

# Ethical Issues in Personality Assessment in Forensic Psychology

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In this article we address several ethical issues of concern for psychologists who are engaged in personality assessment in forensic settings such as for courts or attorneys. The ethical issues reviewed include the role of the psychologist as an expert witness, matters of competence, informed consent, confidentiality, multiple relationships, and special issues related to billing. Emphasis is placed on how psychologists can provide useful information to the courts in a manner consistent with the American Psychological Association's (APA; 1992) *Ethical Principles of Psychologists and Code of Conduct*, the Committee on Ethical Guidelines for Forensic Psychologist's (1991) *Specialty Guidelines for Forensic Psychologists*, and the APA's (1994) *Guidelines for Child Custody Evaluations in Divorce Proceedings*. The practical recommendations made in this article are consistent with the APA's *Ethical Principles of Psychologists and Code of Conduct*.

Increasingly, psychologists are playing important roles as expert witnesses providing information to the courts or to attorneys who are representing clients before the courts. This article is not intended to be a "how-to" manual for forensic evaluations. Rather, it highlights some common ethical issues that emerge when psychologists conduct forensic personality assessments.

Most doctoral programs do not train students to work in forensic psychology; however, psychologists entering this arena can make serious mistakes if they do not familiarize themselves with its unique rules and ethical dilemmas. Forensic psy-

chology involves legal risks, and the reasons for the increased legal risk are not hard to understand. Although good feelings and a positive therapeutic relationship are common in the psychologist–patient treatment relationship, the same degree of good feeling does not necessarily occur in the forensic setting. Indeed, the report of the forensic psychologist, if not favorable to the client being evaluated, may engender intense ill feelings and a desire for revenge that may take the form of a malpractice suit, licensing board complaint, or ethics complaint. The primary source documents that guide psychologists doing forensic work are the American Psychological Association's (APA; 1992) *Ethical Principles of Psychologists and Code of Conduct* (hereafter referred to as the *Ethics Code*), which has a special section on forensic psychology, and the *Specialty Guidelines for Forensic Psychologists* (Committee on Ethical Guidelines for Forensic Psychologists [CEGFP], 1991) from Division 41, Society for Law and Psychology. The *Guidelines for Child Custody Evaluations in Divorce Proceedings* (APA, 1994) are also relevant for child custody evaluations. In addition, psychologists need to know the laws of their state or province, especially regarding the duty to protect, child abuse, and other mandated reporting laws. The article in this issue by Bricklin provides a model with examples for considering ethical dilemmas that may arise in assessment.

## ROLE OF THE EXPERT WITNESS

A psychologist may be involved in a forensic examination either as a court-appointed evaluator or as an employee of an attorney. When attorneys hire psychologists, their work falls under the attorney–client privilege, and some courts have ruled that the attorneys may, after reviewing the reports or comments of the psychologists, choose not to reveal that information in court (Knapp, VandeCreek, & Fulero, 1993). However, when psychologists do appear in court, either as a court-appointed evaluator or an employee of one attorney, they typically assume the role of an expert witness.

The basic assumption of the Anglo American legal tradition is that truth is best obtained through an adversarial process by which two sides confront each other with facts, questions, information, and evidence. The legal system generates a verdict in which one side is found guilty/not guilty or liable/not liable, depending on the nature of the case. The adversarial role differs considerably from the psychotherapeutic role where reconciliation, agreement, and cooperation are the norm. Psychologists perform best as expert witnesses when they understand and accept the adversarial milieu of the courtroom setting. Although the exact rules vary from jurisdiction to jurisdiction, the general rule is that expert witnesses provide information that is outside the expertise of the everyday layperson. That is, the typical judge or juror would not be expected to have the in-depth information on a specific topic that is obtained from the expert witness. The judge allows the

experts to express opinions based on their knowledge of a particular issue or question. Traditional areas of expert testimony include medicine, engineering, finances, accounting, psychiatry, and psychology.

Whether a psychologist is admitted as an expert depends on the judge who reviews his or her education, training, and experience and how it relates to the specific question before the court. Opposing counsel can always object to the admission of the expert witness. However, the judge has the final decision on who is, or is not, an expert.

Psychologists disagree among themselves as to whether they should be allowed to testify concerning the ultimate question or issue before the presiding judge (e.g., Who should have custody of the child? Was the defendant insane at the time of the murder?). Again, whether a psychologist is allowed to testify on that issue depends on the presiding judge.

Regardless of whether psychologists do or do not testify on the ultimate question, the *Ethics Code* requires that psychologists base their conclusions from the forensic assessments and their recommendations “on information and techniques (including personal interviews of the individual, when appropriate) sufficient to provide appropriate substantiation for the findings” (Standard 7.02, p. 14, APA, 1992). The *Guidelines for Child Custody Evaluations in Divorce Proceedings* (APA, 1994) go even further and state that “the psychologist uses multiple methods of data gathering” (p. 679). It is vital that expert witnesses present accurate and precise information to the court. There are many complex issues before the court that do not have simple answers. For example, there have been some noticeable improvements over the years in the ability of psychologists and other mental health professionals to predict violence. Nonetheless, the best model for predicting violence is analogous to a meteorological prediction in which the probability of violence is reported; not a prediction presented in absolute terms (Monahan & Steadman, 1996).

The requirement for accuracy also means that psychologists should provide written or oral reports “of the psychological characteristics of an individual only after they have conducted an examination of the individual adequate to support their statements or conclusions” (APA, Standard 7.02(b), p. 14, 1992). Similarly, psychologists should refrain from making professional statements about persons whom they have not personally evaluated.

### EXAMPLE 1: AN IMPRUDENT COMMENT

A psychologist was hired by a mother to do a custody evaluation. The father did not agree to the evaluation and did not participate in any way. During the course of the evaluation the children made several credible critical comments about their father’s disciplinary style. In his final report the psychologist

wrote that the father had “authoritarian tendencies and could benefit from participating in parenting classes.”

In this case, the psychologist was brought before his state licensing board and given a reprimand. As a practical point, evaluations based on the participation of only one parent are often limited in their value to the court. If they must be done, however, the evaluators should refrain from making comments about persons whom they have not professionally evaluated directly. The most that the psychologist could have said under the circumstances was that “the children reported discomfort with their father’s disciplinary style” or some other similar statement that reflected that the source of the comment was from the children.

Attorneys may sometimes make useful suggestions concerning the content or presentation of the psychological report. They may have relevant background information on the client or may help psychologists improve the clarity of their reports. However, attorneys are advocates for their clients and because they do not appear in court as experts, are not bound by the same rules of professional objectivity. Input from attorneys should be listened to carefully, but it should not override psychologists’ professional opinions.

## COMPETENCE

According to the *Ethics Code* (APA, 1992, Principle 1.04a), psychologists are required to restrict their practice to their areas of competence or expertise. Principle 1.04a states that

Psychologists provide services, teach, and conduct research only within the boundaries of their competence, based on their education, training, supervised experience, or appropriate professional experience. (p. 4)

The *Specialty Guidelines for Forensic Psychologists* (CEGFP, 1991) has a similar provision. In addition, the *Guidelines for Child Custody Evaluations in Divorce Proceedings* (APA, 1994) explicitly acknowledges that competence in performing psychological assessments of children or adults is necessary but not sufficient to be able to conduct a child custody evaluation. Furthermore, competent psychologists are knowledgeable “in the areas of child and family development, child and family psychopathology, and the impact of divorce on children” (APA, 1994, p. 678). Even then, issues may arise outside of the competence of the individual psychologist who then should seek consultation or make a referral.

How do psychologists know if they are competent to provide forensic personality assessments? The general rule is that psychologists can best obtain proficiency in a certain skill by submitting themselves to external feedback. The most obvious

example of external feedback is when a person attends a graduate program and submits to the feedback and evaluation of faculty and clinical supervisors. However, psychologists may feel a need to develop expertise in a different or emerging area of professional practice such as forensic psychology. In some areas it is possible for psychotherapists to obtain a proficiency credential such as from the American Board of Forensic Psychology or the Professional Academy of Custody Evaluators. However, for other areas of specialty work there may be no uniformly agreed on course of study (set of readings, workshops, or classes) or examination for psychologists to complete that would ensure that they have reached the desired stage of proficiency. In those situations, in addition to undergoing a self-prescribed course of readings and continuing education programs, psychologists should submit their work product to the detailed and routine evaluation of another mental health professional who is an expert in that field. This can be done through the submission of tapes, copies of reports, or other work products that the supervisor can evaluate to determine if the desired level of competency has been reached.

#### EXAMPLE 2: WHAT ARE THE LIMITS OF CONFIDENCE

A young psychologist, who is highly proficient in personality assessment, was asked to review the findings of a forensic psychologist in an insanity case. The young psychologist reviewed the raw data and concluded that the defendant indeed was insane, noting the classic 6–9 profile on the valid MMPI–2 profile (paranoia and schizophrenia scales), the bizarre responses reported in the interview, and the disturbed responses on the projective tests. “It is a cut-and-dry case,” the young psychologist reported.

In this example, the young psychologist’s report and testimony were thoroughly discredited in court. The issue before the court was not whether the defendant was mentally ill: he obviously was. Instead, the issue before the court was whether he met the legal definition of insanity. Although he was highly proficient in personality assessment, this psychologist should have received consultation or supervision in forensic cases before presuming to present himself as competent in this domain of practice.

#### INFORMED CONSENT

Informed consent is an axiom of professional ethics. As applied to forensic evaluations, informed consent applies both to informing the attorney who may be hiring the psychologist and informing the client who is being evaluated. The *Ethics Code* requires that informed consent be obtained “using language that is reasonably un-

derstandable to participants” (APA, 1992, Principle 4.02, p. 9). The *Ethics Code* acknowledges that the ability to consent varies with individuals and that undue influence should not be exercised in the consent process. Relevant limitations on confidentiality (Standard 5.01) and information about financial responsibilities (Standard 1.25) should be explained at the beginning stages of therapy. The *Specialty Guidelines for Forensic Psychologists* states that the psychologist should inform the party “of factors that might reasonably affect the decision to contract with the forensic psychologist” (CEGFP, 1991, p. 443). These factors include the fee structure, prior or current personal or professional activities that might produce a conflict of interest, areas of competence and limits to the areas of competence, and the known scientific bases and limitations of the methods and procedures that the psychologist will employ. It also means informing clients about the relevant limitations of confidentiality. The *Guidelines for Child Custody Evaluations in Divorce Proceedings* (APA, 1994) has a similar provision. Although not explicitly discussed in these documents, psychologists should also inform the attorney or client of the possibility that they may need to seek additional consultation from other mental health professionals if needed.

In forensic evaluations, the court may order clients to submit to an evaluation against their will. In that sense, the client is not consenting to the evaluation. Nonetheless, the psychologist still has the responsibility to give the reluctant client relevant information about the nature of the examination and the future use of information. In addition to representing an ethical or legal obligation, informed consent also reflects good clinical practice. The informed consent process is an opportunity to engage the client in the evaluative process, correct mistaken expectations, and encourage adherence to the evaluation. Certainly, in a forensic environment it would be necessary to clarify the role of the evaluator and how it contrasts to the role of a psychotherapist.

Informed consent represents an ongoing dialogue between the psychologist and client and is not merely the rote dissemination of a predetermined set of facts. Therefore, the information provided at the beginning of the evaluation may be insufficient as new clinical or legal issues unfold. Certainly, the essential information on informed consent should be repeated at the start of each new assessment session. Brochures or informed consent forms may help if they supplement, not replace, the dialogue between psychologist and client. Such forms can include basic information about billing policies, scheduling appointments, fees for canceled appointments, common exceptions to confidentiality, and so on. However, psychologists are mistaken if they place too much reliance on a written form. Handelsman et al. (1995) found that a sample of consent forms used by mental health professionals in Colorado had a readability scale of 15.74 grade level (college senior level), suggesting that many clients were unable to understand the forms that were submitted to them. Practitioners who rely solely on written forms may neglect to talk with clients about their expressed or anticipated concerns. Another mistake is the failure to tailor the in-

formation to the needs of the client and the failure to allow sufficient time to answer questions. When implemented properly, informed consent fulfills both the clinical demands and the ethical obligations of the psychologist.

### EXAMPLE 3: A FORM IS NOT ENOUGH

A psychologist conducted a court-ordered evaluation of a prisoner. Before the interview started the psychologist briefly told the defendant the purpose of the interview and explained that the information would be shared with the court. The psychologist provided and discussed appropriate release of information forms and a detailed informed consent form and gave a copy to the client. During the trial, the defendant acted genuinely surprised when the psychologist appeared in court and repeated the content of their interviews.

The psychologist had technically fulfilled his responsibilities by informing the patient of the nature of the interview and obtained a signed consent form. Despite this fact, the defendant still did not understand the nature of the interview. Perhaps the anxiety of the defendant interfered with his ability to attend to what the psychologist stated. Perhaps the defendant had a strongly held presumption that anyone called “doctor” was there for treatment. In any event, in hindsight the psychologist should have done more to apprise the defendant of the nature of the interview and the use of the information.

### RECORDING AND RELEASING INFORMATION

The first rules of confidentiality were based on the professional codes of ethics (such as the APA's, 1992, *Ethics Code*), although these rules were later supplemented by state laws and court decisions that penalized the unauthorized release of patient information. In addition, privileged communication laws permit patients to withhold information from the courts in limited circumstances. However, privileged communication laws do not typically apply in court-ordered examinations. Nonetheless, psychologists should be scrupulous about getting release of information forms signed ahead of time by all parties and informing them of the limitations of confidentiality of the results of their evaluation.

At times, attorneys ask psychologists to examine clients for them and may, depending on the results, use the information in court. In those cases, some jurisdictions rule that the work of the psychologist falls within the attorney–client privilege and is not available to the court. Other courts, however, disagree and do not hold those communications to be protected by the attorney–client privilege (Knapp et al., 1993). The issue of whether the work product of the psychologists gets admitted into court is ultimately the decision of the judge. In any event, psychologists should do the best work they can and be able to document all of their

conclusions, whether their work will be subjected to examination. Record keeping is very important for the forensic psychologist. The *Specialty Guidelines for Forensic Psychologists* (CEGFP, 1991) states that the record-keeping standard “is higher than the normative standard for general clinical practice [and it should be the] best documentation possible under the circumstances” (p. 445, VI. B). The records should contain information sufficient to justify the decisions made by the psychologist. Information contrary to the opinions of the psychologists should be included as well, including reasons why that information did not change or influence the final opinions found in the report.

It should be anticipated that the court or another professional will review the records. Consequently, forensic psychologists should be prepared to send all of their notes and test data, including raw test data, to an appropriately qualified professional. One of the conflicts that can occur in this otherwise straightforward scenario is that the request may direct that the records be sent to an attorney who does not have the training to understand or appreciate the nature of the raw test data. Although it is not our goal to review all of the possible responses of psychologists to such requests, APA’s Committee on Legal Issues (1996) delineated a series of strategies that can reduce the likelihood of such a confrontation, and provide guidance when that confrontation does occur. Whether the information goes to an expert directly or via an attorney, however, forensic psychologists should be aware that the raw test data, scoring, results, and interpretation will most likely be scrutinized by another health care professional who will carefully check the data for errors or alternative interpretations.

During forensic examinations, psychologists need to be scrupulous concerning their questioning of clients about events or facts directly related to the crime or injury that formed the basis of the legal proceeding. Although the rules for admission of such statements into court vary according to jurisdiction, the *Specialty Guidelines for Forensic Psychologists* (CEGFP, 1991, see V. G) urges psychologists to exercise extreme caution in preparing reports or offering testimony so that the prohibition against self-incrimination is not inadvertently violated.

## AVOIDING MULTIPLE RELATIONSHIPS

The prohibition against conflicting and multiple roles can be found in the APA (1992) *Ethics Code*, the APA (1994) *Guidelines on Child Custody Evaluations in Divorce Proceedings*, and the *Specialty Guidelines of Forensic Psychologists* (CEGFP, 1991). The APA *Ethics Code* states that

In most circumstances, psychologists avoid performing multiple and potentially conflicting roles in forensic matters. When psychologists may be called on to serve in more than one role in a legal proceeding—for example, as a consultant or expert for one party or for the court and as a fact witness—they clarify role expectations and the

extent of confidentiality in advance to the extent feasible, and thereafter as changes occur, in order to avoid compromising their professional judgment and objectivity and in order to avoid misleading others regarding their role. (Standard 7.03, p. 14)

However, all of these source documents include some language that acknowledges unusual situations, such as in a small forensic hospital or a small community, where such multiple involvements may be unavoidable. For example, the *Specialty Guidelines for Forensic Psychologists* (CEGFP, 1991) states that “the forensic psychologist takes reasonable steps to minimize the potential negative effects of these circumstances on the rights of the party, confidentiality, and the process of treatment and evaluation” (p. 443, IV [D] [2]). The *Specialty Guidelines for Forensic Psychologists* also recognizes that, at times, it may be necessary to provide emergency mental health services to clients being evaluated. In such cases, forensic psychologists “attempt to avoid providing further professional forensic services to that defendant unless that relationship is reasonably unavoidable” (p. 446, VI, [D] [2]).

These standards recognize that any psychotherapist who moves into the role of an evaluator will be at a disadvantage because of the likelihood of transference and the loss of objectivity. It will prove difficult to publicly discuss the client candidly on one day, including a description of all of the client’s shortcomings or family secrets, and then simply pick up treatment where it was left off the next week. Consequently, psychologists should decline the role of evaluator when a therapy client enters a custody dispute. Furthermore, a psychotherapist in this example will be cautious about offering any testimony in the custody dispute because the role of expert witness may conflict with the therapeutic role.

#### EXAMPLE 4: JUST ONE LETTER

A psychologist was treating the children of a separated couple. The children reported that they preferred to live with mother. Later the mother requested that the psychologist write a letter to her attorney describing the progress of therapy. After receiving the letter, the mother’s attorney called stating, “I don’t want you to do a custody evaluation, but I would like you to share your opinions as to where the children should live.”

There is an old phrase, “it looks like a duck, walks like a duck, and quacks like a duck, then it is a duck.” Even though the mother’s attorney said he did not want this to be a child custody evaluation, in essence, as soon as the psychologist gives a recommendation as to where the children should live, he or she is conducting a child custody evaluation.

Often, patients who are involved in other types of litigation will enter therapy. They may have initiated a lawsuit involving an accident (automobile, tripping on

the sidewalk, etc.), wrongful termination of employment, sexual harassment, child custody, domestic abuse, or some other issue. These patients may present for therapy with an apparently routine disorder (depression, problem with children, etc.), but soon after treatment begins, they may try to solicit the involvement of the therapist in their court case. Nothing is wrong, of course, with treating a patient who is involved in litigation. However, these patients need to know that the involvement of the psychologist in the litigation may mean that the confidentiality of the sessions may be compromised if they enter their mental health as an issue in litigation. Furthermore, they need to know that the very process of litigation for emotional damages has, in and of itself, subtle pressures to maintain a sick role.

The process of questioning and continuing to focus on their illnesses may undercut the natural process of recovery and dissuade the patients from putting the trauma in the past and getting on with their lives. Psychologists have two ways of handling these situations. First, psychologists should try to identify these patients early. All patients should be routinely asked if they are involved in current litigation. Also, all patients who have recent physical injuries or who request help with their child's problems, should be asked for more details about their life circumstances and the possibility of litigation. Second, if litigation does appear unexpectedly in the course of therapy, psychologists need to communicate clearly to the patient the nature of their involvement. For example, some conscientious psychologists cite the APA (1994) *Guidelines on Child Custody Evaluations in Divorce Proceedings* as reasons not to move from a treatment to an evaluation relationship for children involved in custody disputes.

### MAKE FINANCIAL ARRANGEMENTS IN ADVANCE

The APA (1992) *Ethics Code* states that, "as early as is feasible in a professional relationship, the psychologist and the patient ... reach an agreement specifying the fees for the services and the billing arrangements" (Principle 1.25, p. 6). According to the principle of informed consent, clients and attorneys should know the important elements of what they are getting into ahead of time. Discussing these issues early in the relationship reduces further confusion and misunderstandings.

Prudent psychologists inform clients, their attorneys, or both of the cost for the assessment and other payment policies including acceptance of credit cards, policy on billing for missed appointments, and range of services covered (report writing, testing, phone calls, court testimony, etc.). It is legitimate for psychologists to charge for all the time expended in the case including travel time, preparation, and all time spent in the courtroom. A written statement or service brochure that contains information on fees, billings, and collections could be given at the initial in-office contact. The service brochure might also specify the credentials and professional services of the psychologist as well as other office financial procedures.

Psychologists working on forensic cases should not be paid on a contingency basis (getting paid only if the client wins in court). Such arrangements give the appearance that psychologists could taint their testimony for their own financial gain (see CEGFP, 1991, p, 443, IV B). In addition, the client may lose the case, or the award may be much less than expected. Woody (1991) cautioned that letters of promise to pay from the client's attorney have little legal weight and should not be overvalued.

Although it is not an ethical requirement, it is prudent for psychologists to get paid in advance for their work. Failure to do so may result in a situation in which the client or the client's attorney will stall or withhold payment for the services if the report from the psychologist does not contain the elements that they wanted. Such a fee dispute can tarnish the perceived objectivity of the expert witness or result in subtle bargaining for changes in the report.

### EXAMPLE 5: COVERT BARGAINING

A psychologist wrote a custody report for the court which included some critical comments about the father. The psychologist then received a phone call from father's attorney requesting some wording modifications on the report. The psychologist made no other promise, but to consider the wording changes. The attorney then described the financial problems his client was having and said, "I'll see what I can do about getting him to pay you for your services." Although there was no explicit mention of payment being done in exchange for changing the wording, the implication was clear.

The psychologist did not make the change and never received payment from the father. The double bind of the psychologist was obvious. If he or she pursued the nonpayment issue with the father, he could claim that the report was biased because of the financial dispute between them. On the other hand, the welfare of the children dictated that the court receives the benefit of the report.

### CONCLUSIONS

Forensic work can be rewarding for psychologists, and it constitutes another area in which psychologists make a substantial contribution to public welfare. However, it does entail its unique set of ethical risks. Prudent psychologists can greatly reduce the likelihood of difficulty by attending to the potential problem areas delineated earlier.

### ACKNOWLEDGMENT

The views expressed here do not necessarily represent those of the Pennsylvania Psychological Association.

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## APPENDIX

## Risk Management Checklist

1. Are you familiar with general courtroom procedures including the role of expert witnesses?
2. Have you obtained the necessary competence in the area for which you are hired or appointed? Do you seek consultation from knowledgeable professionals when appropriate?
3. Have you informed all parties of the essential features of your forensic assessment including limits to confidentiality and fees?
4. Have you documented the basis for your conclusions adequately? Are you prepared to have your work, including your raw data, evaluated by another qualified expert? Do you appropriately identify the limitations of your testimony?
5. Have you secured all necessary release of information forms? Are your reports and/or testimony phrased in a manner that reduces the likelihood that self-incriminating statements will be included?
6. Have you avoided multiple relationships when conducting forensic evaluations? If a multiple relationship is unavoidable, have you made the prior relationships known and limited their intrusion upon the truth-seeking function of the court?

7. Do you make financial arrangements known in advance? Do you avoid contingency fees? Do you insist on being paid in advance?

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Received May 15, 2001