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## The Use of Facilitated Communication in Child Abuse Prosecutions

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## THE USE OF FACILITATED COMMUNICATION IN CHILD ABUSE PROSECUTIONS

### I. INTRODUCTION

Before allowing a child who has alleged that he or she has been abused to testify at trial, a judge must be satisfied that the child is competent.<sup>1</sup> In other words, the judge must find that the child has the ability to "observe, record, recollect and recount as well as an understanding of the duty to tell the truth."<sup>2</sup> Determining whether children with certain developmental disorders are competent to testify has recently presented the courts with some difficult issues, as evidenced by a recent case in which the Supreme Court of Kansas upheld a conviction based primarily on the apparent testimony of a nonverbal, nonexpressive child.<sup>3</sup>

Marc R. Warden was convicted in 1992 for indecent liberties with a child.<sup>4</sup> The allegations against him were apparently made by a nonverbal, nonexpressive twelve-year-old autistic boy who was a resident at the Institute of Logopedics in Wichita, Kansas, where Warden was employed as a resident care giver.<sup>5</sup> The boy, referred to throughout the trial as J.K., apparently made the allegations against Warden using a relatively new, and controversial, method of communication known as facilitated communication.<sup>6</sup>

At trial, Warden challenged the competency of J.K.'s testimony, arguing that this novel technique had "not met with general acceptance within the scientific community and therefore state-

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1. See MCCORMICK ON EVIDENCE § 62, at 90 (John W. Strong, et al. eds., 1992).

2. *Id.* at 91; see also *In re Luz P.*, 595 N.Y.S.2d 541, 543 (N.Y. App. Div. 1993) ("The capacity of a witness to observe, remember and communicate goes to the question of the competency of that witness.").

3. See *Kansas v. Warden*, 891 P.2d 1074 (Kan. 1995).

4. See *id.*

5. See *id.* at 1081.

6. See *id.* at 1081-82.

ments made through facilitated communication [did] not satisfy [the general acceptance test of] *Frye v. United States*.”<sup>7</sup> The trial court, however, held that *Frye* was not applicable, instead framing the issue simply as “whether [the child] was communicating.”<sup>8</sup> The court stated that it was “willing to place [its] faith in the jury, let them hear the evidence and [allow Warden to] make the argument to them” against the technique’s validity.<sup>9</sup> Warden was convicted and sentenced to three to ten years’ imprisonment.<sup>10</sup>

This was not the first case in which a nonverbal, nonexpressive child apparently made allegations of sexual abuse by means of facilitated communication.<sup>11</sup> Indeed, between 1990 and 1993, more than twenty such charges gained national attention,<sup>12</sup> and one critic places the number closer to sixty or

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7. *Id.* at 1084 (citing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)).

8. *Id.*

9. *Id.* at 1085.

10. See *id.* at 1084.

11. See, e.g., Mark Sauer, *Out of the Quiet: Autistics “Speak” But Their Stories of Abuse are Frightening*, SAN DIEGO UNION-TRIB., May 23, 1993, at D1 (sexual abuse allegation by 12-year-old autistic girl against her father); *Allegations by FC of Sexual Abuse Have Been Challenged*, WASH. POST, Jan. 17, 1995, at Z12 (sexual abuse allegation by 16-year-old autistic girl against her father); Richard Saltus, *Sexual Abuse Charges Fuel Doubts About “Breakthrough” Method*, BOSTON GLOBE, June 28, 1993, at 37 (sexual abuse allegation by 15-year-old autistic girl against her guardian’s fiancé); Ellen Miller, *Parents Win Back Retarded Son, Move*, DENVER POST, Aug. 31, 1994, at A01 (sexual abuse allegation by 41-year-old severely retarded man against his father); Alex Rodriguez, *Facilitating Abuse Charges?*, CHICAGO SUN-TIMES, May 22, 1994, at 16 (sexual abuse allegation by 10-year-old autistic girl against her father); J. Trout Lowen, *Mexico Couple Blames Facilitator in \$10M Lawsuit*, SYRACUSE HERALD-J., Feb. 24, 1994, at C1 (sexual abuse allegation by 12-year-old autistic boy against his step-father); Eugene L. Meyer, *Autistic Girl’s Rape Case Heightens Debate Over “Facilitated Communication,”* WASH. POST., Dec. 27, 1993, at B01 (rape allegation by 9-year-old autistic girl against teacher’s aide); Pat Burson, *Facilitated Communication: Is it Harmful Manipulation? Pandora’s Box: The Technique That Aims to Unlock the Silent World of the Verbally Impaired Has Led to Troubling Court Cases*, ATLANTA CONST., Oct. 20, 1993, at C1 (sexual abuse allegations by 13-year-old autistic boy against family members).

12. See Richard Saltus, *Sexual Abuse Charges Fuel Doubts About “Breakthrough” Method*, BOSTON GLOBE, June 28, 1993, at 37.

more.<sup>13</sup> These charges have been leveled against parents, teachers, aides, siblings, and others.<sup>14</sup>

Facilitated communication evidence, whether in the form of an out-of-court statement or in-court testimony, has proved to be problematic for the courts. Because facilitated communication, on its face, fails to fall neatly into any of the contemporary definitions of scientific evidence, proponents argue that it should not be held to the evidentiary standards for such evidence. In some instances, this argument has prevailed, allowing facilitated communication evidence to be introduced in criminal prosecutions.

This article argues that because the theoretical underpinnings of this novel technique challenge current scientific thinking in the area of developmental disorders, facilitated communication constitutes scientific evidence. It concludes that as scientific evidence, facilitated communication fails to meet the standards for the admissibility of such evidence.

## II. FACILITATED COMMUNICATION: THE PHENOMENON

Facilitated communication has been defined as "a method of augmentative and alternative communication (AAC) that involves a facilitator providing varying degrees of physical support, as well as emotional and communicative support, to the user of a communication aid."<sup>15</sup> More specifically, it is a technique used to assist nonverbal and nonexpressive people, especially those suffering from autism, in communicating through the use of a typewriter, keyboard, letter board, or other similar device.<sup>16</sup>

During a facilitated communication session, a person, referred to as the facilitator, provides support to the subject's finger,

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13. See Howard C. Shane, *The Facilitated Nightmare: The Dark Side of the Phenomenon*, in FACILITATED COMMUNICATION: THE CLINICAL AND SOCIAL PHENOMENON 299, 302 (Howard C. Shane ed., 1994).

14. See *id.* at 303.

15. M. Lori Janzen-Wilde et al., *Successful Use of Facilitated Communication With an Oral Child*, 38 J. SPEECH & HEARING RES. 658, 658 (1995).

16. See John W. Jacobsen et al., *A History of Facilitated Communication*, 50 AM. PSYCHOLOGIST 750 (1995).

wrist, elbow, or shoulder while the subject apparently points to the keyboard, typewriter, letter board, or other similar device.<sup>17</sup> Those who serve as facilitators range from professionals, such as psychologists, educators, or speech pathologists, to lay persons, such as the subject's family members and friends.<sup>18</sup>

Facilitated communication was developed in the 1970's in Melbourne, Australia by Rosemary Crossley. Crossley originally began using the technique with cerebral palsy patients, but later used it with autistic individuals.<sup>19</sup> At first, Crossley's new technique was met with little, if any, skepticism.<sup>20</sup> In 1989, however, facilitated communication lost much of its favor with the Australian public as the result of unfounded sexual abuse allegations and negative stories in the press.<sup>21</sup>

Facilitated communication was introduced into the United States by Douglas Biklen of Syracuse University, who visited Australia in 1990 to study the technique in detail.<sup>22</sup> Soon after his return, he published his seminal article on the subject<sup>23</sup> and established the Facilitated Communication Institute at Syracuse University.<sup>24</sup> Today, Biklen is the chief proponent of facilitated communication in the United States.<sup>25</sup>

Since its introduction into the United States by Biklen, facilitated communication has been the subject of a great deal of criticism. One commentator suggests that "[i]t seems counterintuitive that these institutionalized individuals could be able to spell/type words and produce complex phrases/sentences via [facilitated communication] when such literacy skills prove impossible for many illiterate individuals with significantly

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17. See Kathleen M. Dillon et al., *Belief In and Use of a Questionable Technique, Facilitated Communication, For Children With Autism*, 75 PSYCHOL. REP. 459 (1994).

18. See Janzen-Wilde et al., *supra* note 15, at 658.

19. See Jon Palfreman, *The Australian Origins of Facilitated Communication*, in FACILITATED COMMUNICATION: THE CLINICAL AND SOCIAL PHENOMENON 33 (Howard C. Shane ed., 1994).

20. See *id.* at 40-41.

21. See *id.* at 53-54.

22. See *id.* at 52.

23. See Douglas Biklen, *Communication Unbound: Autism and Praxis*, 60 HARV. EDUC. REV. 291 (1990).

24. See Palfreman, *supra* note 19, at 52.

25. See Howard C. Shane, *Facilitated Communication: Factual, Fictional, or Factitious*, in FACILITATED COMMUNICATION: THE CLINICAL AND SOCIAL PHENOMENON 1, 10 (Howard C. Shane ed., 1994).

higher levels of measured intelligence and formal education."<sup>26</sup> Others suggest that the facilitator is the actual source of the communication.<sup>27</sup> Critics point to the fact that proponents of facilitated communication have offered no empirical evidence supporting the technique.<sup>28</sup> One critic argues that, in addition to unfounded sexual abuse allegations, widespread acceptance of the technique could present many new hazards, including problems with decisions involving medical care, educational placements, personal relationships, and choice of lifestyle.<sup>29</sup> Remarkably, however, despite the criticism and negative data associated with facilitated communication, the technique "continues to be disseminated and implemented widely."<sup>30</sup>

### III. FACILITATED COMMUNICATION IN THE COURTROOM

Facilitated communication presents intriguing problems regarding a witness's competency. Because of the physical contact between the subject and the facilitator, it is not clear who is actually the source of the communication, and courts that have addressed the issue have differed on whether facilitated communication constitutes "scientific evidence."<sup>31</sup>

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26. W. David Crews, Jr. et al., *An Evaluation of Facilitated Communication in a Group of Nonverbal Individuals With Mental Retardation*, 25 J. AUTISM & DEVELOPMENTAL DISORDERS 205, 212 (1995).

27. See, e.g., Barbara B. Montee, *An Experimental Analysis of Facilitated Communication*, 28 J. APPLIED BEHAV. ANALYSIS 189 (1995).

28. See, e.g., Gina Green & Howard C. Shane, *Science, Reason, and Facilitated Communication*, 19 J. ASS'N FOR PERSONS WITH SEVERE HANDICAPS 151 (1994).

29. See Shane, *supra* note 13, at 301-11.

30. Montee, *supra* note 27, at 198.

31. Courts generally categorize scientific evidence as either "hard" or "soft." See Charles Bleil, *Evidence of Syndromes: No Need for a Better Mousetrap*, 32 S. TEX. L. REV. 37, 40 (1990). "Hard" scientific evidence is that "which is quantifiable based on nonhuman, objective testing devices." *Id.* DNA evidence is a classic example. See *id.* "Soft" scientific evidence, on the other hand, "refers to nontraditional psychological evidence in the form of behavioral science testimony, or opinion testimony normally given in court by social workers, psychologists, and psychiatrists." *Id.* Examples of this class of evidence include battered woman syndrome, rape trauma syndrome, and sexually abused child syndromes. See *id.* at 48-56. Some commentators argue that "soft" scientific evidence should not be held to the same evidentiary standards which apply to "hard" scientific evidence. See *id.* at 67. However, courts generally hold both hard and soft scientific evidence to the same standard for admissibility, and those courts which have held facilitated communication to the standards of scientific evidence, have classified it as "soft" scientific evidence. See, e.g., *Ex. rel. Jenny S. v. Mark S.*, 593 N.Y.S.2d 142 (N.Y. Fam. Ct. 1992).

Of those courts which have classified facilitated communication evidence as scientific, none have permitted its introduction into the courtroom. On the other hand, of those courts which have held that it is not scientific, at least two allowed its use, one at trial and another at a grand jury hearing.<sup>32</sup>

In order to be admissible at trial, evidence characterized as scientific must satisfy certain evidentiary rules. Most state courts have adopted the general admissibility test of *Frye v. United States*.<sup>33</sup> For scientific evidence to be admissible under *Frye*, it must be shown to have met with the general acceptance of the relevant scientific community.<sup>34</sup> Critics of *Frye* argue that it precludes the introduction of novel, yet reliable, evidence.<sup>35</sup>

Those courts that reject *Frye* subject scientific evidence to some variation of a reliability or relevancy standard.<sup>36</sup> For example, in *Daubert v. Merrell Dow Pharmaceuticals*,<sup>37</sup> the United States Supreme Court held that courts determining the reliability or relevancy of scientific evidence should consider the following: (1) whether the theory or technique is amenable to empirical testing and whether it has, in fact, been tested; (2) whether the theory or technique has been published and subjected to review by peers in the scientific community; (3) the theory or technique's rate of error; and finally (4) the general acceptance, or lack thereof, which the theory or technique has received from the scientific community.<sup>38</sup>

The first reported case involving facilitated communication, *Ex rel. Jenny S. v. Mark S.*,<sup>39</sup> occurred in a New York family court. It involved an action brought by the Department of Social Services to remove a sixteen-year-old nonverbal autistic child from her home because of sexual abuse allegations against

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32. See *infra* notes 39-78 and accompanying text.

33. 293 F. 1013 (D.C. Cir. 1923).

34. See *id.* at 1014.

35. See James M. Hall, Note, *Facilitated Communication: The Key to Unlocking the Skull?*, 44 SYRACUSE L. REV. 1059, 1074 (1993).

36. See, e.g., *Spencer v. Commonwealth*, 393 S.E.2d 609, 621 (Va. 1990).

37. 509 U.S. 579 (1993).

38. See *id.* at 593-94.

39. 593 N.Y.S.2d 142 (N.Y. Fam. Ct. 1992).

the child's father.<sup>40</sup> These abuse allegations were supposedly made by the child, referred to by the court as Jenny, using facilitated communication.<sup>41</sup>

Pursuant to New York law, which allows the out-of-court statements made by a child "relating to any allegations of abuse or neglect" to be admitted into evidence,<sup>42</sup> the Department of Social Services sought to introduce Jenny's out-of-court allegations.<sup>43</sup> Therefore, the issue before the court was "whether the child herself made a statement."<sup>44</sup>

Jenny's family argued that the evidence elicited by facilitated communication was inadmissible because the technique constitutes scientific evidence which fails to meet the general acceptance test of *Frye*.<sup>45</sup> The Department of Social Services, on the other hand, argued that facilitated communication does not constitute scientific evidence, but rather, "a simultaneous transmission from written English to spoken English and that therefore *Frye* does not apply."<sup>46</sup> Consequently, since the individual serving as the facilitator "is merely a transmitter," the only question presented to the court is the qualifications of the facilitator.<sup>47</sup> Alternatively, the Department of Social Services argued that even if *Frye* was applicable, facilitated communication "has passed from the state of experimentation and uncertainty to that of reasonable demonstrability."<sup>48</sup>

The court first held that facilitated communication constitutes "soft" scientific evidence because Jenny was "assertively assisted" in typing her allegations, an "inherently suggestive procedure," and that these allegations could not be admitted as evidence absent testimony concerning the mechanics of the procedure.<sup>49</sup> The court concluded that *Frye* was applicable.<sup>50</sup>

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40. See *id.* at 143-44.

41. See *id.*

42. N.Y. FAM. CT. ACT § 1046(a)(vi) (McKinney 1997).

43. *Ex rel. Jenny S.*, 593 N.Y.S. 2d at 143.

44. *Id.* at 143-44.

45. See *id.* at 145.

46. *Id.* at 150.

47. See *id.*

48. *Id.* at 145.

49. See *id.* at 146.

50. See *id.* at 148.



Using the *Frye* analysis, the court first found that the relevant scientific community was made up of physicians, psychologists, psychiatrists, educators, neurologists, and speech and language pathologists.<sup>51</sup> After hearing the testimony of several experts from this group, the court concluded that facilitated communication had not met with general acceptance in the relevant scientific community and was, therefore, inadmissible.<sup>52</sup>

The day after *Jenny S.* was decided, another New York court handed down a similar decision.<sup>53</sup> *In re M.Z.* involved a ten-year-old partially verbal boy with Down's syndrome who allegedly made abuse allegations against his parents.<sup>54</sup> As in *Jenny S.*, the issue in this case was the admissibility of these out-of-court allegations.<sup>55</sup> The court characterized facilitated communication as scientific and subjected it to the *Frye* standard.<sup>56</sup>

During the hearing, the state presented the testimony of several "experts" in the field of facilitated communication. Among these experts were a special education teacher, a psychiatrist, and a speech pathologist.<sup>57</sup> Each of these three experts testified that he or she was introduced to facilitated communication through "lectures, workshops and/or writings of Dr. Douglas Biklen of Syracuse University."<sup>58</sup>

The psychiatrist was the mother of an autistic daughter who apparently could communicate using facilitated communication with some of her teachers, and she testified that even though she was unable to use the technique herself, she believed that it worked.<sup>59</sup> She gave her expert opinion as a psychiatrist that

facilitated communication is a means to overcome speech impairments in the case of individuals suffering from autism, by allowing them to bypass impaired limbic function of the brain; in the case of other disabilities, it overcomes

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51. *See id.*

52. *See id.* at 149-50.

53. *See In re M.Z.*, 590 N.Y.S.2d 390 (N.Y. Fam. Ct. 1992).

54. *See id.* at 390.

55. *See id.*

56. *See id.* at 391-92.

57. *See id.* at 395.

58. *Id.*

59. *See id.* at 395-96.

"dyspraxia"—a condition described as an inability to make the appropriate physical or neurological response to a verbal command even though the latter is understood.<sup>60</sup>

However, she admitted that she "was not aware of any studies as to either of these theories as they related to facilitated communication, and that they involved premises about the nature of both autism and Down's syndrome which differed from the current prevailing view as to the etiology of those conditions."<sup>61</sup>

The speech pathologist testified that she had performed eighty to one hundred evaluations of individual children to determine if facilitated communication would be appropriate.<sup>62</sup> Of these evaluations, she concluded that facilitated communication would be appropriate for all but one of the children.<sup>63</sup> Apparently discounting the possibility that the technique may not yield results, when asked how much training is required for one to become a facilitator she replied that "you know you're not doing it right if you don't get results."<sup>64</sup>

At the close of the hearing, the court held that a *prima facie* case for the admissibility of facilitated communication evidence with a child with Down's syndrome had not been made.<sup>65</sup> The court based its opinion on the following:

The experts . . . did not present any coherent theory as to the underlying principle. . . . [The experts] indicate[d] that the technique itself is subject to manipulation, and produces variable results with different children and different facilitators; that there is no established procedure for training, monitoring or evaluating practitioners; and that [the experts] were not aware of any empirical studies relating to the technique or its results. With the exception of one child, there was no evidence of experience using facilitated communication with children suffering from Down's syndrome. According to [these experts], there is a body of opinion among experts in autism and speech impairment which

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60. *Id.* at 395.

61. *Id.* at 395-96.

62. *See id.* at 396.

63. *See id.*

64. *Id.*

65. *See id.* at 399.

questions the underlying theories embodied in the promotion of facilitated communication for use with autistic and Down's syndrome children.<sup>66</sup>

On March 26, 1993, the third reported decision dealing with facilitated communication was handed down.<sup>67</sup> Unlike the two cases which preceded it, *People v. Webb* involved the use of facilitated communication to present live testimony before a grand jury.<sup>68</sup> In this case, a criminal defendant sought to have his indictment dismissed on the grounds that the grand jury proceeding was defective.<sup>69</sup> The defendant based this challenge on, among other things, the fact that facilitated communication was used to present the testimony of the victim witness.<sup>70</sup> The witness, a child who suffered "great difficulty in performing the motor acts of speech," apparently testified before the grand jury by pressing keys on a mechanical device which, in turn, produced a synthesized voice sound for the appropriate letter of the alphabet, which, when strung together, formed word sounds.<sup>71</sup> During the testimony, the subject's wrist was supported by a facilitator.<sup>72</sup> Precautions were taken to prevent the facilitator from influencing the witness' responses. During the testimony, in order to prevent him from hearing the questions propounded to the witness, the facilitator listened to "white noise" through headphones.<sup>73</sup> Additionally, the facilitator swore under oath to "assist this witness to communicate his answers without adding to, subtracting from or changing in any way the testimony" of the witness.<sup>74</sup>

The court distinguished this case from *Jenny S.* and *M.Z.* on the basis that those two cases did not involve the use of facilitated communication to present live testimony, but rather dealt with out-of-court statements.<sup>75</sup> In this case, the grand jurors could actually witness facilitated communication in practice,

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66. *See id.*

67. *See People v. Webb*, 597 N.Y.S.2d 565 (N.Y. Co. Ct. 1993).

68. *See id.* at 567.

69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.*

73. *See id.*

74. *Id.* at 569.

75. *See id.* at 568.

and presumably could evaluate the credibility of the technique for themselves.<sup>76</sup>

In stark contrast to the *M.Z.* court's statement that the mechanics of facilitated communication were inherently suggestive, the *Webb* court opined that facilitated communication does not involve interpretations or "substitution of testimony by or from a third party," and was appropriate in the context of a grand jury proceeding.<sup>77</sup> However, the court stated that "[i]f, contrary to the Court's impression from review of the Grand Jury minutes, this mode of communication does involve reliance upon scientific conclusion, then there may well be serious questions as to whether those procedures enjoy sufficient acceptance in the scientific community which uses them to justify their reception and use in evidence."<sup>78</sup>

Three days after the *Webb* decision, a New York appellate court effectively overruled *Jenny S.* and *In re M.Z.*, in a case involving sexual abuse allegations by an eleven-year-old autistic girl against both of her parents.<sup>79</sup> The girl, referred to in the court's opinion as Luz, was both nonverbal and mentally retarded.<sup>80</sup> She apparently made the abuse allegations while using facilitated communication with one of her school teachers.<sup>81</sup> On the basis of these allegations, the Department of Social Services removed her from her home and initiated legal actions against her parents.<sup>82</sup>

At a fact-finding hearing in the family court, the county attorney sought to elicit testimony from Luz using facilitated communication.<sup>83</sup> The parents objected, arguing that in order to be admissible, such evidence must satisfy the standards of *Frye*.<sup>84</sup> The court agreed and then dismissed the case when the

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76. *See id.*

77. *Id.* at 569.

78. *Id.*

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

80. *See id.* at 542.

81. *See id.*

82. *See id.*

83. *See id.* at 543.

84. *See id.*

county attorney requested an adjournment so that he could call expert witnesses from out of town for the *Frye* hearing.<sup>85</sup>

The appellate court characterized Luz's facilitator as a "transmitter who would convey [Luz's] responses word for word,"<sup>86</sup> and generally compared facilitators to interpreters, translators, sign-language signers, or "anyone else who transmits the testimony of a witness."<sup>87</sup> Holding that the family court erred in determining that facilitated communication was subject to the *Frye* test, the court stated that

[t]he test for the court in cases such as these is a pragmatic one. Can the interpreter, or in this case the facilitator, effectively communicate with the witness and reliably convey the witness's answers to the court? A determination of these questions does not require expert testimony. To the contrary, the proffered facilitated communication lends itself to empirical rather than scientific proof. Thus, the test proposed by the County Attorney, whereby the court could question Luz outside the presence of the facilitator and then hear her responses through facilitated communication, should adequately establish whether this is a reliable and accurate means of communication by Luz. Fact-specific questions can be devised which should demonstrate whether the answers are subject to the influence, however subtle, of the facilitator. If the court is satisfied from this demonstration that the facilitator is 'qualified' to transmit communications from Luz to the court, then the facilitator may be appointed as an interpreter . . . .<sup>88</sup>

Marc Warden's case, discussed in the introduction, was the first in which facilitated communication was utilized to present "live" courtroom testimony, and it remains the sole reported case in which the use of facilitated communication has led to a criminal conviction.<sup>89</sup> During Warden's trial, Theresa Conrad served as the facilitator for J.K.<sup>90</sup> Conrad had served as J.K.'s primary facilitator prior to trial, and it was through her that J.K. allegedly made the sexual abuse charges against War-

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85. *See id.*

86. *Id.* at 544.

87. *Id.* at 545.

88. *Id.*

89. *See State v. Warden*, 891 P.2d 1074 (Kan. 1995).

90. *See id.* at 1083.

den.<sup>91</sup> No steps were taken to prevent Conrad from hearing the questions posed to J.K. by the attorneys.<sup>92</sup> J.K. was provided with a yes/no board and a Canon communicator to respond to questions.<sup>93</sup>

J.K. had been diagnosed with severe or profound mental retardation and was nonverbal and nonexpressive.<sup>94</sup> His mental skills were comparable to a two or three-year-old child, and he was able to pick his name out from a group of words, without the assistance of a facilitator, only when no other words in the group began with the letter "J."<sup>95</sup>

On direct examination, when J.K. was asked if Warden hurt him, he apparently typed "ASS," and when asked where he was when Warden hurt him, he typed "GAT FAW" and then "FUK."<sup>96</sup> He was asked if the latter meant "fuck," and he pointed to "yes" on the yes/no board.<sup>97</sup> When asked if Warden "fucked his ear, mouth or toes," J.K. pointed to "no."<sup>98</sup> He was then asked if Warden "fucked his butt," to which he responded "yes."<sup>99</sup> He pointed to "no" when he was asked if Warden "fucked him with his nose, mouth, or a suppository," but he pointed to "yes" when asked if Warden "used his penis to fuck J.K.'s butt."<sup>100</sup>

The cross-examination of J.K. took place outside the presence of the jury, who observed it on closed-circuit television.<sup>101</sup> When asked his father's name, J.K. typed "STEVE," and he typed "YTURBEE" when asked his mother's name.<sup>102</sup> His father's first name was Steve and mother's last name was Yturbe.<sup>103</sup> He typed "RAT" when asked how many times he

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91. *See id.* at 1081.

92. *See id.*

93. *See id.*

94. *See id.* at 1078.

95. *See id.*

96. *See id.* at 1083.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *See id.*

102. *Id.* at 1083.

103. *See id.*

had been asked if somebody hurt him.<sup>104</sup> He responded "AT SCHOOL" when asked if Conrad was always with him when he was asked about being hurt.<sup>105</sup> When asked when his birthday was, J.K. typed "WAS CIPL WEAKS."<sup>106</sup> He had celebrated a birthday three weeks earlier.<sup>107</sup>

The prosecution also presented the testimony of a Wichita Police Detective who had interviewed Warden following the allegations.<sup>108</sup> The detective testified that Warden admitted to rubbing his erect penis on J.K.'s back and anus.<sup>109</sup> Warden testified that he indeed made such a confession but that he did so not because it was true, but because he was scared.<sup>110</sup> One of Warden's coworkers testified that Warden admitted to her that he once fondled J.K.<sup>111</sup>

No physical evidence was collected from J.K. following the abuse allegations because investigators felt that an examination "might be traumatic for him and his extensive use of suppositories would possibly interfere with the results of the examination."<sup>112</sup>

Warden appealed his conviction to the Supreme Court of Kansas, assigning error to, among other things, the fact that the trial court refused to apply the *Frye* standard of admissibility to facilitated communication.<sup>113</sup> The court rejected this appeal, stating:

[w]e are not persuaded that statements produced through facilitated communication are scientific evidence subject to the *Frye* test. Facilitated communication is just what its name implies: a method of communication. Unlike the tests revealing that JK is autistic and mentally retarded, which require scientific interpretation of JK's skills and behaviors, facilitated statements require no scientific interpreta-

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104. *See id.*

105. *See id.*

106. *Id.*

107. *See id.*

108. *See id.*

109. *See id.* at 1083.

110. *See id.* at 1084.

111. *See id.* at 1083.

112. *Id.* at 1082-83.

113. *See id.* at 1084.

tion . . . . Because facilitated communication requires no scientific testimony, the *Frye* test is inapplicable. To admit statements made using facilitated communication, a party need not show the technique has achieved general acceptance in the scientific community.<sup>114</sup>

#### IV. ARGUMENT

In order to accept facilitated communication as a valid means of communicating evidence, courts must first assume that the subjects to be facilitated have greater cognitive abilities than indicated by their medical diagnoses. Next, the courts must either explicitly or implicitly recognize apraxia as a condition with which the subjects are afflicted, despite the absence of: (1) any clinical diagnoses to that effect; and (2) any scientific evidence associating apraxia with autism or other developmental disorders. Finally, the court must discount the likelihood that the facilitators are the actual source of the communications. That any court in the United States would so readily make these assumptions and characterize facilitated communication as merely another method of communication is troubling.

Courts have been less skeptical of facilitated communication than one might expect because many see it as "just what its name implies: a method of communication."<sup>115</sup> A thorough examination of its underlying theories, however, clearly establishes that facilitated communication does indeed constitute scientific evidence and is inadmissible under both a *Frye* standard and a relevancy standard.

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114. *Id.* at 1088.

115. *Id.* See generally James M. Hall, Note, *Facilitated Communication: The Key To Unlocking the Skull*, 44 SYRACUSE L. REV. 1059 (1993); Matthew S. Luxton, Comment, *Facilitated Communication For People With Autism in the Courts: Balancing the Need for Reliable Evidence With the Requirements of the Constitution*, 18 HAMLINE L. REV. 201 (1994); Jennifer L. McGarrity, Comment, *Facilitated Communication—Just Another Admissibility of Evidence Issue For Courts?*, 20 U. DAYTON L. REV. 935 (1995).



### A. *Facilitated Communication Constitutes Scientific Evidence*

The Kansas Supreme Court stated that "[u]nlike the tests revealing that JK is autistic and mentally retarded, which require scientific interpretation of JK's skills and behaviors, facilitated communication requires no scientific interpretation."<sup>116</sup> However, the claims of sudden emerging literacy skills "in people labeled autistic or retarded would represent . . . a significant challenge to theories of autism, retardation, and literacy acquisition,"<sup>117</sup> and "call into question our basic understanding of disability."<sup>118</sup>

Autism is the developmental disorder most often associated with the use of facilitated communication. The prevailing view, which is supported by "extensive empirical evidence," is that "most people with autism and other developmental disabilities have cognitive and language impairments."<sup>119</sup> However, in an

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116. *Warden*, 891 P.2d at 1088.

117. Grover J. Whitehurst & Deanne A. Crone, *Social Constructivism, Positivism, and Facilitated Communication*, 19 J. ASS'N FOR PERSONS WITH SEVERE HANDICAPS 191, 192 (1994).

118. Robert H. Horner, *Facilitated Communication: Keeping it Practical*, 19 J. ASS'N FOR PERSONS WITH SEVERE HANDICAPS 185, 186 (1994); see also Barry M. Prizant et al., *Implications of Facilitated Communication for Education and Communication Enhancement Practices for Persons with Autism*, in FACILITATED COMMUNICATION: THE CLINICAL AND SOCIAL PHENOMENON 123, 130 (Howard C. Shane ed., 1994) ("The primary assumption, based solely on typed communication by some individuals, is that prior knowledge and information regarding the capabilities of persons with autism is, at best, inaccurate or totally invalid."); Biklen, *supra* note 23, at 301 (stating that "[r]esults from Crossley's work challenged current theories; she was getting results that no one else had").

119. Green & Shane, *supra* note 28, at 163. The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) provides the following diagnostic criteria for autistic disorder:

A. A total of six (or more) items from (1), (2), and (3), with at least two from (1), and one each from (2) and (3):

(1) qualitative impairment in social interaction, as manifested by at least two of the following:

(a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction

(b) failure to develop peer relationships appropriate to developmental level

(c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest)

attempt to present a plausible explanation for facilitated communication, proponents claim that the subjects with whom it is effective are of normal or even superior intelligence—outward appearances and clinical diagnosis to the contrary notwithstanding—and are simply unable to speak or enact their words or ideas because of a motor impairment known as apraxia.<sup>120</sup>

The use of the apraxia theory to explain the sudden and unexplained literacy “revealed” by facilitated communication suggests that many of these individuals have well developed abilities in most cognitive and linguistic domains (literacy, abstract thinking, reasoning, math, etc.) that they cannot demonstrate because of difficulty with voluntary control of motor actions.<sup>121</sup>

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- (d) lack of social or emotional reciprocity
  - (2) qualitative impairments in communication as manifested by at least one of the following:
    - (a) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime)
    - (b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others
    - (c) stereotyped and repetitive use of language or idiosyncratic language
    - (d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level
  - (3) restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:
    - (a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus
    - (b) apparently inflexible adherence to specific, nonfunctional routines or rituals
    - (c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)
    - (d) persistent preoccupation with parts of objects
  - B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.
  - C. The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder.

120. See Biklen, *supra* note 23, at 303 (“By saying that the person with autism has a problem with praxis we do *not* presume a deficit in understanding, but rather in expression.”).

121. See generally *id.*

Apraxia, which is defined as an "inability to perform an activity properly," is a clinical manifestation of a neurological impairment.<sup>122</sup> In most cases involving a neurological impairment manifesting itself as apraxia, a definitive diagnosis can be reached.<sup>123</sup> Such a diagnosis, which is often apparent, is "based on an analysis of clinical and laboratory test information,"<sup>124</sup> as opposed to behavioral interpretations. However, apraxia is not considered a characteristic of autism, and, in fact, "exemplary motor skills are frequently associated with this disability."<sup>125</sup>

Initially put forward to explain why facilitated communication works with autistic individuals, the apraxia theory was soon adopted as the across-the-board explanation for the apparent success of facilitated communication, regardless of whether the individual suffered from autism, cerebral palsy, Down's syndrome, mental retardation, or a host of other developmental disorders.<sup>126</sup> Because the apraxia theory, offered by proponents to explain why facilitated communication works, challenges scientific thinking in the area of developmental disorders, it should be subject to the standards of admissibility applied to scientific evidence.

#### B. *Facilitated Communication is Inadmissible Under Frye*

Under the *Frye* analysis, facilitated communication evidence would be admissible only if those seeking to admit it can show that it has been generally accepted as reliable within the particular scientific community. In light of the fact that the scientific literature overwhelmingly concludes that facilitated communication is not a valid means of communication, there is very little chance that anyone could make this showing.<sup>127</sup> Indeed,

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122. ALAN BALSAM & ALBERT P. ZABIN, *DISABILITY HANDBOOK* 263 (1990); see also *RANDOM HOUSE DICTIONARY* 104 (2d ed. 1993) (defining apraxia as a "disorder of the nervous system, characterized by an inability to perform purposeful movements, but not accompanied by a loss of sensory function or paralysis").

123. See BALSAM & ZABIN, *supra* note 122, at 270.

124. BALSAM & ZABIN, *supra* note 122, at 270.

125. Shane, *supra* note 25, at 11.

126. See Shane, *supra* note 25, at 11.

127. See Gina Green, *The Quality of the Evidence*, in *FACILITATED COMMUNICATION: THE CLINICAL AND SOCIAL PHENOMENON* 157, 158 (Howard C. Shane ed., 1994).

the American Academy of Child and Adolescent Psychiatry has issued a policy statement declaring that "[s]tudies have repeatedly demonstrated that [facilitated communication] is not a scientifically valid technique for individuals with autism or mental retardation. In particular, information obtained via [facilitated communication] should not be used to confirm or deny allegations of abuse."<sup>128</sup>

Additionally, every court in the United States which has held facilitated communication to the standards of *Frye* has found that the scientific community overwhelmingly rejects the technique.<sup>129</sup> Thus, it is highly unlikely that any jurisdiction which has adopted the *Frye* test would admit facilitated communication evidence.

### *C. Facilitated Communication is Inadmissible Under Reliability/Relevancy Standard*

In determining the reliability, and thus the admissibility, of facilitated communication evidence under the Federal Rules of Evidence, courts must take into account the following four factors: 1) whether the technique or theory of facilitated communication has been tested; 2) whether it has been published and subjected to peer review; 3) its rate of error; and 4) whether it has met with the general acceptance of the relevant scientific community.<sup>130</sup>

#### 1. Testability

Facilitated communication has been the subject of dozens of scientific studies, both qualitative and quantitative, since its introduction into the United States.<sup>131</sup>

Proponents point to several qualitative studies which "have indicated unexpectedly high levels of literacy, numeracy, and

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128. Perry A. Zirkel, *Facilitated Communication of Child Abuse*, 76 PHI DELTA KAPPAN 815, 815 (1995).

129. See *In re M.Z.*, 590 N.Y.S.2d 390 (N.Y. Fam. Ct. 1992); *Ex rel. Jenny S. v. Mark S.*, 593 N.Y.S.2d 142 (N.Y. Fam. Ct. 1992).

130. See *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579, 593-94 (1993).

131. See Green, *supra* note 127; Jacobsen et al., *supra* note 16.

thinking abilities among facilitated individuals who had previously been labeled severely mentally handicapped."<sup>132</sup> A vast majority of these qualitative studies have been conducted by Biklen or his students.<sup>133</sup>

Qualitative research "emphasizes observation of phenomena in context and participants' perceptions about them."<sup>134</sup> With regards to facilitated communication, this qualitative research takes the form of "descriptive reports, backed up by countless anecdotes, reflecting the subjective perceptions of observers who are highly motivated to report success."<sup>135</sup>

Critics point out that this research method fails to control variables, especially the possibility of facilitator influence,<sup>136</sup> and are "limited to anecdotal reports which are devoid of detailed descriptive information and empirical evidence."<sup>137</sup> These critics point to more recent quantitative studies, which "deal exclusively with measurement and reduction of processes to numbers,"<sup>138</sup> claiming that they cast serious doubt on the validity of facilitated communication.<sup>139</sup>

The most common quantitative scientific method used to test the validity of facilitated communication, the single blind message-passing paradigm, was used in a recent study which illustrates the testability of the theory and technique.<sup>140</sup> In this quantitative study, the validity of facilitated communication was evaluated with eight primarily nonverbal subjects with mental retardation.<sup>141</sup> Each of these individuals was alleged to communicate regularly using facilitated communication.<sup>142</sup> Three masters-level speech pathologists who had each received "extensive training" in the technique and had used the technique for a minimum of nine months served as the facilitators.<sup>143</sup> Each

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132. See Crews et al., *supra* note 26, at 205.

133. See *id.*

134. Green, *supra* note 127, at 174.

135. See *id.*

136. See *id.*

137. Crews et al., *supra* note 26, at 205.

138. Green, *supra* note 127, at 158.

139. See Crews et al., *supra* note 26, at 206.

140. See *id.* at 208.

141. See *id.* at 206.

142. See *id.* at 206.

143. See *id.* at 208.

subject "was facilitated by the staff member with whom he/she had practiced the technique the longest and had reportedly communicated (via FC) with best."<sup>144</sup>

While the facilitator was out of the room, each subject was presented with one randomly selected item, either a common object, second-grade-level word, or single numerical digit, for sixty seconds and was allowed to hold the object if desired.<sup>145</sup> The experimenter named the item out loud every fifteen seconds.<sup>146</sup> The facilitator then entered the room and asked the subject to identify the item which he or she had been presented.<sup>147</sup> The facilitator was not informed whether the response, if any was elicited, was correct.<sup>148</sup> This procedure was repeated with eight objects, eight words, and eight digits for each subject.<sup>149</sup>

When presented with the common objects, none of the subjects produced a correct response.<sup>150</sup> One subject, a thirty-seven-year-old mildly retarded man with cerebral palsy, correctly identified five numerical digits.<sup>151</sup> However, he was unable to communicate either two digits or a single letter.<sup>152</sup>

Another subject, a forty-one-year-old mildly retarded man with cerebral palsy, correctly responded to three single digits and one two-letter word.<sup>153</sup> However, the experimenters questioned the validity of these responses because they appeared within "strings of nonsense letter and/or multiple numbers."<sup>154</sup>

The experimenters concluded that "[b]ased on the overwhelming number of incorrect responses, findings from these studies have failed to provide any reliable evidence that confirms the validity of [facilitated communication]."<sup>155</sup> The experimenters

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144. *Id.* at 208.

145. *See id.* at 208-10.

146. *See id.*

147. *See id.*

148. *See id.*

149. *See id.*

150. *See id.* at 211-12.

151. *See id.*

152. *See id.* at 212.

153. *Id.*

154. *Id.*

155. *Id.*

also noted that "multiple incorrect responses (words, phrases, and/or numbers) were facilitated with all subjects."<sup>156</sup> With regards to these incorrect responses, the experimenters hypothesized that they were unknowingly produced by the facilitators.<sup>157</sup>

A 1995 double-blind study which tested for evidence of facilitator control further illustrates the testability of facilitated communication.<sup>158</sup>

This study evaluated facilitated communication with seven subject-facilitator pairs who had reported using facilitated communication to communicate for periods ranging from six to eighteen months.<sup>159</sup> The individuals who were to be facilitated were adults diagnosed with moderate or severe mental retardation, ranging in age from twenty to forty-one.<sup>160</sup> Six of these subject-facilitator pairs reported producing open-ended conversation consisting of full sentences using facilitated communication, while the seventh pair reported open-ended conversation consisting of simple verb-noun phrases.<sup>161</sup>

The experimenters employed two formats: an activity format and a picture format. The activity format involved a research assistant engaging the subject in a familiar activity, such as drinking coffee, eating crackers, playing cards, putting together a puzzle, or looking at a magazine, for approximately five minutes.<sup>162</sup> The research assistant would describe the activity to the subject at least five times.<sup>163</sup> In the picture format, a picture was presented to the subject while, depending on the experimental condition, the facilitator was shown either the same picture, a different picture, or no picture at all.<sup>164</sup> The study used three different experimental conditions: 1) the facilitator knew of the activity or picture; 2) the facilitator did not know

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156. *Id.* at 211.

157. *See id.* at 212.

158. *See* Montee et al., *supra* note 27.

159. *See id.* at 191.

160. *See id.*

161. *See id.*

162. *See id.* at 193.

163. *See id.*

164. *See id.*

of the activity or picture; and 3) the facilitator was given false information about the activity or picture.<sup>165</sup>

Using the picture format, the subject-facilitator pairs produced correct responses 75% of the time when the facilitators were shown the same picture.<sup>166</sup> When the facilitators were not shown any picture, the pairs produced correct responses 0% of the time.<sup>167</sup> And when the facilitators were shown a different picture, a correct response was produced 1.8% of the time, while a correct response corresponding to the picture shown to the facilitators was produced 66% of the time.<sup>168</sup>

Using the activity format, when the facilitators knew the activity, a correct response was produced 87% of the time.<sup>169</sup> When the facilitators were not told of any activity, the subject-facilitator pairs produced correct responses 0% of the time.<sup>170</sup> And when the facilitators were told of a different activity, correct responses were produced 0% of the time, while the correct responses for activity which was told only to the facilitator were produced 80% of the time.<sup>171</sup>

The study found: 1) that no communication came from the client through facilitated communication; and 2) the facilitators controlled the typing.<sup>172</sup> It concluded that "the experimental data strongly suggests that facilitated communication is not a valid means of augmenting communication, and therefore, should not be used."<sup>173</sup>

Another recent double-blind study, in which pictorial stimuli were presented to the test subjects and facilitators also concluded that facilitated communication was not a valid means of communication.<sup>174</sup>

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165. See *id.* at 193.

166. See *id.* at 195.

167. See *id.*

168. See *id.*

169. See *id.*

170. See *id.*

171. See *id.*

172. See *id.* at 197.

173. *Id.* at 198.

174. See Alfred Hirshoren & James Gregory, *Further Negative Findings on Facilitated Communication*, 32 *PSYCHOL. IN THE SCHOOLS* 109 (1995).



## 2. Publication & Peer Review

The above discussion clearly demonstrates that facilitated communication can be tested. Therefore, under *Daubert*, the courts next look to whether the theory or technique has been published and subjected to peer review.

Biklen first introduced facilitated communication into the United States in a non-peer-reviewed journal.<sup>175</sup> Since that time, however, studies of facilitated communication have been published in dozens of peer-reviewed journals. Indeed, one study reviewed the peer-reviewed literature and produced fifteen representative quantitative scientific studies of facilitated communication conducted between 1993 and 1995.<sup>176</sup> A similar study reviewing the peer-reviewed literature discovered six published qualitative studies and twenty-five published quantitative studies.<sup>177</sup>

## 3. Rate of Error

A review of the quantitative studies of facilitated communication reveals that an overwhelming percentage have found the technique to be an invalid means of communication.<sup>178</sup> However, assuming *arguendo* that facilitated communication is indeed a valid means of communication, even its most ardent proponents concede that the technique is subject to facilitator influence.<sup>179</sup> Biklen notes that the question of authorship dominates the facilitated communication debate, and he concedes the fact that there is "considerable evidence that typical communication involves cooperation from participants and is often co-constructed."<sup>180</sup> He goes on, however, to bemoan the fact that the "cultural notion of authorship as something belonging to

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175. See Biklen, *supra* note 23.

176. See Jacobsen et al., *supra* note 16.

177. See Green, *supra* note 127.

178. See, e.g., Crews et al., *supra* note 26; Hirshoren & Gregory, *supra* note 174; Jacobsen et al., *supra* note 16; Montee et al., *supra* note 27.

179. See Douglas Biklen & Judith Felson Duchan, "I am Intelligent": The Social Construction of Mental Retardation, 19 J. ASS'N FOR PERSONS WITH SEVERE HANDICAPS 173 (1994).

180. *Id.* at 179.

one person alone predominates the current discourse on facilitated communication, particularly the public presentation of facilitated communication."<sup>181</sup>

Given the empirical evidence that facilitated communication is an invalid technique, along with the proponents' concession that even if the technique is valid there is a likelihood of facilitator influence, the courts should find a high rate of error associated with facilitated communication.

#### 4. General Acceptance

As discussed earlier, it is highly unlikely that any court would find that facilitated communication has met with the general acceptance of the relevant scientific community.<sup>182</sup> Therefore, it seems reasonable to conclude that under the *Daubert* analysis, the courts would find that: 1) facilitated communication is indeed a testable theory and technique; 2) that it has been published and subject to peer review on many instances; 3) that the technique likely has a high rate of error; and 4) that it has not met with the general acceptance of the relevant scientific community. Consequently, it is hard to imagine any court that would admit facilitated communication after engaging in the above analysis.

### V. CONCLUSION

Facilitated communication is a relatively new phenomenon that has recently appeared in criminal prosecutions throughout the United States, primarily as the result of sexual abuse allegations apparently made by children suffering from severe developmental disorders. The recent trend is for courts to view facilitated communication as an alternative means of communication rather than a scientific principle subject to the standards of scientific evidence. Under this approach, evidence elicited through facilitated communication is occasionally admitted.

This approach is too simplistic in that it looks at facilitated

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181. *Id.*

182. *See supra* Part IV.B.

communication merely as a technique without examining the technique's theoretical underpinnings. Instead, the courts need to recognize that the technique is based on a scientific claim: that those with whom facilitated communication is effective suffer from apraxia. Because the apraxia theory challenges current scientific thinking on the nature of developmental disorders, facilitated communication should be characterized as scientific evidence and subjected to the appropriate evidentiary standards, which, in all likelihood, would preclude its use in future prosecutions.

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