

Ethical Issues in Forensic Psychiatry: From an Attorney's Perspective

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As an attorney responding to Dr. Stone's article, I feel required to approach it from a number of perspectives. To me the heart of his argument is that there are ethical boundary problems making it inappropriate for the psychiatrist to enter the legal arena. Although acknowledging some of the problems he presents, I hope to refute as fallacious many of his statements relating to the role, motivation, and impact of forensic psychiatrists. This article will try to justify the involvement of competent mental health professionals in the legal process. Finally, since the theme of Dr. Stone's paper relates to ethics, I set forth some parameters that should guide the ethical forensic psychiatrist.

Since Dr. Stone used the term "forensic psychiatry" in the narrow sense of the psychiatrist who becomes involved in court cases, for the purposes of this commentary I use Pollack's classical definition: "the application of psychiatry to legal issues for legal ends; i.e., for the purposes of legal justice."¹ However, it should be emphasized that, in my view, "forensic psychiatry" is a broad concept applicable to any involvement by psychiatrists in the legal, social policy, and treatment issues where law and mental health meet. This view is much closer to the more expansive definitions of Robitscher² and Watson.³ It reflects the perception that forensic psychiatrists not only should become involved in the courtroom setting but also should be engaged in research, education, and treatment in order to improve their knowledge and professional skills.

Stone's article originally was presented as a luncheon address. As a result, he raises a number of provocative points to stimulate intellectual discussion without developing in depth the implications of his ideas. This in turn permits only a superficial response to many of the points raised.

Stone's position relating to the forensic psychiatrist is similar to his position in other areas, notably civil commitment⁴ and duty to warn.⁵ He consistently takes the view that the only way for the psychiatrist to be true to his/her calling is to serve the best interests of the patient. He neither credits the needs of society nor does he espouse the psychiatrist's involvement with the greater good, for it is his position that when psychiatrists "try to serve such greater good" they lose their "practical ethical guidelines."

This beginning point emphasizes the polarity of our positions, which may reflect the difference between an "ivory tower perspective" and that of a practicing attorney who believes the psychiatric profession has skills and knowledge that should be used to serve the ends of justice not just the needs of a particular individual. Or the polarity may be the result of different views of the role of the

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forensic psychiatrist not dictated by our professions but by our experience with forensic psychiatry.

Boundary Issues

Stone begins by setting forth what he perceives as the boundary issues raised by forensic psychiatry. Yet some of the issues are so far removed from the reality of the day-to-day practice of forensic psychiatry that they seem nonissues. Other points he raises have validity and should promote his goal: intellectual discussion to define some ethical boundaries.

The primary flaw in Stone's analysis is his discussion of the obligations to patients. Viewing the individual seen by the forensic psychiatrist as a patient constitutes a mistaken understanding of the person's status. In fact, he/she is not being seen for a therapeutic reason but for an evaluation for some third party, either an attorney or the court, to try to address psychological issues raised in a legal context. In brief, the forensic psychiatrist is not a care giver and should not be seen as having a classic physician/patient relationship with the interviewee. There should be no pretense that this psychiatrist will be providing treatment. The person being interviewed should clearly understand the purpose of the evaluation. Both the evaluator and the attorney⁷ have a duty to explain the purpose of the evaluation and how what is said may be used in the legal setting.

Once it is understood that the person is not a patient, many of the so-called ethical problems raised by Stone disappear, because the issue is not how best to serve the individual being interviewed but how to use one's skills most competently to answer a question raised in the legal setting. This does not mean that the end result will be beneficial only to society and not the individual. For example, if during the course of the evaluation the evaluator determines the person would benefit from treatment, this can be brought to the attention of the appropriate people, and treatment may result.

Stone begins defining the ethical boundary questions by asking whether "psychiatry has anything true to say which the courts should listen to"? I believe psychiatry does have valuable information to impart. Indeed, the well-trained, competent forensic psychiatrist has a great deal to offer when legal issues arise that have a psychological component. Without this information there is a greater likelihood of a miscarriage of justice in certain types of cases. This is true not only in the criminal area where the issues of competence to stand trial or criminal responsibility may be paramount to the particular case but also in the civil area where decisions relating to child custody, civil commitment, or guardianship may have a major impact on the involved parties.

The Expert Witness

The role of the forensic psychiatrist is not much different from the role of any other type of expert witness: technical questions are at issue in a judicial or quasi-judicial setting; experts are needed to assist the adjudicator in answering them. Where answers are clear cut, experts are not needed. In many technical areas —

be it engineering or orthopedic surgery — there is room for disagreement. Disagreement among psychiatric experts should not form the basis for advocating their abandonment of the courtroom. Very few things in life lend themselves to certain resolution. Granted, psychiatric issues are particularly susceptible to varying answers, given that the data with which the psychiatrist works are particularly resistant to empirical quantification. Still, to admit that psychiatric experts are dealing with slippery notions and sometimes ephemeral characterizations is hardly to establish the bankruptcy of forensic psychiatry.

Of course, Dr. Stone makes the apt assertion that the “hubris in psychiatry has come from passing it off as certainty or claiming that we know things beyond a reasonable doubt.” There is a good measure of accuracy in this observation, yet it is misleading because it puts forth a global generalization that is unsupported and insupportable. There are many skilled psychiatrists who candidly admit the limitations of their discipline. That expectations were unduly raised in the past as to the wisdom and expertise of psychiatrists is unfortunate. It does not follow that forensic psychiatry has nothing to offer, however.

To further elaborate on his first point Stone asks whether psychiatrists “have true answers for the legal and moral questions posed by the law.” While the question may be rhetorically seductive, in fact it is a red herring. No intelligent physician, lawyer, judge, or jury member is requesting (nor does he/she expect) *true* answers. Resolutions of moral issues generally are put forth by legislatures, which define crimes and establish penalties and which determine whether such procedures as civil commitment or declarations of mental incompetence are suitable mechanisms for dealing with perceived social problems. Legal questions ultimately are answered, not by the psychiatrist, but by judicial officers. Admittedly, psychiatrists frequently have been asked to respond to ultimate legal issues. But their responses, if they are forthcoming, do not mandate inevitable acceptance by those who receive them. The psychiatrist provides information; this information enhances the ability of the judicial officer to reach a better, or at least more informed, decision than otherwise might be made.

In brief, Stone correctly condemns those who offer themselves as legal messiahs bearing ultimate truths. Truth, in fact, is ever elusive. But we need not, in condemning the charlatan, rush to embrace the “truths” of the convinced debunkers: those who, in seeking to expose the flaws in a system or process, so confidently have concluded that eradication — rather than improved performance — is the only course to follow.

The second ethical boundary issue raised by Stone is whether psychiatrists will “trust the rules of justice and fairness to help the patient.” He cites an 1801 English case. But that case did not entail testimony by a forensic psychiatrist. Rather, it addressed testimony by an individual who wished to help his patient and who, in testifying, lost sight of the probable truth. It can be acknowledged that an evaluator may become concerned about the plight of the person being interviewed. It further can be acknowledged that if the psychiatrist's personal views are permitted to distort the objectivity of the evaluation, he/she is not acting competently. It need not be acknowledged that competent forensic psychiatrists

are, as a group, so devoid of integrity as to inevitably compromise their training by sacrificing the impartiality that should be guiding their efforts.

To further support his point Stone goes on to discuss the "very comfortable ideological fit between being a forensic psychiatrist and being against capital punishment," and so on. In part he is accurate. It is likely that someone with training as a physician, however he/she decides to use that training, will be more likely to be opposed to death for whatever reason than are those who have not had as much exposure to it. It is also likely that psychiatrists will think in therapeutic rather than punitive terms. This is appropriate and does not mean that if the psychiatrist is therapeutically rather than punitively oriented he/she cannot use evaluative skills to answer the questions posed in the legal setting. In fact, those who are therapeutically oriented may try to work outside the courtroom to improve conditions in prisons and mental institutions. As for Stone's view that forensic psychiatrists often are defense oriented: this may be true in some cases, but the competent forensic psychiatrist will call the case as he/she sees it, which will sometimes favor the defense and sometimes favor the prosecution.

The third boundary issue raised is "that one will deceive the patient in order to serve justice and fairness." I want to reemphasize that forensic psychiatry as the term is used for this article is not concerned with *patients*. The person being interviewed has often become involved with the legal system of his/her own volition. If the skillful evaluator, after explaining to the person interviewed the purpose of the evaluation and how the statements will be used, obtains information against the interests of the person, then so be it. The evaluator is attempting to reach an honest conclusion about a psychological issue that has legal consequences. Using the most skilled evaluators increases the likelihood the information they obtain will be accurate.

Seduction by the Adversarial System

The fourth boundary issue Stone discusses is "the danger that one will prostitute the profession, as one is alternately seduced by the power of the adversarial system and assaulted by it." Without question there are psychiatrists who have become known as "defense psychiatrists" or "prosecution psychiatrists" and who are willing to take only the perspective of one particular side. These people are not worthy of the name "forensic psychiatrist" for they are not using their skills in an honest way. To suggest that the possibility that some will prostitute the profession is a reason not to become involved in the courtroom setting is analogous to suggesting that because some psychiatrists have sex with their patients, we should never trust any therapist to be alone with a patient. This is, of course, absurd, and the entire profession should not be judged based on the wrongful actions of a few.

I assume that when Stone suggests forensic psychiatrists are "dazzled by the media spotlight and paid more than Blue Cross/Blue Shield allows" he is referring to another aspect of being seduced by the power of the adversarial setting. In my experience, there are probably as many or more forensic psychiatrists in-

volved in civil cases as in criminal cases, yet these cases never receive any media attention nor, for that matter, do most criminal forensic cases. So the notion that the forensic psychiatrist is attempting to become a media star is laughable. Regarding the payment system, in some cases it may be more lucrative to do forensic work, but in many cases, the forensic psychiatrist is a salaried individual serving the court, not the individual attorney. I wonder if Stone also would suggest that psychiatrists who set up practices geared toward the wealthy patient, rather than practicing in a state mental institution where they probably are needed more desperately, are behaving unethically or are being seduced by money rather than the true needs of the mentally ill?

Dr. Stone suggests in closing that the psychiatrist does not reveal "to the jury that he or she has been retained to make the best case possible" nor does the judge instruct the jury that the "forensic psychiatrists have a responsibility to be biased." This represents the heart of Stone's misperceptions about the role of the forensic psychiatrist. The psychiatrist is called to the stand because he/she has evaluated a client and reached a conclusion the attorney finds supports his or her position. The judge and jury understand the attorney would not call any witnesses, be it a psychiatric expert or otherwise, who would not support the position of his/her client.

It is not the psychiatrist's responsibility to "make the case," nor is he/she "to be biased." The psychiatrist is there as an expert to share with the court his/her knowledge and conclusions. If questioning brings out unfavorable information on the attorney's client or weaknesses in the case, it is not the evaluator's job to deny or try to rearrange the facts to win the case. He/she is there to present his/her findings — no more, no less.⁸ The outcome of the case does not depend on the psychiatrist but on the facts the attorney has to work with and how he/she presents them. Yet having said this, as an attorney I must acknowledge I want to feel the expert is "on my side." However, I don't expect him/her to win the case for me. I also think that in some cases it becomes inevitable that the psychiatrist is struck by the plight of the client and wishes to assist in justice being served. He/she must carefully monitor himself/herself using clinical skills to be as objective and impartial as possible. Only in this way is the psychiatrist providing a true and credible service.

Throughout Stone's article, one receives the impression he believes the psychiatrist who enters the legal arena decides the fate of the involved parties. Although the psychiatric evaluation may greatly influence the ultimate judicial outcome, in many cases the information conveyed through the evaluation is just another piece of information that may help decide the ultimate legal issue. Rarely is a case decided solely on psychiatric testimony. Even in cases where the psychological issues seem to be the only issue (such as insanity defense cases), the court has the right to decide the weight given to the testimony of any expert and to reject the findings of all experts, assuming other evidence supports the conclusion reached by the fact finder. Thus, although forensic psychiatrists have much to offer the judicial system, their importance to it should not be overstated.

Finally, I suggest it is possible to serve the needs of the patient and society at

the same time, although maybe not in the same case. There is the need for competent psychiatrists to treat patients as well as to use their skills to answer the psychological questions raised in the legal arena. In this way, whatever the psychiatric profession has to offer can be available to individuals in need of treatment as well as to society, which needs assistance in answering psychological issues that arise in the legal setting.

Why Forensic Psychiatrists Are Needed

With four of every ten children being part of separated or divorced families, competent professionals who can dispassionately assess the needs of the child are critical in contested custody situations. In personal injury and workers' compensation cases, when claims of psychological pain arise in the context of claims of physical injury there is need for someone with experience in understanding and evaluating people to determine if the claim is valid. (If it is not valid and yet succeeds, we all bear the costs in terms of higher insurance rates or higher costs for goods and services.) Finally, with growing numbers of elderly people, issues of competence to manage funds and make rational decisions are increasing. Here the psychiatrist can help assure that allegations of incompetence are grounded in fact, rather than the greed of heirs, too impatient to wait for death to bring them their relative's assets. Indeed, the psychiatric examination can detect treatable causes for manifestations of forgetfulness and depression, initially regarded as symptomatic of untreatable senility.

Attorneys do not have the training or insights to provide the courts with the type of information that would be very valuable in helping achieve a just result in any of these types of forensic cases. Lay people, who are friends of the litigant, also cannot bring the insights or objectivity required for justice to be served. The responsibility falls on mental health professionals, primarily those with the most training — psychiatrists and psychologists — to share their knowledge (however limited it may be) with the courts to try to balance competing claims for a fair result.

The Ethical Forensic Psychiatrist

The person being evaluated in the forensic setting is usually involved with the legal system in a way that may profoundly effect his/her life. This is true in criminal cases where the evaluated person may face imprisonment as well as in civil cases, where he/she may face involuntary hospitalization or the loss of custody of his/her child. For these reasons, the time spent by the forensic psychiatrist in attempting to answer the psychological questions raised in the legal context may be crucial both to the fate of the person and to whether justice is served. It is important for the psychiatrist to undertake his/her task in a thorough, competent, and ethical manner.

Rappeport⁹ has distinguished between the forensic and general psychiatrist. The forensic psychiatrist understands from the outset that he/she is serving a third party, not a patient. When the person comes to be evaluated, he/she is not seeking therapy but some potential benefit relating to the legal system. This makes the

individual more likely to be less open or perhaps even dishonest, a fact of which the evaluator must be aware. The evaluator is responsible for clarifying his/her role with the interviewee and any attorneys involved. At the beginning of each interview the person should be warned how his/her statements and behavior will be used in reaching a recommendation on the particular question at hand.

The ethical forensic psychiatrist then uses clinical skills, combined with any other relevant materials (previous psychiatric records, psychological testing, witness statements, other reports) to form the data base on which his/her expert conclusion will be based. This conclusion should not depend on who paid the evaluator's fees (or on the potential for more fees as a result of courtroom testimony) but should be the result of the evaluator acting in a dispassionate, unbiased, informed manner. This may be the greatest strength of an evaluation, resulting in early settlement of a matter, further exploration of psychiatric issues, or abandonment of these issues.

Unethical Practices

An evaluation inadequately or too hastily done is unethical. If one does not have time to competently answer the question posed to a degree that the evaluator feels comfortable with, then he/she should not undertake the evaluation. Additionally, in certain types of cases (most notably child custody disputes) an evaluation of one parent and not the other is worthless as well as unethical because it is taking money for performing an evaluation that does nothing to answer the question posed.

I also believe it is unethical to respond to questions or to make a determination about an individual without having personally evaluated him or her. The primary skills of the psychiatrist involve observation and the deductions made from these observations. The rendering of a psychiatric opinion based on the comments of others or just on previous records does not provide the type of objective information that can be obtained from a personal interview. Even in the situation where the issue is whether the person was mentally competent at the time of writing a will, the courts do not need a post mortem psychiatric evaluation. Sufficient information to decide competence should be available from the people who knew the deceased at the time of writing the will and possibly from the health care providers who saw that person during that time. It is more likely the psychiatrist will reach an inaccurate conclusion or be unable to adequately support findings on a person he/she has never seen.

The issue of the forensic psychiatrist responding to hypothetical questions, is a matter unsatisfactorily explored in *Barefoot v. Estelle*.¹⁰ The hypothetical question is supposed to include all the facts involved in the case, yet it can never convey all the information that would be revealed to a competent clinician in a personal interview. Accordingly, mental health professionals should object to answering hypothetical questions and should explain their reasoning for doing so. (It should be noted there is a declining use of hypothetical questions, and they have been discarded by some courts.)

Another problem for the forensic psychiatrist involves dealing with self-con-

fessed uncertainty. The ethical way to proceed is to identify those areas one feels confident about, to acknowledge that which is speculation, and to explain why one is speculating. When one cannot reach a conclusion — don't. Although attorneys press for answers, sometimes they are not forthcoming. In those rare instances, an explanation of why an answer cannot be given is in order.

Finally, I want to address what is probably the most controversial issue facing forensic psychiatry today: the role of the psychiatrist in death penalty cases. The furor within the profession over Dr. Grigson's involvement in a series of death penalty cases points out the need for ethical guidelines in this area. I believe if one is morally opposed to the death penalty, then he or she should not become involved in this type of case. The guidelines set forth earlier (not responding to hypotheticals, not testifying about a person one has not evaluated, and being honest about the limitations of one's opinion) would apply with full force in this area.

Whether one should take the view that it is inappropriate for physicians to become involved in these type of cases is worthy of further discussion. I have no answers, since this is not my area of involvement. I do suggest that when mental health professionals become involved in this area, they follow guidelines developed by Dix,¹¹ which incorporate the ideas I have set forth and would require an explanation to the court of the professional's limitations in predicting future dangerousness. These guidelines are worthy of study and discussion by forensic psychiatrists.

It should be noted that even if all mental health professionals refused to participate in this type of proceeding, the number of people sentenced to death probably would not change since the nature of the crime and the person's past behavior are the primary sentencing determinants. Professional input probably will have nothing to add, unless there are some factors that should be brought to the court's attention when considering mitigating the penalty.

Conclusion

I realize that many forensic psychiatrists feel battered both by their colleagues and by the legal profession. There seems to be no shortage of criticism about their work, yet there is no serious discussion about limiting the availability of this type of expertise to the legal system. Although it is clear that forensic psychiatrists are performing a job that needs doing, they are rarely appreciated. Yet most attorneys, the courts, and the legislatures recognize that the psychiatrist can bring useful insights and information to legal disputes. Indeed, this sharing of knowledge should be done by forensic psychiatrists who have learned how to communicate clearly and concisely with the legal community and who are willing to clarify the basis for their opinions as well as the limitations of their knowledge. There is tremendous need for forensic psychiatrists to use their clinical skills to try to serve the goals of achieving of fairness and justice in our society.

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