

California Department of Mental Health

Sexually Violent Predator Evaluations

An Introduction – A reintroduction

Ronald J. Mihordin, M.D., J.D., M.S.P.

Acting Clinical Director Evaluation Service

Sex Offender Commitment Program

Sacramento, California

September 7-9, 2011

Department of Mental Health

Sex Offender Commitment Program



Sacramento, California
September 9, 2011

Introduction to and Review of The Role of the Expert Witness



Ron Mihordin, M.D., J.D., MSP
Sex Offender Commitment Program

Eric Simon, Ph.D.
SVP Evaluator - San Luis Obispo



Scope of Presentation

- For mental health professionals.
- Not private practice oriented.
- Cognitive-Behavioral Therapy for the expert witness.
- Emphasis on process not content.
- Not a comprehensive review of the rules of evidence.



Scope of Presentation

- Statements of the law have been summarized and paraphrased in order to simplify and clarify.
- Most things in law and psychiatry are complex—with a host of exceptions and qualifying contexts. The price of simplification is some loss of technical accuracy.



Glossary

Trial Courts - The courts in which issues of fact and law are tried and first determined. (Witnesses appear and testify in trial courts.)

Appellate Courts - The courts that hear appeals from lower court decisions. (Appellate court decisions are case law.)



Glossary

Lay Witness - A witness not qualified by the trial court as an expert.

Expert Witness - A witness qualified by the trial court as an expert and permitted to testify in the form of opinions.

Trier of Fact - The trial judge or jury.



Glossary

Direct Examination – The first examination of a witness by the party calling the witness.

Cross-examination – The examination of a witness by an attorney other than the direct examiner upon a matter within the scope of the direct examination.
(*Examination by the opposing attorney .*)



The Functions of a Court Trial

The Traditional Views

The Ideal



The Functions of a Court Trial

- The trial as forum for fact finding and issue resolution.
- The courtroom as an arena for presentation of facts.
- An arena for issue resolution by application of the law.



The Functions of a Court Trial

- The adversarial process—a rational contest of alternate propositions.
- The courtroom as a lab where reality is dissected and legally categorized.



The Functions of a Court Trial

The Alternative Views

The Pragmatic



The Functions of a Court Trial

- A dog and pony show.
- A battle of words.
- A spin contest.
- A magic show.
- An infomercial.



Why are you in the courtroom?

- To assist the trier of fact in understanding issues beyond the realm of common experience.
- To provide technical expertise, special knowledge.
- As a reference source on technical aspects of psychiatry/psychology.



Why are you in the courtroom?

- To tutor the trier of fact in psychiatry/psychology.
- To charm and awe the trier of fact.
- To shock and awe the trier of fact.
- To neutralize opposing witnesses.



Why are you in the courtroom?

- To out-number/out-weight the opposing witnesses.



Why are you in the courtroom?

- To out-number/out-weight the opposing witnesses.
- As an evidence maker—the Ruppelstiltskin effect.



Why are you in the courtroom?

- To out-number/out-weight the opposing witnesses.
- As an evidence maker—the Rupelstiltskin effect.
- As a spokesperson for the attorney—the Charlie McCarthy effect.



What Roles Will You Play?

- Treating psychiatrist/psychologist.
- Forensic psychiatrist/psychologist.
- Treating/forensic hybrid witness.



What Roles Will You Play?

- Roles of circumstance?
- Roles ascribed by others?
- Self-ascribed roles?
- Will you be an **Awesome Wizard?**
- Will you be **Trusted Teacher?**



The Awesome Wizard

- Ivy League education.
- Multiple academic degrees.
- Multiple board certification.
- Academic appointments.
- Academic honors.



The Awesome Wizard

- Board/commission membership.
- Professional societies.
- Professional honors.
- Research.
- Multiple publications.
- Recognition in mass media.
- Radio/TV appearances.



The Awesome Wizard

- Celebrity clients.
- High profile cases.
- Professional web site.
- Profession blog.
- *A Great Communicator.*
- Charisma.



The Trusted Teacher

- Has the requisite education.
- Has the requisite degree.
- Has the requisite license.
- Knows the facts of the case.
- Knows the applicable law.
- Communicates effectively.
- Appears (is) trustworthy.



Remember

- You don't have to be an awesome wizard to be an expert witness.
- You can choose your role.
- You can reject ascribed roles.
- You can write the script.



The Rules of the Game

The California Evidence Code

- Witness competency—General rule
(Evidence Code § 700)
- Disqualification of witness
(Evidence Code § 701)
- Personal knowledge of witness
(Evidence Code § 702)
- Lay witnesses; opinion testimony
(Evidence Code § 800)



The Rules of the Game

The California Evidence Code

Lay Witness (Synopsis)

- With exceptions, every one, irrespective of age, is qualified to be a witness and no one is disqualified to testify.
- Inability to express oneself so as to be understood is disqualifying.
- Inability to understand the duty to tell the truth is disqualifying.



The Rules of the Game

The California Evidence Code

Lay Witness (Synopsis)

- A lay witness may testify in the form of an opinion if such an opinion is permitted by law, including an opinion that is:
 - ✓ Based on the perception of the witness.
 - ✓ Helpful to understanding his testimony.



The Rules of the Game

The California Evidence Code

- **Qualification as an expert witness
(Evidence Code § 720)**
- **Cross-examination of expert witness
(Evidence Code § 721)**
- **Credibility of expert witness
(Evidence Code § 722)**
- **Expert witness; opinion testimony
(Evidence Code §§ 801- 805)**



The Rules of the Game

The California Evidence Code

Evidence Code § 720

Any one is qualified to testify as an expert if he has **special knowledge, skill, experience, training, or education** sufficient to qualify him as an expert on the subject to which his testimony relates.



The Rules of the Game

The California Evidence Code

Evidence Code § 721

The expert witness may be cross-examined as to:

- His or her qualifications.
- The subject of his or her testimony.
- Matters upon which the opinion is based.
- The reasons for his or her opinion.



The Rules of the Game

The California Evidence Code

Evidence Code § 721

An expert who gives an opinion may not be cross-examined in regard to a scientific text, journal, etc., unless:

- He referred to, considered or relied on it.
- It has been admitted in evidence.
- It has been established as an authority.



The Rules of the Game

The California Evidence Code

Evidence Code § 722

Compensation and expenses paid to an expert is a proper subject of cross-examination—is relevant to witness credibility and weight of his testimony.



The Rules of the Game

The California Evidence Code

Evidence Code § 801

Expert opinions are limited to those that are:

On a subject sufficiently beyond the common experience so that expert opinion would assist the trier of fact.



Evidence Code § 801

Expert opinions are limited to those that are **based on matter** (including special knowledge, training, etc.) that is:

- **Perceived by** the witness, or
- **Personally known** to witness, or
- **Made known** to witness, **whether admissible or not**, and that may be **reasonably relied upon by an expert** forming an opinion upon the subject.



The Rules of the Game

The California Evidence Code

- Statement of basis of opinion
(Evidence Code § 802)

On direct examination a witness may state the reasons for his opinion and the matter (including training, skill, special knowledge, etc.) upon which it is based.



The Rules of the Game

The California Evidence Code

Evidence Code § 802

The expert opinion may be based on:

- Direct observations.
- Facts assumed in a hypothetical question.
- Facts, opinions, and information from secondary sources deemed by the court to be reasonably reliable.



The Rules of the Game

The California Evidence Code

Evidence Code § 805

Opinion testimony may embrace the ultimate issue to be decided by the trier of fact.



The Rules of the Game

“Substantial Evidence”

The opinion of a qualified expert may be based on information that is itself inadmissible hearsay **if the information is reliable and of the type reasonably relied upon by experts on the subject.**

P. v. Gardeley (1996)
cited in *P. v. Dodd* (2005)



The Rules of the Game

“Substantial Evidence”

*The law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, **the expert's opinion is no better than the facts on which it is based.***

*P. v. Gardeley (1996)
cited in P. v. Dodd (2005)*



The Rules of the Game

- *Frye v. United States* (1923) and *People v. Kelly* (1976).
- Kelly-Frye Standard—**General acceptance in the scientific community.**
- *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993).
- The *Daubert* trilogy—*Daubert*, *General Electric Co. v. Joiner* (1997), and *Kumho Tire Co. v. Carmichael* (1999).



The Rules of the Game

- *People v. Leahy (1994)* – Post-Daubert, the Kelly-Frye test was retained in California.
- Kelly-Frye only applies to “**new scientific techniques.**”
- *People v. Stoll (1989)* and *People v. Ward (1999)* – Expert psychological or psychiatric testimony is **not scientific evidence subject to Kelly-Frye.**



The Rules of the Game

“Reasonable medical certainty?”

- A legal term searching for a meaning.
- No definition in case law.
- No appellate court consensus nationally.
- No appellate court definition in California.
- How-to books for medical experts: “More likely than not”—“51% or greater.”



The Rules of the Game

“Reasonable medical certainty?”

Although judges expect, and sometimes insist, that the expert opinions be expressed with “reasonable medical certainty,” and though attorneys ritualistically intone the phrase, no one knows what it means!

Lewin, J. L. (1998)



The Rules of the Game

“Reasonable medical certainty?”

No consensus exists among judges, attorneys, or academic commentators as to whether “reasonable medical certainty” means “more probable than not” or “beyond a reasonable doubt” or something in between.

Lewin, J. L. (1998)



What to do in Court

The Short List

- Don't try to be a lawyer.
- Know the facts of the case.
- Know the legal definitions that relate to the case.
- Know what you know and how you know it.
- Know who you are and who you're not.
- Talk straight.
- Be calm, cool, and professional.



What to do in Court

The MH Consensus

Some Ethical Principles



Ethical Principles

Honesty and Objectivity

*Forensic psychiatrists should adhere to the principle of **honesty** and should strive for **objectivity**. Although they may be retained by one part to a civil or criminal matter, psychiatrists should adhere to these principles when conducting evaluations, applying clinical data to legal criteria, and expressing opinions.*

AAPL (2005)



Ethical Principles

Honesty and Objectivity

*Forensic psychiatrists enhance the honesty and objectivity of their work by basing their forensic opinions, forensic reports and forensic testimony on **all available data**.*

*They communicate the honesty and objectivity of their work, and the soundness of their clinical opinion, by **distinguishing between** verified and unverified information as well as among clinical **“facts,” “inferences,”** and **“impressions.”***

AAPL (2005)



Ethical Principles

1.01 Integrity

*Forensic practitioners strive for accuracy, honesty, and truthfulness in the science, teaching, and practice of forensic psychology and they strive to **resist** partisan **pressures** to **provide services in any ways that might tend to be misleading or inaccurate.***

*Specialty Guidelines for Forensic Psychology,
APA Council of Representatives,
Adopted August 3, 2011*



Ethical Principles

1.02 Impartiality and Fairness

*Forensic practitioners recognize the adversarial nature of the legal system and strive to **treat all participants and weigh all data, opinions, and rival hypotheses impartially.***

*When conducting forensic examinations, forensic practitioners strive to be **unbiased and impartial, and avoid partisan presentation of unrepresentative, incomplete, or inaccurate evidence that might mislead finders of fact.***

*Specialty Guidelines for Forensic Psychology,
APA Council of Representatives (2011)*

Ethical Principles

10.01 Focus on Legally Relevant Factors

Forensic examiners seek to **assist the trier of fact** to understand evidence or determine a fact in issue, and they **provide information** that is most **relevant to the psycholegal issue**. In reports and testimony forensic practitioners typically provide information about examinees' functional abilities, capacities, knowledge, and beliefs, and **address their opinions and recommendations to the identified psycholegal issues**.

Specialty Guidelines for Forensic Psychology,
APA Council of Representatives,
Adopted August 3, 2011

Ethical Principles

11.01 Accuracy, Fairness, and Avoidance of Deception

Forensic practitioners make reasonable efforts to ensure that the products of their services, as well as their own public statements and professional **reports and testimony**, are communicated in ways that **promote understanding** and **avoid deception**.

Specialty Guidelines for Forensic Psychology,
APA Council of Representatives,
Adopted August 3, 2011

Ethical Principles

11.01 Accuracy, Fairness, and Avoidance of Deception

When providing reports and other sworn statements or testimony in any form, forensic practitioners strive to present their conclusions, evidence, opinions, or other professional products in a fair manner. **Forensic practitioners do not, by either commission or omission, participate in misrepresentation of their evidence . . .**

Specialty Guidelines for Forensic Psychology,
APA Council of Representatives,
Adopted August 3, 2011



Ethical Principles Qualifications

Expertise in the practice of forensic psychiatry should be claimed only in areas of actual knowledge, skills, training, and experience.

AAPL (2005)



Ethical Principles

2.03 Representing Competencies

Forensic practitioners adequately and accurately inform all recipients of their services (e.g., attorneys, tribunals) about relevant aspects of the nature and extent of their experience, training, credentials, and qualifications, and how they were obtained

Specialty Guidelines for Forensic Psychology,
APA Council of Representatives,
Adopted August 3, 2011



Ethical Principles

Role Conflict

*The forensic evaluation and the credibility of the practitioner may be undermined by **inherent conflicts** in the differing clinical and forensic roles. Treating psychiatrists should generally avoid acting as an expert witness for their patients or performing evaluations of their patients for legal purposes.*

AAPL (2005)



Ethical Principles

Role Conflict

Psychiatrists who take on a forensic role for patients they are treating may adversely affect the therapeutic relationship.

*When requirements of geography or related constraints dictate the conduct of a forensic evaluation by the treating psychiatrist, the dual role may be unavoidable; otherwise, **referral to another evaluator is preferable.***

AAPL (2005)



Ethical Principles

4.02.01 Therapeutic-Forensic Role Conflicts

Providing forensic and therapeutic psychological services to the same individual or closely related individuals involves multiple relationships that may impair objectivity and/or cause exploitation or other harm.

Specialty Guidelines for Forensic Psychology,
APA Council of Representatives,
Adopted August 3, 2011



What to do in Court

- Without credibility, your facts, your analysis, your conclusions, no matter how clearly expressed, will lose their effectiveness.
- Like in the game of Monopoly, as a mental health professional, you start with a certain amount of credibility when you take the witness stand.
- Credibility is yours to lose.



What to do in Court

Maintain and enhance credibility by:

- Telling the truth - even when it hurts.
- Knowing the facts of the case.
- Respecting the facts of the case.
- Nonpartisan objectivity and fairness.
- Being confident - when warranted.
- Saying, “I don’t know.” - when warranted.
- Being a *mensch*.



What to do in Court

Lose credibility by:

- Not being truthful.
- Not knowing the facts of the case.
- Not respecting the facts of the case.
- Showing bias and partisanship.
- Not being confident—when warranted.
- Being a know-it-all.
- Showboating.
- Being fluffy, huffy, or stuffy.



What to do in Court

The MH Consensus

Preparation and Performance



What to do in Court Preparation

- Review the facts of the case.
 - ✓ Your copies of the documents.
 - ✓ Your original notes.
 - ✓ Your report.
- Review the subject(s) of the case.
 - ✓ The disorder(s) (texts, DSM-IV-TR).
 - ✓ The treatment (drugs, PDR).
- Review relevant legal definitions.



What to do in Court Preparation

- Organize and tab your materials.
- Organize and tab your thoughts.
 - ✓ What are the legal issues?
 - ✓ What are the clinical issues?
 - ✓ Which facts are relevant?
 - ✓ Gaps in your data base?
 - ✓ Weaknesses in your analysis?



What to do in Court Preparation

- Organize and tab your thoughts.
 - ✓ Weaknesses in your conclusions?
 - ✓ Alternate reasonable formulations?
 - ✓ Foreseeable cross-examination Qs?
 - ✓ How will you respond?
 - ✓ What is “The Story?”
 - ✓ How are you going to tell it?



What to do in Court Preparation

- How to tell the story.
 - ✓ Chronologically?
 - ✓ Around key points?
 - ✓ C-B-C order:

Conclusion



Background



Conclusion



What to do in Court Preparation

- Rehearse your performance.
- A pre-trial conference with the attorney.
 - ✓ Insist on it.
 - ✓ Don't go to court without it.
- Ask the attorney:
 - ✓ What she is going to ask you.
 - ✓ What she expects you to say.



What to do in Court Preparation

- Ask the attorney:
 - ✓ What previous witnesses have said.
 - ✓ About foreseeable cross-examination.
- Tell the attorney:
 - ✓ About skeletons in your closet.
 - ✓ What you plan to or can say.
 - ✓ What you don't plan to or can't say.



What to do in Court Preparation

- Tell the attorney:
 - ✓ About the weaknesses in your testimony.
 - ✓ About the clinical complexities.
 - ✓ What questions to ask you.
 - ✓ How to ask you those questions.



What to do in Court Preparation

- Restructure your presentation plan, if indicated.
- Immerse yourself in the case.
- Clear your mind—clear your calendar.
 - ✓ Get some rest—sleep.
 - ✓ Don't schedule distractions.
 - ✓ Plan to be early and to stay late.



What to do in Court Performance

- As you get close to the courthouse and the courtroom, remember **you are being watched.**
 - ✓ The person you cut off in the parking lot may be a juror.
 - ✓ The fellow who hears your politically charged joke in the elevator may be your cross-examiner.



What to do in Court Performance

- Stay out of the courtroom until you are called to the witness stand.
- Turn off your cellular phone/beeper.
- After being sworn in:
 - ✓ Be seated.
 - ✓ Lay out your documents.
 - ✓ Lay out your supplies.
 - ✓ Adjust the microphone.



What to do in Court Performance

- If asked to give your qualifications:
 - ✓ Do so concisely not exhaustively.
 - ✓ Inform—don't sedate.
- Before responding to any question:
 - ✓ **Understand the question.**
 - ✓ Pause to think.
 - ✓ Pause for objections.



What to do in Court Performance

- Answer the questions you are asked.
- Don't give answers to questions not asked.
- If you think your answer would be clearer if you could say more than the question required, say that, and **ask for permission** to do so.



What to do in Court Performance

- Answer the direct examiner's questions.
 - ✓ Short answers when possible.
 - ✓ Narrative when requested.
 - Talk like you write?
 - A travelogue format.
 - Organize, organize, organize.
 - Economize, economize, economize.



What to do in Court Performance

- Answer the cross-examiner's questions.
 - ✓ The less said, the better.
 - ✓ "Yes" or "no" when possible.
 - ✓ Short answers when necessary.
- Do not challenge the inherent premises when answering hypothetical questions.



What to do in Court Performance

- When you can't answer a question because you don't understand it, say that.
- When you can't answer a question because it is outside your area of special knowledge, training or experience, say that.
- When your testimony is challenged on cross-examination, **embrace the challenge** as an opportunity to further clarify your point.
- **Restate, explain, clarify—don't defend.**



What to do in Court

Some No Brainer Qs and As

Q: Can your opinion be in error?

A: Yes.

Q: Isn't it possible that you were deceived by the patient?

A: Yes.

Q: Before testifying did you discuss the case with the attorney?

A: Yes.



What to do in Court

Some No Brainer Qs and As

Q: Psychology isn't a precise science like chemistry or physics, is it?

A: No.

- When the question contains the words *always* or *never*, the answer is "No."
- When the question starts with the phrase, "isn't it possible," the answer is "Yes."
- "I don't know," is always the right answer if it's true.



What to do in Court Performance

- If you are confronted with a relevant error or misstatement in your report or testimony:
 - ✓ Don't fight reality.
 - ✓ Acknowledge the error.
 - ✓ Decide if the error calls for a new opinion.
 - If yes, revise your opinion accordingly.
 - If not, say that and explain.



What to do in Court Performance

If you are ambushed with questions about earlier statements you made in writings, reports, publications, or testimony in other courts or other contexts, don't answer until you have had an opportunity to refresh your memory by reviewing a trustworthy copy of the statement and the full context in which the statement was made.



What to do in Court Performance

Experts must not advocate. To be effective, experts must merely answer questions directly, and admit the obvious, no matter where it may lead . . . The expert should simply understand that it's the lawyer's job to argue the case, and the expert's to remain objective.

Berg, D. (2005)



What to do in Court Performance

Each witness chair comes equipped with a stabilizer control. It is a control easily within the reach of every expert—the lever marked “truth.”

Baker, T. O. (1983)



What to do in Court Performance - Language

- You're not communicating unless the hearer understands your words.
- **Don't underestimate** the trier of fact's intelligence.
- **Don't overestimate** the trier of fact's experience, background, or knowledge.
- Use respectful everyday words instead of technical terms when possible, or
- Explain technical terms simply—in a way that doesn't put off the trier of fact.



What to do in Court

Problem Language for Legal Experts

- “delusional ideation”
- “affect”
- “neologisms”
- “looseness of associations”
- “flight of ideas”
- “blocking”
- “lability”

Petrella and Poythress (1983)



What to do in Court

Problem Language for Legal Experts

- “non-specific, unsystematized paranoid ideation”
- “oriented to time, place, and person”
- “tangentiality”
- “flat affect”
- “grandiosity”

Petrella and Poythress (1983)



What to do in Court Performance - Language

- Analogies are the “Great Communicators.”
- Analogies don’t prove propositions.
- Analogies do “bring points home.”
- But, don’t be an analogy spendthrift.
- Save them for key points and complex issues.
- Analogies can give life to brain-numbing technical and numerical data.



What to do in Court

The Facts and Figures:

- The first hard drive (RAMAC), delivered on September 13, 1956, weighed 2,140 lbs. and stored 5 megabytes of data.
- Today, a video ipod weighs 5.5 ounces and holds up to 60 gigabytes.
- In 1956, the RAMAC cost \$50,000, or \$10,000 per megabyte.
- Today, a gigabyte of storage on a 3.5 inch hard drive can cost less than 50 cents.



What to do in Court

The Analogy:

A car in 1956 cost about \$2,500, could hold five people, weighed a ton, and could go as fast as 100 mph. If the auto industry had kept the same pace as disk drives, a car today would cost less than \$25, hold 160,000 people, weigh half a pound and travel up to 940 mph.

D. Fost, San Francisco Chronicle



What to do in Court Performance - Costume

- Dress like the typical professionals (lawyers, doctors, local TV news anchors) in the community dress for work.
- Dress to blend in not to stand out.
- Eye-catching jewelry is out.
- Dress comfortably.
- Dressing for court is not a science.



What to do in Court

Performance-Demeanor

- Make eye contact:
 - ✓ With the questioner.
 - ✓ With the trier of fact.
 - ✓ As directed.
 - ✓ With the questioner – short answers.
 - ✓ Initially briefly with the questioner then shift to jurors – longer answers.
 - ✓ With all the jurors, in turn –don't stare.



What to do in Court

Performance-Demeanor

- Humor:
 - ✓ Is for comedians not witnesses.
 - ✓ Can backfire in court.
 - ✓ Feel free to join the crowd and laugh.
 - ✓ Laughing and smiling are OK.
 - ✓ Smirking is not OK.



What to do in Court Performance-Demeanor

- Don't head-butt an attorney.
 - ✓ There is no rational reason for an expert witness to display anger in the court room.
 - ✓ Witnesses don't win verbal fights with cross-examiners—except in movies.
 - ✓ Displaying anger, frustration, or impatience is a sure way to lose credibility.



What to do in Court

Performance-Demeanor

Do Be:

- ✓ Objective
- ✓ Personable
- ✓ Courteous
- ✓ Humble
- ✓ Helpful
- ✓ Educational
- ✓ Credible
- ✓ Clear
- ✓ Consistent
- ✓ Straight forward
- ✓ Cooperative
- ✓ Responsive
- ✓ Honest
- ✓ Expert



What to do in Court

Performance-Demeanor

Don't Be:

- ✓ Arrogant
- ✓ Defensive
- ✓ Combative
- ✓ Uncertain
- ✓ Nitpicky
- ✓ Overzealous
- ✓ Inappropriate
- ✓ Confusing
- ✓ Slick
- ✓ Condescending
- ✓ Hostile
- ✓ Inconsistent
- ✓ Robotic
- ✓ Emotional
- ✓ Angry
- ✓ Unintelligible



What to do in Court

Performance-Demeanor

Ideally, the demeanor of an expert witness will convey the impression that he or she is highly engaged, interested in the legal and clinical issues of the case but indifferent to which party prevails.



What to do in Court Performance After Testifying

- When excused, ask for clarification as to whether you may be recalled or are free to leave the area.
- Say, “Thank you.”
- Leave the courtroom.



What Judges Think

Probative Value of Expert Testimony

The Rating Scale

- 7 to 9 – Element/item **essential** to dispensing justice. Trier-of-fact would be seriously hampered if the element/item not included.
- 4 to 6 – Element/item **desirable** for inclusion in expert testimony. Could do with out it, but inclusion perhaps allows for more fully informed decision.



What Judges Think

Probative Value of Expert Testimony

The Rating Scale

- 1 to 3 – Element/item unnecessary, uninformative, or **undesirable** as a feature of expert testimony.

N. Poythress (1981)

Mental Health Testimony Element	Judges' Probative Value Rating	
	Median Rating	Rank Order
Descriptive testimony.	7.83	1
Ultimate legal issue.	7.60	2
Interpreting the legal standard for mental disorder.	6.83	3
Theoretical accounts or explanations for legally relevant behavior.	6.00	4
Diagnosis.	5.83	5
Weighing of different motives or explanations for legally relevant behavior.	5.50	6
Statistical/actuarial data on diagnosis or clinical observations.	5.25	7
Statistical/actuarial data on the relationship between clinical and legally relevant behavior.	3.20	8

Closing Arguments Analysis

Definitions

BioNar: Historical/Biographical/Narrative – Including prisoner’s personal history, crime history, medical-psychological history and diagnosis, not including “actuarial” risk assessment.

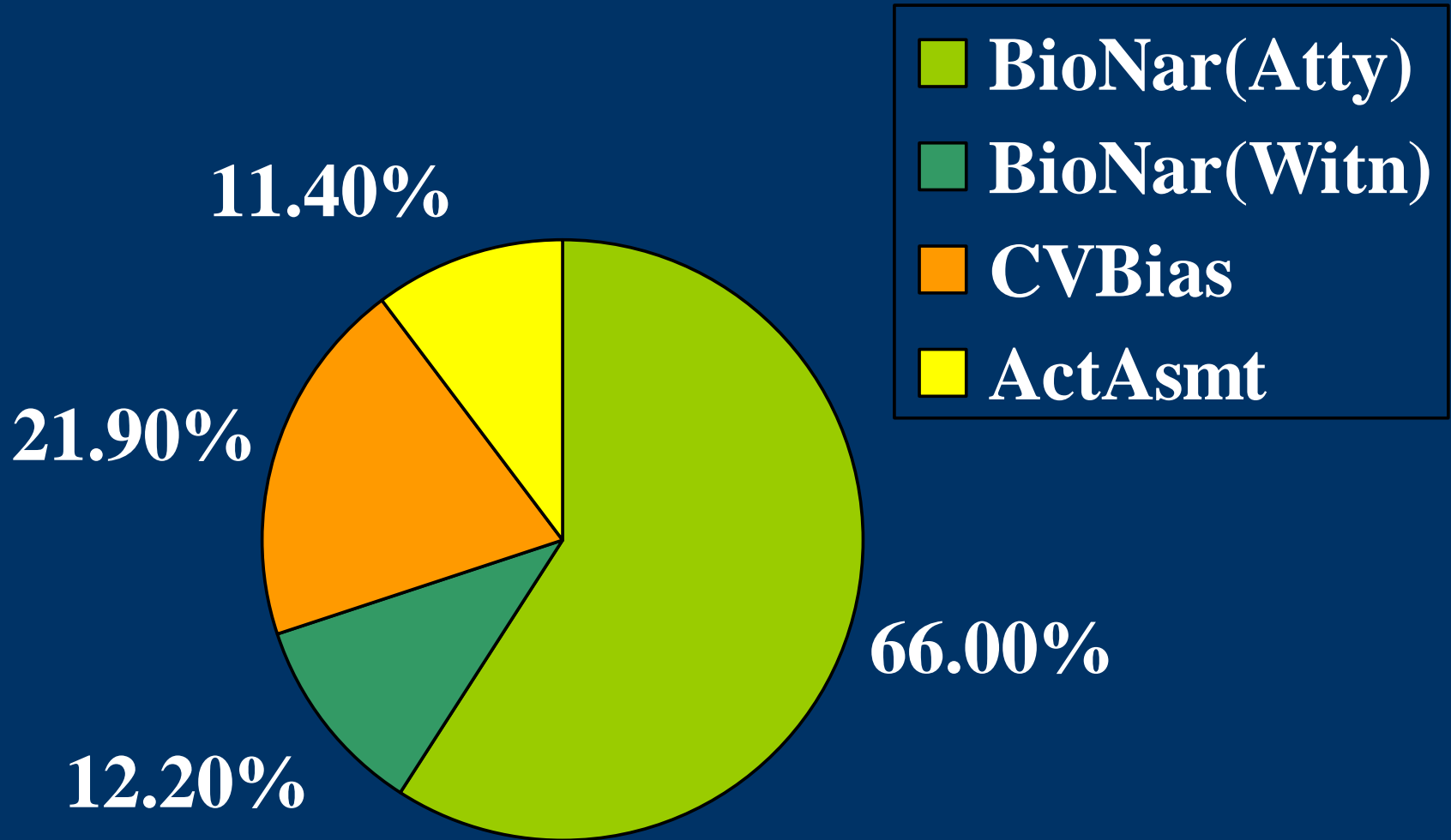
BioNar(Atty): Attorney BioNar statements without source attribution.

BioNar(Witn): Attorney BioNar statements attributed to witnesses.

CVBias: Witnesses’ Curricula Vitae/Background/Bias

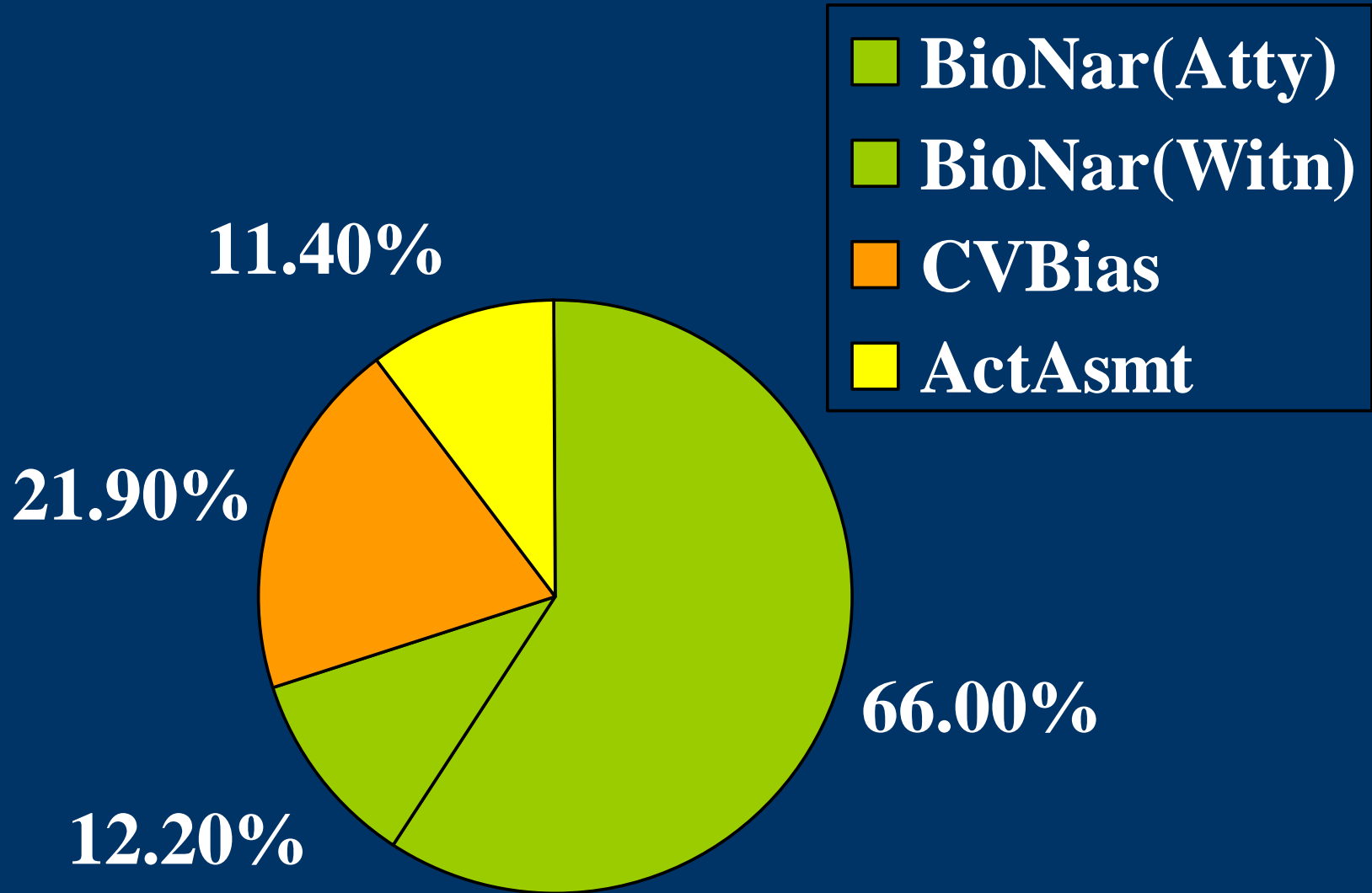
ActAsmt: Testimony based on “actuarial” risk assessment.

District Attorney – Initial Closing Argument



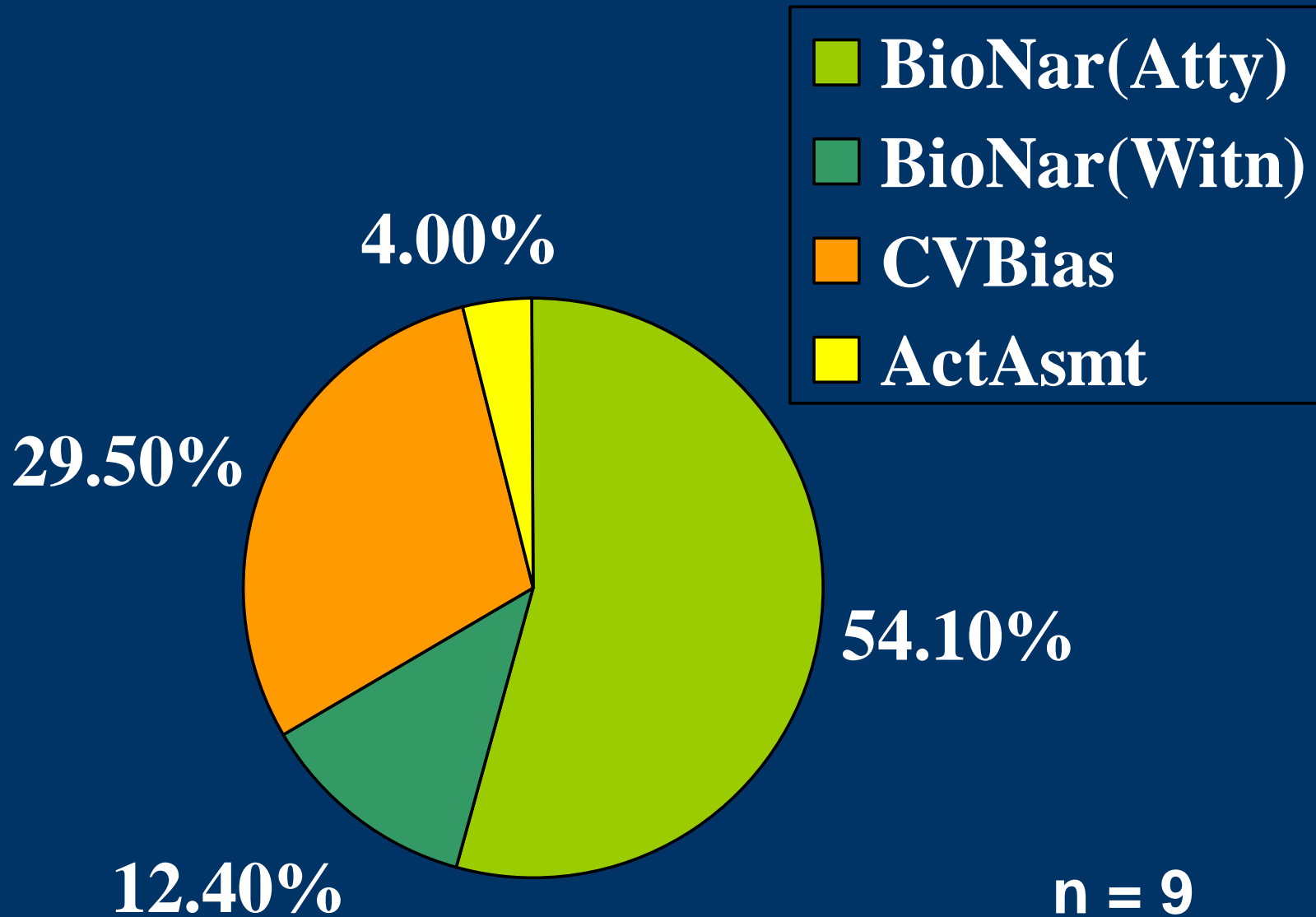
n = 9

District Attorney – Initial Closing Argument

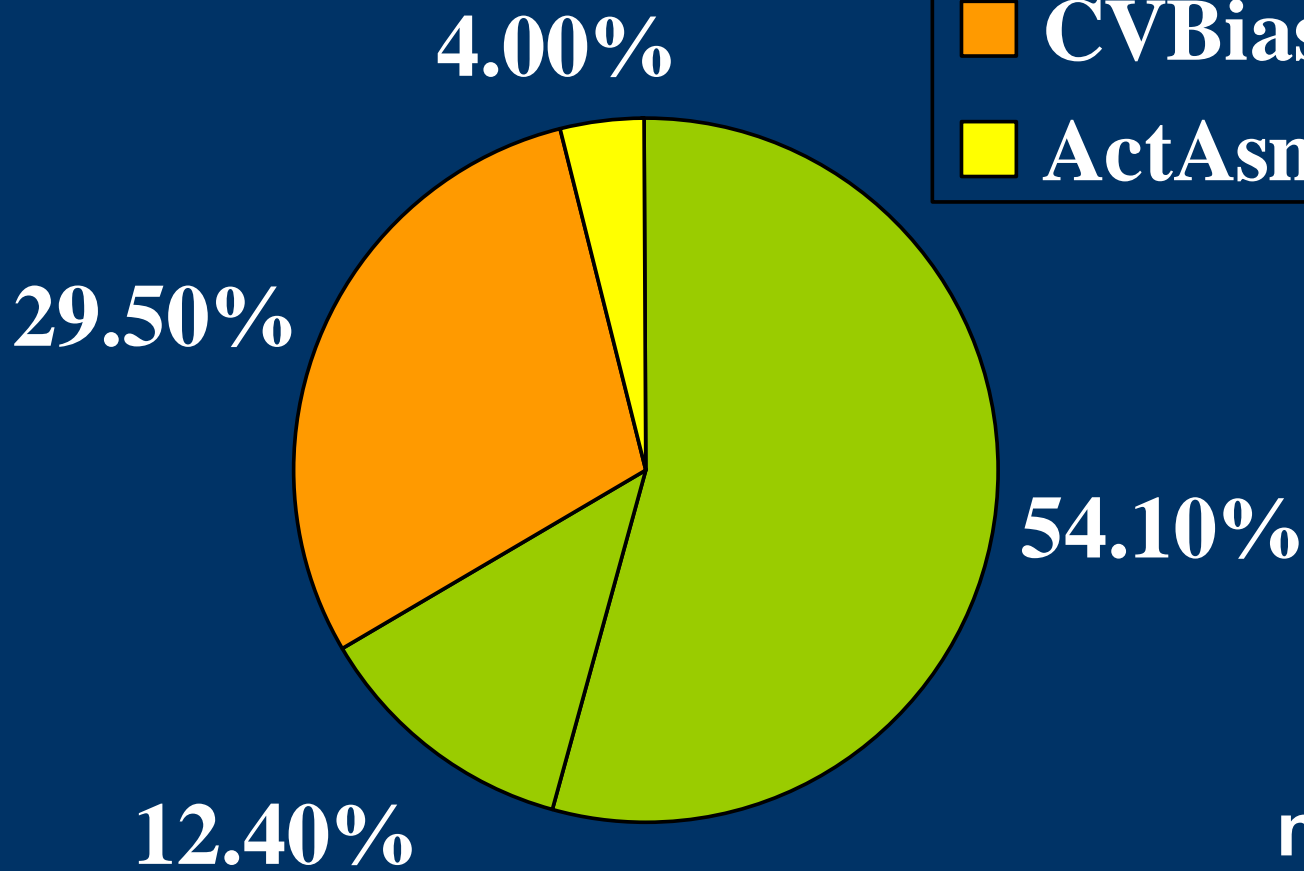
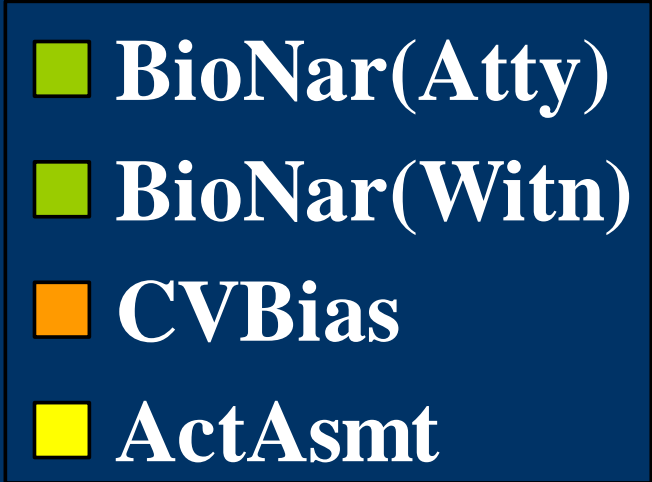


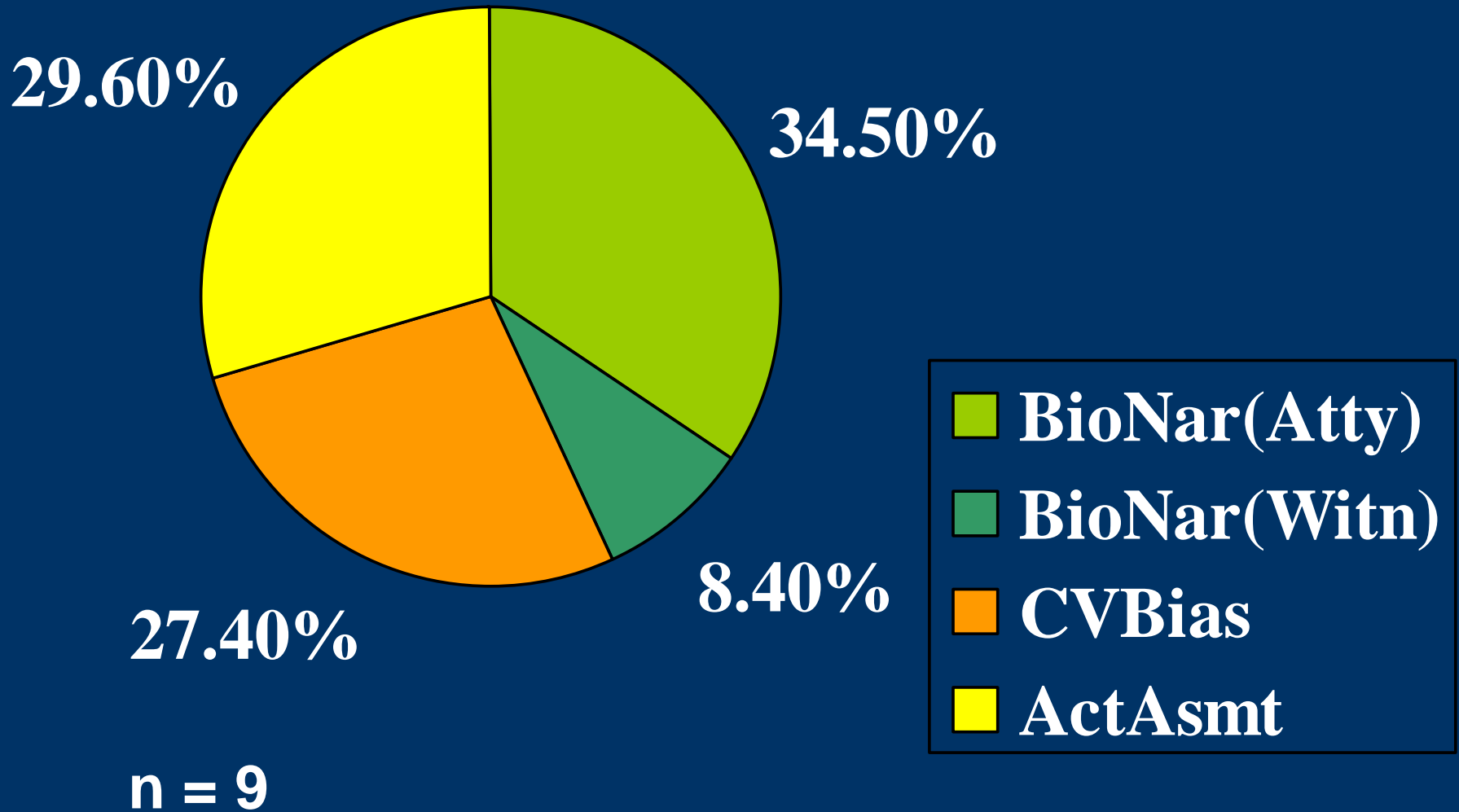
n = 9

District Attorney – Rebuttal Argument

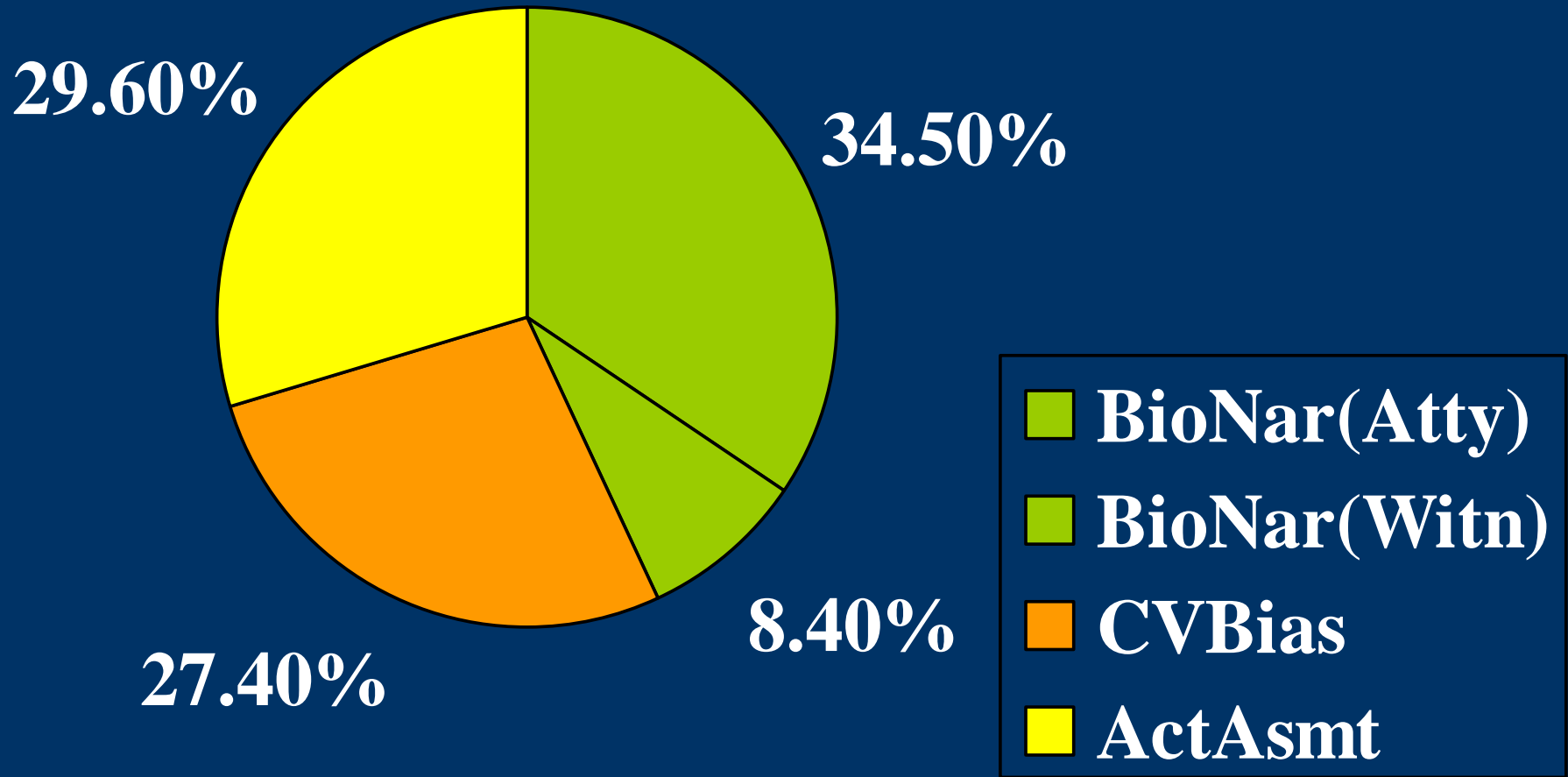


District Attorney – Rebuttal Argument





Defense Attorney – Closing Argument



n = 9

Defense Attorney – Closing Argument



What Lawyers and Judges Think

Expert Testimony Problems

- Experts abandon objectivity and become advocates for their client position.
- Excessive expense of party-hired experts.
- Testimony of questionable value.
- Conflicts among experts that defy reasoned assessment.
- Disparity in competence of opposing experts.

Garg and Eder (2006)



Being an Expert Witness

The Three Keys



Knowledge



Intelligence



Character



Contact Us

California Department of Mental Health

Ron Mihordin, M.D., J.D.

Chief MDO Clinical Coordinator

Forensic Services

(916) 654-3414 FAX (916) 654-2111

ronald.mihordin@dmh.ca.gov



References

Baker, T.O. (1983). *Operator's Manual for a Witness Chair*. Milwaukee, WI: Defense Research Institute

Berg, D. (2005). *The Trial Lawyer: What It Takes to Win*. Chicago, IL: American Bar Association

Brodsky, S.L. (1991) *Testifying in Court: Guidelines and Maxims for the Expert Witness*. Washington, DC: American Psychological Association



References

Brodsky, S.L. (1999) *The Expert Expert Witness: More Maxims and Guidelines for Testifying in Court.* Washington, DC: American Psychological Association

Brodsky, S.L. (2004) *Coping With Cross-examination and Other Pathways to Effective Testimony.* Washington, DC: American Psychological Association



References

Curran, W.J. and McGarry, A.L. (1986) *The Psychiatrist as Expert Witness*. In Curran, W. J. (Ed.) *Forensic Psychiatry and Psychology: Perspectives and Standards for Interdisciplinary Practice*. Philadelphia, PA: F. A. Davis Company

***Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579.**

***People v. Dodd* (2005) 133 Cal. App. 4th 1564.**

***Frye v. United States* (1923) 293 F. 1013.**



References

Gabriel, R. (2006). *Training in Court Testimony*. (Workshop) Morro Bay, CA: California Department of Mental Health.

People v. Gardeley (1996) 14 Cal. App. 4th 605.

Garg, S.K. and Eder, E. (2006) *Selecting and Working with Scientific and Technical Experts*. In Cwik, C.H. (Ed.) and Witt, H. E. (Ed.) *Scientific Evidence Review: Current Issues at the Crossroads of Science, Technology, and the Law*. Chicago, IL: American Bar Association



References

Gutheil, T.G. (1998). *The Psychiatrist as an Expert Witness*. Washington, DC: American Psychiatric Press

Gutheil, T.G. (1998). *The Psychiatrist in Court*. Washington, DC: American Psychiatric Press

***People v. Kelly* (1976) 17 Cal. 3rd 24.**



References

Kennedy, W.A. (1986) *The Psychologist as Expert Witness*. In Curran, W. J. (Ed.) *Forensic Psychiatry and Psychology: Perspectives and Standards for Interdisciplinary Practice*. Philadelphia, PA: F. A. Davis Company

***People v. Leahy* (1994) 8 Cal. 4th 587.**

Lewin, J.L., *The Genesis and Evolution of Legal Uncertainty About “Reasonable Medical Certainty,”* 54 Maryland Law Review 380 (1998)



References

- Melton, G.B., et al. (1987) *Psychological Evaluations for the Courts*. New York, NY: The Guilford Press.**
- Petrella and Poythress. (1983) *The Quality of Forensic Evaluations: An interdisciplinary Study*. 51 J. Consulting Clinical Psychology 76.**
- Poythress N. (1981) *Conflicting Postures for Mental Health Expert Witnesses: Prevailing Attitudes of Trial Court Judges*. Unpublished manuscript. Ann Arbor, MI: Center for Forensic Psychiatry.**



References

Resnick, P.J. (1988). *The Psychiatrist as Expert Witness*. (Workshop) San Francisco, CA.

Rothstein, R.F. et al. (2003) *Evidence in a Nutshell, 4th Edition*. St. Paul, MN: Thomson-West.

People v. Stoll (1989) 49 Cal. 3rd 1136.

Swank, P.R. (2006) *The Philosophy of Menschkeit*.
www.peterswank.com/menschkeit.htm



References

Van Gorp, W. (1996) *How to Be an Expert Witness*. (Workshop) 9th Annual U.S.Psychiatric and Mental Health Congress, San Diego: CME Inc.

***People v. Ward* (1999) 71 Cal. App. 4th 368.**

_____ (2005) *Ethics Guidelines for the Practice of Forensic Psychiatry*. American Academy of Psychiatry and the Law.



References

_____ (2006) *Specialty Guidelines for Forensic Psychology*. American Psychological Association and American Board of Forensic Psychology.



What I Do and How I Do It

Dr. Ron Mihordin



What I do and how I do it.

Ron Mihordin, M.D., J.D.

- Contact witness coordinator or attorney when I receive the subpoena.
- Alert my supervisor and block out time for appearance.
- Make cancelable travel arrangements as soon as appearance time confirmed.
- Review my file, my notes, my report.



What I do and how I do it.

Ron Mihordin, M.D., J.D.

- Review relevant legal definitions.
- Review relevant diagnostic criteria.
- Look for omissions, errors, or areas of my report I will want to or will be asked to explain, clarify, or expand upon.
- Make an outline of the key facts and events—including a “history timeline.”



What I do and how I do it.

Ron Mihordin, M.D., J.D.

- Re-check files to **confirm factual foundation for each element** of the assertions and opinions put forth in my report.
- Talk to myself—rehearsing out loud what I will want to say or probably be will be asked for on direct examination.
- Talk to myself—rehearsing how I will respond to foreseeable questions by the cross-examiner.



What I do and how I do it.

Ron Mihordin, M.D., J.D.

- Travel on a plan that allows for delayed or cancelled flights, traffic congestion, weather, etc.
- Arrive the night before appearance if away from home.



What I do and how I do it.

Ron Mihordin, M.D., J.D.

- Plan to arrive at courthouse hydrated, fed, relaxed—allowing enough time to:
 - ✓ Find find a parking space.
 - ✓ Confirm and find the courtroom.
 - ✓ Confer with the attorney, if not done earlier.
 - ✓ Review and rehearse key points.



What I do and how I do it.

Ron Mihordin, M.D., J.D.

- While waiting to be called:
 - ✓ Avoid stress or distractions.
 - ✓ Read, write, work on tasks **dissimilar** to those involved in the case.
 - ✓ Avoid substantive conversations with anyone but the attorney about the case, psychiatry, or the law.



What I do and how I do it.

Ron Mihordin, M.D., J.D.

- I repeat and remind myself:
 - ✓ It's not my case.
 - ✓ Not to say more than I'm asked to say.
 - ✓ Not to say anything that I don't have factual support for.
 - ✓ To explain, expand, or clarify but not to defend or argue.
 - ✓ To recognize and admit errors.



What I do and how I do it.

Ron Mihordin, M.D., J.D.

- I repeat and remind myself:
 - ✓ Not to fight reality.
 - ✓ To be guided by the facts and logic not identification with either party.
 - ✓ To let the “chips fall where they may.”
 - ✓ To remember that the shortest distance between two point is a straight line.



What I do and how I do it.

Ron Mihordin, M.D., J.D.

- I repeat and remind myself:
 - ✓ It's OK for me to like my opinion but not to fall in love with it.
 - ✓ Cross-examination isn't personal even when it's personal.
 - ✓ To be alert for ambiguous, overly generalized questions.



What I do and how I do it.

Ron Mihordin, M.D., J.D.

- I repeat and remind myself:
 - ✓ To avoid giving the testimony of experts not called to testify.
 - ✓ That I will have been effective if the trier of fact understands my opinion and how I arrived at it—whether they concur with it or not.



What I Do and How I Do It

Dr. Patricia Kirkish



What I do and how I do it.

Patricia Kirkish, Ph.D.

- My self-ascribed role:
 - ✓ I assist the trier of fact by bringing to the courtroom my special knowledge and training.
 - ✓ I clarify for, and explain to, the trier of fact the psychological elements in the case that they need to understand in order to answer the legal questions before them.



What I do and how I do it.

Patricia Kirkish, Ph.D.

- My self-ascribed role:
 - ✓ I am not an advocate—it is not my case to win or lose.
 - ✓ My testimony is but a fraction of all that the trier of fact will consider.
 - ✓ I do not argue the case, but my testimony may serve as the mortar that secures the foundation for rational, fact-based conclusions by the trier of fact.



What I do and how I do it.

Patricia Kirkish, Ph.D.

- When initially subpoenaed, I call the attorney and ask:
 - ✓ What are the legal issues?
 - ✓ Will the trier of fact be a judge or jury?
 - ✓ Will I be asked my opinion regarding the ultimate question(s) in the case?
 - ✓ Or, will I be asked to present more general background information as to how the mental illness or symptoms in this case fit a legal standard or a statutory definition.



What I do and how I do it.

Patricia Kirkish, Ph.D.

- When initially subpoenaed, I call the attorney and ask:
 - ✓ How will my testimony be expected to relate to any previous written report I may have submitted in the case.
 - What elements need to be further explained and clarified?
 - What are the strengths and weaknesses of my conclusions/opinions?



What I do and how I do it.

Patricia Kirkish, Ph.D.

- I remind the attorney that:
 - ✓ My opinions are based on my current knowledge of the facts of the case and context surrounding those facts.
 - ✓ New facts may call for a new opinion.
 - ✓ I am confident in my opinion, but it is not immune to new relevant clarifying information.



What I do and how I do it.

Patricia Kirkish, Ph.D.

- Pre-trial preparation
 - ✓ I review my report and all available source documents (discovery).
 - ✓ I re-think the pros and cons of my conclusions and re-weigh the data relating to each element of my report.
 - ✓ I review the applicable statutory standards.
 - ✓ I review the relationship between the inmates symptoms and the applicable legal definitions and criteria.



What I do and how I do it.

Patricia Kirkish, Ph.D.

- Testimony - Direct
 - ✓ Answer the questions posed clearly and openly as possible.
 - ✓ Avoid answers that go beyond what was asked.
 - ✓ Speak at a slower than conversational rate, but with inflection sufficient to maintain the attention and interest of the trier of fact.



What I do and how I do it.

Patricia Kirkish, Ph.D.

- Testimony - Direct
 - ✓ Look at the trier of fact.
 - ✓ Adjust the delivery of the testimony based on the response/interest level of the trier of fact.
 - ✓ Be yourself.
 - ✓ May use mild humor—humor that does not show disrespect for the court, the law, or the parties.



What I do and how I do it.

Patricia Kirkish, Ph.D.

- Testimony - Direct
 - ✓ Avoid using technical language (jargon).
 - ✓ An effective expert witness explains complex issues in language understood by lay persons.
 - ✓ An effective expert uses analogies and examples.



What I do and how I do it.

Patricia Kirkish, Ph.D.

- Testimony – Cross Examination
 - ✓ Do not be argumentative.
 - ✓ Be honest and open about the scope of your opinions and conclusions.
 - ✓ Tell the trier of fact what data you relied on and the confidence you have in that data and your opinion.



What I do and how I do it.

Patricia Kirkish, Ph.D.

- Testimony – Cross Examination
 - ✓ If you cannot be answer a question as posed, say so.
 - ✓ If you do not understand a question, say so.
 - ✓ It is not the role of the witness to explain what the questions means.



What I do and how I do it.

Patricia Kirkish, Ph.D.

- Testimony – Cross Examination
 - ✓ Maintain a thoughtful, serious, polite, and unbiased manner.
 - ✓ The expert is in court to provide information—not to win or lose the case.