Ethics Corner

Guidance for Clinicians Managing the Pressure of Legal/Forensic Issues

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Most clinical psychologists who focus on treatment issues are reluctant to become involved in forensic matters (i.e., circumstances pertaining to the law and courts). There is, of course, a reasonable and important basis for this reluctance, based on American Psychological Association (APA) ethics and specialty guidelines. For example, APA's *Ethical Principles of Psychologists and Code of Conduct* (APA, 2010) states: "Psychologists provide services, teach, and conduct research with populations and in areas only within the boundaries of their competence, based on their education, training, supervised experience, consultation, study, or professional experience" [Standard 2.01(a)]. Additionally, *Specialty Guidelines for Forensic Psychology* (APA, 2013) further elaborates on the issue of competence:

> Forensic practitioners recognize the importance of obtaining a fundamental and reasonable level of knowledge and understanding of the legal and professional standards, laws, rules, and precedents that govern their participation in legal proceedings and that guide the impact of their services on service recipients. (Guideline 2.04)

Clinicians, particularly those who work with children and couples, occasionally have to manage the requests of clients or attorneys who expect their participation in a legal matter, such as those pertaining to competency issues, disability, divorce, or child custody. These cases often are particularly emotionally charged, and the therapeutic relationship can influence the psychologist's judgment and decisions about how to handle these requests.

There are different levels of participation that may be requested, from simply acknowledging in a letter that treatment has occurred during a specific time frame, to testifying in court and opining about a contentious matter such as a child custody dispute.

In regard to offering testimony, it is important to note the differences between a *fact witness* and an *expert witness*. There are no special qualifications to be a fact witness. A fact witness may testify to any firsthand observations they have made. If restricted to descriptions of observations, in most circumstances treating psychologists may offer testimony to the court within the appropriate ethical boundaries of their role. The challenge occurs if the psychologist is pressed to become an expert witness; this designation indicates specialized knowledge and skills that allow the psychologist to offer opinions to aid the court in making decisions. This specialized knowledge may pertain to particular *DSM-5* diagnoses, parental capacity, risk assessment, or custody determinations, among other matters. Treating psychologists must be very cautious about requests to become an expert witness or to expand their testimony beyond the limited scope of their treatment (e.g., diagnoses rendered with the specific client; client's severity of symptoms or response to treatment).

In their landmark article, "Irreconcilable Conflict Between Therapeutic and Forensic Roles," Greenberg and Shuman (1997) outline 10 key differences between these two roles that underscore substantive differences in orientation and methodology. These include who the client is (e.g., the individual vs. the court or attorney); the privilege that governs the relationship; the attitudes and cognitive set necessary for the work (i.e., supportive, accepting, and empathic vs. neutral, objective, and detached); the level of scrutiny applied to information offered by the client; the amount of control and structure in the relationship;

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and the degree to which an adversarial stance characterizes relationship.

Greeenberg and Shuman (1997) also illustrate, using the example of a personal injury case, why it is not appropriate for a treating provider to take on a forensic role:

> First, the type and amount of data routinely observed in therapy is rarely adequate to form a proper foundation to determine the psycholegal (as opposed to the clinically assumed) cause of the litigant's impairment, nor is therapy usually adequate to rule out other potential causes. Second, such testimony engages the therapist in conflicting roles with the patient. Common examples of this role conflict occur when a patient's therapist testifies to the psycholegal issues that arise in competency, personal injury, worker's compensation, and custody litigation. (p. 51)

Treating psychologists who limit themselves to providing information gathered in the therapeutic process, which is usually based entirely on self-report, without attempting a forensic evaluation or offering a broader opinion about any ultimate legal question, are usually within ethical and legal safe territory. Yet, psychologists may find themselves in hot water—legal or ethical, or both—if tempted to move beyond this rather narrow scope and offer opinions, such as whether the proximate cause of a disability is related to an accident, family disruption, previous psychiatric impairment, and other related psychosocial experiences of the client. Given the limitations of a therapeutic role, this could potentially expose a psychologist to accusations of acting outside their boundaries of competence.

Engaging in Forensic Work

For the psychologist who ventures into the forensic realm, at minimum it is important to become familiar with the literature in clinical judgment and its limitations (see Faust, 2011), the Specialty Guidelines for Forensic Psychology (APA, 2013), and relevant laws and statutes related to the particular psycholegal question before the court.

When addressing concerns about boundaries and scope of expertise with attorneys, misunderstandings between the professions are common. In their classic text, Melton et al. (2007) point out that these differences go well beyond communication, language, and attitude. They describe three broad areas of "paradigm conflicts" that may occur between lawyers and mental health professionals. The first concerns a fundamental difference in philosophy: free will firmly underpins the law, while behavioral sciences are solidly deterministic. The law holds individuals responsible for their conduct in most cases, whereas behavioral sciences attempt to identify factors that determine behavior. Consequently, it is important that a clinician not be "permitted nor cajoled to give opinions on the ultimate legal issue" (Melton, 2007, p. 12), which is in the court's purview.

The second key area where law and behavioral science conflict is in the "nature and process of inquiry." Psychologists are trained to create and promote positive relationships with others and find ways to alleviate conflict between individuals or groups. In contrast the law resolves disputes by "sharpening conflict" so that arguments are carefully posed and resolved fairly. This major difference between the fields often underlies part of the discomfort and anxiety many psychologists experience when confronted with forensic matters (Melton et al., 2007).

The third area of conflict concerns the nature of "fact." The law depends on the appearance of certainty, whereas behavioral sciences are basically probabilistic. Because the law depends on certainty, experts may feel pressure to extend themselves beyond the available data in order to meet the demands of an attorney or client. Further, behavioral sciences are essentially nomothetic, comparing groups across different dimensions (as reflected in research methods and test construction). Yet, the legal system requires evidence that is idiographic, i.e., evidence that speaks to how broader psychological principles apply to a particular fact pattern. Clearly, psychological data is unable to account for all the variance in specific cases (Melton et al., 2007).

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As with all legally oriented matters, it is prudent to consult with your malpractice carrier or attorney before responding to any request for involvement in a legal matter. Ψ

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