

“Hired Guns,” “Whores,” and “Prostitutes”: Case Law References to Clinicians of Ill Repute

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The “hired gun phenomenon” is a recurrent topic in forensic psychiatric shop talk, but scholars have conducted very little systematic investigation of how courts respond to the suggestion that mental health testimony is “for sale.” This article examines the issue using findings from a computer search of court decisions that make, or refer to, derogatory statements concerning mental health experts. The search strategy, using the root words or search terms “(prostitut! or whore or hired gun) w/100 psych!,” yielded 567 cases, 45 (7.9%) of which contained comments about professionals’ ethics. In 35 opinions, professionals were termed or compared with “hired guns”; five cases described testifying experts using the word “whore,” and five cases used some variation on “prostitute.” Most cases referred to psychiatrists (rather than psychologists); specific clinicians were identifiable in 26 cases. Over half the remarks occurred in appeals of criminal convictions and concerned psychiatric testimony at trial or before sentencing. Prosecutors were the most common sources of disparaging statements; appellate courts usually disapproved of their remarks but did not reverse convictions. Appellate decisions themselves were the second most frequent sources of derogatory remarks. These findings document the perception among legal professionals that many mental health experts are unscrupulous.

A leading text on forensic mental health evaluations opens as follows:

There can be no doubt that the legal system’s use of expert opinions from mental health professionals and other behavioral scientists is a

matter of considerable controversy. Members of the general public, the legal profession, and even the mental health profession have all been highly critical of such testimony and the way it is proffered.

The public’s antipathy toward clinical opinion appears to stem from the belief that most “expert” testimony is based on “junk science” from professionals who, for a fee, will find evidence of almost anything [p. 3].¹

Courtroom experts are commonly perceived as “whores”² or “hired guns”; the latter term invokes “the tradition of those

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legendary gunfighters and outlaws of the Old West who meted out frontier justice with their six-shooters” (p. 183).³ For several years, “the hired-gun phenomenon”³ (p. 184)—that is, the perception that expert testimony frequently reflects who is paying the clinician and not an impartial assessment of the merits of a case—has been the object of mental health professionals’ persistent commentary.

Goldstein³ articulates the view that is most acceptable to forensic clinicians, “that the vast majority of forensic psychiatrists are competent and ethical practitioners who attempt to be scrupulously honest” (p. 189). To the extent that it exists, Goldstein argues, the hired gun problem can be reduced by peer review, enforcement of ethical standards, better training for forensic clinicians, and better cross-examination by attorneys.³ Other writers have argued that the impartial expert is an unrealistic ideal because clinicians unavoidably and unconsciously identify with the side retaining them.⁴ However, testifying psychiatrists can still be honest advocates for what they believe is medically correct;^{5,6} moreover, when experts with known biases testify honestly, they help litigants present “the best case possible” and “may serve a worthwhile role of providing the court with” counterbalancing testimony (p. 389).⁷ At the opposite extreme, Stone⁸ consistently maintains that psychiatrists encounter moral problems whenever they enter the courtroom. These problems include the risk that they will “prostitute the profession, as they are alternatively seduced and assaulted by the power of the adversarial system” (p. 58).

The hired gun phenomenon is a recurring topic in popular press accounts and “when forensic psychiatrists gather to talk ‘shop’ with each other” (p. 154).⁹ However, scholars have conducted very little systematic investigation of the frequency or impact of meretricious psychiatric testimony. Existing empirical research seems to bolster Goldstein’s position about the predominant honesty of experts. Contrary to common accusations, for example, most mental health clinicians who testify in criminal cases do not consistently serve as either defense or prosecution experts.¹⁰ Similarly, attorneys and judges probably hold a higher view of mental health professionals than anecdotes suggest. When their opinions are studied systematically, lawyers and judges usually respect the professionals’ opinions.^{11,12} Attorneys who use mental health professionals as experts rate the clinicians’ communication skills and local reputations as more important than the likelihood that the clinician will render a favorable opinion.¹³

The primary source for legal opinion is case law. Disparaging comments about medical testimony were recorded at trial in Great Britain nearly two centuries ago,¹⁴ when Crown Counsel called one witness a “Jew physician, [here] to give an account of a prisoner as a madman, to get him off upon the ground of insanity” (p. 82). In the 1920s, Michigan prosecutors urged jurors to disregard the potentially exculpatory testimony of experts, characterizing alienists and other medical practitioners as “prostitutes.”^{15,16}

These examples show that making disparaging remarks in court about psychi-

atric testimony is not new, but they share the limitations of all anecdotal "evidence." They serve, nonetheless, to raise questions about how frequently such comments appear in case law and how courts have recently viewed the suggestion that psychiatrists are amoral and easily bought. This article provides a systematic look at the issue, using, as its primary source, cases found in the LEXIS MEGA database. Specifically, the article describes findings from a U.S. case law search for occurrences of terms such as "whore" and "hired gun" that lie close to words that refer to mental health professionals.

Methods

The LEXIS MEGA library is a full-text legal research database that combines all reported federal and state case law from the last five decades, as well as some unreported decisions.¹⁷ In April 1999, the author conducted a computerized search of this database using the strategy "(prostitut! or whore or hired gun) w/100 psych!" This strategy sought case law occurrences of the root words ("strings") or search terms "whore," "hired gun," and "prostitute" (e.g., "prostitute," "prostituting") that occurred within 100 words of the root word "psych" (e.g., "psychiatrist," "psychologist").

The search yielded 567 opinions rendered during the years 1978 through 1998. The author then perused these opinions for phrases that referred to mental health professionals as clinicians of ill repute (CoIRs), that is, phrases that called psychiatrists or psychologists "hired guns" or likened their behavior to practi-

tioners of the oldest profession. Cases in which professionals were termed CoIRs (either individually or collectively) were then examined in detail, with the following items noted when applicable:

- Case name
- Whether the case actually alluded to mental health professionals as CoIRs
- The court rendering the opinion
- A "point cite" (i.e., the specific page on which the reference occurred)
- The year date
- The state or federal district
- Whether the case was a civil or criminal case
- The forensic psychiatric issue addressed by mental health professionals involved in the case (e.g., custody determination, insanity)
- The legal issue addressed in the case
- Whether someone asserted that a clinician was, was not, or might be a CoIR
- Who made this assertion
- The name and discipline (psychiatrist or psychologist) of the professional(s) to whom the assertion referred
- Which search term occurred in the assertion (i.e., "hired gun," "prostitute," or "whore")
- Whether the opinion included a ruling about the phrase.

Results

As might be expected, the search strategy generated many citations that did not refer to clinicians' behavior or perceptions about their motives. For example, most opinions containing the strings

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“prostitute” and “psych” referred to women who had emotional problems or had undergone mental health evaluations. The string “whore” typically occurred as a quotation of an insulting remark made by a man about a woman (often in sexual harassment cases); the string “hired gun” occasionally referred to a person who had been paid to commit a killing.

Forty-five (7.9%) of the 567 opinions, however, contained CoIR statements (i.e., unflattering allusions to or comments about mental health professionals). Table 1 lists these cases, the point cite at which the remark occurred, and what the case concluded about each remark.

In 35 (78%) of the 45 CoIR opinions, professionals are termed or compared with “hired guns.” Five cases (11%) contain references to clinicians as “whores,” and five (11%) use some variation on “prostitute” to describe testifying experts. Most of the cases (25, or 56%) refer only to psychiatrists; 16 (36%) refer only to psychologists, and four (9%) refer to members of both of these professional groups. Names of a specific expert witness appear in 26 (58%) of the cases, and a total of 15 psychiatrists and 12 psychologists are identifiable. Only one professional is identifiable in more than one case; he appeared twice because a conviction was overturned (leading to one reported opinion), and the prosecutor was sanctioned for his statements (resulting in the second opinion). Most of the opinions (27, or 60%) deal with appeals of criminal convictions.

Figures 1 through 6 summarize several characteristics of the cases. CoIR references to mental health professionals oc-

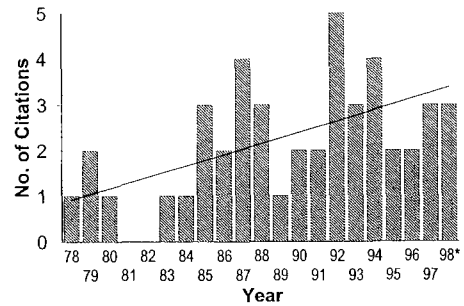


Figure 1. Distribution of the 45 CoIR references with case citations by year (1978–1998).

curred in all years since 1978 except 1981 and 1982. Figure 1 shows the distribution of the CoIR references over this period; there is a significant trend toward more frequent occurrences of CoIR statements ($R^2 = .339$, $df = 19$, $t = 3.12$, $p = .0056$). Figure 2 shows the 20 states that were the source for the cases. Massachusetts generated six citations, and California, Florida, and Illinois each generated four.

Figure 3 displays the topics about which mental health testimony had been offered at the original hearing or trial. Although trials involving testimony about insanity are statistically unusual occur-

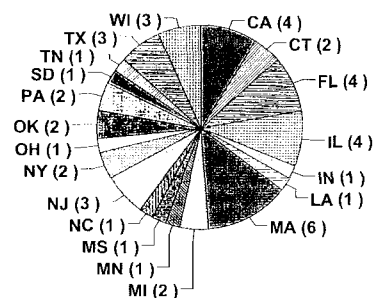


Figure 2. States that were the source for the 45 cases. Numbers of citations are given in parentheses.

Table 1
45 Cases Containing Assertions About Mental Health Professionals as
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Case No.	Case Name	Point Cite	Summary Concerning the CoIR Phrase
1	Watkins v. Telsmith, Inc.	121 F.3d 984, 991 (5th Cir. 1997)	Daubert factors will sort "hired gun" from expert who could withstand peer review.
2	Underwager v. Salter	22 F.3d 730, 736 (7th Cir. 1994)	Not libel to call Underwager's testimony "gobbledygook" at a professional meeting.
3	Jansen v. Packaging Corp.	898 F. Supp 625, 629 (N.D. Ill. 1995)	Expert must be independent, not a hired gun.
4	Tomlin v. Holecek	150 F.R.D. 628, 632 (D. Minn. 1993)	Being defense expert does not imply that clinician is a hired gun.
5	Belcher Towing v. Howard	638 F. Supp. 242, 244 (S.D. Fla. 1986)	Testifying psychologist was not a hired gun; okay for court to accept his view.
6	People v. Visciotti	825 P.2d 388, 435 (Cal. 1992)	Issue as to whether remark constituted prosecutorial misconduct was waived because defense did not object at trial.
7	People v. Lucero	750 P.2d 1342, 1356 (Cal. 1988)	Conviction reversed because excluded expert witness would not have been perceived as a hired gun who testified for money.
8	Glenn v. City of Inglewood	50 Cal.Rptr. 2d 633, 645 (Cal. Ct. App. 1996)	Reasonable to ignore a clinician's opinion because "both sides hire hired guns."
9	<i>In re</i> Walter E.	13 Cal. App. 4th 125 133 (1992)	Not paying for second expert was not due process violation; appellant was only seeking a hired gun.
10	State v. Ross	646 A.2d 1318, 1367 (Conn. 1994)	Prosecution psychiatrist should have testified; professionals are not the hired guns of their employers, and his testimony might have persuaded jury not to impose death sentence; sentence reversed.
11	Utz v. Warden	No. CV911128S, 1991 Conn. Super. LEXIS 770, at *8 (Conn. Super. Ct. Dec. 4, 1991)	Expert was not a hired gun, "as some psychiatrists can be"; appeal dismissed.

Table 1
Continued

Case No.	Case Name	Point Cite	Summary Concerning the ColR Phrase
12	Florida Bar v. Schaub	618 So.2d 202, 203 (Fla. 1993)	Attorney's remarks, which among other things included calling psychiatrist a hired gun, were grounds for license suspension.
13	Nowitzke v. State	572 So.2d 1346, 1350 (Fla. 1990)	Prosecutor's remarks (see no. 12) were grounds for reversal of conviction.
14	Budget Rent-A-Car Systems Inc. v. Jana	600 So.2d 466, 468 (Fla. Ct. App. 1992)	Court's curative instruction was sufficient to remove prejudice caused by remark.
15	<i>In re</i> Marriage of Slayton	685 N.E.2d 1038, 1045 (Ill. Ct. App. 1997)	Dissenting opinion: majority should have given more credence to psychologist, who was not a hired gun.
16	People v. Martin	674 N.E.2d 90, 96 (Ill. Ct. App. 1996)	Given whole context, judge's statements about professionals (e.g., "an industry of hired guns") was not evidence of prejudice.
17	People v. Dunsworth	599 N.E.2d 29, 36 (Ill. Ct. App. 1992)	Cumulative effect of statements was grounds for reversal.
18	Palmer v. State	486 N.E.2d 477, 482 (Ind. 1985)	Defendant not entitled to psychiatrist of his choosing; appointing disinterested experts is better than allowing each side to show up with its hired guns.
19	Miramón v. Bradley	701 So.2d 475 (La. Ct. App. 1997)	Incidental; quote comments on judicial deference to expertise.
20	Commonwealth v. Benson	642 N.E.2d 1035, 1038-39 (Mass. 1994)	Not grounds for reversal; jury would take attorneys' remarks with a grain of salt.
21	Adoption of Carla	623 N.E.2d 1118, 1121 (Mass. 1993)	Expert's passing remark about himself that he was not a hired gun.
22	Commonwealth v. O'Brien	388 N.E.2d 658, 662 (Mass. 1979)	Judge's failure to declare mistrial in response to prosecutor's remark was not grounds for reversal of conviction; defense failed to ask for curative instruction.
23	Commonwealth v. Shelley	373 N.E.2d 951, 954 (Mass. 1978)	Judge's instructions did not neutralize impact of prosecutor's remarks; conviction reversed.

Table 1
Continued Repute

Case No.	Case Name	Point Cite	Summary Concerning the CoIR Phrase
24	Commonwealth v. Grimshaw	576 N.E.2d 1374, 1376 (Mass. Ct. App. 1991)	No grounds for conviction reversal; manslaughter conviction implied jury gave weight to witness's testimony, despite remarks.
25	Commonwealth v. Jones	399 N.E.2d 1087, 1099 (Mass. Ct. App. 1980)	Quotes <i>Shelley</i> as contrast to this case.
26	People v. Chatfield	428 N.W.2d 788, 789 (Mich. Ct. App. 1988)	Failure to review remarks would not be miscarriage of justice; therefore, no reversal.
27	People v. Williams	414 N.W.2d 139, 142 (Mich. Ct. App. 1987)	No objection, so appeal limited to whether failure to reverse would be a "miscarriage of justice"; no grounds for reversal.
28	State v. Bey	610 A.2d 814, 859 (N.J. 1992)	Remark was harmless; court issued curative instruction.
29	<i>In re G.A.</i>	706 A.2d 1116, 1118 (N.J. Super. Ct. App. Div. 1998)	Trial judge erroneously ruled against prosecutor's request to appoint a psychiatric examiner; judge had wanted to avoid a "battle of the experts or the hired guns."
30	State v. Russo	579 A.2d 834, 848 (N.J. Super. Ct. App. Div. 1990)	Remarks were not unduly prejudicial.
31	<i>In re Umani K.</i>	673 N.Y.S.2d 877 (N.Y. Fam Ct. 1998)	Testimony of psychiatrist who had treated a mother was valuable because he was not merely a "hired gun."
32	People v. Wilson	518 N.Y.S.2d 690, 692 (N.Y. App. Div. 1987)	Defense attorneys told jury he would not use "hired guns"; not using expert was evidence of ineffective assistance; conviction reversed.
33	State v. Kirkley	302 S.E.2d 144, 152 (N.C. 1983)	Given sloppy nature of testimony and preparation, comments were not grounds for reversal.
34	State v. Mundy	650 N.E.2d 502, 518-19 (Ohio Ct. App. 1994)	Remark was improper, but in context; it was not grounds for reversal.
35	Ake v. State	778 P.2d 460, 465 (Okla. Crim. App. 1989)	Defendant not entitled to funds for a hired gun; quote of <i>Brown</i> (no. 36).

Table 1
Continued

Case No.	Case Name	Point Cite	Summary Concerning the CoIR Phrase
36	Brown v. State	743 P.2d 133, 137 (Okla. Crim. App. 1987)	Indigent defendant not entitled to public money to shop around for a favorable opinion.
37	Commonwealth v. Slaughter	408 A.2d 1141, 1143 (Pa. Super. Ct. 1979)	Prosecutor's remarks did not imply intent to abort trial; retrial not double jeopardy.
38	Zimmerman v. Zimmerman	1984 Phila. Cty. Rptr. LEXIS 103, *40	Psychologist was not a hired gun, so his testimony was valid and valuable.
39	State v. Hallman	391 N.W.2d 191, 194 (S.D. 1986)	Testimony acceptable; not hired, although used, by prosecution.
40	Gotwald v. Gotwald	768 S.W.2d 689, 700 (Tenn. Ct. App. 1988)	Psychiatrist's statement about himself.
41	Gammill v. Jack Williams Chevrolet, Inc.	972 S.W.2d 713 (Tex. 1998)	Quote from no. 1 (<i>Watkins</i>); appeal concerned application of <i>Daubert</i> to proffered testimony about seat belts.
42	Tompkins v. State	774 S.W.2d 195, 217-18 (Tex. Ct. App. 1987)	Statements were not grounds for reversal: defendant only made general objection and did not set forth a separate point of contention.
43	Gibson v. Gibson	1995 Tex. App. LEXIS 794, *8	Characterization of psychologist by appellant.
44	State v. Repp	362 N.W.2d 415, 423 (Wis. 1985)	Quote of no. 45; concurring judge's opinion of psychiatrists.
45	State v. Flattum	361 N.W.2d 705, 721 (Wis. 1985)	Concurring judge's general opinion of testifying psychiatrists.

rences,¹⁸ they account for 29 percent of the derogatory allusions to professionals in this case sampling. Opinions about criminal trials at which other mental defenses (i.e., battered woman syndrome, specific intent, diminished capacity) had been raised or in which mental health testimony had been introduced in death

penalty mitigation account for an additional 25 percent of the cases.

Figure 4 shows the source of the CoIR remarks. Prosecutors made the plurality of the remarks, usually about defense experts. The next most frequent source was the written opinion itself. As Table 1 shows, the authors of opinions usually do

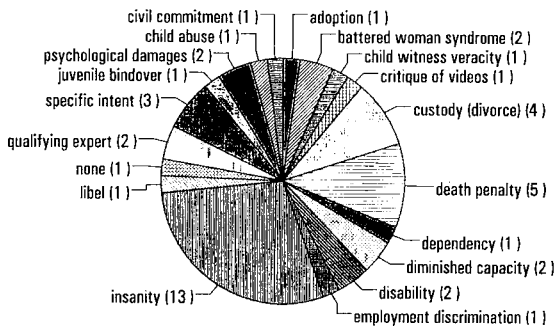


Figure 3. Topics about which mental health testimony was offered at the original hearing or trial. Numbers of cases are given in parentheses.

not make deprecatory remarks about specific professionals. Often, the opinions state that many courtroom experts are “hired guns,” or imply that some mental health professionals are “hired guns,” although the clinician here was not.

This finding is especially interesting in light of what courts said when they reviewed cases where attorneys had uttered such phrases during the original trial. As Figure 5 shows, 19 (42%) of the opinions included rulings about phrases themselves. In all but two cases, these were appeals of criminal convictions, typically alleging prosecutorial misconduct or prejudicial impact of a prosecutor’s remark made during summation. Appeals courts

usually disapproved of prosecutors’ CoIR statements. However, reversals of convictions occurred in only three cases, and in all three, the prosecutors made several derogatory insinuations that went far beyond merely calling the defense witness some variation of a CoIR. In four cases, the appellate court did not reverse because defense attorneys had not objected to the CoIR statements at trial, and thus reversal could occur only if the prosecutor’s statement had created a “miscarriage of justice.”

The 45 cases contained a total of 48 assertions about testifying professionals; and Figure 6 shows the various forms that these assertions took. In 34 cases (76%),

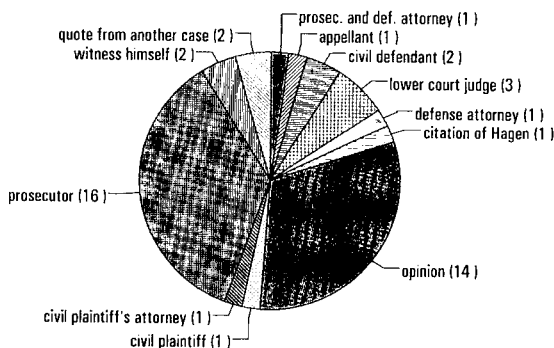


Figure 4. Sources of remarks, with numbers of remarks shown in parentheses.

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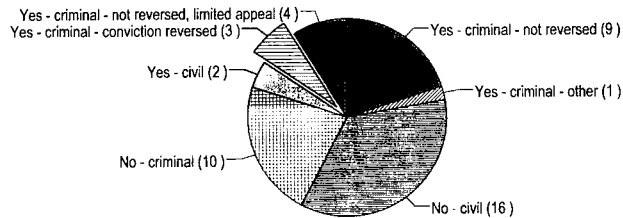


Figure 5. Relationship between the appellate opinion and the ColR remark. Numbers of decisions are shown in parentheses.

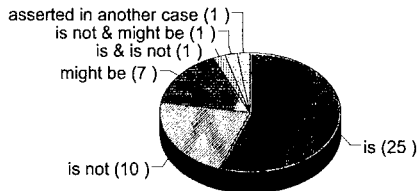


Figure 6. Nature of the assertions. The numbers of cases in which it is asserted that a professional is, is not, or might be a ColR are given in parentheses.

the statements suggested that mental health professionals' testimony was, or might be, basely motivated. And of course, in the 10 cases (22%) that contained only assertions that a clinician was not a hired gun, the statement implied that "some psychiatrists can be" (at *8).¹⁹

Discussion

Four major findings emerge from this sampling of case law. First, 14 written opinions express the belief that at least some mental health professionals' testimony is attributable simply to their payment source. Although the term "hired gun" usually appeared in quotes in these opinions, characterizing clinicians as amoral mercenaries appears to be acceptable for judges (as well as trial attorneys). This finding conforms to the view, expressed by southwestern Ohio trial court judges, that the likelihood of an expert's supporting one's side is an important rea-

son that attorneys select the experts that they do.¹³

Second, this article describes what is probably only a small sampling of reported case law's uncomplimentary characterizations of mental health professionals. Although the search strategy used here probably found most of the phrases that called clinicians hired guns, prostitutes, or whores, it missed other, equally derogatory descriptions that appear in appellate opinions. The author came across several of these while examining the 45 cases obtained via the search strategy. For example, case no. 27 in Table 1 (*People v. Williams*)²⁰ referred to *People v. Tyson*,²¹ a 1985 Michigan case in which the prosecutor described the clinician who appeared in *Williams* as "a businessman. . . who gets paid to do this sort of thing" (at 742). Additional search strategies, such as "(mercenary! or (pay or paid)) w/50 psych!," might have disclosed many other insinuations that clinicians' opinions were fee-driven.

Third, the database used for this article contains primarily appellate level case law references. Lawyers file appeals in only a fraction of cases, and appellate decisions do not, of course, contain full transcripts of what occurred at the origi-

nal hearings or trials. Nonetheless, one can safely conclude that, although it is not common for attorneys to tell jurors disparaging things about testifying experts, it is far from rare. In the sample studied here, prosecutors' CoIR statements occurred far more frequently than did similar statements from criminal defense attorneys; because the sample consisted of appeals, however, this finding does not necessarily imply a true prosecution/defense difference in frequency of CoIR statements. Although written opinions consistently voiced disapproval of prosecutors' disparaging statements about defense experts, convictions usually withstood appeal despite the prosecutors' remarks. Appellate courts overturned convictions only when prosecutors had made a series of derogatory statements and not because of a single attribution of meretriciousness.

Fourth, appellate courts appear to display some hypocrisy in their view of CoIR statements made in trial courts. The written opinions frequently expressed strong disapproval of prosecutors' remarks and seriously considered whether to reverse convictions. As a Massachusetts appellate court stated (in a case in which it ultimately did not reverse a conviction), "We continue to wonder why some prosecutors persist, by ill[-]advised rhetoric and inflammatory remarks, in attempting to snatch defeat from the jaws of victory" (at 1099).²² Yet appellate judges themselves were the second-most common source of CoIR remarks about mental health professionals. In effect, the appellate judges were stating, "We don't want prosecutors to say such things to

jurors, although we write the same things in our opinions and believe that the statements are often true."

Conclusions

The findings presented in this article are a modest example of a growing trend in dealing with "law and mental health" issues, the application of numerical methods to empirical questions. Traditionally, psychiatrists have looked at forensic issues as philosophical problems and have addressed them through scholarship that explores ideas and meanings but not systematically gathered data. While the "hired gun problem" is obviously an ethical issue, it is also a practical problem with at least two facets—the unfortunate and all too common presence of unscrupulous experts, and the perception of legal professionals (not to mention the public) that many experts are unscrupulous. This article provides an initial look at this latter aspect of psychiatrists' presence in court. The author hopes this report will encourage other investigators to map the empirical dimensions of commonly encountered forensic issues.

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