

AMERICAN LEGAL INJUSTICE

Behind the Scenes with an EXPERT WITNESS

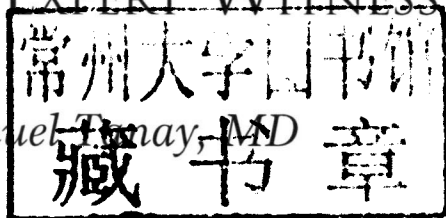
Emanuel Tanay, MD

foreword by Robert I. Simon, MD

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Emanuel T. May, MD



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FOREWORD

I feel like the midwife to Dr. Tanay's book. I was assisted by his lovely wife, Sandra, and others who encouraged Dr. Tanay to write this magnificent book. It is true that I importuned Dr. Tanay to write about his extensive experience as a forensic psychiatrist. He has testified in many notorious cases, including those of Jack Ruby, Sam Sheppard, and Theodore "Ted" Bundy. I also unabashedly resorted to employing guilt and appealing to his sense of duty to share the immense knowledge and perspective of forensic psychiatry, accrued over fifty years.

I have known Dr. Tanay (Emek to his friends) for more than twenty-five years as both a friend and esteemed colleague. I know of no other psychiatrist or forensic psychiatrist who possesses Dr. Tanay's depth and scope of knowledge and experience in psychiatry and the law.

Dr. Tanay has a highly individual, distinct style of testifying. At his presentations on the role of the forensic psychiatric expert, given at the American Academy of Psychiatry and Law, I have admonished attendees that, while the content of Dr. Tanay's presentations is extraordinarily informative, his style of testimony is entirely unique. There is only one Dr. Tanay. He can only be imitated at ones' peril. Dr. Tanay will not shrink from confrontation or suffer any shenanigans from opposing counsel. He is a strong advocate for his expert opinion; otherwise he would not be in court. An adage of Dr. Tanay's is often quoted by forensic colleagues: "I may be wrong but I am not in doubt." Psychiatrists and forensic psychiatrists are taught that engaging opposing counsel in an assertive or aggressive manner will diminish their

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credibility. Not so with Dr. Tanay, whose testimonial style has proven riveting and highly credible to judges and juries alike.

Dr. Tanay's aphorisms are classic. For example, "One has no friends when going to court." This statement is true on many levels. It resonates with my experience that being an expert witness can be quite lonely and anxiety provoking. When I shared these feelings with an attorney acquaintance, he responded, "Don't worry, you are only a spoke on the wheel or hood ornament on the litigation vehicle that the attorney drives into court." While this has proven helpful in reducing my unease, I am sure Dr. Tanay would strongly disagree with this advice. He would likely say, "You are the engine."

I recall another aphorism: "You can't be paranoid enough in litigation." Dr. Tanay does not mean clinical paranoia but rather vigilance. One learns through hard-won experience that litigation is a foreign landscape, full of traps and unexpected twists and turns for the unwary. As experts soon learn, there is an imperfect fit between psychiatry and the law.

Dr. Tanay emphasizes that the direct examination in court is the most important part of expert testimony. The expert must be able to give a coherent, reasonably complete, convincing presentation of his or her opinion to the judge or jury. In contrast, Dr. Tanay considers the cross-examination to be much easier to handle. This is contrary to the belief of fledgling forensic experts, who fret about the cross-examination.

As the reader will discover, true to form, Dr. Tanay holds strong opinions on the legal fictions that confront psychiatrists. For example, at depositions, the expert is often asked about how much time he or she spends treating patients versus acting as a forensic expert. Dr. Tanay emphatically insists that forensic psychiatry is clinical psychiatry. This false dichotomy between forensic and clinical psychiatry is used by opposing counsel to attack the credibility of the psychiatric expert who sees few or no patients. The same professional skills and knowledge that the psychiatrist possesses can be applied to a variety of clinical and forensic roles.

Dr. Tanay is a superb strategist. Lawyers frequently seek his opinions about tactics and strategy. Even so, Dr. Tanay is first and foremost a caring physician. This quality is clearly present in all his forensic cases and especially visible in the discussion of the Andrea Yates case.

Dr. Tanay is passionate about the injustice of justice. He does not shy away from expressing his thoughts and feelings about controver-

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sial issues. The law can be a cruel and blunt instrument when dealing with the mentally ill. Readers may strongly agree or disagree with Dr. Tanay's views, but they will be richly rewarded in encountering the heart and the mind of a great forensic psychiatrist.

Robert I. Simon, M.D.,
Clinical Professor of Psychiatry
and Director of the Program in Psychiatry and Law
at Georgetown University School of Medicine
and former President of the
American Academy of Psychiatry and the Law

PREFACE

“True patriotism hates injustice in its own land more than anywhere else.”

—Clarence Darrow

I have been a forensic psychiatrist for almost fifty years, working against injustice within the American system of justice. Being a forensic psychiatrist has been more than an occupation, more than a profession; it has been a calling for me. Fighting injustice is rooted in my life history, and giving testimony in hundreds of cases fulfilled my need to do meaningful work. My goal in writing this book is not only to share my experiences but to demonstrate the ways in which our legal system is rife with injustice.

Many of the cases I describe in this book sound like fiction, but they did happen—often to ordinary, law-abiding citizens. Similarly, the incompetence, deception, and misguided zeal of the prosecutors, police officers, and judges whose behavior I describe in these pages may also strike you as astonishing, yet such behavior is far from rare in the politicized American legal system. In fifty years of experience with the system, I have taken part in thousands of criminal and civil cases. It took two trucks to transport my case files and notes dealing with countless forensic cases to the Wayne State University Archives.

The average American sees the nation's justice system as an efficient and benevolent social institution. However it is a sad fact that innocent people are often accused, convicted, and incarcerated, allowing

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the real perpetrators of the crime to remain free. It is also troubling that people who do commit crimes often have their offenses mischaracterized, their motives misapprehended, and their pathologies undiagnosed or misdiagnosed, resulting in unnecessarily harsh, lengthy sentences or death verdicts. Most Americans have images of the justice system based upon news media stories that pander to common prejudices. Lawyer bashing is highly popular. Trial lawyers are blamed for everything from the high cost of medical care to the rising crime rate. I believe that lawyers and the law made America the great country that it is. Alexis de Tocqueville had this to say about lawyers: "Lawyers form a society of minds. They are less afraid of tyranny than of arbitrary power. They have authority over the government and derive authority from the government. Lawyers are the American aristocracy. Lawyers and judges are interpreters of the law. When the American people are intoxicated by passion, or carried away by the impetuosity of its ideas, it is checked and stopped by the almost invisible influence of its legal counselors."¹

An expert witness is not only an observer of a real-life drama but also a participant. He or she deals not only with the past but also the future. The homicide, the life-endangering mishap, took place in the past; however, the verdict will take place in the future and will be just or unjust. A trial is not like a television play or a novel—it has an impact on living human beings.

A professional qualifies to be an expert witness if he or she has the requisite knowledge of the subject matter in dispute. A forensic expert has the technical knowledge, understanding of legal issues, and testimonial skills. Testimony is one of the primary functions of a forensic expert witness. Yet forensic experts have limited testimonial skills since they receive no formal training in the craft of testimony.

This book demonstrates the significance of expert testimony in the prevention of injustice and the importance of testimonial skills. However, most lawyers choose experts based upon credentials. Lawyers are suspicious of experts who devote a great deal of time to testifying. It is absurd to belittle a practitioner who frequently performs one of the functions of his profession. Realistically, the opposite should be the case, since proficiency is acquired by practice.

Let me repeat: most professionals have adequate knowledge to serve as experts, but few have the ability to give effective testimony. At times, style of presentation prevails against merit. This is, however, not an argument against persuasive expert testimony. According to Aristotle,

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rhetoric is a tool that can serve a good or bad purpose. He defined rhetoric as “the art of discovering the available means of persuasion in a given case.” The style of testimony, more than any other factor, determines the impact which the expert makes upon the jury.

NOTE

1. Alexis de Tocqueville, *Democracy in America*, ed. Isaac Kramnick and Gerald Bevan (New York: Penguin, 2003).

ACKNOWLEDGMENTS

Robert Simon, MD, and John Chambers, JD, have encouraged me to write this book. Bob, a fellow forensic psychiatrist and author of many books on forensic psychiatry, has for years insisted that it is my duty as one of the most experienced forensic psychiatrists to tell other experts the “secrets” of my success as an expert witness. John, an outstanding trial lawyer, whom I first met as my cross-examiner and with whom I worked on many cases, urged me to write a book that would help lawyers to deal with experts. I am grateful to both of them.

My wife, Sandra, played a significant role by creating an environment in which I could work and consistently encouraged me to continue the project. She remembers my cases in great detail and has contributed valuable suggestions. My daughter Elaine spent many hours with me in a review of the final product. Eileen Pollack, professor at University of Michigan, helped me to revise the introduction, as did my daughter Anita. Katie Wilson, Jennifer Michaels, and Christine Carroll helped as editorial assistants. Tracey Payne and Nicole Root did most of the typing. David Karczynski contributed editorial assistance. My son-in-law, Steve Hersh, an advertising executive, made some valuable recommendations. Tom Gutheil, MD, professor of psychiatry at Harvard Medical School, made useful suggestions. This book would not have been possible without a great many lawyers who have worked with me and lawyers who have worked

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against me on countless cases. I am particularly grateful to Julie E. Kirsch, the editorial director of Jason Aronson, a division of Rowman & Littlefield Publishers, Inc., whose advice and careful review of the manuscript has been invaluable to me. She devoted countless hours to this project.

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INTRODUCTION

Once, at a cocktail party, a lawyer's wife asked me what a forensic psychiatrist does. Before I could answer, her husband self-righteously replied that forensic psychiatrists are called upon to testify in cases of insanity defense and the effects of psychic trauma. I challenged the lawyer to name a single field of law in which I hadn't testified. He thought for a while and with a triumphant smile asked, "How about zoning?" When I cited zoning cases in which my testimony had been critical (in one, the plaintiffs charged the owners of a golf course bordering their property with causing them emotional distress by converting the golf course into a shopping center), he conceded that yes, I had testified in cases from A (airline disasters) to Z (zoning).

Lawyers often tell me that they remember my testimony "because without you we could have never gotten the verdict." Naturally, I am pleased when my testimony leads to a favorable outcome for the side I have supported, but this is not always the case. The following letter shows the impact a forensic psychiatrist can make even on cases that did not turn out favorably for the side he supported. It was written by Commander William Pawlyk, who was convicted of two homicides. Pawlyk served for five years aboard the nuclear submarine the *James K. Polk* and had commanded Submarine Group 9 at Bangor. At the time of the homicides, he was the head of a reserve unit in Portland, Oregon. Pawlyk was sentenced to life in prison in spite of my testimony that he

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was not criminally responsible for the two homicides that he committed. I received the following letter from him after the trial:

June 30, 1991

Dr. Emmanuel Tenay[sic],

Thank you sir, and bless you for your sterling efforts on my behalf. It's true that you are an "expert" witness, but this is especially so because you bring together very humane qualities, with medical-psychiatric expertise, and courtroom experience.

Many of the things you said I found disturbing and difficult to hear, but I recognize their validity. You answered many questions for me, and gave me much food for thought and analysis.

I realize the impracticality of further one-on-one analysis because of distance, access problems, and cost, but I offer my case for any use you see fit—in any way you desire. If you have need of more information that I can help provide in your future work please feel free to ask. That is the least I can do to show you my appreciation and gratitude.

I was amazed by your mastery of my case; in sharp contrast to the superficial, almost unprofessional basis used by Doctors Harris and Dunnet [the prosecution's experts]. With their strong, almost exclusive reliance on DSM-III criteria, neither one directly and rigorously pursued examining me for those indications. They based their opinions on "lack of evidence" which they sought indirectly and shallowly at best.

Their version of professionalism served only to elevate yours even more. There are very frightening aspects and consequences for others, if their approach is widespread. Indeed it's frightening that it exists at all where people's lives and treatment is at stake. . . . Yours is the most human and humane of the sciences. And you have shown me that you are among the most human and humane of its practitioners, as well as among the most knowledgeable and insightful. Again my most grateful thanks for your help at a time of utter desperation. No matter that the final legal outcome, you made possible the more important internal verdict within me. Thank you.

I have been a psychiatric expert witness in the trials of some famous defendants like Jack Ruby, Sam Sheppard, and Theodore Bundy; I was retained in the malpractice case against the psychiatrist who treated John Hinckley, Jr. Several of these high-profile cases are discussed in detail in the pages that follow. No less revealing, however, are the cases of defendants and plaintiffs whose names are not well known, such as Sterling Spann, an innocent man who spent years on death row whose case I describe later.

The story of how I became a psychiatrist and a full-time forensic expert is a long one, but I'll give you the short version here. My experiences as a Holocaust survivor from Poland implanted in me a commitment to the principles of justice. After the war I earned a medical degree from the University of Munich, and I later completed my psychiatric training in America. In 1958, I became an associate director of Detroit Receiving City Hospital Department of Psychiatry, which also served then as the hospital for the Wayne State University Medical School. I joined the faculty of Wayne State University as an assistant professor in the Department of Psychiatry and became clinical professor some years later.

I testified for the first time as a forensic expert in 1954 on behalf of Alice, a fourteen-year-old schizophrenic girl who was my patient at Elgin State Hospital in Illinois. Alice had drowned a four-year-old child and was charged with first-degree murder. Her homicidal behavior was an act of automatism that bypassed rational reasoning,¹ yet Alice was charged with first-degree murder. Her pro bono lawyer had to rely on the testimony of a psychiatric resident whose command of English at that time was rudimentary and who had no courtroom experience.

I studied the legal and forensic literature and wrote an extensive report in which I argued that this was a case of insanity. My report was admitted into evidence despite the prosecutor's objections, and to the surprise of all, my testimony led to the rare result of the judge directing the jury to find the defendant legally insane. One by one, other lawyers asked me to testify for their clients. A turning point in my career came when the attorneys defending Jack Ruby requested that I examine their client prior to his retrial for the murder of Lee Harvey Oswald (after Ruby had been sentenced to death following his conviction for Oswald's murder in March 1964).

I testified in nearly every state of the Union, from remote regions of Alaska to the courtrooms of Manhattan, including military court in Vietnam. In 1981 I testified in San Francisco in the trial of Rev. Jim Jones's disciple Larry Layton for killing Representative Leo Ryan in Guyana. By 1980, my travels had become so disruptive that I gave up a successful and rewarding practice in psychoanalytic therapy and became a full-time forensic psychiatrist, though I continued to teach psychiatry.

I have testified in hundreds of different trials. In addition to criminal trials, I have been called on as an expert witness in countless personal