LAW

SURVIVING IN THE COURTROOM: TEN RULES OF TESTIFYING AS AN EXPERT WITNESS

—by Paul Stern

It scares both parties, but for different reasons. When the "expert witness" takes the stand in a criminal trial both the witness and the prosecutor generally panic a little. And for good reason.

For expert witnesses the fear is that they will say something wrong and all the lawyers will jump up and start carrying on, screaming and pointing shaking fingers in their general direction. As the prosecutor, the fear is that what the witness has told me in my office five minutes ago are words I may never hear again. Worse yet, that the witness will fall easy prey to the defense attorney's cross-examination, sometimes even before the second question is asked.

Fear no longer.

If both the witness and the prosecutor understand what is expected of them there is no reason to fear. First, learn how the criminal justice system works and learn how to testify without hoping the earth will open up and swallow you whole. Here then to help you through are Ten Rules of Testifying as an Expert Witness.

Rule #1: Know why you are in court.

The expert is in court for one reason: to educate. This is true whether the expert is a doctor, psychologist, social worker, forensic scientist, or any other professional. As you recreate for the jury what occurred, you educate them. First on the facts of what you saw, heard, smelled, felt, etc. And, that you have the expertise (you do, as we will learn in Rule #2) to educate the jury about what all these observations mean.

The expert is not there to convict anyone. You are not there to defend the victim. You are not there to justify another person's actions. You are there to educate. You are to give facts to the jury and, when asked, and only then, to offer your opinions about the meaning and significance of those facts. This is all in the process of education. And that is the only reason you are in court.

Rule #2: You are an expert.

In legalese an expert means someone who has skills, training, or specialized knowledge sufficient to "assist the trier of fact to understand the evidence or to determine a fact in issue." An individual may be deemed an expert based upon his or her knowledge, skills, experience, training, or education. In translation, it means someone who has an opinion that is worth listening to.

You went to college to get specific education and training in your profession. You have read text books and professional journals. You have attended seminars and talked with peers. You likely work in an area of specialization within your profession. You have experience working with some cases similar to the one that has brought you to court. If you have done any one of these you have some knowledge, skill, training or education sufficient to assist the trier of fact to understand the evidence or a fact in issue in the trial.

(Suggestion: keep a file listing every relevant training, seminar, etc. you have attended. You may think it is unimpressive, but it's more training than the jurors have had. If it's presented right, the judge and jury will be duly impressed.)

You will be asked to outline all of your training to the judge and jury. Then, you will be able to tell us what you think the facts you talked about (Rule #1) mean. What you think the facts mean is your opinion. Your opinion, based upon your experience. That makes you an expert. The jury will decide if it wants to accept your opinion or reject it. But the fact that you have an opinion that is based on information outside the general knowledge of the average juror is what makes you an expert. And you are.

CAUTION: Never give an opinion about matters in which you are not trained. Never give an opinion you cannot support. Which brings us to . . . .

Rule #3: Don't get carried away.

Now that you have been allowed to give an opinion, don't get carried away. Giving an opinion can be addicting. You might start thinking this is fun. You might start thinking that now that you're an expert, you're an expert on everything. When that happens, you are about to become an easy mark. With that attitude, a competent defense attorney will soon have you picking stocks for us.

Limit yourself to those areas in which you really, really are trained. Don't get greedy, or you'll get humbled. Fast.

Rule #4: Don't be a sucker. Shop before you buy.

By this point you will have been permitted to testify about some of your opinions and interpretations of the evidence. You have also properly limited your expertise to only specific areas. You have shown competence and humility. Now show wisdom.

An opposing attorney may try to cross-examine you with articles, books, other people's opinions, even things you have said previously. You will be confronted with something that appears contradictory in an effort to show that your opinion is inconsistent with these other sources. For example:

Attorney: Do you know of The Book by Dr. I.M. Agenius?

You: Well, yes. It is *the* book in the field.

Attorney: Well, at page 497 Dr. Agenius says "xyz," which is exactly the opposite of what you have told us.

You now have three options. You can say:

1. "Well, I'm right and he's wrong." Do this and you sound like a smart-alec and are only 3-4 questions away from being humiliated. Or picking stocks.

2. "Oh. Well, I guess I'm wrong then. Never mind." Thank you for coming in; I can't wait to work with you again. Do send me a bill for your services.

3. "Really? May I see that? Perhaps you are taking something out of context, or have misunderstood what the doctor has said." Bingo!

Ask to see it (sometimes the attorney may not even have the book or article with him), read it, consider it, compare it, and almost every time you'll find that something has been taken out of context or misrepresented by the attorney. When that happens you can demonstrate that not only are you right (and the other attorney devious), but even Dr. Agenius agrees with you.

Rule #5: Prepare.

The prosecutor will have read your reports many times. The other attorney will have read your reports many times. When you are fumbling through pages giving us lots of, "It's in here somewhere," and, "I think I remember . . . ," you sure won't look very professional.

You will be expected to have read your notes and reports and to know the facts cold. Remember you are an expert. You need to look, sound (and dress) like one. If you do not know what is in your report, stay home. You'll be of no help.

Rule #6: Speak English.

Talking to a jury is like explaining your diagnosis to your client. Talk to the jury as you do when you explain to your client what has happened and what he or she needs to do. Keep it simple. Make it easy to understand. Talk at the same level as when you are talking to your 12-year-old nephew. If you use technical words, define them. Look the jurors in the eye (it's okay to turn you body to make eye contact) and make sure they are understanding what you say.

Use analogies or examples whenever possible. If you can explain your observations, medical terminology, syndromes, untraditional behavior, etc. by making comparisons to everyday events, you convey your point more graphically.

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NEWS

A LITTLE HELP FROM FRIENDS HELPS APSAC BEGIN ENDOWMENT FUND

—by Theresa Reid

$25,000 was the fundraising target unanimously agreed upon by APSAC's Board at its November 18, 1990 meeting in Nashville. Within six weeks, Board members—who already contribute their time and speaking fees, and pay for their own travel to meetings—had themselves contributed over $1600, and had solicited donations from friends and colleagues that continue to come in. At its January 22, 1991 meeting in San Diego, the Board again unanimously agreed on a $25,000 fundraising goal, to be raised from among friends, relatives, and colleagues.

The Endowment Fund is intended to provide stability for APSAC's future. We signed up nearly 50% more new members than anticipated last year, and accomplished a great deal as an organization—filing an influential *amicus* brief with the U.S. Supreme Court, issuing an impressive set of Guidelines from our Task Force on the Psychosocial Evaluation of Suspected Sexual Abuse in Young Children, publishing two special issues of *The Advisor*, offering the *Journal of Interpersonal Violence* as a benefit of membership, and establishing several new Task Forces. We are much more stable financially than we were a year ago.

Still, APSAC needs a more substantial financial base from which to achieve its long-range goals. Among these goals are to launch our own national conference, to produce *The APSAC Handbook on Child Maltreatment* (see "News," p.1), to offer scholarships for professionals who can't afford to pay membership dues. Many of you have already demonstrated your enthusiasm for APSAC in a variety of very helpful ways: by distributing brochures at conferences you attend, by calling in with ideas for *The Advisor*, by starting chapters in your states. Those members who are inclined to do so are invited to join the Board's effort to raise $25,000 as well. By doing so, you will help ensure that APSAC continues to improve communication, practice, and peer support among professionals who respond to child abuse. Ultimately, as you well know, by furthering APSAC's critical services to professionals, you ensure improved services to abused children nationwide as well.

You can help by urging your friends, colleagues, and relatives to make APSAC their favorite charity. Letters explaining APSAC's goals, accomplishments, and role in the field are available on request from the office (312-554-0166). Potential "Friends of APSAC" will be happy to know that all contributions to APSAC are tax-deductible.

Beginning with this issue, a list of contributors to APSAC's Endowment Fund will be listed in each issue, with a report on progress of the effort. The people listed on page 14 have generously contributed money—a total so far of $2,515—to guarantee APSAC's future.

MOVING?

Please notify the office and save us the time and trouble of tracking you down.

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Rule #7: Say it three times. At least.

The prosecutor should be able to get you to get your opinion across to the jury at least three separate times. That, if nothing else, increases the odds that all jurors were awake and listening when you offered your opinion. More important, it shows you did your job right. Observe:

1. The first time through you talk about the overall theory of your work—what you are trained generally to look for and why. This educates the jury to the field.

2. The second time through, you talk about either a hypothetical case or a prior, similar one and what you would look for in that case. The jury is educated a second time about what you, as an expert, should do.

3. The third time you'll talk about this case. When you explain what you did, what you looked for, what you observed, etc., the jurors will think, "Ah, she did it right. She did it exactly the way she's supposed to." Your opinion carries even more weight now.

Rule #8: Be yourself.

It's nice to go and listen to your colleagues testify so you have an idea of what a courtroom looks like, and what might happen. (And to be assured that, yes, you will come out alive.) But when you testify do not copy someone else's style.

Sit back. Listen to the questions. Think about your answer before you give it. Relax. And tell the truth. Do not try to be anything, or anyone, you're not. All you are doing is having a nice, albeit formal, chat with the 12 people who comprise a jury.

Rule #9: There is no such thing as a bad transcript.

In criminal cases, if the defendant is convicted he can appeal. If he is acquitted the State can not appeal. When he is convicted and appeals, a transcript of your testimony will be prepared. If you have done your job properly, i.e., prepared the case, offered an informed, honest opinion, without over-reaching, then, if you're right and everything else works, the defendant may well be convicted and a transcript of what you said will be prepared. If you have not done your job, not prepared, or have offered opinions in a lazy, unsupported, or over-reaching manner, then your testimony may sound unprofessional and unconvincing, and there will be no transcript, because there will be no conviction.

Rule #10: Understand that the jury system is, by definition, illogical.

The first thing that happens when a criminal trial starts is that both sides get to inquire of the prospective jurors whether they know the defendant, the victim, or any of the witnesses. If so, they are not allowed to serve as jurors. We then eliminate those who have had experience with the particular type of offense involved in this trial. Next we get rid of those with strong feelings about it. In time, we insure that no one sits on the jury if they know anything about the case, the people involved, or the issues at stake.

Next, we bring before the jury, as witnesses, all the people who were present when the crime was committed and know what happened. But the jury is not allowed to ask these witnesses any questions.

We also make sure that the jury is not allowed to know the answer to the one question they most want to ask: Has this defendant done this stuff before?

When it's all over, the jury, those people we select because they know nothing and weren't there, tell all those people who were there what really happened by their verdict.

Understand this and you can see why bizarre verdicts can occur. But you can also understand why so much of the witness's job is to be a re-creation expert. Understanding this will also allow you to realize that care as you might, and try as you might, the criminal justice system can not be expected always to get it right. This system works better than any other we can create, but it is not always able to guarantee an infallible judgment, or always properly solve a dispute.

The best chance for success, however, is for the prosecutor and the expert to be fully and properly prepared.

Paul Stern, JD, Deputy Prosecuting Attorney for Snohomish County, Washington, is newly elected to APSAC's Board and a member of APSAC's Task Force on the Peer Review of Expert Testimony, chaired by Anna Salter, Ph.D.