

California Western Law Review

Volume 36
Number 1 *Selected Articles From the
Symposium on the Works in Progress
Presented During First National Meeting of the
Six Regional People of Color Legal Scholarship
Conferences*

Article 7

1999

When Ethics Collide: Psychologists, Attorneys and Disclosure

Nola Nouryan
Hofstra University

Martha S. Weisel
Hofstra University

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

Recommended Citation

Nouryan, Nola and Weisel, Martha S. (1999) "When Ethics Collide: Psychologists, Attorneys and Disclosure," *California Western Law Review*. Vol. 36 : No. 1 , Article 7.
Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol36/iss1/7>

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

WHEN ETHICS COLLIDE: PSYCHOLOGISTS, ATTORNEYS AND DISCLOSURE

NOLA NOURYAN* AND MARTHA S. WEISEL**

Ethic codes of professional organizations edict morally correct behavior within a discipline. These codes are designed to educate new practitioners within the profession. Although the overall intent of such codes is to protect the public from unethical service delivery, the codes also guide professionals in terms of self-regulation and decision making.

Ethical codes deal with broad principles. In contrast, legally mandated ethical requirements are punishable by sanctions if not complied with. Failure to comply with a court order may result in a finding of contempt, leading to fines and possible imprisonment. Presumably, compliance with ethical codes would mesh well with the obligation to obey the law, however, this is not always the case.

As the use of psychologists as experts in legal proceedings expands, the potential for conflict between attorneys and psychologists increases. There appears to be a lack of understanding between the two professions as to their respective ethical standards. The disclosure of information in a legal setting is one area in which this ethical conflict between the professions appears.

The ethical guidelines for psychologists are established by the American Psychological Association (APA). The APA contains two sections, one that is aspirational, and a second that creates enforceable standards of conduct, which are punishable by sanctions if not followed.¹ However, since membership in the American Psychological Association is voluntary, those who are not members have no obligation to comply with the ethical code of the Association.²

Lawyers have their own ethical code. The Canons of Ethics set obligations for every attorney who is licensed to practice law within a state. Violations of particular ethical guidelines may lead to suspension or disbarment

* Dr. Nouryan is an Adjunct Professor of Psychology at Hofstra University and a practicing psychologist.

** Ms. Weisel is an Associate Professor of Business Law at Hofstra University and a practicing attorney.

1. See Patricia Keith-Spiegel, *The 1992 Ethics Code: Boon or Bane?* 25 PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE 315 (1994).

2. See Daniel Tranel, *The Release of Psychological Data to Nonexperts: Ethical and Legal Considerations*, 25 PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE 33 (1994).

and are subject to court intervention.

Attorneys vigorously advocate their client's position. This includes getting as much information as possible to prepare for litigation. Failure to do so may constitute an ethical and legal breach of the attorney's responsibilities. In complying with these duties, lawyers may ask the psychologists for raw data and test protocols. The American Psychological Association precludes such disclosure since turning over data to individuals not trained in their interpretation is a breach of the ethics code. Because the ethical guidelines of the psychologist may not be well understood by the courts, the psychologist may be confronted with a dilemma when asked to testify and provide evidence in this type of proceeding.

In addition, psychologists sign agreements with publishers concerning copyright laws that prevent the dissemination of materials published at great expense. In any particular area, there are very few published instruments which psychologists use that have good reliability and validity. The protection of these instruments is of great concern to the profession. If the items in these instruments become public, they can no longer be used and interpreted with confidence.

This essay reviews and examines the ethical standards of both professions concerning disclosure of data. It also reviews a fact pattern in which this conflict was presented to the court. The essay presents a model agreement that both psychologists and attorneys can use to meet their respective ethical responsibilities. Through examination of this issue across both disciplines, effective collaboration and respect between the two professions can be achieved.

I. PSYCHOLOGISTS ROLE

Psychological test data includes material that a psychologist interprets in order to formulate hypothesis and decisions regarding an individual. Test data includes reports, notes, test scores, test stimuli, responses and test manuals. This information is developed into a written report that supports the psychologist's conclusions. The psychologist, as a witness in court proceedings, is likely to employ a variety of tests in reaching a conclusion. The sharing of written reports by the psychologist submitted to the court is the *interpretation* of data.

A problem occurs because there is a direct conflict between law and ethics involving disclosure of test data. "When a client or patient voluntarily places his or her mental or emotional condition into litigation, this produces a waiver of privilege, and all pertinent information is 'discoverable by both sides of the case.'"³ The law says: provide the data. However, the APA says that the data should not be released. The ethics code states as its standard:

3. *Id.* at 34.

Psychologists refrain from misuse of assessment techniques, interventions, results, and interpretations and take reasonable steps to prevent others from misusing the information these techniques provide. This includes refraining from releasing raw test results or raw data to persons, other than patients or clients as appropriate (*It should be noted that this means it is appropriate for a psychologist to explain and interpret the findings to the client), who are not qualified to use such information.”⁴

This standard is an attempt to prevent potential misuse of data by non-psychologists. Misuse includes analyzing items out of context, which may be misleading. In addition, carefully standardized measures are to be kept out of the public domain. Accessibility can invalidate the test, often at great cost and without providing another methodology of measuring a particular issue.

Psychologists are aware that many things may compromise test outcomes. Test takers in custody disputes may inhibit or modify their responses to appear more desirable. Psychologists are aware of this tendency. Therefore, multiple measures are important to support the validity of the findings. To preserve the integrity of a test, it is often necessary to keep the test taker in the dark regarding the specific information being measured.

Psychologists are also required by the Ethics Code to “maintain the integrity and security of tests and other assessment techniques consistent with the law and contractual obligations.”⁵ Disclosure of test items is a threat to test security. There are a limited number of valid and reliable instruments among standardized psychological tests. Knowledge of specific items on a test by unqualified individuals decreases its validity.

There are several existing principles and standards which psychologists may review concerning this issue.⁶ In June of 1996, the APA published a “Statement on the Disclosure of Test Data” designed to clarify the psychologist’s responsibilities concerning the release of test data. The specific issues that need to be addressed in this instance primarily refer to releasing data to unqualified persons and releasing data without impairing test security.⁷

When psychologists are mandated by law, or otherwise required to release data to persons they believe to be unqualified or in instances that may impair the security of the test materials or intellectual property/copyright interests, they should inform others (e.g. employers, schools, courts, test takers) of their obligations to the Ethics Code.⁸

Although psychologists inform test takers concerning limitations on confidentiality and disclosure of test data, informed consent is not required

4. APA, (1992).

5. APA, Standard 2.10 (1992).

6. See generally American Psychological Association, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING (1985).

7. See Committee on Psychological Tests and Assessment, *Statement on the Disclosure of Test Data*, 51 AMERICAN PSYCHOLOGIST 644 (1996).

8. *Id.*

when the testing is court mandated. Consent is required when an evaluation is requested by an attorney rather than the court. Whether consent is provided or not required, psychologists must still make every effort to limit access of test data only to qualified professionals. The Ethics Code stipulates that psychologists are permitted to disclose confidential records, including test data, without the consent of the individual. However, disclosure of the information should be limited to qualified professionals.

When the APA Ethics Code refers to releasing data to qualified individuals, they are referring to individuals who are competent to interpret the data by virtue of training and experience, that is psychologists. Psychiatrists are not, without special training, qualified to interpret psychological tests.⁹ If an attorney wants a "second opinion" regarding interpretation of test data, he may ask that another psychologist, not psychiatrist, review the data. This distinction is often lost on the lawyers and the courts.

A request from the attorney or the court to review the test data upon which the psychologist based the recommendations has serious consequences. If the psychologist complies with this request, the psychologist is in violation of the ethical guidelines established by the American Psychological Association.¹⁰

II. THE ATTORNEY'S ROLE

Lawyers are bound to zealously advocate on behalf on their clients. Disclosure is an important part of the attorney/client relationship. In New York, CPLR Section 3101 requires full disclosure, and obligates the attorney to get as much information as possible. In preparing for a trial, any expert that is going to be called as a witness, must disclose in "reasonable detail the subject matter on which the expert is expected to testify."¹¹

CPLR Section 3101(d) deals with the scope of disclosure in terms of trial preparation of experts:

1. Experts. (i) Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown, retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental, or podiatric malpractice, a party, in responding to a re-

9. See generally D.L. SHAPIRO, FORENSIC PSYCHOLOGICAL ASSESSMENT (1991).

10. See APA (1992).

11. CPLR § 3101(d)(1)(i) (West 1999).

quest, may omit the names of medical, dental, or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.¹²

Where the attorney is not satisfied with what has been provided, the attorney can ask the court to order such information, basing the need on the attorney's need to prepare for trial. CPLR Section 3101 continues,

(iii) Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. However, a party, without court order, may take the testimony of a person authorized to practice medicine, dentistry or podiatry who is the party's treating or retained expert, as described in paragraph three of subdivision (a) of this section, in which event any other party shall be entitled to the full disclosure authorized by this article with respect to that expert without court order.¹³

In New York there is little case law on the subject. In *Christaidos v. Christaidos*,¹⁴ the court made its decision in a custody matter based on an *in camera* report of an independent expert.¹⁵ The court did not make the report available to the attorneys for the parties.¹⁶ On appeal, the court was ordered to make all reports on which a custody decision was made available to the parties prior to trial.¹⁷ The point of *Christaidos* is that information made available *in camera* to the court, on which a custody decision is made, should be available to the parties.

Christaidos did not deal with requests for raw data. There is nothing in *Christaidos* that suggests that the raw data on which the report was based be made available to the court. Lawyers often make a strong case for securing raw data.¹⁸ This is to identify "mistakes" the psychologist may have made in interpreting the data. If the attorney is not pleased with the evaluation, the attorney must try to break down the recommendation(s). The raw data can be extremely important in preparation for litigation.

Contested custody litigation is one type of legal proceeding in which the conflict between ethical responsibilities of lawyers and psychologists concerning disclosure has been raised. In making a custody determination, most courts have developed a "best interests of the child" standard.¹⁹ This is a flexible, fact-based standard in which the trial court, after hearing all of the

12. *See id.*

13. CPLR § 3101(d)(1)(iii) (West 1999).

14. *See* 565 N.Y.S.2d 536 (2d Dept. 1991).

15. *See id.* at 537.

16. *See id.*

17. *See id.*

18. *See generally* D. Faust & J. Ziskin, *Coping with Psychiatric and Psychological Testimony*, 4 MARINA DEL REY LAW AND PSYCHOLOGY PRESS vols. 1-3 (1981).

19. *See Tropea v. Tropea*, 665 N.E.2d 145 (N.Y. 1996).

evidence presented, including direct and cross-examination of each party and their witnesses, will determine what custodial arrangement will be in the best interests of the child.²⁰

The difficulty in making such a determination has led the courts to increasingly turn to the use of forensic evaluations, usually done by psychologists. These independent psychologists, appointed by the court, but paid by the parties, are hired to make an independent evaluation of the parties, the children, and any other significant individuals. After completing the evaluation, the independent forensic evaluator is supposed to make a recommendation on custody. These recommendations hold tremendous weight with the court and go a long way into forcing parties to settle their bitter custody disputes.

The independent evaluator's role in custody disputes has become increasingly important. While traditionally each party had their own therapist, as well as the therapist who sees the children, as witnesses, courts were not particularly impressed with "hired guns" each of whose testimony cancelled the other out. The independent evaluator is held in quite different esteem. Based on court order, he is selected by the court or the lawyer who is representing the children. Although paid by the parents, his testimony is considered even handed. Further, he has had the opportunity to interview all the parties, including the children, and usually interviews each child with each parent to see how the parties interact.

Once the evaluation is completed, one side will be unhappy with the recommendation of the independent evaluator. In preparing to cross-examine the evaluator, the attorney opposing the expert's conclusion may seek the raw data and test questions upon which the conclusion is based. It is at this point that the disclosure conflict appears. What follows is a fact pattern that illustrates the problem and a methodology involving creative problem solving so that the problem can be avoided.

Psychologist was contacted by a lawyer representing the children of a couple who were involved in a contested matrimonial dispute. Custody and visitation were major issues. Psychologist had been selected by the court to perform the evaluation. There was no written stipulation between all parties, their lawyers and psychologists before testing began. Problems relating to disclosure could have been addressed in writing, and a decision made as to how information would be shared. The authors have prepared such a stipulation.

The evaluation was completed and a report was sent to the court. The report included a recommendation based on the interpretation of the data. Later, a letter was received from one party's attorney asking for the raw data upon which the custody recommendation was made. Psychologist responded with a letter indicating that such information could not be provided because it violated the APA Code of Ethics. At this point, the court should have been

20. *See id.*

advised of the situation, preferably in writing. Psychologist should have insisted that any further action on this matter include notice to her and an opportunity to participate in any conference, written communication or telephone call. One of the problems for psychologists is that they are not parties to the litigation. Therefore, there is no legal requirement that the psychologists be part of the process. However, there is also no one presenting or representing the psychologist's position. Therefore, the court does not have the opportunity to consider the issues involving the psychologist. By becoming involved in the legal process, psychologists may avoid disclosure orders and possible contempt of court. Explaining to the judge (or law secretary) that another psychologist would be appropriate to review data, the later disputes may have been avoided.

Psychologist was served with an Order to Show Cause requiring that the court order him to give the data to the attorney who had requested it as part of his discovery process. Legal documents require a response. Without a response from psychologist, the court had only the attorney's position. The lack of response led to a presumption in law that the attorney requesting the data was correct.

Psychologist received a court order that he turn over all raw data, including all questions, to the judge so that the information could be reviewed. At this point psychologist needed a stay of the court order pending an appeal of the judge's decision. Without a stay, psychologist would be in contempt of court for failure to comply with a court order.

The appellate court granted a temporary stay of the lower court's order. Psychologist also sought a reversal of the lower court's decision that the psychologist's information be provided to the court. It is not known what the appellate court would have done in terms of reversing the lower court's decision. The matter did not get that far. A settlement was reached whereby the psychologist agreed to turn over his raw data and questions to another professionally qualified individual selected by the attorney who wanted the information and psychologist withdrew the appeal. All of the legal maneuvering that took place could have been avoided if the psychologist and attorneys had a written stipulation and developed clear communication with each other.

The psychologist's role in legal proceedings continues to expand. However, guidelines for resolving disputes between psychologists' and attorneys' professional standards of ethics do not currently exist.²¹ In order to decrease the potential for disputes between psychologists and attorneys concerning disclosure, psychologists have an obligation to educate the legal community about the parameters of competent psychological assessment. Judges and attorneys can be educated regarding requirements for competent assessment, as well as the damage that may result when unqualified people attempt to

21. See Daniel W. Hettman, *Child Abuse Reporting in California: A Paradox in Action Versus Belief*, 3 FORENSIC REPORTS 396 (1990).

use assessment material.²² Attorneys must assist psychologists in becoming familiar with the courts. This essay deals with just one of the ethical conflicts that exists between the professions, disclosure of raw data and test protocols.

If a written agreement is entered into by the psychologist and attorney prior to the psychological assessment, the potential for conflict is significantly decreased. A sample of such an agreement is included.

It should be noted that the issue of disclosure of data is only one of the many ethical conflicts between psychologists and attorneys.²³ Attorneys must increase psychologists' awareness of the parameters of attorney-client privilege and its distinctions from psychologist-client privilege.²⁴ They should also discuss with the psychologist the differences in their responsibilities based on who retains them for their services: an attorney or the court (*State v. R.H. & Wetherhorn*,²⁵ *Sultan v. State*²⁶). Issues involving hearsay can also present conflict. The psychologist is told much by his client concerning what others say and do. The psychologist may consider this information important. To the court, this is hearsay, defined as information not said/seen directly by witness and therefore without merit. Issues of confidentiality also present potential conflict.²⁷

How each profession measures credibility and truth pose tremendous areas of conflict. The increasing use of psychologists as witnesses requires that each profession become less mistrustful of the other. The authors believe that interdisciplinary activities between lawyers and psychologists are the best way in which the various issues can be exposed, examined and resolved.

22. See Sherry L. Skidmore, *Assessment Issues*, 5 FORENSIC REPORTS 177 (1992).

23. See *Loomis v. Board of Psychologist Examiners*, 954 P.2d 839 (Or. Ct. App. 1998).

24. See Samuel Knapp, et al., *The Attorney-Psychologist-Client Privilege in Judicial Proceedings*, 12 PSYCHOTHERAPY IN PRIVATE PRACTICE 4 (1993).

25. See 683 P.2d 269 (Alaska Ct. App. 1984).

26. See 468 S.E.2d 443 (N.C. Ct. App. 1996).

27. See *Rost v. State Board of Psychology*, 659 A.2d 626 (Pa. Commw. Ct. 1995).

APPENDIX

Stipulation

THIS AGREEMENT, dated the ___ day of September, 1999 between Dr. Jones, Ph.D. and the attorney for Plaintiff and the attorney for Defendant and the court:

1. Ph.D. agrees to perform an independent forensic evaluation for the court in reference to Smith vs. Smith. The parties agree to cooperate with Dr. Jones.
2. This includes making themselves, their children and whatever other adults Dr. Jones deems appropriate, available for interview and evaluation
3. The evaluation may include psychological testing of various parties.
4. It is stipulated and agreed that the samples of test protocols (printed questions) used in this evaluation may not be disclosed, except to individual trained in their use and interpretation.
5. It is further stipulated and agreed that the raw data (specific answers) may not be disclosed except to individuals trained in their use and interpretation.
6. Dr. Jones agrees to make the test protocols and raw data available to a qualified individual prior to the beginning of trial, if so requested, The request must be in writing at least thirty (30) days prior to the beginning of trial.

