

District Attorney, United States Attorney, County Probation, Federal Parole and the Workmen's Compensation Insurance Fund. These residents rotate through the State of California Department of Corrections and Youth Authority Facilities, as well as county and federal prosecution and defense agencies. They are supervised by a multi-disciplinary staff of psychiatrists, jurists, deputy district attorneys and deputy public defenders.

Through these academic and field experiences residents acquire expertise in psychiatric consultation for legal purposes. The post-graduate program stresses two aspects of consultation to which particular attention will be given in this chapter: 1) qualities of the psychiatric-patient relationship that stem from the legal implications of the consultation; and, 2) characteristics of the psychiatric report that are determined by the special requirements of the legal issue.

HISTORICAL DEVELOPMENTS

Considerable debate about psychological and psychiatric consultation for legal purposes can be found in the literature. In the late nineteenth century, expectations were raised by Hugo Munsterberg, Professor of psychology at Harvard University, that lawyers, judges and juries would be able to rely more and more upon the findings of experimental psychology¹, but these hopes were criticized by leading jurists.² During this time, the professional status of forensic psychiatry was high throughout the world. The image of the alienist was mirrored in the courtroom role of the neurologist. Almost all consultations were limited to criminal trials in which the psychiatric inquiry was directed to issues of mental illness or criminal responsibility³.

During the beginning of the twentieth century the United States witnessed a marked decline in the professional status of forensic psychiatry. This can be attributed to many factors:

1. Psychoanalysis influenced most American psychiatrists to take a dim view of forensic psychiatry. Psychiatric-legal consultation was denounced by leading figures in psychoanalysis including Sigmund Freud⁴, Gregory Zilboorg⁵, and Karl Menninger⁶. Today, most practicing psychoanalysts shun consulting for the court.
2. Traditionally, forensic psychiatrists were associated and identified with state hospital psychiatrists who were not accorded as high esteem as private practitioners.
3. Until recently, the descriptive biological frame of reference was utilized most frequently by psychiatric consultants for the courts. Many American psychiatrists adhere to a dynamic psychological approach and do not accept the biological organic model of mental disorder. Dynamically oriented psychiatrists rejected consultation for legal purposes in the belief that the legal system was more concerned with the descriptive rather than the dynamic approach.
4. Following World War I, American psychiatry moved away from its traditional disposition orientation and focused upon active treatment, particularly psychotherapy. Consultations for legal purposes were frowned upon as being concerned with disposition rather than treatment. This attitude became even stronger after World War II. It is expressed frankly today by psychiatric residents who generally look down upon the disposition oriented court-appointed psychiatrist.
5. Contemporary psychotherapists generally avoid psychiatric-legal consultation because they prefer that the patient's motive for consultation be a sincere desire for treatment. This does not prevail in most legal patients' requests for consultation. Many litigants are forced into consultation by the legal process.
6. Psychotherapists frequently view the patient's relationship to the legal system as anti-therapeutic because legal ends may be punitive and harmful to the patient.
7. Problems of scheduling patients also prevent the psychiatrist in full time private practice from having the flexibility of time necessary for psychiatric-legal consultation.

In recent years, marked differences of opinion have been expressed about the propriety, validity and usefulness of psychiatric consultations for legal purposes. Most psychiatrists believe that their role and function should be structured only by the goals of treatment and should not be directed to resolution of legal conflicts⁷. A few fear that expert witnesses will function as agents for the court and that consultations and opinions will be influenced by social or political

forces⁸. A few jurists believe that psychiatric-legal testimony may usurp the function of the trier of fact and even that the psychiatrists' opinions may subvert legislative function and intent⁹.

Psychiatrists vary in their acceptance of the consultant role. Some accept consultation for the courts on a conditional basis. A few hold that technical psychiatric data should be presented in the report, but that the consultant should not attempt to translate his psychiatric data into the legal opinion; in other words, they believe that the psychiatrist's opinion should not relate his clinical finding to legal issues¹⁰. Some psychiatrists recommend that consultations be limited to civil issues like custody disputes, but should not be applied to criminal issues like that of criminal responsibility. Most would like to limit the psychiatrist's relationship to the court to a particular role, like that of a neutral court-appointed expert, but recommend against the psychiatrist assuming an advocate expert witness role¹¹. A few psychiatrists insist upon the advocate expert witness role in criminal actions, and limit their participation to consulting for the defense, i.e., they refuse to consult for the prosecution or be a neutral witness for the court¹². Reluctance to participate in the role of prosecution or court-appointed psychiatrist appears strongest in capital cases in which consultants believe that their evidence might be instrumental in condemning an accused. Many would restrict their psychiatric-legal inquiry to certain phases of the legal process, e.g., they would consult in the post-conviction phase of the criminal trial on the issue of sentence, but would avoid consultation in the pre-conviction trial phase on the issue of guilt¹³.

Since World War II, legalists have demonstrated a growing acceptance of psychiatric consultations. This probably reflects their identification with the contemporary accent on psychology. Judicial interest in the psychological approach to man appears to be based upon the belief that exploring psychological factors in human behavior will promote truth and justice in the resolution of legal disputes. Judges have found psychological evidence not only more theoretically acceptable, but also more admissible in criminal and civil issues. Citations of psychological and psychiatric material are frequently given today in trial and appellate decisions. Earl Warren, Chief Justice of the United States Supreme Court, in his 1954 landmark decision in the School Segregation case, indicated that evidence from social psychologists had influenced the court's thinking¹⁴. In 1966, an Iowa State Supreme Court ruling in a much publicized custody dispute, relied heavily upon the testimonial opinion of a child psychologist in supporting its decision for the custody award¹⁵.

During the past ten years, participation in community psychiatry programs has stimulated interest among psychiatrists in the problems of psychiatry and law. A more cordial attitude toward the legal system has developed among psychologically oriented psychiatrists who are treating patients in social and legal agencies. As the operation of community psychiatry programs interrelates more with legal and other social institutions, it appears likely that psychiatric consultations for legal purposes may focus more upon treatment issues and less upon the fine points of legal dispute. This interaction, however, may also bring more psychiatrists into the field of consultation for a variety of legal purposes.

THE PSYCHIATRIC-LEGAL CONSULTATION

Many questions have been raised about the psychiatric-legal consultation. To what issues is it directed? What does it include? What special features characterize it? How frequently does it occur? What problems stem from the psychiatrist-patient relationship? What special requirements must the psychiatric-legal report meet? What criticisms are made about these consultations? How can interviews and reports be improved?

DEFINITION OF THE PSYCHIATRIC-LEGAL CONSULTATION

The psychiatric consultation for legal purposes should be viewed from the perspective of the objectives of the legal system. Through law, social conduct is controlled; and society is provided with a peaceful and orderly system for settling conflicts between people, social fictions, and institutions, and between people and legally constituted authority. Within this frame of

reference, the psychiatric-legal consultation is an instrument for the trial process and a valuable aid in the administration of justice.

Psychiatric consultation for the court includes the interview of litigants, witnesses, adjunctive persons, written report and courtroom testimony. Psychiatric expertise provides relevant material which is not otherwise available to the court or jury. Psychiatric expert opinion, when accepted according to the rules of evidence, carries weight as "opinion evidence." The value of the consultation is proportional to the utility of this evidence in helping resolve legal disputes.

Many psychiatrists believe that their medical observations should be accorded legal weight as "scientific facts" rather than opinions; but in law, all evidence presented at trial including "expert opinion," called "opinion evidence," is thrown into the trial hopper. It may then be applied to the "ultimate legal question," the issue at trial which will be decided by the judge or jury who are the "triers of fact." In law, legal facts as evidence differ from scientific facts in that, by themselves, they are not conclusive. They are factors, relevant and materially significant to the legal issue, which will be weighed against each other and applied to the ultimate question. Psychiatric opinion evidence is weighed against other evidence. It frequently is accorded less importance or probative value than is other evidence. The judge or jury need not be bound by the expert opinion, but must take it into account in reaching the decision. Psychiatrists often forget that although both expert and trier give answers to the same trial question, only the trier of fact is the decision maker. His decision may follow or may be contrary to the psychiatrist's opinions.

THE NATURE OF THE PSYCHIATRIC INQUIRY IN THE PSYCHIATRIC-LEGAL CONSULTATION

Psychiatrists are not in agreement about the nature of the psychiatric inquiry for legal purposes. Some believe that this inquiry should not differ from that with the medical (non-legal) patient. They believe that every consultation should explore all psychological phenomena related to personality function and behavior and that their observations should progress from historical, social, physical and clinical data to psychiatric inferences and medical conclusions. This material should then be presented to the legal system as clinical findings — medical opinions, pure and simple.

Other psychiatrists hold that the inquiry with a legal patient differs markedly from that with a non-legal patient. They believe that the consultation should be more specifically pointed to the legal question and that the psychiatrist's opinions should relate clinical material to specific legal issues. They point out that the trial system asks the psychiatrist to offer his expert opinion as a conclusion — thought out, yet open to argument — about the relationship of his psychiatric findings to legal issues and, in particular, to the ultimate legal question. Although most psychiatrists raise questions about the application of their data and opinions to legal issues, jurists and attorneys consider this the most significant aspect of the psychiatric consultation. Many judges want to know the psychiatrist's answer to the ultimate question on the assumption that the psychiatrist has silently answered it for himself and their belief that his hidden answer basically determines all of the expert's opinion evidence. Judges would prefer that the answer, therefore, be explicit and subjected to their critical evaluation during the trial.

Psychiatrists object most to relating their clinical findings to the ultimate legal question because this question carries the weight of moral judgment so distasteful to them. A crucial distinction exists between the expert opinion given by a psychiatrist and the moral-legal judgment of the judge or jury. A moral-legal judgment is inherent in every trial decision. The expert opinion, as legal evidence, is useful for the moral judgment and legal decision to be made by the trier. Confusion arises because the same trial question is put to both psychiatric expert and to the trier; but, in the former case, the question is put to the psychiatrist to utilize his expertise in relating psychiatric findings to the legal issue; and in the latter case, this question is put to the trier to obtain this moral judgment expressed by legal decision.

Most psychiatrists believe that their opinions about the relationships of their findings to legal

issues are outside their medical expertise. To support this contention, some courts have ruled that the psychiatric expert witness cannot be compelled to offer opinions relating his clinical findings to legal issues. In a few jurisdictions, psychiatrists are prevented from answering the ultimate question. On the other hand, most states have held that the psychiatrist's opinion relating his clinical evidence to the ultimate legal issue is admissible and does not invade the province of the trier of fact. When participating in criminal actions, most psychiatrists have strong feelings against relating their medical findings to the ultimate issue of criminal responsibility and guilt. Many psychiatrists, however, freely offer opinions relating data to legal issues in civil actions; e.g., in recommending that custody of a minor child be awarded to one or another parent, or offering opinions about psychological determinants or consequences of personal injury.

It is possible to offer meaningful opinions in trial issues without answering the ultimate question. For example, in a custody dispute, the psychiatrist can offer his opinion as to what kind of emotional adjustment a minor child might make to one or the other parent were the child to live in the home of either. This opinion gives the trier significant material which is helpful in reaching his decision about the custody award. It differs considerably, however, from the answer to the ultimate legal question, more frequently asked by the psychiatrist, as to which parent should have custody of the child. In a trial issue of criminal responsibility, the consultant can direct his inquiry to factors in the accused's mental capacity to have understood his offending actions, or his mental capacity to have planned the crime. In this way, psychiatric opinions can be offered which bear on the moral-legal decision of guilt or innocence, but the psychiatrist can still avoid making this judgment himself.

FREQUENCY OF PSYCHIATRIC CONSULTATIONS FOR THE COURT

During the past twenty years, the use of psychiatric-legal consultations has increased. This is related to the following factors: 1) a growing sophistication among legalists about the theory and practice of psychiatry; 2) a heightened interest among legalists about the theory and practice of psychiatry to the field of law; 3) broadening social policies which have brought attention to a greater number of psychological factors which the trier of fact may consider in criminal and civil actions; 4) changing legal procedures including accent on constitutional guarantees; and 5) expanding rules of admissibility. These allow the inclusion of more psychological evidence in the trial process.

No reliable statistics are available on the frequency of psychiatric-legal consultations. A conservative estimate of the total number of litigants examined for psychiatric-legal purposes in the State of California during the calendar year of 1965 would range between 25,000 to 30,000 persons. The majority of these examinations were for civil rather than criminal actions. Many of these persons were examined by two psychiatrists so that the total number of consultations can be estimated at close to 60,000¹⁶. Although California courts may be more concerned with psychiatric-legal issues than those in other states, there is evidence that such consultations in other states are also more frequently requested than in the past. It is likely that the total number of psychiatric-legal consultations conducted annually in the federal courts and in the fifty state jurisdictions easily exceeds one million per year.

THE PSYCHIATRIC-LEGAL INTERVIEW

Often value judgments can be made about the psychiatric-legal interview which are contrary to the psychiatrist's written report or courtroom testimony. What is considered persuasive testimony or a good written report may be based upon a poor psychiatric interview. The persuasive effect of the psychiatrist's oral testimony often appears to be more related to his courtroom demeanor than the adequacy of his interview with the patient. A good psychiatric report may appear so because significant material and conclusions were well organized and presented despite an inadequate or poorly conducted interview. The psychiatric-legal interview should develop adequate psychiatric material with minimum difficulties for consultant and patient. It should be as therapeutic as possible for the patient by reducing his anxiety and by

helping him understand his problems. Although the therapeutic goals of the interview are secondary to the legal, a good interview should not result in any deterioration of the patient's condition.

The psychiatric-legal interview contains two features which impair communication between the psychiatrist and the patient: 1) the peculiar role of the psychiatrist who is primarily an investigator and not a therapist; and 2) the role of the patient who is primarily a litigant and not a patient.

When the psychiatrist, as investigator, approaches the litigant patient, he may find a number of factors influencing his inquiry and interfering with the success of the interview. Especially important is the psychiatrist's concern about the doctor-patient relationship. For psychiatrists, the doctor-patient relationship is the primary therapeutic tool. Some even hold that a true doctor-patient relationship does not exist in psychiatric-legal consultations because of the absence of therapeutic goals. Functioning in the medical system, the consultant prefers to think of his role as a treater of the patient and not as an agent in the legal system providing evidence for the administration of justice. The consultant copes with this therapeutic bias by maintaining as much neutrality and objectivity as possible. A compelling bias, however, plus fear that his evidence may hurt the patient's legal position may color the consultant's perspective, affect his judgment and distort his conclusions¹⁷. This therapeutic orientation is largely responsible for psychiatrists consulting for the defense rather than for the prosecution in criminal cases, and consulting for the injured plaintiff or aggrieved claimant rather than for the defense in civil issues.

THE PSYCHIATRIST AS ADVOCATE

The psychiatrist, as expert witness for one or another litigant, or for the court, is expected to avoid advocacy. His desire to help the patient, however, may unwittingly lead him into the role of advocate rather than that of expert witness. Evidence of his assuming an advocate role may be hidden or obvious. This change in his position from neutral witness to advocate may be sudden or subtle and may develop during any phase of his participation in the trial process.

Advocacy may be related to many factors. The consultant may identify with the litigant, the legal issue, or with the side that retains him. Personal problems may influence him. For example, the recently divorced psychiatrist who, himself, is a litigant in a child custody dispute may identify with one of the litigants in a child custody action. A psychiatrist consulting in criminal issues may be affected by his opposition to capital punishment, or his disagreement with the severity of criminal sanctions related to certain social offenses; or, he may be trying to uphold his social convictions through the medium of the consultation. The psychiatrist who is most criticized as biased is the one who maintains an inflexible opinion or absolutist point of view without supporting data or logical reasoning when presenting his findings.

RELATIONSHIP OF THE PSYCHIATRIST'S BACKGROUND TO HIS INTERVIEW PROCEDURE

The consultant's approach to the legal patient and his selection of data holding particular significance to him are influenced by his academic background, psychiatric training and experience, adherence to a biological or psychological approach, and his identification with one or another system of medical practice, hospital, agency, or private practice. His approach is affected by whether his clinical training was in a center which was disposition-oriented or in a university or psychoanalytic training institute which was therapy-oriented. His association with a legal or social agency also influences his attitude toward patients. The psychiatrist in full time private practice may be much more acceptant of individual vagaries in his patient than is the institutional psychiatrist, and in contrast to the latter, he may focus more upon the patient's psychological strengths than on his weaknesses and liabilities.

The consultant's background determines, in part, the amount of time he will spend interviewing the patient, whether his approach is directive or non-directive, whether he looks for clinical, descriptive, or psychodynamic material, whether he supports his findings and

conclusions with psychological tests, accentuates the physical and neurological examination, and whether he uses special techniques for evaluation.

The interview can usually be conducted in a non-directive manner with open-ended questions exploring significant areas. Exploration, however requires that specific questions with psychiatric-legal import be answered by the consultant, e.g., whether the defendant has sufficient mental capacity to stand trial. In order to explore significant areas during the limited time of a usual interview, a consultant may become overly directive and specific in his questions. Although the question-answer type of interview should be avoided, the consultant can also develop erroneous conclusions from the non-directive type of interview if pertinent areas have not been explored adequately. For example, in the issue of mental competency to stand trial, if the defendant's ability to defend himself against the charges has not been explored with respect to his understanding these charges and with respect to his ability to cooperate with counsel, then correct conclusions about mental competency to stand trial cannot be determined.

Interview note-taking is not necessary much of the time, but notes should be recorded for legal purposes soon after the interview. Some of the patient's verbatim remarks may be written down by the psychiatrist to describe a specific inquiry. Some psychiatrists and psychologists have recommended taping the interview and a few make extensive annotations of the transcribed record for the court. Taping has the advantage of a permanent record which can be reviewed and abstracted for legal purposes or even replayed in court, but most attorneys and psychiatrists have not found this necessary. Some believe that it may interfere with communication; but probably the chief reason taping is used so infrequently is because of the additional expense involved. Although this procedure has questionable value for the usual case, it may be important in selected consultations.

PSYCHOLOGICAL TESTS

Psychiatrists differ with respect to their reliance on psychological tests for inferences and conclusions and with respect to the legal issues for which they believe tests to be valuable. The clinical psychiatric-legal interview is almost always limited in time, and the psychiatrist often has inadequate collateral source material to support his conclusions. Psychological tests, therefore, can be most helpful in corroborating the consultant's impressions of the patient's mental state, psychodynamics, and personality structure. They provide inferences which the psychiatrist may explore in subsequent interviews. Psychological techniques which raise or strengthen the suspicion of organicity are particularly important. Contemporary psychological tests, however, have not been standardized for legal inquiries, and their validity is questionable when applied to specific legal issues.

EVALUATION OF PHYSICAL FACTORS

The consultant's biological or psychological orientation will influence his selection of physical factors which he believes affect social behavior and will lead him to stress or to minimize the physical examination, neurological studies, electroencephalogram, or other laboratory techniques in order to rule out primary brain disease or systemic conditions with associated brain syndrome. Although in the early twentieth century physical factors were stressed almost to the exclusion of psychological factors, today physical factors may not be accorded enough attention. Many offenders may have hidden or subtle physical factors affecting their social behavior, and these are rarely evaluated prior to trial. Chronic or even acute brain syndromes are sometimes first detected in prison, not having been recognized by the examining consultant prior to the patient's commitment. Emphasis on the psychological model of mental disorder to the exclusion of a consideration of physical factors is a disservice to many patients, particularly indigent defendants in criminal actions, who receive only the most superficial physical examinations.

SPECIAL INTERVIEW TECHNIQUES

In addition to customary interview procedures, some physicians use special techniques. Interviewing hypnotized patients and those under the influence of drugs such as Ritalin, the amphetamines, scopolamine, barbiturates, and alcohol has been found useful at times. These techniques are believed to improve the interviewed patient's verbal and emotional responses by reducing his conscious inhibitory controls, intensifying or reactivating his emotional experiences, stimulating recall of significant events, and obtaining material from different levels of consciousness. Most psychiatrists, however, do not find these special techniques to be generally useful, although they may be important in particular cases, e.g., in evaluating alleged drug-induced antisocial behavior. None of these special techniques enhances the reliability or truthfulness of the information obtained. A litigant patient may fantasy, confabulate and deliberately fabricate while under the influence of hypnosis or any known drug. There is no truth serum. No greater truth can be attributed to the patient's hypnotic or drug-induced statements or behavior than to his conduct or verbalizations while he is in a normal waking state.

RELATIONSHIP OF COLLATERAL SOURCE MATERIAL TO PSYCHIATRIC INTERVIEW

The psychiatric consultant should review as much material as possible prior to interviewing the litigant and reporting to the court. Reports from attorneys, parole officers, probation agents, and law enforcement agencies are frequently not provided unless the consultant insists upon seeing them. Many patients, particularly those involved in criminal issues, communicate more freely if they know their records have been seen. Interviews with relatives or other interested parties often reveal significant information quite different from that given by the patient or stated in the legal reports. Unfortunately, most consultants rely for their impressions solely upon the clinical interview with the patient and the litigant's subjective verbalizations; this may not only reduce the validity of the psychiatrist's conclusions, but sometimes may lead to erroneous conclusions.

RELATIONSHIP OF PSYCHIATRIC-LEGAL INQUIRY TO PSYCHIATRIC INTERVIEW

The consultant must understand the legal issues involved in his psychiatric-legal inquiry. This knowledge determines the areas for exploration so that he can structure his interview and organize his reasoning in answering the legal questions. A conference with the attorney or judge prior to interviewing the patient will clarify what the legal issues are and help him understand the pertinence of his psychiatric findings and conclusions to the trial action. Unless his data and opinions are relevant to the legal issue, the consultation findings have little or no evidentiary value, e.g., an interview directed to the establishment of a psychiatric diagnosis has no evidential value, and would carry little weight unless this diagnosis can be significantly related to the trial issue. The particulars of a defense plea also determine the direction of an interview, e.g., the plea of diminished criminal responsibility may require an extensive exploration of historical factors, whereas a plea of criminal insanity may require an intensive evaluation of psychodynamic features.

RELATIONSHIP OF SOCIAL POLICY TO THE PSYCHIATRIC-LEGAL INTERVIEW

The consultant must also understand that social policies underlie legal concepts and practice and he must know how these policies in turn relate to his psychiatric opinions on a particular legal question. For example, in a workman's compensation issue, the consultant should know that contemporary social policy has extended the concept of causation in industrial disability far beyond the medically accepted concept of causation. In some jurisdictions, any disability preventing employment that can be remotely considered as work-related may become compensable even though the medical causation is highly speculative, or even denied by psychiatric authorities. In personal injury litigation, the consultant should be aware of the

implications of public policy toward negligence and the standards of prudent conduct to which society holds the average person. In a child custody action, the psychiatric consultant should explore the relationships of each parent to the social policy and legal concept of "fitness of the parent" for the "best interests of the child." In his interview exploring the question of criminal insanity, the psychiatrist should understand that criminal responsibility refers to social policy exempting certain persons from public responsibility for their acts with respect to punishment, and that this social responsibility or blamability is different from the psychiatric concept of individual responsibility.

Social policies and public doctrines differ throughout the country, and those applicable to each case should be clarified for the consultant. Without this understanding, the psychiatrist's interview approach, clinical findings, inferences and conclusions may be totally inapplicable to the legal issue. The consultant must apply his psychiatric findings objectively to the social policies as expressed in legal standards. Otherwise, his conclusions may be influenced by his personal biases and dislikes for certain public doctrines. The psychiatric expert should feel free to express his dislike for established social policy; but, if personal or social bias distorts his professional opinions, there is an increasing possibility that the latter may usurp legislative and judicial function.

INTERVIEW TIME

The single one-hour interview which is considered standard for psychiatric-legal consultation is inadequate for many cases. Many psychiatric-legal interviews last only five to ten minutes. The patient's lack of cooperation and poor rapport with the psychiatrist is generally a reflection of this cursory contact. The patient recoils from the consultant who makes only a superficial evaluation of a legal issue which is so important to the patient. The superficial approach also sets the stage for the patient's negative response to psychiatrists in future contacts. Multiple interviews are especially necessary for patients facing criminal charges. Many accused persons are distrustful of authority and fearful of revealing themselves; a single interview, which is brief and superficial, only reinforces their feelings of distrust, suspicion and rejection. Successive interviews with the legal patient, when required, should be conducted on different days, if possible, in order to evaluate the patient under somewhat different settings. Sometimes significant material arises only in subsequent interviews. Most litigant patients, even those evaluated for the court, become more responsive to the consultant with repeated interviews.

Psychiatrists have assumed that it was the desire of the court, patient or counsel to limit interview time, but a survey of opinions of civil and criminal court judges in the United States revealed that most of them wanted psychiatrists to spend more time with patients¹⁸. In another survey, State of California industrial accident commissioners and referees declared that at least four hours of time was necessary for an adequate psychiatric evaluation of the average patient claiming compensation for industrial injury¹⁹. Probably three to five hours of interview time distributed over several sessions, should be standard for psychiatric-legal consultation.

THE PATIENT'S ROLE IN THE PSYCHIATRIST-PATIENT RELATIONSHIP

The basic difference between the role of the legal patient and that of the medical patient in the psychiatrist-patient relationship is that the legal patient is not truly a patient, he is primarily a litigant. He does not enter the sick role as a patient approaching the psychiatrist for relief of disturbing symptoms. He is primarily interested in obtaining the psychiatrist's services to help his legal cause. In this litigant-patient role he sees the psychiatrist either as a potential ally or as a threat in his legal contest. If symptoms are present, he perceives these as either supporting or threatening the outcome of his legal action.

The psychiatric interview is obviously strongly colored by the patient's view of the consultant as an ally or antagonist. Fear of revealing himself because psychiatric evidence might prejudice legal action against him nevertheless influences each legal patient's relationship to the consultant, whether the psychiatrist is retained by the patient, his adversary or the court. The patient's urge to falsify, distort and misinterpret to both ally and antagonist is a reflection of

his continued conscious or unconscious attempts at self-protection. In criminal actions the court-appointed psychiatrist is especially threatening to the patient because he is perceived as a covert agent of prosecution, a threatening part of the legal system, rather than as an impartial and objective consultant. In civil actions, it is equally doubtful that the litigant-patient can approach the impartial medical expert as one who is nonthreatening, neutral and free of bias. Unconscious psychological forces such as guilt feelings and other hidden emotions also may affect the patient's relationship to the interviewer and color his presentation of himself to the psychiatrist.

When seeking a psychiatric consultation in a civil as opposed to a criminal action, the patient's approach to the psychiatrist is similarly influenced by the litigant role. Secondary gain from symptoms is clearly related to the legal end. The patient's desire for a favorable outcome to his hearing or trial is a force which compels him to present his case as favorably as possible to the consultant and leads him to offer self-serving statements made either as deliberate falsifications or unconscious distortions. These are often heard from litigants examined for personal injury actions, industrial accident claims, child custody disputes, administrative hearings and other civil issues.

The litigant's motives for his psychiatric consultation are usually more acceptable to him and his attorney than they are to many psychiatrists. The latter may experience discomfort with such patients and react negatively to them, especially if, as psychiatrists, they reject legal motives as legitimate bases for psychiatric consultation. The consultant may feel exploited by the litigant patient and manipulated by the attorney. Many psychiatrists believe that such manipulation produces a perversion of their psychiatric function to aid in promoting social justice.

The patient with criminal charges against him who seeks psychiatric consultation for treatment purposes rather than legal ends, and who earnestly enters the sick role, is usually more acceptable to the psychiatrist. Fostered by the patient's acceptance of the sick role, the consultant is prone to make a more favorable recommendation to the court relative to the patient's disposition. The court also may be more lenient in sentencing this person if he accepts psychiatric treatment.

INFLUENCE OF INTERVIEW ENVIRONMENT ON PATIENT'S RELATIONSHIP

The interview will be affected by the setting, e.g., whether the patient is seen in custody or in the consultant's private office. Many jail settings have inadequate facilities for psychiatric consultations. Litigants may be more communicative in environments which are more acceptable to both patient and psychiatrist. The patient's attitude toward the consultation is also affected by the stage of the legal process during which the consultation is held. For example, the patient may present quite a different picture before conviction than after conviction or sentence. A brief, perfunctory psychiatric examination enables many defendants to hide their psychiatric disturbance to a greater or lesser degree. Some persons accused of crimes believe they would be more stigmatized by society if they were considered "mentally sick" rather than "criminal offenders." Many frankly deny the sick role and insist upon the criminal role. Denial of the psychiatric patient role by the offender is encountered frequently among patients examined in prison because this environment demonstrates greater acceptance of the criminal offender than of the mental patient.

INFLUENCE OF LEGAL ISSUE ON PATIENT RELATIONSHIP

The patient's approach to the psychiatrist is related to the legal issue with which the patient is involved and is also related to the psychiatrist's function with respect to this issue. In California, many quasi-criminal issues require psychiatric consultation in cases for civil commitment. For example, a psychiatrist will examine the defendant and report his opinion to the court as to whether the patient is or is not a narcotic addict as defined by statute. The court's action upon this opinion may lead to a long-term civil commitment of the patient for rehabilitation. The patient's approach to the psychiatrist will vary, depending upon whether he

is charged with or convicted of a misdemeanor or felony. The felon addict may emphasize both his addiction and his psychiatric symptoms and difficulties. In so doing, he would hope to assure his civil commitment for narcotic rehabilitation because the average period of detention for rehabilitative treatment is much shorter than the penal sentence which the felon would serve in a state prison. On the other hand, the misdemeanor addict would hide his psychiatric difficulties and deny his addiction because civil commitment for rehabilitation is for a much longer period of time than the one year maximum jail sentence imposed for the misdemeanor.

Psychiatric evaluation of the sex offender also demonstrates how the legal issue influences the patient's attitude and his relationship to the psychiatrist. If a person is certified by the consultant to be a mentally disordered sex offender as defined by California statute, he faces an indeterminant civil commitment, possibly for life, at a maximum security prison or hospital, even though he has only been convicted of a misdemeanor sex offense. The court's adjudication of the patient as a mentally disordered sex offender can be made only upon psychiatric certification. The legal significance of the psychiatric interview is known to most sex offenders and obviously affects their relationship to the psychiatrist. Subsequent disposition of the sex offender and the duration of his hospital or penal detention also hinge upon reports from institutional psychiatrists. They periodically examine him for the court, prison or hospital to evaluate psychological improvement, continued sexual psychopathology and danger to the community. Obviously, the psychiatrist is perceived by the sex offender as his most important conduit to freedom.

THE PSYCHIATRIC-LEGAL REPORT

The psychiatric report for legal purposes is the closest professional link between the two disciplines of psychiatry and law. This report should provide a meaningful response to the psychiatric-legal inquiry. To accomplish this, adequate organization of material from the interview and collateral sources and proper structuring of relevant inferences and conclusions are necessary.

DIFFERENTIATION OF PSYCHIATRIC-LEGAL REPORT FROM PSYCHIATRIC-MEDICAL REPORT

No format for the psychiatric-legal report has been standardized up to the present time. Marked differences in organization of their material demonstrate that consultants differ widely in their understanding of the goals of the psychiatric-legal consultation. Psychiatrists have assumed that their reports for legal purposes should follow a format similar to that of reports for medical purposes. Their assumption compounds the difficulty in communication between psychiatrists and legalists. The format of the medical report is structured by the empirical approach to medical practice. The psychiatric report for medical purposes is directed to therapeutic goals. It describes psychopathological phenomena from history, observation, examination and laboratory studies. Following an empirical approach, the psychiatrist presents his inferences, conclusions and recommendations for treatment to be carried out by medical personnel. His report must be organized so as to provide this understanding of the patient in order to focus upon psychiatric treatment.

The purpose of the psychiatric-legal report is to furnish data for legal disposition which will be effected by attorney, judge, or jury. The most significant data are the psychiatrist's conclusions about this legal disposition. In his explanation of the reasoning which led to his conclusions, the psychiatrist must adopt the logical reasoning approach followed by the legal system. *In these psychiatric-legal reports, the organization of material should be determined by this logical reasoning rather than by the empirical approach used in medicine.* For example, description of psychopathological phenomena and elaboration of psychodynamics have no significance and are unnecessary unless they can logically be related to the legal issue. *The psychiatrist's reasoning in establishing and demonstrating this relationship is crucial. Upon psychiatric reasoning, not psychiatric conclusion or opinion, will depend the weight and value*

*which the court or jury accords the report. The format of the psychiatric-legal report should be structured by the legal need for this logical reasoning approach.**

Most reports do not present this reasoning, but merely state the expert's opinion based upon a clinical picture of psychopathology. Consequently, many are not considered useful and are criticized by jurists on this score. For example, one report presents a clinical diagnosis of psychosis which is corroborated by a picture of psychopathology, a supporting life history, and conclusion that the "patient is not competent to stand trial." Another provides a psychiatric diagnosis of schizophrenic reaction, paranoid type, describes this condition and concludes that the "accused party at the time of commission of the act did not understand the nature and quality of his offense." Neither report demonstrates the psychiatrist's reasoning or explains logically the basis for his findings and conclusions.

In the first example, what is necessary is a delineation of the observational basis for the consultant's opinion, i.e., a picture of how, if at all, the defendant's disordered thinking and apperception impaired his ability to stand trial, and in addition, a description of the psychiatrist's reasoning showing how he arrived at his opinion, e.g., a statement that the patient is mute and unable to communicate meaningfully with the psychiatrist and, therefore, is not able to communicate adequately with his counsel for preparation of his legal defense.

In the second example, what is important is a description of how the consultant arrived at his conclusion that the patient did not understand his execution of the act, i.e., the consultant's reasoning accompanying the observational basis for his opinion, e.g., that the patient at the time of assault held the irrational idea that the victim was poisoning her and that she believed herself to be in great danger of bodily harm from the victim. This unrealistic belief occasioned the defendant's abrupt physical attack upon the victim. This unfounded, irrational idea was a symptom of the patient's mental illness. The patient, at the time of her assault, believed her husband had changed from a concerned spouse to a malevolent, dangerous person intent upon destroying her. This peculiar thinking caused her to attack him and demonstrated her bizarre concept of the nature of her relationship to her husband, her gross misinterpretation of her marital situation, and her misunderstanding of her own conduct.

RELATIONSHIP OF CONFIDENTIALITY AND PRIVILEGE TO THE PSYCHIATRIC-LEGAL CONSULTATION

Both parties to the psychiatric-legal consultation are concerned with the confidentiality of professional communications. In most states, all professional communications to a psychiatrist are confidential and cannot be revealed without explicit permission from the patient. Breach of confidentiality by improper disclosure is condemned by professional ethics and may lead to disciplinary sanctions against the consultant. The injured patient may also seek recovery by civil suit against the psychiatrist. The psychiatrist is concerned because of his conviction that his relationship with the patient will be impaired unless the litigant believes that communications will be held in strict confidence; and the psychiatrist also does not want to hurt the patient by being forced to divulge confidences or unfavorable opinions. The patient's obvious concern is with his fear of exposing himself to legal attack or harm by having divulged incriminating material. Although the patient's wish for confidentiality is shared by the psychiatrist, many circumstances do not permit a completely confidential relationship. There are significant exclusions to confidentiality, e.g., the court-appointed psychiatric consultant does not have a confidential relationship with the legal patient.

The psychiatric-legal consultant encounters the problem of confidential communications in two areas: 1) when consulting for the court or other legal agencies; and 2) when consulting at the request of the patient or his legal counsel. In the first case, the fact that this consultant is an agent for the court allows him complete freedom to report all professional communications about the patient to the court. *The legal patient should be informed of the absence of confidentiality by the court-appointed consultant.* Conflict may develop between the court and

*See Appendix for suggested format for Psychiatric-legal Report.

consultant because of the latter's overt or covert omission of psychiatric material which the court believes to be important. The psychiatrist may be troubled over the question of revealing material to the court which could be misinterpreted or could become unduly injurious to the patient. Or, he may be concerned about divulging intimate material which he believes is not significant to the legal issue. After the consultant submits his report, he retains no control over it. He cannot regulate the manner in which the attorney or judge may treat his material. For example, even if the psychiatrist objects to his report being read to the patient or other persons in the court, he cannot prevent this. Such qualms may lead the consultant to censor his report before releasing it to the court.

Any legal agency represented by the psychiatric consultant may maintain confidentiality, if it so wishes. The psychiatric-legal consultant who is acting as an agent should clarify the limits of confidentiality with each agency. Obviously, if confidentiality does not exist, the patient's relationship to the consultant, as agent, will be affected.

When the consultant is an agent of the litigant or of his counsel, full confidentiality exists, and the patient may communicate whatever he wishes to the psychiatrist with complete security that his confidences will be respected. This consultant, however, also may have problems with the question of confidentiality because of the legal purpose of the consultation. Many questions remain unanswered. How far should the psychiatrist respect the patient's wish for confidentiality about communications related to the legal issue? Can the consultant ethically conceal material from the patient's attorney? Is there a change in the confidential relationship between consultant and patient because of involvement of the patient's legal counsel or because of peculiarities of the psychiatric-legal consultation? Full confidentiality exists if the psychiatrist has been engaged by the patient, himself, but this may be questioned if the psychiatric consultation has been requested by the patient's counsel and not by the patient, irrespective of what the legal position holds, and this is unclear. Most psychiatric consultants would respect a legal patient's wish that his communications be held confidential. The psychiatrist would not reveal these to the patient's attorney, even though they were significantly related to the trial issue, and even though the patient might suffer by the psychiatrist's adherence to the patient's wishes.

The question of privileged communication also affects the psychiatric-legal consultation. Privilege pertains to rules of evidence that give the patient the privilege of excluding any and all professional communications from being admitted as legal evidence in trial issues. No privileged communication can be admitted in court against the patient's wishes. This privilege of excluding material belongs only to the patient and can be waived only by him.

In California under a newly enacted psychiatrist-patient privilege code, any patient who is in psychotherapeutic treatment retains his privilege to exclude professional communications from being admitted into evidence even in the case of criminal actions. This broad privilege extends to all confidential material divulged to a private psychiatrist consulted specifically for the legal action; however, this privilege does not extend to communications to the court-appointed psychiatrist examining for legal purposes. Because laws relating to privileged communications and its exceptions vary considerably in different legal jurisdictions, the psychiatric-legal consultant should clarify with attorney or court specific definitions and limits of privilege which pertain to each case²⁰.

In most states, the patient's privilege about professional communications with the psychiatrist, either as consultant or therapist, is the same as his privilege about communications with any other licensed physician. Privilege usually applies to civil trials and does not exist in criminal trials. In most states, professional material divulged by a patient to a psychiatrist is not privileged if it is called for at a criminal trial, and the psychiatrist can be forced to reveal such communications to the criminal court or jury. Refusal to do so may subject him to jural sanctions for contempt of court. A criminal defendant in California who consults a psychiatrist through his attorney, however, retains full privilege. He can prevent the consultant from testifying or reporting his communication to the trial court because the psychiatrist is covered

by the attorney-client privilege and cannot reveal evidence against the patient's interest without the client-patient's permission.

But even in California with its broad privilege, the psychiatrist, functioning as a psychotherapist and not as a consultant for the patient or his counsel, may erroneously believe that the patient's privilege always exists. A number of exceptions to privilege still allow confidential material obtained during psychotherapy to be admitted at trial over the patient's objections, e.g., in those actions in which the patient has raised a question about his mental state as a trial issue, the patient has waived his privilege and his therapist at trial can be forced to reveal communications which may be embarrassing or legally detrimental to the patient.

The dilemma facing the private consultant and the court-appointed psychiatrist is how to acquaint the litigant patient with the significance of privilege and its exceptions and still retain an atmosphere of rapport which will facilitate communication. This dilemma should be discussed with the referring private attorney. He should describe to his client what the psychiatric consultant's role is with respect to privilege before the psychiatrist's first interview with the patient. The court-appointed psychiatric consultant has a greater problem with privilege because the patient must understand the agent role of the consultant in order for this material to be admissible in court. The psychiatrist can not misrepresent or hide his agent role for, if he does, all material he has obtained by so doing is inadmissible in the trial court.

Most court-appointed psychiatrists prefer to clarify their role at the beginning of the interview by advising the patient that everything he says can be introduced as legal evidence against him. Nevertheless, patients with criminal charges against them frequently reveal incriminating material to the court-appointed psychiatrist. It is possible for the psychiatric interviewer transiently to allay that patient's fears and distrust so that the patient knowingly or unwittingly reveals incriminating material. A patient's guilt may pressure him to divulge legally damaging material to a sympathetic appearing psychiatrist. Questions can be raised as to how clearly such a patient understood the role of the court-appointed psychiatrist.

RECOMMENDATIONS FOR PSYCHIATRIC-LEGAL REPORTS

Recommendations for psychiatric-legal reports for the courts or for other legal purposes were compiled for the Advanced Post-Graduate Training Program in Psychiatry and Law and the University of Southern California. These highlighted the most criticized deficiencies of current reports as described by the judiciary, both locally and nationally²¹. Judges were critical of lengthy, wordy reports which they had difficulty reviewing and which repeated material otherwise available to them. They particularly looked askance at ideosyncratic terminology, technical psychiatric terms and psychoanalytic jargon. They recommended that each report should identify the patient by legal data, designate the examination site and duration of examination, identify all material reviewed as the basis for his opinions and comment on the adequacy or limitations of these opinions resulting from inadequate examination or limited source material. Their criticisms pointed to the need for the consultant to state the purpose of the psychiatric-legal inquiry and to relate each opinion to its inquiry. They stressed that only material relevant to the psychiatric-legal inquiry should be included. The judges emphasized their need to be able to distinguish between the report's raw data, inferences and conclusions. They wanted the psychiatrist to demonstrate the specificity and materiality that his data, inferences and conclusions had for each legal inquiry. They wanted to understand the basis for the different emphasis placed by the consultant upon clinical, descriptive or psychodynamic material in different legal issues. Most strongly they recommended that the consultant include the logic and reasoning to support his conclusions.

THE PSYCHIATRIST IN THE COURTROOM

Psychiatric courtroom testimony has been discussed by many authors²². All of the recommendations for psychiatric reports, as outlined above, are applicable to psychiatric testimony in the courtroom. Pretrial consultation with the attorney who has engaged him is essential if the psychiatrist is expected to contribute meaningfully to the trial issue. This is

entirely ethical and gives the consultant an opportunity to collect his material for oral presentation and previews what will be asked of him in the courtroom. Although legal decisions now allow the psychiatric witness considerable latitude in his testimony, the consultant must confine his testimony to the particular legal issue in question. As stressed above in regard to the written psychiatric report, the consultant must be prepared to support his oral opinions by presenting his concepts and facts as well as by demonstrating the reasoning upon which he based his conclusions. He should be able to justify his opinion as preferable to those offered by other consultants.

The psychiatrist in the courtroom must be constantly alert to his participation in an adversary battle with examination and challenging cross-examination as the accepted tools for exposing evidence to legal scrutiny. At times he will be antagonized by attorney tactics; but should the psychiatric consultant on the stand counterattack or retaliate emotionally, his contribution as an expert witness will be lessened considerably. The psychiatrist should look to the judge, as the referee in the courtroom, for help, if necessary. Experience in testifying will help the consultant develop courtroom composure.

FEES FOR PSYCHIATRIC CONSULTATION FOR THE COURT

Unless financial compensation is adequate and somewhat comparable to that in private practice, most competent psychiatrists will not provide adequate psychiatric consultation for legal purposes, and qualified psychiatrists will not be interested in psychiatric-legal consultations. Fixed fees for these consultations are usually written into statute or code and are so low that few competent psychiatrists have been willing to contribute their services. In 1965, the California State Legislature established a more equitable approach to psychiatric-legal consultation fees by authorizing a reasonable fee on the basis of time and service expended. Most jurisdictions stipulate fees only for the interview and the psychiatrist's courtroom appearance but ignore fees for preparation of the report. Because evaluation of data and writing an adequate report are also time consuming, the report becomes the weakest link in the sequence of units composing the psychiatric-legal consultation. The United States Department of Justice and federal judiciary in the Central District of California have recently moved to strengthen the report by allowing a separate fee for the written report as well as an hourly fee for the interview of the indigent criminal defendant.

Total costs for private psychiatric-legal consultation vary greatly. Fees for consultation with practicing attorneys are comparable to other psychiatric consultation or treatment fees in each community, or slightly higher. Although some consultants charge a set fee for the entire psychiatric-legal consultation, an hourly fee approach is preferable. Psychiatrists should itemize their time spent in the various phases of consultation. They should charge for preparation for their courtroom appearance and for their time spent in court, but should not charge for their courtroom testimony. Psychiatrists are well advised to clarify financial responsibility for consultation services when they are initially approached by attorneys.

In conclusion, psychiatric consultation for the court adds an important dimension to the over-all field of psychiatric consultation. Its future value rests on the potential of its contribution to social justice. Consultation directed to legal ends will continue to incur criticism²³, and continued emphasis on research is necessary in order to clarify goals, limits and uses of psychiatric consultation in this field²⁴.