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# Cases and Examples Using the Approaches So Far

Published opinions in response to questions for the AAPL Committee on Ethics (1995) may help clarify how one organization applies its professional ethics. It is an important element of the profession's evolving historical narrative. The responses below tie fundamental principles like truth and justice to specific professional guidelines and offer particular solutions to ethical questions. They are a window into the connection between theory and behavior. Published prior to the most recent guidelines revision (2005), the committee's responses exemplify the approach that distinguishes primary and secondary duties based on the expert's role in the proceeding (i.e., consultant or treater). They appear here with permission.

### 1. *Question: Is sex with a forensic evaluatee ethical?*

Answer: No. Section IV of the AAPL ethical guidelines requires honesty and striving for objectivity. Sex with an evaluatee would seriously impede objectivity and would be exploitative and coercive. It would make the APA section I requirement for delivery of competent medical service almost impossible.

### 2. *Question: Is it ethical for forensic psychiatrists performing an evaluation to use bullying tactics, to be rude, use name-calling, and press a plaintiff to drop the case?*

Answer: Most relevant is the APA and AMA principles of medical ethics section 1, "a physician shall be dedicated to providing competent medical service with compassion and respect for human dignity." Also relevant is AAPL section IV on honesty and striving for objectivity. The use of bullying tactics and deliberate rudeness are disrespectful of human dignity and therefore are unethical, as are pressuring a plaintiff to settle and failing to be objective. However, the special role of a forensic psychiatrist also needs to be considered. A psychiatrist retained by the defense in a civil suit is obtaining information for the

side opposing the plaintiff. What may appear to a plaintiff to constitute bullying tactics may merely be appropriate skepticism to disbelieve the plaintiff or to press for inconsistencies in order to try to determine if there is malingering. Unlike a therapeutic interview that involves helping the evaluatee as the primary purpose, a forensic evaluation may necessitate exploration of areas that a plaintiff prefers to avoid and finds upsetting. In addition, a negative evaluation by a forensic psychiatrist may motivate a desire to retaliate by filing an ethics complaint. Each case should be evaluated by exploring the forensic psychiatrist's reasons for his/her behavior. Differences in interview style do not necessarily involve ethical infractions. However, deliberate rudeness, pressure to settle, and lack of respect for human dignity are not justified.

*3. Question: I am treating an insurance company employee who for the past several years has been forging signatures on loan applications and running an illegal scheme at work. On two occasions he has been admitted to the hospital because of stress. I will be testifying at a Workers' Compensation hearing regarding the employee's ability to work. Am I obliged to reveal these illegal activities as one major source of stress?*

Answer: You are functioning in a treatment capacity and any forensic role is an adjunct to your therapeutic role and not primary. However, testifying in court might still conflict with your therapeutic role since there is no duty for a treating psychiatrist to obtain information from sources other than the patient and you will need to answer any questions the court considers relevant and admissible. You may be unable to be objective under those circumstances because of countertransference feelings toward your patient and your awareness that unfavorable statements will interfere with therapy. AAPL's guidelines require obtaining the informed consent of the subject when possible. Your patient should be informed of the possibility that if you are asked to testify you may be asked questions that would require your revealing his reported illegal activities. Since you would not wish to perjure yourself if asked direct questions in court, he should consult with his attorney and decide whether to call you to testify. In many states, the patient may automatically waive any therapist privilege if he tenders his mental state at issue. The patient should consult with an attorney about this issue in order to make an informed decision. If possible, it might be wise to separate the treatment and forensic roles since the two roles can conflict. AAPL guidelines section IV, honesty and striving for objectivity, recommend that a treating psychiatrist generally should avoid agreeing to be an expert witness or to perform an evaluation for legal purposes on a patient.

4. *Question: A forensic psychiatrist in a small town in which he is the only psychiatrist had been treating the mother who was murdered by her son, the current defendant. This same psychiatrist had been hired to perform a forensic evaluation on the son in a death penalty trial. Is it ethical for the mother's former psychiatrist to perform a forensic evaluation on the son? I am afraid the son is being railroaded.*

Answer: It is unlikely that the forensic psychiatrist under these circumstances could meet the AAPL requirements of striving to be objective. Also, regardless of privilege laws, APA's Annotated Principles clearly state that confidentiality continues after death. Could the forensic psychiatrist avoid using confidential information from the mother in the evaluation? More information is needed on the specifics of the case, but the behavior you question may in fact be unethical. Even if these issues were not problems, there would be an appearance of impropriety and a lack of objectivity. Therefore the psychiatrist should refuse to take the case even if a nonlocal psychiatrist must be found.

5. *Question: Our court clinic has been asked to provide psychiatric evaluations of defendants for dangerousness, in order to help determine bail amount prior to the defendants having access to an attorney. Is this ethical?*

Answer: Both the APA and AAPL (under Section III consent) preclude forensic evaluation prior to access to or availability of legal counsel. The only exception is an evaluation for the purpose of rendering emergency medical care and treatment.

6. *Question: An attorney has asked me to do a forensic examination on a lien, in which I would collect my fee only if the case is successful. Is this ethical?*

Answer: If your fee or its collection is dependent on the successful outcome of a trial, it is unethical as explained under the AAPL guideline section IV, honesty and striving for objectivity. It also is unethical according to the AMA opinions of the Council on Ethical and Judicial Affairs sections 6.01 and 9.07. It is ethical for attorneys to accept cases on a contingency basis since they have no ethical duty to strive for objectivity. The attorney is responsible for all expenses including your fee. A retainer presents no problems with striving for objectivity and may even facilitate it, so it presents no ethical problem. According to AMA Opinions of the Council on Ethical and Judicial Affairs, section 8.10, however, a lien may be filed as a means of assuring payment in states that have lien laws, providing the fee is fixed in amount and not contingent on the amount of the patient's settlement against the third party. Since your lien would be dependent on the outcome of the case, it would be unethical.

7. *Question: I provide psychiatric evaluations for the district attorney's office after an attorney has been appointed but before the attorney has been able to see the defendant. Under these circumstances I explain the nature and purpose of the evaluation, and that I am working for the district attorney so there is no confidentiality. If the defendant tells me incriminating evidence I see no problem since I have obtained his informed consent. Is this ethical?*

Answer: No. The APA and AAPL guidelines preclude such evaluations prior to access to or availability of an attorney. In this case, the attorney clearly has not yet been available. The attorney may not wish his client even to talk to the forensic psychiatrist. The psychiatrist cannot obtain adequate informed consent under these circumstances, as the defendant revealing incriminating evidence to you demonstrated.

8. *Question: Is it ethical for two forensic psychiatrists who work closely together to testify on opposite sides of a case?*

Answer: Yes, as long as no information is shared between the forensic psychiatrists without the approval of both opposing attorneys and both attorneys are informed about the close working relationship of the two forensic psychiatrists. The AAPL guidelines section on confidentiality and honesty are relevant.

9. *Question: On the basis of news reports, a forensic psychiatrist offered to testify for the district attorney in a death penalty case without examining the defendant. Are his actions ethical?*

Answer: AAPL guidelines Section IV, honesty and striving for objectivity, require an earnest effort to personally examine the defendant. If impossible, it is necessary to qualify the opinions and indicate in any reports and testimony that there was no personal examination and the opinion expressed is thereby limited. If such was not done, the testimony would be unethical. Moreover, the extreme interest displayed by the forensic psychiatrist casts doubt on his ability to be objective.

10. *Question: Is it ethical for a forensic psychiatrist initially retained by the defendant in the criminal case to then agree to testify for the codefendant without obtaining the approval of the attorney for the defendant?*

Answer: Commentary under the AAPL guidelines Section III, confidentiality, states the psychiatrist should clarify with a potentially retaining attorney whether an initial screening conversation prior to a formal agreement will interdict consultation with the opposing side if the psychiatrist decides not to accept the consultation. Although it could be debated whether the attorney for the codefendant is the opposing side, the frequent conflict of interest between such codefendants indicates that the essence of this AAPL guideline still applies. The failure of the forensic

psychiatrist to obtain clarification prior to the initial consultation places an affirmative obligation on the psychiatrist to obtain approval from the first attorney prior to consultation or retention by the codefendant's attorney. Alternatively, the forensic psychiatrist could inform the first attorney at the onset that he/she plans to consult with the second attorney or that a brief discussion with the first attorney will not neutralize his ability to work with the second attorney. The APA does not address this issue clearly unless Principle 2, requiring honesty with patients and colleagues, could be broadened to include attorneys and their clients. Under the conditions you mention it would be unethical to testify for the codefendant without the defendant's attorney's approval.

*11. Question: Is it ethical to testify that the psychiatrist for the opposing side is a prostitute because he is paid handsomely for his services for the side the complainant believes is frequently the wrong side?*

Answer: It is crucial to distinguish between honest differences of opinion, biases—conscious and unconscious—and “hired guns”. Ethical guidelines for the AAPL and the AMA and APA ethical frameworks no longer require proper etiquette and respect for other physicians as an ethical issue. In fact principle 2 of the AMA and APA principles indicates an ethical duty to strive to report those physicians deficient in character or competence. However, to call names would violate the APA and AMA requirements to respect human dignity. Moreover, the honesty and objectivity of the psychiatrist calling names would validly be questioned. The exposure of deficiencies of character or competence in other psychiatrists can be accomplished without name-calling.

*12. Question: A forensic psychiatrist in a death penalty case did not interview the defendant because he said such people always lie so an interview would be worse than useless. He also stated that he would express his opinion against the defendant with reasonable medical certainty. Is this ethical?*

Answer: AAPL Section IV, honesty and striving for objectivity, require an earnest effort to personally examine the defendant and if impossible, to qualify the opinion and indicate in any reports and testimony that there was no personal examination and the opinion is thereby limited. Since that was not done and there was no evidence of an attempt to do so, the testimony is unethical. Moreover, the unsubstantiated statements that such defendants always lie and that no pertinent information can come from such an interview would seem to violate to the AMA and APA section 1 requirements for competent medical service insofar as they are totally unsubstantiated opinions that are not compatible with competent service.

13. *Question: A forensic psychiatrist always testifies for the defense in death penalty trials but cannot substantiate his conclusions on the witness stand when asked for justification. He appears willing to lie in order to prevent the execution of the defendant. Is this ethical?*

Answer: AAPL does not require a witness to be expert at responding to cross examination. However, honesty and striving for objectivity are required. Although saving a life may be most consistent with traditional Hippocratic ethics, truth and honesty are the primary duties for a forensic psychiatrist. It might be argued that a secondary doctor patient relationship exists but it cannot override truth and honesty. If the true facts are not favorable, a forensic psychiatrist can refuse to become involved. To testify falsely is always contrary to the APA and AMA requirement for competent medical service and is unethical.

14. *Question: A forensic psychiatrist has testified that a defendant is competent to be executed. Is this ethical?*

Answer: The APA and the AMA forbid participation in a legally authorized execution but such participation has been narrowly defined. Although some would argue that competence to be executed evaluations are unethical because they are too close to the death penalty and the Council of the Medical Society of the State of New York and the American College of Physicians as well as the World Psychiatric Association have taken such positions, yet neither the AMA or APA currently have positions on this issue. Surveys of forensic psychiatrists show divided opinions on this issue, with a slight majority seeing no ethical problem with performing competence to be executed evaluations. It is also debatable whether evaluations showing incompetence to be executed must be unethical if evaluations showing competence to be executed are unethical. At present, there is nothing unethical about the testimony in your question.

15. *Question: A psychiatrist who is asked to evaluate a defendant found him sleeping and testified that the defendant could not be schizophrenic since schizophrenics do not sleep so soundly. Is this ethical?*

Answer: Since there is no evidence for such a statement, it would contradict AAPL's requirements for honesty and striving for objectivity and the APA requirement for competent medical service and it is therefore unethical. AAPL does not forbid testimony expressing minority points of view but there needs to be some evidence for an opinion and unusual opinions need to be honestly labeled.

16. *Question: A plaintiff's attorney has asked me to change the diagnosis in my report from a dysthymic disorder to major depression in order to strengthen the case. Is this ethical?*

Answer: Changing such a major issue would violate honesty and objectivity as well as competent medical service and therefore would be unethical. Although it may not be unethical to accept changes in phraseology or improved ways of expressing an opinion, a major change in diagnosis is unethical without new data to justify it.

*17. Question: A forensic psychiatrist clearly became very involved in a case, emotionally arguing his position in court and giving advice to the attorney about strategy. Is this ethical?*

Answer: Although many forensic psychiatrists believe advocacy is unethical, AAPL has followed the view that advocacy is permissible and advocacy for an opinion may even be desirable. Identification with a cause and even bias are not unethical in and of themselves and some emotionality and bias may be inevitable. However, bias must be openly acknowledged and not lead to distortion, dishonesty or failure to strive to reach an objective opinion.

## Case Vignettes for Teaching and Discussion

Before offering our own integration of ethics models for forensic work, we will relate and expand existing guidelines and ethical concepts to address specific cases. These are examples that apply the dominant language and guidelines of today. They offer mainstream analyses for the forensic practitioner. As in the AAPL opinions above, these cases focus on the expert's primary and secondary duties based on their role in the evaluation.

### *Case 1. Changing the Expert's Report*

Dr. A, a forensic psychiatrist, submits a draft report to a defense attorney. She decides that the evaluatee has bipolar disorder and meets the state's legal criteria for insanity.

The attorney suggests some changes in wording to clarify the opinion, remove some ambiguity, correct spelling errors, and improve the grammar. She corrects two minor mis-statements in the defendant's family and work history. The attorney also observes that the projective psychological tests showed some disorganization under stress, consistent with schizophrenia. To strengthen the opinion, she asks whether Dr. A can change her diagnosis to schizophrenia—or at least schizoaffective disorder. She is concerned that the prosecution psychiatrist may argue, as she has in the past, that a mood disorder does not involve enough cognitive distortion to meet insanity criteria in that state.

The defense attorney reports that she has read in the psychiatric literature that disorganization in projective testing suggests schizophrenia and that this

diagnosis would better convey the nature of the psychosis. She urges making this change, claiming that, without it, she may be unable to use the psychiatrist or her report.

The psychiatrist still believes that bipolar disorder is the proper diagnosis but acknowledges uncertainty. She also hopes to receive further referrals from the attorney. Is it ethical to make the changes?

## Discussion

Rewritten prose is ethical, but diagnostic changes are not. It is certainly ethical to accept wording changes that correct factual inaccuracies and to accept rewrites that help clarify the opinion. But these changes must not change the opinion itself. A change in diagnosis is a major change, and is not considered ethical. Alterations in the nature of the opinion, even in emphasis, would be dishonest, conflicting with AAPL's requirement of honesty. They would also violate the ethical requirement of the American Academy of Forensic Sciences not to distort data.

It is important, besides, that the forensic psychiatrist recognize the difference between her role and that of the attorney. She cannot ethically "spin" the data in order to win the case. "Spin" is an expectation of attorneys, not experts. The expert remains bound by the oath to "tell the truth, the whole truth, and nothing but the truth." Though the legal system may not permit the telling of the whole truth, limiting responses by procedural rule, the expert has a duty to do as much as the legal system will allow. This is the duty to avoid distortion.

It is not enough to wait for cross-examination; good cross-examination may not occur. Reports themselves are not subject to cross-examination. Indeed, expert reports are often submitted under penalty of perjury. Resisting a change in the substance of an expert's opinion is a position most consistent with Appelbaum and others' articulation of the principle of truth-telling.

If the attorney cannot use or does not want the opinion, she has other options: she may refuse to call the expert; she may consult other experts. With enough input, she may finally choose to change the nature of her defense. Indeed, many attorneys use experts to test the strength of their case or the feasibility of certain defense strategies.

## *Case 2. Conducting a Forensic Examination on Your Own Patient*

A patient is badly hurt in a car accident; the other driver is negligent. Dr. B is a psychologist who, for the past few years, has been treating the



patient in psychotherapy. During the accident her patient never feared that his life was at risk, but the resulting pain severely hampered his work and sleep.

The patient sues the other driver. Since the accident, the patient experiences more severe anxiety symptoms, but does not meet diagnostic criteria for post-traumatic stress disorder—a more severe anxiety disorder related to a specific life-threatening event. He takes pain medication from his orthopedist and continues psychotherapy.

The patient's attorney suggests asking the treating psychologist to conduct a forensic evaluation and prepare a report. After all, he says, his psychologist knows him best. The attorney says that since the patient placed his mental state at issue in filing the civil suit, the treatment cannot be confidential anyway, so the treating psychologist may as well do the evaluation.

The attorney is concerned that a forensic evaluator hired by the other driver's insurance company will write that the patient had pre-existing anxiety and not post-traumatic stress disorder. He may say nothing about the severe exacerbation of the anxiety after the accident. Further, since the opposing expert is retained by the insurance company, he may be biased in its favor.

The patient's orthopedist willingly writes a letter supporting the patient's post-accident disability. The patient agrees that his psychologist knows him best, and requests the forensic evaluation by his psychologist. In fact, after the accident, the treating psychologist has already written a report supporting a legitimate short-term disability claim when the patient was too anxious to work. The patient can pay the higher forensic consultation fees and knows the therapist includes forensic work in her practice. What is the ethically proper choice?

## Discussion

Treating psychologists should generally not perform such forensic evaluations. The attorney should hire another clinician to perform the evaluation. The roles are generally considered incompatible and each interferes with the other.

The patient's disclosures in therapy may be affected if he tries to add clinical data relevant to the legal case. Even if he merely *considers* how his disclosures affect the civil suit, the overlapping roles will have had an effect. Also, on the witness stand the therapist may be required to present opinions that could emotionally harm the patient, harm the therapy, or otherwise interfere with the treatment relationship.

The role of expert can also interfere with the duty of therapist supportiveness. A forensic expert must approach the case from the

position of a skeptic, striving for objectivity, seeking out corroborating or contradictory evidence. She must explore the possibility of malingering. Often, others must be interviewed. This can interfere with the primacy of the therapist-patient relationship. If the treater recognizes that the dual role will compromise the relationship, the treater-turned-expert may limit the thoroughness of her forensic assessment. A treater may ordinarily attempt to emphasize positive feelings (or countertransference, in Freudian parlance) towards a patient. This is not appropriate to the forensic role.

Further, a jury may believe that the therapist is simply doing her best to help the patient, hurting her credibility on the witness stand. In their organizational statements, both the forensic psychologists and psychiatrists grasp the importance of separating treatment and forensic roles. Separating roles is also an established habit or safeguard used by ethical practitioners. Even if the therapist's treatment notes are subpoenaed and the therapist is called as a fact witness, the "fact" role is clearer to the legal system, the therapist, and the patient.

The psychologist's position is more complex in this scenario than that of the orthopedist. There is a more personal valence to the psychological assessment, and the degree of trust may be greater after intimate disclosures. Yet even for the orthopedist there is the danger that the patient will distort and exaggerate to help his case. The orthopedist, too, may wish to be helpful—rather than objective—for his patient.

It is true that in disability assessments, treaters must usually submit forms in support of a patient's disability. The therapist's involvement in such cases (and others such as guardianship, Workers' Compensation) appears unavoidable at present, but it is best to limit dual agency as much as possible.

In the unified approach we will introduce in Section II, we will speculate that the treater and forensic roles can be united when the ethical frame is clear, the therapist's motivations are transparent, the parties informed, and conflicts mitigated. An exercise for the reader at this point, would be to imagine the cases where this role unification may be permissible, and to consider what values would be needed to govern the approach.

### *Case 3. An Unorthodox Methodology*

Ms. C is a ballistics examiner who testifies that she has matched a spent bullet to the gun of an accused murderer. The testimony proves critical to obtaining a conviction. The examiner reports that she fired the weapon over 30 times and cleaned the barrel before she could obtain the match, but does not describe this as a departure from usual practice. She is not challenged by the defense. Is there anything unethical to her testimony?

## Discussion

Testing the weapon more than two or three times and altering the test conditions by cleaning the gun undermine scientific standards that require stable experimental conditions. Attempts at objectivity would appear to be obstructed.

Because expert testimony relies on credibility, fundamental principles of truth-telling and honesty require recognizing the flaws of the expert's analysis. Marginal methodologies or methods that stray from accepted norms undermine each of these principles. Minority views or methods are certainly acceptable in courts of law, but the expert must describe their status.

### *Case 4. Recognizing Uncertainty*

Dr. D is a DNA specialist who uses accepted standards to interpret crime-scene evidence. The DNA sample she has analyzed almost certainly matches that of a criminal defendant. She has taken into account the laboratory's error rate, scored results in a blinded fashion, and considered the chances of a false-positive. She presents her methods and reasoning in a clear, but not exhaustive, fashion. She then states her conviction that the sample matches the defendant with a reasonable degree of medical certainty. Does she have further ethical obligations?

## Discussion

The expert does appear to have met her full obligation to the court. The language experts use to present their evidence is critical to the court's understanding and to their own credibility. Language should reflect the inherent uncertainty of laboratory and human measurements, with phrases such as "the findings are consistent with . . . ," "the evidence supports. . . ." Jargon and absolutes distort scientific reporting, especially to lay audiences like juries.

The expert need not make the other side's case for them. But she can offer a balanced view of the evidence in a manner that admits recognizable sources of error. She can also take this approach in order to attenuate her own scientific biases. This is crucial in minimizing hindsight bias, which affects all experts called to testify about past events.

### *Case 5. Getting Paid Only if You Win*

Dr. E is a neurologist hired to perform a forensic evaluation. The retaining attorney says her client has an excellent civil case against the city. Sadly, the client has little money because the case has dragged on for some time.

The attorney says she has taken the case on a contingency basis—and spent so much money that she can no longer afford to pay as she goes. She

has hired experts in other disciplines on the basis of a lien—a claim against someone’s property to secure a debt. All the experts will be able to collect their full fees once the case is settled. She wants the neurologist to take the case on a lien as well.

The neurologist says he is concerned his objectivity may suffer because his fee is contingent on a victory. The attorney responds that poor plaintiffs could never obtain the services of experts if they had to pay up front. She says that even the AMA considers liens ethical and it is clear the plaintiff will prevail. Is it ethical to take the case?

## Discussion

The AMA does consider it ethical to take a case or treat a patient on a lien. The AMA’s Council on Ethical and Judicial Affairs offers an explicit statement to that effect (see AAPL response 6 above, American Medical Association [AMA], 2005).

Although the lien applies in the law regardless of the case’s outcome, in a forensic case it is essentially a contingency fee since the plaintiff has no money and can only pay if he prevails.

As we have seen, AAPL considers contingency fees unethical because they interfere with the ethical requirements to be honest and strive for objectivity. It is difficult for principles of truth and justice to be served if experts are financially invested in the outcome. Even the appearance of self-interest badly undermines the expert’s credibility.

Attorneys need make no pretense of objectivity in court, and can properly accept contingency fees. In this case, it may be best for the attorney to pay the neurologist’s fee and then recover the money when the case is won. If the case is as strong as she claims, there is little financial risk. In accepting contingency fees, attorneys receive a substantial percentage of any financial award, and pay expenses up front out of their own pockets. For the expert a fee paid in advance would solve the ethical problem and avoid the expert’s credibility issue on the witness stand.

In contrast to contingency fees, fees paid to the expert in advance are ethical. The expert is under no financial pressure to tailor his opinions to satisfy the attorney. Retainer fees that are part of standing arrangements between businesses and individual experts do undermine objectivity. The expert has an interest in maintaining a lucrative relationship over time, and may be affected by the familiarity or collegiality of the arrangement.

Although there is AMA support for taking a case on a lien, the concerns of AAPL and the importance of objective expert analysis in general are relevant for all would-be experts. Ethically speaking, it would be best to decline this case.

### *Case 6. Evaluation before Consultation with an Attorney*

Dr. F receives a call from the District Attorney (DA). The DA asks her to perform a forensic evaluation on a person who has just been arrested for a serious crime. The DA says he wants the evaluation before the man is arraigned. He wants the prisoner evaluated as soon after the crime as possible to ensure an accurate evaluation. He knows this will confer an advantage over the defense team who would see the individual later.

Based on the police officer's report that the accused would "just get his psychiatrist to say he is crazy," he does not want to allow the accused to malingering mental illness. Moreover, after arraignment, an attorney may advise the accused not to cooperate. The DA says this procedure is legal in the jurisdiction and past psychiatrists have conducted these evaluations. Is this ethical?

#### Discussion

This case perfectly illustrates that what is legal may not be ethical, and that what is ethical in the law may not be ethical in another profession. In their guidelines, both AAPL and the APA forbid the forensic evaluation of a criminal defendant prior to consultation or access to legal counsel. The defendant may not be in a position to give consent prior to talking to his attorney. He may not fully grasp the situation, the dangers he faces, his rights, or the role of the clinician as an agent of the DA. Forensic assessments under such conditions run afoul of the principle of respect for persons. A forensic psychiatrist in this context would consequently subject himself to possible ethical sanctions by his professional organization.

Exceptions may occur to render care to the accused, with details of the crime left out of any documentation or discussion. Here, however, Dr. D should explain the ethical problem to the DA, and show her willingness to do the evaluation after the individual has spoken to an attorney.

There is some controversial new thinking on this topic that raises the question of whether forensic professionals working specifically for law enforcement have different obligations under these circumstances. They may not be bound by the principles or guidelines described so far. Perhaps they may assist in developing or monitoring interrogation techniques (Phillips, 2005; Schafer, 2001). In section II we propose a view of professional role theory that raises serious doubts about this activity by forensic clinicians.

### *Case 7. How Much Expertise Do You Need?*

Mr. G is an attorney who has joined the jurisprudence section of a forensic sciences organization. This is a section largely for attorneys who meet,

discuss, make presentations with forensic scientists, and occasionally review legal matters for their organization. After attending a number of meetings and working on relevant cases, Mr. E believes he has developed enough expertise in the testing of bodily fluids for chemical substances. He describes himself to colleagues as an expert on the subject. He uses his membership in the organization as a relevant credential, is accepted by one court as an expert, used by another attorney in a case, and consequently uses the leverage to be accepted by other courts. Are there ethical problems in this professional evolution?

### Discussion

There are problems here with misrepresenting one's expertise. An attorney interested in forensic science is not an expert in drug testing. The attorney may have knowledge—but he has no relevant training. Professional specialties and their professional organizations (e.g., APA, AAPL, AAFS, NASW) recognize as members those with specific credentials and education. Attending toxicology sessions at conferences or participating in a committee do not make this attorney an expert. It is an ethical breach to say otherwise and likely violates numerous organizational ethics guidelines.

## *Case 8. The Disability Assessment*

Dr. H has a patient who applies for Social Security Disability Insurance. The agency's policy is to ask treating physicians to assess disability and (ordinarily) not to provide independent disability assessments. If the treating physician does not write a report, the patient will not receive the disability money he needs.

Though she believes the patient is clearly impaired, Dr. H knows the disability only from the patient's reports. For a truly objective assessment she would need reports from work and observations from the patient's home. But, requests for collateral information may suggest mistrust and undermine the treatment relationship. What is the ethical thing to do?

### Discussion

The primary duty for the psychiatrist in this case is to the patient, not the Social Security Administration. Civic duty and scientific objectivity have their place, but they may not necessarily outweigh the primary duty. Within the constraints of honesty and truth-telling, the primary duty is to help the patient while making the best assessment of disability. Assuming a formal forensic stance is a secondary virtue.

But if there is reason to suspect that the patient is lying, it might not be in the interest of the physician, the patient, or the community to receive an uncorroborated assessment. Truth-telling remains a crucial principle for Dr. H and any community that expects professional and legal integrity. Returning to work may also speed the patient's recovery. Given the primacy of the duty to the patient, a concrete suspicion (or the presence of a certain amount of evidence) may be necessary before Dr. H asks permission to speak with collateral informants. Ultimately it may be appropriate to both the treatment relationship and to general physicianly obligations to advocate for the patient. This may include supporting a disability claim while acknowledging the limitations of the evaluation.

Better yet, Dr. H could suggest an independent evaluator. Of course, she herself could bite the bullet and tell her patient that she cannot write a helpful report. If the relationship survived, the issue would become part of re-establishing the trust and collaboration of treatment.

This case provides an example of the kind of thinking that is necessary to the dual role. Practitioners must decide between balancing or ordering principles, separating or clarifying roles, setting thresholds for requiring collateral data, and otherwise weighing duties to patient and society. It is an example of the complexities of dual roles and the difficulties of role theory in addressing common societal interactions. Our approach in Section II may be especially useful in such cases.

### *Case 9. Can the Expert Change Sides?*

Dr. I, a forensic engineer, is asked to consult in a civil suit following the collapse of a building. The attorney discusses the case with him, describing his legal strategy and what he hopes to prove. He also discusses his conversations with the client. He wants Dr. I to be designated (reported to the court) as an expert.

After reviewing some materials in the case, Dr. I decides he is not likely to offer an opinion useful to the attorney. He informs the attorney, who decides not to use him, and sends a bill for several hours of his time.

Before his bill is paid, Dr. I hears from the opposing attorney. Dr. I is happy to get the call, is familiar with the case, and believes he can help. If he takes the case, has he done anything wrong?

### Discussion

It appears that he has. Dr. I has received confidential information from the first attorney (protected by the attorney-client privilege, and by work-product

rules governing the use of experts). Had he wanted to be free to consult with the other side, he should have said so at the outset. This would assure that no specific information was revealed.

This is both a professional standard (e.g., for AAPL and the forensic psychology section) and a corollary to principles of confidentiality and respect for persons. These are in place to preserve the critical exchanges that must occur between attorneys and their clients.

AAPL's ethical guidelines also recommend that experts take precautions to ensure that confidential information does not fall into the hands of unauthorized persons. There is no need for irrelevant personal information to find its way gratuitously into forensic evaluations, or for privacy restrictions to be relaxed in an adversarial setting.

In fact, some attorneys use this scenario to preclude a well-respected expert from testifying for the opposing side. If Dr. I wishes to avoid a position in which the only ethical choice is disqualifying himself, he must warn the attorney *before confidential information is divulged* that he may be interested in working for the other side. Not having done so, he must respect confidentiality and decline the case.

Although the call from the second attorney comes before Dr. I's bill is paid, this creates no special exception to the duties of the expert and attorney or to the requirements of confidentiality. Even if the bill is never paid, the ethical analysis of the situation does not change.

### *Case 10. Doubts and Other Influences*

On first reviewing evidence in a case, Dr. J, a forensic odontologist, believes he can assist an attorney in a civil suit. The attorney designates him as his expert and the other side is notified.

As he works, he finds evidence to suggest that the other side is right. He fears he may have misled the attorney by overstating his initial enthusiasm. He had wanted to impress him because of the attorney's friendship with the department chair. Even if he withdraws, might he be called by the opposing side? Dr. J also empathizes with the client, who could desperately use the money she is seeking. What should Dr. J do?

#### Discussion

This case involves many conflicting values, not all of them forensic. For personal reasons, the evaluator wants to please the attorney and would like to help the evaluatee procure some badly needed income. He is concerned on a personal level that he may have been too eager to take the case. Without meaning to, he may have promised too much or even misled the attorney. Nonetheless, honesty and truth-telling serve as



critical principles for the encounter. They are the foundation of personal and institutional integrity.

Since this is a forensic case, his primary duty may be assigned to the legal system not the plaintiff. However, he was hired by the plaintiff's attorney (rather than the court) and, as a citizen and physician, he does owe secondary duties to the client. The best course may be simply to inform the attorney. It is respectful of the attorney and plaintiff as persons and consistent with honesty and truth-telling.

A possible solution, then, is to withdraw from the case before developing an opinion for either side. Perhaps he will leave the attorney enough time to explore other strategies, consult another expert, or pursue other means of getting assistance for his client. Any other choices—withdrawing without explanation, proceeding with the case—would not seem to be ethical.

This case offers guidance on how personal and professional values may be unpacked to arrive at an ethical decision. Practitioners who recognize the interplay of these values are in a better position to navigate the multiple duties of forensic work.

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