

# Commentary: The Medical Practitioner as an Expert

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This brief commentary reviews the concept of nest fouling, and advances the view that a different approach to giving expert testimony (that of impartially assisting the court) will largely negate nest-fouling issues.

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It is wise to begin this commentary with a health warning: forensic psychiatry can, and frequently does, mean different things on different sides of the Atlantic. The case examples cited by Gutheil and colleagues<sup>1</sup> show a much broader range of activities than forensic psychiatrists in the United Kingdom would be familiar with. For example, the matter of fitness to practice in a licensure complaint would be more likely to be a question for the General Medical Council as the professional regulatory body. The same would apply to doubtful ethical behavior in an ethics complaint. Similarly, it would be unusual for a U.K.-based forensic psychiatrist to testify about the standard of care of a colleague in the context of a malpractice case. Nevertheless, Gutheil and his colleagues raise several issues that are of relevance on both sides of the Atlantic (and elsewhere) and are well worth noting.

The key questions are as follows:

1. Do you express opinions about opposing experts?
2. Do you express an opinion about the issues in dispute between the parties? or
3. Do you express a view on the opposing expert's opinion of those issues?

Quite properly Question 1 is given short shrift. The reputation of an opposing expert forms no part of one's professional expertise, and attempts to elicit

comment on this subject should always be firmly resisted.

As far as Questions 2 and 3 are concerned, they are the central reasons why an expert is called to be involved in a dispute: it is his or her professional expertise and opinion that are required. In these circumstances, it seems somewhat odd that there is any controversy at all about whether giving expert testimony constitutes the practice of medicine. The expert's testimony is regarded as being of expert quality as a result of his or her knowledge and experience of the assessment and treatment of mental disorders. Legitimacy as an expert therefore derives largely (for the purpose of the present discussion) from being a medical practitioner, and it is difficult to see how expert testimony in these circumstances can be properly divorced from the practice of medicine. If the temptation to become embroiled in this controversy is resisted, the next issue to be addressed is one of use of language. Experts are often described as testifying either for the defense or for the prosecution. This approach is potentially part of the problem. A more appropriate approach might be to consider experts as giving testimony to assist the court, irrespective of which side in the dispute engages their services. Indeed, the adoption of this approach would largely negate the circumstances that give rise to the concept of nest fouling. Once both sides understand that their principal remit is assistance to the court, the polarization that is an integral part of the concept of nest fouling is, to a significant degree, dissipated. This is perhaps illustrated in the paper by Gutheil and his colleagues<sup>1</sup> by Example 7, in which an expert is described as being "moved both by the merits of

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the case and hopes of advocacy for juveniles.” This seems to be a dubious basis on which to become involved in a court case, as by definition it negates the concept of impartial objectivity.

Gutheil and colleagues<sup>1</sup> are absolutely correct in pointing out that “feeling strongly about one’s opinion may be a sign of either clear conviction or bias. In addition, this feeling may reflect some transference-based dynamic about the other individual involved—a dynamic that may compromise one’s objectivity.” It is essential that experts be constantly aware of this phenomenon and take adequate account of it in considering their views. The authors are also right to point out that the role of an expert

witness is an elective one and that withdrawal is a possibility (although more as a result of ethics considerations than merely to avoid “nest fouling”).

This brief commentary began with a health warning; it should end with a disclaimer. Other than being fellow members of AAPL, I know of no nest that I share with any of the authors of this article. If, as is hoped, this commentary has avoided taking a partisan or pejorative view, the risk of fouling should be minimal.

### References

1. Gutheil TG, Schetky D, Simon RI: Pejorative testimony about opposing experts and colleagues: “fouling one’s own nest.” *J Am Acad Psychiatry Law* 34;26–30, 2006