

### “THE WHOLE TRUTH”

CONFRONTING IRRESPONSIBLE EXPERTS IN CHILD PHYSICAL ABUSE AND HOMICIDE CASES

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#### The Goals of the Presentation

1. What is an "irresponsible expert witness"?
2. Discuss expert witness ethical standards applicable to all physician witnesses
3. Illustrate the behavior of a few who don't abide by those guidelines – generally by not honoring the "whole truth" part of the oath
4. Suggest ways that attorneys can confront the IDE and get Judges/juries to make the right decisions

#### Child Abuse and Expert Witnesses

- All witnesses, including experts, take an oath to:  
"tell the truth, the whole truth, and nothing but the truth"
- There are good reasons for all three requirements
- Given the fact that jurors and judges rely heavily on expert witnesses, expert witnesses must take all 3 parts seriously

#### Ethics and Guidelines

- All physician expert witnesses are subject to rules of ethics and/or guidelines relating to their participation as expert witnesses
- Each of those sets of rules apply equally to the experts whether they are subpoenaed by the prosecution or the defense
- All physician expert witnesses are bound by the duty to bear 'neutral witness to what the science supports'

#### IDEs are like zombies

- Starting with inflicted head trauma cases, but now expanded to virtually any form of child physical abuse,
- There are physicians (and sometimes teams of physicians) who are more than willing to find 'alternatives' to child abuse – in every case
- Not all defense/parents' experts are 'irresponsible'
- But several will say **anything** to help **anyone** accused of child abuse – whether they have any scientific support or not

### Your First Step

- Make sure the defense/parents' expert is not right
- Maybe the experts you've consulted missed something?
- Ask your experts about the defense expert and his/her report
- If it appears there may be a problem with your case or underlying theory – talk to the defense expert
- The truly "irresponsible" experts will likely not disclose the whole truth about their qualifications or opinions

### What to expect from defense medical witnesses

- Most often, will not offer *reasonable* alternative explanations – they hate to be asked about a "unifying diagnosis"
- Express opinions that other things are "possible" – which they are completely "certain" about
- "I see nothing in the medical findings that proves this was child abuse" or "there is no radiographic finding that alone proves abuse" -- True – so what??
- They are quite "slick" at their craft – making this sound good
- Attempt to confuse – especially as to the timing or cause of injuries

### What to expect from defense medical witnesses

- Attempt to confuse, not explain
- Criticize State's experts for:
  - Failing to do 'critical' testing
  - Rushing to judgment, based on 'dogma'
  - Not considering other things that should be in the 'differential diagnosis'
  - Lack of "evidence-based" scientific opinions (meaning no one has experimented on living kids)
- Most will concede injuries *could be* from abuse – can't really "rule out" abuse as a cause

### What to expect from defense medical witnesses

- Divide and conquer – deal with findings as though each happened in isolation, not together
- Often make grandiose statements of what the literature concludes (i.e. biomechanics) but if pressed will have a hard time supporting the opinions
- More often than not, they are not child abuse pediatricians or regularly work with children in their medical practice
- Children are NOT just miniature adults – completely different medically

### The Irresponsible Expert

Ways to attack the "hired gun"

### Drs. Chadwick/ Krous

- 📖 Drs. David Chadwick and Henry Krous wrote a good analysis of the problem in 1997
- 📖 "Irresponsible Testimony by Medical Experts in Cases Involving the Physical Abuse and Neglect of Children." – 2 CHILD MALTREATMENT No. 4, November 1997.
- 📖 The authors relate three cases from their experience where "defense" experts used unique theories to construct alternative explanations to child abuse
- 📖 They then suggest that irresponsible expert testimony can be defined as follows:

**"Irresponsible" testimony**

1. Lack of qualifications to support opinions
2. Unique theories of causation, contrary to vast medical literature and consensus
3. Unique interpretation of findings
4. Misquoting of the literature (or misunderstanding the nature of the science)
5. Blatantly false statements – either about the science or about their qualifications

**Bias**

Prosecutor Paul Stern suggests several inquiries to sort experts who may have the wrong motive for testifying:

1. What is the expert contributing to the field - through research, peer-reviewed articles, experiments or other efforts to resolve a dispute?
2. Despite being challenged in case after case, does the expert continue to say the same things and undergo the same cross-examination, without responding to criticisms?
3. Does the expert have a motive to allow the answer to the particular question to remain "murky" – since if it was clearly established, there would be no room for his/her continued testimony?
4. Does the expert "try out" his/her opinions in the courtroom only, or in the crucible of peer-reviewed science?
5. Does the expert publish articles only in places likely to come to the attention of attorneys who might be interested in the services of a witness?

**Bias**

- Does the witness actually practice in the medical field, or is he/she "retired" from practice and just makes retirement money as a "hired gun"?
- Does the witness always testify solely for criminal defendants and parents accused of child abuse?
- The "free" testimony witness – explore the truth
- Those who get paid significant sums know they won't even be involved if they don't say what the party calling them wants them to say
- We don't want "experts" like that testifying on behalf of the State

**Appropriate medical experts**

Should be able to document for the court:

1. General training and/or experience in the cause of injuries to children.
2. Specific training, education or experience relative to the particular type of case (e.g. diagnosing the cause of childhood injuries)
3. Memberships in relevant professional societies
4. Child abuse and neglect conference presentations and attendance\*
5. Relevant professional publications (peer reviewed journals, not just articles)

**Appropriate medical experts**

- AAP new Board Certification in the subspecialty of "Child Abuse Pediatrics"
- Does the expert have the qualifications to sit for the Board Certification, or not? (if that's relevant)
- What percentage of the expert's daily medical practice relates to children under the age of 10?
- Have they held themselves out to be an expert in "pediatric . . ."
- Ex. Ron Uscinski – the non-pediatric pediatric neurosurgeon

**Appropriate medical experts**

- The American Medical Association and most subspecialty organizations to which physicians belong,
- Have ethical guidelines and rules that apply to those who offer expert testimony
- The American Medical Association has made clear that physicians testifying as expert witnesses are, in fact, practicing medicine
- Therefore, there are potential consequences for those whose testimony violates the ethical guidelines

### American Medical Association Rule 9.07

- ◆ All physician witnesses are bound by these rules when they testify as experts:

When physicians choose to provide expert testimony, they should have recent and substantive experience or knowledge in the area in which they testify, and be committed to evaluating cases objectively and to providing an independent opinion. Their testimony should reflect current scientific thought and standards of care that have gained acceptance among peers in the relevant field. If a medical witness knowingly provides testimony based on a theory not widely accepted in the profession, the witness should characterize the theory as such.

### American Medical Association

All physicians must accurately represent their qualifications and must testify honestly. Physician testimony must not be influenced by financial compensation; for example, it is unethical for a physician to accept compensation that is contingent upon the outcome of litigation.

Organized medicine, including state and specialty societies, and medical licensing boards can help maintain high standards for medical witnesses by assessing claims of false or misleading testimony and issuing disciplinary sanctions as appropriate.

- Example – Ron Uscinski

#### AANS Neurosurgeon : AANS Governance

Volume 22, Number 2, 2013

#### Notice of Disciplinary Actions: Member Censure

In November 2012, the American Association of Neurological Surgeons (AANS) Board of Directors voted to censure Ronald Uscinski, MD, of Chevy Chase, Md., for unprofessional conduct for violation of the AANS Rules for Neurosurgical Medical/Legal Expert Opinion Services, Section A, Part 1, by testifying as an advocate rather than as an unbiased neurosurgical expert witness. The Rule states, "The neurosurgical expert witness shall be an impartial advisor for attorneys, jurors, and the court on the subject of neurosurgical practice." The Board decision was sustained by a member vote during an appeal of the Board decision to the AANS membership at the AANS Annual Business Meeting in New Orleans on April 29, 2013.

- ◆ Let's break down those requirements:

1. "recent and substantive experience or knowledge in the area in which they testify"
  - Many irresponsible defense experts haven't practiced EVER in the field of child or pediatric medicine (but don't tell the truth)
  - Many retired many years before
  - Frequently, their experience and knowledge relates SOLELY to their testifying as a "consultant" for those representing child abusers

- ◆ Let's break down those requirements:

1. "recent and substantive experience or knowledge in the area in which they testify"
  - For example, a part-time ER physician testifies that he has over 100,000 patient visits with a great number of those pediatric patients
  - What he doesn't point out is that he retired in 2006 and never acted as a full-time physician at all
  - And his testimony in AHT cases is based solely on what he reads

- ◆ Let's break down those requirements:

1. "recent and substantive experience or knowledge in the area in which they testify"
  - Another frequent flyer says she has done "hundreds of child autopsies"
  - But doesn't tell the rest of the truth – which is that almost ALL OF THOSE were done in a pediatric hospital setting
  - As with many other IDE's, she has not worked as a full-time medical examiner – but doesn't disclose that

1. "recent and substantive experience or knowledge in the area in which they testify"
- Another IDE regularly testifies as to fractures in infants and children
  - But has never worked in or specialized in pediatrics, at all
  - He is an adult orthopedic surgeon – maybe a few patients under age 21
- ◆ So, what is "in the area" in which they testify? Any MD will do?

2. "and be committed to evaluating cases objectively and to providing an independent opinion"
- Can the IDE evaluate a case "objectively" if he/she has a preexisting bias that people don't abuse kids, or that pediatricians regularly over-diagnose abuse?
  - What is an 'independent' opinion? – one that is based solely on the expert's views without relation to scientific support?
  - 'Objectively' at least means not acting as an advocate for any party

2. "and be committed to evaluating cases objectively and to providing an independent opinion"
- Medical examiners/coroners should be *independent* of influence by law enforcement or prosecutors to fit their findings to a particular theory of the case
  - But IDE's seem to believe their "independent" opinions about alternative causes of a child's injuries mean different than the mainstream medical community
  - Evaluating a case 'objectively' = what would diagnosticians conclude?

3. "Their testimony should reflect current scientific thought and standards of care that have gained acceptance among peers in the relevant field."
- Does that mean acceptance among those who regularly testify only as IDE's?
  - Doesn't "current scientific thought" at least require the IDE to *mention* the 800+ peer-reviewed articles that support the diagnosis of AHT?
  - The "relevant field" means nothing if not limited to those who regularly work with and diagnose the cause of injuries to young children

3. "Their testimony should reflect current scientific thought and standards of care that have gained acceptance among peers in the relevant field."
- One of the tricks of the IDE is to be "peerless"
  - "I've been practicing in my specialty for longer than any of the child abuse experts have in theirs, therefore, I know more than they do"
  - One is the only "forensic pediatric pathologist" on the planet – by her own designation
  - Others are truly experts both on paper and in their positions – but offer irresponsible testimony in courtrooms

4. "If a medical witness knowingly provides testimony based on a theory not widely accepted in the profession, the witness should characterize the theory as such."
- ◆ The duty to "tell the whole truth" includes this requirement
  - ◆ But this is almost never done by the IDE, and they are reluctant to admit it even on cross-examination
  - ◆ Good example – Marvin Miller's TBBD
  - ◆ Starts right when the abuse begins, ends right when the child is put into substitute care
  - ◆ Convenient . . .

4. "If a medical witness knowingly provides testimony based on a theory not widely accepted in the profession, the witness should characterize the theory as such."

- Another example – pending case where private pathologist and his "team" allegedly found a few cells that may be evidence of a viral infection
- He and his team extrapolate from that the 4 month-old who died from massive brain injury, SDH and traumatic retinal hemorrhages along with ON hemorrhages, died from an ear infection, which led to system-wide sepsis, which led to all the other injuries
- And NO ONE else noticed!

4. "If a medical witness knowingly provides testimony based on a theory not widely accepted in the profession, the witness should characterize the theory as such."

- Dr. Plunkett and his followers believe that there can be a "lucid interval" following fatal brain injury of hours or even days
- No scientific basis for that belief – lots of science shows that is wrong, mostly based on what happens to kids after well-documented accidental head trauma
- But, the IDE's who testify about this don't say it's an extreme minority view (or define lucid interval)

4. "If a medical witness knowingly provides testimony based on a theory not widely accepted in the profession, the witness should characterize the theory as such."

- IDE's regularly testify that short falls can kill young children – that's true, in extremely rare situations
- What they don't bother to mention is that short falls are NOT ASSOCIATED with the types of severe and diffuse brain injury, intracranial bleeding, and ocular damage unique to applied rotational force
- This is a logical tautology – a straw man

5. "All physicians must accurately represent their qualifications and testify honestly"

- Which in my mind means not play games to make it appear that they have qualifications that they don't, that they have experience that they don't, or that their qualifications are better than real experts testifying for the opposite party
- And, they should NOT testify about things they are the only one who could see or discover
- Fabricating findings is one of the primary acts that distinguish the IDE
- Fabricating scientific support for opinions is another

5. "All physicians must accurately represent their qualifications and testify honestly"

- Uscinski, Sheck and the Louise Woodward trial
- "Judge, we haven't heard, yet, from a Pediatric Neurosurgeon – and Dr. Uscinski is a Pediatric Neurosurgeon"
- Uscinski sat there and did not correct that impression – yet as of the late 1990's and even into the new century, his experience involves no more than a few "minors" per year – hardly ever has been involved with an AHT victim
- To be a Pediatric Neurosurgeon requires that 75% of the doctor's practice involve children

5. "All physicians must accurately represent their qualifications and testify honestly"

- Is it "honest testimony" to tell a judge/jury that "recent research has established that the shaken baby syndrome is flawed science, that it's benign to shake an infant human's head violently"?
- Just what "recent research" might that be? Plunkett? Bandak? Donohoe? Really??
- None of that constitutes anything other than publication of IDE's opinions – not science, or junk science
- The only real research being done is starting to establish that violent shaking is harmful

6. "Physician testimony must not be influenced by financial compensation; for example, it is unethical for a physician to accept compensation that is contingent upon the outcome of litigation."

- Those who make their primary living testifying as expert witnesses are definitely influenced by financial compensation
- Some of them are now saying they "testify" for free (because their fees relate to their review of documents or generating their report)
- Most now try to avoid travel and testify by Skype from the comfort of home or office

6. "Physician testimony must not be influenced by financial compensation; for example, it is unethical for a physician to accept compensation that is contingent upon the outcome of litigation."

- If they do testify "pro bono", it's primarily to get their name recognized by those who defend child abusers
- The IDE's regularly present at training conferences for criminal defense attorneys
- If they weren't helping the party who retained them, they would not be testifying
- So, they go out of their way to be helpful ...

6. "Physician testimony must not be influenced by financial compensation; for example, it is unethical for a physician to accept compensation that is contingent upon the outcome of litigation."

- That's not "honest testimony" and it's not science
- Often the IDE testifies in terms of "possibilities" or "plausible" explanations – not unifying diagnoses that explain the child's entire condition
- The trick of "medical certainty" that something is "possible"
- While there may not be a contingency fee agreement – IDE's know what they have to do

2001 Article – American Medical News

"The ideal goal of an expert witness during testimony is to be 'an indifferent advocate for the truth'. Too often, though, physicians make careers as such experts and use unethical tactics to sway jurors. . . . American Medical Association policy states that testimony a physician gives as an expert witness is considered to be the practice of medicine."

2001 Article – American Medical News

- The author points out that many states are enacting standards that require that expert physician witnesses spend at least some time in the active practice of medicine (not just retire to become hired guns)
- Most subspecialties of medicine now have their own ethical guidelines which apply to expert witness testimony
- Some are actively disciplining members

**Common to all expert testimony rules**

- The physician who testifies as an expert witness is expected to **bear neutral witness to what medical science supports**
- They are NOT to testify as an advocate for a particular position or party to a case (true for State's experts, too)
- If they testify about views or opinions that are not supported by the mainstream,
- they are required to disclose that (not hide it until XEX)

### "They always say the same things"

- This is the most common complaint I hear from prosecutors who research prior case testimony or reports from the small group of agenda-driven witnesses
- The "cut and paste" approach isn't exactly science, either
- Ex. – Boston physician who finds an extremely rare condition in EVERY case defense attorneys refer to him

### "I see dead people"

- "I see rickets – or rachitic rosaries"
- "I see cortical tunneling"
- "I see microscopic evidence of brain infection"
- "I see Ehlers-Danlos syndrome, which explains all the child's fractures" \*
- "I see no radiographic sign of child abuse"
- "I see no signs of child abuse (because I don't believe child abuse happens, so there are no signs)"
- "I see BEAFI"
- "I see a steady paycheck coming . . ."

### Things to consider

- The law doesn't allow pure speculation, even from an expert
- Expert testimony should not be based solely on "*ipse dixit*"
- Most IDE's can't state the underlying scientific basis of their opinions – or cite each other's polemic articles as support
- Many mis-cite Plunkett, Donohoe, or Duhaime
- None of which constitutes telling the "whole truth"

### Themes of Def Experts

- The victim was particularly susceptible to injury from regular handling:
  - A. Brittle bone disease – vitamin deficiency – OI - rickets
  - B. Easy bruising (coagulopathy) - DIC
  - C. Prematurity (in their opinion preemies susceptible to injury forever)
  - D. Disease condition, including congenital malformations
  - E. Difficult birth – prenatal or post-natal drug abuse by MO
  - F. Chronic subdurals – the "rebleed" theory
  - G. History of apparent life-threatening events
  - H. Cerebral venous thrombosis

### Themes of Def Experts

- I. "Temporary" brittle bone disease
- J. Short falls, rolling off couches "sometimes cause fatal injuries"
- K. Fractures are just "normal anatomic variants", "pseudofractures" – (like accessory sutures)
- L. Any lack of oxygen to the brain can cause all the findings of SBS/AHT
- M. Burns were "self-inflicted" by the child victim
- N. "Good people" don't abuse children – only those who fit the "profile" (which doesn't exist)

### Themes of Def Experts

- O. "It's well-known that the symptoms the child experienced take 10 – 15 hours to develop – so the injuries were caused when the child was in another person's care and custody"
- P. Retinal hemorrhages are caused by anything that increases the intracranial pressure
- Q. Biomechanical engineers have absolutely proven that serious or fatal head injuries can't be caused to a child without causing neck injuries – or have proven shaking is benign and can't cause SDH
- R. There were no bruises overlying fractures

### Themes of Def Experts

- The “shaken baby syndrome” is a faulty diagnosis with no scientific support – never replicated in the lab
- Biomechanical experiments have conclusively proven that shaking a human infant/toddler can’t cause serious brain injury
- Anything that results in loss of oxygen to the brain can cause *all* the findings associated with abuse

### Themes of Def Experts

- Because a full series of genetic tests was not done, no one can ever know if the child had a ‘preexisting condition’
- That includes “Dexa-Scans” -- hmmm
- Lab results alone don’t answer that question
- In the absence of such testing, the truth about what happened to this poor child will “forever remain a mystery”

### Themes of Def Experts

- “Short” falls can cause exactly the same injuries as are attributed to inflicted head trauma (Plunkett, 2001)
- There is no pattern of intracranial bleeding, ocular injury, or brain injury which is “pathognomonic” of abuse [that’s true]
- No medical expert can express an opinion about what happened to the child “beyond a reasonable doubt” [not required]

### Themes of Def Experts

- Biomechanical studies have shown that although a fall from 1 foot or less can cause injurious forces,
- Even sustained and violent shaking can’t exceed those thresholds
- If a child had concussion, subdurals or brain edema from shaking, failure of the neck at the cervical junction would necessarily occur *before* the head injuries

### Themes of Def Experts

- Child Abuse Pediatricians regularly jump to conclusions about the diagnosis of “intentionally” inflicted injury – mix legal and medical concepts
- Child Abuse experts and their programs are paid more when they find abuse than when they don’t
- Child Abuse experts regularly identify the perpetrator in their testimony

### Themes of Def Experts

- The experts called by the prosecution are wrong about the timing of the injuries
- Fractures or serious head injuries can be “clinically silent” for a long period of time
- Hundreds of innocent parents are being accused of child abuse when there are “possible alternative explanations”

## Confronting the IDEs

Basic ideas for responding in the courtroom

## General Rules

- Don't argue with the expert over things that don't matter (don't get sucked in)
- Stay in control – don't allow the expert to further expound (they will try)
- NEVER ask one question too many
- Ask them to provide the scientific support for each opinion expressed on direct examination
- Don't just take their word for it that "there are dozens of articles that support that view"
- Don't let them cite each other!

## General Rules

- Don't be afraid to challenge their qualifications based on their actual experience (or lack thereof)
- In your practice of medicine, have you ever been in the role of the primary diagnostician as to the cause and timing of childhood injuries?
- If yes, have you ever diagnosed a child as having injuries inflicted by another person?
- Then, get the details of those cases where they did diagnose child abuse

## A few problems to avoid

- Defense and Parents' attorneys and their experts are getting very good at "hiding the ball"
- No reports, or "preliminary reports" –
- Judges must be asked to require timely notice of experts – and willing to grant continuances to avoid game playing
- Get the Court to order timely disclosure of experts
- NO SKYPE testimony – no matter how much they guilt you into it

## Obtain admissions

- Admit that the medical findings by the treating physicians were accurately identified?
- Admit that child abuse or inflicted injury *could* account for those injuries?
- Agree that if accidental trauma can be the cause of an injury, inflicted trauma could also be the cause?
- Admit that when a caretaker of a child changes his/her story about what happened, it may be relevant to the issue of what caused injuries?

## Obtain admissions

- Admit that timing of injuries is not just a medical question?
- All the information you've reviewed was provided by defense attorneys?
- Agree a diagnostician's ethical duty is to consider all the injuries a child has, along with the explanations provided for those injuries before reaching a "unifying diagnosis?"
- Agree that not everyone with an MD degree is equally qualified to express opinions about all medical diagnoses?

### Obtain admissions

- Admit there are certain types of injuries that a non-mobile infant can't cause to themselves?
- Those injuries require someone else's intervention?
- Admit that the peer-reviewed pediatric literature does not support their opinion
- Admit they have not conducted any *original* research to answer the questions they've raised
- (Remember, research is not polemics!)

### Obtain admissions

- "When you claim to be a 'forensic' expert witness, that only means that you testify a lot in court, correct?"
- "In fact, there is no subspecialty in your field where you are qualified as a "forensic. . . , isn't that true?"
- Example – Janice Ophoven claims to be the world's only "forensic pediatric pathologist"

### Obtain admissions

"Do you believe that you've complied with all your ethical responsibilities as a physician expert witness in your direct testimony here today?"

- When they say "yes" – go through all the rules you know they've violated
- "You've done training presentations for the national association of criminal defense lawyers, is that correct?"
- "can you point us to any similar presentations you've done for criminal prosecutors or child protection attorneys?"

### Advanced Cross-Examination

- If you get advance notice of who the defense experts will be . . .
- Contact NDAA-APRI and get access to their extensive materials on that expert (the frequent fliers are well-known)
- Read and analyze the transcripts of their testimony, prior case reports, and even media reports of their testimony
- "You've testified 65 times this year for parents' attorneys or criminal defense attorneys, correct?"
- "And in none of those cases did you opine it was child abuse?"

- "In case X you testified that the child did NOT have posterior rib fractures, external marks or bruises, or other signs of abuse, therefore you concluded he was not abused?"
- "But in this case, Y has those missing injuries and you still say it could not have been from abuse?"
- "Dr. in your opinion, if the child in this case has a metabolic bone disease, that alone means the child could not possibly have suffered inflicted injury, is that right?"
- "What is your empirical, scientific basis for that claim?" [controlled, normative studies, not just opinion]

- "In your report, you state that you regularly consult with the 'foremost experts in your field', right?"
- "Tell us some of those individuals whom you consider to be the leading experts in the field?"
- When they list the group of irresponsible experts, then ask
- "Isn't it true, Dr. B, that each of those physicians you've listed regularly testifies solely for those accused of abuse, either in juvenile court or criminal court?"
- "Is 'child abuse deniers' a recognized subspecialty of your area of medical practice?"

### Motives of the IDEs

- ◆ For many, it's simply how they make their living
- ◆ In one of my cases, two of the three defense experts left active practice of medicine more than a decade ago and have done *nothing other than testify for criminal defendants or parents in abuse cases for 11 to 15 years*
- ◆ One of those makes an average of \$35,000 per case!
- ◆ For others, they really just won't believe that "normal" people abuse children

### Motives of the IDEs

- ◆ Some are actually motivated by "revenge" – look for those who have been fired from a job, for instance with a medical examiner's office
- ◆ Attention? Munchausen by Expert Testimony?
- ◆ One IDE regularly appears on the Nancy Grace show on CNN
- ◆ Know what they say in court is what Judge/jury wants to hear

### Preparing for XEX

- Get their identity and report even before the statutory deadline for expert reports
- Ask the Judge to impose his/her own expert notice deadlines
- Make sure the "notice" is real notice, not "Dr. X will say some stuff about this case"
- No substitute for an actual expert report – needs to be adequate to allow preparation of XEX in advance

### Preparing for XEX

- Consider filing a Motion in Limine if the defense expert's claims/qualifications may not pass tests of reliability (Rule 702, Daubert, Rimmasch?)
- May not keep them out, but limit and educate the Judge as to the limits of support for their theories
- ◆ Remind the Judge he/she is still a gatekeeper for junk science – IDE's regularly offer junk science
- Good chance to contrast expertise and qualifications – compare IDE's vs real experts

### Preparing for XEX

- In direct exam and in their report, they usually speculate about what the State's experts are saying/concluding – or how they reached their opinions
- Ask if they've even talked to those other experts – (almost never)
- That shows their lack of objectivity
- ◆ If at all possible, ask the experts you're relying upon to observe the IDE's testimony – get court permission for that in advance
- ◆ Most of the time, the IDE won't be there for the state's experts because that would cost more

### Preparing for XEX

- To find out about bias, file a Discovery Motion asking the Court to order the defense expert to provide:
  - A list of all cases in which they have provided expert report and/or testimony for the last \_\_\_\_ years;
  - Description of the issues in each case, what type of case (criminal, juvenile, etc.);
  - Whether they actually testified
  - Who subpoenaed them to testify
  - Their fees in those cases
- Be creative in discovery requests – sometimes they just go away

### Preparing for XEX

- If they comply, you'll have almost all you need to expose them as a "hired gun"
- Some prosecutors have had success asking questions such as:
  - What overall percentage of your annual income is derived from acting as an expert witness/expert consultant?
  - When was the last time you actively saw and diagnosed medical conditions in patients (vs. reviewed other physician's reports to criticize)?

### Don't go it alone

- There are a few of us around who have been doing this for a very long time
- NDAA knows who to refer you to based on who your IDEs are and the issues in your case
- In some cases, you should consult with experts other than those we work with here all the time
- The key to successfully proving your case and adequately exposing the weaknesses of the ide is to understand all the medical aspects of your case
- Keep at it until you feel comfortable that you "get it" – if you don't, the judge/jury won't

### The responsibility to advocate

- It's our responsibility to provide clear evidence of the differences between defense/parents' experts and State's experts –
  - expertise, actually working with child patients;
  - no financial stake in the matter; vs
  - advertising their availability as a child abuse "buster" on the Internet, exhibiting their wares at attorney conferences;
  - always finding some other cause, no matter how absurd, other than child abuse;
  - underlying bias is clear from words they use "dogma", "draconian", "rush to judgment",

### The responsibility to "judge"

- It's the Judge's responsibility to assign appropriate weight to the testimony of experts
- When they are diametrically opposed – *they can't all be right*
- Basis for sorting comes down to common sense, who is in the best position to know the answers, and who has mainstream medical literature to support their opinions (not who is the slickest testifier!)
- Who is biased, who is making a living as a hired-gun, who is teaming up with others who believe that child abuse is "over-diagnosed"? Who is making it up as they go?

### The responsibility to "judge"

- Whose testimony is supported by "general acceptance" in the relevant field?
- The "field" is made up of those who regularly diagnose pediatric patients – not just anyone with an MD degree
- Who has provided the scientific basis underlying their opinions – through actual peer-reviewed medical literature, not just their own unsupported opinions?
- "Scientific denialism" is not a "relevant scientific field"
- Those who don't work in the "field" have no business testifying about the cause, mechanism or timing of childhood injuries – their expertise does not "fit" the needs of the case -- *Daubert*

Example of child protection case where the court got it horribly wrong

**In re Yohan K**

- ◆ Illinois Appellate Court got it completely wrong
- ◆ When the Court credits every expert equally – they have a tough time judging the truth
- ◆ In this case, the trial judge got it right – the defense experts' bizarre and inconsistent theories made no common sense
- ◆ The Appellate Court:
  - “...the trial judge's finding of abuse and neglect cannot stand and (the parents) have been thrust into a nightmare by well-intentioned but misguided doctors and child protection specialists”

**In re Yohan K**

- ◆ 993 N.E. 2d 877
- ◆ One of the nation's leading irresponsible experts, Patrick Barnes, testified the baby had congenital rickets [even though his vitamin D levels were NORMAL]
- ◆ COA decided that because Barnes had been around longer than all the State's experts, he was the smartest person in the room
- ◆ And, he was the only one qualified as an expert in “mimics of child abuse” – because he wrote a polemic article about that – which has been soundly criticized by the mainstream!

**In re Yohan K**

- ◆ Can only assume there was no effective challenge to Barnes – who is well-known to only testify for people accused of abuse in juvenile or criminal court since he testified for the prosecution in the Louise Woodward case
- ◆ It could take another hour for me to explain all the ways to challenge Barnes,
- ◆ But I'll sum it up by this: he doesn't tell the whole truth – he testifies solely as an advocate for a position – and he sees things no one else can see (like rickets) – but not in his “day job” as a pediatric neuroradiologist – only in his idle role

**In re Yohan K**

- “Instead of evaluating and weighing the evidence and expert testimony as to each alleged injury, the trial court allowed the proponents to elude their burden of proof by claiming that the ‘constellation’ of Yohan's injuries created a preponderance of evidence that he was abused. This ‘constellation’ of injuries theory allowed the trial court to conclude that Yohan had been abused even though not one of his individual injuries within the constellation had been proven to be abuse...”
- ◆ Really? So now we have to prove each injury could only be from abuse?
  - ◆ Either the State's experts didn't adequately explain the ethical duty to reach a “unifying diagnosis” whenever possible [explaining all of the child's injuries] or the COA didn't “get it” [or had their own bias at work]

**In re Yohan K**

- ◆ But the State's experts did exactly what the ethics applicable to physicians require them to do
- ◆ Barnes and his squad did just the opposite
- ◆ The trial judge specifically found it was absurd that this one child had a collection of three different extremely rare conditions, and that explained all his injuries [rickets, benign extra-axial fluid of infancy, naturally occurring periosteal elevations]
- ◆ The COA, so enamored with Barnes – criticized the State's experts for doing what they're ethically bound to do

**In re Yohan K**

- This is a good example of what happens if we aren't prepared to point out the differences between the irresponsible experts and the responsible, well-qualified experts
- That's not to say every parents' or defendants' expert is "irresponsible" – but the ones we're seeing frequently fit the definition
- Although the case law prohibits experts from personally criticizing each other, there are many ways to illustrate the problem without *ad hominem* attacks by the State's experts

**Patrick Barnes**

- I don't usually single out an IDE for such treatment,
- But this one is a good example
- Because he really is a pediatric neuroradiologist – he really is trained to know about children
- What we know is that since he moved to southern california, although he continues to be a member of the "child protection team" at Lucile Packard children's hospital,
- He never testifies for the State in child protection cases or for the prosecution

**Patrick Barnes**

- Let's look a little deeper:
- Barnes regularly presents training for conferences of criminal defense attorneys and parents' attorneys
- Since the Woodward trial in the late '90's – he's contributed nothing meaningful in terms of any medical research
- His articles since then have been "agenda-driven" case studies where he's trying to get others to believe his defense-oriented views
- Ex. Dysphagic choking article – didn't tell the whole truth about the child's 'constellation' of injuries – or his and co-authors' roles in that case!

**Patrick Barnes**

- When challenged by others about this less-than-truthful behavior, he responded that he didn't have to tell all the injuries the child had because they were "not presenting original research" in the article
- In his "day job" as a Pediatric Neuroradiologist, the child abuse pediatrician he works with confirms that he offers "conventional" opinions regarding child abuse
- In that situation, he has never raised the issue of rickets!
- In every transcript I've read when he testifies as a defense expert, he finds rickets, metabolic bone disease, and/or CVT

**Patrick Barnes**

- So, what's wrong with his testimony in *Yohan K*?
- Even if the baby had rickets – he was only a few weeks old at the time he was hospitalized – no time to develop true rickets
- *There is no peer-reviewed medical support for the position that rickets causes fractures in infants who are not yet mobile –*
- So, even if Barnes was right that Yohan had rickets – it does NOT mimic a child abuse-related fracture in a pre-mobile infant
- He was never challenged about that lack of scientific support for his opinion

## AREAS TO COVER

- What has the expert done to test his/her opinions in the peer-reviewed literature?
- What is the scientific basis for each opinion stated – and can the expert outline how he/she got from “Point A” to “Point Z”?
- Craft questions based on the *Daubert* criteria
- If the defense expert says they have diagnosed that injuries were the result of child abuse before – what was the difference in that case?
- If you’ve gone through transcripts, inconsistencies abound

## AREAS TO COVER

- If their publications are only “review” articles, clarify that they have not done any original research, but only collected and criticized some other articles (Donohoe, Uscinski, Leestma)
- Ask if they are aware of the 750+ articles which support the diagnosis of SBS/AHT and if they have reviewed all of that literature
- Doesn’t matter if they say they have and disagree with ALL OF IT – not reasonable

## AREAS TO COVER

- Many will admit that their opinions and views are different from the vast majority of those medical professionals who work with children on a regular basis
- Some will brag about that – good
- Anything you can do to isolate them on their little island
- Is their opinion that infants/toddlers are just scaled-down versions of adult humans – medically there is no difference other than size?

## AREAS TO COVER

- If they rely on biomechanical studies as though they conclusively answer questions concerning what happens to human children:
  - Is it your contention, Dr., that there is no difference between adult primates and infant humans?
  - Do you claim that the results of those experiments establish *exactly* what happens to infants/toddlers when various strains are placed on their brains?
  - Is there any anthropomorphic dummy, animal, or other object of experimentations that replicates *exactly* what occurs to a human infant or toddler?

## AREAS TO COVER

- “Is it your contention that the exact properties of human infant brain tissue are known?”
- “Agree that no one can establish those facts by experimenting on real children?”
- “Since you have relied on the article by Dr. Bandak to support your claim that infant head injuries by application of rotational force would be preceded by neck injury . . .
- Are you aware he made a 10X math error?

## AREAS TO COVER

- “Given that error, Dr. Bandak’s calculations are based on an infant human’s neck being 3 feet long – of course, you knew that before you testified today?”
- “And, Dr. Bandak, as have many others, assumed that the ‘thresholds’ for SDH in adult primates are exactly the same as for human infants, is that right?”
- “Of course, you’re also aware those “thresholds” were not based on shaking those adult primates, correct?”

### Real research

- Dr. Brittany Coats is now at the University of Utah
- She is conducting real biomechanical research to answer questions relating to the cause of infant head injuries
- But, she concedes that all such research will always come up short in providing exact answers
- At least one of her colleagues has no problem ignoring that “gap” in scientific proof

### A Few Things You Should Know

The 'truth' about IDE claims

### AHT/SBS

- Despite all the media hype based on claims of IDEs and/or Innocence Project representatives
- The medical diagnosis of SBS and AHT is on firmer ground than ever
- There is no dispute about the diagnosis – the only issue to be resolved is whether impact is required to cause serious/fatal brain injury along with violent and sustained shaking
- It's not true there are “hundreds of people innocently imprisoned for the shaken baby syndrome”

### Vitamin Deficiency and Rickets

- It's quite true that a fairly large number of infants in the USA have Vitamin D “insufficiency”
- A smaller number actually have Vit D “deficiency”
- It's NOT TRUE that a mere vitamin insufficiency or deficiency establishes that a child has brittle bones or metabolic bone disease
- AAP has made it very clear – a doctor cannot diagnose “rickets” purely from a blood draw result in the absence of radiographic evidence of bone abnormality

### Vitamin Deficiency and Rickets

- So, Patrick Barnes and others have now created a fiction:
- “Pre-rickets” or “healing rickets” – no clear radiographic findings of rickets, yet
- But that doesn't mean the baby didn't have developing rickets and “early” brittle bones
- NO scientific support for that, at all
- If it's not present, you just need a P Barnes to “see things that no one else can see”

### Vitamin Deficiency and Rickets

- IDEs will claim the child should have been subjected to a full series of genetic tests (or Chan's dexta scans – which are useless)
- Many of the tests would not be medically indicated – NOT appropriate to do tests just for court purposes
- AAP (2013) article brings rationality to this claim
- If the victim has bone deficiency – why would he/she have ONLY posterior rib fractures in two different ages?
- And, remember that non-mobile infants who *do have diagnosed rickets* do not present with fractures

### Osteogenesis Imperfecta

- Is rare, but it does occur
- Can be ruled in or out with appropriate diagnostic testing – four different types, one can be subtle – one not so much
- Even kids with OI can be abused – should not have solely posterior rib fractures or CML's of metaphyses of arms or legs
- OI kids usually have lots of fractures everywhere from normal daily handling
- IDE's will "find" OI, even where it doesn't exist

### Coagulopathies – easy bruising

- Many conditions can lead to easy bruising in infants and toddlers
- All can be verified or ruled out by lab testing
- IDEs like to make "cart before the horse" arguments –
- DIC – often IDEs claim it was a "preexisting" condition, rather than a well-known *result* of a traumatic brain injury

### Cerebral Venous Thrombosis

- Also sometimes called "superior sagittal sinus thrombosis"
- Is also a well-known and even expected complication of kids with a traumatic brain injury who are kept alive on artificial life support, but whose brain injury limits the blood flow to their brain
- IDEs will either see it when it's not there, or say it pre-existed the child's collapse and explains the whole set of injuries (no science to support that)

Courtroom tactics

Strengthen your case

Cut the legs out from the defense experts

### Thorough examination of State's experts

- There are LOTS of things that your experts can establish about child abuse and child abusers
- If a child has a clearly inflicted injury while in the care of one person, and also has similar older and healing injuries, from a medical standpoint it's likely that same person caused the other injuries
- Child abuse is not caused by just anyone who has "access" to a child – caused by caregivers who are stressed while providing care – usually alone

### Thorough examination of State's experts

- Don't assume judges/juries know everything there is to know about child abuse
- Ask State's experts to explain there is NO PROFILE!!!
- Ask State's experts their response to defense experts' reports – including the basis for those opinions
- State's experts should stress the importance of considering the entire 'differential diagnosis' in making diagnostic decisions – point out the defense experts don't engage in that process – they're not diagnosticians

### Thorough examination of State's experts

- Have the State's experts give a basic education about anatomy, mechanism of injuries, timing of symptoms
- Use graphics, illustrations, computer animations – whatever it takes to teach what is known about the cause of certain types of injuries
- Example – posterior rib fractures in infants and young children – only one mechanism
- Tailor the education to the issues in each case – never exactly the same

### Test the scientific support

- Most irresponsible experts can only misquote scientific articles to provide "support" for their theories – or cite each other
- Don't allow them to get away with saying things like: "Neurosurgeons have long known that retinal hemorrhages are caused by increases in intracranial pressure" – Response: not the *type* associated with AHT
- The truly "irresponsible" expert will say anything to support the party who hired him/her – not the neutral role expected

### Test the scientific support

- Although they will claim no "evidence base" for the State's expert opinions – ask them about the evidence base for each of their own opinions [*ipse dixit???*]
- Ex. – Gary Chan and his magic dexta scan – assigns a numerical value to each child's "bone density"
- Which means exactly NOTHING – because there is no normative testing to show what is normal vs. what is a risk for brittle bones

### Test their qualifications

- Pin them down on their experience with a *pediatric* population – and as a diagnostician
- If they hold themselves out as a "Pediatric . . .", find out the qualifications for membership in that association
- Virtually every "irresponsible expert" offering testimony as to abuse of children has a primary involvement with adult patients – or very little active work now
- Some retired decades ago – Horace Gardner

### Cross-examination of experts

- Don't be 'cross' – don't lose your cool no matter how outrageous their claims are
- Approach them with professional courtesy as you undercut their credibility point by point
- And, do NOT under any circumstances, call them "Mr."

