

# The Practice of Forensic Psychiatry: Perils, Problems, and Pitfalls

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The practice of forensic psychiatry can be exciting, rewarding, and fulfilling; however, there are also a number of pitfalls that the practitioner may encounter. Scheduling conflicts may pose significant problems for the busy practitioner, especially one who has an active treatment practice. Differences of opinion between and among forensic psychiatrists can be difficult for some psychiatrists. Collecting fees poses a problem for some, especially in criminal cases or in prolonged civil matters. Selecting the proper cases and rejecting others is often an arduous task fraught with some peril. Preparation of reports may prove problematic when excessive demands are made upon the forensic psychiatrist. There are a number of cases that must be observed with caution and may prove to be a "no win" situation for the private forensic psychiatrist. Peer review and mentoring are two methods of helping the young forensic psychiatrist deal with some of the problems and, hopefully, avoid many of the pitfalls.

Many years ago, I wrote of some of the difficulties for the psychiatrist working as an expert witness.<sup>1</sup> I pointed out the need for the psychiatrist to conduct as thorough an examination and investigation of the case as possible. I indicated that the examination of the defendant, in criminal cases, or the plaintiff, in civil cases, was necessary but not sufficient for forensic work. I have often alluded to the work of the forensic psychiatrist as that of a clinical investigator rather than a therapist. In conducting investigations, the psychia-

trist can probe into areas far beyond that of the therapist, who may be reluctant to intrude prematurely into sensitive areas that may stimulate resistance in the therapy.

The forensic psychiatrist has a much broader role in that other individuals must be interviewed or examined in many cases, and materials, both medical and legal, must be reviewed in preparation for giving an opinion within reasonable medical and/or psychiatric certainty.

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Most psychiatrists who practice forensic psychiatry do so part time in addition to their treatment practice. However, there are a number of full-time forensic

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psychiatrists who are not engaged in a treatment practice. One of the problems for the full-time forensic psychiatrist may be the question that is inevitably asked on cross-examination: "Doctor, you don't have a private practice, do you?" The answer to that is that the practice is private, but is not for treatment. A follow-up question is one that may present a problem in malpractice cases in which the psychiatrist is testifying for the plaintiff that he or she is not currently doing therapy as is the defendant: how then can the forensic psychiatrist be competent to criticize the work of a treating psychiatrist? The answer is that the forensic psychiatrist has conducted treatment for many years and is in touch with others who are currently doing therapy and that he or she also keeps up on the current literature on psychiatric treatment.

When testifying for the plaintiff in malpractice cases in many states, including Ohio, Maryland, and others, the rule indicates that a certain percentage of the expert witness's time must be spent in clinical work. In some states it is 50 percent, in others 75 percent. Teaching time is counted as clinical time. The words are not treatment time, but rather clinical. How does one define clinical? I define clinical as working with individuals. Thus, my time is spent in evaluating and assessing individuals in criminal and civil cases and in reviewing medical and clinical records. All of that is clinical time. The only part that is not clinical is the discussion of the case with the attorney and the time spent in testifying at deposition or at trial.

## General Issues in Forensic Psychiatric Practice

Perhaps the most difficult problem for the practicing forensic psychiatrist is juggling the schedule. I have often taught students that if they want to become forensic psychiatrists, they must be flexible, because they may not know from one day to the next where they will be or what they will be doing. Occasionally, I will receive a phone call indicating that it is now time for trial on a case that was worked up several weeks or months before—can I be ready for court tomorrow or the day after? Court time takes precedence over examinations in most cases, and the psychiatrist should be available to the attorney when the case is ready for trial. Preparation before testimony is also required, and time must be made available for such adequate preparation.

Another scenario is that the psychiatrist may be scheduled for trial on a particular day and will receive a telephone call the night before indicating the case has settled, the defendant has pled guilty, or the case has been postponed. The active forensic psychiatrist will then have to develop something for the next day to avoid open time in his or her schedule. Some forensic psychiatrists build in a fail-safe fee schedule by which they charge for the time reserved for the day in court. Some are successfully able to accomplish that goal, while others are less aggressive about it. It is always good to have something available whenever a cancellation occurs, whether reading records or examining an individual who is in jail awaiting the examination.

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A second difficult and perhaps stressful issue for the forensic psychiatrist is finding that one can be of little or no help to the attorney and his or her client in a particular case. For example, one may find in evaluating a defendant for the prosecution that the defendant was legally insane at the time of the commission of the crime. How does one present these findings or conclusions to the prosecutor and deal with the criticisms, questions, and comments they may have about one's opinion? It may be even more difficult in civil cases in which, when examining a plaintiff for the defense, one finds the plaintiff indeed is suffering from significant mental and emotional disorder that was directly caused by the accident or injury in question.

A third general difficulty for the practicing forensic psychiatrist is the question of effectively attacking the conclusions of a respected colleague who gives an opposite opinion in a particular case. Sometimes, the opinions of one's adversary are persuasive, especially if that expert is a well-respected psychiatrist utilizing logic and consistent data to support his or her conclusions. One should usually form one's own opinions prior to reading an adversary's opinions, but one may indeed be persuaded by a different perspective or the viewpoint of the other side.

One of the reasons for differences, or even opposite opinions in particular cases, may be the different databases utilized by each side. In a recent, highly publicized criminal case, several psychiatrists working for the defense were able to interview various individuals who were

close to the defendant, but they were not able to interview those individuals who were close to the victims. Similarly, the psychiatrist working for the prosecution in that case had access to interviews with the victims and the victims' families, but not to some of the individuals close to the defendant.

### **High Profile Cases and the Role of the Forensic Psychiatrist**

High profile cases invariably lead to media attention and pressure on the forensic psychiatrist for information. How much information to give to the press may be a difficult issue for some psychiatrists. I have made it a point not to discuss my current cases, even when the defendant has given permission. I may utilize the data from the cases in teaching my university classes or at conferences. However, when newspapers or television reporters call, I usually refuse to comment because I feel that these are not the proper media in which the psychiatrist should discuss clinical issues.

Sometimes, the press may become intrusive and demand statements, as occurred in a recent high profile case. Television cameramen came to my office door without appointment and demanded information as I left my office. As usual, I referred all questions to the attorneys.

### **Fees and the Expert Forensic Psychiatrist**

Working long hours over long periods of time may result in fairly high fees paid to the expert witness. How does one han-

dle the issue of fees? First, the psychiatrist should obtain a retainer fee whenever possible when working for the defense in criminal cases and for the plaintiff in civil cases. Incarcerated defendants may not be able to pay one's fees, and unsuccessful plaintiffs often do not have the money for such payment.

Second, it is important for the forensic psychiatrist to attempt to obtain all fees prior to giving final testimony in court ("Your check is my key to the courtroom door").

In high profile cases in which there are a number of hours spent in preparing for trial, the issue of fees may become a media event. In a recent high profile criminal case, one forensic psychiatrist who had spent hundreds of hours on the case was reluctant to tell the jury how much money he made on the case, although he did testify that he charged at the rate of \$500 per hour. The jury was left with the feeling that the psychiatrist was withholding the information because it was an excessive amount. Telling the jury that one has been paid several hundred thousand dollars on a case could lead the jury to believe the expert had been "bought" and that his/her testimony is open to question. On the other hand, another psychiatrist was told by the attorneys to tell the jury how much money he had charged and how much he had been paid for the time that he had spent. The amount, which was over \$100,000, was published in the newspapers, and that psychiatrist has been questioned about it on other cases since that time.

The question of contingency fees arises

occasionally in forensic work. Sometimes, individuals involved in civil cases who require treatment cannot afford the treatment, or their insurance runs out before the end of treatment. The therapist, not wishing to abandon the patient, also does not wish to work for free. The therapist may run a tab or a bill into thousands of dollars over several months or years before the case finally comes to trial. Should that psychiatrist then testify for his/her patient, there would be a weakness in the testimony if the cross-examination focused on the fact that the treating psychiatrist stands to gain monetarily if the patient wins the lawsuit. It is unethical for either the treating psychiatrist or the forensic psychiatrist to testify in court on the contingency that the fees will be paid if the patient wins the lawsuit. The reason it is unethical is that the psychiatrist has a financial interest in the outcome of the case and that interest likely would affect the psychiatrist's neutrality and objectivity. Even if the psychiatrist testified only to the facts of the case regarding treatment and the patient's complaints, it would be unethical for the psychiatrist to profit from the testimony he/she gives in behalf of the patient. Even if there were no bias shown, the appearance of bias would be difficult, if not impossible, to overcome. Clearly, it is not unethical for a treating psychiatrist to delay payment until the patient is able to pay the psychiatrist. However, the psychiatrist's payment, either for treatment or for testimony, should not be based explicitly on the psychiatrist helping the patient win the lawsuit.

## Conflicts of Interest for the Forensic Psychiatrist

Several areas appear to be potential sources of conflict for various forensic psychiatrists:

**Personal Biases** Forensic psychiatrists who have negative feelings about certain defendants should refuse to become involved if neutrality cannot be established. For example, a Jewish or African-American forensic psychiatrist who is requested to examine a "skinhead" who has professed racist and ethnic bias against Jews and blacks should probably not accept the assignment or the request to examine such a patient. Negative countertransference feelings can conflict and affect neutrality in both examination and testimony.

Similarly, if a forensic psychiatrist is called to examine an individual who has a strong religious, ethnic, or other feeling similar to those held by the psychiatrist, neutrality may not be achieved. The psychiatrist may wish to help that individual, through identification, and may not maintain the objective viewpoint that is necessary for effective forensic work.

Strasburger, Gutheil, and Brodsky,<sup>2</sup> in their fine paper, "On Wearing Two Hats," clearly illustrate the problems for a treating psychiatrist who agrees to testify for his patient. There are just too many conflicting issues that could be raised in court. For example, if a forensic psychiatrist is to recommend intensive treatment for a plaintiff injured in an accident, he/she should not be the one to benefit from such a recommendation. Also, one cannot maintain a sense of neutrality with the

patient once he/she has testified for the patient and the patient hears the direct and cross-examination, revealing the weaknesses and problems in the case. Sometimes, cross-examination can be quite effective and disturb the therapeutic alliance required for effective psychotherapy.

**Fact Witness Versus Expert Witness** Another issue in this regard is the question of whether a treating psychiatrist may be called as a fact witness or as an expert witness. If the psychiatrist is called as a fact witness, he/she will be paid a fact witness fee, which may vary between \$9 and \$30 per day. The forensic psychiatrist should always try to be qualified as an expert, not only to charge the expert witness fee but also because the psychiatrist may be asked opinion questions that would be inappropriate for a fact witness. Judges occasionally have allowed clinicians to answer opinion questions even when they have been called as fact witnesses. That sort of situation may be troublesome to some psychiatrists, but my advice is to follow what the court demands at that time in the courtroom.

**Areas of Expertise** Another area of potential conflict or weakness for the forensic psychiatrist is whether testimony is required in a field not of the witness' strong expertise. For example, a psychiatrist who has little or no training or experience in child psychiatry should refer a case involving injury to children or child custody cases to a well-trained child forensic psychiatrist. Also, the psychiatrist who is not well versed in the latest research on psychopharmacology should refer cases involving complicated psychopharmacological issues to those ex-

perts with experience both in psychopharmacology and forensic psychiatry.

***Prior Contact with the Opposing Side***

Another issue of conflict may arise when the forensic psychiatrist is called briefly on the telephone by one side, without further follow-up and without further information given, and then several months later, the psychiatrist accepts the assignment by the attorney for the other side. In one case, I had been called by the public defender in a particular area on two occasions, but no follow-up was given, and I later accepted assignment on the same defendant by the prosecutor in that county. When my report was issued, the public defender's office protested, indicating they had effectively kept me from becoming involved in the case by having called me on two occasions several months earlier, but without retaining me and without sending any strategy or information. After a hearing, the judge allowed me to stay on the case, indicating there was no conflict of interest and no "taint," since no substantive information had been given. Attorneys are not allowed to keep forensic psychiatrists out of a case merely on the basis of a telephone call; strategy must be shared, or the expert must be retained by the attorney.

***Selecting a Case*** Another matter for the potential expert is the verification of which cases he or she ought to take. I was recently made aware that a colleague had agreed to take a case against a psychiatrist whom he knew, with whom he had lunch, and with whom he had considered associating in practice. That psychiatrist was then sued and the colleague agreed to be the expert against the psychiatrist for the

plaintiff. I think that kind of situation poses a problem of boundaries, ethics, and good judgment.

**Preparation of Reports**

Report writing is an important aspect in the work of the forensic psychiatrist. The report is the major product of the examination, of one's thinking and psychiatric skills. It is important that reports are prepared accurately, with proper spelling, grammar, and syntax. The report is the one major reflection of the forensic psychiatrist's work product.

It is best to withhold writing a report until sufficient information and data are gathered and incorporated. Sometimes a judge will demand the presentation of a report at a time prior to the collection of all data. In that case, the psychiatrist must prepare a preliminary report in order to meet the court's deadline. It should be noted that the report is preliminary and, that when further information is obtained, a follow-up report will be prepared and presented. I prefer that method rather than preparing a draft of a report that will later be changed. If a draft is prepared, one should make available both versions of the report so the other side can see what changes were made. It is also usually best to call the attorney before preparing the report to determine the extent and parameters of the report. The lawyer may dictate the guidelines but not the content of the report. Sometimes an attorney wishes only a two-page brief summary, and at other times, a very detailed psychodynamically oriented report. All reports are not alike and should be tailored to the individual needs of a particular case.

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The major difficulty for the forensic psychiatrist may be the attorney's request for the psychiatrist to modify his report. At times, such requests are appropriate, and modification is pursued. However, it is important to retain a copy of the original report in the event the psychiatrist is asked, under cross-examination, for the original version.

It should be noted that reports on particular cases should be sent only to the individual requesting the report (i.e., to the attorney or the judge). Forensic psychiatrists should resist requests by patients who are examined to have the report sent directly to them. If the consulting attorney wishes to release copies of the report to other people, including his/her own clients, that is the responsibility of the attorney and not of the psychiatrist.

### Handling Difficult Cross-Examination

Forensic psychiatrists may be asked difficult relevant questions on cross-examination. However, they may also be asked questions that seem irrelevant and irreverent but that may be geared toward exposing bias and credibility (e.g., questions about fees or personal information may be asked to challenge bias and/or credibility). The forensic psychiatrist must be aware that such questions may be asked and may be allowed by some judges. The forensic psychiatrist should be open about the fees that are charged for that particular case, but need not answer questions about annual income or Internal Revenue Service data that may be asked inappropriately.

A malpractice case in which a forensic psychiatrist is able to provide beneficial testimony in defense of a psychiatrist may result in a potential problem if the forensic psychiatrist finds the hospital at fault. Often the plaintiffs will sue the hospital and the psychiatrist separately, and the forensic psychiatrist may have an opinion that the defendant psychiatrist did not deviate from the standard of care, but may believe that the hospital personnel were responsible for the alleged damage. The plaintiff's attorney will question the defense psychiatrist about his/her opinions regarding the behavior of the hospital personnel in such a case. It is not appropriate, in my opinion, for the psychiatrist to testify against the hospital. Plaintiffs should hire their own expert witness who, presumably, would be in a position to criticize the behavior of the hospital personnel. Should the plaintiff's attorney ask the forensic psychiatrist about his/her opinions regarding the hospital personnel, the best answer appears to be that the expert psychiatrist has not reviewed the records sufficiently to give an opinion, within reasonable medical certainty, about the standard of care for the hospital personnel. The expert's responsibility was to review the doctor's records to determine whether the psychiatrist deviated from the standard of care.

Another potential peril for the expert witness psychiatrist is in testifying in cases in which there are multiple defendants, each of whom has his or her own attorney. It can be a grueling experience to be cross-examined by up to six or seven defense attorneys, each having his/her turn at cross-examining the plaintiff's

expert psychiatrist. Each attorney has a different personality and a different means of questioning. The same questions may be asked repeatedly by different attorneys. Psychiatrists will be tested on the consistency of their responses to similar questions by different examiners.

That issue is linked to the consistency of the psychiatrist's testimony in civil cases in which interrogatories have been filed, an affidavit may have been filed, or sworn testimony at deposition has occurred several months before trial. Cross-examination may focus on slight differences in testimony between and among the various times the psychiatrist has testified in that case as well as in other cases.

Cross-examining attorneys will have access to Lexis and Westlaw databases and to transcripts from other cases in which the expert has testified. It may appear in some cases that the expert has reversed his/her opinions. Great care must be given to insure consistency of response. Similar cases must be differentiated and distinguished when such apparent discrepancies are claimed.

### **Perilous Cases for the Forensic Psychiatrist**

There are several no-win situations that forensic psychiatrists should try to avoid whenever possible.

Unless one is working for a state agency such as the office of a prosecutor, a judge, or the county, a private forensic psychiatrist should avoid examining a police officer or a security guard to determine whether that person may be mentally fit to carry a gun. If the forensic psychiatrist gives the opinion that the in-

dividual may carry a gun and the township allows him/her to work with the gun at the psychiatrist's recommendation, the individual may misuse the weapon in some way and the psychiatrist may be blamed by the township or the victim, claiming inappropriate or incomplete examination and conclusions. Similarly, if the forensic psychiatrist gives the opinion that the person may not carry a gun, the person is deprived of work and his/her ability to earn a living and may sue the psychiatrist to reverse the opinion so that she/he may continue working. The psychiatrist will likely be criticized again for incomplete examination and inappropriate conclusion. If the psychiatrist is working for the state, he/she is covered by the state's immunity, in some cases, and also acts as an agent of the state in the event that liability for malpractice or negligence is claimed.

The same may be said for a forensic psychiatrist conducting an examination of a sex offender in the community to determine whether or not that person is a threat of harm to others. I strongly urge that the psychiatrist conducting such an examination be one who works for a state agency rather than in a private capacity.

A similar situation may occur if a psychiatrist is requested by an individual seeking a sex change operation. It may become a very difficult situation because some individuals may rush into surgery who are not psychologically or emotionally prepared. If the surgery does not go well or they are not satisfied with their new identity, they may blame the forensic psychiatrist for an incomplete evaluation or a faulty recommendation. Psychiatrists

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conducting such examinations should be part of a hospital team that has experience in conducting such examinations.

It is also a problematic situation for a psychiatrist working in a prison who treats a psychotic death row inmate with the goal of alleviating the psychosis so that the prisoner may be ruled competent to be put to death. The issue of the death penalty and the role of the forensic psychiatrist is one that needs further exploration and is beyond the scope of this brief presentation, except to include it as one of the potential pitfalls or dangers for the practicing forensic psychiatrist.

It is also recommended that the forensic psychiatrist take great caution when examining someone who is part of a larger group, such as one belonging to organized crime, to a motorcycle gang, to the Scientologists or other groups from which the examining psychiatrist, who may not find favorably for the individual, may be in jeopardy. The psychiatrist should avoid offers that he/she "cannot refuse." Precautions must be taken in examining such an individual, especially when bringing out the violent personality in a defendant who is thought to have a dissociative identity disorder.

### Senior Experienced Forensic Psychiatrist

In some cases, when adversarial situations occur, both sides will agree to accept the opinion of a senior experienced forensic psychiatrist. That is flattering, but also quite difficult, especially in high profile, controversial cases. In such in-

stances, the forensic psychiatrist works in a different mode, obtaining information from both sides rather than maintaining an adversarial position.

Finally, an experienced forensic psychiatrist may not be called by various attorneys because he or she has testified either at trial or at deposition for several cases and his or her opinions are well known throughout the area. Attorneys may call in such a capacity, asking the senior psychiatrist to refer them to a respected colleague who does not have such a well-known track record. Thus, the experienced forensic psychiatrist will often be of service to attorneys through a triage system of finding appropriate experts in various cases.

In summary, there are a number of issues that can be difficult for psychiatrists working in the forensic arena. One should gain as much experience as possible under supervision in an accredited fellowship training program before embarking on such a career. The pitfalls and dangers are present, and one should be ever aware of them in order to avoid serious problems in the future.

Currently, forensic psychiatrists are embarking upon a peer review system that should help younger psychiatrists with some of these problems. At this point, the program is voluntary and deals primarily with the preparation of reports that are reviewed by senior colleagues.

Another method of helping that I have recommended is mentoring. The senior forensic psychiatrist should be available to act as a mentor to younger psychiatrists on general questions and to beginning

forensic psychiatrists, in particular, in areas of common interest. This is especially helpful when the senior psychiatrist refers a case to a junior colleague.

Thus, the problems and pitfalls are plentiful for psychiatrists, but the remedies are readily available for full recovery.

#### References

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2. Strasburger LH, Gutheil TG, Brodsky A: On wearing two hats: role conflict in serving as both psychotherapist and expert witness. *Am J Psychiatry* 154:448-56, 1997