

# Forensic Psychiatry and the Perturbation of Psychiatrists' Attention and Neutrality During Psychotherapy

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**Most psychiatrists who practice the specialty of forensic psychiatry also conduct a general psychiatric practice. The free-floating attention necessary for the conduct of psychotherapy can be distracted by the many exigent demands a forensic practice places on the clinician. On the other hand, forensic psychiatrists are exposed to challenging cases and learn clinical skills ordinarily not obtainable from the general practice of psychiatry. The conduct of general practice is quite different from that of forensic practice. Understanding the essential differences should help maintain the equanimity of the psychiatrist and preserve the psychiatrist's attention to his or her patients.**

Forensic psychiatry is burgeoning. The past decade has witnessed enormous growth in interest in this specialty as demonstrated by the proliferation of journals devoted exclusively to forensic psychiatry, the development of forensic psychiatry fellowship programs, and certification by the American Board of Forensic Psychiatry. In addition, the American Board of Medical Specialties has recognized forensic psychiatry as a subspecialty of psychiatry. It has authorized the American Board of Psychiatry and Neurology to conduct examinations for a certificate of added qualifications in forensic psychiatry in 1994.

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Most forensic psychiatrists spend most of their time in the practice of general psychiatry and consider forensic psychiatry a subspecialty. Very few psychiatrists practice forensic psychiatry exclusively. Therefore, it is important to examine the influence that the practice of forensic psychiatry has on psychotherapeutic interventions.

Forensic psychiatry is defined as "a subspecialty of psychiatry in which scientific and clinical expertise is applied to legal issues in legal contexts embracing civil, criminal, correctional, or legislative matters."<sup>1</sup> In examining litigants, no treatment agenda exists. The forensic psychiatrist usually is retained by an attorney to provide professional services in the course of litigation. The forensic

psychiatrist must consider a number of data sources and cannot rely exclusively on reports from the litigant. The forensic psychiatrist's role is one of active participation in the legal process.

Forensic practice usually requires the juggling of a number of rapidly developing cases and responding to the exigent needs of attorneys. Some cases may require court testimony. Phone calls are received frequently from importuning attorneys operating on court-mandated deadlines. The constant rescheduling of depositions, examinations, and trials can be extremely disruptive to the stable routine required for the treatment of patients. Travel arrangements may need to be made. Invasion of the psychiatrist's practice by the hurly-burly of litigation is a reality of forensic practice.

### **Perturbations of Attention**

Freud<sup>2</sup> discussed the importance of evenly suspended attention in psychotherapeutic work with patients. Psychiatrists require quiet, relaxing surroundings that promote unperturbed attention when listening to patients. Although interactive, the psychiatrist's position is essentially one of attentive neutrality.<sup>3</sup> This may be less a requirement, however, for psychiatrists who use cognitive-behavioral techniques or who primarily use psychopharmacologic treatments.

Perturbations of free-floating attention and the position of neutrality may arise from a number of directions when the psychiatrist takes forensic cases. For example, most forensic cases are interesting; some of these cases are fascinat-

ing. During the quiet of a psychotherapy session, the psychiatrist's attention may be captured by the intellectual challenges posed by a complex forensic case. Countertransference feelings of guilt, annoyance, or even anger may be felt as a consequence of not listening to or having to listen to the patient. Moreover, forensic cases may have a certain seductive allure through sheer excitement and action. The raucous scene of battling lawyers and the publicity surrounding a sensational case may captivate the psychiatrist's attention as the case heats up to a fever pitch. If the psychiatrist is treating a difficult, low-fee patient, a creeping resentment can undermine the quality of the psychiatrist's listening, particularly when forensic cases can bring substantially higher fees. A steady diet of sordid and gruesome forensic cases can harden the psychiatrist and impair the capacity for empathy so necessary in treating patients.

Once a case is litigated, lawyers usually quickly move on to their next case. Immediately after the trial, however, the forensic psychiatrist may experience a "morning-after syndrome" regardless of the case outcome. Although elation may be experienced briefly if his or her "side" wins, the forensic psychiatrist may feel depleted, let down, or even depressed by the sudden absence of excitement. Under these circumstances, the prospect of going back to work with patients may appear to be a paltry substitute. These feelings are hardly conducive to maintaining undisturbed attention in psychotherapy.

The adversarial process tends to pro-

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duce polarization of expert witnesses and overidentification with the side that has retained the forensic psychiatrist. Some psychiatrists may say "our side" or "their side" when involved in litigation. As the case heads toward deposition or trial, the polarization process can mesmerize the psychiatrist and distract attention from treatment. An expected full-fledged, "hammer-and-tong" attack on the forensic psychiatrist by opposing counsel also can be a source of considerable anxiety and can prove to be extremely distracting to the psychiatrist's ability to listen empathetically.

Complex cases require extensive preparation before deposition or trial. Digesting a large amount of complex information is both energy consuming and extremely demanding of attention and concentration. At such times, the forensic psychiatrist may resent the distracting demands of a general psychiatric practice. On the other hand, the psychiatric practitioner with a small forensic practice may chafe at the demands created by a complex forensic case and become irritated by the disruptive intrusion of litigation on patient care. Countertransference feelings engendered by the litigation process may lead to boundary breaches with patients. If the psychiatrist must leave patients to travel frequently on forensic cases, finding adequate coverage can become burdensome. Upon the psychiatrist's return, he or she will invariably find that some patients feel abandoned and angry and are clinically regressed.

Anxiety created by participation in litigation can have other adverse effects

on the conduct of psychotherapy. Anxiety may disturb the psychiatrist's position of neutrality, precipitating inappropriate activity in therapy. Boundary violations such as talking too much, making self revelations, looking to the patient for reassurance, or attempting to quell personal doubts engendered in litigation by impressing the patient may take place in an effort to discharge anxiety. The unfamiliar terrain inhabited by attorneys and judges is an unfriendly landscape that can strike fear in even the most seasoned forensic psychiatrist.

Rarely returning to his or her general practice as a conquering hero, most forensic psychiatrists who have endured litigation frequently experience a very comforting feeling of being "back home." In the haven of the office and amidst appreciative, sometimes even adoring, patients, the psychiatrist finds comfort and refreshment. This, after all, is the psychiatrist's appropriate metier.

To be sure, the psychiatrist has distractions arising from his or her own practice quite apart from forensic pressures, but the pressures feel different. For example, most psychiatrists have dealt with tough clinical emergencies such as a suicidal or homicidal patient on the verge of hospitalization. The anxiety and distraction experienced by the psychiatrist usually are not of the same magnitude as that experienced before going to deposition or trial. Because of extensive training and experience, the psychiatrist managing a clinical emergency experiences the locus of control within himself or herself. Once venturing into the unfamiliar legal arena, however, the locus

of control passes onto attorneys, judges, and juries. Thus, perturbations of attention are much more likely to be driven by forensic anxieties than by clinical exigencies.

One of the dangers confronting a forensic psychiatrist is the gradual, imperceptible erosion of professional identity. Psychiatrists who practice forensic psychiatry exclusively run the greatest risk of losing their professional identities as physicians and healers to the unrelenting requirements of advocacy in the legal process. The value of a general practice of psychiatry in maintaining the practitioner's clinical skills and roots cannot be overemphasized. This is particularly true of young psychiatrists who have recently graduated from a residency or fellowship program and of psychiatrists who have not had substantial clinical experience before establishing a forensic psychiatric practice. The treatment of patients is a humbling experience that provides a solid grounding in standard-of-care issues as well as tempers expert testimony in malpractice cases. Increasingly, states are recognizing this issue and are requiring forensic psychiatrists to spend substantial time (usually 75%) treating patients to be eligible to testify in certain types of legal cases. The knowledge that one has given competent testimony preserves peace of mind.

### Minimizing Distractions

The general psychiatrist who practices forensic psychiatry can prevent interference with free-floating attention to patients by properly establishing and main-

taining a forensic psychiatric practice. Understanding the difference between medicine and law is critical to the maintenance of professional equanimity. It is essential to recognize that the lawyer, who is ethically bound to represent the client to the fullest, is an *advocate* rather than a scientist. The lawyer will advocate the best possible case for the client while attempting to diminish the opponent's case. Lawyers are steeped in the art of polemics, presenting arguments favorable only to their case. The judge or jury will determine the outcome.

The adversarial procedure is not necessarily designed to discover the truth (as in science) but to provide justice through due process of law.<sup>4</sup> Court proceedings attempt to arrive at justice by following rules of evidence that regulate the admissibility of data.<sup>5</sup> However, the rules of evidence may preclude or limit the admission of documents or testimony deemed critical by the expert in providing complete and truthful testimony. Understanding this difference between science and the law will prevent needless vituperation against lawyers and the legal system.

The proper maintenance of a forensic practice requires written procedures and forms that also are familiar to attorneys. A well-constructed retainer agreement or letter of retainer should clearly set out the responsibilities of each party. Preferably, all understandings and agreements should be in writing. Arrangements concerning fees should be clearly stated and established from the beginning. Having money owed by attorneys will certainly affect the psychiatrist's

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free-floating attention. Nothing can be more distracting than the anger and aggravation provoked by trying to track down and extract payment from a delinquent attorney.

A forensic practice ordinarily requires considerable secretarial support.<sup>6</sup> The need to screen calls effectively and manage the considerable paper work engendered by litigation can become a daunting task for the psychiatrist practicing alone. A secretary can facilitate good psychiatrist-attorney relationships by working in close cooperation with the attorney's secretary on administrative matters.

Careful evaluation and selection of patients is important. Perturbations can be minimized by selecting forensic cases that fall within the psychiatrist's expertise and that are not offensive to his or her values.<sup>7</sup> The psychiatrist who travels frequently on forensic matters should not treat patients who are likely to decompensate in the psychiatrist's absence. Borderline patients have an uncanny ability to sense when the psychiatrist is preoccupied and may react with a regressive episode.

Frequent travel may preclude a hospital practice. New patients should begin treatment during a time of anticipated minimal disruption. Established patients, if not too impaired, can tolerate occasional scheduling changes demanded by the exigencies of forensic practice without undue emotional distress. Perturbing ethical and clinical choices are forced upon the psychiatrist by joint practice. Which patients should the psychiatrist reschedule, and why?

Should the treatment continuity of a patient being seen frequently be interrupted, or should a patient on medications who is seen infrequently be rescheduled?

Psychiatrists who anticipate interruptions in their patient practice because of involvement in forensic cases should consider informing prospective patients. A patient who gives an informed consent after being told, "If I treat you, there may be unavoidable interruptions in your treatment. I will make every attempt to reschedule," may experience less turmoil ultimately. Some psychiatrists with an expanding forensic practice may find that treating patients becomes an increasingly cumbersome problem. They may begin to severely limit their general practice and eventually not treat patients at all.

Forensic psychiatrists sometimes become disturbed by the testimony of an opposing forensic expert. It is helpful to remember that most cases in litigation have equities on both sides. Otherwise, the case would not be litigated or would have been settled. Theoretically at least, if the forensic psychiatrist were able to review a case for both sides, data in support of both the plaintiff and the defendant positions could be found. Moreover, procedural limitations may unduly restrict or distort the testimony of expert witnesses. To attend to patients and also practice forensic psychiatry with reasonable composure, the psychiatrist must be able to tolerate formalisms and ambiguities inherent in litigation.

Occasionally, a forensic psychiatrist may complain of unethical behavior on

the part of another forensic psychiatrist. Almost invariably, on further inquiry, the psychiatrist accused of being unethical is an opposing expert. Lawyers, by virtue of their advocacy position, tend to promote polarization of expert witness testimony. A more dispassionate understanding of the legal process may help the forensic psychiatrist minimize the indigenous good-bad splitting that occurs during litigation. Also, courtroom transferences can become very intense and disruptive. The expert role can stir up powerful feelings of rivalry, narcissistic omniscience, and triumph. Self-scrutiny by the expert is essential to maintaining reasonable objectivity and equanimity.

Finally, perturbation of the psychiatrist's attention and neutrality can be minimized by avoiding role confusion. The total responsibility for litigating a case belongs to the attorney. From the attorney's standpoint, experts are a means to a legal end. They have no value to the attorney beyond assisting the legal case or agenda. For opposing counsel, the adverse expert is an obstacle that must be overcome by all legal means available. The attorney is compelled to zealously represent the client and is merely doing his or her job in attempting to impeach the testimony of an opposing expert. It is a misunderstanding of this aspect of being an expert witness that may lead fledgling forensic psychiatrists to harbor resentment toward the legal profession or to leave the field prematurely.

The forensic expert may play an important part in litigation, but the extent

of that participation is guided by the legal judgment of the attorney. Obviously, the forensic expert's basic testimony must not be influenced by the attorney. Halpern<sup>8</sup> cautions that "... the [forensic psychiatric] examiner should be ever vigilant that he is not being pressured to subordinate his code of ethics to the ethical cannons of the attorney who is engaging his services." There is an old saw among forensic psychiatrists that wryly states, "Lawyers win cases, experts lose them." A kernel of truth does exist in the observation that some lawyers will take credit for winning a case, but will blame the expert if the case is lost. The forensic psychiatrist can find consolation by maintaining a realistic view of litigation while continuing to practice as a physician.

The roles of the general psychiatrist in diagnosing and treating patients contain many fundamental differences from those of the forensic psychiatrist.<sup>9</sup> Unless these roles are kept separate, much confusion and disquiet that is sure to upset the psychiatrist's concentration and attention to patients will ensue. For example, a common mistake made by psychiatrists when first undertaking forensic cases is to blur the distinction between patient and litigant, which impairs the role of independent forensic examiner. This role confusion often is a natural bias introduced by primarily treating and evaluating patients. By contrast, forensic savvy can act as a potential contaminant in psychotherapy by producing a subtle role change in the psychiatrist. The psychiatrist may find himself or herself wondering if the patient is

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lying or malingering or what an eyewitnesses' version of the patient's story would be. These concerns, of course, are irrelevant and distracting to the psychiatrist's treatment role in attempting to see the world through the patient's eyes. Ethical guidelines may help psychiatrists to distinguish between these roles more clearly and particularly to avoid the dual positions of treatment provider and expert witness for the same individual.<sup>1</sup>

Bernard Diamond<sup>10</sup> pointed out the fallacy of the impartial witness many years ago. He recommended instead an active, fiducial role for the forensic psychiatrist to ensure that the testimony given benefits the law, justice, and society and not the self-interest and public relations of the psychiatrist.<sup>11</sup> Role confusion in the litigation context can be minimized by maintaining one's professional identity, rather than by becoming a polarized extension of an attorney's advocacy position. It is certainly appropriate for the forensic psychiatrist to be an advocate for his or her own testimony, provided it is based on sound reasoning and credible data. On the other hand, the expert may adopt the role of educator, which is less narcissistic than advocacy for the expert's own opinion. The expert as educator, however, must be careful to avoid jargon, lecturing, or pomposity. In providing testimony as well as in practicing psychiatry, the influences of uncertainties in science, personal value judgments, and limitations caused by restricted or limited data must be freely acknowledged.<sup>12</sup> After all, in providing testimony as well as in practicing psychiatry, the physician

as a scientist uses this approach in everyday practice. Maintaining the role of a physician-scientist provides an anchor amidst the uncharted waters and tempests of litigation.

## The Good News

The practice of forensic psychiatry, on the other hand, is often beneficial to the psychiatrist's professional growth in a number of areas.<sup>13</sup> Psychotherapeutic fatigue and boredom is lessened when the psychiatrist can see a variety of cases. The types of mentally disordered individuals met in forensic practice usually are quite different from those encountered in an outpatient practice. Psychiatric disorders, many severe, that ordinarily would not be seen in general psychiatric practice occur with regularity in forensic practice. Trauma-related disorders, violent dyscontrol syndromes, chronic pain disorders, paraphilias, and antisocial personalities are just a few types of conditions frequently seen by forensic psychiatrists. These individuals often present challenges to the psychiatrist's interviewing skills, particularly when withholding of information or malingering is suspected. The novel clinical issues presented by many forensic cases provide a constant stimulus to professional growth. The forensic psychiatrist usually is presented with a unique opportunity to perform a thorough, precise examination currently lacking in so many other areas of psychiatric practice.<sup>14</sup>

Working with bright, competent attorneys on interesting cases can be a

challenging, welcome break from the slow, often laborious, process of psychotherapy. Forensic psychiatry is an action specialty that can serve as a beneficial balance to the long hours of quiet but attentive listening required in psychotherapy. Forensic cases are time limited. Usually, no treatment responsibilities exist. This may come as a relief to some psychiatrists who are constantly required to make daily treatment decisions.

Psychiatric diagnosis in legal settings is critically important for court findings, financial judgments, liberty interests of defendants, and some social policy decisions.<sup>15</sup> Inevitably, diagnostic skills are sharpened through the crucible of intense cross-examination. The forensic psychiatrist cannot merely give a pontifical diagnosis. He or she must be able to substantiate clinical findings with sound data and reasoning. Diagnostic precision based on a sound differential diagnosis is often a beneficial outcome. Finally, participation in the often humbling legal process usually exerts a salubrious effect on the psychiatrist by curbing feelings of omnipotence and omniscience that can develop after years of unchecked reverence or even god-like adoration by patients.

### Conclusion

Most psychiatrists who practice the specialty of forensic psychiatry also see patients in the framework of a general psychiatric practice. Involvement in forensic cases provides many professional benefits but also may perturb psychia-

trists' free-floating attention in their psychotherapeutic work. The modus operandi of general psychiatry and forensic psychiatry are quite different. Understanding and maintaining these essential differences will help preserve the ability of psychiatrists to help their patients as well as perform credibly in the legal arena.

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