The Phantom Expert: Unconsented Use of an Expert's Name and/or Testimony, as a Legal Strategy

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The authors explore the forensic, legal, and ethical issues involved in a spectrum of attorney practices involving designating experts without notifying them. Recommendations are offered for dealing with this unethical practice, including exposure of the practice, reportage to bar association ethics committees, and continued open discussion and research.

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This article reviews a practice of certain attorneys—fortunately, a very few—wherein they name an expert witness and/or proffer his or her anticipated testimony without sufficient or appropriate contact with that expert to justify use of the expert's name or the alleged opinion. We identify a spectrum of behaviors under this rubric. This phenomenon, herein termed "the phantom expert," represents one end of a range of misuses of expert witnesses—misuses that raise questions in legal, ethical, and forensic realms.

In addition, examination of this issue leads us back to the most fundamental questions about an expert witness's reputation for objectivity and the relationship between expert and attorney—issues that also serve as part of our discussion. Therefore, although we focus in this article on forensic psychiatry, the issues herein are clearly not limited to that field alone. Expert witnesses of every type have been or may be treated in the "phantom" fashion.

Prevalence

The use of experts without their knowledge is common enough to merit exploration and analysis. Such usage exists in a continuum of questionable actions. An informal survey of approximately seven senior members of the American Academy of Psychiatry and Law seated at the same table during luncheon at a recent annual meeting revealed that well-established forensic experts and those who are known for expertise in a narrow subspecialty are particularly vulnerable to such exploitation, in a spectrum of increasing mendacity, as will be described.

Members surveyed believed, largely on anecdotal grounds, that this practice is more common among plaintiffs' attorneys in civil matters, in situations in which that side is in the position of having to advance expense monies and thus is in a financially more insecure position. However, defense attorneys also use this tactic.

Case Law Search

A search of Lexis-Nexis was performed on all federal and state cases. The search terms, "Using expert's name without retaining him," "misuse of expert's name," "misuse of expert witness's name," and "expert witness's name," yielded 120 citations, none of which was relevant to the issue. Instead, the cases described matters of expert disclosure to the other side, naming of actual versus potential witnesses, and other irrelevant issues.

The Spectrum of Phantom Phenomena

Phantom practices appear empirically to run a gamut of scenarios of increasing deceptiveness, from the more benign to the clearly malignant.

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The Pre-emptive Strike

An attorney calls an expert and says explicitly, "I am calling you fast/first so that the other side won't get/use you." Here the attorney frankly states a strategic motive.

Benign variant: The attorney actually retains the expert and sends the data for review.

Malignant variant: The attorney does nothing further except possibly to claim to the other side that he or she has retained that expert. Although attorneys rarely admit when their intent is to pre-empt the expert, an expert who knowingly allows himself or herself to be retained solely to be removed from a case is acting in an ethically questionable way. Alternatively, the attorney may call the expert and do nothing further, but may inform the other side: "We have called Dr. X" (true) or "We have retained Dr. X" (false).

It is sobering to realize that there may be a docket full of cases "out there," in which one's name and the threat of one's testimony have prompted rapid settlements, yet one knows nothing about it.

Case Example 1

A senior insurance claims manager confessed to a well-known senior expert that he regularly used the expert's name to induce early settlement of cases. The manager said that he regularly tells the other side that the expert "has been or will be" retained. He often provides the nature and scope of the expert's expected testimony (sight unseen, of course). When asked by the expert to cease and desist from this practice, the manager appeared undissuaded.

Of course, this anecdote leaves unknown whether other experts' names are similarly used.

Empty, as Opposed to Full, Disclosure

In using this tactic, the attorney retains the expert and supplies the materials but fails to show or tell the expert what will be contained in the "expert disclosure," a discovery document summarizing the expert's expected opinions to be expressed at trial. This document

> . . .defines what it is the expert will be prepared to testify to at trial. That description may be based on something the expert said [or has written], something the attorney fantasized, or some peculiar combination of both. However, if the expert only learns for the first time at deposition or trial exactly what it is he is purported to testify about, it can produce some chilling moments. . . . Finding out what the expert's opinions are at the deposition is not good for anyone's mental health (Ref. 1, p 10).

The Pure Phantom Expert

Case Example 2

An expert received a subpoena for a deposition—a common occurrence—but was puzzled because he failed to recognize any of the names of parties or attorneys in the case. A call to the deposing attorney revealed that the attorneys on the other side of the case had named him as an expert and disclosed what were ostensibly his opinions, without notifying, much less retaining, him as an expert. Even worse, the ostensible opinions were described in the expert disclosure as partly "based on review of the records" (none of which had been sent). When the phantom expert called the supposed retaining law firm, they rationalized their action as a kind of "place-holding" maneuver after a brief phone conversation about the case. The intent was to meet discovery deadlines but allow for amendment of opinions (or, presumably, the decision not to use the expert at all) after an actual opinion was available. After legal consultation and the realization that bad faith was an infelicitous context in which to begin a business relationship, the expert declined the case and reported the firm to the local bar association's committee on ethics. The committee took the position that the brief phone call sufficed as "opinion gathering."

The Part for the Whole

A "part phantom" variant also occurs. The appropriately retained expert reviews a case and agrees with only part of that side's claim; the expert rejects or rebuts another aspect of the claim (the latter constituting a "hole in the case"). The expert suspects (but cannot prove) that the attorney proffers the expert and reports in a global fashion, "The expert supports the case."

This matter leads to the complex question: how much can an attorney tell an expert about a case before the content of what is told reveals substantive, essential, and protected trial strategy—disclosure which would prevent the expert ethically from working for the other side? This issue is currently being studied empirically. An expert should, in general, be wary of an attorney who makes "preliminary" disclosures without having retained the expert.

Issues for Forensic Practice

The critical problem in many such scenarios flows from the latent implication that the expert's opinion

can be known in advance of review of the data. Granted, an attorney presenting a case by phone in a sufficiently detailed manner may well permit the expert to indicate whether the case does or does not have potential merit, materials unseen. As experts are aware, however, in most instances, the only situation in which an expert's detailed opinion can be known before review of the materials is that in which the matter is an open-and-shut proposition, virtually not even requiring an expert; or it is a situation in which the expert is venal, that is, a "hired gun" who sells testimony, rather than time and predictably gives the lawyer what the lawyer wants, rather than supplying an objective opinion.[2] From that standpoint, the phantom approach "commodifies" the expert and the testimony thereof. The expert is treated as a plug-in module of predictable opinions that can be assumed before any actual facts or records have been examined.

For the ethical expert the objectivity and case-based individuality of his or her opinion represent the core of the expert's value to the ethical attorney and to the legal system. An ethical attorney benefits even by being told by an expert that there is no merit to the case at hand. Valid, important, and economically sound strategic decisions can then be made by the attorney.

Thus, to proffer an expert's opinion *in absentia* may clearly be to impugn that expert's reputation for objectivity, honesty, and ethical practice.[3] For example, the attorney's misrepresentations may be understood by the opposing attorney to be the expert's unreasonable or venal conclusions, leading that expert to be viewed in a negative light. Resultant discovery, of course, may reveal the truth about the situation and the attorney's duplicity.

Experts' opinions and the credibility thereof are arguably the central—or at least, most important—aspects of their professional standing. They are invaluable and irreplaceable. To impugn them is to attack and possibly destroy the ethical expert's livelihood.

A second effect of the phantom approach is the actual or apparent impact on the expert's objectivity. The specious opinions, which the venal attorney fabricates as if issued by the phantom expert, inevitably constitute a precise blueprint for exactly what the attorney wants the expert to say. If the expert, against all better judgment, decides to accept the case, his or her views may be contaminated by exposure to this explicit protocol. Even if not contaminated, the expert is clearly vulnerable on cross-examination to the claim that the attorney's blueprint influenced, shaped, or at least biased the expert's striving for objectivity. In effect, for short-term benefit, the attorney is supplying the other side with ammunition that can hurt that attorney's case at trial. For completeness, of course, note that attorneys commonly attempt to shape the opinions of even legitimately retained experts.

Motives

The phantom expert approach and some of the other scenarios we have described appear to have as one prime rationale the wish on the attorney's part to use the reputation of the expert (as regards specialized knowledge, experience, and effectiveness) as a tactical club designed to beat the other side of the case into submission, particularly in the form of early settlement.

This goal is accomplished with great economy, because the expert will presumably remain unpaid (as well as unknowing) throughout the entire procedure. Thus, a second motive would be simple greed on the part of the attorney.

In relation to Case Example 2, note that one of the most serious issues for attorneys is missing a filing deadline. The threat of this eventuality can lead to the following sequence:

> In the panic to name an expert [as the deadline approaches but] before the window shuts, especially in the inevitable situation where the expert is not immediately reachable, the attorney, relying on a combination of his or her anxiety, familiarity with the expert and a well-developed sense of denial, names the expert. The expert is then subsequently contacted and, with an embarrassed laugh on the part of the attorney, is informed of his good fortune at having been disclosed. In this context. . . conflicts, [expert] unavailability, [the attorney's] inappropriate extension of [the expert's claimed] areas of expertise, can become significant concerns (Ref. 1, p 3).

A Curious Defense of the Phantom Practice

A legal scholar and ethicist[4] has suggested that a law firm confronted about this ostensible violation of ethics principles might invoke, as a defense, the notion of precedent in its legal sense. In this model the law firm would assert that it had reviewed the expert's trial or deposition testimony in a previous case that was fundamentally similar or "identical" to the present one. Such testimony is, of course, available on computer databases in several locales and is some-

times used to impeach experts by pointing out inconsistent testimony in ostensibly similar cases. Thus, the law firm would claim that the expert's opinion was sufficiently clearly known in a sufficiently parallel fact situation to allow at least a draft version of opinions to be generated from that earlier event.

This entire concept rests, of course, on the assumption that cases can be sufficiently closely compared with each other from the forensic psychiatric viewpoint (as contrasted with precedent based on points of law) to be counted as similar, despite the astonishing breadth of human variability, the complexity of civil and criminal fact situations, and the role of nuance, personal evaluation, and personal emotional response by the expert in forensic psychiatric assessments. It also assumes falsely that an attorney is qualified to assess when such a close parallel exists from a forensic psychiatric viewpoint.

A variant of this defense is the attorneys' claim that they called the expert and summarized the case over the phone to get the expert's initial reactions. They then claim that this contact gave them enough information (still without any records) to formulate at least tentative opinions for the disclosure. This claim rests on the assumption that an attorney's almost certainly biased, brief summary of a case by phone constitutes anything like a valid expert database from which conclusions to reasonable medical certainty can be drawn. Only when the facts closely correspond to the attorney's preliminary account is that justification tenable.

Note the asymmetry, in that, ironically, a case as summarized by phone may be specious enough to turn down, based on its inherent implausibility or flawed clinical reasoning. No engagement to give testimony can be accepted, of course, without review of primary data, because there may well be important clinical data in the details of a case, the significance of which the attorney does not recognize.

Legal Analysis

As a rule, most attorneys do not reveal the identity of their experts until it is absolutely necessary to do so. The timing of this event is dictated by the procedural rules of practice. The reason for this approach is the wish to prevent the opposing side from having a head start on discovering the expert's background, publications, or areas vulnerable to attack for purposes of impeachment. Under certain circumstances, withholding the expert's name until the last moment may keep the other side from deposing the expert, although the court may still allow this form of discovery.

In those cases in which the attorney engages in some form of misrepresentation (especially as described earlier in the sections on the malign variant of the pre-emptive strike and the pure phantom expert), the attorney may be committing both civil and ethics violations. In common law, ". . .one who appropriates for his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy."[5] Each person, therefore, has a right to control the commercial value of his name and likeness and to prevent others from exploiting that value without permission. Courts have consistently held that the unauthorized use of another's name, likeness, and/or reputation to promote some business enterprise creates civil liability for the unauthorized user. Although certain protective privileges apply to what participants may say or write in judicial proceedings, a party who knowingly submits false or unauthorized statements to the court would certainly risk losing those privileges.

Similarly, attorneys who knowingly misrepresent facts to the court or who engage in fraud, deceit, or misrepresentation in a law suit are exposed to professional review for possible unethical practice. In either a civil or an ethical context the expert should inform the attorney committing the infraction of the apparent breach and of the expert's intent to seek corrective action. This action may range from simple withdrawal from the case to retraction of the representation or correction of the misrepresentation. In egregious cases (i.e., the pure phantom expert scenario), the expert should determine whether there is a state mandate requiring reporting to the state bar association. The expert should then follow through to ensure that all parties to the litigation, including the court, are informed of the expert's withdrawal from the case or of his or her substitute (corrected) opinion in the case.

In practical terms, invasion of privacy and other civil causes of action against unauthorized use of one's likeness or reputation may be difficult to prove in sufficient robustness to permit recovery of damages. As discussed in the early sections of this article, the attorney has usually had some, albeit limited, contact with the expert—a contact serving as the nucleus for the subsequent misrepresentation. The best strategy for the expert is to confront the attorney

about the misuse of name and reputation and to demand corrective action, because the attorney is theoretically subject to civil redress if the situation is not corrected.

Fortunately, most reputable attorneys do not engage in the practices of misrepresenting experts' opinions or failing to follow through once the expert has been engaged. But when attorneys do engage in such questionable practices, they expose the attorney to liability both from the client and the expert. They should be called to task, for the betterment and improvement of the judicial system.

Conclusions and Recommendations

Phantom practices harm an expert's standing and reputation, the client's welfare, and the legal system itself. Efforts to expose and prevent these practices are highly desirable, although perhaps difficult to achieve. Ironically, rather than precipitating settlement as intended, such practices may actually lead opposing attorneys to pursue full discovery, thus driving up the cost of litigation and prolonging the process.

Experts have suggested billing the offending law firm for the use of one's name, charging for keeping a case open, and making other fiscal responses to the phantom problem. These financial strategies may be legally justified, but they do not address the critical importance of the ethical atmosphere in which the expert and the retaining attorney should work, especially considering that accepting money for use of one's name amounts to collusion and enabling of unethical practice. As noted in Case Example 2, it is probably a dangerous, ill-advised, and self-defeating decision to elect to work for a person or firm that begins the relationship on such dubious grounds. Also consider that a firm that would not hesitate to use an expert without his or her knowledge may well be equally unabashed about defaulting on any debts, no matter how justified.

Ethical attorneys, feeling pressure of time, may at times ask the expert for permission to present to the court a "preliminary" opinion (i.e., one reached before detailed case review) with the proviso for possible later amendments. In light of the importance of the expert's credibility, this offer often should probably be refused. It might properly be accepted when the expert has knowledge of, and confidence in, the attorney's competence in litigation of the kind at issue. It may be desirable instead to refer the case to an expert who can perform an immediate review to present a substantiated opinion to the court.

If an expert receives case materials, but no further retaining steps or communications transpire despite the expert's efforts, after a certain amount of time, the expert should write to the attorney to the effect that unless the expert hears from the attorney by a specified date, the case materials will be returned unread, and the expert will formally withdraw. After the deadline, this plan is put into effect. Some experts state in the covering letter that this ultimate withdrawal, if it occurs before case data or trial strategy have been revealed, does not ethically preclude retention by the other side, as long as the expert makes clear the case material is unread. Actively soliciting such employment from the other side, however, is ethically more ambiguous and should probably be avoided. The role of "preventive contracting" in avoiding such problems is addressed by Berger.[6]

The expert may want to consider the pros and cons of reporting such attorneys or firms for ethical violations to the local disciplinary authority. This course of action may have some deterrent effect against future abuses, although empirical data on this point are rare and not very encouraging.

Note that phantom conduct can be distinguished from the following common situation: The attorney discusses the case with the expert who has read relevant and sufficient material. Based on this discussion, a general opinion about the expert's testimony is then proffered by the attorney. This opinion can be modified, as is always the case, if further information becomes available. It is essential, however, that the expert review any written opinion purporting to represent his or her views. Here, the attorney's proffer is based on reasonable review of the data and the expert's direct expression of an opinion based on those data.

According to the legal analysis above, there appear to be grounds for civil litigation against the offending lawyer or firm. The basis for such action may vary according to the locale, the professional environment, the costs and benefits of the consequences in a particular case, and whether phantom behavior is a repeated or habitual practice by the lawyer or firm. Although the harm to the expert's reputation is, in one sense, obvious, demonstrating concrete or quantifiable effects may be difficult. On the other hand, the misappropriation of the expert's reputation may be considered theft of a valuable asset and hence may call for litigation as a remedy.

Finally, this problem should receive research attention, open discussion in forensic and legal fora, and presentation in the literature, as in this article, and in a forthcoming survey of AAPL workshop attendees.

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