

## A Guarded Word of Welcome

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Historically, the relations between lawyers and psychiatrists have been at best strained, at worst hostile and vituperative. The distance separating our two disciplines as they handle the sensitive child custody determination is well documented.

In his characteristically elegant manner, Doctor Jonas Robitscher, Professor of Law and Psychiatry at Emory University, has set out some of the basic conflicts. He says, "Law is all logic and reason, or at least it sets out to be so. But for a legal system to function, it must be more than merely logical and reasonable. It must be definite. It must be based on precedent. It must rely on rules. And so, in the course of time all functioning legal systems become legalistic, and in the process some of the logic and reason gets left behind . . . Psychiatry deals with the illogical and the unreasonable. Freud's central idea was that human actions have their sources both in the conscious, which may be governed by reason, and in the unconscious, which is not governed by reason, intellect or logic, and which in fact is by definition *unreasonable*. In attempting to describe and deal with the illogical and unreasonable actions of humans, psychiatrists are somewhat contemptuous of precedent, and they often fail to please the court when asked to categorize and place information in neat cubbyholes in the fashion that lawyers approve. When these two disciplines meet, therefore, we may expect to find confusion, complexity and mutual dissatisfaction. . . ."

In his foreword to Doctor Robert Sadoff's new book on Forensic Psychiatry, a distinguished Detroit attorney, Ralph Slovenko, asks a very pointed series of questions. "Is psychiatry too good for the law? Is law too good for psychiatry? Do they simply not go together, like some chemicals?" Ralph Slovenko recently won the Guttmacher Award from the American Psychiatric Association for his distinguished efforts in the field of forensic psychiatry, so it can be anticipated that his biased answers to his own questions are all definite "No's."

This Symposium utilizes no simple solution to resolve differences between lawyers and psychiatrists. In fact, viewpoints will be presented which may be quite disparate or even contradictory. Lawyers talk about what they do, what they need and expect. Psychiatrists do the same, and their expectations and needs are generally not related to those of the lawyers.

Of course, it must be conceded by even the most ardent of antagonists toward the other profession that all is not gloom. Some bright spots are there, perhaps notably recently in the areas of personal injury — compensation law and at least faintly in criminal responsibility law. Child custody litigation, however, is an adversary proceeding in which the primary opponents hate each other with passions which are the most formidable most of us ever hope to see. In such litigation, the need for the kinds of understanding psychiatry can provide is greater than ever. Paradoxically, the contestants often feel quite threatened by the attempts to provide that understanding, and the most umbrage is taken by them. Instead of avoiding all of this ugliness, if psychiatrists would step back a bit and look at the heated situation from an objective (and a safe) distance, one which precludes personal involvement or defensiveness, certain impressions would emerge. The psychiatrists would see that the very rage of the contestants, that which so often drives them away from participating in this litigation, is in fact expected and

perhaps even healthy. If the separating spouses could get along well enough to consider and resolve their interpersonal problems, they ought not to be getting divorced. Usually, divorce is ugly and hateful. When the rage spills over into the relationship with the children, many psychiatrists are so sickened by that behavior that they can not allow themselves to function as they might in other, perhaps even more horrible situations, *e.g.*, that of a criminal case involving a psychotic multiple murderer.

In my experience, I have developed the impression that psychiatrists resent working in domestic relations litigation more than in criminal matters, and for different reasons and with different targets. Psychiatrists tend to resent the law more impersonally, as an institution, in criminal proceedings. They see what amounts to a sham, at least in their eyes, in which some lip service may be paid to psychiatric expertise regarding the make-up, motivations and controls of the individual on trial — if, in fact, that material is allowed to be presented at all. They also see a vast, compartmentalized system in which trial, sentencing and punishment — or what is laughably sometimes called rehabilitation — have no meaningful inter-relationship. In domestic relations matters, however, the issues become more personal. The lawyers appear to be more intense in their roles as advocates because the individuals they represent are so mutually and openly hostile. In child custody cases, especially, it is more common than not for psychiatrists to wind up with little, if any, respect for either of the contesting parties, who are so heavily invested in their own personal and deeply narcissistic needs that the needs of the children are only peripherally acknowledged. Psychiatrists are likely to say, “A plague o’ both your houses,” and then to top Shakespeare’s *Mercutio* by saying the same to both lawyers, too.

Most psychiatrists have problems coping with the adversary system regardless of the type of case at hand. They often feel that the adversary system inhibits the development of the psychiatric ideas and knowledge they need to present the court, and they feel that they can best function in a neutral zone, perhaps as *Amici Curiae*, as Friends of the Court. In child custody cases, especially, they often say that this approach nips in the bud the kinds of hostility so often acted out in court by the contestants and their attorneys as well. I have grave doubts, however, that most attorneys will relinquish their classic advocate roles for such a procedure. The law spawns advocates, champions for their causes regardless of rightness or wrongness. The law insists that every issue raised by a contestant can be defended and heard, and it has generally looked askance at psychiatrists who insist that they can function best outside of the adversary arena, unrelated to either adversary. The psychiatrists are right, of course. They can function best that way, but is that the way lawyers want or, for that matter, need? If they do not want psychiatrists to function that way, are they right? As distinguished an American jurist as Judge David Bazelon has written, “. . . My experience has shown that in no case is it more difficult to elicit productive and reliable expert testimony than in cases that call on the knowledge and practice of psychiatry . . . . In my experience [psychiatrists] try to limit testimony to conclusory statements couched in psychiatric terminology. Thereafter, they take shelter in defensive resistance to questions about the facts that are or ought to be in their possession. Thus, they refuse to submit their opinions to the scrutiny that the adversary process demands . . . .”

Judge Bazelon is a noted critic of American forensic psychiatrists because of problems which arose in criminal cases, not in family law cases. His remarks, however, are appropriate here because his contention is that the adversary system provides the most reliable and meaningful form of meting out justice, and that psychiatrists, just like other experts, must function within it if truth is going to emerge from their testimony. Many psychiatrists disagree strongly with the learned Judge, and I am one of them. Judge Bazelon states that only by stringent direction and cross-examination can the meat of facts be brought out, but there is nothing to prevent this kind of tough questioning by each attorney if psychiatrists operate as *Amici Curiae*. Child custody cases, like murder cases, are handled by trial lawyers, individuals with particular commitments to do battle

for their clients. Although I agree with the opinion of most of my colleagues that in matters of child custody they must have access to all participants, I really wonder about the reception given this idea by most lawyers. Advocacy may be too deeply imbued in the basic identification processes of most attorneys.

Psychiatrists resent attorneys who ask them to participate in litigation proceedings for other reasons, too. The basic conflicts of the adversary system are only one springboard for psychiatrists' complaints. Aside from the philosophic differences, psychiatrists feel that the adversary system reduces their position to a debasing one of tactics, and that much pertinent material is often overlooked because of the real purpose for which the presenting attorney is presenting "his" psychiatrist. Psychiatrists feel that attorneys are not genuinely interested in the real meat of what they have to say unless it suits their contesting purpose, and they are justified in that feeling. This reaction, of course, provides psychiatrists with a remarkable point of view regarding the law as an institution, but it also betrays a vast lack of understanding and appreciation of the necessities of the adversary system and its demands on all parties.

Money has also been a classic problem for psychiatrists when they become involved in medico-legal procedures. Often, psychiatrists are loath to demand their justifiable fees in advance or even at the times of their work. Attorneys, of course, do this routinely. I have often wondered why psychiatrists have simply avoided this issue. A number of psychiatrists have written about the psychodynamics underlying such conflicts. In my own practice, when I become involved in a private medico-legal evaluation, as distinct from a court-appointed one, I clarify at the outset that my fees are to be paid at the times of the evaluations, and that the total bill will depend upon the number of sessions needed. Sometimes, if I have developed a close and ongoing relationship with an attorney, he will tell me that sufficient funds are set aside in his trust account for my workup and participation, and that I can bill him for the entire procedure at its finish. I usually consent to do so, although the attorney usually agrees with me that it is appropriate for him to send me a letter explaining the payment procedure and noting that he understands my fee structure. If I have to go to court to testify, my fee for appearing there is usually paid in advance, at least to the extent of the initial half-day service.

In my capacity as Chairman of the San Diego Psychiatric Society's Task Force on Relationships between Psychiatrists and the Law, I am called frequently by colleagues who complain that they are unable to collect either from the litigants they have seen or from their attorneys. My colleagues have usually erred by not setting forth the plan for fee payment *as the workup goes on*, and making sure that the responsible party understands and follows through. The attorneys also err, however, by not bringing this matter up at the outset to the psychiatrists they call, usually explaining that it is preferable to arrange the fee schedule and payment schedule with the responsible party, whom the psychiatrist generally sees first. Sometimes, of course, individuals fail to follow through with the agreed-upon plan to pay for the work-up as it progresses. In such cases, I do not refuse to see the parties but I explain to them that, even though I am seeing them that day, I shall not proceed with any communications to their attorneys or to the courts until the bill has been paid as previously agreed.

A fundamental error made by many attorneys is that they do not prepare their clients properly. They do not have any appreciation of the costs involved in a proper and complete psychiatric workup, and if the attorneys do not wish a proper and complete psychiatric workup they should have none at all. Attorneys must discuss these issues with their clients and stress the importance of the workup, even if the workup results in findings which might not help their cause. When attorneys do not prepare their clients properly, resentments and problems are germinated. My experience is that when lawyers prepare their clients, and when they communicate freely and openly with the psychiatrists whose help they actively seek, the clients manifest no resentment about the appropriate and expected routine for payment. They know that litigation is expensive to

begin with, and that psychiatric evaluations will increase that total expense to some extent.

My function is only to present an introduction and to set a stage. I have tried to present what might be considered today's climate of relations between psychiatrists and lawyers, especially in family law and custody proceedings. Horror stories will continue to be told by members of each profession about the other. However, it is the hope of all the participants who worked hard in preparing this Symposium that they will become rarer and that meaningful cooperation will become more common.