THE TRIAL OF A MATRIMONIAL ACTION

Strategies, Techniques, Examinations

NEW YORK STATE BAR ASSOCIATION

FAMILY LAW SECTION SUMMER MEETING

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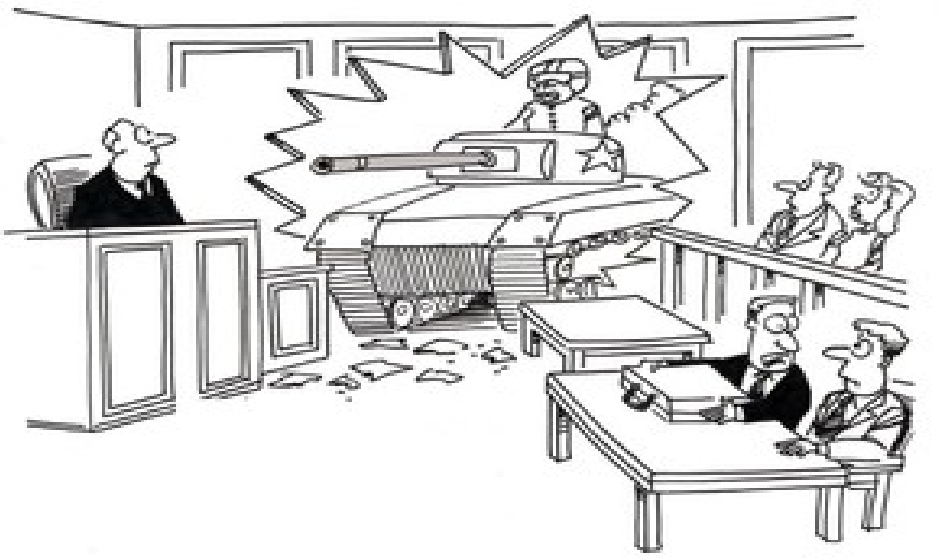

"I thought your wife wasn't contesting the divorce."

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DIRECT EXAMINATION

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INTRODUCTION

Considerations in all Trials

I. Overriding Considerations

A. Understandable case – we like what we know.
B. "Likeability" of client.
1. Discretion in Domestic Relations Law §236.
C. Credibility (client's and you).
D. A trial is a microcosm of human nature.
E. Judges are human.[1]
F. Continuous Reassessment throughout trial **–** what is proven, what is not proven; risk/reward analysis; what doors to keep closed, what doors to open.
G. Every case is a story.

II. Theme to Case

A. Limited Number – best if one theme, one sentence – Examples:
1. Plaintiff can never become self-supporting;
2. Defendant's contributions to the marriage are *de minimus*;
3. Plaintiff is the parent who is child-minded and sensitive and responsive to the needs of the children;
4. The parties' lavish lifestyle was made possible by unreported income.

B. Theory of case – why you should win (herculean contributions of your client; parties basically led separate financial lives).

[1] "We accept that judges are human". Linda Greenhouse, *NY Times*, 3/29/18.

C. Hammer home in motions, conferences, pretrial, opening.

III. Jury v. Bench Trial

A. Debate – There are some that believe that drama, suspense, theatrics of any kind are inappropriate in a bench trial.

B. Just as you argue to jurors; argue to judge.

1. While held to a higher level of discipline, judges and lay witnesses both react to stimuli, demeanor, and body language.

2. Judges are human - "Judges are human, and not immune from psychological and unconscious influences." *People v. Best*, 19 NY3d 739, 744 (2012).

C. Advantage of Bench Trial

1. Know trier of fact.
2. If don't know, find out.

IV. Try to make case interesting

A. Judge Cardozo while on the Court of Appeals (before sitting on the Supreme Court) was asked "how come you get all the interesting cases?" He responded: "Are you kidding? They are the most boring cases in the world until I get them, and I make them interesting."

B. Avoiding Boredom

1. Pace.
2. Financial data in organized summary form.

V. Big Picture Case

A. Corollary to Theme.

B. Avoid minutiae.

C. Better to lose a skirmish or two and win the war.

VI. Building Block Proof of Case

A. A story about the theme(s) of your case – every case has to have one

B. Introduce story in opening; end story in summation – building blocks for themes in between

C. Reason not to waive opening – Preview (trailer)

D. Taglines:

1. "Isn't that correct?", "Correct?", "True?", "Isn't it a fact?"
2. Use but not to excess.

E. Patience and preparation

F. Discipline

G. Different from “Hollywood” portrayals

VII. Think Like the Tribunal, not the Client

A. Stated otherwise, if I was the judge, what would I think?

B. Don’t ask client if more questions

C. Corollary – control your client (sticky notes; jumping up).

VIII. Trial Language

A. To Court – Rule is to guide and persuade the court in your direction, not to *tell* the court.

1. Eschew “You must find…”; “I think…”
2. Human nature results in an exactly opposite reaction and a competitive refusal to be controlled by someone else. Instead, we acknowledge the power of the court to make any ruling they wish, but offer the reason why they should rule in your favor. Acknowledging the power of the other person to control their decisions encourages a more compliant attitude.
3. Use “We submit the evidence shows…”
4. The idea is for the court not to lose face.
5. When reciting law: “As the court well knows…”
6. Do not say to Judge: “I hear what you say” (means you get the point, disagree with it and think little of it).
7. Don’t tell the court what to think, show the court what to think.

B. To Witnesses

1. Always be polite, but firm.
2. Your witness - start with easy questions.
3. Develop a cadence.
4. On direct have the witness tell the story in his own words.
5. Avoid fill-ins such as “a ha”, “right”, “okay”, “so”
    a. Any time you hear “So,” at the beginning of question, probably conclusory and leading or a mini-summation – lawyer testifying or leading.
6. Do not repeat the last answer before the next question.

IX. Anticipating Evidentiary Issues

A. Directly related to extent of preparation. The better prepared you are the more you will be able to anticipate the evidentiary issues you face before trial and those that your adversary

faces. Preparation involves not just what to prove, but how to prove it.

B. Anticipating your evidentiary issues and the other side's evidentiary issues

C. Particularly important with hearsay and exceptions to hearsay rule

D. Be armed with authorities and arguments

E. Example: Business Record Rule – 3 ways (CPLR 4518)

X. Organization; Tidiness

A. Tidiness

B. Use a carefully organized trial notebook.

XI. Patent Weakness in Case

A. Not going to go away by avoiding it

B. Steal the thunder from cross-examination

C. Mention in Opening Statement

D. If shocking, repeat so many times becomes almost mundane and humdrum

XII. Lists, Lists, Lists

A. Need to rely on lists, particularly if no second chair

B. Attention span, level of concentration, and mental acuity are tested to the limit while on trial

C. Trial Preparation List (See Appendix "C")

D. Exhibit List (See Appendix "D")

E. Witness List

F. Denial List – If the testimony of a witness "is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities, nor, in its nature, surprising or suspicious, there is no reason for denying to it conclusiveness." *Hull v. Littauer, 162 NY 569, 572 (1900); Sagorsky v. Malyon, 307 NY 584 (1954).*

G. Subject to Connection List

H. Points to Prove

FACT[2]	**ISSUE**	**HOW TO PROVE**	**FOUNDATION/ AUTHENTICATION**	**OBJECTIONS/ RESPONSES**
Stay-at-home mom	Maintenance/ Equitable distribution	Wife's testimony	N/A	None
Husband's salary	Maintenance/ Equitable distribution	Employer records; W-2	Business Record Rule	Hearsay

I. Points Covered on Direct (reference tool for when cross examiner exceeds scope of direct examination).

XIII. Opening and Closing Doors **[More Mindset]**

A. Has a great deal to do with who has burden of proof.
1. Always think "whose burden is it" and tailor your case accordingly.
2. Effect on order of proof

B. If burden of proof is on the other side, keep as many doors closed as possible
1. Re-direct examination – only if absolutely necessary and only to the extent absolutely necessary.
2. If cross examination on a particular area may expose a danger point to your case which was not brought out on direct, don't cross on that subject.

XIV. Protocols

A. Counsel table – client, associate, paralegal – know their place and function.

B. Client should stay seated, mouth shut, taking notes, no gesticulations or gestures.

C. Recesses – conversations with and around court personnel.

D. Witness – explain in advance the procedures; just answer question; what to do when objection made.

XV. Knowing When to Stop

A. Allied to doors analogy

B. Don't gild the lily; single death rule.

C. Applies to direct and cross-examination.

[2] Peskind, Steven N., *One Hundred Days Before Trial*, 2015 A.B.A. Pub.15.

D. Edward Bennett Williams's remark: "A measure of a great trial lawyer is what the lawyer leaves in the briefcase."

E. Don't prove a minor point or corroborate a fact already established at the risk of opening the door to damaging testimony or at the risk of giving your opponent another bite at the apple.

XVI. Objections

A. Ask yourself, "Does it hurt?"

1. Beware the default mindset that if the other side wants it in, you want it out.

B. The flipside of "does it hurt you" is when you are considering evidence you are trying to have admitted, ask "do you really need it?"

XVII. Preparation

A. Over prepare, under try - Less is More Principle.

B. If you prepare properly, you can anticipate at least 80% of what the other side will do.

XVIII. Sequestration of Witnesses

A. *Levine v. Levine*, 83 AD2d 606 (2d Dept. 1981), reversed on other grounds, 56 NY2d 42 (1982)"The practice of excluding witnesses from the courtroom except while each is testifying is to be strongly recommended."

B. Distinguished by *People v. Santana*, 80 NY2d 92, 587 NYS2d 570, 600 NE2d 201 (1992), where the court found that defense counsel had a right to talk with his own expert while he is cross-examining the opposing expert. Holding that "the presence in the courtroom of an expert witness who does not testify to the facts of the case but rather gives his opinion based upon the testimony of others hardly seems suspect and will in most cases be beneficial, for he will be more likely to base his expert opinion on a more accurate understanding of the testimony as it evolves before the jury" *(Morvant v. Construction Aggregates Corp.,* 570 F2d 626, 629-630 [6th Cir], *cert dismissed* 439 US 801; *see, United States v Kosko,* 870 F2d 162, 164 [4th Cir]). Although not binding, Fed.R.Evid. 615 further support this holding.

C. Federal Rules - "Fed.R.Evid. 615 provides that a district court may sequester witnesses to prevent them from hearing the testimony of other witnesses. Rule 615(3) provides an exception for "a person whose presence is shown by a party to be essential to the presentation of the party's cause." The advisory committee notes specify that the exception contemplates "an expert needed to advise counsel in the management of the litigation." Fed.R.Evid. 615(3) advisory committee notes.

D. Strategy.

XIX. Wildcard Factors

A. “Any other factor which the court shall expressly find to be just and proper.”

B. Avenue to argue any fact(s) of case which strengthens your equitable arguments.

C. Applicable to equitable distribution, maintenance, child support.

XX. Second Chair Role

A. Not a secretary, more like an understudy.

B. Do everything – preparation, note taking, correcting mistakes, organizing and tracking exhibits.

C. What did the leader miss, correct; don't wait to be asked.

D. Arrangement of Exhibits – instant access.

E. Loyalty to first chair.

XXI. Two Cardinal Rules of Litigation

A. Rule #1- Never sacrifice your credibility.
1. Client has one case; you live to fight another day.
2. Credibility is paramount (Advantage of matrimonial practice).

B. Rule #2 – Never violate Rule #1.

XXII. Introducing Exhibit

A. Eight (8) Steps

1) Exhibit marked for I.D.

2) Exhibit Shown to Witness

3) Witness Identifies Exhibit

4) Lay Foundation

5) Offer Exhibit into Evidence

6) Shown to Adversary (may voir dire)

7) Ruling from Court

8) Once Marked and Admitted, testimony re: exhibit

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TRIAL PREPARATION

"Preparation transforms nervousness into confidence." Anonymous
"Failing to prepare is preparing to fail." John Wooden

I. Motions in Limine

A. Definition - preliminary application usually made before or at the beginning of a trial, that certain evidence, claimed to be inadmissible and prejudicial, not be referred to or offered at trial.

B. Examples

1. Application in limine to allow 6-year-old to testify in fault and custody portion of trial denied. (*Reed v. Reed*, 189 M2d 734, 734 NYS2d 806 (S.Ct., Richmond Co., Sunshine, J. 2001)).

2. In limine application on permissible scope of cross-examination concerning a non-party's prior misdeeds (*Peo. v. Scott*, 134 M2d 224, 510 NYS2d 413 (Sup.Ct., Kings Co., 1986)).

3. Assets subject to distribution - "whether a particular marital asset, such as the enhanced earning capacity attributable to a particular career, is subject to equitable distribution is an issue that can be decided prior to trial" (*Hougie v. Hougie*, 261 AD2d 161, 689 NYS2d 490 (1st Dept., 1999)).

4. Classification of assets – *Block v. Block*, 258 AD2d 324, 685 NYS2d 443 (1st Dept. 1999); proper for court to consider before trial "... that the contingency fee cases defendant had commenced prior to the commencement of the instant divorce action are part of his firm's assets or value, and therefore constitute marital property…"

5. Bifurcation – *Enker v. Enker*, 261 Ad2d 433, 687 NYS2d 903 (2d Dept. 1999).

6. Partial Summary Judgment – *Moll v. Moll*, 187 M2d 770, 722 NYS2d 732 (S.Ct. Monroe Co., Lunn, J., 2001) – Pre-trial determination of issue [whether clients served by defendant at Morgan Stanley Dean Witter constitute his "book of business" which is a marital asset subject to equitable distribution] is appropriate by remedy of partial summary judgment.

7. Fix Valuation Date (Domestic Relations Law §236(B)(4)(b)).

II. Trial Notebook

A. Contents

1. Marked pleadings
2. Court Orders
3. Opening Statement Outline
4. Asset Schedule
5. Income Tax summaries
6. Settlement memos
7. Deposition digests
8. Notes for Direct Examination of Witnesses
9. Copies of Exhibits
10. Cross examination notes for opposing witnesses
11. Copy of Domestic Relations Law §236(B)
12. Net Worth Statements
13. Copy of Revenue Ruling 59-60; Revenue Ruling 68-609
14. Expert Witnesses – Professional Standards and Guidelines
15. Expert Reports and outlines
16. Child support and maintenance guidelines charts
17. Insurance schedules
18. Cost of Living Schedules
19. Cash Flow charts
20. Tax impacting charts
21. Arrears chart
22. Law Section

III. Computer-Assisted Trial Preparation

A. Matlaw

B. Family Law Software

C. Finplan (a/k/a Divorce Planner)

D. Case Map

1. Database for trial preparation

2. Links Facts, Objects, Issues, Research

E. Time Map – time lines – (See Appendix "F")

F. TextMap – deposition transcripts; NoteMap - deposition

G. Divorce Math
1. Pension value
2. Present value calculations
3. Alimony recapture
4. House sale- capital gain
5. Social Security tax calculations
6. Mortgage Amortization Schedules

IV. Writing the Trial Memo

A. Basic Thought Process
a. Try the case from the memo
b. Not enough to just relate facts of case

B. Not just what to prove but how to prove it

C. EBT transcript - reproduce section in trial memo
1. Identify page and lines
2. Ask reporter for digital copy of transcript

D. EBT Digest (See Appendix "G")
1. Header - EBT of ___; Date
2. To left, page and line numbers; center-topic

E. Document reference - reproduce part of document to be used

F. Photo - when taken; who can identify and authenticate; what purports to show

G. If part of affidavit of opposing party to be used, incorporate sections to be used with date of affidavit and page and paragraph number

H. Evidentiary Issues

1. If hearsay, see if there is an applicable exception
    a. Admission, state of mind, declaration against interest etc.

2. Not offered for proof of facts asserted

I. Not writing an affidavit; writing a trial guide

J. As many lists as possible, as opposed to narrative sentences

K. Statement of Proposed Disposition - client sign office copy

L. Income taxes filled in on statement of net worth

M. Exhibit sheet (See Appendix "D")
1.Typed periodically
2. Dates, names of reporters

N. Trial Notes
1. To be typed daily
2. Header - e.g., Direct testimony of ____; (Date)

O. Separate trial testimony notebook

V. Life Style Analysis

A. Checks, credit card statements

B. Photographs (e.g, sumptuous home)

C. Separate non-recurring and capital improvements

D. Cost a factor

VI. Tape Recordings

A. Statute- CPLR 4506(3) - "An aggrieved person who is a party in any civil trial, hearing or proceeding...may move to suppress the contents of any overheard or recorded communication, conversation or discussion or evidence derived therefrom on the ground that: (a) the communication, conversation, or discussion was unlawfully overheard or recorded;..."

B. Motion to Turn Over Tape Recordings - CPLR 3101(e) - a party may obtain a copy of

his own statement.

VII. Trial Preparation Checklist (See Appendix "C")

VIII. Miscellaneous Considerations

A. Voice – Warm up
1. Deep breath and fully exhale
2. Stage fright makes us hold our breath
3. Talk to empty courtroom

B. Stage Fright
1. Get to Court early
2. Clerk, rest rooms

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OPENING STATEMENT

"You don't get a second chance to make a first impression."

I. Do not waive

A. Do not reserve (if Defendant)

B. Only chance in trial to tell your story as follows:
1. Without interruption from court or adversary;
2. Unfettered in content and style;
3. Without regard for rules of evidence.

II. Importance

A. Generally, gets only cursory treatment, but is underrated and underused in matrimonial litigation.

B. Importance – Human nature confirms that we make quick judgments about who was right or wrong in our everyday life.

C. Map for Judge - crafting a lens through which the judge will see the evidence.
1. Preview of evidence as you want the Judge to see it.

III. Sequence of Trial

A. Opening – commit to what the evidence will show

B. Witnesses – show it

C. Closing – drive home the promise you have kept

IV. Do not "Read" Opening Statement (or Closing Statement)

A. Your focus and loyalty is to the person you are trying to persuade; not to words on a pad.

B. Use outline to remind of topics, key words (highlight).

C. Commit as much as possible to memory and use notes to look down on occasion when necessary.

1. As few notes as possible; no notes optimal; most of us need an outline.
    a. Notes or an outline limits eye contact with the judge.
2. Better to forget something than to get up there and be wedded to a notebook or legal pad when you are flipping through pages.

V. Other Considerations

A. Establish theme and tell a persuasive story

B. Take the sting out of the worst evidence in your case

C. Strong, not long, but with ardor

D. Language – "The evidence will show…", "We will learn…", "We intend to prove…", "Documentary evidence will reveal…"

E. Where appropriate, tell the story in present tense
1. No: He walked into the room.
2. Yes: He walks into the room (thinking of what happens next).

F. Rehearse (mock practice with colleagues).

G. Personalize your client

H. Order transcript of adversary's opening.

VI. Impactful start to Opening

<u>One way:</u>

"The parties were married in 1995. Both were 25 years old at the time of the marriage. Neither had been married previously. At the time of the marriage, the Wife was a financial advisor and the Husband an associate at a prominent New York City law firm. They have 3 children…."

<u>Alternative – Embodying Principle of Primacy</u>

This is a case about sacrifice and contributions. The personal sacrifices made by the plaintiff-wife to better the family unit. The herculean contributions she has made as the primary caretaker of the 3 children, while simultaneously being at her Husband's side, and frankly at his beck and

call, to aid in the advancement of his illustrious professional career and financial success. This is about a woman who subjugated her career, her opportunity to bask in professional and financial success to the benefit of her Husband and children. This case is about a woman who thought her efforts would bring perpetual happiness and success for her family until her Husband, to her great surprise and chagrin, announced he was no longer happy and issued the parting shot: "See you in court."

VII. ***Biggest Mistake***

A. Over promising - stretching the truth, trying to make something that is not.

1. You lose credibility and when you lose credibility, you lose the power to persuade.

VIII. What Not to Include

A.What is omitted is as important as what is included.

B. Not a laundry list of all of the facts you intend to prove. Opening paints the dispute and your client's position in broad strokes. The closing argument provides the specific evidence that was admitted that proved your client's position.

C. Instead of reciting conclusions, tell enough facts to lead trier of fact to the conclusion. Show, not tell, the conclusion you want the fact finder to reach. Make the facts speak for themselves. People want to reach their own conclusions, not be told what to conclude.

1. Outrageous conduct – don't label it; tell some of the incidents. The conclusion will follow. It makes the trier of fact an investigator of your case; creates curiosity, suspense.

Opening #1 – The evidence will show that the plaintiff has been guilty of egregious parental alienation. This is manifested by her cavalier disregard of the father's rights, her preemption of the parenting role to the exclusion of the father, and her denigration of the father to the child and to whomever will listen.
Opening #2 – The evidence will show that plaintiff has embarked upon a course of conduct, including but not limited to, failing to advise the father of the child's activities, planning outside activities for the child unilaterally and during the father's periods of access, listing her mother as the emergency contact after herself for the child's school, and encouraging the child to call her boyfriend "daddy."

2. Example: inconsistent statement - Instead of just reciting story "A" and story "B", ask questions: "Is what the defendant wrote about this event at the time consistent with what he says now? If he has a new version, when and how did it change? And most importantly, why?"

D. Advantages of Question

1. Gives you an out
2. Keeps suspense
3. Engages trier of fact as investigator
4. Let the case build as evidence unfolds

5. Lessens ennui

E. Details that pile on unneeded technical facts

F. Killer facts that the other side has trouble answering. (Foreshadow instead with facts.)

IX. Preparation of opening statement

A. Weeks before the trial commences; not the morning of trial

X. Aspects of Opening

A. Establish theme and tell a story

1. Make the story interesting

a. Make case interesting – Judge Cardoza while in the Court of Appeals (before the Supreme Court) was asked "how come you get all the interesting cases. Mr. Martin" he said," are you kidding? They are the most boring cases in the world until I get them, and I make them interesting."

2. Create a memorable theme, not a factual theme but a story theme.

B. Foreshadow your favorable facts; details in testimony.

C. Take the sting out of the worst evidence in your case.

1. Tell a story that covers the good, the bad, and the ugly
2. Obvious bad facts that must be answered or you look shady
3. Dealing with bad facts - facts are in three categories: good, neutral, bad
4. Spend time trying to make the bad facts good or at least having diminished impact; play Devil's Advocate, i.e., embrace any weak points, and try to explain why they don't matter.
5. Bring out in opening statement
6. If have to deal with bad facts, do so near end of direct examination so the court does not hear all the favorable testimony through a prism unfavorable to the witness.

D. Make client come alive and as sympathetic as possible

E. Order transcript of adversary's opening – for closing; corollary: don't overpromise, you will be called on it

F. Wording and Language

1. Use descriptive phrases and analogies

a. "Unlike most of us, he needed no ATM machine. He had his own - unreported cash income."

b. Case involving child abuse – "preyed on them like a vulture"

c. Parental alienation; psychological parent

d. Sacrifice of career

e. Child-centered life

f. Lying has become a way of life

2. Use of words; Vocabulary

a. Study: if you use a word someone does not understand, your audience will miss the next 7 words you say as the brain tries to assimilate what you have just said.

G. Refute the points you know the other side will rely upon

1. "Your Honor, in a few minutes my adversary most certainly will tell you "X" and this is why it is not so…"

H. Where applicable, universalize your case. This case transcends and is bigger than *Jones v. Jones*, and explain.

I. STAPLE approach

Start and end strong

Tell a story

Address weaknesses

Pictures/Visual Aids

- Power Point – recent case
- Underused

Law – briefly

Entertain – make it interesting

XI. Sample Opening Statements (See Appendix "E")

4

DIRECT EXAMINATION

I. Direct Examination – General Considerations

A. The 3 "Mosts"
1. Most *overlooked* trial skill
2. Most *important* part of case
3. Most *difficult* part of case

B. Misconception
1. Most lawyers incorrectly assume this task is easy, and thus the lack of preparation shows. Many lawyers just tell witnesses to walk into the courtroom, tell the truth, and don't worry about anything else. Then they ask the witness to "tell the Court what happened". The train wreck then begins.

II. Versus Cross-Examination

A. Art of construction v. Art of destruction.

B. Examiner is the conductor; witness is the virtuoso.

C. Cf. cross examination – if effective, attorney is really testifying.
1. On direct examination, lawyer asks some open-ended questions and lets the witness do the testifying.

III. Four Basic Goals of Direct Examination

A. The testimony must be *clear*.

B. The testimony must be *memorable*.

C. The testimony must be *credible*.

1. Nothing is more destructive of credibility than the woodenness of testimony from prepared script.

2. Long narrative answers destroy credibility by turning the witness into an advocate, not a teller of truth.

D.The testimony must be *invulnerable.*

IV. How to Achieve Goal

A. Testimony must be delivered in digestible bites without advocacy from the witness.

B. To achieve clarity and memorability you need to ask a lot of questions; written scripts destroy clarity and memorability.

C. In making notes about what you want to ask on direct examination, write an outline of the answers you want, not the questions.

D. If testimony is not understood it will not be remembered; what is not remembered later is useless later.

V. Difficulties with Witness Preparation

A. Direct examination is unlike any of the conversation we have in real life.

1. Witness is scared to death

2. Gallup runs a poll each year and asks Americans to identify the top fears. Public speaking is routinely number one – beats out death, snakes, drowning etc**.**

3. Need to prepare witness not only for direct examination but cross-examination as well.

4. The key to successful direct examination is preparation. If properly prepared, it should generally go smoothly.

B. Education of Witness – Eliminate surprises

1. Details of what courtroom looks like
2. Dress; jewelry
3. Eye contact – with whom
4. To whom they should address their answers
5. What to do when objection made

VI. "Stage Position"

A. Direct – stage right or left.

1. Stay behind lectern – covers over 50% of body.

2. During a good direct examination, attention should ordinarily be focused on the witness and *not* the examining lawyer. The examining lawyer should be relatively unobtrusive. The goal is to have the witness simply tell his own story in his own honest, natural and thorough manner.

B. The lawyer is the conductor, director, stage manager, not the script writer.

C. Opening, Closing and Cross Examination – stage center – you are the star.

D. Placement of podium – by moving away from the witness box, forces the witness to speak loudly.

E. Observe Sunday Preachers.

VII. Listen; Appear Interested

A. Do not peer at notes for next question, and not listen to answer.

B. Listening to answer leads to next question - fallacy of script.

C. Look at the witness – communicating.

VIII. Some Aspects of Questioning

A. Start with easy questions
1. When were you married? –let witness relax.
2. Examination peppered with easy questions – when, who, where.

B. Do not rely upon the witness to tell his story. You must get the details you need for your questioning. To the extent you can get away with leading questions, do so.

C. Use imagery in your questioning to emphasize your theme. Look for opportunities to connect the similarities of your witness's testimony with a previous witness in order to corroborate facts.

IX. Cover only what is necessary

A. Remember burden of proof – preponderance of the evidence (51%).

B. The longer you go the more fodder you provide for cross- examination.

X. Chronology

A. Try to take things chronologically within the theme.
1. Easier to follow for the witness and the listener
2. Use of timeline

B. Cf. cross examination – not in chronological order.

XI. Non-Leading Questions

A. Nonleading

1. Short, specific questions with one fact to direct the witness to the exact information you need.

2. Who, what, why, when, where, how.

B. Specific Non-Leading Question

C. Leading without Leading - Closed Questions - limits the range of the witness' answers

1. Example: did you commence employment on a Monday or a Wednesday?

2. Word Choice - The witness is given reasonable choices

a. Instead of "Was the man tall?" ask "Was the man tall, short or average height?" Was the defendant wearing a long-sleeved shirt, T-shirt, or sweatshirt?

b. Instead of "Were you in New York on June 4th?" ask "Do you recall whether or not you were in New York on June 4th?"

3. Yes/No Choice – was the man tall?

4. The use of "if any" in the question

a. "What, if any, derogatory comments did you hear the defendant state?"

D. Piggyback (looping) – (direct or cross examination)

1. Technique of repeating a portion of the witness's previous answer in your next question. The purpose is to remind the trier of fact of the answer and build on it for the next question.

2. Take a fact that has been established with the witness and is favorable to your theme and embody it in the next question

3. Advantage of repetition and greater control over witness as using as part of your question a concession witness has already made

4. Looping – fitting each answer into the last each question ties into the last answer so that a tongue and groove or looping effect achieved.

Q*: You told us at the time in question the defendant was drunk?*
Q: When the defendant was drunk (looped the 1st answer) was he in the presence of his 2 children?
Q: When the defendant was drunk did he have physical contact with his 2 children?
Q: How long did you observe the drunken defendant having physical contact (looping 2 answers) with his children?

E. Failure to Adversary to Object to Leading Questions

1. Adversary asleep at the wheel.

2. Limit use of leading questions as affects quality of testimony.

F. Dealing with Non-responsive Witness

1. "I apparently did not make myself clear. Let me rephrase the question" "I apologize, the question was confusing. I will reword it.

G. Repetition

1. It is essential that important material be heard more than once.
2. Obstacle – objection "Asked and answered."
    a. Interestingly, we never use that objection for the repetition of helpful testimony; only hurtful testimony.

H. Getting around Asked and Answered Objection
1. Looping – repeating the last answer in the form of the next question.
2. Asking for the details of an event through narrowly constructed questions.
    a. Break it down in small parts
    b. Use many close questions showing corroborative detail of the event. In other words, play it out.
3. Use of charts and illustrative aids – generally we take the oral details first and then invoke the charts and illustrative aids later. Achieves repetition.

I. Transition phrase
1. To change a topic; signal to everyone where you are going.

> *Q: Let me turn your attention to the night of December 12.*
>
> *Q: Now that we discussed your prior employment, let's move on to your current employment….*
>
> *Q: Mr. Jones, so we have talked about the financial documents and affidavits that you reviewed in the course of your appraisal assignment. Now I want to turn your attention to the interviews with the principals of the company…[Note: slightly leading as suggests that the appraiser did interview principals but most courts permit as it helps the flow of testimony.]*

2. Not improper leading as improper leading occurs when the questions not only suggest the subject but also suggest the desired answer.
3. Transition questions – not really questions and thus they cannot be leading. They are the hallmark of experienced lawyers. Smooths out and bridges testimony.

J. Commands
1. Direction to a witness on how better to answer the question you're previously asked or are going to ask. Don't feel you are stuck with the witness's initial answer.
2. Whenever the witness fails to give important details, ask follow-up questions.

> *Q: Let me stop you there. What did you mean when you said you had to quit your job?*
> *Q: Explain in more detail your decision to leave the marital residence.*

XII. When Leading Question Permissible on Direct Permissible

A. When they relate to introductory matter or undisputed facts. *Cope v. Sibley*, 12 Barb. 521, 523 (NY App. Div. 1850).

1. Includes introductory and uncontested matters or to call the witness's attention to particular circumstances as, e.g., when another witness made a prior inconsistent statement.

B. When witness' recollection is exhausted, or the witness is a young child, feeble minded, or otherwise unable to testify without assistance *Cheeney v. Arnold*, 18 Barb. 434, 1854 NY App. Div. (App. Term Sept. 12, 1854) affd. 15 NY 345.

1. Child's testimony in a sexual abuse case so the child's testimony can be clarified or expedited if the child is apparently unwilling to testify freely (*see Peo. v. Wasley*, 249 AD2d 625, 671 NYS2d 767, lv. Den. 91 NY2d 1014, 676 NYS2d 142); *see also Peo. v. Martina*, 48 AD3d 1271, 852 NYS2d (4th Dept. 2008).

2. In sexual abuse case, not error to allow leading questions in direct examination of child witness/victim in view of the intimate and embarrassing nature of the crimes. *Peo. v. Martina*, 48 AD3d 1271, 852 NYS2d 527 (4th Dept. 2008).

C. When the witness is hostile or biased *(Becker v. Koch* 104 NY 394 [1887]); the court properly allowed the prosecutor to use leading questions in her direct examination of defendant's wife because the witness was patently reluctant and hostile (*see Peo. v. Clark*, 181 AD2d 1028, 586 NYS2d 538, lv. Den. 80 NY2d 895, 587 NYS2d 925); a hostile witness may be cross-examined and leading questions may be put to him by the party calling him, on the ground that he is adverse, and that the danger from such a mode of examination by the party calling a friendly witness does not exist. *Wiener v. Mayer*, 162 AD 142, 147 NYS 289 (1st Dept. 1914).

D. When the witness is the adverse party

1. A party who calls adverse party as witness, should not be bound by witness's answers and should be permitted to lead and cross-examine, because he is obviously a hostile witness. *Mtr. of Arlene W. v. Robert D.*, 36 AD2d 455, 456, 324 NYS2d 333 (4th Dept. 1971); *see also Cornwell v. Cleveland*, 44 AD2d 891, 355 NYS2d 679 (4th Dept. 1974).

2. *Jordan v. Parrinello*, 144 AD2d 540, 534 NYS2d 686 (2d Dept. 1988) – "...when an adverse party is called as a witness, it may be assumed that such adverse party is a hostile witness, and, in the discretion of the court, direct examination may assume the nature of cross-examination by the use of leading questions. However, a party may not impeach the credibility of a witness whom he calls (*see Becker v. Koch*, 104 NY 394) unless the witness made a contradictory statement either under oath or in writing (*see* CPLR 4514)." (*See also Ostrander v. Ostrander,* 280 AD2d 793, 720 NYS2d 635 (3d Dept. 2001), holding that under facts of the case, sustaining objection to use of leading questions during direct examination of adverse party was proper); *see also Fox v. Tedesco,* 15 AD3d 538, 789 NYS2d 742 (2d Dept. 2005).

3. The general rule prohibiting a party from impeaching his or her own witness does not preclude a hostile witness from being impeached by prior statements made either under oath or in writing (*see* CPLR 4514); *Ferri v. Ferri*, 60 AD3d 625, 878 NYS2d 67(2d Dept. 2009).

4. A party in a civil suit may be called as a witness by his adversary and, as a general proposition, questioned as to matters relevant to the issues in dispute. A plaintiff in a medical malpractice case can call the defendant-doctor as his/her witness as to both "fact" and "opinion". *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 NY2d 20, 255 NYS2d 65 (1964).

E. Friendly Witness – Not permitted

1. Leading questions are not permitted on cross examination during the course of an examination of a *friendly* witness. FRE 611(c).

a. When cross examination is in form only and not in fact as e.g., the cross examination of a party by his own counsel after being called by the adverse party. (Farrell, *Prince-Richardson Evidence*, §6-230).

XIII. Forgetful Witness – Refreshing Recollection

A. What can be used?

1. Any writing or object may be used to refresh the recollection of a witness while testifying irrespective of its source, accuracy, authorship, or time of making. (*McCarthy v. Meaney*, 183 NY 190 [1905]).

2. Where plaintiff reviewed notes for the express purpose of preparing for his testimony at trial, and although plaintiff never used the words "refresh my recollection" relative to the notes, it was clear that the sole object and ultimate goal of reading the notes immediately prior to trial was to refresh his memory, and thus defendant was entitled to have the diary containing the notes made available to him for inspection and use upon cross-examination. *Chabica v. Schneider*, 213 AD2d 579, 624 NYS2d 271 (2d Dept. 1995).

3. 911 tape used to refresh witness' recollection – court found nothing improper with the use of a sound recording as the refreshing recollection device. The fact that the tape itself was inadmissible did not preclude its use as a refreshing recollection device. Other cases have held that where a writing itself is inadmissible; it can still be used as a refreshing recollection device. The reasoning is that it is not the writing or sound recording being offered into evidence, but it is merely used as a tool to refresh recollection. *Seaberg v. North Shore Lincoln-Mercury*, 85 AD3d 1148, 925 NYS2d 669 (2d Dept. 2011).

4. The refreshing recollection doctrine applies where a witness reviews a document prior to testifying at a deposition for refreshing recollection purposes if the document was reviewed for the purpose of refreshing recollection and the testimony is based, at least in part, on that document. Merely looking at a document prior to a deposition would not necessarily trigger disclosure. *Fernekes v. Catskill Regional Med Ctr.*, 75 AD3d 959, 906 NYS2d 167 (3d Dept. 2010).

5. The witness's independent recollection must first be exhausted as a precondition to use of memory stimulant. (*Peo. v. Reger*, 13 AD2d 63, 213 NYS2d 298 [1st Dept. 1961]).

B. Distinction with Past Recollection Recorded

1. *Howard v. McDonough*, 77 NY 592, 593 (1879) outlined the New York rule and delineated the important distinction between the present recollection refreshed and past recollection recorded:

a. A witness may, for the purpose of refreshing his memory, use any memorandum, whether made by himself or another, written or printed, and when his memory has thus been refreshed, he must testify to facts from his own knowledge.

b. When a witness has so far forgotten the facts that he cannot recall them, even after looking at a memorandum of them, and he testifies that he once knew them and made a memorandum of them at the time or soon after they transpired, which he intended to make correctly, and when he believes to be correct, such memorandum, in his own handwriting, may be received as evidence of the facts therein contained, although the witness has no present recollection of them.

C. Rights of Opposing Party

1. Once the witness has used a writing or object to refresh present recollection, the opposing party has the right to inspect it; to use it on cross-examination, and to introduce it into evidence. *People v. Gezzo*, 307 NY 385 (1954); *People v. Reger*, 13 AD2d 63, 213 NYS2d 298 (1st Dept. 1961). Although the decisional law is somewhat unclear, it appears that, at least in civil cases, the same right vests in the opposing party where the witness has used a writing or object to refresh recollection before testifying, *see* Richardson on Evidence, § 467.

D. Privilege

1. The attorney work product privilege is not waived when a privileged document is used to refresh the recollection of a witness prior to testimony. (*Beach v. Touradji Capital Mgt.*, 99 AD3d 167, 949 NYS2d 666 (1st Dept. 2012).

XIV. Anticipate and Neutralize Cross Examination

A. Anticipate and steal the thunder of the "pat" cross-examination questions.

B. Sample Questions that Cross Examiner asks:

Are you here today because you were served with a subpoena to appear in court?
Did you meet with Mr. Smith's attorney (opposing attorney) prior to testifying today? [witness' often lie – think it is wrong that spoke to opposing attorney before]
Did you discuss with Mr. Smith's attorney the subject matter of your direct testimony prior to testifying on direct examination?
Did you discuss with the plaintiff the subject matter of your direct testimony prior to testifying on direct examination?...
Isn't it true that the Plaintiff drove you to court this morning?
That was about a 45-minute trip, true?
At no time during that trip did you discuss this case or your testimony?

C. What should you ask on direct?

Are you here because you were served with a subpoena to appear in Court and testify?

Did you talk to me about your testimony prior to coming to court today?
When and where did that conversation take place?
Did I ask you certain questions about this case?
Did you answer them?
Did I suggest in any manner what your answers should be?

D. Expert – terms and amounts of payment; being paid for your time (not testimony) in Court today?

XV. Important Part of Testimony

A. Do something different – modulation of voice; walk toward witness, change pace of question.

B. Pause after a favorable answer (let it sink in).

C. Craft important foundational questions in advance with precision.

Lack of Emphasis on Key Point

Q. In normalizing the earnings of the business, what if anything did you ascertain regarding reported income?
A: It was understated year after year to the tune of approximately $150,000 and we added that back to income for our analysis.
Q: What comprised the understatement of income?
A: Personal expenses were written off to the business.

Emphasis on Key Point

Two (2) Questions above plus:
Q: Tell the court the categories of personal expenses that were charged to the defendant's business
A: Employees that were paid by the business but performed no work for the business, dining out that was not related to a business purpose, and entertainment expense enjoyed by Mr. and Mrs. Thomas that were similarly unrelated to the business.
Q: With respect to the employees you just mentioned, who are they?
A: The parties' daughter is in the payroll of the company for $30,000 per year. She is a student at the University of Arizona and my investigation revealed she does not work for the business. Additionally, the housekeeper employed by the parties in their home is on the payroll of the business for $35,000 per year and she similarly does not work for the business.
[Continue to provide specifics of each of the categories]

XVI. Unexpected Answer or Non-answer

A. When witness misses an important fact on direct, avoid constant entreaties and numerous ways to get it in. Try to come back to it and ask question in a different way.

XVII. Some Questions to Commit to Memory

A. Expert Opinion - Do you have an opinion with a reasonable degree of psychiatric (or other discipline) certainty as to whether…?

1. Although *a reasonable degree of certainty* is the preferred standard for expert testimony, it is not the only language sufficient to establish the foundation for such testimony where it is reasonably apparent that the expert signifies a probability supported by some rational basis. (*McKilligan v. McKilligan*, 156 AD2d 904, 550 NYS2d 121 [3d Dept. 1989])

2. Court not required to "certify expert," it is sufficient that the witness testify as to his or her qualifications and the Trial Judge instructs the jury as to the method of evaluating expert testimony. (*Peo. v. Grajales*, 294 AD2d 657, 742 NYS2d 687 [3d Dept. 2002]).

B. Photograph in Evidence – "Does this photograph fairly and accurately portray the (whatever the scene may be) on or about (Date)? Has the photograph been altered in any manner?

C. Net Worth Statement – If you were asked to testify to each and every entry in this statement of net worth, would your testimony conform to the entries on this statement?

1. Response: "Without conceding the truth or accuracy of the statement and subject to cross examination, I have no objection."

D. Conversation with Spouse

Did you have a conversation with your spouse regarding this matter? *Where did the conversation take place?* *When did the conversation take place?* *Tell us in words or substance what you said to her and what she said to you during this conversation?*

XVIII. Calling Adverse Party as Witness on Direct Case

A. Strategy – when to call

1. Bombshell testimony
2. Adverse party unprepared

XIX. Corroboration

Seek opportunities to connect the similarities of your witness' testimony with a previous witness in order to corroborate facts.

XX. Presenting Financial Testimony - Voluminous Record Rule

A. Exception to Best Evidence Rule

B. Allows the use of summaries where the originals are so numerous so they cannot reasonably be examined in court.

C. Requirements

1. Voluminous records.

2. Originals must be admissible for the summaries based on the originals to be admissible.

3. Summaries may not include information not contained in or computed from the originals.

4. Originals or duplicates of voluminous records must be made available to the other side for examination or copying (*Ed Guth Realty, Inc. v. Gingold*, 34 NY2d 440, 358 NYS2d 367 [1974]).

D. Examples

1. Computer printouts were admissible under the "voluminous writing" exception to the best evidence rule. *(Ed Guth Realty, Inc*. v. *Gingold*, 34 NY2d 440, 358 NYS2d 367 [1974]).

2. Summaries or balances of accounts may be produced to prove aggregate profits or receipts without the need to produce those documents which set forth the underlying dates. Business summaries have been deemed to be independent from the writings or documents upon which they are drawn. *R & I Electronics, Inc. v. Neuman*, 81 AD2d 832, 438 NYS2d 832 (2d Dept., 1981).

3. Error to refuse to permit use of charts which summarized accountant's voluminous work-papers where the latter were in evidence. (*Herbert H. Post & Co*. v. *Bitterman*, 219 AD2d 427, 649 NYS2d 21 (2d Dept., [1996]).

E. Interplay with Business Record Rule - *Peo. v. Weinberg*, 183 AD2d 932, 586 NSY2d 132 (2d Dept. 1992).

XXI. Experts

A. If feel your expert is superior, consider asking judge to take experts seriatim.

1. In non-jury case, latitude in taking witnesses out of turn.

B. View and present your expert not as a hired gun, but as a valuable teacher.

C. Dealing with Qualifications.

D. Language – explain in lay terms.

E. Degree of Certainty – "reasonable degree of [medical] certainty" or other words which convey the equivalent assurance that the opinion was not based on either supposition or speculation *Matott v. Ward*, 48 NY2d 455 (1979).

F. Avoid and chastise the "too comfortable" expert

1. Sits back, cavalier answers, attempt at humor.

G. A dose of humility

XXII. Exclusion of Evidence – Offer of Proof

A. The other side of the objection coin. Just as an objection preserves error in admitting evidence for review, an offer of proof preserves error in excluding evidence.

B. Protection of Record on Appeal

1. Offers of proof create a solid record for appellate review of the evidentiary exclusion *see Devito v. Katsch*, 157 AD2d 413, 556 NYS 2d 649 (2nd Dept. 1990).

2. "It is a cardinal and well settled principle that offers of proof must be made clearly and unambiguously" (*People v. Williams,* 187 N.Y.S.2d 750, 159 N.E.2d 549). "Where there is a bona fide objection to the offer of certain evidence, the proponent of such evidence must take advantage of the opportunity to make an offer of proof in order to demonstrate the relevance of the disputed evidence." (*People v Billups*, 132 AD2d 612, 518 NYS2d 9 (2d Dept. 1987).

3. Proponents of excluded evidence are in a weak position to later argue on appeal the value of the excluded evidence if fail to make an offer of proof.

C. Attempt to convince trial court to change its ruling**.** You are giving the court additional information in an effort to persuade court to change its mind.

D. Shorten Trial

1. *Porter v. Porter*, NYLJ, 12/12/2001, p. 22 col.2 (S.Ct., Richmond Co., Sunshine, J.) "Offer of proof" is not a term of art but it's generally accepted meaning ... is to summarize the substance or content of the evidence." *People v. Williams,* 81 NY2d 303, 314, 598 NYS2d 167 (1993) (offer of proof requirement of CPL 60.42[5]). Accepting offers of proof are "a busy court's attempt to keep the respective parties focused upon a succinct presentation of evidence relevant to the issues to be decided." *Douglas v. Douglas*, 281 AD2d 709, 722 NYS2d 87 (3rd Dept. 2001)."

2. "…while the court may not deprive a party of the right to inquire into matters "directly relevant to the principal issues of the case against him"... it may, in the proper exercise of discretion, restrict inquiry into collateral matters …or prohibit unnecessarily repetitive examination…" *Feldsberg v. Nitschke*, 49 NY2d 636, 427 NYS2d 751 (1980).

E. Procedure

1. Ask permission to make an offer of proof.
    a. Witness removed from courtroom.
2. State what the witness would have testified to if the objection was not sustained.
3. Explain the purpose and relevancy of the proposed testimony and why the evidence is admissible.

XXIII. Using Deposition Testimony to Prove Facts

A. CPLR 3117

1. Transcripts of non-party – contradict or impeach.
2. Transcript of party – can be used for <u>any</u> purpose – means to contradict or impeach or as evidence in chief.

B. CPLR 3117 – General

1. CPLR 3117(a)(1) - All or part of a deposition may be used by any party to contradict or impeach the testimony of the deponent as a witness.

2. CPLR 3117(a)(2) - All or part of a deposition of a party may be used for any purpose (including evidence in chief of the facts in the deposition testimony) by any party having an adverse interest to the deponent.

3. Trial judge has the discretion to determine when the deposition may be read.

4. CPLR 3117(A)(3) – Unavailability Situations

a. Deposition of any person (including own party) may be used by any party for any purpose if:

b. Witness is dead;

c. Witness is at a greater distance than 100 miles from the place of trial or is out of the state (unless collusively out of state);

d. Witness is unable to attend or testify because of age, sickness, infirmity or imprisonment;

e. Party offering the deposition has been unable to procure the attendance of the witness by diligent efforts; or

f. On motion or notice, the use is justified due to special circumstances in the interests of justice.

C. Reading Only Part of a Deposition Transcript

1. If a party reads only part of the deposition testimony, the other party may read in other parts that are of importance to them and which reflect on the matter read in by the first party.

2. The court has broad discretion over controlling this procedure. (*Reape v. City of New York*, 228 AD2d 659, 645 NYS2d 499 [2d Dept. 1996]).

3. *See Villa v. Vetuskey*, 50 AD2d 1093, 376 NYS2d 359 (4th Dept. 1975) – a party seeking to cross-read his own deposition should await his own case to do so and not ordinarily be permitted to do it on the heels of adversary's reading of his deposition in the middle of the adversary's case.

4. CPLR 3117(b) thus permits a party to read in relevant portions of his own deposition only after an adverse party has made use of it.

5. The failure to raise a substantial evidentiary objection to a question at a deposition session is not a waiver of the objection. (CPLR 3115(a),(d)).

D. Inconsistent Deposition Testimony of a Party

1. A party is not bound by the contents of his deposition testimony and may introduce evidence at trial inconsistent with such testimony.

2. Converse is not permitted, i.e., a party may not use his own deposition testimony to impeach his trial testimony. (*See Mravlja v. Hoke*, 22 AD2d 848, 254 NYS2d 162 [3d Dept. 1964]).

E. Use of Party's Deposition

1. The deposition of a party may be used for any purpose by adverse party. CPLR 3117(a)(2).

2. If only part of a deposition is read at trial by a party, the other party may read any other part of the deposition which fairness requires ought to be considered in connection with the part which was read. CPLR 3117(b).

3. A party does not make the adverse party his/her own witness by reading the adverse party's deposition, or part thereof, at trial. CPLR 3117(d); *Carr v. U.S. Mattress Corp.*, 166 AD2d 172, 564 NYS2d 67 (1st Dept., 1990).

a. *See Yeargans*, 24 AD2d 280, 265 NYS2d 562 (1st Dept. 1965) "[i]t was also prejudicial error to exclude the motor vehicle report offered by the defendant when the report tended to contradict the version of the accident given by the defendant in a deposition before trial. CPLR 3117(d) specifically provides "at the trial, any party may rebut any relevant evidence contained in a deposition, whether introduced by him or by any other party." It may be noted that the deposition was first used by the plaintiff in his case in chief and was not used to contradict or impeach the defendant deponent who had not yet testified. (*See* CPLR 3117(d))."

b. Not error in refusing to allow introduction of defendant's deposition testimony at trial as evidence in chief as defendant, by voluntarily leaving the state and refusing to return for trial, procured her own absence and thus failed to satisfy CPLR 3117(a)(3)(ii). *Dailey v. Keith*, 1 NY3d 586, 774 NYS2d 105 (2004).

4. Deposition Corrections

a. Deposition corrections submitted in conformity with the requirements of CPLR 3116(a) "could not properly be considered" where the witness "failed to offer an adequate reason for materially altering the substance of his deposition testimony" *Ashford v. Tannenhauser*, 108 AD3d 7365 (2d Dept. 2013*).* In addition, an affidavit contradicting deposition testimony "appear[s] to raise the feigned issues of fact to avoid the consequences of the prior testimony and, thus, w[as] insufficient to defeat summary judgment" *Kadisch v. Grumpy Jack's Inc.*, 122 AD3d 788 (2d Dept. 2013).

XXV. Proving Facts by Opinion Testimony of Lay Witnesses

A. A lay witness must confine his testimony to a report of the facts, and may testify in the form of inferences or opinions only when from the nature of the subject matter no better or more specific evidence can be obtained.

1. Lay witnesses usually restricted to relating what they perceived, e.g. saw, heard, touched, smelled, tasted.

2. By contrast, a witness qualified as an expert with respect to a particular issue is permitted to testify as to his or her opinion. *Morehouse v. Mathews*, 2 NY 514, 515-516 (1849).

3. "[F]or at least the last century, lay persons have been permitted to give opinion evidence only when the subject matter of the testimony was such that it would be impossible to accurately describe the facts without stating an opinion or impression (*see* Richardson, Evidence §363, 366 [10th Ed, Prince]; Fisch, New York Evidence §361 [2nd Ed])." *Kravitz v. Long Island Jewish-Hillside Medical Ctr*., 113 AD2d 577, 497 NYS2d 51 (2d Dept. 1985).

B. Error, albeit harmless on facts of case, to admit into evidence a 911 tape on which one of the witnesses could be heard voicing her opinion that the Defendant drove purposely into the victim. *People v. Haynes*, 36 AD3d 562, 833 NYS2d 193 (2d Dept. 2007).

C. Lower court properly excluded testimony by defendant's wife as to effects of Prozac on defendant. *People v. Gatewood*, 91 NY2d 905, 668 NYS2d 1000 (1998).

D. Disability; Medical Condition

1. Error to permit plaintiff to testify as to the nature, extent, and effect of his injuries, as such matters require support from expert medical witness. *Razzaque v. Krakow Taxi, Inc*., 238 AD2d 161, 656 NYS2d 208 (1st Dept. 1997).

2. Cf. "Considering all of the evidence..., including the testimony of the plaintiff concerning her disability, we conclude that ...maintenance should continue for a period of 10 rather than 6 years. *Rindos v. Rindos*, 264 AD2d 722, 694 NYS2d 735 (2d Dept. 1999).

3. Individual seeking spousal maintenance is entitled to submit general testimony regarding a medical condition, where the effect of that condition on the person's ability to work is readily apparent without the necessity of expert testimony. A decision of the Social Security Administration may serve as some evidence of a disability, but it is not prima facie evidence thereof. *Knope v. Knope*, 103 AD3d 1256, 959 NYS2d 784 (4th Dept. 2013).

E. Identification

1. Lay witness not permitted to testify that the substance was marijuana. *People v. Kenny*, 30 NY2d 154, 331 NYS2d 392 (1972).

F. Emotional state of people

1. *Pearce v. Stace*, 207 NY 506 (1913); *see Falkides*, 40 AD2d 1074, 339 NYS2d 235 (4th Dept. 1972) (while a layman cannot testify that a person is of unsound mind, irrational or emotionally disturbed, he can describe the acts of a person and state whether those acts impressed him as being irrational); *see also Gomboy v. Mitchell*, 57 AD2d 916, 395 NYS2d 55 [2d Dept. 1977]).

2. Lay witnesses cannot properly give an opinion as to the mental capacity of an individual; they are free to "state the impressions which the acts and declarations of the individual produced upon their minds at the time, and as to whether they were rational or irrational." *Mayr v. Alvarez*, 130 AD3d 1199, 1201, 14 N.S.3d 530 (3d Dept. 2015).

G. Estimated speed of an automobile

1. *People v. Heyser*, 2 NY2d 390, 161 NYS2d 36 [1957]; *Guthrie v. Overmyer*, 19 AD3d 169, 797 NYS2d 203 [4th Dept. 2005]).

H. Whether a person appeared to be intoxicated, feeble or ill.

1. Lay witness may testify that person appeared intoxicated or sober based upon observation and experience. *People v. Leonard S.*, 8 NY2d 60, 201 NYS2d 509 (1960).

2. "A lay witness is competent to testify that a person appears to be intoxicated when such testimony is based on personal observation and consists of a description of the person's conduct and speech (*see Ryan v Big Z Corp*., 210 AD2d 649, 651);" (*Rivera v. City of New York*, 253 AD2d 597, 677 NYS2d 537 [1st Dept. 1998]).

I. Handwriting

1. So long as foundation established that witness is familiar with handwriting of person who purportedly wrote the exhibit in question. *People v. Corey*, 148 NY 476 (1896).

2. The familiarity cannot be obtained for the purpose of litigation. *Peo. v. Arroyo*, 273 AD2d 85, 709 NYS2d 71 (1st Dept. 2000).

J. Valuation

1. "New York courts ... have permitted qualified lay witnesses to present their opinions as to the value of property ... before and after the act complained of" (Fisch, New York Evidence § 372, at 255 [2d ed]). While a lay witness testifying as to value must have some acquaintance with the particular property at issue, as well as knowledge of its market value, that does not mean that he must therefore qualify as an expert (*see* Fisch, New York Evidence § 372, at 256 [2d ed]; 58 NY Jur 2d, Evidence and Witnesses, §§626, 693, at 259-260, 343-344). Therefore, plaintiff may be able to prove damages through the use of lay opinion testimony provided such witnesses are found competent to testify.

2. Because property valuation is not strictly a subject for expert testimony, opinion testimony by a lay witness is competent to establish the value of the property if the witness is acquainted with the value of similar property. *Peo. v. Sheehy,* 274 AD2d 844, 711 NYS2d 856 (3d Dept. 2000).

K. Owner of Property

1. Additionally, it has been recognized that the owner of property can testify as to its value regardless of any showing of special knowledge as to the property's value (*see* Fisch, New York Evidence § 372, at 89 [2d ed, 1988-1989 Supp]; 58 NY Jur 2d, Evidence and Witnesses, §705, at 355). (*Tulin v. Bostic*, 152 AD2d 887, 544 NYS2d 88 (3d Dept. 1989)); *Levine v. Levine*, 37 AD3d 553, 830 NYS2d 250 (2d Dept. 2007) (Supreme Court properly credited defendant husband's value with regard to certain items because he was familiar with those items and plaintiff wife could not refute his testimony).

2. "On questions of value, a witness must often be permitted to testify to an opinion as to value, but the witness must be shown to be competent to speak upon the subject. He must have dealt in, or have some knowledge of the article concerning which he speaks..." *Teerpenning v. Corn Exchange Ins. Co.*, 43 NY 279, 282 (1871).

3. The general rule requiring that a proper foundation be laid to show the witness has knowledge upon a subject before the witness can testify as to the market value does not apply where the witness is the owner, and as the owner of property is presumed to be familiar with its value by reason of inquiries, comparisons, purchases and sales; owner's testimony regarding the purchase price of the property may be probative on the issue of value so long as the property is of the sort not subject to prompt depreciation or obsolescence, e.g., jewelry. *Peo. v. Womble*, 111 AD2d 283, 489 NYS2d 521 (2d Dept. 1985).

L. Application to equitable distribution cases

1. "The Supreme Court properly credited the plaintiff's testimony as to the value of certain jewelry and tools, since he was familiar with the items, and the defendant did not challenge the testimony at trial..." *Cuozzo v. Cuozzo*, 2 AD3d 665, 768 NYS2d 636 (2d Dept. 2003); *see also Levine v. Levine*, 37 AD3d 553, 830 NYS2d 250 (2d Dept. 2007).

2. Valuation of marital residence based on plaintiff's testimony concerning her knowledge of the recent sale of a neighbor's house which was of similar design to the marital residence. *Del Vecchio v. Del Vecchio*, 131 AD2d 536, 516 NYS2d 700 (2d Dept. 1987).

XXIV. Attorney's Demeanor

A. Your cross-examination demeanor and your direct examination demeanor should be equally high-energy. Many lawyers are sleepwalking through the direct examination.

B. Wimbledon Effect on direct examination – trier of fact has his head swinging back and forth between the attorney and the witness.

C. The skillful advocate controls the examination. He is not the presenter of his pad of questions; he does not hold the pencil, checking off as he "covers" his questions or makes his points. The advocate uses questions to control the pace of the examination, determining the amounts of the information he wants from the witness on a particular topic, and avoiding boredom.

D. Review: to maintain control, leading without leading questions to monitor the subject matter, closed and open questions to regulate the amount of information released on the subject, and transition questions to glide smoothly from one subject to another.

E. Writing down questions

1. Do not write the question you're going to ask, but instead write out topics and facts you need.
    a. You are not asking the court to watch a play.
2. No examiner can ever write down the number of questions necessary to script all the questions to make the back-and-forth of the testimony into a smooth, flowing presentation, rather than a herky-jerky episodic implantation of points into the record. There are also always gaps to fill and no written questions fill that.
3. In truth, most of us write down questions not to remind us of what the witness will say; rather, we write the questions because we fear we will not have the words of art needed to elicit the information from the witness.

XXV. Sequence of Witnesses

A. One of the most difficult considerations in trial work.
1. One problem is that in the real world we don't always have the choice. We take a witness when the witness is available.

B. Initial Witness – set the theme.
1. The first went there should be one who helps you, but hurts the least. Rule of Primacy.
2. Never put a witness on first who is vulnerable on cross-examination as your whole case will lose credibility. Consider testimonial protection that one witness gives to the other.

C. When to call the "less than brilliant" client.

D. Witnesses on same theme seriatim – better flow.
1. Non-titled spouse's contribution

2. Declining health

E. As a general rule, the benefits of a witness's direct testimony should substantially outweigh the harm that could be done on cross-examination. Otherwise the witness should not be called.

F. Conventional theories

1. Chronology
2. The biggest slice of the case first
3. Key witnesses first and last – primacy and recency
4. The client should go on first or last.

XXVI. Common Mistakes

A. Failure to Listen to the Answer

1. Do not peer at notes for next question, and not listen to answer.
2. Listening to answer leads to next question - fallacy of script.
3. Look at the witness – communicating – eye contact.
    Noted pauses
    Flashes of anxiety
    Dryness of mouth
    Moistening of lips
    Hesitations; discomfort
    Uncalled for repetition of coached material
    Stammer and needless reference by the witness to counsel's name
4. Listen carefully to the words of the witness and the words of the question will automatically follow.
5. In short, notes should focus on answers.

B. Failure to Properly Introduce a Witness

1. Who is this witness? Is she a steady, reliable person, or a flake? Served in armed forces? Pillar of the community?

C. Failure to constantly evaluate the quality and sufficiency of the answer.

1. Vague phrases – numerous vacations, lots of cash, etc.
2. Break it down; quantify
3. Easier to do with short questions and answers

D. Failure to simplify the testimony to the trier of fact.

1. Legalese
    a. "Execute the agreement"
2. Psychobabble

E. Avoiding Exactitude – Giving the witness wiggle room.

1. Inexperienced lawyers tend to overprove and get too detailed. They strive for exactitudes and precisions and as a result the witness is a target when it comes to cross-examination.

2. A proper examination shows the witness has given sufficient detail taking into account the passage of time and one's memory. Words like "in substance" or "indicate" are friendly words for your witness.

F. Statements – "For the Record;" "Please note my objection."

1. Comment to judge – "for the record."

a. Euphemistic way of saying that the judge will find against me and really speaking to the court that sits in review.

b. Generally useless except when it is used to create repetition through speech by counsel.

2. After argument on counsel's objection, and adverse ruling, avoid stating "Please note my objection."

a. Not necessary – your objection protects the record.

G. Showing neutrality of a witness - a few simple questions at the beginning of the testimony.

Do you know the plaintiff? *Do you know the defendant?* *Do you have any financial interest in the outcome of this case?*

XXVII. Preparation of Witness

A. Prepare in themes, not a prepared script.

1. Witness should know the facts and understand the significance, testify in themes rather than in phrases, is aware of the order of the questioning, and able to defend the position he is taking is a properly prepared witness.

2. When preparing themes, it is not necessarily chronological order. Facts must be grouped together to make points, and this often requires moving widely time – separated events.

B. Prep witness that she met with opposing counsel and reviewed testimony prior to trial. Let the witness know it is standard procedure to meet with counsel and prepare to testify.

"Did we discuss the topics of our testimony?" *"Did I tell you what your answers should be?"*

C. Teaching Witness to defend on cross examination.

1. Teach witness to resist demands for "Yes" or "No" answer where not fitting.

a. Witness states in effect that she cannot answer with one word and be consistent with her oath.

2. Inform witness that has right to view a supporting document if applicable to the question.

3. Inform witness that it is okay to have a clearer recollection of an event at the time of trial than 6 or 12 months earlier when she gave a statement without the benefit of documents she subsequently reviewed.

4. Inform witness that can repudiate a prior inconsistent statement on the ground that she was nervous and anxious at the time.

XXVIII. Exhibits

A. Two basic purposes of exhibits:

1. To put information in the record.

2. To corroborate oral testimony so as to give the testimony greater weight in the direct examination and make cross-examination more difficult.

B. At times you should corroborate even unimportant details with exhibits to show the credibility of the witness. If the witness says she was in New Orleans on May 11, produce the canceled ticket, or the hotel bill.

C. To use exhibits effectively, there are two prerequisites:

1. Total understanding of how to lay a foundation for the exhibit; and

2. Exhibits and copies of the exhibits should be organized in the chronological order that you will use them so that pace is preserved.

a. Little worse than conducting an examination with a bunch of binders and legal pads and counsel expending time looking for exhibits in them.

D. Laying a foundation, or authenticating of exhibit, is simply showing that the exhibit is what its proponent claims it to be.

1. Example – tape-recorded conversation – all that is required is a participant or an over-hearer, be prepared to testify that she has listened to the recording and it is a fair and accurate recording of the conversation that she participated in or overheard.

Q: Now you told her she participated in the conference call with A and B on June 12?
A: Yes, that is true.
Q: I now show you what has been marked as Plaintiff's Exhibit "4". Have you listened to the conversation on that drive?
A: Yes.
Q: Is that a fair and accurate recording of the conversation which you yourself participated in on June 12?
A: Yes.
COUNSEL: I offer it in evidence.

2. Old-fashioned blowup - not only clarifies but gives you the advantage of repetition.

E. Lack of Emphasis on Key Points

XXIX. Use of Charts and Visual Aids

A. Advantages

1. Helps make the case understandable.
2. Helps organize the examination so the trier of fact can see where you are going.
3. Helps you control the witness so that the witness cannot evade your questions.
4. Physically interact with the chart.

B. Power Point presentations, white board, blown up charts, films, photos, spreadsheets

1. *People v. Williams*, 29 NY3d 84, 52 NYS3d 286 (2017).

a. There is no inherent problem with the use of a PowerPoint presentation as a visual aid in connection with closing arguments.

b. The PowerPoint materials must be limited to characterizations of facts that are "within the four corners of the evidence" and not allow jurors to draw conclusions which are not fairly inferable from the evidence.

c. If counsel is going to superimpose commentary to images of trial exhibits, the annotations must accurately represent the trial evidence.

2. *People v. Anderson*, 29 NY3d 69, 52 NYS3d 256 (2107).

a. PowerPoint slides depicting an already admitted photograph with captions accurately tracking prior testimony might reasonably be argued as relevant and fair commentary on the evidence.

C. Chart

1. Arrears
2. CSSA and Maintenance Guidelines
3. Timelines (Part of making your case understandable)
4. Cash flow at different levels of maintenance, child support, distributive award
5. Tax Impacting
6. Life Insurance Policies

D. Photos; Videos

1. Standard of
2. Custody Case – photos of activities with children
3. Day-in-life film
4. Abuse
5. Cash

E. Tape recorded conversations – have transcript prepared

F. Spreadsheets & summaries – Voluminous Record Rule

XXX. Free Narrative Questions v. Specific Questions

A. Free Narrative (Open Questions)

B.

1. Letting witness to generally recount what he saw and heard and give narrative testimony.

Describe what took place *What happened next?* *Tell us in your own words what transpired*

2. These questions turn the examination over to the witness. The witness can pour out as much or as little as he wishes. "What happened next?" invites the narrative.

3. When we use the narrative form of direct examination, we transfer the responsibility for argument of our case to the witness.

4. Where there are long narrative answers, the trier of fact's head is stuck in one place. There is no Wimbledon effect.

5. Really the opposite of the leading question.

a. Leading question gives the examiner control over the witness.

6. Narrative testimony gives the witness too much freedom to respond as a witness sees fit and creates a risk about testimony on inadmissible matters.

7. When to Use Free Narrative

a. A good witness will generally appear more honest and be more impressive when allowed to tell the story in his or her own way.

b. Effective often when you have a witness who was intelligent and has been well prepared.

c. Also has the advantage of giving the opposing side little advance notice of where the witness is going and making it difficult and sometimes impossible for opposing counsel to head off inappropriate testimony with a timely objection.

d. The use is discretionary with the trial court.

B. Specific Questions

1. Desirable to ensure the presentation of complicated testimony.

2. Good with a nervous witness and to prevent dull testimony.

3. The advocate uses questions to break up points in small digestible pieces so that the trier of fact does not choke on chunks of information.

4. The advocate uses questions to dwell on areas he wishes to dwell on and to obtain the repetition of significant portions of the testimony, often with illustrative aids.

XXXI. Direct Examination that Anticipates Cross Examination

A. Patent Weakness in Case

1. Not going to go away by avoiding it.
2. Come out front; steal the thunder from cross-examination.
3. Mention in Opening Statement.
4. If shocking, repeat so many times becomes almost mundane and humdrum.
5. Other attorney may look foolish if he or she tries to cover the same ground.

a. You also prevent a damaging cross-examination by being the first attorney to bring out bad information about a witness and thus you control how the testimony is presented.

B. Expert Witnesses

1. Terms and amounts of payment.
   a. Establish fees as being customary, ordinary and non-contingent.
   b. Try to have expert paid up to date when taking stand.
2. Being paid for your time, not testimony in court today.

XXXII. Confused or Nonresponsive Witness

A. Take onus off witness

1. Wrong: "You don't understand the question?"
2. Correct: "I am sorry, I worded that question poorly, allow me to rephrase it."

XXXIII. The 5 Minute Prima Facie Contempt Case

A. Court Order – Judicial Notice

B. Arrears – Voluminous Record Rule

C. Shifting of Burden – *Powers v Powers*, 86 NY2d 63 (1995).

D. No longer need to show, resort to less drastic remedies.

1. Such application [contempt] may also be made without any previous sequestration or direction to give security or any application for enforcement by any other means. 2016 Sess. Law News of N.Y. Ch. 365 (S. 5189) (McKinney's).

XXXIV. Use of Hearsay on Direct Examination

A. Try to prove as much of your case with admissible hearsay (hearsay exceptions) as possible as the evidence so adduced has the obvious advantage of not being subject to cross examination.

B. Examples
1. Business record rule – most common and most important
2. Present sense impression

3. Excited utterance
4. Past recollection recorded
5. State of mind – intent, reliance, etc
6. Physician can testify to patient's out-of-court statement if related to diagnosis or treatment
7. Admission – direct, vicarious
8. Declaration against interest
9. Dying declaration
10. Prior Inconsistent statement

XXXV. Outline for Direct Examination of a Business Appraiser

A. Qualification of Expert

B. Facts re: Retention:
- By whom?
- Retainer Agreement
- Terms of Compensation

C. Appraisal Assignment:
- Fair Market Value or some other standard of value
- Entity being appraised
- Appraisal Date

D. Documents Revised to Carry Out Appraisal Assignment:
- Tax Returns
- Financial Statements
- Books of Account
- Financing Applications
- Other Appraisals
- Restrictive Agreements
- Audit Reports by taxing authorities
- Depositions (both parties)
- Affidavits
- Trade Journals
- Internet Research

E. Other Steps Taken
- Interviews with principals, employees
- On-site inspection
- Independent research – Industry data, statistics, comparables

F. Explain Method(s) of Valuation
- Explain various methods – cost, income, market
- Revenue Ruling 59-60; 68-609
- Method Utilized and why
- Sanity Checks

G. Report Prepared
Go through methodologies
Go through calculations

H. Charts and Exhibits

I. Conclusion
Reasonable Degree of Certainty

J. Other Uses of Expert
Double Dipping – stream of income
Cash Flow charts
Tax effect of pension benefits, property distribution

XXXVI. Bases of Expert Opinion

A. General

1. Where an expert states his conclusion without reliance on any facts or data, his testimony should be given no probative force whatsoever (*Kaluga v. Korytowsky*, 269 AD2d 566, 704 NYS2d 507 [2d Dept. 2000]).

2. The opinion of an expert must be based on facts in the record or personally known to the witness. An expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion. *Interstate Cigar Co.* v. *Dynaire Corp.*, 176 AD2d 699, 574 NYS2d 789 (2d Dept. 1991).

3. An expert opinion "unencumbered by any trace of facts or data…should be given no probative force whatsoever," *Amatulli v. Delhi Constr. Corp.*, 77 NY2d 525, 533-534, 569 NYS2d 337 (1991).

B. Proper Basis – General

1. To be properly admitted, expert opinion evidence must generally be based upon facts either found in the record, personally known to the witness, derived from a "professionally reliable" source, or from a witness subject to cross-examination, *McAuliffe v. McAuliffe*, 70 AD3d 1129, 895 NYS2d 228 (3d Dept. 2010).

C. Proper Basis - Personal Knowledge

1. Facts personally known to the expert by virtue of observation or examination. *Hambsch v. New York City Transit Auth.*, 63 NY2d 723, 480 NYS2d 195 (1984); *Cassano* v. *Hagstrom*, 5 NY2d 643, 187 NYS2d 1(1959); *Peo. v. Keough*, 276 NY 141, 145 (1937); *Comizio v. Hale*, 165 AD2d 823, 824 (2d Dept. 1990).

2. "Nor do we find any error committed by the Family Court in permitting a pediatrician, who only saw the child professionally on one occasion, but saw the child socially on a regular basis, to express his expert professional opinion on the basis of those observations. There is nothing in the rules of evidence which would prevent a qualified expert from giving a

professional opinion on the basis of direct observations, no matter how they arose." *Matter of Faith Z.*, 92 AD2d 990, 461 NYS2d 488 (3d Dept. 1983).

3. In custody case, the testimony of the expert was admissible since the expert opinion was primarily based upon direct knowledge derived from psychiatric interviews of the parties and their children, alone and in combination. Although the expert's report and testimony may have incorporated inadmissible hearsay, the admissible evidence in the record was sufficient to support the trial court's conclusion. Although the court should have stricken the hearsay aspects of the expert's written report, admitting it did not constitute reversible error. *Lubit v. Lubit*, 65 AD3d 954, 885 NYS2d 492 (1st Dept. 2009).

D. Proper Basis - Facts in Evidence

1. Facts received in evidence prior to the time that the expert renders his or her opinion from the witness stand. *Hambsch* v. *New York City Transit Auth.*, *supra*; *Cassano* v. *Hagstrom, supra*; *Admiral Ins. V. Joy Contrsc.*, 119 NY3d 448, 948 NYS2d 862 (2012).

a. Although an expert may rely on facts within his or her personal knowledge which are not contained in record, expert must testify to those facts before opinion is rendered. *Mandel* v. *Geloso*, 206 AD2d 699, 614 NYS2d 645 (3d Dept. 1994).

2. *Jill S. v. Steven S.*, 43 AD3d 724, 842 NYS2d 401 (1st Dept. 2007) – Court properly precluded petitioner's expert witness as the proposed testimony was both irrelevant and not based on facts in evidence but rather hearsay (documents not admitted into evidence at the hearing).

3. If an opinion is given and cross-examination reveals it to be based on facts not in evidence, the opinion should be stricken (*Lopato* v. *Kinney Rent-A-Car*, 73 AD2d 565, 423 NYS2d 42 [1st Dept. 1979]).

4. How based on facts in record

a. Hypothetical Question

b. Expert reviews testimony and exhibits

c. Expert sits in during trial

XXXVII. Professionally Reliable Hearsay Exception

A. *Wagman v. Bradshaw*, 292 AD2d 84, 739 NYS2d 421 (2d Dept. 2002): "It is well settled that, to be admissible, opinion evidence must be based on one of the following: first, personal knowledge of the facts upon which the opinion rests; second, where the expert does not have personal knowledge of the facts upon which the opinion rests, the opinion may be based upon facts and material in evidence, real or testimonial; third, material not in evidence provided that the out-of-court material is derived from a witness subject to full cross-examination; and fourth, material not in evidence provided the out-of-court material is of the kind accepted in the profession as a basis in forming an opinion and the out-of-court material is accompanied by evidence establishing its reliability....The Court of Appeals has held that an expert witness may testify that he or she relied upon specific, inadmissible out-of-court material to formulate an opinion, provided (1) it is of a kind accepted in the profession as reliable as a basis in forming a professional opinion, and (2) there is evidence presented establishing the reliability of the out-of-court material referred to by the witness (*see* Hambsch v New York City Tr. Auth., 63 NY2d 723)....In addition to our holding that the "professional reliability" exception does not permit an expert witness to offer opinion testimony based upon out-of-court material, for the truth of the

matter asserted in the out-of-court material, we also take this opportunity to reiterate the requirement that, "in order to qualify for the 'professional reliability' exception, there must be evidence establishing the reliability of the out-of-court material" (Hambsch v New York City Tr. Auth., supra at 726). Indeed, "reliability of the material is the touchstone; once reliability is established, the medical expert may testify about it even though it would otherwise be considered inadmissible hearsay" (*Borden v Brady*, 92 AD2d 983, 984 [Yesawich, J., concurring])."

B. "The court properly permitted defendant's vocational rehabilitation expert to give opinion testimony based upon a labor market survey he conducted by telephone with prospective employers. The general rule that opinion evidence " 'must be based on facts in the record or personally known to the witness' " (Hambsch v New York City Tr. Auth., 63 NY2d 723, 725, quoting Cassano v Hagstrom, 5 NY2d 643, 646, rearg denied 6 NY2d 882) is subject to an exception where, as here, the opinion is based upon data "of a kind accepted in the profession as reliable in forming a professional opinion" (People v Sugden, 35 NY2d 453, 460, 363 NYS2d 923 [1974]; see, Serra v City of New York, 215 AD2d 643, 644, 627 NYS2d 699 [2d Dept. 1995]; Nandy v Albany Med. Ctr. Hosp., 155 AD2d 833, 834, 548 NYS2d 98 [3d Dept. 1989]). The contention of plaintiffs that the market survey is not the kind of evidence considered by the profession to be reliable is belied by the fact that their own vocational rehabilitation expert based his opinions upon similar hearsay information." *Greene v. Xerox Corp.*, 244 AD2d 877, 665 NYS2d 137 (4th Dept. 1997).

C. In determining loss of future income, economist could rely on letter from plaintiff's employer describing plaintiff's potential for advancement where economist testified that the letter was the type of document relied upon in the field of economics. *Tassone v. Mid-Valley Oil Co., Inc.*, 5 AD3d 931, 773 NYS2d 744 (3d Dept. 2004).

D. Deemed Reliable in the Profession

1. The proponent's burden of showing acceptance in the profession may be met through the testimony of a qualified expert, whether or not that expert is the same one who seeks to reply on the out-of-court material. (*Peo. v. Goldstein*, 6 NY3d 119, 810 NYS2d 100 [2005]).

2. When determining what materials may serve as the basis for an expert's opinion, the court will not automatically accept any given expert's opinion with respect to whether any particular material is relied upon in the profession, and if such material appears inherently unreliable, or there are conflicting opinions from other experts as to what material is properly relied upon, the court may reject an expert's testimony in this regard; however, the expert's view of what is properly relied upon by experts in his profession is highly relevant, and it may, in a proper case, be deemed determinative. *State v. J.R.C.*, 47 M3d 969, 7 NYS3d 866 (Supreme Court, Livingston Co., 2015, Wiggins, J.)

3. *Omar B. v. Diane S.*, 175 AD2d 834, 573 NYS2d 301 (2d Dept. 1991) (It was proper to permit the court-appointed psychiatrist to express his opinion based in part on medical records that were not admitted into evidence at the hearing to terminate parental rights of natural mother, but were clearly the kind of materials accepted in the profession as reliable in forming an opinion); *see also Holshek* v. *State*, 122 AD2d 777, 505 NYS2d 664 (2d Dept. 1986); *Moors* v. *Hall*, 143 AD2d 336, 532 NYS2d 412 (2d Dept. 1988) (plaintiff's expert, to prove value of household services, could rely upon official publications of statistics and other data gathered

where such extraneous material is of a kind accepted in the profession as reliable in forming a professional opinion).

4. *Peo.* v. *Sugden*, 35 NY2d 453, 363 NYS2d 923 (1974) -- Two instances where an expert may use inadmissible evidence as the basis for his testimony are when the evidence is of a type "accepted in the profession as reliable in forming a professional opinion," regardless of whether otherwise admissible, or when the declarant testifies at trial.

5. *Cristiano v. York Hunter Services, Inc.*, NYLJ, Sept. 27, 2010, p.29 col.1, S.Ct., Kings Co., Kramer, J. – Plaintiff directed to appear for a FCE test (Functional Capacity Test), often used by physicians when making determinations on a patient's ability to return to work as an FCE report has been deemed to be the type of out of court materials accepted as reliable by experts in the medical profession and thus do not constitute impermissible hearsay.

6. Supervising pharmacist's testimony concerning chemical composition of pills proper where relied in part on package inserts and pharmaceutical reference manuals not in evidence, as reliance on such information was customary among pharmacists. *Peo. v. Czarnowski*, 268 AD2d 701, 702 NYS2d 398 (3d Dept. 2000).

E. Requirement of Reliability

1. Preliminary showing - "In order to qualify for the "professional reliability" exception, there must be evidence establishing the reliability of the out-of-court material" (*Hambsch v New York City Tr. Auth*., 63 NY2d 723).

a. The reliability of information is primarily a question for the trial court, rather than the expert, in determining whether to apply the professional reliability exception to the rule that opinion evidence must be based on facts in the record or personally known to the expert witness. *State v. William, F.*, 44 Misc.3d 338, 985 NYS2d 862 (Sup. Ct., NY Co., 2014, Conviser, J.).

2. *Velez v. Svehla*, 229 AD2d 528, 645 NYS2d 842 (2d Dept. 1996): ...if an expert relies on out-of-court material, "there must be evidence establishing the reliability of the out-of-court material" (*Hambsch*, 63 NY2d at 726; *People v. Sugden*, 35 NY2d 453, 460-461). In the instant case, the basis for the statistical testimony provided by the defendant's expert was not revealed. Therefore, there was no indication that the testimony was reliable and not mere speculation. Without an adequate foundation, that testimony was inadmissible (*see Vetere v Garcia*, 211 AD2d 631). The proponent's burden of showing acceptance in the profession may be met through the testimony of a qualified expert, whether or not that expert is the same one who seeks to reply on the out-of-court material. (*Peo. v. Goldstein*, 6 NY3d 119, 810 NYS2d 100 [2005]).

3. Written report prepared by a nontestifying doctor interpreting a biopsy of patient's prostate should not have been introduced into evidence in action to recover damages for medical malpractice and wrongful death, and plaintiff's experts should not have been allowed to base their opinions, at least in part, upon contents of the report, absent proof that report was reliable. A written report prepared by a nontestifying doctor interpreting the results of a medical test is not admissible into evidence. *D'Andraia v. Pesce*, 103 AD3d 770, 960 NYS2d 154 (2d Dept. 2013).

F. Declarant Testifies

1. When the evidence does not qualify "under the professional test", the expert may rely upon the evidence, but the declarant must testify and be subject to cross-examination.

(*Hambsch v. New York City Tr. Auth*., 63 NY2d 72363 NY2d at 723, *Peo.* v. *Stone*, 35 NY2d 69, 76, 358 NYS2d 737 [1974]).

2. An expert may base his opinion on an out-of-court written statement of a witness who testified at trial. *Flamio* v. *State*, 132 AD2d 594, 517 NYS2d 756 (2d Dept. 1987).

XXXVIII. Collateral Sources

A. *Straus v. Strauss*, 136 AD3d 419, 24 NYS3d 76 (1st Dept. 2016)

1. It is permissible for the forensic report to not rely to a significant extent on hearsay statements where the primary source of the report's conclusions are the evaluator's firsthand interviews with the parties. Moreover, where the proponent of the report intends to call witnesses at a future custody hearing, anyone to whom the evaluator spoke, thereby rendering the declarants subject to cross-examination, it renders admissible any opinion evidence based on their statements. "To the extent that any hearsay declarants are not cross-examined, those portions of the report containing inadmissible hearsay should be stricken or not relied upon." (Emphasis added).

B. In visitation modification proceeding, Family Court erred in permitting a "licensed mental health counselor" to offer an opinion that was based in part upon his interviews with collateral sources where there was no evidence that the out-of-court material was of a kind accepted in the profession as reliable in forming a professional opinion, nor was such material from a witness subject to full cross-examination on the trial. *Murphy v. Woods*, 63 AD3d 1526, 879 NYS2d 648 (4th Dept. 2009).

XXXIX. Tips for Mental Health Professional on Direct Examination

A. Stay within confines of order of referral

B. Put studies and research in report

1. *Frey* case
2. *Straus* case
    a. Lack of citations on cross examination

C. MMPI-2 Computer scoring and interpretation

1. Give attribution to narrative

D. Cross Examination

1. Admit obvious error
2. Steal thunder of cross examination
3. Trying to justify the unjustifiable digs deeper hole

E. Use of collaterals

F. Lay terms

G. Stipulation not to call as witness
1. Issue: court's role as *parens patriae.*

H. *Tarasoff* case (529 P.2d 553 [1974]).

1. Inability to predict dangerous behavior.
2. Duty to warn changed to duty to report.

XL. Ending of Direct Examination

A. Strong Finish – Principle of Recency

B. Emotional where fitting:

Q: Ms. Thompson, have you been subpoenaed to testify in this case?
A: No.
Q: Has anyone, including my client or myself or anyone from my firm pressured you to testify?
A: *No. not at all.*
Q: Do you work full-time?
A: Yes.
Q: Are you taking time off from work to be here today and testify?
A: Yes.
Q: Are you being compensated for taking this day off?
A: No.
Q: Then, Ms. Thompson, can you tell us why you are here?
A: [Strong soliloquy about how she believes in your client's cause.]

5

CROSS EXAMINATION

"To ask the cross examiner how he succeeds is to ask the artist how do you mix paints." Emory Buckner

I. Introduction

A. Who can cross examine

1. All of us can become good cross examiners.
2. A chosen few, by dint of innate ability, can be great.

B. Cross Examination v. Direct Examination

1. Star of the Show
2. Types of Questions
3. Voice Tone and Inflection; where to stand

C. Dangerous Territory

1. It is a generally accepted principle that testimony on cross examination, when it is hurtful to the cross-examiner's case, will make a stronger impression that what was said on direct.

2. Lack of Focus – Don't know what really want to get out of cross examination. All over the place.

3. If just amplifying direct, sit down.

D. Control

1. The cardinal concept of cross examination is that you take control of the witness and lead the witness to where you want the witness to go.
2. Tools to Keep Control
    a. Leading questions
    b. Speed – It is infinitely more difficult to fabricate a story when the cross examiner affords one little or no time for the witness to do so. Liars need time to reflect and

formulate their prevarication.

c. Exception to speed – damaging or clearly incredible answer.

3. One fact per question.
4. No compound questions.
5. No questions calling for explanations.

E. Aspects of Control

1. Control *topics* of cross examination.
2. Control *length* of cross examination.
3. Control *sequence* of cross examination.

II. Direct v. Collateral Cross

A. Pure (Direct) Cross – attacking substantive direct testimony and credibility of witness.

B. Collateral Cross – not making an attack on the substance of testimony, but rather showing that for extrinsic reasons, testimony is not to be relied upon.

COMMANDMENTS AND RULES

I. Be Brief

A. *"Never cross examine any more than is absolutely necessary. If you don't break your witness, he breaks you."* Rufus Choate

B. "In trial, less may be more, and more may be a bore, or worse." James McComas, *Dynamic Cross Examination, p. 342 (2011).*

C. Not necessary or desirable to cover all matters brought out on direct.

D. Think commando raid **–** go in, get what you need, get out.

E. Low ceiling for oral testimony

F. Framing questions – taglines

1. Helps avoiding explanation by witness
2. Avoid excessive use
3. If use, vary **–** Correct? True? Fair Statement?
4. Declarative statement as question

G. No neutral questions.

II. Short Questions, Plain Words

A. Two rules:

1. Leading questions
2. One fact/question – leaves little or no wiggle room for the answer, makes impeachment with prior inconsistent statement easier, and eliminates the ability of witness to argue.

B. Plain words

1. Wrong: "So the basis of your opinion is specious and spurious?"
2. Alternative: "So there is no factual basis for your opinion?"

C. Rapid questioning

D. Transitions – without repeating damaging direct

III. Ask Only Leading Questions

A. Greatest weapon in arsenal of cross examination

B. Control

C. Three types of questions

1. Open ended – tell us, how, what, explain
   a. Ask for a narrative
   b. Used on direct
2. Leading questions
3. Declarative questions (type of leading question)

D. When to jettison the leading question

1. Not for neophytes.
2. When sure you know the answer; can deal with unexpected answer.
   a. Dramatic effect is increased by the words spewing from the mouth of the witness rather than "Yes" or "No" after declarative question.
3. Still frame question without opportunity for witness to expound.

Example

Doctor, how many times have you testified as an expert?
Doctor, how much money did you make in the last year testifying as an expert witness?
Doctor, how long has it been since you treated a patient?
Doctor, how many times did you sit for the exams that lead to board certification in adult psychiatry?
How many times did you pass the exams?

IV. Never Ask a Questions to which you do not know the Answer

A. Cross examination – not a discovery tool.

B. Not a fishing expedition.

1. "Fishing expeditions in a courtroom rarely land a great catch. You're more likely to experience a perfect storm."

C. In a prepared cross examination, not looking for information, looking for confirmation (or facts you state in your leading declarative question).

D. Exception – nothing to lose – dart board approach.

V. Listen to Answer and Observe Witness

A. Rule often breached

1. See violated more than any other rule.
2. Often a function of being over scripted.
3. Lawyer often so wrapped up in what questions to ask and how the lawyer appears that does not listen carefully to the answer which can lead the examiner to something better than initially expected.

B. Rule applies equally to direct examination

1. L.P. Stryker – the trial lawyer should "rivet his eyes on the quarry during direct examination; do not, as most of us do, sit there, eyes down, making notes."

C. Listening – not only to words.
1. Eye contact
2. Observe manner of answer
3. Body language
4. Leans back
5. Avoids eye contact
6. Tone of voice
7. Different from other answers

D. Most witnesses are trying to guess what the ultimate point of your questions is and how to avoid the outcome. In such a state, the witness will often inflate the truth or try to distract you from a weakness in his testimony. Only by constantly looking at the witness can you perceive when this occurs.

VI. Do Not Quarrel with the Witness

A. "*Cross examination is not the art of examining crossly*." – Horace Rumpole (John

Mortimer's *Rumpole of the Bailey*).

B. Passion is effective advocacy; anger rarely is.

1. Your anger is a sign that you have lost control.
2. If fight with witness, appears you are bullying witness.

C. Do not overlap with the witness

1. Appears you are trying to cut off the witness.
2. Studies have shown that the witness is then perceived as having greater control than the lawyer ((Duke University), William O'Barr, *Linguistic Evidence*).

D. You cause and encourage arguments with witness when ask questions such as:

"Wasn't it unusual for you…"
"Would it not have been more prudent of you…"

E. Conversely, never say thank you.

F. The Intractable Witness

1. Wants to tell you his story regardless of your question; resists directly answering your question.
2. What not to do:
    a. At onset – just answer "Yes" or "No"
    b. Ask court for assistance – truly a last resort
3. What to do:
    a. Maintain steady eye contact
    b. Say something like:

Sir, my question is slightly different from the one you have chosen to answer. *Sorry I confused you, let me try again.* *Can you try to answer my question?* *You told us you came here to tell the truth. If the simple truth is "Yes", please just tell us "Yes".* *So, the answer is "Yes?"* *I know you wanted to say that sir, but my question is...*

    c. If not successful: Repeat question, starting with witness' name, and repeat question very slowly.
    d. Reverse repetition

Q: Did you speak to the defendant again?
A: It was not necessary.
Q: My question is slightly different from the one you have chosen to answer. Did you speak to the defendant again?
A: I told you it was not necessary.
Q: Are you telling this Court that you had a second conversation with the defendant?
A: No.
Q: You never spoke to him again?
A: Yes.

4. If witness' answer is patently absurd, let it stand.

VII. Do Not Permit the Witness to Explain

A. If short, leading, one fact/question – no opportunity.

B. Avoid asking "How," "Why." "What caused…", "For what reason…", etc.

C. The "May I explain?" Witness

1. How respond

a. Sir, when I am finished, your attorney may ask you to explain; right now, please answer my question. (Repeat, state his name; slowly)

b. If no answer, "may the witness be directed to answer Yes or No?"

VIII. Don't have the Witness Repeat Direct

A. Sad fact of cross – Too often, cross examination buttresses, supplements, or reinforces direct than impeaches the witness.

B. No witness lies about every fact upon which they testify; facts which can't be impeached should not be repeated.

IX. Avoid the One Question Too Many

A. Observe the single death rule.

B. Score your point; stop that point; go on to another point that is important.

C. Abe Lincoln, Claus Von Bulow.

D. Example: Father claims he is the primary caretaker of child.

Q: *Your son spends the night at his mother's home?*
A: Yes.
Q: She gets him up in the morning?
A: Yes.
Q: She fixes his breakfast?
A: Yes.
Q: She bathes him?
A: Yes.
Q: She dresses him?
A: Yes.
Q: She has him ready for you when you pick him up at 10:00 am?
A: Yes
Q: You bring him home at 4:00 pm?
A: Yes
Q: She feeds him dinner?
A: Yes.
Q: She spends the evening with him?
A: Yes.
Q: She gets him ready for bed?
A: Yes.
Q: She puts him to bed?
A: Yes.
Q: If he wakes up in the night, she takes care of him?
A: Yes.
Q: If he is sick, she looks after him?
A: Yes.
Then, Stop. Do not ask: "So you still claim that you are the primary custodial parent?"

X. Prior Inconsistent Statement – Direct Testimony contradicts Deposition Testimony

A. Contradiction must be on something significant. Avoid nitpicking tiny inconsistencies that bore and irritate everyone.

1. "*The only completely consistent people are the dead."* Aldous Huxley
2. If the contradiction doesn't concern a fact intrinsically important to the case outcome, then the only reason to bring out the inconsistency is part of a witness-destroying cross. At the outset of the cross examination, you must determine if you have enough important material to render this witness so self-contradictory as to be unworthy of belief.

B. If you want the initial statement to be the operative statement, give the witness a graceful way to save face and adopt the earlier version.

Q: You had just forgotten what you said before?
Q: When I reminded you about it just now, that refreshed your memory?
Q: You just misspoke earlier on direct examination?

C. Where witness concedes prior statement was untrue, don't let witness off the hook. Ask a series of questions like:

Q: So, what you said before was untrue?
Q: You knew it was untrue when you said it?
Q: It wasn't a mistake?
Q: It was a choice to tell a lie?
Q: The oath that you took to swear to tell the truth on that prior occasion – that didn't matter to you?
Q: The reason you told a lie was that you wanted to mislead the person you were talking to?
Q: You wanted that person to believe it was true, even though you knew it was not true?
Q: You thought it would help you to tell a lie?
Q: Now today, you want the court to believe what you are saying is true?
Q: It would help your position if the court decides what you are saying today is true?

D. Deposition - Seal testimony at the close of the deposition.

Q: Anything else you can tell us about the event?
Q: You understand that we are here today to try to obtain your complete recollection about the event?
Q: If you think of anything else, you will let your lawyer know and he will let us know?
Q: Is there anything you have not seen (photo, document, etc.) that might bring more details of this to mind?

E. Steps in Impeaching with Prior Inconsistent Statement

1. Commit the witness to reaffirmation of the direct testimony.
2. Establish circumstances of prior inconstant statement and importance of circumstances (without revealing statement).

You have given prior sworn testimony in this case, correct? You appeared in my office on June 12 for a deposition?
You knew weeks in advance of June 12 that you were going to appear in my office for the deposition?
You discussed your deposition testimony with your attorney prior to coming to my office, correct?
You arrived at my office with your attorney?
Your attorney sat by your side throughout the testimony?
You saw a court reporter in the room?
The court reporter took down every word that was stated?
The court reporter administered an oath to you, true?

You raised your right hand and swore to tell the truth?

Did you tell the truth? (Win, win question.)

Now, I draw your attention to page 23 of the transcript of your deposition, beginning at line 12, where I asked you the following question and you gave the following answer . . .

3. Impeach Witness with Prior Inconsistent Statement

a. Before: Approach the witness; change intonation.

b. After: Walk slowly back to lectern; stall a few moments ("Your honor, May I have a moment?"); let the inconsistency sink in; let the witness squirm.

c. Avoid saying something like "So, Mr. Smith, when did you lie under oath, at your deposition or on your direct testimony?"- Invites wiggle room. **[**

F. Resumption of Questioning after Impeach Witness with Prior Inconsistent Statement

1. Different topic immediately – no opportunity for witness to rehabilitate.
2. Next topic should be one of importance as the witness is at the nadir of credibility.

XI. Save the Explanation for Summation

A. Get the facts you need from testimony; explain in summation.

B. "Mini summations" – objections.

ADDITIONAL COMMANDMENTS

I. When Not to Cross Examine

A. "*More cross examinations are suicidal than homicidal."* Emory Buckner

B. If not hurt on direct, just say: "No cross examination"; "We have no reason to cross examine this witness, your Honor."

C. Harmless witness (unless you can turn into your witness).

D. Repeat of direct.

E. Don't clarify the confusing - If direct discombobulated, don't clarify on cross examination.

F. Exception - getting killed – dart board approach – have absolutely nothing to lose.

G. Two-prong test:

1. Did the witness hurt our case on direct examination?
2. Is there anything unique the witness can provide that will materially help our case?

If answer is "yes" to either, cross examine.

II. Preparation, Preparation, Preparation

A. If properly prepared, know a great deal of cross examination before trial begins; the more you will anticipate what the other side will do.

B. Preparation allows a lawyer to go off script without throwing caution to the wind.

C. Additional Preparation

1. Google and Facebook every witness
2. Check websites of husband's company
3. Experts – written articles; prior testimony; other reports (example: capitalization rates)
4. People Search

D. Practice in advance

III. Organize

A. Process of collating, organizing facts relevant to the witness being examined

1. Example: Case Map.

B. Avoid fumbling through papers

1. Ruins pace, give witness time to think, circumvent, cajole.

C. Colored exhibit sheet

D. Use of deposition testimony

1. Get ASCII disk or email of transcript and cut and paste into trial memo.
2. Commercially available transcript programs.

E. Impeaching from a deposition transcript

F. Slave to note taking

1. Key words and phrases.
2. Miss body language of witness

IV. Don't be Over-Scripted

A. Security blanket

B. Tend not to listen to answer – violate that commandment

C. Use outline or checklist – some specific questions

V. Notes on Direct

A. No necessity to hit all areas of direct and should not

B. Areas outside direct – cross examination is more than combating what heard on direct

VI. Order of Cross Examination

A. Order should not follow direct
1. Witness prepped in certain order
2. Change sequence
3. Generally, don't start with last point on direct; freshest in mind of witness

B. If not successful – violate rule of primacy

C. Primacy and Recency
1. Must start and finish strong

VII. Telling a Story

A. A story about the theme(s) of your case

B. Introduce story in opening; end story in summation – building blocks for themes in between

C. Reason not to waive opening – Preview

D. Taglines – limit – storyteller, raconteur

VIII. Don't Sweat the Small Stuff

A. Cross examination and impeachment on insignificant matter
1. Only cross examination on substantive matters
2. Otherwise, trivialize your case

B. Try a Big Picture Case
1. Major themes
2. If lose a minor skirmish but win the war, good result.
3. Prioritize
4. Constant reevaluation during trial of where you are with respect to big picture

C. If your response to hearing something on direct is "So what," don't cross.

IX. Don't Shoot Every Mosquito

A. Corollary to big picture case – themes

B. Forget minutia unless have outright lie – then *falsus in uno, falsus in omnibus*

C. Short of that, limit or avoid totally the minutia

D. Some lawyers feel they have to cross examine on all points made on direct. Reasons why this is wrong:

1. Few if any witnesses lie on all aspects of their testimony;
2. Makes for an exhaustingly long cross examination;
3. Valid points are lost among the minutiae that ultimately will have no bearing on any issue.

X. Etiquette of Cross Examination

A. Don't talk above witness; don't raise voice in anger; don't be rude.

1. Message: don't want trier of fact to hear answer;
2. Sign of loss of control; and
3. Trier of fact resents a bully**.**

B. Francis Wellman*: "Hold your temper while you lead the witness to lose his."*

XI. Avoid Glee

A. You just scored big time, a searing, blistering blow.

B. Don't telegraph the exhilaration; don't gloat – consummate professional.

C. Next move – cross examine on a matter of substantial importance.

XII. Witnesses Not to Call

A. Witness that the opposing side must have necessity to call

1. Advantage of cross examination
2. If good witness for you, greater effect if turned witness around on cross examination than if testified for you on direct
3. If they don't call – choice to call on rebuttal or argue missing witness inference

XIII. The Bad Parts Don't Go Away

A. Not by avoidance

B. Minimize to extent you can

C. Steal thunder – bring out on direct case

XIV. Every Witness is not a Liar

A. Plenty of witnesses believe that their testimony is true and accurate.
1. There may, however, be errors of perception, memory, interpretation.

B. Don't come on like gang busters.

C. Also, even if a witness lies, does not mean lies about everything.

XV. Sensitive Witnesses

A. Kinder, gentler approach

B. Children, elderly, infirm, disabled
1. Slower, softer pace.
2. Even just a nice avuncular figure on direct – unless have explosive material, little softer approach.

XVI. Courtesy Copy to Court

A. Applies to cross examination and direct examination.

B. Any exhibit in evidence about which you are questioning witness, have a courtesy copy for court.
1. EBT transcripts
2. Complex financial spreadsheet

XVII. Silence is Golden

A. If there is a pregnant pause between question and answer, don't interrupt it ("Did you understand my question?" "Do you want me to repeat the question?").

B. Let the silence speak loudly.

C. Witnesses who take a long time to respond – less credible.

XVIII. Cross examination to "break the flow"

A. Use any possible objection.

B. Some possible objections:
- Form of question
- Compound question
- Assumes facts not in evidence
- Hearsay
- Calls for legal conclusion
- Speculation

XIX. Your Own Style

A. Can learn from others; your style must be you – if not, will show.

XX. Frame as Many "Win, Win" Questions as Possible

A. When you prepare, you will discover "win, win" questions.
1. Don't care if answer is "Yes" or "No"; you have the witness either way.

B. Example – Business Appraiser
1. Established universal use and role of Rev. Rul. 59-60.
2. Did you follow the Revenue Ruling in conducting your appraisal assignment?
    a. If no – attack nonuse
    b. If yes – show how did not in fact follow.

C. Example – Prior Deposition Testimony
1. "Were you telling the truth when you testified at that deposition?"

XXI. Primacy and Recency

A. Definitions
1. Primacy – what we hear first, we tend to believe.
2. Recency – what we hear last, we tend to remember.

B. Start cross examination and end cross examination strong

C. Pecking order
1. Strong point.
2. Other points – strongest to weakest.
3. Strongest Point.

D. Primacy
1. Unnerves witness at beginning; never recovers
2. Reason why not overuse "Isn't it a fact…"

3. Reason to skip the saccharine salutary introductions some lawyers use

E. Recency

1. Applies not only to end of examination but to end of court sessions (day, lunch break).
2. At times, may move you to cut short your planned cross examination.

XXII. Strategic Use of Recesses

A. Expert witness finished with direct – 4:15 p.m.

B. When Judge interrupts cross examination and asks would this be a good time to take a short recess.

XXIII. Trilogies

A. Use in all parts of trial – opening, direct and cross examination, summation.

B. Two is oppositional; four is too many to digest and remember.

VERBAL AND BODY LANGUAGE OF CROSS EXAMINATION

I. Verbal

A. Opening salutations – avoid

B. One fact/question.

C. Avoid:

1. Negative endings to questions – "did you not"; "have you not" – confusing
2. Pompous vocabulary
3. Let me ask you this question…
4. Differential and uncertain words – "Is it probable", "do you think…", "Is it possible…"
5. Starting question with repeating part of direct

D. Memorable words or phrases

1. When you *viciously* assaulted your spouse; when you *secretly* emptied the contents of the bank vault…

E. Adverse witness– don't say you "testified."

F. Positive as opposed to negative phrasing – designed to get a yes answer, not a no answer.

G. When necessary, give question contextual significance. Mr. Appraiser is DCF an accepted method of valuation… (Why ask); Mr. Appraiser, you are aware that the appraiser retained by the defendant used a DCF method to value defendant's business? Is that an accepted method?

H. Voice inflection

I. Qualifiers as Answers

1. Don't let witness get away with hedge words – "I think", "To the best of my recollection", "It seems…"
2. Prior to the answer to this pressing question, there was no such preface to the witness' answers – Answers like: Yes, No, definitely not.
3. Probe memory – on direct, asked questions about events four years ago; no hesitancy.

II. Body Language

A. Theatre Analogy

1. Like an actor, where you stand, when you move, where you move to all have significance. The courtroom is the stage.

B. Where to Stand
1. Direct Examination – Stand behind the lectern – lawyer not the star; is the director.
2. Cross examination - star, center stage
    a. Don't stay behind lectern – covers over 50% of body.
    b. Move to side, approach witness; draw back from witness; peripatetic.

C. Lose the pen or pencil in hand – distraction

D. Eye contact – crucial

E. In the face of the witness -

F. Detecting witness' discomfort or attempt to buy time

1. Beginning with "Uh", "mmm", "okay", "y'know", "like"
2. Eye contact with examiner lost
3. Hand covers mouth or part of it before answer or and partially covers eyes
4. A witness repeatedly crossing and uncrossing legs
5. Attempting to brush lint off his suit jacket when there is no apparent lint
6. Witness responds with "That is an excellent question" and then gives non-responsive answer; "Now would you please answer my excellent question?"
7. Witness often asking for the question to be repeated.

MODES OF IMPEACHMENT

I. Bias, Interest, Motive, Prejudice

A. Show any bias, interest, etc. at beginning of cross examination
1. Taints credibility for remainder of examination.

B. Play out relationship – friend, colleague, boss, relative

Employee of Adverse Party being cross examined:

You are employed by Mr. Anderson, correct?
You have been employed by him for eight years?
You like your job at the corporation Mr. Anderson owns?
You believe you are compensated fairly for your efforts?
You have no desire to lose your job?
You want to retain your job?
You support your family with the salary earned from this employment?
You were asked by Mr. Anderson to come to court today to testify?
You immediately replied in the affirmative?
You were not served with a subpoena to come to court, correct?
You came voluntarily after Mr. Anderson asked you to come?
Prior to coming to court, you met with Mr. Anderson's attorney, Mr. Dewey?
You met Mr. Dewey at his office?
You went to Mr. Dewey's office because Mr. Anderson asked you to do so?

Friend of Adverse Party being cross examined:

You are appearing here today voluntarily?
No subpoena was served upon you to appear in court?
You are here because Mrs. Smith asked you to be here?
She only had to ask you once and you agreed to come to court and testify?
To come to court today, you have missed a day of work? Are you paid for this missed day of work?
Is the missed day of work chargeable to your vacation time? Did you pay for child care to come to court today?
Did Mrs. Smith reimburse you for this expense or promise to reimburse you?
She he is a friend and neighbor of yours?
Your children are friends with her children?
They regularly play together?
Did Mrs. Smith drive you to the courthouse today?
Is she going to drive you home after the court session is over?
How long was the drive from your home to the courthouse?

Did you talk about the case during this 40-minute drive?
You have spoken to Mrs. Smith's attorney prior to coming to court today? (develop when, time spent, what was discussed, etc.)
Are you here today to be fair and unbiased?
Are you a partisan for Mrs. Smith?
You and I have spoken before this trial, correct?
I called you, introduced myself as Mr. Smith's attorney, and told you I wanted to ask you some questions?
You refused to speak to me?
You did not refuse to speak to Mrs. Smith's attorney?

C. Collateral evidence rule

D. Some experts spend most of their professional time testifying and may even advertise to get business.

E. Explore the history of testifying for a particular firm - hired gun approach.

1. Make sure that your own expert is not subject to the same criticism.

F. Primacy Effect - power of first impression. One tends to place more weight on information obtained sooner as opposed to information of equal or greater importance received later. Information received earlier in the deliberative process has greater impact than information received subsequently.

G. Custody Case - Evaluator should initially see both parents together.

1. In overly contentious cases, often afraid.

II. Implausibility

A. Good to get implausible answers – defies rule of probability

B. Examples Clarence Thomas; Bill Clinton

III. Bad Reputation in Community for Truth and Veracity

A. Applicable in civil cases and often overlooked in civil cases.

B. Not substantive testimony; just put witness on to state that he/she is aware of the reputation of an opposing witness in the community for truth and veracity, and that reputation is bad.

1. *Peo. v. Fernandez*, 17 NY3d 70 (2011) – family and friends can constitute the relevant community for this purpose.

2. Not deemed collateral.

IV. Prior Criminal Conviction

A. Civil *Sandoval* application (*Tripp v. Williams,* 39 M3d 318, 959 NYS2d 412 (Supreme Court, Kings co., 2013, Battaglia, J.)) - In a personal injury action involving the collapse of a masonry wall, plaintiff was precluded from impeaching defendant with evidence of his 25-year-old convictions of certain sex crimes, apparently committed against minors. CPLR 4513 does not deprive a trial court of all discretion in controlling the use of a criminal conviction for impeachment. The potential for the unfairness in the admission of prior crimes may be as great for a civil litigant, who has no control over the use of a criminal conviction and has no right not to testify, as for a criminal defendant. Here, due to the long passage of time since the convictions and the lack of evidence that the crimes involve forcible conduct, the probative value of the convictions was outweighed by the potential for prejudice to the defendant. The principles articulated in *Sandoval*, 34 NY2d 371, 357 NYS2d 849 (Ct. App. 1974) are applicable to civil, as well as criminal, actions.

B. Specific immoral, vicious or criminal act – to show moral turpitude

C. Must have reasonable grounds to inquire about specific misconduct and pursue the line of inquiry in good faith

D. If criminal charge and acquitted, can't ask

E. If call adverse party or if witness declared hostile, can't impeach on direct with criminal conviction

V. Cross Examination by Criminal, Immoral or Vicious Acts

A. Although a witness may be questioned about prior bad acts which bear upon his [or her] credibility, the questions must be asked in good faith and must have a basis in fact. *People v. Spirles*, 136 AD3d1315, 25 NYS3d 462 (4th Dept. 2016).

B. An adverse party or a hostile witness may not be impeached on direct examination by evidence of his or her criminal conviction. *Morency v. Horizon Transp. Servs., Inc.*, 139 AD3d 1021, 33 NYS3d 319 (2d Dept. 2016).

C. There is no bright-line rule of exclusion based upon age of conviction. *People v. Martin,* 136 AD3d 1218, 26 NYS3d 382 (3d Dept. 2016).

D. Civil judgments cannot be characterized as bad or immoral ... acts involving moral turpitude that would allow them to be used to question the defendant's credibility" *Quiroz v. Zottola,* 129 AD3d 698, 698, 11 NYS3d 194, 196 (NY App. Div. 2015).

E. Domestic Violence

1. Prior bad acts in domestic violence situations are more likely to be considered relevant and probative evidence because the aggression and bad acts are focused on one particular person, demonstrating the defendant's intent and motive. *People v. Pham*, 118 AD3d 1159, 987 NYS2d 687 (3d Dept. 2014).

F. Perjury

1. "We reject plaintiff's contention that Supreme Court erred in allowing cross-examination of her expert regarding an out-of-state conviction of contempt. That conviction was based upon lies told by the expert to a judge during the course of the expert's trial testimony. Although the conviction was in 1983, " '[c]ommission of perjury or other acts of individual dishonesty, or untrustworthiness . . . will usually have a very material relevance, whenever committed' " (*Donahue v Quikrete Cos.* [appeal No. 2], 19 AD3d 1008, 1009 [2005], quoting *People v Sandoval*, 34 NY2d 371, 377 [1974]) *Towne v. Burns*, 125 AD3d 1471, 3 NYS3d 844 (4th Dept.. 2015).

G. Interplay – Bad Acts and Collateral Evidence Rule

1. *Young v. Lacy*, 120 AD3d 1561, 993 NYS2d 222 (4th Dept. 2014) – In personal injury action, error for trial court to refuse to let defendant's attorney question plaintiff as to why she filed tax returns as head of household when she was married and living with her Husband at the time, and the number of dependents she claimed, as the questions raised the possibility of tax fraud which has some tendency to show moral turpitude and thus relevant on the credibility issue. However, defendant's attorney would have been bound by plaintiff's answers and could not resort to extrinsic evidence or other witnesses to refute plaintiff's answers because of the collateral evidence rule.

VI. Lack of Knowledge (Woody Allen Cross)

VII. Other Modes

A. Perception

B. Memory – cf. memory of more remote incidents on direct, with lack of memory of more recent incidents on cross examination

C. Coached or rehearsed answer – ask witness to repeat

VIII. Riding the Lie

A. Fine line – gilding the lily and maximizing the effect of a lie

B. Ride the lie – safe questions without giving witness opportunity to excuse the lie or explain the lie

Q: When you signed the false tax return, you knew it was false and misleading? *Q: When you signed the false tax return, you did not inform your accountant of the missing and misleading information?* *Q: After you filed the false tax return, you have never amended the return in the two years that have expired since the date of filing?*

Q: After you filed the false tax return, you annexed it as an Exhibit and submitted it to this Court, correct?...

C. Caught Witness in Lie, as, e.g., false financial statement to bank, then*:*

The lie was created by you?
You created the lie because it worked to your financial advantage?
It helped you make money?
You lie when it helps you make money?
Money is involved in this matrimonial action, correct?

IX. Impeachment by Omission

A. Impeach by what the witness failed to find or observe as opposed to what they did find or observe.

B. Example

1. Must lock down witness' testimony
2. Doctor, have you now told us all of the shortcomings of my client as a parent that you found from your clinical examination?
3. Reviewed report, etc.
4. Then bring out other aspects of parenting that were not included in his list of shortcomings
    a. Either overlooked – failure of examination.
    b. Favorable to your client.

Q: Doctor, you issued a report in this case?
Q: A 65-page single spaced report?
Q: It is a comprehensive report?
Q: You included all of the facts that you considered relevant in your evaluation?
Q: You reviewed the report before you submitted it to the Court?
Q: Reviewed it carefully?
Q: Actually, you reviewed it again in preparation for testifying here in Court today?
Q: Do you still believe it is comprehensive and states all the relevant facts?
Q: If a spouse has committed domestic violence, would this be a relevant factor in your evaluation? (WIN, WIN question]
[If no, pursue]
[If yes] Q: Dr., please direct the court's attention to the specific page in your report in which you discuss the <u>relevant</u> (LOOPING) factor of domestic violence?
A: It is not there.

X. Patience and Pacing (Build-up Method)

A. Patience – has to do with closing escape hatches

B. Example – Peer Review

Q: You are familiar with the peer review process?
Q: By peer, we are referring to people in your area of science?
Q: So, the peer review process involves a review of one's opinions of her scientific peers of colleagues?
Q: It allows one to get valuable feedback from other scientists about what they think of your opinions?
Q: It provides a sense of whether your opinions are generally regarded as supportable and reliable by other experts in your field?
Q: This can be very valuable in the scientific process, correct?
Q: One form of peer review involves standing up at meetings and sharing your views with peers of fellow colleagues?
Q: And you are discussing the bases of your opinions with them?
Q: This allows your peers to comment on the strengths or weaknesses of your opinions?
Q: You have been involved in this litigation for four (4) years, correct?
Q: You have never stood in front of a group of your fellow scientists to share with them the opinion you shared with this court on direct examination?
Q: Another form of peer review is publishing articles?
Q: When you submit an article to a professional journal, the article is peer reviewed before it is published?
Q: This, too, can be a valuable part of the scientific process?
Q: It might help weed out what is generally referred to as junk science?
Q: You have never submitted a manuscript stating your opinions as expressed to this court today to a journal for publication?...

C. Pacing

1. Generally, quick and crisp.
2. To help pace, ask questions not subject to valid objection.
3. Often, objection made when your cross examination is going well just to break the flow.
4. Exceptions to quick and crisp:
    a. Witness squirming, taking long time to answer.
    b. Crucial moment – act deliberately
        (1) The change of pace will be noted;
        (2) The change in the inflection and tone of voice will be noticed;
        (3) The change of your position in the courtroom will be noticed.

TYPES OF CROSS EXAMINATION

I. Direct Cross v. Collateral Cross

A. Starts long before the trial
1. Biggest decision - what to cross on; what not to cross on.

B. Direct cross - frontal challenge on the findings, conclusions, diagnoses (if any). Issue of battling the expert on his home turf; if do, thorough preparation and learning about the subject. Learn the underlying science of the expert's opinion.

1. Wrong tack – too often lawyers delude themselves believing that they can win an argument on the subject matter of the expert's opinion. This rarely succeeds. Better off to use low risk techniques.
2. Contrary to accepted theories of child development
3. Inaccurate conclusions re: factual data
4. Child doesn't separate from mother
    a. Attached
    b. Children separate more easily from parents with whom they feel secure with

C. Collateral Cross

1. Inadequate interviews
2. Did not interview key people
3. Failed to use psychological tests or used tests for which reliability is doubtful
4. No home study
5. Departures from Established Protocols
    a. List of things the expert did not do which should have been done
    b. Most disciplines have recognized protocols. It is a matter of identifying the protocol relevant to the opposing expert's discipline.
    c. Not limited to omissions. The affirmative conduct of the opposing expert can be fertile territory. He may have embarked upon a course of action that deviates from the established protocol.
6. No site visit of business
7. Confirmatory bias, primacy effect
8. Highlighting Expert's lack of information
    a. Marshal omissions and facts the expert does not know and provide no wiggle room by short, tight, leading questions.
        (1) Consider: Where expert does not know something that should know: You mean that after all that money, you don't know …?
    b. Also use where there is an uncertain state of the disciplines in which the expert operates.

9. Hired Gun Approach: bias, interest or prejudice
    a. Expert advertises in publications
    b. History of testifying for a particular lawyer or firm
    c. Being paid beyond the prevailing rate

10. Attacking Expert's Key Assumptions
    a. At times, if you can establish that only one of the assumptions of which the expert has constructed his analysis, the entire opinion can come crashing down.

II. Constructive v. Destructive Cross Examination

A. Destructive – obvious

B. Constructive – several forms – Goal is to elicit favorable testimony from a seemingly adverse witness, usually without the witness knowing she is giving favorable testimony

C. Formm of constructive cross examination

1. Use adverse witness to corroborate points that have been made or will be made by your witnesses (generally won't know doing that).
2. Have adverse witness concede points that are favorable to your case.
3. Play off one adverse witness against another.

D. The effect of having an adverse witness agree with your point is profound.

E. *The Verdict* – Paul Newman's expert shattered

F. Use adverse witness to corroborate points that have been made or will be made by your witnesses.

G. At times ask opposing expert… Isn't it correct that the degree of difference of opinion between your report and the other experts report is perfectly normal within this area of expertise, so that you cannot prove the other expert wrong?

III. Columbo Cross

IV. Blank "Incriminating" Document

A. Old trial lawyers' trick – still works sometimes

B. Witness for the Prosecution

V. Memory

You say you were in Albany having lunch with ____ on April 15th of last year?
You sure that lunch was April 15th?
You remember that now, about 1 ½ years later?
So, tell us with whom you had lunch on April 14th of that year?
On April 13th?
How about last month, June 13th?

VI. The "I Don't Remember," "I Don't Know Witness"

A. Good memory on direct; "amnesia" on cross examination

1. Offer examples of questions on direct examination when answered with alacrity and without hesitation. Contrast to cross examination.

B. Determine if legitimate or not – if it is, move on; if not, test.

C. Ride it out - The more times a witness says “I don’t remember”, “I don’t recall” to questions which common sense tell us should be remembered, the better.

1. Keep asking questions until you get a ridiculous list of “I don’t remember”

D. How to test memory or lack thereof. Compare memory on direct with lack of memory about more recent events that you raising on cross examination.

1. See if approximations trigger memory – more or less than 5, 10 etc. - amount of money.
2. Momentous moment in life.

E. Witness Refuses to Answer

1. Ask the same question again, slowly
2. Ask a third time, starting with the witness’ name
3. Then, “Is there something you do not understand about my question?” “Is there some reason you do not want to answer this question?”
4. Consider: “If that is what your answer is, if that is the best you can do, that’s fine.”
5. Go to the Judge as a last resort.

6

CROSS EXAMINATION OF EXPERTS

"An expert is one who knows more and more about less and less." Nicholas Murray Butler

I. General Considerations

A. Two killer features – preparation and language

B. Learn and Use the language of the expert

C. Reasonable Expectations

1. Punch holes
2. Marginalize the expert

D. Less is More Principle

1. You over prepare, you under try.
2. There is no correlation between the length of the cross examination and the effectiveness of the cross examination.
3. Commando raid cross examination – Like a guerilla fighter, you in and you're out. You know what points you want to make; jump in and make them, and get out.

E. Preparing your expert – Questions

1. Who is more experienced?
2. Our best point
3. Their best point
4. If you were on the other side, what would you attack and why?
5. How do we win this?

F. Writing Out Questions - This is one area where you are justified to write out some questions in advance so that you get the language correct

G. Advantages of cross examination of expert v. lay witness.

1. Aura - Hired gun – build upon this through cross examination
2. Report in advance – as opposed to lay witnesses
3. Family Law – soft sciences
    a. Discretion
    b. Judgment
    c. Impressions
    d. Observations
    e. Hypotheses
    f. A lot of subjectivity
    g. Often incapable of being measured or analyzed by scientific method

4."*Frye v United States* (293 F 1013 [DC Cir 1923]) does not require that a forensic report cite specific professional literature in support of the report's analyses and opinions. As the motion court noted, plaintiff could cross-examine the forensic evaluator regarding the lack of citations, and such an omission is relevant to the weight to be accorded to the evaluator's opinion, not to its admissibility (*Zito v Zabarsky*, 28 AD3d 42, 46 [2d Dept 2006]); *Straus v. Strauss*, 136 A.D.3d 419 (1st Dept. 2016).

H. Disadvantages of cross examination of an expert

1. Not afraid of the aura of the courtroom.
2. Battle tested and has refined her answers and is more intent on getting those answers in no matter what the question.
3. Unique knowledge about their area of expertise.

I. Control

1. More crucial than ever – cannot give the expert a chance to make speeches
2. Control – on cross examination, maintain control by being patient and persistent. You may have to ask the same question four times.

J. Decide: Direct v. Collateral Cross

K. Devastating Answer

1. Look unconcerned when you have a devastating answer you did not expect. It is an act that you must learn.
2. Don't allow the bleeding to continue.

L. What Not to Do - If direct discombobulated, confusing, - don't clarify on cross examination

M. File of Expert

1. Subpoena duces tecum for expert's file – drafts, work papers, correspondence, memoranda etc.
2. Seasoned experts – often don't bring entire file.

N. Strategies for Impeaching Witness

1. Area of expertise the witness claims
2. Education and training
3. Employment history
4. Disciplinary or criminal record
5. Acceptance among peers in the field
6. Prior retentions by party or party's attorney
7. Payment terms, significance; anything owe
8. Do you feel you will have a better chance to have your balance owed paid by defendant if you testify in his favor?

O. Evasive Expert

1. Consider letting the expert know you are content with his evasiveness. Say something like "If that is what your answer is, if that is the best you can do, that's fine."
2. When a witness does not answer the question, repeat the question until get a response. After several attempts, if the witness still won't answer the question that is ok.

II. Qualifications of Expert – Voir Dire

A. When to Challenge

1. Chance to punch holes in other side's expert during their direct case.
2. It is not a cross examination, but can be used as such.
3. Chance to cast a shadow on opposing expert before expert attempts to convince trier of fact.
4. Just to challenge qualifications – witness not competent to offer expert opinion testimony on the topic before the court.
    a. Some case law – courts haven't allowed a witness to testify (*Wells v. Wells*, 177 A.D.2d 779, 576 NYS2d 390 [3d Dept. 1991]).
5. Really a secondary motive:
    a. Remove halo – impressive Curriculum Vitae.
    b. Show lacks forensic experience.
    c. Not board certified.
    d. Hasn't treated a patient in 10 years.
    e. Spends more time theorizing than doing.
6. Often belonging to various impressive sounding academies, societies and the like involve little more than applying and paying a fee.

Q: There is no test taken or required to become a member of that organization? *Q: You simply pay a membership fee and annual dues and you are a member?*

Q: You are aware that Mr. _____, the opposing expert in this case, is board certified in your discipline?
Q: To become board certified, you must pass a test and peer review, correct:?
Q: Is it also correct that you are not board certified?

7. Generally – objection to witness testifying as expert – denied – qualifications go to "weight."

B. Voir dire – secondary function – challenge admission of

C. False or Exaggerated Qualifications – Set up questions

Q: You have stated your qualifications to the Court?
Q: They are accurate and complete?
Q: You would not exaggerate or misstate your qualifications, would you?
Q: To do so would be misleading and inappropriate, you agree?

III. Attorney Demeanor and Presence

A. Where to stand

1. Cross – star, center stage – you are testifying; just getting confirmatory yes and no's from witness.
2. Don't stay behind lectern – covers 2/3 of body.
3. Move to side – approach witness; draw back from witness.
4. Sunday morning preachers – translucent lecterns and move from it.
5. When move from place to place, witness has to follow you rather than concentrate on next question or how to squirm.

B. Lose the pen or pencil in hand – distraction

C. Eye Contact is crucial. It says you mean business; this is not going to be easy; if want out, better tell me the truth. This can't happen if you are a slave to your notes or glued to a scripted cross.

D. In the face of the witness

1. Judge may or may not allow
2. Heightens anxiety of witness; goal is to have witness want to save face, make concessions and go home.

IV. Professional Standards and Guidelines

A. AICPA – Statement on Standards for Valuation Services

1. §43 – Subsequent Events – known or knowable.

B. American Psychiatric Assn.- "The American Psychiatric Association Guideline for Psychiatric Evaluation of Adults", 3d Ed.

C. American Academy Child and Adolescent Psychiatry – "Practice Parameters for Child Custody Evaluation "and "Practice parameters for Child and Adolescent Forensic Evaluations"

D. American Psychological Assn.

E. CPA – Prepared amended tax returns for husband – Licensed by IRS, Office of Prof.
1. IRS CIRCULAR 230 – Due diligence requirements if practice before tax court.

F. Close escape hatches - Consider the following Q & A:

Q*: Doctor, you have been practicing psychology for 20 years now?*
Q: During that period of time, you have been a member of the American Psychological Association?
Q: In fact, you have been an active member, serving on various committees of that association?
Q: You are familiar with the fact that the American Psychological Association promulgates guidelines for its members that are engaged in forensic psychology?
Q: As a long-time active member of the American Psychological Association (notice looping), you are familiar with these guidelines?
Q: You have employed these guidelines in your practice?
Q: You have employed these guidelines in connection with the forensic evaluation in this case?
[Develop specific guidelines that have not been followed…]

V. Other Standards and Rulings

A. Business Valuation – Revenue Rulings
1. Rev. Ruling 59-60 (See Appendix "A")
2. Rev. Ruling 68-609 (See Appendix "B") – Capitalization of excess earnings – formula approach.

VI. Jack of All Trades Expert

A. Experts who value one type of business or industry – Many types of businesses and industries

B. SIC CODES – Standard Industrial Classifications – hundreds – classifies industries by 4-digit code

Q: Mr. Pencil, you are a CPA?
Q: You make your living doing forensic evaluations?
Q: You do evaluations of businesses?
Q: You also do evaluations of intangible assets?
Q: Like intellectual property?
Q: That includes patents, trademarks, copyrights and the like?
Q: You do evaluations of enhanced earning capacity?
Q: With respect to businesses, there are many types of businesses, correct?
Q: There are retail businesses?
Q: There are manufacturing businesses?

Q: There are service businesses?
Q: You told us about your training in forensic accounting and business valuations?
Q: This is a complex field?
Q: No two businesses are exactly alike?
Q: No two industries are exactly alike?
Q: There are facts and nuances endemic to each business and industry?
Q: There are experts whose field of expertise is a single type of business?
Q: For example, there are experts that only value car dealerships?
Q: There are experts who only value patents?
Q: There are experts who only value certain types of retail businesses?
Q: Like apparel companies?
Q: There are experts who only value law practices?
Q: Dental practices?
Q: Medical practices?
Q: You are familiar with what is known as SIC Codes?
Q: SIC stands for Standard Industrial Classification, a system devised by the U.S. government to classify industries by 4-digit codes?
Q: And these codes appear on corporate and other business tax returns, correct?
Q: There are hundreds of codes, representing hundreds of different industries?
Q: If you and your firm were retained by any company within these hundreds of different industries to value the company, you would not hesitate to undertake the engagement?
Q: You value all and any of the business types and industry types that I have mentioned?

VII. Professional Witness

A. Total compensation

B. Relationship with law firm – works for opposing firm regularly; significant income

1. When to confront with relationship questions – after score good point with expert. For example, if impeached expert with prior inconsistent statement, then ask about how much being paid, how often hired and testifies for this firm, etc.

C. Example: University professor – supplements

Q: So, it is clear that you make a lot more money doing this consulting and testifying work then you make as a professor back at your university, true?
Q: You told us on direct that you have actually testified in court about 20 times in the last several years?
Q: For these 20 times you prepared a report?
Q: You did this impartially?
Q: Just like you would at the university, correct?
Q: In each instance you studied the matter independently and you reached a conclusion?
Q: Your conclusion in each case was that the party that was paying you was correct?
Q: *In not one of those cases did your report support the position of the party in the litigation that was not paying you?....*

VIII. Cross Examination by Disclaimers

A. Statement of Limiting Conditions (Euphemism)

1. *"We have based our valuation on figures presented by management without a certified statement, nor have we performed an audit of the figures. We have assumed for the purpose of this appraisal that the figures provided by management are correct."*

2. *"[ABC Appraisal Co.] will not express any form of assurance on the likelihood of achieving the forecast/projection or on the reasonableness of the used assumptions, representations and conclusions."*

IX. Cross Examination by Treatise

A. Special mode of impeachment – learned treatise

1. For impeachment, not substantive evidence.
2. Witness – must acknowledge authoritativeness of the particular treatise.
3. If witness relied upon treatise in testifying, okay to cross examination without anything further.

B. Old Lawyer's Trick – authority in briefcase

Q: Sir, you related to us your credentials on direct examination, correct?
Q: As part of your credentials you noted that you are an adjunct professor at Rockland Community College where you teach forensic accounting and business valuation?
Q: You have taught this course for a number of years, correct?
Q: In teaching these courses, do you assign certain textbooks as part of your course curriculum?
Q: You also maintain certain textbooks relative to these areas of expertise in your private office?
Q: And you subscribe to updates for these texts, correct?
Q: These texts are well-known in your profession?
Q: They are recognized as authoritative in the profession?
Q: You agree with me, sir, that one of these well-known texts in the area of your expertise is Shannon Pratt's text, entitled "Valuing a Business", 5th Edition?...
Q: You assign this book to your students and use it as a text book for your class, correct?

X. Hypothetical Questions on Cross Examination

A. Methodology – confront expert and ask witness to assume certain facts which are in evidence – "fairly inferable" from testimony (CPLR 4515).

B. Example

1. Earnings based method of valuation.
2. Sir, assume court...income per tax return not all the income…
3. Further assume ….(Writing off 3 car leases and all attendant expenses; Housekeeper being carried as an employee of his business entity; Artwork adorning the parties' living room paid by business and carried as a business asset…; Home electric bill paid by business, etc.

4. Would that affect your valuation? (Win, Win)

XI. Attacking the Expert's Report

A. Evidence issue - *Berrouet v. Greaves*, 35 AD3d 460, 825 NSY2d 719 (2d Dept. 2006), which holds that while trial courts are accorded wide discretion in making evidentiary rulings, professional reports constitute hearsay and therefore are not admissible without the consent of the parties.

B. Expert's report – study line by line – bound to find inconsistencies or downright misleading statements.

C. Lack of citations and authorities

1. "*Frye v United States* (293 F 1013 [DC Cir 1923]) does not require that a forensic report cite specific professional literature in support of the report's analyses and opinions. As the motion court noted, plaintiff could cross-examine the forensic evaluator regarding the lack of citations, and such an omission is relevant to the weight to be accorded to the evaluator's opinion, not to its admissibility (*Zito v. Zabarsky*, 28 AD3d 42, 46 [2d Dept 2006]); *Straus v. Straus,* 136 A.D.3d 419 (1st Dept. 2016).

D. Questions and Strategies

1. When first receive report – check carefully – inadmissible hearsay.
2. Who wrote report?
3. Who did grunt work? (Often not witness.)
4. Did associate write and witness signed off?
5. Drafts of report – was a draft sent to attorney before final report?
6. Work Papers.
7. Did expert independently verify any of the key performance indicators underlying the valuation?
8. Was a draft submitted to attorney prior to finalization of report?
9. Bring entire file to Court.
10. Peer review – methods and analysis.

E. Investigation of Opposing Expert

1. Transcripts, decisions – Westlaw and LexisNexis.
2. Go to expert's website, Facebook page, and scour the Internet for information.
3. Contact other attorneys, prior report.
4.Writings of experts.

XII. Bases of Expert Testimony

A. Can't really cross examine experts if don't know the proper bases of cross examination.

B. Three Bases:

1. Personal knowledge
2. Facts in evidence
3. Professional Reliability Test
    a. Accepted in profession, not by this witness
    b. Reliability (*Hambsch*)
    c. Cannot be principal basis (*Brady v. Bordon*), but a link in chain
    d. Examples: pension actuary; forensic mental health expert (collateral sources).

C. Collaterals

1. *Murphy v. Woods*, 63 A.Ad.3D 1526 (4TH Dept. 2009) – "… Family Court erred in permitting a "licensed mental health counselor," who examined the parties' child and was called as a witness by the mother, to offer an opinion that was based in part upon his interviews with collateral sources who did not testify at trial. There are two exceptions to the general rule requiring that opinion evidence be based on facts in the record or on facts personally known to the witness: if the opinion is based upon out-of-court material "of a kind accepted in the profession as reliable in forming a professional opinion or if it comes from a witness subject to full cross-examination on the trial" (*Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 726 [1984] [internal quotation marks omitted]). Neither exception applies in this case."

2. *Straus v. Strauss*, 136 AD3d 419 [1st Dept. 2016] – "To extent that any hearsay declarants are not cross-examined, the motion court acknowledged that those portions of the report containing inadmissible hearsay should be stricken or not relied upon…"

D. Can have entire testimony stricken

XIII. Frye Standard

A. *Frye v. United States*, 293 F. 1013(1923) - When the questions involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are admissible in evidence.

B. *Peo. v. Wernick*, 89 NY2d 111, 651 NYS2d 392 (1996) – The *Sugden* exception, i.e., permitting an expert to base an opinion on out-of-court evidence under certain conditions, specifically incorporates the customary admissibility test for expert scientific evidence (i.e., *Frye*), which looks to general acceptance of the procedures and methodology as reliable within the scientific community. (*Peo. v. Angelo*, 88 NY2d 217, 644 NYS2d 460).

C. Challenging Scientific Evidence

1. N.Y. Standard: Has underlying device, procedure or methodology been generally accepted within relevant scientific community. *People* v. *Wesley*, 83 NY2d 417, 611 NYS2d 97 (1994). See also, *People* v. *Angelo*, 88 NY2d 217, 644 NYS2d 460 (1996): Polygraph inadmissible in absence of proof that it had gained general acceptance.

2. People v. Wesley, 83 NY2d 417 (1994) - After the *Frye* inquiry, the issue then shifts to a second phase, admissibility of the specific evidence—i.e. the trial foundation—and elements such as how the sample was acquired, whether the chain of custody was preserved and how the tests were made.

7

CROSS EXAMINATION OF MENTAL HEALTH PROFESSIONALS

I. Right to Cross Examine

A. *Musumeci*, 267 AD2d 364, 700 NYS2d 71 (2nd Dept., 1999): "The Supreme Court improperly precluded the defendant from cross-examining the court-appointed forensics expert and from calling his own forensics expert (*see Matter of Friedel v. Board of Regents of University of State of N.Y.*, 296 N.Y. 347, 73 N.E.2d 545; *see also People v. Ramistella*, 306 N.Y. 379, 118 N.E.2d 566; *People v. Hill*, 161 A.D.2d 506, 556 N.Y.S.2d 286). Accordingly, the defendant was denied his right to properly present his case on the issue of custody."

B. Court has no right to receive and consider any evidence that you do not have the right to cross – examine.

C. Case re: probation department investigation after evidence closed
1. Sole exception - in camera interview

II. Forensic Report not Business Record (CPLR 4518)

A. *Palma S. v. Carmine S.*, 134 Misc.2d 34, 509 NYS2d 527 (Fam..Ct., Kings Co., 1986):

"Unlike Dr. Milani, Dr. Abbott never testified in any action between the parties and, of course, was never cross-examined. His report, were to be admitted, would be received solely as a business record under CPLR § 4518 and as set out in *Hessek*. In *Hessek*, however, the court limited the admissibility of the medical records to certain factual information contained in the reports which had some bearing on the factual issues to be resolved. In the case at bar, the reports of Dr. Abbott were prepared, not in the course of the parties' treatment, but at the request of this court so that Dr. Abbott could give his opinions, diagnosis and recommendations at the instant custody hearing. Therefore, any factual information which may be contained therein regarding the examination would be composed of Dr. Abbott's subjective descriptions of the parties or the contentions of the respective parties. Without Dr. Abbott's testimony his subjective descriptions cannot be admissible and the contentions of the parties which are merely incidental to the issues to be resolved by this court from all of the evidence and testimony at trial are not relevant outside of the framework of the doctor's expert opinion. This is especially true since Dr. Abbott was never cross-examined regarding the contents of his reports. Accordingly, CPLR § 4518 is inapplicable, and these reports will not be admitted even as a business record."

III. Pre-Trial Strategy - Forensic Report

A. Getting the Report (in advance of trial)
   1. Less of a problem today
   2. Sign a Stipulation
   3. New Form (Exhibit "A")

B. Raw test data - Special Circumstances Standard Rejected

1. The notes and raw data of a court appointed neutral forensic psychologist are relevant and material to the issue of custody and "special circumstances" need not be present to direct the release of such data. Accordingly, the forensic evaluator's raw data, recordings, notes, tests, test results, and all material relied upon and created during the evaluation process are discoverable by both parties and by the Attorney for the Children. Additionally, the parties themselves are allowed to read the report, as well as the raw data, albeit the parties shall not be provided with a copy of the report but will be allowed to review it and the raw data in their attorney's office with an attorney present. The parties will be permitted to take notes, but will be precluded from taking photos and/or copies of the report and/or the raw data. The evaluator is directed to maintain and provide copies of all the raw data materials to the Court, which in turn, will provide same to counsel upon the signing of a stipulation with the provisos set forth above. *J.F.D. v. J.D.*, 45 M3d 1212(A), 3 NYS3d 285 (S.Ct. Nassau Co., 2014, Goodstein, J.).

IV. Motion in Limine - Redact Impermissible Hearsay - Professionally Reliable Hearsay Exception

A. Examples
   1. Report itself
   2. Statements from "collaterals" (statements to evaluator by nonparty)
   3. Statements by litigants which are not admissions

4. Documents - school records, police reports, social services reports etc. - some may be business records, some may not

V. Confirmatory Bias (Distortion)

A. The inclination to seek information that will confirm an initially-generated hypothesis and the disinclination to seek information that will disconfirm that hypothesis,

B. Bolstering - Evaluator, motivated by desire to bolster a favored hypothesis, intentionally engages in selective reporting or skewed interpretation of data.

VI. Closing Escape Hatches

A. Cardinal principle of cross examination

1. "*Much depends upon the sequence in which one conducts the cross-examination of a dishonest witness. You should never hazard the important question until you have laid the foundation for it in such a way that, when confronted with the fact, the witness can neither deny or explain it."* Francis Wellman, *The Art of Cross Examination.*

B. Example: Cross examining with prior inconsistent statement –deposition transcript

C. Think of all the ways a witness can try to wiggle out and deny responsibility for the statement

D. Where witness' response is "Really did not understand the question"

1. Recall at beginning of examination, I stated "If you don't understand…"
2. When I asked you (question in issue) you did not tell me that you did not understand the question?
3. When I asked you the question, you did not ask me to repeat it?
4. You did not correct your answer when you returned the transcript with the errata sheet?

VII. Dealing with Objections During Cross Examination

A. Objections:
Beyond the Scope
Speculation
Argumentative. Not really valid - badgering the witness
Assumes facts not in evidence
Mischaracterization of the evidence
Compound Question
Repetitive. The question has been asked and answered.
Hearsay
Lack of Foundation.
Privileged

Relevance. Remember that questions which seek to elicit bias, prejudice or interest of the witness are permissible.
Competence. The witness is not competent to answer the question. Competence also refers to the inability of a witness to testify owing to age, infirmity, statutory authority (CPLR 4502(a))

B. If know it is an improper question, withdraw and rephrase when objection is made.

VIII. Combating the Hearsay Objection

A. Admitted not for truth

1. Hearsay is not involved as the question and proposed answer is offered not for the truth of the matter but for some other relevant purpose that you set forth

B. State of Mind

1. Hearsay is not a valid objection because the question and proposed answer is offered solely to show the state of mind of the declarant or hearer of the statement and state of mind is relevant.

C. Verbal Act

1. Hearsay is inapplicable as a verbal act is being shown;
    a. Words themselves have legal significance
    b. Help explain an otherwise equivocal or ambiguous act

D. Hearsay Exception

1. Albeit the question calls for hearsay, it fits within one of the recognized exceptions to the hearsay rule

IX. Other Areas of Inquiry

A. Obligated by ethical guidelines to test variable hypotheses

B. Discrepancy between contemporaneously-taken notes and final report

C. Documents which were made available and should have been utilized but were ignored

D. Choice of collaterals interviewed

E. Influence of Examiner

1. Acknowledgment that exceptional case where final conclusion based solely on methods that are independent of examiner's judgment
2. Limits and deficiencies of clinical judgment

3. Examiner exerts considerable effect on data obtained
4. Patients react differently when seen by different psychiatrists.

F. Evaluation almost always involves prediction.

1. Inability to predict future violent behavior - *Tarasoff v. the Regents of the University of California, 17 C.3d 425 (1975)* - brief of American Psychiatric Association.
2. The assumption that a psychiatrist can accurately predict dangerous behavior lacks any empirical support.

G. Conclusions based on invalidated and speculative theories of child development.

X. Guidelines

A. American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings* (American Psychological Association, 1994)

1. §11 - *"multiple methods of data gathering"* (convergent validity) - Important facts and opinions are documented from at least two sources whenever their reliability is questionable.
2. §12 - the psychologist interprets any data from interviews or tests as well as any questions of data reliability and validity, cautiously and conservatively, seek convergent validity.
3. Familiarity with Literature - §5B - Requires use of current knowledge of scientific and professional developments.

4. Person not evaluated - §13 - precludes opinions about any individual not personally evaluated, but does not preclude reporting what an evaluated individual has stated about such a person.

5. Record keeping - §16 - requires maintaining all records in accordance with APA Record Keeping Guidelines (APA, 1993), and states that "All raw data and interview information are recorded with an eye toward their possible review by other psychologists or the court where legally permitted."

XI. Psychological Testing - General

A. Methods of scoring and interpretation

1. Computer based
    a. Text in report lifted from computer read-out.
    b. Much of data relevant to reliability proprietary in nature and thus kept secret from particular evaluator.

B. Psychologist interprets

1. Treatises and manuals for guidance - integrates test data with other information

obtained through interviews and other methods.

2. Cross-examine re: interpretive strategy.

C. Reliability/Validity Analysis

1. Professional reliable hearsay rule
2. APA Ethical Principles and Code of Conduct (2002 - Effective 06-01-03)

a. 9.02(b) Psychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established, psychologists describe the strengths and limitations of test results and interpretation.

b. APA Ethical Principles and Code of Conduct (2002 - Effective 06-01-03) - 9.06 Interpreting Assessment Results - When interpreting assessment results, including automated interpretations, psychologists take into account the purpose of assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences, that might affect psychologists' judgments or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations. (*See also* Standards 2.01b, c, Boundaries of Competence, and 3.01, Unfair Discrimination.)

c. APA Ethical Principles and Code of Conduct (2002 - Effective 06-01-03)

(1) 9.09 Test Scoring and Interpretation Services - Psychologists who offer assessment or scoring services to other professionals accurately describe the purpose, norms, validity, reliability, and applications of the procedures and any special qualification applicable to their use.

(2) Psychologists select scoring and interpretation services (including automated services) on the basis of evidence of the validity of the program and procedures as well as on other appropriate considerations. (*See also* Standard 2.01b and c, Boundaries of Competence)

(3) Psychologists retain responsibility for the appropriate application, interpretation, and uses of assessment instruments, whether they score and interpret such tests themselves or use automated or other services.

D. Flens, J.R., "The Responsible Use of Psychological Testing in Child Custody Evaluations," Journal of Child Custody, Vol. 1, Nos. 1 & 2 (2005) & simultaneously published in book form: Flens, J.R., Drozd, L, *Psychological Testing in Child Custody Evaluations*, (Haworth, 2005), p. 17: "A problem in the use of interpretive scoring programs provided by testing services is that the ethical criteria of 9.09(b) may be impossible to meet. Presently, the algorithms (i.e., the program logic and decision rules) used to generate the statements in the computer-generated test interpretations (CGTI) are proprietary secrets and not available for review by the evaluator. Therefore, it is not possible for evaluators to know how to answer important questions about how the program generates the statements found in CGTIs."

XII. MMPI-2

A. Most widely known and used standardized test of personality

1. Objective personality test (means demands a structured response; no free form association or a projection of subject's feelings into the test); as opposed to projective tests which are diagnostic tests in which the test material is unstructured so that responses will reflect aspects of the subject's underlying personality and psychopathology. (Rorschach)

2. 567 true-false questions

3. 9 validity scales

4. MMPI-2 - adults age 18 and over; MMPI-A - Adolescents - 14-18

B. Normative sample group - MMPI-2

1. 1462 women; 1138 men; randomly drawn from California, Minnesota, North Carolina, Ohio, Pennsylvania, Virginia, Washington state

2. Men: 82% white; Women: 81% white

3. Age range - 18-84

4. Mean educational level - 13 years

C. Validity and Reliability statistics

1. Reliability - degree to which a test produces results that are free of measuring errors, i.e., consistency of the results of a test.

2. Reliability coefficients - number that falls in a range of zero (for no reliability) to one (indicating perfect reliability).

3. Difficulties of personality assessments of people enmeshed in family custody disputes.

D. Quality of information suspect

1. Self-protection

2.Assert their lack of problems

3. General lack of appropriate measures for the family custody litigation setting

4. *See* Pope, Butcher, & Seelen, *The MMPI, MMPI-2 and MMPI-A in Court*, American Psychological Assn., 2002.

E. Computer-generated MMPI profiles

1. Q: In your written report, have you included any work, conclusion or words of others without acknowledging that these came from other sources?

F. Other questions

QUESTION	ANSWER
On the MMPI-2, at what level is a clinical score generally considered significant?	A score on a clinical scale is generally considered significant when it reaches or exceeds 65.
Did you administer the	Gave the instructions, personally monitored

MMPI-2?	the person, etc.
What instructions were given to the test taker?	Instructions about answering all questions (affects validity)
Who scored the test?	Compare scoring method used with method set forth in manual
By what method were the interpretive statements derived from the MMPI-2 scores and profiles?	The witness may have used a computer-generated scoring and interpretation service that provide a printout of the scores, profile and interpretation.

XIII. DSM V- American Psychiatric Association

A. DSM-V – Cautionary Statement

1. "However, the use of DSM-V should be informed by awareness of the risks and limitations of its use in forensic settings. When DSM-V categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis."

B. Classification and nomenclature for mental disorders

C. Example - 301.4 - Diagnostic criteria for *Obsessive-Compulsive Personality Disorder*

A pervasive pattern of preoccupation with orderliness, perfectionism, and mental and interpersonal control, at the expense of flexibility, openness, and efficiency, beginning by early adulthood and present in a variety of contexts, as indicated by *four (or more) of the following*:

- *is preoccupied with details, rules, lists, order, organization, or schedules to the extent that the major point of the activity is lost*
- *shows perfectionism that interferes with task completion (e.g., is unable to complete a project because his or her own overly strict standards are not met)*
- *is excessively devoted to work and productivity to the exclusion of leisure activities and friendships (not accounted for by obvious economic necessity)*
- *is over conscientious, scrupulous, and inflexible about matters of morality, ethics, or values (not accounted for by cultural or religious identification)*
- *is unable to discard worn-out or worthless objects even when they have no sentimental value*
- *is reluctant to delegate tasks or to work with others unless they submit to exactly his or her way of doing things*
- *adopts a miserly spending style toward both self and others; money is viewed as something to be hoarded for future catastrophe*

REDIRECT EXAMINATION

I. Only if really necessary– tends to highlight the areas you think are weakest in your witness.

II. Exception – when cross examination included an area not covered by direct.

SUMMATION

I. Work on at the end of each day of trial

A. Fresh in mind

B. Will keep you focused on the important themes of the case

C. Trick is to be within 80%

1. It has been said that once you prepare your case, you can outline your closing statement before the trial begins and if you're 80% accurate, you have prepared the case well.

II. Opening is the prediction of what the evidence will prove. Closing is a recitation of what actually occurred at trial.

A. Case coalesces in summation
1. Not one knockout punch

III. Speak in first person – "I think", "I feel", "I believe"

A. Do not be hesitant to give opinion about the evidence

B. Why the facts as they emerged in trial mean you win

IV. Closing is argument, not regurgitation

A. Marshal the relevant evidence

B. Not a seemingly endless recitation of all the facts; only those that support your position or refute your adversary's position.

C. Arguments based upon the evidence

V. Use of alliteration to emphasize points – makes a theme more memorable

8

AUTHENTICATION & EVIDENTIARY FOUNDATIONS

I. Meaning of Authentication

A. The proponent of evidence must prove authenticity as a condition to the admission of evidence by the laying of a proper foundation.

B. Proving authenticity involves proving that the proffered evidence (writing, tape, model, summary, etc.) is what the proponent claims it to be.

C. Laying the proper foundation does not assure admissibility as the document, object or testimony may be barred by means of some other evidentiary rule (e.g., hearsay).

D. Chain of Custody

1. A chain of custody is employed when the evidence itself is not patently identifiable or is capable of being replaced or altered (e..g, drugs) (*Peo. v. McGee*, 49 NY2d 48, 424 NYS2d 157 [1979]).

2. Mere identification by one familiar with the object, however, suffices when the evidence is nonfungible, unique and not subject to alteration. (*Peo. v. Taylor*, 206 AD2d 904, 616 NYS2d 116 [4th Dept. 1994].)

II. Best Evidence Rule

A. The Rule

1. When seek to prove the *contents* of a writing, recording or photograph, the original of the writing, recording or photograph is required. (*Schozer v. William Penn Life Ins.*

Co. of New York, 84 NY2d 639, 620 NYS2d 797 (1994); *Flynn v. Manhattan & Bronx Surface Transit Operating Authority*, 61 NY2d 769, 473 NYS2d 154 (1984).

2. Does not apply when seek to prove a fact that has an existence independent of a writing, photograph or recording, despite the fact that a writing, photograph or recording evidencing the fact sought to be proved exists.

a. Example - If a photograph is offered to illustrate the witness' testimony, not attempting to prove the contents of the photograph, the best evidence rule does not apply. If, however, offer photograph to prove contents of a particular scene, rule applies.

b. Example - A party seeking to prove payment of a debt may do so by testimony even though a receipt for payment was given. The payment, not the terms of the receipt, is the fact to be proven.

B. *See Ferraioli*, 295 AD2d 268, 744 NYS2d 34 (1st Dept. 2002): "[a]n original writing must be placed in evidence when a party seeks to establish the contents of such writing (Schozer v. William Penn Life Insurance Co. of N.Y., 84 N.Y.2d 639, 620 N.Y.S.2d 797, 644 N.E.2d 1353). If a writing is collateral to the issue to be proven, the best evidence rule does not require its production (*Grover v. Morris*, 73 N.Y. 473, 480). By the same token, a document is not subject to the best evidence rule although related to an original writing subject to the best evidence rule if it does not vary the terms of the original (*Kelly v. Crawford*, 5 Wall. 785, 72 U.S. 785, 789, 18 L.Ed. 562; VII Wigmore on Evidence 2104 [Chadbourn Rev. 1978]). A post-nuptial agreement which provides for specific equitable distribution and which meets certain statutory requirements is valid and enforceable (Domestic Relations Law 236[B][3]; *Matisoff v. Dobi*, 90 N.Y.2d 127, 132, 659 N.Y.S.2d 209, 681 N.E.2d 376). Plaintiff's statement of net worth did not vary the terms of the post-nuptial agreement. Defendant had not made any claim that plaintiff had failed to disclose or had concealed income or resources in connection with the post-nuptial agreement. Indeed, the trial court found plaintiff's statement of net worth only relevant to defendant's affirmative defense of duress. That defense, however, was unrelated to plaintiff's statement of net worth since it was premised on plaintiff's threat to "commence an ugly transatlantic divorce action, forcing defendant to return to New York to litigate unless defendant gave into" plaintiff's demands as incorporated into the post-nuptial agreement. While the terms of the post-nuptial agreement were relevant to this affirmative defense, the appended statement of net worth was incidental and collateral to defendant's claim of duress. The post-nuptial agreement should have been admitted into evidence."

C. Meaning of "Original"

1. First produced and operative document

2. Duplicate originals (*Sarashon v. Kamaiky*, 193 NY 203, 86 NE 20 (1908) (where a document is executed in counterpart, each part is regarded as an original).

3. Carbon Copies. *People v. Kolp*, 49 AD2d 139, 373 NYS2d 681 (3d Dept., 1975) - On such multi-copy forms, all duplicates are admissible as originals without the necessity of producing or accounting for the absence of other counterparts.

D. CPLR 4539 -. Accurate Reproductions in Regular Course of Business - If any business, institution, or member of a profession or calling, in the regular course of business or activity has made, kept or recorded any writing, entry, print or representation and in the regular course of business has recorded, copied, or reproduced it by any process which accurately reproduces

forms a durable medium for reproducing the original, such reproduction, when satisfactorily identified, is as admissible in evidence as the original, whether the original is in existence or not. (*See Peo.* v. *May*, 162 AD2d 977, 557 NYS2d 238 (4th Dept., 1990)).

E. Secondary Evidence

1. For secondary evidence to be admissible, the proponent must establish that the original writing has been in existence, that it is genuine (if authenticity is questioned), and that a proper excuse exists for its nonproduction (*Glatter v. Borten*, 233 AD2d 166, 649 NYS2d 677 (1st Dept., 1966)).

F. Reasons for Non-production of Original

1. The original is lost - *Harmon v. Matthews*, 27 NYS2d 656 (sup. Ct., 1941) - A reasonable search was exhausted; testimony of last custodian usually required.

a. If loss or destruction was result of fraudulent design, parol evidence not admissible.

b. Loss of the original may be established upon a showing of diligent search in the location where the document was last known to have been kept and through the testimony of the person who last had custody of the original. *Schozer* v. *William Penn Life Ins. Co.*, 84 NY2d 639, 620 NYS2d 797 (1994).

2. The document is outside the court's jurisdiction and cannot be obtained; or

3. The document is in the possession or control of the adverse party who, upon due notice, has failed to produce it (Serve notice to produce).

a. Lapidus v. *NYC Chapter of NYS Assn. for Retarded Children, Inc.*, 118 AD2d 122, 504 NYS2d 629 (1st Dept., 1986) -- "That plaintiff could not produce the written employment contract upon which he relies is not fatal to his claim. Since the record contains sworn testimony showing the existence of such a document and that it was in the possession of the Association, which was duly served with a notice to produce and has failed to do so, plaintiff may offer secondary evidence establishing its contents".

4. Other bona fides reasons

a. Not error in receiving photocopy of letter from father to mother in evidence where mother testified she had left original at home because she thought copy would suffice and father admitted that he had sent the letter *see LaRue v. Crandall*, 254 AD2d 633, 679 NYS2d 204 (3d Dept., 1998).

b. Where a reasonable excuse is offered for the nonproduction of the original of a separation agreement, a party can rely upon secondary evidence, i.e., a copy of the agreement, to prove the terms of the agreement. (Accepted excuse was that original on file with County Clerk) *Story v. Brady*, 114 AD2d 1026, 495 NYS2d 464 (2d Dept., 1986).

c. Use of document which contained figures taken from other documents not produced at trial was violation of best evidence rule, absent explanation for failure to produce original documents. *National States Elec.* v. *LFO Construction Corp.*, 203 AD2d 49, 609 NYS2d 900 (1st Dept., 1994).

G. Overriding Policy

1. The more important the document to the final outcome of the case, the stricter the requirement that an evidentiary foundation be established demonstrating the loss. *(Poslock* v. *Teachers' Ret. Board*, 209 AD2d 87, 624 NYS2d 574 (1st Dept., 1995)).

2. Not error for court to apply the best evidence rule to preclude the copy of a letter and file in a malpractice action from being admitted into evidence at trial, since plaintiff failed to meet the strict requirement of proving an evidentiary foundation establishing loss and lack of improper motive for the nonproduction of the originals. *Proner* v. *Julien & Schlesinger, P.C.*, 214 AD2d 460, 625 NYS2d 207 (1st Dept., 1995)

III. Audiotapes

A. *Peo. v. Ely*, 68 NY2d 510 - Clear and convincing evidence that the offered evidence is genuine and that there has been no tampering.

B. Chain of custody showing in *Peo. v. Ely*, 68 NY2d 520, 510 NYS2d 532 (1986).

1. "The inherent difficulty with fungible goods simply is not present when evidence of a conversation is sought to be introduced, for the conversation itself is unique and the participants are available to attest to its accuracy. Thus, a chain of custody is not required for the introduction of tape recordings such as those present here." *Peo. v. McGee*, 49 NY2d 48, 424 NYS2d 157 (1979).

2. Although not a requirement there is an alternate method - requires evidence regarding the making of the tapes and identification of the speakers, and that within reasonable limits those who have handled the tape from the time of its making to the production in court; identify it and testify to its custody and unaltered state.

C. Means of authentication *(Peo. v. Ely*, 68 NY2d 520, 510 NYS2d 532 [1986]).

1. Testimony of participant to a conversation that it is complete and accurate reproduction of the conversation and has not been altered *(Tepper* v. *Tannenbaum*, 65 AD2d 359, 411 NYS2d 588 [1st Dept., 1978]).

a. Court erred in admitting tape recording where proponent failed to establish by "clear and convincing proof" that the offered evidence is genuine and that there has been no tampering with it. *(Cross v. Davis*, 269 AD2d 837, 703 NYS2d 789 [4th Dept. 2002]).

b. Harry R. v. Esther R., 134 M2d 404, 510 NYS2d 792 (Fam. Ct., Bx. Co., 1986) - do not have to be an expert to use simple tape recorder and where father testified that recording device was operable, he was capable of using it and that recording was authentic, unedited and audible, and he identified speakers, thereby a sufficient foundation having been laid.

2.Testimony of a witness to the conversation or to its recording, such as the machine operator, to the same effect

3. Foundation Elements

a. The operator of the equipment was qualified.

b. The operator recorded a conversation at a certain time and place.

c. The operator used certain equipment to record the conversation.

d. The equipment was in good working order.

e. The operator used proper procedures to record the conversation.

f. The tape was a good reproduction of the conversation.

g. The operator accounts for the tape's custody between the time of taping the time of trial. (Optional).

4. Testimony of a participant to a conversation together with proof by an expert that upon analysis of the tapes for splices or alterations there was neither.

D. Audibility

1. If a recording is partly inaudible or intelligible, it is nonetheless admissible unless those portions are so substantial as to render the recording as a whole inadmissible; matter of discretion of trial judge. (*Peo. v. Graham*, 57 AD2d 478, 394 NYS2d 982 [4th Dept. 1977]). To be admissible, the tape should be at least sufficiently audible so that independent third parties can listen to it and produce a reasonable transcript. (*Peo. v. Lebow*, 29 NY2d 58, 323 NYS2d 829 [1971]).

2. Insubstantial defects in the overall quality of a recording affect its weight, not its admissibility (*Peo. v. Morgan*, 175 AD2d 930, 573 NYS2d 765 [2d Dept. 1991]).

E. Surreptitious Recordings

1. Error to hold that defendant was precluded from using any audio tapes at trial to impeach witnesses on the ground that the defendant secretly recorded conversations he had with the plaintiffs and nonparty witnesses; the tapes are admissible if they are relevant and material and their admission does not violate the rules of evidence. (*Breezy Point Coop. v. Young*, 234 AD2d 409, 651 NYS2d 121 [2d Dept. 1996]).

2. Illegal Eavesdropping

a. CPLR 4506(3): "An aggrieved person who is a party in any civil trial, hearing or proceeding...may move to suppress the contents of any overheard or recorded communication, conversation or discussion or evidence derived therefrom on the ground that: (a) the communication, conversation, or discussion was unlawfully overheard or recorded;..."

b. CPLR 4506 does not exclude evidence of conversations "freely heard" by an eavesdropper (*see Peo. v. Kirsh*, 176 AD2d 652, 575 NYS2d 306 (1991)).

c. One party to conversation must consent - *Berk*, 70 AD2d 943, 417 NYS2d 785 (2d Dept., 1979); *Pica*, 70 AD2d 931, 417 NYS2d 528 (2d Dept., 1979) - Where conversation between plaintiff and a male not her husband was recorded by her husband without the consent of either party, it was violative of §250.05 of Penal Law and must be suppressed pursuant to CPLR 4506. A second recorded conversation between plaintiff and defendant, recorded with the obvious consent of the latter, should not be received upon a pendente lite motion, and should await resolution at trial as the possibility exists that the contents of the conversation constitute a privileged, interspousal communication pursuant to CPLR 4502.; *Cronin*, 89 Misc2d 548, 392 NYS2d 530 (Monroe Co., 1976).

IV. Photographs

A. Two purposes of photographs
1. An illustration of other testimony; or
2. Substantive evidence of the facts portrayed in the photograph.

B. General foundation - the photograph is a fair and accurate representation of the place, person, scene or subject portrayed. *(Peo. v. Pobliner*, 32 NY2d 356, 354 NYS2d 482 [1973]).

1. "Short" version - Is this photograph marked as Exhibit "D" a fair and accurate representation of the condition of the bedroom in the marital residence as it existed on April 4, 2004?

C. Foundation Elements

1. The witness is familiar with the object or scene

a. Any person familiar with the scene or object depicted may verify the photograph. Not necessary to call photographer as witness, so long as someone can testify that the photograph accurately shows what it purports to show. (*Peo. v. Byrnes*, 33 NY2d 343, 362 NYS2d 913 [1974]; *Kowalski* v. *Loblaws, Inc.*, 61 AD2d 340, 402 NYS2d 681 [1st Dept., 1978]).

2. The witness explains the basis for his or her familiarity with the object or scene

3. The witness recognizes the object or scene in the photograph

4. The photograph is a "fair, "accurate", "true" or "good" depiction of the object or scene at the relevant time

5. The photograph has not been altered

V. Videotapes

A. General use

1. Day-in-life films

2. Surveillance films - *Tran v. New Rochelle Hosp. Med. Ctr.*, 99 NY2d 383, 756 NYS2d 509 (2003) – Plaintiff is entitled to surveillance videos prior to giving a deposition.

3. Standard of living

B. Relevancy

1. *In re Chase*, 264 AD2d 330, 694 NYS2d 363 (1st Dept. 1999) – In guardianship proceeding, video-taped by a professional production crew that was interviewing Mr. Chase, a Holocaust survivor, for the Steven Spielberg project documenting the Holocaust, where Mr. Chase states that he gave his property to his children, was relevant as the evidence would have substantiated Ms. Chase's testimony that, far from being motivated by a conflict of interest, her actions were consistent with her father's wishes for the management of his finances.

C. Foundation

1. Testimony from the videographer that he took the video, that it correctly reflects what he saw, and that it has not been altered or edited is normally sufficient to authenticate a videotape. When the videographer is not called, testimony, expert or otherwise, may also establish that the videotape truly and accurately represents that was before the camera *Zegarelli v. Hughes*, 3 NY3d 64, 781 NYS2d 488 (2004).

2. The proponent of videotape evidence "must show that the tape is a true, authentic and accurate representation of the event taped without any distortion or deletion. (*Peo. v. Curcio*, 169 M2d 276, 645 NYS2d 750 [Sup.Ct., St. Lawrence Co., 1996]).

D. Lost videotape

1. Best evidence rule precludes a witness from testifying to an altercation he observed on a surveillance videotape in the absence of the tape. (*Peo. v. Jimenez*, 8 M3d 803, 796 NYS2d 232 [Sup.Ct., Bronx Co., Cirigliano, J., 2005]).

2. Cf. *Schozer v. Wm. Penn Life Ins.*, 84 NY2d 639, 620 NYS2d 797 (1994) - Lost x-ray.

VI. Voice Identification - Generally

A. Applicable whether heard firsthand or through recording.

B. A person's voice can be identified by a witness having some familiarity with the voice, and the familiarity can be acquired either before or after hearing the voice to be identified.

C. Error to preclude plaintiff from testifying about two telephone conversations because plaintiff could not recognize the speaker's voice, as the identity of a party to a telephone conversation may be proven by circumstantial evidence. (*Vinciguerra v. Otis Elevator Co., Inc*., 254 AD2d 350, 678 NYS2d 670 [2d Dept., 1998]).

VII. Oral Statements - Telephone calls

A. Telephone Directory Doctrine - *Peo. v. Lynes*, 49 NY2d 286, 425 NYS2d 295 (1980) - Examples where witness unfamiliar with voice:

1. Placing of a call to a number listed in a directory or other similar responsible index of subscribers

2. Unforced acknowledgment by the one answering that he or she is the one listed

3. Some corroborating evidence

a. Substance of conversation furnishes confirmation of caller's identity, as, e.g., when subsequent events indicate that the party whose identity is sought to be established had to have been a conversant in the telephone conversation;

b. When the caller makes reference to facts of which he alone is likely to have knowledge.

VIII. Handwriting Foundation

A. Witness Familiar with Handwriting

1. Lay witness can identify handwriting with which he is familiar either by seeing the party write, writings acknowledged by the party to be written by him or receiving correspondence from the party in response to his own communication addressed to him, *Gross* v. *Sormani*, 50 AD2d 531, 189 NYS2d 522 (3d Dept., 1959); *Peo. v. Corey*, 148 NY 476, 42 NE 1066).

2. Must be based upon familiarity *not* acquired for purposes of litigation. (*Peo. v. Molineux*, 168 NY 264, 326: "writings created post litem motam are inadmissible against a party creating them.")

a. Exemplars created after a controversy has arisen for purposes of litigation are inadmissible as they are "created at a time when defendant had a motive to disguise his handwriting." (*Nelson v. Brady*, 268 AD 226 (1st Dept., 1944); *Peo. v. Perry*, NYLJ, Oct. 27, 2000).

b. Testimony is barred based on familiarity gained for purposes of litigation. (*Hynes* v. *McDermott*, 82 NY 41, 52-54).

B. Foundation Elements

1. The witness recognized the author's handwriting on the document.
2. The witness if familiar with the author's handwriting style.
3. The witness has a sufficient basis for familiarity.

C. Foundation - Trier of fact determination

1. A trier of fact can make his or her own comparison of handwriting samples in the absence of expert testimony on the subject (*Roman v. Goord*, 272 AD2d 695, 708 NYS2d 904 [3d Dept., 2000]; *Johnson v. Coombe*, 271 AD2d 780, 707 NYS2d 251 [3d Dept., 2000]).

2. *American Linen Supply Co. V. M.W.S. Enterprises, Inc.*, 6 AD3d 1079, 776 NYS2d 387 (4th Dept. 2004) - Handwriting exemplars of the president of a corporation where relevant and should have been admitted to purpose of comparison to his purported signature on a particular contract since his signing of a 1994 contract was an issue.

D. Foundation - Expert Testimony

1. Expert testimony - comparison of disputed handwriting and exemplars
2. CPLR §4536: "Comparison of a disputed writing with any writing proved to the satisfaction of the court to be the handwriting of the person claimed to have made the disputed writing shall be permitted."
3. Foundation Elements:
   a. The proponent authenticates the exemplars.
   b. The witness qualified as an expert the document examiner.
   c. The witness compares the exemplars and the document in question.
   d. Based on the comparison, the witness concludes that the same person who wrote the exemplars wrote the document in question.
   e. The witness specifies the basis for his or her opinion, i.e., the similarities between the exemplars and the questioned document.

IX. Reply Letter Doctrine

A. Based on assumption of reliability of mail service

B. Foundation Elements
1. The witness prepared the first letter.

2. The witness placed the letter in an envelope, addressed to the author (of the second letter), and properly stamped and mailed the envelope.

3. The witness thereafter received a letter, arriving in the due course of mail.

4. The second letter referred to the first letter or was responsive to it.

5. The second letter bore the name of the author. The witness recognizes the exhibit as the second letter.

6. The witness specifies the basis on which he recognizes the exhibit.

9

CROSS EXAMINATION OF MENTAL HEALTH PROFESSIONALS- Q&A's

CROSS-EXAMINATION OF FORENSIC PSYCHIATRIST

NONCOMPLIANCE WITH ORDER OF REFERRAL

Q: Doctor, your involvement in this case emanated from a court order by Justice Ashton?
A: Correct.
Q: And that order appointed you and set forth your assignment and obligations in connection with the forensic evaluation, correct?
A: Yes.
Q: That order by Justice Ashton set forth findings that you were required to make and findings which you were directed not to make, correct?
A: Yes.
Q: Doctor, and in performing this forensic evaluation you considered all of the relevant facts?
A: I believe I did.
Q: To the extent you did not do so, your evaluation would not be complete, true?
A: Yes.
Q: Your methodology was completed?
A: I believe it was.
Q: To the extent it was not complete, it would be wrong and less reliable?
A: Yes.
Q: Your investigation in methodology was fair?
A: I believe it was.
Q: To the extent it was not fair, it would be inappropriate?
A: Yes.
Q: In fact, Doctor, you note in your report on page 2, under the heading "reason for referral", the specifics of the court order of Justice Ashton?
A: I see that, yes.
Q: When you undertook this assignment, did you consider yourself bound by the order of Justice Ashton as to what you were to do?
A: Yes.
Q: Did he carry out that order in both the letter and in spirit?

A: Yes.
Q: For example, you are directed not to make a specific recommendation as to legal custody?
A: That is part of the order, correct.
Q: Justice Ashton directed you to address "suggested parent access times including overnight visits"?
A: Yes.
Q: Doctor, isn't it a fact that your 32 page, single-spaced report contains no "suggested parent access times including overnight visits" as directed by Justice Ashton?
A: In specific terms, no.
Q: You did not do that in any terms, isn't that correct, Doctor?
A: I guess you are right.
Q: The order of Justice Ashton also directed you to address "suggested decision-making roles of each parent", correct?
A: Yes.
Q: Again, Doctor, a perusal of your report fails to contain any suggested decision-making roles of each parent, true?
A: Let me see. It appears that way.
Q: The order of Justice Ashton also directs that you address "suggested spheres of influence"?
A: Yes.
Q: And your report fails to address that direction by Justice Ashton as well?
A: I guess so.
Q: Doctor, as a forensic evaluator appointed by a court pursuant to a court order, do you believe you have the right to ignore any of the directions made by the court in its order of referral question?
A: No.
Q: And yet, Doctor, we have just noted three areas that you were directed to address and which you failed to do so?
A: It appears that way.

PEER REVIEW

Q: You are familiar with the peer review process?
Q: By peer, we are referring to people in your area of science?
Q: So, the peer review process involves a review of one's opinions by her scientific peers of colleagues?
Q: It allows one to get valuable feedback from other scientists about what they think of your opinions?
Q: It provides a sense of whether your opinions are generally regarded as supportable and reliable by other experts in your field?
Q: This can be very valuable in the scientific process, correct?
Q: One form of peer review involves standing up at meetings and sharing your views with peers of fellow colleagues?
Q: And you are discussing the bases of your opinions with them?
Q: This allows your peers to comment on the strengths or weaknesses of your opinions?
Q: You have been involved in this litigation for four (4) years, correct?
Q: You have never stood in front of a group of your fellow scientists to share with them the opinion you shared with this court on direct examination?
Q: Another form of peer review is publishing articles?
Q: When you submit an article to a professional journal, the article is peer reviewed before it is published?
Q: This, too, can be a valuable part of the scientific process?
Q: It might help weed out what is generally referred to as junk science?
Q: You have never submitted a manuscript stating your opinions as expressed to this court today to a journal for publication?...

EXPERIENCE IN TESTIFYING

Q: In reciting your qualifications, Doctor, you told us you have testified on numerous occasions?
A: Yes.
Q: And many of those occasions involved the issue of the determination of child custody, correct?

A: Certainly.

Q: In many of those cases, Doctor, and unlike this case, there was no restraint placed upon you in making a recommendation that one parent or the other should be the sole custodian, or that the parent should be joint custodians, true?

A: Yes, with some judges I am free to make a recommendation.

Q: And there are occasions when you recommended sole custody, and occasions where you recommended joint custody?

A: Yes.

Q: Doctor after you testify in a case you leave the courtroom correct?

A: Correct.

Q: You don't stay in the courtroom to hear the rest of the testimony?

A: Generally, no.

A: I guess in some cases that is true.

Q: In some cases Doctor, do you even know if the court followed the recommendation you made or made some other custodial arrangement inconsistent with your recommendation?

A: I think in most cases I learn from one source or another, but there are some where I probably do not know.

Q: You keep no running record or statistics, do you Doctor, about when the court follows your recommendations or does not follow your recommendations?

A: No statistics or formal records.

Q: Doctor you have made recommendations on custody evaluations for a good number of years, am I correct?

A: Definitely.

Q: So where the court has followed your recommendations, the children subject to these proceedings have grown and presumably matured over the years?

A: Surely.

Q: Doctor, have you done any follow-up studies as to how the children have fared over the years, where the court has followed your recommendation?

A: No I have not.

Q: Conversely, have you done any follow-up studies as to how children have fared over the years where the court has not followed your recommendation?

A: No I have not.

Q: So, Doctor, we have no *quantitative or empirical* means of testing the *validity or efficacy* of your recommendations, as we don't know how these children have fared over the years?

A: Well, I guess you can say that.

Q: Doctor, whether you've testified 3 times or in excess of 30 times as you stated, we really haven't learned anything from your experience because of the lack of any empirical or other data as to the development of the children?

QUALIFICATIONS; BOARD CERTIFICATION; EXPERIENCE

Q: Doctor, at the commencement of your direct examination, you told the court of your qualifications and the court received into evidence your curriculum vitae, correct?
A: Yes.
Q: I note that you told the court that you are board certified in adult & child and forensic psychiatry?
A: Correct.
Q: Research has not demonstrated a relationship between Board certification and competence, has it?
A: Not to my knowledge.
Q: Has it been demonstrated through published scientific research that the conclusions of board-certified psychiatrists are more accurate than those of psychiatrists who lack Board certification?
A: I am not aware of any such research.
Q: Are there a number of publications and reputable psychiatric journals to the effect that there is no relationship between Board certification and competence has been established?
A: I am not aware of that either.
Q: Isn't Board certification defined by the Board as indicating only minimal competence in the field?
A: Well, you have to pass a test so I don’t think it is “minimal”.
Q: And Doctor, you are certified in forensic psychiatry as well?
A: Yes.
Q: This is a relatively new kind of certification, is it not?
A: Yes.
Q: Similarly, it has not been demonstrated, through research that such certification indicates a higher level of competence or accuracy of conclusions than for those not so certified, has it?
A: I am not aware of any such research.

PROFESSIONAL ASSOCIATION PROTOCOLS

Q: Doctor, you have been practicing psychiatry for many years now?
A: Yes.
Q: During that period of time, you have been a member of the American Academy of Child & Adolescent Psychiatry, correct?
A: I am a member, yes.
Q: In fact, you have been an active member, serving on various committees of that association?
A: Correct.
Q: You are familiar with the fact that the American Academy of Child & Adolescent Psychiatry promulgates guidelines for its members that are engaged in forensic psychiatry?
A: Yes.
Q: Specifically, the professional organization published a Summary of Practice Parameters for Child Evaluation?
A: Yes.
Q: As a long-time active member of this association, you are familiar with these guidelines?
A: In a general sense, yes.
Q: You have employed these guidelines in your practice?
A: I believe I have.
Q: You have employed these guidelines in connection with the forensic evaluation in this case?
A: Again, I believe I have.
Q: Doctor, in those parameters, it states, and I quote: “The evaluator should consider meeting with the parents together at least once if the parties consent to it.” It is a fact that you never met with the parents together and you did not seek consent to a joint meeting with the parents?
A: That is correct.
Q: It further states: “Explore any allegations parents make against each other,” correct?
A: Yes.
Q: Doctor, is it a fact that my client made a number of allegations against his wife, particularly with respect to her alcoholism, that you did not explore?
A: I believe I took up these allegations with the Mother.
Q: If you did that would be included in what you have described as a comprehensive report that you rendered to the court, correct?
A: Yes.
Q: Can you point to that part of the report, Doctor, which describes your exploration of my client’s allegations and specifically a discussion of same with the mother?
A: I believe inferentially it is discussed in my general discussion about the mother’s alcoholism.
Q: Doctor, those same practice parameters, in the section entitled “Structuring the Evaluation”, it tells the examiner to request all legal documents from both sides, reading them not for the truth of the contents but, rather, for insight into what the parties are charging and counter-charging, correct?
A: You seem to have them in front of you, so I am sure it is correct.
Q: Doctor, in the section of your report entitled "Review of Records", which goes from page 26 through 29 of your report, you list eight records that you reviewed, correct?
A: Yes.
Q: And you agree with me Doctor, that none of them include the legal documents from either or both sides of this controversy?
A: Yes.
Q: Doctor, those same practice parameters state that the examiner should "Consider interviewing extended family, friends, neighbors, and alternate caregivers, such as babysitters.", correct?
A: Again, I am sure it so states.
Q: You did not interview any extended family, friends or neighbors of either of the parents, true?
A: True.
Q: Doctor, although your report states (page 3) that the family had live-in help until one year ago, and there is a full-time sitter Monday through Friday with variable hours, you did not interview any such person, correct?
A: Correct.
Q: Those same parameters state “Consider whether a visit to one or both homes would be helpful.” Did you visit the home of the parties?
A: No, I did not believe that was necessary.

FAILURE TO CONTACT SCHOOL PSYCHOLOGIST FOR CHILD

Q: Doctor, in doing your forensic analysis is it important that you do as complete an analysis as possible?
Q: You want to gather as much pertinent information about the subject of your report as is possible, correct?
Q: Did you strive to do that in the present case?
Q: Doctor, there is an important difference between an expert opinion and a personal opinion?
Q: The defining attributes of an expert opinion is the procedures employed in formulating the opinion, and in using the body of knowledge that forms the foundation upon which those procedures were developed, correct?
Q: You agree, do you not, that if the accumulated knowledge in your field was not utilized, the opinion expressed would not be an expert opinion, but rather a personal opinion, albeit one being expressed by an expert?
Q: Forensic experts are expected to investigate the accuracy of information provided by those being evaluated, correct?
Q: You are court-appointed correct, Doctor?
Q: Would you agree as a general proposition that the fact that an expert is court-appointed does not guarantee either objectivity or impartiality?
Q: In attempting to do a complete analysis, would mental-health professionals who had interaction with Peter, Jr. be important persons to contact?
Q: Such a person will be deemed a collateral contact?
Q: If you did contact such person it would be noted in your report, correct?
Q: Doctor, in your report you note that Peter, Jr. is in a socialization program and sees school psychologist, Julia Cohen, weekly?
A: Yes.
Q: You agree with me Doctor that the school psychologist thereby has very frequent contact with Peter, Jr.?
A: I assume so, at least weekly as it states.
Q: And this frequent contact is in the school setting, correct?
A: Yes.
Q: And the school psychologist would presumably have access to information concerning: the child's school performance, interaction with his peers, input from the child's teachers, classroom behavior, test scores and grades for the child and other pertinent information that could bear upon your assessment in this case?
Q: Doctor, do you see in your report and I'm referencing page 19 and consecutive pages, you note the collateral contacts that you contacted and spoke with in connection with this case?
A: Yes.
Q: You note that you had a telephone conference with a psychologist who treated Peter, Jr. 3 years ago?
Q: You are aware that the school psychologist, Julia Cohen, sees Peter, Jr., weekly and on an ongoing basis, including at the present time?
Q: You also note that another collateral contact was a substance abuse counselor of the mother?
Q: You also note that he spoke with a Doctor Burke, who treated Peter, Jr. and other family members?
Q: This was done in private sessions outside of the school setting, correct?
Q: Doctor, you do not have any direct contact, by telephone or otherwise with the school psychologist of Peter, Jr., namely, Julia Cohen?
Q: Will you agree with me that the thoughts and observations of a school psychologist who saw the child weekly and had access to the child's school records and performance, and interaction with his peers, would be pertinent to a full and complete assessment of this child for the purposes of your forensic evaluation?
Q: In fact, you did not even attempt to contact the school psychologist, did you?
Q: So, at least in that respect your report is not as complete as it should have been or what you would have liked it to have been?
Q: And this court will not have the benefit of this pertinent information in making its assessment as to the custody of Peter, Jr.?
Q: In your initial interview with the mother (p.3), did she tell you that there is tremendous tension in the house because "there is little or no agreement between the parents about how to parent Peter, Jr."
Q: So the issue of parenting of Peter, Jr. was a major stressor to this entire family, correct?
Q: So collecting and analyzing all of the pertinent information about Peter, Jr. would be all the more important, correct?

LAW GUARDIAN (ATTORNEY FOR CHILD)

Q: Doctor, the report you issued in this case, was it a comprehensive report?
A: I believe so.
Q: You included all of the facts that you considered relevant in your evaluation?
A: Yes.
Q: You reviewed the report before you submitted it to the Court?

A: Yes.
Q: And you reviewed it again before you testified in Court today?
A: I reviewed it yesterday.
Q: Do you still believe it is comprehensive and states all the relevant facts?
A: Yes.
Q: You are aware that the Court appointed an attorney for the children, Mr. Prince?
A: Yes.
Q: In that capacity, you know that he regularly communicated with the children and acted as the children's advocate?
A: Yes.
Q: Mr. Prince then might have had important information to impart that would be relevant to your comprehensive evaluation?
A: Yes, he certainly might.
Q: There is no reference in your report, Doctor, to you having met with or conversed with Mr. Prince?
A: I guess there is not.
Q: So whatever relevant information he may have had, you were not privy to it?
A: No.
Q: And it was not contained in what you have described as a comprehensive report?
A: No.
Q: So collecting and analyzing all of the pertinent information about Peter, Jr. would be all the more important, correct?
A: Possibly.

CONFIRMATORY BIAS; PRINCIPLE OF PRIMACY

Q: Doctor, are you familiar with the term confirmatory bias?
A: Yes, I am.
Q: Confirmatory Bias is the tendency of clinicians, and people in general, to maintain beliefs despite the force of counter evidence, and to pay particular attention to evidence that supports their beliefs, misinterpret ambiguous or nonsupport of evidence as supporting their beliefs, and disregard or dismiss counter evidence, would that be a fair analysis of the term?
A: Yes.
Q: Doctor, you are familiar with the Principle of Primacy?
A: Yes I am.
Q: That principle basically means that when faced with conflicting stories that which we hear first we generally tend to believe?
A: That is the principle.
Q: In doing your clinical examination in this case, you first interviewed the mother for 2 hours, true?
A: That is correct.
Q: You then had a second interview with the mother, lasting 1.75 hours?
A: Yes.
Q: You then had a third interview, this one with the 3 children and the mother, which also lasted 1.75 hours, correct?
A: Yes.
Q: Accordingly, you spent 3.75 hours with the mother, and 1.75 hours with the children and the mother, before you ever met or spoke to the father, correct?
Q: Doctor in your meetings with the mother during this 3.75 hours, she told you many negative things about the father correct?
A: She did.
Q: For example, she told you:
Jr. did not have a good relationship with the father.
Father indulges Jr.'s passion for trains.
Father is unstructured with all of the children.
Father opposed to psychiatric treatment and psychotropic medication for Jr.
Father has little to do with the 2 younger children.
Father is rejecting of the daughter because he wanted a 3rd son.
Father does not have many friends.
When mother was in rehab, the nanny almost quit because of father's deplorable care of the children.
Father has a lot of the same issues as the oldest son and ignores the other two children.
Father definitely favors Jr., which the 2 younger children resent.
Relationship between Jr. and his father is dysfunctional in many ways.
Father has a laissez-faire attitude concerning the children socialization, bedtime, rules and structure.

Father shows no interest in Alan's enthusiasm for sports
He used my alcoholism as a weakness, not a disease (p.7)
He makes derogatory comments about my drinking in front of the children (p.7)
Q: Doctor from this information, is it true that you form some initial oppressions from the data that was presented to you?
A: It would generally be impossible not to.
Q: And is there some literature to the effect that psychiatrists frequently form diagnostic impressions very early in the clinical examination, sometimes in a matter of minutes?
A: That happens at times.
Q: What I want to know, Doctor, is there literature and research in your field that this occurs?
A: Yes.
Q: Is there a body of research showing that initial beliefs are often maintained, even in the face of counter evidence?
A: I have seen such research.
Q: Is there a body of literature indicating that once clinicians have taken a position or adopted a conclusion, that they apply very high standards of rigor about any contradictory evidence and will accept a much lower standard of rigor from any data that supports their position?
A: Some believe that.
Q: Doctor, are you familiar with the term "premature closure"?
A: Yes I am.
Q: Does that term refer to a tendency to form conclusions very early in the data collection process?
A: Yes.
Q: Does the literature show that this sometimes results in becoming resistant to data which might indicate that the initial conclusion was wrong?
A: Yes.
Q: And we've established that you heard the mother for 3 and three-quarter hours as the initial interviews in your forensic analysis?
A: Yes.
Q: Doctor, you not claiming that because you are a psychiatrist, that unlike other human beings, you are immune from the effects of confirmatory bias, premature closure, or the principal of primacy?
Q: In fact, Doctor, on page 7 of your report this section entitled "Mental status exam", in that section you present conclusions and findings and impressions about the mother correct?
A: Yes.
Q: This was based upon just 3 and three-quarter hours of interviews with her alone, and the additional time when she brought the children to see you, all before you ever met or spoke to the father?
A: That is the proper sequence.
Q: In fact, Doctor, you first saw the mother for the two-hour session on January 28, 2008, true? And then you saw her for a 2nd time on February 5, 2008, true?
A: True.
Q: It wasn't until 2 months after you first met the wife and have a two-hour session that you first met and spoke with the father?
A: That is about correct.
Q: Doctor, you care about the people involved in the cases in which you act as a forensic evaluator?
A: Of course.
Q: And even after you see an individual, you reflect upon the clinical examination, review your notes, think about impressions and possible conclusions?
A: Constantly.
Q: And you did this in the two-month interval between your initial interview with the mother and your initial interview with the father, correct?
A: I am sure I did.
Q: Doctor, you were the one who arranged the appointments in the sequence of events regarding the forensic evaluation?
A: I was.
Q: You determined who would be interviewed, the sequence of the interviews, the length of the interviews, the place of the interviews, the collateral sources that would be contacted and other aspects of the forensic assignment ordered by Justice Ashton?
A: Yes.
Q: You had the option, did you not, to see each parent on the same day for the same amount of time?
A: I guess I could have done that.
Q: You could have seen the mother for an hour and the father for an hour on the same date, correct?
A: As I said, that could have occurred.
Q: Had you done that you would have had input from both parents as part of the formulation of your initial impressions in

your initial data collection?
A: I presume so.
Q: Had you done this, you would have mitigated or ameliorated, if not eliminated, the effects of confirmatory bias, the principle of relevancy, and premature closure?
A: Again, presumably that could have occurred.

ALCOHOLISM

Q: Doctor, your report notes that the mother describes herself as a recovering alcoholic (p.4) and you quote her as saying: "I have been in recovery for 5 or 6 years with one relapse. I have been clean and sober for 3 years." correct?
A: Correct.
Q: You have concluded (p.31) that the mother's alcohol history does not seem pertinent in making a custody decision?
A: I have so concluded.
Q: So you are starting to this court that in making its decision, the mother's alcoholism is not a relevant or pertinent consideration?
A: I believe she has made a successful recovery and thus this issue should not be determinative.
Q: Doctor, I didn't ask you if it was determinative. I asked if her history of alcoholism is a relevant and pertinent consideration for the Court.
A: I don't believe it is particularly relevant.
Q: Particularly relevant, does that mean it is relevant to some degree?
A: I believe I have stated what I mean.
Q: On page 4 of your report, you note that she is between AA sponsors because of previous sponsor's relapse, correct?
A: Yes.
Q: So the person who was assisting her as a sponsor has relapsed?
A: Yes, that is what she told me.
Q: Her father was an alcoholic for most of her childhood, as you note on page 6 of your report?
A: Yes, that is what she related.
Q: A maternal aunt was an alcoholic?
A: Yes.
Q: Her father's male cousin is an alcoholic and former cocaine user who is in recovery?
A: Yes, again that is what she related to me.
Q: The Husband reported to you that after the death of her father, she and her mother began drinking, and her mother would bring jugs of wine to the home (page 8)?
A: That is what he related to me.
Q: Did you check this out factually in any manner?
A: No.
Q: You have not reported that the husband lied to you with this allegation, correct?
A: That is so.
Q: On page 28 of your report, you state: "Husband reports that she once got into a car accident while driving the two boys. She fled the scene with the two children which led to her arrest. I got her out of jail in June of 2002. Two weeks later she was diverted by the Committee on Physicians Health because the chairman of her department found her visibly intoxicated."
A: I am stating in my report what the husband alleged, correct.
Q: That is a very serious allegation, is it not?
A: Yes, very serious.
Q: If true, the two boys were placed in a potentially very dangerous situation?
A: Yes.
Q: Did you do anything to validate or corroborate this factual allegation?
A: Not really.
Q: Did you then accept it as true?
A: Yes.
Q: The father reported to you that she had been writing herself prescriptions for Toredol and Percocet (Page 8), and that she popped Percocet like candy (p.9)?
A: He so reported.
Q: Doctor, I am correct that you made no efforts to validate, corroborate or refute this information imparted to you by the father?
A: Other than my conversations with the parties, no.
Q: Did you specifically ask the mother if she denied these allegations made by the father?

A: No.
Q: In contrast, with respect to the father, you note "there is no family history of psychiatric illness, alcoholism or substance abuse", correct?
A: Yes.
Q: Doctor, you are aware that in 2005 the mother suffered a relapse and had to leave the marital home and went to a clinic for rehab?
A: Yes, she was quite upfront about that.
Q: Doctor, you cannot sit here and tell this court with any degree of medical certainty that she will not suffer a relapse again, as her immediate past sponsor has done?
A: No, that is not possible to state, although I do not think it would occur.
Q: And, as contained in your report, the mother often drives the children to the various extracurricular and other activities?
A: Yes.
Q: And you cannot predict with any degree of certainty that if she relapses she will not be driving a car with the children in the car?
A: No.
Q: You are aware that she had a previous DWI?
A: Yes, both parties told me that.
Q: You are aware that psychiatrists are ill-equipped to predict future dangerous behavior of people they examine or treat?
A: To a degree.
Q: In fact, Doctor, in your training I assume you are aware of the famous court case by the name of *Tarasoff v. The Regents of the University of California* (1977).
A: Yes, I am aware of that case.
Q: In that case, a young woman student was killed by a student who told a counselor he was seeing at the University that he intended to kill her. The therapist called the campus police, who felt the student appeared rational and no further action was taken. The young woman's parents sued the University because no one had warned the victim, alleging that the therapist had a duty to warn. Those are the basic facts, correct?
A: I am not aware specifically but that sounds correct.
Q: You are a member of the American Psychiatric Association, correct?
A: Yes.
Q: You are aware that the APA filed a brief in the *Tarasoff* case stating: that the duty to warn imposes an impossible burden on the practice of psychotherapy. *"It requires the psychotherapist to perform a function which study after study has shown he is ill-equipped to undertake, namely, the prediction of his patient's potential dangerousness?"*
A: I am aware of that position.
Q: So, applying that principle to this case, Doctor, you cannot tell this court if she will relapse again and if so, whether there will be danger to the children as a result of the relapse?
A: That is true.
Q: You agree with me Doctor that a prime function of us parents is to provide for the safety of our children?
A: Of course.
Q: Certainly, the physical safety is of the utmost concern?
A: Yes.

JOINT CUSTODY

Q: Doctor, you have stated, have you not, and specifically on page 31 of your report, that each parent is capable of providing suitable residential care for the children?
A: Yes.
Q: Would you also agree that both parents are loving and caring of their children?
A: Yes.
Q: And Doctor, would you agree with me that where you have two loving and caring parents, each capable of providing suitable residential care, it is best if both parents are intimately and extensively involved in the upbringing and entire maturation process of the children?
A: Unquestionably.
[ASK IF EACH ITEM BELOW IS INDICATIVE OF A POSSIBILITY OF JOINT CUSTODY BEING FEASIBLE CHOICE]
Q: Doctor as stated of page 31 of your report, and I quote: "both parties are capable of providing suitable residential care." Those are your words, correct?
A: Yes.
Q: Doctor, I am making reference to page 3 of your report where on you quote the mother stating as follows: "on weekends, we take care of the kids without the sitter". Doctor, will you concede that when the mother said that, the

reference to “we” meant herself and the father of the children?
A: Yes, I so quoted her.
Q: You reported to this court (p.14) that Jr. "has a good relationship with both parents”, correct?
A: Correct.
Q: You noted on page 15 of your report, and you highlighted it, that Jr. expressed no preference
A: Yes.
Q: You further noted that the son, Alan, believes it would be fair to split time with each parent, and quoted him as saying, "I am pretty organized so it would be no problem"?
A: Yes.
Q: You also noted (p. 17) that Alan was emphatic that the future arrangements would not be confusing to him and he could handle a physical custody split, which he thought to be the fairest?
A: I so noted.
Q: You noted, did you not, that there is strong agreement between the parents that Alan is a competitive, athletic, and assertive boy who was generally well-adjusted?
A: Yes.
Q: You also noted that there is a strong consensus between the parents about Beth's anxiety problems, psychological and interpersonal strengths and her array of age-appropriate interests?
A: Yes.
Q: You noted (top of p. 25) that “It is significant that there is a high degree of consensus between the parents concerning the nature of Peter's psychiatric problems, his social, emotional and behavioral symptoms and his strengths and weaknesses in terms of school, interest and socialization” it is so noted, correct?
A: I did.
Q: So you found that the parents agree as to these issues?
A: Yes I did.
Q: Doctor there are not many perfect parents, are there?
A: No.
Q: Many parents have some characteristics that are less than desirable, is that correct?
A: Certainly.
Q: In most cases, children manage to accomplish reasonably normal development anyway, is that not correct?
A: That is correct.
Q: Aside from Peter, Jr., who we know suffers from Asperger’s syndrome and PPD, the other children did not show any signs of any serious psychological problems, correct?
A: No they did not.
Q: And these children have been living with both parents all of their lives, true?
A: True.
Q: In fact, they are doing pretty well, considering the marital discord in the home, would you agree?
A: Yes.
Q: Would that suggest to you that the children are psychologically sound?
A: In a sense, but there are the problems that I have noted.
Q: And they would likely do all right with either of the parents, or with both of the parents in a joint custody arrangement, is that correct?
A: I do not believe that joint custody is feasible in this case. In a sense, I wish it was. However, there is a long history of the inability of these two parents to act in concert and harmony, even for the benefit of their children.
Q: And would joint custody be more fitting for adolescents who arrive at a point in life where parents are likely to have relatively less influence on their development and peer associations considerably more influence?
A: Possibly.

STRESSOR; EXAMINER EFFECT

Q: Doctor, you had multiple examinations of the parents and the children, correct? (recount visits) (clinical examinations)
Q: And when you did this, doctor, did you have any doubt in your mind that the children knew the purpose for which they were coming to your office?
Q: They knew that their parents were embroiled in a divorce action, which included the issue of which parent they would live with when the action was completed?
Q: Would you state that both the parents and the children, when they met with you, were under a certain amount of stress and anxiety because of the circumstances surrounding their visits with you?
Q: Doctor, is there a very substantial body of scientific and professional literature indicating that the general circumstances under which a forensic examination is conducted (the time, the place, the purpose) affects the kind of information or data that emerges in the examination?

Q: Doctor isn't there research showing that such factors affect the kind of information that is obtained in the interview?
Q: Isn't there described in the literature something known as situation effects?
Q: The pendency of a divorce and custody case could qualify as such a situational effect, correct?
Q: In fact, the DSM describes marital breakup as a psychosocial problem that can affect diagnosis and prognosis?
Q: The breakup of a marriage, particularly when children are involved, is a highly stressful situation for most normal people, both parents and children, right?
Q: The behavior observed under the circumstances may not be representative of the individual's behavior on the more normal, less highly stressful circumstances, true?
Q: Not only do we have the strain of the circumstances relating to the divorce and the issue of custody, but the additional strain of the circumstance of the clinical examination itself?
Q: Doctor, in addition to the psychological stress, or of a divorce and custody proceeding, is it not a fact that a clinical examination is also affected by the nature of the examiner himself or herself?
Q: The attitudes of the examiner, the personality of the examiner, the race or economic status of the subject and the examiner, all have an effect, correct?
Q: You have learned in your studies, Doctor, have you not, that some examiners with one theoretical orientation might get different data and record different data and interpret the data differently than an examiner of a different theoretical orientation, correct?
Q: Similarly, examiners with different personalities might get some distinct kinds of information from the people they examine, true?
Q: That is because people respond differently to several types of people, is that not so?
Q: What the examiner perceives, remembers and records is also subject to various influences?
Q: There may be distortion or bias due to the theoretical orientation of the examiner, the values and attitudes of the examiner, and other characteristics of the examiner?
Q: The interpretation of the data collected is subject to influence, distortion and bias due to the same factors, am I correct?
Q: In addition, forensic evaluation cases like this necessarily involve a prediction?
Q: And Doctor, isn’t it a fact that a prediction in this field is overwhelmingly speculative?
Q: And one examiner or clinician can base his/her conclusions on unvalidated and speculative theories of child development that differ from another examiner or clinician?
Q: There are different and competing theories of child development?
Q: And Doctor, what you have provided us with on your direct examination is what could be called to a clinical judgment, is that correct?
Q: And isn't there a substantial body of scientific and professional literature indicating that there are several serious flaws and problems with clinical judgment? (Lacks validity or cannot be relied upon)

FACTS FAVORABLE TO FATHER

Q: As noted on page 10 of your report, the father was subjected to four (4) CPS investigations?
A: Yes.
Q: All of the investigations concluded with an “unfounded” finding, correct?
A: Yes.
Q: He believes the referrals were one from the school and the rest from his wife or her mother, and he so told you?
A: Yes.
Q: Did you explore this allegation with the mother?
A: Not really.
Q: Would it be pertinent if she made false allegations of child abuse or neglect?
A: Of course.
Q: So in not exploring this allegation, your report is incomplete in another respect, correct?
A: Yes.
Q: With respect to the father, there is no family history of psychiatric illness, alcoholism or substance abuse (page 12)?
A: That is correct.
Q: You noted that the father "presents as pleasant, articulate and cooperative”?
A: I did.
Q: Peter, Jr. again mentions how much he enjoys building rockets which he shoots at a site in upstate New York?
A: Yes, he does
Q: With whom does he do this?
A: His father.
Q: You note in your report (p. 18) that Jr. seemed "closely identified to his dad as they share a love of trains and rockets,” Mr. Smith tries to reassure Jr. when he gets fixated on a particular issue which causes him to become anxious or angry?
A: I did.

Q: You also noted that Mr. Smith tried to diffuse the issue about summer camp in noting that he, too, must abide by the court ruling?
A: Yes, that was very appropriate.
Q: When Jr. argued that since he should be able to fire his Doctor, his father gently, but firmly, said that does not work that way to which Alan concurred, correct?
A: Yes.
Q: That also was an appropriate and proper way to handle the situation?
A: I believe so.
Q: You also noted (p.19) that "Mr. Jones stayed clear of any hot button issues involving himself and Carol, which showed good judgment on his part in front of the children?"
A: Yes, I so noted.
Q: As part of your psychological testing, you performed the MMPI-2 tests on the parents, correct?
A: Yes.
Q: And the results regarding the father showed no clinical diagnoses, true?
A: Yes.
Q: His clinical scales and content scores were within normal limits?
A: Yes, that is what the test revealed.
Q: With respect to Dr. Smith, the test revealed features of obsessive-compulsive, histrionic and sadistic personality attributes?
A: Yes.
Q: Doctor, if you would be good enough to turn to page 23 of your report, I notice that you put certain words in bold print; is that for emphasis to the reader?
A: Yes.
Q: Now, you bold type the words "open and cooperative manner" when you speak of Dr. Smith's approach to the testing, correct?
A: Yes.
Q: Two paragraphs later, you state that "Mr. Jones was cooperative with the examination, correct?
A: Yes.
Q: You chose not to put his cooperation with the tests in bold type, it is in regular type?
A: Yes.
Q: So you chose to emphasize the mother's cooperation but not the father's?
A: It appears so.
Q: On the same page, you put in bold type, and referring to the mother, the words "disciplined in nature, often appearing to be conscientious, dependable and persistent", correct?
A: Yes.
Q: Those are basically positive traits of the mother that you are emphasizing?
A: Correct.
Q: With respect to the sentence: "Dr. Smith did have features of obsessive-compulsive, histrionic and sadistic personality traits", you chose not to emphasize that sentence and therefore it was not in bold type?
A: Yes.
Q: That sentence portrays a basically negative statement about Dr. Smith, does it not?
A: It depends upon the degree of each of these traits, but generally speaking, they are not positive, albeit many very successful people have, for example, obsessive-compulsive personality traits.
Q: At the bottom of page 23 and carrying over to page 24, you put in bold type, and referring to the father, "Interpersonal relationships may be shallow in nature and there may be a tendency for such an individual to appear self-centered and exploitive or indifferent to the needs of others."?
A: I did place that in bold type.
Q: Again, for emphasis?
A: Yes.
Q: So, Doctor, you deliberately chose to put the father's negative findings in bold type for emphasis and the mother's positive findings in bold type for emphasis?
A: It appears that way.
Q: This is in spite of the fact that the findings from the psychological testing included positive and negative features about both parents, correct?
A: Yes.

AVAILABILITY

Q: Doctor, a parent's availability to be with the children as frequently as possible is a factor to be considered in a custody determination, do you agree?

A: Yes, it is one factor to consider.

Q: In this case, we have two working parents, both working full time, correct?

A: Yes.
Q: You noted in your report that occasionally the mother worked 24-hour shifts at the hospital, correct? (Page 2)
A: Yes.
Q: You are aware Doctor, are you not, that my client works a normal work week, namely, Monday through Friday?
A: Yes.
Q: You further noted that until a year ago, they had full-time help in the house and since that time a full-time sitter, Monday through Friday?
A: Correct.
Q: In your report you cited the mother's statement that on weekends, "we" take care of the kids without the sitter?
A: Yes.
Q: So, you would agree, would you not, that at least as work schedules are concerned, the father is available at least as much of the mother if not more so?
A: Yes.

PSYCHOLOGICAL TESTS

Q: Doctor, you performed psychological testing on both parents, correct?
A: Yes, the MMPI-2 and the Mellon Clinical Multiaxial Inventory-III.
Q: The psychological testing suggested some maladaptive personality disorder features of the mother, did it not?
A: Yes.
Q: This was in terms of certain personality traits?
A: Yes.
Q: Doctor, am I correct that a personality trait or attribute basically is a habitual pattern of behavior, thought and emotion?
A: Yes.
Q: And when the traits are inflexible, they can become maladaptive and cause significant functional impairment, and then they constitute disorders?
A: Yes.
Q: The mother, according to the psychological testing, did have features of obsessive compulsive, histrionic, and sadistic personality attributes or traits, correct?
A: Correct.
Q: Obsessive compulsive personality traits can manifest themselves in a variety of ways, correct?
A: Yes.
Q: Some features might be excessive orderliness, frugality and a cold mechanical quality in relationships with people, and being capable of a great amount of work but lacking flexibility and interpersonal warmth?
A: That can be part of it, yes.
Q: A person with histrionic traits can often be self-centered, immature, vain, and at times dramatic in behavior?
A: Yes.
Q: A sadistic personality trait can manifest itself by a lack of concern for people and deriving pleasure from harming or humiliating others?

A: That would fit the definition of a sadist, but that is not what the test found. It just suggested there might be such traits related to sadism. Q: p. 23 - the father was cooperative with the examination?

Q: The Father received no clinical diagnosis?

A: That is correct.

Q: His clinical scales and content scores were within normal limits?

A: Yes.

Q: These conclusions were reached because psychological personality testing was done under the supervision of a clinical psychologist, correct?

A: Yes.

Q: Not yourself?

A: No.

Q: You were not present when these tests were administered?

A: No.

Q: The tests were the MMPI – 2, and the Mallon Clinical Multiaxial Inventory – 3?

A: Yes.

Q: Doctor, it is true that the standard tests used were not designed for, and have not been validated for conventional custody issues?

A: That is true.

Q: In fact, your report indicates that the two tests administered are not designed to determine whether one parent is more suitable than another?

A: That is correct.

Q: And yet the psychological test results must have some relevance or you would not have had them administered, true?

A: Yes.

Q: Doctor, do you recall that previously I questioned you about the practice parameters promulgated by the American Academy of Child and Adolescent Psychiatry?

A: I do recall.

Q: Those parameters state, and I quote, "In most cases, psychological testing of the parents is not required. Psychological tests, such as the Minnesota Multiphasic Personality Inventory, the Thematic Apperception Test, and all the Rorschach were not designed for use in parenting evaluations. Their introduction into a legal process leads to professionals battling over the meaning of raw data and attorneys making the most of findings of "psychopathology," but has little utility for assessing parenting." Doctor, you had one of those tests administered to the parents, correct?

Q: That was the MMPI?

A: Yes.

Q: In fact the same parameters also state, and again I quote, "Certain tests have been advanced as having specific utility in assessing variables specific to a custody evaluation. These include the Bricking Perception of Relationships Test and the Ackerman-Steindorff Scales for Parent Evaluation of Custody." You did not have either of these tests administered, isn't that a fact?

A: Yes.

COLLATERAL SOURCES

Q: Doctor, would it be fair to say that you rely to a great extent upon the collateral contacts in this case?
A: I relied to some extent; I would not say great extent.
Q: You expend about four pages in your report discussing the collateral sources, true?
A: Yes.
Q: They included a clinical psychologist who treated Peter, Jr. about 3 years ago, Doctor Lois Lane? (p. 20)
A: Yes.
Q: Your only contact with her was a phone consultation on August 6, 2008, correct?
A: That is correct.
Q: You had no in person meeting with her?
A: No.
Q: How long did that telephone call last?
A: I don't recall specifically but maybe about 15 minutes or so.
Q: Did you take notes?
A: Yes.
Q: Do you have in court with you today the original notes?
(if not, explore)
Q: Would it be fair to say that after that phone conversation, it was clear to you that she liked the mother and disliked the father?
A: I don't know if she personalized it that way. She did have her views of the parents, however.
Q: Am I correct in saying you received no documents from her?
A: That is correct.
Q: You did not read or review any notes she took or may have taken during her sessions with Peter, Jr., or the parents, or any recordings she may have made?

A: No.
Q: So basically you took her word for what she said without any form of corroboration through original notes or other data?
A: I had no reason to doubt what she told me, which were her professional opinions and judgments.
Q: Did you ever know or converse with this clinician prior to that phone call?
A: No.
Q: Were you familiar with her reputation within the professional mental health community?
A: No.
Q: So whether she was an accomplished and highly respected mental health professional, or a quack, you had no way of knowing?
A: I believe I would have discerned if she was, to use your word, a “quack”.
Q: You also had a phone consultation with Doctor Trisha Burke on August 8, 2008?
A: Yes.
Q: How long did that conversation last?
A: Again, I am not sure, but probably about the same length as the phone call we just discussed.
Q: Did you ever meet in person with Doctor Burke about this case?
A: No.
Q: Did you receive any notes or documentation from Doctor Burke concerning her treatment of Jr.?
A: No.
Q: Again, did you take her word for what she said without any form of corroboration or validation?
A: I considered what she said along with all the other information that was imparted to me as part of this forensic assignment.
Q: You are aware that Doctor Burke and the father had differences of opinion as to the proper treatment for Peter, Jr., including drugs that were administered for his use?
A: Yes, I was made aware of that.
Q: These differences of opinion might have led to a bias on the part of Doctor Burke against the father and in favor of the mother?
A: I assume that is possible.
Q: But you would not know if such a bias existed or not, correct?
A: True.
Q: You don't advocate, do you, that every parent should blindly follow whatever advice a therapist gives if in apparent good faith there is reason to believe that the advice may be against the interest of the child?
A: No. Blind adherence is certainly not optimum.
Q: Am I correct in concluding that based upon the conversation with Doctor Burke, there is a general dislike between her and the father?
A: I would not know if it was on such a personal level, although they did have disagreements about treatment and drugs which were prescribed for Peter, Jr.
Q: In your recommendation section of the report, you state Doctor, that “the observations of Drs. L and G, who have worked with the family for several years, seem highly relevant to reaching a conclusion about custody, especially decision-making authority”?
A: I said that.
Q: It is clear then, Doctor, that you relied heavily upon the observations of doctors’ L and G in formulating your own conclusions?
A: It appears that way, yes.
Q: Doctor, while recognizing that you are not a lawyer, albeit you have had extensive courtroom experience, you are aware of what is known as hearsay evidence, true?
A: I have heard the term many times.
Q: Hearsay, to your understanding, is basically out-of-court statements to prove a relevant fact in the case, correct?
A: I believe that is what it is.
Q: And you agree with me that the portion of your report relating to the observations and statements of Doctor L and Doctor G are out-of-court statements which render opinions upon which you have relied?
A: To the extent I have previously said, yes.
Q: Doctor, we have you relying extensively on the substance of telephone conversations which first, are hearsay and, second, have not been corroborated or validated by you by even the acquisition of notes or other original data collection by them?
A: Yes.
Q: Do you believe that such extensive reliance on this type of material is conducive to the rendering of a comprehensive, accurate report to be submitted to a court to aid in the determination of a child custody dispute?
A: I believe on balance I have rendered such a report.

CONCLUSIONS

Q: Doctor, there is a segment of your report entitled "Summary and Conclusions", correct?
A: Yes, it is near the end of my report?
Q: And that section contains, does it not, your conclusions and opinions about the issues involved?
A: In part it does.
Q: Doctor, there is a difference between expert opinions and subjective opinions, correct?
A: Yes.
Q: You understand, Doctor, that in terms of professional opinions, it is implicit that the opinion be stated in terms of reasonable professional certainty?
A: That is my understanding of the standard.
Q: And to give an opinion based upon reasonable professional certainty, it must be grounded upon studies, research, literature in the field, and empirical data known to the mental health professional?
A: Yes.
Q: So what is known or relied upon by a mental health professional is that which is established empirically as reported in peer-reviewed professional literature, not what you as an individual may conclude idiosyncratically from intuition, or since personal value judgments?
A: Yes.
Q: In your extensive 32-page report, did you cite to the court any studies, literature, research or empirical data?
A: No.
Q: Doctor, would you agree with me that different theoretical backgrounds of psychiatrist predispose them to reach different conclusions based upon the same data?
A: That can be.

Revenue Ruling 59-60

§4: Factors to Consider

(1) THE NATURE OF THE BUSINESS AND THE HISTORY OF THE ENTERPRISE FROM ITS INCEPTION
The history of a corporate enterprise will show its past stability or instability, its growth or lack of growth, the diversity or lack of diversity of its operations, and other facts needed to form an opinion of the degree of risk involved in the business. For an enterprise which changed its form of organization but carried on the same or closely similar operations of its predecessor, the history of the former enterprise should be considered. The detail to be considered should increase with approach to the required date of appraisal, since recent events are of greatest help in predicting the future; but a study of gross and net income, and of dividends covering a long prior period, is highly desirable. The history to be studied should include, but not be limited to, the nature of the business, its products or services, its operating and investment assets, capital structure, plant facilities, sales records and management, all of which should be considered as of the date of appraisal, with due regard for recent significant events. Events of the past that are unlikely to recur in the future should be discounted, since value has a close relation to future expectancy.
(2) THE ECONOMIC OUTLOOK IN GENERAL AND THE CONDITION AND OUTLOOK OF THE SPECIFIC INDUSTRY IN PARTICULAR
A sound appraisal of a closely-held stock must consider current and prospective economic conditions as of the date of appraisal, both in the national economy and in the industry or industries with which the corporation is allied. It is important to know that the company is more or less successful than its competitors in the same industry, or that it is maintaining a stable position with respect to competitors. Equal or even greater significance may attach to the ability of the industry with which the company is allied to compete with other industries. Prospective competition which has not been a factor in prior years should be given careful attention. For example, high profits due to the novelty of its product and the lack of competition often lead to increasing competition. The public's appraisal of the future prospects of competitive industries or of competitors within an industry may be indicated by price trends in the markets for commodities and for securities. The loss of the manager of a so-called "one-man" business may have a depressing effect upon the value of the stock of such business, particularly if there is a lack of trained personnel capable of succeeding to the management of the enterprise. In valuing the stock of this type of business, therefore, the effect of the loss of the manager on the future expectancy of the business and the absence of management- -succession potentialities are pertinent factors to be taken into consideration. On the other hand, there may be factors which offset, in whole or in part, the loss of the manager's services. For instance, the nature of the business and of its assets may be such that they will not be impaired by the loss of the manager. Furthermore, the loss may be adequately covered by life insurance, or competent management might be employed on the basis of the consideration paid for the former manager's services. These, or other offsetting factors, if found to exist, should be carefully weighed against the loss of the manager's services in valuing the stock of the enterprise.
(3) THE BOOK VALUE OF THE STOCK AND THE FINANCIAL CONDITION OF THE BUSINESS
Balance sheets should be obtained, preferably in the form of comparative annual statements for two or more years immediately preceding the date of appraisal, together with a balance sheet at the end of the month preceding that date, if corporate accounting will permit. Any balance sheet descriptions that are not self-explanatory and balance sheet items comprehending diverse assets or liabilities should be clarified in essential detail by supporting supplemental schedules. The statements usually will disclose to the appraiser (1) liquid position (ratio of current assets to liabilities); (2) gross and net book value of principal classes of fixed assets; (3) working capital; (4) long-term indebtedness; (5) capital structure; and (6) net worth. Consideration also should be given to any assets nor essential to the operation of the business, such as investments in securities, real estate, etc. In general, such nonoperating assets will command a lower rate of return than do the operating assets, although in exceptional cases the reverse may be true. In computing the book value per share in stock, assets of the investment type should be revalued on the basis of their market price and the book value adjusted accordingly. Comparison of the company's balance sheets over several years may reveal, among other facts, such developments as the acquisition of additional production facilities or subsidiary companies, improvement in financial position, and details as to recapitalizations and other changes in the capital structure of the corporation. If the corporation has more than one class of stock outstanding, the charter of certificate of incorporation should be examined to ascertain the explicit rights and privileges of the various stock issues including: (1) voting powers, (2) preference as to dividends, and (3) preference as to assets in the event of liquidation.

(4) THE EARNING CAPACITY OF THE COMPANY

Detailed profit-and-loss statements should be obtained and considered for a representative period immediately prior to the required date of appraisal, preferably five or more years. Such statements should show (1) gross income by principal items; (2) principal deductions from gross income including major prior items of operating expenses and interest and other expense on each item of long-term debt, depreciation and depletion if such deductions are made, officers' salaries, in total if they appear to be reasonable or in detail if they seem to be excessive, contributions (whether or not deductible for tax purposes) that the nature of the business and its community position require the corporation to make, and taxes by principal items, including income and excess profits taxes; (3) net income available for dividends; (4) rates and amounts of dividends paid on each class of stock; (5) remaining amount carried to surplus; and (6) adjustments to, and reconciliation with, surplus stated on the balance sheet. With profit and loss statements of this character available, the appraiser should be able to separate recurrent from nonrecurrent items of income and expense, to distinguish between operating income and investment income, and to ascertain whether or not any line of business in which the company is engaged is operated consistently at a loss and might be abandoned with benefit to the company the percentage of earnings retained for business expansion should be noted when dividend-paying capacity is considered. Potential future income is a major factor in many valuations of closely-held stocks, and all information concerning past income which will be helpful in predicting the future should be secured. Prior earnings records usually are the most reliable guide as to the future expectancy, but resort to arbitrary five-or-ten year averages without regard to current trends or future prospects will not produce a realistic valuation. If, for instance, a record of progressively increasing or decreasing net income is found, then greater weight may be accorded the most recent years' profits in estimating earning power. It will be helpful, in judging risk and the extent to which a business is a marginal operator, to consider deductions from income and net income in terms of percentage of sales. Major categories of cost and expense to be so analyzed include the consumption of raw materials and supplies in the case of manufacturers, processors and fabricators; the cost of purchased merchandise in the case of merchants; utility services; insurance; taxes; depletion or depreciation; and interest.

(5) DIVIDEND-PAYING CAPACITY

Primary consideration should be given to the dividend-paying capacity of the company rather than to dividends actually paid in the past. Recognition must be given to the necessity of retaining a reasonable portion of profits in a company to meet competition. Dividend-paying capacity is a factor that must be considered in an appraisal, but dividends actually paid in the past may not have any relation to dividend-paying capacity. Specifically, the dividends paid by a closely-held family company may be measured by the income needs of the stockholders or by their desire to avoid taxes on dividend receipts, instead of by the ability of the company to pay dividends. Where an actual or effective controlling interest in a corporation is to be valued, the dividend factor is not a material element, since the payment of such dividends is discretionary with the controlling stockholders. The individual or group in control can substitute salaries and bonuses for dividends, thus reducing net income and understating the dividend-paying capacity of the company. It follows, therefore, that dividends are less reliable criteria of fair market value than other applicable factors.

(6) WHETHER OR NOT THE ENTERPRISE HAS GOODWILL

In the final analysis, goodwill is based upon earning capacity. The presence of goodwill and its value, therefore, rests upon the excess of net earnings over and above a fair return on the net tangible assets. While the element of goodwill may be based primarily on earnings, such factors as the prestige and renown of the business, the ownership of a trade or brand name, and a record of successful operation over a prolonged period in a particular locality, also may furnish support for the inclusion of intangible value. In some instances it may not be possible to make a separate appraisal of the tangible and intangible assets of the business. The enterprise has a value as an entity. Whatever intangible value there is, which is supportable by the facts, may be measured by the amount by which the appraised value of the tangible assets exceeds the net book value of such assets.

(7) SALES OF THE STOCK AND THE SIZE OF THE BLOCK OF STOCK TO BE VALUED

Sales of stock of a closely-held corporation should be carefully investigated to determine whether they represent transactions at arm's length. Forced or distress sales do not ordinarily reflect fair market value nor do isolated sales in small amounts necessarily control as a measure of value. This is especially true in the valuation of a controlling interest in a corporation. Since, in the case of closely-held stocks, no prevailing market prices are available, there is no basis for making an adjustment for blockage. It follows, therefore, that such stocks should be valued upon a consideration of all the evidence affecting the fair market value. The size of the block of stock itself is a relevant factor to be considered. Although it is true that a minority interest in an unlisted corporation's stock is more difficult to sell than a similar block of listed stock, it is equally true that control of a corporation, either actual or in effect, representing as it does an added element of value, may justify a higher value for a specific block of stock.

(8) THE MARKET PRICE OF CORPORATIONS ENGAGED IN THE SAME OR SIMILAR LINE OF BUSINESS

APPENDIX A

I.R.S. Revenue Ruling 59-60

HAVING THEIR STOCKS ACTIVELY TRADED IN A FREE AND OPEN MARKET, EITHER ON AN EXCHANGE OR OVER-THE-COUNTER.

Section 2031(b) of the Code states, in effect, that in valuing unlisted securities the value of stock or securities of corporations engaged in the same or similar line of business which are listed on an exchange should be taken into consideration along with all other factors. An important consideration is that the corporations to be used for comparisons have capital stocks which are actively traded by the public. In accordance with section 2031(b) of the Code, stocks listed on an exchange are to be considered first. However, if sufficient comparable companies whose stocks are listed on an exchange cannot be found, other comparable companies which have stocks actively traded on the over-the-counter market may also be used. The essential factor is that whether the stocks are sold on an exchange or over-the-counter there is evidence of an active, free public market for the stock as of the valuation date. In selecting corporations for comparative purposes, care should be taken to use only comparable companies. Although the only restrictive requirement as to comparable corporations specified in the statute is their lines of business be the same or similar, yet it is obvious that consideration must be given to other relevant factors in order that the most valid comparison possible will be obtained. For illustration, a corporation having one or more issues of preferred stock, bonds or debentures in addition to its commons stock should not be considered to be directly comparable to one having only common stock outstanding. In like manner, a company with a declining business and decreasing markets is not comparable to one with a record of current progress and market expansion.

Revenue Ruling 68-609

The purpose of this Revenue Ruling is to update and restate, under the current statute and regulations, the currently outstanding portions of A.R.M. 34, C.B. 2, 31 (1920), A.R.M. 68, C.B. 3, 43 (1920), and O.D. 937, C.B. 4, 43 (1921).

The question presented is whether the "formula" approach, the capitalization of earnings in excess of a fair rate of return on net tangible assets, may be used to determine the fair market value of the intangible assets of a business.

The "formula" approach may be stated as follows:

A percentage return on the average annual value of the tangible assets used in a business is determined, using a period of years (preferably not less than five) immediately prior to the valuation date. The amount of the percentage return on tangible assets, thus determined, is deducted from the average earnings of the business for such period and the remainder, if any, is considered to be the amount of the average annual earnings from the intangible assets of the business for the period. This amount (considered as the average annual earnings from intangibles), capitalized at a percentage of, say 15 to 20 percent, is the value of the intangible assets of the business determined under the "formula" approach.

The percentage of return on the average annual value of the tangible assets used should be the percentage prevailing in the industry involved at the date of valuation, or (when the industry percentage is not available) a percentage of 8 to 10 percent may be used.

The 8 percent rate of return and the 15 percent rate of capitalization are applied to tangibles and intangibles, respectively, of business with a small risk factor and stable and regular earnings; the 10 percent rate of return and 20 percent rate of capitalization are applied to businesses in which the hazards of business are relatively high.

The above rates are used as examples and are not appropriate in all cases. In applying the "formula" approach, the average earnings period and the capitalization rates are dependent upon the facts pertinent thereto in each case.

The past earnings to which the formula is applied should fairly reflect the probable future earnings. Ordinarily, the period should not be less than five years, and abnormal years, whether above or below the average, should be eliminated. If the business is a sole proprietorship or partnership, there should be deducted from the earnings of the business a reasonable amount for services performed by the owner or partners engaged in the business. *See Lloyd B. Sanderson Estate v. Commissioner*, 42 F. 2d 160 (1930). Further, only the tangible assets entering into net worth, including accounts and bills receivable in excess of accounts and bills payable, are used for determining earnings on the tangible assets. Factors that influence the capitalization rate include (1) the nature of the business, (2) the risk involved, and (3) the stability or irregularity of earnings.

The "formula" approach should not be used if there is better evidence available from which the value of intangibles can be determined. If the assets of a going business are sold upon the basis of a rate of capitalization that can be substantiated as being realistic, though it is not within the range of figures indicated here as the ones ordinarily to be adopted, the same rate of capitalization should be used in determining the value of intangibles.

Accordingly, the "formula" approach may be used or determining the fair market value of intangible assets of a business only if there is no better basis therefor available.

APPENDIX C

TRIAL PREPARATION CHECKLIST

TRIAL PREPARATION CHECK LIST

☐ Note of Issue Filed

☐ Statement of Proposed Disposition (or Counter Statement)

☐ Judge's Rules Obtained

☐ Marked Pleadings

☐ Updated Net Worth Statement

☐ Appraisals
- ☐ Marital Residence
- ☐ Pension
- ☐ Business
- ☐Jewelry, Fine Art, etc.
- ☐ Vocational Expert

☐ EBTs
- ☐ All conducted
- ☐ Transcripts obtained and served
- ☐ Errata Sheets done
- ☐ Digested

☐ Equitable Distribution Memo
- ☐Equitable Distribution Factors
- ☐Maintenance Factors

☐ Custody Outline (if applicable)

☐ List of Law Issues/Memo of Law

☐ Stipulations
- ☐Grounds
- ☐Custody & Visitation
- ☐Values
- ☐Counsel Fees determined on Affirmations

☐ Witnesses
- ☐List; subpoenas
- ☐Interviews held and Memos

☐ Subpoena Duces Tecum
- ☐List of Institutions, etc.
- ☐Served and documents received

☐ Subpoenas & Notice to Produce (party)

☐ Expert Demands
- ☐Service of Demand
- ☐Response to Demand

☐ Insurances
- ☐Schedule of Life Insurance – coverage and cash surrender
- ☐Medical Insurance Information

☐ CSSA Guideline Charts & Maintenance Guideline Charts

☐ Cash Flow Charts (with experts)

☐ Summary of Court Orders & Motions

☐ Trial Notebook completed

☐ Standard of Living
- ☐Summaries (checks, credit cards, etc.)
- ☐Memo

☐ Custody Cases
- ☐Forensic Report received/summarized
- ☐Subpoena – Forensic expert

☐ Arrears in Support
- ☐Schedule of Arrears
- ☐Domestic Relations Law §244-a Notice

☐Tax Return Summaries
- ☐Personal Returns
- ☐Corporate/Partnership Returns

GASSMAN BAIAMONTE GRUNER, PC

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EXHIBIT SHEET

PLAINTIFF:
DEFENDANT:

COURT:	**INDEX NO:**
JUDGE:	**CHAMBERS #:**
PART #:	

TRIAL DATES	Reporter	Phone	TRIAL DATES	Reporter	Phone

	PLAINTIFF	ID	EV	DEFENDANT	ID	EV	
1							A
2							B
3							C
4							D
5							E
6							F
7							G
8							H
9							I
10							J
11							K
12							L
13							M
14							N
15							O

(Excerpt of Mr. Gassman's opening statement.)

THE COURT: Do you have an opening statement?

MR. GASSMAN: Yes, I do.

THE COURT: Go ahead.

MS. ZUCCARDY: Sorry, your Honor.

I'm not familiar with the practice of this Court. Opening statements are common in your custody matters?

COURT: Are you objecting?

MS. ZUCCARDY: I'm clarifying.

THE COURT: You may give an opening statement, if you would like.

MR. GASSMAN: If the Court pleases, as you know this case is about access, access to a ten-year-old child. Now all cases concerning child access are difficult and are taxing upon all concerned. This is particularly so, however, because the relief we are asking this Court is admittedly drastic. We are asking that there be no contact between the mother and the child going forward, as there has been none in the last 21 months. We do this because we submit that the evidence will show in an overwhelming manner that there has been drastic abuse and neglect of this child by the mother causing egregious and substantial harm, hopefully not irreparable.

You will hear, your Honor, from numerous witnesses, both lay, expert -- both lay witnesses and

expert witnesses, who will not only talk about what has happened in the past but the remarkable improvement that this child has made in the 21 months that have elapsed since the contact with the mother by court order was suspended.

We submit that the expert testimony of the court-appointed psychiatrist, Dr. K[redacted], and others will show that the mother suffers from severe psychiatric disorders, that she is in total denial as to her past conduct and has failed in any respect to take responsibility for the neglect and abuse of not only this child, but we will present evidence of her neglect and abuse of her other two children similarly born out of wedlock. We will show that because of her psychiatric condition and her failure to own up and take responsibility for her actions, it is the opinion of the experts involved in this case that she is not amenable to treatment or improvement because she hasn't even realized the problem. It is a problem.

We will also show through expert testimony and again through lay testimony, as well, that if there is a resurgence of conduct, there will be a screeching halt to the progress that this child has made and the danger of a severe retrogression in her development and maturation.

Now, I submit to the Court that the evidence will

also show that Mr. [redacted] has not taken this position of no access out of any animus, whim or desire to hurt the mother. He has done it because there is a pattern of emotional, psychological and physical abuse, all of which we will show through sworn testimony. We will show that for the first nine years of [redacted] life when she had regular contact with the mother, this child was traumatized. We will show that in the last roughly two years when contact had been suspended, she has shown remarkable improvement. Unfortunately, and only for the first application I made this morning regarding the New York Post article, the trauma of this child will continue. We know that through social media and the Internet today that this article will be thrown in the face of this child and so her socialization will be affected by it, and of course we raise the issue of safety, as well.

Now, as the Court knows, this hearing and this proceeding was brought about because of an order to show cause we brought in December of 2013, when Ms. [redacted], as a result of inhaling Dust-off, was found in her apartment in an almost unconscious state, inhaling Dust-off in front of witnesses. We will present written testimony about this. We will present verbal testimony of this, and we will present -- excuse me -- we will present a pictorial history of this. This was on tape. As a

result there was a neglect proceeding commenced in the Family Court of New York County, and we will show that although eventually her youngest child, [redacted], was returned to her, she admitted on the record to a finding of neglect in the Family Court of New York County, but I submit to the Court that the incident regarding the Dust-Off was not the beginning of the abuse and neglect and certainly didn't end the abuse and neglect. That was just the catalyst that brought us into court and caused the forensic examinations that have been held and this hearing. The total picture of this abuse and neglect has numerous components, and that will be presented through numerous witnesses and will form, I submit, a montage of abuse and neglect which is clear and convincing. It will show both in psychiatric terms of witnesses who will testify that she is narcissistically obsessed with her own well-being and not that of her children.

You will hear from not only expert witnesses. You will hear from her older son, [redacted], age 21, who has no relationship with his mother and who bears the scars of his mother's abuse and neglect until this date, scars that we seek to avoid imposing upon [redacted], and he will testify before this Court.

You will hear from Dr. [redacted] K[redacted] who will be our initial witness.

MS. ZUCCARDY: Objection, your Honor.

I object to him summarizing Dr. K[redacted] testimony before I have had an opportunity to test his credentials or the report. It is a way of back-dooring and getting it before your Honor.

MR. GASSMAN: Counsel misapplies the whole concept of the opening statement which is to give you a preview of what we intend to prove.

THE COURT: Continue. Overruled.

MR. GASSMAN: We will present evidence from Dr. K[redacted], who found the mother's deficit so serious that he not only warned of the danger to this child of resumption of access, but he advocates a termination of parental rights of the defendant. Certainly, a drastic conclusion written by, and I believe it will be stated on the stand, by someone who is highly respected, highly experienced and has testified in numerous cases of this nature.

You will hear from Dr. [redacted] G[redacted], who has been [redacted] therapist for many years, who will concur with Dr. K[redacted] finding that there should be no contact with this child.

You will hear from Dr. [redacted] P[redacted], a psychologist, who both parties chose as a parent coordinator in this case, who had vast contact with the mother, the father and the child and who will opine similarly in nature.

You will hear from a series of lay witnesses who have had years and years of exposure to [redacted], including nannies, including other people who knew her and still know her very well, and you will hear from the experts that Ms. [redacted] has a serious personality disorder with strong anal-adaptive, histrionic, borderline and narcicisstic features. You will hear that she, to quote one expert, is shockingly ignorant about childcare practices, that she is an unfit parent and that her conduct had been so grave that the child appears traumatized -- Dr. K[redacted] words, not mine -- by her past experiences with the mother. As a result, we are asking for the cessation of conduct -- excuse me -- contact, and we will also show this Court that the mother has presented the persona of an actress; she, by training, seeks to be an actress and that she has been less than honest and forthright with any of the professionals that have interviewed her in connection with this case, that she had been guilty of substantial drug use which she has denied not only to experts in this case but to a place where she went to after the neglect proceeding was brought against her, to the Dunes out in Westhampton, and she denied drug use to them, and it is in a report that they offered previously in this case as an

exhibit to a motion. You will see her own admissions of substantial drug use. She only admitted it not because of some efficacious experience, your Honor, but when she was confronted with the video that we annexed to the court papers in December of 2013.

You will hear substantial testimony about the mother, when she did have access to the child, coached this child to lie to her father, to have secret codes that only she and the child would have and the father would not be privy to, to spend her time with the child, not forming play dates, not engaging in child-appropriate activities but in having the child rehearse what she would tell the father, all of which the experts will agree, I submit, cause tremendous anxiety upon the child and traumatized her to a great extent.

You will hear testimony about a role reversal where a child of tender years, [redacted], would see her mother in a stupor because of drugs, would take away cans of Dust-Off and would feel she was responsible to make her mother better, a burden that should not be carried by a child of such tender years.

You will hear from the witnesses, numerous witnesses, that [redacted] has acknowledged to both expert and lay witnesses that she had been the victim of corporal punishment, that when she had an enuresis problem, instead

of treating it properly, the mother spanked her and had her wear Pull-Ups and diapers until she was eight years of age. You will hear testimony about her infantizing the child by these Pull-Ups and diapers.

You will hear numerous witnesses, and we have 15 in all, who will talk about the poor parenting, the lack of attention to the child. You will hear from a nanny who went to Hawaii when the mother was living there with this child, and basically the mother ignored the child during the entire trip, causing tremendous disappointment to this child.

Thankfully, you will also hear about the vast improvement of this child in the last 21 months; the change from an anxious, diffident, almost frozen persona of this child, to someone who has solved her bedwetting problems, sleep issues, lives in a stable, child-centered, loving environment with an extended family, is able to have a wonderful relationship with her older half-brother, [redacted]. You will hear about her wonderful relationship with her stepsister, who is a year-and-a-half younger than her; her relationship with Mr. [redacted] wife, which is a healthy and proper relationship and one that inures the benefit of this child.

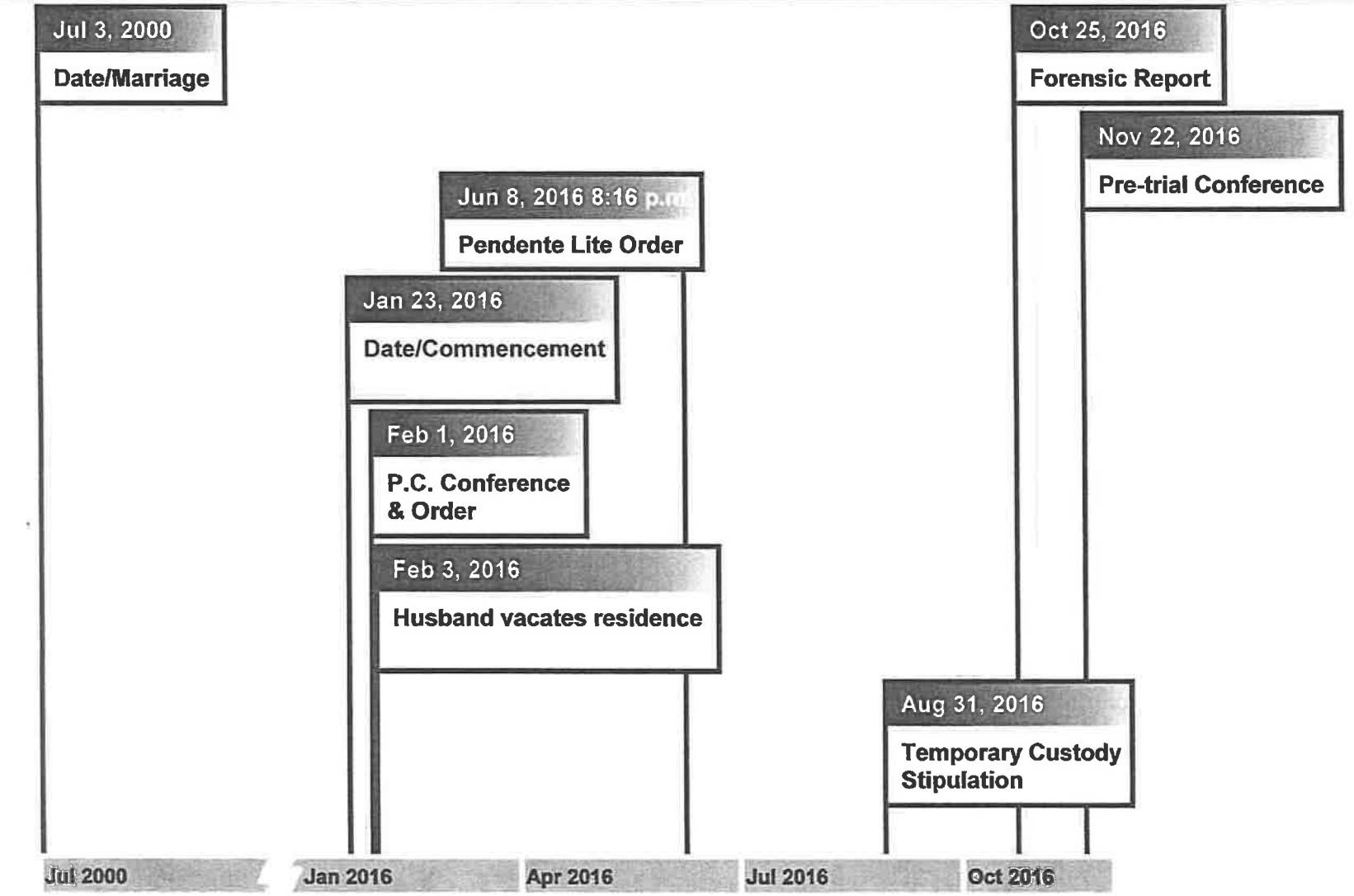
In some -- your Honor, we realize that we are seeking to impose what some may consider a hardship upon

the mother to cease all contact with her daughter, but no one has brought this about other than the mother, and if the best interest of the child which has become somewhat of a cliche but is still the standard that we are all guided by in these cases, if it means anything, it means that the interest, the safety and welfare of this child must trump all other considerations even if that imposes a hardship upon a parent.

Thank you, your Honor.

(Whereupon the trial continued but was not transcribed.)

SMITH v. SMITH



APPENDIX F

EBT OF [redacted] EBT **Dated: April 18, 2016**

Page/Line Nos.	Subject Matter	Summary
7:6 – 8:10	H's residence	H resides at [redacted], NYC, on a lease that started on January, 2015 when he moved out of the marital residence. It has been extended since and he has the option to run it through the next three years.
8:21 – 9:6	Exhibit "A"	Lease for H's apartment in Manhattan. Referred to as the "[redacted] lease".
9:20- 10:11	H's residence	H pays $7,200 per month on his apartment; there was no security payment. He makes direct payment.
11:2 – 15	DOB	H was born on [redacted] in Kew Gardens, Queens. Date of Marriage in May 7, [redacted]; married at Holy Family Church in Hicksville, NY. They have three children.
12:4 – 13:24	Residences	After marriage, they lived in [redacted], Long Island where they rented for about two or three years. They then bought a house in New Hyde Park for approximately $79,000, and they had a mortgage.
14:7 – 15:9	Residences	They lived in NHP for five years, and then moved to [redacted] Lane in Manhasset, which they still own today. NHP house was purchased in joint names, as was Payne Whitney.
15:20 – 16:5	H's employment	At the time of PW purchase, H was working for [redacted] company as a training manager/training independent franchise bottlers.
16:11 - 17:4	H's residence	He moved in NYC in January, 2015, where he lives alone. [redacted]
17:11 – 19:16		H is currently dating [redacted] who lives in [redacted]. She has also stayed at his apartment in NYC, maybe once a month, but he has not tracked it. This would be for a day or two or three, depending on when it was, and he cannot recall the first time she stayed over.
19:17 – 20		He knows [redacted] for maybe three years.
20:14 – 21:6	Girlfriend	He has bought [redacted] things starting roughly in [redacted] when he bought her several things and he previously provided in discovery a list of those items. In [redacted], he knew she existed for approximately two years.
22:13 – 24:2	Girlfriend	He has bought her earrings, but he does not recall the cost. It was not a lot. Purchased on credit card/[redacted] prior to the commencement of divorce.