



Unloading the hired gun: Inoculation effects in expert witness testimony



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ABSTRACT

The current study investigated the efficacy of inoculation as a trial strategy designed to counter mock jurors' perceptions that an expert is a hired gun in a criminal trial. The effect of narrative and fragmented expert responses to cross-examination questions was also examined. The significant results were that not using inoculation led to higher ratings of expert knowledge compared to other conditions. Response style did not make a difference in the criminal setting. Implications of these results regarding "hired gun" expert witnesses and courtroom persuasion are discussed.

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1. Introduction

The field of forensic psychology involves psychologists performing a variety of tasks related to the legal system. Even with the various tasks, the cornerstone of forensic psychology involves psychologists assuming the role of expert witness and testifying in court (Colbach, 2009). One study reported that 86% of civil trials surveyed utilized expert testimony (Gross & Syverud, 1996). Melton, Petrila, Poythress, and Slobogin (2007) reported that mental health experts in the legal system have been met with cynicism and apathy in recent years due to a belief that experts may be acting as hired guns and selling their testimony to the highest bidder.

Research into the efficacy of expert testimony that may be particularly valuable is to explore possible ways for expert witnesses to avoid being labeled as a hired gun. While actual hired guns are hopefully few in number, the perception of a witness being a hired gun is often cultivated by opposing counsel on cross-examination as a way to discredit the testimony of an expert and portray the expert as less trustworthy (Melton et al., 2007). The current study examined persuasive techniques used by both attorneys and experts to avoid the expert being labeled as a hired gun.

1.1. What is a hired gun?

Hired guns are witnesses who take the position their clients (the attorney) want them to take in exchange for their fee (Easton, 2000). Simply put, a hired gun is an expert who forms an opinion based on the request of the retaining attorney rather than the clinical evidence in the case. It should be pointed out that there is no ethical standard prohibiting any expert from providing persuasive testimony as long as that testimony is based on honest, accurate, and objective procedures (American Academy of Psychiatry & the Law, 2005; American Psychological Association, 2002, 2013). The newest publication of the *Specialty Guidelines for Forensic Psychology*

states that the ethical obligation to provide fair and impartial testimony "does not preclude forceful presentation of the data and reasoning upon which a conclusion or professional product is based" (American Psychological Association, 2013, p. 9). Clearly, persuasion is an important part of ethical forensic practice; however, persuasion always takes a backseat to honest and objective representation of the evaluation. Therein lies the crux of hired gun testimony; whereas ethical professionals seek to present persuasive testimony based on honest and objective procedures, hired guns seek to provide persuasive testimony tailored to the aims of the retaining attorney.

Another important feature of a hired gun is that they are highly paid for their opinions (Fischer, 1997). When questioned about their pay, experts frequently point out that they are paid for their time rather than their opinions (Brodsky, 2004). The implication is experts who are paid for their time would come to the same opinion regardless of which side hired them. However, experts who are paid for their opinion would readily change that opinion depending on which side retained the expert. In addition to being highly paid, hired guns are also thought to testify frequently (Cooper & Neuhaus, 2000). Experts must walk a fine line between being effective and persuasive advocates for their data and being viewed as a hired gun.

1.2. Hired gun effects in expert witness testimony

The skimpy literature has shown experts who are viewed as hired guns are less effective at persuasion than impartial experts (Cooper & Neuhaus, 2000; Levett & Kovera, 2009). It is surprising that little empirical research has been conducted examining the hired gun effect. Cooper and Neuhaus (2000) conducted a series of studies examining the hired gun effect in expert witness testimony examining pay, frequency of testimony, and complexity of testimony between experts testifying in biochemistry. They found that experts who were highly paid were

neither liked nor believed by mock jurors (Cooper & Neuhaus, 2000). Mock jurors also made personal attributions about perceived hired guns, rating them as less likeable, believable, honest, and trustworthy (Cooper & Neuhaus, 2000). In addition, mock jurors hearing complex testimony were more likely to use peripheral persuasion cues such as pay and frequency of testimony to decide whether or not to believe the expert (Cooper & Neuhaus, 2000). Results from this study have not been replicated using a criminal case scenario nor using a psychologist as the expert. It has also yet to be examined whether a single highly paid, frequently testifying expert is perceived as a hired gun when no opposing expert is present.

Levett and Kovera (2009) examined the effect of opposing expert testimony on jurors' perceptions of the expert. This study used a civil trial in which a psychologist served as the expert. They found when an opposing expert questioned the methodology of the initial expert, the initial expert was more likely to be viewed as a hired gun (Levett & Kovera, 2009). This finding occurred with no mention of the expert's pay or frequency of testimony. Levett and Kovera (2008) previously found the mere presence of an opposing expert caused mock jurors to question the validity of all expert testimony. Simply put, opposing witnesses seem to cancel each other out.

Although not an empirical study, Ivkovic and Hans (2003) presented qualitative information from a sample of actual jurors in civil trials following the conclusion of their cases. Though no statistical tests were conducted, the authors concluded that the jurors attempted to interpret each expert's motives for testifying. Examination of these motives often led to reduced ratings of credibility (Ivkovic & Hans, 2003). Motives that the jurors attributed to the expert included monetary gain, friendship with the retaining attorney, and sympathy with the defendant (Ivkovic & Hans, 2003). In line with the findings of Cooper and Neuhaus (2000), jurors in this study frequently discounted the testimony of experts who testified in a number of similar cases for the same attorney (Ivkovic & Hans, 2003). Similarly, a majority of respondents (57%) in a telephone survey stated they would be most likely to believe an expert who has previously testified for both the prosecution and the defense (Boccaccini & Brodsky, 2002).

As previously stated, most experts are thought to be ethical professionals. Yet, a common tactic for an opposing attorney is to discredit the expert by implying that the expert is a hired gun (Gutheil, Simon, & Simpson, 2006). As such, it is of increasing importance for attorneys and expert witnesses to know how to avoid being perceived as a hired gun.

1.3. Hired guns and expert credibility

We have noted that experts who are viewed as hired guns are less credible (Cooper & Neuhaus, 2000). Melton et al. (2007) posits the credibility of the expert is important in getting the jury to believe their testimony. Research has broken down credibility into four components: knowledge, trustworthiness, likeability, and confidence (Brodsky, Griffin, & Cramer, 2010). Within this model, trustworthiness is the aspect of credibility most likely to be tainted when hired gun questions are asked. Melton et al. (2007) define trustworthiness as perceptions regarding the honesty of an expert witness and they opine trustworthiness may be the most important aspect of credibility. They explain attacks on an expert's trustworthiness are likely to occur during cross-examination through the use of questions designed to make the expert appear to be a hired gun. Although not addressed using these terms, Cooper and Neuhaus' (2000) findings suggest that reduced credibility may be the reason witnesses viewed as hired guns are neither liked nor believed. Similarly, Williams, Bourgeois, and Croyle (1993) found attorneys' and experts' level of trustworthiness significantly predicted mock jurors' findings.

Trustworthiness is important in expert testimony. If a jury does not trust an expert, they are unlikely to agree with the expert's findings (Williams et al., 1993). There is an extensive literature on expert witness testimony that offers suggestions for how to increase credibility; however, none of these studies offer suggestions for how to avoid being labeled as a hired gun. On the most basic level, this is a question of persuasion. One side is trying to convince the jury that the expert is a hired gun while the other side seeks to affirm the integrity of the expert. Several social psychological studies on persuasive techniques are relevant to this task.

1.4. Inoculation against persuasion

The foundation of the current study is the idea of inoculation against attitude change put forth and studied by William McGuire in the 1960s. First discussed as an "immunization effect," the basic idea behind inoculation is to provide arguments against an opposing idea before the opposing idea is presented (McGuire & Papageorgis, 1961). In doing this, the target is "inoculated" against the full-strength version of the argument in much the same way that vaccines offer weakened versions of viruses to prevent the later effects of the full-strength virus (McGuire, 1999; Papageorgis & McGuire, 1961).

On a cognitive level, inoculation works as a persuasive communication technique by presenting and immediately disproving arguments. By bringing these arguments up on their own the communicator theoretically gains a measure of credibility and trust from the person being persuaded. Moreover, by effectively explaining away the counter arguments, the communicator can neutralize the argument the opposing side was hoping to use in the future.

1.5. Inoculation and hired gun testimony

One possible way to counter the perception of being a hired gun is to use inoculation theory. This process involves exposing the jury to information suggesting the expert is a hired gun on direct rather than cross-examination and quickly showing the expert is not biased in favor of the retaining side. In theory, this inoculation could prevent jurors from being convinced the expert is a hired gun on cross-examination. Melton et al. (2007) suggest that admitting to weaknesses and alternate explanations of data in a case may serve to increase the expert's credibility. Admitting to such flaws could inoculate the judge and jury against future challenges to the expert's findings (Melton et al., 2007). It makes sense that admitting to possible biases and providing evidence showing that the expert is not biased could also increase the expert's credibility. Although this theory has never been tested in relation to expert witness testimony, it has been used in various contexts to control the release of potentially damaging information.

Inoculation theory has been applied to other trial contexts in the past. Research on trial strategy suggests that it is beneficial for an attorney to admit to weaknesses in their case before the opposing attorney has a chance to point those weaknesses out to the jury (Williams et al., 1993). In this study, the defense attorney was rated as more trustworthy and mock jurors were less likely to believe his client was guilty when the defense attorney pointed out weaknesses in the case before the prosecutor was able to do so.

1.6. Expert witness response style

Another variable worthy of examination is the response style of the witness in the face of hired gun questions. Response style relates to the credibility aspects of confidence and likeability (Brodsky et al., 2010). One can easily imagine an expert becoming defensive when asked hired gun questions on cross-examination but responding more calmly when asked the same questions as inoculation on direct examination. An extension of this idea leads to an examination of fragmented versus narrative responding. Using narrative responses, the witness would

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