

THE FINANCIAL SIDE OF EXPERT WITNESSES

BY STANLEY SCHNEIDER



In Texas, our criminal justice system has a serious problem involving forensic science. We have had more forensic science scandals of significant magnitude than any other state. Fred Zain, Ralph Erdman, Victor Saldano, the Houston Police Crime Lab, Timothy Cole, and dog-sniffing lineups have significant meaning to us all. Public officials and experts have argued over the integrity of the Cameron Todd Willingham arson investigation. In the ever-changing world of technology, the problems of lawyers providing indigent defense and the use of forensic experts present tremendous challenges.

The concept of science in criminal cases, especially indigent cases, poses several difficult issues. Many lawyers feel that if they wanted to learn chemistry or biology they would have gone to medical school. But the complexities of forensics require a lawyer to learn a foreign language — science. And lawyers have to know how to find an expert to help on a case. The cost of the expert is another issue when, in many cases, the person accused is having difficulty paying a lawyer or posting a bond to obtain release from incarceration.

In Texas, there are countless ways a lawyer can learn the basics of almost any forensic science. First, the Texas Criminal Defense Lawyers Association (TCDLA) has held seminars on almost every possible forensic science discipline that can be applied to murders, sexual assaults, drug cases, computer crimes, and driving while intoxicated. TCDLA's seventh annual Forensic Science Seminar will be held in Dallas in October. There will be five tracks over two days that will cover topics including eyewitness identification, computer crimes, sexual assault, accident reconstruction, and crime scene investigation. Each spring, TCDLA jointly sponsors a seminar with the National College of DUI Defense that provides an in-depth analysis of blood and breath testing. The opportunities for a lawyer to learn the science necessary to provide a forensic defense are available. The lawyer only has to ask and there will be a lecture, paper, or referral available.

Judge Barbara Hervey of the Texas Court of Criminal Appeals has worked to find ways to effectively train judges, prosecutors, and defense lawyers on the basics of forensic science. Judge Hervey has said that she wants everyone involved in the criminal justice system to be on the same page insofar as the methodology and procedures that are available. To accomplish this, she is planning a series of forensic seminars around the state.

Issues pertaining to both the retained attorney and an attorney representing the indigent present more difficult challenges. Lawyers have to recognize when an expert is needed. If an expert is needed, then the problem becomes how to choose an expert. The first point is that in almost every case an expert can be of assistance. Whether a lawyer is investigating a DWI or a capital murder case, he or she will need to ask someone a question about some aspect of a case.

More important, finding a competent expert can be extremely difficult. One resource available is TCDLA's capital assistance lawyer, Phillip Wischkamper, who maintains a list of experts that have provided assistance to lawyers. Another resource is the experts who speak at TCDLA's forensic science seminar. These experts are committed to providing assistance in indigent cases, but the lawyers have to do their own homework and be sensitive to ethical issues regarding experts.

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The Internet can be a fantastic source for an expert. Recently, I tried a capital murder case in Wharton County. I searched the Internet for information concerning the concept of suicide by cop. Each person I talked to suggested that I talk to Dr. Vivian Lord. Each article I read referenced research by Dr. Vivian Lord. Dr. Lord became my expert at trial. In choosing her, I researched her background and methodology so that she would qualify as an expert.

Even when an expert appears to be competent, there can still be problems. There have been several cases in which defense experts did not have the credentials to render their proffered testimony. It seems fraudulent forensic science comes in many forms and is not only a problem with state labs.

Paying an expert can be a difficult problem. Many judges feel that if a lawyer is retained, the client must pay all expenses. But, many times, the person accused has used every available resource to post bond and hire a lawyer. All other available funds are needed for the accused to survive.

In *Ex parte Briggs*, 187 S.W. 3d 458 (Tex. Crim. App. 2005), the Court of Criminal Appeals was faced with a case in which a decision not to call an expert was dependent on the financial condition of the defendant. The court determined that if an investigation of medical records to determine a child's cause of death is essential to the presentation of an effective defense, counsel cannot decline to conduct such an investigation based on his client's lack of financial resources. It relied on decisions by the 7th Circuit in *Brown v. Sternes*, 304 F. 3d 677, 693–98 (7th Cir. 2002) (noting that "attorneys have an obligation to explore all readily available sources of evidence that might benefit their client[,]") and concluding that counsel who had access to the defendant's medical records "had a professional obligation to do an in-depth investigation into their client's deep-seated psychiatric problems"; failure to do so was ineffective assistance of counsel), and *Bouchillon v. Collins*, 907 F. 2d 589, 595–97 (5th Cir. 1990) (trial attorney who failed to do any investigation into the client's medical and mental history after he had been informed of prior hospitalizations and who may have persuaded the client to plead guilty and accept plea offer was constitutionally ineffective for failing to make adequate investigation when it did not appear that the defendant had any other available defense). The court ruled that if any reasonable attorney appointed to represent an indigent defendant would be expected to investigate and request expert assistance to determine an infant's cause of death, a privately retained attorney should be held to no lower standard:

The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection. ... We see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.

In *Wright v. State*, 223 S.W. 3d 36 (Tex. App. — Houston [1st Dist] 2006, pet. ref'd), the 1st Court of Appeals applied *Briggs*

to find counsel was ineffective because of his nonstrategic decision in failing to seek an expert's opinion.

To obtain the assistance of an expert necessary to present a defense, the lawyer must first determine the need for an expert and identify the expert that is needed. Tex. Code Crim. Pro. Art. 26.052(f) provides: "Appointed counsel may file with the trial court, a pretrial, *ex parte* confidential request for advance payment of expenses to investigate potential defenses." This rule applies equally to retained attorneys as well as appointed counsel when an accused cannot afford to pay for an expert. See *Ex parte Briggs*, *supra* (citing ABA Standard for Criminal Justice: The Defense Function, Standard 4–4.1 (2d ed. 1986)). To make the threshold showing required by *Ake v. Oklahoma*, to demonstrate that the defendant is entitled to this funding, it is often necessary for the defendant to reveal information that would otherwise be privileged. A defendant should not be forced to abandon his request for essential help for fear that the very information that entitles him to that help will be used against him. Both the Equal Protection Clause of the Fourteenth Amendment and the equal protection guarantee of Article I, Section 3 of the Texas Constitution guarantee that indigents charged with criminal offense are entitled to the appointment of experts and other ancillary personnel to aid their defense. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

The trial court then must determine whether a defendant is indigent and his counsel is unable to retain any expert assistance due to his client's indigent status. The assistance should include the determination of any defenses that are viable, the presentation of testimony, and the assistance in preparing the cross-examination of the state's psychiatric witnesses. *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087 (1985); *De Freece v. State*, 848 S.W. 2d 150 (Tex. Crim. App. 1993).

The Court of Criminal Appeals has held that the appointment of experts should be made regardless of the expert's field of expertise, as there is no principled way to distinguish between psychiatric and non-psychiatric experts. The denial of the appointment of an expert under *Ake* amounts to "structural error" that cannot be evaluated for harm. *Rey v. State*, 897 S.W. 2d 333 (Tex. Crim. App. 1995).

Many judges routinely consider requests by retained lawyers whose clients are indigent. Judge Ron Clapp in Wharton County carefully scrutinized my client's defense needs and provided every assistance available. Many Harris County judges carefully consider the demands of *Ex parte Briggs* and recognize the need to assist the indigent defendant represented by retained counsel. The bottom line is that lawyers need to know the science and when to ask for assistance. The only way to provide effective assistance is for the lawyer to study and know how technological advances can provide the edge to represent their clients.

STANLEY SCHNEIDER

is a partner in Schneider & McKinney, P.C., in Houston. Schneider specializes in state and federal criminal trials and appeals.