

Interviewing Protocols -- Expert Validation Testimony In Theory and Practice

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A. Practicalities

1. Often the same judge will have heard the same 'expert' over and over again
2. That judge's view concerning validation testimony is crucial
3. This history has to impact the approach you take as the judge has great flexibility to accept or reject proposed expert testimony
4. Practical Rule of Law Practice – unless a case is appealed, 'the law of a case' is what the trial court says it is. And while there is no guarantee this will change even if there is an appeal, it surely will not change without one.

B. Roadblocks to admissibility --- objections from opposing counsel and/or the court to admissibility.

Examples of roadblocks put up by trial courts wishing to exclude validation testimony:

1. Statements made to validators are 'buttressing'! True or False?
2. Therapists treating a victim cannot serve as sex abuse validators in the same case! True or False?
3. Validators cannot testify where the child testifies in person before the court! True or false?

C. Winning the battle, losing the war

1. Per *Matter of Kayla J* 74 AD 3d 1665 (Third Department, 2010) focusing on point #2, above

"We disagree with Family Court that this testimony was unacceptable as validation evidence on the ground that the therapists were not retained as objective investigators. Although both therapists were retained for treatment rather than to determine whether the child had been abused, a therapist's testimony may be received as corroboration of a child's out-of-court statements; "[a]n expert's relationship to the party offering [him or] her does not disqualify the witness from giving opinion evidence and any bias [the witness] may have had could be addressed on cross-examination" (*Matter of Nicole V.*, 71 NY2d 112, 122 [1987]). However, the fact that such testimony is admissible in the first instance does not divest the court of its fact-finding authority to accept or reject the expert's opinions (see *Matter of Erinn G.*, 249 AD2d 879, 880-881 [1998]).(emphasis supplied)"

... in the end we see judges have wide discretion to credit or discredit validation testimony:

2. The following quote 'from the trenches' underscores the discretion a court may have

*** DEFENSE COUNSEL** "BASICALLY, AS BAD AS THE ALLEGATIONS ARE, MY POSITION WOULD HAVE TO BE THAT IT IS SIMPLY NOT PROVEN AGAINST MY CLIENT GIVEN THE BURDEN OF PROOF. I BELIEVE THAT THE TESTIMONY OF DR. VALIDATOR SHOWS THE VALIDATION WAS LITTLE MORE THAN BOLSTERING IN THIS CASE. THE DOCTOR HAD A CONVERSATION WITH SOMEBODY AND SHE BELIEVED IT

THE COURT: I, FRANKLY, JUST AS A MATTER OF TALKING ABOUT THE LAW AMONG SEVERAL OF US, I'VE NEVER BEEN PARTICULARLY IMPRESSED WITH VALIDATION TESTIMONY, PERIOD... SO YOU DON'T HAVE TO DO A LOT TO CONVINCE ME IN THAT REGARD...ALTHOUGH OBVIOUSLY JUDGES A LOT SMARTER THAN I ALLOW IT

DEFENSE COUNSEL: I DON'T THINK THERE ARE ANY, JUDGE

THE COURT: YEAH, THAT WILL HELP

* QUOTE FROM AN ACTUAL COURT CASE [I AM CLEANING THE GRAMMAR AS I OFTEN WISH THE COURT REPORTERS WOULD DO FOR ME!!!]

D. Admissibility of Expert Testimony in New York - Frye or Daubert?

Frye Standard in New York – See *People v. Wernick*, 89 NY2d 111, 115 [1996]; *People V Wesley*, 83 NY 2d 417 (1994)

- a. General acceptance in the relevant scientific community
- b. Trial judge must determine whether Frye standard has been met
- c. Proponent of evidence must present a testimonial description of the procedures used to produce the evidence in question
- d. The presentation of the expert's opinion assuming a sufficient foundation has been laid

Used to assess novel techniques in addition to 'hard' science
Some courts are using heightened levels of scrutiny to expert testimony...

CAUTION... acknowledging the influence of the Federal *Daubert/Kumho Tire*, Some NY trial courts (Supreme and Family) have tried to carve out a gate keeping role similar to that suggested in *Daubert/Kumho* requiring that the expert testimony be screened for reliability by considering:

- a. whether the principle or method has been tested

- b. whether the principle or method is subject to peer review and publication
- c. whether there is an established rate of error
- d. whether it has been accepted to some degree, even if not on a widespread basis, in the relevant community of experts
- e. whether the principle or method has been applied reliably to the facts of the particular case

Daubert/Kukho, however, is not the law of the State of New York!

For example, see footnote in *Zito v. Zabarsky*, 28 A.D.3d 42 [2d Dept 2006] [fn*]

The trial court purported to conduct this hearing based upon Frye v. United States (293 F 1013 [1923]) and Daubert v. Merrell Dow Pharmaceuticals, Inc. (509 US 579 [1993]). We note however, that New York has not adopted the Daubert standard, but rather continues to adhere to the Frye test for determining the admissibility of novel scientific evidence (see People v. Wernick, 89 NY2d 111, 115 [1996]; People v. Wesley, 83 NY2d 417, 423 n 2 [1994]).

Additionally, The Third Department has rejected any heightened level of judicial scrutiny of expert testimony. *Hallahan v Ashland Chemical* 267 AD2d 657 (1999)

Finally, in sex abuse cases the law in New York is far less rigid than *Daubert/Kumho* would be in permitting expert opinions in sexual abuse cases... as *People v Taylor* 75 NY 2d 277 (1990), *White v Keane* 51 Fed Supp 2d 495 (SDNY 1999) stand for the fact that ‘the child sexual abuse syndrome’, an analytic concept developed by mental health professionals to explain common psychological patterns exhibited by children who have been sexually abused has been generally accepted in NY thus allowing a qualified social worker to render an opinion concerning a child’s unusual behavior in this regard without a Frye hearing to determine general acceptance in the scientific community.

See too, *Matter of Nicole V* 71 NY 2d 112 (1987); *In re: Michael F.* 85 A.D.3d 1588 [4th Dept, 2011]; *In re: Rebecca FF* 81 AD 3d 1119 [3rd Dept., 2011]; *In re: Nikita* 77 A.D. 3d 1209 [3rd Dept, 2010]

E. Handling strengths and weaknesses of an opposing expert’s testimony

A modest proposal for utilizing information presented by experts on opposite sides of a case

Find areas of agreement between the validators, not areas of difference

Focus on areas of agreement between the experts – not areas of disagreement

Miranda HH example(80 AD3d 896, Third Department, 2011) regarding spontaneity