

Preparing and Presenting Expert Testimony in Child Abuse Litigation

A Guide for Expert
Witnesses and Attorneys

Paul Stern

图书馆

IVPS

Interpersonal Violence:
The Practice Series

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Witnesses and Attorneys

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Interpersonal Violence:
The Practice Series

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Interpersonal Violence: The Practice Series

Jon R. Conte, Series Editor

Interpersonal Violence: The Practice Series is devoted to mental health, social service, and allied professionals who confront daily the problem of interpersonal violence. It is hoped that the knowledge, professional experience, and high standards of practice offered by the authors of these volumes may lead to the end of interpersonal violence.

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PREPARING AND PRESENTING EXPERT TESTIMONY IN CHILD ABUSE LITIGATION:

A Guide for Expert Witnesses and Attorneys

by Paul Stern

To the child abuse professionals who do the work
to protect and support children:

May you find the energy,
the perseverance,
and the commitment
to achieve our ultimate goal—
our obsolescence.

And to the children upon whose behalf we work—
for, if the truth be known,
they have more courage than all of us.

Foreword

It was a jury of average ignorance, perfectly capable of determining which side had the best attorney.

Old Judges' Axiom

Practitioners involved with issues of child abuse quickly discover a reality of their professional life—the inevitability that they will cross the courtroom threshold at some point as an “expert” witness. Regardless of whether that experience is novel, frequently repeated, a voluntary excursion, or one commanded by the necessities of a case or order of a subpoena, the experience often is an intimidating one. Few venues provoke as much discomfort as the witness stand.

Lawyers who employ or challenge such experts seldom appreciate this dynamic. Their experience with experts occurs from the relative sanctuary of their tables in the courtroom, buttressed by their familiarity with the dynamics of court and rules of evidence, confident in the recognition they get to ask the questions rather than answer them. Those days, after all, were left far behind when they graduated from

law school and no longer had to endure the Socratic methods of their professors. Only when they confront the need to cross-examine a knowledgeable expert on a subject foreign to them does their comfort level approach that of the witness.

Much has been written in the legal literature about the use of expert witnesses from the perspective of case law decisions outlining boundaries of legally permissible expert testimony. While the law states an expert witness is someone with knowledge beyond that of the average juror, attorneys presenting such testimony recognize the true *expert* as something much more. Knowing the subject may qualify the witness to enter the court, but communicating this knowledge effectively is what defines the true expert. Unfortunately, virtually nothing has been written about how to prepare and present effective expert testimony. This book represents a major step forward in filling this void, offering important practical and theoretical advice to professionals appearing as expert witnesses and attorneys handling these sensitive cases. While the knowledge gleaned from these pages may not alleviate all fears expert witnesses face before and during testimony, it will arm them with resources to confront that experience with skill, poise, and confidence. Attorneys will find this book a valuable how-to manual for preparing, presenting, and confronting expert testimony.

The use of expert witnesses in cases of child abuse and other forms of interpersonal violence has developed out of a social and legal need to attach more concrete and scientific standards to the evaluation of such allegations. Society is uncomfortable with the concept of child abuse, in particular with allegations made against adult caretakers and parents. The problem is compounded by reluctance to make legal and social determinations regarding the credibility of such allegations on a child's word alone. Society as a whole and jurors and judges in particular look for "evidence" considered more reliable on which to base their decisions.

The last decade has witnessed a proliferation in the number of litigated cases involving interpersonal violence, mostly in the areas of child maltreatment and domestic violence. The complexity of issues involved in such litigation, breadth of research, and specializations of professionals dealing with these issues have increased the number of experts called into court. Accordingly, attorneys using and

confronting these experts must have a thorough appreciation of how these experts are perceived by judges and juries, and how best to present or discredit their testimony. The fact that the use and misuse of expert witnesses remains one of the most frequent issues for appellate litigation, and a common cause for many poorly reasoned decisions by fact finders, suggests much work remains to be done.

The misuse of expert witnesses has spurred a large body of case law and legal commentary criticizing and restricting the use of expert testimony in child maltreatment cases, especially in cases involving child sexual abuse. Regrettably, such critiques and case law ignore the purpose behind the appropriate use of expert testimony: to assist the fact finder in understanding the evidence or deciding a fact or issue by providing him or her with specialized knowledge. Just as misuse of expert testimony can result in improper verdicts, failure to permit proper use of expert testimony can lead to misinformation decisions based on speculation and bias.

Research on jurors who decide these complex cases reveals that many bring their biases and beliefs into the jury room, and most have little understanding of family dynamics and victim responses to interpersonal violence. Indeed as the author points out, the selection of jurors in the legal system is designed to impanel the group of least knowledgeable individuals to decide the issues. The necessity to educate these fact finders and to do so persuasively become paramount considerations for litigants, most often prosecutors and other government attorneys who bear the burden of proving such victimization to the requisite degree of legal certainty. The art and science of this persuasion are the subjects of this book. Its accessibility to attorney and professional alike is testament to the author's own ability to educate.

Early in their careers attorneys learn that experience rather than formal education is their best teacher. Frequently the most important lessons come from the hardest experiences. Paul Stern shares both his experience as a veteran courtroom practitioner and the wisdom he's gained from successes and failures. Throughout the book, the reader will find practical tips that will improve the presentation of testimony by both witness and attorney and facilitate challenges to improper expert testimony. The author's style complements his message, using clear language, analogies, and repetition where necessary

to reinforce points. The book excels in illustrating the substantive message through court transcripts and case examples. Most importantly, the book highlights how to use scientific and social science research and professional literature to support appropriate expert opinions and discredit the charlatan expert.

Chapter Six, authored by Benjamin E. Saunders, provides balance to the manuscript by presenting information and perspective from a respected non-lawyer professional who has had extensive experience as an expert witness and consultant. Saunders accurately comments that the legal profession tends to take itself too seriously, both inside the courtroom and in its relations with non-lawyers, including witnesses. His critique underscores the need for lawyers to obtain the insights of professionals who interface with the legal system. Only through such an exchange of ideas can the legal system hope to balance the frequently conflicting obligations faced by professionals who serve as expert witnesses. Saunders' discussion of the ethical considerations frequently encountered by professionals solicited as expert witnesses is especially important. As is true of most issues involving professional ethics, the answers are seldom black-and-white. For the expert going to court and for the attorney dealing with the expert in and out of court, the time for considering and discussing those issues is well before the first question is posed in the trial.

Readers who follow the author's advice can turn the old judges' axiom around, "It was a jury of understanding, well informed by the expert's testimony, perfectly capable of determining the issues." The "best attorney" should not be one who convinces a jury through his courtroom flair, but one who educates the jury, enabling them to make an informed decision. From this, ideally, the search for the truth will emerge, and justice will prevail.

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Perhaps the best thing about writing a book is that the publisher gives the author the opportunity to include acknowledgments. In theory, this is the place for the author to acknowledge the people who helped in the creation of the project. However, writing this book was the easy part—the hard part was being in the position to be able to do so. That depended completely on those around me who provided encouragement, teaching, and support and led me through doors I could never have opened alone. And so I say thank you to those people here, and especially to three people.

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1

The Need for Expert Testimony

What we choose to believe depends on whom we rely upon as our teachers.

Roland Summit, "Misplaced Attention to
Delayed Memory," 1992

Increasingly in U.S. society we require our human conflicts to be resolved in courtrooms. However, those entrusted with making the decisions affecting these conflicts often lack the knowledge base to make informed or sophisticated decisions. They generally must be provided with information that interprets the evidence presented to them and that explains human behavior so that they will be better able to reach appropriate resolutions. Those who are called upon to so educate the decision makers are *expert witnesses*.

The quality of the decisions made by judges and jurors is largely dependent upon the quality of the education they receive from expert