

Practical Ethical Problems of the Forensic Psychiatrist in Dealing with Attorneys

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Alan A. Stone, MD has delineated clearly the areas of ethical conflict for the forensic psychiatrist. He focuses primarily on issues of criminal law and psychiatry and the forensic psychiatrist as double agent. However, he also alludes to the four issues concerning ethical boundaries of forensic psychiatry. His first concern is whether psychiatry has anything true to say that the courts should listen to. His next three concerns relate to the role of the forensic psychiatrist in either twisting the rules of justice and fairness to help the patient or the opposite risk that the patient will be deceived by the forensic psychiatrist in order to serve justice and fairness. Finally, he is concerned that the forensic psychiatrist will prostitute the profession of psychiatry as he or she enters the adversarial system and is assaulted by it.

I agree with Stone that these are appropriate concerns and potential risks faced by the forensic psychiatrist. I am grateful to Professor Stone (as should all forensic psychiatrists be grateful) for his scholarly approach to our dilemmas and for alerting us to the potential hazards of our subspeciality. This article will focus on the ethical concerns of the forensic psychiatrist working with attorneys in various phases of both criminal and civil law.

Dr. Stone seems concerned about the potential seduction of the forensic psychiatrist by the power of the adversarial system. Perhaps of greater concern than seduction is the potential intimidation of the forensic psychiatrist by the attorney requesting his/her services. The canons of ethics for attorneys demand a vigorous approach to representation of the best interest of the client. In pursuing ethical goals with his or her client, the attorney may make demands on the forensic psychiatrist that are either inappropriate or potentially unethical from the medical-psychiatric position.

Potential ethical conflicts may arise in these areas:

1. The nature of the case and the psychiatrist's professional expertise.
2. The nature of the case and the psychiatrist's personal biases.
3. The nature of the case and the psychiatrist's prior record of contact with the patient, client, or other attorneys involved in the case.
4. Issues of confidentiality of information.
5. Issues involving preparation of reports and testimony at depositions and trials.
6. Issues involving fees for professional services rendered.

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Professional Expertise

Forensic psychiatry has become a subspecialty of psychiatry; a number of professionals have gained substantial experience in the field, and many have become certified by the American Board of Forensic Psychiatry. These experiences include working in areas of civil and criminal law but not necessarily perfecting skills in child psychiatry, psychopharmacology, or administrative and hospital psychiatry. Cases that require expertise in these other areas of psychiatry may preclude a particular forensic psychiatrist from participating in a particular case.

What are the ethical issues for the forensic psychiatrist who is consulted by an attorney on a case where he/she has little experience or training? Is it appropriate for that forensic psychiatrist to accept participation, or should he/she recommend a respected colleague with demonstrated expertise in the field of child psychiatry, psychopharmacology, suicidology, or other specific facet of psychiatry around which the cases revolves?

Psychiatry has developed a number of subspecialties not all recognized by board certification. However, child psychiatry is a particular subspecialty that requires training and experience in working with children and families that the average psychiatrist does not possess. The general forensic psychiatrist may have little experience working with young children or with families. In cases of child custody where the children are under age of seven or eight and require a play-therapy technique in order to evaluate their relationships with their parents and siblings, a child psychiatrist is better able to conduct such an evaluation and participate in the court proceedings.

In a civil case of damages to an infant or to a young child, the child psychiatrist with experience in childhood development and treatment of adolescents may be in a better position to conduct a comprehensive examination of an injured youngster than is a general psychiatrist with little or no training or experience in childhood development. Some child psychiatrists have specialized in the area of children's burn injuries or amputations and would be more credible in communicating their studies, experiences, and treatment modalities to the court than is a forensic psychiatrist without such specialization.

The field of psychopharmacology has proliferated significantly over the past two decades. Newer drugs with particular side effects have emerged and have been studied by a group of psychiatrists with a background in psychopharmacology. Similarly, the field of depression has determined newer causes in the biophysiological sphere and newer chemical treatments.

The forensic psychiatrist is seen as a teacher in court.¹ He or she may testify because he/she has gained particular knowledge through training and experience. He/she may testify to opinion evidence not available to the average intelligent lay person. This is true in all fields, not just psychiatry. Thus, the most effective expert witness in a particular case would be the one whose specialization is at issue in that case.

The expert witness must be both credible and convincing to be effective. His or her effectiveness is at issue in consulting and working with attorneys whose

needs are to present the most effective and vigorous defense of their clients. The forensic psychiatrist should alert the attorney of the limits of his/her expertise and the areas of strength and weakness in his/her psychiatric background, education, and experience.

In a recent case a highly placed professional whose opinions affected numbers of people had a profound personality change following open heart surgery; the author consulted a colleague with experience in both cardiology and psychiatry as the particular expert who could be most helpful in evaluating the effects of cardiac surgery on the individual's personality and judgment.

Personal Bias

From a different perspective, the forensic psychiatrist may have personal difficulties with respect to a particular case. For example, a particular forensic psychiatrist may have personal views against the death penalty and may not wish to consult with the prosecution on a capital criminal case. This bias should be expressed to the attorney at the outset. Some forensic psychiatrists might have problems in dealing with cases of child abuse or child murder. Working for the defense in such a case may reveal personal emotional conflicts for that particular psychiatrist. The psychiatrist may not be as effective a consultant or witness as he/she would be in other cases or as another forensic psychiatrist without such personal bias would be in this particular case. It is important for the forensic psychiatrist to reveal his/her personal feelings about the case at the outset if there is any likelihood those feelings will influence his/her opinion or effective participation in the case.

There are some forensic psychiatrists who are opposed to the insanity defense and do not believe psychiatrists should be involved in testifying to tests of criminal responsibility. Such forensic psychiatrists usually do not choose to participate in insanity trials but occasionally may accept a case for the prosecution in order to express their personal bias against the insanity defense, using that case as a vehicle for such expression. The psychiatrist's personal bias should be discussed openly with the attorney to determine whether that bias will negatively affect the case. The attorney is the coordinator of his/her presentation of evidence and must make the final decision about who will testify and what effect testimony will have.

Similarly, there are psychiatrists whose bias in child custody disputes favors either father or mother. Some psychiatrists appear regularly to testify that mother should receive custody of her children. If this particular bias is initially not revealed openly to the attorneys, it will most certainly appear on cross-examination.

This pattern of psychiatric bias, whether personal or professional or a combination of both, emerges in all phases of forensic psychiatry.² There are psychiatrists who testify exclusively for defendants in criminal cases and others primarily for prosecution. In personal injury cases, there are psychiatrists whose record reveals a regular involvement for the plaintiff and others who testify primarily for the defense. There is no question about the ethical issue for such regular testi-

mony on one side or another, but the ethical question is the disclosure to the attorney by the forensic psychiatrist of his/her apparent bias and of his/her track record.

Prior Professional Contacts

A particular forensic psychiatrist may have had previous dealings with a particular client/patient and may be precluded from further involvement if called by the other side. Legal cases are adversarial by nature, and attorneys are responsible for protecting the interests of their clients. It is certainly unethical for a forensic psychiatrist to consult with the attorney on one side of the case and then, when not called by that attorney, to volunteer services to the other side. Once the psychiatrist is consulted by an attorney, he/she is precluded from giving professional help to the attorneys of the other side unless mandated to do so by court order or unless the attorney initially consulting him/her allows such participation on the other side of the case. Several examples can clarify this issue:

1. A forensic psychiatrist is called by the plaintiff's attorney in a malpractice case against a psychiatrist. After carefully reviewing all the material provided and examining the plaintiff, the forensic psychiatrist renders an opinion that there was no deviation from the standard of care by the defendant psychiatrist and, therefore, in his opinion no malpractice. Naturally, the plaintiff's attorney will not wish to use the testimony of that psychiatrist. However, if the attorney for the defendant calls that same forensic psychiatrist to help defend this case, it is not ethical for the forensic psychiatrist to participate in the defense, since he had initially given his opinion to the plaintiff's attorney.

2. If, however, in a personal injury case, the forensic psychiatrist, called by the defense to examine the plaintiff, finds evidence for traumatic stress reaction or evidence of psychiatric difficulties related to and caused by the accident in question, the psychiatrist may be called by the plaintiff's attorney to testify, especially if his report had been turned over to the plaintiff's counsel by defense attorney. The issue revolves around whether counsel for the other side was notified of the examination and the opinion of the forensic psychiatrist. If notice were given and the report made available, the forensic psychiatrist may be called to testify by the attorney whose side is most helped by the psychiatrist's opinion.

3. In criminal cases, however, that is not always the case. If the psychiatrist is called by the prosecutor to examine a defendant pleading insanity, and finds the defendant to meet the test of insanity in that jurisdiction, he may be called either by defense attorney or prosecutor since his report will be "discovered" by the defense attorney. The opposite, however, is not always true. If a psychiatrist finds no evidence for insanity while examining for the defense, his report may not be turned over to the prosecution and he may not be called to testify for the prosecution in that case. The author, for example, was called in the case of *United States v Alvarez*³ to examine the defendant by his attorney. Examination revealed evidence for emotional disturbance but not sufficient to support an insanity defense. No report was issued, but the prosecution subpoenaed the author knowing that he had examined the defendant and was not being called by the defense attorney.

Motions to quash the subpoena were denied and the author was required to give testimony for the prosecution that there was no evidence for insanity on his examination. The Federal Court of Appeals overturned the verdict in that case basing its decision in part on the inappropriate use of the author's testimony by the prosecution, which should have been declared inadmissible by the judge.

4. In another criminal case, the author had examined the defendant ten years prior to the trial in question. No evidence for insanity had been found at the prior examination, but the author had conducted a sodium amytal interview and had examined the defendant a number of times, testifying at his robbery trial. Ten years later, the same individual was charged with homicide and the prosecution called the author to evaluate the evidence in the case to determine whether there existed an insanity defense for the homicide. The author noted a distinct conflict of interest and indicated his willingness to participate only if defendant's counsel agreed. Agreement was given and the evaluation was conducted. At trial, however, the defendant himself testified he had not given permission and that his attorney had done so without his direct consent. The judge indicated no legal impediment to the psychiatrist's testimony, but the author declined to testify indicating a conflict of interest based on prior examination of the defendant who was unwilling to allow the testimony. The judge accepted the medical psychiatric conflict and did not order the author to testify.

One further comment about the forensic psychiatrist testifying in court when called by one side or the other: occasionally attorneys will list a forensic psychiatrist as a potential expert witness without ever having called the psychiatrist to obtain his/her consent. The attorney on the other side, seeing the particular forensic psychiatrist's name on the expert list to be called, is then precluded from calling that particular psychiatrist. This appears to be an ethical issue for lawyers who may follow that practice either because they want to "tie up" a prominent forensic psychiatrist to keep the other side from calling him/her, or it may be an oversight that the attorney wished to call that particular psychiatrist and later decided not to, or had assumed an associate had done so.

Occasionally, the author has been called by attorneys asking whether he had been consulted by the attorney for the other side in a particular case. The response has always been very clear and open, depending on the situation. If I have been called by the adverse attorney, I feel it is ethical and essential to disclose that to the attorney asking me. He or she may want to use my services and must know he or she cannot because of prior commitment to the other side. Similarly, if I have not been called by the attorney, but have been listed unbeknown to me, I will so indicate and be available to the attorney who calls first. It is not unethical for a forensic psychiatrist to consult with an attorney who calls him/her even though that psychiatrist's name has been listed by the other side if the psychiatrist was not consulted.

Confidentiality

A very important ethical issue arises when the forensic psychiatrist examines a client who says he/she does not wish information given to the psychiatrist dis-

closed to his/her attorney. Depending on the nature of the information, the forensic psychiatrist may need to reveal certain disclosures of information to the attorney in order to help with the case. To avoid such an apparent conflict, the forensic psychiatrist at the outset should tell the client/patient who he/she is working for and what will be done with the information. Very often I tell examinees: "If you don't want the information put into a report or revealed to your lawyer, do not tell me." Forensic psychiatrists conducting examinations in criminal or civil cases cannot guarantee secrecy nor should they suggest they can.

Some information that must be disclosed will be harmful to the examinee. How does that fact correlate with the ethical proposition "*primum non nocere*," first, do no harm? The examinee is not the forensic psychiatrist's patient. There is no doctor-patient relationship established, and that should be discussed with the person to be examined. It may be proper not to refer to the defendant or the plaintiff or the examinee as "patient" in the final report.

Forensic Reports **

With respect to preparation of reports for attorneys, there appear to be a number of questions that arise that have potential ethical import. The preparation of the report is the work product of the forensic psychiatrist. However, the type of report prepared is determined by the needs of the attorney calling the psychiatrist as consultant. Some attorneys wish to have comprehensive, complete, thorough, well-documented reports that may run thirty or forty pages. Others want only a one-page, bottom-line report with conclusions that can be elaborated later.

Just as the forensic psychiatrist must prepare testimony with the attorney calling him or her prior to the courtroom appearance, so must the forensic psychiatrist prepare a report after consultation with the attorney, depending on the attorney's needs and wishes. In some cases it is important that only one report is issued. Changes in reports are questioned later under cross-examination and may weaken the attorney's case. In criminal cases, certain material appropriately and ethically may be omitted or deleted from a report because of the rules of evidence. For example, the attorney may wish the psychiatrist to delete the information about prior arrests or crime because the report is to be used for competence determination. In sentencing reports, however, history of previous arrests and crimes is appropriate.⁴

In civil cases of personal injury, however, it is not appropriate or ethical for the forensic psychiatrist to delete a history of prior injuries in order to strengthen the plaintiff's case on a particular accident. Attorneys want the forensic psychiatrist in personal injury cases to focus on information that most helps their position. However, it is essential for the psychiatrist to be aware of other data or records that will tend to weaken the position of the attorney. In all these cases, the

** A clear exposition of the guidelines for preparation and contents of written reports of mental evaluations is presented in the first tentative draft of the Criminal Justice Mental Health Standards prepared by the American Bar Association. See Standard 7-3.7. on preparation of written reports and Standard 7-3.8. Discovery of Written Reports.

attorneys may wish the psychiatrist to focus his/her report on only that information supporting their position or contention and eliminate all information tending to negate or weaken that position. This is the process of intimidation alluded to above. The psychiatrist must determine what information is essential in such reports even though that information goes against the position of the attorney calling him or her.

Agency Relationships

Such questions also raise the issue of agency in forensic psychiatry. In working with attorneys, whom does the psychiatrist represent? The attorney, the defendant or plaintiff, the judge, society, psychiatry, or himself or herself? In treatment situations, the psychiatrist is the agent of the patient. In forensic psychiatric matters, the psychiatrist is the agent of the attorney who calls him or her for consultation. In that context, the psychiatrist must reveal to the attorney his/her personal and professional biases as indicated above. Similarly, he/she must indicate he/she is a physician whose concern is for the welfare of individuals suffering from mental or emotional illness.

In personal injury cases in which the psychiatrist is called by the defense attorney, he/she must conduct a comprehensive and thorough examination of the plaintiff and review and evaluate all the records. Should evidence be found for mental or emotional illness as a result of the injury, it would be reported to the attorney for the defense. The psychiatrist also should recommend treatment modalities for the particular condition he/she observes.

Some defense attorneys in civil matters do not wish their psychiatrists to discuss diagnoses or treatment with the plaintiff. Is it ethical for the forensic psychiatrist for the defense in a personal injury matter to tell the plaintiff what he/she thinks is wrong with the plaintiff and where treatment may be obtained? Some psychiatrists rigidly adhere to the rule of agency and say nothing to the plaintiff for they feel no obligation to do so and recognize that the plaintiff's attorney has a psychiatrist who can make such recommendations.

However, there are forensic psychiatrists who are quite concerned about the welfare of individuals, whether they be agents of the plaintiff or the defendant. They will, in appropriate cases, tell the plaintiff what is wrong and what needs to be done in order to help alleviate his or her suffering. If the forensic psychiatrist is of such a bent, he/she should disclose that therapeutic zeal to the defense attorney, indicating that he/she will try to help the plaintiff as much as possible if he/she finds evidence of mental illness.

Similarly, in cases of commitment to mental hospitals, the psychiatrist called by the patient's attorney (that is, the mental health advocate) should discuss his/her biases about mental illness and need for treatment. The mental health advocate has the ethical position of arguing for the wishes of the client whether or not they are medically sound.⁵ The psychiatrist called as consultant by the mental health advocate must adhere to his/her own principles despite the needs or wishes of the patient's attorney. Should he or she find evidence of significant mental illness that renders the person a significant danger of harm to self or others, he or

she must recommend hospitalization rather than a less restrictive form of treatment that might meet the wishes of the patient or the needs of the patient's attorney. The process of intimidation can sometimes sway the judgment of the forensic psychiatrist to adhere to principles espoused by lawyers rather than medical judgments agreed on by physicians and psychiatrists.

Subpoenas and Court Orders

Subpoenas may represent another form of intimidation. The psychiatrist may receive a subpoena to disclose records on a particular individual or a subpoena to appear in court or at deposition to testify in a particular case. It is usually good practice for the psychiatrist to call the attorney issuing the subpoena to determine specifically his or her requirements. It also may be a good idea to call the attorney for the other side if the psychiatrist has any question about the validity of the subpoena.

It should be remembered that a subpoena is a court document issued by one side unilaterally without benefit of argument before a judge to determine the validity of disclosure of information. A court order, on the other hand, has the power of the judge behind it, following an argument in court between the two parties in conflict and the judge agreeing the information must be disclosed. It is not always appropriate to respond to the subpoena without first questioning its validity. This is especially true for the forensic psychiatrist who examines an individual for the plaintiff or for defense, and the attorney for the other side subpoenas his or her records. Such subpoena may not be warranted, and upon argument in court, the judge may quash the subpoena, which means that he or she would order it null and void, and restrict the psychiatrist from disclosure of information at that particular time.

Professional Fees

Finally, a comment on fees is important in any discussion of practical, ethical issues in working with attorneys. Most forensic psychiatrists have a standard fee for all forensic work they do. The amount, of course, varies by location and among individuals. Some psychiatrists who testify occasionally (but primarily run an office or hospital practice) may have a differential fee for time in court rather than time in their office. Elevation of fee is justified in some cases, especially where disruption of schedule occurs or further expertise is required.

All fees should be discussed clearly with attorneys prior to consultation. It is not unethical for a forensic psychiatrist to request a retaining fee prior to his/her involvement in the case. Such retainer is justified on the basis that it allows the psychiatrist a free hand in giving an opinion even if it is contrary to the needs and wishes of the attorney calling him/her.

In some cases the author has experienced disappointment in lawyers who subsequently do not pay for opinions they cannot use. There should be no subtle or overt indication that the psychiatrist will give an opinion the attorney can use in order to be paid. That is unethical, and it is financial intimidation.

Similarly, forensic psychiatrists may request fees for testimony prior to appearing in court. This will ensure the integrity of their schedule and will not institute any particular bias in the case in the event their testimony harms the side that calls them. The author has in the past been disappointed by attorneys who were unhappy with the testimony after vigorous cross-examination and refused to pay for the time in court. It is not ethical, of course, to work on a contingency fee. The psychiatrist's fee must not be geared to the amount of the award or the settlement, even though the major issue in the case revolves around the psychiatrist's testimony.

Sometimes the psychiatrist is asked to wait for his/her fee until the settlement or the award. It is not improper nor unethical for the psychiatrist to agree to wait especially if he/she is treating the plaintiff and the long-term fees involve a great deal of money. As long as the fee continues the same and is not based on any contingency of winning, it is not unethical. If there is no award or settlement, however, the psychiatrist may have to wait a long time to be paid.

It is criminal fraud (and definitely unethical) for a psychiatrist to agree to "pad" the bill by indicating many more visits than occurred with the patient. The forensic psychiatrist should charge only for time spent with the client, time consulting with the attorney, and any and all time reviewing, reading, and evaluating records and preparing reports. All time spent preparing for and presenting expert psychiatric testimony also may be billed at the usual hourly rate.

The major question posed by Dr. Stone is whether the psychiatrist has anything true to say that the courts should listen to. Courts have been calling forensic psychiatrists because they require expertise in various areas involving mental health, mental illness, and abnormal behavior.

Psychiatrists can do only as much as the science or discipline permits. However, we should be in a position to assess each case thoroughly and comprehensively to give a reasoned opinion based on professional training, practical experience, and a full assessment of the data. In this way, we can help the court resolve difficult, if not impossible, conflicts.

Several areas of potential ethical conflict arise in working with attorneys in forensic cases. These issues have been discussed primarily with respect to the personal and professional biases of the examiner, the prior professional association with attorneys or clients involved, and the propriety of disclosing information in forensic reports and through testimony.

The essential feature to be implemented is that the forensic psychiatrist disclose to the attorney at the outset any information that may impair his/her effectiveness in a particular case. By such initial disclosure, the attorney is in the position to make necessary decisions regarding the psychiatrist's usefulness in the case.

Second, the forensic psychiatrist must adhere to his/her ethical-medical principles in all phases of working with attorneys and judges. We must not be seduced nor intimidated by the needs of the lawyers or the wishes of their clients so that we deviate from well-established medical guidelines for the well-being of our patients.

Last of all, the forensic psychiatrist should bear in mind that the final decision in any of these legal matters belongs to the court, not to the psychiatrist. We give opinions — we give help when called on — but the final arbiter of any of the moral and legal contests is the court that requested our presence to aid its task. We can help — we must help — and we can do so ethically and reasonably by adhering to well-established psychiatric principles.

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