

Cross-Examination of the Psychiatrist, Using Publications: Point Counter-Point*

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Dr. Irwin Perr has used a specific case to draw a generalization and make a recommendation about the forensic psychiatrist's tactical response to a particular aspect of the legal adversary process; that is, he addresses the question of how the psychiatric expert witness should respond to cross-examination by use of publications that attack his credibility as a witness. In his article he makes a point. I would like to offer these comments as a counter-point.

Dr. Perr states, "The use of [specific] articles and excerpts tends to distort the [trial] process;" and by this he means that the adversary use of technical publications distorts the fact-finding trial process seeking to clarify and establish the authenticity or truth of a phenomenon, here a clinical judgment, because published statements can be taken out of context and twisted to the attorney's use and purpose. Not being present, the author of the written treatise is himself immune to criticism, challenge, and attack and is not even available to present the statement in proper perspective. The expert witness, therefore, is faced with an allegedly authoritative statement that impugns the credibility of the clinical judgment and opinion offered by that witness.

Dr. Perr suggests the following as a (traditional) testimonial response by the expert witness to this cross-examination ploy, "[one] way of responses available to the witness in such a situation is [for the witness] to deny or not acknowledge the authoritativeness of the publication and to base his opinion on his own experience, discussion with colleagues, information culled from professional meetings, conferences, and [upon an] over-all interpretation of the literature at large."

Dr. Perr thus recommends that, for legal trial purposes, no psychiatric author should be recognized as an authority above the psychiatric expert witness, and that psychiatric expert witnesses who are practicing psychiatrists and "who are knowledgeable about a given topic should learn to rely on their own opinions without seeking supportive writings elsewhere."

If I can consider this to be the trial posture that Dr. Perr recommends for

*This paper was offered as discussion of the preceding paper on "Cross-Examination of the Psychiatrist, Using Publications," by Irwin Perr, M.D., J.D., presented at the American Psychiatric Association annual meeting, Session on Expert Testimony, at Toronto, May 2, 1977.

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this expert witness, I would like to express my position as one exactly opposite to that presented by Dr. Perr. My recommendation to this kind of cross-examination would be for the expert witness to respond as follows: Not to deny the weight of established authority in psychiatry. Not to appear as professionally idiosyncratic. Not to stand out as singular among psychiatrists. Not to refute as non-authoritative that professional literature which we acknowledge as significant in our teaching of psychiatry. That is, not to undermine the credibility of established clinical criteria that appear in the published literature, materials that serve as the systematized basis for psychiatry as a medical discipline.

My recommendation is to accept the weight of established authority and to deal with this as the authoritative generality; but, if differences exist between the expert's specific clinical opinion and a statement that is generally accepted by the professional community, the expert witness can demonstrate to the trier of fact how and why the unique features of the instant case lead to an opinion that differs from the established position.

My reasons for the above recommendations are both empirical and theoretical and are concerned with the issue of credibility of the psychiatric expert witness, as this issue impacts upon both the immediate trial issue and the general field of forensic psychiatry.

Dr. Perr has generalized from the trial experience he has described. My trial experiences lead me to conclude that my recommendations, albeit based upon a theoretical stance, are also operationally effective.

Judged by my experiences as an expert witness, in my opinion, the approach I have recommended substantially increases the credibility of the psychiatric expert witness when cross-examined by use of publications that attack his credibility. It is my experience that opinion evidence that is proffered to the trier of fact with the request that it be accorded great weight because of the qualifications of the witness or the unique authoritativeness of the individual expert (in contrast to the authority of the established field) is frequently disregarded as *ex cathedra* by the more sophisticated trier. And it is my opinion that the average juror is more sophisticated about psychiatry than many psychiatrists and attorneys recognize. My trial experience, both generally and with respect to this specific cross-examination legal ploy, demonstrates that opinion evidence appears most credible and becomes most persuasive to the trier of fact when opinions are not presented as professionally singular and idiosyncratic but rather when they are closely integrated with the established and authoritative professional literature, and when the basis for any divergences of the witness's opinion from an established stated position can be fully understood by the trier as falling within the context and authority of the systematized organized field of psychiatry rather than dependent upon the "authority" of the individual psychiatrist.

My disagreement with Dr. Perr's position is based upon an equally strong conviction that his recommendations substantially undermine the credibility of the field and practice of forensic psychiatry.

Both society at large and the legal profession in particular view psychiatrists as frequently expressing polar positions in their opinions and presenting the height of idiosyncratic, individualistic professionalism. Each

psychiatrist portrays himself as a uniquely professional world unto himself, each presenting his singular concepts and individual professional theses, theories, interpretations, and criteria for identification of clinical conditions uniquely defined by him; and each psychiatrist appears to recognize no authority beyond his individual clinical experience and his own subjective response to patients.

In no other branch of medicine do practitioners attempt so to deny authenticity to clinical procedures and to judgments made by others. Many, if not most, practicing psychiatrists openly decry the clinical interpretations and judgments of their professional colleagues. In fact, among many of those who become Board-certified psychiatrists, it would appear that they verbalize their acceptance of clinical features of psychopathology, as described in the literature by acknowledged authorities, for the sole, limited, and express purpose of the Board examination, because in their subsequent clinical practice so little further evidence appears of any continued acceptance of authorities other than themselves.

In no medical field other than psychiatry do practitioners respond so individualistically and so idiosyncratically; and no others glory so in being deviant. Consequently, in no other field of medical practice is reliability so low. Reliability is reflected in credibility. And no other field of medicine carries as low credibility as psychiatry. I believe that improvement in reliability and credibility is the number one problem of American psychiatry; and similarly, such improvement is essential for the field of forensic psychiatry.

Credibility in forensic psychiatry is a direct function of reliability. It can be no greater than the level of reliability in psychiatry. In my opinion, Dr. Perr's recommendation to deny or refuse to acknowledge the authoritativeness of specific authorities, but rather to rely on the weight of one's individual "over-all interpretation of the literature at large," is paradoxical and destructive to the reliability of American psychiatry. It impairs the general credibility of the forensic psychiatrist, and more frequently than not it reduces his persuasiveness to the trier of fact, especially a jury. In the example offered by Dr. Perr, I believe that what was persuasive to the judge was not the non-authoritativeness of Dr. Kardiner's chapter in the American Handbook of Psychiatry, but rather the weight he (the judge) accorded to the authoritative statement made by Dr. Kardiner that the "literature [on traumatic neurosis] can only be characterized as anarchic," and therefore, judged by this authoritative statement, no single representation (on traumatic neurosis) should necessarily be given much weight.

Dr. Perr's recommendation in this matter runs directly counter to our approach at the University of Southern California Institute of Psychiatry and Law. We accept psychiatric authorities, as such, and we accept their individual professional contributions as authoritative for legal trial purposes, but we do so under our express guidelines and principles of forensic psychiatry, ones that systematize our psychiatric opinion-making for legal purposes. Acceptance of acknowledged psychiatric authority is one of a number of corollaries that leads to psychiatric-legal opinion-making with a higher level of confidence, so that such opinion-making becomes more

reliable and hence more credible, and the opinion more persuasive to the trier of fact.

Under these guidelines the forensic psychiatrist must be master of the professional literature that relates to his case; and he must be able to articulate it, describe it fully, and explain it persuasively to the trier of fact. He must not only acknowledge the authoritative literature that is basic to the issue, but he also must stress it, both in case materials and in generalities and inferences drawn from them. He must, however, clearly denote the singularities of his specific case and incisively point out whatever similarities and differences exist in this case that distinguish it from cases and generalities described in the literature; and finally he must lead the trier of fact, through logical reasoning, to understand how both the established literature and the unique features of the instant case, if present, relate to the legal issue at hand. In this way, the forensic psychiatrist can establish for the trier of fact how and why he (the expert) can attribute whatever level of confidence he accords to his opinion in this case.

If forensic psychiatry is to be accepted as a forensic science discipline, psychiatry, itself, must be presented as a field that is scientific in the sense of having a systematic organization of technical material, organized under the mantle of medical science, with clinical definitions and criteria of psychopathology articulated in the professional literature by authorities. Psychiatry as a medical discipline is founded on the authoritativeness of such literature. In my opinion, if the forensic psychiatrist denies the authoritativeness of our established literature, he discards the scientific scaffolding of our discipline, and he denies himself the basis for legitimate identification with the substructure of the established psychiatric community.

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