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STRATEGIES FOR CROSS-EXAMINING EXPERT WITNESSES:

SOCIAL SCIENTISTS' ENCOUNTERS WITH ATTORNEYS

IN THE SCHOOL DESEGREGATION CASES

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Strategies for Cross-Examining Expert Witnesses:  
Social Scientists' Encounters with Attorneys  
In the School Desegregation Cases

An important part of expert testimony in courtroom litigation involves cross-examination by opposing attorney(s). For attorneys, this is a critical part of the adversarial process and a necessary mechanism for ensuring that the judge is provided with truthful and relevant testimony. For social scientists, this mechanism may constitute a challenge to their preferred process of seeking truth and often is the most stressful part of providing testimony. In this paper we examine several strategies of expert cross-examination attorneys used in a sample of the school desegregation cases. School desegregation is by no means the only litigation involving social scientists as expert witnesses; scholars have been active in cases involving employment discrimination, environmental impact, products' liability, medical liability and insurance, mental health assessments, etc. The school desegregation cases represent a relatively unique set because the issues (and sometimes the attorneys and experts) are rather similar across locales, and we can rather easily identify several outstanding strategies of cross-examination.

The findings reported here come from data collected in a larger study of interactions among social scientists, attorneys and judges involved in the school desegregation cases of the 1970's (Chesler, Sanders and Kalmuss, 1981). Two data sources are used in this paper: 1) interviews with 83 scientific experts who testified in, and 60 attorneys who tried, a sample of 17 school desegregation cases in Federal District Courts during the 1970's; and 2) over 2500 pages of court transcripts of cross-examination in a sub-sample of 6 of these cases. Excerpts from our interviews with these actors, and edited versions of interactions occurring in the court transcripts, are presented as evidence.<sup>1</sup>

### Purposes of Cross-Examination

Different experiences with cross-examination, and different views of the purposes of cross-examination, are tied undoubtedly to different conceptions of the nature of truth and to different ways of attaining truth in the courtroom. Some actors see the cross-examination of expert testimony as an effort to get at transcendent truth, truth that exists above party or individual convictions and affiliations. This approach is supported by legal scholars who believe an important part of the attorney's role on cross-examination is to promote this truth. For instance, in objecting to the use of what he saw as weak or inadequate scientific evidence in the early desegregation cases, Cahn indicated that opposing lawyers have a critical duty.

...it is a lawyer's duty to conduct thorough and searching cross-examinations of adversary experts. In this way, he serves more than the interests of his own client. Vigorous cross-examination serves the larger social interest (a) by exposing fallacies in the expert evidence and (b) by deterring experts from making assertions that will not hold water. If the prospect of skilled cross-examination can deter some laymen from committing perjury, it may also deter some experts from passing off wishes as facts (1956:193).

Several scholars we interviewed report agreement with the view that the basic purpose of cross-examination is to clarify issues and to determine the "truth". As one expert notes:

The function of the cross-examination is to sharpen what's been said, to make sure the witness says what is in fact true and consistent with reality. It's done to ensure validity, and it's terribly important. It is not used to discredit the witness: the attorney who tries that is in trouble.

One lawyer reflects a position close to Cahn's in the following statement:

My cross-examination of an expert witness is to hold them to the area of their expertise and to prevent their trying to spread the aura of legitimacy from an area which they might be a legitimate and unchallengeable expert into an area where they are just somebody else talking.

Despite this view, most scientific experts see attorneys' goals as "winning" the case, and the purpose of cross-examination as a means of negating one truth in order for another to persevere. They often feel it is a partisan attempt by opposing attorneys to undermine their testimony. Moreover, the major tactics they see being utilized are attacks on their credibility and attempts to discredit them. Consider these reflections by scientists who testified as experts:

The purpose of the cross-examination is to destroy the credibility of the witness.

The lawyers are trying to make you look bad and less competent than you are. They will try to make you contradict yourself, and will try to discredit you personally if they cannot discredit your social science data or testimony.

Attorneys writing in legal books and journals often agree that a primary purpose of cross-examination is to gain admissions favorable to their side of the case, even if that does involve discrediting the witness (Haddad, 1979). Most attorneys we interviewed agree that the purpose of cross-examination is to aid their effort to argue or demonstrate that their own or their witnesses' version of reality is more accurate. In this pursuit many admit that they do try to destroy the credentials of opposing witnesses or to discover weaknesses or holes in their arguments that might harm their credibility. For instance:

I guess you would say that a good cross-examiner had to destroy the credibility of a witness.

It was easy to cross-examine him and to affect his credibility because he had a tendency to make a lot of statements that he didn't really have any knowledge about. That they were really opinions that he held without any basis in fact or in articles that he had read or whatever.

This partisan view of cross-examination, and indeed the entire courtroom process, creates particular stress for experts, especially for those anticipating attacks by opposing attorneys. In fact, experts express far more discomfort and

conflict related to cross-examination than to any other aspect of witnessing. Over three-fourths of the scholars who reported conflict in their roles as expert witnesses indicated that most of this conflict occurred during cross-examination (Chesler, Sanders and Kalmuss, 1981). One root of this stress and role conflict is the loss of control experts may experience regarding their substantive presentation, as well as their emotional stability or integrity. The following statement by one expert captures some of these feelings:

It is a little mini-war that the expert-witness plays with the lawyer. And once the lawyer makes you look like an ass, you say, "Boy, next time I get on the witness stand, that lawyer's going to look like an ass."

Part of the reason cross-examination represents such a battleground is the organizational structure and procedure of the courtroom. The adversarial process for testifying and attaining legal truth, and the adversarial structure of the courtroom, and testimony, establish an arena wherein different versions of truth or reality are presented and tested against one another. As representatives of their party's interests, attorneys are lead agents in arguing for one version of reality and against another version. When experts enter to present or support one of these versions they enter the basic battleground.

Another reason scholars in particular may find cross-examination stressful is that many enter it with naivete about the ground rules, with concern about protecting their own neutral stance as scholars and with a commitment to the certainty of their testimony (Kalmuss, 1981). Challenges to their testimony that are well within the norms of the courtroom may feel like highly personal attacks. Under such circumstances, scholars may try to defend themselves against intrusion, potential embarrassment and role confusion.

### Attorneys' Strategies of Cross-Examination

The strategies of cross-examination, and indeed any courtroom examination, are the subject of a body of "how to" books written by successful trial attorneys (Bailey and Rothblatt, 1977; Jones, 1975; Keeton, 1975; McElheney, 1974; Morrill, 1971), and often presented in journals oriented to practicing attorneys (e.g., American Journal of Trial Advocacy, Litigation, Trial, The Practical Lawyer). Much of this advice is summarized in O'Barr (1982). These general suggestions to be used with discretion, include: a) be well prepared and knowledgeable about probable testimony; b) maintain tight control over witnesses during cross-examination; c) do not reveal surprise even when an answer is totally unexpected; and d) be courteous and avoid interrupting a witness whenever possible. Beyond such general suggestions there are more particular strategies attorneys may pursue in the attempt to undermine opposing experts on cross-examination. Our review of court transcripts reveals at least 5 such strategies used by attorneys in the school desegregation cases.

Challenges to the witness' academic credibility

Challenges to the witness' knowledge of local issues

Implications of special interest or personal bias

Searches for admission of the legitimacy of opposing views

Exposures of contradictions or errors in testimony

Other language has been used to describe some of these strategies. For instance, quite close to the "search for admission of the legitimacy of opposing views" is the "learned treatise" strategy described by Haddad (1979) and Poythress (1980). Here the attorney confronts the witness with a renowned article opposed to his view and asks if the witness is familiar with it. If the expert denies knowledge his qualifications may be cast into doubt; if he indicates knowledge he must

argue against the learned treatise lest it (and its fame) cast doubt on his substantive testimony.

In this section we illustrate these five strategies, and provide several examples of the procedure whereby attorneys "lay a trap" for a witness and try to throw him or her off stride in order to spring a sudden challenge.<sup>2</sup>

### Challenges to the Witness' Academic Credibility

Some attorneys argue it is fruitless to challenge directly a scholar's academic credentials. After all, if a person is admitted as an expert, has the requisite degrees and publications, etc., that might not be very productive. However, Kornblum suggests academic standing and credentials should be questioned, if only to establish their limits (1974). As one attorney indicates in an interview:

I don't challenge their credentials. I don't need to do that. . . You just want to make clear what it is that forms the basis of their testimony. It's important for the judge to know whether this person is brought forward as an expert who knows what the hell he's talking about.

Of course the attorney who attempts to discredit a witness personally must be careful. In the early desegregation trials, for instance, cross-examination of plaintiff witnesses often was particularly disparaging, sometimes to the tactical disadvantage of opposing counsel. As Cahn indicated in his review of Isadore Chein's testimony and cross-examination:

In the Virginia trial, the defense appeared particularly inept. Far from caring to concentrate on the doll test and its scientific validity, the lawyer for the defendants was preoccupied with other lines of cross-examination. He had a different set of values to display. Why concern himself with dissecting the experts' logic and the correctness of their inferences? Instead questions were asked which would convey disparaging insinuations about a professor's parents, his ancestral religion, the source of his surname, the pigmentation of his skin, or the place of his birth. . . .As any healthy-minded person reads the Virginia trial record, it is possible



not to contrast the altruism and sober dignity of the scientists with the behavior of the defendant's counsel, who by his manner of espousing the old order, exposed its cruelty and bigotry (1955:165).

It is rare to discover such crass cross-examination in the 1970's. But this history is on record. Its existence, as well as critiques like Cahn's, helped establish some limits to the direct attacks on scientists' personal credibility in these cases.

One way attorneys attempt to challenge a witness' credentials directly is to raise questions about their experience and knowledge of the field. For instance, in one cross-examination the attorney challenges an educational scientist's limited experience as a school superintendent.

Counsel: You yourself have not been the superintendent of any large city —

Witness: That is correct.

Counsel: According to the newspaper you were the superintendent at some district in the state at some time.

Witness: They were two separate districts.

Counsel: How big a district was the first?

Witness: Oh, small. Enrollment at the time was under a thousand, but I can't remember the exact number.

Counsel: Any blacks?

Witness: No.

Counsel: Is that the extent of your experience as an administrative head of any school district?

Witness: Yes.

Other challenges to a witness' credentials may include examination of prior testimony or scholarship, particularly if the scholar has testified in other cases. Several attorneys indicate that it is easier to cross-examine witnesses who have testified many times before. After all, their statements are on the

record; it is easier to predict what they will say, to prepare to challenge it and perhaps even to find an embarrassing admission or error in pages of prior testimony. As one attorney notes in this regard:

He has never testified before, which you can understand is a benefit in that he didn't have a million pages of cross-examination to pull out the mistakes that he had made before.

In addition to challenges focusing on the witness' own experience and research, attacks on a more indirect sort can be made on the source material a scholar cites. In the following excerpt the attorney implies that sources not appearing in a refereed journal may not be quite acceptable, legitimate or fully scientific.

Counsel: Was that published in a refereed journal?

Witness: It was a special report by the Department of Geography.

Counsel: Was it published in a refereed journal?

Witness: No.

Later, the witness turns the tables and raises the same issue regarding one of the attorney's sources:

Witness: Has this article been published?

Counsel: Yes, I believe so.

Witness: Where was it published?

Counsel; It was published by the Survey Research Center of the Institute for Social Research. . . .I don't know if it's been published in a refereed journal. It's a hardcover book I have been advised.

The game continues: later the same attorney "reduces" another of this witness' references to a much less credible source, a graduate student's doctoral dissertation!

Counsel: Was it a book?

Witness: It's a dissertation.

Counsel: Was it published by a commercial or academic publisher?

Witness: No.

Counsel: So this is what we call a student doctoral dissertation?

Witness: Yes.

Attorneys also can challenge a witness' credibility in terms of their track record in studying the precise issue to which they are testifying. Granting the witness general expertise in the area of residential segregation, the attorney below closes in on a scholar's publication record regarding the role of schools in perpetuating this social process (known as the "problem of reciprocal effect").

Counsel: In fact, doctor, everything that I have read of yours, including your articles . . . at no place mentions school de jure segregation as a cause of racially segregated neighborhoods, is that a fair statement.

Witness: I don't know whether there is some reference to it in the materials of the kind you mentioned about, but I have not studied that aspect specifically.

Counsel: You came here to testify about it, though?

Witness: Certainly.

#### Challenges to the Witness' Knowledge of Local Issues.

A second major strategy used by attorneys in cross-examination is to challenge the national scholar's general data with regard to its relevance, applicability and validity in the local arena. Social scientists' ability to generalize across individuals and local situations is central to the development of their discipline; this focus may make them vulnerable in a court proceeding concerned with local facts, violations and remedies. Thus, Gardner (1979) stresses the importance of this strategy for defense counsel in employment discrimination cases and Pettigrew (1979) reports its common use in school

desegregation trials. As noted below by one attorney, some scholars are easy to cross examine because they lack time on-site, experience in the specific locale, or even detailed knowledge about the case and school situation at hand.

He on the other hand, was an easy cross because he had no familiarity with the city. He had no familiarity with voluntary programs. He had no familiarity with mandatory programs. He just came here and pontificated and it wasn't too hard to deflate that.

An example of the actual use of this strategy during cross-examination follows:

Counsel: Can you tell us where the initial placement of a school in this city has influenced the initial character of the neighborhood?

Witness: No, I can't.

Counsel: Since you can't tell us one, then you are not telling the Court that the initial location of schools in this city has influenced the racial character of the neighborhoods?

Witness: No. I am not adducing any specific examples about this city, and in particular, I would be uninformed about the initial placement, because most of my studies have dealt with a period when the city was largely built up -- had more to do with relocation and redesignation of the character of schools.

Counsel: Doctor, I inquired of that because you were tendered by your attorney as an expert in the field of racial residential urban segregation, especially in this city, and that is what you do purport that to be your field of expertise.

Witness: Yes.

Another example of this approach comes from a cross-examination in which the witness clearly anticipates the line of attack and attempts to distinguish his observations ("refamiliarizing myself") from his investigations ("scholarly study"):

Counsel: Your study of this school system, if I have got it correctly -- first, your study of the plan is limited to your driving tour of the schools, right, on two separate occasions?

Witness: My study of what?

Counsel: Of the plan.

Witness: Of the school plan, yes.

Counsel: And you didn't go in the schools?

Witness: No sir. Not on that tour. I have personal acquaintance among many teachers and I must say I have conversed with some of them.

Counsel: But your investigation did not include conferences for that purpose with any teachers or principals or administrators?

Witness: You are speaking now of my tour?

Counsel: Yes.

Witness: Yes, and I think you dignify it to call it an investigation. I was refamiliarizing myself with the schools in this system.

Counsel: And you haven't made any study of the type of programs which are being advanced, taught, in each of the various schools?

Witness: No sir.

Counsel: Nor of the particular training which particular teachers have received for particular programs in their particular school?

Witness: No sir.

In the same testimony a similar dynamic occurs later, although on a different topic. The witness has just testified to the problems of teacher prejudice against minority youth and to the potential impact of such attitudes on student performance.

Counsel: Did you talk to any teachers? You said you did not talk to any teachers in this city to see if this is a prevalent attitude?

Witness: I said I talked fifteen minutes to one teacher. I also said I drew no conclusion from that. I said that (prejudice) is a general characteristic across the nation.

The Court: Do you think you can ask the teacher or superintendent, or the School Board Member, or a Doctor of Education, or a housewife, or a Federal Court Judge if they are prejudiced and they will say they are?

Witness: It is impossible. There is no instrument to measure that.

Counsel: I presume a man of your qualifications who has been making

surveys can make questions of a particular individual to get some indication how they feel?

Witness: I consider the more important thing is not the attitude and not the perspective, but the behavior. The behavior is observable, it is recordable. If I were to study this city it would take me a year, probably, and what I would do is establish check sheets on the behavior of teachers: how many times does X teacher or teachers as an aggregate call on minority children, how much reinforcement, how much reward, what kind of reward? I would use some kind of interaction scale. I think it is a dead issue to look to prejudice. What I said is teachers in minority schools tend to be pessimistic about the ability of their children to learn. I refer you to DARK GHETTO by Dr. Kenneth Clark to support what I say about the black population, and so forth: He has not studied this city either.

Buoyed no doubt by the judge's intervention and apparent sympathy (with his expertise if not necessarily his stance on the issues), the witness subtly attacks back in his last comment: Kenneth Clark, whose testimony was a central part of the scientific evidence in Brown v. Board of Education, has not studied the city either!

#### Implications of Special Interest or Personal Bias

A third strategy of cross-examination attorneys employ is to suggest or gain admission that the scientist has been compromised by his or her biases or special interests. Many scholars have addressed experts' problems of "objectivity" in court (Kalmuss, 1981; Kousser, 1982), and Haddad (1979), Kornblum (1974) and Shubow and Bergstresser (1977) have identified some of the specific indicators of bias for which attorneys should probe. For instance, personal bias may take the form of strongly held values on the issues in litigation or friendship with the attorney or party in the case. Other special interests at stake may involve monetary gain, publicity seeking, consistent alliance or allegiance to a particular party in a series of cases (plaintiff or defense) or strong

theoretical predispositions. Attorneys generally are rather cautious about how they employ this strategy. A direct approach might have them calling all experts "hired guns", "whores", or "party shills", but a more subtle and indirect series of inquiries and implicatons usually is used.

Innuendoes that financial gain, perhaps ill-gotten at that, may be at stake, can be seen in this cross-examination excerpt:

Counsel: Is there a rule in your University on consulting time?

Witness: There is no rule in the University at the present time...

Counsel: Your fees go directly to you and not to the University, I take it?

Witness: That's true.

Counsel: Have you been on the University payroll full time during the period when you have spent twenty-five working days on this case?

Witness: I have.

This kind of questioning is not unique. Frequently, the questions to plaintiff and defense witnesses are even more specific, probing how much experts were paid, how many hours or days they worked on the case, etc.

A somewhat different approach to the problem of bias is used in the following cross-examination:

Counsel: I understand that you have testified in many cases involving the same examination of effects of residential movements in desegregation cases.

Witness: I have testified in many cases. The examination has varied from one to the other.

[...]

Counsel: In any of these cases, have you testified on behalf of a board of education or other defendant wherein plaintiffs are seeking a desegregation order of some kind?

Witness: I cannot give a direct answer to that, because I do not follow that closely the legal status of who is challenging whom at

the particular stage in which I appear. As I mentioned in the deposition, I have testified for a Board of Education when it was seeking the desegregation remedy that I believe was at stake at that particular stage of the trial.

The full meaning of the witness' answer remains somewhat unclear; perhaps deliberately. It is unlikely that the witness really does not follow closely "the legal status of who is challenging whom". Moreover, his report of an example where he did testify for the school board (which was the original defendant in a city suit and became the plaintiff in a metropolitan suit) indicates his sophisticated understanding of both "the legal status" issue and the attorney's intent in asking the question. This line of questioning was not followed further in the cross.

Another variant of inquiry into a witness' interests is the attempt to discover or suggest that she has personal views, for or against desegregation, that might impede her ability to act neutrally and objectively. Ironically, while taking payment for testifying is sometimes brought up to insinuate that the expert is testifying for financial gain, the willingness to testify without remuneration is equally suspect. Experts who are willing to testify for expenses alone are open to the criticism that they are "true believers", and thus their testimony will not be neutral and objective.

#### Search for Admissions of Legitimacy of Opposing Views.

A fourth major strategy attorneys use in cross-examination of expert witnesses is to try to get them to admit that other scholars might reasonably come to a different conclusion about a situation or data set. If such admission can be gained, then it is truly "one person's opinion versus another's", rather than one person's views representing the bulk of scientific evidence. Attorneys know scientists have a tendency to make such admissions as part of their



commitment to "fairness", and usually warn their own witnesses to stick to their guns. As one attorney comments:<sup>3</sup>

When you are on cross-examination, the other side is going to try to discredit you. So, how a person conducts himself on past cross-examination in one of these cases would be one of the factors we would look at in determining who we would want to call as an expert. We want somebody that isn't easily shaken from his opinion, who doesn't hedge and backtrack from what he said on direct because of a few pointed questions by the opposing counsel. The opposition has got to suggest that it is possible that other factors are the real reason why something happens and not the factors you listed. And he has got to be able to say, "No, and this is why: because I have studied those other factors and this is why those factors are not the reason."

Efforts to find admissions of reasonable doubt frequently require the attorney to use other scholars' studies or actual testimony as a spring board (thus the use of the "learned treatise", Poythress, 1980). In the following example the witness first resists but then is forced to admit legitimate opposition:

Counsel: So that it's fair to say that social scientists in good faith differ considerably as to what is the best way to study data.

Witness: I think there is some debate about how to handle data. I think more debate comes on what the structure of the models are.

Counsel: This is what I think I was getting at. Could different persons, using the same data -- could they be using different models and thus come up with different predictions?

Witness: Yes. I believe they would be using the wrong models.

Counsel: Right, but one could disagree on that?

Witness: Yes.

### "Setting a Trap" for Exposures of Contradictions or Errors in Testimony

A final strategy attorneys use to challenge or impugn the credibility of opposing witnesses is to discover contradictions or errors in their testimony.

In the extreme case, an attorney plans how to "trap" a witness:

He is very dishonest with his numbers. And you could show that, you could do that in this case where he manipulated numbers, manipulated figures to get certain results that were pre-ordained, given his biases and his previous finding. And you could demonstrate that in other cases in order to get certain conclusions he manipulated numbers. One way in here he would take the same numbers and do something else with them, so it wasn't hard to show those contradictions.

Since experts are themselves adept and alert, attorneys seldom can extract damaging testimony or admissions directly; a variety of subtle devices more often are used. Sometimes an attorney who seeks to trap a witness thinks through his approach carefully well ahead of time and sets up an intricate argument. At other times the attorney just falls into it: one question leads to another and sooner or later the attorney discovers how he might be able to make an effective challenge. In this regard Shubow and Bergstresser recommend giving some witnesses enough rope to "confuse and alienate everyone listening" (1977, p. 33) and thereby trap themselves.

In the first few examples of this strategy we illustrate traps that are unsuccessful or are avoided. The reader, who now knows that traps are being set, can imagine how each vignette will end before the end occurs. The first example of an attempted trap comes from the cross-examination of an expert whose direct testimony linked housing and school segregation to governmental actions.

Counsel: Is it true that it is your opinion that racial separation in housing occurs regardless of the character of local laws and policies, and regardless of the extent of other forms of segregation and administration?

Witness: Would you check the last word? Yes, that is a sentence I wrote many years ago to which I still agree.

The witness recognizes that the attorney is reading to him from his own published works. If he denies the comment, he would be contradicting his own words. In fact, this expert is aware of the danger this statement created and ready for the attempted trap.

In a second example of a failed trap, a witness openly discussed the role of de jure segregation in Northern school systems. Given the specific legal meaning and legal history of de jure/de facto distinction in Southern and Northern school systems, the attorney senses he has caught the witness in a critical error or legal faux pas.

Counsel: Oh, you have found a Northern city that does have a de jure segregated school system?

Witness: By my understanding they all have it.

Counsel: If it should be determined that all Northern cities do not have de jure segregated school systems, then what would your conclusions be?

Witness: Well, you are referring to determination, using the particular determination within a court of law. I am referring to a scholarly definition with respect to the kinds of impact these law and administrative uses affect residential patterns. I would not change my statement on the basis of what those Court determinations happen to be. This is referring to a legal rather than scholarly definition of the term.

The witness' response works in this case. Subsequently the cross-examining attorney persists but the witness's own attorney intervenes, and the Judge finally halts the interaction by indicating that the witness does carefully distinguish between legal and "scholarly" definitions, and that he has been clear enough.

Not all traps fail. In the following example, the cross-examining attorney spends a good deal of time asking the witness what materials he has read, how much time he spent on them, etc.

Witness: There were two huge boxes, I was a little dismayed when I sat down with all these documents. I did attempt to look at all of them but it was quite -- it's quite obvious that I could not read what appeared to me to be six thousand pages of housing documents. I looked at most of them and picked and selected, trying to get a feel for the housing documents. I looked at what material was available and yesterday I spent some time with the bin of maps.

Counsel: How much time?

Witness: With the maps? I looked at all of the maps because I'm interested in maps.

Counsel: How many maps and how much time?

The witness indicated he worked hard and read a lot of material -- a "good witness". This line of question and response continues. It is not yet clear what the attorney's intent is: does he know where he is going or is he "fishing" for a vulnerability, an opening?

Counsel: Could you tell me what depositions you read?

Witness: If you would like me to consult my notes, I can. Just off the top of my head . . . I would have to look up the names because the names were all unfamiliar to me. Would you like me to do that?

Counsel: Yes.

[...]

Witness: It was a substantial document. It was perhaps -- I'll give it by thickness. It was perhaps an half inch or three-quarters of an inch thick.

Counsel: Did you read a quarter of an inch or a half inch or all of the inches?

Witness: I thumbed through it. I don't think it's ever necessary to read every word in the volume to get an idea of what's in it. If we in academics had to do that, you would never get through all the stuff there is to read.

Counsel: What other documents.

Witness: As I said to you, I read and selected in that listing of housing documents, given the time constraints that I had, and I found many of them interesting and some of them I made a few notes on that I could add to my lectures. There were some interesting points made.

Counsel: What did you find interesting?

Witness: I found an interesting discussion of the public housing policies.

Counsel: Which aspect of the public housing, the fact that it was

segregated?

Witness: No. I was more interested in the procedures for developing that and the way in which it had been effected in this city.

Suddenly the questioning becomes more direct: a specific question is asked about a specific housing unit.

Counsel: Do you recall what it was you read about Gaylord Homes?

Witness: I think what I was interested in was that in some of the documents they indicated that the expansion -- the growth of the black residential area to the west was affected by the location of Gaylord Homes, which was built by a black developer on vacant land and so influenced the growth in that direction.

Counsel: Was that private housing?

Witness: I believe Gaylord Homes was public housing but I would want to recheck that. I thought initially that Gaylord Homes was a private development and I was corrected in a conversation about that so I would want to go back and check the document to be absolutely precise.

Counsel: Do you know how many units of housing are involved in Gaylord Homes?

Witness: No, I do not.

Counsel: Do you know its location -- I'm sorry strike that. Do you know the time that it opened, and the date that it opened?

Witness: The exact date?

Counsel: The approximate date.

Witness: In the twenties some time I believe.

Counsel: When?

Witness: I thought it was in the twenties some time.

Counsel: Do you know the surrounding area by race or by zoning, what was around Gaylord Home site at the time it opened.

Witness: I have not made a study of that specifically.

Counsel: Do you know if it was adjacent, immediately adjacent to the black expansion area?

Witness: I said I didn't make a specific study of that.

[...]

Counsel: For your information, the Gaylord Homes housing project is the largest housing project in the metropolitan area. It was built and opened in 1953, all black.

Witness: That's an interesting piece of misinformation then in that document that I copied out. I have a note here that there's a comment about Gaylord Homes influencing the expansion west in the twenties and that it one of the housing documents. I would certainly like to look at that but I could be mistaken. As I said to you, I tried to look at as much of the housing information as I could, given the time, but I was writing rapidly and reading rapidly and errors do occur.

The trap is sprung: the witness does not remember key pieces of information about the "largest housing project in the metropolitan area", and a segregated project at that. The witness tries to double back by suggesting there was "misinformation" in the record, talking about the work-load, and admitting he might have been mistaken.

### Experts' Strategic Responses

These excerpts of cross-examination should do more than illuminate various strategies and challenges opposing attorneys make. They also provide some indication of the reasons scientists experience stress and potential conflict in the courtroom. They also indicate ways in which scientists try to cope with challenges and, in many cases, fight back.

Attorneys generally are urged to prepare their witnesses for the courtroom process in general, and to coach them in how to respond to cross-examination (Ames, 1977; Kornblum, 1974; O'Barr, 1982; Philo and Atkinson, 1978). After all, scientists engaged in the struggle for truth and for control of courtroom testimony are not passive and dependent objects. They, too, develop procedures for advancing or defending their opinions and deflecting or counterattacking

attorneys' challenges. Their procedures are reactive for the most part, because initiation of challenges lies in attorneys' hands; but experts do have choices about how to respond.

Several social scientists have discussed these issues in print, providing clear examples of their experiences and counter-strategies (Brodsky, 1977; Loewen, 1982; Pettigrew, 1979; Poythress, 1980; Taueber, 1979; Williams, 1957; Wolfgang, 1974). Included in this advice are the following suggestions for maximum witness effectiveness: a) be "cool" or reasonable and cooperative; b) direct answers are more persuasive than vague or fragmented ones; c) exaggeration or going outside one's own field weakens a witness' testimony; d) extreme slowness in response is not convincing; e) too many qualifications of an answer are not good; and f) follow your own attorney's lead. Experts follow these general suggestions in a number of ways during cross-examination, but often modify them when they feel they are under attack. We identify at least six of these strategies used by experts to thwart or counter attorneys' attacks on their credibility.

The first and most general strategy expert witnesses employ is to try and stay "cool", to be removed from and untouched by the battle insofar as possible. In this response style scholars answer all the questions posed to them as courteously as possible. If a challenge hurts or is about to hurt they do not show it. In fact, as far as their behavior is concerned, we would not know they are part of a contest at all. Only their subsequent revelations in an interview suggest what really went on inside. As one scholar reports on her experiences and responses:

The next time I am under cross I am going to write up a card and I am going to put it in front of me where I can see it and it is going to say "stop". And any time I get a question that upsets me I'm going to stop and I am going to sit and I am going to wait until I have figured

out what I am going to do, and then I am going to answer. I am not going to be rushed and I am going to try to keep my cool.

Possible examples of this strategy presented earlier include comments such as "I don't know", "If you give me an honest man's leeway", and "I do not follow that closely the legal status of who is challenging whom..."

A second strategy experts utilize during stressful cross-examination involves parrying the opposing counsel's questions. For instance, the expert may ask the attorney to repeat or rephrase questions that he does not want to answer or may want to think about. At the very least, such an approach stalls for time; at best, the attorney may decide it is not worth while to pursue the issue. A related approach involves reinterpreting questions (often to oneself) and then answering the question one wishes to answer rather than the one that is asked. If the attorney asks a vague question to start with this would be an effective device. Even if the attorney asks a fairly direct question, this strategy permits the expert to make the points he wishes to make, or to avoid a direct response to an uncomfortable question. In order to counter this tack the persistent attorney must interrupt, point out that his question has not been answered, and begin again. Possible examples of this strategy include comments such as: "I do not follow the question," "I did not understand the question" and "I think the way to achieve school integration is through housing" (in response to a question about the desirability of school desegregation).

A third strategy experts use during cross-examination is to concede voluntarily minor errors or damaging admissions before they are introduced or emphasized by opposing counsel. This "fair-minded" behavior may even gain extra credibility points, while at the same time defusing a potentially embarrassing contradiction or error. Examples of this strategy include comments such as: "I would now soften what I said", "I think you dignify it to call it an



investigation" and "I could be mistaken".

A fourth strategy includes obfuscation, or the attempt to cloud a problematic question and response with jargon, circular reasoning or plain doubletalk. This is a dangerous strategy, since if it is exposed as such it could damage the credibility of the witness. However, it often is hard for attorneys to challenge directly or to impute such a deliberate motivation to normal scientific jargon.

A fifth strategy utilized by some experts involves counterattacking when the attorney appears vulnerable. Gardner notes that expert witnesses may use this strategy especially if the attorney is ill-prepared, "if the witness realizes he is dealing with a new-student in class" (1979, p. 18). On the other hand, most lawyers recommend that their witnesses avoid this approach, because it does more than defend against attack; it opens up whole new avenues for challenge and response. As such, it might sacrifice the expert's long-term credibility for minimal and momentary gain. Nevertheless, some experts utilize this approach, whether deliberately or because they are provoked into it. Possible examples of interactions leading to such comments include: "He has not studied this either", and "Has the article been published?...Where was it published?"

Finally, no expert is "out there" alone; the expert who remembers the alliance with his or her own attorney has an extra resource to rely on when the going gets tough (Philo and Atkinson, 1978). For instance, several attorneys indicate their willingness to interrupt the cross-examination process to "tip-off" their witness to a trap, to object to a line of questioning or to otherwise prevent effective challenges to their expert's testimony. The first example of this tactic occurs as the witness' own counsel is conducting direct testimony: opposing counsel attempts to mount a challenge at an early stage and

is beaten back.

Counsel: Doctor, in light of what you have just read and the testimony you have given previously, is it fair to say that if a white person is considering moving in an area -- what does FHA say -- with an incompatible racial element, that figuring up what he could pay or would pay for a mortgage, FHA is suggesting here that he include in the cost of a private school or transportation to a private school or another school which is more compatible racially?

Witness: Yes. That's what this section suggests.

Counsel: Is that the situation that prevails today as a practical matter?

Witness: As a practical--

Opposing Counsel: (Interposing) In this community?

Counsel: In general, is my question.

Opposing Counsel: I believe it would be better to limit it to this community.

Counsel: My question is in general. If you want to ask questions, you wait until your turn.

We can expect that when opposing counsel enters cross-examination this line of challenge will reemerge.

Another example of attorney intervention in crossexamination occurs as opposing counsel is questioning a witness' relationship to the case, and whether he demonstrates a personal "interest" (bias) in the case.

Opposing Counsel: I would like to establish a few facts with respect to your involvement in the events preceding this litigation directed to the litigation. As I understand it, you are the one who decided to make a contact with counsel for the Plaintiffs in this action. Is that correct?

Witness: That is not correct.

Opposing Counsel: Would you tell us what the contact was then, or who made the first contact to your knowledge...

[...]

Counsel: I think I am going to object to this line of questioning on a

number of grounds. In the first place, I don't think it is relevant to anything. I also don't think it is proper cross-examination. I do not think it goes to any of the issues raised on direct.

The Court: It may and may not go to credibility. The Court fails to see the relevance.

Opposing Counsel: It goes to bias.

All these response strategies by experts are part of the battle for control of testimony that occurs throughout the courtroom drama. The escalation of these issues during cross-examination merely highlights the underlying process of the adversarial system. Moreover, these experts' responses indicate that there really is an interaction occurring, and that experts are not simply passive and neutral agents acted upon by attorneys. Further, opposing counsel and expert are by no means the only actors in these situations. On several occasions, as we have indicated, one's own counsel and the judge are active agents, either making direct inquiry to the expert or curbing one another.

### Conclusions

The interactions presented above indicate some of the strategies used by attorneys and experts in courtroom cross-examination. The challenge to, and preservation of, certain roles and role behaviors involves scholars and attorneys in a delicate series of interaction sequences. The challenges to experts' testimony, often to their person and their roles, are set within the normative structure of courtroom adversariness. In many cases it is difficult for experts experiencing such challenges to present the kinds of testimony they wish to present, in the manner in which they wish to present it. It certainly is difficult for scholars to exercise the same control over their presentations in court as they do in the classroom or in publications.

The adversarial structure of courtroom litigation is reflected in an

underlying contest between plaintiff and defense parties. As plaintiff and defense attorneys try to present and interpret social reality in ways that make the best case for their side, experts appearing on behalf of those parties are inevitably drawn into the adversarial contest. Then the contest for experts' resources, and for interpretations of their offerings, involves them directly. Cross examination procedures represent the clearest, but by no means sole, example of the dilemmas faced by social scientists in the adversarial arena of the courtroom.

## FOOTNOTES

1. We have edited the court transcripts in order to guarantee anonymity to lawyers and scholars involved, at least insofar as possible, and to shorten some examples.

2. Our examples of "strategies" reflect inferences we make from observations of an interaction. We can not seriously imply or impute deliberate intent to any specific attorney or scholar in this regard. To a considerable extent, however, the general inferences we make about lawyers' and experts' strategies in cross-examination are supported by the interviews.

3. This lawyer is asking for a witness who will not use too many hedges, will not hesitate over every conclusion and will be assertive in presenting testimony. O'Barr (1982) defines this as "powerful" speech, and presents data to suggest that experimental jurors rate such witnesses higher than witnesses using "powerless" speech on dimensions of trustworthiness, convincingness, and truthfulness.

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