

Attorneys' Pressures on the Expert Witness: Early Warning Signs of Endangered Honesty, Objectivity, and Fair Compensation

Thomas G. Gutheil, MD, and Robert I. Simon, MD

While most attorneys practice ethically and treat their retained experts fairly, there are a few that do otherwise. The authors describe "early warning signs" of the likelihood that the attorneys attempting to retain the psychiatric expert witness may compromise the expert's honesty and striving for objectivity. Experts themselves may have certain vulnerabilities that interfere with their ability to detect those early warning signs. Recommendations for the expert are offered.

The goals and the ethical mandates of the psychiatric expert witness and of the retaining attorney differ in essential ways: these differences always create an enduring tension between the parties. The attorney is ethically obligated to embark on zealous, vigorous, and partisan advocacy on behalf of the client. While objectivity may govern case selection, the attorney need not be objective in presenting the case in court. In contrast, the expert is committed to honesty and to striving for objectivity throughout,¹ even when those

goals are accomplished at the cost of disappointing the retaining attorney by, in essence, failing to be sufficiently partisan.

In addition, the expert's "normal narcissism," fostering the wish to perform effectively and to make a difference in the matter at hand, is in tension with the fact that the expert is often viewed by the retaining attorney as the "hood ornament on the vehicle of litigation that the attorney drives into court"; the outcome of a case is often predetermined by initial jury selection, the type of case, the nature of the plaintiff and the defendant, and the competence of the attorneys rather than by the expert's skill. Moreover, many attorneys take the position that "experts cancel each other out."

The tensions noted above may play

Dr. Gutheil is affiliated with the Program in Psychiatry and the Law, Massachusetts Mental Health Center, Harvard Medical School, Boston, MA, and Dr. Simon is affiliated with the Program in Psychiatry and Law, Georgetown University School of Medicine, Washington, DC. Address correspondence to: Thomas G. Gutheil, MD, 74 Fenwood Rd., Boston, MA 02115.

Attorneys' Pressures on the Expert Witness

themselves out to the detriment of the expert-attorney relationship when an attorney deals with the expert in a manner that either exploits the expert personally (e.g., financially) or exploits the expert's opinion (e.g., by attempting to compromise the expert's honesty and striving for objectivity). Fortunately for all concerned, the majority of attorneys are ethical and honest and use the expert appropriately; however, attorneys also exist who are neither and who do attempt to co-opt, coerce, abuse, or exploit the expert. How may experts defend themselves appropriately from that second category of attorney and maintain the honesty and striving for objectivity that are part of the expert's ethical code?

For clarity in answering this question, let us begin this discussion with an analogy. Consultative experience with sexual misconduct by therapists reveals empirically that overt sexual misconduct usually is preceded by boundary crossings followed by boundary violations of incrementally increasing severity.²⁻⁴ Such a progression is referred to as the "slippery slope" of deviations from proper practice. The early steps of this process also can be viewed as an early warning system that can be monitored and used by therapists themselves or by others to keep a check on the maintenance of proper professional boundaries.⁵ We suggest that attorneys who behave manipulatively toward the expert witnesses they retain may manifest similar "early warning signs" that permit the expert to avoid such attorneys. Defining and describing these early warning signs may enable forensic experts to practice both more ethically and more circum-

spectly and to avoid being professionally abused.

Early Warning Signs

The Assumed Opinion The earliest conversation by telephone with an attorney desirous of hiring the expert may convey the fact that the attorney anticipates what the expert's opinion will be before the expert has seen any of the actual primary data (e.g., records or interviews). This may be conveyed by such remarks in the initial phone call as: "So what we need here, Doctor, is the opinion that this person I just told you about is criminally not responsible because of insanity; can you do that for us, Doctor?"

For the expert, the only possible realistic answer, of course, is: "It depends on what I find out." However, a question like the one above from the attorney, coming after only the attorney's phone summary of a case, clearly conveys the curious implication that actual clinical data such as a personal interview are seen as irrelevant to the transaction at hand. A case that begins on this note should probably be turned down.

Example: In a variation on this theme, an attorney appeared to be behaving unprofessionally in the initial call to the expert. The attorney, the client, and the expert belonged to the same minority group, but the attorney seemed highly overidentified with his client. The attorney's message appeared to be, "Here is the report I am going to expect, which you, as a member of this minority group, will surely produce." Note that this conversation preceded any review of data.

Here, the attorney's assumption that the expert would give the desired opinion seemed based on the attorney's wish to

sweep the expert into his own identification with the client and the client's ethnic identity.

Selected Data Attorneys often ask experts to opine about "bare bones" data (e.g., a case summary provided during the initial phone contact); this is a legitimate request. Other data may be excluded by discovery or admissibility considerations. In the situation we are addressing here, however, attorneys provide the expert with only a sampling of the total database (and usually a biased sampling), such as deposition summaries without depositions; with some of the records rather than all relevant ones; or with legal documents but not clinical documents. Attorneys may go so far as to actually withhold records ("You really don't need to see the *whole* record, do you, Doctor?") or to urge the expert to skim, skip over, or ignore parts of the database. Complicating the issue is the fact that the expert does not always know what material has or has not been sent or made available. Some experts recommend requesting the index to the case file from the attorney to check the list of documents against what has been supplied. However, attorneys may legitimately resist such a request out of concern for revealing the contents of their file to opposing counsel.

The selective withholding of pertinent data by attorneys may be coupled with the monetary concerns more fully addressed in the next section. The attorney may claim that key documents are withheld to save money. In other cases, the claim of financial constraints may be an excuse for the wish to conceal damaging information under the cover of budgetary restrictions.

Again, such attempts, on whatever basis, to restrict the expert from obtaining a complete database may well be harbingers of trouble with the attorneys.

Applied Parsimony Clinicians are well aware of the possible psychodynamic conflicts and neurotic behavior regarding money, conflicts to which attorneys are not immune.⁶ Of course, overtly psychopathic conduct by attorneys or law firms, although relatively rare, is not unknown. In any case, financial issues may represent pressures on experts, threatening their efforts to be honest and objective.

One attorney who "ran out of money" wanted an expert to prepare for the deposition during the deposition itself. He reasoned that opposing counsel would pay for that preparation because it took place on "his nickel" (i.e., the opposing counsel's fiscal obligation). Such a suggestion should be explicitly rejected, of course, since careful advance preparation and thought as well as active advance communication with the attorney, are part of the expert's duty regarding depositions. As one author puts it, "Learning an expert's opinion for the first time during a deposition is not good for anyone's mental health."⁷

Some attorneys have no idea of the time required to assess a forensic case and, hence, are surprised and dismayed at the appropriate costs thereof. These same attorneys commonly do not trouble themselves to investigate the facts of the matter or to inform themselves about the prevailing expert witness costs in their jurisdiction.

In another dynamic variation, some at-

Attorneys' Pressures on the Expert Witness

torneys become caught up in a posture of narcissistic entitlement about a case, taking on an attitude captured by the idea: "Expenses be damned, this case is a winner!" This view is maintained until reality belatedly makes itself known. The appropriate remedy here is for the expert to discuss or convey by a detailed fee agreement and by estimates of the time required to prepare just what the finances will involve. This aspect of the transaction may be compared to informed consent in clinical practice.⁸

In another case, an attorney confronted his client, who was concerned about expenses, with the query: "I can worry about your case or I can worry about money. Which do you prefer?" Though this forced choice resembles a kind of seeking of consent, it is a false dichotomy; this approach again may underscore the difficulty in discussing money issues rationally.

Misinformation or Deception About the Insurance Picture An attorney falsely stated that the insurance firm defending a case of alleged malpractice could not advance a retainer fee. The expert knew this was false because he was reviewing a different case at the same time for the same firm at a different office of the insurance company where the full retainer was paid without question. This situation underscores the importance of the expert making sure that the attorney understands that he/she is ultimately responsible for payment. The expert should resist being referred (or "fobbed off") to a faceless insurance carrier that is not personally invested in the expert being paid.

Signs of outright misrepresentation

such as the foregoing are ample grounds for withdrawing from the case.

Cry Poverty Attorneys may deliberately embark on retaining an expert while intending to avoid, dicker about, attempt to reduce or otherwise fail to honor financial agreements. Early warning signs include a wish to get the expert to modify the initial fee agreement or contract.

Example: An expert's fee agreement contained these clear statements: "It is understood and agreed that timely payment for my service and expenses will be solely the responsibility of the attorney, and is in no way contingent upon the outcome of any litigation or settlement. . . . It is understood and agreed that you [attorney] will pay all out-of-pocket expenses in connection with this matter." At the bottom of the two-page agreement the attorney had typed in the codicil: "Agreed, with the understanding that the obligations of this agreement are those of the client and that neither the undersigned [attorney] nor the law firm are personally responsible for the fees and costs set forth above." Since this clause completely reversed the contractual point of the agreement, it was understood as an attempt to "de-contract the contract." The expert withdrew.

Attempts to modify contracts in some cases may conceal the attorney's suspicion that he/she actually cannot afford that expert. Rather than seeking a less expensive consultant, however, the attorney plans to use the retained expert and then, later, to dicker about the fee.

Retainer agreements, suitably detailed, usually flush those attorneys out of concealment (but not in the example above). Generally, once they have been confronted with a fee agreement, attorneys are never heard from again. Experts should demand a retainer fee ("earnest money") on the principle that "if they don't pay sooner, they won't pay later."⁹

The Client May Balk Ignoring the fact that the contractual tie with the expert is or should be with the retaining attorney,⁹ attorneys may attempt to disavow responsibility for the expert's fees by claiming that the client may express or has expressed reservations about the contract (as the previous example shows, this maneuver can appear quite early in the negotiations). Here again, such attorneys may be signaling indirectly that they cannot afford that expert or that they are unable or unwilling to honor the agreement.

Example: An attorney representing a local client (i.e., living in the same town as the retained expert) called the expert and said that the client had some concerns about provisions listed in the expert's fee agreement regarding out-of-state travel and overnight stays. The puzzled expert pointed out that those provisions would not even apply to the present *local* case. The attorney insisted that the client was troubled by those contract elements and was resisting the idea of a retainer. The expert withdrew from the case, noting that, if the client could become inflamed by irrelevant and nonapplicable contract provisions and if the attorney took that response seriously, working without a retainer would be the height of folly in that case.

The Complaining Response An issue arising somewhat later in the case is the attorney's response to the expert's initial *unfavorable* opinion, whether given in response to the "prima facie" summary over the phone during first phone contact or after some initial review of materials has occurred. Ethical attorneys may respond along these lines: "Yes, I thought you might come down that way, but I owed it to my client to check it out with an expert in the field"; or "Slow down, Doctor, I'm

writing this down so I can understand it and tell the client."

Less ethical attorneys at this juncture begin to complain, or even to whine: "You guys are so rigid; couldn't you just extend the standard of care to fit this case?" or "Couldn't you just cut the defendant a little slack on this insanity thing?"

Example: In an evaluation of an inpatient for dangerousness on behalf of an attorney seeking the patient's discharge, the expert discovered that, according to notations earlier in the medical record that had not been mentioned by the retaining attorney, the patient had been described by a recognized expert on dangerousness as "one of the most dangerous patients he had ever seen." When this finding was presented to the attorney, the latter began to whine: "Why do you guys always have to go by the history? Can't you just take my client as he stands, here and now?" Since history is the most relevant factor in dangerousness, the expert withdrew from the case.⁹

The Phantom Expert This issue, which has been discussed extensively elsewhere,* refers to a spectrum of attorney behaviors that have in common the attorney's false claim to the other side of the case that he/she *has* retained the expert or that the expert will proffer certain specified opinions, in cases in which the expert has *not* been retained, paid, or told what opinions the attorney is advancing (opinions that are ostensibly from that expert!). There are a variety of degrees of being a "phantom expert," which depend on the amount of relevant case data that has actually been supplied. For example, an attorney may claim (without ever con-

* Gutheil TG, Simon RI, Zoltek-Jick R: The "phantom expert": unconsented use of an expert's name/testimony as a legal strategy. Submitted for publication.

Attorneys' Pressures on the Expert Witness

tacting the expert) that a particular reputable expert has been retained, or that the expert supports the case, or that specific opinions will be offered—all maneuvers designed to intimidate the other side into early settlement without going to the trouble and expense of actually retaining the expert and giving the latter the case materials to review. The most relevant aspect of phantom practice may be the fact that the attorney's proffered testimony, ostensibly from the expert, represents a precise blueprint of what the attorney wishes the expert to say; thus, such an opinion represents a pressure on the expert to testify a certain way.

Such conduct is unethical, fraudulent, and tortious, and it violates the attorney's good faith contract as an officer of the court. Faced with such a situation, the expert clearly should withdraw and may consider notifying the Board of Bar Overseers in the relevant jurisdiction.

Subtle or Overt Bribery Attorneys may flatter the expert, admiring the breadth of the expert's knowledge, wisdom, and experience, by saying, "I've got another case for you to work on after we finish this one." Another attorney may treat the expert to a meal at an expensive restaurant to "go over a case." Both these approaches can be seen as exerting some psychological pressure for a favorable decision by the expert. The remedy to this approach is to keep one's own perspective clear, to remain alert to this kind of pressure and, perhaps, to turn down even some kindly intended social or other gestures by the attorney; support for this last, seemingly cold, position may derive from the fact that a "pure" business relation-

ship is easier to defend on cross-examination as being free from bias.

Subtle Extortion In this category, the attorney withholds some or all payment for expert work at various decision points (written report, deposition, or trial), as a means of subtly pressuring the expert to come out with a favorable opinion. The unconscious message here is, "If you do not find in my side's favor, you will never see the money for what you have already done/will do." Here again, a clear fee agreement, coupled with the expert's determination to stick to the agreement's conditions and to insist on timely payment at or before each stage of the work, is the best defense.

Expert Vulnerabilities to Attorney Pressures

Although honest and ethical attorneys remain in the majority, we have focused here on the exceptions to this general rule. We began our study with an analogy to boundary violations that are preludes to sexual misconduct – situations in which the therapist's countertransference plays a pivotal role. It may be useful now to discuss some of the quasi-countertransference dynamics that may enter into the expert's side of the equation. What are the expert's motivations and dynamics that reveal the predispositions or vulnerabilities that must be overcome for the expert to maintain ethical practice? What conditions might lead an expert to be deaf to early warning signs of unethical behavior by the retaining attorney and, thus, to collude unknowingly with unethical practice? What are the factors affecting "forensic countertransference"?

The Venal Expert The venal expert, or "hired gun," constitutes the *bête noire* of forensic work.⁹ Such experts "sell out" by charging for testimony rather than for time. The attorneys who hire such experts¹⁰ can be assured of getting the testimony they want. Hence, for this group of experts, the entire concept of early warning signs is irrelevant: Both parties usually know what they are getting.

The Desperate Expert This situation arises out of financial pressure and neurotic behavior about money on the expert's part. Having, for example, multiple children in college or an expensive house to pay off can induce a range of emotions, such as fear of bankruptcy, the sense of being on the verge of destitution, and the like. This risk is especially salient for the expert limited to a private forensic practice who, lacking a stable source of income on which to fall back, must live from case to case, with income fluctuating as cases are abruptly settled or long deferred. The desperation resulting from such circumstances may lead the expert to ignore early warning signs to preserve a hoped-for source of income, no matter how tainted.

The Beginning or New Expert As is the case with any version of the beginner role, the new expert is filled with uncertainty about his or her own worth, merit, skill, and ability. The need for reassurance about these matters may lead the inexperienced expert to sign up with attorneys whose derelictions they do not recognize as such.

The Expert Who Needs to Be Loved The truism that "therapy works best when it is seen as work rather than love" has its

analogy in expert witness practice: The relationship between expert and retaining attorney works best when it represents a business relationship based on mutual respect rather than a mutual admiration society based on the expert's need for relational or narcissistic gratification. The expert's needs for approval, validation, support, or other factors may lead to difficulty detecting signs of venality in the attorney.

The Expert on a Mission Dietz¹¹ has addressed the pitfalls of the expert's deviating from the role of forensic scientist into the role of zealot or crusader, whose efforts constitute a personal or political agenda rather than a search for truth. The expert with a history of having been abused as a child who now functions to validate alleged victims of trauma, regardless of the data; or the expert who attempts to promote (or to oppose) the principles of libertarianism, feminism, conservatism, right to life, and other agendas through testimony in a given case may ignore warning signs about the attorney in pursuit of the higher crusade.

Here, of course, the goals of honesty and striving for objectivity are compromised from the outset. Personal agendas, if uncorrected, are a pitfall of bias for the ethical expert.

Conclusions and Recommendations

The majority of attorneys practice ethically and deal fairly with the expert witnesses they retain. In regard to the unethical minority, however, a number of attorney maneuvers and responses have been outlined above in this preliminary

Attorneys' Pressures on the Expert Witness

study; responses that telegraph to the knowledgeable expert the likelihood that some trouble, ethical and/or financial, lies ahead. These early warnings should serve to put the expert on the alert for pressures from the would-be retaining attorney that might compromise the expert's honesty and striving for objectivity. In complementary fashion, experts may be vulnerable to such pressures for various reasons and may fail to detect or to heed these early warning signs of trouble.

Beyond simply withdrawing from the case—a last resort that may be necessary at times—the expert has a number of options open. Several of these options are achieved by a clear and detailed fee agreement.⁹ Having one's consciousness raised by discussions such as that in this article and remaining alert to one's own resistances and "blind spots" regarding such signals may also stand the expert in good stead, as will regular consultation with colleagues about this lonely, often isolating work, in which the attorney may be the only nonpatient with whom the expert converses during the work day. Talking with even a corrupt attorney may feel like a kind of refreshing relief from a sensory deprivation experiment.

Finally, the expert should continue to strive for freedom from bias that may emerge from *any* direction, including attorney pressures. Only in this manner can ethical practice be preserved.

Acknowledgments

The authors thank the members of both programs for valuable critical comments and Michael D. Robinson, MD, for the first case example.

References

1. American Academy of Psychiatry and the Law: Ethics Guidelines for the Practice of Forensic Psychiatry (ed 4 rev). Bloomfield, CT: AAPL, 1995
2. Gutheil TG, Gabbard GO: The concept of boundaries in clinical practice: theoretical and risk management dimensions. *Am J Psychiatry* 150:188–96, 1993
3. Epstein RS: Keeping Boundaries: Maintaining Safety and Integrity in the Therapeutic Process. Washington, DC: American Psychiatric Press, 1994
4. Simon RI: Sexual misconduct: how it begins before it happens. *Psychiatr Ann* 19:104–12, 1989
5. Gutheil TG, Simon RI: Between the chair and the door: boundary issues in the therapeutic "transition zone." *Harv Rev Psychiatry* 2:336–40, 1995
6. Krueger DW (editor): *The Last Taboo: Money as Symbol and Reality in Psychotherapy and Psychoanalysis*. New York: Brunner-Mazel, 1986
7. Berg PSD: The great communicators: lawyers and experts. *Testifying Expert* 6:3,10, 1998
8. Simon RI, Wettstein RM: Toward the development of guidelines for the conduct of forensic psychiatric examinations. *J Am Acad Psychiatry Law* 25:17–30, 1997
9. Gutheil TG: *The Psychiatrist as Expert Witness*. Washington, DC: American Psychiatric Press, 1998
10. Goldstein RL: Hiring the hired guns: lawyers and their psychiatric experts. *Legal Studies Forum* 9:41–53, 1987
11. Dietz PE: The quest for excellence in forensic psychiatry. *J Am Acad Psychiatry Law* 24: 153–63, 1996