

President's Message:

The Ethics of Forensic Psychiatry

As in the case with any other ethical system, the ethics of forensic psychiatry must be rationalized in their own terms. There is no ultimate justification. Any system of ethics must be created by the participants in the process and by society as a whole.

That isn't easy in our field for several reasons. One of the most important is that there are so many participants involved, including psychiatrists, attorneys, litigants and defendants, victims, juries, witnesses, even media representatives and the general public itself. Second, one of the major groups involved, the attorneys, are experts in searching arguments for strengths and weaknesses, and since ethical judgments are much like legal judgments, attorneys are wont to stretch the interpretation of ethical principles, sometimes to the point of non-recognizability. Third, criminal defendants are often involved in our work. Their frequent contempt for ethics and for the law complicates things. And fourth, at least in the criminal system, there are many people to whom a slap on the wrist, or even a public rebuke, is an insufficient motivating phenomenon to be taken into account. Unlike most people, to whom either of these would be punishments of a major degree, many involved in court situations react only to strong immediate deprivations, and they even regard lesser punishments as a sign of weakness and an invitation to continue offensive behavior.

What should be regarded as ethical behavior for forensic psychiatrists? And what punishments should an organization like AAPL mete out to offenders? What punishments can the organization impose? How aggressive should AAPL be in monitoring practitioners to seek out unethical behavior? If complaints of unethical behavior come to us, how should we prosecute them; who should have what kind of rights? Indeed, what risk does the organization itself run if it investigates a complaint, finds cause, and punishes, and the person punished appeals the decision through a court suit for damages, let us say, alleging malice.

We ourselves can answer the first few of the above questions, but we must consider them all in the context of the last question. We surely have to protect our own integrity when dealing with ethical violations, or we might be in the anomalous position of destroying ourselves without punishing the offender. Such an occurrence, which is by no means impossible, would be an utter perversion of our ethical mission, and must be avoided at virtually any cost of not punishing violators. In

the most practical sense it is better to let a hundred violators escape unscathed than to deal inappropriately with an innocent party who might thus be able to bring down the whole temple with him.

Of course we cannot be so fearful that we cannot take any risks. But we must be circumspect.

What types of ethical standards should we set and how shall we deal with alleged and with proven offenders? What would our members be likely to agree on? Perhaps more important, how aggressive should we be in seeking out unethical behavior? Surely if an aggrieved person brings a complaint to our Ethics Committee we must investigate that. But how much responsibility do we have to report unethical behavior when we ourselves observe it? To what extent does that depend on the severity of the behavior? What about unethical behavior reported to us by a patient — or even by a non-patient — concerning a fellow practitioner — or worse, a fellow AAPL member? Or suppose that we read in a newspaper or magazine article about a colleague's behavior that seems unethical. To what extent should such situations be reported or otherwise acted on officially? If such violations are to be reported, to whom should such communications be addressed? To what extent should such a body attempt to reform an unethical practitioner and to what extent should (and can) he be punished?

With minor exceptions such specific questions are not addressed in any detail in the codes of ethics of our professions. And maybe they shouldn't be. Maybe codes of ethics ought deliberately to be vague for policy reasons. A vague code leaves flexibility of action for those who must make disciplinary decisions. A detailed code is likely to frighten the ignorant and dependent layman and make him question obsessively whether his own doctor is acting ethically or not. And such questioning must remain obsessional, for the layman has no real way of ever answering the question without going through enough study to become a well-informed layman; and that is out of the question for all but a minuscule number of patients.

Fortunately, in my experience forensic psychiatrists are ethical practitioners. They appear to me to be on the whole both broadly knowledgeable and conscientious. I assume their practices are impeccably ethical.

There have been two instances in which allegations were made to me that AAPL members had been behaving in an unethical manner. In both instances I wrote to the individuals who made the allegations requesting that they provide more information. Indeed, in one case I specifically requested that the names of the offenders be withheld but that some description of the unethical behavior itself be furnished. Both requests remained hanging. I have heard nothing further regarding the allegations made.

Without any real knowledge of the facts of those communications, I am assuming that public behavior on the part of some psychiatrists,

perhaps at a public trial, was offensive to other psychiatrists, possibly also involved in the same trials. It is at least possible that a disagreement of approach to a case was initially regarded as unethical but was on reflection regarded as being within appropriate limits of ethical practice. Or at least that kind of scenario is possible and probably occurs fairly frequently.

One final issue seems important, and it is related to the issue of balancing of loyalties. When one examines or treats a person in connection with a legal situation, it is at the request of an attorney or a judge. Generally, whatever one observes and reports will be likely to help the individual's side of the case or that of the attorney who summoned the psychiatrist. How much loyalty do we owe to the patient, how much to the court, and how much to the attorney, whose interests don't always correspond completely with the patient? One situation which provokes that kind of question is that in which psychiatrists called to testify by opposing counsel present conclusions which are diametrically opposed and which correspond to the position of the attorney who summons each. How can it be that psychiatrists examining the same patient can arrive at such opposite conclusions? The superficial appearance is that the psychiatrist is at best hypocritical and at worst perjuring himself. Can two psychiatrists, both acting ethically, come to such opposite positions?

In my mind the answer is yes, for the following reasons:

A psychiatrist summoned by an attorney is engaged to help the attorney determine the best possible case for his client. Determining that means that the forensic psychiatrist must be thoroughly familiar with the psychiatric facts of the case in hand, and he must also be able to relate those facts to the case under litigation. Knowing the issues under litigation leads the psychiatrist to explore the case looking for possible facts and plausible interpretations which will buttress the case the attorney will present. That means not only finding positive facts, if they exist, in relation to the case, but also appreciating the negative facts, and exploring those negative facts and their significances further to ascertain if they can be refuted. Thus there will be a bias of efforts looking for facts supporting the side which has requested the psychiatric evaluation. When the examination is complete, the psychiatrist indicates to the attorney what is in the doctor's opinion the best case that could be made, that case by no means necessarily being the best case the attorney would like to see available.

In my view that approach is appropriate and is virtually the only kind of ethical approach which can be made. For ultimately any medical examination of an individual is undertaken with a purpose in mind. The ordinary purpose of an examination is diagnosis, or more especially, therapy. The examiner ceases making observations on the patient when he has enough information to make his therapeutic interventions. Similarly, if a patient is examined with reference to prognosis, one

ceases efforts when one has enough information to answer the questions regarding prognosis under different conditions of management.

Likewise, the purpose of examination in a legal case is to assist those who need assistance in answering the legal questions and, in the case of working with a partisan attorney, to help the attorney to develop his best possible case.

There is an implicit concern among many forensic psychiatrists that there are persons in our field who are "hired guns," *i.e.*, who will take any arbitrary position on a case depending who pays them. It is implied, but not stated, that such persons will, if not actually perjure themselves, at least dance on the fence standing on the bound of perjury. There are strong feelings among us that we should purge the perjurers and purify the field.

I personally have not observed large numbers of psychiatrists testifying; I have no personal observations of psychiatric testimony that appeared perjured to me. I concede that it is likely that such testimony is given in various courts in our land. But in some ways perjured testimony, or dictated testimony, given by an expert, is different from perjured testimony given by an ordinary witness. It is quite different in its impact and on its challengeability to say as an ordinary witness might, "I saw him raise the knife and stab the victim," testimony which need not be justified in terms of principles of operation of a field of knowledge, from what it is to say, as an expert witness might, "This is a case of transient psychosis which deprived the murderer of his ability to determine right from wrong." The conclusion of the expert must be based on some kind of principle of psychological behavior so that the observed behavior of the psychiatric examination is interpreted. True, the expert can invent findings in his examination, but those too are subject to confirmation by independent examiners, with the exception of examination facts uncovered at a past time and no longer observable in contemporary repetition of the examination.

Psychiatrists' interpretive statements are public, and they are subject to cross examination. Competent counsel, assisted by competent psychiatric advice, can almost always effectively counter hired-gun testimony. Furthermore, if a psychiatrist is blatant enough in his presenting of conclusions which are contrary to the decent application of logic and science in his field, he is subject to professional censure for incompetence or whatever. (Again, I have never personally observed a person censured for his biased public declarations, but the potentiality is surely there.)

The real problem is that there must be competent and effective counsel with competent psychiatric assistance available in order for biased psychiatric testimony to be countered adequately. If the opposing party in a trial does not have competent counsel, that can make all the difference regarding presentation and acceptance of biased psychiatric testimony on behalf of one party.

Of course, not everyone has competent counsel. There is an ever-present shortage of well-schooled capable attorneys, especially in cases with indigent defendants, for which even capable attorneys usually don't have the time to plan and implement the most effective presentation of which they might be capable. That is, however, part of the broad problem of social justice, not merely that of forensic psychiatry.

Meanwhile we try our best to be of whatever assistance we can in the case in which we are called, knowing that the very nature of our being called by one side or another biases our approach to the case. In fact, in many ways the worst situation is that in which we are called on by the court to make an evaluation. In such a case we have to take into account and balance out in our approach to the case the interests of the individual, the interests of society, and the interests of the court itself, and by and large we are on our own when we do it. There is much more guesswork imposed on us than when we have a more definite framework of operation such as when we are called by the defense or by the prosecution. (Perhaps that shows that it's harder morally to be a judge than an advocate, because it requires balancing of the ultimate consequences of one's decision, a difficult and demanding procedure both intellectually and ethically.)

Possibly our most difficult problem in any court case in which we are involved is to keep our professional distance from the outcome. We are engaged as experts to do a job, to consult, to advise, perhaps to treat. It is too easy to get ego-involved in the notion that somehow our facts, our testimony, or our recommendations will carry the day for our side, and consequently to act in a manner which does turn out to be biased, in the sense of not being true to the facts and the best conclusions that can come from them. In the long run maintaining such a disciplined professional distance is the only way we can best serve ourselves and those who seek our services.

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