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Stanley L. Brodsky

University of Alabama - Tuscaloosa

Dustin B. Wygant

Eastern Kentucky University, dustin.wygant@eku.edu

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Brushed-Off Testimony

Stanley L. Brodsky, PhD, and Dustin B. Wygant, PhD

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In line with years of tradition, soldiers young and old come together at the local pub or hall to swap war stories of time in the trenches. For the forensic clinician, the trenches represent the hard-fought battles during expert testimony. As it turns out, our pub was a social gathering at the 2012 meeting of the American Psychology Law Society in San Juan, Puerto Rico. The University of Alabama Psychology Law Program hosted a social gathering for its faculty, graduate students, alumni, and friends to come together and share stories and camaraderie. It was in this setting that we launched into a spirited discussion of similar experiences testifying in rural county courts.

The Brush-Off: The Principle

When expert witnesses are called to testify, they routinely experience challenging and difficult events. For example, emotionally charged and complex cross-examinations are common. Queries about the scholarly foundations of professional practices fall like raindrops. Postponements, delays in being called to the stand, and lengthy sidebars are part of more or less predictable and sometimes annoying events at trial.

There are also occasions when experts are faced with dismissive and peculiar parameters instituted by the judge, a pattern we both have come to think of as brushed-off testimony. Such testimony is characterized by the presence of at least some of these five

elements: a level of informality is present, well beyond what is typical or expected; the judge appears to have a dismissive attitude toward the expert; when testifying, the expert may be instructed to stand in front of the bench, rather than be seated in the witness stand; the judge and other courtroom actors display a palpable disregard for the conclusions and opinions of the expert; and the entire proceeding is of a rushed and superficial nature in which minimal opportunity is available to provide meaningful testimony.

We found that we could illustrate the characteristics of brushed-off testimony and concluded that we had similar suggestions for how testifying experts can respond personally after finding that their testimony has been brushed off.

Herein, we each recount, in the first person, trial experiences that illustrate the concept of brushed-off testimony. Then, we jointly present our conclusions and suggestions for others who find themselves caught in similar situations.

Case One (Brodsky)

Base Rate Information

When discussing an anomaly, it is useful to compare it to normal events. In Alabama, strangers as well as experts are treated with remarkable kindness and politeness. The same qualities of kindness and graciousness I have seen in rural Alabama over the years have also been typical of my experiences in Alabama courts.

There have been exceptions. Former governor George Wallace and I stared each other down on one occasion. Dressed in a dashiki and with an Afro hairstyle that stood up in a foot-high halo around my head, I had joined a line of people waiting for Wal-

Dr. Brodsky is Professor of Psychology, Department of Psychology, The University of Alabama, Tuscaloosa, AL. Dr. Wygant is Assistant Professor of Psychology, Department of Psychology, Eastern Kentucky University, Richmond, KY. Address correspondence to: Stanley L. Brodsky, PhD, Department of Psychology, 348 Gordon Palmer Hall, The University of Alabama, Tuscaloosa, AL 35487-0348. E-mail: sb@ua.edu.

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lace's autograph in a program marking the dedication of a building. He stared at me for perhaps 30 seconds. I stared back. Finally, in a gesture of mock civility he said, "Y'all have a good day," and signed. He showed disapproval, certainly, but not a brush-off. At a rural diner, when a colleague and I were especially hairy and hippie-looking, we were told that the diner was out of food, no matter what we ordered. It was part of the adversarial vocabulary that acknowledged our presence, but they took no formal action to move us on. In courtrooms, however, judges have been consistently polite, welcoming, and often chatty. That's why the brushed-off experience stands out so clearly.

Joining the Gang

I arrived at the single courtroom to provide expert testimony in the sentencing hearing of a defendant with whom I had completed a forensic evaluation. It was in the mostly empty courthouse of a rural county of about 20,000 people in central Alabama. The courtroom was empty, too, apart from a cluster of people gathered around the judge's bench. Spotting me entering the courtroom, the defense attorney for the person accused of murder rushed to meet me. He led me by the arm to the group standing in a half-circle, speaking quietly to the judge.

I was placed in the center of the group of perhaps 15 people. I knew the defendant and the defense attorney who had retained me. He whispered the names and roles of some of the participants without explaining why they were present. The convicted co-defendant (and spouse of the defendant) in his white, soiled prison uniform stood close in, handcuffed and shackled. The attorney for the state stood nearby. The family members and minister of the defendant were there, too. The family members of the deceased victim joined the half circle. Two police officers stood among us, one close to the co-defendant. Other people standing alongside were not identified, but one seemed to be a news reporter.

I was sworn in by the judge who made no eye contact with me. The defense attorney sped through a few questions, hardly touching on the pathological background of the defendant, my assessment procedures, my forensic interview, the specific psychological measures I had used, my synthesis of the data, or the conclusions presented in my report. The report had been conveyed to the attorney several months earlier, but here he mostly ignored it. He asked five

questions, all of which were about my conclusions. He tried to introduce my qualifications, but the judge waved him off. The state's attorney asked a single question about whether I had testified in court before.

To me, there were many findings from the assessment that were related to the sentencing at hand. But after 15 minutes, the judge concluded that phase of the trial. It is common for expert witnesses who are so inclined to second guess rulings of the court, but it is rare that such efforts have much payoff. However, the procedures left me stunned. Why was everyone standing around? Why had the judge seemed so resistant to allowing my complete testimony? I had the impression that my testimony had been ignored and was not valued. While we all stood there, the judge pronounced the severest possible sentence on the defendant.

Afterthoughts

I don't dwell on things. Within an hour, the court appearance had left my mind, only to pop up unexpectedly now and then. One such pop-up moment was when my colleague Dustin Wygant and I were sharing our war stories. With that stimulus, I have revisited my brushed-off testimony.

I do not narcissistically assume that the court should accept and act on my every word. When I testify, I appreciate that my place in the legal process is limited and focused. I am not one of those who prefer not to know the outcome of the hearing or trial. I am curious, but I am not invested in the outcome as a sign of the worth of my efforts.

Sometimes judges (or juries) and I agree. Sometimes we do not. In this case, my appearance probably made no difference. The judge did not even pay lip service to the possibility that my testimony might have contributed something substantive.

The presence of a crowd around the judge's bench told me that the judge was speeding up the process. Testifying while standing gave the same impression. I have watched experts testify standing in Great Britain, New Zealand, and Australia. I have nothing against standing. However, this testimony was an improvised event, and improvised acts have a thrown-together quality.

Did the judge owe the defendant more than he gave her? I think so. Justice on a moving sidewalk seems strange and strained. However, the judge did not owe me anything. I am clear that I was a guest in

the courtroom. Hosts have great latitude in how they treat their guests, and abrupt and arbitrary behaviors are within the judge's purview.

In *Chelsea Hotel*, the Leonard Cohen song about his brief fling with Janis Joplin, Cohen closes with, "I remember you well in the Chelsea Hotel, that's all; I don't even think of you that often." That's how I reflect on this brush-off. I remember it well, but don't dwell on it. It may be appropriate to add one concluding thought: that's the way it should be.

Case Two (Wygant)

"Just stand up here and tell the judge what you think . . ."

My case took place in a small rural county circuit court in eastern Kentucky. I had evaluated a defendant charged with multiple counts of felonious burglary for competency to stand trial and criminal responsibility. In conducting his assessment, I diagnosed the defendant with mild intellectual disability. Despite his disability, I had opined that he was both competent to stand trial and that the data could not support an insanity defense. Consequently, the defense attorney did not issue a copy of my report to the judge. However, she believed that some of my findings might offer mitigating information to the court during the sentencing hearing in the form of diminished capacity during the commission of the offenses. The defendant had been convicted of all charges.

There were two co-defendants in the case, both of whom had been evaluated at the state's forensic psychiatric facility. Neither of the co-defendants had been found incompetent to stand trial or insane. There were three separate defendants in the case, each represented by different counsel. Neither of the co-defendants had called expert witnesses. I recognized early on that my position in the courtroom was marginalized when I heard one of the attorneys of a co-defendant say, "I heard you brought some damned shrink here to make us all look bad." He did not realize that he had made the comment in front of me.

Both attorneys for the co-defendants were able to get their cases heard by the judge first. On each occasion, the attorneys put forth little effort in arguing mitigating factors for the judge to consider (e.g., first major criminal charges, low average IQ, or promise of restitution). Shortly before I was set to testify, the attorney who retained me approached and said that she was not sure whether I would have any impact in

the case, since the judge had already sentenced each of the co-defendants to nine years' imprisonment. Nevertheless, she wanted to proceed and called me to the stand.

I still considered myself somewhat of a novice in court. While I had worked in forensic psychology for six years (including an internship and postdoctoral training), I had been called to court only a handful of times and never in Kentucky since relocating there. I felt a twinge of excitement and nerves as I saw the players take the stage. At the last moment, however, the attorney who had retained me came over and informed me that I would not be delivering my testimony in the witness box. Quite unexpectedly, she said, "We're just going to have you stand here and tell the judge what you think."

I have to admit that I was taken aback. Constancy and anticipated rituals before testifying have always calmed me, so this change was unnerving. At first I thought, "Okay, this is a little strange; now what do I do?" I approached the bench. The court stenographer turned on a white-noise generator so that the court audience could not hear my testimony. The defense attorney stood to my left and the prosecutor to my right. The judge looked askance at me during my testimony with one hand holding up his head, giving an appearance of profound disinterest. Perhaps most unnerving was that the defendant was nowhere in sight. Before I began speaking, I turned around and saw him standing about 30 feet from me. It seemed odd to me that the man I would be describing to his sentencing judge wouldn't even hear what I had to say about him. Adding to the unusual aspects of the experience, at no point was I asked to raise my right hand or affirm a sworn statement. "Just tell the judge what you think" ran once more through my head. "Okay," I thought, "where and how do I begin?"

Before I said anything, the defense attorney began with a statement, "I'm going to ask you a couple of background questions," and launched into some very brief qualification queries. The prosecutor and judge had no questions about my professional background. The defense attorney then asked me questions about my involvement in the case and the methods I used to examine the defendant. When I began to describe using the Wechsler Adult Intelligence Scale (WAIS-IV), the judge spoke up for the only occasion during my testimony, and said, "Doctor, we don't need to know about the test procedure, just tell us his scores." Well, that struck me as obtuse, considering that the

WAIS is a rather complicated instrument and that some of the subtleties of the results influenced my clinical opinion.

The defense attorney proceeded to ask me questions that I had prepared with her before the trial. One difficult element of the experience was that I didn't know whom to look at while answering. I wanted to maintain eye contact with the judge when delivering my responses, but he appeared detached and uninterested. After offering information about the defendant's capacity during the offenses, the judge turned to the prosecutor and, addressing her by her first name, asked, "Do you have anything you want to add to the questions?" She promptly responded, "I have no questions for him." "You're dismissed, doctor, thank you for coming today," the judge quickly replied. From start to finish, my appearance took seven minutes.

I was shocked by the experience. I should have been relieved. The testimony was over and I had survived. But did I even fight? A feeling of disappointment quickly overshadowed my sense of relief. I had something to say in this matter. At least I thought I did. I had met with the defendant on three occasions during the evaluation. I interviewed his sister and mother. I reviewed many records and discussed my findings with his attorney in five or six phone calls. Adding to the frustration, I had taken two of my graduate students with me while I conducted the evaluation. I saw the experience as an opportunity to mentor my students on psychological and forensic assessment, case conceptualization, and testimony preparation. Both of these students were in the courtroom as I testified. What would they think of the matter? One feeling that came to mind as I walked away from the judge was embarrassment, particularly as my students watched me approach them. I had spent the car ride over to the court reiterating to them the importance of what we can do as forensic psychologists. Now, in light of my disappointing experience, I felt as if I had lost credibility with my mentees.

I later heard from the defense attorney that her client, too, was sentenced to nine years of imprisonment.

Our Conclusions

These two vignettes describe incidents that took place in small rural communities in which major criminal trials are infrequent. Nonetheless, the experiences may have some broader implications for ex-

pert witnesses. Here are six interrelated lessons that we draw from brushed-off testimony.

It can be an exercise in humility. As Gutheil and Simon¹ have noted, it is easy for experts to slip into narcissistic postures. Being dismissed in the ways noted in the two case studies has a major corrective influence. The old saying goes, anxiety is the natural antidote for anxiety. We would add, having one's testimony brushed off is a compelling antidote for narcissism.

Such experience reminds us that we are guests in somebody else's house. The rules of the house govern all guests, and as master of the domain, the judge tells us where to stand and what to do. When in Rome . . .

It's not about our special expertise. When Joel Dvoskin and Stanley Brodsky led a workshop on court testimony in 2008 at the annual meeting of the American Psychology-Law Society, Dvoskin sang a song he had written, titled, "It's not about you." One of his lines noted that mental health expert testimony is like the footprints left by a defendant's muddy boots and no more.

Don't take it personally. There is a tendency for experts to assume that this kind of judicial apathy or dismissiveness is related to who they are. Our observations were that it made no difference who we were: experienced or novice witness, big-city or small-town expert. The judges were simply acting according to their own wishes. Our privilege is to participate, reflect, and tell the story.

Still another lesson is preventive. Well-prepared experts insist on meetings with retaining counsel to go over the findings and anticipate difficulties in testimony. With this kind of preparation, there is a possibility of having a joint strategy for addressing dismissive judges.

Finally, both of these stories illustrate a lack of respect for substantive content in expert testimony, an attitude that does a disservice to defendants and to the integrity of the judicial process as a whole. Experts must remain in their roles as objective evaluators and not cross lines in the realm of advocacy during testimony. Nevertheless, one adaptive option is to act, on a very small scale, Paul Revere-like, calling out about the hazard by writing about it here for our colleagues and for ourselves.

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1. Gutheil TG, Simon RI: Narcissistic dimensions of expert witness practice. *J Am Acad Psychiatry Law* 33:55-8, 2005