On the Preparation and Use of Psychiatric Expert Testimony: Some Suggestions in an Ongoing Controversy*

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Almost since their earliest entrance into the courtroom, "alienists" (an earlier designation for psychiatrists) have been perceived as a threat to public security and a fancy means for "getting criminals off."[1] Whether in the context of an insanity defense or in other legal contexts like involuntary hospitalization, psychiatrists often are thought to pervert the normal, effective progression of the justice system. Only rarely in legal literature or in the press is the instrumental function of psychiatric expert testimony discussed fully and accurately. Equally rare is an accurate discrimination between the goals of the legal system and the failure to reach these goals because of unskillful preparation and use of such testimony. This paper is addressed primarily to this latter issue. A few general statements about the use of psychiatric information in the criminal justice system will first be made, preceding a description of this author's method of preparation and presentation of psychiatric expert testimony.

It is not possible to understand the function of psychiatric testimony in a criminal trial accurately unless it is examined in the light of the overall goals of the criminal justice system. In more ancient times (2000 years ago, when the disposition of criminals followed the simple "eye for an eye, tooth for a tooth" doctrine), the non-utility of information about states of mind would have been crystal clear and logically consistent. Any proscribed physical act brought forth its full punishment, and there were few mitigating circumstances, such as self-defense. With the "advance" of civilization, more complex concerns began to enter the definitions of crime, such as the wish (need?) to take into account the mental capacity of the culprit, along with humanitarian treatment intentions such as the desire to "rehabilitate" the miscreant. It is the presence of these diverging and contradictory values that raise fundamental difficulties in any criminal justice system. In fact, the moment these rehabilitative impulses emerge into expressions, the legal system is doomed to encounter contradiction, confusion, and frequent public criticism. None of this is attributable to any psychiatric theory or to the psychiatric profession. Psychiatry did not create these conflicted psychological intentions, and at most, we have learned to identify them and track them through some of their multiform disguises.[2] These tensions will

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not be eliminated by abolishing the insanity defense[3] nor by deciding to handle all criminals we decide to imprison with a straight maximum sentence.[4] Therefore, these conceptual confusions and conflicts should be viewed as the product of social developments in an evolving "civilization," and not as the aberrations of "power-stealing" psychiatrists.[5]

Public mental hospitals have long tended to be inadequately staffed, and the more prestigious and highly trained members of the psychiatric and other therapeutic professions are rarely to be found in these institutions. However, hospital personnel are the ones who often testify in court, especially in criminal trials, where they are but rarely joined by their colleagues from private practice (where they make much more money and experience little of the massive frustration present in state mega-institutions). The absence of the professional elite from this important social role of psychiatric expert witness may not be accounted for merely on economic grounds. It is one of the predictable results of the failure to perceive fully the purposes and "system utility" of their presence in the trial process, coupled with the great discomfort that ineffective or non-comprehended performance can engender.

I would suggest that one of the effects of psychiatric testimony is to present, in the context of a given trial, the kind of information that can facilitate increased social awareness and understanding of the forces that must be managed differently if society is to deal effectively with the problems of crime. When an individual has committed dangerous and frightening acts, the normal first response of all people will be an impulse toward violent retribution. It is just because this primal impulse is inhibited, that society advances and moves away from the simplistic, socially rejected, and ineffective Talion principle of an "eye for an eye." We have long known (at least philosophically, when we attempt to think "objectively") that chopping off the hand of a pickpocket does little to deter this kind of crime, and even if it did, few of us would be willing to be the amputator. Since well back into the Middle Ages, executioners have sought masked anonymity, reflecting a widespread social reaction of ambivalence toward starkly retributive punishment, "satisfying" though it may be at some level. With the likelihood of widespread media coverage, a criminal trial that utilizes psychiatric testimony provides a substantial means for educating the community about the complex nature of criminal behavior. Only when the social, physical and psychological motivational dynamics are better understood will it be possible for the community, through its legislatures, to change the nature of correctional institutions and procedures so they can have a greater potential for effecting change. At the very least, such changes will require greatly increased resource allocations, and cannot be achieved without increased public awareness about the pros and cons of various treatment alternatives and the way they relate to a specific criminal's psychological dynamics. For this reason, it is important that psychiatric testimony continue to be presented in the context of criminal trials. Such information, if properly and skillfully presented, is not only relevant to the individual defendant involved, but is also important to the community's need to learn more about the nature of deviant behavior. Then and only then may society continue its slow and painful movement toward rationality in

the correctional system, which ideally should abide by the ancient medical maxim of *primum non nocere* – at least don't do harm.

Appropriate, skillful, knowledgeable preparation of expert testimony will have a great deal to do with its effectiveness both in the courtroom and as a contribution to the public's knowledge about crime and deviant behavior. This means that the expert witness must function in a "persuasive mode." By this I mean that he will clearly advocate his opinion and put it as clearly as possible to the fact-finders in the jury box, a process which should make it equally clear to the community-at-large. With this in mind, I will set forth the manner and style in which I prepare expert testimony which often seems to have, among other things, an educational impact on those who are directly connected to the case and conceivably on those who observe it from without. It will be described in the sequence in which it unfolds.

A. Initial Contact with the Expert

The particular potential expert witness should be chosen because of his known or anticipated ability to provide a delineated diagnostic formulation of the client's behavior as it relates to the specific legal questions at issue. Therefore, when contact is made first by phone and/or letter, counsel should state explicitly the legal question for which he seeks a psychiatric evaluation, using the language that will be relevant in the trial. (If the expert is experienced, he will immediately insist on this kind of description and formulation.) Counsel and the psychiatrist should make a preliminary check on the logistics of timing in relation to trial date and examination requirements, and should also discuss the matter of compensation. Once these issues have been resolved, an appointment for the examination can be made. Arrangements might have to be made to transport a prisoner to the local jail (to avoid the expense of having the expert travel to some distant prison). In many cases, the interview can be conducted in the psychiatrist's office.

B. The Initial Examination

The interview should be sufficiently thorough to enable the expert to arrive at a relatively firm conclusion about how his clinical data relates to the legal question(s) put by counsel. At its conclusion he should be able to answer definitely whether there is a criminal defense, or whether there is a basis for taking counsel's plaintiff or defendant position in a civil matter, such as in a petition for involuntary hospitalization, or a multitude of other legal questions. He should be able to provide a well-elaborated diagnostic formulation and relate it to the legal questions about which he has been instructed by counsel. It is not likely that there will be adequate information at this time to fulfill the requirements for trial or deposition preparation, but additional data can be collected later, after the legal strategy questions have been settled. When the preliminary examination has been completed, the expert will contact counsel and arrange for their first meeting.

C. First Conference with Counsel

The first issue to be settled is whether or not the information derived from the psychiatric evaluation will have utility in counsel's case, and the

information will speak for itself. The expert and the lawyer will review the findings and counsel will decide if it would be advantageous to proceed with their use. For example, in a criminal matter, if the interview data does not appear to contribute to any defense utility, that would be the end of the matter, unless the information generated has some possible application to the sentencing process. If the findings seem useful, they would be elaborated in the form of a report to the court, and might also be incorporated into counsel's arguments in relation to disposition. If the examination data were to be used in this manner, counsel would have to inform the expert about all the dispositional options available, so that he could write his report in relation to them.

Once it has been decided that the expert opinion will be useful in the trial or in settlement negotiations, the next set of questions to be explored relate to how the case should be presented, and in determining this strategy, the expert may be helpful in analyzing the various aspects of communication effectiveness. When psychiatric evidence is going to be used in a trial, more frequently than not it stands at the peak of the pyramid, and it must serve the purpose of gathering all the elements of the case into a logical whole consonant with the legal question at issue. The theory in such a case will be largely "psychological," and the expert should have some valuable ideas about how best to communicate these propositions to the fact-finders. Also, if the case theory turns on "understanding" some piece of client behavior, past or future, I believe the use of psychiatric information to explain that behavior is essentially an all-or-none proposition. For this reason, one of the central issues of persuasion will be the credibility of expert testimony, which always relates to the psychological "wholeness" of the information as the fact-finders see and hear it. To them it makes no sense at all to use the old strategy of criminal cases where counsel argues that "In the first place my client didn't commit the act, but if he did commit the act, he had an altered state of mind." Although there is legal theory to justify this kind of argument, fact-finders are likely to hear such technical arguments as persiflage, and in annoyance, will tend to reject counsel's case totally. Similarly, I do not believe that juries are much persuaded by the legal argument that they should draw no inferences from the failure of the defendant to testify when at one and the same time they are being asked to contemplate and weigh his state of mind. "If you say defendant is a certain way, why won't you let me see for myself?" For this reason, it seems that the only logical way to proceed is to put the client and all information about him into the jury's full view and then rely on the interpretations about these data that the expert will make. The jury can then reach a judgment without *feeling* they are being misled. The most effective means of carrying out this process should be the subject of this initial conference.

After resolving the strategic question of how best to present the case, experts can be extremely useful in exploring ways of corroborating the psychological theory that will be developed and presented about the client. It is a foregone conclusion that during the trial (and probably before?), there will be much skepticism about the expert's testimony regarding some reconstructed event. Even if they cannot be sustained, there are likely to be objections about the "hearsay" quality of a psychiatric expert examination.

Although these objections can be met in nearly all jurisdictions, the mere fact that they are raised brings doubts to the minds of the fact-finders, and therefore a complete job of corroboration should be made in relation to the psychiatric testimony.[6]

Since the diagnostic formulation will rely heavily upon the client's developmental history, the expert is in the best possible position to help counsel determine where to obtain the best ratifying data. He knows the time at which the crucial events probably happened; he knows who will likely have been in a position to observe them, and he can help counsel to assay the persuasive effectiveness of such witnesses. A technique which I use to carry out this procedure is to have counsel send me two copies of the report he writes after he or his agent has interviewed potential witnesses. I review them to determine whether that person would be useful to the case by virtue of having observed crucial developmental data. Those parts I wish to "have in evidence" before my testimony is given I underscore in red and send one copy back to counsel. He will then see to it that such information is placed in evidence during the testimony of that person at the trial. When it is time for the expert testimony, he need only inform me of whether or not the designated information withstood the challenges of cross-examination, and if it did, I am free to refer to it in the manner described below.

One further consideration about the use of this kind of witness is quite unconventional, and many lawyers are aghast at and reluctant to follow this suggestion. It relates to the maxim, familiar to all trial lawyers, that you should never ask a question of a witness to which you do not know the answer. In certain situations, however, when counsel has a witness who was at the right place at the right time to possess the required information and who couples this experience with the verbal skill to describe it effectively, it is best *not* to have him go over his description of the client's behavior before the trial. The reason for this "dangerous" suggestion is that after a person has been over material several times, it gets a kind of routinized patina which communicates to the fact-finder that he has been "rehearsed." Laymen will usually also conclude that counsel has trained the witness to say what he has said for self-serving purposes.

If a witness presents his testimony essentially for the first time from the witness stand, it will be filled with hesitations, stops and starts, and occasional minor addenda, precisely the kinds of cues that everybody unconsciously listens for which signal credibility. Everyone "knows" that a remembered episode does not rattle off the tongue with the precision of a computer print-out. Therefore, we perceive a certain degree of hesitation and bumpiness as a manifestation of credibility.

To follow this procedure does not in fact breach the maxim noted above, since thorough preparation would already have provided ample details from many other witnesses about the nature of the client's past behavior patterns. Counsel will already have a clear picture of what they are like, even though he will not have ratified it from the mouth of this particular witness. In my opinion, there is little jeopardy in this procedure, and it offers a large bonus of increased credibility.

Another technical question which will arise is whether or not to use more than one expert witness. It is my opinion that one is quite sufficient. I have

often listened to several experts discussing a subject, all saying approximately the same thing. However, since each has his own private language (even when they share the same technical vocabulary), the listener is forced to make many adjustments and translations of language to understand them. Difficult as it is for experts to do this, it is virtually impossible for laymen. Since we know that fact-finders, when confronted with situations like this, are inclined to dismiss *all* the testimony they hear, the use of multiple experts is probably risky.[7] Therefore, once more we should follow the principle of parsimony and use one expert to present all of the relevant information with a single set of communication symbols.

Another reason for being parsimonious in the presentation of testimony is to avoid the serious risk of "information overload" caused by bringing so much testimony into the case that the jury or the fact-finder simply cannot cope with it all. This situation fosters boredom, surrender, and ultimately an avoidance of all the information. Skillful decision-making about how much information to present during the trial should strip issues down to the bare minimum needed, and *no more*. This places the case in its most persuasive posture.

One problem to be avoided is the so-called "Battle of the Experts."[8] This ineffective confrontation is usually a function of inexpert work on the part of both psychiatrists and lawyers. I have found that the following procedure minimizes this potential. The moment the decision has been reached that there is a strong psychiatric case to present, counsel formally petitions the court to suggest that the expert witness for the opposing side join with us in order that a joint report may be filed to facilitate communication. We note that we are going to disclose to the opponent all information relating to the psychiatric issues and that filing a joint report would eliminate the confusion of language which might develop. Examples of such an affidavit and petition follow.

STATE OF NEW YORK
COUNTY COURT: COUNTY OF ERIE
THE PEOPLE OF THE STATE OF NEW YORK
VS. Ind. No. 35,562
SAMUEL T. BRIDGES, JR. NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of JOHN W. CONDON, JR., sworn to the day of , 1971, and upon the indictment and all other papers and proceedings theretofore had herein, the undersigned will move this Court on behalf of the Defendant, Samuel T. Bridges, Jr., at a Special Term thereof to be held at the Erie County Hall, City of Buffalo, State of New York, on the day of , 1971, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for the following relief:

1) An Order permitting the institution of the following procedures with respect to the Defendant herein, Samuel T. Bridges, Jr.:

a) The arrangements and execution of a joint and cooperative psychiatric examination of the Defendant at the Erie County Jail to be

conducted simultaneously by any qualified psychiatric experts chosen by Michael F. Dillon, Esq., District Attorney of Erie County, and by Condon, Klocke, Ange and Gervase, attorneys for the Defendant, at a date and hour to be established by the mutual agreement of all involved.

DATED: Buffalo, New York

, 1971

Yours, etc.

TO: MICHAEL F. DILLON, ESQ.
District Attorney of Erie County

STATE OF NEW YORK
etc.

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO

JOHN W. CONDON, JR., being duly sworn, deposes and says,

1) The Defendant is represented by the firm of Condon, Klocke, Ange and Gervase.

2) The Defendant was charged by the Grand Jury of Erie County by indictment number 35,562 dated June 26, 1969, with the crime of murder.

3) Pursuant to that indictment, the Defendant is being held in the Erie County Jail, awaiting trial on the instant charge.

4) Pursuant to Section 336 of the Code of Criminal Procedure, the Defendant entered a plea of Not Guilty by Reason of Insanity on the 24th day of December, 1970.

5) This plea was entered after conscientious examination by your dependent of the facts and circumstances surrounding the instant case.

6) It has been the consistent experience of your deponent that in trials in which there has been interposition of an insanity defense, it has been necessary for both defense and prosecution to present the testimony of psychiatric experts.

7) The defense intends to present such testimony in the instant case.

8) It would be unrealistic and unwise to expect meaningful psychiatric evidence to be evinced at trial in the absence of an opportunity for *all* experts to have examined the Defendant.

9) While your deponent is aware that it is not unrealistic to expect that different psychiatric experts may ultimately hold different opinions as to his client's mental condition, he strongly suggests that in the interests of clarity and justice whatever opinions are ultimately formed ought to be based upon the same factual data, and that such data ought to be equally available to *all* the experts.

10) Psychiatric experts will be called upon to present a lay jury with their opinions, and with their reasons for forming and holding these opinions. Your deponent believes that the trier of fact will be best served in its attempts to think lucidly about this technical and complex opinion testimony if all such testimony is at least the out-growth of the same or similar data, and if the State's experts are preserved from having to operate

under the disability of ignorance of facts which might well be pertinent to their analysis.

11) In view of these factors, it is the contention of your deponent that at this stage of these proceedings (*i.e.*, the period available for the collection of psychiatric data) the ends of justice would be best served not by vigorous partisanship or by legal gamesmanship of any sort, but by a spirit of cooperation and mutual inquiry.

12) Further, your deponent, by virtue of the fact that he represents the Defendant, probably has far superior control of psychologically relevant data than does the prosecution. In view of this fact, he believes that he might best advance the ends suggested in this affidavit by propounding the joint examination herein requested.

13) Your deponent believes that it would be fundamentally unwise and probably detrimental to his client's best interests if at this time the psychiatric witnesses were forced into adversarial positions by the intrasigence or pressure of either defense or prosecution.

14) Your deponent believes that the ends of scientific objectivity will be best served by the suggested procedure.

WHEREFORE, your deponent prays that an Order issue granting the instant motion and permitting the procedure suggested therein.

_____

JOHN W. CONDON, JR.

Sworn to, before me this
day of 1971
ss.
notary public

The purpose of this procedure is to accomplish precisely what it states. It also virtually eliminates the possibility of playing the courtroom games often used with psychiatric testimony to confuse the jury. Such gambits as "the defendant or the plaintiff has gone off to some ivory tower to get an expert who'll come in here and try to pull the wool over your eyes, etc.," simply cannot be used under these circumstances. Even if opposing counsel does not join in this procedure, the full disclosure offer discounts or eliminates the likelihood of using such trial tactics, most of which have little to do with the accuracy of fact-finding. This procedure is sufficiently effective that by the time the case comes to trial or deposition, there will be little fundamental variance in the viewpoints of the several experts. This is as it should be, at least as far as the observable psychological data are concerned. Although different theories of interpretation may be utilized by the experts (I personally believe that even the theoretical options are few if they are thoroughly defined and developed), this procedure eliminates the "vast" discrepancies that seem to exist between various observers. These discrepancies are far more likely to be related to trial tactics used by counsel than to differences in the psychiatric data.

Finally, the first conference with counsel should initiate the "interdisciplinary teaching" that must take place between the lawyer and the expert witness. It is crucial that each understand fully what the other is

about. Although lawyers carry out this procedure skillfully in relation to most kinds of expert testimony, they are frequently loath to do it in relation to psychiatric information. This shortcoming seems to me to derive from the tendency to relate all psychological matters to one's own psyche, which can create anxiety and the need to obscure this identification from awareness by a whole series of rationalizations. At any rate, counsel's willingness to learn about the theoretical tenets I will use in my work on the case is a prerequisite for my participation. Since the expert always has to rely on counsel to backstop him in cross-examination and on redirect, it is crucial that this learning take place. I therefore "assign" Chapters 3 and 4 of my book, *Psychiatry for Lawyers*, for counsel to read! These will thoroughly teach him the fundamental predicates of my theory.

From the lawyer's side, it is crucial that he teach the psychiatrist the nature of the legal considerations which will be applied to the expert data. I usually request that counsel send me his "law memoranda" on the case, since this will generally brief the relevant cases and provide me with the precise language that will be applied to the consideration of the matters at hand by the judge and the fact-finders. (It also serves to ensure that he has done his homework. I have found in the past that occasionally lawyers have not, in fact, studied the law, let alone the psychiatry.) Again I have the impression that this lack of legal preparation may be related to the nature of the case. Psychologically disturbing conflicts have a nasty potential for producing a defensive turn-off in all people, lawyers included.

In addition, I have counsel provide me with the *total* file of information in the case. This I carefully read, and frequently, from the most unlikely places, clues emerge which reveal important things about the psychological nature of the client. Since the expert should be better able than the lawyer to recognize and evaluate these in relation to their psychological meaning, this reading can help ensure that there will be no surprises when the case comes to trial.

By the end of this session, both counsel and expert witness should be ready to move explicitly toward final preparation for the case, whether it goes to trial or some other disposition.

D. Completion of Data-Gathering and Tactical Planning for Report/Deposition/Trial

After the expert has completed his examination, so that he can comfortably "know" that he is not likely to be confronted with surprise information about the client, he will then be ready to plan with counsel how to develop the case in the expert testimony. In the meantime, counsel will have completed his investigations and interviews with corroborating witnesses and will have shaped his legal theories about how to proceed.

At that point, the expert and counsel meet again to discuss the precise tactics of the trial. There are many aspects of this planning in which the expert can provide useful information. For example, the expert's opinion should be sought on questions of the kind of jurors to be selected. Counsel is generally familiar with selection theories about demography as it relates to the client, and he uses this information skillfully. From the psychological standpoint, the critical question is, who can best 'listen' to *this* particular

case with me/us? To answer this query, we must form some precise images about the psychological capacities of individual jurors. Although some aspects of the answer to this question are related to demographic qualities, most relate to the personal background experiences of the individual jurors. This takes us to the subject of *voir dire.*

Many lawyers use a kind of moralistic admonition here which I believe is likely to be more detrimental to their cause than helpful. They might say something like, "Can you promise me that you will give your full attention to this matter and find for my client if the information you hear during the trial indicates that you should?" Because jurors feel this is a moralistic pressure on them, even if they cannot verbalize why they are bothered, it will be disquieting to them. That is an undesirable tactical result.

It would be more fruitful for counsel (and lawyers often move in this general direction) to seek to find out if the juror can comfortably listen and pay attention to the material that will be presented in the instant case. Let me describe how this might be done. Counsel develop a whole series of questions which by their nature confront the potential juror with the particular psychological stress that will come up in the case. For example, if the case involves a grisly homicide, can the juror deal with inevitable photographs of the bloody corpse? You cannot get an accurate answer to this question by merely asking, so the purpose of counsel's question is to elicit a response that can be seen. For example, "Mr. Juror, this case involves a very brutal homicide, and there will be much evidence brought before you of a very unpleasant nature. Do you think you will be able to stand it?" When this question is asked, the crucial aspect of the examination is for counsel to observe the juror's *behavioral* manifestations, from which his anticipated feelings about seeing such evidence can be deduced. He might squirm, blanch, blush, develop sweaty palms, swallow hard, or his voice might croak when he answers. But the next question is the crucial one for determining the juror's desirability. "How did you feel when I asked you that question?" The answer should determine the choice. If you have observed squirming or any of the other signs listed above and the juror says, "Oh, it didn't bother me at all," that is a juror to be avoided if possible. You will have just observed psychological denial, and that kind of listening will be detrimental to the fact-finding process. On the other hand, if he says, "I guess that made me kind of uncomfortable, but I think I could handle it all right," he is the kind of juror one wants. He will be able to stand right in with the evidence and perhaps empathize and understand the bloody event. Then and only then can he possibly be sympathetic to the defense's arguments. Probably such a response will strike rapport with counsel, and he will "feel good" about such a juror. That, too, is important, and indeed many skillful trial lawyers use that as a simple criterion of whether to choose a particular juror.* In a very real sense, that is the bottom line, and the procedure I described above is merely its articulation.

In the event that counsel is not permitted to conduct the *voir dire,* he must find some way to shape questions for the judge to ask which will allow him to obtain the same kind of observational data we described above. That

*This description was provided to me by Professor Irving Younger, who was formerly a judge and before that a trial lawyer.

will probably be a difficult task ,and might be a good argument for permitting counsel to conduct the *voir dire.*

E. The Report to Counsel

At about this time, the expert should be ready to write a report on the psychiatric findings about the client and send it to counsel. Sometimes this *must* be shared with opposing counsel as a matter of law (as for example, defendant's psychiatric examination of plaintiff in a tort action charging emotional damages), but usually, following the principle put forth above, counsel will share the report to press for joint examination procedures. At any rate, the expert should have a thorough idea of the function of the report, so that he can write it in the most useful form.

During the course of his interviews with the client, the psychiatrist "listens with his third ear"[9]; in other words, he listens for the spoken and unspoken clues to deeper emotional attitudes which the patient holds unbeknownst to himself. In addition to emotional expressions which emerge as the patient relates his history (the anamnesis), there is ample opportunity to observe the patient's awareness of where he is, what he is doing, and to whom he is talking. For instance, involvement in a world of unreality may be revealed through such serious defensive aberrations as hallucinations and delusions. The patient's ability to place his observations into appropriate and reasonable categories, to think about them logically and to relate them more or less accurately with past experiences and philosophical considerations can be estimated and evaluated. The nature of his impulse life, the manner in which his ego copes with inner impulses and relates them to the world around him, as well as to his own moral and ethical value system, are observed and "formulated" by the examiner.*

After the examination has been concluded (in fact, while it is going on), the psychiatrist formulates in his mind a dynamic concept of the total scope of his patient's psychological behavior and its genesis. After these data are derived, the psychiatrist is able to delineate the patient's character structure and to know the nature of his specific repetition-compulsions. Once this is established, he can predict with fair accuracy how this person will relate to future situations and stresses. Here we should re-emphasize that prediction *must* be related to a multiple set of variables. We know from everyday experience that individual reactions vary according to shifting circumstances. For example, a person living within the bounds of his usual life situation will behave in one way, but if subjected to severe stress by some catastrophic circumstance, he may act like an entirely different person.[12] In our everyday estimates of people, we make intuitive rule-of-thumb judgments of their reactions to various kinds of situations. The psychiatrist does the same thing, but he carries his prediction to a greater degree of refinement and can also describe explicitly *how* he made his judgments. He is able to describe more specifically the kinds of stresses that cause a person to alter behavior. Also, he is able to define the *cause* of particular reactions specifically in relation to varying stresses and to anticipate the manner in which they will be handled.

*For a thorough summary of the manner in which psychiatrists approach psychiatric examinations, see Menninger.[10] An excellent description of the manner in which a psychoanalyst approaches case evaluation is to be found in "The Psychoanalytic Diagnostic Interview" by Saul.[11]

Needless to say, at this time we cannot specify the precise degree of accuracy of these predictions.*

We should comment on the manner in which the psychiatrist approaches a patient. The more he does this in the role of physician, the more data he will obtain. If the approach is that of a "prosecutor" whose function is to attack rather than help, problems are raised automatically which detract from the reliability of the data. A subject who knows that his revelations may be used against him will certainly not be so open as one who expects help in the form of treatment from a physician. This can raise deep conflicts for the psychiatrist, since he can be placed squarely between the Scylla of what he may conceive as his confidential relationship to a patient, and the Charybdis of his obligation as an investigator retained by a court or institution.** While this is an ethical matter which the psychiatrist can and must clarify for himself, it also involves the serious legal question of how and when his testimony may be utilized.[18,19] There are many problems remaining over psychiatric expert testimony. So long as punishment and retribution play such important conscious and unconscious roles in decisions, psychiatrists and lawyers alike will continue to find themselves in ambiguous positions in relation to their professional roles.

F. The Presentation Form of Expert Testimony and its Rationale

1. General Considerations

The issue of when the expert should be presented in trial is usually clear, and every effort should be made to present the testimony at its optimal moment. Frequently, because the expert is a physician, there will be struggle to fit his testimony to a time that fits his schedule, which may not be the most effective time for presentation. Therefore, long range planning should be carried out so that he will arrive at the correct psychological moment, which is usually toward the very end of the case. The reason for this timing is that the psychiatric expert witness is the ultimate interpreter of *all* the events and data in the case which relate to the client's behavior. If everything relevant has been presented in evidence, then he will use it all, tie it all together and synthesize it into a comprehensible, psychologically logical whole. Since that is the primary purpose of the case, the only logical place for him to testify is at the end.

Prior to the trial, clear decision must also be made about the manner in which the testimony will be presented. I have encountered very few counsel who have the technical knowledge about psychiatry to carry me through the whole of my testimony with the question and answer technique utilized with most other sorts of expert witnesses. Therefore, it is best to allow the expert to set the manner of unfolding his testimony, according to some plan which closely approximates the one which I shall now present.[20] Since all of the information in the testimony will already have been shared fully with

*Some efforts to quantify emotional reactivity and its direction are made in such projective tests as the Rorschach, and in such studies as those by Saul and his colleagues in which they attempt to quantify the emotional forces symbolized in dreams.[13,14]

**For a good analysis of this subject see the report on "The Privileged Communication and Confidentiality of Psychiatrists" by the Group for the Advancement of Psychiatry, Committee on Law.[15] Some of the dilemmas confronting the psychiatrist in these matters arose in the recent *Tarasoff* case.[16,17]

opposing counsel (sometimes this includes complete transcriptions of interviews, cross-annotated and indexed, to all of the other information about the case), there will be no reason to bring all of that information to the courtroom. My notes will be in the form of a detailed outline (in cases in which the full behavior of the client must be "explained"), which will also be available in several copies for both counsel and the trial judge if he wishes it.

During the trial, counsel will ask only questions that facilitate my working my way through the outline, in as interesting a fashion as possible. Usually this means that he will ask all of the principal introductory questions (the "major heads" in the outline) and any others which he feels he can do effectively. The format described below will show the precise strategy of the testimony and the nature of its major tenets.

2. Qualification

The qualification of the psychiatric expert is carried out in the usual manner of all expert witnesses. Their background is delineated in whatever detail possible. One might note here that the "testimonial weight" of this evidence of expert qualification is substantially magical in nature. Although a highly experienced witness will have very impressive credentials, this is not difficult to offset with testimony presented by a younger, less credentialed witness, who knows how to present findings in a way that helps the fact-finders to understand. In the end, the jury will attribute most weight to the testimony that makes the incident under consideration most comprehensible and logical.

3. The Data Bank

This is the point at which this style of preparation begins to take its bite. First of all, an impressively voluminous amount of information will have been gathered, an amount which demonstrates a substantial embrace of the background of the person under discussion. Furthermore, all of this information will have been given to the opposing counsel, an arrangement which should be clearly pointed out to the fact-finder. This announcement instantly conveys that no effort was made to obscure anything, and that all information, both helpful and non-helpful to the case, has been revealed to the opposing side. This process establishes an immediate ambience of credibility.

4. Putting the Legal Question

The purpose of this tactic is to set the stage for the expert to translate the legal question into the operational language that will be used by him. For example, counsel will ask "Do you have an opinion about whether or not the defendant knew the difference between right and wrong, knew the nature and consequences of his act, or acted with an irresistible impulse?" Or he may ask, "Do you have an opinion about whether or not the present mental condition of the plaintiff John Jones is related to the accident which occurred on such and such a date?" After these questions are answered in the affirmative, counsel then asks, "What is your opinion?" and after that is answered, he says, "Would you please explain to the jury how you reached

your opinion?" From this point onward, all of the expert's testimony will be for the purpose of presenting an explanation of how he arrived at his opinion. This will require a full description of his theories, of his data-gathering techniques, and of the inferences he draws from the data through the use of his theories. When he has finished, the fact-finder should know exactly how he arrived at his conclusions.

5. The Expert's Translation of the Legal Question into His Own Operational Language and Theory

In every case, the language of the legal question before the fact-finders will not coincide with the language that the expert will use in his conceptualization of the problem. Therefore, his first task must be to translate the legal expressions into the verbal form in which he will explore and discuss matters. This will enable the jury to know precisely how he is perceiving things so they can tell whether he is proceeding in the same direction they are. This crucial first step in the testimony provides the only way to avoid having the expert's testimony emerge in the form of a "conclusion of law" (*e.g.*, "he knows right from wrong"), something which he is not entitled to do.[21] Let's illustrate this point.

In the above question regarding "criminal responsibility," the expert would proceed to clarify along some line such as this.

"First of all, when I approach a question like this, I must translate such words as *right* and *wrong* and *knowing* into descriptive terms of mental behavior as I observe them. For example, take the word *knowing.* To me, the word knowing reflects a complicated mental *process,* which involves a whole series of discrete psychological activities which I must evaluate one by one, before I can find out whether or not a person 'knows' something. First, they must have the capacity to *perceive.* This means that their neurological perceptual apparatus will be intact and functioning well, because without that, there is no way in which they could know. Then they must be able to *remember* what the perceptual cues mean, so that they may sort out and understand what it is that they are experiencing. Next they must be able to sort out all of these newly experienced bits of information and relate them to their past memories; their *integrative* function must be intact, etc." It may be seen that the expert is translating the process of knowing into the separate and discrete functions of the ego, which is what he will examine in order to arrive at his opinion about "knowing." He is literally teaching the fact-finders the theoretical propositions that he uses to make up his mind about this issue.

This same procedure will be used in relation to the concepts of *right* and *wrong.* Here the relevant theory comes from the way in which *superego* is formed and how these concepts are related to this particular defendant's psychic economy. Step by step each relevant point of law is translated into its psychological counterpart so that the fact-finder can know precisely how the expert witness evaluates the subject's behavioral activities. By the time he has completed this description, there should be no guessing at all about what is being evaluated, and the fact-finder should be able to follow his explanation closely. This procedure should be followed in all cases and questions.

Let us now turn to the other questions about the expert's role, which must also be delineated in the testimony. For example, one of the first challenges which should be made to any psychiatric expert relates to the fact that "he was not there" at the time the events occurred, so how can he know what happened? This is true, of course, and must be "given away" immediately. If one did not observe the actual events, what makes it possible to reconstruct them? The answer to this question relates to another important item of theory which always must be explained fully to the fact-finder. Central to all theories of human behavior is the concept that each human being develops a finite set of adaptive techniques, which allows an expert to reconstruct past activities and make predictions about future acts. Although this is what we earlier described as a "repetition compulsion," it may be described to the jury in the form of the familiar adage, "As the twig is bent, so doth the tree incline." Everyone has heard this and thus can easily understand the meaning of this theoretical construct. It can also be described to the jury through familiar examples; for instance, once a style of walking or a golf stroke becomes automatic, it is very difficult to change. These illustrations are readily understood.

Next, there will be specific dynamic elements in relation to the case, such as the impulse to kill, which must be described as theoretical propositions in a form that will enable laymen to see how the expert perceives them and tests for their presence through his examination procedures. The way in which the mind builds up a conscience and then uses it in the psychic economy will be delineated. The different kinds of defense mechanisms used by the client as well as what they mean in his mental activity will be presented. By the time this portion of the testimony is completed, the jury should understand what the expert seeks to describe in relation to the specific behavior of the client, which is at issue in the trial at hand.

Next, the expert turns to a description and evaluation of the examination data that he utilized to reach his decision. He will go through each of his sources and describe precisely what weight he accorded to it and how he checked it for accuracy. The first source is usually the subject's history. For the most part, this information is mostly obtained directly from the client; it is never viewed as factual in terms of what actually happened. Rather, it is regarded as the subject's *memory* of what happened, and although it may not be historically accurate, it does provide the best image of the individual's perception of the events. In this regard, the account provides a precise reflection of his mind-state.[22] Since that mind-state is exactly what the examiner is seeking to understand, the history is an excellent, if not the best, source of information. However, to ascertain exactly what did happen will require the careful and systematic use of information from many other sources. Just as "history" is assembled from many sources with the technical requirement to sort, challenge, discard, and reassemble, so a personal history is developed in this manner. Each person's data must be "discounted" for its systematic bias. These biases are not conscious nor deceitful, but rather reflect the experiential skewing that is the product of the individual's life. This is the central goal of a skillful psychiatric examination. In this way, the examiner is able to define progressively the systematic distortion that the subject brings to his experience. When this distortion is understood fully, it

becomes possible to "read" all of his communications and understand them in relation to his personal adaptive methods.

Corroborating information allows the examiner to find out what "really" happened in the situations under study (although, as previously mentioned, the corroborators themselves will have systematic distortions which must be understood). This corroboration may come from other individuals, from documents written by the subject, or from the multitude of school, medical, army, or other records that we all leave behind us in the wake of living.

The most precise examination tool that a skillful psychiatric expert utilizes is his capacity to read the communication transactions between himself and the patient. This interactive process, the transference-countertransference, provides the only data immediately accessible and testable by the examiner. If, for example, the psychiatrist has developed the image that the subject has difficulty acknowledging his angry feelings and avoids them by invoking the psychological defense of denial, that deduction can be readily tested. During the course of the interview, the examiner will have detected certain subjects sufficiently disturbing psychologically to the subject to stimulate discomfort and anger. Thus, a question can be asked that is the psychological equivalent of a kick in the shins. The normal response to such a kick would be pain, followed instantly by anger. If instead the person smiles at the kick, the examiner may accurately deduce that the defense of denial is being used. The reasons for the denial are not yet revealed, but the response is unequivocally clear.

Once the examiner has gone systematically through the psychological information generated and had explored it precisely in relation to the transference data, he has a sound method for testing his diagnostic formulations.[23] These observations and the deductions drawn from them should also become clear to the fact-finders, when they are led back to reflect on what they observed of the subject. It is through these data that the expert is able to develop maximum credibility.

After all of the information has been elicited, studied, and integrated, a systematic, logical, and consistent picture of the subject's personality should emerge. If any significant piece of information does not fit into the diagnostic formulation evolved, then the formulation must be in error, presuming that the data are correct. It will have to be re-examined in light of the exception, and that data accounted for. In the end it is this total integrity of the formulation that gives the expert testimony its credibility and its weight, and distinguishes it from the ordinary kind of expert testimony profferred, which is largely laden with conclusions and labeling information which communicate neither the source nor the significance of the information reported.

6. Substance of the Examination

At this point, since the theoretical presumptions have been laid out fully to the jury, the testimony moves to its substantive presentations about the psychological nature of the person involved. The full diagnostic formulation is set forth. It will be correlated with the subject's childhood and family history, with details about his educational experience, and with the other relevant social information needed for a complete psychological description

of the subject and his behavior. Since much of this information will have become apparent through the testimony of corroborating witnesses, the fact-finders will already be aware of the salient features of the client's background. The presentation of the expert will draw it all together and make psychologically sound conceptual sense of it.

This presentation will describe the client up to the moment of the crucial event, which is the focus of the trial, and its form will prepare the fact finder to consider the *denouement,* which resulted from the encounter between a ready subject and the "right" set of circumstances. Sometimes even the fates take a hand at this point. It will be described and analyzed in terms of *what the episode meant to the subject of the trial.* Usually, his perception of the episode will be quite different from that of others, and the fact-finder must be helped to see it as the subject did. (This raises all of the technical legal problems of "objective" versus the "subjective" standards of perception.) For example, although a rear-end collision would be frightening to anyone, some individuals will "surcharge" the incident with additional meanings that may have extreme and sometimes tragic consequences to their psychic economy. These meanings, as well as their psycho-historical origins, must be laid out fully and then related to the consequences, in order that the precise physical and psychological nature of the episode will be comprehensible to the fact-finder. If this synthesis is not carried out, it leaves the fact-finder with that burden, which he can carry only rarely. In other words, when the expert testimony has been completed, it should have:

1. Laid out clearly the theories and techniques that the expert used to fulfill his task.
2. Thoroughly organized *all* of the data in the case.
3. Provided a clear "explanation" of the relationship of data to the issues being adjudicated.
4. Presented an affirmative recognition and acceptance of *all* vulnerable portions of the data in the case.
5. Set forth a stark and clearly stated model of explanation, which will be held up to the opposing expert who shall be pressed to follow it in the cross-examination.

Expert testimony presented in this form will create a *gestalt* that has integrity and internal logic, and this should be palpable to the fact-finders and give the testimony maximal credibility and persuasiveness. As we have already noted, this testimony should be presented immediately after the fact-finders have had the opportunity to observe the subject of litigation on the witness stand for themselves. The direct examination of the subject should have emphasized those aspects of his personality central to the diagnostic formulation, so that the fact-finders have experienced them directly. I do not believe that there is any other way to present a case with psychological logic and persuasive impact for the fact-finders. "If you are going to be so open in the presentation of your case, why won't you let us see the subject for ourselves?" This *caveat* is absolutely logical, and if the fact-finder is not to see the subject, the psychological explanation probably should not be utilized. This common-sense judgment on the part of the fact-finder has psychological validity, and no amount of admonition by the judge about the "law" will likely set it aside. Such intuitive perceptions

cannot be touched by instructions from a judge.

F. Cross-Examination

If the direct examination has been carried out as described above, the expert should have little concern about the cross-examination. The cross-examiner only provides opportunity for reiteration and continued persuasion. Since all of the vulnerabilities in the case will have been fully elaborated on direct examination, nothing can be added on cross-examination. Similarly, if the pre-trial preparation was thorough, there should be no surprises forthcoming on cross-examination. The lawyer encountering this kind of direct testimony probably should seriously consider limiting cross-examination to a minimum in order to avoid adding persuasive weight through reiteration.

After counsel has prepared his expert's testimony in the form described above, the cross-examination of the rebuttal expert witness should be directed toward forcing him to deal with the same technical and theoretical issues presented in the direct testimony of counsel's own witness. Even if the witness alleges to have a different theoretical orientation, there is no logical way for him to avoid dealing with the considerations we have set forth. If reconstruction is called for, he must have a theory to do it. If prediction is at issue, it must also have a theoretical basis. Needless to say, the data utilized must be clearly set forth, and counsel should not settle for such conclusory words as the presence or absence of "hallucinations," whether or not the subject is "well oriented as to time, place and person," or other technical jargon only peripherally relevant to the issues at hand. If the pre-trial data sharing described above has been carried out fully, by the time the opposing expert comes to the witness stand all or most of the word games that often characterize this kind of testimony will probably have been stripped out.

In preparing experts for trial, counsel should make sure that they have been fully instructed about the precise legal implications of the task they are to carry out. For example, most physicians (and presumably others) have no notion whatsoever about what it means to give "opinion evidence." They unwittingly confuse opinion with "scientific validity," and because as scientists they are well aware of the lack of validity of their views, they present their evidence in a hesitant and hedging way. This result reflects more of the confusion about what opinion evidence is than confusion over their observational data and the inferences drawn from that data. This crucial piece of knowledge about evidence must be laid out carefully for experts.

Another common cross-examination tactic which lawyers use to the utter confusion of most laymen is having the expert define the crucial words in the predicate. For example, after praising the unwitting but now flattered expert, the cross-examiner will ask the question (carefully separated by several sentences from the original proposition), "By the way doctor, what is the cure rate for schizophrenia these days?" If schizophrenia was thought to be an issue in the trial, the expert would likely be able to give an answer to such a seemingly innocuous question, and would do so. At that point cross-examining counsel snaps the trap shut and follows up with the devastating question, "By the way doctor, what do you mean by 'cure'?"

The innocent victim will then struggle to explain what he means, and whatever choice he makes among the many controversial alternatives, the well-prepared lawyer will confront him with the other definitions *seriatim.* Before long, cross-examiner and expert are engaged in a delightfully confusing semantic exploration which leaves the fact-finder completely baffled, precisely the result sought by counsel. After that devastation is complete, a similar tack will be taken in relation to the word *schizophrenia.* Good preparation of the witness by counsel can stop these obfuscating tactics completely. For example, the well-prepared and skillful witness will answer the first question something like this: "Well now, counselor, I believe I know what you mean, but to make sure that I do, perhaps you should tell me what you mean by 'cure'." Counsel will then "generously" comment, "Well, Doctor, since *you're* the expert here, you probably can answer that." To which the expert pleasurably states, "That's correct, I am, but that is why I want to make sure I know what *you* mean when you use the word, because it is so controversial."

By now, counsel knows that the witness understands the true purpose of the question, and he will begin to regret that he ever asked it. He will attempt to extricate himself as gracefully as possible by saying something like, "Well, I guess we don't need to deal with that question." From that point on his questions will be straightforward and bona fide.

Another old chestnut, not much used any more, was the attempt to panic the expert by prominently displaying on counsel's desk a double armload of texts on the subject, their spines carefully facing the witness box. The unsuspecting and unsophisticated witness will quickly run down the stack and gasp when he sees an authoritative volume that he forgot to check the night before. In other words, he believes he has a duty to know what everybody has ever said on the subject at issue. Of course, such is not the case. Counsel must teach his witness that the only expert sources he *must* know thoroughly are those he might choose to quote himself. While a truly expert witness will have read voluminously and could comment extensively on the literature, *he will not be able to quote chapter and verse, nor should he try,* because of the vulnerability he would then expose. When opposing counsel introduces an issue with a statement like, "Of course Doctor, I am sure you know what Karl Menninger says on this subject," the expert should answer, "Well, I probably have read what Dr. Menninger says, but I read so much that perhaps you should give me the quotation to which you want me to respond." This forces counsel to read the statement, permitting the expert to comment on the Menninger view, which he can then readily do. In other words, the expert witness should be carefully instructed that if he refers to a published source to corroborate his opinion, he may then be cross-examined about the *entirety* of the source, as a legitimate test of his credibility. These are the kinds of technical points that counsel must teach his expert witness about well before the trial begins. If he does so, then the witness can feel at ease, comfortably esconced in the knowledge he possesses about the case, which he has expertly ascertained, synthesized, and then formulated. Under these circumstances he will have no trouble dealing with the cross-examination process, and he may even find the experience intellectually stimulating.

H. Redirect Examination

Following this form of presentation, the only purpose of redirect examination should be to "reassemble" such distortions as were produced in cross-examination by taking material and issues out of context. Because counsel will have done his homework well enough to know exactly where the issues of psychological importance are, he can readily move to the pieces that need contextual reiteration to remedy for the fact-finder the cross-examination distortions. Since the expert should have been able to cope with the cross-examination easily, as described above, this portion of the testimony should be very brief indeed.

Conclusion

It has been the purpose of this paper to present *a* way of dealing with the problems of developing and delivering expert psychiatric testimony. Although there are different modes of presentation, all of them must deal with the issues described here, if such testimony is to be useful and effective in a trial. Then psychiatric insights about the nature of criminal behavior, as well as other legally relevant psychological processes, can help to educate the public, as well as to impact on the common law and legislative processes. Those effects will be socially useful.

References

1. A good example of this attitude may be seen in the broadside, *Monomania*, written by "Dry Nurse." It was published in 1843 in London by Saunders and Otley, of Conduit Street. One stanza reads,

   XCVI. "Doctors were not subpoen'd, to shield of knave from common justice, righteous retribution – by flimsy, barefaced artifice to save a brutal murderer from execution – to prove him mad, who'd ne'er been heard to rave, or labour under mental prostitution; to prove him mad, by theories, too wild, too weak, too silly, *to deceive a child*."

   I am indebted to Dr. Bernard Diamond for allowing me this volume from his library.
2. For some excellent descriptions of these dynamics see the following Isaac Ray Lectures: Zilboorg G: The Psychology of the Criminal Act and Punishment, N.Y., Harcourt, Brace and Co. (1954); Biggs J: The Guilty Mind, N.Y., Harcourt, Brace and Co. (1955); Weihofen H: The Urge to Punish, N.Y., Farrar, Straus and Cudahy (1956), pp. 130-170; Roche P: The Criminal Mind, N.Y., Farrar, Straus and Cudahy (1958); Menninger K: The Crime of Punishment, N.Y., The Viking Press (1966), pp. 190-218.
3. This proposition has been put by many, including the following: Menninger K: The Crime of Punishment, N.Y., The Viking Press (1966), p. 139; Szasz T: Law, Liberty and Psychiatry, N.Y., The MacMillan Co. (1963), Chapter 10; Goldstein T: Albany is urged to curb defense on insanity plea, N.Y. Times (19 Feb. 1978), pp. 1, 39. This article reports the current debate in the N.Y. Legislature about eliminating the defense of insanity.

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