

Keeping Criticism at Bay: Suggestions for Forensic Psychiatry Experts

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Antisius, after examining the corpse of Julius Caesar, “opined that only one of the 23 sword wounds was deadly, namely the one perforating his thorax.”¹ This report, dating back to the Roman Empire, seems to be the first documented use of a scientific expert witness.¹ Experts are presumed to be persons with special reliable knowledge who share their insights through testimony so that legal issues may be justly resolved. The role of expert testimony is continually criticized by almost everyone, and medical experts seem to be the most controversial for the following reasons: medicine remains as much an art as a science, touches life and death, and involves highly personalized decisions. Yet, despite such abundant criticism, courts will continue to need expertise. Forensic psychiatry experts can keep criticism at bay by being aware of the cultural differences between law and medicine, understanding how the admissibility of expert testimony may impinge on their opinion, taking heed of the current attempts to regulate expert testimony, and being familiar with jurors’ attitudes.

Proof in Science Versus Proof in Law

As scientists, physicians search for objective truth by designing and completing studies that help define illness and find its cures, all the while recognizing that any single individual may not fit the statistical norm. This recognition represents the conflict between the science and the art of medicine. An exam-

ple of this tension is the well-known ABCD criteria for the diagnosis of malignant melanoma: A for asymmetry, B for (irregular) borders, C for (variable) color, and D for a diameter greater than 6 mm. Lay persons and some physicians assume that the diagnosis of melanoma should be a relatively simple matter, yet more than 20 percent of biopsy-confirmed melanomas fail to demonstrate these clinical criteria.² Lawyers in a courtroom begin with a conclusion, present the facts, and argue the law to their best advantage, hoping that the fact-finder will accept their version as true. For example, returning to the melanoma case, the plaintiff in a missed melanoma diagnosis may argue that based on the ABCD criteria, only a negligent physician would miss the diagnosis of a malignant melanoma, while the defense posits that up to 20 percent of all malignant melanomas are clinically missed.

“Proof in science does not constitute proof in law.”³ Truth in law is the result of a fight, the product of an adversary system in which processes such as cross-examination, oaths, and observations of demeanor contribute to fairness and truth, regardless of the substantive issues.⁴ Thus, the law’s telic version of the truth—that is, the jury’s version—is dependent on the circumstances and context of a particular case, may not be testable, may not be subject to publication, and yet is final. Recognizing and understanding these different versions of truth should allow experts to frame their opinions better and anticipate possible cross-examination. In court, experts can protect the integrity of their opinions by providing specific disclosure of the facts on which they relied and explaining the particular methodology used.⁴

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Who Is Shaping the Expert's Opinion?

Realistically, experts will present testimony at trial only if their opinion is helpful to the trial attorney who hired them. Yet, “[a]n expert can be found to testify to the truth of almost any factual theory, no matter how frivolous.”⁵ And, as was noted by a turn-of-century court and recently repeated, “there is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called ‘experts.’”⁵ Despite the continued evolution of the standards and rules regarding the admissibility of expert opinion, trial attorneys continue to refer to experts on the opposite side as “whores”⁵ as if to acknowledge the “hired-gun” bias of the expert. Even some judges and lawyers denigrate experts. They may overlook the fact that expert bias is of their own making, and “attorneys, rather than the expert witnesses themselves, are to a great extent responsible for crafting expert testimony in most instances” (Ref. 5). Experts must be mindful of how lawyers may attempt to shape expert testimony and should hold themselves to an affirmative ethics standard to refuse to give testimony that would not reasonably be expected to pass *Daubert/Kumho*^{6,7} scrutiny.

The fact that attorneys attempt to shape their experts’ opinions results from the combination of the attorneys’ duty as zealous advocates for their clients and the many possible ways by which they may influence an expert’s opinion. As committed advocates for their clients, the subtle, or perhaps not so subtle, means of possibly influencing experts could be argued to be part of attorneys’ ethical responsibility to their clients.⁵ The attorney has the power to select, hire, and pay an expert. Experts are selected on numerous criteria including their credentials, ability to communicate, hourly rate, and appearance. Whether they are used in court may depend on how helpful their opinion is to the attorney. The expert is hired as an at-will employee. Either the attorney or the employee may sever the relationship at any time for any reason; however, the possibility of being fired by an attorney may exert subtle influences on the expert’s opinion.

The attorney’s control over the information provided an expert may become a primary means of controlling the expert’s opinion. Attorneys use discovery and investigation to develop their cases. Rarely does a retained expert do any independent investigation, and so the expert relies on the informa-

tion provided by the retaining attorney. If an expert thinks certain information is necessary before an opinion can be fully articulated, the expert’s ethical duty is to request that information. It may be impractical or impossible for an attorney to supply the requested information, but the expert should be mindful of possible censure of information by the attorney and decide whether that information is necessary to provide an opinion that passes *Daubert/Kumho* scrutiny. If the expert thinks that certain information is necessary, the opinion should not be finalized until that necessary information is received.

Finally, an expert may be flattered when an attorney asks her or him to become part of the trial team; however, joining such a team, and participating in the team’s us-versus-them mentality, may become a slippery slope for the expert. First the expert advocates for her or his opinion, later the expert advocates for the team’s—that is, the attorney’s—opinion. This is clearly a “pitfall of over identification with the retaining attorney.”⁸

Another slippery slope may be to identify with a particular side in the justice system: prosecution or defense. Consider this quote by a forensic psychiatrist:

I believe that the proper role of a forensic psychiatrist is to seek the truth, not to help any party to the case. That’s my core philosophical difference with both clinical psychiatry and the defense bar. And it is one of the reasons that I appear mostly for the prosecution. One of the conditions I have for accepting a case is that I have access to all information. Prosecutors never have a problem with that because their goal is to seek truth and justice, and all the data are important in that quest [Ref. 9, p D5].

No matter what side the expert is on, truth and justice are only found after the adversaries face off in court. And of course, even with all the data at hand, prosecutors may be wrong. Consider the results of the Innocence Project¹⁰ in which modern DNA analysis has exonerated, at this writing, 131 criminally convicted murderers and rapists who were considered “definitely the one” by prosecutors.

Naturally, the extent and style of an individual attorney’s interaction with an expert varies greatly, but it is an expert’s responsibility to be aware of possible subtle coercion by an attorney.

Rules and *Daubert/Kumho*: A Primer

Rules regarding the admission of evidence vary between states and between the state and federal sys-

tems. Complicating the interpretation of any set of evidence rules are state and federal case law opinions that further delineate how a particular rule is actually used. Because experts' opinions are coming under greater scrutiny by judges, opposing lawyers, and, increasingly, medical associations and state medical boards, it is imperative that experts have more than a passing familiarity with the rules governing the admissibility of expert witness testimony so that their opinions can withstand such analysis.

Beginning in Medieval times, under early common law, lay witnesses¹¹ testified only to that about which they had personal knowledge, while expert testimony was generally admissible if it was "not within the common knowledge of the layman."³ The role of the expert was to assist jurors in evaluating information about which they lacked adequate knowledge or experience or to make such information available to them. This delineation of the expert's versus the juror's role still holds today. Experts had to state their qualifications, state the facts underlying their opinions, and explain the basis for the opinion.³ Under common law, experts were prohibited from expressing opinions on the ultimate issue in cases so as not to invade the province of the jury; this prohibition has been abolished in the United States under the Federal Rules of Evidence.¹²

In 1923, The Court of Appeals of the District of Columbia, in a sparse opinion, fashioned the *Frye* test or general-acceptance test, establishing that a scientific principle must be generally accepted in its field to form the basis of expert testimony.¹³ The case considered whether the measurement of systolic blood pressure was a reliable means of determining whether a subject was attempting to deceive the examiner. The court found it was not enough for one qualified expert to believe and testify that the procedure was reliable, but rather that the court must determine whether "general acceptance" of the procedure had been reached among experts. For the next 50 years or so, this opinion dominated the admission of scientific evidence, and remains the standard in many states.

In 1975, after 13 years of effort, Congress enacted the Federal Rules of Evidence that are applicable in the federal court system. Explicitly addressing the admissibility of expert testimony, the Rules leaned toward a liberal policy of admissibility. Examples of this include a relaxed standard for expert qualification by permitting an expert to be qualified in any

identifiable field of specialized knowledge that may assist the trier-of-fact; the need for hypotheticals was eliminated in certain circumstances, and the restriction against testifying to the ultimate issue was abolished.³ Under Rule 104(a), a judge is required to determine whether an expert can testify, and Rule 702 provides the guidelines for this task:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact issue, a witness qualified as an expert by knowledge, skill experience, training or education, may testify thereto in the form of an opinion or otherwise.

Because the *Frye* test was not specifically mentioned in the Rules, a debate arose. Some courts reasoned that the liberal Rules, allowing admission of evidence that was relevant and of assistance to the trier-of-fact, were inconsistent with *Frye*, and so overruled *Frye*. Other courts held that the Rules were not meant to be a comprehensive codification of the entire common law of evidence, and, since *Frye* was not specifically overruled, it stood.³

In 1993, The Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals*,⁶ ended this debate. In the majority opinion written by Justice Blackmun, the judges were unanimous in finding that the *Frye* test was superseded by the Rules (Ref. 6, p 587). The Supreme Court first found exclusive reliance on the general acceptance standard improper: "[n]othing in the text of this Rule establishes 'general acceptance' as an absolute prerequisite to admissibility" (Ref. 6, p 589). The Court found that the trial judge had a duty to screen evidence for reliability and listed nonexclusive and/or dispositive criteria as: (1) whether the technique or theory can be and has been tested, (2) whether the technique has been peer reviewed and published, (3) the known or potential error rate when the technique or theory is tested, (4) the existence and maintenance of standards and controls, and (5) whether the technique or theory is generally accepted in the relevant technical community (Ref. 6, pp 593–4). The major premise in *Daubert* is that "[p]roposed testimony must be supported by appropriate validation—i.e., 'good grounds,' based on what is known" (Ref. 6, p 590).

Because the Court in *Daubert* limited its discussion to scientific testimony, confusion and debate grew over the scope of *Daubert's* application to non-scientific testimony, i.e., experts seeking to testify based on technical or other specialized knowledge.¹⁴ In 1999, in a unanimous decision, the Supreme

Court in *Kumho Tire Co. v. Carmichael*⁷ held that the gatekeeping duty set forth in *Daubert* extended to all expert testimony. The Court thus granted the district courts broad discretion to determine reliability, reasoning that the plain language of Rule 702 extended testimonial latitude to all experts without drawing a distinction between scientific and nonscientific evidence and that judges, as gatekeepers, would find it almost impossible to make such a distinction themselves.

Amended Rule

On December 1, 2000, several amendments to the Federal Rules of Evidence became effective. A brief review of amendment to Rule 702 (Testimony by Experts) is necessary to round out this discussion. Rule 702 (Testimony by Experts), with amended portions in italics:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact issue, a witness qualified as an expert by knowledge, skill experience, training or education, may testify thereto in the form of an opinion or otherwise, *if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.*

Note that the three criteria added echo some of the factors outlined in *Daubert/Kumho*. Practically speaking, the effect of the amendment is to apply specific criteria to all types of expert testimony and thus to articulate a consistent approach to be followed by every trial court. The amended rule does not supplant or alter the criteria listed in *Daubert* because, as noted by the Court, those criteria were not exclusive and/or dispositive. (For a more detailed legal discussion, readers are referred to the Advisory Committee's Note to Rule 702, which may be found on line at various sites.¹⁵)

Danger? Danger! Expert Opinion Scrutiny by Medical Associations

An enduring urban mystery was solved last week when Vincent (The Chin) Gigante, the Mafia leader who spent decades slobbering, muttering, and wandering Manhattan in his bedclothes, admitted in a Brooklyn federal court that he had deceived psychiatrists who had evaluated his mental competency from 1990 to 1997 and found him to be suffering from various forms of dementia. . . . He pleaded guilty. . . . [But a] mystery remains: How did some of the most respected minds in forensic psychiatry and neuropsychology—including a prominent Harvard psychiatrist, five past presidents of the American Academy of

Psychiatry and [the] Law, and the man who invented the standard test for malingering get it wrong [Ref. 16, p WK7]?

The trial is over. The "truth" exposed. The experts who testified have collected their fees and gone home. But are they home safe? Perhaps not. Could these experts' opinions withstand scrutiny under the American Psychiatric Association's ethics guidelines? A current trend in medical malpractice litigation increases the scrutiny of medical expert testimony, not by the courts, but by state and specialty medical associations, some having activated systems to track and punish physicians who provide allegedly fraudulent expert testimony.¹⁷ Currently, this scrutiny focuses on experts who testify for plaintiffs in medical malpractice cases, but some opine that "[m]edical societies should strengthen their position by extending the review process to expert testimony given by doctors in lawsuits of any kind, not just medical malpractice cases" (Ref. 18, p 4F).

The American Medical Association supports increased scrutiny and pressure on colleagues who testify in malpractice cases, particularly those who testify for plaintiffs. The Florida Medical Association (FMA) has, over the past 18 months, activated a system to track and punish physicians who provide allegedly fraudulent expert testimony. The FMA has not issued any sanctions, but FMA counsel Jeff Scott said that there are "many complaints going through the system right now."¹⁷ Under the FMA peer review system, complaints about members' expert witness testimony are brought to the FMA's Committee on Ethical and Judicial Affairs, which assigns them for evaluation by an expert in the same field as the original physician defendant. Depending on the expert's report, the committee may call for a hearing that includes testimony of the plaintiff and defense experts in the original malpractice case. The committee reports to the FMA Board of Governors who may take disciplinary steps against the member whose expert witness testimony was challenged.

Gary Friedman, a Coral Gables personal injury attorney, thought he had the perfect expert witness in his medical malpractice case on behalf of Christine del Cueto, a 3-year-old Miami girl who was crippled during brain surgery at New York's Columbia Presbyterian Medical Center in October 1995. The case was scheduled for April 9, 2003, in New York, but on March 10, Mr. Friedman received a letter from his expert, Dr. Robert Rand, returning his witness fee check and writing, "I have been informed by the

senior neurological society to discontinue expert testimony for plaintiffs or risk membership. Therefore, I am withdrawing as your expert” (Ref. 17).

North Miami Beach Neurosurgeon Gary Lustgarten has testified for 20 years as an expert for both plaintiffs and defendants. “I testified honestly on every occasion. But the medical establishment felt I was a plaintiffs’ advocate and set out to damage my credibility” (Ref. 17). After testifying against two North Carolina doctors in a wrongful death claim that was settled for \$2 million, one defendant filed a grievance with the American Association of Neurological Surgeons (AANS), of which Lustgarten was a member. The complaint alleged that Lustgarten had falsely accused the defendant of altering the medical record, and that he had incorrectly characterized the standard of care in North Carolina. After Lustgarten testified against a Georgia physician in a wrongful death claim that was tried twice, with both trials finding for the defendant, that defendant physician filed another grievance with the AANS against Lustgarten alleging he lacked familiarity with local standards of care.

The AANS expert witness review program was established in 1983 and falls within the group’s “professional conduct program.” Any member may gather evidence and present a grievance to the group’s professional conduct committee. The committee reviews the grievance and its supporting evidence, forwards copies to the accused member, and holds a hearing on the matter. After hearings on the grievances against Lustgarten, the AANS suspended his membership on two separate occasions. In April 2001, Lustgarten filed suit against the AANS in the U.S. District Court for the Southern District of Georgia. Lustgarten alleged that the AANS system of peer review and sanctions constituted a conspiracy to obstruct justice and was a restraint of trade under the Clayton and Sherman Antitrust Acts. Because the AANS is based in Chicago, the suit was removed for trial to the U.S. District Court in Chicago; however, Lustgarten dropped his suit because of a unanimous ruling by the Seventh U.S. Circuit Court of Appeals in a nearly identical case, *Austin v. AANS*,¹⁹ decided in June 2001.

Austin v. AANS: The Shape of Things to Come?

Donald C. Austin, a neurosurgeon, testified on behalf of a woman whose recurrent laryngeal nerve was permanently damaged during an anterior cervi-

cal fusion by Dr. Ditmore. Damages included a paralyzed vocal cord, difficulty swallowing, shortness of breath, and, ultimately, a tracheostomy. Austin testified at the original malpractice trial that “the majority of neurosurgeons” would concur that the plaintiff suffered permanent injury because Ditmore had been careless. On cross-examination, Austin was asked why the medical literature did not confirm his view; Austin responded that the “medico-legal atmosphere that we’re in these days” (Ref. 21, p 971) had deterred the surgical community from acknowledging that this type of complication resulted only due to surgeon negligence. Contrary expert opinion/evidence was given to the jury at the malpractice trial, and the jury returned a verdict for Ditmore.

At the AANS disciplinary hearing, which was held after Ditmore presented a grievance regarding Austin, discussion indicated that the recurrent laryngeal nerve is difficult to see and is often not seen during this procedure. Ditmore pointed out during the AANS hearing that Austin could hardly be considered an expert on anterior cervical fusions because Austin had performed only 25 to 30 of these in more than 30 years, while he, Ditmore, had performed 700 anterior cervical fusions, and only this case resulted in permanent damage. (Austin had done a large number of other cervical procedures.) Ditmore further testified that Austin had no basis for his testimony that “the majority of neurosurgeons” would concur with his opinion. Austin claimed at the hearing that he had based his opinion on two articles. One, by Ralph Cloward²⁰ that concluded, “serious complications are avoidable and can be prevented by the surgeon adhering to the surgical technique described for,” and another by Robert Watkins²¹ that stated, “the key to prevention of traction injuries to the nerve is not to retract vigorously into the soft tissues.” No other literature on anterior cervical fusions was presented during the AANS hearing (or to the district court). Dr. Austin was suspended by the AANS for six months.

In December 1998, Austin filed suit against the AANS¹⁹ in U.S. District Court in Chicago. Contract law governs a dispute between a voluntary association and one of its members; the parties’ contractual obligations being defined by the charter, bylaws, and any other rules or regulations of the association. Most states have conferred additional legal rights on members of voluntary associations. In addition to contractual obligations, members can base suits on

procedural irregularities (due process violations, which did not occur in this case), for impairment of an “important economic interest,” or on bad faith. In his suit, Austin alleged that the AANS acted in bad faith—that is, suspended him in “revenge” because it only disciplines members who testify in behalf of plaintiffs—and that it is against public policy for a professional association to discipline members on the basis of trial testimony unless the testimony was intentionally false. In October 2000, the district court granted summary judgment for the defense (AANS), and Austin appealed to the Seventh Circuit. In an opinion authored by Circuit Judge Posner, the Seventh Circuit affirmed the lower court, thus affirming judgment for the AANS.

In finding the dismissal of Austin’s suit “unquestionably correct,” (Ref. 19, p 971) Judge Posner first cited relevant literature the court found on the Web that noted that permanent damage to the recurrent laryngeal nerve is a rare complication of anterior cervical fusion: “A 1982 study found only 52 cases of paralysis to the recurrent laryngeal nerve in 70,000 such operations” (Ref. 19, p 971).

The court then noted that Austin’s testimony was irresponsible because it was not supported by either of the articles he cited, and it violated the AANS ethics code, which requires that a member appearing as an expert testify “prudently,” “identify as such, personal opinions not generally accepted by other neurosurgeons,” and “provide the court with accurate and documentable opinions on the matters at hand” (Ref. 19, p 971).

The court also found that Austin failed to show that an “important economic interest” was at stake. Though Austin’s income from testifying at malpractice trials had dropped from more than \$220,000 a year to \$77,000, this, in the court’s view, represented “moonlighting” income, not income from his primary profession as a neurosurgeon, and so it was not the kind of important economic interest that legal cases recognize as being jeopardized by the action of a voluntary association “[w]here membership is optional, expulsion (or suspension, or denial of admission) is not deemed the invasion of an important economic interest” (Ref. 19, p 972). Continuing, the court also found that the fact that all complaints against AANS members have been those who have testified for plaintiffs is not evidence of bad faith. The court reasoned that the current asymmetry of only plaintiff experts being sanctioned by the AANS

was because “it is natural for the defendant to complain to the Association; a fellow member has irresponsibly labeled him negligent. If a member of the Association who testifies for a plaintiff happens to believe that the defendant’s expert witness was irresponsible, he is much less likely to complain” (Ref. 19, p 972).

The court did not find it against public policy for a professional association to sanction one of its members for irresponsible testimony, as opposed to “knowingly false” testimony. The court reasoned that this type of professional regulation furthers the cause of justice because “[j]udges are not experts in any field except law” and they “need the help of professional associations in screening experts.” (Ref. 19, pp 972–3). Even if a judge rules that expert testimony is admissible, it is not conclusive evidence that it was responsible testimony. Posner concluded that because of the strong national interest in improving the quality of health care, “more policing of expert witnessing is required, not less” (Ref. 19, p 973) Dr. Austin, by testifying at trial, provided “a type of medical service, and if the quality of his testimony reflected the quality of his medical judgment, he is probably a poor physician” (Ref. 19, p 974).

Owing to the nature of psychiatry, psychiatric opinion may be vulnerable to this type of criticism and review. Will we need experts for experts? Experts are often members of numerous associations and have several state licenses. It is wise for experts to be attentive to the policies of their particular associations and state boards in regard to this type of peer review.

The Jury as Critic

Research confirms how skeptical jurors are. A 45-year retrospective of all jury research concluded: “Perhaps the notable observation about expert testimony, however, is the overall lack of impact it appears to have on jury decision” (Ref. 22). And it is well known that actual jurors report that experts usually just cancel each other out.

Mock juries give some insight on attitudes toward experts. In one experiment with mock jurors, experts were designated as court-appointed in hopes of reducing the hired-gun bias. Experts were presented with two variables: the amount the expert was paid (\$75 vs. \$4,800) and the expert’s credentials. The expert with high pay and high credentials was seen as “less trustworthy, less believable, less honest, less like-

able, and more annoying” (Ref. 22). Even if the expert presented complex testimony, the higher the pay, the less trustworthy the expert was found to be.

Mock juries have also been used systematically to examine jurors’ conceptions of insanity and how these then impact on insanity case judgments.²³ Jurors have complex perceptions of insanity that vary considerably from one juror to another. These perceptions do not easily match legal tests of insanity or psychiatric diagnosis. In fact, the jurors’ individualized attitudes resist education by experts and ultimately highly influence the jurors’ interpretation of the case and verdict.

Studies have also found that jurors evaluate the integrity and professionalism of an expert before they evaluate the content of the experts’ opinions. Judges similarly evaluate experts; they use demeanor, consistency or inconsistency in testimony, changes in behavior, such as evasiveness or defensiveness, and plausibility to determine the credibility of experts.²²

Mock juries and studies do not have the same impact as interviewing actual jurors who participated in trials. Even with its limitations, because it dealt with capital jurors who voted to convict at the guilt stage and now were deciding death versus life imprisonment, an article with actual interviews and extensive juror quotes illustrated the hurdles experts need to overcome.

One juror, for instance, savaged a psychiatrist: “They’re the dumbest people in the world when it comes to substance [abuse] and knowledge of it. They’re worse than doctors and they’re the dumbest ones. . . . [Lawyers] bring in expert witnesses, they’re not experts. They are just human beings and they get labeled this way and they’re so ridiculous, you know. . . . I don’t know where they come up with the expert witnesses” [Ref. 24, p 1132].

In most cases, it is the jury that ultimately judges an expert’s opinion; it is best to remain humble.

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