

Temptations for The Expert Witness

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For a considerable length of time, we have been leading workshops on testifying in court for forensic mental health professionals, many of whom offer stories of anguish and humiliation on the stand. These workshops have largely been based on our own experiences, both positive and negative. We advise some obvious but not always easily attained behaviors for the psychiatrists, psychologists, and social workers who are in attendance. “Don’t make up stuff on the stand,” we tell them. “Answer the questions that are asked, even when the answers do not support your conclusions or help the side that called you to testify.” “For goodness sake,” we vigorously wag a finger in the air and we say, “be prepared.” “Actually know the scholarly foundations of whatever you do.” “Be ready to testify thoughtfully, carefully, and responsibly about what you know and how you know it, and equally important, what you don’t know.”

The fears of our expert witness participants are typically about blundering and feeling inept and “caught out” during cross-examination. Many people do not manage aggressive cross-examination well. There are several reasons for lapses in professional demeanor and responses while testifying, one of which is that expert witnesses become narcissistic. They come to believe that testimony during cross is all about them, about whether they are smart enough, clever enough, or quick-witted enough. Narcissistic experts often find themselves in a spitting contest with cross-examining attorneys, trying to outdo them and never giving in. They develop an

emotional intensity during the cross-examination. Most forensic experts have horror stories. Sometimes they go blank and cannot remember something they knew. Sometimes they stumble. Other times they have felt controlled and manipulated by attorneys.

In this article we write about ways attorneys draw out the worst in experts, and offer advice for how to avoid these traps. Obviously, careful and professional examination of litigants, knowledge of the literature, and awareness of courtroom procedures are central to doing well and presenting helpful testimony. There is a substantial body of literature to guide expert mental health witnesses (see, for example, Ref. 1). Here, however, we address problematic temptations that often lure otherwise competent expert witnesses into behaviors that do not serve them or the court well.

We offer seven baits or temptations that can draw an expert into behaviors that are unbecoming. We provide examples of responses that are inappropriate and harmful and descriptions of how to handle them.

The Lure of Argumentativeness

Proceedings in depositions and trials focus on arguments. Successful attorneys are skilled at developing their own positions and arguing against their opponents in a strong, compelling, and legally sound manner. Expert witnesses who are not alert to the pull of argumentativeness can easily be drawn into unnecessary back-and-forth one-upmanship.

So, what is the problem? It is getting caught in a debate mentality in which triers of fact perceive us as partisans instead of being seen as honest, objective sources of information. The partisan perception is promoted by testimony that centers on outsmarting the cross-examining or deposing attorney. There are

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times and places for energetic give-and-take on the stand; experts should avoid rebutting every implication or assertion coming from examining counsel. Consider when the cross-examining attorney asks a straightforward question, such as, "You were not actually there in the home when Ms. Jackson was allegedly unable to take care of her children, were you?" The argumentative experts rush in with explanations of the things they do know and have seen. The poised expert simply replies, "Of course not."

Why don't experts simply answer the question? Some experts do not believe that the retaining lawyers are competent to clarify misleading questions on redirect. Similarly, many experts view opposing counsel as their enemy, and sometimes believe that it is their duty to thwart the "hidden agendas." Our advice is simply to answer the questions and avoid the temptation to be argumentative.

The Lure of Narcissism

Margaret Thatcher once famously said, "Power is like being a lady. If you have to tell people you are, you aren't." We propose the same truth about expertise. When expert witnesses feel the necessity of "tooting their own horn," it is our experience that jurors tend to be put off. The correct way to establish credentials is in response, preferably in a humble manner, to questions by attorneys.

People think about movie stars and professional athletes with some degree of jealousy. Imagine being the center of attention, being praised and fawned over; who could resist such an existence? During trials, expert witnesses experience a small taste of this same enticing elixir. For a few hours, they are treated as "stars." Even during cross-examination, when they are often attacked, they remain the center of attention.

This status can lead experts to adopt an exaggerated view of their own importance and "specialness." It is not surprising, then, that experts would try to protect their inflated self-image when they are attacked during cross-examination. Like a movie star asking a policeman, "Do you know who I am?" This approach seldom goes well. Imagine instead the experts who understand that they are there simply to answer questions as honestly as they can; with no grandiosity to protect, they can respond to personal attacks with dignity and equanimity. When cross-examining attorneys spend an inordinate amount of

time attacking the experts instead of the evidence, it will often be they who lose credibility with the jurors.

In their observation of narcissistic expert witnesses, Gutheil and Simon² argued that many experts have come to believe that their testimony serves the implicit purpose of displaying how exceptional they are. Responsible experts resist the urge to make testimony the occasion for flamboyant demonstrations of wisdom. We value experts who comfortably say, "I don't know" to questions. Indeed, if "I don't know" is the correct answer, any other answer is a lie. Jurors know that experts are not omniscient. It is a mistake to think that being a know-it-all will increase credibility. In our experience, quite the opposite is true.

The principle to be remembered here is that good attorneys can always find something you don't know. It is how you react to this finding that matters. For example, imagine being asked, "Doctor, exactly how good is the reliability reported in the manual of the Competence Assessment Instrument you used in this examination?" Or "Describe and provide the citation information for all the research studies you have read in the past six months about the accuracy of psychiatrists in assessment of mental state at the time of offense." Reacting defensively, evading or refusing to answer the question, pretending as if one knows everything and is infallible: these are the problem reactions. Instead, effective experts admit what they don't know with composure and ease.¹

The Lure of Emotionality

When cross-examinations and depositions get heated, some experts feel as if their skin is being rubbed by sandpaper and their core stability is being nudged off center. At the extreme, this reactivity can take the form of excessive and inappropriate interpersonal reactions.³ We have described cases in which experts' inability to cope with assertive or aggressive cross-examinations have resulted in crying or fainting on the stand (Ref. 1, p 186). We reported one extreme example of an expert nearly being found in contempt of court and jailed for responding with frustration to a cross-examining attorney with curse words (Ref. 3, p 273).

The solutions for preventing such undesirable testifying behaviors include self-control and resilience. Expert witnesses can be confident that properly prepared attorneys will pose tough, sometimes unfair, questions. Expecting that these questions will sometimes be asked may help experts remain in control of

their emotional reactions. A commitment to bolster resilience, or the ability to manage stress,⁴ may also help experts maintain control of their emotional reactions during challenging cross-examinations.

The Lure of Scientific Language

Experts who talk over the jury's head make jurors feel inadequate and inferior. Experts who talk down to the jury make jurors feel patronized. Instead, experts should pretend that jurors are smart friends who are not mental health professionals and should explain clearly in language that everyone can understand and with a posture of respect.

Address questions like, "Doctor, when you said that Mr. Doe suffered from negative symptoms, does that mean that he doesn't have any symptoms at all?" Explain directly what is meant by the jargon phrase, negative symptoms. Similarly, if you use a phrase like "negative countertransference," explain what this means in easy-to-understand language to prevent being asked something like, "Doctor, when you said that Dr. Feelgood, who is paying you to testify on his behalf, experienced negative countertransference toward the plaintiff, doesn't that really mean that he hated the plaintiff?" If you need to use jargon, define it immediately and in a straightforward way.

Some experts approach the courtroom as an opportunity to convince the jury of their intelligence. Our view is that the best experts' goal is to convince the jury of their professionalism. They simplify their opinion and make it much easier for the jury to understand what they say. Experts who set out to convince the court, and themselves, of their superiority are less effective than those who simply do their job without worrying so much about how impressive they appear.

Worries About "Losing"

A problematic trap for the expert is focusing on whether or not one "wins" a case. Consider, for example, this question that an expert who worries about winning might experience in a bad dream: "Doctor, isn't it true that the court in a previous case decided for the side against which you testified, thereby clearly deciding that your testimony was not credible?" This question would rarely be posed in an actual case. If it were to be asked, then see our suggestions above in "narcissism" and "emotionality." Another response might be, "My job is not to win a

case, but to answer the questions as truthfully as I can, letting the chips fall where they may."

Worrying about "losing" is problematic for numerous reasons. The chief reason is an indication that the experts are advocating for the outcome of cases rather than simply advocating for their opinion. This signals a loss of objectivity and professional credibility on the expert's part: a dangerous path for the future of one's career, and a path that will lead to vigorous cross-examinations down the line. Another reason worrying about "losing" is problematic is that it may lead to inappropriate focusing on one's "record." We consider it a problem to even hint at showing off a high percentage of cases in which the court decided the case in a manner consistent with one's expert opinion. For example, imagine being asked this tough question on cross: "Doctor, did you write this listserv post, bragging about the fact that you haven't lost any *Atkins* cases? Can you explain what you meant?"

Like anxiety, competitive spirit can help an expert to prepare more carefully for deposition or trial testimony. However, also like anxiety, too much competitiveness can quickly convince the trier of fact that experts are not interested in the truth; they are only interested in winning. This danger is especially likely in complicated litigation, where there can be months or years of very close collaboration between experts and the lawyers who retain them. Overly competitive experts often fall into the trap of overstating the evidence, logic, and certainty of their opinions.

Our recommendation is to focus on the opinions and the bases for the opinions without worrying about the outcome of cases. Some experts we know do not even seek to know the adversarial outcomes of the cases in which they have been involved. Also, we recommend understanding (and communicating) when there are areas of uncertainty in your opinion based on conflicting evidence. Triers of fact appreciate this honesty and are less likely to see experts as "hired guns" when they are fair and clear about the evidence underlying their opinions.

The Lure of Stubbornness

Stubbornness may well be seated in long-term, well-established personality traits. In general, experts who are stubborn, argumentative, and unreasonable, are not impressive witnesses in court. The push-pull technique⁵ may serve as a corrective antidote for the

tendency toward expert stubbornness. With the push–pull, poised expert witnesses can respond to an aggressive cross-examination with behaviors that are the opposite of what the attorney exhibits: quiet and calm responses to loud and aggressive questions, measured breathing and pace of speech in response to pressured questions. Poised experts can respond affirmatively and with equanimity to questions that might otherwise stimulate stubbornness, like “Doctor, are you ever wrong?” A comfortable answer of, “Oh, sure” might suffice. If the attorney errs by following up with “Do you think you might be wrong this time as well?” then the expert may offer a comfortable but low-key affirmation of belief in the assessment and conclusions.

Stubbornness is a particularly obvious example of confirmation bias.^{6–7} Confirmation bias causes people to attend systematically to evidence that support their opinion, and to reject evidence that disproves it. When this happens on the stand, it is often obvious to everyone in the courtroom except the stubborn expert, who seems to say, “That’s my story and I’m stickin’ to it.” The unwillingness to yield on any point, even one that seems obviously true, tends to decrease the expert’s credibility in the eyes of the triers of fact.

The Lure of Talking Too Much

Perhaps there is a parallel lure in writing about expert testimony. In that spirit, we minimize the length of this section and simply draw on the grandparental wisdom offered to one of the authors. “There is such a thing as an unexpressed thought.” As soon as the question has been satisfactorily answered, we recommend that the experts simply stop talking.

Conclusion

Each of these lures can be counteracted; none is likely to trap experts who retain their humility. We recommend silently repeating a mantra before and during expert testimony: “It’s not about me.” Once an expert witness accepts this simple truth, it becomes easier to excel. At the end of the day, mental health expert witnesses are selling only one thing: credibility. Remaining humble will help experts

avoid each of these traps, presenting instead a picture of a calm and confident teacher, whose job is to explain honestly to the triers of fact the evidence and logic that support each opinion. Dvoskin and Guy put it this way:

Ironically, the most successful, respected, and admired forensic experts are those who understand their role in context. They realize that trials are not about them, and strive not to win but to explain their opinions as clearly as possible. While this stance does not feel quite so exhilarating as being the star witness, it allows one to practice successfully, over time, in a manner that is as lucrative as it is ethical [Ref. 8, p 211].

We have used the metaphor of lures to identify possible problems in expert testimony. The word lure may be defined as a temptation, but the concept of lures is often seated in fishing; it is the use of artificial bait that uses movement or color to attract a fish. In a parallel sense, we think of the lures presented herein as artifices that may serve to hook expert witnesses into nonproductive and self-defeating behavior. Taking the bait diminishes the worth and credibility of testimony. Experienced and knowledgeable experts remain aware of and stay away from these lures. Although it would be an overstatement to write that testimony without taking the bait goes well, it is reasonable to suggest that the bait-rejecting expert has a better chance of being seen as impartial, composed, and cogent.

References

1. Brodsky SL, Gutheil TG: *The Expert Witness: More Maxims and Guidelines for Testifying in Court*. Washington, DC: American Psychological Association Books, 2015
2. Gutheil TG, Simon RI: Narcissistic dimensions of expert witness practice. *J Am Acad Psychiatry Law* 33:55–8, 2005
3. Brodsky SL, Wilson JK: Worst expert testimony ever. *Psychol Inj & L* 9:272–4, 2016
4. Southwick SM, Charney SS: *Resilience: The Science of Mastering Life’s Greatest Challenges*. New York: Cambridge University Press, 2012
5. Brodsky SL: *Testifying in Court: Guidelines and Maxims for the Expert Witness* (ed 2). Washington, DC: American Psychological Association Books, 2013
6. Neal TMS, Grisso T: The cognitive underpinnings of bias in forensic mental health evaluations. *Psychol Pub Pol’y & L* 20: 200–11, 2014
7. Kane AW, Dvoskin JA: *Evaluation for Personal Injury Claims*. New York: Oxford University Press, 2011
8. Dvoskin JA, Guy LS: On being an expert witness: it’s not about you. *Psychiatry Psychol & L* 15:2, 2011