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Facilitated Communication: Novel Scientific Evidence or Novel Communication?

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I. INTRODUCTION

Sexual assault of children is a crime of silence. Because offenders use subtle or blatant coercion to keep children from reporting abuse, and because children often are taught not to express grievances against authority figures, victims frequently delay disclosure for months or even years.[1] When young victims are disabled, total silence is virtually ensured.[2]

Disabled children are attractive targets for abuse because they are physically unable to resist, lack awareness of what constitutes sexual abuse, and are isolated from much of society.[3] When an abuser is also the main provider of a disabled child's physical or emotional needs, the child is even more dependent, compliant, and reluctant or unable to disclose the abuse.[4]

These inhibitors to reporting are compounded when a disabled child cannot communicate in what is considered a normal manner. One of the largest groups of persons with profound communication im-

1. KATHLEEN COULBORN FALLER, UNDERSTANDING CHILD SEXUAL MALTREATMENT 51 (1990). *See* Lucy Berliner & Jon R. Conte, *The Process of Victimization: The Victims' Perspective*, 14 CHILD ABUSE & NEGLECT 29 (1990).
2. Reports are made in approximately one in thirty cases of sexual abuse of disabled persons, compared with one in five cases for non-disabled persons. Deborah Tharinger et al., *Sexual Abuse and Exploitation of Children and Adults with Mental Retardation and Other Handicaps*, 14 CHILD ABUSE & NEGLECT 301, 304 (1990). For an in-depth discussion of the vulnerability of disabled children, see Mary I. Benedict et al., *Reported Maltreatment in Children with Multiple Disabilities*, 14 CHILD ABUSE & NEGLECT 207 (1990); Sandra L. Elvik et al., *Sexual Abuse in the Developmentally Disabled: Dilemmas of Diagnosis*, 14 CHILD ABUSE & NEGLECT 497 (1990).
3. Sandra S. Cole, *Facing the Challenges of Sexual Abuse in Persons with Disabilities*, 7 SEXUALITY & DISABILITY 71, 74 (1986).
4. *See* David H. Neely, *Handicapped Advocacy: Inherent Barriers and Partial Solutions in the Representation of Disabled Children*, 33 HASTINGS L.J. 1359 (1982). For a useful discussion regarding loss of social power of the sexually abused disabled individual, see Cole, *supra* note 3, at 77-79.

pairments is the autistic population.[5] Because of their unique disorder, autistic people face all the barriers confronting other disabled persons, compounded by the barrier of impaired communication.[6] Thus, autistic persons who are psychologically prepared to disclose abuse may not be physically able to do so.

In an attempt to lessen these communication barriers, researchers recently have been investigating a technique known as facilitated communication.[7] Facilitated communication involves teaching dis-

5. Autism is characterized by abnormal social interaction, impaired communication, and limited activities and interests. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 299.00, at 66 (4th ed. 1994) [hereinafter DSM-IV]. Autistic individuals may exhibit abnormal behavior such as rocking, distracted eye movements, walking on tiptoe, or poor motor coordination. Persons with autism may ignore sensations such as heat, cold, or pain; they may bang their heads or bite their hands; they are often extremely sensitive to sounds and touch; and they may have an exaggerated reaction to lights and odors. *Id.* They also may exhibit echolalia, an involuntary echoing of speech recently spoken by another. *See* STEDMAN'S MEDICAL DICTIONARY 486 (25th ed. 1990). Further, autistic individuals may reverse pronouns, be unable to name objects, or use idiosyncratic utterances. DSM-IV, *supra*, at 66-67.

   Research suggests that autism affects two to five per 10,000 individuals. *Id.* The rate of incidence is four to five times higher in boys than girls, although autistic girls tend to exhibit more severe mental retardation than autistic boys. *Id.* at 68. Despite remarkable advancements in the diagnosis and treatment of persons with autism, little is known about the etiology of the disorder, although several theories link autism to neurobiologic and genetic factors. *See* URA FRITH, AUTISM: EXPLAINING THE ENIGMA 75 (1989). For a revealing discussion of autism from the autistic individual's perspective, see MARGARET EASTHAM, SILENT WORDS (1992); TEMPLE GRANDIN & MARGARET M. SCARIANO, EMERGENCE: LABELED AUTISTIC (1986); DONNA WILLIAMS, NOBODY NOWHERE (1992).

6. *See* FRITH, *supra* note 5, at 75.

7. Facilitated communication was first developed by Rosemary Crossley in the 1970s while she worked as an aide in an Australian institution for individuals with severe physical disabilities. *See* Rosemary Crossley & Jane Remington-Gurney, *Getting the Words Out: Facilitated Communication Training*, 12 TOPICS IN LANGUAGE DISORDERS 29 (1992). Because the most common methods of replacing speech involve complex hand movements such as handwriting and manual signing, Crossley developed the method of facilitated communication for individuals whose communication impairment was compounded by hand-function impairments. ROSEMARY CROSSLEY, FACILITATED COMMUNICATION TRAINING 3 (1994).

   One of Crossley's patients at the institution was Anne McDonald, a person severely disabled by cerebral palsy. Crossley believed that McDonald and other patients with similar physical disorders possessed intelligence that had gone undiscovered because of physical disabilities. Crossley's work with facilitation enabled McDonald to communicate with Australian authorities and eventually gain her release from the institution. *Id.* at 4. Crossley and McDonald later wrote a book about the experience. ROSEMARY CROSSLEY & ANNE MCDONALD, ANNIE'S COMING OUT (1980).

   In the early 1980s, Crossley and her colleagues began to use facilitation more extensively at the Dignity through Education and Language Communication Centre (DEAL) in Melbourne, Australia, extending their training to individuals who were unable to communicate independently, but for whom independent di-

abled individuals[8] to type on a computer keyboard or alphabet board with the assistance of another person known as a facilitator.[9] The facilitator's function is to support the student's hand, arm, or elbow so the individual may control his or her hand while typing.[10] Ideally, the

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rect access with their hands was a realistic goal. Many of these individuals were diagnosed with disabilities such as autism. Crossley & Remington-Gurney, *supra* at 33. For a brief critique of Crossley's research, see Sue Bettison, *Correction to Previous Evaluation of Facilitated Communication*, 22 J. AUTISM & DEV. DISORDERS 450 (1992); Sue Bettison, Letter to the Editor, *Informal Evaluation of Crossley's Facilitated Communication*, 21 J. AUTISM & DEV. DISORDERS 561 (1991).

By the late 1980s, Douglas Biklen from Syracuse University brought facilitated communication to the United States and Canada after meeting with Crossley and her students in Australia. Biklen has explained his findings and thoughts on facilitated communication through a series of publications. DOUGLAS BIKLEN, COMMUNICATION UNBOUND (1993); Douglas Biklen, *Communication Unbound: Autism and Praxis*, 60 HARV. EDUC. REV. 242 (1992); Douglas Biklen et al., *Facilitated Communication: Implications for Individuals with Autism*, 12 TOPICS IN LANGUAGE DISORDERS 1 (1992); Douglas Biklen et. al., *"I AMN NOT A UTISTIVC ON THJE TYP" ("I'm not Autistic on the Typewriter")*, 6 DISABILITY, HANDICAP & SOC'Y 161 (1991); Douglas Biklen, *New Words: The Communication of Students with Autism*, 12 REMEDIAL & SPECIAL EDUC. 46 (1991); Douglas Biklen, *Typing to Talk: Facilitated Communication*, 1 AM. J. SPEECH-LANGUAGE PATHOLOGY 15 (1992). Biklen also founded the Facilitated Communication Institute at Syracuse University and began publishing the *Facilitated Communication Digest*.

8. The literature reports the use of facilitated communication among people with cerebral palsy, Down Syndrome, autism, and other conditions diagnosed as mental disorders. BIKLEN, COMMUNICATION UNBOUND, *supra* note 7, at 100-07.

   For accounts of other discoveries of similar types of communication techniques for disabled persons made independent of Crossley, see ROSALIND C. OPPENHEIM, EFFECTIVE TEACHING METHODS FOR AUTISTIC CHILDREN 54-55 (1974)(special education teacher providing handwriting support to overcome students' motor skills disabilities); Mary Stewart Goodwin & T. Campbell Goodwin, *In a Dark Mirror*, 53 MENTAL HYGIENE 550 (1969)(pediatricians worked with more than 65 autistic children who communicated on an electric typewriter when given the opportunity even though they had been diagnosed as illiterate). *See also* BIKLEN, COMMUNICATION UNBOUND, *supra* note 7, at 96 (discussing teachers who discovered a form of facilitated handwriting).

9. CROSSLEY, FACILITATED COMMUNICATION TRAINING, *supra* note 7, at 3. The facilitator usually is a parent, teacher, or a staff member of a mental health institution. Biklen, *Autism and Praxis*, *supra* note 7, at 298.

10. The beginning phase of facilitated communication training typically consists of a student placing his or her hand down into the facilitator's upturned hand with the facilitator isolating the index finger if necessary. While the student's arm is moving forward, the facilitator supports the arm and controls extraneous movements. *See* CROSSLEY, FACILITATED COMMUNICATION TRAINING, *supra* note 7, at 19-20. This procedure stabilizes the wrist enabling the student to move his or her hand toward the keyboard. Biklen, *New Words*, *supra* note 7, at 46-47. In addition to providing physical support, some researchers believe the facilitator's function is to provide emotional support and encouragement and to remind the student to maintain focus. Douglas Biklen, *Autism Orthodoxy Versus Free Speech: A Reply to Cummins and Prior*, 62 HARV. EDUC. REV. 242, 243 (1992).

level of support diminishes over time as the student's skills and confidence increase.[11] Some students eventually type with a light touch to the elbow, while others require only the facilitator's touch on the shoulder. In some cases contact is eliminated entirely and the student achieves complete independence in communication.[12]

As the procedure has gained recognition and become more widespread, individuals with communication impairments have used the facilitated communication technique to disclose sexual abuse.[13] This method of disclosure has, however, generated considerable debate in both the scientific and legal communities.[14]

One of the most intensely debated issues is the scientific validation of the technique.[15] Critics of facilitated communication claim no systematic research supports the conclusion that facilitation results in actual communication.[16] These researchers suggest that application

11. Crossley & Remington-Gurney, *supra* note 7, at 39-42.
12. *See* Crossley & Remington-Gurney, *supra* note 7. *See also* CROSSLEY, FACILITATED COMMUNICATION TRAINING, *supra* note 7, at 113-27 (providing Crossley's description of case studies detailing the progress of two students toward independent communication).
13. *See* Ann Botash et al., *Evaluation of Children Who Have Disclosed Sexual Abuse Via Facilitated Communication*, 148 ARCHIVES IN PEDIATRIC ADOLESCENT MEDICINE 1282 (1994)(analyzing 13 cases of facilitated disclosures of sexual abuse); Bryna Siegel, *Brief Report: Assessing Allegations of Sexual Molestation Made Through Facilitated Communication*, 25 J. AUTISM & DEV. DISORDERS 319 (1995); Gordon Dillow, *Teacher Says Method That Helps Disabled Ruined Him*, L.A. TIMES, Jan. 24, 1993, at J1; Eugene L. Meyer, *Autistic Girl Barred From Testifying*, WASH. POST, April 23, 1994, at B5; Gail Randall, *Live-in Aide Convicted of Sexual Abuse*, WICHITA EAGLE, March 31, 1993, at 1a.
14. *See* John E.B. Myers, *The Tendency of the Legal System to Distort Scientific and Clinical Innovations: Facilitated Communication as a Case Study*, 18 CHILD ABUSE & NEGLECT 505 (1994); Elliott W. Simon et al., *Keeping Facilitated Communication in Perspective*, 33 MENTAL RETARDATION 338 (1995).
15. Validation refers to quantitative studies that consistently demonstrate universal verification that accurate communication results from facilitation. Robert A. Cummins & Margot P. Prior, *Autism and Assisted Communication: A Response to Biklen*, 62 HARV. EDUC. REV. 228 (1992). Cummins and Prior use the term "assisted" rather than "facilitated." *See also* Elliott W. Simon, *A Naturalistic Approach to the Validation of Facilitated Communication*, 24 J. AUTISM & DEV. DISORDERS 647 (1994).
16. *See, e.g.*, Stephen N. Calculator & Karen M. Singer, Letter to the Editor, *Preliminary Validation Information of Facilitated Communication*, 13 TOPICS IN LANGUAGE DISORDERS ix (1992); W. David Crews, *An Evaluation of Facilitated Communication in a Group of Nonverbal Individuals with Mental Retardation*, 25 J. AUTISM & DEV. DISORDERS 205 (1995); Michael Eberlin et al., *Facilitated Communication: A Failure to Replicate the Phenomenon*, 23 J. AUTISM & DEV. DISORDERS 507 (1993); Alan Hudson et al., *Brief Report: A Case Study Assessing the Validity of Facilitated Communication*, 23 J. AUTISM & DEV. DISORDERS 165 (1993); Lars Klewe, *Brief Report: An Empirical Evaluation of Spelling Boards as a Means of Communication for the Multihandicapped*, 23 J. AUTISM & DEV. DISORDERS 559 (1993); Susan Moore et al., *Brief Report: Evaluation of Eight Case Studies of Facilitated Communication*, 23 J. AUTISM & DEV. DISORDERS 531

of the technique to the autistic population has reached the status of a "minor epidemic" despite a dearth of scientific validation.[17] Some researchers state that all relevant studies show that facilitators manipulate responses by cuing[18] the student or actually typing for the student.[19] These critics argue that the value of the technique will remain in question until independent scientific evidence is available regarding facilitator influence.[20]

Conversely, proponents of facilitated communication note that initial research was not designed to scientifically validate the technique.[21] Instead, this research was designed to examine the relation-

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(1993); Susan Moore et al., *Brief Report: Facilitator-Suggested Conversational Evaluation of Facilitated Communication*, 23 J. AUTISM & DEV. DISORDERS 541 (1993); Margot P. Prior & Robert A. Cummins, *Questions About Facilitated Communication and Autism*, 22 J. AUTISM & DEV. DISORDERS 331 (1992); Marcia Datlow Smith et al., *Facilitated Communication: The Effects of Facilitator Knowledge and Level of Assistance on Output*, 24 J. AUTISM & DEV. DISORDERS 357 (1994); Carol A. Vazquez, *Brief Report: A Multitask Controlled Evaluation of Facilitated Communication*, 24 J. AUTISM & DEV. DISORDERS 369 (1994); Douglas L. Wheeler et al., *An Experimental Assessment of Facilitated Communication*, 31 MENTAL RETARDATION 49 (1993).

17. *See* Prior & Cummins, *supra* note 16, at 332.
18. *See* Prior & Cummins, *supra* note 16, at 333; Robert A. Regal et al., *Facilitated Communication: An Experimental Evaluation*, 24 J. AUTISM & DEV. DISORDERS 345, 353-54 (1994); Wheeler et al., *supra* note 16, at 49. Cuing refers to conscious or unconscious conduct by the facilitator that communicates to the student what letters the facilitator wants the student to type. Cuing, as used by critics of facilitated communication, does not necessarily involve cognitive awareness on the part of the student as to what he or she types. It can be merely a motor response to a stimulus. *See* Cummins & Prior, *supra* note 15, at 232. Cummins and Prior call this a "Clever Hans Effect" in reference to a horse whose owner claimed to have taught the horse to communicate. *Id.* at 232-33. According to the owner, each letter of the alphabet corresponded to a number, and the horse would tap out words and sentences to communicate. *See* Biklen, *Free Speech*, *supra* note 10, at 249.
19. Wheeler et al., *supra* note 16, at 58. Some researchers argue that the technique's objective must be clear in order to determine the impact of cuing on the communication. If facilitation is characterized as a training procedure for developing linguistic and cognitive skills over a period of years, then cuing may be considered part of that process, just as it is a normal part of language acquisition in very young children. Vazquez, *supra* note 16, at 374. The issue of cuing is not as important to people who use facilitation as a part of a long-term teaching process rather than as a means of communication. Moore et al., *Evaluation of Eight Case Studies*, *supra* note 16, at 538.
20. Bettison, *Correction to Previous Evaluation*, *supra* note 7, at 450. Bettison's concern is that facilitation competes with an educational approach to autism that emphasizes slowly teaching material appropriate to the student's cognitive development. Bettison, *Informal Evaluation*, *supra* note 7, at 561. Of course, this approach assumes a low level of cognitive development that proponents of facilitated communication do not accept. BIKLEN, COMMUNICATION UNBOUND, *supra* note 7, at 173-89.
21. *See* BIKLEN, COMMUNICATION UNBOUND, *supra* note 7, at 3-4. In fact, Professor Biklen states that when he began to study Crossley's students, he knew very lit-

ship of facilitated communication to autism, reflecting an attempt to generate, rather than test, hypotheses.[22] In addition, these proponents argue that existing quantitative and qualitative research demonstrates the validity of facilitated communication.[23] Moreover, they note that recent research designed to be statistically experimental and capable of replication has documented successful message-passing through facilitation.[24] Finally, proponents take issue with the meth-

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tle about facilitated communication and what he did know challenged his traditional belief concerning the abilities of autistic individuals. Consequently, he did not assume the validity of facilitated communication or of a "new" approach to autism. *Id.* at 1-4.

22. Proponents state that their qualitative studies disclose several factors which support the authenticity of facilitated communication, the most compelling of which are: (a) individuals convey information unknown to the facilitator, such as the child's new address, weekend activities or college level information unknown to the facilitator; (b) different individuals reveal unique personalities even though they share a common facilitator; (c) individuals remain consistent in writing style although they use several facilitators whose own writing styles differ from the student's; and (d) individuals become increasingly independent in their typing ability, with some students eventually typing with just a touch to their elbow or shoulder, or with no contact at all. Biklen et al., *"I AMN NOT A UTISTIVC ON THJE TYP"*, *supra* note 7, at 174; Missy Morton, *Not Being Able to Speak Doesn't Mean I Can't Tell: Facilitated Communication and Disclosures of Abuse*, 12 A.B.A. Juv. & Child Welfare L. Rep. 42, 43 (1993). *See* Crossley, Facilitated Communication Training, *supra* note 7, at 89.

    Responding to opponents' assertions regarding the possibility of influence if the facilitator has *any* physical contact with a student, Biklen asserts:

    > [Critics] have not explained to us how it would be possible for a facilitator to manipulate any person, let alone a person with autism who cannot speak and who has a range of extraneous behavior including hand flapping, to type out statements such as 'NOSEY PEOPLE TO EVEN WANT TO SEE ME' through cues of a person who rests his or her hand on the communicator's shoulder.

    Biklen, *Free Speech*, *supra* note 10, at 245.

23. Biklen, *Free Speech*, *supra* note 10, at 252-54. One quantitative study was conducted by the Australian government when facilitated communication came under attack in that country. Intellectual Disability Review Panel (IDRP), Report to the Director-General on the Reliability and Validity of Assisted Communication (Melbourne, Australia 1989)(unpublished report)(on file with the American Prosecutors Research Institute). Although the study notes that students can be influenced by facilitators, it also recognizes the validity of the communication of four of six subjects. *Id.* at 40. Critics dispute the IDRP's conclusions and claim that this study does not support the validity of facilitated communication. Cummins & Prior, *supra* note 15, at 235-38.

24. Donald N. Cardinal et al., *An Investigation of Authorship in Facilitated Communication*, 34 Mental Retardation (forthcoming 1996)(pre-publication summary of the study on file with the American Prosecutors Research Institute). Cardinal's study analyzed the communication of 43 students who use facilitated communication, the majority of whom had been diagnosed with autism or mental retardation. Each student was shown a flash card while the facilitator was not present. The facilitator then entered the room, at which time the student typed the word with the facilitator. Sessions of five such trials were conducted three times per week for six weeks. This resulted in 90 trials per student and more

odology used by certain facilitation opponents, suggesting that some research methods have been designed to produce failure.[25]

In sum, those who question the validity of facilitated communication claim that inadequate evidence is available regarding facilitator influence.[26] Those who support the authenticity of communication received through facilitation assert that sufficient research has been conducted to prove accurate communication occurs.[27]

The debate in the legal community stems primarily from complaints of child sexual abuse disclosed through facilitated communication.[28] The issue confronting the legal system is whether in-court testimony elicited through this type of communication should be per-

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than 3800 total trials. The results were compared to students' message-passing ability without facilitation. *Id.*

Approximately one-third of the students demonstrated a substantial increase in message-passing with facilitation, providing evidence that these individuals were able to consistently author information using facilitated communication. Thirty-nine percent showed a lesser degree of improvement and 26 percent showed no improvement. The researchers found that even those students who eventually were successful in passing messages required several sessions before substantial improvement was found.

Cardinal and his colleagues concluded from their research that students often need practice with testing procedures before conclusions are drawn about their ability to communicate. The authors state in summary: "[F]acilitated communication may be a reasonable method of instruction for the development of communication for some people with severe communication disorders when used properly." *Id.*

25. Among other criticisms, proponents assert earlier methodologies required short or single word answers from students with "word finding problems" resulting from expressive aphasia. CROSSLEY, FACILITATED COMMUNICATION TRAINING, *supra* note 7, at 75. "Aphasia" is the loss or impairment of the ability to use words or sounds; "expressive aphasia" affects the ability to speak or write. *Id.* at 134.

    In addition, Cardinal suggests that single point-in-time studies do not accurately measure a person's ability to communicate via facilitated communication. Rather, a person's performance must be measured repeatedly over time for an accurate assessment. Cardinal et al., *supra* note 24. *See* BIKLEN, COMMUNICATION UNBOUND, *supra* note 7, at 126.

    Further, individuals may refuse to participate in facilitated communication if they feel they are being tested, deceived, or not respected. CROSSLEY, FACILITATED COMMUNICATION TRAINING, *supra* note 7, at 43-46. Crossley asserts that the ultimate validation of facilitation is to bring people to the stage where they can type independently. *Id.* at 86.

26. *See, e.g.*, Smith et al., *supra* note 16, at 366.
27. Biklen, *Free Speech*, *supra* note 10, at 252-53.
28. For examples of disclosures of sexual abuse made through facilitated communication, see Sally Bligh & Phyllis Kupperman, *Brief Report: Facilitated Communication Evaluation Procedure Accepted in a Court Case*, 23 J. AUTISM & DEV. DISORDERS 553 (1993); Botash et al., *supra* note 13, at 1286-87; Sharon L. Hostler et al., *Childhood Sexual Abuse Reported by Facilitated Communication*, 91 PEDIATRICS 1190 (1993). *See also supra* note 13.

mitted. Courts faced with this issue have adopted widely varying approaches.

Some courts view facilitated communication testimony as an issue of competency that should be decided on a case-by-case basis.[29] Under this analysis, the determination of whether a witness is communicating through facilitated communication is analogous to cases in which witnesses communicate through translators.[30] If the proponent of the testimony demonstrates to the satisfaction of the court that the communication is being accurately translated, the witness is allowed to testify.[31]

Other courts view facilitation as a novel scientific technique that must be subjected to rules governing scientific evidence.[32] Relying primarily on the rule enunciated in *Frye v. United States*,[33] these courts hold that facilitated communication must be generally accepted in the scientific community before a witness should be allowed to testify through the technique.[34] Courts adhering to this view use an approach similar to that used with hypnotically affected testimony: a person who has been hypnotized generally is not allowed to testify as to facts recalled during hypnosis because there is no agreement in the scientific community that hypnosis produces reliable memories.[35] Using similar reasoning, some courts hold that a witness may not testify using facilitated communication until there is general agreement in the scientific community that the technique produces reliable communication.[36]

Barring a class of individuals from all access to the courts is an extremely serious proposition. When the class of people is disabled, the consequence of not allowing juries to hear complaints of abuse is tremendous. Of equal importance, however, is the threat of incarcerating people based on unreliable evidence. The legal system, therefore, must be equipped to address this situation fairly and with the process due both victim and accused.

This Article argues that facilitated communication testimony must be analyzed as ordinary lay testimony rather than as a scientific technique. Part II discusses cases involving third-party assistance of in-court testimony. Part III discusses cases involving out-of-court scientific procedures potentially affecting in-court testimony. Part IV analyzes the varying approaches of courts currently struggling with

29. *See infra notes* 224-52 and accompanying text.
30. *See infra* text accompanying notes 227-32.
31. *See infra* text accompanying notes 227-32.
32. *See infra* text accompanying notes 214-23.
33. 293 F. 1013 (D.C. Cir. 1923).
34. *See infra* text accompanying notes 214-19.
35. See *infra* text accompanying notes 214-19.
36. See *infra* text accompanying notes 214-19. *See also* 1 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE & NEGLECT CASES § 2.12, at 44-47 (Supp. 1995).

facilitated communication. Finally, Part V discusses which legal theory is applicable for determining the admissibility of facilitated communication.

II. ADMISSIBILITY OF TESTIMONY FROM WITNESSES WHO REQUIRE IN-COURT ASSISTANCE TO COMMUNICATE

Children and witnesses with disabilities historically have received special consideration when testifying. Courts address two issues when such testimony is proffered. First, courts examine whether the witness is competent to testify, and second, courts set standards for use of a translator or other person to assist with the transmission of the witness' testimony. The following section analyzes the rules courts have developed to address each of these issues.

A. Competence of Special Classes of Witnesses

1. Witnesses with Physical and Mental Disabilities

Witnesses whose physical disabilities seriously interfered with their communication were ruled incompetent to testify at common law.[37] Blackstone stated: "[A] man who is born deaf, dumb, and blind, is looked upon by the law in the same state with an idiot; he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas."[38] Stated otherwise: "[T]he testimony of a witness deaf from childhood, and unable to understand, or express herself intelligibly, has been rejected."[39] Similarly, a criminal defendant who was hearing and speech impaired at birth was presumed to be an "idiot" and thus incompetent to stand trial unless the defendant demonstrated "use of understanding."[40]

The ancient presumption of incompetence for hearing and speech impaired witnesses has long been abolished.[41] Courts now treat hear-

37. 1 Simon Greenleaf, A Treatise on the Law of Evidence § 370c (John Wigmore ed., 16th ed., Little Brown 1899) (1842).
38. 1 Blackstone, Commentaries on the Laws of England 304 (David S. Berkowitz & Samuel E. Thorne eds., 1978) (1769).
39. Sidney Phipson, Phipson on Evidence § 1515, at 582 (Michael Argyle ed., 10th ed. 1963).
40. 1 M. Hale, Pleas of the Crown 34 (P.R. Glazebrook ed., 1971) (1736). It is important to note that even when courts were disposed to exclude testimony of disabled witnesses, they recognized that a witness who could show an ability to communicate would be allowed to testify. *Id.* However, the burden was on the proponent of the testimony to overcome the presumption of incompetence.
41. State v. Butler, 138 N.W. 383, 384 (Iowa 1912)(hearing and speech impaired witness with "sufficient mental capacity to be able to communicate his ideas by signs or in writing" is competent); State v. Howard, 24 S.W. 41, 45 (Mo. 1893)(presumption that "a person deaf and dumb from birth should be deemed an idiot" is not the "modern" practice).

ing and speech impaired witnesses as they do any other witness, allowing them to testify and requiring competence to be demonstrated only when there is at least prima facie evidence of incompetence.[42] As Greenleaf stated more than 150 years ago:

> A deaf-and-dumb person, in the times of less accurate knowledge, was treated as presumably an imbecile and therefore as incompetent unless shown to be sufficiently intelligent. To-day, there appears to be no such presumption, and such persons may testify so far as *any means of communication* are available.[43]

No courts in the United States today prohibit a witness' testimony solely because the person cannot speak or hear.[44] The court in *Kley v. Abell*[45] stated succinctly: "Those cases dealing with the testimony of witnesses unable to speak or hear have uniformly held that they are not thereby deemed incompetent merely because of that disability." An early explanation of the modern test for determining competency was given in *Bugg v. Town of Houlka*:[46]

> The doctrine announced in Blackstone's day has been largely relaxed, if not altogether abolished, and deaf and dumb persons are now generally accepted as competent witnesses. Of course, the showing must be made in any given case that the witness has a system of communication, and, if otherwise competent, his testimony is received.[47]

The admissibility of testimony from witnesses with mental or developmental disabilities[48] has been similarly analyzed, with most states creating a presumption of competency.[49] The rationale for allowing

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42. 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 498, at 706 (Chadbourn rev. 1979).
43. 1 GREENLEAF, *supra* note 37, § 370c, at 511 (emphasis added)(footnotes omitted).
44. For a list of cases, see 2 WIGMORE, *supra* note 42, § 498, at 706; Jay M. Zitter, Annotation, *Deaf-Mute As Witness*, 50 A.L.R. 4th 1188 (1986)(citing cases).
45. 483 S.W.2d 625, 627 (Mo. Ct. App. 1972).
46. 84 So. 387 (Miss. 1920).
47. *Id.* at 388.
48. The medical definition of a developmental disability is "a category of cognitive, emotional, or physical handicapping conditions that appear in infancy or childhood and are related directly to abnormal sensory or motor development, maturation or function; the resultant impairment involves a failure or delay in progressing through the normal developmental milestones of childhood." STEDMAN'S MEDICAL DICTIONARY 442 (25th ed. 1990). Autism, cerebral palsy, and mental retardation are examples of developmental disabilities. CHILDREN WITH AUTISM 278 (Michael D. Powers ed., 1989). Developmental disability is defined in the Americans with Disabilities Act as a "severe, chronic disability resulting from an impairment which occurred before the individual reached the age of 22 and which significantly limits the person's functional ability." 42 U.S.C. § 6001 (Supp. 1994).
49. As explained by Wigmore:

> In earlier times, all persons afflicted with marks of feeble-mindedness ("idiots"), or natal mental defects, and even deaf-mutes or the mutes, were presumed to be incapable of testifying, until the contrary was shown. Today this presumption has disappeared.

testimony of physically and mentally disabled witnesses is bluntly explained by Wigmore:

> Here is a person on the stand; perhaps he is a total imbecile, in manner, but perhaps also there will be a gleam of sense here and there in his story. The jury had better be given the opportunity of disregarding the evident nonsense and of accepting such sense as may appear. There is usually abundant evidence ready at hand to discredit him when he is truly an imbecile or suffers under a dangerous delusion. It is simpler and safer to let the jury perform the process of measuring the impeached testimony and of sifting out whatever traces of truth may seem to be contained in it.[50]

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2 WIGMORE, *supra* note 42, § 498, at 706 (footnotes omitted). The *Federal Rules of Evidence* follow Wigmore's view, eliminating the common law rule of presumed incompetency of disabled witnesses and creating a presumption of competency for all witnesses. FED. R. EVID. 601. *See* MCCORMICK ON EVIDENCE § 62, at 156-57 (Edward W. Cleary ed., 3d ed., 1984). Many states have adopted some version of this rule. *See* United States v. Gutman, 725 F.2d 417, 420 (7th Cir. 1984)(undisputed findings that a person had serious mental illness for one year prior to trial was not in itself sufficient to require a competency hearing when the trial court concluded the witness was able to tell the truth and understand the oath); State v. Watkins, 857 P.2d 300 (Wash. Ct. App. 1993)(trial court not required to make sua sponte competency determination of developmentally disabled witness); People v. Davis, 585 N.E.2d 214, 222 (Ill. App. Ct. 1992)(Down's Syndrome does not disqualify a witness); People v. Alexander, 724 P.2d 1304 (Colo. 1986)(slightly retarded hearing and speech impaired witness presumed competent); Ingram v. State, 463 N.E.2d 483 (Ind. Ct. App. 1984)(court not required to assess sua sponte competency of mentally retarded witness); People v. Spencer, 457 N.E.2d 473 (Ill. App. Ct. 1983)(witnesses with mental impairments benefit from a presumption of competence which the opponent must rebut); Mickens v. State, 428 So. 2d 202 (Ala. Crim. App. 1983)(court may swear witness if no objection). *Cf.* Sizemore v. State, 416 S.E.2d 500 (Ga. 1992)(mentally retarded children not exempted from competency challenge because child competency statute applies only to children who do not understand an oath); State v. Kinney, 519 N.E.2d 1386 (Ohio Ct. App. 1987)(court required to test competency when it was called into question); Darnell v. Commonwealth, 558 S.W.2d 590 (Ky. 1977)(trial court may have to conduct an inquiry on its own if there are "manifest" signs of incompetence).

50. 2 WIGMORE, *supra* note 42, § 501, at 709. *See also* 1 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 2.3, at 69 (1992).

A small minority of states maintain a presumption that persons of unsound mind are incompetent to testify. *See, e.g.*, State v. Dighera, 617 S.W.2d 524, 526 (Mo. Ct. App. 1981)("a person confined to a mental institution under lawful process or adjudicated as mentally ill is absolutely incompetent as a witness"). In such cases, the burden of overcoming this presumption is placed on the proponent of the witness. *Id.* In *Dighera*, the witness was visually impaired as well as hearing and speech impaired. She communicated by finger-spelling through a translator. The court determined through examination of her records at the institution that she was admitted to the institution for shelter, not for treatment of a mental illness. Because she was able to "notice, recollect and communicate" the necessary events, she was found competent to testify. *Id.* at 527.

2. *Competence of Children*

Testimony of children historically was received with the same skepticism as testimony of disabled witnesses.[51] Pointing to the alleged unreliability[52] of young children's testimony, courts presumed children below a certain age were incompetent, requiring a proponent of a child's testimony to affirmatively prove competence for the testimony to be admissible.[53] However, more than 200 years ago English courts ruled that there is no age below which a person should be deemed incompetent to testify,[54] and courts since that time have taken a much more expansive view toward the admissibility of the testimony of child witnesses.[55] Thus, even very young children are presumed competent and may be permitted to testify unless their testimony has no probative value whatsoever,[56] or would be unfairly prejudicial because a jury would base its decision on sympathy for a child rather than on substantive testimony.[57]

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51. 1 MYERS, *supra* note 50, § 2.2, at 65.
52. The point at which a child's communication becomes "reliable" is greatly debated. Some researchers suggest that very young children can be misled more easily than older children and therefore claim the testimony of very young children is inherently unreliable. *See* Stephen J. Ceci & Maggie Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 PSYCHOL. BULL. 403 (1993)(collecting research on the suggestibility of child witnesses). On the other hand, a considerable body of research demonstrates children have a remarkable degree of resistance to suggestion. *See, e.g.*, Gail S. Goodman & Allison Clarke-Stewart, *Suggestibility in Children's Testimony: Implications for Sexual Abuse Investigations*, *in* THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS 92 (John Doris ed., 1990). Other studies provide techniques for improving accurate recall in children's testimony. *See* Karen J. Saywitz et al., *Effects of Cognitive Interviewing and Practice on Children's Recall Performance*, 77 J. APPLIED PSYCHOL. 744 (1992).
53. At common law there was a rebuttable presumption that children below the age of 14 were incompetent to testify. ROBERT M. HOROWITZ & HOWARD A. DAVIDSON, LEGAL RIGHTS OF CHILDREN § 3.18, at 107 (1984).
54. Rex v. Brasier, 1 Leach 199, 168 Eng. Rep. 202 (1770). Professor Myers cites *Rex v. Brasier* as the first case to create a presumption of competency for child witnesses. 1 MYERS, *supra* note 50, § 2.2, at 67.

    More than 100 years ago, the United States Supreme Court abolished the presumption of incompetency, upholding the testimonial competence of a five-year-old. Wheeler v. United States, 159 U.S. 523 (1895). *See also* People v. Draper, 389 N.W.2d 89 (Mich. Ct. App. 1986)(three-year-old victim competent to testify). For a list of cases in which very young children have been found competent to testify, *see* 1 MYERS, *supra* note 50, § 2.1, at 60 n.2.
55. For example, *Federal Rules of Evidence* Rule 601 creates a presumption that all witnesses are competent. Based on a literal reading of this rule, some courts allow all witnesses to testify as long as the testimony is relevant and not unduly prejudicial.
56. *See* State v. Dwyer, 440 N.W.2d 344 (Wis. 1989), *cited in* 1 MYERS, *supra* note 50, § 2.4, at 70 n.48.
57. 1 MYERS, *supra* note 50, § 2.4, at 71. It is under the authority of Rule 403 or an equivalent—preventing unfair prejudice—that courts apply the traditional com-

Most states have followed the example of the federal system by presuming competency for all witnesses regardless of age,[58] while other states have created a presumption of competency specific to child witnesses.[59] A very few states retain a rebuttable presumption of incompetence for child witnesses.[60] Regardless of such statutory presumptions, trial courts have broad discretion in determining competency,[61] and a court's finding regarding competence will be reversed only when this discretion is abused.[62]

B. Admissibility of Testimony From Witnesses Who Communicate With Third Party Intervention

Once the presumption of incompetence for witnesses with disabilities was removed, courts had to establish a system for determining the admissibility of testimony translated from disabled witnesses. This was particularly true for hearing-impaired witnesses who needed translators, although the same rules have been applied to witnesses who needed interpretation for other reasons. The following section surveys the admissibility of testimony from all witnesses who rely on a third party to communicate in court.

1. *Sign Language*

Persons with communication impairments use diverse modes of communication. While some disabled individuals use their voices to

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petency test even with a presumption of competency. *See, e.g.*, State v. Fulton, 742 P.2d 1208, 1218 n.15 (Utah 1987), *cert. denied*, 484 U.S. 1044 (1988).

58. *See* Fed. R. Evid. 601.
59. American Prosecutors Research Institute, Legislation Regarding the Competency of Child Witnesses to Testify in Criminal Trials (current through December 31, 1994)(summarizing state and federal legislation in the United States)(available from the National Clearinghouse on Child Abuse and Neglect Information).
60. *See* Idaho Code § 9-202 (1985); Mich. R. Evid. 601; Mo. Rev. Stat. § 491.060(2) (1988); N.J. R. Evid. 17 (1967); N.Y. R. Evid. 60.20 (1975). *See also* Nora A. Uehlein, Annotation, *Witnesses: Child Competency Statutes*, 60 A.L.R. 4th § 30, at 369 (1988).
61. Villarreal v. State, 576 S.W.2d 51, 57 (Tex. Crim. App. 1978), *cert. denied*, 444 U.S. 885 (1979). In the context of child witnesses, Wigmore stated:

   > [T]he *trial court* must be the one to determine finally, upon all the circumstances, whether the child has sufficient intelligence. . . . Nevertheless, upper courts, instead of enforcing this principle rigidly, continue to revise rulings upon the competency of children whom they have never seen or heard. Time should not be wasted on such a task.

   2 Wigmore, *supra* note 42, § 507, at 714-15 (emphasis in original)(citations omitted).
62. *Id.* An example of abuse of discretion would be the trial court's refusal to examine a child who is offered as a witness when there is evidence of the child's incompetence. Horowitz & Davidson, *supra* note 53, § 3.18, at 110.

communicate, others use sign language,[63] a combination of talking and signing,[64] or unique signs or sounds understood only by friends and relatives.[65] If a communication-impaired individual testifies in a judicial proceeding, a third party most likely will be asked to interpret or aid in the transmission of the testimony. Courts have articulated three prerequisites to the admissibility of such testimony.

First, the translator must be qualified. Sign language interpreters were found qualified at common law as long as they demonstrated to the court's satisfaction an ability to communicate with the witness.[66] The translator was required to show he or she could understand the signs used by the witness and "well and truly interpret the meaning."[67] Under the *Federal Rules of Evidence*, interpreters may be qualified based on personal experience, training, or formal education.[68] Although the *Federal Rules* do not require certification,[69] federal courts are required under the Court Interpreters Act[70] to use interpreters certified by the Director of the Administrative Offices of the United States Courts.[71] In many jurisdictions[72] accurate inter-

63. OLIVER SACKS, SEEING VOICES: JOURNEY INTO THE WORLD OF THE DEAF 9 (1989). The most prominent form of sign language in the United States is American Sign Language, although it is only one of many forms of sign language in existence. *Id.* at 24.
64. Some hearing impaired persons communicate through lip reading or speech reading, with the assistance of an oral interpreter who silently repeats the words of a speaker for the speech-reader using facial expressions and body language. BARBARA CHERTOK, EYES, HANDS, VOICES: A DEAF AMERICAN MONOGRAPH 24 (1990). *See* United States v. Lyons, 33 M.J. 543 (1991)(witness' sign language vocabulary did not exceed two hundred words so she augmented her use of signs by the use of gestures and sounds).
65. This form of communication is termed "idiosyncratic communication" in this Article for ease of reference.
66. State v. DeWolf, 8 Conn. 93 (1830).
67. Bugg v. Town of Houlka, 84 So. 387, 388 (Miss. 1920). *See* Brown v. State, 331 So. 2d 820 (Ala. Crim. App. 1976)(hearing and speech impaired witness allowed to testify through an interpreter).
68. Rule 604 states "[a]n interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation." Rule 702, governing qualifications of experts, allows an expert to be qualified based on "knowledge, skill, experience, training or education." FED. R. EVID. 702.
69. It is unclear whether a person who is certified under the Court Interpreters Act can be subjected to further scrutiny under Rule 604. *See* 27 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE & PROCEDURE § 6054, at 313 (1990). Wright and Gold argue that the purpose of the Act is to ensure a minimal level of qualification for interpreters in federal court. *Id.*
70. 28 U.S.C. § 1827 (1988). The Act applies whenever a presiding judicial officer finds that a defendant's ability to comprehend the proceedings or communicate with counsel is "inhibited" by language or hearing problems. *See* United States v. Perez, 918 F.2d 488, 490 (5th Cir. 1990).
71. 28 U.S.C. § 1827(a) (1988). A certified interpreter is to be used when a witness speaks a language other than English, or "suffers from a hearing impairment . . .

pretation does not require a literal translation[73] because most other languages, whether foreign or signed, do not have word-for-word equivalents to spoken English.

Once an interpreter is found to be qualified, courts have no practical way to contemporaneously determine whether the interpreter is translating accurately. Consequently, the second requirement in determining the admissibility of translated testimony is of paramount importance: an interpreter must be sworn to interpret truthfully.[74] In most cases it is impossible to simultaneously verify in court the accuracy of what is translated because no one in the proceeding other than the witness and translator knows the language. In the context of foreign language translation, Wright and Gold explain both the problem and the solution provided by the *Federal Rules*:

> Enforcement at the trial level would require either that the judge himself be fluent in the foreign language spoken by the witness or hear testimony from interpreters employed by the parties on the subject of the accuracy of the translation provided by the court's interpreter. . . . Rule 604 reflects the reasonable conclusion that, in light of these practical problems, the court should normally depend on the qualification and oath or affirmation requirements of Rule 604 to produce an accurate translation.

Accordingly, as with foreign language cases, courts in cases of signed testimony must rely on the truthful interpretation by a translator under oath.[75]

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so as to inhibit such witness' comprehension of questions and the presentation of such testimony." 28 U.S.C. § 1827(d) (1988). A certified interpreter must be used when "reasonably available." *Id.* When not reasonably available, courts look only to the interpreter's qualifications. Fed. R. Evid. 604, 702. *See* United States v. Ball, 988 F.2d 7, 9-10 (5th Cir. 1993)(examining qualifications of a wife interpreting for her husband); Fairbanks v. Cowan, 551 F.2d 97 (6th Cir. 1977)(impaired speech interpreted by father).

72. Many courts do not allow interpreters to paraphrase or edit. *See* United States v. Torres, 793 F.2d 436 (1st Cir. 1986). Similarly, a House Report discussing the Court Interpreter's Act anticipated that translations which "allow the interpreter to condense and distill the speech of the speaker" would be used "very sparingly." H.R. Rep. No. 95-1687, 95th Cong., 2d Sess. 8 (1978). *See* 27 Wright & Gold, *supra* note 69, § 6055, at 322, n.18. Wright and Gold call this view "simplistic" and cite cases recognizing that most languages do not have exact equivalents in another language. 27 Wright & Gold, *supra* note 69, § 6055, at 322-23.

73. *See* Garcia v. State, 463 N.E.2d 1099 (Ind. 1984)(interpretation proper even though interpreter for hearing and speech impaired witness could not always translate word for word because a person of normal intelligence could understand the witness' testimony); State v. Galloway, 284 S.E.2d 509 (N.C. 1981)(translator for hearing and speech impaired witness could not literally translate without free conversation between her and the witness; the court held that any confusion from the interpretation would go to the weight and not the admissibility of the testimony). *See also* 27 Wright & Gold, *supra* note 69, § 6055, at 322-23.

74. *See* 27 Wright & Gold, *supra* note 69, § 6055, at 322-23.

75. *See* 27 Wright & Gold, *supra* note 69, § 6055, at 321.

The third requirement is that the interpreter not demonstrate a bias against the party-opponent.[76] While the interpreter does not have to be completely impartial,[77] the court will consider the degree of personal involvement of the interpreter, the circumstances of the case, and the availability of an alternative translator.[78] For example, in *Prince v. State*,[79] the trial court allowed the husband of a hearing and speech impaired rape victim to translate the victim's sign language. The court held that it was not an abuse of discretion to allow a close relative to act as interpreter,[80] noting that there was no showing that the husband was unqualified, interpreted inaccurately, or did anything to harm the defendant's rights.[81]

2. *Idiosyncratic Language*

In many cases, witnesses with hearing and speech impairments do not learn sign language through formal education.[82] Instead, they create their own system of communicating with relatives and friends with whom they spend significant amounts of time. Persons who translate these idiosyncratic forms of communication must satisfy the same requirements as those translating standardized methods of communication such as sign language.[83]

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76. United States v. Ball, 988 F.2d 7, 9-10 (5th Cir. 1993).
77. *See* Robinson v. State, 444 So. 2d 902 (Ala. Crim. App. 1984)(holding that deaf-mute victim's interpreter in rape trial does not have to be the least interested person available).
78. United States v. Ball, 988 F.2d 7, 10 (5th Cir. 1993).
79. 336 S.W.2d 140 (Tex. Crim. App. 1960).
80. *Id.* at 142.
81. *Id. See also* Burgess v. State, 53 So. 2d 568 (Ala. 1951)(brother allowed to translate for hearing and speech disabled sister); Almon v. State, 109 So. 371 (Ala. Ct. App. 1926)(mother of complaining witness with speech impediment properly allowed to interpret); Claycomb v. State, 211 P. 429 (Okla. Crim. App. 1923)(husband interpreted for Spanish-speaking wife); State v. Smith, 102 S.W. 526 (Mo. 1907)(professor of hearing and speech impaired witness allowed to translate); State v. Burns, 78 N.W. 681 (Iowa 1899)(not an abuse of discretion for trial court to allow a friend of the hearing and speech impaired witness to act as interpreter).
82. *See* Harry Bornstein, *A Manual Communication Overview*, *in* MANUAL COMMUNICATION: IMPLICATIONS FOR EDUCATION 21-44 (Harry Bornstein ed., 1990).
83. *See* Kley v. Abell, 483 S.W.2d 625 (Mo. Ct. App. 1972)(trial court erred in failing to assess the qualifications of brother who interpreted for witness who was capable of communicating "only by means of making grunts, gestures and motions"); People v. Thompson, 309 N.Y.S.2d 861 (1970), *aff'd*, 268 N.E.2d 804 (1971)(defendant not prejudiced by allowing speech therapist to interpret communication of hearing impaired illiterate witness who could read lips when defendant was acquitted on counts in which the witness was the prosecution's main witness); Burgess v. State, 53 So. 2d 568 (Ala. 1951)(hearing and speech impaired witness allowed to testify through her brother by means "which time and necessity had invented between them"); Commonwealth v. Clark, 52 Pa. D. & C. 189 (1944)(interpreter allowed to testify for witness who did not know sign language when she

First, translators of idiosyncratic communication must demonstrate they are qualified. One factor courts look to in determining qualification is whether an interpreter has communicated with the witness long enough to give the interpreter sufficient particular knowledge about the witness' manner of communication.[84] For example, in *Minor v. State*,[85] the cousin of a disabled witness was permitted to translate hand signals because the two had been communicating for several years.[86] Similarly, in *United States v. Ball*,[87] the court found the wife of a hearing impaired witness qualified as an interpreter because their long relationship allowed them to understand each other.[88]

Another factor courts examine is whether the translator is actually interpreting a language or merely relating vague impressions from the witness. In *Watson v. State*,[89] the witness was unable to speak because of a stroke and could only say "uh-huh." Throughout his testimony he gave contradictory answers and the court was frequently unable to determine whether the witness meant "yes" or "no." The interpreter had been taking care of the witness for six months, and in explaining how she understood the witness, said: "[H]e puts quite a bit of emphasis on his yes answers and he will bow to you usually. And if he is saying no he usually grabs you. That means to halt, and then he will explain whatever he is trying to tell you over."[90] She explained that they "did not talk as such but could 'communicate.' "[91] The appellate court held there was no evidence that this person was qualified to act as an interpreter. The court reasoned the trial court not only failed to specify how the witness was competent, it failed to

made motions understandable to him); Almon v. State, 109 So. 371 (Ala. Ct. App. 1926)(mother of complaining witness with unique speech impediment allowed to interpret); Skaggs v. State, 8 N.E. 695 (Ind. 1886)(interpreter who was not "adept" at sign language but who could "well and truly interpret" for the particular witness was permitted to interpret).

84. *See* State v. Weldon, 17 S.E. 688 (S.C. 1893)(testimony of hearing and speech impaired witness through interpreters admissible when the witness had worked for the interpreters before and they testified that he was intelligent and that they had very little difficulty communicating with him by signs).
85. 659 S.W.2d 161 (Tex. Ct. App. 1983).
86. *Id.* at 164. The court noted that the witness was otherwise competent in that he was able to understand questions and had no mental disabilities.
87. 988 F.2d 7 (5th Cir. 1993).
88. The court analyzed the use of such an interpreter under *Federal Rules of Evidence* Rules 604 & 702. *Id.* at 9.
89. 596 S.W.2d 867 (Tex. Crim. App. 1980).
90. *Id.* at 869.
91. *Id.*

properly say why the interpreter was uniquely qualified to translate for the witness.[92]

Another reason for disqualifying the interpreter mentioned by the *Watson* court, though not articulated by other courts, is the fact that there was no means to independently verify the accuracy of the idiosyncratic translation.[93] Thus, the court recognized what other courts may assume but few state: the interpretation must be capable of being objectively tested to determine if communication is occurring.[94]

Courts assess qualifications primarily by requiring the translator to provide sound reasons why she or he is qualified.[95] The person's qualifications are tested through the traditional means of direct and cross-examination.

On rare occasions courts may elicit independent testimony from other witnesses about the qualifications of the interpreter. For example, in *United States v. Addonizio*,[96] a dying man was unable to speak above a loud mumble, and the court allowed his wife to interpret for him. The court questioned the wife and also accepted the testimony of the witness' physician that the wife had been with her husband constantly during his illness and had demonstrated an ability to interpret accurately.[97]

The second requirement for interpreters of idiosyncratic communication is that they be sworn.[98] As early as 1786, English courts held interpretation of idiosyncratic sign language admissible as long as the interpreter was sworn. In *John Ruston's Case*,[99] a speech-impaired witness was able to communicate with his sister through signs that "were not significant of letters, syllables, words, or sentences, but were expressive of general propositions, and entire conceptions of the

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92. *Id.* at 871-72. *See also* People v. Bustos, 51 Philippine Rep. 385 (1928)(finding a teacher of the hearing and speech impaired unqualified because she did not have sufficient contact with the witness to be able to understand her signs).

93. As the *Watson* court stated: "[T]here would be no conceivable manner in which the interpreter's 'translation' could be tested for obviously there was no one else available to act as an intermediary in that regard." Watson v. State, 596 S.W.2d 867, 873 (Tex. Crim. App. 1980).

94. Courts do not uniformly require objective testing of the translation. *See* WRIGHT & GOLD, *supra* note 69, § 6055, at 320-21. Only in the unusual case such as *Watson* where a person's ability to translate is put into question has the issue arisen.

95. *See, e.g.*, United States v. Ball, 988 F.2d 7 (5th Cir. 1993)(parties given the opportunity to question wife concerning her abilities to interpret for her husband); United States v. Addonizio, 451 F.2d 49 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972)(court examined translator and other witnesses concerning translator's abilities); Burgess v. State, 53 So. 2d 568 (Ala. 1951)(translator examined on voir dire concerning his ability to translate).

96. 451 F.2d 49 (3d Cir. 1971).

97. *Id.* at 68.

98. *See* FED. R. EVID. 604. *See also* Skaggs v. State, 8 N.E. 695, 697 (Ind. 1886).

99. 1 Leach Cr. L. 408, 168 Eng. Rep. 306 (1786).

mind."[100] The witness was sworn to tell the truth, the interpreter was sworn "well and truly to interpret,"[101] and the evidence was deemed properly admitted. Likewise, the sworn testimony of an interpreter of idiosyncratic communication has been accepted in the United States.[102]

Finally, interpreters of idiosyncratic communication must meet the requirement of impartiality, although in almost all cases the interpreter is a close friend or relative.[103] The impartiality rule requires the appointment of "[t]he most competent least biased person."[104] For example, in *United States v. Ball*[105] the defendant failed to show the wife's bias threatened the fairness of the proceedings. The Court of Appeals held that the trial judge must consider the circumstances of each case, including the "interpreter's interest and involvement in the case, the necessity of having a family member act as an interpreter, and available alternative modes of testimony."[106]

In contrast, the court in *Prince v. Beto*,[107] found reversible error when a husband was allowed to testify for his hearing and speech-impaired wife when other interpreters were available, the husband had offered to not cooperate if he was paid one hundred dollars, there was evidence he lied about other facts, and it was difficult to elicit a correct interpretation.

A unique variation of idiosyncratic communication cases are those in which a witness is unable or unwilling to speak aloud at trial and instead whispers or mumbles testimony to another who then speaks it

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100. *Id.*
101. *Id.*
102. Skaggs v. State, 8 N.E. 695, 697 (Ind. 1886). *See* Zitter, *supra* note 44, § 8.
103. *See* Charles C. Marvel, Annotation, *Disqualification, for Bias, of One Offered as Interpreter of Testimony*, 6 A.L.R. 4th 158, 170-72, § 5b (1981). In Territory v. Duran, 3 P. 53 (N.M. 1884), a nine-year-old hearing and speech impaired child witnessed a murder. The child had not learned standardized sign language, so the mother interpreted the child's idiosyncratic signs. In attempting to assess the competency of the child, the mother was unable to get the child to respond to questions asked to assess his competency; he only wanted to tell the events he witnessed. The New Mexico Supreme Court held that allowing the testimony was improper when the child's competency was not established. *Id.* at 54-55. *See* Fairbanks v. Cowan, 551 F.2d 97 (1977)(not error to allow father to act as interpreter for son who was victim of sodomy even though father was outwardly emotional during trial).
104. State v. Givens, 719 S.W.2d 25, 27 (Mo. Ct. App. 1986)(half-brother of witness whose damaged vocal cords made her voice nearly inaudible allowed to interpret while under oath).
105. 988 F.2d 7 (5th Cir. 1993).
106. *Id.* at 10. Similarly, the Texas Court of Appeals stated: "Although the use of a partisan interpreter should be avoided, the appointment of an interpreter is a matter to be left to the trial court, and absent a showing of abuse of such discretion, such judgment will not be disturbed on appeal." Minor v. State, 659 S.W.2d 161, 164 (Tex. Ct. App. 1983)(citation omitted).
107. 426 F.2d 875 (5th Cir. 1970).

aloud.[108] Courts examine interpreters for whispering witnesses as they do interpreters of other idiosyncratic forms of communication.[109] Since there are normally no qualifications of an interpreter to assess,[110] however, courts look only to whether the interpreter is sworn[111] and impartial[112] and consider these two safeguards as adequate protection against unreliable testimony.

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108. *See* People v. Miller, 530 N.Y.S.2d 490, 493 (Crim. Ct. 1988)(52-year-old victim who had cerebral palsy and communicated in mumbles allowed to testify with the assistance of a speech therapist who testified she would give a literal transmission of the witness' statements and that "[s]he would neither alter the meaning or syntax of his answers nor fill in words for the witness"); *In re* R.R., 398 A.2d 76 (N.J. 1979)(mother allowed to interpret for four-year-old sexual abuse victim who occasionally used gestures and incomprehensible speech); United States v. Addonizio, 451 F.2d 49 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972)(no error for trial court to allow witness' wife to interpret for witness who was unable to speak above a loud mumble); Trial of Charles Lord Mohun, 12 A COMPLETE COLLECTION OF STATE TRIALS 949, 990 (T. B. Howell ed., 1812) (1691)(court clerk repeated answers of a young witness who could not speak loud enough for the judge to hear).
109. In United States v. Romey, 32 M.J. 180 (C.M.A.), *cert. denied*, 502 U.S. 924 (1991), an eight-year-old sexual abuse victim whispered responses to her mother. The trial judge swore the mother as an interpreter and instructed her to repeat precisely what the child said without any additional words. The defendant argued that this procedure denied him the right to confront his accuser and that it prevented him from receiving a fair trial because the mother's bias made the testimony unreliable. *Id.* at 183. The court held the interpreter's bias did not make the testimony unreliable for five reasons. First, the mother was not an eyewitness and did not provide substantive evidence for the government. Second, there was no evidence she "engaged in any extortious conduct" toward the defendant. Third, defendant did not challenge the accuracy of the mother's interpretation at trial. Fourth, she took an oath analogous to that of an interpreter. Fifth, the mother's testimony was largely cumulative of what the child ultimately testified to on her own. *Id.* at 183-84. The court broadly held: "We find no unreliability or true unavailability for cross-examination or denial of due process in this context." *Id.* at 184.
110. Qualification of the interpreter only arises in whispering cases when the witness' speech is difficult to understand and too quiet to hear. Such cases are discussed *supra* under idiosyncratic methods of communicating. The qualification requirement is omitted only in those cases in which there is no speech impairment other than speaking too softly to be heard in court. For a discussion of cases in which child witnesses require an interpreter to relay their whispered testimony, see 1 MYERS, *supra* note 50, § 2.13, at 88-93.
111. In State v. Leavitt, 758 P.2d 982 (Wash. 1988)(en banc), a six-year-old victim answered twelve of the prosecutor's questions at a competency hearing by whispering the answers to a social worker who repeated them to the court. The court swore the social worker to repeat the child's answers "truly and accurately." There was no reversible error in this procedure. *Id.* at 983-84. In State v. Wells, 230 S.E.2d 437 (N.C. Ct. App. 1976), it is not clear whether the translator was even put under oath. A nine-year-old victim whispered answers to questions of a "very personal nature" to the court reporter who repeated them to the jury. On appeal, the court refused to reverse because defense counsel failed to object to this procedure at trial. *Id.* at 438.

C. Burdens of Proof

1. Proving Competency of a Witness

Courts in jurisdictions with a presumption of competency assess witness competency only when it is factually challenged by the opponent of the testimony, thereby eliminating the requirement of a competency hearing each time a child or a disabled witness testifies.[113] The rule enunciated in *State v. Hussey*,[114] typifies the position of courts applying the presumption of competency:

> To disqualify a child witness from testifying, the presiding justice must make a specific finding that either the proposed witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury, or the proposed witness is incapable of understanding the duty of a witness to tell the truth.[115]

A witness' incompetence may be proven through the testimony of another person who has personal experience with the witness.[116] Citing a disability alone is not sufficient to rebut a presumption of competency;[117] the opponent must present specific evidence why the particular witness is not competent.[118]

If the opponent presents some evidence of the witness' incapacity, a competency hearing may be held[119] to provide the opponent an op-

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112. *See* United States v. Addonizio, 451 F.2d 49, 68 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972).
113. *See* State v. Superior Court, 719 P.2d 283 (Ariz. Ct. App. 1986); Ingram v. State, 463 N.E.2d 483 (Ind. Ct. App. 1984)(stating that trial court has no duty to conduct competency hearing until a party puts the matter in issue). *See also* 1 Myers, *supra* note 50, § 2.3, at 68-70; 2 Wigmore, *supra* note 42, § 506, at 712.
114. 521 A.2d 278 (Me. 1987).
115. *Id.* at 280. Similarly, the Arizona Court of Appeals held:

    > In instances of extreme youth, to find a lack of competency, the judge must be convinced that no trier of fact could reasonably believe that the prospective witness could have observed, communicated, remembered or told the truth with respect to the event in question.

    State v. Superior Court, 719 P.2d 283, 287 (Ariz. Ct. App. 1986). For a list of ages at which courts have deemed children competent to testify, see Uehlein, *supra* note 60, §§ 30-44.
116. *See* 2 Wigmore, *supra* note 42, § 485, at 642-43.
117. Kley v. Abell, 483 S.W.2d 625, 627 (Mo. Ct. App. 1972).
118. In rare instances, children and witnesses whose mental capacity is challenged are required to submit to independent psychological examinations. The expert who examined the witness then testifies as to the competence of the witness based on the examination. *See* United States v. Pacelli, 521 F.2d 135 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); State v. Butler, 160 A.2d 8 (N.J. 1960). However, such an examination is looked upon as the exception rather than the rule. 1 Myers, *supra* note 50, § 2.22, at 134. Psychologists are no more qualified to determine a child's competency than a judge.
119. Some courts have held that the failure of the trial court to hold a hearing to determine the competency of a witness who communicates through idiosyncratic methods is an abuse of discretion. Kley v. Abell, 483 S.W.2d 625, 628 (Mo. Ct. App. 1972).

portunity to demonstrate that the witness is not communicating.[120] At this hearing, both the opponent and proponent have the opportunity to present evidence, but the burden is on the opponent to overcome the presumption of competence.[121]

In some jurisdictions, the burden of proving competence shifts to the proponent after the opponent makes a prima facie showing of incompetence.[122] Guidance as to which party bears the burden of proof is not provided by all courts:

> What is sufficient in order that the offering party may be put to the necessity of adducing evidence of capacity, and the judge to the necessity of determining the existence of capacity, has not been made entirely clear by decisions. It may be supposed that a mere *objection raised* and a claim to have a voir dire examination would suffice. Moreover, the *offering of any extrinsic evidence* whatever would suffice to make it necessary for the judge to record a similar finding.[123]

More frequent, however, are those states requiring the opponent to do more than merely raise an objection to the competency of a witness; the opponent must affirmatively establish the incompetence of a witness.[124]

2. *Proving Qualifications of an Interpreter*

Courts decide the need for an interpreter on a case-by-case basis,[125] and a court may hold a hearing to assess qualifications of a proffered interpreter.[126] The hearing need not be conducted in the presence of the jury, and it should be limited to matters unrelated to the substance of the case.[127] The opponent bears the burden[128] of proving through direct or cross-examination, or by independent testi-

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120. 2 WIGMORE, *supra* note 42, § 484, at 641-42.
121. *See, e.g.*, Holloway v. State, 849 S.W.2d 473, 477 (Ark. 1993)("[t]he burden of persuasion is upon the party alleging that the potential witness is incompetent"). *See also* MCCORMICK, *supra* note 49, § 70, at 168 n.2.
122. *See* 2 WIGMORE, *supra* note 42, § 497, at 703.
123. *See* 2 WIGMORE, *supra* note 42, § 497, at 703.
124. See cases cited in 1 MYERS, *supra* note 50, at 117 n.298.
125. *See* Burgess v. State, 53 So. 2d 568 (Ala. 1951); Todd v. State, 380 So. 2d 370 (Ala. Crim. App. 1980); Dobbins v. Little Rock R.R. & Elec. Co., 95 S.W. 794 (Ark. 1906); People v. Vandiver, 468 N.E.2d 454 (Ill. App. Ct. 1984); Commonwealth v. Clark, 52 Pa. D. & C. 189 (1944). In some situations, such as when a witness is able to receive and respond to questions in writing, a translator may not be required. Ritchey v. People, 47 P. 272 (Colo. 1896)(hearing and speech impaired witness examined through written questions and answers). Some courts require the testimony of witnesses who are able to write to be taken in writing rather than through an interpreter. *Cf.* Morrison v. Lennard, 3 Car. & P. 127, 172 Eng. Rep. 354 (1827)(allowing translated testimony even though witness could write). For a discussion of the use of writing instead of signed interpretation, see cases cited in Zitter, *supra* note 44, § 5.
126. State v. Van Pham, 675 P.2d 848, 856 (Kan. 1984). *See also* 21 C.J.S. *Courts* § 110 (1990).
127. 27 WRIGHT & GOLD, *supra* note 69, § 6054, at 314.

mony[129] that the translation is inaccurate or the interpreter is unqualified.[130]

D. Summary of Cases Involving Third Party Interpreters

Because witnesses must have the capacity to communicate in order to be competent to testify, the testimony of a witness who is unable to communicate independently may be subject to scrutiny. However, the presumption of competence applies to such a witness and the opponent of the testimony bears the burden of proving the incompetence of the witness.

A hearing may be held to determine whether the witness is actually communicating. Because such witnesses require the assistance of another to communicate, the third party assistant often is the focus of the inquiry. Each case is examined on its own facts and courts determine whether the interpreter is qualified and unbiased. The interpreter is then sworn and allowed to interpret.

III. ADMISSIBILITY OF TESTIMONY FROM WITNESSES WHOSE IN-COURT TESTIMONY IS AFFECTED BY OUT-OF-COURT PROCEDURES

The law governing the admission of translated testimony is well settled. Facilitated communication, however, poses a unique legal issue: when scientific or pseudo-scientific out-of-court procedures are applied in a way that may arguably affect the substance of a person's in-court testimony, is the admissibility of the testimony contingent upon whether the out-of-court procedures are generally accepted in the scientific community? Courts differ greatly in their responses to this question, with most of the relevant precedent arising in the context of hypnotically affected testimony.[131]

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128. An opponent may waive or forfeit the right to challenge an interpreter's qualifications by failing to object at trial. *See* Hicks v. State, 713 P.2d 18 (Okla. Crim. App. 1986)(defendant waived right to challenge trial court's failure to swear or qualify interpreter for nine-year-old hearing and speech impaired child).
129. 21 C.J.S. *Courts* § 110 (1990).
130. 27 WRIGHT & GOLD, *supra* note 69, § 6055, at 321.
131. Experts routinely apply accumulated scientific knowledge to evidence adduced at trial. For example, DNA evidence is analyzed out-of-court and the interpretation is given in-court based on the expert's scientific knowledge; radar clocking takes place out-of-court and the officer testifies about the clocking and working of the radar in court. However, there are few other situations in which a procedure that could be labelled scientific is itself the lay testimony. Thus, the most analogous precedent is that involving an out-of-court scientific procedure—hypnosis—that arguably affects the lay witness' in-court testimony.

A large body of case law addresses the admissibility of in-court testimony of witnesses who underwent hypnosis prior to trial.[132] Hypnosis was adopted as an investigative technique for law enforcement in the 1970s to assist witnesses in remembering details surrounding a crime.[133] Hypnosis has also been used by criminal defendants to refresh their memories of crimes they are accused of committing.[134] The effectiveness of hypnosis as a therapeutic tool is well accepted,[135] but it remains a controversial investigative technique.[136]

Courts differ as to how the debate over hypnosis within the scientific community impacts the admissibility of in-court testimony based on hypnotically affected memories. One approach applies the rule enumerated in *Frye v. United States*,[137] and holds hypnotically affected testimony per se inadmissible because it is not generally accepted in the scientific community as producing reliable memories.[138] A second approach allows hypnotically affected testimony only if enumerated safeguards are present when the hypnosis occurs.[139] A third approach declines to apply *Frye* to this testimony.[140] Before discussing these approaches, however, it is first necessary to review the *Frye* opinion and its progeny.

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132. For a summary of the case law, see Thomas M. Fleming, Annotation, *Admissibility of Hypnotically Refreshed or Enhanced Testimony*, 77 A.L.R. 4th 927 (1990).

133. Michael J. Beaudine, Comment, *Growing Disenchantment with Hypnotic Means of Refreshing Witness Recall*, 41 VAND. L. REV. 379 (1988). *See* Michael S. Serrill, *Breaking the Spell of Hypnosis*, TIME, Sept. 17, 1984, at 62; *The Svengali Squad*, TIME, Sept. 13, 1976, at 56.

134. *See* Rock v. Arkansas, 483 U.S. 44 (1987)(holding that a per se rule of inadmissibility for all hypnotically affected testimony unconstitutionally prohibited a criminal defendant from testifying on her own behalf).

135. Jacqueline Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 VAND. L. REV. 1185, 1221-38 (1992)(reviewing psychiatric and psychological literature concerning the reliability of memories of childhood sexual abuse recalled while undergoing therapeutic hypnosis and arguing that hypnosis should not render the witness incompetent to testify in civil proceedings).

136. ROY UDOLF, FORENSIC HYPNOSIS: PSYCHOLOGICAL AND LEGAL ASPECTS (1983). *See* Biskup v. McCaughtry, 20 F.3d 245, 253-55 (7th Cir. 1994)(reviewing hypnosis case law and holding that admission of a hypnotically affected statement does not violate the Due Process Clause of the Fourteenth Amendment).

137. 293 F. 1013 (D.C. Cir. 1923).

138. *See infra* text accompanying notes 166-73.

139. *See infra* text accompanying notes 163-65.

140. *See infra* text accompanying notes 174-89. Some courts carve out a fourth approach, a "totality of the circumstances" test. *See* People v. Romero, 745 P.2d 1003 (Colo. 1987), *cert. denied*, 485 U.S. 990 (1988); Zani v. State, 767 S.W.2d 825 (Tex. Ct. App. 1989). For purposes of this Article, no attempt was made to distinguish these cases from the second class of cases.

A. *Frye v. United States*

The Court of Appeals for the District of Columbia in *Frye v. United States*[141] held inadmissible the testimony of an expert witness as to the results of an early version of a polygraph test conducted on a criminal defendant.[142] In one paragraph the court crafted a holding that has been quoted extensively by courts ever since:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[143]

The *Frye* opinion established the principle that before expert testimony based on novel scientific discoveries is admissible, a court must find that the science is generally accepted in the relevant scientific community.

Courts in subsequent cases have explained why a test such as *Frye* is necessary for analyzing novel scientific evidence.[144] First, a *Frye* test ensures reliable scientific evidence will be presented to the jury by creating an extremely cautious standard, whereby only well-tested evidence is admissible.[145] Second, the consistency and uniformity is provided by creating a bright-line rule for each category of scientific evidence.[146] In a particular jurisdiction, everyone will know that, assuming proper performance of the procedure, information produced by alcohol breatholizers and radar guns is admissible, while the results of

141. 293 F. 1013 (D.C. Cir. 1923).
142. *Id.* at 1014.
143. *Id.*
144. For discussion and analysis of these cases, see 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 1-5(A) to -5(E) (2d ed. 1993); Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a Half-Century Later*, 80 COLUM. L. REV. 1197 (1980); David McCord, *Expert Psychological Testimony about Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1 (1986); David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19 (1987); J. Ken Thompson, Note, *A Review of the Admissibility of Novel Scientific Evidence*, 17 AM. J. TRIAL ADVOC. 741 (1994).
145. *See* State v. Mena, 624 P.2d 1274, 1279 (Ariz. 1981); John E.B. Myers, *Expert Testimony Describing Psychological Syndromes*, 24 PAC. L.J. 1449 (1993)(criticizing the proliferation of pseudo-scientific syndrome testimony in child sexual abuse cases). Myers argues elsewhere that, due primarily to inadequacies in the abilities of attorneys to cross-examine experts about novel scientific evidence, the courtroom is not the place to assess such evidence. Rather, the scientific community should debate the issue before the evidence enters the courtroom. Myers, *supra* note 14, at 506-07.
146. *See, e.g.*, Contreras v. State, 718 P.2d 129, 135 (Alaska 1986).

polygraphs and hypnosis are inadmissible. Third, a rule of per se exclusion is necessary because evidence cloaked as science is given great weight by juries and therefore should be admitted only if widely accepted by scientists as reliable.[147] Fourth, techniques not highly regarded among scientists may nonetheless become a major distraction at trial if admitted.[148] Fifth, a *Frye* test ensures that a well defined group of experts is available to testify on the issue.[149] As a general rule, then, *Frye* is seen as a conservative test precluding admission of inadequately tested novel scientific evidence.[150]

B. Courts Applying a *Frye* Test to Hypnotically Affected Testimony

Most courts initially analyzed hypnotically affected testimony as an issue relating to the credibility of witnesses, and not as scientific testimony.[151] The New Jersey Supreme Court explained the then-prevailing view:

> These cases have generally reasoned that testimony of a witness whose memory has been revived through hypnosis should be treated like any other present recollection refreshed. That the witness' memory may have been impaired by hypnosis or that suggestive materials may have been used to refresh his recollection is considered to be a matter affecting credibility, not admissibility. It is assumed that skillful cross-examination will enable the jury to evaluate the effect of hypnosis on the witness and the credibility of his testimony.[152]

In the early 1980s, however, many courts rejected a case-by-case analysis of hypnotically affected testimony and a majority now ex-

147. United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974).
148. Reed v. State, 391 A.2d 364, 371-72 (Md. 1978).
149. United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974).
150. See *infra* note 182 for a discussion of tests other than *Frye* governing the admission of novel scientific evidence.
151. The seminal decision holding that hypnosis affects only the witness' credibility was Harding v. State, 246 A.2d 302 (Md. Ct. Spec. App. 1968), *cert. denied*, 395 U.S. 949 (1969). *See also* United States v. Awkard, 597 F.2d 667, 669 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979)(holding that hypnosis goes to credibility, not admissibility); United States v. Narciso, 446 F. Supp. 252 (E.D. Mich. 1977)(analyzing constitutional implications of suggestive eyewitness identifications and finding that hypnosis did not create a "very substantial likelihood of irreparable misidentification" in this case)(quoting Simmons v. United States, 390 U.S. 384 (1968)); Clark v. State, 379 So.2d 372 (Fla. Dist. Ct. App. 1980)(analyzing hypnotically affected testimony as a present recollection with hypnosis going to the witness' credibility); People v. Smrekar, 385 N.E.2d 848, 855 (Ill. App. Ct. 1979)(holding hypnotically affected testimony admissible when the hypnotist was shown to be competent, suggestion was not used, the identification was substantially corroborated, and the witness had ample time to view the defendant at the time of the crime); State v. McQueen, 244 S.E.2d 414, 427-29 (N.C. 1978)(analyzing hypnotically affected testimony as a present recollection with hypnosis going to credibility); State v. Jorgensen, 492 P.2d 312 (Or. 1971)(holding that hypnosis goes to weight, not admissibility, of testimony).
152. State v. Hurd, 432 A.2d 86, 91 (N.J. 1981)(citations omitted).

amine it as scientific testimony.[153] These courts state that the rationale of *Frye* applies equally to "evidence which appears scientific and is especially likely to be accepted and believed,"[154] and enunciate several reasons justifying its application to hypnotically affected testimony.

In what is recognized as one of the leading cases,[155] the New Jersey Supreme Court in *State v. Hurd*[156] discussed the rationale behind applying *Frye* to hypnotically affected testimony:

> Like the results of a polygraph examination or voiceprint analysis, the credibility of recall stimulated by hypnosis depends upon the reliability of the scientific procedure used. If the procedure is not capable of yielding reasonably reliable results, then its probative value may be outweighed by the risks entailed in its use in a criminal trial. These risks include prejudice, jury confusion, and consumption of time and trial resources.[157]

The court then identified three reasons why hypnosis is not generally accepted as an accurate method of recalling memories. First, a hypnotized person is highly vulnerable to suggestion:[158] answers may be shaped by questions and other subtle cues. Second, a person who has been hypnotized may not be able to critically evaluate the hypnotically refreshed memories.[159] Especially if an authority figure such as a police officer is present during the hypnosis, the person may be willing to accept information uncritically while hypnotized.[160] Third, a person who has been hypnotized may lose the ability to distinguish pre- and post-hypnosis memories.[161] Memories recalled under hypnosis may be combined with memories recalled before hypnosis such that neither the expert nor the person hypnotized may be able to segregate what has been affected by hypnosis.[162]

Despite finding *Frye* applicable, the *Hurd* court severely limited its application. Instead of requiring that hypnosis produce "historically

153. *See* Beaudine, *supra* note 133, at 386-87. The first exclusion of hypnotically refreshed testimony based on *Frye* occurred in State v. Mack, 292 N.W.2d 764 (Minn. 1980), followed by People v. Shirley, 641 P.2d 775 (Cal.)(en banc), *cert. denied*, 459 U.S. 860 (1982), which firmly established a per se inadmissibility approach based on *Frye*. *See* Beaudine, *supra* note 133, at 400.
154. Contreras v. State, 718 P.2d 129, 135 (Alaska 1986).
155. *Hurd* was not the first court to apply a scientific evidence standard to hypnotically affected testimony. *See* State v. Mena, 624 P.2d 1274 (Ariz. 1981); State v. Mack, 292 N.W.2d 764 (Minn. 1980). However, the *Hurd* opinion sparked a major change in approach toward such cases that has been followed by numerous other jurisdictions. *See* Gary M. Shaw, *The Admissibility of Hypnotically Enhanced Testimony in Criminal Trials*, 75 MARQ. L. REV. 1, 25-33 (1991).
156. 432 A.2d 86 (N.J. 1981).
157. *Id.* at 91-92 (citation omitted).
158. *Id.* at 93.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*

accurate" testimony, the court said it only needs to be determined whether hypnosis "is able to yield recollections as accurate as those of an ordinary witness, which likewise are often historically inaccurate."[163] The court held that, to show an acceptable level of reliability, the proponent of hypnotically affected testimony must establish the existence of certain safeguards. Safeguards include using an independent and professional hypnotist, recording information known to the witness before hypnosis, recording the hypnosis session itself, and precluding outsiders such as police investigators from attending the hypnosis session.[164] Many courts have followed the procedural requirements delineated in *Hurd*.[165]

Following *Hurd*, many courts began excluding all hypnotically affected testimony regardless of whether *Hurd's* procedural safeguards had been followed.[166] In a decision that has since been adhered to by many other courts,[167] the Alaska Supreme Court in *Contreras v. State*[168] examined whether identification of defendants is per se tainted when victims are placed under hypnosis to reconstruct memories of their assailant. The government urged the court not to apply a *Frye* test to hypnotically affected testimony, arguing that if all lay testimony were subjected to a *Frye* test, most of it would be deemed inadmissible due to the large amount of scientific literature finding eyewitness testimony as a whole unreliable. The court dismissed this argument, finding that hypnosis changes the witness' memory and demeanor in ways that non-hypnotic memory refreshing devices do not.[169] Not only does this hinder effective cross-examination, rea-

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163. *Id.* at 92.
164. *Id.* at 96-97.
165. *See* People v. Romero, 745 P.2d 1003 1016-17 (Colo. 1987); State v. Iwakiri, 682 P.2d 571, 578-79 (Idaho 1984); State v. Butterworth, 792 P.2d 1049, 1058 (Kan. 1990); House v. State, 445 So. 2d 815, 824-26 (Miss. 1984); State v. Beachum, 643 P.2d 246, 253-54 (N.M. Ct. App. 1981); State v. Adams, 418 N.W.2d 618, 623-24 (S.D. 1988); State v. Armstrong, 329 N.W.2d 386, 394-96 (Wis. 1983).
166. *See* State *ex rel.* Collins v. Superior Court, 644 P.2d 1266 (Ariz. 1982); State v. Mena, 624 P.2d 1274 (Ariz. 1981); People v. Quintanar, 659 P.2d 710 (Colo. Ct. App. 1982); State v. Atwood, 479 A.2d 258 (Conn. Super. Ct. 1984); State v. Davis, 490 A.2d 601 (Del. Super. Ct. 1985); Bundy v. State, 471 So. 2d 9 (Fla. 1985), *cert. denied*, 479 U.S. 894 (1986); State v. Moreno, 709 P.2d 103 (Haw. 1985); Peterson v. State, 448 N.E.2d 673 (Ind. 1983); State v. Haislip, 701 P.2d 909 (Kan.), *cert. denied*, 474 U.S. 1022 (1985); State v. Collins, 464 A.2d 1028 (Md. 1983); Commonwealth v. Kater, 447 N.E.2d 1190 (Mass. 1983); People v. Gonzales, 329 N.W.2d 743 (Mich. 1982); Alsbach v. Bader, 700 S.W.2d 823 (Mo. 1985); State v. Palmer, 313 N.W.2d 648 (Neb. 1981); People v. Hughes, 453 N.E.2d 484 (N.Y. 1983); Robison v. State, 677 P.2d 1080 (Okla. Crim. App.), *cert. denied*, 467 U.S. 1246 (1984); Commonwealth v. Nazarovitch, 436 A.2d 170 (Pa. 1981); State v. Martin, 684 P.2d 651 (Wash. 1984).
167. *See* People v. Zayas, 546 N.E.2d 513 (Ill. 1989); Daniels v. State, 528 N.E.2d 775 (Ind. 1988).
168. 718 P.2d 129, 135 (Alaska 1986).
169. *Id.*

soned the court, it also creates a false impression for the jury to assess.[170]

The court held *Frye* applicable to hypnotically affected testimony, stating "lay testimony that is dependent upon hypnosis cannot be logically dissociated from the underlying scientific technique."[171] The court held that a *Frye* test provides a manageable standard, is judicially economical, guards against juries placing too much weight on scientific evidence whose validity has not been accepted by the scientific community, and ensures uniformity of decision-making.[172] The court went on to rule that under a *Frye* standard, any memory recalled is per se inadmissible.[173]

C. Courts Holding *Frye* Inapplicable to Hypnotically Affected Testimony

A few courts reject the premise that *Frye* applies to hypnotically affected testimony.[174] These courts adhere to the earlier view that the

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170. *Id.*

171. *Id.* at 134. The Minnesota Supreme Court expressed similar reasoning:

> Although hypnotically-adduced 'memory' is not strictly analogous to the results of mechanical testing, we are persuaded that the *Frye* rule is equally applicable in this context, where the best expert testimony indicates that no expert can determine whether memory retrieved by hypnosis, or any part of that memory, is truth, falsehood, or confabulation—a filling of gaps with fantasy. Such results are not scientifically reliable as accurate.

State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980).

172. Contreras v. State, 718 P.2d 129, 134 (Alaska 1986). The *Contreras* court stated:

> If hypnotically adduced testimony were to be admitted, the jury would have to decide the question of the credibility of the witness. However, this determination would be predicated upon the jury's understanding of the scientific underpinnings of the methods by which the testimony was developed. The way a jury would evaluate such testimony is closely analogous to the way it would evaluate evidence developed from polygraph testing.

Id. at 135.

173. Although at least one court has ruled that using a hypnotic procedure excludes all testimony by the hypnotized witness about the subject of the hypnosis, People v. Shirley, 641 P.2d 775 (Cal.)(en banc), *cert. denied*, 459 U.S. 860 (1982), most courts adhering to a rule of per se inadmissibility nonetheless allow a person who has been hypnotized to testify as to events recalled before the hypnosis session. See cases listed in McGlauflin v. State, 857 P.2d 366, 371-72 (Alaska Ct. App. 1993)(hypnotically affected testimony admissible when hypnosis was not conducted for the purpose of eliciting facts about the crime and there was very little discussion of the crime during the session), and in Hall v. Commonwealth, 403 S.E.2d 362, 370 (Va. Ct. App. 1991). Consequently, only memories affected by the hypnosis are excluded per se in these jurisdictions. *See id.* The proponent of the testimony has the burden of proving the testimony was recalled prior to the hypnosis. *Id.*

174. *See* Clay v. Vose, 771 F.2d 1 (1st Cir. 1985); United States v. Waksal, 539 F. Supp. 834 (S.D. Fla. 1982); State v. Wren, 425 So. 2d 756 (La. 1983); State v. Little, 674 S.W.2d 541 (Mo. 1984)(en banc), *cert. denied*, 470 U.S. 1029 (1985);

fact that a witness has been hypnotized goes only to the weight, not the admissibility, of the testimony. The North Dakota Supreme Court in *State v. Brown*[175] was one of the first state supreme courts to explicitly reject a *Frye* test in the context of a hypnotized witness, holding that admissibility of such testimony should be analyzed as an issue of competence.[176] According to this view, once a witness is found competent, any subsequent attack goes to the credibility of the hypnotized witness rather than to the scientific nature of the hypnosis itself.[177] The court in *Brown* reasoned that a per se exclusion of testimony unfairly prohibits a crime victim from testifying in any form.[178] Rather, the proper method for determining the worth of hypnotically affected testimony is through cross-examination:

> If we were to apply to all witnesses the concern with suggestibility and difficulty of cross-examination which is exhibited in the decisions from the jurisdictions which have adopted the per se inadmissibility rule in regard to hypnotically induced testimony, "we would not allow a lawyer to talk to his witnesses before trial, we would exclude most identification testimony, and relatives and friends of a party could be excluded as witnesses."[179]

The court also recognized potential criticisms of its approach and accepted the implications:

> Should our decision result in exposing the jury in each case to the testimony of expert witnesses as to the reliability and uses of hypnosis as an investigative tool, so be it. We believe this alternative is preferable to the potential exclusion of relevant testimonial evidence and the end of hypnosis as an investigative tool in this jurisdiction. . . . We are firmly of the belief that jurors are "quite capable of seeing through flaky testimony" and pseudo-scientific "claptrap."[180]

State v. Brown, 337 N.W.2d 138 (N.D. 1983); State v. Glebock, 616 S.W.2d 897 (Tenn. Crim. App. 1981); State v. Armstrong, 329 N.W.2d 386 (Wis. 1983); Chapman v. State, 638 P.2d 1280 (Wyo. 1982).

175. 337 N.W.2d 138 (N.D. 1983).
176. *Id.* at 151.
177. *Id.* See also Brown v. State, 426 So. 2d 76, 89-90 (Fla. Dist. Ct. App. 1983), cited by the North Dakota court for the proposition that *Frye* is inapplicable to eyewitness testimony.
178. State v. Brown, 337 N.W.2d 138, 149 (N.D. 1983).
179. *Id.* at 151 (quoting dissenting opinion from State *ex rel.* Collins v. Superior Court, 644 P.2d 1266, 1277 (Ariz. 1982)(Holohan, C.J., dissenting)).
180. State v. Brown, 337 N.W.2d 138, 151-52 (N.D. 1983)(quoting People v. Williams, 183 Cal. Rptr. 498, 502 (Ct. App. 1982)(Gardner, J. concurring)). The court in State v. Armstrong, 329 N.W.2d 386 (Wis. 1983), also discussed the problem of applying *Frye* to in-court eyewitness testimony:

> [I]t is not the reliability of hypnosis to put one in a hypnotic trance that is at issue when the witness testifies. It is the reliability of a specific human memory as affected by hypnosis that must be examined. There are no experts who can testify as to what specific effects hypnosis has had on the witness' memory; just as there are no experts who can testify that a normal waking memory of an event is in fact a completely accurate representation of what actually occurred. The most a trial judge can do is review the hypnotic session to ensure that no impermissible suggestiveness has occurred. However, in such a review, it is not the

A variation of the *Brown* approach is expressed by courts declining to apply *Frye*, yet continuing to closely scrutinize the procedures surrounding the hypnosis of a witness. Prominent among these are federal courts that rely on *Federal Rules of Evidence* Rule 702[181] in analyzing the admissibility of novel scientific evidence under a relevancy test rather than under a *Frye* test. This analysis balances the probative value of hypnotically affected testimony against its possible prejudicial effect.[182] While general acceptance is one indicator of reliability, additional factors are weighed in determining admissibility.[183]

The Court of Appeals for the Fifth Circuit, for example, held *Frye* inapplicable to hypnotically affected testimony in *United States v. Valdez*.[184] The court stated:

> The "Frye test" . . . applies in terms to the admissibility of expert opinion and experimental data. The issue here is not the admissibility of a hypnotist's observations or statements made by the witness during hypnosis but instead the admissibility of the testimony of a lay witness in a normal, waking state. . . . Our evaluation instead considers three basic evidentiary precepts: first, the principle embodied in Federal Rules 402 and 601 that "all relevant evidence is admissible" and "every person is competent to be a witness," subject only to certain explicit exceptions; second, the jurisprudential rule that, in determining admissibility, the trial judge's discretion is wide (a rule based on the superior opportunity for insight available to trial judges); and finally, the limiting rule that even relevant evidence may be excluded if its probative value is substantially outweighed by such factors as "the danger of unfair prejudice, confusion of the issues, or misleading the jury."[185]

In a footnote, the court made its view of *Frye* and hypnosis very clear: "[We] decline to apply a test designed for pseudo-scientific data

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> reliability of hypnosis that is to be examined. Rather, it is the effect of a specific hypnotic session that is to be determined.

Id. at 393.

181. Rule 702 allows the admission of expert testimony so long as it "assists the trier of fact." FED. R. EVID. 702.

182. *See* United States v. Valdez, 722 F.2d 1196, 1201 (5th Cir. 1984). *See also* 1 MYERS, *supra* note 50, § 4.19, at 266-67. Some courts treat a *Frye* test and a relevance test as essentially the same. For example, in State v. Hurd, 432 A.2d 86 (N.J. 1981), the court held that a general acceptance test applies to hypnotically affected testimony and used a relevance analysis as part of the justification for applying *Frye*. *See supra* notes 155-65 and accompanying text. Similarly, *Contreras v. State* is based on a relevancy balancing test under the state equivalent to Rule 403. Contreras v. State, 718 P.2d 129, 136-38 (Alaska 1986). As evidenced by both *Hurd* and *Contreras*, however, courts adopting a relevance test do not necessarily apply the test case-by-case. For the purposes of this Article, these courts are grouped together under the first approach discussed *infra* at text accompanying notes 151-73, and only those courts adopting a case-by-case relevancy analysis are discussed in this section. See Shaw, *supra* note 155, at 21-24, for a comparison and contrast of the varying approaches.

183. See 1 MYERS, *supra* note 50, § 4.19, at 266-67, for a summary of the factors courts use when applying a relevancy test to novel scientific evidence generally.

184. 722 F.2d 1196 (5th Cir. 1984)(citing FED. R. EVID. 403).

185. *Id.* at 1200-01 (footnotes omitted).

in a manner that would render a lay witness incompetent to give previously admissible testimony."[186] Rather than create a per se rule of inadmissibility in all cases,[187] the court required an examination of the facts of each case to determine whether adequate procedures[188] were followed to ensure reliability.[189]

D. Constitutional Issues

Regardless of whether courts adopt a *Frye* test, constitutional concerns play a significant role in many decisions precluding hypnotically affected testimony.[190] The court in *Contreras* noted that the effect of hypnosis on a witness' demeanor—giving the witness extreme confidence in the memory—can impair cross-examination to the point that it violates a defendant's right of confrontation.[191]

Similarly, witnesses who are hypnotized by police for purposes of identifying assailants may be so inclined to help the police that they are "hypersuggestible" to whatever the police want or expect to find.[192] Consequently, a defendant's due process rights may be jeopardized by eyewitness identifications made under hypnosis.[193]

Yet another constitutional argument is that an identification made by a witness for the first time while under hypnosis violates a defend-

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186. *Id.* at 1201 n.19.

187. The *Valdez* court established a per se rule for the limited case in which a person who knows a witness to be under suspicion is hypnotized for the purpose of identifying the perpetrator. *Id.* at 1202. However, the court specifically stated:

> We do not formulate a per se rule of inadmissibility for cases not involving personal identification. In a particular case, the evidence favoring admissibility might make the probative value of the testimony outweigh its prejudicial effect. If adequate procedural safeguards have been followed, corroborated post-hypnotic testimony might be admissible.

Id. at 1203.

188. The safeguards to which the *Valdez* court refers are those proposed by the expert whose testimony formed the basis of the *Hurd* safeguards. *Id.* at 1202. *See* State v. Hurd, 432 A.2d 86, 96 (N.J. 1981); Martin Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT. J. CLINICAL & EXPERIMENTAL HYPNOSIS 311 (1979).

189. United States v. Valdez, 722 F.2d 1196, 1203 (5th Cir. 1984). This analysis may see greater use in light of the Supreme Court's decision in Daubert v. Merrill Dow Pharmaceuticals, 113 S. Ct. 2786 (1993)(holding *Frye* not mandatory for novel scientific evidence to be admissible because the *Federal Rules of Evidence* supersede *Frye*).

190. *See* United States v. Valdez, 722 F.2d 1196, 1202 (5th Cir. 1984); State *ex rel.* Collins v. Superior Court, 644 P.2d 1266, 1273-75 (Ariz. 1982).

191. Contreras v. State, 718 P.2d 129, (Alaska 1986)(applying the state confrontation clause).

192. *See* State *ex rel.* Collins v. Superior Court, 644 P.2d 1266, 1270 (Ariz. 1982).

193. United States v. Valdez, 722 F.2d 1196, 1203 (5th Cir. 1984). The *Valdez* decision is limited to instances in which a "hypnotized subject identifies for the first time a person he has reason to know is already under suspicion." *Id.*

ant's right to a fair trial.[194] In *United States v. Valdez*,[195] for example, the witness, a police officer, knew Valdez was a suspect in the case before he was hypnotized concerning the relevant incident. During the hypnosis, several Texas Rangers, FBI agents, and an assistant U.S. Attorney were present. A number of different persons asked questions, some of which were related to information known by the witness about Valdez.[196] The court concluded the suggestive procedures and prior information the witness had about Valdez created an ideal situation for him to be led to believe he saw the defendant.[197]

E. Summary of Hypnosis Case Law

A majority of courts believe that hypnotically affected testimony, even though it is lay testimony, is so affected by a scientific procedure that the rules governing expert scientific evidence are applicable.[198] One commentator explains this reasoning:

> Although *Frye* did specifically deal with the testimony of an expert witness, the reasoning underlying its holding is not restricted to expert testimony. *Frye* requires that evidence derived from scientific principles be sufficiently reliable and sets a standard for determining reliability. Nothing in *Frye* limits it to only those instances in which the evidence is the testimony of an expert witness, nor is there any policy consideration that should so limit it.[199]

Courts have articulated several factors specific to hypnosis that justify their application of *Frye*. First, the out-of-court scientific procedure affects in-court testimony in intangible and untestable ways.[200] Hypnosis is designed to affect a person's memory and its purpose is to reconstruct memories not recalled by the conscious mind.[201] When a previously hypnotized person testifies, the witness is able to confidently assert facts presumptively not known without the aid of hypnosis, creating an impression that accurate testimony has been produced. The hypnotized person is, however, extremely suggesti-

194. The Supreme Court has made it clear that a defendant's right to a fair trial can be denied when police use unduly suggestive eyewitness identification procedures. *See* Manson v. Brathwaite, 432 U.S. 98 (1977).
195. 722 F.2d 1196 (5th Cir. 1984).
196. For a discussion of the significance of the fact that hypnosis takes place out of court, see Beaudine, *supra* note 133, at 405; and Kenneth G. Carroll, Note, *The Admissibility of Hypnotically Refreshed Testimony*, 20 WAKE FOREST L. REV. 223, 244-45 (1984).
197. United States v. Valdez, 722 F.2d 1196, 1202-03 (5th Cir. 1984).
198. *See supra* notes 151-73 and accompanying text.
199. Shaw, *supra* note 155, at 19-20.
200. *See supra* note 162 and accompanying text.
201. *See supra* notes 159-61 and accompanying text.

ble[202] and is later unable to distinguish pre-hypnotic from post-hypnotic memories.[203]

Second, there may be no way to recreate what happens during the hypnosis session or to fairly test the accuracy of the testimony, either through scientific means, cross-examination, or otherwise.[204] Hypnosis changes the demeanor of witnesses so the jury cannot see a "before and after" picture of the witness. Courts are extremely concerned under such circumstances that the aura of science will influence juries into accepting unreliable testimony as true.[205] In particular, these courts say a jury's normal ability to assess credibility is negated because the effects of the scientific procedure make witnesses appear more credible than they are.[206]

Third, a case-by-case examination is viewed as a misuse of judicial resources. As stated by the court in *Contreras*, the *Frye* test is judicially manageable and provides for consistent application.[207]

Fourth, courts are concerned about the effect of hypnosis on the constitutional rights of a criminal defendant. Hypnosis often is used by police to obtain an eyewitness identification. The hypnosis is conducted by a police officer or by an outside expert while law enforcement is present[208] and the witness may feel pressure to be more confident in answers.[209] Relying on a body of Supreme Court law which prohibits overly suggestive eyewitness identification procedures,[210] these courts hold that procedures surrounding hypnosis violate a defendant's due process and confrontation rights.[211] In many of the hypnosis cases, these constitutional concerns either constitute an independent reason to preclude hypnotically affected testimony,[212] or at the very least weigh heavily in decisions precluding such testimony under *Frye*.[213]

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202. The opportunity for facts to be suggested to the person are increased if the interview takes place in the presence of law enforcement. *See supra* notes 194-96 and accompanying text.
203. *See supra* note 161 and accompanying text.
204. *See supra* note 162 and accompanying text.
205. This assumption has been attacked as unsound. *See* 1 GIANNELLI & IMWINKELRIED, *supra* note 144, § 1-5(E), at 22.
206. Contreras v. State, 718 P.2d 129, 138 (Alaska 1986).
207. *Id.*
208. *See, e.g.*, State v. Hurd, 432 A.2d 86, 88 (N.J. 1981).
209. *Id.* at 93.
210. *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98 (1977).
211. *See, e.g.*, United States v. Valdez, 722 F.2d 1196, 1203 (5th Cir. 1984).
212. *Id.*
213. *See, e.g.*, Hall v. Commonwealth, 403 S.E.2d 362, 367-68 (Va. Ct. App. 1991)(stating "although the use of post-hypnotic testimony may in some circumstances violate a defendant's right to effective cross-examination, a per se ban on the use of such testimony is not required by the Sixth Amendment").

Citing these factors, courts have created rules either precluding all hypnotically affected testimony or requiring extensive procedures ensuring the objectivity of the hypnotic sessions.[214] These rules are responsive to perceived problems created by the fact that hypnosis does not take place where the judge, jury, and opposing counsel can contemporaneously scrutinize it.

IV. LEGAL CONTROVERSY SURROUNDING FACILITATED COMMUNICATION

Very few courts have specifically ruled on the admissibility of facilitated communication testimony. These few decisions nonetheless reflect the same divergence of opinion on facilitated communication that exists within the scientific community.

The first reported case addressing the admissibility of facilitated communication testimony is *Department of Social Services v. Mark*,[215] decided by the family court of Ulster County, New York. The case involved the removal of a 16-year-old non-verbal autistic child from her parents' home. Through facilitation, the child disclosed that her father sexually abused her. The court applied a *Frye*[216] test to the out-of-court disclosure, determining that since facilitated communication exists in the "twilight zone" between experimental and demonstrable scientific techniques, the child's statement "cannot be admitted into evidence without testimony concerning the technique used to acquire the statement."[217] Following a pre-trial hearing in which expert testimony concerning facilitated communication was received, the court equated facilitated communication with hypnosis, polygraphs, rape trauma syndrome, and other syndrome testimony.[218] Relying on this precedent, the court found that facilitated communication had not been generally accepted in the relevant scientific community and therefore the statement made through facilitation was inadmissible.[219] Further, the court determined that the relevant scientific community had not accepted facilitated communication as "simultaneous transmission," and accordingly rejected an analogy to sign language.[220]

Similarly, in *In re M.Z.*,[221] a New York family court held statements obtained through facilitated communication inadmissible in a

214. *See supra* notes 156-73 and accompanying text.
215. 593 N.Y.S.2d 142 (Fam. Ct. 1992).
216. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). *See supra* text accompanying notes 141-50.
217. Department of Social Services v. Mark, 593 N.Y.S.2d 142, 146 (Fam. Ct. 1992).
218. *Id.* at 146-47.
219. *Id.* at 150.
220. *Id.* at 151.
221. 590 N.Y.S.2d 390 (Fam. Ct. 1992).

child protective hearing because it viewed the technique as not generally accepted in the relevant scientific community.[222] The court noted that the judgment was not a reflection of the utility or reliability of facilitated communication; the court's findings were based on the petitioner's failure to establish a prima facie case as to the admissibility of the facilitated testimony in that case.[223]

Two other New York cases, *In re Luz*[224] and *People v. Webb*,[225] held that facilitated communication testimony should be analyzed as a matter of competency of witnesses rather than expert testimony. In *Luz*, the trial court held a *Frye* hearing and determined that facilitated communication was not scientifically reliable and therefore testimony given through facilitated communication could not be presented.[226] On appeal, the Appellate Division analyzed the issue as a question of competency rather than scientific reliability. The appellate court stated that when a witness is unable to communicate without an interpreter, the court must appoint an interpreter who can understand the witness.[227]

Comparing cases in which speech-impaired witnesses use sign language translators or other interpreters, the court held that in-court facilitated communication testimony cannot be excluded simply because the method of communication is not scientifically verified.[228] The court stated:

> The test for the court in cases such as these is a pragmatic one. Can the interpreter, or in this case the facilitator, effectively communicate with the witness and reliably convey the witness' answers to the court? A determination of these questions does not require expert testimony. To the contrary, the proffered facilitated communication lends itself to empirical rather than scientific proof.[229]

Moreover, the court reasoned that questions may be asked in order to deduce whether communication emanated from the witness or the facilitator, and further, that courts should determine whether the facilitator is qualified to interpret based on this in-court test.[230]

Addressing the applicability of the *Frye* test, the court pointed out that qualifications of an interpreter are tested on a case-by-case basis and are not subjected to a Frye test.[231] The court stated that whether a child is otherwise competent[232] is likewise determined by the trial

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222. *Id.* at 399.
223. *Id.*
224. 595 N.Y.S.2d 541 (App. Div. 1993).
225. 597 N.Y.S.2d 565 (Crim. Ct. 1993).
226. *In re* Luz, 595 N.Y.S.2d 541, 544 (App. Div. 1993).
227. *Id.* at 543.
228. *Id.* at 544.
229. *Id.* at 545.
230. *Id.*
231. *Id.*
232. *See supra* notes 51-62 and accompanying text.

court. The opponent of the testimony has the burden of demonstrating the witness lacks testimonial capacity.[233]

Another New York court used similar reasoning in allowing grand jury testimony through facilitated communication. In *People v. Webb*,[234] the court held it was proper to allow a facilitator to assist an autistic child in testifying before a grand jury.[235] The *Webb* court distinguished *Mark* and *M.Z.* because those cases dealt with prior out-of-court statements obtained through facilitated communication.[236] In *Webb*, by contrast, the witness used facilitated communication to testify in court where the grand jurors were able to see the witness under oath and observe the procedure. Further, in order to prevent the facilitator from hearing the questions; the facilitator wore earphones through which "white noise" was transmitted.[237] A *Frye* test was not applied and the witness was allowed to attempt to demonstrate her competence.[238]

Most recently, the Supreme Court of Kansas in *State v. Warden*,[239] ruled that a *Frye* test does not apply to facilitated communication testimony. In *Warden*, the defendant worked as a caregiver at an institution where the victim, diagnosed with autism and profound mental retardation, was a resident. Twelve years old at the time of trial, the victim had no verbal skills and was believed to have mental skills equivalent to those of a two- or three-year-old.

The victim began using facilitated communication with a speech pathologist at the institution in February 1992, and by 1993 was able to type with support to the forearm or elbow when he was calm. In the

233. *In re* Luz, 595 N.Y.S.2d 541, 546 (App. Div. 1993).

234. 597 N.Y.S.2d 565 (Crim. Ct. 1993).

235. *Id.* at 568. The court found error in allowing the facilitator's presence at the grand jury proceeding, but held there was no possible prejudice from such error. *Id.* at 569.

236. The significance in the difference in the facts of the cases should not be overlooked. *Mark* and *M.Z.* considered the reliability of out-of-court statements, whereas *Luz* and *Webb* assessed the admissibility of in-court statements. *See* People v. Webb, 597 N.Y.S.2d 565, 568 (Crim. Ct. 1993). However, the broad language in both *Mark* and *M.Z.* seems to create a blanket rule about the inadmissibility of facilitated communication testimony. In fact, the lower court in *Luz* relied on *Mark* to require a *Frye* hearing for the in-court statements. *See In re* Luz, 595 N.Y.S.2d 541 (App. Div. 1993).

237. People v. Webb, 597 N.Y.S.2d 565, 567 (Crim. Ct. 1993).

238. The *Webb* court qualified its holding by stating that if, "contrary to the Court's impression from review of the Grand Jury minutes," facilitated communication does in fact involve a scientific technique, there would be "serious questions" about whether the technique is generally accepted in the scientific community. *Id.* at 569. Therefore, the court stated it would hold a hearing to "inquire into the technique and the mode of communication." At this hearing, the state is required to prove the "claimed normality" of the technique. *Id.*

239. 891 P.2d 1074 (Kan. 1995).

spring of 1992, the victim disclosed[240] that the defendant[241] sodomized him. The victim provided additional detail about the abuse during an interview facilitated in the presence of a police officer. At trial, the facilitator provided wrist support to the victim, who typed short sentences and responded to yes and no questions on a communicator.[242]

The Kansas Supreme Court held, first, that a *Frye* test does not apply to statements made through facilitated communication, finding that facilitated communication is a method of communication not requiring scientific interpretation.[243] The court stated that the credibility of the statements are to be assessed by the jury. Second, the court stated that certain procedures such as a facilitator wearing earphones or diverting her eyes from the keyboard should be followed when using facilitated communication to testify.[244] The court further held that the facilitator should be sworn to transmit the responses accurately.[245] Third, the court held that in assessing the reliability of the

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240. The victim's disclosures came through a series of interviews with his facilitator and the director of the psychology department of the institution. *Id.* at 1081-82.

241. The defendant confessed to the police that he had touched the victim's back with his erect penis, and had pushed it up to the victim's anus, but claimed he did not penetrate the victim. The defendant also admitted to a co-worker that he had fondled the victim. *Id.* at 1083. Defendant recanted both the confession and admission at trial. *Id.* at 1084.

242. *Id.* at 1083.

243. *Id.* at 1088. The court's holding apparently applied both to out-of-court statements and in-court testimony given through facilitated communication. This lack of clarity may be significant. On one hand, it is a novel issue in either context: can a court preclude in-court or out-of-court statements based purely on the reliability of the method of communication as perceived by the scientific community? Case law surrounding hypnotically affected testimony provides the most relevant precedent. It can be argued that the reliability of out-of-court facilitated communication statements is more closely analogous to the hypnosis process because both procedures occur out of court in a potentially suggestive environment. However, an important difference with facilitated communication is that the statements, whether in-court or out-of-court, can be tested for reliability through other means, such as those mentioned in *Warden*. *Id.* at 1093. Reliability of hypnotically affected testimony, on the other hand, can never be tested.

A more significant issue for out-of-court facilitated communication statements would arise when the victim is unavailable for trial and the Confrontation Clause is implicated by introduction of hearsay without the opportunity for cross-examination of the declarant. In this instance, the reliability of the statements would be directly at issue and closely scrutinized. The rationale of Supreme Court cases examining the reliability of various hearsay exceptions when a witness is unavailable would be relevant to this situation. *See* Idaho v. Wright, 497 U.S. 805 (1990); Ohio v. Roberts, 448 U.S. 56 (1980).

244. State v. Warden, 891 P.2d 1074, 1093 (Kan. 1995). While such procedures were not followed, the court found no error in the state's failure to use procedures in this case, in part because defendant waited until immediately before the victim's testimony to request a protocol. *Id.* at 1090.

245. *Id.* at 1090. The trial court's failure to swear the facilitator in this case was not reversible error.

victim's out-of-court statements for purposes of admitting them under a special hearsay statute, the trial court implicitly made a finding the victim was communicating and was competent.[246]

Finally, the court enunciated several general rules.[247] First, the court stated that trial courts should conduct a case-by-case assessment of whether a witness is validly communicating through facilitated communication. The witness should be questioned outside the presence of the jury to determine competence.[248] Second, trial courts should devise procedures ensuring the trustworthiness of the testimony. For example, witnesses should give independent responses such as yes/no signs when possible, and the facilitator could wear earphones or look away from the board[249] when the witness is typing.[250] Third, the witness should be sworn and the facilitator should be sworn as an interpreter.[251] Concluding its discussion of facilitated communication, the court stated:

> [T]he jury observed for itself [the victim's] testimony through facilitated communication and could decide what weight, if any, to give his testimony. The jury heard testimony concerning the potential for facilitator influence or cuing and the lack of quantitative research validating any facilitated communication. It cannot be said that no reasonable person would agree with the trial court's ruling permitting [the victim] to testify.[252]

As evidenced by the relative paucity of case law and legal literature addressing facilitated communication, the debate over admissibility is not fully developed. However, because of the vulnerability of the autistic population to exploitation, the increasing use of facilitation, and the unique legal issues posed by the use of this technique in court, the controversy will not end soon.

If all witnesses are presumed competent and allowed to testify without any inquiry regarding the use of the technique, courts could be flooded with complaints of abuse. If facilitated communication is subjected to the test of scientific reliability, however, many individuals

246. *Id.* at 1092. Factors such as the victim's ability to show affection and respond to pictures, and the facilitator's lack of prior knowledge that the victim would allege abuse were cited as supporting the validity of the communication. While the Kansas Supreme Court indicated the trial court should have verified the validity of the communication in different ways, it did not find reversible error in the trial court's procedures. *Id.* at 1093.
247. *Id.* at 1093-94.
248. *Id.* at 1093.
249. Requiring the facilitator to be blindfolded or to look away from the board is not advocated by proponents of facilitated communication. Biklen argues that visual assistance is an integral part of facilitation and blindfolding techniques are likely to interfere with communication. BIKLEN, COMMUNICATION UNBOUND, *supra* note 7, at 123-24. Biklen recommends a variety of other means for testing the validity of communication. *Id.* at 124-31. *See infra* notes 317-28 and accompanying text.
250. State v. Warden, 891 P.2d 1074, 1093 (Kan. 1995).
251. *Id.*
252. *Id.* at 1094.

will be unfairly denied the opportunity to be heard. The following Part proposes a method for analyzing in-court facilitated communication testimony taking into account both the need to provide all victims of crime access to the courts and the need to ensure an acceptable level of reliability for non-traditional forms of testimony.

V. APPLICATION OF PRECEDENT TO FACILITATED COMMUNICATION

Legal precedent relevant to the admissibility of facilitated communication testimony can be divided into two categories.[253] The first category involves cases in which out-of-court scientific procedures affect the in-court testimony of a lay witness. Courts take three different approaches in analyzing this category of cases. The first approach treats such in-court testimony as novel scientific evidence[254] and creates per se rules of exclusion on the ground that the out-of-court procedure is not generally accepted in the scientific community.[255] The second approach requires proof that the out-of-court technique follows procedures designed to produce reliable testimony.[256] The third approach presumes the competency of all witnesses, admits their testimony, and requires opponents to attack the credibility of their testimony rather than its admissibility.[257]

The second category of relevant precedent involves cases in which a third party assists a witness' in-court testimony.[258] Courts analyzing such cases presume that all witnesses are competent and admit

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253. One significant body of relevant law that is not discussed in this Article is the Americans with Disabilities Act, which itself raises a host of issues about categorically depriving a class of disabled persons access to courts. 42 U.S.C. §§ 12101-12213 (Supp. 1994). Under the ADA a "disabled person" is someone who either has, is regarded as having, or has a record of having, a physical or mental impairment that substantially limits that person in one or more major life activities. *Id.* § 12102[2]. Courts are required under the ADA to provide a qualified interpreter, which is defined as an interpreter who is able to "interpret effectively, accurately, and impartially . . . using any necessary specialized vocabulary." 28 C.F.R. § 35.104 (1994). *See* LINDA KILB, *Title II—Public Services, Subtitle A*, Implementing the Americans with Disabilities Act 100 (Lawrence O. Gostin & Henry A. Beyer eds., 1993). The disabled individual's right to judicial access, whether as a juror, witness or litigant, is rooted in §§ 12131-12165 of the Act, which prohibit discrimination by public entities such as state and local courts. *Id.* For a discussion of the ADA and facilitated communication, see Nancy M. Maurer, *Facilitated Communication: Can Children with Autism Have a Voice in Court?*, 6 MD. J. CONTEMP. LEGAL ISSUES 233, 260-70 (1995).

254. These cases primarily involve hypnotically affected testimony. *See supra* note 171 and accompanying text.

255. *See supra* notes 151-73 and accompanying text.

256. *See supra* notes 163-65 and accompanying text.

257. *See supra* notes 174-89 and accompanying text.

258. These cases primarily involve translated testimony. *See supra* notes 63-130 and accompanying text.

their testimony as long as the proponent of the testimony is able to demonstrate some method by which the witness can communicate.[259] If the method of communication is shown to be potentially unreliable, courts look to whether the interpreter is qualified, sworn, and sufficiently impartial.[260] Each case is analyzed on its facts and admissibility is determined on a case-by-case basis.[261]

Facilitated communication testimony involves issues presented by both of these categories of cases: it could be classified as a scientific procedure subject to special scrutiny or it could be viewed as lay testimony subject only to traditional competency requirements. This Part considers both views of facilitated communication testimony.

A. Cases Applying *Frye* to Testimony Affected by an Out-of-Court Procedure

The strongest argument for precluding facilitated communication testimony on *Frye* grounds is found in cases dealing with the admissibility of hypnotically affected testimony.[262] These cases warn that courts should be hesitant to admit novel scientific evidence when the scientific community itself does not accept the validity of the procedure. Such testimony has the danger of improperly influencing a jury's decision when the testimony is not proven to produce reliable results. If admitted uncritically, testimony potentially influenced by suggestion occurring during hypnosis may be accepted by a jury as though it were accurately recalled from memory. By placing strict limitations on the admissibility of this testimony, courts attempt to ensure a higher degree of reliability derived from the use of this scientific technique.

While the concerns present in hypnosis cases lead many courts to apply the *Frye* test, the issues surrounding expert testimony and lay testimony converge in such a way with facilitated communication as to make a rule of per se exclusion based on *Frye* inappropriate.

First, the previously described dangers thought to be presented by out-of-court hypnosis sessions are eliminated because facilitated communication occurs in-court, subject to the scrutiny of judge, jury, and party-opponent.[263] Courts are concerned that hypnotic interviews conducted by police or with police present encourage witnesses to say what the police suggest to them with no one to independently monitor the hypnotic session. Once a suggestion is adopted by a hypnotized witness, it becomes firmly a part of what the witness believes to be accurate memory. Later cross-examination of the witness is thereby

259. *See supra* notes 113-23 and accompanying text.
260. *See supra* notes 84-106 and accompanying text.
261. *See supra* note 83 and accompanying text.
262. *See supra* notes 151-73 and accompanying text.
263. *See* State v. Warden, 891 P.2d at 1074, 1094 (Kan. 1995).

rendered ineffective, and courts contend the only protection against the unreliable testimony is to preclude it altogether.

In-court facilitated testimony does not involve the same type of potentially coercive out-of-court procedures involved in hypnotically affected eyewitness identification.[264] Regardless of prior disclosures made through facilitation, a jury will assess in-court statements made with facilitation. Opposing counsel can argue that the facilitator is influencing the procedure and the jury will assess the validity of that argument. The opponent also has the opportunity for effective cross-examination; unlike hypnosis, there is no alteration of the witness' memory by facilitation.

The second factor distinguishing hypnosis cases from facilitated communication cases involves the court's ability to test the accuracy of the results. While it is arguably impossible to test the potentially suggestive effects of hypnosis on subsequent testimony, it is possible to test whether facilitation is influenced by the facilitator.[265] Because a witness cannot recall a particular fact or set of facts before hypnosis, there is no way to assess whether the hypnotically affected memory is accurate. Once changed, the argument holds, the memory is changed forever.

What is untestable in the context of hypnosis, however, is quite testable with facilitation. In *People v. Webb*, for example, the facilitator was unable to hear the questions posed to the witness, and the court held the grand jury could assess whether communication was occurring based on the responses to the questions.[266] Because such a test is possible with facilitation, the rationale applied to hypnosis cases is less compelling.[267]

With regard to testing reliability, facilitated communication testimony is more comparable to testimony elicited from a witness in a dissociative state. In *Dorsey v. State*,[268] a victim of sexual assault exhibited multiple personalities. All of the victim's personalities testi-

264. An opponent may argue that facilitators plant information in witnesses who require significant support to facilitate at the time of disclosure and that any later disclosures are "tainted" by that earlier information. The earlier facilitation, the argument goes, is a coercive pre-trial procedure, similar to improper hypnosis techniques.

Such an argument assumes the initial disclosures made with hand or wrist support are the result of cuing, coercion, or other improper behavior by the facilitator and not legitimate communication. However, a witness who is able to demonstrate an ability to accurately facilitate at the time of trial has demonstrated an ability to communicate and there is no reason—other than speculation—to assert that the witness was not communicating earlier in the process.

265. See *infra* notes 311-23 and accompanying text for a discussion of the legal context in which a test should occur.

266. *See supra* notes 234-38 and accompanying text.

267. *See supra* notes 159-62 and accompanying text.

268. 426 S.E.2d 224 (Ga. Ct. App. 1992).

fied at trial and were subject to cross-examination.[269] There is uncertainty in the relevant scientific community regarding the reliability of testimony from witnesses in a dissociative state: some argue the testimony as a whole is unreliable because the witness is incoherent and inconsistent, while others argue that the testimony elicited from each personality is individually reliable.[270] Although there is substantial evidence supporting the existence of multiple personality disorder,[271] there is wide disagreement about the prevalence of the disorder.[272]

The defendant in *Dorsey* argued that case law governing admissibility of hypnotically affected testimony should control the admissibility of testimony by a witness with multiple personality disorder. He further argued that such testimony should be per se inadmissible because there is disagreement in the scientific community as to the reliability of testimony given by a person in a dissociative state.[273] The court rejected this argument and held the hypnosis case law inapplicable, finding there are ways to test the reliability of testimony from a person in a dissociative state. Significantly, the court noted that the jury could observe the testimony and also that the witness was subject to cross-examination.[274] The court stated:

> The trial court properly recognized that if testimony from a person in a dissociative state is never admissible, even if sufficient indicia of reliability are present, persons aware of someone's dissociative disorder will be able to take advantage of that condition with impunity. This we cannot allow.[275]

The rationale of *Dorsey* applies with equal force to facilitated communication. The testimony of a person with a dissociative disorder and facilitated communication testimony both involve procedures which could be classified as scientific, whereby testimony could be precluded without examining the reliability of the testimony. However, unlike hypnotically affected testimony, these types of testimony can be

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269. Certain events normally trigger a person moving from a "host" personality (non-dissociative) to a dissociative state. In *Dorsey*, the witness slipped into a child personality when the prosecutor asked her about the abuse. For a useful discussion of psychological defense mechanisms such as dissociation used by victims of trauma, see LENORE TERR, UNCHAINED MEMORIES (1994).

270. *See* State v. Dorsey, 426 S.E.2d 224, 227 (Ga. Ct. App. 1992). Experts for the defendant argued that there was no real difference between multiple personality disorder and hypnosis. The court rejected this argument, finding the spontaneous and involuntary nature of multiple personality disorder distinguishing. *Id.* For a description of multiple personality disorder, see DSM-IV, *supra* note 5, § 300.13, at 487. The DSM-IV now terms the disorder Dissociative Identity Disorder, but the more familiar term Multiple Personality Disorder is used in this Article.

271. *See* DSM-IV, *supra* note 5, § 300.13, at 484.

272. *See* DSM-IV, *supra* note 5, § 300.13, at 486.

273. Dorsey v. State, 426 S.E.2d 224, 226-27 (Ga. Ct. App. 1992).

274. *Id.* at 227.

275. *Id.*

assessed for reliability. Neither of these classes of arguably novel testimony should be precluded without providing the witness the opportunity to be heard.

The third argument for treating facilitated communication testimony differently from hypnotically affected testimony is that facilitated communication does not alter a witness' demeanor to the witness' advantage. One problem with hypnosis is the lack of any method to test memories before and after hypnosis. The jury only sees the post-hypnotic testimony and demeanor of the witness. Hypnosis is challenged on confrontation grounds because the hypnosis alters the witness' demeanor to the point that cross-examination is rendered ineffective. Additionally, hypnosis has been held to violate due process because of the "hyper-suggestible" nature of the out-of-court interviews.[276]

Neither of these concerns is present with facilitated communication testimony. There is no change in the witness' demeanor. The entire procedure is visible to the judge and jury.[277] Moreover, because of motor disabilities and the physical appearance of many autistic people, their presence before the jury may not be to their advantage:[278] judges and juries may assume *incompetence* until competence is convincingly demonstrated.[279]

Fourth, concerns about judicial economy are misplaced. Hypnosis can never be entirely trusted because an individual's reconstructed memories cannot be tested for accuracy. A per se rule may make economic sense because, regardless of the amount of in-court testing, the reliability of hypnotically affected memories will always be questiona-

276. *See supra* notes 190-97 and accompanying text.

277. The procedure would take place in front of a judge alone if the competency hearing were held outside the presence of the jury. For a discussion of holding the competency hearing in front of the jury, see *infra* note 320. The jury will assess the credibility of any witness found competent to testify at trial. The argument about facilitator influence could be made at that stage and jurors could witness the procedure and assess reliability for themselves.

278. Stereotyped body movements include the hands (clapping, finger flicking) or whole body (rocking, dipping, and swaying). Abnormalities of posture (e.g., walking on tiptoe, odd hand movements and body postures) may be present. These individuals show a persistent preoccupation with parts of objects (buttons, parts of the body). There may also be a fascination with movement (e.g., the spinning wheels of toys, the opening and closing of doors, an electric fan or other rapidly revolving object). The person may be highly attached to some inanimate object (e.g., a piece of string or a rubber band).

DSM-IV, *supra* note 5, § 299.00, at 67.

279. For a discussion of jurors' perceptions of children's credibility, see Gail Goodman et al., *Determinants of the Child Victim's Perceived Credibility, in* PERSPECTIVES ON CHILDREN'S TESTIMONY 1 (S. Ceci et al., eds., 1989); Gail Goodman et al., *Jurors' Reactions to Child Witnesses*, 40 J. SOC. ISSUES 139 (1984). Many of the stereotypes about children are compounded when the child is disabled.

ble. This inability to determine reliability is due to the limited understanding in the scientific community of how the memory functions.

By contrast, if an individual can demonstrate his or her ability to communicate, no judicial economy argument justifies excluding the testimony.[280] When an individual's communication can be verified as actually occurring, that person should always have access to courts, even if additional procedures are necessary to establish other aspects of the person's competence.[281]

In addition to the legal arguments, public policy considerations also dictate against extending *Frye* to cases involving facilitated communication. *Frye* began as a rule to limit expert testimony about scientific methods not proven to accurately measure what they purport to measure. *Frye* was later extended to "soft" sciences such as psychology when those disciplines appeared to produce previously unknown types of evidence.[282] The broad acceptance of this extension of *Frye* opened a new door for excluding previously admissible lay testimony.[283] Taking the test yet a further step, however, goes beyond the legitimate uses of the rule and improperly prohibits a class of witnesses from testifying without considering the facts of each case.

The tendency of courts to overextend *Frye* is illustrated in *State v. Valera*.[284] In *Valera*, a therapist used "relaxation therapy" to help a child feel comfortable talking. In doing so, the therapist asked the

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280. As stated by Wigmore:

> It is clear that testimony must not be allowed to fail if some process of interpretation is available. The conditions under which it is to be resorted to are the simple dictates of cautious common sense: (1) Interpretation is proper to be resorted to *whenever a necessity exists*, but not till then[;] . . . (2) If interpretation is necessary, and *no adequate means* of securing it is practicable, the testimony is lost, for without adequate communication there can be no testimony[;] . . . (3) What *sort of a person* is a proper one to be *interpreter*, is a question depending much on the circumstances; and should be determined by the trial judge.

2 WIGMORE, *supra* note 42, § 811, at 277-81 (emphasis in original)(citations omitted).

281. *See supra* notes 113-24 and accompanying text.

282. McCord explains:

> Both the *Frye* rule and the "relevance analysis" as currently formulated are more easily and more often applied to "hard" scientific evidence, such as neutron activation analysis, and gas chromatograph analysis. "Novel" psychological evidence, which is "soft" and subjective, is a relative newcomer to the *Frye* scene, although it now seems to have arrived with a vengeance.

McCord, *Expert Psychological Testimony*, *supra* note 144, at 27 (footnotes omitted).

The *Frye* test has long been criticized on a variety of grounds, one of which is that it is selectively applied. *See* Mark McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879, 886-905 (1982)(discussing decisions that have modified or rejected a *Frye* standard).

283. *See* 1 MYERS, *supra* note 50, § 4.18, at 265.

284. 817 P.2d 731 (N.M. Ct. App. 1991).

child to take deep breaths, notice sounds outside, and think about what she was feeling.[285] The child disclosed sexual abuse by the defendant during the relaxation therapy session. Prior to the disclosure, the child had made no mention of sexual abuse; the therapist thought the child had been suffering from post-traumatic stress disorder from a recent car accident.[286] The child did not claim to have forgotten the memories; rather, she disclosed the abuse because she felt safe and trusted the therapist.[287]

The trial court applied a *Hurd*-type test to the procedure and determined that because the *Hurd* procedures for hypnotically affected testimony had not been followed, the child's disclosure of abuse was inadmissible. The New Mexico Court of Appeals reversed this decision, finding that the technique used by the therapist did not create the same problems of traditional hypnosis cases.[288] First, the court ruled that relaxation therapy did not present problems of reliability. Second, the court found it significant that the technique was not used in a forensic setting; in fact, the therapist was surprised by the disclosure.[289] The court held that the *Hurd* safeguards simply did not apply to this situation.[290] Therefore, the testimony of the child witness was admissible.

The trial court's ruling in *Valera* reflects the ease with which lay testimony can be improperly cast as scientific evidence and precluded. Even though the concerns of hypnosis were not present in this case,[291] the trial court accepted the defendant's characterization of the therapy as a scientific technique, and simply precluded the lay testimony under *Frye*. Exclusion of all facilitated communication testimony would be a further step in this misguided direction.

Another troubling aspect of applying *Frye* to facilitation is that facilitation occurs at many levels. At its most supportive level, the technique involves a facilitator who supports the hand of the witness while the witness types. The facilitator holds the witness' hand with every touch on the keyboard. This level of facilitation is the most frequently

285. The therapist labelled her technique "Ericksonian hypnosis," but stated that practitioners of "classical hypnosis" would not call her procedure hypnosis.

286. The child had displayed behavior and emotional symptoms consistent with Post Traumatic Stress Disorder. *See* DSM-IV, *supra* note 5, § 309.81, at 424.

287. State v. Velera, 817 P.2d 731, 733 (N.M. Ct. App. 1991).

288. The court stated the record was inadequate for it to address the issue of whether a *Hurd* test ought to be applied to this type of hypnosis. *Id.* at 734. The court stated it was not necessary to answer this question because it was able to distinguish the case from traditional hypnosis cases even under the *Hurd* guidelines.

289. *Id.* at 734.

290. *Id.* at 735.

291. Relaxation therapy does not purport to alter memory or affect the demeanor of witnesses.

attacked by critics on the basis of facilitator influence.[292] This is only one level of facilitation, however. Many people only need a facilitator to hold their elbow or sleeve while typing.[293] These methods of support, while still involving touching, provide little possibility of guidance by the facilitator.[294] Moreover, many students eventually are able to type without any physical contact,[295] though they may still require the facilitator's physical proximity.[296] Certainly, in instances of minimal facilitator contact there can be no real possibility of the facilitator guiding or influencing the person's typing, yet this facilitation could be deemed inadmissible under a per se rule.[297]

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292. Even the strongest proponents of facilitation agree that influence is always possible at this level. Biklen, *Autism and Praxis*, *supra* note 7, at 297. Thus, guidelines have been established for proper facilitation when hand support is provided. BIKLEN, COMMUNICATION UNBOUND, *supra* note 7, at 128 (emphasizing the need for the facilitator to make sure the student is looking at the keyboard); CROSSLEY, FACILITATED COMMUNICATION TRAINING, *supra* note 7, at 43-46.

293. This is the level of support sometimes used by the child in State v. Warden, 891 P.2d 1074, 1080 (Kan. 1995), although he needed wrist support to testify at trial. *Id.* at 1083.

294. Prior and Cummins argue that through elaborate cuing, a presumably illiterate and unintelligent person is able to punch the right keys to write coherent statements and carry on discussions. CUMMINS & PRIOR, *supra* note 15, at 232-33. Biklen challenges them to explain how touching a student's shoulder can influence the student to write complex sentences. Biklen, *Free Speech*, *supra* note 7, at 249.

295. BIKLEN, COMMUNICATION UNBOUND, *supra* note 7, at 130. That many people achieve independence is in itself a compelling argument for the validity of facilitated communication. Without facilitation, the person never would have begun typing nor gained the ability to type independently.

296. CROSSLEY, FACILITATED COMMUNICATION TRAINING, *supra* note 7, at 59. Researchers do not know why physical presence is necessary but hypothesize that, especially with autistic people, the emotional support is important. *Id.* at 67 n.4.

297. This potential "parade of horrors" is not an irrational threat or a baseless claim. Courts—as well as the attorneys practicing before the courts—have long preferred bright line tests. For example, for years all disabled victims were precluded from testifying when their attackers were charged under rape statutes against a person "incapable through unsound mind of giving legal consent." Wilkinson v. People, 282 P. 257, 257 (Colo. 1929). Courts reasoned that if the person was incapable of giving legal consent to the intercourse, he or she was necessarily incompetent to testify at the trial. Lee v. State, 64 S.W. 1047 (Tex. Crim. App. 1901). Thus, the incapacity which was an essential element of the crime always made the victim of such a crime incompetent to testify. The rule resulted from the attempt of courts to create a bright line rule: all victims incapable of giving consent to rape are automatically excluded as witnesses.

Wigmore claimed that the *Lee* opinion and other like decisions committed "an absurdity in the name of the law," 2 WIGMORE, *supra* note 42, § 498, at 501, and the rule has long since been uniformly rejected. *See id.* at 706 ("It may be noted here that capacity to consent to a rape, being a question of the criminal law, is not to be used as the standard for capacity to testify; hence a female legally incapable of such consent may still be mentally able to give a dependable account as a witness.")(emphasis and footnotes omitted). In rejecting the rule presuming incom-

B. Cases Not Applying *Frye* to Testimony Affected by an Out-of-Court Procedure

Not all courts extend *Frye* to lay testimony affected by out-of-court scientific procedures. A number of courts—led by the North Dakota Supreme Court in *Brown v. State*[298]—continue to treat such evidence as lay testimony which should be assessed by traditional tests of credibility rather than in terms of scientific testimony.[299] These courts hold that a test designed for "pseudo-scientific data"[300] should not be used to categorically eliminate the testimony of lay witnesses.[301] Instead, these courts reason that in-court testimony of lay witnesses should be admissible so long as the witness is competent and the testimony is relevant.[302] Following this rationale, these courts have established that determining competence and relevance on a case-by-case basis and attacking credibility through in-court cross-examination should be the first, rather than the last, resort.[303] These cases, as well as others discussing competency generally,[304] guide establishment of a structure for analyzing facilitated communication testimony.

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petence of such witnesses, the Colorado Supreme Court, demonstrating an enlightened view, stated:

> Offenses, such as the one under consideration, are committed in secret, and, if we hold that the weak in mind and feeble in intellect are incompetent to testify as witnesses, simply because they are incapable of giving legal consent, we would, by our decision, rob these unfortunates of all the protection of our laws, and such instances of depravity and immorality as we have considered here could be carried on by the lowest of humanity without fear of punishment.

Wilkinson v. People, 282 P. 257, 260 (Colo. 1929). *See also* Sanchez v. State, 479 S.W.2d 933 (Tex. Crim. App. 1972)(overruling Lee v. State, 64 S.W. 1047 (Tex. Crim. App. 1901)).

A rule completely eliminating all facilitated communication testimony would create an extremely bright line, precluding an entire class of witnesses in much the same manner as the *Lee* rule. Such a rule would indeed rob this class of victims of the protection of our laws and would heighten the possibility of crimes being carried out without fear of punishment.

298. 337 N.W.2d 138 (N.D. 1983).
299. While *Brown* and other cases following this reasoning have been severely criticized by some courts and commentators, the principles underlying these courts' decisions are relevant to facilitated communication testimony. *Brown* is most harshly criticized as naively assuming that hypnosis does not affect a "present recollection refreshed" analysis. Nonetheless, the principles concerning lay and expert testimony expressed in *Brown* are sound and compelling in the context of facilitated communication. *See supra* notes 174-89 and accompanying text.
300. United States v. Valdez, 722 F.2d 1196, 1201 n.19 (5th Cir. 1984).
301. *See supra* notes 184-89 and accompanying text.
302. United States v. Valdez, 722 F.2d 1196, 1201 (5th Cir. 1984). If a witness is found competent, the testimony should be considered relevant inasmuch as the scientific procedure employed in the case has already been tested and shown reliable.
303. *Id.*
304. *See supra* notes 37-62 and accompanying text.

1. *Step One: Determining the Qualifications of the Interpreter*

Courts begin any competency analysis by examining whether a witness can perceive events, remember those events, communicate his or her memory, and understand the duty to tell the truth.[305] At issue with facilitated communication is whether the witness can communicate.[306] In sign language and foreign language translation cases, this prong is established by proving that a translator is qualified to translate for the particular witness. When standard qualifying factors do not exist,[307] as with idiosyncratic communication, the form of the assessment is case-specific.[308] Courts examining the qualifications of an interpreter of idiosyncratic communication employ a common sense[309] examination of the abilities of the translator, such as the translator's training and experience with the witness.[310]

With facilitated communication, assessing qualifications requires examining the length of time the facilitator has worked with the witness and the success of the facilitator communicating with other students,[311] reviewing the facilitator's training,[312] and examining the method of facilitation used.[313] Factors to consider include whether the facilitator uses wrist, elbow, shoulder, or some other form of support.

If the student types with minimal shoulder support or even with elbow support, the court may reasonably determine that no influence is possible and not require further testing. Competency also may be established through records,[314] through the testimony of people who

305. 2 WIGMORE, *supra* note 42, § 478, at 636.

306. Facilitators also can be challenged based on inexperience and failure to follow accepted protocol. For example, Biklen and others insist that a person should not facilitate if the witness is looking away from the keyboard. Biklen, *Autism and Praxis*, *supra* note 7, at 307. This and other standards are being developed by persons who facilitate. *Id.*

307. When possible, proving qualification can be done through standardized means such as foreign language and sign language certification. *See supra* notes 69-71 and accompanying text.

308. *See supra* note 125 and accompanying text.

309. Watson v. State, 596 S.W.2d 867 (Tex. Crim. App. 1980).

310. *See supra* cases cited in note 125.

311. *See supra* notes 84-92 and accompanying text.

312. Training is available for facilitators and standards exist for determining proper facilitation techniques. Biklen, *Autism and Praxis*, *supra* note 7, at 307.

313. *See In re* Luz, 595 N.Y.S.2d 541, 545 (App. Div. 1993).

314. State v. Dighera, 617 S.W.2d 524 (Mo. Ct. App. 1981)(trial court's determination of competency based solely on the witness' records from a mental institution was not reversible error, but the "better practice" was to proffer the witness before trial).

know the witness and can vouch as to the accuracy of the communication,[315] or through testimony of facilitators themselves.[316]

If the student requires hand or wrist support, examination of the circumstances may lead to in-court testing of the procedure.[317] As stated by the court in *Luz*:

> The test for the court in cases such as these is a pragmatic one. Can the interpreter, or in this case the facilitator, effectively communicate with the witness and reliably convey the witness's answers to the court? A determination of these questions does not require expert testimony. To the contrary, the proffered facilitated communication lends itself to empirical rather than scientific proof. . . . Fact specific questions can be devised which should demonstrate whether the answers are subject to the influence, however subtle, of the facilitator. If the court is satisfied from this demonstration that the facilitator is "qualified" to transmit communications from Luz to the court, then the facilitator may be appointed as an interpreter.[318]

Any test conducted at a competency hearing should be structured in such a way as to allow the student to practice and become comfortable with the format of the test,[319] and the purpose of the test should be explained to the witness.[320] Tests also must be conducted more than

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315. Villarreal v. State, 576 S.W.2d 51 (Tex. Crim. App. 1978)(school superintendent testified that students were taught it was wrong to lie, demonstrating that the witness would know the difference between truth and falsity).

316. State v. De Wolf, 8 Conn. 93 (1830)(interpreter testified that student could read, write, and knew sign language).

317. Some individuals may object to the idea of any testing whatsoever on the ground that it is not required in idiosyncratic cases or any other cases in which a witness cannot communicate through traditional means. The potential for influence is just as great in idiosyncratic cases and the inability to test is the same; in fact, the tests proposed for facilitation could have been used in these cases but apparently such a procedure was not contemplated.

However, testing is justifiable with facilitated communication involving maximum support because of the extent of unintentional influencing demonstrated by the literature. Unlike translation of idiosyncratic testimony in which there is no reason to believe the communication may be inaccurate, the scientific literature related to facilitated communication does create such a belief, which justifies requiring individual facilitators to demonstrate their ability to facilitate accurately. Moreover, as argued in this Article, testing is a last resort, not the first approach, and competency may be shown through other means in some cases.

318. *In re* Luz 595 N.Y.S.2d 541, 545 (App. Div. 1993).

319. BIKLEN, COMMUNICATION UNBOUND, *supra* note 7, at 31. Because autistic and other disabled witnesses object to having their intelligence questioned and tested (as all people do), a testing environment itself can impede success. Therefore, it is necessary to familiarize the student with the test format and allow time for the student to become comfortable with the test. Allowing child witnesses to become familiar with the courtroom and court processes is common. *See* State v. Osborn, 490 N.W.2d 160, 164 (Neb. 1992).

320. Courts generally have the discretion to determine whether to conduct this hearing in front of the jury. FED. R. EVID. 104(c). *See supra* note 127 and accompanying text. *See also* 1 MYERS, *supra* note 50, § 2.18, at 124. A proponent of facilitated communication testimony may want to consider moving to hold the hearing in the presence of the jury in order to eliminate the need for the witness being tested twice. While courts usually have the authority to allow such an unu-

once. Recent research has demonstrated that, under test conditions, a student who can successfully pass messages[321] one day may not be able to the next day.[322] Consequently, it may be necessary to try the test more than once. If a student cannot pass messages consistently enough to satisfy the court, the student may then be found incompetent to testify. On the other hand, the circumstances surrounding one or more failures in a series of tests may leave the court convinced that communication is occurring, particularly where reasons are articulated explaining why the student failed. Additionally, tests should take place in a comfortable and familiar environment. Courts should be able to accommodate the needs of autistic individuals just as they have accommodated the needs of children and other witnesses.[323]

Further, a test must be used that has a proven ability to demonstrate successful message passing. A variety of options are available for structuring the tests themselves.[324] The *Luz* court suggested asking questions to the witness outside the presence of the facilitator, with the facilitator present only when the response is given.[325] Another option involves using earphones through which "white noise" is played to prevent the facilitator from hearing the questions.[326] In a case in Maryland, a reading comprehension test was attempted in which the student read two short paragraphs that the facilitator did not read, then attempted to answer questions based on the readings.[327] Such a test can demonstrate an ability to communicate as well as an ability to perform at higher levels of cognition.[328] Another

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sual step, most courts will be reluctant to risk the prejudice to the jury due to the risk of the witness being found incompetent. *See id.* at n.342. However, in an exceptional case in which a witness may not have the ability to pass two rounds of tests, the proponent should consider this option.

321. The term "pass messages" is used to describe the ability to communicate a word or phrase.
322. *See supra* note 25.
323. *See* 2 MYERS, *supra* note 50, § 8.3, at 327-29.
324. Proponents of facilitated communication have several recommendations for constructing validation tests. *See* BIKLEN, COMMUNICATION UNBOUND, *supra* note 7, at 127-31; Douglas Biklen et al., *How Teachers Confirm the Authorship of Facilitated Communication: A Portfolio Approach*, 20 J. ASS'N PERSONS WITH SEVERE HANDICAPS 45 (1995). Authors of recent research emphasize the inadequacy of single point-in-time tests and provide additional suggestions for validating communication. Cardinal et al., *supra* note 24.
325. *In re* Luz, 595 N.Y.S.2d 541, 545 (App. Div. 1993). This is the type of assessment used in the Cardinal study. *See supra* notes 24-25.
326. This is the technique used by the court in People v. Webb. 597 N.Y.S.2d 565, 567 (Crim. Ct. 1993).
327. Meyer, *supra* note 13, at B5. In this case, the trial judge indicated that he would determine the validity of facilitated communication testimony on a case-by-cases basis. *Id.* While precluding the witness' testimony on the ground that the witness could not answer the questions correctly, the court added: "I'm not convinced the method cannot work." *Id.*
328. *See* Cardinal et al., *supra* notes 24-25.

possible test is to ask the student questions for which the facilitator has no way of knowing the answer and which can be independently verified.[329]

2. Step Two: Swearing the Interpreter

In addition to finding the facilitator qualified, courts must place the facilitator under oath.[330] Swearing the facilitator will provide the same check against intentional misinterpretation as it does with any other translation case.[331] Just as there is no way for a judge to know whether foreign language or sign language interpreters are translating accurately, there is no way to ensure the truthfulness of individual facilitators.[332]

It may be argued that swearing the interpreter is irrelevant because critics do not claim that facilitators intentionally misinterpret; rather, it is claimed that facilitators unintentionally give their views rather than those of the witness.[333] The problem with facilitation, it is argued, is that to all appearances it is legitimate because even the facilitator completely believes its accuracy, but when tested it is shown to be the facilitator rather than the witness communicating.[334]

If, in fact, a facilitator's translation is the result of *unintentional* facilitator influence, such inaccurate translations will be discovered in assessing the facilitator's qualifications.[335] Facilitators who can demonstrate they are qualified—either through in-court testing or other methods—have necessarily demonstrated that they can successfully pass a variety of messages without influencing the process. If a disclosure of abuse is somehow unintentionally emanating only from the facilitator, the facilitator will not be able to demonstrate he or she is qualified.

Once a facilitator demonstrates an ability to pass messages successfully, the oath protects against *intentional* influence by the facilitator. The oath—backed by the punishments accompanying perjury and contempt of court—is the only protection against any witness

329. BIKLEN, COMMUNICATION UNBOUND, *supra* note 7, at 129.
330. State v. Warden, 891 P.2d 1074, 1093 (Kan. 1995).
331. *See supra* notes 98-102 and accompanying text.
332. Claims of intentional misrepresentation are rarely made in other interpretation cases today. Rather the oath is seen as a prophylactic devise, reminding all witnesses of their obligation to state the truth.
333. Susan Moore et al., *Facilitator-Suggested Conversational Evaluation*, *supra* note 16, at 547 ("The only logical conclusion that can be drawn from these observations is that these particular observed communications are originating from the facilitators.").
334. *See supra* note 16.
335. *See* Biklen, *Free Speech*, *supra* note 10, at 249. That facilitators can influence short, uncomplicated answers is shown in various studies and recognized by most researchers of facilitated communication. *Id.*

deliberately misleading a tribunal. In this regard facilitated communication testimony is no different from any other testimony.

3. *Step Three: Assessing Unfair Bias*

Finally, courts must determine whether a facilitator is biased to a degree creating unfair prejudice.[336] Because many autistic individuals have shown strong preferences in people with whom they will facilitate,[337] it is not always possible to provide completely disinterested interpreters. Further, due to the individual techniques and feedback inherent in the process, the facilitator and witness typically must have a relationship of mutual understanding and trust. Such relationships rarely rise to the level of disqualifying bias in translation cases.[338] If a facilitator is challenged, bias can be assessed by traditional and familiar methods.[339]

4. *Burdens of Proof*

Every witness is presumed competent.[340] Based on the literature and the testimony of experts[341] related to facilitated communication, an opponent of facilitated communication testimony would attempt to demonstrate that there is sufficient concern regarding the reliability of the technique to challenge the presumption of competence. Scientific evidence alone would likely be insufficient to meet the opponent's burden.[342] The opponent must make a prima facie showing that the witness is not actually communicating.[343] If the opponent makes this initial showing, a competency hearing would be held for the opponent to demonstrate that the witness is not communicating.[344] At this hearing, both the opponent and proponent would have the opportunity to present evidence, and the burden would be on the opponent to overcome the presumption of competence.[345]

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336. *See supra* notes 103-12 and accompanying text.
337. In fact, facilitators are predominantly teachers, counselors, or family members. BIKLEN, COMMUNICATION UNBOUND, *supra* note 7, at 74-75. In State v. Warden, 891 P.2d 1074, 1080 (Kan. 1995), the witness was able to facilitate with several people, but would only facilitate with one individual at the sexual abuse trial. *Id.* at 1083.
338. *See supra* note 107 and accompanying text.
339. *See supra* notes 103-06 and accompanying text.
340. *See supra* notes 42-50 and accompanying text.
341. *See supra* text accompanying notes 116-18.
342. No amount of general scientific data based on a larger population of people who facilitate would be able to provide the requisite individualized proof that a specific witness is unable to communicate. *See supra* note 83 and accompanying text.
343. *See supra* note 121 and accompanying text.
344. 2 WIGMORE, *supra* note 42, § 484, at 641-42.
345. *See supra* note 121 and accompanying text.

C. The Role of Expert Testimony

There are two possible roles for expert testimony in determining the competence of a witness to testify with facilitated communication. First, experts may be called upon by the opponent attempting to make the necessary prima facie showing of the witness' incompetence.[346] A likely subject of expert witness testimony at the competency hearing would be studies purporting to show the existence of facilitator influence, especially if wrist or arm facilitation is used.[347] Another arguably relevant area of expert testimony would be research indicating that communication does not occur with facilitation.[348] This testimony might provide the prima facie showing necessary for an opponent to challenge an individual's ability to communicate. Of course, at this stage, the proponent also may make use of expert testimony to present an opposing scientific point of view.[349]

The second possible place for expert testimony is at trial. If the witness is found competent, the proponent probably will want to repeat the tests used to establish competency to convince the jury that the witness is in fact communicating.[350] The opponent can then cross-examine the facilitator, the witness, or the proponent's expert based on results from the in-court test. The opponent also can present common sense arguments or expert testimony about influence. The precise parameters of expert testimony would depend on the facts of a particular case, but might include research about subconscious cuing, the "Clever Hans" effect,[351] or other information the court deems relevant.[352]

The proponent could justifiably object to expert testimony on the grounds of relevance: it is not relevant that other persons cannot com-

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346. A *Frye* or comparable challenge is inapplicable at this stage because such preliminary questions are not governed by the rules of evidence. *Federal Rules of Evidence* Rule 104 states:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges. [Subdivision (b) relates to the relevancy of evidence which depends on the fulfillment of a condition of fact.]

FED. R. EVID. 104(a).

347. *See supra* note 16 and accompanying text.
348. *See supra* note 333.
349. *See supra* note 346.
350. Repeating tests can have a positive or negative effect on the witness. Successfully proving competence the first time may give the witness more confidence in front of the jury. However, given the difficulties involved in testing, the proponent always runs the risk of not adequately proving the validity of communication in front of the jury.
351. *See supra* note 18.
352. *See supra* note 16 and accompanying text.

municate through this means if it has been shown that the particular witness is able to communicate. Expert testimony probably would be admitted to permit a defendant the fullest possible cross-examination, although courts that do not view facilitated communication as a scientific technique may not allow such testimony.[353]

VI. CONCLUSION

Increasing use of facilitated communication inevitably will result in increased reports of abuse. Courts and attorneys handling such cases need a framework for analyzing the unique legal issues presented by the prospect of facilitated communication testimony. Two diverse bodies of case law provide relevant precedent for determining the admissibility of facilitated communication testimony.

One body of case law holds that the scientific laboratory rather than the courtroom is the proper place to test novel scientific testimony. In the context of facilitated communication, this case law provides a necessary limitation on the evidentiary use of new scientific techniques. The rule must not, however, be extended beyond its proper application or used as a short-cut bypassing traditional and effective methods of assessing reliability.

In the case of facilitated communication, application of a *Frye* test is inappropriate for several reasons. First, facilitated communication occurs in front of the jury where the reliability of the testimony can be evaluated by the finder of fact. Second, when necessary, the accuracy of the translation can be assessed by objective means, through an appropriate in-court test. Finally, denying a victim access to the courts because of the failure of other victims to satisfy experts as to their competency is manifestly unjust.

More applicable to facilitated communication testimony is precedent governing the competency of witnesses who testify through a translator. Recognizing that the reliability of facilitated communication is debated in the academic community, it nonetheless remains lay testimony when a witness desiring to speak with the assistance of a facilitator is presented to the court. Because it is lay testimony, facilitated communication testimony should be analyzed as translated testimony, with appropriate safeguards ensuring that only competent witnesses testify.

To ensure that a facilitator is qualified to translate, the facilitator must demonstrate his or her qualifications by showing that he or she can accurately facilitate with the witness. This may be proven through testimony of the facilitator or other witnesses; evidence of out-of-court tests which demonstrate an ability to accurately trans-

353. *See, e.g., In re* Luz, 595 N.Y.S.2d 541 (App. Div. 1993)(analyzing facilitation as a matter of competency rather than a scientific technique).

late; or in-court testing of the facilitation with the facilitator and the student. As long as the facilitator and the witness are sworn and the facilitator is not unfairly biased, the testimony should be admitted.

Courts have long wrestled with balancing the reliability of testimony of disabled victims with the right of the victim to be heard. While courts are justifiably cautious when testimony is produced with the assistance of techniques that appear to be cloaked with science, they likewise must be careful not to exclude witnesses without giving each witness the opportunity to demonstrate his or her competence. It would be unjust for an individual witness to be barred from the courtroom on the basis of other disabled persons' inability to pass tests. By way of analogy, it could hardly be argued that because some children of a particular age are not competent, no child in that age group is competent.

Existing procedures for determining the competency of witnesses and qualifications of translators ensure that unreliable testimony is not presented while at the same time allowing communication that can be proven trustworthy to be admitted. If these procedures are followed, justice for victims as well as accused can be attained.