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# The Expert Witness

## A Crusader's View

*GREGORY*

Finally we come to Professor Tom Tobin, professor of veterinary science and professor of toxicology at the University of Kentucky and director of the Kentucky Equine Drug Research Program. I'm told that he describes himself as part-way between an analyst and a veterinarian.

*TOBIN*

When David invited me to speak on being an expert witness, I was at first flattered, then apprehensive. I was apprehensive because I knew that many people in this room would have more experience as an expert witness than I. Michael has had at least nineteen hundred more hearings: I put my total estimate at much less than a hundred; I'm not sure exactly how many. I assumed from my conversations with David that what he wanted was my perspective and my experiences as a relatively free-standing expert who at times has supported the use of certain medications.

Reviewing my experiences as an expert, it's clear that I've been involved in three quite distinct processes. First, the political process over the late seventies and early eighties in the United States. Second, administrative processes such as Mr Jackson just spoke about. And third, full-blown trials (the judicial process) such as Michael spoke about. I'm going to review my experiences under these three separate—related, but nevertheless distinct—headings.

My involvement as an expert in the political process has been on behalf of local and national horsemen's groups in the United States. This started during the late seventies when the Humane Society of the United States floated a bill called the "Corrupt Horse Racing Practices Act" which they were trying to get passed in Congress. This bill would have made the treatment of horses with phenylbutazone or any other medication a felony, and it included stiff penalties for anybody associated with running a medicated horse. 'Anybody' included the owner, the trainer, the veterinarian, and track management. And the upshot of this bill would have been that an owner could be sitting relaxing on a beach (say, in Palm Beach in the United States) and could actually be participating in a felony if a horse belonging to him was running in California with more phenylbutazone in it than this bill stipulated. Such a law was obviously greatly feared by the racing industry in the United States, but there was little consensus on how to approach the problem.

There is little consensus in the United States on the subject of medication. There are at least twenty-eight different racing jurisdictions, and twenty-eight different medication rules. Each rule is a product of local attitudes and political realities. More fundamentally, these differing rules reflect sharply differing opinions on medication across the country.

When this process started in the United States, the conservatives, who could live with "no-medication rules," wanted the other twenty-seven states (each state has the 'correct' rules and the other twenty-seven are 'wrong') to change to their rules immediately. The

liberals accused the conservatives of running scared, and wanted to defend the liberal medication position. Since Kentucky was—to put it mildly—one of the more liberal states in the Union, I became a technical defender of the liberal position. The advent of this bill set the two groups at each other's throats, which made for a nice, comfortable, collegial atmosphere for me to testify in. I defended the liberal position at hearings before individual racing commissions, before state Houses, and finally before a Congressional subcommittee—and, once or twice, in the courts.

In the beginning the general pattern was that the Humane Society would approach a commission, and a conservative member of the commission would propose a more restrictive medication rule. The Humane Society would ship their representatives out from Washington to the commission hearing, and at the hearing the Humane Society representatives would make their pitch for the total elimination of medication. Then the horsemen, with their experts, would make a counter-pitch. At the end of the day, the commission would vote. The Humane Society, who tended to come on like "motherhood and apple pie" (as we say in the United States), made large gains early in these hearings.

The principal characteristic of these hearings was that they were open to all. Any Tom, Dick, or Harry could come in and voice his opinions, and many did. I'm not quite sure about this, but at open hearings like these virtually nobody is under oath. In general, however, the representatives of the Humane Society and the horsemen's points of view were the ones taken seriously.

Making presentations at these hearings, I soon found that the average commissioner knew very little about drugs. My presentations therefore became approximately twenty-minute overviews of medication and more specifically of phenylbutazone and furosemide which were the controversial drugs. I would carefully point out the differences between phenylbutazone and local anaesthetics (because many commissioners did not realize the differences between these agents), between phenylbutazone and morphine (and narcotics generally). Then I would wind up by pointing out that phenylbutazone was essentially 'horse aspirin'. This was the unkindest rub of all as far as the Humane Society was concerned, and their representatives complained bitterly to me about this comparison. Thereafter I never failed to emphasize that phenylbutazone was essentially horse aspirin.

Along the way in these hearings, I like to think that I learned some of the skills and rules for making a good presentation. The message should be clear, simple, and short. (I had to learn that rapidly because I was often restricted to a set time.) I dealt only with the very general outlines of the drugs involved. There was a good reason for this: Most of the information was not available or the commissioners were not aware of it. I compared and contrasted, again in general outlines, phenylbutazone and furosemide with the 'hard medications'. It was very important for me to key my statements into the everyday experiences of the commissioners who were virtually all laymen with no specialized knowledge of drugs.

I also believe that the personal impact you make at a hearing is extremely important. You simply must keep their eyes on you. If you lose their eyes, you lose their minds, you lose their ears, you've lost the group. I used my hands and other body movements as much as possible. I much prefer not to speak from behind a lectern where all you see is a talking head behind a mike. I prefer to be out in front of the group, use my hands, and make eye contact. If, during the course of a presentation, I was talking about intra-articular injection, I would point out and mimic on my own body an intra-articular injection (a local anaesthetic block); I would mimic an intravenous—or 'mainline'—shot (using lay terms). I simply made every effort I could to hold their eyes on me as I made my presentation. I had to leave the group with two or three major points about the medications (a take-home message), but I also wished to leave them with an impression of me and of my belief in what I was saying. And you can not do this when you're hiding behind a lectern; it's also difficult on a witness stand. It's much better when you're standing out in front of people, facing them, and there's a little movement, and they can see you, and relate to you and your body language. I was very glad of my teaching experience when I started with these hearings and my presentations were basically built on my teaching experience.

I must have testified at approximately a dozen hearings of different commissions around the country between 1979 and 1981. When I did this I "came off the fence" on a very controversial subject: medication. And I came off the fence on the opposite side from the conservatives and the Humane Society. When you come off the fence, you force people to choose sides

about you, and I made my share of enemies. At one time (shortly before the publication of my book) I was convinced that my academic career was finished, that I would have to leave the University of Kentucky. I had no idea where I would go or what I would do. Time passed, however, and the early eighties found me still a professor at the University of Kentucky, still with research money, and more or less still in the game. In addition, support for equine medication research had been written into state law in Kentucky, so the question of support for this field—for the short term at least—was secure.

By late 1982 the scene had shifted to Washington where the chairman of the Congressional Subcommittee on Criminal Justice had begun to hold hearings on the Corrupt Horse Racing Practices Act. These hearings had long been feared and as soon as they got underway the fears appeared to be well-founded. The Humane Society led off, putting their strongly anti-medication pitch into the record, with the enthusiastic cooperation of the committee chairman.

In response to the Humane Society's charges, the leaders of different segments of the horse industry came forth and presented their responses. Not surprisingly, these responses tended to reflect the particular interests and positions of these groups within the horse industry. Beyond this, the honour of making a presentation before the Congressional subcommittee was usually reserved for the president of each society, quite independently of whether or not he'd done his homework, knew what he was talking about, or indeed had any of the skills for making a good presentation. As the hearings wound along, the Humane Society had a succession of what I can only call 'field days'.

The Horsemen's Benevolent and Protective Association, for reasons which were not clear, had two presentations before this committee. The first appearance clearly pointed to the need for expert representation. For the second presentation by this group, therefore, a professional lobbyist was chosen,together with an ex-Congressman who had been a member of that committee the previous year, and myself, as a technical expert. We had our work cut out for us for nobody had yet tackled with any success the positions that the Humane Society had put into the committee's record.

Because I was the technical expert, much of the effort of rebutting their positions fell to me. I well remember getting a huge bundle of hearing transcripts from the lobbyist two weeks before the hearings with an urgent request for rebuttals of the Humane Society's positions. Along with my colleagues and my students I worked day and night for two weeks assembling data. When we went before the committee we had on hand to present to them a position document that was four inches thick. We had rebutted many of the positions of the Humane Society; we provided documentation from research that the industry had been doing, to rebut their positions; we were ready to throw quite literally a special-edition, five-pound book at the committee if the situation required it.

Despite our careful preparation and the technical strength of our position, I was far from relaxed going into those hearings. I was not concerned about our technical position, nor our ability to defend it. Rather, I was afraid of the skills of the individual who was the chairman of the committee. He was a professional politician with little sympathy for our position. I expected to be outshone in forensic skills—to get the kind of question that Michael spoke about which is very difficult to answer without either making a fool of yourself or insulting the person asking the question. I was worried about the kinds of accusations that might be dropped on me in the committee hearings. The Humane Society had been following me: we'd been sparring for four years; they knew me well; they knew what I had done; they had checked me out very carefully. I was concerned about the allegations that might be thrown at me before the committee and very concerned about how I would cope with them.

In the event, the hearings went smoothly, and we were considered an effective team. Going into these hearings, the chairman of the subcommittee was heard to say that he had not yet heard a good reason why the bill should not be written into law. After our presentation, however, he was most immediately concerned with retrieving the positions of the Humane Society. Our analysis of their positions had the effect of putting them on the defensive and they never afterwards recovered the initiative. The hearings that we attended were the last hearings on this bill. I don't expect that the problem of medication in the United States has gone away completely, but the area has been quiet since.

These hearings gave me a unique insight into the political process in the United States where I saw a small, but very vocal and media-oriented group, attempt to change the law. It would be fair to say that they had good success before racing commissions, but

much less success before state Houses, and no success whatsoever before Congress. In retrospect, although I didn't realize it at the time, this is what might have been expected. Congress and the state Houses are exposed to this type of posturing every day, while commissions are in general less likely to have been exposed to these intense political pressures.

The second type of event that I've become involved in is administrative hearings before commissions. In general, the drugs involved are 'soft drugs', that is ones that are legal in some jurisdictions in the United States but not others. I very rarely become involved in hard-drug hearings, as the issues are much more clear-cut, there is little or no room for manoeuvre if the rules are well-drafted, and generally little or no sympathy for the defendant. Almost invariably, therefore, my experience with the administrative process has involved soft drugs.

A typical example occurs where a trainer has used a phenylbutazone-like drug, a trace of it has turned up in the urine sample, and he's facing a substantial suspension. This is a fairly straightforward case where the trainer, the analyst, and sometimes the authority, are victims of the technical uncertainty—and I believe this is substantial, Michael—of administering drugs to horses and having them 'clear' the urine within a certain time. If the trainer is having a successful meet, he may wish to delay whatever action the commission may take. If he gets an expert to present his position, he may be able to delay administrative action to a time less punitive to him. In this type of situation, a good presentation of the technical difficulties facing the trainer can encourage an authority to reduce the penalty and the situation may resolve itself with a minimum of hardship on all sides.

In an administrative hearing in the United States the format is much more rigorous than in the typical open hearing. The situation is adversarial. The witnesses are generally restricted to the commission witnesses and the trainer's witnesses. You are sworn in as for a trial, established as an expert, and you are led in your presentation by an attorney. You may be vigorously cross-examined by the commission's attorneys, and the members of the commission may also choose to ask questions. In general, however, the atmosphere and circumstances are much more relaxed than in the third type of event in which I occasionally find myself, and that is a full-blown trial.

The role of the expert in a trial is absolutely vital. In a complex technical area such as medication, nothing can be done without good expert opinions. An expert is needed in the first place to say whether or not there actually is a case. If there *is* a case, an expert is needed to marshal the evidence and organize it effectively. For your attorney to get your evidence before the court, he will have to establish you as an expert before the court, then examine you on the material to get the information into the record or before the jury.

Experts are needed to place positions before the court and to destroy them. Expert attorneys are needed to cross-examine you and there are very few of these indeed. Although an experienced expert with a strong case can tie the average attorney in knots, a good attorney will give any expert a solid run for his money. A complex technical case is, in the last analysis, a battle of experts.

In the judicial system you will be carefully qualified as an expert by your attorney, and if your credentials are in the least suspect, you will have your status as an expert challenged. I have seen challenges to my expertise more than once, but in general I find that the courts are very reluctant not to hear what an expert has to say. Once you are qualified as a witness, your attorney will proceed to examine you with the objective of putting a position favourable to his client before the court. You will then be cross-examined by the opposing attorney with the objective of modifying, altering, or possibly destroying the position that you have put into the record.

The important thing on cross-examination is to keep your answers short, short, and shorter still. The opposing attorney may be having trouble with material for his cross-examination. If your answer to a question is long or complicated, it almost certainly contains the seeds to another question. If this keeps up, you are educating the opposing attorney and he will hit on something useful eventually. So keep your answers short, simple, and brief. Do not be afraid to stop in mid-sentence: I've done it more than once. I just cut right off and let the opposing attorney do the work. He's being well paid for it.

If you don't understand a question, don't hesitate to say so. A trickier situation occurs when the cross-examiner does not understand the question he is asking and a short, simple answer would mislead the court. Under these circumstances, you may elect to explain

the deficiencies in the question posed, but again the golden rule is: Be brief!

Just as attorneys set traps for witnesses, witnesses can set traps for attorneys. If you see the examining attorney walking into a trap, make sure you get him well in before you spring it. If you're quite sure that the attorney is heading down a blind alley, make sure everybody in the court knows that the attorney believes he is on to something good, throw him a little body language to make him think you're agitated, and lead him right on into the trap. These situations, however, require that you know your ground well, and it helps to be relatively experienced. In general, they are not for the newcomer. Also, in the last analysis, they are only incidents in the game of cross-examination and will rarely affect the final outcome.

I find that it helps enormously to take one to two days before a major case to 'psych up' for it. In this period you re-review the case material. You have to get it clear in your mind what you want to present before the court—to mentally tidy up the picture you're going to present. If your attorney asks you to submit questions, this will help clear up in both your minds what is going to go into the record.

You should at this time carefully review the weaknesses of the case (the points that may give you trouble) and your defences in these areas. This is, in essence, anticipating cross-examination. If you do a good job preparing for cross-examination, you will know where to give short answers ("Yes" or "No" answers), where to be defensive, and where you are secure enough to try to score extra points. But overall the most important thing during the pre-trial 'psych-up' is to review the material so that you have it all at your fingertips, you're comfortable with your positions (and that takes a little time), you know where your weaknesses are, and—above all—you're not worried about them.

You have far less latitude as a witness in court than in the other situations I have described. You are invariably sworn in, with due ceremony, and the swearing-in always makes an impression on me. You are placed in the witness box, from which you can not move, and which shields you from the waist down. Your use of body language is therefore substantially reduced. On the other hand, the attorney who is cross-examining you can move around freely, and may even lean into the witness box and discreetly snarl at you as he places a question. It is not considered good form for the expert to snarl back—and that at times has bothered me! You have to just sit and take it and be cool.

As a witness, you must answer all the questions that are put to you, unless you do not know the answer, can not recall the answer, or do not understand the question. Beyond this, you must answer, "Yes," or "No," and you can elaborate as much as you wish. Remember, however, the key to handling cross-examination is to keep your answers short. The questions all come one way, and you are not permitted to ask questions back. Sometimes in the heat of cross-examination you can throw a question back or, more slyly, structure your answer as a question. If the attorney examining you does not immediately and haughtily remind you that he is the one who asks the questions (and that you are the one who gives the answers), then you have him somewhat off balance.

As well as not asking questions, you can not initiate discussion. You have to sit there and wait as material that you know the answer to is discussed before you. It takes a little time to get used to the way the game is played and to learn how to work with it. You should be quite comfortable on direct examination, but on cross-examination you need to be careful.

A favourite ploy on cross-examination (at least this is one that's been commonly used on me) is for the opposing attorney to read to you from a document and then ask your opinion of the quotation. You have the right to inspect the document and you should always exercise this right. You should demand the reference. (This is one circumstance in which you can undoubtedly ask a question, the attorney is required to answer you, and you can turn the tables on him somewhat if he takes this approach.) If the reference is dated, or if you know of more recent work, you can kill this approach right there. Sometimes only a photocopy of a single page from an article is presented. Usually the reason for this is that the rest of the article contains material detrimental to the examining attorney's position. You should, therefore, press your requirement vigorously to see the whole article or the whole book.

If the attorney asks you to read something into the record, you should do so without protest, in a bold voice, even though it apparently runs counter to your position. You must appear confident, relaxed, and read it in as though it were just a piece of English and then go ahead and say what you have to say about it. You can't appear to flinch as you read it. Just read it as a

piece of work, and then point out why it is dated, out of context, or whatever you determine to be the problem with it. Always carefully examine the sections before and after the one you are asked to read, as these may well contain important qualifying material. Don't let them fluster you: read the document carefully; check the edition; check the year; and don't hesitate to point out discrepancies or deficiencies.

It is good practice to sum up your position at the end of your testimony in much the same way as you would sum up at the end of a scientific paper. You will need your attorney's assistance in doing this, but it's important and worth the effort. Before a jury you are in the same position as you are before any other laymen. But even before a judge you should always summarize your 'take-home' message as briefly as possible. Only in this way can you be sure that your major points are clear and that you have conveyed the message you intended. And if you can not convey your message in a number of simple points, you have not prepared your case properly.

Expert appearances in any of the situations I've described are very stressful circumstances. They will absorb your attention entirely for some time beforehand. You will feel totally drained after them, and images from the hearings will flash through your mind for days. They are, nevertheless, ultimately satisfying experiences. This is because the only measure of the quality of your work as a researcher is how much it contributes to changes in the way things are done. Appearances as an expert are a sure sign that you are contributing to change and speak to the significance of your expertise.