

M. I. Tuchler,¹ M.D.

The Adversary System: Role of the Psychiatrist

Forensic psychiatry as a specialty is nonexistent. There is no such sub-specialty recognized within the American Board of Psychiatry and Neurology. Equally as startling within the adversary system is the selection of the so-called forensic psychiatrist. The defense attorney has the choice of several varieties of psychiatrists upon whom to depend for psychiatric expertise within the adversary system. He may call upon a professional psychiatric witness who devotes his primary effort on the courtroom appearance. Or he may select a legally sophisticated but non-trained physician with some degree of psychiatric knowledge. Neither of these professionals has either competence or credibility. Emanuel Tanay properly says [1],

the suspicious attitudes of the general public and lawyers toward the forensic pseudo-psychiatrist are, therefore, understandable.

Certainly, the involvement of competent, full-time psychiatrists in the legal process is essential if the sub-specialty of forensic psychiatry is to gain repute and accept its established role within the adversary system.

To function as a forensic psychiatrist, the professional must not only be well-trained, Board certified understandably, but skilled and experienced in the practice of clinical psychiatry. I, personally, know of no psychiatrist who practices forensic psychiatry exclusively.

The psychiatrist must also have acquired some degree of legal sophistication. A member of any of the specialties within the forensic sciences who devotes his full time to the courtroom testimony, soon ceases to be an active participating forensic scientist within his specialty. The psychiatrist must have some knowledge of many of the sanctions, traditions, and rituals within the legal system. For example, the concept of punishment as a deterrent to recidivism, is deeply ingrained within the legal system. When the criminal act is motivated by the need for punishment, repetition, usually, is not prevented by the imposition of a criminal sanction. When an act is symptomatic of a deep-seated emotional illness, deterrents are of little consequence. The adversary system supports the need that a rational motive or intent be established often for a most irrational antisocial act. Here, the adversary system beautifully illustrates the conflict between the prosecution and the defense. The prosecution attempts to substantiate a rational motive for an act while the defense affirms the irrationality of the behavior.

Thus, the identification of the psychiatrist sensitive to the needs of the prosecution (or defense) becomes a significant, sometimes subtle, and frequently an outspoken, criterion in the selection of a professional witness.

Presented at the Twenty-Fourth Annual Meeting of the American Academy of Forensic Sciences, Atlanta, Ga., 2 Mar. 1972. Received for publication 27 Oct. 1972; accepted for publication 29 Jan. 1973.

¹ Adjunct professor of psychology, Northern Arizona University, Flagstaff, Arizona.

The psychiatrist who testifies in a court of law is frequently asked if he has ever so testified on previous occasion; it then becomes essential for the cross-examination to elicit the frequency of his appearances before a court. It is not infrequent to learn that the cross-examiner equates the familiarity with court testimony with that of a "professional witness" and often implies that the expert through cross-examination has been unmasked as a fraud.

As Emanuel Tanay reports [1]:

The first courtroom testimony of a psychiatrist, like the virginity of a maiden, is highly valued, though it usually admits of a poor performance.

Clinical competence, credibility, and a knowledge of the interface of psychiatry and the law are essential to the professional functioning within our adversary system.

It is unfortunate that the interface between psychiatry and the law is primarily an interaction and a confrontation of the expert witness; it is unfortunate that the psychiatrist is locked within the legal system in so restrictive a role. The competent forensic psychiatrist is practicing social psychiatry. Within the practice of social psychiatry is the concept that the law serves to protect and safeguard the community as well as the individual; in this area the function of the psychiatrist and the lawyer appear in agreement. As the psychiatrist must be familiar with the legal setting under which he functions in his capacity as an expert within the adversary system, so the legal profession requires a much more sophisticated understanding of the role of psychiatrists in general, and of the psychiatric process in particular.

It is my impression, gathered over these thirty years, that while the testimony in court may appear to be an important function of the psychiatrist, it is indeed his least significant contribution. Probably one of the most gratifying areas in which the psychiatrist can assist the adversary system is in dialogue with lawyers and with the judiciary. The question "who is the expert?" is often as ambiguous to the attorney and to the judge as it is to the layman. While certification for the forensic psychiatrist is a goal in the foreseeable future, clinical training and certification in psychiatry can easily be ascertained. Post-graduate training in the field of forensics is also of considerable significance: without experience in the prison environment or at a court clinic, the psychiatrist practicing before the court is often less than adequate.

A knowledge of the legal process and the role of the psychiatrist within this legal process is also critical. The psychiatric witness contributes opinion evidence. This is often no more than data to be added to the sum total of the information which, when presented and digested, is put through the legal mill. The testimony of a psychiatrist is but one cog in the wheel of justice.

Within the adversary system the psychiatrist must be informed that every piece of data which he presents is going to be subjected to careful scrutiny as to its significance and will be critically challenged. A decision is rarely reached until every bit of data or evidence is presented, and each bit of evidence must satisfy certain legal definitions. The sum total of evidence presented is oftentimes reacted to with emotion by a jury of twelve.

The psychiatrist clearly should be permitted to testify on psychiatric data. He should not be involved in making a legal judgment or in devising a judicial opinion. Yet every day the psychiatrist is asked to make a moral judgment with regard to the right and the wrong, and he is, at times, forced to make a decision which truly is in the province of the judge or the jury or both.

In some states the following questions are asked in the matter of pretrial procedures in criminal cases:

1. Whether or not the defendant presently suffers from a mental illness or defect.
2. His present ability to understand the nature of the proceedings against him.
3. The defendant's present ability to assist in his own defense.
4. Whether the defendant suffers from a condition which is diagnosed solely as a sociopathic or psychopathic disorder.
5. Whether the defendant's ability to reason or to control his conduct is substantially impaired.
6. The defendant's potential for violent or dangerous behavior.
7. Whether the defendant's present mental illness or defect justifies his commitment to a mental institution.

Judge David Bazelon, the Chief Judge of the Federal Circuit Court of Appeal, District of Columbia, has seriously questioned the psychiatrist's contribution on the issue of criminal responsibility. Judge Bazelon believes that psychiatrists do not understand their role as an expert witness; they do not direct themselves to psychic exploration of significance to the legal issue of criminal responsibility, namely, the verdict. He believes the material presented by the psychiatrist and their opinions are often colored by their concern about the disposition! He is also of the opinion that many psychiatrists fail to appreciate the adversary procedure. He believes that psychiatrists simply do not understand the legal process.

While Judge Bazelon feels that the psychiatrist should offer a full psychodynamic picture of the accused in a criminal proceeding, including the *significance* of the criminal act to the accused, he stresses that the psychiatrist should not offer *any* opinion regarding *any* legal issue, should not use any legal language, and he should refuse to answer any legal question. Here is a direct quotation of Judge Bazelon, as reported by Dr. Seymour Pollack [2]:

the theme that the psychiatrist should avoid law, legal education, and legal training, appears paramount. "The psychiatrist should stay away from the law. The less you know about the law, the better."

Dr. Winfred Overholzer, late Superintendent of Saint Elizabeth's Hospital, has reported that if Judge Bazelon's criteria were to be met, each case would require at least one hundred psychiatric man hours, in order to bring *all* the facts to the attention of the court.

In personal communication Judge Bazelon has stated that it is none of the psychiatrist's business what the legal question is, that the tailoring of a psychiatrist's testimony for the law and to suit the needs of the law is "terrible." "Why do psychiatrists get on the stand and try to give the judge what they think he wants?" Thus, Judge Bazelon is particularly condemnatory of the tendency of psychiatrists to misdirect their opinions toward the disposition of the accused, his sentence, rather than on the legal issue, the verdict. He states [2]: "No expert witness is supposed to have any interest whatever in the outcome."

In contrast, Dr. Seymour Pollack [2] believes that the basic function of the forensic psychiatrist is:

To relate his professional material to legal issues for legal purposes, but inferences should be drawn about how this mental impairment relates to a significant social behavior and to significant legal rules.

Dr. Pollack believes that the forensic psychiatrist must become knowledgeable about the law, be familiar with its concepts, the language of the law, and those issues involved in the

psychiatric testimony in order to become more skilled in his application of psychiatry to these issues. With this statement, this examiner is in full agreement. The material which is presented by the psychiatrist must be directed to the medical and psychiatric objectives and to clarification and understanding of the act and of the motives; and this clarification must fit into the purposes of the law. It is essential that the psychiatrist give a full, comprehensive description of the accused, that he not just label the individual, and he certainly should support his opinions with significant data which can validate his reasons for his opinions. Diagnostic labeling is meaningless in the absence of diagnostic understanding. So much for the concern of the psychiatrist with his task before the adversary system.

Now let us pay attention to the legal process. As already stated, in my opinion the psychiatrist involved in the adversary system should have a fundamental knowledge of the legal process. He should know that the courtroom situation is divided into three steps: the first of which is the gathering and the presentation of data, only one part of which is contributed by the psychiatric witness. The second phase of the legal process puts the data through the adversary procedure in which every issue, and all issues raised, may well be challenged and each piece of evidence assigned a significant value or weight, the sum total of which eventually is presented before the trier of fact. The third phase consists of the data thus gathered being viewed in light of existing common law and statute law where the rules of evidence apply. Thus, the more relevant the psychiatric testimony to the existing law, the more meaningful is its comprehension and its applicability.

For years the law was interested only in intent. The lawyers, the judge, and the jury were indeed pleading for significant understanding of motivation. Within the federal jurisdiction and in many states the psychiatrist is not able to report significant psychiatric data in full. Under the American Law Institutes Model Criminal Code which is now applicable in some states and in the majority of federal jurisdictions, also under the Durham rule, again under Judge Biggs' [3] decision in the Currans matter, and in New Hampshire, the psychiatrist can speak fairly, fully and completely regarding causation and dynamics. Under M'Naughten rule, you will recall, he was forced to a "yes" or "no" on the accused's knowledge of the right and the wrong, and on the accused's ability to follow the right. I need not repeat how difficult this was for the majority of professionals in psychiatry, particularly those who wanted to talk psychiatry to a jury rather than express a moral and philosophical guess. The psychiatrist does not have scientific answers in the same manner that the toxicologist has; he cannot report on milligrams percent; he cannot demonstrate objective findings as does the pathologist on his microscopic findings or the ballistics experts on his studies.

Summary

The psychiatrist functioning within the adversary system of the law meets with a challenge. The law deals with social realities; psychiatry has a legitimate interest in furthering this reality. Law, on the other hand, deserves a little cross fertilization with concepts derived of psychiatric knowledge, for human behavior is the life blood of the law. Collaboration between the law and behavioral science, including psychiatry, is desirable. It is in the best interests of the law and psychiatry that the sub-specialty of forensic psychiatry be enhanced, developed and formalized as a sub-specialty within the profession of psychiatry.

References

- [1] Tanay, E., *Journal of Forensic Sciences*, to be published.
- [2] Pollack, S., *Newsletter*, American Academy of Psychiatry and Law, Vol. 2, No. 4, July 1972, p. 5.
- [3] Bigg, J., *U.S.A. v. Currans* 200 F 2nd 751 (1961).