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Ensuring a Fair Hearing for Litigants with Mental Illnesses: The Law and Psychology of Capacity, Admissibility, and Credibility Assessments in Civil Proceedings

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ENSURING A FAIR HEARING FOR LITIGANTS WITH MENTAL ILLNESSES: THE LAW AND PSYCHOLOGY OF CAPACITY, ADMISSIBILITY, AND CREDIBILITY ASSESSMENTS IN CIVIL PROCEEDINGS

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Q: Did you have any occasion before this to review records or talk to psychiatrists or anybody else regarding the mental health condition of Resident G?

A: No, I did not.

Q: Did you know if Resident G was just a big liar?

A: No.

Q: Okay. Well, did you check her records or talk to her psychiatrist to see whether one of the problems with her mental health is that she's a liar?

A: No.

Q: Okay. Resident E[,] does he have a mental health diagnosis?

. . .

A: . . . He's schizophrenic.

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. . .

Q: Did you ask Resident E for consent to be able to review his mental health records?

A: No, I did not.

Q: Do you know how big a liar Resident E is?

. . .[1]

INTRODUCTION

The above quotation is from a proceeding against the operator of an adult home in New York City that houses over 200 individuals with disabilities. In that proceeding, the New York State Department of Health accused the operator of abusing and exploiting the home's mentally ill residents.[2] The quotation provides an example of the types of difficulties and, in some cases, outright injustices experienced by people with mental illnesses (PWMI) when proceedings involving their interests are heard in court or administrative hearings.

Featured is a line of questioning of a government witness by the operator's attorney, who equated being mentally ill with being a "big liar." Never during this line of questioning did attorneys for the New York State Department of Health, which was purportedly representing the interests of the residents, object.[3] There were

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[1] Transcript of Hearing at 522–24, In the Matter of Antonia C. Novello, as Comm'r of Health of the State New York, to determine the action to be taken with respect to Benito Fernandez, as Operator of Brooklyn Manor Home for Adults (N.Y. Dep't of Health Jan. 23, 2006) (Unpublished Report and Decision) (copy on file at MFY Legal Services, Inc.) [hereinafter Transcript of Hearing, In the Matter of Antonia C. Novello]. In this proceeding, the Honorable James F. Horan, an Administrative Law Judge, was charged with determining whether the operating certificate of Benito Fernandez, operator of Brooklyn Manor Home for Adults, should be revoked.

[2] *See id.*

[3] Although "[t]he rules of evidence need not be observed" during an administrative hearing involving the New York State Department of Health, parties may make requests and submit exceptions, and the hearing officer has the power to "admit or exclude evidence." *See* N.Y. COMP. CODES R. & REGS. tit. 10, §§ 51.11(d)(2), 51.9(c)(1), (6) (2008).

numerous potential objections to these questions because, at the very least, they were argumentative, lacked a proper foundation, and assumed facts that were not in evidence. The residents whose complaints were the subject of the hearing were not able to defend themselves from these attacks because both they and their advocates from MFY Legal Services, Inc. (MFY), were barred from attending the proceeding. Unfortunately, this type of treatment of PWMI is commonplace in our legal system.

Most PWMI do not live in institutions.[4] In fact, most reside in the community and are active members of society. Like other people, they are subject to being sued and can bring their own lawsuits. When PWMI are in court, however, the stakes are often quite high. Even in civil cases, judges may have the power to grant, preserve, or deny government benefits that enable PWMI to obtain basic necessities. Judges also may be empowered to make decisions that could result in PWMI being evicted from their homes. It is therefore essential to ensure that PWMI are able to obtain fair hearings that are free from discrimination.

This Article arises from the work of MFY's Mental Health Law Project and Adult Home Advocacy Project in courts of law and administrative proceedings in New York City. MFY has provided free civil legal services to low-income New Yorkers since its founding in 1963. It was originally a unit of Mobilization for Youth, a social welfare organization on Manhattan's Lower East Side, but was incorporated as a separate not-for-profit law firm in 1968. Since 1983, MFY's Mental Health Law Project has provided advocacy services to PWMI, including consultation, advice, and direct representation. Since 1992, MFY's Adult Home

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[4] According to the National Institute of Mental Health, "[a]n estimated 26.2 percent of Americans ages 18 and older—about one in four adults—suffer from a diagnosable mental disorder in a given year." National Institute of Mental Health, The Numbers Count: Mental Disorders in America, http://www.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america.shtml (last visited Dec. 29, 2008). Institutionalization does, however, still occur. *See, e.g.*, Susan Stefan, *"Discredited" and "Discreditable": The Search for Political Identity by People with Psychiatric Diagnoses*, 44 WM. & MARY L. REV. 1341, 1366 (2003) (noting that "49 states still have mental hospitals").

Advocacy Project has focused on protecting the rights of mentally ill residents of adult homes.[5] These projects represent PWMI in matters related to housing, Supplemental Security Income and Social Security Disability benefits, public assistance, Medicaid, civil rights, and numerous other issues. MFY's representation enables PWMI to avoid homelessness and to remain in the community by ensuring the preservation of their incomes and affordable housing. During 2008 alone, the organization advised or represented more than 2,500 PWMI.

Given the volume and the nature of its caseload, MFY has a unique perspective on the problems facing PWMI in civil and administrative proceedings. Although there are other organizations and governmental entities that represent PWMI, they generally do so in cases where the client's disability is always central to the legal issue at hand—such as involuntary commitment or social security hearings. MFY, however, represents PWMI in a wide range of cases, in many of which the client's disability is not centrally or even peripherally relevant to his or her legal problem. Yet, even in those matters, MFY often sees how a tribunal's treatment of the client is skewed by the knowledge that he or she has a mental health problem.

The purpose of this Article is to highlight the problems encountered by PWMI giving testimony in civil and administrative

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[5] *See generally* http://www.mfy.org/adulthome.shtml. In New York, an adult home is defined as a facility that is "established and operated for the purpose of providing long-term residential care, room, board, housekeeping, personal care and supervision to five or more adults unrelated to the operator." N.Y. COMP. CODES R. & REGS. tit. 18, § 487.2(a) (2008). Adult homes are for "adults who, though not requiring continual medical or nursing care . . . , are, by reason of physical or other limitations associated with age, physical or mental disabilities or other factors, unable or substantially unable to live independently." *Id.* § 485.2(a). Outside of New York State, adult homes are generally known as "board and care homes." Medicare defines a "board and care home" as "group living arrangement [that] provides help with activities of daily living such as eating, bathing, and using the bathroom for people who cannot live on their own but do not need nursing home services." Medicare: Types of Long-Term Care, http://www.medicare.gov/LongTermCare/Static/BoardCareHome.asp?dest=NAV%7CTypes%7CTypes%7CBoardCareHome#TabTop (last visited Dec. 17, 2008).

proceedings and to challenge court personnel and advocates to rethink their approaches to matters involving PWMI in light of modern clinical information and available research on the subject. We also offer some suggestions on how to facilitate better communication and obtain useful testimony in civil court proceedings involving PWMI, which we hope will lead to more equitable rulings.

Part I of this Article describes the way in which the legal system determines the capacity and credibility of PWMI who are involved in litigation. This part begins with a discussion of the applicable law regarding the determination of capacity, admissibility, and credibility. It then gives examples of how, in practice, these legal standards are often ignored or misapplied due to improper assumptions and prejudices about PWMI.

Part II presents modern clinical evidence regarding the capacity and credibility of PWMI. In this part, we show that data available from research studies support the notion that having a particular mental health condition does not necessarily mean that an individual lacks capacity to testify. Similarly, with regard to credibility, the clinical evidence shows that it is not possible to make generalizations regarding an individual's ability to provide accurate information simply based on whether that individual has a psychiatric diagnosis or a mental health history.

Part III of this Article sets forth a series of recommendations that would improve the ability of the legal system to provide fair hearings for PWMI. These recommendations include: training court personnel, advocates, and guardians *ad litem* to improve their understanding of mental illness and PWMI; enforcing legal and evidentiary standards in light of modern clinical research findings; and providing reasonable accommodations to improve the accessibility of the court system for PWMI.

I. CAPACITY, ADMISSIBILITY, AND CREDIBILITY DETERMINATIONS RELATED TO PWMI IN THE LEGAL SYSTEM

MFY's experience representing PWMI in various forums is that the testimony of PWMI is often excluded or disregarded. Sometimes this is because legal standards that presume PWMI to

have the capacity to testify are ignored or misapplied. Sometimes the law is nominally applied, but courts make rulings based on unwarranted and prejudicial inferences about mental illness. Frequently, however, there is no legal analysis because courts or advocates either assume without discussion that the testimony of witnesses with mental illnesses is not valuable, or because they are not willing to make accommodations necessary to enable this testimony to be taken.

A. The Law Regarding Capacity, Admissibility, and Credibility

1. The Threshold Question: Capacity to Testify

Before reaching issues of admissibility and credibility, courts may examine the threshold question of whether a witness with a mental disability has the capacity to testify. The capacity of a witness to testify is a question of law; in other words, in a jury trial, the judge makes this decision.[6] In New York, as in federal courts, there is a presumption of an adult witness's capacity to testify.[7] There is also a general policy that favors allowing litigants with mental disabilities to testify.[8]

The question of whether an individual has the capacity to testify in court is entirely distinct from the question of whether an

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[6] *See* FED. R. EVID. 601 ("Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law."); People v. Rensing, 14 N.Y.2d 210, 213 (1978) ("The capacity of a person to be a witness is presumed and, if objection is made that he is incompetent, it is for the judge, in the exercise of his discretion, to determine his mental capacity to testify.").

[7] *See* FED. R. EVID. 601; *Rensing*, 14 N.Y.2d at 213.

[8] *See* Tromello v. Dibuono, 132 F. Supp. 2d 82, 85 (E.D.N.Y. 2000) ("The competency test above has been liberally construed in favor of the admission of testimony by persons with limited mental capacity. Thus, for example, courts in New York have determined in favor of admitting testimony by a nonverbal, autistic and mentally retarded 11-year-old child, by a person judicially declared incompetent and unable to manage his affairs, and mentally retarded adults with the mental age of four- to six-year-olds.") (internal citations omitted).

individual has capacity in any other aspect of his or her life. An individual may have diminished capacity in one area while retaining capacity in others. Almost one hundred years ago, the New York State Court of Appeals ruled against appellants who claimed that testimony given by the complaining witness should not have been allowed on the ground that he had been judicially declared "incompetent to manage his own affairs" several years earlier.[9] In denying this ground for the appeal, the court noted:

> It did not by any means follow from [the prior declaration of incompetence] as a matter of law that he was, and for years would continue to be, so utterly lacking in intelligence that he could not appreciate at all the relationship and significance of facts and would not be able to understand the obligation of an oath and describe accurately what those facts were.[10]

Since that time, statutory law on the capacity of PWMI has evolved with society's understanding of the complexity of mental illness. The New York Mental Hygiene Law, which allows courts to appoint guardians for individuals proven to be incapable of managing their own affairs, no longer provides for a simple adjudication of "competency" or "incompetency."[11] Instead, a court must tailor a guardianship order to afford an incapacitated individual the maximum amount of independence possible. A court may grant a guardian powers only in the specific areas in which it determines that the individual requires assistance.[12] Thus, even if a

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[9] *See* Barker v. Washburn, 200 N.Y. 280, 283 (1911).

[10] *Id.*

[11] Competency was the standard under the former conservator and committee statutes. *See, e.g.*, N.Y. Civil Practice Act 207 (2005); *see also* N.Y. MENTAL HYG. LAW §§ 77–78 (repealed 1992). Article 81 of the Mental Hygiene Law, which replaced the conservator and committee statutes, no longer uses a competency standard. *See* N.Y. MENTAL HYG. LAW §§ 81.01–81.43 (McKinney 2005).

[12] *See* N.Y. MENTAL HYG. LAW § 81.01 (McKinney 2005) ("The legislature declares that it is the purpose of this act to promote the public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the

guardian is appointed to apply for government benefits on a person's behalf, the same person may retain her right to make decisions about how to spend the government benefits.[13] Similarly, pursuant to Article 81 of New York's Mental Hygiene Law, it is possible for someone to be adjudicated incompetent to budget his or her income, but competent to retain counsel and manage his or her own medications.[14]

For the same reason, when determining whether a witness has the capacity to testify, it is inappropriate for a judge to make any general assumptions. Instead, judges should ask two questions when the capacity of a witness is challenged: (1) whether the proposed witness is capable of comprehending the nature of an oath, and (2) whether the witness is capable of giving an accurate account of what he or she has seen and heard.[15] The second question carries greater weight, as the necessity of the oath itself has been called into question during recent years.[16]

This is true even in the context of criminal cases in New York. Section 60.20 of the New York Criminal Procedure Law states that "[a]ny person may be a witness in a criminal proceeding unless the court finds that, by reason of infancy or mental disease or defect, he does not possess sufficient intelligence or capacity to justify the

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person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life.").

[13] *See id.* § 81.22(a)(7); *see also id.* § 81.29(a) ("An incapacitated person for whom a guardian has been appointed retains all powers and rights except those powers and rights which the guardian is granted.").

[14] *See id.* § 81.02.

[15] *See, e.g.*, District of Columbia. v. Armes, 107 U.S. 519, 521–22 (1883); People v. Rensing, 14 N.Y.2d 210, 213 (1964); Ellarson v. Ellarson, 190 N.Y.S. 6, 8 (App. Div. 3d Dep't 1921); *see also* FED. R. EVID. 603.

[16] In *Brown v. Ristich*, 36 N.Y.2d 183 (1975), the New York State Court of Appeals reinstated an administrative decision that had been overturned on the grounds that mentally retarded witnesses had not been administered an oath. At the hearing, it had been determined that although the witnesses had capacity to recount events, it would be senseless to administer an oath, because the witnesses would not understand what it meant. *See id.* at 187. The court ruled that where administration of an oath would not serve its purpose, witnesses could testify unsworn, provided sufficient foundation existed supporting the administrative law judge's determination of capacity. *See id.* at 190.

reception of his evidence."[17] Witnesses who are "more than nine years old" are generally required to testify under oath.[18] A court may make an exception, however, if it "is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath" but that "the witness possesses sufficient intelligence and capacity to justify the reception [of unsworn evidence]."[19] The only caveat is that a defendant cannot be convicted solely on the basis of such unsworn evidence.[20]

2. Admissibility and Exclusion of Evidence Related to Mental Illness

When a witness with a mental disability testifies, the question is raised whether evidence of his or her disability should be admitted. The court makes the legal decision as to whether such evidence should be admitted or excluded.[21] This aspect of the process is essential because when evidence regarding the mental health of a witness is readily admitted, the focus of the case frequently shifts to mental health rather than the substantive legal issues at stake.

The rules of evidence governing relevancy and admissibility in New York state courts are generally consistent with the Federal Rules of Evidence. Evidence is relevant "if it has any tendency in reason to prove the existence of any material fact, i.e., it makes determination of the action more probable or less probable than it would be without the evidence."[22] In general, "all relevant evidence is admissible unless its admission violates some

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[17] N.Y. CRIM. PROC. § 60.20(1) (2008).

[18] *Id.* § 60.20(2).

[19] *Id.*

[20] *Id.* § 60.20(3).

[21] *See* People v. Lowe, 408 N.Y.S.2d 873, 876 (N.Y. Crim. Ct. 1978) (citing N.Y. CRIM. PROC. § 60.20).

[22] People v. Scarola, 71 N.Y.2d 769, 777 (1988); *see* FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

exclusionary rule."[23]

The most commonly invoked exclusionary rule is that relevant evidence "may still be excluded by the trial court in the exercise of its discretion if its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury."[24] Given the stigma that is attached to mental illness, it is likely that the danger of unfair prejudice would substantially outweigh the probative value of a mental health history in any case where that mental health history does not directly implicate the subject matter of the case or the witness's veracity.

Furthermore, pursuant to the Federal Rules of Evidence, the use of "character evidence" is generally excluded. Rule 404 of the Federal Rules of Evidence states that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion" except under three enumerated circumstances.[25] The first two circumstances pertain to criminal cases and involve the character of the accused and the character of the alleged victim.[26] The third circumstance applies to the character of witnesses in both civil and criminal cases and allows, *inter alia*, character evidence to be used to attack the credibility of a witness.[27] Similarly, "the credibility of a witness may be attacked . . . by evidence in the form of opinion

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[23] *Scarola*, 71 N.Y.2d at 777; *see* FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.").

[24] *Scarola*, 71 N.Y.2d at 777; *see* FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

[25] FED. R. EVID. 404(a); *see, e.g.*, Fanelli v. diLorenzo, 591 N.Y.S.2d 658, 659 (App. Div. 4th Dep't 1992) (holding that the trial court's admission of "testimony that [the defendant] was typically non-violent and mellow when intoxicated" constituted reversible error).

[26] *See* FED. R. EVID. 404(a)(1)–(2).

[27] *See* FED. R. EVID. 404(a)(3) (referring to FED. R. EVID. 607, which states: "The credibility of a witness may be attacked by any party, including the party calling the witness.").

or reputation, but . . . the evidence may refer only to character for truthfulness or untruthfulness."[28]

Questions involving the admissibility of evidence of mental illness arise frequently in criminal trials, when an individual with mental illness is the complaining witness or the defendant. PWMI are often in the position of being the complaining witnesses because they are far more likely to be the victims of crime than people who do not have mental health problems.[29]

During criminal trials, evidence of mental illness is often admitted under the exceptions to Rule 404's prohibition on the use of "character evidence."[30] In cases where the sole or main witness against a criminal defendant is discovered to have had a mental illness that was not revealed to the jury, New York appellate courts have overturned verdicts and ordered new trials.[31] Some courts, however, specify that evidence of mental illness should be admitted only if the mental condition in question may affect the accuracy of the testimony.[32] This qualification is important

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[28] FED. R. EVID. 608(a); *accord* FED. R. EVID. 404(a)(3).

[29] Aaron Levin, *People With Mental Illness More Often Crime Victims*, PSYCHIATRIC NEWS, Sept. 2, 2005, at 16 (noting that a recent study found that "[m]ore than one-fourth of persons with severe mental illness are victims of violent crime in the course of a year, a rate 11 times higher than that of the general population"). Although PWMI are disproportionately the victims of crimes, more attention is often paid to their role in the criminal justice system as alleged perpetrators. In recent years, increasing attention has been focused on the criminalization of mental illness and the inability of courts to meet the needs of PWMI who stand accused or who accuse others of committing criminal acts against them. *See generally* J. Steven Lamberti & Robert L. Weisman, *Persons with Severe Mental Disorders in the Criminal Justice System: Challenges and Opportunities*, 75 PSYCHIATRIC Q. 151 (2004); Michael D. Thompson, Melissa Reuland & Daniel Souweiene, *Criminal Justice/Mental Health Consensus: Improving Responses to People with Mental Illness*, 49 CRIME & DELINQUENCY 30 (2003).

[30] *See, e.g.*, People v. Lowe, 408 N.Y.S.2d 873, 875 (N.Y. Crim. Ct. 1978) ("Evidence of the mental illness of a witness is a fact that a jury is entitled to know so that it may '. . . assess and evaluate the testimony given by him and not accept it . . . as the statement of a 'normal' individual.'") (quoting People v. Rensing, 14 N.Y.2d 210, 213–14 (1964)).

[31] *See, e.g.*, *Rensing*, 14 N.Y.2d at 213–15.

[32] *See Lowe*, 408 N.Y.S.2d at 875–76 ("Where, as here, there is knowledge

because, as discussed in Section II.B below, most mental illnesses do not have a bearing on an individual's ability to recount events accurately.

The Federal Rape Shield Law provides a good example of the limited protection that exclusionary rules often provide for crime victims or witnesses who have histories of mental health problems. As codified by Rule 412 of the Federal Rules of Evidence, the Federal Rape Shield Law "broadly reflects the rejection of a system that conflated a woman's chastity with her credibility."[33] With certain limited exceptions, "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior," and "[e]vidence offered to prove any alleged victim's sexual predisposition" is inadmissible in "any civil or criminal proceeding involving alleged sexual misconduct."[34]

However, the Federal Rape Shield Law "leave[s] at least one large gap. In most states, neither the rape shield law, the other rules of evidence, nor the case law set out comprehensive guidelines for the admissibility of evidence of the complainant's mental health."[35] As a result, subject to other evidentiary rules, "defendants may still request a review of a complainant's mental health history, a mental examination, or cross-examination as to a history of psychological problems."[36] This is a significant gap because, according to one study, PWMI are "23 times more likely to be raped than . . . the general population."[37] As discussed in

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or a long-standing, ongoing mental condition of a complainant who is the sole eyewitness to the crime, *and where such condition may affect the accuracy, perception and comprehension of his testimony*, evidence must be disclosed to the defendants concerning such a condition.") (emphasis added).

[33] Tess Wilkinson-Ryan, *Admitting Mental Health Evidence to Impeach the Credibility of a Sexual Assault Complainant*, 153 U. PA. L. REV. 1373, 1374 (2005).

[34] FED. R. EVID. 412(a); *see* N.Y. CRIM. PROC. LAW § 60.42 (McKinney 2008).

[35] Wilkinson-Ryan, *supra* note 33, at 1374.

[36] *Id.*

[37] Levin, *supra* note 29, at 16 (noting that a recent study found that "[m]ore than one-fourth of persons with severe mental illness are victims of violent crime in the course of a year, a rate 11 times higher than that of the general population").

Parts II.B and III.B below, the idea that it is always necessary for a jury to hear about a witness's mental health diagnosis to evaluate her testimony is contradicted by clinical information that indicates that most mental illnesses do not affect a person's ability to perceive events or her ability to recount them.

3. Credibility Assessments by Factfinders

If an individual with mental illness is found to have the capacity to testify, the factfinder is responsible for assessing his or her credibility.[38] Similarly, if evidence of the witness's mental illness is admitted by the court, the factfinder is charged with deciding how, if at all, that evidence affects the weight of the witness's testimony.[39]

As one commentator has pointed out, even though "[t]he evaluation of witness credibility is crucial to the process of fact-finding, . . . there is no law of witness credibility."[40] Factfinders have considerable discretion in determining how to weigh the evidence that has been admitted. Absent "glaring error," that discretion goes unchecked by the appellate courts.[41]

Factfinders, however, are not always left to their own devices. Some courts have allowed for the use of so-called "framing testimony" by experts to give the factfinder input or guidance as to how the evidence should be weighed. One form of framing testimony is criteria-based content analysis (CBCA).[42] CBCA has

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[38] *See* FED. R. EVID. 104(e); *see also* Hon. James P. Timony, *Demeanor Credibility*, 49 CATH. U. L. REV. 903, 904–05 (2000).

[39] *See* FED. R. EVID. 104(e); *see also* Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 178–80 (1990).

[40] Morris D. Bernstein, *Judging Witness Credibility: A Talmudic Perspective*, 5 RUTGERS J. L. & RELIGION. 4, 4 (2003).

[41] *Id.* ("It is a foundational principle that, absent glaring error by the trial court, an appellate court will not review the findings of fact made at trial.").

[42] CBCA is a technique used by a psychiatrist or psychologist to attempt to determine the veracity of a statement by evaluating its verbal content. *See* C.L. Ruby & John C. Brigham, *The Usefulness of the Criteria-Based Content Analysis Technique in Distinguishing Between Truthful and Fabricated Allegations: A Critical Review*, 3 PSYCHOL. PUB. POL'Y & L. 705, 705 (1997).

been used in some American courts as an aid in assessing the credibility of statements made by children in the context of abuse cases.[43] In general, however, studies on the efficacy of CBCA have yielded "mixed results."[44]

Similarly, courts often allow expert witnesses to testify about the credibility of eyewitness identifications.[45] Eyewitness expert testimony is a form of "social framework testimony."[46] Social framework testimony "presents 'general conclusions from social science research'" and provides a "context or framework for evaluating what eyewitnesses report—but the jurors do the evaluating."[47] Instead of commenting upon the credibility of the identification itself, eyewitness expert testimony "explains what scientists know about how factors that may have been operating in the case at trial increase or decrease the likelihood of eyewitness accuracy."[48]

Factfinders are generally prone to give too much weight to eyewitness testimony, yet, in our experience, they often improperly discount the eyewitness testimony of PWMI. In situations where the mental illness itself is central to the lawsuit, framing testimony by a mental health professional can be used to prevent a PWMI from being unfairly discredited. A mental health professional can discuss modern clinical research findings, like those presented in Part II below,[49] in order to provide context for the factfinder who is charged with evaluating the testimony of a PWMI. Where the

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[43] *Id.* at 705–06.

[44] *See id.* at 716.

[45] *See* People v. LeGrand, 8 N.Y.3d 449, 452 (2007) (holding that it is an abuse of discretion for a court to exclude expert testimony on the reliability of eyewitness identification "where the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime"); *but see* Decision of the Day, N.Y.L.J., Oct. 20, 2008, at 18 (denying appeal in *People v. Abney* based on court's refusal to permit the defense to present expert testimony on the reliability of eyewitness identifications because there was evidence corroborating the identification).

[46] Michael R. Leippe, *The Case for Expert Testimony about Eyewitness Memory*, 1 PSYCHOL. PUB. POL'Y & L. 909, 910 (1995).

[47] *Id.*

[48] *Id.* at 922.

[49] *See infra* notes 82–101 and accompanying text.

mental illness is of a variety that may impede perception of reality or ability to communicate, a mental health professional can also elucidate what symptoms may or may not impact the testimony. Although there may be objections to offering such framing testimony, Rule 702 of the Federal Rules of Evidence states that "[i]f scientific, technical, or otherwise specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise . . . ."[50]

B. Misapplications and Shortcomings of the Law Regarding Capacity and Credibility

1. The Inaccurate Assumption that Lack of Capacity in One Area Means Lack of Capacity in All Areas

An individual may have diminished capacity in one area of his or her life while retaining capacity in others. As discussed in Part I.A.1, the New York Mental Hygiene Law requires courts to tailor guardianship orders to afford an incapacitated individual the maximum amount of independence possible.[51] In practice, however, legal analysis often conflicts with established jurisprudence because judges fail to appreciate the complexity of the concept of capacity.

One example of this is apparent from a 2006 housing court case in which MFY represented a resident of an adult home. In this case, the administration of an adult home barred a resident from returning to the home after a psychiatric hospital stay because she allegedly signed an agreement to voluntarily relinquish her residency rights while she was in the hospital.[52] During a pre-trial conference, an MFY attorney indicated that the resident would

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[50] FED. R. EVID. 702.

[51] *See supra* notes 6–14 and accompanying text.

[52] *See* Hemans v. Lakeside Manor Home for Adults, No. 010693/06 (N.Y. Civ. Ct. July 18, 2006) (unpublished decision) (copy on file at MFY).

testify that she had been fraudulently induced into signing the agreement.[53] Although the MFY attorney did not raise the issue of capacity, the judge responded by stating that if the resident did not have the capacity to sign the paper, she would not have the capacity to testify about it. The judge essentially recast the attorney's argument about the adult home operator's alleged misconduct into one implicating the resident's capacity. It is extremely unlikely that the judge would have raised the issue of capacity if the resident had been hospitalized for a physical ailment. The judge's statement is an example of inappropriate assumptions that litigants who are known to have mental health problems face regarding their capacity.

Given how courts often view the capacity of PWMI, it is not surprising that PWMI are often excluded from the witness stand or even the courtroom itself. In the Department of Health (DOH) proceeding discussed in the introduction, residents were not called as witnesses during the hearing and were barred from even attending it.[54] This was true even though investigations of numerous complaints made by residents of the adult home served as the basis for the proceeding and the residents themselves had a great deal at stake in its outcome.[55] In making this determination, the ALJ cited the privacy of those residents whose complaints were being discussed as a justification for their exclusion.[56] It is troubling that, given the strong policy that favors open hearings,

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[53] The information in this sentence and in the rest of the paragraph is based on the attorney's recollection of the pre-trial conference. In this case, the resident was allowed to testify. Unfortunately, however, because she admitted to having signed the paper, the judge disregarded testimony by both the resident and various clinicians that she had believed she was signing a receipt for her allowance. Although the resident's argument was that the operator had misrepresented the nature of the document to her, the court again seemed to recast the argument as one about the resident's competency, simply ignoring the numerous points on which the testimony of the resident's witnesses about the circumstances under which the document was signed conflicted with the accounts given by the operator's witnesses.

[54] *See* Transcript of Hearing, In the Matter of Antonia C. Novello, *supra* note 1, at 5, 8.

[55] *See id.*, at 8–21, 27.

[56] *See id.* at ALJ I.

the administrative officials did not make more of an effort to structure the hearing in such a way that residents' privacy could be protected without excluding the people who had a strong interest in its outcome. MFY had suggested, for example, that pseudonyms be used for evidence that included individual residents' names. This suggestion was rejected without explanation. Interestingly, however, the ALJ adopted such an approach in his Report and Decision, where he used initials or numbers to refer to the residents.[57]

2. The Inaccurate Assumption that Mental Illness Makes Testimony Inherently Unreliable

Even when PWMI are allowed to testify at a hearing, their testimony is often severely discounted by factfinders.[58] Factfinders often allow prejudices about mental illnesses to interfere with an accurate weighing of the credibility of witnesses who have a history of mental illness.[59] Court personnel frequently assume PWMI cannot tell the truth, or worse, purposely do not tell the truth. Unfortunately, little is done to challenge the widely-held belief that a witness with a mental illness is unlikely to be able to tell the truth on the stand.

Susan Stefan, a prominent disability law attorney at the Center for Public Representation, has written persuasively that PWMI generally are put into one of two categories: those who are "discredited" and those who are "discreditable."[60] Although there

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[57] *See id.* at 5.

[58] *See supra* notes 40–41 and accompanying text. Determination of credibility is a jury function, although where a jury is making this determination the judge still plays a role when giving the jury instructions. In administrative and many housing proceedings and other civil court cases, however, the judge determines credibility because there is no jury. *Id.*

[59] Bernstein, *supra* note 40, at 53 (pointing out that because factfinders often "mechanically impose[] a stock character type upon the witness," an administrative law judge, for example, "might, unbeknownst to herself, be making her determinations based upon a gallery of mental images of presumptively credible witnesses").

[60] Stefan, *supra* note 4, at 1349 (quoting ERVING GOFFMAN, STIGMA:

are key differences between the two groups, "[n]either group is believed or credited when they report their own perceptions of their situations."[61] Thus, for PWMI, "credibility is . . . a primary issue."[62]

The defense attorney quoted at the beginning of this Article tried to discredit a resident of an adult home by equating having a mental illness with being a "liar."[63] In that proceeding, the adult home operator had a history of serious complaints against him and a previous finding that his extensive violations merited non-renewal of his operating certificate.[64] However, despite these circumstances and evidence that the staff of the home had falsified records that it provided to DOH inspectors, the ALJ allowed the

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NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 4 (1963)).

[61] *Id.* at 1378.

[62] *Id.* at 1379.

[63] *See* Transcript of Hearing, In the Matter of Antonia C. Novello, *supra* note 1, at 522–24.

[64] *See* Richard Perez-Pena, *5 From Adult Home Die, Trapped in Burning Van*, N.Y. TIMES, July 13, 2006, at A1 ("Brooklyn Manor has long been known as one of the worst homes, according to records and state officials. Over the years, its operators have been cited for a number of violations and abuses that included lack of heat, swarming flies, staff shortages, failures to provide medical aid and employee assaults on patients. Last year, a fire killed a resident in his bed."); Marc Santora, *Stuck in a Bad Place; With Few Options, State Lets Troubled Adult Home Stay Open*, N.Y. TIMES, May 15, 2005, § 1, at 37 ("As early as 1991, state investigators found problems at Brooklyn Manor, uncovering evidence that the operator of the home, Benito Fernandez, . . . took more than $45,000 in retirement benefits from a resident who had entrusted the money to the home [and that] [o]ver the ensuing years, more reports by state investigators found that not only was money being misappropriated, but that the level of supervision and coordination of care was abysmal."); *see also* New York State Coalition for Adult Home Reform, Brooklyn Manor: A Timeline of Tragedy, http://www.scaany.org/collaborations/documents/brooklyn_manor_timeline.pdf (last visited Dec. 17, 2008). The decision, issued on March 7, 1996, affirmed the regulators' decision not to renew Fernandez's operating certificate on the ground that he lacked the requisite moral character to run an adult home. Although the case—which was commenced by the Department of Social Services—lasted two and a half years, and although the decision was based on forty-two days of testimony and numerous exhibits, the State inexplicably withdrew its case against Fernandez after the decision was issued. The State of New York later re-issued Fernandez' operating certificate.

operator to retain his license.[65] Various factors contributed to this ruling, but the ALJ emphasized in his decision that the DOH inspector whose testimony was crucial to the DOH's case had "failed to check residents' records to see if [they] revealed histories of making false accusations."[66] The ALJ therefore appeared to follow the lead of the defense attorney in assuming that PWMI are liars and placed the burden on them or their advocates to prove otherwise, even in the face of significant evidence that the staff of the home were the ones guilty of making false statements.

II. CLINICAL EVIDENCE REGARDING THE CAPACITY AND CREDIBILITY OF PWMI

References to reliable modern clinical information about mental illness are lacking in much of the jurisprudence about competency and credibility of PWMI. The assumption in many cases seems to be that any history of mental illness is enough to impugn an individual's ability to perceive or recount events in a credible manner. Clinical evidence in the mental health literature, however, indicates otherwise.

There does not appear to be a large body of mental health literature specifically addressing the capacity of PWMI to testify in civil proceedings.[67] However, information available in the medical psychiatric literature supports the claim that having a particular mental health condition does not necessarily mean that an individual is incompetent or, in modern clinical terminology, "lacks capacity."[68] There is also substantial clinical evidence to support the notion that it is not possible to make generalizations

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[65] *See* Transcript of Hearing, In the Matter of Antonia C. Novello, *supra* note 1, at 51.

[66] *See id.* at 27.

[67] The authors have not found any mental health literature specifically addressing this issue.

[68] *See* Thomas S. Zaubler, Milton Viederman & Joseph J. Fins, *Ethical, Legal and Psychiatric Issues in Capacity, Competency and Informed Consent: An Annotated Bibliography*, 18 GEN. HOSP. PSYCHIATRY 155, 162–63 (1996); Laura Weiss Roberts, *Evidence-based Ethics and Informed Consent in Mental Illness Research*, 57 ARCHIVES GEN. PSYCHIATRY 540, 540–41 (2000).

regarding an individual's ability to provide accurate information simply based on whether that individual has a psychiatric diagnosis or a mental health history.[69] Mental health research data supports the assertion that such determinations require case-by-case analyses.

A. Research on Determining Capacity

In assessing the capacity of an individual, an experienced clinician[70] will utilize different forms of mental examination and interviewing techniques to determine if certain criteria are met. Basic criteria for determining capacity routinely include, among other things, the individual's ability to: (1) express a choice, (2) understand relevant information, (3) demonstrate an understanding of the circumstances and consequences relevant to the current situation, and (4) rationally manipulate information to some degree, mainly as it relates to the situation at hand.[71] As with

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[69] *See* Zaubler et al., *supra* note 68, at 162–63; *see generally* Roberts, *supra* note 68, at 540 (discussing nuances in determining capacity in individuals with "serious psychotic symptoms" for the purpose of ethically obtaining their informed consent to participate in mental health research protocols).

[70] The term "clinician" refers to "an individual qualified in the clinical practice of medicine, psychiatry, or psychology as distinguished from one specializing in laboratory or research techniques or in theory." Medline Plus, http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=clinician (last visited Apr. 5, 2009). It is important to note that knowing how to gather and appropriately use relevant medical, psychiatric, and other personal history, in a way which may aid the assessment of capacity without unnecessarily violating a person's confidentiality or unjustly impugning credibility, is a skill that requires proper training, experience and often the professional ethics of a licensed mental health practitioner who may be in the best position to offer such an opinion.

[71] *See* Paul S. Appelbaum & Thomas Grisso, *The MacArthur Treatment Competence Study. I: Mental Illness and Competence to Consent to Treatment*, 19 L. & HUM. BEHAV. 105, 109–11 (1995) [hereinafter Appelbaum & Grisso, *MacArthur Study I*]; Roberts, *supra* note 68, at 540; *see generally* Janet I. Warren et al., *Opinion Formation in Evaluating the Adjudicative Competence and Restorability of Criminal Defendants: A Review of 8,000 Evaluations*, 24 BEHAV. SCI. & L. 113 (2006) (analyzing criminal forensic evaluations conducted by clinicians in Virginia during a twelve year period).

any type of medical or health condition, which may fluctuate or be completely ameliorated with proper care and treatment, assessments of capacity need to be updated regularly to reflect current mental status.[72]

When applying these criteria in evaluating PWMI, it is important to understand that the presence of certain psychiatric signs and symptoms alone does not necessarily require a determination of incapacity.[73] Certain mental illnesses, such as non-psychotic mood and anxiety disorders, may have little or no impact on an individual's ability to perceive reality or accurately recall past events.[74] Other mental illnesses, such as schizophrenia or mood and anxiety disorders accompanied by psychotic symptoms, may affect perception in certain instances, but not in ways that necessarily implicate or impede the ability to testify accurately.[75]

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[72] *See* Appelbaum & Grisso, *MacArthur Study I*, *supra* note 71, at 121–22; Zaubler et al., *supra* note 68, at 162–63; Warren et al., *supra* note 71, at 120–21; Roberts, *supra* note 68, at 540.

[73] *See* Appelbaum & Grisso, *MacArthur Study I*, *supra* note 71, at 107; Zaubler et al., *supra* note 68; Warren et al., *supra* note 71; Roberts, *supra* note 68. The MacCAT-T is an established clinical instrument that is frequently employed to determine the competence of psychiatric patients to make informed treatment decisions on a case-by-case basis. *See generally* Thomas. Grisso, Paul S. Appelbaum & Carolyn Hill-Fotouhi, *The MacCAT-T: A Clinical Tool to Assess Patients' Capacities to Make Treatment Decisions,* 48 PSYCHIATRIC SERVICES 1415 (1997) [hereinafter Grisso et al., *The MacCAT-T*].

[74] *See* Thomas Grisso & Paul S. Appelbaum, *Comparison of Standards for Assessing Patients' Capacities to Make Treatment Decisions*, 152 AM. J. PSYCHIATRY 1033 (1995) [hereinafter Grisso & Appelbaum, *Capacities to Make Treatment Decisions*]; Thomas Grisso et al., *The MacArthur Treatment Competence Study. II: Measures of Abilities Related to Competence to Consent to Treatment,* 19 L. & HUM. BEHAV. 127 (1995) [hereinafter Grisso et al., *MacArthur Study II*].

[75] *See* Grisso & Appelbaum, *Capacities to Make Treatment Decisions*, *supra* note 74; Grisso et al., *MacArthur Study II*, *supra* note 74; Grisso et al., *The MacCAT-T*, *supra* note 73; Thomas Grisso & Paul S. Appelbaum, *The MacArthur Treatment Competence Study. III,* 19 L. & HUM. BEHAV. 149, 171–73 (1995) [hereinafter Grisso & Appelbaum, *MacArthur Study III*]; Scott Y.H. Kim et al., *Determining When Impairment Constitutes Incapacity for Informed Consent in Schizophrenia Research,* 191 BRIT. J. PSYCHIATRY 38, 40–41 (2007).

Psychotic symptoms, including hallucinations, are rarely constant and are often specific in nature. An auditory hallucination, for example, may frequently involve a person hearing a particular, repeated voice or sound.[76] Therefore, hallucinations may be discrete and distinguishable from other occurrences in a person's daily life.[77] Psychotic delusions, or beliefs not based in reality, are also frequently discrete, specific to one area of a person's life, and do not necessarily affect a person's functional status generally.[78]

Training in interviewing PWMI and access to relevant background information regarding the interviewee are necessary components in evaluating an individual's capacity. A typical mental status interview includes determining whether an individual is oriented to his or her surroundings, including person, place, and time.[79] In addition, experienced clinicians frequently employ various interviewing tools in evaluating an individual's cognitive ability.[80] As evidenced by some of the landmark psychiatric studies of capacity for informed consent cited above,[81] such tests are routinely performed because a person's level of capacity or incapacity to perceive reality and recall past events can never be assumed based solely on the presence of a mental health diagnosis. Where there is concern about a witness's ability to testify accurately, relevant and properly obtained clinical information can be extremely helpful in evaluating the testimony.

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[76] *See* Michael Garrett & Raul Silva, *Auditory Hallucinations, Source Monitoring, and the Belief That "Voices" Are Real*, 29 SCHIZOPHRENIA BULL. 445, 449 (2003).

[77] *See id.* at 452–53.

[78] *See* Grisso & Appelbaum, *Capacities to Make Treatment Decisions*, *supra* note 74; Grisso et al., *MacArthur Study II*, *supra* note 74; Grisso et al., *The MacCAT-T*, *supra* note 73.

[79] *See* HAROLD I. KAPLAN & BENJAMIN J. SADOCK, SYNOPSIS OF PSYCHIATRY 200–04 (1991) (providing details of a mental status examination); *see also* John Donnelly, Mervin Rosenberg & William P. Fleeson, *The Evolution of the Mental Status—Past and Future,* 126 AM. J. PSYCHIATRY 997, 998 (1970) (describing the development of "an organized, systematic methodology" for mental status examinations).

[80] *See* KAPLAN & SADOCK, *supra* note 79.

[81] *See supra* notes 71–77 and accompanying text.

B. Research on Determining Credibility

There is little literature that directly addresses the issue of determining the credibility of PWMI in civil court proceedings. What is available, however, suggests that PWMI are no more likely to exhibit criminal or exploitive behaviors such as chronic, intentional lying than individuals who do not have major mental illness.[82] Although people who have chronic mental illness are more often arrested for "nuisance" type crimes as a consequence of exhibiting psychiatric symptoms in public, these activities are clearly not what is generally considered to be criminal behavior.[83]

Research shows that lying is somewhat commonplace in the general population. For example, one study concluded that "American college students on average tell two lies a day, and ordinary people in the community one a day."[84] Research also indicates that "some people lie more than others," and "that those who tell more lies are more manipulative, more concerned with self-presentation, and more sociable, but less socialized."[85] In general, it is not easy to detect when someone is lying; "a number of studies have demonstrated that people are poor lie detectors, being able to identify lies in experimental studies at about chance

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[82] *See* Paul S. Appelbaum, Pamela Clark Robbins & John Monahan, *Violence and Delusions: Data from the MacArthur Violence Risk Assessment Study,* 157 AM. J. PSYCHIATRY 566, 571 (2000); Marnie E. Rice & Grant T. Harris, *A Comparison of Criminal Recidivism Among Schizophrenic and Nonschizophrenic Offenders,* 15 INT. J. L. & PSYCHIATRY 397, 404–05 (1992); Jennifer L. Skeem & Edward P. Mulvey, *Psychopathy and Community Violence Among Civil Psychiatric Patients: Results from the MacArthur Violence Risk Assessment Study,* 69 J. CONSULTING & CLINICAL PSYCHOL. 358, 369–70 (2001).

[83] *See* H. Richard Lamb & Linda E. Weinberger, *Persons with Severe Mental Illness in Jails and Prisons: A Review,* 49 PSYCHIATRIC SERVICES 483(1998), *available at* http://psychservices.psychiatryonline.org/cgi/content/full/49/4/483#R494105; Gold Award Article, *Helping Mentally Ill People Break the Cycle of Jail and Homelessness: The Thresholds, State, County, Collaborative Jail Linkage Project, Chicago*, 52 PSYCHIATRIC SERVS. 1380, 1380–81 (2001).

[84] Don Grubin, *Commentary: Getting at the Truth about Pathological Lying*, 33 J. AM. ACAD. PSYCHIATRY L. 350, 350 (2005).

[85] *Id.* at 351.

rates, and sometimes below chance."[86]

What is predictive in terms of determining which individuals are more likely to be chronic liars or exhibit other acts of criminality is a cluster of behaviors and behavioral patterns characterized as "psychopathy." The term psychopathy, described by psychiatrist Hervey Cleckley in 1964, refers to certain behaviors or patterns of behavior that involve the chronic exploitation or violation of the rights of others.[87] Individuals who exhibit repeated patterns of these behaviors are frequently described by mental health professionals as having "antisocial personality traits" or "antisocial personality disorder."[88] As many in the legal and criminal justice professions know, people with antisocial personality disorder may be as inconspicuous, in terms of their superficial behavior and appearance, as anyone else in the general population.

The *Diagnostic and Statistical Manual of Mental Disorders, Volume IV TR (DSMIVTR)* is used by mental health professionals to classify and characterize varying forms of mental illnesses according to different historical, observable, and symptomatic

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[86] *Id.* Technological improvements may lead to better tools for lie detection—and difficult constitutional questions for courts—in the future. *See* Sarah E. Stoller & Paul Root Wolpe, *Emerging Neurotechnologies for Lie Detection and the Fifth Amendment*, 33 AM. J. L. & MED. 359, 360–61 (2007) (noting that "[s]everal new technologies use measurements of blood flow or electrical impulses in the brain to identify distinct indicators of deceptive communication," but that "[e]ven the most accurate lie detection techniques are, at this point, unproven"). *See also* Joseph H. Baskin, Judith G. Edersheim & Bruce H. Price, *Is a Picture Worth a Thousand Words? Neuroimaging in the Courtroom*, 33 AM. J. L. & MED. 239, 265 (2007) (noting that "[s]everal new studies have posited that MRIs can be successfully used to identify brain changes in individuals who fabricate information" and that "[t]his information could benefit both civil and criminal litigation"); Yaling Yang et al., *Prefrontal White Matter in Pathological Liars*, 187 BRIT. J. PSYCHIATRY 320, 321–22 (2005) (finding that the prefrontal cortex of "liars" showed an average increase of twenty-two percent in the amount of "white matter" and a decrease in the amount of grey matter).

[87] HERVEY CLECKLEY, THE MASK OF SANITY 362–63 (4th ed. 1964).

[88] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION TEXT REVISION 701–06 (2000).

criteria.[89] Antisocial personality disorder is defined by, among other characteristics, a historical and repetitive pattern of intentional deception and exploitation of others.[90] In contrast, there is no reference to exploitative or intentionally deceptive behavior in the list of criteria for chronic mental disorders such as schizophrenia, bipolar disorder, and other mood and anxiety disorders.[91] In terms of diagnostic *DSMIVTR* criteria, there is therefore no direct, necessary connection between psychopathic behavior and having these major mental disorders, just as there is no such direct, necessary connection in people who do not have a major mental illness.

In terms of assessing tendencies for psychopathic behavior, the Psychopathy Checklist–Revised (PCL–R) is one of the most well-established (in terms of statistical validity and reliability) and frequently used tools to evaluate and predict an individual's potential for exhibiting such behaviors.[92] PCL–R scores have also been shown to be a valid means of evaluating degrees of psychopathy.[93] In general, higher PCL–R scores are predictive of greater tendencies toward criminal behaviors.[94] This evaluative tool has been useful in predicting such behavior among various populations, including both incarcerated and unincarcerated groups.[95] As would be expected, in general higher PCL–R scores

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[89] *See generally id.*

[90] *See id.* at 701–06.

[91] *See id.* at 297–331, 345–400, 429–76.

[92] *See* ROBERT D. HARE, THE HARE PSYCHOPATHY CHECKLIST–REVISED: PCL-R (2d ed. 2003).

[93] *See* JOHN MONAHAN ET AL., RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE 37–60 (2001); Robert D. Hare, *Psychopathy: A Clinical Construct Whose Time Has Come*, 23 CRIM. JUST. & BEHAV. 25, 25–28, 30–32, 36–41 (1996); Martin Hildebrand, Corine De Ruiter & Henk Nijman, *PCL-R Psychopathy Predicts Disruptive Behavior Among Male Offenders in a Dutch Forensic Psychiatric Hospital*, 19 J. INTERPERSONAL VIOLENCE 13, 23–24 (2004).

[94] *See* MONAHAN ET AL., *supra* note 93; Marnie E. Rice, *Violent Offender Research and Implications for the Criminal Justice System*, 52 AM. PSYCHOL. 414, 414–18 (1997).

[95] *See* MONAHAN ET AL., *supra* note 93; Marnie E. Rice, Grant T. Harris & Catherine A. Cormier, *An Evaluation of a Maximum Security Therapeutic*

have been found in individuals who are either incarcerated or who have significant criminal histories.

Research also indicates that individuals with psychiatric illnesses who have significant criminal histories exhibit higher levels of psychopathy.[96] Similarly, non-mentally ill people who have come into significant contact with the criminal justice system (and even such individuals who have not had legal problems *per se* but who admit to violence and other antisocial acts) also score higher on established psychopathy measures, supporting the assertion that these measures are reliable predictors of violence and criminality.[97]

The MacArthur Violence Risk Assessment Study,[98] which was a landmark investigation of potential dangerousness among people with psychotic delusions, further dispelled widely-held beliefs about PWMI being a more violent, criminally-predisposed group. This study and others have concluded that even those PWMI who tend to be most obviously ill with frank delusions are not necessarily more likely to commit violent acts than the general population.[99]

Community for Psychopaths and Other Mentally Disordered Offenders, 16 L. & HUM. BEHAV. 399, 399–400, 408 (1992); Michael R. Levenson, Kent A. Kiehl & Cory M. Fitzpatrick, *Assessing Psychopathic Attributes in a Non-institutionalized Population*, 68 J. PERSONALITY & SOC. PSYCHOL. 151 (1995).

[96] *See* C.D. Hill, R. Rogers & M.E. Bickford, *Predicting Aggressive and Socially Disruptive Behavior in a Maximum Security Forensic Psychiatric Hospital*, 41 J. FORENSIC SCI. 56, 56–59 (1996); Grant T. Harris, Marnie E. Rice & Vernon L. Quinsey, *Violent Recidivism of Mentally Disordered Offenders: The Development of a Statistical Prediction Instrument*, 20 CRIM., JUST. & BEHAV. 315, 315–33 (1993); Hildebrand et al., *supra* note 93, at 16–26.

[97] *See* Ralph C. Serin, *Violent Recidivism in Criminal Psychopaths*, 20 L. & HUM. BEHAV. 207 (1996); Ralph C. Serin, *Psychopathy and Violence in Criminals*, 6 J. INTERPERSONAL VIOLENCE 423, 423–30 (1991); Rice, *supra* note 94, at 421–23; David DeMatteo, Kirk Heilbrun & Geoffrey Marczyk, *An Empirical Investigation of Psychopathy in a Noninstitutionalized and Noncriminal Sample*, 24 BEHAV. SCI. & L. 133, 133–46 (2006).

[98] *See* MONAHAN ET AL., *supra* note 93.

[99] *See id.*; Appelbaum, Robbins & Monahan, *supra* note 82; Thomas Stompe, Gerhard Ortwein-Swoboda & Hans Schanda, *Schizophrenia, Delusional Symptoms and Violence: The Threat/Control-Override Concept Reexamined*, 30 SCHIZOPHRENIA BULL. 31, 40–41 (2004); Paul S. Appelbaum,

Accordingly, individuals having a primary psychiatric diagnosis alone (i.e., a mood, anxiety or psychotic disorder) are not more likely to exhibit psychopathic or antisocial behavior than those who have not been so diagnosed. Some studies have even indicated that non-psychopathic people with mental illness have a lower likelihood of physical aggression, beyond self-directed aggressive acts of suicide attempts and self-mutilation.[100] Admittedly, there is limited data that exclusively addresses the issue of lying under oath in court proceedings. The extensive body of literature available on the subject of psychopathic behavior, however, indicates that people with chronic mental illness who do not have criminal histories (apart from arrests for "nuisance" type crimes) do not have any higher levels of psychopathy or tendencies toward deceitfulness than their non-criminal, non-mentally ill counterparts in the general population.[101]

III. RECOMMENDATIONS

In this part, we set forth recommendations that would improve the ability of courts to provide PWMI with fair hearings. These recommendations include: (1) providing training for court personnel, advocates, and guardians *ad litem* (GALs) to improve their understanding of mental illness and PWMI; (2) enforcing legal and evidentiary standards in light of modern clinical research findings; and (3) providing reasonable accommodations that would assist PWMI to access the court system in order to prosecute or defend their rights adequately.

A. Recommendation 1: Mental Health Training Should be Provided to Court Personnel, Advocates, and GALs

When considering the problems PWMI encounter in civil and administrative proceedings and contemplating what solutions may

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One Madman Keeping Loaded Guns: Misconceptions of Mental Illness and Their Legal Consequences, 55 PSYCHIATRIC SERVICES 1105, 1106 (2004).

[100] Hill, et al., *supra* note 96, at 58.

[101] *See* Appelbaum, Robbins & Monahan, *supra* note 82; Rice & Harris, *supra* note 82; Skeem & Mulvey, *supra* note 82.

exist, it is instructive to examine recent developments in the criminal justice setting. In response to widespread discontent with the way criminal defendants with mental illnesses were treated in traditional criminal courts, many states, including New York, have established what are known as mental health courts.[102]

A mental health court typically has a staff dedicated to the court part, including not only a judge and other court personnel but also a mental health case worker.[103] Personnel are given specific training in communicating effectively with PWMI.[104] The court then works with prosecutors and defense attorneys to develop a plan that offers defendants opportunities to receive treatment instead of punishment and to connect them with treatment facilities and other services in the community.[105] Although long-term data on the effectiveness of these efforts are limited, they appear to represent a much needed initiative to address the needs of PWMI in the criminal justice system.[106] There is no reason to think that

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[102] *See* DEREK DENCKLA & GREG BERMAN, RETHINKING THE REVOLVING DOOR: A LOOK AT MENTAL ILLNESS IN THE COURTS 7–8 (2001), *available at* http://www.courtinnovation.org/pdf/mental_health.pdf.

[103] *See id.* at 9.

[104] *See* Bazelon Center for Mental Health Law, The Role of Mental Health Courts in System Reform, http://www.bazelon.org/issues/criminalization/publications/mentalhealthcourts/index.htm (last visited Mar. 23, 2009).

[105] *See* DENCKLA & BERMAN, *supra* note 102, at 10.

[106] This is not to say that mental health courts are not without their problems. As Wolff has pointed out, "[m]ental health courts create stigma by segregating people by illness and then defining their uniqueness and irresponsibility in terms of the illness. Furthermore, labeling the court a 'mental health' court, focuses public attention on psychiatric issues, and amplifies the mark associated with the court." Nancy Wolff, *Courts as Therapeutic Agents: Thinking Past the Novelty of Mental Health Courts*, 30 J. AM. ACAD. PSYCHIATRY L. 431, 434 (2002). Wolff also points out that "[m]ental health courts assume uncritically that criminal behavior is caused by a psychiatric problem" and ignore "socioeconomic and historical factors that predispose [individuals] to committing crimes." *Id.* at 432. A study published by the Bazelon Center for Mental Health Law also pointed out flaws or limitations of the mental health court model. One conclusion was that "[m]any of the existing courts include practices that are unnecessarily burdensome to defendants, that make it harder for them to reintegrate into the community and that may compromise their rights." Bazelon Center for Mental Health Law, The Role of

similar efforts would not be beneficial to the PWMI and the personnel who deal with them in the civil court system as well.

Training that challenges biases against PWMI and equips court personnel to communicate more effectively with them should also be expanded beyond specialized court parts. PWMI generally do not appear different from other people and many litigants with mental illness do not wish to disclose their diagnoses. Even when a mental illness is obviously present or must be revealed during litigation, the continued social stigma associated with mental illness may cause some litigants to opt out of a specialized court part. For this reason and others, all court personnel, as well as advocates, should be given training to understand mental illness.

As a consequence of stigma and potentially debilitating symptoms, PWMI are often at a great disadvantage when attempting to advocate for themselves in a court system that is generally ill-equipped to accommodate them. A primary goal in training court personnel and advocates should be to sensitize them to any misperceptions or biases they might have toward PWMI. Such training should not supplant the use, where appropriate, of clinical expertise during litigation. It should, however, provide a basic background in the complexity of mental illness, the dangers of lumping into one category all those who have mental illnesses, and the need to avoid drawing unwarranted conclusions about the relevance of a mental disability to a legal proceeding.

In addition to some clinical background, all advocates and personnel who might come in professional contact with PWMI should be trained on ways in which they might communicate more effectively with litigants and witnesses with mental illnesses. The goal is not to transform all court personnel into pseudo-therapists—in fact, care should be taken to discourage judges from assuming the role that has been referred to in the criminal justice context as "psychologists in black robes."[107] However, a shift in

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Mental Health Courts in System Reform, http://www.bazelon.org/issues/criminalization/publications/mentalhealthcourts/index.htm (last visited Mar. 23, 2009). This study also pointed out that a mental health court cannot be "effective unless the services and supports that individuals with serious mental illnesses need to live in the community are available." *Id.*

[107] DENCKLA & BERMAN, *supra* note 102, at 19.

attitude and some simple interviewing techniques can be extremely helpful in eliciting information from those whose mental illnesses interfere with their ability to communicate clearly at times. For example, setting ground rules during interviews, redirecting clients who tend to be over-inclusive or tangential, and explaining why certain questions are being asked, may all help in gathering the information they need to provide quality representation.

Interviewing litigants with certain mental illnesses may require added patience. However, advocates who are willing to assist clients with mental illnesses through the sometimes more time-consuming process of fact-finding interviews may be rewarded with vital information that cannot be obtained through any other means. Several years ago, an attorney from MFY received reports that several female residents of an adult home had been repeatedly sexually assaulted by an administrator of the home. The attorney spent a great deal of time interviewing each of the residents because all were in a state of decompensation at the time, and their delusions about other areas of their lives often led them off the track of the questions being asked.[108] However, by persisting through these at times challenging interviews, the attorney involved noted that every victim reported a few very specific details pertaining to the occurrence of the alleged crimes. Culling these consistent details from their tangential accounts bolstered the credibility of her report to the enforcement agency responsible for overseeing adult homes.[109]

MFY attorneys are frequently required to gather information from clients with various communication difficulties. It requires patience, empathy, and, as a threshold matter, an avoidance of the

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[108] The victims in this case were all delusional. One result of systemic failure to listen to people with delusions is a tendency on the part of unscrupulous individuals to target such people as victims, assuming that such victims will not report the abuse, or that if they report the abuse, they will not be believed.

[109] Unfortunately, the Department of Social Services (DSS), then in charge of overseeing adult homes, handled this complaint merely by interviewing the accused, who, not surprisingly, denied the allegations. DSS took no action against the home, and the administrator, although he did not continue in the position, went on to work at a health care facility.

assumption that because a client is mentally ill, he or she will not be able to tell the truth. Although most attorneys at MFY have no formal training in mental health, periodic in-house trainings by mental health professionals, as well as experience communicating with clients with mental illnesses, have helped them conduct productive interviews with clients who have severe thought and speech pattern disturbances. This experience has shown that basic training can lead to greater understanding.

Training is particularly important for GALs. Some litigants with mental illnesses, while capable of managing their own day-to-day affairs, lack the capacity to participate in certain aspects of their own cases and may benefit from the appointment of a GAL.[110] GALs are appointed by the court at the request of litigants or by the court *sua sponte* where it appears that the party in question is "incapable of adequately prosecuting or defending" his or her rights.[111] A GAL may discharge various functions that his or her ward, but for a mental disability, would do to prosecute or defend a case. In some cases, this may include applying for public benefits in a non-payment eviction proceeding or seeking assistance from the state's Adult Protective Services program to address a clutter problem in a nuisance eviction proceeding.[112] It may also include a factual investigation of the ward's possible claims or defenses.[113]

A properly trained GAL may be of tremendous assistance in ensuring that an individual with mental illness receives a fair hearing. However, the appointment of a GAL who is not properly trained may simply have the affect of replicating unjust aspects of

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[110] *See* N.Y. C.P.L.R. 1201 (McKinney 2008); *see generally* Jeanette Zelhof, Andrew Goldberg & Hina Shamsi, *Protecting the Rights of Litigants with Diminished Capacity in the New York City Housing Courts*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 733 (2006).

[111] N.Y. C.P.L.R. 1201 (McKinney 2008). Again, it should be stressed that the need for a GAL specifically addresses the inability to participate effectively in a court case. It should not be assumed that every litigant with a mental illness requires a GAL, nor should it be assumed that someone who requires a GAL lacks competence to give testimony or lacks credibility.

[112] *See* Zelhof, Goldberg & Shamsi, *supra* note 110, at 763.

[113] *See id.*

the court system and potentially harming the litigant.

B. Recommendation 2: Legal and Evidentiary Standards Should be Enforced in Light of Modern Clinical Research Findings

Certain legal standards, particularly related to the relevance of mental health history and the credibility of testimony by PWMI, should be enforced in light of current knowledge about mental illness. The idea that it is always necessary for a jury to hear about a witness's mental health diagnosis to evaluate her testimony is contradicted by clinical information that indicates that most mental illnesses do not affect a person's ability to perceive events or her ability to recount them. The generalizations that courts make concerning the admissibility of a witness's mental health history should be re-examined, particularly when the person giving testimony is the litigant and his or her rights may be unfairly prejudiced by the admission or misuse of mental health information.

Professor Tess Wilkinson-Ryan has argued that "most jurisdictions are overly permissive in admitting evidence of the accuser's psychiatric make-up and history" in civil and criminal cases involving sexual misconduct.[114] In making this argument, she notes that, because "courts implicitly rely on outdated and inaccurate conceptions of psychiatric practice, it is too easy for defendants to introduce evidence that has no logical bearing on the complainant's credibility but will nonetheless prejudice the jury against her."[115]

This argument is generally applicable to the use of such evidence to impeach the credibility of PWMI. Due to the limited probative value and the considerable prejudicial effect of mental health evidence, "most psychological evidence should be inadmissible because its relevance is substantially outweighed by its prejudicial effects."[116] There are at least two reasons for this

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[114] Wilkinson-Ryan, *supra* note 33, at 1375.

[115] *Id.*

[116] *Id.*

conclusion. First, psychology is "often misunderstood by courts and juries alike."[117] The admission of evidence of a litigant's or witness's mental health history can therefore "create prejudice and confusion for the court and jury."[118] Second, the admission of such evidence can also "humiliate the [litigant or witness]."[119] The likelihood of such evidence being admitted into evidence may therefore deter PWMI who are potential litigants from seeking justice.

Evidence of a witness's mental health history is probative only if it holds "a specific and scientifically legitimate relevance to the [witness's] credibility."[120] Even then, the probative value of such evidence "should be balanced against the potentially misleading and confusing effect that the information will have on the fact-finding process."[121] As Wilkinson-Ryan has pointed out, careful adherence to the rules of evidence would reduce the amount of psychiatric evidence that is admitted as evidence.[122] Advocates for PWMI should therefore consider filing motions *in limine* on these bases to exclude the use of mental health evidence to impeach the credibility of their clients or witnesses.

C. Recommendation 3: Civil Courts Should Provide Reasonable Accommodations to Improve the Accessibility for PWMI.

Often, the reason that the testimony of PWMI is not heard is because courts fail to provide the accommodations necessary for their testimony to be taken. Giving testimony in a deposition or at trial can be a highly stressful experience for anyone.[123] For people

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[117] *Id.*

[118] *Id.* at 1376.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *See id.*

[123] Bruce Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 CAL. W. L. REV. 105, 108 (2000) ("Being a party in litigation is an extremely stressful event. It ranks near the death of a loved one, the loss of a job, and the experience of a grave illness.").

who have severe anxiety, major depression, agoraphobia (fear of leaving one's home), or certain other mental illnesses, the very prospect of testifying may be overwhelming.[124] For others who have difficulties in processing thoughts in a linear fashion or who may have limited or atypical verbal expression, the inflexible forms in which testimony is supposed to be elicited and conveyed may be difficult to master.[125] There are several accommodations that can be made to facilitate the full participation of PWMI in their own cases.

The Americans with Disabilities Act (ADA) was intended to usher in "a bright new era of equality, independence, and freedom" for people with physical and mental disabilities.[126] Title II of the ADA requires public entities, such as courts, to be accessible to these individuals.[127] The Supreme Court has held that "this duty to accommodate is perfectly consistent with the well-established due process principle that, 'within the limits of practicability, a State

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[124] Ian Freckelton, *Therapeutic Appellate Decision-Making in the Context of Disabled Litigants*, 24 SEATTLE U. L. REV. 313, 325 (2000) ("Litigation involving persons with disabilities takes place in many different contexts: civil, criminal, matrimonial, and administrative, to name just a few. However, all legal contexts share the potential to demoralize, alienate, and entrench symptoms of suspicion, bewilderment, and disenfranchisement for those with disabilities.").

[125] Winick, *supra* note 123, at 110 ("Surely one of the most stressful emotional aspects of a lawsuit is when the client testifies at trial or has his or her deposition taken by the adverse party. The courtroom is a public place, and testimony is taken from the witness stand in the presence of a variety of strangers and enemies. Public speaking even in a friendly and supportive environment can produce great stress for those who are inexperienced in doing it. Playing such a key speaking role on center stage in the courtroom can thus be a nightmare for many clients. Even depositions, which typically are taken in a lawyer's office, will nonetheless be taken in front of strangers such as the court reporter and also the adversarial parties in the lawsuit and their attorneys.").

[126] President George H. W. Bush, Remarks at the Signing of the Ams. with Disabilities Act (July 26, 1990), *available at* http://www.eeoc.gov/abouteeoc/35th/videos/ada_signing_text.html.

[127] *See* Tennessee v. Lane, 541 U.S. 509, 531 (2004) ("Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility.").

must afford to all individuals a meaningful opportunity to be heard' in its courts." In reaching this decision, the Court emphasized the "fundamental right of access to the courts."[128]

Almost all of the focus of courthouse compliance with the ADA has been with respect to physical access. "[T]he question of what aids and services are helpful for people with mental disabilities is largely unexplored and must also be the subject of discussion among judges, lawyers, mental health professionals, people with disabilities, and court personnel."[129]

Recognizing that the prospect of submitting to a deposition or a standard examination on the witness stand can be so stressful as to be outside of the realm of possibility for litigants with certain mental illnesses, in many cases MFY attorneys have successfully sought various accommodations to prevent this type of problem from shutting litigants out of their proceedings. For example, judges can allow for interrogatories in lieu of depositions or limit the length of depositions.[130] Judges can also grant leeway in terms of evidentiary rules, such as the prohibition against leading questions on direct examination, where attorneys indicate that strict adherence to form is likely to prevent them from being able to elicit information from their clients or witnesses. Attorneys should also ask judges to be cognizant of the special needs of their clients during cross-examination and to be especially watchful that they are not harassed by opposing counsel.

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[128] *Id.* at 533–34.

[129] Zelhof, Goldberg & Shamsi, *supra* note 110, at 770. The exception is mental health courts, which, "[i]n following the legal theory of therapeutic jurisprudence . . . are attempting to improve justice by considering the therapeutic and antitherapeutic consequences that 'flow from substantive rules, legal procedures, or the behavior of legal actors (lawyers and judges).'" Wolff, *supra* note 106, at 431.

[130] *See, e.g.*, Goldman v. Eggers, No. L&T 64884/2001 (N.Y. Civ. Ct. Oct. 19, 2001) (ordering that "discovery in this case [shall] proceed with the production of documents and then with interrogatories rather than an oral deposition" based on evidence of respondent's medical condition) (unpublished decision) (copy on file at MFY).

Other accommodations that would help make courts more accessible for PWMI include:

1. Setting up a quiet waiting room for litigants for whom the sometimes chaotic and noisy environment of the courthouses may exacerbate the symptoms of mental illness and the stressors contributing to decompensation.[131]
2. Allowing for the flexible scheduling of hearings for litigants who, for example, take medication that has the side effect of making it difficult to wake up or be coherent in the morning.[132]
3. Allowing, upon request, priority for litigants or witnesses with disabilities for whom a long wait in court might exacerbate agitation and confusion.[133]
4. Allowing, upon request, for telephone or video appearances and testimony, or in-home hearings for litigants or witnesses with disabilities such as agoraphobia, claustrophobia, or age-related infirmities.[134]

CONCLUSION

Despite clinical information and some jurisprudence to the contrary, the apparent perception among many court and legal personnel is that PWMI are generally incompetent and deceptive witnesses. Because of these widespread misperceptions, the disparity between myth and truth remains an imposing obstacle when it comes to obtaining justice and equal opportunities for PWMI in civil court. Courts and advocates should be doing all that is in their power to ensure that PWMI do not fall through the cracks when it comes to obtaining justice. With reasonable accommodations, PWMI can have meaningful opportunities to participate in litigation that concerns their lives.

Whenever possible, PWMI should have the opportunity to testify in hearings where decisions will be made affecting their

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[131] *See* Zelhof, Goldberg & Shamsi, *supra* note 110, at 770.

[132] *Id.*

[133] *Id.*

[134] *Id.* at 771.

lives. First, these individuals are generally the ones best qualified to speak about their own experiences. Second, regardless of whether individuals are able to recall their experiences well or always communicate effectively, it is essential that judges and juries be confronted with the humanity of those about whom they will be making decisions and learn to be patient in listening to the evidence they present. Third, the opportunity to participate in a hearing, if handled properly, can be a highly empowering experience for litigants who have grown accustomed to being ignored or having to rely on others to speak for them.[135]

The New York State Court of Appeals has warned of the danger of structuring proceedings in such a way that people with mental disabilities were not given voice. *In the Matter of Joan Brown v. Ristich* involved an accusation by a developmentally disabled resident of the infamous Willowbrook State School that a staff member had attacked her with a broom, lacerating her head.[136] The only eyewitnesses in the case were two other residents, both of whom were also developmentally disabled. In reinstating the administrative decision against Willowbrook, which had been based in part on these residents' testimony, the court noted the growing concerns about treatment of residents in such institutions and set forth the important policies bolstering its decision:

> The right of petitioner [the Director of Willowbrook] is undeniable. However, we cannot overlook the rights of institutional residents, especially those incapable of eloquent expression and abstract thought. These people also deserve a fair hearing. To deny them the right to complain of their treatment because they lack the ability to conceptualize the nature of an oath would be blinding ourselves to reality.[137]

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[135] Winick, *supra* note 123, at 106 ("People like the opportunity to participate in a process that affects them; they dislike being excluded from participating. This participatory or dignitary value of process produces litigant satisfaction and a greater degree of acceptance of and compliance with the ultimate decision reached.").

[136] Brown v. Ristich, 36 N.Y.2d 183, 190 (1975).

[137] *Id.* at 191–92.

These words still ring true for people with all types of mental disabilities, whether they are institutionalized or living in the community. The very fact that their testimony is too often never heard or taken seriously makes PWMI greater targets of abuse and exploitation. It is our hope that this article will promote greater awareness of these occurrences so that they occur with less frequency and PWMI are given an equal playing field to defend themselves and to seek redress when they have been wronged.