

Commentary: Role Conflict for the Witness Consultant

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As Dr. Simon has so aptly outlined, acting as witness consultant, like so many maneuvers in the judicial process, has potential benefits as well as pitfalls. To be a witness consultant carries many of the qualities of supervising a junior clinician, with all the pleasures (and perils) of such teaching. The task is for one person to assist a second person to optimize the functioning of a third person by promoting awareness of psychological factors that may impede that functioning.

The valuable help of a witness consultant is much like that offered by the consultation-liaison service of a hospital or the model of school consultation in community psychiatry. Among other things, it enables an attorney to recognize and acknowledge that his witness has far less experience with the parameters of testimony than he has himself. Often, that difference is very anxiety provoking to a potential witness. The opportunity for the attorney to recognize and counsel the prospective witness about “the nameless dread” of testimony is an important one. As Dr. Simon notes, an attorney can help the witness to understand that he/she is not the one on trial . . . notwithstanding the rigors of a scary cross-examination.

A witness consultant may teach an attorney to recognize the leverage of positive transference in the attorney-client relationship. Positive transference can be used to establish a working cooperation directed toward optimal witness performance. A kind of “therapeutic alliance” between attorney and witness can enhance the witness’s ability to understand and effectively convey what it is that he/she can con-

tribute to the legal proceeding. Likewise, the witness consultant can help an attorney recognize and deal with a potential witness’s negative transference, engendered both by past experiences and by the inevitable pressures of litigation.

Perhaps the two most important functions served by the witness consultant are to encourage the attorney to allow adequate time with his/her client and to listen. A simple but valuable process, listening, and one all too often lost in the hurly-burly of an attorney’s need to strategize, to gather factual information from the witness, and to plan with him/her. Often, individuals engaged in lawsuits feel a sense of relief at being able to unburden themselves of their individual story, a relief that comes just from being heard by a good listener. Allowing adequate time speaks for itself; so often both plaintiffs and defendants complain of lack of time with their attorney.

The approach of the witness consultant ought to be oriented toward a focus on procedural matters rather than substantive ones. This will help the attorney avoid the accusation of witness tampering, a crucial matter. Additionally, the attorney’s approach, encouraged by the witness consultant, is more a behavioral one than a psychodynamic one. Clarification rather than interpretation is the byword. The attorney does not need to delve into the depths of the unconscious to respond to the witness’s workaday concerns.

Doing witness-consulting work resembles coaching the attorney to do supportive psychotherapy and approaches being psychotherapy by proxy. Questions might be raised about the adequacy of such treatment at second hand. The “curbside consultation,” which most of us engage in during professional practice, has its limits. An attorney may ask for a

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tutorial on how best to support his client, but is he trained and able to use the advice? My experience has been that where this work is done, it is best accomplished in a minimalist way. Sometimes, just offering written material that the attorney can share with his client is helpful.¹

Working with or through a third party is accepted practice in dealing with parents in child psychiatry, but in this venue one might ask (and not entirely facetiously) whether the witness consultant's work could be framed as encouragement of the unlicensed practice of medicine? (Some boards of registration frown on engaging laypeople to do psychotherapy and some specifically prohibit it.) It is doubtful. It would seem that most attorneys would regard counseling their clients as being within the purview of their work.

If a witness is so vulnerable, should he/she not be treated by a mental health professional? Use of stress management techniques may be a good thing, but better in practiced hands. Of course the witness consultant role "could" be to gather enough information second hand (through the attorney) to offer triage for the vulnerable witness. In that case, suggestions and referral to appropriate treatment resources may be helpful.

The presence of a witness consultant introduces a third partner to the dance, and if two is company, three is often a crowd. Although *Ake v. Oklahoma* legitimizes the attorney's use of psychiatric resources for the purpose of strategizing—in addition to acting as expert witness—there is a conflict inherent in the witness consultant role when the witness consultant tries additionally to be either the treating doctor or an expert witness in the case. This conflict is just as salient as the conflict of treater acting as expert witness. The role of a witness consultant is unavoidably an advocacy role, with different tasks and goals from those of an expert witness or a treater. If the witness consultant is also an expert witness in the same case,

the bias induced by his advocacy role is likely to taint his/her striving for scientific objectivity. Likewise, if the witness consultant tries to function also as therapist for the plaintiff, a foreign element has intruded into the psychotherapy, which may compromise the work. We have paid special attention to this conflict elsewhere.² There are clinical, ethical, and legal reasons to avoid this conflict. With all good intentions, it is too easy to affect treatment adversely by forming dual relationships in which the focus of the treater becomes no longer one of expectant waiting, therapeutic neutrality, and unremitting empathy. Whether or not the witness is aware of a consultant in the wings, drawing either a treating therapist or an expert witness into the witness consultant's role does create the conflict of a dual relationship. This is true even though the witness consultant doesn't ever meet with the witness and works solely with the attorney. Once the battle has been joined, the witness consultant becomes an unmistakable partisan. The agency conflict is obvious. At the very least, the witness consultant is quite likely to identify with the attorney's being "supervised." At worst, the disinterested, objective posture that enables a judicious consideration of both sides of the case in question is lost.

Admittedly, the difficulty and expense of finding and adding a third psychiatric voice to those of treater and expert may make the choice impractical and even idealistic. In many areas, the availability of well-trained forensic practitioners is limited. Still, an awareness of the potential role conflict inherent in using treater or expert as witness consultant in addition to their traditional roles should be recognized and minimized wherever possible.

References

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2. Strasburger LH, Gutheil TG, Brodsky A: On wearing two hats: role conflict in serving as both psychotherapist and expert witness. *Am J Psychiatry* 154:448-56