

Understanding and Anticipating Attorney Behavior: Practical Advice for Novice and Professional Testifiers

**Testifying in Court: Guidelines and Maxims for the Expert Witness**, 2<sup>nd</sup> edition

By Stanley L. Brodsky

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## **Abstract**

Reviews the book *Testifying in Court: Guidelines and Maxims for the Expert Witness*, 2<sup>nd</sup> ed., by S. L. Brodsky. This book is intended as a practical guide for expert witnesses, particularly psychologists, who may be called to testify in court. It is appropriate primarily for novice testifiers, though it could be useful as quick reference material for those with more extensive courtroom experience. A large number of short chapters deliver concrete advice across a wide range of courtroom issues, such as how to dress for court, speak on the stand, and especially how to deal with various maneuvers by cross-examining attorneys. Chapters are organized for quick reference, which helps those with limited time to prepare for court. Through the judicious use of anecdotes from his own experience and that of his colleagues, Brodsky personalizes his advice to help ease concerns and potential stress of early career experts called to court.

## **Review**

Testifying in court as an expert witness can be a nerve-racking experience for those from a variety of disciplines, and psychology is no exception. It is not uncommon for psychologists, from disciplines ranging from clinical to experimental, to be called to court to provide opinions based on their expertise. A firm and thorough knowledge of one's own domain is of course a requirement, but it also is helpful to have a set of guidelines to follow before delving into an atmosphere with rules and behavior so utterly different from those of the university, clinic, or laboratory. Brodsky provides such advice in the second edition of his book *Testifying in Court*.

The book, from beginning to end, is written as a practical guide, a kind of do-it-yourself pamphlet on expert courtroom testimony. As such, the reader does not feel overburdened with citations of academic publications. Neither, too, does the author fall prey to indulging in endless narratives of his own experiences in court. Rather, Brodsky strikes a nice balance between these two extremes, with some important citations of empirical work mixed with particularly relevant stories and anecdotal courtroom transcripts.

## **Overview**

Of the 55 chapters, the vast majority is geared toward a general audience of potential expert witnesses. However, eight chapters are specific to mental health professionals, covering such topics as understanding the limitations of childhood reports of sexual abuse, how to deal with accusations of malingering by one's clients, and having a thorough knowledge of the *DSM* and one's own forensic reports. An additional two chapters are not

necessarily specific to clinical psychologists, but they do have direct implications for this group, such as using clinical training to deal with intimidation from cross-examining attorneys. Brodsky only occasionally focuses on clinical psychologists, perhaps because other authors dedicate much longer texts to this group (e.g., Barsky, 2012). This allows for a wider audience to derive useful advice from this book.

One example of such advice comes from the first chapter, on the “Admit-Deny” technique. This is one of many approaches Brodsky describes to deal with cross-examination, which can involve complex and loaded questions from attorneys seeking to confuse the expert on the stand. The idea behind Admit-Deny is to assertively acknowledge any veracity in the question and then immediately and strongly deny any untrue elements. This not only serves to clarify the issue for the jury and other members of the court, but also importantly draws power from the cross-examining attorney to the expert witness.

This power play comes up often during the book, with descriptions of times when an expert witness should craft responses in such a way as to maintain control of the facts he or she is attempting to convey. For example, Chapter 34 describes the importance of regulating speech, breathing, facial expressions, and eye contact to counteract aggressive strategies by opposing counsel such as rapid-fire questions meant to befuddle the expert witness. A more obvious power play is to wrest control back from the cross-examiner. One method for doing so is described in Chapter 40: to exaggerate agreement with an obviously true statement made by opposing counsel. For example, if the attorney states that the science underlying the expert’s opinions is not perfect, and thereby open to attack, it can be useful

to admit this obvious fact assertively. This “Push-Pull” technique is essentially the opposite of becoming defensive with pushy cross-examination, which Brodsky repeatedly states can poison the credibility of the expert witness for those on the jury.

In contrast with the occasional need for a power play by the expert, Brodsky regularly emphasizes the importance of not entering into any battles with the cross-examining attorney. Rather, remaining nondefensive, calm, and collected is key, especially to juxtapose the expert’s objective opinions with the often passionate and argumentative strategies by attorneys. Other themes from the book include being (a) thoroughly prepared, (b) transparent about what you know and don’t know, and (c) cautious when dealing with all members of the court, and the cross-examiner in particular.

## **Critique**

On the whole this book provides a manageable amount of useful advice for the novice testifier, but the manner in which it is provided is somewhat strange. Brodsky continues (as in the first edition) to utilize an alphabetical ordering of chapters that might lead to confusion or even frustration for some readers. This organizational scheme (or lack thereof) destroys any fluidity of the reading experience. Granted, Brodsky admits in his Introduction that the book is designed for readers to start and stop anywhere. However, as the book’s content is best suited for beginning testifiers in need of most or all of the information, would it not be more advantageous to design it for them to read cover-to-cover? Perhaps organizing categorically according to theme would be better, or by degree of importance or likelihood of encountering the various scenarios or strategies in the

courtroom. The push-pull technique is referenced several times in earlier chapters, but the reader must wait until Chapter 40 before it is described, just because it starts with the letter “P.” Why put the onus on the reader to skip around when it really is not necessary or advantageous to organize in this way? The alphabetical approach also leads to a very abrupt ending to the book. It would have been helpful to read a concluding section of some kind, perhaps summarizing all chapters into themes or shared concepts, or discussing the most important take-away messages. As it stands, these messages are only at the end of each chapter (the “maxims”), which are very helpful in summarizing the primary thrust of each chapter.

An additional limitation, also easy to remedy, is one superfluous chapter that a third edition would benefit from eliminating. Chapter 18 describes some of Sigmund Freud’s experiences as an expert witness, which seems out of place with the practical information and modern-day anecdotes from all other chapters.

## **Conclusion**

In sum, *Testifying in Court* will benefit experts preparing for courtroom testimony. The focus is on psychologists, with some special attention given to mental health practitioners, but the content would still be useful for experts in other domains. Brodsky makes use of a balanced approach, dispensing practical advice with the aid of some citations from the research literature as well as relatable anecdotes from personal experience.

## Reference

Barsky, A. E. (2012). *Clinicians in court: A guide to subpoenas, depositions, testifying, and everything else you need to know (2nd ed.)*. New York, NY, US: Guilford Press.

Testifying in court as an expert witness can be a nerve-racking experience for those from a variety of disciplines, and psychology is no exception. It is not uncommon for psychologists, from disciplines ranging from clinical to experimental, to be called to court to provide opinions based on their expertise. A firm and thorough knowledge of one's own domain is of course a requirement, but it also is helpful to have a set of guidelines to follow before delving into an atmosphere with rules and behavior so utterly different from those of the university, clinic, or laboratory. In addition to preparing professionals for the courtroom, he aims to put them at ease so that they may present the most cogent and effective testimony.

Testifying in court can be a challenging experience. Novices who are unfamiliar with the judicial environment can feel insecure about many aspects of their testimony, from the language they use to the clothes they wear. Even experienced expert witnesses can be flustered by a skillful lawyer's cross-examination. For over 20 years, Stanley Brodsky's Testifying in Court has been a trusted guide for expert witnesses across a variety of professions. Readers have come to know and trust his sage and good-humored advice on every aspect of the experience from initial preparations to maintaining power a Tips for Testifying in Court. Expert witnesses must convince the judge or jury that their testimony is sound and truthful. They must be highly knowledgeable, organized, alert, unflappable and ethical: Knowledgeable " Show that you are up to date, have command of the subject matter in your field, and are knowledgeable about the Federal Rules of Evidence and any state or jurisdictional laws relevant to the case." Melendez-Diaz has far-reaching implications for the forensic and legal communities, but one of its practical outcomes is that forensic experts who conduct testing and analysis for criminal cases must be prepared to testify in court on the results of the testing. The prospect of giving expert testimony can be intimidating, and preparation is critical.