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Boundaries for Forensic and Treating Psychologists

*Samuel Knapp, EdD, ABPP; Director of Professional Affairs
Bruce Mapes, PhD; Independent Practice, Chester County, PA*

Often treating psychologists find themselves involved in the legal system. Consider the situation:

A psychologist was treating a woman who later became involved in a personal injury lawsuit. The patient's attorney asked the psychologist to act as an expert witness and give an opinion on how the injury caused emotional damage to the patient.

Is this a proper role for the treating psychologist to assume? To answer this question, we first need to look to the APA Ethics Code (APA, 2010) and to the Guidelines for Forensic Psychologists (APA, 2013). According to Standard 3.05 of the APA Ethics Code, this would constitute a multiple relationship. Although multiple relationships are not inherently unethical, they could be if the relationship, "could reasonably be expected to impair the psychologist's objectivity, competence or effectiveness in performing his or her functions as a psychologist, or otherwise risks exploitation or harm to the person with whom the professional relationship exists."



Dr. Samuel Knapp



Dr. Bruce Mapes

In addition, psychologists in Pennsylvania must also rely on the Specialty Guidelines for Forensic Psychology of the American Psychological Association. According to the Pennsylvania State Board of Psychology, APA guidelines are binding on all psychologists licensed in Pennsylvania. These guidelines state that "Providing forensic and therapeutic psychological services to the same individual or closely related individuals involves multiple relationships that may impair objectivity and/or cause exploitation or other harm" (Guideline 4.02.01). The guidelines note, however, that treating psychologists may provide testimony in

"a patient's reported history or other statements, mental status, diagnosis, progress, prognosis, and treatment" (Guideline 4.02.02). The line demarcating acceptable versus unacceptable testimony appears to be the issue of giving testimony that directly responds to the legal issues before the court, such as the nature of parenting arrangements for a child, whether an incident was the direct cause of harm to a litigant, whether a defendant met the legal standard for insanity, etc.

These rules make conceptual sense. Providing both treatment and a legal opinion on a patient risks a clinically contraindicated multiple relationship. Effective treatment of a patient requires building a relationship and expressing empathy for the patient. Such emotions, which are essential for good treatment, nonetheless could suggest bias on the part of the psychologist.

In addition, treating psychologists offering opinions in court should be aware that their testimony may

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Practical Considerations in Forensic Psychology for Non-Forensic Psychologists

Bruce Mapes, PhD; Independent Practice, Chester County, PA
Samuel Knapp, EdD, ABPP; Director of Professional Affairs

Non-forensic psychologists can minimize the disruption or inconvenience of courtroom testimony by keeping a few ideas in mind and preparing for the possibility that they, despite their best efforts otherwise, may be required to testify in court.

We recommend that psychologists routinely ask all new patients whether they are currently involved in any litigation or anticipate being involved in any litigation. A small number of patients enter therapy with an expectation that they will be able to elicit their psychotherapist as a support for their case. Identifying these patients early will help psychologists to clarify their roles and what they can and cannot do. Also, psychologists can then make a better informed decision as to whether they would be appropriate to treat this particular patient.

Even if psychologists conscientiously identify or attempt to screen out patients in litigation ahead of time, sometimes they will find themselves in unexpected situations where their testimony is relevant to a case before the court. Here, the informed consent process and agreement is very important. We recommend that psychologists include a statement in their informed consent forms that patients are responsible for compensation for all time they spend on patients' care outside of therapy. Often patients will make extensive demands on the time of psychologists to read reports, prepare letters, consult with others, etc. Personally we believe it is unwise for psychologists to nickel and dime patients for every kind of favor asked. Both authors have gladly spent time gratis preparing brief letters or reports for patients. However, the wording in the informed consent

document provides the psychologists with the option of charging for such reports if they become extensive or appear clinically contraindicated.

Such agreements are especially relevant in forensic cases. A patient may make a seemingly minor request that the psychologist write a brief report for their attorney. But such

Even if psychologists conscientiously identify or attempt to screen out patients in litigation ahead of time, sometimes they will find themselves in unexpected situations where their testimony is relevant to a case before the court.

brief reports can quickly escalate into dozens (or hundreds of hours). Psychologists cannot demand payment for such services unless they have specified the costs for such services ahead of time. For that reason, we recommend that the informed consent agreement note that psychologists will charge for forensic time at a specified rate and that these charges apply to, but are not limited to, time spent writing reports, reviewing documents, consulting, traveling, testifying in court, and sitting in court waiting to testify. Also we recommend that psychologists put in the informed consent form that they would be compensated for any travel costs they might incur for testifying such as parking fees, meals, overnight stays, or mileage (at IRS rates). Finally, we recommend that the agreement also allow the option that the psychologist can require a retainer. This should be in writing and signed by the patient.

We have been astounded by the number of patients who willingly pay tens of thousands of dollars to their attorneys, but begrudge paying anything to their psychologists. One patient was especially indignant when the psychologists asked to be paid for dozens of hours that she had put into his case. "How do you expect me to pay this when I already owe my attorney \$10,000," the patient asked.

It is prudent to get paid in advance when the patient (or the attorney acting on behalf of the patient) is requesting an extensive amount of work. One psychologist asks that payment be made 15 business days in advance to ensure that the check clears.

Psychologists who accept verbal agreements of payment, run the risk that they have no legal basis to insist upon payment. Furthermore, I have heard stories where it appears that some unscrupulous attorneys appear to withhold or delay payment as leverage for testimony. Although they may not state that payment is contingent on acceptable testimony, the implication is that the two are linked.

Often psychologists will ask the PPA staff or others to recommend an acceptable fee to charge for forensic services. Professional associations cannot recommend specific fees for services. However, we do note that an hour of forensic time is 60 minutes as opposed to 40 minutes for a 90834 or a 53-minute minimum for 90837. In addition, non-forensic psychologists doing forensic work may want to factor in additional training materials that they need to buy or consultations that they may need to get as part of their preparation for this experience. Consequently, many psychologists charge more for their forensic work than they do for their psychotherapy work. ■

PRACTICAL CONSIDERATIONS IN FORENSIC PSYCHOLOGY...

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disrupt the treatment relationship. A psychologist on the witness stand can no longer place the well-being of the patient first, but now has a primary obligation to provide accurate and unbiased information to the court. Although the patient may have the goal of winning the case, “the role of the expert witness is not to promote winning for one of the parties, it is to assist the trier of fact (judge or jury)” (Woody, 2009, p. 82).

Even if psychologists offer opinions that are consistent with the patients’ perspectives and goals, the patients may believe that the psychologists did not speak up strongly enough on their behalf. Often psychologists can minimize harm by informing their patients ahead of time of the general nature of what they have to say, their limited role in the proceedings, and so on. However, many patients are

overinvested in the legal proceedings and may still feel disappointment that their psychologists were not sufficiently vigorous in their statements.

Often psychologists can minimize harm by informing their patients ahead of time of the general nature of what they have to say, their limited role in the proceedings, and so on.

Furthermore, treating psychologists seldom engage in the type of inquiry necessary to address the legal issues before the court. The role of the expert witness is to “weigh all perspectives fairly” (Shuman & Greenberg, 2003, p. 223). The nature of the psychotherapeutic relationship does not require that. Instead, treating

psychologists ordinarily take the statements of their patients on face value. Psychotherapists are not expected to gather information from collateral sources, give malingering scales to their patients, conduct an internet search on them, routinely use multiple measurements to seek convergent data to justify their conclusions, or engage in other assessment techniques used by forensic specialists. For example, when a patient is involved in an accident, treating psychologists would not ordinarily access reports from police, detectives, or other third parties that could include information that contradicts the statements of their patients, or at least gives some context for the statements of their patients.

One forensic psychologist noted:
I can’t begin to tell you how many forensic evaluations I’ve done

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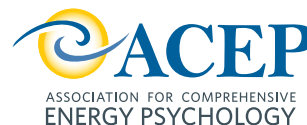
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Continued from page 4

over the years where a clinician will adamantly recount a client's narrative only to be dismayed when I tell them that I have some sort of evidence—a police file, court judgment, etc.,—that contradicts the story the client told the clinician (Steve Erickson, personal communication, May 23, 2016).

We are aware of some situations where attorneys or patients have tried to use the expertise of treating psychologists without paying them.

Along the same lines, psychologists need to remember that secondary gain often plays a major role in how patients view their illnesses. It is not always malingering or deliberate deception, although sometimes it is. When patients have had numerous interviews with attorneys who repeatedly ask them to elaborate on their injury and suffering, and who continually reinforces the need to blame problems on a specific incident or third party, it is only natural that patients will begin to emphasize or overemphasize the role of the incident in creating their distress. Often these occur without patients being aware of the process.

Sticking to the appropriate role can be difficult for treating psychologists. Even if the treating psychologists stick to the points above, and clearly stay within the defined role, they should be aware that an attorney may try to pressure them into giving answers to causation or other legal standards. The treating psychologist should resist such pressures and stick to a recounting of the facts surrounding treatment. For example, the statements of the treating psychologist should be concrete, such as "Mr. X told me that he was involved in an accident . . ."

The consensus of psychology ethicists, as reflected by the standards

in the forensic guidelines, is that treating psychologists should avoid giving opinions on legal issues before the court. The issues surrounding the testimony of treating psychologists can become difficult to navigate, in part because of confusion concerning the term "expert" (see accompanying article (p. 6) on the differences between lay, fact, and expert witnesses). Certainly psychologists are professionals who, through years of education and supervised experience, have acquired expertise beyond that of a layperson in the diagnosis and treatment of mental illnesses. In the ordinary use of the word, psychologists are experts. But within the legal system, the term "expert," takes on a different meaning: one who directly addresses the legal question before the court.

The issues get further complicated by financial issues. We are aware of some situations where attorneys or patients have tried to use the expertise of treating psychologists without paying them. Sometimes

attorneys have offered psychologists witness fees (often \$15 or so to pay for parking) and then maneuver the questions or push the envelope on what they ask in an effort to get expert opinions out of treating psychologists. In the accompanying article we describe practical steps that treating psychologists can take ahead of time to clarify their roles and to ensure that they are paid fairly in the event that they are called into court. ▮

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PPA is pleased to recognize Dr. Rex Gatto for his service, dedication, and commitment to PPA for conducting and facilitating three PPA Strategic Planning sessions during 2016. All work was done pro-bono because he believes in his professional association.

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Types and Roles of Expert Witnesses: Lay, Fact, and Expert

Bruce Mapes, PhD; Independent Practice, Chester County, PA
Samuel Knapp, EdD, ABPP; Director of Professional Affairs

As noted in the previous articles, requests for courtroom appearances by psychologists can be controversial and difficult, especially for those psychologists who are not used to or trained in courtroom procedures. One of the basics in preparing for courtroom work is to understand the different types of witnesses that courts may call.

All psychologists should be forensically informed in that they should know when they are entering the legal arena and have the resources or consultants available to assist them in their interactions with the court.

Lay witnesses have neither special training nor knowledge but may testify about something that they saw or heard. Typically, they will be eyewitnesses. For example, a lay witness may have observed a fight and can testify about what he or she observed or heard.

More recently, lay witnesses have been allowed in some jurisdictions to offer opinions which are “rationally based on the perceptions of the witness” and “helpful to a clear understanding of the witness’s testimony or to the determination of a fact which is at issue.” The testimony cannot be based upon knowledge outside of the understanding of the ordinary person (e.g., clinical formulations).

Fact witnesses (also called a character witness) can only testify to facts that they actually observed and may offer interpretations or opinions relevant to those facts. Typically, they lack information about the crime and other collateral information, but they know the character or personality of the subject of the case. However, they cannot testify on facts reported by others, offer interpretations of other facts, give opinions relevant to law, and answer hypothetical questions.

Finally, **expert witnesses** are individuals who on the basis of training, education, or experience can assist the trier of fact (judge or jury) to understand a concept or issue relevant

to the legal question. Most likely the experts will be forensic psychologists with specialized training on such issues as rules of evidence, admissibility of evidence, and other important information concerning the adversarial process. They can draw inferences on facts, interpret the facts or opinions given by others, give opinions on the relevant legal issues, and respond to hypothetical questions. Typically, expert witnesses have a broader information base than fact witnesses and are subject to a broader range of cross-examination questions.

These distinctions have implications for professional psychologists whose patients get involved in litigation. All psychologists should be forensically informed in that they should know when they are entering the legal arena and have the resources or consultants available to assist them in their interactions with the court. However, some psychologists become forensic specialists which requires a body of knowledge including special issues concerning assessment, legal proceedings, and other issues unique to the forensic area. ▮

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Giving Thanks for Rachael Baturin

Samuel Knapp, EdD, ABPP; Director of Professional Affairs

Justin Fleming, BS; Director of Government Affairs

Most PPA members know and appreciate Rachael Baturin, MPH, JD (Director of Legal & Regulatory Affairs) because she directly assists them when they face difficult legal or ethical issues. Or they know Rachael from workshops she presents at the PPA convention, other CE programs, or from her writings in the *Pennsylvania Psychologist* (including working on the PPA legal column which now has more than 80 articles). She has a well-deserved reputation for accuracy and approachability. Over the years she has compiled a data bank of articles on the PPA website that address the most common questions that PPA members face. Those contributions alone merit the deep appreciation of Pennsylvania psychologists.

But many of her most salient accomplishments are outside of the awareness of the membership. In private meetings with insurers she has been able to thwart unwelcome policies that would have harmed public access to psychological services. Usually our interest to maintain good and open relationships with these insurers preclude us from announcing the “victories” that occurred in these private meetings. One medical director, who has since moved on, was known for holding off on new policies unless he could “check with Rachael first.”

Rachael Baturin has had her finger in almost every piece of legislation affecting psychology in the last 20 years. For example, on a shelf at the PPA office there is a letter from United States Senator Robert Casey endorsing mental health parity. This letter was a crucial turning point in this

decade’s long effort. Senator Casey was under intense pressure within the state to oppose mental health parity and was silent on the issue. APA staff were stymied and asked Rachael for help. She made the contact, made the case, and Senator Casey was on board. The support of the U.S. Senate for mental health parity was never in question after her involvement.

For the last 15 years Rachael has represented PPA in meetings with the State Board of Psychology. The members of the State Board of Psychology are hard-working and dedicated public servants who deserve our appreciation. However, sometimes PPA and the Board will approach issues from differing perspectives. Rachael has always been able to present PPA positions effectively and has often persuaded the



One medical director, who has since moved on, was known for holding off on new policies unless he could “check with Rachael first.”

Board to adopt or modify positions that we considered to be more enlightened or more in line with the public interest.

More recently, Rachael spent dozens of hours researching and preparing an Amicus (Friend of the Court) Brief before the Pennsylvania Supreme Court in support of a case involving a PPA member. In doing this, she completely altered her Thanksgiving holiday and completed the task dutifully and exceptionally.

From keeping PPA as an Act 48 provider (CE for school personnel), to working with family court judges on enlightened child custody procedures, to promoting graduate students through her work with PPAGS, to promoting healthy workplaces, it is hard to identify a major PPA accomplishment in which Rachael has not had a major role.

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GIVING THANKS FOR RACHAEL BATURIN

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Consider these other contributions:

- Rachael has been the Federal Advocacy Coordinator in Pennsylvania for almost 15 years. PPA's Federal Advocacy Network has consistently been rated as one of the most effective and responsive psychology networks in the United States. The response rate (percentage of psychologists who respond to legislative alerts) regularly puts PPA near or at the top of state psychological associations.
- She literally wrote the amendments to the Professional Psychology Practice Act which became law in June 2016.
- Her first case as an attorney was an appeal to the Pennsylvania Supreme Court on behalf of a psychologist.
- The royalties for the textbook, *Pennsylvania Law and Psychology* (co-written with Samuel Knapp and Allan Tepper) now in its 6th edition have been used to fund the Patricia M. Bricklin ethics award which goes to a graduate student in psychology in Pennsylvania.

"Rachael is our go-to person on so many issues," remarked PPA Executive Director Krista Paternostro Bower, CAE. "In the office we often find ourselves saying 'Has Rachael had a chance to chime in on this yet?' Her value to this organization and its membership cannot be overstated." She is the staff person assigned to several PPA committees which are run efficiently and effectively. She always helps other staff members do their jobs better. "She kept me from stepping on

Rachael Baturin has had her finger in almost every piece of legislation affecting psychology in the last 20 years.

many cow pies," said PPA Director of Professional Affairs Samuel Knapp, EdD, ABPP. "Being able to work closely with Rachael on matters of law and regulation is one of my favorite aspects of this job," said PPA Director of Government Affairs Justin Fleming. Rachael's efforts frequently go above and beyond for our members, and it is the pleasure of the PPA Board and staff to recognize her many contributions to our members and PPA as a whole. 🐮



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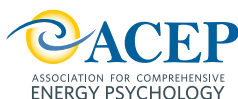


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Calendar

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