APSAC

Volume 3 Number 3, Fall, 1990

THE ADVISOR

AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN

LAW

COPING WITH CROSS EXAMINATION

—by John E.B. Myers

Professionals from medicine, psychiatry, social work, and psychology often testify for the state as expert witnesses in child abuse litigation. For professionals new to the role of expert witness, and for many veterans of the witness stand as well, no aspect of testifying causes more anxiety than cross-examination. Anxiety results because cross-examination is both adversarial and a bit mysterious. Non-lawyers generally are not privy to the cross-examiner's art. The purpose of this article is to reduce that anxiety by going behind enemy lines, if you will, to demystify the process. The expert witness who knows the cross-examiner's techniques and strategies is able to deal with him or her on more equal terms.

Testifying in court begins with direct examination. During direct examination, the district attorney calling the expert witness asks the questions. Following direct examination, the attorney defending the alleged abuser has the right to cross-examine.

No two cross-examiners are alike, of course, and each attorney's technique is influenced by her personality and experience. Nevertheless, most cross-examiners rely on some combination of the following principles.

Principle #1: Avoid the Frontal Attack in Most Cases.

When people think of cross-examination, they remember Perry Mason ruthlessly burrowing in on a witness until the beleaguered chap finally blurts out, "All right! You win! I did it." That may be the way it is on TV, but such dramatic cross-examination is seldom seen in real courtrooms, especially with expert witnesses.

The competent cross-examiner seldom attempts a frontal attack on an expert in the hope of destroying the expert's credibility or getting the expert to change her opinion. Why do cross-examiners avoid the frontal attack? Because it usually fails. Furthermore, jurors may react negatively to a cross-examiner who ruthlessly attacks an expert, especially an expert in the business of helping children, and the jury's discontent with the defense attorney may generalize to the defendant. Thus, skilled cross-examiners seldom use the sledgehammer approach, preferring instead more subtle techniques.

Principle #2: In Appropriate Cases, Conduct Only a Positive Cross-Examination, and Avoid or at least Postpone Negative Cross-Examination.

There are two basic types of cross-examination: negative and positive. The purpose of negative cross-examination is to attack the expert's credibility, impartiality, or competence, and to undermine the believability of the expert's testimony. In positive cross-examination, on the other hand, the attorney avoids attacking the expert, and attempts instead to elicit from him or her information favorable to the defendant.

Negative cross-examination is risky. When a witness knows she is being attacked, she resists providing testimony that is favorable to the attacker. Furthermore, a witness under attack is prone to look for—and find—opportunities to refute points the cross-examiner is trying hard to make.

In some cases, the cross-examiner avoids the risks of negative cross-examination altogether, and limits herself to the positive approach. For example, the attorney may reemphasize with the expert any parts of the expert's direct testimony that may be favorable to the defendant.

Naturally, when the attorney's questions are fair and accurate, the expert agrees with them. There is nothing wrong with agreeing with the cross-examiner. In fact, an expert who stubbornly refuses to give an inch in the face of reasonable questions from the cross-examiner undermines her own credibility in the eyes of the jury.

When the cross-examiner intends to conduct a negative cross-examination, she may begin with the positive approach, hoping to elicit favorable information before the expert is alerted, and perhaps alienated, by the onset of negative or attacking questioning. Remember then: even though the cross-examiner begins on a positive note, the negative segment may be just around the corner.

Principle #3: Raise Just Enough Doubt about the Expert's Testimony to Give Yourself Ammunition for Your Clos-

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NEWS

APSAC's OFFICES MOVE; NEW TASK FORCES FORMED; STATE CHAPTER FORMATION GOING STRONG

—by Theresa Reid

As of July 1, APSAC had a new address: 332 South Michigan Avenue, Suite 1600, Chicago, 60604. Our new phone is 312-554-0166. You may see stationery and brochures bearing our old, University of Chicago, address for months yet—we have a lot of stock. Please just ignore them. Anne Cohn and the National Committee for the Prevention of Child Abuse have kindly provided us with space in their offices at very reasonable rates, and we'll be here for the duration.

Task Forces

At its meeting in Atlanta in April, APSAC's Board authorized the formation of two new Task Forces: one, on Psychological Maltreatment, is being co-chaired by Stuart Hart and Marla Brassard, from Indiana University-Purdue University and the University of Massachusetts at Amherst, respectively (see article, page 3); the other, on Assessment and Treatment of Adult Survivors of Abuse, is being chaired by Dan Sexton of Child Help USA (213-465-4016). Dan will write soon about the specific objectives to be addressed by the Adult Survivor Task Force. Meanwhile, he would

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ior. Including her in the planning process helps her gain a much-needed sense of control. Therapist and child should concurrently work on ongoing conflicts, on alternative ways the child can cope, and on ways to change the environment so that the need for dissociative defense lessens.

The therapist will have to help caregivers, teachers, and others learn to accept dissociation without promoting it. The child's behaviors may make her the center of attention. Some who focus on her may do so out of curiosity or meanness, others to prove or disprove the diagnosis, others in a misguided attempt to cure the child by ridicule, harrassment, or shock. Adults in close contact with the child should be sufficiently familiar with the dissociative process and its appearances so that any fascination is defused. Remind them, for instance, that we all dissociate to some degree when watching a movie, or driving a long, straight, boring road, or listening to a symphony.

8. Integration (uniting of the split-off parts) is a long, slow process that can't be forced. It occurs with the reduction or resolution of conflicts and the learning of new coping skills. Although spontaneous integration may occur after a release of strong feelings related to traumatic events, it shouldn't be interpreted as a spontaneous cure: much conflictual material may still remain hidden. The therapist needs gradually and carefully to determine this possibility through discussion and directed play.

To be as helpful as possible, therapists should make sure to deal with the feelings of loss they may experience initially in relation to the process. Children, too, should be encouraged to talk about what integration will mean to them.

Integration will occur gradually as a result of the child's desire for normalcy, her participation in a healing environment, her freedom from abuse, and her evolution of new coping skills. Integration can be boosted and reinforced with visualization exercises. For example, have the child close her eyes and, through vivid imagery, bring together the separated parts of herself. Each part might be a color, which joins all the others to form the rainbow of self.

Continued support is necessary for some time, while the clinician helps the child solidify gains and supports her in using her new coping skills to negotiate the inevitable bumps along the developmental road.

The identification and treatment of dissociatively disordered children requires complex clinical skills, of which this article is only a brief overview. If we learn to recognize dissociative disorders promptly and to provide or secure appropriate treatment, however, we will be doing a great deal for the children we have chosen to serve.

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Beverly James, MSW, is director of the James Institute in Kona, Hawaii. She is author of Treating Traumatized Children *(Lexington Books, 1989), and co-author of* Treating Sexually Abused Children and their Families *(Consulting Psychologists Press, 1983).*

MYERS *(Continued from page 1)*

ing Argument to the Jury.

As mentioned above, many people think the goal of cross-examination is to get the expert to change her opinion or admit she might be completely wrong. Cross-examination sometimes has this dramatic effect, but not very often. The skillful cross-examiner knows she is not likely to get the expert to change her opinion, so she takes a more subtle approach.

The goal of cross-examination is usually not to score a direct hit on the expert, but to poke a few holes in her testimony. The cross-examiner hopes to raise questions about the expert's testimony—questions that are deliberately left unanswered until the cross-examiner's closing argument to the jury.

How does the cross-examiner raise doubts about the expert's testimony? By controlling the witness during cross-examination. Control of the witness is ac-

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SPECIAL OFFER TO APSAC MEMBERS

NEBRASKA LAW REVIEW (V. 68 [1989], NOS 1 & 2) ARTICLE, "EXPERT TESTIMONY IN CHILD SEXUAL ABUSE LITIGATION," by John E.B. Myers, JD; Jan Bays, MD, FAAP; Judith Becker, Ph.D.; Lucy Berliner, MSW; David L. Corwin, MD; and Karen Saywitz, Ph.D.

A comprehensive review, with major sections on "The admissibility of expert testimony," "Expert testimony based on novel scientific principles," and "Categories of expert testimony on child sexual abuse." Opening and closing overviews bring the issues into clear focus.

145-page bound reprint. ***Sale To Benefit APSAC***. Call the office for details.

CORRECTIONS

In the last issue of *The Advisor*, a typo was made at the end of Karen Saywitz's article, "Developmental considerations for forensic interviewing." On p. 15, the last sentence in the third paragraph from the end of the article should read, "Be sure to praise the children for their effort—working hard during the interview—*not* for the content of what they say." In the published version, "and" was substituted for that "*not*"—a critical difference. We're sorry for the mistake.

Also: *The Advisor*, V.3, n. 1 & 2, contained a bibliography of selected studies on "Incestuous Fathers and Families" by Linda Meyer Williams and David Finkelhor. Dr. Williams's name was inadvertently omitted from the byline. Additional information on the topic can be found in: L.M. Williams and D. Finkelhor (1990), "The characteristics of incestuous fathers: A review of recent studies," in Marshall, Laws, and Barbaree (eds.), *The Handbook of Sexual Assault: Issues, Theories, and Treatment of the Offender* (NY: Plenum).

complished in three ways: First, through the use of leading questions; second, by limiting the expert's opportunity to explain her answers; and third, through the technique of hiding the ball.

Leading questions. Unlike the attorney conducting direct examination, the cross-examiner is permitted to ask leading questions: questions that suggest their own answers. For example, suppose the cross-examiner wants the expert to acknowledge that a child recanted her allegations of sexual abuse. The cross-examiner will control what the expert says by using leading questions that require the expert to give short, specific answers: answers the attorney wants the jury to hear.

The attorney might ask, "Now doctor, it's true, isn't it, that Sally recanted her allegations?" The cross-examiner controls what the expert says by asking leading questions that permit only short, specific answers, preferably limited to a simple yes or no. The cross-examiner keeps the expert hemmed in with leading questions, seldom asking why or how something happened. How and why questions permit the expert to explain, which is precisely what the cross-examiner does not want the expert to do.

Limiting the expert's opportunity to explain. Naturally, when an expert is asked a leading question that limits her to a yes or no answer, she wants to expand on the answer so the jury can understand fully. For example, with Sally, who recanted her allegations of sexual abuse, the jury would benefit from knowing that she recanted because her life was threatened. If the expert tries to explain, however, the attorney may interrupt and say, "Doctor, please just answer yes or no." If the expert persists in trying to explain herself, the attorney may ask the judge to admonish the expert to limit her answers to the specific questions asked.

Experts find cross-examiners' efforts to thwart their explanations very frustrating. "How can this process possibly lead to the truth?" many experts find themselves thinking. But before you give up on our adversary system, remember three things:

(1) The cross-examiner's job is to represent her client zealously—to present her client's view of the facts—not to permit the expert another opportunity to repeat the unfavorable testimony given during direct examination. To present her client's viewpoint adequately, the cross-examiner must have fairly wide latitude to control the course of cross-examination, and to control what the expert—an adverse witness—is permitted to say.

(2) It is sometimes quite proper to say, "Counsel, it is not possible for me to answer your question with a simple yes or no. May I explain myself?" Many judges will permit the expert to explain herself during cross-examination if the jury needs more information to make sense of the expert's testimony.

(3) After cross-examination comes "redirect" examination, when the prosecutor is permitted to ask further questions, and the expert has an opportunity to clarify matters that were left unclear during cross.

Hiding the ball. In this technique, the cross-examiner's goal is to hide from the expert the real purpose of the cross-examination.

Suppose the cross-examiner wants the expert to agree with something she knows the expert is unlikely to agree with. For example, the cross-examiner wants the expert to agree that Sally could well have been telling the truth when she recanted her allegations. The attorney knows that if she asks outright whether Sally's recantation was truthful, the expert will say no. So the cross-examiner uses an indirect approach instead. With this indirect approach, the attorney conceals her ultimate objective, so the expert is not alerted to the need to answer carefully. Essentially, the attorney sets a verbal trap, leading the witness to agree with the defense before she can figure out what's happening. How exactly does an attorney hide the ball? She may ask a series of seemingly innocuous leading questions; since the expert can't tell what bearing these apparently innocent questions have on the case, she may comply with the attorney's ploy.

To keep the expert off balance, and to keep the ultimate objective hidden, the cross-examiner may bounce from topic to topic, always returning to questions that lead to the ultimate goal. Gradually, the attorney tries to lock the expert into a predetermined position. Only when the expert is painted into a corner does the cross-examiner raise the subject she had in mind all along.

The skilled cross-examiner is like a good chess player, always thinking two or three moves ahead. It is usually unwise to attempt to out-lawyer the lawyer by guessing where her questions are going. Experts get into trouble when they stop concentrating on the question at hand. The best course is simply to listen carefully to each question as it comes, and answer accordingly. In nearly all cases, the expert will see what is developing and have little difficulty coping with the attorney's questions.

Principle #4: Undermine the Expert's Assumptions.

One of the most common techniques of cross-examination is to commit the expert to the facts and assumptions that support her opinion, and then to dispute some or all of those facts and assumptions.

Consider a child sexual abuse trial in which a physician testifies on direct examination that in her opinion a child experienced vaginal penetration. The cross-examiner begins by committing the doctor to the facts and assumptions underlying her opinion. The attorney says, "So doctor, your opinion is based exclusively on the history, the physical examination, and on what the child told you, is that correct?" She continues, "And there is nothing else you relied on to form your opinion in this case, is that correct?" By committing the expert to a specific set of facts and assumptions, the attorney deprives her of justifying her opinion on some other basis should this one be undermined.

Once the cross-examiner pins down the tenets of the doctor's opinion, she attacks one or more of them. The attorney might ask the expert if her opinion would change if certain facts were different. Or she might press the expert to acknowledge alternative explanations for the expert's assumptions. Or she might ask whether qualified experts could come to different conclusions based on the same facts. Or, having pinned down the expert's assumptions, the attorney may wait until after the expert has left the stand, then offer evidence to disprove the assumptions.

The expert could think of her testimony as a three-legged stool. The seat is the testimony, the legs are the facts and assumptions that support it. The cross-examiner's job is to knock away one or more of the legs so the testimony comes tumbling down.

With this technique of cross-examination in mind, it is easy to see the importance of thorough preparation before setting foot in the courtroom. The expert must possess a thorough knowledge of the facts of the case, and must be confident in the inferences, assumptions, and conclusions she draws from the facts.

Principle #5: Raise the Possibility of Bias or Partiality.

The cross-examiner is permitted to inquire about possible bias. For example, the attorney might proceed as follows: "You met with the district attorney prior to testifying today, didn't you? And during that meeting you discussed the testimony you gave on direct examination today, didn't you?" (Meeting with the district attorney to discuss testimony is perfectly proper.) "Now doctor, you work at Children's Hospital, don't you? You work in the child abuse unit of the pediatrics department, don't you? And you regularly perform evaluations at the request of the district attorney, don't you? You often

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REID *(Conitnued from page 1)*

be delighted to hear from you—what do you think such a task force should accomplish? John Briere (213-226-5697) would like to hear from you on adult survivor issues too: he has agreed to be *The Advisor's* Associate Editor for Adult Survivors, and is interested in hearing what topics you'd like to see addressed.

State Chapter Progress

APSAC members from 15 states have expressed an interest in organizing chapters in their states. Some are forging ahead with organizational efforts, some are more tentatively exploring the role of a state chapter and their role as organizers. These wonderful people are listed below. If you're interested in helping get a state chapter off the ground, give the person(s) in your state a call—they'll surely be happy to hear from you. If your state isn't listed here, and you're interested in forming a state chapter, give the office a call. We'll be *delighted* to hear from you!

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testify for the prosecution in child abuse cases, don't you, doctor? Thank you, doctor, I have no further questions."

Note that the attorney did not ask the final question. She did not say, "So, doctor, your close working relationship with the DA's office biases you in favor of the prosecutor, doesn't it?" She knows the doctor will say no to such a question, so she simply implies the possibility of bias, raising it again during her closing argument. The attorney might conclude by describing the relationship as "just a little bit too cozy." Cross-examination is usually not a very pleasant experience. But the right to cross-examine is vitally important to the discovery of the truth. Armed with greater understanding of the principles and goals of cross-examination, the expert can become less anxious and more effective.

John E.B. Myers, JD, is Professor at McGeorge School of Law, University of the Pacific, and the Executive Editor and Associate Editor for Legal Affairs for The Advisor.

MEMBERSHIP DRIVE NEWS

APSAC's first membership drive netted, officially, 39 new members. The top recruiter was ***Barbara Bonner,*** a Board member from Oklahoma City, who recruited 13 new members. Next was ***Mark Everson,*** from Chapel Hill, North Carolina, who brought in 8 new members. ***Carolyn Cole*** of Durham, North Carolina, recruited 5 new members. Other members who sucessfully recruited were ***Geri Beattie,*** of El Cajon, CA; ***Tom Curran,*** of Philadelphia; ***Deborah Doane*** of Bellevue, WA; ***Barbara Boat*** of Chapel Hill, NC; ***John Briere*** of Los Angeles; ***David Corwin*** of St. Louis; ***Paul Davey*** of Clarksdale, MS; ***J. Don Everhart*** of Camp Lejeune, NC; and ***Lois Kyes,*** of Framingham, MA.

Many more members must be spreading the word about APSAC besides those listed here: membership growth for the year has been excellent, half again what the Board expected. Many thanks to those of you who exerted yourselves during the membership drive, and to those of you who regularly talk to colleagues about APSAC. You play a crucial role in the organization's continued success.

APSAC MEMBERSHIP BY STATE

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NC	98	HI	14
IL	87	MS	14
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OK	40	KY	12
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WA	38	NH	11
PA	34	CT	10
CO	31	IA	10
VA	30	NM	10
WI	29	KS	9
AZ	28	UT	8
GA	27	NE	7
MD	27	SC	7
OH	27	AK	6
MN	25	RI	6
NV	24	AR	4
NJ	24	VT	4
AL	23	WY	3
MI	21	DE	2
TN	21	ND	2
OR	20	WV	2
ME	17	MT	1

States with no members: South Dakota.
Members with no states: 10—Canada; 2—Puerto Rico; 2—Scotland; 1—Australia; 1—Guam; 1—Israel.
TOTAL: 1,353