**The Who, What, When, Where, Why, and How of Experts**

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**The Right to Expert Assistance**

* Indigent defendants have the right to expert assistance at state expense
* Expert assistance might include:
	+ Performing independent testing
	+ Evaluating the evidence
	+ Consulting to help prepare a defense and for cross-examination of the state’s experts
	+ Testimony
* The expert should be independent of the state and available to work as part of the defense team
* See *Ake v Oklahoma*, 470 US 68 (1985), *McWilliams v Dunn*, 137 S Ct 1790 (2017), *People v Kennedy*, 502 Mich 206 (2018)

**The Need for Expert Assistance**

* Constitutionally effective representation may require attorneys to consult experts in preparation for trial or sentencing, regardless of client’s indigency
* In some cases, “the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence”
	+ See *Harrington v Richter*, 562 US 86, 106 (2011)

**What makes an expert an expert?**

* Knowledge, skill, experience, training, or education
* Expert testimony must be:
	+ Based on sufficient facts or data
	+ The product of reliable principles and methods
	+ Result from the reliable application of those principles or methods to the facts of the case
* See MRE 702, *People v Carll*, 322 Mich App 690 (2018)

**When do you need to consult an expert?**

* Cases where the prosecution’s case rests on scientific, medical, or forensic evidence
* Cases where scientific, medical, or forensic evidence might support a defense at trial
* Cases where there is mitigation evidence to present at sentencing
* In cases requiring expert assistance, try to begin working with the expert as soon as possible

**Common Issues Involving Experts – THIS IS NOT AN EXHUASTIVE LIST**

* Issues related to competency and criminal responsibility
	+ *Drope v Missouri*, 420 US 162 (1975)
	+ *People v Lucas*, 393 Mich 522 (1975)
* Keep an eye out for cases involving the following issues or areas of science, medicine, and forensics:
	+ Child sexual abuse syndrome
	+ Children’s susceptibility to suggestion
	+ Shaken Baby Syndrome/Abusive Head Trauma
	+ Tool mark identification
	+ DNA testing, particularly YSTR testing of mixtures
	+ Arson
	+ Battered Spouse Syndrome
	+ Accident reconstruction
	+ Cell phone or cell tower data
	+ Eyewitness identification
	+ Psychology, including competency and criminal responsibility
	+ Sexual delinquency
	+ Forensic and/or Neuropathology
	+ This list is not exhaustive and attorneys should be vigilant, especially when anticipating prosecution expert testimony or other evidence presented as reflecting expertise

**How do you find the right expert for your case?**

* Know your case, including all discovery materials
* Identify any scientific, medical, forensic evidence the prosecution is likely to rely on to prove their case
* Identify places where scientific, medical, or forensic testimony or evidence might help establish a defense to the prosecution’s case
* Do some preliminary research about that field of expertise
	+ Online research
	+ Defense attorney forums, list servs, SADO’s expert database
	+ Journal articles
	+ National Academy of Sciences papers, including *Strengthening Forensic Science in the United States* (2009), available online at: <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>
* Talk to potential experts and talk to others about them
* Ask for referrals from other attorneys, law school clinics
* Get creative
	+ Work with someone who has the expertise you are looking for, but who may have less or no experience as an expert witness
		- See *People v Carll*, 322 Mich App 690 (2018)
	+ Reach out to local universities

**How to get money for experts**

* Request funds through the appropriate procedures
* Newly clarified (and constitutional) standard:
	+ Defendant must show the trial court that there exists a reasonable probability both that:
		- An expert would be of assistance to the defense; and
		- That denial of expert assistance would result in a fundamentally unfair trial
	+ Support your request using caselaw and other materials, such as the MIDC’s white paper on Investigation and Experts, available at: <http://michiganidc.gov/wp-content/uploads/2017/03/White-Paper-3-Experts-and-Investigators.pdf>
* Sample motions and language for motions provided in handouts

**What if I can’t get the money?**

* Make sure the record reflects your efforts – this is especially important to preserve the issue for appeal

**Make it easy for the expert to work with you**

* Be clear about what you need/expect from the expert
* Make sure you understand what the expert needs/expects from you
* Stay in touch with the expert and keep the expert updated throughout the proceedings
* Don’t hide bad facts the expert will eventually learn anyway
* Avoid the document dump
	+ But be sure to provide them with reports/summaries from all prosecution experts, all expert testimony, and records of the underlying basis for that testimony
* Do whatever you can to save the expert time (and you money)
	+ Offer to take notes during your meetings, prepare summaries to make sure you are on the same page
	+ Offer to draft affidavits or reports based on meetings with the expert
* If your expert will be preparing a report or affidavit, make sure you speak with them before they write the report
	+ See if they will allow you to review a draft report so that you can help shape the final product to fit your case
	+ Clear and regular communication is key to getting what you need from the expert
* If your expert will be testifying, take the time to prepare the expert
	+ Provide an outline of topics you plan to cover
	+ Make sure they know where to go and when
	+ Make sure any necessary arrangements are made for demonstratives, exhibits, or technology
	+ Let your expert know what to expect from the judge or prosecutor
* The easier you make it for the expert to work with you, the easier it will be for you to work with them in the future

**Additional Resources (included with CAP handouts):**

Kennedy Cheat Sheet