



Giving Opinions in Therapy Cases Involved With the Courts

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Vignettes

1. A patient is seen in psychotherapy after losing his job. The focus in therapy is on the emotional impact of the job loss, but there is also work on the patient's interpersonal problems that contributed to the job loss. Later, his attorney asks your opinion about the emotional impact of the job loss.

2. A chronically angry patient complains that a coworker is driving him crazy. Your formulation is that the patient's difficulties result from a combination of the co-worker's provocative behavior and the patient's emotional fragility and reliance on projection. He has trouble forming a therapeutic alliance and deteriorates. His attorney later asks your opinion about whether the coworker's behavior caused him to deteriorate.

3. The parents of a child patient are in court over custody. The mother asks you to write a letter about whether the current custody arrangement is affecting the child.

In these cases, you do, of course, have a formulation on the issue you're been asked to comment on. In fact, you based your treatment in part on your formulation and thus, you have a professional opinion. Do you give it?


Some psychologists are happy to offer their clinically-based opinions to the courts. Others are reluctant, but from the point of view of the legal system, their reasons often don't "stand up in court." The best of these reasons, in my opinion, is to preserve the privacy of therapy. Unfortunately, the legal protection of psychotherapy privacy—privilege—often either doesn't apply or is waived. Other reasons psychologists want to avoid giving these opinions include fear of lawsuit or board complaints, disruption to their schedules, loss of income, and just plain anxiety. None of these is ultimately convincing to judges or attorneys, who cite the legal system's need for information.

How do psychologists try to avoid giving these opinions? Some psychologists avoid taking "forensic cases," but it is frequently impossible to identify cases that will later be involved in the courts. Others ask patients to agree as a condition of treatment that they will not later ask the psychologist to testify or provide records in a legal context. But when the patient's attorney says that the testimony is needed for their case or the other side's attorney issues a subpoena, such agreements may not hold up.

When a psychologist, willingly or not, must give an opinion, which opinions can ethically be offered? Standard 9.01 of the Ethics Code (Bases for Assessments) states that psychologists must base opinions, including forensic testimony, on information and techniques sufficient to substantiate their findings. To find this line, we

need to ponder the nature of the knowledge we develop in our clinical work. Converging factors point to the conclusion that such clinical knowledge is a heuristic, a construction, a narrative, a pragmatic and useful account, but *not an uncovering of objective truth*. In psychoanalysis, Roy Schafer and Donald Spence have argued rigorously for this view, narrative therapy is based on it, and postmodernists of all stripes are convinced of it. No one who adopts this view thereby becomes hopeless about therapy; on the contrary, they are impressed by the curative power of a sound narrative.

It is difficult even for those who fully embrace this view to avoid lapsing into the experience of objective truth in the consulting room. (I once had the opportunity to ask Schafer whether his experience of doing treatment changed after he concluded that what we think of as objective truth is a narrative construction. His entire answer: "No.") This misperception of our formulations matters greatly when we step into the legal arena, where our opinions may be taken as expert conclusions about objective truth. In that domain, the ethical answer to many or most questions about our clinical cases should be, "I have a formulation sufficient for providing treatment, but to answer that question in a truth-seeking forum, I would need both information from sources other than the patient and training in forensic psychology."

The best source on this issue is Greenberg and Shuman (1997), which would likely be in your packet if you've taken a workshop from APAIT. The APAIT's risk management book (Bennett et al., 2006) has a helpful discussion, too. A therapist asked for an opinion in a legal context will find these sources very helpful. 

References

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