Forensic Work and Nonforensic Clinicians Part III: Testifying in Court

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By the time you are called to testify at trial, you have probably already "testified" in the case. If you have been deposed, your answers and opinions may be made available to the court as if you had spoken from the witness stand. Your trial testimony will probably be carefully compared to your deposition testimony and/or to any reports you have written. One should be certain that apparent inconsistencies between/among them can be explained, since they are likely to be highlighted by the "other side" in order to rebut your testimony.

Be Prepared

It is important to review your notes and records, and especially your deposition if you have been deposed, just before trial. Review takes time, but it is critical to be prepared. Be sure to have a pre-trial conference with the attorney who has retained you to learn what questions are likely to be asked.

Don't expect to be the star of the show. You and your opinions are important, but most trials are carefully scheduled and choreographed, with lots of witnesses, lawyers, jurors, and a busy judge to accommodate. The attorney is unlikely to be able to spend hours preparing you. Indeed, the lawyer who was full of compliments and flexibility just a few weeks before may now delegate his contact to an assistant and leave you to fend for yourself (often in a strange city). Don't take it personally. Just be sure you are very well prepared, be where you are supposed to be (on time), and be available for last-minute discussions and schedule changes.

If you can, allow plenty of time for travel and rest. Arrive in the trial city well in advance. Contact the lawyer or assistant when you arrive at your hotel, ascertain exactly where and when you are to meet the attorney, and then stay within easy reach. Arrive at the courthouse in plenty of time to find parking (and the courtroom). And bring an extra shirt or blouse in case of lost buttons or errant spaghetti sauce.

Don't be surprised if the trial, or your testimony, is canceled at the last minute. Many things can cause this. Settling the case just before (or even during) the trial is common; or the lawyer may decide, after all your months of work, that certain aspects of the trial now suggest that you should not testify. Don't take it personally; such decisions are made with overall strategy in mind and are not intended to reflect on you or your expertise.

Judge and Jury

All trials have both a *trier of law* and a *trier of fact*.

Trier of law. A level playing field is the foundation of the American adversarial system. A comprehensive system of laws, from the Constitution to caselaw, protects criminal defendants' (especially indigent ones') ability to defend themselves against the power of the State, individuals' ability to assert their rights against corporations or governments, and the ability of poor or unsophisticated persons to be heard on an equal footing with those who have more resources. The trier of law, who is always the judge, oversees the fairness of the trial process by interpreting the law and its application. The job is much more complex than simply being a referee, but that's a rather visible part of it.

Trier of fact. The trier of fact is responsible for weighing the evidence that the trier of law allows it to see, including testimony and exhibits. When there is a jury, it is the trier of fact. If not, then the judge is both the trier of law and the trier of fact (a "bench" trial).

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Appeals. When verdicts are appealed, the appeal is always based on points of "law," not "fact." Our system scrutinizes, and sometimes overrules, judges' decisions about how the law should be applied, but it is very reluctant to second-guess a jury's deliberations.

Process and Procedure

The aim and process of trial testimony differs from those of depositions in several ways. The deposition is by the opposing attorney and is a sort of "fishing expedition" designed to discover things about you and the case. Trial testimony, on the other hand, is an offering of your opinions on behalf of the side that retained you.*

You will probably not be allowed to hear others' testimony, particularly that of other experts. You will wait outside the courtroom until called and walk into the room from the back, into the area in which the attorneys and court reporter are sitting. If there is a jury, they will be seated to one side. The judge will probably direct you from there, in a friendly voice, and ask you to stop at some point to be sworn. A court officer will swear you in, and you will be directed to sit in the witness chair. Witness chairs are usually somewhat uncomfortable and routinely have an annoying wobble and squeak. Try not to shift your position too much.

Whether or not to take your notes to the witness stand is a topic of great and serious controversy among forensic psychiatrists. On the one hand, they make a great security blanket. On the other, many lawyers prefer that you speak extemporaneously, and it may not be wise to have your notes so obvious to the other side. I always ask the lawyer what he would like for me to take to the stand, and he or she usually says either "nothing" or just a copy of any formal reports I've prepared. *Do* bring your notes and records to the trial, but leave them elsewhere while you testify.

Incidentally, if you do take your report or notes to the witness stand, bring an extra copy. The opposing lawyer may ask to see them, then walk away with them during questioning. It is embarrassing to have to say "may I have my notes back," implying that you can't remember things on your own.

The next voice you hear will be that of the lawyer who retained you. He or she will first ask you questions about your background and the work you have performed in connection with the case, in order to establish that you are qualified to offer expert opinions in the matter. The other side probably will not object, but if they do, the judge may continue the testimony about your qualifications outside the presence of the jury, and the other side may be allowed to question your qualifications in a process called *voir dire*.† After that, assuming you are allowed to testify, the jury will return and the lawyer who retained you will continue with *direct* questioning. This is the easy part. The questions will be familiar (often discussed before the trial), and the lawyer will already know most of the answers you will give.

After your direct testimony, the opposing lawyer will *cross-examine* you. The purpose of cross-examination is to challenge, and undermine if possible, things that you have just said in direct testimony. It is thus more anxiety-provoking, and can be unpleasant or embarrassing, especially if you have not prepared well or have expressed opinions that cannot withstand rigorous scrutiny.

In general, the opposing lawyer may only cross-examine you on topics that were introduced during your direct testimony. This is unlike your deposition, in which virtually any topic was fair game. The scope is narrowed, but the intensity is increased.

Cross-examination is also the time when reviewing your report and deposition becomes important. The opposing lawyer wants to do three things: find flaws in your opinions (or turn them to the opposition's purpose), find inconsistencies in your testimony, and undermine your credibility. The first relates largely to your findings in the case; the last two particularly affect whether or not your testimony is given much weight by the jury or judge. If you have been consistent in your opinions (given consistent facts and findings on which to base them), that's fine. If, however, there are necessary *apparent* inconsistencies (such as changes based on new information), they may already have been pointed out in direct testimony. If there are real inconsistencies, or weaknesses in your background that are relevant to the case, the opposing lawyer will highlight them prominently.

Redirect examination is an opportunity for the retaining attorney to clarify or rebut items brought out on cross-examination. Then the opposing lawyer has a

*Once again, it is not "your" side—and the lawyer is not "your" lawyer—but that of the attorney who retained you. Expert witnesses should advocate clearly and articulately for their opinions, but not be partisans in the litigation.

†Note that it is usually your specific legal qualifications to testify in this specific instance that are being challenged, not your general background or integrity.

chance to *re-cross* on only those topics. The back-and-forth questioning doesn't usually last long, and the opposing lawyer gets the last word.

You will be told when your testimony is finished. Most of the time, you will be completely excused. One is occasionally subject to recall, and must remain in the area. If that is not made clear, it's not a bad idea to quietly ask the judge or attorney whether or not you are completely excused before you leave the room.

Etiquette and Other Pointers

Respect the judge. The judge is the absolute boss in trials, especially federal ones. If the judge asks (or orders) you to do something, do as he or she says, or very politely suggest an alternative. Judges are usually quite polite to experts, and may come to your aid if the opposing lawyer seems to be harassing you.

Stand when the jury or judge is entering or leaving. Don't avoid looking at the jury, but do not appear to be communicating with them.

Do not leave the witness chair without permission. If you need to get up to illustrate something, ask the judge for permission.

Speak toward the jury (or the judge in a bench trial). The judge and jury (if there is one) are the ones who make the decisions. Don't let the opposing lawyer draw you away from them.

Never be cavalier or sarcastic, or lose your composure. How you *appear* to the jury is almost as important as what you say to them.

Don't try to second-guess or "outwit" the opposing attorney. It's not your job, and the courtroom is not your turf. Seemingly unsophisticated lawyers have a way of lulling arrogant opposing experts into more arrogance, then suddenly becoming more sophisticated. The opposing attorney almost certainly knows the answers to all the questions he or she asks. Listen carefully and answer each one individually.

Leave time for objections. Consider pausing very briefly before answering the opposing lawyer's questions, especially if he or she appears to be rushing you. This provides time for objections and keeps you from being pressured or drawn unthinkingly into the opposing lawyer's "rhythm."

Keep it short, especially on cross-examination. You are not lecturing to graduate students. First, any comments beyond a concise answer may give the opposing lawyer information to which he is not entitled or open up new areas for cross-examination. Second, juries have a low tolerance for academic expounding. If their eyes glaze over, they aren't listening or remembering what's important. Sometimes the lawyer who retained you will ask you to explain something in more detail, but wait to be invited to do so.

On the other hand, an opposing lawyer's demand for a yes-or-no answer may be a signal that more is really required. Sometimes a question can't be answered "yes," "no," or "I don't know." Don't be bullied into inaccuracy or half-truth.

Speak clearly and be articulate. Remember that you are trying to get a dozen average citizens to listen and understand. Simplify your terms and concepts; use everyday examples, but be respectful and don't patronize.

Dress the part. Your dress and comportment influence the jury and should reflect the seriousness with which you take the proceedings. Be conservative, neither flamboyant nor overly formal. If you are into gold chains (for men), provocative blouses, motorcycle boots, or facial piercing (or ear piercing for men), leave your alter ego at home.

Be cautious about revealing irrelevant personal information. Everything you say is recorded *verbatim*, and can become very public. It is probably unnecessary to reveal your home address or social security number, for example, or information about your family. Be polite; judges and juries are more likely to accept your need for family privacy than an attitude of defensiveness.

Be cautious when commenting about other experts. "Battles" between experts are sometimes based on the attorneys' attempts to make them appear diametrically opposed, so that the jury will see fewer shades of grey. You may be asked whether or not you believe Dr. X (an opposing expert) is competent, or whether or not you respect his or her work. It is often reasonable to say that you generally respect the doctor's work (if you do) but that, like most professionals, you can disagree at times. Similarly, if asked by the opposing attorney whether or not you agree with a particular textbook or other document, make it clear that you may respect it generally, but you can disagree with particular passages or unique or specific applications.

Other Kinds of Court Testimony

Hearings. Many mental health professionals, particularly psychiatrists, are more likely to testify in hearings (e.g., for civil commitment) than in trials. The principles are similar, but the setting is a little less formal and there is no jury involved (the judge is the trier of law and of fact). In some hearings, such as those for commitment and disability, it may be acceptable to offer opinions about someone who has been your patient. In others, such as child custody hearings, your expert role should be free of any therapeutic relationship with a litigant.

Trial depositions. Courts sometimes take expert testimony before trial, in deposition-like settings (e.g., in special situations that make it impossible or impractical to have the witness present in the courtroom). The setting may seem less formal, but the rules are the same. Such testimony is routinely videotaped, and jury and/or judge will view it at some point during the trial. Speak to the camera, and thus the jury, not just the lawyers.

The Last Word

Prepare well. Arrive early. Listen carefully. Be concise. Respect the process.