

# Psychiatric Consultation and Testimony in Legal Proceedings — Practical Applications for Nebraska Lawyers

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In Nebraska as elsewhere, counsel and testimony of medical experts are increasingly common in a variety of legal settings. Among medical specialties, psychiatry holds a prominent place in this respect due to the range and importance of its medico-legal engagement. This directly reflects the diversity of issues falling under the psychiatrist's scope of practice and expertise. Although lawyers with significant involvement in criminal law, estate planning, and family law are likely to be well acquainted with the use of psychiatric consults, expert psychiatrists actually operate on a significantly broader scale. The range of issues is broad enough, in fact, to have given rise to the distinct medico-legal subspecialty of forensic psychiatry, replete with American Board of Medical Specialties certification.



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This article presents an overview of the use of forensic psychiatric consults and testimony in legal proceedings by 1) explaining the qualifications of the forensic psychiatrist, 2) discussing the areas of law with which forensic psychiatrists are most typically involved, and 3) describing forensic psychiatry resources available to Nebraska attorneys.

## Training and Accreditation in Forensic Psychiatry

Recognition of forensic psychiatry as a distinct subspecialty is a relatively recent phenomenon. In the United States, the American Board of Psychiatry and Neurology (ABPN) first established board accreditation standards in Forensic Psychiatry in 1994. As of 2002, 1384 US psychiatrists held ABPN board certification in the subspecialty.<sup>1</sup>

First trained as a physician and then as a psychiatrist, the forensic psychiatrist is now most commonly trained under a one-year fellowship after his or her four-year psychiatric residency. The purpose of the fellowship is to equip psychiatrist experts with intensive training in the interplay between law and psychiatry — emphasizing patient-specific issues (e.g., capacity, competency, disability, and emotional harm) as well as medical practice matters (e.g., informed consent procedures, medical and psychiatric standards of care, and various regulatory matters). In addition, forensic psychiatry fellowship training typically involves a thorough grounding in the trial process itself, allowing the psychiatrist to assist attorneys on matters such as jury selection and witness evaluation and preparation.

Although neither the Federal Rules of Evidence<sup>2</sup> nor major cases (notably *Daubert*<sup>3</sup> and progeny) regarding expert testimony require that a testifying psychiatrist have forensic accreditation, completion of a forensic psychiatry fellowship does add to the expert's credibility both in terms of medical credentials and a more specific understanding of his or her own role in the legal system. However, because forensic psychiatry board accreditation has been in place for less than a decade, many experienced forensic psychiatrists practice without formal accredi-

tation and among this group are some of the most highly qualified experts in the field. In fact, in view of *Daubert*, highly specific forensic experience is unlikely ever to reduce to more general subspecialty certification; rather, the depth of a psychiatrist's experience with quite particular matters of forensic expertise will often remain more important than formal accreditation in the subspecialty.

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### Forensic Versus Therapeutic Psychiatry — A Distinction with a Difference

In considering whether and how to use psychiatric consults or testimony, lawyers should take care to recognize the fundamental distinction between a psychiatrist's purely patient-centered role in the therapeutic context and the often partisan nature of serving as an expert in a legal proceeding. A common problem encountered with forensic psychiatric testimony (particularly in cases involving child custody matters, disability disputes, and emotional injury claims) arises where a party seeks expert testimony from a treating psychiatrist. Here the difficulty has less to do with the expert's formal qualifications than the essential difference between the roles of a treating physician and an independent expert. That is, psychiatrist 'dual-agency' is best avoided.

When, for example, a treating psychiatrist testifies in favor of a patient's parenting abilities, both the expert's credibility and the physician-patient relationship are undermined: How credible can such testimony be in view of the ongoing relationship between the physician and patient and the absence of similar relationships with other interested parties? How candidly can the physician be expected to respond when cross-examined about otherwise medically privileged matters that underlie his or her opinions? What damage is done to the future of the physician-patient relationship if the patient feels betrayed by or is simply unsatisfied with

the psychiatrist's in-court performance? Recognizing these inherent conflicts, the American Academy of Psychiatry and the Law (AAPL) has determined in its ethical guidelines that a treating psychiatrist may not ethically testify on behalf of a patient when there exists the alternative of testimony from a non-treating psychiatrist.<sup>4</sup>

In short, although psychiatric consults and testimony can be invaluable in many legal contexts, lawyers should avoid consulting a treating psychiatrist merely on the basis that he or she is 'already familiar' with the patient-client's case. While such familiarity might reduce expenses, any savings could well come at the cost of Aesop's observation that familiarity breeds contempt — here for the expert's ethical posture and, consequently, credibility.

Turning now to specific legal practice settings where attorneys most typically benefit from forensic psychiatry consults and testimony, the remainder of this article will consider the role of psychiatric expert evaluation and testimony in following areas: 1) wills, trusts, and contracts, 2) child custody, guardianship, conservatorship, and civil commitment, 3) employment litigation, 4) general personal injury law, 5) product liability, 6) medical malpractice, 7) criminal law, and 8) general trial consultation.

### Wills, Trusts, and Contracts

Although the standard for the degree of mental competence necessary to make a will is among the most permissive in law, testamentary capacity and undue influence are nevertheless among the most frequently litigated mental health questions.<sup>5</sup> And while forensic psychiatrists are often centrally involved in the litigation of these cases, a salutary trend is that they also be consulted preemptively where the possibility of a challenge is anticipated.

Psychiatric evaluations in conjunction with the rewriting of a will or trust can provide credible evidence of a testator's competence or the absence of undue influence at the time of execution. Such evaluations, often conducted in



conjunction with a videotaping<sup>6</sup> of the execution of the documents, are fast becoming routine in large estates, and are increasingly common even in moderate-size estates where significant hostility exists among potential beneficiaries, particularly if the testator is very ill or elderly.

Similar competence issues may arise in relation to ordinary contracts. For example, in the Nebraska case *Buchanan v. Wilson*,<sup>7</sup> the plaintiff was allowed to rescind a contract for a land trade despite a determination that he was not wholly in competent. Instead, the Court found it sufficient that the defendant had unfairly taken advantage of the plaintiff's diminished mental status at the time of the transaction.

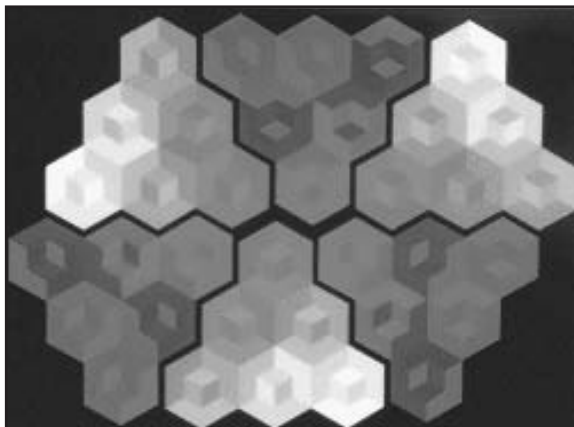
### **Child Custody, Guardianship, Conservatorship, and Civil Commitment**

Child custody cases comprise one of the most routine uses of forensic psychiatry consults, generally in the context of adoption, divorce, or termination of parental rights. Forensic psychiatrists are well versed in the legal concepts underlying the 'best interests of the child' standard<sup>8</sup> and how such questions apply to psychiatric evaluations of the child and prospective primary guardians. Here, the AAPL's admonition against evaluation by a treating psychiatrist is especially applicable, in that proper consideration of the situation typically requires the evaluation of potential caregivers as well as the child.

Although actions concerning guardianship, conservatorship, and civil commitment are not invariably initiated by family members, in the vast majority of these cases at least one family member is indeed intimately involved in the proceedings. For example, guardianship and conservatorship questions (Neb. Rev. Stat. § 30-2601, *et seq.*) most commonly arise out of adult children's concerns about an elderly parent who may suffer from some degree of dementia,<sup>9</sup> in which case the lawyer may find it best to seek an evaluation by a psychiatrist with substantial geriatric expertise in addition to general forensic experience.

Standards for civil commitment are related to but distinct from the standards for

guardianship and conservatorship, as set forth in the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. § 83-1001, *et seq.* Such proceedings invariably involve an expert evaluation by a psychiatrist (or sometimes a psychologist) acting for the state. In a contested case, testimony from an independent forensic psychiatrist may be essential to a person resisting the proceedings.<sup>10</sup>



Civil commitment is also distinguishable from guardianship and conservatorship in view of the far greater loss of autonomy formal commitment entails. Particularly where a mental health commitment is for more than a short duration, forensic psychiatrists are routinely called on to provide consultation and testimony on questions concerning mental health patients' rights to participate in and consent to their psychiatric and other medical care plans, to refuse treatment, and to receive therapy in the least restrictive settings that will serve their needs.<sup>11</sup>

### **Employment Litigation**

Forensic psychiatrists can assist either plaintiffs or defendants in a variety of employment cases, including workers' compensation and disability actions, licensing proceedings, and claims of employment discrimination on the basis of sex, age, race, religion, or other sociological factors, in addition to claims of frank sexual or related harassment.

With the decline in the stigma against mental illness, it is increasingly common for employees to raise mental health problems in workers' compensation cases, Americans with Disabilities Act litigation, and claims for Social Security disability. Likewise, from the defendant's perspec-

tive, forensic psychiatric testimony can be the lynchpin to establishing that a claimant has (or has not) been misdiagnosed, is malingering, or is exaggerating the severity of a claimed disability.

Relatively recent growth in the use of psychiatric testimony has also been seen in the area of professional and other employment licensing. Courts have shown an increasing willingness to

review licensing revocations on mental health grounds, e.g., an appeal by a nurse who has lost his or her license due to past substance abuse problems or an attorney who has suffered from depression and faces disciplinary charges for lack of diligent prosecution of a case. Forensic psychiatric testimony can be essential in such proceedings to establish that the client's problems are *bona fide*, are being treated, and are under control, thus allowing consideration of the client for license reinstatement.

In employment discrimination and sexual harassment claims, psychiatric consultations are frequently obtained to support or refute claims of consequent emotional distress. In addition, a number of recognized diagnostic categories in psychiatry may be investigated by defendants where false accusations of discrimination or sexual harassment are suspected (e.g., antisocial, borderline, dependant, hysterical, and paranoid personality traits, among others). Likewise, even where such accusations are made in apparent good faith, forensic psychiatric testimony may bear upon the reasonableness of the employee's perception of discrimination or harassment.

### **General Personal Injury**

Although forensic psychiatry services are used in only a small percentage of personal injury cases, due to the sheer volume of such actions this area nevertheless makes up a substantial portion of a typical forensic psychiatrist's workload. Moreover, psychic damages and related sequelae are growing as a proportion of claims nationally. On the defense side, ruling out psychiatric mimics to claimed physical injuries or illnesses is often the primary inquiry. On the other hand, plaintiffs' attorneys may likewise find psychiatric evaluations to be invaluable in establishing emotional injury claims,

particularly to meet rising standards that emotional injuries be manifest as both medically diagnosable and medically significant conditions.<sup>12</sup>

In recent years, novel psychiatric concepts have gained in prominence as applied to actions that in the past would more likely have been categorized simply as general emotional injury claims. Notable among these are theories relating to 'fear of illness'<sup>13</sup> and Post Traumatic Stress Disorder,<sup>14</sup> as well as an increasing emphasis on emotional aspects of loss of consortium claims. Similarly, a variety of neuropsychiatric claims increasingly rely on expert psychiatric evaluation and testimony, notably cognitive and emotive changes subsequent to traumatic brain injury. Depending on the nature of the case, an attorney may be able to develop a more credible presentation by illustrating how a more specific psychiatric diagnosis or theory underlies the client's emotional damages claim.

## **Product Liability**

Product liability law is a burgeoning area for medical testimony generally and psy-

chiatric testimony is no exception. Both consumer and medical product cases may raise important issues that can be well addressed by a forensic psychiatrist, although medical cases are more common in this respect. Among medical products cases, forensic psychiatrists tend to be more involved in pharmaceutical product liability cases than medical device actions in view of their more frequent day-to-day experience with the former.

As regards pharmaceutical actions, it should be noted that myriad drugs have so-called 'psychiatric profiles' — not merely those prescribed for psychiatric conditions per se. Thus, for example, although every psychiatrist should hold a full understanding of the details of tardive dyskinesia<sup>15</sup> (a side-effect associated with older anti-psychotic medications), an attorney who suspects a client's depression may be traceable to a high blood pressure medication may find a forensic psychiatrist to be more immediately conversant in the area, particularly as to the related legal issues.

## **Medical Malpractice**

In the context of medical malpractice litigation, issues addressed by forensic psychiatrists range from the very general (e.g., basic standards of care applicable to all physicians regardless of specialty) to those where psychiatric training is particularly useful (e.g., where informed consent is at issue, with testimony as to a plaintiff's ability to understand and consent to a medical procedure). Psychiatric issues also often arise in tort claims related to failure to prevent suicide, homicide, or other violence, as well wrongful decisions to not admit or discharge from a restricted clinical setting.

Of course, as psychiatrists, these witnesses are further and exclusively qualified to testify regarding the standards of care applicable in malpractice actions against others in their specialty, whether such actions are brought by psychiatric patients for negligent treatment or by third parties for failure to warn of substantial dangers posed by certain patients.<sup>16</sup>



## Criminal Law

Criminal law includes a broad range of issues where forensic psychiatric testimony can be central to a defendant's case, among them competence to enter a plea or stand trial, the insanity defense, addiction and its impact on volition, false confessions, and various forms of diminished capacity as mitigating factors in sentencing.<sup>18</sup>

In addition, forensic psychiatrists are often called upon to evaluate purported victims of and witnesses to alleged crimes, particularly in terms of psychological matters that may lead to false accusations or unreliable memories of the events at issue.

## Trial Consultation

With the increased prevalence of trial consultation services in recent years, some forensic psychiatrists have established themselves as experts as to behavioral, cognitive, and related perspectives. Consults regarding jury selection and witness evaluation are increasingly common, as is advice to attorneys who may be contemplating taking on a particular civil matter but wish to confirm that the potential client's claims are well grounded. Similarly, psychiatric experts increasingly assist with formulation of case theory, direct- or cross-examination preparation, and even summation thematics and technique.

Forensic psychiatrists are sometimes also called upon to assist with certain questions of legal ethics. For example, psychiatric evaluations may in some situations indicate that psychological factors relating to memory, perception, or cognitive interpretation are more likely to be at work than a true intent to deceive, such as when an attorney is concerned about possibly suborning perjury due to changes in a client's story.

## Hiring a Forensic Psychiatrist

Advising a legal client regarding a possible need to retain a forensic psychiatrist raises the same sorts of issues that surround other significant litigation expenditures, and should follow a careful examination of the likely costs and benefits. Potential costs of forgoing a consultation

should also be considered and discussed — How much more, for example, might a 90-year-old client's estate spend to defend against a challenge to a will rewritten near the end of a long illness? In a case where the client is already under the care of a psychiatrist, the attorney should also take care to explain the rationale for an independent evaluation by a non-treating psychiatrist, namely, to preserve the existing physician-patient strategic relationship and, perhaps more tactically significant, to avoid damage to the testifying expert's objectivity and credibility.

## *Naturally, whether a psychiatric consultation is cost-effective depends on the circumstances of the case at hand.*

Where cost is a controlling consideration, the attorney may wish to consider having the psychiatrist conduct a preliminary review to determine whether a full-scale evaluation is warranted under the circumstances of the client's case. Such reviews are common, often requiring only a few hours to prepare a preliminary overview of the psychiatric issues involved and to arrive at a good estimate of the time and expense necessary to conduct a full evaluation if warranted. It bears emphasis that, if the fundamentals of a case are robust, cutting corners on expert evaluation and testimony are often a 'false economy'. Moreover, such 'economies' can invite potential later claims of legal malpractice and are, in fact, a factor in the rising rates of such claims.

Although consultation and expert witness fees vary significantly among forensic psychiatrists, typical hourly consultation fees of forensic psychiatrists in Nebraska are between \$200 and \$500 per hour. Local rates compare favorably to the more typical national range from \$300 to \$700 per hour. Billable services typically include initial and subsequent discussions, chart review, patient examination, time spent drafting letters and reports, depositions, trial preparation, court time, as well as any travel-related time and expenses. It should also be noted that hourly fees are typically the only basis by

which forensic psychiatrists charge for their services and that such services are for consultation rather than 'testimony'. That is, an expert is hired for review and independent evaluation but not for an opinion, *per se*. Contingency payments for forensic psychiatric testimony raise obvious issues as to the witness's objectivity and, so, have been deemed unethical by the American Academy of Psychiatry and the Law.<sup>19</sup>

## Conclusion

While the role of psychiatric testimony has long been acknowledged in some legal areas (particularly criminal law, mental health law, estate planning, and family law), in recent years the use of forensic psychiatric consults and testimony has expanded considerably. Attorneys now commonly turn to forensic psychiatrists in relation to claims of disability, emotional distress, and loss of consortium, for trial preparation services such as witness preparation and jury selection, and in quasi-judicial settings such as professional licensing and disciplinary hearings.

Naturally, whether a psychiatric consultation is cost-effective depends on the circumstances of the case at hand. Nevertheless, Nebraska attorneys in need of forensic psychiatry consults and testimony have a variety of experts and resources immediately available to them, typically at a significantly lower cost than in major urban markets. As the knowledge base and theoretical approaches of forensic psychiatry continue to expand, the use of psychiatric expert services in legal proceedings will almost certainly continue to rise as well. **TNL**

*Endnotes available upon request. Contact Kathryn Bellman or Pamela Jo Moore at the NSBA office, (402) 475-7091 or (800) 927-0117 or [kbellman@nebar.com](mailto:kbellman@nebar.com), [pjoore@nebar.com](mailto:pjoore@nebar.com). Endnotes can also be obtained at [www.nebar.com](http://www.nebar.com) under "The Nebraska Lawyer".*