

INTRODUCTION TO ESSENTIALS OF FORENSIC ASSESSMENT

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The psychologist's role in forensic assessment has been present for decades. However, it is only in recent years that the psychologist's involvement in court cases has become as prominent as it is. Psychologists have become involved in all aspects of the courts, including divorce, personal injury, criminal, children's court, and even in some cases, probate court.

For years expert psychological testimony was considered to be admissible based on the *Frye* test from the Supreme Court case *Frye v. United States* (1923). The point at which a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way toward admitting expert testimony deduced from a well-recognized scientific principle or discovery, the principle from which the deduction is made must be sufficiently established to have gained *general acceptance* in the particular field in which it belongs (Ackerman & Kane, 2005).

In June 1993 the United States Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals*. The Court declared that the *Frye* "standard, absent from and incompatible with the Federal Rules of Evidence should not be applied in federal trials." Although the *Daubert* ruling has not been accepted by all states (Arizona, California, Florida, Nebraska, and New York have explicitly rejected that model), and other states have not adopted the model, psychologists must be aware of whether the state in which they practice is a "*Daubert state*." If the *Daubert* criteria must be met, certain requirements should be adhered to with regard to use of specific instruments. (See Rapid Reference 1.1.)

Two Supreme Court cases followed *Daubert* and clarified some of the *Daubert* ruling. In *General Electric Company v. Joiner* (1997), the U.S. Supreme Court reaffirmed the conclusions in *Daubert* and stated, "Nothing in either *Daubert* or the Federal rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* (he said it himself) of the expert (139L.Ed.2d@520). The trilogy of cases concluded

with *Kubmo Tire Company v. Carmichael* (1999), in which the U.S. Supreme Court stated that individuals may be considered experts if they have any specialized knowledge or experience that may contribute to the fact finders' understanding of the case.

The trilogy of *Daubert*, *Joiner*, and *Kubmo* cases has formed the basis for how forensic psychologists should operate in the forensic arena. The Supreme Court allowed each state to determine whether it would use the *Daubert* standard or continue to use the *Frye* standard. It is commonly accepted among forensic psychologists (Ackerman, 2005; Gould, 2006) that the *Daubert* standard should be used by the forensic psychologist, whether practicing in a *Daubert* state or not.

The influence of *Daubert* has not only been felt in the 2002 iteration of the American Psychological Association Code of Ethics, but has significantly impacted academics as well. In the past decade, there has been a proliferation of “evidence-based” textbooks, professional books, and professional literature that addresses evidence-based issues.

When giving evidence in a case, a psychologist will be asked to state whether the opinions given are to a “reasonable degree of psychological/professional certainty/probability.” Although no legal or psychological standard has been established to instruct the psychologist or lawyer as to what “reasonable degree” represents, the accepted standard from the legal perspective is the 51st percentile, or anything that occurs more than 50% of the time. Psychologists are likely to be more conservative, having been taught in the course of their education to look at research at the .05 or .01 confidence level. However, in the legal arena it is acceptable to opine that something occurring more than 50% of the time will be to a “reasonable degree of certainty.”

Rapid Reference 1.1

Daubert Criteria

- Use theoretically and psychometrically adequate data-gathering instruments.
- Draw conclusions using scientifically validated theoretical positions.
- Weigh and qualify testimony on the basis of the adequacy of theory and empirical research on the question being addressed.
- Be prepared to defend the scientific status of your data-gathering methods during the process of qualification as an expert witness.

Table 1.1 Criteria of Psychological Tests for Use in Forensic and Custody Evaluations

Otto, Edens, and Barcus (2000, p. 100)	Melton, Petrila, Poythress, & Slobogin (2007, p. 48)
1. Is the test commercially published?	1. Is the test commercially published?
2. Is a comprehensive test manual available?	2. Is a comprehensive user's manual available?
3. Are adequate levels of reliability demonstrated?	3. Have adequate levels of reliability been demonstrated?
4. Have adequate levels of validity been demonstrated?	4. Have adequate levels of validity been demonstrated?
5. Is the test valid for the purpose for which it will be used?	5. Is the instrument valid for the purpose for which it will be used?
6. What are the qualifications necessary to use this instrument?	6. What are the qualifications necessary to use this instrument?
7. Has the instrument been peer reviewed?	7. Has the instrument been subjected to peer review?
	8. What construct is to be assessed?
	9. How directly does the instrument assess the construct of interest?
	10. Are there alternative methods of assessment that assess the construct of interest in more direct ways?
	11. Does the use of this instrument require an unacceptable degree of inference between the construct it assesses and the psycho-legal issue(s) of relevance?
	12. Does the instrument include measures of response style?

CRITERIA FOR THE USE OF TESTING

In an ideal world, all these criteria could be fully met. In practice, psychologists may use a test that does not quite meet the ideal—for example, a test that, although the best test, is too new to appear in the *Mental Measurements Yearbook* or published research. The psychologist is responsible for acknowledging this fact, however, and for indicating how a given test addresses the psychological and legal issues (Ackerman & Kane, 2005, pp. 148–149).

The psychologist should read the test manual of any unfamiliar tests in an effort to determine how many of the Otto et al. (1998) and Melton et al. (2007) criteria are met. A test that meets few of the criteria will have difficulty in gaining acceptance according to *Daubert* requirements.

CAUTION

When giving evidence in a case, do not rely on "junk science," which cannot meet the *Frye* or *Daubert* test.

Codes

Many organizations have developed codes or guidelines to be utilized in performing different types of forensic work. The forensic psychologist must be aware of the existence of these codes and guidelines and be familiar with many of them. (See Rapid Reference 1.2.)

Although these codes and guidelines are not necessarily considered mandatory by the American Psychological Association (APA), they tend to be viewed by the courts and legal profession as the standard of practice or standard of care. As a result, any psychologist engaging in professional activity different from what the codes or guidelines would suggest is likely to be subjected to a rigorous cross-examination about the standard of practice or standard of care. Therefore, it is recommended psychologists take a conservative approach and view the guidelines as if they represent the standard of practice, even though the sponsoring organization may not state that this is the case.

The 2002 American Psychological Association Ethical Principles of Psychologists and Code of Conduct, which can be found in full at www.apa.org, has been strongly influenced by *Daubert*, *Joiner*, and *Kubmo*.

When reading the new Code of Ethics it is apparent that the revision committee was aware that psychologists are involved in forensic psychology in ever-increasing numbers and that the Code is being used by non-psychologists in many appropriate and inappropriate ways, especially in litigation. The previous iteration of the Code (APA, 1992) had a separate section for forensic psychology. The latest revision has eliminated the section on forensic psychology and has incorporated the forensic issues within each of the 10 ethical standard areas.

A second major change in the code can be found in the second to last paragraph in the Introduction. It states,

The modifiers used in some of the standards of the Ethics Code (e.g., reasonably, appropriate, potentially) are included in the standards when they would (1) allow professional judgment on the part of psychologist,

Rapid Reference 1.2

Codes and Guidelines

- American Psychological Association's (2002) "Ethical Principles of Psychologists and Code of Conduct"
- American Psychological Association's (1987) "General Guidelines for Providers of Psychological Services"
- The American Psychology-Law Society's (in press) "Specialty Guidelines for Forensic Psychologists"
- American Psychological Association's (2007) "Record Keeping Guidelines"
- Association of State and Provincial Psychology Boards' (2005) *Code of Conduct*
- American Professional Society on the Abuse of Children's (1997) "Guidelines for Psychosocial Evaluation of Suspected Sexual Abuse in Children"
- Academy of Family Mediators' (2001) "Standards of Practice for Family and Divorce Mediation"
- American Psychological Association's (2009) "Guidelines for Child Custody Evaluations in Family Law Proceedings"
- American Psychological Association's (1997) Patients' Bill of Rights (adopted by 14 health care providing organizations)
- American Psychological Association's (1998) "Guidelines for Psychological Evaluations in Child Protection Matters"
- Association of Family and Conciliation Courts' (2007) "Model Standards of Practice for Child Custody Evaluations"
- American Academy of Matrimonial Lawyers' Guidelines (in preparation)

(2) eliminate injustice or inequality that would occur without the modifier, (3) ensure applicability across the broad range of activities conducted by psychologists, or (4) guard against a set of rigid rules that might be quickly outdated. As used in the Ethics Code, the term reasonable means the prevailing professional judgment of psychologists engaged in similar activities, in similar circumstances, given the knowledge the psychologist had or should have had at the time. (2002, p. 2)

Whereas in the past, psychologists had little or no discretion in following the APA Code, the new Code allows psychologists to make choices based on the circumstances that are presented. Examples of these choices will be demonstrated in the discussion of the standards, *infra*.

The Codes and Guidelines that are published by governing organizations are considered to be *aspirational* and not *mandatory*. As a result, from an ethical perspective, the psychologist can engage in behavior that is outside the Standards, Codes, or Guidelines. However, since these documents are promulgated by professional governing bodies, they are often viewed by the legal profession and the courts as the “Standard of Practice” for psychologists. Therefore, the psychologist must be aware that the legal profession may look at these Standards and Codes differently than the psychologists.

This section will address each of the standards and subsections of the Code that are applicable to forensic psychology settings and discuss them. Other standards can be found by reading the Code in its entirety.

Code Section 1.02

1.02 Conflicts between Ethics and Law, Regulations, or Other Governing Legal Authority

If Psychologists’ ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists make known their commitment to the Ethics Code and take steps to resolve the conflict. If the conflict is unresolvable via such means, psychologists may adhere to the requirements of the law, regulations, or other governing legal authority. (p. 1063)

There will be times that court orders ask psychologists to engage in an activity that is contrary to the APA Code of Ethics. The court order supersedes the Code. However, it is the psychologist’s obligation to explain to the court that they are being asked to violate the Code and to make a record in the event that a complaint would be filed against the psychologist. Attorneys should be willing to help psychologists make this record.

Code Section 2.01

2.01 Boundaries of Competence

(a) Psychologists provide services, teach, and conduct research with populations and in areas only within the boundaries of their competence, based on their education, training, supervised experience, consultation, study, or professional experience. (p. 1063)

Psychologists are often willing to testify in areas where they may not have training or competence. It is not unusual for an attorney who is interested in obtaining

as much information through his or her expert witness as possible, to ask a psychologist to testify in areas about which they have little or no expertise. However, it is the psychologist's responsibility to educate the attorney, and not the attorney's obligation to know the Code. Lyn Greenberg and her colleagues discuss forensic psychologist's obligations in 2004, stating, "Psychologists practicing in forensic cases have an ethical obligation to be thoroughly familiar with research relevant to the populations they are serving." (p. 19)

Code Section 3.04

3.04 Avoiding Harm

The first obligation of any healthcare provider is "do no harm." However, there are legitimate activities that may lead to harm, one of them being conducting a child custody evaluation in a case where the judge determines that one of the parents must relinquish custodial rights. (p. 1065)

Code Section 3.05

3.05 Multiple Relationships

(a) A multiple relationship occurs when a psychologist is in a professional role with a person and (1) at the same time is in another role with the same person, (2) at the same time is in a relationship with a person closely associated with or related to the person with whom the psychologist has the professional relationship, or (3) promises to enter into another relationship in the future with the person or a person closely associated with or related to the person. 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, or otherwise risks exploitation or harm to the person with whom the professional relationship exists. Multiple relationships that would not reasonably be expected to cause impairment or risk exploitation or harm are not unethical. (p. 1065)

This section states that "a multiple relationship occurs when a psychologist is in a professional role with a person and at the same time is in another role with the same person." This would include situations where a psychologist serves as

a therapist and evaluator, therapist and mediator, or evaluator and mediator. A psychologist can assume one of those roles, but not more than one. This standard also addresses the issue of the “psychologist’s objectivity or effectiveness in performing his/her functions as a psychologist.” Since the psychologist’s objectivity may already be impaired, it is helpful if the psychologist has engaged in peer review with a trusted colleague to obtain additional input as to whether the situation rises to the level of an ethical concern or not. There are times that multiple relationships are unavoidable, such as in rural areas, small towns, or on military bases.

Code Section 3.06

3.06 Conflict of Interest

Psychologists refrain from taking on a professional role when personal, scientific, professional, legal, financial, or other interests or relationships could reasonably be expected to (1) impair their objectivity, competence, or effectiveness in performing their functions as psychologists or (2) expose the person or organization with whom the professional relationship exists to harm or exploit. (p. 1065)

Multiple relationships and conflict of interest are often confused since they both involve impairment of objectivity, competence, and effectiveness in performing functions. Conflicts of interest can involve seeing both members of a couple in therapy, performing a custody evaluation on someone who may have other interests with the psychologist, such as a banker, insurance salesman, stockbroker, or real estate agent.

Code Section 3.07

3.07 Third-Party Requests for Services

When psychologists agree to provide services to a person or entity at the request of a third party, psychologists attempt to clarify at the outset of the service the nature of the relationship with all individuals or organizations involved. This clarification includes the role of the psychologist (*e.g.*, therapist, consultant, diagnostician, or expert witness), an identification of who is the client, the probable uses of the services provided or the information obtained, and the fact that there may be limits to confidentiality.

(See also Standards 3.05, Multiple Relationships, and 4.02, Discussing the Limits of Confidentiality.) (p. 1065)

Code Section 3.10

3.10 (a) Informed Consent

When psychologists conduct research or provide assessment, therapy, counseling, or consulting services in person or via electronic transmission or other forms of communication, they obtain the informed consent of the individual or individuals using language that is reasonably understandable to that person or persons except when conducting such activities without consent is mandated by law or governmental regulations or as otherwise provided in this Ethics Code. (p. 1065)

As part of obtaining informed consent, it is necessary for the psychologist to indicate to the subject, who requested the services, which are paying for services, what will happen with the results of the evaluation? Failure to obtain informed consent of the party may invalidate the evaluation, and as a result, disqualify its use in the court. (See Rapid Reference 1.3.)

Rapid Reference 1.3

Obtaining Informed Consent

Psychologists are ethically bound to inform evaluation participants of the following:

- Nature and purpose of the evaluation at the beginning of an evaluation.
- Extent of the evaluation.
- Cost of the evaluation.
- Amount of time the evaluation will take.
- Any fee arrangements in writing (if the participant is not paying for the evaluation, inform the participant who is paying for the evaluation and what the relationship is between the evaluator and the payor).
- Who will receive the report and how the information will be used.
- Concept of confidentiality and whether the results of the evaluation will be confidential.
- Duty to warn or protect where applicable.

Code Section 4.01***4.01 Maintaining Confidentiality***

Psychologists have a primary obligation and take reasonable precautions to protect confidential information obtained through or stored in any medium, recognizing that the extent and limits of confidentiality may be regulated by law or established by institutional rules or professional or scientific relationship. (*See also* Standard 2.05, Delegation of Work to Others.) (p. 1066)

Confidentiality is the cornerstone of the therapeutic relationship. However, it has little applicability in the forensic setting. In most requests for forensic evaluations, the court orders the evaluation, thus requiring that the report be supplied to the court, the attorneys, or some other agency or individual. The forensic psychologist needs to inform the participant in the evaluation that the results are not confidential. The psychologist is best protected by having the individual sign a statement recognizing that the report is not confidential.

Code Section 6.01***6.01 Documentation of Professional and Scientific Work and Maintenance of Records***

Psychologists create, and to the extent that records are under their control, maintain, disseminate, store, retain, and dispose of records and data relating to their professional and scientific work in order to (1) facilitate provision of services later by them or by other professionals, (2) allow for replication of research design and analyses, (3) meet institutional requirements, (4) ensure accuracy of billing and payments, and (5) ensure compliance with law. (*See also* Standard 4.01, Maintaining Confidentiality.) (p. 1067)

The American Psychological Association has developed Record Keeping Guidelines (APA, 2007). The record keeping guidelines can be found by going to the American Psychological Association web site at www.apa.org.

Code Section 6.03***6.03 Withholding Records for Nonpayment***

Psychologists may not withhold records under their control that are requested and needed for a client's/patient's emergency treatment solely because payment has not been received. (p. 1068)

One of the more difficult components of performing child custody work can be receiving payment. Psychologists usually attempt to receive payment on a retainer basis. However, there are times when work is performed pursuant to court orders prior to receiving a payment, and at a later date there is a request for a release of information obtained during that period. Psychologists are not obligated to disseminate the information if payment has not been received unless that information is needed for the “patient’s emergency treatment.”

Code Section 6.04

6.04 Fees and Financial Arrangements

- (a) As early as is feasible in a professional or scientific relationship, psychologists and recipients of psychological services reach an agreement specifying compensation and billing arrangements.
- (b) Psychologists’ fees practices are consistent with law.
- (c) Psychologists do not misrepresent their fees.
- (d) If limitations to service can be anticipated because of limitations in financing, this is discussed with the recipient of services as early as feasible. (See also Standards 10.09, Interruption of Therapy, and 10.10, Terminating Therapy.) (p. 1068)

Code Section 9.0

9.0 Assessment

The standards on assessment as represented by Section 9 of the APA Code may be the most important collective set of standards as it applies to forensic psychology and custody evaluation.

Section 9.01

9.01 Bases for Assessments

- (a) Psychologists base the opinion contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings. (*See also* Standard 2.04, Bases for Scientific and Professional Judgments.) (p. 1071)

This standard is a reflection of the *Daubert* standard. In today’s world of forensic psychology, a psychologist should not render an opinion that cannot be

supported by scientific data to substantiate the findings. Assessment techniques that in the past were referred to as “junk science” are no longer acceptable for the bases of opinions.

(b) Except as noted in 9.01(c), 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. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts and clarify the probable impact of their limited information on the reliability and validity of their opinions (Boundaries of Competence, and 9.06, Interpreting Assessment Results). (p. 1071)

As noted in the American Psychological Association Guidelines for Conducting Child Custody evaluations, a psychologist should not render an opinion about the psychological characteristics of an individual who they have not personally evaluated. The most flagrant example of a violation of this standard is when a psychologist tests one parent and then proclaims, based on those test results, that that parent should be the custodial or placement parent, without testing or evaluating the other parent.

(c) 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. (p. 1071)

This does allow for record review to provide consultation to an attorney in cases. Consultation or responding to hypothetical questions in testimony is not the same as rendering an opinion without evaluating individuals.

Code Section 9.02

9.02 Use of Assessments

(a) Psychologists administer, adapt, score, interpret, or use assessment techniques, interviews, tests, or instruments in a manner and for the purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques. (p. 1071)

This standard addresses the issue that the instruments that are used should be applicable to the setting within which they are used. As a result, using tests in custody evaluations that have no research about their applicability to that setting is not appropriate.

(b) Psychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established, psychologists describe the strengths and limitations of test results and interpretation. (p. 1071)

Section 9.02b indicates that if reliability and/or validity cannot be established, it becomes the reporting psychologist's obligation to indicate what limitations are for the use of that particular instrument.

Code Section 9.03

9.03 Informed Consent in Assessments

(a) Psychologists obtain informed consent for assessments, evaluations, or diagnostic service, as described in Standards 3.10, Informed Consent, except when (1) testing is mandated by law or governmental regulations; (2) informed consent is implied because testing is conducted as a routine educational, institutional, or organizational activity (*e.g.*, when participants voluntarily agree to assessment when applying for a job); or (3) one purpose of the testing is to evaluate decisional capacity. Informed consent includes an explanation of the nature and purpose of the assessment fees, involvement of third parties, and limits of confidentiality and sufficient opportunity for the client/patient to ask questions and receive answers. (p. 1071)

The same issues that apply to general informed consent apply to informed consent for assessments in custody cases since most of the work that is done in a custody case is assessment oriented.

Code Section 9.04

9.04 Release of Test Data

(a) The term test data refers to raw and scaled scores, client/patient responses to test questions or stimuli, and psychologists' notes and recordings concerning client/patient statements and behavior during an examination. Those portions of test materials that include client/patient responses are included in the definition of test data. Pursuant to a client/patient release, psychologists provide test data to the client/patient or other persons identified in the release. Psychologists may refrain from releasing test data to protect a client/patient or other persons identified in the release. Psychologists may refrain from releasing test data to protect a client/patient or

others from substantial harm or misuse or misrepresentation of the data of the test, recognizing that in many instances release of confidential information under these circumstances is regulated by law. (*See also* Standard 9.11, Maintaining Test Security.) (p. 1071–1072)

There probably is not a standard that has a greater impact on the relationship between psychologists and lawyers than 9.04(a). For decades psychologists and lawyers have been in a professional “tug-of-war” about the release of “raw data.” The Revision Committee was obviously aware of these concerns when 9.04a was written. The most important statement in 9.04(a) is the qualification given about what is required to release information, which states, “Psychologists may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or test,” indicating that it is the psychologist’s belief that the attorney is not qualified to interpret the data, and as a result, is likely to misuse or misrepresent it. The common practice of sending the raw data to another psychologist of the attorney’s choice is still the best resolution of this concern.

Code Section 9.06

9.06 Interpreting Assessment Results

When interpreting assessments results, including automated interpretations, psychologists take into account the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences that might affect psychologists’ judgment or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations. (*See also* Standard 2.01b and c, Boundaries of Competence, and 3.01, Unfair Discrimination.) (p. 1072)

There is a dilemma that arises out of Ethical Standard 9.06. As a result, technically, anyone using the MMPI-2 interpretation programs would be violating this standard. However, from a practical issue that is not likely to carry any weight.

Code Section 9.08

9.08 Obsolete Tests and Outdated Test Results

(a) Psychologists do not base their assessment or intervention decisions or recommendations on data or test results that are outdated for the current purpose.

(b) Psychologists do not base such decisions or recommendations on tests and measure that are obsolete and not useful for the current purpose. (p. 1072)

Too often, psychologists do not keep up to date by ordering new tests because they are very costly (\$1,000–\$1,200 per intelligence test), there is a comfort level with using tests the psychologist is familiar with, and the psychologist may not use the test frequently enough to warrant spending the time to develop familiarity with a new test. However, the standard of practice indicates that after a new test has been out for a year, it should replace the old test.

Code Section 9.09

9.09 Test Scoring and Interpretation Services

- (a) Psychologists who offer assessment or scoring services to other professionals accurately describe the purpose, norms, validity, reliability, and applications of the procedures and any special qualifications applicable to their use.
- (b) 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. (*See also* Standard 2.01b and c, Boundaries of Competence.) (p. 1072)

It indicates that when using automated interpretations, the problem with this standard is that there are some tests, such as the MMPI-2, that do not divulge their rationale, scoring, and interpretation methods, or other important information to determine whether the test fits these circumstances based on trade secrets, copyright laws, and other concerns.

Code Section 9.10

9.10 Explaining Assessment Results

Regardless of whether the scoring and interpretation are done by psychologists, by employees or assistants, or by automated or other outside services, psychologists take reasonable steps to ensure that explanations of results are given to the individual or designated representative unless the nature of the relationship precludes provisions of an explanation of results (such as in some organizational consulting, preemployment or security screenings, and forensic evaluations), and this fact has been clearly explained to the person being assessed in advance. (p. 1071)

This standard helps people recognize that ordinarily the results would be shared with the individual, but there are some settings such as forensic evaluations where sharing with the individual would be precluded by the evaluation.

Code Section 9.11

9.11 Maintaining Test Security

The term *test materials* refers to manuals, instruments, protocols, and test questions or stimuli and does not include *test data* as defined in Standard 9.04, Release of Test Data. Psychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques to this Ethic Code. (p. 1072)

We have now come full circle in that 9.04 allow psychologists to release test data with a valid release. However, in the spirit of the 2002 Code, the psychologist is allowed to make the ultimate decision of whether releasing the test data will cause “substantial harm or misuse or misrepresentation of the test data.” Recent informal surveys of experienced forensic psychologists yielded virtual unanimity that they would use the qualifier about harm, misuse, or misrepresentation to prevent the release of test data in custody cases. Note that even though the Ethical Code allows for release of test data, it still protects test materials (manuals, instruments, protocols, and test questions) and affirms the necessity for psychologists to maintain the integrity and security of these materials. (p. 1072)

Rule of Conduct H.4 of Association of State and Provincial Psychology Boards (1991) “Code of Conduct” states, “Psychologists shall not reproduce or describe in popular publications, lecture, or public presentations, psychological tests or other assessment devices that might invalidate them.” (p. 26)

Responding to Attorney’s Demands

- When an attorney requests or subpoenas raw test data from a psychologist, the psychologist’s ethical obligation is to inform the attorney that the integrity and security of the tests must be maintained and to offer to send the raw test data to any licensed psychologists of the attorney’s choice.
- The attorney should have his or her client sign an informed consent form requesting release of information from the evaluation or therapy or both, including the name of the psychologist to whom the raw data should be sent, if possible.

- If the attorney seeks a court order to personally review the raw test data, rather than sending it to a psychologist retained as a consultant for that purpose, the judge could be asked to review the test data in camera (instead of permitting discussion in open court) and narrow the subpoena as much as possible.
- The court should also be asked to issue a protective order
 - Prohibiting parties from making copies of the materials.
 - Requiring that the materials be returned to the psychologist at the conclusion of the proceedings.
 - Requiring that the materials not be publicly available as part of the record of the case, either by sealing part of the record or by not including the material in the record at all.

DON'T FORGET

- Do not transcend the boundaries of your expertise. (Code: Principle A, Standard 12.1; Testing: 2.01(a); Custody Guidelines: 5A)
- Do not misrepresent your qualifications. (Code: Principle B, Standards 2.01(a), 5.01)
- Avoid dual/multiple relationships. (Code: Principle B, Standards 3.05, 3.06; Specialty Guidelines: IV.D (1,2); Custody Guidelines)
- Discuss fees from the outset. (Code: Standard 6.04; Custody Guidelines: 15; Specialty Guidelines: IV.B)
- Do not release raw data to unqualified individuals. (Code: Standards 9.04; 9.11)
- Do not use obsolete tests. (Code: Standard 9.08; Custody Guidelines: 5B)
- Do not violate test security. (Code: Standard 9.11; Testing: Standards 11.7 and 5.7)
- Inform patient/client of limits of confidentiality. (Code: Standards 3.10, 9.03; Specialty Guidelines: V.B.; Custody Guidelines: 10)
- Report previously unreported child abuse. (Code: Standard 4.05)
- Understand state laws regarding duty to warn and protect. (Code: Standard 4.05)
- Do not withhold records for lack of payment. (Code: Standard 6.03)
- Do not make recommendations without seeing both parents. (Code: Standards 7.02(a,b,c), 7.04(b); Specialty Guidelines: VI.H; Custody Guidelines: 8, 13)
- Do not work on a contingency fee basis. (Specialty Guidelines: IV.B)
- Maintain records. (Code: Standard 6.01; Custody Guidelines: 16; Record Keeping Guidelines)

- Requiring that testimony regarding the content of the items be sealed or not included in the record.
- Sealing any references to test items in pleadings or other documents filed by the parties.
- Requesting that the judge's opinion, including both findings of fact and conclusions of law, not include descriptions or quotations of the actual items or responses.

Note: From Ackerman, 2006, p. 49

The Health Insurance Portability and Accountability Act (HIPAA)

The provisions of HIPAA do not control any aspect of forensic psychological evaluations. Forensic services are provided to respond to a legal and not a therapeutic question: They are provided at the request of a third party (not the client himself/herself) and fall outside the health care system and, as a result, are not covered by health insurance. The only exception would be if protected health information is received by the forensic evaluator from another party as part of record review. The forensic psychologist must maintain the security of those protected health information records.

PRESENCE OF THIRD PARTIES DURING EVALUATIONS

It is not unusual for attorneys or courts to request that a third party be present during a forensic psychological evaluation. This is often done under the guise of wanting to make sure that a child is not "harmed" or an adult is not "badgered." Parents have also requested to be present when their children are evaluated, especially when abuse allegations have been made. However, research indicates that such "third party observers" (TPOs) should not be present because of the effect such observers are likely to have on the results of the evaluation. In order for a standardized psychological instrument to be valid and reliable, it must be administered according to specific criteria that were utilized during the standardization process. There are no tests that are standardized with third party observers present. Kramer and Brodsky (2007) state "the examiner must ensure that the attorney does not actively or passively interfere with the examination itself."

"Impression management" is an additional area of concern. Examinees alter their performance depending on their perception of how they should or want to come across, ways they want to avoid coming across, whom they want to please (or avoid pleasing) with their performance, and so forth. Parties may increase the statements they make that are designed to get the TPO to like them,

or approve of them, may avoid disclosure of sensitive or negative (especially embarrassing) information, or may otherwise fail to be forthright with the evaluator (Ackerman & Kane, 2008, p. 21).

KNOW YOUR STATE LAW

Every state has different laws and regulations that govern how forensic psychologists are allowed to practice within that state. A copy of temporary practice laws in the United States and Canada can be found on pages 3–8 of Ackerman and Kane (2008). Before beginning practice in your jurisdiction, it is essential to determine what state laws govern your professional forensic psychology activity. The following list is a guide to specific laws that you should inquire about within your jurisdiction.

- Determine if your jurisdiction has incorporated the APA Child Custody Guidelines into state law or any other guidelines or codes.
- Before you attempt to practice in another state for a specific case, check the state laws in that state to determine what you are and are not allowed to do.
- Determine if your state has a law that specifically identifies what should be included in a child custody evaluation.
- Determine if your state has laws that specifically identify the type of training you need in order to perform a child custody evaluation.
- Determine if your state law allows courts to order significant others (new spouses, live-in partners, grandparents) to participate in the evaluation or if it must be voluntary.
- Determine the role of the guardian ad litem by statute and if the guardian ad litem must be an attorney or can be a mental health professional or other nonattorney.
- If a guardian ad litem is involved in the case, are you allowed to meet with the children without the guardian ad litem's permission?
- Determine the current state law regarding *Tarasoff*-type warnings.
- Determine if your state has a law regarding maintaining test security or releasing test data.
- With regard to placement issues, find out if any “rebuttable presumptions” are mandated by law when making placement decisions and determine if your state has a law that requires starting from a position of “substantially equal placement.”
- Determine what domestic violence laws exist in your state and whether you are required to include domestic violence issues as part of your evaluation.

- Determine whether your state’s law(s) regarding mandated child abuse reporting has any areas in which “permissive” reporting is allowed instead of “mandated” reporting.
- Determine if your state has some form of information system allowing you to check for current or previous court cases in which parties or significant others have been involved.
- Is your state a *Daubert* state, a *Frye* state, or neither?
- Does your state prohibit dissemination of medical and/or educational records to parents who have been denied placement of their children pursuant to court order?



TEST YOURSELF



1. Dual or multiple relationships are becoming an increasing concern in the practice of forensic psychology.

True or False?

2. Raw data should readily be turned over to attorneys when a subpoena is issued.

True or False?

3. When raw data are subpoenaed, the psychologist should

- attempt to quash the subpoena.
- encourage the judge to review the records in camera.
- request the judge order that the data be returned after the case is completed.
- ask the judge not to include any raw data in the findings of fact and court orders.
- all of the above.

4. Which of the following is not one of *Daubert* requirements?

- Use of tests found in the Mental Measurements Yearbook
- Use theoretically and psychometrically adequate data-gathering instruments
- Draw conclusions using scientifically validated theoretical physicians
- Weigh and qualify testimony on the basis of adequacy of theory and empirical research
- Be prepared to defend the scientific status of your data gathering

5. There is no difference between the psychologist’s role as a therapist and forensic evaluator.

True or False?

6. Tests such as the MMPI-2 can be sent home with subjects in an effort to save time.

True or False?

7. Informed consent includes all of the following, except informing the participants

- (a) of the nature and purpose of the evaluation.
- (b) the extent of the evaluation.
- (c) the cost of the evaluation.
- (d) the location of the evaluation.
- (e) the amount of time the evaluation will take.

8. The original Duty to Warn or Protect case was

- (a) *Egley v. University of South Carolina*.
- (b) *Tarasoff v. Regents of the University of California*.
- (c) *Schuster v. Altenberg*.
- (d) *Jaffe v. Redmond*.

Answers: 1. True; 2. False; 3. e; 4. a; 5. False; 6. False; 7. d; 8. b