

Pejorative Testimony About Opposing Experts and Colleagues: “Fouling One’s Own Nest”

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Circumstances sometimes require expert witnesses under oath to express opinions about opposing experts or professional colleagues who work within their own professional, geographic, or organizational circle. This requirement poses some common problems that have not been well discussed in the literature. This article addresses some of those problems and suggests some useful solutions.

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Working as a forensic psychiatrist can be a lonely experience, making collegial relationships all the more important, whether they be through the American Academy of Psychiatry and Law (AAPL), psychiatry district branches, organizational meetings, or more informal gatherings. In addition, experts may operate within a “nest” of associations, such as an institution, clinic, academic setting, professional organization, or small community within a geographic area. As a result of this proximity or other factors, colleagues may appear as opposing experts in one’s cases or the expert may be in the position of testifying regarding a colleague’s standard of care in the context of a malpractice case, ethical behavior in an ethics complaint, or fitness to practice in a licensure complaint.

In any of the last three contexts, an expert on the stand for a deposition or trial may be asked for an opinion about the opposing expert or colleague. Inescapably, this has the potential to strain the collegial

relationship. Separate retaliatory ethics complaints and even suits for slander may be the result.¹

An additional factor is the recent controversial decision by the American Medical Association² to characterize expert testimony as constituting the practice of medicine (consequently sometimes requiring licensure in the relevant state to testify). This decision may have the effect of decreasing the use of out-of-state experts and increasing the use of local practitioners and may be expected to increase the strains noted earlier. The expert is torn between the wish and burden to testify truthfully under oath and a concern about “fouling one’s own nest.”

Advocacy pressures are another factor. On the witness stand in the heat of the moment during aggressive examination by attorneys, personal biases and information may slip out or be blurted out defensively.

An additional problem is posed by the perceived greater threat and unpleasantness of travel in an era marked by terrorism. This may increase the number of cases one might undertake that are close to home and hence are subject to the concerns we are addressing.

The Literature

An earlier study³ concerning what experts found acceptable to say about opposing experts revealed

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that material considered to be in the public domain (such as information that might appear in a *curriculum vitae* or Web site or published material) was seen as fair game for use by one expert against another. Private information about an opposing expert's substance abuse, marital difficulties, recent personal losses, and the like were viewed as off limits.³

Examples

Some case illustrations may clarify the problem.

Example 1

An expert was asked about the reputation of an opposing expert who practiced in the same town. The expert testified that the opposing expert's reputation was "mixed." The testimony led to a confrontation and subsequent tension between the two.

A point could be made that experts should not respond to those questions because they are outside their mandate or even their expertise. One may state: "I have not been retained to assess another person's reputation but to give testimony on the matter at hand." Another appropriate response would be: "I have no factual basis for such an opinion to a reasonable degree of medical certainty."

Example 2

An expert accused the opposing expert (from the same organization) of brainwashing the examinee and lodged a complaint. The complaint was met with the statement "This matter is not included in our ethics codes."

It is a common observation that ethics codes have severe limitations when employed to deal with specific conduct by individuals. Even the AAPL codes fall short of clear guidance on matters that arise daily in forensic practice.

In several instances, the fact of residence in the same "nest" is not as significant as the resultant accusation of bias that emerges in cross-examination. The claimed bias may stem from a previous acquaintance between parties, from a competitive motivation against a colleague in the same field and same area, from an alleged rivalry, or from other factors. In addition, opposing experts who take extreme positions may thus invite more personal criticism.

Example 3

An expert initially hesitated to take a case involving a breach-of-confidentiality suit against a physi-

cian in a neighboring county. The local physician had been practicing as a psychiatrist but without the requisite training and without telling his patients of the deficiency. The expert's hesitation derived from the fact that she had been interviewed and had recommended against awarding staff privileges to the physician a dozen years earlier, specifically because of his lack of training. She advised counsel of the prior contact and ultimately signed on to the case. During the deposition, the previous contact was brought to light, in an attempt to show the expert's bias.

Example 4

An expert was consulted by an attorney for a plaintiff who alleged wrongful termination by a university for revealing the institution's misuse of research funds. The expert, however, held a position at the same university accused of misappropriation of funds by the whistle-blower. Taking the case would pit the expert against his own faculty.⁴

A strong case could be made for the expert's turning down this last case in general. The view of the expert on the case was allegedly that the institution would not want its own funds misused; therefore, the expert was testifying in the interest of the institution. This posture does not escape the appearance of a serious conflict of interest.

The Insider Position

Being an "insider" in the community or organization in question cuts in two directions. First, one may have access to private and personal knowledge about the other practitioner. Such information may be put to use to strengthen a case. However, this is, in a sense, knowledge gained corruptly, since it was not gathered from investigation of a case, by reading the other expert's report or deposition, or by similar means. Rather, it was obtained by association, from rumor and gossip, or from extraforensic sources. Thus, the source of the data may be the threshold on which to decide whether to offer such critical testimony. In the other direction, such knowledge may constitute a bias⁵⁻⁷ that interferes with a calm and objective assessment of the relevant facts in the case or situation.

Institutional Nests

Similar problems may occur in institutional "nests." These may include hospitals or correctional

or residential facilities with which the expert has been affiliated, academic institutions, or professional organizations. In areas where there are few forensic psychiatrists, experts may be called on by counsel for either side in civil suits involving institutions where they have past or present affiliations. These cases are problematic, on the one hand, in that they introduce the issue of bias, especially if one is testifying for the defense. On the other hand, testimony on behalf of the plaintiff may invoke the wrath of medical colleagues at the institution and accusations of showing disloyalty, being a hired gun or, worse, being a “courtroom whore.” Participation in these cases may also jeopardize future relations with the institution if one’s testimony is critical or, conversely, not helpful enough.

Example 5

An expert was asked by a plaintiff’s attorney, who had been retained by the family of a decedent, for a forensic opinion regarding a suicide that had occurred in the local prison. The expert refused the case, citing prior employment there, which could create an appearance of bias, and the fact that the staff psychiatrist was a colleague.

Example 6

A few years later, the same expert was consulted on another suicide at the same prison. At that time, she did not have any relationship with the *locum tenens* psychiatrist on staff. She again refused to become involved, citing again the possible perception of bias. In addition, she expressed a wish to maintain good relations with the prison administration, since she now did volunteer work there.

Note that avoiding even the appearance of bias is of significant value in enhancing expert credibility.

Example 7

The same expert was called by the plaintiff’s attorney in a case involving allegations of abuse of the use of seclusion and restraint at a youth correctional facility in a different part of the state. Her work on staff in a new youth facility at the other end of state (operated by the same agency) had given her first-hand knowledge of the standards of care for juveniles. She had also heard of abuse at the other facility. The expert weighed the possible conflict of interest, since both facilities were under the department of corrections. Moved both by the merits of the case and

hopes of advocacy for juveniles, she accepted the case, which reached an out-of-court settlement that resulted in sweeping improvements in the subject facility.

An ancillary problem of becoming involved in litigation involving one’s own institutional “nests” is that review of discovery material may reveal deficiencies in the standard of care rendered by colleagues who are not necessarily parties to the litigation. The expert who reviews these records may be left knowing more than he or she cares to know about colleagues and the expert may not be in a position to discuss these matters with the latter, even if it might result in improvements.

A related problem arises with class-action suits, in which plaintiffs may appear who are affiliated with a broad spectrum of facilities and locations. Although such suits may accomplish great good for patients, the ripples from them may impinge unforeseeably and unexpectedly on one’s colleagues.

Example 8

A plaintiff’s expert was asked how he knew the expert for the defense. The answer was they used to cover each other’s practices. He was then asked what he thought of the other expert’s quality of care, based on that experience. After a certain amount of hemming and hawing, the expert stated that the two of them had not shared the same threshold of anxiety over what constituted an emergency. This testimony led to awkwardness in their future encounters.

Although, in this example, the testimony was phrased rather tactfully, the potential for narcissistic injury is always present.⁸ Note also that the option of not offering an opinion on this nonforensic point was not exercised. Note also that, because the other clinician was chosen to cover the practice, a negative opinion calls the referring clinician’s own judgment into question.

Where to Draw the Line

These examples leave unclear the question of where one should draw the line to avoid fouling one’s own nest. One criterion may be the content of the information, testimony, or revelation itself. Needless inflammatory testimony or other communication is inappropriate.

A second parameter is the size of the relevant community. Even in AAPL, with a membership of nearly 2000, members have occasionally found themselves

on opposing sides of cases with other members. If everyone behaves politely and with appropriate mutual respect, useful testimony may be provided, without subsequent alienation or acrimony. However, lasting grudges may also develop.

A third consideration is one's own strength of feeling about a case, another knife that cuts two ways. Feeling strongly about one's opinion may be a sign of either clear conviction or bias. In addition, this feeling may reflect some transference-based dynamic about the other individual involved—a dynamic that may compromise one's objectivity.

Strong feelings may also lead to this narcissistic posture⁸: "I know my opinion is correct; therefore, if the opposing expert disagrees, the only possible explanation is that he or she is a corrupt hired gun." Even in an acknowledged adversary procedure, disagreement may be seen as insult or criticism, leading to a perception of "nest fouling," even when this is not necessarily the case.

Special Cases

Example 9

During a trial, an expert witness observed the opposing expert—an individual from the same community and regarded as a friend—sitting beside the cross-examining attorney and prompting the attorney in the cross-examination. The expert felt strongly offended at the colleague's apparent "in-his-face" participation in the impeachment process.

Note that this expert was aware that opposing experts regularly consult with attorneys on the best approach to cross-examine the other expert. Indeed, *Ake v. Oklahoma*⁹ may be read as permitting this. What may have been problematic in this example was the knowledge that the behind-the-scenes consulting expert, advising the attorney, is ethically permitted to be partisan; but, by the same token, the consulting expert is in an ethical conflict with the testifying expert, who is supposed to be neutral and objective. The vision of the opposing expert consulting before his eyes (and then, presumably, testifying later on the stand) may have seemed to the expert on the stand to be blurring the line between these two roles. He viewed it as a personal affront.

Example 10

An attorney recruited as an expert a member of the same department as the previously chosen opposing expert.

In this example, the attorney appears to be inviting nest fouling by raiding the nest of the other side's expert. The intent of this move may have been to achieve a greater impact by impeachment "from within."

Some Useful Approaches

Since the expert witness role is an elective one, the expert can always withdraw when facing a potential "nest-fouling" situation, as in Example 5. A rigorous assessment should be made of one's motives, overt and covert, in accepting cases such as the ones described herein. In this regard, the situation ultimately may not differ greatly in terms of social relations from criticizing a colleague to another colleague about the former's medical practice.

Should one confront a colleague from one's own nest whose criticism is inappropriate? Should one attempt to open a discussion when criticized by a local colleague, lest social embarrassment poison the relationship? Whether the outcome is deepened resentment or liberating resolution probably depends on the personality of the colleague being confronted and one's own interpersonal skills.

Example 11

A senior forensic psychiatrist witnessed one of his fellows testifying against him by using personal information. The senior asked why the fellow had said what he had said. The fellow replied, "On the stand it's like when you are having sex; in the heat of the moment you say all kinds of things." Both parties laughed and the matter was resolved.

The humorous approach, of course, will not work in all situations.

Conclusions

In any case, few approaches serve better than maintaining tact, a sense of proportion, decency, and good manners. If criticizing a fellow local practitioner in a malpractice context, for instance, it is an excellent idea to express oneself along the lines of, "I am sorry to say that, in this case, Dr. X. fell below the standard of care." It is less useful to trumpet, "This is the worst case of malpractice I have ever seen!" The thoughtful testifier should avoid editorializing in general and should embrace the careful avoidance of bias and the awareness of the effects of transference and countertransference on one's testimony.

Pejorative Testimony About Opposing Experts

In sum, advocacy pressures and attorney's needs and goals have the potential to bring out the worst in us, and we should resist. Birds instinctively know not to foul their own nests; forensic psychiatrists stand to learn from them. Adhering to standards of appropriate conduct and mutual respect are the best safeguards against such fouling.

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