

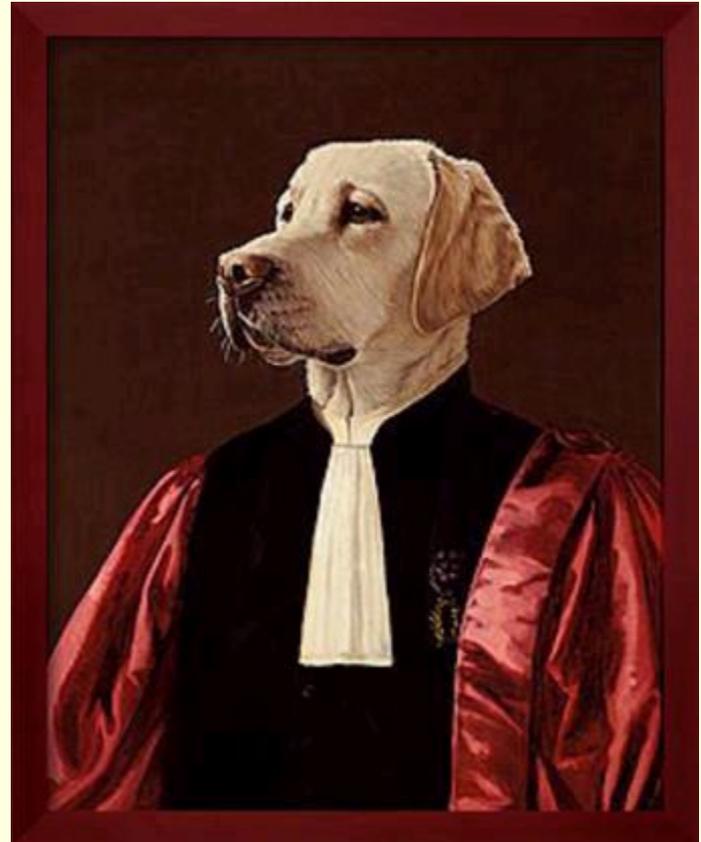
Providing effective testimony after pediatric traumatic brain injury

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Disclosure

- Speaker has no conflicts of interests to declare.
- Speaker is not a lawyer, nor a legal scholar, and is not giving legal advice.



Objectives

- Understand differences between clinical and legal roles.
- Describe the criteria for admissibility of evidence.
- Understand essential deposition and court procedures.
- Recognize, and deal with, some common gambits used during such procedures.



References I have found helpful*:

- *Mastering expert testimony* by Tsushima & Anderson (Erlbaum, 1996)
- Stanley L. Brodsky's series:
 - *Testifying in court* (APA, 1991)
 - *The expert witness* (APA, 1999)
 - *Coping with cross-examination* (APA, 2004)
- * And no, I don't get kickbacks for this!



More disclosure

- Medicolegal referrals comprise about 15% of my practice.
- The vast majority of are from the defense.
- More than a third of the depositions that I do are based on clinically referred patients.
- No extra \$ for any of this.
- So, why do I do them?
- Really, it just comes with the territory.



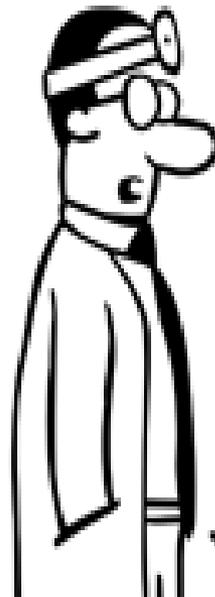
Understand the legal arena

- When you testify, your primary job is to assist the trier of facts, and you should do so in an objective and evidence-based manner.
- You may be a treating doctor or an expert witness (although those lines do get blurred).
- If you do file review only, document the limitations thereof.
- Understand local standards, including Daubert or Frye admissibility rules.

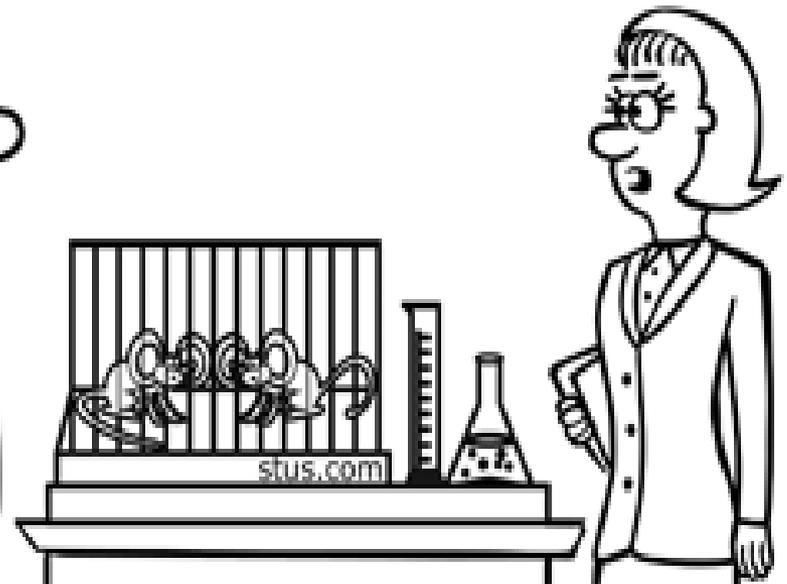
What evidence is admissible?

- Frye standard:
Is the evidence ***generally accepted*** within the witness' field of expertise?

My theories aren't generally accepted yet.



It's okay if your peers don't respect you, as long as the judge and jury do.



Daubert went further:

- Has it been peer-reviewed?
- Can it be submitted to an empirical test?
- Is the error rate known?
- Is there a manual or other control procedure?



In general, it is best to:

- Stick to your area of expertise.
- Make sure that all of your procedures are reliable and well-validated.
- Understand who your client is.
- Be aware of your own biases.
- Always be well-prepared.
- Accept constructive feedback.

Differences in context

	Clinical Work	Legal Arena
Requester or service	Physician	Attorney
Professional interaction	Collegial / consultative	Often adversarial
Patient relationship	Treating, advocating	Objective, just the facts
Confidentiality / HIPAA	Almost always applicable	Typically waived or superseded
Handling of raw data	Test security	Discovery rules
Level of certainty required for opinions	Clinical judgment; knowledge of C.I. and base rates	More likely than not (> 50%) or reasonable certainty (> 90%)
Your audience	Other professionals	Judge and/or jury

Before agreeing to do an IME

- Is the matter within your expertise?
- Do you have a conflict of interest?
- Can you get access to all relevant records as well as to the potential examinee?
- Can you proceed in an unbiased manner?
- Are fees and contingencies agreed upon?
- Do they want a call before a report is written?
- Dealing with requests for tests to be given.

Third-party observers



- Unless sanctioned by state law – don't allow it.
- Use AACN and NAN position papers *and* empirical evidence in peer-reviewed journals.
- If you proceed anyway, document the potential threat to validity.

During the IME

- Informed consent / assent
 - Referral source
 - No doctor-patient relationship
 - Usual rules of confidentiality do not apply
 - No feedback session or treatment initiation
 - Importance of truth and effort
 - Opportunities for breaks
- Stick to standardized, well-validated methods.
- Objectively document relevant observations.



Your report (if not a clinical eval)

- Remember your audience.
- Document referral source / reason
- Document consent procedures.
- Note any limitations / reservations.
- May need more detail on records reviewed.
- Stick to the facts; avoid inflammatory remarks.
- Answer the questions that were posed to you.
- Plain language, for plain people, please.



Failure on the TOMM

Nerdy doctor

- The examinee's performance on a standardized forced-choice performance validity measure was not consistent with veracious effort and therefore indicative of a high probability of symptom magnification.

Effective witness

- On a task where the chance of getting the right answer was equal to the flip of a coin, Mr. Jones answered correctly only 30% of the time. Truly, a person who had never seen the pictures, and just guessed, would likely have done better.

Requests for raw data



- Be familiar with your state's laws.
- Consult with your state psych association or APA on a PRN basis.
- Follow the guidelines described by Attix et al. (2007, *TCN*, vol. 21, pp. 232-238).

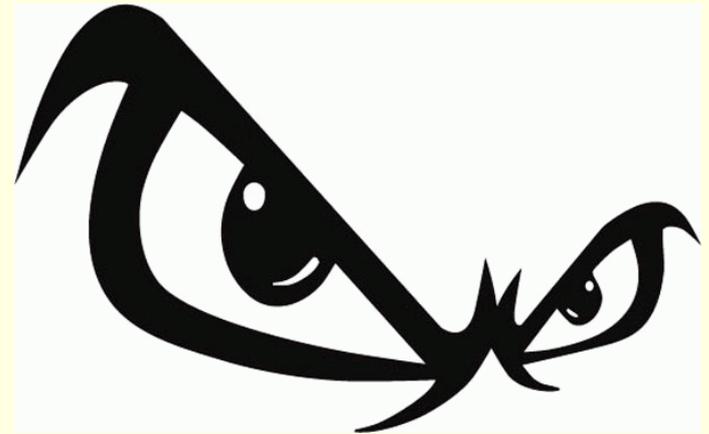
Types of testimony

- Sworn affidavit
 - Can be used prior to taking the case.
 - Make sure that you carefully read it.
 - Always use peer-reviewed references.
- Deposition
 - Discovery
 - Trial
- Court appearance
- Most cases get settled.



In general

- Come to the deposition or trial fully prepared.
- Dress in comfortable business attire.
- First meet with the attorney who retained you.
- They may be aggressive; it's just business.
- If they raise their voice, lower yours.
- Learn to say “No” and “I don't know”.
- Personalize but don't make it about you.



In general (continued)

- Use humor sparingly and only in good spirit.
- Try not to be repetitive, except to prove a clear point (use sparingly).
- Don't talk too much.
- If the attorneys argue amongst themselves, *stay out of it*.
- In depositions, simply answer the question after they are done arguing.
- In court, wait for the judge to instruct you.



In general (conclusion)

- **Listen** very carefully when comments get rephrased or taken out of context.
- **Look** at the attorney during the question but at the camera or jury when you answer.
- **Talk** with confidence; try to avoid terms like “I believe”, “I suppose”, etc., and watch the body language.



General procedures

- Swearing in
- Direct and cross examinations
- Credentials review / voire dire
- Objections to counsel
 - Foundation
 - Leading / badgering
 - Compound
 - Argumentative
- Objections to witness
 - Hearsay
 - Non-responsive
 - Irrelevant
 - Speculative



Your credentials

- Keep it short and sweet.
- Delineate *relevant* expertise.
- Don't engage in self-inflation.
- Don't get into board / turf issues.
- Don't disparage other witnesses.
- No need to claim universal knowledge.
- Constructive offense is the best defense.



Credibility of a treating doctor:

You would say anything to help your patient, right?



- I am her doctor and I have been taking care of her for years, so of course I want what's best for her!



- I have sworn to tell the truth, and I take that oath seriously. I will answer any reasonable questions to the best of my ability.

Credibility of an expert witness:

You're being paid for your opinion here, right?



- Well, yeah, I guess – I mean, I hope so. And there's nothing wrong with charging more for depositions!



- I expect to get paid today for my *time*. I have been hired for my expertise, not for my opinion – which is not for sale.

The hired-gun insinuation



- Doctor, of all the times that you have testified, how often has that been for the plaintiff? And how often for the defense?

The contrary %

- In all the depositions over the last 3 years, I testified as a treating doctor by plaintiff request 12 times, and as an expert witness upon request by the defense 21 times.
- Keep in mind that when, as an expert witness, I arrive at an opinion that does not support their side, they often settle the case instead of having me testify. That happens about 1 in every 4 times.

Learned treatise: *Is it authoritative?*



- Well, everybody I know has that book. It's a classic. So, yeah, I agree that it is the go-to guide on how to do a good assessment.



- I am know and respect that work but that does not mean I agree with everything in it. What specific portion do you want me to comment on?

Isn't it *possible* to have significant mental problems after a mild TBI?



- Well... yes. But they would be even worse with a severe TBI.



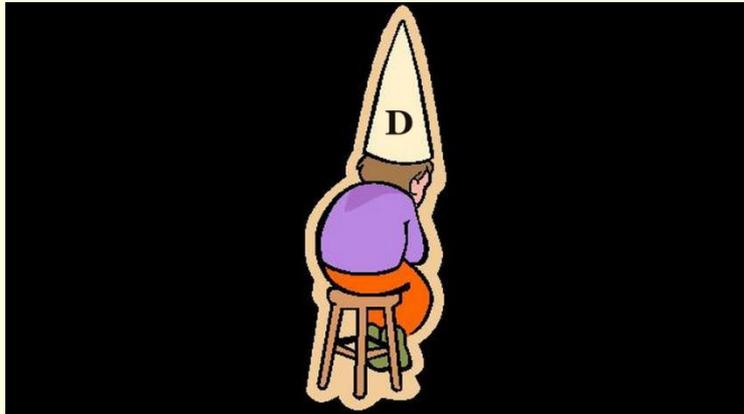
- That is unlikely. Some *transient* symptoms such as headache or irritability can occur in the short run but they are typically not severe and do not last.

The binary question



- If you can answer in a straightforward manner, then do so.
- If not, you do not have to.
- I am not comfortable answering that with a simple Yes or No. I am afraid that it might be confusing or misleading to the jury / court. For that reason, I would like a brief moment to explain my opinion.

Can *children with TBI* have problems with a ...b...c...d...etc.?



- Yes, they can.
- Yes, that too.
- Yes.
- Yes.
- Yes.

- Let's be clear what we're talking about; *severe* TBI, or *mild* TBI like in this child? Because the answer would be different.

Is it not true that most children recover well from early brain injury?



- Well, I am not sure that it is “most” but I must admit that I have seen good recovery in some cases.



- No. In fact, the opposite is true. The earlier the brain injury, the higher the chances for longer-term problems.

The use of dependent clauses (admit / deny)

- Although it is indeed possible for children to have cognitive problems in the absence of any brain injury,
- my review of *this* child's school records – both before and after the accident – clearly suggest a considerable drop in test scores. Given the fact that there were no other complicating factors, I consider it most likely that the TBI was responsible for that decline.

The use of dependent clauses (more **admit** / **deny**)

- Whereas there may be *some* children who continue to have emotional issues for many months after a mild traumatic brain injury,
- the literature – as well as my own experience – *strongly* suggests that the *vast* majority of those children have other complicating issues. In this case, it is important to note that the parents were in the midst of a messy divorce when that car accident occurred in which the child sustained minor injuries.

Trying to make you defensive:



- You saw this child only once. Did you talk to the child's best friend? To her coach? To any of a dozen other people who have known her for years and saw her many times? Did you?

The **push** & **pull** technique

- Heavens, no! Not only did I not talk to this child's best friend or her coach,
- I also did not talk to her great-grandmother, her next-door neighbor, or her brownie scouts leader.
- I talked to her, to her mother, and I read her school and medical records. Just like I would with *any regular clinical* patient.

Subjectivity

- Doctor, when you interpret those test results, that is just your subjective opinion, right?
- No, that is my objective, professional opinion.
- Are you telling me that every other doctor would agree with you?
- If they just look at the facts, and know what they are doing, then most likely – yes.



1 for a story about pumping up one's confidence

Opposing experts

- So, then why does Dr. X not agree with you?



- Because she obviously does not know what she is talking about. I gave more than twice as many tests as she did, so that should tell you something.

Opposing experts

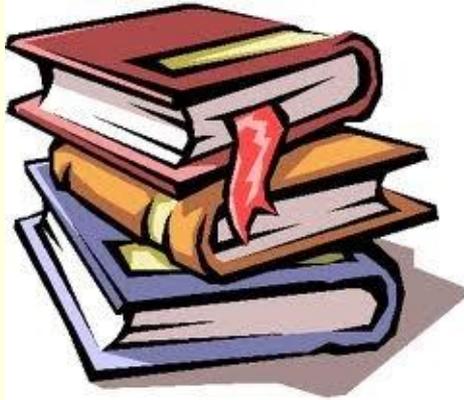
- So, then why does Dr. X not agree with you?



- You're going to have to ask *her* for the basis of her opinion. It is not clear from her report, it is not supported by any facts, and it does not fit with the consensus in the literature.

About that literature

- You need to have a sound understanding of the literature; preferably *before* you accept a case, and definitely *before* you start testifying.
- Make only references that are specific; don't confabulate or speculate.



- Emphasize consensus papers in well-respected, peer-reviewed journals.

The worst witnesses

- Come unprepared.
- Become defensive fast.
- Or become too arrogant.
- Talk way, way too much.
- Make things up on the go.
- Go beyond their own competence.
- Act as if it is their job to win the case.



The best witnesses

- Come fully, thoroughly prepared.
- Are comfortable with what they know *and* what they don't know.
- Talk in a concise, clear manner, in a language that ordinary people can understand, yet is still evidence-based.
- Focus on the facts, not on personal ego.
- Maintain a calm, professional composure.



In the end

- Always leave in a dignified manner.
- Don't go out of your way to try to find out who "won" or how much money they got.
- Remember:
 - It's not about you.
 - It really is just business.
 - Just stay honest and objective.
 - The most important thing: Be yourself.

Unless....

The most important thing in life
is to be yourself...



Unless you can be Batman,
Always be Batman.