Ethical Considerations for Expert Witnesses in Forensic Linguistics

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In connection with an undergraduate course that I teach on linguistics and the law, I recently visited a department of the Los Angeles County Criminal Courts and took a seat in the gallery. Immediately, the bailiff inquired whether I was in the courtroom as a witness and permitted me to remain, disregarding my apparent image as an Irish cop come to testify. The bailiff then returned to his own activities, including playful interaction with a five-year-old boy I presumed to be related to the defendant sitting nearby.

On the witness stand a police officer was answering questions from the prosecutor. The officer testified that the defendant had been arrested after the officer saw him laying a fully loaded semi-automatic handgun on the ground as police arrived in response to a telephone complaint. Following a brief cross examination, the officer stepped down from the witness stand.

At that point the judge announced that a jury from a previous trial in his department had just reached a verdict, so he temporarily dispatched the gun defendant, the gun jury, the prosecutor and defense attorney, summoning in their place an entirely different cast of characters from the previous trial and soliciting the jury's verdict. Unsatisfied with certain technicalities in the finding, however, the judge reinstructed the jury and ordered its members to complete their deliberations.

Meanwhile, noticing his gallery filling up with a group of observers whom he correctly assumed to be students with a mentor, the judge invited us into his chambers. The exchange that followed permitted my students, apropos of what they had witnessed, to ask questions about the challenges of jury instructions, a subject we had

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tackled in class, and other matters that had piqued their interest in his courtroom. The judge was informal in his demeanor, engaging and candid in his interaction, and charmingly personal about his law school days and about being a judge.

When the deliberating jury's buzz signaled that the jurors had reached a verdict, all of us returned to the courtroom, only to learn that they had still not followed instructions and needed once again to deliberate. While awaiting the verdict this time, the judge reconvened the case I had originally encountered that afternoon, the case that is the central focus of our discussion here. He summoned the original players—police officer, defendant, prosecutor, defense counsel, and jurors. My students were riveted by the shifting sets and convoluted legal stagings, but neither they nor I anticipated the drama that lay ahead.

In the course of the comings and goings in the courtroom, I had noticed that the defendant in the handgun case was blind, and I surmised, in light of the police officer's soft testimony and the extreme nature of the defendant's handicap, that the jury was unlikely to convict a blind man of what was after all a victimless crime. When I whispered my observation to a few students sitting near me, they expressed initial surprise and then confirmed that the defendant was indeed blind.

With the police officer as its sole witness, the state rested its case, and the defense called as its first witness a young woman whose function was to testify as to the defendant's blindness. She identified herself as the mother of the defendant's child, not the boy playing with the bailiff but another one. In the event, it proved impossible for the defense to lay an acceptable foundation for the testimony of this witness, so the judge excused her and directed the jury to disregard what little she had said and to avoid speculation about those aspects of her testimony she had not been given leave to express. I thought the failure could be of little consequence because, in my view, testimony about the defendant's blindness would have carried proverbial coals to Newcastle.

As its next witness, the defense called the defendant himself. Neatly dressed and courtroom presentable, a young father whose son was playing with the bailiff, the blind man reported that at the time of his arrest he had been standing with a group of friends when the police arrived and that someone fleeing had pushed a gun at him. He said he instinctively grabbed what was pushed at him and laid it down immediately upon realizing what he was holding. I found his

story credible, and so did my students. In fact, on the basis of the defendant's simple and direct account, I wondered why such a case had been brought to trial in a city troubled by widespread crime more serious than this appeared to be.

Under cross examination, the defendant was made to act out his story while standing down from the witness stand. The badgering manner that the prosecutor used in his interrogation solidified my sympathy for the defendant, and it had a similar effect on my students. We found it distressing to see the prosecutor questioning the witness's manifest blindness eye by eye, and we felt uncomfortable when the prosecutor smirked in our direction following questions he apparently regarded as devasting or answers he regarded as preposterous. Upon an objection by the defense counsel, the judge directed the prosecutor to stop badgering the witness. (Secretly, I cheered.) At this point, once again, the jury deliberating off stage signaled that they had reached a verdict. Noting the late hour, the judge excused the gun jury for the weekend and completed his business with the other jury, whereupon they too were excused.

With the courtroom cleared of both juries, the blind defendant through his attorney now sought to have the judge reconsider an order remanding him to jail for the weekend, an order intended to ensure the defendant's presence at the resumption of trial on Monday morning. Before permitting the defendant to make his appeal, the judge warned that he did not want to hear any lies such as those he had been hearing and had heard during a previous trial in which the same blind defendant stood accused of murder. "But, Your Honor, I beat that rap," quipped the defendant from his table, only to be answered by a sharp retort from the judge: "Because I cut you a lot of slack!" My students and I froze in our seats.

The judge then reprimanded the defendant for being five hours late to court that day, costing the taxpayers thousands of dollars and keeping the jury and alternates waiting impatiently. When he asked, with obvious irritation, what had caused the delay, the defendant explained that he had gone to fetch his five-year-old son from the boy's mother, intending to deliver him to day care before proceeding to court. To this the earlier failed witness interjected from her seat in the gallery that the five-year-old's mother, out of control, had stabbed the defendant in the hand; taking care of the wound caused the delay. "Wait," said the judge

incredulously to the blind man: "YOU were picking up your son to drop him off at day care? WHO was driving?"

For our purposes here I needn't continue the story, except to report that the judge did remand the defendant and to add a curious detail. As this part of the proceedings wound down, another gallery visitor (possibly himself an assistant district attorney) audibly informed the prosecutor that, though he himself would be unwilling to testify in the matter, he had reason to believe the defendant was at least partly sighted. He reported that they had ridden the elevator together that afternoon and he had observed the defendant finding his way around the courthouse without assistance of any sort.

A vague dizziness engulfed me as a young blind father whom I couldn't believe the state was trying on such little ground was transformed before my eyes into a manipulative thug who deserved to be detained over the weekend and whom I wouldn't trust to give me directions to a gas station. Admittedly, I don't know which view of the defendant (if either) might be accurate. What matters, in any case, is that a lesson can be drawn from these events about the perils of expert witnessing and that lesson is the point of telling the story.

In a trial such as the handgun trial, jurors get to see and hear only part of a story. They do get to see and hear two sides of it, though. Expert witnesses, by contrast, are given access to significantly less of the story, and what they get comes only from the partisan advocates who pay them. If it ever happens at all, it must be extraordinarily rare for experts to know for certain that they are retained by an innocent party. Our Anglo-American legal system is committed to providing defendants a fair trial and, by way of acknowledging everyone's limited knowledge of events, insists on viewing defendants as "innocent until proven guilty." Such a neutral view, though, can prove a challenge for an expert witness to maintain.

In my experience as an expert witness and consultant, a typical involvement begins with a telephone call from an attorney (or prosecutor). The caller is representing (or prosecuting) someone about whom I know nothing at all, and the attorney provides some information about a case nearing a trial date, sometimes naming an expert already identified on the opposing side. The caller typically asks whether hers is the kind of case in which I have expertise and, if so, whether I might be willing to consider serving as an expert.

With an attorney offering a linguist the possibility of serving justice by solving linguistic puzzles and explaining to others how certain complicated aspects of language really work (and offering handsome fees for doing so), it is easy to say, "Send me the material, and I'll have a look." "What's your fax number?" the attorney inquires, or "Where can I have the material messengered?" It seems straightforward enough. From what the caller has said, her client appears to be innocent or, in a civil matter, to have a just cause.

Before the materials arrive, then, I've been supplied a frame in which to view them. I've been told the story. More accurately, I've been told a story and, more accurately still, half a story. In fact, of course, I've heard quite a bit less than half a story and almost certainly one that differs markedly from what the expert on the other side hears. Imagine how different would be the three stories of the defendant laying down the loaded semi-automatic if they were provided to me by the prosecutor, the defense counsel, or the judge (had he been acting as an advocate). In all cases, it is safe to assume, my frame differs from the one the linguist on the other side has been given before he or she agreed to look at the materials, only some of which would be the same as mine.

In typical cases, I examine the material sent by the attorney in order to make an initial assessment as to whether I have expertise and something enlightening to report. Not surprisingly, many times I find that I can be of assistance. "I'm delighted," the attorney says when she learns of my willingness to serve as a consultant or an expert. "I've never worked with a linguist before, and I look forward to working with you; you seem to understand the issues and you sound like an honest person. We're glad to have you aboard." The attorney agrees to send additional material, and we agree to talk in a few days.

Sometimes the material sent contains a report, declaration, or deposition by an opposing expert and, typically, it reveals good sense, makes some telling observations, and highlights some significant findings. In addition, often, it may show logical gaps, have overlooked or misinterpreted critical data, or even be perplexingly wrongheaded in places. Sometimes, the linguist appears to have addressed matters lying beyond what I would regard as linguistic expertise—opining perhaps on matters of typical typewriting habits, or psychological association of ideas, or how people think when they read assembling instructions for pool tables.

(About the complementary judgment that an opposing expert witness might make about reports of mine, I trust it is clear that implicit in my argument is the recognition that sufficient objectivity would certainly cast my own analyses well within the unfavorable generalizations I have just made.)

From the reports and declarations I have read (including several of my own), I recognize how easy it is for linguists serving as expert witnesses to believe that, if justice has any meaning, the party retaining them in a criminal case is in the right or, in a civil case, should prevail. In other words, on the basis of half a story told by a distinctly interested advocate, and in the absence of most information about a counter view, linguists serving as expert witnesses sometimes seem inclined to view themselves as working not *on behalf of justice*, but *on the side of justice*, and *against injustice*. This view, of course, is naive and it risks being unethical.

The safest ethical stance for an expert to take concerning the justness of a party on whose behalf he or she is rendering an expert opinion is one of skepticism. Ethically, experts should remain skeptical of the justness of the side retaining them. Indeed, in an ideal world it would be the court that contacted and retained an expert witness, as Roger Shuy rightly notes in *Language Crimes* (1993), and technically it is for the trier of fact—and not for any party to an action—that an expert renders an opinion. But in practice the frame in which a linguistics expert works is gilded or tarnished by a partisan advocate, who also negotiates the fee and picks up the tab.

I don't want to be misunderstood on this matter. I am not recommending that an expert opinion should itself be skeptical. Rather, I am saying that it is critical for an expert to draw a clear distinction between the matter on which an opinion is solicited and the overall rightness of the cause in which the opinion plays a part. In principle, the job of an expert is to clarify and enlighten specific issues for the trier of fact, and experts must take care not to be drawn unawares into partisan advocacy.

Consider that a contract or insurance policy about whose language an expert renders the opinion that it would be incomprehensible to a person of ordinary intelligence might very well have been understood fully by the party retaining him but keen for self-interested reasons to demonstrate the contract's opacity. Consider that within a contract a clause that an expert can legitimately construe as ambiguous might in fact have been

understood at signing in identical ways by all the signatories. Consider that an incriminatory interpretation of a taped discussion on the basis of which a prosecutor wishes to argue intent to defraud the government or solicit a bribe may be legitimately undermined by an expert on behalf of a defendant who in fact intended to defraud the government or solicit a bribe. Consider that, irrespective of whether or not the interlocutors engaged in a criminal conspiracy, a recorded conversation introduced into a trial and purporting to prove a conspiracy can sometimes legitimately be shown unable to prove a conspiracy. In other words, it is one thing to demonstrate that a particular argument is riddled with holes or a piece of evidence fails to demonstrate what it purports to demonstrate; it is quite another thing to determine the righteousness—the guilt or innocence—of any party's claim.

In our system of justice, it is the duty exclusively of the trier of fact to determine who prevails in a civil cause of action and to reckon guilt or innocence in criminal actions. Deciding who prevails is neither the responsibility nor the prerogative of an expert, who is in a particularly disadvantageous position from which to ascertain the facts and the overall merits of a case. Determining facts is a complicated and challenging process, requiring extensive investigation and costly discovery. Inevitably, juries and judges charged with determining issues of fact have more information than any single expert could have, and they have significantly more knowledge of the facts by trial's end than a partisan advocate could have provided an expert before the start of trial, even assuming an intention to be candid. It is the duty of an expert witness only to render an opinion, typically about a relatively narrow aspect of a case, however important that aspect may be in determining the eventual outcome of the case.

Before a jury reaches its verdict, an expert witness who permits himself to believe that he is working on the side of justice (rather than on its behalf) runs a serious risk of compromising professional expertise within the highly partisan activities of advocacy constituting the American judicial system. Ordinarily, no determination about innocence or righteousness can be justified by the information an expert has access to.

Neither can a linguist, having rendered an expert opinion, take pride in success simply because the jury finds in favor of the client who paid his fee, nor feel he has failed if the jury finds otherwise. Expert testimony, carefully crafted and objectively

rendered, will have advanced the cause of justice, no matter the outcome. For experts to short-circuit the trial process by allowing themselves to believe that they serve a righteous client is to preempt the trier of fact and compromise the cause of justice they are ethically committed to assist.

It is useful for experts to recall that defense attorneys do not often ask clients whether they are guilty or innocent of the charges laid. It's sobering, too, to bear in mind that prosecutors regard successful trials as those that result in convictions, while defense attorneys measure success by acquittals. It probably goes without saying that civil attorneys are determined to prevail for their clients, not only for the sake of financial gain and collegial repute but because they have an obligation to do their very best; however, it bears underscoring that doing the best for a client may entail an attorney's withholding from an expert certain matters that are known about a case.

Faced with opportunities for giving expert testimony for fifteen years, challenged occasionally by colleagues troubled about the ethics of working for clients whose righteousness is unclear, and having heard colleagues aver that they would never work for a client whose righteousness or innocence they weren't fully convinced of, I have had occasion to weigh certain ethical considerations surrounding expert witnesssing in forensic linguistics, and I have had to formulate some guidelines for myself. They are designed to keep me aware of some of the snares of our partisan system, while allowing me to offer testimony on behalf of litigants whose righteousness I cannot know until a trier of fact decides the matter.

1. Don't allow yourself to believe that a lawyer has told you all she knows of a case or, for that matter, that she knows all there is to know, including who's right or innocent.

2. Distinguish carefully between your roles as expert witness and as consultant. To the attorney who has retained your services these roles may be indistinct. But for the expert these roles must remain separate because as a consultant you serve the client and the client's cause, whereas as an expert witness you serve the court and the cause of justice.

3. Consistently conduct yourself in your analysis and reporting as though opposing counsel had retained a linguist

shrewder and more insightful than you, a linguist whose task (as consultant) may be to review your analysis and declarations, your curriculum vitae and publications, and your previous testimony and public statements, so as to provide her retainers with the most challenging and damaging questions with which to depose and cross-examine you. Be mindful that her implicit task may be to discredit your methodology, provide counterexamples to your generalizations, and perhaps raise questions about your suitability for the task at hand.

4. Recognize that certain questions will not be asked of you in direct examination because your retainers can anticipate your replies and may not wish a trier of fact to hear them. But those questions may well arise in depositions or cross examination and an ethical expert must be prepared to inform a trier of fact both expertly and honestly, no matter the question.

Keeping such guidelines in mind cannot guarantee ethical behavior on an expert's part, of course. But attending to them helps structure a degree of awareness with respect to the adversarial nature of the American judicial system. That awareness, in turn, can help avoid unwittingly unethical behavior by linguists disposed to put their expert knowlege to work in the service of justice but unaccustomed to the adversarial character of the American judicial system.

REFERENCE

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