

TREATING vs. EXPERT PSYCHOLOGIST as WITNESS

Albert M. Drukteinis, M.D., J.D.

In both civil and criminal litigation where a mental issue is raised, treating psychologists are often called to testify on behalf of their patient. These psychologists, psychiatrists, counselors, and other mental health therapists have known their patient over a period of time and are said to be in the best position to render an opinion about the mental state of that patient. In opposition or as an alternative, independent expert psychologists are asked to evaluate the same patient and provide an opinion which is represented as more detached and objective. But who in fact is the better witness? Who can render the most reliable opinion? These questions require further exploration.

Treating psychologists often have intimate knowledge of their patient's psychological and emotional functioning, strengths and vulnerabilities, defense mechanisms, symptom complexes, and response to treatment. Inevitably, they have also made a diagnosis of their patient's condition which has served as the foundation of the therapeutic work. In addition, they often have seen the patient over an extended period of time which can include many hours of personal contact - the

inference being that they would, therefore, naturally know the patient the best. Furthermore, their involvement has frequently been initiated outside of the context of the legal arena so that their

observations are somehow more pure and not contaminated by pressure from a hiring insurance company or law firm. For these reasons, treating psychologists are usually sought by plaintiffs' lawyers who represent them as the most credible witnesses to their claim.

However, there are serious drawbacks that must be considered in the use of treating psychologists which can only be understood by examination of the nature of the psychotherapeutic relationship. At the threshold of this is that treating psychologists generally accept the reality of the patient's presentation and historical narrative. This does not mean that if a patient's account is delusional or grossly distorted, a treating psychologist would not confront it. Similarly, over time and with the development of trust, the treating psychologist may be able to present alternative perspectives on even more subtle distortions which the patient may harbor. But, for the most part, a plausible perspective of the patient is accepted. The patient's reality and the meaning attributed to it are more important than actual reality. For example, if a patient is expressing emotional pain because of a mother's abuse, it may not be important at least in the outset to determine how often the abuse occurred, what were the particular circumstances, or whether or not it has been misrepresented. The patient can still be comforted and helped to work through this pain in the absence of a completely accurate historical account. Treating psychologists, after all, are not lie detectors and are not in the business of doing detective work. Yet, if the plausible perspective of the patient is brought into the courtroom as a fact by the treating psychologist, it may be erroneous and misleading.

Treating psychologists are also limited in the scope of information to which they have access. Again, they typically rely on the patient's account. At times, they may ask for earlier mental health records or, more likely, summaries of records, but they don't perform exhaustive corroborative searches. They will usually not have access to police or accident reports, complete medical records, other witness statements, employee files, and school records. Those are not essential for psychotherapeutic work to continue even though they are critical in litigation. If they do receive corroborating information at some later point in order to

prepare for testimony, they may face information that is not compatible with their earlier clinical formulation. Yet, modification of their opinion could threaten the therapeutic alliance.

This leads to the next important drawback in the use of treating psychologists as witnesses, namely, that their therapeutic alliance with the patient can preclude objectivity. Treating psychologists, by their very role, rely on the treatment relationship in order to provide their healing. That relationship must be one of trust and confidence, and belief on the part of the patient that the psychologist is there for them. If the psychologist expresses an opinion that is contrary to the patient's legal claim, resentment can inevitably form and the relationship is damaged. It would be naive to think that the authority and opinions of the psychologist would be accepted by the patient without such a consequence. More likely, the psychologist and patient will become adversaries, with the patient perhaps even seeking other professional help. Instinctively, treating psychologists know this and especially where there has been a long-term relationship, they will not compromise the patient's interests. For example, if a psychologist has been in a treatment relationship for many years with a patient who has hypochondriacal tendencies, would the psychologist refuse to support a recent claim of whiplash symptoms even if exaggerated? It is unlikely. This does not mean that the psychologist would purposely give false testimony, but there would be the inclination to soften the impact of hypochondriasis on the patient's current distress.

Another potential conflict faced by treating psychologists is payment for their services. Although private health insurance carriers will be responsible for payment of most therapy with or without some co-payment on the part of the patient, this is not always the case. For example, workers' compensation claims, payment to the psychologist will be directly related to a favorable opinion that the patient's symptoms arose out of and in the course of employment. The typical scenario in these cases occurs after an initial interview between the psychologist and patient, when the patient announces that all the bills will be covered by workers comp. The psychologist is next handed an insurance form which requires that the work connection be documented. This decision is often made after a relatively brief interview with little in the way of corroborating information. Later, as treatment has progressed and a more formal opinion is requested, is it really possible for the psychologist to be objective and say that the symptoms are not work related, when fees have been collected over a period of time on that basis? Again, this does not mean that the psychologist will falsely provide an opinion in order to be paid, but that conscious or unconscious factors will certainly influence the psychologist's ability to be objective. In other cases, when an attorney sends a client to a psychologist for treatment, payment of accumulated fees may depend on the successful outcome of litigation, thereby also eroding objective opinion.

This last example leads us to an even wider area of concern, that is whenever a patient is being sent for psychological treatment by a lawyer and the treating psychologist is then asked to be a witness in the patient's litigation. These types of referrals are frequently made and are not always for contrived purposes. A lawyer may see genuine emotional distress that is in need of attention independent of the law suit. However, this is where the greatest number of conflicts arise and where objectivity suffers most.

Expert psychologists would appear to be a better choice as witnesses and using them would avoid many of the potential conflicts and issues around credibility just described. Expert psychologists can say what they want and are not bound to a therapeutic alliance with the patient. They are in a position to consider all the data and give it proportional weight. They usually have access to more corroborating information and, by virtue of their experience, should be asking for complete records and background data which provide a more complete understanding of the patient's history. If properly trained and certified, expert psychologists

are more knowledgeable in courtroom procedure, rules of evidence, the legal standards to which their opinions are being applied, and the limitations of psychological testimony.

On the other hand, expert psychologists may not always be objective either. In the first place, the concept of objectivity is probably an illusion. There is always bias in every opinion and every testimony; this goes for both treating psychologists as well as independent expert psychologists. Bias can come from basic philosophical positions or allegiance to a theoretical stance; in psychology, for example, there are a number of schools of thought, one or more of which may dominate the expert psychologists thinking. There is also potential bias based on agency, i.e. whose agent is the psychologist? The insurance company's? The law firm's? The state's? Can the expert psychologist really maintain neutrality with regard to agency?

Money, too, affects objectivity so that there will always be an inclination to provide favorable opinions to whoever is hiring the expert psychologist. This has led to the use of the term hired gun. No doubt this occurs and lawyers may, indeed, rely on predictable opinions of their frequently used experts. However, expert psychologists may, at times, be incorrectly labeled as hired guns due to widely conflicting testimony observed in the courtroom. It should be noted that legitimate differences can exist in clinical opinion and in the adversarial process itself, where favorable aspects of an opinion are emphasized and unfavorable aspects are downplayed. This happens, of course, with any expert opinion, not just that of a psychologist. Considerable differences are seen among other medical specialists, economists, arson and ballistics experts, engineers, etc. These reasonable differences should not imply that the opinions are by a hired gun. But, if very similar sets of facts lead to two different opinions by the same expert, or if the expert routinely swings in conclusions then it may be suspected. Even more important is the question of whether the expert psychologist's opinions are on sound psychological grounds. The widely held Frye rule (293 Fed. 1013, D.C. Cir. 1923) in which the basis of scientific testimony must have found general acceptance in the scientific community, has been augmented by the recent Daubert decision (113 S. Ct. 2786, 1993) where courts may inquire more specifically into the reliability of the theoretical basis for testimony. Hopefully this will limit expansion in the use of junk science which has found a recent explosion in United States courts.

Although the dilemma of whether to use treating psychologists or expert psychologists is not easily resolved, guidelines are available. The American Academy of Psychiatry and Law, much as other professional forensic organizations, advocates a split in functions in order to achieve greater objectivity. Specifically its ethical guidelines state: "Treating psychiatrists should generally avoid agreeing to be an expert witness or to perform evaluations of their patients for legal purposes..." This does not mean that there could not be instances where treating psychologists provide important information to the court as witnesses, but they should realize the limitations of their testimony and the effect of their therapeutic alliance. In most cases, for their own protection and that of their patient, they should suggest that an independent expert psychologist be used to whom their records and observations can be provided. Expert psychologists, on the other hand, can not cloak themselves with a pretense of objectivity just because they are not treating psychologists, if their evaluation and testimony practices reveal otherwise. They need to be constantly alert to issues of bias within themselves and strive as much as possible to be neutral agents who may defend their opinions vigorously but avoid advocacy.