

# “The Fallacy of the Impartial Expert” Revisited

Jay Katz, MD

**This article, in memory of Bernard Diamond, revisits his seminal editorial on the “Fallacy of the Impartial Expert.” In a later article he formulated his thesis most succinctly: “There is no such thing as an impartial expert witness; the objectivity of the expert witness is largely a myth.” I argue that the implications of his challenging assertion have as yet not been fully recognized. Ultimately, they also invite a revision of the American Academy of Psychiatry and Law’s Guidelines for the Practice of Forensic Psychiatry. The Guidelines should emphasize more than they do experts’ commitment to honesty and to informing fact finders about the extent and limits of their scientific knowledge, the facts on which their opinions are based, as well as the scientific and value assumptions that underlie their testimony.**

Bernard Diamond was my teacher, colleague, and friend. When, untutored in law-*and*-psychiatry, I joined the faculty of Yale Law School in 1958, I turned to him for advice. He generously then, and ever after, shared with me his experience and wisdom. I and all of us will miss him.

One of the first articles he sent me was a draft of what he called an editorial on “The Fallacy of the Impartial Expert.” That remarkable article, published the following year in the *Archives of Criminal Psychodynamics*,<sup>1</sup> influenced me profoundly and shaped my subsequent conduct as an expert witness. Bernie’s thesis was simple, yet revolutionary, in its time; and even today its implications are not fully appreciated: “[T]he expert witness called by either adversary is

likely to be biased to some degree, his opinions are not truly impartial, and he, himself, as a party to the adversary system, becomes to a certain degree an advocate.”<sup>1</sup> He stated his thesis somewhat tentatively then—“to some degree,” “to a certain degree.” Fourteen years later, he put it more unequivocally and generally by omitting any reference to who hires the expert: “[T]here is no such thing as an impartial expert witness; the objectivity of the expert witness is largely a myth; the solution is to drop all pretense of impartiality and allow the trier of fact to clearly see the biases and values of the witness.”<sup>2</sup>

In 1959, most psychiatrists believed that they could function as impartial experts if they were insulated from law’s adversary system by serving solely as court appointed experts. Then they could remain detached and objective. The deplorable and unseemly “battle of

---

Dr. Katz is Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry, Yale Law School, 127 Wall St., New Haven, CT 06520

experts" would disappear from view and the psychiatrist's image as a person of authority would be restored.

Bernie's critique of the "virtues" of the court-appointed expert proved persuasive and such proposals are now rarely advanced. However, his more seminal message on the fallacy of impartiality and objectivity, as he wistfully noted years later, was "politely ignored in psychiatric discussions."<sup>2</sup> It remains not fully appreciated to this day. For example, the Ethical Guidelines for the Practice of Forensic Psychiatry of the American Academy of Psychiatry and the Law ask that "the forensic psychiatrist [adhere] to the principles of honesty and striving for objectivity."<sup>3</sup> The phrase "striving for objectivity" is not defined in the commentary to the Guidelines beyond the admonition that forensic psychiatrists "[distinguish] to the extent possible between verified and unverified information, as well as between clinical 'facts,' 'inferences,' and 'impressions.'"<sup>3</sup> This, at best, begins to define minimal standards for the conduct of expert witnesses, but the enigmatic demand of "striving for objectivity" promises too much. It leaves unacknowledged, and thus unexplored, Bernie's central message. I shall return to these two principles at the end of my talk and then will suggest that they be modified in light of Bernie's unassailable critique: "the objectivity of the expert witness is largely a myth."

I can best pay my respect to this giant of our field by intertwining my reflections on his writings on the expert witness with what I have learned from him

in one aspect of my work: my role as an expert witness. Testifying in court, once I had gained sufficient experience about life in the courtroom, has been limited, and that too has been influenced by the lessons I had learned from Bernie. Unlike my friend and counterpart at Harvard Law School, Alan Stone, I have not totally retreated from the courtroom. I believe, as did Bernie, that psychiatrists have also an important educative mission to perform in shaping the evolution of the common law, which despite its at times frustrating, all too rationalistic legalisms, is infused with, and responsive to, psychological insights in its quest to administer justice fairly. I can only note in passing that in fulfilling this educative function my responsibility to the lawyer's client, be he or she a person or the State, must not conflict. Expert witnesses ultimately are beholden both to the side they are testifying for and to the ethical standards of their profession. The conflicts that such dual obligations entail—particularly the necessity to decline participation whenever one's professional opinions are in any danger of being corrupted—are still in need of searching inquiry, which the admonition of "striving for objectivity" obliterates or at least inhibits.

I share many of Alan Stone's concerns about the ways in which expert witnesses have conducted themselves in the courtroom, but I do not share his ultimate fears of our subverting "justice and fairness" or "prostitut[ing] the profession."<sup>4</sup> Of course, "[f]orensic psychiatry is caught on the horns of an ethical dilemma." Dilemmas permeate all life's

## “The Fallacy of the Impartial Expert” Revisited

activities, be they personal or professional, and why should forensic psychiatry be exempt? While Stone has thoughtfully identified many of these dilemmas, Bernie’s life in the courtroom has demonstrated that one can educate judges about the complexities of the mind and their implications for the administration of justice.

To be sure, psychiatrists do not “have true answers to the legal and moral questions posed by the law,” to answer Stone’s question; and I agree that it is “absurd for psychiatrists to decide legal-moral questions.”<sup>4</sup> They may attempt to do so, but in the real world they will only succeed if their views agree with those of judge and jury. However, psychiatric experts can, better than they often have, assist courts in finding answers to questions that ultimately judges and juries must provide. It is a pity that a thoughtful person like Stone as well as many other thoughtful psychiatrists refuse to appear in court; for it is precisely they who could bear witness to what psychiatry truly has to offer and, in turn, apprise judges about the extent as well as limits of our contributions to the resolution of the human, psychological dilemmas that, after all, are integral to law’s task.

In the remainder of this paper, I intend to pay my respect to, and admiration for, Bernie by reviewing his major arguments on the functions of the expert witness and surround them with commentary based on my experiences and reflections:

1. Bernie labeled as fiction the oft-made contention that “only the imme-

diate parties to a legal action—the defendant and the plaintiff or prosecutor and their counsel—are adversaries.”<sup>1</sup> Instead, he argued that the judge, the jury, and witnesses—expert and lay—also are partisans in the morality play that unfolds during a trial. This insight alone has far-reaching implications. I shall only mention one to which I have already alluded: Implementation of the proposal that psychiatrists be appointed by courts would quickly lead to judges choosing them on the basis of a shared philosophy about the conflicting aims of the criminal justice system, be they retribution, rehabilitation, or deterrence. Thus, judge and “impartial expert” with similar mind sets, and acting in concert, would affect the administration of justice in decisive ways. Juries would only hear one authoritative voice and the majesty of both law and forensic “science” would obliterate the complexities inherent in making judgments about motives, dangerousness, blame, and responsibility. It is precisely this danger that the adversary system seeks to frustrate.

2. Bernie made short shrift of the charge that “under the adversary system the expert witness sells his opinion.”<sup>1</sup> He believed that “this charge is too base to [even] defend.” In 1959, prior to the proliferation of the expert witness-industrial complex, his was quite a correct assertion. In today’s world, with the ever-increasing commercialization of the medical and legal professions, one finds a greater number of “hired guns” stalking the courtroom who, aided and abetted by members of the legal profes-

sion, prostitute their psychiatric knowledge. This sorry spectacle requires the attention of professional organizations like the American Academy of Psychiatry and Law. They must take greater responsibility, as Bernie suggested, "in exposing and disciplining members of their profession who misuse and abuse the legal (and professional, I would add) principles of expert testimony."<sup>5</sup> Of course, before such policing actions can be instituted, the ethical standards for psychiatric expert testimony must be more precisely defined than they now are.

At the same time, the widespread concerns voiced particularly by judges and the public over experts-for-hire are exaggerated. They have also been leveled against experts who have given responsible testimony, albeit testimony that was not to the liking of fact finders or the public. The charge that the "lure of filthy lucre" contributes in a major way to the lamented spectacle of the battle of experts overlooks that their differences of opinion are shaped not so much by money but by subtler and more decisive considerations. For example, as Bernie recognized, psychiatrists, like all experts, however much they try, cannot fully "detach themselves from their own prejudices, refrain from homogenizing their moral judgments with their medical opinions, [desist from being] preoccupied with [their] own omniscience, [and remain unafraid] to expose [their] deficiencies of knowledge about some of the most fundamental problems of human nature."<sup>1</sup> Moreover, the so-called "selling" of expert opinions is influenced less

by the fees lawyers and their clients pay experts, and more by the readiness with which psychiatric experts succumb to the constraints that lawyers seek to impose on the scope of experts' testimony. Not all of these constraints are necessarily prescribed by law, even though lawyers often insist otherwise. To be sure, the strategy of a trial ultimately must be decided by the lawyer; but, as Bernie observed, experts must be more willing than they often are to decline to testify if in their opinion more limited testimony will accrue to the detriment of the client or subvert their professional integrity. Such a judgment only experts can make, and they cannot rationalize participation by thinking that the lawyer as the captain of the ship is in total charge. To so believe is a dangerous evasion of one's responsibilities to one's profession and oneself.

3. During a trial, opposing counsel must subject experts to vigorous cross-examination and in the process demonstrate that "the clinical facts upon which the expert bases his opinions are not complete or may not even be true, that the skill and knowledge of the expert in his professional field are deficient, and that his expert opinions are faulty and unwarranted."<sup>1</sup> Experts, therefore, must eventually defend their expert status, clinical facts, knowledge, and opinions. Taking off from these legal and personal realities, Bernie cogently observed that "[i]t is absurd to pretend that the psychiatric expert [can under these circumstances remain] neutral. For the sake of his own ego integrity, he must identify himself with his own opinions and be-

## **"The Fallacy of the Impartial Expert" Revisited**

come the advocate of those opinions."<sup>1</sup> This most crucial insight is all too often overlooked by experts and their detractors. Not only one's professional certainty is on the line but one's personal certainty as well.

Under these circumstances it is difficult to acknowledge ignorance, doubt, and uncertainty about one's opinion, particularly when experts fear that their opposing colleagues will not so conduct themselves and, instead, will profess certainty about their conclusions. It requires a Bernie Diamond to urge us never to forget that "[s]cientific knowledge is always approximate, tentative, and subject to revision. . . . The expert is never justified expressing his opinion with 100% certainty. There is a level of doubt about every scientific conclusion."<sup>5</sup> Or as my friend and colleague Andrew Watson put it more concretely: "I believe that removing bits and pieces of testimony that runs against the individual about whom you are testifying disturbs the fundamental creditability of the presentation. . . . Jurors are not fools and they know that all details of a case are not likely to be favorable to one side or the other."<sup>6</sup> Whenever I testified I followed their advice, often against an initial reluctance of the attorneys who wanted me to speak with greater certainty. However, they often went along with me, once I had discussed with them the scope of their cross-examination of expert witnesses. During these discussions we explored, in particular, how the lawyers might challenge what Bernie called experts' "[e]xaggerated and unsupported expression of confidence."<sup>5</sup> In

my experience, jurors and judges generally reacted favorably to testimony that tried to explain rather than to assert.

Expert witnesses have an obligation to educate judge and jury about the limits of scientific knowledge. If they want certainty, they cannot find it either in science or in law. Thus, experts should convey to them that the significance one attaches to constitutional or organic factors, early development, or the power of the unconscious as determinants for human conduct are disputed within the scientific community. Such disputes alone cast doubt on impartiality. Even Bernie himself once fell victim to the fallacy of impartiality when he wrote that he might be willing to accept the superiority of the impartial expert if experts were "dynamically oriented psychiatrists who fully appreciated the impartial role they play in the administration of justice."<sup>1</sup> Here he insufficiently considered that a belief in the superiority of dynamic psychiatry itself constitutes a scientific bias and that even dynamically oriented psychiatrists could not be impartial. His critique of the impartial expert cannot exempt anyone.

4. Bernie also argued that impartial expert witnesses cannot function within a legal framework unless it allows them to "apply [their] knowledge to human reality instead of legal fiction."<sup>1</sup> Surely for him, the psychoanalyst he was, the concept of criminal responsibility itself, about which he had written a great deal, constituted a legal fiction, and I agree. However, this is not the time to explore this knotty problem, and instead I would like to extend his observation about "le-

gal fiction” to another tension between psychiatry and law: the imprecision inherent in legal concepts that makes them subject to different interpretations.

The first time I testified in court, I was eventually asked whether the accused was “competent to stand trial.” Although the court believed that I, the psychiatrist, was the proper person to answer this question, I quickly became aware of my reluctance to do so. It seemed to me that “competence” was ultimately a legal term, not a psychiatric one. I suggested to the court that on the basis of my clinical examination I could answer questions about how the accused perceived the forthcoming trial, his attorney, his participation in the defense, and the legal significance and penal consequences of the homicide he had committed. Answers to these questions were within the realm of my professional capacity. I had examined the accused and had concluded that he was “delusional” about why he had killed his wife, but that at the same time he was remarkably knowledgeable about all aspects of the trial—the functions of the different participants, and the rules governing their actions.

However, the ultimate question of his legal competence to stand trial, I refused to answer. Unlike Bernie, I felt then, and still believe today, that only the judge could make such a judgment.

The two other psychiatrists involved in that case felt differently. They were willing to answer the “competence” question, and they answered it in the negative, even though they also informed the judge that “he was remark-

ably improved” following a two months’ stay for observation in a mental hospital. They made much of the “facts” that he was “getting along well in the protected environment of the hospital” and that he was in danger of suffering “a full-blown psychosis” should he “be subjected to a trial.”

The judge accepted their prognostications about future incompetence. The accused was remanded to the hospital where he remained confined for the rest of his life. The lack of clarity in law of what constitutes competence for purposes of standing trial is not one for psychiatrists to resolve by providing “ultimate issue testimony.”<sup>7</sup>

Giving such answers contributes in significant ways to the battle of experts. I learned this lesson early. One day, an Attorney General of a Midwestern state, who had heard of my unusual position at Yale Law School, called and asked me to examine a young man who had killed three members of his family. He had been examined by a psychiatrist for the defense who had concluded that he was “insane.” The Attorney General’s psychiatrist, on the other hand, had come to the opposite conclusion. For political reasons, the Attorney General did not wish to proceed to trial until the controversy between the two experts had been resolved. After discussing the matter with the young man’s attorney, who also knew me, they agreed that both would be bound by my evaluation on his “sanity” or “insanity.” I gulped and told him that I needed time to reflect on his proposal and that I would call him back.

## **“The Fallacy of the Impartial Expert” Revisited**

When I did, I told him that as a psychiatrist I could not comfortably conduct an examination when so much rested on my ultimate findings and conclusions; and that, as a law professor I did not believe that the legal system was well served by giving an expert such uncontested authority. Instead, I offered to serve as his consultant, examine the young man and then discuss and compare my findings and conclusions with those of the other two psychiatrists. I added that I might be able to explain to him why the two psychiatrists had come to different conclusions, which would then allow him, as one party to the adversary process, to decide how to proceed. After further consultation with the lawyer for the defense, the Attorney General agreed to my counterproposal.

When, after my examination, the two psychiatrists and I talked and compared notes, it turned out that indeed we did essentially agree on our clinical findings. Our three clinical stories attested to the young man's life-long difficulties in controlling his impulses and his paranoid fantasies about the family members he had killed. Against great odds, he had been able to control his impulses from spilling over into action until one fateful afternoon. He knew then that what he was doing was “wrong” and “unlawful.” That knowledge had helped him for years from acting on his impulses.

The three of us, however, did not know why his capacity to control had failed him when he finally committed the bloody deeds. The two psychiatrists had not intended to tell their clinical stories in great detail or expose their

uncertainties about his state of mind when he committed murder. Instead, they planned to embed their testimony in what was then DSM II by attaching diagnostic labels to the defendant: whether they considered him “borderline” or “psychotic.” They were prepared to reduce his lifelong personal struggles to the impersonality of a diagnostic manual. Doing that was aided and abetted by their untutored, and therefore idiosyncratic, views on the legal relevance of their diagnostic impressions to the ultimate issue question then governing the determination of legal insanity.

The danger in answering the ultimate issue question does not solely rest on the imprecision of the legal standards themselves that govern “competence” and “insanity” or the lack of experts' appreciation that these legal standards are subject to the vagaries of different legal interpretations, as are the psychiatric standards of DSM III. The greater danger in answering this abstract jurisprudential question resides in the likelihood that the human being—his conflicted struggles with himself and the world in which he lived his life—will then become obliterated. If stripped of the opportunity to answer the ultimate issue question, psychiatric experts would be forced to achieve Bernie's goal of attending to the person; and, after all, it is the person they have been trained to evaluate and not law's jurisprudence.

The ultimate issue question, whether a defendant was “responsible for criminal conduct as a result of mental disease or defect [because he lacked] substantial capacity to appreciate the wrongfulness

of his conduct or to conform his conduct to the requirement of the law," is for the jury or judge to answer. They must answer it on the basis of expert testimony that would attempt, as Bernie wrote in an article coauthored with David Louissell, then professor of law at Berkeley, "to communicate to the jury the relevancy of the total life history of the defendant to that critical moment of the alleged criminal act."<sup>8</sup> They suggested that to do this successfully and meaningfully required "the psychiatrist [to] use the narrative form. He has a story to tell, a story of another man's whole life, thoughts, feelings, hopes, fears, fantasies, loves, hates, delusions, and dreams. Unavoidably, the clinical history, like all good stories, will contain exaggerations for the sake of emphasis, discrepancies and inconsistencies, loose ends, and unresolved contradictions. But they can be dealt with in cross-examination."<sup>8</sup>

During the last two decades I have insisted whenever first consulted by lawyers for the prosecution or defense that I would not answer the ultimate question of, for example, "criminal responsibility." I would do so not because of my "misunderstanding of the law" or because I might "rely on an erroneous interpretation of the governing legal standard," but as I have already intimated, because law's terms of art are vague (even though they sound precise) and subject to different interpretations by judges themselves. I will not even agree to answering the ultimate question with an initial disclaimer attached to it: that my "expertise [gives me] no greater role in setting societal moral standards

than any other citizen."<sup>9</sup> Doing that does not resolve the dilemma that answering this question poses. Instead, I tell the lawyers that I shall try to explain to judge and jury why this is not a question that psychiatrists can answer. I can tell a story that I hope will aid judge and jury in making the moral/legal judgment that only they can make. Different psychiatrists may tell different stories, but then judge and jury must come to their own conclusions based on clinical data as well as other relevant considerations.

Of course, neither the prosecution nor defense will ask me to participate as an expert in a trial if they did not think that I had a meaningful contribution to make to their side. And I would not participate unless I felt similarly. As Bernie put it, "[t]he psychiatrist in the courtroom must first be concerned with the outcome of the particular case on trial."<sup>2</sup> Thus, experts are advocates, but their concerns with outcome must be grounded in their fidelity to standards of the professional group to which they belong.

At the very end of an article on "The Psychiatrist as Advocate," Bernie quoted Erik Erikson on the "core of disciplined subjectivity which must govern clinic work," and then went on to say that "[i]t is this disciplined subjectivity which should characterize responsible expert testimony. . . . Such testimony neither pretends a scientific objectivity undeserved by the state of the art, nor is it 'wild' in the sense of relying on the speculative fantasies of the witness with little or no foundation of clinical experience."<sup>2</sup>

## "The Fallacy of the Impartial Expert" Revisited

Bernie's comment on the "state of the art" draws attention to the fact that psychiatry, like medicine, is an art and a science beset by pervasive uncertainty. Awareness and acknowledgment of uncertainty, as I have written elsewhere,<sup>10</sup> are most crucial for improving communications between physicians and patients. Similarly, in the courtroom, the opposing views of experts for each side could become more comprehensible to judge and jury if experts were to delineate better the uncertainties that inevitably must affect their judgments and conclusions. It is experts' silence about uncertainties that powerfully contribute to the misunderstanding of their testimony.

I would give greater specificity to Paul Appelbaum's ethical standard of "truthfulness"<sup>9</sup> and Loren Roth's standard of "scientific validity,"<sup>4</sup> by substituting, or at least adding, another standard: "acknowledgment of uncertainty." Requiring experts to acknowledge the uncertainties that crucially affect their "scientific" judgments will give meaning to truthfulness and scientific validity. Moreover, such acknowledgments will facilitate identification of the personal and professional value preferences that shape experts' judgments.

Consider one example: the legal standard of "the best interest of the child" that governs the adjudication of child custody disputes. Some child psychoanalysts believe that continuity of association between adult and child over a period of time is *prima facie* evidence that the child should remain in the custody of that adult. Yet the importance

of physical continuity for the future welfare of the child is beset by considerable uncertainty and therefore professional controversy. It is contested by those who give greater weight to biological, intrapsychic, and/or genetic continuities. These uncertainties and biases, under my standard, experts must acknowledge.

Fidelity to truthfulness and scientific validity alone could lead experts to espousing, without qualifications, *their* truths and *their* convictions on what constitutes validity. Of course, my recommendation does not completely solve the problem; but it highlights that acknowledgment of uncertainty is integral to the ethical framework within which, in the Academy's view, experts must operate.

5. This leads me to another problem that inheres in psychiatric testimony under the adversary system. It is exemplified by Judge David Bazelon chiding psychiatrists subsequent to *Durham* for "[continuing] adamantly to cling to conclusory labels without explaining the origin, development, or manifestations of a disease."<sup>11</sup> He was correct in his critique that draws attention to what I have already discussed, and Bazelon complains about, namely, psychiatrists' reluctance to "acknowledg[e] the limits of their expertise, and [to] confront openly and honestly the conflicts that impaired this competence even when the expertise was sufficient and relevant."<sup>11</sup>

Yet, Bazelon should also have addressed the contributions that lawyers and judges make to the failure of achieving the noble purposes of his *Durham* decision.<sup>12</sup> I told Judge Bazelon on many

occasions that his commendable efforts to improve the quality of psychiatric testimony required his being equally critical of the questions that lawyers are permitted to ask (and that judges permit lawyers to ask), as he was of the answers that experts have been willing to give. Paul Appelbaum has correctly suggested that the expert must assume responsibility for bringing to fact finders' attention the "limitations of his/her conclusions" or the existence of contrary "minority opinions" within the professions.<sup>9</sup> To accomplish Appelbaum's objectives requires that the rules of direct and cross-examination be reformulated so that the answers elicited from experts will facilitate disclosure of uncertainty.

6. Finally, Bernie Diamond's views on the expert witness as advocate were to a considerable extent vindicated by the U.S. Supreme Court decision in *Ake v. Oklahoma*.<sup>13</sup> In an 8 to 1 decision, Justice Marshall, speaking for the Court, asserted that in a criminal trial it was essential for a psychiatrist "to assist [lawyers] in preparing the cross-examination of a State's psychiatric witnesses [as well as] to assist in evaluation, preparation, and presentation of the defense."<sup>13</sup> Marshall recognized what had often been, and should be, customary practice in all proceedings in which expert witnesses participate: to facilitate the search for truth by aiding attorneys to ferret out uncertainty and controversy during direct and cross-examinations.

Paul Appelbaum in his thoughtful paper on *Ake*, however, blunted somewhat the implications I draw from *Ake* by asserting that the decision only "calls for

the psychiatric expert to function as a consultant, not as an advocate."<sup>14</sup> It led Appelbaum to assert that "advocacy must be subordinated to objective standards of truth, science, or good clinical practice."<sup>14</sup> I would put it differently, and I believe so would Bernie: Advocacy must remain faithful to "disciplined subjectivity." Having learned this from Bernie, I have been able at times to explain to judge and jury why my testimony differed from that of my colleagues on the opposing side. Adherence to an "objective standard of truth" can be misleading, and is too prone to a deception of self and others. Bernie put said it well: "I suspect that the psychiatrist needs to assert his claim for objectivity and scientific neutrality precisely because he knows in his heart that his discipline lacks those very virtues which he proclaims from the witness stand."<sup>2</sup>

I hope that I have conveyed to you how much we still have to learn from Bernie. If what I have said has some merit, it should lead to a revision of the Academy's Ethical Guidelines for the Practice of Forensic Psychiatry that comport better with his vision and wisdom. Thus, in conclusion, I would like to reiterate that the Guidelines' current appeal to "striving for objectivity" perpetuates the myth of the objectivity of the expert witness. Such a prescription is oblivious to too many problems: the conflicting theoretical orientations within our field about, for example, the impact of biological and psychological determinants on conduct as well as the weight to be given to conscious and unconscious processes in the evaluation of

## **“The Fallacy of the Impartial Expert” Revisited**

conduct; the imprecision in law about what constitutes responsibility and competence as well as the differing assumptions that law and psychiatry bring to these concepts; and the competing interests of adversary lawyers and their clients in the administration of justice as well as the differing assumptions that lawyers and psychiatrists bring to what constitutes justice.

If in the context of a trial, “striving for objectivity” can have any meaning, it can only be this: that expert witnesses appreciate that their testimony is deeply influenced by the uncertainties of their art and science, by the uncertainties of law, by the drama of the adversary system, by their views on what constitutes justice for the client and society, and by the fallibility of their opinions because what they have learned from the accused is limited in many crucial ways. Therefore, I suggest that the Academy’s Ethical Guidelines state: “The forensic psychiatrist adheres to the principles of honesty and strives to inform fact finders about the extent and limits of his or her scientific knowledge and the factual information on which his or her opinions are based as well as about the scientific and value assumptions that underlie them.” The rest is commentary, which will have to be extensive in order to give meaning to these principles.

In 1811, a legal scholar bewailed the current deplorable climate of expert testimony. At the same time, he expressed the hope that “as experience and science advance, the uncertainty and danger from this kind of proof [will] diminish.”<sup>15</sup> This has not happened. It may

not even happen in 1991 because lawyers and judges prefer to hear, and experts prefer to proffer, conclusions that are unencumbered by doubts and reservations. However, as one renowned scientist once put it, while advances in science have given us a degree of greater certainty, these very same certainties, painstakingly acquired, also confront us with “the only solid piece of scientific truth [we truly possess]: the depth and scope of our ignorance.”<sup>16</sup> Thus, if psychiatric experts are willing to acknowledge both their certainties and their ignorance, truths are likely to emerge in the courtroom that will assist judge and jury to administer justice as fairly as it is humanly possible. This is the legacy that Bernie has bequeathed to us.

### **References**

1. Diamond BL: The fallacy of the impartial expert. *Arch Crim Psychodynamics* 3:221–35, 1959
2. Diamond BL: The psychiatrist as advocate. *J Psychiatry Law* 1:7–19, 1973
3. American Academy of Psychiatry and the Law: Ethical Guidelines for the Practice of Forensic Psychiatry (Revised October 1989), in *American Academy of Psychiatry and Law: Membership Directory* xii, 1991
4. Stone AA: The ethical boundaries of forensic psychiatry: a view from the ivory tower. *Bull Am Acad Psychiatry Law* 12:209–19, 1984
5. Diamond BL: The psychiatric expert witness, in *Ethical Practice in Psychiatry and Law*, Edited by Rosner R, Weinstock R. New York: Plenum Press, 1990, p 83
6. Watson AS: Response from a straw man. *Bull Am Acad Psychiatry Law* 12:221–4, 1984
7. Smith SR: Mental health expert witnesses: of science and crystal balls. *Behav Sci Law* 7:145–80, 1989
8. Diamond BL, Louisell DW: The psychiatrist as an expert witness: some ruminations and speculations. *Mich L Rev* 63:1346, 1965
9. Appelbaum PS: Psychiatric ethics in the

- courtroom. *Bull Am Acad Psychiatry Law* 12:225-31, 1984
10. Katz J: *The Silent World of Doctor and Patient*. New York: Free Press, 1984, pp 165-206
  11. Bazelon DL: The perils of wizardry. *Am J Psychiatry* 131:1319-20, 1974
  12. *Durham v. United States*, 214 F.2d 862, (D.C. Cir. 1954)
  13. *Ake v. Oklahoma*, 470 U.S. 68 (1985)
  14. 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
  15. MacNally L, cited in Weinstein JB: Improving expert testimony. *U Rich L Rev* 20:473-97, 1986, p 496
  16. Thomas L: *The Medusa and the Snail: More Notes of a Biology Watcher*, New York: Viking Press, 1979, p 73