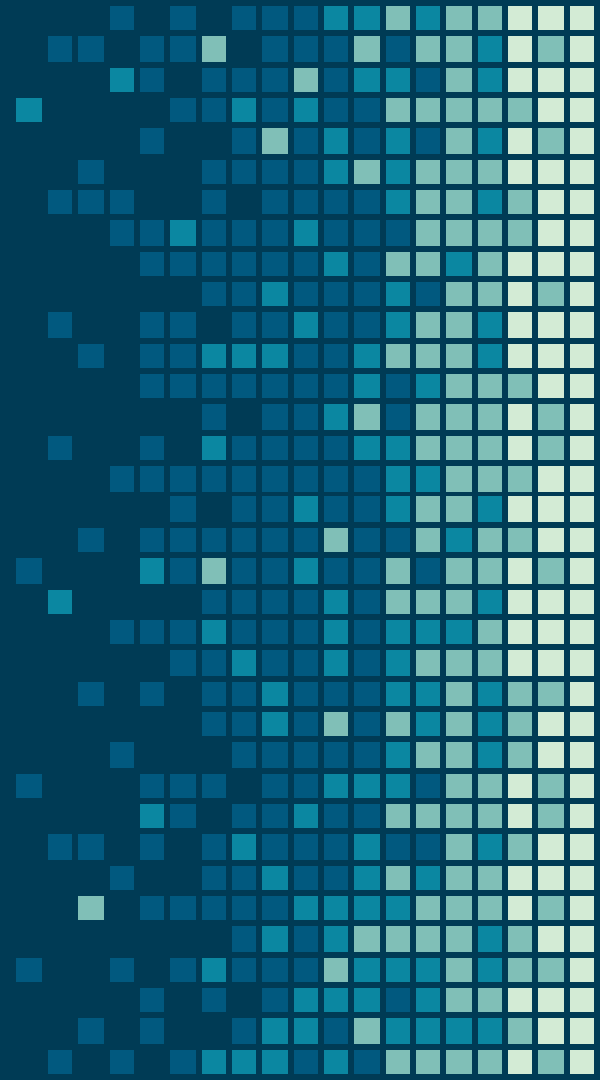


The use and examination of expert witnesses

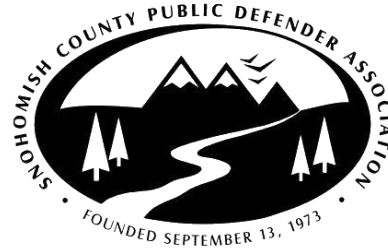
11.18.22 - Sonja Hardenbrook



Who am I?



- 19 years at
- mixed civil / criminal practice
- heavy expert practice
- as of 12/1



H Hardenbrook
Law
1329 N 47th St. #31029, Seattle 98103

This CLE will discuss:

- Basics for admissibility
- Discovery obligations & opportunities
- Best practices for selecting and working with experts
- Procuring adequate expert funds
- Brainstorm of issues for experts
- Tips for starting an expert practice
- Tips for creative expert use and examination
- Investigating and crossing opposing experts



ADMISSIBILITY





Relevancy



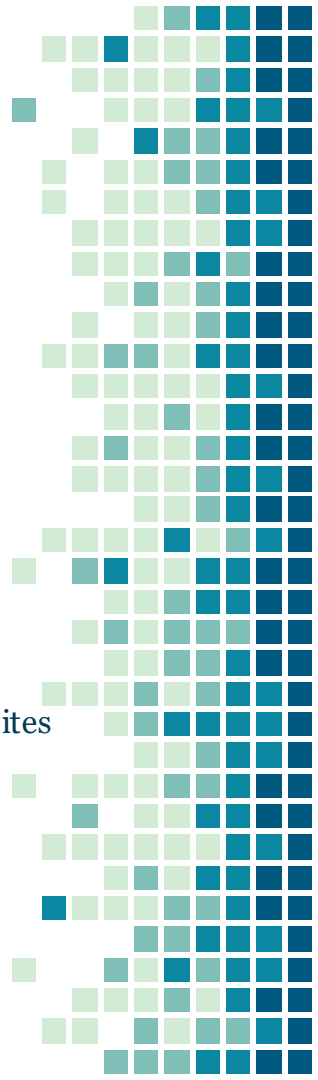
Low bar



Think expansively
/ be creative



Probability invites
science



“ *If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . .*

ER 702

“ ... a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

ER 702

Frye Standard

Originated

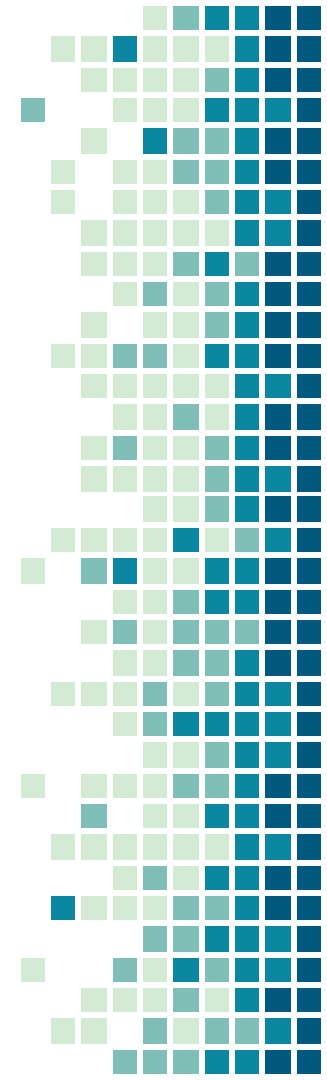
Frye v. United States, 293 F.1013, 1014 (D.C. Cir. 1923)

Applied in WA

State v. Gregory, 158 Wash.2nd 759 (2006).

Summary

Scientific theory & technique / methodology must be *generally accepted* in the relevant scientific community

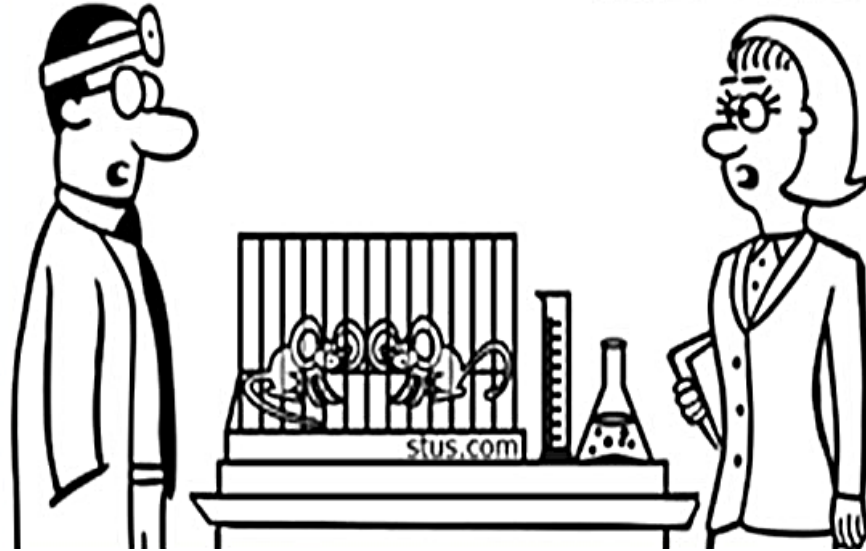


General rule:

Novel theories are amissible for the State

My theories aren't generally accepted yet.

It's okay if your peers don't respect you, as long as the judge and jury do.





ER 703 Basis of Expert Testimony

The **facts and data** in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.

If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, **the facts or data need not be admissible in evidence.**



DISCOVERY - Obligations

- . Prosecutor obligations
- . Defense obligations
- . Civil obligations
- . Navigating obligations with your expert



DISCOVERY - Opportunities

- . Criminal opportunities
- . Civil opportunities
- . Deposing / interviewing experts
- . Defending your expert in a deposition / interview



Best Practice(s) for selecting and working with experts

My checklist, #1-9

Legal minds differ – this is simply my perspective. Feel free to consult other sources.

Other resources:

ABA

WSBA

Secondary sources (\$)

Legal newsletters

NAPD

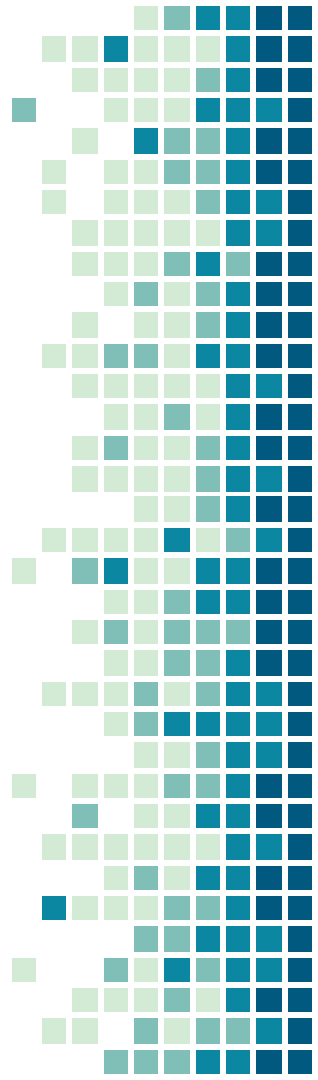
WDA & WACDL

Colleagues

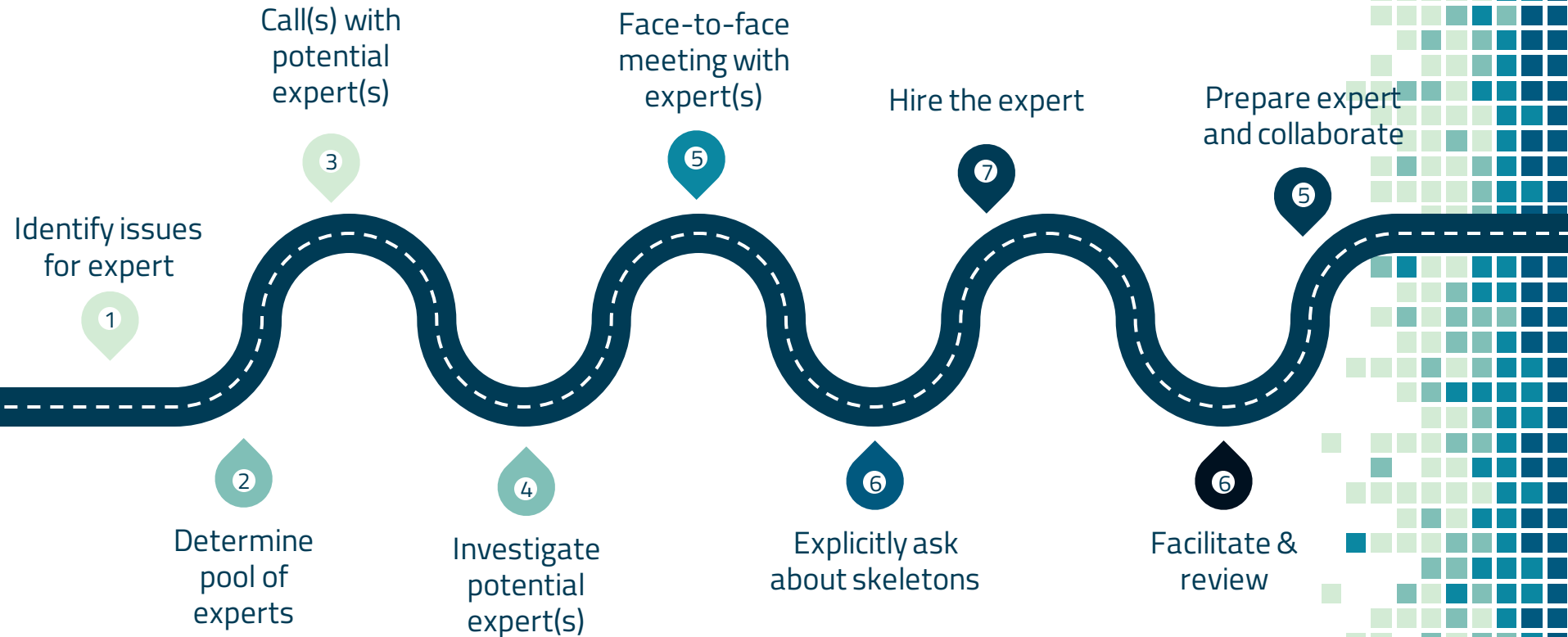
CHECKLIST FOR RETAINING A (POTENTIALLY) TESTIFYING EXPERT WITNESS

1. Determine an **initial need(s)** an expert would be helpful to your case
2. Determine **need of potential expert** - check broadly & consider multiple:
 - o **Call with potential experts (do not email)**
 - o Initial phone call to determine:
 - o Do you need an expert?
 - o Do you need an expert to testify?
 - o Do you need an expert to testify in your jurisdiction?
 - o Do you need an expert to testify in your jurisdiction?
 - o Do you need an expert to testify in your jurisdiction?
 - o Do you need an expert to testify in your jurisdiction?
 - o Do you need an expert to testify in your jurisdiction?
 - o Do you need an expert to testify in your jurisdiction?
 - o Do you need an expert to testify in your jurisdiction?
3. Determine **potential experts**:
 - o Length of expert for lawsuit
 - o Do you need an expert to testify in your jurisdiction?
 - o Do you need an expert to testify in your jurisdiction?
 - o Do you need an expert to testify in your jurisdiction?
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9. Determine **potential experts**:
 - o Length of expert for lawsuit
 - o Do you need an expert to testify in your jurisdiction?
 - o Do you need an expert to testify in your jurisdiction?
 - o Do you need an expert to testify in your jurisdiction?
 - o Do you need an expert to testify in your jurisdiction?
 - o Do you need an expert to testify in your jurisdiction?



My Expert Process



Step 1: identify issue(s) for expert

Read discovery



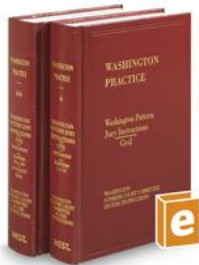
Review statutes & annotations



Get to know your client



Review jury instructions



Identify *must win* facts or issues



Consult manuals or references in field



Step 2: find pool of experts

- Academics & authors
- Practitioners
- Professional witnesses
- Government employees
- Nonprofit employees
- ACLU special projects / ABA task forces
- Specialty bar groups



Step 3: call potential experts



- Provide sketch of case
- Brainstorm possibilities
- Be clear about limitations
- List of information
- Review funding parameters
- Discuss document retention
- Offer public materials

Step 4: investigate potential experts

- Ask colleagues
- Google
- Caselaw search
- Read publications
- Consult references
- Observe class or testimony
- Review available transcripts / media
- Ask other potential experts
- Online expert vetting



Step 5: meet with expert

- Face-to-face / Zoom / Teams
- Provide more detail – bad facts
- Review CV together
- Assess their ego
- Discuss notes / record keeping
- Assess appearance / demeanor
- Can they adapt to audience?
- Have them explain complex concept in their field



Step 6: ask about their closet

Explicitly ask about skeletons:

- Ever had testimony limited?
- Ever had testimony excluded?
- Ever failed to be qualified?
- Any personal issues?
- Padded or exaggerated CV?
- Published articles opposed to opinion / testimony?
- Professional complaints or investigations?
- Anything the opposition could dig up?



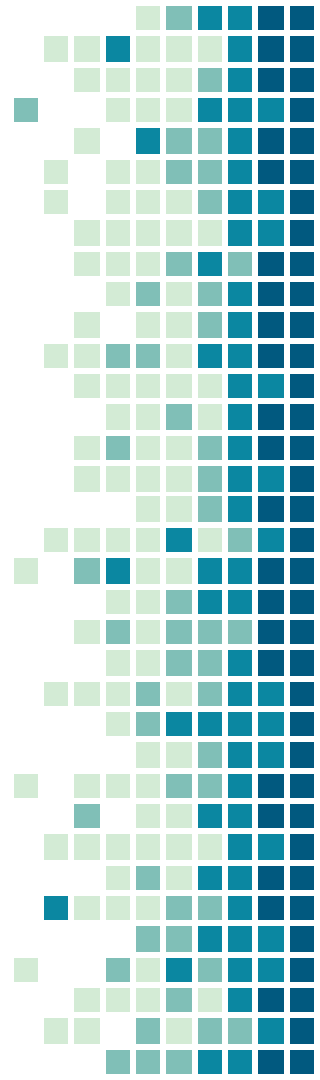
If you think hiring a
pro is expensive . . .

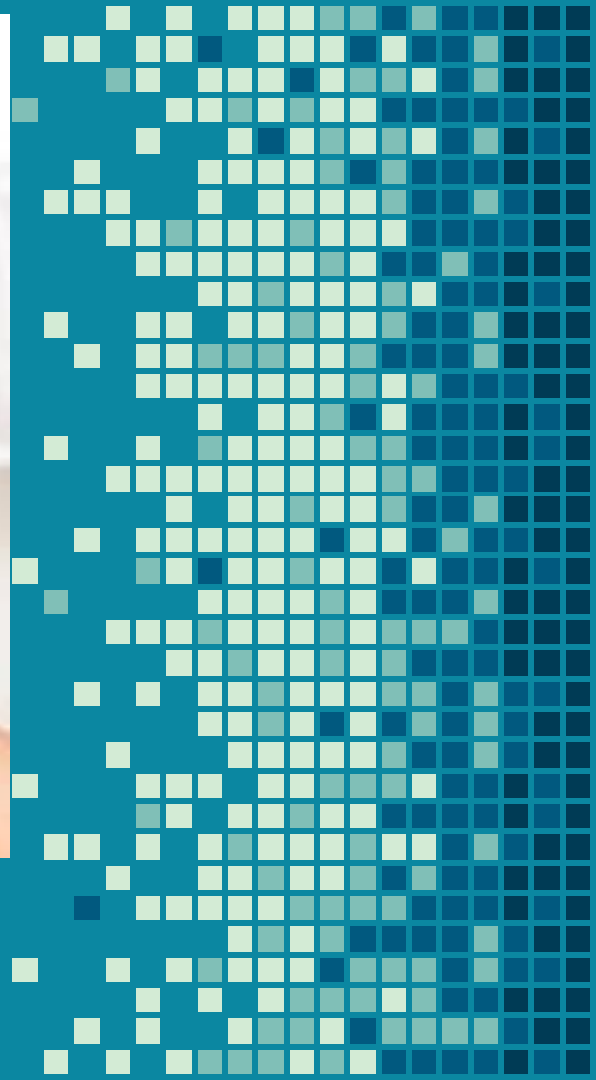
. . . try hiring an
amateur.



Step 7: hire the expert

- Execute written contract or letter of retention
- Talk through staged work, financial and products
- Discuss notes and record keeping (again)
- Discuss professional best practice you'll use in your cross
- Preliminary determination about consulting v. testifying





NOT by a long shot!

Step 8: facilitate & review

- Provide the information they need / want (keep track)
- Discuss work at each step & conclusion
- Review drafts, limit discoverability
- Keep audience of report in mind
- Citations, citations, citations
- Schedule regular check-ins to keep on plate and current
- Preserve ability to testify, if possible
- Consult before you disclose report(s)



Step 9: prepare

- Instruct expert on attire and mannerisms



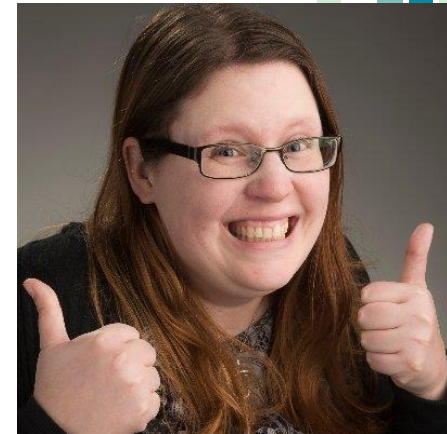
for audienc
gs

expert on e

to trial rul

case so far

- You create exhibits in consultation with them



Procuring adequate funds



- Reduce boilerplate.
- Know your jurisdictions procedures to protect work product.
- List all direct & collateral consequences
- Cite to public defense standards & RPCs
- Cite caselaw like *Strickland* & *A.N.J.*
- Justify expense but prepare for reductions
- Consider doing staged work

Brainstorm of Expert Issues

Mental State



Challenge *actual* physical / digital evidence



Challenge *meaning* of physical / digital evidence



Independent *examination*



Send expert to visit scene & find evidence



Sentencing or Mitigation



Tips for new expert practice

Pick a case with solid argument for funds and clear issue

Use a Checklist for expert process

Prepare! Prepare! Prepare!

Explicitly request feedback from expert and others.

Pick an experienced expert to guide you through

Over explain and overshoot funding request

Be patient with yourself – this is hard!

Reflect – what could you do even better next time?

Tips for experienced expert practice:

Craft your cross examination like a pageant

Increase use of learned treatises

Go in person to labs, conferences, schools, etc.

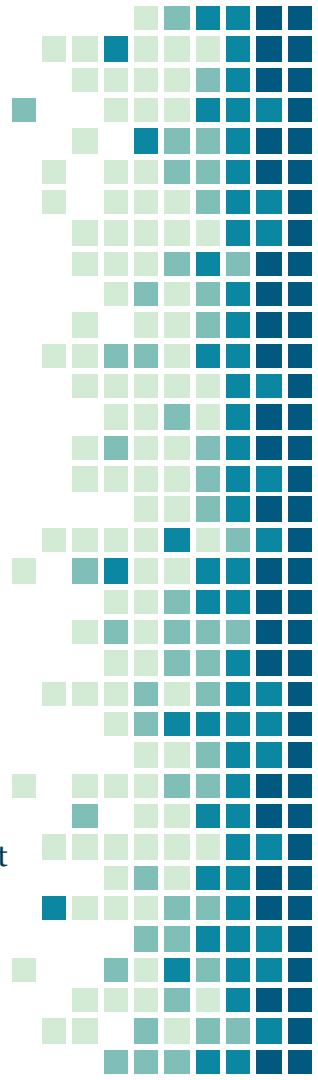
Explicitly request feedback from expert and others.

Develop your own exhibits and analogies

Develop files on experts and issues

Use technology to assist in expert testimony

Reflect – what could you do even better next time?



Opposing expert - Investigation

- Start with report & CV
- Google
- Use local & national colleagues
- Check all factual references & citations
- Check licensing and organizations
- Find other reports / publications / testimony
- Check their - work manuals / protocols
- Request additional discovery
- Use online expert vetting
- Do a thorough interview / deposition



Interview to lay groundwork for cross examination

- Set ground rules
- Methodically do T&E
- Save documents to end
- Commit them to peer review
- Play dumb, make them explain
- Have them explain a complex concept in field
- Push expert to see reaction
- Commit them to authoritativeness of learned treatises; leading authorities in field

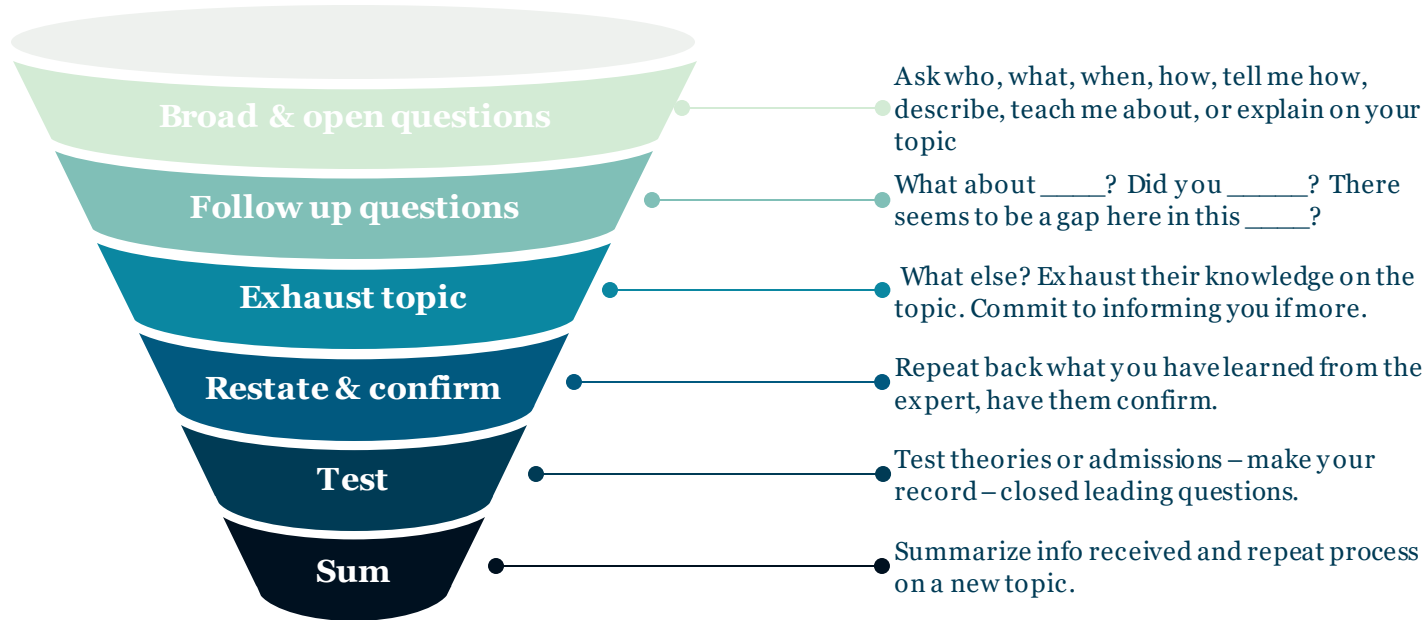




BE CURIOUS

Do not cross examine during interview / deposition

Funnel Method for Interview / Dep



Sample ground rules:

Introduction to Rules

Good morning _____. My name is Sonja Hardenbrook and I am one of Mr. _____'s attorneys. We are here for a deposition in his case.

Also present today are a court reporter, Prosecutors Michael Herd and Katherine Bosch, and Jennifer Bartlett, Mr. _____'s other attorney.

_____ has its own lawyer, an attorney general, right?

- Her name is _____?
- She represents _____ not you?
- You are agreeing to her presence at your deposition?

How shall I refer to you today? Dr. _____? Or something else?

- Please feel free to address me as Sonja or Ms. Hardenbrook, I have no preference.

I have never deposed you before, so I want to review the rules so we are on the same page, okay?

How it will work with me is that I'll ask you a bunch of questions.

- I will expect you to answer them.
- I am not sure how long we'll take, but I believe I we are going to be here for most of the day.
- Because I have not deposed you before, we will go through your relevant training and experience in some detail. This will take a while.
 - o The good news is that once we've done this carefully, in all future deposition of you we'll start from today's date forward rather than redoing the T&E we discuss today. Understand?
- The Prosecutor or Attorney General may object to some of my questions. They do, you still need to answer the question and their objection will be preserved for the record.
 - o If they are instructing you not to answer the question, they will need to call the court for a protective order and we will all stay on the line while they do so.
- If you need a break, just let me know. I will have you finish whatever question we are on, and then we can see about taking whatever kind of break you need.
- Is there anything about your body or mind that would impact your ability to truthfully answer my questions?
- On occasion, I may ask a question that I do not state well or that is confusing to you. Please do not answer it. Let me know that I was unclear and I'll will ask a better question. Okay?
- Conversation will be recorded by court reporter. She can only type one person speaking at a time, so let's try to take turns?

- Sometimes it may happen that you'll answer a question as fully as you can in the moment, but later on you want to go back and add to or correct that answer.

- o If that happens during the deposition, what will you do?
- o If that happens after the deposition, what will you do?

Special Zoom rules

- We are in different locations and you are looking at your computer to participate in this deposition. The record needs to reflect if you look at *any document* in answering these questions, whether it be an email, a digital document, or a piece of paper.
- We need to address that BEFORE you look at anything so that our record can be clear and the court reporter can make an accurate record of what you are reviewing. Ok?
- Bandwidth / freezing problems.
 - o If you have a bandwidth or freezing problem – please let us know as soon as you realize it.
 - o We will stop the deposition until the issue is resolved.
- I often transition between sitting and standing, and my desk moves when I do so. Please continue talking when this happens and I will do my best not to be a distraction.

Introduction

Please state your full name and spell it for the record?

Have you been deposed before?

- By whom?
- In what context?
- In what case?

How did you prepare for Mr. _____'s deposition or trial testimony?

- With whom did you speak in preparation for this deposition?
- What did you review in preparation for this deposition?
- Contact with others at WSH on this case?
- Contact with prosecutor on this case?
 - o You have spoken to the prosecutor's office about Mr. Kellogg's case? How many times? When? What was discussed?
 - o How communicate?
 - o Have you reviewed any documents or records since your report in October 2021?
 - What records?
 - Who provided?

Sample questions:

Current Employment / Duties

What is your current employment?

- What is your title?
- What are your current job duties?
 - o Please explain each duty

- How did you come to your current position?
 - o Aware of any particular reason you were hired?
 - Now you started at OFMHS in August 2020, were you brought on specifically to conduct forensic risk evaluations.
 - For NGRI patients?
 - To address backlog?

- Did you receive any additional training for your current position?
 - o Tell me about that.
 - o What is re-specialization as a forensic psychologist?
 - How long?

Definition of terms

What is the difference between clinical and forensic psychology?

- In theory?
- In practice?
- Which are you?
- Were you trained as such?
- Prior work as such? When change?

What is a Treatment Team?

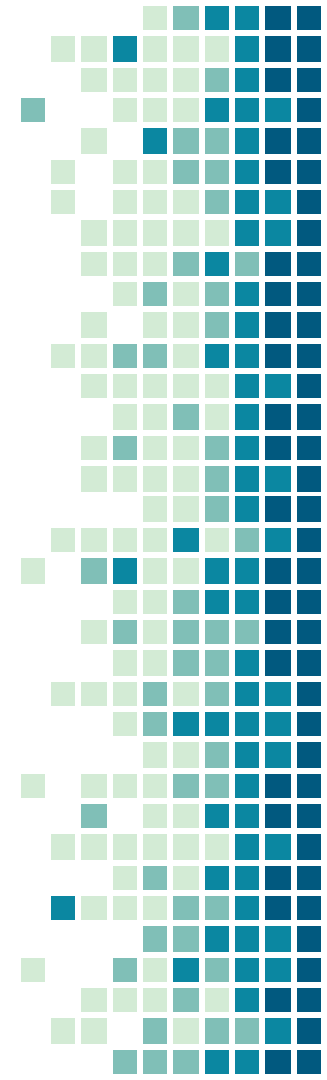
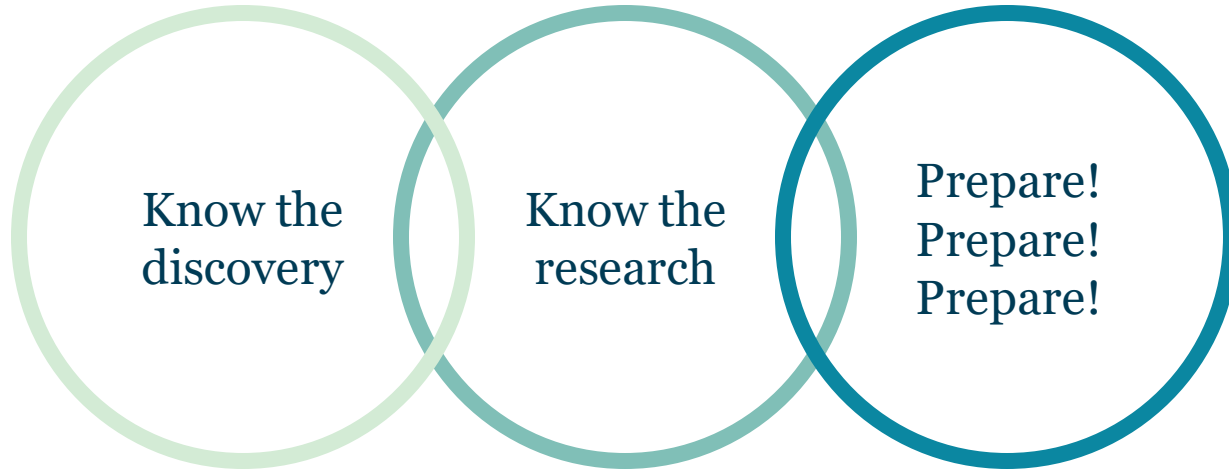
- What is your understanding of purpose?
- How function life?
- Members?
- How often meet?

Follow up on Interview / Deposition

- . Review SDT with witness
- . Supplemental discovery
- . Protection order or disclosure to professional
- . Motion to Compel if necessary
- . Research issues for impeachment



For cross-examination, preparation is everything



Prepare cross of opposing expert



- Figure out your own style – be authentic
- Organize in topical chapters for adaptation
- THIS is why we went to law school!
- Know the facts & research
- Overprepare
- Have citation, quotation or publication ready
- Maintain ground rules
- Train expert & amazing things happen

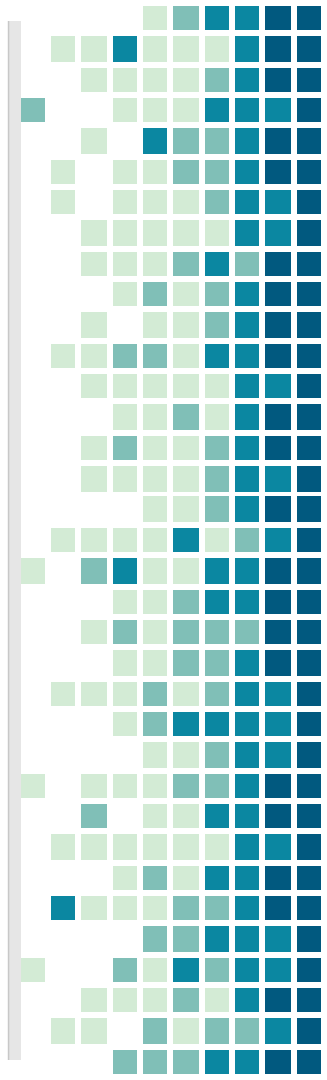
Sample cross drafting process:



Sample:

PROSECUTION HACK

- You testified on Monday that you've evaluated "right around 40" respondents in Washington for SVP?
 - o BUT case list in discovery only includes 30 people you've evaluated in SVP context in WA, not counting Mr. Cheatam? (Discovery 3722)
 - That case list was updated in August 2019? (Discovery 3723)
 - That case list included Mr. Cheatam totals 31? (Discovery 3722)
 - ~~Sometimes you evaluate someone 2-3 times before their trial? (Discovery 3722; Goodwin, Golden, Ezell, Simon, etc.)~~
 - ~~In this case you only evaluated Mr. Cheatam once?~~
 - ~~Only evaluated Mr. Cheatam once?~~
 - o And of your Washington Evals – none of them have been for any defense attorneys? (October 1 Deposition of Patterson 146:11-13)
 - You have never "testified for the defense in Washington?" (October 1 Deposition of Patterson, 5:19-20)
 - In WA you work directly for the Attorney General's Office or the King County Prosecuting Attorney? (October 1 Deposition of Patterson 150:5-14)
- You told the jury you've done 750 SVP evaluations in CA, right?
 - o ~~But 800-850 in CA? (October 1 Deposition of Patterson 146:2-3)~~
 - ~~All for state panel there? (October 1 Deposition of Patterson 146:4-5)~~
 - Just like in WA, no SVP evaluations for defense in CA? (October 1 Deposition of Patterson 146:14-15)
 - o ~~In WA you've only ever testified for the Prosecution?~~
 - ~~You work directly for the Washington State Attorney General in this case? Pursuant to a Contract? From July 1, 2019-June 20, 2021. (Discovery 3678)~~
 - ~~Under that contract you get assigned particular cases?~~
 - ~~Contract period capped at \$400-\$450,000 for the two-year period? (Discovery 3702) unless you get an amendment from the AG?~~
 - ~~Each case pays up to \$16,000 for pre-commit? \$15,000 for post-commit?~~
 - o You've been deposed 20-30 times? (October 1 Deposition of Patterson, 4:23)
 - "two-thirds of that number" would be depositions in WA? (October 1 Deposition of Patterson, 5:2-3).
 - That's 13-20 depositions for 31 different Respondent's? (uh, do the math)



Sample:

CROSS OF PATTERSON

EDUCATION - THE PATH OF LEAST RESISTANCE

UNDERGRAD

- You went to undergrad at Whitman in Walla Walla?
 - You testified yesterday that you got a degree in psych from Whitman in Walla Walla?
 - But you also studied chemistry and French in undergrad? You studied psychology, chemistry and French? (October 1 Deposition of Patterson, 10:19-25)
 - Studied psychology?
 - You “had been considering medical school”? (October 1 Deposition of Patterson, 11:1)
 - But you didn’t get into medical school? (October 1 Deposition of Patterson 14:2-5)
 - You got an “invitation to reapply”? (October 1 Deposition of Patterson 14:2-5)
 - Medical school at UW wanted you “to do some work and reapply”? (October 1 Deposition of Patterson 14:2-5)
 - So that led to the work you pursued after undergrad?
 - You were “looking at a variety of different pathways at that point in [your] life?” (October 1 Deposition of Patterson 14:16-17)
 - You considered “psychology graduate school” as an “alternative to medical school?” (October 1 Deposition of Patterson 14:18-20)

POST UNDERGRAD

- You got a job at the **Fred Hutchinson Cancer Research Center** through a classmate? (October 1 Deposition of Patterson 30:3-7)
 - Your friend’s dad was “chief of the lab you worked in” at the Hutch (October 1 Deposition of Patterson 30:3-7)
 - Full time paid position? ~~doing research on cell development related to cancer?~~ (October 1 Deposition of Patterson 20:19-20; 21:1-5)
 - So the volunteer work you told the jury about yesterday, was done around the hours of your full time employment?
 - After working there you decided that psychology “was more interesting to [you]?” (October 1 Deposition of Patterson 23:16)
- You applied to psychology programs during last year at the Hutch? (October 1 Deposition of Patterson 35:5-23)
 - You never reapplied to medical school? (October 1 Deposition of Patterson 35:24-25)
- You told the jury about your volunteer positions in Seattle the years following

Sample:

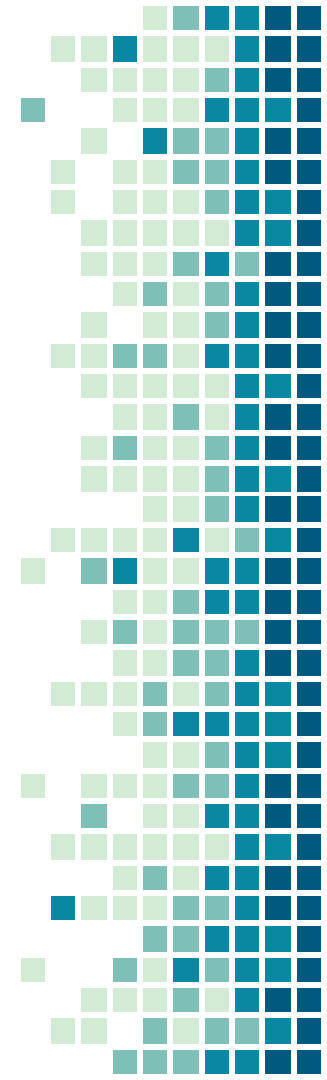
Current research on general sex offender recidivism, has it between 5-6% or at most 11-12%, right? (*Dep p92, line 18-23*)

You use an adjusted actuarial approach in conducting your work on the SVP panel? (*Dep p75, page discussion*)
That's a combination of clinical judgment and actuarial instruments?

- Clinical judgment is basing your prediction of recidivism on your experience in the field and what you think" not based on any research?" (*Dep p75, line 3-7*)
- Clinical judgment is subjective? (*Dep p75, line 8-9*)
- Whereas "the strength of actuarial [is] that they are objective, not subjective?" (*Dep p75, line 8-9*)
- And "research has established that the actuarial are better than clinical judgment?" (*Dep p75, line 14-15*)
- And "the adjusted actuarial approach, according to research, has appeared on the spectrum somewhere between" those two? (*Dep p75, line 17-19*)
- So you choose to use the adjusted actuarial approach "even though that's not always supported by the research?" (*Dep p88, line 6-7*)

1. Static -99R (7)(5 year 31.2; 10 year 41.9)

- The Static 99R "the most widely used instrument in the world." (*Dep p71, line 13-15*)
- It's the most researched? (*Dep p71, line 17*)
- "[I]t's been around for a long time?" (*Dep p71, line 17-18*)
- You agree "that the actuarial method is superior to clinical judgment?" (*Dep p74, line 21-23*)
- That fact "has been well established in the literature?" (*Dep p74, line 24-25*)
- You favor the "Static-99R . . . because it's the most researched and widely used" actuarial? (*Dep p88, line 18-19*)



If Expert resists. . . punish them.



- Move to strike as nonresponsive
- Keep re-asking the same question
- Use body language to communicate displeasure and move on
- Use ground rules

Objection example:

14 A. Yes. That's what I said during the deposition.

15 Q. Thank you.

16 And then there was also a question about the second
17 deposition where I had asked if you recalled my asking
18 you if you had gotten any new information about the SCC
19 treatment program between your first eval and the
20 second dep. Right?

21 A. Yes. But I, you know, that was a vague question, and
22 I --

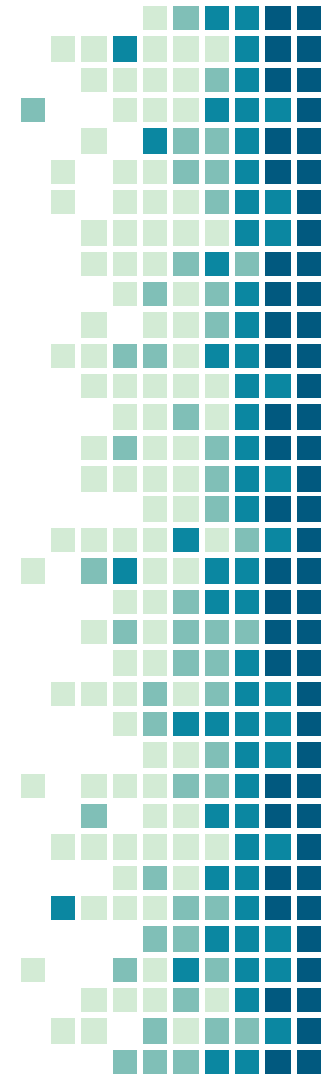
23 MS. HARDENBROOK: Objection. Move to strike as
24 nonresponsive.

25 THE COURT: Well, everything after "yes" will be

03:36

03:36

03:36



Repetition example:

Q. Now, you wrote an article that was on your review of statistical issues in SVP cases that was actually rejected by the Journal of Sexual Abuse and Treatment; is that right?

A. Yes.

Q. And the Journal of Sexual Abuse and Treatment is a peer-reviewed journal?

A. Yes. It's peer reviewed.

Q. And it's also a journal that people in your field would look to and rely on in developing their opinions, correct?

A. Yeah. Among other places, but yes.

Q. Okay. And they did not -- they did not accept your article or publication; is that right?

A. That's true.

Q. And you did mention that it was later published in a book; is that right?

A. An award-winning book, yes.

Q. But that book is not peer reviewed, either, correct?

A. No. But it is edited by two editors who are at the top of the field -- of the field of criminal -- criminal psychology and criminology.

Q. But it's not peer reviewed, correct?

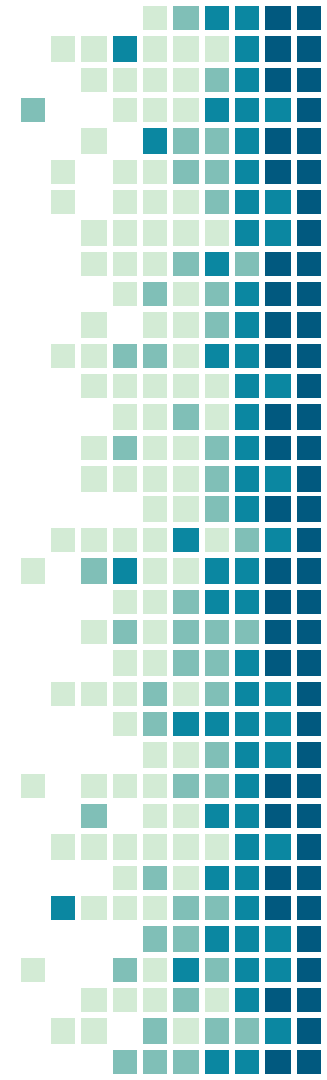
A. No. It's not peer reviewed and -- well, okay. Peer-review is not a single thing. It's like, whose peers are reviewing you?

Q. It's not peer reviewed, right?

A. Correct. It's not peer reviewed.



Body language example:



Ground rule example:

Q. Can we have this understanding: I promise you that I won't be repetitious and waste your time if you can promise me that you won't try to help me by answering questions that I haven't asked, and you'll just answer my questions. Can we do that?

A. Yes.

.....

Q. You don't believe that it matters whether or not the victims are prepubescent or pubescent for Mr. Client to have pedophilic disorder, correct?

A. It would matter if he was not attracted or had sex with children generally 13 years of age or under and that if none of the children were in early pubescence, I would not feel a diagnosis of pedophilia would be technically accurate and that a diagnosis of pedophilia otherwise specified or not otherwise specified, either one, would be technically a more appropriate diagnosis.

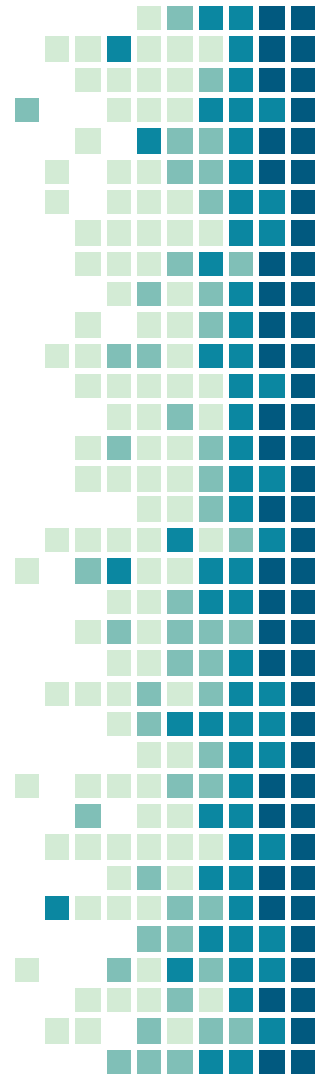
Q: And like I said, Dr. X, you don't need to try to help me. I'm going to ask my questions. A lot of times they are "yes" or "no" answers.



Make expert tell your story

WHAT YOU DID NOT TELL THE JURY

- Client's life
 - “father alcoholic” (Testimony 11/13/17 31:9-10)
 - “father . . . not involved much in his raising.” (Testimony 11/13/17 31:9-10)
 - “mother was overly critical of him” (Testimony 11/13/17 31:10-13)
 - “mother was . . . abusive at times” (Testimony 11/13/17 31:10-13)
 - “mother would slap him with a razor strap when he misbehaved” (Testimony 11/13/17 31:10-13)
 - “she tied him to the bed at . . . times.” (Testimony 11/13/17 31:10-13)
 - “sexually abused at age 16” (Testimony 11/13/17 31:20-21)
 - But you concluded that 16 “would be an old age to be sexually abused?” (Testimony 11/13/17 31:20-22)
 - _____ “had very few friends” as an adolescent? (Testimony 11/13/17 31:23-24)



Get comfortable with Learned Treatises



- ER 803(A)(18) different rules
 - *call to attention* on cross
 - *rely on* in direct
- Statements from published documents
- Established as reliability authority
- May be read into evidence but not received as exhibits (admitted as illustrative only)

3 ways to establish LT as a *reliable authority*



Learned Treatise – your turn to testify

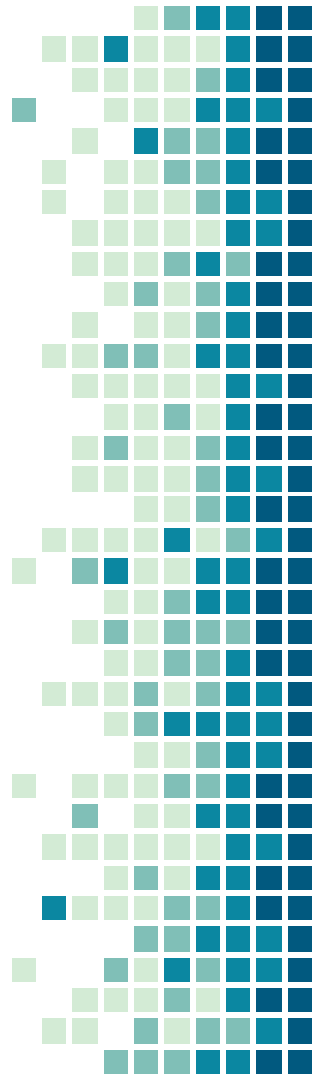


Learned Treatise – if you get shut down

Make your
record

Be more
prepared
next time

Funny story
for CLE or
cocktail
party



THANKS!

Any questions?

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