

“Telling Tales Out of Court”: A Pilot Study of Experts’ Disclosures About Opposing Experts

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A pilot questionnaire surveyed forensic psychiatrists and psychologists about information they would feel it appropriate to disclose to their retaining attorneys about an opposing expert witness. A spectrum of hypothetical disclosures was offered, varying in their relevance to the case at hand and in their degree of “public” versus “personal” information. Respondents agreed significantly that “public” information could be disclosed to one’s attorney, but responses about disclosing “personal” information varied widely. The findings and their implications are briefly discussed.

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It is unethical for a physician to disparage the professional competence, knowledge, qualifications or services of another physician to a patient or a third party. . . .¹

A number of sources^{2–5} including, by implication, the Supreme Court case of *Ake v. Oklahoma*,⁶ have stated or implied that consultation to the retaining attorney by the expert witness is a legitimate expert function. Indeed, it is extremely common for one side’s expert to offer the retaining attorney consultative assistance by pointing out weaknesses in the other expert’s opinion, mistaken assumptions, flawed clinical reasoning, and unsupported conclusions. Such consultation is aimed at aiding the attorney in critiquing the opposing expert’s report; in preparing for the opposing expert’s deposition; and, if a case reaches trial, in designing cross-examination of the opposing expert.

Beyond these familiar, case-centered functions, however, there exists a gray zone of information which experts might or might not choose to disclose

to their retaining attorneys. This information might include relevant issues of credentialing, such as whether the other expert is board certified, widely respected, a member of the American Academy of Psychiatry and the Law (AAPL), and similar, largely public information. Such data are fairly readily available through the other expert’s curriculum vitae, from directories and organizational information sources, or, recently, even from the Internet. Other information of a more personal nature might well be known to members of the relatively small forensic, academic, or regional community; but certain constraints—be they considerations of ethics, personal values, good manners, or even good taste—might lead an expert to decline to share what he or she knows with the attorney.

Information about a person may be divided into three realms of discourse: private (relating to one’s personal life and shared only in confidence); social (relating to what one might share with acquaintances at a party); and public (relating to information generally available through court records, lectures, publications, and the like). We propose that professionals are under ethical constraint to protect private and

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social realms of discourse, including disclosures about opposing experts.

While the diverse substance of the informational gray zone of expert-expert disclosure is commonly discussed when forensic practitioners gather and gossip, and very briefly in the literature,⁶ neither the content nor the decision-making in regard to such disclosures has ever been studied systematically. This pilot study attempts to address this lack to learn how experts actually judge various forms of disclosure under various circumstances, how experts function, and how experts view professionalism.

We hypothesized that some disclosures would be generally acceptable, particularly in the "public" data realm; and that other, more "personal" data, particularly of a stigmatizing nature, might well be withheld. Beyond this sharp public/private distinction, we wondered further if there might be subgroups among the expert witness community who would tend toward marked reticence about the other expert in any area other than the latter's expressed opinion. We further wondered whether there might be other subgroups who would be less constrained, under the philosophy that any data, no matter how obtained, how relevant or how derogatory, are fair game for the adversary system.

Method

Participant Description

The participant sample consisted of (1) those members of the Program in Psychiatry and the Law (the Program) who had played no role in the questionnaire design and (2) attendees at a workshop entitled "Attorney-Expert Twilight Zone," advertised as focusing on unexplored aspects of expert witness practice. The latter workshop was held at the 1999 Annual Meeting of the AAPL. We hypothesized that subjects (mostly AAPL members) were interested in forensic practice and varied in their levels of experience. Although clearly neither representative nor random, the sample was purposeful; the title of the seminar might be presumed to attract those interested in the topic who could readily express opinions on "right behavior," regardless of their actual experience with the questionnaire situation.

Questionnaire Design

Participants filled out questionnaires that inquired about a variety of issues, including a spectrum of

possible disclosures—ranging from those that might be considered objective and factual, to those that would be considered highly subjective and personal—that one side's expert might or might not make to the retaining attorney about the opposing expert. Participants were asked to imagine the appropriate behavior, even if they did not face this situation in practice.

Questions were organized in order of increasing encroachment on personal privacy or increasing possible stigma from the information to be disclosed. In some cases the nature of the case was given to imply possible relevance of the disclosure. Respondents were asked to rate whether the disclosure was ethical or appropriate on a 10-point scale, where 1 equaled "never appropriate" and 10 signified "always appropriate." A score of 5.5 indicated indifference. Thus, the numerical responses were tested as they differed significantly from 5.5.

In each instance a follow-up query asked, on a similar 10-point scale, how relevant was disclosure of that issue to the function of expert witnesses.

Note that (a) this was a limited pilot study and (b) a small percentage of the questionnaires were completed by members of the Program who had not participated in designing the questionnaires.

Results

A total of 37 usable questionnaires were returned for analysis, a response rate of approximately one-third. Many contained one or more elements of missing data. Even with the missing data, the following conclusions could be supported by the evidence: (1) disclosure of the publicly available factual material was regarded as fully acceptable by large majorities; (2) the more personal data evoked significant scatter in responses. Some questions identified subgroups of respondents who supported either yes or no responses. The questions and the responses are summarized as follows. We examined frequency distributions, means, and standard deviations of responses, *t* tests as well as a principal component analysis limited to two factors. For all the *t* tests, we compared the means obtained with a chance rating of 5.5, half-way between totally inappropriate (1) and totally appropriate (10).

The following five queries may be considered to constitute the "public" data on the opposing expert, based mostly on information theoretically available from a curriculum vitae or court records. Responses

with respect to appropriateness of such disclosure were uniform. Participants also found questions 3, 4, and 5 relevant to their expert function, while not finding questions 1 and 2 relevant.

1. *The other expert is not board certified.* When compared with a chance rating of 5.5, the mean rating of 8.7 on this item suggests that participants found this disclosure appropriate ($M = 8.7$, $SD = 2.0$, $t(36) = 9.8$, $p = .000$).

2. *The other expert is not forensic board certified.* Results here were almost identical to those of number 1 ($M = 8.1$, $SD = 2.3$, $t(36) = 6.7$, $p = .000$).

3. *The other expert does cases only for one side (plaintiff/prosecution/defense).* Respondents accepted this disclosure at a level significantly above chance ($M = 8.4$, $SD = 2.2$, $t(36) = 7.9$, $p = .000$). There was a nonsignificant trend toward the view that this disclosure was relevant to expert function.

4. *The other expert's lecture last year on this very subject reveals a bias.* Results were broadly comparable with those in number 3 above ($M = 8.4$, $SD = 2.0$, $t(36) = 8.8$, $p = .000$).

5. *The other expert's recent article on subject matter related to this case reveals a bias.* Again, results paralleled number 3 above ($M = 8.6$, $SD = 1.7$, $t(36) = 10.7$, $p = .000$).

Results were quite different with the more "personal" queries as follows. Instead of responding that the queries were "appropriate" as happened in the first five questions, subjects most frequently indicated "inappropriate" to the following seven questions.

6. *The other expert is a survivor of childhood sexual abuse and probably cannot be objective about this recovered memory case.* Responses here were scattered, with a large standard deviation ($M = 4.0$, $SD = 3.2$, $t(36) = -3.0$, $p = .005$). Interestingly, there was a plurality in favor of "never appropriate," yet nine respondents indicated that it was almost always acceptable to disclose this fact.

7. *The other expert has been through a messy divorce and custody battle and is thus questionably objective about this custody case.* Amid scattered responses with a large standard deviation ($M = 4.2$, $SD = 3.4$, $t(36) = -2.3$, $p = .029$), the modal answer was a slightly statistically significant "never appropriate."

8. *The other expert is gay/lesbian and thus is questionably objective in this emotional injury case involving gay-bashing.* Responses against disclosure were

significant with the mode at "never appropriate" ($M = 3.8$, $SD = 3.2$, $t(36) = -3.2$, $p = .003$).

9. *The other expert is known to me personally to be an alcoholic [in a case involving alcoholism].* The modal answer was "never appropriate" ($M = 3.8$, $SD = 3.1$, $t(36) = -3.2$, $p = .003$).

10. *The other expert is known to me personally to be a substance abuser [in a case involving substance abuse].* Participants favored not disclosing this (mode = 2) even though responses showed some scatter ($M = 3.7$, $SD = 3.0$, $t(36) = -3.6$, $p = .001$).

11. *The other expert is known to me personally to be a liar.* Again, participants favored nondisclosure (mode = 2) even though responses showed some scatter ($M = 4.1$, $SD = 3.0$, $t(36) = -2.7$, $p = .010$).

12. *The other expert is known to me personally to be a member of a hate group (Ku Klux Klan, survivalist militia, skinhead group, etc.).* The responses to this query revealed a statistically significant finding toward appropriateness of disclosure ($M = 7.1$, $SD = 3.1$, $t(36) = 3.1$, $p = .004$), accompanied by a similar agreement that this disclosure was relevant to expert witness function ($M = 7.6$, $SD = 2.5$, $t(36) = 4.8$, $p = .000$). Although comparably as personal as (and perhaps more stigmatizing than) earlier hypothetical disclosures, this query identifies a semi-public role (i.e., political group membership), which may explain why this query yielded a different response.

In most of the last seven questions, responses to their relevance to expert function, however, were widely scattered and hence inconclusive. The exception was question 12, being a member of a hate group.

Factor analysis of the data revealed two major factors. The variables that load on each factor support grouping the questions into two main constructs: (a) the publicly available data, which are generally viewed as suitable for disclosure; and (b) a set of "personal secrets," the appropriateness of disclosure of which evoked wide variability of opinion among respondents to this survey.

Discussion

Because we are reporting a pilot study, it is clear that further investigations must involve larger numbers of participants with a wider range of backgrounds. The study data are also limited to what respondents say they would or should do, rather than what they actually do "behind closed doors."

A relatively clear distinction between disclosures of private and public data did emerge. However, beyond the simple public/private distinction, we may find it noteworthy—and, perhaps, even somewhat distressing—that, for “personal” data, responses were so widely scattered, indicating that there is little consensus or agreement about the suitability of personal disclosures. This is the case despite the fact that many of the personal data used in the questionnaire would be the kind of information highly subject to rumor, hearsay, innuendo, personal bias, or animus in the reporter, and similar distorting influences. An example might be question 7, in relation to which an expert would be unlikely to know all of the facts about an opposing expert’s difficult divorce case. These findings about the willingness of some experts to consider revealing personal information clearly suggest a need to discuss these issues in open fora with the possible goal of at least some movement toward consensus in such critical matters.

These results reveal interesting parallels with two earlier studies in other realms: one of mental health professionals’ attitudes toward sex between patients⁷ and a second one on the imagined duty of therapists to report patients’ past crimes.⁸ Both those studies and the present one capture the notion of “professional duties,” a notion characteristic of the systematic reasoning stage of moral development.⁹

At this developmental stage, a person’s roles within a system are seen as public. While all roles have a public dimension in contrast to their private aspect, professional work in the real world is usually open to examination and critique. Forensic psychiatrists, for example, must testify clearly and make clear the bases of their opinions so that lay juries can understand both the opinion and the reasoning behind it. The forensic context is a public one, occurring in “open” court, so that the disclosures in our survey that addressed “public” data were seen to be appropriate. The information disclosed in the public realm was distinguished from that which might be appropriately considered “secret.” The personal information known to the expert was separate from the expert’s public (professional) role. This position contrasts markedly with more primitive conceptual models in which the private person and the (public) role are inappropriately joined (or confused) in the observer’s eye.⁹

Ethical Issues

Although our study was aimed primarily at determining what our sample actually thought would be appropriate disclosure by one expert about another expert, both the issue and the responses raise certain ethical questions. Our general position is that the minimally acceptable requirement for an expert is to maintain professional standards, which would include avoidance of conflict of interests; refraining from disclosing private material about either clients, patients, or the other expert; and maintaining professional judgment despite various pressures, either from attorneys or from the stresses of testifying under oath.

The ethics code of the American Academy of Psychiatry and the Law identifies duties to examinees but offers little explicit guidance on dealing either with attorneys or opposing experts. In general terms, the criterion of honesty and striving for objectivity includes the idea that the expert’s opinion “reflects this honesty and efforts to attain objectivity”.¹⁰ The accompanying commentary to the ethics code goes on to say specifically:

... practicing forensic psychiatrists enhance the honesty and objectivity of their work by basing their forensic opinions, forensic reports, and forensic testimony on all the data available to them. They communicate the honesty of their work, efforts to attain objectivity, and the soundness of their clinical opinion by distinguishing to the extent possible between verified and unverified information, as well as among clinical “facts,” “inferences,” and “impressions.”¹⁰

Based on the foregoing citation, one could justify not telling one’s retaining lawyer information about the other side’s expert because of the difficulty in discriminating “between verified and unverified information,” but that question is obviated if, in fact, the information is directly and validly known to the expert. On the other hand, a case could be made that both honesty and striving for objectivity at least permit telling the attorney candidly what one expert knows about the other. Further, objectivity would theoretically benefit, because certain kinds of knowledge about the opposing expert might help identify a potential bias that might be ultimately illuminating to the jury from cross-examination. Both of these latter rationales may be seen to derive from the phrase in the ethics commentary, “all the data available.” While it is actually more likely that the framers of this code had in mind the clinical data relating to the examinee or the forensic issue at stake, the deci-

sion to disclose could thus be defended in relation to the material in our study.

Professionals, however, understand not only the stated literal portions of ethics codes but also the reasons for statement of those principles and the implications for those situations not explicitly described (see, for example, Handselman,¹¹ noting that ethics codes offer only minimal guidance but should provide basic principles to guide decision making). A more fundamental argument could be made that critique of an opposing expert's opinion legitimately uses those clinical skills for which one has been retained, while disclosure of more personal information lies outside that realm of legitimacy. Appelbaum⁶ has put this with characteristic clarity:

... information about a witness's private life ("He's going through a divorce and might be a little shaky now") or professional reputation unrelated to the opinion being offered in the current case ("I understand he's a hired gun for sale to the highest bidder") does not serve to advance the interests of ascertaining truth in the courtroom. An aggressive attorney might well like to know such information and might find it of use in attacking an opposing witness, but it should not be the role of the forensic expert to provide it (p. 24).

Appelbaum's decisive answer, with which we are in full agreement, contrasts markedly with the wide scatter of responses on our survey, a contrast that forcefully suggests that the issue requires further discussion.

Unaddressed in our study is the personal ethical self-scrutiny that might, for example, lead an expert to avoid taking a custody case in the middle of, or shortly after, a messy divorce situation. In that sense, the expert attempts to maximize striving for objectivity by taking affirmative steps to avoid potential personal bias.

We further suggest that an impression formed about an opposing expert (such as "I think that expert only takes cases for the defense"), if conveyed as if it were a known fact, represents a failure of the ethics of objectivity. While "objectivity," as used in the ethics guidelines, may focus primarily on the posture of the expert toward the examinee or the clinical question at issue, the requirement for objectivity could easily be understood (and appropriately so) to extend to the opposing expert as well.

Conclusion

In conclusion, these results imply that respondents for the most part viewed their expert functions and those of the opposing expert as public and open. In their choice of disclosures, respondents drew more from their professional and scientific roles than from the personal "secrets" and presumed biases of the opposing expert. Insofar as these responses mirror actual practice, the findings are generally encouraging as to the professionalism and judgment of respondents. The wide scatter on some responses, however, clearly indicates the need for both open discussion about, and further study of, these issues.

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References

1. American College of Physicians: Position paper: Ethics Manual. *Ann Intern Med* 128:576-94, 1998
2. Gutheil TG: *The Psychiatrist as Expert Witness*. Washington, DC: American Psychiatric Press, 1998
3. Appelbaum PS, Gutheil TG: *Clinical Handbook of Psychiatry and the Law* (ed 2). Baltimore: Williams & Wilkins, 1991
4. Berger SH: *Establishing a Forensic Psychiatric Practice*. New York: WW Norton Co., 1997
5. *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985)
6. Appelbaum PS: In the wake of *Ake*: the ethics of expert testimony in an advocate's world. *Bull Am Acad Psychiatry Law* 15:15-25, 1987
7. Commons ML, Bohn JT, Godon LM, Hauser MJ, Gutheil TG: Professionals' attitudes towards sex between institutionalized patients. *Am J Psychother* 46:571-80, 1992
8. Commons ML, Lee P, Gutheil TG, Goldman M, Rubin E, Appelbaum PS: Moral stage of reasoning and the misperceived "duty" to report past crimes (misprision). *Int J Law Psychiatry* 18:415-24, 1995
9. Colby A, Kohlberg L: *The Measurement of Moral Judgment*. Vol. I: Theoretical Foundations and Research Validation. New York: Cambridge, 1987
10. American Academy of Psychiatry and Law: *Ethical Guidelines for the Practice of Forensic Psychiatry*. Washington, DC: AAPL, 1995, pp xi-xii
11. Handselman MM: Confidentiality: the ethical baby in the legal bathwater. *J Appl Rehab Counseling* 18:33-4, 1989