# Collaboration with Experts to Prove Serious Physical Abuse and Child Homicide Cases

Dr. Antoinette Laskey – Medical Director, Safe and Healthy Families Team
Primary Children's Medical Center
Rob Parrish, Deputy Salt Lake County District Attorney

## Association of Prosecuting Attorneys Child Abuse Prosecution Project

### 4th National Prosecutor's Conference on Child Abuse and Neglect

October 23, 2019
Salt Lake City, Utah
Hosted by the Salt Lake County District Attorney's Office

## Introductions

- Us
- You

## Outline for the presentation

- Our focus will be not as much on the medical basics of physical abuse and child homicide – which will be covered by Dr. Starling,
- But rather on the need for investigators and prosecutors to effectively collaborate with experts to understand and prove these tough cases to a jury or judge
- PART ONE - Dr. Laskey will talk about the diagnostic process that Child Abuse Pediatricians and other expert diagnosticians follow – how they consider a very wide range of possible causes for a child's set of injuries before reaching a diagnosis
- She will explain that the medical diagnosis of "child abuse" is not the same as the legal definition
- Dr. Laskey will explain how collaboration during the investigation, sharing of investigative facts with the medical expert, and discussion of the significance of the "unifying diagnosis" and timing of the injuries are topics the expert can help us understand and prove

## Outline for the presentation

- PART TWO - Rob will address why investigators and prosecutors have to have a firm grasp of the medical findings and the significance of those findings in each case
  - Not all of that education can come from collaboration with the medical experts
  - All of us have to do our own homework
  - And all of us have to make sure we "get it"
  - Rob will show how deciding when the injuries occurred and who caused them, and deciding what charges are appropriate on the facts of each case is enhanced with expert collaboration
- Rob will then shift to a discussion of the necessity for meaningful pre-hearing or pre-trial preparation – *not accomplished 5 minutes before the trial or hearing*
- And Dr. Laskey will explain what she as an expert witness needs from us to prepare for court hearings and trials – and will offer some examples when the direct examination went smoothly and when it could have been improved

## Outline for the presentation

- PART THREE – Rob will begin the discussion as to the most effective ways to use a medical expert to educate the trier of fact and give the jury/judge the necessary tools to make their own decision about what happened to the child
- Both Dr. Laskey and Rob Parrish will illustrate some effective ways to educate the trier of fact about complex medical issues using visual demonstrative evidence such as computer graphics, animations, charts from medical texts, and other aids
- That discussion will focus in on the unique challenges of teaching the trier of fact about Abusive Head Trauma and Abdominal Trauma, two of the most difficult areas for child physical abuse and child homicide prosecution
- Dr. Laskey will offer her perspective on what seems to have worked best in her experience as an expert witness – and how we can all improve our courtroom presentation of evidence

## Outline for the presentation

- PART FOUR - Rob will then offer ideas as to how prosecutors should prepare to cross-examine medical witnesses who testify for the defense, including obtaining help from the child abuse expert or Child Abuse Pediatrician to understand the strengths and weaknesses of the defense expert report
  - Rob will address what resources are available to prosecutors from those who have already researched and confronted defense medical witnesses
  - He will discuss just a few examples of the unsupported and often unscientific claims made by some medical witnesses in these cases,
  - Including examples of common 'alternative explanations' sometimes offered by defense medical witnesses – and what criminal justice professionals must know about the truth – including cross-examination basics for prosecutors
  - And offer some suggestions as to how to effectively expose the lack of credible science to support their courtroom-only opinions
  - Rob will suggest that when possible we have the Court allow the child abuse expert or Child Abuse Pediatrician to attend the defense medical witnesses' testimony, to help us with ideas for cross-examination and offer their thoughts about what items could be clarified in rebuttal testimony, which opinions are "fringe" or have no general acceptance anywhere in the medical community, and which statements are nothing more than *"ipse dixit"*
  - Both Dr. Laskey and Rob Parrish will offer their thoughts about when re-calling the child abuse expert or Child Abuse Pediatrician as a rebuttal witness is appropriate
- *Both will then conduct a brief demonstration of rebuttal testimony based on the hypothetical defense expert report made available in advance of the training*

## Outline for the presentation

- CONCLUSION –
- We will both then wrap up with the need to develop and maintain professional trust and understanding on an ongoing basis
- And there should be time for questions and discussion at the end

## Outline for the presentation


## Part One

Dr. Toni Laskey

## Dr. Laskey – What is a Child Abuse Pediatrician and What Training/Experience is Necessary

- Nationwide network of CAPs and other experts who diagnose child injuries – how they collaborate with each other
- Importance of research in the field – advancing what is known and what still needs to be understood
- Contrary to some claims – they find "abuse" in less than 50% of cases referred to them for evaluation
- Members of the SHF team and how they function – similar to most large children's hospitals – but some don't have easy access to a children's hospital
- Everyone involved in investigation and prosecution of these cases needs to consult with physicians who have expertise in the field and can help

## Dr. Laskey – The process of differential diagnosis in child physical abuse/homicide

- Followed in every case – no rush to judgment – no "magic findings"
- Differing levels of certainty – every case is different
- Collaboration among experts helps inform diagnoses
- The difference between a medical diagnosis of "child abuse" and the legal definition
- Sometimes answers aren't instant
- Some tests must be delayed while the medical personnel try to save the child's life
- But, physicians are willing to consult with the investigators and prosecutors throughout the development of an investigation or legal case

## Dr. Laskey – The process of differential diagnosis in child physical abuse/homicide

- Why investigators need to inform the experts about what they are finding – especially when the caretakers for the child change or evolve their stories about what happened
- The importance of interviews with all caretakers as to the hours to days prior to the child becoming injured – going from "fine" to "not fine"
- CAPs have a role to play in keeping this child and others "safe" from future harm
- Can help criminal justice professionals understand the medical issues – but can't answer the ultimate question of who hurt the child, exactly what mechanism was used, or exactly when

## Part Two

Rob Parrish

What investigators and prosecutors need to understand

The collaboration process with experts begins from the start

## The role of investigators and prosecutors

- We need to begin the collaboration with the experts early – but be patient because all questions can't be immediately answered
- Experts can assist investigators with what to look for, what the likely cause of the injuries was, and when they were likely caused
- All of those opinions are strengthened when they know what the investigators have discovered
- Before prosecutors screen a case for charges the prosecutor should have a firm understanding of the medical issues in the case – the opinions of the expert medical witnesses, and the scientific basis of those opinions
- We also need to know the degree of certainty attached to those opinions

## The role of investigators and prosecutors

- My first child abuse trial of any kind was a homicide – St. George, Utah
- Key witnesses were Dr. Marty Palmer, Pediatrician and director of the Child Protection Team at Primary Children's Medical Center and Dr. Marion "Jack" Walker, Pediatric Neurosurgeon
- Several trials later, I had determined that I wouldn't go to trial without the help of the right experts – and that included Dr. Palmer in most of my cases for most of the next decade (he tragically passed away in 1994)
- With the help of mentors like that, and continuing with the assistance of many more experts, I was finally able to understand the language of medicine and develop ways to prove physical abuse/homicide cases in the courtroom
- That expert collaboration continues today – and I learn something new in every case

## Why investigators and prosecutors need to have a firm grasp on medical issues

- Because if we don't "get it" – how will we ever be able to educate a group of laypersons selected as a trial jury and/or a Judge who may or may not have much medical training?
- I've seen far too many prosecutions fail because the attorney never really understood the key issues or their significance to the proof
- This is not an area for the generalist
- While prosecutors can learn what they need to know to prove a case they often need to spend a lot more time than on other criminal cases – and be willing to accept help from a variety of sources
- Since investigators get trained, then rotated back to other assignments, it's important that we all cross-train each new group of special victim and homicide investigators

## Why investigators and prosecutors need to have a firm grasp on medical issues

- Criminal investigators won't know when they're being lied to unless they understand the medical basics
- And, they won't be able to confront the suspected perpetrators of the abuse about their false statements unless they know why the "stories" don't account for the child's injuries
- It's those discrepant stories and evolving accounts of what caused the injuries that allow prosecutors to prove not only the identity of the perpetrator, but also their mental state
- Between doing our homework and judiciously using help from the experts, prosecutors need to make sure we understand the medical issues in each case – sufficient to teach them to the trier of fact

## The 'window of time'

- Through evaluation of the nature of the child's injuries, when the child was reported to go from "fine" to "not fine", and what has happened to the child since then . . .
- Experts can help us understand the window of time during which the injuries were caused, the onset of symptoms and what symptoms would have occurred, and what anyone who was caring for the child at the time should have noticed
- Even for infants who are not mobile, there are usually some indications of a fractured long bone, damaged brain, or internal abdominal trauma
- Narrowing that window combines medical science with investigative facts

## The 'window of time'

- But we need to have a general understanding that some abusive injuries may not be painful for very long
- Ex. Rib fractures – pain lasts for weeks in adults – 48 hours for babies and toddlers
- On the other hand, once a long bone is fractured, the child won't be "asymptomatic" for hours or days when caretakers change clothes, change diapers or pick up and hold the child
- In my experience, perpetrators don't tell the truth about what they did to the child,
- But they do tell the truth about the onset of symptoms – they don't know the significance of those symptoms

## Sudden loss of impulse control or long pattern of sadistic injuries?

- As prosecutors decide whom to charge and what charges are appropriate, experts can help us understand whether this case involves a sudden loss of impulse control while caring for a child
- Or a long pattern of injuries inflicted upon the child by one or more caretakers
- The former, even where the results are bad, may be subject to different charges and resolution possibilities than the latter
- However, some who abuse children don't seem to have any understanding how to appropriately parent a child, believe they must micromanage everything the child does, or are repeating the terrible patterns of their own experience being parented

## The "whodunit"

- Can be the most difficult decision to make – even when it is clear that *someone* abused the child
- The experts can help us understand that almost all child abuse is committed by someone who gets overstressed while caring for a child
- And that common behaviors of perpetrators are in the list of things they use to sort between an abuse diagnosis and something else
- Discrepant history, evolving stories, and delay in seeking medical care are almost universal in cases of inflicted childhood injuries
- The offering of the stories helps us determine who likely caused the child's injuries

- **The issue isn't just who had *"access"* to the child during the window of time during which the injuries occurred**
- **It's who was in a situation where they might be *stressed* by the child while engaged in a primary caretaking role?**
- **As experts in the field have documented, almost all child physical abuse is done by someone who is taking care of the child and became overstressed in that endeavor**

- **Even Judges often get this completely wrong – they'll decide that because there were other adults who had "access" to the baby, they can't decide who caused the abuse**
- **Who really cares that Aunt Harriet was there for 15 minutes, held the baby, but was never alone with her – and after that the baby drank a full bottle and was interacting with everyone normally?**
- **But what do we do when there are several adults who cared for the child during the "window of time" the experts have helped us identify?**

## Factors to consider

Sorting between possible perpetrators of abuse

1. **Which of the possible perpetrators was with the child when the child became symptomatic?***
2. **Who offered the stupid stories, or has tried too hard to explain serious or fatal injuries as an accident?****
3. **Whose story has evolved or changed to fit the information provided about how serious the injuries are?**
4. **Who had a "motive" to hurt or even kill the baby?**

5. **Who was overstressed by a sudden change in child caretaking responsibility?**
6. **Who exhibited unrealistic, age-inappropriate expectations of the child?**
7. **Who has a history of abuse of this child or others? Domestic violence? Animal abuse?**
8. **Who has a history of "anger" problems, or is a "control freak"?**
9. **Who blamed other children?** (where such a claim is unreasonable)
10. **Who is physically capable of the abuse?**

11. **Who caused a delay in seeking medical care for a critically/fatally injured child?**
12. **Who has "shopped" for medical care to avoid the accumulation of documentation of maltreatment?**
13. **Who was an abuse victim him/herself?** "I would *never* do something like that to my children, because it happened to me."
14. **Did one caretaker criticize the other for being too "lenient" with discipline?**
15. **Has one person provided a "partial admission"?**

16. **Who has shown virtually no emotion about the injured child?**
17. **Who is always seeking attention for him/herself? Munchausen Syndrome** (or by proxy)
18. **Who just happened to be alone with the child every time an unexplained or suspicious injury occurred?**
19. **Who calls the baby "it" or "him" or "her" and never uses his/her given name** (the victim was an object)
20. **Did one of the caretakers lack any "attachment" to the victim?**

### The New Factors

21. Who was playing _____ on a cell phone or checking their FB messages when a child interrupted this highly socially important activity?
22. Was one caregiver trying to be "superman" or "superwoman" and take the stress without waking or interrupting their partner?
23. Who is described to be "too rough" with the kids and who, when admonished by mother-in-law, says "They're my kids and it's none of your business" or "I was whooped when I was a kid and I turned out alright"

**[subject to a full psychological]**

## Common sense and the United States Supreme Court

Estelle v. McGuire - 1991

"The proof of battered child syndrome itself narrowed the group of possible perpetrators to McGuire and his wife, because they were the only two people regularly caring for Tori during her short life . . .Only someone regularly caring for the child has the continuing opportunity to inflict these types of injuries; *an isolated contact with a vicious stranger* would not result in this pattern of successive injuries stretching through several months."

## Expert witness preparation

- Can't happen 5 minutes before a hearing or trial begins – no matter how busy the prosecutor and expert may be
- Prepare well in advance so that a meaningful collaboration can occur – even if you have to meet after-hours or on weekends
- Go over and make sure you understand the expert's qualifications – a CV alone is never "self-explanatory"
- Prosecutors need to determine what the expert's opinions are about:
  - Nature and severity of child's injuries
  - If diagnosed to be the result of inflicted injury, what is the basis?
  - How did the expert "rule out" other potential diagnoses? What is their "unifying diagnosis"?
  - What degree of certainty can the expert express about the cause of injuries?
  - What is the expert's opinion about the onset of symptoms for each injury, and what does that signify as to when the injury was caused? What is the basis of opinions on timing?
  - If known in advance, what is the expert's opinion about the defense expert report?

## Expert witness preparation

- Prosecutors need to know the scientific and ethical limits of expert opinions – well in advance of the hearing, not while examining the expert on the witness stand
- Everyone's style is different, but in whatever way we can, the prosecutor needs to go over the questions with the expert in advance
- Sharing the questions can allow a process of rephrasing or eliminating questions that are impossible or awkward for the expert to answer
- During the preparation meetings, the prosecutor needs to ensure he/she has a full understanding of the medical issues in the case
- Pretending to understand when you really are still confused can't lead to anything good (and puts undue pressure on the expert)

## Expert witness preparation

- The expert needs to have a clear understanding of how their opinions fit within the overall proof in the case
- No child abuse or child homicide case is proven ***solely*** by expert testimony (regardless of Prof Tuerkheimer's ridiculous claims)
- But, no such case is proven in court without *some help* from medical experts, either
- Since almost all child abuse is done in secrecy without other witnesses, and since the child is usually too young to say what happened or too injured to do so, virtually every case is based on circumstantial evidence
- Proof relies upon expert opinion combined with investigative facts - always

## Expert witness preparation

- In some cases, the Judge has ruled on evidentiary issues – including sometimes limiting what expert evidence can be admitted
- We need to clearly explain those limits to the expert witness prior to the hearing or trial, to avoid reversible error
- It's not enough to explain the ruling – the expert also needs to comprehend why the Judge ruled that way
- As a preview for the next segment – both the expert and the prosecutor need to find the best ways to explain and illustrate complex medical topics for the Judge and/or jury
- Before the preparation meeting is done, both should have a pretty good idea what they will use for that purpose

## Expert witness preparation

- Dr. Laskey – What does the expert witness hope to accomplish in the pre-hearing or pretrial preparation meetings?
- Examples of when preparation was insufficient?

## Expert witness preparation

# Part Three

**Collaboration to find or create the best ways to illustrate expert opinions**

**Medical school 100 for jurors and judges**

## Education of the trier of fact

- Maybe the most important aspect of collaboration is realizing that the judge or juror with no or very little background in medical science will need to learn what is necessary to decide the case in a short time
- That might be a one-day preliminary hearing – or a five day trial
- Either way, it's not much time to give the TOF what they need to make the key decisions
- We learned quite some time ago that the old way of education and expert testimony didn't work well
- Even when the expert is accomplished at making medical terms understandable to the lay person
- It's much easier to understand when the TOF can *see* the information demonstrated than just hear it explained

## Education of the trier of fact

- I usually spend about 2/3 of my time in the qualifications and education phase of questioning the expert witness
- And only the remaining 1/3 on the actual injuries suffered by the child and opinions as to how they were caused, when they were caused, and how the diagnostic opinions were based on science
- When the general education is effective – the TOF has already learned the basics and can now apply what they've learned to the facts of this particular case
- But, this process is never easy
- And we have to be vigilant to remember who the audience is – no matter how much *we* learn about medical science, they may not know much at all

## Education of the trier of fact

- The next thing prosecutors have to consider is that of all the crimes that jurors sit in judgment of, child abuse is closer to their experience than anything else
- We don't choose burglars on a burglary jury – robbers on a robbery jury
- But we have no choice but to choose people who have been stressed by a child in child abuse cases – almost everyone has
- And, most of those who cause harm to a child are not hardened criminals with a long criminal record – they are just like those who sit on the jury
- So, we come into these cases with a burden of proof that may silently exceed "beyond a reasonable doubt"
- That means we can't leave any stone unturned – or assume anything

## Education of the trier of fact

- Dr. Laskey -- views as to the best ways to educate a Judge or jury about child abuse

## Illustrating the expert's opinions

- A large body of research shows that we retain more of what we see than what we only hear
- Though percentages vary among researchers, some say it's a 65% to 10% ratio
- Those of us who have done trials for a long time have witnessed the revolution from passing 8X10 photos among the jurors while the expert is testifying about something totally different
- To using computers in the courtroom so that everyone is seeing exactly the same thing the expert is testifying about while the expert is able to point out the salient parts of the photo/xray/ct scan, etc.
- But the revolution also came with another change:

## Illustrating the expert's opinions

- I learned fairly early in my career that while some physicians are pretty good at drawings on a white board or an easel
- Some are really bad – like "you're gonna lose at Pictionary" bad
- Again, there's nothing worse than finding that out after handing the expert the erasable marker and asking them to draw what they're talking about (and the case had nothing to do with amoebae)
- Since we've moved ahead in the last two decades – things are tremendously improved – and the outcomes in tough cases are the best evidence that it's working

## Illustrating the expert's opinions – The Basics

- Important to recognize that most experts have access to visual materials that they are comfortable using
- Do NOT just show up at the hearing/trial with what you think would be great and not show it to the expert in preparation meetings
- IF you're going to use CT scans or xrays -- be sure to use split-screen to show "normal" vs. "abnormal"
- If you're having a tough time understanding the radiologic images and what they show -- a jury or judge may struggle even more
- That's when you find another way to illustrate the injury(ies)
- Some visuals are useful in general education – in some cases, you'll want to have case-specific illustrations, graphics, or animations created

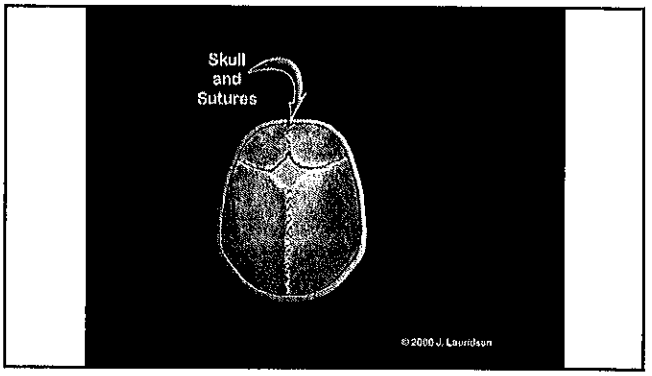
## Illustrating the expert's opinions

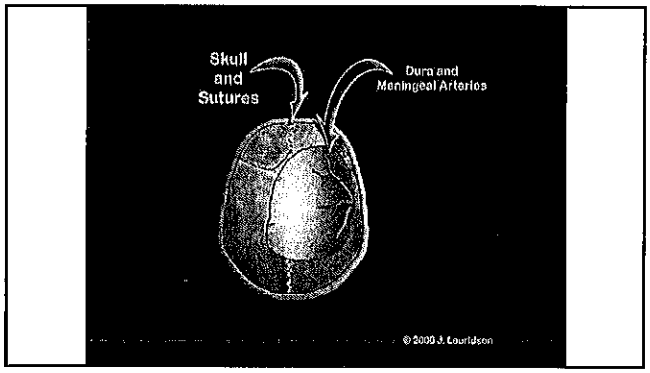
- Some examples of visual methods for educating jurors and judges about child physical abuse and child homicide:

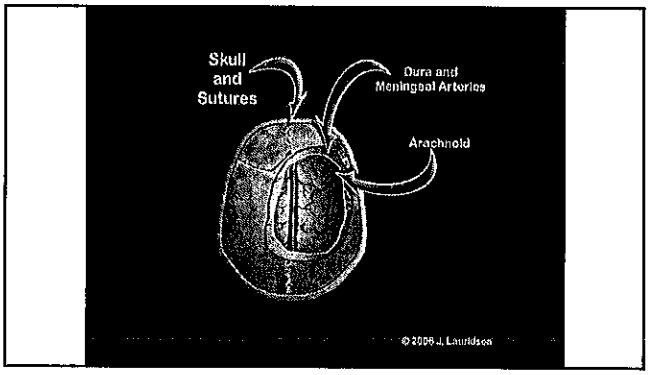
## Examples of illustrating medical opinion

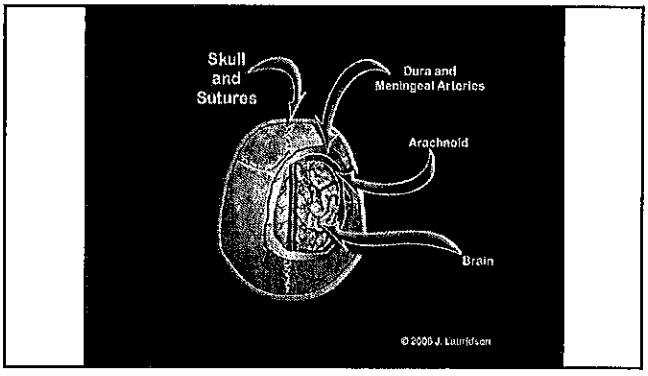
## General education

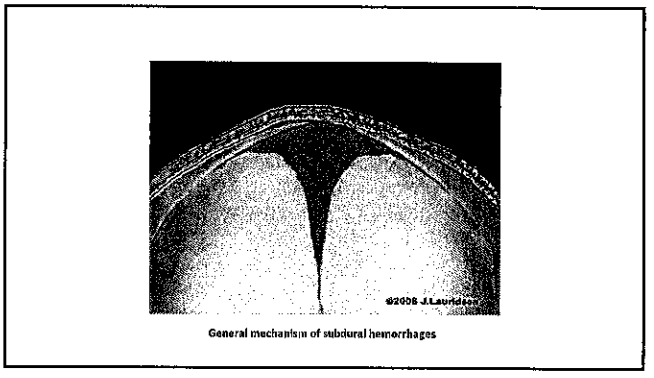
- **Abusive** Head **Trauma** basics



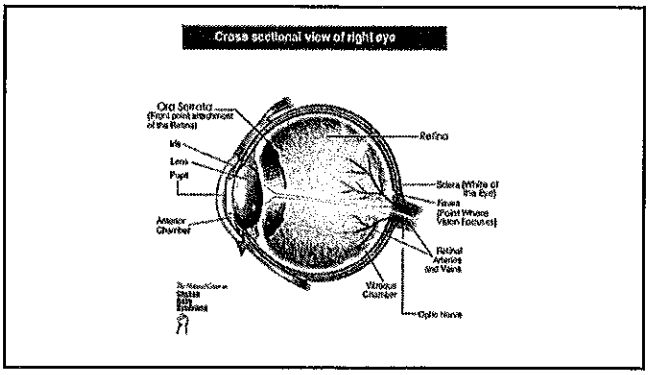



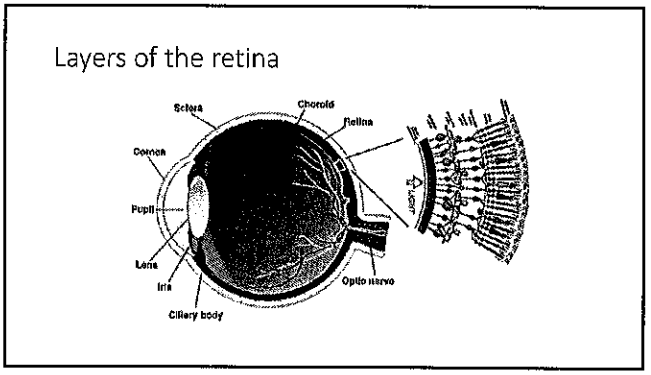



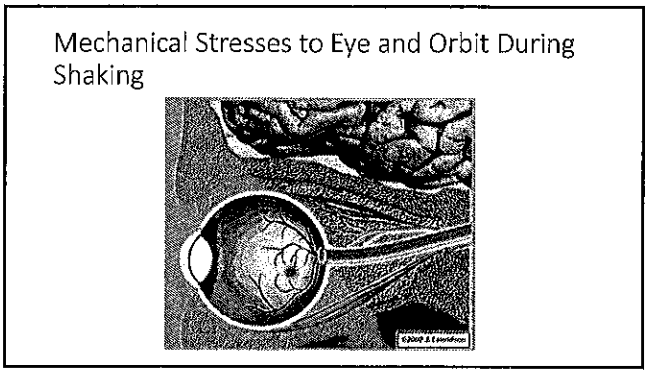



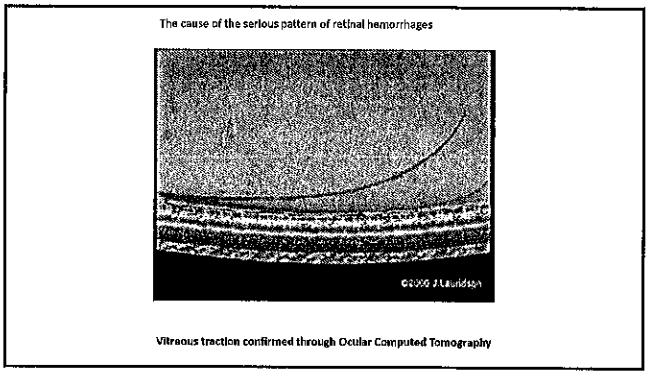



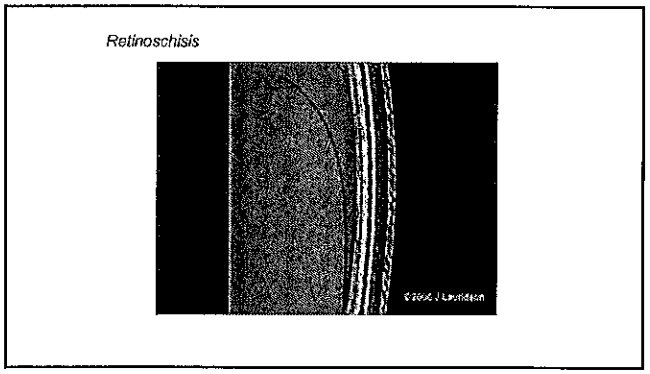

General mechanism of subdural hemorrhages

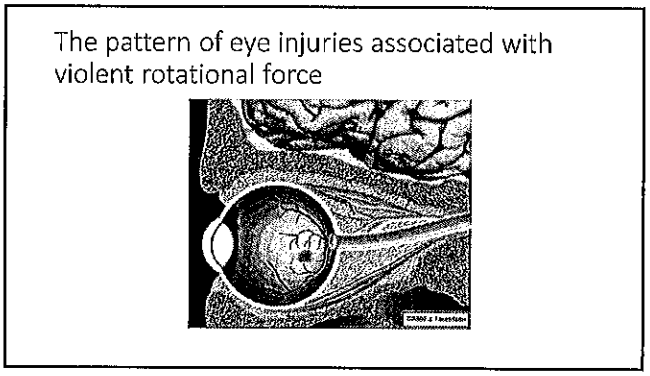

Cross sectional view of right eye
Ora Serrata
Iris
Lens
Pupil
Anterior Chamber
Retina
Sclera (White of the Eye)
Fovea
Retinal Arteries and Veins
Vitreous Chamber
Optic Nerve

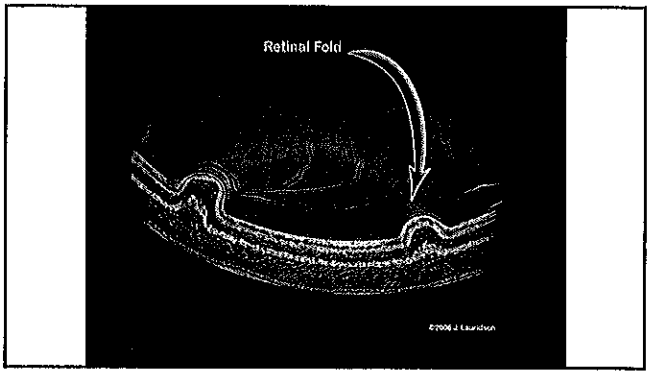

Layers of the retina
Sclera
Choroid
Retina
Cornea
Pupil
Lens
Iris
Ciliary body
Optic nerve


Mechanical Stresses to Eye and Orbit During Shaking

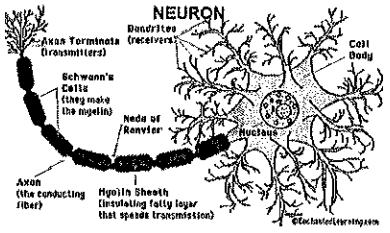

The cause of the serious pattern of retinal hemorrhages
Vitreous traction confirmed through Ocular Computed Tomography

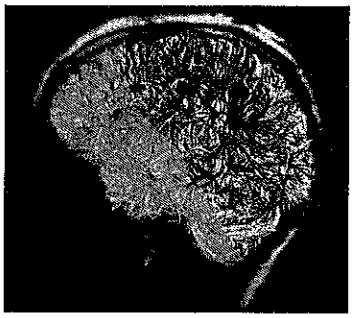

Retinoschisis


The pattern of eye injuries associated with violent rotational force

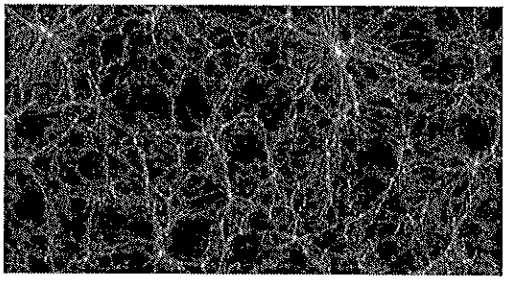



## Brain damage basics

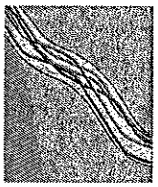


## What they look like up close



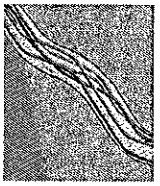
## Axon Injury



Temporary changes to axon surface

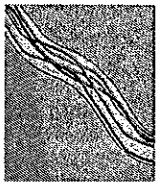
Slowing of impulse transmission

## Axon Injury



Fluid entry into cell and temporary axonal swelling

## Axon Injury

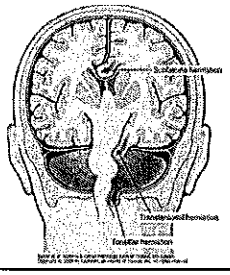


Disruption of neurofilaments and microtubules causing interrupted axonal transport with "retraction ball" formation

## DURAL REFLECTIONS AND VENOUS SINUSES

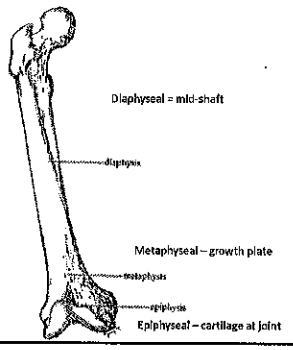

FC - FALX CEREBRI
TC - TENTORIUM CEREBELLI
ISS - LOCATION OF INFERIOR SAGITTAL SINUS
SS - LOCATION OF STRAIGHT SINUS
GCV - OPENING OF GREAT CEREBRAL VEIN OF GALEN
DS - DIAPHRAGMA SELLA
TN - TENTORIAL NOTCH

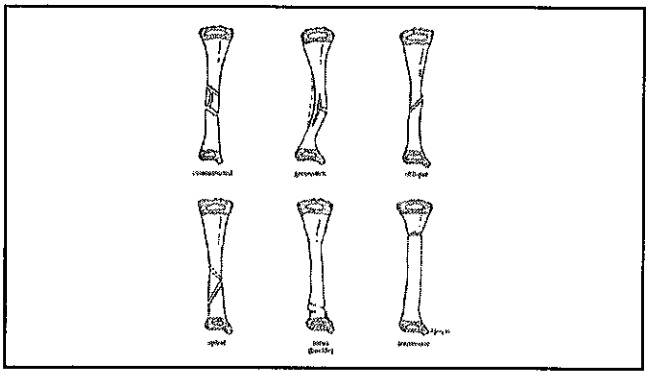
## Herniation in the brain



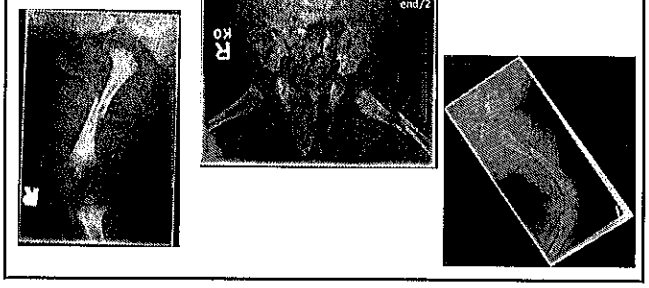
## Parts of the long bones

Which bone?
Where's proximal?
Where's distal?





## Spiral fractures of femur




What bone?

What type of fracture?

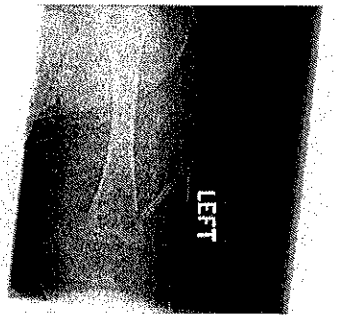
How does this happen?

In a non-mobile infant?

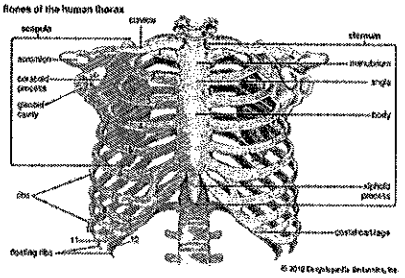
What pain?

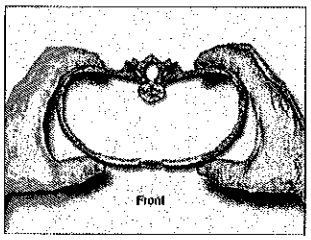
Silent for three days?

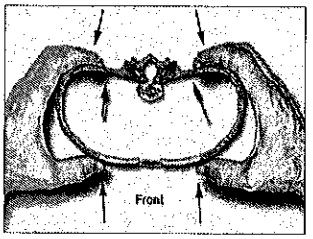
NOT!

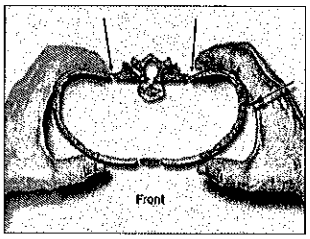


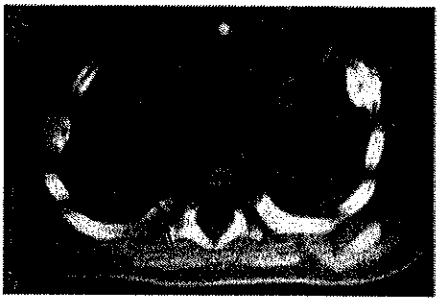

## The human rib cage

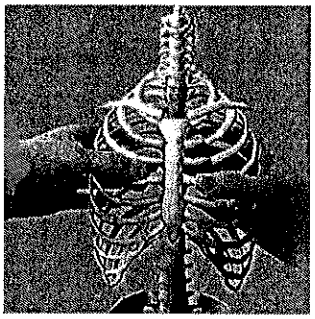


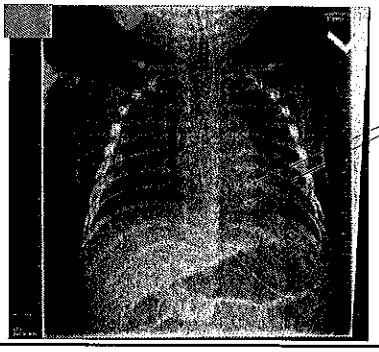



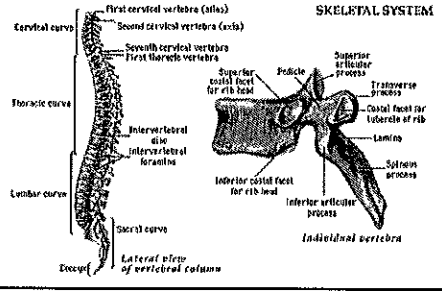


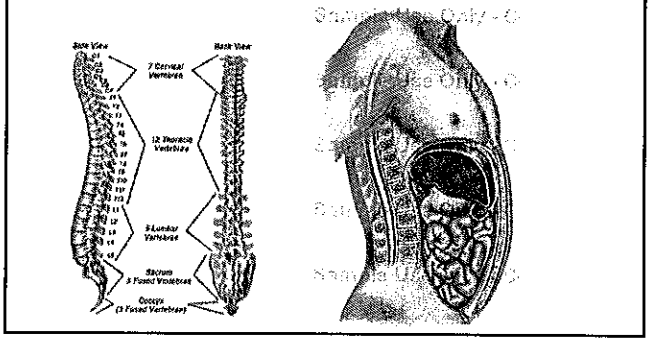



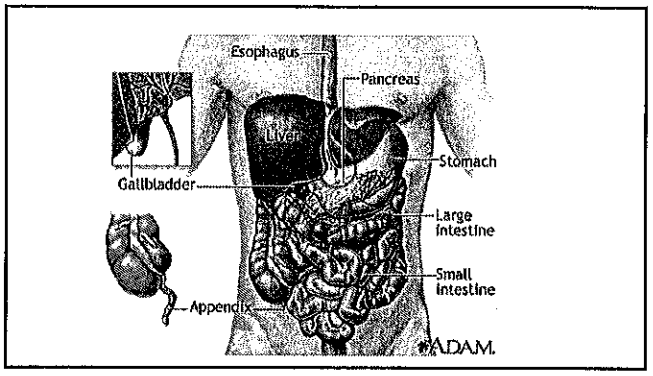


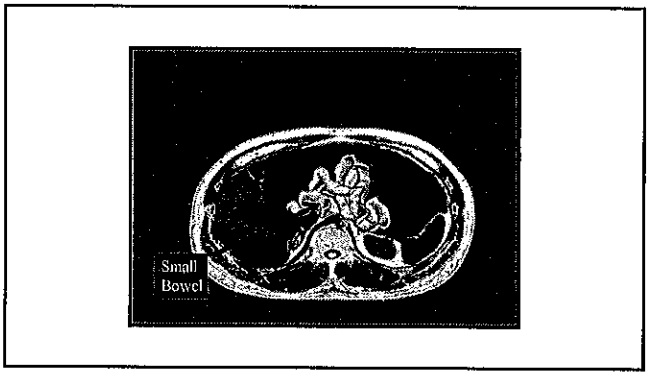


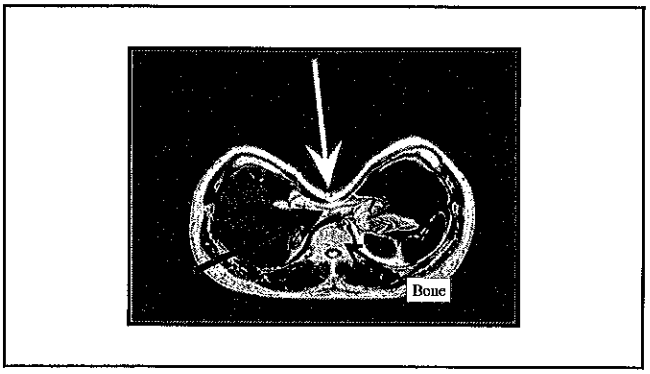

## Parts of the spine

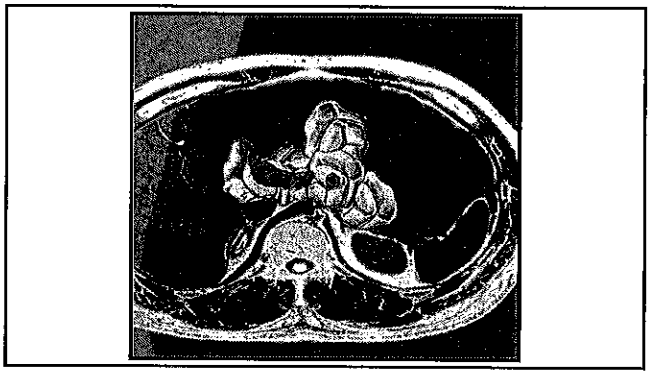


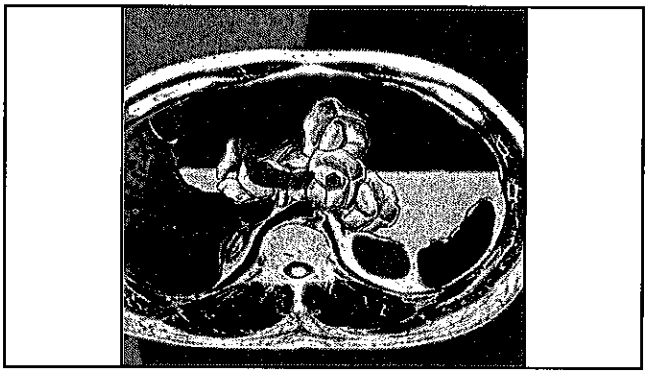



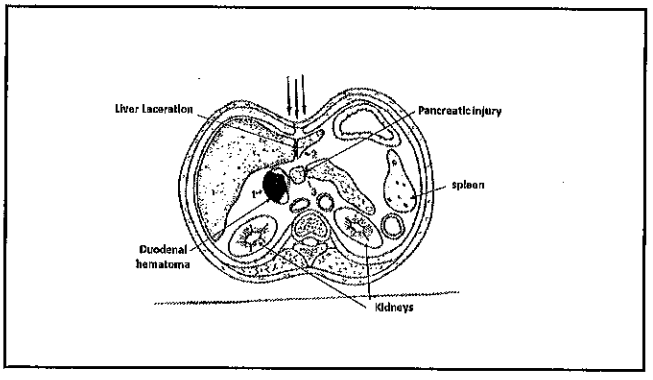

Esophagus
Pancreas
Liver
Stomach
Gallbladder
Large intestine
Small intestine
Appendix
A.D.A.M.


Small Bowel


Bone






Liver Laceration
Pancreatic injury
spleen
Duodenal hematoma
Kidneys

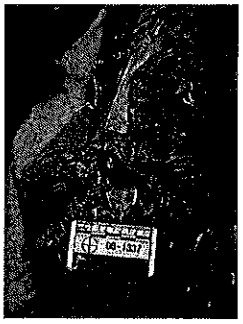
## Case-specific graphics

- Sometimes we need to turn to outside sources to create graphics that our expert(s) are comfortable with and can lay the foundation for

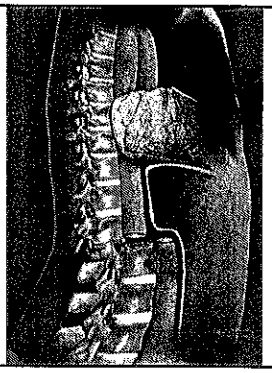
## Transecting Injury to the Aorta and Spine

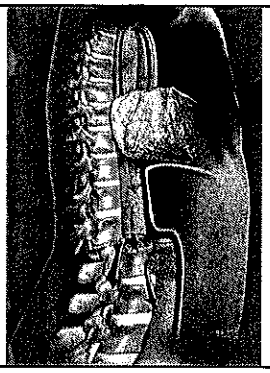
The case of 2 year-old AL – child homicide

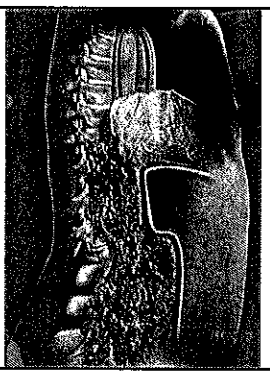
Cropped for jury

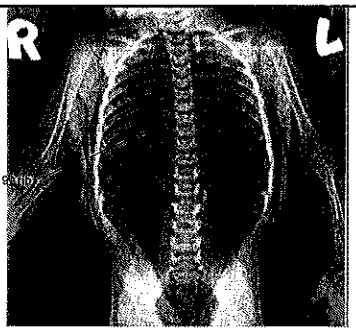


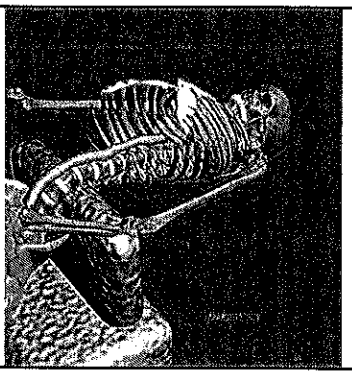
Original autopsy photo (defense stipulated)

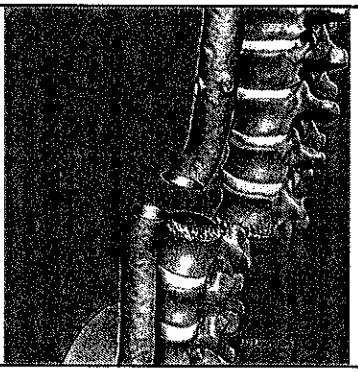










## State v. Esar Met

Sexual assault and murder of 7 year-old Karen refugee by Burmese refugee

Good example of how to illustrate expert testimony by computer animation

Virtually anything can be animated based on your experts' opinions

## VI. State v. Met

- Met was left alone at So Salt Lake Apartment complex the day HNM went missing – huge search for 2 days – Met had already vanished (he was Burmese refugee, victim was Karen refugee)
- Finally police got into his apartment and found her body in the shower in the basement he occupied
- Multiple external and internal injuries – internal injuries not obvious from autopsy photos
- And, we needed to illustrate the mechanism that caused the key injuries and her death

## VI. Met

- Extensive collaborative effort between Dr. Dan Davis, Dr. Todd Grey, Washington University computer lab and me
- After hours of discussion, back and forth drafts, and experimentation, we came up with this video to cover all injuries
- No objection from the defense
- Clearly had an impact on the jury

## VI. Met


## Dr. Laskey

- Experience and examples as to how best to illustrate medical opinion testimony
- What's the best process for deciding what to use?

## Part Four – Confronting and Cross-Examining Defense Experts

- Although a lot has been written and presented about medical witnesses who criticize the shaken baby syndrome and/or abusive head trauma diagnoses
- There are also several physician witnesses who testify regularly about fractures, abdominal trauma, bruises, burns and other forms of abuse and neglect
- Which is not to say that they are wrong – sometimes they bring up issues that we need to take seriously
- But some of them have unreasonable underlying biases and some of them – as with defense experts on SBS/AHT, are really just child abuse denialists (my phrase – not anyone else's)

## Part Four – Confronting and Cross-Examining Defense Experts

- The first step with such defense medical witnesses is to make sure you know they're coming and what they're going to testify about
- Seems like every jurisdiction has different rules about expert notice and whether expert witnesses have to be identified and provide a report prior to a trial or hearing
- But, even if your rules still allow trial by ambush – don't
- Because every trial judge has inherent authority to grant a prosecution motion for adequate discovery, adequate enough that the prosecutor doesn't have to guess about who the expert is or what he/she is going to say

## Part Four – Confronting and Cross-Examining Defense Experts

- The defense medical witness who knows they have little or no science to back up their opinions – that, in effect they'll be asking the TOF to "believe me, because I'm the expert" –
- Tend to also do whatever they can to avoid preparing a report – because they know that gives the prosecutor time to check them out, discuss the defense witness' proposed opinion testimony with the prosecution's experts, and maybe even file a Motion in Limine to exclude or limit their trial testimony
- For physicians who fit this pattern, it's more important than ever to find whatever we can in advance about them

- Consider filing a Motion in Limine if the defense expert's claims may not pass tests of reliability
- May not keep them out, but limit and educate the Judge as to the limits of support for their theories
- Remind the Judge he/she is still a gatekeeper for junk science – CADs may be offering junk science, pure speculation, or "ipse dixit"
- Good chance to contrast expertise and qualifications – compare CADs vs real experts
- We need both the judge and jury to understand the difference between our experts and theirs

- In direct exam and in their report, they usually speculate about what the State's experts are saying/concluding – or how they reached their opinions (it has to fit their "straw man" argument)
- Ask if they've even *talked* to those other experts – (almost never)
- That shows their lack of objectivity
- Many CADs just don't want to believe that caregivers abuse children – so they come up with any alternative

Example – Marvin Miller's TBBD – even his colleagues acknowledge that there's nothing to his theory, but he just refuses to believe that "normal" caretakers would hurt kids

- To find out about bias, file a Discovery Motion asking the Court to order the defense expert to provide:
  - A list of all cases in which they have provided expert report and/or testimony for the last ____ years;
  - Description of the issues in each case, what type of case (criminal, juvenile, etc.);
  - Whether they actually testified
  - Who subpoenaed them to testify
  - Their fees in those cases
- Be creative in discovery requests – sometimes they just go away because they don't want to play

- If they comply, you may find that all of their recent courtroom experience has been as a defense or parents' witness
- Some prosecutors have had success asking questions such as:
  - What overall percentage of your annual income is derived from acting as an expert witness/expert consultant?
  - In your "day job" (whatever that is), how often are you the *primary diagnostician* as to the cause of injuries to young children?
  - In that day job, have you diagnosed abuse as the cause of a young child's injuries?

## The responsibility to "judge"

- It's our responsibility to provide clear evidence of the differences between defense experts and prosecution experts –
  - expertise, actually working with child patients;
  - no financial stake in the matter;
  - advertising their availability as a child abuse "buster" on the Internet, exhibiting their wares at defense attorney conferences;
  - always finding some other cause, no matter how absurd, other than child abuse;
  - underlying bias is clear from words they use "dogma", "draconian", "rush to judgment", "triad"

## The responsibility to "judge"

- It's the Judge's responsibility to provide appropriate weight to the testimony of experts
- When they are diametrically opposed – they can't all be right
- But the reality is Judges will usually allow defense experts to testify, or may limit them to areas they are experienced in, but almost never prohibit their testimony
- Because criminal defendants have a right to present a defense
- And even a modicum of scientific reliability may be all that's required to overcome a *Daubert* challenge (for the defense expert)

## Your First Step

- Make sure the defense expert is not right
- Maybe the experts you've consulted missed something?
- Is the defense expert someone who regularly works with pediatric patients?
- Talk to the proposed expert – find out what they say was missed or how the experts you're dealing with made mistakes [the may refuse to talk to you]
- The truly "irresponsible" experts will likely not disclose the whole truth about their qualifications or opinions
- And will dodge the tough questions

## What to expect from defense medical witnesses

- Most often, will not offer *reasonable* alternative explanations -- they hate to be asked about a "unifying diagnosis"
- Express opinions that other things are "possible" – which they are completely "certain" about
- "I see nothing in the medical findings that proves this was child abuse" or "there is no radiographic finding that alone proves abuse" -- True – so what??
- They are quite "slick" at their craft – making this sound good
- Attempt to confuse – especially as to the timing or cause of injuries

## What to expect from defense medical witnesses

- "Canned" lecture – shouldn't be allowed, but that's what they expect to do
- Criticize State's experts for:
  - Failing to do critical testing (which isn't)
  - Rushing to judgment, based on 'dogma' or the 'triad'
  - Being unaware of their "alternative explanations" – didn't even consider other possibilities (part of the straw man)
  - Lack of "evidence-based" scientific opinions (meaning no one has experimented on living kids)
  - Ignoring research from Bandak, Plunkett, Leestma, Gabaeff, ...

## What to expect from defense medical witnesses

- Divide and conquer – deal with findings as **though each** happened in isolation, not together
- Often make grandiose statements of what the literature concludes (i.e. biomechanics) but if pressed will have a hard time supporting the opinions
- More often than not, they are not child abuse pediatricians or regularly work with children in **their** medical practice
- When you press them, they often admit that their view as well as **the** "experts" they're relying on are not "mainstream" or even are "fringe"
- But then **they** invoke "the world is flat" arguments

## What to expect from defense medical witnesses

- They may create elaborate PPT presentations taking the actual x-ray images from your case and putting arrows to show the "evidence of rickets" or "healing rickets" - - but nothing is there according to real experts
- Confusion is created by discussing things no one in the courtroom could possibly understand
- Blatant falsehoods – about their qualifications, the basis for their opinions, mainstream medical consensus, etc.
- Get very good at hiding the lack of science

## Common to all expert testimony rules

- The physician who testifies as an expert witness is expected to **bear neutral witness to what medical science supports**
- They are NOT to testify as an advocate for a particular position or party to a case (true for State's experts, too)
- If they testify about views or opinions that are not supported by the mainstream,
- they are required to disclose that (not hide it until XEX)

## The "half-truth" game

- Watch closely for those who tell only part of the truth
- E.g. – One witness claims that she's done "hundreds of child autopsies" as a pathologist
- The truth is . . .
- Or, "chronic subdural hematomas can rebleed with little or no new trauma"
- True, but that doesn't cause the brain to suddenly swell, doesn't result in traumatic retinal hemorrhages, and is equivalent to scratching a scab
- What they say is not a lie – but leaving out the "rest of the story" violates their oath to "tell the whole truth

## What issues can you expect?

There are some predictable patterns

## Themes of Def Experts

- The victim may have suffered from:
  A. Brittle bone disease – vitamin deficiency – OI
  B. Ehlers-Danlos Syndrome
  C. Easy bruising (coagulopathy) - DIC
  D. Prematurity
  E. Disease condition, including congenital malformations
  F. Difficult birth – prenatal or post-natal drug abuse by MO
  G. Chronic subdurals – the "rebleed" theory
  H. History of apparent life-threatening events
  I. Cerebral venous thrombosis (CVT)
  J. Without an eyewitness, no one knows the *exact mechanism* of injury (true, but we don't have to prove that)

## Themes of Def Experts

- The "shaken baby syndrome" is a faulty diagnosis with no scientific support – never replicated in the lab
- Biomechanical experiments have conclusively proven that shaking a human infant/toddler can't cause serious brain injury or SDH
- Anything that results in loss of oxygen to the brain can cause *all* the findings associated with abuse (Geddes)
- If shaking could result in serious brain damage, it would necessarily be preceded by neck injury (which is rarely present in AHT cases) – neither of those statements are true

## Themes of Def Experts

- Biomechanical studies have shown that although a fall from 1 foot or less can cause serious or even fatal head injuries,
- Even sustained and violent shaking can't exceed those injury thresholds (which they don't say have never been established for human infants)
- The injury thresholds most BMEs use are derived from animal experiments or "scaled" down from what occurs with adults
- But they never admit that until challenged on XEX

## Themes of Def Experts

- ☐ Because a full series of genetic tests were not done, no one can ever know if the child had a preexisting condition
- ☐ Lab results alone don't answer that question
- ☐ In the absence of such testing, the truth about what happened to this poor child will "forever remain a mystery"

## Themes of Def Experts

- ❑ Vitamin D or other vitamin deficiencies, without anything else, can be proof of brittle bones
  - ❑ [Most kids in the USA are VitD insufficient, some are deficient]
  - ❑ AAP – "rickets" or bone deficiencies NOT proven by mere vitamin deficiency
- ❑ Bone fractures can be asymptomatic – caregivers might not notice
- ❑ No way to date bruises, retinal hemorrhages, skull fractures – which is sort of true, but usually unimportant

## Themes of Def Experts

- "Short" falls can cause exactly the same injuries as are attributed to inflicted head trauma (Plunkett, 2001)
- There is no pattern of intracranial bleeding, ocular injury, or brain injury which is "pathognomonic" of abuse [that's true]
- No medical expert can express an opinion about what happened to the child "beyond a reasonable doubt" [not required]

## Themes of Def Experts

- RH in multiple layers extending to the periphery with macular folds are seen in a variety of accidental situations and diseases (um, no – never proven by anyone)
- Alternatively, RH is a RH is a RH – number, location and distribution are irrelevant
- All types of retinal hemorrhages and other eye injuries, including retinoschisis, can be caused by increased intracranial pressure [which most kids with AHT have] – a false premise

## Themes of Def Experts

- "There are no radiologic findings which are by themselves specific for child abuse or inflicted injury" [Barnes' vacuous profundity]
- True – so what?
- Rickets, osteogenesis imperfecta, inborn errors of metabolism – generally rare, but not in cases with certain experts
- "I see things that no one else can see" – but only when I'm testifying for the defense
- Alaska case – appellate court held that it was okay for defense medical witnesses to offer explanations for child's injuries that were based on the claims of other physicians even though they have no expertise in that field

## Coagulopathies

- Wide variety of bleeding disorders can affect kids – some congenital
- But, DIC is a well-documented *result* of inflicted head injuries
- Don't let defense experts confuse the temporal association with a causal association
- Even kids with bleeding disorders should not have *solely* subdural hemorrhages or retinal hemorrhages or a combination of the two

## Vitamin Deficiency and Rickets

- It's quite true that possibly a great number of infants in the USA have Vitamin D insufficiency
- A smaller number actually have Vit D "deficiency"
- It's NOT TRUE that a mere vitamin insufficiency or deficiency ***establishes*** that a child has brittle bones or metabolic bone disease
- AAP has made it very clear – a doctor cannot diagnose "rickets" purely from a blood draw result in the absence of radiographic evidence of bone abnormality
- But there are CADs who regularly testify that every case they have been asked to become involved with is a case of "healing rickets" or "early rickets"

## Osteogenesis Imperfecta

- Is rare, but it does occur
- Can be ruled in or out with appropriate diagnostic testing – four different types, one can be subtle – one not so much
- Even kids with OI can be abused
- OI kids usually have lots of fractures everywhere from normal daily handling
- CADs will "find" OI, even where it doesn't exist
- Or will say that because their new-fangled bone density test wasn't performed, no one can know whether the child had easy fracturability

## The poor kid with every illness in the book

- Is likely going to be a victim of multiple child abuse injuries evaluated by the child abuse denialist witness
- In one of my cases, the defense expert hypothesized no less than *8 different extremely rare* diseases for the cause of SDH, RH and fatal brain trauma – the statistical likelihood was ridiculously infitesimal
- And, the CAD always assumes that all of those conditions were missed in the "rush to judgment" even though child abuse pediatricians would much rather find disease is the cause (and probably can testify there was no indication of any of those extremely rare causes of a single medical finding)

## General principles of XEX

- Have a firm objective in mind
- Obtain admissions that help your case - things the defense expert must concede – narrow the disputed issues
- DON'T just offer them another chance to "expound" their theories
- Establish all the things not in contention – for instance, the injuries documented
- Expose bias – how much of their time is spent as a professional witness for child abusers? Money?
- Explore differences in qualifications
- Don't let them obfuscate about their background and qualifications (but you have to do your homework)

- Don't argue with the expert over things that don't matter (don't get sucked in)
- Stay in control – careful use of leading and closed-end questions
- NEVER ask one question too many
- *Ask them to provide the scientific support for each opinion expressed on direct examination*
- Don't just take their word for it that "there are dozens of articles that support that view"
- Don't let them cite each other! – garbage relying upon garbage is still . . .
- Focus your questions on what the mainstream literature says – and what those who regularly diagnose child injuries accept

## Obtain admissions

- Admit there are certain types of injuries that a non-mobile infant can't cause to themselves?
- Those injuries require someone else's intervention?
- Admit that the peer-reviewed pediatric literature does not support their opinion (ie. they aren't mainstream)
- Admit they have not conducted any *original* research to answer the questions they've raised
- (Remember, research is not polemics!)

## Obtain admissions

- "When was the last job you've had where you were the primary, ultimate diagnostician as to the cause and timing of a young child's injuries?"
- Pediatric radiologists, even Pat Barnes, are not able to answer that
- "When you claim to be a 'forensic' expert witness, that only means that you testify a lot in court, correct?"
- "In fact, there is no subspecialty in your field where you are qualified as a "forensic. . . , isn't that true?"

## Obtain admissions

"Do you believe that you've complied with all your ethical responsibilities as a physician expert witness in your direct testimony here today?

- When they say "yes" – go through all the rules you know they've violated – use Barnes' own ethics article
- "When was the last time you told a criminal defense attorney that you couldn't help them because you felt the child's injuries *were* caused by abuse?"
- If they answer – get the details – they'll likely dodge the question

## Advanced Cross-Examination

- I know you may not always get this chance, but if you know an expert is going to testify
- Contact NDAA or APA and get access to their extensive materials on that expert
- Read and analyze the *transcripts* of their testimony, prior reports, or even media reports of their testimony
- Line them up on a chart to go through on XEX –
- "You've testified 65 times this year for parents attorneys or criminal defendants, correct?"
- "And in none of those cases did you opine it was child abuse?"

- "Also in the last year, you've testified zero times for any prosecution office or child protection attorneys' office in this country as to a case where child abuse was a possible explanation, is that right?" The last five years? Ten years?
- "How much of your time practicing medicine is actually spent diagnosing and treating your own patients versus 'consulting' and providing testimony for cases where you were not a diagnostician?"
- "Isn't it true that the ethical guidelines for your specialty require that you have actual clinical experience in the relevant field within the last 2 years?"
- "Yet, you retired from clinical practice 17 years ago, right?"
- "Is there a "relevant field" of "hired gun defense experts who do nothing else"? (Just wonderin')

## Advanced Cross-Examination

- "In case X you testified that child did NOT have posterior rib fractures, external marks or bruises, or other signs of abuse, therefore you concluded he was not abused?"
- "But in this case, Y has those missing injuries and you still say it could not have been from abuse?"
- "Dr. in your opinion, if the child in this case has a metabolic bone disease, that alone means the child could not possibly have suffered inflicted injury, is that right?"
- "What is your empirical, scientific basis for that claim?" [controlled, normative studies, not just opinion]

## Advanced Cross-Examination

- "In neither your report nor your direct testimony here today have you even mentioned the 1000 plus articles in the mainstream medical literature that support the diagnosis of SBS/AHT?"
- "Instead, you've relied on and cited about 12 articles to support your opinion, correct?"
- "And each of those articles have been soundly criticized in the mainstream medical literature, yet you didn't mention that?"
- "As an example, you told this jury that Dr. Mark Donohoe proved that there is no scientific basis for the shaken baby syndrome, right?"

## Advanced Cross-Examination

- "When were you going to tell them that he only searched the Internet using one search engine and solely for articles that used the exact phrase, "shaken baby syndrome"?
- "When were you going to tell them that he isn't even a diagnostician, let alone a pediatrician who works with children?"
- "When were you going to let the jury know that when Donohoe found only 55 articles in the literature, there were actually over 550 which had been published at the time (2003)?"
- "And certainly you didn't mean to deceive when you implied, as Donohoe did, that people *can experiment* on living children?"
- "Finally, is it maybe time now to mention that Donohoe's article has been eviscerated by actual experts in the field?"

## Dr. Laskey

- Thoughts about how the child abuse expert can help us identify and confront bogus claims
- Need for significant collaboration on this issue?
- Assistance as to cross-examination?
- Rebuttal testimony?

## Demonstration of Expert Rebuttal Testimony

- Based on the hypothetical defense testimony from Dr. X's report
- Won't cover all the issues raised, but just a select few
- Key is to make sure the jury or judge is returned to "reality" as to the unsupported claims of the defense expert

## Questions or comments?

## Conclusion

## Expert Collaboration

- Is a vital part of proving all child physical abuse and child homicide cases
- But, it can't be done with a minimal effort, or with a plan to meet the expert 5 minutes before trial
- The ongoing professional relationship with the child abuse expert requires mutual communication
- And, even during the trial, we need the assistance of the expert to respond to the twists and turns of the defense
- But, with adequate self-education – adequate preparation – we can prove these very difficult circumstantial evidence cases

## Dr. Laskey

- Your concluding thoughts and recommendations