

NATIONAL COLLEGE OF DISTRICT ATTORNEYS

Presentation On

“CROSS-EXAMINATION OF THE INSANITY DEFENSE EXPERT”

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DISCUSSION NOTES AND DETAILED OUTLINE

I. COMPETENCY AND LEGAL RESPONSIBILITY

A. INCOMPETENCY.

- 1) This refers to a defendant who is, at the time of the hearing, suffering from a mental disease or defect which makes it legally impossible to try him.
- 2) If there is any reason to doubt the defendant’s competency, there must be a determination made by a finder of fact. (Drope v. Missouri 420 U.S. 162 (1974).
 - a. A hearing by the court, or...
 - b. A trial by a jury on the issue.
- 3) The test, generally, consists of two elements:
 - a. the defendant understands the nature of the proceedings against him and,
 - b. he is able to assist in his own defense.
- 4) Do not get caught up in the “psycho-babble” and forget that what we are talking about is really very simple.
 - a. The nature of the proceedings can be explained to him.
 - i. Someone has said he (the defendant) has done something wrong.

- ii. If he (the defendant) did something bad he is going to be punished for it.
 - iii. To find out if he did do something wrong, a person (the prosecutor) will call some people to come in and say what he did.
 - iv. Another person, the defense attorney, will help the defendant to show that he did not do anything wrong and that he shouldn't be punished.
 - v. Another person, the judge, will make sure everybody is fair.
- b. The ability to aid in his defense is mostly whether or not he can communicate with his attorney.
- i. He is not incompetent just because he chooses not to communicate with his attorney.
 - ii. He is not incompetent just because he has no defense.
- 5) The burden of proof on this issue may be on either side, but if there is any evidence to cast it in doubt, a hearing must be conducted.
- 6) In some jurisdictions, either side may request a jury trial on the issue of competency and this may be the way to go where you have no expert testimony and the defense has some, especially if the defense has the burden of proof.
- 7) Keep in mind that, in most jurisdictions, a finding of incompetency may result in longer incarceration at a mental institution than the defendant could get for some of the more minor offenses.

B. INSANITY.

- 1) This refers to a defendant who, at the time of the crime, suffered from a mental disease or defect which makes it legally impossible to convict and/or punish him for the crime because his mental disease or defect renders him irresponsible for his actions.
- 2) There are two generally accepted tests of insanity.

- a. The American Law Institute (ALI) test:
 - i. A person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law.
 - ii. As used in this Article, the terms “mental disease or defect do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.
 - b. The M’Naghten Rules: a person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he was unable to appreciate the nature and quality of his acts, or was unable to know the difference between right and wrong insofar as his acts were concerned.
- 3) The Federal Rules of Criminal Procedure (12.2), as well as most state rules, require the defendant to give notice of intention to use a mental defense.
- a. The State is entitled to have the defendant examined.
 - b. Evidence and statements derived from the defendant during this examination can not be used against him except on an issue of mental condition on which he has introduced testimony.
- 4) The burden of proof on this issue is different from jurisdiction to jurisdiction.

II. RESOURCES

A. DSM-V.

- 1) Your office should have its own copy of the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition.
- 2) The DSM-V is a publication of the American Psychiatric Association and contains a listing of every recognized mental disease or disorder.

- a. By the numbers.
 - b. Elements of the disease.
 - c. DSM-I came out in 1952 and was good for 16 years.
 - d. DSM-II came out in 1968 and was good for 12 years.
 - e. DSM-III came out in 1980 and was good for 6 years.
 - f. DSM-III-R came out in 1986 and was good for 8 years.
 - g. DSM-IV came out in 1994 and was good for 6 years.
 - h. DSM-IV-TR came out in 2000 and was good for 13 years.
 - i. DSM-V came out in 2013.
- 3) Mental diseases are decided on by majority vote.
- a. This is scientific?
 - b. By vote, a whole lot of people can be “cured” if the APA decides that a mental disease is no longer a disease (the cure for the common cold).
 - i. Under DSM-II, homosexuality was mental disorder.
 - ii. Under DSM-III, homosexuality was a mental disorder only if you weren’t comfortable with it (ego-dystonic homosexuality).
 - iii. Under DSM-III-R, homosexuality is not a mental disorder at all.
- 4) The DSM-V is structured in a similar manner for each diagnosis and usually includes the following:
- a. A general description of the disease, including “essential” features;
 - b. A description of each of the symptoms;
 - c. The progression (if any) of the disease;

- d. The degree of impairment;
 - e. The “differential diagnosis”;
 - f. A chart of “diagnostic criteria”.
- 5) The “differential diagnosis” category is particularly useful in that it gives you some other possible diagnosis which you can look up and use to cast doubt on the expert’s diagnosis.
- 6) The “diagnostic criteria” gives you a chart of all of the symptoms.
- 7) The DSM-V even discusses “**Malingering**” (Faking it).
- a. DSM definition: “Intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as... evading criminal prosecution.”
 - b. Suspect if (in any combination):
 - i. Person referred by attorney to the clinician for examination.
 - ii. Marked discrepancy between the person’s claimed problem and the objective findings.
 - iii. Lack of cooperation in the evaluation process and treatment.
 - iv. Antisocial Personality Disorder.
 - c. Often shows up in testing.
 - i. Scores are too low; even random guessing can result in probably 50% correct.
 - ii. Exceedingly simple tests are done poorly.
 - iii. Missing easy questions but getting difficult ones right may be signed of major mental illness; malingerer would likely do poorly on all.
 - d. Validity scales on tests can negate the results altogether.

- e. True amnesia (of the event) is rare.
 - i. Fakers frequently say truth serum or hypnosis won't do them any good.
 - ii. With true memory loss, the person usually *wants* to know what happened.
- f. Rorschach (Ink Blot) Test is somewhat disfavored in some contexts as probative of anything. But it can help spot a malingerer, who would come up with bizarre content descriptions while retaining good perception of shapes or physical attributes on the card.

B. OTHER RESOURCES.

- 1) Your office should have its own set of Ziskin, (J.Ziskin, Copying with Psychiatric and Psychological Testimony, 4th Ed., Marina Del Rey, Calif. Law and Psychology Press, 1988).

III. PRE-TRIAL PREPARATION

A. Anticipate the Insanity Defense.

- 1) Investigate the defendant early on if you sense an insanity defense may be raised later (i.e. evidence is overwhelming).
- 2) Canvas the defendant's neighborhood and work place. If he's crazy you'll soon know. If defendant is not, you'll have several rebuttal witnesses.
- 3) Interview the defendant's family (before a defense attorney tells them what the defense will be).
- 4) Interview everybody connected to the case:
 - a. Police officers.
 - b. Witnesses.
 - c. Girlfriend/boyfriend/spouse.
 - d. Parole or probation officers.
 - e. Jailers – is he on the psych floor? Is he taking his meds? Is he reading or watching TV? Is he a discipline problem?

- 5) Investigate his financial background.
 - 6) Does defendant own real estate?
 - 7) What about personal property?
- B. Find Out Who the Insanity Defense Expert Is.
- 1) Most Jurisdictions Require Notice.
 - a. Ask Defense attorney early and often.
 - b. Put request in writing
 - 2) Check visitor records at the jail.
 - 3) Once you're on notice the insanity defense may be raised move for discovery per your local rules or F.R.E. 705. Get everything, not just his final report.
- C. Interview the Defense Expert.
- 1) Use a prover.
 - 2) Ask what materials the expert was given.
 - 3) Ask expert what the defense attorney told him to do. Any correspondence?
 - 4) When was the expert retained?
 - 5) How much does he cost? Get time sheets for billing.
 - 6) Did expert meet with the defendant?
 - 7) Did defendant admit committing the crime?
 - 8) Where any tests performed on the defendant?
 - a. Minnesota Multiphasic Personality Inventory (MMPI). Get the list of questions.
 - b. Rorschach – Ink blot test.
 - c. Wechsler Adult Intelligence Scale (WAIS-R).

d. Stanford – Binet.

If so, subpoena the raw data on all tests performed by this expert or his assistant.

- 9) Ask the expert what the facts are. You'll be surprised how little he knows.
- 10) Ask for a copy of the expert's CV or resume.
- 11) Be nice. Be chatty. Don't cross examine him now. Wait for the trial.

D. Get Information About the Defense Expert.

- 1) Subpoena the expert for a list of proceedings where he or she has testified.
 - a. Talk to the prosecutors from these cases and get transcripts.
- 2) Check with the state board of licensing regarding whether the witness is board certified, or licensed in a particular field.
- 3) Use the internet and see if the witness has a web site advertising himself as an expert. You'll want to download a copy of this web site.
- 4) When you get the list of times that the witness testified, call both sides from the prior case about the expert. Don't let the side who used the expert know that your interests are adverse to the expert's position. The lawyer who says the witness will say what needs to get said may very well get a subpoena.
- 5) Check Lexis, AP and other news web sites for the existence of the witness' name. Explore all hits.
- 6) Check every entry on the expert's CV. Nothing is more devastating than catching the expert lying about his or her credentials.
 - a. Call every employer who has had contact with the expert. See what they have to say and subpoena that which useful.
 - b. Find out whether the associations listed in the witness's CV have entrance examinations. Some let anyone in as a

member if they fill out an application and send in a check. You'll be amazed at how many organizations limit their criteria to payment.

- c. Call directory assistance for the phone numbers of all organizations listed in the CV. You will be amazed to find out how many boutique associations with fancy titles are really tied to an answering machine in the expert's house.
 - d. Subpoena all job applications and performance evaluation.
- 7) See if you can do a state, federal and criminal docket check regarding defendant's name. Get copies of all civil court files including pleadings and interrogatories and if you think it is necessary order transcripts of all depositions that the witness testified at. The witness' name will appear upon notice of depositions or as a party.
- a. Order certified copies of all files which you deem relevant. Now you can get them admitted with out calling a witness.
 - b. Order certified copies of convictions and arrest photos from the jurisdiction where the witness was arrested.
- 8) Go to medical school libraries and start looking for the witness' name.
- a. Do not take the witness' word about his or her publications.
 - b. Get copies of all articles naming the witness. Read them all. If you have a law clerk, make the poor soul read the articles in the bibliography.
 - c. If a publication was omitted from the CV it might be because its impeaching.
- 9) Subpoena the attorney jail visit logs in order to see who has been meeting with the defendant.
- a. Psychiatrists and other doctors will sign in on this log because they want to be able to sit in private in a room with the defendant. This log will also show how much time the individual actually spent with the defendant.
 - b. If the expert videotaped or audiotaped his interviews of the defendant subpoena them immediately. Many jails

require court orders before allowing defense experts to bring into the jail audio/video equipment.

E. Get Your Own Expert.

- 1) Court Appointed Forensic Psychiatrist.
- 2) If none available call:
 - a. Prosecutor's Offices;
 - b. N.C.D.A., N.D.A.A., A.P.R.I., etc;
 - c. Crime Labs;
 - d. Police Departments;
 - e. State hospitals.
- 3) Once you find your expert give him everything in your file.
 - a. Use your expert to flush out the logical flaws in the defense witness' opinion. Show all raw data to your expert. Ask your expert to find out what the defense expert could have or should have done.
 - i. Give your expert time to learn the material. Once your expert is up to speed the two of you should start brainstorming.
 - ii. Have the expert teach you about the field.
 - iii. Let your expert know where you think the strengths and weaknesses in your case are.
 - iv. Make sure your expert teaches you what to ask and what NOT to ask. Make sure you understand why you are asking these questions.
 - v. Make your expert explain his or her opinion to you in plain English.
 - vi. Ask your expert how he anticipates being attacked.
 - vii. Ask your expert about "the policeman at the elbow" test.

- b. Have the expert explain and list all industry or scientific maxims which apply to this case.
 - i. Make sure you understand all technical definitions. Once you know them, you can challenge the defense expert regarding his or her knowledge of definitions. If the defense expert tries to make up a definition or stretch the real definition, you can challenge the witness and then prove up the true definition in rebuttal. For example, all psychiatric expert witnesses should know what the legal definition of insanity is when the defendant raises the insanity defense. When the defense expert doesn't know what the definition is then he or she looks less skilled in the eyes of the jury.
 - iii. Make sure your expert can distinguish between lay witness definitions and legal definitions.
- c. Ask the expert for titles or copies of all learned treatises which you may invoke during cross.
- d. Plot your attack together. Your expert should help you come up with the structure of the attack. Let your expert help you set the traps.
- e. Set up your rebuttal evidence. Plot the testimony which your expert will testify to after the defense expert is finished.

IV. JURY SELECTION

- A. Always voir dire prospective jurors when an insanity defense is raised.
- B. General Considerations.
 - 1) Background in mental health?
 - 2) Experience personally or knows someone with mental illness?
 - 3) Opinion of psychologists, psychiatrists, counselors.
 - 4) Experts' fallibility.
 - 5) Sympathy.
 - 6) Medication.

7) Opinion of mental defenses in general.

C. Sample voir dire questions:

- 1) Do you agree that psychology/psychiatry is an area full of pitfalls and uncertainties?
- 2) Do you agree that psychology/psychiatry is largely a field of speculation?
- 3) Do you agree that even a sane person can commit horrible crimes?
- 4) Do you agree that, just because someone does a horrible crime that he is not necessarily insane?
- 5) Do you believe that someone should be able to commit a crime and not be held responsible for it just because it was an unbelievably terrible crime?
- 6) Have any of you been treated or seen by a psychologist/psychiatrist?

V. TRIAL TACTICS

A. Attacking the profession.

- 1) Only use this tactic if you don't have or need an expert.
- 2) DSM-V.
 - a. Cautionary Statement – A warning that clinical diagnosis of a mental disorder per this manual may not be wholly relevant to legal judgments including individual responsibility. (Section 1).
 - b. It is diagnosis by vote – the members of the American Psychiatric Association advisory committee vote upon what behaviors are to be considered mental disorders. Many times the vote is based not upon scientific evidence but upon prejudice. Criteria for a diagnosis are voted on by committees. Majority vote can establish a diagnosis or disorder, or the same majority can eliminate a diagnosis or disorder.
- 3) Get the expert to admit that there are many different theories of human behavior (Freudian, Adlerian, Jungian, etc.).

- a. Each of the various theories have their own supporters, within the profession.
 - b. There are valid differences of opinion.
 - c. None of the recognized theories have been scientifically, objectively proven right or wrong.
 - d. Which theory does he subscribe to?
 - i. If he names one, he will have to admit that others believe other theories are more accurate.
 - ii. Has he always believed that theory to be more accurate than the others, or has he vacillated?
 - iii. If he subscribes to none in particular, but parts of all, it is an eclectic approach and therefore, his very own theory, supported by no one else.
- 4) Get him to admit that the scientific and professional literature shows that psychologists/psychiatrists frequently disagree with each other in their diagnosis.
- 5) Qualifications – But remember the trial court will usually allow the expert to testify regardless of his lack of qualifications and all of the above nonsense.

B. Attacking the defendant with the profession.

- 1) Admissions. Get concessions from the defense expert that defendant admitted committing the crime during the “clinical interview.”
- a. Sometimes these admissions are found in the expert’s notes, but not in his report. Cross him on this intentional omission.
 - b. Get expert to admit defendant committed the crime.
 - c. Concede motive.
 - d. Concede planning.
 - e. Concede goal directed behavior during the crime. (101 reasons why defendant is sane).

- f. Concede post-crime activity, e.g. destroying evidence, flight, etc.
- 2) Raw data. If the defense expert conducted tests on the defendant cross him on the results. (They're hilarious!)
- a. Minnesota Multiphasic Personality Inventory (MMPI). Get answers to the following 20 questions.
 - i. #28. When someone does me wrong, I feel I should pay him back if I can, just for the principle of the thing.
 - ii. #45. I do not always tell the truth.
 - iii. #49. It would be better if almost all laws were thrown away.
 - iv. #71. I think a great many people exaggerate their misfortunes in order to gain sympathy and help of others.
 - v. #93. I believe most people would lie to get ahead.
 - vi. #128. The sight of blood neither frightens me nor makes me sick.
 - vii. #265. It is safer to trust nobody.
 - viii. #269. I can easily make other people afraid of me and sometimes I do it for the fun of it.
 - ix. #277. At times I have been so entertained by the cleverness of a crook that I have hoped he or she would get away with it.
 - x. #280. Most people make friends because friends are likely to be useful to them.
 - xi. #289. I am always disgusted with the law when a criminal is freed through the arguments of a smart lawyer.
 - xii. #298. If several people find themselves in trouble, the best thing for them to do is to agree upon a story and stick to it.

- xiii. #316. I think nearly anyone would tell a lie to keep out of trouble.
- xiv. #376. Policemen are usually honest.
- xv. #386. I like to keep people guessing what I am going to do next.
- xvi. #406. I have often met people who were supposed to be experts who were no better than I.
- xvii. #437. It is all right to get around the law if you don't actually break it.
- xviii. #475. When I am cornered I tell that portion of the truth that is not likely to hurt me.
- xix. #481. I can remember "playing sick" to get out of something.
- xx. #542. I have never had any black, tarry-looking bowel movements.

3) Malingering.

- a. Factual concessions for malingering – lock in criteria for malingering without raising the subject.
 - i. Hired after defendant charged. (medico-legal context)
 - ii. Consulted with defendant's lawyer (medico-legal context)

4) Bias.

- a. Payment.
 - i. It is likely the expert is not the defendant's treating psychiatrist. He's being paid to evaluate defendant and testify. Then he'll move on to the next case in another courtroom.
 - ii. What's the payment for? Check his notes, billing statements and time sheets. Is he charging for travel, room and board, etc.? How much time did he actually spend with the defendant? With the attorney?

- iii. What percentage of his annual income is derived from testifying for murderers?
 - b. Works for defense lawyers.
 - i. Has he ever testified for the State in a criminal prosecution for murder? Not likely.
- 5) Attacking the basis for the opinion.
 - a. Did an evaluation of defendant.
 - i. When? Where? Who was present (defense attorney)? How long was interview(s)? Majority of opinion is from self-reporting.
 - b. Reviewed some police reports and defendant's statements, but not all of the reports and records.
 - c. Interviewed defendant's family.
 - d. Didn't interview witnesses, police officers, victim's family, crime lab personnel, etc.
 - e. Performed psychological testing? If not? Why not?
 - f. Any history of mental illness? Usually there's none until the defendant is charged with murder.
 - g. Reviewed some medical records, but not all.
 - h. Did he review records from the jail?
 - i. Impeach the expert's diagnosis with DSM-V.
 - j. Garbage In/Garbage Out – How good was his information?
 - i. Self-reporting by defendant.
 - ii. Incomplete information.
 - iii. False information.
 - iv. Misleading information.

- v. Exaggerated information.
 - vi. Would it change your opinion to know...? (Include facts the expert wasn't aware of. A "yes", "no" and "maybe" are all winning answers).
- 6) Defense Expert's Report.
- a. It's almost better for purposes of cross if there isn't one – usually it's because the defense attorney told him not to write one.
 - b. Tear it apart line by line for deficiencies:
 - i. Failure to include all factors in evaluation.
 - ii. Incorrect diagnosis.
 - iii. Properly address/apply the legal standard and offer support for the finding?
 - iv. Draw nexus between mental problem and charged conduct?
 - v. Based on bad or incomplete information?
 - vi. All self-reporting?
 - vii. Vague overstatements.
 - viii. Interviews done?
 - ix. Most common problem: unsupported conclusions masquerading as opinion.
 - x. Was it a "cut and paste job" from another case?
- 7) Facts of the case – the most potent weapon to shoot down the insanity defense.
- a. Proof of preparation to commit a crime.
 - b. Hiding the preparation of the crime.
 - c. Hiding the commission of the crime.

- d. Taking steps to avoid detection, arrest and conviction.
 - e. A logical, well reasoned confession.
- 8) Style of Cross Examination.
- a. Leading questions.
 - b. Polite but firm.
 - i. As a general rule, jurors don't like to see any witness – even a paid expert – beaten up by a nasty lawyer.
 - ii. Convey a subtle air of skepticism (the raised brow, the turn of the head, the roll of the eyes, etc).
 - c. Get an answer.
 - i. Experts will frequently take any opportunity to expound on something or other. Simply repeat your question: “Doctor, I’m going to repeat my original question now, and I’d ask that you please listen to the question and answer the question that I ask.” Or, “Perhaps you did not understand my question. Let me repeat it.”
 - ii. Do NOT ask the judge to make the expert answer. You are the one in control.
 - d. If bogged down by scientific jargon go back to the facts of the case. The jury will appreciate it.