

Personal Questions on Cross-Examination: A Pilot Study of Expert Witness Attitudes

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Expert witnesses have long recognized the various challenges to one's equanimity, confidence, and even self-esteem presented by cross-examination. Indeed, anyone willing to testify in court—expert or not—must naturally expect and prepare for vigorous attempts at impeachment by the opposing attorney.

Attorneys have spent much training—and spend, with each trial, much preparation—for their role in cross-examination, in the service of impeaching, discrediting, and invalidating testimony opposed to their side of the case. They are allowed wide latitude in what they may ask the expert and on what sources of information they may draw in discovering or designing refutations and contradictions to the expert's testimony.

In actual forensic practice attorneys have been known to ask questions of the expert that are or seem highly personal and intrusive, as well as dubiously relevant to the matter at hand; however, some more personal questions might arguably become relevant insofar as they demonstrate an actual or potential bias.

Experts vary in how they respond to this maneuver in the heat of trial, and an expert might legitimately feel that a particular query was too personal to be

answered on the stand. However, no data currently exist as to how experts themselves view the appropriateness of personal questions in various contexts that might affect the actual relevance of those queries. This pilot study explored that issue.

Methods

Members of the Program in Psychiatry and the Law at the Harvard Medical School and attendees at a workshop on attorney expert relations held at the 1999 annual meeting of the American Academy of Psychiatry and Law (AAPL) completed questionnaires that asked subjects to rate the appropriateness of a series of personal questions asked of the expert in contexts that might possibly justify their relevance. The workshop—one of series of combined research and discussion opportunities given over the last three years at AAPL meetings—was identified explicitly in brochure materials as one in which participants would contribute to research by questionnaire completion and—as a kind of *quid pro quo*—would have the opportunity to discuss issues related to expert witness practice that had been scanted in other fora. Respondents were assured anonymity and confidentiality, which precluded obtaining demographic detail but made for freer discussion.

By virtue of their attendance at the AAPL meeting and this workshop in particular, respondents were presumably forensically sophisticated and experienced in testimony. Responses on 37 usable

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questionnaires (representing about one-third of workshop attendees) were rated on a scale from one (too personal) to six (appropriate); the questionnaire was composed of the questions listed in the Results section, followed by six-point scales. Subjects were asked to explain their responses. Results were analyzed and are presented. Not all respondents commented as invited; representative comments were chosen for detail, articulateness, and relevance.

In addition to *t* tests and statistics, we calculated effect sizes *d* using procedures introduced by Cohen¹ and reviewed by Rosenthal and Rosnow.² There are two sources of response variability. One is the difference between the means; another is random variability. The more variability of the results that are accounted for by the difference in means—compared with the results of merely random variability among subjects—the larger the effect size (an effect size of .2 is small, .5 is medium, and .8 is large).

Results

1. *In a custody case, "Doctor, have you been divorced?"* No significant trend emerged, but there was a modal peak at "too personal" (35% of responses were here) and a remarkably flat distribution across all other responses. The mean response was 2.94 (SD = 1.89), which reflects this spread. Representative comments included: "Mildly intrusive . . ." (subject 17); "This may be fair—if not used as a diversion, but better to avoid" (subject 27); "Personal, but public record anyway" (subject 31); "Might go to possible unconscious bias" (subject 35).

2. *"What were the circumstances of the divorce?" (Who divorced whom, what were the stated or actual grounds, etc.)* Here, in contrast to the last query, respondents gave the strongest response of the survey. Seventy-six percent found this to be too personal, giving a mean response of 1.42 (one = too personal; SD = 1.02). This was significantly different from the midpoint of the scale (3.5), which would represent the respondents being either indifferent or at least more evenly distributed along the distribution ($t(35) = -12.20; p < .0001; d = 2.04$, a large effect size; a statistically significant response of "too personal"). Representative comments included: "Extremely personal—beyond the pale—could not possibly be relevant and simply serves to embarrass the expert" (subject 14); "Too nosy—unrelated to my opinions" (subject

15); "Although some logic may apply as in previous questions, believe it is inappropriate (altho' I'm not logically following through)" (subject 36).

3. *"Doctor, have you had 'any' substance abuse problems?"* Here again, a large proportion of the sample (65%) found this to be too personal. The mean response was 2.00 (SD = 1.77), which again was significantly different from the indifference point of 3.5 ($t(34) = -5.03; p < .0001; d = .85$, a large effect size). Representative comments included: "My medical history is not a credential" (subject 15); "Cannot envisage relevancy except to get emotional response from me" (subject 21); "I strongly believe there are no reasons for personal questions . . ." (subject 26).

4. *In an emotional injury case, "Doctor, what percentage of your income derives from forensic work?"* This fairly common query was the only result that showed a significant bias toward appropriate, with 59.4 percent of the sample responding with either five or six (six = appropriate). The mean response for this item was 4.49 (SD = 1.22). Again, this was significantly different from the midpoint of 3.5, but with many more responses in the appropriate range ($t(36) = 4.93; p < .0001; d = .81$, a large effect size). Representative comments included: "I believe it is reasonable to ask what % of my work is forensic & I always answer questions about how much I'm earning on the case at hand. I would have trouble getting closer to a discussion about actual income" (subject 2); "This doesn't bother me as it reflects my activities and CV" (subject 15); "I think one needs to answer percent work (NOT INCOME) from forensics—50:50 leans against hired gun" (subject 26); "Believe with specialty of forensic psychiatry, this is no longer synonymous with hired gun, so basically irrelevant—no difference" (subject 30).

5. *Same case, "Doctor, what is your income?"* This query showed a modal peak of too personal (62.2% thought this was too personal). The mean was 1.60 (SD = .98), which was significantly different from the indifference point of 3.5 ($t(34) = -11.51; p < .0001; d = 1.94$, a large effect size). Representative comments included: "Only IRS should know" (subject 5); "Could not be relevant to case. Jury assumes all doctors make a lot of money (wrong!)" (subject 14); "How is this relevant? Damaging only" (subject 17); "I have not ever had this question allowed by the judge; inappropriate" (subject 34).

6. *In a testamentary capacity case, "Doctor, do you have a will?" (Moving party = disgruntled heirs)* No clear position emerged on this point with results paralleling chance distribution. There was a non-significant trend toward too personal. Representative comments included: "Too subjective, tho' not offensively personal" (subject 15); "This is mildly intrusive but not overly personal" (subject 17); "It may have some relevancy. . . ." (subject 21).

7. *In a malpractice case in which an alcoholic man committed suicide, "Doctor, are you an alcoholic?"* Here, there was a trend toward too personal, with 59.5 percent of the respondents answering with a two (one = too personal). The mean response was 2.89 (SD = 1.51), which was significantly different from the indifference point of 3.5 ($t(35) = -2.43; p < .02; d = .40$, a small effect size). Representative comments included: "Just feels too personal" (subject 5); "Might be helpful if conveyed with empathy" (subject 27); "Irrelevant and inflammatory" (subject 35).

8. *Retained to do an insanity evaluation of a spree killer who has sworn to kill homosexuals and has killed several persons thought by him to be homosexual, "Doctor, are you homosexual?"* For this question, 56.8 percent of the respondents felt that it was too personal. The mean of 2.19 (SD = 1.67) was significantly different from the indifference point ($t(35) = -4.69; p < .0001; d = .78$, very close to large effect size). Representative comments included: "What happens in bed is my business" (subject 10); "This would tend to be prejudicial and I would expect that a judge would bar it" (subject 15); "If I were homosexual I would feel differently—maybe" (subject 27).

9. *Evaluating ex-altar boy for emotional harms from sexual abuse by Catholic priest, "Doctor, are you Catholic?"* This query elicited a broad divergence of responses, with some (27%) responding that it was too personal (one), while others (40.5%) answering with a four or five. The mean response of 3.2 (SD = 1.73) was not significantly different from the indifference point of 3.5. Representative comments included: "Relevant if you want to be a Supreme Judicial Court justice in Massachusetts" (subject 12); "Personal, but not top secret. I would be reluctant" (subject 15); "This may be relevant to formulation of the case and is only mildly intrusive" (subject 17); "Attorney may wish to know if expert is familiar with Catholic

church system—does veer toward personal" (subject 26).

Discussion

As the study results indicate, little consensus could be derived from responses to a variety of personal queries with varying relevance to the forensic matter at hand. Respondents did feel strongly that inquiry about the circumstances of the expert's divorce were clearly too personal and thus inappropriate, though queries about the "fact" of divorce showed little agreement. Respondents also accepted the appropriateness of a question about what percentage of the expert's income was derived from forensic work, but felt (nonsignificantly) that query as to the actual income was too personal.

Little guidance is offered to the expert faced with such questions in deposition or trial; relatively few resources address this issue directly. In recent work, Babitsky and Mangraviti^{3, 4} devote a few pages to this issue. Those authors make this point⁴:

Remember that as a witness in a case your credibility is a major issue. Thus, questions about licensing, criminal convictions, fees earned, suspensions, exclusion of prior testimony, prior expert witnessing work, etc. are all fair game and should be answered without hesitation. (pp 224–5)

The same authors note that the test for appropriateness of personal questions is "reasonableness." Federal Rule of Evidence 611 gives a judge authority to exercise control over questioning "to protect the witnesses from harassment or undue embarrassment."⁵

The deponent has no redress unless the annoyance, embarrassment or oppression will be unreasonable, and the seeking of information is not unreasonably annoying, embarrassing or oppressive if the information is material and relevant [p. 654].⁶

If you are accompanied to a deposition by your personal attorney, the latter can instruct you not to answer a given question, but your retaining attorney usually may not. In controversial junctures, depositions can be suspended and the matter argued out before a judge. An expert may seek a protective order from the judge to permit not answering a question.

An answer of, "I choose not to answer that question as it is too personal, but I will attest that my (marital status, income, substance abuse history if

any, etc.) does not affect my opinion in this case," would probably be safe but open to judicial challenge on a proper motion by the questioning attorney. Some case law may exist that protects the expert from having to divulge his/her income in this situation. Indeed, although this study took the experts' own views as its subject matter, a logical subject for future research would be the case law that articulates the legal standard for disclosure of such information.

This pilot study must, by its nature, constitute only a preliminary exploration of a subject that is often problematic for expert witnesses. The authors hope that this small study will stimulate further research into this topic.

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References

1. Cohen J: *Statistical Power Analysis for the Behavioral Sciences* (ed 2). Hillsdale, NJ: Erlbaum, 1988
2. Rosenthal R, Rosnow RL: *Essentials of Behavioral Research: Methods and Data Analysis*. New York: McGraw-Hill, 1991
3. Babitsky S, Mangraviti JJ: *How to Excel During Depositions: Techniques for Experts That Work*. Falmouth, MA: SEAK, Inc., 1999
4. Babitsky S, Mangraviti JJ: *How to Excel During Cross-Examination: Techniques for Experts That Work*. Falmouth, MA: SEAK, Inc., 1997
5. Fed. R. Evid., Rule 611: *Mode and order of interrogation and presentation*
6. *Federal Procedure, Lawyer's Edition*. Rochester, NY: Lawyers' Cooperative Publishing, 1994, p 654