

Editor:

In his recent article published in the last issue of the Journal, Dr. Robert Simon called our attention to an important role that forensic psychiatrists can play in the litigation process.

Legal education, bar examinations, and judicial decisions create the impression that the practice of law is purely an intellectual exercise. Nothing could be further from the truth. Lawyers' work involves interpersonal relationships and persuasion. The ability to persuade involves many factors. Having a good case is not enough. Good witnesses and credible experts are essential. The lawyer has to be credible and the forensic psychiatrist can help the lawyer in this effort.

Far too often, the attorney and the expert construe the role of a forensic psychiatrist merely as an opinion giver on a narrow technical subject in the pending litigation. Over the years, my role in relation to attorneys has evolved into that of an advisor on a whole range of issues, including strategy, order of presentation, and the relative value of witnesses. In my view, lawyers overvalue witness preparation, which some of them disparagingly call "sanding the witness." Many of these training sessions backfire. It is unlikely that a "bad witness" will be transformed into a good witness in the few hours that he or she will spend with the lawyer.

Too frequently, the lawyer tries to mold the witness instead of finding out what the witness is like and what he or she has to say. Under the category of "witness" we should include the plaintiff and the defendant. A very good case may result in an adverse verdict because the client is a "bad witness."

The term "bad witness," in the context of litigation, means someone whose testimony may be counterproductive to the party calling him or her.

There is no doubt that giving testimony is stressful; however, many people find the encounter satisfying. Thus, I would caution against the assumption that the experience is uniformly distressing.

The purpose of litigation from the perspective of litigants is persuasion. Testimony is a tool; an anxious witness is not necessarily an ineffective persuader. It depends on the context. The plaintiff who is the victim of a crime or a mishap may make a very

effective witness by displaying massive anxiety on the witness stand. Anxiety, fear, and anger are emotions that may prove to be persuasive assets.

I was testifying once as an expert witness in a murder trial. The defendant, an Italian immigrant, was a shopkeeper who was charged with the first-degree murder of his wife. I testified in favor of his version of the incident, which was that he tried to prevent his wife from committing suicide when the revolver, which had a hair trigger, discharged killing her. On cross-examination, the prosecutor asked that I take the gun and pull the trigger to show the jury that it required considerable pressure to bring about a firing of the weapon. When the gun was handed to me, I refused to touch it. "Are you scared of guns, Doctor?" the prosecutor asked with a voice dripping with sarcasm. "Yes, I am. I am terrified of guns," was my answer accompanied by some emotion perceptible to the observers. The prosecutor credited my response with a favorable outcome for the defendant. My genuine anxiety did not make me less credible.

One picture is worth a thousand words, says a Chinese proverb. I am more modest and say that one feeling is worth a hundred words. Anxiety, like any other feeling, may enhance the testimony. Naturally, paralyzing or disorganizing anxiety would not enhance anyone's testimony.

J.P. McCarthy was a legendary interviewer on radio and television in the Detroit area. I recall vividly my first appearance on his extremely popular Focus Show. I was sitting in the famed Studio 4 of Detroit's WJR, known as "the Great Voice of the Great Lakes," expecting a preliminary chat before we went on the air that would reduce my apprehension. J.P. did not make his appearance until the last second, and we then plunged into a heated discussion on gun control. It was J. P.'s view that preparatory communication with the "witness" detracted from the performance. I must have done quite well. In the next 30 years, I was the most frequent guest on his program. Testimony is performance. One should be prepared, but not necessarily rehearsed. The ability to transform a "poor" witness into an effective one is quite limited. In my view, the biggest problem in the courtroom is not apprehension but timidity. Anxiety can transform a timid, boring witness into an exciting one. Absence of courtroom experience and reluctance to stand up for one's views often is more of a detriment in a witness than anxiety.

*Civil Action* by Jonathon Harr is a book that gives a realistic depiction of an actual trial that depended on effective expert testimony.<sup>1</sup> Schlichtmann, the plaintiff's lawyer, gave an opening statement that was masterful. Facher, the defense lawyer spoke at great length. His presentation was devoid of charisma but addressed the essential points. Schlichtmann, a seasoned lawyer, understood that expert testimony would be decisive to the outcome of the case. The geologist John Drobinski was outstanding in his field but likely to make a poor witness. Schlichtmann spent days preparing the witness and trying to make him appear credible. Schlichtmann instructed his expert on how to keep his hands, which way to look, how to sit. In the words of the lawyer, "the geologist was a courtroom virgin." There was little doubt that Drobinski did outstanding work in the scientific examination of the evidence in this case. Schlichtmann anticipated that the direct examination would take three days.

On the seventh day of Drobinski's testimony, Facher argued that this expert's opinion should not be accepted. Drobinski remained on the stand for three weeks. Schlichtmann was satisfied that Drobinski "never once raised his voice or betrayed any irritation" when he was cross-examined by Facher, who accused him of being a perjurer and being incompetent.

The same thing happened when Professor George Pinder, a man of outstanding reputation and Chairman of the Department of Geology at Princeton, took the witness stand. In cross-examination, Facher abused him, but consistent with the prevailing conventional wisdom, Pinder was considered a good witness because he replied calmly to all insults. He was cross-examined in minute detail based on a thousand pages of a discovery deposition, which had gone on for five days.

By the fourth day of Facher's cross-examination, Pinder had lost his appetite and developed insomnia. He felt the burden of the case—the Woburn families, all the other experts, Schlichtmann and his partners, and their financial investment—entirely on his shoulders. At night, he would lie awake in his bed at the hotel thinking about Facher and plotting escapes from Facher's traps. He felt lucky if he got four hours of sleep. He called home to Princeton every evening and talked to his wife. "You cannot imagine the pressure," he told her. "There is no relief from it. I never

had anyone try to discredit me as a human being, which is what Facher is trying to do."<sup>1</sup> [p. 339]

A skillful lawyer with unlimited financial resources, dealing with an honest, well-prepared expert who gave meritorious testimony, will have no difficulty in creating the appearance of deception and incompetence unless the expert is skilled in the art of testimony. In the words of Schlichtmann's associate, Conway, "There is nothing worse than watching your witness being raped. It's awful to sit there not being able to do anything." He then added as an afterthought, "George Pinder is the guru, the world's greatest expert. He knows more about the aquifer than anyone else in the world."

I believe Schlichtmann made the common mistake of getting the world's greatest expert on the subject instead of getting a person with ordinary knowledge of the subject and superior ability to present it in the courtroom. Schlichtmann was devastated by the debacle of the cross-examination of his star witness and spent hours preparing Pinder for redirect. In the words of Harr, "Schlichtmann felt he could make Pinder shine again on redirect." Lawyers have the grandiose notion that they can, in a few hours, transform an amateur into a virtuoso. In fact, these efforts were quite obviously counterproductive because they made the expert more anxious, deprived him of sleep, and diverted his attention from content to form. After all the preparations, Schlichtmann asked Pinder just before he took the witness stand, "Are you feeling okay?"

"I was feeling fine until I started talking with you," muttered Pinder.

"Pinder did not do fine that day," comments Harr.

At the end of a devastating re-cross-examination, Harr wrote,

As the day wore on, Judge Skinner had a few more observations to make about Pinder: "You have a hopeless witness who changes from A to B," the judge told Schlichtmann at a bench conference. "The spirit of his answers doesn't change from day to day, but the form certainly does." The lawyer answered, "Expert witnesses are born, not made." "But you made him an expert," replied the judge.<sup>1</sup> [p. 338]

Obviously, both the judge and the lawyer were not talking about the geological expertise of Professor Pinder but his testimonial skills. Suddenly, it didn't matter how much geology he knew; what was essential was his ability to function in the courtroom. I believe that effective experts are not born or made; they develop through experience. This does not

mean that talent is not essential for excellence in any field.

After six days of cross-examination, Pinder flew home to Princeton. "His wife met him at the airport. She was shocked by his appearance, by his pallor and the dark circles under his eyes." The merits of the case, the superior credentials of the experts for the plaintiffs and the dedication and skill of the plaintiffs' lawyer did not prevail. The experts were neutralized by the skill of the defense lawyer.

It mattered little that two years after the trial, the opinions of the distinguished scientist, Professor Pinder, were confirmed by the Environmental Protection Agency (EPA) studies. Harr writes, "The report may have vindicated Pinder, but it came out too late to do Schlichtmann any good."<sup>1</sup> [p. 339]

I had dinner with three very successful plaintiff's lawyers. "What makes a good plaintiff's lawyer?" I asked. Ambition, compassion, attention to detail, ca-

capacity to become totally involved in a case, a sense of strategy, avoidance of exaggeration, and credibility are some of the characteristics they listed.

I know these three men very well. They have in common the attributes they listed, but they are very different from each other. They did not mention knowledge of law. I presume they took that for granted. They did not list persuasiveness and credibility, which I consider vital. Most experts are reluctant to see themselves as persuaders. I find that strange. All teaching includes persuasion. All physicians, particularly psychiatrists, practice persuasion.

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#### Reference

1. Harr J: *Civil Action*. New York: Random House, 1995