

FORENSIC PATHOLOGY C.A.P. PRESENTATION

1. Medical Examiner Qualifications:

- a. Education
- b. Board Certifications
 - 1) Anatomic or Clinical Pathology
 - 2) Forensic Pathology
 - 3) Neuropathology
- c. Work Experience
- d. Prior Expert Testimony:
 - 1) In general
 - 2) Similar cause and manner of death
 - 3) How to locate prior testimony:
 - A) Your Expert
 - 1] Ask your expert
 - 2] Westlaw / Lexis search:
 - a] In general
 - b] *Daubert* challenges
 - 3] Google search
 - a] In general
 - b] *Daubert* challenges
 - 4] Ask around
 - B) Opposing Expert
 - 1] Ask your expert

- 2] Westlaw / Lexis search
 - a] In general
 - b] *Daubert* challenges
- 3] Google search
 - a] In general
 - b] *Daubert* challenges
- 4] Ask around:
 - a] S.A.D.O. [<http://www.sado.org/Page/28/Services-Expert-Witness-Collection> – by subscription]
 - b] Other attorneys
- 5] Get:
 - a] Transcripts
 - b] Reports
 - c] Articles / Books
 - d] F.O.I.A. request to Medical Examiner’s Office
 - e] Materials to be produced pursuant to MCR 6.201(A)(3):
 - A] Make request
 - B] Expert CV
 - C] Report by expert or written description of substance of proposed expert testimony, expert’s opinion(s), and underlying basis of opinion(s)

- e. Teaching
- f. Publications

g. Membership / leadership in professional organizations

2. What to Look for in Wayne County Medical Examiner's Office Files:

a. Typical WCMEO Report:

1) Post-Mortem Report:

A) Summary & Opinion (usually one page)

B) More detailed report

2) Autopsy Diagram(s)

3) WCME Photos:

A) Scene photos – WCMEO investigator

B) Autopsy photos – Kelly Root

4) Toxicology Report (blood, urine, vitreous fluid):

A) Sent out for analysis

B) Takes a while

C) Consider whether to wait for report before proceeding with exam

5) Identification Information

6) Background Information

7) Physical Evidence (e.g. bullet or fragment, clothing, SAK, blood card):

A) Collected by medical examiner

B) Put into sealed & signed envelope

C) Turned over to WCMEO investigator

D) Then turned over to police

b. Other Items:

1) Tissue sample slides

- 2) Work done by others (e.g., specialized work done on request)
- 3) Other documents reviewed (e.g., other medical records of decedent)
- 4) Other

3. **Battle of the Experts [See M Crim JI 5.10(2): “[Y]ou do not have to believe an expert’s opinion. Instead, you should decide whether you believe it and how important you think it is. When you decide whether you believe an expert’s opinion, think carefully about the reasons and facts [he / she] gave for [his / her] opinion, and whether those facts are true. You should also think about the expert’s qualifications, and whether [his / her] opinion makes sense when you think about the other evidence in the case.”]:**

- a. Jury has to decide which of two doctors to believe / trust, based on at most several hours of exposure to each or both, and to decide if evidence proves defendant’s guilt beyond a reasonable doubt
- b. Task is unfamiliar to jurors – need a good analogy to something jurors may have to do in making an important decision in their daily lives
- c. Chief Judge Timothy Kenny’s “Battle of the Experts” Analogy:
 - 1) Imagine you go to your family doctor because of persistent and painful headaches, that have continued despite your doctor’s best efforts
 - 2) Your doctor refers you to two experts for their opinions:
 - A) One has all the attributes, education, and work experience of the prosecution expert
 - B) The other has all the attributes, education, and work experience of the defense expert
 - 3) You get diametrically different opinion from each:
 - A) One says that they are just headaches, and recommends changing diet, reducing booze and caffeine, getting more sleep, and reducing stress
 - B) The other one says that you have a brain tumor requiring prompt surgery
 - 4) How would you decide which doctor’s opinion to trust?
 - 5) EXPERTISE: While sitting in the waiting room, wouldn’t you probably look at the diplomas and awards on the walls of each office, review what

was said in biographies in office brochures, and ask about the qualifications of each expert who provided you an opinion?

- A) Education
 - B) Board Certifications
 - C) Work Experience:
 - 1] In general
 - 2] The problem(s) at issue
 - D) Teaching
 - E) Publications, speeches, etc. – what has the doctor written or said about the problem(s) at issue in the past
 - F) Membership/leadership in professional organizations
 - G) Our expert wins this battle because of
- 6) BASIS FOR OPINION: What work did each doctor do to arrive at his or her opinion?
- A) Did she or he examine you personally or just review records?
 - B) Did she or he perform her or his own analysis or merely critique the other doctor's opinion(s)?
 - C) Did she or he make sure that the right tests or analyses were done?
 - D) What facts or data were relied upon? [Adequacy of facts or data relied upon by an expert may always be tested on cross-examination. *Campbell v Charles J Rodgers Constr Co*, 58 Mich App 411, 416 (1975)]
 - E) Did the expert prepare a thorough and understandable report or presentation?
 - F) Did that report explain how and why he or she reached the included opinion(s)?
 - G) Our expert wins this battle because of

7) COMMON SENSE: Does each doctor's opinion make common sense to you, based on everything else you know [See M Crim JI 3.6(3)(c): "All in all, how reasonable does the witness's testimony seem when you think about all the other evidence in the case?"]?

- A) Is the opinion comprehensible?
- B) Does the doctor explain how and why he or she reached the opinion(s)?
- C) Is the opinion based on the facts, as you know them?
- D) Does this make sense to you?
- E) Does he or she explain how and why each opinion of the other doctor is wrong?
- F) Does this make sense?
- G) Bias or interest in outcome [Parties can generally elicit a "very liberal" or "broad" range of evidence to discredit an expert witness, so long as cross-examination does not involve personal attacks or unsubstantiated innuendo. *Wilson v Stilwill*, 411 Mich 587, 599 (1981); *Wischmeyer v Schanz*, 449 Mich 469, 474-475, 481 (1995); *People v Tyson*, 423 Mich 357, 375 (1985); *Kern v St Luke's Hosp Ass'n*, 404 Mich 339 (1978); *Board of County Rd Comm v GLS LeasCo, Inc*, 394 Mich 126, 132-134 (1975)]:
 - 1] Can be cross-examined on compensation. *Alford v Vincent*, 53 Mich 555 (1884); *People v Williams*, 162 Mich.App. 542, 548-549 (1987) [Counsel is always free to argue from the evidence presented at trial that an expert witness had a financial motive to testify]; *People v Unger*, 278 Mich App 210, 236-237 (2008), lv den 408 Mich 1027 (2008) [The prosecution was free to argue that defense counsel had "bought" [expert's] testimony by paying him a substantial amount of money]
 - 2] Can be cross-examined on amount earned for expert witness testimony. *Wilson v Stilwill*, 411 Mich 587 (1981).
 - 3] Can be cross-examined on testimony in similar cases. *Wilson v Stilwill*, 411 Mich 587 (1981).

4] Can be cross-examined about testimony for a particular class of plaintiffs or defendants. *Wilson v Stilwill*, 411 Mich 587 (1981).

H) Our expert wins this battle because of

8) Demeanor: What was the expert's demeanor like when you spoke with him or her about the opinion(s) [See M Crim JI 3.6(3)(c): "How did the witness look and act while testifying? Did the witness seem to be making an honest effort to tell the truth, or did the witness seem to evade the questions or argue with the lawyers?"]?

A) Was the expert forthright or defensive when you asked questions about his or her opinion(s)?

B) Did the expert argue with you when you probed about his or her opinion(s), or how or why he or she arrived at the opinion(s)?

C) Did the expert give you straight answers to the questions you asked, or was she or he evasive?

D) Did you have to bring in the expert's boss to get him or her to give you straight answers to your questions [like when I had to get the judge to order the opposing expert to do so during his or her testimony].

E) Was the expert's overall demeanor one that would lead you to trust the opinion he or she gave you, or one that would cause you to question it?

F) Our expert wins this battle because....

NOTE: Make sure that your expert is instructed to be and is straight forward on both direct and cross-exam, that he or she avoids arguing with opposing counsel while holding his or her ground, and that he or she does not appear to be argumentative, evasive, or slippery on the stand. See how to deal with elusive witnesses (often experts) in McElhany, "The Greased Pig -- Handling Elusive Witnesses in Closing Argument", 74 A.B.A. J. 115 (1981).

9) Looking at the opposing experts' respective qualifications, work done, common sense, and demeanor in this case, if you received diametrically opposed opinions about your headaches and their treatment from specialists with similar attributes as the trial experts in this case, you'd trust the specialist like our expert because....

- 10) Use that same common sense and reason in accepting the testimony of our expert witness, and in rejecting the contrary opinion of the opposing expert.

4. Specific Subjects on Causes and Manners of Death:

- a. Shaken Baby Syndrome (a/k/a Abusive Head Trauma or AHT)
 - 1) *People v Ackley*, 497 Mich 381 (2015) – failure to obtain or consult with expert witness re: AHT held to be ineffective assistance of counsel in murder and child abuse prosecution.
 - 2) *People v Beebe*, unpubl op of Michigan Court of Appeals, 2018 WL 6625246 (Dkt. 339760, Dec 18, 2018) – expert testimony admissible under MRE 702 notwithstanding “prominent controversy within the medical community”
 - 3) *People v McFarlane*, 325 Mich App 307 (2018), app for lv to appeal taken under consideration, ___ Mich ___, 933 NW 2d 692 (2019) – criticized, in *dicta*, reference by prosecution expert to terms “abusive head trauma” and “child abuse.”
- b. Bite Mark Evidence:
 - 1) *People v Marsh*, 177 Mich App 161, 162 (1989) – held admissible under *Davis / Frye* analysis
 - 2) Statistical analysis inadmissible, based on parties’ stipulations as to trial court’s findings after remand for *Davis / Frye* analysis. *People v Wright* (on rem), unpubl op of Michigan Court of Appeals, 1999 WL 33446496 (Dkt. 179564, Apr 23, 1999); rem to trial court 461 Mich 906 (1999); rem for new trial, 463 Mich 993 (2001)
 - 3) Problems with identifying alleged bite mark to particular defendant discussed in *Otero v Warnick*, 241 Mich App 143 (2000), lv den 463 Mich 903 (2000) [ME’s forensic pathologist owed no legal duty to criminal defendant, so no legal liability to that defendant regardless of even gross negligence]; *Amolsch v Warnick*, unpubl op of Michigan Court of Appeals, 1999 WL 33446484 (Dkt. 203198, Apr 27, 1999), lv den 462 Mich 865 (2000) [same]; *People v Ege*, unpubl op of Michigan Court of Appeals, 1996 WL 33359075 (Dkt. 173448, Sep 17, 1996), lv den 456 Mich 911 (1997) [in “troubling case.” conviction affirmed despite contradictory expert testimony]