



# Appendix E

---

## Use and Cross-Examination of Expert Witness

---

## USE OF EXPERT WITNESS

- I. **Prosecution Experts — Who to Use**
  - A. No expert required unless material is incredibly bizarre. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49/56 N.6 (1973).
  - B. Contemporary Community Standards (CCS).
    1. Prurient Interest — use psychologist, therapist, university instructor.
    2. Patent Offensiveness — poll, community activist, individual who has shown magazine to many people to determine if they find it patently offensive under CCS.
  - C. Serious literary, artistic, political, or scientific value (LAPS) — english teacher, professor, art teacher, political scientist, educator or education teacher.
- II. **Defense Experts — Who and What to Expect**
  - A. Their witnesses will always have pro-defense bias; never impartial; some are virtually professional porno-defense witnesses. As a general rule, do not expect to get them to change their positions or admit to yours. Instead, try to bring out the absurdity of their positions. Make them admit to views that are as far from the average person as possible.
  - B. Contemporary Community Standards (CCS).
    1. Prurient Interest — same professions as prosecution will use. Will say it doesn't appeal to prurient interest because average person doesn't have one. Remember: test doesn't require that material appeal to prurient interest of average person, just that its appeal be to a prurient interest. E.g., material can be so deviant that the average person would be repelled, yet still be obscene. See: *Mishkin v. New York*, 383 U.S. 502 (1966).
    2. Patent Offensiveness — poll usually.

- 
- C. Serious literary, artistic, political, or scientific value (LAPS) — same type of people as prosecution uses; also sex therapist.
    - 1. Will say it has scientific value because it shows what people actually do; or
    - 2. Has scientific or educational value because it can be used in sex therapy to cure sex problems.

## CROSS EXAMINATION OF DEFENSE EXPERT

### III. All Defense Experts

#### A. Bias —

- 1. How much money being paid to testify?
- 2. Paid before or *after* testifying? Always gets paid after?
- 3. How many times has expert testified for the defense?
- 4. Ever refused to testify?
- 5. How often for prosecution?

B. Will talk too much. Will move further and further from common sense of jury. Difficult to get them to agree with you on cross; just let them talk. Make your point by the wording and way you ask your questions.

C. If expert is from out of town or state, develop the fact that there are dozens of qualified local experts who could have been called? (They called him or her because the "fix" is in.)

### IV. Patent Offensiveness — Under *CCS*

A. What if anything would material have to show to offend the *CCS*? (probably say child porn)

---

<sup>1</sup> Remember that a "standard" is what people strive for, what you attempt to live up to; E.g., you want your children to live up to certain standards. It is not the lowest common denominator. A *CCS* is what the community strives to achieve.

- 
1. Go one by one through sexual depictions that are shocking to see if he or she believes they violate the CCS.
    - a. E.g. — anal intercourse, S&M, oral sodomy, bestiality, sex with dead people, violence, bondage, snuff films, child porn, torture and urination sex.
    - b. If expert says none of these violate CCS, "Then your testimony is that everything named is acceptable, under the community's standards?" (All pornography is legalized?)
    - c. If expert says certain things do violate CCS, ask to compare it to material in instant case.
    - d. Ask incredulously that *nothing* short of this would violate the CCS.
  
  2. If a citizen testifies that material does not violate CCS make him or her get specific:
    - a. How many people did he or she talk to?
    - b. Where do these people live?
    - c. Go through different subdivisions of county or city.
    - d. Ages — what did percentage over **35** say, etc.
    - e. Race or sex — percentage of blacks, hispanics, etc.
    - f. Ask whether specific age group, or area, or section, or race would find that it violated CCS.  
  
Compare age, race, sex, education, socioeconomic status, etc., breakdown with actual percentage in the community.
    - h. Ask for names of respondents.
    - i. Didn't witness show the actual material to people he or she talked to?

- 
- j. Get witness to say there is no one standard, but many. (Witness should then be disqualified; the law requires one standard.)
  - k. "Did not conduct a survey using any scientific or statistical methodology did you?"
3. Poll (See Appendix F for methodology questions).
    - a. Show item to respondent? (No)
    - b. Didn't attorney let you or tell you to?
    - c. Attorney didn't bother to ask you to show item to respondent?
    - d. You didn't ask whether this specific item was patently offensive to respondent?
  4. When was last time you observed someone reading this magazine?
  5. Besides at Defendant's establishment, ever seen specific item for sale or rent anywhere else?
  6. Recognize that a substantial number of people in this community would find the material highly offensive?
  7. Would majority of people, 51%, wish to see these materials openly sold or rented?
    - a. Ask if expert has seen them in grocery and drug stores, dentists' office, anywhere people go?
    - b. Isn't the reason it's not there is because people would be highly offended by it?
    - c. Except associated with this trial, have you ever seen anybody view it or read it?
  8. If expert is from out-of-town stress that. Later argue that someone who spent three days in community cannot tell you what your CCS is? Many of you (jury) have lived here your entire lives. Expert is asking you to ignore that.

- 
9. Aren't there *local* or *in-state* experts on this subject? (but the porn industry regular from out of state was called in?)
  10. Ask expert if he or she disagrees with laws against obscenity?
  11. Ask expert to tell you the names of any item for sale in community that are more sexually explicit than item at issue?
    - a. Where did you see it?
    - b. Aware that that establishment is about to be indicted?
  12. Bring out that the magazine or video was published or made in Los Angeles, or New York, New York. Argue that it's more suitable to their CCS.
  13. In a magazine trial — outline stories. Ask if expert read stories? How long? Give expert names of chapters and ask him or her questions about them. Test his or her knowledge. Ask: "as an expert tell us what this story is about?" Often not familiar with them.
  14. Ask expert to read a portion of the magazine. Ask expert, isn't it true that most people would find this shameful and degrading, or offensive?
  15. Ask expert if he *or* she personally uses pornography.
    - a. Recommend to friends or family or clients?
  16. Ask expert to recognize that many others in community have opinions different from his or hers?
    - a. Substantial number would find magazine highly repugnant?
    - b. In his or her opinion would prevailing portion of community read magazine in mixed company?
  17. If material deals with deviant sex, ask isn't it true that most people in community disapprove of that kind of activity?

- 
18. Isn't it true that most people wouldn't voluntarily look at it? (E.g., homo, bestiality, S&M, bondage)
    - a. If you went down the street or door to door and just showed it to people wouldn't they take offense? (If expert says no, this shows he or she is not credible.)
  19. If it is deviant material, "isn't it true doctor that homosexuality, bondage, bestiality, S&M are deviant sexual practices?"
    - a. Those persons who engage in it, if any, would be interested in this material?
    - b. Homosexual population is 10% or less; bondage and S&M is a smaller percentage?
    - c. These items cater to a statistically small percentage of the community.
    - d. The majority of the community would be highly offended by this, right?

**V. Prurient Interest Under CCS, Scientific Value, Educational Value — Cross Examination**

**A. Questions**

1. Did you *show* material to anybody to see if it appealed to their prurient interest?
2. If expert testifies that 1970 Presidential Commission stated that pornography helped people and should be legalized ask:
  - a. Are you aware that U.S. Senate voted 65-5 to reject Commission Report?
  - b. Are you aware of Hill-Link minority report that linked pornography to antisocial behavior?
  - c. Aware that U.S. Supreme Court in *Paris Adult Theatre I v. Slaton*, adopted and cited Hill-Link as partial authority for its holding? See 413 U.S. at 58 and 59 n.8.

- 
- d. Aware that Congress and virtually every state legislature has followed the minority report by adopting laws against obscene material?
  - e. Aware that not a single state has adopted commission's recommendations to decriminalize obscenity?; nor has federal government?
  - f. Isn't it true that Commission findings were so flawed that a new Commission was recently empaneled to completely restudy problem?
  - g. The new Commission found cause and effect relationship with much porn and anti-social behavior?
  - h. Didn't both commissions find that the largest group of consumers of porn were children (under 18)?
3. **Ask** expert to read a portion or view a portion of video tape?
    - a. What scientific value does this have? (Go through different scenes; e.g. rape, violence, bondage)
    - b. Isn't it true that the average person finds this stuff morbid and degrading? Offensive?
  4. If a person watched it 50 times, once a day, and masturbated each time, would he have an unhealthy interest in the movie? No? How many 75 or **25**? (pin expert down)
  5. You would agree that the facts of this case do not involve the educational or medical use of these materials?
  6. If expert states it has scientific value because it shows something that occurs or exists, ask:
    - a. Would movie showing bestiality or child sodomy have scientific value and therefore not be obscene?

- 
- b. Snuff films, torture?
  - c. Film of anything that actually exists would automatically have scientific value?
7. Isn't it true these films were produced to arouse people sexually?
- a. No *scientific* purpose was intended by the seller or the producer?
  - b. It was sold in a pornographic bookstore not a scientific lab or hospital?
8. If expert states they have scientific value because they are educational about human anatomy and human sexual activity, ask:
- a. Isn't it true there are other sources of information about human anatomy and human sexual activity, the purpose of which is to educate people?
  - b. E.g., aren't there marriage manuals that have this purpose?
9. Isn't it true that people are influenced by what they see? (modeling and imitative learning)
- a. E.g., isn't it true that ABC charges \$250,000 for 30 second commercials because they can influence the behavior of 50 million viewers?
  - b. Many things people see and read profoundly influence their behavior? ("The Burning Bed," "Das Capital")
  - c. Isn't it true that some persons who look at violent movies go out and engage in violent activity?
  - d. Isn't it true that some persons who see sexually violent porno go out and engage in violent rape?
  - e. Isn't it true that some persons who see porno are influenced to go out and engage in the behavior they have seen? (E.g., S&M, bestiality, bondage)

- 
- f. Especially young, impressionable people?
  - g. Isn't it true that this film gives the viewer the message that these sex acts are OK to do? (E.g., S&M)
  - h. Isn't it true that young people learn through "modeling" and "imitative behavior?"
10. Have expert read text or view scene of homosexual conduct or S&M, etc.
- a. Do you encourage people to engage in that kind of activity?
  - b. Isn't it true that most people disapprove of that kind of activity?
  - c. Wouldn't most people say that it is shameful to look at this kind of material? (E.g., women masturbating penis)
  - d. Do you recommend or prescribe this type of practice?
  - e. With the AIDS epidemic isn't this unhealthy sex?
11. If expert says it has serious educational value because people can learn things from it, such as sex techniques **ask**
- a. Do films or magazines that teach us something have serious educational value?
  - b. So according to your view training films shown to Nazi concentration camp guards on how to properly exterminate Jews would have serious educational value?
  - c. How to seduce children? Child porn? Bestiality?
  - d. What does this teach children?

- 
12. What, if anything, would something have to show to appeal to a prurient interest in sex?
- a. Go one by one through shocking depictions to see if, under his or her view, it would appeal to a shameful, morbid, degrading, or unhealthy interest in sex. E.g., isn't an interest in watching a woman have sex with a pig a shameful or degrading interest? A healthy interest? A prurient interest? Sexual torture? S&M? Bondage? Anal sex? etc.
  - b. If expert states it is not a prurient interest (unhealthy, morbid, etc.), then you have shown his or her testimony to be not credible. "you are telling the jury that an interest in watching a man ram a riding-crop up a woman's anus is not a shameful or morbid interest in sex"?