Adventures in the Twilight Zone: Empirical Studies of the Attorney-Expert Relationship

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A series of empirical pilot studies, performed during workshops at meetings of the American Academy of Psychiatry and Law (AAPL), and examining various aspects of the attorney-expert witness relationship are presented and their implications are discussed. The author calls for further investigation of a topic that—although constantly a feature of discussion among both experts and attorneys—lacks extensive empirical investigation.

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In 1977 on the inpatient unit known as Service Two at the Massachusetts Mental Health Center, the litigation in the case that would come to be known as *Rogers v. Commissioner*[1] was in full swing in its second year, and the case was casting its shadow over that unit; the author was the attending psychiatrist there.

After a discussion with Paul S. Appelbaum, MD, the author became aware that while District Court Judge Joseph Tauro, in his wisdom, was equating antipsychotic medication to psychosurgery, no one really knew just how much treatment refusal was actually occurring. Somewhere in that moment, Dr. Appelbaum and the author looked at each other with a wild surmise (as John Keats describes Cortez's men seeing the Pacific for the first time) and realized a truth that became the watchword for the Program in Psychiatry and the Law (hereafter, the Program), which Dr. Appelbaum started and which the author continued to the present with codirector Harold Bursztajn, MD. The watchword is "Nobody's done the study—to find out what actually happens." The slogan, posted in the author's office, reminds Program members of the need for empirical underpinnings of our work.

This interest in empirical work must somehow synergize with as yet unanalyzed primal scene conflicts in the author, whose greatest research pleasure is doing studies in taboo areas, areas which raise conflict, embarrassment, and anxiety in the profession and which consequently have not been previously explored. Thus, they are both taboo and novel. This category may include studies and resulting articles on seclusion and restraint, on money as a clinical issue, on expert witness billing practices, and the present subject, the actual operation of the attorney-expert relationship.

A possible objection should first be addressed. Is it truly fair or even accurate to call an area "taboo" when it has been and continues to be the subject of innumerable conversations, trainee supervisions, and off-the-record discussions with forensic colleagues? Ironically, yes, because despite this extensive and ubiquitous verbal blizzard, empirical study is extremely rare.

This empirical paucity stands in marked contrast to the plethora of generalizations about that relationship. Scholars such as Brodsky,[2] Chiswick,[3] Bluglass,[4] Resnick,[5] Stanley,[6] and Rogers,[7] for example,

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have all explored the potential for identification with the retaining attorney as a potential contaminant of the expert's objectivity; indeed, Katzmann refers to this as a "natural bias"[8] (p 5).

Similarly, material is not lacking on what attorneys generally want from experts. A number of scholars have addressed this,[2, 9, 10] perhaps none so cogently as Ralph Slovenko[11]: "What the lawyer wants in an expert medical witness. . . are the looks of Robert Redford, the knowledge of Michael DeBakey, and the presence of Ronald Reagen [sic]."

Furthermore, it is not suggested here that the literature is completely empty of studies with some empirical underpinning. Consider Bob Goldstein's excellent piece on hired guns and the lawyers who hire them[12] and Doug Mossman's impressive recent survey of judicial attitudes toward "whores of the court,"[13] to cite just two among a number of valuable examples. Nevertheless—given its absolute centrality to forensic practice—the attorney-expert relationship in all its detail remains, for the most part, *terra incognita* to systematic statistical study.

The approach to be used by the Program to map this dark territory was to persuade American Academy of Psychiatry and Law (AAPL) members to fill out questionnaires designed primarily by the Program's senior research scientist, Michael Commons (with input from Program members). After these questionnaires were completed, they were scored by Commons, Dr. Patrice Miller, and various research assistants. The questionnaires addressed aspects of the attorney-expert relationship that we thought were interesting and relevant but that had not been previously explored empirically.

To keep this adventure from being too exploitative of the goodwill of AAPL members, the author used a kind of *quid pro quo* approach. At a series of workshops at annual meetings, attendees were asked to participate in filling out questionnaires designed by the Program; but attendees then had the opportunity to discuss these prickly topics in an open forum, out of the shadows. The questions stimulated discussion, which in turn got members thinking about the issues, perhaps for the first time or in novel ways, and that was the "compensation" for participating in the research.

Indeed, this project, now in its third year, worked very successfully; members seemed to enjoy the discussion, and trainees in particular expressed gratitude for the chance to talk and hear about what constituted the details of actual forensic practice—what do forensic practitioners actually do—exploration of which they sometimes missed during their training. The workshops also produced highly interesting and original data, which constitute the present discussion. The author hopes that this presentation is not the finale but merely the overture to ongoing, open exploration and discussion of this central subject.

The Matter of Fee Agreements

An early study of attorney-expert relations involved a survey of fee agreements used by senior AAPL members. This study was the most purely descriptive of the Program's researches, designed to see what was out there; the study consisted of deliberately looking for fee agreements through solicitation letters and follow-up. If one psychiatrist stated that another one used fee agreements, the latter was solicited for that agreement. In other words, other than focusing on senior members of AAPL, no attempt at random sampling occurred.

This intentional beating of the bushes garnered a total of 20 responding members, only 55 percent of whom used agreements. The remaining 45 percent described alternative approaches: asking for large retainers, using the attorney's retention letter, or using the attorney's own contract.

This large percentage of senior members "not" using contracts may be a surprising finding. One might speculate that noncontract users had not yet been deceived by their first attorney. (The author's own fee contract, originally a few lines, has expanded to almost two pages in response to new forms of perfidy by attorneys.)

In any case, of the 11 contract-users, some interesting patterns emerged.[14] Ten of the 11 required retainers. Seven described travel policies. Three attempted to describe the expert's approach to a case. Finally, the level of detail was the greatest variable. The length of contracts ranged from one-half page to two and one-half pages of relatively fine print. Six agreements specified cancellation policies, one specified Eastern Standard Time, another offered differential rates for different amounts of advance notice of cancellation, three contracts specified interest rates on overdue accounts, three discussed why the agreement itself was needed, and one explicitly noted that there would be no charge for alcoholic beverages or entertainment.

Our recent series of limited pilot studies draws from a data pool of 37 questionnaires that were filled out by attendees at one of the seminars mentioned previously that took place at the 1999 AAPL meeting—a small sample, but sufficient for some preliminary conclusions. Because anonymity was assured, demographics are unavailable. As expected, the spontaneous comments were even more interesting than the numbers alone.

Billing Issues

Independent of the attorney-expert context, money is a taboo issue in itself. As noted elsewhere[9] (p. 24), "Therapists who are quite capable of taking an extensive, probing sexual history without a qualm begin to blush and stammer when it comes to discussing money." Hence, a potentially golden area for novel exploration would be billing practices. Our initial survey of expert billing in complex travel situations[15] revealed that most respondents followed more or less rational approaches to billing dilemmas. However, when confronted with a truly complex travel scenario, respondents gave a surprising answer:

To remind the reader, the complex dilemma reads as follows:

> You fly from home in Boston to Chicago on Case A on Thursday, then directly to Los Angeles on Case B on Friday, then home to Boston Saturday morning, arriving Saturday night. You do no extra work on planes or in hotels. How do you bill?[15]

The charges would include the costs of tickets, day rates, overnight stays, and flight times either in segments or *in toto*; and these could be billed to either retaining law firm, to both, or to neither. What actually happened was that most respondents, apparently throwing up their hands at the complexity of the example, simply billed both firms for "all" expenses—that is, the extreme form of double billing. For earlier, simpler examples, most billing was nonredundant. Not one of the respondents thought of, say, splitting Saturday—the return trip—evenly between the two firms, a fair apportionment.

Our second billing study attempted to examine some finer points—what we termed "marginal areas"—of the billing strategies used by respondents.[16] For example, we asked about billing for library research on the exact case topic and on a general area that includes the case. Regarding billing for research on the specific case topic, 94 percent said yes and 6 percent said no. On the general topic, 68 percent said yes and 32 percent said no. The comments reflected controversy over whether an expert is expected to know the field already or whether library research aids in strengthening the case. Respondents variably mentioned clearing this with the attorney first.

Another area we explored was the travel dilemma: "Assume you use a day rate for travel. You arrive in a new city at 10 a.m. for a case and return the next day, arriving home at 10 a.m. Do you bill for one or two days? Why?" Here, 73 percent billed for one day and 27 percent for two. Various rationales, including the impact of an overnight stay, were provided. We then pushed the envelope by asking, "If you review that case between 8 and 10 a.m. in flight, do you bill for those hours in addition, or do you subsume them under the day rate?" Eighty-five percent of respondents subsumed that time under the day rate and 15 percent billed separately. These results appear clearly to support the conclusion that respondents were attempting to bill nonredundantly.

More complex responses greeted more subtle questions. We asked if respondents billed for "thinking" about a case. Fifty-seven percent of respondents said yes and 43 percent no. This relatively even split was discussed with comments, such as "I think about it way too much—they couldn't afford it," "Most of my thinking is done while reading the chart and making notes," and "No, because I hadn't *thought* about doing it."

A particularly provocative question, judging by the extreme scatter of responses, was this one: "Assume a retaining attorney sends materials but no retainer for a long time. You do not read the case. The other side calls and promises instant retainer. What is the proper response and why?" The general trend was toward turning down the second attorney, based in part on avoiding any appearance of impropriety or "jumping ship." However, many respondents responded concretely: "No retainer, not retained"; others suggested calling the original attorney and forcing the issue or setting deadlines. We pushed the matter by asking, "Is your answer different if you have already returned the case in disgust?" Seventy-four percent said no and 26 percent said yes. The minority opinion respondents considered themselves unretained and free to take the case for the other side.

Trial Behaviors

Our next exploration addressed two common experiences for experts. First, expert witnesses sweating

under fierce cross-examination from the opposing attorney often have the feeling that "anything goes" in that situation; it seems that any question, no matter how unpleasant, may be asked. Second, experts are commonly asked not only to critique the opposing expert's opinion, but also to reveal frankly what they know about the opposing expert as a person. Are there any limits on these topics? What can attorneys properly ask? What can experts properly say about the opposing expert? What principles might apply? We tried to find out.

We first asked respondents to our questionnaires to opine about a spectrum of queries of increasing personal intrusiveness; in each case the questions were at least theoretically relevant because they derived from the subject matter of the case.[17] For example, in a psychiatric malpractice case involving an alcoholic man who committed suicide, the question directed to the expert was, "Are you an alcoholic?" The queries ranged from "What were the circumstances of your divorce?" to "What percentage of your income derives from forensic work?" with many points between.

The most striking finding of all was the wide spectrum of responses to the various questions and the wide diversity of opinion on what was legitimately a relevant area for inquiry and what was "too personal"; this diversity makes percentage discussions relatively unhelpful. To summarize the strongest trends, clear majorities felt that queries about the circumstances of the expert's divorce, substance abuse problems, homosexuality, and actual income were too personal to be appropriate. In contrast, queries about the "percentage" of income from forensic work, the expert's Catholicism, the "fact" of divorce or possession of a will were seen as possibly relevant and acceptable, if not completely appropriate.

Next, we examined what experts felt they could appropriately say about opposing experts as a legitimate part of their consultation to the retaining attorney; as you will note, principles similar to the last inquiry—concerning the intrusiveness or personal nature of the information—seemed to apply.[18] To summarize those findings, majorities of respondents felt it was acceptable to state that the opposing expert was not board certified, was not forensic board certified, does cases for only one side, or that the other expert's recent lecture or article reveals a bias in the present case. Generally, these comments were justified as being "public" (e.g., stated on the other expert's curriculum vitae) and thus appropriate for disclosure.

More personal and subjective disclosures generally were categorized nonsignificantly as inappropriate, but the responses showed surprisingly wide scatter; clearly, further discussion of these topics in open fora would be valuable. The information in question included the following:

- "The other expert is a survivor of child sexual abuse and probably cannot be objective about this recovered memory case."
- "The other expert has been through a messy divorce and custody battle and thus is questionably objective about this custody case."
- "The other expert is gay/lesbian and thus is questionably objective in this emotional injury case involving gay-bashing."
- "The other expert is known to me personally to be an alcoholic; . . . a substance abuser; . . . a liar."

The last query, which might seem comparably personal to the foregoing queries, showed an unexpected result: "The other expert is known to me personally to be a member of a hate group (KKK, survivalist militia, skinhead group, etc.)." Respondents here showed a (nonsignificant) trend toward the "appropriateness" of this disclosure. This trend may be explained by the fact that group membership is considered a semipublic role and thus open for sharing with the attorney.

Attorney Pressures

Our most provocative study examined the sensitive topic of attorney pressures on expert witnesses; initial exploration of this issue has already appeared[19] in print. Here, we note that most attorneys deal fairly with their retained experts, but not all do so. We looked at three tactics designed to exert undue influences on experts, which we summarized as "withholding, seducing, and coercing." By "withholding," we referred to attorneys holding back critical data to influence an opinion. By "seducing," we referred, not to sexual seduction, but to the use of personal or social incentives intended to persuade an expert to adopt the attorney's opinion, such as promises of future retention if the opinion in the present case were favorable. By "coercing," we meant the attempt to dissuade the expert from an unfavorable opinion by the use of threats, such as "You'll never work in this town again."[20]

Forty-nine percent of respondents noted that material had been withheld from them; their spontaneous comments made clear that the withholding did not occur for such legitimate reasons as relevance and accident. One subject noted, "I have experienced receiving large amounts of records, only to find that some were missing—deemed 'unimportant' by attorney but actually relevant if not central."

Thirty-five percent of respondents reported having experienced some form of blandishments aimed at influencing an opinion. Of course, this is the most suspect finding because an attorneys' intentions are not always clear; taking one to dinner or praising one's work may be nothing more than a form of professional courtesy.

Nineteen percent of respondents had experienced threats against them by attorneys aimed at affecting their opinions. Indeed, the prototypic example was noted by one subject: "The worst scenario (so far) was when a prosecutor stated in writing that, if I didn't cooperate with him (I had been retained for the defense), I would never work in my town again."

Conclusions

What may be drawn from these preliminary studies are a series of observations. First, double billing, which constitutes fraud, is regrettably not inherently avoided, at least in theory. Second, fee agreements vary widely and are not used universally. Third, fortunately, some apparent social/ethical standards do govern expert-expert and expert-attorney interactions, at least as reported in these studies. These preliminary observations require further investigation in larger heterogeneous study pools to support their validity.

Obviously, these highly preliminary data from small samples can serve only one unequivocal purpose—to stimulate further study and open discussion of these previously hidden issues. But we owe it to our trainees and to our field's empirical tradition to continue these research endeavors with the goal of better understanding the complexities of the attorney-expert relationship, better understanding the standards of appropriateness applied to these issues, and better guiding our students and colleagues in withstanding the potential biasing factors and pressures that may be brought to bear on them in their work. The author hopes that this review has opened the topic for candid discussion.

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