The issue of psychiatrists serving as forensic expert witnesses has long been controversial. What are the rules for serving as an expert witness, and what is expected of a psychiatrist who serves as an expert witness?

Common law, based on canon law, disqualified a person from testifying on account of bias or interest in the outcome of the case. It was one of several grounds for disqualification—the others being insanity, infancy, infidelity and infamy. Today, by and large, the rules on competency have been converted into rules of credibility, whereby nearly every proposed witness is allowed to testify, but their credibility may be attacked on cross-examination. Quite often, cross-examination ends up being a smearing process, and, as a result, many experts are reluctant to testify or they charge large fees.

In the second quarter of the 19th century, U.S. physicians became increasingly involved in medicolegal matters. After 1840, physicians exercised growing influence in the disposition of estates. They established a major role for themselves in the adjudication of wills where they were offered fees much higher than those offered in other medicolegal proceedings. The power of physicians to overturn wills through retroactive rulings of testamentary incompetence eventually became so great that several states restricted what they regarded as an "epidemic of contests of wills." Today, psychiatrists mainly serve as expert witnesses in personal injury (including malpractice) and criminal cases (Mohr, 1993).

Unlike lay or fact witnesses, experts are compensated for their testimony—experts like to say they are paid for their work on the case, not for their testimony. The fees paid to an expert must be "reasonable." Moreover, the fee may not be contingent upon the outcome of the case, so as to avoid inducement to testify falsely. In fact, legislation in some states makes testifying on a contingency fee basis a misdemeanor. Furthermore, experts retained on a contingency basis violate ethical guidelines, and any member of the profession learning of it has an obligation to report them to the board of medicine. Some argue that in many cases, the ban on expert contingency fees deprives litigants of the services of a competent expert. As for consulting firms involved in finding expert witnesses for litigants, a number of courts have ruled that paying such firms on a contingency fee basis is also improper (First National Bank of Springfield v Malpractice Research, Inc., 1997).

It would be an unconstitutional taking of property to require an expert to provide opinion testimony without compensation—nonetheless, jurors tend to look upon expert witnesses as "hired guns." The courts have made rulings to counter this viewpoint. At one time, as the Illinois Supreme Court indicated in 1909, expert witnesses could not be questioned with regard to the number of occasions on which they had previously testified for a given category of party (e.g., plaintiffs or defendants) (McMahon v Chicago City Railway Co., 1909). Several other decisions of the Illinois Supreme Court indicated that experts should not be questioned regarding compensation received for testifying in cases unrelated to the parties or their attorneys.

In 1988, the Illinois Supreme Court revised these decisions restricting questioning about prior testimony or fees (Trower v Jones, 1988). As a consequence, the qualifications of the expert may now be challenged. In federal courts, testifying experts must now submit a list of all prior cases within the past four years in which they provided testimony and their current compensation (Federal Rules of Civil Procedure, undated). They must also provide a signed written statement summarizing their opinion and the basis for that opinion along with their curriculum vitae. The report is admissible as evidence.

The rules of evidence expressly provide for the court appointment of an expert, but the provision is rarely used in the United States, because it is viewed as an undesirable departure from the adversary system. Experts are usually called by the parties, except in child custody disputes. Under the adversary system, the parties prepare the case, decide what evidence to present, and prepare witnesses by going over their testimony prior to trial.

In most other countries, the court itself appoints expert witnesses, with the judge questioning them.
The advocates of party selection of expert witnesses maintain that the impartial witness is a myth and empowering the parties to choose the witnesses in judicial proceedings gives them some effective control over the proceedings and thereby vindicates democratic values. Obtaining the optimal expert requires time and money, and when the litigation has substantial stakes, the parties are far more likely than the judge to have the ability and inclination to recruit an expert. To most observers of court proceedings, the concept of an "impartial expert" echoes hollowly. In an article regarded as a classic, Diamond (1959) debunked the idea of an impartial expert.

In procuring the assistance of an expert, the attorney typically talks in terms of "if you take the stand," reviewing the topics and the facts of the case. Once the expert agrees to serve, the attorney expects them to take on the role, in effect, of an advocate--to make the best case they can for the lawyer's client. For compensation, the expert will carry out an evaluation and testify for the party without fabrication. More often then not, the expert educates the lawyer on the matter in litigation. The witnesses are also adversaries. They are either witness for the plaintiff or the defendant. Because each side is allowed to present its best version of the contested issue, the adversarial system ensures that both sides will be heard.

To make their case, lawyers say that they "buy" experts. In a sense, they are right, but it is not unethical so long as they do not ask the expert to fabricate or falsify their opinion. Who can say that the opinion of the so-called impartial expert is less biased than that of the adversary witness? The partiality of the impartial expert is masked. The adversary system of calling witnesses for each side and then examining them by direct and cross-examination has evolved specifically for the purpose of exposing shortcomings and biases and probing the accuracy and veracity of the opposition witnesses' testimony.

Experience reveals that there is almost no subject that cannot be viewed in at least two ways. Law students learn to feel comfortable arguing for either side of a case. The famous Japanese film Rashomon (1950) reminds us that there is no one truth, but many truths. Events are seen in different ways, just as whether the commission of an act was voluntary or if there was negligence, intentional wrongdoing, causation or extent of harm. However, the identity of an alleged offender must be established by proof beyond a reasonable doubt.

What about an expert purveying their services? In 1975, Patty Hearst, the 22-year-old newspaper heiress, was arrested for bank robbery. She had been kidnapped by the so-called Symbionese Liberation Army and then joined them as a bank robber. Louis Jolyon West, M.D., then chairperson of the department of psychiatry at the University of California, Los Angeles, had done research on the Stockholm syndrome, a psychological phenomenon whereby a hostage develops positive feelings for their captor. West offered his services to the Hearst family. The trial judge, however, excluded his testimony because he had proffered his services. Since that time, as a result of a 1997 U.S. Supreme Court decision, experts are permitted to advertise their services (Bates v State Bar of Arizona, 1977).

An expert or an attorney may be compromised by an agreement with a publisher to write about the case. During the course of the Hearst trial, F. Lee Bailey, Hearst's attorney, contracted to write a book about the trial, thus raising questions of potential or actual conflict of interest. The court held that Hearst's Sixth Amendment right to the assistance of counsel was violated by Bailey pursuing his own interest in publication rights, rather than her interest in acquittal. Likewise, a therapist is compromised by serving as an expert in litigation involving a patient. An expert, unlike a fact witness, may express an opinion as to the past, present or future. The Ethical Guidelines for the Practice of Forensic Psychiatry point to the problems related to a treating therapist serving as an expert witness. The relevant guideline states:

Treating psychiatrists should generally avoid agreeing to be an expert witness or to perform evaluations of their patients for legal purposes because a forensic evaluation usually requires that other people be interviewed and testimony may adversely affect the therapeutic relationship.

Engaging in conflicting therapeutic and forensic relationships exacerbates the risk that experts will be more concerned with case outcome than the accuracy of their testimony. Moreover, testifying as an expert on behalf of the patient may jeopardize the therapeutic relationship. In any event, attorneys and juries tend to give more credibility to the testimony of a therapist than to a forensic expert.

In a case in Michigan for breach of an insurance contract, where the jury awarded over 1 million
dollars to the patient, the attorney who represented the patient said the key to winning the case was not hiring expert witnesses to explain the plaintiff's condition (McCaulley, 2001). Rather, he relied exclusively on the testimony of the plaintiff's treating doctors. Moreover, he explained, "We never hired an expert psychiatrist. We relied exclusively on the treaters. If you've got good treaters and they are credible, that goes a long, long way with a jury as opposed to what any expert might say." When testifying in legal proceedings, some treating therapists seek to avoid dual relationship problems by confining their testimony to facts. In these circumstances, treating therapists typically report their diagnostic findings, explain their patient's clinical condition and detail the course of treatment. These therapists avoid expressing any opinions regarding issues such as causation or responsibility, and they do not get an expert fee. The critics of therapists serving even as fact witnesses claim that such testimony can misinform and mislead in a legal proceeding.

May therapists be forced to testify about their patients as expert witnesses? What if an attorney cannot locate an expert witness or cannot get an expert to testify? In Glenn v Plante (2004), the Wisconsin Supreme Court was presented with this question. The court concluded that treating physicians may be required to testify regarding their observations relating to the care or treatment provided to their patient as such compulsion is considerably different than forcing a physician to testify as to the standard of care and treatment provided by another physician. Special rules govern the qualification of experts in malpractice cases. In this type of litigation, the legislatures or courts oblige the attorney to list an expert or the case will be dismissed at the outset. The courts have traditionally deferred to the profession to set the standard of care in malpractice cases. In doing so, they adopted the "school" method for qualifying expert witnesses, allowing an expert who either practices in or is familiar with the particular school of the practitioner on trial. Thus, a surgeon or a nurse could testify against a podiatrist, as long as they were knowledgeable about podiatrists' standard of care. Under this rule, it was not very difficult to obtain an expert to testify against the defendant.

However, at the behest of medical societies, various states have required that the testifying expert not simply be familiar with the practice of the defendant but that they are of the same specialty. Thus, psychologists would not be permitted to testify on the standard of care required of psychiatrists, even though they may be familiar with the practice of psychiatry. Decisions of the Michigan Supreme Court make it difficult, if not impossible in some cases, to determine who is of the same specialty to qualify as an expert witness (Schwartz, 2004).

At one time a "locality rule" was also generally followed in regard to the medical profession. The locality rule further constricted the pool of professionals qualified to testify. The expert testifying in a medical malpractice case had to be able to testify as to the standard of knowledge and skill of a practitioner in good standing for the community (or a similar one) in which they practiced. The definition of community was narrow. The rule insulated the medical profession from liability. In a small community, an attorney could tie up experts who would be willing to testify against a colleague.

The locality rule arose in the days when medical education was not standardized and there was a wide variance in the knowledge and skill of doctors in different areas of the country. As this situation has changed, the courts have held that there is a minimum national standard, particularly for specialists. Tennessee, however, continues to adhere to the locality rule (Robinson v LeCorps, 2002). With the near total demise of the locality rule, journals for lawyers are now replete with advertisements of experts offering their services nationwide. The use of experts has become so common that thriving businesses serve as clearinghouses for witnesses. The lawyer looking for an expert can also search by state or specialty. Trial attorney associations maintain a regularly updated index of experts. For a fee, the lawyer now has a cornucopia of available services. Most law firms maintain a list of experts whom they call upon as needed, however competent they may be. In child custody litigation, some experts lose credibility the more they appear as a witness for a given lawyer, as these cases are tried before judges alone and they get to know the credibility of the witness.

In one way or another, professional organizations have sought to curtail expert witnesses. It's a catch-22 situation: On the one hand, the law, deferring to the profession, requires expert testimony in a malpractice case, but on the other hand, it has been increasingly difficult to obtain competent expert testimony. The American Association of Neurosurgeons has been attacking neurosurgeons who are willing to testify for plaintiffs in malpractice cases. In peer reviewing medical testimony, the organization has not found a single case of bad testimony in favor of a defendant physician, but many in favor of the plaintiff. The American Medical Association has endorsed such programs. One expert witness sued the Florida Medical Association and three physicians for damages and an
injunction to end the peer review of medical testimony (Fullerton v Florida Medical Association, 2004). Not too long ago, hospitals would penalize any member of its staff who would testify for a plaintiff in a malpractice case.

The current effort to hold expert testimony by physicians as constituting the practice of medicine is another attempt to curtail the "traveling expert." In recent years, ostensibly to improve the quality of expert testimony, a number of states have required licensure in the jurisdiction of the forensic examination or testimony (Reid, 2000).

Tennessee legislation (Tennessee Code Annotated, undated), for example, states:

No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established [in a malpractice action] unless the person was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make the person's expert testimony relevant to the issues in the case.

In 1998, the AMA adopted a policy that expert witness testimony by physicians be considered the practice of medicine subject to peer review. An Alabama appellate court, however, has ruled that a psychologist licensed in another state could not be prohibited from testifying as an expert witness solely on the ground of nonlicensure in Alabama (Mitchell v Mitchell, 2002). The court commented, "[T]estifying ... is not [a function of] practicing psychology."

Years ago, the U.S. Supreme Court ruled that under the "Privileges and Immunities" clause of the Constitution, a state may discriminate against nonresidents only when its reasons are substantial and the difference in treatment bears a close or substantial relationship to those reasons (Canadian Northern Railway Co. v Eggen, 1920; Supreme Court of New Hampshire v Piper, 1985).

The media focuses on trials, but the tribulations of expert witnesses are mostly not at trial but in depositions. Trial attorneys are really pre-trial attorneys. As statistics show, more than 96% of cases are settled without trial. Settlements depend on readiness for trial. With the assistance of experts, the attorneys and insurers appraise the merit of a case and speculate what would happen at trial. Accordingly, a settlement is then reached.

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