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ETHICAL ISSUES IN CONDUCTING FORENSIC EVALUATIONS

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UNIQUE NATURE OF FORENSIC MENTAL HEALTH PRACTICE

The role of the forensic mental health professional (MHP) often differs substantially from that of the typical clinician. These differences bear directly on the ethical delivery of services (Canter, Bennett, Jones & Nagy, 1994; Heilbrun, 2001, 2003).

For the therapist, the client is the individual presenting for treatment; in forensic evaluations this is rarely the case (cf. Greenberg & Shuman, 1997). This distinction carries with it important ramifications for informed consent or disclosure as well as the control and use of information obtained during the course of the evaluation. Additionally, the customary therapeutic alliance and typical assurances of confidentiality do not exist in a forensic context. Pressure to assume an advocacy position, however subtle, may pose an ethical dilemma for the forensic MHP. Unlike a therapeutic relationship, the forensic evaluation involves limited contact, an adversarial forum, an impartial stance, and a critical, evaluative style that includes reliance on collateral and corroborated information rather than mere assertions by the examinee.

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The content of the clinical forensic interview tends to be much more circumscribed as it is focused narrowly on information pertinent to the relevant psycholegal question to be answered (e.g., mental state at time of offense, competency to stand trial), and careful consideration must be given to the influence of multicultural factors at all stages of the evaluation process.

In this regard, it is worth noting that forensic evaluations often will involve consideration of aspects of human behavior that are not normative and may be quite disturbing. In cases involving potential legal dispositions that are contrary to strongly held personal convictions (e.g., capital punishment), MHPs may find themselves with diminished objectivity (Brodsky, 1990; Weissman & DeBow, 2003; cf. Heilbrun, 2001). To perform forensic evaluations competently it is necessary to approach assessments with as much clinical impartiality as possible. On those occasions where such objectivity appears compromised, the MHP may well consider whether to abstain from participating in the forensic evaluation (Bonnie, 1990; Brodsky, 1990; Specialty Guidelines for Forensic Psychologists, §III[E], 1991).

Forensic MHPs practice in a unique niche and are obligated to meet a high ethical standard. This requires special attention to various issues including confidentiality, clarification of roles, and the intended use and potential recipients of the opinion or evaluation ultimately rendered. Familiarity with legal standards and adherence to professional ethics codes and the forensic specialty guidelines can be used as evidence of a professional commitment to a standard of care, in the event one's opinion is challenged. Professionals who choose to participate in the legal forum must ensure that their performance meets not only the standards of general practice for their profession, but also those pertaining to the forensic specialty, if any (see American Academy of Psychiatry and the Law, 1987; Committee on Ethical Guidelines for Forensic Psychologists, 1991 and the Appendix to this article). Equally important is a thorough knowledge of professional statutory regulations and current legal standards upon which forensic testimony may be

based (as discussed elsewhere in this Issue; for Texas, see also Shuman, 1997).

IDENTIFICATION OF CLIENT

In the practice of traditional clinical psychology, identification of the client is typically straightforward—generally, it is the individual presenting for treatment. In a forensic context, it is rare for the person being evaluated to be the client (Greenberg & Shuman, 1997; Ogloff, 1999). The forensic practitioner may have as a client (a) the individual (*via* his or her attorney), (b) the custodian of the individual (e.g., the Texas Department of Criminal Justice), or (c) the Court (by way of a court order for evaluation). It is important to determine, as part of preparation for the evaluation, a variety of issues including: (a) the specific referral question to be answered (e.g., competency to stand trial), (b) who the client is, and (c) who will have access to the final report. This information is then shared with the examinee.

INFORMED CONSENT VS. DISCLOSURE

Informed consent is a long-held tenet of professional practice. In seeking to share information before decisions are made, informed consent speaks to the importance of personal autonomy and respect for the dignity of people. Disclosure, or notification, on the other hand, seeks merely to inform, not to obtain the consent of the participant.

Notwithstanding the foregoing, in the practice of forensic evaluations, informed consent is often not *legally* required. Generally, informed consent *is* required unless the evaluation is (a) court-ordered, and/or (b) statutorily required. Regardless of whether an informed consent procedure or disclosure process is used, the elements of notification should be similar. The following are important points to be included:

(a) Name of person or agency requesting the evaluation, and the intended recipient(s) of the final product

(b) Other professionals or agencies who will have access to the report
(c) Limits of confidentiality, and the absence of privileged communication
(d) Non-therapeutic nature of the relationship (i.e., evaluator is not a treatment provider)
(e) The psycholegal or referral question to be addressed in the evaluation (e.g., competency to stand trial; mental state at the time of offense)
(f) The type of material that will be collected, and the methods by which the information will be obtained (e.g., psychological tests, interview)
(g) The nature of the legal proceeding(s) at which the examiner may be required to testify (e.g., trial, post-trial sentencing)
(h) The type of information which may require mandatory reporting (e.g., child abuse)
(i) Whether the examinee has a right to decline participation in the evaluation and the possible consequences for declining (adapted from Melton et al., 1997, p. 88)

Unlike non-forensic cases, In the case of court ordered evaluations it is not imperative that the examinee fully understand the disclosure provided—indeed he or she may not be able to (e.g., acute psychosis); however, every effort should be made to facilitate that understanding. If it is clear, despite the evaluator's efforts, that the defendant does not understand the disclosure, this should be noted in the final report. In the event that a defendant has refused to participate, the forensic MHP might wish to consult with the examinee's attorney to facilitate his or her cooperation. In instances where there is neither a court order nor a statutory mandate for the evaluation, informed consent is generally required. In cases where the examinee is not competent to provide such consent, counsel should be consulted regarding the possibility of consent by an authorized third party.

Written versus verbal notification

Debate exists regarding the necessity of offering written consent or disclosure information as opposed to a verbal notifica-

tion. Some experts recommend providing a written form containing all pertinent details (Melton et al., 1997), whereas others note that, although ideal, a written form is not necessary (Shapiro, 1999). In any case, the consent or disclosure process, whether written or verbal, should be noted and documented within the practitioner's files. In general, given the importance of the doctrine of informed consent in the mental health professions as well as the potential legal ramifications should the examinee later argue non-notification, it may be advisable to consider using a written form as a matter of practice. Conscientious documentation may forestall later problems—evidence of the consent/disclosure process can be compelled by law (e.g., competence to stand trial or fitness to proceed hearings).

Special considerations: Mental illness, mental retardation, and participation of juveniles

With all examinees, but especially with juveniles and individuals who have cognitive limitations, the precise nature of the professional relationship should be explained carefully. It is useful to state clearly, for example, "I have been ordered by the judge in your case to conduct this evaluation. My report will be given not only to your attorney, but also to the judge and the District Attorney. She will have access to everything that I put in my report. Do you understand?" Some juveniles may require communication that is simple and concrete, in keeping with appropriate levels of cognitive development. Juveniles also may exhibit more limited understanding of their rights (e.g., self-incrimination), and thus require sensitive handling of ethical issues, and perhaps repeated reminders of important information.

With many forms of mental illness the ability to receive and process information is impaired. For example, individuals who are floridly psychotic or delusional may not possess the ability to attend to and process information until he or she has been stabilized with medication. Although mental retardation is not a mental *illness,* the impact of the condition on communication may be equally problematic. Mental retardation manifests itself in a number of characteristic traits that interact to create certain vulnerabilities in examinees undergoing forensic evaluation. Furthermore,

individuals with mental retardation may not be easily identified as many have learned to adapt by emulating their "normal" peers, and often feign understanding so as to avoid stigmatizing labels; this is the so-called "cloak of competence." With such individuals there is also a tendency to acquiesce in order to please authority figures, and a heightened suggestibility to leading questions (see Melton et al., 1997, p. 171).

The forensic practitioner bears an ethical responsibility to be aware of the characteristics and vulnerabilities of individuals with mental retardation, mental illness, and age-related cognitive limitations during the course of conducting an evaluation.

PRODUCING A FORENSIC REPORT WITHOUT A CLINICAL INTERVIEW

In the vast majority of cases, an integral part of the forensic evaluation is a clinical interview with the evaluee; this is certainly the preferred and optimal situation. However, in some instances an interview is not possible because either the evaluee declines to participate, or circumstances do not so allow. Consider however, that if MHPs refused to perform evaluations absent an interview, any defendant could halt court proceedings simply by refusing to comply. Ethical guidelines for both psychologists and psychiatrists acknowledge the occasions where an interview is not feasible but there is sufficient collateral information to formulate an opinion with a reasonable degree of clinical certainty. In such circumstances, MHPs must state clearly in their work product (whether oral or written) the limitations that this situation imposes.

> Forensic psychologists avoid giving written or oral evidence about the psychological characteristics of particular individuals when they have not had an opportunity to conduct an examination of the individual adequate to the scope of the statements, opinions, or conclusions to be issued. Forensic psychologists make every reasonable effort to conduct such examinations. When it is not possible or feasible to do so, they make clear the impact of such limitations on the reliability and validity of their professional products,

evidence, or testimony. (Specialty Guidelines for Forensic Psychologists, §VI[H], 1991)

While there are authorities who would bar an expert opinion in regard to an individual who has not been personally examined, it is the position of the Academy that if, after earnest effort, it is not possible to conduct a personal examination, an opinion may be rendered on the basis of other information. However, under such circumstances, it is the responsibility of the forensic psychiatrist to assure that the statement of their opinion and any reports of testimony based on those opinions, clearly indicate that there was no personal examination and the opinions expressed are thereby limited. (Ethical Guidelines for the Practice of Forensic Psychiatry, §IV, 1987)

CONFIDENTIALITY

In the forensic arena, MHPs may be well advised to assume *non*-confidentiality as a general matter, and to conduct evaluations accordingly. Although there are many instances in which the examinee is owed *no duty* of confidentiality (e.g., court ordered or statutorily mandated evaluations), the doctrines of informed consent, the ethical standards of MHPs, or both may require that such an individual be informed, at the outset, of the *absence* of confidentiality.

Where the defense has retained the forensic examiner, most courts have found the results of the forensic evaluation to be protected by attorney-client privilege unless and until the defense raises the issue of mental state, thus waiving privilege. However, pretrial discovery provisions vary and, thus, it may be unadvisable to offer complete confidentiality assurances under *any* circumstances (Melton et al., 1997). Finally, if the evaluation is court ordered, the examinee should be notified that *no* privilege exists, and that copies of the final report will be given to the prosecutor and judge as well as his or her defense attorney. One exception would be a court order specifically appointing the evaluator to assist the defense counsel (e.g., in response to an *Ake* motion; Ake v. Oklahoma, 1985).

LEGAL PRIVILEGE, LIMITS ON CONFIDENTIALITY, AND ETHICAL GUIDELINES

In Texas, privilege is broad and extends to persons "licensed or certified by the State of Texas in the diagnosis, evaluation or treatment of any mental or emotional disorder," or "involved in the treatment or examination of drug abusers" (Tex. Rule Evid. 510(a)(1)). Despite the application of privilege to a wide range of mental health professionals in Texas, privilege should not be an issue for most forensic evaluators as it attaches mainly to therapeutic encounters and not forensic assessments. Regardless, in most forensic evaluations the issue of mental state has already been raised and, thus, any existing privilege has been waived.

Civil Rights

Although all clinicians have a responsibility to be respectful of the rights of those to whom they provide services, the responsibility for clinicians doing forensic work is even more pronounced. Forensic MHPs have an ethical obligation to make themselves aware of and be sensitive to the civil rights of forensic examinees. This is because the evaluative *context* (i.e., criminal justice setting, crimes alleged) is such that the threats to those rights are more substantial. Although other rights may be implicated as well, rights secured under the Fifth and Sixth Amendments to the Constitution (and their State constitutional counterparts) are at issue most often.

Fifth Amendment privilege against self-incrimination

The privilege against self-incrimination is a cornerstone of our legal system. It reflects the belief that no person accused of a crime should be forced to provide testimonial evidence against himself or herself. In *Estelle v. Smith* (1981), the Supreme Court held the defendant's Fifth Amendment privilege against self-incrimination was violated because he was not advised prior to the psychiatric evaluation (for competency) that he had a right to remain silent, and that any statement he made could be used against him in a later sentencing proceeding.

Texas law specifically circumscribes the use of defendant statements made during a mental health evaluation:

> A statement made by a defendant during an examination or hearing on the defendant's incompetency, the testimony of an expert based on that statement, and evidence obtained as a result of that statement may not be admitted in evidence against the defendant in any criminal proceeding, other than at: (1) a hearing on the defendant's incompetency; or (2) any proceeding at which the defendant first introduces into evidence a statement testimony or evidence [regarding mental state.] Tex. Code Crim. Proc. Art. 46B.007 (Lexis 2005)

Defendants, however, are often very concerned that prejudicial information will be given to the court and/or the prosecutor, even though the specific statements are inadmissible at trial.

Fifth Amendment implications are one reason for being mindful of the uses to which defendants' statements may be put; it is important to exercise caution not only about obtaining information (i.e., through appropriate consent/disclosure procedures), but also about communicating that information (e.g., by avoiding certain offense-related information of an irrelevant nature, in competence reports). Beyond Fifth Amendment concerns, forensic examiners also must be aware that much of what can be generally said about an examinee may be prejudicial in the eyes of the fact finder. Accordingly, forensic evaluators should exercise caution during the interview and refrain from obtaining or recounting information that is not relevant to the psycholegal issue at hand.

Sixth Amendment right to counsel

As a general matter, forensic practitioners make every effort to ensure the examinee has legal representation before performing an evaluation. This principle seeks to safeguard the individual's rights as well as shield the examiner should the evaluation be contested later. One exception would be initial Sexually Violent

Predator (SVP) evaluations, which are conducted for triage purposes, prior to a petition for commitment.

The decision to perform evaluations without appointed counsel is not clear-cut in all cases. In striving to ensure fairness and accuracy in the evaluation process, forensic practitioners may be called upon to inform the court of their ethical standards that discourage providing services without legally appointed counsel. In the event that the court indicates a pressing need to have the individual evaluated, the examiner should inform the judge of any reservations he or she may have.

> Forensic psychologists do not provide professional forensic services to a defendant or to any party in, or in contemplation of, a legal proceeding prior to that individual's representation by counsel, except for persons judicially determined, where appropriate, to be handling their representation pro se. When the forensic services are pursuant to court order and the client is not represented by counsel, the forensic psychologist makes reasonable efforts to inform the court prior to providing the services. (Specialty Guidelines for Forensic Psychologists, §VI[D], 1991)
>
> With regard to any person charged with criminal acts, ethical considerations preclude forensic evaluation prior to access to, or availability of legal counsel. (Ethical Guidelines for the Practice of Forensic Psychiatry, §III, 1987)

Presence of attorney during evaluation

In *Estelle v. Smith* (1981), the Supreme Court held that defendants have a constitutional right to the assistance of counsel, who must be informed of the purpose(s) of the interview prior to participation in a forensic evaluation. However, the Court did not find a right to the presence of counsel during the evaluation. A judge may so order. Some experts, for ethical and legal reasons, recommend allowing defense counsel to be present in *criminal* cases (Melton et al., 1997, p. 72). In cases where a court order specifies the presence of counsel, or instances where a particular

attorney wants to be present during the interview, evaluators have a number of options.

Practically, the presence of *any* third party may pose a problem. Given the potential for the examinee to be distracted or unduly influenced by the presence of counsel, most MHPs prefer the attorney not to be physically present in the same room. Most courts have supported this preference of MHPs (i.e., *not* upheld a right to presence of counsel during an evaluation), although some exceptions exist. However, if court-ordered or requested by the defense, forensic evaluators must make the determination on an individual basis. A number of options representing a compromise have been suggested: (a) videotaping, (b) audiotaping, or (c) observation from a removed location (out of visual field of evaluee, with no interruption etc.). When faced with an attorney's resolute request to be present, one must weigh the costs and benefits of allowing counsel to be present. Ultimately, if the presence of counsel is court-ordered and the forensic MHP is unwilling to comply, he or she may refuse to conduct the evaluation.

PROFESSIONAL COMPETENCE

Developing specialized expertise

Mental health professionals are ethically obligated to be competent in whatever area they practice. Although there is no clearly delineated litmus test for ascertaining professional competence, a number of factors are generally considered indicative of specialization in a given area. Demonstration of some combination of the following can be offered as evidence of expertise:

(a) education and training (e.g., graduate training, continuing education workshops),
(b) reading and research in the area of specialization,
(c) supervision by a qualified MHP with relevant experience,
(d) record of relevant work experience, and
(e) publication of scholarly works in the area of specialization

Texas has adopted new statutory provisions relating to competence to stand trial (or fitness to proceed in juvenile cases) and those provisions specify the kind of training and experiences that qualify one as an expert to conduct competence evaluations (see Tex. Code Crim. Proc. Art. 46B.022 for provisions related to establishing expertise for competency to stand trial evaluations and Tex. Code Crim. Proc. Art. 46C.102 for provisions related to establishing expertise for sanity evaluations). However, most areas of practice do not yet have such clearly delineated requirements.

Evidence of general competence in the area of forensic mental health practice should be considered the first level of qualification. However, specific competencies are also required. Thus, for example, an examiner with experience in conducting child custody assessments should not assume competence to perform sanity or competency evaluations (Melton et al., 1997, p. 81). Finally, the MHP is also required to make clear the *boundaries* of his or her competence. This could include, for example, the number of similar evaluations conducted.

In addition to psychological expertise, the forensic examiner should also become well versed in the following:

(a) Legal standards and statutes for Texas: A thorough understanding of specific standards is imperative in determining whether legal criteria are met (for example, awareness of the legal standard for Insanity which stipulates that that "the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.")
(b) Rules of Evidence: Rules vary by jurisdiction; in Texas for example, ultimate issue testimony on Sanity (i.e., testimony which answers the ultimate legal question, for example, not guilty by reason of insanity) is permitted; in the federal system, it is not.
(c) Rules of Discovery: Legal rules govern the ability of parties to request information that is not privileged and is relevant to the matter at hand. The purpose of discovery is to allow all parties to obtain full knowledge of the

various issues and facts of the case prior to trial. The Texas Rules of Civil Procedure were changed recently in 1999; Rule 192 identifies the types of information which is discoverable. Also, jurisdictional policies vary across the state regarding open versus closed files maintained by prosecutors. In some jurisdictions, policies exist which prohibit, for example, the disclosure of certain law enforcement reports to defense counsel. Forensic evaluators should be aware of any such discovery rules that may impact their practice.

(d) General ground rules of an adversarial legal system.
(e) The process of plea bargaining and potential outcomes.
(f) For unique evaluations, it may be necessary to review relevant case law in the area to have a clear understanding of the issues at hand—both psychological and legal.

Appropriate test use

One area of forensic assessment that has sometimes generated controversy involves the use of psychometric tests (Borum & Grisso, 1995). In the case of forensic assessment, important legal decisions regarding such issues as parental custody, competency to stand trial, criminal responsibility, personal liberty, and even capital punishment are influenced to some degree by the MHP's report and recommendations; thus, the forensic MHP is urged to exercise caution (Gray-Little & Kaplan, 1998). In many cases, there may be no clearly identifiable reason to administer a psychological test to an examinee. In such cases, testing should not proceed until or unless a determination is made that a psycholegal issue can be directly addressed by the use of a particular test (see Heilbrun, 1992).

As with any testing endeavor, forensic clinicians must use instruments appropriately. Indiscriminate administration of instruments may, at best, be time consuming and unnecessary, and, at worst, expose prejudicial information. Ethical responsibilities begin with adequate training and continue through the selection, administration, scoring and interpretation of results (Butcher & Pope, 1993; Gray-Little & Kaplan, 1998).

Awareness of psychometric properties, norm groups, culturally influenced variability, and other idiosyncratic test interpretation issues is extremely important, especially if testimony is open to cross-examination by opposing attorneys. Familiarity with typical questions posed to experts, and a thoughtful, accurate, and ready answer, can assist forensic practitioners in developing a comfortable and articulate courtroom style (see, for example, Pope, Butcher & Seelen, n.d.).

In contemplating whether to use a forensic instrument, MHPs may consider the following questions:

- Is the test *directly* relevant to the psycholegal issue at hand? (e.g., competency to stand trial)
- Does the instrument match, *exactly*, the factor being measured? (e.g., a test normed on persons with malingered psychosis should not be used to assess for malingered Post-Traumatic Stress Disorder)
- Is the measure culturally appropriate, valid, and reliable?
- Are the tests, and/or the results of the test, easily *understandable*? (i.e., will the court find the information useful)

For every test administered and reported, the MHP must have a thorough knowledge of reliability and validity, norm group composition, related multicultural issues (addressed in the following section), and awareness of conflicting evidence in the literature. Regardless of pressure to administer tests, the central issue should remain one of relevance. If there is no clearly identifiable reason to administer a psychological test, it should not be given. One obvious exception to the foregoing occurs where testing is statutorily mandated (e.g., all SVP evaluations in Texas must include a measure of psychopathy). Forensic MHPs are ethically obligated to be aware of such requirements, and to be adequately trained in the administration and interpretation of appropriate tools.

MULTICULTURALISM

Cultural competence in forensic practice

In recent years greater attention has been paid to the influence of cultural factors on the evaluation process and outcome (see, e.g., Dana, Aguilar-Kitibur, Diaz-Vivar, and Vetter, 2002; Lopez, 2002). *Multiculturalism* refers to the wide range of human experience and socialization that result in an individual's unique way of perceiving and experiencing the world and others (see *Guidelines,* APA, 2003). Originally concerned with race and ethnicity, the term multiculturalism now includes socioeconomic class, sexual orientation, gender, physical ability, age, and religious preference (see Sue & Sue, 2003). Another "culture" familiar to most forensic MHPs is the culture within the criminal justice system and corrections more generally.

Most MHPs today have been trained within a system reflecting what is termed *mainstream culture*. This understanding often tends to reflect largely White, middle class ways of thinking and being in the world. In 2000, about 33% of Americans identified as non-White; Texas in particular is one of five "high diversity" states with many counties composed of 60-77% racial/ethnic minority group members (see *Guidelines*, APA, 2003). As U.S. population trends show evidence of dramatically diverse demographic shifts occurring, the forensic MHP would do well to consider becoming conversant with multicultural issues and pursue training.

Many different cultures have prescribed ways of behaving and interacting with others that can be quite different from mainstream culture, but are nonetheless equally valid. In forensic practice, as in general mental health arenas, examinees will behave, think, and feel in ways that are influenced by the cultural context of their lives. The astute and multiculturally competent evaluator will be able to consider factors outside of traditional clinical training to arrive at a more accurate and representative picture of the examinee (see Hicks, 2004).

"Shifting the lens"

Although clinical professional judgment and hypotheses must be maintained (e.g., delusions), the forensic MHP should also be able to "shift the cultural lens" (Kleinman & Kleinman, 1991) and see the world from the examinee's viewpoint (e.g., spirituality) in order to interpret behavior (Lopez, 2002). Consider for example an individual separated for some time from family while incarcerated; during evaluation he or she speaks of communicating with a deceased grandmother. A multiculturally competent MHP is better able to discern whether (a) a thought disorder, or (b) a culturally accepted practice of spiritual communication with forbears, is the more accurate interpretation of behavior. Deciding which hypothesis is a better explanation of behavior remains a sometimes challenging task; care must be taken neither to over-attribute cause to culture, nor to avoid the implications of its influence.

Another important issue for the MHP to be aware of is that even within a particular cultural group, great diversity can exist. For example, the racial group referred to in the U.S. as *Hispanic*, actually comprises at least a dozen very distinct ethnicities including Cuban, Puerto Rican, Mexican, and so forth. Care must be taken not to make global assumptions about a cultural group without first investigating their accuracy.

Culture and context

Another example of cultural differences lies in child rearing practices. Within some cultures child rearing is a task commonly left to grandparents and/or extended relatives. Parents may be absent for a number of reasons (migrant work, incarceration, hospitalization), or may actually be in the home but not functioning as parental authority figures. In such a case, collateral information would most appropriately come from the individual in the role as primary caretaker, and not necessarily a biological or legal parent. In considering family members and roles, it may be wise to avoid confusion of familial name labels with functional roles; in some cases family members referred to as "brother" or "sister" may actually be biologically a cousin or other extended relative who has been reared with the examinee.

Clinicians should also take care in the conceptualization of such a living arrangement; it is not necessarily the case that an individual reared in such a manner has experienced "abandonment" or other psychological trauma normally attributed to such a situation by mainstream culture. In order to understand and interpret behavior, the competent MHP must understand the context from which it arises.

Culture and behavior

For the forensic MHP, failing to become multiculturally competent can lead to inaccurate and potentially misleading case formulation. Consider for example, a culture that places a high value on respect for elders; this deference may be exhibited by avoidance of eye contact and slight bowing of the head. An unaware clinician may interpret this nonverbal behavior as a lack of self-esteem, shame, failure to engage, or possibly even depression.

In other cultures (such as 'prison culture') prolonged eye contact can be a sign of aggression or intimidation. Within the same culture, respect is commonly the only currency one possesses and it is often defended or obtained by violence. It is not uncommon for individuals to engage in violent behavior over seemingly small slights. For an examinee with no prior history of violent or aggressive behavior, consideration should be given to the circumstances surrounding apparently atypical behaviors.

Culture and diagnoses

A recent review of the literature (Gray-Little & Kaplan, 1998) reveals numerous studies suggesting that race and ethnicity may influence a clinical diagnosis even where symptoms are controlled for (pp. 142- 145). In general, some evidence suggests mood and personality disorders tend to be diagnosed more frequently in Whites than Blacks, and that Blacks are diagnosed with serious thought disorders (e.g., schizophrenia) three or more times as often than Whites. In terms of professional clinical judgment, there is some evidence that, even with comparable symptoms, minority group members tend to be judged both as having more severe mental health problems in some cases, and less severe in others (p. 143). Other research indicates that Black adolescents with

aggressive and delinquent behavior are judged to be less psychopathological than White children who exhibit the same behavior (Martin, 1993). Another area of concern involves the self-reporting of symptoms: consistent findings indicate that Asian and Hispanic group members tend to report somatic symptoms more when depressed than do Whites. In the case of bipolar disorder, Blacks and Hispanics report more hallucinations than do Whites (see for review Gray-Little & Kaplan, 1998). Although there is great variability at the individual level, the evaluating MHP must be familiar with literature addressing issues of culture and diagnosis in order to remain aware of possible biases in the clinical assessment phase. Guidelines for developing a culturally appropriate clinical formulation can be found in Appendix I of the DSM-IV-TR (APA, 2000).

Culture and tests

Recent advances in research have revealed the troubling variability of tests normed on mainstream cultures but routinely used with diverse populations (see for review, Gray-Little & Kaplan, 1998; Hicks, 2004). In some cases, cultural differences may even extend to *test-taking* behavior. For example, many psychometric tests currently used have time limits. Some cultures value accuracy over speed of completion; the performance of individuals from such cultures may be poor as the result of non-completion, and thus may not accurately reflect their actual abilities.

Care must be taken to choose assessment measures normed on populations that accurately reflect the examinee. In one case, the Wechsler Adult Intelligence Scale-Revised (WAIS-R), was translated into Spanish by a bilingual translator for use with a Cuban immigrant who was being evaluated for competency to stand trial; he obtained a fullscale score of 62. However, when the same individual was reassessed with a proper Spanish version of the WAIS-R, normed on a Spanish-speaking sample, his IQ scored rose 43 points to a fullscale of 105 (Johnson & Torres, 1992, as cited in Gray-Little & Kaplan, 1998). Using a measure whose normative sample was so dissimilar to the examinee was not improved by simple translation into Spanish. Examiners should not assume that simply employing the services of a translator will address any cultural or communication problems that exist. Extensive

research indicates that there exists significant variability in the validity of many commonly used tests when administered to individuals from other cultures. It is the responsibility of the practitioner to be aware of such issues prior to selecting or scoring a measure.

To become truly multiculturally competent requires a long-term commitment to learning about others' lives and experiences, and a willingness to consider one's own biases, attitudes and beliefs. It requires a thoughtful and open awareness of both the similarities and differences that are present in persons and groups within the community, and how those factors may contribute and influence the individual and the assessment process generally. Continuing education classes, graduate training, as well as the local library can provide useful resources, but perhaps the best opportunity to learn is by seeking to work with individuals and groups from diverse backgrounds. Especially in the case of forensic evaluations, where impartiality and the avoidance of undue bias is critical, MHPs should actively pursue multicultural learning on an ongoing basis.

DUTY TO PROTECT THIRD PARTIES

Absence of Tarasoff requirements in the State of Texas

A precedent-setting case in the late 1970s raised the question of whether a mental health professional has a responsibility to warn a third party who has been threatened by a client in treatment. In *Tarasoff v. Regents of the University of California* (1976), the Supreme Court of California imposed a duty, on therapists in California, to take measures to protect identified victims, regardless of confidentiality requirements.

In Texas, however, the *Tarasoff* duty does not apply. In *Thapar v. Zezulka* (1999) the Supreme Court of Texas refrained from imposing a duty on MHPs to warn third parties of a patient's threat to harm. The court chose instead to reiterate its commitment to "closely guard a patient's communications with a mental health professional" (p. 638). Under these conditions, the MHP is, in fact, *prohibited* from warning the victim as that would have violated the

patient's right to confidentiality. Under Texas law there is an exception in the confidentiality statute that *allows* for disclosure to appropriate medical or law enforcement personnel. However, the court noted, "[the statute] *permits* these disclosures but does not *require* them…" (p. 639). In cases involving threat of harm to third parties, forensic evaluators should review current legal standards and consult with experienced colleagues to determine an appropriate course of action or consult with legal counsel (see Shuman, 1997, pp. 109-115).

> Texas allows an MHP to disclose confidential information obtained during the course of the therapist-patient relationship to medical or law enforcement personnel if the MHP determines that there is a probability of imminent physical injury by the patient to the patient or to others. Although unjustified disclosure of confidential information may give rise to a malpractice claim, the issue arises more commonly in the case of a failure to disclose and resultant harm to a third party. (Shuman, 1997, pp. 110-111)

KNOWLEDGE OF RELEVANT LEGAL STANDARDS IN TEXAS

Forensic MHPs are required to have a thorough understanding of the legal doctrines and standards in the areas in which they purport to be expert (cf. Heilbrun, 2001). Thus, a familiarity with both state and federal requirements is necessary. A clear understanding of the differences among legal concepts, for example—competence and sanity—is crucial, as even seasoned clinicians have been known to confuse the two (for discussion see Melton et al., 1997; Gutheil, 1999). Legal standards and related issues are addressed elsewhere in this volume.

DOCUMENTATION

Maintaining accurate records is important in all professional practice. In this regard, forensic practice is held to a *higher standard* than general practice. It is good practice to retain all

notes, documentation, recordings, tests, and any collateral materials used to form an opinion. In the creation of forensic evaluation files, it is important to make *no* assumptions of privacy, privilege, or confidentiality.

Contemporaneous notes, even if they have been rewritten, should be retained.

Forensic evaluators should be aware that personal notes may be subject to discovery. Given the higher level of scrutiny that forensic MHPs must anticipate, professionals are well advised to consider carefully the information included in those notes.

COLLATERAL SOURCES

Just as forensic MHPs must approach record maintenance differently from their non-forensic counterparts, so must they approach data collection differently (cf. Heilbrun, 2001). As Weissman and DeBow observe, "forensic contexts have a broader range of goals…. Ethical evaluations call on the expert to use multisource, multimodal methodologies for the task of answering such complex psycholegal questions" (2003, p. 41).

Collateral sources may include police or criminal history reports, institutional records, personal correspondence, victim statements, medical records, and employment records, to name a few. Other sources of collateral information include the personal reports of witnesses, friends, or family members. Before contacting such individuals, it is best to consult with counsel and announce any intention to interview collateral sources, thus, allowing counsel to voice any concerns or prohibitions. When interviewing collateral sources, it is important to inform the reporting individuals that nonconfidentiality must be assumed (i.e., what is reported will be recorded with identifying information). The issue of how much to reveal to collateral sources is best discussed with counsel prior to the interview.

DUAL ROLES

Clarification of roles and avoidance of multiple relationships

The importance of clarifying roles and addressing the non-therapeutic nature of a forensic evaluation has been addressed previously and is discussed at length in the literature (see, for example, Greenberg & Shuman, 1997; Heilbrun, 2001; Melton et al., 1997; Shapiro, 1999). Forensic MHPs have an obligation to refrain from any activity that may be perceived as biased, or construed as posing a conflict of interest (cf. Heilbrun, 2001). The importance of maintaining a reputation of propriety and objectivity is paramount in the provision of forensic services. For this reason, professionals should avoid functioning as both therapist and forensic evaluator of the same individual. The importance of avoiding dual roles is premised upon a number of factors:

(a) Within a therapeutic relationship, assurances of confidentiality are paramount; in forensic evaluations these same assurances do not stand—in fact, information reported usually must be conveyed in the report
(b) The role of therapist is often one of ally and advocate, this role is naturally assumed to be the case in treatment settings; forensic evaluators are required to act with objectivity and impartiality insofar as it is possible to do so
(c) The forensic evaluator, once having engaged in a treatment relationship, is not able to "forget" the information gleaned in that capacity and proceed with the forensic evaluation in an unbiased manner. Information derived during the therapy relationship may significantly color the forensic evaluation and be revealed in the public forum.
(d) Finally, functioning in a forensic capacity with a therapy client (or former therapy client) very well may destroy the therapeutic relationship, thus, potentially resulting in harm to that individual.

> Forensic psychologists recognize potential conflicts of interest in dual relationships with parties to a legal proceeding, and they seek to minimize their effects. (Specialty Guidelines for Forensic Psychologists, §IV [D], 1991)
>
> Treating psychiatrists should generally avoid agreeing to be an expert witness or to perform evaluations of their patients for legal purposes because a forensic evaluation usually requires that other people be interviewed and testimony may adversely affect the therapeutic relationship. (Ethical Guidelines for the Practice of Forensic Psychiatry, §IV, 1987)

The forensic MHP as consultant to counsel

The ethical tension between the role forensic evaluator and that of attorney historically has been difficult to reconcile. In *Ake v. Oklahoma* (1985), the Supreme Court broke ground in ruling that the indigent defendant, Ake, had a right of access to a psychiatrist to "assist in evaluation, preparation and presentation of the defense." In effect, the Court ruled that criminal defendants have the right to a psychiatric consultant who participates as a member of the defense team, assisting in strategy and trial preparation. If only one mental health professional is appointed to a case, she or he will need to perform the evaluation as well as consult on strategies favoring the examinee. In light of longstanding efforts by mental health professionals to avoid the appearance of bias or partisanship, this ruling left many stunned.

Nonetheless, other experts insist that *Ake* did not force mental health professionals into an advocate's role—merely a consultant's role. The difference, they argue, is that one (consultant) merely proffers unbiased information and opinion, whereas the other (advocate) decides what to make use of in support of the defense strategy (Appelbaum, 1987, p. 20).

> ***Ake v. Oklahoma***
> "[T]he State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."(*Ake v. Oklahoma*, 105 S. Ct. 1087 (1985))

Awareness of covert influence and inappropriate requests

Following *Ake*, forensic practitioners were allowed (indeed, *required*) in some cases to function as an integral part of the defense team. As such, questions of remuneration and client satisfaction were increasingly raised. Once appointed to assist the defense team, the forensic MHP was no longer a disinterested and neutral participant. Many question whether MHPs can produce an impartial and unbiased clinical forensic evaluation while simultaneously providing input to the legal team on defense strategy. Before agreeing to serve as both consultant and expert, an MHP should think through carefully the ethical and practical implications of such a decision and explore any potential alternative options.

Contingency fees

Payments made on the basis of the outcome of a particular case, or contingency fee arrangements, are strictly prohibited by most professional guidelines (Ethical Guidelines for the Practice of Forensic Psychiatry, §IV, 1987; Specialty Guidelines for Forensic Psychologists, §IV[B], 1991). This prohibition speaks to the importance of the examiner maintaining a professional impartiality in order to meet the goal of assisting the trier of fact.

> Forensic psychologists do not provide professional services to parties to a legal proceeding on the basis of "contingent fees," when those services involve the offering of expert testimony to a court or administrative body, or when they call upon the psychologist to make affirmations or representations intended to be relied upon by third parties. (Specialty Guidelines for Forensic Psychologists, §IV[B], 1991)

> Contingency fees, because of the problems that these create in regard to honesty and efforts to obtain objectivity, should not be accepted. On the other hand, retainer fees do not create problems in regard to honesty and efforts to obtain objectivity and, therefore, may be accepted. (Ethical Guidelines for the Practice of Forensic Psychiatry, §IV, 1987)
>
> The adversarial nature of our Anglo-American legal process presents special hazards for the practicing forensic psychiatrist. Being retained by one side in a civil or criminal matter exposes the forensic psychiatrist to the potential for unintended bias and the danger of distortion of their opinion. It is the responsibility of forensic psychiatrists to minimize such hazards by carrying out his (*sic*) responsibilities in an honest manner striving to reach an objective opinion. (Ethical Guidelines for the Practice of Forensic Psychiatry, §IV, 1987)

Modification of forensic reports

As a matter of practice, attorneys may legitimately reframe or refocus the evaluation *if the referral question was misidentified originally*. However, MHPs should carefully guard against allowing attorneys to dictate or modify the substance of reports. The importance of clarifying roles and defining the referral question at the beginning of the process is paramount and can reduce the likelihood of subsequent problems (cf. Heilbrun, 2001).

The American Bar Association (ABA) has directed attorneys "[to] not edit, modify, revise, or otherwise compromise the integrity of the report" (ABA Criminal Justice Mental Health Standards, §7-3.7[c], 1989). Despite this, some have suggested that, in fact, such alterations are routinely made:

> [I]n practice, it is not at all unusual for an attorney to consider a report prepared by an expert he or she has retained to be a draft which will be revised after further discussion with the professional. Members of the legal profession have admitted that "an attorney almost always assists in the preparation of expert witness reports" (Easton, 2001).

Needless to say, this practice is completely at odds with ethical standards addressing the preparation of forensic reports, and should be actively discouraged.

CONCLUSION

As the foregoing discussion reveals, forensic mental health practice can be a rigorous but rewarding undertaking; it is also an extraordinarily challenging endeavor fraught with multiple ethicolegal concerns. Careful consideration of and familiarity with legal standards and one's professional ethics code are imperative. Professional competence must go beyond traditional clinical training and experience to include forensic populations and the legal system more generally. Given the stakes may be much higher than in traditional practice, it is incumbent upon forensic MHPs to be aware of and communicate the boundaries of their personal competences.

Ethical issues often cannot be resolved simply by consulting definitive standards of practice. Forensic MHPs must become comfortable with resolving these issues for themselves by an informed, reasoned, and ethically sensitive process of personal deliberation and consultation with colleagues. Finally, throughout the entire process, the forensic MHP must guard against cooption by any party, acknowledging others' legitimate interest in advocacy, but striving to maintain personal objectivity and clinical impartiality. Ultimately, the only real currency the forensic MHP possesses is his or her personal credibility; it should be guarded jealously.

The following summary points are offered for consideration and to assist in decision-making as the MHP seeks to navigate the forensic arena:

- Ensure personal competence and familiarity with legal and ethical standards by a commitment to ongoing professional development, education, and consultation with experienced colleagues
- Attend to the development of multicultural competence; be aware of and sensitive to the influence of cultural

factors on diagnoses, test interpretation, clinical and other related interpersonal interactions

- Be aware of personal boundaries of competence; accept only those forensic cases relating to areas in which a level of personal expertise has been, or is being, attained
- Upon acceptance of a case, immediately seek to identify the client and clarify the referral questions from the requesting party
- Provide for comprehensive informed consent or disclosure prior to evaluation; clearly explicate the role of forensic evaluator and the nontherapeutic nature of services to be rendered
- Ensure that examinee is fully aware of limits of confidentiality, privilege, and whether s/he has a right of refusal
- Be aware of the legal statutes and case law upon which the psycholegal question turns; if uncertain, request clarification from attorney or courts
- Carefully and accurately document the evaluation process; be aware of the rules of discovery and assume *non*-confidentiality as a rule and attempt to limit discoverable material that is not relevant
- If it is not feasible to conduct an in-person interview, clearly state this fact and the limitations it imposes upon your findings
- Be aware of subtle or overt attempts at cooption; strive to maintain clinical impartiality and personal objectivity
- Remain cognizant of the potentially significant influence of forensic mental health testimony on the court, and its impact upon the examinee; wield that influence cautiously and judiciously.

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Appendix A: Ethical Guidelines of the Professions

Ethical guidelines for practitioners in both psychiatry and psychology are available online from the following:

Psychiatry:

American Academy of Psychiatry and the Law Ethical Guidelines for the Practice of Forensic Psychiatry
http://www.aapl.org

Psychology:

Specialty Guidelines for Forensic Psychologists
http://www.abfp.com

Law:

Fitch, W. L., Petrella, R. C., & Wallace, J. (1987). Legal ethics and the use of mental health experts in criminal cases. Behavioral Sciences and the Law, 5, 105-117.

Note: This reference, although not to ethical guidelines per se, nicely describes how attorneys conceptualize their ethical responsibilities relative to mental health experts.