DIRECT EXAMINATION OF A MENTAL HEALTH EXPERT ON DAMAGES IN A CHILD SEXUAL ABUSE CASE

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This presentation will conduct a mock examination of a mental health expert witness testifying on damages for the National Crime Victim Bar Association.

Initially, we look at the rules governing opinion testimony as provided by the FRE.

701 Lay Opinion: If the witness is not an expert, opinion is admissible only when it is 1) rationally based on perceptions, and 2) helpful to the trier of fact.

702 Testimony by Experts: Expert opinions may be admissible if 1) the testimony assists the trier of fact, and 2) the witness is qualified as an expert.

703 Bases of Opinion Testimony by Experts: Expert opinion may be based on facts or data 1) actually seen or heard by the expert or 2) communicated to him at or before the hearing. Admissibility of the facts or data is not essential if typically relied on in this field.

704 Opinion on Ultimate Issue: An expert may express an opinion which 1) addresses an ultimate issue of fact, but opinions or inferences regarding the mental state of the accused are reserved for the trier of fact, and 2) when that mental state is an element of the crime charged or a defense to that crime.

705 Disclosure of Facts or Data Underlying Expert Opinion: An expert need not provide facts supporting the reason for his opinion unless 1) the court so requires, or 2) asked on cross examination.

706 Court Appointed Experts: The court 1) may issue an order to show cause as to why an expert should not be appointed, 2) may request nominations of an expert by parties, 3) may appoint an expert whether or not the parties agree to that expert, if the expert consents. The witness shall be informed of his duties 1) in writing, 2) a copy of which is filed with the court. The witness shall communicate his findings to the parties, and 1) may be deposed, 2) may be called to testify, 3) may be cross examined, and 3) shall be paid as the court directs. The jury’s knowledge of the court appointment is left to the discretion of the court. This rule does not limit parties from calling other experts.

**CATEGORIES OF EXPERT WITNESSES**

A damages expert may be used in basically two different capacities —consultation or for testimony. Also keep in mind that your damages expert can double as an expert to opine on counter-intuitive behaviors during and after the abuse.

Consulting and testimonial witnesses are the basis for expert witnesses. They are derived from five general categories of expertise. For the purpose of our presentation, the expert witness will qualify as either the “practitioner” or a “Specialist.”

1. **Lay people**: common sense and life long experience
2. **Technician/examiner**: limited and concentrated training, applies known techniques, works in a system and taught with the system [e.g., investigator and supervisors (observers and viewers)].
3. **Practitioner**: material and information analysis and interpretation based upon direct experience.
4. **Specialist**: devoted to one kind of study or work with individual characteristics. (Perhaps a PhD researcher vs a PsyD clinical expert.)
5. **Scientist**: conducts original empirical research, then experiments to verify the validity of the theory; designs and creates instrumentation and applied techniques; is published in own field with peers; and advances his field of knowledge.

Laying the Foundation

1. What is your occupation/profession?
2. What is your educational background?
3. What degrees, certificates, or licenses do you have?
4. Have you attended or conducted continuing education seminars, conferences and related training?
5. Are you a member in any professional organizations/societies?
6. Have you received any awards or other professional recognition?
7. Have you published articles in your field?
8. How many cases involving CSA have you handled?
9. How many years have you worked in this field?

NEED FOR EXPERT OPINION

1. What are the key principles that a person without specific education or experience in this field
would need to grasp in order to understand the damages case?

2.Are there misperception for those of us who do not have your expertise?
2. Can you explain the method involved in this field of expertise to the jury?

BASIS FOR OPINION

1. Have you examined or interviewed the child?
2. Have you conducted any tests on or interviewed the child?
3. Have you reviewed any records / documents / photographs / reports / recordings of the child?
4. Have you reached any conclusions as a result of your investigation?
5. Did you rely on any other source of information in forming your opinion other than the
materials that we have discussed?

TESTING

1. What testing did you base your opinion on?
2. How did you insure the reliability?
3. What were the results?
4. How many times have you used this testing?
5. Have you always used the same method when you used this testing?

Extent of Subjective Interpretation

1. Does any part of the testing require subjective interpretation?
A. If yes, describe what facet of the testing is subjective.
B. If yes, do you believe another professional might interpret the same data differently?
2. Is there any method you use to assess the subjective component of this testing?
3. Did you use that method in arriving at your opinion in this case?

Peer Review

1. Has there been peer review of your testing?
2. Has the testing you rely on today been published?
A. If so, where and when?
3. Have any articles or other publications criticized or cast doubt on your theory/technique?
A. If so, when and what was the basis for the criticism?
4. Does that criticism change your opinion in this case?
A. Why not?

Acceptance in Scientific Community

1. Is this testing and evaluation generally accepted in the scientific community of forensic psychology?
2. What evidence is there that this is a generally accepted technique/theory?
A. Offer formal statements of professional organizations
B. Offer professional literature, training, publications
C. Show use by government/trade/community organizations

Use Outside Courtroom

1. Is this technique/theory used for a purpose outside the courtroom and litigation?
A. Describe various uses

EXPERTISE IN “SOFT SCIENCES”

1. What is your field of expertise/specialty?
2. Within the [mental health/social work/social sciences/other discipline] field, is this a recognized professional area of expertise?
3. Are there published articles recognizing this field of expertise/specialty?
4. Has this field of expertise/specialty been recognized by any licensing or accreditation body or any governmental agency?
5. Are there professional journals or conferences that focus on this field of expertise / specialty?
A. Is there controversy within the profession about the efficacy or reliability of this field of
expertise /specialty?
(1) If so, can you articulate why these [opinions/statements/criticism] should not undermine the value of your opinion?

OPINION

1. Based on your education and experience, are you able to give an opinion as to the impact of the abuse on the Plaintiff?
2. Within your field is it common for a practitioner to give an opinion as to the impact to a Plaintiff?
3. What facts or evidence did you rely on?
4. Is this the type of evidence ordinarily relied upon by professionals in your field?
5. Is there any other evidence or information relied on in the ordinary course of business by professionals in your field as part of making such a determination that you did not use?
A. If so, what is it?
(1) Why did you not rely on this?
B. If not, why not?