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The Simulated Patient

Almost no one hears what doctors, lawyers, dentists, and other professionals say to their clients and patients in the course of private office visits. The cloak of confidentiality exists for the benefit of the clients and patients, but it also protects professionals from external scrutiny. This allows fee inflation, malpractice, sexual exploitation, and other abuses of power to go undetected, as well as bias in service delivery, the topic examined by Hazelkorn and Robins.

There is little research on what goes on behind closed professional doors. Any study that sheds light on these private contacts is important to the maintenance of high standards of professionalism and to the identification and correction of problems in delivery of professional services.

The use of simulated patients is an effective means of collecting data, because one "patient" can present the same problem to many professionals and record differences in their responses. But is it unethical to deceive the professional about the true reason for the office visit or to make the professional an unwitting subject of study?

Certainly there is some breach of trust in the surreptitious study of the work of another. While the expectation of privacy might be less in one's professional activities than, for example, in one's home, a dentist visited by a simulated patient might still feel spied upon.

Hazelkorn and Robins ameliorated any harm to the dentists by disclosing the true nature of the work after each office visit and by eliminating data collected from those who objected to the study. Only six of their 400 participants "became upset when they learned that they were uninformed subjects." This is a striking result; use of this disclosure and opt-out procedure with another professional group probably would result in evaporation of the data base. If one conducted a similar study of lawyers and after each office visit informed each lawyer that he or she had just advised a simulated client, the researcher might face an angry crowd.

Less deception is usually preferable. However, if the researcher does not identify the professionals included in a study, I am not persuaded that it is ethically necessary to disclose the procedure to each or to allow a subject to opt out.

Outside of academia, deceptive investigation is commonplace, at least in the legal community. Investigators pose as prospective tenants, employees, or customers to identify discrimination[1,2] or consumer fraud.[3] Law enforcement agencies use wiretapping and plainclothes officers. These practices differ from academic research in that their purpose is to investigate individuals and companies rather than to study patterns in professional conduct. The latter is less intrusive because it does not lead to legal action against its subjects. The methodology used by Hazelkorn and Robins has obvious potential as a method of regulatory monitoring. But used for the limited purpose of describing patterns in professional conduct, it seems no more than a minimal intrusion in exchange for a valuable body of knowledge.

The deception of a research subject might be difficult to justify if the information could be gathered by non-deceptive means. In Hazelkorn and Robins' study, prior notice would have distorted the data. An alternative methodology employed by Professors Austin Sarat and William Felstiner in studying divorce lawyers was to sit in on client interviews with the consent of both lawyers and clients.[4] Although the conduct of the lawyers undoubtedly was affected by their presence, this study produced a fascinating body of data. The lawyers' conversations with their clients retained their gritty normalcy, allowing examination of their interactions. Sarat and Felstiner's research shows that one can effectively study professional service delivery without deception. However, some distortion in the observed conduct probably is inevitable.

Another problem with direct observation of professional service delivery is that the presence of a researcher would result in the loss of legal protection of the confidentiality of the conversation between the doctor and patient or between the lawyer and client. Such conversations are regarded as "privileged"; neither the professional nor the client or patient can be forced to testify as to what was said in private. However, if a third party is present during the conversation, the privilege is lost.[5] Sarat reported that the lawyers whose work he observed were not concerned about this, but many researchers would hesitate to gather data in a manner that would compromise the legal rights of patients or clients.

My own research on deception of clients by lawyers, principally focussing on billing fraud, employs yet

another methodology—confidential interviews with lawyers and paralegals.[6] My data may be even more distorted than Sarat and Felstiner's. My sources may have inaccurate memories and incomplete information. They may paint rosy pictures of their own behavior. They may vilify the conduct of others whom they dislike. Nevertheless, the stories present striking patterns and offer a basis for useful discussion. One example is a lawyer who described her deception of clients who questioned the hours she billed to them:

> The client calls up and...ask[s] about [the] bill, and you are saying, "Oh, yeah, on 1/26/88 I spent x amount of time," and you go through as if you had kept to the minute time records when in fact each week you've been fudging on them and padding them because you were required to have eighteen to twenty-two hundred billable hours [per year]... This is so common. I have many friends working in large firms—it is the practice.[6]

In my research—like Sarat and Felstiner but unlike Hazelkorn and Robins—I do not deceive my sources. Neither do I identify them or the firms where they work. However, my sources and I collude in withholding information from other lawyers about whom the stories were told, who would doubtless object to content of the stories and to their publication. Though I would like to be able to discuss the stories with those whose conduct is described, I cannot. The subject matter is so sensitive that absent promises of confidentiality, my sources would not talk to me. By accepting these constraints, I can identify patterns of conduct that otherwise would remain behind closed doors.

There should be a place in the study of the professions for simulated patients, direct observation, and confidential interviews with both the providers and recipients of services. Deception of subjects in research should be allowed if there is no good non-deceptive alternative, and if the research itself is justified by an important public purpose. The Advisory Committee on Experimentation in the Law of the Federal Judicial Center framed the following criteria for deceptive experimentation used to evaluate innovations in the justice system: "(1) that the concealment itself be indispensable to the validity of experimental results, and (2) that the burden ofjustification for the practice concealed not merely be met, but met by a clear and convincing margin."[7] Any such research should be evaluated by a Human Subjects Committee, as Hazelkorn and Robins' work was.

Delivering professional services is a privilege, and often is a lucrative occupation. We who participate in the professions need to collectively protect our clients and patients by accepting a little outside scrutiny from time to time.

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References

1. Ayres I. Fair Driving: Gender and Race Discrimination in Retail Car Negotiations. Harvard Law Review 1991;104:817.
2. Oh AYK. Using Employment Testers to Detect Discrimination: An Ethical and Legal Analysis, Georgetown Journal of Legal Ethics 1993;7:473–522.
3. Schrag PG. Counsel for the Deceived: Case Studies in Consumer Fraud. New York: Pantheon Books, 1972;162–184.
4. Sarat A, Felstiner WLF. Law and Strategy in the Divorce Lawyer's Office. Law and Society Review 1986;20:93.
5. For example, the California Evidence Code. section 912, provides that a claim of privilege is waived "if any holder of the privilege...has disclosed a significant part of the communication or has consented to such disclosure".
6. Lerman LG. Lying to Clients. University of Pennsylvania Law Review 1990;138:(a) 659–760; (b) 717.
7. Advisory Committee on Experimentation in the Law. Experimentation in the Law. Washington DC: Federal Judicial Center, 1981;46.