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Abstract

In lieu of an abstract, below is the essay's first paragraph.

Clinicians and forensic psychologists are two types of psychologists who are often required to appear as witnesses in court proceedings. Their roles, duties, and responsibilities in legal issues are surprisingly different, but it is possible for them to overlap. It is important for psychologists to recognize both the obligations and limitations of their responsibilities when testifying. An important and often unclear question that generally arises is: how can psychologists best fulfill their legal and ethical duties to their clients?

**The Different Duties and Responsibilities of Clinical
and Forensic Psychologists in Legal Proceedings**
by Denise R. Hugaboom

Clinicians and forensic psychologists are two types of psychologists who are often required to appear as witnesses in court proceedings. Their roles, duties, and responsibilities in legal issues are surprisingly different, but it is possible for them to overlap. It is important for psychologists to recognize both the obligations and limitations of their responsibilities when testifying. An important and often unclear question that generally arises is: how can psychologists best fulfill their legal and ethical duties to their clients?

Clinical psychologists play an important role in legal issues regarding their clients. Clinicians may be asked to submit records to insurance companies, report suspected incidents of child abuse, and testify on behalf of or against their clients in a court of law. Unfortunately, when asked or required to participate in legal proceedings of any sort, clinicians are faced with indistinct guidelines that blur between legal and ethical requirements.

One of the primary requirements of a practicing clinician is to maintain confidentiality with a client (American Psychological Association 1992). Once a client discloses private information to a therapist in an environment in which it is expected that the information will not ordinarily be disclosed to third parties, it becomes confidential (Smith-Bell & Winslade, 1994). The laws regarding confidentiality and privacy have changed over time. The constitutional right to privacy was first recognized by the Supreme Court in *Griswold v. Connecticut*, (1965) and in *Eisenstadt v. Barrd* (1972). However, the constitutional rights to privacy

were restricted in *Whalen v. Roe* (1976). In this case, the Court ruled that a patient does not have a constitutional right to informational privacy of communications or records generated in the course of medical treatment when the records are adequately protected from unauthorized disclosure (Smith-Bell & Winslade, 1994). There are only 10 states which have recognized a constitutionally based psychotherapist-patient privilege for psychotherapeutic communications, and the decisions that were made in those states are now at least 15 to 20 years old (Smith-Bell & Winslade, 1994, citing Smith, 1980, citing *Bremer v. State*, 1973).

It is reassuring to know that with these ambiguous lines that border legal rights and ethical requirements, there are some particular cases in which the decision between right and wrong is defined as clearly as black and white. There are times when legally and ethically, a clinician must break confidentiality. Corey (2001) lays out several circumstances in which counselors must legally report certain information. Counselors are required to break confidentiality and report or even testify when clients pose a danger to themselves or others, and when a counselor believes that a minor (a person under the age of 16) is a victim of rape, incest, or abuse. They are also required to release their records to a third party upon request of the client. Finally, therapists must release certain information if it becomes an issue in court action. Besides these specific situations, a clinical therapist is legally required to testify to all other psychotherapeutic communications unless that material has the status of being privileged. Refusal to do so

may result in the therapist being charged with contempt of court (Smith-Bell & Winslade, 1994).

The only situation in which the therapist is aware of relevant information but is legally permitted to refuse to speak about it is when that information is considered privileged. A privilege is the exception to the general rule that the public has a right to relevant information in a court proceeding, and this common-law rule can be used by the therapist to protect the client's right to privacy and confidentiality. A piece of information must fulfill several requirements in order to be held privileged. The information must be from a patient to a licensed or certified therapist, or to an assistant of a therapist. A professional relationship must exist between the patient and the clinician, and the communications must be related to the provision of professional service. Finally, because the communications must be considered as confidential, they may not be released by the client to a third party (Smith, 1986-1987). When information holds the privileged status is one of the few times that a therapist is not legally required by a court of law to testify for or against the client.

The laws and requirements that guide behavior vary from state to state, causing another source of concern for practicing clinicians. California's laws are currently perhaps the most diverse, including the newly enforced duty of psychotherapists to testify against their clients at trial. California's laws mandate that no therapist can be licensed to practice without passing a test that includes a measure of understanding of the duty to warn and protect (Meyers, 1991). The Tarasoff case in California has become notorious due to the California Supreme Court's decision regarding it. The Tarasoff decision requires that a confession of an intention to commit murder by a client to a therapist must be reported in the form of

a Tarasoff warning, or a warning by the clinician to the potential victim and to the police. If that attempt to protect or warn fails, the clinician is then required by law to testify in court against the patient. It seems that following the Tarasoff decision, patients in California have the right to less and less privacy. The California courts are now saying that the usual rules of confidentiality and privilege do not apply to any patients who have demonstrated that they will be or have been dangerous (Meyers, 1991). Section 1024 of the Evidence Code of the California Supreme Court creates this broad exception by stating, "There is no privilege... if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger" (Meyers, 1991-citing Section 1024 of California Evidence Code). As the psychotherapist-patient privilege diminishes, more and more responsibility is put on the therapist to make the right choice, and more and more consequences face the therapist for making the wrong choice.

In legal confines, clinicians face many tough choices. Decisions regarding testifying against a client in a court of law, testifying on behalf of a client, or even deciding whether or not to report a potentially "dangerous" client often require time, careful judgment, and opinions that come from the heart. Each decision comes with numerous consequences. If a decision is made to follow ethical guidelines and maintain confidentiality, the therapist risks being held in contempt of court and jailed. If a decision is made to follow legal requirements and break confidentiality, the therapist risks losing an effective therapeutic relationship due to a shattering of trust. A counselor's first priority is to do what is best for the client, and testifying against the

client is obviously not always the best thing. Because of the fuzzy lines surrounding legal and ethical guidelines, it is possible that a counselor might break confidentiality mistakenly when not legally required to do so. This could result in the counselor being stripped of his or her license to practice, a devastating outcome. Because of the possibility of these consequences, it is often better to have a forensic psychologist, or expert witness, testify in a court proceeding.

A forensic psychologist's job is similar in some aspects to a clinician's job. "Forensic psychology" is defined in the Forensic Specialty Guidelines (1991) as "all forms of professional psychological conduct when acting, with definable foreknowledge, as a psychological expert on explicitly psycholegal issues, in direct assistance to courts, parties to legal proceedings, correctional and forensic mental health facilities, and administrative, judicial, and legislative agencies acting in an adjudicative capacity" (1991). Forensic psychologists provide services only in areas of psychology for which they have specialized knowledge, skill, experience, and education. They are responsible for presenting fundamental and reasonable levels of knowledge of legal, professional, factual, and civic standards that govern their participation as experts in courtrooms. These standards give a forensic psychologist the privilege to testify under the title of an expert witness. The major difference between an expert witness and a non-expert is that the expert is permitted to and expected to render a personal opinion (Iverson, 2000). They have the responsibility to provide services in a manner consistent with the highest standards of the profession, and must make a reasonable effort to ensure that their services and products of their services are used in a responsible manner (Forensic Specialty Guidelines, 1991).

Although there are ways in which treating clinical psychologists are similar to forensic experts, there are also many ways in which they are different. A forensic psychologist generally meets with the patient only one or two times in order to conduct an evaluation. The meeting and evaluation take place only after a crime has been committed and an accusation has been made. Forensic evaluations are usually short, and less information is covered than would be in a clinical evaluation (Iverson, 2000). Because the forensic psychologist is not the patient's treating psychologist, he or she can more easily determine objective reality, whereas a clinician generally focuses on a patient's subjective reality (Faust & Ziskin, 1988). Forensic psychologists may be asked to write a report, as in the issue of child custody, or they may be asked to put their ability to use in a courtroom and testify as expert witnesses. One of the most important differences between clinical and forensic psychologists in issues regarding legality, however, is the difference of informed consent.

When a patient sees a clinical psychologist for the first time, he or she is given informed consent. Informed consent is a process by which the therapist educates the client about his or her rights and responsibilities in therapy. Some aspects of informed consent include general goals of counseling, the responsibilities of the counselor toward the client, the responsibilities of the client toward the counselor, the limitations of and expectations to confidentiality, legal and ethical parameters that could define the relationship, the qualifications and background of the therapist, and the services the client can expect (Corey, 2001). The limitations of and expectations to confidentiality is the most important aspect of informed consent with relation to the possibility of the counselor testifying in

court. The client can then expect that what he or she says to the therapist will, in fact, remain confidential and privileged, unless the counselor deems it necessary to break confidentiality for legal or ethical reasons. In a typical forensic evaluation, informed consent includes the psychologist making it known to the client that any information he or she discloses with direct regards to the legal purpose of the evaluation will be divulged at the therapist's discretion. Information that does not bear directly in the legal issues of the case at hand will remain confidential, and forensic psychologists will make every effort to be sure that the client understands his or her rights (Specialty Guidelines for Forensic Psychologists, 1991). Thus, while in a clinical setting the client may be willing to speak freely with the expectation that what is said remains confidential, in a forensic setting, the client is aware that much of what is said is subject to public disclosure.

It seems that the jobs of a clinical psychologist and of a forensic psychologist are entirely different from each other, with different descriptions, different requirements, different expectations, and different ethical and legal obligations. However, these roles can, and quite often do, overlap. Although some argue that clinical psychologists do not have an adequate knowledge base for formulating expert opinions, expert testimony by clinical psychologists has become commonplace in the courts of the United States (Rotgers & Barrett, 1996). Clinical psychologists must undertake several important steps and follow specific guidelines that have been developed just for this purpose to be qualified to conduct a forensic evaluation and testify as an expert witness.

Iverson writes regarding dual relationships in psycholegal evaluations about four basic points that are directly related to whether or not treating

psychologists should be qualified as expert witnesses (2000). These points are comprised from the American Psychological Association Ethical Principles and Code of Conduct, and the Specialty Guidelines for Forensic Psychologists. The first point is that psychologists are permitted to provide expert testimony only after they conduct an appropriate evaluation for this type of testimony. Although some therapists feel that their initial clinical evaluation was sufficiently thorough to be used for expert testimony, there are fundamentally different emphases on why that person first came to clinical therapy and why that person is now in need of a forensic evaluation. Therefore, a new evaluation must be conducted with the current emphasis in mind. Secondly, a clinical psychologist must recognize and discuss with the client potential conflicts that may arise from this dual relationship. Both parties should be aware that with the clinician testifying as an expert, some trust that has built up over time might be broken down, and that the therapeutic relationship could suffer as a result. Third, psychologists should do their best to avoid performing multiple and potentially conflicting roles in forensic matter. Although it is evident that a dual relationship is occurring, the psychologist should keep clinical matters in mind in therapy sessions and forensic matters in mind during the evaluation and in the courtroom. An effort should not be made to bring the two together; in fact, an effort should be made to keep them completely apart. Fourth, in professional relationships which have been terminated, the prior professional relationship does not exclude the psychologist from testifying as a fact witness or from testifying to their services to the extent permitted by applicable law. The psychologist should, however, appropriately take into account the ways in which the prior relationship might affect his or her current professional

objectivity, and disclose any potential conflicts to the relevant parties (Iverson 2000).

The American Psychological Association also published in its Ethical Principles of Psychologists and Code of Conduct several standards of professional conduct regarding the expert testimony of clinical psychologists. Rotgers and Barrett (1996) discuss four of these standards in their article regarding implications and recommendations for practicing clinical psychologists serving as expert witnesses. Standard 1.06, entitled "Basis for Scientific and Professional Judgments" encourages psychologists to rely on scientific and professionally derived knowledge in their practice as both clinicians and as expert witnesses. Standard 2.02, "Competence and Appropriate Use of Assessments and Interventions" requires clinical psychologists to select assessment instruments for their evaluations on the basis of research indicating the appropriateness of the instruments for the specific issues at hand, and directs psychologists to work actively to prevent misuse of those instruments. Standard 2.04, "Use of Assessment in General and With Special Populations" requires familiarities of psychometric properties and limitations of assessment instruments which are used in the practice of psychology and may be used in a forensic evaluation. Finally, Standard 2.05, "Interpreting Assessment Results" requires clinical psychologists to directly state any reservations they may have about the accuracy and limitations of their forensic assessments.

With the rules and guidelines that have been established to allow clinicians to testify as experts, this type of testimony has become common in courtrooms nationwide. According to Faust and Ziskin, clinicians appear in up to as many as one million legal cases annually (1988). It appears, however,

that clinicians who play the role of forensic psychologists may cause more trouble than they are worth. There are probably more consequences associated with this type of testimony than any other that has been mentioned so far.

One reason that clinical psychologists' testimony as expert witnesses is so problematic is that they often just are not knowledgeable enough about forensic matters. According to studies performed by Faust and Ziskin (1988), clinical psychologists often cannot answer forensic questions accurately. This discredits them as witnesses, and the credibility of a so-called expert witness is vitally important in a court of law. Faust and Ziskin also report that clinical psychologists are not as likely as forensic psychologists to help a judge and jury make more accurate conclusions than would otherwise be possible. In fact, results of one study showed that professional, practicing clinical psychologists performed similarly to high school students in a task which required them to predict violence of a given individual. It is astounding to find out that in the results of many studies involving prediction of violence, clinicians are wrong at least twice as often as they are correct (Faust & Ziskin, 1988).

Not only are clinical psychologists not knowledgeable enough about forensic matters, they often depend on the wrong information to lead them to making conclusions and predictions. In many cases, that fact that clinical criteria have been met does not mean that the satisfaction of legal criteria has been established (Faust & Ziskin 1988). For example, the clinical criteria that determine the diagnosis of insanity do not include some tests that are required for the diagnosis of legal insanity, such as the capacity to appreciate the consequences of one's actions, or to resist an impulse. Therefore, a clinician acting as an expert witness might be inclined to base his

diagnosis on clinical testing, whereas a forensic psychologist would also be sure to include appropriate tests for a legal diagnosis.

Forensic evaluations made by clinical psychologists are also inaccurate for numerous other reasons. It is difficult for a clinician to maintain the neutral role that is necessary in a forensic evaluation simply because it is evident that the clinician is not in fact neutral to the client; they already know each other on a more intimate level because of the previous therapeutic relationship (Iverson 2000). Obviously, the lack of neutrality will affect the clinician's role in the courtroom. As previously mentioned, it is also difficult for the clinician to focus on objective reality. They are minimally trained to do so; rather, they have been trained to focus primarily on the patient's subjective reality (Faust & Ziskin, 1988).

Perhaps the most important reason why it is so problematic for a clinician to testify as an expert is because of the detrimental effect it can have on the therapeutic relationship. If a clinical psychologist serves as an expert witness, the process of gaining informed consent is a tedious one. The client must consent to certain things being revealed while choosing to keep others privileged. The psychologist then must answer any questions asked about the information which is subject to public knowledge while keeping the privileged information confidential. The clinician may unknowingly exert undue influence on his or her patient due to his or her gained position of trust and authority. The patient may feel as though he or she has disrespected or offended the professional credentials of the psychologist by not giving consent (Iverson 2000). It is also important to consider the situation in which the therapist reveals information that the client did not even expect to come up. Because the counselor

and the client have had a therapeutic relationship, the therapist certainly knows more than would be known from simply conducting a forensic evaluation. The therapist risks embarrassing the patient by revealing information that the patient does not expect to be presented in the therapist's testimony. It is also possible that the therapist might be embarrassed personally if discredited through cross-examination, all of which is likely to put serious strain on an effective therapeutic relationship (Iverson, 2000).

How does a psychologist fulfill his or her legal and ethical responsibilities to both the client and society? It is possible that an answer could be made for them; if psychologists' records are subpoenaed, they simply have no choice. But otherwise there simply seems to be much gray area that engulfs issues of confidentiality, informed consent, legal and ethical laws. With laws becoming stricter, it seems that citizens are losing more of their rights to confidentiality and psychotherapist-patient privilege than ever. On the other hand, it seems that citizens are far more protected from harm because of the duty to warn and Tarasoff laws. Psychologists today need to be aware of their own level of knowledge and know when they are doing more harm than help. More than anything, psychologists need to use their knowledge and their heart to fulfill their legal and ethical duties responsibly.

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