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Review Article

What if I Am Asked to Say "Nothing but the Truth", but I Feel Threatened or "Muzzled"? A Forensic Psychiatrist's Journey Toward a Professional Dilemma

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Abstract

This short article is about some forensic mental health environment changes I observed over the last years, as many Canadian forensic psychiatrists may have too. Many mental health professionals seem to get reluctant or afraid about mentioning some diagnostic or psychopathological issues in their clinical report. Also, forensic psychiatrists are probably more and more questioned about the diagnostic conclusions presented in their reports or during their testimony. While recognizing the impact of potential personal bias on forensic expert conclusions, I will propose some reflections on the impact of societal and legal pressures on the clinical or forensic work of mental health professionals. I suggest that those pressures may subtly, directly or indirectly, threaten and, in a way, "muzzle" mental health professionals, especially forensic mental health experts. I will expose some essential contextual aspects of forensic mental health work with its numerous potential pitfalls, with professional internal as well as external pressures related to the adversarial system. Then, I will expose what I conceptualize as an expert's professional dilemma about professional independence and the duty to tell the truth while feeling threatened professionally.

Keywords: *Expert Opinion; Professional Independence; Adversarial System; Gaming the Expert; Telling the Truth*

Changing context of forensic and occupational psychiatry

As a forensic psychiatrist also doing occupational psychiatry, I have observed, over the last ten years, an increasing trend regarding external pressures put on the experts working in an adversarial legal system.

What if an evaluee complains about my report because I wrote that her psychiatric condition was influenced by some of her personality traits and by quite possible secondary gains. Should I have avoided writings those comments?

What if a close friend of mine acting as a medical officer for different employers tells me that over the last few years she has decided not to mention in her reports her opinion about the employees' personality. She no longer writes about personality disorder or even about the employees' personality traits. She is afraid to get a complaint from her medical college or to have her diagnosis questioned and then to be imposed to explain her opinion at a tribunal or in court. She says that if the employer really wants to know about the employee's personality, she will suggest to ask for an expert's opinion through an Independent Medical Examination (IME) and to let the expert specifically raise the issue. Is she correct when she avoids telling her clinical impressions because she feels threatened professionally?

What if two senior colleagues of mine present at a meeting their experience as expert criminal forensic psychiatrists, one for each side, in a very interesting and quite complex criminal case. They explain how they arrived at two different opinions about the same situation. Talking to them after their presentation, I understand that those two senior colleagues decided to omit to talk about some pertinent clinical issues, and that their conclusions were apparently influenced by the retaining lawyers' comments. Where they correct to act like this?

Those situations remind me of other situations where I was told more or less directly by lawyers things like: "Can you not speak about that?", "Can you avoid talking about that?", "I do not want to influence your opinion, but if you could mention, you know, that…" Or, "May be it's better to raise that or that… and not to raise that".

I could of course mention other similar situations, but those few examples already illustrate that at least some psychiatric diagnosis, or some proposed psychiatric explanations, seem more susceptible to raise a great amount of questions, controversies, or look unwelcome by the lay public as well as by legal system officers.

For this short article, I will mainly focus on forensic psychiatrists' work, even though many aspects raised here may also apply to other mental health practitioners doing forensic mental health work. Even if forensic psychiatrists were and continue to be invited guests in the medico-legal arena, it seems evident that there is a certain form of ambivalence from legal agents toward mental health experts. It may look like those guests are invited to present an opinion influenced or framed (conscientiously or not) by external incentives, and that those guests may not really be invited to give their independent and complete professional opinion.

A requested expert's considered opinion

Forensic psychiatrists acting as expert have a role which differs from eyewitnesses or treating practitioners who are invited to testify in court as eyewitnesses concerning their patients. The experts will be allowed and, in fact, are specifically invited to give an expert opinion to the court or to a tribunal. Experts will be allowed to answer hypothetical questions. Their paramount duty is said to assist the court through the provision of an independent and unbiased opinion about matters coming within the expertise of the witness.

Critics of experts: Sometimes desired, sometimes unliked

In many countries, experts have been part of the medico-legal environment for even centuries. Across the history, experts have received good comments as well as bad comments on their role, on their opinions.

Forensic psychiatrists have heard comments like: they are professionals only interested by the money, they are easy going with the side who pay them, they talk like if what they say is the only truth, etc.

At times, the medias and the legal system officers severely criticize experts, their attitudes and their work. Newspapers regularly negatively comment forensic experts at highly publicized criminal trials, for example. But, conversely, experts are regularly consulted by medias and by legal professionals to help understand certain behaviours or situations under litigation.

Even if experts are sometimes called names like hired guns, saxophones, whores, on a day to day basis their opinion is in fact rather highly valued and well considered by tribunals and courts. The law system usually recognizes the essential role they may have to help the court in criminal cases, in professional responsibility cases and civil damage cases, to name a few.

Expert's competence, expert's rigour, admissibility of expert's evidence

Nowadays, it is well recognized that the legal system has to give some guidance to experts and to layers who intend to submit expert evidence in court.

For over 400 years, the United Kingdom legal system as requested expert opinions. It used to be reported that experts could write and say what they wanted to say. The basis of their report and testimony could then be related to their experience, or their notoriety in their field of practice.

But things have changed. Over the years, the criteria for the admissibility of expert evidence has evolved. For example, at the beginning of the 20th Century, in the United States of America, the standard for admissibility of scientific expert evidence was the Frye test, or general acceptance test [1]. The Frye standard essentially stipulated that expert opinion must be based on a scientific technique where the technique is generally accepted as reliable in the relevant scientific community.

Since 1993, the United States Federal Law follows the Daubert standard [2], a more stringent rule of evidence about the admissibility of expert witness testimony. According to Daubert, the trial judge must follow guidelines for admitting scientific expert testimony: the judge is gatekeeper; to assure the relevance and reliability of the expert's evidence, the trial judge must ensure that the expert's testimony is "relevant to the task at hand" and that it rests "on a reliable foundation"; an expert conclusion will qualify as scientific knowledge if the proponent can demonstrate that it is the product of sound 'scientific methodology' derived from the scientific method. The proposed set of illustrative factors [3] used in determining whether these criteria are met, include: whether the theory or technique employed by the expert is generally accepted in the scientific community; whether it has been subjected to peer review and publication; whether it can be and has been tested; whether the known or potential rate of error is acceptable; and whether the research was conducted independent of the particular litigation or dependent on an intention to provide the proposed testimony.

Many other countries like the United Kingdom [4], Canada [5] and Australia [6], to name a few, now use similar sets of criteria.

It becomes clear that not every opinion or every part of the expert opinion is admissible in court. The expert does not control the legal process. As discussed, the expert is only invited to prepare a rigourous professional report and/or testify only on aspects related to his expertise. The expert must respect those parameters while preparing his/her report and/or when testifying, and the judge will act as the gatekeeper of the process.

Expert's mandatory professional independence

In many countries, it is now well recognized that the fundamental obligations of the expert witness are to the court/tribunal, not to the party on whose behalf he or she is called to testify. The evidence of an expert witness should be the independent product of the expert and it should not be unduly influenced, in either form or content, by the exigencies of litigation [7].

The expert's declaration

Most jurisdictions now also require the expert to sign an expert's declaration of duty to the court or tribunal (not to the retaining party) at the time of the production of the expert's report. And, at the time of testifying, the expert is asked to swear to say the truth, only but the truth.

Expert's report and testimony in an adversarial context

Even with the quite well-defined legal guidelines mentioned before, the adversarial system is not a straightforward process for the expert working to produce objective and independent conclusions.

Within the adversarial system, each of the opposing side may present its own expert opinions. Each side hopes to win its case, wants to avoid to lose the case. So, each side will assess the risk of losing, compared to the probability of winning the case. Unsurprisingly, each party will retain the expert opinion which best serves its theory of the case. In a way, the expert may de facto become an instrument supporting a lawyer's theory of the case, and that opinion will be presented as evidence for that party's pleading.

The expert will present a medical frame of reference which will be confronted to aspects of the lawyers' legal theories. However, the lawyers and the experts initial thought frameworks differ. The lawyer thinks like a lawyer [8-10] whose aim is to win his case, based on facts submitted to the scrutiny of a legal frame. On the other end, the forensic psychiatrist is rather oriented toward an understanding of a situation from a comprehensive mental health perspective [11]. It is well known that it is not for the mental health professional to judge a legal situation. But it is to the invited mental health professional to try to explain why a mental health explanation better explains a certain situation compared to another mental health explanation. It is not to the expert to advocate for the lawyer's client, but it is the role of the expert to help explaining a situation from a psychological/psychiatric perspective. The expert's role is said not to advocate but to educate the court [12]. However, the retaining lawyer will hope that the expert opinion will support his legal theory of the case.

So, the expert can be exposed to potential internal as well as external bias. Particularly, he/she must resist the enthusiastic covered or uncovered pressure from the retaining party. At cross-examination, the expert will also have to avoid from inadvertently advocating for the retaining lawyer's client while he/she submits and defends his/her professional opinion to the court.

Challenging expert's immunity

In many countries experts no longer have immunity or, at least, expert's immunity is contested [13,14]. In some countries the experts may even be civilly sued for alleged substandard professional services by the lawyer's clients or even by the lawyers requesting their opinion. Moreover, experts are among the physicians most frequently complained about at their medical college, their professional regulating bodies. Such a situation raises questions like: Is that experts really do not work with professionalism? or Is it possible that sometimes experts undergo the impact of an emotional turmoil by the losing party?

Expert's potential personal pitfalls

According to the American and the Canadian Academies of Psychiatry and the Law, experts should adhere to the principle of honesty and should strive for objectivity [15,16]. However, the human brain may, at times, show some signs of failure [17]. Bias is part of the possibility during human reasoning [18] and even experts [19-21] are susceptible to have blind spots, are subject to bias. Many authors have proposed strategies to overcome that possibility [22,23]. Even if the expert aims at avoiding or correcting personal bias, other potential influences must be considered.

Expert's pathway toward his/her opinion: Some other potential pitfalls

Before going at trial, there are different steps concerning the production of the expert's evidence. In fact, even before the expert gets involved in the process, many things happened. Also, if we look at the different steps, it will become evident that every step of the process the expert must be careful about common potential pitfalls.

At the time were the lawyer attempts to find an expert, the lawyer kindly recognizes the expert's competence. The expert may be flattered to be chosen, among other colleagues, as a potential expert. The expert may also already be influenced by the first impressions shared by the lawyer about his/her client and the situation presented as the lawyer understands it or may be "anchors" it. Then there is the assessment of the documents and the evaluee by the expert. It is followed by expert's report, with sometimes factual changes proposed by the requesting party and/or requests to clarify some aspects of the expert conclusions, with potential influence on the wording, and sometimes inducing a differential meaning on the expert initial conclusions, those changes possibly serving the court but possibly rather serving the retaining lawyer's position [24]. At the time of preparing the experts testimony, the expert may also be influenced by verbal and non-verbal cues from the lawyer. Some observers may say that in some situations the lawyer may kind of "game the expert".

It is well known that many strategies have been used to get rid of an expert's opinion, before a trial or at trial [25], the expert being kind of an enemy, at least for the opposing party, in the adversarial struggle to win the case.

As many experts may now have experienced, in some cases the expert gets a professional complaint, or an overt or covert threat of a complaint, to his/her médical collège, from the retaining partyor the adverse party, about an aspect of the expert's opinion on the actual case.

So, there are many potential external pressures and potential threats which may influence or interfere with the expert's work.

Discussing alternate hypothesis: optional or mandatory?

Experts are requested to give an opinion, an expert opinion. Even if the expert will eventually present his opinion, the expert has to understand the alternative interpretations, and will have to indicate why he selected or has chosen to adopt a hypothesis compared to another hypothesis. The expert must be prepared for his opinion to be challenged by the opposing side. Depending on the jurisdiction and the professional guidelines, the expert may not only have to mention the alternative hypothesis, but also to rigorously comment the pros and cons of the different major hypothesis.

External pressures, defensive reasoning and omissions

In the context of the adversarial system, we often observe that the retaining party tends to take special care of his/her expert and sometimes will appear a fraternity bias. Some experts may then feel some pressure to be loyal (re: allegiance bias) to the retaining party, even though the expert's duty is de facto to the court.

Robert Prentice [26-28] approaches the situation from an ethical perspective, and identified different pitfalls for lawyers and how to try to avoid or correct them. Nevertheless, the name of the game will remain to argue for winning [29]. Studies in behavioral ethics show that humans have an aversion for loss. It is not surprising that defensive reasoning may be frequent in an adversarial system. The lawyer is there to advocate for his/her client and focuses on winning the case for his/her client. That pressure on the lawyer may inadvertently be interpreted by the expert as also belonging to him/her, which is not the case.

Omission is part of our life, consciously or unconsciously [30]. And, of course, it may be present within the legal adversarial system. As mentioned, each of the opposing parties wants to win the case. Should they share or expose information which may harm their case? Since what is at stake is a win or a loss, it is easy to understand what happens.

In the case of argumentative debate, it is said [31] that the truth will raise from the debate between the two opposing parties which will collaborate toward a single objective, the truth, even if it means that one of the debating party will lose. In the case of an adversarial legal system the objective may more often be to win, not to the truth. Then, one easily available strategy toward winning is the use of omission.

Professional threats

Over the recent years, some forensic psychiatrists have been sued for defamation for diagnosing malingering [32]. As mentioned earlier, more clinicians and expert feel threatened if they use certain diagnosis, like malingering, even though the diagnosis is part of a recognized classification.

Moreover, considering the risks or threats of a complaint to their licensing bodies or a suit at a civil court, some diagnosis or diagnostic issues are more likely to be avoided by forensic psychiatrists. We may think of malingering, conversion, secondary gains, passive-aggressive traits, factitious disorder, to name a few.

What about telling the truth even if I feel the pressure of professional threats?

The expert is invited to tell the truth, but is submitted to many external influences from the social environment as well as from the legal system officers.

Previously, I have mentioned some situations where colleagues were reluctant to mention psychiatric issues in their expert reports, or omitted aspects of a case in their report.

I also mentioned situations where I was told more or less directly by lawyers such things as: "Can you not speak about that?", etc. Accepting that kind of request is not insignificant, since it may instrumentalize the expert opinion to serve another goal than the expert duty to an honest and objective professional opinion [33]. As shown, even accepting to change the terms used in the expert initial opinion is not without consequence, as suggested by Elizabeth Loftus' experiment [24].

But even the truth is not simple to define. Philosophers do not all agree on a single definition of the truth [34,35]. Law also has some difficulty to define what is the truth [36]. In her article entitled "The trouble with the adversary system in a post-modern, multi-cultural world", Carrie Menkel-Meadow [37] clearly shows that the adversarial system may have an impact, an influence on the issue of the truth.

Studies on eye witnesses have shown that sincerity may differ from the truth. The same may apply to the expert witness. Gutheil and colleagues [38] have written an article entitled "The whole truth" versus "the admissible truth": an ethics dilemma for expert witnesses". That article explores some nuances about the issue of truth in forensic psychiatry, and the duty to the court. As mentioned in Gutheil's title, the admissible truth may not be as complete as the whole truth. Also, Griffith [39], in an article entitled "Truth in forensic psychiatry: a cultural response to Gutheil and colleagues", proposes a nuanced perspective this time more inclined to a culturally influenced perspective on the truth, or what could, by some, be considered the acceptable truth in forensic psychiatry. Forensic psychiatrists are not in the usual patient-doctor relationship, and some amendment to the traditional ethical principles seem justified [40] to accommodate that duty to the court, to the truth.

As mentioned earlier, the expert should aim at an honest and objective opinion. The expert is there to help the court not to act as an advocate for the lawyer's client. As an expert, is my opinion the only indisputable truth? Of course, no! The expert from the other side also swears to say nothing but the truth. But, as an expert I will have defend my professional opinion, but I will also have to be opened to revise my opinion or part of my opinion, if appropriate, according to new facts presented. As an expert, I learned that many factors may influence my opinion. It is my duty to try to identify those factors and to bring changes to my opinion, if appropriate. I have to remember that my paramount duty is to assist the court through the provision of an independent and unbiased opinion about matters coming within my expertise.

The evidence that I will propose as an expert witness should be my independent professional product and it should not be unduly influenced, in either form or content, neither by the exigencies of the litigation process nor by the potential professional threats (e.g. being civilly sued, complaints to my medical college, etc.). Again, I am also asked to say "Nothing but the truth", but I may feel threatened or "muzzled" by those threats mentioned earlier. Those threats may secondarily influence the way I will expose my opinion and may, up to a point, consider to possibility to choose to omit some parts of my professional conclusions, to release that pressure. If I omit those aspects, do I really help the court, the legal system? Do I serve the court if I take such a defensive position? How should I deal with that dilemma?

Conclusion

My conclusions about that dilemma

That ethical and professional dilemma about my professional independence, the external pressures associated to the adversarial system and the importance of the truth, raises questions like the ones mentioned in Gentile's book [41] "Giving Voice to Values: How to Speak Your Mind When You Know What's Right". It took me some time before writing this article, since I know that some readers of this article will not share my opinion and could eventually use that against me. I know that when I agree to act as an expert, I accept to have to defend my report in front of an instance [42]. I am ready to have to debate about my opinions in court, but I may get chilly when I think

that there is no real complete immunity for experts, that the debate will go further than just professional argumentation, that I may be sued or that I may get a professional complaint to my medical college, even though I tried to do my professional work rigorously. However, I strongly believe that it is important to protect our professional independence, a "concept fundamental to a profession, an attitude of mind characterised by integrity and an objective approach" [43,44].

Like many colleagues, I believe that it is important for experts to carefully follow the rules imposed by the law for the admissibility of expert evidence. It is also important to resist the external pressures associated with the adversarial system. Our professional organizations and regulating bodies would probably gain by supporting the professional independence of their members. As independent professionals we should not accept to be muzzled by external pressures or threats. It is fundamental to preserve our professional independence if we want to respectfully accomplish our duty of honesty and of striving for objectivity [45-47] in our defined role to the court, to the administration of justice.

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