

# The Quest for Excellence in Forensic Psychiatry

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Excellence in forensic psychiatry requires adopting an appropriate professional role; developing an uncommon depth of knowledge and experience; full disclosure of credentials, biases, and weaknesses to potential clients; wise choices about which assignments to accept; and scrupulous fairness in the presentation of findings and opinions. An elusive goal in the best of circumstances, the quest for excellence can appear even more quixotic as resources diminish. As forensic psychiatry faces cost controls from insurance companies, increased competition from psychiatrists who have lost clinical opportunities, and the prospect of tort reform, the pressure to employ more efficient methods and to do more superficial work increases, threatening the quality of forensic work. The many influences, distractions, temptations, and hazards in the path toward excellence can be largely overcome by men and women of integrity, but there are inflexible barriers in the path of those who take assignments for which they are unsuited, for which the data will not be made accessible, or for which too little time is available to prepare properly. Often the most consequential decision one makes in a case is the decision to accept the case.

If you would hit the mark, you must aim a little above it; Every arrow that flies feels the attraction of the earth.—Henry Wadsworth Longfellow

The future of our discipline lies in the bright young people who are developing new careers in forensic psychiatry, and my remarks are directed principally to them. Much of what I have to say will be familiar to the more seasoned among you,

but I ask your patience as I address the newer generation of forensic psychiatrists. My central message is simple: if you aspire to excellence in forensic psychiatry, then become truly expert in some area, apply that knowledge as fairly as you possibly can, apply your creativity, and be honest in all your dealings.

In 1987, the American Academy of Psychiatry and the Law (AAPL) first adopted its Ethical Guidelines for the Practice of Forensic Psychiatry. These guidelines are revised periodically and remain the only existing guidelines of practice for forensic psychiatry that have been promulgated by forensic psychiatrists. In 1994, the AAPL convened a Task Force on Practice Guidelines for

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Forensic Evaluations, chaired by Dr. Robert Granacher. Also in 1994, Council learned that an American Psychiatric Association (APA) component had drafted a section on forensic psychiatry in its practice guidelines for psychiatric examination. Dr. Melvin Goldzband orchestrated a response on behalf of the AAPL, and the forensic section was dropped from subsequent drafts of the APA document.

The movement toward practice guidelines is inevitable, important, and deserving of our effort to insure that the guidelines reflect a sophisticated understanding of forensic practice. To be of value, the guidelines eventually developed will have to be achievable by most forensic psychiatrists in most of their work. The existing ethical guidelines are designed to protect human rights, the integrity of the legal process, and the reputation of the profession, and I expect that any practice guidelines that are promulgated will reflect similar concerns. Some areas that are appropriate for practice guidelines are the need to clarify the referral question, issues of agency and conflict of interest, informed consent, confidentiality, obtaining sufficient data before reaching an opinion, and applying the applicable legal test.

My topic is not these guidelines, although they are of great importance, but rather a higher standard of excellence than would be suitable for formal guidelines. I want to outline some ideas for the newcomers to forensic psychiatry so that they can have an ideal in mind when coping with the omnipresent limitations in our skills, technology, time, budget, and wisdom. Only if one can imagine an

ideal level of practice can one aim for that mark, and for those starting out without a mentor, it may not be easy to do that imagining. I had the good fortune of being introduced to forensic psychiatry by Dr. Herbert Thomas, a man of abiding values, and to be mentored by two of the most generous teachers our field will ever know, Drs. Jonas Rappeport and Robert Sadoff. In a broader sense, I felt mentored by the entire early leadership of AAPL, who accepted me into their midst while I was still a third-year medical student.

Collegiality is one of the great strengths of our Academy, and you will gain immeasurably if you participate actively enough to both learn from and teach the titans, none of whom got that way by being close-minded. The ultimate arbiters of excellence in forensic practice are not our clients—the lawyers and courts who seek our opinions—but our consciences, our peers, and our leading thinkers as they judge our integrity and our commitment to the pursuit of the truth.

### **The Role of the Forensic Psychiatrist**

It is not an altogether simple matter to pursue the truth with integrity. Even as you try to do so with the best of intentions, there are influences, distractions, temptations, hazards, and barriers in your path. Worse yet, early in your career you may not recognize them for what they are unless you hone your sensitivity to these threats to your integrity. Following are three examples.

1. You are asked to examine someone for an attorney and find that opposing

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counsel has obtained a favorable report from a more senior and well respected forensic psychiatrist. In writing your report, you find yourself wondering what this more senior colleague will think of it. What impact will your report have from future referrals from this colleague or from the lawyers involved in the case?

2. You are asked to work on a case that has attracted unusual attention from the press. Your friends and family are looking forward to seeing what you have to say when the case comes to trial, and your role in this case might bring your work to the attention of a new audience of potential clients. Your findings from the data and examination, however, do not look very favorable to the side that hired you. If you give a full and balanced presentation to your client, you will probably not be called to testify; if you limit your presentation to the helpful points you've identified, you will probably be asked to testify.

3. You are asked to give an opinion on an issue that looks straightforward, but in a case brought under a law that offends your personal values on the death penalty, abortion, or free speech. Do you lend your honest expertise to an enterprise that you believe is fundamentally wrong? Do you try to influence policy from the inside by working on the case but trying to persuade the advocate to change course?

These and similar questions have less to do with ethical or practice guidelines than with basic questions of values, integrity, and the role of the forensic psychiatrist. We are sufficiently diverse in our values and sufficiently human that we would not all behave the same way in

each of these hypothetical situations. Surely, however, we would all agree that when we become aware of such threats to our integrity, we should place the interests of truth above self-interest.

In analyzing situations like these hypotheticals, I have found it helpful to conceptualize four roles available to us: advocate for a cause, advocate for the party, clinical psychiatrist, and forensic scientist. Advocates for causes, such as those who oppose psychotropic medications or the death penalty, sometimes show up in court offering expert opinions consistent with their advocacy positions. I call this the Misplaced Lobbyist Phenomenon. Such advocates are testifying before the wrong branch of government when they appear in the courtroom, where they should be exposed as partisans. If you want to be an advocate for a cause, you should avoid any forensic work related to your cause. This calls into question the motivation of those who accept *pro bono* work related to particular causes, which may reflect humanitarian values that, while laudable, diminish the expert's objectivity and appearance of neutrality.

Advocacy for the party is more common and stems from more than one source. Honest experts often express their opinions so one-sidedly and so vehemently that they appear to be advocates. This can occur for many reasons, including enthusiasm, "tunnel vision," a desire to please, and a mistaken view of the proper role. Another, more troublesome source of advocacy for the party is the blurring of boundaries between expert and lawyer, which may be accompanied by a feeling of superiority over the law-

yer. I call this the Frustrated Lawyer Phenomenon, which seems to be correlated with a desire to attend law school and an abiding intellectual interest in law.

The third role available to you is that of a clinical psychiatrist in the courtroom. When confronted with the kinds of questions posed in the hypotheticals, you can ask yourself what the ideal clinical psychiatrist would do in a similar situation. This requires that you determine which parties to the case should be thought of as "patients" and attend to what would be in the best interests of their mental health. There is a long historical tradition of clinical psychiatry in the courtroom, and some forensic psychiatrists even today view themselves in this role. Outside the courtroom, these concerns underlie the laudable intellectual pursuit known as psychiatry and law, which has occupied many of the finest minds in our Academy. If you choose this route, I think you will find yourself busy with lots of intellectually fascinating moral quandaries. I refer to this as the Alan Stone Exercise, which may be very good for the brain and the soul.

Inside the courtroom, however, the role of clinical psychiatrist is fundamentally incompatible with the role of forensic psychiatrist. Notwithstanding a recent proposal to create a limited doctor-patient relationship for forensic examiners,<sup>1</sup> the most fundamental distinction between clinical and forensic psychiatry is the absence of a doctor-patient relationship in the latter. The clinical psychiatrist has a duty to the patient that conflicts with the forensic psychiatrist's duty to the truth. In forensic psychiatry, there should be no

doctor-patient relationship that could bias one's findings or opinions. This is not to say that the treating psychiatrist should never testify about his or her patient; rather, it is to acknowledge that the treatment relationship precludes a role as an objective and detached expert.

The fourth role is the one I recommend to you. Many apparent moral conflicts dissolve if you resolve for yourself that the proper role of the forensic psychiatrist is the same as that of any other forensic scientist. My touchstone for grappling with apparent moral conflicts has always been to ask myself what the ideal forensic *pathologist* would do in a similar situation. The ideal forensic pathologist would not care a whit about what a more senior colleague might think, about being called to testify in a high profile trial, or about whether the law offends personal values; and when acting as forensic psychiatrists, neither should we. My conception of our role is that it is the same as that for any other group of forensic scientists who are called upon to give evidence about technical matters.

### Expertise and Disclosure

The way to become truly expert is to read critically the important writings on your topic, to examine, investigate, or study as many cases as you can find, and to think and communicate about your topic; writing about it forces the greatest discipline. Only when you have done these things will you learn how little you know about every other topic. The information revolution has made it impossible for anyone to have expertise in every forensic psychiatric issue,<sup>2</sup> but easier to

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rapidly acquire vast quantities of information about a great many topics.

In court, of course, the test for the admissibility of opinion testimony from an expert is far lower than this. The courts permit us to testify to matters about which we have more than a layman's knowledge by virtue of our professional education, training, and experience. In theory, artful cross-examination will lessen the weight of testimony by an expert whose knowledge is superficial.

In practice, however, the low standard for the admissibility of expert testimony is an invitation to mediocrity. If you aspire to excellence, you must learn to fully disclose your credentials, biases, and weaknesses before accepting a particular consulting assignment. Thus, in addition to determining whether there is a conflict of interest and whether you can meet the client's deadlines, you should make a fair representation of your degree of experience with similar matters, any vulnerabilities in your own background, and any biases you may bring to the case that could jeopardize your credibility.

Lawyers understand that there is a first time for everything, so disclosure that this is your first case of this type will not necessarily cause them to look elsewhere. If it does, that is probably because they think that the particular case requires someone with prior experience in a similar matter, and your forthrightness may make them more likely to come back to you with a case for which you are a suitable expert.

Failure to disclose relevant information can seriously jeopardize the client's case. In one case, a psychiatrist whose testi-

mony undermined the credibility of a woman who believed she had recovered repressed memories of sexual abuse was revealed during cross-examination to have been sued by a former patient for sexual misconduct. He had never informed the client of this skeleton in his closet.

It could undermine your credibility in almost any case to have a history of a criminal conviction or to have a financial stake in the outcome of the case, and these facts should be disclosed before accepting any assignment in forensic psychiatry. Other information that is not necessarily discrediting or even adverse should be disclosed in any case in which this information might undermine the witness's credibility before a jury. Depending on the nature of the case, such information might include socially stigmatized and publicly known sexual conduct, having been sanctioned by an official body, having massive debt, having been a party to similar litigation, having been the victim of a similar crime, or having a family member with the same condition as a party to the case. An alternative to disclosure, of course, is to turn away any case for which one can recognize one's own unsuitability.

Bias may be more difficult to disclose than discrediting information, because we are not always aware of our biases, although they are inevitable,<sup>3,4</sup> and we do not have a shared understanding of what constitutes bias. The most important biases, I think, are the most obvious. One who has acted as an advocate for some person, group, or cause is obviously biased and should disclose this.

Even after accepting a case, however, bias can arise and interfere with one's judgment. I have seen it arise from two sources: countertransference and a failure to maintain appropriate professional boundaries. Countertransference can operate in the forensic examination just as it can in any relationship. If you find yourself becoming aroused, attracted, afraid, or angry, you need to take two steps: (1) discuss this with a supervisor, colleague, or therapist; buy an hour of time if necessary; (2) do not give an opinion in the case until you have processed these feelings and reflected rationally on the data.

A failure to maintain appropriate professional boundaries is shocking to witness in the forensic arena. I once received a call from a psychologist claiming she was calling on behalf of an attorney (which turned out to be half true; she was retained but had no authorization to retain me). At the outset of the conversation, I found it peculiar that she was speaking so sympathetically about the party to the suit, whom she referred to by her given name. Before long she revealed that she was sitting in the living room of the plaintiff and in her company, while discussing theories of the case with me! In another instance, a group of experts had just finished a pretrial meeting with the lawyers, and a party to the case appeared on the scene. One of the experts expressed warm sentiments and gave a goodbye hug to that party, who was an adult of the opposite sex.

While one would hope that an expert with proper training in either psychotherapy or a forensic discipline would avoid such conduct, a more subtle phenomenon

may require some setting of limits. Occasionally an attorney will invite you to have lunch or dinner with a party to the case or will invite the party whom you have examined without telling you. It is better to decline such invitations graciously or to explain that you would prefer not to be joined by the party because it could appear to compromise your objectivity and distance.

Bribes and threats could, of course, provide a source of serious bias. Although I have been offered bribes and threatened in other professional contexts, I haven't experienced worrisome examples of either in connection with forensic cases. A "con artist" I examined for the defense once brought 50 percent of the fee in cash, suggesting that I not report it. (I sent his lawyer a receipt and an invoice for the remainder, but the lawyer went bankrupt and never paid.) In another instance a man who had stalked teenage girls and threatened a number of judges and other government figures sent me a few death threats, but they were actually clever and amusing, and I felt flattered to be included on his hit list.

### **Data Access and Resources**

To excel, you need to have access to all the necessary data and the time to study it all thoughtfully. The novice may be too easily lured into situations in which limited data access or limited resources cause major problems, and these traps can ensnare even the most cautious expert, because they are not always foreseeable.

Limitations on access to data are not acceptable. In some cases, overwhelming quantities of materials exist, much of

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which would be irrelevant to your purposes, and so it may not be necessary to review everything that exists about a case. Nonetheless, the client who refuses to grant you access to data should be shunned. If your role is to seek the truth, you should not do business with those who would hide it from you.

Criminal defense lawyers routinely withhold evidence of their client's guilt, at least until confident that the government has the evidence. In civil cases, lawyers for both plaintiffs and defendants can be selective in their release of information to experts. I will not accept a case in which I learn that information relevant to the referral question is going to be withheld from me. Unfortunately, even when lawyers agree to make all the evidence available, the expert has no way to verify that all of the data have been provided.

I have known the prosecution to withhold important evidence on only one occasion, and it was in the context of a court-ordered evaluation. This is the only case in which I have ever learned that my testimony had helped convict a man who had been insane. Thankfully, the conviction was overturned on appeal (on other grounds), and when the prosecutor called back to advise me of the retrial, I informed him that I would be delighted to testify again, but this time my opinion would be based on the evidence that he had withheld from me but which a defense expert had since shared. I was too naive at the time to report the prosecutor for prosecutorial misconduct and, in keeping with my custom of not responding to critics, did not respond when he

was quoted in the press as saying I had changed my opinion for no reason.

Resource limitations are best resolved before you begin work on a case, so that both you and the client can make an informed decision about whether to do business. You don't want to be in a situation in which you are tempted to cut corners or forced to do a bad job because the client came to you too late. My advice to you who are just beginning your careers is to take your time in deciding whether to accept an underfunded assignment, and accept it only if you are willing to donate your own time and resources to do whatever is necessary to fully prepare. When a case comes to you too late for you to prepare properly, turn it down.

Resource constraints are going to become even more important in the years ahead because of cost controls from insurance companies, impending changes in the tort system, and increasing competition both from the new cohorts of graduating fellows and from psychiatrists in practice who have lost clinical opportunities. We are seeing the early signs of a "managed care" environment in the private practice of civil forensic psychiatry, with increasing numbers of insurance companies and self-insured entities following the practice of government agencies by capping the hourly professional fees for experts and setting ceilings on total fees for a particular assignment. Tort reform, which lies just on the horizon, will have an even greater impact on civil forensic practice, because neither plaintiffs nor defendants will have incentives to prepare their cases as well as they now do.

Reduced budgets for experts will adversely affect the quality of forensic psychiatric work, to the detriment of the search for truth and consequently to that party to the litigation whose cause would be most advanced by the truth. As lawyers shop for experts, limits on hourly fees cause lawyers to give greater weight to cost and hence less to expertise in their selection of experts and cause experts to negotiate in accordance with their other opportunities. A ceiling on the total fees for a particular case operates differently, putting the expert in the position of deciding whether the assignment can be completed within the budget without an unacceptable loss of quality or income. In either event, lower resource allocations for expert inquiry and preparation on behalf of parties to litigation is adverse to their interests.

The search for truth is compromised when it is conducted by the less qualified or by those looking for shortcuts. The expert who is earning less than his or her customary hourly fee may be motivated to devote less time to the case than it deserves or to inflate his hours. The expert who is working against an unreasonably low cost ceiling may be motivated to forego a thorough review and thoughtful analysis of the data.

I raise the parallel to managed care only to emphasize that if so many people are willing to sacrifice the welfare of the individual patient for the hope of a collective financial good, others will have no reticence toward sacrificing the interests of the individual litigant or the search for truth for the sake of cost control. The public sector has always labored under

this handicap, and the private sector is heading in that direction.

Certain costs can be reduced by efficiencies that we perhaps do not use enough, such as having trained but less expensive staff summarize certain records. When it comes to issues of integrity and the search for truth, however, there is no acceptable compromise. The higher your standards, the more often you will have to turn away assignments.

On the brighter side, there may be occasions when you are given full access to data and have the time and other resources needed to excel. In the best of circumstances, you can even direct or participate in some original investigation. Many of my favorite experiences fall into this category. For example, a question arose in connection with the prosecution of a man known as the "Times Square Slasher" as to whether the use of handcuffs and adhesive tape during sex was so unique as to constitute a signature crime. A budget of \$5,000 was available, for which the client received a most unusual report about the sales of handcuffs in bondage supply stores, the stocking of handcuffs and adhesive tape among the props at bondage theaters, and a survey of the prevalence of handcuffs and adhesive tape on the covers of pornographic magazines in a random sample of Times Square adult bookstores. Since we were there anyway, we also categorized all the other pornography and published the data in the *American Journal of Psychiatry*.<sup>5</sup> To make matters even more interesting, a *Psychology Today* synopsis of the study attracted the attention of a Congressional staffer, leading to an invitation to brief

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interested members of Congress, who persuaded the President to ask the Attorney General to appoint a Commission on Pornography, which resulted in a White House interview and appointment as a Commissioner. I must admit that, standing in the grime of Times Square, I did not foresee that it would result in invitations to Capitol Hill or the White House.

Another occasion arose in connection with a lawsuit against *Soldier of Fortune* magazine for publishing an advertisement for a "hit man" that was used by a Houston man to hire his wife's killer. That investigation included a content analysis of 18,000 classified advertisements, a Nexis search uncovering more than 30 crimes commissioned through the *Soldier of Fortune* "classifieds," and an adventurous period of field work in the subculture of right-wing extremism that would become familiar to the general public 10 years later as a result of the Oklahoma City bombing.

With respect to traditional issues in forensic psychiatry, however, the experience that opened my eyes was the preparation that went into the evaluation of John Hinckley in connection with his defense of insanity for the attempted assassination of President Reagan. I believe this was the most thorough pretrial evaluation that had ever been conducted, and it led to what I regarded as important discoveries about how little we usually learn when we rely on the information traditionally supplied by lawyers and defendants. Everywhere we looked, we found important information: at the crime scene, in Hinckley's room in his parents'

home, in the possessions he left at his hotel room, in his personal writings, in his college term papers, in the statements of both remote and proximal witnesses, in the text of books he had read, and even in the movies he had watched. Without this information, the examinations would have been less fruitful. I will always be grateful to Roger Adelman, the lead prosecutor, for making this experience possible and for teaching me the importance of thorough preparation.

In the years since the Hinckley trial, I've dealt with an average of one case a year that was prepared this meticulously, and it never fails to impress me how much can be uncovered when the investigative resources are available. Every one of us should have this experience at least once, both to keep us humble on the occasions when the data are thin and incomplete and to help us recognize those occasions when a case should be turned down because the available resources will not allow the assignment to be completed at an acceptable level of quality.

## Scrupulous Fairness

Forensic psychiatrists are called upon to present their findings and opinions in a variety of media, including letters, reports, affidavits, declarations, and testimony. Regardless of medium, one has to make choices about how much information to convey, which information to convey, and how much of one's reasoning to expose. These choices are not made in a vacuum and are influenced both by mundane factors such as budgetary and time constraints and by clients' preferences reflecting their tactics and strategy.

Because of the many factors governing these choices, particularly the client's legitimate interest in controlling the timing of discovery, no clear guidance is available about what the expert should do in every case. I think, nonetheless, that an ideal does exist and consists of complete disclosure of all information, all reasoning, and all opinions. While it might seem obvious that complete disclosure is consistent with the norms of science, the pursuit of truth, and the integrity of the expert, it is not and never will be the norm in law. It took me 15 years of practice to understand this simple truth: complete disclosure and scrupulous fairness are the very best way to educate opposing counsel, opposing experts, and fact finders. Moreover, in those cases where you have reached the correct opinion and have the data to prove it, this is the very best technique of persuasion.

One example of this approach was a report that Dr. Bennett Blum and I wrote for a recent case in which we found a defendant insane at the time of two homicides for which he faces the death penalty. In a 53-page report, we included a 10-page section entitled, "Discussion of Inculpatory Theories of the Crime." This section began:

We considered and rejected five inculpatory theories regarding the defendant's mental state and behavior at the time of the homicides. These theories, our reasoning, and our conclusions follow: . . .

Thereafter, we went through each of five theories under which the defendant would have been responsible and explained our reasoning and the evidence upon which we rejected each theory.

Because complete disclosure of the weaknesses of a case is not the norm for lawyers, you will encounter resistance from many clients when you inform them that this is your intention. The worse the lawyer's case, the greater the resistance you will encounter. This will result in a negotiation that has more than one acceptable outcome. The worst case scenario is the one in which, after full discussion of your findings, the lawyer puts you on the witness stand to address a very narrow issue on which you have a favorable opinion, knowing that if asked certain questions during cross examination, you will be damaging that lawyer's case. The best case scenario is one in which your findings are so consistently favorable that you are given *carte blanche* to reveal everything and tell the whole story in both your report and your testimony. (The second best case scenario is the one in which your findings are so unfavorable that you aren't called to testify.)

Unlike denial of access to data, a client's refusal to let you volunteer the weaknesses of the case is not grounds for refusing to proceed. The lawyer has to make judgments based on the interests of his or her client, and these judgments sometimes require keeping experts on a tighter leash than would be ideal for our purposes. If the lawyer chooses to expose you to cross-examination about unfavorable findings, you must respond to the damaging question by graciously conceding all that merits concession.

## Conclusions

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sional role; developing an uncommon depth of knowledge and experience; full disclosure of your credentials, biases, and weaknesses to potential clients; wise choices about which assignments to accept; and scrupulous fairness in the presentation of your findings and opinions.

An elusive goal in the best of circumstances, the quest for excellence can appear even more quixotic as resources diminish. As forensic psychiatry faces cost controls from insurance companies, increased competition from psychiatrists who have lost clinical opportunities, and the prospect of tort reform, the pressure to employ more efficient methods and to do more superficial work increases, threatening the quality of forensic work.

The many influences, distractions, temptations, and hazards in the path toward excellence can be largely overcome by men and women of integrity, but there are inflexible barriers in the path of those who take assignments for which they are unsuited, for which the data will not be made accessible, or for which too little time is available to prepare properly. Often the most consequential decision one makes in a case is the decision to accept the case.

If you make wise choices about the positions and cases you are willing to accept, and if you guard your integrity as your most cherished asset, you will find that forensic psychiatry offers limitless possibilities for intellectual challenge and for the exploration of uncharted terrains. Although circumstance may draw your arrow to the earth, if you strive for excellence and aim a little high, you should be able to hit the mark.

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