

## Expert Evaluation, Controversial Cases, and the Media

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It took only minutes for the first media call to reach several defense psychiatrists, including me, after an elderly Vincent “the Chin” Gigante pled guilty to obstructing justice by faking mental illness. Within a day or so, half a dozen reporters for newspapers, wire services, and networks called to ask essentially the same question: “How could so many psychiatrists be fooled when the police, judges, and we reporters all knew he was guilty?”

Don’t believe everything you read in the papers. Even experienced clinicians can be quick to pass judgment based on a few media sound bites and rumors. This column will briefly discuss the Gigante matter and explain some principles of forensic work with controversial and high profile cases.

### The Original Gigante Case\*

For many years, Vincent Gigante was reputed to be the leader of New York’s most powerful organized crime “family.” During the same period, he appeared to suffer from chronic and severe mental illness (generally characterized as some form of schizophrenia, and later a dementia), was hospitalized over 20 times, and was diagnosed and treated by dozens of physicians and scores of other professionals. He was arrested from time to time and was generally found incompetent to stand trial. Law enforcement officers and prosecutors were largely convinced he was malingering. His alleged position in a prominent crime organization, coupled with eccentric public behavior (such as walking around Greenwich Village in a bathrobe), made him a frequent topic in the news and tabloid media.

During the early 1990s, federal prosecutors used video surveillance and wiretap evidence to suggest that Gigante’s day-to-day behavior was inconsistent with mental illness and trial incompetence. He was arrested and underwent extensive evaluation by a large group of defense-retained psychiatrists and other experts, as well as somewhat less extensive assessments by experts retained by the prosecution. A federal judge

conducted a competency hearing at which transcripts seem to indicate that the judge, perhaps frustrated by the failure of earlier efforts to bring Gigante to trial, gave little credence to the defense experts’ findings. In spite of the experts’ considerable experience, thorough evaluations, and often outstanding reputations in their fields, the judge quickly found that Gigante was competent to stand trial “as a matter of law.” He was tried and convicted of a racketeering-related felony.

After the conviction, defense attorneys once again petitioned to show that Gigante was not competent, this time for sentencing, and that he was ineligible for incarceration because of physical and mental infirmity. At this time, he was an inpatient on a secure unit in the Westchester County Medical Center in New York, where several forensic experts, including the author, conducted additional evaluations.

Like the other experts, I tried to include in the evaluation process everything available that could reasonably be considered important: 1) review of clinical records, arrest and court records, jail and forensic facility records, and the immediate staff and nursing records from the hospital where he was being held; 2) extensive interviews with the defendant (many hours, over several visits at different times of day), both in his room and in an anteroom; 3) testing (in my case for dementia and malingering, as well as review of others’ psychological, neuropsychological, and neuroradiologic findings); and 4) a number of conversations with corroborating sources, including unit nurses, family members, and attorneys.

The defense evaluations were generally conducted individually, although some information was exchanged before testimony. The prosecution assessments were

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\*The names and clinical comments reported here are part of the public record.

often by groups or teams and based largely on findings during an earlier hospitalization at Butner Federal Correctional Institution. Some of the prosecution experts were federal employees.

The defense experts were quite united in their impressions of lack of competence for sentencing (the criteria are similar to those for standing trial). The primary differences among defense opinions appeared in the relative weight given to apparent psychotic symptoms (consistent with Gigante's decades of allegedly schizophrenia-like symptoms) compared with prominent symptoms of dementia (similar to Alzheimer's, but more likely multi-infarct and probably associated with open heart surgery, an artificial [porcine] heart valve, an early career in boxing, and/or some other factors). Other possibilities were raised, including malingering and medication effects (voluntary and involuntary). The prosecution experts acknowledged a number of symptoms and signs, but focused on the likelihood of malingering.

Reports were written and testimony taken from both sides' experts. The judge once again denied the defense motion to find Gigante incompetent, and he was sent to federal prison, where he spent much of his sentence receiving some form of medical care.

### The Second Case

Some years later, in a very unusual turn of events, the defense experts were contacted by a federal prosecutor from New York. He told each of us that he could now prove not only that Gigante was malingering his mental disabilities, but that the Gigante family had aided in those efforts. Many of his close relatives were to be charged with obstructing justice and/or perjury.

One of the prosecution's strategies in the obstruction case was to approach the defense experts and try to get them to recant their testimony. The prosecution's method was simple: demand that the former *defense* experts meet with a prosecutor and hear or observe a few audio- and videotapes recorded at the prison. These brief snippets, several vignettes totaling 10 or 20 minutes taken from hours of surveillance of visiting rooms and phone calls, were purported to show communication with family and his former internist which, in turn, allegedly indicated that Gigante was not demented or psychotic at all and, by inference, that he had been fully competent to stand trial and be sentenced many years earlier.

Virtually all of the defense experts questioned these methods on two primary grounds. First, there was the

likelihood that we still had a professional duty to the lawyers who had retained us in the first place. While we could be called to testify by the prosecution, it seemed improper to "work with" the prosecution when we might still be considered experts for the defense. Second, even if it were proper to work for the prosecution at this point, we were being asked—rather firmly—to change our opinions based not on an appropriate review and reassessment, but on a small portion of the information available (and without being allowed to see anything else, review current records, or re-examine the defendant).

Like most of the other defense experts, I first politely declined involvement in this prosecution exercise. I was then told by the prosecutor that I had no choice in the matter, that I was to be subpoenaed to appear before a federal grand jury in New York, that the proceedings would rapidly move to a trial of Gigante for obstruction of justice, and that the opportunity to examine the selected tapes in private was a way for me to "avoid being surprised and embarrassed" when they were played before me in open court. I received the subpoena a few days later.

At this point, it seemed advisable to retain my own attorney (as had several of the other experts). I met with a criminal lawyer who explained that a grand jury subpoena was indeed a potentially serious situation for me (not just for Gigante). He described the substantial power held by federal prosecutors and grand juries and their ability to interfere greatly with my life should they choose to do so. My lawyer agreed that I had done nothing wrong in the earlier evaluation and testimony, but recommended that, after notifying the current Gigante defense lawyers, I meet with the federal prosecutor as asked.

At that point, the first subpoena was withdrawn. The prosecutor and one of his investigators came to Austin and, in the presence of my lawyer, played the brief tapes. The process was cordial but very serious. After an hour or so, I finally told the prosecutor that I was unable to come to any conclusion about Mr. Gigante's competence to stand trial or other mental characteristics based solely on the tapes he had played and, in addition, that I was unable to draw any conclusion as to whether Gigante's current condition (which was impossible to evaluate under the circumstances) was or was not inconsistent with his appearance at, and just before, his earlier trial and sentencing. The prosecutor tried briefly to elicit some opinions, then said I should expect to be subpoenaed to Brooklyn. At least two other former defense experts

went through roughly the same experience and said about the same things.

Several months later, we were all subpoenaed to the Brooklyn federal courthouse to testify before the grand jury. That process is secret in that it is not public; the transcript and other records are not available to the defense or to the public; there is no right to rebuttal or cross-examination; and one is not allowed to be represented by counsel in the room (but may request a pause in testimony to leave the room and consult with a lawyer). The experience can be daunting, and anticipating it even more so; however, I was treated politely as I reiterated my earlier statements to the prosecutor. Compared to that of the other experts, who practice within an hour or two of Brooklyn, my travel for the grand jury appearance was lengthy and professionally disruptive. My total costs for time spent, travel, and retaining necessary counsel came to well over \$10,000; a small portion (for travel expenses only) was reimbursed by the government.

A few months later, a 75-year-old man named Gigante signed some papers and nodded his head a few times in court, apparently accepting responsibility for obstructing justice and faking his mental illness. By doing so, he and his attorneys prevented the prosecution and probable incarceration of his wife and all but one of his children. The addition to his current prison sentence was short, but substantial for a person of his age and health. I'm told that he said almost nothing during that proceeding. No one, perhaps not even he, knows whether or not he fully understood the process, or whether the statements he signed were accurate.<sup>†</sup>

## **How Should Forensic Experts Conduct Evaluations Such as This?**

One's practices and priorities for controversial or highly public cases should be similar to those for other work. Do a comprehensive, professional evaluation. Understand the attorney's points and needs. Be objective with your findings and be prepared to discuss frankly whether or not they support the lawyer's objectives. Be honest and extremely competent in litigation conferences, reports, and testimony. Know how to work

with the attorney in the service of the case, but be alert for subtle pressures and never lie.

In prominent or controversial cases, it may be more difficult to adhere to the priorities and quality that one should come to expect in every case. The lawyers and agencies on either side may be more sophisticated than those in some other forensic matters, and more than usually motivated. The media routinely become involved. It is sometimes difficult to retain one's objectivity, and even equanimity, amidst the fray.

When the media call, be cautious about interviews and comments. If the case is ongoing, decline comment (especially without permission from the lawyer or agency who retained you). The reporter's purpose is rarely the same as ours, and is often simply to attract readers or viewers. There is nothing inherently wrong with giving interviews—the reporter will get his or her quotes and sound bites somewhere else if not from you—but be objective, clear, and understand that even your most reasonable statements are likely to be misconstrued.

## **The Last Word**

Were the Gigante defense experts “embarrassed,” as suggested by some media articles? Speaking for myself, no, and I don't believe our profession received the “black eye” trumpeted by several reporters.

There is nothing embarrassing about being retained by the side that loses. All veteran lawyers and experts have had that experience many times. We understand that the media often “get it wrong” and that their purpose is usually self-serving rather than an effort to reveal unbiased truth. Thus media emphasis is necessarily different from that of a forensic consultant or expert. We have a duty to perform a comprehensive assessment, to weigh information fairly, to be objective in our work, to work diligently with the retaining attorney or agency, and to express our findings articulately without regard to audience or politics. None of those applies to most media outlets.

Dr. Jonathan Brodie, an expert witness for the Gigante prosecution, has said that the defense psychiatrists and other clinicians should be “humbled.” I disagree, especially given the extraordinary prosecution circumstances and the complexity of the various evaluations. I am not willing to accept malingering as a “given” in this case, nor do I believe that our critics can do so with certainty. I don't discount the possibility, of course, nor do I mean to be arrogant about our role in the search for truth. But I don't believe everything I read in the papers.

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<sup>†</sup>Please note that this column takes no position on the guilt or innocence of Vincent Gigante, nor on whether or not he actually malingered some or all of his symptoms. My purpose is to describe a process during which a powerful court eventually obtained the ends it had sought for decades, and to offer a brief rebuttal to some subsequent media comments.