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Book Review: Testifying in Court, by Jack E. Horsley and John Carloca

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Testifying in Court, by Jack E. Horsley, with John Carlova (Oradell, N.J.: Medical Economics Books, 1983), 142 pp., \$24.95.

REVIEWED BY
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Few professional situations fill health care providers with as much fear and anxiety as the spectre of testifying in court. With the exception of the professional witness whose sole practice consists of litigation-referral examinations and related court appearances, and the few truly courtroom-comfortable¹ forensic experts who seem to gravitate regularly to sensational and/or provocative and/or precedent-setting cases,² most doctors (and other mental health professionals as well) approach courtroom appearances the way, well, the way many of the rest of us approach a visit to the doctor's: with free-floating terror.³

Thus, a book such as *Testifying in Court* by Jack Horsley and John Carlova will likely be welcomed by these same terrified doctors who will devour its contents in a frenetic search for a key which will adequately demystify the court process. Although this is clearly the target audience for this book, it is not clear that the work will, in the long run, fill this need. While the volume provides a more than satisfactory overview of the trial process for the occasional medical witness (or the one-time defendant), I am not convinced that the previously terrified reader will have reduced his or her terror level upon completion.

Perhaps my ambivalence about the volume is caused by three factors: (1) the ultra-folksy, down-home style in which it is written; (2) the lack of specific application (in fact, in some instances, the irrelevancy of the work) to the special problems facing psychologists and psychiatrists;⁴ and (3) its lack of usefulness for a reader who has already spent some serious time thinking about the central issue and is now looking for a more in-depth approach.⁵

In short, the book is fine as a brief (131 pages of wide-margined, nonfootnoted, and nonreferenced text), generalist overview of problems facing the expert witness. On the other hand, it's probably a decent assumption that the health care professional who is sufficiently sophisticated to read *this* journal's recommendations as to outside reading has already spent a significant amount of time working through the problems covered in the volume; for such a reader, there simply will not be much of substance.

Horsley has been a trial lawyer for over 40 years and is a former director of the Society of Trial Lawyers, and past president of the Illinois Defense Counsel Association; Carlova is an author/editor who writes frequently for the public press (e.g., *Reader's Digest*, *Cosmopolitan*), and has collaborated with Horsley in the past on *Your Family and the Law*, another book aimed directly at physicians. The writing style is precisely what one would expect from these backgrounds: succinct, anecdotal, free of jargon, mildly epigrammatic, and, again, a bit too folksy at times. (I kept seeing Jimmy Stewart in a black-and-white movie from the early forties, standing at counsel table and saying, "Well Judge, I'll have to object to that; that just wasn't a proper question.") There's nothing wrong with any of this in the abstract, of course, but it sometimes tends to give a "Dr. Welby Knows Best" tinge to the volume that detracts somewhat from its contemporaneous value.

The word "contemporaneous" was chosen carefully. Very little of the book reflects the broad range of new concerns that has arisen in the past two decades: the role of the doctor testifying in institutional class actions or mass tort suits; the increasing number of cases in which courts allow new tort actions arising from medical encounters (e.g., wrongful birth);⁶ use of screening panels to divert malpractice trials from court;⁷ applicability of the Civil Rights Act⁸ to malpractice allegations when the doctor acts "under color of

state law”;⁹ death of the “locality rule”;¹⁰ changing concepts in informed consent;¹¹ impact of cases such as *Darling v. Charleston Community Memorial Hospital*¹² on trial strategy; the impact of changes in antitrust law on the economic regulation of health care providers;¹³ etc.¹⁴ Also, the constant use of the pronoun “he” throughout the book probably isn’t inadvertent; it’s probably an accurate reflection of the prevalent picture observed by Horsley over the years in which few women served as trial counsel and perhaps even *fewer* were called as expert witnesses.

Once these pitfalls are dealt with, however, the book does contain many helpful preparation hints, especially to the one-time witness (or the one-time defendant). It suggests, *e.g.*, that planning strategy with a trial lawyer is not only ethical, “it’s a moral necessity” (p. 19), and that the witness personally “check out the lawyer” to determine if he’s adequately preparing to rebut the adversary’s allegations and if he’s “including you sufficiently in the preparation of the case” (pp. 24–25); it gives some helpful hints about behavior at depositions, about figuring witness fees, about jury selection (the authors strongly endorse an active role for defendant-doctors in this phase of the trial process), about the importance of demeanor and style (both at counsel table and on the witness stand), and about how to handle “booby-trapped” cross-examination.

Again, most of these suggestions make sense, both standing alone and in relationship to each other, especially those recommending the use of visual and demonstrative exhibits, graphs and charts, and those which focus on the need of the witness to be alert to the mood of the judge and the jury. Yet, the whole is somewhat *less* than its component parts, perhaps because of the book’s failure to synthesize recent developments in law and medicine (and in the social patterns of who become lawyers and doctors), and analyze how the general rule of court behavior might be altered in light of

10. See, *e.g.*, Note, "Psychiatric Negligence," 23 *Drake L. Rev.* 640 (1974) (rule in its "death throes").
11. See, *e.g.*, *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1972).
12. 211 N.E.2d 253 (Ill. Sup. Ct. 1965), *cert. denied*, 383 U.S. 946 (1966) (evidence of state and national hospital regulations admissible in negligence action against hospital). Note that author Horsley represented defendant in the *Darling* case.
13. See, *e.g.*, *Blue Shield of Virginia v. McCready*, 102 S. Ct. 2540 (1982); see generally, Perlin, "The Supreme Court and Economic Regulation of Mental Health Care: The 1982 Term," 3 *Directions in Psychiatry* lesson 6 (1983).
14. This list is, of course, incomplete. See, *e.g.*, Perlin, "The Legal Status of the Psychologist in the Courtroom," 4 *Ment. Dis. L. Rep.* 194, 195 (1980): "Psychologists now commonly testify as expert witnesses in civil commitment matters involving questions of retardation, acceptability of treatment involving behavior therapy and appropriateness of placements. They are also increasingly involved in such issues as employment discrimination, juvenile placements, accuracy in evaluation of eyewitness testimony, special education assignments, effects of bilingualism on children, post-sentencing dispositions, extent of neurological injury, community standards in obscenity prosecutions, trademark infringements and fraudulent advertising suits. Ever more importantly, perhaps, psychologists are beginning to testify in class actions involving such fundamental issues as right to education, right to habilitation and right to vote. [Footnotes omitted.]"