

Expert Witness Perceptions of Bias in Experts

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A pilot study of perceptions of different sources of expert bias, as well as of personal investment in case outcomes, was performed among attendees at a workshop at an annual meeting of the American Academy of Psychiatry and the Law. Participants were asked to rate hypothetical responses by experts to various case outcomes and the biasing potential of different kinds of situations for opposing or other experts. A factor analysis produced two factors. Factor 1 included questions about situations that were obviously biasing (such as working only for the defense). Factor 2 included questions assessing the potential of certain situations to cause bias in experts, or how likely experts thought other experts were to be biased. In general, experts identified only four areas to be overtly biasing. All occurred within situations in which experts worked only for one or the other side of civil or criminal cases. Experts otherwise thought other experts were reasonably bias free and well able to compensate for any bias when it occurred. The data suggest that experts may deal with bias by turning down cases that may cause them personal discomfort.

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There are many ideal qualities for expert witnesses. The objectivity of the expert witness, in psychiatry or elsewhere, is one of the more valued qualities that an expert hopes to bring to the legal system, despite the latter's necessarily partisan adversarial structure. Despite this ideal, dealing with bias constitutes one of the central challenges for expert witnesses in the legal system. The issue has been considered throughout the history of forensic work.^{1–5} Diamond,^{1,6} among others, long ago noted the "fallacy" of impartiality as a standard. In part because of these kinds of views, the ethics guidelines of the American Academy of Psychiatry and Law (AAPL) prescribe "honesty and striving for objectivity," a phrasing intended to support the expert's efforts to deal with potential bias, despite its ubiquity.⁷

That bias is a fact of clinical judgment and is present in the trial situation has been documented in numerous studies. For example, Garb⁸ has reported

numerous biasing factors that affect clinical judgments of all kinds, including assessments of personality, psychodiagnoses, predictions of violence and suicidality, and treatment decisions. Studies of expert witnesses in particular have focused on how they are perceived by juries. For example, juries tend to see experts as "hired guns" who are highly paid for their testimony and who testify frequently.⁹ Experts have also been described as being biased by countertransference^{2,3} and by victims' statements.⁵ Whereas the existence of bias seems incontrovertible, all of the above studies were conducted in relatively naturalistic situations, in which it is difficult to isolate precisely what factors may be causing the bias. For many years, however, the topic of bias has been studied in more well-controlled experimental situations by researchers in psychophysics and behavioral economics. These controlled studies show that no absolute performance is unbiased.^{10,11} In such studies, two major factors have been shown to bias choice.¹² One is how often one choice rather than another is made: an imbalance might occur when one testifies regularly for only one side. The second factor is how choice outcomes are rewarded: does one get more business or less? Can one ask for higher fees? Does one become more popular or famous rather than infamous? This research allows the prediction that

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those two situations are particularly biasing and should be seen as such by expert witnesses.

As yet, there have been no studies of experts' own views of potential biases in the forensic arena. The present study is one of a number of studies that we have undertaken to gain better understanding of forensic experts.¹³

What kinds of situations do forensic experts themselves see as biasing? In particular, do their views tend to agree with those of others and of the empirical work mentioned above—that is, that factors such as payment, frequency of testifying, and others may influence an expert's testimony? It is axiomatic that experts may advocate for their professional or medical opinions, but not for the retaining side of the case. Yet, experts commonly assist the retaining attorney in devising strategies about a case, in crafting the cross examination of an opposing expert, and in other arguably partisan efforts.

The questions asked of the participants in this present pilot study were phrased to cover potential biasing factors in "other" experts, not in one's own conduct, to minimize defensiveness. The question is not whether bias exists—it has been amply demonstrated to exist—but instead, what forensic experts themselves perceive as possible sources of bias.

Methods

Participants

After obtaining clearance through our human studies committee and approval from the Research Committee of the American Academy of Psychiatry and the Law (AAPL), we handed out the questionnaire shown in the Appendix. As part of the educational program at an annual meeting of the AAPL, a workshop was scheduled. Attendees of the workshop became participants in the study as part of their participation in the educational process. Participants were 46 attendees at one of the "twilight zone" workshops held in October 2000. The workshop was advertised in advance as both research and an opportunity to discuss in a workshop setting attorney-expert matters that were not often openly addressed—that is, that exist in an insufficiently assessed "twilight zone"¹⁴ or gray area. Some participants had previously attended similar workshops, and the basic theory and early results had been presented in the Presidential Address of 2000.¹⁴ Thus, some familiarity

Table 1 Sample Demographics: Expert Bias Study

Variable	Percentage or Value
Male	62.2%
MD	83.7%
APA member	89.2%
Board-certified: forensic*	68.6%
AAPL member	83.3%
Average number of years in forensic practice	11.34 ± 9.32
Annual number of forensic cases	48.82 ± 79.07

* No data available on whether this category represents ABFP, ABPN added qualifications, or both.

with the format might be expected from at least some attendees.

Attendees of the workshop are described by the demographics in Table 1. The data in this table make clear that those attending, while homogeneous in some ways (almost all psychiatrists, members of the American Psychiatric Association [APA], and members of AAPL), nevertheless showed a range of experience in forensic practice.

Instrument

In the questionnaire that the participants completed, the word bias was not used in the prologue; instead "expert witness reactions to cases" was the focus of the study. Participants were asked to think of recent cases in which they had served as expert witnesses. The first series of queries addressed, on six-point scales (mean, 3.5), the question of the experts' influence on case outcomes and the participants' emotional reactions to those outcomes. Next, a series of queries asked participants to identify potentially biasing factors, from least biasing to most biasing, such as money, prestige, and the amount of public attention attracted by cases. The final series of queries focused on expert attitudes toward bias and biasing factors. Most of the questions asked the respondent to assess how often "opposing experts" showed bias in certain situations or were able to compensate for bias. Questions were phrased in this way to minimize the effect of participants' answering as they thought they should. By having them respond as reflections of how other experts would answer, we deliberately attempted to diminish the effect of this factor and to circumvent the subject's own defenses.¹⁵

Results

We sought to ascertain whether the 26 questions or items on the questionnaire were grouped together

in ways that could be informative by first analyzing the data with a factor analysis. Two factors were found both to explain some of the variance and to be interpretable. Factor 1, "obvious biasing," explained 15.9 percent of the variance and consisted of seven items. Specifically, four of the items asked about expert witnesses who were known to work only for the defense or the plaintiff in cases, and two additional items asked about the biasing effect of working on a high-profile case, or of experts' desire to show off their own expertise, skill, or erudition.

The second factor, "how choice outcomes are rewarded" which explained 12.3 percent of the variance, consisted of five items. These included three items asking about the respondent's judgment of the importance of some additional factors that might lead to biasing, such as an expert's identification with the retaining attorney, identification with certain social goals, and the tendency to work repeatedly for the retaining side. This factor also contained items reporting the frequency of opposing experts' belief in being bias free and in being able to compensate for their biases. These items all seemed to concern the respondent's judgments about how important or likely bias is among expert witnesses. The factors, together with statistical data, are presented in the Appendix.

The next major question was whether some situations were potentially more biasing for experts than others. There are two ways in which to examine how biasing these situations were perceived to be. First, if the sample as a whole saw opposing experts as not being very biased at all, their ratings of bias, on a scale of one (not at all biased) to six (extremely biased) would be close to one. In fact, the mean ratings of almost all the questions about bias were significantly higher than the lowest rating, with *t* test values ranging from a low of 8.90 to a high of 22.86 ($p < .03$), showing that all mean ratings were significantly higher than one (all probabilities are corrected for the calculation of multiple *t* tests, by using the Bonferroni correction). The two exceptions in the 33 items were: (1) whether the respondent had ever decided to take action after concluding that an expert witness on the side opposite the respondent's had acted unprofessionally during the course of a case ($t(25) = 2.44$, $p < .73$); and (2) the respondent's assessment at the time of the given events of the appropriateness of the opposing expert witness also being the examinee's treater ($t(17) = 3.47$, $p < .10$).

Perhaps a more relevant question around which to focus the results, however, was how biased opposing experts were seen as being, along the continuum from 1 to 6, for each situation. If the mean rating was approximately 3.5 (the midpoint of the six-point scale), then opposing experts were perceived as neither completely unbiased nor highly biased. Therefore, all the ratings were tested against that midpoint.

Respondents rated four items from Factor 1 as significantly more biased than the midpoint, suggesting that they recognized these factors as highly biasing for forensic experts: working only for the defense on criminal cases (mean (M) bias rating of 4.51, SD = 1.43, $t(33) = 4.41$, $p < .031$), working only for the plaintiff in criminal cases (M = 4.56, SD = 1.30, $t(34) = 4.81$, $p < .031$), working only for the plaintiff in civil cases (M = 4.59, SD = 1.39, $t(34) = 4.64$, $p < .031$), and working only for the defense in civil cases (M = 4.46, SD = 1.44, $t(34) = 3.94$, $p < .031$).

The remainder of the items clustered around the midpoint of 3.5: the amount of money involved, how high profile the case is, the expert's personal philosophy and social goals, and the expert's connection to the retaining attorney. The scores were not at the end of the scale that would have indicated that respondents saw these situations as creating any great degree of bias in opposing experts.

To what extent was there relative unanimity in the beliefs of the respondents? Perhaps some respondents, in fact, perceived that there was a great deal of bias, and others did not. An examination of the frequency with which respondents chose the various alternatives on the scale (1 through 6) would help to answer this question. For example, for items that the participants tended to see as somewhat biasing, such as whether an individual worked only for the prosecution in criminal cases, 83 percent of the sample saw such experts as revealing some bias (17% did not see that factor as particularly biasing). On the other hand, for items such as whether money led to bias (54% agreed that it tended to) or whether the expert's social goals made a difference (53% tended to think that they did), percentages were much more equal on each side of the midpoint. These findings suggest that the sample may have been split in many cases, with some individuals seeing opposing experts as largely unbiased and other individuals seeing opposing experts as biased more often than not.

We also asked about the biasing potential of possible specific beliefs or characteristics of expert witnesses. For example, respondents were asked to assess what proportion of expert witnesses believe, to a degree that biases their testimony, that all crime is substantially related to mental illness. The mean rating on this question was 2.78 (SD = 1.05; with 1 = none), significantly lower than the midpoint of 3.5 ($t(33) = -3.99, p < .031$). Similarly, respondents judged it unlikely that experts were biased if they were of the same race or ethnicity as the retaining party (M = 2.64; SD = 0.92, $t(34) = -5.51, p < .031$). In general, respondents judged “opposing experts” as tending to believe that they were bias free (M = 4.00, SD = 1.13, $t(35) = 2.66, p = \text{NS}$) and as believing that they can compensate for any biases they might have (M = 4.21, SD = 1.03, $t(33) = 3.99, p < .031$).

There was some indication that experts may deal with potentially biasing factors even before they take on cases. When asked whether they would turn down cases that caused personal discomfort for a variety of reasons, the mean rating of the sample was 5.13 (SD = 1.05; 1 = never turn cases down and 6 = always turn cases down; $t(33) = .031, p < .031$).

A final set of questions asked how likely experts were to be biased by the outcome of a case. Experts neither agreed nor disagreed that favorable case outcomes were related to the quality of an expert’s work (M = 3.17, SD = 1.31, a rating close to the midpoint). However, experts believed to some extent that outcomes could at least affect experts’ “happiness” and “feelings of competence.” Thus, if an expert testified in an appropriate manner and the expert’s side won the case, it was predicted that the expert would be somewhat happy (M = 3.97, SD = 1.17; in which 1 = unhappy and 6 = happy) and definitely would be happier than if he or she testified in an appropriate manner but the retaining side lost the case (M = 2.23, SD = 0.81). Similarly, experts were judged to feel more competent if they testified appropriately and their side won the case (M = 4.43, SD = 1.06; in which 1 = incompetent and 6 = competent), than if they testified appropriately and the retaining side lost the case (M = 3.45, SD = 1.04).

Discussion

It is not surprising that forensic psychiatrists wildly underestimate the biasing effects of their own conflicts of interest and of other factors—or at least

they underestimate the biasing effects of such factors on opposing experts, where it would be expected they would see them as most prominent. One of the great failures of forensic psychiatry and psychology is the “ingrown” nature of its methods and knowledge. The harsh criticisms of forensic psychiatry and psychology from experimental psychiatrists, experimental psychologists, and lawyers are due to the widespread ignorance of basic scientific methodology too often seen in forensic psychiatric and psychological testimony (personal communication by an anonymous reviewer). Note that the perception of bias is independent of the lack of scientific training and the like and influences even the most objective decisions (for example, whether cancer is seen in an x-ray).¹²

The results of this study appear noteworthy for the number of potentially biasing factors that did not impress many experts as being actually biasing. Even for the few items that were seen as potentially biasing, there was a minority of experts who thought that these also were not biasing. Only experts who regularly chose one side of a case were seen as potentially biased; only when the case appeared to have an unmanageable personal resonance, as discussed in the results, did participants appear to recommend bowing out. Queries aimed at eliciting awareness of the power of rationalization (e.g., . . . does the other side’s witness believe he or she can compensate for an obvious bias. . .) also did not turn up a statistically significant response.

We might conclude from the data that a state of relative denial exists among respondents as to the power of potentially biasing factors to affect their decision making. We assert that ignorance of research results may be more important as a distorting factor and source of error than bias itself in mental health testimony. Yet, improving the usefulness of forensic testimony will require that both of these sources of distortion be addressed. The first step in examining questions of bias should be to point out that, for some reason, many forensic experts do not see it as a problem. Further examination of this issue may help us to understand better why this may be.

We argue that, like memory, testimony is a constructive act. Also, like memory, that construction may be influenced by potentially biasing factors. In terms of useful approaches, we recommend (1) not denying bias; (2) resisting attempts to compensate for possible bias (since attempts to correct one’s own biases may constitute disingenuousness); and (3) di-

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rectly addressing bias on direct examination, while allowing each attorney to point out the potential for bias of the other side's expert. For example, in a suicide malpractice case, an expert might respond on direct, "I am biased in favor of the belief that everyone is an autonomous agent; but in this case it is my expert opinion based on the data that the treater's negligence was the proximate cause of the plaintiff decedent's suicide"; or, in an insurance challenge, "I do not believe that every patient who commits suicide is mentally ill or insane by the relevant criteria, but I believe in this case the decedent was sufficiently mentally ill to meet criteria for unsound mind in this jurisdiction."

From this standpoint we might respond to the attorney who claims that psychiatric expert testimony is hopelessly biased: "No. We can employ procedures and methods that make our judgments sensitive, reasonable, and reliable up to reasonable medical certainty. By acknowledging and sharing our biases we allow all concerned to make better judgments about our testimony."

We cherish therefore no hope that experts can ever be free of bias, but we believe that the procedures of the court may elucidate biases and make them available for consideration in the fact finder's decision making.

Appendix

Factors								
Description		<i>t</i>	<i>df</i>	Sig.*	Mean Difference†	Factors		
						1	2	3
1	Been asked to respond to an attorney deadline at the last minute	12.490	39	.000	0.80		-.309	
2	Experienced unreasonable attorney impassions on time (e.g., overlong depositions, late-night meetings or depositions, esp. night before trial, etc.)	3.592	40	.001	0.24			-.325
3	Type of rates respondent charges in forensic practice	6.169	35	.000	1.03			-.442
4	Ever decided to take action after concluding that an expert witness on the opposite side from respondent's has acted unprofessionally during the course of a case	2.440	25	.022	0.19		.351	
5	Ever assessed the expert witness on the opposite side from respondent's in a case to be a "hired gun" (supplying an opinion only for money) during the course of a case	10.356	33	.000	0.76			-.282
6	Ever been involved in a case where an expert witness on the opposite side from respondent's has also been the examinee's treater	6.465	33	.000	0.56			-.217
7	Assessment at the time of the given events of the rectitude of opposing expert witness's also being the examinee's treater	3.466	17	.003	1.42			.552
8	Level of agreement on whether favorability of outcome for his/her own side in a given case indicates the quality of respondent's work on that case	10.332	38	.000	2.17	.518		
9	Respondent's assessment of degree of "happiness" felt by the opposing expert witness who has testified in an "appropriate manner" in a given case, if the latter's side wins, instead	15.505	36	.000	2.97		.465	
10	Degree of competence felt by the opposing expert witness who has testified	19.168	34	.000	3.43		.124	
11	Degree of "happiness" felt by the opposing expert witness who has testified in an "appropriate manner" in a given case, if the latter's side loses	13.659	36	.000	1.91	-.358		
12	Degree of competence felt by the opposing expert witness who has testified in an "appropriate manner" in a given case, if the latter's side loses	14.314	36	.000	2.45			.394
13	Degree of his/her own "happiness" in a given case where, despite his/her having testified "appropriately", his/her side loses with the possibility of an unjust outcome	9.200	36	.000	1.23			.511
14	Degree of his/her own "happiness" in a given case where, despite his/her having testified "appropriately", his/her side wins with the possibility of an unjust outcome	11.220	34	.000	1.76			.651
15	Professional experience of biasing potential of money on expert witness	10.738	34	.000	2.50		.314	
16	Respondent's assessment from professional experience of the biasing potential of the (retaining) law firm on expert witness	8.901	34	.000	2.04	.403		
17	Professional experience of the biasing potential of the high profile of a given case on expert witness	12.931	33	.000	3.04	.639		
18	Professional experience of the biasing potential of an expert witness's own "personal philosophy" on him/her	12.257	33	.000	3.06		.734	
19	Professional experience of the biasing potential of an expert witness's inclination to one side (plaintiff/prosecutorial) or another (defense) in court cases	12.121	32	.000	2.74		.620	
20	Professional experience of the biasing potential of an expert witness's identification with the retaining attorney	13.778	32	.000	2.39		.625	

Appendix (continued)

Factors								
Description	<i>t</i>	<i>df</i>	Sig.*	Mean Difference†	Factors			
					1	2	3	
21 Professional experience of the biasing potential of an expert witness's dedication to his/her social goals	9.750	33	.000	2.46		.538		
22 Professional experience of the biasing potential of an expert witness's desire to show off his own expertise, skill, erudition, or the like	15.017	33	.000	2.75	.513			
23 Level of agreement that any defense-only criminal-case expert witness reveals bias	14.357	33	.000	3.51	.815			
24 Level of agreement that any prosecution-only criminal-case expert witness reveals bias	16.198	34	.000	3.56	.860			
25 Level of agreement that any plaintiff-only civil-case expert witness reveals bias	15.314	34	.000	3.59	.790			
26 Level of agreement that any defense-only civil-case expert witness reveals bias	14.235	34	.000	3.46	.814			
27 Proportion of expert witnesses believing, to a degree that biases their testimony in insanity cases, all crime to be substantially related to mental illness	9.853	33	.000	1.78		.458		
28 Respondent's assessment of proportion of expert witnesses believing, to a degree that biases their testimony in insanity cases, crime almost never to be related to mental illness	10.998	32	.000	1.73		.464		
29 Rate of frequency at which respondent will turn down cases that evoke personal discomfort or squeamishness (due to personal attachments/involvements or memory of similar experience)	22.863	33	.000	4.13	.316			
30 How frequently an expert's objectivity is compromised when the opposing expert witness and his/her side are of the same race or ethnic group as the first expert witness	10.563	34	.000	1.64			-.295	

* Two-tailed *t* test.

† Mean difference is the difference between mean rating obtained and a rating of 1.

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