

Withholding, Seducing, and Threatening: A Pilot Study of Further Attorney Pressures on Expert Witnesses

Thomas G. Gutheil, MD, Michael Lamport Commons, PhD, and Patrice Marie Miller, EdD

J Am Acad Psychiatry Law 29:336–9, 2001

It is likely that the majority of attorneys deal fairly with the experts they retain. However, it is also true that attorneys have at their disposal a number of means of influencing expert witnesses. As with many other aspects of the attorney-expert relationship, this issue has not been formally studied. The present study was undertaken to initiate a dialogue on this topic and to present some preliminary empirical data on a topic not previously detailed in the literature. The three queries chosen constitute common sources of pressure discussed among experts in informal settings.

In a previous communication,¹ some situations were described in which certain attorney pressures may have been intended to compromise the psychiatric expert witness's honesty and professional objectivity—qualities described as essential by, among other standards, the code of ethics of the American Academy of Psychiatry and Law (AAPL).² In the present communication, we examine additional tactics of attorneys ostensibly intended to manipulate experts in the direction of opinions favorable to those attorneys' cases.

Materials and Methods

Members of the Program in Psychiatry and the Law at the Harvard Medical School and attendees at

a workshop on attorney-expert relations held at the 1999 annual meeting of the American Academy of Psychiatry and Law completed questionnaires that asked subjects to describe their experiences with three pressuring tactics attorneys use to attempt to influence the experts' opinions. The workshop—one of a series of combined research and discussion opportunities afforded for the past three years at AAPL meetings—was explicitly identified in the meeting brochure as one in which participants would contribute to research by completing a questionnaire and, as a sort of *quid pro quo*, would have the opportunity to discuss issues related to expert witness practice that had received scant attention in other forums. Respondents were assured of anonymity and confidentiality, which precluded obtaining demographic detail but made for freer discussion.

We hypothesized that respondents, by virtue of attendance at the AAPL meeting and selection of this workshop, would constitute a pool with significant forensic sophistication and particular interest in this subject. This pool produced 37 completed questionnaires, representing about one third of attendees. Participants were asked to report how often they had experienced a particular practice and to furnish examples. For the purposes of the data summarized herein, approximately 10 percent of respondents gave no usable answers, because they had no experience in actually working with attorneys toward eventual testifying in court. From comments on the questionnaires, we understood that this group included

Dr. Gutheil is Professor of Psychiatry at Harvard Medical School, Boston, Massachusetts. Drs. Gutheil, Commons, and Miller are affiliated with the Program in Psychiatry and the Law, Massachusetts Mental Health Center, Boston, Massachusetts. Address correspondence to: Thomas G. Gutheil, MD, 74 Fenwood Road, Boston, MA 02115.

consultants and those providing treatment in forensic settings.

In addition to using t tests and other statistical methods, we calculated effect size (d), according to procedures developed by Cohen³ and reviewed in Rosenthal and Rosnow.⁴ There are two sources of response variability: One is the difference between the means, and the other is random variability. The more variability in results accounted for by the difference in means, rather than by mere random variability among subjects, the larger the effect size—an effect size of 0.2 being small, 0.5 medium, and 0.8 large.

Results

Attempts to Influence the Expert by Withholding Relevant Forensic Information

Busy attorneys have been known to forget to send parts of the case file to the expert witness, especially when the file is large. In addition, attorneys may withhold material that is legally inadmissible or that the attorney does not want to make available to the opposition, as might occur in those jurisdictions where the opposing side is entitled to see anything the expert sees or uses. Attorneys may also withhold materials when they honestly believe that the document is not relevant to the expert's testimony.

On a more venal level, however, attorneys may withhold material to save money by decreasing the expert's review time. Finally and relevant to our present study, attorneys may deliberately withhold case material for the simple reason that they want to influence the expert's opinion by omission, so to speak. To explore the issue further, we asked our respondents the following question: *Have you experienced an attorney's withholding data—either entire documents and records or single facts—while retaining you? Please describe with all needed detail.*

The expected or desired norm for this behavior would be that some attorneys might withhold data for the legitimate reasons noted earlier, but that no attorney would withhold relevant data. If none of the experts had experienced this, the obtained mean would have been 1 (the score given to "no" answers). In fact, 49 percent of the experts responded that attorneys had withheld relevant data from them, and the mean answer was 1.55 ± 0.50 (SD). This number was significantly different from 1, or a "no" response ($t^{32} = 6.20, p < .001, d = 1.1$, a very large

effect size). Only 41 percent said that such withholding of data had never happened to them.

The fact that nearly half the respondents experienced some withholding of data is surprising. This finding may include honest errors as noted earlier; but, although we have no specific data showing the motivations of the withholding attorneys, specific information on this issue is supplied by the quoted comments that follow, which clearly indicate that respondents were referring to venal withholding of information. Some of the responses:

I have experienced receiving large amounts of records, only to find that some were missing—deemed "unimportant" by the attorney, but actually relevant, if not central (Subject 1). Yes. Attorney refused to send depositions, claiming he wanted to "reduce costs." I told him I could not work on the case without the appropriate information (Subject 29). Yes. Prosecutor didn't send me copies of all requested documents; defense attorney sent me none. Same case—issue was insanity (Subject 33).

Nonsexual Seduction by an Attorney as an Influence on the Expert

A long-recognized source of potential bias in the expert's opinion is that the expert likes, admires, or identifies with the attorney, perhaps even unconsciously. Such feelings may lead the expert to slant, shade, or color the opinion in the attorney's favor.⁵ Expert witnesses must strive to remind themselves of these influences (as with other biases) and resist them to preserve the objectivity of their opinions.

Some attorneys have been known to attempt to use these tactics consciously and deliberately. We termed such an effort "partisan seduction" and asked respondents the following question: *Have you experienced some form of partisan seduction by an attorney, apparently aimed at obtaining a favorable opinion (e.g., taking you out to dinner; praising your work, reputation, or writings; indicating that if you find favorably in this case, many others will come your way)? Please describe with all needed detail.*

Note that the query specifically points to behavior "apparently aimed at a obtaining a favorable opinion." This language distinguishes the behavior being explored from that of attorneys who might, for example, join an expert for evening dinner during a trip out of state as a courtesy or convenience or to go over trial strategy—a common and benign experience for many experts. Similar points of distinction could be made about offers of future work after an opinion has

been rendered, the effects of the timing of praise, and so on.

In response to this question, 35 percent reported having experienced such partisan seduction, for a mean response of 1.39—again, a number significantly greater than the expected norm of 1, indicating no partisan seduction ($t^{32} = 4.56, p < .001, d = 0.78$, very close to a large effect size). A larger number, 54 percent, had not had this experience. Some of the comments received:

Yes, I was brought into a mass tort case by my malpractice carrier (even though I wasn't being sued) and behind closed doors [was] told I would get paid, but we'd have no contract in [the] open (Subject 11). Taking me out to eat: [I] decline in all circumstances. Praising my work: Yes, it happens. I try to remember why they're telling this to me and don't place a lot of value in what they say. I have received hints about future work and view it as a red, red, red flag (Subject 2).

Threats as an Influence on the Expert's Opinion

If the previous query revealed our interest in the “use of the carrot,” we were also interested in the “use of the stick”—that is, the use of a threat or its equivalent designed to coerce the expert to render an opinion favorable to the attorney. We asked the following question: *Have you ever experienced overt or subtle threats from attorneys or others (e.g., examinees, forensic supervisors) aimed at influencing your opinion? Examples: Attorney will pay your bill only after hearing your opinion; hinting that your forensic career in this town will be over unless you come across with the desired opinion; or threats to complain about you to a board or ethics committee. Please describe with all needed detail.*

Note again the specificity of language: “threats,” which in the case of supervisors, for example, can readily be distinguished from disagreements or corrective educational efforts, even confrontational ones.

As noted, the question also attempted to address the possibility that these influences may come from the examinee who seeks a particular case outcome and threatens to report the examiner to a sanctioning authority if the evaluation result is unfavorable. In addition, we sought data on whether the distorting influence might derive from supervisory staff. This serious concern stems from off-the-record comments to the authors by some forensic fellows and trainees who described feeling pressured to form their opinions in a certain way, regardless of their views on the matter. As the following results indicate, this last is-

sue was not noted to be a problem in this small sample.

Although, among these experts, only 19 percent reported having experienced threats of this sort (70% had not) and the mean was 1.21, this was still significantly different from the expected value of 1 ($t^{32} = 2.93, p < .006, d = 0.42$, a small effect size). Although a clear minority of respondents experienced serious attempts to influence their opinions, a result of almost one in five is still disturbing, under the model, “any is too many.” Some comments in response to this query:

One examinee wrote to [the] media accusing me of sex crimes; [I was] told by [the] attorney, “That is not how it works,” when [I said], “I will try to be objective” (Subject 1). Absolutely. The worst scenario (so far) was when a prosecutor stated in writing that, if I didn't cooperate with him (I had been retained by the defense), I would never work in my town again (Subject 2). Yes. An attorney made the underlined threats [against respondent's career in home city; threats to complain about respondent to various professional boards or committees] after a deposition that I handled adequately, but not well. My efforts, nonetheless, gave the attorney necessary information to successfully conclude the case. The attorney then refused to pay for my work (Subject 29).

Discussion

Experience in the field suggests that, although most attorneys deal fairly with their experts, experts may still be subjected to diverse attempts to influence their opinions as they strive for honesty and objectivity, according to their code of ethics.² These influences may derive from the expert's personal history or professional experience, in the form of forensic countertransference⁵; from the media or professional colleagues; or from the retaining attorneys themselves. We have attempted to study the last source.

Ethics

A comprehensive discussion of the ethics involved in attorney-expert relations is beyond the scope of this small pilot study, but some comments may be relevant. The goals of attorney and expert always diverge in one respect: The attorney must be unabashedly partisan as a role descriptor; the expert must strive for objectivity and a nonpartisan position—for example, by admitting (on cross-examination by the other side) the limitations of, or exceptions to, an opinion. Attempts by an attorney to persuade an expert of the validity of the attorney's side of a case are fully legitimate. Such efforts can be distinguished

from the approaches examined in the present study, which involve elements of duplicity and coercion that go beyond simple persuasive efforts and transcend the ethical limits of the behavior of attorneys as officers of the court and as professionals.

In a given instance, such distinctions may be difficult and are beyond the scope of this self-report study. If a prosecutor, for instance, threatened to report an expert for violation of a valid standard of ethics, the design of the questionnaire in the present study would allow the violator falsely to claim "pressure," when this is clearly not a valid example of undue pressure. A further study might examine the actual context of the claims made by participants to ensure their validity.

Those of us involved in training forensic practitioners owe it to our students to become aware of possible sources of bias, such as those described herein and to develop strategies to aid our trainees and consultees in resisting the pressures that distort the va-

lidity of experts' opinions. The authors hope that this pilot study will stimulate interest in further explorations of this ethically complex topic.

Acknowledgments

The authors thank members of the Program and of the American Academy of Psychiatry and the Law for participating in the study, and members of the Program, the staff of the Dare Institute, and our anonymous reviewers for critical comments and assistance.

References

1. Gutheil TG, Simon RI: Attorney pressures on the expert witness: early warning signs of endangered honesty, objectivity and fair compensation. *J Am Acad Psychiatry Law* 27:546-53, 1999
2. Ethics Guidelines for the Practice of Forensic Psychiatry 1987-1995. American Academy of Psychiatry and the Law, Bloomfield, CT
3. Cohen J: *Statistical Power Analysis for the Behavioral Sciences* (ed 2). Hillsdale, NJ: Erlbaum, 1988
4. Rosenthal R, Rosnow RL: *Essentials of Behavioral Research: Methods and Data Analysis*. New York: McGraw-Hill, 1991
5. Gutheil TG: *The Psychiatrist as Expert Witness*. Washington DC: American Psychiatric Press, 1998