

Legal Update

Editor: Dennis P. Stolle, J.D., Ph.D.

Ethical Challenges for Psychology in the Justice System

By: Linda Chezum

Professor, Purdue University
Department of Youth Development
and Agriculture Education

Adjunct Professor,
IU School of Medicine
Indiana Alcohol Research Center

Many recent changes in juvenile codes, sentencing statutes, and probation and parole policies were made with the laudable aim of avoiding incarceration for mental health and alcohol and drug misuse. These law and policy changes are moving the courts from punitive sentences to treatment approaches. Thus, an expectation that the courts will rely more on frequent utilization of forensic psychology in making their sentencing decisions seems reasonable. The various versions of justice reinvestment, specialty courts, treatment courts, and family treatment courts should increase the demand and number of venues for experts who can provide forensic psychological testimony and services. The use of expert psychological testimony in both state and federal courts has the potential to advance the public confidence in the justice system as being safer, fairer, and more humane. If the reliance on the forensic psychology expert increases as expected, maintaining the public confidence requires facing significant ethical questions for the psychologists and attorneys who work in the justice system. Some of the questions are systemic; other questions are only answerable at the individual personal level, professional by professional. Some may not be interested in addressing the larger systemic ethical questions or decide that those concerns should be someone else's responsibility. Regardless—whether the lawyers, the psychologists, or both address the issues—it is likely that ignoring the questions will not improve the success of treatment in the justice system nor improve public perception of treatment. Assessment and treatment recommendations given in a forensic setting should be held to a standard that recognizes the risk to the patient and community if the treatment fails. To allow the judicial equivalent of returning to the dark ages before treatment because the ethical questions are not adequately resolved would be a disservice to society.

The systemic level questions are:

1. Are there enough adequately trained psychologists to staff the justice system to provide adequate training and supervision of the probation and parole staff in conducting needed screenings?
2. Are there enough adequately trained psychologists to staff the justice system to provide valid assessments?
3. Are there adequately trained psychologists to staff the justice system treatment programs so that the treatment

ordered is appropriate for the individual, culturally and diagnostically and delivered with fidelity to the evidence based model?

4. Are the professionals provided adequate private office space and other resources to conduct the screening, assessments and treatment with competence and confidentiality?

The questions for the forensic psychologists individually are:

1. Do you have the experience and training needed to conduct valid forensic assessments in the justice system in order to recommend treatment plans to the courts? Anyone who testifies beyond the observations and understanding of the ordinary lay person must be qualified as an expert pursuant to the rules of evidence in the jurisdiction.
2. Is the treatment plan you recommend to the court the most appropriate one in meeting the treatment needs of the patient or are you recommending it because the patient needs "something" and your recommendation is what is available?
3. Is the treatment evidence-based and delivered with fidelity to the model that was evaluated?

This column suggests that unless the ethical questions are faced and dealt with in a straightforward fashion, there are risks of returning to the dark ages of incarceration without diagnosis and treatment. In short, the success of the justice reinvestment efforts, the therapeutic courts, and other specialty court approaches will be determined by the public's perception of the success of the treatment ordered by the courts. If on the child protection docket, more families are not successfully reunited or if on the criminal docket, repeat offending does not decrease, the public is likely abandon the treatment approach. If the public perceives treatment as not working, demands for changes to the justice system may imperil treatment efforts. From starting the first court alcohol treatment program to be certified by the Indiana Division of Addiction Services through the last 40 years, this writer has worked to advance the relationship between treatment providers and the courts. Now, after years of fits and starts by drug courts and other specialty courts, the lack of adequate treatment that is specific to the individuals' needs, culturally appropriate, and both geographically and economically accessible, the possibility looms

that the public may rebel at the justice systems' failed attempts to use the power of the courts to "cure" people.

This caution is found in the writing of many researchers. It is notable that those who research justice system programs for alcohol misuse, drug addiction and mental illness note clear caveats in their writing about the need for quality of treatment. In his reports for the different kinds of courts, highly respected researcher, Douglas B. Marlowe, JD, PhD, sets out the importance of the quality of treatment for the success of such programs. In his Research Update on Adult Drug Courts, published by the National Association of Drug Court Professionals, Marlowe states: "The quality of treatment is also a critically important consideration. Significantly better outcomes have been achieved. Drug Courts are proven to retain offenders in treatment considerably longer than most other correctional programs when Drug Courts adopted standardized, evidence-based treatments." In his Research Update on Juvenile Drug Treatment Courts, Marlowe reports: "It would seem that youthful substance-abusing offenders may be unusually intolerant of weak or ineffective efforts. With a relatively narrow margin for error, it is incumbent upon JDTC practitioners to 'get it right' by honing their skills and targeting their interventions most effectively from the outset.... Lackluster results have commonly been reported for programs that failed to offer evidence-based treatments, neglected to include family members or other caregivers in the interventions, or made insufficient efforts to tailor their interventions to the cognitive and maturational levels of the juveniles."

Some family dependency courts also use a treatment court model. In his Research Update on Family Drug Courts, Marlowe reports a number of studies that highlight the need for quickly available and accessible treatment in these courts. For example, looking to research by Worcel, Marlowe reports that "participants who met more frequently with their counselors (typically weekly for at least the first phase of the program) remained in treatment significantly longer and were more likely to complete treatment.

The extent of the coverage of courts using a treatment model varies wildly from state to state. Some states have fewer than ten courts. Some states are not sure how many courts have a treatment model. In contrast, Michigan has 164 problem-solving and other non-traditional courts that help specific offenders get needed treatment under strictly supervised conditions with frequent drug tests and judicial status hearings. The specialty courts are accessible to 97% of Michigan's population. A reasonable conclusion is that Michigan has a court structure that supports treatment approaches but the coverage of the courts does not speak to the adequacy of the treatment available to the court population. The more important and relevant question is whether there is appropriate treatment that is reasonably accessible and available to all of the justice system population. As a state with a high saturation (perhaps the highest) of specialty courts, Michigan would be a very interesting case study. A meaningful evaluation of the areas with adequate treatment resources as compared to those with less treatment would be informative.

There is widespread agreement (at least in theory) that it is desirable for the courts to use assessments and recommendations for addiction and mental health related decisions. The agreement includes the premise that courts should order people to treatment based on the "expert" testimony or accept agreements based on an expert's report. Critical steps are screening, assessment, treatment, aftercare and monitoring. And – the dream is -the communities served by such a justice system will save money, be safer, and the populace will be more productive.

Thus, it is obvious that The American Psychology-Law Society (AP-LS) is situated to have a significant role in the improvement of justice system's use of psychological science. The stated purpose of AP-LS is spot-on: "promotes the contributions of psychology to the understanding of law and legal institutions, the education of psychologists in legal matters and law personnel in psychological matters, and the application of psychology in the legal system." AP-LS defines forensic psychology in a useful and comprehensive manner: "forensic psychology refers to professional practice by any psychologist working within any sub-discipline of psychology (e.g., clinical, developmental, social, cognitive) when applying the scientific, technical, or specialized knowledge of psychology to the law to assist in addressing legal, contractual, and administrative matters." The definition is expanded in the explanation of the application of the AP-LS *Specialty Guidelines for Forensic Psychologists* (Guidelines). It is to the guidelines that one must look for the ethical guidance for the individual psychologist. Indeed, the very first responsibility for the forensic psychologists is on point to the ethical questions confronting both the justice system and the professional.

1.01 Integrity

Forensic practitioners strive for accuracy, honesty, and truthfulness in the science, teaching, and practice of forensic psychology and they strive to resist partisan pressures to provide services in any ways that might tend to be misleading or inaccurate.

If forensic psychologists and treatment options are in short supply in many parts of the US, the first question arising from the section 1.01 Integrity is whether it is ethical for the forensic psychologist "expert" and the proponent of the expert's testimony to recommend treatment because it is available, geographically or economically while knowing that the treatment does not specifically address the patients' needs?

For example, if a defendant has poor eyesight, should the court order the defendant to go to the dime store because it was closer or cheaper than an ophthalmologist? If a person who has impaired vision is ordered to obtain a lens that is cheaper and easier to obtain than a prescription lens that would properly correct the vision is injured or causes an injury because of poor vision, do we say they failed and do not want to see? Is any order for needed treatment or care that does not adequately address the person's needs and help that person correct a deficit an ethical order? Is it ethical for forensic psychologists to recommend makeshift and inadequate treatment solutions when informing the courts on addictions or mental health

needs? If a person fails to get clean and sober with inadequate or inappropriate treatment, should the courts punish them and should they be adjudicated as habitual offenders?

The next question is what are the ethical responsibilities of the forensic psychologist and the lawyers when a system has inadequate assessment, diagnostic and treatment resources for mental health and addictions?

What should be the minimum qualifications for the forensic psychologist to be considered an expert? Who is setting standards for qualifications to conduct an assessment or make a recommendation for treatment to be ordered by the court? The Guidelines, Section 2. COMPETENCE, provide significant guidance for determining who is competent to provide psychological testimony for sentencing and parenting decisions by a court. An obvious conclusion is that many probation and parole officers do not qualify as expert witnesses in providing diagnostic and treatment testimony even though they testify and make psychological recommendations. Many courts avoid the dilemma presented by lack of qualified experts for the expert testimony by issuing an order that the person shall follow any and all treatment recommendations from the court's preferred provider. Ethical responsibilities of the courts are beyond the scope of this column, but AP-LS might be the appropriate body to undertake a cross disciplinary examination of the practice of blanket orders to treatment. Some justice system observers have noted that an ethical assessment and treatment system would require that the assessment be conducted by an entity with no financial or employment stake in the treatment provider. Although the guidelines address this issue in Section 1.03 Avoiding Conflicts of Interest, continuing discussion and consideration beyond the AP-LS with the local and federal justice systems could be useful.

A larger systemic question is why should someone have to go to jail and court to get treatment for a health condition? That question leads to the question of whether the forensic psychologists have a professional duty to advocate for services that are available to the community without having to go to court. Alcohol misuse, drug addictions, and mental health are the only health conditions that routinely require court interventions. As described on the Substance Abuse and Mental Health Services Administration's (SAMHSA's) webpage:

"...far too few people with behavioral health conditions receive the help they need. For instance, data from SAMHSA's National Survey on Drug Use and Health (NSDUH) — 2014 show that in 2014, 15.7 million adults reported having a major depressive episode (MDE) in the past 12 months. Of those, about one-third of adults (33.2%) did not seek professional help during the previous 12 months. The 2014 NSDUH data also show that 21.2 million Americans ages 12 and older needed treatment for an illegal drug or alcohol use problem in 2014. However, only about 2.5 million people received

the specialized treatment they needed in the previous 12 months."

By back loading significant treatment resources into the justice system we are stealing resources from community based treatment providers. If we really believe that treatment can work, why not front load the mental health and addictions treatment systems with outreach to the individuals and families so they can obtain accessible, appropriate and affordable treatment before lives are shattered by criminal records and misguided court orders. The education and outreach about psychological services, forensic or otherwise is not an explicit topic in the guidelines. But if it is not the experts who work with the system who will explain the needs, who will?

The rule of law is threatened when the science used by the courts is biased, arbitrary, or otherwise unreliable. A decision using flawed science is likely to produce an unjust result. Whether one is a forensic psychologist or a lawyer, any failure to insure that psychological testimony provided is ethically produced and ethically explained, harms the entire justice system. Ethical science as evidence is an area which needs significant discussion and forensic science as a collection of disciplines has only taken baby steps. As a starting point, my recent book -- *Science, Ethics, and Justice* -- asks many questions about how science might ethically inform law and policy. One premise of the book is that the scientists and lawyers have to work together to understand the ethical boundaries. AP-LS members have the opportunity to engage in such a process by starting with education of the legal profession about its Guidelines. Using the Guidelines as a framework to discuss some of the ethical issues presented by expert psychological testimony, AP-LS could provide a model for other forensic disciplines to advance and strengthen forensic science and protect the rule of law. As a division of the APA, the Society likely has access to resources beyond its own members. By seeking to address the ethical and legal requirements of scientific evidence across varied disciplines, we will strengthen the guarantee of the rule of law.

