

The Art of the Expert Witness

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Psychiatrists who do civil assessments are sometimes required to attend court to give expert evidence. For many this is a formidable challenge that causes significant anxiety and some even leave the field because of their concerns about court appearances, especially cross examination. I have been an expert witness in almost a thousand cases over the years and have learned some skills in the process. This paper is to inform you about what I have learned, sometimes painfully.

The trigger for writing this paper was a comment I made that courses for expert witnesses are, almost always, run by lawyers who can tell you what they want from an expert witness but have never been expert witnesses themselves. I thought their ignorance was abysmal and their lack of interest in hearing from people who had been expert witnesses was lamentable.

The professional literature has many citations re medical expert witnesses – but none about how to do it!

This work is not for everyone and temperament is important. You have to cope with being challenged. Some like the role and others dread it. It helps if you are an extrovert who is comfortable performing and who can think on your feet. It helps to be able to see where a line of questions is leading. It helps if you don't take criticism personally and are resilient. You need to be able to focus on the immediate issue but also keep an eye on maintaining your long-term credibility.

Most of the information here is in my book *The Guide to Civil Psychiatric Assessment* and this and other information is available on my website www.civilforensicpsychiatry.com.au.

Expert Witnesses and Codes of Conduct

An expert witness is a person who is a specialist in a subject, often technical, who may present his/her *expert* opinion without having been a *witness* to any occurrence relating to the lawsuit.

The responsibility of the expert witness is to inform the court or tribunal and not be an advocate for either side

Expert witnesses are usually immune from negligence suits in relation to court work, and work done out of court connected with the work in court.

Each expert witness should exercise independent judgment and should not act on any instruction or request to withhold or avoid agreement.

Each jurisdiction has a Code of Conduct for Expert Witnesses. I have included the essential parts of the rules for Victoria and NSW.

Victoria Supreme Court (General Civil Procedure) Rules 2005

Rule 44.01 Expert Witness Code of Conduct

- 1. A person engaged as an expert witness has an overriding duty to assist the Court impartially on matters relevant to the area of expertise of the witness.***

2. An expert witness is **not an advocate for a party**.
3. Every report prepared by an expert witness for the use of the Court shall state the opinion or opinions of the expert, an acknowledgement that the expert has read this code and agrees to be bound by it, and
(c) the qualifications of the expert to prepare the report

NSW Uniform Civil Procedure Rules 2005 - Schedule 7

Expert witness code of conduct

2 General duties to the Court

An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the court impartially on matters relevant to the area of expertise of the witness.

3 Content of report

Every report prepared by an expert witness for use in court must clearly state the opinion or opinions of the expert

(see appendix for Court Rules on Expert Evidence in each state and territory.)

Preparation

1. Legislation

You are not a lawyer and do not need to know the relevant legislation, nevertheless it is useful to be aware of the provisions of the law in your state relevant to workers' compensation and accident claims. For example in some states the injury does not have to be the only cause of the illness or even the major cause, this is different in Queensland and South Australia where the injury has to be **the** significant contributing factor.

2. The Report

You should assume that it is possible you will be cross-examined on your report and opinion. Bear this in mind when writing your report.

Is your report comprehensive?

Have you covered all the bases?

I saw a man for a custody claim. He was 46 year old and a successful businessman. I was a cross-examined about his six years in prison from when he was 19! It was early days in my career and I had not asked him about any criminal behaviour. In fact it had no bearing on the case but it undermined my credibility.

Think about how your opinion may be attacked. Think about how to deal with other opinions that either agree or disagree with your opinion. Have you adequately explained the reasons leading to your opinion and why your opinion differs from others? Once I understood the importance of commenting on other opinions I had fewer calls to Court.

Court Arrangements

You will be asked to appear in court at a certain time. Feel free to negotiate if the time is unsuitable. This is worth doing even if you have received a subpoena. Lawyers and courts have no interest in your well-being, you have to look after yourself. That means avoiding an appearance as a witness if you are on vacation locally, and never appearing as an expert witness if you are interstate or overseas. In my experience this takes at least three days out of your holiday including finding a place where you can give video evidence, the anticipatory day beforehand, the day of the hearing and unwinding the following day. Subpoenas only have power in your state. They cannot be enforced if you are interstate or overseas. My office manager explains that I will be in a rural area with no Internet contact. On one occasion I was persuaded to come back from Tasmania for a court appearance with the promise that my airfares would be paid. They weren't.

For some years the Administrative Appeals Tribunal allowed for expert evidence to be given by telephone and courts on circuit allowed expert evidence to be given remotely. In the Covid 19 era remote evidence is the new norm. It makes no difference to the comments above.

Pre Court Actions

Read your report within a day of your appearance so it is fresh in your mind. Ask yourself questions like “have I left any openings where I could be attacked?”, “Have I explained the terms I have used in the report and opinion?”, “Have I adequately explained the reasons why I differ from other opinions?”.

One of my medical negligence case involved a known pethidine addict who had been prescribed Nardil by her psychiatrist and had malignant hypertension leading to a devastating stroke. The injury had occurred 10 years previously. I realised I would be questioned about when the interaction between Nardil and pethidine became known (it was years before the injury.). I keep every third MIMS Annual and I photocopied the edition 9 years beforehand, 3 years beforehand and the year of the incident making copies for both sides and for the judge. On examination I was told that an expert from Sydney had testified that the interaction between Nardil and pethidine was not known at the time of the incident. I said that the expert was incorrect and distributed the photocopies. There was no cross examination and the case was settled later that day.

As an aside, I complained to the College about the prescribing practices of the psychiatrist who claimed to have not kept any notes. To my surprise the offending psychiatrist called me a few days later and was very annoyed at the complaint. The College refused to inform me of the outcome but I heard anecdotally that the psychiatrist had been reprimanded for not keeping adequate notes, nothing about the incompetence!

Expert Conclaves and Concurrent Evidence (Hot tubbing)

Expert conclaves and joint appearances of experts in court can occur in every jurisdiction but appear to be more common in New South Wales and in the Administrative Appeals Tribunal, a Commonwealth tribunal.

The conclave involves a pre-trial discussion between the experts to clarify areas of agreement and areas of disagreement. I try to take the initiative and write the report. This is sent to the other experts for them to sign off and then sent to the court. In some of these conclaves the other expert has tried to persuade me that their view is correct. That is not the function of the conclave. Just focus on areas of agreement and disagreement.

Concurrent Evidence (Hot tubbing)

This refers to experts being present in court at the same time and being cross-examined and, sometimes with the agreement of the court to cross-examine each other. These can be a farce or can be useful.

Court Appearance

1. Demeanour

The manner of your address in court matters. You would be wise to dress and speak respectfully.

2. Punctuality

it is important to arrive at the right court at the right time. However as a general rule lawyers and courts will mess you about. You have to put up with it. For example you may appear at

10:00 AM and sit there waiting for hours. After 60 minutes, if there is no subpoena I pass a message that I will be leaving. This usually leads to some action.

I was flown by light plane to Mildura arriving at 8:45AM and was told I would be called before lunch, not so. At 2:00 PM I passed a message that I would catch the last plane to Melbourne leaving at 4:45 PM. I was then told the last plane was leaving at 7:15 PM. This was a lie. I sent back a message that I would be leaving immediately. I was called straight away. I caught the last flight out.

Do not be intimidated by the court setting. If you are physically uncomfortable inform the judge, if you need water ask the tipstaff. If you cannot hear the question asked for it to be repeated. If you are interrupted when answering a question insist on completing your answer. Appear to be respectful and although tempted, avoid being a smartarse.

Examination in Chief

The examination in chief is the examination by the barrister representing the party who referred you the client. This is usually not stressful although, at times it can be very tedious if a jury is present. As I have to read my whole report. On one occasion I was asked to read my report that was 14 pages long. With a judge alone it is much quicker. Usually the barrister take you to the relevant matters immediately and focuses on them.

Cross Examination

Bear in mind that your job is to inform the court, not to enter into a duel with the barrister. Accordingly it is important to keep cool. Be courteous and respond appropriately. You will usually be cross examined by one barrister, complex claims may lead you to being cross examined by two or more barristers.

The opposing barrister has the goal of tarnishing your report. This can be done in several ways that are not mutually exclusive.

- Attack your credibility:
 - hired gun
 - lack of expertise in the area
 - Medical Board issues
- Attack your report by:
 - highlighting flaws and errors in your report.
 - noting missing information e.g previous physical/mental health issues
 - highlighting differences from other experts.
 - challenging your diagnosis.
 - challenging your impairment assessment methodology.

Cross-examination styles range from aggressive, confronting attacks, to polite and respectful questions (usually in higher courts).

Experienced advocates know that experts are more likely to change their opinion if their egos are not attacked.

Some cross examiners take you through a series of hypothetical questions to which you can only answer in the affirmative. They then relate these hypothetical questions to the particular case and expect you to concur.

One barrister asked me this ridiculous question.

'Doctor, would you agree that a child's upbringing has an effect on their subsequent behaviour?'

Ridiculous because it was so self-evident. I said

'Wow, I'm trying to think of a way I could answer no to that question.'

Some cross-examiners focus on relatively trivial items in your report that are not of much substance but that you may have skimmed over or had incorrect information. On Re-examination (see later) you will have an opportunity to put that in perspective so don't argue about it.

Surveillance material may be presented. You may be asked about what you saw when you viewed it. (Incidentally I always view surveillance material with the claimant present.) A colleague was asked if he had viewed the material at normal speed. He had been given three hours of surveillance material. His reply was that he had looked at the relevant areas at the normal speed.

You may be cross-examined on material such as treating doctor's reports that you have never seen before. Sometimes claimants have seen a GP multiple times with no mention of any mental health issues. This does not necessarily mean anything much as these are often 5-10 minute consultations focusing on a particular issue with no time to discuss any extended matters. Moreover many people are reluctant to relate mental health issues to GPs.

The other challenge that arises is when your opinion differs from that of a treating psychiatrist or psychologist.

"Doctor, you only saw the claimant once didn't you? His psychiatrist has seen him for five years, why should we prefer your opinion to that of his treating psychiatrist?"

This is not an insurmountable problem. This may be because the treating psychiatrist has only been provided with history from the claimant and has not had the benefit of other documentation. It is also the case that treating psychiatrists usually have an unconscious or conscious bias for their patient.

Good cross-examiners find the flaws in your report and opinion that are relevant to the claim. If there are flaws in your report do not go on the defensive. Immediately admit to any error and, if it does change your opinion you will need to bite the bullet but if you consider it is not relevant to your opinion make that clear.

I was in court with a very experienced and very competent psychiatrist who regrettably had made a fatal error, his report did not contain any information about what happened to the plaintiff from the time he first saw him until he reviewed him five years later. He immediately admitted to the error and agreed it damaged his opinion. The alternative is a futile struggle to retain your dignity and credibility when in this case it had been shot.

I made a serious error with a man who was a carpenter in the family business in a small community that he had reluctantly taken over when his father and brother abandoned the business when it was in financial distress. Over a period of months he had to sack long-term employees/friends and was unable to pay out their entitlements. He was ostracised and his immediate family also suffered. This caused him a great deal of distress and he developed a severe depressive episode that has persisted. My error was that I paraphrased a paragraph written by his treating psychologist about the situation that led to his depression. Although I saw him for review five times I never questioned him about that initial situation again. I had

The Art of the Expert Witness

to agree that I did not obtain my own comprehensive account of the factors leading to his illness.

When I am being cross-examined I agree to most of the hypothetical questions, I'm prepared to give away everything except the essential issues.

There is some difference being cross-examined when a jury is present and when the case is a judge only matter. I make a point of translating technical terms into lay language in a jury trial.

The hardest thing to do when you are in the witness box is to change your mind.

If provided with fresh material that contradicts what you understood ask for five minutes to consider this new material before replying.

I am there, not as an advocate for the claimant, but as an advocate for my opinion!

Tricks of the Trade

- Take your time, don't be rushed into giving an answer.
- If you are being harassed avoid looking at the barrister and give monosyllabic answers.
- "*You're just a hired gun aren't you doctor?*" In a monotone say "*no*".
- If you are asked a long question then pause for 30 seconds at least, appearing to be pondering the question and then ask for the question to be repeated, they can never remember what they said!
- If asked the same question repeatedly say "*I have already answered that several times.*"
- If you do not understand a question asked for it to be put a different way.
- If your answer causes some ambiguity about your opinion do not be fussed as the matter can be resolved on re-examination.
- If challenged about your report being an outlier say "*it appears that my opinion differs from that of other psychiatrists.*"
- Bring a copy of the DSM5 diagnosis(es) with you to refer to if needed.

If you have written an opinion that is not consistent with the information in your report and is a clear outlier then you must not be surprised if the experience of being cross-examined is unpleasant.

However most cross examinations are "Paper Tigers". You have little to be concerned about if you have written a competent report with an opinion that either agrees with the opinions of others or, if it does not agree makes clear the areas of disagreement and the reason for that disagreement.

Re- Examination

Re-Examination Is a critical part of the process. You will be asked about disputed matters brought up during cross examination and you will then have an opportunity to clarify your answers. Do not try to do this so much during cross examination because you will have your turn later. The judge may also ask you questions to clarify issues.

Fees

How much to charge? Establish your hourly rate. If you are asked to go to court do not cancel any appointments until the date and time is confirmed. When that has been done cancel appointments according to the time you expect to be involved (including travel) and make it clear that you will charge for the time allotted whether or not the case proceeds. I charge an hourly rate door to door. If I am away from my rooms for 2 1/2 hours, I charge for 3 hours. There may be some delay in payment until the case is finally settled.

Learn from your mistakes

If you have been savaged, write a brief summary of what happened, in particular about the issues and especially about where you thought your performance fell short.

If you messed up it will take your ego about 24-hours to get over the pain. The best response is to ensure that you do not make the same mistakes again.

Consider how your report and opinion fell short. For example if I see somebody for review now I go back over the original incident to make sure I got it right.

Your Reputation

Your reputation is your most valuable asset. You must nurture and protect it. The most egregious error is to write a report for both sides in a dispute without being aware of that. In one notorious case a psychiatrist was disclosed as having written an opinion for each side, unwittingly, and had given totally different opinions depending on the side who had briefed him. Needless to say his reputation was severely damaged and has never recovered. Avoid becoming known as a plaintiff doctor or a defendant doctor.

After you have done this work for some time you become known. Some psychiatrists are notorious for never acknowledging the presence of mental illness, some do the opposite. Avoid being pigeonholed.

Problems with Expert Witnesses

Ian Freckelton has written eloquently about problems with expert witnesses and their evidence in his book *The Trial of the Expert*.

Problems associated with all expert witnesses include the following:

- partisanship
- expert shopping
- experts for hire
- the adversary process leading to polarisation of opinion.
- inability to communicate their opinion.

These matters are self-evident and require no further explanation.

Criticism of the role of the expert is summarised in Freckelton's book as follows:

- The court hears not the most expert opinions, but those favourable to the respective parties.
- The corrupt expert may be a rare phenomenon, but will not necessarily be exposed by an inexpert cross-examination.

The Art of the Expert Witness

- The expert is paid for services, and is instructed by one party only; some bias is inevitable.
- Questioning, whether extractive or hostile, by a lay barrister may lead to the presentation of an inaccurate picture, which will mislead the court and frustrate the experts.

Where substantial disagreement arises, it is irrational to ask a lay judge to solve it; the judge has no criteria by which to evaluate the opinion.

- Success may depend on the portability or self-confidence of the expert, rather than professional competence.
- Those professions on which the judicial system is reliant are antagonised by adversary trial procedures.

Freckelton discusses the particular problems of mental health professionals. He describes unease expressed by critics as falling into three main categories:

- allegations of unreliability
- distortion of the professional's usual role (to provide appropriate assessment and treatment of mental illness).
- a tendency towards findings of mental illness. It is said that there appears to be a tendency amongst mental health professionals towards findings of "abnormality". This may appear more readily amongst those witnesses for that side of the dispute which has most to gain from a finding of illness. Presumably, it will be counterbalanced by findings of experts appearing for the other side.

A cautionary statement in DSM5 refers particularly to forensic use of DSM5:

When DSM5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis.

Judges' Comments on Psychiatric Testimony

The ultimate consumers of psychiatric testimony are the courts, including both judges and juries. It is impossible to determine the opinion of jurors about psychiatric testimony. The opinion of judges however is readily available in their judgments. The following is the summation of research I did some years ago on Judgements in the Victorian County Court. Incidentally one of these criticisms refers to evidence I gave.

The concerns of the judges fall into six main areas:

1. inadequacy and incompetence
2. lack of credibility
3. partisanship
4. ignorance
5. inflexibility
6. concerns about *impairment assessments*

Conclusions

1. Impending court appearances cause uncertainty.
2. Your role is to inform the judge or tribunal.
3. A competent report and opinion will ensure minimum fuss.
4. Avoid being pushed around, you have rights too.
5. Cross examination is a “paper tiger” if your report and opinion are competent.
6. Do not become personally involved.
7. Learn from your mistakes, take heart, we all make them.

Appendix

Expert Witnesses – Code of Conduct:

These can all be viewed at www.civilforensicpsychiatry.com.au

Australian Capital Territory Schedule 1 Expert Witness Code of Conduct

Federal Court - Expert Evidence Practice Note

New South Wales Uniform Civil Procedure Rules Schedule 7 2005

New Zealand High Court Schedule 4 Code of Conduct for Expert Witnesses 1 January 2018

Northern Territory Practice Direction No 6 of 2015 Expert Reports

Queensland Supreme Court of Queensland Practice Direction 2 Of 2005 Expert Evidence

South Australia Direction 5.4 – Expert Witnesses (Rule 160)

Tasmania Supreme Court Practice Direction No1 of 2016

Victoria Supreme Court (General Civil Procedure) Rules 2005 S.R. No. 148/2005

Western Australia District Court Code of Conduct – Expert Witnesses