

THE EXPERT WITNESS

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Admit - Deny
1) Dependent clause / begin w/ while
2) Independent
although

In B.D. Sales (Ed.) Psychology in the legal process. New York: Spectrum, 1977, pp. 269-276.

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The Mental Health Professional on the Witness Stand: A Survival Guide

STANLEY L. BRODSKY

When Wonder Woman is attacked by enemies firing bullets at her, she moves her wrists with lightning speed. Wonder Woman's bracelets deflect each of the bullets so that they zing back at the assailant or harmlessly fall to the ground. Mental health experts being cross-examined on the witness stand find themselves in a similar position under attack. The witnesses can count on receiving a number of hostile missiles; most witnesses, however, were not bred on Paradise Island or blessed by Athena, and are not able to fend off attorneys' bullets with the speed and grace of a Wonder Woman. All too many witnesses find themselves distressed by the unfamiliar field of battle, opposed by the courtroom equivalent of super-heroes and heroines (in attorneys and other witnesses alike), and sufficiently wounded that they vow to never risk such hazards again.

Hostilities with the enemy may be expected. Fierce fighting behind the lines with allies can be devastating. Fellow mental health professionals accuse expert witnesses of debasing the profession in public, inappropriately participating in ugly "battles of the experts," and attempting to appear authoritative without scientific bases. This latter criticism has especially been leveled by Ziskin (1975):

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With each additional experience of testifying, and with an increasing awareness of the vulnerability that existed, I become increasingly concerned with the deference that was accorded to me by lawyers and judges who consistently treated me as though *they totally believed that I really knew* what I was talking about. I knew how shaky were the grounds on which my conclusions rested and could not understand how lawyers could be so naive as not to be aware of this. (vii) . . . Despite the ever increasing utilization of psychiatric and psychological evidence in the legal process, such evidence frequently does not meet reasonable criteria of admissibility and should not be admitted in a court of law and, if admitted, should be given little or no weight . . . In the light of current scientific evidence, there is no reason to consider such testimony as other than highly speculative. (1)

In a thoughtful chapter on psychiatric expert testimony and the adversary system, Slovenko (1974) notes that there are a series of common attacks that have been made on the use of psychiatric testimony. Among these attacks are that:

- (1) Some psychiatrists and other mental health experts testify only for the sake of publicity. Attracted to the public light and attention, they offer information far more sensationalistic than informative.
- (2) Much jargon and gobbledygook appears in the testimony. So much jargon is used in presenting professional opinions that the material becomes unintelligible to the jury.
- (3) Psychiatric diagnoses and prognoses are unreliable. They fail to be consistent over time and the definition of terms themselves are pointless and self-defeating.

The discrediting of expert witnesses is dramatic and powerful. Dr. Carl Bingr testified that Whittaker Chambers, major prosecution witness in the Alger Hiss trial, had been found to be a "psychopath with a tendency toward making false accusations." Slovenko reported that "Bingr on direct examination had pointed out Chambers' untidiness, and on cross-examination he was made to acknowledge that the trait was found too in such persons as Albert Einstein, Heywood Broun, Will Rogers, Owen D. Young, Bing Crosby, and Thomas A. Edison. Bingr testified that Chambers habitually gazed at the ceiling while testifying and seemed to have no direct relation with the psychological examiner. The prosecutor in a turnabout told Bingr 'We have made a count of the number of times you looked at the ceiling. During the first ten minutes you looked up at the ceiling nineteen times; in the next fifteen minutes you looked up ten times; in the next fifteen minutes ten times; and for the last fifteen minutes ten times more. We counted a total of fifty-nine times that you looked at the ceiling in fifty minutes. Now I was wondering whether that was any symptom of a psychopathic personality.'" (p. 46)

It is too late for Dr. Bingr to be rescued. It is not too late for the reader to learn the "bullets and bracelets" game. The place to begin is the pre-trial meeting with the attorney on "your" side.

MEETING WITH YOUR ATTORNEY

Why you are testifying, on what, and in what manner need to be clarified early and well. The very first task, then, is to establish a congruence of the attorney's expectations for you and your knowledge and plans to testify. Thus you should make an appointment at least a few days in advance of your testimony with the attorney who actually will be conducting the direct examination. This meeting should have been preceded by several phone calls or a prior meeting in which your role and his or her goals are clearly defined.

When you meet, ask to see a list of questions the attorney is intending to ask you during direct examination. If you do not like them, change them. Some of the guidelines this writer uses for questions include the following:

- (1) They should be predominately open-ended.
- (2) Avoid a "20 Questions" format (in which there is a gamelike rehearsed search for *the* answer).
- (3) Avoid being put in the position of performing unnatural professional acts. That is, if something sounds sour or phony, explain firmly that you will not do it, and stick with your decision.

Some experienced witnesses come to this first meeting with a list or to draw up a list of questions that will help the attorney, if he or she is inexperienced. Keep asking what *you* wish to accomplish as you think through the purposes of the direct examination with the attorney.

SCHEDULING PROBLEMS

There is little that is more frustrating than sitting in a bare witness room for three or four hours, waiting to testify, and then being told to return the next day. Most of the time, the attorney who has called you will be cooperative in setting up a time-scheduling arrangement. Discuss your time preferences in advance, try to keep your appointments fluid that day, and finally go in with the expectation that there may be as much as an hour or two-hour discrepancy between your planned appearance and your actual testimony, even with the most careful arrangements, liaison, and notice.

THIRTEEN SUGGESTIONS FOR COPING WITH THE CROSS-EXAMINATION

Wonder Woman and O.J. Simpson alike have an abundance of natural talents. Both, however, needed considerable training in specific techniques to utilize their talents well. Similarly every person engaged in forensic "bracelets and bullets" needs to master basic techniques for parrying the cross-examination. Thirteen suggestions are presented here:

* (1) *Specific knowledge.* For each specific area of testimony involving theory, research, or practices, be knowledgeable about scientific and factual information. You should consider what you are accountable for defending, specific theories you use, and your subsequent conclusions. Both the information and the assumptions on which your conclusions are built should be defensible from research studies or major professional perspectives.

(2) *Preparation and review.* Many experts review *Buros' Mental Measurements Yearbooks* and *Psychological Bulletin* review articles prior to their testimony. You are far better prepared if you have read the most current knowledge and critiques by other experts, for reference and utilization on the stand.

(3) *Time and attention.* Your potential vulnerability means that extra time and care should be directed at the assessment process or the information-gathering process related to the court case. The extra time itself is useful when a cross-examining attorney seeks to equate time invested with your amount of knowledge and expertise. Each case should be considered special and given extra attention.

(4) *Honesty.* Always be honest! We have an ethical responsibility to be honest, and we are under oath. However, honesty is sometimes relative. There are many different ways of being honest. The courtroom situation is sometimes one in which you as the expert are seen as assuming an unequivocal advocacy role, identified with the attorney that has called you to testify. Therefore, honesty including evidence *against* the position of your side, is an impressive part of credibility.

(5) *Admit weaknesses.* When there is an area of personal or professional ignorance or weakness, you should admit it. I suggest admitting it in single words without great elaboration. The attitude with which you admit these weaknesses is even more important. If you have a long latency, are puzzled, stammer, and admit the weakness as if you have been personally defeated, this tends to discredit the whole testimony. These negative emotional messages suggest that you have many other areas related to your testimony that are of questionable value. A straightforward admission, almost with pride, and certainly with no sense of loss or deficit, impresses all observers.

(6) *Instruction.* Remember that the persons in the courtroom—the observers, the attorneys, the judge, and the jury—tend to be bored by much of what goes

Intro - Child Abuse
 mins (Patented) - Forensic Psychology
 Milner (Scale)
 Much Screening - Parenting
 Ray Kellner

on. Certainly a professional speaking in jargon or in language not meaningful to them will leave them distracted and daydreaming. It is very easy to fall into the temptation of engaging in a one-to-one relationship and conversation with either the direct-examining or cross-examining attorney. As you are on the witness stand, look around the courtroom, make eye contact with the judge, with members of the jury, with a variety of people. As you speak, speak to all of them. Consider it almost a group session in which there are many people with whom you wish to make good personal contact. There would be no greater sign of a successful witness than the jurors or attorneys speaking to their spouses or friends about things they learned in the courtroom. Your telling them about psychology and psychological principles in personally meaningful terms makes a great impact in your testimony and in the worth of the court experience for them.

(7) *The push-pull technique.* There are a great many questions that attorneys will ask in order to make you respond with a single damaging admission. The push-pull technique for dealing with such ploys consists of initially admitting and then denying the truth or the provocative question. An answer to a question about the usefulness of the Rorschach may look like this: "While there are many criticisms of the Rorschach in terms of its theoretical meaning, those of us who use it regularly have found that it is an extraordinarily meaningful and important technique." The push-pull technique is sometimes simpler. Instead of pushing against an attorney at one point, or disagreeing, one pulls in the direction he pushes, responding with great enthusiasm, "Oh, my gracious, yes!" can transform the psychological meaning of the situation to your advantage.

(8) *You as a special expert.* If the attorney actively challenges existing knowledge and research in the field, you should cite your own special areas of experience and knowledge that set you apart from the garden-variety psychologist or psychiatrist.

(9) *Anticipation.* Learn to anticipate where the attorney is headed with the cross-examination. If you know the purpose and directions of the line of questioning, you are far better equipped to help shape the outcome. Otherwise, you may find yourself having admitted a series of partial truths that cumulatively harm your testimony in major ways.

(10) *Take time to think.* The staccato, machine-gun pace of some attorneys during cross-examination tends to lead some witnesses to give very quick, insufficiently thought-out answers. Pause, cock your head, look up into the distance for a moment, make it clear you are giving the question serious thought, and then answer.

(11) *Do not speak for other experts.* It is your testimony that is of concern. A good cross-examining attorney may raise a whole series of hypothetical questions about what other experts might say. If at all possible, stay with your own knowledge and perspectives.

(12) *Don't talk too much.* Except during direct examination or at times

TABLE I
Gambits in Expert Witness Examination and Responses that Degamitize

Title	Source	Example	Responses
1. Infallibility complex	McConnell	Do you think the new research by Smith and Jones on—might be important in this regard?	Admission of ignorance. Moving from concrete issues to abstract principles and knowledge. Responses that put the question in a broad perspective.
2. Primary source gambit	McConnell	"On this point about —, were you the first person to report this very interesting scientific finding?" "Then who did first?" "When?" "Where?" "When was the last time you read that source?" "Don't errors sometimes creep into texts?" (Theme: How do you know what you know?)	True self-preparation. Nature of cumulative scientific knowledge.
3. GOK (God Only knows)	McConnell	(Theme: Questions of how little the profession truly knows about relevant areas). "What actually causes schizophrenia?"	A state of knowledge summary. Full, detailed description of <i>one</i> key study.
4. Historic hysteric gambit (typically used only after expert's testimony has devastated the case)	McConnell	"Have you ever heard of Ignaz Semmelweis? (Pasteur, Fleming, or other scientific geniuses who were scorned by their colleagues). (Theme: Attacks your predecessors and points out the uncertainty of professional consensus.)	Ideas <i>then</i> which are <i>now</i> considered professionally absurd. Current speed of acceptance of scientific information.

5. Expert as capitalist		<p>"How much are you being paid for your examination and testimony?" "By whom?" "How much money did you earn last year?" (Applies only to private practitioners.)</p>	Matter-of-fact responding. May include a modest statement of integrity.
6. Subjective advocacy	Brodsky & Robey	<p>"Isn't it true that anyone may develop subtle prejudice or biases without being aware of them?" "Is there any possibility you may have biases in this case, or any other, of which you are not aware?" "Would you personally like to see the defendant acquitted/convicted?"</p> <p>"This is not your first time in court, is it?" (Theme: Number of times expert has testified for a given side.)</p>	Possible biases acknowledged as well as your pursuit of objectivity—and psychological techniques that help this pursuit.
7. History of advocacy			Acknowledgement, noting different access by plaintiffs and defense. Answer on your terms.
8. Challenging experience	Zuskin	<p>"Have you conducted follow-up research studies on the reliability (or validity) of your own assessment?"</p>	<p>Continuing contact with clients (case history research). Feedback from colleagues to enhance validity. The clinician's professional growth as result of experience and literature—a research process.</p> <p>Component responding: discuss <i>follow-ups</i> you do; discuss <i>research</i> (systematic accumulation of your knowledge); discuss bases of reliability or validity for you personally (not the entire profession).</p>

when you have something of very great importance to say, keep your responses to two or three sentences. I would give a similar warning not to speak too little, but this is a rare deficit among mental health professionals on the witness stand.

(13) *Listen carefully to the questions.* There is a tendency for many attorneys to be imprecise in their use of language or their posing of questions. If you listen very carefully to the words used and the questions posed, then you will find yourself with increased options for answering the question. In addition, you can often rephrase a question an attorney asks, querying if that is what he meant. When this is done, the balance of power becomes subtly changed in the courtroom to your advantage.

CONCLUSION

Ambrose Bierce once wrote that a trial is a formal inquiry, designed to affirm the impeccable character of lawyers, judges, and juries. While Bierce was cynical about everything, his observation was astute about the attorneys' need to look good. When attacking the witness on specific content seems to be failing, then attorneys may attack on general principles and anticipated weaknesses of all mental health professionals. Table I presents eight such gambits, drawn from McConnell (1969), Brodsky & Robey (1972), and Ziskin (1975). Accompanying each gambit is a suggested response for the witness. The themes are related. The attorney sets up the witness as ignorant, irresponsible, or biased. The witness disarms the attack through demonstration of quiet competence and mastery of the situation.

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One of the steps in becoming an expert witness is awareness of the roles and procedures that accompany a court appearance. Two extremes of witness orientation by mental health professionals are related to likely impact and effectiveness.

ON BECOMING AN EXPERT WITNESS: ISSUES OF ORIENTATION AND EFFECTIVENESS

Stanley L. Brodsky and Ames Robey

Some of the most strongly held and controversial attitudes in the fields of psychological and psychiatric practice and training may be observed in psychological-legal activities. These attitudes frequently arise from a small number of widely publicized professional actions on the witness stand. The nature of witness behavior by mental health professionals will be examined here particularly for situations in which there are contradictory expert testimony or other forms of contested cases.

The attitudes depend upon the viewer's perspective. To the attorney, always caught up in the advocacy process, the expert witness is for or against him. To many mental health professionals, the ideal role of the expert witness is that of a detached, thoroughly neutral individual who simply and informatively presents the true facts as he sees them; the undesirable role is that of a partisan, seeking to undermine the opponent, acting deceptively to present "his" case more favorably and behaving in a variety of unethical, inappropriate ways for reasons of greed, maladjustment, or personal aggrandizement.

MacDonald (1969) in his discussion of psychiatric testimony, illustrates this typical position of the mental health professional:

The medical witness should never take sides in a case, but should endeavor to be fair, impartial, and free from prejudice. He should regard himself as an indepen-

dent witness for the court and should not act as an auxiliary advocate for the prosecution or defense.

There may be no single constant entity as appropriate professional behavior. Professionals act very much differently when interviewing a new patient, when chairing a staff meeting, when speaking to a PTA group, and when interviewing for a new position. Different situations call for and elicit differential role behavior, and so too does the courtroom setting.

The witness role calls for a set of behaviors that differ from those in most other settings in which psychological professionals appear. The role-demands that seem applicable to the forensic setting are orientation to and awareness of the situational demands.

We suggest a schema for conceptualizing the expert witness in terms of *courtroom-oriented* versus *courtroom-unfamiliar*. The attitudes, roles, and behavior of the expert witness under a variety of conditions may be examined using this proposed continuum.

Three phases of forensic involvement that may be delineated are the pretrial phase, the actual activities on the witness stand, and the posttrial phase. Within each phase there are a number of characteristic attitudes and behaviors associated with the extreme poles of courtroom-oriented and courtroom-unfamiliar. These are shown in Table 1.

In the pretrial phase, the attitudes of the courtroom-unfamiliar witness are neg-

TABLE 1

Comparison of the Courtroom-Oriented and the Courtroom-Unfamiliar Expert Witness

Stage	Courtroom-Oriented	Courtroom-Unfamiliar
Pretrial		
Training	Legal-Medical Institutes, court clinics, or other training centers with legal background; sometimes self-taught, by bitter experience	No relevant training
Point of entry of witness into proceeding	Early in legal procedure; extensive pretrial conference with emphasis on appropriate questions to elicit evaluation-related content	Late entry; minimal or no pretrial conference with attorney; minimal or no preparation with attorney on technique for eliciting opinion
Knowledge of law, evidence, and constitutional privilege	Usually aware; occasionally more so than the particular lawyer in the trial	Usually unaware or minimally informed
Record keeping	Thorough; tends to anticipate cross-examination; exact as to dates, times, places, detail, prior hospital records	Often tends to be variable or average; omits or uncertain of dates, time, etc.
Reaction to subpoena	Minimal emotional reaction; reviews record, calls lawyer, determines basis of subpoena and information desired by lawyer; sets up conferences with lawyer	Distress and anxiety; usually does not call lawyer; no conference unless requested by lawyer—even then minimal; unaware of legal position
On the Witness Stand		
Written report	Clear, concise, equivocal where necessary; avoids legal problems but answers legal questions raised	Technical language, poorly understood by lay readers; often does not answer legal questions raised
Target of testimony	Jury or judge	Lawyer or mental health colleagues
Language	Spoken English	Professional terminology
Purpose of testimony	Persuasion; teaching; mild advocacy of his findings	"Objective" presentation of clinical information
Courtroom activity	Active; may sit and advise lawyer	Passive; sits in back of courtroom; does not communicate with lawyer
Testimony process	Steady; consistent; aware of "traps"; concedes to minor points easily	May be badly manipulated; gets stubborn; backs into corner
Reaction to cross-examination	Normal acceptance as routine procedure	Resentment, anger, professional confusion

TABLE 1 (Continued)

Stage	* Courtroom-Oriented	Courtroom-Unfamiliar
Setting up rebuttal on redirect examination	Active involvement; awareness of techniques	No activity; unaware of techniques
Posttrial		
Reaction after court findings, especially to distortion of opinion and loss of case by client	Acceptance; learns; reappears in court	Nonacceptance; alienation; reacts by future avoidance
Results of court adjudication	More consistent with expressed view of witness whether opposing testimony is present or not	Less consistent with expressed view, particularly in borderline or contested cases with opposing testimony
Fees	Higher, based on actual time spent in evaluation, reporting, and courtroom time; based on regular private practice fees	Variable; generally low or occasionally unrealistically high compared with regular private practice fee for service time

ative and fearful, and he has some personal and professional fears about active forensic involvement. He usually has little or no training in forensic practices, prepares as if the clinical case were to be presented in a professional conference, and has minimal contact with the attorneys or judicial procedure in advance. On the other hand, the courtroom-oriented witness is frequently a product of legal-psychological training or postgraduate education, is well aware of the legal issues involved, and invests more effort, time, and careful keeping of records than with nonforensic clients. He seeks out extensive evaluation opportunities, is in frequent communication with the attorneys, and prepares a report that may be understood by lay audiences. The courtroom-oriented witness understands the advocacy system, the purpose and nature of expert testimony, and judicial decision-making processes. The courtroom-unfamiliar witness often does not.

The witness-stand behavior and attitudes of our two models usually represent

sharp contrasts. From the perspective of a juror, the two types may be seen as follows. The courtroom-oriented witness speaks in language that is understandable. This witness instructs while explaining, speaks directly to the jury, and is composed, courteous, and consistent during cross-examination. He readily admits areas of uncertainty and ignorance that exist for himself and his profession. Because of his familiarity with the issues and procedures, he rarely is "boxed in" during cross-examination. On the other hand, the testimony of the courtroom-unfamiliar witness is such that jurors sometimes find it difficult to keep their attention from wandering, at least during direct examination. Such witnesses use technical terms and often stubbornly cling to small points or overstate findings when cross-examined. The perceptive juror will observe the courtroom-unfamiliar witness becoming anxious, sometimes brusque during cross-examination, or amenable to manipulations through semantic or hypothetical questions.

After the testimony is completed, the courtroom-oriented witness usually has positive or at least neutral feelings toward the experience. He frequently receives much positive reinforcement—financially as well as personally—and will continue forensic activities. At the extreme, the courtroom-unfamiliar man often leaves with a sense of anger, will sometimes perceive himself and his views as having been on trial, and now and then will make speeches to professional groups about the unbridgable gap between law and psychology (or psychiatry).

The results of the judicial process are much influenced by these contrasting demeanors. Simply stated, the courtroom-oriented witness is more likely to elicit decisions consonant with his opinion. And, we might add editorially, this is as it should be, for the courtroom-oriented witness has spent more time evaluating, has been a more effective communicator, and has assumed the appropriate expert witness role.

An example may serve to illustrate this concept of courtroom-orientation. We recently observed a prosecuting attorney seeking to challenge the objectivity of a psychiatrist testifying about the defendant's mental status and criminal respon-

sibility. "Would you tell the court," the attorney asked, "if there is any chance, because the defendant has paid your fee, that your testimony might be biased?" Instead of denying possible bias, the witness replied, "Certainly. It's impossible not to be biased in some way about most things. It has been written 'whose bread I eat, his songs I sing.' Being very much aware of this, I try to be even more cautious than usual and do my best to be sure that my bias is not interfering with my clinical judgment."

We have set up some extreme stereotypes for the purpose of highlighting the issues. Nevertheless, the issues exist and are important ones. The long-standing division of expert witnesses into partisan "bad guys" and objective "good guys" is not a useful way of considering role-demands and effectiveness. The continuum suggested here sees the expert mental health witness in terms of courtroom-orientation as one aspect of more satisfactory collaboration of law and the mental health professions.

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SAMPLE CROSS-EXAMINATIONS

CREDENTIALING

- Q. Doctor, what does it mean to be board-certified?
- Q. Board-certification, then, represents assurance of competence and excellence?
- Q. And, doctor, are you board-certified?
- Q. You have presented your experience as evidence that you are an expert on this case, have you not?
- Q. Did you intend to give this court the impression that experience represents competence and knowledge?
- Q. Doctor, are you familiar with the many studies that show that spanking new psychologists (psychiatrists) are just as competent and able as ones who have been practicing for many years? That you psychologists essentially learn nothing?
- Q. Doctor , is experience indeed important in beciming an expert in your field? In clinical practice?
- Q. Please tell the court exactly how many black women from rural areas you have evaluated before who have been accused of murdering their children! (This question is always phrased so specifically that the answer is "none")
- Q. None? Not one single one? Please speak up.

To psychologists:

- Q. Doctor, you are not a medical doctor? Not a physician?
- Q. Are you allowed to prescribe medicine in this state? In any state in this country?
- Q. Mister (or Mrs,emphasized) are you licensed to practice medicine in this state?
- Q. Mr. Jones, isn't it true that some metnal disorders actually have their origins in the brain itself?
- Q. And Mr. Jones, you are not qualified to operate on the brain, medically treat the brain, medicate the brain, is not that true!?

To Psychiatrists:

- Q. Doctor, what courses are offered to people who receive Ph.D. degrees in clinical psychology?
- Q. Have you had graduate level courses in learning? In memory? In perception? In projective testing? In personality testing? In intelligence testing?
- Q. I see from your report that you drew on the Minnesota Multiphasic Personality Inventory and the Wechsler Adult Intelligence Scale, as part of your information. When were these tests first developed? Who developed them?
- Q. Were there any people from Seattle who were included when the normals were included? Were there any native American Indians, Doctor?

Guidelines:

1. There are thousands of things each of us is not. Attorneys will often bring out what we are not.
2. It is okay to not be everything. Acknowledge your absence of universal knowledge matter of factly.
3. Don't be defensive. Be comfortable, understanding.
4. Emphasize your agreement with questions that would otherwise produce a cringe. "Of course not!" That clarifies your role and position.

CHALLENGES TO OBJECTIVITY

Statement: Good morning, Doctor. I see you are here testifying on behalf of an accused murderer once again!

Q. How much are you being paid for your testimony today, Doctor?

Q. How much is your hourly rate regularly?

Q. What is the total amount of money you estimate you will receive in this case, Doctor?

S. That's a great deal of money, isn't it? Let's go on to the case.

Q. Doctor, we have heard your opinion. Now personally would you like to see Mr. Howard acquitted?

Q. Just your personal opinion, now, have you come to like Mr. Howard during your evaluation?

Q. Doctor isn't it true that people can sometimes have biases that they are not aware of?

Q. And these can include some very strong feelings unknown to them sometimes?

Q. Furthermore, Doctor, doesn't this apply to psychiatrists and psychologists just like the rest of us?

Q. That includes you, doesn't it? And even on matters of evaluations like this, doesn't it?

Q. Now, do you have any personal friends who have strong opinions on this case? Have you discussed it with your husband/wife?

THE SMOKING GUN

- Q. You have testified that you believe this child should be in the custody of her father, is that not correct?
- Q. And you have testified that it is in little Allison's best interests psychologically to be in the nurturing care of her Dad?
- Q. Are you aware that we have just discovered that her father has had at least three known instances of physical assault and one of sexual assault with penetration on his daughter from his first marriage?
- Q. Doctor, would that change your opinion?
- Q. In your testimony, you indicated that the accident has left Mr. Giller depressed, morose, and so impaired, that he is substantially unable to participate in normal social interchanges? Yes?
- Q. Hypothetically, now, if you were to learn that Mr. Giller has played poker three times in the last month, has had at least six social engagements with accompanying intimacy with one Marcia Geilthorpe, and that friends call him happy and normal, would your opinion be open to question?
- Q. Can you be fooled, Doctor? That is, is it conceivable that a client of yours might present himself as sick when he truly is not?
- Q. Hypothetically, would or could it have made a difference in your conclusion if you knew that Mr. West had checked out the book THE BRAIN WATCHERS from the library on four separate occasions before the exam? And that this book has explicit instructions on how to look ill or well on psychological examinations?
- Q. And further, Doctor, if you were given information that Mr. West exclaimed to his cell mate upon returning after the exam, "Boy, I really fooled that shrink!"

WITNESS RESPONSES

The Deposition

Depositions can be deceptive. The casual atmosphere of many depositions can allow a witness to relax too much and then to talk well beyond the factual bases underlying the conclusions. Entering a deposition calls for the same rigor, preparation, and caution as live testimony.

One functions of depositions is discovery of facts by opposing counsel, who customarily conduct the proceedings. These attorneys will seek to test the limits of your knowledge, probe for weaknesses, and be alert for statements to use in the trial proper, which would reveal you as contradictory or vacillating. For these reasons, you may wish to keep in mind two principles for participating in depositions:

- Avoid unnecessary speculation, discussion, or thinking aloud
- State only those conclusions about which you are professionally comfortable and actually prepared to discuss

The physical setting for the deposition aids in your achieving good performances. Some suggestions include insisting the depositions be held in your office, where you will be more in control, structuring the seating arrangements so the attorneys have the soft, comfortable chairs, and you the erect higher chair, and utilization of the environment to enhance your demonstrated mastery and professionalism.

The Rumpelstiltskin Principle

The working knowledge of the names of the active participants in the courtroom is a valuable tool for comfort and mastery. Before testifying, the expert witness should learn who each of the opposing attorneys is, (as well as refresh your memory about what the client-defendant-plaintiff looks like).

The names of cross-examining attorneys are especially important. Witnesses can count on many cross examination questions beginning with, "Dr. Johnson, isn't it true that...?" The attorney's use of your name represents a control mechanism that explicitly directs you to answer and be responsive. Experts who do not know the attorney's name sometime begin their responses with, "Yes, counselor..." Such an answer is far weaker than one which starts with the name use, such as, "Yes, Mr. Darrow, while it is true that..."

Learning names can be accompanied by learning the physical placement of all the courtroom actors. Not only should attorneys' and judges' names be noted and memorized, but the names and locations of the clerks administering the oaths as well. In that way, when called to testify, you can stride decisively and confidently to the correct spot to be sworn in as a truthful witness. And when taking the oath, your voice should be clear, audible, confident

The Zang

In a recent newspaper story, an Air Force general described a newly developed directional control device on jet planes. The device is a series of remotely controlled vanes on the bottom on the fuselage of the plane. When activated they allow the plane to make unexpected, instant motions to the side, almost perfectly horizontally. It also permits instant motion down, or up. And this sudden and expected movement has been dubbed a zang. The verb form is to zang.

The use of the zang in expert witness testimony calls for understanding the straight, swift course that cross-examining attorneys take in seeking specific aims. They lead the expert with what seems to be light speed through a series of conclusions that end uncomfortably for the expert. To zang means to suddenly pull oneself out of the flow. One has to know where the attorney is going to move; otherwise it is possible to find oneself even more quickly swept along. Thus the first step is to conceptualize the line of questions and the likely future questions.

Next, within the limits of full accuracy, leap to the side. Zang! The zang may consist of giving an honest no to a question the attorney was certain would produce a yes. It may consist of answering, "There is no yes or no answer to that question." The zang may be especially effective if viewed as setting limits for oneself. For example, attorneys get stuck when the expert answers, "That question cannot truly be answered; it is beyond the limits of my professional knowledge to be able to give a response or opinion to that issue."

CHILD CUSTODY

The evaluation. The evaluation of the child and parents typically takes place in the clinician's office. The question of generalizability from office behavior can be an important one in both the assessment and in court testimony. At the least, one needs to address this issue in the evaluation, inquiring in obvious and nonobvious ways about how characteristic the immediate behaviors are. Some clinicians, who work without the benefit of other professionals who make home visits, themselves conduct observations and interviews in the homes of both parents, with the child and parent present. Occasionally dramatic behavior differences are seen in a child in the office and in a parent's home.

The relationship of the parent to the child can be studied in success, failure, and cooperation situations. The child may experience success in easy intellectual or motor tasks, with the parent nearby and commenting to the child. Then the child can be given tasks that are beyond his/her ability levels, but easily within the parent's ability; the extent to which the parent is encouraging, neutral or punitive may be noted. Cooperation tasks can take the form of joint maze solving or other problems, depending on the child's age. When the two join together, the sensitivity of parent to child's

pace and feelings are accessible.

I find that asking items from some structured attitude scales helps me in assessing parents. For example, I have used the Traditional Family Ideology Scale, developed by Levinson and Huffman (1955). It has items like:

A child should not be allowed to talk back to his parents, or else he will lose respect for them.

A child who is unusual in any way should be encouraged to be more like other children.

A teen-ager should be allowed to decide most things for himself.

These items give a sense of the parents' valuing of the child's submission to authority and moralistic rejection of impulse life.

When one parent is unavailable for the evaluation, an "iffy" quality often emerges in our knowledge. We become dependent on second-hand information. In such circumstances, it is useful to describe fully the limits on what we do know.

The Testimony. Testifying calls for differentiating in your mind between discussing minimally adequate parenting for the child, and ideal parenting. Mental health professionals are much better at knowing minimal needs than ideal parenting; ideal parenting is a subjective, personal decision, and we would be hard pressed to give research or other scholarly bases for ideal standards. I avoid talking about what would be ideal for the child, if I can.

"How do you know what you know?" is the underlying question in many custody cross-examinations. Of course, the

examination report itself will answer some of these concerns. Still, the clinician should be prepared to cite sources of knowledge including actuarial data that are part of (and not exclusively) the evaluation. The clinician might want to have available the 1979, #4, volume 4, issue on divorce of the Journal of Social Issues. Similarly, the second issue of the 1977 volume of the Journal of Clinical Child Psychology is devoted to divorce information. In this area where values are suspected by opposing attorneys, and occasionally judges, as replacing objectivity on the part of the clinician, such scholarly and empirical foundations are important.

References

- Levinson, D. and Huffman, P. Traditional family ideology and its relation to personality. Journal of personality, 1955, 23, 251-273. (also reprinted in J.P. Robinson and P.R. Shaver, Measures of social psychological attitudes. Ann Arbor: Institute for Social Research, 1969, 295-300.
- Tessman, L.H. Children of parting parents. New York: Aronson, 1978.

THERAPIST AS EXPERT WITNESS

When a therapist or counselor is called as an expert witness, the case is typically a civil suit in which the client's competence as a parent or disability as a result of some trauma is at issue. The therapist is asked to draw on the knowledge of the client from the therapy sessions for the testimony on competence or disability, and that source of knowledge provides the difficulty. A role conflict arises for most therapists: they are involved in a helping role for their clients, seeking to do everything they can for the clients' betterment. Yet on the witness stand, the therapists are asked to serve as impartial assessors, potentially giving information that may be upsetting to the clients. Furthermore, the caring, therapeutic role may throw a shadow of doubt on the true impartiality of the therapists as witnesses.

The cross-examination questions often begin like this:

- Q. Isn't it true, Doctor, that a psychotherapist wants his clients to be happy?
- Q. And wouldn't you like to see Mr. Brown happy and satisfied? Furthermore, isn't it so that winning this case is important to Mr. Brown and would leave him feeling happier and better?
- Q. What does the term 'therapeutic alliance' mean? And therefore in that sense you are indeed allied with Mr. Brown, are you not?
- Q. Finally, Doctor, please tell us truthfully now, is it not true that you would be more personally involved with Mr. Brown as a therapist and ally than a person who just saw him for three hours for a diagnostic session? Thank you. That will be all.

This line of questioning is met by describing the

participant-observer role in psychology. An explanation of how you are trained to both be a participating human being and simultaneously a detached observer resolves the dilemma in a manner that is consistent with the actual roles of most therapists. The training in objectivity must be emphasized as well as how all the time in therapy you listen, and evaluate, and how this process is what differentiates therapy from friendships.

A second line of questioning challenges the extent to which the client may have sought to deceive you.

- Q. Doctor, Mr. Brown knew this case was coming to trial, didn't he? And he has known for a while as well that you would be testifying too? Furthermore, he has come to know quite a bit about you as a person, just by spending this much time with you every week, hasn't he? Much more than he would know if he had just met you once for a diagnostic assessment, right?
- Q. Doctor, like all other human beings, you can be fooled, can't you? And Mr. Brown is no dummy, is he?
- Q. Isn't it true, Doctor, that there is no way you can absolutely guarantee that Mr. Brown has not presented the image to you of what he wants you to say today? Isn't that so? And isn't it likely that Mr. Brown, interested in winning this case, will be quite pleased with your testimony on his behalf?

The questions may be handled with an admit-deny response. For example you might explain: "While Mr. Brown surely did want me to testify as I have, my sessions with him have allowed me to come to understand and evaluate him in unusual depth, and I have kept alert for just this issue you raise."

A last suggestion: try to obtain independent sources of knowledge about the client. A referral for an outside evaluation, or testing, or pre-therapy data may suffice.

TERMINATION OF PARENTAL RIGHTS TESTIMONY

In hearings for termination of parental rights, the testimony presented by the welfare or child care worker often goes unchallenged. Either the parent or the attorney representing the parent chooses implicitly to agree with the recommendation that the child be removed involuntarily from the home. In such cases, the testimony can be straightforward and without major difficulty. In cases in which the attorney and parent strongly contest the proposed termination, the testimony of the welfare worker may be a difficult experience.

As with all attorney challenges to expert testimony, the underlying and basic theme will be to raise doubts about the validity of the evidence. These inquiries often will pursue the nature of the observations and data, the possible effects of observations, the possible of accidental injury in abuse cases, and cultural and personal values. The following sample lines of questioning illustrate these issues.

The Nature of the Evidence

- Q. You have testified that your recommendation that Jimmy be taken away from his mother was based in part on your personal observations, isn't that correct?
- Q. How much time have you spent watching Jimmy and his mother eating together over an evening meal?
- Q. How much time have you spent watching Mrs. Harrison when Jimmy has been come from school with a fever and needed loving care?
- Q. How much time have you spent watching this mother and son playing together? What? None whatsoever? None?
- Q. In fact, isn't it true that there are many positive ways that Mrs. Harrison and Jimmy spend time together that you have not seen at all? And isn't it therefore true you did not have this positive information available to you in your assessment?

This line of questions is handled best by affirming that there are years of interactions between parent and child that absolutely nobody has seen. An admit-deny works here: "While I have not seen Jimmy and Mrs. Harrison playing together, I have seen the hostile and insensitive way she responds to his requests to do things."

Observation Effects

- Q. You have testified that Mrs. Harrison was ill at ease with Jimmy, isn't that correct?
- Q. Are you familiar with the research on the effect of being observed?
- Q. Aren't you aware that just being watched makes many people ill-at-ease?
- Q. Indeed, isn't it so that you have no absolutely certain way of knowing that it was not your watching that made Mrs. Harrison ill at ease?

These questions are addressed by insuring that you do have a good basis for your observations and then staying with the soundness of what you have done.

Accidental Injury

- Q. You have testified that Mrs. Harrison deliberately hits and occasionally injures Jimmy, isn't that so?
- Q. Now you have never actually seen Jimmy being hit, have you?
- Q. Nor has any other person actually seen Jimmy injured, have they?
- Q. You do know Mrs. Harrison claims this has been purely a series of accidents?
- Q. Indeed in social work, people are taught to distrust second hand reports, isn't that so?
- Q. Isn't it true that it is a mere assumption and that you have no way of knowing truly for certain that Mrs. Harrison has beaten her son? Furthermore, isn't it true you have no way of, for absolutely certain, proving it was not an accidental fall?

The best answers to such questions are nondefensive acknowledgement of the questions asked, sometimes with a "of course not," or "nobody else was there." Similarly an admit-deny can be employed, beginning with, "while nobody knows absolutely for certain,"

THE DSM-III CHALLENGE

A DSM-III diagnosis will often be the basis for a challenge to knowledge by the cross-examining attorney. If you have used the DSM-III, you should be very familiar with it, including its limits. In the following sample examination, the attorney seeks to make two points: first, because you are not a medical doctor, you are not an apt user of the DSM-III, and second, that you are using it inappropriately.

Q. The guidelines for the Diagnostic and Statistical Manual were published by the American Psychiatric Association, weren't they?

A. Yes they were.

Q. Psychiatrists are medical doctors, aren't they?

A. Yes

Q. You didn't attend medical school, did you?

A. No

Q. You didn't enroll in regular, degree credit disability medical seminars offered by any medical school, did you?

A. No

Q. Now doctor, you are familiar with this Diagnostic and Statistical Manual III, that you have used for the diagnosis?

A. Yes

Q. Are you familiar with the statement on page 12 of the DSM III that cautions against the use of information in the manual for legal, nonclinical purposes, such as this case?

A. No I am not.

Q. It reads "the use of this manual for nonclinical purposes such as the determination of legal disability, competency or insanity, or justification for third party payment, must be critically examined in each instance within the appropriate institutional context." Had you known that explicit caution against doing exactly what you are doing today?

A. No

Q. Why haven't you?

A. I don't know.

The questions can be handled by discussing how good knowledge belongs to everyone: neither psychiatrists nor physicians own scientific information. Indeed the American Psychiatric Association consulted with psychologists in developing the DSM-III. This response may be supplemented by a comment on why you find the DSM-III meaningful and important in diagnostic clarity and consistency. When the case does not require a diagnosis, my customary practice is not assigning a diagnosis. I explain that diagnoses are only shorthand labels for more extensive understandings of the nature of disorders, and that I find it more helpful to describe fully the person with whom I am working.

The question about the warning on the DSM-III introduction is a "smoking gun" ploy in the form of an unexpected shock that seems to contradict what have you have done. Your response could be an admit-deny.

A. "While I am not familiar with this statement in the manual, I use just such critical examination of diagnoses in all my assessments."

This kindof challenge can be handled by knowing that you have made an appropriate assessment that fits with the DSM-III guidelines, and affirming that felt competence in a comfortable manner.

COPING WITH ZISKIN

Ziskin, Jay Coping with psychiatric and psychological testimony . Beverly Hills, California: Law and Psychology Press, 1970, 1975, 1980.

The Ziskin volumes are all designed to prepare attorneys for cross-examination of mental health expert witnesses. Ziskin correctly observes that few attorneys know enough about the flaws and problems in the mental health professions to be able to perform a good cross-examination. Rather the attorneys tend to be intimidated by the experts and to fail to pursue fundamental scientific deficits in the clinical practice of psychology and psychiatry. Toward promoting better cross-examinations, Ziskin describes the major difficulties in theory, research, and practice in the mental health professions in a manner that allows direct use in the courtroom.

Some of the Ziskin information is very good indeed. In fact, it is not unusual for experts about to testify to find their anxiety levels rising dramatically upon observing a copy of Ziskin displayed prominently on the opposing attorney's table. I have seen competent professionals become bewildered and ineffective when the expected examination is replaced by a Ziskin based attack on sources of knowledge, theoretical foundations, validity of clinical examinations, and professional lacunae.

To prepare well for Ziskin-based cross-examination calls for an understanding of the sources of information the attorneys are using. We do not anticipate attorneys presenting us with results of research, with opinions of experts we respect, or with challenges to the profession as a whole. However the attorneys' knowledge suffers from a severe limitation as well; it is drawn from the one-sided presentation in the Ziskin books. Instead of presenting both sides reasonably well, Ziskin (properly for the purposes of his text) explains the antipsychology and anti-psychiatry case. The studies, arguments and theories that support the mental health professions are minimized or omitted.

As a result the Ziskin-armed attorney typically cannot deal effectively with an expert armed with both the Ziskin perspective and with the competing, positive findings. After the expert has responded "no" to three or four questions the attorney was certain would elicit "yes" answers, with accompanying compelling explanations, the attorney becomes discouraged, and settles for victories in tiny areas in order to save face.

ACTUARIAL DATA IN EXPERT TESTIMONY

1. Sexual Assault

*Must be good
fundamental studies
of behavior & risk to
public safety*

Source: Soothill, K.L., Jack, A., and Gibbens, T.C.D. Rape: A 22-year cohort study. Medicine, science and law, 1976, 16(1), 62-69.

Findings: A 22 year study of 86 men convicted of rape indicated that over the entire period, 42 men (49%) were reconvicted of felonies, and four men reconvicted of rape, one man twice. After 10 years, 31 (36%) had been reconvicted of felonies, three reconvicted of rape.

2. Civil commitment and Likelihood of Serious Harm (LSH)

Source: McGarry, A.L., Schwitzgebel, R.K., Lipsitt, P.D. and Lelos, D. Civil commitment and social policy: An evaluation of the Massachusetts Mental Health Reform Act of 1970. Washington, D.C.: NIMH Center for Studies of Crime and Delinquency, DHHS Publ. No. (ADM) 81-1011, 1981.

Findings: Mass. law until 1970 was sufficiently general that it allowed neurotics and character disorders to be committed for violating the conventions and morals of the community. The Reform Act required factual evidence of substantial risk of physical harm. These research followed 406 persons committed under the old law and 282 committed under the new law. Strict adherence to LSH criteria, factual evidence only, yielded 31.5% cases under the old law, and 36.5% under the new law. When LSH material was divided into behavioral evidence of what the person did, verbal of what a person threatened, opinion of what the psychiatrist thought without mentioning behavioral or verbal evidence,, or "none" that is, no dangerousness information whatever, the following pattern emerged:

	<u>Old law</u>	<u>New law</u>
Behavioral	44.8%	53.2%
Verbal	9.4	7.8
Opinion	8.6	17.4
None	37.2	21.6

3. Prediction of Violent Behavior

Sources: Monahan, J. Community mental health and the criminal justice system, Chapter 1. New York: Pergamon, 1976. Monahan, J. Predicting violent behavior. Beverly Hills, CA: Sage, 1981.

Findings: The Monahan chapter and book summarize existing prediction research. Part of the key table in the first reference includes this:

Study	% True positives	% False positives	N predicted violent	years Followup
Wenk, et al (1972)	0.3	99.7	1630	1
Wenk, et al (1972)	6.2	93.8	104	1
Steadman (1973)	20.0	80.0	967	4
Kozol, et al (1972)	34.7	65.3	49	5
State of MD (1973)	46.0	54.0	221	3
Thorberry & Jacoby (1974)	14.0	86.0	438	4

Monahan (1981) describes a six item actuarial prediction procedure used by the State of Michigan, called the Assaultive Risk Screening Sheet. The items are type of crime, existence of serious institutional misconduct, first arrest before 15th birthday, reported juvenile felony, specific assaultive crime, and ever married. Based on a simple decision tree, the following table resulted from a 14 month parole follow-up of 2200 male inmates with arrest for violent crime the criterion.

Risk category	Recidivism Rate	% of sample
Very high risk	40.0%	4.7%
High risk	20.7	6.6
Middle risk	11.8	45.5
Low risk	6.3	23.5
Very low risk	2.0	19.7

The implications are that a strong case can be developed for including explicit actuarial norms in the context of a clinical examination.

Learned Treatise Gambit - when an attorney presents known figureheads in the field as authoritative

- 1) Never certify that anything is authoritative - avoid
- \$ State that (~~these academics~~) it is not your job to research the literature but rather to protect the interest of these children
- \$ What happens when the lawyer presents to you literature which contradicts your judgement?
- 2) Be an expert ³² for an appropriate rebuttal