

Addressing the Perfect Phantom on the Witness Stand

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When expert witnesses are cross-examined, a common gambit of opposing counsel is to create a phantom for comparison purposes. The constructed phantom is typically portrayed as an individual who has gone through similar, difficult life circumstances without the impairments or problematic behavioral sequelae of the plaintiff or defendant in the trial. Abuse histories, assaults, and traumatic experiences all are posited to have little effect on this phantom other, an invulnerability that leads us to call this construct the Perfect Phantom. In this article, the nature of the Perfect Phantom cross-examination is described, along with strategies for coping with these questions.

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One of the common lines of questioning that faces the testifying mental health expert is a strategy we have come to think of as the Perfect Phantom. It works this way. Opposing counsel creates imaginary people or discusses real people who, despite developmental or traumatic hardships, not only survive, but also become models of remarkable success. Members of juries may be open to accepting such comparisons because individuals often look personally to mythical or celebrated others for comparisons of body shape and weight,¹ as well as for accepting idealized media images of perfectly constructed human bodies.²

In the context of trials and sometimes depositions, comparisons may be introduced during questioning by opposing attorneys. In its broadest usage, comparisons are developed in the form of inquiries about actuarial data and base rates in the general population. For most of the cases that involve mental health professionals, specific and applicable base rate data are not available. Furthermore, Poythress³ has argued that such actuarial data are not needed to meet the *Daubert* criteria for admissibility of expert mental health testimony. In contrast, Lees-Haley⁴ and Tenopyr⁵ have described the logical and important role of actuarial data in the overall picture of expert testimony. If such actuarial data are available and presented, are they likely to make a difference? In

examining expert testimony involving violence predictions, studies have indicated that jurors are less likely to value actuarial testimony compared with mental health clinical testimony.^{6,7}

The Perfect Phantom may be understood most clearly when viewed in questions raised during actual court testimony, as illustrated by some of our own experiences testifying in court. For example, during a murder trial in which the psychological issue of mental state at the time of offense is present, a prosecutor may ask about and refer to other people who have been under similar stress as the defendant, but whose behaviors have been exemplary or at least not disordered and violent. We have been asked why the brother of a defendant who was raised in the same brutal and abusive environment was a successful businessman and happy family man while the defendant had developed a major clinical disorder.

The attorney may ask, "There are certainly many other people exposed to similar stressors as Mr. Smith, but they don't brutally kill their wives, do they, Doctor?"

This line of questioning can take several forms, all designed to undermine the individual testimony by referring to implicit, but unavailable, base rates or persons in which the same psychological disorder, offense, and personal impairment do not occur. Experts are sometimes asked about the many teens raised in adverse conditions who have never been in juvenile court. Other experts are asked about indi-

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viduals who suffer from psychotic disorders but never harm anyone.

Still other trials in which personal injuries have been alleged and the question of damages arises, the expert is sometimes asked, “Isn’t it true that millions of women have been inappropriately touched by employers, boyfriends, parents, and schoolmates and have been able to function normally, function well, and succeed in their lives?”

In almost every type of cross-examination in which mental health experts are involved, the Perfect Phantom is constructed hypothetically or identified specifically, and is dramatized through questioning of the witness and before the jury. Perfect Phantoms are portrayed by opposing counsel as having braved unpleasant or horrific conditions, but as having flourished as they moved on to successful lives. One clear example is the question, “Plenty of veterans come through combat without PTSD, don’t they?” (Gutheil TG, personal communication, August 22, 2008. Used with permission.) This process of generating mythical people or identifying a real person for comparison purposes and then questioning the expert has the potential for diminishing the worth of the testimony of mental health experts while influencing the jury. Following are the methods of coping that we propose.

Staying With the Case at Hand

In answering Perfect Phantom questions, a helpful strategy is to go back to the essential assessment data and confidently reply:

I cannot speak for anybody else’s behavior, but I can indeed speak about Mr. Smith with whom I spent many hours. The mental health information about Mr. Smith is compelling that his auto accident, coma, and brain injury led to a marked lessening in his ability to understand what goes on in social situations and to be able to make intelligent and willing decisions.

Addressing Differential Vulnerabilities to Real Stressors

Almost all people have a point at which they succumb to mounting or immediate stressors in a pathological manner. It is the reason that normal bereavement, with all of its apparent psychopathological elements, is part of our diagnostic nosology. The Perfect Phantom is never portrayed by cross-examining attorneys in this context or in situational frames of reference. The expert may wish to testify that with

those exemplary phantoms, it is likely that, with sufficient study, professionals would find points in their lives in which they have exhibited symptoms or maladaptive behavior.

Testifying About the Underlying Phantom: The Hardy Personality

An explanatory framework of resilience can assist in distinguishing between defendants (or plaintiffs) and the constructed Perfect Phantom. One witness reply is to describe the hardy personality. Maddi and Kobasa⁸ described the hardy personality as one that responds to severe stressors successfully through viewing the events as a challenge to be mastered, as having a personal sense of control or self-efficacy, and as having a commitment to mastering such difficulties. Bregman⁹ has studied how individuals with hardy personalities who are subjected to major life traumas actually demonstrate post-traumatic growth. In addition, the components of commitment and control in hardy personalities are themselves associated with organizational effectiveness and good citizenship.¹⁰ Thus, when the question of why a plaintiff’s or defendant’s peer or relative has not had such pathological reactions or difficulties, a reasonable point of departure is to address how hardy—or not hardy—the evaluatee may be compared with the Perfect Phantom.

State Versus Trait Perspectives

In his book, *Coping with Cross Examination*, Brodsky¹¹ wrote critically about a frequent response to cross-examination questioning in which a Perfect Phantom appears:

Q: Well, a lot of normal people do inappropriate things, don’t they, without affecting their mental worth or ability?

A: I think a great many people who pass for normal do just that sort of thing [Ref. 11, p 115].

The preferred response was subsequently identified as this: under certain circumstances, even normal people may commit inappropriate acts, and inappropriate behavior may be seen in just about everyone at selected times. In responding this way to a Perfect Phantom question, the expert emphasizes the distinction between long-term and pervasive traits of successful adaptation and shorter-term maladaptive behavior. The essence of this reply is that each of us is vulnerable to our own conglomeration

of stressors at different stages of our lives compounded by real aggravating factors.

In one case, a defendant in a capital murder case had been bankrupt and out of work and was maintained on steroids for an autoimmune disease. His wife and her lover stole the equity from his home sale. The combination of failing health, money problems, and unemployment led to his killing his wife in what was diagnosed as a dissociative episode. Perhaps a Perfect Phantom could be posited to withstand these stressors, but this defendant could not. It was the transient and difficult circumstances preceding the offense that were the focus of the evaluation rather than all of the times the defendant and the constructed others coped successfully.

Conclusion

The Perfect Phantom is commonly generated to minimize the individual vulnerability and pathology of defendants or litigants. At any given time, Perfect Phantoms are not necessarily perfect, but this construct makes it seem as if this were true by suggesting a false sense of norms. By indicating that most people do not act or react like the evaluatee, the Perfect Phantom ploy suggests that the litigant is possibly malingering or making excuses. It is a false belief that self-control is accessible to all of us. Most people incorrectly assume that strong willpower or proper and organized management of life events will lead to control of what we do and who we are, regardless of situation or context.

Perfect Phantoms are intended to minimize diagnostic conclusions about plaintiffs or defendants. As opposing counsel refers to the mythical and Perfect Phantom, the task for the expert witness is to stay

close to the assessment, to acknowledge that others do not act this way, and to stay faithful to already established conclusions and professional opinions.

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