Pharmacology

Editorial

EXPERIENCES AS AN EXPERT WITNESS: EDUCATING PEOPLE WHILE UNDER OATH

Thomas Tobin, MVB, MRCVS, PhD

INTRODUCTION

When I was invited to speak* on being an expert witness, I was at first flattered, then apprehensive. I was apprehensive because many people have more experience as an expert than I. For example, Michael Moss has attended at least 1,900 more hearings than I have, and this likely holds true for many senior members of the profession. However, I suspect what really is wanted is my perspective as a relatively free-standing expert; one who has at times supported the use of certain medications. In this vein, it is probably fair to say that my experiences have been broader than those of the average racing chemist.

Reviewing my experiences as an expert, it is clear that I have been involved in three distinctly different processes. The first is the political process, the second relates to administrative processes, and the third is the judicial process. So I will categorize and compare my experiences under these three different headings.

Author's address: Kentucky Equine Drug Research Program, Department of Veterinary Science, University of Kentucky, Lexington, KY 40506.

*Adapted from a presentation made to the 6th International Conference of Racing Analysts and Veterinarians, Hong Kong, December, 1985.

Published as Kentucky Agricultural Experiment Station Article 84-4-231 with the approval of the Dean and Director, College of Agriculture and Kentucky Agricultural Experiment Station.
Publication #114 from the Kentucky Equine Drug Testing and Research Programs, Department of Veterinary Science and the Graduate Center for Toxicology, University of Kentucky.
Supported by a grant entitled "Masking by Phenylbutazone in Equine Drug Testing: An Analysis: from the Kentucky State Racing and Harness Racing Commission and the Kentucky Equine Drug Research Council.

THE POLITICAL PROCESS

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 (HSUS) was trying to get a bill called the "Corrupt Horse Racing Practices Act" passed. 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 the running of a medicated horse. "Anybody" included the owner, the trainer, track management, and, indeed, just about everybody associated with putting a horse on the track. What this meant was that an owner, who might think that he was simply sitting on Palm Beach, could, in fact, be participating in a felony on the West Coast, if per chance, his horse out there ran on too much phenylbutazone. This law was greatly feared by the industry, but there was no concensus on how to approach it. There is little consensus in the U.S. on the subject of medication. There are at least twenty-eight different racing jurisdictions, and 28 different medication rules. Each rule is a product of local attitudes and political realities. More fundamentally, however, these differing rules reflect sharply differing opinions on medication across the country.

The conservatives, who could live with "no medication" rules, wanted the other 27 states to change their rules

immediately. The liberals accused the conservatives of running scared, and wanted to defend the liberal medication rules then in place in many states. Since Kentucky was one of the more liberal states, I became a technical defender of the liberal position. The advent of this bill set these groups at each others 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, before a Congressional subcommittee, and in the courts. In the beginning, the general pattern was that the Humane Society (HSUS) would approach a Commission, and a conservative member of the Commission would propose a more restrictive medication rule. There would then be a Commission hearing on the proposed rule change. The Humane Society would send its representatives from Washington to attend the hearing. At the hearing, the Humane Society would make its pitch for the total elimination of medication. Then the local horsemen, with their experts, would make a counter-pitch. At the end of the day the Commission would vote. The Humane Society, which came on like motherhood and apple pie, tended to make large gains in the early days of 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. Nobody was under oath. In general, however, the representatives of the Humane Society, and the horsemen's points of view were the ones that were taken seriously. Making presentations at these hearings, I soon found that the average Commissioner knew very little about drugs and medications. My presentations, therefore, became twenty minute overviews of medication, more specifically "Bute" and Lasix® in racing horses. I would carefully point out the differences between phenylbutazone and local anesthetics, between phenylbutazone and morphine, and 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 the comparison. Thereafter, I never failed to emphasize that phenylbutazone was nothing more than horse aspirin.

Along the way, I like to think that I learned some of the skills of making a good presentation. The message should be clear, simple and short. I only dealt with the very general outlines of drugs and what they did. I compared and contracted, again in general outlines, soft drugs (Bute) and hard drugs (morphine). It was very important for me to key my statements into the every day experience of Commissioners, who were virtually all laymen, with no specialized knowledge of drugs.

I also believe that the personal impact that you make at a hearing is very important. In the first place, you must keep their eyes on you. For this reason, I used my hands and other body movements as much as possible. If I could mime something or indicate an area on my own body, I always did so, since I felt that it increased the visual impact that I made. I had to leave the group with two or three major points about the drugs, the take home message, but I also wished to leave them with a strong visual impression of me, and my belief in the material I presented. I was very glad of my teaching experience, and my presentations were basically built on that.

I must have testified at a dozen hearings around the country between 1979 and 1981. In so doing, I came "off the fence" on medication on the opposite side from the Humane Societies. When you come "off the fence" in a controversial area, you force people to choose sides about you, and I made my share of enemies. At one time, I thought that my academic career was seriously endangered. Time passed, however, and the early eighties found me still a professor at UK, 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 equine medication research 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 they got underway, these fears appeared well-founded. The Humane Society led off, putting their strongly anti-medication pitch on 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 each group. Beyond this, the presentations were usually made by the President of each group, despite the fact that he might not necessarily be skilled in forensics. As the hearings wound along, the Humane Society tended to have a succession of "field days".

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

As the technical expert, a substantial portion of the effort of rebutting the Humane Society 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 Societies' positions. Along with my colleagues, we worked day and night for two weeks assembling data. When we went before the Committee, we were well-prepared. We had on hand to present to the Committee, a position document that was four inches thick. We were quite literally ready to throw a five pound special edition book at them 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 chairing the Committee, a professional politician who had little sympathy for our position. I expected to be outshone in forensic skills, and I was worried about what kind of accusations or allegations might be made. Over the years, the Humane Society had said some not very nice things about me, they had been following me long enough, and they intensely disliked me. What kind of allegations might be thrown at me during the hearings, and how I might handle them, was not clear.

In the event, the hearings went smoothly, and we were considered a very 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 position of the Humane Societies. Our analysis of the Humane Societies' positions and claims 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. As of this time, the medication area is quiet, although it is unlikely to stay this way forever.

The hearing gave me a unique insight into the political process in the United States, where I saw a small but very vocal and media orientated group attempt to change the law. It would be fair to say that they had good success before the Racing Commissions, but much less success before State Houses, and no success at all before Congress. In retrospect, this is what might have been expected. Congress and State Houses are exposed to this type of posturing every day, while Commissions in general are less likely to have been exposed to the intense political pressures that are an every day event for legislative bodies.

THE ADMINISTRATIVE PROCESS

The second type of circumstances that I have been involved with is administrative hearings before Commissions. In general, the drug involved is a "soft drug", i.e., one that is legal in some jurisdictions but not in others. I very rarely become involved in hard drug hearings, as the issues are much more clear cut, there is virtually no room for manuever if the rules are well drafted, and generally little or no sympathy for the defendant. Almost invariably, therefore, my experience with the administrative process involves "soft" drugs.

A typical "soft" drug hearing is where a trainer has used a phenylbutazone-like drug. A trace of it has turned up in a urine sample, and the trainer is facing a substantial suspension. This is a fairly straight-forward case, where the trainer, the analyst, and sometimes the Commission also, are victims of the technical uncertainty of administering drugs to horses and having them "clear" the urine by a certain time. If a trainer is having a successful meet, he may very much 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 for him. In this type of situation, a good presentation on the technical difficulties facing the trainer can encourage a sympathetic Commission to reduce the penalty, and the situation can resolve itself with a minimum of hardship on all sides.

In administrative hearings, the format is somewhat more rigorous than the typical "open" hearing. The basic situation is adversial, and the witnesses are generally restricted to the Commission witnesses, and whomever the trainer may wish to present. You are sworn 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 members may also choose to question you. In general, however, the atmosphere and circumstances are much more relaxed than the third type of circumstance in which one may find himself, a full-blown trial.

THE JUDICIAL PROCESS

The third situation in which I got involved is a trial in state or Federal court, before a judge and/or judge and jury. The role of a good expert under these circumstances is absolutely vital. In a complex technical area such as medication, one can do virtually nothing without good expert opinions. You need an expert in the first place to tell you whether or not you have a case. If you have a case, you need an expert to marshall the evidence for you and get it organized in an effective manner. For your attorney to get 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 onto the record or before a jury.

You need experts to place positions before the court and experts to destroy them. You need expert attorneys to cross-examine experts and there are very few, indeed, of these. While an experienced expert with a strong case can tie an 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 a witness has to say. Once you are qualified as a witness, then your attorney proceeds to examine you, with the objective of putting a position favorable 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 on the record.

The important thing in cross-examination is to keep your answers short, short and shorter. The opposing attorney may be having trouble with material for his cross-examination. If your answer to a question is long, it likely contains the seeds to another question. If this keeps up, you are educating the examining attorney and he will hit something useful eventually. So, keep your answers short, simple and brief. Do not be afraid to stop in mid-sentence if need be. Let the opposing attorney do the work.

If you do not understand the question, do not hesitate to say so. A trickier situation occurs where the cross-examiner does not understand the question that he is asking you, and a short simple answer could mislead the court. Under this circumstance, you may elect to explain the deficiencies in the question posed to you, but again, the golden rule is to be brief.

Just as attorneys can set traps for witnesses, witnesses can set traps for attorneys. If you see the examining attorney walking into a blind alley or trap, make sure you work him well in before you spring it. In fact, if one is quite sure that the attorney is heading down a blind alley, it is good to make sure that everybody in the court knows that the attorney believes he is on to something good before you spring 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 a newcomer. Ultimately, also, they are only incidents in the game of cross-examination, and will rarely affect the final outcome of the case.

I find that it helps enormously to take a period of one to two days before a major case to "psyche up" for it. In this period, one re-reviews the case material, and the position that one is going to present. If your attorney asks you to submit questions, this helps clear in both your minds what is going to go into the record.

You should, also at this time, carefully review the weaknesses of the case, the points that may give you trouble, and your defenses in these areas. This is in essence anticipation of cross-examination. If you can do a good job preparing for cross-examination, you will know where to give short answers, and where you are secure enough try to score extra points. But overall, the most important thing about the pre-trial psyche up is to review material so that you have it all at your fingertips, so that you are comfortable with your positions, and that you know where your weaknesses are, and are not worried about them.

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

As a witness, you must answer all the questions as they are put to you, unless you do not know the answer, cannot 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, that 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 may 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 you the one that answers them, then you have him worried.

As well as not asking questions, you cannot initiate discussion, and you have to wait while 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 learn how to work with it. However, you should be quite comfortable on direct examination which is when your own attorney is examining you. On cross-examination, however, one needs to be careful.

One is virtually always subjected to cross-examination. While one of my cross-examinations consisted of only one quesion, others have gone on for days. In general, however, cross-examination only takes an hour or so. When a cross-examination takes several hours or days, the purpose is to wear the witness down, which can be a very effective tactic.

A favorite ploy on cross-examination is for the opposing attorney to read you a quotation, and then ask your opinion of the document, and whether or not you agree with it. You have the right to inspect the document, and you should always exercise this right. You should demand the reference, the journal, and the year. If the reference is dated, or if you know of more recent work, you can kill this approach right there. Sometimes only a single page of a photocopy from an article is presented to you. The reason for this is that the complete article contains material detrimental to the examining attorneys' position. You should, therefore, press your requirement to see the whole article, or 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 cannot 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 material leading up to the section, and after the section that you are asked to read, as these sections may very well contain important qualifying or limiting statements.

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 is important and worth the effort. Before a jury, you are in the same situation I was with the Racing Commissioners, i.e., they are essentially laymen. Even with professionals, one should always summarize your "take home" message as briefly as

possible. Only in this way can you be sure that your major points have gotten home, and that you have conveyed the message that you intended. If you cannot convey your message in a number of simple points, you have not prepared the case properly.

SUMMARY

In summary, therefore, my experiences as a witness have been divided into three major areas. In the first, in what was essentially the political process, the game was charge and counter-charge, and the rules, such as they were, were fairly loose. In the second area, that of administrative hearings, the rules are somewhat tighter, but still not as restrictive as those of a full court session. In court session you are always sworn, carefully qualified as an expert and almost invariably subjected to searching cross-examination. The rules of evidence are strictly adhered to. This is the situation where your freedom of action is most restricted, and is the most rigorous of the situations in which you will use your expertise. However, in the last analysis, you should remember that all that is required of you are simple statements of fact, and your best opinions. Make your statements simple, consistent, and concise, and keep your answers on cross-examination as short as possible.

Expert appearances under any of these conditions are very stressful circumstances. They will absorb your attention entirely for some time before you make your appearance. You will feel totally drained after them, and images from the hearing will reverberate in your mind for days. They are, nevertheless, ultimately satisfying experiences. This is because the only measure of the quality of your research is how much it changes the way things are done. Appearances as an expert are a sure sign that you are contributing to change, and speak the significance of your expertise.