

Attorneys' Requests for Complete Tax Records from Opposing Expert Witnesses: Some Approaches to the Problem

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As part of an impeachment attempt on cross-examination of opposing expert witnesses in trial or deposition, the cross-examining attorney may request the complete tax records of the expert. It is widely believed that expert witnesses may be expected to express opinions that favor the parties who engage them and who pay their fees. Theoretically, the purpose of this request is an attempt to paint the expert as a "hired gun" whose major source of income is forensic work. The different issues, statutes, and case law citations that bear on requests for tax records are reviewed, and the strategies for coping with this tactic are suggested.

J Am Acad Psychiatry Law 34:518–22, 2006

When an expert testifies in deposition or trial, it is common for the opposing attorney to attempt to impeach the expert's testimony or impeach the expert personally in some way. Courts have long recognized that the importance of the credibility of a witness to the trial of a case cannot be overstated. For retaining attorneys, this is especially true with respect to expert witnesses,¹ in that juries often give more weight to the testimony of "experts." Common approaches to impeachment include: confronting the expert with contradictions in the testimony itself, in previous testimony, or in published materials; questioning the adequacy of the expert's assessment/methodology in the case; questioning the expert's qualifications; or attempting to portray the expert as a venal "hired gun" who sells testimony instead of time.^{2,3}

In the context of this last strategy, cross-examining attorneys commonly ask what the expert's fee is, how much the expert has earned on the case so far, and what percentage of an expert's income or time comes

from forensic work (sometimes in proportion to clinical work or teaching). The cross-examining attorney hopes that high "numbers" in any of these categories may aid in portraying the expert as venal, suggesting he or she is saying whatever the retaining attorney wants, for money.

In some cases, attorneys have asked the expert to provide tax returns of the recent past with the stated goal of demonstrating for the jury the extent of the financial connection between the expert and the party (and related interests) who engaged the expert and the cumulative amount a party has paid such expert. While most experts would regard as fair, relevant, and reasonable the question about percentage of income from forensic work, the request for tax returns—a nonforensic psychiatric inquiry—occupies a different realm. In this article, we explore this issue from several viewpoints.

Context

A look at the background against which all this occurs may provide useful perspective. Our culture is involved in a privacy conflict, with strong forces on both sides. On the one hand, the Health Insurance Portability and Accountability Act of 1996, though lacking in some privacy essentials, expresses an effort to maintain the privacy of medical records; and, in

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the current era, the Supreme Court case of *Jaffee v. Redmond*⁴ established a privilege for psychotherapy notes. On the other hand, the astonishing wealth of private information on the Internet and the decrease in privacy inherent in the recent Patriot Act both make possible extensive discoveries of previously private information. None of these forces was present even 10 years ago.

Experts express concerns about the availability of their social security numbers, as a means of identity theft, and—since they often work with criminal populations—about whether revealing their total income may tempt antisocial persons to commit property crimes.

Protective orders, an approach commonly used with sensitive information, may prove useful but may expire at the end of litigation. Testimony itself has an extremely long half-life on mainframe computers within the legal system.

Finally, experts in corporations may be more vulnerable to such demands than individual practitioners. Judges may be more protective of an individual expert witness than a corporate witness.

All the foregoing factors raise concerns among experts about the use of tax returns in the legal process.

Relevance

The jury, in evaluating the expert's testimony, must have facts to determine the credibility of the expert. It is widely believed that expert witnesses may be expected to express opinions that favor the party who engaged them and who pays their fees. Put another way, there is a fear that those who pay the fiddler call the tune. This is the reason why judges give counsel wide latitude to explore the expert's bias or motivation for his or her testimony.⁵ Impeachment by showing that the witness may be biased rests on two assumptions: (1) that certain relationships and circumstances impair the impartiality of a witness, and (2) that a witness who is not impartial may, consciously or otherwise, shade his or her testimony in favor of or against a party. Since the bias of the witness is always significant in assessing credibility, the trier-of-fact must be sufficiently informed of the underlying relationships, circumstances, and influences operating on the witness to determine whether a modification of testimony reasonably could be expected as a probable human reaction.

Problems and Pitfalls

The Tension Between the Expert and the Cross-Examiner

If given a choice, many experts would like to take the witness stand, state their qualifications to give opinions, give the opinions, and then leave the courtroom. The opposing counsel rarely lets that happen. Professional experts are often extremely effective. Their opinions can be powerfully organized and skillfully crafted to persuade a jury to find or not find fault with, for example, a physician on trial. As experience shows, some (psychiatric) witnesses are experts not only in psychiatry, but also in the art of being a persuasive witness and in the art of handling cross-examination.

The Aligned Expert Witnesses

It is well known that there are experts who testify exclusively for plaintiffs in medical negligence cases, as well as experts who testify exclusively for the medical and pharmaceutical industries. Further, there are experts who have established relationships with certain insurance companies and pharmaceutical companies.

The Professional Witness

The bench and the bar know that some expert witnesses derive a significant portion of their total income, not from treating patients, but from giving their opinions in the forensic arena. Counsel should distinguish for the jury the "professional witness" from the physician who earns most of his or her income from caring for patients. At times the "professional witness" should have closer financial scrutiny, since his or her livelihood depends on getting business in the litigation world.^{6,7}

The fact that an expert witness derives most of his or her income from giving opinions in the litigation process does not mean that the opinions given by the expert are not honest, accurate, and credible. The trier-of-fact should know, however, who most often pays the expert (i.e., the defense, the plaintiff, and, at times, which industry), how much, and how dependent the expert might be on a particular source of income.

Case Law and Rulings in Some Jurisdictions

How do the courts balance the expert's privacy rights versus the attorney's goal to show bias? The

Supreme Court of Kentucky, in *Primm v. Isaac*,⁸ recently said, in declining to require an expert to produce tax and financial documents without first attempting to obtain the information through a less intrusive, burdensome, and costly means:

We hasten to add, however, two important caveats. First, we do not intend by our decision today to preclude discovery of a nonparty witness's financial documents. There may be cases where tax returns and other documents relating to expert's activities should be compelled upon a trial court's finding that the witness has been less than forthcoming about the information. If, after taking the deposition, a party can demonstrate that additional information is necessary to undertake reasonable bias impeachment, it may seek leave of court to take additional discovery. Further, should the trial court determine that the witness has not provided complete and unevasive answers to the deposition questions, or "has falsified, misrepresented, or obfuscated the required data," the aggrieved party may move to exclude the witness from testifying or move to strike that witness's testimony and, or further, move for the imposition of costs and attorney's fees in gathering the information necessary to expose the miscreant expert [Ref. 8, p 639].

In a Maryland case, *Behler v. Hanlon*,¹ the fact that an expert witness had a 20-year history of earning significant income testifying primarily as a witness for defendants and an ongoing economic relationship with certain insurance companies certainly fit within recognized examples of bias/prejudice impeachment, making such facts relevant to the subject matter of the litigation and placing it squarely within the scope of discovery recognized by the courts.

In *Behler*, because of the risk that the expert's opinions were financially motivated, the plaintiff sought extensive private financial information regarding the defendant's medical expert for use at trial. The court concluded that the information sought by plaintiff regarding the doctor's activities as a defense expert witness was relevant (see Ref. 1). The court concluded, however, that the scope of information sought by the plaintiff was "overkill" and thus could be properly limited pursuant to federal disclosure rules. A balance was struck.

In *Behler*, the plaintiff sought discovery of the total income earned by the expert for the last five years, the amount thereof earned by providing the defense with independent medical evaluations, records relating to the hours spent by the expert in this capacity, copies of his tax returns, a listing of all insurance companies with whom he was affiliated, and a listing of all cases in which he had provided expert services. The court said:

While there may be cases in which an expert's gross income, and the specific amounts thereof earned by providing services as an expert witness, may be discoverable, this should not be ordered routinely, without a showing, absent here, why less intrusive financial information would not suffice [Ref. 1, p 561].

In *Behler*,¹ the court ordered that before the deposition the expert make a diligent search of all records in his possession, custody, and control, to enable him to provide the following information: (1) the percentage of his gross income earned for each of the preceding five years attributable to performing expert witness services on behalf of insurance companies, or attorneys defending personal injury cases; (2) a list of cases in which he had provided such services during the last five years, in sufficient detail to enable the plaintiff to locate the court file, or issue a subpoena for it. At a minimum, this should include the name, address, and telephone number of the attorney and/or insurance claims representative who engaged the expert; (3) the name of each insurance company for which the expert had provided services as an expert witness in personal injury cases for the preceding 10 years. The court added that if, after taking this deposition, plaintiff can demonstrate that additional information is required to enable him to undertake reasonable bias impeachment of the expert, he may seek leave from the court to take additional discovery.

Finally, to guard against possible abuse of the sensitive financial information for which discovery had been allowed, a protective order was issued that prohibited dissemination or copying of the information produced for any purpose not directly related to the prosecution of the case, absent the consent of the expert, or further order of the court. The protective order was to remain in effect following the conclusion of the pending case, unless withdrawn by the court.¹

In *Behler*,¹ no intellectually honest argument could be made that the information sought by plaintiff regarding the doctor's activities as a defense expert witness was not relevant to bias/prejudice impeachment, and, therefore, it was within the scope of discovery permitted by Rule 26(b)(1). However, legitimate questions were raised regarding the extent of the bias discovery sought, the methods of discovery employed, and possible abuses that could occur if the discovery was permitted without a protective order.

The wise expert will make "concessions" to facts that are likely to be discoverable by law, to circum-

vent a larger financial net's being sanctioned by a court order.⁹ A good illustration is a California case¹⁰ in which counsel announced he was going to ask a medical expert at his deposition to divulge the actual dollar amount of income that he earned from his medical-legal practice. The attorney argued that such information was relevant to show the expert's bias toward the defense in this case and in general. The expert smartly agreed to provide estimates of the percentage of his medical practice that involved forensic work versus clinical work, the percentage of his income that was derived from forensic work, the percentage of his forensic practice that was on behalf of plaintiffs versus defendants, the number of forensic evaluations he performed per week, and his hourly billing rate for performing forensic services.

The expert, however, refused to answer any questions seeking to learn his gross annual income earned as a result of forensic work or his gross annual income from all of his combined medical activities. The court said the information the expert agreed to provide should be more than sufficient to allow plaintiffs effectively to cross-examine the expert at the time of trial regarding his opinions and the financial motive or bias that may have influenced those opinions.

In a Texas case,¹¹ the expert admitted that approximately 90 percent of his expert consultation services had been provided to defendants as opposed to personal injury plaintiffs. He also testified that "the success [of the party who retains him to testify]. . . is not my concern." After these concessions, the court refused the plaintiff's request for tax returns. The court was guided by the historic reluctance of Texas courts to allow "uncontrolled and unnecessary discovery of federal income tax returns" (Ref. 11, p 835).

Ethics Matters

If an ethical lawyer believes that the expert has truthfully answered questions about such matters as percentage of income from forensic work and rate of compensation, the lawyer should not seek a wholesale rummaging through the expert's financial records. There is no need. The lawyer has enough information to demonstrate the expert's bias or prejudice, if any. However, if the expert has not answered questions honestly or has already shown himself or herself to be wily (as determined by the lawyer's informal discovery), the lawyer needs documented impeachment material with which to bring the fact of an expert's ethics shortcomings to the fact finder's

attention. Generally, if the lawyer can show the court that the expert is suspect and evasive, the court will allow more formal investigation into the expert's financial background.

Under federal and state discovery rules, a party legitimately may seek discovery of facts that relate to any of the various forms of impeachment. However, the mere fact that such information falls within the scope of legitimate discovery does not mean that parties are entitled to unfettered discovery of impeaching information by whatever means of discovery they seek. Ethical lawyers know not to request discovery if it is clear that the discovery would be unnecessarily burdensome, duplicative, costly, or insufficiently probative of an expert's credibility to warrant the expense of production.

On the other hand, unethical experts are fair game for very intrusive discovery of tax returns and more, if a lawyer learns, for example, that an expert is on the payroll of a drug manufacturer, his or her testimony supports the drug's safety, and he or she has directly or indirectly misled counsel about financial ties to the manufacturer.

Honest answers to the following questions can assist an expert in his or her decision to be retained or not by a lawyer. Should the expert take the case? To what degree is there a conflict of interest? If the expert believes that a conflict is present, what steps might mitigate it? What in all fairness should the expert disclose to the opposing side about financial ties to the party for whom the expert is testifying, the retaining lawyer, or the entity that is paying for the services? Is it relevant that the expert is on the board of directors for the insurance company that is paying the bill for this case? Should this relationship be disclosed? Why, out of all of the experts from whom to choose, has the lawyer chosen this particular one? Is there any way in which the expert feels beholden to the attorney or his client?¹²

Privacy Concerns

Discovery of an expert's financial history is always going to involve a balance between the expert's privacy rights and the attorney's right to probe for potential bias. The expert witness who gives honest answers to the questions regarding financial incentives has little to fear. Courts are not going to authorize the harassment of experts by a wholesale rummaging through their personal and financial records under the guise of seeking impeachment evidence. Permit-

ted inquiry, both at the discovery and trial stages, should be tightly controlled by the trial court and limited to its purpose, and should not be allowed to expand into an unnecessary exposure of matters that are personal to the expert and have no relevance to the credibility of the expert's testimony. Trial judges know it is not the proper function of cross-examination to embarrass witnesses or to invade unnecessarily their legitimate privacy. Permitting a lawyer to do so would discourage experts from testifying and needed testimony would be nearly impossible to obtain.¹³

An additional privacy factor applies when the expert files tax returns jointly with a spouse, partner, or associate. The expert might then refuse to disclose the forms to protect the privacy of others. We have no data on the success of this response.

Suggested Strategies

- Make concessions to financial facts that are likely to be discoverable by law, to circumvent a larger financial net's being sanctioned by a court order.
- Weigh carefully the decision to accept employment from a lawyer or company with which you have a long history if you don't want to run a risk of discovery into your financial history of such retention.

- Consider entering into an agreement limiting the use of discovery aimed at financial information if the plaintiff and defense experts are "professional witnesses."

Acknowledgments

The authors thank members of the Programs in Psychiatry and the Law at the Massachusetts Mental Health Center, Harvard Medical School and at Georgetown University School of Medicine; their anonymous reviewers for critical comments; and Ms. Ellen Lewy for assistance with the manuscript.

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