

## **The Expert Witness as a Teacher†**

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In the context of litigation, the forensic psychiatrist, like all other experts, does function as a teacher in relation to the other participants in a trial. Plato writes:

If you ask what is the good of education — in general, the answer is easy — that education makes good men, and that good men act nobly, and conquer their enemies in battle because they are good.<sup>1</sup>

The receptiveness of lawyers to our teaching relates, at least in part, to their desire to conquer their enemies in battle. The expert has some knowledge which is essential to the outcome of the particular dispute.

The scientific witness might have knowledge and opinions which will serve as a basis for determination if there was liability or contributory negligence. The lawyers, the judge, and the jury require information from scientific witnesses before they can, in certain cases, formulate relevant questions.

In a trial involving the claim of wrongful death, there was considerable dispute between the lawyers for the plaintiff and defense on the value of psychological autopsy. Legal briefs were offered to the judge on the subject. Testimony from a non-forensic psychiatric witness was taken to determine whether psychological autopsy had probative value. Extensive legal research was conducted by both attorneys and the court to arrive at the opinion whether such evidence was admissible. Ultimately, the judge rendered a lengthy opinion from the bench, providing the basis for her ruling that testimony on psychological autopsy would be admitted, with certain cautionary instructions to the jury. This ruling was perceived by the plaintiff attorney as a great victory.

I testified on behalf of the plaintiff. In the first few minutes of my testimony, it became apparent that the term, "psychological autopsy" would not be used in my testimony and that this particular procedure was irrelevant to this particular case. I testified that the so-called psychological autopsy was a technique utilized in arriving at an opinion as to the mode of death (suicide, accident, homicide), and not as to the

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1. Dialogues of Plato. The Great Books, Encyclopedia Britannica. (1952) Vol. 7, p. 648

cause of death, which was the issue in the case at hand. The fact that the plaintiff committed suicide was not the subject of dispute; it was even stipulated by the defendant. The lawyers failed to consult their expert on this particular area, since they considered it purely a legal evidentiary matter.

Lawyers often consider psychiatric testimony superfluous when damages are seemingly self-evident. I have reference to amputations, extensive paralysis, and death cases. Such cases provide the greatest opportunity for a psychiatrist to function as a teacher and demonstrate that psychiatric knowledge, like all science, goes beyond common sense.

The forensic expert is not only knowledgeable in his particular scientific discipline, he also, invariably, accumulates considerable legal information. The expert is grossly underutilized as a source of information of purely legal issues.

Early in my forensic career, I began with the assumption that lawyers are knowledgeable in law, and I held onto this naive view, stubbornly, against overwhelming odds. Many a courtroom disaster could have been averted had I allowed myself to offer the lawyer some legal instruction in the pre-trial conferences which I invariably do at the present time. The expert witness deals with a very narrow area of the law and, therefore, often acquires considerable knowledge on legal matters relevant to the particular area. Some experts view knowledge of the law as a variety of original sin and try to conceal it. One does not become less of a psychiatrist just because one is knowledgeable in law. Knowledge of the law is not only essential to the function of being an expert witness, but also enables the expert to communicate with a lawyer and establish a working relationship with him. Once the lawyer recognizes that the expert understands the litigation process, he becomes more receptive to the expert's views involving his scientific discipline. It goes without saying that if the expert displays his legal knowledge which is relevant to the case, in a pompous manner, the opposite effect will result.

The expert witness, through experience, acquires a sense of strategy in presentation of scientific information to the fact-finders. Thus, the expert is not only a source of information on technical content, but also an advisor on how this information can be best imparted to the fact-finders.

It behooves the expert witness to arrive at the beginning of his employment as an expert at some definition of his role. It is essential for the expert to have a conference with the lawyer who retains his services. During that conference, one can assess the lawyer's weaknesses and strengths and make suggestions as to the services one can offer him. In such a conference, one can arrive at a role definition for the expert in the forthcoming litigation.

It is my practice to ask the lawyer if he wishes me to assist him with various aspects of the case or to restrict myself simply to a specific

psychiatric issue. In the first session, I will make reading suggestions to the lawyer, providing him with some reprints of my own articles and other references, and sometimes offer him transcripts of testimony I have given in similar cases. It is of great value for the expert to accumulate a library of transcripts for his own learning and for the education of others.

I occasionally will suggest in his first conference that the lawyer should acquire a co-counsel, and I have, on a number of occasions, refused to participate in a case unless a co-counsel was secured. It is the responsibility of the expert to make an assessment not only of the case, but also of the lawyer with whom he is working. Some lawyers are quite knowledgeable in certain scientific areas; whereas, others lack rudimentary knowledge of the subject matter. Meaningful communication between the lawyer and his expert cannot take place without establishing some form of common language.

It is a sad spectacle, indeed, to observe a lawyer unable to communicate with his own expert on direct examination. Such failure is invariably experienced by the lawyer as humiliating, frightening, and discouraging. These situations develop as the result of the failure of the expert to assume a teaching role.

Physicians are licensed to practice medicine; lawyers are licensed to practice law. However, actual knowledge is not a matter of licensure, but of fact. I have learned from lawyers a great deal of medical information. A few examples come to mind. A lawyer once consulted me about Wilson's Disease, which was the subject of a malpractice lawsuit. In preparation for our first conference, I reviewed some literature on the subject. I could have saved myself the effort of doing so, since the lawyer in question had virtually encyclopedic knowledge of this rare disease.

I have encountered lawyers whose knowledge in specialized areas of medicine was truly outstanding. By the same token, many an expert acquires factual knowledge of legal information and should not be timid in imparting this knowledge to the attorney he is working with.

In the following, I will give excerpts from a preliminary conference with an attorney seeking my involvement in a case of wrongful death. The deceased was a young, psychotic man who was placed in a county jail after he was accused of pulling a fire alarm. A few hours after his arraignment and placement in a solitary cell, he hanged himself from a cross bar. Prior to the conference, I had been given a few statements made by the jail personnel. Excerpts from this conference follow:

DR. All right, I would like to have the VA records, because that would establish to what extent this individual was obviously mentally ill.

ATTY. Well, here's the situation, as far as the records are concerned. First of all, it's unlikely, when we get down to

the point of what the jail people should have done or should have known, that they would have known what those records contained. OK.

DR. That's true; however, you can claim that it was apparent that he was a mentally ill person. If it was apparent, we want to substantiate it.

ATTY. Right. OK. So, the records would help substantiate . . .

DR. The records would help that. They would not . . . They could not have known it, but . . .

ATTY. It would show his mental status.

DR. It would show his mental state. If he was just two days ago hallucinating, delusional and obviously crazy, then his setting off a fire alarm in a bazarre fashion, fits the picture.

ATTY. Right

It turned out that the deceased was discharged from a local VA hospital less than 48 hours prior to his arrest. He was discharged against medical advice and was described as grossly bizarre and in need of treatment.

The attorney then described the difficulties they had in securing the records from the VA. The VA was not named as a defendant, which was pointed out to be an oversight for substantive and tactical reasons. At the time of our conference, the statute of limitations had already run out.

DR. You've got two things here. One is what happened in the jail. See, you are going after the jail, only, so, let me tell you, there is another issue, and that is the issue of the fact that in the recent past, the mentally ill are being railroaded out of institutions. And, that's why they have to go to jail, since they can't go to a hospital. Why do you think he pulled the fire alarm? It's the next best thing to killing somebody. The only way you can get into an institution if you're psychotic nowadays, you've got to kill or threaten to kill somebody. The only way of getting into an institution is to do something criminal, only if you commit a criminal act, a dangerous act, are you entitled . . .

ATTY. . . . to be protected from yourself.

DR. To be cared for. So, you do something bizarre, set fires, pull alarms. This is the bigger picture. I think at the trial, you've got to develop this too.

ATTY. Right. Absolutely.

DR. So, you see, the jail, in a way, becomes a victim of something even bigger.

ATTY. Different perspective. I don't think we've even thought about that. I haven't.

DR. I think you should, because this is the real culprit.

ATTY. That may be what the defense will be.

DR. The jail has become the substitute for the state hospital.

ATTY. Right.

DR. Once they have been assigned that function, let them tool up for that function.

ATTY. Right.

DR. They have become the modern-day caretakers of the mentally ill. Well, let them be the caretakers. The society shifted the responsibility of care for the chronically mentally from State hospitals to jails. They closed the hospitals and they opened up the jails.

ATTY. Uh Hum.

DR. The problem does not go away by renaming it, or changing the criteria. The legislature, the courts, the society have changed the whole system. OK?

ATTY. Uh Hmm.

DR. If you go into the County Jail, half of the population are psychotics. You can't treat them like the ordinary criminals.

ATTY. Right.

DR. I notice you name a psychiatric social worker.

ATTY. Right. Yes. I want to ask you some questions about it.

DR. Did you take a deposition of her?

ATTY. Uh. She has moved to Canada.

DR. So what?

ATTY. OK. And we could go after her, but what we've — what we're thinking of doing is using her statement as a business record, which we think will probably help us more than getting her on the stand and giving her ways to get — to explain things . . .

DR. I don't agree.

ATTY. Why?

DR. Uh, first of all, you don't know enough about her.

ATTY. Yeah.

DR. How do we know she is a psychiatric social worker?

ATTY. Isn't that a specific degree that you get?

DR. No, it isn't.

ATTY. It isn't? Hmm.

DR. We don't know what her experience is — what's her age?

ATTY. I know nothing about her. I don't know anything about her. I'll tell you that right off the bat.

DR. Well, that's . . .

ATTY. Right. I don't think anybody else in our . . .

DR. Well, that's very bad.

ATTY. Right. Oh, I agree . . .

DR. If I may be presumptuous to tell you that this is negligence on your part.

ATTY. All right. Well, you know, as long as we're talking about it,

it's true that this case has not been prepared as it should have been by now. There's no question about that.

DR. Right. I can see.

ATTY. There's no question about it.

DR. I don't have a single deposition. There has to be more than what we have here.

ATTY. You know. That's the situation we are in now. We're going to do the best we can . . .

DR. Can't you get anything?

ATTY. We could take her deposition.

DR. Absolutely. I think she should be deposed.

ATTY. That was the conversation we just had most recently, and the consensus seemed to be that we would be better off being able to limit her to the statements that have already been made than to get her in.

DR. I don't agree. I don't agree because you see, the statements are all right, but I think you might have a much bigger issue. Here was a mentally ill person, and any person could tell this guy was crazy.

ATTY. Why do you say that?

DR. Well, the way he acted. He sits in a corner. He is curled up. He didn't respond. He was hallucinating.

ATTY. Uh hmm.

DR. That's why they called a social worker. Because, the turnkeys determined in their wisdom, quite correctly, that the guy is crazy.

ATTY. Uh hmm.

DR. They knew it. The policeman should have known. The turnkey knew. So he calls a professional. Now, what we want to know is how professional is the professional?

ATTY. Uh hmm.

DR. OK?

ATTY. Yes.

DR. Because, if she is a professional, then she should have recognized what she was dealing with.

ATTY. OK.

DR. They might have been negligent in not providing adequate, diagnostic evaluation.

ATTY. Well, that's one of the central issues.

DR. Yes. They didn't. You don't know that. If we find out that the so-called social worker is merely a social worker by nomination, not by education. That's quite common.

ATTY. You think?

DR. Absolutely. Social worker is somebody who has two years after college. That doesn't equip the person to make diagnostic determinations as to mental illness.

ATTY. Uh hmm.

DR. But for all I know, she is not a social worker . . .

ATTY. Hmm.

DR. And, even if she is, that's not adequate. We want to know what her education is. Has she had experience? Has she worked in a State Hospital for ten years? Or, has she just finished high school and took this position. You know, people are called "social workers" just because they fill the position. What are the criteria for being a social worker at the jail? According to a study I saw not long ago, majority of jail social workers have merely a high school education.

ATTY. Is that right?

DR. You look incredulous, but that's true. I read a paper someplace, I can't give the reference now, where the majority of jail social workers have high school education only. Even if you are a real social worker, that does not equip you to make diagnostic determinations. What are the resources? Now, you haven't deposed anybody from the jail as to what are their resources. Suppose you make a diagnostic determination that a person is suicidal and dangerous. What are your resources?

The attorney asked if I could give an opinion that the deceased was suicidal. I responded:

I would label it an educated guess. If he wasn't suicidal, they drove him to suicide. If he wasn't suicidal, he was psychotic. OK? And in need of care; he was asking for help; in the only way that he knows. As a psychotic, you don't say, 'Ladies and gentlemen, I am in need of care in a State Institution.' You act bizarre, and that's your means of asking for help. All right? A neurotic can come in and say, 'Doctor, I am sick. I have anxiety or I have compulsions. I don't get along with my boss or my wife, or whatever. I need help.' A psychotic can't do that. He only behaves bizarrely. What do we do? By we, I mean the society. We lock him up. Throw him in jail, where there are criminals, which creates more of a difficulty, and in desperation, he hangs himself. I don't think he was suicidal. From what — the little that I know. That's why I want the records.

ATTY. Well, when you say that they drove him to suicide, there's two things that I'm concerned about. First of all, you're saying just by putting him in jail at all. Right? Is that what you're saying?

DR. By not providing within that setting proper care — he doesn't care, as a psychotic person, whether he is in jail, a place called jail, hospital, or an institution for rehabilitation, or whatever. He needs structure and care. He is a sick person. OK? Had they called it jail and provided him with

care, medication, supervision, he would not have hung himself. Hanging oneself is a desperate act, but one still hopes to be rescued, even a psychotic might. In this instance, they structured it in such a way that when the person hangs, he cannot be rescued. The guy was hanging and they took a great deal of time because of their set-up, they say so themselves, there was no option for him but to die. Who took these statements?

ATTY. These were taken by investigators — whoever was making the investigation for the jail of the incident.

DR. So, you have none of your own.

ATTY. None of our own.

DR. I'm going to file a malpractice suit against you.

ATTY. Believe me — you think it's funny. It's not funny at all.

DR. I'm serious.

ATTY. I'm serious too.

DR. At least, I'm glad you're blushing.

ATTY. I inherited all of this.

DR. I know. I'm not being facetious. I am dead serious. I think it's absolutely negligent what this file looks like, if it's all you have, what you gave me.

ATTY. Well, we got a deposition. This doesn't help very much. Of his sister. That's it. You've got it.

DR. And, this is a big case, you know?

ATTY. I know. I know all of this (laughter).

DR. And Jones is in it.

ATTY. That's right.

DR. I'm going to beat his head.

ATTY. You and me. You and me.

DR. Really. That's terrible —

ATTY. All right. I understand.

DR. What else can I do to make you feel good?

ATTY. (Laughter). Well, in terms of your saying that they, by putting him in the jail and not giving him any kind of treatment or care, they drove him to suicide. There's another thing that was happening in there in terms of, you probably noticed, the other inmates egging him on. Did you read about that?

DR. Yeah. That, you see, that's one of the problems with psychotics. You put a psychotic in a jail. You're condemning him to abuse. He becomes a victim.

ATTY. He was with the discipline problems of the jail.

DR. He becomes, by definition, a victim. You put a person like this in a jail — they become immediately a victim. It's like throwing to the lions, a lamb. They play with him. They torture, they torment them.



ATTY. For some reason, the defendants in this case seem to think that this is helpful to them. That these are supervening cause. The defense attorney says to me, you know, really, the reason why the guy died is because the other inmates egged him on . . . You would clearly think that putting him in a ward, with people like that . . .

DR. Even in the jail, they have an infirmary. They have a place they could isolate him and put him in a place where they can supervise him. Clearly, he was not a dangerous criminal, who had to be put in a bullpen, where you can't get to him when he hangs. It took them the longest time to get to him . . . Many a person was saved by being simply cut down. This guy is put in there, and nobody's there to cut him down.

This transcript provides a clinical illustration of the teaching functions which a forensic psychiatrist can assume in relation to a lawyer. The lawyer was given instructions on the preparation of proofs in litigation involving a psychiatric issue.

At the same time, the lawyer's insight into the plight of a psychotic was enhanced. The lawyer was given information about matters relevant to the law suit. I also provided some guidance on trial strategy, at the same time I did criticize the lack of preparation.

The "student" was then given directions on what to do next. Throughout the conference, the lawyer remained receptive to the consultant's instructions and a sense of educational alliance was maintained.

Conveying information to patients about their illness has become known as patient education and has gained wide acceptance in medicine. Courtroom testimony often conveys to the patient, in a condensed form, a great deal of information about his or her illness. Even though teaching the patient about his or her illness is not the purpose of the testimony, the psychiatrist does invariably engage in patient education by giving testimony in the patient's presence. The psychiatrist who conveys intellectual knowledge about a psychic condition to the sufferer through his testimony runs the risk of causing harm. Testimony can have the anti-therapeutic impact of a poorly timed interpretation. Being present at one's own psychic vivisection can lead to iatrogenic exacerbation or precipitation of psychopathology.

It has, therefore, been my practice to stamp every report with a caution "Disclosure of this information directly or indirectly to the patient may be injurious to his mental health. You are requested to preserve the confidentiality of this report."

I routinely request that the person about whom I testify, be excused from the courtroom during my testimony. Some patients are in full agreement with this suggestion whereas others insist on being present, which is their legal right. In civil cases, the decision whether to listen

to psychiatric testimony is left up to the plaintiff and most often the plaintiff is not present when I testify.

In criminal cases, the judge has to rule upon the request and frequently the court denies the request based upon a variety of legal grounds.

Two cases will illustrate the complexity of the clinical judgments involved in this particular aspect of psychiatric courtroom testimony.

A young black man with a history of a very traumatic life, was a client of a rehabilitation program in a college town. His counselor was an attractive white co-ed who treated him very kindly and towards whom he developed strong positive feelings. During one of their contacts, while he was relating a painful experience, she turned around to offer him a cup of water. At this point he attacked her, killing her instantly. One of my interpretations was that the defendant could not tolerate the kindness of his counselor. In addition to my regular interview, I also had a tape recording of a sodium amytal interview which dramatically supported my formulation. I advised the court that the defendant should be excused during my testimony. My advise was not accepted. While the tape of the sodium amytal interview was being played, the defendant had an acute psychotic episode. At this point, the court ruled that he could be absent for the rest of my testimony. The defendant was acquitted by reason of insanity.

The very opposite result, however, occurred in another case where the defendant herself refused to leave the courtroom during my testimony. Mrs. Jones was facing the death penalty for the killing of her two children in one of the western states. A previous trial in which I did not take part, resulted in a hung jury. Mrs. Jones carefully planned the killing of herself and her two children ages 7 and 9. The children who were sleeping with her were shot and killed. She then fired two magnum bullets into her precordial region. One week later, she was found still living and after prolonged hospitalization, she made full physical recovery. At the end of my testimony, to which she listened against my recommendation, she reported that her depression lifted. In a number of written communications over the last seven years, she insisted that listening to my testimony has had a profound therapeutic impact upon her. Mrs. Jones was acquitted by reason of insanity, completed college and has been working in one of the health professions.

Psychiatric testimony in a courtroom has, at times, significant educational impact upon a variety of people who are directly or indirectly involved in a law suit. The judges and the courtroom personnel often reveal by comments and questions that they have gained new insight and information through psychiatric testimony.

Recently, a woman had presented herself in my office without appointment and was insistent on seeing me. She was a juror in a notorious murder trial which took place ten years ago. The defendant killed his daughter and three young men who shared an apartment with

her. The juror felt compelled to explain to me why the jury found the defendant guilty. I testified in support of insanity defense. The juror expressed apprehension about the defendant seeking revenge upon his release from prison. It became apparent that her fears were a projection of her guilt about having voted for conviction.

She did let me know that our discussion was very helpful to her. It is regrettable that ten years went by before it took place. When she came to see me, she explained "because you seemed like you understood people."

The much maligned insanity defense provides a vehicle for conveying information not only to fact finders but also to the primary and secondary victims of crimes. One of the more gratifying experiences derived from testifying has been the responses of victims and their relatives who gained insight, as the result of my testimony, about the perpetrators. The relatives of the perpetrators of crime are often horrified and confused by the fact that their loved one could have been the doer of a horrible deed.

In one insanity defense trial, the defendant who killed his wife was threatened with death by his sons and other relatives of the deceased. The trial was disrupted by intense emotional expressions from the audience. The judge, on the advice of police, ordered the expert witness to be brought to and from the courtroom under police escort.

At the end of my testimony, the sons and the other relatives informed the judge that neither the defendant nor his expert witness were any longer in danger.

The community at large, through the news media, can benefit from psychiatric testimony. I recall a number of cases where significant community tensions were prevented or diminished by the publicity about the psychiatric aspects of a disturbing event. It is also common to receive telephone calls or letters from individuals who have been helped by the account of testimony given in the news media.

In 1963, I testified in a so-called mercy killing of a woman by her husband. After the defendant's acquittal was reported, I received a telephone call from a widow of a prominent Detroit physician. She described how her husband had been dying of cancer and suffering terribly. "He took a very long time to die," the woman said with a great deal of feeling. One night she took a pillow, placed it over her husband's face and held it till he stopped breathing. We talked for 45 minutes. I was the first person to whom she talked about it. No doubt many others have had guilt about fantasies of killing their suffering friends or relatives, and read the account of this trial.

It is apparent that psychiatric testimony has broader impact than the result contemplated by the primary needs of the litigants. The undesirable side effects of courtroom testimony have been unduly emphasized in the literature. It has been the purpose of this paper to call attention to some of the beneficial byproducts of psychiatric testimony.