

Integrity Checks on the Witness Stand

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Rare is the forensic psychiatrist who has not been accused of being a "hired gun" for whatever side has brought him into court. The psychiatric "battle of the experts" has become such a cliché that *Time Magazine*, commenting on psychiatric testimony in the Hillside Strangler case, said "the shrinks were, as usual, divided."¹

In his book, *Coping With Psychiatric and Psychological Testimony*, attorney-psychologist Jay Ziskin elaborated on this and further denied that such testimony has any scientific basis.² He states that there is no statistical reliability or validity to most psychiatric opinions. He thinks that impartiality is a myth, especially since, in the adversary process, each side hires its own experts. He believes that most psychiatric opinions in the courtroom are so speculative that they should be disallowed.

Karl Menninger's well-known stand is that psychiatrists have no business in criminal responsibility determinations.³ His objections seem to be more on grounds of humanitarianism.

As a forensic psychiatrist I have come to accept the reality of the need for expert opinion in the courtroom, especially in the area of criminal responsibility. This controversial area of accountability continues to be where we are most often in the public eye. Despite the current talk of "doing away with the insanity defense," those of us associated with the law know how difficult this would be to accomplish. An attempt to do away with such a statute in the State of Washington in 1909 was declared unconstitutional.⁴

My own belief is that a psychiatrist can offer an important viewpoint to the criminal justice system at the responsibility level. Obviously, however, psychiatric entry into the courtroom should be made with the utmost integrity and care. I am using two rather simple measuring devices to keep a check on my own integrity. I call these my "Contrary Quotient" and my "Validity Percentage."

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Contrary Quotient

By my Contrary Quotient I am trying to directly attack the idea that all psychiatric experts are hired guns for whatever side asks for an opinion. To determine my Contrary Quotient, I randomly selected fifty consecutive criminal responsibility determinations that I performed in 1978 and 1979. Twenty-nine of these were requested by the prosecution and twenty-one were requested by the defense. Assuming that the prosecution would like a finding of responsible and that the defense would like a finding of not responsible, my opinion was contrary to the requestor in nineteen cases and affirmative to the requestor in thirty-one cases. In other words, 38 percent of the time I did not give people what they wanted. This is my Contrary Quotient (see Table 1).

Table 1: Contrary Quotient 38 Percent

Number of Consecutive Evaluations	Requested By		Examiner's Response	
	Prosecution	Defense	Contrary	Affirmative
50	29	21	19 (38%)	31 (62%)

I have used the Contrary Quotient in other forensic areas than criminal responsibility, such as in workers' compensation evaluations. Here I am most often asked for an opinion by the insurance carrier. I measured my findings in the areas of whether there is psychiatric disease secondary to an industrial injury, whether the claimant is psychiatrically stationary, and whether there is continuing psychiatric impairment as a result of the industrial injury. Again reviewing fifty consecutive cases in all three areas, I came up with a Contrary Quotient of 28 percent.

Validity Percentage

By measuring my Validity Percentage, I am trying to determine whether my testimony demonstrates some consistency in interpreting the criminal responsibility standard used in my community. A number of textbooks explore these various statutes in depth.^{5,6,7} But, as Pollack has pointed out, in essence they are really community value judgments.⁸

Most of my forensic work is done in Multnomah County, Oregon, which includes the city of Portland. In 1979 there were about 4,700 felony cases, heard by 19 circuit court judges in this jurisdiction.⁹ About 35 of these cases resulted in not responsible findings. The standard of criminal responsibility here is that developed by the American Law Institute (the ALI Test).¹⁰

In 1977, 1978, and 1979, I testified in the Multnomah County Circuit Court on the matter of criminal responsibility on 60 different occasions. Twenty-four times it was my opinion that the defendant was not responsible because of mental disease or defect. On 36 occasions it was my opinion that the defendant was responsible. The trier of fact, either a judge or jury, agreed with me in 54 of those 60 cases. As an aside it should be noted that

only three of the 24 not responsible findings came from juries. In my experience juries are very reluctant to accept this defense.

Validity usually refers to how accurately something measures what it is intended to measure. I submit that my opinions here demonstrate a Validity Percentage of 90 percent in terms of their accordance with community standards (see Table 2).

Table 2: Validity 90 Percent

Total No. Testimony	My Expert Opinion		Final Verdict	
	Responsible	Not Responsible	Agree	Disagree
60	36	24	54 (90%)	6 (10%)

To me this is surprisingly high. I would not have done as well if I had measured my testimony outside of Multnomah County and would have done worse if I had studied a different series of my cases. It's high enough that it has me a bit worried, just as I should worry, I think, if it were 10 percent.

Discussion

What do my statistics prove? I think they show that a psychiatrist can involve himself in the criminal justice system and be used regularly by both sides. I think my Contrary Quotient shows that an expert can be honest to his or her own standards and not give people what they apparently want — and still be regularly employed. If anything I think it is doing a real disservice to the requesting party if opinions are twisted in an effort to please. As my reputation for impartiality has grown, so has my work load.

More importantly, by my use of the term Validity Percentage, I think I have demonstrated that there is consistency between my opinions and community policy regarding who should be considered responsible for behavior and who should be considered not responsible. This consistency results from experience and study. Some have challenged my use of case outcome as a way of evaluating my performance. Case law, though, remains an important aspect of our system.

In establishing my credentials on the witness stand, the number of times I have testified on one side of this issue or the other is usually admissible. This is done to show that I do not have a bias. The times the judge or jury has agreed with my opinion is usually inadmissible. This is because there is really no way of showing that my opinion was the reason for the eventual determination by the factfinder.

My sample is small and there are many variables. Some cases never reached the point of needing testimony because of plea bargaining, stipulation, and the like.

I fully realize that my Contrary Quotient and Validity Percentage would hardly satisfy a skilled statistician, which I certainly am not. But I do think

they provide good starting points. I challenge other forensic psychiatrists to accumulate similar data, to ponder it, and perhaps even to share it.

References

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4. Peterson, L.L., *Overview of Major Criminal Tests Regarding Insanity*. Prepared for Governor's Task Force on Corrections, Portland, OR, 1976.
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7. Slovenko, R., *Psychiatry and Law*. Boston: Little, Brown and Co., 1973.
8. Pollack, S., "The Insanity Defense As Defined By The Proposed Federal Criminal Code." *Bulletin of the American Academy of Psychiatry and The Law*, Vol. 4, No. 1, 1976, pp. 11-23.
9. Data supplied by Charles Bernard, Multnomah County Circuit Court Administrator.
10. Oregon Revised Statutes, Jan. 1, 1972, pp. 1200-1204.