Is it Ever Okay Not to Disclose Work for Hire?[1]

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As best I can determine, there's no linguistics journal, organization, or conference that has any official policies regarding disclosure of fees, consulting, conflicts, and the like. I take that as a testimony to the general economic insignificance of our results. Of course there are some people who have a financial interest in getting language right, but they almost never have a stake in having the results come out in any particular way. It's hard to see how anybody could make a lot of money from persuading everybody that small clauses exist, the way a pharmaceutical company can profit enormously in if it can seem to prove that drug X is an effective treatment for such-and-such a disease, whether or not it actually is. You don't have to worry about ethical issues when the author has an obvious and unequivocal interest in doing the science right. They only become important when the author might conceivably have an interest in doing the science wrong.

Of course there are a few areas of linguistics where the lack of disclosure could obviously be important. Technology, for example: if you write a paper for a conference extolling the virtues of LFG-based parsers and you work for a company that makes tools that use those parsers, you'd be best off letting the readers know that. That seems self-evident.

Things are a little more complicated in forensic linguistics. When linguists offer their opinions as consultants in a legal matter, after all, it's a matter of record who has retained them. So ethical questions about disclosure are only going to become relevant after the linguist has opined on some issue as an expert witness in the legal context and then returns to the same issue later on in an academic or other nonlegal setting--writing a book, article, or review, or giving a conference presentation. And even then, disclosure is usually made. After all, most of these second-look publications come from linguists who want to revisit a case because it raises interesting points about forensic linguistics. It's a satisfying exercise, if only because you get to share all your clever arguments with an audience who are in a better position to appreciate them. In those situations you're naturally going to mention your own involvement in the case you're writing about.

But an interesting situation with regard to disclosure arises when the linguist revisits her testimony not for its legal significance, but as a scholarly question in its own right. For example, I once worked on a case that involved some interesting questions about racism. This was a defamation case where the American Civil Liberties Union, who were filing an amicus brief in the case, asked me to opine on whether the word *racist* had a definitive or objective meaning, an issue that could have important bearing on a finding of defamation. Suppose for purposes of argument that, some time after I rendered

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my opinion, I had decided to write an article on the semantics of the word *racist* that would report on some of the issues that I opined about in this case.

There are many good reasons one might want to do this. For one thing, *racist* and *racism* are important cultural keywords, and it would be rewarding to look at them in richer detail and against a deeper background than a court proceeding would allow. In that way they're unlike most of the items I've wound up testifying about, like *shipping and handling*, *proximately*, or *disinfectable*. What's more, in a paper I could redress a lot of the scholarly compromises I was forced to make when I prepared my expert report--enlarging the background, and filling in all the lacunae, qualifications, and nuances that scholarship requires but which might have been rhetorically ineffective in the original case or confused the court or the jury.

This highlights an essential difference between expert witnessing and scholarship. As everybody who has done legal expert testimony or consulting knows, what makes for good testimony can make for bad scholarship, and vice versa. For example, it isn't uncommon for a linguist who is opining to the court about the meaning of a word to downplay or even fail to report the dictionary definitions that do not directly support her case.[2] However, it would be unprofessional if someone in an academic or scholarly context suppressed part of a dictionary definition that didn't support her thesis about the meaning of the word. As Finegan notes in this volume, "In scholarly research in linguistics, it is in the interest of truth that researchers themselves identify and grapple with counterexamples." But this is not always the case in expert witnessing: in the years I've been doing this, I've found that most linguistic experts tell the truth, and a substantial majority tell nothing but the truth, but I've never seen anyone tell the whole truth.

So it's clear that any paper I wrote about the word *racist* might be somewhat different from my earlier legal opinion. And for that reason alone, it would be wise of me to disclose that earlier work when I publish the paper, if only because I would thereby avoid the risk of having fingers pointed at me for failing to mention it. In the midst of an ambient culture that fetishizes transparency, people are routinely taken to the woodshed for violating those expectations in the most trivial ways.[3]

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[2]As Aprill (1998: 277) notes, that is also exactly what judges sometimes do in their written opinions.

[3] One could of course argue that these expectations are unreasonable. Take the situation that provided part of the impetus for this volume. Some years ago I represented a group of Indians who petitioned the Trademark Board to cancel the trademark of the Washington Redskins on the grounds that it was disparaging and hence had been improperly registered under the terms of federal law. My colleague on this panel, Ronald Butters, was one of the two experts engaged by the Redskins organization, and he wrote a report arguing that the term *redskins* was a neutral, if informal, synonym for *Indian* that did not have and had never had any disparaging connotations. A year later he made the same argument in a talk he delivered at the Dictionary Society of North America, without disclosing that he had been retained by the Redskins in the case, and a while after that he made the same point in a posting to the American Dialect Society list, again without mention of his earlier legal engagement. When I wrote to the list to suggest that he was

It is true that if that happened I could point out that there was no explicit disclosure policy imposed by the journal or conference. But policies don't *create* practical and/or ethical imperatives about disclosure and conflicts, they just institutionalize and formalize them. From a purely ethical point of view, we have to ask another question: would a failure to disclose in this situation *actually* risk deceiving or misleading my readers? There's a kind of ethical first principle that governs disclosure, what one might term the Client's Interest Test: if your views on an issue are the product of work that was taken on behalf of a party who will benefit if your opinion is favorable to that party's interests, then your audience has a right to know that.

Such a principle obviously covers the situation where someone pays me directly to write a journal article that advances their interests--for example if 3M engages me to write a paper arguing that *Post-It* is not a generic trademark. But nobody's going to be paying me to write a paper on *racist*, and even if I had originally been compensated for opining on the meaning of the word (it happens that in that case I did the work without pay), I'm revisiting it now on my own dime in a different context with no obligation to anyone. My readers can evaluate my paper on its own terms, just as they could with any other paper I write. So why am I obliged to disclose the earlier engagement?

The answer here would have to be that once I've generated an opinion that will serve a third-party's interest on an issue, there's a presumption that it will constrain or influence anything I have to say about it later. And in that case, the disclosure obligation is the same as it would be if I were being directly paid by a client for writing the paper.

There are several reasons for making this assumption. One is that once you've opined on a case, it's a little awkward to contradict or modify your opinions in a scholarly publication. For one thing, you'd risk alienating the attorneys who originally retained you and might open yourself to the charge of having been venal or mendacious in giving your original testimony. At the very least, you would leave a public record of inconsistency that you might have to explain or justify at some point. So if you were to wind up simply elaborating or refining what you said in your earlier opinion but not substantially revising it, then a reader who knows about your earlier advocacy might reasonably conclude, "Well, of course, what else was he going to say?" That is, once you've given a particular opinion in the legal context, it's reasonable to assume that you perceive a continuing interest in maintaining that opinion, even after the original engagement is long behind you.

Sometimes, in fact, a retrospective self-concurrence might reflect not just a reluctance to modify your earlier opinions, but a defensive need for self-justification. This situation is most likely to arise when the general issue at stake is connected to some social or political controversy and when the position the expert took in her testimony may

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remiss in this latter omission, he replied that disclosure "just didn't seem particularly important… it has always seemed to me that the truth is the truth, regardless of the source." He noted, correctly, that neither the LSA nor any other relevant organization had any rules that required such disclosures. My own view, argued here, is that disclosure in these cases is ethically required whether or not it is mandated by a specific rule or policy, though others may in good faith differ.

open her to the charge of having allowed cupidity to overcome scruples. In that case, the expert may choose to reiterate or qualify her views in a scholarly publication, as if to say, "See, I didn't just say this for money, I really believe it." For example, the feminist historian Rosalind Rosenberg came in for vehement criticism for her testimony on behalf of the defendants Sears Roebuck & Company in a 1985 landmark case wherein she argued that women prefer to sell soft-line products that are sold on a noncommission basis rather than items like tires and refrigeration equipment.[4] Both she and Alice Kessler-Harris, the expert for the plaintiff United States Equal Opportunity Commission, were obliged to spend considerable time after the trial justifying and qualifying their opinions (see, e.g., Rosenberg 1986a,b; Kessler-Harris 1986; see also Haskell and Levinson 1988).

In that instance both the case and the involvement of the experts had been widely discussed in the relevant scholarly communities, so disclosure of that involvement was not an explicit issue. Indeed, there would have been little point to their writing a defense of their participation if they had not disclosed their participation--and what they had said. But such disclosure would seem to be both judicious and ethically mandated whenever an expert publishes on an issue in which her earlier testimony might be seen as serving the interest of practices which are socially and politically unpopular. To make this point, I want to take up the second way in which expert witnessing may influence scholarship, a way that operates more surreptitiously. As Finegan points out in this volume, expert witnesses tend to feel sure that they are on the stronger or sounder side of the linguistic issues in any case for which that they have been consultants. I think experts sincerely believe this--they are not just saying it because they are reluctant to look like "hired guns" who will take on any case, whether or not they believe the arguments. But then what explains why so many cases seem to the participating linguist to be righteous? Is it that we've all just been very lucky in that we only get calls from attorneys with strong cases to argue? Or maybe we're all turning down half the cases we're queried about solely because we think the linguistic arguments are weak.

For myself, I find I am relatively eager to please from the outset. And by the time I've finished with a case, I've usually managed to convince myself that my linguistic arguments are solid. In this psychological process, I believe that I and other expert witnesses are not so different from lawyers. As Eisenberg has noted, good lawyers tend to believe their own arguments (1993: 391). As she put it, "rather than taking positions that they don't agree with, the lawyers may find themselves agreeing with positions that they might not otherwise have taken." And while they might not have had any strong views when the matter was first presented to them, they often persuade themselves that "had they thought about the issue hard enough beforehand, they would have come to the same conclusion regardless of their client's interests." In short, as an expert witnesses I am obliged to concede that, because my work is for pay, it probably has unconsciously influenced some of my views. So again, the Client's Interest Test comes into play, and there's an ethical obligation to disclose.[5]

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[4]EEOC & Keane v. Sears Roebuck & Co., 7th Cir. Nos. 04-2222 and 04-2493.

[5]One could argue that my convictions about whose arguments are most persuasive are beside the point; as an expert, it is my responsibility to marshal the best arguments that I can honestly make on behalf of my client's linguistic position, giving considered attention to counter-arguments that might be raised against

Is the situation different when a linguistics expert agrees to testify without pay ("pro bono") on behalf of a client? Certainly, unpaid work isn't always undertaken *pro bono publico* in the literal sense of the term. Law firms often concentrate their pro bono work on issues that their important clients are concerned about. Analogously, a linguist might agree to handle a case pro bono as a favor to a law firm that has given her a lot of work in the past. But let me assume for now that the linguist is motivated entirely by some mixture of altruism or political conviction.

People sometimes suggest that there's really no important difference between someone who works for a client for money and the sorts of experts that Butters describes in this volume as "pro bono zealots for a social or political cause." The implication here, presumably, is that someone who agrees to serve as an expert out of a conviction that the side is morally in the right is no more to be trusted than someone who has no particular commitments that touch on the moral or political issues in the background--or whose commitments are not sufficient to motivate him in the absence of further material incentives from a client. But this runs counter to an ethical distinction that is woven deep into the fabric of American moral life: there's a difference between taking money for something and giving it away for free. And the same distinction arises when you look at questions of when judges or officials should recuse themselves or what disclosures we require journalists to make. You'd fire a baseball writer for taking money from George Steinbrenner but not simply for being a huge Yankees fan.

In fact I'd argue that my general views about the issues I've addressed in pro bono cases are not as subject to the self-delusion that can occur with paid consulting. At least I can be confident that those views are rooted in independent convictions about issues like free speech and racism that I held long before I knew anything about the particulars of the case. In that sense, pro bono undertakings are analogous to being asked to testify about something you have already written, which is the last situation I wanted to talk about here. In 2001, for example, I wrote an article in which I argued that the software that was being touted as a solution to the proliferation of Internet pornography was inherently flawed. A while after that I had a call from the attorneys for the American Library Association, who had joined with the ACLU in filing a suit to overturn the Children's Internet Protection Act of 2000, which mandated the use of these filters in public libraries that received certain federal subsidies. They asked me to testify on their behalf, and I prepared an extensive report. As it happens, I didn't write anything further about this subject after this, but if I had, it's a fair question whether I would have had an obligation to mention the legal engagement. You could say, well, in this case I had published my views before I had any idea I might someday be engaged as an expert witness, so that engagement could not have influenced my opinion. And I think in certain cases this does in fact obviate the need for disclosure. For example, suppose an organization engages John Baugh to testify about racial profiling based on speech, which is something he's been writing about for some time (Baugh 2000, Purnell et al. 1999), and pays him to prepare a report that summarizes his prior research on this issue. It

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that position or in favor of the other side's position and that it is the business of the court to decide which position is most justified (see Shuy 2006: 124–25). But that responsibility ends when the case is over: if I later publish an article defending what was more-or-less my client's position, the presumption is that I judge that position correct.

doesn't seem as if he'd have to disclose that testimony in all future publications on this subject. On the other hand, suppose the organization asks Baugh to undertake some new research to demonstrate the existence of racial profiling with regard to a particular group or a particular region that he had not studied before. If he goes on to report the results of that new research in an academic paper, we would probably say he should disclose his involvement in the case. Not that there's any question that his engagement could have altered his general views on racial profiling, which were obviously shaped before he took the case on, and not that anyone would imagine he had changed his protocols or methods, say, to do this particular study. But, again, it is relevant to the reader that this research was done in the context of expert witnessing rather than disinterested research. As it happens, that was the situation with the work I did for the American Library Association, which involved carrying out some research that went beyond the scope of my original paper on filters.

In fact, I don't think disclosure in and of itself is a particularly important issue for linguistic experts. It doesn't come up very much in linguistics; people aren't pouring in billions of dollars to direct the course of linguistic research in one direction or another. And when it does come up it is usually just a matter of ethical common sense. If we need a rule, I think we can get by with a very general version of the principle I mentioned above: disclose earlier advocacy (whether for pay or even when freely given because the expert thinks the cause is just) if there is a presumption that your client's interests may have played a role in shaping your later work on an issue—not whether *you* think those interests played a role, but whether a reader might reasonably presume that.

Perhaps discussing disclosure helps us to see how various and subtle these influences can be, coloring one's views on an issue long after the case is over.

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