PRESERVING YOUR PSYCHIATRIC EXPERT’S INTEGRITY IN CRIMINAL MATTERS: FROM RETENTION THROUGH TESTIMONY

BY HELEN M. FARRELL

Forensic psychiatry, a specialized branch of medicine, deals with the interface of mental health and the law. Matters arise that encompass both the civil and criminal realms of law. When it comes to the latter, stakes are high and criminal defense attorneys are dedicated to a positive outcome for their client. This often entails hiring a forensic psychiatrist to offer expert opinions, and often testimony, regarding the matter at hand.

The role of the forensic expert is to offer a neutral and unbiased opinion. Integrity requires honesty at its core and a commitment to the strongest of moral principles and rectitude. But, when questions of culpability, sanity, competence, and mitigating factors arise, things are rarely clear-cut. It is in these instances that criminal advocates may highlight what is in their client’s favor and seem to ignore the rest. Forensic experts can therefore find themselves in a situation where they feel pressure to sway their opinion in one direction or another.

Here is where the phenomenon of the expert witness being called a “hired gun” comes into play. Experts hired by one side are often accused of simply forming an opinion to support the attorney who retained them. This is how in one case there can be two experts (one for the prosecution and another for the defense) who are similarly trained and credentialed, yet come to two completely opposite conclusions.

This article addresses the misconception that forensic experts are “hired guns.” It looks at the guiding principles of ethical practice within the specialty, highlights some commonly experienced scenarios in which forensic psychiatrists may feel that they are being asked to bend their professional or moral principles, and addresses how counsel can respond.

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**CASE VIGNETTES**

**Case 1:** A doctor is hired as an expert for a criminal defense case that involves issues of mental responsibility for drug possession and distribution. Retaining counsel is a friend of a friend who makes a point of mentioning that he is aware of the doctor’s “compassion and understanding” toward addicts. The defendant is described by counsel as a “great guy who is trying to finish college; a felony charge like this will ruin his life.” Counsel says that when the case is over, he’d like to treat the doctor and their mutual friend to 18 holes of golf and dinner at a swanky country club.

**Case 2:** A doctor has finished work on a criminal defense case that involves a highly publicized murder charge. After completing a report, the doctor forwards a confidential copy via certified mail, for which counsel certifies receipt. A month later, counsel e-mails the doctor in a panic, insisting that she’s lost the report and needs to “work on it today,” and demanding that the doctor send a copy via e-mail attachment immediately. When the doctor refuses, citing concerns regarding confidentiality and appropriate handling of records, counsel responds with another e-mail in all capital letters, stating that “you work for me” and demanding that the doctor do as directed.

**Case 3:** A doctor is serving as the defense expert in a case of assault and battery. This matter is definitely going to trial. During a meeting to prepare for testimony, retaining counsel asks the doctor to change some elements of the report in order to “strengthen the case.” Counsel verbalizes an understanding that the doctor isn’t being asked to “falsify any claims,” but does insist that the doctor “just omit some facts that from a legal perspective may not be all that relevant.” The facts in question involve the defendant’s admission of having used marijuana on the date in question, and the defendant’s having failed a malingering test in the course of the forensic evaluation.

**ETHICAL CONCERNS OF FORENSIC PSYCHIATRISTS**

Forensic psychiatry is a well-established professional pursuit; however, because doctors interfacing with the legal system approach cases with an eye toward standards and legal criteria, rather than from a treatment perspective, controversy still exists concerning some details of how this specialty is practiced. Proferring impactful scientific opinions in a public forum, practitioners must be held to the highest moral integrity from the time of retention through testimony. (Alfredo Calcedo-Barba, *The Ethical Implications of Forensic Psychiatry Practice*, 5 World Psychiatry 93 (2006).)

An important consideration from the outset is that counsel is exchanging dollars for time—not for an opinion or findings per se. In addition, even in instances when forensic psychiatrists cannot take the stand in support of the goals of the side that has retained them, they may still be a useful resource in accessing a body of knowledge and methodology that helps to illuminate areas of practice at the intersection of law and mental health. Even when one’s own expert will not be a presence in the courtroom, there often remains the daunting task of seeking to cross-examine the doctor on the other side.

Because of the adversarial nature of the legal profession, there will undoubtedly be pressures on the expert. This has led to accusations of forensic psychiatrists being “hired guns” for the retaining party. (Edward M. Colbach, *Integrity Checks on the Witness Stand*, 9 Bull. Am. Acad. Psychiatry & L. 285 (1981).) The integrity of the expert is often called into question during testimony, such that counsel will observe forensic psychiatrists attempting to enter the courtroom with the utmost integrity and care. (Margaret A. Hagan, *Whores of the Court: The Fraud of Psychiatrist Testimony and the Rape of American Justice* (1997).)

Despite the advancements made in the methodology and science of forensic psychiatry, there remains an impression that mental health testimony is “for sale.” This opinion has been documented in published legal decisions themselves, with experts even having been described as “prostitutes” and “whores.” In such cases, the prosecutors were the most common source of disparaging statements. Appellate decisions, in particular, have been found to be a source of negative comments regarding criminal defense experts. (Douglas Mossman, “Hired Guns,” “Whores,” and “Prostitutes”: *Case Law References to Clinicians of Ill Repute*, 27 J. Am. Acad. Psychiatry & L. 414 (1999).)

Concerns that the content of expert testimony frequently revolves around the circumstance of who is paying the evaluator—as opposed to impartial assessment of the merits of a given case—has been the focus of persistent commentary in the medical literature as well. (Robert Lloyd Goldstein, *High Noon in the Courtroom: An Overview of the Psychiatric Expert as Hired Gun*, in 3 Am. Psychiatric Press, *Review of Clinical Psychiatry and the Law* 183 (Robert I. Simon ed., 1992).)

Perhaps surprising to some, the long-established reality is that in an effort to remain neutral, most mental health clinicians who testify in criminal cases do not consistently serve as either defense or prosecution experts. (Daniel B. Kennedy et al., *A Test of the “Hired Gun” Hypothesis in Psychiatric Testimony*, 57 Psychol. Rep. 117 (1985).) In addition, the legal profession probably entertains a higher view of mental health professionals than anecdotal evidence suggests. When their opinions are studied systematically, lawyers and judges usually respect expert opinions. (Virginia A. Hiday, *Are Lawyers Enemies of Psychiatrists? A Survey of Civil Commitment Counsel and Judges*, 140 Am. J. Psychiatry 323 (1983).) Research has shown that attorneys value the expert’s local reputation and communication skills over the likelihood that the clinician will render a favorable opinion. (Douglas Mossman & Marshall B. Kapp, “Courtroom Whores”?—or Why Do Attorneys Call Us? *Findings from a Survey on Attorneys’ Use of Mental Health Experts*, 26 J. Am. Acad. Psychiatry & L. 27 (1998).)

**CASE VIGNETTES REVISITED**

In Case 1, we witness the sort of dilemma that can arise when working with friends. In professional circles, it’s quite likely that colleagues may become acquaintances and then more—conference panelists, golf partners, dinner dates, etc. There is no shame in recognizing that we are human...
beings who crave friendship and attention. It’s okay for forensic psychiatrists to have mutual friends with retaining counsel, and for the expert and the lawyer to become friends themselves. Matters become far more complicated, of course, when an assumption takes hold that a true “friend” would proffer a favorable expert opinion.

The most important issue for the expert and counsel to keep in mind is maintaining professional boundaries that are consistent across the board. Business is business, and forensic psychiatrists and attorneys need to make it clear from the outset that although they share friends or know each other socially, the expert’s role is to be neutral and to offer an unbiased opinion. This role should be reinforced in writing in the expert’s service contract. All texts and e-mail exchanges should reflect a resolutely professional demeanor. In Case 1, counsel should expect the expert to respond to this invitation with a clarification that business and pleasure don’t mix in such situations, and that social events can be addressed at another time.

Conduct of the sort displayed by counsel in Case 2 is likely to be viewed by a psychiatric expert as a projection of feelings of inadequacy, incompetence, and anger onto the expert. As mental health professionals, however, experts need to understand the impact on counsel of the emotional pressure cooker that is contemporary criminal practice. Experts need to bear in mind that they have an obligation to finish work on time and to submit their reports via appropriate channels. Upholding their own professional standards of confidentiality is a critical requirement for forensic psychiatrists. In Case 2, the expert can be expected to reiterate the stance that the material was sent, that counsel received it, and that the expert will not breach confidentiality by sending an unsecured e-mail message.

In Case 3, no matter what sophistry surrounds the request, legal counsel is asking the expert to falsify an opinion. Although counsel may actually be convinced that ignoring certain inconvenient details is acceptable, the forensic psychiatrist will inevitably view such exclusions as an unethical approach that violates guiding principles of forensic practice. When testifying experts find themselves in a situation where a lawyer—or a team of lawyers—is applying pressure in the “wrong” direction, the best of them will remain calm and convey their reservations in a reasonable and accessible fashion. These, of course, are just the attributes that counsel was seeking to put on display from the outset.

ALLYING WITH THE EXPERT’S PROFESSIONAL INTEGRITY

Ever since such issues began to be studied with academic rigor, commentators have argued that the notion of the impartial expert is an unrealistic ideal, because evaluators may unavoidably and unconsciously identify with the side retaining them. (Bernard L. Diamond, The Fallacy of the Impartial Expert, 3 ARCHIVES CRIM. PSYCHODYNAMICS 221 (1959).) In recognition of such concerns, the “hired gun” problem can be addressed by the application of peer review, rigorous enforcement of ethical standards, better training for forensic examiners, and more focused cross-examination by counsel. (Goldstein, supra.)

There are many ways for experts to ensure that their practices remain ethical and reflect standards of professional integrity—methods that retaining counsel will wish to encourage for the client’s lasting benefit. Exceptionally helpful, as suggested above, is a written contract that clearly states hourly rates, the retainer fees, and the fact that the expert is exchanging money for time and not for a predetermined opinion. Further useful will be language outlining counsel’s expectation that the expert will be a fair and neutral party who will weigh all available information and reach an impartial finding.

When scouring discovery and related materials, experts can be encouraged to keep a running list of data that support and refute the retaining counsel’s position. This will not only help in formulating an unbiased opinion, but also prove invaluable—should that opinion run counter to counsel’s initial expectations—in helping counsel to understand when, from a forensic psychiatric perspective, the mental health component of a case simply doesn’t hold water.

If the expert is requested to write a report, he or she can never be encouraged too many times to address only those legal issues that rest within the scope of the original referral question.

Similarly, it is never a bad idea to offer a reminder that all notes and files are confidential. Forensic psychiatrists may instinctively feel a pull to share their work product with colleagues for consulting purposes and with student trainees for instructional purposes. These are clinically sounds instincts, but not viable forensic instincts.

Experts may be called upon to alter reports in the event of typographical errors, newly discovered information, and the like, but their opinions must remain sacrosanct. Prior to testimony in the courtroom or in depositions, in-person meetings are always an excellent idea—the forensic psychiatrist’s ethical and procedural reservations cannot always be anticipated. Experts need to know that it is okay, and at times even desirable, for them to say “I don’t know” or “I don’t have an opinion on that.”

It is inevitable that the forensic psychiatrist’s moral flexibility will be called into question on several occasions during a professional career. Whether due to a direct request or due to what mental health professionals call the implicit “demand characteristics” of a given situation, there can be some level of pressure to change an opinion, falsify records, or slant testimony a particular direction. Insightful, patient, and well-prepared counsel can enable experts to uphold their integrity—for the sake of individual reputation and that of the profession, but critically, for the sake of the client, who is always best served by a comfortable and effective expert witness.