Ethics and Forensic Work

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Call for Forensic Topics. I want to make this column as interesting and useful to readers as possible. Please send suggestions for future column topics to P.O. Box 4015, Horseshoe Bay, TX 78657, or e-mail them to reidw@reidpsychiatry.com.

This column will address both "formal" professional ethics codes and less formal (often generic) ethics, such as those suggested by philosophical or societal moral concepts, but will focus on the former. Websites containing the ethics codes and principles of several professional organizations are listed in Table 1; many other organizations (e.g., for nurses, family therapists, social workers, and various kinds of counselors) also have ethics codes or guidelines.

Most organizations and practitioners believe clinicians in forensic practice cannot (or at least should not easily) shed the raiment of physician or psychotherapist. That is, once we have taken the oath or otherwise accepted the responsibilities of our clinical professions, we are bound by them in every situation. That view places broad ethical limits on things such as participating in executions or interrogating prisoners or terrorists.

A second view recognizes a few areas of qualitative difference between clinical and forensic practice, and the fact that clinical ethics do not anticipate all forensic situations. Most such forensic ethics don't conflict markedly with clinical ones, but rather try to find reasonable compromises in settings in which doctor-patient relationships or other clinical trappings are absent.

CONTEXT, ENFORCEMENT, AND CONSEQUENCES

Ethics Aren't Laws

The concept of ethics may refer to formally documented canons, informal social standards of conduct (which seem self-evident to their proponents but elude specific definition), or philosophical constructs. Formal ethical codes, principles, or guidelines are created by specific organizations and apply only to their members. None of these has anything to do with the law.

Ethics "Enforcement" Is Quite Limited

Ethical codes, principles, guidelines, and exhortations are not legally enforceable unless they have been incorporated into the law (in which case they have moved beyond the realm of "ethics" addressed here; we will not discuss what happens if one breaks the law). As a practical matter, ethical breaches may result in some punishment by a professional organization, *provided 1) there is a breach of that organization's published ethics code and 2) the accused person is a member of the organization.* This means that a clinician who is not a member of such an organization (for example, the American Psychiatric Association or the American Psychological Association) does not have to worry about being punished for any breach per se of that organization's ethical principles.

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Put another way, professionals who don't belong to one of these organizations are not obligated to adhere to their ethical principles. Lots of clinicians can hold all the licenses and certifications they need and can work in virtually any professional setting without being a member of the American Psychiatric Association or a similar ethics-promulgating group.

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Table 1. Websites presenting organization ethics codes

American Academy of Psychiatry and the Law (AAPL) Ethics Guidelines for the Practice of Forensic Psychiatry, 1995 revision: www.aapl.org/ethics.htm

American Medical Association Code of Medical Ethics, Council on Judicial and Ethical Affairs, 2002-2003 edition, with opinions: www.ama-assn.org/ama/pub/category/8600.html. The AMA Code itself (2001) is at ww.ama-assn.org/ama/pub/category/2512.html

American Psychiatric Association Principles of Medical Ethics with Annotations Especially Applicable to Psychiatrists, 2001 editions (principles, principles with annotations, and opinions of the ethics committee): www.psych.org/apa_members/ethics.cfm

American Psychological Association Ethical Principles of Psychologists & Code of Conduct (2002): www.apa.org/ethics/code2002.html

American Psychology-Law Society (Division 41 of the American Psychological Association) (1991): www.abfp.com/downloadable/foren.pdf

Small organizations often defer (but don't always *refer*) ethics enforcement to larger ones. The administrative costs and liability exposure associated with enforcement, accusations of bias or restraint of trade, and so on make the process so expensive that, for example, well-meaning subspecialty organizations often avoid it altogether. This tends to remove the "teeth" from their ethics guidelines.

Some small groups and subspecialty organizations (e.g., American Psychiatric Association district branches) share liability with a larger organization or shift enforcement responsibility to a larger one (e.g., by requiring that the smaller group's members also belong to the larger one, such as the American Psychiatric Association). Some organizations simply ignore breaches (e.g., by making their ethics guidelines voluntary or merely symbolic). Subspecialty guidelines enforced by a larger organization may omit some relevant topics, since the smaller group can't require anything more than that which the larger organization is willing to ratify.

One consequence of these limitations on context and enforcement is that the public may be best protected when it seeks out clinicians and practitioners who are members of organizations that take ethics seriously. For example, non-members of the American Psychiatric Association may be fine and ethical clinicians (and may have acceptable reasons for not belonging to such an organization); nevertheless, it seems reasonable to suggest that potential patients look for membership in the American Psychiatric Association and similar organizations as, on average, an indication that a clinician is willing to accept the organizations' ethical principles.

Ethics Are Also Important for Non-Members

Having said that enforceable ethics are specific to the organizations to which one belongs, let's point out a few ways that ethical *principles* are generally good things even outside those organizations. The threat of censure by the American Psychiatric Association is not the only reason to practice ethically.

- Ethics help define the "standard of care," that level of practice expected of reasonable clinicians under similar circumstances. In malpractice lawsuits, the plaintiff accuses a defendant clinician of practicing below the standard of care. There is often more than one correct behavior, but practice outside the ethics observed by a great majority of one's peers is likely to be perceived as inadequate, and below some local or broader standard.
- Ethical people care about other important things, too, such as their patients, good practices, and credibility. Conversely, those who practice outside formal or informal ethical expectations are much more likely than their more prudent colleagues to have other problems as well.
- Established ethical principles promote individual internal morals and ethics. Even in the clinical professions, some people need external superego support. The great majority of psychiatrists don't need to be reminded to behave ethically, but for those who do—and those who don't know the latest in the sometimes-changing view of what is acceptable—formal guidelines strengthen internal resolve.

CLINICAL/CLINICIAN ETHICS

Most of the ethical principles that apply in forensic settings are those that apply to all clinicians. A clinician-patient relationship is only one of the circumstances that generates practice and ethical standards. When patient care is the task, our practice in jails, prisons, and security hospitals must generally meet the same expectations as practice anywhere else. In addition, a

clinical role (as contrasted with a solely administrative or forensic evaluative one), even in a forensic setting, generates some clinical ethical responsibilities even when no doctor-patient relationship is present. For example, a clinical utilization reviewer, the medical director of a facility or company, or a clinician-officer in a healthcare enterprise continues to be bound by most, if not all, the ethical principles of his or her profession.

Even when we are acting in a solely administrative or forensic evaluative role, most organizations and ethicists believe that we cannot completely cast off the raiment of physician or other healthcare professional. The law agrees, to a point. Forensic practitioners have been sued or reprimanded for not recognizing, for example, serious suicidal danger or acute medical illness during independent medical examinations for a forensic or administrative client.

A physician was reviewing imaging data for a defense attorney in a case involving alleged traumatic injury. She discovered hidden, but definite, indications of a dissecting aneurism, not related to the trauma. It had not been seen by the plaintiff's treating physicians or forensic expert.

The defense attorney, believing that divulging the aneurism would increase any damage award even though it was irrelevant to the injury, told the defense expert not to include the information in her report and not to mention it to the other side unless specifically asked. After the case was settled, the defense expert notified the treating physician and the aneurism was surgically repaired. The former plaintiff filed a complaint with the state medical licensing agency, which reprimanded the physician for not communicating to the plaintiff a potentially life-threatening condition.

The lack of a physician-patient relationship at the time of the forensic evaluation and imaging review did not protect this doctor from an "emergency" duty. In my view, psychiatrists and other mental health professionals should assume that they have some level of duty to, at least, communicate a recommendation for clinical evaluation or treatment when they discover a previously unknown life-threatening condition.

Similar issues arise when one discovers evidence of reportable conduct (such as child abuse), professional misconduct or impairment (such as sex with patients), or substantial danger to others. One should consider consulting an attorney and/or one's professional licensing agency for guidance, including information on reporting requirements and potential immunities for evaluating or treating clinicians.

A psychiatrist who is sometimes retained by plaintiffs in cases alleging clinician-patient sex was aware that his state requires that any therapist who has reason to believe such an act has occurred must, as a matter of state law, report the clinician to his/her licensing board or a law enforcement agency (without regard to the patient's wishes in the matter). Concerned about a potential conflict between his forensic role, the plaintiff's wishes in the legal matter, and his possible duty under the reporting statute, the psychiatrist queried his own licensing board.

The Board's opinion was that the forensic psychiatrist need not report so long as he believes there is no marked danger to other patients, he communicates a recommendation for reporting to the plaintiff (e.g., through her lawyer), and a court has not found that reportable sexual behavior indeed occurred. The psychiatrist now communicates this opinion to lawyers with whom he works in such cases and routinely notes that he (the psychiatrist) may be required to report the defendant clinician after the case is resolved, or if he believes there is immediate danger.

SOME SPECIFIC FORENSIC TOPICS

Most legitimate experts and virtually all forensic professional organizations are very strong advocates for professional ethics. They work hard to overcome the negative perceptions of forensic experts created by a few so-called "experts." Some of these negative perceptions arise because our work is often complex, legitimate forensic conclusions may seem counter-intuitive to those without the "big picture," and our comments are easily misunderstood in media "sound bites." The American Academy of Psychiatry and the Law and the American Psychology-Law Society (Division 41 of the American Psychological Association) are dedicated to ethics in the forensic professions and spend considerable time and resources teaching, discussing, and advocating for solid ethical principles.

The *Ethics Guidelines* of the American Academy of Psychiatry and the Law rely first on the American Psychiatric Association's *Principles of Medical Ethics* and focus on four broad areas: 1) confidentiality, 2) consent, 3) honesty and striving for objectivity, and 4) expert qualifications. The following examples illustrate

some of these areas and also highlight a few important *practice* guidelines related to fairness, credibility, and the ability of the forensic expert to perform his or her tasks objectively, with a minimum of diversion or extraneous influence.

Confidentiality

The clinician's duty of confidentiality may or may not apply in various kinds of forensic work. When interviewing an evaluee, the evaluator is generally free to report his or her findings to the retaining attorney, court, or agency. Nevertheless, our professional standards require that we notify the evaluee of our identity and role, our agency (on whose behalf we are working), and the fact that the results may appear in a report or testimony. Some experts carry out such a notification in the form of an evaluee's informed consent. Others aver that notification alone is sufficient.

In matters of litigation, an expert has an obligation of confidentiality to the attorney who retains him or her. One must safeguard case-related information in much the same way as patient information. Adequate storage and other physical protections are expected, as well as staff training, care with email, and the like.

Colleagues sometimes ask whether or not they should notify the court or lawyers for the other side if they discover what they believe is a miscarriage of justice. My answer, always given as a non-lawyer, is that they are free to discuss it with the attorney who retained them (or the judge, if they are truly court-retained) or with their own lawyer, but that they should not otherwise carry information outside the lawyer-expert relationship without first getting legal advice. That's the adversarial system. They must not lie in reports or testimony, of course, and they are usually free to withdraw from the case (but not to divulge confidences about it). In a few cases, experts are required to sign a formal confidentiality agreement (when they have access to proprietary business information, for example).

Public Statements and Comments to the Media

Even when the information is not strictly confidential, publicly commenting on one's cases* is likely to be unethical, or at least imprudent. Notoriety is seductive; it tweaks our narcissism and creates lots of opportunity to rationalize giving interviews or accompanying a zealous lawyer before the television cameras. However, if statements are to be made, let someone else make them.

*Commenting on other things, such as news events or cases in which one is not personally involved, is a different matter, with its own caveats and potential pitfalls.

Conflict of Interest

The most basic kind of conflict is between the attorney/litigant's interests and those of justice (the court's interest). Testifying experts (as contrasted with solely consulting or strategic ones) should be objective in their reviews and evaluations and scrupulously honest in their reports and testimony. This does not mean that an expert should not advocate vigorously and articulately for his or her *opinions*, but that, most of the time, *testifying* experts should approach the answering of questions with an attitude somewhat akin to that of an objective researcher writing the "Results" section of a scientific paper.

Many lawyers, judges, and laypersons don't believe that for a moment. Some lawyers expect their experts to advocate strongly for their clients' interests, whether the evidence supports them or not. One reportedly said something like "I would no more go into a trial with nonpartisan experts than I would fight a war with noncombatants in my foxhole." The concept of personal advocacy for a *litigant*, as contrasted with advocacy for one's carefully arrived at opinions, is discussed elsewhere[1] and addressed in some ethics guidelines (e.g., *AAPL Ethics Guideline IV*).

Note that my analogy to a scientific paper didn't suggest a similarity to a researcher writing the "Discussion" section. The adversary process is largely one of questions and answers. Although there are a few situations in which an expert should offer extensive discussion of both sides of an issue in court, most of the time it is most appropriate (and well within ethical bounds) simply to answer the questions asked. The responsibility for asking the *right* questions is generally left to the attorneys for either side. It is generally ethical, incidentally, to expand on answers that support the retaining attorney's point but to be less verbose in replying to questions from the attorney for the other side, so long as one does not "lie by omission." Like most issues in the real world, the lines are rarely crisp and there is often room for disagreement among reasonable commentators.

A second important potential conflict, which is discussed more fully in earlier columns[2] and on my website (www.reidpsychiatry.com), is that between the role of a treating and a forensic clinician. Although many courts

allow a treating clinician to offer expert opinions (one of the defining tasks of an "expert" in legal matters), there are myriad reasons to avoid such role conflict whenever possible. In short, a clinician-patient relationship creates a duty to the patient which competes with the duty of objectivity expected by a court. For example, a doctor is not allowed, by ethics and sometimes by law, to act against the best interests of his or her patient. On the other hand, the court reasonably expects an expert witness to be objective and tell the truth without regard to how the truth affects the litigants. Note that the sources of treater bias are both conscious and unconscious and are very difficult to overcome (see my March, 1998, column, "Treating Clinicians and Expert Testimony"[2]).

Payment Methods

The broadest ethical *caveat* regarding payment is that which prohibits any form of "contingency" fee (payment which depends on the outcome of a case). I almost always recommend that charges be based solely on the time the expert has spent. Other issues related to payment are less obvious.

A fairly subtle, but unfortunately common payment-related ethical issue arises when the retaining attorney uses the fee to manipulate the expert's opinion. One should be alert for comments by the retaining attorney such as "I have a lot of cases just like this one" (with the implication that he'll send you lots of business if you support his case); "Don't forget that I've paid you a lot of money" (usually said just before trial); "I'll pass your bill along to the client for payment"; or "We lost the case, so none of us is going to get paid."

With the first remark described above, the expert must be careful not to let the suggestion (usually an empty one, incidentally) of further referrals influence whether or not he accepts the current case and works ethically and objectively on it. With the second and third comments, the testifying expert's advocacy is in danger of shifting from his or her opinions to the lawyer or litigant, with a concomitant suggestion of prostituted testimony. The fourth remark suggests that the expert may have allowed the lawyer's bill to mount and testimony to take place without payment in advance. Testifying (or even releasing a report) while money is owed can give the impression that one's opinions are influenced by the prospect of not being paid if one doesn't testify in a certain way. When one is paid in advance for one's time and expenses, there is no suggestion that compensation may be withheld if the lawyer doesn't agree with the opinions you express.

It may sometimes be unethical to charge a flat fee for a complex forensic service (e.g., a single rate for all competency evaluations or pre-malpractice-suit affidavits). Nevertheless, criminal courts often authorize a single, all-inclusive fee for pre-trial evaluations. Forensic clinics, and sometimes individual experts, may do routine-sounding tasks, such as preliminary lawsuit reviews, for a set fee. How could this be construed as unethical?

Let's start with the premise that no two cases are alike. Although one may estimate the time required for review or evaluation, it is difficult to predict whether or not additional review (and thus extra time) will be needed to come to a valid, reliable opinion. I hope that ethical experts, once retained, work diligently regardless of their fee, but one could ask whether a reviewer's attention to detail is as good when receiving $1000 for 4 hours of work as when the same amount must cover 10 hours (or, alternatively, when the expert chooses to spend only 4 hours on a case that really requires 10).

Knowingly Allowing Bias to Control Testimony

The job of the testifying expert is usually more technical than philosophical. Testimony is rarely an appropriate vehicle for pressing one's personal or philosophical views. The obvious conclusion is that we should do our best to recognize and set aside significant bias.

If a case seems likely to trigger very strong personal feelings, consider declining the referral. It is better, ethically and professionally, to recognize that you may not be able to do your best work in such circumstances than to allow the attorney to proceed at an unnecessary disadvantage.

Bias *for* a particular view or opinion is just as problematic as bias against it, and arguably more subtle. The witness stand is not the place to express your philosophy, nor to allow your philosophy to shape, substantially at least, your opinions in a case.

An experienced forensic psychiatrist testified for the prosecution against finding a murder defendant not guilty by reason of insanity. He acknowledged that the defendant was severely mentally ill at the time of the killings and that the mental illness substantially influenced the killer's behavior, but opined that the defendant knew the nature, legal wrongfulness, and consequences of the acts in the narrow sense contemplated by the applicable state statute.[†]

[†]In the trial, this was expressed in such a way that the expert did not usurp the jury's task of determining guilt or lack thereof.

After the case was resolved, he readily admitted that if the state in which the case was being tried had used an American Law Institute insanity defense statute (a bit more liberal than the strict M'Naughten statute that applied in the current case), he might have opined that the same defendant lacked criminal responsibility. When asked how he could testify differently about the same defendant, based merely on the state in which the trial occurred, he correctly made the point that his philosophy *about responsibility was irrelevant to whether or not the defendant's condition and behavior, measured as scientifically as possible, met the requirements of the applicable law. His task was to articulate the latter as well as he could and not to modify his testimony based on some other standard.*

In a different case,

a well-trained psychiatrist with very strong feminist views testified often for the prosecution in sexually violent predator commitments. The applicable statute required a paraphilia diagnosis and chronically dangerous sexual behavior in order to confine offenders indefinitely to a state hospital. The psychiatrist testified that any man who has non-consensual sex with adult women, even two episodes of so-called "date rape" over several years, meets DSM criteria for a violent, predatory paraphilia and thus qualifies for indefinite involuntary hospitalization. In fact, that view was not supported by the DSM or other reliable evidence.

Working Outside One's Expertise

Expertise should be claimed only in areas of actual knowledge, skill, training, and/or experience. To do otherwise is tantamount to lying or misrepresenting oneself to both the court and the retaining attorney.

A young psychiatrist accepted a forensic referral and told the retaining (plaintiff's) attorney that he understood the general rules of forensic work. He reviewed a substantial body of records and spent many hours interviewing the plaintiffs and other witnesses, wrote a report, and was eventually called for deposition. By the time he was deposed, the retaining attorney had spent a great deal of money preparing the case and the deadline for naming additional experts had passed.

During the deposition, the defendant's attorney asked if the expert had taken any notes during his many hours of interviewing various people. The expert said that he had, but that he had shredded his notes upon receiving the deposition subpoena. That very imprudent, arguably illegal act belied the witness's earlier representation to the retaining lawyer that he was competent to be an expert, ruining his usefulness in the case and wasting that lawyer's (and the plaintiff's) time and money.

Child custody disputes are an area of particular concern. Unfortunately, general psychiatrists, psychologists, and counselors with little training or experience in children's mental health or child custody are often called upon to assess child custody litigants and testify about their findings. Their evaluations are often incomplete (e.g., may not include both parents, all children, and individual and family assessments) and routinely lack the subspecialty expertise required for the best interests of the child in these very difficult legal contests.

THE LAST WORD

Ethics are important. They make us better doctors in both clinical and forensic situations, and their absence causes problems for all concerned.

References

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