Psychiatric Ethics in the Courtroom

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In his provocative article, "The Ethical Boundaries of Forensic Psychiatry," Alan A. Stone, MD challenges those of us whose work brings us in contact with the courts to define a set of principles by which our behavior might be guided. Delineating the proper role of psychiatry in the courtroom is, of course, not a problem limited to those who consider themselves "forensic psychiatrists." My experience suggests that most psychiatrists in institutional practice (and that includes private facilities, as well as community mental health centers and state hospitals) are frequently called on for courtroom testimony; I suspect that a survey of our colleagues in private practice would show that a surprising number of them come into contact with the courts as well.

Despite the discomfort court appearances arouse in many psychiatrists, there is little reason to believe this contact will diminish. Societal demands for psychiatric testimony in tort actions, child custody cases, and criminal cases, not to mention more exotic forms of litigation, show no sign of abating. Sometimes psychiatrists enter these cases voluntarily, but their testimony is often coerced, the result of a court's subpoena. Even were forensic psychiatry to disappear as a subspecialty, therefore, the problems associated with psychiatric testimony and the need for ethical guidelines in the courtroom would remain. Thus, the problems identified by Dr. Stone are issues that should concern all psychiatrists. The visibility of psychiatric testimony and the often angry responses it draws from the public (witness the brouhaha that followed the *Hinckley* trial) should serve to reinforce that concern.

Dr. Stone describes my approach to these matters as follows: "Dr. Paul Appelbaum has suggested the standard of truth should govern the forensic psychiatrist.... I assume that Paul Appelbaum's standard of truth is not the same as the one I raised at the beginning... the truth in an absolute sense.... What Dr. Appelbaum means, I think, is closer to honesty; the forensic psychiatrist must honestly believe what he says and should not allow his views to be distorted."[1] Let me refine that a bit further. *The primary task of the psychiatrist in the courtroom,* I believe, *is to present the truth, insofar as that goal can be approached, from both a subjective and an objective point of view.*

I will consider the implications of this principle, but I must first note that other commentators have addressed psychiatric ethics in the courtroom in similar terms. Elements of my approach can be found in the writings of forensic psychia-

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trists such as Rappeport[2] and of jurists such as Bazelon.[3-5] I suspect that many psychiatrists, whether or not they consciously have thought through this issue, view themselves as fulfilling the role I am suggesting when they enter the courtroom.

Absolute Truth?

To say that psychiatrists should seek the truth in their testimony is, as Stone notes, so upstanding a principle as to ensure acclaim but perhaps too rigorous to be of much practical use. How often, after all, can we echo the words of one forensic psychiatrist who proclaimed that his certainty of the defendant's diagnosis and prognosis, though he had never examined the man, was "100 percent and absolute?"[6]

It is not, however, absolute truth we are considering here. Modern notions of probability have cast doubt on the existence of truth in any absolute sense; even more primitive ideas of establishing truth would suffice to demonstrate that there is little in psychiatry that can be spoken of in terms of certainty. Clinicians have recognized that one cannot wait for absolute truth to be determined: there are patients waiting in the halls to be treated. Thus, we treat them as best we can, using the best theories available, and hoping that careful reflection and investigation will enable us to refine our tools before the next generation of patients appears.

A similar rationale obtains in court. The trial process cannot be suspended while absolute truth is sought. The best available witnesses are called. When experts might be helpful, they can be asked to do no more than present the truth as closely as they can approximate it. All involved recognize that a retrospective assessment of a defendant, for example, to ascertain his/her state of mind at the time of the crime cannot yield certainty. Psychiatrists gather available evidence, employ their expertise, and present relevant information. The jury is instructed to determine not that the testimony is true or false but merely that it is sufficiently likely to be true (the standard will vary between civil and criminal cases) to warrant the finding they reach.

So far this formulation seems singularly vulnerable to Stone's critique: "(T)his is a very appealing standard, but like Kant's categorical imperative it is much more convincing as an abstract statement than it is useful as a practical guide to conduct." Can psychiatrists merely offer whatever opinions they believe to be true, consoling themselves that, given the limitations of the field, this is the closest approximation to the truth at which they can arrive? If so, we have created an unenforceable and ultimately meaningless standard.

Before reaching that conclusion, consider the second half of my principle, which requires the psychiatrist to approximate the truth from both a subjective and an objective point of view. What can this mean? Subjectively, to present the truth as he/she sees it, the psychiatrist must surely gather the maximum possible amount of relevant data. If those data do not allow a conclusion to be reached, which will often be the case, a statement to that effect may be the closest possible approach to the truth. If further data would allow refinement of the conclusion,

that must be noted, too. I am wary of psychiatrists who do not admit — frequently — that they do not know. I become nervous if too much time passes and too many cases are undertaken between my own admissions of ignorance.

Objective Truth

This, however, is not the end of it. There is *objective* truth to be reckoned with. It frequently has been said that the psychiatrist should acknowledge the limitations of his/her testimony. "If we answer honestly," Rappeport writes, "our doubts or the limits of our knowledge should be evident."[2] (Yet, it should be noted, Rappeport is unwilling to place the burden on the psychiatrist for making this disclosure.) Judge Bazelon has urged repeatedly that "psychiatrists involved in public decision making should take especial care to confine themselves within the limits of their medical expertise." Further, he believes that "(t)he responsibility for acknowledging its limitations must... rest — in the first instance — with the profession itself."[5]

An objective approach to the truth, given that absolute certainty is unattainable, clearly requires the psychiatrist to make evident the limitations on his/her conclusions. The responsibility for disclosure must rest with the witness. Although there may be rare circumstances in which the bounds of the question-and-answer format of a courtroom examination will prevent such qualifications of testimony from being made, most judges are willing to allow an expert who indicates a desire to do so the time to elaborate on a conclusion. The adversary system, as any psychiatrist who has testified in court knows, does not guarantee that such limitations will be exposed. Most cross-examinations are grossly inadequate. If truth is to be approached, it must be by the efforts of the witness.

Still, the phrase "objective truth" suggests another obligation. In the absence of a professional consensus on an issue, there will always be minority opinions held by a significant segment of the profession. Even if the psychiatrist who is testifying does not adhere to these beliefs, they should be acknowledged. This does not require an elaborate digression. The witness simply can note the presence of differing opinions, which he/she does not share, and indicate that they constitute a minority view. When the witness is in the minority, however, the obligation to acknowledge the existence of conflicting theories becomes stronger. Concurrently, the witness assumes the obligation of justifying his/her deviation from that consensus. The court ought not to have idiosyncratic opinions passed off as professional consensus. The witness's testimony should reflect accurately the current corpus of psychiatric knowledge on the subject being addressed.

Let us consider whether this formulation of the psychiatrist's ethical burden in the courtroom meets Dr. Stone's concerns about psychiatric testimony. First, Stone is uncertain psychiatrists "have anything true to say that the courts should listen to." As to whether we have anything true to say, we must first inquire what Stone means by truth. Absolute truth, we all agree, is a chimera.

I suggest the relevant issue is whether, employing my standard, psychiatrists would testify according to the standard of truth that usually prevails within the psychiatric profession. The most forthright discussions of cases at conferences

and rounds, and the dialogue in the psychiatric literature, usually involve an open statement of a point of view, the presentation of the evidence that supports that view, and a notation of all relevant limitations on the conclusion. This is precisely the standard I am proposing for courtroom testimony.

Note a convergence here with what Dr. Stone terms Dr. Watson's standard of "good clinical practice." Also note the inadequacy of Stone's response to Watson's standard. If the "Jew physician" in his dramatic anecdote genuinely believed that his patients were suffering from a mania, and that belief was consistent with the contemporary knowledge of the medical profession, his actions — despite the scorn to which he was subjected — were blameless. If he espoused an explanation he did not believe, neither "good clinical practice" nor my truth-oriented standard would condone his behavior. In neither case is the moral dilemma as difficult as Stone would have us believe.

Stone's argument about whether psychiatrists have anything to say that is true focuses primarily on the easiest target, although it is one that needs to be attacked. He frames the basic question as whether "psychiatrists have true answers to the *legal and moral questions* posed by the law" and then proceeds to argue convincingly that they do not. I grant him the point.

Psychiatry does not even purport to have answers to the moral questions posed by its own practices, much less those of another discipline. Thus, I agree with Stone that psychiatrists should not be making moral judgments, that is, should not be responding to ultimate questions (Is this man legally insane?) that are within the province of the trier of fact as the representative of society. A psychiatrist abiding by my standard who desired to answer an ultimate question first would have to acknowledge that his/her expertise gave him/her no greater role in setting societal moral standards than any other citizen, in effect acknowledging that for the purpose of this answer he/she is not an expert and thus vitiating the admissibility of the response.

. . . On the Patient's Behalf

The second issue that concerns Dr. Stone is "the risk that one will go too far and twist the rules of justice and fairness to help the patient." I should note that this is not just a problem for "hired guns," but plagues (perhaps even more severely) the testimony of psychiatrists who have been caring for a patient for some time, only to find themselves drawn into court on the patient's behalf. Certifications of disability for Social Security purposes offer a good example of this problem. The clinician often has reason to believe that relief from financial burdens would considerably ease a patient's recovery. Standards of disability are, in addition, extremely nebulous.[7] There is thus a strong temptation to call the patient disabled even if that requires "twisting the rules of justice and fairness."

One cannot remove the temptation, but I think my standard effectively addresses the ethical norm. If one subjectively does not believe the patient to be genuinely disabled, regardless of the benefit that might accrue and the inconsequential extent of the additional burden placed on the public purse, the psychiatrist is not justified in certifying the patient as unable to work.

Stone's third concern is "the opposite risk that one will deceive the patient in order to serve justice and fairness." This issue does not arise from courtroom testimony itself, and thus fails to be addressed by my principle. It concerns instead the behavior of the forensic psychiatrist during the data-gathering process, in which the psychiatrist's empathic skills may be employed to "seduce" the subject of the examination into revealing deleterious information he/she would not otherwise reveal. This is a genuine ethical dilemma, particularly since "informed consent" often serves only to induce the subject to further lower his/her guard.

I have had an opportunity to struggle with this question along with my colleagues on the Task Force on the Role of Psychiatry in the Sentencing Process of the American Psychiatric Association.[8] We found no solution other than to alert the profession to the problem and to encourage psychiatrists to remind defendants — repeatedly, if necessary — about the potentially harmful effects of their revelations. If I believed that this problem were of universal scope and substantial magnitude (which I do not), it would lead me to rethink my stand on the ethics of forensic examinations, an issue distinct from the question of courtroom behavior currently under discussion. Here I can do no more than acknowledge that conscious or unconscious seduction of the subject is likely to be a problem for a subgroup of subjects, probably small, but of undetermined size. (This would, incidentally, constitute a difficult, but fascinating direction for empirical inquiry.)

Fourth, Stone is worried about the "danger that one will prostitute the profession." Presumably this refers to the danger that is, in fact, the converse of the problem posed earlier, in which sympathy for the patient leads one to distort one's testimony for his/her benefit. Here I take it that Stone is concerned both that the substantial rewards of testimony pleasing to the person who is paying one's bill will affect the direction of one's conclusions and that ideologic considerations may mold one's testimony. Again, it is difficult to deny the potential for such behavior. The *Hinckley* trial presented an outstanding example of the coincidences that abound in this area; the distinguished psychiatrists involved in the case unanimously reached opinions consistent with the side for which they were testifying. I suspect that unconscious bonds of allegiance, not monetary gain, is the usual culprit here, but the power of purse is not to be denied.

Again, Stone has identified a genuine problem. Once more, however, I believe the principles laid out above provide useful guidance. One cannot be certain that psychiatrists will resist the blandishments of money and power, particularly when unconscious forces are at work to such an extent. But the principle of pursuing the truth offers a guideline for those who desire to resist these pressures.

Ethical Guidelines

It would appear to this point that my formulation stands up to Stone's concerns, but the acid test is still to come. Dr. Stone asserts that forensic psychiatry is so incapable of formulating ethical guidelines that even conduct as outrageous as that of several of the psychiatrists who have testified for the prosecution in Texas death penalty cases could not be said to be unethical by means of neutral

principles. I have addressed at length the problems raised by this behavior elsewhere.[9,10] To summarize the main issues, the psychiatrists involved have repeatedly offered predictions of the future dangerousness of defendants, based on a diagnosis of sociopathy, and more recently without ever having examined the defendant.[6]

Would such behavior be tolerated under my standard? Even granting that the psychiatrists involved may believe they are offering the court the simple truth, the standard I propose clearly would reject their behavior. From a subjective point of view, as I have demonstrated in another paper,[10] they have failed to obtain sufficient relevant information on which to base their conclusions *even when measured by their own standards.* Despite this, they profess "reasonable medical certainty" or even "100 percent and absolute" certainty about their conclusions. From the objective point of view, they purport to be making judgments of future dangerousness that a majority of scholars, and at least a significant minority of the profession, believe are unwarranted. Yet they make no effort to qualify their conclusions with this very important information, and when questioned about it directly, deny awareness of or brush off opposing points of view. Thus, according to both the subjective and objective prongs of the standard, their testimony fails to conform to the ethical principle.

Stone's fifth concern encapsulates all his previous ones. It is his belief that forensic psychiatrists "are without any clear guidelines as to what is proper and ethical." The implication of his paper, moreover, is that the formulation of neutral principles on which guidelines can be based is impossible. This rejoinder, I hope, will have put the latter assertion to rest. It may well be true that the ethics of the psychiatrist in the courtroom have been neglected to date and that no consensus about proper guidelines exists within the profession. Yet it should be clear by now that useful guidelines can be formulated, based on the desired neutral principles and addressing Stone's concerns.

Rather than withdrawing from the courtroom, as Stone has elected to do, and thereby forfeiting the opportunity to confront the challenging ethical issues such work presents, psychiatrists should reaffirm their commitment to engage in court-oriented work, aware of the problems involved and determined to attempt a solution. The model I have proposed here undoubtedly will have elements that are unacceptable to some psychiatrists. Although I regret that, I am willing to engage in debate with them about more universally acceptable alternatives. Even if no uniform standard is agreed on, the existence of a number of competing standards, with advocates of each having to justify their behavior to adherents of the others, can do nothing but clarify the moral reasoning on which courtroom behavior is based.

It is unquestionable that the ethical perils of courtroom testimony increase the risks of life's moral adventure. One can, however, choose whether to avoid moral risks or to confront them openly, seeking to grapple with them and perhaps to overcome them. The latter seems to me to be the more satisfying course.

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