

EXPERT WITNESS MENTAL HEALTH TESTIMONY: HANDLING DEPOSITION AND TRIAL TRAPS

Donald A. Eisner, Ph.D., J.D.

Expert witnesses face daunting challenges during deposition and cross-examination at trial. The opposing attorney is attempting to impeach the credibility of the expert. Areas that may be pursued include: 1) bias—including whether has the expert has a conflict of interest or stake in the outcome of the case; 2) qualifications and ethics—including who is actually providing the testimony and whether they are qualified to do so; 3) invasion of privacy—Must tax returns be turned over to the opposing attorney? What intrusive questions need to be answered? 4) hypothetical and difficult questions—The cross-examining attorney attempts to rattle and unnerve the expert. The implications for not avoiding impeachment can be serious in that there can be criminal and civil actions as well as administrative sanctions brought against a negligent and/or unethical expert witness.

An expert witness, defined under Federal Rule of Evidence 702, can be subjected to a wide array of questioning. At a deposition, the opposing attorney is given some latitude and may inquire into areas which may seem intrusive. The experience can be quite intense. A treating or percipient witness may not face some of the hurdles that confront an expert witness.

The expert witness, unlike the treating therapist, is called upon to render an opinion on issues such as standard of care, as well as various other medical legal issues. At a deposition, the opposing attorney may embark down several avenues in order to discredit or impeach the expert witness. At trial, the cross-examining attorney likewise attempts to impeach the credibility of the witness and bolster his side of the case. An expert witness may be engulfed in four main deposition traps: conflict of interest, credibility, invasion of privacy, and hypothetical and difficult questions. Even if nothing substantive emerges in the deposition, or under cross-examination, the expert witness who becomes agitated or unnerved is ultimately entrapped. The risks inherent in these traps are discussed. Several suggestions are offered on how to handle or avoid the traps.

CONFLICT OF INTEREST

An expert witness can be examined for bias. This can include a personal or social relationship with the hiring attorney. Bias may be explored by way of how many cases the expert has performed for a particular attorney, as well as whether the expert does only defense or plaintiff work. The nature of the expert's forensic practice is a routine area of inquiry. The expert should be able to answer in a direct and nondefensive manner. Should there be some evasiveness, red flags may emerge, and lead to further questioning.

Another area of concern, which may have lessened in the last decade or so, has to do with the arrangement with respect to payment. A contingency fee arrangement generally is frowned upon and in many jurisdictions is prohibited. In *First National Bank of Springfield v. Malpractice Research, Inc.* (1), it was found that the contingency fee arrangement between the expert witness and a consulting group was void as contrary to public policy.

Furthermore, it should be noted that a split fee would also be frowned upon. An example might be an expert witness stating that he or she is willing to accept payment for \$200 an hour, which is below his normal fee of \$500, but in the event of a successful resolution of the case, in addition to the \$200 per hour he would accept 10% of recovery.

Another potential bias trap is to accept a contingency fee as a consultant. In this instance, the expert would simply be reviewing records and deposition testimony, and offering other types of advice. Problems can occur if the consultant were to be designated in order to provide deposition or trial testimony. In this instance, obviously, the expert would have to disclose the nature of the contingency, or split fee arrangement, at the time of the deposition or at trial. Needless to say, the expert witness' credibility would be severely undermined when admitting to having a stake in the outcome of the case. Even if the expert is not directly involved in different payment schemes, a case for bias could still be made. For example, if the attorney accepts the expert witness fee with a consulting company, it could be argued that the expert witness panel company may have an untoward stake in the outcome the case. Secondly, there may be a separate agreement between the expert panel and the attorney and the consulting company. The arrangement may be unknown to the expert witness. However, if the contingency fee arrangement is dis-

covered in a deposition or at trial, it may prove to be somewhat uncomfortable for the witness.

Another aspect relating to bias or conflict of interest is when a treating therapist is called upon to perform expert witness testimony. As Gutheil and Hilliard (2) point out, the expert has different clinical, legal and ethical requirements. The distinction is so stark that Reid (3) suggests that nonforensic clinicians should not accept forensic referrals. At the very least, the issue of bias will emerge. The treating therapist may have an inclination to support the former or current patient. The witness may be seen an advocate rather than an impartial or neutral evaluator.

Several organizations have ethics restrictions regarding changing roles from treater to expert. The American Academy of Psychiatry and the Law states that a clinician who accepts an expert role can have a negative impact on the therapeutic relationship. The guidelines specifically state that "treating psychiatrists should generally avoid acting as an expert witness for their patients" in a forensic setting (4). The California Association of Marriage and Family Therapist Ethical Standards 8.3 relates to avoiding conflicts of interests in legal proceedings (5). Specialty Guidelines for Forensic Psychology (6) at 6.02 discusses this issue in the context of multiple relationships. There is recognition that providing forensic and therapeutic services to the same person as specified in ethics rule 6.02.01 is a "multiple relationship that may impair objectivity and/or cause exploitation or other harm." A clinician who performs in both roles is supplying a tremendous amount of grist for the impeachment mill.

What happens if the treating therapist is an expert witness? It appears generally they cannot be compelled to offer testimony as an expert witness. For example, a radiologist made comments to a patient regarding issues related to her treatment. He was subpoenaed to testify and was asked questions that related to the standard of care (7). The radiologist made statements to the patient, who later was the plaintiff in the case, regarding the earlier treatment by another doctor. He did not have any further contact with the patient. However, eight months later, the radiologist received a letter indicating that a medical malpractice lawsuit was filed against the family doctor. The plaintiff's attorney wrote to the radiologist and asked for a letter that documented his opinions. As a treating physician, this would have transformed the radi-

ologist into that of an expert witness. The radiologist indicated in a letter that he did not want to get involved in the case and would not offer any opinions.

Probably not too surprisingly, the radiologist received a deposition subpoena. At the deposition, the physician refused to answer questions regarding negligence. There was a court hearing several weeks later and the judge ruled that the radiologist did not have to answer questions that related to expert witness opinions. Further, it was noted that the radiologist had fulfilled his duties as a percipient witness and did not have to act as an expert witness if he did not wish to do so. The latter portion of that statement by the judge is interesting in that if the radiologist did have a desire to express expert witness opinions as indicated above, this could greatly complicate one's professional life from an ethical perspective.

Furthermore, there is case law that specifically indicates that expert witnesses cannot be forced to testify. In *Glenn v. Plante* (8), the treating doctor had criticized the treatment of another doctor. Words were used that implied standard of care issues, such as treatment being "unwarranted." The case went to the appellate level in Wisconsin wherein the treating doctor was required to testify. The case was appealed to the Wisconsin Supreme Court where the Wisconsin Medical Society and the AMA filed a brief that opposed the appellate decision requiring the compulsion of the doctor's testimony. As it turned out, the Wisconsin Supreme Court reversed the appellate decision and stated that if there is not a showing of compelling circumstances, the expert witness should be free from testifying against their will.

The forensic mental health expert can easily avoid the conflict between the clinical role and the expert role. The clinician can refuse to accept an expert witness referral related to their client and, if subpoenaed, can politely refuse at the deposition to answer questions that go beyond the scope of a treating clinician.

Regarding potential or actual bias, the expert can use a checklist in order to ascertain if any areas might be problematic. For example: Has the witness been retained in large number of consecutive cases by the same attorney? Is there an unusual fee arrangement? Is the expert planning on writing an article or book based on the case? Does the witness have a personal or family connection with the attorney or the party to the case? Has the witness ever treated the plaintiff? Does the witness know the defendant?

QUALIFICATIONS AND ETHICS

In an attempt to impeach the expert witness, the opposing attorney may try to make a direct attack on credibility by examining qualifications and any ethical improprieties. At a deposition or a trial, this will take the form of an inquiry into the academic background of the witness. It is almost too obvious to mention that one's résumé should be accurate. There are numerous instances where the purported expert has embellished or fabricated the résumé. This has led to disastrous consequences, including charges of perjury. Following is an example of what might appear to be minor puffery in one's résumé:

The expert witness states in his résumé that he was a visiting professor at USC. The opposing attorney at the deposition of Dr. Smith asks:

Q: "Were you a visiting professor at USC?"

A: "Yes."

As it turns out, this particular witness was not a visiting professor, but rather taught a continuing education class on posttraumatic stress disorder for three weekends. This witness has no other affiliation with USC. Needless to say, upon further questioning, the witness would need to maintain the fabrication or admit to embellishment of his résumé. In either case, his credibility is severely tarnished.

There are a number of real life examples of professionals getting into difficulty by not being accurate with respect to their résumés. For example, a clinical social worker who claimed to be an expert had testified in family court matters (9). In various correspondences, the expert identified himself as a doctor and stated he held a doctoral degree in clinical psychology. The university he cited denied ever awarding the witness a degree.

In California, a computer forensic expert pled guilty to federal perjury charges because of falsifying his résumé and lying in court about his credentials. This expert witness was involved in child pornography cases. Federal agents became suspicious about his résumé. He claimed he went to the California Institute of Technology and the University of California at Los Angeles. However, the degrees he claimed he had obtained were not offered by

either school (10). When this witness was working on the child pornography cases, interestingly enough, he had already been qualified as an expert witness in computers and had submitted court testimony in several jurisdictions, including federal court in California and at least three California counties.

In *Drake v. La Portuondo* (11), the defendant was charged with murder and convicted in 1982. A purported psychologist stated that he was an expert in what was called “piquerism.” Allegedly, piquerism is a paraphilia in which sexual gratification occurs through penetrating someone else’s body by way of cutting or stabbing. The defendant, Drake, was convicted of two counts of murder and sentenced to prison. He appealed the decision, but it was affirmed. Ultimately, Drake was granted a new trial by the United States District Court of Appeals on January 23, 2009 (12).

Drake contended that the psychologist who testified against him at the trial on the so-called paraphilia had misrepresented his credentials. It was found that this expert’s qualifications were essentially perjured. Namely, his teaching experience and licensure were at question. Furthermore, the syndrome which he called piquerism does not appear to be an actual syndrome. The prosecutors in the case conceded that there was no record that this witness was ever an adjunct professor at Northern Michigan University and there was no prior record of him ever testifying as an expert witness as a psychologist in a criminal proceeding.

What if the expert does a slipshod job prior to offering deposition testimony or giving testimony at trial? There may be an increase in what is termed expert witness malpractice actions (13). It appears that the theory of expert witness liability is viable in some instances. Thus, the expert can no longer expect to not be involved in a negligence cause of action for offering negligent testimony. Furthermore, in *Davis v. Wallace* (14), the court indicates that there is an emerging body of case law, as well as articles, that question the granting of absolute immunity to expert witness testimony. This would include both in-court testimony and pretrial preparation.

At first glance, it appears that a witness might be found liable for changing position in midstream (15). A Federal District Court ruled that an expert witness in a medical malpractice case could be the proximate cause of the plaintiffs having their case dismissed. The plaintiffs had initially brought a case for wrongful death based on a premature release from the hospital.

The retained expert opined in an affidavit that the treating doctor performed below the standard of care, and that the patient was likely to have survived, had she remained in the hospital. The plaintiffs claimed that the expert abruptly changed his opinion in favor of the defense. Thereupon, the plaintiffs sued the expert for seven causes of action: professional malpractice, fraud, negligent misrepresentation, breach of fiduciary duty, breach of contract, breach of the implied covenant of good faith and fair dealing, and negligent infliction of emotional distress. The United States District Court dismissed the plaintiffs' action. The matter was brought to the United States Court of Appeals.

At the time of the expert witness deposition, the expert testified that he had not read the treating doctor's deposition, or was aware that it had been taken. He had never testified at trial before. At the deposition, the expert's opinion softened and seemingly was modified. He was no longer of the opinion that the patient would be alive within a reasonable degree of medical certainty had she been admitted to the hospital. It appeared that the witness found the opposing attorney to be what was described as "mean" and apparently was intimidated. Reportedly, the expert told the retaining attorney he did not want to lose his license. Subsequently, the retaining attorney sent the depositions from two nurses and the treating physician to the expert.

The expert then drafted an Addendum to his earlier deposition. Typically a percipient or expert witness makes a minimal correction for typographical errors, or may fill in some names. This Addendum directly contradicted his earlier opinion on causation and standard of care. Namely, he opined that there was no deviation from the standard of care in this matter. The expert sent the Addendum simultaneously via fax to the retaining and opposing attorney. The treating doctor moved for and was granted a summary judgment. Thereupon the plaintiffs sued the expert for the various causes of action. In a split decision, the case was considered viable by the Tenth United States District Court of Appeals. Whether there is immunity for expert witness was left undecided.

So can an expert change an opinion without risking a lawsuit? Yes, but not under the set of circumstances in *Pace v. Swerdlow*. In this matter, the witness could have reviewed the depositions and informed the retaining attorney in advance of the deposition about potential changes in his viewpoint.

Second, there was an implication that the witness changed his testimony for reasons unrelated to the facts of the case, i.e., he was intimidated and perhaps changed his mind to avoid a medical board investigation. Obviously, that line of reasoning can subject a witness to liability and destroy his credibility. Third, without consulting the retaining attorney, the witness sent a document to the opposing attorney. If there is a complete turnaround in an expert's opinion, the retaining attorney alone should be timely informed of any changes.

Ironically, the circumstance in *Pace v. Swerdlow* could lead to an ethics investigation. The witness needs to make a change in testimony on a good faith basis. For example, in one criminal case, the expert apparently was asked to alter his progress notes. He admitted to so doing. The state board revoked his license, stayed the revocation, and placed the mental health expert on three years probation (16).

What if the witness makes an unintentional error? Credibility can crumble under the weight of a good faith mistake. In *General Medical Council v. Meadow* (17), a British Court held that in the event of misstatements made during the course of litigation, the expert can be held accountable at a disciplinary hearing. The expert relied on a statistic he had gleaned from a report and in so doing miscalculated the rate of sudden infant death syndrome in two siblings. The case heightened the issue as to whether experts should be accredited by a governmental agency (18).

When allegedly factual opinions are presented, the information should be able to reasonably pass a *Daubert* (19) level of scrutiny. Following is an example where deposition testimony demonstrates a descent into an abyss. Assume the expert in a child custody evaluation administered the Rorschach and several other psychological tests. A diagnosis and conclusion was offered on the basis of the psychological tests and clinical interview.

Q: "Did you administer any psychological tests?"

A: "Yes."

Q: "Which tests did you administer?"

A: "The Rorschach, Beck Depression Inventory, and Beck Anxiety Inventory."

Q: "What procedures did you use to score and interpret the Rorschach?"

A: A combination of the Exner and Klopfer systems."

Q: "Any other scoring methods?"

A: "I used some of my own scoring methods."

Q: "Have you published any articles on your own scoring methods?"

A: "No."

Further inquiry could examine the ethical aspects of using an idiosyncratic scoring system. Consequences could be exclusion excluding evidence, and referral for disciplinary actions. As noted above, if the witness or testimony is excluded, leading to a negative outcome, there could be a civil lawsuit brought against the expert.

Another area that could be problematic with respect to credibility concerns the identity of who actually did the forensic evaluation, including the administration of the tests, and review of the records. In a psychotherapy malpractice case handled by this writer, the expert had someone else collate and summarize a large amount of records. He did not mention this in his report or prior to the deposition. At the deposition, the expert witness confused the names of the co-defendants. This led to the discovery that he personally did not review the records.

If the witness were called to trial, the following might have occurred:

Q: "Isn't it true that in the deposition you testified that you spent 10 hours reviewing the records?"

A: "Yes."

Q: "Isn't it true that you charged your customary fee for the 10 hours of record review?"

A: "Yes."

Q: "Isn't it true that your office manager collated and summarized the records?"

A: "Yes."

Q: "Isn't it true that your office manager prepared a 5-page summary?"

A: "Yes."

When the expert is asked, "What records did you review," the clear implication is that he actually reviewed the records. If not, there should be a disclosure statement as to who actually reviewed the records. Furthermore, a licensed forensic specialist should do the review and summary. Should the expert not have done what he was hired to do, and was thereby subject to impeachment, or otherwise disqualified, there might be a basis for a civil lawsuit for negligence testimony or other causes of action.

In a workers' compensation case reviewed by this writer, a number of applicants were evaluated at the same office. It seems unlikely that one evaluator could have performed the assessments in such a short period of time. The issue emerged as to whether psychological assistants had conducted extensive portions of these reports. Subpoenas were issued for the office personnel including the psychological assistants. The clinic director decided to abandon his requests for fees. The depositions were cancelled.

In a series of Florida capital murder cases (20), the use of psychological interns jeopardized the decisions. Trainees were used by the public defenders' office in order to save money. They were supervised by a forensic psychologist. An intern had administered her first MMPI-2, followed by questioning the defendant on the critical items. A total of eight first-degree murder cases may be affected by this use of unlicensed individuals.

INVASION OF PRIVACY

A number of sensitive topics can emerge in the deposition of an expert witness. The areas may relate to one's finances, religious background or drug and alcohol history.

There are several routine or preliminary questions that essentially need to be answered:

1. "Are you currently in private practice?"
2. "What is your psychotherapeutic orientation?"
3. "Have you ever provided expert witness testimony before?"
4. "Have you ever testified in trial as an expert witness?"

5. "What percentage of your current practice is forensic or providing expert witness testimony?"
6. "In the last five years, in what percentage of your cases were you hired by a plaintiff attorney?"

An opposing attorney may wish to probe a bit more deeply into the expert witness' bias, including finances. For example, is the expert's income essentially derived from one attorney firm, a marketing firm, consulting firm, or other business? In order to do so, the opposing attorney may request a copy of the expert's income tax forms (21). The issue raised is: Does an expert witness have to routinely present income tax records? At least one case took a middle ground—*Behler v. Hanlon* (22). The *Behler* court ruled that prior to a deposition an expert should make a diligent search of the records which would allow him to present what percentage of gross income for the preceding five years is based on performing expert witness services. Additionally, the expert was to make a list of cases wherein he served as an expert witness during the last five years. The court further stated that after taking the deposition, if the plaintiff can demonstrate that more information is needed in order to engage in impeachment of the expert, they may seek relief from the court to gain additional discovery information.

The Alaska Supreme Court in *Noffke v. Perez* (23) required the expert to produce tax returns before he could testify. As it turned out, the expert was a part owner and worked for an independent medical evaluation company. The records from both the witness and his company would need to be disclosed in order to ascertain if there is potential bias. The court stated that if there is a "plausible argument that the witness generates such a significant portion of his or her income from a particular side or particular attorney, the expert's impartiality can be reasonably questioned." Despite a protective order, the records were not produced and the witness was not allowed to testify.

Examples of intrusive questions are described by Brodsky (24). He notes that experts can be confronted with materials or questions that are inaccurate, distorted, misleading or even untrue (p. 123). In a child custody matter, the witness could be questioned as follows:

- Q: "Doctor, are you currently married?"
A: "No."

Q: "Have you ever been divorced?"

A: "Yes."

After the last question and answer, the expert and the retaining attorney will need to decide whether to allow a few more of these questions, or try to stop it at this point. Sometimes it may be helpful for the witness to see where the opposing attorney is going.

Q: "Were you divorced more than one time?"

A1: "Yes."

A2: "I'm not comfortable answering that question."

As Brodsky further notes (24), there is a significant gender bias with respect to invasive questions (p. 126-130). There are a number of questions that male expert witnesses, for various reasons, are virtually never asked: Do you use illegal drugs? How do you discipline your children? Who else lives in your house with you?

If there is a probe of personal business activities, the witness may not need to answer. For example:

Q: "How do you obtain referrals as an expert?"

A: "Newsletter, advertising and networking."

Q: "What magazines do you advertise in?"

A: "I am not a liberty to disclose that. It's proprietary information."

The witness can simply state that the information is proprietary and may not have to disclose.

In the face of all this, the witness needs to maintain a calm demeanor. Furthermore, even if some of the negative history emerges at a deposition, the retaining attorney can attempt to exclude the information at trial. The expert should have a strategy that has been worked out in advance regarding potentially intrusive questions.

HYPOTHETICAL AND DIFFICULT QUESTIONS

The initial part of the deposition may seem cordial and friendly. The expert witness may be lulled into the proverbial false sense of security. Perfunctory questions about one's background are followed by more intense,

probing questions. After the preliminary and routine part of the deposition, the scenario changes. At times the questions may be on the order of hypothetical or seemingly difficult questions. The goal is to trap the expert in a labyrinth from which there may be little room to escape.

One of the ways that the opposing attorney may lead an expert into a cul-de-sac is by demonstrating that the expert never actually saw the party or the plaintiff. At times an expert witness may be asked to review series of records or documents and render an expert opinion. The following dead-end trap was presented by Brodsky (24, p. 216-220).

The expert was called to testify regarding nursing home quality and staffing. The case was her first courtroom presence as an expert. She was called on to testify whether there was any verbal abuse present at the nursing home. She read thousands of pages of progress notes in order to assist her in rendering an opinion. For reasons that are not mentioned, the direct examination lasted only five minutes.

Upon the cross-examination, the expert witness was asked if she had a particular form. She was unable to find the form and became unsettled. The downhill course started immediately after that when the witness was asked if she ever met the residents of the nursing homes who said they were abused. The witness stated, "No." She was then asked if she did any additional assessments, other than looking at what was in the record. She answered, "No." She was then asked whether she talked to any of the staff. She stated, "No." At this point the witness was feeling trapped and miserable. Although one can certainly answer questions, yes or no, this was not the time to do so.

What might this witness have done in order to improve her courtroom performance? First, the witness should anticipate the questions that would emerge. Second, the witness may be bolstered by the knowledge that an expert witness does not actually have to see a patient or a plaintiff in order to render opinions. For example, in *State of North Carolina v. Douglas McCall* (25), the court ruled as follows: "The fact that the expert's testimony took the form of hypothetical questions and was based on information related to her by a third party does not affect the admissibility of her opinion, but instead

goes to the weight of the evidence.” The North Carolina court ruled that the expert testified that her opinion was not based upon actually conducting an evaluation of the child, and that the source of her information about the plaintiff did not reduce her qualifications as a psychologist or her expertise in treating the victims.

In the typical situation, the retaining attorney would have an opportunity to redirect; however, in the above nursing home matter, since the direct examination was so skimpy, it appears it was up to the expert to take it upon herself to deflect the impeachment type questions. In this scenario, the witness could have offered some possibly more helpful responses along these lines: “Although I did not meet any of the clients or talk to the staff, I did a comprehensive review of all of the progress notes and was able to reach my conclusions based on my review of 1000 pages.”

In another example where the opposing attorney tried to lock the witness into his version of the case, the author was deposed in a medical malpractice case. The plaintiff was involuntarily hospitalized under California Welfare and Institutions Code, Section 5150 for approximately three days. Statements were made that he was suspicious and thought that neighbors were harassing him and perhaps throwing things at his window. Because of the numerous complaints that he made regarding the neighbors, they apparently called the authorities. Subsequently, the police came to his house for a brief interview.

The plaintiff was questioned as to whether he owned guns. He answered, “Yes.” One of the officers asked the plaintiff, “What would you do if somebody were going to come directly into your house?” Since he had a gun in his house, he claimed that he would protect himself and his family. Thereupon he was taken to a psychiatric hospital. One of the issues that emerged during the deposition was whether the individual was psychotic at the time this occurred. It should be noted that the applicant was a 38-year-old male who was married and had three children. He had been actively working full-time for the past 10 years. There was no indication in the assessment and the related conclusion that this individual had any signs or symptoms of a psychosis. Following is a portion of the transcript:

Q: “If I was to say, hypothetically speaking, that in the middle of the night I am hearing voices outside my house, would that be a concern to you? You just mentioned one of the symptoms might

be hearing voices. Would that concern you if, in fact, there was no one outside my house creating that noise, but I am saying I am convinced there are some noises outside?"

It was clear where the attorney was going with the question; namely, he wants to demonstrate that the plaintiff clearly is paranoid schizophrenic. The question was abstract, confusing, probably compound, and didn't necessarily have to be answered as stated.

A: "You mean if someone is coming into my office for a consultation? If so, I'd want to know a little bit more about it."

Q: "Okay, but my question is: If I was convinced that someone outside my house is making noises in the middle of the night when in fact there was nobody there, would you consider the hearing noises part of your symptom list?"

A: "It depends on whether we have other constellation of symptoms. Again, in isolation, it may be the person has posttraumatic stress disorder, was in the Army and that's why it happened. We are getting on the edge of what one can really answer with a degree of medical probability."

Q: "Okay. Can we agree, though, that paranoid schizophrenia is a possibility? I understand that what you are saying is that further investigation needs to be done. There needs to be a more definitive investigation, so to speak."

There was, of course, no final question in this line of questioning. Furthermore, it appears that there were two previous questions before the last statement.

A: "I would further state that unless I have further information I would be reluctant to say that this is a possibility based on that one isolated symptom you mentioned." At this point, an unrelated topic emerged.

About twenty minutes later a misleading question was asked:

Q: "You have stated that you had concerns over whether the plaintiff was a danger to himself or others, correct?"

A: "No, I didn't have the concern."

Here is another sample scenario. The MMPI-2 is vital to the conclusions and opinions offered by the expert witness.

Q: "Can the MMPI-2 be faked?"

A1: "Yes"

A2: "Yes, but..."

A3: "Although, the MMPI-2 can be faked, it is difficult to do so."

With A1, the attorney will say "thank you" and move on. With A2, the attorney will interrupt and say "thank you." Thus, the witness may not be able to complete the answer, at least under cross-examination. With A3, it will seem rude if the attorney interrupts, and probably would not do so. With A3, the response is offered in a nondefensive and jargon free manner. Now the opposing attorney either has to delve into aspects of the MMPI-2 or persist with the original line of questions. If the latter, it might proceed as follows:

Q: "Can you answer the question yes or no?"

A: "The question is somewhat complex, so it would be difficult to do."

Q: "So, under some circumstances, the MMPI-2- can be faked?"

A1: "As I mentioned a moment ago ..."

A2: "You must not have heard what I just said..."

A3: "The question has already been asked and answered."

A4: "Your honor, that is a trick question."

A5: "You mean will a psychopath try to outwit the MMPI-2?"

In the face of a barrage of questions, the expert needs, as noted above, to maintain the calm demeanor throughout. Snide or sarcastic remarks are to be avoided (A2). The witness should not answer in the form legal objection (A3). Arguing with the attorney or even the judge usually is counterproductive (A4). Even jokes or attempts humor at can boomerang (A5).

DISCUSSION AND CONCLUSION

There are a number of potential pitfalls awaiting an expert witness who testifies at a deposition or trial. The opposing attorney will use every tool in his arsenal to try to impeach the witness. The opposing attorney will scrutinize the witness for potential or actual bias. If it can be shown that the witness is biased or has a stake in the outcome, then this will tend to destroy the witness' credibility. The easiest way to avoid this problem is for the expert to review any source of bias. If red flags are present, the potential expert should refrain from taking the case.

In some instances there can be a very close examination of the expert's résumé and academic background. It is imperative to make sure there are no questionable "typographical" errors. If the witness persists in the fabrication, the implications are quite serious. Namely, the witness could be charged with perjury. In a malpractice case, for example, if dismissed based on witness negligence, there could be a viable civil cause of action for negligent testimony. There is an emerging trend that does not offer expert witness immunity. Should the witness display unethical behavior during litigation, the matter could be turned over to a governmental board for disciplinary action. Examples include not being familiar with the basis for one's opinion, arbitrarily changing an opinion, and administering and scoring tests without proper validation.

Regarding invasion of privacy with respect to income tax returns, if there is some reason to believe that the expert could be biased, the expert may have to release his or her taxes. Regarding other intrusive questions, if not directly relevant, the witness can refuse to answer. Even if a response is given, the retaining attorney can later offer a motion to exclude the answer. Whether to answer or not is a strategic issue, and should be discussed with the retaining attorney beforehand.

It can be anticipated that, during cross-examination, there will be intense questions that may seem to be a form of harassment, are repetitive, or difficult to answer with "yes" or no." In the face of all this, the expert needs to maintain a calm and cool exterior.

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ABOUT THE AUTHOR

Donald A. Eisner, Ph.D., J.D. is a licensed psychologist and attorney. He has testified in state and federal court as an expert and has represented plaintiffs in psychotherapy malpractice actions. Dr. Eisner is Dean, Eisner Institute for Professional Studies.