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## Gender-Intrusive Questioning: A Survey of Expert Witnesses

Tarika Daftary-Kapur<sup>†</sup>, Maureen O'Connor<sup>\*,‡</sup> and Mindy Mechanic<sup>§</sup>

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**This paper reports the results of a survey of male and female psychologists with expert witness experience. The survey explored the roles of both expert witness gender and valence of the testimony to provide preliminary empirical data on whether gender in combination with the valence of testimony leads to perceived bias targeted towards female experts. The presence of such bias might diminish the credibility of the expert and subsequently the proffered testimony and, thus, undermine the legal system as effective fact-finder by leading to decision-making based on extra-legal factors. Copyright © 2014 John Wiley & Sons, Ltd.**

The use of expert testimony “is an increasingly pervasive and controversial feature of the legal system in the US” (Matoesian, 1999, p. 491). It has both increased in recent decades, and become a necessary component of criminal and civil trials (Schuller, Terry, & McKimmie, 2001). The influx of scientific or otherwise complex technical information inside the confines of the courtroom necessitates the interpretation skills of an expert. Expert testimony is only admissible if it clarifies previously entered evidence, or determines an important fact in the case (*Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579, 1993; Krauss & Sales, 2001). For example, in eyewitness testimony, eyewitness accounts of a crime and subsequent identification of a perpetrator may be overly weighed by jurors. Expert testimony is believed to sensitize jurors to the “witnessing and identification factors that are critical to the evaluation of eyewitness memory, with an increased likelihood of improved decision making” (Cutler, Penrod, & Dexter, 1989, p. 216). Thus, the role of experts within the legal domain is an essential aspect to the constitutional guarantees of a fair trial.

While the proffering of traditional forms of scientific expert testimony in legal proceedings is not new, increasingly, social science and clinically based expert testimony addressing sensitive and controversial issues, such as the victimization of women, is entering the legal arena. Compared with expert testimony on emotionally neutral topics such as patent or trademark issues, the content of some social science testimony, particularly victimization experiences, can be described as having a “high emotional valence.” Moreover, in contrast to other forms of (gender-neutral) high-valence topics, such as the death penalty, some topics, such as sexual victimization, have been traditionally identified as “women’s issues” (gendered and high valence) (see, e.g., Williams, 2003).

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The results of several extensive surveys of gender bias in the courts have consistently documented bias targeted towards females at all levels of courtroom involvement, e.g., female defendants, clerks, attorneys, and judges (Supreme Court Gender Bias Task Force, 2004). Gender bias was manifested in a variety of ways, including inappropriate focus on personal aspects of the women's lives, general discounting of women's competence, and women attorneys, in particular, being placed in a double-bind of needing to appear sufficiently zealous to be competent but avoiding the appearance of stridency and aggressiveness that is less tolerated in women than in men (Czapanskiy, 1993). Few of these reports specifically addressed gender bias with respect to expert witnesses, but where mentioned, the findings seemed to show consistently that judges were perceived to assign more credibility to male witnesses generally, and to male experts in particular. In the Minnesota Gender Bias Task Force report, for example, while a majority of respondents indicated that gender played no role in how judges evaluated witness testimony, 55% of women attorneys versus 13% of male attorneys believed that judges assigned more credibility to male expert witnesses (Czapanskiy, 1993, citing Minnesota Gender Bias Task Force report). In the Maryland state report (cited by Czapanskiy, fn. 7), of those who responded to a question of whether judges appeared to give less weight to the testimony of female experts than that of male experts, 43% of female attorneys, 19% of female court personnel, 9% of male attorneys, and 3% of male court personnel agreed that the phenomenon occurs, while all but 2% of the judges reported that this never happens. Unfortunately, data on the extent of such bias directed towards female experts was not systematically collected during these gender bias surveys. Nevertheless, additional anecdotal data suggest that female experts (but not male) may be subject to gender bias, particularly in cases that are gendered and high-valenced, such as those addressing victimization (see, e.g., Walters, 1994, in which the seven female experts interviewed all reported experiencing gender bias).

This paper will present the results of a survey of male and female psychologists with expert witness experience. The survey will explore the roles of both expert gender and valence of the testimony to provide preliminary empirical data on whether gender in combination with the valence of testimony leads to bias targeted towards female experts that might diminish the credibility of the expert and subsequently the proffered testimony, thus undermining the legal system as effective fact-finder by leading to decision-making based on extra-legal factors.

### Role of Expert Witnesses

Courts have recognized the potentially heightened influence of experts on fact-finders, particularly juries (Penrod & Cutler, 1989), as they confront scientific and technical knowledge that is, by definition of expert opinion evidence, "beyond the ken" of the average juror (Fed. R. Evid. 702). The U.S. Supreme Court has acknowledged that "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it," (*Daubert v. Merrell Dow Pharmaceuticals*, 1993, p. 595). The Eleventh Circuit Court of Appeals explained that "expert testimony may be assigned talismanic significance in the eyes of lay jurors," and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse (*General Electric Co. v. Joiner*, 1997; *United States v. Frazier*, 2004). One of the main reasons that courts have focused increased attention on the criteria and process for determining the admissibility and reliability of expert evidence is precisely because they "recognize that

jurors place special trust in expert witnesses to explain applicable scientific principles” (Garrett & Neufeld, 2009).

Research on the effect of expert testimony shows that, at least in the laboratory, experts have mixed effects on juries and do not necessarily represent the level of threat expressed by the courts. Kwartner (2007) meta-analyzed 29 expert-witness studies and found that there was a small but significant effect of expert testimony on verdict decisions. Some studies have found that having an expert testify can influence juror verdicts (Kovera *et al.*, 1997), but others have found no such influence (Davenport & Cutler, 2004; Fulero & Finkel, 1991; Levett & Kovera, 2008). Krauss, Lieberman, and Olson (2004) examined the effect of processing style on jurors’ evaluation of expert testimony and found gender differences in decision-making, in that their manipulations worked with males as opposed to females. However, several other studies of college student mock jurors using simplistic trial transcripts found few differences between mock juror decisions based on expert testimony of different scientific quality (Guy & Edens, 2003, 2006). As discussed in the opening article of this section by Neal (2014), research into the effects of expert gender on decision-making is mixed – at times, gender influences credibility and the level of persuasion, and at times it does not. Overall, findings on the influence of expert testimony tend to be content- and context-driven, and are not consistent across the board.

From the courts’ perspective, one mechanism for keeping the power of the expert witness in check is through the traditional adversarial safeguard of cross-examination. Cross-examination has long been considered “one of the fundamental guaranties of life and liberty” (*Kirby v. U.S.* 174 U.S. 47, 55, 1899) and an “essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal (*Pointer v. Texas*, 380 U.S. 400, 405, 1965). It is “implicit in the constitutional right of confrontation” (*Chambers v. Mississippi*, 410 U.S. 284, 294–295, 1974), and therefore considered an essential constitutional guarantee for those charged with crimes under the confrontation clause of the Sixth Amendment which gives defendants the right to confront witnesses who are offering testimony against them.

The purpose of cross-examination is essentially to explore and illustrate weaknesses in witness testimony and evidence being presented. The main strategies used to discredit an expert witness through cross-examination include attacking the scientific foundation of their work, critiquing their educational credentials, exposing weaknesses in their methods of examination and evaluation (Rogers, Bagby, & Perera, 1993; Ziskin & Faust, 1988), and highlighting potential bias, such as financial incentives (e.g., money earned by testifying), that might influence the direction of testimony (Cooper, 2000; Eastson, 2000). As Commons, Miller, Li, and Guthiel (2012) state, “an expert’s perception of bias regarding the opposing expert could be used in a critical cross-examination, and cross-examining in that fashion could “negatively affect an audience’s perceptions of the cross-examining attorney’s case” (citing Harrison, 2001).

Where opposing sides might not have equal access to expert guidance, or where it is difficult to challenge the underlying science or reliability of the expert’s testimony, another strategy might be to resort to the use of personally intrusive questions – and often gender-intrusive questions – during the cross-examination process (Guthiel, Simon, & Hilliard, 2001). Through his extensive interaction with and experience in training expert witnesses, Brodsky (2004) noted that female experts, in particular, are increasingly reporting being faced with personally intrusive questions. Such questions might include asking about personal victimization experiences, about family dynamics

or marital status, or about political stances relating to feminist issues. While an attorney might justify such questioning during litigation as one strategy to demonstrate an expert's lack of objectivity, this form of gendered inquiry could be objected to as irrelevant to a material fact in the case (i.e., the scientific or clinical basis of an expert's evidence), and therefore outside the scope of acceptable cross-examination. Yet anecdotal evidence and initial pilot data for this survey reveal that such questions do occur and are either not objected to at all, or allowed by the judge after objection (O'Connor & Mechanic, 2000).

In the only study to examine experimentally whether intrusive questioning impacts the credibility ratings of an expert, Larson and Brodsky (2010) found that regardless of type of questioning (intrusive or non-intrusive), female experts were thought to be less credible than male experts. Surprisingly, mock jurors also rated the expert who was asked intrusive questions as being more believable, trustworthy, and credible. At the same time, the mock jurors in the study seemed to be tuned in to the intrusive nature of the questioning, and as a result may have discredited the attorney's line of questioning. Thus it is still possible that the use of personally intrusive questions, which are unrelated to the testimony of an expert, may undermine the credibility of that expert and lead to decision-making based on extra-legal factors as opposed to the evidence and testimony presented.

### **Credibility and Expert Witnesses**

The credibility of a source can have a significant impact on the persuasiveness of a message. This becomes all the more salient in the courtroom where the trier of fact is charged with basing decisions on the facts and on the credibility of witnesses. Some research has shown that non-expert witness characteristics can influence juror judgments. For example, Ruva and Bryant (2004) found that age and speech style were directly related to how credible a witness was judged by participants (the witnesses in this study were children testifying about a crime, and not experts). In a related study Wessel, Drevland, Eilertsen, and Magnussen (2006) found that judges' assessment of witness credibility was unrelated to witness emotionality.

A line of research has examined the influence of perceptions of expert witnesses' credibility on decision-making. The less credible the expert is perceived to be, the less likely it is that their testimony will be persuasive (Brodsky, Griffin, & Cramer, 2010). Some recent research has shown that juror ratings of expert credibility can predict verdicts and sentencing outcomes (Cramer, Brodsky, & Decoster, 2009). Neal and Brodsky (2008) compared the credibility of male and female expert witnesses while manipulating levels of eye contact the witnesses made with the attorney and jury. They found that female experts were credible regardless of their eye contact level, whereas men were credible only if they maintained assertive (high) eye contact. Neal, Guadagno, Eno, and Brodsky (2012) found gender differences when the expert was rated as low in likeability and knowledge, such that the male expert was perceived as more credible than the female expert – although these ratings of credibility did not affect final sentencing judgments.

Relatedly, research has shown that credibility ratings might differ across genders by case type. Couch and Sigler (2002) had mock jurors read about a civil case involving an automobile accident where in one scenario the automotive engineer presented was male and in the other female. They found that male and female experts were equally

effective and there were no differences in credibility ratings. When complexity of the evidence was varied and crossed with gender, however, Schuller, Terry, and McKimmie (2005) found that the male expert was judged to be more persuasive when the case was complex, whereas the female expert was judged more persuasive in less complex cases. Similarly, McKimmie, Newton, Terry, and Schuller (2004) found that the impact of an expert was greater when the gender of the expert was congruent with the case domain, and this was mediated through ratings of credibility. Overall, it would appear that there is some impact of credibility on evaluations of expert witnesses. Taking into consideration an expert's credibility is appropriate as long as it is limited to their qualifications to provide testimony in the case. Where this might be an issue is when credibility is undermined by extra-legal factors, such as bias or personal and private issues.

## Current Study

Very little research addresses the issue of gender-intrusive questioning of experts, although this process is not rare. Brodsky (1999) discussed categories of questions female witnesses (not solely expert witnesses) had been asked, which compromised the witnesses' privacy. The difference between reported questioning of male and female experts was attributed to attorneys holding the perception that they could "get away with" more personally intrusive questions when it came to female witnesses. Although the results are intriguing, they are restricted to female witnesses in general and not expert witnesses. Brodsky (1991) addressed the gendered treatment of female expert witnesses and how to combat this in his treatise, "Testifying in court: Guidelines and maxims for the expert witness." He found that women often report being treated in a demeaning manner when they testify. Additionally, according to Brodsky, "[i]nstead of being treated with the respect their (women's) credentials would normally elicit, a patronizing quality sometimes emerges during depositions and testimony" (p. 65).

In a study of expert witnesses, Gutheil, Commons, and Miller (2001) examined expert witnesses' attitudes toward personal questions during cross-examination for purposes of discrediting and invalidating the testimony. The results indicated that experts felt questions regarding the circumstances of the expert's own divorce, questions about the expert's own substance abuse problem, alcoholism, religion and sexuality were all too personal. This study, although informative, does not address actual experiences of the experts and included an extremely small sample size ( $n = 37$ ). Based on this limited resource base, and the potentially biasing effects of this type of intrusive questioning, it is imperative that the experiences of expert witnesses, as well as whether there is a gendered component to personally intrusive questioning, be examined.

## METHOD

### Participants

One hundred and forty-three psychologists were recruited through the American Psychology-Law Society (AP-LS) listserv. Permission was acquired from AP-LS to access the listserv. Participants were sent a solicitation email describing the purpose of the study. Participants were informed that they would be asked to complete a survey

on their experiences as an expert witness in the legal system. The majority of our participants were male (63%,  $n = 90$ ), and the majority were Caucasian (95.7%,  $n = 134$ ), with African-Americans, Asian, and Hispanic making up the remaining 4.3%.

## Procedure

In the solicitation email, participants were provided with a link to the survey. The survey was hosted on surveymonkey.com, a secure data collection website, and took participants approximately 25 minutes to complete (completion times ranged from 15 to 45 minutes). All procedures were conducted in accordance with ethics guidelines of the American Psychological Association.

## Measures

The survey instrument consisted of five sections as detailed below.

### *Demographics*

Participants were queried on their experiences serving as expert witnesses in the legal system. This included questions on the frequency with which they have provided expert testimony/consultation, and the types of issue for which they have provided testimony/consultation. Additionally, we asked questions related to respondent age, gender, race, ethnicity, educational background, and area of expertise.

### *Routine Legal Questions*

Participants were queried on their experiences facing routine legal questions during their consultation experience. Routine legal questions were operationalized as those regarding expert objectivity, fees, income, time spent testifying, and credentials. If a respondent indicated that they had been asked these types of questions, we asked them to think back to the most recent case in which this had occurred and answer a series of questions related to that case, including the type of proceeding (civil, criminal), the stage at which the question was asked (initial consultation, deposition, Frye/Daubert hearing, other type of hearing, trial, post-trial proceeding), the point in the proceeding at which the question arose (direct examination, cross-examination, other), the side for which the expert was testifying, the gender of the attorney asking the question, the gender of the judge/trier of the fact, and the outcome of the question (whether an objection was raised, and whether it was allowed).

### *Intrusive Questions*

We then queried participants on whether they were asked questions operationalized as intrusive. These included questions regarding personal finances, marital status, mental status, physical abuse, political beliefs, and advocacy. A sample question was, "In your experience as an expert, have you been asked about your OWN personal marital status?" If a respondent answered yes to any of these questions, we probed further with the exact same questions as those in the routine legal question section.

## *Gender-Intrusive Questions*

In this section we asked participants whether they had been asked questions operationalized as “gender-intrusive.” This included questions related to children, sexuality, victimization, feminist beliefs, women’s movement, men’s movement, victim advocacy, personal experiences with childhood sexual abuse, sexual harassment, sex discrimination, and partner victimization. A sample question is, “[i]n your experience as an expert, have you been asked about your OWN personal involvement as an advocate on behalf of victims?” If a respondent answered yes to any of these questions, we probed further with the exact same questions as those in the routine legal question section.

## **RESULTS**

### **The Experts**

Experts in our sample had served as expert witnesses in some capacity for an average of 17.86 years ( $SD = 8.18$ ; median = 20), ranging from 1 to 38 years. On average, respondents had played the role of an expert witness at deposition 55 times ( $SD = 7.51$ , median = 20), and at trial 63 times ( $SD = 10.12$ , median = 15). The primary work setting for respondents was a college, or university setting (30.6%,  $n = 53$ ), followed by private forensic practice (23.7%,  $n = 41$ ), private clinical practice (13.9%,  $n = 24$ ), public forensic practice (11.6%,  $n = 20$ ), forensic and clinical practice (9.2%,  $n = 16$ ), and other (11%,  $n = 20$ ). Areas of expertise ranged from workers’ compensation to eyewitness identification. We classified expertise as to whether it was gendered in nature (e.g., sexual harassment) or non-gendered (e.g., insanity and competency). Approximately 17.6% ( $n = 30$ ) of our experts worked in gendered fields (52% of these were females) and the remaining 82.4% ( $n = 144$ ) worked in non-gendered fields. Finally, the majority held Ph.D.s (77.5%,  $n = 136$ ), followed by Psy.D.s (12%,  $n = 22$ ), a combined Ph.D./J.D. (5.6%,  $n = 8$ ) and an M.A./M.S. (4.9%,  $n = 8$ ).

### **Data Analysis Strategy**

We divided our data analysis into two sections:

- We examined whether there was a difference in the nature of questions asked (routine legal questions, intrusive questions, gender-intrusive questions) as a function of gender of the expert, gender of the attorney, and gender of the trier of fact.
- We examined whether there was a difference in the nature of questions asked as a function of area of expertise (whether it was gendered or not).



## Gender and Type of Questioning

### *Do Types of Questions Vary as a Function of Expert Gender?*

We examined whether there were any differences in questioning as a function of gender of the expert – regardless of the type of case, or gender of other parties involved. As described, questions were divided into three categories – routine legal, intrusive, and gender-intrusive. With regard to routine legal questions, there were no significant differences in the number of times male and female experts were queried on these subjects (see Table 1). With regard to intrusive questions, the only significant difference was in relation to the question, “[i]n your experience as an expert, have you been asked about your own personal finances, including bankruptcy, annual income, not including expert fees?” Male experts were asked this question (10.3%,  $n=9$ ) at a significantly higher rate than were female experts (2%,  $n=1$ ) ( $\chi^2(1)=3.13$ ,  $p<0.05$ , Cramer’s  $V=0.153$ ).

For questions classified as gender-intrusive, these differences widened. Of the 11 gender-intrusive questions we queried experts on, females were asked four (36%) of these questions at a significantly higher rate. Specifically, females were more likely to be asked if they had a history of victimization [7.8% vs. 1.1%,  $\chi^2(1)=4.31$ ,  $p=0.038$ , Cramer’s  $V=0.17$ ], were a feminist [5.8% vs. 0%,  $\chi^2(1)=5.30$ ,  $p=0.021$ , Cramer’s  $V=0.19$ ], were involved in the women’s movement [5.8% vs. 0%,  $\chi^2(1)=4.12$ ,

Table 1. Questioning as a function of expert gender

Topic	Female experts	Male experts
Routine legal questions		
Objectivity	73.1%	80.9%
Fees	82.7%	79.5%
Income	52%	54.5%
Time spent testifying	55.1%	69%
Credentials	75.5%	72.9%
Intrusive questions		
Personal finances	2%**	10.3%**
Marital status	18.4%	13.8%
Mental status	3.8%	2.2%
Physical abuse	1.9%	4.4%
Political beliefs	1.9%	3.3%
Advocate for prisoners	1.9%	1.1%
Gender-intrusive questions		
Children	18.8%	10.3%
Sexuality	2.1%	1.1%
Victimization	7.8%*	1.1%*
Feminist	5.8%*	0%*
Women’s movement	5.8%*	0%*
Men’s movement	0.0%	1.1%
Advocate for victims	5.7%	5.6%
Victim of childhood abuse	1.9%	0%
Victim of sexual harassment	1.1%	0%
Victim of sexual discrimination	3.8%*	0%*
Victim of partner victimization	1.9%	0%

Percentages indicate proportions within gender.

\*Significant at the  $p<0.05$  level; \*\*significant at the  $p<0.01$  level.

$p = 0.035$ , Cramer's  $V = 0.17$ ], and were victims of sexual discrimination [3.8% vs. 0%,  $\chi^2(1) = 5.19$ ,  $p = 0.025$ , Cramer's  $V = 0.21$ ]. See Table 1 for percentages across all questions asked.

### *Do Types of Questions Vary as a Function of Gender of Attorney and Trier of Fact?*

We examined whether there were differences in the types of questions asked as a function of the gender of the attorney and trier of fact in the case to which our expert respondent was referring. We limited this analysis to those who worked in gendered areas (as defined earlier). Our analyses revealed that there were no differences in the types of routine legal or intrusive questions asked as a function of attorney gender. There were, however, significant differences when it came to gender-intrusive questions. Specifically, when the expert was female, male attorneys (91.7%) were significantly more likely than female attorneys (8.3%) to ask her gender-intrusive questions. On the other hand, when the expert was male, female attorneys (54.5%) were more likely to ask him gender-intrusive questions than were male attorneys (45.5%). There were no significant differences as a function of gender of the trier of fact (see Table 2 for percentages).

## Specialization and Type of Questioning

### *Does the Rate of Intrusive Questioning Vary as a Function of Specific Areas of Specialization?*

Type of questioning was examined as a function of the expert's area of specialization, specifically whether experts were working in gendered or non-gendered areas (regardless of expert gender). Overall, we found that all three categories of questions – routine legal, intrusive, and gender-intrusive – occurred at a higher rate when the case was gendered in nature. Specifically, when it came to routine legal questions, experts working in gendered areas, as compared with non-gendered areas, were more likely to be asked about their objectivity (100% vs. 72.1%), fees (82.7% vs. 76.3%), personal income (74.1% vs. 48.4%), and percentage of time spent testifying (65.1% vs. 60%).

Table 2. Questioning as a function of attorney and trier of fact gender

Sex of expert	Attorney		Trier of fact	
	Females	Males	Females	Males
Routine legal questions				
Female	19.4%	80.6%	20.6%	79.4%
Male	31.7%	68.3%	18%	82%
Intrusive questions				
Female	9.1%	90.9%	20%	80%
Male	30%	70%	25%	75%
Gender-intrusive questions				
Female	8.3%*	91.7%*	9.1%	90.9%
Male	54.5%*	45.5%*	36.4%	63.6%

\*Significant at the  $p < 0.05$  level.

For intrusive questions, we only saw a difference in frequency of questioning in one area of specialization – marital status. Those who worked in gendered areas (36%) were more likely to be asked about their own marital status as compared with those who worked in non-gendered areas (11.2%).

For gender-intrusive questions, we saw significant differences in frequency of questioning across the majority of areas of specialization. Experts working in gendered areas, when compared with non-gendered areas, were more likely to be asked about their children (44% vs. 6.5%), identification as a feminist (3.8% vs. 0%), involvement in the women's movement (3.8% vs. 0%), involvement in the men's movement (3.8% vs. 0%), history as a victim of childhood sexual abuse (8.2% vs. 0%), and history as a victim of intimate partner violence (10% vs. 0%). See Table 3 for the breakdown across all areas.

*Does the Frequency of Questioning Vary as a Function of Expert Gender and Area of Specialization?*

Given that we saw differences in questions asked when the case was gendered versus non-gendered, we wanted to examine whether gender of expert played a role. There were no significant differences between male and female experts with regard to type of questions asked as a function of gender and area of specialization for routine legal questions. For intrusive questions, when it came to the questioning of experts working

Table 3. Questioning in gender and non-gender related cases

Topic	Gender-related	Non-gender-related
Routine legal questions		
Objectivity	100%*	72.1%*
Fees	82.7%*	76.3%*
Income	74.1%*	48.4%*
Time spent testifying	65.1%*	60%*
Credentials	76.0%	73.8%
Intrusive questions		
Personal finances	8%	8.8%
Marital status	36%*	11.2%*
Mental status	3.8%	2.5%
Physical abuse	0.0%	4.1%
Political beliefs	3.8%	2.5%
Advocate for prisoners	0.0%	1.7%
Gender-intrusive questions		
Children	44%*	6.5%*
Sexuality	4.0%	0.08%
Victimization	7.7%	2.5%
Feminist	3.8%*	0%*
Women's movement	3.8%*	0%*
Men's movement	3.8%*	0%*
Advocate for victims	7.7%	4.9%
Victim of childhood abuse	3.8%*	0%*
Victim of sexual harassment	0.0%	1%
Victim of sexual discrimination	3.8%	1%
Victim of partner victimization	3.8%*	0%*

Percentages indicate proportions within area of specialization.

\*Significant at the  $p < 0.01$  level

in non-gendered areas, male experts (26.90%) were asked more intrusive questions than female experts (20%); whereas when we considered experts in gendered areas, female experts (46.10%) were asked more intrusive questions than male experts (33.33%; see Table 4).

For gender-intrusive questions, regardless of whether the expert worked in a gendered area, female experts were asked gender-intrusive questions at a greater rate. Specifically, 27.5% of females were asked gender-intrusive questions when they worked in non-gendered areas as compared with 14.10% of men; and for gendered areas of specialization, 46.10% of females were asked gender-intrusive questions, compared with 33.3% of males. Thus, it seems that when cases are “gendered” in nature, women get asked more intrusive questions – both general intrusive and gender-intrusive – but when cases are non-gendered, males are asked more intrusive questions, but women are still asked more gender-intrusive questions.

## DISCUSSION

The purpose of the present study was to understand the self-reported experiences of expert witnesses in the courtroom with extra-legal questioning as well as to examine whether there is a gendered component to personally intrusive questioning. Existing research has examined a few factors that undermine the credibility of experts and the differential impact of male and female experts, but there is no research (other than anecdotal) on the extent of this issue.

### Females Were Asked More Intrusive Questions Than Males

Consistent with research on the effect of gender of the expert witness, a greater proportion of women in our survey than men were asked gender-intrusive questions. Specifically, women were more likely to be asked if they had a history of victimization, were a feminist, were involved in the women’s movement (as compared with males being asked if they were involved in the men’s movement), and were victims of sexual discrimination. Additionally, experts working in gender-related areas were asked a greater proportion of intrusive as well as gender-intrusive questions than experts working in non-gendered areas. Overall, we found that all three categories of questions – routine legal, intrusive, and gender-intrusive – were reported to occur at a higher rate when the case was gendered in nature. This has implications for gendered treatment and endorsement of stereotypes in the legal arena. In interviews with jurors, Ivkovic and Hans (2003) found

Table 4. Questioning as a function of substantive area

Type of question	Substantive area of expertise					
	Total		Gender-related		Non-gendered	
	Females	Males	Females	Males	Females	Males
Routine legal questions	94.34%	94.44%	100%	100%	92.50%	93.5%
Intrusive questions	26.43%	26.21%	46.1%	33.33%	20%	26.9%
Gender-intrusive questions	32.07%	16.67%	46.1%	33.33%	27.5%	14.1%

that many mentioned the expert's gender when discussing perceptions of credibility (although they didn't link this to their evaluations in an explicit way). Research does tend to show that male experts are viewed as more credible than females, and it is possible that intrusive questioning to undermine an expert's credibility can magnify this effect.

### **Case Type and Intrusive Questioning**

In the experience reported by the expert respondents, it seems it is more common to ask intrusive questions when the case at hand has "high emotional valence," involving topics such as sexual victimization, which have traditionally been identified as "women's issues." In our survey, there were significant differences in the rate of intrusive questioning as a function of the expert's area of specialization. Experts working in gendered areas, as compared with non-gendered areas, were more likely to be asked about their children, identification as a feminist, involvement in the women's movement, history as a victim of childhood sexual abuse, and history as a victim of intimate partner violence. This is compounded by the fact that women tend to be disproportionately represented in these areas (24.5% of our female respondents worked in gender-related areas whereas only 13.3% of our male respondents did). This may lead to reliance by jurors (or judges) on extra-legal cues when evaluating the credibility of experts, making it especially concerning for female experts, e.g., the sex of the expert (research indicates that males are evaluated more favorably than females) and the intrusive questions (limited research shows that experts who are asked intrusive questions are rated as less credible).

### **Gender Dynamic and Intrusive Questioning**

One intriguing finding that requires additional exploration is the gender dynamic that was revealed by our respondents between the sex of the expert and that of the questioning attorney. In our sample, female experts reported being asked gender-intrusive questions significantly more often by a male attorney than by a female attorney, while male experts were asked gender-intrusive questions significantly more often by a female attorney than by a male attorney. The social influence and power dynamics of gender composition have received considerable attention in social psychology, and to some extent in the legal context as well (see, e.g., Carli, 2001; Peresie, 2005; Schuller *et al.*, 2001). Peresie (2005), for example, examined the gender composition of judicial appellate panels in sex discrimination and sexual harassment cases and found that the presence of a female judge affected the likelihood that a discrimination plaintiff would prevail on appeal, while Schuller *et al.* (2001) found female expert witnesses to be more influential where the subject matter was considered to be within their knowledge base. This dynamic interaction of gender of the expert and gender of the other participants in the legal proceeding (i.e., the attorneys, judges, parties) needs to be further explored. A finding of mere gender differences is insufficient to capture the potential complexity of these interactions.

### **Limitations and Future Directions**

The current study had a few limitations worth mentioning. First, only a small percentage of the experts surveyed (17.6%) were involved in traditionally "gender valenced" fields.

Even with this small percentage, we saw differences in questioning across gender and case type. Additionally, although overall rates of gender-intrusive questioning were low (many of our percentages were under 20% overall), these were significantly more prevalent in gendered areas, which is a cause for concern. In general, people tend to underestimate the frequency of events, and as such it is possible that the surveyed experts experienced intrusive questioning more often than they reported. Nevertheless, given that differences in intrusive questioning were seen in this small sample, future research should look to examine this issue more closely, by focusing more explicitly on experts in gendered fields.

Secondly, our sample consisted mostly of older, male respondents (56% of respondents were between the ages of 50 and 69 years, and 63% were male). This demographic generally is not the target of gender-intrusive questioning. At the same time, the survey respondents were representative of the population of experts from which we sampled – 66.5% of all members of AP-LS are male and 59% are between the ages of 50 and 69 years. Additional organizational samples of people who provide expert testimony in broader areas could reveal additional information about the content and process of questioning.

Overall, the results of this study suggest that unequal, gendered treatment of women is a problem worthy of further exploration. If scientists and clinical professionals are being called upon to bring their specialized knowledge to legal proceedings, then we need to better understand barriers that might undermine the effectiveness of that scientific or clinical expertise. Female experts were more likely to be asked intrusive questions, regardless of case type. Female experts believed that intrusive questioning was a common practice, significantly more likely than their male counterparts. It is imperative that all players in the legal system are aware of this sex role bias and take steps to reduce it. Female experts should also be aware of the effects of this bias on perceptions of their testimony and jury decision-making (Brodsky, 1999). Given that we know that gender-intrusive questioning is a real phenomenon, research should examine how and under what conditions this line of questioning affects verdicts and sentencing decisions. If indeed there is a negative effect of intrusive questioning – whether this effect is on an individual's credibility, or on the ultimate decision – steps should be taken to eliminate this additional form of gender bias from the legal arena.

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