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## **Testifying in Court as an Expert Witness**

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Expert opinion has played a part in the legal process for centuries. At first, experts were invited to serve on juries, then in the late Middle Ages they began to testify as witnesses. During the eighteenth century, the testimony of experts in various fields became institutionalized in England (Cross & Tapper, 1990; Hodgkinson, 1990; Learned Hand, 1901).

The first psychologist to be called as an expert witness was probably the German Albert von Schrenck-Notzing, who testified in 1896 in the trial of a Munich man accused of murdering three women (Bartol & Bartol, 1987). His evidence focused on retroactive memory falsification – confusion among witnesses between what they saw and what they subsequently learned of an event. At about the same time in the United States, Hugo Münsterberg acted as a psychological consultant in two murder trials, and although his own evidence was not admitted in court he became a forceful advocate of psychological testimony in particular and forensic psychology in general. He was the first psychologist to collect empirical evidence specifically for use in legal cases, and his research into reaction times between rifle shots (Münsterberg, 1899) was still considered relevant more than half a century later in the controversy surrounding the number of assassins involved in the killing of President John F. Kennedy (Haward, 1979).

Münsterberg's (1908) pioneering though controversial book on psychological testimony, *On the Witness Stand: Essays on Psychology and Crime*, was followed by many others dealing exclusively or largely with this topic. Present-day psychological witnesses will find the following books, in differing ways, especially useful: Brodsky (1991), Gudjonsson (1992), Gudjonsson and Drinkwater (1987), Haward (1981), Lloyd-Bostock (1988), Loftus and Ketcham (1991), Shapiro (1984), and Weiner and Hess (1987).

### **Psychologists Who Testify**

Recent decades have seen a dramatic increase in the frequency with which psychologists have been called as expert witnesses in the United States, and to a lesser extent in Britain. A survey carried out by the British Psychological Society revealed that 92 per cent of psychologists who had testified in court or in front of a tribunal were either educational or clinical psychologists (Lloyd-Bostock, 1988, p. 137). Educational psychologists are often involved in assessments of juvenile offenders and of children who are the subjects of custody disputes between divorcing parents, and they are sometimes called as expert witnesses. A growing minority of clinical psychologists specialize in forensic psychology and spend a large part of their working time preparing evidence and testifying in court.

Other categories of psychologists who are called as expert witnesses from time to time include prison psychologists, who often contribute to assessments of offenders and occasionally give supporting evidence in court, occupational psychologists, who sometimes testify in cases involving employment discrimination or personal injury, and academic psychologists, a small number of whom who testify on other specialized issues.

The law allows most witnesses to testify only about facts, but expert witnesses are uniquely permitted to give evidence of their opinions as well. Questions that have been put to

expert psychological witnesses include the following (adapted from Haward, 1981): Is the accused's confession likely to be genuine? Did the plaintiff suffer brain damage, and if so what are its likely long-term effects? Is the appellant a fit person to have custody of his child? Is the memory of this witness likely to have been improved by hypnosis? Is this person's mental condition such as to require her to be detained under the Mental Health Act for the protection of others? Is the accused psychologically fit to stand trial? What psychological evidence is available regarding the suggestibility of child witnesses when being interrogated by police officers? Is this person's eyewitness identification of the accused likely to be trustworthy? Does this person suffer from severe learning difficulties, and if so how is this likely to affect his earning power? What are the likely effects of long-term alcohol abuse on this person's memory? Is the accused's behaviour likely to have been significantly influenced by social psychological effects during this incident of mob violence?

### **Preparation**

Testifying in court is a daunting ordeal for almost anyone, and few if any expert witnesses ever become comfortably habituated to it. The awe-inspiring architecture and furnishing of the courtroom, the bizarre dress conventions in some courts, and the solemn rituals governing courtroom proceedings are all calculated to impress on witnesses the gravity of the occasion. If all that is not impressive enough, then hostile and determined cross-examination is virtually guaranteed to disconcert even the most nonchalant expert witness – that, after all, is often one of its primary objectives.

The outcome of a case may depend crucially on expert testimony, and the expert knows that a great deal is at stake, otherwise the matter would not have ended up in court. The expert's own professional reputation is inevitably on the line, which increases the pressure still further. Nothing can be done to make the job easy or stress-free, but adequate preparation can go a long way towards reducing anxiety and facilitating the effective presentation of evidence. This involves judicious preparation of evidence and, equally importantly, mental preparation.

### **Preparing Evidence and Writing Reports**

The expert witness's first task is usually to prepare a written forensic psychological report based on information gathered from interviews and (if appropriate) from psychological tests. The report, to which is normally attached a brief curriculum vitae outlining the expert's formal qualifications and experience, is usually disclosed to lawyers representing the opposing party. Its preparation and organization can have a significant bearing on the outcome of a case. Practical advice on preparing reports can be found in Carson (1990, pp. 30-32), Gudjonsson (1992, pp. 304-305), Hodgkinson (1990, pp. 84-88), and Shapiro (1984, pp. 181-189).

Forensic psychological reports often need to deal with issues that do not arise in other types of psychological reports. Perhaps most importantly, expert witnesses often have to be alert to the possibility that clients are malingering, whereas in other circumstances psychologists can usually take the behaviour and symptoms presented by their clients at face value. Malingering is often a pivotal issue in criminal trials, because a person who was mentally disordered at the time of an alleged offence may for that reason alone be found not guilty, and one who is mentally disordered at the time of evaluation may even be declared unfit to stand trial. In civil litigation, a plaintiff who suffers from some psychological incapacity as a result of a head injury sustained in a road traffic accident, for example, may be entitled to substantial damages. In all such cases the likelihood of malingering should be evaluated in the light of all the available evidence, and the issue should be addressed directly

in the report.

A report should be confined to answering the question(s) posed by the instructing solicitors. The individual who is the subject of the report should be interviewed and assessed with diligence and circumspection, using the most appropriate techniques and instruments. All available evidence, including tape-recorded police interviews where relevant, should be asked for and studied. A diligent expert witness will also review current literature in the relevant field before preparing a report. The report should be written in plain, jargon-free language, and it should be balanced and scrupulously honest. Its conclusions should be concrete and explicit, citing wherever possible the facts on which they are based. Uncertainties, where they exist, should be incorporated with appropriate qualifiers – ‘probably’, ‘I feel fairly certain’, ‘in most cases of this kind’, and so on. It is a dangerous fallacy that only absolute, cut-and-dried conclusions are acceptable in court.

If the instructing solicitors are not satisfied with the conclusions of the report, they may simply ignore it and decline to call its author as a witness. They may instruct another psychologist, in the hope of obtaining a more favourable report. Alternatively, they may ask the original psychologist to modify the report or to delete the unfavourable points. A psychologist who is asked to alter a report in a way that might mislead the court should, of course, refuse to do so (Gudjonsson, 1992), but reasonable suggestions designed to improve the clarity of the report should not be rejected out of hand.

It is a good idea to structure the report as a series of numbered points or paragraphs (Carson, 1990). This helps to systematize the material and makes it easier for everyone concerned to refer to specific parts of the report during the presentation of oral evidence and the judgment. A report that is presented clearly, comprehensively, succinctly, and above all persuasively is often accepted by the lawyers on both sides of the case without the psychologist having to testify orally.

### **Mental Preparation**

Before testifying in court for the first time, a psychologist should, if possible, visit the court while it is in session in order to become familiar with its layout, rituals, and general ambience. The discomfort that most people feel in court tends to diminish quite rapidly as a function of the amount of time spent in it. It may be useful to know that the law allows experts, unlike lay witnesses, to sit in court and listen to the evidence of other witnesses in their own cases before testifying themselves (Hodgkinson, 1990, p. 107).

In the United Kingdom, most minor criminal trials take place in magistrates’ courts. The magistrates who hear a case are either three unpaid Justices of the Peace, selected from the community, or one legally trained stipendiary magistrate, and the lawyers who argue for the prosecution and the defence are solicitors. Serious criminal cases are heard in a crown court in front of a judge and (except in Northern Ireland) a jury of twelve members of the general public. In a crown court, the prosecution and defence lawyers are barristers rather than solicitors, and both they and the judge wear wigs and black gowns. In both types of court the proceedings are run by a clerk and a court usher who calls witnesses and carries messages and exhibits. Most civil (non-criminal) cases are heard in county courts presided over by circuit judges and recorders or, in difficult or specialized cases, in the High Court, both of which resemble crown courts.

### **Presenting the Evidence**

Expert witnesses are often anxious about how they should dress for court. It is advisable to avoid casual dress but, as far as possible, to wear familiar and comfortable clothes. Clothes that are likely to attract attention for any reason at all are inappropriate.

The first thing that happens after a witness has been ushered into the witness box is the administration of the oath. The witness is asked to swear on the Bible or other appropriate holy book to tell the truth. The witness normally reads the oath off a card, and an atheist, agnostic, or heathen is allowed to affirm by reading a non-religious declaration, but it is worth considering whether this could convey an unfavourable impression to the magistrates, judge, or jury.

Carson (1990, p. 11-12) has pointed out that the ritual of taking the oath provides witnesses with a golden opportunity to range their voices in order to establish the optimal volume and pitch for audibility and comfort across the unnaturally large spaces of a typical courtroom. Carson advises witnesses to take their time and to declaim the words of the oath with feeling: nothing but good can come from appearing to take them seriously, and magistrates, judges, and juries form their crucial first impressions of witnesses at this point. It is inadvisable to repeat the oath from memory, unless it has been very carefully memorized, because if even one word is wrong the witness will be corrected immediately and may consequently feel (and look) foolish.

After taking the oath, expert witnesses usually begin their evidence-in-chief by testifying about their qualifications and experience in order to establish the basis of their expertise. The lawyer leading the examination-in-chief usually draws attention to key points from the expert witness's curriculum vitae and simply asks the witness to confirm them. During this preliminary phase of the evidence, since no cognitive effort is required, a witness has a further opportunity to settle down.

An appropriate form of address should be used when speaking directly to the court. Witnesses should address magistrates as 'Your Worship(s)'; but if that expression sticks in the gullet, then 'Sir' and 'Madam' are generally acceptable, although neither is grammatical when addressing a full bench of three magistrates. Circuit judges, recorders in county courts, and crown court judges, apart from judges in the Central Criminal Court in London (the Old Bailey), should be addressed as 'Your Honour'. High Court judges, and by tradition judges in the Old Bailey, although it is really only a crown court, are addressed as 'My Lord' or 'My Lady'. In tribunals, 'Chairman', 'Madam Chair', 'Sir', or 'Madam' are generally appropriate forms of address.

Witnesses are often advised to stand in the witness box facing the bench and to direct their answers directly to the magistrate(s) or the judge and jury, if there is one. This is a difficult and unnatural way of conducting a dialogue, because our natural impulse is to reply directly to the person who asks the questions. As long as the replies are loud and clear enough to be audible throughout the courtroom, replying directly to the lawyer who is asking the questions should do no harm, although replying to the court is more correct and preferable for various other reasons (Carson, 1990).

Expert witnesses may take whatever notes they wish into the witness box, but if they do, lawyers representing the opposing party are then entitled to ask to see them and to base questions and arguments on their contents. Formal psychological reports are usually taken into the witness box, because they have usually been disclosed already and because questions are likely to refer to them repeatedly.

Testimony begins with the examination-in-chief, in which the psychologist often simply confirms and clarifies the evidence in the written report. This is followed by cross-examination, conducted by a lawyer representing the opposing party, which is designed to undermine the testimony. Brodsky (1991) and Carson (1990) have suggested numerous guidelines and maxims for handling difficult questions during cross-examination. The golden rule is to listen attentively and to answer carefully and objectively. Expert witnesses should keep the limits of their expertise clearly in mind, and if they do not know the answer to a

question, they should not hesitate to say so. The most common faults of expert witnesses include waffling instead of confining themselves to answering the questions, being afraid of expressing opinions, exaggerating, answering questions defensively, speaking inaudibly, over-qualifying statements, using jargon, and appearing to be partisan rather than objective.

Expert witnesses should unhesitatingly concede valid points that appear to favour the opposing side, but they should be assertive enough to stand their ground and to avoid crumpling unnecessarily in the face of hectoring or intimidating cross-examination. They should never fall into the trap of becoming angry in response to sarcastic or bullying cross-examination (or cross-making-examination, as it might be called). Emotions aside, it is seldom if ever right to change a professional opinion as a result of cross-examination; expert opinion should be grounded in the relevant literature and data.

### **Ethical and Professional Issues**

Psychologists who are asked to testify as expert witnesses often face ethical and professional dilemmas (Colman, 1991; McLoskey, Egeth, & McKenna, 1986). If a defendant appears to be guilty of an especially despicable crime, the first dilemma may revolve around whether simply to refuse to testify for the defence. Although there is no compelling professional duty to testify – nothing comparable to the ‘cab-rank rule’ according to which barristers are obliged to accept briefs within their fields of practice as long as they are available – there are at least three powerful arguments in favour of testifying in these circumstances. The first rests on that precious element of the rule of law known as the presumption of innocence, according to which any defendant is rightly considered innocent until proven guilty. The second argument is that it is the job of the magistrate(s), judge, or jury, and not the expert witness, to decide questions of guilt or innocence. The third argument is that innocent people are often falsely accused, and those charged with the most heinous crimes – who face the heaviest sentences if convicted – should be defended at least as vigorously as anyone else.

After agreeing to testify, a dilemma often arises between presenting controversial psychological issues even-handedly or slanting them selectively in favour of the client’s case. This dilemma arises from the incompatibility between the methods of truth-seeking of psychology and the law (Colman, 1991; Loftus & Monahan, 1980). Psychologists are taught to seek the truth through the detached and dispassionate application of the scientific method. Lawyers, in contrast, seek the truth through adversarial court cases in which each party presents the arguments and evidence that support its own case and vigorously attacks those presented by the opposing side, and the magistrate, judge, or jury referees the debate and decides where the truth lies.

Expert psychological witnesses who are caught between these two incompatible approaches to truth-seeking should remain true to their own profession. Although they may be subjected to direct and indirect pressures from lawyers, they should adhere firmly to the *Code of Conduct, Ethical Principles and Guidelines* of the British Psychological Society (1991). They are duty bound to give fair and balanced testimony, especially on controversial issues. Although the client’s lawyers hope and expect that the evidence will help their case, the expert’s proper function is not to help the client to win the case but to help the court to reach the right decision. Prejudicial testimony undermines the reputation of both academic and professional psychology and the credibility of all future expert psychological witnesses.

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The witness will have no choice to testify, unless doing so places her at risk of conviction of a crime. If she has committed a crime or is concerned that testifying will place her at risk for being charged or convicted of a crime, she still has to show up, but she can "plead the 5th." If you require legal assistance, please contact a lawyer in your area. (more) 3.7K views · View 12 Upvoters. Justin Schwartz, Lawyer, 15+ years practice; clerk on 7th Cir. and N.D. Ill.; Former Asst Prof. of Law, John Marshall; affiliated with several law firms. A few are identified as expert witnesses if so declared in the field of narcotics, handguns, chemical testing, forensics, etc. If a beat officer/patrolman made the arrest, he is probably a fact witness. I am trying to give you a general answer to your question. We do not have an attorney-client relationship by this response on the avvo website. I have not been retained to represent you. I am licensed to practice law in Kentucky and in federal court in this state and the Southern District of Indiana. You need to seek legal advice from an attorney licensed to practice in your area. More. 0 fo In addition to disclosing an expert witness's identity, the Federal Rules call for additional disclosures. Unless there are other orders by the court or stipulations to the contrary, when disclosing an expert witness, the party must also disclose a report, prepared and signed by the witness. The report must include the following information: All opinions the witness will testify to, as well as the basis and reasons for the opinions held. The data or facts the witness considered when forming their opinion. Consulting experts, even if they don't plan to call them as testifying witnesses at trial. On the other hand, in *Ager v. Jane C. Stormont Hospital and Training School for Nurses*, 622 F.2d 496 (10th Cir. 1980), the United States Court of Appeals for the Tenth Circuit held the opposite. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and. Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include