

# Psychiatrists in the Hot Seat\*: Discrediting Doctors by Impeachment of Their Credibility

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Attacks on the credibility of the psychiatric expert witness are termed *impeachment*. This article provides an in-depth review of the various impeachment techniques used by lawyers during cross-examination and offers specific suggestions to the psychiatric expert witness on how to prepare for and counter some of these trial ploys. *Bolstering* and *rehabilitation* of the expert's credibility are also discussed. Finally, improper use of impeachment tactics is also considered. Excerpts from trial transcripts and court opinions are supplied to illustrate these points. Although impeachment remains a formidable weapon in the lawyer's armamentarium, it is suggested that the well-prepared and experienced psychiatric expert witness will be more than equal to the task.

[Truth] oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien.<sup>2</sup>

Psychiatry has established itself as an "inextricable cog in the machinery of the law"<sup>3</sup> and the demand for qualified psychiatric expert witnesses has multiplied exponentially over the past several

years at every conceivable stage of both criminal and civil cases.<sup>4-8</sup> Another indicium of this phenomenon has been the steady growth of a literature devoted to the subject of the psychiatric expert and psychiatric expertise<sup>9-12</sup> A plethora of articles and books have dealt with the proper role of the psychiatrist in court, preparation of the psychiatric expert witness, and the potential pitfalls of expert testimony.<sup>13-15</sup> Rada has addressed these issues in a thoughtful review and analyzed the countertransference issues that commonly arise among psychiatric expert witnesses. He states:

The courtroom scene tends to arouse intense anxiety about a dreaded encounter rather than exhilaration about participation in a lofty and noble task. . . . almost every psychiatrist is aware of those notorious instances in which a

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\* *Hot Seat*. 1. The electric chair. 2. A witness chair in a courtroom.<sup>1</sup>

distinguished and eminent psychiatrist has ventured into the courtroom only to leave feeling humiliated and degraded. One does not have to be arrogant, unwilling to have one's views questioned, as is often suggested by our legal colleagues, to feel threatened about courtroom testimony.<sup>16</sup>

This "dreaded encounter" is epitomized in the process of impeachment by opposing counsel during cross-examination of the psychiatric expert witness. Although the opposing side is entitled to a vigorous cross-examination, at times the proper bounds of courtroom decorum are violated and the expert is subjected to personal attack and harassment. This prospect has contributed to the reluctance of many reputable experts to involve themselves in litigation.<sup>17</sup> A number of books and treatises purport to provide the lawyer with a systematic and methodical basis to impugn the credibility of psychiatric expert witnesses.<sup>18-19</sup> This article will focus on the process of impeachment itself, providing an in-depth review of the various impeachment techniques used by lawyers and offering specific suggestions on how to prepare for and effectively counter some of these trial ploys. Whenever possible excerpts will be supplied from trial transcripts and court opinions to illustrate these points.

### **The Credibility of Witnesses and Impeachment Techniques**

Credibility (or believability) is a vitally important factor in the testimony of psychiatric expert witnesses. Often the witness's credibility becomes the central issue in a "battle of the experts," the outcome turning on whom the jury chooses to believe. The lawyer who has retained

a psychiatric expert witness naturally wishes to build up that witness's credibility in the jury's eyes. In doing so (on direct examination), the lawyer is said to be "bolstering" the witness's credibility. For example, a full recital of the doctor's credentials, including professional training and experience, affiliations and appointments, authorship of professional papers, and presentations at conferences, is calculated to impress the jury and influence them to attach greater weight to the expert testimony.<sup>†</sup> Conversely, the opposing counsel strives to assail the witness's credibility. Such attacks on the expert's credibility are termed impeachment.<sup>20</sup>

It is important to understand the distinction between two basic categories of evidence: *substantive* evidence and *credibility* evidence. If the specialized scientific knowledge of the psychiatric expert will assist the jury to understand the evidence or to determine a fact in issue, the expert is permitted to testify with an opinion or inference (sometimes even if that opinion or inference embraces an ultimate issue to be decided by the jury).<sup>20-21</sup> The expert can also testify in nonopinion form, e.g., give a dissertation or exposition of scientific principles relevant to the case, leaving the jury to apply them to the facts. The expert's opinion and/or exposition (and the facts or data on which they are based) are substantive evidence, bear directly on

<sup>†</sup>It is necessary, as a threshold issue, to establish the credentials of doctors in order to have the judge qualify them as experts. The lawyer retaining an expert will seek to capitalize on this requirement by emphasizing and even embellishing these credentials to bolster the witness's credibility in the mind of the jury.

the merits of the case, and certainly will be extensively probed and scrutinized during cross-examination. In contrast to substantive evidence, credibility evidence has only indirect relevance to the merits of the case (i.e., by reflecting on the witness's credibility, it influences the weight the jury will attach to the testimony which he gives concerning the merits).

The various impeachment techniques commonly used by lawyers to attempt to discredit psychiatric expert witnesses will be presented in the following sections.

**Demeanor‡ Impeachment** Quite aside from the substantive content of psychiatrists' testimony, their general appearance and conduct in the courtroom may sway a jury. In a previous article I discussed a recent New York case in which the judge in a bench trial rejected consensus opinions by both defense and prosecution psychiatric expert witnesses to the effect that the defendant lacked criminal responsibility.<sup>23</sup> In questioning the credibility of *both* psychiatrists, the judge noted: "it was almost like pulling teeth to get them to answer a question. They ducked, dodged and equivocated throughout except when it came to expressing their [conclusory] opinions as to the defendant's mental state."<sup>24</sup>

<sup>24</sup>The demeanor of an orally testifying witness is 'always assumed to be in evidence.' It is 'wordless language' . . . . [Testimony] may seem uncontradicted by one who merely reads it, yet it may be 'contradicted' in the trial court by his manner, his intonations, his grimaces, his gestures, and the like—all matters which 'cold print does not preserve' . . . . The witness' demeanor, not apparent in the record, may alone have 'impeached' him."<sup>22</sup>

Opposing counsel is generally sensitive to the use that may be made of a witness's unfavorable demeanor to impeach that witness during cross-examination in order to persuade the jury to reject that witness's damaging testimony given during direct examination. The experienced cross-examiner has an armamentarium of tactics, including *ad hominem* attacks, argumentative questioning, ploys calculated to "shock" the witness, and other anxiety-inducing techniques that are intended to prompt negative demeanor, confusion and uncertainty in the witness. If such tactics are successful, the effects on the expert witness are usually not lost on the jury. Signs of distress, such as squirming and shifting around in the witness chair, perspiring, crossing and uncrossing of legs, looking at the floor or ceiling, and glancing toward counsel for assistance, may raise questions in the jury's mind. Psychological research indicates that jurors have good "polygraph" instincts and attach a good deal of weight to the witness's demeanor in assessing credibility.<sup>25-26</sup>

Maintaining an effective demeanor during courtroom testimony is a skill that requires practice and diligent preparation. Rada recommends thorough preparation in three areas: attitudinal preparation, cognitive preparation, and skill preparation.<sup>16</sup> Although some anxiety is to be expected in any courtroom encounter, it can be minimized by careful attention to a number of considerations: (1) mastery of the specific complexities of the case, the psychiatric findings, the legal issues to be addressed, and

the relevant professional literature; (2) achieving a good working alliance with the lawyer by means of pretrial strategy sessions, review of testimony to be given, anticipated cross-examination, and strengths *and* weaknesses of the case; (3) practicing the art of communication of relevant psychiatric knowledge to a jury of laymen (e.g., maintaining good eye contact with the jury, avoiding a condescending manner, and avoiding unintelligible professional jargon).

A number of commentators offer specific advice on such matters as how to project confidence, how to dress, proper posture, maintaining good eye contact, body language, and other nonverbal presentational characteristics.<sup>27-29</sup> Each expert is likely to develop a unique style of presenting testimony in a firm and confident manner, with sufficient preparation and experience. Perhaps the single most important admonition for the expert witness is "be prepared to act courteously even if subjected to improper treatment by opposing counsel."<sup>16</sup> (p. 156). Maintaining a dignified, unruffled and courteous demeanor enhances the professional image of expert witnesses and reinforces the jury's confidence in their testimony.

***Impeachment Based on Proof That the Witness Is Biased*** The demonstration of bias in the psychiatric expert witness is logically relevant to impeachment of that witness. Bias may affect a witness consciously or unconsciously.<sup>20</sup> With the proper amount of pretrial research and investigation, opposing counsel can sometimes unearth damaging information which demonstrates the possibility

or probability of bias on the part of the expert. For example, it might be brought to the attention of the jury that the psychiatric expert has frequently been retained in similar cases by the same lawyer who is calling him or her as an expert witness in the present case; or it might be shown that the psychiatric expert always testifies for one side and never for the other (e.g., in medical malpractice cases, the expert always testifies for the defense or has some special relationship with the defense).

*Example 1*

Q. You have done previous work for the Health and Hospital Corporation?

A. I think I did have one or two cases with them, but not in this office. in the Bronx I believe.

Q. And that was where the Health and Hospital Corporation was a defendant; is that right?

A. I believe so, yes.

Q. Okay, you have an ongoing connection with the Health and Hospital Corporation; isn't that correct?

A. I would say two cases in two years, is about it.

Q. No, my question is you have an ongoing connection with the Health and Hospital Corporation. I'm not talking about testifying, I'm talking about your work at Bellevue?

A. Well, I was at Bellevue from '74 to '75, yes.

Q. And don't you still do work at Bellevue?

A. I teach. I am not paid by Bellevue.

Q. But you do teach at the Bellevue facility?

A. I teach the . . . medical students there, yes.<sup>30</sup>

*Example 2*

Q. How much did you make as a result of your various consultations and testimonial performances from the Legal Aid Society last year, doctor?

Defense Counsel: I object to the word 'performances.'

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The Court: All right, as to form.

Defense Counsel: If it is testimony, it is testimony. We don't need [the prosecutor]—

Q. We will call it testimony.

A. I work for [the Legal Aid Society], yes.

Q. And never the Bronx District Attorney's office, correct?

A. Well, that is your fault. You know, you could hire me any time you want. I am in the phone book.

Q. There may be a good reason we haven't.<sup>31</sup>

Another fertile area for impeachment on the issue of bias regards the amount of monetary compensation the expert receives (which will usually seem exorbitant to members of the jury who receive a token *per diem* sum for their services). Does the expert receive a large percentage of his or her total income from testifying in similar cases? Does the jurisdiction permit contingency fees for expert witnesses, based on the outcome of the case? These circumstances might suggest possible bias on the part of the expert.

### Example 3

Q. Doctor, isn't it a fact that you are being paid for your testimony here today?

A. No. I am not being paid for my *testimony*, I'm being paid for my *time*. I'm being paid by the hour for my services. Whether or not I reached a conclusion that pleased Mr. ———, who retained me. I'd still be paid for my time.

Q. It pleased Mr. ———, but it didn't fool the jury, did it doctor?<sup>32</sup>

Intimations of venality on the part of the expert are not the only grounds for demonstrating bias. Misguided ideology or covert partisanship may also be implicated:

[The expert] may be biased or prejudiced in more subtle and elusive ways, either because of his unconscious identification with *his side*

of the legal battle or because of his own private value system and ideological leanings. Such a situation along with a "secret hope for victory of his own opinion [may lead to] innumerable subtle distortions and biases in his testimony that spring from this wish to triumph."<sup>33</sup>

### Example 4

Q. Doctor, this is a malpractice action against psychiatrists who are psychopharmacologists and you yourself are a leading researcher and teacher in that field, psychopharmacology. Isn't it very probable that you, *whether consciously or unconsciously*, doctor, are biased in their favor? Isn't that a fact?

A. [Unconvincingly, in a very low voice] No. In fact, I have very high standards in this field—higher than the average psychiatrist.

Q. [Sarcastically] Are you telling us, doctor, that you in fact are prejudiced *against* psychopharmacologists?<sup>34</sup>

It goes without saying that the best measures to avoid allegations of bias are preventive in nature. In order to maintain an appearance of strict impartiality, psychiatric experts should always remain available to accept referrals from both sides (e.g., defense and prosecution). It must be clear that they play no favorites. They should also be prepared to emphasize that in a significant percentage of cases in which they are retained, they do not reach conclusions that are favorable to the side retaining them. It is important to be able to rebut any inferences that the expert is a "hired gun" whose opinion is for hire.

Finally, the forensic psychiatrist should be involved in a wide range of professional activities such as teaching, private practice, or hospital work. Such activities not only enhance professional skills, but tend to refute allegations that the psychiatrist functions as a full-time

expert witness. Such individuals are suspect and highly vulnerable to this line of cross-examination. § I have reviewed the scientific and ethical problems raised by this phenomenon in a previous article.<sup>11</sup> [Some states are considering limiting the percentage of total income that a doctor may derive from expert witness activities.]

***Impeachment Based on Proof That the Witness Made a Prior Inconsistent Statement*** Any prior inconsistent statement (made orally or in writing) by the expert witness is logically relevant to impeachment of credibility. The prior inconsistency (e.g., any written or verbal pretrial statement that is inconsistent with the expert's testimony during the present trial) may be used effectively to impeach the expert's memory or sincerity, or both. Lawyers are quite skillful and resourceful during their preparation for trial: they have methods for investigating the background of experts (including access to sophisticated computer data banks maintained for just such a purpose), for discovering whether the expert has testified in other similar cases, and for obtaining transcripts of such previous testimony. By using this systematic approach, lawyers can also discover and obtain copies of depositions given by an expert in other cases. Lastly, articles and scientific treatises written by experts may be used against them when they least expect it, catching them off guard. Such information, obtained in

§One lawyer referred to such full-time expert witnesses with great disdain: "Indeed we have sprouted a new subspecialty in psychiatry: the professional alienist who will go anywhere, anytime and testify to anything if the price is right."<sup>35</sup>

advance by opposing counsel, can serve as powerful ammunition. Most jurisdictions permit the expert witness to be impeached by prior inconsistent statements made during testimony in a previous case (at trial or at deposition), during testimony in the same case (at deposition), or in publications. Using the expert witness's own words against him or her can be a devastating tactic.

*Example 5*

- Q. Doctor, do you recall having written this article on "Clinical Determinations of Future Violent Behavior?"
- A. [Visibly surprised] Uh, yes I do.
- Q. And in that article, doctor, written by yourself, don't you claim that such determinations are very unreliable?
- A. I think that the focus of . . .
- Q. Yes or no doctor, didn't you state that they are very unreliable? Please answer just yes or no.
- A. [Pause] Yes I did.
- Q. And yet, you are trying to tell this jury today that you can make such a determination reliably in this case. Were you telling the truth at the time you wrote the article, doctor, or are you telling the truth today?<sup>36</sup>

The psychiatric expert witness who is well-prepared is unlikely to be taken by surprise by such ploys. In most cases the expert will be able to point out that the prior statements or opinions were either taken out of context and need to be clarified, or that the present case can be distinguished from the previous case or cases (and therefore that any inconsistency is more apparent than real). Less often, the expert will simply acknowledge a change of opinion about the issue in question as a result of new information, greater experience, or recognition of having made a mistake. Acknowledg-

ment of a prior mistake is likely to win a measure of respect from the jury. No expert should feel that he or she is infallible or above criticism.<sup>16</sup>

***Miscellaneous Impeachment Techniques*** There is virtually no limit to the ingenuity of lawyers in skillfully impeaching the credibility of expert witnesses. Admissions on substantive issues that are favorable to the cross-examiner's position in a case are difficult to obtain. Experts are probably the most difficult of all witnesses to cross-examine. Their education is at least equal to and often better than that of the cross-examiner. Moreover, they are testifying in the area of their expertise, in which they are presumably self-confident and at ease. The expert's command of the situation should be secure. It is not very likely that he or she will concede to having been wrong on a major issue in the case during cross-examination. Yet, even this supreme self-confidence may be used as a weapon against the expert. The refusal of experts to admit that they were wrong or that they might change their minds under certain circumstances on even minor points in a case may serve to create the impression that they are biased in favor of one side, are rigid, or have tunnel vision. On the other hand, if they do make minor admissions (to avoid the appearance of stubbornness or "overadvocacy"), they may be surprised at how quickly these admissions can pyramid to the detriment of their position. Proficient cross-examiners are very adept at pointing out facts in the case that the expert has failed to take into consideration in reaching a conclusion, any

exaggerations in the expert's testimony, or any conflicts between his or her opinion and that of leading authorities in the field.<sup>37</sup> In regard to the latter, the expert is likely to be confronted with excerpts from authoritative psychiatric texts that impugn the credibility of the clinical judgment and opinion offered.<sup>38</sup> Expert witnesses should be aware of any conflicts between their testimony and the weight of established authority as reflected in the psychiatric literature. Opposing counsel is certain to emphasize any such conflicts to the jury. It may be that new discoveries in the field or legitimate differences of opinion within the profession may account for such conflicts. Often the isolated quotation from the professional literature is taken out of context or can be distinguished from the singular features of the case at hand. In this regard Pollack has stated that "the forensic psychiatrist must be master of the professional literature that relates to his case; and he must be able to articulate it, describe it fully, and explain it persuasively to the trier of fact."<sup>38</sup> (p. 335)

Other possible avenues of attack on the expert's credibility might involve shaky credentials, blemished background, or any demonstrated cultural or racial bias. If the psychiatrist has made a hasty or slipshod examination or is testifying outside the particular area of his or her expertise,<sup>39</sup> these issues are likely to be raised during cross-examination. If these areas are potential pitfalls, they should be explored in depth with the lawyer during pretrial preparation sessions in order to prepare ade-

quately to deal with them during cross-examination.

### Rehabilitation of the Witness After Impeachment

Attempts to repair the damage that has been inflicted on the witness's credibility by impeachment are called *rehabilitation*. The expert's own lawyer, during redirect examination, is said to be rehabilitating the witness's credibility.

#### Example 6

After a withering cross-examination during which it was emphasized that the witness often works for the prosecution in criminal cases, the prosecutor attempted to rehabilitate the expert on redirect examination:

- Q. Doctor, it has been pointed out that you testify more often for the prosecution than for the defense.
- A. Yes.
- Q. Do you always reach the conclusion after your evaluation of a case, the conclusion that is favorable to the prosecution side? In other words, do you always reach the finding that the prosecutor would like you to reach?
- A. Certainly not.
- Q. Well, doctor, the defense attorney has strongly implied that you are a "puppet" of the D.A.'s office and that you do what you are told and paid to do.
- A. That's not true.
- Q. Well, doctor, in what actual percentage of the cases you evaluate for the D.A.'s office do you reach a conclusion that is favorable to the prosecution?
- A. In less than half of the cases.
- Q. Let me make sure I understand you doctor. Are you saying that in most of the cases you evaluate for our office, in more than 50 percent you do *not* reach the conclusion we might want you to reach?
- A. That's correct.
- Q. Thank you doctor. I have no further questions.<sup>40</sup>

### Persecution of the Expert Witness: Improper Use of Impeachment

He may prosecute with earnestness and vigor—indeed, he should do so. But, while he [the lawyer] may strike hard blows, he is not at liberty to strike foul ones.<sup>41</sup>

A number of cases indicate that at times lawyers are carried away by their zealous advocacy during a trial: "From time to time it has come to pass that, during the pitch of trial, [lawyers] . . . have occasionally acquiesced to their baser instincts and referred to the opposing . . . [witness] in terms less than becoming the decorum of the courtroom."<sup>42</sup>

Courts generally afford wide latitude to lawyers in their attempts to impeach expert witnesses. Consequently, during the heat of trial, the otherwise dignified atmosphere of the courtroom may be interrupted by an inflammatory sobriquet or a mean-spirited cross-examination, punctuated by ridicule and insult that go far beyond the bounds of legitimate advocacy. The following case is illustrative:

Defendant also contends that he was denied a fair trial on the issue of insanity by reason of . . . certain conduct and comment of the prosecutor. One of these contentions relates to the remarks of the prosecutor in his summation concerning two of the defense psychiatrists. Specifically, he referred to them as "the two happiness boys," as "those two idiots—I am sorry, those two psychiatrists"; He "charged" them with being "ignorant, stupid, incompetent," and scoffed at their titles of "Diplomate." These remarks were improper and cannot be justified or excused by anything that transpired earlier in the trial.<sup>43</sup>

In another case the appellate court censured the prosecutor for repeatedly

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resorting to ridicule and sarcasm in order to impeach the credibility of the defense's psychiatric expert witness. The court offered the following examples from the trial transcript:

### *Example 7*

- A. I did speak to the defendant at great length. I did read letters that he wrote to his common-law wife. I did read the other records and I have no impression that he's trying to blame anybody but himself for this.
- Q. You read his words and you are telling us that he doesn't really on reflection mean what he says. Do you always diagnose people as crazy based on this type of guesswork, doctor?

### *Example 8*

- Q. Yes or no, doctor, isn't that true?
- A. He was a patient in the outpatient service for a period of time before that.
- Q. Doctor, is it a symptom of some form of psychosis when a man can't answer a straightforward yes or no question?

### *Example 9*

- A. I will define [antisocial personality] the way the American Psychiatric Association defines it, not the way you want to define it here today.
- Q. Let's hear it, doctor. Run through your routine. What does it mean?

### *Example 10*

- A. You know, I spent some time in our correctional institutions on visits and—
- Q. I am glad you said on visits.
- A. I put it that way for your benefit. And I think that you know being cooped up in a place like that twenty-four hours a day can drive anybody crazy. I don't see that as any remarkable statement on his part.
- Q. Would you suggest that we open our prison doors so that none of our prisoners go crazy and send them to you?<sup>31</sup>

Although courts condemn such inexcusable and improper remarks directed at expert witnesses, they usually regard them as merely "technical error," i.e., not depriving the defendant of a fair trial

or warranting a reversal. (In general, courts regard reversal as an ill-suited remedy for such prosecutorial misconduct, unless it was so inflammatory that it did deprive the defendant of a fair trial.)

## Conclusion

Although the primary purpose of cross-examination of the psychiatric expert witness is to secure admissions favorable to the opposition on substantive issues in the case, a secondary parallel aim is to discredit the witness as thoroughly as possible in the eyes of the jury. Attacks on the expert's credibility are termed *impeachment*. This article has explored the process and techniques of impeachment of the psychiatric expert witness and offered illustrative case examples, based on trial transcripts and appellate court opinions.

Impeachment remains a formidable weapon in the lawyer's armamentarium; however, the well-prepared and experienced psychiatric expert witness will be more than equal to the task. Specific suggestions have been offered on how to prepare for and effectively counter the various techniques of impeachment.

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