

CROSS EXAMINING THE PSYCHOLOGICAL EXPERT

Alyson F. Lembeck, Esq.

Family Law Attorney, Guardian ad Litem, Mediator

Ellis Funk, P.C.

Cross examining a psychological expert can be a daunting task. Judges typically give great deference to psychological experts. In order to successfully challenge an expert witness, it is best not to attack the expert witness, but rather to question the underlying facts the witness relied upon to reach his or her conclusion. The following are examples of cross examination techniques that can change the paradigm to allow the Judge to disagree with the expert and rule in favor of your case.

OVERALL APPROACH

Always treat the expert witness with respect. It is not a good idea to attack the expert witness directly. Rather than attacking the conclusions, focus on the underlying assumptions and facts supporting the expert's conclusion. If you can prove there is another logical opinion that can be made based on the evidence considered by the expert, you will have a better opportunity to convince the Judge of your position.

Make sure all of the questions you ask are designed to support your theory of the case. Do not allow the expert witness to utilize your time to restate his or her direct examination. Ask leading questions and control the witness so that you receive short and concise answers to the questions you want answered.

HEARSAY

The psychological expert's conclusions generally rely heavily on hearsay information. For example, most experts use information they learned from both parties, schools, materials submitted by the parties, and from other third party collateral witnesses. It is important to question the expert witness what, if any, information was independently verified. You can provide the Judge reasons why the information the expert relied upon was not credible. The expert may not be able to determine whether one or both parties told the expert true information. If you can show the Judge that information provided to the expert was false, this may cause the Judge to question the expert's conclusions.

APPEARANCE OF IMPROPRIETY/BIAS

Many expert witnesses are hired by one party. In these instances, you can call into question whether the expert is acting as an advocate for one side. It is helpful to point out to the Judge who hired the expert, the cost of the expert, and whether the expert has been hired multiple times by the same lawyer. It is also important to research the other cases the expert has been involved in to see if there is a trend in his or her testimony (ie. Always finds the father should have joint custody) or whether there is inconsistency in positions taken in the past by the expert. Finally, it is persuasive to question the expert about what he or she did to prepare for the testimony. Asking how long he or she spent with the opposing counsel prior to testifying is a good way to show the Judge that the expert's opinion may be persuaded by his or her alignment to one side.

If the expert was hired as a neutral, it is important to consider how many times the expert met with each party, whether the expert interviewed all of both parties' witnesses, whether the

expert met with the children with each party, and point out to the Judge if the report shows bias such as accepting one party's information as truthful without any verification while doubting the other party's information.

MISSING INFORMATION

In most cases, the expert involved may not have all of the information and evidence in a case. If you can prove evidence in a case that if considered by the expert would change his or her opinion, you may be able to get the expert to acknowledge that if they had that information they would have drawn a different conclusion. This can be very persuasive to the Judge.

DO NOT ATTACK CREDENTIALS

It is a mistake to attack the expert's credentials. Most experts are more than qualified to provide his or her expert opinion. Further, it is likely the expert has already testified and has been qualified in the Judge's court before. Cross examining the expert's credentials provides the expert time to reinforce his or her experience. Instead, you should consider stipulating to the credentials of the expert so that it is not emphasized to the Judge.

PSYCHOLOGICAL TESTING

The Minnesota Multiphasic Personality Inventory (MMPI-2) and the Rorschach Inkblot Test are the two instruments most frequently used for the evaluation of adults in child custody cases. Coping with Psychiatric and Psychological Testimony, David Faust based on the original work by Jay Ziskin, Oxford University Press, 2012. There are issues in using these tests. Most importantly these tests do not test parenting ability. There is almost always insufficient scientific foundation to make a direct connection between the results on the tests and parenting. The information gained from the tests are indicative of what characteristics others have that have

tested similarly, but it does not necessarily mean the party has those characteristics. Further, most people being tested as part of a custody evaluation present themselves in a more favorable light and test with a level of defensiveness. Those going through a divorce tend to be more anxious, depressed, and paranoid. This could affect the validity of the test. It is not a good idea to attack the testing because the expert knows much more about the testing and will be able to explain the testing measures. However, there are inherent flaws and limitations in the testing that should be brought to the Court's attention.

DISCOVERY

It is a good idea to get the expert's entire file including all information and testing the expert relied upon. The documents in the file typically contain information that was submitted by each party which may be helpful to your case. Also, the notes of the expert may reveal additional information to support your case. Finally, having the raw test data will allow you to seek the guidance of another expert's opinion about the test results.

HIRE YOUR OWN EXPERT

The most helpful tool to cross examining an expert is to hire your own expert to help you identify the flaws and weaknesses of the other expert's opinion. Your expert can help you prepare your cross examination questions or even attend trial as an expert to call into question the other expert's report and to explain why a different conclusion should be drawn using the same information. Having another expert to rely upon can be invaluable in effectively cross examining an expert.