

# Letters to the Editor

---

Only letters that are responsive to articles published in previous issues of the *Journal* will be accepted. Authors of these published articles are encouraged to respond to the comments of letter writers. The Editor hopes that this section will enhance the educational mandate of the *Journal*.

Editor:

I am writing in reply to "The forensic psychiatrist as expert witness in malpractice cases," by Professor Alan Stone.<sup>1</sup>

My own experience and that of others suggests that one criticizes Professor Stone at one's peril, but his use of my name and textbook,<sup>2</sup> as exemplars and embodiments of forensic psychiatry, is so flattering on the one hand, and so provocative on the other, that it overcomes the reticence so characteristic of my retiring nature and moves me to respond.

The article itself uses the case of *Williamson v. Liptzin*<sup>3</sup> as a springboard from which to rebuke forensic psychiatry for various faults, including overidentification with legal issues over clinical ones; emphasis on procedural versus substantive criteria; and mercenary concerns coupled with an alleged willingness of experts to say anything that will serve the attorney's needs. This summary cannot

do justice to Professor Stone's careful argument, and the reader is referred to the original article for full explication.<sup>1</sup>

Professor Stone's withering contempt for general psychiatry is well known to generations of law students (and my forensic fellows) who have taken his law and psychiatry courses at Harvard Law School over ever-so-many decades, but his recent criticism of forensic psychiatry appears to be emerging anew. With one of his criticisms I fully agree: forensic psychiatrists are in constant danger of being swayed—and, in a worst case scenario, corrupted—by the legal context, attitudes, and viewpoints in which they work. But this is, in my view, a danger and not, as Professor Stone implies, an inevitability characteristic of all experts.

My thesis here is that Professor Stone is treating *all* experts as though they did what *some* experts admittedly do. Professor Stone's description of how experts should approach a case is clearly wrong and even illogical, but his recognized brilliance over ever-so-many decades tells me that a failure in logic is not the true problem. It seems to be an animus against experts like that of his legal colleagues, among whom he has dwelt for so long, and among whom expert witnesses are regarded as a necessary evil encroaching on the sacred precincts of the jury's decisions—an evil to be tolerated with regret and resignation but disparaged whenever possible. Let me begin by noting Professor Stone's description of the expert approach to cases as follows.<sup>1</sup>

Professor Stone notes (Ref. 1, p. 457):

---

Address letters to: Ezra E. H. Griffith, MD, Editor/The Journal of the American Academy of Psychiatry and the Law, Department of Psychiatry, Yale University School of Medicine, 25 Park St., 6th Floor, New Haven, CT 06519.

"I believe forensic psychiatrists have succumbed to the rules of adversarial combat. They have inadvertently accepted the lawyer's view that the adversarial system of law requires experts for both sides (i.e., professionals who are prepared to take either side of the argument)."

While the statement is literally true as written—experts must accept the adversary nature of the legal system, and a given expert may theoretically be found on either side of case—the last phrase could be read to imply that the *same* expert is willing to take either side of a case, *regardless of merit*—the classic definition of the "hired gun" (for discussion of this problem, see Ref. 2). To demonstrate that this is not merely a possibly erroneous inference, consider the following (Ref. 1, p. 458): "...the [previous medical] conspiracy of silence has been replaced by experts competing to sell their expertise to either side of a case."

One might hope that Professor Stone means that experts are not influenced by the side that retains them, only by the merit of the data, rather than suggesting that the *same* expert is venally indifferent to the merits of the case and will take whatever opinion is needed by a given side. This benign construction is refuted, unfortunately, by the subsequent comments (p. 458, continuing from the above):

Thus, a forensic psychiatrist asked to evaluate the *Liptzin* case for a plaintiff's lawyer who is seeking to retain him as an expert might begin with a lawyer-like perspective, "What within the bounds of honesty can be said against Dr. Liptzin's standards of care in treatment of Mr.

Williamson?" This attitude is quite different from asking oneself, "Is this a good psychiatrist to whom I would gladly refer a patient?"

Here, in the guise of correcting one expert bias, Professor Stone falls into another, sometimes called the "nice guy" error: "This doctor seems like a nice guy, so he should not be liable." As Professor Stone would probably admit, liability determinations are based on case-specific criteria ("Did this nice guy fall below the standard of care in *this* case?"), which are quite distinct in most respects from the criteria for making patient referrals.

Of course, *both* of Professor Stone's proffered alternatives completely miss the mark; neither constitutes ethical practice. The proper expert for *either* side enters the case as neutrally as possible, beginning with the assumption that good care was delivered (since the plaintiff carries the burden of proving it was not), and allows the emerging facts of the case to support or refute that assumption. To go into a case with the position, "What can I say against the defendant?", is to have succumbed already to an unacceptable and disqualifying bias.

Is this an overly idealistic view? Possibly so, but it is still a crucial point to make. By ironic coincidence, the same issue of the *Journal* contains an article by Mossman provocatively titled, "'Hired guns,' 'whores,' and 'prostitutes': case law references to clinicians of ill repute."<sup>4</sup> While providing discouraging proof of my assertion that the legal system occasionally shares Professor Stone's animus toward experts, the article also provides specific examples where judges proved

## Letters

able to distinguish the theoretical “hired gun” from the ethical expert then before them. It is to preserve this ability to distinguish the gold from the dross in expert witness practice that the errors in Professor Stone’s descriptions must be analyzed and challenged.

I conclude that Professor Stone, in the course of indicting experts generally, has actually identified important pitfalls of expert witness practice that the ethical expert identifies and avoids: overidentification with the retaining attorney or the legalistic view; economic influences and biases; and overreliance on procedural rather than substantive clinical issues. For these caveats we can once more be grateful to Professor Stone for again illuminating matters at the interface of psychiatry and law.

Thomas G. Gutheil, MD  
Professor of Psychiatry  
Harvard Medical School  
Boston, MA

## References

1. Stone AA: The forensic psychiatrist as expert witness in malpractice cases. *J Am Acad Psychiatry Law* 27:451–61, 1999
2. Gutheil TG: *The psychiatrist as expert witness*. Washington, DC: American Psychiatric Press, 1998
3. *Williamson v. Liptzin*, Cal., Orange County Sup. Ct., Dkt. No. 97CVS690
4. Mossman D: “Hired guns,” “whores,” and “prostitutes”: case law references to clinicians of ill repute. *J Am Acad Psychiatry Law* 27: 414–25, 1999

Editor:

Alan Stone’s commentary of a malpractice case in “The Forensic Psychiatrist as

Expert Witness in Malpractice Cases”<sup>1</sup> raises a number of important questions about this unusual malpractice verdict, which astonished the defendant as well as most psychiatrists. Many players complicate jury trials. Thus there is plenty of room for commentators to critique the legal representation, trial tactics, demeanor of the defendant and plaintiff, and the experts’ credibility on both sides in an attempt to judge the major contributing factors that affected the jurors and hence the ultimate outcome. Professor Stone ignores most of these issues, finds them relatively trivial, or wishes to focus solely on the role of the plaintiff’s “forensic” psychiatric experts and on his view of their ethical approach to a case. He finds both the ethics and practitioners blameworthy.

It is not very clear how Dr. Stone defines a forensic psychiatrist, but he seems to use the first, second, and/or fifth definition below. He excludes some expert witnesses from his definition of forensic, so he does not define them by role. This is important, as the groups vary considerably in training, experience, and knowledge. Possible definitions include: (1) those who have passed subspecialty board examinations, have subspecialty training or experience, and identify themselves as forensic psychiatrists; (2) those who express an interest in the area and join a professional organization like the American Academy of Psychiatry and the Law; (3) any psychiatrist who agrees to participate as a consultant or expert in the legal system (this group includes psychiatrists who may not have had any specific forensic training); (4) those who work in

correctional and maximum-security settings; (5) those psychiatrists who practice solely or predominantly as an expert witness.

I am not sure how Professor Stone intuitively grasps the ethics or practices that guided these "forensic" psychiatrists. He begins with the premise that "forensic" psychiatrists initiate a case review with "What, within the bounds of honesty, can I say against Liptzin" as the standard.

I can say that I do not approach a case that way, nor do most of my colleagues who train and teach psychiatrists how to evaluate a potential malpractice case. I try to read documents sent by attorneys for evaluation in a neutral fashion, enumerating both concerns regarding the treatment as well as appropriate practices. The process asks that peers review their profession's practitioners and give judgments as to when practice falls below an acceptable standard of care. This needs to be done with compassion and fairness, since each of us may be in a position where an untoward event exposes our work to similar scrutiny by peers. Most good attorneys appreciate this approach in their effort to decide whether a sufficient case exists. Just as attorneys evaluate potential experts, experts need to evaluate an attorney's integrity and approach to a case.

The process itself has many pitfalls that make it more difficult for the evaluator/potential expert witness. Before a malpractice case can be filed in many states and in the federal courts, an attorney has to find an expert who must sign an affidavit that the case has merit. The basis for drawing this conclusion early in the pro-

cess is often only: (1) the written psychiatric record (that clearly does not contain all of the necessary information) and (2) the plaintiff's version of the events.

These statements or affidavits have to be tentative at best, as more detailed depositions of witnesses and defendants cannot occur until the case is filed. There may well be adequate explanations or justifications for the defendant's behavior and opinions may change as the case develops. This places a burden on the expert to continuously evaluate the new information and not just maintain a position to please an attorney.

Dr. Stone trivializes an ethic of honesty as being unnecessary, since witnesses are sworn to tell the truth anyway. This AAPL "Ethics Guideline"<sup>2</sup> was included because of the recognition that the adversarial system creates pitfalls for physicians. The guideline states that:

... forensic psychiatrists function as experts within the legal process. Although they may be retained by one party to a dispute in a civil matter or the prosecution or defense in a criminal matter, they adhere to the principle of honesty and they strive for objectivity. Their clinical evaluation and the application of the data obtained to the legal criteria are performed in the spirit of such honesty and strive for objectivity.

As the commentary notes,

The adversarial nature of our Anglo-American legal process presents special hazards for the practicing forensic psychiatrist. Being retained by one side in a civil or criminal matter exposes forensic psychiatrists to the potential for unintended bias and the danger of distortion of their opinion. It is the responsibility of forensic psychiatrists to minimize such hazards by carrying out their responsibilities in an honest manner striving to reach an objective opinion.

## Letters

This is a broader and more comprehensive statement that goes beyond mere truth telling on the witness stand.

How standards of care are defined in a legal case is complicated and worthy of scholarly attention. How experts decide the appropriate standards varies depending upon the context and the specific behavior involved. Some standards of care are set by formal written practice guidelines or ethical guidelines developed by professional organizations. Others may be set by discussions in the scientific literature derived from scientific studies. Sometimes courts set standards in legal decisions or legislatures pass statutes. Other questions can be answered by surveys of practitioners in the area or sampled nationally. Sometimes they may reflect little more than an individual expert's personal experience, if it is not possible to obtain better data. When the profession is at odds within itself or has developed no standards, the task is more difficult and that fact should be identified. While "local standards" have gradually been replaced by national ones, the context remains important.

In this case, however, it is hard to imagine how experts were able to say that the violence that occurred six months after stopping treatment was predictable, based on the past history of the patient or by virtue of his diagnosis. What seems predictable was that without treatment deterioration in his condition would occur. A more difficult standard was whether the psychiatrist should have made an appointment or followed up more closely when the patient left the student health service

for the summer vacation. This is now generally expected for hospitalized patients who have psychotic disorders. On the other hand, for outpatients this is less well-defined and again more contextual, based on individual circumstances. In this area, reasonable practitioners might disagree.

We do not know whether the "forensic" experts approached the case any differently than the non-forensic experts, however defined. There were experts on both sides. Credibility of the defendant as well as the expert witnesses during the trial is a factor that is hard to discern from the written record. I suspect that anyone reviewing a case will experience some difficulties, more because of the process and less because of their ethics. Adequate peer review is difficult without an understanding of the details, but because of the complex rules of evidence which each side strives to exploit to their advantage during a trial, they are not always presented in a fashion that seems fair to physicians.

No one is happy with the perception in this country that every untoward event must be caused by someone's negligence and that a lawsuit is the way to resolve the issue. The *Daubert*<sup>3</sup> decision by the U.S. Supreme Court and subsequent cases<sup>4</sup> mandate judges to serve as gatekeepers to screen out so-called "junk science." Judges need to better exercise that authority and may need to ask for "expert" consultation to fulfill that role. Yet psychiatrists, both forensic and others with important expertise, need to remain involved in the process and try to bring honesty and objectivity to their work and

profession. If the profession does not speak out against practices that fall below the standard of care, then we abdicate an important moral and ethical responsibility. The legal process is not without its defects, but total withdrawal is not the solution. The challenge is to develop responsible and ethical participation, which has to include training and education. As a teacher of law students, Dr. Stone has undertaken as formidable a task as we have in training forensic psychiatrists.

Howard Zonana, MD

Department of Psychiatry  
Yale University School of Medicine  
New Haven, CT

#### References

1. Stone A: The forensic psychiatrist as expert witness in malpractice cases. *J Am Acad Psychiatry Law* 27:451-61, 1999
2. American Academy of Psychiatry and the Law: Ethics guidelines for the practice of psychiatry (adopted May 1987). *AAPL Newsletter*, April 10, 1987
3. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, (1993)
4. *Kumho Tire Co., Ltd. v. Carmichael*, 119 S. Ct. 1167 (1999)