

# AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW

## ETHICS QUESTIONS AND ANSWERS

### OPINIONS OF THE AAPL COMMITTEE ON ETHICS

ADOPTED BY AAPL COUNCIL MAY 19, 2013

Unlike the Ethical Guidelines for the Practice of Forensic Psychiatry, that were voted on and endorsed by the entire membership, these opinions are the product of the Committee on Ethics. They have been reviewed and approved by the AAPL Council with an opportunity for review and input by the membership. They do not necessarily represent the opinions of any other organizations. They are an ethical analysis only. For legal advice, an attorney must be consulted. We offer no assurance that the American Psychiatric Association, which enforces ethical behavior, will agree with our analysis. The APA, not AAPL, has the requisite procedures to investigate a specific case or judge the ethics of a situation. To make such a determination, it is necessary to obtain comprehensive information, hear testimony, and give the psychiatrist who is the subject of a complaint an opportunity to reply. Our opinions are based on actual questions, but should be regarded as opinions on questions of ethics and not as judgments about a specific psychiatrist in an actual case.

#### 1. QUESTION – IS SEX WITH A FORENSIC EVALUEE ETHICAL?

*Answer - No. The AAPL Ethics Guidelines are grounded in principles of respect for persons, social responsibility, honesty, and striving for objectivity. Sex with an evaluatee undermines objectivity, and is disrespectful, exploitative, and unprofessional. It makes the ethical requirement to maintain professional boundaries and deliver credible forensic services impossible.*

#### 2. QUESTION – IS IT ETHICAL FOR A FORENSIC PSYCHIATRIST PERFORMING AN EVALUATION TO USE BULLYING TACTICS, TO BE RUDE, USE NAME CALLING, AND PRESS PLAINTIFF TO DROP THE CASE?

*Answer - AAPL Ethics Guidelines are grounded in respect for persons and striving for objectivity. The AMA Principles of Medical Ethics themselves state: "A physician shall be dedicated to providing competent medical service with*

*compassion and respect for human dignity [Section 1]." Bullying tactics and deliberate rudeness are disrespectful of human dignity and pressuring a plaintiff suggests failure to strive for objectivity.*

*However, the special role of a forensic psychiatrist should also be considered. What may appear to constitute bullying tactics, rudeness, or name calling to the plaintiff may merely be an assessment of malingering or skepticism about inconsistencies. A forensic evaluation may necessarily explore areas that a plaintiff prefers to avoid and finds upsetting. Confronting inconsistent information or employing a non-therapeutic interviewing style do not necessarily involve ethical infractions. In fact, an ethics complaint itself may be retaliatory -- motivated by the psychiatrist's negative evaluation.*

*Such cases may be evaluated by exploring both the alleged behaviors and the forensic psychiatrist's reasons for them. However, actual bullying, deliberate rudeness, and name-calling are failures of professional ethics and are not appropriate.*

### **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 - The AAPL Ethics Guidelines (Section IV. Honesty and Striving for Objectivity) state that "Psychiatrists who take on a forensic role for patients they are treating may adversely affect the therapeutic relationship with them. Forensic evaluations usually require interviewing corroborative sources, exposing information to public scrutiny or subjecting evaluatees and the treatment itself to potentially damaging cross-examination. The forensic evaluation and the credibility of the practitioner may also be undermined by conflicts inherent in the differing clinical and forensic roles. Treating psychiatrists should therefore generally avoid acting as an expert witness for their patients or performing evaluations of their patients for legal purposes." In situations in which the dual role is required or unavoidable (such as Workers' Compensation, disability evaluations, civil commitment, guardianship, or "military boards" for active duty service members about fitness for duty), sensitivity to differences between treatment and legal obligations remains important.*

*Although you are functioning largely in a treatment capacity for your patient, you will still be required to answer any question the board considers relevant and admissible. Any forensic role is adjunct to your therapeutic role since there is no duty for a treating psychiatrist to obtain information from sources other than your*

*patient. You may be unable to be objective under these circumstances because of countertransference feelings toward your patient and your awareness that unfavorable statements will interfere with therapy.*

*The patient would benefit from consulting his attorney on whether to use you for the hearing at all, because in many states a patient automatically waives the therapist-patient privilege if he makes an issue of his mental state. You should also assess whether your own objectivity is compromised by a lack of corroboration of the patient's self-report and the inherent advocacy of the treatment role. As a result, the treating psychiatrist should generally resist requests to testify except in response to a court order, or in some instances to a subpoena, or to the patient's explicit and competent waiver of confidentiality, preferably on advice of the patient's attorney.*

**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 BY THE COURT 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 - Under these circumstances, it is unlikely the forensic psychiatrist could meet the AAPL requirements of striving to be objective and being sensitive to role conflicts. The psychiatrist's opinion could be tainted by countertransference issues, and perhaps, even some guilt at not foreseeing the possibility of his patient's death. In addition, regardless of privilege laws, confidentiality continues after death. Could the forensic psychiatrist avoid using confidential information from the mother in the evaluation? He will likely be influenced to some degree even if he is very careful. More information on the specifics of the case is needed but with the legal stakes so high, this variation of the dual role is probably not covered by the geographic exception. Allowing an exception to the standard of role separation may in fact be unethical here. Even if these issues were not problematic, there would be an appearance of impropriety. Therefore the psychiatrist should likely refuse to take the case and suggest that a non-local psychiatrist 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 - In order to protect the rights of the accused, both the APA and AAPL (in section III Consent) preclude forensic evaluation prior to access to or availability of legal counsel. The only exceptions are an evaluation for the purpose of rendering emergency medical care and treatment or under court order.*

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 contingent on the successful outcome of a trial, it is unethical as explained under AAPL Guidelines Section IV, honesty and striving for objectivity. It also is unethical under 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. In contrast to the forensic psychiatrist, attorneys appropriately can advocate for their client's side by presenting only that portion of the truth that helps their side. In contingency cases, the attorney is responsible for all expenses including your fee. A retainer fee that is not part of a long-standing financial arrangement does not pose a problem with striving for objectivity and may even facilitate it, so it is not considered unethical. 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 where there are lien laws, providing the fee is fixed in amount and not contingent on the amount of the individual's settlement against a 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 THAT 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. Consent obtained without access to an attorney is not adequately informed consent and is therefore unethical. The APA and AAPL preclude such evaluations prior to the defendant having access to an attorney. The defendant and the attorney should both be aware of any planned forensic evaluations before they occur so that the defendant may have the benefit of counsel's advice. An attorney may wish to apprise his client of the risks of self-incrimination or may not wish his client even to talk to the forensic psychiatrist.*

**8. QUESTION – IS IT ETHICAL FOR TWO FORENSIC PSYCHIATRISTS WHO WORK CLOSELY TOGETHER TO TESTIFY ON OPPOSITE SIDES OF A CASE?**

*Answer - Yes. All parties and their attorneys must be informed of the precise nature of the relationship. No information should be shared between the forensic psychiatrists without the approval of both opposing attorneys. Procedures must be established to preserve the confidentiality of all information, work product and research. The AAPL Guidelines sections 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 examine the defendant. If the defendant was ultimately not examined, it would be necessary to qualify the opinion and indicate in any reports that there was no personal examination conducted on the defendant and consequently the opinion was limited by the absence of a personal evaluation. In the expert's testimony, however, the legal system may not always allow the expert an opportunity to qualify the opinion and no attorney may ask about any limitations on the expressed opinion. In such instances, the expert should endeavor to indicate in testimony this limitation on the opinion offered to the degree that is reasonably possible. Moreover, the extreme interest displayed by the forensic psychiatrist casts doubt on his ability to be objective. It would be important for the psychiatrist to explore the motivation for offering his or her services under these circumstances.*

**10. QUESTION – IS IT ETHICAL FOR A FORENSIC PSYCHIATRIST INITIALLY RETAINED BY THE DEFENDANT IN A CRIMINAL CASE TO THEN AGREE TO TESTIFY FOR THE CO-DEFENDANT WITHOUT OBTAINING THE APPROVAL OF THE ATTORNEY FOR THE DEFENDANT?**

*Answer - AAPL Guidelines of Confidentiality and Honesty apply in situations where information may be used outside the appropriate context. Forensic psychiatrists are bound by privilege not to misuse information gathered in their forensic work. Psychiatrists become part of an important confidential process when they are retained, and undermining it undermines the judicial process itself. If co-defendants appear together, both privilege and confidentiality may become blurred. Because conflicts of interest may arise between co-defendants, it is the ethical obligation of the expert who is "retained" to join with the attorney-defendant privilege and protections of confidentiality. Information from the expert is appropriately controlled by that privilege and protection. So the answer is NO, a forensic psychiatrist should not consult with a second attorney, whether representing a co-defendant or another party when there is no permission. It would be ethically cleaner to suggest they find another expert. Of course, if the forensic psychiatrist is sued, there is no ethical problem if the forensic psychiatrist consults with his own attorney.*

**11. QUESTION – IS IT ETHICAL TO TESTIFY THAT THE PSYCHIATRIST FOR THE OPPOSITE 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 differentiate between honest differences of opinion, biases - conscious and unconscious - and "hired guns." Ethical guidelines for AAPL and the AMA, and APA ethical frameworks no longer require proper etiquette and respect for other physicians as an ethical issue. In fact, Section 2 of the AMA and APA principles indicates an ethical duty to strive to expose those physicians deficient in character or competence. However, to call names would violate the APA and AMA requirement to respect human dignity. Moreover, the honesty and objectivity of a psychiatrist calling names would validly be questioned. An attack against incompetence or perceived unethical behavior by another expert should be made vigorously through careful and persuasive dispute of inaccurate, non-scientifically supported testimony by the other expert by means of the statement of one's own opinion, through one's own elicited testimony or by vigorous argument with reasoning in the forensic report. 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 Guidelines 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 or testimony that there was no personal examination and the opinion is thereby limited. Since that was not done and there is 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 could come from such an interview would seem to violate the AMA and APA Section 1 requirement for competent medical services insofar as totally unsubstantiated opinions 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 A 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 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 facts of the case 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 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 Medical Society of the State of New York and the American College of Physicians have taken such positions, neither the AMA nor APA has done so. 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 that show someone incompetent 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 WAS 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 THAT ETHICAL?**

*Answer - Since there is no medical evidence to support such a statement, it would contradict AAPL's requirement for honesty and striving for objectivity and the APA requirement for competent medical service and is therefore unethical. AAPL does not forbid testimony expressing minority points of view but there needs to be some evidence for an opinion and the 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 it 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 WITH A CASE, EMOTIONALLY ARGUING HIS POSITION IN COURT AND**



## GIVING ADVICE TO THE ATTORNEY ABOUT STRATEGY. IS THIS ETHICAL?

*Answer - Neither being an emotional advocate for one's opinion nor providing requested legal advice is unethical. Being a partisan or legal advocate for an examinee (as opposed to one's opinion) is a departure from striving for objectivity and may, depending on degree, be unethical. Identification with a cause and even bias are not necessarily unethical in and of themselves and, as humans, 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. While it is not unethical to argue one's position in court with conviction, it would be prudent to avoid being too emotional.*