third Ave. R. R. Co.\*, 46 App Div 527](#) [extent of injuries "likely" to increase in future held admissible]
- [\*Drollette v Kelly\*, 286 App Div 641](#) ["could" have caused present condition sufficient]
- [\*McGrath v Irving\*, 24 AD2d 236, 238](#) [allowing "opinion" of what "was" cause of disease];
- [\*Matter of Brown v Highways Displays\*, 30 AD2d 892](#) [finding "could be", "possibly was" and "probably was" adequate to establish condition as work-related]

What was each step in the analytic process?

Is each step clear?

Are the links between steps reasonable?

What facts were relied on?  
Why are those facts significant?  
Are those facts verifiable?  
Are those facts in evidence?

## What is the Basis for the Opinion

What facts were disregarded?  
Why were those facts disregarded?  
Why are those facts insignificant?

What medical information was used?  
How does the medical information support the position?  
Is the medical information understandable?

# Explaining the Expert's Opinion

The expert's opinion will only be as convincing as the explanation describing the basis for the opinion

You need to show:

- How the expert came to this opinion
- Why the judge should rely on this opinion

# Questioning treating physicians

Treating Physicians have the advantage of having worked directly on the case with that child on the very issue before the court.

Use that advantage!

Take time to go through their involvement, physical examination, findings, diagnosis, and course of treatment:

- When was your first involvement in the child's case?
- How did you get involved in her treatment?
- Did that require a decision from another doctor?
- Who was that doctor in this case?
- What was your role in the child's care and treatment?
- What did you do at that time?
- What did that entail?
- How many times did you examine the child?

# Hypothetical Questions

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CPLR 4515 states that expert opinion need not be hypothetical in form

Hypotheticals can still be a useful tool for non-treating or consulting experts who do not have personal knowledge to base their opinion

Hypotheticals must be based on facts that are in evidence or fairly inferable from the evidence (O'Shea v. Sarro, 106 A.D.2d 435 (2<sup>nd</sup> Dept. 1984))

The attorney needs to know what predicate facts are important to the expert's opinion to phrase the question

The question is asked as a general narrative that takes into consideration the most important evidence



# Posing a Hypothetical: An Example

Doctor, I'm going to ask you to assume certain facts are true and then I will ask your opinion based on those facts. Assume the following facts are true:

- A female child was 7 months old on January 1, 2019, and the child was not ambulatory
- That child lived with her 29 yo mother and 32 yo father, who were the only individuals caring for this child from December 29, 2018 to January 1, 2019
- The child's mother and father told hospital staff that they witnessed no traumatic event involving the child during that period of time
- Prior to January 1, 2019, the baby was seen by a pediatrician on 3 occasions with no medical issues
- On January 1, 2019, the baby presented to the hospital with bilateral retinal hemorrhages, a subdural hematoma,, where testing was done and ruled out any blood disorders

**Doctor, based on these facts, do you have an opinion within a reasonable degree of medical certainty, whether the injuries sustained by the child are of a nature as would not ordinarily be sustained except by reason of the acts or omissions of the person caring for this child?**

# Voir Dire of Adversary Expert

Objective of voir dire:

1. Disqualify the witness as an expert
2. Limit the nature of witness' expertise

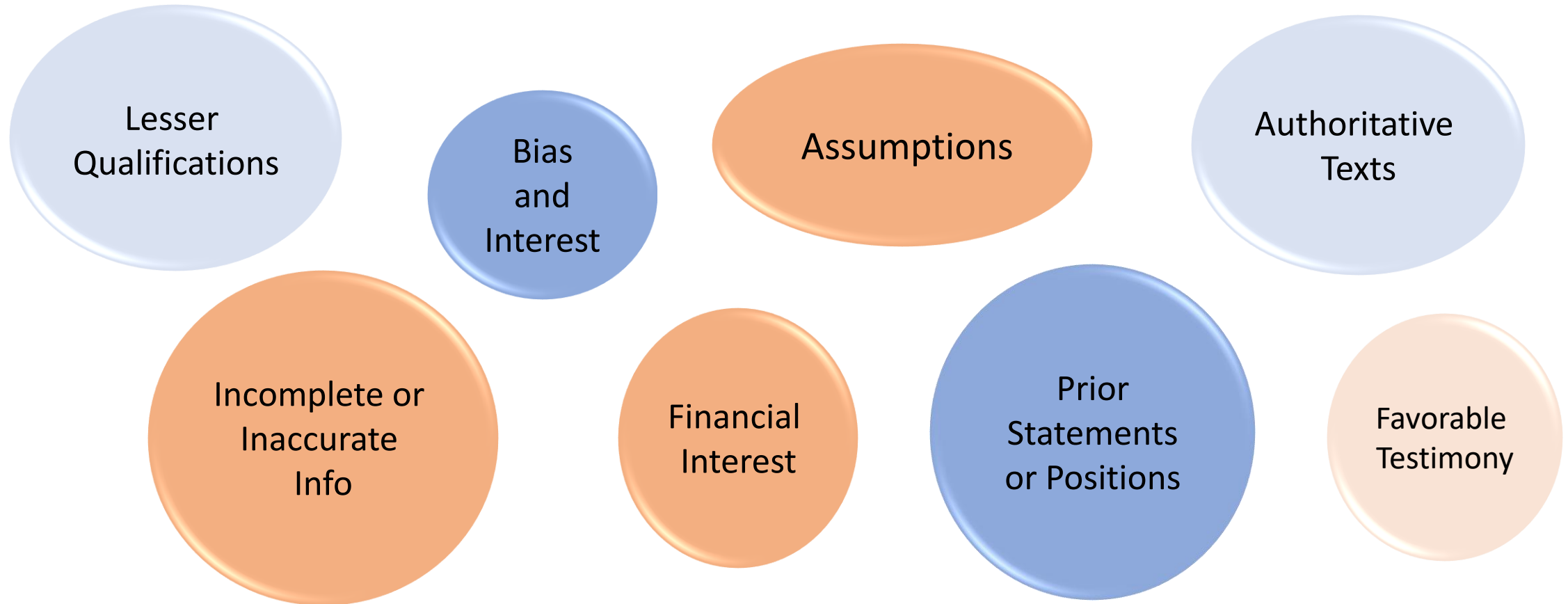
Most proffered experts will be certified in something; but do not automatically concede certification.

Focus on limiting that certification based on insufficient qualifications and experience for subspecialty.

Be mindful of the limits of the expert's certification while he/she is testifying.

Stipulate when Appropriate

# Organizing Cross Exam of Expert



# Cross Examination of an Expert

## Points

The expert knows more about the substantive area than you

You know more about the courtroom and the legal process than the expert

You control the questions

Use the form of the questions to control the answers you get

## Techniques

- Start strong, end strong, keep it simple
- Generally, use close-ended, leading questions
- When to try “open ended” questions
- Build up to your question
- Stop when you’ve made the point

# Elicit Favorable Testimony

## Points

Most experts will agree that there are certain facts or scientific principals that are true or assumed to be true.

Identify those facts that your expert also relies on.

Use their expert to validate parts of your expert's opinion

## Techniques

- How many things, even fundamentals, will they agree with your expert on?
- Does their opinion rely on any of the same components or assumptions as your own expert?
- Did they say things on direct that you can have them repeat?
- Can they admit to facts not mentioned in the direct that support your case?

# Cross on “Lesser” Qualifications

## Points

No two experts are exactly alike

A judge will invariably compare the qualifications of opposing experts

Evaluate the qualification of your experts against theirs and focus on where yours are strong and theirs fall short

## Techniques

- Doctor, this case involves the question of possible physical abuse of a child, correct?
- You’ve been asked to assess whether this is an inflicted injury or one caused by accidental means, is that right?
- You are board certified in pediatrics, correct?
- That is through the American Board of Pediatrics?
- The American Board of Pediatrics offers certification in child abuse pediatrics, isn’t that right?
- You aren’t certified by the ABP in child abuse pediatrics?
- In fact, you haven’t taken the examination to be certified in child abuse pediatrics, have you
- Lack of treating patients
- Lack of published work

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# Bias

## Points

Demonstrating bias can be a powerful tool because it shows that the testimony is slanted and its implication effects the entirety of the testimony.

## Look at

History of positions

Pattern of past clients

Language in prior testimony

Slant of publications

Affiliations

Financial interest “hired gun”

Relationship with party or counsel

## Techniques

Doctor, do you think an expert should be fair and impartial?

You were asked to be involved in this case by the respondent?

Part of your role was to testify if this case went to trial?

And that was for the respondent?

In fact, you predominantly testify in these types of cases for the respondent or defendant?

Over the past 10 years, how many times have you testified at a deposition or trial?

Of those times, how many were you a witness testifying for the defense?



# Financial Interest

**An expert being "paid" in of itself is not very probative of bias, but combined with other things it can be effective**

## Techniques

Think about other ways to ask the question that will bring a more effective result:

You are no longer treating patients, correct?

You haven't treated a patient in over five years?

Your practice is primarily based on consultation?

What percentage of your professional income is derived from legal consultation and testimony

# Incomplete Or Inaccurate Information

## Points:

Review of a partial record

Exaggerations

Facts in dispute

Excluding certain known facts

## Techniques

Doctor, you never saw the child yourself?

You never treated the child in any capacity?

So you don't have any personal knowledge about the case?

Your opinion is based entirely on the review of medical records?

And you relied on the respondent's statements in those records?

Did you do anything to verify the statements in those records?

Did you talk to anyone to validate the statements she made?

If her statement was false or exaggerated, wouldn't that affect your opinion?

You didn't review the ACS case record, did you?

So you don't know what the ACS record says about the child's father statement?

# Assumptions

## Points:

Expert opinion can only be based on:

Facts personally known to the expert

Facts in the record or reasonably inferred from the record

Hearsay that is reliable and used in the ordinary course

Opinions and conclusions are admissible not admissible if they are based upon mere supposition or speculation

## Techniques

Identify the Assumptions used by the expert in formulating the opinion

Does the Doctor not know enough to make the “opinion” or assumption because they didn’t ask the right questions, don’t know the background?

-You didn’t review X

-You didn’t speak to Y

# Prior Inconsistent Statements (to impeach credibility)

## Points:

Follow these steps to impeach a witness with a prior inconsistent statement:

Commit the witness to the direct examination testimony you want to attack.

Bolster the reliability of the prior statement.

Confront the witness by reading the prior statement.

Then STOP

Doctor, you say that the subject child did not suffer abusive head trauma?

It's your opinion that the child's injuries are attributed to accidental injury?

You agree that the child presented with retinal hemorrhages at the hospital on January 1, 2019?

You said earlier today that the fact that the child had retinal hemorrhages does not mean that the child was abused?

Even with evidence of retinal hemorrhages, you conclude that the child's injuries were caused accidentally?

Doctor, you wrote an article called "Moderate Bilateral Retinal Hemorrhages in an Infant Following a Short Fall?"

Your article appeared in the journal "Clinical Pediatrics" in 2014?

Doctor, I'm going to read from your article and then please let me know if I've read it correctly. The first sentence of your article says: "Retinal hemorrhages in infants and toddlers is rare, and is found most often in the setting of suspected nonaccidental head injury."

Doctor, did I read from your article accurately

## Learned Treatises/ Authoritative Texts for Impeachment Purposes

### **Technique:**

An expert can also be impeached by treatises. The technique is similar to impeachment with a prior inconsistent statement:

Commit the witness to the direct examination you want to attack.

Get the witness to credit the text or treatise as authoritative. Confront the witness with the treatise by reading from it.

Then STOP.

The witness must accept the text as authoritative before the contents can be put to them.

Questions to consider in getting a reluctant witness to accept a text as reliable:

Example:

Is the witness familiar with the text?

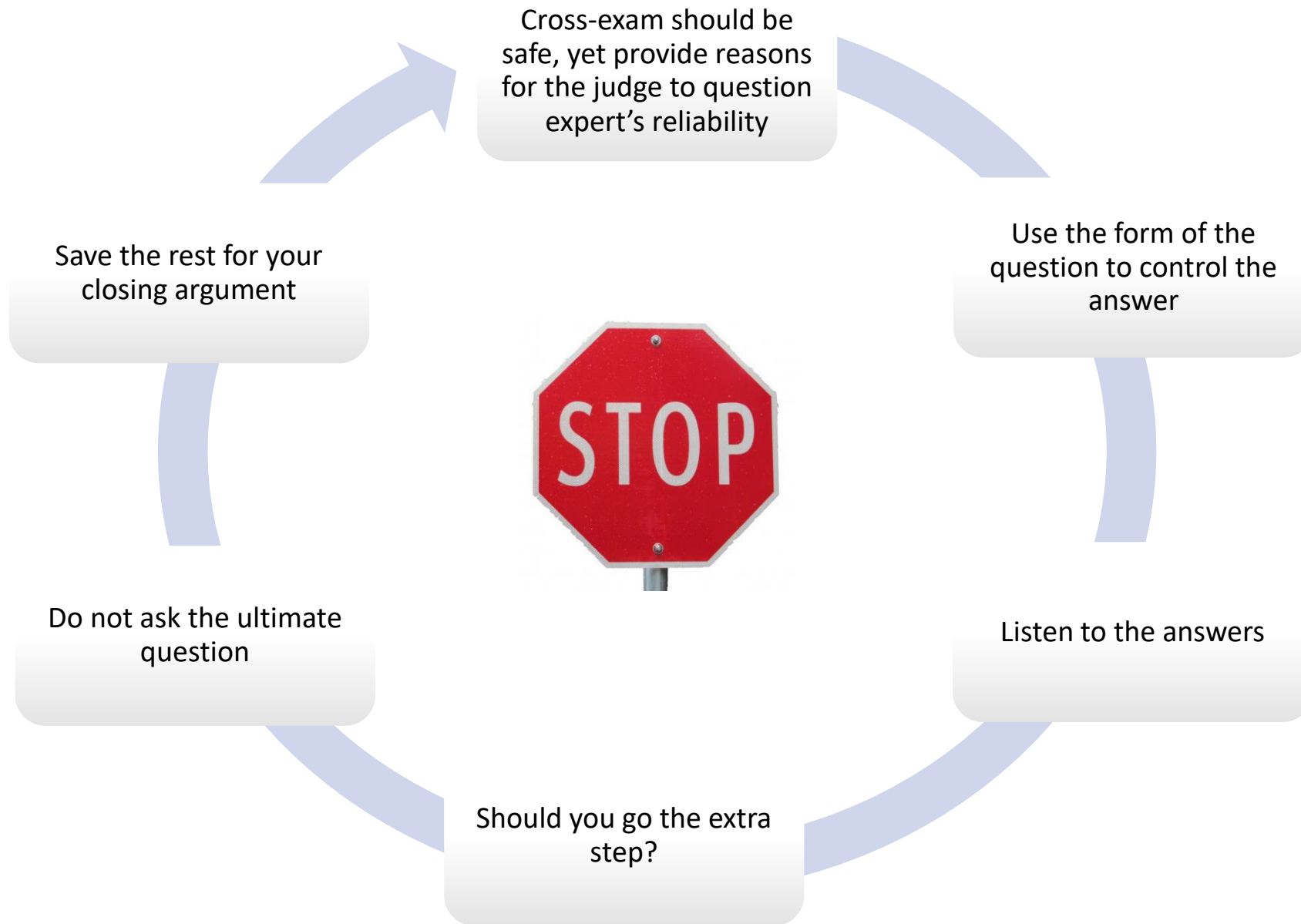
Does the witness own the text or subscribe to the periodical?

Is the text one that is or has been used by the witness?

Is the text/periodical generally reliable?

Is the witness familiar with the author?

Is the author a prominent figure in the field?



# A Sample of Child Protective Caselaw on Experts



# In Re Nicole V: Experts in Child Abuse Litigation

*What are the symptoms & behaviors of the subject child? Which behaviors are commonly seen in victims of sexual abuse?*

**Child's social worker provided expert testimony based on her 10 sessions with the child, about the child's behavior and this provided sufficient corroboration for the child's out of court statements.**

- An expert's relationship to the party offering her does not disqualify the witness from giving opinion evidence and any bias (the expert) may have had could be addressed on cross-examination Nicole V., at 122
- The court held that expert testimony about a child's behavior by the child's therapist satisfied the standards of § 1046(a)(vi) because child sexual abuse syndrome was a recognized diagnosis.
- The psychological and behavioral characteristics and reactions typically shared by victims of abuse in a familial setting are not generally known by the average person and the courts, Nicole V., at 120, compared to the child in question, Nicole V., at 121-122.
- What are the unique **behaviors**, and **reactions** of the child that it **beyond** the **common understanding** of people?



# WHAT IS A VALIDATION?

- "Validation" is defined as the "process by which an expert confirms or fails to confirm the existence of 'intrafamilial child sex abuse syndrome'", and wherein "[the] validator determines the existence of posttraumatic stress, from a cluster of behaviors." ( Matter of Michael G., 129 Misc 2d 186, 192, quoting from Sgroi, Handbook of Clinical Intervention in Child Sexual Abuse [1982].)
- **Nicole V.** was NOT *necessarily* a validation as we commonly know it today.

***WORDING OF EXPERT'S QUESTIONS***

Third Dep't overturns Family Court finding of sexual abuse. An expert had testified that "poorly worded questioning about sexual abuse can alter a child's responses and, indeed, his or her memories in such a way that a child sometimes reports abuse that did not occur in an effort to please the interviewer by providing what the child perceives as the answer the interviewer wishes to hear."

## In re Yorimar K.-M., 309 AD2d 1148, 1148 (4th Dept 2003)

### ***PROBABILITIES NOT CERTAINTIES***

Although the expert did not specifically testify that the victim had in fact been abused, she testified that the victim's **behavior** was consistent with that of children who had been sexually abused.

## In re Elizabeth G., 255 AD2d 1010, 1011 (4th Dept 1998)

### ***CHILD'S AFFECT & ABUSE***

Children became agitated, had anxiety, was uncomfortable and distracted when describing abuse, including hiding behind a chair during when describing the abuse. The social worker testified that the behavior of both children were consistent with the behavior of sexually abused children.

# In re Thomas N., 229 AD2d 666, 668 (3rd Dept 1996)

## ***THE SGROI METHOD***

The Sgroi method tests for the existence of five standards; (1) multiple incidents of the abuse over time, (2) progression of sexual activity, (3) an element of secrecy, (4) an element of pressure or coercion, and (5) the graphic detail of the events.

## Matter of Destiny C. (Goliath C.), 127 AD3d 1510 (3rd Dept 2015)

### ***EXPERT FOR PHYSICAL FINDINGS; “DEPRIVATION OF ASSISTANCE OF COUNSEL”***

Corroborative evidence included expert testimony that her disclosures and her advanced sexual knowledge were consistent with those of a child victim of sexual abuse. In addition, Family Court was presented with an expert opinion that the scarring inside of the older girl's vagina and the size of the opening of her rectum were both consistent with those findings expected for a child who had been sexually abused. Also, with regard to a “deprivation of effective assistance of counsel” allegation, the respondent did not identify relevant experts who would have been willing to testify in a manner helpful to either of their cases. Further, neither the father nor the mother specifically alleges that his or her respective counsel failed to investigate whether such expert witnesses existed

# People v. Spicola 16 N.Y. 3d 441 (Court of Appeals 2011)

## ***EXPERT TESTIMONY RE: VARIATIONS IN BEHAVIOR AFTER EXPERIENCING ABUSE***

- “We have “long held” evidence of psychological syndromes affecting certain crime victims to be admissible for the purpose of explaining behavior that might be puzzling to a jury (see Carroll, 95 NY2d at 387). Indeed, the majority of states “permit expert testimony to explain delayed reporting, recantation, and inconsistency,” as well as “to explain why some abused children are angry, why some children want to live with the person who abused them, why a victim might appear ‘emotionally flat’ following sexual assault, why a child might run away from home, and for other purposes”

# In re Lonell J., 242 AD2d 58 (1st Dept 1998)

*Expert testimony in DV cases*

## ***EXPERT TESTIMONY NOT REQUIRED TO ESTABLISH EMOTIONAL IMPAIRMENT***

- Nothing in section 1012 itself requires expert testimony, as opposed to other convincing evidence of neglect. Family Court Act § 1046 (a) (viii) states that "proof of the 'impairment of emotional health' or 'impairment of mental or emotional condition' as a result of the unwillingness or inability of the respondent to exercise a minimum degree of care toward a child *may* include competent opinion or expert testimony"
- Such inclusive language undermines any conclusion that expert testimony is required.



# Frye Hearings

The **Frye test** asks whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally. Frye holds that while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. It emphasizes counting scientists votes, rather than on verifying the soundness of a scientific conclusion

[Parker v. Mobil Oil Corp., 7 N.Y.3d 434, 442](#)

# Frye - Additional caselaw

A **Frye** hearing is necessary only if expert testimony involves "**novel** or experimental matters" (see *People v Byrd*, 51 AD3d 267, 274, 855 NYS2d 505 [1st Dept 2008], *lv denied* 10 NY3d 956, 893 NE2d 446, 863 NYS2d 140 [2008], citing *Parker v Crown Equip. Corp.*, 39 AD3d 347, 348, 835 NYS2d 46 [1st Dept 2007]). The application of a generally accepted technique, even though its application in a specific case was unique or modified, does not require a **Frye** hearing (see *Byrd*, 51 AD3d 267, 855 NYS2d 505; *Styles v General Motors Corp.*, 20 AD3d 338, 799 NYS2d 38 [1st Dept 2005]). The **Frye** test concerns only the acceptability and reliability of the scientific technique and not the "adequacy of the specific procedures used to generate the particular evidence to be admitted" (see *Wesley*, 83 NY2d at 422).

[People v. Garcia, 39 Misc. 3d 482, 484](#)

The question of whether specific contaminants cause physical injury does not present a **novel** scientific theory (see *Nonnon v City of New York*, 32 AD3d 91, 819 NYS2d 705 [2006], *affd* 9 NY3d 825, 874 NE2d 720, 842 NYS2d 756 [2007]). Therefore, the defendants are not entitled to a **Frye** hearing (see *Frye v United States*, 293 F 1013 [DC Cir 1923]).

[Davydov v Board of Mgrs. of Forestal Condominium, 185 A.D.3d 548, 550](#)

# State of New Jersey v. Nieves, 476 NJ Super 609, 2023 WL 5947996,

"The evidence supports the finding that there is a real dispute in the larger medical and scientific community about the validity of shaking only SBS/AHT theory, despite its seeming acceptance in the pediatric medical community."

" In determining whether ABT/SBS is generally accepted within the medical and scientific community requires evaluation of two considerations: (1) whether the theory is generally accepted by the biomechanical community and supported by biomechanical testing and (2) whether the theory is generally accepted by the pediatric medical community and supported by clinical data connecting the constellation of symptoms with SBS/AHT."

# What does New York think??

"The New York courts have specifically held that SBS/AHT is generally accepted in the scientific community. Additionally, SBS/AHT has been consistently recognized by New York courts as an accepted scientific theory, without explicit *Frye* analysis."

People v. Flores-Estrada, 55 Misc.3d 1015 (Kings Cty Sup. Ct. 2017)

# Additional NY cases

- *People v Yates*, 290 AD2d 888, 736 NYS2d 798 (3rd Dept 2002)
- *People v Sulayao*, 58 AD3d 769, 871 NYS2d 727 (2nd Dept 2009),
- *People v Thomas*, 46 Misc 3d 945, 998 NYS2d 590 (Westchester County Ct 2014)
- *People v Hershey*, 85 AD3d 1661, 925 NYS2d 314 (4th Dept 2011),
- *People v Kendall*, 254 AD2d 809, 678 NYS2d 182 (4th Dept 1998)
- *People v Van Norstrand*, 85 NY2d 131, 647 NE2d 1275, 623 NYS2d 767 (1995)
- *People v Wong*, 81 NY2d 600, 619 NE2d 377, 601 NYS2d 440 (1993);
- *Matter of Joaquin Enrique C. [Anna Julia F.]*, 79 AD3d 548, 912 NYS2d 219 (1st Dept 2010);
- *Matter of Lou R.*, 131 Misc 2d 138, 499 NYS2d 846 (Fam Ct, Onondaga County 1986)
- *Matter of Damien S.*, 45 AD3d 1384, 844 NYS2d 790 (4th Dept 2007)
- *Matter of Seamus K.*, 33 AD3d 1030, 822 NYS2d 168 (3d Dept 2006);
- *Matter of Antoine J.*, 185 AD2d 925, 587 NYS2d 13 (2nd Dept 1992)

# Experts in the NY Courts Evidence Website

[Link in Handout](#)

# Child Witnesses

# Child witnesses

## Do you need the child to testify?

- Consider corroboration (FCA 1046)

## Preparing the child to testify & cross examination

## Is the child competent to testify?

- Age 14 is presumed competent

## Alternatives to “in-court” testimony

- Video
- Non-sworn testimony



Do we even  
need to call  
the child to  
testify?

### **1046(a)(vi) Corroboration**

"previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, but if uncorroborated, such statements shall not be sufficient to make a fact-finding of abuse or neglect. Any other evidence tending to support the reliability of the previous statements, including, but not limited to the types of evidence defined in this subdivision shall be sufficient corroboration. The testimony of the child shall not be necessary to make a fact-finding of abuse or neglect;"

# Are they Competent to Testify?

- 
- The resolution of the issue of witness competency is exclusively the responsibility of the trial court, subject to limited appellate review. *People v Parks*, 41 NY2d 36, 46 (Court of Appeals 1976)
  - Trial judge sees the proposed witness, notices their manner, apparent possession or lack of intelligence.
  - A trial judge may resort to any examination which will tend to disclose his **capacity** and **intelligence** as well as his **understanding** of the **obligations of an oath**. *People v. King*, 137 Misc.2d 1087, 1089, (citing to *People v. Nisoff*, 36 N.Y.2d 560, 566 (1975), citing *Wheeler v. United States*, 159 U.S. 523, 524 (1895)).
  - The court (usually the trial judge, or, in some instances, the prosecutor/petitioner) is required to conduct a preliminary **voir dire** or examination of the prospective child witness, which involves a number of inquiries. See *People v. Morales*, 80 N.Y.2d 450 (1992).

# Some questions to ask the child to show competency

## Truth v. Lie

- Does the child know the difference between a lie and a truth?
- Does the child know the meaning of an oath?
- Does the child understand what can happen if he or she tells a lie?
- The child understands the moral and legal duty to tell the truth

## Child's Ability

- Does the child have the ability to recall and relate prior events?
- The child has a memory of the event or conversation in question
- The child has the ability to communicate about the event in question
- Ask child about personally significant events - e.g. birthday celebration, vacation trip, or other special event.

# Competency

Even though a child witness may not be capable of giving sworn testimony, they may still give unsworn testimony, pursuant to FCA §152 (b).

Case examples of such are set forth below.

- *In the Matter of Christina F.*, 74 NY2d 532 (Court of Appeals 1989)
  - A child's out-of-court statements describing sexual abuse by her father may be corroborated by the child's later cross-examined but unsworn in-court testimony, so as to support a fact finding of abuse.
  - The corroborative evidence offered here was testimony in court, before a Judge and court reporter, with direct examination, cross-examination by respondent's attorney, and additional questioning by both the court and the Attorney for the Child.
- *In re Roy T.*, 126 Misc.2d 172, 173 (Monroe County, 1984)
  - A four-year-old child abuse victim was permitted to provide unsworn testimony after a preliminary examination by the court to establish whether or not he “understood the nature of an oath, the difference between right and wrong, the duty to tell the truth, and whether any punishment follows the telling of an untruth.”
- *In the Matter of Aryeh-Levi K.*, 134 A.D.2d 428 (2nd Dep’t 1987).
  - A six-year old child sexual abuse victim’s unsworn testimony was properly deemed credible by the trial court where she detailed the respondent stepfather’s acts of sexual abuse against her.



# Tips for Preparing a Child Witness

## Logistics

- What does the Child want to bring to Court with them?
- Show them the empty Courtroom if possible
- Make sure their attorney is present during preparation (and any one else that would be helpful and good for the child)
- Consider:
  - Will they miss school?
  - Who will bring them?
  - On the day of Court, where will the Child wait when they testify?
  - Will they be in the same room as the respondent?

# Tips for Preparing a Child Witness

## Build Rapport

- Be nice, explain who you are, decide who else should be in the room to assist as needed.
- Schedule more than 1 meeting with the child and their attorney
- Where should you meet? Who else should be present? Who should you consult?
- Tell the child what you expect of them (ie. They can say they don't understand, ask for a break, etc.)
- Ask them some easy questions – favorite subject in school, their birthday

# Tips for Preparing a Child Witness

## Preparing for the Necessary Testimony

- Ask the child to tell you in their own words what happened
- Be prepared to take breaks when the child needs or end the interview.
- Use time markers when determining time frame (was school in session? Was it cold out?)
- Use simple language
- Prepare the child for cross
- Tell them what to do when an objection is made
- Explain that the judge will probably ask questions as well
- Prepare them for the swear-ability questions & cross examination

# Challenges at Cross- Examination

## Research on forced choice questions finds that children:

- Assume the interviewer has provided the correct answer
- Feel compelled to answer from among the choices offered
- May be reluctant to say they don't know
- Picking randomly, most often pick the last option offered
- Are more likely to answer “yes” to yes/no questions
- Have the highest “error” rate with tag questions and negative forced choice questions



# Challenges to Consider

- **Adversarial process**
  - Courtroom is formal, intimidating
  - Presence of Respondent
- **Subject Matter**
  - Child's ability to understand questions may be limited, can be easily misled or confused
  - Subject matter is personal
- **Attention Span**
  - Children under age 6 generally can't focus for more than 30 minutes
  - Use strategies that minimize distractions and help focus attention
  - Create an interview environment which is calm, comfortable and sparse
  - Be prepared to end the interview when the child needs to. It may take more than one session.

# While in Court:

01

Be sure to use the language that you used when preparing the child

02

Before the testimony begins, remind the child that s/he may say things like: "I don't know," "I don't understand the question," and "Can you repeat the question"

03

If the child has asked for a supportive person to be in the courtroom, be sure that nothing blocks the child's view of him/her

04

Request a break for the child when s/he appears stressed by the examination

# Methods of Testimony

## Children testifying in “open court”

### **The presence of a respondent(s) during the child’s testimony may:**

- Be distracting for the child witness
- Make them more likely to minimize or deny the event
- Make them more likely to answer “I forget”
- Make the experience of testifying more traumatic

# Testimony Outside Respondent's Presence

The Family Court must balance the due process rights of an article 10 respondent with the mental and emotional well being of the child. The Family Court properly balanced the respective interests of the parties and, based upon the record, reasonably concluded that the child Y.-L. R. would suffer emotional trauma if compelled to testify in front of the appellant

**Matter of Q.-L. H., 27 AD3d 738, 739 (2nd Dept 2006)**

No 'presumptive right' to elicit a child's testimony before the trial judge outside the respondent's presence and that no 'presumption of harm' to the child who testifies in front of a respondent may be drawn from the fact that the child is an alleged victim of sexual abuse

The determination of harm to a child must be made by the trial court on a case-by-case basis

When considering the potential harm to the child, "[t]ender years, mental health, behavior in the courtroom, the need to shield some children from the emotional trauma certain disclosures would be likely to produce, ... are not the kind of considerations which Family Court Judges must or should ignore."

**Dep't of Soc. Servs. v. Phillip C., 1991 N.Y. Misc. LEXIS 838 at 1 (N.Y. Fam. Ct. 1991)**

# In order to use an alternative method:

- File a written motion requesting an alternative to testifying in open court
- Be prepared to prove (movant has the burden) the need for the alternative to open court testimony with:
- Testimony of or affidavit from a mental health professional that can render an opinion as to the effect of open-court testimony on the child or the proceedings\*

\*A hearing may or may not be required