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Ethics in Forensic Practice

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In order to facilitate citations to the text of this chapter, page breaks have been designated by placing the page number between bold brackets > **[#]**.

In an article outlining the development of ethics codes in the profession of psychology, Hobbs (1948) called attention to the fact that psychologists were involved in what he described as "an impressive range of activities . . . [that have taken us] into situations which frequently demand decisions of an ethical nature" (p. 80). Hobbs observed: "The individual psychologist often finds himself in need of guidance when such decisions have to be made. He feels personally the need for a code of ethics" (p. 80). We note, with interest, Hobbs's emphasis on guidance.

In psychology, as in other professions, a desire for guidance is experienced by those who, in the early stages of their careers, recognize their obligation to practice competently and who, in the later stages of their careers, strive for excellence. The unfortunate reality is that in all professions there are individuals who wish simply to be apprised of the minimum requirements. Psychology's objective must be to cultivate in psychologists a desire to do what is right rather than to instill in them a concern for what must be done in order to meet minimum standards. Focusing on the floor rather than the ceiling (Kirkpatrick, 2004) leads us to lower our expectations for ourselves, our colleagues, and the institutions in which we offer our services. Guideline 2.03 of the March 2011 draft of the *Specialty Guidelines for Forensic Psychologists* (Committee to Revise, 2001, hereinafter, "SGFP, draft 6"), urges forensic practitioners to use the Specialty Guidelines to "improve the quality of forensic psychological services; enhance the practice and facilitate the systematic development of forensic psychology; encourage a high level of quality in professional practice; and encourage forensic practitioners to acknowledge and respect the rights of those they serve."

After having studied several hundred ethics codes from organizations as different from psychology's as the Peanut Butter Manufacturers Association, Landis (1927) concluded that there were, essentially, four types of ethics codes: those that enumerate specific rules of conduct, those that combine rules of conduct with general principles, those that merely set forth principles, and those that set forth general principles and apply those principles to specific situations. Landis concluded that codes "made up largely of specific rules" (p. 93) appear to be most effective. If, among psychologists, there are those who strive to do their jobs to the best of their ability and those who simply wish to clear the bar, what path should be taken in constructing our next ethics code? The SGFP, draft 6 (Committee to Revise, 2001) recognizes this important issue. Guideline 2.05 says, in part, "Professional conduct evolves and may be viewed along a continuum of adequacy, and 'minimally competent' and 'best possible' are usually different points along that continuum" (p. 5). It is our view that when psychologists engage in forensic psychological practice, "minimally competent" ought never to be an option. We must stride toward "best possible" in each forensic psychological activity. The stakes for the litigants are too high for us to give them anything less than "best possible."

IDENTIFYING THE PROBLEMS

Though many of the ethical dilemmas encountered by forensic psychologists are similar to those encountered by our colleagues in other psychological specialties, some of the ethical problems we face are less likely to be **[38]** encountered in other specialties. Many of the problems identified by Weissman and DeBow (2003) when the topic of ethics in forensic practice was addressed by them in the first edition of this volume remain with us.

Adversarial Roles

In our interactions with each other, attorneys, and the court, it is important that we exercise caution in using terms the meaning of which may not be clear to those with whom we are communicating. Weissman and DeBow (2003), for example, wrote: [E]xperts . . . must remain disinterested third parties . . . . An expert joining an attorney's "legal team" of other experts and attorneys, rather than maintaining neutrality, objectivity, and suitable boundaries, is an example of proscribed behavior. (pp. 33, 36)

It is not until the reader reaches page 38 that it becomes clear that Weissman and DeBow were referring only to testifying experts. They have written, "It is a mistake to assume that one can serve a case in the dual capacity of both expert and consultant" (p. 38). We wholeheartedly agree. Returning to the matter of exercising caution in our use of terms, we use the term expert to designate a person with a high degree of skill in or knowledge of a particular field or a certain subject. A discussion of the general components of competent functioning within the role of "expert" is found in Guideline 4 of the SGFP.

It is appropriate that consulting experts assist "attorneys in their preparation of cases for litigation" (Weissman & DeBow, 2003, p. 38). Problems arise, however, when experts who have been retained to assist attorneys also endeavor to assist triers of fact by changing roles and testifying as expert witnesses. In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the United States Supreme Court ruled that the defendant was entitled to the assistance of a psychiatrist whose tasks might include presentation of evidence and preparation of "the cross-examination of the State's psychiatric witnesses . . ." (at 70). We respectfully disagree with the Supreme Court's apparent view that the same forensic mental health practitioner can effectively function both as a testimonial expert, whose obligation is to assist the trier of fact, and as an integral part of a legal team, in which his or her duties may include preparation of cross-examination questions for witnesses called by opposing counsel.

In December 2010, the United States Supreme Court approved changes to the Federal Rules of Civil Procedure (FRCP) governing discovery of information from expert witnesses who have been retained to testify at trial. These changes raise some important issues pertaining to transparency. Though we recognize that the changes to FRCP 26 are unlikely to affect most state courts for some time, discussion of the implications of these changes is warranted.

The Committee on Rules of Practice and Procedure (hereinafter referred to as "the Committee") identified inefficiencies in the procedure of allowing expansive discovery of testifying experts. Rule 26(a)(2)(B), as modified, focuses on disclosure in discovery only of the "facts or data considered by the witness" in forming the expert opinions. Previously, experts were required to disclose all "data or other information" relied on when developing their opinions, preparing reports, or preparing for testimony.

Amended Rule 26 allows the following three types of communications between counsel and an expert to remain "open to discovery: (1) compensation for the expert's study or testimony; (2) facts or data provided by the lawyer that the expert considered in forming opinions; and (3) assumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion." It is likely that these exceptions will allow opposing counsel to continue to investigate what, if any, influence attorneys have had in the development of their experts' opinions.

In making the changes to FRCP 26 (a)(2)(B), it appears that the Committee did not consider how the changes might increase the risk that bias adversely affects the experts' testimony. When psychologists function as trial consultants, their responsibilities are often to assist attorneys in preparing for trial. Involvement in preparation for trial creates pressure to advocate for legal positions rather than to advocate for the data. Research findings reported by social psychologists (e.g., Festinger, 1957) suggest that, whether or not consultants are aware of it, advocating for legal positions tends to create a bias in favor of those positions. That is, trial consultants are not likely to be able to maintain the neutrality that enables experts to advocate for the data. Instead, they become part of the legal teams with which they have been working, and they find themselves advocating for specific outcomes.

We also believe that the modification to Rule 26 may affect the public perception of the integrity of the work in which forensic psychologists are engaged. Guideline 3.01 addresses the responsibility forensic psychologists have toward maintaining integrity in the work they do for the legal system. "Forensic practitioners seek to promote accuracy, honesty, and truthfulness in the science, teaching, and practice of forensic psychology and they strive to resist **[39]** partisan pressures to provide services in any ways that might tend to be misleading or inaccurate."

The change in Rule 26 appears to allow testifying experts to engage in behind-the-scenes consulting and advocacy without concern that, in the course of discovery, specific information provided, perspectives shared, and tactical advice provided will have to be disclosed. This modification to Rule 26 serves to undermine the transparency traditionally expected of testifying experts, allowing them to take sides by playing trial consultant roles and never having to disclose such advocacy when testifying about a work product. When transparency is intentionally undermined, integrity is diminished.

The term transparency, as used here by us, is intended to describe a philosophy from which a pattern of professional behavior logically follows. The philosophy guides us in our roles as forensic psychologists and, subsequently, in our roles as testifying experts: (1) As evaluators, in order to gather information helpful to triers of fact, forensic psychologists must be unencumbered by personal or philosophical agendas; must be committed to a balanced approach in their work; and must be alert to phenomena that adversely affect decision making. (2) As testifying experts, in order to be effective, forensic psychologists must be credible; must recognize that credibility is earned, and that complete openness is one means by which an expert establishes credibility; and must respect the rights of those wishing to question the opinions of experts and the manner in which those opinions were formulated. The pattern of behavior that flows from the stated philosophy includes, but is not limited to, (1) actively disclosing any prior or current relationships with the participants before accepting a forensic psychological evaluative task; (2) being diligent in the creation and maintenance of records; and (3) producing, in response to legally permissible requests, the complete contents of the file in the matter being litigated.

The definition of forensic psychology that appears in SGFP, draft 6 (Committee to Revise, 2001) makes reference to providing direct assistance to courts, parties to legal proceedings, and "serving as a trial consultant or otherwise offering expertise to attorneys, the courts, or others. . . [etc.]" (Guideline 1.03, p. 3). A forensic psychologist who provides litigation support services is, in the words of the Specialty Guidelines, providing direct assistance to parties to legal proceedings, and is functioning in an appropriate role. In providing direct assistance to parties, however, forensic psychologists are at risk for adopting an adversarial mindset that would impair the ability to provide the kind of balance and objectivity reasonably expected of expert witnesses, whose task is to assist triers of fact without regard for who retained them. It is not our intention to suggest that a bright-line distinction can be drawn between assisting attorneys in the development of litigation strategies and preserving one's purity as an objective testifying expert. We do, however, differentiate between assisting attorneys by calling their attention to all the pertinent data and the implications of those data and assisting them by playing a role in tactical decision making.

Ethics and Advocacy

In the previous edition of this volume, Weissman and DeBow (2003) offered some observations concerning advocacy agendas and how they can distort experts' presentation of their evidence. As this is being written, a New Jersey psychologist, functioning as a therapist, but offering recommendations to a court in a matter involving allegations of child sexual abuse, stands accused of having willfully withheld exculpatory information in formal communication with the court.

While assuring the court that she was "an expert in the area of child sexual abuse," and assuring the public, in an interview with the media, that "I've reported what a child has said," the psychologist neglected to inform the court that, in response to direct questions posed to a three-year-old, the child stated that her father's penis was green, that a tablecloth came out of it, and that her mother had told her to say that "Daddy put it in me." In a memorandum prepared for her defense attorney, a forensic psychologist asserted that, as a therapist, the psychologist "is not expected to be neutral and detached but rather an ally of the patient [and that the] exculpatory factors . . . only needs [sic] to be addressed if one is doing an objective forensic evaluation. . . ."

The applicability of the standards that comprise our Ethics Code (American Psychological Association, 2002) and the applicability of guidelines such as those contained in both the *Specialty Guidelines for Forensic Psychologists* (Committee on Ethical Guidelines for Forensic Psychologists, 1991) and the SGFP, draft 6 (Committee to Revise, 2001) is determined by the nature of the services performed and not by a psychologist's stated areas of expertise or area(s) of practice. The current Forensic Specialty Guidelines assert that when a psychologist is "acting, with definable foreknowledge, as a psychological expert on explicitly psycholegal issues, in direct assistance to courts, . . . [etc.]" (Guideline I.B.1.b.), the psychologist is performing a forensic psychological service and is **[40]** obligated to avoid selective reporting of data or the presentation of data in any manner that might mislead triers of fact or others likely to rely upon the reported findings or the accompanying recommendations. The SGFP, draft 6 (Committee to Revise, 2001) makes clear that "[a]pplication of the Guidelines does not depend on the practitioner's typical areas of practice or expertise, but rather on the service provided in the case at hand." The New Jersey psychologist appears to have become invested in a specific litigation outcome, leading her to lose sight of her obligation to report to the court all information bearing upon the issues in dispute.

In addition to participating in a lengthy interview with a reporter from a local television station, the psychologist established a fund-raising website on which case-specific information appeared. Guideline 13.06 of the SGFP, draft 6 (Committee to Revise, 2001) states: “Ordinarily, forensic practitioners seek to avoid making detailed public (out-of-court) statements about legal proceedings in which they have been involved.” “When making public statements, forensic practitioners refrain from releasing private, confidential, or privileged information, and attempt to protect persons from harm, misuse, or misrepresentation as a result of their statements.”

Inadequate Professional Preparation

Weissman and DeBow (2003) called attention to the fact that it is erroneous to conclude “that a solid background of preparation as a clinical psychologist and competent clinical skills are all that is necessary and sufficient for the psychologist who accepts forensic-clinical referrals” (p. 36). When providing therapeutic services, the assessment task is to gather information and generate hypotheses relating to: (1) diagnosis, (2) treatment plan, (3) etiology, (4) personality functioning, (5) treatment motivation, and/or (6) prognosis. Once treatment has begun, continued assessment may be useful in gauging any changes that occur.

More than three decades ago, Morse (1978) presented a strong argument for prohibiting mental professionals from referencing diagnoses in their expert testimony. Morse asserted that, more often than not, diagnoses do not bear directly on the psycholegal issues in dispute and that, even where they may be marginally relevant, their prejudicial impact must be considered. Greenberg, Shuman, and Meyer (2004), commenting on the appearance of diagnostic labels in custody evaluation reports, opined that “diagnosis is both ethically and legally precarious because it is misleading and risks distorting a candid assessment of a litigant’s functioning” (p. 10).

Greenberg et al. (2004) called attention to the fact that

> [i]n some instances, such as the insanity defense, civil commitment, and the Americans with Disabilities Act, the law makes diagnosis an essential element of a claim or defense . . . . In other instances, such as personal injury litigation, child custody litigation, and testamentary or contractual competence determinations, the law does not make diagnosis an essential element of a claim or defense. Instead, legal criteria for these actions are functional and concern themselves with impairment or capacity without regard to diagnosis. (p. 1)

The ethical implications of providing diagnoses are succinctly summarized by Greenberg et al. as follows: When testimony about a party’s diagnosis either lacks adequate reliability or validity, or is unfairly prejudicial, it is contrary to the expert’s “obligation to all parties to a legal proceeding to present . . . findings, conclusions, evidence or other professional products in a fair manner” (Committee on Ethical Guidelines for Forensic Psychologists, 1991). (p. 2)

Empirical research has been done on specific, identified disorders and formal diagnostic labels provide indirect links to that research; however, our empirical research never relates to the specific individuals with whose litigation forensic psychologists have become involved, but rather to the diagnostic category. The descriptors that apply to a particular diagnostic category do not perfectly describe any particular human being. Thus, diagnosis is, in

essence, a short-hand form of description. Forensic psychologists provide information that is far more useful when they directly address psychological characteristics that bear upon the psycholegal issues before the court. The SGFP, draft 6 (Committee to Revise, 2001) recognizes this concern, stating: “Forensic practitioners are sensitive to the problems posed by using a clinical diagnosis in forensic contexts and consider and qualify their opinions and testimony appropriately.”

The Virtues of Not Being Helpful

In 2001, forensic psychology was recognized as a psychological specialty by the Commission for the Recognition of Specialties in Professional Psychology (CRSPP), an organization that functions under the aegis of the American Psychological Association. A petition for recertification was filed in 2007 and the requested recertification was granted in 2008. The formal recognition of forensic psychology as a specialty serves to emphasize the fact that psychologists performing forensic psychological services should secure education, training, and supervised **[41]** experience beyond that which is required in general psychological practice.

Because graduate programs in forensic psychology have only recently been established, most of the psychologists who practice in this specialty were initially educated and trained in psychological specialties such as clinical psychology and counseling psychology, and their previous work experience was in the provision of health services. Some of the most serious problems that forensic psychologists create for themselves stem from an inability or unwillingness to control the impulse to think and act like “helpers” when they are contractually obligated to function as something quite different—independent examiners.

One cannot evaluate individuals while simultaneously offering advice to them or endeavoring in some other manner to assist them. When, for example, forensic psychologists functioning as custody evaluators attempt to improve the parenting skills of those whom they are evaluating, the evaluators indirectly become evaluators of the success or failure of their own interventions.

In the course of obtaining education and training in forensic psychology, some psychologists digest a significant amount of law and become quite confident that they can provide legal guidance to examinees they believe may be receiving inadequate or misguided advice from their attorneys, or to examinees who may have elected to represent themselves. And some forensic psychologists have obtained law degrees and may function as attorneys at times. Yet no matter how much legal knowledge psychologists may have, the ability to conduct impartial forensic evaluations is compromised when legal advice is offered. When the task accepted by a forensic psychologist is evaluative in nature, performing unassigned tasks inevitably diminishes the psychologist’s effectiveness at the assigned task.

Privacy Issues

Particularly in situations in which reports by forensic psychologists become unsealed components of public records, one occasionally encounters practitioners who are insensitive to the privacy concerns of individuals they have evaluated, and others named in the reports as well. That privacy should be conceptualized dichotomously was endorsed by the United States Supreme Court, in 1975, when it declared that “interests in privacy fade when the information involved already appears on the public record” [*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), at 494–495]. Subsequently, however, the Court has modified its position significantly.

In *Department of State v. Washington Post Co.,* 456 U.S. 593 (1982) at 603 (footnote 5), the Court observed that "despite their public availability elsewhere" there remained a "privacy interest in keeping personal facts away from the public eye" and, in 1989, the Court introduced the concept of practical obscurity [*U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), at 762]. The Court observed that many public records are stored in such an inaccessible fashion that only the determined and the resourceful can obtain them.

The court pointed out that functional barriers to various public records include travel to the location in which they are stored; the filing of request forms; time expended in waiting for the records to be produced; frequent delays resulting from inadvertent filing errors, and so forth. Thus, various real-life factors function to provide a partial barrier to the public disclosure of personal information. Though this marginal protection was not the result of any agency's foresight, the Supreme Court has concluded that legitimate privacy interests are protected (489 U.S. 780). For forensic psychologists, the message to be taken from this ruling is that consideration should be given to the privacy concerns of those whom we evaluate, even where the records of the case in which we are involved are public.

We can accomplish this by carefully considering the positive and negative effects of disclosure of different types of information gathered by us. Where it can reasonably be foreseen that certain types of information will not bear directly on the issues in dispute, forensic psychologists can display their respect for people's privacy interests by not seeking such information in their interviews. Ethical Standard 4.04 addresses "Minimizing Intrusions on Privacy." Standard 4.04 (a) reads: "Psychologists include in written and oral reports and consultations, only information germane to the purpose for which the communication is made." Standard 4.04 (b) reads: "Psychologists discuss confidential information obtained in their work only for appropriate scientific or professional purposes and only with persons clearly concerned with such matters." A perspective is reflected in SGFP, draft 6 (Committee to Revise, 2001), Guideline 10, addressing issues of privacy in forensic psychological activities.

Ignoring Discrepant Data

Not all negligent, incompetent, or unethical practices can be enumerated in statutes that define professional obligations, in a profession's ethics code, or in any other document. Some professional behaviors are too rarely **[42]** encountered to warrant inclusion in such documents. On the other hand, in the eyes of those who develop descriptions of appropriate professional behavior, the obligation to take certain professional actions may seem so self-evident that discussion seems superfluous. For example, in conducting forensic psychological assessments, it is not uncommon for psychologists to find that data from one source lend support to one hypothesis while data from another source lend support to a conflicting hypothesis, yet neither our Ethics Code (American Psychological Association, 2002) nor the *Specialty Guidelines for Forensic Psychologists* (Committee on Ethical Guidelines for Forensic Psychologists, 1991) reminds psychologists of the importance of endeavoring to resolve discrepancies in data. In some situations, obtaining clarifying information will require no more than the expenditure of a reasonable amount of additional time. In such situations, failure to seek the additional data is a failure to be thorough.

SGFP, draft 6 (Committee to Revise, 2001), Guideline 3.02 appears to indirectly address our concern about the need to disclose and discuss discrepancies in data by encouraging forensic psychologists to "weigh all data, opinions, and rival hypotheses objectively." SGFP, draft 6 (Committee to Revise, 2001), Guideline 3.02 reads, in part,

> Forensic practitioners recognize the adversarial nature of the legal system and strive to treat all participants and weigh all data, opinions, and rival hypotheses objectively. When conducting forensic examinations, forensic practitioners strive to be unbiased and objective, and to avoid partisan presentation of unrepresentative, incomplete, or inaccurate evidence that might mislead finders of fact.

Data Suppression

We draw a distinction between the careless failure to address discrepancies in data and the deliberate suppression of data. The trust placed in forensic psychologists by the courts is violated when data supportive of our positions are presented forcefully and data inconsistent with our positions are withheld. SGFP, draft 6 (Committee to Revise, 2001), Guideline 13.03 reads, in part:

> Forensic practitioners recognize their obligation to affirmatively disclose all sources of all information obtained in the course of their professional services, and to be prepared to identify the source of each piece of information that was considered and relied upon in formulating a particular conclusion, opinion or other professional product.

Withholding Data

During the revision of the 1992 Ethics Code (American Psychological Association, 1992), there was heated debate concerning those sections of the ethics code that would address the release of data. Some offering commentary on the matter (e.g., Martindale & Martindale, 1993, 1994; Martindale, et al., 1994) opined that psychology's efforts to keep raw data out of the hands of people deemed unqualified was a losing battle. Historically, it appears to have been a battle the outcome of which has been entirely dependent on litigants' monetary resources and willingness to expend those resources in battles for test data. Those with the money (and inclination) to challenge psychologists typically won and those with limited funds had to expend some of those funds on another expert (to whom the data might be released). Others (e.g., Kane, 2007) opined that attorneys should retain licensed psychologists to assist the attorneys and litigants in understanding the data. Those advancing this position expressed concern that the psychological tests upon which we depend will become virtually useless if they are frequently dissected in our courts, thereby enabling large numbers of people to develop a familiarity with them.

Forensic psychologists should recognize the role of unidentified experts. With only limited exceptions, attorneys are permitted to retain consultants; not identify those consultants; and, under the terms of work product doctrine, protect from disclosure all input from their consultants. For example, an attorney has the right to hear—privately—from his or her consultant that test data obtained by an evaluator weaken the attorney's case. The attorney also has the right to see if a different expert has a different perspective on the test data. Psychologists interfere with traditional trial preparation procedures when they insist on releasing data only to identified psychological consultants.

Lees-Haley, Courtney, and Dinkins (2005) are among those who view the data release provisions in the 2002 Ethics Code as an improvement over those in the 1992 Ethics Code. In our view, psychologists stepped into the legal arena, presented themselves as practitioners whose work would be characterized by transparency, and subsequently endeavored to shield their data from legitimate scrutiny. In taking mutually contradictory positions, harm was done to the profession of psychology. It should not be necessary to remind psychologists that the disclosure of or protection of data gathered by us in the course of performing forensic psychological services are matters that **[43]** are governed by the rules of evidence and that, far more often than not, our files are subject to discovery.

Psychologists resisting the disclosure of their test data often cite the terms of contracts with test publishers and point out that on some tests (such as the MMPI-2) the raw data are not separable from the test items. Lees-Haley and his colleagues (2005) pointed out that the American Psychological Association has published and marketed texts containing entire psychological tests. Lees-Haley et al. asked rhetorically if it would be unethical for a psychologist to give an attorney a copy of a text that the APA sells to attorneys.

Lees-Haley et al. also call attention to the fact that, in *Responsible Test Use* (Eyde et al., 1993, 2009), there is no statement urging test users to disclose test data only to qualified psychologists. Lees-Haley et al. concluded that

> [r]efusals to disclose psychological tests and test data, in the context of court proceedings, have gone too far. We are damaging our credibility by testifying to contradictory assertions of fact and claiming to follow ethical standards that are contrary to our conduct. Because we are conducting ourselves in this manner and because attorneys are vocal professionals who often influence public opinion, the erosion of our credibility in these quarters is not surprising. (p. 79)

Psychologists who offer forensic psychological services should recognize that operating within the legal system demands cognizance of the discovery process and an appreciation for its role in due process. (Note SGFP, draft 6 [Committee to Revise, 2001], Guideline 10.01.) Attorneys have certain obligations that psychologists must appreciate. The attorney who wishes to challenge a forensic psychologist's findings must have access to all the data gathered by the psychologist in order to plan an effective cross examination. Forensic psychological examiners can legitimately be questioned concerning data gathered but not utilized or data utilized but not alluded to in their reports. Thus, a psychologist who administers tests is obligated to make the test data available to an attorney who wishes to explore the psychologist's decision-making process. Though some test data cannot be understood without specialized education and training, not all data require expertise to decipher.

In an editorial published online, in 1999, the American Psychological Association reminded psychologists of their ethical obligation "to protect the value of secured tests whose psychometric integrity depends upon the test taker not having prior access to test materials." We appreciate APA's stated concerns and are aware of the problems that can arise when examinees are familiar with tests that are to be used in examining them (e.g., Baer, Wetter, and Berry, 1992, 1995). Nevertheless, we find more persuasive the argument put forward by Tippins (2004), who stated that "there is no way to effectively challenge an expert's conclusion without disclosure and analysis of all that underlies it, disclosure that is routinely available with respect to virtually all expert witnesses" (p. 3).

The Case of the Confident Incompetent

Kruger and Dunning (1999) were awarded the 2000 Nobel Prize in Psychology for their work on inflated self-assessments. Dunning and his colleagues (e.g., Dunning, Johnson, Ehrlinger, & Kruger, 2003; Ehrlinger & Dunning, 2003) have repeatedly demonstrated the inability of people to engage in accurate self-assessment. Their research indicated that the less competent are less likely to recognize their limitations as "their incompetence robs them of the ability" to accurately assess their performance (p. 1121). Indeed, Krueger and Mueller (2002) reported that "[p]eople who score low on a performance test overestimate their own performance relative to others, whereas high scorers slightly underestimate their own performance" (p. 180). Davis et al. (2006) reported that when physician competencies, as objectively observed and measured, are compared with physician self-assessments, it becomes apparent that "physicians have a limited ability to accurately self-assess" (p. 1094). There is no basis for presuming that psychologists would fare any better.

With this as background, consider the advice of Tippins and Wittmann (2005) that we contemplate our findings and our recommendations in terms of what they refer to as a clinical inference hierarchy. They suggest that we carefully distinguish between our observations (level I), inferences based on those observations (level II), the implications of those inferences (level III), and the prescriptive recommendations we offer (level IV). Though the recommendations made by Tippins and Wittmann were offered in connection with the performance of custody evaluations, they are equally applicable in other forensic psychological assessment contexts.

Tippins and Wittmann argued that, when preparing reports, we must remind ourselves of our limitations. In discussing level I issues, they cite research documenting that even during basic data gathering, forensic mental health professionals' observations can be distorted by various cognitive biases, attribution errors, labeling effects, illusory correlations, flawed estimation rules, and **[44]** so on. They also call attention to the research that raises questions about the accuracy of our contemporaneous note taking.

Tippins and Wittmann point out that the inferences drawn at level II may not be reliably connected to the level III constructs that are tied to the psycholegal issues in dispute. In discussing level IV issues, Tippins and Wittmann opine that when testifying experts weigh in on the ultimate issue(s) in dispute, they blur the boundaries between triers of fact—authorized by law to make socio-moral and social-control decisions—and expert witnesses, whose role is to assist triers of fact.

If we are observant and maintain a modicum of objectivity concerning the accuracy of our clinical judgment, we learn that the clinical judgment of the experienced members of the profession is not appreciably better than the clinical judgment of graduate students (Garb, 1984, 1989, 1992, 1998; Garb & Boyle, 2003; Garb & Grove, 2005). Wiggins (1973) observed that "[t]here is little empirical evidence that justifies the granting of 'expert' status to the clinician on the basis of his or her training, experience, or information-processing ability" (p. 131). Wigmore has offered the perspective that a witness's qualifications as an expert vary on a question-by-question basis. As conceptualized by Wigmore (1979), "experiential capacity is always relative to the matter at hand [; therefore,] the witness may, from question to question, enter or leave the class of persons fitted to answer, and the distinction depends on the kind of subject primarily, not on the kind of person" (p. 750).

Westen and Weinberger (2004) called attention to the fact that the vast majority of forensic psychologists offer opinions in contexts in which they do not have subsequent access to reasonably unambiguous outcome data—clear evidence of what has worked and what has not worked. Only with outcome data might we be able to ascertain which types of data, when attended to, lead us to correct answers and which types of data lead us astray. In the field of forensic psychology, we lack the ability to manipulate independent variables, manage potentially confounding variables, and measure dependent variables (Ramsey & Kelly, 2004). We cannot resolve this inherent deficiency in our data; we can, and should, disclose the limitations of our data.

Justice Is Not a Game

Weissman and DeBow (2003) opined that some forensic psychologists appear to have developed the notion that "the adversary system somehow is a 'game,' a game that lawyers play and that experts can join" (p. 35). For example, Benjamin and Gollan (2003) stated that the erasure of tapes made during forensic interviews "prevents the opposing counsel from using contemporaneous material out of context during a later cross-examination at deposition or trial" (p. 35). Brodsky (1991) advised testifying experts that, in order to avoid being questioned regarding a learned treatise, "[t]he first option is to decline absolutely all such acknowledgments of others' expertise unless you have a thorough, ready mastery of the documents or the writings of the expert and do indeed agree with everything in them" (p. 120).

Juxtaposed with Brodsky's advice is an acknowledgment that the generally accepted definition of an authoritative treatise is one that is "a recognized source of professional knowledge" (p. 119). It is reasonable, therefore, to infer that Brodsky is well aware that a witness's acknowledgment that a particular work is an authoritative treatise does not constitute a statement that the witness does "indeed agree with everything" contained within it. Refusals by witnesses to acknowledge that works known by them to be recognized sources of professional knowledge are authoritative treatises, as a means by which to avoid questions concerning those works, is game playing. Cross examination is not a game, and even if it were, our games have rules and honest competitors are expected to play by the rules.

Psychologists who lack respect for the manner in which the adversarial system operates should not perform forensic psychological services. Psychologists who recognize the critical role that cross examination plays in the process should simply respond honestly, even when the inquiries become exacting, and not endeavor to avoid answering difficult questions in the manner suggested by Brodsky.

Discovering the Illegible

The manner in which one creates records, the steps taken to preserve them, the individuals to whom they are disclosed, and the procedures followed in releasing them are all contextually determined. In no context are appropriate records more important than in the forensic context. Unfortunately, it is more likely than not that most state regulations governing the practice of the various mental health professions make no reference to the issue of legibility. Many health service providers might take the position that records created in a treatment context must be readable by and understandable to the treating clinician and the individual who has been legally designated as the custodian of those records in the

event of the **[45]** clinician's death. In a forensic context, records must either be created in a manner that renders them readable by others or legible versions of those records must be prepared in response to requests from those to whom the records have been provided.

Forensic psychologists should be sensitive to the presumed objectives that underlie the laws and rules governing their roles. As this relates to record creation, it should be understood that discovery is linked to due process and that the rights of litigants wishing to challenge the findings and opinions of forensic psychological experts cannot be protected unless the experts have created, maintained, and produced records that are reasonably detailed and legible. SGFP, draft 6 (Committee to Revise, 2001) guidelines address components of the responsibilities of forensic psychologists to document all data they review with enough detail and quality to allow for reasonable judicial scrutiny and adequate discovery by all parties (Guideline 12.05). Forensic psychologists have a responsibility to make available all documentation in their files (Guideline 12.06) and to keep and maintain all records consistent with federal and state laws, rules, ethical codes, and regulations (Guideline 12.07).

Documenting Ethical Decision Making

Most psychologists have had enough exposure to medical settings to be aware of the adage that "if it's not in the chart, it didn't happen." Many are surprised to learn that the adage applies not only to behavior (actions taken; words spoken) but, in some contexts, to thought processes as well. The best evidence that a thorny issue has been thought through is a written record of one's reasoning. When forensic psychologists encounter an ethical dilemma, we recommend that they take the following steps and document having done so: (1) Identify the dilemma; (2) seek information and guidance, if available, from various sources of professional authority that guide us in our work (e.g., the Ethics Code, the Specialty Guidelines, etc.); (3) seek information, if available, from applicable material appearing in professional journals; (4) seek information from the materials retained by them following attendance at continuing education workshops; (5) record the steps taken to resolve the dilemma; (6) consider seeking consultation; and (7) articulate, in the documented decision process, the manner in which the final decision was made.

When faced with an ethical dilemma, we recommend that forensic psychologists use, and document having used, the decision-making process that follows (adapted from Keith-Spiegel and Koocher, 1985): (1) briefly describe the ethical dilemma and list the various issues (if there is more than one); (2) identify all those who are likely to be affected by the decision; (3) specify what consideration is owed to each and the basis for it; (4) list the ethical standards and/or practice guidelines that appear to be applicable; (5) for each issue, outline alternative actions, list the reasonably anticipated consequences and benefits of each action, and list any published research that sheds light on the anticipated consequences and benefits; (6) identify the smallest change in circumstances that would cause them to choose a different action from the one tentatively chosen and identify what the different action would be; and (7) identify what action(s) must be taken in the event that there are unanticipated consequences and/or in the event that negative consequences that were considered are more serious than was anticipated.

Ethical Ambiguity

Ethical Standard 9.01 (American Psychological Association, 2002) addresses Bases for Assessments, a matter of great importance to forensic psychologists. Forensic psychologists who have been retained by attorneys to conduct work product reviews do not agree among themselves concerning the circumstances (if any) under which they can responsibly offer opinions concerning the psychological characteristics of individuals whom they have not evaluated. Though no empirical data are available, anecdotal evidence suggests that the performance of work product reviews, particularly in the context of family law proceedings, is becoming increasingly common. For that reason, we address the issue in detail.

Ethical Standard 9.01(a) provides an admonition that, to many, seems clear and concise: "Psychologists base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings." Ethical Standard 9.01(b) reads, in pertinent part, "Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions." Standard 9.01(c) reads, "When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations." SGFP, draft 6 (Committee to Revise, 2001), Guideline 11.03 **[46]** also addresses the obligations of a forensic psychologist in rendering opinions regarding persons not examined.

Reviewers are constrained with regard to the issues upon which they can responsibly opine. Work product reviews are performed in order to formulate opinions concerning (1) the evaluator's adherence (or lack thereof) to statutory requirements, professional standards, and generally accepted practice guidelines; (2) the methodological integrity of the evaluation process, as outlined in the report; (3) the appropriateness of any assessment procedures employed; (4) the accuracy of any data interpretations offered; (5) the degree to which impressions described and perspectives communicated are consistent with the information provided; (6) the sufficiency of explanatory statements concerning the manner in which weight was assigned to different data, particularly where discrepant data are involved; (7) the logical nexus between the information, impressions, and perspectives communicated within the body of the report and the opinions expressed at the conclusion of the report; (8) the degree to which the evaluator appears to have drawn upon psychology's established knowledge base in formulating his or her opinions; and, and (9) the degree to which opinions offered are supported by data that have been articulated in the body of the report (Baerger, Galatzer-Levy, Gould, & Nye, 2002; Galatzer-Levy, Baerger, Gould, & Nye, 2002; Gould, Kirkpatrick, Austin, & Martindale, 2004; Martindale, 2007a, 2007b; Martindale & Gould, 2008; McCurley, Murphy, & Gould, 2006). It is not intended that the reviews will lead to the formulation of opinions concerning the characteristics of the examinee.

If the data from a specific test have been relied on and if all the data are available to a work product reviewer, the reviewer can testify concerning information appearing in the test manual and in the peer-reviewed published literature. In doing so, a reviewer can responsibly state that, according to the manual and published studies, data patterns of the type displayed by an examinee are often observed in groups of people with certain specified characteristics. Only under limited circumstances can a testifying reviewer express opinions concerning a specific person whose test performance is being discussed, and care must be taken to place appropriate limits on the opinions expressed.

The scope of a reviewer's task is limited and should not be confused with the work of a practitioner conducting a second evaluation (Austin, Dale, Kirkpatrick, & Flens, 2011; Gould et al. 2004; Gould, Martindale, Tippins, & Wittmann, 2011). If a reviewer identifies deficiencies in an evaluator's work, the reviewer's task is to articulate those deficiencies and explain why they may have had a significant impact on the process of formulating the opinions that have been communicated to the court by the evaluator in his or her advisory report (Austin et al., 2011; Gould et al., 2011; Martindale & Gould, 2008). Though it is appropriate that reviewers identify missing information and opine concerning the likely consequences of formulating an opinion without the identified information, reviewers should not attempt to gather the missing information, fit the missing pieces into the puzzle (as assembled by evaluator), and present the completed puzzle to the court (Austin et al., 2011; Gould et al., 2011).

The Pursuit of Excellence

In an article in which she reported on psychology licensing board disciplinary actions, Van Horne (2004) wrote, "Our increasingly litigious society leaves many professional psychologists with a sense of vulnerability" (p. 170). Knapp and VandeCreek (2003) opined that "fear of being the target [of disciplinary] action has had a chilling effect on many psychologists" (p. 301) and that the 2002 Ethics Code "revision process took place in an atmosphere of anxiety and frustration concerning the disciplinary processes impacting psychologists" (p. 301). It is not surprising, therefore, that suggestions that standards be progressively ratcheted up elicit visions of how the higher standards would be used to the disadvantage of forensic psychologists in the course of litigation and in board actions. Such visions stimulate resistance to the progressive bar-raising process proposed by us (e.g., Martindale & Gould, 2004). Improvements in forensic psychological services, elevation of the image of organized psychology, and protection for individual practitioners will never be achieved if we do not strive for incremental changes in what we demand from ourselves. We believe that our services should reflect our respect for the concepts of self-determination, autonomous decision-making, transparency, and competence.

Clarity and Specificity in Ethics Codes

The interests of society, consumers of psychological services, well-intentioned practitioners, and the profession of psychology are best met when our ethical standards are reasonably specific and clearly written. Because no ethics code will ever be able to address all the thorny situations in which psychologists are likely to find themselves, all codes must afford individual practitioners some leeway. Ethics codes are most useful to all those who are affected **[47]** by them when the paths to be chosen and avoided can be clearly identified. Practitioners who want to do the right thing but are not entirely clear concerning what practices constitute "the right thing" are offered more effective guidance when ethical standards are articulated with clarity. Two axioms follow from this. The first is: If you do not know where you are going, you are likely to end up somewhere else. The second is: It's easier to do what's expected of you when what's expected of you is clearly stated.

The profession is better served when groups (like ethics committees and licensing boards) that have the responsibility of responding to complaints against psychologists have unambiguously worded standards to guide them in their deliberations. Presumably, when the rules are clear, what does and does not constitute a deviation from those rules is also

clear. Thus, it is easier to exonerate wrongly accused practitioners and easier to take effective action against practitioners whose actions constitute deviations from the rules. Clearer rules also make the educational function of ethics committees and licensing boards easier.

The public is also better served when standards of practice for service providers are clearly articulated. The public has a better understanding of what is to be expected and the public has more effective recourse when service providers (including psychologists and other professionals) deviate from the standards. The ethical standards by which we are judged are those that we have developed. Our society has become increasingly litigious and it is not surprising that psychologists involved in revising an ethics code may contemplate how the ethical standards might be used to their disadvantage in litigation. Elevating the level of psychological practice by raising the ethical bar must take precedence over concern for the litigation-related apprehensiveness of psychologists.

Perspectives on Regulation

People often have attitudes that are mutually inconsistent. We tend to resist regulation when we are the ones whose actions are being regulated and endorse regulation when we are its beneficiaries. When we drive, we think like drivers; when we walk, we think like pedestrians. Many of the unfortunate interactions between vehicles and pedestrians would be avoided if drivers adopted the mindset of pedestrians and pedestrians thought back to the last time they were behind the wheel of a car.

Forensic psychologists are just as inconsistent as others. In many cases, our views concerning regulation depend on whether we are service providers or service recipients. As service recipients, we are angered when we deal with professionals who suggest that they know more than they really do or can accomplish more than they will be able to accomplish. When we examine the failings of other professions, we often express the view that these professions should more effectively regulate the professional behaviors of their members. We should reflect on this as we debate issues concerning the regulation of the professional behavior of forensic psychologists. The critical eye that is so easily focused outward when we are the service recipients needs to be focused inward when we are the service providers.

Too frequently, forensic psychologists do to others that which we criticize when, in our capacity as regular folks, it is done to us by members of other professions. We criticize medical professionals for providing us with insufficient information; for making decisions that are ours to make; for requiring us to sign documents that we have not had sufficient opportunity to read and contemplate; and, in some cases, for suggesting that they have answers that they do not really have. We criticize police officers who bend the rules because they are absolutely certain that they can distinguish the guilty from the innocent. We criticize computer technicians for delving into problems that we never asked them to tackle. All these professional sins have been committed by forensic psychologists.

We urge forensic psychologists to treat those with whom they interact as they would wish to be treated if the roles were reversed. Forensic psychologists conducting evaluations should endeavor to view the evaluation process from the perspective of those being evaluated, the collateral sources, the attorneys, the judge, and those likely to be affected by the evaluators' work.

IMPLICATIONS AND APPLICATIONS

Data collected and made publicly available by ethics committees and by state licensing boards are not grouped based on the identified specialties of the psychologists. Thus, we do not have data that might reveal what complaints of ethical improprieties are most commonly filed against psychologists offering forensic psychological services. In consultation with colleagues offering different types of forensic psychological services, we have compiled a list of what appear to be the major areas in which ethical infractions are alleged.

Preparation

Notwithstanding the clear wording of ethical Standards 2.01 (a) and 2.01 (f), psychologists with no "education, **[48]** training, supervised experience, consultation, study, or professional experience" [wording taken from 2.01 (a)] specific to any psychological specialty are often drawn to psychology's various specialties. Because the bulk of our work is in the area of litigated child custody disputes, we acknowledge that selective attending may be coloring our view of this dynamic, but it seems to be a particularly troublesome occurrence in the custody arena.

Even after having obtained some professional experience, it seems that many psychologists offering forensic psychological services fail to "become reasonably familiar with the judicial or administrative rules governing their roles" [wording taken from 2.01 (f)]. In New Jersey, a state that looks with disfavor on ipse dixit opinions, an evaluator who has been asked to articulate the bases for his opinions cites his years of experience and his clinical judgment. His testimony is deemed to be without value and the court, citing earlier decisions, describes "a prohibition against speculative testimony" [*Grzanka v. Pfeifer*, 301 N.J. Super. 563, 580 (App. Div.), cert. denied, 154 N.J. 607 (1997)]. The court adds that "[u]nder this doctrine, expert testimony is excluded if it is based merely on unfounded speculation and unquantified possibilities" [*Vuocolo v. Diamond Shamrock Chem. Co.*, 240 N.J. Super. 289, 300 (App. Div.), cert. denied, 122 N.J. 333 (1990)].

When a forensic psychologist testifies, the concepts and data that are the basis of the proffered opinion should reflect the generally accepted and current state of knowledge in the field (Mnookin, 2008). We have often observed testimony from well-credentialed colleagues who present perspectives that were accepted seven or eight decades ago but that have little, if any, basis in current peer-reviewed writings or who present perspectives that reflect an idiosyncratic view of the research rather than reflecting that which is generally accepted. Forensic psychologists need to continually ask themselves whether the opinions offered to the court have adequate indicia of reliability (Faigman et al., 2002).

The need to base forensic psychological opinions and testimony on scientifically informed knowledge is addressed in SGFP, draft 6 (Committee to Revise, 2001), Guideline 4.05. It reads:

> When providing opinions and testimony that are based on novel or emerging principles and methods forensic practitioners, when possible, make known the limitations of these principles and methods. Forensic practitioners seek to provide opinions and testimony that are sufficiently based upon adequate scientific foundation, and reliable and valid principles and methods that have been applied appropriately to the facts of the case. (p. 7)

Marketing

Section 5 of our Ethics Code (American Psychological Association, 2002) addresses Advertising and Other Public Statements. Psychologists are not discouraged from marketing their professional services, but a new letterhead does not transform a psychologist in general practice into a forensic psychologist. Standard 5.01directs, in part:

> Psychologists do not knowingly make public statements that are false, deceptive, or fraudulent concerning their . . . practice . . . . Psychologists do not make false, deceptive, or fraudulent statements concerning (1) their training, experience, or competence; (2) their academic degrees . . . [or] (3) their credentials . . . .

In a text published by the American Bar Association and intended primarily for attorneys, Zervopoulos (2008) urged attorneys to ensure that board certification credentials claimed by psychologists offering forensic psychological services have not been obtained through "certification mills" (p. 41). Zervopoulos related the experience of Steve Eichel, a Pennsylvania psychologist who secured board certification for his cat, Zoe, from an organization boasting that its credentials were awarded to a "'select group of professionals who, by virtue of their extensive training and expertise, have demonstrated their outstanding abilities in regard to their specialty'" (p. 41). Zoe, identified on her application as Zoe D. Katze, Ph.D., did little more than lick the envelope into which Eichel inserted the application and required fee, and, soon thereafter, Zoe's credentials arrived (Hansen, 2002).

In medicine, psychology, and social work, the traditional certifying boards granting diplomate status (board certification) in recognition of proficiency in a specialty all emerged from and were supported by the parent organizations of the professions (American Psychiatric Association, American Psychological Association, and National Association of Social Workers). In each case, there was a desire among members of the parent organization to develop a procedure by which members with a demonstrably advanced level of knowledge, training, and experience in a specialty could submit themselves to a peer-conducted review of evidence of their mastery and obtain formal recognition of their proficiency upon successful completion of the process (Golding, 1999; Martindale, 2005a).
[49] Until the mid-1990s, when a mental health professional declared that she or he was board certified, the meaning of the term was clear. In the field of psychiatry, it referred to certification by the American Board of Psychiatry and Neurology; in psychology, it referred to certification by the American Board of Professional Psychology; and, in social work, it referred to certification by the American Board of Examiners in Clinical Social Work. Each of these boards established rigorous standards and the diplomate credential, when awarded, was evidence of a significant achievement. In the mid-1990s it became apparent to various entrepreneurs that, in many fields, there are practitioners who wish to be perceived as proficient in a specialty but who would prefer the appearance of proficiency to the reality of proficiency because the look can be obtained much more easily.

A psychologist's participation in litigation carries with it an obligation to contribute clarity, not misleading complexity. Psychologists ignore their responsibility to assist triers of fact when they create confusion concerning their own credentials, and, more specifically, when they create confusion about what it means to be board certified. Whether or not the presentation of vanity board credentials by a psychologist constitutes a violation of Standard 5.01's admonition regarding false or deceptive statements concerning their training,

credentials, and so on, is debated, and the point at which puffery becomes deception may be hard to pin down.

We urge psychologists not to create veneers of faux proficiency. The integrity of the judicial system is adversely affected when professionals who have been designated as experts engage in the deliberate distortion of information, even if the information relates to the experts' credentials rather than to substantive issues in the case before the court.

Informed Consent and Assent

Standard 4.02 (a) (2) obligates psychologists to discuss "the foreseeable uses of the information generated through their psychological activities." And Standard 4.02 (b) reads, "Unless it is not feasible or is contraindicated, the discussion of confidentiality occurs at the outset of the relationship and thereafter as new circumstances may warrant." It seems that many psychologists conducting forensic psychological evaluations fail to explain what will occur when their evaluations have been concluded. Forensic psychologists should specify (preferably in written form) whether reports will be prepared and, if reports will be prepared, those to whom their reports will be released, those who will have access to the information contained in their reports, and what mechanisms (if any) will be in place to prevent the disclosure of report contents to those with no legally recognized need for the information. (See SGFP, draft 6 [Committee to Revise, 2001], Guidelines 5.03, 8.02, 8.03, and 10.)

Methodological Integrity

In Ethical Standard 3.05 (a) a definition of multiple relationship is provided. At the conclusion of the definition, the following admonition appears: "A psychologist refrains from entering into a multiple relationship if the multiple relationship could reasonably be expected to impair the psychologist's objectivity, competence, or effectiveness in performing his or her functions as a psychologist. . . ." There are among us psychologists who express confidence that neither their objectivity, competence, nor effectiveness will be impaired simply because they are involved in multiple relationships with those whom they are evaluating or intend to evaluate. SGFP, draft 6 (Committee to Revise, 2001), Guideline 6.02 addresses multiple relationships in a manner consistent with the Ethics Code's Section 3.05).

We urge psychologists who believe that the multiple relationships in which they find themselves are of a type "that would not reasonably be expected to cause impairment" to familiarize themselves with the vast literature on cognitive biases (Arkes, 1981, 1991; Beattie & Baron, 1988; Borum, Otto, & Golding, 1993; Crano, 1977; Dailey, 1952; Davies, 2003; Garb, 1994; Haverkamp, 1993; Heider, 1946; Klayman & Ha, 1987; Koriat, Lichtenstein, & Fischhoff, 1980; Kuhn, 1962; Leeper, 1935; Martindale, 2005b; Northcraft & Neale, 1987; Rosenhan, 1973; Rosenthal, 1966; Sandifer, Hordern, & Green, 1970; Skov & Sherman, 1986; Snyder & Swann, 1978; Strohmer, Shivy, & Chiodo, 1990; and Tversky & Kahneman, 1974). Rosenhan's (1973) study, "On Being Sane in Insane Places," dramatically demonstrated that, once formed, opinions concerning individuals' personality characteristics are not amenable to change. Opinions formed within the context of an interpersonal, professional, or social relationship are likely to significantly interfere with the objectivity needed in forensic psychological evaluations.

In a recent article describing a “hybrid model for consulting with attorneys” in child custody disputes, Lee and Nachlis (2011) urged the forensic practitioner to partner “with the attorney and the parent” acting as an **[50]** “equal member of the team” (p. 97). Lee and Nachlis (2011) wrote:

> The advantage that this provides is that the [forensic practitioner] is less likely to end up in a position where she is advocating a position that is based upon facts previously selected by the attorney or the parent who has hired her. . . . Another factor that helps the [forensic practitioner] maintain a scientific and objective, and therefore, ethical stance is the constant focus on the child’s best interest [*sic*] combined with a vigilant awareness that one only has partial information. (p. 97)

It is our contention that “a vigilant awareness that one only has partial information” should lead the forensic practitioner to recognize that she lacks the ability to “focus on the child’s best interest [sic].” One cannot focus on that which cannot be seen, and the parenting plan most likely to be in a child's best interests cannot be seen when all that is available is partial information.

Lee and Nachlis (2011) encouraged the forensic psychologist to “suggest strategies to the parent that will help the child deal with issues that arise from living within a shared parenting environment during the course of an evaluation. This latter function may be very similar to what has been described as ‘coaching’ or ‘witness preparation’ in the literature” (p. 95).

Although the goal of assisting a parent to help a child during the evaluation process is a noble one, this is the responsibility of a clinician and not a forensic psychologist consulting with an attorney on a legal dispute. Work product doctrine protects from discovery actions by a consultant that are related to the attorney’s trial preparation. Lee and Nachlis (2011) recommended directly assisting the parent in his or her parenting—an activity that is not an aspect of an attorney’s trial preparation. It is possible that records of actions by a consultant that are unrelated to providing assistance in trial preparation might be the subject of a discovery demand. In 1996, the Fourth Circuit Court of Appeals ruled that there were two discernibly different types of work product—opinion work product, which is “absolutely immune” from discovery, and non-opinion work product, which is discoverable upon a showing of substantial need (*In re Grand Jury Proceedings*, 102 F.3d 748, 750 [4th Cir. 1996]). Litigant coaching performed by a retained consultant is non-opinion work product; therefore, consideration must be given to the risk that information pertaining to those activities might be discoverable.

The discovery of litigant coaching by a forensic psychological consultant would be likely to undercut the attorney’s trial strategy, resulting in harm to the client and possibly to the child at the center of the controversy. Ethical standard 3.04 reads: “Psychologists take reasonable steps to avoid harming their clients/patients, students, supervisees, research participants, organizational clients, and others with whom they work, and to minimize harm where it is foreseeable and unavoidable.” Though Lee and Nachlis’s discussion of the hybrid model relates to forensic psychological services performed in the context of child custody litigation, professional activities “described as ‘coaching’ or ‘witness preparation’ in the literature” (p. 95) are also encountered in other areas of forensic psychological practice. We recommend that when such coaching is being considered, forensic psychologists alert retaining attorneys to the attendant risk.

Ethical Standard 2.04 obligates psychologists to base their work "upon established scientific and professional knowledge of the discipline." Standard 9.02, addressing Use of Assessments, emphasizes, in section "(a)" using techniques "in a manner and for purposes that are appropriate in light of the research . . ." on or evidence of the usefulness and proper application of the techniques. Section "(b)" calls attention to the importance of established "validity and reliability . . . for use with members of the population tested." Notwithstanding what seems to us to be the unambiguous message of Ethical Standard 2.04, forensic psychologists frequently utilize assessment techniques and instruments the usefulness of which for forensic purposes has not been demonstrated and the reliability and validity of which have never been established.

More than five decades ago, Meehl (1960) expressed concern regarding "the cultural lag between what the published research shows and what clinicians persist in claiming to do with their favorite devices . . ." (p. 26). More than four decades ago, Chapman and Chapman (1967), in discussing the use of drawings in assessments, called attention to the possibility that "clinicians simply perpetuate . . . erroneous principles of interpretation . . ." (p. 193).

There is little doubt that various drawing tasks remain high on the list of inappropriate assessment techniques employed with disturbing frequency in the context of litigated custody disputes (Ackerman & Ackerman, 1997; Bow, 2006; Keilin & Bloom, 1986). In describing students of psychology, Gottfredson (2009) observed that they "do not come to academic subjects as blank slates but often with basic misconceptions that create barriers to learning . . ." (p. 58). The same observation could be made of psychologists who were educated and trained as treatment providers and who subsequently became interested **[51]** in forensic psychology. It is essential that psychologists offering specialized psychological services honor their obligation to secure the requisite knowledge and skills and to close the gap between what the research shows and their choices of assessment methods.

Reports and Testimony

Ethical Standard 9.06, Interpreting Assessment Results, obligates us to articulate any significant limitations to the interpretations offered by us. The adversarial atmosphere in which forensic psychologists operate stimulates in many a reluctance to voluntarily disclose the limitations of our data. We remind forensic psychologists who slip into this mindset that the objective when functioning in consulting roles is to call the attention of retaining attorneys to all the relevant data; to explain the nexus between those data and the issues in dispute; and, with supportive and non-supportive data in mind, to assist in the development of litigation strategies. In contrast, when functioning as testifying experts, the objective of forensic psychologists is to assist triers of fact, not to win the game for the team that retained them. SGFP, draft 6 (Committee to Revise, 2001), Guideline 13 addresses several aspects of the importance of transparent communication in oral and written testimony.

Pope, Butcher, and Seelen (2006), in a text used by many attorneys, reminded readers that there are several software programs that interpret test data and generate interpretive reports. These reports, referred to as computer-based test interpretations (CBTIs), differ with respect to the quantity of the information provided and the accuracy of the interpretations offered. Standard 9.09 (b) of the Ethics Code states, "Psychologists select scoring and interpretation services (including automated services) on the basis of evidence of the validity of the program and procedures as well as on other appropriate

considerations." The question to which there is no satisfactory answer is: How do practitioners "select scoring and interpretation services" and make their decisions "on the basis of evidence of the validity of the program," when meaningful validity data have not been published?

In an earlier edition of their text, Pope, Butcher, and Seelen (2000) stated that "[i]n most published studies of CBTI validity, the CBTIs' recipients (usually clinicians) rate the accuracy of computer interpretations on the basis of the clinicians' knowledge of test respondents" (p. 10). What Pope et al. described as "studies of CBTI validity" are in other venues (such as advertising and product marketing) referred to as customer satisfaction data. The participants in the studies are, inevitably, satisfied customers. If they were not satisfied with the fit between their own impressions and the CBTI narratives, they would have stopped ordering the narratives and, by virtue of that decision, their names would no longer have appeared on the lists from which potential survey participants were selected.

In referring to the collected survey data as validity data, Pope et al. (2000, p. 10) blurred the important line between reliability and validity. Even if we view the surveys that have been alluded to as a means by which to compare the impressions of one judge (the clinician) with another judge (the computer), good levels of agreement would merely establish good inter-judge reliability. The clinician/computer agreement survey is flawed in other ways as well. A more reasonable study would require that clinicians prepare narratives and that other clinicians be asked to rate the agreement between the clinician-prepared narratives and the CBTIs.

No discussion of the ethical factors involved in our Reports and Testimony would be complete without mention of the all-too-common cutting and pasting of CBTI segments into the reports of forensic psychologists. Standard 8.11, addressing Plagiarism, reads: "Psychologists do not present portions of another's work or data as their own, even if the other work or data source is cited occasionally." It seems clear to us that forensic psychologists who have taken detailed descriptions of the personality characteristics of evaluees directly from CBTIs and have presented these descriptions "as their own" are plagiarizing. The utilization of CBTI-provided data interpretations also indirectly suggests a failure to meet the obligation imposed by Standard 9.09 (c) to retain responsibility for the interpretation of their test data.

Alex Caldwell, developer of Caldwell Reports, has expressed a perspective that is dramatically at odds with ours. In a message posted to the Child Custody listserv on September 3, 2009 (quoted with permission), Caldwell likened the purchase of a computer-generated interpretive report (CBTI) to "an assessment consultation" with a specialist. He stated that knowing the basis for a particular interpretive statement "is not the examiner's responsibility—it is the specialist's." Caldwell added that when forensic psychologists are being peppered with difficult questions from cross-examining attorneys, it is "straightforward" to say that the bases for the data interpretations provided in the witness's report, but provided to the witness in a CBTI, are the responsibility of the person whose name appears on the CBTI and to state: "'If you want to identify them, it is your right to retain him **[52]** and ask him.'" SGFP, draft 6 (Committee to Revise, 2001), Guideline 12 addresses many aspects of these important elements of the use of assessment techniques in forensic psychological services.

Show Me the Bases

We begin by calling attention to the fact that showing occurs prior to trial and that telling occurs at trial. The obligation of testifying experts to articulate the bases for their opinions is clear. (Refer to SGFP, draft 6 [Committee to Revise, 2001], 13.03.) There is, however, wide inter-jurisdiction variation with regard to rules governing both the quantity and specificity of the information that must be disclosed prior to trial concerning an expert's anticipated testimony. In many jurisdictions, identified expert witnesses are not required to disclose the bases for their opinions prior to trial. Particularly in situations in which forensic psychologists are functioning as court-appointed examiners, we urge them, both in their reports and in their testimony, to articulate in reasonable detail and with reasonable specificity the bases for their opinions.

Though hard data are impossible to obtain, there is broad agreement that, in many forensic matters, reports prepared by examiners often become instruments to be constructively employed in settlement negotiations, as opposed to ordnance used by one side against the other during warfare-by-litigation. When evaluators include in their reports reasonably detailed information concerning the bases for opinions expressed and present that information in a fair and balanced manner, the probability is increased that the litigating parties will be able to use the reports in a constructive manner, thereby empowering them to resolve their disputes without going to trial. Where there is lack of clarity or perceived lack of fairness, the probability is increased that evaluators' reports, instead of being tools in a resolution process, will become something to be fought over in court.

Releasing Test Data

In an earlier section ("Withholding Data") we offered commentary on what we believe to be the problems associated with refusals by psychologists to release test data to non-psychologists when the data have been gathered for purposes of litigation. The American Psychological Association's position on the release by psychologists of test data to non-psychologists changed significantly between 1992 and 2002, and the change is reflected in the 2002 Ethics Code.

Stephen Behnke, APA's Ethics Director and writer of the Ethics Rounds column in each issue of the Monitor, devoted an entire column to that topic (Behnke, 2003). In his column, entitled "Release of Test Data and the APA's New Ethics Code," Behnke wrote: "In the 1992 Code, psychologists presumed that test data would be withheld, unless certain conditions were met. In the new Ethics Code, the presumption favors release unless the specified exceptions are present" (p. 71). Behnke pointed out that withholding data "in the context of a legal obligation [emphasis in original] to release the data . . . may result in adverse legal consequences" (pp. 71–72).

The SGFP, draft 6 (Committee to Revise, 2001), Guideline 12.05 is consistent with the Ethics Code in directing forensic psychologists to "recognize the importance of documenting all data they consider with enough detail and quality to allow for reasonable judicial scrutiny and adequate discovery by all parties. This documentation includes, but is not limited to . . . assessment and test data, scoring reports, and interpretations. . . ."

Spoliation of Records

Ordinarily, urging forensic psychologists to create and preserve detailed records might seem superfluous, but the landscape was changed by the publication of a text in which the destruction of records was advocated. In this text, the authors endorsed the erasure of tapes (Benjamin & Gollan, 2003, p. 35). Courts do not take lightly to the destruction of records: "Spoliation is the destruction or significant alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation" (*West v. Goodyear Tire & Rubber Co*., 1999, p. 778). Forensic psychologists have foreknowledge that their records are likely to be needed if the cases in which they have been involved proceed to trial. (Refer to SGFP, draft 6 [Committee to Revise, 2001], 12.05.) The destruction by forensic psychologists of their own records is a self-serving act. Such destruction makes effective cross-examination impossible. When forensic psychologists alter, conceal, or destroy portions of their files, efforts to thoroughly explore their methods and procedures are frustrated and the risk is increased that errors will go undetected.

In *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), the United States Supreme Court observed: "Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well" (p. 13). Applying that logic to the work of forensic psychologists, even those who have been appointed by the court sometimes err. For that reason, the work of court-appointed **[53]** forensic psychologists should be subjected to no less scrutiny than the work of retained experts (Tippins, Gould, & Martindale, 2011).

The Development of our Ethics Codes

Those psychologists who accept responsibility for developing ethics codes for our profession must master two specific balancing acts. They must balance statements communicating aspirational goals with statements articulating enforceable standards. They must also balance the needs of the profession with the needs of those who are served by psychologists and those who are indirectly affected by the quality of psychological services.
Peanuts and Psychologists
In mid-January 2009, our confidence in the safety of peanut butter and other peanut products was rocked by a major recall of peanut products. Commentators in the various media called attention to the fact that this was the latest in a series of increasingly serious food contamination scares. On February 2, 2009, Consumers Union posted an editorial on its website (www.consumerreports.org) headlined: "Peanut recall raises questions about ethics and competence." The Consumers Union editorial writers asked rhetorically: Are they insufficiently motivated to do the job right or do they lack the requisite competence? This question, of course, raised another: If they were sufficiently motivated to do the job right, how difficult would it have been to secure the requisite competence?

Celia Fisher (2003), who served as Chair of the Task Force that developed the 2002 Ethics Code (American Psychological Association, 2002), wrote that, beginning with the 1992 Ethics Code (American Psychological Association, 1992), "[f]or the first time, clear distinctions were made between aspirational principles that articulated foundational values of the discipline and specific decision rules articulated in 180 distinct ethical standards that would be subject to enforcement by the APA, other organizations, and licensing boards that adopted them (citation omitted)" (Fisher, 2003, p. 6).

We question the wisdom of the "clear distinctions" to which Fisher alluded. The process of teaching psychologists to think ethically is impeded when we repeatedly accentuate the demarcation between aspirational goals and enforceable standards.

A Pitch for Requiring Aspiring

It is likely that some of those who offer commentary on decisions handed down by the United States Supreme Court felt that Potter Stewart's often-quoted observation regarding "hard-core pornography" ("I know it when I see it"; *Jacobellis v. Ohio*, 378 U.S. 184 [1984], 197) did nothing to elucidate the defining characteristics of hard-core pornography, but it is a statement that has heightened our awareness that there are certain things that are understood when encountered but that are difficult to define (Burton, 2008).

With Potter Stewart in mind, we reflect upon whether aspirations can be reasonably inferred based on observed behavior. In discussions of our Ethics Code (American Psychological Association, 2002), we are often reminded that the Principles that appear at the beginning of the document are "aspirational goals [that] should be considered by psychologists in arriving at an ethical course of action" (Fisher, 2003, p. 3). It logically follows that in order to pursue aspirational goals, one must engage in goal-directed behaviors

In the course of growing up, many children hear from a parent, a teacher, or a coach the accusation: "You're not trying hard enough." It is not our contention that those who sit in judgment of colleagues accused of wrongdoing can measure effort with reasonable precision, but there are situations in which it is clear that a practitioner whose actions are under scrutiny has, in simple terms, failed to try hard enough. Where professional goals to which we aspire are difficult to achieve, the failure to achieve them may not reflect deficient effort. When, however, that to which we claim to aspire is easily achieved with minimal effort, it can reasonably be inferred that failure to reach the goal reflects inadequate efforts to arrive at an ethical course of action.

Beauchamp and Childress (2008) opined that, while beneficence is often viewed as voluntary rather than obligatory, the concept of obligatory beneficence is not oxymoronic. It is our contention that all ethical principles and standards are derived from and are elucidations of the ethic of reciprocity—the concept that each of us is entitled to just treatment and bears a reciprocal obligation to treat others in a just manner (Paden, 1997, 2003; Stace, 1937/1975). When we are the service recipients, we expect that service providers will perform their services to the best of their ability. Recipients of forensic psychological services are entitled to expect that we will perform our services to the best of our ability.

Our reading of the SGFP, draft 6 (Committee to Revise, 2001), Guideline 2.05 is that the conduct and **[54]** competencies of forensic psychologists evolve. Those who have worked in the field for several decades are expected to have developed a standard of professional conduct and competencies that are further advanced along the continuum of adequacy than those who have recently begun forensic practice. Implicitly, the SGFP, draft 6 (Committee to Revise, 2001) encourages forensic psychologists to strive toward the "best possible" pole of the continuum of adequacy. We believe that each of us should work toward making our next forensic work product better than the last. We should always be moving further along the adequacy continuum toward that which is the "best possible." We should strive for excellence.

Barge Towing and Forensic Psychology

The year 1944 began inauspiciously for the Carroll Towing Company. On January 3, one of the company's barges, the Anna C, broke free of its mooring lines, drifted into a tanker, and sank. The United States, the lessee of the barge, sued Carroll Towing. Three years later, Carroll Towing's loss became tort law's gain, when Judge Learned Hand created what came to be known as the Hand Rule [*U.S. v. Carroll Towing Co*., 159 F.2d 169 at 173 (2d Cir. 1947)].

The Hand Rule suggests that, in liability matters, we should consider the probability that a negative event will occur, the gravity of the harm that would result, and the cost of taking adequate steps to prevent the negative event. Justice Hand's reasoning can be applied to the decisions that psychologists make as they contemplate entry into a specialty area such as forensic psychology.

Survey data (Bow & Martindale, 2009) suggest that in the specialty of child custody evaluation, commencing practice without first having acquired sufficient knowledge and developed the requisite skills is disturbingly common. Among 138 child custody evaluators completing a survey, 32% stated that they had attended no workshops or seminars on evaluation methodology prior to conducting their first evaluations, 30% reported having attended one or two workshops prior to accepting their initial evaluation assignments, 12% reported that they had read no books or journal articles, 7% reported that they had read one article or book, and 17% reported that they had read two articles or books.

In the same survey, information was obtained concerning the manner in which interest in conducting child custody evaluations had been stimulated. Eighteen percent of the respondents reported that they had been invited to conduct an evaluation by an attorney and 6% reported that a psychotherapy case had morphed into a custody evaluation. On the basis of these data, it is reasonable to infer that a sizeable percentage of the psychologists currently conducting evaluations began without first having given reasonable consideration to the likelihood that they might harm those who were relying upon them to provide useful expertise.

We urge psychologists who are contemplating performing forensic psychological activities to obtain the requisite knowledge and skill and, subsequently, to "keep abreast of developments in the fields of psychology and the law and engage in continuing study and education" (SGFP, draft 6 [Committee to Revise, 2001], Guideline 4.02).

In any of the forensic psychological evaluation activities that involve submission of reports to courts or offering testimony, those who proceed without first having prepared themselves adequately are not considering the probability that they will employ inappropriate methods, formulate erroneous opinions, and communicate those opinions to courts that may be led to hand down misguided opinions as a result of having accepted flawed advisory input.

Striving for Excellence

In the search for ethics, organized psychology has lost its way. Softly spoken messages urging us to aim higher are not heard when, in a thundering voice, the American Psychological Association keeps lowering the performance bar in the area of professional ethics. Psychology has consistently exhibited appropriate modesty with regard to its ability to predict future behavior. It should come as no surprise, therefore, that those who predicted that the creation of the "clear distinctions" between aspirations and standards to

which Fisher (2003) alluded would elevate the level of psychological practice appear to have been mistaken. With the "clear distinctions" referred to by Fisher has come an understandable concern among psychologists with what they are required to know in order to stay out of trouble. And they are required to be reasonably familiar with the enforceable ethical standards (that is, the rules). There will be no quiz on the Ethical Principles, and they have lost importance.

Déjà Vu All Over Again

More than eight decades ago, Landis (1927) observed that ethics codes were not being written in a manner that would meaningfully contribute to efforts by professional organizations to enforce exhortations to their members that they practice ethically. It is likely that if Landis were surveying the scene today, he would offer a similar observation.

More than six decades ago, Hobbs (1948) opined that our profession needs "not only a code that will make **[55]** possible effective discipline of those engaged in malpractice but also, and more importantly, a code that will provide real guidance to the psychologist who is making an honest effort to practice his profession in the best ethical tradition" (p. 81). He opined, further, that the standards contained in our code "should be of palpable aid to the ethical psychologist in making daily decisions" (p. 81).

Hobbs, writing on "the development of a code of ethical standards for psychologists," reported that, in the late 1940s, the American Psychological Association decided to create "an empirically developed code" based on an investigation of the ethical dilemmas encountered by a "representative sample of members" (p. 83). As described by Hobbs, "[t]he research itself would involve the collection, from psychologists involved in all of the various professional activities, of descriptions of actual situations which required ethical decisions" (p. 83).

Though we have been unable to locate a writer who has identified the point at which we peaked, numerous ethics commentators have suggested that the 1992 code was a weakened version of the 1982 code, and the 2002 code is a weakened version of the 1992 code, particularly with respect to those portions of the code that relate to forensic psychological activities (e.g., Campbell, 2002; Tippins, 2011).

Bersoff (1994) reported that many critics of the 1992 code (American Psychological Association, 1992) had "criticized the code for its lack of clarity, its rampant qualifying language, and for seeming to protect the profession rather than the public" (p. 382). Sieber (1994) opined that the 1992 code's vagueness rendered it "analogous to an etiquette book that simply advises readers to be considerate" (p. 369). Carolyn Payton (1994), a former member of APA's Policy and Planning Board and Public Policy Committee, wrote: "All previous codes seemed to have been formulated from a perspective of protecting consumers. The new code appears to be driven by a need to protect psychologists. . . . It reads as though the final draft was edited by lawyers in the employment of the APA" (p. 317). It was Payton's conclusion that the 1992 code had been "diluted almost to the point of uselessness" (p. 319).

Keith-Spiegel (1994), commenting on the 1992 code, opined that each ambiguous word or phrase creates a "yawning gap through which many interpretations can flow" (p. 367). Vasquez (1994) observed that the 1992 code contained an excessive amount of "qualifying language" and that, in so doing, it created "loopholes for psychologists" (pp. 321–322).

In commenting on the 1992 code, Koocher (1994) opined that its wording "is largely reflective of the style of lawyers . . . and seems more intended to narrow one's liability than to stir one to the highest plane of ethical functioning" (p. 361). He expressed the hope that, in developing the next code, "the voice of defense and liability lawyers . . . should be tempered with equal input from advocates of public interest and social responsibility" (p. 361). In his commentary on the 1992 code, Bersoff (1994) opined that earning and maintaining the public's trust would require that we develop an ethics document that reflects our moral integrity and our primary mission of promoting human welfare" (p. 386).

Both Koocher (1994), in his reference to "input from advocates of public interest and social responsibility," and Bersoff (1994), in his reference to our need for a "document that reflects our moral integrity and our primary mission of promoting human welfare," pointed our national association in the right direction. The APA was not attentive. With regard to ethical issues in forensic psychology, Pope and Vetter (1992, p. 399) reported data collected in a national survey of ethical dilemmas encountered by APA members. Many of the dilemmas related to forensic psychological practice.

Though participants in the Pope and Vetter survey had expressed concern regarding ethical dilemmas linked to forensic practice, our 2002 Ethics Code (American Psychological Association, 2002) saw the elimination of six ethical standards pertinent to "Forensic Activities" (section 7 of the 1991 code) and the removal of Standard 1.23 (b), which read: "When psychologists have reason to believe that records of their professional services will be used in legal proceedings . . ., they have a responsibility to create and maintain documentation in the kind of detail and quality that would be consistent with reasonable scrutiny in an adjudicative forum."

Psychologists involved in the creation of our 2002 Ethics Code have engaged in some mutual back-patting. Fisher (2003), the Chair of the Ethics Code Task Force, wrote: "Each subsequent revision of the APA Ethics Code has been driven by the desire for standards that would encourage the highest endeavor of psychologists, ensure public welfare, promote sound relationships with allied professions, and promote the professional standing of the discipline (citation omitted)" (p. 3). It is difficult to discern how our profession ensures the public welfare when we eliminate from our ethics code a record creation and record keeping requirement such as that which appeared in the 1992 Ethics Code's Standard 1.23 (b), referenced above.

Fisher (2003) also assured readers of her commentary on the Ethics Code that "[a] core value of the discipline **[56]** of psychology as articulated in the Preamble of the 2002 Ethics Code is the welfare and protection of the individuals and groups with whom psychologists work" (p. 7). Our profession's core values are best judged not by assurances of good intentions, but by what we require of the members of our profession, and what we require is set forth in standards that are dramatically at odds with our stated aspirations.

One of the purposes of an ethics code, according to Fisher, "is to gain public trust by demonstrating that psychologists are members of a responsible and substantial profession with high standards. A code can serve a public relations value by being seen as a contract with society to act in consumers' best interest. A professional ethics code also provides standards against which the public can hold psychologists accountable" (Fisher, 2003, p. 7). We are in agreement with these sentiments; however, it is the reality that the public can

point to ethical standards as a means by which to "hold psychologists accountable" that has led the American Psychological Association to pursue a practitioner protection goal by shortening the list of professional activities concerning which complaints can be lodged and increasing the ambiguity of the manner in which the remaining items are defined.

Knapp, a member of the Ethics Code Task Force, and VandeCreek (2003) stated that a "goal of the Ethics Committee Task Force was to reduce the potential of the Ethics Code to be used to unnecessarily punish psychologists" (p. 301). Barnett (2003), in his commentary on the Task Force objectives, asserted: "A main goal of the ECTF [(Ethics Code Task Force)] was to create a revised Ethics Code that provides better protection for psychologists" (p. 9). Reacting to Barnett's commentary, Tippins (2008) stated: "The real question that confronts the psychology profession—the pachyderm in the parlor that must be acknowledged—is whether guidelines, practice protocols and ethical codes are intended to protect the public from substandard services or whether their purpose is to lower the bar for the APA's members and shield from criticism those practitioners who deliver a shoddy work product" (p. 12). There is reason for concern that protecting the legitimate rights of consumers of psychological services has been subordinated to reducing the complaint-anxiety of forensic psychologists.

LOOKING FORWARD

It is essential that forensic psychology examine its aspirations and decide what steps can be taken to achieve its goals. Roughly a decade ago, the Honorable Stephen Hjelt (2000), the presiding Administrative Law Judge for the California Office of Administrative Hearings in San Diego, addressing himself to psychologists, wrote: "[Y]our profession has strong roots as a discipline that has a foundation in the scientific method. However, some of you simply stopped using it" (p. 12). Timothy Tippins (2008), an attorney witnessing the same departure from science alluded to by Judge Hjelt, wondered if psychology will "continue to fall away from its roots into the murky world of speculation simply because there is an economic market for such speculation" (p. 12). Goldstein (2007) opined that because forensic psychology has grown significantly, "the need for a standard of care—those steps the reasonably prudent forensic mental health expert should take to ensure quality, ethical, relevant opinions, reports, and testimony that are data-based [emphasis added]—is even more critical" (p. 6).

A disservice was done to the specialty of forensic psychology in the creation of the 2002 Ethics Code (American Psychological Association, 2002). Specifically, we are in strong disagreement with the assertion by Knapp and VandeCreek (2003) that "there was no loss in protection of the public" (p. 307) as the 1992 Ethics Code (American Psychological Association, 1992) was transformed into a "revised Ethics Code that provides better protection for psychologists" (Barnett, 2003, p. 9). Tippins (personal communication, 2/15/11, e-mail on file, quoted with permission) observed that

> [t]he extent to which the APA diluted its ethics code in 2002 indicates that trade unionism trumped professional responsibility. This is extremely unfortunate in that it makes those forensic psychologists whose testimony can alter the lives of litigants less accountable. The diluted standards may make life easier for individual psychologists, but they make the psychology discipline seem less respectable.

Protection for consumers of forensic psychological services and for those affected by those services has been significantly diminished by a revised Ethics Code (American Psychological Association, 2002) that relieves psychologists whose work will be used in legal proceedings of the responsibility "to create and maintain documentation in the kind of detail and quality that would be consistent with reasonable scrutiny in an adjudicative forum" [Standard 1.23 (b) of the 1992 Ethics Code]. Protection for litigants has been significantly diminished by a revised Ethics Code in which psychologists are no longer urged to "recognize limits to the certainty with which diagnoses, judgments, or predictions can be **[57]** made about individuals" [Standard 2.04 (b) of the 1992 Ethics Code].

We agree with the assertion by Knapp and VandeCreek (2003) that "it is important to have a code that reflects the consensual values of the profession" (p. 307). Unfortunately, the values of the profession are communicated through the Ethical Principles, which Fisher (2003) and others have emphasized must be distinguished from the enforceable standards.

In their commentary on the Ethics Code, Knapp and VandeCreek (2003) made it clear that psychologists, in numbers sufficient to attract the attention of the American Psychological Association, had been expressing discontent with the process by which complaints against psychologists are being dealt with. Knapp and VandeCreek (2003) reported that the APA Ethics Code "has been used by state psychological associations, licensing boards, malpractice courts, and institutional employers . . . [and] the fear of being the target of [a disciplinary or legal] action has had a chilling effect on many psychologists" (p. 301). Knapp and VandeCreek (2003) added that "some psychologists viewed the prior Ethics Code as an antipsychology document . . . . Consequently, the ECTF established as one of its goals to reduce the ways in which the Ethics Code might be used unfairly to penalize psychologists" (p. 302).

There is reason to hypothesize that the "fear of being a target" exists in a data vacuum. Though data reported by Kirkland and Kirkland (2001) are now more than a decade old, no more recent data were available as this chapter was being prepared. Kirkland and Kirkland, surveying licensing board actions taken in response to complaints lodged in connection with child custody matters, reported that 1% of the complaints resulted in disciplinary action by the board.

Van Horne (2004) observed that "[t]he perception of disciplinary actions taken by licensing boards is dependent on the vantage point of the observer" (p. 170). Van Horn concluded, "Realistically, for those psychologists who follow practice standards, recognize their own limits, document their services, and utilize consultation, risk of adverse action against their licenses is negligible" (p. 177).

Notwithstanding the reassurance provided by Van Horn, the concerns of the psychologists alluded to by Knapp and VandeCreek (2003) must be addressed. We submit, however, that those concerns are not constructively addressed by reducing the number of enforceable rules, inserting calculated ambiguity into many of the remaining rules, and emphasizing the distinction between aspirational statements and enforceable rules. In her article, Van Horn has alluded to "the complexity of board procedures" (p. 170). In our view, the concerns of psychologists can be more effectively addressed if we direct our efforts at improving the procedures employed by licensing boards.

Licensing Boards

Securing better protection for psychologists can be accomplished without a concomitant reduction in protection for consumers of psychological services. Without placing either psychologists or the public at a disadvantage, we can reexamine and, where necessary, revamp the methods employed by disciplinary boards when complaints against psychologists are being investigated.

Though ethics committees have not yet gone the way of the dinosaur, complaints alleging ethical infractions by psychologists are much more commonly addressed by state licensing boards. Forensic psychologists are often underrepresented (or not represented at all) on licensing boards, thereby creating a unique problem for forensic psychologists against whom complaints have been lodged.

An examination of the manner in which our boards handle complaints can begin by systematically gathering the answers to questions such as those that follow.

1. How are investigations initiated? (a) Must there be a complainant, or can the board initiate an investigation sua sponte (on its own), rather than in response to a complaint? (b) Does the organization accept anonymous complaints?

2. Does the investigative agency act on complaints registered by organizations (such as a state psychological association)?

3. Does the organization investigate the actions of practitioners not yet under its jurisdiction (such as practitioners who are not yet licensed but presumably wish to be licensed in the future)?

4. Does a withdrawn complaint stop the investigative process or does an investigation, once started, continue?

5. What is the organizational structure of the board? From what broader agency does the board derive its authority? (Is it, for example, under the aegis of the Department of Consumer Affairs?)

6. What is the source of the board's funds, and what data are sought by oversight groups when funds are being sought? (In fighting for its budget, is the board encouraged to demonstrate that it has investigated and disciplined an impressive number of practitioners?) (a) What other agencies compete for whatever funds are **[58]** available?

7. What is the composition of the board? (How many of the board members are familiar with forensic work?) (a) How are members of the board selected?

8. What are the investigative and operational procedures? (a) Is the focus of the investigation limited by the allegations contained in the complaint? (Does the board investigate aspects of an evaluator's professional practice concerning which no allegations have been made?) (b) Are consultants retained? (c) If so, how are they selected? (d) What information is given to them? (e) Can consultants, once retained, request that their assigned tasks be broadened or changed? (f) If a practitioner has been previously investigated and no disciplinary action has been taken, can a new complaint result in a review of earlier complaints and the use of information obtained during the investigation of earlier complaints? (g) Are plea bargains offered? (h) What is the range of possible

outcomes? (i) What are the complainant's rights? (j) Can the complainant offer testimony during the investigative inquiry? Can the complainant call witnesses? (k) Can the complainant search for others who have been displeased with the results of evaluations and encourage them to join in the complaint? (l) Can the complainant retain his or her own expert? (m) What are the rights of the practitioner under investigation? (n) Is the practitioner shown a copy of the complaint and supporting documents? (o) If not, what information is provided? If a consultant has been retained, does the practitioner have access to the consultant's report? (p) Can the practitioner seek the exclusion of the consultant's report if it is felt that there is a conflict of interest? (q) Are helpful instructions given to the practitioner relating to what documents must be produced?

The professional services offered by forensic psychologists are often provided in an atmosphere of conflict and animosity. Particularly in offering evaluation services, we must employ procedures designed to avoid fueling suspicion and contributing to the acrimony. The integrity of a forensic psychological evaluation is dependent on transparency—openness to scrutiny, including scrutiny by those who might be motivated by a desire to cast doubt on the value of the work done.

If forensic psychologists wish to assist triers of fact, they should presume that everything in their files is subject to disclosure, unless they have been informed otherwise by the court. Withholding or destroying components of the file undermines an essential element of our system of justice: Courts, not psychologists, decide what is and what is not discoverable.

Conclusion

Slightly more than a decade ago, Jeffrey Younggren (2000), a former Chair of the American Psychological Association's Ethics Committee, opined that "[t]he regulation of psychology is not going away and psychology is being held accountable for what it does and how it presents itself in the courtroom" (p. 9). Younggren predicted that those who yearn for less regulation were unlikely to see their wishes granted. Unfortunately, Younggren's prediction turned out not to be correct. Younggren concluded that "if we do not claim and define psychology, someone else will do it for us and we will have to deal with the result" (p. 9). With Younggren's cautionary statement in mind, we urge the task force working on our next ethics code to embark on the task with the objective of providing better protection for consumers of psychological services, rather than the "better protection for psychologists" that was alluded to by Barnett (2003, p. 9).

> TEXT CONCLUDES ON PAGE 58 <

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