

Truth and Corrections

Michael A. Norko MD, MAR



It is a great privilege to be writing this column, as I am honored and humbled by the opportunity to serve AAPL for this year as presi-

dent. In AAPL, through the interplay of fate and design over decades of endeavor, we have gathered to our unique missions some of the most accomplished, thoughtful and hard-working psychiatrists in this country and beyond. The range and depth of scholarship, practice and teaching among this body of forensic psychiatrists is truly extraordinary, and I will not hesitate to remind us of that happy circumstance, which we may be prone to take for granted. It can all seem so natural, so ordinary, when we gather together to share experience, knowledge and aspirations.

The annual meeting is a remarkable event, one that has been a rich source of professional fulfillment for me over 30 years. It is thus a great pleasure to be planning for our next gathering in Denver. The agenda that I am imagining is, by way of abundant enthusiasm, somewhat involved and worthy of a bit of explanation.

Over the last 2-3 years I have had numerous conversations with AAPL colleagues about our relationship to correctional psychiatrists, and the underdeveloped state of that relationship given the tremendous overlap of our multifarious concerns in delivery of care, jurisprudence and policy-making. I see the Denver meeting as a chance for us to attempt new levels of outreach and welcome to our colleagues practicing in correctional settings. We will be highlighting the interconnectedness of the community, hospital and corrections domains of public sector forensic practice. A group of AAPL committee chairs and correctional liaisons are actively composing a significant initiative to welcome our correctional colleagues in a

special way in Denver. (You can read more about this corrections initiative in the Medical Director's column by Jeff Janofsky in this issue of the *Newsletter*.)

Several of our committees have been asked to consider presentations on their own or in collaboration with other committees that relate to the confluence of forensic themes across correctional, hospital, and community psychiatry. All our colleagues are invited to do the same, and we are especially hoping for submissions from psychiatrists working in correctional settings highlighting innovative programs, research, policy or practice.

But I also want to try to describe how I see this initiative coming together with the conceptual theme that I wish to explore (The Search for Truth) through various planned activities and invitations for your abstract submissions. The AAPL Ethics Guidelines remind us that we "should adhere to the principle of honesty and should strive for objectivity" in our forensic work. This is the beginning of the search for truth, but it is not the end of the discussion. Honesty is not fully contained in the box marked "Just the facts, ma'am." The subjectivity of perspective, narrative and voice complicate and widen the terrain of what honesty and authenticity must cover. The clinical/forensic dualism seems no longer a rich enough construct to adequately address the range of inquiry or the complexity of professional tasks and challenges. Truth is hard work.

And then there is the confounding variable of the medium through which our work is processed. Although it is an obvious first lesson of forensic psychiatry, clinical and legal systems operate within very different functional paradigms. This leads to unavoidable levels of misunderstanding or incomplete understanding – the very substrate of forensic training. But our best efforts

as forensic practitioners, even combined with the best collaborations with our legal colleagues, may not deliver the wholeness of truth we aspire to within our system of justice.

So while we are encouraging abstract submissions for presentations of particular interest to correctional psychiatry and its interconnections, we are also seeking proposals that examine how the adversarial system uses expert knowledge to make decisions, and the effectiveness of that process at discovering *the* truth (and not just merely deciding it as our best approximation of that goal). In other words, how well does our grasp serve our reach?

The other side of the equation is seldom discussed at AAPL and I very much hope that we might explore it further – that is, what possible alternative mechanisms might be available to channel the presentation of forensic expertise in various legal settings? What data are available from other legal systems to enrich our thinking about our role in court? What theoretical models might stir our imagination? Are there potent avenues of dialogue to be had with our legal colleagues which have not been tried or at least not yet exhausted?

Reena Kapoor, Program Chair for the 2017 meeting, and I have planned some focal points for these explorations by way of luncheon speakers. Carrie Menkel-Meadow, Professor at the University of California, Irvine School of Law, will discuss her experiences as a mediator interested in the deeper psychological needs of the parties in a legal contest. The Honorable John L. Kane of the U.S. District Court of Colorado will illustrate his efforts to apply sentencing guidelines fairly to individuals living with mental illness. Anthony Graves will describe his experiences in our criminal justice system as a death row exoneree. We are working on constructing a mock trial to illustrate one possible alternate mechanism for the presentation of psychiatric testimony by way of an expert consensus panel.

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Ask the Experts: Sitting at the Table

Neil S. Kaye, MD, DFAPA

Graham Glancy, MBChB, FRCPsych, FRCP(C)

Neil S. Kaye, MD, DFAPA and Graham Glancy, MB, ChB, FRC Psych, FRCP (C), will answer questions from members related to practical issues in the real world of Forensic Psychiatry. Please send question to nskaye@aol.com.

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Q. The lawyer in a criminal case has asked me to testify as an expert on the effects of alcohol and antipsychotics on the alleged victim, and also to sit with the lawyer during the trial to coach/assist her with questions of witnesses and the opposing expert. Can I do this?



A. Kaye:

While there is no prohibition against this, I highly discourage this practice. Specifically, I am against the mixing of roles. The

credibility of the expert would be inherently tainted by the apparent role of non-impartial advocacy when sitting at the defense counsel's table. Lawyers may not immediately see the conflict presented by such "dual agency" and so it is suggested that you discuss with the lawyer what she is hoping to achieve. Your guidance may be just the counsel the lawyer needs. Often, an expert will actually have more courtroom experience than the lawyer when the topic is a complex mental health issue and most lawyers are appreciative of our input.

I had a similar case recently and the lawyer wanted me to address issues related to the victim's use of illicit drugs and alcohol with her

antipsychotic medications, but without allowing me to examine the victim. I declined noting that unless the victim specifically refused to be interviewed, to opine on her condition and the effects of her mental illness based solely on a list of medications and a purported diagnosis would be below the accepted standard of care. The judge threatened me with contempt of court, but I held my ground and noted that while I could address things in the hypothetical, such an opinion was unlikely to be of real use and would easily be grounds for an appeal. After I sat in court for a few hours, the judge finally agreed to excuse me.



A. Glancy:

If the retaining counsel retains you to address the effects of drugs and alcohol in conjunction with antipsychotic medications, in

the hypothetical, there is no reason why he should not do this, if you feel qualified to do so. If you then do a report and possibly testify regarding your opinion, there is no reason why you should not sit with the lawyer in order to listen to and help prepare a cross examination of the opposing expert. If on the other hand you would be more comfortable interviewing the evaluatee, you should not be seen sitting at the table with the lawyer since this gives an appearance of advocacy. A cornerstone of the AAPL ethics guidelines is the striving for objectivity and honesty, and this should always guide our professional life.

The forensic psychiatrist acting as an evaluator and as a consultant might be considered a dual role. It does however appear to be contemplated in the landmark decision *Ake v Oklahoma* (470 US 68 (1985)). It may well be that lawyers have less difficulty with it than we forensic

psychiatrists have.

In Canada it seems to be less of an issue, and it is not uncommon practice for the forensic psychiatrist to sit at the table with the lawyer, often at the stage where a particularly important witness, such as the evaluatee, is testifying. Occasionally one has the opportunity to see the opposing expert testify and perhaps help prepare the cross examination. I have never known anyone to have a difficulty with this, and it never has been an issue to my knowledge. However even as I write this I can see the wisdom of Dr. Kaye's advice and I am in the process of revising my opinion.

Take Home Points:

Dual agency is often a delicate balance and an issue that demands an expert's vigilance. Expert witnesses and lawyers often appraise this issue differently and the pressure for an expert to stretch this boundary is a common occurrence in litigation. (P)

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We hope this experiment will form the nidus for discussion and interrogation of the potential pros and cons of such a prototype. I will, of course, also attempt some further considerations of the search for truth in my presidential address.

And we hope that your contributions will enlarge upon these inquiries and extend their reach. Submissions that manage to combine the search for truth with the corrections initiative will naturally get bonus points, which, if nothing else, may be redeemed for warm appreciation and a hardy handshake from your president (of AAPL... just to be clear).

The deadline is March 1 – submit early, submit often. And get excited. (P)