

# **“In the Box” Preparing for court and giving evidence as an Expert Witness**

National Judicial College of Australia -  
Science, Experts and the Courts Conference  
Museum of Sydney - 2006

**Dr Bruce A Stevens**, Canberra Clinical and Forensic Psychology,  
10<sup>th</sup> floor AMP Building, Canberra City, ACT 2601. Ph 016301698 (24 hour answering service).

The sad truth is that a psychologist who treats clients can not avoid court. Most mental health professionals dislike going to court and some might be considered ‘court phobic’. While court is challenging it need not be a source of undue professional anxiety. I think it is to have a professional approach that makes it easy to prepare for court and to become familiar with some of the common pitfalls.

## **1. Pathways to Court**

*A Reliable Witness* (Ogilvie Publishing, 2004<sup>1</sup>) is a very helpful book in understanding this process. It has been written by Dr Phil Watts, a Forensic Psychologist in WA. He outlined various pathways to court. The most common is because you have treated a client, maybe had your notes subpoenaed, or written a treatment report. If you do forensic work then you will commonly be called into court. Watts distinguished:

- Court appointed expert;
- Agreed Expert;
- Party Expert;
- Paper Expert;
- Second Opinion Expert.

This is in decreasing order of how the court will perceive the objectivity or strength of your evidence. He made the point that the stronger your position of objectivity then the less likely that you will be called into court. He also noted that a professional can be called into court to defend him or herself in a mal-practice or negligence case against you.

## **2. Why do psychologists have terrible experiences in Court?**

All of us have heard a psychologist relate a humiliating experience in court. Such experiences “get around” and sometimes become more colourful with time. While I am not sure about the original reality, it is sometimes a foolish mistake that even a Psych101 student shouldn’t make. Eg. *I was in Family Court offering evidence about a father’s use of a child’s nickname. A child psychologist wrote a report, quoted a source but did not check the primary source. The barrister looked up the original article and the clear meaning was different to that conveyed in the report. The psychologist looked foolish under cross-examination, but presumably no more than if a university lecturer had challenged an essay with a similar mistake.*

---

<sup>1</sup> PO Box 1084 Canning Bridge, WA, 6153.

It is possible to look foolish by not understanding the legal process and overstepping your role in offering an expert opinion. Consider the following **levels of observation or opinion**:

- Observing behaviour, 'He was wringing his hands.'
- Perception of mental state, 'He appeared anxious.'
- Formulation, 'The anxiety during the interview was consistent with a general observation of trying to please others.'
- Diagnosis, 'It was consistent with Generalised Anxiety Disorder.'
- Relation to a legally relevant question, 'At the time of the offence, his anxiety was so overwhelming that he failed to consider the consequences of his behaviour.'
- Elements of the ultimate issue, 'Although he was anxious at the time of the offence, he was able to reflect on the consequences of his behaviour, he knew the nature and consequences of his acts.'
- Ultimate legal issue, 'He was sane at the time of the offence.'

It is best to not trespass on **legal territory** and avoid both elements and the ultimate issue. If you carry out an injury assessment, you might give a malingering test. It is best to conclude that the client failed on a specific malingering test, but not conclude that "He was found to be malingering." Sometimes judges ask for not only our opinion but our recommendations (especially in family law). If asked a direct question by the judge while giving oral evidence, then you might say, "I can only express an opinion on psychological grounds, but I would recommend that the relocation not be allowed (ultimate issue in a Family Law case)."

It is risky to use **legally defined concepts** in expressing an expert opinion, because it is easy to presume that we know more than we do. After all the law is not our area of expertise.

### **Know your limits of expert opinion.**

Few of us come to court feeling as expert as we would like to. All I had going for me in 1994 was a degree in psychology and having my court phobia under control! Remember that for most psychologists the first experience of court will probably be a treatment report. In this case our expertise simply rests on having seen the client in counselling, so our role as an expert is generally limited to the treatment provided. If we are cautious then it is hard to get into too much trouble.

It is in writing a report that we become more vulnerable, say for compensation for injury. We are expressing an expert opinion in writing to the court and naturally we should be prepared to have that opinion tested by cross-examination. The weight of expectation will vary, from a treatment report to a party report and up the chain towards a much greater expectation of expertise if we are appointed by the court (as say a 30A Expert in Family Court). In general terms we are unlikely to be called in with an injury report (1% of the time, most settle before court), criminal (maybe 10% of the time), and family (maybe 30%).

I think it is helpful to think of our **expertise** in terms of:

- (a) **Core strengths** where we have clinical experience and a good idea of recent research.
- (b) What is psychological but **not an area of our expert opinion**.
- (c) The **in between** is important to consider. This is a grey area where we have some experience and understanding, so there is some basis for an opinion, but perhaps one expressed with caution. The onus is more on us to do extra research, ask peers, or get supervision if we write a report. It can be an area we are growing in expertise and important in our development.

I think it is normal not to feel completely informed, but this should not impair our potential usefulness to the legal process. It is advisable to be more cautious about our expertise if greater weight is being placed on our opinion, for example as a court appointed expert.

Remember that our opinion rests on:

- (a) **Clinical experience** such as therapy with individuals (perhaps including children and adolescents), couples or families. Also psychological assessment with different client populations such as sex offenders or the mentally ill.
- (b) **Knowledge of research.** For psychologists this is the social scientist part of our training. Unfortunately most of us find this tedious to learn and easily forgotten. However, it is amazing the quantity of research results we see in terms of review articles in journals or presentations at conferences. More later about how to prepare for court.

Obviously being a psychologist does not mean that we are an expert on everything (though the courts may sometimes wonder about our periodic claims of omniscience). A law degree is rare in our ranks, so we should not pronounce on the ultimate issue before the court. I do not have an expert opinion on medical questions such as drug effects and there are areas of psychology beyond my expertise such as brain injury. We have limits. Generally, when we are being **cross-examined** there is no expectation that we know everything. Simply admit your ignorance about a point and never try to bluff.

**To do:** Put as much **preparation** as possible **into the report** given to the solicitor. If it is shoddy then it is impossible to defend; if it is clear in reasoning, justified in conclusions and based soundly on empirical testing then it is easy to defend in the witness box. Even if you are providing a treatment report, try to make it look as professional as possible. That is model it after a forensic expert report. Keep to plain English and avoid psychobabble! Psychological terms should be explained. It is safest to describe behaviour rather than use an overall term such as Domestic Violence. It is best to avoid any emotive language and be matter of fact in tone (or the report can be challenged because you took a dislike to a party). Criteria for diagnoses from DSMIV can be given in appendices. Openly declare any limits in data gathering, for example “I did not interview the father in this matter...” Then state the implications in forming your opinion. Remember that the report sets off the legal process and determines how you will be treated in court, for example which side will perceive as hostile to their case!

### 3. Research: Preparing for Court

You are expected **to take** a copy of your report to the court and all notes including raw data for testing. It is very important that you take good notes, for example I will use quotation marks and include exactly what the person has said in the report. I use a lot of quotes in the report (adds vividness for diagnosis), and my notes can back this up. Remember that a number of years can pass before you go to court especially in an injury case. I have to read my notes since I rarely remember anything about the particular case.

The case may be complex and include a thick file of **affidavits** and other legal material. It may be useful to colour tab important sections of the file so you can find it quickly while under cross-examination. It is not necessary to bring all the affidavits to court (these can be

provided), but it is required that you list in your report what you have read. I think it is a good idea to have copies of the **Expert Code of Conduct** for the various courts and be familiar with the principles when you give evidence.

We may see countless journal articles including the results of **research**, but this may be difficult to recall especially in the witness-box. It is easily forgotten. *I remember being cross-examined about profiles of pedophiles. I was on the spot and really grilled by a good barrister. I had a mental blank and while I could recall some relevant information, I knew that my performance had been poor.* After my embarrassment wore off, I realized that I had heard a keynote address at the APS National Forensic Conference two months before on exactly that issue! I then created a system to summarize and index research that I could bring to court. I have found it useful to cite relevant research in giving evidence. For the first time in my working life I have a better sense of being aware of the results of research and this has given me an increased confidence in testimony. Another approach, with even less work, is to have an expanding file and toss in copies of relevant articles (especially review articles). If you are called to court, dig out a few relevant articles before you go.<sup>2</sup> Often you have to wait anyway and you can quickly familiarize yourself with the research. It is also useful to bring a copy of DSMIV.

What is most helpful to the court is when research results are **counter intuitive** (for example with sexual abuse indicators, noting that child victims of violence but not sexual abuse often act out sexually, another example is Bruce Rind, et al's study "A meta-analytic Examination of Assumed properties of child sexual abuse using college samples" *Psychological Bulletin*, 124/1, 22-53, 72% females reacted negatively at the time, only 33% of males 42% look back as positive and did not differ from normal sample on psychological criteria, only minority of men saw as highly negative). Over the years I have noticed that experts like Dr Ken Bryne or Dr Brent Waters are known in legal circles as being able to cite relevant research and frankly it has amazed me how they do it so well. Now I am better able to do it myself and naturally it helps to add to a professional reputation.

Always take a **CV** into court. Just add it to your book or folder. It is also a good idea to bring the subpoena since it will have the address of the court where you are to appear. It is easy to make a mistake and embarrassing if you can not find the court.

One thing I have noticed as a forensic psychologist is that other psychologists will spontaneously share their deepest court related fear. Countless times I have heard, "But what if they ask me about the **validity or reliability** of a test I have used?" Naturally this is a concern but in hundreds of times in court, I have yet to be asked this question about any measure I have used. However, it is easily solved problem if you stick to commercially available tests and simply photocopy the relevant pages in the manual and take them in a folder with you into court. I think that most psychologists have the idea that cross-examination is like being an undergraduate and facing an oral exam by the Professor of Psychology! The reality is that you know far more about psychology than almost any barrister, which is why you are the expert!

---

<sup>2</sup> If you have an important article that you think might be highly relevant to the case, make four copies so you can distribute to the parties. Dr Watts recommends this and I think is right that it gives an impression of being professional.

I should add a point that many of our fears are based on what we have heard about court room practice in the **USA**, where as the reality of courts in our country is that it is more of a ‘Gentleman’s Club’ with the judges and barristers mostly male. I have yet to be bullied by any barrister, and if he or she went beyond reasonable guidelines of polite behaviour the judge would mostly likely intervene. What this means is that giving evidence is usually far more comfortable than we might imagine. While courts in the USA can be very nasty places for the expert, this is not the case in Australia though this could change in the future.

It is helpful to talk to the lawyer who has brought you to court or for whom you wrote the report, in my experience this rarely happens. Even a brief word can help you to appreciate the issues being considered.

If you really are petrified about giving evidence for the first time, then I recommend taking a **Beta-blocker** (which is commonly used by singers and musicians before performing). This blocks the adrenaline rush and will keep your voice steady (if that is a concern to you). I said this to one of my associates, and one of my earlier associates in the practice said, “Why didn’t you tell me that!” Her first court appearance was in a murder trial and that is about as intense as giving evidence gets.

#### **4. In the witness box**

Court really is something of a **game**. A very serious game, but a game. The legal participants rarely take it personally, no matter how badly they seem to act towards “My learned friend” at the bar table. There is a use of language that seems familiar but is different. As Phil Watts said, “Things which make common sense and are obvious are overlooked while, at other times, procedures become bogged down with strange rules and apparently petty details.” (2004, p. 1) When this happens I just sit back and wait for the skirmish to finish, and then questions to me will continue. Often, even with my experience, I will have no idea what was resolved. However I do realize that the law is mostly about a just procedure, so the rules of evidence are important to the process which hopefully protects the rights of all who are involved.

The first thing is that we are sworn in, taking either an affirmation or an oath on the Bible. The expert witness has the role of assisting the ‘fact finder’ (judge or jury) by presenting scientific, technical or specialized knowledge. This is why our **credentials** are important. Mostly, I find is that questions are limited to my name, professional address and highest degree. I will tend to offer my academic appointments (Adjunct Senior Lecturer in Forensic Psychology at University of Canberra, etc.) This stage is called the *voir dire* but generally it is a formality, especially if you are well known to the court. At this point you might be asked for a copy of your CV (though you should attach a brief CV to all reports or even brief expressions of opinion). This is more of a problem if you are a recent graduate and have limited experience. Do not bluff, simply state you areas of academic training and experience (however limited). It is up to the court to accord you evidence with what ever weight it deserves. Remember that “good evidence is good evidence” (Watts, 2004, p. 84) and it is all part of gaining experience.

Note that there are two approaches to court. The **adversarial** method, which is commonly seen in criminal and civil courts. The other is the **inquiry** method, which is commonly seen in tribunals. The Family Court was set up as inquisitorial but has a strong adversarial aspect.

What is most relevant to you in court is that with the inquiry method the judge is more likely to ask you direct questions.

I think it is helpful to address the **barrister by name**. As I write this, I am just back from court where the two barristers were Mr White and Mr Livingston. I spoke to both by name. This allows more of a 'level playing field' in that we address each other as equals. This is slightly disconcerting to the barristers who expect to be able to intimidate even experts 'on their ground'.

In this it is important to **look like an expert**, so conservative professional clothes are an asset. Watch the other extreme, excessively expensive watches or jewellery can give the impression to a jury that your testimony has been bought! Keep your testimony clear and jargon free. Charlene Steen advised, "Jurors are extremely sensitive to how the expert witness presents him/herself, and will be offended if the expert appears biased, dishonest, argumentative, or pompous." If possible display confidence but not arrogance. Be careful to explain any "psychobabble", that is any terms not widely understood by the general public.

Sometimes you will be brought into court as a **witness of fact** and not an expert witness. The role of a witness of fact is simply to state what treatment was given, "Mr Smith was seen four times in individual therapy and then referred to a pain management program." If your role is not clear then ask the judge in court.

I find that it is helpful to **face the barrister** when he or she is asking the question, but then face the judge (or rarely the jury) when giving a reply. There are various views on this, including some experts who will only face the judge, but I find this rigid and unnatural. (I have heard barristers talk about Ken Byrne's left ear hole)

There is a difference between **direct and cross examination**. The first barrister to address you is generally the 'friendly' side and will give you more latitude to express your views including why you reached a conclusion. This is called *Examination in Chief*. The other barrister will *cross examine*, but in my experience rarely restrict your answers. You might be asked about sources of information, assumptions on which opinions have been based, degree of certainty of an opinion, validity and deficits of all sources, if testing instruments were administered personally and correctly, and why the opinions of opposing experts might be different. Both may later have an opportunity to redirect questions but the scope is limited to topics already raised. There may also be additional barristers, for example if there are two or more defendants in a criminal trial or a child representative in the Family Court. Sometimes the judge will ask clarifying questions.

Professor Don Thompson, barrister and psychologist, at an APS National Conference, emphasized that is important to listen carefully to the **question and respond** to it. He recommends "Just Right" balance of not saying too much or too little. Saying too much opens you up to hostile questions. Focus on the question, answer precisely and say if you don't know the answer. If you need to give ground on a point, simply do it. This is always preferable to trying to stick to a lost point (David Childs barrister, cited by Watts, 2004, p. 116).

If you want to build up a forensic practice it is very important how you **perform under cross-examination**. Think, for a moment, about the lawyer's concerns in a legal matter. It is in court and he or she has a favourable report from an expert. But rather than being able to

base the case upon this evidence, the expert crumbles under cross-examination and the evidence becomes worthless! Just how you perform is a very important part of your legal reputation.

## 5. “Tricks of the Trade” What Barristers will try to do...

When cross-examined **do not be rigid** or defensive. Keep your cool. Any advocacy for a client will diminish the value of your evidence – if not make it worthless. This goes against the role set by the Expert Code of Conduct in which your responsibility is to the court not the parties. Make every effort to be fair to both sides. As lawyers say there is ‘no property in an expert witness’.

The strength of your opinion is important. I have a **graduated scale** of concern from notable but not significant (“feather on the scales”), significant, clear concern, up to grave concern. Be careful and measured in offering opinion, for example with child drawings in family court I would clearly distinguish what I think indicates level of attachment and speculative interpretation. Be careful with wild Freudian interpretations: “Sometimes a cigar is just a cigar!” Barristers will constantly put pressure to either strengthen or diminish your conviction about a point (depending on whether it serves their client). Be precise about your strength of conviction - perhaps expressing it as a **percentage**, which I have found at times helpful to the court.

Watch the barrister who gives a **sweeping generalization**, “Wouldn’t you agree that...” Respond with something like, “I would agree with some aspects of what you have said, but I would make one or two qualifications. Would you like me to explain further?” On very rare occasions a barrister will try to force you to say **yes or no** to what is being put to you and I think it is appropriate to say “mostly yes” or “mostly no”. If this is not allowed then I would follow the advice of Phil Watts to “If I answer with a yes or no answer it would be misleading to the court.” An absolute fall back is to remind the barrister that you have just made an oath to give the “whole truth and nothing but the truth”.

Barristers use a technique of “**closing the gate**” which can lead you to a conclusion you do not want to make. This is only effective if you make or concede to generalizations, not if you qualify in the interests of accuracy every point you make. When you refuse to accept the generalizations of the barrister, you will soon feel like you are going around in circles. This is a good sign that you are not conceding anything. The barrister may say “Wouldn’t you agree that...” I will say, “No, I think it is more nuanced than that. I think that there are three issues, not one. Would you like me to repeat what I have said?” I have often repeated what I have previously said and simply reinforced my evidence to the judge. **If you get caught** (being led somewhere you didn’t want to go), simply admit making too many generalizations and then refuse to agree to what now seems the logical conclusion.

A more subtle way of working is the more careful **building of evidence around a core point** – what will later be the argument put to the judge in closing submissions. This can seem like ‘closing the gate’, and if you accept any generalizations you will feel pressure to accept the barrister’s ‘logical’ but simplistic conclusion. I actually think that this approach is very reasonable and need not distort your evidence if you are precise in giving your evidence. Accept that the barrister has a point but has not presented the whole picture.

If you feel **pressured** in the box, then it is a good idea to slow the proceedings down. If you feel swept along, pause and think before your answer. There is no rush and this will give an impression of deliberation about the expression of your opinion. If the barrister asks one or more questions in a question or it becomes convoluted, write the points down. I have put barristers on the spot by replying, “You have asked me three questions, would you like me to answer them in sequence?” It is not uncommon for them to get confused or forget part of a question. I have reminded them that they asked something in a question that I have not had an opportunity to answer. I will frequently ask a barrister to ask a question again, especially if the question is unclear. Sometimes the judge will comment that the question was unclear to him or her as well! It always gives me more time to think and will interrupt the pacing of the barrister.

**Other evidence may have arisen** in a trial and a barrister may want you to express an opinion on it, eg. “Would it change your recommendations about unsupervised contact if you had been informed that the father has been convicted of child sexual assault on three occasions?” When this happens simply say “Yes.” Never say I had a different view of the father based on my clinical interview.

I a barrister in a family matter with contested residency asked you, “Would you change your opinion over the competence of the mother if you heard that she had left her children (age 4 and 6) for five hours unsupervised at home while she went out drinking?” Again simply say “Yes.”

Initially I was impatient when barristers presented a **scenario**, thinking it was simply a mind game, until a leading family lawyer explained why it was important. I will now listen carefully, preface my response with something like “I am to assume...” and then give an opinion. If you need to pause and think through your response then do it. The court will wait and you will be seen as careful and considered in your opinion. If the suggested situation has no substance then the judge will simply ignore what you say. Remember to convey being *reasonable* and *flexible*. Ms Beatrice Melita, in as previous APS conference, observed that when the expert changes his or her opinion in the box with new information, this shows that the “scientist’s mind is open” to new information.

I think it is helpful to the judge to be as **transparent** about your logic as possible. Outline A-B-C, not A-C (Watts, 2004, p. 86). Never make guru like pronouncements. Instead allow the train of your thought to be seen: I thought that this might be the case, but then... I also checked... And after weighing both conclusions, I thought... I do this in my reports, so it is consistent to follow the same line in the court. Avoid saying “I feel” or “I guess”, what is important is what **you think**. The basis is facts or theory.

Watch the **nice barrister**. He or she may be very considerate to your discomfort, apologize for asking awkward questions, and have a friendly warm tone. You may feel so relieved that you relax far more than you should. **DON’T!** The barrister is being paid thousands of dollars a day to fight for their client, so never assume goodwill because it is more likely to be a tactic. I remember being regularly cross-examined by a leading barrister through the 1990’s. Cross-examination was so warm and smooth, it was like being in a hot bath, and it even had seductive overtones. He was known for his iron fist in a velvet glove approach. He has since gone to the bench and has dropped the nice façade!

The most difficult barrister is the one who has done his or her homework. This barrister knows you. He or she will have a game plan that is not obvious, more like the **indirect tactics** advocated by the famous military strategist Sun Tzu in *The Art of War* (Boston: Shambhala, 1988). However you will generally not have difficulties if you stay with careful and precise evidence, transparent logic and being completely non-defensive.

It is inevitable that something will happen (eventually) in which you feel **embarrassed**. *I remember an incident in which a Legal secretary was taking notes while I was speaking on the phone with her to arrange an appointment, I made a flippant remark that was later used by the barrister in cross examination. I was non-defensive, 'took it on the chin' and to my surprise impressed the judge with my credibility.* I have to come to realize that the judge attaches considerable weight to how believable is the testimony, which is a skill they develop, and this applies to experts as well.

During the **court recess**, it is advisable not to talk openly about the proceedings in the public area, since you may not be aware of who is listening. Ask to go into a private room if necessary. **DO NOT** laugh about the proceedings in the public area.

Even if you try everything and you feel like a flop after giving evidence, do not be too concerned. Every court appearance is a **learning experience**. We learn by making mistakes. This is unavoidable, since our opinion is never perfect. We do the best we can. And what we have said is generally only a small part of the proceedings.

## **Conclusion: Pressure on Opinion**

The most obvious pressure is from a solicitor or a party in a dispute. Usually this is more pronounced when our role is that of a "hired gun" rather than a court appointed or agreed expert. It is important to be clear on the point that no matter who pays "our opinion is not for sale". We sell our time not our opinion.

More subtle is internal pressure, what therapists call counter-transference, from our own history or personal issues. As an example an assessor who suffered DV as a child, may over react to violence cues and lose objectivity in an assessment.

I think we have to give up the myth that an expert can attain complete objectivity - as if we have a privileged observer role. Strong currents will swirl around and within, we need to become aware and then make allowances. *Objectivity is not something we assume we have but something we strive for.*