BAD BOYS IN COURT

By Richard G. Christopher

Actually, this is not about *bad* **”boys”** per se; rather, it will be *bad* **”words”** that will be under scrutiny. And, to be absolutely proper, it is the *incorrect* choice and usage of the bad-boy words I will address. So, let's get right to it, meet the bad boys: **”apparently,” ”appeared,” ”evidently,” ”indicated**,” and **”suggested!”** Those are just five of the many bad-boy word choices that can definitely hurt you in court if you're not hip to the basis of the many objections they can draw. Sure, there are other “bad” words, but these are by far the ones most often wrongly used by lawyers, judges, and professional witnesses such as *us*. To begin with, *bad* words have at least two aspects in common; (1) they are interchangeable with other words and, (2) they are inescapably conclusory. For the latter reason they will usually draw an objection.

Let's start with interchangeability. ***”Appeared”*** is interchangeable with ***”seemed”; ”evidently”*** with ***”apparently”; ”indicated”*** with ***”implied”; ”suggested”*** with ***”inferred”;*** and, so on down through the dictionary. Here's the way it usually goes down. Witnesses, including police officers (and us, too) sometimes incorrectly testify as follows: “”She *appeared* to be *drunk”,* ” or “”*Apparently* she was *drunk”, ” or* “”*Evidently* she was *drunk”,* ” or, “”So-and-so *indicated* she was *drunk”,* ” or, “”It was *suggested* she was *drunk”.”* But don't confine your thinking just to the word “”drunk.”” You can just as easily substitute speeding, murdered, kidnapped, raped and so on; you name it.

A phrase containing any of those “”bad”” words though inevitably puts forward a conclusion without a foundation. That is absolutely misleading and unquestionably objectionable. Why? Because those “”bad”” words supplant the premise or basis from which a reasoned conclusion could be drawn. That kind of testimony deprives the fact-finder (judge or jury) of the real information needed to form a reasoned conclusion. Even worse, the fact-finder might accept the incorrect phrase [testimony] as self-proving without getting any additional supporting testimony or evidence. In a nutshell, that is the gravamen, the nitty-gritty, the danger, of using **bad words in court**.

So, staying with the example of “”drunk,”” what should a witness say, instead of, “’The defendant was ***apparently*** drunk?’” Well, it is not complicated. If you intend to describe a drunk person, you simply cannot use a conclusory word (apparently), or the word “”drunk.”” That is inadequate and patently absurd. The best example of the way to describe observations adequate to enable the fact-finder to reach a valid conclusion is the standard police litany, i.e., which will go something like this: “*I detected a strong odor of alcohol on the defendant's breath when he spoke and exhaled; his eyes were bloodshot, and glassy; he was unsteady on his feet; and, his speech was thick, and incoherent.”* Now, perhaps the witness could have testified to other observations but, for our purposes, that's a sufficient exemplar. Once that particular testimony is in, the prosecutor would probably ask whether the officer had formed an opinion as to the defendant's sobriety based on his (the officer's) observations. The officer should respond with a **”Yes,”** or **”No,”** because such a question requires nothing more than a “”yes”” or “”no”” answer. It isn't optional whether the officer should add further information when the yes, or no, are responsive and complete. After the officer's answer, the prosecutor would usually ask for the officer's actual opinion. That question needs only a three-word response, “”He was drunk.”” But,

remember, I gave you the simplest of examples and used only one [bad] word, “”apparently,”” in that effort. Regardless, your own testimony in connection with your observations should be governed by the same logic, and you should always strive to answer only the question asked.

One more thing before I roll out the old fact-based-scenario, I hope all who read this will acknowledge that attorneys and jurists “despite their own faults” sort of have a right to expect us [sophisticated P.I's] to be reasonably articulate and conversant in legal terminology, somewhat aware of the rules of evidence, and mildly familiar with court procedures. If that describes you, you probably don't need to read this. However, on the off chance you really weren't aware of the “”bad boy”” “problem” or the even more likely possibility that I am addressing it better than anyone else ever has , I will push on.

Okay, here we go. Ms. Jones drank some “”a couple of beers”” at JOE'S BAR & GRILLE. When she left the bar, she got into her car, drove from the parking lot out onto the roadway and was involved in a collision with another car. Ms. Jones submitted to a Breathalyzer test at the scene, which registered a “”point-one-one”” blood alcohol reading. Fortunately for her (Jones) that test result was suppressed because the particular breath-testing machine had not been properly calibrated. Further, some months later but, before the trial, our private investigator interviewed a Mr. Brown, who was a bar patron on the night of the collision event and who told the investigator, quote, ***”Ms. Jones had a few drinks over a three, or four, hour period during which we shared a four-pound lobster dinner. She left at about 9:55 PM. She was completely sober. We were going to meet at her place a half-hour later. We had, had a good time at dinner ” which I bought” and I had visions of enhancing our relationship.””*** Okay, there you have it. So, let's move on. It's show time; we are in trial, the Defense Attorney has our P.I. on direct-examination to impeach Mr. Brown whose testimony has changed from that which he purportedly told our P.I. and the change is detrimental to the defense of Ms. Jones. After the usual, who are you, what do you do for a living, introductory stuff he asks--

Defense: “”When you interviewed Mr. Brown, did he tell you he had made some observations of the defendant, Ms. Jones, while she was at JOE'S BAR & GRILLE?””

Witness: **”He indicated. . .””**

Prosecutor: **”Objection!””** [Of course. Get it?]

Judge: **”Sustained.””** [What else?]

So, right off the bat, the prosecutor recognizes that the answer about to come from the P.I. ***is not going to be responsive***. Why will it be “”not responsive?”” Because the answer to that simple question is either “”Yes,”” or “”No.”” Nothing else will do. (Of course, for you perfectionists, there could be an, “”I don't recall”” but, not this time. Anyway, there's more. The problem is/was that the P.I. began his answer with “” . . . ***indicated*** . . .” ” That word “”indicated”” presupposes a conclusory answer. In essence the question was, *”Did Mr. Brown make some observations of Ms. Jones. . . .?””* What's his problem? The question began with the word, **”DID!””** A question that starts with **”Did,””** always calls for a **”Yes””** or **”No””** answer. Geez! This is great stuff? Pay attention.

(NOTE: What the Defense Attorney is trying to elicit here is the fact that Ms. Jones was not drunk when she left the bar. Mr. Brown purportedly told the investigator Ms. Jones was ""completely sober"" and that observation "NOT the investigator's interpretation of the observation" is what the attorney was trying to get into evidence. Unquestionably the investigator is about to state a conclusion. That is instantly, clearly, evident, because he prefaced his answer with the [bad] word *indicated.* That answer was unresponsive and objectionable and serves as a ""red flag"" to the opposing counsel that the forthcoming answer will be a conclusion! The correct response to that initial question would have been a simple, ""Yes"" or ""No!"" Nothing more. Nothing less. Moreover, the purpose of that particular question has to be the laying of a foundation for follow-up questions which would [might] have led to bringing out the information developed by the investigator during his interview of Mr. Brown. However, the investigator " mimicking some of the hordes of incompetent lawyers and jurists" used a bad word, he said, ***indicated.*** When a witness testifies about an occurrence, that testimony should be offered in the most direct way, and certainly sans conclusions. It is hoped from that testimony the fact finder will be able to draw his own conclusion. If not, shame on the attorney who failed to bring it out.

Let me carry this out ad nauseum. Though. The ""bad"" words I have listed carry with them the probability that whatever follows will be conclusory. So, the mere mention of *apparent, appeared, evidently, indicated, or suggested,* should raise an objection. Allowing that the P.I. witness has at least a modicum of courtroom presence, the fact-finder[s] might give substantial credence to his testimony. However, every *sustained* objection concerning his testimony can work against him, discredit him and thus, bring about the unsuccessful prosecution of the defense case. Right, or wrong, that result is possible, if not probable if we don't pay attention. Poor phrasing or poor choice of words, as in the given scenario is the sole basis for the objection. The phrasing of the answer as demonstrated, forces the fact-finder to guess at the truth. It does nothing to shed light on the issues being litigated. The testimony that was sought would have been admissible but for the ""bad"" word. Yes, and even the woman's statement would be admissible [as a statement by a party] in some instances, but *statements as evidence* are another issue entirely.