

Are There Impartial Expert Psychiatric Witnesses?

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An expert psychiatric witness is court appointed in about 30 states when the insanity defense is raised.^{1,2} This defense evokes powerful prejudices, toward either condemnation or compassion, and has generated polemical debate.³ Similarly, psychiatric opinion is required in procedures of competency to stand trial and sexual offenses of many varieties that stimulate feelings ranging from shock and horror to mercy and therapeutic optimism. In cases of divorce and custody of minor children, which can be laden with surplus emotion,⁴ a psychiatrist may be called to testify. In these and other actions, the psychiatrist is frequently expected to be an impartial expert witness throughout his pretrial work,* his direct and cross examination, redirect and recross examination, and occasional attacks upon his facts, opinions, and credibility.

This author proposes to show this expectation is, in most instances, an ideal fiction; to note some formal and informal ethical standards urging impartiality; and to cite some suggestions to diminish the degree of partiality in psychiatric expert testimony.

Formal Ethical Ideals

In 1958, the American Medical Association and the American Bar Association jointly proposed a National Interprofessional Code for Physicians and Attorneys, which admonished the expert medical witness, thus including the psychiatric witness, never to become an advocate.⁵ The American Association of Questioned Documents Examiners first adopted a code of ethics in the 1940s; its latest amendment in 1972 continues to require members to act at all times, in and out of court, in an "absolutely impartial manner."⁵ In 1976, the American Association of Neurological Surgeons advised neurosurgeons "to testify impartially for both defendant and plaintiff."⁶ In 1977, the American Academy of Forensic Sciences handed down a Code of Ethics giving two substantive principles and three guiding principles, for all forensic scientists, the third being "the forensic scientist should act in an impartial manner and do nothing which would imply partisanship or any interest in a case except proof of the facts and their correct interpretation."⁵ The American Academy of Psychiatry and Law is preparing a code of ethics intended to guide, although not govern, forensic psychiatrists.

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* When the impartial psychiatric expert performs a pretrial examination in cases where the insanity defense has been raised, this examination may result in a violation of the defendant's Fifth Amendment rights against self-incrimination and his Fifth and Fourteenth Amendment rights to due process: Requiring a criminal defendant to submit to a government psychiatric examination. 83 *Harvard L. Rev* 648 (1970); Berry, FD: Self incrimination and the compulsory mental examination: a proposal. 15 *Ariz L Rev* 919 (1973); Horman, DK: The privilege against self-incrimination in pre-trial psychiatric examination: Oregon's compromise. 14 *Willamette LJ* 313 (1978); Needell, JE: Psychiatric expert witnesses: proposals for change. 6 *Amer J L and Med* 425 (1980).

(A high court held that interest or bias of an expert may be used to rebut that expert's testimony.⁷ This is gentle compared to Scripture, where we read that to be "partial in the law" is both "contemptible and base before all the people."⁸)

Informal Ideals

For forensic psychiatrists, "Ten Tips for Handling Oneself in Court" gave as its first advisory, "Never permit yourself to become partisan in the litigation—not for your patient, not for your lawyer friend, not for a cause."⁹ Another expert wrote that the "greatest danger to truth for a forensic scientist is in becoming an advocate."⁵ This latter expert, collaborating with a distinguished psychiatrist, wrote that all forensic science expert witnesses "must give the aura of being independent non-partisan scientists or clinicians." He cited the late Dr. Seymour Pollack, "the appearance and projected image of neutrality, impartiality and objectivity are as important as the authentic characteristics."¹⁰ A forensic psychiatric teacher recommended that the testifying psychiatrist should not sit at the attorney's table in court and should answer fairly and impartially.¹¹ A similarly distinguished forensic psychiatrist, among 16 suggestions, proposed that "Once you have been called to the stand, avoid partisanship," but did note that the psychiatrist may have a positive countertransference toward the (litigant-) patient.¹² Currently, I advise my residents to examine the medical and legal issues closely, simultaneously to attend their own personal prejudices, and then to act only as wise practitioners of community medicine.

Psychiatrists' Partialities

Modern medicine has produced the psychiatric physician, who is ideally "healer and servant in the ministry of mercy"¹³ but who is substantially influenced by the phenomena of transference¹⁴ and countertransference, as are all other normal and abnormal persons.¹⁵

Transference is the positive or negative partiality of a patient's feelings and behaviors toward his or her physician, including rational and adaptive aspects of feeling and behavior, as well as irrational or nonadaptive prejudices that originate in unconscious strivings. Countertransference is the positive or negative partiality of the physician's feeling and behavior toward his or her patient, being the counterpart of a patients' transference, having the same nature of structure and origin as that transference. Countertransference is regularly seen in a psychiatrist's relations with an individual, or with a group, and among normal or abnormal people.¹⁵

With this in mind, a keen observer wrote that the psychiatric expert witness's "personal loyalties and general social and political convictions inevitably, if unconsciously, will bias both his observations and his judgment. In spite of every effort to correct for such biases, the psychologist or psychiatrist is no more immune to such self-deception than is the layman."¹⁶ In particular, the expert psychiatric witness "may be strongly identified,

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consciously or otherwise, with authority and conservative ideas of individual responsibility,"¹⁶ such as the sense of justice¹⁷ or his concept of the "spirit of the law"¹⁸ or the concept that the plaintiff deserves a minimum of compensation.¹⁹

On the other hand, the psychiatrist may undertake a crusade for the underdog, from the witness stand.^{20,21} Further, when most frequently, the psychiatrist has a certain amount of empathy with the litigant-patient, or toward the lawyer with whom he enlists on "one side of the legal battle, (the psychiatrist) if he is at all human, must necessarily identify himself with his own opinion and the subjective desire that 'his side' win. . . . It is absurd to pretend that the psychiatric expert remains neutral under such a legal procedure."^{22,23}

Thus the ideal of the completely impartial psychiatric witness is, in most cases, what Freud entitled an "ideal fiction."²⁴

Some Remedies

Proposals have been made to encourage the expert psychiatric witness to temporarily renounce some of his professional loyalties and part of his human condition, so that he may become, while participating in the pitched battles of the adversary system, an objective, unbiased, and uninvolved forensic scientist.⁵ At a high level, Judge David Bazelon indicated the need for similar proposals, when he wrote that "substantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable."²⁵ This justice commended public agency members "articulating both their factual observations and *their value preferences*"²⁶ and made some arguments for and against a Science Court.²⁷ A Science Court would report on the current state of technical knowledge to the regulatory government agencies, and would, I assume, have a permanent seat occupied by a forensic psychiatrist.

The Commission on Revision of the Federal Court Appellate System made a preliminary report in 1975, proposing a "pool of scientific advisors" to be on call to the courts, available throughout the country. The final report, that year, did not recommend constituting this pool, probably because the advice of these advisors to the judges would not be furnished to the litigants.²⁸ In the 1960s "impartial medical panels," appointed by the courts from various medical specialties as medical advisors in diagnosis and evaluation of evidence in personal injury lawsuits, were employed to advise these courts but have fallen from use because the litigants are denied their Sixth Amendment class of rights to confront these experts.²⁸

At the trial court level, it is the trial judge who has the power to exclude partiality or accept impartiality, by his rulings on what opinions may be admitted into evidence: The American Law Institute Code of Evidence 401² provides that "a judge may require that a witness, before testifying in terms of inference, be first examined concerning the data upon which the inference is found." Informal ethical advice to the psychiatrist testifying in such

courts has already been noted.

Currently, I suggest that the courses in professional ethics given in the training of forensic psychiatrists—equivalent to the course in professional responsibility in law schools—be offered in shortened form as part of the continuing medical education for all psychiatrists, giving appropriate emphasis to the normal trend toward subjectivity and partiality, even among such experts.

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