



## Do forensic practitioners distinguish between testifying and consulting experts? A pilot study<sup>☆</sup>

Thomas Gordon Gutheil<sup>\*</sup>, Michael Lamport Commons, Eric Y. Drogin, Mark J. Hauser,  
Patrice Marie Miller, Andrew Michael Richardson

Program in Psychiatry and the Law, Department of Psychiatry, Beth Israel Deaconess Medical Center, Harvard Medical School, United States

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### ABSTRACT

Forensic mental health professionals ( $n = 44$ ) reviewed a series of statements that an attorney might make to a consulting or testifying expert. Each statement was rated for its degree of appropriateness to either the consulting or the testifying role. In light of increasing attention paid to this topic in the forensic practice literature, as well as long-standing distinctions recognized by the legal profession, it was originally hypothesized that participants would differentiate clearly between these roles; however, results of this pilot study indicate that forensic practitioners do not possess a consistent sense of which activities rest most comfortably within testimonial as opposed to consulting duties.

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### 1. Introduction

According to *Black's Law Dictionary*, a “testifying expert” is one “identified by a party as a potential witness at trial” (Garner, 2009, p. 660). The testimony of such experts “may be subject to rigorous cross-examination,” as they are expected “not only to offer an opinion, but also to state grounds on which that opinion has been formulated” (Appelbaum & Gutheil, 2007, p. 281). Sources of ethical guidance for psychiatrists and psychologists alike emphasize the need for those functioning in this capacity to eschew partisan bias. For example, the *American Academy of Psychiatry and the Law's* (2005, p. 3) *Ethics Guidelines for the Practice of Forensic Psychiatry* stress the importance of minimizing “unintended bias” by “acting in an honest manner and striving to reach an objective opinion”, while the *American Psychological Association's* (2011, p. 3) newly revised *Specialty Guidelines for Forensic Psychologists* urge testifying experts to “strive to be unbiased and impartial, and avoid partisan presentation of unrepresentative, incomplete, or inaccurate evidence that might mislead finders of fact”.

In contrast, a “consulting expert” is one who, “though retained by a party, is not expected to be called as a witness at trial” (Garner, 2009, p. 660). This circumstance enables consulting experts to adopt a demonstrably partisan role, as their work is explicitly adjunctive to that of the retaining attorney. Consulting experts' work will

“support one side's attempts to prevail over the other in civil and criminal legal proceedings” (Drogin, 2010, p. 678), advising the retaining attorney on such matters as where to obtain qualified testifying experts and how to counter the efforts of experts retained by opposing counsel (Brodsky, 2009).

Although these are described as clearly distinguishable functions in theory, it is likely that some overlap inevitably occurs in practice, particularly when testifying experts undertake to aid the retaining attorney in understanding relevant data or in detecting conceptual or factual errors in the reasoning of the opposing expert (Commons, Miller, & Gutheil, 2004; Dattilio, Commons, Adams, Gutheil, & Sadoff, 2006; Gutheil, 2010; Gutheil & Simon, 2004). Complicating the issue further, it can plausibly be argued that every potentially testifying expert begins as a temporary consulting expert in the earliest phases of potential retention—a function that enables counsel to turn down scientifically driven cases as a poor prospect for success and, in effect, to “audition” potential testifying experts on the basis of informal perceptions. This short-lived, temporary consulting role, often based on preliminary data only, usually does not raise an ethics conflict, since it neither requires nor fosters the partisan role of the “full-time” consulting expert.

One possibility is that the allegedly sharp distinction between these two roles (Brodsky, 1999; Drogin & Barrett, 2007; Martindale, 2007) is essentially an academic subtlety, meaningful only in the abstract. To examine this possibility, we designed a questionnaire composed of a variety of statements—both straightforward and tendentious—that a retaining attorney might pose to a forensic mental health expert, and we asked subjects to indicate whether such statements fit best with the role of the “consultant expert” or that of the “testifying expert.”

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<sup>\*</sup> Corresponding author.

E-mail addresses: [gutheiltg@cs.com](mailto:gutheiltg@cs.com) (T.G. Gutheil), [commons@tiac.net](mailto:commons@tiac.net) (M.L. Commons).

## 2. Participants

There were a total of 44 participants in the study. Of these participants 27 (61.4%) were male and 16 (36.4%) were women, with the gender of one (2.3%) unreported. Reported ages ranged from 31 to 85 ( $M = 57.08$ ,  $S.D. = 14.66$ ) with 7 (15.9%) unreported and professional backgrounds varied considerably, though all participants possessed some form of graduate degree ( $M = \text{Ph.D.}$ ) (Table 1).

## 3. Instrument

26 questionnaire items were developed on the basis of the authors' individual experiences as testifying and consulting experts in civil and criminal cases. We attempted to identify items that would occupy a full spectrum of potential appropriateness or inappropriateness for either role—for example, we reasoned that an item such as “I would like you to review all of my client's prior evaluations” would constitute a request commonly fielded (and expected) by testifying as well as consulting experts, while an item such as “I would like you to help me gather some dirt on the opposing expert” would be sufficiently partisan and provocative to prompt a reaction on the part of those participants most inclined to view these roles as separate and distinct. At subsequent meetings of the Program in Psychiatry and the Law, members suggested modifications to the existing questions and proposed additional questions.

In the introduction to the questionnaire, we provided the following orienting description in order to ensure that participants would be aware of how consulting and testimonial roles might be distinguished:

Every expert witness begins his/her task as a consultant to the retaining attorney in reviewing a case. At a certain point an expert may go on to be a testifying witness who might or will appear in court. On other occasions the expert may continue as a consulting witness only, with the understanding that he/she will *not* testify in court but will function behind the scenes.

In order to avoid limiting participants to merely sorting the various statements in terms of their being “more” appropriate for testifying experts *as opposed to* consulting experts, we also provided the opportunity for participants to provide a separate appropriateness rating for each role, employing a Likert scale format:

Inappropriate for consultant		Appropriate for consultant
1	2	3
	4	5
		6
Inappropriate for testifying expert		Appropriate for testifying
1	2	3
	4	5
		6

Participants were asked to approach this task in the following fashion:

Below are a series of instructions or comments from a retaining attorney that might be made to you, a forensic practitioner, by a retaining attorney. For each of the following, please indicate by circling the number on the scale, whether the instruction given is suited to a behind-the-scenes consultant who will not testify or to an actual testifying expert.

**Table 1**

Participants by primary academic degree ( $n = 47$ ).

Degree	Frequency	Percentage
Ed.D.	1	2.3
M.A./MS	2	4.5
M.D.	10	22.7
Ph.D.	23	52.3
Psy.D.	6	13.6
Other	2	4.5

## 4. Procedure

Requests for participation were circulated on various professional discussion lists for forensic practitioners, including “Forensic-Psych” (forensic-psych@listserv.icors.org), “Forensic Specialty” (forensicspecialty@yahoogroups.com), “Program in Psychiatry and the Law” (pipatl@yahoogroups.com), and “Psylaw” (psylaw-l@listserv.unl.edu). Results were obtained via Survey Monkey (surveymonkey.com), an online questionnaire service.

## 5. Results

We hypothesized that participants would differentiate clearly between testifying and consulting roles by consistently rating some items as more appropriate for the former and some as more appropriate for the latter. In order to examine this hypothesis, we evaluated mean differences between the rated appropriateness of an activity for a consulting expert and for a testifying expert using *t*-tests. To examine whether the ratings were related, correlations were also calculated.

Our presentation of the results is grouped into four categories, based upon the outcomes of these two kinds of statistical tests (see Table 2). The first category consists of those items with both significant differences and significant correlations, listed in order of decreasing difference sizes (see Table 3.1). The second category consists of those items with significant differences, but without significant correlations, listed in order of decreasing difference sizes (see Table 3.2). The third category consists of those items without significant differences, but with significant correlations, listed in order of decreasing degrees of correlation (see Table 3.3). The fourth category consists of those items without significant differences or significant correlations, listed in order of decreasing degrees of correlation (see Table 3.4).

### 5.1. Category 1: significant differences, significant correlations

Ten of the 26 items (38.64%) fell within this initial category. All of these items were rated as being significantly more appropriate for consulting experts than for testifying experts, with mean differences between  $+0.89$  and  $+1.66$ . Note that in this group the standard deviations of the means were relatively small, suggesting a general unanimity of opinion. These items were also significantly and positively correlated with each other, implying consensus. In other words, participants who rated the item as very appropriate for consulting experts tended to rate the same item as very appropriate for

**Table 2**

Definition of categories.

	Significant difference	No significant difference
Significant correlation	Category 1	Category 3
No significant correlation	Category 2	Category 4

**Table 3.1**  
Category I: significant differences, significant correlations.

Item	Textual excerpt	Consulting	Testifying	Difference	r
		Mean (SD)	Mean (SD)		
5	Review the opposing expert's articles and see if there's anything on which to cross-examine	5.52 (0.85)	3.86 (1.90)	1.66	.348
4	Critique the other expert's opinion	5.51 (0.96)	4.09 (1.94)	1.47	.498
2	Help me gather some dirt on the opposing expert	3.02 (1.87)	1.89 (1.43)	1.14	.620
15	Review the entire hospital file in this case and evaluate their staffing practices	5.05 (1.43)	3.95 (2.02)	1.09	.604
7	Do some pie charts of the percentages of risk in these situations	5.12 (1.44)	4.07 (1.70)	1.05	.496
12	Determine what mental health theory would be most appropriate in this case	5.43 (1.15)	4.41 (1.77)	1.02	.483
9	Figure out why the opposing expert reached that opinion	5.45 (0.90)	4.50 (1.73)	0.95	.551
16	Tell me about your experiences in this court, and with this judge	5.11 (1.42)	4.23 (1.76)	0.89	.575
21	Tell me what experts typically charge in cases like my client's	4.64 (1.73)	3.95 (1.92)	0.69	.691
22	Show me how I can prepare my client to respond honestly and validly to your evaluation questions	3.65 (2.00)	2.98 (1.97)	0.68	.563

testifying experts (although, as shown by the *t*-tests, somewhat less appropriate). Responses to these items conveyed the perspective that a consulting expert's role is primarily about advising the attorney about opposing experts, judges, and the like, with additional attention to developing case theories and aiding in the preparation of demonstrative evidence.

Item 2, with its focus on gathering "dirt" on the opposing expert, was the most provocatively and tendentiously worded, resulting in the low ratings, implying that it is inappropriate for both roles but even worse for the testifying expert role. In contrast, Item 5, with its

**Table 3.2**  
Category II: significant differences, non-significant correlations.

Item	Textual excerpt	Consulting	Testifying	Difference	r
		Mean (SD)	Mean (SD)		
18	Describe the ideal expert witness in this case	5.40 (0.96)	3.23 (1.87)	2.17	.273
1	Help me design a suicide risk list as demonstrative evidence for this malpractice case	5.07 (1.28)	3.02 (1.84)	2.05	.236
25	Tell me if I should allow my client to engage in therapy prior to trial	5.00 (1.45)	3.00 (1.84)	2.00	.230
13	Evaluate my client's mental health status	3.80 (2.15)	5.72 (0.83)	−1.93	−.135
6	Outline the questions for direct testimony in this case	5.32 (1.12)	4.26 (1.75)	1.10	.344
17	Tell me if I should accept this plea offer, based on what you're likely to say on the stand	2.98 (1.72)	2.28 (1.66)	0.70	.227
8	Determine how you can be more persuasive than the opposing expert	4.00 (1.86)	3.33 (1.58)	0.67	.220
14	Tell me if a mental health evaluation seems necessary in this case	5.57 (0.97)	4.91 (1.51)	0.66	.244

**Table 3.3**  
Category III: non-significant differences, significant correlations.

Item	Textual excerpt	Consulting	Testifying	Difference	r
		Mean (SD)	Mean (SD)		
20	Explain how you and the opposing expert reached the same diagnosis of my client	4.70 (1.74)	5.13 (1.45)	−0.43	.344
19	Tell me whom I should hire if it turns out you are not available as an expert	5.05 (1.26)	4.68 (1.49)	0.38	.568
24	Tell me whether I should call you as a witness at trial	4.08 (1.99)	3.70 (1.86)	0.38	.526
26	Identify potential vulnerabilities of your opinion on cross examination	5.18 (1.47)	5.25 (1.41)	−0.08	.351
23	I would like your honest opinion on how I conducted your direct examination this morning	4.79 (1.75)	4.88 (1.60)	−0.08	.445

focus on obtaining material from the opposing expert's writings for cross examination, might be seen as the "clean" version of this task.

### 5.2. Category II: significant differences, non-significant correlations

Eight of the 26 items (30.77%) fell within this second category. Marked by significant differences between items but non-significant correlations, this collection of results would be most consistent with the original hypothesis. The means of these items show that participants rated seven out of eight of them (87.5%) as significantly more appropriate for consulting experts than for testifying experts. Note that the range of the mean differences for these five items was larger than for the previous group, ranging from +0.66 at the low end to +2.17 at the high end. Also, none of the ratings for these eight items was significantly correlated, such that the majority of participants gave different ratings for consulting experts versus testifying experts.

Overall, these outcomes provide only partial support for the hypothesis that there is a difference in what participants feel is appropriate for a consulting expert versus a testifying expert—at least with reference to these particular activities.

### 5.3. Category III: non-significant differences, significant correlations

Five of the 26 items (19.23%) fell within this third category. Marked by non-significant differences between items but significant correlations, this collection of results would be most inconsistent with the original hypothesis. The means of these items show that participants rated three out of five of them (60.00%) as more appropriate for testifying experts than for consulting experts, but there was not a significant difference between the ratings. Note that the mean differences for these five items were very small compared to the other groups, ranging from +0.08 at the low end to 0.43 at the

**Table 3.4**  
Category IV: non-significant differences, non-significant correlations.

Item	Textual excerpt	Consulting	Testifying	Difference	r
		Mean (SD)	Mean (SD)		
3	Try to persuade the jury that this outcome was not the defendant's fault	3.16 (1.82)	2.55 (1.73)	0.61	.134
10	Review all of my client's prior evaluations	5.61 (0.95)	5.36 (1.20)	0.25	.188
11	Evaluate my client and let me know if we need any additional experts	4.79 (1.73)	4.91 (1.65)	−0.12	.194

high end. These items were also significantly and positively correlated with each other, implying consensus. In other words, participants who rated the item as very appropriate for consulting experts tended to rate the same item as very appropriate for testifying experts.

#### 5.4. Category IV: non-significant differences, non-significant correlations

Three of the 26 items (11.54%) fell within this fourth and final category. Results here included neither significant differences nor significant correlations between items. Four items showed slightly higher ratings for consulting experts, while only one item showed a higher rating for testifying experts. The correlations were positive, but again, non-significant.

These items might be styled a lawyer's "wish list," since a number of the items seemed not only to represent counsel's hoping that the expert would make some of the legal decisions ("I would like you to tell me whether I should call you as a witness at trial"), but also that the expert would perform tasks of an overall unrealistic nature ("I would like you to try to persuade the jury that this outcome was not the defendant's fault").

In sum, among the first 14 items in the table, 13 were judged to be significantly more appropriate for consulting experts than for testifying experts. Among the remaining 12 items, while they were often rated as somewhat more appropriate for consulting experts, these differences were not significant.

## 6. Discussion

The legal profession has recognized a distinction between testifying and consulting roles for many years. The Supreme Court of the United States opined in *Ake v. Oklahoma* (1985) that affording capital murder defendants access to "consultants" as well as "witnesses" (p. 81) – particularly in the light of the former's ability to "assist in preparing the cross-examination of a State's psychiatric witnesses" (p. 82) – was critical to an appropriately level playing field in such cases.

The American Bar Association (1989) has since promulgated Criminal Justice Mental Health Standards that seek to distinguish between the "roles of mental health and mental retardation professionals in the criminal process," and that emphasize how those serving in "evaluative roles" as opposed to consulting ones have "an obligation to make a thorough assessment based on sound evaluative methods and to reach an objective opinion on each specific matter referred for evaluation" (§7–1.1(b)).

In light of this long-standing guidance from the legal profession, what can be inferred from the results of this pilot study? There are a number of possible interpretations. First, almost every expert starts out as a temporary consultant. Then, for some, the roles shift after the witness is retained to testify. This means that, for many items, the consulting role is embedded in the testifying role. This fact may account for why the consultant values are higher in the first results;

in addition, the consultant is generally given wider latitude in choice of tasks and decisions.

Respondents may also be influenced by a sense of where their duties lie: to whom is the respondent primarily responsible? Possibilities include the judge, the jury, the examinee, the retaining attorney, the witness's personal ideology or ethics code, the witness's notions of professionalism, the expected effect on future employment, and identification with others' professional roles.

## 7. Conclusions

From the discussion above it is clear that some authorities in the literature and in the guidelines of interested clinical and legal organizations do distinguish between the consulting and testifying roles. Our own data derived from practitioners, however, suggest: some of the questionnaire statements reasonably well distinguished between these roles; others did not. All possible outcomes were observed: the rating of roles of experts and consulting experts was either significantly different or not, significantly correlated or not and all combinations of both. We did not see a pattern as to which items fell into each of the four possible groups.

In sum, then, only some issues bring out a distinction between consulting and testifying expert. These issues tend to involve practical advice to the attorney, focus on the opposing expert and use of the witness's clinical skills.

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