

Failing to Call an Expert Witness in Criminal Child Maltreatment Cases May Be “Ineffective Assistance of Counsel”

The U.S. Constitution’s Sixth Amendment states, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.” The phrase that most of us probably cite most often is the last one, “the assistance of counsel.” There are many aspects to demonstrating that an attorney has lived up to a reasonable standard of competence. The Supreme Court, in *Strickland v. Washington*, 466 U.S. 668 (1984), has held that the Sixth Amendment does not just guarantee a right to counsel—it guarantees a right to effective counsel. And, the Supreme Court has interpreted this right as extending to all “critical” stages of a criminal proceeding.

For a number of different reasons, ineffective assistance of counsel can be a factor in an alleged wrongful conviction. Examples may include an attorney’s failure to call a witness, properly investigate the facts of the case, cross-examine a witness, request DNA testing, make objections to a prosecutor’s arguments, acknowledge a conflict of interest, or present an expert witness on behalf of the defendant. This article briefly investigates the last circumstance.

In the child welfare legal arena, this issue may come up in child



maltreatment cases. For instance, in *People of the State of Michigan v. Ackley* (2015), Leo Ackley was convicted by a jury of first-degree felony murder and first-degree child abuse following the death of his live-in girlfriend’s three-year-old daughter while she was in his care. At his trial, the prosecution called five medical experts. They testified that the child had died as the result of a head injury that was caused intentionally. Ackley’s attorney called no experts even though court funding for expert assistance was available and a forensic pathologist might have corroborated the possibility that the girl’s injuries resulted from an accidental fall. The Michigan Supreme Court concluded that the “defense counsel’s failure to engage a single expert witness to rebut the prosecution’s

expert testimony, or to attempt to consult an expert with the scientific training to support the defendant’s theory of the case, fell below an objective standard of reasonableness, and created a reasonable probability that this error affected the outcome of the defendant’s trial.”

Indeed, “[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence.” (*Hinton v. Alabama*, 134 S.Ct. at 1088 quoting *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 788 (2011)). When is an attorney’s decision not to retain an expert witness a matter of reasonable trial strategy and tactics, and when is

See *Expert Witness* on page 34



Name: Bryan Grove

Title: Organizational Effectiveness Consultant

Time at APHSA: 1 year

Life Before APHSA: Prior to joining APHSA, I lived in Mississippi and worked at the state Department of Human Services as a program director for Early Childhood Care and Development with the child care subsidy program. I also served as an organizational effectiveness facilitator for the agency division directors and for the agency leadership development program. Originally from Washington State, I came to human services with a background in international and local community development.

I studied Sustainable Community Development at the University of Washington honors college. A portion of the degree provided a year of practical experience focusing on empowerment and community development in rural Morocco after a 2004 earthquake. I moved to Jackson, MS, in 2008 as a consultant to facilitate the creation of a multi-ethnic college housing and mentoring community for the John and Vera Mae Perkins Foundation for Reconciliation and Development near Jackson State University. While involved in this work, I completed a master's degree in Urban Planning at Jackson State University with an emphasis on community development and housing and sought to apply these principles of sustainable community development within positions in state and local government.


What I Can Do for Our Members: Our Organizational Effectiveness (OE) practice serves to help our members become more effective and efficient by helping them focus on addressing root causes affecting organizational and community well-being. Together

with a member and a small team from the member organization, we start with an area of need or an immediate priority. Then we focus on building the internal capacity of staff and organizational system to identify where to go, honestly assess where we are, and then initiate a process of planning, implementing, and monitoring progress. The Human Services Value Curve (HSVC) is an important component in this process as it helps to give a framework for better understanding where we are and where we want to go. The OE practice empowers an organization or community to progress up the Value Curve.

Priorities at APHSA: During my first year with APHSA, I've worked primarily with HSVC translation, facilitating deep-dive assessments of local systems of care seeking to move vulnerable populations upstream in integration of health and human services to improve outcomes and save health costs downstream, and evaluation of the impact of the Affordable Care Act on the level of integration between Medicaid and SNAP programs in six states across the United States.

Best Way to Reach Me: Either via email at bgrove@aphsa.org or by phone at (202) 821-3013.


When Not Working: My wife Mallory and I currently live in Grand Rapids, MI, where Mallory is a resident psychiatrist. I enjoy international travel, learning languages, extreme sports, running, college football, building bridges across cultural divides, and spending time with my wife.

Motto to Live By: In our divided world, some ancient wisdom seems apropos: Do nothing out of selfish ambition or vain conceit, but in humility consider others above yourselves, not looking to your own interests, but also to the interests of others. 

EXPERT WITNESS continued from page 25

it evidence of ineffective assistance of counsel, resulting in a substantial likelihood of a miscarriage of justice? In reviewing a claim of ineffective assistance of counsel for failure to retain an expert witness, an appellate court must evaluate and determine whether the attorney's decision was within the range of competence demanded

of attorneys in similar criminal cases. The reviewing court should avoid the "distorting effects of hindsight" and "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct" (*Strickland*, 466 U.S. at 689-90). As the U.S. Supreme Court has said, sometimes "a single,

serious error may support a claim of ineffective assistance of counsel." (*Kimmelman v Morrison*, 477 US 365, 383 (1986)). 

Daniel Pollack is a professor at Yeshiva University's School of Social Work in New York City. He can be reached at dpollack@yu.edu; (212) 960-0836.