

# THE PSYCHOLOGY OF CROSS-EXAMINATION

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**PROFESSIONAL**

Goranson Bain Ausley, PLLC - Member  
Diana S. Friedman, P.C. – July 2001 to November 2015  
Partner, McCurley, Kinser, McCurley & Nelson, L. L. P. – 1992 to 2001  
Webb, Kinser & Luce, P.C. 1991

**EDUCATION**

Louisiana State University - B.S. – December 1984  
Southern Methodist University – J.D. cum laude - May 1991 – Order of the Coif  
Board Certified, Family Law, Texas Board of Legal Specialization – 1996 to present

**SPECIAL RECOGNITION**

Sam Emison Award Recipient – Texas Academy of Family Law Specialists – 2016  
Dallas 500 - The Most Powerful Business Leaders in Dallas Fort-Worth – 2016  
Lawyer of the Year in Family Law, Dallas/Ft. Worth, The Best Lawyers in America – 2016  
Dan R. Price Award Recipient, Family Law Section – 2014  
The Best Lawyers in America – 2010 to 2017  
“A Standing Ovation” Award, Texas Bar CLE – 2015  
D Magazine Best Lawyers in Dallas – 2013, 2015, 2016, 2017  
Texas Monthly Super Lawyer – 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012,  
2013, 2014, 2015, 2016, 2017, 2018  
D Magazine Best Lawyers Under 40 – 2004  
Top 50 Female Lawyers in Texas, Texas Monthly – 2004, 2005, 2006, 2007, 2010, 2011, 2012,  
2013, 2014, 2015, 2017  
Top 100 Attorneys In Dallas/Fort Worth Recognition Preview, Texas Monthly – 2011, 2012,  
2013, 2014, 2015, 2017  
Top 100 Attorneys In Texas Super Lawyer, Texas Monthly – 2011, 2012, 2013, 2014, 2017

**PROFESSIONAL ACTIVITIES AND AFFILIATIONS**

Texas Family Law Foundation (Past President 2013-2015)  
Member, Family Law Council State Bar of Texas – 2002 to present (Past Chair 2013-2014)  
Texas Academy of Family Law Specialist (Past President)  
Fellow, American Academy of Matrimonial Lawyers  
State Bar of Texas – Family Law Section (Past Chair)  
Co-Course Director – Advanced Family Law Course – 2012  
Course Director, Texas Association of Family Law Specialists Trial Institute – 2007  
Co-Course Director, New Frontiers in Marital Property Law – 2006  
Co-Chair, Legislative Committee – 2007 to present  
Dallas County Bar Association – State Bar of Texas  
District 6-A Grievance Committee – 1996 – 2002



# **Jonathan W. Gould, Ph.D., ABPP**

**Board Certified in Forensic Psychology  
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## ***Resume***

Dr. Gould has been court appointed to conduct child custody evaluations in about 400 cases. He has been retained as a trial consultant in approximately 3,000 cases across the country, including approximately 1,500 work product reviews. In addition, he has been retained by one-side to conduct an evaluation of a parent or a family in approximately 500 cases. He has worked as a parent coordinator in approximately 200 cases. He has assisted attorneys in their preparation of their witnesses for settlement conferences, evaluations, depositions, and trials in approximately 600 cases.

### **EDUCATION BACKGROUND**

|                     |  |
|---------------------|--|
| Diplomate           | American Board of Professional Psychology (2007)   |
| Board Certified     | American Board of Forensic Psychology (2007)   |
| Supervised training | Marriage Council of Philadelphia (1984)<br>University of Pennsylvania School of Medicine<br>Philadelphia, Pennsylvania |
| Doctoral Training   | Department of Counseling Psychology (1985)<br>State University of New York at Albany<br>Albany, New York               |
| Master's Training   | Department of Psychology (1978)<br>State University of New York, College at Plattsburgh<br>Plattsburgh, New York       |
| Bachelor's Training | Union College (1975)<br>Schenectady, New York  |

### **SELECTED BOOKS**

Ackerman, M.J., Kane, A., & Gould, J.W. (2019). *Psychological Experts in Divorce Actions (7<sup>th</sup> edition)*. New York, Aspen.

Ackerman, M.J., Kane, A., Gould, J.W., & Dale, M. (2015). *Psychological Experts in Divorce Actions (6<sup>th</sup> Ed.)*. New York, Aspen.

Gould, J.W & Martindale, D.A. (2007). *The Art and Science of Child Custody Evaluations*. New York: Guilford Publishers.

Gould, J.W. (2006). *Conducting Scientifically Crafted Child Custody Evaluations, 2nd Edition*. Sarasota, FL.: Professional Resource Press.

Gould, J.W. (1998). *Conducting Scientifically Crafted Child Custody Evaluations*. Thousand Oaks, Ca.: Sage Publications.

### SELECTED CHAPTERS AND ARTICLES

Rappaport, S., Gould, J., & Dale, M., et al. (2018). Psychological testing can be of significant value in child custody evaluations: Don't buy the 'anti-testing, anti-individual, pro-family systems' woozle. *Journal of the American Academy of Matrimonial Lawyers*, 30 (2), 405 – 436.

Gould, J.W., Flens, J., & Rappaport, S. (2018). Use of Psychological Tests in Child Custody Evaluations: Effects of validity scale scores on evaluator confidence in interpreting clinical scales (pp. 497 – 513). In R. Rogers & S.D. Bender (eds). *Clinical Assessment of Malingering and Deception (4<sup>th</sup> edition)*. New York: Guilford Publishers.

Gould, J.W. (2018). Challenges to the Admissibility of Child Custody Advisory Reports: The Daubert Challenge. In M. J. Ackerman, A.W. Kane, & J.W. Gould (2017). *Psychological Experts in Divorce Actions (6<sup>th</sup> Ed.: 2018 Supplement)*. New York, Aspen

Gould, J.W., & Posthuma, A. (2017). Invited Response to Turket's 'Harmful effects of child custody evaluations on children.' *Court Review*, 52, 150 – 157.

Gould, J. & Rappaport, S. (2016). Proper Use of Psychological Test Results in Child Custody Evaluations. *Matrimonial Strategist*, 34 (12), 1, 4.

Gould, J., Mayefsky, A., Stempleck, P. (2016, June). Constitutional Rights and the Expert Opinions Addressing Parental Access and Decision-Making. *Matrimonial Strategist*.

Gould, J.W., Dale, M., Fisher, N.B., & Gould, M.R. (2016). Scientific and Professional Knowledge For Family Court: Legal Expectations of Experts. In L. Drozd, M. Saini, & N. Olesen (Eds.) *Parenting Plan Evaluations (2<sup>nd</sup> Ed.)*. New York: Oxford University Press.

Gould, J.W. & Nolletti, J. J. (2015). Preparing clients for custody evaluations: A call for critical examination. *Journal of the American Academy of Matrimonial Lawyers*. 27 (2), 359 – 389.

Dale, M.D., & Gould, J.W. (2014). Science, mental health consultants, and attorney-expert relationships in child custody. *Family Law Quarterly*, 48 (1), 1 - 43.

Kuendig, P.C., Gould, J.W., & Dodd, R.J. (2013). Hiring family law forensic psychological experts: How to maximize the results, minimize the costs. *Family Law News*, 35 (4), 11 - 14).

Gould, J.W., & Martindale, D.A. (2013). Cultural Competence and Child Custody Evaluations. *Journal of the American Association of Matrimonial Attorneys*, 26 (1), 1 -13.

Austin, W.G., Pruett, M., Kirkpatrick, H.D., Flens, J.R., & Gould, J.W. (2013). Parental gatekeeping and child custody: Child access evaluation: Part I. *Family Court Review*. 51 (3), 485 – 501.

Gould, J.W., Martindale, D.A., & Flens, J.R. (2013). "Responsible use of psychological tests: Ethical and professional practice concerns." In D. Saklofske, C. Cecil Reynolds, & V. Schwann (Eds.). *The Oxford Handbook of Child Psychological Assessment*. New York. Oxford University Press.

Gould, J.W. & Martindale, D.A. (2013). "Child Custody Evaluations: Current Literature and Practical Applications." In R. K. Otto (ed.). *Handbook of Psychology: Volume 11: Forensic Psychology (pp. 101 - 138)*. New York: John Wiley & Sons.

Martindale, D.A. & Gould, J.W. (2013). "Ethical Principles and Professional Competencies." In R. K. Otto (ed.). *Handbook of Psychology: Volume 11: Forensic Psychology*. New York: John Wiley & Sons.

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**EDUCATION:**

South Texas College of Law, J.D., 1988  
San Francisco State University, University of California, Berkley, M.A.  
University of Arizona, B.A.

**SPECIALIZATION:**

Board Certified, Family Law. Texas Board of Legal Specialization

**PROFESSIONAL AFFILIATIONS:**

Texas Academy of Family Law Specialists  
Board of Directors – 2005-2008  
American Academy of Matrimonial Lawyers – Fellow  
Officer (Texas Chapter) – 2008-2014  
Texas Board of Legal Specialization – Board Certified in Family Law  
College of the State Bar of Texas  
Houston Bar Association – Family Law Section  
Board of Directors – 1991-1993, 1995-1996  
Officer – 1995-1999  
Houston Bar Association Judicial Selection Committee - 1999  
Houston Bar Association – Probate Bench/Bar Committee – 1996, 1998  
Houston Bar Association – HAY Center – Committee 2010-2012  
Houston Bar Foundation Fellow  
Houston Bar Foundation Board – 2002  
Chair - Houston Bar Foundation – 2004  
Immediate Past Chair – Houston Bar Foundation – 2005  
South Texas College of Law - Family Law Trial Institute – Faculty Member  
Burta Rhodes Raborn Inns of Court – Family Law  
Officer – 2001-2005  
Gulf Coast Family Law Specialists  
Board of Directors – 1995-1999  
Child Abuse Task Force Member – 1991-1992  
Children’s Assessment Center – Advisory Board – 1993-2000  
Family Law 2000 Task Force  
Aid to Victims of Domestic Abuse (AVDA) – Board Member – 2008- 2017

## **PROFESSIONAL AWARDS/HONORS:**

Recipient of the 2019 Sam Emison Award – Texas Academy of Family Law Specialists  
Recipient of the 2018 Joseph D. Jamail Award for Justice – Aid to Victims of Domestic Abuse (AVDA)  
Recipient of the 2005 Annual David Gibson Award for Professionalism and Excellence in the Practice of Family Law. Presented by the Gulf Coast Family Law Specialists.  
Recipient of the 2005 Annual Burta Rhodes Raborn Inn of Court Mentor Award.  
Selected as a “Super Lawyer” by Texas Monthly Magazine, 2003-2021  
Listed in “Best Lawyers in America, from 2005-2021  
Selected as “Super Lawyers”, 2003-2022  
Selected as Top 100 Texas Super Lawyers”, 2008, 2009, 2012, 2014-2022  
Selected as “Top 50 Women Attorneys in Texas”, 2006–2022  
Selected as “Top 100 Houston Area Super Lawyers”, 2006-2022

## **AUTHOR & LECTURER:**

“Personality Disorders”. Innovations: Breaking Boundaries in Custody Litigation, Chicago, IL June 2022, (Co-Authored Dr. Jonathan W. Gould, Ph.D., ABPP & Dr. Alan Ravitz, MD PC).

“Understanding The Amicus Statute & Making It Work For Your Case”. 47<sup>th</sup> Advanced Family Law Course, San Antonio, Texas August 2021, (Co-Authored Jennifer S. Caras & Erin Christopher).

“Trying A Jury Trial: A Dying Art”. Advanced Trial Skills For Family Lawyers, December 2020, (Co-Authored with Adam Dietrich).

“The Practitioner’s Guide to Who, What, When, Where, Why, and How of Depositions”. 46<sup>th</sup> Annual Advanced Family Law Course, San Antonio, Texas, August 2020, (Co-Authored with Sherri, Evans, Jelena Kovacevic & May C. Burkett).

“Do You Have An Appointment?” – The Role of Amicus Attorneys Ad Litem, Parenting Facilitators, and Parenting Coordinators. 45<sup>th</sup> Annual Advanced Family Law Course, San Antonio, Texas, August 2019, (Co-Authored with Dina Trevino, Ph.D., Erin Christopher and Kelly Hughes Norsworthy).

“The Amicus Attorney: Friend or Foe”. Marriage Dissolution, Galveston, Texas, April 2019, (Co-Authored with Wendy Burgower, Claudia Canales, Barbara Nunneley, Loran Canales, and Judge Randy Shelton).

“Effective Voir Dire; Tips From the Pros”, Advanced Trial Skills for Family Lawyers, New Orleans, December 2018, (Co-authored with Erin Christopher).

“Interviewing Children: A Primer for Attorneys and Judges”, Annual Judicial Education Conference, Houston, Texas, September 2018, (Co-authored with Judge David Farr, Dr. Jonathan Gould, and Kathy Kinser).



“Kids With Special Needs: What You Need To Know To Prepare, Including Financial Issues At The Time of Divorce and Needs In The Future”, Advanced Family Law Course, San Antonio, Texas, August 2018, (Co-authored with Colleen Elbe, Hon. Stephani A. Walsh, Jonathan Bates, R. Kevin Spencer).

“A Peak Behind the Curtain: In Chamber Interviews with Children”, Texas Bar College 20<sup>th</sup> Annual Summer School”, Galveston, Texas July 2018, (Co-authored with Hon. David Farr, Dr. Jonathan Gould).

“Innovations: Breaking Boundaries In Custody Litigation”, New Orleans, LA, January 2018 (Co-authored with Hon. David Farr, Jonathan Bates and Dr. John Zervopoulos).

“Children in Divorce: What YOU Need to Know”, Innovations – Breaking Boundaries in Custody Litigation, New Orleans, LA, February 2017 (Co-authored with Sol R. Rappaport, Ph.D., Hon. David Farr, Houston Judge, 312<sup>th</sup> District, Charlotte Rainwater and Eric Robertson).

“VoiR Dire – How to Spot the Wild Card in the Deck and Other Tells by Potential Jurors”, Extreme Family Law Makeover XV Beating The Odds In Your Family Law Case Seminar, San Antonio, Texas, February 2017 (presented with Jim Monnig).

“Direct and Cross of A Child Custody Evaluation”, San Antonio, Texas, August 2016, (Co-authored with The Honorable Judge Dean Rucker, Christy Bradshaw Schmidt, MA, LPC, Brian Webb and Chetammia A. Holmes).

“The New Custody Evaluations”, Marriage Dissolution Institute, Galveston, Texas, April 2016, (Co-authored with Christy Bradshaw Schmidt, MA, LPC)

“Child Custody Evaluation Bill Drafting of the Orders”, Advanced Family Law Drafting, Dallas, Texas, December 2015 (Co-authored with Dr. Benjamin J. Albritton, Diana Friedman, Lerrin B. Goldberg and Jelena Kovacevic )

“Technology and Domestic Violence: Combating Offender’s Use of Technology and Empowering Victims”, 41<sup>st</sup> Annual Advanced Family Law Course, San Antonio, Texas, August 2015 (Co-authored with Claire Elizabeth Rogers, Maisha Colter and Aaron M. Reimer)

“The Insidious Nature of Bias In The Forensic Experts Work and How to Challenge It”, 37<sup>th</sup> Annual Marriage Dissolution Institute, April 2014 (Co-authored with Dr. Jonathan Gould, PH.D. and Claire Elizabeth Rogers).

“Child Custody Evaluations”, Advanced Family Law Course, San Antonio, Texas, August 2013 – (presented with Katherine A. Kinser).

“Custody Evaluations and The Proposed New Statute”, State Bar of Texas 36<sup>th</sup> Annual Marriage Dissolution Institute, Houston, Texas, April 2013 (presented with Jonathan Gould, Ph.D., ABPP, Christy Bradshaw Schmidt, MA, LPC and Kristal C. Thomson).

"Managing Severe Cases of Parental Alienation", 38<sup>th</sup> Annual Advanced Family Law Course, San Antonio, Texas, August 2012 (Moderator).

"Trial Strategies: Know Where You're Going", Innovations – Breaking Boundaries in Custody Litigation, Houston, Texas, January 2012 (Moderator).

"Psychological Issues and Testing", Advanced Family Law Course, San Antonio, Texas, August 2011 (presented with Dr. Jonathan Gould and Keith M. Nelson).

"The Future of Premarital, Postmarital and Cohabitation Agreements", New Frontiers In Marital Property Law, Scottsdale, Arizona, October 2010 (presented with Diana Friedman, Thomas Greenwald, Katherine Kinser, and Jimmy Vaught)

"Theming Your Case; and Using Electronic Media to Make Your Presentation", Family Law on the Front Lines, July 2010, San Antonio, Texas (presented with Wendy Burgower)

"Grandparents: What New?" South Texas College of Law 24<sup>th</sup> Annual Family Law Conference, March 2010.

"Affective Use of a Paralegal in Family Law", Texas Young Lawyers Association, Ten Minute Mentor Program, 2008 (presented with Nan Gibson)

"Tilting at Windmills: Representing Non-Parents in Suits Affecting Parent-Child Relationships", University of Texas School of Law, 8<sup>th</sup> Annual Family Law on the Front Lines, 2008, Galveston, Texas (co-authored by Lynn Kamin, Sharon D. Cammack and Stephanie G. Solomon)

"How to Effectively Cross Examine a Psychologist", University of Texas School of Law, 7<sup>th</sup> Annual Family Law on the Front Lines, 2007, Galveston, Texas (presented with Jonathan Gould; authored by Jonathan Gould)

"Track II: Evidence and Discovery – How to Obtain and Use Electronic Evidence and Other Data: Online, Offline and Legally", 33<sup>rd</sup> Annual Advanced Family Law Course, August 2007, San Antonio, Texas (presented with John Wiechman, Michael F. Pezzulli and Rick Robertson)

"Jurisdictional Jeopardy: HC, UCCJEA, PKPA and Other ABC's of Custody", University of Texas School of Law, 6<sup>th</sup> Annual Family Law on the Front Lines, 2006, Galveston, Texas (presented with Miriam L. Ackels and K. Nicole Voyles; authored by Miriam L. Ackels)

"Use It and Lose It' – Substance Abuse Issues in Divorce", State Bar of Texas 2006, Advanced Family Law Course (co-authored with Amy N. Montgomery)

"What to Do When the Grievance Committee Calls", State Bar of Texas, 28<sup>th</sup> Annual Advanced Family Law Court, Dallas, Texas 2002 (co-authored with Sharon D. Cammack)

“Extraterritorial Custody Issues – The UCCJEA, PKPA, and The Hague Convention”  
Advanced Family Law Seminar, San Antonio, Texas 2001

## **FREQUENT AUTHOR AND SPEAKER THROUGHOUT TEXAS**

- “Different Strokes for Different Folks” – Innovations – 2017
- “Pick a Number, Any Number: Valuing Business, Marriage Dissolution Institute, State Bar of Texas, Moderator” – 2017
- “Child Custody Evaluations – What the Judiciary Needs to Know” – 2016 Annual Judicial Education Conference – 2016
- “Direct and Cross Examination of a Tracing Expert” – Advanced Family Law – 2016
- “2015 Legislative Update: Family Law” – Advanced Family Law – 2015
- “Legislative Update” – Legislative Update 2015 – Family Law
- “The Witness You Don’t Want and How to Deal With Them” – Innovations – 2015
- “Contempt Trial Demonstration” Advanced Family Law Course – 2014
- “You Don’t Own Me - Alienation and Reunification” Innovations – 2014
- “Obtaining and Modifying Above Guidelines Child Support” Advanced Family Law Course – 2013
- “Legislative Update – Current Issues” Marriage Dissolution – 2013
- “Who Are You and What Do You Do” Innovations – 2013
- “Attachment Issues/Visitation Under Three” Marriage Dissolution – 2012
- “Social Studies, Psychological Evaluations, Child Custody Evaluations – What’s in a Name” Marriage Dissolution – 2012
- “If you don’t know where you’re going, you will probably end up someplace else: Legal and psychological principles and methodologies applied to successful complex custody litigation” Innovations – 2012
- “Possession and Access for Children Under Three” Advanced Family Law Course – 2011
- “Plutoed Parents: Preventing and Overcoming Parental Alienation” Family Law on the Front Lines – 2011
- “The 2 Steps to the 12 Steps: How to Determine if a Parent is a Druggie, a Drunk, or Just Dry” 2010 Parent-Child Relationships Conference – 2010
- “The New Parent Coordination/Facilitation Statute: What’s In, What’s Out” Marriage Dissolution – 2010
- “Application of Child Development Research to Crafting Age-appropriate Possession Orders for Children Under Three” Family Law on the Front Lines – 2010
- “Premarital and Post-marital Agreements with Ethical Considerations” Advanced Family Law Drafting – 2010
- “The Sixth Sense: I Hear Voices, But Is The Child Being Heard? (Which Perspective Really Matters to the Court?)” Parenting-Child Relationships: Critical Thinking for Critical Issues – 2009
- “Family Law Contracts: Pre and Post Marital Agreements; Divorce Decrees; AID’s; Application of Transactional Contract and Related Law; Enforcement Breach and Contractual Defenses” – 2009
- “Finding Solutions for Dividing Property in a Troubled Economy” – 2009
- “Characterization Challenges” - 2008
- “Making the Most of Social Studies and Psychological Evaluations,” Family Law on the Front Lines, The University of Texas School of Law - 2008
- “Sex, Lies & The Internet: Internet Behavior,” Family Law on the Front Lines, The University of Texas School of Law – 2007
- “Who Gets the Debts, or Worse, I’m Gonna File for Bankruptcy,” Advanced Family Law Course, State Bar of Texas – 2006
- “Ethical Dilemmas,” Family Law on the Front Lines, The University of Texas School of Law – 2005
- “Ka-ching, Ka-ching, Kachina? The Modern Day Cash Register,” – 2005
- “Complex Trust Issues,” Advanced Family Law Course, State Bar of Texas – 2003

# Sarah Aminzadeh Milinsky

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## Education

---

**University of North Texas Dallas College of Law, Dallas, TX** May 2021

- Juris Doctorate, Cum Laude
- Dean's List – Fall 2018, Spring 2019, Spring 2020, Fall 2020, Spring 2021
- CALI Award – Evidence, Fall 2020

**University of North Texas, Denton, TX** December 2017

Bachelor of Arts in Psychology

- Legal Studies Certificate
- Dean's List – Spring 2016, Fall 2016
- President's List – Spring 2017, Fall 2017

## Experience

- 
- **Associate Attorney**, Goranson Bain Ausley, PLLC, Dallas, TX, April 2021 – Present
  - **Law Clerk**, Goranson Bain Ausley, PLLC, Dallas, TX, October 2020 – April 2021
  - **Law Clerk**, Forester Haynie, PLLC, Dallas, TX, May 2019 – October 2020
  - **Intern**, Texas Humane Legislation Network, Dallas, TX, January 2020 – May 2020
  - **Intern**, Denton County Criminal District Attorney's Office, Denton, TX, July 2019 – August 2019
  - **File Clerk**, Kaplan & Moon, PLLC, Dallas, TX, April 2017 – August 2018

## Scholastic Activities

---

**Editor-in-Chief**, UNT Dallas Law Review publishing *Accessible Law* Fall 2019 – May 2021

Accessible Law is a student-run publication with the primary purpose of publishing a multimedia journal that provides the public with access to justice.

**Champion**, Kastl Law Mock Trial Competition February 2021

Participated as a witness in the First Annual Kastl Law Mock Trial Competition.

**President/Founder**, Student Animal Legal Defense Fund Spring 2019 – Spring 2020

SALDF is a student organization affiliated with the Animal Legal Defense Fund and shares its mission to protect the lives and advance the interests of animals through the legal system.

## Community Engagement

---

**Volunteer**, Becky's Hope Horse Rescue November 2019 – March 2020

Becky's Hope Horse Rescue is a non-profit charity dedicated to the rescue, rehabilitation, and rehoming of abused, neglected, and abandoned farm animals. Volunteer activities include caring for the farm animals, mucking pastures and stalls, and maintaining the farm in general.



# CHANDLER RICE WINSLOW

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## EDUCATION

**Southern Methodist University Dedman School of Law**, *Juris Doctor*, May 2009

- SMU Moot Court Board
- Locke Liddell & Sapp Negotiation Competition

**Southern Methodist University**, *Bachelor of Arts in Advertising*, May 2006

- Temerlin Advertising Institute Outstanding Senior in Creative
- National Society of Collegiate Scholars
- SMU Honor Roll – Top 15% of students
- Kappa Tau Alpha Honors Society

**SMU Summer Program at University College, University of Oxford**, *July- August 2007*

## EXPERIENCE

**GoransonBain Ausley, PLLC**, Associate Attorney: May 2021- Present

- Family Law Attorney

**Brousseau Naftis & Massingill, PC**, Associate Attorney: November 2018- April 2021

- Family Law, Employment Law, and Civil Litigation Attorney

**Warmbrodt, Winslow & Associates, PLLC**, Associate: April 2012- December 2014; Partner: January 2015- September 2018

- Family Law Attorney

**Alexander & Associates**, Associate Attorney: September 2009- April 2012

- Family Law and Criminal and Juvenile Defense Attorney

**W.W. Caruth, Jr. Child Advocacy Clinic** Student Attorney, January - May 2009

- Attorney Ad Litem/Guardian Ad Litem in CPS Removal Cases

## PROFESSIONAL LICENSES AND AFFILIATIONS

Licensed by the State Bar of Texas

Member of the Dallas Bar Association

Member of the Dallas Women Lawyers Association

Board of Directors for the Collin County Young Lawyers Association (2010-2016)

## LEGAL PRESENTATIONS

*“Property Agreements: Why are They Important and How Can They Protect Your Clients?”*





## DISCLAIMER

This article is based on a previously published article entitled, “*Cross-examining Experts in Child Custody: The Necessary Theories and Models . . . with Instructions*,” written by Milfred D. Dale, Jonathan Gould, & Alyssa Levine in the *Journal of the American Academy of Matrimonial Lawyers*, 33 (2), 327 – 39. This article attempts to update the prior article and apply it to Texas Law.



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# THE PSYCHOLOGY OF CROSS-EXAMINATION

## I. INTRODUCTION

In family law, many disputes are presented as “he said, she said” which leaves the factfinder having to determine who to “trust” in the dispute. As such, the primary role of cross-examination in a family law case is to strengthen a client’s argument by eroding the credibility of opposing witnesses. By integrating various social and cognitive phenomena rooted in psychology, the examining attorney can effectively unveil a witness’s true colors through their unpolished communication and behavior. By doing so, witnesses will inevitably lose credibility with the factfinder through the witness’s display of hypocrisy, deceit, unprofessional behavior, a disrespectful attitude, and lack of emotional control.

## II. BASIC STRATEGIES

### A. Develop a Strong Theory of the Case

James W. McElhaney wrote that “the theory of the case is the basic underlying idea that not only explains the legal theory and factual background but also ties as much of the evidence as possible into a coherent and credible whole.”<sup>1</sup> The theory of the case is the basic concept around which everything else revolves and provides a viewpoint through which the trier of fact can look at all of the evidence in order to decide in the proponent’s favor.<sup>2</sup> An effective cross-examination will incorporate the attorney’s theory of the case while remaining organized and prioritizing important elements. The theory must be coherent and explanatory, able to withstand scrutiny, and logical and persuasive enough to be chosen over the best argument of the opposing party. Never do anything inconsistent with your theory of the case.<sup>3</sup>

The facts that the attorney carefully selects to integrate into his or her cross-examination must explain the motives of key witnesses, account for differences amongst witness statements and other evidence, and address why the trier of fact should believe this version of events, all while strengthening the theory.<sup>4</sup> The theory must be comprehensive and include any facts that are necessary to convince the trier of fact that the

theory and story accurately describe what happened.<sup>5</sup> The theory of the case must possess internal plausibility, which means necessary elements of the theory are included, the relationships between data and facts are defined, and the setting, characters, and means or motive are adequately developed.<sup>6</sup> The theory must also possess external plausibility, which means it is believable based on how people typically react.<sup>7</sup>

The theory of a case must also take into account the fact that people often subconsciously make decisions based on emotional reactions, even when they believe such decisions are based in reason, favoring emotion over logic.<sup>8</sup> Recent research in behavioral science has shown that humans also make imperfect decisions, based on prior beliefs.<sup>9</sup> This stems from the function of “confirmation bias” which is where a person will make a decision or form an opinion and will reject subsequent conflicting evidence and accept only evidence that supports their belief.<sup>10</sup>

Applying confirmation bias to the concept of “facts beyond change” is central to developing the theory of the case and is a vital element of the attorney’s advocacy. It is essential for the attorney to understand how case-specific facts relate to every aspect of the case. Because a successful theory cannot ask the trier of fact to ignore facts that they will believe, the theory of the case must always explain “facts beyond change.”<sup>11</sup>

Pozner and Dodd explain this concept and its importance in the following manner:

Facts beyond change are the givens of a lawsuit that will be believed by the jury as fair, accurate, and highly relevant regardless of any party’s best efforts to dispute or

<sup>5</sup> JESSICA D. FINDLEY & BRUCE D. SALES, *THE SCIENCE OF ATTORNEY ADVOCACY: HOW COURTROOM BEHAVIOR AFFECTS JURY DECISION MAKING* 162 (2012).

<sup>6</sup> See R. P. BURNS, *A THEORY OF THE TRIAL* (1999).

<sup>7</sup> *Id.*

<sup>8</sup> Kahneman, Daniel, *Thinking Fast and Slow* (New York: Farrar, Straus and Giroux, 2013); See also: Shane Read, *Winning at Cross-Examination, A Modern Approach for Depositions and Trials* (Westway Publishing, 2020).

<sup>9</sup> Shane Read, *Winning at Cross-Examination, A Modern Approach for Depositions and Trials* (Westway Publishing, 2020).

<sup>10</sup> *Id.*

<sup>11</sup> LARRY POZNER & ROGER J. DODD, *CROSS-EXAMINATION: SCIENCE AND TECHNIQUES* (3ded., e-book 2018).

<sup>1</sup> James W. McElhaney, *The Theory of the Case*, 45 LITIG. J. 1 (Spring 2019) (1979).

<sup>2</sup> *Id.* at 2.

<sup>3</sup> *Id.* at 1.

<sup>4</sup> See Anthony J. Bocchino, *Ten Touchstones for Trial Advocacy*, 74 TEMPLE L. REV. 1 (2001).

modify them. ... A successful theory must either incorporate all relevant facts beyond change or be unaffected by them. A successful theory can never contradict a fact beyond change, because, if the jurors are confronted with the theory and an actuality (a fact beyond change), and the two cannot exist simultaneously, the jurors must decide the case in accordance with the actuality (the fact beyond change)...If cross can affect the jurors' perception that the fact is fair or accurate or relevant, the fact is capable of dispute and is no longer a fact beyond change.<sup>12</sup>

The theory of the case should make the trier of fact empathize with the client's position. The theory must be specific enough to allow a trier of fact to easily integrate the facts they hear during cross-examination into the theory of the case. To persuasively use a theory, it should be expressed as a theme that can be used throughout the trial, including during the cross-examinations of opposing witnesses and should speak to the fact-finder's emotions.<sup>13</sup>

### B. Attorney as Storyteller

As a general truth, people have a negative emotional reaction to people they do not trust. Therefore, the ultimate purpose of cross-examination is to show the judge or jury that the examining attorney is more credible than the witness.<sup>14</sup> An attorney's credibility, demeanor, and presence in the courtroom are extremely important. The lawyer is functionally a witness and a storyteller, both for themselves and indirectly for their client. While never under oath, lawyers functionally "testify" during every aspect of the process, not just during opening and closing arguments. Among other things, cross-examination offers numerous opportunities to credit the lawyer and sometimes only a limited number of opportunities to discredit the witness. Gerry Spence analogized the entire trial process, including cross-examination, as a kind of psychodrama, a contest of competing stories.<sup>15</sup> William Barton noted, "Trials are about the generation, collection, consolidation, and utilization of the

intangible personal attribute of credibility."<sup>16</sup> A party can have credibility and lose, but a party without credibility cannot win.<sup>17</sup>

### C. The Art of Listening

During direct examination of the witness, *listen*. Rather than spending this time organizing notes and exhibits, it is imperative that the attorney listen to the direct examination to determine what to highlight during cross-examination. The goal of the attorney should be, at all times, to listen to the answer provided by the witness and continually evaluate the sufficiency of that answer, as well as the manner in which that answer was given, immediately after it is given. If a witness gives testimony that is not harmful to the client, limit time spent on cross-examination of that witness.<sup>18</sup> In fact, consider passing the witness altogether because asking the witness questions only suggests to the factfinder the witness is worth questioning. This is especially true if the testimony was simple bolstering of the other party.<sup>19</sup> Asking no questions can minimize the importance of that witness in the factfinder's eyes.<sup>20</sup>

While it is one thing to listen to the witness during direct examination, the attorney should stay vigilant by also watching both the factfinder and the witness for body language and other clues as to how to approach his or her cross. If the jurors (or judge) appear confused or surprised, the listening attorney should recognize that further explanation or elaboration will be necessary for their cross. The attorney who watches the factfinder or witness's reaction to the questioning or testimony puts himself or herself at a distinct advantage by knowing which topics to follow-up with in more detail.

### D. Listen, but Don't Take the Bait

During cross-examination, listen, but don't take the bait. Often times when a cross-examiner is doing well, an intelligent witness will provide non-responsive answers that provide additional facts intended to throw the examiner off course from their line of questioning.

<sup>16</sup> See William A. Barton, Different Types of Cross-Examination, 31(2) LITIG. J. 7, 16 (2012).

<sup>17</sup> Id.

<sup>18</sup> Wendy Burgower (2020, August 3-6) You've Lost that Loving Feeling: Cross-Examination [Paper presentation]. 46th Annual Advanced Family Law Course, San Antonio, TX.

<sup>19</sup> LARRY POZNER & ROGER J. DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES. The Michie Company Law Publishers, 1993.

<sup>20</sup> Id.

<sup>12</sup> Id. at 2883.

<sup>13</sup> Id. at 3095.

<sup>14</sup> JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 444-45 (2006).

<sup>15</sup> GERRY SPENCE, HOW TO ARGUE AND WIN EVERY TIME (1995); see Trial Lawyers College, www.triallawyerscollege.com, (last visited Jan. 23, 2021).

<sup>21</sup>The witness may provide new information for which the examiner was not aware (new bait) or may attempt to lure the examiner to present evidence out-of-sequence by addressing information for which the witness suspects to be subject of later inquiry (structure bait).<sup>22</sup> It is important for a cross-examiner to not be lured by such bait, as it abbreviates the examiner's presentation of certain aspects of their story and diminishes the benefits derived from a well-planned and executed cross-examination.<sup>23</sup>

### E. Bias

Any motive that the witness has for telling less than the truth must be exposed during the cross-examination. An effective cross-examination will expose any bias the witness may have. When the witness is a friend, a relative or a lover, explaining the witness's relationship with an opponent can be effective in attacking the witness's bias. It is important to demonstrate the witness's bias or motive at the beginning of the cross-examination. By showing that the witness has a personal interest in the subject of their testimony early on, subsequent answers will be clouded by the witness's own personal bias, which can cause a witness to become defensive, to become more reserved in an attempt to appear not biased, to over-justify their answers, or to become argumentative and over-aggressive in their responses.<sup>24</sup>

### F. Primacy and Recency

The sentence structure and organization of cross-examination questions can leave a lasting impression on the factfinder. "Primacy" and "Recency" are psychological concepts related to the emphasis that a listener puts on words. The concept of primacy suggests that the first words that a listener hears will be the words the listener remembers, while the concept of recency suggests that the last words a listener hears will be remembered.<sup>25</sup>

When applied to the sentence structure of cross-examination questions, primacy and recency help develop succinct, fact-specific questions that do not detract from the question being asked. For example, the overuse of phrases such as "isn't it true" or "isn't that right" at the beginning or ending of a question can distract and detract from the underlying purpose of the examiner's line of questioning as illustrated through

the following example<sup>26</sup>:

#### **Destruction of Recency**

Q: You moved out of the marital residence in August, isn't that right?

Q: You have not returned to that house since you moved, isn't that right?

Q: Since you moved in August, you have not seen your children, isn't that right?

#### **Destruction of Primacy**

Q: Isn't it true that you moved out of the marital residence in August? Q: Isn't it true that you have not returned to that house since you moved

Q: Isn't it true that since you moved in August, you have not seen your children?

#### **Recency and Primacy Utilized**

Q: You moved out of the marital residence in August?

Q: You have not returned to that house since you moved?

Q: Since you moved in August, you have not seen your children?

Similarly, when organizing a series of questions related to a singular topic of cross-examination, it is imperative to apply primacy to introduce bias, attack credibility, or to lead the series of questions with a single fact of importance and to conclude the series with a question that establishes the goal of the series.<sup>27</sup> This is true regardless of if the series of questions are informational or confrontational.<sup>28</sup>

### G. Safe Havens

In general, human beings go to great lengths to protect their image or reputation. This is true in the courtroom as well as when witnesses try to preserve their image by making excuses for their actions or inactions that make them "look bad."<sup>29</sup> These excuses have been called "safe havens" because they allow the witness to explain away poor conduct that would make them look irresponsible, unprofessional, unreliable, etc.<sup>30</sup> Although oftentimes the cross-examiner may think that such excuses will be easily transparent to the factfinder, there is always the possibility that the factfinder might give the witness's excuse some weight. Therefore, it is best to predict any available safe havens and destroy them before the witness has a

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> Id.

chance to utilize them.

The theory of destroying safe havens is built on the same principle that human beings want to preserve their image. In order to destroy safe havens, the attorney must first identify potential safe havens and then ask a series of leading questions that show the witness in a positive light and to which the witness will want to respond to with “yes.”<sup>31</sup> By providing the witness a sense of protection from early affirmative answers, the attorney is building the witness’s confidence while also effectively denying the witness’s ability to use a safe haven in the future.<sup>32</sup>

For example, if a police officer testifies to a fact found nowhere in his report, some potential safe havens to explain the missing information might be a lack of time when writing the report, the assertion that reports are only summary in nature, or the assumption that another officer covered that fact. In order to destroy these possible safe havens, the attorney must ask questions that acknowledge that the officer is a keen observer, a policy-following professional, a thorough person who knows how to do things well, and that in the present case, he did do things well.<sup>33</sup> By doing so, the examining attorney can successfully destroy the police officer’s safe havens and expose that: the information could have been in the report, should have been in the report, would have been in the report if it happened, and it is not in the report.<sup>34</sup>

### III. CROSS-EXAMINATION OF OPPOSING PARTY

When cross examining the opposing party, the ultimate goal should be to undermine the viewpoint or factual basis that direct examination laid out for the factfinder.<sup>35</sup> When the witness is a party, there is always an underlying agenda. One of the most effective ways to thwart the opposing party’s agenda is by destroying his or her credibility through challenging questions. The opposing party’s testimony is only as strong as their ability to effectively state the events that are relevant to their testimony.

#### A. Commitment to Values

Enticing the opposing party to commit to moral values can successfully highlight hypocritical behavior

exhibited by the opposing party at some point in the case. The moral values such as honesty, fidelity, and respect are universally held to be honorable values. The factfinder, whether a judge or jury, will find these societal values to be important and, as a result, the opposing party will have difficulty rejecting or disagreeing with such values during cross-examination.<sup>36</sup>

Depending on the facts, it may be wise to establish the pertinent values you want the opposing party to commit to at the beginning of your cross-examination. By questioning him or her early in the cross-examination, the opposing party will assent with a “yes” to the importance of moral values without having any clue as to how his or her answer will be used against him or her later in the cross-examination.<sup>37</sup> Once it has been established that the opposing party commits to certain moral values, the cross-examiner can begin establishing facts contrary to these values that display the opposing party’s hypocritical behavior.

Emphasizing the opposing party’s hypocrisy often generates an explosive response by the opposing party, because he or she will feel trapped by the questioning and become desperate to explain their hypocritical behavior. Oftentimes, when the opposing party is caught in violation of a moral value, the opposing party tends to behave defensively and wants to blame someone.<sup>38</sup> Often times, that “someone” is the client, and this defensive “blame game” will appear distasteful to the factfinder, thereby further eroding the opposing party’s credibility.

Eventually, the opposing party will have no other option but to admit to his or her hypocritical behavior. Once an admission is obtained, you can begin to shame the opposing party for his or her moral lapses.<sup>39</sup> When the opposing party’s hypocritical and morally unsound behavior is exposed, they prove themselves as unlikeable, and rehabilitation with the factfinder may prove to be very challenging.<sup>40</sup>

#### B. Looping

Looping is a technique used in cross-examination in which the question builds on the answer previously given. The loop formula is as follows:

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<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> Wendy Burgower (2020, August 3-6) You’ve Lost that Loving Feeling: Cross-Examination [Paper presentation]. 46th Annual Advanced Family Law Course, San Antonio, TX.

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<sup>36</sup> Ryan Malphurs, Liz Porter, Ike Vanden Eykel, & Lindsey Vanden Eykel (2017, August 7-10) Cross-Examination: Practical Tips and Techniques [Paper presentation]. 43rd Annual Advanced Family Law Course, San Antonio, TX.

<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> Id.

<sup>40</sup> Id.



1. Establish the desired fact or phrase through the use of a leading question:
2. Use the fact or phrase established in the following question, but without re- asking the fact; and
3. Connect the looped fact or phrase with an additional question that contains an undisputed fact.<sup>41</sup>

Looping picks up on the answers of the witness, build on his or her original answer, and uses his or her words to build the next question addressed, thereby using the witness's own words against them. This technique can be used to words of phrases used during a witness's deposition or trial testimony. For example:

Q: You sent my client a text message calling her a "good mother"?

Q: She was a "good mother" when she stayed home with your daughter when she fell ill?

Q: She was a "good mother" when she attended your daughter's soccer games?

Looping is a tool to reiterate and emphasize an important point and can be used to show the trier of fact that even an opponent's witness agrees with a client's proposition or viewpoint.

### C. Irving Younger's Ten Commandments

For many years, Irving Younger was considered the quintessential "teacher of trial lawyers" about the craft of trying lawsuits through his creation of ten commandments for cross-examination questions.<sup>42</sup> By writing every cross-examination question consistent with Younger's ten commandments, cross-examining lawyers are better able to control adverse witnesses through a process that, in theory, allows for one of only four possible answers to any question on cross: "yes," "no," "I can't answer that question yes or no," or "I don't know."<sup>43</sup> Younger's ten commandments included:

1. Be brief.
2. Short Questions, plain words.
3. Always ask leading questions.

<sup>41</sup> Id.

<sup>42</sup> See Stephen D. Easton, Irving Younger's Ten Commandments of Cross-Examination: A Refresher Course with Additional Suggestions, 26 AM. J. TRIAL ADVOC. 277 (2002).

<sup>43</sup> See William A. Barton, Different Types of Cross-Examination, 31(2) LITIG. J. 7, 16 (2012).

4. Don't ask a question to which you do not already know the answer to.
5. Listen to the witnesses' answers.
6. Don't quarrel with the witness.
7. Don't allow a witness to repeat his or her direct testimony.
8. Don't permit a witness to explain his or her answers.
9. Don't ask one question too many.
10. Save the ultimate point of your cross for your closing argument.<sup>44</sup>

However, how does one reconcile the notions of primacy and confirmation bias with Younger's tenth commandment? Some attorney scholars argue that Younger's tenth commandment (and others) are outdated and wrong when applying recent research in behavioral science. Shane Read explains, "Jurors make snap judgments about the effectiveness of your cross-examination as soon as you conduct it. A cross-examination is a battle between your credibility and that of the witness. Jurors quickly decide who won...Start strong. Studies have shown that people make up their minds about other people within seven seconds of first meeting them."<sup>45</sup>

Perhaps in an effort to update Younger's ten commandments, in a 2002 paper honoring Younger, Stephen Easton added ten suggestions, each in response to one of Younger's original ten commandments.<sup>46</sup> For example, Younger suggested limiting cross-examination to three points with each witness in order to control an adverse witness. In turn, Easton suggested that proper preparation requires annotating each cross-examination question with a reference to the supporting evidence. Having the means to "prove up" your question somewhere in your files is not enough, especially with an adverse witness such as the opposing party.<sup>47</sup> The questioning lawyer should ask questions that only illicit the answer "yes" and if there is anything other than a "yes" answer, the lawyer must be able to immediately access the evidence supporting

<sup>44</sup> Milfred D. Dale, Jonathan Gould & Alyssa Levine, Cross-Examining Experts in Child Custody: The Necessary Theories and MODELS...WITH Instructions, 33 J. Am. Acad. Matrim. Law, 360. (2021).

<sup>45</sup> Shane Read, Winning at Cross-Examination, A Modern Approach for Depositions and Trials (Westway Publishing, 2020).

<sup>46</sup> See Easton, *supra* note 48.

<sup>47</sup> Milfred D. Dale, Jonathan Gould & Alyssa Levine, Cross-Examining Experts in Child Custody: The Necessary Theories and MODELS...WITH Instructions, 33 J. Am. Acad. Matrim. Law, 360. (2021).

the question.<sup>48</sup>

#### IV. CROSS-EXAMINATION OF EXPERTS

When cross-examining an expert witness, stick to the facts, confirm favorable facts up front, remember Daubert factors, and discredit testimony when possible.

##### A. Stick to the Facts

Challenges to adverse experts should remain focused on the facts of the case. Attorneys often forget that the expert witnesses will likely know more about the subject matter than the attorney seeking to challenge the witness,<sup>49</sup> but this should not be true about the *facts* of the case. Fighting the facts, including the facts of the expert's methods and work in the case, should be the cross-examiner's focus. Make the expert confirm favorable facts that cannot be disputed, but do not ask about the expert's interpretation of such facts.<sup>50</sup> The expert will not want to look foolish for denying the truth of undisputed facts, but will argue and support their interpretation.<sup>51</sup> When attacking an expert witness on cross-examination, it is important to fight the facts, not the opinion.<sup>52</sup> Always consider employing your own expert to review and explain an opposing expert's report and to help craft cross-examination questions.<sup>53</sup>

##### B. Factors to Consider

In *Daubert v. Merrell Dow Pharmaceuticals*, the U.S. Supreme Court found Federal Rule of Evidence 702 to require that expert testimony must be based on sufficient facts or data and that the expert must apply reliable methods and principles to the facts and data of the case.<sup>54</sup> The *Daubert* standard<sup>55</sup> is a flexible factor-based test intended to embrace the liberal nature of the Federal Rules of Evidence. The named factors include (1) whether the knowledge can and has been tested, (2) whether the theory or technique has been subjected to

peer review and publication,

(3) the known or potential rate of error, and (4) whether the practice is generally accepted.<sup>56</sup> *Daubert* did not eliminate the concept that "general acceptance" was evidence of reliable expert testimony, but it did alter the rule to allow for other equivalent and new methods of determining whether expert evidence is reliable.<sup>57</sup>

##### C. Child Custody Evaluators

"Child custody is one of the few areas in which our otherwise adversarial, party-driven courts routinely appoint a neutral expert to conduct an investigation on its behalf."<sup>58</sup> Courts regularly appoint a neutral mental health evaluator to report on the functioning of the parents, children, and family dynamics, and to make recommendations about the parenting plan that is in the best interests of the child.<sup>59</sup> While courts are not required to rely upon the recommendations of the evaluator, many do. When cross-examining a court-appointed expert, the choice of technique must consider whether the evaluator is court-appointed and the court's relationship with that particular expert. If the court chose the evaluator and is familiar with the evaluator's work, the evaluator's report may be viewed as a preview of the court's ruling.<sup>60</sup>

Cross-examination of the child custody evaluator should focus on the reliability and relevance of the information gathered during the evaluation, the manner in which the evaluator integrated current professional and scientific knowledge of the discipline into the report, and the degree to which the expert opinions proffered in the evaluation appear logically or scientifically related to the collected data.<sup>61</sup> An effective cross-examination should address three broad areas: (1) methodology, (2) formulation of opinions, and (3) communication of findings and opinions to the court.<sup>62</sup> Below are several cross-examination models that have proven to be effective during the cross-examination of a child custody evaluator:

<sup>48</sup> See Easton, *supra* note 48 at 283-84.

<sup>49</sup> See Thomas C. O'Brien & David D. O'Brien, *Effective Strategies for Cross-Examining an Expert Witness*, 44 LITIG. J. 1 (Fall 2017).

<sup>50</sup> See Shane Read, *Winning at Cross-Examination, A Modern Approach for Depositions and Trials* (Westway Publishing, 2020).

<sup>51</sup> *Id.*

<sup>52</sup> See David Sugden, *The Expert Impeachment Witness: Fight the Facts, Not the Opinion*, EVIDENCE AT TRIAL (Apr. 19, 2018).

<sup>53</sup> *Id.*

<sup>54</sup> FED. R. EVID. 702.

<sup>55</sup> See *Daubert v. Merrell Dow Pharm., Inc.* 509 U.S. 579, 587-88 (1993).

<sup>56</sup> *Daubert*, 509 U.S. at 593-94.

<sup>57</sup> *Id.*

<sup>58</sup> Andrew I. Schepard, *Children, Courts, And Custody: Interdisciplinary Models for Divorcing Families* 152 (2004).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Milfred D. Dale, Jonathan Gould & Alyssa Levine, *Cross-Examining Experts in Child Custody: The Necessary Theories and MODELS...WITH Instructions*, 33 J. Am. Acad. Matrim. Law, 360. (2021).

<sup>62</sup> *Id.*

1. Attacking the Expert. Carefully organized cross-examination questions can force the expert to admit to errors or incorrect elements in his or her analysis.<sup>63</sup> Rather than trying to prove that the child custody evaluator is wrong, the examining attorney should attempt to identify “truths” supporting his or her challenge that the expert cannot refute. In other words, the questioning attorney must force the child custody evaluator, or any other expert, to admit undeniable truths or look silly denying them.<sup>64</sup> Establishing that the expert’s theory and testimony are incorrect may be proven by inconsistent prior statements (from depositions or even other cases), by contrasting these statements with statements of other experts in learned treatises, or by simply proving the expert is wrong about the facts or the theory that he or she applied to the facts of the case.<sup>65</sup>

2. Limiting the Use of Science. Timothy Tippins, a well-known advocate of destructive cross examination in child custody cases, targets not only the expert’s performance of a child custody evaluation, but also the “science” upon which the expert relies.<sup>66</sup> For Tippins, cross-examination of a child custody evaluator involves identifying and isolating each inference embraced by the expert’s opinion and requiring the evaluator to support each inference by citation to the empirical research.<sup>67</sup> Tippins posits that evaluators should not offer custody opinions or recommendations because the status of the relevant psychological literature supporting an evaluator’s opinion on the ultimate issue is tenuous or non-existent.<sup>68</sup> Tippins notes that “no empirical work has been done in which a matched set of children with similar test and interview data is placed into different custodial arrangements to examine the

overall effectiveness of one placement over another.”

3. Rules of the Road Approach. In *The Rules of the Road*, Rick Friedman and Patrick Malone articulate an approach to constructing a case strategy that can be used as a technique for cross-examination of expert witnesses, including child custody evaluators.<sup>69</sup> The Rules of the Road technique was initially designed for plaintiffs’ attorneys in civil cases who viewed ambiguity, confusion, and complexity as helpful to defendants, not plaintiffs.<sup>70</sup> This technique coincides with all aspects of child custody cases because the very nature of the “best interests of the child” standard is ambiguous, confusing, and complex.<sup>71</sup>

At its most basic level, the purpose of the Rules of the Road technique is “to breathe life into ambiguous legal standards and create an indisputable standard for everyone . . . to see.”<sup>72</sup> In other words, the attorney should formulate “rules” that require the dispute to be resolved in the client’s favor. These “rules” are to be used in all facets of the case, including cross examination, and should be expressed in such a way to make it uncomfortable for the expert to deny it. For example, in a child custody case, if the examining attorney can force the child custody evaluator to commit to a “rule” that essentially deems his or her client a good parent, the expert will inevitably feel uncomfortable denying the “rule” later on.

#### D. Tracing Experts and Forensic Accountants

In divorces involving complex marital estates or the commingling of assets, experts are often utilized to support a party’s valuation of a business, tracing of separate property, or presentation of a waste, reconstitution, or reimbursement claim. The field of tracing experts is not large, so the attorney should do their homework and approach seasoned valuation

<sup>63</sup> Id. at 377.

<sup>64</sup> Id. at 378.

<sup>65</sup> Id.

<sup>66</sup> Id. at 379.

<sup>67</sup> Id. at 380.

<sup>68</sup> 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, 193 (2005).

<sup>69</sup> Rick Friedman & Patrick Malone, *Rules of the Road: A Plaintiff Lawyer’s Guide to Proving Liability* (2d ed. 2010).

<sup>70</sup> Milfred D. Dale, Jonathan Gould & Alyssa Levine, Cross-Examining Experts in Child Custody: The Necessary Theories and MODELS...WITH Instructions, 33 J. Am. Acad. Matrim. Law, 383. (2021).

<sup>71</sup> Id. at 383.

<sup>72</sup> Rick Friedman & Patrick Malone, *Rules of the Road: A Plaintiff Lawyer’s Guide to Proving Liability* (2d ed. 2010).

experts with caution.<sup>73</sup> If the expert's report is available, then cross-examination questions should focus only on that report. Use the data on the page and make that expert "own" it.<sup>74</sup> Consider hiring an expert to help uncover the adverse expert's mistakes or flaws in the methodology used to develop the framework for cross-examination questions. If there is a mistake in the input on tracing, a seasoned forensic will know that the "conclusion" is vulnerable until the mistake is corrected. All it takes is finding more than one or two "data" mistakes to render an opinion unreliable. It is more effective to attack the information first and then elicit the acceptance that the mistake(s) may have impacted the conclusion.<sup>75</sup>

When drafting questions, the cross-examiner should also carefully review the adverse tracing expert's background and credentials, keeping in mind the *Daubert* factors. One method to challenge the adverse expert's testimony by attacking its admissibility. Does the adverse expert lack credentials? Has the expert's testimony previously been excluded, and if so, why? Other challenges for admissibility include lack of knowledge, lack of education, lack of certifications, lack of experience, and absence of professional memberships.<sup>76</sup>

The examining attorney may also want to explore the expert's bias by asking, for example, how many times this expert has testified for this particular attorney or how much the expert is being compensated for his or her testimony.<sup>77</sup> Also consider examining whether the adverse expert has ever taken a contrary position to the tracing methodology used or if there are alternative tracing methods that were not utilized and how that could impact the outcome.<sup>78</sup>

## V. DEPOSITIONS AND CROSS-EXAMINATION

A key part of cross examination is to never ask questions the examining attorney does not already know the answer to. To avoid any potential surprises at trial, attorneys should consider utilizing depositions

prior to the witness taking the stand. What the cross-examiner accomplished during a deposition can arm him or her for cross-examination at trial, especially if the cross-examiner approaches the deposition with the notion that the case will go to trial.

Depositions are primarily used for two objectives: (1) information gathering and/or to lay the groundwork for needed admissions to file a summary judgment, or (2) to lay a foundation of "lies" or inconsistent statements that can serve as a basis for cross-examination at trial.<sup>79</sup> Trial depositions should be handled with precision and conciseness. Enter the deposition with the mindset that this is the only opportunity to question the witness and ask questions to which you generally know the answer to base upon prior testimony, writings of the expert, discovery in the case and common sense.<sup>80</sup> The aim of a trial deposition is to control through leading questions and complete command of the facts and common sense.<sup>81</sup>

Before starting a deposition, remember to inform the deponent that: they are testifying under oath, they must give accurate and truthful answers, and if the deponent answers a question, it is assumed they understood the question. In this way, it will be difficult for the deponent to make excuses if their testimony at trial contradicts their deposition testimony. While depositions afford the witness the opportunity to "tell their story," this testimony can later be utilized at trial during cross-examination to show inconsistencies in the witness's testimony for impeachment purposes.<sup>82</sup>

## VI. CONCLUSION

Cross-examination is one of our judicial system's essential means for testing evidence and uncovering the truths of a case. In the words of John Henry Wigmore, cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth."<sup>83</sup> Few trial techniques are more difficult to perform or impossible to master than cross-examination. As most attorneys know, trials are fluid events in which the landscape is constantly changing, and things almost never go as expected.<sup>84</sup> No two witnesses are the same. Through the utilization of

<sup>73</sup> Wendy Burgower (2020, August 3-6) You've Lost that Loving Feeling: Cross-Examination [Paper presentation]. 46th Annual Advanced Family Law Course, San Antonio, TX.

<sup>74</sup> Id.

<sup>75</sup> Id.

<sup>76</sup> Kathryn Flowers Samler (2016, August 1-4). Direct and Cross Examination of a Tracing Expert [Paper presentation]. 42nd Annual Advanced Family Law Course, San Antonio, TX.

<sup>77</sup> Id.

<sup>78</sup> Id.

<sup>79</sup> Wendy Burgower (2020, August 3-6) You've Lost that Loving Feeling: Cross Examination [Paper presentation]. 46th Annual Advanced Family Law Course, San Antonio, TX.

<sup>80</sup> Id.

<sup>81</sup> Id.

<sup>82</sup> Id.

<sup>83</sup> 3 Wigmore, Evidence §1367, p. 27 (2d ed. 1923).

<sup>84</sup> Thomas W. Cranmer & David D. O'Brien, The Art of Cross-Examination, Mich. B.J., August 2013.

strategies derived from human psychology, cross examination can be more than just a tool to expose the truth. Rather, effective cross examination can be used to reveal the innerworkings of the witness's mind, motive, and morals.

