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INTRODUCTION

More Ways to Maxim-ize Your Testimony

Why a third edition? After all, subsequent editions of psychology textbooks often contribute little new knowledge to the students' experience. Having taught from the 12th edition of one textbook, I am aware of how much is unchanged from prior editions.

When American Psychological Association Publishing and I started planning for a third edition of *Testifying in Court*, I thus found myself with three organizing principles.

1. **To write a new edition that went beyond minimal tinkering with the prior edition.** The new edition has new structure, new substantive content, and additional perspectives, without traveling on the same fixed railroad tracks as the prior edition.

2. **To draw on new sources while staying faithful to the model of practical advice, helpful maxims, responsible scholarship, and high readability.** I have included testifying experiences of experts at both early and later stages in their careers, as well as included experiences of forensic social workers.

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Testifying in Court: Guidelines and Maxims for the Expert Witness, Third Edition, by S. L. Brodsky

3. **To have a good time while communicating my sense of enjoyment in an entertaining way.** I often chuckled to myself as I was writing. Some new chapters reflect that amusement, with titles like "Worst Expert Testimony Ever," "Brushed-Off Direct Examination," and "Cherry-Picking."

The underlying goal is to teach, guide, and model court testimony. Many forensic mental health professionals in the United States and Canada already own a copy of one of the prior editions. They will see a major upgrade in this third edition. Many nonforensic professionals, especially those dealing with substance abuse, disability, and misbehaving adolescents, also find themselves involved with the legal system. They are called now and then to testify in court, and they share an anxiety that is normative in professionals who are infrequent expert witnesses.

This third edition groups the chapters into seven related parts, and the chapters are ordered alphabetically within each part. In earlier editions, all of the chapters were arranged alphabetically, so more structure is present in this edition. The longest part of the new edition, Cross-Examination, contains 22 chapters, reflecting its importance. Some chapters overlap in content. That overlap is especially true for the topic of cross-examination testimony, which often slides into discussion of other testimony issues.

The organization of the new edition follows the chronological order in which experts are involved in the testifying process. The book begins with Part I, which focuses on concerns that precede testimony. Part II develops the ways of thinking that make a skilled witness. In Part III, the book then segues to challenges to objectivity in terms of hired gun perceptions. Part IV, on direct examinations, includes acceptance as experts and what makes good and bad testimony on direct. Part V deals with aggressive questioning in cross-examinations and understandings of how to respond to them. Part VI addresses what *not* to do on the stand, a topic rarely considered in depth. Part VII is how to think about the testifying experience after it is over, and how to learn from it. Finally, all of the maxims at the end of each chapter are presented together in the Appendix.

In every introduction to my testifying books, I have invited readers to share their reactions, experiences, or comments. Once again, I invite you to do so. I would like to hear from you.

—Stan Brodsky
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1 BEGINNING TO THINK AND ACT LIKE AN EXPERT WITNESS

In workshops I conduct for forensic mental health professionals, where testifying in court is the subject, these obvious, but not always easily attainable, suggestions are typically offered for the psychiatrists, psychologists, and social workers in attendance.

- "Don't make up stuff on the stand."
- "Answer the questions that are asked, even when the answers do not support your conclusions or help the side that called you to testify."
- "For goodness sake, be prepared."
- "Know the scholarly foundations of whatever you do."
- "Be ready to testify thoughtfully, carefully, and responsibly about what you know and how you know it and, equally important, what you don't know."

Part of this chapter is drawn from a related article, "Temptations for The Expert Witness," by S. L. Brodsky, J. A. Dvoskin, and T. M. S. Neal, 2017, *Journal of the American Academy of Psychiatry and the Law, 45*(4), pp. 460–463. Copyright 2017 by the American Academy of Psychiatry and the Law. Adapted with permission.

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Expert-witness participants are typically fearful about blundering, feeling inept, and being "called out" during cross-examination. However, credible expert testimony depends on more than responses during cross-examination. This book seeks to reach broadly beyond techniques of responding and on to behaviors, attitudes, and emotions.

Many people do not manage aggressive cross-examinations well, but this difficulty often lies within their understanding of professional roles and demands. Several reasons account for lapses in professional demeanor while testifying, one of which is that expert witnesses come to believe that testimony during cross-examination is equated with whether they are smart, clever, or quick-witted. Some experts find themselves in a spitting contest with cross-examining attorneys, trying to outdo them and never giving in. They become emotionally intense during the cross-examination. Some experts have horror stories. Sometimes their minds go blank, and they cannot remember something they knew. Sometimes they stumble. At other times they feel controlled and manipulated by attorneys.

This book is about how to bring out the best in yourself in situations in which attorneys may try to draw out the worst. Careful, professional examination of litigants, knowledge of the literature, and awareness of courtroom procedures are central to doing well. A substantial body of literature exists to guide expert mental health witnesses, some of which will be cited in this book. Some temptations often draw otherwise competent expert witnesses into behaviors that do not serve them or the court well. The following are examples of problems that can draw experts into behaviors that are unbecoming.

GIVING IN TO ARGUMENTATIVENESS

Proceedings in depositions and trials focus on arguments. Successful attorneys are skilled at developing their own positions and arguing against their opponents in a compelling and legally sound manner. Expert witnesses who are not alert to the pull of argumentativeness can easily slip into unnecessary back-and-forth one-upmanship.

So, what is the problem? It is thinking within a debate mentality. It is being partisan instead of being honest, objective sources of information. The partisan perception is promoted by testimony that centers on outsmarting the cross-examining attorney. Although there can be times for energetic give-and-take on the stand, experts should avoid rebutting every implication that does not support their conclusions. Consider when an attorney asks a

straightforward question, such as, "You were not actually there in the home when Ms. Jackson was allegedly unable to take care of her children, were you?" Argumentative experts rush in with explanations of what they do know and have seen. The poised expert simply replies, "Of course not."

Why don't experts simply answer the question? Some experts don't believe that misleading questions will be clarified on redirect. Similarly, many experts view opposing counsel as their enemy. The credible expert simply answers the questions and avoids the temptation to be argumentative.

In a more gendered era, Margaret Thatcher once famously said, "Power is like being a lady. If you have to tell people you are, you aren't." The same principle applies to expertise. When expert witnesses feel the necessity to "toot their own horn," jurors tend to be put off.

People may think about movie stars and professional athletes with some degree of jealousy. Imagine being the center of attention, being praised and fawned over—who could resist such an existence? During trials, expert witnesses may experience a small taste of this same elixir. For a few hours, many feel that they are being treated as "stars."

This position can sometimes lead experts to adopt an exaggerated view of their own importance and to try to inflate their professional images. This is an approach that seldom goes well, like a movie star attempting to avoid a ticket or arrest and asking a police officer, "Do you know who I am?" Become, instead, the expert who understands that they are there simply to answer questions as honestly as they can—with no grandiosity to protect. Respond to general inquiries and to personal attacks with dignity and equanimity.

When cross-examining attorneys spend an inordinate amount of time attacking experts, instead of the evidence, it will often be they who lose credibility with the jurors. Responsible experts resist the urge to make testimony the occasion for flamboyant demonstrations of wisdom. I value

experts who comfortably answer, "I don't know." It is a mistake to think that being a know-it-all will increase credibility.

Good attorneys can always find something you don't know. It is how you react to this finding that matters. For example, imagine being asked, "Doctor, exactly how good is the reliability reported in the manual of the Competence Assessment Instrument you used in this examination?" or "Describe and provide the citation information for all the research studies you have read in the past 6 months about the accuracy of psychiatrists in assessment of mental state at the time of offense." Effective experts admit what they don't know with composure and ease.

EMOTIONALITY

When interactions with attorneys get heated, some experts feel as if their skin is being rubbed by sandpaper and their core stability is being nudged off center. At the extreme, this reactivity can take the form of excessive interpersonal reactions. Brodsky and Gutheil (2016) described cases in which experts' inability to cope with assertive or aggressive cross-examinations have resulted in crying or fainting on the stand (p. 186).

Preventing such undesirable testifying behaviors calls for self-control and resilience (Southwick & Charney, 2012). Properly prepared attorneys will pose tough questions. Expecting that these questions will be asked may help experts remain in emotional control. A commitment to being resilient, or to be able to manage stress, may also help.

WORDS AND LANGUAGE

Experts who talk over the jury's head make jurors feel inadequate and patronized. Instead, experts should pretend that jurors are smart friends who are not mental health professionals, and they should explain clearly in language that everyone can understand and from a posture of respect.

Consider questions like, "Doctor, when you said that Mr. Doe suffered from negative symptoms, does that mean that he doesn't have any symptoms at all?" Explain directly what is meant by the term "negative symptom." Explain diagnostic terms in easy-to-understand ways. If you need to use jargon, define it immediately and straightforwardly.

Some experts approach the courtroom as an opportunity to convince the jury of their high intelligence. Instead, the best goal is to demonstrate their

professionalism to everyone listening. That may involve seeking to simplify opinions. Experts who set out to convince the court, and themselves, of their superior skills are less effective than those who simply do their job without worrying about how impressive they appear.

WORRIES ABOUT "LOSING"

A problematic trap for the expert is focusing on whether or not one will "win" a case. Consider, for example, a possible question that an expert who worries about winning might fear: "Doctor, isn't it true that the court in a previous case ruled for the side against which you testified, clearly deciding that your testimony was not credible." One response might be, "I am not here to win a case; that is the job of the lawyers. I'm here to answer the questions as truthfully as I can."

Worrying about "losing" is problematic for several reasons. The chief reason is that such a concern is an indication that the expert(s) are advocating for the outcome of cases rather than simply advocating for their opinion. This focus on outcome signals a loss of objectivity on the expert's part—a dangerous path that will lead to less credibility. Another reason worrying about "losing" is problematic is that it may lead to inappropriate focusing on one's "record."

Although, like anxiety, competitive spirit can help an expert to prepare more carefully for trial testimony, too much competitiveness can also get in the way. This danger is especially likely in complicated litigation, where there can be months or years of close collaboration between experts and the lawyers who retain them. With collaboration and felt competition, experts can fall into the traps of overstating the evidence, logic, and certainty of their opinions.

The alternative? Focus on your opinions and the bases for your opinions without worrying about the outcome of the cases. Also, comfortably communicate the areas of uncertainty in your opinion based on conflicting evidence.

STUBBORNNESS

Stubbornness may well be seated in long-term, well-established, personality traits. In general, experts who are stubborn and argumentative are not impressive witnesses in court. Poised expert witnesses can respond to an

aggressive cross-examination with behaviors that are the opposite of what the attorney exhibits: quiet and calm responses to loud and pressured questions. Poised experts can respond affirmatively and with equanimity to questions that might otherwise stimulate stubbornness, like "Doctor, are you ever wrong?" A comfortable answer of, "Oh, sure" might suffice. If the attorney follows up with "Do you think you might be wrong this time as well?" then the expert may offer a comfortable but low-key affirmation of belief in the assessment and conclusions.

Stubbornness is a particularly obvious example of confirmation bias (Kane & Dvoskin, 2011; Neal & Grisso, 2014). Confirmation bias causes people to attend systematically to evidence that supports their opinion and to reject evidence that disproves it. When this happens on the stand, it can be obvious to everyone in the courtroom, except the stubborn expert. The unwillingness to yield on any point, even one that seems obviously true, decreases the expert's credibility in the eyes of the triers of fact.

CONCLUSION

At the end of the day, mental health expert witnesses are selling only one thing: credibility. Remaining humble will help experts avoid these traps, presenting instead a picture of a calm and confident teacher whose job is to explain each conclusion honestly to the triers of fact. Dvoskin and Guy (2008) put it this way:

> Ironically, the most successful, respected, and admired forensic experts are those who understand their role in context. They realize that trials are not about them and strive not to win but to explain their opinions as clearly as possible. While this stance does not feel quite so exhilarating as being the star witness, it allows one to practice successfully, over time, in a manner that is as lucrative as it is ethical. (p. 211)

The Maxim: The problem behaviors of argumentativeness, emotionality, competitiveness, and stubbornness hook expert witnesses into nonproductive and self-defeating behavior. Experienced and knowledgeable experts remain aware of, and stay away from, these attitudes in order to be seen as impartial, composed, and cogent.