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Testifying About Mitigation: When Social Workers and Other Mental Health Professionals Face Aggressive Cross-Examination

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Aggressive cross-examinations can be challenging and difficult for social workers and other mental health professionals who testify in court as expert witnesses. Although several sources of guidance for expert witnesses are available, responses to cross-examination can be understood especially clearly in case-specific contexts. This article describes the nature of mitigation assessments and presents cross-examination of a social worker offering psychosocial mitigation testimony in the sentencing phase of a capital murder trial. The cross-examination questions and answers are discussed in several categories, including challenges to objectivity, challenges to thoroughness and competence, challenges to validity, and differing findings by another expert. Each set of questions and answers is accompanied by interpretative comments about how to cope with the specific cross-examination strategies.

Testifying in court can be stressful and demanding for lay and expert witnesses alike. For the social work professional on the witness stand, challenges that arise during cross-examination are typically about credentials, experience, competence, accuracy and nature of the assessment, and subsequent conclusions. Vogelsang (2001) has identified major concerns for the social work expert witness, with specific guidelines for how to handle

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common challenges. Lubet (1999) has addressed the conceptual foundations of expert testimony, writing from a legal-psychological point of view. Brodsky (1999, 2004) has identified common scenarios and difficulties for the expert mental health witness, while presenting specific techniques for managing cross-examinations.

In their factor analysis of a large pool of paired adjectives related to expert witness credibility, Brodsky, Griffin, and Cramer (2010) reported four major factors: knowledge, confidence, likeability, and trustworthiness. These four factors fit into our own observations of what makes a good social work expert. Witnesses who are uncertain about their knowledge base and about themselves tend not to be believed. Confident experts tend to be believed, as long as they are not overconfident. Knowledgeable witnesses are credible because good knowledge goes to the heart of probative issues. Experts who are feisty or defensive have credibility problems simply because they are less likeable than affiliative, pleasant witnesses. Witnesses who are seen as trustworthy are relied on because of their perceived honesty and integrity. These factors operate in combination, as well. Thus, knowledgeable and trustworthy expert witnesses are believed when they are confident and are liked by jurors and judges.

The practical foundations of expert testimony can be understood in a case-specific context. Terrell and Staller (2003) have described the contexts of historical injustice regarding the death penalty and the need for informed social work testimony in presenting mitigation evidence. The legal foundations of mitigation testimony are seated, in large part, in the U.S. Supreme Court decision in *Lockett v. Ohio* (1978). Sandra Lockett had been waiting in an idling vehicle when two acquaintances killed a clerk during a robbery. Drawing on the 8th Amendment and the 15th Amendment, the Supreme Court ruled that every aspect of a defendant's character, record, and circumstances may be considered as mitigating factors in the sentencing phase of capital murder trials. The Lockett decision overturned an Ohio statute that mandated the death penalty, provided that the victim had not induced the murder and that the defendant was neither coerced or mental defective. The ruling explicitly invalidated the Ohio statute that did not permit consideration of factors such as the defendant's age, character, and relatively minor role in the crime.

In the context of assessment of mitigating factors, Fabian (2009) has described the role of the mental health professional in identifying the pathways to violence in a person's life, and he especially emphasized the need for expert assessment of the biopsychosocial predisposing factors. This information is ordinarily presented by experts called by the defense during the penalty phase of capital murder trials. Following this direct examination, it often is the cross-examination of the mental health mitigation experts that raises provocative challenges to the testifying expert. Although general rules may be applied about responses to cross-examination questions, the fundamental concern is always the individual case at hand. For example, the issues that occur with custody or commitment hearings are different from those in

product liability lawsuits. In criminal cases, testimony regarding competency to stand trial is different from testimony in the penalty phase of capital murder trials. It is the latter testimony we address in this article.

The present case reports describe the experiences of an expert witness who has already presented mitigation evidence during direct examination. In the first case, we address ways to master an aggressive cross-examination when objectivity, integrity, and professional competence are challenged. The defendant at the trial was a young woman charged with capital murder of her infant child; she had just been convicted. The direct examination testimony had been completed and the social worker's testimony was the major component of the mitigation evidence offered to the jury. The case information describes the testimony of the social worker called by the defense.

Nonverbal communications would not be evident without commentary from just the transcript of exchanges between cross-examining attorney and witness. The district attorney conducted the cross-examination in a challenging and abrasive manner. His voice was loud, he sometimes yelled, and his nonverbal style was aggressive, with finger pointing and choppy hand gestures. The social worker's replies to such behaviors were presented in an intentionally contrasting manner. The witness sought to present herself as calm and at ease. The calmness was maintained by internal self-talk of professional competence. The witness kept in mind that she was clearly advocating for her findings rather than for one side or the other. The more the cross-examining attorney was aggressive in voice and posture, the more the witness sought to be soft-spoken, calm, and poised.

There were four topic areas within the testimony during cross-examination in which the social worker demonstrated professional control and effective testimony. These four topics were challenges to objectivity, challenges to thoroughness and competence, challenges to validity, and comparisons to other capital cases. Each topic area will be discussed in turn as examples of aggressive questioning and professional responses.

Challenges to Objectivity

The objectivity of an expert witness may be questioned in several ways. One of the most common ways is to suggest that the expert is a bought witness, who has compromised objectivity because of payment for services (Brodsky, 1991). In the present trial, the cross-examination about fees unfolded in this manner:

Q: How much are you getting paid to do this evaluation?
A: $150 per hour.
Q: How much are you going to bill the county for this evaluation?
A: I don't know exactly.
Q: I asked you to tell me of what you are going to bill for this case.
A: I can only make an estimate. I didn't bring my list of hours with me.

Q: Ma'm, do we have a communication problem?
A: I am doing fine on following what you are asking, counselor.

What the expert really sought to get across was, "While I am not having any communication problems, counselor, you seem to be having some problems following what is going on." That explicit and sharp retort was not used because attacks on attorneys can diminish credibility.

Part of the dynamics of questions and answers around payment and objectivity is the struggle for interpersonal control. As seen in the dialogue above, the district attorney spent the initial stage of this cross-examination demanding a fee estimate. The witness then gave a ballpark estimate of $3000 to $4000 as the charge for the case. When one has a general idea of an answer to questions of this sort, one should respond. If the fee estimate is extracted only after a protracted exchange, the expert witness can be seen as withholding and intractable. This battle was about who is in control, seated within an energetic cross-examination about fees.

Q: (resuming) So, Ma'm, you know the County is going to pay you $3,000 or $4,000 to give us an evaluation, so what have you done in that evaluation to get all that money, Ms.? (with Ms. pronounced mizzzz)
A: I did a systematic evaluation of the life history of the defendant.
Q: (Looking intensely at the jury) "So you are getting 3 to 4 thousand dollars, isn't that correct?
A: Oh, yes. I surely hope so. That's correct.

At this point, the push-pull method (Brodsky, 1991) of responding was used. The push-pull avoids instinctive defensiveness and instead shows clear agreement. Brodsky noted, "When the cross-examination question is true but is asked in a pushy and negative manner, consider agreeing strongly" (p. 166). The witness using the push-pull not only agrees with the question, but the emphasis on agreement lets the expert control the direction and gain psychological momentum. At this point, the push-pull answer shut down the questioning about fees and the cross-examining attorney shifted to questions about professional competence.

Challenges to Thoroughness and Competence

Q: What did you do in order to complete this evaluation?
A: I interviewed the defendant's family members. I spoke to one of her high school teachers and I met with the defendant herself . . .
Q: (Interrupting) Did you interview any of the co-defendants?
A: No, I did not have permission to interview the co-defendant, nor would I do so even if I had permission. That is a law enforcement job and an investigator's task.

Q: Ma'm, did you interview the defendant's live-in boyfriend?
A: No, I did not.
Q: Do you know anything about him?
A: I know what I read from the official records.
Q: So you think you could get a grasp of what happened in this the murder without having interviewed any of the co-defendants?
A: I am not a police officer seeking to investigate a murder. I am a social worker assessing social and life history and evaluating mitigating factors that might be present for the defendant. I do not do so for her co-defendants.
Q: So without ever having to talk to the other people in the house, you decided that there were mitigating factors?
A: Oh, yes. There were strong mitigating factors. Absolutely!

It is standard practice in mitigation assessments not to meet with codefendants because it is the defendant's social history that is at issue. As Eisenberg (2004) observed, even though mental health professionals retained in death penalty cases may have expertise in several different areas, the best role is to "limit involvement to only one forensic evaluation function" (p. 85). Furthermore, information from co-defendants is often suspect because co-defendants often blame each other and seek to make a plea bargain in which excessive blame is attributed to other defendants. This entire line of questioning about the co-defendant was a red herring. It was an effort to make the mitigation assessment appear incomplete.

Challenges to Validity

The validity of an assessment refers to the accuracy of the findings. Validity is the bottom line of the evaluation, and reflects the essential worth of the expert's data, conclusions, and opinions with respect to the forensic task.

Q: Isn't it correct that one of the areas of mitigation you addressed was whether that the defendant was experiencing a postpartum depression?
A: Yes, that's right.
Q: Isn't it true that you have never really interacted with anyone who had postpartum depression?
A: No, that is not true. As a therapist I have worked with many women experiencing postpartum depression.

This question was a shot in the dark by the district attorney, who did not actually know about the experience of the expert. In Advanced Trial Advocacy classes, law students are taught never to ask a question of an expert during cross unless you know with certainty what the answer will be. The attorney did not follow that rule. At this point, the cross-examination

shifted to a different validity issue, which was reconciling the testimony with the differing findings by another expert.

Q: Are you familiar with the psychological evaluation by Dr. G. who diagnosed the defendant with PTSD and with major depression with psychotic features in remission?
A: Yes, I am familiar with that evaluation.
Q: He also did a forensic evaluation on her that determined that she was competent to stand trial and responsible at the time of the offence, which means she knew right from wrong. Isn't that correct?
A: Yes, he evaluated her for both competency to stand trial and mental state at time of offense.
Q: Did you talk with Dr. G?
A: No, I did not.
Q: (Arms thrown in the air) You didn't talk with Dr. G?
A: No, I did not talk with Dr. G. But I did read his report.
Q: Did you see where he wrote that she was competent to stand trial?
A: Certainly. I read that.
Q: But you said that there were mitigating factors.
A: Yes, I did. Let me explain.
Q: No, I didn't ask you to explain! I asked you if you established mitigation.
A: There is no simple yes or no answer. We are talking about the difference between a legal conclusion about sentencing, which belongs to the jury and judge, and social work findings, which are based on my best professional judgment.
Q: Are you deliberately not giving me a yes or no answer?
A: No. But that answer requires an explanation.
Q: All right, choose: either answer what I asked you with a yes or no, or explain to the jury! It is your choice.
A: Thank you. I will do both. The essential answer is yes, and I will indeed explain it to the jury.
Q: (pause) Well, then, I guess you can explain it to the jury.
A: There is a difference between mitigating circumstances, competence to stand trial, and ability to understand right from wrong. I agree with Dr. G. that the defendant could understand right from wrong. My investigation and my evaluation of mitigation offer information about diminished responsibility at the time of the offence. I did find mitigating factors related to diminished responsibility.

Note that the attorney initially was attempting a sleight of hand, trying to link together the pretrial issue of competency to stand trial and the post-verdict sentencing issue of mitigating factors. The witness sought to use narrative responses and complete sentences, which are more credible than simple yes-or-no replies. Effective witnesses avoid repeated one-word answers. The research literature indicates that fragmented answers, such as

those with one word, are less desirable than narrative answers and complete sentences (Kerr, 1981). Good expert witnesses maintain a clear distinction between the ultimate legal opinion by the court and their own professional conclusions. Melton, Petrila, Poythress, and Slobogin (2007) observed that many points fall on the continuum between straightforward mental health findings and the expert reciting a clinical opinion in the exact terminology of the governing statute. In this exchange the expert carefully delineated the difference between the expert's task and the responsibility of the trier of fact.

Note the transformative moment (Brodsky, 1991) in the exchange. The witness's reply "I will do both" shifted the power relationship. The attorney displayed an uncharacteristically long pause and then showed a diminished level of challenge. At this point, the witness's other option would have been to say even more: for example, "Thank you. I will indeed explain to the jury the differences between pretrial competency, and social work evaluations of mitigating factors, and the ultimate sentencing decision in which mitigating factors are one component."

Other Cross-Examinations

When cross-examining attorneys have little success in challenging experts on current findings and conclusions, they sometimes shift their focus to another topic of perceived greater vulnerability in the expert. In this next instance, the attorney asks questions about an earlier case in order to portray the expert's work as contaminated and softhearted.

Q: Do you remember about a mitigation case that you testified in Bay Minette, AL for John Buckshot Morrow?
A: Yes, I remember that case well.
Q: Did you write an article on that trial was called "Buckshot's Case" with Dr. Karen Staller?
A: Oh, yes
Q: Did you testify that he was not intelligent enough to formulate a plan to rob and kill the victim?
A: He didn't kill the victim; that was in the police records. He drove the truck and thought that his associates were going to rob the victim.
Q: Ma'm, I asked you if you testified.
A: I did testify to that fact that he had an IQ of 58. Somebody with an IQ of 58 cannot formulate a complex plan.
Q: Isn't it true that the jury gave him the death sentence?
A: No, that is not true. They recommended a sentence of life without parole. But the judge overruled the jury.
Q: So a circuit court judge gave him a death sentence?
A: That's correct. The judge overruled what the jury thought was fair.

Q: Do you remember testifying in the case of Jeremy Jones, who was tried and found guilty in our own county for murdering a whole family in their sleep?
A: Yes, I remember.
Q: And you testified then that you found mitigating factors, despite the lives of that whole family he snuffed out?
A: Yes, I did. There was a history of abuse and severe deprivation long before the tragic deaths of those people.

The push-pull reply is seen twice here. Both times the "yes" answer was much stronger than simple agreement because it emphasized unqualified agreement about writing the article and about finding mitigating factors. The attorney sought to invalidate the expert's opinion by addressing testimony and the sentences in other capital cases. The essential issue is that experts should keep a clear focus on their current opinions and not be distracted by an ultimate legal judgment elsewhere. If experts base the worth of their testimony on the jury or judge's decision in cases in which they participate, they will find themselves often discouraged. The issue should be the internal integrity and worth of what the experts themselves have found. What a jury or judge have decided elsewhere, or indeed at the present, is based on specific case and legal considerations and factors quite apart from the expert's contributions.

In a one additional case, the defense attorney asked the social worker expert witness, "Give all of the disturbance and disorder you have described, and his history of misbehaving, how could this supposedly crazy man sit here and behave well in court for two weeks?" This situation is one in which the cross-examining attorney is attempting to invalidate the testimony by contrasting the conclusions with behaviors that the judge and jury observed. The expert's answer was, "All behaviors take place in a context. Mr. P. has hardly paid attention to what has been going on in his trial. His eyes have been unfocused. His mind is probably elsewhere." At the point the attorney said what attorneys say when they feel they have been defeated in the exchange; "Let me move on to another topic."

CONCLUSION

Skilled social work testimony starts with mastery of the subject matter and awareness of issues that arise in the legal arena. Beyond these fundamentals, social work experts should appreciate that every aspect of their work is fair game for critical evaluation, especially in capital murder trials where much is at stake. In these cases, the skilled expert should not automatically accept the frame of reference of the cross-examining attorney. The present exchanges illustrate the challenges in insistent and aggressive cross-examinations during mitigation testimony. Effective responses call for maintaining composure and

clarity under attack and being able to put into a meaningful context the answers to challenging questions opposing attorneys use to undermine expert testimony.

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