

The Custody Evaluator Meets Hearsay: A Star-Crossed Romance

by
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I. Introduction

The intersection between the hearsay rule and the law of expert testimony is as important as it is complex and challenging. It is important because the admissibility of the expert's opinion hangs in the balance. It is complex because the hearsay rule is itself intricate. When the hearsay rule collides with the evidentiary rules applicable to expert testimony, nuanced distinctions flourish. The late and truly great legal educator, Irving Younger, characterized the hearsay rule as the trial lawyer's equivalent of the daunting *rule against perpetuities*.¹ The rule is intrinsically complex because not every out-of-court statement is hearsay. Even when such a statement is hearsay, it may still be admissible because it falls within one of the many recognized exceptions to the rule that can shepherd the statement into evidence.

When this complex rule intersects with the rules governing expert testimony it takes on a technical edge that exponentially increases the density of the issues. This is because the hearsay statement in issue, *though remaining inadmissible*, may, under certain conditions, be relied upon by the expert as a basis for his or her conclusions without rendering the opinion inadmissible. This article will explore the crucial intersection between hearsay and expert testimony. It will do so in the context of the Federal Rules of Evidence² (also referred to herein as FRE), which have

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¹ IRVING YOUNGER, *HEARSAY: A PRACTICAL GUIDE THROUGH THE THICKET* 7 (Prentice Hall 1988).

² The Federal Rules of Evidence are an appropriate framework for discussion even though domestic relations issues are litigated in state courts because many states have model codes that closely parallel the FRE. Additionally, even in common law states, the FRE inform judicial decisions

522 *Journal of the American Academy of Matrimonial Lawyers*

served as a model for many state evidence codes, as well as in the context of common law structures.³ While the issues discussed here apply to *any type of expert*, such as physicians, engineers, and financial evaluators,⁴ this article will focus on the ramifications of the hearsay/expert intersection in the context of child custody evaluations where these issues arise so frequently.

The following scenario will ring familiar to any experienced custody lawyer and will set the stage for the discussion that follows:

Dr. Credulous undertook a custody evaluation with respect to the Jones family, consisting of mother, father, their nine-year-old son and three-year-old daughter. The doctor interviewed the parents and the older of their two children, conducted observational sessions with each parent and both children, administered an MMPI-2 to the parents, and spoke with a few collateral sources. In the latter category was Mr. Official, the director of the Sunshine Preschool Center where the parties' daughter attended Monday through Friday. Mr. Official informed Dr. Credulous that on two occasions the mother arrived to pick up their daughter in an intoxicated condition. Dr. Credulous filed a report recommending that the father receive custody and the mother be relegated to supervised visitation. Dr. Credulous made clear that he would have recommended joint custody with equal parenting time but for the statements made by Mr. Official. At trial Dr. Credulous testified that he assumed the truth of Mr. Official's statement that the mother had been intoxicated when picking up her daughter. Assuming Mr. Official does not testify at trial and is not subjected to cross-examination, the rule against hearsay and the rules governing expert testimony are now in direct collision.

Let the games begin!

and, in a number of instances, the commentary to the FRE elucidates court decisions that might otherwise remain opaque.

³ Common law exemplars will be drawn principally from New York state court decisions which are generated largely in the absence of a comprehensive evidence code. Although New York has codified a number of evidentiary rules, primarily in article forty-five of the Civil Practice Law and Rules, it has nothing remotely resembling a comprehensive evidence code parallel to the FRE. Even in the absence of a model evidence code, case law in New York, with some exceptions which will be noted, where relevant, fairly closely tracks developments in the federal courts.

⁴ It should be noted, for example, that when a business evaluator who is valuing a business relies in part on statements by owners of similar businesses in the geographic area of the subject company, the evidentiary issue is the same as when a forensic mental health evaluator relies upon statements by a daycare provider when doing a custody evaluation.

A. *A Brief Evidence Primer*

Because this discussion is relevant to expert witnesses as well as attorneys, a brief primer on the nature of the adversarial process and the fundamental evidentiary concepts designed to guide that process is warranted.

A trial presents an opportunity for each side of the litigation to construct in the courtroom a model of its version of reality. The contours of the model to be constructed are governed by substantive law. In a custody case the desired model will be those “facts” that will demonstrate that the child’s best interests will be served by awarding custody to the lawyer’s client. The mother creates one construct. The father builds another. At the end of the case, the trier-of-fact typically confronts competing, often diametrically opposed, versions of the facts. For the trier-of-fact to reach a decision, he or she must answer two questions: (1) What facts are true? (2) What do the found-facts mean?

While the substantive law provides the blueprint of the model to be constructed by the proof, when it comes to *how* the model is built, i.e., *what material* may be used to construct it, the advocate must turn his or her attention from the substantive law to the full panoply of rules embodied in the law of evidence. Pertinent to the present discussion, the question would be to what extent, if at all, can hearsay be used to build the model? Most directly to the point here, the key question is to what extent, if at all, may the custody evaluator rely upon hearsay to provide the basis for his or her opinion? Within that question lie other sub-questions, such as what preconditions must exist to permit such reliance and what limitations apply to its use.

B. *It’s All About the “R” Word*

Before wading into the intricacies of the hearsay-basis issue, it is important to note the principal purpose of evidence doctrine. That purpose is to ensure the reliability⁵ of the information

⁵ The reader should note that there is a difference in nomenclature between the legal and behavioral science communities with respect to the words “reliability” and “validity.” In the psychology discipline, “reliability” refers to “the ability of a measurement instrument to measure an attribute consistently,” while “validity” refers to the “accuracy” of the measurement. When the law uses the term “reliability,” as in “evidentiary reliability,” it is referring to the validity, i.e., the accuracy, of the evidence. Because an instrument or technique

placed before the fact-finder.⁶ It is only by fidelity to the rules of evidence that some measure of adjudicative integrity can be achieved. It has been said, quite rightly, that the “[r]ules of evidence are the palladium of the judicial process”⁷ and that “intrusions into time-tested concepts limiting the use of secondary evidence destroys (*sic*) the vitality of that judicial process.”⁸

The importance of observing, indeed of strictly enforcing, the rules of evidence is clear when one considers that their central purpose is to ensure the reliability, i.e., the trustworthiness and accuracy, of the information that is put before the fact-finder and upon which the ultimate decision in the case will be based. The computer enthusiasts among us would express this as “garbage in, garbage out.” Evidentiary rules exist to keep the garbage out of the courtroom.

In this important respect, the assurance of evidentiary reliability, the law converges quite elegantly with the core principle of psychology. Psychology defines itself as a “scientific study”⁹ and warrants that any professional conclusions its practitioners express will be based upon *demonstrably* valid knowledge established by the scientific method.¹⁰ Thus, although some domestic relations courts are notoriously lax in their application of the rules of evidence, both from the perspective of evidence doctrine and the organizing principles of psychology as a discipline, demonstrable reliability is key. Given that the trajectory of a family’s life hangs in the balance of the custody decision, fidelity to

cannot be said to be valid in the absence of reliability, the law’s use of the term implies both reliability and validity as they are known in the social sciences. *See* AMERICAN PSYCHOLOGICAL ASSOCIATION, APA DICTIONARY OF PSYCHOLOGY 786, 975 (2007).

⁶ While some evidence rules reflect public policy concerns unrelated to reliability, such as the various privileges designed to ensure the privacy of various relationships, such as physician-patient or attorney-client, most of the rules aim to ensure the reliability of the evidence put before the court.

⁷ *Wagman v. Bradshaw*, 739 N.Y.S.2d 421, 426 (N.Y. App. Div. 2002).

⁸ *Id.*

⁹ CHARLES G. MORRIS & ALBERTA A. MAISTO, *PSYCHOLOGY: AN INTRODUCTION* xii (11th ed. 2002).

¹⁰ KEITH E. STANOVICH, *HOW TO THINK STRAIGHT ABOUT PSYCHOLOGY* 6 (7th ed. 2004).

the rules of evidence designed to ensure the reliability of the proof is as essential in a custody case as in any other.¹¹

C. Hearsay Rule: Guardian of Reliability

Standing as the central evidentiary edifice designed to safeguard the reliability of the evidence is the rule against hearsay. Common law defined hearsay in the following terms:

Hearsay, the exclusion of which is perhaps the best known feature of Anglo-American law, has been subjected to a variety of definitions. Rule 63 of the Uniform Rules of Evidence, approved by the American Law Institute and American Bar Association, defines hearsay evidence as “(e)vidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated.” This enunciation must be read in connection with the connotation accorded to “statement” in rule 62, that it “means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated” and follows Wigmore in defining hearsay as an extrajudicial statement which is offered to prove the truth of the matter stated.¹²

Under the Federal Rules of Evidence, hearsay is similarly defined as “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.”¹³ Stated simply, hearsay requires two elements: (1) an out-of-court statement; (2) that is offered for the truth of its content.¹⁴

D. Cross-Examination: A Signal Feature of the Common Law Trial

The rule prohibiting hearsay¹⁵ grows out of the common law’s long-standing embrace of cross-examination as the princi-

¹¹ *In re Charles B.*, 441 N.Y.S.2d 132, 134 (N.Y. App. Div. 1981) (“A trial before a court without a jury in the Family Court does not provide a license to dilute the rules of evidence.”).

¹² *People v. Caviness*, 342 N.E.2d 496, 498-99 (N.Y. 1975) (internal citations omitted).

¹³ FED. R. EVID. 801.

¹⁴ JOHN H. WIGMORE, *TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 1361 at 1–3 (James H. Chadbourn rev. 3d ed. 1974).

¹⁵ FED. R. EVID. 802.

pal guarantor of reliability. Ever since Sir Walter Raleigh was executed on the strength of a supposedly unavailable accuser who was not produced for courtroom confrontation, the law has taken a dim view of evidence that cannot be tested in the crucible of cross-examination:

The most notorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries. One such was the 1603 trial of Sir Walter Raleigh for treason. Lord Cobham, Raleigh's alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh's trial, these were read to the jury. Raleigh argued that Cobham had lied to save himself: "Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour." Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear, arguing that "[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face" The judges refused, and, despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," the jury convicted, and Raleigh was sentenced to death.¹⁶

The vaunted John Henry Wigmore wrote that "cross-examination . . . is beyond any doubt the greatest legal engine ever invented for the discovery of truth."¹⁷ The rule against hearsay was born of this precept. It sees the great sin of hearsay in the fact that the declarant is not on the witness stand subject to cross-examination. Without cross-examination, there is no opportunity to test the reliability of the evidence and, hence, the rules of evidence exclude hearsay.

II. Expert Testimony

To understand the impact of the hearsay rule on expert testimony, one must appreciate the unique evidentiary position that the expert witness occupies. Unlike ordinary lay witnesses who are generally required to confine their testimony to first-hand knowledge based upon their perceptions,¹⁸ the expert witness is allowed to offer inferences, conclusions, and opinions. In most cases, the expert has been called to the witness stand to do precisely that. This latitude, however, is not afforded without pre-

¹⁶ *Crawford v. Washington*, 541 U.S. 36, 44 (2004) (internal citations omitted).

¹⁷ WIGMORE, *supra* note 14, § 1367 at 32.

¹⁸ FED. R. EVID. 701.

condition. In exchange for the leeway granted, the expert is expected to anchor his or her inferences, conclusions, and opinions to the “knowledge and experience of his discipline.”¹⁹ In the aftermath of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and its progeny,²⁰ FRE 702 was amended to make reliability a core condition of admissibility:

Testimony by Expert Witnesses – A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based upon sufficient facts or data; (c) *the testimony is the product of reliable principles and methods*; and (d) the expert has reliably applied the principles and methods to the facts of the case.²¹

Traditionally, common law jurisdictions have allowed expert testimony only where it was deemed *necessary*, i.e., where the testimony related to an issue that was beyond the ken or understanding of the non-expert fact-finder. Returning to the earlier conceptualization, only where the trier-of-fact could not decide what facts were true or what they meant would expert testimony be received. With the liberalization of the Federal Rules of Evidence in 1974, the benchmark changed to a standard of *helpfulness*. “[I]f the expert’s scientific, technical, or other specialized knowledge *will help the trier of fact* to understand the evidence or to determine a fact in issue”²² a properly qualified witness will be allowed to bring that expert knowledge into the courtroom.

Today, the distinction between necessity and helpfulness has become blurred and is largely one of semantics. As one leading treatise has observed:

Despite the clear intentions of the drafters of modern evidence codes to abolish the common law rules, many – perhaps most – American courts continue to exclude expert testimony because it is either not necessary, not “beyond the ken of the jury,” or not “beyond the common knowledge” of the average lay person.²³

¹⁹ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993).

²⁰ *Weisgram v. Marley Co.*, 528 U.S. 440 (2000); *Kumho Tire Co. Ltd., v. Carmichael*, 526 U.S. 137 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

²¹ FED. R. EVID. 702 (emphasis added).

²² *Id.*

²³ DAVID H. KAYE ET AL., *THE NEW WIGMORE: A TREATISE ON EVIDENCE – EXPERT EVIDENCE* 39-40 (2010).

Whether courts articulate the standard for expert testimony in terms of necessity or helpfulness, once it is determined that the testimony will be received, the key consideration remains whether the principles, methods, and factual assumptions underlying the expert's conclusions are reliable.²⁴ This makes sense given that in the absence of demonstrable reliability, evidence can be neither necessary nor helpful. Thus, the commitment to reliability of evidence suffuses the law of expert testimony just as it is the bedrock of the rule against hearsay.

A. *Logical Structure of Expert Opinions*

Preliminary to discussion of the impact of hearsay on the admissibility of expert opinions, we must first analyze the structural character of such opinions because the hearsay issue impinges upon *two levels of basis* within that structure. As will be seen, the consequences differ depending upon which level is being examined.

Expert opinions should have a logical structure. There must be at least one major premise and at least one minor premise for each inference drawn or conclusion formed.

The major premise is the *professional knowledge base* of the expert's discipline. It is what the California Supreme Court, in *People v. Sanchez*,²⁵ recently referred to as the "general knowledge" of the witness with respect to his or her field of expertise.²⁶ In terms of psychology, which defines itself as a "scientific study," this "general knowledge" equates to that which is grounded in the empirical research reported in the peer-reviewed literature of the discipline.

The minor premise level contains the *case-specific factual data* put before the expert. The expert uses the published professional knowledge base of his or her discipline to explain the meaning of the case-specific data gathered during the evaluation process.

For example, the psychologist finds that mom displays behaviors "A," "B," and "C." These behaviors would be the minor premises of the opinion. The major premise must come from the

²⁴ FED. R. EVID. 702.

²⁵ 374 P.3d 320 (Cal. 2016).

²⁶ *Id.* at 327.

professional knowledge base of the psychology discipline. Based upon that professional knowledge, the expert concludes that those symptoms support a diagnostic inference of depression. Moving up the scale of inference,²⁷ the expert also finds that the empirical research of the discipline indicates that parental depression can pose certain risks to child development.²⁸ Based on that body of research, the evaluator may develop additional inferences. It is only when the expert uses the knowledge of his or her discipline in this manner to provide the major premise or premises to explain the meaning of the case-specific data that form the minor premise or premises that the resulting opinion is truly an expert opinion, as opposed to a personal opinion being expressed by one who happens to have professional credentials. As forensic psychologist David A. Martindale has thoughtfully observed:

The defining attributes of an expert opinion relate not to the credentials held by the individual whose fingers type the words or from whose mouth the words flow; rather, the requisite characteristics relate to the procedures that were employed in formulating the opinion and the body of knowledge that forms the foundation upon which those procedures were developed. If the accumulated knowledge of the expert's field was not utilized, the opinion expressed is not an expert opinion. It is a personal opinion, albeit one being expressed by an expert.²⁹

1. *Major Premise Hearsay Predicates*

Virtually all expert opinion rests upon hearsay at its most foundational level – i.e., the scientific or specialized knowledge that provides the major premises that support the expert's opinion. The scientific or specialized knowledge that the expert presumably brings to the courtroom – and which in fact is the *raison d'être* for his or her presence on the witness stand – is largely acquired through hearsay. Lectures heard, treatises studied, arti-

²⁷ For a discussion of the various levels of inference in custody evaluations, see Timothy M. Tippins & Jeffrey P. Wittmann, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193 (2005).

²⁸ See MARC H. BORNSTEIN, 1 HANDBOOK OF PARENTING CHILDREN AND PARENTING 27 (2d ed. 2002).

²⁹ David A. Martindale, *Cross-Examining Mental Health Experts in Child Custody Litigation*, 29 J. PSYCHIATRY & L. 483, 503 (2001).

cles read, this is the stuff of an expert's professional knowledge, as each generation stands upon the scholarly shoulders of those who came before. In other words, at the major premise level, the general knowledge level, in almost every instance the expert will be predicating the opinion on hearsay.³⁰ To the extent that the expert purports to have used expert knowledge as a basis for his or her conclusions, the expert will be on the witness stand and can be fully cross-examined with respect to that knowledge.

Even though in most instances all of the major premise information is based upon hearsay, it poses no barrier to admissibility of the resulting opinion. As Wigmore long ago explained: "It would be absurd to deny judicial standing to such knowledge, because all scientific data must be handed down from generation to generation by hearsay, and each student can hope to test only a trifling fraction of scientific truth by personal experience."³¹ Wigmore's view has been widely embraced by the courts, as recently reflected in *People v. Sanchez*, which, citing Wigmore, stated: "an expert's testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds."³²

The law's tolerance of hearsay at the major premise level rests upon the expectation that the expert will predicate his or her conclusion on the collective published knowledge of his or her discipline, not on some cryptic, idiosyncratic paradigm of unknown validity that has been embraced only by the witness and perhaps a few other outliers. As the U.S. Supreme Court made clear in *Daubert*:

Unlike an ordinary witness . . . an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation. Presumably, this relaxation of the usual requirement of firsthand knowledge – a rule which represents "a 'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information,'" – is premised on an assumption that

³⁰ The exception would be those instances where the expert on the stand actually conducted empirical research him/herself and testifies on the basis of that research from personal knowledge.

³¹ SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 430(1) at 529 (John H. Wigmore 16th ed. 2001).

³² *Sanchez*, 374 P.3d at 327.

the expert's opinion will have a reliable basis in the knowledge and experience *of his discipline*.³³

Thus, legal tolerance for reliance upon hearsay with respect to the specialized or scientific knowledge base of the witness's discipline has both a long tradition and built-in safeguards. An expert's assertion that the specialized knowledge base contains particular statements or information can be challenged on cross-examination, by presenting contradictory writings, and by calling retained experts to so testify.³⁴

2. *Minor Premise Hearsay Predicates*

Evidentiary tolerance of the expert's reliance upon hearsay at the major premise level does not carry over to the expert's adoption of case-specific factual premises. In sharp distinction to the latitude accorded hearsay-based major premise reliance, when it comes to the case-specific factual data forming the minor premises of the opinion, common law evidence doctrine brought far greater scrutiny to bear.

At common law an expert witness was restricted in terms of what was and was not a permissible basis for an opinion. The common law rule allowed the expert to rely only upon facts in evidence or personal knowledge.³⁵ Under the common law rule, there really was but one permissible basis for the opinion; namely, facts in evidence. This was so because when an expert

³³ *Daubert*, 509 U.S. at 592 (emphasis added) (internal citations omitted).

³⁴ FED. R. EVID. 803(18):

Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if: (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and (B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice. If admitted, the statement may be read into evidence but not received as an exhibit.

In a common law jurisdiction such as New York, the excerpt read from the treatise does not come in as evidence-in-chief but only as impeachment of the credibility of the witness. *See, e.g.,* *Labate v. Plotkin*, 600 N.Y.S.2d 144, 145 (N.Y. App. Div. 1993); *Hastings v. Chrysler Corp.*, 77 N.Y.S.2d 524, 526–27 (N.Y. App. Div. 1948).

³⁵ *People v. Keough*, 11 N.E.2d 570, 572 (N.Y. 1937); *see also* *People v. Jones*, 539 N.E.2d 96, 97 (N.Y. 1989); *cf.* N.Y. C.P.L.R. 4515 (2018).

532 *Journal of the American Academy of Matrimonial Lawyers*

relied upon personal knowledge, he or she was required to spread that knowledge on the record before expressing the opinion: “an expert who relies on necessary facts within personal knowledge which are not contained on the record is required to testify to those facts prior to rendering the opinion.”³⁶

In sum, under the common law rule only admissible evidence could properly serve as the basis of an expert’s opinion. Thus, by definition, inadmissible hearsay was an impermissible basis and the expert’s reliance upon it would render the resulting opinion inadmissible. The common law rule, in its simplicity and unassailable logic, put the epistemological genius of the common law on resplendent display. It ensured that the expert’s opinion was based only upon competent evidence securely snuggled in the court record. In so doing, it ensured further that the fact-finder could properly be informed of every minor premise, case-specific factual predicate of the expert’s opinion. This, of course, is essential if the fact-finder is to be intellectually positioned to assess the validity of the opinion proffered by the expert.³⁷

B. *The Hypothetical Question*

The common law rule further assured that the fact-finder would come to know each and every factual premise upon which the expert relied.³⁸ It did so through the mechanism of the hypothetical question. The attorney who wished to elicit the opinion was required to feed the predicate “facts” to the expert in hypothetical form: “Doctor, please assume facts A, B, C, D, and E. Assuming those facts, doctor, do you have an opinion to a reasonable degree of professional certainty as to the cause of the plaintiff’s injuries?” or whatever the particular issue in the case may be. Evidence doctrine required that each and every one of those predicate facts—to wit: A, B, C, D, and E—be facts in evidence.³⁹ If any one of them was not a matter of record evidence, an objection to the question should be sustained. The beauty of the hypothetical question was the opportunity it afforded the opponent of the expert’s opinion to make timely objection to keep

³⁶ *Jones*, 539 N.E.2d at 98, *citing* *Weibert v. Hanan*, 95 N.E. 688, 688 (N.Y. 1911); *cf.* N.Y. C.P.L.R. 4515 (2018).

³⁷ *People v. Strait*, 42 N.E. 1045, 1046 (N.Y. 1896).

³⁸ *Id.*

³⁹ WIGMORE, *supra* note 14, §§ 674–686 at 937–68.

from the trier of fact any opinion resting in whole or in part on inadmissible hearsay.

Example: The psychiatrist on the witness stand holds the opinion that the defendant is paranoid-schizophrenic. He predicates this opinion on three things:

- A. *His own examination of the defendant and his observations of the defendant's behavior during the interview, as to which he has testified;*
- B. *His review of a hospital record related to the defendant's previous confinement in a mental institution (which records have been placed in evidence pursuant to the business record exception to the hearsay rule);*
- C. *What he was told by the defendant's mother about his childhood and what he was told by the defendant's ex-wife about his behavior during their marriage. Neither the mother nor the ex-wife testified at trial.*

Predicates A and B pose no problem under the common law rule. The witness' observations during the interview are first-hand knowledge which he made a part of the record. The hospital record is in evidence. So far, so good, but, as the reader likely has already realized, predicate C is the problem. It consists of out-of-court statements upon which the witness has relied for their truth in forming his opinion. Thus, under common law, the opinion would *not* be admissible.

As can be seen, the common law rule, in conjunction with the enforcement mechanism of the hypothetical question, quite effectively ensured that the trier of fact would know each and every predicate fact upon which the expert relied because each such fact would be in evidence. Equally important, the rule kept out opinions that relied upon inadmissible hearsay that should not be put before the trier of fact. Notwithstanding its virtues, the hypothetical question was the subject of harsh criticism. It was cumbersome in its execution and subject to abuse by skilled trial advocates who could present it as a mini-summation mid-trial. Exemplary of the invective hurled in its direction, Learned Hand called it "the most horrific and grotesque wen upon the

fair face of justice.”⁴⁰ Not surprisingly, the hypothetical question became a target of the evidentiary reforms of the 1960’s and 70’s.

C. *Professional Reliability Predicate*

In 1974, the Federal Rules of Evidence went into effect. Among them, FRE 703 significantly altered the landscape of permissible predicates by expanding the bases upon which an expert might permissibly rely in formulating conclusions.

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.⁴¹

At roughly the same time, no doubt swept up in the slackening zeitgeist of the era, even common law jurisdictions such as New York marched in lockstep down the path of evidentiary liberalization by way of decisional law. The Court of Appeals, New York’s highest court, in *Hambusch v. New York City Transit Authority*,⁴² ushered the professionally reliable hearsay concept into civil litigation, holding that “an expert may rely on out-of-court material if ‘it is of a kind accepted in the profession as reliable in forming a professional opinion.’”⁴³ The court explicitly held, however, that more was required than a showing that the out-of-court material was of a type upon which the expert’s profession customarily relied. The court prescribed a second, distinct, and essential foundational prong, namely that “to qualify for the ‘professional reliability’ exception, there must be evidence establishing the reliability of the out-of-court material.”⁴⁴

Inexplicably, the New York courts largely ignored this second-prong requirement until 2002 when the Appellate Division, in *Wagman v. Bradshaw*,⁴⁵ reminded one and all that more was required than “customary reliance.” The expert, declared the court, could rely upon “material not in evidence provided the out-of-court material is of the kind accepted in the profession as

⁴⁰ *Rabata v. Dohner*, 172 N.W.2d 409, 418 (Wis. 1969).

⁴¹ FED. R. EVID. 703.

⁴² 469 N.E.2d 516 (N.Y. 1984).

⁴³ *Id.* at 518.

⁴⁴ *Id.*

⁴⁵ 739 N.Y.S.2d 421 (N.Y. App. Div. 2002).

a basis in forming an opinion *and the out of court material is accompanied by evidence establishing its reliability.*"⁴⁶

This is no provincial issue. The importance of this second-prong requirement of reliability has also been the subject of commentary and controversy nationwide. The stringency of the second-prong requirement is consistent with prevailing authority under FRE 703 as well. As one leading treatise summarized the point:

The approach of the courts in recent years has been toward increased gatekeeping and a greater focus on the validity of expert evidence. To permit an opinion to rely upon grossly unreliable and otherwise inadmissible evidence simply because the evidence is "of a type" that can usually be relied on would be oddly inconsistent with the general thrust of doctrine governing the admissibility of expert evidence after *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁴⁷

Though some courts continue to deflect the reliability issue by deferring to the expert witness's assessment of it, as one leading treatise declares, "this is both the minority view and the weaker one. The dominant view is that courts have an independent obligation to assess the reasonableness of an expert's reliance on a type of factual data."⁴⁸ As one U.S. Court of Appeals made explicit: "We agree that a district court is not bound to accept expert testimony based on questionable data simply because other experts use such data in the field. The Supreme Court's recent decision of *Daubert v. Merrell Dow Pharmaceuticals Inc.*, makes this clear."⁴⁹ In other words, no matter how many lemmings in the expert's profession may careen over the cliff, the courts are not obliged to follow.

D. Reliability of Collateral Sources

The reliability of out-of-court statements upon which an expert relies is an issue that arises recurrently in custody evaluations. Custody evaluators frequently rely upon statements made by third-party collateral sources, such as teachers, nannies,

⁴⁶ *Wagman v. Bradshaw*, 739 N.Y.S.2d 421, 422 (N.Y. App. Div. 2002) (emphasis added).

⁴⁷ *KAYE ET AL.*, *supra* note 23, § 4.6.1(b) at 162.

⁴⁸ *Id.* at § 4.6.1(b) at 163; *see also* cases cited therein.

⁴⁹ *United States v. Locascio*, 6 F.3d 924, 938 (2d Cir. 1993) (internal citation omitted).

friends, and relatives of the parties. Many times none of these third parties testify in court subject to cross-examination. While it is customary for evaluators to rely upon such information for their truth, evaluators rarely if ever have sufficient information or knowledge to know whether it is reliable.

In an important custody decision that conscientiously applied the second-prong requirement of professional reliability, *In re Lisa W. v. Seine W.*,⁵⁰ the court ruled that customary reliance is not sufficient to meet evidentiary standards:

While psychologists may gather and incorporate information from collateral sources into their opinions, hearsay information received from third party sources, without more, does not satisfy the requirements for professional reliability. Expert reports should not function as a conduit for inadmissible hearsay. Out of court materials are hearsay even when repeated in court by an expert.

Contrary to petitioner's assertions, [the evaluator's] availability for cross-examination does not cure the hearsay problem. Information provided by collateral sources, especially where, as here, many of those sources are family members, is susceptible to mistaken observation, errors in judgment, bias and misunderstanding, all antithetical to scientific reliability. If the information provided by collateral sources is defective, then the report and the opinions it contains will be defective as well. Proof of reliability or cross-examination of the collateral sources is the only cure.⁵¹

It is instructive to parse this language to see the trenchant points being made:

1. While psychologists may gather and incorporate information from collateral sources into their opinions, hearsay information received from third-party sources, without more, does not satisfy the requirements for professional reliability.
2. Expert reports should not function as a conduit for inadmissible hearsay.
3. Hearsay remains hearsay even when repeated in court by an expert.
4. The evaluator's availability for cross examination does not cure the hearsay problem. The evaluator who con-

⁵⁰ No. 05459-61/03, 2005 WL 2882454 (N.Y. Fam. Ct. Aug. 25, 2005).

⁵¹ *Id.* at *4; see also *D'Esposito v. Kepler*, 788 N.Y.S.2d 169, 170-71 (N.Y. App. Div. 2005).

ducted the interview may have first-hand knowledge that the statements were made by the interviewee but has no personal knowledge as to the veracity of the statements. Information provided by collateral sources, especially where many of those sources are family members or friends, is susceptible to mistaken observation, errors in judgment, bias, and misunderstanding, all antithetical to reliability.

5. If the information provided by collateral sources is defective, then the expert's opinion will be defective as well.
6. Proof of reliability or cross-examination of the collateral sources is the only cure.

Given that there will rarely, if ever, be independent, extrinsic evidence of the reliability of collateral informants, they must be brought in for cross-examination so that the evaluator's opinion will rest on competent evidence. The California Supreme Court made the same point in *People v. Sanchez*: "What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception."⁵² This led quite inexorably to its holding:

In sum, we adopt the following rule: When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth.⁵³

The wisdom of this view will become apparent when one considers the conundrum presented when the out-of-court declarants are not subject to cross-examination.

III. The Conundrum: Disclosure of Content

Once the court has determined that the out-of-court material is sufficiently reliable to serve as a proper predicate for the expert's conclusion, it is important to underscore that the *only* evidential force of that determination is that the *opinion* is not

⁵² *Sanchez*, 374 P.3d at 334 (emphasis in original).

⁵³ *Id.*

rendered inadmissible because of that reliance. The out-of-court statement upon which the expert has relied remains inadmissible hearsay. The following declaration by the U.S. Court of Appeals for the Sixth Circuit is representative of the point:

Rule 703 allows a testifying expert to rely on materials, including inadmissible hearsay, in forming the basis of his opinion. Rules 702 and 703 do not, however, permit the admission of materials, relied on by an expert witness, for the truth of the matters they contain if the materials are otherwise inadmissible.⁵⁴

Harkening back to the scenario set forth at the outset of this article, if the judge were to experience a momentary mental lapse and rule that the evaluator's reliance on the statement by the daycare director that the mother had picked up the children in an intoxicated state was reasonable, that statement would remain inadmissible hearsay unless the declarant is called to the stand and subjected to cross-examination.

A. *The Conduit Problem*

The crucial question – and it is distinct from the issue of whether the expert's reliance was reasonable – is whether, once predicate reliability has been established, the *content* of the inadmissible out-of-court statement upon which the reliability of the expert's opinion depends, may be disclosed to the fact-finder. In terms of our scenario, the question would be whether the expert can tell the fact-finder that the daycare director stated that the mother was intoxicated when she arrived to pick up her daughter.

This is a “most important interpretive question”⁵⁵ that poses a core epistemological problem that threatens the integrity of evidentiary structure and, with it, due process.⁵⁶ The central problem is that if the expert is allowed to disclose the content of the inadmissible hearsay to the finder of fact, the expert becomes a “conduit” of hearsay. This would readily lend itself to abuse. A party could intentionally put inadmissible evidence of unknown

⁵⁴ *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 728 (6th Cir. 1994); *see also Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261–62 (9th Cir. 1984).

⁵⁵ *KAYE ET AL.*, *supra* note 23, at 170.

⁵⁶ *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); *see also Greene v. McElroy*, 360 U.S. 474, 496–97 (1959).

and untested reliability before the expert for the sole purpose of bringing it before the trier of fact through the backdoor of the expert's testimony.

B. *Restricting Disclosure*

The question of whether and to what extent inadmissible predicate hearsay may be revealed to the fact-finder was addressed by an amendment to FRE 703 in the year 2000. The amendment sets up a presumption against disclosure: "Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."⁵⁷

Essentially the amendment to 703 recognizes that allowing an expert to recite inadmissible hearsay predicate "facts" that the witness accepted as true, renders the expert an evidentiary alchemist, one who, by force of his or her predicate reliance, would effectively transmute not lead into gold but inadmissible hearsay into admissible evidence. Accordingly, the amendment pushes strongly in the direction of avoiding the hearsay "conduit" issue by precluding disclosure of the out-of-court material upon which the expert has relied. The burden rests upon the party who seeks such disclosure to show that its prejudicial effect is outweighed by its probative value. Assuming that burden is not met, the hearsay content stays out and the conduit problem is avoided.⁵⁸

The preclusion alternative, presumptively embraced by the revised FRE 703, however, carries its own set of problems. At this restrictive end of the spectrum, preclusion of disclosure of the data upon which the expert has relied honors hearsay doctrine but it does dramatic violence to another core concept of common law trials and the fundamental evidentiary precepts that

⁵⁷ FED. R. EVID. 703 (2000) (amendment effective Dec. 1, 2000).

⁵⁸ Although some scholars advocate that professional reliance per se ought to warrant a distinct exception to the hearsay rule, the drafters of the 703 amendment implicitly rejected this view. See Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583 (1987); cf., Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577 (1986).

govern the role of expert witnesses.⁵⁹ More than a century ago the New York Court of Appeals, in *People v. Strait*, penned an opinion that made this critical common-sense point:

The witness was an expert on the diseases of the mind, but he was not an expert on determining the facts, where such facts had to be obtained from the statements of others. *It was essential that the jury should be informed as to the facts upon which the expert based his conclusions in order to determine whether they were well founded.* If the facts were not disclosed, his conclusions could not be controverted. He might have been deceived by a false statement prepared for the occasion, and for the purpose of making him a valuable witness upon the trial.⁶⁰

The point made in *People v. Strait* bears emphasis: it is essential that the fact-finder learn of every predicate “fact” that the expert assumed to be true. Without that knowledge it is epistemologically impossible for the fact-finder to assess the soundness of the resulting conclusions. Notwithstanding the disclaimer of some evaluators that they do not pass upon the truth or credibility of the statements they gather, when they utilize a hearsay declaration as a premise or an assumption undergirding their conclusions, they necessarily, though implicitly, accept it for its truth, as will the fact-finder upon hearing it. *People v. Sanchez* made this point: “an expert’s testimony regarding the basis for an opinion *must* be considered for its truth by the jury.”⁶¹

When an expert is not testifying in the form of a proper hypothetical question and no other evidence of the case-specific facts presented has or will be admitted, there is no denying that such facts are being considered by the expert, and offered to the jury, as true. Indeed, the jury here was given a standard instruction that it “must decide whether information on which the expert relied was true and accurate.”⁶²

Indeed, the *Sanchez* opinion strikes directly into the heart of the conundrum when it states:

Once we recognize that the jury must consider expert basis testimony for its truth in order to evaluate the expert’s opinion, hearsay and confrontation problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth. If an expert

⁵⁹ Ronald J. Allen & Joseph S. Miller, *The Common Law Theory of Experts: Deference or Education?*, 87 Nw. U. L. REV. 1131 (1993).

⁶⁰ *Strait*, 42 N.E. at 1045-46 (emphasis added).

⁶¹ *Sanchez*, 374 P.3d at 330 (emphasis in original).

⁶² *Id.* at 333.

testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner.⁶³

The court in *In re Lisa W. v. Seine W.*, made the same point quite succinctly, noting that, “if the collateral source information is not being offered for the truth, then there is simply no reason to offer it.”⁶⁴

Withholding any part of the underlying data upon which the expert’s opinion has been constructed deprives the fact-finder of the opportunity to render an informed judgment as to the reliability of the opinion. It would require the fact-finder to evaluate the conclusion without knowing all of its factual premises, something that simply cannot be done without indulging in rank speculation. Denying the fact-finder such predicate knowledge, in effect, transforms the trial into the juridical equivalent of the 50’s game show “I’ve Got a Secret,” leaving the fact-finder to conjecture “If I knew what the expert knows, would I accept his or her opinion?” It places the fact-finder in the intellectually untenable position of evaluating a conclusion on the basis of the expert’s say-so, which is all too often influenced by the impressiveness of the witness’s credentials and presentational flair. This represents an unfortunate authoritarian regression to the *ipse dixit* state of affairs that the U.S. Supreme Court has rightly declared to be a relic of a bygone era.⁶⁵

C. *The Unicorn Solution*

Intermediate solutions are no more satisfying, at least not beyond the level of the superficial. One common “solution” to the hearsay/disclosure conundrum is the insistence that the inadmissible statement can be imparted to the fact-finder with a limiting mandate that it is not admitted for its truth but only to enable the fact-finder to intelligently evaluate the expert’s conclusions. This is closely akin to the approach taken in jury trials of admit-

⁶³ *Id.*

⁶⁴ 2005 WL 2882454, at *5.

⁶⁵ *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

ting the out-of-court statement in the company of the so-called “limiting instruction” that it is not to be considered for its truth but only for some other purpose.

No less a judicial personage than Learned Hand said of the limiting instruction that it foists upon the jury “a mental gymnastic which is beyond, not only their powers, but anybody[] else[’s].”⁶⁶ A quarter century later, Hand referred to such an instruction as a “placebo” because it does “violence to all our habitual ways of thinking.”⁶⁷ Assuming that Judge Hand would include judges in the realm of “anybody else,” the notion of limiting the use to which evidence is put is equally specious in bench trials as in jury cases. In accord with Judge Hand’s refreshing grasp of the reality of human cognition, scholars likewise have dismissed the limitation rubric as so much “judicial double talk.”⁶⁸ Significantly, behavioral science research supports the wisdom of Judge Hand and others who have dismissed the limiting instruction solution as a mandate that lies beyond human achievement. “The research findings show that jurors and judges cannot be made to forget things that they have heard.”⁶⁹ The research further reveals that enabling judges or jurors to limit the use to which evidence is put is “even more challenging.”⁷⁰ Refreshing instances of judicial recognition of this reality occasionally appear. New York’s high court has acknowledged the potentially pernicious, though “subtle impact of inadmissible hearsay on even the most objective trier of fact”⁷¹ in the context of non-jury family law trials.

The nuanced intellectual gymnastic required by any “limited use” concept in the context of the professional reliability predicate is uniquely defiant of human application. In other circumstances hearsay may come in for some purpose unrelated to its truth, e.g., as circumstantial evidence of the state of mind of the declarant or of the one who hears the statement. In such scenarios the fact-finder is not required to assess the truth of the out-

⁶⁶ *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932).

⁶⁷ *United States v. Delli Paoli*, 229 F.2d 319, 321 (2d Cir. 1956).

⁶⁸ Rice, *supra* note 58, at 584; *cf.*, Carlson, *supra* note 58.

⁶⁹ MICHAEL J. SAKS & BARBARA A. SPELLMAN, *THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW* 107 (2016).

⁷⁰ *Id.* at 108.

⁷¹ *In re Leon RR.*, 397 N.E.2d 374, 377 (N.Y. 1979).

of-court statement to make use of it for its intended non-hearsay purpose, though the danger always lurks that he or she will do so nonetheless. By contrast, when grappling with the professional reliability predicate, the fact-finder is required to assess the truth of the hearsay precisely because it is an essential premise of the expert conclusion being evaluated and, hence, its reliability must be assessed. The fact-finder must determine whether the hearsay predicate is true as part of its task of deciding whether to accept the opinion based thereon. But once having determined the truth of the predicate hearsay for the purpose of determining the soundness of the resulting conclusion, the fact-finder thereafter must disregard that truth. Behold the Unicorn! This takes casuistry to dizzying heights.

IV. Specific Issues in Forensic Custody Evaluations

A. Hearsay and Custody Evaluation Protocols

As noted throughout this article, custody evaluators frequently file reports that are replete with hearsay. They are advised to do so by the published guidelines, practice parameters, and model standards promulgated by their professional associations. Evaluators often are guided in their work by the American Psychological Association's *Guidelines for Child Custody Evaluations*, the American Academy of Child and Adolescent Psychiatry's *Practice Parameters for Custody Evaluations*, and/or the Association of Family and Conciliation Courts' *Model Standards of Practice for Child Custody Evaluation*.⁷² Those documents advise the evaluator not to rely solely upon the competing "he said, she said" claims of the litigants. All of these guidelines specifically recommend that evaluators obtain information from third parties, such as teachers, medical providers, professional

⁷² American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSYCHOL. 677 (1994); American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65 AM. PSYCHOL. 863 (2010); Stephen P. Herman, et al., *Practice Parameters for Child Custody Evaluation*, 36 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 57s (1997); David A. Martindale, et al., *Model Standards of Practice for Child Custody Evaluation*, 45 FAM. CT. REV. 70, 70-91 (2007).

caregivers, and extended family members that might confirm, disconfirm, or add to the contentions put forth by the parties.⁷³ These protocols also instruct that evaluators should review and consider “medical, educational, or psychiatric records.”⁷⁴

Serving somewhat as a cautionary counterbalance to the seeming hearsay endorsement of the custody protocols, the 1991 Specialty Guidelines for Forensic Psychologists, promulgated by Division Forty-One of the APA, pointedly cautioned forensic evaluators as to the dangers of reliance upon hearsay and the need for second-source confirmation:

Forensic psychologists are aware that hearsay exceptions and other rules governing expert testimony place a special ethical burden upon them. When hearsay or otherwise inadmissible evidence forms the basis of their opinion, evidence or professional product, they seek to minimize sole reliance upon such evidence. Where circumstances reasonably permit, forensic psychologists seek to obtain independent and personal verification of data relied upon as part of their professional services to the court or to a party to a legal proceeding.⁷⁵

Further underscoring the dubious reliability of hearsay, the 1991 Specialty Guidelines provided that when the evaluator relies upon hearsay that has not been corroborated, he or she bears “an affirmative responsibility to acknowledge the uncorrobo-

⁷³ American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, *supra* note 72, at § 11 (1994); American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, *supra* note 72; Herman, et al., *supra* note 72, at § I (B)(2)(a) at 57s; Martindale, et al., *supra* note 72, at § 11.1.

⁷⁴ Herman, et al., *supra* note 72, at § I (B)(1) at 57s.

⁷⁵ Committee on Ethical Guidelines for Forensic Psychologists – Division 41, American Psychological Association, *Specialty Guidelines for Forensic Psychologists* 15 LAW & HUM. BEHAV. 655, § VI (F) (1991). It should be noted that the revised version of the *Specialty Guidelines for Forensic Psychologists* (“SGFP”) does not contain these specific admonitions. Instead, section 9:02 provides “9.02 Use of Multiple Sources of Information – Forensic practitioners ordinarily avoid relying solely on one source of data, and corroborate important data whenever feasible (American Educational Research Association, American Psychological Association, & National Council on Measurement in Education, in press). When relying upon data that have not been corroborated, forensic practitioners seek to make known the uncorroborated status of the data, any associated strengths and limitations, and the reasons for relying upon the data.” *Specialty Guidelines for Forensic Psychology*, Adopted by APA Council of Representatives (Aug. 3, 2011) <http://www.apa.org/practice/guidelines/forensic-psychology.aspx>.

rated status of that data and the reasons for relying upon such data.”⁷⁶

An important caveat must be noted with respect to these professional protocols. They are forensic constructs, not evidentiary structures. In other words, obtaining a corroborative source or, alternatively, disclosing its absence, may place the evaluator who relies upon hearsay in a professionally defensible position vis-à-vis the licensing authorities of his or her own discipline but this in no way alters the rules of evidentiary admissibility that control in the courtroom.⁷⁷ This point was made explicit in *In re Lisa W.*⁷⁸ While noting that the APA Guidelines for Custody Evaluations endorse resort to collateral sources, the court correctly recognized that professional protocols from disciplines outside the law, whatever their merit or demerit may be in those external venues, do not resolve evidentiary issues:

Moreover, the guidelines pertaining to psychological practice notwithstanding, the fact that experts generally rely on a particular methodology or source of information is not sufficient to ensure admissibility at trial. While psychologists may gather and incorporate information from collateral sources into their opinions, hearsay information received from third party sources, without more, does not satisfy the requirements for professional reliability. Expert reports should not function as a conduit for inadmissible hearsay. Out-of-court materials are hearsay even when repeated in court by an expert.⁷⁹

Simply stated, the law of evidence trumps extra-judicial practice guidelines when issues of admissibility arise.

⁷⁶ Committee on Ethical Guidelines for Forensic Psychologists, *supra* note 75, at § VI (F)(1). Unfortunately, the 2011 version of the SGFP omitted these specific references to hearsay, though section 9.02 admonishes that “Forensic practitioners ordinarily avoid relying solely on one source of data, and corroborate important data whenever feasible (American Educational Research Association, American Psychological Association, & National Council on Measurement in Education, in press). When relying upon data that have not been corroborated, forensic practitioners seek to make known the uncorroborated status of the data, any associated strengths and limitations, and the reasons for relying upon the data.”

⁷⁷ *Lisa W.*, 2005 WL 2882454, at *4.

⁷⁸ *Id.*

⁷⁹ *Id.*

B. *Forensic Use of Third-Party Information*

Forensic evaluators, as noted, above, commonly interview non-parties who may have information relevant to the family being assessed. They also customarily review documents provided from schools, physicians, hospitals, therapists, and others. So common is the practice of soliciting such data that the acronym TPI has come to signify third-party information from sources typically referred to as “collateral informants,” or, more simply, “collaterals.”⁸⁰ Whenever an evaluator relies upon such hearsay sources, evidentiary doctrine governing permissible predicates for expert opinion is implicated. The question to be examined here is whether reliance on TPI *in the context of custody evaluations* fits within the structure of permissible evidentiary predicates for expert opinion testimony and whether the underlying rationales for such bases are truly apposite in the custody evaluation arena.

1. *Rationales for the Professional Hearsay Predicate*

To understand the application of the professionally reliable hearsay predicate to the use of third-party collateral information, it is important to examine its underlying rationale. The Advisory Committee for the Federal Rules of Evidence delineated a specific rationale for the professional hearsay predicate. Its commentary states that Rule 703 was “designed to broaden the basis for expert opinions . . . and to bring the judicial practice into line with the practice of the experts themselves when not in court.”⁸¹

The above statement raises an important policy question: Should the courts lower the standard of evidentiary integrity, i.e., reliability, to the level of an outside profession or should the outside profession be required to raise the reliability bar of their practice as a precondition to admission of their testimony? Additionally, even if one accepts the overall rationale, just how valid are these justifications for diminishing traditional common law safeguards against unreliable proof in the context of custody evaluations?

⁸⁰ Kirk Heilbrun, Janet Warren & Kim Picarello, *Third Party Information in Forensic Assessment*, in 11 HANDBOOK OF PSYCHOLOGY 69 (2003).

⁸¹ FED. R. EVID. 703 advisory committee’s note.

2. *Conformity to Clinical Practice*

In touting the notion that courtroom procedure ought to comport with the practice of professionals outside the courtroom, the advisory commentators focused heavily, perhaps myopically, on the parallel exemplified by the practice of physicians:

[A] physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. *Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses.* The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.⁸²

Whatever validity this rationale may have in the medical setting envisioned by the commentators, before transplanting it wholesale into the field of custody evaluation, some important distinctions need be drawn.⁸³

First, faced with life or death emergencies, the physician may be forced to act on the best information available under exigent circumstances. Either act on the information that is available, imperfect though it may be, or let the patient die.

⁸² FED. R. EVID. 703 advisory committee's note (emphasis added).

⁸³ The physician model actually had roots in common law as an exception to the rule that the expert was confined to personal knowledge and facts-in-evidence as predicates for his or her opinions. Common law apparently found sufficient indicia of reliability in the view that physicians were uniquely able to discern contradictions between objective symptoms and subjective patient complaints and thereby could be trusted to separate wheat from chaff. See KAYE ET AL., *supra* note 23, at § 3.5.1; see also Barber v. Merriam, 93 Mass. 322, 325 (1865):

Such representations are competent only when made to a person of science and medical knowledge, who has the means and opportunity of observing and ascertaining whether the statements and declarations correspond with the condition and appearance of the persons making them, and the present existing symptoms which the eye of experience and skill may discover. Nor is it to be forgotten that statements made to a physician for the purpose of medical advice and treatment are less open to suspicion than the ordinary declarations of a party. They are made with a view to be acted on in a matter of grave personal concernment, in relation to which the party has a strong and direct interest to adhere to the truth.

548 *Journal of the American Academy of Matrimonial Lawyers*

Fortunately, the law rarely faces such exigencies. The law is and ought to be a reflective process. Courts ought not to feel compelled to act on information of undemonstrated reliability. Indeed, evidence doctrine is designed largely to keep material of questionable reliability out of the judicial process. Nor does the “life or death” aspect of the medical model translate well into the forensic mental health arena: “[W]hatever may be true about physicians who make ‘life or death’ decisions, mental health professionals conducting forensic evaluations seldom operate in analogous high-stakes settings, and they usually deal with information that is significantly less objective.”⁸⁴

This leads to the second point of distinction. Statements made by a patient, or even friends or relatives of the patient, for the purpose of diagnosis and treatment are likely not contaminated by a motivation to dissemble. When the unconscious patient’s wife tells the anesthetist that her husband had his most recent meal six hours previously, one may assume that she is most likely telling the truth as she knows it. By contrast, in custody litigation, countless agendas are typically in play that can skew the information provided. This certainly is true of the competing parents who are locked in litigation. Indeed, that is precisely why TPI has come to play a significant role in the forensic process.⁸⁵ But litigants are not necessarily the only ones who are burdened with partisan agendas. It is true also, at least potentially, of everyone who provides information to the evaluator. Collaterals too may have agendas that propel inaccurate and misleading information. Friends and relatives often have obvious alliances. Even professionals, presumed to be objective observers, such as daycare providers, teachers, pediatricians, therapists, and others can labor under any number of cognitive biases, mistaken perceptions, and faulty recollections, all of which need to be

⁸⁴ Randy K. Otto, Christopher Slobogin & Stuart A. Greenberg, *Legal and Ethical Issues in Accessing and Utilizing Third-Party Information*, in *FORENSIC PSYCHOLOGY: EMERGING TOPICS AND EXPANDING ROLES* 190, 193 (Alan M. Goldstein ed. 2006).

⁸⁵ Evaluators seek information from others that may either confirm or disconfirm the parties’ contentions. Forensic models have been constructed toward the goal of seeking convergent data points as a means of corroborating the competing histories related by the parents, much in the same fashion as a judicial fact-finder assesses credibility by evaluating the consistency or inconsistency of the testimony.

tested in the crucible of cross-examination before their utterance is allowed to impact the lives and liberties of the families before the court.

The next question implicated by the “conformity” rationale is whether reliance on untested hearsay provided by third-parties is in fact common practice within the field of psychology outside the forensic arena. Do psychologists engaged in clinical – as opposed to forensic – practice commonly look to such sources? A number of respected authorities from within the forensic psychology community have suggested that the answer is ‘no’: “When conducting evaluations in therapeutic (as distinguished from forensic) contexts, mental health professionals rely primarily on information provided by the examinee-client. Occasionally therapists may consult other health care providers about the patient’s history, but rarely is any other information sought from outside sources.”⁸⁶

This makes sense when one considers that the purpose of the clinical process, in contrast to the forensic enterprise, is therapeutic, not investigatory. The focus is on the patient’s perceptions and their impact, as opposed to the determination of objective fact.

An important assumption underlying mental health evaluations of various kinds is the notion that information about an individual is best obtained directly from that individual. This is particularly true for assessment done for diagnosis as well as for treatment planning . . . For the most part, it is reasonable to expect that individuals who are consulting . . . will provide accurate information to facilitate effective treatment.⁸⁷

This stands in stark contrast to the forensic enterprise where the evaluator “functions more as an objective truth seeker than as a therapeutic change agent who seeks, and accepts, a more subjective view of the individual’s reality.”⁸⁸ Thus, significant reliance upon third-party information is largely a forensic protocol designed for courtroom use and relatively foreign to clinical practice. In effect, it is a *modus operandi* crafted by a professional community impacted by an economic incentive to see its opinions accepted in the courtroom. Respected commentators

⁸⁶ Otto, Slobogin & Greenberg, *supra* note 84, at 190.

⁸⁷ Heilbrun, Warren & Picarello, *supra* note 80, at 69–70.

⁸⁸ *Id.* at 71.

have noted that the professional reliability rationale “evaporates” when dealing with “forensics-only fields of expertise.”⁸⁹ “Just as asking whether the relevant scientific community accepts a particular technique is a flawed inquiry when the community itself has a significant professional stake in the techniques’ continued courtroom acceptance, a focus on custom could generate an incentive among some experts to develop self-serving customs.”⁹⁰

3. *Credibility Assessment*

Underlying the conformity rationale, at least in part, is the assumption – and the word “assumption” must be underscored – that experts possess heightened powers for assessing the trustworthiness of the out-of-court statements upon which they rely.⁹¹ Accordingly, the next pertinent question is whether mental health professionals possess a superior ability to discern true statements from lies. They don’t. While one might intuitively or reflexively assume that mental health professionals have an edge in distinguishing truth from falsehood, the research gives the lie to such assumption. Simply stated, “[t]here is no research that shows clinicians are any more skilled at deciphering lies from truth than the lay person.”⁹² Time-honored decisional law has recognized this reality, declaring that while the mental health witness may be an expert on diseases of the mind, he or she is not an expert on the facts of the case.⁹³ Further, there is a robust line of cases forbidding mental health opinion testimony that speaks to the credibility of others.⁹⁴ As one federal appellate court judge stated quite thoughtfully: “The simple truth is that the notion of expert character testimony, although it has been bandied about in the literature for some time, is one of those ideas whose

⁸⁹ KAYE ET AL., *supra* note 23, at 164.

⁹⁰ *Id.*

⁹¹ *Id.* at § 3.5.1.

⁹² William G. Austin, *Guidelines for Utilizing Collateral Sources of Information in Child Custody Evaluations*, 40 FAM. CT. REV. 177, 180 (2002); *see also* Paul Ekman & Maureen O’Sullivan, *Who Can Catch a Liar*, 46 AM. PSYCHOL. 913, 913–20 (1991).

⁹³ *Strait*, 42 N.E. at 1045–46.

⁹⁴ *United States v. Brodie*, 858 F.2d 492, 496 (9th Cir. 1988); *United States v. Cecil*, 836 F.2d 1431, 1439 (4th Cir. 1988).

time has not yet come, and with common sense and a modicum of luck it never will.”⁹⁵

4. *Bystander Utterances Are Not Professionally Reliable*

Perhaps most significantly, the Advisory Commentary to FRE 703 makes clear that it does not authorize a sweeping endorsement of reliance upon the sort of third-party collateral source utterances so commonly employed in custody evaluations. Indeed, this is precisely the type of inadmissible hearsay that the Advisory Committee assured would *not* be deemed reliable professional hearsay:

If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data “be of a type reasonably relied upon by experts in the particular field.” The language would not warrant admitting in evidence the opinion of an “accidentologist” as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied.⁹⁶

What are third-party collateral informants if not bystanders to the events and behaviors they relate to the evaluator? Thus, it seems clear that third-party information provided by collateral sources does not comport with the rationale proffered in support of the professional hearsay predicate.

C. *Hearsay Implications of Psychological Testing*

Family law practitioners are accustomed to seeing references in custody evaluation reports to psychological testing. It is not at all uncommon for custody evaluators to employ psychological tests and projective protocols to gain additional data pertaining to the parents and the children being assessed. One respected survey reports that more than 90% of responding evaluators indicate that they use psychological testing in the evaluation process.⁹⁷ These may include self-report inventories such as the Minnesota Multiphasic Personality Inventory, Second Edition (MMPI-2) and the Millon Multiaxial Clinical Inventory, Third

⁹⁵ United States v. Oshatz, 912 F.2d 534, 548 (2d Cir. 1990) (Mukasey, J.) (internal citations omitted).

⁹⁶ FED. R. EVID. 703 advisory committee’s note.

⁹⁷ James N. Bow & Francella A. Quinnell, *A Critical Review of Child Custody Evaluation Reports*, 40 FAM. CT. REV. 164, 168 (2002).

Edition (MMCI-III) as well as projective instruments such as the Rorschach inkblot test, the Thematic Apperception Test (TAT), Draw-A-Person (DAP), etc.

Significantly, not all evaluators administer, score, and interpret the psychological testing personally. Instead, they delegate it to others, typically a psychologist whose training with respect to testing is more extensive and focused than is that of psychiatrists or social workers. Even some psychologists delegate the testing process to others. It is also not unusual to find that the psychologist who administered the testing does not personally score and interpret the test data. Rather, he or she relies upon outside, computer-based services to do so. Indeed, it is not unusual to find significant portions of text in evaluation reports that have been lifted verbatim from the interpretive report, sometimes without so much as a quotation mark to distinguish the evaluator's statements from those of the outside computer program.

Such delegation is awash in a sea of hearsay and raises profound issues of evidentiary admissibility of the inferences and conclusions based upon the testing. When evaluators rely upon such computer-generated test interpretations to support their conclusions and opinions, careful reliability analysis is critical to ensure that the court is basing its custodial decision on quality information. Pretrial disclosure and reanalysis of all raw test data and the interpretive reports generated on the basis of that data is essential to facilitate informed judgments as to reliability. Additionally, an understanding of the dynamics of the computer-generated interpretive process is indispensable to proper analysis of the evidentiary issues which abound.

1. *Computer-Based Test Interpretation (CBTI)*

The nature of Computer-Based Test Interpretation (CBTI) renders it impossible for the custody evaluator who delegates the task of interpretation to an outside service to meet the test of extrinsic reliability required by the second-prong of the professionally reliable hearsay predicate.

When a psychologist *personally* interprets test data, he or she turns to the various manuals and treatises that provide guidance as to their meaning based upon reported empirical research studies and then integrates the test data with the other

information that has been gathered during the evaluation. He or she can be cross-examined with respect to the interpretive strategy and methodology employed and any deficiencies in this process can be revealed. He or she can also be cross-examined about the intellectual integrity of any research study he or she used as the basis for the conclusions drawn. If the evaluator claims to be basing a conclusion on the test data, as interpreted on the basis of his or her subjective “clinical” judgment, he or she can be cross-examined with respect to the reliability of that judgment.

In contrast, when the evaluator relies upon CBTI reports, he or she is adopting conclusions that were generated by a computer program that is based upon closely-guarded proprietary secrets, known to the program developers but unknown to the evaluator who is relying upon the program’s work product. This is extremely important given that the interpretive process is an inherently subjective undertaking.

The way the CBTI services work is that the test answers are fed into a computer program. The program scores the test and spits out a narrative interpretation. The interpretation is based upon the algorithms, or decision-making rules, that have been put into the program by the programmers. Again, the key point here is that those decision-making rules are closely guarded proprietary trade secrets. When the evaluator reads the report that is sent back by the service he or she in most instances does not know which scale scores were the basis for the specific conclusions set forth in the report. The evaluator does not know which research studies, if any, provided the bases for each stated conclusion. The evaluator does not know which interpretive statements came about because of specific research findings as opposed to those that were produced by someone’s unproven subjective judgment. Indeed, the evaluator does not even know whose subjective judgment provided any given decision-making rule contained in the program.

John R. Graham, one of the developers of the MMPI-2 and a highly respected authority in the field makes this point clearly when he draws the important distinction between *actuarial* interpretations and *automated*, non-actuarial interpretations. The former are “based entirely on previously established empirical relationships between test scores and the behaviors included in

the interpretive statements. Experience and intuition play no part in actuarial interpretation.”⁹⁸ Significantly, the interpretive services in use today are *not* entirely actuarial, meaning that intuition and guesswork *do* impact the interpretive process, rendering it far from objective:

The MMPI-2 interpretive services currently available are not actuarial in nature. They are . . . automated clinical prediction. On the basis of published research, clinical hypotheses, and clinical experience, clinicians generate interpretive statements judged to be appropriate for particular sets of test scores. The statements are stored in the computer and called on as needed. The accuracy (validity) of these kinds of interpretations depends on the knowledge and skill of the clinicians who generated the interpretive statements. The validity of these interpretations should not be assumed and needs to be demonstrated as much as the validity of a test.⁹⁹

Accordingly, as far as the evaluator on the witness stand knows, the narrative conclusions upon which he or she relied have come from the proverbial “black hole.”

2. *Clinical Experience a/k/a “Guesswork”*

The CBTI reports upon which evaluators are basing conclusions of potentially life-altering potency are in part the product of “hypotheses,” i.e., guesses, together with the much vaunted “clinical experience.” A substantial body of research has demonstrated that in the mental health field, increased experience generally does not lead to increased accuracy.¹⁰⁰ Forensic psychologist Jeffrey P. Wittmann, summed it up rather succinctly: “Our field is famous for supporting conclusions during testimony simply on the basis of ‘accumulated clinical experience,’ a phrase which may mean nothing more than accumulated personal bias.”¹⁰¹

⁹⁸ JOHN R. GRAHAM, *MMPI-2: ASSESSING PERSONALITY AND PSYCHOPATHOLOGY* 332 (2006).

⁹⁹ *Id.*

¹⁰⁰ Timothy M. Tippins, *Custody Evaluations: Clinical Experience or Clinical Canard?*, N.Y.L.J., Jan. 6, 2006, at 3, col. 1; *see also* references cited therein.

¹⁰¹ Jeffrey J. Wittmann, *Child Advocacy and the Scientific Model in Family Court: A Theory for Pretrial Self-Assessment*, 13 J. PSYCHIATRY & L. 61, 78 (1985).

Thus, when the evaluator's conclusions are based in some part upon the subjective, clinical experience of the person or persons who designed a computer program, questions of reliability abound. Cross-examination of the evaluator cannot test the reliability of the computer-generated conclusions because he or she does not have access to the requisite information to make an informed judgment as to the reliability of the computer program. The evaluator has no way of knowing whether he or she would have come to the same conclusions as the computer had he or she directly looked at the research and personally done the interpretation. No wonder Graham cautions that the validity of automated reports cannot be assumed and that their validity "must be demonstrated empirically," a caution that he notes is also found in the APA's Guidelines for Computer-Based Tests and Interpretations.¹⁰²

Another prominent and respected authority in the field of psychological testing and custody evaluations, James R. Flens, has written with equal clarity of the dangers – ethical as well as evidentiary – of reliance upon computer-generated interpretations. Noting that section 9.09(b) of the APA's Ethical Principles and Code of Conduct requires that "[p]sychologists select scoring and interpretation services (including automated services) on the basis of evidence of the validity of the program and procedures as well as on other appropriate considerations," Flens states:

A problem in the use of interpretive scoring programs provided by testing services is that the ethical criteria of 9.09(b) may be impossible to meet. Presently, the algorithms (i.e., the program logic and decision rules) used to generate the statements in the computer-generated test interpretations (CGTI) are proprietary secrets and not available for review by the evaluator. Therefore, it is not possible for evaluators to know how to answer important questions about how the program generates the statements found in CGTI's.¹⁰³

An example of how these unknowns impact the testimony of the delegating evaluator can be found in connection with the MMPI-2, which, with 93% of evaluators who use psychological

¹⁰² GRAHAM, *supra* note 98, at 332, 335.

¹⁰³ JAMES R. FLENS & LESLIE DROZD, *PSYCHOLOGICAL TESTING IN CHILD CUSTODY EVALUATIONS* 17 (2005).

testing reporting its use, is the most widely used psychological test in the custody evaluation arena.¹⁰⁴

The evaluator who receives an interpretive report from one of the computerized services does not know exactly how each of the interpretive statements contained therein was generated. A statement imputing a personality characteristic or some psychopathology to a test subject may have been generated because a certain score on a given scale was reached or by use of code types which look at combinations of scale elevations.

The point is that the evaluator on the witness stand does not know what those decision rules or algorithms are, so he or she does not know precisely which levels or combination of levels produced the various interpretive statements contained in the report. Without that knowledge, the evaluator cannot provide the court with the requisite assurance of reliability which, under the professionally reliable hearsay predicate, is a fundamental prerequisite to admissibility of the evaluator's opinion. Only by producing in court the developers of the computer program who have the requisite first-hand knowledge of its decision rules and program logic could the court gain the necessary insight into how the interpretation was generated and, because those program developers closely guard that information as proprietary secrets, this is not likely to happen.

Whatever utility CBTIs may have in clinical, therapeutic practice, the seclusion of underlying information as trade secrets renders them ill-suited for forensic use. Clearly, reliance on CBTIs, under FRE 703 and state analogs, ought to render the forensic opinion inadmissible in the absence of independent proof of reliability. To hold otherwise is to allow into evidence opinions based on secret data – shielded from the light of cross-examination – with the potential to alter the life course of the families who come before the court. This flies in the face of evidentiary safeguards designed to avoid such Star Chamber adjudication.

¹⁰⁴ Bow & Quinnell, *supra* note 97, at 168.

V. Conclusion

Given that a custody adjudication impacts fundamental rights¹⁰⁵ and given the centrality of expert evidence in custody litigation, courts need to apply a high level of scrutiny to ensure its reliability. This is particularly true of the bases underlying the expert's conclusions. If the premises of the opinion are inaccurate, the conclusions cannot be accepted. If the bases are not demonstrably reliable, the conclusions cannot be accepted. As one high court judge reminded bench and bar: "Reliance on inadmissible evidence is a weakness, not a strength, in an expert's opinion; an opinion that a jury cannot 'understand and evaluate' without hearing inadmissible evidence is a worthless opinion."¹⁰⁶

While the issue of reliability also impacts the issues of credibility and weight, where the expert's conclusions rest upon hearsay the more fundamental issue of admissibility is implicated. In these cases, the court – as legal arbiter and enforcer of evidentiary doctrine – must undertake the technical challenge of determining whether the opinion can come before the fact-finder at all. Thus, mastery of the issues discussed above is mission critical.

Courts must understand these principles to protect the integrity of the adjudicative process by ensuring the reliability of the evidence. Attorneys must have working knowledge of these often-nuanced issues so they can raise cogent objections to admissibility. Expert witnesses in turn must appreciate these issues as well so they can tailor their forensic practice to safeguard against findings of inadmissibility.

As for policy-makers, it is time for them to grapple with the conundrum that the professional hearsay predicate has produced, one that forces an ultimate choice of either allowing the expert to act as a conduit of contaminating hearsay or denying the fact-finder the full knowledge of the expert's premises. Given the inadequacy of the various approaches to reconciling the professional reliability test with the fundamental rights of litigants to a

¹⁰⁵ Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

¹⁰⁶ State v. Floyd Y., 2 N.E.3d 204, 219 (N.Y. 2013).

fair process in accordance with the first principles of the common law trial system, intellectual honesty would demand acknowledgement that the professional reliability predicate does severe violence to the epistemic structure of common law trials and to the evidentiary structure of expert testimony. They would be well-advised to seriously consider restoring the common law safeguards of insistence that all expert predicates are drawn from facts in evidence. This can be accomplished by requiring that all third-party sources testify subject to the rigors of cross-examination.

The principal justification for the professional hearsay predicate is the expediency it brings to the trial process in dispensing with the need to call the witnesses who are the source of the information. The price extracted for that convenience is the destruction of evidentiary integrity, the erosion of the trial process,¹⁰⁷ and the immolation of due process on the altar of expediency. That is a high price indeed.

¹⁰⁷ The problem is even more complicated in bench trials where the court cannot rule on the evidentiary issue without learning of the content of the excluded statement.