

On a Therapist Serving as a Witness

Ralph Slovenko, JD, PhD

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Therapists (as expressed in codes of ethics) and lawyers (law professors aside) have divergent views about a treating therapist's serving as a witness, be it as a fact witness or as an expert witness. It is discouraged in the standards of ethics of numerous professional organizations, including the American Psychology-Law Society and the American Board of Forensic Psychology, the American Academy of Psychiatry and the Law, the Committee on Psychiatry and Law of the Group for the Advancement of Psychiatry, and the American Psychological Association.

In the Ethical Guidelines for the Practice of Forensic Psychiatry of the American Academy of Psychiatry and the Law, it is stated: "Treating psychiatrists should generally avoid agreeing to be an expert witness or to perform evaluations of their patients for legal purposes because a forensic evaluation usually requires that other people be interviewed and testimony may adversely affect the therapeutic relationship." For psychologists, the American Psychological Association's code of ethics allows psychologists to serve both as consultant or expert and as fact witness in the same case, provided that they "clarify role expectations." The American Psychology-Law Society of the American Psychological Association addresses the "potential conflicts of interest in dual relationships with parties to a legal proceeding."

The rationales given for the guideline do not distinguish the type of therapy—psychoanalysis or other talk therapy or pharmacotherapy. Also, under the guideline or rationales, it is immaterial whether the therapist-patient relationship has ended.

In an article that received the Manfred Gutt-macher Award, Larry Strasburger, Thomas Gutheil, and Archie Brodsky¹ point out that therapists typically have neither the requisite information nor the

inclination to validate the historical reality of a patient's reality. Disclosures in therapy are useful, therapists know, without regard to their objective reality. Strasburger and colleagues write:

The process of psychotherapy is a search for meaning more than for facts. In other words, it may be conceived of more as a search for narrative truth (a term now in common use) than for historical truth. Whereas the forensic examiner is skeptical, questioning even plausible assertions for purposes of evaluation, the therapist may be deliberately credulous, provisionally "believing" even implausible assertions for therapeutic purposes. The therapist accepts the patient's narrative as representing an inner, personal reality, albeit colored by biases and misperceptions. This narrative is not expected to be a veridical history; rather the therapist strives to see the world "through the patient's eyes." Personal mythologies are reviewed, constructed, and remodeled as an individual reflects on himself or herself and his or her functioning.¹

Forensic psychologist Dr. Stuart Greenberg and law professor Daniel Shuman write:

Therapists are usually highly invested in the welfare of their patients and rightfully concerned that publicly offering some candid opinions about their patient's deficits could seriously impair their patients' trust in them. They are often unfamiliar with the relevant law and the psycholegal issues it raises. They are often unaware of much of the factual information about the case, and much of what they know comes solely from the patient and is often uncorroborated. What they do know, they know primarily, if not solely, from their patient's point of view. They are usually sympathetic to their patient's plight, and they usually want their patient to prevail.²

Clinical psychologist and forensic expert Terence Campbell discussed the "inevitable conflicts" between the responsibilities of treating therapists and expert witnesses or evaluators:

Ultimately, therapists find it difficult to competently evaluate their clients—a therapeutic alliance between client and therapist inevitably reduces the therapist's objectivity. Conversely, evaluators find it difficult to respond therapeutically to the subjects of their evaluations—neutrality and objectivity mitigate against therapeutic alliances. As a result, it is the rare therapist who can respond simultaneously and effectively to both therapeutic and evaluative responsibilities. Psychologists who ignore

Dr. Slovenko is Professor of Law and Psychiatry at Wayne State University Law School, Detroit, MI. Address correspondence to: Ralph Slovenko, JD, PhD, Wayne State University Law School, 471 W. Palmer, Detroit, MI 48202.

these limitations can find themselves trapped in the ethical pitfalls of dual relationships.³

Law professor Alan Scheflin—be it noted, a strong supporter of the controversial “revival of memory” therapy—argues that converting therapists into detectives, even if it could be accomplished, would destroy their healing role and would put them in an impossible conflict of interest. He also argues that narrative truth is just as alive in the courtroom as it is in therapy. Both the courtroom and the therapy room involve the articulation of constructed realities, or stories. Neither forum is designed solely or exclusively to search for truth, he says, and neither is properly structured or equipped to find it.⁴

Some therapists seek to avoid dual-relationship problems by confining their testimony to facts. In these circumstances, treating therapists typically report their diagnostic findings, explain their patient’s clinical condition, and detail the course of treatment. In limiting themselves to “fact testimony,” these therapists avoid expressing any opinions regarding the issues before the court (such as causation or responsibility), and they are not paid an expert’s fee.

In another article, Professor Shuman and colleagues suggest prohibiting therapists from testifying altogether about their patients. On the bases of conflict of interest, lack of foundation, potential for unfair prejudice, harm to the therapist-patient relationship, they propose that professional codes of conduct condemn therapists who testify about their patients.⁵

Notwithstanding the numerous caveats, there is apparently no empirical study of harm done to therapy or to the judicial process as a result of dual roles. It is an assumption without proof. One may wonder whether the ethics guideline (promoted by forensic experts) is designed to safeguard the shop for forensic experts.

Consider a question put by a psychiatrist to the Committee on Ethics of the American Academy of Psychiatry and the Law (AAPL):

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?⁶

Would an examining psychiatrist be privy to information about the illegal schemes? In this case, the treating psychiatrist would probably be more helpful

to the court than an evaluator. Similarly, a treating psychiatrist may be singularly aware that injuries complained about by a patient in a lawsuit predated the alleged cause of action. Consider the case reported by Dr. Jack Gorman in his book *The New Psychiatry* of a patient who had back trouble for many years preceding a car accident that she claimed hurt her back.⁷

The therapist is familiar with the patient’s condition at the time of visitation. The therapist is an “eyeball witness,”—hence, qualified to testify about it—but discerning a past condition or what happened in the past (without corroboration) from a present condition is dubious. The *DSM* does not give the etiology of the various disorders set out in the manual.

What about testimony concerning the patient’s condition at the time of treatment? In a California case given extended coverage in *Psychiatric News*, a young girl who sought damages for emotional trauma allegedly resulting from an automobile collision, stated in the course of a deposition that before the collision she had no problems that necessitated psychiatric care, but thereafter, she had felt the need, because she blamed herself for the accident, in which her mother and brother were killed. The testimony and records of the psychiatrist, Dr. George Caesar, were thereupon sought. Dr. Caesar contended that an independent psychiatric evaluation by another psychiatrist, which had been performed, could determine the specific effect of the collision on the plaintiff and would be more useful than his records. The effect of any disclosure by him, he urged, could prevent the continuation of therapy and might “conceivably result in even more catastrophic things like suicide attempt.”^{8,9}

In a dissent to Dr. Caesar’s reluctance to serve as a witness, Dr. Samuel D. Lipton wrote: “Who is able to provide better evidence, the psychiatrist who examined her immediately after the accident and continued to treat her, or one who saw her for the first time much later?” The question, for him, was rhetorical.¹⁰

Many therapists would agree with Dr. Lipton. Notwithstanding the ethical provision on dual roles, there may be a silent majority or at least a significant minority of therapists in agreement. One can only speculate whether the ethics provision is honored more in the breach than in the observance.

Among other types of cases, factitious sexual harassment may be recognized only by gaining access to medical records to show that an alleged event was fabricated. In a case in which a patient is the victim of a homicide, the therapist's testimony as to any statements of the patient about whether or by whom threats against the patient were made would be helpful in an investigation or prosecution. In a civil action for the alleged wrongful death of a patient in which the defendant contends that the deceased did not die as the result of any action of the defendant but was a suicide, the testimony of the therapist of the deceased would be helpful in discerning the cause of death. In cases of criminal responsibility of a patient, or the civil commitment of a patient, the therapist has what many consider a superior vantage point as to the patient's mental status, diagnosis, and clinical condition. Reporting statutes are based on the assumption that therapists are aware, or reasonably so, of the veridical truth.

The problem is ascertaining those cases in which a therapist can provide otherwise unavailable and relevant information. No witness has to hit a home run so to speak, but might not the therapist in some cases advance the inquiry at least to first base? To make that determination prompts the demand for discovery of the therapist's records in all cases. At a minimum, it may be suggested, an evaluator would be remiss in not considering a therapist's report. The forensic examiners, for example, obtained the therapy records of John W. Hinckley, Jr., the would-be assassin of President Reagan.

In some states in workers' compensation cases, the examiner is also obliged to provide treatment. In cases of competency to stand trial, the examiner often treats the individual as well as testifies on trialability. In an evaluation in child custody cases, an examiner not only makes an examination but may also offer counseling. The Social Security Administration as well as other agencies require statements from treating psychiatrists in adjudicating patients' disability claims.

Quite often in child custody cases, patients call on their therapists to assist them by serving as witnesses in obtaining custody. The therapeutic relationship is apparently enhanced by the support.

In the case of Lyle and Erik Menendez, who were charged with murdering their parents, there was an audiotape of a therapy session in which Lyle explained why he and his brother had killed them. In a

stunning admission during the penalty phase of the retrial of the brothers, Dr. William Vicary, who had treated Erik and also served as the forensic psychiatrist, said under oath that he had altered notes of his sessions at the request of defense attorney Leslie Abramson. The revelation set off a firestorm of controversy. According to Dr. Vicary, information was deleted from his notes because Abramson thought it would hurt the defense. Among the most important deletions was a statement by Erik a week before the murders that he hated his parents, and that he "wanted to kill them." Other deletions related to statements regarding Erik's homosexual conduct and an incestuous relationship with his mother that was "in his head," rather than real.

In a critical comment about Dr. Vicary's agreeing to be both therapist and expert witness for Eric Menendez, Dr. Diane Schetky wrote:

Dr. William Vicary is to be commended for owning up to his mistakes in the Menendez case, but he minimizes the untenable position he put himself in by agreeing to be both therapist and expert witness for Eric Menendez. If there is a lesson to be learned from this case, it is the peril of trying to serve two masters at one time. . . . Amid pressures to protect his patient and appease his attorney client and his belief that his testimony was critical to the case, he lost sight of the need for the psychiatrist at all times to testify truthfully. When we allow our integrity to be compromised by competing pressures, we do a disservice to our patients, the profession, and the legal system.¹¹

By way of response, Dr. Theodore Pearlman (who supports dual roles) wrote:

Dr. Schetky pontificates about the perils of "serving two masters." There is nothing absolute in the AAPL ethical guidelines which precludes duality of service. The creditable psychiatrist serves no masters other than loyalty to his training, qualifications and integrity. Rigidly separating out the expert role from the treating role by no means guarantees ethical expert opinion. Lucrative fees for expert psychiatric services, known in one celebrated case to have amounted to \$3,000 per day for the two-week duration of a trial, may well influence expert psychiatric opinion.

The important question is this: Who is in a more favorable position to provide accurate and honest expert testimony in the case of a psychiatric patient under treatment, who subsequently becomes involved in a question of law? [Is it the] nontreating forensic psychiatrist divorced from the therapeutic relationship, or the treating psychiatrist who, over a period of maybe many months, has seen the patient within the context of a therapeutic alliance and has had ample opportunity to not only objectively evaluate, but also understand the psychodynamics of the patient's mental illness, personality function, interpersonal relationships and patterns of behavior preceding the incident forming the basis of the legal inquiry? The conclusion is compelling that a judge and jury will afford greater weight to psychiatric

testimony inclusive of retrospective evaluation and treatment than to the testimony of an expert evaluating the patient for the first time after the event constituting the basis for medico-legal inquiry.¹²

There is bias among witnesses, be they therapist or forensic examiner. They may be biased by virtue of philosophy. The bias of child sexual abuse experts has often been noted.¹³ Then too, Dr. Bernard Diamond, the late renowned forensic psychiatrist, testified only for the defense in criminal cases because of "the need of psychiatric testimony to humanize the law."¹⁴ More experts are biased by the fee than by philosophy. The sobriquet "hired gun" is not without basis. Oft-quoted in discussions about expert testimony is the following testimony on cross-examination in a personal injury case: "Is that your conclusion that this man is a malingering?" The expert responded, "I wouldn't be testifying if I didn't think so, unless I was on the other side, then it would be a posttraumatic condition."¹⁵

As a rule, lawyers consider that a therapist, who sees the patient during a period when the patient would have no apparent motive to deceive, has more to offer the court than a forensic expert. They are aware that judges and juries give more credibility to the testimony of a therapist than to that of a forensic expert. That appraisal by judge and jury is based not on psychiatric theory but on common sense—aided and abetted by the widespread criticism of expert testimony.

An illustration is a recent case in Michigan in which a patient sued an insurance company for breach of an insurance contract. The patient, the plaintiff, was a surgeon who began experiencing some operating room anxiety at the same time he was commencing a contentious divorce with his second wife. He began seeing Dr. Elliott Luby, a well-known psychiatrist and forensic expert. The plaintiff was treated with anxiety-reducing medications, but after showing some signs of improvement, he lost a patient on the operating table. At that point Dr. Luby told him he should voluntarily stop performing surgery. Then the patient started a cardiac catheterization lab in the Bahamas and began treatment with a psychiatrist there, with the overall goal of performing exercises to get used to going into the operating room again. Some months later, the patient began to have pain and numbness in his arms, and he saw an orthopedic surgeon, who performed tests that showed he had a herniated disk in his cervical spine. He then called his insurance agent in regard to his disability policy. The insurer denied the claim on the ground that his psychiatric treatment was not continuous and was not

designed to get him better and return him to the operating room. The jury returned a verdict of \$1.267 million.

In an interview after the verdict, Joseph Bird, the patient's attorney, said the key to winning the case was not hiring expert witnesses to explain the plaintiff's condition. He relied exclusively on the testimony of the patient's treating doctors. He added, "We never hired an expert psychiatrist. We relied exclusively on the treaters. If you've got good treaters and they are credible, that goes a long, long way with a jury as opposed to what any expert might say." And he added, "Dr. Luby is the most wonderful witness I've ever seen. He is absolutely impervious to attack. You could drop a nuclear bomb and you couldn't crack his testimony. He was just unstoppable."¹⁶

All in all, the ethics guideline is not much honored in the legal process. For better or worse, that is the reality.¹⁷

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