

CROSS-EXAMINATION OF PSYCHOLOGISTS

1. BASICS

The basics for cross-examination of a psychologist are the same as for any witness only more so. No questions but leading questions. An experienced expert will take an open-ended question and provide a narrative to reinforce his or her opinion. Similarly, no compound questions that provide the witness with an opportunity to critique your question or exploit an ambiguous question by giving a non-responsive answer.

Be precise in your questions. If there is a term of art or a diagnostic label involved use that language. Nothing is more frustrating than having an expert give the court a lecture on the lawyer's failure to define terms properly. An example is questioning the expert about the "reliability" of a test when you are trying to ask about the "construct validity" of what the test purports to measure. They are not the same and a sharp expert will be happy to expose the difference.

Have a theory of why the expert's opinion should be disregarded by the trier of fact. Pointing out random failings of the witness might leave the court with a sense that the expert is sloppy but still correct. If your theory is

that the expert did not see the parent and children sufficiently to form a valid opinion about the parent-child relationship emphasize that in cross and try to develop other problem areas in the evaluation in support of that theory.

Start off with questions that will elicit agreement from the witness to train the witness. Establish helpful facts that are not in dispute at the beginning of the cross to get them out of the way prior to areas of cross likely to generate dispute.

Block “safe-havens” before the witness is aware of the need to seek shelter. The term “safe-haven” is borrowed from Pozner and Dodd’s *Cross Examination: Science and Techniques*. Safe-havens are evasions and qualifications the witness will use to excuse or explain away possible criticisms of the witness or their work. Some are discussed below.

2. DISCOVERY IN SUPPORT OF CROSS-EXAMINATION

In an ideal world you would be able to depose every expert witness after a thorough investigation. The reality of a public defense practice is that time and money are limited. Nevertheless you should demand a copy of all raw interview notes taken by the expert in the case. This can be fruitful in showing that the expert took statements out of context, failed to clarify ambiguous statements or that statements contained in the evaluation are not

to be found in the interview notes. A failure to preserve raw notes is an obvious area for cross-examination.

Given the low-cost and easy availability of audio and video technology, it is worth asking why experts do not record all clinical interviews. This can be an area for cross-examination if the client denies making certain statements to the evaluator or disputes the accuracy of evaluator observations.

The same basic principles apply to experts as to police officers when it comes to the need to accurately record statements. This can be employed repeatedly when the expert falls back on a lack of memory during testimony about details of client interviews or observations of parent-child interactions.

Does the expert have draft versions of the final report? Ask for them. Does the expert use a template report form? Read any written report with an eye for inappropriate pronoun gender (“she” for a male subject and vice versa), incorrect proper names and other “typos” which indicate the expert cuts and pastes a standard report form.

Demand all tests and test results. Do not rely upon the expert’s summary. You may encounter the argument that the psychologist can not give test data over to a lay person for ethical reasons. Ask for them anyway or move to exclude the testimony. You have a right to this information even

if you are not in a position to hire your own expert to review the work of an adversarial expert.

If you are able to obtain past evaluations by this expert these can be a goldmine for cross-examination. I encourage every lawyer and law firm to maintain a bank of expert reports for this purpose.

If the witness has contacted collateral sources you should interview the source about that contact. Has the expert accurately represented the information? Was material information omitted? Did the expert convey information about the direction of the evaluation?

Even if the expert comes with universal acclaim for honesty and professional competence there is nothing wrong with checking up on the expert's CV. In one sexually violent predator case the state retained a nationally known psychiatrist with expertise in treating sexual offenders. A diligent investigator discovered that the expert had been claiming a medical degree from a different school than the one he actually attended and had invented a number of publications. The expert was abandoned by the state, criminally charged with false swearing and barred from forensic work by his state's medical board.

3. EXPERT CREDENTIALS

Once upon a time it could be assumed that every psychologist had a traditional PhD and had completed a dissertation reflecting a capacity for original research in the field. Now, however, an increasing number of practitioners have a PsyD from a school of “Professional Psychology.” Some of these schools are affiliated with legitimate institutions of learning. Others are proprietary for-profit schools. Some programs are quite candid in stating that their degree programs are designed to meet the minimum standards for licensure as a psychologist. If a dissertation is required it is often greatly reduced from traditional standards. There are schools offering degrees by “distance learning.” One such example is the Union Institute in Ohio. These schools are more than diploma mills but do not offer the same degree of rigor found in more traditional schools. The emphasis is on obtaining credentials necessary to engage in clinical practice. Faculty are often graduates of that school’s own program, leading to a closed system at odds with academic rigor.

No expert wants to admit that he never actually set foot on the campus of the institution which awarded his degree or that the program was tailored

to meet minimum state licensing standards. Hopefully, judges might also be concerned with the witnesses' training.

Ask for transcripts. A transcript, along with course descriptions (often available online) can demonstrate that the witness has only had a general survey course in an area of claimed expertise. The cross here is in principle the same as when cross-examining a police officer puffing his training at the police academy.

Get at least the title of the expert's dissertation. It may be something totally unrelated to evaluating parental fitness or diagnosing psychological disorders. (Note: if you plan on pointing out that the dissertation research has no bearing on parental evaluations get the witness to endorse the importance of research and the central role of the dissertation in graduate education. This will cut the witness off from the "safe haven" of minimizing the dissertation's importance when you get around to attacking it.)

Has the dissertation research ever been published? Cited by other researchers or clinicians? Or was it just another task to perform to obtain the degree? If the dissertation topic is relevant to the evaluation at hand, try to get a copy. Many unpublished dissertations can be obtained from the issuing institution via inter-library loan. Another source is ProQuest (formerly known as University Microfilms). You can search their holdings at:

<http://www.proquest.com/brand/umi.shtml>. The expert should be expected to have a copy as well.

If the expert has professional publications, get copies. The expert's own research and characterizations of relevant literature are of obvious value in cross-examination. The same goes for presentations to lay or professional groups.

Many clinical psychologists never perform any research. Some will testify that the research and clinical practice are separate, distinct disciplines and that the lack of academic publications or research activity in no way detracts from their expertise. Whatever the merits of this position, you have a witness who will have to concede that he relies upon the professional literature for his knowledge rather than her or his own research program. You can also lay a foundation about the role of peer-reviewed publications in graduate training and maintaining a current knowledge of a discipline.

The goal is to cut off the witness from offering an "expert opinion" which can not be supported by citation to published, peer-reviewed literature. A graduate degree does not transform every opinion held by a witness into an expert opinion.

Some witnesses will resort to various evasions when pressed for the basis of their opinion. There is no reason to accept vague statements such as

“the literature in general” or “it is commonly accepted” as the basis for an expert opinion. Such statements offer no information that can be evaluated by the trier of fact.

When laying a foundation about the role of research and professional publication you can also ask the witness if he/she is familiar with particular authorities in the field. Get the witness to agree that these authors are respected and that the witness has read and relies upon their work. This is a no-lose situation in cross-examination. If the witness endorses the authority of an author, you have the foundation to cross the expert with that author’s publications. It will be much more difficult for the witness to minimize the work of a researcher already acknowledged as authoritative. On the other hand, a witness who repeatedly denies familiarity with published, relevant research undermines his own authority.

In reviewing an evaluator’s publications you may find views inconsistent with the witness’s current position. If the expert backs away from a previously published statement by saying that his/her views have changed since then, use this as an opening to cross about the lack of certainty in the field. (Shifts in the experts views over time can be a point of attack on the expert’s claim of confidence in his/her opinion: “When you

held a contrary view in the past, you held that view with a great deal of confidence did you not? Just as you are confident in your present view?”)

Note the literature cited in an evaluator’s publications. This can be useful if you intend to cross-examine the expert with learned treatises or professional literature. It is more difficult for an expert to dismiss a contrary authority if he has cited that author with approval.

If you have the opportunity to depose or interview the witness, ask what journals the witness subscribes to or reads on a regular basis. I had one expert admit that he did not subscribe to any professional journals and did not read any on a regular basis. I admired his candor.

Professional Membership and Certifications

Some memberships reflect professional accomplishments at the highest level. Other memberships require nothing more than an application and payment of yearly dues. This is not an area usually worth a lot of time in cross-examination unless the expert appears to be padding his CV with a lot of fluff or invites additional cross by bolstering his opinion by reference to memberships or certifications.

4. EXPERIENCE AND CLINICAL JUDGMENT

There is a voluminous literature spanning decades which holds that clinical judgment is little better than chance in many situations and that there is little

or no correlation between experience and clinical accuracy. Similarly, there is no correlation between a clinician's expressed level of confidence in his opinion and accuracy. A major work in this area is Meehl's 1954 book *Clinical vs. Statistical Prediction: A Theoretical Analysis and a Review of the Evidence*. Meehl reviewed his work and the clinical versus statistical controversy in 1989 and found no need to modify his criticisms of 1954.

Meehl, P. E. (1989). Law and the fireside inductions (with postscript): Some reflections of a clinical psychologist. *Behavioral Sciences and the Law*, 7, 521-550. See also: Dawes, R. M., Faust, D., and Meehl, P. E. (1989). Clinical versus actuarial judgment. *Science*, 243, 1668-1674.

Dawes, R. M. (1989a). Experience and the validity of clinical judgment: the illusory correlation. *Behavioral Sciences and the Law*, 7, 457-467.

The actuarial versus clinical debate has been particularly active in the area of predicting violence or recidivism. That topic is not relevant here except that a number of "meta-analysis" studies have confirmed with very large samples that factors related to clinical impression have poor predictive value. Hanson, R. K. and Bussiere, M. T. (1998). Predicting relapse: a meta-analysis of sexual offender recidivism studies. *J. of Consulting and Clinical Psychology*, 66, 348-362.

Determine where your witness comes down in the clinical versus actuarial (statistical) debate. Most should have to acknowledge the shortcomings of clinical judgment given the decades of accumulated research.

Even while conceding that clinical judgment is problematic, some psychologists will carve out an exception for themselves. One way of attacking this position is to discover whether the expert has any means of tracking his past evaluations for accuracy. How can the expert maintain a high degree of confidence when lacking any outcome data? How can clinical judgment be refined without any feedback?

If the expert is one frequently used in your jurisdiction, look for cases where the expert's opinion has been proven wrong. An example might be where the psychologist testified in favor of termination but where a successful reunification took place despite the opinion.

5. QUALITY OF INFORMATION USED

Source bias

What information sources does the evaluator appear to accept at face value? Does the evaluator place weight upon the observations of prospective foster parents without considering their potential bias? Are

some case participants given emphasis over others without clear rationale?

Has the evaluator neglected to contact or report contacts with important collateral sources? Does the expert's report provide actual information which can be evaluated or just summary conclusions?

Some evaluators attempt to defuse the issue of faulty information by inserting boilerplate disclaimers into their reports:

“The information in this report is intended to inform the reader of data that was presented to the examiner and is not meant to represent factual events....the evaluator presumes that it is complete and accurate.”

The boilerplate goes on to state that should the information relied upon prove to be unreliable or incomplete then the evaluation can be rescinded. If the evaluator in fact makes no effort to consider potential sources of bias and error in evaluation data the expert is exposed to cross-examination about faulty or incomplete data.

Failure to consider reasonable alternatives

Does the expert fail to consider the implications of disputed facts or does the expert make adopt one version of facts without adequate reason?

A striking example in a dependency case was the situation of a step-father accused of molesting his 16 year-old step-daughter. There was a history of conflict between them over grades, curfew, and parental authority

in general. The father was an immigrant and very strict while the daughter was acculturated and unhappy with his restrictions.

The father was criminally charged and acquitted at trial prior to the evaluator's involvement. The molestation issue remained in dispute in the dependency case. The evaluator accepted the fact of molestation as a given in the report without even a brief consideration of the alternative hypothesis of a false accusation. The psychologist diagnosed the father as both a pedophile and a psychopath (mis-using the Hare PCL-R). This in the case of a man with no prior CPS referrals and no prior contact with the criminal justice system. The evaluator gave no consideration to the father's history of steady employment, stable long-term marriage or had a normal, unremarkable relationship with his other children, both male and female.

“Cherry-picking” data for diagnosis

Some DSM diagnoses require that the evaluator consider the subject's overall level of functioning across varied spheres of activity. Does the evaluator do this fairly or does the evaluator select some singular or isolated event to satisfy a diagnostic criterion?

The DSM-IV general diagnostic criteria for a Personality Disorder requires that the person exhibit “an enduring pattern of inner experience and behavior that deviates markedly from the expectation's of the individual's

culture” and that this marked deviation is “inflexible and pervasive across a broad range of personal and social situations.” DSM-IV at 633.

Telling a lie to a social worker (I tried to get to my UA but my car broke down) absent a lot more data does not support a conclusion that the parent is a pathological liar or have an anti-social personality. Take the witness back to the published diagnostic criteria. Confront the evaluator with documented examples of behavior inconsistent with the diagnostic label.

Stale or chronologically confused data.

Be on the lookout for lists of parental deficiencies that contain outdated problems. Why is the evaluator listing a substance abuse issue from years ago along with current issues of concern? Is the evaluator confusing time-lines or sequences of events? At a minimum these problems can reinforce a theme that the expert is sloppy or lacks sufficient command of the case facts.

Failure to control for settings of observations

The psychologist observes the child in the comfort of the pre-adopt home she has been living in for the past 18 months. The child appears to calm, happy and affectionate with the caregivers. The parents are observed with the child at a DCFS supervised visitation room. The child is cranky, distracted and the parents have to focus on calming the child. The cross here

is obvious but can go beyond the fact that the situations are not comparable. The evaluator can be crossed on their lack of professional competence in conducting observations in this manner.

6. METHODOLOGY OF ANALYSIS

Why these tests?

If the evaluator uses psychological tests, the lawyer must gain some familiarity with the test and its limitations. Why is the test being used? Why this test and not some other? Does the expert have the necessary training to use this test? Is this test valid for its intended use in the evaluation? Has the test been validated for a person with your client's characteristics?

There are a wealth of data concerning the MMPI-2 and the MCMI-II, two commonly used tests. While the tests are commonly used and well accepted by psychologists they are not immune from attack. If your client is a racial minority, an immigrant or comes from an unusual background you have room to challenge the applicability of the tests to your particular client.

In reviewing recent literature on evaluations in contested custody situations I have seen reference to test norms for male and female litigants in custody actions that allow evaluator's to compare a parent's score to litigants in similar situations. McCann, J.T. et al. (2001). The MCMI-III in Child

Custody Evaluations: A Normative Study. *1 J. Forensic Psychology*

Practice 27. I have not seen any reference to these norms in any dependency evaluations. This lack presents an opportunity to attack both the test data and the expert's failure to stay current with developments in the field.

If the evaluator is using computer-scored tests you can challenge the evaluator's actual knowledge of the scoring and interpretation. Does it take expertise to send off a mark-sense form and get back a result generated by an unknown computer program? Is the evaluator capable of scoring the test without using a scoring service?

Integrating data

Having obtained all sorts of information about a parent, how does the expert integrate that information to reach a conclusion? This goes back to the issue of clinical versus actuarial judgment. Actuarial instruments use an explicit, set methodology for data analysis. Clinical judgment is idiosyncratic and variable. Clinical opinions are vulnerable to cross examination about the fact that another expert might consider the data differently and reach a different result. What can be more striking is an individual expert being unable to describe exactly how he/she combines the data to reach a conclusion.

You will hear vague statements such as: “I consider all of the data as a whole.” What weight is given to an individual test or fact: “It’s all a part of the overall picture.”

Be on the lookout for tests which have conflicting assumptions or score factors in different ways. I don’t have a ready example of this in a dependency case but there are two widely used actuarial tests used in assessing sex offenders. The Violence Risk Assessment Guide (VRAG) lowers an offender’s risk if the offender had killed or seriously injured a past victim. The Minnesota Sex Offender Screening Tool (MnSOST) increases the risk level with the use of force against a victim. The use of both assessments in a single evaluation presents clear problems of interpretation.

7. USING THE DSM IN FORENSIC SETTINGS

See DSM-IV excerpt.

8. MORE THAN ONE EXPERT OPINION MULTIPLIES THE FUN

While it can be discouraging to face multiple experts holding opinions contrary to your client’s position, multiple experts almost always will give you something to use in cross to show the unreliability of their opinions.

Review their reports for differences in tests employed, conflicts in recitation of basic case facts, contradictory diagnoses, and differences in methodology. Even if the experts reach the same ultimate conclusion, how reliable is a conclusion reached by inconsistent assumptions or methodologies? An argument can be made that ultimate conclusion was reached for reasons other than dispassionate science. The more opinionated and confident each expert the better the opportunities for the lawyer to point out that they both can't be right but they both could be wrong.

SUGGESTED READING AND RESOURCES

The web contains a wealth of information. Google is my favorite search engine. If you wish to search for academic publications go to Google Scholar. Scholar will improve search focus and efficiency. If you encounter a publication that requires a subscription or payment to download click on "Cached" or "Similar Pages" below the initial URL on the search page. This will sometimes turn up a free version of the material on another site.

Relevant material can be found by searching under "child custody" or "parenting evaluations." Most of this material concerns custody contests between parents rather than dependency cases.

The bible for cross-examination of psychologists is the 3-volume set: Coping with Psychiatric and Psychological Testimony by Ziskin and Faust. The problem is that the set is expensive and hard to find used. The current edition is the 1995 5th edition with a 2000 supplement. The 6th edition is scheduled for publication later this year from Oxford University Press. The expected price is about \$240. The older editions can be useful but are outdated in dealing with specific tests.

Statistics are a fact of life. Get an introductory text. You can learn this.

MOST OF ALL DON'T BE INTIMIDATED!