"The Whole Truth" Versus "The Admissible Truth": An Ethics Dilemma for Expert Witnesses

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The expert witness testifies under oath to tell "the whole truth," yet certain aspects of the legal system itself make this ideal difficult or impossible. The authors present both a philosophical and a practical discussion of the challenges for the expert in attaining this goal. After review of oaths in general and truth-telling in particular, real-life examples are provided to examine the vicissitudes of the whole truth in court. Recommendations are provided for experts, to preserve the truth in the adversary system.

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> Facts are not truths; they are not conclusions; they are not even premises. The truth depends on, and is only arrived at, by a legitimate deduction from all the facts which are truly material.—Samuel Taylor Coleridge

> The expert witness is a hood ornament on the vehicle of litigation that the attorney drives into the courtroom, not the engine.—Robert I. Simon, Georgetown University, personal communication, 1998

Before testifying in a courtroom, a witness swears the time-honored oath to tell "the truth, the whole truth, and nothing but the truth." Since these three elements of the oath convey different nuances, the wording is truly not redundant; instead, the wording aims to be comprehensive, endeavoring to keep a witness, say, from misleading a jury with lies instead of truths; half-truths instead of the whole truth; or truths submerged in untrue, misleading, or distracting filler rather than the unclouded truth, "nothing but the truth." The exact origins of this triple phrasing are obscure, but as we note later, even this exact wording is not essential to the concept that underlies the words.

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Appelbaum[1] has proposed that truth-telling is the first principle on which the ethics of forensic psychiatry rests. He[2] further distinguishes subjective truth-telling (saying what one believes to be true) from objective truth-telling (acknowledging the limits of the testimony).

But no one experienced in the ways of the law would claim that truth is the only criterion for courtroom content. In court, truth is always in tension with admissibility, which is derived essentially from the rules of evidence adopted by courts. Admissibility itself is molded by often conflicting considerations of justice, relevance, precedent, probity, prejudice, and aid to the fact-finder; and in tension with the deliberate shaping of meaning by the questioning attorney in accordance with that side of the adversarial process. Only in the comic book *Superman* were truth and justice sought simultaneously.

Some proponents of the present adversarial legal system argue that truth-finding is not even the main function of the adversary system[3]; rather, the primary purpose is to resolve disputes. Landsmann further asserts that, given the frailties of the human mind and memory, a concern with truth may be both "naive and futile" (Ref. 3, p 36).

Despite the solemnity and power of the oath, attorneys on both sides of a case may attempt to sway or even mislead a jury through shaping expert testimony (or, indeed, the testimony of any witness) by eliciting truthful data that still do not represent the whole truth. Faced with such attorneys, the expert witness may be torn among conflicting ethical pressures: loyalty to the oath, the need to answer the question responsively, the wish not to argue or to seem to argue on direct or cross-examination, and the desire not to mislead the jury. While "truth" may connote the factual basis of a case, psychiatric experts may view "truth" as the context-laden totality of clinical information. In addition, cross-examining attorneys have familiar strategies for dealing with opposing experts, asking only questions to which the answer is known, keeping the expert on a "tight rein," and so on.

Under the rubric of the admissibility concerns raised by the case of *Daubert v. Merrell-Dow Pharmaceuticals*,[4] the trial judge as evidentiary gatekeeper may interpose a filter between the expert's opinion and the actual testimony. In addition to the *Daubert* criteria of reliability and relevance, the judge may also impose time restrictions on testimony. The result may be the decision to leave out otherwise relevant sections of testimony and lines of reasoning.

In this essay we explore the ethics tensions faced by experts attempting, against the varied resistances of the adversarial system, to honor their oaths by telling "the whole truth."

Some Background on Oaths

Oath: a solemn declaration, accompanied by a swearing to God or a revered person or thing, that one's statement is true or that one will be bound by a promise. The person making the oath implicitly invites punishment if the statement is untrue or the promise is broken.[5]

An early record of an oath with an appeal to God is in the Book of Genesis[6]: "Now swear to me here before God that you will not deal falsely with me or my children or my descendants. . . . Abraham said, 'I swear it.'" This is followed, of course, by a commandment against bearing false witness.

The concept of an oath can be found in many cultures as a promise made under penalty or sanction. Oaths are connected with the idea of answering a query. The Old English ancestor of "answer," *and-swaru,* became *and-swear*, meaning "to reply or swear to."[7] The core concept of a bond or restraint was linked to an appeal to a deity; direct curses including death are invoked on himself by the swearer in the event of oath-breaking or perjury. Ancient oath-takers also swore by nature (rivers or the sun) and by weapons, especially swords, in part because of their cruciform shape. Early oaths were also sworn on (male) genitals, with castration the implicit punishment for perjury. Hence, the Latin word *testis* means both testicle and witness; both testicle and testimony derive from *testis*, the common ancestor. In Genesis we find: "Put, I pray thee, thy hand under my thigh and I will make thee swear by the Lord."[8]

Constantine required every witness to a cause to take an oath. This was confirmed by Justinian's code. The Church of England adds the caveat that "vain or rash swearing is forbidden [to] Christian men."[9]

Later legal descriptions[10] focused the issue more formally; other citations found the role of religion in oaths more controversial on a First Amendment basis, and old English common law held that atheists could not swear oaths.[11] Some present-day Christian groups refuse to swear in court, believing this to be a sin.[12] Over time, the appeal to conscience replaced the themes of threat, punishment, and fear that had dominated early oaths. The Federal Rules of Evidence[13] state:

> Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so.

Finally:

> . . .a person is guilty of perjury if they [sic] give false testimony on a material point in the proceeding [citation omitted]. A point is considered material if it will influence the outcome [citation omitted]. Perjury does not apply to opinions but only to the facts to which a person testifies [Ref. 14, p 261].

Case Examples

Some examples taken from actual experience of authors and colleagues may clarify and shed light on how expert testimony may be limited by exclusion (e.g., as inadmissible) or distortion.

Excluded Truth

Example 1

A 27-year-old man with mental retardation and psychiatric illness was placed in a respite program. At one point a plaintiff's attorney asserted various sweeping claims against the respite provider, leading

to a trial. The patient's records contained psychiatrically relevant data consistent with abuse by his father. Before trial, the defense expert was advised by the defense attorney that the judge had ruled that the allegation of physical abuse by the client's father was "off limits," and should not be mentioned or discussed. In fact, the attorney claimed that the judge would declare a mistrial if the jury learned that there was discussion in the record of the father's being abusive.

The resultant ethics dilemma became apparent to the expert when he said, under oath, "I swear to tell the truth, the whole truth, and nothing but the truth." It was unclear to the expert whether the attorney had properly conveyed the judge's ruling or perhaps had exaggerated, and he was preoccupied during testimony with concerns about how to avoid the key issue of abuse. Though the subject fortuitously never arose in the actual trial, the expert was unsure how it would or should have been handled. The expert experienced a fear of inadvertently "throwing a wrench in the works."

Example 2

A psychiatrist at a local hospital was testifying, under oath, at a commitment hearing. Evidence that would establish the basis for the commitment was disallowed because the psychiatrist had not spoken directly with the persons who had witnessed the patient's dangerous behavior. The psychiatrist testified that this patient represented a risk to herself on the basis of information given to him by the social worker. The social worker had spoken directly with witnesses but was not present during the hearing. Given that the information was thirdhand, it was determined to be hearsay and was excluded from testimony.

Note that this conclusion apparently represents a bad judicial ruling, since psychiatrists are usually granted an exception to hearsay when gathering information from third parties in accordance with usual medical practice.

Example 3

In a different commitment case with a similar dilemma, information was disallowed because it was obtained prior to the patient's having been warned that information from an interview was not confidential and might be revealed at the commitment hearing. The psychiatrist was only permitted to testify about information obtained subsequent to the nonconfidentiality warning.

In these case examples, there are constraints imposed by the court's preventing full testimony by the psychiatrist about the whole truth. The expert witness could only testify about a partial truth—that part of the truth that remained after critical information had been excluded. Since experts have little control over the process of court proceedings, the expert must tolerate feeling the tension and frustration created by these constraints.

In addition, the expert witness is left in a dilemma, seen most clearly in the commitment examples just described. Either the witness cannot support with evidence the position that the patient should be committed, since critical information on which to base his opinion has been excluded, or the witness can continue to assert that the patient should be committed despite a lack of convincing evidence remaining after legal exclusion. In both of the commitment examples, the psychiatrist continued to assert that the patient should be committed, and in both cases, the petition for commitment was denied. At least part of the problem in these last two cases derives from the ambiguity as to whether the petitioning psychiatrist is treater or expert, as extensively discussed elsewhere.[15] While the two roles are different,[15] each role may usefully present some part of the whole truth, from different perspectives. This last topic may well benefit from further empirical research.

Distorted Truth

Example 4

The expert had made a guardianship evaluation of an elderly man a year after the man had drawn up a new will. The expert concluded that the examinee was at present incompetent to manage his own affairs. After the man died, the expert was asked by the decedent's family (who were challenging the will) to testify as to his findings on examination. To his surprise, when on the witness stand, he was asked to opine as to the deceased man's testamentary capacity at the point of will-signing (a year prior to the expert's guardianship evaluation). The attorney deliberately used language that obfuscated the fact that the expert's findings at the time of guardianship were not a reflection of the elderly man's capacities contemporaneous with the signing of the will a year earlier.

Example 5

An expert was testifying for the defense of a physician who had worked collaboratively with a counselor. Though the patient was deceased, the therapist was accused by the plaintiff-parents of having elicited "false memories of childhood sexual abuse." The physician had served as medical back-up only. On cross-examination of the physician's expert, the plaintiff's attorney asked the expert repeatedly to agree with the possibility that "recovered-memory therapy" could produce false memories. The expert thought that the question was doubly misleading. First, the literature made clear that such therapy could elicit true memories, false memories, and everything in between; second, this expert was testifying on behalf of the physician, and there was absolutely no evidence that the physician (as opposed to the therapist) had ever performed any "recovered-memory therapy." When, in answering the questions, the expert attempted to address these possibly misleading failures to provide the "whole truth," the attorney moved to strike those "whole truth" responses. For unclear reasons, the judge granted those motions. Although the expert actually answered the question, the hope that redirect would clarify the point failed to materialize.

This not uncommon situation reveals additional tensions for the expert witness. In attempting to be both an effective and ethical witness, the expert should resist efforts by either attorney to mislead the jury. This goal of the expert is in tension with the expert's need to eschew advocacy and to give responsive answers to questions as they are posed, leaving challenges or corrections to the retaining attorney on redirect examination or to the judge. As noted, experts should also avoid arguing with either attorney or using the witness stand to proclaim a particular political point of view.

The Question of Duty

Is there a duty for the expert to resist misuses of his or her opinion or testimony? We believe so, but embedded in these tensions is the core issue of the limits of the expert's control over what happens in the courtroom, especially on cross-examination. There are, moreover, few sources of aid in these dilemmas. One's retaining attorney may appropriately wish to minimize the number of objections on cross, to avoid annoying the jury with interruptions. Experience teaches that the judge's function in preserving the whole truth is highly unpredictable. Possible biases aside, real-life judges may make all decisions fairly or, in some cases, be inclined to honor all motions to strike or none; may sacrifice all rational principles to the goal of "move the case along"; may favor or disfavor one or more attorneys before them; may be identified with and favor plaintiffs or defendants; or may appear to the untrained eye to be making decisions randomly.

In some situations an opening—by means of which the whole truth may pass through adversarial filters into the courtroom's light in federal cases—is provided by Federal Rule of Evidence 703[16] which holds that an expert witness may rely on data on which other experts in that field typically or traditionally rely. This rule permits some forms of forensic data to be included that might otherwise be inadmissible. In the experience of the authors, some lower nonfederal courts have abided by this rule. Clearly, the expert must work with the retaining attorney on presenting this theory. The authors have had experiences in which psychological test data—valuable and often essential to a forensic assessment—have been admitted on Federal Rules of Evidence grounds after pretrial motions had been granted to exclude it.

Discussion

> "The expert's job is to protect the truth from both attorneys."—overheard statement muttered by an anonymous forensic psychiatrist at the 1998 AAPL meeting after a mock trial.

The whole truth turns out to be an ideal influenced by multiple variables. Some of our own examples seem to demonstrate, not only an ethics dilemma involving the truth, but bad lawyering, bad judging, or both. These issues permit little control or remedy by the witness on the stand. In theory, the attorneys and fact-finders are entrusted with the task of seeing to it that the relevant information is introduced and challenged, but—as the above examples show—this is not always the reality. The justice system has reasons for its laws and rules, and the expert should not presume to know better. We argue, however, that an expert has a dual responsibility (which may not always be possible to fulfill): forming an opinion with reasonable care and diligence and attempting to defend that opinion against misrepresentation by either attorney.

The whole truth thus is not a Newtonian truth, objective and discernible to all parties, but is perhaps

closer to relative truth or probabilistic truth, assuming a margin of uncertainty.[17] Testimony that conveys the whole truth is inevitably sensitive to external biases and pressures, such as excluded information and distortions of testimony by one's own or the opposing attorney. Expert witnesses are also proponents, not for one or the other side of the case, but for their own opinion,[15] and that opinion should be based on an honest analysis of all the relevant facts. Expert witnesses are thus allowed to be ardent supporters of their own representations of the whole truth, which, despite limitations, they hope—because of their personal investment—will be credible and convincing. Being a proponent for one's reasoned opinion can be distinguished from being an advocate for one side of the case, client, hiring attorney, or for the self-serving interests of a hired gun.

In sum, as noted earlier, there are limits to an expert witness's control over what happens in the courtroom, limits that may affect the expert's primary function: to "assist the trier of fact to understand the evidence or to determine a fact in issue."[18] Testimony may be distorted or misquoted, important information may be excluded, and pretrial motions may corrupt "the whole truth." The cross-examining attorney may entrap the expert into inadvertent statements, the retaining attorney may extend or exaggerate the expert's opinion beyond its actual limits or ask selective questions about only part of the truth, or the judge may on occasion bring a bias to the proceedings. The expert controls none of these variables directly. Within limits, however, the expert can take some steps that may be helpful in resolving or at least alleviating the tension felt by the expert witness between the whole truth and the admissible truth.

Recommendations

1. The expert's opinion is data-driven and thus inescapably relies on the authenticity and completeness of the materials provided. Consequently, the importance cannot be overemphasized of the expert's reviewing all available data and requesting enough information to fill apparent gaps in the database. Common examples of often-omitted data include military history, previous offenses, emotional injuries, traumata, or hospitalizations. The expert should identify apparent gaps in the available database and decide whether they might have an impact on the extent of an opinion that would constitute the whole truth. Some experts use language in the fee agreement itself, such as, "The retaining attorney is expected to furnish all relevant documents and materials," to place that burden squarely on the attorney.[15]

2. When the expert is aware that critical information has been withheld or excluded, the expert must decide in concert with the retaining attorney whether to proffer a contingent opinion, limited only to the available database, or to withdraw from the case entirely. The situation is similar to that in usually unwitnessed events, such as sexual harassment and sexual misconduct, when the expert opinion often must begin, "If the plaintiff's allegations are true. . . ." By analogy, when testifying, the expert should explicitly link the elements of the opinion to the available facts, candidly conceding the limits of such testimony.

The authors have participated in cases in which the testimony was intentionally restricted to single data points, such as choice of medication, documentation, vacation coverage plans, or psychological testing, rather than covering broader issues such as the standard of care. Such narrowing of focus has sometimes made possible valid testimony on a selected part of the truth, with consent of both the expert and the retaining attorney. Clearly, in pretrial preparation the expert must make clear to that attorney the parameters of the opinion in congruence with the available data.

The serious decision to withdraw, leaving the retaining attorney in the lurch, is a difficult and highly problematic one—a decision of last resort. Every effort should be made to find a way to include determinative data in the basis of the opinion.

3. The expert should also remember that, on taking the oath, his or her duty is to the truth and not to those present in the courtroom. That said, the trial judge is effectively the arbiter of the proceedings. The expert may face motions to strike testimony, may be directed to disregard facts, or may inadvertently say something resulting in a mistrial. Such obstacles to truthful testimony are beyond the expert's domain, yet speaking truthfully is vital to any legal system and to the expert's own integrity.

4. The expert should remain alert for leading or misleading questions, inaccurate summing up of previous testimony, or invitations to speculate outside one's area of expertise—actions that may distort testimony. Corrective responses to these maneuvers may be possible within normal testimonial procedures and techniques. In pretrial conferences with

one's retaining attorney, in particular, limits can be set on what the expert is prepared to state as an opinion. Any disagreements about conclusions should be clearly identified in advance of testimony.

5. The expert should be mentally prepared for the sometimes highly distracting effect of trying to honor the legal restrictions on testimony that limit "the whole truth." Given that the witness is often attempting to fit a broad, complex, context-laden opinion into the Procrustean bed of admissible testimony, it is not surprising that experts must sometimes have to resist a distracting preoccupation with what should not be said in court.

6. As suggested by the epigraphs heading the case examples, the expert witness should not assume the mantle of guardian of the "whole truth," since the factors reviewed herein and the many considerations of the legal system may make this impossible. Appropriate humility dictates that the witness should base testimony on available data, relying on the inherent safeguards of the legal system to achieve a just result and accepting the possibility that the process may sometimes fail this end.

To preserve testimony that is the whole truth, then, there are several measures, as we have outlined, that the expert can adopt to prevent misrepresentation. Yet ultimately, the expert plays a humble role in the workings of the court. Attorneys, partisan by role, may attempt to persuade the court without necessarily presenting a balanced view of the facts of the case, and it is certainly possible for an expert's testimony to be used willy-nilly in blatant contradiction of the facts. Still, even acknowledging all the ways in which the integrity of testimony can be adversely distorted, the expert should strive to remain true to the oath, saying the whole truth and nothing but the truth.

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