

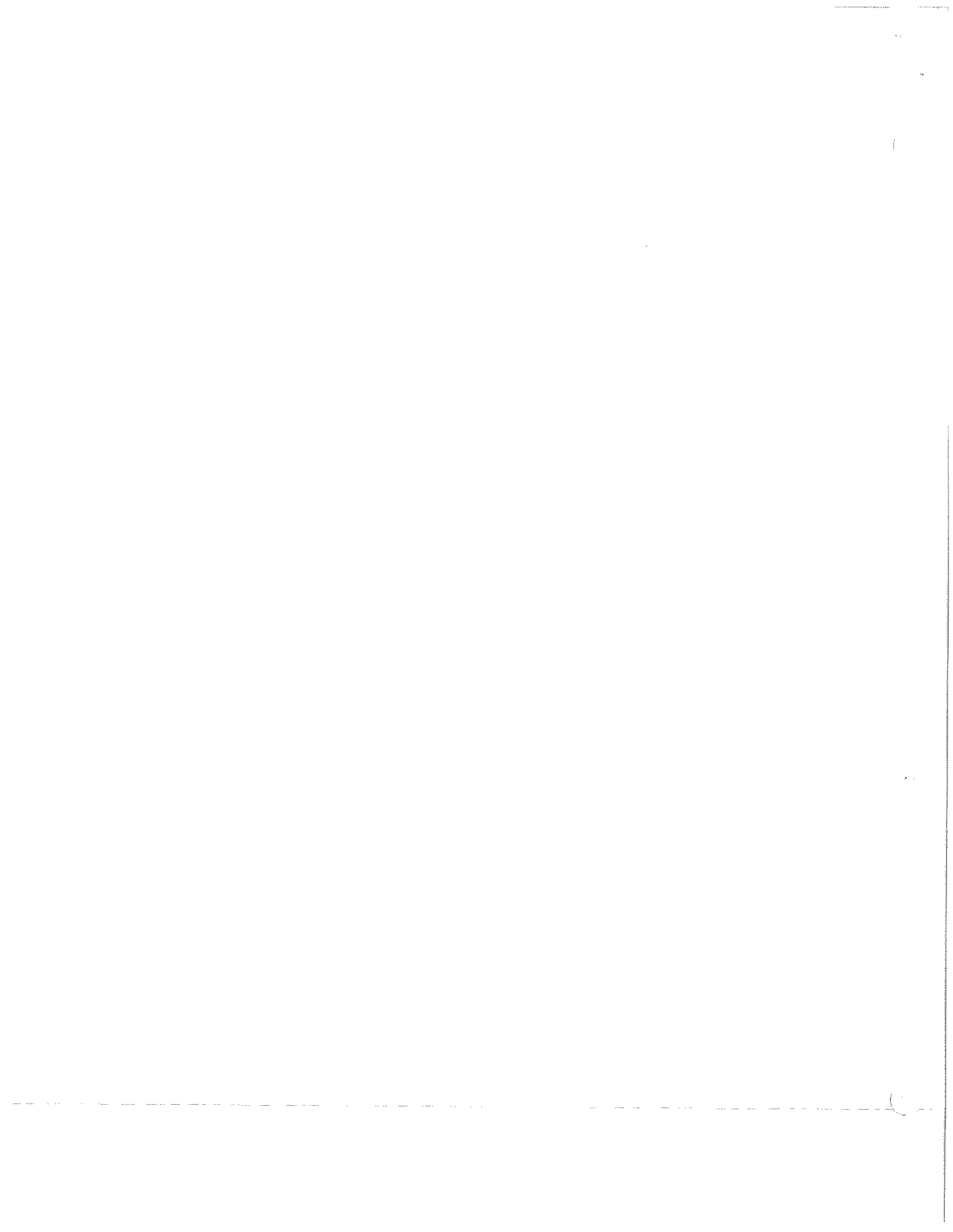
**SHRINKING THE SHRINKS DOWN TO SIZE:
EXCLUDING MENTAL HEALTH EXPERTS & EFFECTIVE
CROSS EXAMINATION STRATEGIES**

**MIKE AND MARY JOHANNA McCURLEY
McCurley, Kinser, McCurley & Nelson
4242 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270
(214) 744-4620**

Co-Author: C. ANDREW TEN EYCK

**Advanced Family Law Course
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EEE



MIKE McCURLEY
4242 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270

EDUCATIONAL: Lewisville High School, Lewisville, Texas, 1964
North Texas State University, Denton, Texas, B.A., 1968
Southern Methodist University, Dallas, Texas, J.D., 1972

LICENSED: State of Texas, 1972

Federal District Court
Northern District of Texas, 1972

Federal District Court
Eastern District of Texas, 1974

United States Supreme Court, 1977

AREAS OF PRACTICE: Board Certified by the Texas Board of Legal
Specialization in Family Law

PROFESSIONAL EMPLOYMENT

McCurley, Kinser, McCurley & Nelson
4242 Renaissance Tower
1201 Elm
Dallas, Texas 75270
214/744-4620

1992 to present

Koons, Fuller, McCurley & Vanden Eykel
2311 Cedar Springs Road
Suite 300
Dallas, Texas 75201
214/871-2727

1982 - 1992

McGuire, Levy & McCurley
3012 North Belt Line Road
P.O. Box 5507
Irving, Texas 75062
214/255-4127

1972 - 1982

PROFESSIONAL ASSOCIATIONS

- Texas Board of Legal Specialization, Family Law
- Texas Academy of Family Law Specialists
- State Bar of Texas Family Law Council
- Texas Bar Foundation
- College of the State Bar of Texas
- American Academy of Matrimonial Lawyers
- American Academy of Matrimonial Lawyers, Texas Chapter
- American Academy of Matrimonial Lawyers Foundation, Charter Member
- International Academy of Matrimonial Lawyers, United States of America, Charter Member
- Dallas Bar Association, Family Law Section
- Dallas Bar Foundation
- American Bar Association
- American College of Family Trial Lawyers

PROFESSIONAL ACTIVITIES AND HONORS

- President, 1998, American Academy of Matrimonial Lawyers
- Board of Managers, 1993, International Academy of Matrimonial Lawyers

- Treasurer, 1991-1993, Vice President 1994-1996, President-Elect 1997, American Academy of Matrimonial Lawyers
- Chairman, 1991-1993; Secretary, 1987-1989, State Bar of Texas Family Law Council
- Board of Governors, 1988-1996, American Academy of Matrimonial Lawyers
- Fellow, 1984-1996, American Academy of Matrimonial Lawyers
- Budget and Finance Committee, 1995, American Academy of Matrimonial Lawyers
- Ethics of Practice Committee, 1995, American Academy of Matrimonial Lawyers
- Long Range Planning Committee, 1995, American Academy of Matrimonial Lawyers
- Site Selection Committee, 1994-1996, American Academy of Matrimonial Lawyers
- Gender Bias Study Committee, 1991- 1994, American Academy of Matrimonial Lawyers
- Client Relations Committee, 1992-1993, American Academy of Matrimonial Lawyers
- Interdisciplinary Committee on Mental Health, 1992, American Academy of Matrimonial Lawyers
- Public Relations Committee, 1991-1992, American Academy of Matrimonial Lawyers
- Liaison to Mediation Study Committee, 1991-1992, American Academy of Matrimonial Lawyers
- President, 1987-1988; Secretary/Treasurer, 1986; American Academy of Matrimonial Lawyers, Texas Chapter
- District 6 Grievance Committee, 1982 and 1988-1996, State Bar of Texas
- Child Support Guidelines Advisory Committee, 1987, Supreme Court of Texas
- Family Law Practice Notes Committee, 1984, State Bar of Texas
- Co-Chairman, Committee to Revise Texas Family Practice Manual, 1983-1984, State Bar of Texas
- Co-Editor on New Family Law Practice Manuals
- Editor of Supplement for Family Law Practice Manuals, 1982
- Committee to Revise Texas Family Practice Manual, 1979-1982, State Bar of Texas

ARTICLES AND PUBLICATIONS

- Participant in Workshop and Article, "Voi Dire Demonstration", Marriage Dissolution Institute, 1997
- Participant in Workshop and Article, "Advanced and Persuasive Trial Tactics", Advanced Family Law Course, 1997
- Article and Speech -- "Managing the Difficult Client", American Academy of Matrimonial Lawyers, Maryland Chapter, 1996
- Participant in Workshop and Article, "Winning Your Case in ADR", Advanced Family Law Course, State Bar of Texas, 1996
- Participant in Workshop and Article, "The Art of Persuasion: Developing a Case Theme and Telling the Story", American Academy of Matrimonial Lawyers, 1996
- Participant in Workshop and Article, "Cross-Examination" and "The Art of Persuasion", Advanced Family Law Course, State Bar of Texas, 1995
- Article and Speech -- "Tactics, Themes and Practical Tips in Representing Persons with Alternative Life Styles in Family Law Litigation," Advanced Family Law Course, State Bar of Texas, 1994
- Participant in Workshop, "The Art of Persuasion and Cross-Examination," Advanced Family Law Course, State Bar of Texas, 1994
- Participant in Workshop, "Choosing and Courting a Jury" - Advanced Family Law Course, State Bar of Texas, 1994
- Article and Speech, "The Happy, Healthy Trial Lawyer", Utah Chapter, American Academy of Matrimonial Lawyers; Products Liability Seminar, State Bar of Texas, 1994
- Article and Speech -- "Insights for the Stressed Out, Strung Out Lawyer", American Bar Association, 1994
- Participant in Workshop, "Discovery", Marriage Dissolution Seminar, 1994
- Article and Speech -- "Deposition Strategies for Custody Cases", Advanced Family Law Course, State Bar of Texas, 1993
- Participant in Workshop, "Trial: Custody", Marriage Dissolution Seminar, 1993

- Article and Speech -- "Sex, Drugs and Rock & Roll of Family Law", Tarrant County Bar Association and Dallas Family Law Section meetings, 1993; TSCPA Divorce Conference, 1994
- Article and Speech -- Complete Lawyer Seminar, 1993
- Participation in Mock Trial, Cross Examination of 12 Year Old Child re: Election of Managing Conservator, Texas Academy of Family Law Specialists, 1993, Reno, Nevada
- Article and Speech -- "Fraud, Mistake, Etc.", American Bar Association, 1992
- Article and Speech -- "Ultimate Trial Notebook", State Bar of Texas, 1992
- Article and Speech -- "Bad Facts Custody", Advanced Family Law Course, State Bar of Texas, 1992
- Article and Speech -- "Same-Sex Cohabitation Agreements", American Academy of Matrimonial Lawyers Mid Year Meeting, 1992, Palm Springs, California
- Participation in Mock Trial, Cross-Examination of a Psychologist, Texas Academy of Family Law Specialists, 1992, Reno, Nevada
- Article and Speech -- "Stress Management", Law Education Institute, 1992, Vail, Colorado
- Course Director, Advanced Family Law Course, State Bar of Texas, 1991
- Article and Speech -- "Stress Management", State Bar of New York, 1991
- Course Director, American Academy of Matrimonial Lawyers Mid Year Meeting, 1990, Tucson, Arizona
- Participation in Mock Trial, Cross-Examination of a Psychologist, Texas Academy of Family Law Specialists, 1990, Reno, Nevada
- Participant in panel discussion, "Children's Rights vs. Parent's Rights in Custody Arrangements", Association of Family and Conciliation Courts, Dallas, Texas, 1989
- Article and Speech -- "Stress Management", 1989, Missouri Chapter, American Academy of Matrimonial Lawyers
- Article and Speech -- "The Secret Trial," 1989, Advanced Family Law Seminar, State Bar of Texas
- Participant in panel discussion, "Custody Workshop," 1989, Advanced Family Law Course, State Bar of Texas

- Participant in lecture, demonstration and panel discussion on the "Custody Quotient", 1989, Trial Institute of Texas Academy of Family Law Specialists, Las Vegas, Nevada
- Participant in Mock Trial, "Direct Examination of CPA", 1989, Atlanta Chapter, American Academy of Matrimonial Lawyers
- Article and Speech -- "Stress Management", 1989, American Academy of Matrimonial Lawyers Mid Year Meeting, Naples, Florida
- Article and Speech -- "The MMPI: An Explanation and Critical Analysis", American Academy of Matrimonial Lawyers Annual Meeting, 1988; Oklahoma Chapter of American Academy of Matrimonial Lawyers, 1988; Law Education Institute Seventh Annual Divorce Law Update, January, 1989
- Participant in Mock Trial, "Direct and Cross Examination of Psychiatric Evidence", 1988, New York Chapter, American Academy of Matrimonial Lawyers
- Article and Speech -- "Awarding, Setting and Collecting of Attorney's Fees," 1988, Advanced Family Law Course, State Bar of Texas
- Article and Speech -- "A Practical Approach to the Cross-Examination of the Mental Health Expert," 1987, International Academy of Matrimonial Lawyers, London, England
- Co-author of Article and Co-Speaker -- "Psychological Testing", 1987, Marriage Dissolution Institute, State Bar of Texas
- Article and Speech -- "Finding the Hidden Asset of Cash," 1987, American Academy of Matrimonial Lawyers
- Article and Speech -- "Strategies in Trying Custody Cases: Representing Mother, Father, Child, Grandparents and Other Relatives, 1987, Advanced Family Law Course, State Bar of Texas
- Article -- "Putting Emotions in Motion in Trial of Child Custody Cases," 1987, Trial Practice Newsletter
- Participant in Mock Trial, "Cross-Examination of the Psychologist In a Family Law Case," 1987, Texas Academy of Family Law Specialists Trial Institute

MARY JOHANNA McCURLEY
McCurlley, Kinser, McCurley & Nelson, L.L.P.
4242 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270
214/744-4620

MARY JOHANNA McCURLEY: born Baton Rouge, Louisiana, October 3, 1953; admitted to bar, 1979, Texas.

EDUCATION: Centenary College (B.A., 1975); Louisiana State University; St. Mary's University of San Antonio (J.D., 1979). Board Certified, Family Law, Texas Board of Legal Specialization.

EXTRACURRICULAR RESPONSIBILITIES: Delta Theta Phi (Vice President, 1978-1979); President, Student Senate, St. Mary's School of Law, 1979.

PROFESSIONAL RESPONSIBILITIES: Assistant Editor, Family Law Manual, State Bar of Texas, 1982-1989; Co-Editor: Family Law Manual, State Bar of Texas 1989-1990; Course Director, American Academy of Matrimonial Lawyers, Matrimonial Law - 1998, 1998.

FACULTY: National Business Institute, Inc. -- Child Custody and Child Visitation in Texas, 1992; Co-Chairperson, Texas Supreme Court Child Support and Child Visitation Guidelines Committee, 1991; 1992; Member, Texas Supreme Court Child Support and Child Visitation Guidelines Committee, 1996-1997.

AUTHOR AND LECTURER: "Effectively Dealing with The Child's Choice of Managing Conservator" co-authored with R. Scott Downing and Kenneth W. Rockenbach, Texas Academy of Family Law Specialists, 1998. "Effectively Dealing with the Child's Choice of Managing Conservator," co-authored with R. Scott Downing and Kenneth W. Rockenbach, Texas Academy of Family Law Specialists, 1997. "Preparing for the Petitioner's Financial Temporary Hearing," co-authored with R. Scott Downing, Marriage Dissolution Course, 1997. "Dealing with Ad Litem," co-authored with Jack W. Marr & Kathleen Cardone, Advanced Family Law Course, 1997. "Pensions, Stock Options and Other New Sources of Wealth," Annual Divorce Conference of the Dallas Chapter, Texas Society of Certified Public Accountants, 1997. "Attorney Ad Litem and Guardian Ad Litem Practice," (co-author with Reginald A. Hirsch and R. Scott Downing), Advanced Family Law Course, 1996. "Gender Bias in Our Courts and Practice - Fact or Fiction?," Advanced Family Law Course, 1995. "Peculiar Characterization Issues," 18th Annual Marriage Dissolution Institute, 1995. "An Overview of Psychological Testing," Illinois State Bar Association Family Law Handbook, 1994. "An Overview of Psychological Testing," Advanced Family Law Course, 1994. "Psychological Testing and the Expert Witness," The Practical Lawyer, October 1994; "An Overview of Psychological Testing," Utah chapter of the American Academy of Matrimonial Lawyers, 1994. "An Overview of Psychological Testing," American Bar Association Family Law Conference, 1993. "Discovery," Marriage Dissolution Course, 1993; "Social Studies and Psychological Evaluations: Their Use in Evidence and How to Cross Examine," Advanced Family Law Course, 1993; "We Have

Found The Enemy - It Is Us!" or Self Management, Not Stress Management, Advanced Family Law Course, 1993; "Tracing," State Bar of Texas, Advanced Family Law Course, 1992; "Child Support Issues - Modification, Second Family and Other Significant Problems," South Texas College of Law, 1992; "Ethics," State Bar of Texas, Advanced Family Law Course, 1992; "Modification, From Sole to Joint and Back Again," Annual Family Law Institute, South Texas College of Law, 1990, 1992; "Managing Stress," New York Bar Association, 1991; "Attorney and Guardian Ad Litem," State Bar of Texas Advanced Family Law Course, 1991; "Divorce Taxation," American Academy of Matrimonial Lawyers, 1991; "Dealing with Experts and Psychological Tests," Marriage Dissolution Course, 1991; "Alimony," co-authored with Jimmy L. Verner, Jr., Advanced Family Law Drafting Course, 1990; "Innovative Ideas for Setting and Collecting Attorney Fees," American Academy of Matrimonial Lawyers, 1990; "Managing Stress," Advanced Family Law Course, 1990; "Psychological Testing: An Update," Marriage Dissolution Course, State Bar of Texas, 1989; "Enforcement - Support and Visitation", Marriage Dissolution Course, 1986, State Bar of Texas; "Jury Selection in Custody Cases," Advanced Family Law Course, 1987; and "Evidentiary Issues in Child Support, Texas Revolution in Child Support: Perspective, Pleading and Practice," State Bar of Texas, 1986.

MEMBER: Dallas (Family Law Section, Board of Directors, 1981-1982; Secretary-Treasurer, 1983; Vice Chairman, 1984; Chairman 1985; Past Chairman, 1986) and American Bar Associations; State Bar of Texas (Adjunct Member, Family Law Council, 1982-1985; Family Law Council, 1987--present; Board of Directors, Texas Academy of Family Law Specialists, 1990-1992; American Academy of Matrimonial Lawyers (AAML - Texas Chapter - Treasurer, 1993-1995; Secretary, 1995-1996; President-Elect, 1996-1997; President, 1997-1998; Special Concerns for Children Committee, 1997-1998); Co-Chairperson, Continuing Legal Education, 1995 and 1997-1998; Member, Interdisciplinary Relations - Mental Health, 1997 - 1998; Member, Board of Governors, 1998 - ; Member, Advertising Committee; Member, Marketing and Public Relations Committee; Member, Stepfamilies Rights and Adoption Committee, 1994; and Chairperson, Mediation Study Committee, 1993.

C. ANDREW TEN EYCK
MCCURLEY, KINSER, MCCURLEY & NELSON, L.L.P.
4242 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270

EDUCATION:

The Principia School, St. Louis, Missouri, 1991
University of Houston, Houston, Texas, M.A., *cum laude*, 1995
South Texas College of Law, Houston, Texas, J.D., 1998

PROFESSIONAL EMPLOYMENT:

MCCURLEY, KINSER, MCCURLEY & NELSON, L.L.P.
4242 Renaissance Tower
1201 Elm
Dallas, Texas 75270
214/744-4620

1999 to present

SHORT & JENKINS, P.L.C.
One Greenway Plaza
Suite 700
Houston, Texas 77046
713/626-0208

1994 to 1999

PROFESSIONAL ASSOCIATIONS:

Member, State Bar of Texas
Member, Texas Young Lawyers Association
Member, Dallas Bar Association-Family Law Section

ARTICLES AND PUBLICATIONS:

Co-author of various continuing legal education articles

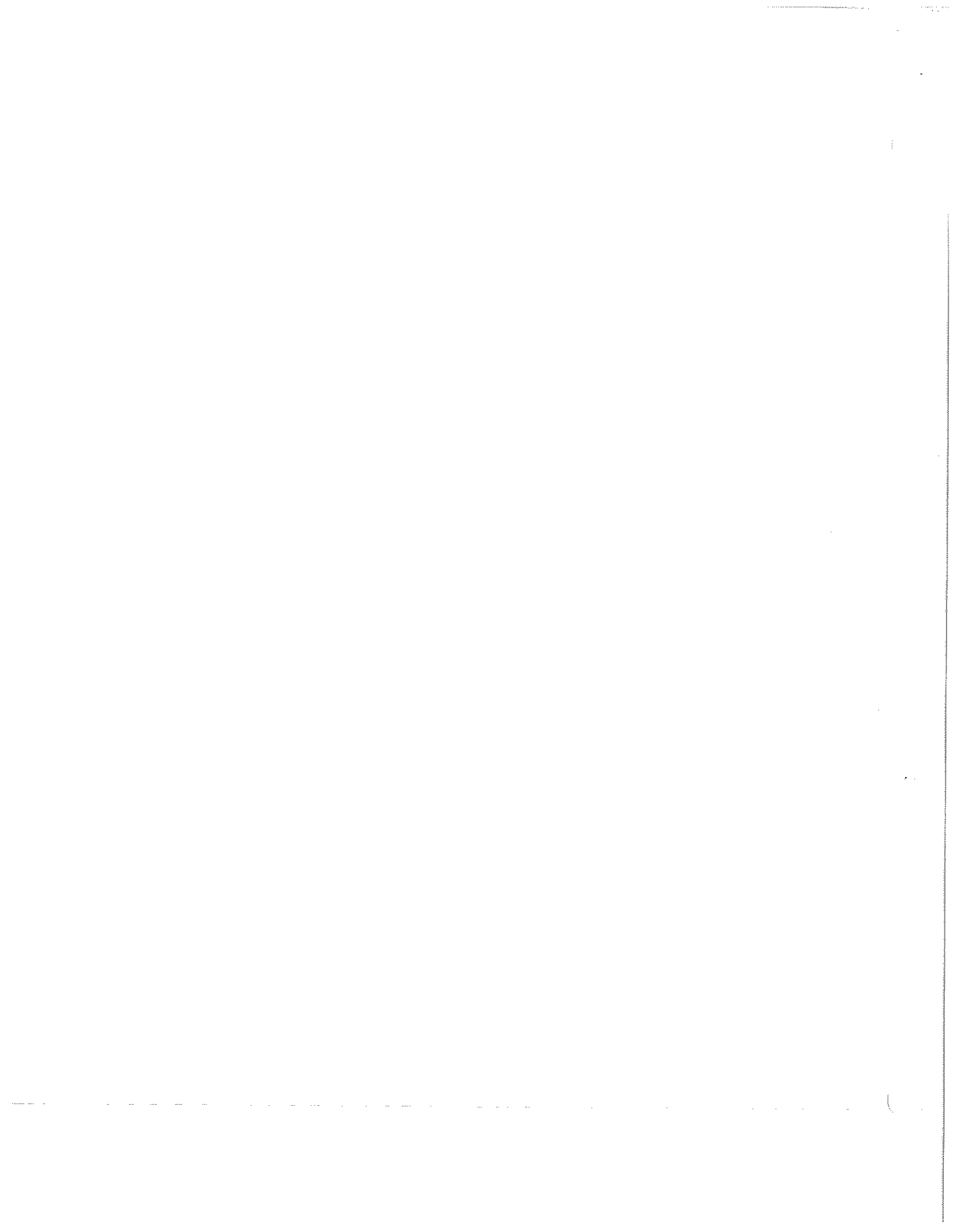
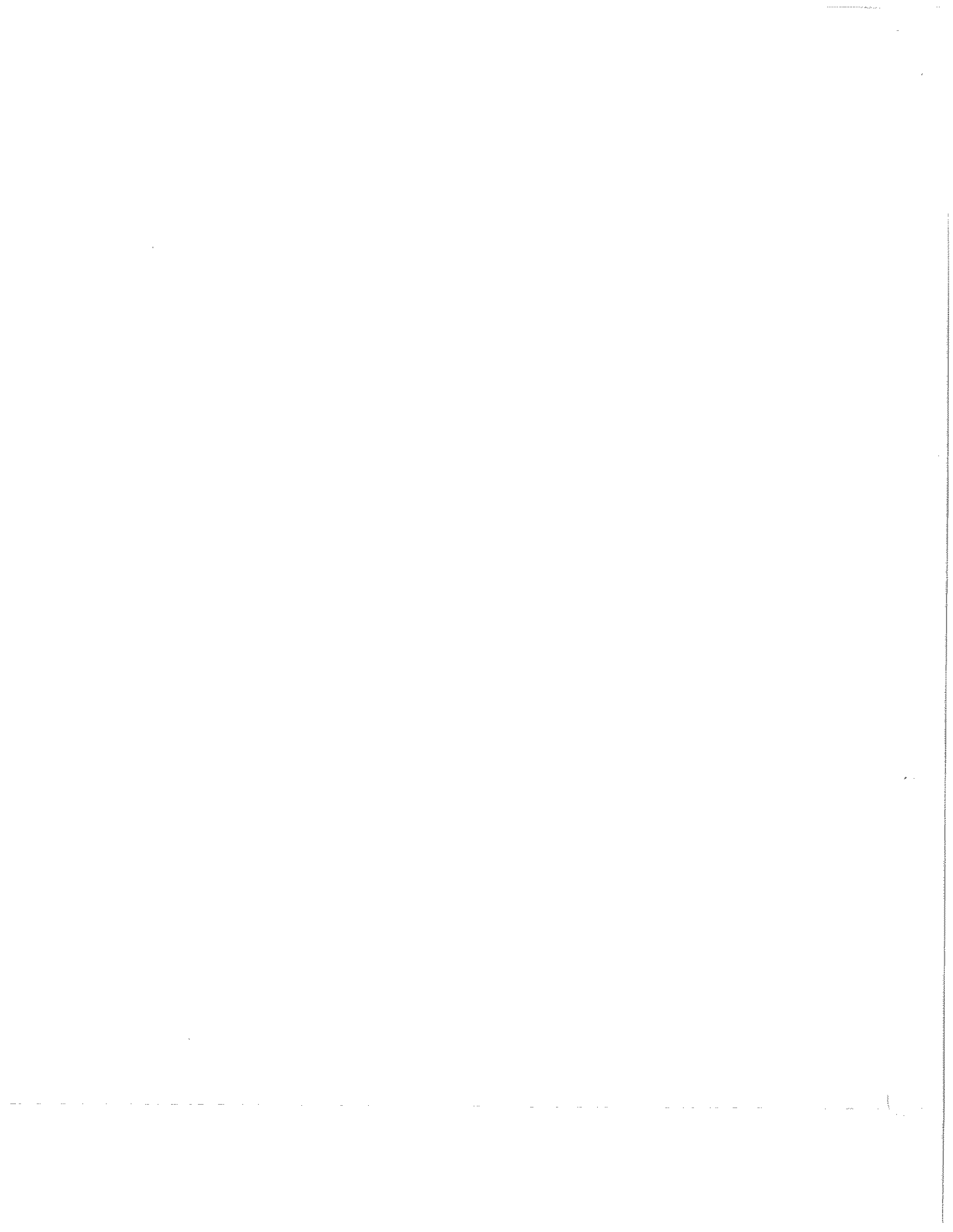


Table of Contents

I.	INTRODUCTION	1
II.	REASONS TO EXCLUDE EXPERT TESTIMONY.....	1
III.	MENTAL HEALTH EXPERT TESTIMONY CONTEMPLATED BY THE TEXAS RULES OF EVIDENCE	1
IV.	STRATEGIES IN EXCLUDING THE MENTAL HEALTH EXPERT	1
	A. Look for Timely Designation & Supplementation of Mental Health Expert	1
	B. Look for Failure to Produce Expert Reports & Documents	3
	C. Scrutinize Method of Supplementation	3
	D. Look for Failure to Timely Supplement Depositions Testimony	3
	E. Determine Whether Mental Health Expert is in Violation of a Court Order	4
	F. Motion to Exclude the Mental Health Expert's Testimony	4
	G. Objections at Trial	4
	H. Motion in Limine	4
	I. Voir Dire of the Expert	4
	J. Texas Rule of Evidence 104 Hearing on Admissibility	5
V.	RECENT DEVELOPMENTS CONCERNING THE "NOVEL SCIENCE" ISSUE	5
	A. A Brief Historical Look Leading to <i>Daubert</i>	5
	B. <i>E.I. Du Pont De Nemours & Co. v. Robinson</i>	6
	C. Recent Cases of Significance Following <i>Daubert</i>	6
	D. Utilizing <i>Daubert/Robinson</i> and Their Progeny in an Effort to Exclude the Mental Health Expert	7
VI.	SUMMARY OF METHODS TO EXCLUDE EXPERT TESTIMONY	9
VII.	THE RULES OF THE GAME	9
	A. Wide open Cross-Examination	9
	B. Purpose of Cross-Examination	10
	C. Kinds of Cross-Examination	10
VIII.	PRACTICAL TIPS AND STRATEGIES	11
	A. The Science of Cross-Examination	12
	B. Cross-Examination at Trial	13
IX.	THE ART OF WAR	13
	A. Impeachment	13
	B. Preparation and Planning for Cross-Examination	14
	C. Techniques of Cross-Examination	16
X.	PRACTICAL TIPS FOR THE CROSS-EXAMINATION	

OF A MENTAL HEALTH EXPERT	17
A. Applicable Rules	17
B. Effective Cross-Examination of Expert Witnesses	18
C. Mental Health Professionals	20
XI. CONCLUSION	26

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I. INTRODUCTION

In recent years, mental health professionals have become key players in family law litigation. Because of the increased involvement of mental health professionals testifying as experts in the litigation process, the family law practitioner may find herself confronting the issue of how to exclude the mental health expert's testimony if they believe that testimony is damaging to their case.

The purposes of this paper are three-fold: the first is to provide the practitioner with a variety of strategies with which to plot for the exclusion of mental health testimony; the second is to review updates in case law and rule changes to examine how changes in the law may assist you in excluding unwanted expert testimony; the third is to provide practical suggestions during the cross-examination of the mental health expert should the practitioner's efforts to exclude the testimony fail.

II. REASONS TO EXCLUDE EXPERT TESTIMONY

The initial reason family law practitioners wish to exclude expert testimony is to keep damaging testimony from being considered by the trier of fact. Beyond this initial reaction, the practitioner needs to be able to explain to the Court why a particular mental health expert's testimony should not be admitted into evidence.

Allowing the testimony of an expert who presents an inaccurate application of their proposed field of testimony can have a detrimental impact upon the jury. The Texas Supreme Court has recognized that expert witnesses can have an extremely prejudicial effect on the jury, in part because of how the jury perceives a witness labeled as an expert. *E.I. Du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). A jury more readily accepts the opinion of an expert witness who has been admitted by the trial court. *See, Id.* at 553. Trial judges have a heightened responsibility to ensure an expert's testimony is reliable. *Id.*

The trial court's role is to make the initial determination whether the expert's opinion is relevant and whether the methods and

research upon which it is based is reliable. *E.I. Du Pont de Nemours & Company, Inc. v. Robinson* at 558. An expert witness may be very believable but his or her conclusions may be based upon unreliable methodology. *Id.* When faced with a witness who's opinion was formed based on unreliable methodology, the family law practitioner needs to request the trial judge exclude any evidence that's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleads the jury. *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 589-90, 113 S.Ct. 2786 (1993).

III. MENTAL HEALTH EXPERT TESTIMONY CONTEMPLATED BY THE TEXAS RULES OF EVIDENCE

Rule 702 of the Texas Rules of Evidence clearly contemplates and provides for the use of expert testimony. Specifically, Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

See also, United Blood Serv. v. Longoria, 938 S.W.2d 29, 30-31 (Tex. 1997) (regarding qualifications of experts).

IV. STRATEGIES IN EXCLUDING THE MENTAL HEALTH EXPERT

A. Look for Timely Designation & Supplementation of Mental Health Expert

With the initiation of any custody matter, the practitioner should safely assume that mental health expert testimony might be used in the case. In anticipating such testimony, no time should be wasted in sending out discovery requests to flush out any mental health experts who may be called to testify. The recent changes to the Texas discovery rules provides the family law practitioner with a new discovery technique, the request for disclosure. The request for disclosure eliminates questions the practitioner would have asked through written interrogatories. Due to the

new limitation on the number of interrogatories that may be propounded by a party, the request for disclosure is now a vital discovery device which forces your opponent to disclose information about their experts. The form of the request for information regarding expert witness is as follows:

For any testifying and consulting expert:

- (1) State the expert's name, address, and telephone number;
- (2) State the subject matter on which the expert will testify;
- (3) State the facts known by the expert that relate to or form the basis of the expert's mental impressions and opinions formed or made in connection with the case in which the discovery is sought, regardless of when and how the factual information was acquired;
- (4) State the expert's mental impressions and opinions formed or made in connection with the case in which discovery is sought, and any methods used to derive them;
- (5) State any bias of the witness;
- (6) Provide all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert's testimony;
- (7) Provide the expert's current resume and bibliography.

TEXAS RULE OF CIVIL PROCEDURE 192.3(e).

By seeking this basic information at the beginning of the case, the practitioner creates the first hoop through which his opponent must jump, thereby creating the first potential pitfall that may lead to the exclusion of a mental health expert. The designation and full disclosure concerning a mental health expert must be complete and made in a timely manner. Additionally, unlike interrogatories, the request for disclosure must be answered and your opponent cannot object to the request. Failure on the part of the opposing counsel to timely designate a mental health expert

is a hurdle that could easily trip up your opponent.

The likelihood for your opponent to know who his experts will be upon receipt of the request for disclosure is unlikely. Thankfully, the TEXAS RULES OF CIVIL PROCEDURE require supplementation of discovery answers and responses, including when a party seeks the information of a testifying expert. See TEXAS RULE OF CIVIL PROCEDURE 195.6 and 193.5. Keep in mind that the Rule expressly provides:

If an expert witness is retained by, employed by, or otherwise under the control of a party, that party must also supplement the expert's deposition testimony or written report, but only with regard to the expert's mental impressions or opinions and the basis for them.

TEXAS RULE OF CIVIL PROCEDURE 195.6.

Failure to designate a mental health expert in a timely fashion arms a practitioner with strong ammunition. See TEXAS RULE OF CIVIL PROCEDURE 193.5 and 193.6. The Texas Supreme Court has applied the supplementation rule in a very strict manner. *Sharp v. Broadway National Bank*, 784 S.W.2d 669 (Tex. 1990), offers strong authority for the exclusion of a mental health expert when opposing counsel fails to timely supplement discovery responses. In *Sharp*, the experts were orally identified to the opposing counsel. The opposing counsel even deposed the expert based upon the oral identification; however, no written supplementation of interrogatory answers was provided. Consequently, the Supreme Court held as follows:

The absence of surprise, unfairness, or ambush does not alone satisfy the good cause exception to the sanction of automatic exclusion . . . Identification of witnesses in response to discovery must be in writing; oral notice is not proper . . . This avoids the inevitable disputes over who said what when. The fact that a witness' identity is known to all parties is not itself good cause for failing to supplement discovery. A party is entitled to prepare for trial assured that a witness will not be called because opposing counsel has not identified him or her in response to a proper interrogatory. Thus, even the

fact that a witness has been fully deposed, and only his or her deposition testimony will be offered at trial, is not enough to show good cause for admitting the evidence when the witness was not identified in response to discovery.

Id. at 671.

B. Look for Failure to Produce Expert Reports & Documents

After the request for disclosure has been served upon the other party, the family law practitioner should follow up with a set of interrogatories and first request for production of documents. These discovery tools should be used to fill in any gaps that the request for disclosure did not address.

Texas courts hold that the exclusion of an expert's testimony is appropriate when an expert's report has not been timely furnished to an opposing counsel. In *Dennis v. Haden*, 867 S.W.2d 48 (Tex. App. — Texarkana 1993, writ denied), and in *Reichold Chemicals, Inc. v. Puremco Manufacturing Co.*, 854 S.W.2d 240 (Tex. App. — Waco 1993, writ denied), it was held that the trial court improperly allowed experts to testify despite the fact that expert reports had not been produced. *See also, City of Beaumont v. Bouillion*, 873 S.W.2d 425 (Tex. App. — Beaumont 1993), *rev'd on other grounds*, 896 S.W.2d 143 (Tex. 1995) (Trial court refused to permit accountant to testify when only one page of a nineteen page report by CPA was faxed to opposing counsel three days before trial).

If, in response to a document production request seeking expert reports, an opposing counsel responds that no such reports exist, the practitioner should file a motion to reduce the expert's opinions to tangible form — creating yet another potential snare for the opposition.

C. Scrutinize Method of Supplementation

Another factor to be considered when attempting to exclude mental health experts is whether opposing counsel formally supplemented answers and responses to interrogatories, responses to request for disclosure and requests for production. *See* TEXAS RULE OF CIVIL PROCEDURE 193.5 and 193.6. Rule 193.5 requires practitioners to provide an amended or supplemental response "reasonably promptly after

the party discovers the necessity for such a response." TEXAS RULE OF CIVIL PROCEDURE 193.5(b). A presumption exists that amended or supplemental responses supplied less than 30 days before trial are not reasonably prompt. *Id.*

If a party fails to amend or supplement their discovery responses in a timely manner, the court may preclude that party from introducing into evidence the material or information that was not timely disclosed. TEXAS RULE OF CIVIL PROCEDURE 193.6(a). This includes exclusion of testimony by witnesses who were to timely identified pursuant to a discovery request. *Id.* The burden then shifts to your opponent to establish there was good cause for the late supplementation or that such supplementation will not unfairly surprise or unfairly prejudice the other parties.

At the very least, a practitioner can raise an issue of exclusion when opposing counsel chooses to supplement by letter rather than by formal discovery response. *See Johnson v. Berg*, 848 S.W.2d 345 (Tex. App. — Amarillo 1993, no writ) (Case reversed because expert *not* allowed to testify based on letter supplementation); *See also Varner v. Howe*, 860 S.W.2d 458 (Tex. App. — El Paso 1993), *leave granted, mand. denied*, 888 S.W.2d 511 (Tex. App. — El Paso 1994) (Case reversed because expert allowed to testify based on letter supplementation.). A practitioner should also scrutinize whether the names, addresses, telephone numbers are correctly disclosed and whether interrogatory supplementation is verified. While these may not be express grounds for an exclusion, they certainly may provide persuasive argument points.

D. Look for Failure to Timely Supplement Deposition Testimony

Often overlooked is whether the opposing party actually supplemented the mental health expert's deposition testimony. A party must supplement changes of an expert's opinion following the expert's deposition. *Collins v. Collins*, 904 S.W.2d 792, 801 (Tex. App. — Houston [1st Dist.] 1995, writ denied). The purpose of this rule is clearly designed to prevent trial by ambush by requiring the disclosure of material changes in previously disclosed information. *See also, Exxon v. West Texas Gathering Co.*, 868 S.W.2d 299, 305 (Tex. 1993). So, as trial preparation heats up, many attorneys become focused on other details and can easily overlook the crucial importance of supplementing

deposition testimony. Herein lies, yet another, ground for potential exclusion of a mental health expert. A practitioner seeking to exclude a mental health expert should painstakingly review the mental health expert's testimony for any partial answers or for any topics of which the expert does not "yet" have an opinion. Failure to supplement deposition testimony may not present grounds to exclude expert testimony in its entirety, however, a practitioner may be able to at least limit a mental health expert's testimony. Additionally, if an expert changes a portion of her opinion, she is under a duty to supplement their responses within ten days.

E. Determine Whether Mental Health Expert is in Violation of a Court Order

Given the contested nature of the actions which typically require the retention of mental health experts, the practitioner should be mindful of whether the mental health expert violates a court order. Many times a mental health expert is specifically proscribed from meeting with or counseling the children of the parties; yet, for some reason, the mental health expert winds-up contravening the express admonition of the court. If such a situation occurs, the practitioner should draft his motion to exclude the mental health expert's testimony.

F. Motion to Exclude the Mental Health Expert's Testimony

After scrutinizing opposing counsel's thoroughness as discussed above, a practitioner should consider drafting a motion to exclude the testimony of the mental health expert. With this type of motion, an attorney can argue that the expert should be barred from testifying completely. Also, the attorney can request alternative relief and ask the court to strike the portion of the expert's testimony that was improperly disclosed during discovery. If arguable grounds exist, the motion to exclude is an invaluable tool to achieve the desired exclusion or to alternatively limit testimony.

G. Objections at Trial

Where the inadmissibility of a mental health expert's opinion can be determined from what is already known to the trial court, the practitioner can simply make the objection and secure a ruling. However, if the factual basis for the objection cannot be determined from what is already known to the trial court, then a procedural

vehicle must be used to get the justification for the objection before the trial court.

H. Motion in Limine

One way to bring up the questions of admissibility of an expert's testimony is to file a motion in limine, asking that the testimony not be elicited without prior permission of the court.

A major drawback of using a motion in limine to raise the issue of the admissibility of an expert's testimony has to do with preservation of error for appeal. Texas cases have made it clear that the denial of a motion in limine is not itself reversible error; nor can the granting of a motion in limine be claimed as error on appeal. *Keene Corp. v. Kirk*, 870 S.W.2d 573, 581 (Tex. App.--Dallas 1993, no writ) (after motion in limine was sustained as to certain evidence, counsel conducted the balance of his examination of the witness without ever eliciting the excluded evidence; error was therefore waived); *Waldon v. City of Longview*, 855 S.W.2d 875, 880 (Tex. App. - - Tyler 1993, no writ) (fact that motion in limine was sustained, and proponent offered exhibit on informal bill of exceptions, did not preserve error, since it was incumbent upon the proponent to tender the evidence offered in the bill and secure a ruling on its admission).

If a motion in limine is granted and the evidence is nonetheless offered, or argument of counsel made, in violation of the order in limine, an objection to the offending evidence or argument is a prerequisite to raising a complaint on appeal regarding the violation of the order. If the objection is sustained, then the aggrieved party should move that the jury be instructed to disregard the improper evidence or argument. If the instruction is denied, appeal can be premised on the denial. If the instruction is granted, it will cure harm, except for an incurable argument.

I. Voir Dire of the Expert

The admissibility of a mental health expert's testimony can be challenged by developing the reasons for exclusion during voir dire of the witness after she has been called by the opposing party to testify in court.

The obvious drawback to developing the grounds for exclusion of a mental health expert's testimony during witness voir dire is that the process occurs during the trial, when the pressure is on to get the evidence presented and the trial over. Developing the grounds for the objection

during the middle of the opposing party's examination does not permit the court the time for reflection, as would a pre-trial hearing or a hearing outside the presence of a jury (or in a non-jury trial, a separate hearing on the admissibility of the testimony). In some cases, raising the issue during witness voir dire is a good plan; in other cases, raising the issue in a different way might be better.

J. Texas Rule of Evidence 104 Hearing on Admissibility.

TRE 104(a) provides that the court is to decide preliminary questions concerning the qualification of a person to be a witness, or the admissibility of evidence. Often referred to as "gatekeeper" hearings, Rule 104(c) allows a practitioner the pre-trial opportunity to exclude a mental health expert based upon the expert's qualifications. Rule 104(c) expressly provides that hearings on preliminary matters are to be conducted outside the presence of the jury "when the interests of justice so require." TRE 103(c) provides that, in jury cases, proceedings should be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means.

TRE 103(a)(1) provides that "[w]hen the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections."

V. RECENT DEVELOPMENTS CONCERNING THE "NOVEL SCIENCE" ISSUE

Recent developments of new standards for the admissibility of expert testimony provide practitioners a larger arsenal from which to challenge the testimony of a mental health expert. These standards involve a judicial determination (both trial and appellate) of the reliability of the expert's methods in arriving at an opinion. A Texas practitioner must have a firm grasp of the holdings of two seminal cases. They are the United States Supreme Court case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, L.Ed.2d 469 (1993), and the Texas Supreme Court case of *E.I. Du Pont De Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

A. A Brief Historical Look Leading to *Daubert*

In 1923, the District of Columbia Court of Appeals issued a two-page opinion which became the primary determinative test for the admissibility of "novel" scientific evidence for seventy years. See *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923). In *Frye*, defense counsel sought to introduce expert testimony explaining the results of a systolic blood pressure deception test, the forerunner to today's polygraph test. In upholding the trial court's refusal to admit the expert evidence, the court of appeals stated that while courts will go a long way in admitting expert testimony, "the thing from which the [expert testimony is deduced must be] sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* at 1014. Even though there is no cited authority to support this statement, the "general acceptance" standard became the cornerstone for the admissibility of scientific evidence in the federal courts and most of the state courts for many years.

The court in *Frye* was grappling with the admissibility of a specific systolic blood pressure test. In 1923, this test had not yet gained enough scientific recognition among "physiological and psychological authorities" to justify the court's admitting expert testimony based on such a new science. Consequently, the *Frye* court required the party offering this novel scientific evidence to show that the scientific test or theory was based on techniques or principles that had received general acceptance in the particular field of science to which it belonged — otherwise such evidence was not admissible.

With this background, we turn to *Daubert*. The Plaintiffs in *Daubert* asserted that Bendectin, an anti-nausea drug marketed by Merrill Dow, caused birth defects in children. Specifically, the drug had been marketed to the children's mothers and had been taken during pregnancy.

After substantial discovery, Merrill Dow filed a Motion for Summary Judgment. In support of its Motion, Merrill Dow submitted an Affidavit from an epidemiologist, who opined that there was no causal connection between Bendectin and the birth defects. His opinion was based on his review of more than thirty studies.

The Plaintiffs countered with opinions from their own experts which stated that there was, in fact, a causal connection. The Plaintiffs' experts based their opinions on a "re-analysis" of the

epidemiological studies, test tube studies, and animal studies. Relying on the *Frye* standard, the trial court granted the Motion for Summary Judgment. The 9th Circuit Court affirmed the trial court's decision.

Granting *certiorari*, the Supreme Court rejected the trial court's use of the *Frye* test. Authoring the opinion of the Court, Justice Blackmun discussed how the trial court should handle the admissibility of "expert testimony." Blackmun's opinion makes the following key points, including:

- The trial court is the "gate-keeper" with regard to the admission of expert testimony;
- This role is predicated upon FEDERAL RULE OF EVIDENCE 702 (which is virtually identical to TEXAS RULE OF EVIDENCE 702); and
- To be admissible, scientific testimony must be relevant, reliable and probative.

Blackmun further explained that courts should be mindful of two competing goals regarding the admissibility of expert testimony; (1) the liberal admission of evidence where juries are the ultimate arbiters of witness credibility, and (2) the gate-keeping role of judges to keep juries from hearing testimony.

Upon remand to the 9th Circuit, the 9th Circuit again affirmed the trial court's decision which granted the Motion for Summary Judgment. The 9th Circuit concluded that the Plaintiffs had not proven the "reliability" of its evidence. The 9th Circuit also held that the Plaintiffs' evidence was irrelevant because only one of the experts would testify that Bendectin had caused the birth defects in question.

B. *E.I. Du Pont De Nemours & Co. v. Robinson*

Prior to *Daubert* reaching our state, it had been Texas custom and practice to focus on the expert's qualifications as the most important criteria for admissibility. Then the court considered *Robinson*. In *Robinson*, the Texas Supreme Court faced this issue in a case where the Plaintiffs alleged that a fungicide manufactured and sold by Du Pont damaged their pecan orchard. After the Plaintiffs' expert was deposed, Du Pont filed a pre-trial motion in an effort to exclude the expert's testimony. The trial

court concluded that the expert's testimony was not reliable and would not fairly assist the trier of fact in understanding any fact in issue in the case. The case was then tried to the Court, where Plaintiffs offered the testimony of their expert. The trial court again excluded it.

The Plaintiffs offered a bill of exceptions containing the testimony. The trial court then granted Du Pont's Motion for Directed Verdict. The Court of Appeals reversed and remanded for a new trial. The Supreme Court reversed the Court of Appeals and affirmed the trial court's judgment. In doing so, the Texas Supreme Court adopted an analysis similar to the *Daubert* analysis. Justice Cornyn joined by Justices Hightower, Gammage, and Spector, wrote a dissent in which he criticized the majority opinion, because, among other criticisms, the *Robinson* majority opinion "thrusts judges, by and large untrained in science, into the inappropriate role of amateur scientists."

C. Recent Cases of Significance Following *Daubert*

Daubert now applies to more than just scientific evidence. The United States Supreme Court held that "the '*Daubert* 'gatekeeping' obligation applies not only to 'scientific' testimony, but to all expert testimony. *Kuhmo Tire Company v. Carmichael*, 119 S.Ct. 1167, 1169 (1999). *Kuhmo Tire Company* was a suit against the manufacturer and distributor of a tire that failed, causing injury to the plaintiff. The Court ruled that the trial judge had not abused his discretion by applying the *Daubert* factors to the testimony of a tire failure expert. *Id.* at 1179. Depending on "the nature of the issue, the expert's particular area of expertise, and the subject of his testimony," a trial court can apply the relevant *Daubert* factors to all types of expert testimony. *Id.* at 1174-1176.

"Even if the specific factors set out in *Daubert* for assessing the reliability and relevance of scientific testimony do not fit other expert testimony, the court is not relieved of its responsibility to evaluate the reliability of the testimony in determining its admissibility." *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 724 (Tex. 1998). *Gammill* dealt with mechanical engineers testifying as expert witnesses. Even though the specific factors in *Daubert* did not apply, the Court used the general principles of *Daubert*, relevance and reliability, to

affirm the exclusion of the engineer's testimony. *Id.* at 723-728.

"Daubert does not support the proposition that a reviewing court can in effect exclude expert testimony that was not objected to based on its scientific reliability before trial or when it was offered at trial and then render judgment against the offering party." *Maritime Overseas Corporation v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998). If expert testimony is not objected to either before or at the trial, then the error is not preserved in the record and the appellate court cannot review the issue. *Id.* at 411.

Several other recent cases have shed light on the application and interpretation of *Daubert*. See *Minnesota Mining and Manufacturing Company v. Atterbury*, 978 S.W.2d 183 (Tex.App. — Texarkana 1998, pet. denied) (Recognizing that the United States Supreme Court favors admission of evidence in borderline situations while the Texas Supreme Court apparently does not); *Nenno v. State*, 970 S.W.2d 549 (Tex.Crim.App. 1998, no pet.) (*Daubert* inquiry is flexible so there is no need to develop distinctions between "hard" science, "soft" science, or nonscientific testimony); *Chisum v. State*, 988 S.W.2d 244 (Tex.App. — Texarkana 1998, no pet.) (Refusal to hold gatekeeper hearing to determine reliability of scientific evidence was harmless because expert provided sufficient foundation for admission of evidence during voir dire testimony); *United States v. Scheffer*, 530 U.S. 303 (Nothing in *Daubert* forecloses, as a constitutional matter, a per se rule against admission of polygraph evidence in court martial proceedings).

D. Utilizing *Daubert/Robinson* and Their Progeny in an Effort to Exclude the Mental Health Expert

1. Is the expert qualified?

Prior to offering evidence from or the testimony of an expert, the party intending to rely on that evidence must establish if the witness is qualified. Under TEXAS RULE OF EVIDENCE 702 an expert can be qualified "by knowledge, skill, experience, training, or education" See also *James v. Hudgins*, 876 S.W.2d 418, 421 (Tex. App. — El Paso 1994, writ denied) (Requiring a showing that the expert possesses "a higher degree of knowledge than an ordinary person or the trier of fact").

If the opinion relates to the standard of care within a licensed profession, the expert will generally be required to be licensed in that same profession. *Parkway Co. v. Woodruff*, 857 S.W.2d 903 (Tex. App. — Houston [1st Dist.] 1993, aff'd 901 S.W.2d 434 (1995); *Cf. Southland Lloyds Ins. Co. v. Tomberlain*, 919 S.W.2d 822 (Tex. App. — Texarkana 1996, writ denied) (Error to exclude expert who was not licensed in Texas as a Texas recording agent); See also *Ponder v. Texarkana Memorial Hospital*, 840 S.W.2d 476 (Tex. App. — Houston [14th Dist.] 1991, writ denied) (Non-physician with a doctorate in neuroscience, who conducts research on the causes of neurological injuries and teaches neurophysiology, neuroanatomy, and neurochemistry to M.D.'s and Ph.D's, may qualify as medical expert on the cause of brain damage). However, licensure does not equal qualification to testify. *Broders v. Heise*, 924 S.W.2d 148 (Tex. 1996) ("There is no validity . . . to the notion that every licensed medical doctor should be automatically qualified to testify as an expert on every medical question").

There is no recipe or formula for determining whether a particular witness is qualified to testify as an expert. *Rogers v. Gonzalez*, 654 S.W.2d 509 (Tex. App. — Corpus Christi, 1983, writ ref'd n.r.e.) ("It is almost impossible to lay down any definite guidelines for determining the knowledge, skill or experience required in a particular case or of a particular witness").

2. Reliability of Scientific Evidence

A variety of factors have been suggested to determine the relevance and reliability of scientific expert testimony. These factors are generally described as "non-exclusive." For example, in *Daubert*, the United States Supreme Court suggested the following:

- Has the theory or technique been, or can it be, tested? (Falsifiability, refutability or testability);
- Has the theory or technique been subjected to peer review and publication? (Relevant but not dispositive);
- What is the known or potential rate of error?

- Is the theory or technique generally accepted by the relevant scientific community?

Subsequently, on remand, the 9th Circuit added a fifth factor for consideration:

- Do the matters about which the expert will testify grow naturally and directly out of research she conducted for the purposes independent of litigation?

Prior to the *Daubert* opinion, the Texas Court of Criminal Appeals dealt with the issue of admissibility of expert testimony in the case of *Kelly v. State*, 824 S.W.2d 568 (Tex.Crim.App. 1992). In doing so, the Court held that the proponent of novel scientific evidence must prove by clear and convincing evidence that the evidence is reliable, relevant, and will help the jury in reaching accurate results. Regarding reliability, the Court suggested the following "non-exclusive" factors:

- The extent to which the underlying theory and techniques are accepted in the relevant scientific community;
- The testifying expert's qualifications;
- The existence of scientific literature supporting or attacking the theory or technique;
- The technique's potential rate of error;
- The availability of other experts to evaluate the technique;
- The clarity with which the evidence can be presented to the Court; and
- The experience and skill of the person who applied the technique on the occasion in question.

In similar fashion, the Texas Supreme Court in *Robinson* stated that "there are many factors that a trial court may consider in making the threshold determination of admissibility under Rule 702." The court then listed the following non-exclusive factors:

- The extent to which the theory has been or can be tested;
- The extent to which the technique relies upon the subjective interpretation of the expert;
- Whether the theory has been subjected to peer review and/or publication;
- The technique's potential rate of error;
- Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
- The non-judicial uses which have been made of the theory or technique.

Even if the court determines that the evidence is relevant and reliable, *Robinson* instructs the trial judge to "then determine whether to exclude the evidence because its probative value is outweighed by the 'danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delays, or by presentation of cumulative evidence.'"

The *Daubert* standard as adapted and modified in *Robinson* makes it more difficult for expert witnesses to testify in family law matters. The proponent of the testimony not only has to show that the expert's testimony is relevant to the matter, but also has to prove that the evidence is sound. This new standard has not yet been tested frequently in Texas appellate courts, so the full effect of the *Robinson* decision will not be felt for a few years. *Robinson* provides the opponent with several new areas to challenge expert testimony and all of these areas must be explored in order to exclude, or limit the expert's testimony.

VI. SUMMARY OF METHODS TO EXCLUDE EXPERT TESTIMONY

All of the methods listed above are incredibly effective in excluding or limiting expert mental health testimony. When your client is threatened with adverse testimony from a mental health expert, all of these steps should be followed in order to protect the client. In some cases, the other side will jump through all of the

hoops and get the expert qualified to testify, despite your best efforts. After you have exhausted all of these possibilities, you now will have to cross-examine this witness after he has presented evidence against your client. Simply because the mental health expert has survived your initial attacks, does not mean that the game has been lost. An effective cross-examination is the key to undoing any damage caused by the mental health expert's testimony. Cross-examination, if done well, can make your case. If it is done improperly, then you and especially your client are not going to be happy. Cross-examination of witnesses is the most dangerous double-edged sword in the litigator's arsenal. In order to conduct a strong cross-examination, the attorney must know the rules of the game, the best strategy, and the art of war.

The remainder of this article will provide a general overview of the applicable rules of cross-examination, tips and strategies to consider in any cross-examination, and specific ideas related to mental health experts. This paper will also examine the best cross questions you can ask of a mental health expert when he or she does take the stand. In order to develop a smooth and thorough presentation, the lawyer must develop his or her own unique style of cross-examination. Combined with your own flare, this tool can truly be a work of art at trial if the attorney is armed with knowledge about the witness, the opposing counsel, and the audience.

VII. THE RULES OF THE GAME

A. Wide open Cross-Examination

Under Texas evidence law, "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." TEX. R. EVID. 611(b). In other words, the scope of cross-examination is wide open and not limited to the scope of direct examination and credibility.

The cross-examination of a mental health expert, however, may be limited to the scope of the direct examination, credibility, and to areas designated during discovery as being within the scope of the direct examination. The subject matter of the mental health expert's testimony must be disclosed after a proper discovery request at least 30 days prior to the beginning of the trial, unless the party affirmatively establishes good cause for the failure to supplement his or her discovery responses. TEX. R. CIV. P. 193.5(b) and 193.6. Methods to limit the testimony of the

expert, or to exclude the witness for failure to properly designate are discussed more fully in Section III of this article.

In one case, a witness was designated as an expert by both sides. The Court of Appeals held that it was proper for the trial court to allow cross-examination that went beyond the scope of the cross-examiner's designation because it fell within the scope of the direct-examiner's designation. The Court of Appeals rejected the argument, holding that the better rule is to require a showing of good cause only when the scope of cross-examination exceeds the designation of testimony by either party. The Court reasoned that this rule preserved the parties' right under Texas Rule of Evidence 611(b) to cross-examine "on any matter relevant to any issue in the case." *Kreymer v. North Texas Mun. Water Dist.*, 842 S.W.2d 750, 752-53 (Tex.App.--Dallas 1992, no writ).

As a general rule, leading questions are permitted and advisable when a witness is being cross-examined. TEX. R. EVID. 611(c). However, leading questions may be denied when opposing counsel calls an adverse party witness. If the party is "friendly" to the examiner, use of leading questions is generally inappropriate. See *GAB Business Services, Inc. v. Moore*, 829 S.W.2d 345, 351 (Tex.App.--Texarkana 1992, no writ) (Held that there was no error by trial court in limiting use of leading questions in cross-examining friendly witness). By the same token, when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions as in the case of cross-examination. TEX. R. EVID. 611(c). It would be a very rare instance that an attorney would ever want to call his opposing counsel's expert witness, but if you do, then leading questions are available to the attorney.

B. Purpose of Cross-Examination

There are two primary purposes of cross-examination. One is to overcome, qualify or explain testimony given on direct examination. The other is to attack the credibility, knowledge, and recollection of the witness by exposing inaccuracies in the direct examination or by exposing the witness' bias or prejudice toward the other side. If a mental health expert is hired by opposing counsel, he will always be adverse to your case. An attorney's cross-examination must be focused on ways to highlight this bias, in order

to reduce the strength of the opinion elicited on direct examination.

The right to cross-examine adverse witnesses is a "valuable right to the litigant, and a denial or abridgement thereof upon a material matter is reversible error." *Rich v. Park*, 177 S.W. 184, 189 (Tex.Civ.App.--Austin 1915), *rev'd on other grounds*, 212 S.W. 947 (Tex.Civ.App. 1919, opinion adopted). The tool of cross-examination has been called "the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970) (quoting 5 Wigmore, Evidence § 1367)

C. Kinds of Cross-Examination

A cross-examiner may question a witness on any matter relevant to the witness's credibility, except to the extent that evidence is made inadmissible for impeachment purposes. See e.g. TEX. R. EVID. 404 and 608. Matters relating to the credibility of a witness may include the witness's 1) ability to recall or communicate events; 2) lack of personal knowledge about the event; 3) bias, prejudice, partisanship, corruption, or interest; and 4) inconsistent statements.

1. Competence

The ability of a witness to perceive, recall, and communicate relevant events is a question of competence. TEX. R. EVID. 601. Initially, this is a question of law for the judge, but if the witness satisfies this test, the problem becomes one of credibility, which is a fact question for the jury. To be competent, the witness must have the ability to understand the nature and significance of the oath and be able to conform his or her conduct to it. This is not an issue with most experts, who will be able to understand the difference between a lie and the truth, even if you disagree in certain instances.

2. Lack of Personal Knowledge

While most expert witnesses will be competent to testify before the judge and jury, they might lack personal knowledge regarding the matters about which they propose to testify. This is not the case with a pure expert who is brought to the courthouse to speak of a mental health topic without regard to the underlying facts of the matter. This witness cannot be challenged on lack of personal knowledge. Personal knowledge should be investigated by the attorney at the

discovery phase. At trial, the witness can be precluded from testifying about those matters of which he or she has no personal knowledge. An example of this type of situation with an expert would be if the expert had never met your client, but still proposes to discuss his parenting abilities. Also, if the psychologist has never seen the children, but he proposes to talk about which party is the better parent.

3. Bias, Prejudice, Interest, or Partisanship

This is the most important area to cover when cross-examining a mental health expert. Bias is an improper predisposition in favor of one side of a controversy, while prejudice has been defined as an improper predisposition against another. *Traders & General Ins. Co. v. Diebel*, 188 S.W.2d 411, 414 (Tex.Civ.App.--Dallas 1945, writ *ref'd* for want of merit). Partisanship amounts to favoritism toward one side for whatever reason. Corruption is more heinous, involving such things as bribery or false testimony. *Texas & Pac. Ry. Co. v. Brown*, 98 Tex. 397, 14 S.W. 1034, 1035 (1890); *Rutledge v. Rambler Automobile Co.*, 95 S.W. 749, 750 (Tex.Civ.App.--San Antonio 1906, no writ).

Demonstrating bias is often an effective technique when cross-examining expert witnesses. Such witnesses are often professional witnesses for one side and may have an obvious institutional bias and interest. Exposing bias and prejudice in the lay witness often involves exposing an employment relationship that makes the witness incapable of being impartial and objective. In family law cases, this will always apply to a relative of the party eliciting the testimony. Regardless of the particular area, the approach is the same. Your cross-examination must carefully suggest the witness' bias or prejudice, then stop. A subtle cross-examination that allows that jury to then reach their own conclusion is often more effective than an overly zealous cross-examination that runs the risk of offending the jury.

A witness may also lack credibility because he or she has a stake in the outcome. For example, a witness is interested if the witness or one of his relatives will receive money if the case is won. *Rothermel v. Duncan*, 365 S.W.2d 398, 403-04 (Tex.Civ.App.--Beaumont), *rev'd on other grounds*, 369 S.W.2d 917 (Tex. 1963). Of course, the actual evidence of one's financial interest will be very subtle in most cases, so it must be investigated thoroughly. On a typical level, an

expert witness who is being paid for his testimony or who testifies often for one attorney or side may be subject to attack on the ground of interest. Therefore, be sure to ask a multitude of questions about the expert's prior testimony and compensation before trial. If possible, locate other deposition transcripts from other cases. This can provide excellent cross-examination information, especially if the expert will take the reverse position depending upon who is paying.

The examination of a witness concerning a bias or interest is comparable to the procedure for impeachment on a prior inconsistent statement. To show bias or interest, the witness must first be confronted with the information that shows he is biased or prejudiced. The witness must be given an opportunity to explain or deny the circumstances or statements. TEX. R. EVID. 613(b). If the statement is in writing, the writing need not be shown to the witness, but on request it must be shown to opposing counsel. TEX. R. EVID. 613(b). If the witness unequivocally admits such bias or interest, extrinsic evidence of the bias or interest is not admissible.

4. Admissions or Concessions

With an expert mental health witness, an attorney can use cross-examination to help build his case. The expert will have been retained by the opposing party and would only have been listed and put on the witness stand if he or she had something beneficial to say about that party. Even though the expert will be in opposition to your client, you can still make points for your client. This type of cross-examination has also been called corroborative cross examination. Corroborative cross seeks to have the witness agree with the facts which support your client's position. During this type of cross, get the witness to agree with every good admission previously made about your client. This should include any admissions on positive parenting skills of your client, values that are important to your burden of proof, fault grounds and the like. If the witness starts contradicting his deposition testimony, that is when you use the deposition for impeachment.

Corroborative cross must be attempted prior to any questions that attack the credibility of the expert witness. At the beginning of a cross-examination, the witness will be less hostile and more trusting than he will be later in the cross-examination. There is a two-fold purpose to this method: 1) oftentimes the witness can be "worn

down" to the point of answering questions in the manner he believes the questioner wants him to answer because he assumes the deposition testimony is going to be "thrown in his face," and 2) the judge or jury are hearing every contradictory answer and will, hopefully, decide that if the witness cannot tell the truth about unimportant issues, he will probably not tell the truth about issues that will effect his future.

There are many examples of these types of concessions. If your client had a poor score on his MMPI test, and the opposing party's mental health expert testifies as to its meaning, you can get him to admit that the MMPI is not valid for the diagnosis of mental health problems. Also, you can try to get the expert to admit that the stress of the divorce or custody battle might have effected your client's responses to some of the questions.

VIII. PRACTICAL TIPS AND STRATEGIES

Any approach to cross-examination must be considered in light of your own personality. Learn from the masters and their years of experience, but we should not try to be someone we are not, or do something unnatural to our own personality. Watching a great trial lawyer cross-examine a difficult witness is an educational experience unavailable from any article or seminar. Remember, the strategy and technique is unique to that lawyer, that case, and that witness. In the final analysis, we must be ourselves.

Although there is no real substitute for the courtroom, knowledge of the fundamentals of cross-examination can prevent common pitfalls. The key to any cross-examination is control.

A. The Science Of Cross-Examination

One of the most complete and enjoyable books on the subject is Pozner and Dodd's Cross-Examination: Science and Techniques. Every family law practitioner should be familiar with the cross-examination techniques outlined in Pozner and Dodd's book.

Cross-Examination: Science and Technique provides fundamental cross-examination skills the practitioner may utilize for just about any conceivable witness. When cross-examining a mental health professional two of the techniques, looping and the use of trilogies, are especially valuable.

1. Looping

“Looping is a method by which an important or favorable point is reemphasized by repeating the information to be emphasized in the body of another question. At its most basic form it works like this:

- 1) Through a leading question establish the desired fact or phrase;
- 2) Use the fact or phrase these established within the body of a succeeding question, but without re-asking the fact; and
- 3) Be careful to connect the looped fact or phrase with a question (the next succeeding) that contains an undisputed fact.”

Pozner and Dodd, *Cross-Examination: Science and Technique*, 451 Michie (1993)

Looping allows the family law practitioner to establish a fact that is harmful to their opponent through a leading question and then use the helpful fact against their opponent through repetition. The beauty of looping is that the helpful facts that are repeated become the witnesses words, not the words of the lawyer. This adds to the cross-examination by first establishing and then reinforcing helpful testimony through a witness.

An example of looping in the cross-examination of a mental health professional would be:

- Q: Isn't it true Doctor, that you *failed to engage in any psychological testing* in order to reach your diagnosis?
- A: Yes.
- Q: After *failing to engage in any psychological testing*, you created a report based only on what your client reported to you?
- A: Yes.
- Q: Isn't it true that when you *failed to engage in psychological testing*, your report could be filled with things your client made up?
- A: Yes.

As this example shows, looping the phrase “failed to engage in psychological testing” reinforces the point the practitioner is making as the cross-examination progresses.

2. Spontaneous Loops

As shown above, loops can be scripted based on the practitioner's knowledge of the witnesses proposed testimony. Some loops cannot be

planned for, but these spontaneous loops can be even more effective. As with any other cross-examination technique, it is imperative that the cross-examiner listen to the answer to the question, before charging forward with the next question. An experienced cross-examiner knows that some of the best questions he or she asks are based on answers that the witness provided voluntarily.

- Q: When you re-evaluated your report, you discovered mistakes, didn't you doctor?
- A: I wouldn't say mistakes. I'd say *inaccuracies*.
- Q: There were *inaccuracies* in the report that you created about my client?
- A: Yes.
- Q: Isn't it true, doctor, that these *inaccuracies* in your report invalidate many of your conclusions about my client?
- A: Yes.

The spontaneous loop is particularly effective technique to use with an intelligent witness. Many expert witnesses will be inclined to use their own words and the skilled practitioner can use their words against them. In the example above, the expert thought he was avoiding a trap by dodging the word “mistakes”. However, by using a spontaneous loop and taking the witnesses own word “inaccuracies”, the skilled cross-examiner uses the witnesses own words to damage his testimony.

3. Trilogies

Another dramatic technique espoused by Pozner and Dodd is the use of trilogies. Trilogies are found throughout history in famous speeches and in great works of literature. Pozner and Dodd recommend give the following examples of famous trilogies:

- Plato's “wisdom, courage, and temperance”
- Churchill's “Never give up, never give up, never give up.”
- Lincoln's “We cannot dedicate, we cannot consecrate, we cannot hallow, this ground.”

Using trilogies to “build the drama and to make more memorable the cross-examination” allows the practitioner to not just make his point, trilogies make the point memorable. *Id.* at 473.

Trilogies can highlight testimony you want the jury to remember while they are deliberating. An example of a trilogy used in a cross-

examination of a mental health expert brings home this point.

Q: Despite the fact that the child told you his parents killed babies, you still believed him?

A: Yes.

Q: Despite the fact that the child said he saw his mother ride off in a flying saucer, you still believed him?

A: Yes.

Q: Despite the fact that the child said that his sister could morph into a dog, you still believed him?

A: Yes.

Or trilogies can be used in a short bursts for emphasis.

Q: You diagnosed this patient, but you never tested him?

Q: You diagnosed him, but you never did any psychological testing?

Q: You evaluated him, but you never did any objective verification?

Q: You labeled him, but you never received any information beyond what he told you?

Trilogies have power, not only because they are memorable and concise. In a two week custody case, trilogies and loops become "sound bites" that jurors take with them when they retire to the jury room for deliberations.

B. Cross-Examination at Trial

After the discovery phase, counsel should have a thoroughly prepared and organized trial notebook complete with full examinations for each potential witness to be cross-examined. As experience and confidence is gained in the courtroom, the trial notebook questions may be limited to an outline of important points to be covered with each witness. Regardless of the attorney's experience level, there is no way to anticipate every question to be asked on direct examination. Be prepared to be spontaneous and react to unplanned testimony that has been brought out on direct examination by opposing counsel.

Virtually the entire cross-examination should be prepared by going through prior deposition testimony and picking out the most damaging points to the adversary as well as the most helpful points for your client. From these points, prepare an outline of points to cover on cross-examination; either in question or "statement"

format, depending on your experience and comfort level. Each statement or question should be keyed by line and page number to the deposition.

IX. THE ART OF WAR

A. Impeachment

Impeachment is the most dramatic trial technique in the lawyer's arsenal. Selectively used and effectively employed, it can have a devastating effect at trial. Jurors appreciate effective impeachment. An effective impeachment is rarely successful if attempted at the examiner's whim during the trial, but is usually the result of intense research and preparation at the discovery level.

1. Prior Inconsistent Statements

One of the most common ways of discrediting a witness' testimony is to show that the witness has previously made statements that are inconsistent with his or her testimony at trial. A prior inconsistent statement of a witness is admissible to attack his or her credibility. TEX. R. EVID. 613(a). A prior inconsistent statement of a party or witness is also admissible to prove the truth of the matter asserted when the declarant testifies at the trial or hearing, is subject to cross-examination, and the inconsistent statement was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition. TEX. R. EVID. 801(e)(1)(A).

Raising prior and inconsistent statements is the most frequently used impeachment method at trial. More than any other impeachment method, however, impeaching with prior inconsistent statements requires precise technique to be effective before the jury. Rule 613 of the Texas Rules of Evidence expressly requires that the witness have an opportunity to admit, deny, or explain the making of the inconsistent statement.

If the prior inconsistent statement was made in a deposition, the following litany should be followed with any impeachment of a witness with deposition testimony. First, the examiner should establish that the deposition was taken and have the witness testify about the general area of inquiry. Secondly, the examiner should establish that the witness understood the nature of the deposition and treated it as an important, serious matter. Third, if the witness read and corrected the deposition transcript, delve into the fact that

the witness even had a second opportunity to review and correct their testimony prior to trial. Fourth, identify trial testimony that is inconsistent with deposition testimony and commit the witness to it. Fifth, confront the witness with the prior inconsistent deposition testimony.

2. Contradictory Facts

A cross-examiner may wish to show that certain facts are different from what the witness claims. This is usually called impeachment by contradiction. How the fact is asserted on cross-examination determines whether you are under an obligation to prove up the actual fact.

B. Preparation and Planning for Cross-Examination

1. Plan of Attack

The following basic principles should be observed in developing a plan for cross-examination of witnesses.

- a. The cross-examination should be planned to meet its intended purposes.
- b. Plan to begin and end with your strongest points. People tend to remember what they hear first and last, with some casual day-dreaming in the middle. Do not let your brilliant cross-examination fizzle out with a boring or irrelevant question.
- c. Have a preconceived plan about how, when and why the witness' credibility will be attacked. Otherwise, the jury will sympathize with the witness, who it will see as being bullied by the lawyer.
- d. Cross-examination, like other parts of the trial, is not just substantive; it is a matter of impression management. Do not just expose the opposition's weaknesses, be prepared to tell a sequential and creative story that clearly exposes why your client should win.
- e. Your story is obviously different from the opposition, so tell it that way. Do not fall into the trap of attacking the witness based on the way in which the story was told on direct. This could cause the jury to believe "that's the way it really happened". Your side of the

story should be distinct from the opposition, so create your own version of what happened through cross-examination. Reduce the basic facts to memory and be sure that they are brought out appropriately with each witness' testimony.

- f. The cross-examination should be aimed at probabilities. By using experience and logic to think through what probably happened (including the minor details), the cross-examiner can interrogate the witness to bring out the "probable" facts that favor the cross-examiner's case or that tend to cast doubt on the witness' story, conclusions, or interpretations. Stretch the other side's bad facts as far as you can on cross-examination and patch them up with logical conclusions during final argument.
- g. Many commentators believe that a cross-examiner should never ask a question of an opposing witness unless the answer is known beforehand. This simple principle provides safety from misfortune, but it may not be appropriate in all circumstances. One such instance is when an opposing witness simply must be raked over the coals in order to minimize the harm that his testimony has already caused. If the examination will delve into an area in which the examiner does not know how the witness will answer, a back-up point should be saved for use after the answer. For example, with an expert witness, the cross-examiner should save the points that the witness is being paid a big fee and has testified numerous times for the opposing counsel until the end of the examination unless some other sizzling question is being saved until the end. There is nothing worse for the case on cross-examination than getting "killed" with an answer and having no further points to make.

2. Jury v. Non-Jury

Before beginning any "presentation", it is important to know your audience. Therefore, prior to preparing your cross-examination outline, think about whether your questions will be observed by a judge or jury. If your audience

consists of a jury, it will be impossible to tailor your style of presentation around any particular model. On any given day, the panel members can be completely different. Therefore, with a jury panel, it is even more important to know your witness.

Let the jury know that the opposing counsel will call certain witnesses that you will have to cross-examine. Let the jury know that you are only doing your job and not trying to abuse anyone. Also, remember to discuss credibility issues with the jury at the very outset. During the voir dire examination, ask the jurors to identify various reasons that a person would lack credibility. Make sure the panel members identify the issues of credibility concerning friends and relatives of an opposing party. Do not forget to talk to them about credibility issues in relation to experts and their fees. As a result, if you simply cannot chip away at the substantive portion of the witness' testimony, ask a few questions related to bias and prejudice, then move on. Remind the jury about the credibility problems in closing argument.

If you are trying the case before a judge, there should be some familiarity with the judge's personality, demeanor, bias' and prejudices. If you know nothing about these issues -- find out. Many judges prefer that the lawyer get right to the point, without abusive questioning, grandstanding and belaboring the point. Of course, there are those "technical" sorts who love to dabble in the minutia. Find out about your judge's house rules and tailor your cross-examination around those preferences. Be prepared for every contingency and be ready to adapt to it. In fact, be ready for the judge to take over your cross-examination entirely. One lawyer was so devastated by the judge's actions that he actually stood up and said, "Judge, I don't mind you cross-examining my witness, but please try not to lose the case for me!" This sort of statement is probably not recommended with most courts. As a result, it is important to be "flexible" anytime you are dealing with a judge rather than a jury. Judges are human too, and they may prefer to speed up your case on any given day. Be ready to accommodate the judge in any way possible so long as it does not harm your case.

3. Temporary Hearing v. Final Trial

The issue of cross-examination at the temporary hearing stage is often over-looked. Of course, the tips provided in this article can be used

either at the temporary hearing or the final trial. In family law, the temporary hearing often sets the stage for the final outcome of the case. Therefore, it is imperative that the lawyer be immensely prepared during this phase of the case. The temporary hearing should be prepared as though it is a final trial, designed to place the parties in a certain position for all time. If the lawyer approaches the temporary hearing in this fashion, the chance of success increases dramatically.

Be prepared for the other side to call expert witnesses at the temporary hearing, especially if you are dealing with a custody matter. On cross, determine whether the witness was recently hired for purposes of the litigation. If the opposing party does not have an established relationship with the expert, his opinions can be attacked.

Finally, be prepared to deal with the associate judge's schedule in an appropriate manner. If possible, obtain a special setting so that you are not surprised by the short amount of time the Associate Judge has allotted for her docket. If there is no time to obtain a special setting, be sure to get right to the point on cross-examination. Associate Judges generally have a very heavy docket and are unable to hear any contested matter that lasts over thirty minutes absent a special setting. The most important factor in preparing for cross-examination at the temporary hearing stage is to be flexible. On final, you should know the time constraints and plan accordingly.

C. Techniques of Cross-Examination

The main thrust of cross-examination will normally be to bring out all details that tend to show that the facts stated on direct examination are not probable or credible. If a witness is completely honest, he will have to answer some questions in a way that appears unfavorable to his side of the case. Most witnesses, however, will try to answer all questions favorably to themselves, and will therefore be inconsistent in some ways. The cross-examiner should look for the weak points in the witness' version of the story and focus the cross-examination on those areas.

1. Probabilities

As stated above, the witness should be asked and committed to a multitude of small details surrounding an event or crucial point. By doing so, the cross-examiner can build up an arsenal of

small details pointing to the probability of the conclusions desired. These should seem inconsequential enough that the witness would look horribly biased if the question was not answered favorably. The lawyer should be prepared to tie together all of these probabilities into a logical conclusion during closing argument.

2. Possibilities

An unfavorable witness, particularly an expert witness, should be cross-examined about the possibilities favoring the cross-examiner's side, even though he or she may have testified that the probabilities are otherwise. Particularly to a jury, the "possibility" that something may or may not be true can carry more weight than it really should. Discredit an expert's testimony by forcing him to admit to a multitude of possibilities that could disprove a theory or change a final outcome. This should dilute the overall impact of the expert's conclusions which seemed air tight on direct-examination.

3. The "Flank" Attack

If there is nothing with which to impeach the witness, the cross-examiner should not take the witness over the subject of the direct examination. Instead, the cross-examination should attack only the weak points of the witness' story and ask for details in areas where the witness may not be prepared. Each time there is an inconsistency, the witness should be confronted with that fact until the jury finally senses that he or she is inventing answers. The jury will begin to see the contradictions and discount the witness' story.

4. The "Plank" Attack

Before the cross-examiner impeaches a witness with a prior inconsistent statement, he or she must set up the witness for impeachment by pinning the witness down on all the surrounding details and make the witness give a full account of the present version of the facts. Then, the witness can be impeached with the statement giving the previous version or story. In other words, the cross-examination should walk the witness down the plank then kick him off.

5. Magnify Mistakes

The cross-examiner should always keep a finger on the opposing side's weaknesses. If a witness makes a statement that damages him or

her, it should be used as the predicate for some questions thereafter. However, the cross-examiner should take care not to overuse the statement. A few questions immediately after the fact is brought out should be sufficient; then the matter should be dropped for a time. However, the cross-examiner should come back to it occasionally and use it as the predicate for one or two questions. If it is overused, the jury may become comfortable with the fact and not hold it against the witness to the extent that they otherwise would. The fact must be emphasized so that the jury remembers it, but left somewhat mysterious and unusual.

6. Documents

A cross-examiner may take written material sentence by sentence and line by line and ask the witness about each such sentence. One tactic involves the examiner's going through each sentence separately and fully with all of the questions about that area before going to the next sentence. Often a witness can be set up in this way by giving explanations for certain sentences only to be impeached with the next sentence of the document. If possible, the examiner should not show the witness the document while going through it. Instead, the examiner should simply read it, taking one sentence at a time, asking several questions about it, and then reading the next sentence and repeating this procedure.

7. Past Details

If the witness says that he or she remembers a small detail that occurred long ago, the examiner can point out how minute it is, how long ago it was, and compare it to the more significant information that has conveniently been forgotten. By doing so, the implication is that the witness cannot really remember in such detail. For example, if a doctor testifies that he or she remembers certain things in an examination of a patient three years ago but has no office notes to refresh recollection, the cross-examiner can ask the doctor how many patients he or she sees per week, per month, per year, and then ask how long it has been since this examination. An inquiry can also be made about when the particular examination took place, what was the time of day, how many other patients were scheduled on that day, etc. It is unlikely that the witness will recall these details. The examiner should stop at that point and not allow the doctor to explain why he or she remembers the allegedly significant detail. On summation, the lawyer should discount the

witness' recall of the harmful detail by the fact that the witness cannot recall basic everyday information surrounding the same issue.

X. PRACTICAL TIPS FOR THE CROSS-EXAMINATION OF A MENTAL HEALTH EXPERT

In theory, expert testimony is admissible because experts possess knowledge, training, and experience which allows them to form opinions on matters that jurors are not equipped to form. Expert opinions aid jurors in understanding topics and deciding issues which are beyond their common experience or knowledge. Expert testimony can allow a jury to reach its own conclusions by enabling it to comprehend specialized factual matters. Expert testimony can also be used to present facts and conclusions in the form of the expert's opinion, leaving the jury to either accept or reject the expert's conclusion. Experts serve two basic functions at trial: (1) to present factual subject matter not ordinarily understood in a manner that will enable the judge or jury to decide issues in the case; and (2) to present opinions, rationale, arguments, theories, and reasons based on expert skill or knowledge that the jury is free to accept or reject, and thereby decide the issues in the case.

A. Applicable Rules

1. Rule 702: Testimony by Experts.

Article VII of the Texas Rules of Evidence is dedicated solely to the rules applicable to expert testimony. Rule 702 states that, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." TEX. R. EVID. 702.

Based on this rule, the expert must be qualified to testify as a person who has specialized knowledge on the subject matter of the testimony. *Housing Authority of City of Galveston v. Henderson*, 267 S.W.2d 843, 845 (Tex. Civ. App. - Galveston 1954, no writ). The court exercises discretion in permitting evidence from an expert, and should do so only after being satisfied that the witness has specific qualifications not possessed by the jury which can aid them in determining the issue at hand. *Trick v. Trick*, 587 S.W.2d 771, 773 (Tex. Civ. App. -

El Paso 1979, writ dismissed). Therefore, be cognizant of the fact that opposing counsel's expert may have a ten page vitae outlining an area of expertise that has nothing to do with the issue before the court. Use this to keep the expert off the stand altogether or to discredit his opinions and conclusions.

2. Rule 703: Bases of Opinion Testimony.

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Tex. R. Evid. 703.

First-hand knowledge of the subject matter in issue will qualify any person to give testimony on that topic. In particular cases involving value of realty or personal property, personal knowledge of market values of similar property in the locality is a requirement. *Mobile Housing, Inc. v. Tague*, 488 S.W.2d 582, 584 (Tex. Civ. App. - Dallas 1972, no writ); *Arkansas Louisiana Gas Co. v. Allison*, 620 S.W.2d 207, 210 (Tex. Civ. App. - Tyler), modified on other grounds, 624 S.W.2d 566 (Tex. 1981).

Before the adoption of Rule 703, the rule in Texas was that an expert could rely on hearsay only when the testimony was also predicated on personal knowledge. See, e.g., *Parr v. Tagco Industries*, 620 S.W.2d 200, 206 (Tex. Civ. App. - Amarillo 1981, no writ) (expert testified to cost of repairs to determine damages in DTPA case). In *Parr*, the expert testified that he used the services of an estimator to verify and confirm his personal opinion on the cost of needed repairs, and the court applied the long established rule that an expert's testimony predicated upon personal knowledge and hearsay was admissible evidence. Since the adoption of Rule 703, an expert may base his opinion testimony on hearsay evidence alone, if it is reasonably relied upon by experts in the field of expertise. *Metro Aviation, Inc. v. Bristow Offshore Helicopters, Inc.*, 740 S.W.2d 873, 876 (Tex. App. - Beaumont 1987, no writ). The test for admissibility now centers on the reasonable reliability of the hearsay evidence and whether experts in the field rely upon it. The trial court makes the initial determination of admissibility.

3. Rule 704: Opinion on Ultimate Issue.

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." TEX. R. EVID. 704.

The general rule is that no witness may give opinion testimony on a question of domestic law or on matters that involve questions of law. The key is to stay away from legal definitions, since evidence of mental capacity based on observations or other admissible evidence is acceptable and need not include opinions based on legal definitions or conclusions. Additionally, Rule 704 has been interpreted by the Texas Supreme Court to allow expert testimony on mixed questions of law and fact as long as it is relevant and based on proper legal concepts.

4. Rule 705: Disclosure of Facts or Data Underlying Expert Testimony.

"The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data." TEX. R. EVID. 705(a).

The clear intent of Rule 705 is to eliminate the hypothetical question which has always been criticized as time-consuming, cumbersome, and awkward. Yet, what the rule may actually accomplish is the refinement of the use of the hypothetical as an effective tool in presenting expert opinions.

B. Effective Cross-Examination of Expert Witnesses

As noted by a leading civil trial litigator Frank Branson, "The primary purpose of cross-examination is to lead the opposing expert to the truth, since he obviously missed it on direct!" A second objective is to discredit the expert's opinions by showing he is biased, prejudiced, unqualified, or inadequately prepared. The two approaches are not necessarily harmonious, so select the one that is best suited to the particular case and the specific expert.

There is no right way or wrong way to prepare to cross-examine an expert witness. But

remember that the expert is armed with a vast amount of knowledge on the subject matter of his testimony, so do your homework thoroughly. There are some suggested steps that will be part of any successful preparation.

1. Do Your Homework.

The expert's credentials should be closely examined well in advance of trial. You can engage sophisticated computer networks or you can make phone calls. Get copies of every article the expert has ever written and study each one carefully. Compare the expert's articles to others in the field, noting each and every difference. The same applies to every transcription of the expert's testimony in every trial. If the expert is a "hired gun", it is likely that he has expressed an opinion on the same issue in the past. If the expert has reached a different conclusion on the same issue, this is a lawyer's dream. Use this to the maximum extent possible on cross-examination to show that the expert's opinion is not worth more than his hourly rate. You may find that the expert always testifies for the same side. This can be a jewel as well. If the expert only recommends fathers for custody, capitalize on this. It will severely damage such a recommendation. At a minimum, ask other lawyers about the expert, especially if they have cross-examined him. Get insight into the expert's knowledge, but also delve into his courtroom demeanor and personality. The expert may be a "brain-child" on paper and a bumbling idiot before a judge or jury. Of course, the opposite could be true. Therefore, the examiner must be prepared to focus on the expert's weak points, whatever they may be, prior to facing this important witness at trial.

If you are going to challenge the witnesses' qualifications in his field do it outside the presence of the jury. Do not ask the Judge to rule in the presence of the jury unless you are positive that he is going to tell the jury that this person is not qualified as an expert. If the Judge overrules you then the jury may have the false impression that this person is a solid, credible expert.

You may find that your expert is generally qualified in the area but not specifically qualified in the exact area involved in your case. If this is the case (again, outside the presence of the jury) direct your objection to his lack of qualifications in this specific instance and not his general qualifications.

2. Enlist Your Expert's Assistance.

It is almost always necessary to have a session with your own expert which is exclusively devoted to preparation for cross-examination of the adverse expert. Prepare a notebook for your expert which contains everything you have found about the adversary and have her study the information well in advance of trial. Once your expert has reviewed the adverse expert's deposition testimony, reports, transcripts, and publications, plan a session wherein the expert will teach you about the subject matter, as well as educate you about any flaws or weaknesses in the expert's theories. It may also be helpful to enlist the assistance of your expert in conducting his own investigation. Just like in the legal arena, accountants, appraisers, and psychologists have their own "gossip" pool. Tap into this source whenever possible. You never know what sorts of gems you will discover about the opposition.

3. Be Concise.

A well prepared cross-examination should be brief, concise, and narrow in scope. Preparation eliminates shotgunning, and shotgunning is what turns your cross into a rehash of the direct. Trim your cross-examination to a short list of necessary areas that must be covered. Depending on the subject matter, this can take five minutes or five hours. But remember to adhere to the rule of quality over quantity.

4. Use Leading Questions.

When possible use leading questions with the expert witness to keep him on the subject of interrogation. Only ask open-ended questions when you do not care what the expert says and when you are certain that nothing he says will hurt you.

5. Maintain a Poker Face.

Don't bleed on the floor when the expert witness cuts you. When he scores, move on without showing it.

6. Know Thyself.

Know when to take risks and explore uncharted ground, and when not to. Know the difference between a calculated risk and shotgunning.

7. Listen.

If you are not listening to the answers, you will never know when to be bold and daring. If you have a hard time really listening to the answers, then the expert is dictating the pace of your cross.

8. Be Kind, Gentle, and Polite.

Jurors are conditioned by television, books, movies, and cocktail conversation to sympathize with the witness on cross. They are more sympathetic when the witness is a non-litigant. Therefore, treat the expert as politely as possible unless the nature of the case and the witness calls for different tactics. This is especially true in the discovery phase. It will do absolutely no good to practice your hard hitting cross-examination during depositions. Treating the expert with respect and courtesy is the way to get the most valuable information.

9. To Break or Not to Break.

If given a choice, go right into cross-examination at the end of direct. Remember that opposing counsel ended strong on direct, or tried. It's important for you to start and end very strong. If you need a break to get your act together and you ask for one, you have lost the chance to start strong, and you have given the jury additional time to mull over the opposing counsel's strong points as they drink coffee. If you need a break for a really good reason, or if you sense that the jury needs a break for the same good reason, graciously ask the court its preference. The Court will likely need one, and you will get your recess.

10. You Can Lead 'Em to Water but You Can't Make 'Em Drink.

If you have ascertained (either in pre-trial preparation or in listening to the witness on direct examination) that it is not possible to undermine the qualifications of the expert successfully, then you should not attack the witness unnecessarily. To better explain, "Never try to teach a pig to sing - it wastes your time and it annoys the pig". Likewise, consider very carefully whether or not you really want to cross-examine this expert witness. Typically the more qualified the expert, the less you will gain by cross-examination. Do not do it unless you really think you can accomplish something.

C. Mental Health Professionals

The general rules and strategies previously discussed should be utilized with all experts, including the mental health professional. Additionally, keep in mind that the mental health professional has a two-fold task unlike most pure experts. He must deal with the case on an objective and subjective level. In that regard, the mental health expert is not faced merely with raw data in order to form his opinion. Of course, if that is all the expert has done in the case, he is dead in the water. Most experts will engage in a thorough investigation of the parties, children, extended families, teachers and psychologists. Therefore, this should be your first area of investigation for cross-examination purposes. This line of questioning should inquire into failure to see crucial parties, failure to communicate with other witnesses, failure to review other available evidence or to follow up on other avenues of information. Most will admit that more information is always helpful in arriving at accurate findings, but few will admit that their opinion will change.

1. Know the Lingo.

No attorney should attempt to examine or cross-examine a mental health professional without knowing the expert's lingo. An excellent source of information is the DSM-IV. The Diagnostic and Statistical Manual provides information on the most recent classification of mental disorders. If the opposing party alleges any sort of mental disorder, or your client thinks one exists, research the manual thoroughly on that particular topic. The DSM-IV provides a list of criteria that make up recognized disorders. It will also include a listing of symptoms which could warrant a finding that a particular disorder exists. The examiner can put this list into a question format during the discovery phase to get the witness committed to each identifying criteria. Your own expert can then review the deposition and advise about possible cross-examination questions concerning any potential diagnosis, or lack thereof, that may be favorable to your position. The DSM-IV is also helpful to educate the attorney about possible disorders that might exist in any fact scenario. Being able to talk intelligently with the mental health professional on cross-examination will boost your own credibility and break the expert's confidence in making sweeping or generalized opinions that could hurt your case.

If your client has been diagnosed by the opposing expert as having a mental disorder, use

of the criteria set out in DSM-IV is mandatory to effectively test the reliability of the diagnosis. If the diagnosing expert has not done a complete DSM-IV diagnosis, the attorney can chip away at the credibility of the expert. Questions as to each and every criteria which forms the basis of the diagnosis should be closely examined. The examiner should also cross-examine the opposing expert regarding criteria which may exist regarding the opposing party as to the possibility of his or her suffering from a mental disorder.

2. Questioning Psychological Tests and Testing.

Ensure that you are fully aware of the scope of the expert's testimony. Determine whether the scope of his testimony was dictated by the judge or opposing counsel. If the expert is court-appointed, ensure that everyone is aware of the extent of his or her involvement. As the trial progresses, follow up on whether the expert is doing his job. If the expert is appointed solely to test the parties then report the results, a thorough knowledge of the test itself, as well as its validity and reliability, is imperative. The following is a general overview of psychological tests and their purpose. If any of these tests are used in your case, an in depth study of the particular test should be thoroughly reviewed. There are basically four areas ripe for cross-examination regarding any given psychological test:

a. Uniformity in Test Administration and Scoring

Dr. A. Anastasi, author of *Psychological Testing*, states:

If the scores obtained by different individuals are to be comparable, testing conditions must obviously be the same for all. Such a requirement is only a special application of the need for controlled conditions in all scientific observations. In order to secure uniformity of testing conditions, the test constructor provides detailed directions for administering each newly developed test. The formulation of such directions is the major part of the standardization of a new test. Such standardization extends to the exact material employed, time limits, oral instructions to subjects, preliminary demonstration, ways of handling queries on subjects, and every other detail of the testing situation.

Many other more subtle factors may influence the subject's performance on certain tests. Thus, in giving instructions or presenting problems orally, consideration must be given to the rate of speaking, tone of voice, inflection, pauses, and facial expression.

A. Anastasi, *Psychological Testing* 23 (2d ed. 1968).

It has been suggested that whenever the client is submitted to psychological testing, the administration of the test should be videotaped. Only then could the attorney truly know if the test was administered correctly and in the proper setting. At the very least, the attorney needs to inquire as to any deviation from the standard instructions or if the clinician might have inadvertently given any clues to the test taker.

The family law practitioner should be further concerned with whether a person going through the pains of a divorce and/or custody fight can truly meet the conditions for being in "standard" surroundings and being free from distraction.

b. Norms Should be Standardized.

The next area for cross-examination should be inquiry into the norms used for the test. An individual's score on a psychological test is meaningless without reference to scores from a normative sample. The attorney must constantly bear in mind that psychological test norms are neither universal, absolute, nor permanent.

Clinicians tend to ignore the limitations of norm groups and give tests which have set norms for one group to a member of another group. Thus, for example, a psychologist who has given to a Mexican American an intelligence test for which the norm group was comprised of white Americans should be questioned as to how such norms can be applied to this individual.

c. Reliability

Cross-examination should then focus on reliability of the test. Reliability refers to the degree of probability that upon taking a test a second time with a different examiner, the individual would obtain close to the same score as on the prior taking. If an individual were to

obtain a much different score on a second or third testing, then, obviously, the test does not measure any stable characteristic of the individual. It has been suggested that a minimum reliability coefficient of .80 should be expected. Where the coefficient is less than .80, a motion should be made to strike any testimony and any conclusions based, or partially based, upon the results of that test. The motion to strike or the objection to the testimony should be that the test fails to meet the standards of reliability accepted by the profession and, therefore, cannot support a conclusion with reasonable certainty. Of course, the attorney will have to prove through this witness or another one, that a coefficient of less than .80 is considered unreliable by the psychiatric and psychological community.

When an expert is relying on a test with a reliability coefficient between .80 and .90, the attorney should attempt to get the witness to admit that the reliability of the test is a matter of dispute in the psychiatric and psychological community. Generally, the most widely used intelligence tests have a reliability coefficient of .90 or above.

d. Test Should Be Validated for the Purpose Used.

Validity is where most psychological tests fall short. Of the various types of validity, only concurrent or predictive validity have any merit in the legal process. An objection should be made to any testimony regarding a test having only face or construct validity because those types are based purely on assumptions. Concurrent and predictive validity on the other hand, are based on an actual demonstrated relationship. In other words, the validity of these tests scores must be shown not only be the test itself, but in conjunction with other considerations.

In cross-examining the expert, the attorney needs to discover the possibilities that classifications or predictions, as established by the research on that particular test, may be correct or incorrect. If a personality test, for example, correctly identifies 90% of schizophrenics as schizophrenics, and fails to properly classify 10% of non-schizophrenics as non-schizophrenic (false positive) and correctly identifies 90% of non-schizophrenics as non-schizophrenics, then the test is valid for the purpose of identifying schizophrenics and non-schizophrenics. But, if the test only correctly classifies 60% of schizophrenics as schizophrenics, and classifies

40% of schizophrenics as non-schizophrenic (false negative) and classifies 30% of non-schizophrenics as schizophrenic (false positive), then the ability of the test to achieve its purpose (identifying schizophrenics and non-schizophrenics) should be challenged. One of the questions to ask the expert who has administered and relied on such a test, should be: "What is the percentage of erroneous exclusions (false negative) and erroneous inclusions (false positives) that can be expected from this particular test?"

Validity is an area that can be raised in a challenge to the testimony under the *Robinson* decision of the Texas Supreme Court discussed in Section IV. of this article.

3. Cognitive, Objective and Projective Tests

a. Cognitive Tests.

Measure language and levels of academic achievement.

(1) Weschler Intelligence Test (WIT).

This test is designed to measure knowledge, reasoning, judgment, vocabulary, visual alertness, perception and eye-hand coordination, and a full scale I.Q. It is designed for different age groups. There are often discrepancies between the subtest scores. The attorney should be aware as to whether the discrepancies have been validated for the conclusions being drawn by the expert. This test also produces higher scores on retesting, so questions regarding the number of times it has been administered will be important. This test also has the tendency to overestimate low I.Q.'s. A person with a score of 0 might actually have an even lower I.Q.

(2) Wide Range Achievement Test (WRAT).

This test measures one's level of academic achievement. This test is commonly used to determine whether gaps exist between a person's ability and his/her achievement level.

b. Objective Tests

(1) Generally.

These types of test results require little or no interpretation by the examiner. Interpretation is usually done automatically.

(2) Minnesota Multiphasic Personality Inventory (MM-PI).

This is by far the most commonly encountered test in child custody cases. The results suggest personality traits and certain types of mental disorders. The patient/client answers 500 plus questions. In its simplest form, if the person tested answers certain questions the way a paranoid patient did (based on the standardized results from other mental patients), the person is considered to be paranoid. Total reliance on the MMPI for formulation of the expert's opinion is fertile ground for cross-examination.

Some suggested lines of questioning regarding this test are as follows:

- Was the MMPI in question scored using the updated norms established by Colligan, Osborne, Swenson and Offord, *The MMPI: A Contemporary Normative Study* (New York: Praeger Publishers, 1983)?
 - If yes, is there research validating the new norms?
 - If no, point out criticisms of old norms appearing through Colligan, 1983, and Ziskin, 1981.
 - If the test was scored by computer, does the computer service incorporate the results of the new norms established by Colligan, 1983?
- Was MMPI scored, whether by computer or by the clinician, using the new calculations regarding T-scores developed by Colligan in 1983?
- How much does the expert rely on the MMPI in the formulation of his/her opinion?
- If the answer is 100% or "very much," the expert is in trouble and should be confronted with articles that show it is

not proper to rely on this test to that large of an extent

- If the answer is only partly or only as one aspect, the expert is likely making proper use of MMPI results.
- Establish which MMPI was administered (short form, long form, etc.)
- Establish how many and what scales were scored.
- Attempt to get the expert to admit the limits of the reliability of the test.
- If the expert is familiar with the lie detector test and its reliability and validity, have the expert give an opinion as to which is a more reliable and valid test as far as prediction is concerned. If the opinion is that the lie detector is more reliable and valid, why should MMPI results be admissible and lie detectors not?
- Subpoena the test administered and the party's answers. Questions such as, "So you're saying just because Mrs. Jones says she doesn't have a satisfactory sex life, that means she is a psychopathic deviant?" should be easily fielded by a competent psychologist. However, for purposes of cross-examination of the opposing party, it might be interesting to know and point out answers to such items as "Evil spirits possess me at times."
- If the MMPI was computer scored, ask if the expert knows the basis of the interpretation placed on the scores by the computer; i.e. what research does the computer endorse?
- Was the test administered in the expert's office or was the party allowed to take the test home? If the test was taken at home, how does the expert know who took the test? (It would be rare that a home test would be permitted; although, note that in establishing the new norms, Colligan mailed the MMPI's to the subjects who took the test at home. Colligan, 1983,

pages 75 and 333. This may be fruit for cross-examination itself.)

- If sub-scales were used, were the test scores different on the sub-scales than the standard clinical scales?
- If the expert diagnoses your client as a manic-depressive (or some other diagnosis), determine what the expert observed or was told about your client's behavior and actions which supports his diagnosis independent of MMPI scores. Attack the opinion with evidence of opposite behavior, if it exists.
- Other Suggestions. MMPI scores may vary over time. In a case where your client has fared poorly on the MMPI, a retest done by a consulting psychologist may look substantially different and provide good information for cross-examination. Note the validating scales on the MMPI should pick up any deliberate attempt to make the test results look different.

In a case where MMPI results are pivotal, sending the MMPI to the various computer scoring services may (small chance) result in different interpretations of the same test. The same could be done by taking the test results of another clinician and getting a second opinion.

c. Projective Tests.

These types are relatively unstructured and the results require the subjective judgment of the mental health expert. Projective tests, because of their subjective interpretation, are topics for intense cross-examination. If projective tests are the only tests administered, the opposing expert should be exposed to the jury as not having sufficient data upon which to base his conclusions.

(1) Rorschach Test (Ink Blot).

Consists of 10 ink blots and the person tested responds by telling the examiner what the blot represents to them. Can be administered to children and adults. Cross examination must focus on the reliability and validity of this test. Other areas to focus on are:

- Whatever the clinician proposes as his or her interpretation of the

subject's responses to the test, he or she should be asked whether there is contradictory psychological literature or studies that challenge his or her assessment. If the clinician denies such studies, then the attorney must be armed with several studies to contradict the expert's hypothesis.

- There are at least five major Rorschach methods or systems in the United States alone. The five systems— Beck, Hertz, Klopfer, Piotrowsky and Rapaport-Schafer— differ from each other enormously. They differ in basic administrative procedures, scoring, and interpretive hypothesis. A survey of the five systems showed that roughly 54% of the psychologists prefer the Klopfer System, and 34% prefer the Beck system. On cross-examination, the expert should be asked which of the five major systems he or she used. If the clinician used the Klopfer system, it must be emphasized that almost half of all clinicians that use the Rorschach do not use that system. In the case of all other systems, less than half use any one system.
- One expert in Rorschach has determined that when a battery of tests is given, the sequence in which the tests are given can make a difference in the test results. The administration of one test affects the response given in different tests that follow. The incidence of human content response on the Rorschach can alter depending on the order in which the different tests are given. Thus, the attorney should ask the expert witness if the results he or she obtained might have been different if given in a different order.

(2) Thematic Apperception Test (TAT).

This test is typically used in conjunction with the Rorschach. If the Rorschach reveals innerconflict within the individual, the TAT is used to uncover the source of the innerconflict. The test is based on the idea that when faced with an ambiguous social situation, a person will expose his or her own personality. The theory, taken further, is that once the person is explaining the occurrence, he or she becomes conscious of himself, and therefore, becomes vulnerable to scrutiny.

The creators of the TAT came up with a set of pictures containing in most instances at least one person in the picture with whom the subject could, hopefully, relate. Therefore, there were separate sets of pictures chosen for children, males, females, young adults, and older adults. Standard TAT instructions stress imagination and creativity. The test consists of 30 cards which depict people in different situations. A few of the cards show other types of scenes without people in them. The examiner must present the standard cards or may selectively choose his own if he has a particular area on which he wishes to focus. The subject is then asked to look at each card and make up a story about it.

Cross-examination of a TAT expert must focus on the reliability and validity of the test. The fundamental problem with the TAT is that it is subject to an even wider range of distorting factors than objective tests, or even of some other projective tests. For example, examiner bias, particularly cross-sex administration affect the type of content elicited. J.D. Swartz, who reviews the TAT in the *Eighth Mental Measurements Yearbook*, explains that the body of TAT research does not provide any cohesive knowledge regarding the applications of the test to personality evaluation. Reliability and validity are especially a problem with the TAT because “. . . of the free nature of the response, the high degree of interaction with situational factors, great difficulty in attaining suitable independent criteria to validate inferences against and problems of trying to develop meaningful quantitative measures.” Additionally, because of the many variations in scoring and administration, the TAT is likely to be as ambiguous to the examiner as it is to the subjects responding to it. Thus, the TAT, like the Rorschach, remains a test of controversy, with strong doubts as to its reliability and validity and its ability to assess individual personality traits accurately. In cross-examining a witness regarding this test, the attorney should elicit testimony which shows that anyone who

administers this test in a child custody situation has done so when the great weight of authority shows the TAT results to be of little benefit in such situations and, at very best, full conjecture.

(3) Children's Apperception Test (CAT).

This test should only be administered to children ages 3-10. It is similar to the TAT, except the child is shown pictures of animals. Instead of responses to specific questions, the child is encouraged to discuss his/her meaning in relation to the child's family.

Note: The TAT/CAT may be less reliable when given to creative persons or children. Unusual responses may be a function of their creativity rather than personality traits or emotional disturbances.

(4) Bender-Gestalt Test.

This test consists of 9 black geometric designs printed on cards. It is primarily used to measure the person's ability to concentrate. It is also very useful in determining whether or not the subject suffers from organic brain syndrome.

(5) Sentence Completion Test.

This test is given orally to very young children and in written form to children 12 years or older. The examiner leads with a phrase and the person tested is asked to complete the sentence. Generally, the opening words for a sentence stem, permit an almost unlimited variety of possible completions. Examples might be: "My ambition _____; Women _____; What worries me _____; My mother _____." These sentence stems are frequently formulated so as to elicit responses relevant to the personality domain under investigation. The flexibility of the sentence completion technique represents one of its advantages for clinical and research purposes. Nevertheless, some standardized forms have been published for more general applications.

(6) Projective Drawing Test.

Most psychologists recognize that not all the information desired in psychological investigations can be gained through verbal interaction. Children start drawing before they learn to talk, therefore drawing techniques can be very useful in assessing a child's intellectual and

personal functioning. The following tests have been used in the area of projective drawing and could be encountered in divorce litigation. The person tested is asked to draw a tree, a house, a family, etc. The content and proportions are then interpreted by the expert.

(7) Play Test - Therapy.

This procedure is usually done with very small children. Observations are made by the expert as to various aspects of the child's behavior and interaction. For example, the particular toys chosen by the child are used to measure aggression, concentration, etc.

(8) Administering and Interpreting Psychological Tests.

Even if the tests relied on by the expert are accepted, standardized and validated, the cross-examiner needs to be sure that the normal detailed instructions for administering the tests were followed. If not administered and interpreted according to the "book", the test itself and the opinion based on those test results should not be afforded the same weight as one properly conducted and scored.

4. Turn Their Expert Into Yours.

In some instances, it is not advisable to dispute the credibility of the opposing expert. Based on his prior testimony, book or treatise, the expert may be forced to make certain admissions. The cross-examiner should attempt to elicit that the expert:

- Admits that a series of examinations were better than one examination;
- Changes or revises his opinion on subsequent examination;
- Certain tests resulted in negative findings for opposing party;
- Admits your expert's theory represents legitimate scientific knowledge;
- Could have been mistaken;
- Can never be wrong.

XI. CONCLUSION

The use of expert mental health testimony in family law cases will continue to be important. Generally, the mental health expert is able to present compelling testimony to judges and juries to aid their decision in custody and divorce litigation. When the opposing attorney has

retained an expert who can provide damaging information against your client, it is your job to do everything possible to limit the effect of this testimony. This paper has explained how to attempt to exclude the witness prior to trial, or at least prior to his taking the stand. There are numerous methods to accomplish this goal, and all of them should be explored. Due to the changes in the discovery rules, always make sure that the opposing attorney timely listed and supplemented their experts and their opinions. Should the opposing attorney manage to have his witness testify on direct, you must be prepared to effectively cross-examine the expert. Every family law practitioner can use the techniques discussed above to create an effective cross-examination that reduces any damage done to your client on direct, and in some instances the skilled cross-examiner may actually help score points for their client.

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