Cross-Examination of the Psychiatrist, Using Publications*

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The psychiatrist, more frequently than other physicians, may find himself in the role of a witness in a courtroom proceeding. Untrained in the verbal combat and the procedural technicalities of the law, he may find the confrontations, and innuendoes, and the misleading questions and commentary far removed from the search for justice so piously proclaimed as characteristic of our legal system. He may withdraw from the legal arena in protest and shock, a course advised by many. Or he may adapt himself to the rules of the game and accept the need to communicate his special knowledge in a stylized form alien to his profession. If he withdraws, the legal system, such as it is, is deprived of a valuable informational resource; and justice, such as it is, certainly cannot benefit thereby. If he participates, he has the opportunity to convey pertinent information to the decision-makers of society.

He who would assume the role of expert is suspect in our society. His knowledge, character, language, and mode of communication are all subject to the barbs of the adversary lawyer, who has two goals – to destroy the impact of his testimony while extolling the virtues of his own consultant psychiatrist.

In order to demonstrate the factual inaccuracy or the limited creditability of the psychiatrist witness, the adversarial lawyer will utilize contrary information and opinion from any source. The crucible of the law is based on verbal confrontations of all participants. One way of evading the principle of confrontation is the use of the uncontradicted printed word. The printed word, if it can be introduced into the legal proceeding, has certain advantages for the one utilizing it. It has the psychological advantage of status and clarity; it has the practical advantage of being unarguable or unattackable. How does one subject the printed word to a cross-examination? The utilization of the printed word is subject to great abuse; it can be used out of context and in a manner not in keeping with its source. The attorney can search through the literature to obtain isolated quotations to make a desired point. With the variety of printed opinions available, attorneys can almost always find material to support a given position. As an old proverb states, "Paper is the most tolerant of all objects; it will accept without protest what is imposed on it."

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Courts traditionally have refused to allow the written word into the courtroom in order to establish the veracity of a position. Nonetheless courts have acquiesced in various legalisms to circumvent the misuse of the printed word, which then becomes an unimpeachable witness with the absent author immune from criticism or scrutiny. His qualifications, biases, experience remain unexplored. The judge, the jury, and the psychiatrist witness himself may all be misled by the distortion which takes place when printed excerpts are used.

Generally, medical books, treatises, or articles are not admissible to establish the truth of the opinions stated therein.[1] The legal basis for such a policy is the "hearsay" quality of such texts. Some attorneys argue that the opinion of an author not connected to the litigation is more likely to be unbiased. However, the realities of the use of texts are often quite the opposite. In most jurisdictions, statements from medical books can be used to test the credibility of the expert medical witness. In some states, medical textbooks can be used as direct evidence in suits against physicians and hospitals (Massachusetts, Nevada) or somewhat more broadly (Wisconsin, Alabama). Generally, as in Ohio and New Jersey, the textbook itself must be qualified as an authoritative textbook, the content of which can then be used to demonstrate an acceptable standard of care or professional viewpoint.

In New Jersey, "the credibility of an expert may be attacked by the use of learned treatises. However, the expert's credibility is not subject to attack by the use of all learned treatises in the expert's field. An expert may be cross-examined upon a treatise only if he admits that the treatise is a recognized and standard authority on the subject involved. Only then may the contents of the treatise be read for the purpose of discrediting the witness. If the expert is not familiar with the authoritative nature of the treatise, cross-examination of the expert by use of the treatise should not be allowed. The contents of the treatise may not be utilized as substantial evidence, even if the treatise may be employed to attack credibility, and the triers of fact should be charged . . . as to the limited effect to be given to the work."[2]

The psychiatrist witness therefore may find himself confronted by cross-examination based on excerpts from a well-known psychiatric text, involving material or views with which he may not be fully familiar and written perhaps by one of eminent reputation. Ordinarily the writer is not present; the written word becomes an unimpeachable witness and the author immune from criticism. The various parties present may be unaware of the distortion which occurs when statements are taken out of context. First, however, the attorney must establish that the written material referred to is indeed authoritative and is recognized as such by the psychiatric witness.

Thus one way of response available to the witness in such a situation is to deny or not to acknowledge the authoritativeness of the publication and to base his opinion on his own experience, discussions with colleagues, information culled from professional meetings, conferences and over-all interpretation of the literature at large. Few writers deserve obeisance; most are merely colleagues with selected experiences and biases. Obviously, the witness who is versant with the literature is in a better position to handle

questions; on the other hand, it is impossible for him to know what will be used or in what way or to memorize a vast literature. He can suggest that the commentary is not authoritative or that it is taken out of context, and request the opportunity to review the data being used, but such an approach is not very practical or convincing.

I wish to present a specific case history in which the American Handbook of Psychiatry[3] was stricken as irrelevant. The defendant in a murder trial in 1974 wished to establish the presence of both a dissociative state and a wartime traumatic neurosis (from the Vietnam conflict). I noted during presentation of the case by the defense attorney that he had volumes of certain encyclopedic texts on his desk, including the American Handbook; I therefore knew that out of the vastness of these multivolume texts, reference would be made to specific articles. Prior to testifying, I carefully studied four chapters likely to be used in cross-examination.

When cross-examination began, the very first question was whether or not I recognized the American Handbook as authoritative. I responded "No" but acknowledged that it was a text used in training in the field of psychiatry. The judge (the trial being conducted by a judge without jury) immediately interposed to question the denial of authority to the book. In my preparation for testifying, I had the night before counted the number of contributors to each of these major texts – over 100 in one case, and more in the other. I pointed out therefore to the judge that these were edited books with numerous contributors, that the books were not solitary works but the contributions of hundreds of writers who had contributed individual chapters. I pointed out that Arieti was not the author but the editor, and I denied an inherent authoritativeness of any specific chapter based on the general usage of the treatise. The defense attorney was then asked to deal with specific sections of the book relevant to the case; he proceeded to utilize the chapter on "Traumatic Neuroses of War" by Kardiner.[4] I acknowledged that Kardiner was "qualified" to write on the subject. The prosecutor objected to the relevance of the material; the judge deferred a ruling until further clarification of the content. The defense attorney then asked if I agreed with the discussion of the "catastrophic dream" as the universal hallmark of the traumatic syndrome. Parenthetically, I might add that this discussion of catastrophic dream inherently created a distortion in that it magnified the role of dreams in the actual case at hand, though I did not have the opportunity or spontaneous wit to so state. The defense attorney then began to quiz me as to my agreement with the text sentence by sentence. I responded to the question on dreams by indicating that the commentary reflected concepts of 1917 (the date of the Handbook had already been given as 1959). In response to a question as to my use of World War I dates, I pointed out that most of the references were from the World War II period but that the basic work had been done many years earlier based on veterans of the First World War. This was noted in Keiser's book.[5] Subsequent to my testifying, I obtained further information about the work done on traumatic neuroses based on cases studied at a Veterans Hospital between 1922 and 1925.[6] A major article[7] was published in 1941 prior to American involvement in World War II. In other words, I made the point that the material in a text dated 1959 was indeed based on work done in a

very different environment many decades earlier and that the references from the earlier 1940's used reflected work from that earlier time.

I acknowledged the importance of catastrophic dreams but preferred to note "extreme anxiety" or "panic state" as the hallmark. The defense attorney then referred to comments on irritability and startle patterns to which I agreed; he proceeded to discuss explosive aggressive reaction patterns, fugue states, and diminished awareness. I agreed generally but referred to my own experience in the Korean War and the terminology in use at that time, using such words as anxiety state and combat exhaustion. Reference to epileptic symptom complexes was then made by the attorney (more common in World War I) and "adventitious destructive activities," "meaningless" in nature.

Some of the aspects of traumatic neurosis of war have altered in time, as have the terminology and perhaps the acceptance of some of the psychoanalytic explanations. I focused on the broadness of the concept of "traumatic neurosis" and then quoted Kardiner himself as stating that every veteran had a traumatic neurosis. The judge, himself a veteran, was most interested in that comment, and asked for an explanation. For once, I too had been prepared with quotes and excerpts from the very article that the defense attorney was using to attempt to impeach my credibility.

I therefore quoted Kardiner: "No one exposed to war experience comes away without some of the symptoms of the traumatic syndrome, however temporary these may be, no one."

In response to a question by the judge as to whether I agreed with that statement, I indicated that everybody reacted to stress and that everybody in military service had an emotional reaction to such an experience, but that to use the expression, "symptoms of a traumatic neurosis" reduced it to a meaningless concept. I then quoted Kardiner again, using the other excerpt prepared for the occasion.

"In general there is a vast store of data available on these neuroses but it is hard to find a province of psychiatry in which there is less discipline than this one. There is practically no continuity to be found anywhere and the literature can only be characterized as anarchic."

The judge was impressed that the author used by the defense had himself pointed to the variety of viewpoints and opinions and then asked the defense attorney if he disagreed with the accuracy of my excerpt. The defense attorney indicated that he would have to refresh his own memory as to the context of the quotation; the court accordingly granted a five-minute recess. After recess, the defense attorney acknowledged the accuracy of the quotation and began to use other excerpts of vague meaning and reference to other texts. The Court then interposed:

> With regard to the objection of the prosecutor as to the relevancy of Dr. Kardiner's contribution to the textbook edited by Silvano Arieti the objection is sustained as the result of the language contained in that text itself, which indicated that is only an opinion of an individual as to his interpretation of symptoms and that all his research reveals that there is an aura of anarchy among psychiatrists who would evaluate the same symptomatology in order to come to conclusions as to whether or

not something is traumatic neurosis, anxiety neurosis, or whatever kind of problem it may be . . . . Now, go on to the next treatise.

Thus it was that the American Handbook of Psychiatry was excluded as a treatise for purposes of cross-examination.

I feel somewhat awkward in recounting these events, since they smack of "gamesmanship," rather than the professional expounding of an opinion of an expert witness. This case, however, is not presented as a discussion of wartime traumatic neurosis or of the merits of the work of authors who have contributed to the evolution of the understanding of a subject. Those who would wish to review the specific case at hand are referred to the four psychiatric reports in an earlier publication.[8]

I present this material to bring to the attention of psychiatrists and others one potential abuse which exists in our legal procedure – the use of printed material to attack one's credibility as a witness. It is indeed a rare event when one can anticipate the use of the specific printed word which may be presented in such a way as to convey an aura of verity and to disparage the expert witness. Knowledge is not a monopoly of any writer; and practicing psychiatrists who are knowledgeable about a given topic should learn to rely on their own opinions without seeking supportive writings elsewhere. Information does not exist in a vacuum; in a legal proceeding it is helpful when referable to specific circumstances in which the examiner himself is in the best position to convey a clinical judgment, having both seen the patient and reviewed the literature as he deemed necessary. The use of articles and excerpts tends to distort the process. Unfortunately few can anticipate the pitfalls in testifying, prepare to such an extent that they are globally versant with the literature, or memorize an appropriate article or treatise. The better the training in forensic psychiatry, the better can one perform an essential professional function which is a relevant duty of the expert witness – to communicate in a meaningful way one's opinion and the basis for the opinion without being subjected unduly to tactics which interfere with the reasonable accomplishment of that function. As long as evidence-giving is based on the adversarial system, those who would participate in such a system must be cognizant of the tactical nuances involved in the presentation of testimony essential to a reasonable legal decision.

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