

## On Being an Expert Witness: It's not about you

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Expert testimony, for many mental health professionals, is fraught with anxiety. In this article, the authors attempt to alleviate this anxiety with a simple recipe for professional, ethical, and economic success as an expert witness. Because experts are essentially getting paid for their credibility, this is one area of practice where the most ethical behavior can also be viewed as the most likely to lead to economic success. First, a review of relevant U.S. case law and rules governing the legal admissibility of expert testimony is provided. Next, issues that should be considered prior to taking the stand are discussed, including the value of seeking consultation and how to decide when to accept a referral. Finally, prudent and empirically supported strategies to manage direct testimony and cross-examination are suggested, including how to approach the “ultimate issue” issue, and how to be persuasive without abandoning our duty to tell the “whole” truth, especially including the parts we may not find convenient.

**Key words:** admissibility; Daubert; evidence; expert testimony; expert witness; Federal Rules of Evidence; testimony.

Psychologists and psychiatrists are often asked to provide testimony in courts of law. For some, this is a harrowing and anxiety-laden experience, whereas others seem comfortable, even eager, to testify. For those with significant anxiety, it is often centered around the embarrassment that comes with faring poorly on cross-examination. Mental health professionals loathe and fear the prospect of being embarrassed, being (hopefully unfairly) accused of unethical or immoral conduct, or being harshly criticized by attorneys whose zealous advocacy is untempered by any duty to be fair or objective in dealing with opposing experts. (Note that this is not intended as a negative criticism of

attorneys, whose duty is to advocate for their client, in contrast to expert witnesses, whose duty is to provide accurate and objective information to triers of fact.)

When mental health professionals go to court, they are working in a system that uses very different language, whose rules of engagement are unique to courts of law, and over which they have very little control. In this article we argue that expert testimony, at its best, is a simple process. By simply answering questions honestly, telling the court what we know, how we know it, and what we do not know, we will not only abide by our legal oath to be truthful, but also will maintain the credibility that is ultimately the only asset for which we get paid.

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It is our position that the most egregious errors by expert witnesses are almost always attributable to narcissistic needs, including the need to be praised, to make money, to be right, and to win. There is a seduction to being the apparent star witness of a trial, and it feels good to have so many people care what one thinks and says about the case. But yielding to these needs is a dangerous and slippery slope. Experts who need to win will be tempted to embellish the evidence on which their opinion is based. Experts who need to be admired will be tempted to enhance their credentials, including education, training, experience, and standing in the professional community. Experts who are too oriented toward money will be tempted to tell prospective clients what they want to hear, thus landing in positions that do not fit the evidence.

In our view, it is far better for experts to take a more humble stance, and think of themselves simply as evidence. It is the lawyer's job to win a case; it is the expert's job to answer questions as truthfully as possible.

### **What We Can and Cannot Say: A Brief Overview of Rules Governing the Legal Admissibility of Expert Testimony**

The primary function of an expert witness is to "assist the trier of fact to understand the evidence or to determine a fact in issue" (Federal Rules of Evidence [FRE] 702). In general, in order for expert evidence to be admitted in the United States, it must be relevant, necessary, and given by a properly qualified expert. These factors have been documented and expanded upon over the past several decades in a series of legal rules pertaining to admissibility. The first rule was set forth in *Frye v United States* (1923), a case in which an attempt was made to introduce results of a polygraph assessment. The decision essentially held that scientific evidence

could be admitted only if it is based upon theories or research results that have "general acceptance in the particular field in which it belongs". An important consequence of this type of test is that testimony based on newer (albeit potentially reliable and valid) evidence would be barred from admissibility. The *Frye* test also has been criticized for being vague and vulnerable to manipulation (Melton, Petrila, Poythress, & Slobogin, 2007).

In contrast to the spirit of *Frye*, the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals* (1993) eschewed the necessity of a threshold standard of scientific reliability. All federal courts and the majority of United States jurisdictions use some version of the *Daubert* standard. This legal decision is notable because it outlined a host of factors that could be considered when evaluating the admissibility of an opinion. Under *Daubert*, the basis of expert evidence must comprise information that is based on scientifically valid reasoning or methodology, is reliable, and was obtained through sound scientific methods. An evaluation of the scientific validity underlying the witness' opinion entails considering whether the theory or technique in question: (a) can be tested, (b) can be applied properly to the facts at issue, (c) has been subjected to peer review or publication, and (d) has an acceptable known or potential rate of error. Approval by peer reviewers and level of acceptance of the methods by experts in the field, reminiscent of *Frye*, also may be considered in the evaluation of the scientific validity of the opinion.

Put very simply, under *Daubert*, courts are encouraged to ask two questions of experts: (a) "Why should we believe you?" and (b) "Why should we care?" The first speaks to the credibility, reliability, and validity of experts' opinions and the facts and logic upon which they are based. The second speaks to the relevance of the

opinions to be offered to the specific questions at bar. Consistent with long traditions of Anglo-American law, this probative value must then be weighed against any prejudicial effects of the opinions to be offered (see Krauss and Sales, 1999, for a discussion of the challenges in applying the *Daubert* test).

The majority decision in *Daubert* indicated that the FRE regarding opinions and expert testimony had placed appropriate limits on the admissibility of purportedly scientific evidence. FRE 702 decrees that if scientific, technical, or other specialized knowledge will assist the trier of fact to (a) understand the evidence or (b) determine a fact in issue, then a witness qualified in skill, knowledge, experience, training, or education may testify thereto in the form of an opinion or otherwise. *Daubert* and FRE 702 prohibit testimony if it is based on “unhelpful” evidence. Evidence may be regarded as unhelpful for many reasons, including if its probative value does not outweigh its prejudicial value (see FRE 703), if it has an unacceptably high error rate, or if it is not generally accepted in the particular scientific community. *Daubert* highlighted that the inquiry is a flexible one, and its focus must solely be on principles and methodology, not the conclusions that they generate. *Daubert* casts the trial judge in the role of gatekeeper to ensure that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.

On its surface, *Daubert* appears to promote a more liberal approach to issues of admissibility. Indeed, the Supreme Court’s ruling in *General Electric Co. v. Joiner* (1997) ensured that trial judges would have wide discretion in the application of the *Daubert* standard. But, especially with respect to testimony by mental health professionals, the emphasis on testing, in practice, is more conservative. Moreover, peer review and general

acceptance were retained and highlighted as important factors to consider.

Six years after its decision in *Daubert*, the Supreme Court clarified in *Kumho Tire Co v. Carmichael* (1999) that the gatekeeping function applies to expert testimony based on all types of knowledge: scientific, technical, and other specialized knowledge. The important implication for testimony based on clinical opinion is that personal knowledge or experience can be the basis of an expert’s testimony. The Court recognized that the difference between these three types of knowledge is not always clear, and thus gives the trial judge broad latitude to evaluate the degree to which the expert’s testimony is valid and reliable. As such, the factors identified for consideration in *Daubert* are important, but not technically mandatory. In other words, evaluation of the admissibility of testimony is flexible and should be considered on a case-by-case basis. Trial courts are relatively free to exclude expert testimony, but also free to fashion the standard used for exclusion. In that sense, *Kumho Tire* highlighted just how vital it was for judges, jurors, and so forth, to perceive expert witnesses as credible.

In our view, this reification of the trial judge as gatekeeper is of paramount importance to expert witnesses. The first audience that must be addressed is the trial judge. If the judge finds that an expert witness lacks credibility, then no jury will ever hear the opinions offered. Even when the judge finds no reason to doubt the credibility of an expert witness, however, the testimony itself must also be deemed relevant to the case at bar. The judge’s decision, quite appropriately, will thus center on the expert’s credibility and the relevance of his or her opinions to the question before the court. In short, the judge asks of the expert witness, “Why should we believe you and why should we care?”.

### ***Before Taking the Stand***

On one hand, a credible expert is expected to have an adequate command of their field of inquiry. Despite the medical and psychological tradition of “learning by doing”, courts understandably expect experts to know what they are doing before they enter the courtroom. On the other hand, it is axiomatic that there is a first time for everything; every expert at one point in his or her career will testify for the very first time. Further, no one is expected to know everything, and a willingness to acknowledge one’s limits can add to their perceived credibility and wisdom. The answer to this apparent dilemma is knowing when and how to seek consultation.

Seeking consultation can be an invaluable part of one’s role as an expert witness. Consultation can be obtained by trading free consultation with trusted colleagues or paying for their time. It may be worthwhile to arrange to have one’s report reviewed by a leading researcher in the relevant area. Serving as an expert witness in a rape case, the first author (JD) called a well-respected rape researcher, paid for an hour of her time, and sent her the report. He asked her what, if anything, he had missed. Was there any new study that contradicted the findings? Was there an alternative theory that competed with the conclusions? In this case, it turned out that the consultant agreed with the conclusions, but suggested several new studies that buttressed the inferences upon which the report relied. In this example, it is important to note that it might have turned out differently; the consultant might have given the expert a reason to doubt his conclusions. Although an expert is not bound to agree with each and every idea proposed by a consultant, neither can the expert hide or disregard them. Each competing study should be mentioned in a revised report, and given serious consideration. In other words, experts should select consultants carefully to ensure that their opinions will in turn be

credible and relevant to the referral questions.

In considering whether to accept a case, potential experts must evaluate their strengths, limitations, biases, and liabilities, and realize that not all referrals will be a good fit with their expertise. Good experts turn down or refer cases. A potential expert also may review a complaint and simply believe that the lawyer does not have a very good case; in other words, it is unlikely that the expert’s opinion will be helpful. When that occurs (which it certainly will), the expert should simply advise the lawyer that the case appears weak, or that the expert’s opinion is very unlikely to be useful, and turn it down. In some cases, an attorney may nevertheless insist that they want an expert to take a look at the case before deciding. On its face, this appears harmless; if the attorney is willing to pay for the expert’s time on the off-chance that the opinion might change, why not take the money? Or, an attorney might value the expert’s contrary opinion to better prepare for what an opposing expert is likely to say. But there are exceptions; for example, this may be a ploy to create conflict that would prevent a uniquely qualified expert from testifying for the other side.

### ***On the Stand: How to Play by the Rules and Have Your Testimony Admitted***

#### *Credibility*

The importance of credibility cannot be overstated: it need be impeached only once to diminish its worth. Careful attention to cultivating credibility is essential for expert witnesses. As noted by Melton et al. (2007), research on the social psychology of persuasion has identified three components of credibility: expertise, trustworthiness, and dynamism. Within the context of expert witness testimony, expertise refers to the formal aspects of experience and

training, such as academic and clinical training, positions held, and professional accolades received. Trustworthiness addresses the degree of confidence that the trier of fact places in the expert and his or her motivations, opinions, and testimony. Dynamism pertains to the expert's non-verbal presentation style of providing testimony. But, although credibility is achieved through years of education, experience, and preparation, it is far more easily destroyed, for example, when an expert is caught in a lie.

A substantial amount of commentary is available to mental health experts preparing for cross-examination attacks on their credibility (e.g., Brodsky, 1999, 2004). Of course, some factors are out of the hands of the experts, at least at the time of trial, such as their previous training and current professional position. For example, research suggests that jurors prefer mental health testimony from experts who are more clinically oriented and have practical experience, rather than experts in "ivory tower" academic positions (Boccaccini & Brodsky, 2002), especially when such experts are highly paid (Cooper, Bennett, & Sukel, 1996; Cooper & Neuhaus, 2000). In contrast, many factors are within the experts' control, and therefore can be learned. In fact, there is a field devoted specifically to this task: witness preparation is designed to instruct witnesses to use effective testimony delivery skills – verbal and nonverbal communication skills – with the aim of increasing the degree to which they are perceived as being credible and persuasive in the courtroom (see Boccaccini, 2002, for an excellent overview).

Empirical findings about the relationship between verbal communication styles and jurors' perceptions of experts' credibility and persuasiveness is available largely through the efforts of the Law and Language Project at Duke University (O'Barr, 1982). This project was founded

in 1974 to investigate the impact of specific forms of courtroom speech on jurors, and examined the hypothesis that there is a positive association between communicating clearly and being perceived as more credible and persuasive. In a series of studies, four specific styles of courtroom speech were investigated: (a) powerful versus powerless speech, (b) narrative versus fragmented testimony, (c) hypercorrect speech, and (d) simultaneous speech (for an overview of findings from the Project, see Boccaccini, 2002). Research studies in which all or nothing manipulations of speech (rather than moderate levels) were used suggest four verbal behaviors that characterize effective witnesses: a powerful speaking style (e.g., speaking with confidence and assertiveness; avoiding the use of intensifiers, hedges, and the excessive use of polite forms); expressing confidence in oneself when directed to do so; providing descriptive answers to attorneys' questions; and avoiding hypercorrect speech (i.e., not using more formal vocabulary than one typically would).

Another type of verbal behavior observed at times during testimony is experts' use of humor and sarcasm. Basing our assumptions on the normal curve, we must assume that some people simply are not funny. Humor can be highly inappropriate if doing so expresses disrespect for the process. In contrast, humor at one's own expense can ease tension and make the expert likeable. Sarcasm, however, can make one look small-minded, mean-spirited, disrespectful, and insecure.

There have been decidedly fewer research investigations pertaining to nonverbal communication in courtroom settings. Reviewing studies of nonverbal communication in both legal and nonlegal settings, Boccaccini (2002) concluded that nonverbal behavior can in fact influence the way in which one is perceived by others, and he identified several such behaviors that tend to characterize effective

communicators. The empirically supported nonverbal behaviors included: frequent eye contact with attorneys and jurors (especially while speaking), illustrative gestures, leaning forward slightly, relaxed posture, facing one's head and body toward the jury and attorney, expressing genuine emotions, and speaking at a moderately fast rate in a loud voice that varies in pitch. In contrast, Boccaccini found that ineffective communicators tend to "avert their gaze (especially when speaking), use self- and object-adaptors, make frequent posture shifts, have rigid postures, pause before answering questions, display extreme affect (flat or melodramatic), and speak slowly using a soft and flat voice".

This review of verbal and nonverbal behaviors that are associated with enhanced credibility and persuasion is consistent with the recommendations provided by other scholars in the field. For example, Melton et al. (2007) concluded that at least five factors affect how the trier of fact perceives the expert. The expert should choose an appropriate style of dress, be familiar with courtroom protocol, physically look at and speak to the trier of fact when giving testimony, adopt a powerful style of speech that enhances credibility, and maintain composure in the face of a difficult cross-examination. Based on responses from a survey of jurors who had participated in civil cases, Champagne, Shuman, and Whitaker (1991) reported that clarity of presentation, familiarity with the facts of the case, and impartiality (with regard to use of third-party information and source of payment) were relatively more important in terms of establishing credibility compared to the expert's academic credentials, personality, or appearance. Of course, these latter factors still play a substantial role.

### *Yes, Experts Get Paid*

A frequent method used by opposing counsel to attack an expert's credibility is

to point out that she or he is being paid to testify. The expert simply should affirm this as true, treating it as a non-issue, and offer no further explanation. It is important to note, however, that mock juror research has found evidence of an inverse relation between the expert witness' fee and jurors' willingness to believe the testimony (Boccaccini & Brodsky, 2002).

Although the popular image of experts being paid to appear in court as "hired guns" has been promulgated by the media (Hagan, 1997), it can be counteracted by reminding the trier of fact that an expert is paid for his or her time and expertise, not the conclusions she or he draws. In so doing, experts may feel protected by the knowledge that they are acting as objective professionals.

For better or for worse, however, there really is no such thing as an "objective expert". Experts are all human beings, too, and it is foolhardy and unconvincing for them to pretend that they are the only people in the world not affected by money. Instead, experts should take affirmative steps to counteract these obvious sources of potential bias. Freely acknowledging one's biases not only goes a long way to appearing credible, but also takes some of the wind out of the opposing attorney's sails. There are many generic answers to stupid "hired gun" questions: "My opinion is based on the evidence"; "I base my opinion on the facts of the case"; "I am paid for my time"; "I am paid for my experience"; "I am paid for my knowledge and expertise"; or "I generally am regarded as very good at what I do".

Of course, there are some professionals in the field who truly would be described accurately as hired guns. This practice obviously is ethically contraindicated. The specialty guidelines for forensic psychologists (Committee on Ethical Guidelines for Forensic Psychologists, 1991) specify that a forensic expert should be committed to fairness and justice in the legal system; a

forensic expert's testimony should be to further the best interests of the court, not those of a particular legal party.

Another consequence relating to the fact that experts get paid is that there virtually always will be a dual relationship with clients that presents inherent conflicts of interest – conflicts that also can threaten an expert's objectivity and credibility. Contrary to folklore, there is no prohibition against dual relationships in either the Ethical Guidelines of the American Psychological Association or the Specialty Guidelines (Committee on Ethical Guidelines for Forensic Psychologists, 1991). Each set of guidelines advises psychologists to "avoid" only those dual relationships that create real or reasonably perceived conflicts of interest. Taken to a logical extreme, a strict prohibition against all dual relationships would preclude any mental health expert testimony except that which is court appointed or *pro bono*. In the United States no organization of mental health professionals has taken this extreme position. In contrast, it does remind experts to take steps, such as those suggested below, to make sure that their opinions are not determined by financial relationships but by the facts of each case.

If there is no such thing as a completely objective expert, and if money serves as a powerful and seductive source of bias, how can experts attain and demonstrate a reasonable degree of objectivity in court? There are a number of steps that can be taken to counteract real and perceived bias, but none are more important than transparency.

#### *Transparency*

The degree of flexible inquiry established by *Daubert* coupled with its emphasis on open evaluation of experts' work highlights the importance of transparency in forensic mental health practice. The basis of an expert's opinion should be communicated

clearly to the trier of fact, which involves showing one's work and not asking the court merely to trust the expert blindly and take their word for it. Every single fact or assumption on which the opinion is based, and the source of that information, should be stated. The expert should distinguish between the components that played a role in forming the opinion, such as observable facts, psychological tests, collateral information, logic, and research findings. Of course, experts must never rely solely upon information provided by the attorney – using multiple sources of information enhances credibility. When experts explicitly show their work, detail the evidentiary bases for each and every inference, and explain competing theories and contradictory evidence, they allow people to scrutinize their work in a way that is sometimes uncomfortable but in the end augments their credibility. A balanced assessment in which pros and cons of the opinion are identified communicates that alternative possibilities were considered before forming the opinion. The ability to demonstrate the basis for expert testimony will go far in terms of helping the judge, in his or her role as gatekeeper, to evaluate the admissibility of expert testimony.

Experts who make clear that the basis of their opinion is the coupling of logic and evidence are more likely to be perceived as credible. To prevent making huge inferential leaps, experts should cross-examine themselves prior to giving testimony. Experts should frequently ask themselves the same question that they will likely be asked at trial: "How do I know that?" (i.e., credibility) and "Why should anyone care?" (i.e., relevance).

#### *Being Truthful (Using the Whole Truth) and Staying as Objective as Possible*

As Gutheil, Hauser, White, Spruiell, and Strasburger (2003) point out, "the expert witness testifies under oath to tell 'the

whole truth,' yet certain aspects of the legal system itself make this ideal difficult or impossible" (p. 422). According to these authors, telling the whole truth likely is closer to a relative or probabilistic truth in that an expert's responsibility involves forming an opinion carefully and diligently, while at the same time attempting to shield that opinion against misrepresentation by both sides.

Being truthful as an expert witness mandates including data even if they do not support the expert's opinion; this can include citing competing positions and researchers who disagree. One should also consider what he or she would have said, and why, if they had been called by the other side. There are at least two sides to every story, and so if every word of testimony supports the side that called the expert, the expert is probably not telling "the whole truth". If a point is in favor of the opposing side, wise and effective experts concede it gladly. It is unacceptable to mislead by omission (e.g., claiming one was not posed a specific, relevant question) or on purpose (this is lying). Of course, there is no need for the expert to tell the court everything he or she knows. As Shakespeare wrote, "Brevity is the soul of wit", and it is useful to remember that there is such a thing as an unexpressed thought.

Being truthful does not mean that one cannot advocate for an opinion. It is important – mandatory, even – for the expert to believe that the inferences and opinions that form the testimony are correct and that the stated opinion is held sincerely. An expert should, however, keep in mind that greater confidence in one's opinion does not necessarily mean that the opinion is more likely to be accurate.

It is also of paramount importance to be willing to declare one's ignorance. The right answer to some questions is "I don't know". People who are never willing to utter these magic words – often called

"know-it-alls" – are neither appreciated nor believed. Saying "I don't know", when that is the case, is an absolutely acceptable and truthful response; indeed, if one is to keep one's oath, it is mandatory. Ironically, declaring one's ignorance is the pinnacle of credibility. In our experience, jurors are most likely to believe experts who are willing to admit their limitations and ignorance.

Finally, telling the whole truth also entails stating the limitations of the opinion. If the expert is unwilling to do this, the opposing side will, and it is far better for the admission to come as part of direct testimony, as evidence that the expert is willing to tell the whole truth, whether convenient or not. When limitations, caveats, and alternative hypotheses are exposed reluctantly on cross-examination, the expert will appear to have been caught in a lie by clever opposing counsel. In a similar vein, experts should be clear about the limitations of their expertise (e.g., practical or solely academic), as well as the limits of the field itself.

#### *Educate by Being Simple*

Experts by definition are well-educated people, but the effective expert will not try to put this on display. In short, be humble and be simple. Most experts want the jury to realize how smart the expert is; but the most effective experts want the jury to realize how smart the jury is. This means explaining one's opinion, and the inferences and evidence on which they are based, clearly and in English. The expert who educates the trier of fact is able to convince instead of impress. If the judge or jury truly understands and agrees with the evidence and logic that form the basis of the inferences and opinions, then the expert will have excelled. "Blowing them away" with complicated verbiage and sophisticated theories just encourages juries to dismiss an expert's input. An effective



witness will act as an educator, which requires using simple language. Being an educator whose goal is to explain also involves anticipating the jury's questions (after all, in many jurisdictions the jury is not allowed to ask questions) and answering them in testimony.

### *Keep your Enemies Close*

A strong and sincere willingness to consider opposing points of view fairly, seriously, and with an open mind, are vital to establishing credibility. Although one might be inclined to generate hypotheses about the other expert that include a host of demeaning adjectives, it is critical to consider that the opposing expert's opinion may have merit. By accepting the possibility that the opposing expert has made a noteworthy point that was missed, one should not hesitate to make it known to the retaining attorney: the expert should tell them that this previously unknown or overlooked point might hurt the attorney's case and, if asked about it, the expert will agree with the opposing expert on this important point. When considering the performance of the opposing expert, it also is a good idea to assess one's own feelings of competitiveness; an expert who becomes competitive may be vulnerable to loss of objectivity.

### *Questions*

The questions asked on direct testimony likely will not be a surprise. In fact, most competent attorneys will go over these questions before trial to make sure that they are clear and that the attorney will not be surprised by the expert's responses. The more unpredictable part of testifying is the cross-examination. One must recognize that lawyers are not supposed to be objective and do not have to treat experts nicely. When lawyers yell at a witness, it should not be taken personally, and – most

importantly – an expert must never lose their temper or composure. Experts should respond only to questions, not statements. In response to a hostile statement, it is often effective to stare at the attorney with a pleasant air of expectation, to demonstrate to the jury that one is waiting for a question. Pursuant to the oath, even hostile questions must be answered honestly. There is often no need to elaborate. If an expert witness feels compelled to defend themselves, they will only look defensive.

Experts must listen carefully to the question before they begin to formulate an answer. The best way to avoid being thrown off by rapid-fire questions is to maintain a professional and thoughtful pace. It is important to be mindful, and take all the time necessary to answer. Some experts will take a drink of water if they need to slow down and think about how to phrase an answer. Very brief pauses can also give attorneys time to object to questions that are improper.

If the cross-examining attorney poses a complicated question, it is essential to seek clarification. By deconstructing compound questions and dividing the response, with one answer to the first part of the question and a clearly separate answer to the second part, it is possible to retain clarity in the face of an opposing expert's efforts to confuse the expert or the trier of fact. Some lawyers will try to trick experts by asking bad questions. On cross-examination, generally, it is not a good idea to help them out by restating a better question for them. But, if answering a bad question accurately would mislead the trier of fact, experts must resist the temptation, because purposely or knowingly misleading the court is lying. If the question is unclear, the expert should simply say, "I don't understand the question", or ask the cross-examining attorney to repeat or rephrase the question. Often, the next question will undoubtedly be easier to understand and answer. Finally, experts must learn to tolerate

silence, and force the attorney to ask another question. Smart attorneys will use discomfort to keep an expert talking – hoping that the expert will go beyond their knowledge or expertise and say something unfortunate.

#### *“Ultimate issue” issue*

Experts should anticipate being asked for an opinion about the ultimate legal issue in the case at bar. There is active debate in the literature regarding how to respond to this situation. Whereas many legal scholars and clinical practitioners are proponents of offering opinions that address the ultimate legal issue, others maintain that they are legal questions, better decided by the finder of law or fact. Moreover, such opinions are founded on analysis that involves social and moral policy in addition to clinical data, and therefore are outside the prefecture of scientific inquiry (e.g., Buchanan, 2006; Melton, 1999; Melton et al., 2007; Redding, Floyd, & Hawk, 2001; Slobogin, 1989; Slovenko, 2006; Tillbrook, Mumley, & Grisso, 2003). Whether one decides to extend expert testimony to include a direct response to the ultimate issue, it will remain important to break the ultimate issue down to its component parts, always adhering to the principle: show the work upon which the opinion is based.

#### *After Leaving the Stand: Learning from Experience*

After a case has ended, it is often a good idea to try to interact with the opposing counsel. Their opinions can be wonderful quality improvement devices. They may ask questions about how and why the expert handled a particular situation or made a particular statement. Keeping an open mind and honestly considering such feedback allows one to use these criticisms in improving subsequent performance.

#### **Conclusion**

Certainly, not every mental health professional is cut out to be an expert witness. It requires a thick skin, and the ability to be questioned, doubted, and even insulted, without losing one’s temper. But there is much good news. The professional and financial success of forensic mental health experts is based almost entirely upon their credibility; thus, this is the rare field where the most ethical practices, in the long run, are also the most lucrative. The principles for success are simple and straightforward. Experts should: (a) tell the truth, whether it helps or not; (b) tell both (or all) sides of the story; (c) admit the limitations of their knowledge and experience; (d) turn down cases when appropriate; (e) seek consultation, especially aimed at revealing and counteracting bias; (f) just answer the questions; and perhaps above all (g) learn to say the magic words: “I don’t know”.

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 opinion 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.

Not bad work if you can get it.

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