The Expert Witness as a Backdoor to Impermissible Hearsay Testimony[1]

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The core components for admissibility into evidence are relevance, materiality, and competence. Law students are well schooled in the notion that the exceptions to the rule against hearsay[2] make the trial world go round. Trial lawyers, legal scholars, and the judiciary continue to struggle with the exclusionary concepts of the rule which includes the scope and breadth of expert testimony. Expert opinion testimony, by its very nature, not only invades the bailiwick of the trier of fact because it "is used in partial substitution for the jury's otherwise exclusive province...to draw conclusions from the facts"[3], but also relies on data which would ordinarily be incompetent hearsay. Experts hail from a broad spectrum of professions, disciplines, and walks off life, and are governed by standards uniquely applicable to the metrification or data assessment methodology of their respective fields of expertise. Left unchecked, experts can and do infuse a mountain of otherwise impermissible and prejudicial evidence into the trial scheme.

In 1974, the Court of Appeals, in *People v. Stone*, mused that "making available to our triers of fact the information available from the arts and sciences remains one of the continuing challenges of the law."[4] Emphasizing that CPLR §4515[5] "represents an effort by the Legislature to strike a balance between potentially conflicting factors of the medical soundness and legal admissibility of a psychiatrist's expert opinion",[6] *Stone* concluded:

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[1] N.Y.L.J., July 29, 2004.

[2] *People v. Caviness*, 38 N.Y.2d 227, 342 N.E.2d 496, 379 N.Y.S.2d 695 (1975).

[3] *People v. Miller*, 91 N.Y.2d 372, 694 N.E.2d 61, 670 N.Y.S.2d 978 (1998); *People v. Taylor*, 75 N.Y.2d 277, 552 N.E.2d 131, 552 N.Y.S.2d 883 (1990); *People v. Jones*, 73 N.Y.2d 427, 539 N.E.2d 96, 541 N.Y.S.2d 340 (1989); *People v. Cronin*, 60 N.Y.2d 430, 458 N.E.2d 351, 470 N.Y.S.2d 110 (1983).

[4] *People v. Stone*, 35 N.Y.2d 69, 315 N.E.2d 787, 358 N.Y.S.2d 737 (1974), citing, 5 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 4515.03.

[5] Rule 4515. Form of expert opinion: Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data and other criteria supporting the opinion.

[6] In *People v. Wernick*, 89 N.Y.2d 111, 674 N.E.2d 322, 651 N.Y.S.2d 392 (1996), the Court of Appeals offered examples of prior rulings involving scientific evidence: *People v. Wesley*, 83 N.Y.2d 417, 633 N.E.2d 451, 611 N.Y.S.2d 97 (1994), DNA, and *People v. Taylor*, 75 N.Y.2d 277, 552 N.E.2d 131, 552 N.Y.S.2d 883 (1990), identifiable symptoms occasioned by

In evaluating the worth of that opinion, the jury should be informed of his sources and how he evaluated those sources in arriving at his conclusion. On cross-examination, the validity of his reasoning process may be probed and any shaky factual basis of the opinion exposed.

The "customary admissibility test for scientific standards" in New York, derived from *Frye v. United States*,[7] "looks to the general acceptance of the procedures and methodology as reliable within the scientific community."[8] In *People v. Wernick*[9] the Court of Appeals underscored that the "protocol requires that expert testimony be based on a scientific principle or procedure which has been sufficiently established to have gained general acceptance in the particular field in which it belongs." Accordingly, the reason for having the declaring source information available for testimony and cross examination is because a human declarant does not constitute

Furthermore, the significance of the expert's source evaluation, to wit, "that the expert witness distinguish between what part of his investigation he relied upon in forming his opinion and upon what part he did not rely", was not lost on the Court of Appeals.[10] Having the expert map out a blueprint that explains the various degrees of reliance on different factors facilitates a distillation of permissible and impermissible data thereby permitting the trier of fact to weigh the potential viability of the expert's final opinion after having discarded the impermissible information.

Court appointed experts in matrimonial actions routinely testify as to information gleaned from collateral sources, such as accountants, business comptrollers, teachers, neighbors, nannies, etc., all of who are out of court declarants whose statements are offered for their truth via the mouth of the expert, and, as such, constitute hearsay in its purest form. The customary methodology within a discipline to garner and incorporate information from collateral sources into its conclusions notwithstanding, the actual information received from the declarants does not fall under the rubric of a "generally accepted scientific principle" and

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rape.

[7] *Frye v. United States*, 293 F.2d 1013 (D.C. Cir. 1923).

[8] *People v. Angelo*, 88 N.Y.2d 217, 666 N.E.2d 1333, 644 N.Y.S.2d 460 (1996); *People v. Wesley*, 83 N.Y.2d 417, 633 N.E.2d 451, 611 N.Y.S.2d 97 (1994).

[9] *People v. Wernick*, 89 N.Y.2d 111, 674 N.E.2d 322, 651 N.Y.S.2d 392 (1996); Citing, *People v. Wesley*, 83 N.Y.2d 417, 633 N.E.2d 451, 611 N.Y.S.2d 97 (1994); *People v. Taylor*, 75 N.Y.2d 277, 552 N.E.2d 131, 552 N.Y.S.2d 883 (1990), *Wernick* rejected the expert testimony because he "should not have been allowed to parade before the jury non-testifying experts' publications about a theoretical profile, without a reliability foundation being satisfied at the threshold."

[10] *People v. Sugden*, 35 N.Y.2d 453, 323 N.E.2d 169, 363 N.Y.S.2d 923 (1974).

thus can not satisfy the *Frye* standard (nor any other standard) that exempts it from a cross examination of the declarant himself. The accuracy of the collateral sources is undisputedly susceptible to mistaken observation, errors in judgment, bias, miscomprehension, and other foibles of human perception, all incapable of scientific reliability. Cross examination is the only litmus test. The expert's availability to cross examination does not in any manner, shape, or form, cure the remaining ills regarding the declarants' statements. Clearly, if the information provided by a collateral source is defective then the report may be fatally tainted, after all, an expert's opinion is only as sound as the facts upon which it is based.[11]

The legal community including presiding justices in matrimonial and Family Court proceedings have interpreted the seminal decision *People v. Sugden*[12] as having endowed experts with free reign to filter hearsay from collateral sources through their reports or testimony without requiring the cross examination of those sources – it is commonly referred to as "the professional reliability rule" and is so taught at seminar after seminar. The argument typically urges that as long as the expert gathers the type of data customarily relied upon by others in that discipline then those data become admissible with nothing more. Period – it stops there; the collateral sources are not subpoenaed to testify and the expert's opinion is marked into evidence without any challenge whatsoever to its seriously flawed admissibility. *Sugden* does not now, nor did it ever, stand for such a proposition. To hold otherwise would undermine the entire body of law on hearsay because everyone would look to shield witnesses incapable of withstanding rigorous cross examinations by limiting their exposure to the expert who would then waltz their statements into evidence unopposed.

Sugden's breakthrough tracked judicial history from an absolute prohibitionist posture against admitting an expert's expression of opinion based upon material not in evidence into permitting such expressions "to some degree" provided the data relied upon are of the kind ordinarily accepted by experts in the field."[13] However, *Sugden* did not stop there. It underscored that if the expert relies on material outside of what the profession "accepts as reliable in forming a professional opinion" then that data must be introduced "from a witness subject to full cross-examination on the trial" or through some other independently admissible source.[14] In *People v. Wernick,*[15] the court fine tuned *Sugden* underscoring, in no

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[11] *People v. Jones*, 73 N.Y.2d 427, 539 N.E.2d 96, 541 N.Y.S.2d 340 (1989).

[12] *People v. Sugden*, 35 N.Y.2d 453, 323 N.E.2d 169, 363 N.Y.S.2d 923 (1974).

[13] *People v. Stone*, 35 N.Y.2d 69, 315 N.E.2d 787, 358 N.Y.S.2d 737 (1974); *People v. DiPiazza*, 24 N.Y.2d 342, 248 N.E.2d 412, 300 N.Y.S.2d 545 (1969).

[14] *People v. Jones*, 73 N.Y.2d 427, 539 N.E.2d 96, 541 N.Y.S.2d 340 (1989), "As a general rule, in order for an expert's opinion to qualify as evidence supplying a necessary element of proof on a sufficiency review, it must rest on facts in evidence or on those personally known and testified to by the expert...A flexibility has evolved which permits expert reliance on out-of-court material if it is of a kind accepted in the profession as reliable in forming a professional opinion or alternatively, if it comes from a witness subject to full cross- examination

uncertain terms, that prior case law does not serve as *carte blanche* authority to expert witnesses to include any non-scientific information of their choosing without their availability to scrutiny by way of cross examination. *Wernick* categorically rejected such "a *per se* admissibility authorization" because it "would eliminate important threshold safeguards built into the rule by our precedents." The Court of Appeals had early noted the insidiously subtle damage occasioned by impermissible hearsay on even the most objective trier of fact.[16] Accordingly, *Wernick* set forth a two prong test regarding when an expert may refer to out-of-court evidence: "when the evidence is of a kind accepted in the profession as reliable in forming a professional opinion, and when it comes from a witness subject to full cross-examination on the trial."

The underlying theme of admissibility was similarly well captured in *Matter of Leon RR*[17] where the Court of Appeals held that "not only must the entrant be under a business duty to record the event, but the informant must be under a contemporaneous business duty to report the occurrence to the entrant as well." A critical observation in *Leon RR*[18] was the court's focus that it "is essential to emphasize that the mere fact that the recording of third-party statements by a caseworker might be routine, imports no guarantee of the truth, or even reliability, of those statements."

> To construe these statements as admissible simply because the caseworker is under a business duty to record would be to open the floodgates for the introduction of random, irresponsible material beyond the reach of the usual tests for accuracy cross-examination and impeachment of the declarant. Unless some other hearsay exception is available, admission may only be granted where it is demonstrated that the informant has personal knowledge of the act, event, or condition and he is under a business duty to report it to the entrant.

Notwithstanding the court's multiple expressions of concern that hearsay inadmissible through the front door not be smuggled in through the back door on the coattails of expert testimony, this happens daily, most notably through the testimony of: (a) mental health professionals in child custody cases where information is gleaned from nannies, teachers, neighbors, parents of the child's play dates, etc., and (b) forensic accountants in business valuations following interviews with comptrollers, accountants, distributers, suppliers, etc., none of who are ever called to testify at trial.

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on the trial."; *People v. Angelo*, 88 N.Y.2d 217, 666 N.E.2d 1333, 644 N.Y.S.2d 460 (1996); *People v. Miller*, 670 N.Y.S.2d 978, 694 N.E.2d 61, 91 N.Y.2d 372 (1998).

[15] *People v. Wernick*, 89 N.Y.2d 111, 674 N.E.2d 322, 651 N.Y.S.2d 392 (1996).

[16] *Matter of Leon RR*, 48 N.Y.2d 117, 397 N.E.2d 374, 421 N.Y.S.2d 863 (1979).

[17] *Matter of Leon RR*, 48 N.Y.2d 117, 397 N.E.2d 374, 421 N.Y.S.2d 863 (1979).

[18] Citing the landmark decision, *Johnson v. Lutz*, 253 N.Y. 124 (1930); Richardson, Evidence § 302.

The proponent of a favorable forensic report who has not subpoenaed the expert's collateral sources to testify at trial and, ergo, subject to cross examination, risks losing otherwise pivotal evidence because opposing counsel must move to strike those branches the expert's testimony and report not supported by their declarants' presence.

This issue impacts questions of property distribution in matrimonial actions where the onus to present the valuation of an asset rests with the party seeking to share in the asset absent which valuation results in a forfeiture of that right. Similarly, custody and visitation determinations may produce unfortunate results.

In sum, an expert's report and testimony must fail to the extent that: (1) the out of court collateral sources are not produced to testify, (2) the findings and conclusions are not independently sustainable on other permissible evidence, hearsay or otherwise, and (3) the expert cannot distinguish between the weight given to the various strata of information.