

# Peer Review of Psychiatric Expert Testimony

## American Psychiatric Association's Council on Psychiatry and Law

Among the most visible and controversial functions of psychiatrists has been their service as expert witnesses for the courts. Psychiatric testimony is called upon in a vast array of cases. In civil law, these include disputes over the capacities of persons to contract, write a will, or manage their affairs; suits alleging emotional harms as the result of tortious acts; and claims of malpractice against other psychiatrists. Criminal cases in which psychiatrists frequently appear range from hearings on defendants' competence to stand trial or to waive their rights, to trials based on pleas related to impaired mental states. Psychiatrists also testify in family law cases involving child custody and termination of parental rights, among others.

Although this paper, for reasons of convenience, speaks primarily about psychiatric testimony in court, it is clear that psychiatrists perform similar functions in non-courtroom settings. They may provide testimony, for example, for administrative hearings, depositions, and peer review conferences. Moreover, their testimony is not always oral, sometimes taking the form of written evaluations or affidavits. Psychiatrists' roles

as experts are much the same in these courtroom and non-courtroom venues. The expert's task, in addition, begins long before evidence is offered, with the evaluation that is performed. The following discussion is applicable to psychiatrists who serve the function of expert witnesses in whatever setting their participation occurs, and whether their testimony is oral or written. It extends to review of their reports and testimony, as well as to the evaluations on which they are based.

The diverse range of settings in which psychiatric testimony is sought by the legal system stands as an acknowledgment of the importance to the courts of information about persons' mental functioning. The continued demand for such testimony is some indication that the parties to these cases believe that psychiatrists offer useful data and opinions that assist in adjudicating the claims. But psychiatric participation in courtroom proceedings and related areas has not been without its critics. Some criticism, to be sure, is ill-informed, stemming from a misunderstanding of the role of the expert witness in court. Much of it, however, comes from knowledgeable commentators who are disturbed by aspects of psychiatrists' conduct on the witness stand.

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In general, informed criticism of courtroom testimony by psychiatrists falls into two categories. Judges, scholars, and legal and psychiatric practitioners have criticized the competence of some psychiatrists who testify in court.<sup>1-5</sup> The most frequent complaints heard are that psychiatrists may fail to understand the legal issues at stake, to have a firm enough grounding in the relevant empirical literature to be able to draw scientifically well-founded conclusions, or to communicate their findings and opinions understandably to judge and jury.

The second group of objections to psychiatric testimony relates to the ethics of courtroom testimony. Critics complain, for example, that some psychiatrists deliberately distort their testimony to serve the interests of the people who are paying them, or to advance other causes to which they are sympathetic.<sup>1</sup> This critique calls into question the dedication of some psychiatrists to truthfulness in court. Although the two categories of criticisms are related—the ethics of offering an opinion in an area that one does not fully understand are problematic at best—they suggest two different sorts of remedies. Problems related to the competence of those testifying can presumably be addressed by education and training. Lapses of professional ethics, though sometimes susceptible to educational approaches, may call for more punitive sanctions.

Despite the degree of concern expressed about psychiatric testimony, there have been few efforts made to address the problems identified, and those

have been largely ineffective. The courts themselves have the power to accept or reject the characterization of a potential witness as an “expert,” but they usually depend heavily on review of formal credentials, rather than examining actual performance.<sup>6</sup> There is a strong tendency for the courts to rely on the adversary process—especially the rigors of cross-examination—to weed out improper testimony.<sup>7</sup> Sometimes opposing counsel and opposing experts have sufficient skill and sophistication to highlight the defects of incompetent or unethical expert testimony. In these cases, the adversary process functions satisfactorily as a check on expert witnesses. However, all too often, opposing counsel are unaware of problems with expert testimony and therefore unable to challenge expert witnesses effectively. Further, judges and jurors, who lack substantive knowledge of the subject of the expert opinion, are frequently forced to base their decisions more on the demeanor and credentials of the expert than on the scientific validity of the testimony. In sum, our impression is the internal checks of the legal process fail often enough to require some self-regulatory responses by psychiatry.

*Post facto* remedies against expert witnesses who are believed to have testified incompetently or dishonestly have been equally ineffective. Perjury convictions are rare and when they occur are usually based on falsification of credentials, rather than the substance of the expert testimony.<sup>8</sup> Malpractice actions are often blocked by the immunity conferred on experts for their testimony.<sup>8</sup>

Ethics proceedings in professional societies are also uncommon, in part because professional codes of ethics rarely address forensic functions directly, leaving complainants recourse only under the most general of ethical prohibitions.<sup>9</sup> This is as true for the American Psychiatric Association's Annotations to the Principles of Medical Ethics as it is for other professional codes.<sup>10</sup>

One of the more creative suggestions for improving expert testimony draws on the medical profession's experience with peer review as a means of quality control.<sup>11</sup> As part of their accreditation processes, medical facilities are required to establish on-going programs that review the quality of care that they deliver and indicate where improvements are needed.<sup>12</sup> These programs—dubbed “peer review” because doctors' behaviors are reviewed by other physicians—have become a cornerstone of quality assurance in medicine. Their importance has been recognized by a set of legal protections, including personal immunity for peer reviewers and confidentiality for the process, embodied in federal and state laws.<sup>13</sup> Peer review has the advantage of allowing those with the greatest knowledge of medical practice to determine the appropriateness of their colleagues' conduct. Suggestions that peer review principles be applied to courtroom testimony by physicians have been endorsed by a variety of physician groups.<sup>14-17</sup> Excerpts from transcripts of psychiatric testimony have been published on occasion with critiques and commentary.<sup>18</sup> We are unaware, however, of any organization that has estab-

lished an on-going effort to conduct peer review of expert testimony.

The Council on Psychiatry and Law of the American Psychiatric Association has been exploring the use of peer review of expert testimony, and conducting reviews of actual testimony to gain experience with the process. We have reviewed the testimony of our own members, who were present for the discussion, and of other psychiatrists, who were not present, to experiment with more than one format for peer review. As a result of our experience, we believe that peer review may be a useful mechanism for improving the quality of psychiatrists' performance in court. The purpose of this paper is to share our reflections and experiences with peer review of expert testimony in the hope that we can stimulate other groups to undertake similar efforts. As the pool of experience with and knowledge about peer review grows, we believe it likely that models will develop that will serve the ultimate end of increasing the quality of expert testimony.

### **What Are the Goals of Peer Review?**

Peer review of forensic testimony should be aimed at improving the overall quality of information provided to the courts. This goal can be achieved primarily by educating psychiatrists about potential problems with their testimony. Such feedback is analogous to the courtroom supervision provided fellows in forensic psychiatry training programs, and more broadly to the model of case-based supervision that lies at the

core of psychiatric training. The peer review session can be designed along the lines of the clinical case conference, as discussed below. Thus, peer review should be seen primarily as a device for offering continuing education to psychiatrists about matters related to courtroom testimony.

Viewed in this perspective, peer review should not be limited to psychiatrists whose competence in the courtroom has been called into question, or whose ethics are at issue. It is not a device whose benefits are limited to clinicians who rarely testify in court or who have just entered practice. Our experience with peer review of testimony offered by members of the Council on Psychiatry and Law suggests that even very experienced clinicians find value in having their colleagues examine and provide feedback concerning their performance.

Another purpose of peer review of expert testimony is the identification of potentially unethical behavior. Examples of such behavior include misrepresentation of one's expertise relevant to the question at issue, and deliberate misstatement of current psychiatric knowledge. For several reasons, we see this as a secondary goal. First, it is our impression that overtly unethical behavior is characteristic of only a small subgroup of practitioners. Thus, the educational goals of peer review are likely to have a much wider impact than those oriented toward discovering ethical impropriety. Second, it is often difficult to distinguish between behavior that is unethical and simple lapses in competence. Such a dis-

inction may depend on the intent of the expert witness at the time, a factor that cannot easily be ascertained, and may become evident only after review of the expert's performance on several occasions, which will not always be possible.

To be sure, there will be circumstances in which unethical behavior is evident, especially as peer review bodies gain experience over time with the work of individual psychiatrists. Mechanisms must be developed to respond to such findings, as we discuss below. But we believe that it would be an error to place undue weight on identification of unethical behavior as a primary goal of peer review.

### **What Standards Should Be Applied to Review of Expert Testimony?**

At the beginning of our peer review efforts, concern was expressed that the lack of clear-cut standards or practice guidelines would limit the effectiveness of our consideration of expert testimony. It was feared that judgments would be based on idiosyncratic opinions of panel members, with consensus impossible to achieve. Some commentators have expressed the belief that no meaningful standards exist for evaluating expert testimony,<sup>19</sup> a conclusion that, if true, would clearly imperil the process.

In fact, our experience suggests that it is possible to reach a fair degree of consensus among reviewers of widely different backgrounds and orientations about the appropriateness of testimony under review. Most of the behaviors that were

called into question in the cases we reviewed (e.g., testimony that went beyond the bounds of or misstated current psychiatric knowledge; misrepresentation of credentials or expertise) were agreed by all to be inappropriate. When practices fell into categories about which there is substantial disagreement in the field (e.g., offering testimony on ultimate issues), the group had no difficulty in applying the equivalent of the "respectable minority rule" in malpractice litigation: as long as the practice in question is accepted by a reasonable proportion of the profession, it cannot be considered to be inappropriate.

Even when consensus was lacking, moreover, it was our impression that the educational function of peer review was served by opening up the issue for discussion and comment. Experts whose testimony was being considered thereby were made aware of different approaches to the question, and through the give and take of the review process were able to assess the cogency of each position. Whether or not their practices subsequently were altered, they were undoubtedly more aware of the issues involved.

Although the Council did not attempt to develop written standards for forensic testimony, we found that their absence was not an impediment to the peer review process, as it generally has not been an obstacle to peer review in clinical practice. Indeed, survey data confirm that most issues related to forensic practice are the subject of fair consensus in the field.<sup>20</sup> Nonetheless, the formulation of general standards or principles for

experts' conduct would be desirable. The American Psychiatric Association, in collaboration with the American Academy of Psychiatry and the Law, has established a Task Force on Peer Review of Psychiatric Expert Testimony, one of whose tasks will be to explore the development of standards to guide the peer review process. Moreover, we think it likely that, as peer review is practiced more widely, it will serve as an impetus to the crystallization of standards (where that is possible) and the development of more explicit guidelines.

### **How Should Peer Review Be Performed?**

Given that neither we nor anyone else has much experience with peer review of expert testimony, it is too early to indicate precisely how the process should be structured. Our experience to date, however, suggests several guidelines that might be helpful as more groups try to design a peer review program.

Expert testimony is a particularly good subject for peer review because the performance of the person whose work is being reviewed is captured in its entirety in the transcript of testimony or the expert's written report. Review of physician performance in clinical settings based on available medical records, in contrast, is a much more difficult task. Nonetheless, additional contextual information may be invaluable to the forensic peer review process. We found it useful to provide in advance to reviewers a brief summary of the facts of the case, any reports generated by the expert, and

the transcript itself. In most cases, this seemed like an adequate basis for the review process.

To avoid interference with the legal process, review should be limited to cases that are already closed. Materials to be reviewed should be part of the public record, e.g., trial testimony, depositions, and reports that have been entered into evidence. If an expert desires to have material reviewed that is not in the public domain, permission should be obtained from the attorneys for the parties to the case. Even when materials are in the public domain, it is desirable to protect the confidentiality of the parties involved by blocking out identifying information concerning the subject of the testimony or others involved with the case.

Although, for the purpose of gaining experience, we conducted our peer review efforts in quite a large group of up to 20 people (and found them feasible even in that setting), smaller groups of reviewers will allow the process to move with greater efficiency. It seems advisable for there to be at least three reviewers involved, with one person designated as chairperson and assigned to organize the review session. The reviewers should have substantial experience with expert testimony, and should be selected to ensure some diversity of expertise, training, and perspective. Larger groups obviously increase the variety of views that may be presented, but also raise the cost of peer review. A primary reviewer should be assigned to begin the discussion by focusing on those aspects of the testimony that are worthy of attention.

We found that the time necessary to review each case varied considerably, but that an allotment of 60 to 90 minutes was usually adequate.

Peer review proceeds most smoothly when the person whose testimony is being reviewed is present. That person can be invited to begin the process by describing the background of the case and providing an overview of the opinions that were offered. Contextual information is sometimes lacking in the written materials, and the expert being reviewed is usually the best person to provide it, or otherwise to explain the testimony. Most importantly, the educational function of peer review is immeasurably facilitated by engaging the expert witness being reviewed in a dialogue about his or her performance. The reviewee benefits from hearing different points of view expressed, attempting to come to grips with them, and observing the response to his or her arguments. Although the results of a peer review can be communicated in writing, much of the richness of the discussion would inevitably be lost. The presence of the psychiatrist whose testimony is being reviewed seems to us to be one of the most important elements of the peer review process.

Structuring the peer review process may be aided by the use of a review form or checklist that focuses the reviewers' attention on those aspects of testimony that are most frequently problematic. A sample form developed by the Council is available on request, but there are many other ways in which a review form can be organized. Such forms are widely

used in peer review of clinical work, providing a means for rapid screening of records to detect potential problems.<sup>21</sup> As firmer standards are developed, they can be incorporated into the form itself.

There may be some value, even when the psychiatrist being reviewed is present for the process, in providing a summary of the comments in written form. This affords the reviewee an opportunity to reflect at leisure on the points that were made and to have a permanent record of the review process. The desirability of this practice may be affected by the legal protection afforded to peer review in the jurisdiction, specifically whether peer review reports can be subpoenaed by attorneys in subsequent cases.

Finally, a decision will need to be made about establishing a procedure for dealing with behavior that is believed by the reviewers to represent a clear violation of ethical standards. The expert whose testimony is under review should be informed in advance of whether action will be taken if unethical conduct is discovered. If review bodies desire to pursue presumed violations of professional ethics, the cases will require referral to a district branch of the medical or psychiatric society of which the psychiatrist is a member, or to the board of registration that oversees medical practice in the state. On the other hand, peer review bodies may elect, when state law permits, not to report apparent ethical violations in order to maintain the confidentiality of the peer review process, thus encouraging voluntary participation. At this time, the resolution of this

question seems most properly the prerogative of each peer review group.

### **Who Should Conduct Peer Review?**

Peer review can be carried out by a number of organizations, each with its own advantages and disadvantages. The Council believes that it is too early to endorse any given approach, but that the relative merits of the available options should be the subject of further consideration. It has been suggested that for experts in organized practice settings, peer review can be accomplished by their departments or facilities.<sup>11</sup> Most hospitals or departments of psychiatry already have a structure for peer review in place, to which this additional function could be added. Facilities with formal programs in forensic psychiatry may elect to use peer review as part of the credentialing and quality assurance processes for psychiatrists who will be doing forensic work. Although this might work well for larger departments or facilities that have a number of psychiatrists involved in expert testimony, it might prove problematic for smaller departments. There may not be a sufficient number of psychiatrists with forensic expertise to comprise the review panels, and it may be more difficult for reviewers to judge objectively the performance of their close colleagues.

District branches of the American Psychiatric Association or the American Medical Association may be appropriate bodies to undertake forensic peer review. These district branches are already reviewing allegations of ethical miscon-

duct, and some have experience with peer review of clinical practice. Moreover, they have a larger body of potential reviewers from which to draw than do individual departments. Most psychiatrists are members of the APA and many are AMA members, putting them under district branch jurisdiction. The educational function of the review of expert testimony will complement many of the other efforts of the district branches. Once peer review mechanisms are established, they might be made available to psychiatrists who are not members of the sponsoring society, perhaps for an appropriate fee.

Subspecialty societies, such as the American Academy of Psychiatry and the Law and the American Academy of Forensic Sciences, might also offer peer review services. This will be easier where local branches exist and can take responsibility for the process, but models can be envisioned where peer review would be performed at the national level, perhaps in conjunction with annual meetings. Subspecialty boards, such as the American Board of Forensic Psychiatry, might also offer peer review, especially in conjunction with any future periodic recertification process.

Boards of licensure or registration in medicine are a final organizational level at which peer review could be lodged. Since these bodies have disciplinary authority over physicians, their involvement might be perceived as more threatening than review by professional societies or departments. There may, however, be mechanisms by which the peer review function can be organized

by the boards, but operated autonomously by subcomponents that are distinct from the boards' disciplinary arms.

This list of possible venues for peer review is not exhaustive. At this stage, it is difficult to say whether one or another structure will work best. Experimentation with all of these possibilities is warranted to gain further experience on which more informed judgments can be based. The Task Force on Peer Review of Psychiatric Expert Testimony will be considering these options, and should be able to provide additional guidance at the conclusion of its work.

### **Should Peer Review Be Voluntary or Mandatory?**

Voluntary peer review is in keeping with the overall educational focus that we suggest. By encouraging expert witnesses to bring their own testimony for peer review, the most threatening aspects of the procedure are diminished and the cooperation of the expert witness is assured. As peer review programs multiply, those expert witnesses who are willing to submit their testimony to peer review may find their credentials enhanced before judges and juries. Indeed, it may be desirable to develop a mechanism for formally acknowledging that an expert witness has submitted to peer review, or other devices for encouraging voluntary participation, such as granting CME credits.

Mandatory peer review is more problematic. The argument in favor of requiring peer review is that unethical practitioners will simply avoid voluntary review, while only those who are already

the most conscientious will take advantage of it. Although there may be some truth to that contention, it runs contrary to the primary educational goals of peer review, and neglects the problems reviewers are likely to have identifying unethical behavior. Unless a review body has the power to compel experts to undergo review (e.g., if peer review is sponsored by a board of registration), psychiatrists may simply decline to participate, rendering judgments difficult. Even if they appear, the threat to their livelihoods of negative findings will tend to adversarialize the review process, and may make them resistant to educational efforts.

There may be a point when mandatory review mechanisms will have to be devised to deal directly with the small number of unethical expert witnesses. We do not believe that sufficient experience with forensic peer review exists to warrant that step at this time. Development of peer review programs, for the foreseeable future, should focus on voluntary participation.

One reasonable exception might be mandatory review for psychiatrists seeking certification or recertification by a subspecialty board in forensic psychiatry. The American Board of Forensic Psychiatry already reviews forensic reports written by applicants as part of its examination. Should a new board be established under the American Board of Psychiatry and Neurology, as is currently anticipated, a review of actual testimony might be included in its certification process or in any projected periodic recertification. It seems reason-

able to ask those psychiatrists who desire to be designated as experts in forensic work to undergo more rigorous review of their actual courtroom behavior.

### **What Difficulties Can Be Anticipated with Peer Review?**

Any peer review effort raises questions concerning the liability of reviewers and the legal protections that are available to ensure the confidentiality of the process. State and federal laws provide immunity for peer review in many cases, and some protections for the confidentiality of the process. Unfortunately, statutes directed at peer review of clinical practice may not be applicable to peer review of expert testimony. In those cases, the involved organizations should be able to arrange insurance coverage, perhaps through existing policies that provide indemnification for similar administrative functions. Differences across jurisdictions require entities that are contemplating peer review to ascertain the applicable rules in their states.<sup>22, 23</sup>

Cost of peer review is another issue that must be addressed. Our experience is that the process of reviewing forensic testimony is interesting and rewarding, and it is not inconceivable that district branches of the APA, for example, might be able to establish peer review programs with volunteer psychiatrists. Nonetheless, reading testimony and attending review sessions can be time-consuming, and it would clearly facilitate the process were even partial compensation available for the time expended. Expert witnesses whose testimony is being reviewed might be asked to defray some

of the costs involved to provide an honorarium for reviewers. This might be more acceptable to reviewees if having one's testimony peer reviewed—perhaps combined with assigned readings—qualified for an appropriate amount of category 1 continuing medical education credits.

### Conclusion

Peer review is a promising mechanism for improving the quality of psychiatric expert testimony in court. Our preliminary experience suggests that it is feasible and that it offers considerable educational benefits. Further experimentation is warranted to test those conclusions, and to identify optimal models for conducting peer review. We believe that such efforts are likely to be highly valuable and should be encouraged.

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