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June 24, 2009

Honorable A. Kirke Bartley, Jr.
New York County Supreme Court
Part 94
100 Centre Street
New York, New York 10013

Re: People v. Marshall and Morrissey
Indictment No. 6044/2007

Dear Justice Bartley:

This letter is submitted in response to defendants' June 4, 2009 motion to preclude the testimony of Mr. Alex Forger, whom the prosecution intends to call as an expert witness. As Your Honor has recognized,¹ this case presents arcane issues of trusts and estates law. For the benefit of the jury, Mr. Forger can shed light on the professional standards of conduct for trusts and estates attorneys and the highly technical legal language used in wills and codicils. Without that testimony, these complex matters would remain inscrutable to – and likely misunderstood by – even the most sophisticated juror. Because Mr. Forger's testimony is relevant to material issues in the case, will help the jurors in their assessment of the case, and is properly admissible under the applicable legal standards, the defendants' preclusion motion should be denied.

The defendants apparently do not dispute Mr. Forger's qualifications as an expert. Nor could they; Mr. Forger is preeminent in his field. A graduate of Princeton University and Yale Law School, Mr. Forger practiced trusts and estates law for over forty years. He served as the co-executor of the estate of Jacqueline K. Onassis, temporary administrator of the Doris Duke estate and the trustee of numerous trusts. In addition to myriad professional awards and honorary degrees, Mr. Forger received the Treat Award for Excellence in 1988, presented by the National College of Probate Judges in recognition of contributions to the improvement of the law or judicial administration in probate or related fields.

Consequently, the question before the Court is simple: whether Mr. Forger's testimony "would aid [the] jury in reaching a verdict." People v. Taylor, 75 N.Y.2d 277, 288 (1990).

¹ In denying the defendants' objection to a demonstrative exhibit, Your Honor aptly noted: "This is rather arcane. And in all due deference to the practitioners of estate and trust law, I think anything to help the jury in understanding would be . . . I think it's of assistance to this jury – and it's arcane law – so that they understand what happened" (Tr. at 4253, 4259).

“[T]he admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court,” upon which the law imposes few restrictions. People v. Lee, 96 N.Y.2d 157, 162 (2001). And in exercising that discretion, a trial judge must be guided by the principle that the touchstone of expert testimony is helpfulness. As a general matter, “expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror.” De Long v. Erie County, 60 N.Y.2d 296, 307 (1983). But expert testimony is not limited to topics entirely outside the reach of the average juror. As (former) Chief Judge Kaye has observed, “[W]e have repeatedly upheld the admission of expert testimony for the purpose of clarifying an area of which the jurors have a general awareness.” People v. Mooney, 76 N.Y.2d 827, 832 (1990) (Kaye, J., dissenting). Thus the Court of Appeals has endorsed the admission of expert testimony “to clarify the proper police practice expected in a given police emergency,” Selkowitz v. Nassau County, 45 N.Y.2d 97, 103 (1978), and “the market value of the types of services performed by the average housewife,” De Long, 60 N.Y.2d at 307.

Moreover, the concern that an expert’s testimony “would somehow preempt the jury’s function[] has long been discredited as a test for expert testimony.” Mooney, 76 N.Y.2d at 832 (Kaye, J., dissenting). In fact, the Court of Appeals has admonished that trial “courts should be wary not to exclude [expert] testimony merely because, to some degree, it invades the jury’s province.” Lee, 96 N.Y.2d at 162 (emphasis added). See, e.g., People v. Hicks, 2 N.Y.3d 750, 751 (2004) (explaining that so long as an expert’s testimony is “beyond the ken of the average juror, it matters not whether the testimony relate[s] to the ultimate issue in the case”); People v. Cronin, 60 N.Y.2d 430, 433 (1983) (reversing where the trial court “erroneously believed that it had no discretion to exercise” and issued a “blanket preclusion of testimony regarding intent” from an expert witness called by defendant).

Relevant here are two kinds of expert testimony. The first is expert testimony on particular norms of conduct, which the jury can use to determine whether an individual’s conduct conformed to those norms. The Court of Appeals’ opinion in Hicks, *supra*, serves as a useful guidepost. There, the Court affirmed the admission of expert testimony from an arresting police officer “that the packaging of the drugs recovered from defendant was inconsistent with personal use and consistent with the packaging that the officer had encountered in previous drug sale arrests.” Hicks, 2 N.Y.3d at 751. The Court reasoned that the officer’s testimony was useful to the jurors, who “may not be aware of the quantity and packaging of heroin carried by someone who sells drugs, as opposed to someone who merely uses.” *Id.* As the First Department had previously explained, there is a critical difference between asking an expert “to identify what acts and circumstances are consistent with the sale of drugs – as opposed to mere possession – and asking for the officer’s opinion on the ultimate issue to be determined in the case, that is, whether this defendant possessed drugs with the intent to sell. The former is permissible, the latter is not.” People v. Ingram, 2 A.D.3d 211, 212 (1st Dept. 2003).

Of course, expert testimony about professional norms and standards is admissible with respect to activities other than drug-dealing. The Court of Appeals has long deemed expert testimony “appropriate to clarify a wide range of issues calling for the application of accepted professional standards.” Selkowitz, 45 N.Y.2d at 102. Expert witnesses have testified regarding “the standard of care for contractors, O’Connor v. 595 Realty Assoc., 23 A.D.2d 69 (1st Dept.

1965), fire fighters, McGee v. Adams Paper & Twine Co., 26 A.D.2d 186, aff'd, 20 N.Y.2d 921 (1st Dept. 1966), window washers, Gonzalez v. Concourse Plaza Syndicates, Inc., 31 A.D.2d 401 (1st Dept. 1969), and mariners, Carpenter v. Eastern Transp. Co., 71 N.Y. 574 (1878), to name but a few.” Id.

The law treats attorneys no differently from window washers. Expert testimony is frequently admitted to explain the standards of care for attorneys, particularly in cases dealing with complex areas of law. See, e.g., Orchard Motorcycle Distrib., Inc. v. Morrison Cohen Singer & Weinstein LLP, 49 A.D.3d 292, 293 (1st Dept. 2008) (affirming dismissal of legal malpractice claim where “plaintiffs failed to submit their own expert affidavit delineating the appropriate standard of professional care and skill to which defendant was required to adhere under the circumstances, which involved matters arising out of foreclosure actions, complex loan arrangements and bankruptcy proceedings that ordinary jurors could not evaluate based on their own knowledge and experience.”); Merlin Biomed Asset Mgmt., LLC v. Wolf Block, 23 A.D.3d 243, 243 (1st Dept. 2005) (affirming ruling that “plaintiffs were required to offer expert testimony in support of their claim for legal malpractice that raises issues regarding the standard of care of an attorney drafting purchasing and marketing agreements in the field of hedge funds and financial management companies, a subject that is not part of the jurors’ ordinary, daily experience”).

The second kind of expert testimony relevant here comes from attorneys. A line of opinions from the First Department recognizes that it is often appropriate – and even necessary – for an attorney qualified as an expert to explain the legal and regulatory obligations of other professions. “Particularly in complex cases involving the securities industry, expert testimony may help a jury understand unfamiliar terms and concepts.” United States v. Bilzerian, 926 F.2d 1285, 1294 (2d Cir. 1991). For example, in People v. A.S. Goldman, Inc., 9 A.D.3d 283 (1st Dept. 2004), the First Department endorsed the admission of expert testimony in an “intricate securities case involving complicated regulatory requirements.” Id. at 285. The People’s experts in Goldman “explained the regulations and their relation to the documented actions of defendants. They did not testify to the ultimate issue before the jury, but left it to the jury to determine if defendants’ conduct, viewed in the context of the statutory requirements, proved that they intentionally engaged in the fraudulent schemes charged.” Id. Similarly, in People v. Schwartz, 21 A.D.3d 304 (1st Dept. 2005), the First Department approved the use of expert testimony on two material issues: SEC filings and securities laws and regulations. The defendants in Schwartz were charged with grand larceny and Martin Act violations. A securities law professor gave background testimony (defining technical terms relevant to the case) and explained the duties of disclosure and fair dealing owed by broker-dealers to investors.² The First Department held that the trial court “providently exercised its discretion” in admitting this testimony, which did not tread upon the court’s role in instructing the jury on grand larceny and the Martin Act. Id. at 308. Indeed, the law professor “was neither offered nor accepted as an expert on the various New York State statutes at issue in th[e] case, nor did he testify as to the ultimate issues before the jury.” Id.

² The People’s brief on appeal in Schwartz provides a more detailed description of the expert’s testimony. Due to the size of that brief, the People have transmitted an electronic version of it to defense counsel and the Court.

The First Department's decisions in Goldmen and Schwartz are of a piece with People v. Lurie, 249 A.D.2d 119 (1st Dept. 1998), in which the court approved the admission of expert testimony in a real estate fraud prosecution in connection with the mismanagement of a co-op building. The prosecution's expert witness testified to "basic co-op terminology, how buildings are converted to co-ops, the obligations of the sponsor during and after the conversion process, the review of conversions and amendments by the Department of Law and the disclosure and other regulatory requirements of the Martin Act." Id. at 121. In rejecting the defendant's appellate challenge to this testimony, the First Department reasoned that it "was necessary to explain the complicated regulatory scheme governing co-op conversions and the corresponding disclosure requirements imposed on sponsors." Id. at 122. The expert "never testified as to the ultimate issue; rather, she left for the jury to decide whether the evidence of defendants' conduct, viewed in the context of the statutory requirements, proved beyond a reasonable doubt that defendants intentionally engaged in a fraudulent scheme to obtain money from unsuspecting purchasers and shareholders." Id. Moreover, to the extent that the expert's testimony touched on "matters of law that should, instead, have been covered in the court's instructions to the jury," the First Department found no prejudice to the defense in that the expert "accurately stated the law as applicable to the circumstances of the case and never testified that defendant had committed the charged crimes or states ultimate legal conclusions." Id.

Against this backdrop, it is clear that Mr. Forger's expert testimony should be admitted. Mr. Forger, who has offered to testify pro bono, will provide disinterested expert testimony on two material issues: first, the ethical obligations and professional standards that govern the practice of trusts and estates law; and second, the practical impact of the wills and codicils signed (or allegedly signed) by Brooke Astor between 1953 and 2004.

The first category is in the nature of background. Mr. Forger will define the multi-part test for testamentary capacity and will explain to the jury how, as a practical matter, a trusts and estates attorney applies that test, particularly when representing a client who is elderly or has Alzheimer's disease. Mr. Forger will generally describe the circumstances that must be present in order for a trusts and estates attorney to execute a will or codicil. Mr. Forger will describe the ethical implications of a trusts and estates attorney's representation of multiple members of a single family, and will offer his expert opinion on the limited circumstances under which dual representation is ethically appropriate. Finally, Mr. Forger will describe the professional standards applicable to the practice of trusts and estates law, including the attorney's obligation to examine all prior wills and codicils of a prospective client and to meet with a client before executing a will or codicil on her behalf.

Mr. Forger will "clarify a wide range of issues calling for the application of accepted professional standards," which is a wholly appropriate matter for expert testimony. Selkowitz, 45 N.Y.2d at 102. Just as the expert in Schwartz explained a broker-dealer's duties under securities laws and regulations, and the expert in Lurie explained a co-op sponsor's disclosure obligations and regulatory requirements, so Mr. Forger will explain a trusts and estates attorney's ethical obligations in representing a testator. In short, this testimony is nothing new under the sun.

This testimony is also highly relevant. It will provide the jury with the analytical tools needed to determine whether the attorneys who (ostensibly) represented Brooke Astor in late 2003 and early 2004 failed to follow the generally-accepted practices of their profession. These practices exist to ensure that a client is capable of consenting to a change to her estate plan. The jury has already heard – and will hear – testimony that the circumstances of these attorneys’ interactions with Brooke Astor were controlled and/or strongly influenced by the defendants. The combination of such fact testimony and Mr. Forger’s expert testimony tends to establish that the defendants enabled Messrs. Whitaker and Christensen to shirk their professional obligations to ensure that Mrs. Astor had the capacity to consent to the transfers and estate planning changes they implemented. That inference directly supports the People’s theory – the defendants knew that Brooke Astor lacked such capacity. People v. Camiola, 225 A.D.2d 380, 381 (1st Dept. 1996) (affirming conviction where “the People proved beyond a reasonable doubt that the victim was incapable of consenting to defendant’s actions and that defendant was cognizant of her diminished mental capacity, yet continued to deplete her assets”); People v. Schlick, 45 A.D.3d 436, 436 (1st Dept. 2007) (“Even if defendant believed that the victim, had she remained competent, would have continued the pattern of gifts, this would not have entitled him to unilaterally take her money after she was no longer capable of choosing to give it away.”).

This testimony will also be helpful to the jurors. True, they may have some general ideas about an attorney’s ethical obligations to his clients. But Mr. Forger will describe matters that are particular to the practice of trusts and estates law, which, as this Court has already recognized, “is rather arcane” (Tr. at 4253). Simply put, the matters about which Mr. Forger will testify are simply “not part of the jurors’ ordinary, daily experience.” Merlin, 23 A.D.3d at 243. Moreover, as a disinterested, unpaid third party witness, Mr. Forger represents the only objective source of this information.³

The second category of Mr. Forger’s testimony will relate directly to the facts of this case. Having examined the 38 wills and codicils executed by Brooke Astor between 1953 and January 13, 2004, the purported codicil of March 3, 2004, along with other property transfers and gifts, Mr. Forger will parse the technical legal language in those documents to explain their real-world implications. Mr. Forger will elucidate Vincent Astor’s will and bequest to Mrs. Astor; the pattern of giving reflected in the wills Mrs. Astor executed between 1953 and 2002 (including the charitable remainder unitrust or “CRUT”); Mrs. Astor’s May 2003 transfer of Cove End to Mr. Marshall; and the relative changes marked by the December 18, 2003 and January 12, 2004 codicils, as well as the purported March 3, 2004 codicil. In addition to explicating the terms of the December 2003 and January 2004 codicils, Mr. Forger will also opine on Messrs. Whitaker and Morrissey’s draft letters and memoranda regarding the effects of those codicils, how the codicils related to each other and the 2002 will, and whether the codicils were consistent with Mrs. Astor’s prior pattern of charitable giving.

This component of Mr. Forger’s testimony is likewise proper, relevant and helpful. It cannot be seriously disputed that the technical legal language of wills, codicils and property transfers is beyond the ken of the average juror. Indeed, it is beyond the ken of the average attorney who does not practice trusts and estates law. In any event, this kind of expert testimony

³ Of course, the People have no objection to Your Honor delivering to the jurors the pattern jury instruction on expert witness testimony.

is properly admitted “for the purpose of clarifying an area of which the jurors have a general awareness.” Mooney, 76 N.Y.2d at 832 (Kaye, J., dissenting).

Despite the well-established precedent allowing for Mr. Forger’s testimony, the defendants have moved to preclude it. Their arguments need not detain the Court for long.

With respect to the first category of Mr. Forger’s testimony, the defendants employ a scattershot approach. They contend that the People should not be permitted to call an expert to testify about the professional standards and ethical obligations of trusts and estates attorneys because doing so would be, as they see it, improper impeachment of the People’s witnesses, irrelevant, confusing, prejudicial, and otherwise “improper.”

The first of these arguments represents yet another rehashing of the defendants’ motion to preclude certain testimony of Henry Christensen (Br. at 6-10). Your Honor already denied that motion. Nevertheless, the defendants persist in making the same argument, both in the instant motion and in a separate motion to preclude certain testimony of Warren Whitaker. As the People have explained to defense counsel, ad nauseum, New York law recognizes only “three categories of proscribed forms of impeachment testimony” – evidence of the witness’s bad general character, prior contradictory statements, and collateral matters. Prince, Richardson on Evidence § 6-419 [Farrell 11th ed.]. Clearly, background testimony about trusts and estates law falls within none of those narrow categories. That Mr. Forger might, by implication, contradict the testimony of Messrs. Christensen and Whittaker does not alter that conclusion. “A party may prove a material fact in a case by different witnesses though the incidental effect may be contradiction of each other’s testimony, and there is nothing prohibiting a party from presenting divergent expert opinions on a particular subject, the conflicting testimony simply creating a credibility question for the jury, which is free to accept or reject all or parts of a witness’s testimony.” People v. Bass, 277 A.D.2d 488, 492 (3d Dept. 2000) (internal citations omitted). The First Department recently confirmed that principle in People v. Kozlowski, 47 A.D.3d 111 (1st Dept. 2007), finding that similar testimony from a prosecution witness “did not fall within any of the three categories of proscribed forms of impeachment testimony.” Id. at 119 (citing Becker v. Koch, 104 N.Y. 394, 401 (1887); Prince, supra, at § 6-419). See also Remington Arms Co. v. Cotton, 190 A.D. 600, 610 (1st Dept. 1920) (“[A] party may introduce evidence and swear witnesses to contradict any fact testified to by his witnesses where it appears that such testimony is not offered for the purpose of impeachment.”).

The defendants’ second argument – that Mr. Forger’s testimony is irrelevant – is belied by their own trial strategy. The centerpiece of Mr. Hafetz’s opening statement was that Henry Christensen and Warren Whitaker are lions of the trusts and estates bar,⁴ and therefore should be

⁴ Mr. Hafetz described Mr. Christensen as “a well respected lawyer, an extremely well respected lawyer, an attorney, as the prosecutor says, from the venerable firm of Sullivan and Cromwell, a leader in the Trusts and Estates Bar” (Tr. at 288). Similarly, with respect to Warren Whitaker, Mr. Hafetz said this:

No one rushed him in. No one rushed him out. No one told him, hey, pal, you got two minutes with this lady and get out of here. Whitaker stayed as long as he thought was appropriate. . . . Whitaker is a highly respected lawyer. In fact, he is so well respected that his peers in the Trusts and Estates Bar in New York State selected him as the chairman of the New York State Bar Association Committee on Trusts and Estates. He is an independent, highly qualified, extremely well respected professional. And Whitaker will

believed when they testify to having met their professional obligations to Mrs. Astor. *Ergo*, argued Mr. Hafetz, the defendants could not be guilty of any crime.⁵ Similarly, Mr. Puccio described Whitaker as a “well-educated” “expert,” whom Mr. Morrissey brought in as “a top person to accomplish what Brooke Astor wants” (Tr. at 351, 352).⁶

Mr. Hafetz followed the same tack in his cross-examination of Mr. Christensen. First, he elicited four pages’ worth of testimony about Christensen’s credentials (Tr. at 4880-84; 4896). Then, having back-doored Christensen’s qualifications as an expert, Mr. Hafetz delved into the background terminology of trusts and estates,⁷ before turning to: (1) how Mr. Christensen assessed testamentary capacity (Tr. at 5030); (2) whether Christensen considered his discussions with Mr. Marshall to serve as “fulfillment of [his] obligations to a client” (Tr. at 5060); and (3) Christensen’s opinion, “as a trusts and estates lawyer,” on whether it is “necessary to have an opinion of a doctor to determine testamentary capacity of someone to execute a will where they have been diagnosed with Alzheimer’s” (Tr. at 5104). In effect, Mr. Hafetz elicited Christensen’s “expert” opinion testimony about the ethical quality of Christensen’s representation of Mrs. Astor.

Mr. Hafetz was more overt in his cross-examination of Mr. Whitaker. Mr. Hafetz began by asking Whitaker, “as a trust and estates expert,” ten questions about testamentary capacity (Tr. at 7236, *et seq.*). Mr. Whitaker thus gave his views on whether “the mental capability for testamentary capacity is less than that necessary for executing a contract” (Answer: “Yes. That’s correct.”); whether a testator needs to understand “all the language of the will instrument” (Answer: “No.”); whether a medical opinion as to testamentary capacity is needed if the testator has Alzheimer’s disease (Answer: “No. It certainly is not.”) (Tr. at 7237, 7238). Mr. Hafetz also

testify that on January 12, 2004, along with his partner Robert Knuts, who also is no schlock lawyer. Knuts is a former high level official in the SEC, this is the person he chose to bring with him on that date. They sat. They spoke to Mrs. Astor and they explained the codicil to her

(Tr. at 282).

⁵ On that note, Mr. Hafetz said this:

[I]f Terry Christensen is believed and credible, as indeed he should be, that Mrs. Astor understood what she was doing in December of ‘03, in a will that was slightly more difficult even to understand than January of ‘04, then it follows that Mrs. Astor was capable of understanding what she was doing in January of ‘04. This is a mountain that the prosecution cannot overcome

(Tr. at 292).

⁶ Mr. Puccio went on to say this about Whitaker:

Mr. Whitaker deals with elderly people all the time. You think the evidence is going to show that this is the first elderly person he has ever met? I submit the evidence will show that he is experienced, he is somebody that knows how to size up a person, knows what they understand. And he explained to her – hey, is this a complicated concept – you are going to leave your money to his son and he in turn can leave it to his wife

(Tr. at 356).

⁷ For example, Mr. Hafetz asked Mr. Christensen to explain the difference between a will and codicil (Tr. at 4989), describe his understanding of the requirements for testamentary capacity (Tr. at 5029), and define Durable Power of Attorney (Tr. at 5088).

confirmed, with a leading question, that Whitaker knows Mr. Christensen “to be a respected member of the trust and estate bar” (Tr. at 7245), thereby reinforcing the theme of Hafetz’s opening statement.

Remarkably, having made Christensen and Whitaker’s professional performances central to their case, the defendants now argue that “it is simply not relevant whether either had a conflict or otherwise violated professional standards” (Br. at 11), and seek to block a disinterested expert from giving the jury objective standards to assess those very performances. This sword-and-shield approach should be rejected. See People v. Acevedo, 256 A.D.2d 162, 162 (1st Dept. 1998) (approving the testimony of a police officer on the “propriety of the force used under the Police Departmental guidelines” where the defendant made those guidelines an issue in the case). But even if defense counsel had said nothing about the credentials and diligence of Messrs. Christensen and Whitaker, Mr. Forger’s testimony would nonetheless be relevant. It tends to show that the defendants created a situation in which Mrs. Astor’s attorneys could not – and did not – uphold their duty to assess her capacity to execute changes to her estate plan; in other words, the defendant created the circumstances that permitted them to carry out their crimes. The natural inference, of course, is that in doing so, the defendants knew that Brooke Astor lacked the requisite capacity. Camiola, 225 A.D.2d at 381; Schlick, 45 A.D.3d at 436.

The defendants go on to pronounce that “an ‘expert’ lawyer is not permitted to testify about the legal standards that govern conduct” (Br. at 12). No such blanket exclusion exists; in fact, quite the contrary is true. Goldmen, 9 A.D.3d at 285; Schwartz, 21 A.D.3d at 308; Lurie, 249 A.D.2d at 121-22. The cases cited by the defendants stand for the uncontroversial propositions that an expert cannot testify to the ultimate issue at trial, Russo v. Feder, 301 A.D.2d 63, 68-69 (1st Dept. 2002) (rejecting an expert “legal opinion as to what performance or absence thereof constitutes legal malpractice”), or usurp the trial court’s role in charging the jury on the relevant law, Bilzerian, 926 F.2d at 1294 (explaining that expert testimony “must be carefully circumscribed to assure that the expert does not usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it”). The People do not disagree – these principles apply regardless of whether the expert is an attorney. But Russo and Bilzerian are clearly distinguishable; Mr. Forger will offer no testimony about the defendants’ subjective intent, nor will he instruct the jury on grand larceny, conspiracy or scheme to defraud.

The defendants also rely on a federal trial court’s unpublished order precluding the introduction of expert testimony on legal ethics in the prosecution of an attorney for his role in a “bumper car” insurance fraud scheme (Br. at 12). United States v. Kaplan, 02 Cr. 883 (DAB) (S.D.N.Y. March 25, 2004). In Kaplan, Judge Batts reasoned that “the disciplinary rules that [the defendant] allegedly violated bear only an attenuated relationship to the crimes charged in the Indictment.” Id. at 4. Here, by contrast, the issue of whether Messrs. Christensen and Whitaker followed generally-accepted practices and fulfilled their obligations to Mrs. Astor is central to the case, in no small part from the defendants’ trial strategies. Consequently, the holding of Kaplan has no authority here, persuasive or otherwise.

The defendants' objections to the second category of Mr. Forger's testimony, regarding Mrs. Astor's estate planning documents, fare no better. In the main, the defendants claim that such testimony is unnecessary because the "jury plainly has the language skills and intelligence to decide what patterns, if any, are evidence in Mrs. Astor's wills and codicils" (Br. at 3).⁸ In support of this argument, the defendants helpfully note that the documents are "written in English" (Br. at 2), and cite an inapposite decision of the Fourth Department, Hess v. Zoological Soc'y of Buffalo, Inc., 134 A.D.2d 824 (4th Dept. 1987) (holding that the language of a zoo construction contract, including the phrase "negotiated proposal," was "clear and unambiguous; therefore, interpretation of the contract was a matter for the court").

Again, the defendants' argument falls under the weight of their own trial tactics. As Mr. Hafetz told the jury in his opening statement, "no one is saying that when documents are prepared, will documents, that a testator would read it and understand it by themselves. I don't know if any of you jurors ever prepared a will or had wills signed, but, obviously, it is a document like many legal documents, that the lawyer walks you through and explains to you" (Tr. at 283). The People wholeheartedly agree – like testators, the jurors cannot be expected to understand Mrs. Astor's estate planning documents "by themselves," hence the need for Mr. Forger to walk them through those documents. But Mr. Hafetz did not stop there. He told the jury: "You will learn from the evidence that this is a pattern, a pattern of Mrs. Astor. Patterns are important in this case, very significant to remember" (Tr. at 301 (emphasis added)). To reinforce the "pattern" theme of his opening statement, Mr. Hafetz repeatedly invoked the image of "a tide, a tide coming in, coming back to Tony, back to her son," suggesting that the first and second codicils were the natural and inevitable conclusion to Mrs. Astor's pattern of charitable giving (Tr. at 334).⁹ Later, after informally qualifying Christensen as an expert, Mr. Hafetz stated, "I want to ask you some questions about Mrs. Astor's will making patterns" (Tr. at 4903 (emphasis added)). Mr. Hafetz proceeded to introduce several demonstrative exhibits so that Christensen could do just that (Tr. at 4912-25; see also Tr. at 4896-4920; Tr. at 4925; Def. Exs. x 100, x 200, x 500). Similarly, Mr. Hafetz elicited Whitaker's expert opinion on whether the January 12, 2004 codicil was consistent with the "pattern of the last several years" of Mrs. Astor's life (Tr. at 7283), and asked Whitaker to explain the charitable remainder unitrust in great detail.¹⁰ By taking these steps, the defendants have foreclosed any claim that the jury needs no help interpreting the wills and codicils.

⁸ In the eyes of the defendants, the jurors are a strange group indeed: on the one hand, they are capable of tracking patterns through Mrs. Astor's complex, voluminous estate planning documents without aid; but on the other hand, they are at risk of being so confused by Mr. Forger's testimony as to believe they are "being asked to judge whether either or both of these lawyers followed the ethical rules" (Br. at 13).

⁹ Mr. Hafetz employed the "tide" metaphor early in his opening statement:

That meant that the dutiful, loyal, obedient Tony Marshall, in her love for him, as only a mother-son love can be from time immemorial, recognized who he was and what he was. And like a tide flowing in at the end, she decided that's where she wants her money to go. . . . [S]he decided to revert and do what her life pattern had always been. That is to leave her money, her own personal money, which she never had any use in giving to charity, used almost nothing of it in her lifetime – it only changed when he married to Charlene – to leave him what was left, to revert to give that money to her son, Tony

(Tr. at 318).

¹⁰ During Mr. Hafetz's cross-examination of Mr. Whitaker, the following exchange took place:

In what appears to be an alternative (and contradictory) argument, the defendants concede that the estate planning documents require explication, but argue that the People can elicit such testimony only from Christensen and Whitaker because they prepared the documents (Br. at 5, 15).¹¹ As a preliminary matter, if this were the rule (which it assuredly is not), then the jury should hear no testimony about the wills and codicils Mrs. Astor executed prior to when Christensen began drafting them. Perhaps recognizing the absurdity of this rule, the defendants have already violated it by eliciting “pattern” testimony from Christensen with respect to wills dating back to 1960, before Christensen even graduated from law school (Tr. at 4916, et seq.).

In reality, of course, the defendants are merely arguing that the People must elicit relevant evidence from witnesses of the defendants’ own choosing. The law, however, is just the opposite. Absent a defense showing of undue prejudice, “the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, . . . a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it.” Old Chief v. United States, 519 U.S. 172, 186-87 (1997). This well-established rule recognizes “the need for evidence in all its particularity to satisfy the jurors’ expectations about what proper proof should be.” Id. at 188. The defendants have already elicited testimony from Messrs. Christensen and Whitaker about Mrs. Astor’s pattern of giving, so they cannot claim unfair prejudice when the People do the same from a disinterested unpaid expert.

I thank the Court for its consideration of this matter.

Respectfully submitted,



Sally Pritchard
Assistant District Attorney

Q: It says there, “my trustees shall pay a unitrust an amount equal to seven percent of the fair market value of the assets of the trust valued as to the first day of each taxable year of the trust.” Can you explain what the seven percent means? Is that an interest payment or income payment, explain what it is.

A: You take the entire value of the trust the first day of each year. If it is 60 million, you take the seven percent of the entire value of all assets, you calculate seven percent of that million – so if it is 60 millions, it is four point two million dollars, and that is the amount that would be paid during that first year to Mr. Marshall, one quarter each three months

(Tr. at 7287).

¹¹ It is not lost on the People that the defendants waited until June 4, the last day of Mr. Christensen’s testimony, to file a brief arguing that any evidence of Mrs. Astor’s pattern of estate planning should be elicited only from Mr. Christensen.