Mental health practitioners are increasingly testifying in child welfare cases without educational preparation or professional support for this activity. This article provides an overview of the basic requirements for expert witness testimony (EWT). The review of key components of expert testimony covered are sources and types of testimony, knowledge needed, preparation of effective documentation, preparation for testifying, qualification and the *voir dire* process, recommendations for giving testimony, confidentiality and privileged communication, use of visuals and videotapes, use of humor and sarcasm, and how to do a post testimony self-evaluation. [Brief Treatment and Crisis Intervention 1:115–130 (2001)]

**KEY WORDS:** expert witness testimony (EWT), documentation, confidentiality, child welfare.

Mental health professionals are increasingly providing expert witness testimony (EWT) at the request of courts or attorneys (Gutheil & Appelbaum, 2000). EWT can be difficult because mental health professionals and attorneys use differing philosophies, logical orientations, procedural methods, interactional styles, and techniques of problem solving. Attorneys believe truth is derived by presenting focused and narrow arguments to an impartial arbiter who will decide who is truthful. Attorneys use circumvention, confrontation, persuasion, and selective use of facts to defend a client. Mental health professionals view truth as derived through open and extensive discussion between parties in a dispute with thorough exposure of all information available to resolve differing views of truth. Mental health professionals use mediation, facilitation, interpretation, facts, and symbolism to assist clients. When mental health pro-
Professionals enter the realm of legal proceedings, they are confined to legal methods and processes and are not allowed to use any of their familiar methods in providing EWT. This shift in orientation is the reason EWT is difficult for mental health professionals to perform and understand. Mastery of the legal aspects of EWT and forensic mental health practice are not generally taught in mental health professional education programs. In addition, employers require mental health professionals to provide testimony, but rarely provide them with training, consultation, or support for court appearances. This article attempts to make up for some of the educational limitations related to EWT through providing basic strategies for providing effective testimony in family and child welfare cases.

Nature of EWT

EWT is usually based on requested evaluations of a child or adolescent that focus on level of functioning, mental status, degree of mental injury, and diagnosis related to a specific event or series of events. EWT in child welfare can also include the functional level, mental status, and diagnoses of adult caregivers as well as assessment and recommendations regarding the caregivers’ ability to provide for the safety, protection, and well being of a child or adolescent. Mental health professionals can also be called upon to provide EWT confined to evidence-based statistical probability that a child may be at risk of harm or the likelihood that an adult will re-offend in the future (Gendreau, Little, & Goggin, 1996; Grubin, 1998; Hanson, 2001; Quinsey, Harris, Rice, & Cormier, 1998). For example, EWT may be based on the probability that a child will be harmed if placed in the custody of a parent who has a history of domestic violence. Such testimony can be based on a clinical evaluation of the person or review of documents and records. There are a range of situations in which the mental health professional can be asked to provide EWT in child welfare cases, and the most common ones are:

- short- and long-term effects of neglect, physical abuse, sexual abuse, and/or witnessing domestic violence;
- probability that neglect, physical abuse or sexual abuse occurred;
- mental injury of a child;
- custody decisions;
- impact of reunification with a parent after a long separation;
- termination of parental rights (TPR);
- mental status and functioning of parents in anticipation of reunification with a child.

There are other unique situations that can lead to requests for EWT. Under some circumstances a mental health professional serving as a therapist can be called as an expert witness, but most often therapists are called as fact witnesses or what has been referred to as an “eyewitness” (Vogelsang, 2001). Therapists called to testify as fact witnesses are usually limited to the facts of the treatment and recommendations that emerge as a result of the treatment. A therapist who testifies as an expert regarding a person or family the therapist has treated is in a difficult position. The dual role of therapist and expert can lead to allegations of bias that diminish the credibility of the EWT. When a therapist serves as a fact witness and expert witness, there may be a conflict between the therapist position as an expert that will require the therapist to withdraw from providing further treatment for the client. For example, a therapist who has treated a family provides EWT about risk to the children if the father is allowed to resume living with the family. After hearing the therapist’s EWT, the father may not want to return to the therapy, and the spouse may not agree with the therapist’s EWT resulting in her rejection of the therapist by saying, “I thought she was working with us, not against us.”
The basic rule for making a decision to provide EWT is whether the mental health professional can provide testimony that is objective, unbiased, within the professional’s expertise, can be provided within the scope of reasonable and scientific knowledge, and whether the request is within the bounds of the professional’s ethical code. Most core mental health professional organizations have published specific guidelines for forensic practice that contain guidelines for EWT. Any mental health professional who provides EWT should be familiar with these guidelines and the general professional code of ethics for their profession because attorneys can question the expert witness about the published ethics codes and practice guidelines during EWT.

Areas of Needed Knowledge and Skill

Forensic assessments and EWT require highly specialized training and experience, and this is especially the case in the complex field of child welfare. The primary areas that an expert witness should have training in for child welfare testimony should include, but are not limited to, the following (key resources are cited):

- infant, child, and adolescent development (Berk, 1998; Bukatko & Daehler, 1998; Newcombe, 1996; Wellman, Cross, & Watson, 2001);
- child and adolescent psychopathology (Ollednick & Hersen, 1998; Sameroff, Lewis, & Miller, 2000);
- adult psychopathology (Kaplan & Sadock, 1998; Millon, Blaney, & Davis, 1999);
- attachment theory (Cassidy & Shaver, 1999; Dyer, 1999);
- traumatic stress theory (Carlson, 1997; Schiraldi, 2000, van der Kolk, McFarlane, & Weisaeth, 1996; Wilson & Keane, 1997; Wolchik & Sandler, 1997);
- basic developmental neurology (Harris, 1995);
- basic understanding of psychopharmacology (Fuller & Sajatovic, 1999, 2001; Werry and Aman, 1999);
- basic understanding of genetics (Anderson & Ganetzky, 1997);
- basic knowledge of substances and alcohol use/abuse/dependence (American Psychiatric Association, 2000c; Ray & Ksir, 1996);
- basic child welfare practice (Lutzker, 1998; Hobs, Hanks, & Wynne, 1999);
- fundamental knowledge of factors involved in violent and sexual offenses (Grubin, 1998; Hanson, 2001; Quinsey et al., 1998);
- knowledge of local, state, and federal laws regarding child welfare;
- ability to administer and interpret standardized measures and instruments (American Psychiatric Association, 2000b; Cohen & Swerdlik, 1999; Groth-Marnat, 1997; Munson, 2001b; Olin & Keatinge, 1998).

Preparation for EWT

Preparation for legal system involvement begins the moment the practitioner receives a referral. A thorough and complete record of all activity should be maintained from the time the first contact with a client takes place. The report of an assessment and evaluation is the cornerstone of expert or fact witness testimony. Mental health professionals entering the legal arena to do assessments should be clear about the purpose of the evaluation or the treatment provided.

Forensic Evaluations

An evaluation should consist of a standard protocol that is routinely used with cases based on the clinician’s specialty practice area. The assessment should include contact with all per-
sons who have relevance to the outcome of the case. If key individuals are not interviewed, this should be noted and acknowledged as a limitation of the evaluation. Gardner (1995a) gives a good example of this in his protocol for child sexual abuse evaluations that can serve as a model for child welfare evaluations. Clinical interviews should be conducted with pertinent individuals and standardized measures used when appropriate (e.g., to confirm a diagnosis, to determine suitability for custody, or level of parenting stress). The evaluator should contact collateral sources that may have information relevant to the issues explored in the evaluation (such as child welfare workers, therapists, medical and psychiatric hospitalization reports, police, school counselors, teachers, employers, and probation officers).

Evaluation reports should be clear and concise. There is debate whether brief or extensive written reports are the most effective in support of testimony (Gardner, 1995b). The general rule is the report should be detailed enough to cover all aspects of EWT, and there should be a concise summary that gives key points regarding background, procedures used, findings, and recommendations. Concise summaries can be problematic if judges and lawyers only read the summary and not the details of the report. When this happens the expert will have to call attention to details of the report during EWT. Various outlines for submission of reports have been devised (Gardner, 1995b, Koocher, Norcross, & Hill, 1998; Melton, Petrila, Poythress, & Slobogin, 1997; Nurcombe & Partlett, 1994; Sattler, 1998). The following outline is recommended for child welfare reports that are a basis for EWT:

- **Reason for evaluation.** This should be a brief statement of the purpose of the evaluation and the referral source.
- **Procedures.** There should be identification of information sources, persons interviewed, and standardized measures used.

A brief statement should be included that describes how suggestive questioning and inducements for participation were avoided (see Ceci & Bruck, 1995).

- **Abuse history.** Identify presence or absence of any individual or family history of neglect, physical abuse, sexual abuse, or domestic violence.
- **Background.** Information relevant to the factors that led to the presenting problem should be summarized.
- **Family history.** Detailed family history data including information about parents, siblings, education, employment, social functioning, and religious activity should be described.
- **Developmental history.** Include a survey of the mother’s use of tobacco, alcohol, substances, and prescription medications during pregnancy. Note if there were any complications during pregnancy or at birth. A review for premature birth, low birth weight, eating/feeding problems during infancy, problems with toilet training, or problems entering school should be included.

- **Developmental milestones.** Assess and note appropriate developmental milestones of children and adolescents. This can be done with standardized measures or milestone checklists. The most common areas of development are physical, self-help, social, communication, and intellectual (Berk, 1998). Language development can be a crucial indicator of development in combination with maltreatment. Language delays are common (Amster, 1999) and are so prevalent in the child welfare population that they can be used diagnostically for maltreated children (Munson, 2001a).
- **History of out-of-home placements.** As much information as possible should be included about past and current placements. This applies to children and adults.
• **Visitation.** If the child is not in the care of the parents, a summary is given of the visitation schedule and whether or not visitation is supervised. Summaries of observation of visitations by the evaluator/therapist should be included (for reporting observation guidelines, see Milner, Murphy, Valle, & Tolliver, 1998).

• **Criminal justice history.** History of all arrests, convictions for criminal offenses, and description of civil litigation the child or parent has experienced.


• **Medical history.** Report major illnesses, injuries, hospitalizations, and family history of illness for the child and parents. Document date of last physical examination. If the client has not had a physical examination in the last 30 days, this should be noted and the client referred for medical screening to rule out any general medical conditions that could be a source of dysfunction. Children should also be referred for dental, vision, and hearing screenings if there have been no screenings in the last year.

• **Medications.** Note past and current medications including dosage information. Review for use of herbal medications or cultural bound medications. If the client is taking medication, record the most recent administration prior to the evaluation session.

• **Mental health treatment.** Review past and present inpatient and outpatient mental health treatment. Record diagnoses received and names of therapists, quality of relationship with the therapists, and the outcome of the treatment. This should be recorded for children and the parents.

• **School.** For children, report school functioning academically and behaviorally. For adults, report amount of education.

• **Clinical interview.** Record the identified client’s mental status, interview behavior and demeanor, speech, language, somatic complaints, perception, cognition, judgment, memory, intellectual functioning, emotions, interpersonal skills, and access to weapons.

• **Standardized measures.** Give descriptions and summaries of standardized measures administered. Interpretation of objective measures should be described in clear, concise language. The interpretation should be focused on the purpose of the evaluation and the recommendations.

• **Diagnosis.** Provide a thorough DSM-IV-TR multiaxial diagnosis (see Munson, 2000; 2001a; 2001b).

• **Summary and conclusions.** This section should give a concise summary of the case and provide an integrated analysis of the significant aspects of the findings. Conclusions should be supported with citations of empirical research and clinical literature that support findings and conclusions.

• **Recommendations.** Based on the findings of the evaluation and the diagnosis, specific recommendations should be made with justification for each recommendation.

**Standards for Documentation**

In preparing the evaluation written report for EWT or writing therapy notes for fact witness testimony, it is recommended the guidelines below be followed:

- Begin documentation as soon as the referral is initiated.
- Documentation should be stated factually and professionally.
• The record or report should reflect the flow of assessment, diagnosis, treatment, and discharge/termination.

• Use term contact or treatment notes, not progress notes. Some attorneys may call references to progress notes misleading if the client did not show any progress in the therapy.

• Contact notes should have summaries of critical activities in the treatment; critical activities outside the treatment; contacts with collateral sources; crucial statements, observations and interpretations. Vital statements by client or worker should be recorded in quotes.

• Record in the chart or report only information that is part of the record. Do not make handwritten notes or reminders on charts or reports. Do not put “post it” reminders in charts or on reports with notes on them.

• Update documentation after each contact, not periodically.

• Record all important dates.

• A written informed consent should be entered in the chart at the first meeting.

• Use only abbreviations that are generally accepted or have a glossary of abbreviations used on all contact note forms, evaluation forms, and evaluation reports.

• Make note entries uniformly for all clients. Inconsistent notation can lead to lawyers claiming positive or negative bias on the part of the witness.

• Record notes and reports for children using first names, for adults use “Mr.,” “Ms.,” or “Mrs.”

• Use professionally recognized terms and language. For example:
  
  Use: “He appeared to be under the influence of alcohol, and his speech and thought processes were impaired at a level that made it difficult to conduct the interview,” not “He was drunk and difficult to talk to.”

  Use: “Indications are she made inaccurate statements,” not “She lied to me.”

  Use: “Limited intellectual capacity,” not “mentally retarded,” unless mental retardation is assigned as a diagnosis derived through standardized tests and assessment of adaptive functioning.

• Use descriptive rather than judgement words. For example:
  
  Do not use: “She suffers with a dissociative disorder.”

  Use: “She has a dissociative disorder.”

  Do not use: “She has a long Hx of terrible trauma.”

  Use: “She has a Hx of chronic significant trauma.”

• Clearly indicate professional judgements that were made as part of the evaluation or treatment:
  
  Use: “In my professional opinion . . .”

  Use: “It is my professional assessment that . . .”

  Use: “It is my professional conclusion that . . .”

  Do not use: “It is my view . . .”

  Do not use: “I believe . . .”

  Do not use: “It is apparent that . . .”

• Avoid use of first person phraseology when possible. For example:
  
  Do not use: “Nelson showed many memory lapses during my evaluation session that caused me to be concerned that he may be a dissociative.”

  Use: “Nelson demonstrated memory lapses during the evaluation that was indicative that he may have a dissociative disorder.”

• Indicate source of statements and use qualifier words when direct knowledge of information is not known by the evaluator or therapist. For example:
  
  Do not use: “Mr. Jones is in jail for child sexual abuse.”

  Use: “Mr. Jones’ wife reported he is in jail for sexual abuse.”
• Key words that can be used as source qualifiers are:
  “It is alleged that . . .”
  “According to . . .”
  “Mr. Jones stated that . . .”
  “It was reported by . . .”
  “Reportedly . . .”
  “According to . . .”
• Record all requests for release of information.
• Obtain releases from all parties mentioned in the record before releasing a record or remove or strike out the names of people for whom releases have not been obtained. It is appropriate to charge for this activity.
• Proofread all documentation before placing it in the record or before submitting reports or records to attorneys or courts. Attorneys can attempt to discredit an expert or fact witness on the basis that careless recording is an indication of careless intervention and imprecise evaluation techniques.
• Sign all notes and reports over name, title, and degree. If written materials are unsigned, it can be alleged others could have written the material.
• Never change a record after receiving a court order (Flach, 1998).

Use of Legal Language

Use language in reports and notes that is familiar to the courts. This language can be derived from written opinions of appeals courts. Do not attempt to make legal statements, but use brief, legal phrases to express concepts that are being communicated in the report or notes. For example, phrases that can be helpful are:

• best interest of the child
• general well-being of the child
• risk to the child
• safety of the child
• vulnerability of the child
• special needs child
• influences likely to be exerted on the child
• preference of the child
• fitness of person seeking custody
• adaptability of person to the task
• environment and surroundings child will be reared in
• potential for maintaining natural family relations
• opportunities for the future life of the child
• prior voluntarily abandonment or surrender of custody
• parental rights versus performance of parental duties
• chronic and enduring mental illness
• persistent and ongoing problems

In some jurisdictions these terms and phrases have legal criteria for being met, and when using these terms and phrases the therapist or expert witness should be aware of any jurisdictional case law that specifically define these phrases and terms. Use of specific terms in documents and testimony can lead an attorney to ask what is meant by the term and if the witness understands the legal or statutory meaning of the term or phrase. The witness should have knowledge of the history of the term and its formal as well as informal usage.

Expert and Fact Witnesses

Expert witnesses and fact witnesses are different in most jurisdictions. For example, a mental health professional can be called to testify to the treatment that has been provided to a person and would only testify to the facts of the treatment. If the therapist is testifying as a fact witness, the testimony is in the form of inferences limited to those based on rational perception that can be
helpful in clarifying testimony or determination of a contested issue. Expert testimony is admitted, in the form of an opinion, if the court determines that the testimony will assist the trier of fact (judge or jury) in understanding the evidence or to determine a fact that is in question. In making that determination, the court establishes (a) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education; (b) the appropriateness of the expert testimony on the particular subject; and (c) whether a sufficient factual basis exists to support the expert testimony. An expert opinion is not inadmissible because it embraces an ultimate issue to be decided by the trier of fact. An expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may not state an opinion or inference as to whether the defendant had a mental state or condition constituting an element of the offense because that issue is for the trier of fact to decide. This exception does not apply to an ultimate issue of criminal responsibility. Expert witnesses can give opinions and inform the trier of fact in order for courts to make the best possible decision in cases. For this reason judges are granted liberal discretion in allowing expert testimony (Mueller & Kirkpatrick, 1999).

Expert testimony occurs after the report has been submitted, and the expert’s testimony should be based on the procedures and findings contained in the report.

Before the Hearing

An expert witness should request to meet with the attorney who will be offering the expert to the court. Such a meeting can be helpful in preparing how the expert wants to present testimony and what is to be highlighted. It is important to ask the attorney questions about the nature of the testimony. The attorney should be provided written information about the expert’s credentials prior to the hearing. If the expert meets with the attorney, review the written materials, organize them, and highlight key points.

In addition to written reports, an outline should be developed of key points to be used in the testimony, and committed to memory in order to prevent having to refer to notes and reports during testimony. Referring to notes and reports during testimony can detract from the credibility of the expert (Gardner, 1995b). This does not mean that referring to notes and reports should never be a part of testimony. When testifying to highly technical matters like specific testing results, dates, or when an attorney asks a specific question about an entry in notes or reports, the expert should refer to the specific records being questioned. When asked about a specific entry in documents the expert should request permission from the court to refer to the document and review it to ensure that the attorney is not taking the written material out of context.

At the Hearing

The classic advice holds regarding attire and demeanor. Dress professionally, act professionally, and arrive at court early. Bring all materials related to the case to court. Avoid talking with anyone in the waiting room, courtroom, or hall before testifying. This includes colleagues, attorneys, police, strangers, or the parent or child the expert is testifying about. Do not smile, laugh, joke with anyone before, during, or after testifying in the presence of the judge or jury. For confidentiality reasons, do not leave a brief case or hearing materials unattended at any time.

On the Stand

When called to the witness stand, the expert should take all materials brought to court. Ma-
Materials should not be left in the seating area. Materials should be readily available to the expert to use with minimal effort and to avoid delay of the court proceedings. When being sworn talk loudly, distinctly, and clearly. Always talk at a voice level that the judge, jury, recorders, and attorneys can hear.

Procedural qualification of experts focuses on the concepts of knowledge, skill, experience, training, and education because these are the areas identified in the law as basic to being an expert (Mueller & Kirkpatrick, 1999). The process of expert qualification includes review of professional education (degrees and dates received, internships, specialized training, continuing education, honors, awards, licenses, certifications (Tsushima & Anderson, 1996), employment history, number of clients evaluated or treated, research activity, publications, professional paper presentations, and the amount of prior testimony as an expert witness. The expert should have all of this information readily available to share with the court.

Before testifying the professional will usually be subjected to a voir dire process in which the mental health professional will be questioned by the attorneys to qualify as an expert. The written summary of credentials provided to the attorney prior to the court appearance should be the basis for qualifications questioning. Sometimes attorneys are conscious of the need to proceed rapidly and may do a brief review of expert credentials, especially if the expert has testified in the court in the past. If the expert is easily and quickly qualified without oral examination of credentials or presentation to the court of a written credentials summary, it is important for the expert to include in testimony responses that call attention to the expert’s qualifications. For example, substantive comments can be prefaced with comments such as, “In my 20 years of work with this population, it is my experience that . . .” or “As part of my training I became familiar with research that supports . . .” Such comments could be crucial if there is an appeal of the case. The author had the experience of testifying in a court that was familiar with his credentials, and there was a brief voir dire. The case was appealed, and when the testimony was reviewed by the state’s highest court of appeals, the questions during oral arguments indicated the justices had limited information about the expert’s extent of knowledge, skill, experience, training, or education. When this occurs it can have a significant impact on the outcome of the appeal.

The attorney who is challenging the expert’s testimony will use the voir dire procedure to test and challenge the expert’s credentials and competency to testify as well as to challenge expert testimony in general (for example, citing research indicating expert opinions are no more accurate than those of lay persons). There may be attempts to show bias in requesting information about fees received for testimony, personal history of the expert as a victim of abuse or domestic violence to show the expert may be “on a mission,” promoting a cause, or engaged in advocacy.

Voir dire is a standard legal procedure that should not be viewed as a personal attack, although it may seem to be. This can be the most difficult phase of expert testimony as attacks on education, training, and experience can be intense (Tsushima & Anderson, 1996). The key is to be calm and answer questions directly and honestly. Do not become defensive or argumentative during the voir dire process, especially when feeling attacked personally or professionally. For example:

Attorney question (AQ): It is true that the social work profession is on the lowest tier of therapists, with psychiatrists at the top, psychologists next, and social workers at the bottom, correct?

Expert answer (EA): No, that is not the situation today. It was like that 40 years ago. Clinical practice with children and adolescents to-
day is quite complex and requires multidisciplinary expertise. All recognized mental health professionals are equal members of the treatment team. Social workers have the most historical expertise in child welfare, and we often provide leadership in this area.

**Focus of Qualifications**

In the process of qualifying an expert witness, the trend is to narrow as much as possible the areas of expertise. A person may qualify in the traditional core professions of clinical social worker, psychologist, or a board-certified psychiatrist. Qualifications may be further narrowed as expert in child welfare, child psychology, developmental psychology, or child psychiatry. Attorneys and sometimes judges will limit the expert to specified areas such as custody, adoption, sexual abuse, physical abuse, neglect, child trauma, post-traumatic stress, or domestic violence. If the professional is qualified in the more general classifications, then testimony in the more specific areas can be reviewed later in the testimony and included or excluded. If the professional is initially qualified in a very narrow area, it is difficult later in the testimony to expand the area of expertise or shift the expertise to another area of specialization. The main point for the expert witness is to be prepared to present with accuracy and detail specific areas of expertise as well as the more general areas of expertise.

**Testimony for the Attorney Who Secured the Expert**

A general rule of testimony is to avoid anticipating what the judge or the attorneys are dealing with or attempting to elicit from the expert. Simply answer the questions on the basis of what was done, the reason it was done, the findings made, and the opinions formulated. Ask attorneys to repeat unclear questions. Answer only the questions that are asked, and do not attempt to expand on a previously given answer. Focus on the immediate question being asked. It is recommended that the expert look at the judge when giving opinions, look at the attorney when giving facts, and avoid looking at the client when giving difficult testimony. Always look at the judge when giving answers to questions asked by the judge.

**Cross Examination**

Cross examination is always difficult because it is the opposing attorney’s second chance to challenge the expert witness. In the *voir dire* phase of testimony, there is a general challenge to qualifications to testify, and in the cross examination, there can be specific challenges of the validity of the expert’s procedures and conclusions. It is important to remain calm, factual, and not alter voice level when such challenges are made. The expert should avoid becoming angry or provoked. This requires a significant amount of self-control. It is important for the expert to remember that the focus is to provide facts and opinions related to what is routinely done in conducting assessments, evaluations, treatment, and in formulating opinions. The expert should hesitate when reluctant to answer a question in order to give the attorney who offered the expert an opportunity to object.

During cross examination, refrain from thinking the case outcome hinges on the expert testimony, and do not attempt to analyze the effect of testimony while testifying. Focus on the accuracy and scientific basis of the testimony.

Try to avoid answering hypothetical questions. For example:

AQ: Hypothetically, if my client had a relative who could provide care for this child, could
the child adjust to placement under these circumstances?
EA: It depends. It depends on the home study of the relatives, their parenting skills, the child’s bond and attachment with the foster parents, and history of contact with the relatives as well as other factors. So it would be difficult for me to answer that question hypothetically or specifically without more precise information.

During cross examination an expert can use the attorney’s questions to expand on previous answers or to elaborate points. For example, in a case where the functional adequacy of the child’s mother was at issue the following exchange occurred:

AQ: My client was evicted from her apartment because she had no job, could not pay her rent, and DSS would not give her assistance, wasn’t she?
EA: My notes indicate that she was evicted because she was having loud parties, and the police were called because of substance use. This was consistent with statements she made to me that she had been using cocaine regularly for the last three years. I have no record that she ever asked for assistance with her rent.

In a case where past domestic violence was a concern with respect to return of the child to the father’s care, the attorney’s questions provided the expert witness the opportunity to elaborate an opinion:

AQ: Then all you can testify to is that there were arguments between my client and the mother? There was no real domestic violence in this relationship, was there? Please answer yes or no.
EA: Recurring shouting and belittling are violent acts. In addition, there is increased risk to the child because the father frequently uses alcohol . . .

Avoid defensiveness when asked questions that can be viewed as attacks on professional ethics. It is best to respond with a simple statement of ethical obligations. For example:

AQ: It is true that you wrote such detail about my client’s drug history knowing it would harm her in the TPR [termination of parental rights] hearing, didn’t you?
EA: No, my professional ethics code would not allow me to do that. I wrote it because I am required to record all relevant information regarding a person’s history that may be a factor in his or her ability to parent a child.

If the opposing attorney asks a question directly from the expert’s notes or report, the expert should ask for the specific page number of
the report and answer on the basis of the content of the report. It is also a good policy to make verbal reference to the report. Use statements such as, “In my report summary section, I indicated . . .” or “My background information section of the report confirms that . . .”, and “The results of my testing explained on page 6 of the report indicate that. . .” This is an effective way to call attention to findings. Do not read from the report unless it is necessary to refute a challenge to findings by the opposing attorney. Testify as much as possible from memory.

Confidentiality and Privileged Communication

Privileged communication is the right of a person to control the use of information shared in the course of a relationship with a mental health professional. Confidentiality is the ethical obligation of a mental health professional to not disclose information shared by a client. Confidentiality of client communications are sanctioned for psychiatrists, psychologists, and social workers (Jaffee v. Special Administrator for Allen, Deceased v. Redmond et al, 1996). Confidentiality can be a source of conflict for the mental health professional in expert witness testimony depending on whether the expert is testifying as a court appointed evaluator or testifying as a therapist for the child or parent. When the expert has conducted a court-ordered evaluation, there is more latitude in admissibility of testimony about direct communications of the child or parent to the evaluator. When the expert is testifying about psychotherapy treatment the child or parent may invoke through the attorney the right to privileged communication. In the case of a child who is represented by an attorney, the attorney may waive the privilege for the child or request the court to honor the privilege. When the court rules that confidentiality cannot be waived, the expert may have to rely on observations, interpretations, and opinions exclusively to validate a conclusion. When the court waives the confidentiality or privileged communication, the mental health professional can testify to what was communicated directly in treatment or an evaluation. The issue of confidentiality will be decided by the judge after hearing arguments from the attorneys. Once the decision is made about confidentiality, the judge may direct the expert how to appropriately testify.

Use of Visuals

Some experts (Vogelsang, 2001) recommend using visuals as part of testimony. It is recommended that visuals only be used as a last resort and only to explain very complex technical material or complex timelines. Visual presentation of simple, easily understood material can appear contrived and condescending as well as an inappropriate use of court time. An expert should not use any visuals that have not been subjected to prior review with the attorney who called the expert. The criterion for deciding to use visuals should be that standard oral testimony is not sufficient to make clear the point at issue.

Videotapes of interviews made by expert witnesses can be admitted as evidence, but their utility is controversial (Ceci & Bruck, 1995). Attorneys usually object to use of videotaped interviews and will most likely strongly object to use of edited videotapes. Some judges refuse to allow use of videotapes because of the amount of time required to review the tapes. An expert witness should not base preparation for testimony on the assumption that videotape material will be admitted as evidence. It is best for the witness to prepare as if videotaped material or visuals will not be allowed, and consider it a
supplemental resource if such materials are admitted as part of testimony.

**Use of Humor and Sarcasm**

An expert should never use humor during testimony. Testifying in child welfare cases is a solemn undertaking. The expert who uses humor takes the risk of being viewed as not serious, callous about the clients, and not credible. The expert should not respond to humor initiated by attorneys and judges. The expert should respond to humor with silence or a serious comment that focuses on the issues.

Experts should never use sarcasm in response to questions by attorneys. For example, if an attorney challenges the expert’s fee and history of extensive expert testimony as indicative of “being a hired gun,” and the expert responds that “I am paid for my services just as attorneys are paid fees, so I guess that makes us all hired guns,” this can cause the attorney to escalate the intensity of the questioning of the expert. Sarcasm comments by experts can signal an attorney that the expert is prone to defensiveness, and the attorney may use more questions to provoke defensiveness in the expert. Experts should avoid any comments that may intensify attacks. Also, sarcasm by experts can be interpreted by judges and juries as defensiveness and loss of objectivity. The following testimony illustrates an inappropriate sarcastic response to a question that led to the attorney having the opportunity to leave the court with the impression the expert did not know what he was doing:

AQ: Doctor, were you paid for your testimony here today?
EA: Yes.
AQ: How much were you paid?
EA: I was paid $1,000.
AQ: In advance?
EA: Yes.

A more appropriate answer would be for the expert to use the question to answer directly and enhance credibility:

AQ: Isn’t that what hired guns do, get the fee in advance?
EA: No, I get the fee in advance in order to remove any speculation that my evaluation and my testimony will be contingent on being paid a fee after I testified. By receiving the fee in advance, I am not indebted to anyone for the nature of my finding.

**After Testifying**

When testimony is completed and the expert is excused by the judge, the expert should leave the courtroom. The expert should not remain to hear others’ testimony or to hear the decision in the case. This could be viewed as bias or undue interest in the outcome of the case. It is helpful for the expert to know the outcome of the case, and this information can be obtained by telephoning the attorney later.

After a hearing the best way to prepare for the next court appearance is for the expert to mentally review the testimony and think of ways the testimony could have been accomplished more effectively. The expert should not obsess about the effect of the testimony after it is completed. Instead analyze ways responses can be improved in the future. Write down key questions from testimony that may be asked in future cases and review them before testifying again.
Brodsky (1998) has pointed out the importance of self-evaluative analysis of expert testimony by concluding that:

Evaluators and witnesses are typically so caught up in “doing” that they are not open to conceptualizing cases and testimony as learning experiences. I suggest asking, “What additional validated measures might I administer that are directly related to these forensic issues? What else should I read or what short courses should I take to be better prepared? What have I learned about my own need for professional and scholarly growth?” (p. 484).

**Conclusion**

Serving as an expert witness is difficult under any circumstances. It is a necessary aspect of mental health practice that is increasing. Forensic work is truly one of the artistic and scientific aspects of mental health practice that requires discipline, skill, knowledge, patience, and preparation. Skill at testifying only emerges with experience. The more the mental health professional testifies, the more likely the legal system and its procedures will become less foreign.

Testifying can be stressful if the expert comes to believe that the final decision hinges on his or her testimony. Remember, the judge or the jury will decide the outcome of the case, not the attorneys or the witnesses. Do not assume the judge or the jury made the decision exclusively on the basis of expert testimony. There are often many witnesses in a case, and many factors that influence and determine the outcome. The expert witness cannot even control the nature of the expert testimony. Expert witnesses need to understand that EWT is only as good as the attorney who offers the professional as an expert. An expert witness cannot control a weak performance by an attorney who does not effectively guide and craft the testimony.

The judicial system is too complex for legal outcomes to be based on a singular act of an expert witness. The expert witness is simply one necessary and important part of a multifaceted system. The paramount focus and orientation of an expert witness is to offer findings and opinions in a truthful, fair, and factual manner, which can assist the trier of fact in making a decision.

**References**


 Sameroff, A. J., Lewis, M., & Miller, S. M. (Eds.).