

# Testifying In Court: The Expert Expert Witness

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## We start with tough X-E Questions

- Questions You Should Be Able to Answer at End of Workshop



## Contact Information

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## Goal: Preparation for Worst Case Scenarios

### **Worst Case Scenarios**

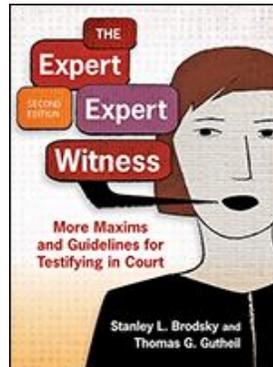
**Conducted by courtroom-skilled, case-prepared attorneys**

**These attorneys know how to challenge witnesses**

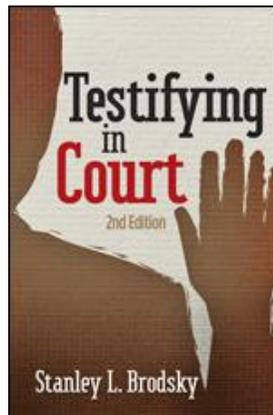
**They bring out problems in the experts' work or uncertainties in their testimony:**

**EXAMPLE: "Don't all evaluations have some findings that do not support the conclusions as strongly as others?" (Yes). "Please describe those findings from your own evaluation."**

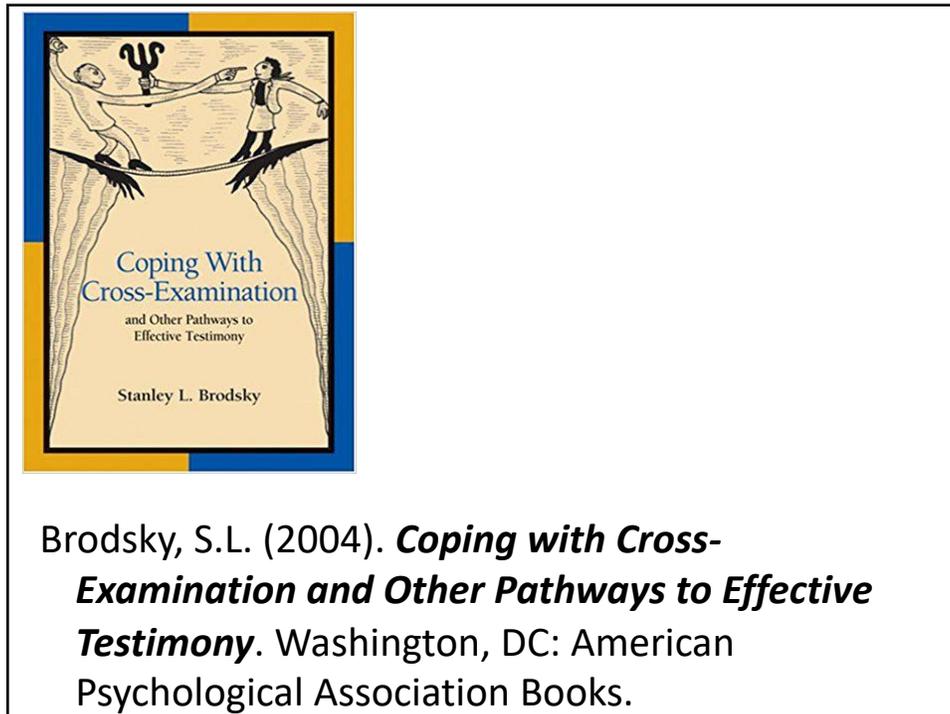
## Some References



Brodsky, S.L. & Gutheil, T. (2016). *The Expert Expert Witness: More Maxims and Guidelines for Testifying in Court, Second Edition*. Washington, DC: American Psychological Association Books.



Brodsky, S.L. (2013). *Testifying in Court: Second Edition*. Washington, DC: American Psychological Association Books.



## More References

- Brodsky, S.L. & Wilson, J.K. (2016). Worst expert testimony ever. *Psychological injury and law*, 9(3), 272-274. . DOI 10.1007/s12207-016-9261-7
- Brodsky, S.L., Dvoskin, J.A., & Neal, T.M.S. (2017). Temptations for the expert witness. *Journal of the American Academy of Psychiatry and Law*, 45, 460-463.
- Gutheil, T.G. & Dattilo, F.M. (2008). *Practical approaches to forensic mental health testimony*. Philadelphia: Lippincott Williams & Wilkins.
- Brodsky, S.L. (2011). *Therapy with coerced and reluctant clients*. Washington, DC: American Psychological Association.

## Objectives Today: 1-3

- 1. Learn the *process* of testifying**
- 2. Understand more choices & constructs during cross-examination & depositions**
- 3. Apply techniques that cut across specialties, cases, and tasks**

## Objectives: 4-6

- 4. Prepare you to leave courtrooms with more knowledge of transactions on the stand**
- 5. For you to feel more comfortable and satisfied about your testimony**
- 6. More able to integrate who you are and what you have to say with the demands of the court**

## Positive Outcome of Demonstrations

**Objective: avoid trauma in demonstrations.**

**But, my objective *is* to arouse some anxiety.**

- **No demonstration should end without presentation by you or me of successful responses.**
- **If I have not demonstrated successful responses, demand them!**

## Pass as Option Is Always Present

**“Pass” is an always available participant option**

**No obligation to respond in role-playing**

**Vicarious learning may occur from watching others**

**“Pass” as response will never be questioned or pursued**

**Still, please join in and participate in role-playing if you are comfortable doing so**

## THE PUSH-PULL

**A martial arts principle: Begins with attorney having aggressive tone or demeaning issue with factual basis.**

**When in agreement, witness moves in the same direction as the question, instead of resisting**

**A shift in ownership. The topic becomes owned by the witness.**

*Nondefensiveness of the push-pull promotes credibility*

## PUSH-PULL EXAMPLES

**Requires practice to master the push-pull**

**Good push-pulls often begin with**

**“Oh, yes” or**

**“That is most certainly so” or**

**“Much more than most people would think”**

## THE ADMIT- DENY 1: The Admit

Always follows a question in which complex issues are presented overly simply

**Admit deny consists of two parts: admitting the part that is true and denying part that is untrue**

**Reply begins with a dependent clause, using words like “*although*” and “*while*.”**

**Thus, admit-deny might begin with this phrase:**

**“Although there is a great deal of information I did not have . . . ”**

## ADMIT-DENY 2: The Deny

- **The second part of the sentence is a powerful denial of the parts that are untrue. The deny statement might be completed with:**
- **“ . . . the information I do have is clear, consistent and compelling in pointing to my conclusions.”**

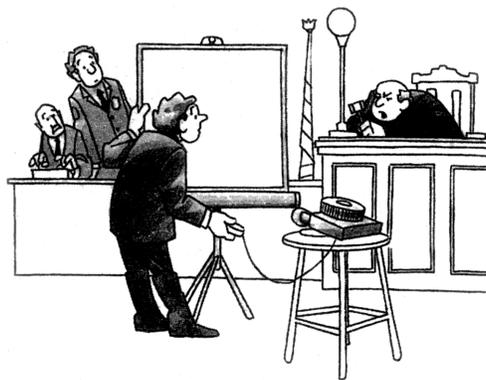
**Admit-deny responses require practice. *The deny needs to be stated much more strongly and emphatically than the admit part.***

## ANSWER “YES OR NO”

**Attorneys are entitled to ask that you answer questions with a simple “yes or no”**

**If there is a simple yes or no reply, by all means answer that way. Don’t be evasive. Say yes or no.**

**The second “Rule of Three” - no more than three yes answers or no answers in a row. Change wording.**



**“Will the witness please confine himself to a simple ‘yes’ or ‘no’!”**

## YES OR NO

Sometimes the yes or no answer is demanded inappropriately. Do not give in. Instead, say:  
“There is no simple yes or no answer to that question.”

Some witnesses turn to the judge and state:

“Your honor, it would be professionally irresponsible to try to give a yes or no answer to that question.”

“To answer yes or no would violate the oath I have taken to tell the whole truth”

## My Responsibilities

**To present principles that apply broadly**

**To give you a menu of choices: but no mandates. These will be techniques you may wish to try.**

**Humor: In workshop, not testimony**

**Also – I will not get through all of my slides. That is part of my plan.**

## Testifying at its best

**Validates personal mastery & professional poise**

- **Public presentation of professional self: A rare event**
- **Managing tough scrutiny from intelligent questioners**
- **Effectiveness in a land of foreign concepts & procedures**
- **Intellectual challenge of quick thinking & mental agility**

## Testimony at Its Worst

***At its worst, testimony can leave the expert feeling worthless and abused, and resolving never again to be in the courtroom voluntarily.***

- **Feelings of helplessness and inadequacy.**
- **Disillusionment with the process.**
- **Anger at the cross-examination.**
- **Frustration about one's performance.**

## Routine Testimony

**Routine court testimony is unremarkable  
and not challenging**

**Uneventful & predictable**

**Not the focus today**

**There are  
almost  
always  
surprises  
when  
testifying**



## SURPRISES: 2 Examples. Singing and Swooping Attorneys

- After attorney says the witness is playing a game, he sings, "Once in a while he won't call, but It's all in the game." (Tommy Edwards song, 1958)

(Many a tear has to fall, but it's all in the game. All In the wonderful game that we know as love) <https://www.youtube.com/watch?v=akbfXUA08OY>

- Attorney shifts position between each cross-examination question. Droops over the podium, then swoops towards the back of the courtroom, then forward to the podium, bent at the waist and knees, his body forming a stylized letter Z. It was captivating to watch.

## Worst Case Scenario #1

"I had been given thousands of documents to read (I actually read them all). During cross, the lawyer asked why I had not addressed the impact on the examinee of his mother sleeping with her other son." (In all of these documents mentioned in only 1 sentence).

"The lawyer then spent at least 30 minutes browbeating me on my position regarding children sleeping with their parents and the effect on siblings"

This is a classic battle for power & control. Try out answers. [from assertiveness training: While I appreciate your concern about the nature of the family bed, . . . ]

## Worst cases: # 2, 3, 4 To Faint, To Cry, To Blank Out

- Rare event: man who had panic attack and fainted on the stand
- Woman who cried without visible emotion
- Greatest fear: blanking out
- Solutions:
- Habituate to courtroom.
- Gain an implicit ally.
- Request break for personal reasons.

## Preparing for Court

**Two essential issues cut across all testimony**

- 1. What do you know?**
- 2. How do you know what you know?  
(the methodology issue)**

## The Nature of Preparation

**Techniques are no substitute for preparation.**

**Be prepared -- The Boy Scouts' and Girl Scouts'  
Credo. Spoken while holding up middle 3 fingers  
of the right hand**



## Be Prepared (Tom Lehrer, 1953)

Be prepared! That's the Boy Scout's marching  
song,  
Be prepared! As through life you march along.  
Be prepared to hold your liquor pretty well,  
Don't write naughty words on walls if you can't  
spell.

## Be Prepared - Tom Lehrer (continued)

Be prepared! And be careful not to do  
Your good deeds when there's no one watching you.  
If you're looking for adventure of a new and different  
kind,  
And you come across a Girl Scout who is similarly  
inclined,  
Don't be nervous, don't be flustered, don't be scared.  
Be prepared!

[http://www.youtube.com/watch?v=fSwjuz\\_-yao](http://www.youtube.com/watch?v=fSwjuz_-yao)

## To Prepare

- **Review facts of case so they are fresh**
- **Knowledge base: The first rule of three**
- **This rule is: Learn in detail three studies directly relevant to your methods or tasks**

## Preparation Queries: Try Them

Is it important to stay current in your field?

Describe all of the books & articles you have read in the last year? How about in *The Journal of Addiction Medicine*? In the *Journal of Addiction Research and Therapy*? In *Journal of Clinical Psychology*?

What scholarly books have you read in the last month? When? What chapters were in it?

## Preparation Queries 2

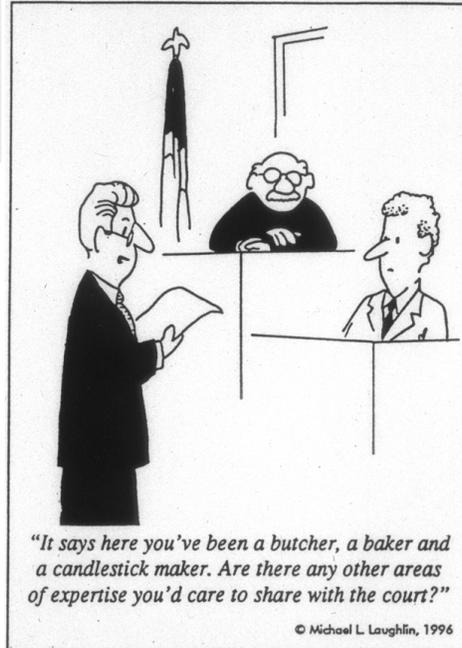
Would you be surprised to see 50,236 entries in PsycINFO for "addiction treatment?" Or 9,452 entries in *PsycINFO* for "addiction evaluation?"

About how many have you actually read?

How many of the tens of thousands articles for mental health treatment have you read? Or how many of the 18,012 on treatment relapse have you read?

(Search results as of 04/07/2019)

**Prepare To  
Discuss  
Areas of  
Expertise**



## Experts Who Bring Authentic Self into Courtroom

- The case for authenticity – easier on you and can be convincing.
- BUT suppose you're authentically very funny?
- Remember Otto's Law "Nobody is as funny as they think they are."
- Use only context congruent humor.
- Or suppose you are authentically feisty and argumentative?

The Humor Hazard:  
Use Humor Rarely - Never Be Flip



**“I’ll handle the jokes, counselor”**

## Narcissistic Experts

- Believe it is all about them.
- Focus on their success.
- A transitory state from being on the stand.
- Gutheil & Simon (2005): A sense of grandiosity; they believe they are in control and that testifying affirms how special and exceptional they are. This “leads the vulnerable expert to shape, slant, or distort testimony to win approval from the retaining attorney or to ‘win’ at any cost.”



## It's Not About You – Dvoskin 2016 (Narcissism on the Witness Stand)

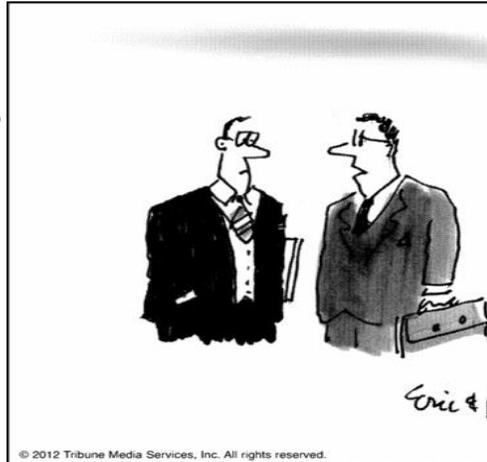
When you walk into court in your fancy new suit  
And you think you're as cool as the night  
When you snap at the lawyer who questions your point  
When you dare him to stand up and fight  
When you're sure that you know that your side ought to win  
And that God is for sure on your team  
You might stop for a moment and think of this song  
Because things are not just what they seem  
*It's not about you*  
*It's not about you*  
They may call you an expert and kneel at your feet  
• But believe me *it's not about you*

## Experts Who Think They Know Best

### The Humility Conundrum

“Do you consider yourself to  
Be more intelligent than  
most people?”

- Confidence vs  
humility



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“I told the judge I’d go over his head  
and take the case to Dr. Phil.”

## Learning To Say “*I Don’t Know*”

- Good attorneys will always find something we do not know.
- Honesty and the oath.
- How one says *I Don’t Know*.
- What follows the *I Don’t Know* statement is important.

## The Art of Saying “I Don’t Know”

Saying “I don’t know” is natural cure for perceived narcissism (much as the bite of tsetse fly is a natural cure for insomnia).

Best said with confidence.

Stated in such a manner that it is clear it is truly okay with you that do not know.

Sometimes the best answer is, “nobody keeps track of that information in those terms.”

## Attorneys Who Bully and Attack



*“What if my bliss happens to be suing people?”*

**“What if my bliss happens to be suing people?”**

## Bullying Attorneys

Strategies for dealing with bullying:  
Pace  
Breath  
Control

## Power and Control on the Stand

**Struggles for power and control**

**Attorneys seek positions of power and dominance over witnesses during X-E.**

**Attorneys seek to control substance and process of the examination.**

**Witnesses, in turn, seek to be powerful and to stay in control of self and of testimony.**

## Ultimate Attorney Control: When there is nobody to whom to reply

- “You have testified that your opinion is based on reasonable professional certainty, but it is true, isn’t it, that your opinion is neither professional nor certain, Doctor! Thank you. No more questions.
- And the attorney walked away from the podium.

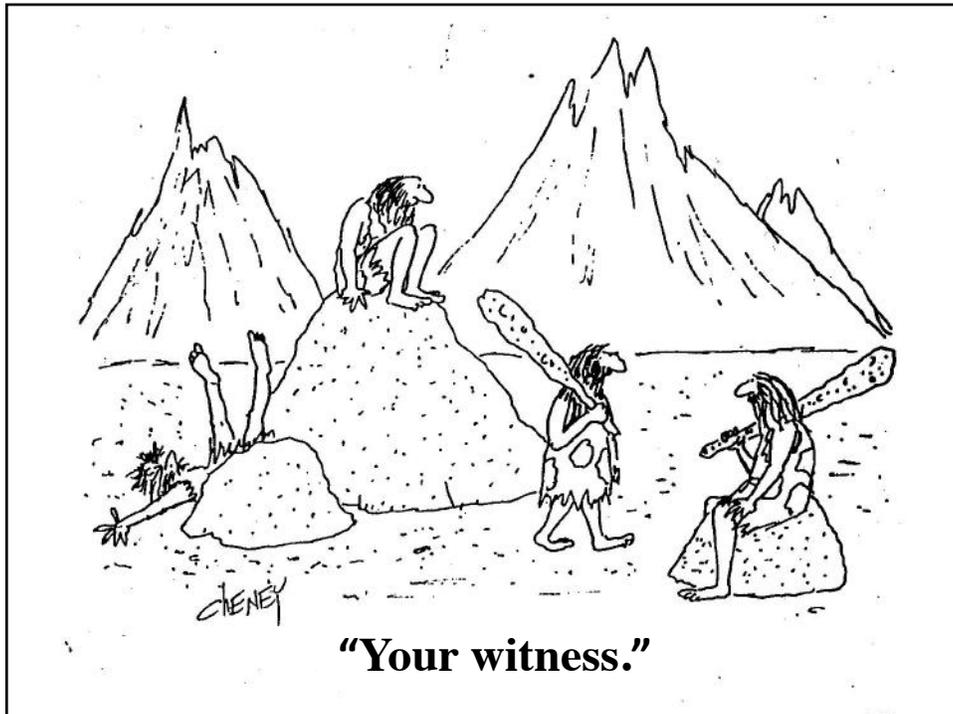


*“Are you just pissing and moaning, or can you verify what you’re saying with data?”*

**“Are you just pissing and moaning, or can you verify what you are**

## Worst Case Scenarios #5 & #6: Asked about a book or report

5. "While testifying about an evaluation that involved sexual abuse, I was asked about a book that had something to do with allegations of sexual abuse. Once I said I had not read it, the attorney battered me over and over for not knowing of this book or reading this book."
6. "The attorney went on for 6 hours about why I had not read and used the psychiatrist's report on this examinee."



## Answers to Worse Case #5 & #6

#5. Nobody has read everything

#6. It is only my interviews, my assessment, and my conclusions on which I have drawn.

## The 4 Components of Credibility

**Confidence**

**Likeability**

**Honesty (trustworthiness)**

**Knowledge**

## Confidence

- People believe individuals who are confident
- When not confident, act paradoxically
- The hazard of too much of a good thing: the arrogance of absolute certainty

## Research on Witness Confidence

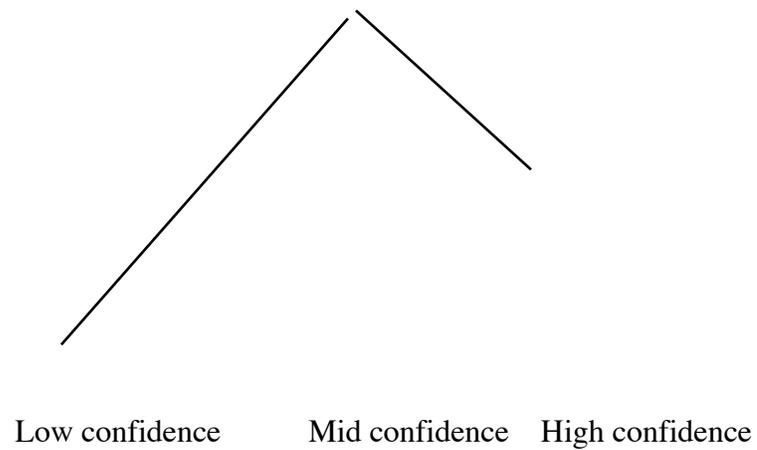
Cramer, 2006: studied 319 college students on confidence and expert witness credibility.

*Low Confidence:* Quivering tone of voice, absence of fluency in speech, vacillating pace of speech

*Medium Confidence:* Moderate and stable tone of voice, clarity in speech, moderately paced speech, willingness to acknowledge a degree of certainty

*High Confidence:* Loud and strong tone of voice, assertive speech and mannerisms, rapidly paced speech, unqualified statements (“I am certain”), good posture, fluency in speech.

## Witness Confidence & Credibility



## Findings

Confidence a significant main effect for credibility

Inverted V curve: Credibility rises with medium confidence and then falls off

High confidence still yields more credibility than low confidence

# Likeability

Some experts become unpleasant on the stand

Best testimony by experts maintains a  
fundamental niceness and likeability

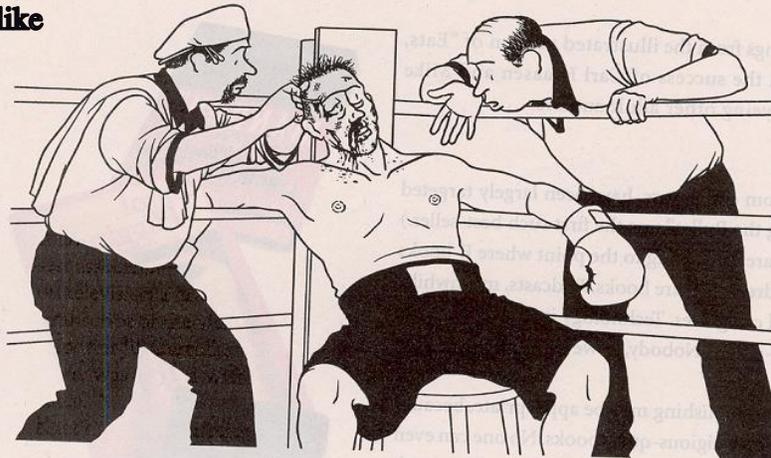
People believe individuals they like

Likeability is related to ratings of  
trustworthiness, especially among women.

Brodsky, S.L. et al (2009). Credibility in the Courtroom: How Likeable Should an Expert Witness Be? *Journal of the American Academy of Psychiatry & Law* 37, 525-532

**People believe  
individuals  
they like**

# Likeability



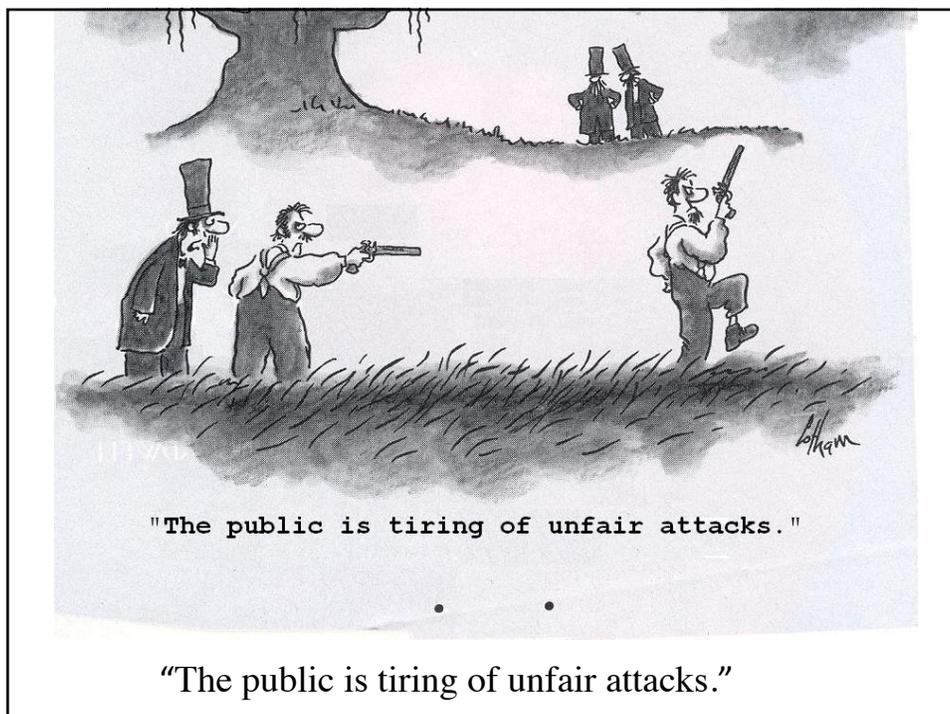
*“Sure, he’s pulverizing your face, but you’re chipping away at his likeability.”*

**“Sure, he’s pulverizing your face, but you’re chipping away at his likeability.”**

## Trustworthiness (honesty)

- People believe witnesses they trust
- Trustworthiness is compromised by refusal to acknowledge problems
- Trustworthiness is compromised by defensiveness
- Defensiveness is a common response

Larson & Brodsky, BSL, 2014: Assertiveness versus defensiveness. [doi.org/10.1002/bsl.2016](https://doi.org/10.1002/bsl.2016)



## Research on Knowledge and Expert Testimony

- Differences in Expert Witness Knowledge: Do Mock Jurors Notice and Does It Matter?
- J Am Acad Psychiatry & Law 43:69-81 (2015)
- [Caroline Parrott, Tess Neal, Jennifer Wilson,](#) & Stanley L. Brodsky
- 155 college students, 2x2 design high/low knowledge, male/female witness
- Knowledge defined as : substantive content and clarity of testimony, credentials, relevant experience, self-proclaimed expertise, assertiveness, and familiarity with the case

## Findings

- No difference in capital sentencing.
- Low knowledge associated with higher likability.
- Too much self- assertion of knowledge may have turned off mock jurors.
- Ceiling effect on expertise.
- Still: high knowledge is responsible thing to acquire. But deliver it in doses that can be swallowed.

## Handling Anxiety about Testifying

**Testimony anxiety is normative in infrequent or new witnesses**

**Overprepare:**

**Action is the natural antidote for anxiety**



## Anxiety Reduction

**Familiarization with and habituation to the courtroom**

**Observations before testimony (if rule is waived)**

**Speaking aloud**

**Fit and place in the witness stand**

## Anxiety Reduction- 2

**Known and proven methods**

**Do not try new personal or chemical methods**

**•The Rumpelstiltskin Principle:**

**Know names of all of the participants**

**•Parallel forms of address can then follow:**

**“Dr. Smith, would you please explain . . . .”**

**“Mr. Moore, it is routine practice to . . . .”**

**And stay hydrated**



*“The important thing is to stay hydrated.”*

## Breath control

Avoid shallow and quick breathing

Breathe in before answer

Deep breathing = emotional power

Pay attention to breath



*"You're always telling me how much you love me—but just once I'd like to hear you say it the way you said it in your deposition."*

**"You're always telling me how much you love me. – but just once I'd like to hear you say it the way you said it in your deposition"**

## Judges

**Always the trier of law (may be trier of fact)**

**Longevity, power, elections, active vs passive**

**May ask questions of witnesses**

**Widely varying degrees of control & interest**

**Affiliating with witnesses**

**May actively control witnesses**



## Arbitrary Judges

HAVING REVIEWED  
YOUR LONG RECORD OF  
REPEATED VIOLENT OFFENSES  
I'VE DECIDED TO SHOOT  
YOU HERE ON THE SPOT.



## Treating Expert Witnesses

**They testify about what they have seen and heard in their roles as therapists or other direct service roles.**

**Do not have to go beyond the limits of their observations**

**Privilege is owned by client and waived**

**Felt conflicts between helping roles and being an objective witness**

## Examples of Treating Expert Witnesses

- **Psychotherapists or mental health professionals testifying about their clients who are in child custody litigation or facing criminal charges**
- **Child abuse or Protective Service Workers who have been helping abusive partners or abused children or partners**
- **Drug or alcohol treatment program personnel**

## Principles of Testimony for Treating Expert Witnesses

- **Awareness of dual role.**
  - **Resist pull to offer forensic-evaluative testimony if primary role is as therapist**
  - **Accept possibility of contamination of subsequent treatment role**

## Evaluating Expert Witnesses

- **Retained for the purpose of assessment**

**Distinct roles – Treator is helper; Evaluator is not clinician, needs full informed consent (Shuman, Connell)**

- **Client is retaining attorney (never the evaluatee). Never call the evaluatee your client. Confuses roles.**

**Plaintiff or defendant is the evaluatee and is not a patient no matter what s/he requests or says.**

## Direct Examination: Introduction

**Know path to witness stand**

**Primacy effects: Approach with poise and confidence, no matter how you feel. Affect follows behavior.**

**Identification of witness to court reporter  
(business card)**

## Walking to the Witness Stand

- Intellectuals often lead with their heads.
- The performance begins here: Testimony as performance art.
- Primacy & recency effects.

## First Impressions

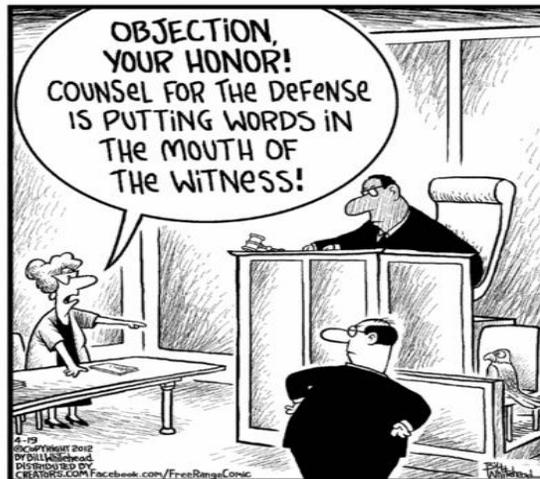


"Forget the facts! Don't I *look* innocent?"

## Direct Examination: Questions

- Experts: nature, time, & place of examination, methodology, findings, conclusions, opinion
- Open-ended questions should be asked by attorney followed by narrative answers by witness
- Direct examination testimony tells a story
- Narratives that promote cognitive processing by audience: Heilbrun research  
e.g., MR & cloak of competence

## Counsel Putting Words in Our Mouths



## Words in Our Mouth

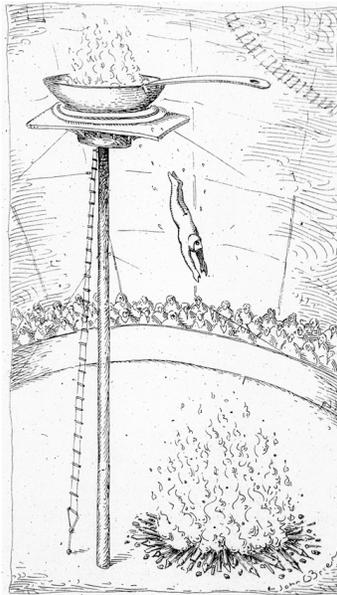
- Scott Bresler U Cincinnati – Examinee who spoke only through hand puppet
- Attorneys ask, "Wouldn't it be fair to say. . .?"
- (Followed by their statement of our findings)

# Nonverbal communication by attorneys

I watched an attorney stick out tongue at opposing counsel



**A nonverbal commentary on testimony**



## Pace Control: Four rules

**Attorneys attempt to control pace**

**To control your own pace:**

- 1. Correct shallow and anxious breathing**  
**- Breathe in deeply. Respond on out-breath. Slows pace, promotes power in answers (already noted)**
- 2. Some answers require thought. Stop talking. Take time to think.**
- 3. Think with visible actions. Hands, head positions, posture, body movement.**
- 4. Then respond with clarity and strength**

## ELICITED VANITY

- Attorneys sometimes engage in outrageous flattery . In cross-examination or during depositions, ingratiating questions can take on a challenging or threatening quality.**
- “You consider yourself a very careful observer of human behavior, don’t you?”**

**“With all the achievements on your resume, do you have an exceptionally high level of expertise in your field?”**

## Elicited Vanity: Answers. 1

**Such questions have potential for bringing out self-promotion and arrogance.**

**Avoid elicited bragging**

**Matter-of-fact modesty**

**Do not be an expert on your expertise**

## General Principles of Testimony

- Taking your time
- Speak audibly
- Avoid empty fillers
- Speak rationally
- Speak to audience – eye contact: How much, to whom?
- Avoid jargon

## What Experts Fear The Most

- Going blank on the stand
- After that, Not knowing detailed information about procedures or tests such as development or reliability or norms
- Being embarrassed
- Missing something

## Challenges To Experience

You relied to some extent upon your experience in coming to your conclusions, isn't that correct?

Doesn't the weight of scientific research show that experience does not help mental health professionals to be more accurate in their evaluations?

While it may be your impression that experienced clinicians are accurate, the question is about the scientific literature. Are you familiar with that literature?

## Experience: Answers

**In common sense terms, acknowledge the limitations of experience.**

Remember, there are people who keep doing the same things over again, without learning more.

Feedback and study shape learning, rather than experience by itself.

## Challenges to Experience

- As much common sense as empirical
- All experts have a first time testifying
- Little experience – sign of not being a hired gun or bought witness
- The Faust – Brodsky brouhahas
- Clinical-therapeutic experience is highly valued by jurors. Almost everyone thinks experience matters
- Spengler et al The meta-analysis of clinical judgment project. – low relation between experience and diagnostic accuracy (in *The Counseling Psychologist*, doi.org/10.1177/0011000006295149)

## Credentials: Answers

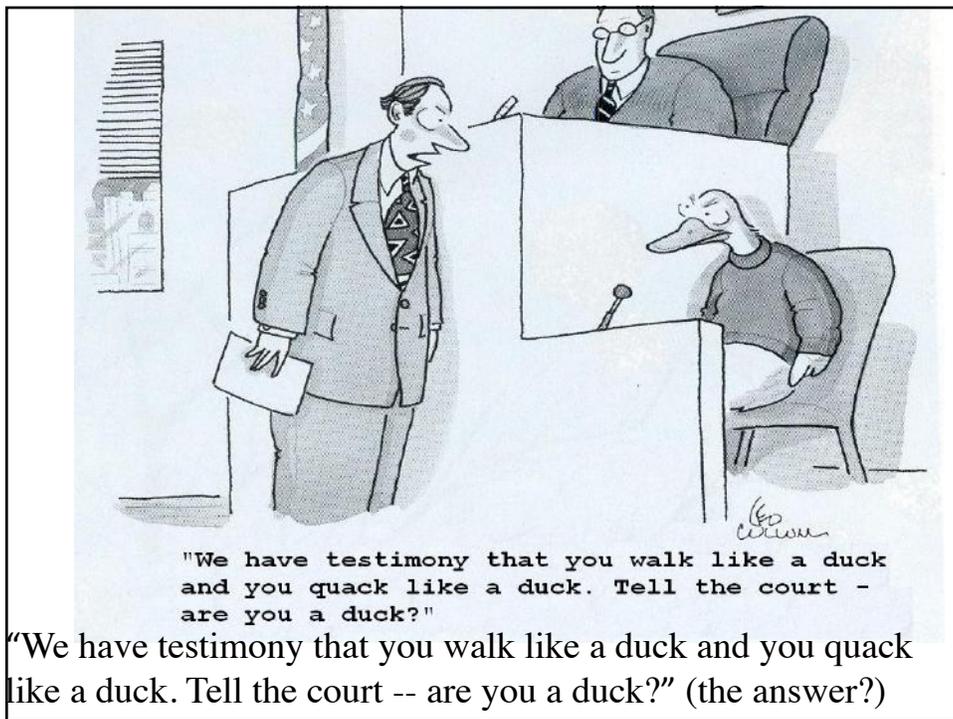
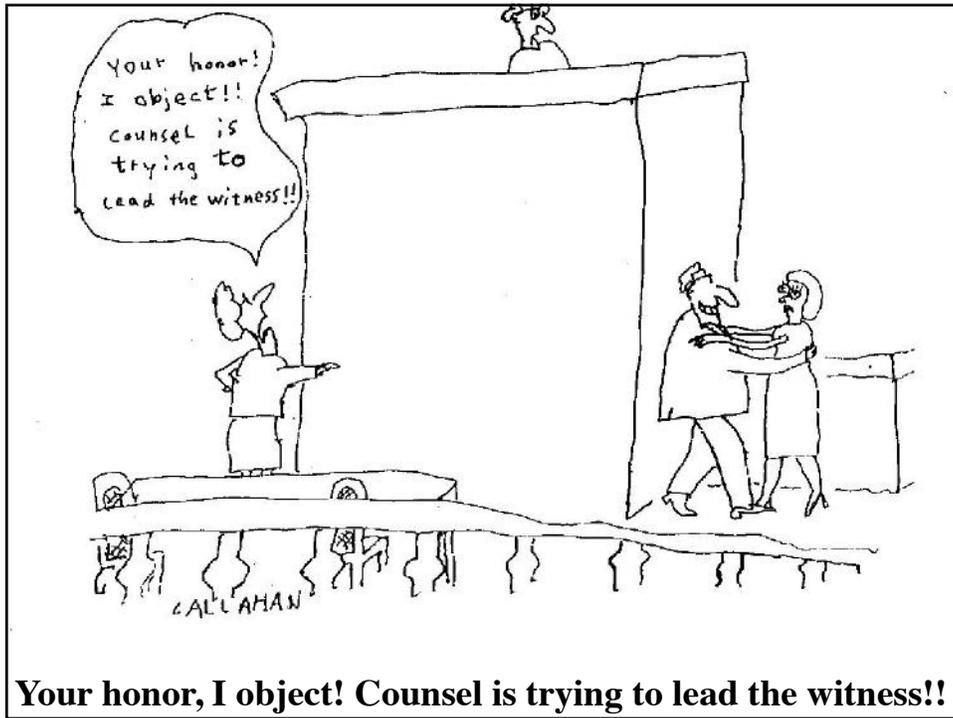
Give thoughtful, fully accurate answers. Don't fudge.

Place credential gaps in context of jobs or tasks.

There is always something we are not. Relax

## Challenges to Technique

- Evaluation techniques of uncertain validity
- Limitation of methods – All have limitations
- Dr., What are the major weaknesses in the use of the Personality Assessment Inventory?
- Now – a different story when attorney is specialized and knows more than expert (rare)
- Another expert sits on attorney table and feeds X-E questions to be asked.
- Many questions not substantive – just designed to reduce credibility of the witness.



## Learned Treatises

- Admitted if expert has relied on it
- Or accepts book or study or person as authority
- Accept only if truly, thoroughly familiar w it
- Be cautious about quickly accepting even if person is famous psychologist (including Nobel Prize winner Daniel Kahneman?)

## Learned Treatise in Cross-Examination

Doctor, Would you accept Dr. Phillip Zimbardo as an authority on the effects of imprisonment?

If not him, who would you fully accept as an authority?

Are you *the* national authority?



## Prior Writings or Testimony

- Attorneys collect transcripts of testimony by certain experts – often out of context
- What if inconsistent with current testimony?
- Professional writings
- listservs, Facebook
- Case descriptions of pending trials
- My story of leaving my body during sidebars, and “my mind was elsewhere”



### More Worst Case Scenarios: Gender and Personal Questions

“During a trial, the attorney asked personal information such as my home address and my current medications”

“Attorney asked me under oath what kinds of pain medications I’d been on during the evaluation and had they impaired my ability to function as an evaluator”

### Worst Case Scenario: Personal Questions

“I was asked over and over about my personal life. Do I have kids? how many? I wouldn't respond.

The attorney then tried to go around it in an indirect way. Do you work part time? Why do you work part-time? What kind of car do you drive?”

## Reports and Your Own Records

- **When you write reports, know that you may be held accountable for all entries**

**No duplicate and “held in reserve” sets of records**

**Precision and care in writing**

- **Check and double check accuracy**

**Commit essential aspects to memory so your testimony is not drowned in your searching through records**

## AFTER YOUR TESTIMONY: 1

- **Do not assume the legal opinion is a direct reflection of your effectiveness. It is a common error.**
- **Step down with confidence**

**Read something else you should have known for this case**

**Get feedback from courtroom participants**