THE PSYCHIATRIST AS EXPERT WITNESS

COURSE OUTLINE*

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I. Introduction.

A. Inexperienced clinicians are likely to feel anxiety when called upon to testify.

B. Evaluations for clinical and legal purposes are different.

In clinical situations, the goal of the evaluation is to provide some hypotheses for treatment purposes.

In the legal situation, one all-or-none decision must be made.

C. Jury skepticism regarding mental health witnesses.

Rating of witnesses:

Medical doctor 8.13
Firearms expert 7.62
Psychiatrist 6.44
Psychologist 6.28
Police officer 6.19
Polygraph expert 5.55

D. General remarks about trials.

The adversary system seeks justice, not truth.

Trials are not scientific.

They resolve conflict with the appearance of fairness.

The objective of the court system is not to find truth; the objective is to settle disputes fairly and finally.

E. Reasons clinicians disagree in court.

1. The adversary system polarizes expressions of psychiatric and psychological opinion.

2. Attorneys select and "shop" for clinicians likely to support their position.
3. Inferences about data vary with different schools of psychiatry and psychology.

4. Opposing attorneys provide different data to each clinician.

5. Clinicians may be biased.

6. Occasional unethical clinicians' opinions may be altered by financial considerations.

II. Types of witnesses.

A. Fact witnesses may be compelled to testify if they have some knowledge due to direct observation.

A treating doctor may be compelled to testify about his contact with a patient.

A treating doctor usually has more credibility than a non-treating doctor.

B. Expert witnesses are persons who have facts directly related to some science or profession beyond the scope of the average layperson.

Expert witnesses may offer opinions, whereas fact witnesses may not.

Expert witnesses are entitled to an expert witness fee, whereas fact witnesses receive only an ordinary witness fee.

The Federal Rules of Evidence permit expert testimony if it is helpful, rather than requiring that it be necessary.

Rule 26 (Federal Rules of Civil Procedure)

Experts in federal civil trials must provide the names of all cases in which testimony (court or deposition) was given in the last four years. See Appendix XI.

III. Admissibility of expert testimony

The testimony must be relevant.

The prejudicial impact of the testimony must not outweigh its probative value.

Frye rule: general acceptance in scientific community.

Daubert v. Merrell Dow
Frye was superseded by the Federal Rules of Evidence

Under Daubert, the court must engage in a two-part analysis.

First it must determine nothing less than whether the expert's testimony reflects "scientific knowledge," whether their findings are derived from the "scientific method," and whether their work product amounts to "good science."

Second, it must ensure that the proposed expert testimony is "relevant to the task at hand," i.e., that it logically advances a material aspect of the proposing party's case.

See Appendix XII for case summaries.

Jury instruction regarding expert witness opinions:

If upon a consideration of all of the evidence in the case you find that the opinion testimony of any witness is of no assistance to you in determining the probable truth of any matters in issue in this case, or if you find that such opinion testimony is contrary to the evidence or to reason or to common sense, or if you find that any of the material facts upon which the opinion testimony was based is not supported by a preponderance of the evidence, or if you conclude that the particular witness who expressed the opinion is without credibility, then in such event it would be your duty as jurors in this case to reject such opinion testimony and give it no further consideration whatever in your deliberations.

IV. Conduct of the psychiatric or psychological expert witness.

A. When approached by an attorney to perform an evaluation for legal purposes, terms should be clearly established.

   The specific legal question should be stated.

   The legal standard should be in writing.

   Clarify role as consulting or testifying expert.

   Fees for evaluation and testimony should be understood.

   Obtain retainers from plaintiff's attorneys in civil cases and defense attorneys in criminal cases.

   The clinician should inform the attorney of any possible conflict of interest.

   The clinician should inform the attorney of any "skeletons" in his closet.

   For example, a suspension of his professional license.
B. Transference feelings by the expert should be examined.

These may be toward the opposing expert, cross-examiner, or employing attorney.

This may lead to over-advocacy.

C. Do not fraternize or discuss the case with opposing counsel, other witnesses, or jurors.

D. There is a fallacy that expert witnesses are impartial.

A clinician is a human being who cannot help but identify himself with his opinion and hope for the success of that side which supports his opinion.

V. A legal report is usually prepared for the attorney in advance.

The witness should expect this report to be picked apart in cross-examination.

The report may be given substantial evidentiary weight by judges.

It is essential to avoid conclusory reports.

Data and reasoning must be included.

See Appendix I for suggestions regarding report-writing.

VI. Depositions:

A. Trial or evidence depositions

Purpose: To preserve testimony from a witness who may not be available at trial.

Comparable to trial with direct and cross-examination.

Likely to be videotaped.

Suggestions for video depositions:

Think of the camera as your friend.

Treat each question and answer as a separate item because
the deposition may be edited.

Do not look at your attorney for approval or as a confidence booster.

Turning away from the camera is glaringly obvious on video.

If possible, position yourself so that you can exchange glances without turning your head completely away from the camera.

B. Discovery depositions

For the purpose of discovery prior to trial.

Ordinarily in civil cases.

Questions by opposing counsel.

Often more important than the trial.

Insist upon a pre-deposition conference with your attorney.

Volunteer nothing.

Don't let attorney friendliness cause you to lower your guard.

Goals of the attorney.

a. Discovery of facts and opinions.

b. Assess the witness.

c. Gather ammunition for trial.

The form of the question reveals the attorney's interest.

If for discovery, the question will be broad.

If seeking admissible evidence, questions will be precise to "freeze" testimony.

See Appendix IV and V for suggestions regarding depositions.

VII. Confidentiality may or may not be respected in the courtroom.

The subject of your examination must be told this before the examination.

The judge is the final decision-maker.
The clinician may be held in contempt of court for refusing to answer after being directed to do so by the judge.

VIII. Direct examination of the expert witness.

A. When called to testify, the witness should stride forward confidently, stopping at the witness stand to face the judge, to be sworn in.

The clinician should not wait to be ushered around the courtroom like a lost child.

B. Non-leading questions will be asked by the attorney who employed the expert.

C. The expert's qualifications will first be elicited.

Avoid the appearance of immodesty.

In being qualified as an expert witness, jurors don't like to have their noses rubbed in a long list of qualifications.

Be brief and reserve a portion to where it is relevant to the examination.

For example, state why you feel qualified particularly to render an opinion in this particular case.

When being qualified, consider showing who uses the publications you have written.

For example, my textbook is used at 30 medical schools.

Call your CV a "resume."

D. Description of your examination and materials reviewed.

E. Statement of opinion with reasonable scientific certainty.

Definition -- varies with the jurisdiction.

Commonly, more probable than not.

Legal meaning of probability -- 51%.

Distinction from possibility.

The opinion question should be answered "yes" or "no" without stating your opinion.

F. Give conclusions first, then explanations.

G. Be able to explain how you arrived at your opinion.
Step by step logic is necessary.

*Beware of bringing in so much material that jurors will lose track of your major points.*

*Less is more.*

*Too many supporting points drown out the points they are intended to support.*

*Help jurors keep track of how each subordinate point you make connects to the main point you want to show.*

*Don't support an assertion or conclusion with another assertion.*

*Support every assertion and opinion by making clear how you know it to be true.*

*Consider using a time line as a visual aid.*

*When repetition for emphasis or clarity is desirable, say it in different words or from a different vantage point.*

**H. It is usually best to omit your theoretical orientation.**

**I. Use demonstrative evidence if possible.**

*After three days, people remember:*

*Ten percent of what they hear.*

*Twenty percent of what they see.*

*Sixty-five percent of what they see and hear.*

*By using visual evidence for clarity and reinforcement, the retaining attorney can use the same visuals in closing argument to remind the jurors of your testimony.*

*A good visual either clarifies better than words or persuades better than words.*

*The main point of the visual aid must come across quickly, easily, and clearly.*

*Visual evidence is useless if its main points cannot be taken in at first glance.*

*Visuals have such high impact that you should use them only for points that you want to emphasize.*

*Each visual display should make only one or two points.*

*Ask yourself what single message you want each visual display to carry.*

*Then make sure the visual does not carry other messages that compete for attention.*
Be thoughtful that one of your own visuals cannot be used by the cross-examiner to show how you are wrong.

Juries love boomerangs against an expert witness.

J. The credibility of the expert to the jury is critical.

Components of credibility.

1. Expertise -- credentials, training, experience.

2. Trustworthiness -- appearance of objectivity, lack of partisanship, sincerity.

   Some studies suggest this is more important than credentials.

3. Dynamism -- style of delivery.

   While teachers are lecturing, students are not attending to what is being said 40% of the time.

   In the first ten minutes of a lecture, students retain 70 percent of the information; in the last ten minutes, 20 percent.

   Jurors can be daydreaming even when they seem to be hanging on your every word.

   It is a deception mastered in third grade.

Credibility is strongly enhanced by a demonstrable command of relevant information.

The appearance of limited knowledge tends to diminish credibility.

Credibility is damaged by using such phrases as "to the best of my current understanding" or "as far as we can tell."

Keep your hands away from your face.

It makes you look sneaky.

It is instructive to understand what judges and jurors employ as factors in determining the believability of lay witnesses. In California, jurors are instructed to consider the following:

Whether the witness had the opportunity to see, hear, smell, touch, or otherwise become aware of the matter about which the witness has testified;

The ability of the witness to remember or communicate the content of events;
The general character and quality of the testimony;

The demeanor and manner of the witness while testifying;

Whether matters testified to can be or have been corroborated by other evidence;

The attitude of the witness toward what he or she has testified to and toward the giving of the testimony itself;

Inconsistency or consistency of previous statements made by the witness;

The witness' prior conviction of a felony.

"The demeanor of the witness includes such factors as the tone of voice in which a witness' statement is made, the hesitation or readiness with which his answers are given, the look of the witness, his carriage, his evidences of surprise, his gestures, his zeal, his expression, his yawns, the use of his eyes, his furtive or meaning glances, or his shrugs, his self-possession or embarrassment, his air of candor or seeming levity."

To humanize means to emphasize the human elements of a person so that the jury can relate to them.

Use names throughout the trial of the party retaining you.

First names should be avoided since it suggests inappropriate intimacy.

To dehumanize the opponent party, say, "the plaintiff."

It humanizes you to smile from time to time.

As an expert, you can show passion.

That means enthusiasm and strength of expression that comes from devotion to the task at hand, not dramatics.

Jurors tend to believe experts who are reasonably passionate about their work. Jurors tend to distrust or ignore experts who seem disinterested or uninvolved.

K. Persuasiveness is correlated with confidence.

Although factual accuracy and communicator confidence are unrelated, impressions of confidence nonetheless accounted for 50% of the variance in decisions to accept what was said as true.

Confident speakers rarely break eye contact.

L. Persuasiveness and credibility are associated with:
More eye contact

Higher vocal volume
Conversational delivery

Slightly faster speaking rate

Lower pitch

M. Impact of word choice.

The business organization on your side is a "company" or a "store." The opposition is a "corporation."

N. Style of speech.

Witnesses who speak in a powerful style, avoid unnaturally formal speech patterns, testify with minimal assistance from the lawyer, and resist efforts by the opposing counsel to cut short their remarks, will enhance their credibility because they will make more favorable impressions on the jury (O'Barr, 1982.)

Powerful speech, as opposed to powerless speech, is associated with:

1. Greater credibility of the witness.
2. Greater persuasiveness of witness.

Powerless speech is used by persons with low power and low status vis-a-vis the court, whether male or female.

Powerless speech tends to make frequent use of:

1. Intensifiers (so, very, surely).
   
   Eg., I surely did.
2. Hedges (kind of, I think, I guess).
3. Especially formal grammar.
4. Hesitation forms (uh, well, you know).
5. Gestures.

   Eg., Use of hands and expressions such as "over there" while speaking.

6. Questioning forms.

   Eg., Use of rising, question intonation in declarative contexts.
7. Polite forms (please, thank you, sir).

*Powerful speakers are more straightforward and give more one word answers.*

*When there is overlapping speech between a witness and an attorney, witnesses who continue speaking are viewed as more powerful and more in control.*

*Attorneys are perceived as less control when there is overlapping speech.*

O. **Narrative versus fragmented style**

*It is better to use a narrative than a fragmented testimony style.*

*A narrative style gives a complete answer.*

*A fragmented style is very brief and answers only the specific question.*

*Witnesses tend to use one or the other.*

**Examples of narrative and fragmented style**

**Narrative Style**

*Q.* Now, calling your attention to the twenty-first day of November, a Saturday, what were your working hours that day?

*A.* Well, I was working from, uh, 7 a.m. to 3 p.m. I arrived at the store at 6:30 and opened the store at 7.

**Fragmented Style**

*Q.* Now, calling your attention to the twenty-first day of November, a Saturday, what were your working hours that day?

*A.* Well, I was working from 7 to 3.

*Q.* Was that 7 a.m.?

*A.* Yes.

*Q.* And what time that day did you arrive at the store?

*A.* 6:30.

P. **Expert Witness Clothing:** See Appendix IX
Q. Counterarguments.

Discuss counterarguments during direct testimony if an opposing expert will later testify.

If no rebuttal is expected, there is greater persuasive impact by ignoring counterarguments.

This does raise ethical issues about telling "the whole truth."

R. Use analogies and examples.

*Find ways to relate unfamiliar concepts to familiar things to the jury.*

*For example, Geoffrey Fieger argued in defense of Dr. Kevorkian, that the doctor's intent had not been to cause death, but to end suffering.*

*In his closing argument, Fieger talked to jurors about taking a suffering pet to the veterinarian to be put to sleep. "The owner's intent is not to kill; the intent is to end unbearable suffering."*

*This understandable and emotionally bonding analogy helped to win an acquittal.*

S. Experts of superior competence are liked more after a minor error.

T. Hypothetical questions.

Experts may be given a hypothetical scenario and asked to form an opinion assuming the hypothetical to be true.

*The purpose is to give the basis for the expert's opinion since there may be a dispute about the facts.*

*The jury may reject the expert's opinion based on the factual assumptions without disbelieving the expert.*

All the facts assumed in the question must be in evidence.

*An expert may testify to hypothetical questions without having examined the patient.*

The more modern rules of evidence (including Federal Rules of Evidence) abolish the need for hypothetical questions. (See Appendix X)

Don't refuse to consider changing your opinion if you are presented with new information.

*Listen carefully because the attorney may:*
1) exclude factual information that the clinician knows to exist.

2) include factual information of which the clinician is unaware; or

3) include as information to be assumed facts not in evidence in the case.

The witness may remind the jury of an incorrect hypothetical question by qualifying his opinion.

Eg: Assuming only x, y and z is difficult for me, because of my own investigation I found a and b, which contradicts x. However, if I assume only what you stated, and disregard what else I know, a reasonable inference would be r.

Should you Answer Hypothetical Questions?

a. If the hypothetical set of facts makes sense and you have enough information to render an opinion, do so.

b. You do not have to accept hypothetical facts which are contrary to known facts and psychiatric principles.

c. If asked a hypothetical that is "inappropriate," state that you cannot give an answer to the hypothetical.

U. Hearsay rules.

Hearsay is a verbal out of court statement made by a person with no personal knowledge of the facts, but offered as evidence to prove the truth of an asserted matter.

In jurisdictions with a strict hearsay rule, the expert must base his opinion solely on:

1. His own examination; and

2. The facts in evidence.

The more modern rule (Federal Rules of Evidence) allows exceptions to the hearsay rules during expert testimony.

The expert is permitted to testify on the basis that he usually uses in forming scientific opinions.

V. The ultimate legal question.

The ultimate question is one whose answer is decisive in resolving the case.

In some jurisdictions, expert witnesses may not answer "the ultimate legal question."
It may be felt to "invade the province of the jury."

The more modern rule (Federal Rule 704) allows expert witnesses to give an opinion about the ultimate question as long as it may be helpful to the jury.

The only federal exception is the insanity defense.

The jury may accept or reject the expert's opinion.

IX. Cross-examination:

A. Cross-examination may be viewed as positive and negative.

Positive cross-examination is to get the witness to help the cross-examiner's side.

The witness may be used to repeat the major points of the attorney's case.

The witness may be used to enhance the credibility of one of his own witnesses. Eg:

By saying that he refers patients to him.

B. The purpose of negative cross-examination is to discredit adversary testimony.

The goal of cross-examination is not to convince a witness of error, but to expose weaknesses in the testimony.

Trial attorneys may take pleasure in discrediting experts. For example,

"This may sound nasty, but you deserve to know that many trial attorneys take particular pleasure in knocking out dishonest or ignorant experts. I don't just mean for the case at hand. I mean ending their careers, with prejudice as we say."

C. Cross-examination can be either substantive or collateral.

Collateral attacks may show the witness has bias or inadequate qualifications, rather than attacking the substance of the direct testimony.

D. The credentials of the witness may be attacked.

The witness may be shown to lack experience or education.

It may be shown that the witness has not completed his board examinations.

It may be brought out that the witness did not pass his board
examinations on the first sitting.

Defensiveness about credentials may cause more loss of credibility than the credentials themselves.

E. The cross-examiner may attempt to show bias or personal interest of the witness.

It may be shown that the witness is always employed by one side.

Acknowledge a known bias. It is discovery of a correct bias that is most damaging.

It may be shown that the witness formed an opinion in the case before being given all the facts.

A cross-examiner may portray an expert as a hired gun because all or most of his income comes through conducting independent medical examinations.

The doctor may be asked, "When was the last time you actually treated a patient?"

The expert's credibility may be attacked by pointing out that he has advertised himself as an expert witness.

Including a toll free number makes such an advertisement look even more commercial.

F. The adequacy of the examination may be attacked.

The opposing attorney tries to demonstrate that the expert's data base is limited or based on biased sources.

The length of the examination may have been short.

If it is suggested that you took an inadequate history, you can point out that you selected the most relevant portions of the client's life for the purpose of the evaluation.

If you are unfamiliar with an article suggested by an attorney, you might explain,

"With over 700 journals and 40,000 articles published every year in my field, no one is familiar with every article."

There may have been an absence of privacy.

The absence of corroborating information may be demonstrated.

G. The validity of inferences and reasoning may be attacked.

Inconsistencies within the report.
Inconsistencies between the report and articles authored by the expert.

Inconsistencies between the witness' present opinion and prior statements in depositions or other cases.

The expert should assume that the cross-examiner has a copy of everything he has published.

H. The validity and reliability of clinical examinations may be attacked.

The subjective nature of examinations may be attacked.

The evidence of limited reliability has been collected in the Ziskin book, *Coping with Psychiatric and Psychological Testimony*. (See references)

If two mental health professionals are trained in different theories, they may reach different conclusions based upon the same data.

*The reliability of psychiatric diagnosis prior to DSM-III was only 60% between two examiners, and 45% among three examiners.*

*Reliability data is now closer to 80% since DSM-III and its successors.*

The race and sex of the examiner do make a difference in the information elicited from a patient.

There is no scientific evidence which indicates the validity of making a retrospective diagnosis.

I. The most common method of impeaching expert witnesses is the use of a prior inconsistent statement.

J. Cross-exam questions will be short and leading.

This makes it harder for the witness to weasel out.

K. The principles of primacy and recency:

The beginning and the end of cross-examination are most important.

For this reason, the attorney may seek to use very effective cross-examination techniques immediately to embarrass the witness.

This will cause the witness to be reluctant to go too far during subsequent cross-examination questions.

The attorney is likely to stop when he is ahead even though there are additional questions to be asked.
L. Use of DSM-IV

1. If you did not use DSM-IV, the attorney may suggest that you make up your own diagnoses.

2. If you did use DSM-IV, the attorney may point out that it is an experimental manual that continues to undergo revisions.

   Isn't DSM-IV a political document, rather than a scientific document?


3. The introduction shows that task force members differed in their interpretations of research studies.

4. There is a disclaimer that it should not be used for legal purposes.

   DSM-IV Statement of Caution:

   It is to be understood that inclusion here, for clinical and research purposes, of a diagnostic category such as Pathological Gambling or Pedophilia does not imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder, or mental disability. The clinical and scientific considerations involved in categorizations of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability determination, and competency. (American Psychiatric Association, 1994)

M. During cross-examination, do not look at the attorney who retained you.

   It looks to the jury like you are seeking advice on what to say.

N. During cross-examination, the cross-examiner may refer to you meeting with "your lawyer."

   You should explain that he is retaining counsel but is not the expert's lawyer.

O. During cross-examination, counsel may read from a document and ask you "Is that correct?"

   If you answer affirmatively, that answer can be construed as meaning not only has the attorney read it correctly, but that you agree with the statement.

   A better answer is to say "That is what is written there."

P. Attorneys assume control by use of tone of voice, by questions that elicit yes or no answers, by facial expressions, by eye contact, and by taking the witness to a planned destination.
Q. **Suggestions to increase witness control** during cross-examination.

1. You may break the pace of the cross-examiner's rhythm.
   
   You may pause before answering.
   
   You should not answer any question that includes a minor error.

2. You may break eye contact with the attorney by looking at the jury.

3. You should demonstrate a confident, relaxed posture.

4. You should try to give full answers on cross-examination.

5. If you are badgered, you can tell the judge that you have answered the question as well as you can.

6. You can point out any misquoting that the attorney does of earlier remarks made by you.

7. You should finish your answer if interrupted by a cross-examiner.

8. You may use a tone of victory if a point must be conceded.

9. You may use the admit-deny technique.
   
   It allows you to acknowledge the truth of the question, but still make your point.

10. You should know the names of the key players in the courtroom.

11. You cannot rephrase every question to your liking because it would make you appear evasive and biased to jurors.

   You can, however, pick spots to reframe critical questions in ways that better suit your opinions.

_The following advice was prepared for attorneys._

1. *If an opposing expert has not hurt you, do not cross-examine her at all.*

2. *If she has really hurt your position, make a frontal assault.*

3. *If the witness is shaky, show off your knowledge to get her to stick to the truth.*

4. *If the witness is arrogant, appear ignorant to get her to go too far.*

5. *If the direct testimony is unassailable, attack the witness's credibility and fee.*
See Appendix VIII for additional suggestions to attorneys.

S. Classification of cross-examiners.

1. The country-type lawyer who claims to know nothing.
   
   A good answer is to "one down" him.

2. The unctious-type who is excessively polite.

3. The blustery-type who works toward immediate credibility destruction.

   Allow the force of his assault to defeat him by not counter-attacking.

T. Rights of Expert Witnesses.

1. If the expert has a question about how she should answer the question posed, she may ask the judge.

2. The expert may ask the judge whether the material asked for is privileged.

3. The expert may refuse to answer questions she does not understand. She may ask examining counsel to clarify the question.

4. The expert may state that she does not know the answer to the question.

5. The expert may ask the judge whether she can qualify his answer when a yes or no answer is requested.

6. The expert has a right to complete her answer and should protest if she is interrupted.

7. The expert may refer to written records to refresh her recollection or memory.


U. Files taken to the witness stand.

The cross-examiner may request them and read them in detail.

Take no information with you to the stand that do not wish to be cross-examined upon.

V. Textbooks and articles.

If you acknowledge a textbook as an authority, you are liable to be cross-examined on its contents.

A good response is that your knowledge comes from many
sources including training and experience.

Some jurisdictions permit a textbook to be declared authoritative either by judicial notice or testimony by another expert.

Insist upon seeing any quote in its context before responding to a question.

X. Suggestions for expert witnesses

A. Have a pretrial conference in all cases.
B. Give your resume (C.V.) to the attorney in advance.
C. Do adequate preparation.
   
   Seek access to important witnesses and documents.
D. Know the specific legal issue and standard.
E. Dress conservatively.
   
   See Appendix IX for details.
F. Leave the courtroom immediately after your testimony.
G. Attempt to display dignity, confidence and humility.
   
   Confidence is highly correlated with persuasiveness.
H. Give short clear answers in simple language.
I. Stay within your field of expertise.
   
   Be comfortable saying, "I don't know."
J. Use the client's own words to demonstrate a point.
K. Qualify your answer when it is necessary.
   
   You may seek leeway from the judge.
L. Look at the jury and direct your remarks to them.
   
   Talk to jurors they way you talk to friends in normal personal conversations.
   
   Looking at an individual juror for more than a few seconds at a time can make him uncomfortable.
   
   To prevent this, move your glance easily and comfortably from
juror to juror as if talking with friends at a gathering.

M. When you are on the witness stand, do not look at your attorney for help in answering a question.

N. Anticipate where the cross-examiner is leading so that you don't get boxed in.

Here are some don’ts.

A. Don't be, or even appear to be, an adversary.

Once you are on the stand, it is your absolute obligation to tell only the truth regardless of the effect it will have upon the side that hired you.

Don't defensively try to explain away points you should concede on cross-exam.

Trying to evade questions makes you seem partisan, less authoritative, and less honest.

Wait for redirect.

If you allow yourself to become an over-advocate in the litigation, you lose your credibility.

The appearance of impartiality is best achieved when you treat both lawyers (on direct and cross) with the same professional courtesy and distance.

When walking out of the courtroom, do not look at or acknowledge the party who has retained you. Do not stop to shake hands. If you do so, you may lose credibility with the jury.

However, you can take sides to wage battle on behalf of decent professional standards in your field.

A plaintiff's expert can be professionally offended at what the defendant has done.

A defendant's expert can be professionally offended at what the plaintiff's experts have claimed.

B. If asked what an attorney told you to say in your testimony, a good answer is that you were told to tell the truth.

C. Don't ever talk down to the jury.

D. Don't use jargon.
When jurors don’t easily understand you, they stop listening.

Worse, they trust you less because honest means clear talk.

"Eloquence is the power to translate a truth into language perfectly intelligible to the person to whom you speak."

Consider the following testimony:

"The patient showed marked psychomotor retardation and considerable inhibition of speech. Some ideas of reference were implied, although no frank delusion formation was evident."

This could be expressed in the following lay language:

"His movements were slow and his voice was low and monotonous. He spoke little and volunteered nothing. He felt that certain people were referring to him when they spoke with each other privately, but he did not show any clearcut delusions about this -- just vague ideas that he was the subject of other people's conversations."

Avoid "prior and subsequent;" instead use "before and after."

E. Don't appear arrogant.

Clinicians who have published extensively must especially guard against being portrayed as arrogant.

An aloof witness with a long resume has less persuasive power than one who is perceived as genuinely caring about patients.

An expert should never say (or think) that the information is "too complicated" for the judge or jury.

F. Don't attempt to be humorous.

G. Don't be a smart aleck or argue with the cross-examiner.

Lawyers argue; witnesses testify.

Avoid the temptation to subtly belittle the cross-examining attorney due to lack of technical knowledge or mispronunciation of unfamiliar terms.

The jury will quickly identify with the attorney being patronized, especially if he/she has been polite to the expert.

H. Don't lose your temper.

I. Don't be defensive.

J. Don't answer any question you don't fully understand.
K. Don't guess at an answer; it is better to say you don't know or don't remember.

L. Don't attempt to defend the whole science of psychiatry.

M. Don't refuse to admit the obvious.

N. Don't volunteer additional information.

O. Don't base your opinion on the subject's account without factual corroboration.

P. Don't be pushed into an opinion that is not your own by a zealous attorney.

Q. Don't say you have an impression, feeling or speculation; offer a professional opinion.

R. Don't try to avoid answering questions about your fee or pretrial conferences.

S. Don't mention an insurance company in a civil trial; it could cause a mistrial.

T. Don't be cowed by the judicial process; you are the expert.

XI. Summary

Know the facts cold.

Stay respectful toward the cross-examiner.

Don't be an overadvocate.

Ideal testimony

He never overlaid an argument with superfluous words, or stretched it beyond its strength, or weakened it by exaggeration, or made it subservient to the parade of his own learning and ingenuity; but, having clearly and forcibly presented it, was content to leave it to stand on its own merits.
THE PSYCHIATRIST AS EXPERT WITNESS

References


1. Psychiatrists disagree in court because:
   1. The adversary system polarizes expressions of psychiatric opinion.
   2. Opposing attorneys provide different data to each psychiatrist.
   3. Attorneys select psychiatrists likely to support their position.
   4. Psychiatrists may be biased.

2. In discovery depositions, goals of the deposing attorney include:
   1. Intimidating the witness.
   2. Assessing the witness.
   3. Getting the witness to change his/her opinion.
   4. Gathering ammunition for trial.

3. Expert psychiatric opinions may be expressed if they are stated as:
   1. Strong possibilities.
   2. 100% certain.
   3. 40% certain.
   4. A reasonable medical certainty.

4. Psychiatrists testifying in court should:
   1. Refer to their curriculum vitae as their resume.
   2. Use occasional jargon.
   3. Leave the courtroom immediately after their testimony.
   4. Try to minimize their participation in pretrial conferences.

5. The psychiatric expert witness must understand:
   2. The legal issue.
   3. The grounds for objections.
   4. The legal standard.
6. The psychiatric expert witness should:
   1. Attack the cross-examiner if personally attacked.
   2. Direct his/her remarks to the questioner.
   3. Use humor if the trial is boring.
   4. Not appear to be an adversary.

7. Expert witnesses:
   1. May give opinions in court.
   2. Generally have more credibility than fact witnesses.
   3. Have facts beyond the scope of the average juror.
   4. Are truly impartial.

8. Basic components of credibility include:
   1. Expertise.
   2. Trustworthiness.
   3. Dynamism.
   4. Logic.
ANSWERS TO SELF-ASSESSMENT QUESTIONS

1. e. All are correct.
2. c. Only 2 and 4 are correct.
3. d. Only 4 is correct.
4. b. Only 1 and 3 are correct.
5. c. Only 2 and 4 are correct.
6. d. Only 4 is correct.
7. b. Only 1 and 3 are correct.
8. a. Only 1, 2 and 3 are correct.
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I. Introduction:

The purpose of the legal report is to furnish data to help in the legal disposition of a dispute.

This differs substantially from the standard psychiatric-medical report, which serves the purpose of therapeutic goals.

II. Stages of Report Writing:

A. Gathering material.
B. Consider the audience and purpose of the report before you begin to write.
C. Organize and outline the material before the first draft.
D. Fine tune the report so that it does not tire out the reader.

III. Federal Rule of Civil Procedure 26 require the following items in federal civil reports:

1. A written report signed by the expert.
2. A complete statement of all your opinions.
3. The basis and reasoning for your opinions.

The basis will be your interviews and documents reviewed.

4. Your qualifications. Attaching a cv will do.
5. A list of all publications authored by you in the last ten years.
6. Your fees for review and testimony.
7. A list of all cases in which you have testified at trial or at deposition in the past four years.

IV. Format and Content:

A. Proper formatting of reports

Use a 12 point font that is easy to read, especially if your report is likely to be faxed.
Use topic headings to break up the report.

It permits the reader to find specific data easily.

Use short, concise paragraphs.

Be sure you number the pages.

Consider using an executive summary at the beginning of a lengthy report.

B. Listing of documents (Babitsky and Mangraviti, 2002)

The list should be numbered.

The documents should be listed in some natural grouping, such as chronologically, or grouping together medical reports and depositions.

Avoid saying that you reviewed relevant portions of a document.

How can you know what is relevant unless you review the document in its entirety?

If the retaining attorney selected what portions were relevant, your conclusions are suspect.

Avoid the word "various" in listing documents because it suggests that you are not thorough and precise.

Instead list each document.

If you list the documents that were not available for review, you make opposing counsel’s job easier on cross-examination.

C. Use clear attribution in all portions of your report.

Rather than saying "Mrs. Jones reported a history of bipolar disorder initially," it would be better to say, "In the 6/4/01 assessment by Dr. Smith at University Hospitals, Mrs. Smith reported a history of bipolar disorder."

D. The report must contain all the data necessary to fully support the opinion.

The presence of any irrelevant material detracts from the report and sets up data for cross-examination.

E. Failure to list all of your opinions in your report may result in the preclusion of your offering opinions at trial that were not included in your report.

F. If you use citations to texts or articles, be specific.
Avoid general statements such as "my opinion is supported by the 'weight of the literature.'"

Be certain that you have used the latest edition of any book that you cite.

G. Reports should be self-sufficient.

Without referring to other documents, the reader should be able to understand how the opinion was reached from the data in the report.

Critical documents should be briefly summarized within the report.

H. Opinion is divided on whether the clinician's opinion should come first, or at the end of the report.

I. Possible Subheadings in Reports Regarding Criminal Defendants:

The suggested items may be omitted if not relevant.

1. Identifying information:
   This should include case number and the criminal charges.

2. Source of referral:

3. Referral issue:
   This should specify the questions being asked by the referral source.

4. Sources of information:
   The length and location of interviews with the subject or defendant and any other parties should be specified.
   All the documents that were reviewed should be listed.
   Vertical listing facilitates being able to see quickly if a document was reviewed.

5. Qualifications of the examiner:

6. Statement of non-confidentiality:
   The examiner should state that the defendant understood that there would be no confidentiality and he agreed to proceed.

7. Past personal history:

8. Family history:

9. Sexual and marital history:
10. Educational history:
   Include special education and suspensions.

11. Employment history:

12. Military history:
   This may be relevant to show patterns of antisocial conduct manifested by court martials, Article XV's, or a less than honorable discharge.

13. Relevant medical history:
   Include head injuries, seizures, and current meds.

14. Drug and alcohol history:

15. Legal history:
   This should include both juvenile and adult arrests.
   In civil cases, include prior law suits and worker's compensation claims.
   Prior contacts with courts is relevant to assessing competence to stand trial.

16. Psychiatric history:

17. Prior relationship of the defendant to the victim:
   This may be relevant in a NGRI assessment if it is unclear whether the motive was psychotic or rational.

18. Relevant events preceding the crime:

19. Defendant's account of the crime:
   Direct quotations from the defendant are important.
   Having a section labeled "Defendant's account of the crime" reduces the need to continually say, "The defendant stated...".

20. Witness and/or victim accounts of the crime:
   Specify if direct contact or summary of police reports.

21. Mental status examination:
   This should include an assessment of suicide risk.

22. Physical examination and laboratory tests:
This may be taken from recent records if relevant.

23. **Summary of psychological testing:**

This section may summarize psychological testing from past records.

It may also summarize current psychological testing. If the examiner is a psychiatrist, a full report of a psychologist may be appended.

24. **Competency assessment:**

It should contain factual data and answers to McGarry-type questions or other competence assessment instruments.

Judgments about the answers and opinions should be deferred until the Opinion section.

25. **Psychiatric diagnosis:**

The diagnosis should be made only in terms of DSM-IV.

In cases of disputed diagnosis, it is appropriate to add a paragraph demonstrating how the defendant's symptoms justify the diagnosis in DSM-IV.

26. **Opinion:**

The opinion should be stated with "reasonable medical or psychological certainty" unless the examiner is unable to form an opinion.

Each opinion should be stated clearly, explicitly, and with confidence.

Avoid hedge words such as "it seems," "I think," and "I believe," in expressing your opinions.

Such words suggest that you do not have confidence in your opinion.

The expert opinion should be stated in the exact language of the legal standard in that jurisdiction.

G. **The most critical part of the report is the reasoning in the opinion section.**

1. The weight accorded to the expert's report is directly proportional to the strengths of the reasoning supporting the opinions.

2. Opinions should be based upon data contained within the report, including summaries of collateral data such as
autopsy reports.

Specific examples should be taken from the data section of the report to support the opinion.

3. Start with a statement of your opinion.  
   Support it with your reasons.  
   Don't begin with the evidence and conclude with your opinion.

4. Consider adding a section to show that you considered malingering.

5. Conclusions about patterns of behavior must be supported with multiple examples, rather than a single incident.

6. Conclusory judgments about a defendant's maturity or impulse control should not be made unless they are supported by specific data.

7. Reasons supporting opinions should be clearly and fully stated.  
   The reader should not have to use his own inferences to understand the point.

8. If there are two versions of the facts, offer alternative opinions.

9. Psychodynamic themes have no significance unless they can be logically related to the legal issue.

10. It may be useful to specify those factors which militate against your opinion.  
    It increases the credibility of the clinician.  
    However, it also provides ammunition for cross-examiners on depositions and/or court testimony.

11. A psycho-legal report should specify its limitations.  
    Limitations include opinions resulting from inadequate examination or limited source material.  
    If the examiner has not gained access to certain data, the reason it was not obtained should be specified.

12. Limitations of the assessment process and our state of knowledge may mean that we cannot validly predict the future.
A conservative statement can be made in a "double negative".

For example, "In my opinion there are no psychiatric contra-indications to this defendant being placed on probation."

V. Attorney Control over Reports:

A. The clinician should have a clear understanding with the referring attorney about whether he wishes a report, or only a telephone conference after the evaluation.

The attorney may not want a report because it is subject to discovery.

You should still consider dictating a report for your own file.

B. No report may be requested.

This should be clear in advance.

Your opinion may not be helpful.

For strategic reasons.

Opposing counsel is less able to prepare for cross-examination or depositions.

More common in civil cases because of discovery rules.

C. A brief report is requested.

This may satisfy court requirements and still keep details unavailable.

This may be done to keep costs down.

D. Efforts by attorneys to alter the content of reports.

If you allow the retaining attorney to cause you to modify any substantive opinion in a draft report, the cross-examiner can ask to see earlier drafts and seriously undermine your credibility at trial.

A phone call between the attorney and expert before preparing the first report to clarify the attorney’s needs is better than needing to modify a draft report.

If you destroy draft reports, the cross-examining attorney can make it look like you were trying to hide something.
Do not refer to any discussions with retaining counsel unless they are relevant to the report.

Meeting to review draft of report is better than mailing or e-mailing a draft report to the attorney.

Requests for deletions or changes after the final report has been sent.

- Inadmissible criminal history.
- Non-relevant prejudicial item.
- Correction of error.
- Basic change in opinion.

Obligation to reveal changes if asked.

VI. Report Writing Style:

A. Message of a report
   1. Substance
   2. Tone

B. The clinician must personally proofread the report.
   Be sure you have not used bad grammar.

   - If your grammar skills are not excellent, consider having another person proofread your reports.

   Cross-examiners will try and show that bad grammar is a result of rushing, sloppiness, ignorance, or worse.

   Proof read for typographical errors.

   - Typographical errors are fully avoidable and should be eliminated from your report.

   - Spelling errors will make you look needlessly sloppy and damage your credibility.

C. The style of the report may vary depending upon its purpose and the recipient.

D. Throughout the report there should be a clear separation of factual data from editorial opinions, inferences, and conclusions.

   The latter belong only in the "Opinion" section.
E. Every effort should be made to avoid bias and the appearance of bias.

F. Objectivity is conveyed in a number of ways.

Tentative words such as "suspect" or "possibly" should be avoided.

Avoid statements such as "obviously" or "It is clear..." unless the situation is truly apparent to all concerned.

More neutral terms such as "The defendant states..." are preferable to the more pejorative "The defendant alleges..." or "claims" or "denies", which infers that the defendant's credibility is in doubt.

Example: A complete absence of any comments about suicidality are manifestly and egregiously below the standard of care of psychiatrists.

The words "manifestly" and "egregiously" suggests that the expert is a hired gun who is making any statements necessary to help his side win.

Better: In my opinion, based upon a reasonable degree of medical certainty, the absence of comments about suicidality in the records is below the standard of care for psychiatrists.

G. Clinicians should avoid recitation of case law or other detailed legal knowledge.

H. Use the first person singular when referring to yourself.

Use of the third person or "undersigned" is awkward and can be used to make the expert sound pompous or silly.

I. The following items should be avoided in psychiatric-legal reports (Babitsky and Mangraviti, 2002):

1. Avoid snide comments.

   Example: Failure to get Lithium levels was both amateurish and irresponsible.

   Better: Failure to obtain Lithium levels was below the standard of care.

2. Do not comment on the credibility of witnesses.

   It makes you appear biased.

3. Do not comment on other expert’s reports by making personal attacks.
It is unseemly and will hurt your credibility.

4. Do not say that your examination has been "complete and thorough."
   
   To do so sets a very high standard for yourself.
   
   Any slight omission can be brought out in cross-examination.

5. Avoid friendly language directed to the retaining attorney.

   Example: P.S. I hope you, Mary, and the kids have a happy holiday season.
   
   This shows a personal relationship with the attorney which will reduce your credibility.

6. Do not use words that suggest you are guessing about the facts.

   Avoid words and phrases such as "supposedly," "It has been reported," "is said," "as I understand the facts," and "presumably."

   Instead attribute the information to a specific page of a deposition or a specific medical record.

7. Avoid using legal terms generally.

   If an attorney wants you to use a phrase like "grossly negligent," in your report, be certain that you fully understand the precise meaning of that phrase in the relevant jurisdiction.

8. Avoid ever describing a report as a "draft" report.

   It implies the report was changed after discussions with retaining counsel.

9. Do not label your report a "work product."

   Writing "work product" on the document does not make the document a work product, but it does make it look like you are trying to hide something from the other party in the case.

10. Do not label your report "confidential."

    If you do, the cross-examiner will suggest you are trying to hide something from the judge, jury, or opposing counsel.
11. Avoid the use of absolute words such as "always" or "never."

Such language leaves the expert open to damaging cross-examination.

All the cross-examiner has to do it present a single counter example in which the expert’s statement is not correct.

12. Do not use emphasis when expressing your opinion, such as by emphatic language, exclamation points, capital letters, or underlining.

The cross-examiner may turn your use of emphasis against you.

13. Avoid the words "apparent" and "perceived."

Example: This report is intended to express the writer’s perceived impression of the apparent performance of the Dr. Jones.

Better: In this report, I will express my professional opinion to a reasonable degree of certainty regarding the performance of Dr. Jones.

14. Avoid any language that suggests that you desire to satisfy the needs of the retaining attorney.

Example: I trust this report is sufficient to meet your needs at this time. If I can be of any further assistance, please do not hesitate to call me.

The cross-examiner can seek to show that your goal was to meet the retaining attorney’s needs rather than to prepare an objective report.

15. Avoid the word "authoritative."

Stating that a certain reference is authoritative will usually allow the cross-examiner to question you about anything contained in the text.

16. Avoid the word "legal."

Most psychiatrists go beyond their area of expertise when they discuss what is and is not legal in their reports.

17. Avoid the word "probable."

Example: It is probable that his psychological damages
would have been substantially lessened.

Better: It is my opinion, based upon a reasonable degree of medical certainty, that his psychological damages would have been lessened.

18. Avoid the word "possible."

The term "possible" in law means less than 51% and is legally insufficient to support an opinion.

19. Avoid the word "obvious."

A good cross-examiner can use this term to make the expert appear patronizing and presumptive.

20. Avoid "presumably."

To presume is to assume.

You should avoid making presumptions whenever possible.

21. Avoid "evidently" and "supposedly."

These terms imply uncertainty.

22. Avoid the term "is said" because it also implies uncertainty.

This term makes it appear as though your opinion is based on hearsay and rumor.

23. Avoid the royal "we."

A cross-examiner can make the expert look silly, pompous, or even dishonest.

Unless more than one person was involved in forming the opinion, the report should be written in first person singular.


Superfluous language provides fertile grounds for cross-examination that will damage your credibility.

25. Avoid boiler plate language.

The cross-examiner can show that you used the same language in other reports and imply that you are a hired gun, rather than someone who does careful individual evaluations.
Even avoid such language as "This report does not necessarily embody the details of all my opinions. I reserve the right to amend and add to my opinions upon further review of the records."

26. Avoid giving any legal advice.

Example: The defendant psychiatrist would be well advised to settle the lawsuit.

27. Never submit a report with the phrase "dictated but not read."

The cross-examiner will put you on the defensive.

You can be made to look arrogant, sloppy, or even like a hired gun.

28. Never suggest that your opinion is based even in part on discussion with the retaining attorney.

You must also never rely on a written summary by the retaining attorney. Such information is not reliable evidence.

29. Never rely on a deposition summary prepared by the retaining attorney.

It will be hard to defend under cross-examination unless you have reviewed the actual deposition transcript, which has not been filtered through counsel.

30. Don’t puff up your own qualifications in your cv.

Avoid words like "internationally recognized expert."

Avoid listing any qualification or degree which was purchased rather than earned.

For example, do not list yourself as a diplomate of the American Board of Medical Examiners when this requires only sending money, rather than passing a serious examination.

Avoid including in your cv any superfluous information.

For example, membership in MENSA or awards received as a college undergraduate.

Avoid saying that you have knowledge of the current literature because it is easy for the cross-examiner to mention articles you will be unfamiliar with.
VII. **Four principles of good writing:**

Clarity, simplicity, brevity, and humanity.

A. **Clarity**

1. Clarity is the main goal of writing reports.

2. Avoid ambiguity in word choice and sentence construction.
   
   "Sanction" may mean to give permission or to disapprove. Instead of saying "since" or "as", say "because".
   
   Instead of saying "while", say "although".
   
   Instead of saying "when" or "where", say "if".

3. Avoid pregnant negatives.
   
   "The patient was not frankly delusional".
   
   "Memory was not grossly impaired."

4. Avoid hedging statements.
   
   "It appears that..."
   
   "In a sense..."

5. Jargon and technical terms should be avoided.

   If it is not possible, each technical word should be explained.

   Judges look askance at idiosyncratic terminology and psycho-analytic jargon.

6. Make correct word choices.

   "Feel" refers to visceral descriptions.

   "Think, believe, and state" refer to intellectual statements.

   Mitigate - appease, alleviate; reduce severity of punishment.

   Militate - have force against or in favor of a conclusion.

7. Important information should be at the beginning or the end of a sentence, not in the middle.

8. Use correct verb tense.
In a report of an interview, put things into past tense.

Mental status observations are in the past tense.

Your own Opinion section should be in the present tense.

Example: It is my opinion with reasonable scientific certainty that Mr. Jones is competent to stand trial.

Medical Records are in the present tense because they were just read.

Example: The doctor's entry on January 4 states...

9. Distinguish between:

- accurate and inaccurate
- cause and effect
- consistent and inconsistent
- essential and unessential
- facts and conclusions
- facts and hypothesis
- facts and inferences
- facts and opinions

- plausible and implausible
- possible and probable
- relevant and irrelevant
- summaries and conclusions
- supportive and contradictory
- valid and invalid
- verifiable and unverifiable
- warranted and unwarranted

B. Simplicity:

Dress not thy thoughts in too fine a raiment. And be not a man of superfluous words.... (Marcus Aurelius, c. 170)

1. Avoid unnecessary words and verbal bloating.

2. Multi-syllable words reduce readability, tax the reader, and decrease comprehension.

3. Choose simple words.

Avoid words like "the undersigned" and the "same" is enclosed.

Instead of "commencing", say beginning.

Instead of "remuneration", say salary.

Instead of "detrimental", say harmful.

Instead of saying "at the present time", say now.

Instead of saying "consequently", say so.

Instead of saying "subsequent to", say after.

4. Use short Anglo-Saxon nouns rather than nouns of Latin
variation that tend to end in "ion."

Avoid concept nouns like instruction and implementation.

5. Avoid nominalization.

It is converting a verb into a noun.

It causes sentences to lose their punch and weakens writing.


"It is possible that ..."

"There are ..."

"It is interesting to note that..."

7. Simplified Fog Index:

a. Use a writing sample containing 100-150 words.

b. Your sample should begin and end with a full sentence.

c. Count the number of words and divide by the number of sentences.

d. Divide the number of big words (three or more syllables) by the total number of words and multiply by 100.

e. Add the average number of words per sentence (item 3) to the percentage of big words (item 4).

f. Multiply that number by .4 to ascertain your fog index.

The ideal fog index is 10-12.

Acceptable fog index is 8-14.

Below 8, your writing is probably too simplistic.

Above 14, your writing puts a strain on the reader's comprehension.

C. Brevity

Long sentences in a short composition are like large rooms in a little house. (William Shenstone: On Writing and Books, 1764)

1. Short words are better than long words.

2. Short sentences are better than long sentences.
3. Sentences of about 20-25 words have the greatest readability.
4. Short paragraphs are better than long paragraphs.
5. Avoid redundancy.

D. Humanity:
1. Quotations animate writing.
   It allows the person quoted to speak directly to the reader.
   It improves accuracy which is especially important in the defendant’s account of the crime.
2. Use active voice rather than passive voice.
   Active verbs are the strongest tool you can use.
3. Be natural.
4. Don't say anything that you wouldn't be comfortable saying in conversation.
5. If your writing is stiff and pompous, that is how you'll be perceived.
6. Consider reading what you've written out loud.

VIII. Further suggestions:
A. Use Alternatives to "He said":
   He added
   He told me
   He described
   He discussed
   He volunteered
   He expressed
   He contended
   He continued saying
When asked, the defendant responded

He related (connotation of telling a story)
He revealed (connotation of telling a secret)
He maintained (sticking to a belief despite opposition)
He acknowledged (implies unwillingness)
He insisted (suggests more than once)
He asserted (implies argumentative)

B. Avoid the following:

He admitted
He claimed
He alleged
He lied

C. Dictation "Sound-Alikes"

abjure, adjure
accede, exceed
accept, except
affect, effect
allusion, illusion
casual, causal
cite, site, sight
collision, collusion
complement, compliment
council, counsel, consul
decent, descent, dissent
formally, formerly
loose, lose
persecute, prosecute
prescribe, proscribe
principle, principal
respectfully, respectively
their, there, they're
waive, wave
whose, who's

IX. Suggestions for Persuasive Writing

A. Spareness, directness and clarity
   No apologies for the recommendations.
   No hesitancies, no superfluous verbiage.
   Preambles weaken writing.
   Avoid such words as "I suspect," and "I believe."

B. Factual specificity
   No vagueness or generalities.
   No points begging for support or left to implication.
   If further investigations are needed, they should be completed before final recommendations are made.
   Vague recommendations for therapy should be avoided.
   Such recommendations give the court insufficient basis on which to exercise its coercive power.

C. Consistency and coherence.
   No contradictions.
   No recommendations canceling one another out or threatening to take away what has already been granted.
   Be sure that your report is internally consistent and consistent with any previous reports you have written.

D. Persuasiveness is related to the quality of reasoning.

E. Avoid pitfalls that weaken writing.
1. Passive voice.
2. Nominalizations.
3. "There is" and "there are".
4. "It seems to me."
5. "I do not think."
6. "I do not believe."
7. "It can be argued." This makes the expert sound like an advocate.

F. Begin sentences with negative clauses and conclude with a positive statement.

X. Practical Considerations:

A. In organizing the "Opinion" section, it is helpful to jot down an outline of all the reasons supporting your opinion, before beginning to dictate your opinion.
1. Mapping of thoughts.
2. Begin with your strongest points.
3. Recommendations should also be organized by priority.

B. Use caution in the preparation of preliminary reports before full data has been obtained.

   The report should be clearly labeled as preliminary.

C. Recommendations to the court should be realistic with respect to the availability of treatment services.

D. Various parties to a lawsuit may gain access to copies of a psychiatric-legal report.

   Embarrassing or provocative material should only be included if it is necessary to support your opinion.

E. Discoverability of expert reports and related material

   Assume that anything you write in your file will be discoverable.

   Do not include anything in your report that you wouldn’t want a jury to see.

   Do not create any written report unless specifically instructed to do so by retaining counsel.
XI. Sanity Opinion Suggestions:

A. The language of the insanity test should be addressed, rather than saying the defendant is sane or insane.

B. In NGRI reports, the examiner should address the sanity question on each charge if there is more than one.

C. Even if the examiner finds no mental illness, it is useful to render an opinion regarding the wrongfulness and refrain arms of the sanity test.

    Should the trier of fact conclude the defendant was mentally ill, your opinion on these issues may be important.

D. If the defendant's version is different from witness accounts, you may offer two separate formulations.

    The trier of fact will rely on that opinion based on the facts which they believe are true.

E. Common Errors in Writing Sanity (NGRI) Reports:

1. Equating psychosis, PTSD, or pathological gambling with insanity.

2. Conclusory reports.

3. Mentioning disposition or future dangerousness.

4. Psychodynamic explanation given as an excuse, rather than focusing on sanity criteria.

5. Inability to refrain due to intoxication, called insanity.

6. Failure to read witness statements and defendant's prior statements.

7. Failure to address both arms of the insanity test.

8. Desire for "just" outcome altering accurate report.

9. Referring to abstract wrongfulness, rather than wrongfulness of the specific act.

10. Failure to address the NGRI issue in that particular jurisdiction clearly.

11. Referring to present tense on mental disease, rather than discussing mental disease at the time of the crime.

12. Adding new data in the opinion section not recorded in the
13. Failure to include sufficient data to justify the conclusion.

14. Failure to use DSM-IV diagnoses.

15. Failure to explain drugs and street drugs.

XI. Conclusion:

A poorly written report can be used to discredit and embarrass you in cross-examination.

Clear thinking should be reflected in a lucidly written report.

Vague, diffuse reports are easily discounted.
REFERENCES


(11) St. James, D: Writing and Speaking for Excellence, Jones and Bartlett Publishers, Sudbury, Massachusetts, 1996.


APPENDIX II

Potential Sources of Bias in Forensic Decision Making

1. The hindsight bias refers to the fact that after an event has taken place, its occurrence seems so inevitable that one believes that it could have easily been predicted in advance.

2. Confirmatory bias refers to a tendency to look for evidence which supports one's hypothesis, and to ignore information that is not consistent with that hypothesis.

   The initial contact from the attorney can set up a bias in what to look for.

   To correct for this, the clinician can search for disconfirmatory information.

3. There is a tendency to under-revise initial hypotheses.

   Disconfirmatory data may be explained away if they do not support the initial hypothesis.

   Example: Assuming that although a defendant was only convicted of two prior offenses, he probably committed a number of violent offenses for which he was not caught.

4. Do not place an over-reliance on memory in forensic evaluations.

   It is much easier to recall information which has been cued, perhaps by the questions of an attorney, or which confirms the hypothesis being considered.

   Example: Clinicians tend to remember symptoms consistent with the diagnosis more easily than those which were inconsistent with the diagnosis.

   This bias can be reduced by fully recording all the information gathered.

5. Identify and weigh the most valid sources of data.

   List separately the most valid sources of data and what inferences can be drawn from them.

APPENDIX III

TRUTH, ADVOCACY, AND ETHICS

The objective of trials is the peaceable settlement of disputes with the appearance of fairness. Trials make no pretense of being scientific. In the United States and England, trials are conducted within the adversary model -- i.e., the attorneys are advocates of the causes they represent. Cast into the midst of this battle, the ethical psychiatric witness must resist the temptation to accept an advocate's role (1).

It is a fallacy to assume that a psychiatric witness can be completely impartial. Regardless of whether he is employed by the court or an attorney, the psychiatrist usually starts out with an impartial attitude. Once he has formed an opinion, however, it is only human for him to identify himself with that opinion and, hope for the success of the side which supports his conclusions (2). However, once the psychiatrist takes the witness stand, he must do his best to impartially preserve the truth and his professional integrity. He must guard against any sense of loyalty to the retaining attorney which would cause him to shift his thinking from that of an objective expert witness to being an advocate. The expert must not go beyond the available data and the scholarly foundations of his testimony (3). Blatant advocacy is easily recognized and reduces the credibility of the expert witness; subtle advocacy is the more difficult problem. Rappeport (4) suggests that it is proper for the psychiatric expert to "assist the lawyer as best he can, but only within the requirements of medical ethics." Zusman and Simon reviewed examinations of plaintiffs about psychological damage resulting from the 1972 collapse of the Buffalo Creek dam. They attributed differences in psychiatric opinions to the interview settings, the examiners' training and orientation, and forensic identification with the attorneys who employed them (5).

The psychiatric expert witness is obligated to present the truth. This means that a thorough examination must be performed, and relevant information may not be kept secret (6). Psychiatrists have an affirmative obligation to specify any limitations in a forensic report, such as an inability to personally examine the subject or limitations in the state of the science. For example, the examiner may specify the limited validity of psychiatric prediction of future dangerousness. If an expert does not feel he is capable of addressing a question, he should decline to do so.

Several ethical concerns are raised by court-ordered psychiatric evaluation of convicted defendants for sentencing purposes. The key issue is finding the proper balance between the psychiatrist's responsibility to the defendant and the best interests of society. The American Psychiatric Association Task Force on the Role of Psychiatry in the Sentencing Process (6) suggests that psychiatrists should try to adhere to an "individual-centered orientation while performing this societal-centered task." Specific recommendations as to whether a defendant should be placed on probation or incarcerated should be avoided.
Ten states now require an assessment of dangerousness in determining the aggravating and mitigating factors to be considered in deciding whether or not to impose the death penalty. Psychiatrists should feel free to refuse if they are uneasy about participating in death penalty proceedings. The psychiatrist must obtain informed consent from defendants who are seen for pre-trial assessment -- i.e., for competency to stand trial or an insanity defense. The Supreme Court reversed one decision because a psychiatrist had used information from a competency assessment in a death penalty hearing, without forewarning the defendant (7). The APA Task Force (6) suggests that psychiatrists not participate in death penalty hearings unless they have personally examined the defendant, although it is not illegal to do so (8).

Psychiatrists who are inexperienced in courtroom work may be unaware that their diagnoses and conclusions regarding legal issues are only considered as opinions. Juries are instructed to decide for themselves how much weight to give the testimony of each witness. Even when it is uncontradicted, the jury has the right to disregard psychiatric opinion evidence. The jury alone makes the ultimate decisions about disputed issues, such as criminal responsibility or liability for malpractice.

REFERENCES


Appendix IV

Do's and Don'ts of Depositions

Phillip J. Resnick, M.D.

A deposition is the testimony of a witness taken before trial, under oath, and it is usually recorded by a court reporter.

Attorneys may obtain discovery regarding any matter, not privileged, which is relevant.

The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Depositions: two types

1. To preserve testimony from a witness who may not be available at trial.

   Called an evidence or trial deposition.

   Comparable to trial with direct and cross-examination but no judge is there.

2. For the purpose of discovery prior to trial.

   Ordinarily in civil cases.

   Eg.: Malpractice, personal injury.

   Questions by opposing counsel.

   It is often more important than the trial.

Goals of the deposing attorney in discovery depositions.

a. Learn facts and your opinions.

b. Assess you as a witness.

c. Gather ammunition for trial.

At a deposition, opposing (examining) counsel has two primary reasons for asking questions.

The form of the questions reveals his major interest.

1. If the question is primarily for discovery purposes, the questions will be broad.

   Opposing counsel will often ask "why" questions during a
deposition.

"Why" questions educate the cross-examiner.

He will not ask such questions at trial.

2. If seeking admissible evidence, questions will be precise.

Admissible evidence seeks to "freeze" your testimony.

Plaintiff's attorneys are more likely in a malpractice case to focus on attempting to show the weakness of the opposing expert for the purpose of effecting a settlement during a discovery deposition.

Malpractice defense attorneys are more likely to be focusing on preparation for trial.

Preparation for Your Deposition

Prepare thoroughly and memorize critical dates.

Consider preparing a time line of events in a complicated case.

Insist on predeposition conference with your retaining attorney.

Ask the retaining attorney what to expect of the deposing attorney.

Review with your retaining attorney the issues and themes of the case to keep in mind.

Find out from the retaining attorney in advance what documents to bring to the deposition.

You cannot discard notes of interviews with an examinee.

The attorney may suggest you remove letters from him that are considered "work product."

Bring a copy of your curriculum vitae.

Wear appropriate clothing.

Be well rested.

There are disadvantages of scheduling a deposition in your own office.

Demeanor of the Deponent

Show that you are master of the facts, and are confident about your opinions.

Choose your words carefully.

Do not appear defensive.
Do not appear arrogant.
Do not be argumentative.
Do not joke around or be sarcastic.
Do not lose your cool even when the deposing attorney provokes you.

Deposition Rules
Do not give non-verbal answers such as nodding your head because the court reporter can only take down verbal responses.
Avoid overlapping speech with the deposing attorney.
Spell unusual words and names.

Conduct During the Deposition
Listen carefully to the exact question.

   Focus entirely on listening to the question rather than thinking of your answer during the question.

   Briefly pause to allow time for objections to be made.

Do not answer a question until you fully understand it.
You can seek clarification, but do not ask the deposing attorney to define a term.
Give the shortest correct answer to each question.
Answer only the question which is asked.

   Your job is not to try to fix the deposing attorney's questions by saying such things as "Well, if what you mean is ..."

Do not volunteer information of any kind.
Volunteering information may:

1. Open up new areas for questioning.
2. Equip the deposing attorney with more ammunition.
3. Eliminate opportunities for your retaining attorney to use surprise as a strategy, should the case go to trial.

Furthermore, your volunteered information does not get to the jury;
Don't be overly technical.

If you understand the question, give a fair and honest answer.
On the other hand, if the deposing attorney fails to ask the right question, you should not supply the information not requested.

When you are deposed, you are under no obligation to become a teacher. The one exception to this approach is if your retaining attorney tells you that he expects the case to settle, rather than to go to trial.

Only if your retaining attorney approves in advance, should you consider volunteering information.

Always tell the truth.

The best way to cause the jury to disbelieve all of your testimony is to make an inaccurate, exaggerated, or false statement.

Avoid phrases like "To tell you the truth" or "To be honest."

Do not say "No" if the true answer is "I do not recall."

Stick to the facts.

Avoid unnecessary characterization of the facts.

Avoid adjectives and superlatives such as "never" and "always."

Be careful with questions involving times, amounts, degrees, and the like.

If you make any type of estimate, be sure to state that it is an estimate.

Do not be tempted to leave "wiggle room" by suggesting that you may perform additional tests or evaluations.

If you do not perform the test, the cross-examiner can make it appear that you did not do a complete evaluation during the trial.

If you realize that you gave an incorrect answer earlier, take time to correct it during the deposition.

Roles adopted by deposing attorneys

1. Mr./Ms. Friendly

The deposing attorney may try to show that he or she is human and not to be feared.

Do not ever have the illusion that the deposing attorney is your friend.

Be aware that nothing is "off the record" unless the attorney
taking the deposition instructs the court reporter to go "off the record."

   Even then, the attorney can summarize "on the record" what you have just said "off the record."

2. **Eager student**

   The deposing attorney may play the role of an "eager student" to massage your ego and try and get you to volunteer information and detailed explanations.

3. **Mr./Ms. Silent**

   After you give a brief answer, the deposing attorney may sit silently as if expecting a more substantive response.

   Resist the temptation to fill the silence.

**Rights of the Deponent**

1. **You have a right not to be made uncomfortable.**

   You may request changes in the temperature of the room or a drink of water.

2. **You have a right to take a break at any time.**

   However, you may not take a break while a question is pending.

   If you feel fatigued, do take a break.

   In a full day deposition, the greatest likelihood of making mistakes begins about 4:00 p.m.

3. **You have a right not to be interrupted.**

4. **You have a right to not answer compound questions.**

5. **You have a right not to answer personally intrusive questions that are not relevant.**

   You can legitimately be asked about being convicted of past crimes; having had your license suspended, and whether you passed your boards at the first sitting.

   You may be required to state what portion of your income comes from forensic work versus clinical work.

   You usually are not required to state your annual income.

6. **You have a right not to be abused or yelled at.**

   Respectfully request that shouting or an intrusive line of
questioning be stopped.

If the abuse continues, you can inform the deposing attorney that pursuant to Federal Rule of Civil Procedure 30(d)(4), you are going to terminate the deposition to file a motion for protection with the court.

This of course is much more likely to be done by your retaining attorney than by you.

Objections During Depositions

An attorney may instruct you to not answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to seek an order limiting the deposition because it is being conducted in bad faith, or in such a manner as to unreasonably annoy, embarrass or oppress the deponent.

If an objection is made by your retaining attorney, stop speaking immediately.

If you are instructed not to answer the question, do not answer it.

Attorneys at depositions object and battle over objections 517% more than it is actually necessary to represent their clients properly.

Common objections during depositions will include:

- Vague questions
- Ambiguous questions
- Unintelligible questions
- Complex or confusing questions
- Compound questions
- Misleading questions
- Unfair characterization
- Misstating prior testimony
- Argumentative questions
- Question calls for legal conclusion
- Asked and answered
- Leading questions
- Objection to hearsay
- Question calls for an opinion beyond the expert's qualifications

Responses to Specific Deposition Questions

Before answering any question about a document,

Be certain that the document states what the attorney says it does.

Take time to review the document.

When looking at a document, observe:
Who signed it.
When it was prepared.
Whether it is a draft.
Whether it contains confidential information relating to other patients.
Who was copied on it.

If opposing counsel seeks to have you give just a yes or no answer, do not feel a need to oblige.

If you are asked a hypothetical questions which includes an impossible premise, decline to answer the question.

When confronted with hypothetical questions, identify the hidden assumption before answering.

Do not accept as true any proposition put to you in a leading question unless you have carefully considered the truth of the proposition.

Do not guess at answers.

Feel no obligation to read someone else's mind.

Do not speculate, especially when you are presented with an incomplete clinical picture.

In reality there is no rule against seeking the expert witness's speculation in a deposition, so long as that speculation is reasonably calculated to lead to the production of relevant information.

If opposing counsel mischaracterizes your testimony or seeks to get you to endorse his paraphrasing, do not accept it.

Admit that no one article is authoritative, unless you are willing to admit that every statement made in the article should legally set the standard of care required in a malpractice case.

Attorney ploys

In reviewing your qualifications in a deposition, the deposing attorney may ask you what a particular piece of education or honor has to do with a specific opinion formed in this particular case.

This allows the attorney to discount some of your various credentials at trial.

Be aware that if you answer a question about who is the greatest authority in a particular area, the deposing attorney may then seek to employ that expert.

At trial, a portion of your deposition can be taken out of context for the purpose of impeaching you.

One way to avoid having a deposition answer taken out of context is
to embed the question in your answer.

"I only have a few more questions."

Don't respond by letting your guard down.

After the Deposition

Do not waive your right to read and correct your deposition before signing it.

When you review your typed deposition you may also make substantive changes as long as you give your reasons for doing so.

If you make substantial changes, you may be subject to further examination by deposition.

You can also expect to be rigorously cross examined about why you made the changes.

Attorneys will use your discovery deposition at trial and phrase questions with your precise wording from your deposition.

It is not uncommon for your trial testimony to be different, not because of any intent to deceive, but because your memory has faded.

Nonetheless, these deviations in the hands of a skillful attorney can be used in an effort to discredit your honesty.

You cannot win a case in a discovery deposition, but you can lose one.

Summary

Prepare thoroughly for your deposition and have a mastery of the facts.

Listen carefully to each question, before starting to formulate your answer in your mind.

Answer only the precise question.

Carefully study your discovery deposition just before your trial testimony.
References


APPENDIX V

Suggestions for Videotaped Depositions

1. Be videotaped in the best possible context.
   Books on shelves and diplomas in the background are better than a blank wall.

2. Lean slightly forward from the waist, signifying a sense of readiness, assertiveness, and confidence.

3. Look directly into the camera occasionally to stress a point.

4. Project your voice.

5. Avoid miscellaneous sounds such as tapping your fingers or clearing your throat.

6. Avoid long pauses. They can seem more like hesitancy than thoughtfulness on videotape.

7. Because video depositions are boring, there is even more reason to use visual evidence such as charts.

8. Practice handling charts and graphs so you won't be fumbling around when you should look like you are in control.

9. Avoid touching your ears and nose.
APPENDIX VI
CAUSATION

A lawyer's view of causation is quite different from a doctor's. Doctors tend to look for the basic underlying cause, and have a high standard of scientific proof. Lawyers are interested in "proximate cause" and include in their definition of "cause" any factor that aggravates an underlying disorder: the proverbial "straw that breaks the camel's back." Moreover, because of time limitations, the standard of proof in a legal proceeding is necessarily lower. The expert will be expected to give definite weight to his opinion as being at least a probability or more likely than not, but beyond mere speculation.

Following is a chart distinguishing between medical and legal definitions of varying aspects of causation:

(a) "To Cause"

<table>
<thead>
<tr>
<th>Medical Definitions:</th>
<th>Legal Definitions:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. to produce a new condition or pathology;</td>
<td>1. to produce a new condition or pathology;</td>
</tr>
<tr>
<td>2. to initiate an underlying disorder.</td>
<td>2. to aggravate an underlying disorder by worsening, hastening, or accelerating its progression.</td>
</tr>
</tbody>
</table>

(b) "The Cause"

<table>
<thead>
<tr>
<th>Medicine's emphasis:</th>
<th>Law's emphasis:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. etiologic elements, i.e., seeking to assign a cause;</td>
<td>1. whether a particular event was the proximate, precipitating cause of an injurious result;</td>
</tr>
<tr>
<td>2. various causes of an underlying disorder;</td>
<td>2. one cause that precipitates triggers, hastens, or worsens some medical condition;</td>
</tr>
<tr>
<td>3. the multiplicity of causes and their interrelationships.</td>
<td>3. the one causative element under legal scrutiny, independent of other, coexisting causes.</td>
</tr>
</tbody>
</table>

(c) Role of Pre-existing Disorder (Disability, Illness, or Disease)

| Medicine's emphasis: | Law's emphasis: |
1. the patient's pre-existing condition is important in affecting the end results of degenerative disease processes.

2. it is important in a particular case that the injurious result would not have occurred in the absence of significant pre-existing diseases.

(d) The Quantum of Aggravation

Medicine's emphasis:

1. responsibility should not be assessed when the degree of aggravation is small in relation to the extent of underlying pathology.

2. responsibility should not be assessed when the degree of hastening of an inevitable end result was minor in relation to the entire clinical picture.

3. responsibility should not be assessed when an end result is inevitable because of the expected natural progression of the underlying disorder.

Law's emphasis:

1. the crux of legal causation is the occurrence of aggravation of an underlying disorder, not the degree to which it was aggravated.

2. the important consideration legally is whether a process and end result was hastened, not how much it was hastened. For example, if death is hastened even by a moment, the result is actionable.

3. the inevitability of the end result is unimportant if that result occurred sooner than it would have occurred had the underlying disorder progressed naturally.

(e) The Degree of Proof Required for Acceptance of Cause-and-Effect

Medicine's standards:

1. proof means scientific proof.

2. equally consistent theories

Law's Standards:

1. depending upon the jurisdiction, establishment of legal causation requires "probability," 50.1 percent "more likely than not," or "reasonable medical certainty," not scientific proof.

2. equally consistent theories
of causation are acceptable as guides in choosing the appropriate medical treatment of the patient.

1. **The shell game question.** In this ploy, the lawyer attempts to shift dates, places, or subjects without advising the witness. If the lawsuit involves two transactions, he may start the witness talking about transaction number one, and then without alerting the witness, skillfully weave in a few questions which could only relate to transaction number two. The witness may respond to such questions with the request for clarification or may answer the questions pointing out the difference in time.

2. **The sham question.** This is a form of a leading question, in which the lawyer suggests the answer he wants. It usually appears as more of a statement than a question: "You didn't see the defendant very long, did you?" Don't let the question put words in your mouth. The witness reply may be: "I saw the defendant long enough to perform an adequate examination."

3. **The vain Caesar question.** This question plays on the witness's vanity and sounds something like this: "As Director of the Department of Psychiatry, didn't you know that Mr. Jones, a paranoid schizophrenic, was an escape risk?" The inference is that the witness is a bad psychiatrist because he didn't know the risk. The correct answer would be: "No."

4. **The "you said it" question.** Sometimes lawyers misquote a witness's prior testimony, either intentionally or unintentionally. In either event, the witness should immediately correct the lawyer in a polite, but firm manner. Watch out for questions which appear to summarize your testimony. For example, a psychiatrist may have listed four reasons for a conclusion that a testator was incompetent. The lawyer may ask: "Well now, Dr. Smith, is it your testimony that you believe the testator was not competent because of his delusions?" The answer is "No, that was only one reason."

5. **The "how high is up" question.** Beware of open ended comparisons, such as: "Was it long?" A simple yes or no answer may lead to difficulty later on. You can respond by asking for clarification or may simply state: "It was one hour long."

6. **The "have you stopped beating your wife" question.** This classic "trick question" is known to everyone. You cannot answer either yes or no without running into difficulty. The question can be asked in a variety of forms, such as: "Doctor, is it still your practice to use electroconvulsive treatments which have been criticized by most authorities in the field?" The attorney calling you should object. If no objection is interposed, your reply might be: "I cannot accept the premise of your question because electroconvulsive treatments are recommended by most reputable authorities in the field."

7. **The "you could have done better" question.** Plaintiffs' lawyers may know that no matter how skillfully the defendant has acted, there is always room for a higher degree of skill and care. If a psychiatrist wrote suicide precautions which required
checks every fifteen minutes, he should have ordered "constant observation." An attorney might ask an argumentative question, such as "Really, couldn't you have done a better job protecting this patient." Dr. Witness might reply: "I don't know how you are using the word 'better,' but I think I took appropriate precautions."

8. **The impossible question.** Doctors and lawyers view the word "impossible" differently. Doctors think in terms of precise rules of physical behavior. Lawyers, on the other hand, often think in terms of how the evidence may appear to the jury. To a lawyer, a phenomenon is either possible or impossible. The lawyer may ask: "Well, Dr. Jones, are you saying it would be impossible to foresee the dangerous conduct of your patient?" The doctor replied: "Well, I don't know that I would say impossible." The lawyer may then say: "Well, if it wasn't impossible, as you have just said, Dr. Jones, then tell the jury why you failed to protect this poor, innocent plaintiff against the foreseeable risks of your patient?" Dr. Jones could have avoided the lawyer's trick if he had answered: "I certainly don't know of any way that a doctor could have foreseen the danger; as far as I am concerned, it would be impossible."

9. **The "please forget" question.** Lawyers find that if they add the words "if you remember" to the beginning or end of a question, very often the witness will not remember. Thus, this phrase may be added when a lawyer wishes to suggest to a witness that he does not remember.

10. **The "double negative" question.** Occasionally a lawyer will inadvertently phrase a question with two negatives, such as "You are not telling us that you didn't complete the examination?" To avoid confusion, the doctor should not answer with a simple yes or no, but instead state, "I did complete the examination."

11. **The "knowledge" question.** The phrases "to your knowledge..." and "as far as you know..." present a special hazard when tacked on to a question. The witness may be induced to make an answer which implies something he did not intend. Consider the question: "To your knowledge, did the head nurse know about the suicide precautions before the attempt?" The witness may not know, but be inclined to respond with: "Not to my knowledge." This answer suggests that the head nurse did not know. The doctor should have answered: "I don't know."

12. **The Primrose Path questions.** The Primrose Path is a tactic in which a witness is asked whether he agrees with carefully worded, very broad, and oversimplified statements, which on the surface appear undeniably true. The witness is led into voicing his agreement to one statement after another, until he finds that he is trapped into a conclusion which he knows to be dead wrong. Many lawyers feel that these are objectionable questions. To avoid falling into this trap, almost every Primrose Path question needs to be clarified.

13. **The silent treatment treatment.** This is a subtle form of intimidation in which the lawyer, by silence, suggests that the witness should make a further answer. If the lawyer simply stares at the witness after he has completed his question, the
witness may become uncomfortable or assume that his answer is incomplete. Do not be intimidated by these tactics. If the lawyer sees that you are not afraid of silence, he will move on to the next question.

14. **The end of the line question.** In depositions, lawyers should properly ask whether they have obtained all of the information a witness may have on a particular subject. For instance, an attorney may ask: "Is that all of the information the plaintiff told you regarding her psychic injury?" The witness who would like to leave the door open to the possibility he will recall further details may answer: "I have told you all the information I can remember at this time."

15. **The punch after the bell question.** This is a tactic employed by counsel to persuade the witness to drop his guard before the end of a deposition. A lawyer might say: "I think that's all the questions I have; let me have a moment to review my notes." The witness senses that the deposition has concluded and relaxes. Then, wham, the lawyer asks tough, rapid-fire questions. Remember, the deposition is not over until everyone leaves.

APPENDIX VIII

SUGGESTIONS FOR CROSS-EXAMINERS
OF PSYCHIATRIST OR PSYCHOLOGIST EXPERT WITNESSES

1. In depositions, "box in" the expert with questions with increasing specificity. Leave any fatal blows for cross-examination at the trial itself.

2. Teach yourself everything you can about the opponent's expert witness. Learn about his qualifications, or lack thereof. Try to find his "Achilles' heel."

3. Use your own expert to learn the qualifications of his counterpart, and have him assist you in developing lines of cross-examination.

4. All books and articles written by the opposing expert should be studied.

5. Copies of the expert's testimony at previous trials should be obtained, including previous depositions of the expert in other cases.

6. Every movement and expression of the witness on direct examination should be observed for a weak spot which may serve as an opening for cross-examination.

7. Stipulate that the opposing expert witness is an expert if he has good credentials. Do not, if they are weak. Only stipulate that your expert witness is an expert if his credentials are weak.

8. It is generally unwise for the cross-examiner to attempt to cope with the expert witness in his own field.

9. To the extent that the witness being cross-examined has something nice he can say for you, do not attack him until he has said it. Save the attack for last.

10. Before engendering any animosity, have the opposing expert acknowledge specific books and articles as authorities.

11. Be imaginative in attempting to get the expert to acknowledge the authoritativeness of a book. If it was his college text, or if it is in his office library, it may be harder for him to deny its authoritativeness. In a discovery deposition, you may catch him unaware and get such an acknowledgement.

12. Get the clinician to admit that psychiatry or psychology is an inexact science.

13. Get the expert to concede that one examination is generally not as good as a series of examinations and that occasionally he has to revise his own opinion.

14. Usually, the vast majority of the information on which the psychiatrist rests his diagnosis comes from the defendant, and is not corroborated by outside sources.

15. Ask the clinician what notes he took during his examination.
and obtain a copy of them. Ask whether he attempted to record the most significant things in his examination. If not, why did he choose to write down insignificant things. Examination of the notes may then serve to exclude certain bases for his conclusion as having been regarded as unimportant by the clinician himself. A comparison of the doctor's notes with his report, both for omissions in the report and conflicts between the report and the notes, can be extremely effective.

16. Sometimes, it is advisable to deal the witness a stinging blow with your first few questions. It makes a greater impression on the jury than if it came later on when their attention has begun to lag. It may also make the witness afraid of you and less hostile in subsequent answers. It will often enable you to obtain truthful answers on subjects about which you are not prepared to contradict him.

17. The slightest word of the presiding judge is weightier than the eloquence of counsel.

18. If you surrender a witness to the judge to control him by getting the judge to instruct him to answer yes or no, it is difficult to regain control.

19. Expert witnesses sometimes feel that their very "self" is on trial, staked to the proposition they are supporting.

20. Often, an expert's primary concern is his own professional integrity, and thus opposing experts may admit freely that certain propositions are reasonable theories.

21. Clinicians tend to think of nothing as certain, unless it complies with fairly strict standards of scientific proof, and will therefore be willing to say that almost anything is "arguable" and not scientific certainty.

22. Force the expert to clarify his terms and the basis of his conclusions.

23. Determine if the expert witness has a proper understanding of the rule of law, under which he is testifying.

24. Hold your temper while you lead the witness to lose his.

25. No question should be put to an expert which is broad enough to allow the expert an opportunity to expand upon his own views, thus giving him an opportunity to present additional reasons which were not brought out in direct examination.

26. Assume that an expert witness called by the opposition attorney has come prepared to do you all the harm he can, and will avail himself of every opportunity to do so.

27. Have the witness agree to a series of general principles, then ask short questions that relate directly to the case. You often get confessions that are more apparent than real, but they are still helpful. If your questions are skillfully put, the witness must agree or appeared biased.

28. Do not try to convince the witness of error; instead, expose
weaknesses by showing bias, faulty reasoning, or reliance on incorrect data.

29. Mistakes should be drawn out by inference rather than by direct questions, because all witnesses have a dread of self-contradiction.

30. Allow the loquacious witness to talk on; he will be sure to involve himself in difficulties from which he can never extricate himself.

31. The whole effect of an expert's testimony may sometimes be destroyed by putting the witness to some unexpected test at the trial, if his failure of the test can be held up to ridicule before the jury.

32. Encourage the expert witness to betray his partisanship; encourage him to volunteer statements and opinions, and to give unresponsive answers.

33. Attempt to show bias by asking a series of questions that common sense will show that the expert has gone too far for one side. This will be evident to the jury.

34. When an expert refuses to concede obvious points, counsel should carry him to extreme positions.

35. Reserve the question you want favorably answered until the witness is in the right humor to answer it. For example, after a retort by the witness has given him a good laugh on the cross-examiner, ask the question while the witness is still exultant.

36. If a witness waffles with an answer such as, "You could say that," you might respond by saying, "It's not only that you could say that, that's the truth."

37. A cross-examiner may shatter the injurious effect of a hypothetical question by demanding that the expert repeat, in substance, the question upon which he based his answer. A stumbling reply will be quite damaging.

38. If a witness is pretentious, ask him if he is familiar with a list of bogus medical books.

39. Obtaining multiple "yes" answers from a witness will sound like a series of admissions. You will be "testifying," with the witness reduced to agreeing.

40. Ask the witness, "What is the biggest weakness in your opinion?"

41. Witnesses are usually prepared on the central issue; ask instead for details on the outer fringes of the case. This may result in inconsistencies.

42. End your cross-examination on a strong point. It is better to sit down after scoring a particularly damaging point, even if you have several other questions remaining.

43. An opposing expert in a medical malpractice can be made into your expert by breaking down the many items which were done right by the defendant physician. The expert witness will have to agree
44. If the psychiatrist did not use DSM-IV, suggest that he makes up his own diagnoses, even though he is a member of the APA. If he did use DSM-IV, point out that it is an experimental manual that continues to undergo revisions. The introduction shows that task force members differed in their interpretations of research studies. There is a disclaimer that it should not be used for legal purposes.

The following suggestions are specifically for cross-examination of defense psychiatrists in insanity trials:

45. Detailed knowledge of the defendant's behavior, demeanor, and statements the day before the crime and the day of the crime will be helpful in cross-examining the defense psychiatrist.

46. Ask the clinician what the defendant's thoughts, feelings, acts, and emotions were just before and after the crime. Where the clinician has no information in this regard, ask him whether this is because he did not ask the defendant or the defendant did not remember. If he did not ask the defendant, why not? If the defendant did not remember, why didn't he? Get the expert to admit that the absence of such information is significant and that it was not available to him at the time he reached his conclusions.

47. Ask the clinician what impression, if any, he had formed of the defendant's mental condition based upon background data, prior to the time he met him. It can later be used against the doctor in cross-examination.

48. Ask the expert if he believed each statement that the defendant told him. What impact, if any, it would have on his opinion were the statement proven to be untrue.

49. Insist that the expert explain each "objective" observation of the defendant which was significant in arriving at a diagnosis. Many "objective" phenomena, such as sloppy dress or nervous movements, will be regarded as insignificant or ludicrous by a jury which has often observed such behavior in people they believe to be "normal."

50. Any honest clinician will concede that determining a defendant's mental condition at a particular times becomes progressively more difficult as that point in time becomes less proximate to the examination. Ask the expert whether he would not have preferred to examine the defendant right after the event. This normally creates a "no lose" situation -- either the expert refuses to admit this and therefore appeared biased, or he does admit it, but has not taken the trouble to find out exactly what the defendant did and said on that day from witnesses.

51. Ask the expert if the defendant had a choice to either commit the crime or not. If the answer is yes, inquire at what point the defendant lost his freedom of choice. Did he have the power that morning to choose to stay in bed or get out of bed? To take a gun or not take a gun? To write out the hold-up note or not write a note? If permitted in your jurisdiction, ask whether
the defendant would have committed this crime if a police officer were standing there at the time.

52. Doctor, do you concur with this statement by Dr. Loren Roth:

   It is no easier to distinguish between an irresistible impulse and an impulse not resisted, than it is to distinguish between twilight and dusk?

53. Consider asking some of the following questions:

   a. As a psychiatrist, your examination is limited to just talking with your patient?

   b. It is not uncommon for men to lie, is it, doctor?

      Especially when one has a great deal to gain by doing so?

   c. There are many schools of psychology or psychiatry, are there not?

      And each has different ideas about what goes on in the human mind?

   d. Isn't it a fact that a number of competent clinicians can examine the same man and come up with entirely different opinions?

   e. Would it be fair to say that many times you have found yourself in disagreement with other experts who are also testifying?

   f. Doctor, can you offer any scientific evidence that the psychological theories upon which you based your conclusions have some basis in fact?

   g. Has there ever been a scientific study of the accuracy of your professional judgment?

   h. Are you aware of the great number of studies which show that the more experienced psychiatrist is no more accurate in his assessments than inexperienced ones, or even lay people?

54. Ask the defense expert: At the time you formed your opinion, were you aware that the defendant: Stabbed the victim six times? Wiped away his fingerprints? Went back to work and acted fine? Lied to the police, etc?

   This is a "no lose" tactic. The existence of the damaging fact is emphasized. Either way the witness answers, the accuracy of his opinion can be questioned. Ask only if the psychiatrist was aware of the facts. Don't ask why the defendant did such and such. Save these questions for closing argument to the jury. Don't ask the psychiatrist if his opinion would be different if he knew the additional facts.

55. Doctor, have you had any training in the scientific detection of lying?

   Did you pay attention to the defendant's voice pitch? (Valid)
Did you notice whether the defendant blinked his eyes more often than usual? (Valid)

Did you notice if the defendant's pupils were more dilated than usual? (Valid)

Did you pay attention to the amount of eye contact in determining truthfulness? (Invalid)

Are you aware of the fact that scientific studies show that there is no consistent relationship between eye contact and lying?

56. Ask the clinician if he had any special training in the detection of malingering. Attempt to have the clinician admit that he has been deceived by some patients. Have the clinician admit that if the defendant successfully fooled him, the clinician would not know that he had been fooled.

Suggestions to attorneys doing direct examination of mental health experts:

1. Use words and phrases such as teach, tell, explain, help us understand, help us learn, educate us about, demonstrate, and untangle.

2. Stay away from words like elucidate, eliminate, explicate, expound, discern, or assist us in comprehending. Those words make you sound like a twit and encourage your witness to sound like one too.
APPENDIX IX

MALE EXPERT WITNESS CLOTHING

Authority.

The darker the suit, the more authoritative it is. The patterns lending themselves to high authority are listed in decreasing order:

(1) Pinstripe; (2) Solid color; (3) Chalk stripe; (4) Plaid.

While large men should consider avoiding pinstripes so that they are not overwhelming to their audience, small men may increase their authority by wearing dark pinstripe suits with vests and expensive ivy league ties. Witnesses who believe they come on "too strong" may soften their appearance by avoiding pinstripes and wearing medium, rather than dark-colored suits. Both removing a suit jacket and wearing short-sleeved shirts reduce a man's appearance of authority.

Credibility.

Dark blue or gray suits, either solid or pinstriped, have the most credibility. However, lower class jurors find persons wearing solid-colored suits more likable than those wearing pinstripes. Lower class jurors also find blue more likable than gray. Middle class blacks dislike dark blue, which represents the establishment.

The suit says: "I accept the conventions of the profession. I am a team player. I belong here. I am successful enough to be able to afford this suit, and discreet enough not to wear anything gaudy."

Ties of small repeating patterns, such as diamonds are best. Ivy league patterns may alienate lower class jurors. Paisley patterns are not viewed as serious, and bow ties evoke distrust.

Persons wearing tinted glasses are not trusted. Facial hair is generally viewed negatively; persons with goatees are especially distrusted. The more that jurors can see your face, the more easily they will trust you.

General Clothing Suggestions.

Conservative clothing rather than chic or "in" clothing should be worn. A witness should avoid any sign of ostentation, and any clothing which might suggest that one is a "smart ass big city slicker." This puts off jurors and threatens judges who rose from the lower classes. Jewelry should be avoided except for a wedding band. Brown suits are less well received than blue or gray. An attache case (preferably brown leather) is seen as a symbol of success. Small men should never carry umbrellas into the courtroom.

Be certain that your lapel pins cannot be misinterpreted as religious, political, or social movement symbols that might alienate some jurors.

Don't wear half frame reading glass.

Peering over them gives you an arch, snooty, or glaring look.
Don't wear a gold Rolex watch or Mount Blanc pen in the courtroom.

Do not dress too warmly in court.

Jurors will not notice if a witness is a little chilly, but witnesses who dress too warmly will sweat.

Jurors sometimes think sweating reveals dishonesty.

References:


(2) Reidinger, P. "Dressing Like a Lawyer," *ABA Journal*, pgs. 78-80, March 1996.

FEMALE EXPERT WITNESS CLOTHING

Authority:

A suit is still the most effective outfit a woman can wear to court.

When female judges were shown pictures of female experts and asked to pick the most competent, they chose women wearing suits. The older the judge, the more conservative her taste.

The darker and more obviously expensive a garment, the more authority it gives its wearer. If you want to add to your authority, consider charcoal grey or navy suits.

Dark blue and medium range grey suits say "expert," while earth tones say "friendly."

Authority is decreased by blonde and gray hair in women.

Credibility:

A medium range blue suit with a white blouse is the highest credibility outfit a woman can wear.

A navy blue suit with a white blouse is second.

A beige suit with a touch of grey in it, with a light blue blouse is third.

The key to being credible is not creating any visual surprises. You must present an expected image.

If you are a psychiatrist, you must look like a psychiatrist.

Earth tone colors, such as mahogany and rust colored suits or jackets make you more persuasive and appealing.

However, if you have to convince men on a jury that you are a competent professional, wearing traditional men's wear colors, such as grey and blue is better.

Types of suits:

1. The traditional "dress for success suit" that imitates the colors and basic design of a man's suit.

One version looks like a man's jacket and the second is cut with the same style but without lapels. Both are high authority suits.

2. The "aggressive feminine" suit. It is aggressive because of either a strong color or a strong pattern.

Aggressive feminine suits don't work particularly well with either men or women.
3. The "stylish professional" suit

The jackets of most of these suits are designed to be worn without a blouse. The stylish professional suit in navy or charcoal grey can be very effective when dealing with conservative men.

4. The "soft feminine suit."

These include suits in pastel colors and those with feminine detailing, such as small felt collars or lace at the neck or sleeves. Most suits with feminine detailing are "too cute" to be effective in court.

5. The "conservative feminine suit" has a conservative cut but the color is one that would be found only in a woman's suit -- for example, mahogany, dark plum, or deep maroon.

This suit sends the message that the woman is feminine and powerful.

Importance of Wearing a Jacket

While 95% of persons perceive women wearing a jacket as serious, less than 35% describe women without jackets in similar terms.

Navy jackets have almost as much authority as black, while sending a friendly, less threatening message.

The skirts that tested best with navy jackets are in descending order, beige with a grey tint, medium grey, charcoal grey, medium blue, taupe, white grey, and beige.

The best blouses with navy jackets are white, pale blue, beige, maroon, white on white, rust, ecru, and pale pink.

Medium brown jackets send a very positive message about the wearer being friendly and easy to get along with. It is a good choice for you in your treatment role because they relax people and get them to open up.

Any jacket put over a dress adds to the authority of the wearer. If you may be called to court unexpectedly, you may elect to keep a jacket on hand so it can be put on in an emergency.

Dresses are less authoritative.

An exception is that dresses alone work better than jacket outfits for the small percentage of women who are very aggressive or whose size, style, or personality makes them intimidating.

The only pattern that makes dresses more effective is the pinstripe. Recommended colors include blue and dark grey. When testifying however, pinstripes can be difficult to look at and distracting.

Footwear
The closed heel, closed toe pump in a conservative color with 1-1/2 to 2" heels is still the best footwear. Short women can benefit by wearing high heels because they increase their sense of presence and authority.

Flesh colored pantyhose continue to test best.

**Accessories**

Buying a very good quality brief case is a good investment.

> A woman's brief case should not look masculine. The best colors are standard brown or tan.

The best handbags are obviously expensive leather satchel bags with understated hardware. The best colors are brown, beige, black, and navy.

**Miscellaneous**

Make-up should be understated. Lipstick is expected.

Jewelry should be simple, of good quality, and not jingle.

Looking attractive makes most female experts more effective -- looking strikingly beautiful makes them less effective.

Women should never wear sexy clothing to court. They are thought to be less effective by both sexes.

Pants should be avoided in court because they are likely to antagonize judges as well as some jurors.

Items to be avoided are bright colors in anything (especially floral dresses), shiny materials, and obvious polyester.

**Juror response to female expert clothing**

Women jurors like and trust women experts dressed in earth tones.

If a female expert is less well dressed than women on the jury, they will perceive the expert as lower status.

To gain the respect of suburban women jurors, you must look like you are sophisticated enough to fit in with their lifestyle.

> This can be accomplished by wearing an expensive, feminine, traditional stylish suit or jacket outfit.

Middle class juries react better than they did 20 years ago to signs of style and wealth, such as expensive jewelry and designer scarfs.

Blue collar whites respond best to female experts in traditional blue, grey, and beige suits.

They expect mental health professionals to look professional.
They are turned off by women in light blue, maroon, and green suits, and all but the most conservative and traditional jacket outfits.

Urban juries, which are often composed of blue collar whites and minorities, are a challenge.

While whites respond favorably to an establishment look, blacks respond with distrust to that look.

You can keep your credibility with blue collar whites as long as you wear a traditional suit. However if it is too traditional, it may put off blacks who respond best to white female experts who wear earth tones.

Brown tweed, herringbone, and plaid suits and jackets work best for both groups.

Rural juries now respond to the same kind of dress that the rest of us do. If you dress down, some of them will be offended.

Regional differences must be considered.

The "More Knowledgeable" Scientific Expert

<table>
<thead>
<tr>
<th>Description of Pairs</th>
<th>Responses (n = 102)</th>
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</thead>
<tbody>
<tr>
<td>Pair 1</td>
<td></td>
</tr>
<tr>
<td>A. Male with dark brown sports jacket</td>
<td>10</td>
</tr>
<tr>
<td>B. Male with dark blue suit</td>
<td>81</td>
</tr>
<tr>
<td>Pair 2</td>
<td></td>
</tr>
<tr>
<td>A. Male with conservative tie</td>
<td>92</td>
</tr>
<tr>
<td>B. Male with loud tie</td>
<td>8</td>
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<tr>
<td>Pair 3</td>
<td></td>
</tr>
<tr>
<td>A. Male with two-piece suit</td>
<td>41</td>
</tr>
<tr>
<td>B. Male with three-piece suit</td>
<td>59</td>
</tr>
<tr>
<td>Pair 4</td>
<td></td>
</tr>
<tr>
<td>A. Female with skirt and sweater</td>
<td>23</td>
</tr>
<tr>
<td>B. Female with skirted suit</td>
<td>77</td>
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<tr>
<td>Pair 5</td>
<td></td>
</tr>
<tr>
<td>A. Female with hair up</td>
<td>70</td>
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<tr>
<td>B. Female with hair down</td>
<td>30</td>
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<tr>
<td>Pair 6</td>
<td></td>
</tr>
<tr>
<td>A. Male standing and illustrating</td>
<td>84</td>
</tr>
<tr>
<td>B. Male sitting and talking</td>
<td>16</td>
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<tr>
<td>Pair 7</td>
<td></td>
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<tr>
<td>A. Male with dark brown sports jacket</td>
<td>30</td>
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<tr>
<td>B. Female with gray skirted suit</td>
<td>70</td>
</tr>
<tr>
<td>Pair 8</td>
<td></td>
</tr>
<tr>
<td>A. Female with gray skirted suit</td>
<td>31</td>
</tr>
<tr>
<td>B. Male with dark blue suit</td>
<td>69</td>
</tr>
</tbody>
</table>

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give his reason therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

(a) Required Disclosures

(2) Disclosure of Expert Testimony

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.
Appendix XII

Frye v. United States

Court of Appeals of District of Columbia, 1923

Facts: Mr. Frye was convicted of the crime of murder in the second degree. He appealed the decision based upon the exclusion of the proffer of an expert witness to testify to the result of a deception test made upon him. The test was a systolic blood pressure deception test. Admission of the expert evidence was objected to by the state, and was excluded by the trial judge.

Holding: The judgment was affirmed. The systolic blood pressure deception test had not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery.

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

Commentary: The "general acceptance" test for admission of scientific discoveries is known as the Frye test. Many commentators have been critical of it. The Supreme Court in Daubert v. Merrell Dow Pharmaceuticals (1993) stated that the Federal Rules of evidence supersede the Frye test.

The blood pressure deception test used on Mr. Frye was eventually found to be unreliable. It was developed by Marston, who later authored the comic script character, Wonder Woman.
Appendix XII (con't)

Daubert v. Merrell Dow Pharmaceuticals

U.S. Supreme Court, 1993

Facts: Two minor children, born with serious birth defects, and their parents sued Merrell Dow Pharmaceuticals alleging that the birth defects had been caused by the mothers' ingestion of Bendectin. The federal district court granted Merrell's request for summary judgment based on a well credentialed expert's affidavit stating that the extensive published literature had not shown the maternal use of Bendectin to be a risk factor for human birth defects. The thirty published studies involved over 130,000 patients.

The plaintiffs proffered the testimony of eight experts, who based their conclusion that Bendectin can cause birth defects on animal studies, chemical structure analyses, and unpublished "reanalysis" of previously published human statistical studies. The trial court concluded that the plaintiff's evidence did not meet the "general acceptance" (Frye) standard. The Court of Appeals affirmed the trial court decision. The plaintiffs appealed to the U.S. Supreme Court.

Holding: The U.S. Supreme Court held that the Federal Rules of Evidence, not Frye, provide the standard for admitting expert scientific evidence in a federal trial. (The Federal Rules of Evidence were adopted by Congress in 1975.)

Reasoning: The Frye test stated, "... The thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." The rigid Frye test was at odds with the liberal thrust of the Federal Rules and their general approach of relaxing the traditional barriers to opinion testimony.

Federal Rule 702 governing expert testimony provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

The Court reasoned that Rule 702 placed appropriate limits on the admissibility of purportedly scientific evidence by assigning to the trial judge the task of insuring that the expert's testimony both rests on a reliable foundation and is relevant to the task at hand. The reliability standard is established by Rule 702's requirement that an expert's testimony pertain to scientific knowledge. The adjective "scientific" implies a grounding in scientific methods and procedures, while the word "knowledge" connotes a body of known facts or ideas inferred from such facts or accepted as true on good grounds.

Faced with a proffer of expert scientific testimony under Rule 702, the trial judge must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid, and properly can be applied to the facts at
issue. The judge should consider, among other factors:

Whether the theory or technique in question can be (and has been) tested.

Whether it has been subjected to peer review and publication.

Its known or potential error rate.

The existence and maintenance of standards controlling its operation.

Whether it has attracted widespread acceptance within the relevant scientific community (Frye test).

The inquiry must focus solely on the principles and methodology, not on the conclusions that they generate.

Cross examination, presentation of contrary evidence, and careful instruction on the burden of proof, rather than wholesale exclusion, is the appropriate means by which evidence based on valid principles may be challenged.

Commentary: Daubert ended the 70 year reign of the Frye "general acceptance" test in federal trials.
Jurisdictions in 1995*

<table>
<thead>
<tr>
<th>Frye Jurisdictions</th>
<th>Daubert Jurisdictions</th>
<th>Other Jurisdictions</th>
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*Capital Reports #45, December, 1995, National Legal Aid and Defender Association’s Death Penalty Litigation Section.
### Appendix XIII

**COMPARISON OF THE COURTROOM-ORIENTED AND THE COURTROOM-UNFAMILIAR EXPERT WITNESS**

#### PRETRIAL

<table>
<thead>
<tr>
<th>Stage</th>
<th>Courtroom Oriented</th>
<th>Courtroom Unfamiliar</th>
</tr>
</thead>
<tbody>
<tr>
<td>Training</td>
<td>Legal-medical institutes, court clinics, or other training centers. Legal background: sometimes self-taught, by bitter experience</td>
<td>No relevant training</td>
</tr>
<tr>
<td>Point of entry of witness into proceeding</td>
<td>Early in legal procedure; extensive pretrial conference with emphasis on appropriate questions to elicit evaluation-related content</td>
<td>Late entry; minimal or no pretrial conference with attorney; minimal or no preparation with attorney on techniques for eliciting opinion</td>
</tr>
<tr>
<td>Knowledge of law, evidence, and constitutional privilege</td>
<td>Usually aware; occasionally more so than the particular lawyer in the trial</td>
<td>Usually unaware or minimally informed</td>
</tr>
<tr>
<td>Record Keeping</td>
<td>Thorough; tends to anticipate cross-examination; exact as to dates, times, places, detail, prior hospital records</td>
<td>Often tends to be variable, imprecise; omits or uncertain of dates, time, etc.</td>
</tr>
<tr>
<td>Reaction to subpoena</td>
<td>Minimal emotional reaction; reviews record, calls lawyer, determines basis of subpoena and information desired by lawyer; sets up conferences with lawyer</td>
<td>Distress and anxiety; usually does not call lawyer; no conferences unless requested by lawyer--even then minimal; unaware of legal position</td>
</tr>
</tbody>
</table>

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### COMPARISON OF THE COURTROOM-ORIENTED AND THE COURTROOM-UNFAMILIAR EXPERT WITNESS

#### ON THE WITNESS STAND

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<tr>
<th>Stage</th>
<th>Courtroom Oriented</th>
<th>Courtroom Unfamiliar</th>
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<tbody>
<tr>
<td>Written report</td>
<td>Clear, concise, equivocal where necessary; avoids legal problems but answers questions raised</td>
<td>Technical language, poorly understood by lay readers; often does not answer legal questions raised</td>
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<tr>
<td>Target of testimony</td>
<td>Jury or judge</td>
<td>Lawyer or mental health colleagues</td>
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<td>Language</td>
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<td>Persuasion; teaching; mild advocacy of his or her findings</td>
<td>&quot;Objective&quot; presentation of clinical information</td>
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<tr>
<td>Testimony process</td>
<td>Steady; consistent; aware of &quot;traps;&quot; concedes to minor points easily</td>
<td>May be badly manipulated; gets stubborn; backs into corner</td>
</tr>
<tr>
<td>Reaction to cross-examination</td>
<td>Normal acceptance as routine procedure</td>
<td>Resentment, anger, professional confusion</td>
</tr>
<tr>
<td>Setting up rebuttal on redirect examination</td>
<td>Active involvement; awareness of techniques</td>
<td>No activity; unaware of techniques</td>
</tr>
</tbody>
</table>

#### POST-TRIAL

<table>
<thead>
<tr>
<th>Stage</th>
<th>Courtroom Oriented</th>
<th>Courtroom Unfamiliar</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reaction after court findings, especially to distortion of opinion and loss of case by client</td>
<td>Acceptance; learns; reappears in court</td>
<td>Nonacceptance; alienation; reacts by future avoidance</td>
</tr>
<tr>
<td>Result of court adjudication</td>
<td>More consistent with expressed view of witness whether opposing testimony is present or not</td>
<td>Less consistent with expressed view, particularly in borderline or contested cases with opposing testimony</td>
</tr>
<tr>
<td>Fees</td>
<td>Higher, based on actual time spent in evaluation, reporting, and courtroom time; based on regular private practice fees</td>
<td>Variable, generally low or occasionally unrealistically high compared with regular private practice fee for service time</td>
</tr>
</tbody>
</table>
The cross-examination of psychiatrist Dr. Carl Binger by Thomas Murphy is frequently described as the single most devastating cross-examination of an expert ever conducted. In 1950, Dr. Binger testified in the trial of Alger Hiss for the defense. Dr. Binger testified that the key government witness against Mr. Hiss, Whittaker Chambers, had a psychopathic personality characterized by a tendency to make false accusations. Dr. Binger had never clinically examined Whittaker Chambers, but he had read what Mr. Chambers had written, observed him in the trial, and been given a hypothetical question including the facts of his life.

The following excerpts were selected to demonstrate certain errors by Dr. Binger and examples of effective cross-examination techniques.

The first example shows Dr. Binger refusing to concede the obvious.

Q. "I am trying to find out and have you tell this jury in as plain as language as I know, whether or not you would not be better qualified if you had Mr. Chambers in your office and subjected him to whatever questions you wanted to ask? Wouldn't you be better qualified?

A. I have told you several times, Mr. Murphy, that it depends wholly upon the attitude with which he came to consult me. If he came to consult me as a psychiatrist and it was his intention to deceive me and not to tell the truth, I would be less well qualified than I am. If he came to be cured of an illness from which he suffered, I would be better qualified than I am."

Dr. Binger made the statement on direct examination that one piece of evidence was the observation he made of Whittaker Chambers during his testimony that "he frequently looked up at the ceiling as if trying to recall something that he had previously said." The cross-examiner, Mr. Murphy, said to Dr. Binger, "Now, Doctor, we made a count this morning of the number of times that you looked at the ceiling, and during the first ten minutes you looked at the ceiling 19 times, the next 15 minutes 20 times; and the next 15 minutes 10 times; and the following 10 minutes 10 times, making a total in 50 minutes of 59 times, and I was wondering, Doctor, whether that had any symptoms of a psychopathic personality?" Dr. Binger, replied, "Not alone."

Dr. Binger said that another piece of evidence that Whittaker Chambers had a psychopathic personality was "the frequent variation of names" he used. "...once he would be Jay David Whittaker Chambers, then he would be Jay Chambers, and Whittaker Chambers."

Q. "Well, does that fit into the pattern of repetitive lying, the variation of those names?

A. I should say not only into lying but into the kind of pathological lying which was playing a part as if he were somebody else; trying to make yourself conform to some imagination that you have about yourself.
Q. I see. So that anyone who does that, Doctor, evidences a symptom of a psychopathic personality, would you say?

A. Not that alone.

Q. No. But it is some evidence to be taken into consideration by a trained psychiatrist?

A. I think not only by a trained psychiatrist; by anyone.

Q. Well, is it not a fact, Doctor, that in the American Medical Directory in 1938 you were listed as Carl Binger and in 1942 as Carl A. L. Binger? And in the American Medical Directory for New York, New Jersey and Connecticut in 1939 and 1940 as Carl Binger, and that in the Directory of Medical Specialists you are listed as Carl Alfred Lanning Binger? Aren't those all substantially correct, Doctor?

A. I assume they are if you read them out. I don't know.

Q. You don't attach any significance to that, do you, as far as yours is concerned?

A. Not diagnostic significance.

Q. Diagnostically speaking, yes.

A. No."

The following example demonstrates a problem that Dr. Binger got himself into by volunteering unnecessary information.

Q. "And I think you told us yesterday that in connection with the ordinary white lies that parents tell their children that you would not attach much relevancy to those.

A. Well, conventional white lies I would attach no significance to.

Q. No significance?

A. No. I told two yesterday.

Q. You told two yesterday.

A. Yes.

Q. What were the two that you told, Doctor?

A. I was telephoned to, and when I got home I was tired, and told the maid to say I was out. Twice.

Q. I suppose actually the maid was the one who lied there?

A. No. She did what I asked her to.

Q. She did what you said, told her to do?

A. Certainly.
Q. And you say that she was the one who lied or you lied? I am not clear.

A. I said I lied.

Q. And if you tell somebody to do something, the one who does the telling is the liar, and not the one who actually speaks?

A. Well, obviously, I was the liar yesterday, not she.

Q. I was just trying to make an analogy as to what Mr. Chambers was doing. If Mr. Peters told Mr. Chambers to lie when he applied for the Breen passport, would you say that Mr. Chambers or Mr. Peters was the liar?

A. I don't compare a man of Mr. Chambers' superior intellect and education to our colored West Indian cook who will always do what I ask her to do.

Q. Well, Doctor, whether you compare it or not, my question was whether when Mr. Peters, Mr. Chambers' superior, told Mr. Chambers, as a paid functionary of the Communist Party, to do thus and so, my question is whether or not in your opinion as a doctor Mr. Peters or Mr. Chambers was the doer of the act.

A. Both.

Q. Both?

A. Yes.

Q. So that if Mr. Chambers lied pursuant to Mr. Peter's direction both were lying?

A. That is right.

Q. Although when you told your maid to do something that was not truthful, it was only you who lied?

A. Yes, because mine was a perfectly harmless white lie that did not do anybody any harm."

Dr. Binger gave as another example of Mr. Chambers' psychopathic personality the fact that he had shown "insensitivity to other people's feelings."

Q. "Dr. Binger. Now, would you say that this phrase would be insensitive to the feelings of others, that "Every really good wife is partly mother, sister, psychiatric nurse, and courtesan?"

A. Would I say that was offensive?

Q. Yes, that the person who said that was insensitive to the feelings of others, to call a woman both a mother and a prostitute.

A. Well, since I said that myself I could hardly say it was offensive."

The final excerpt demonstrates effective cross-examination of
psychoanalytic speculations. Dr. Binger stated that when Mr. Chambers' brother died, Mr. Chambers symbolically "buried himself in the Communist underground."

Q. "Well, Doctor, don't you assume in your state of facts that the brother was buried underground?

A. I don't know where the brother was buried.

Q. Why of course. Suppose the brother was cremated? What would be the symbolical symbol there?

A. I don't think it is quite -- I don't think that is quite as literal as that, Mr. Murphy. We speak of burying in the Communist underground, going underground. Usually after a person dies there is the thought of burial. Now, whether the brother was cremated or whether his ashes were scattered on the four winds has nothing to do with my assumption, It was an assumption, I still make it, and it can be given whatever importance you wish to give it.

Q. Well, Doctor, let us suppose that you assumed that he did not go underground as a Communist functionary until three years I think it was, some five years later?

A. Yes, I know there was an interval. He did say however that he became a fanatical Communist after his brother's death.

Q. But tell us about the symbolism of going underground five years later pursuant to orders from his superior -- do you attach some significance to that in connection with the proposed death with that intervening time there and pursuant to orders?

A. I think the Unconscious recognizes no statute of limitations. I think this is a continuous process that goes on in the mind, whether it is one year or five years or ten years has nothing to do with it.

Q. Doctor, if he did it pursuant to orders, pursuant to the orders of his superior and went underground--

A. He accepted those orders, didn't he?

Q. Yes, assuming he did it pursuant to orders, do you still attach the symbolism to it and tie it in in some way with the proposed death?

A. I am not trying to lay too much emphasis on it. I think it is a significant fact worth bearing in mind."
APPENDIX XV

Risk Management Tips for Forensic Practice

1. Performing a forensic examination in a state where you are not licensed to practice may be a violation of the state's licensing laws. Confirm that you, as an out of state physician not licensed in the state where the evaluation is to take place, can legally perform a forensic examination.

2. Have the patient sign a written consent form for the evaluation, regardless of whether or not written consent is legally required.

3. The evaluatee should sign a release, prior to the examination, waiving confidentiality for specific purposes. The release should include permission to disseminate the report to the appropriate parties, to have your deposition taken, and provide testimony at trial. The release should be prepared by an attorney familiar with the state law pertaining to physician-patient privilege and confidentiality in the state where the evaluation is performed.

4. If the evaluation is conducted on the evaluatee while he or she is a patient in the hospital, do not write "orders" in the medical records or give verbal orders to the nurses.

5. Be certain that you know who has legal authority to consent to the evaluation of a child before performing an evaluation and rendering an opinion about which parent or legal guardian should have custody. Make sure that the legally authorized party gives written consent for a custody evaluation.

6. When being deposed consider similar cases you have consulted on and whether your testimony is consistent with those cases. If not, be very clear on the distinctions. The attorneys will often have transcripts from testimony in prior cases, and your prior testimony can be used to attack your credibility.

7. Avoid discussions with the press about any case where you have been retained to provide a forensic evaluation or consultation. If it is a high profile case, you may find yourself under scrutiny, and "no comment" is the appropriate response.

Appendix XVII

Objections List

1. Objection: Irrelevant

   It has no tendency to make the existence of any fact that is of consequence to the
determination of the action more probable than it would be without the evidence.

   A. Prejudice

       The relevance is outweighed by unfair prejudice.

2. Objection: Hearsay

3. Objection: Leading Question

4. Objection: Repetitive; asked and answered.


7. Objection: Confusing, misleading, ambiguous, vague, unintelligible.

8. Objection: Compound question

9. Objection: Argumentative

10. Objection: Improper characterization

11. Objection: Unresponsive; objection your honor, the answer is not responsive to my question.

12. Objection: Lack of foundation