# Social Workers and the Witness Role: Ethics, Laws and Roles

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**Abstract**
Social workers have increasingly gained acceptance as expert witnesses over the past two decades, although they have long informed the court about cases in which they were involved. To serve their clients and communities effectively, social workers must keep abreast of the often-changing laws and ethics of the witness role. This article clarifies the differences among the various witnessing roles that social workers assume, explores the ethical and legal requirements for performing those roles, and discusses recent changes in standards of evidence accepted at the federal level.
*Key Words:* testimony, courts, experts, ethics, social work law

## Introduction

Social workers have a long history of providing testimony in court, particularly in Family Court proceedings. Gothard (1989) noted that prior to 1980, few courts accepted expert testimony by social workers, and when they did, it was almost always to address child protection or custody issues. This has changed in the past two decades (NASW, 1998), but the change has brought liability risks for social workers who claim expertise inappropriately or who fail to observe either the law or their ethical obligations to clients. This paper will differentiate among the various witnessing roles that can be held by social workers and suggest areas of the law and ethics with which social workers should be familiar in order to maximize their effectiveness on the witness stand and avoid the risk of malpractice.

## Legal Status of Social Workers as Experts

Prior to 1996, the states differed vastly as to whether, and under what circumstances, social workers were granted the right to act as expert witnesses (Gothard, 1989). In 1996 the U. S. Supreme Court, in *Jaffe v. Redmond*, granted social workers parity with other mental health professionals, effectively permitting them to act as experts in court. *Jaffe v. Redmond* further stated that, because the mental health professions are more alike than different, the highest practice standards adopted by anyone apply to all (Jaffee v. Redmond, 1996; NASW, 1998).

State courts do not have to comply with federal rulings due to jurisdictional differences and states' rights. If they do not, however, decisions can be reversed on appeal to federal courts.

Most states had accepted social workers as experts before the federal courts did. Yet, because *Jaffe v. Redmond* increased the grounds for, and therefore the likelihood of, appeals to federal courts, most courts now consider social worker expert witnesses on case-by-case bases, rather than rejecting them outright based upon their professional status alone. As a result, social workers have increasingly testified in a broad variety of cases over the past two decades, including not only child welfare (Gyurci, 1989), but mitigation in capital sentencing (Andrews 1991), victimization and trauma (Gothard, 1989; NASW, 1998; Schultz, 1990), alcoholism (van Wormer, 1988), forensics, commitment hearings, education (Pollock, 2003b), and myriad other issues.

By gaining parity with other mental health professionals, social workers also are by analogy held to the same standards as other mental health professionals, which the courts have interpreted as the highest standard of any mental health profession (NASW, 1998). That means, for instance, that because psychologists but not social workers have developed guidelines for forensic investigations and testimony (Annon, 1996), social workers who conduct forensic investigations or testify about them are held to the psychologists' standards.

**Witnessing Roles**

If social workers (and others) are unclear about the role of social workers as expert witnesses, one reason is that social workers have traditionally provided accounts of home visits, observation of injuries and other similar testimony in court. This is not expert testimony, but the same kind of testimony that any lay person can provide to the court in the role of fact witness (more commonly, but less accurately, referred to as an eyewitness).

One criterion that sets expert testimony apart from fact witness testimony is that only expert witnesses can draw conclusions, offer opinions based on hypothetical circumstances or interpret factual evidence (Barsky & Gould, 2002; Schroeder, 1995). Another is that experts always appear in court voluntarily, while a fact witness can be subpoenaed and compelled to offer testimony. In addition, experts charge fees for court appearances, while fact witnesses are obligated to testify– as professionals and as citizens (Barker & Branson, 2000).

A particularly significant difference is that each time professionals testify as experts, they must undergo a *voir dire* examination to ensure that their expertise matches the facts in need of expert interpretation. However, it is up to the judge in the case to determine whether a particular expert passes a given *voir dire*. The judge's determination often is affected by the opposing attorneys' arguments for and against the need for expertise in the case, the match between the

needs of the case and the background of the expert and the judge's attitudes and experiences with experts (Barsky & Gould, 2002; Madden, 1998).

**Treating Therapists as Experts**

A confusing aspect of expert testimony is that some courts accept treating therapists as experts in cases involving their own clients (Linhorst & Turner, 1999; Madden, 1998). Therapy is based on relationship; thus, any therapist who has treated an individual for enough time to testify may be too biased to act as an expert in that patient's case (Strasburger, Gutheil & Brodsky, 1997). Furthermore, few treating therapists have the skills or training required of court experts, which include understanding the expert role, understanding how that role differs depending upon whose behalf the expert is testifying, and most important, having the expertise to be fully knowledgeable about the research in the area in which testimony is being offered.

Miller (1990) considers this separation of treating therapist and expert witness to be unworkable and inadvisable, given that many mental health professionals do not hold roles that are purely therapeutic. He cites workers in public inpatient facilities who offer limited confidentiality and who are accountable to the public rather than to their clients alone, clients dealing with extra psychic problems who expect workers to influence systems impinging on their functioning and the limited services sometimes afforded by professionals due to managed care.

However, when workers perform the roles of both treater and expert in the same case they are sometimes referred to as "sanitized" expert witnesses—and why does anything need to be sanitized unless it is essentially dirty? This is more than a semantic, or even an ethical, characterization. Treating therapists who act as "sanitized" expert witnesses expose their clients to the likelihood of mistrials or appeals based upon their dual roles (Mason, 1992), due to their inherent incompatibility (Strasburger, Gutheil & Brodsky, 1997); and expose themselves to charges of ethics violations (Appelbaum, 1997). For this reason, Stone (1983) suggests that a potential expert should withdraw from that role the moment that an evaluation crosses the line into a therapeutic encounter. Similarly, therapists should, even if qualified, never provide expert testimony about a client they treated in the past.

Although the American Psychological Association permits its members to perform both roles if they clarify role expectations, the American Psychology-Law Society, the professional subgroup for forensic experts, considers performing both roles to present a professional conflict of interest, while the American Academy of Psychiatry and Law, the professional subgroup for forensic psychiatrists, opposes the practice even more vehemently (Strasburger, Gutheil &

Brodsky, 1997). Similarly, the National Association of Social Workers does not address this issue specifically but considers unavoidable dual relationships of any kind to be a violation of its *Code of Ethics* (NASW, 1996). Serving as both a treating therapist and an expert in the same case, then, clearly violates the *NASW Code*. In addition, because *Jaffee v. Redmond* (1996) holds all mental health professionals to the highest standard of *any*, it appears that social workers would be wise to avoid dual relationships as witnesses in court (Weinstock & Garrick, 1983). For instance, in one case, a mental health professional who originally acted as a fact witness but was pressured to testify as an expert, was later successfully sued for negligence for failing to carry out the investigatory tasks required of an expert (*Althaus v. Cohen & WPIC*, 1992).

**The Ethics of Client Identification in Court Testimony**

The law permits either party in a civil or criminal matter, or the court itself, to retain expert witnesses. Regardless of who hires the expert, in custody and child welfare cases the best interests of the child always predominate (Madden, 1998). That is to say that in such cases, no matter who selects the expert or pays the expert's fee, professional ethics dictate that the expert must always work on behalf of the child.

It is vital, particularly in such cases, that social workers make these facts clear to their clients and others that they interview in the course of evaluation. Such actions are dictated by the *Code of Ethics'* mandates in regard to client confidentiality and informed consent. It is best, in fact, to provide clients with a written document that both parties sign, which provides information about the social worker's role in evaluation and testimony, and the limits to privileged communication in these cases (Houston-Vega, Nuehring & Daguio, 1997). Courts recognize that mental health professionals conducting court-ordered evaluations are not subject to privilege rules (Pollack, 2003a; State v. Bush, 1994). However, mental health professionals can be held liable for failing to properly inform clients of the limits of confidentiality in such cases. In fact, a psychologist recently lost an appeal in New Jersey in which she violated privilege in response to a court order, because she had neither obtained the client's permission to divulge information nor forced the court to compel her testimony (Ackermann, 1999).

**The Ethics of Responding to a Subpoena**

NASW (1997a) anticipated such concerns when it issued guidelines on social worker response to subpoenas. The directive, *Social Workers and Subpoenas*, notes that social workers must respond to subpoenas but that they should try to obtain client permission before releasing data, and unless they receive permission, should file legal objections before making privileged

information available to the court. This mitigates between social workers' obligations to maintain client confidentiality, provide for informed consent, and comply with the law.

There is no clear standard regarding when or under what circumstances a court will require a social worker to waive privilege. *Jaffe v. Redmond* upheld social worker privilege in a murder case, although violent crimes are among the more frequent circumstances in which privilege is waived. On the other hand, in *Polotzola v. Missouri Pacific Railroad* the court found that privilege could not be maintained if a client sought to claim damages for emotional suffering (Pollack, 2003a; Polotzola v. Missouri Pacific Railroad, 1992), presumably because mental health records were the best evidence to support the client's claim.

Professional ethics and most state licensing law, however, require that social workers resist releasing information unless clients waive privilege or until a court forces them to do otherwise after all legal forms of resistance have been exercised (Shroeder, 1995). In fact, this is the only way to avoid the possibility of malpractice charges. Even if a court requires that privileged information be divulged, social workers can request *in camera* inspection of records (review by the judge in chambers) to ensure that the information contained in them is necessary to the case, as established in *Commonwealth of Massachusetts v. Bishop* (1988); Pollack, 1997). Furthermore, social workers need only to respond to specific questions about information contained in their records, not provide the entire record to the court (Kagle, 1991).

**The History of Legal Standards for Experts**

Experts have been used in law since the fourteenth century (Hand, 1901). However, until the 20th Century, courts did not impose greater standards on expert testimony than on that of other witnesses (Weinstein, 1986). Then in 1923, federal courts introduced the *Frye* test for the admissibility of evidence. The *Frye* test used a two-step approach, requiring judges to first identify the scientific field of the testimony, then to determine that the principle to be introduced into evidence was generally accepted by scientists in the field (Puzniak, 2000), to ensure that given experts' theories met general acceptance within their disciplines (Hjelt, 2000). *Frye* was the subject of sporadic criticism over its seventy-year life span, as being unduly restrictive of newly developed knowledge (Locke, 1996).

In 1993, the U. S. Supreme Court altered its standard of evidence. The new *Daubert* rule, which replaced *Frye,* ostensibly determined admissibility based upon whether the underlying reasoning and methodology of the testimony is scientifically valid and can properly be applied to

the facts at issue. To make these determinations, the Court suggested four general, nonexclusive factors:

- Whether the theory can be (or has been) tested.
- Whether it has been subjected to peer review and publication.
- Whether it has a known or potential error rate.
- Whether it has gained wide acceptance within the relevant scientific community (Locke, 1996).

Courts varied in how they interpreted *Daubert*. Some allowed expert testimony and scientific evidence without strict adherence to the criteria, and were criticized for promoting "expert-shopping," litigation-based research, and jury verdicts based on unreliable evidence (Locke, 1996). *Daubert* required that judges become more involved in assessing the reliability of experts' credentials and scientific theories, but not all judges were qualified to do this. In fact, few judges knew enough about the mental health professions to be able to evaluate expertise effectively. For instance, some judges assumed that the fact that mental health professionals have doctoral degrees ensures that they understand and have conducted independent research. However, fewer than 3% of the nation's colleges and universities are considered research universities, and more than half of the research and development funds in higher education are allocated to only forty institutions; although nearly 500 institutions offer Ph.D. degrees, and faculty members increasingly define a broad range of scholarly work as research (Straus, 1997).

On the other hand, some judges became extremely conscientious in response to *Daubert*. In one case, the judge hired his own experts; but in many other cases, judges simply refused to allow expert witnesses to testify (Schmitt, 1997). The Supreme Court supported such reticence, adding in an opinion to *Daubert* that, "A court may conclude that there is simply too great an analytic gap between the data and the opinion offered," according to Chief Justice William Rehnquist (Murray, 1998, 41).

In response, the American Association for the Advancement of Science is experimenting with providing the courts with candidates qualified to serve as neutral experts. The experts on this list represent science rather than any specific plaintiff or defendant. They are available to judges trying complex cases involving any form of scientific knowledge (Goodman, 1998).

Given the temporal proximity of *Daubert* and *Jaffe v. Redmond*, it is not surprising that many of the cases that created the most controversy during the *Daubert* period related to mental health and other aspects of the social sciences. Despite claims of "scientific rigor" in much social science research, it became clear during the successful appeals of a number of cases in which

defendants were determined guilty largely on the testimony of "experts," that the *Daubert* rules were poor screens for scientific evidence (Nathan and Snedeker, 1995; Pendergrast, 1995; Wexler, 1990). What stood for tests of theory were often far from rigorous; peer review and publication in at least some professional journals depended more on holding opinions in common with the editors than in having used appropriate research methodology; without rigorous methodology, known and potential error rates were based on fiction; and wide acceptance within the relevant scientific community was sometimes interpreted so loosely that only those professionals with common belief systems were seen as members of the *relevant* community (with *scientific* interpreted even more loosely).

**Current Legal Standards for Experts**

As a result, in 2000 Congress clarified the rules of evidence by adding text to Federal Rule of Evidence 702. To the original text, which read, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise," the following new text was added: if,

- the testimony is sufficiently based upon reliable facts or data.
- the testimony is the product of reliable principles and methods
- the witness has applied the principles and methods reliably to the facts of the case (Brown 2001; Rule 702).

The aim of the new text is to enable judges to exclude what has been referred to as "consensus knowledge," concepts that professionals assume to be true only because other professionals make the same assumptions.

**"Experts" Who Fail to Meet the Standards**

Rule 702, like *Jaffe v. Redmond*, is limited to the federal courts (although, again, attorneys wishing to avoid federal appeals strive to remain within federal guidelines during state court proceedings). State courts are neither bound by Rule 702 or by *Frye* or *Daubert*, and generally have much lower "standards" for the acceptance of expert testimony than do the federal courts. As a result, many mental health professionals who have been accepted as experts by lower courts have lacked proper credentials, presented unreliable theories as facts, and intentionally confused or misrepresented issues and evidence (Schmitt, 1997; Sherman, 1997; Huber, 1991). Angell (1998) added that some "experts" cite experience or unpublished research as scientific evidence, and some are willing to support any claims of the attorneys who hired them, no matter how farfetched. This type of situation occurs, according to Huber (1991), because "maverick" experts who are shunned

by more reputable colleagues are embraced by litigators. Schmitt (1997) noted that, as a result, the attorneys who can afford the greatest amount of expert time usually win. Ethically, social workers must testify only to conclusions drawn from facts (Melton 1994); and never according to particular ideological beliefs or act as "hired guns" for the party which is paying their fees (Vandenberg, 1988). Expertise is never completely neutral or objective; but there is a clear difference between conclusions drawn from evidence and conclusions drawn without evidence, or despite contrary evidence.

Hagen (1997) pointed out that mental health practitioners are largely ineffective in making determinations about human behavior—and least effective in making predictions about future behavior—regardless of the evidence of past activities, and no mental health technology enables a practitioner to predict future behavior. Yet "experts" have testified to the likelihood that a particular person "will kill again" or "has been rehabilitated" or "has been abused"—and courts have acted on these spurious claims. Dawes (1994) observed that what little the mental health industry can offer in the sense of "statistical likelihood" is also prone to "identify" innocent people as criminals, and criminals as either "innocent" or not guilty.

Many clinicians who lack research training and skills testify based on their own clinical experiences, which tend to be extremely narrow at best (Hagen, 1997). Questionable "experts" also tend to use "tools," such as Rorschach and other projective tests, which have never proved predictive (Dawes, 1994; Hagen, 1997). For example, Robert Davis, a Diplomate of the American Board of Professional Psychology and a consultant to the Oregon Parole Board, uses the "Palo Alto Destructiveness Test" to determine the degree of violence to which offenders are prone—but no such test exists (McIver, 1997). Some "experts" are nothing of the sort. In one case purporting Satanic abuse in day care centers, an "expert" on Satanic cults was found to be a fraud who falsified his education, experience and professional affiliations (Rubinstein, 1990).

Dineen (1998) opined that what she calls "bogus experts" can be divided into four groups: *fakes* - whose "credentials" consist of outright lies; *sophisticated fakes*—who have degrees from diploma mills and have been published (if at all) in non-peer-reviewed, self-promoting journals; *self-promoters* - who exaggerate their credentials and experience and rehash common knowledge or recognized theories with fancy jargon and as "syndromes;" and *ideologues* - who have developed theories around pet ideas that have not been adequately tested or that test poorly.

Professional social workers can fall into the first two categories if they exaggerate their professional successes, embellish their *curriculum vitae* or obtain advanced degrees from

programs more interested in tuition than academic rigor. However, even legitimate professionals must guard against falling, or being perceived as falling, into the latter two. It is clearly unethical to exaggerate credentials or use jargon to purposely confuse. It is similarly unethical for social workers to so strongly advocate for a point of view that they espouse theories in the name of expertise when the area can claim no experts, because there is so little research demonstrating their validity. Clearly, such behavior violates the *Code of Ethics'* requirements for professional competence, honesty and avoidance of conflicts of interest.

**The Ethics of Representing the Social Work Knowledge Base**

There has been a recent flood of civil and criminal litigation against mental health professionals who have served as expert witnesses, but misrepresented information and/or their qualifications on the witness stand (Hagen, 1997). Some of this litigation has been directed against social workers (Barker & Branson, 2000). Much of this litigation has been successful, and in several cases, when it was not, only professional immunity (often extended to social workers in government investigative capacities, such as child protection) kept the social workers from being found guilty or liable (Sarnoff, 2001). Note that guilt is established in criminal courts, while liability (for monetary damages) is established in civil courts. These cases have, in fact, resulted in legislative changes limiting social worker immunity in many jurisdictions.

Over the past few years, NASW has issued several specific position statements, professional standards and clinical indicators (NASW, 1998; NASW, 1997a; and NASW 1997b), in addition to having expanded its *Code of Ethics* (1996). The most up-to-date list of these can be found at NASW's website: http://www.naswdc.org. All of these reconfirm that social workers may represent themselves as experts only within the bounds of the education, training, licensing, consultation and supervision they have received. The *Code* also specifies that social workers are required to keep current with the knowledge base through continuing education and to critically examine research evidence and evaluations of practice methodologies (Reamer, 1998).

**The Ethics of Interpreting the Testimony of Clients**

One of the most challenging areas of social worker testimony is that of interpreting the testimony or demeanor of others. This type of testimony is required when a witness is unable to offer testimony, or to offer testimony that is readily comprehensible by an average citizen juror, due to youth, age or physical or mental impairment.

Interpretation of testimony can be required from a social worker as a fact witness, when the worker is familiar with the client's behavior and can explain (usually by analogy to previous actions) what

circumstances might have triggered a reaction, or what the client means by a particular response. Or it may constitute expert testimony by a worker who has studied behavior in a given age cohort or among people with a discrete mental health diagnosis or disability (Gutheil, 1998b).

While it is not unethical to interpret client behavior under such circumstances, workers who do so must exercise extreme caution. In particular, they should be careful to use precise language to explain that certain phenomena are common, or statistically likely, rather than certain. They should also be careful to specify how and why they reach conclusions, sharing their evidence, basing their testimony on fact and research rather than opinion or theory, and being sure that they have not been biased by the opinions of others (Gutheil, 1998b).

For instance, a social worker who works with a woman who states that she was beaten by her husband can testify that the client told her she was beaten by her husband, that she spoke to the husband and that he admitted or denied the abuse, and that she observed bruises consistent with the client's claim. What the social worker cannot legally do is testify that the client was beaten by her husband–unless she actually observed the beating. Note that this clarification does not diminish the social worker's ability to testify effectively; in fact, it sharpens the testimony by incorporating details that objectively support the claim.

**Other Ethical Challenges**

In addition to all of the ethical concerns already discussed, there are still further reasons to consider the ethical ramifications of testifying as an expert in any given situation. Gutheil(1998a) observes that, because all expert witnessing involves limited if any confidentiality, that it always challenges professional ethics. Further, any inaccuracies in testimony given under oath constitute perjury.

Issues of competence and bias are ever-present concerns for expert witnesses. It can completely undermine a case if an expert is shown not to be fully cognizant of the most current research regarding the aspect of the case about which the expert is hired to testify. And just as demonstrating that the expert has a treatment relationship with the client can threaten a case outcome, the same is true if there is any type of personal relationship with the attorney or any other party to the litigation. Similarly, personal involvement with an issue (such as a worker who was seriously injured by a drunk driver testifying in a DUI case) or ideological adherence to a viewpoint can jettison a case and place the challenged expert at risk of malpractice litigation. Bias can be suggested by a failure to reject even a small proportion of cases reviewed, consistently reaching

the same conclusions about cases reflecting widely disparate facts or demonstrating that the testimony conflicts with those expressed in the expert's publications (Gutheil, 1998a).

**Preparing for the Witnessing Role**

Regardless of how many times a social worker has testified in court, each case offers the opposing attorney and the judge the right to accept or reject the expert anew. Not only do judges and court jurisdictions vary in the degree of expertise they require, but a social worker who is an expert in one subject area may not have the expertise to testify about another (Barker & Branson, 2000).

As noted, the qualification procedure used by the court to determine expertise is called a *voir dire*. To prepare for a *voir dire*, social workers should ask for a detailed explanation of the questions to which they will be asked to respond. They should also review the factors that demonstrate their expertise in the subject, such as courses taken, papers written and research conducted (NASW, 1998). Even more significant, social workers should review their resumes, highlighting the areas of interest to the court, and making certain that they are accurate, because, as noted, any misstatements made to the court can be considered perjurious (Barsky & Gould, 2002).

To prepare for testifying, social workers should review the latest research and controversies about the topic and consider how best to translate this information to lay people. If the issue is complex, it may be useful to prepare charts or slides to explain the concept in court (NASW, 1998).

Ethical expert witnesses do not have to convince a judge or jury of the guilt or innocence or liability or lack thereof of parties at trial. Instead, they should act as teachers who explain the state of knowledge on issues about which they have current expert awareness to those who will use that knowledge to make decisions (Madden, 1998).

The role of expert is a particularly important one, because jurors give considerable weight to the testimony of experts (National Institute of Justice, American Academy of Forensic Sciences, American Bar Association, National Center for State Courts, Federal Judicial Center & National Academy of Sciences, 1999). Furthermore, inaccurate testimony can result in a faulty case outcome, and if that can be proven, the expert can be held liable for malpractice because actual harm resulted from the act.

Finally, it is important for social workers who seek advice from other mental health professionals who have experience testifying in court to determine in what level of court they

testified and during which period. Testimony that was permitted during the *Daubert* period may not stand the newer tests of the revised Rule 702.

**The Ethics of Record-Keeping for Court**

No social worker relishes having records subpoenaed by a court. However, every record should be written with that possibility–no matter how remote–in mind. Changing a record after it has been subpoenaed, even to correct a mistake, is a felony: it constitutes tampering with evidence. In addition, good practice dictates that clients be treated equally, and writing good records all of the time builds skills that ensure that any records that do eventually appear in court will be able to withstand the scrutiny to which a court will subject them (Kagle, 1991).

There is no limit to the time a record must be retained if there is the possibility that it will be subpoenaed in court (Gutheil, 1998a). The availability of electronic technology that reduces the space required for storage and simplifies copying of records eliminates any excuse for prematurely or erroneously destroying a record subject to subpoena (Dickson, 1998).

**Conclusions**

Social workers have the right and the obligation to act as witnesses, including expert witnesses, when it is appropriate to do so. Appropriateness hinges upon both their awareness of the issues under consideration and whether confidentiality considerations take precedence. Legal and ethical factors must both be taken into account to ensure that social workers obey the law and protect their clients' rights, and do not risk malpractice charges in the process.

Social workers who offer expert testimony must keep abreast of the latest research in their fields and must be able to determine both the validity of the research about which they testify and its relevance to the facts in the case. Social workers must also keep abreast of current evidentiary standards. Court testimony is one of the most powerful tools available to social workers. As such, it incorporates inherent dangers as well as benefits, and must be used wisely and well.

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