



Ethical decision-making in forensic psychology¹

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Abstract

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The purpose of this article is to develop a comprehensive process for identifying and addressing primarily ethical issues related to the psychology profession in South Africa. In fulfilling this purpose, research was conducted of relevant ethical and to a lesser extent, legal aspects pertaining to the psychology profession. In an attempt to prevent unprofessional conduct claims against psychologists from succeeding and to alert psychologists to the concurrent ethical problems that may lead to malpractice suits, this article offers material on some important issues – in the context of forensic psychology – such as ethical decision-making and principles, professional ethics, the regulation of psychology as a profession, the Ethical Code of Professional Conduct to which a psychologist should adhere, ethical aspects and issues pertaining to forensic psychology in general, some ethical issues pertaining to child forensic psychology, summary guidelines for ethical decision-making

1 This article is an abstract of and adaptation of research conducted for the LL.D. thesis, entitled, *Aspects of law, psychiatry and psychology: an analysis of constitutional, medico-legal and liability issues*, for which the author is currently registered at the University of South Africa under the supervision of Prof. M.N. Slabbert. It was further presented as a paper at the Fourteenth South African Psychology Congress (26-29 August 2008), held at Emperors Palace, Johannesburg. Special recognition is given to Prof. Slabbert (Unisa) and Dr. Louise Olivier (clinical and counselling psychologist) for being great teachers and for their advice, inspiration and support, not in only in the writing of this article, but also in the writing of the thesis.

and some steps to follow to ensure sound ethical decision-making.

Opsomming

Etiese besluitneming in forensiese sielkunde

Die doel van hierdie artikel is om 'n proses te ontwikkel waardeur etiese kwessies met betrekking tot die sielkundeprofessie in Suid-Afrika geïdentifiseer en hanteer kan word. Om hierdie doel te bereik, is navorsing gedoen oor die relevante etiese kwessies en, tot 'n mindere mate, die regs kwessies met betrekking tot die sielkundeprofessie. In 'n poging om te verhoed dat onprofessionele gedragseise teen sielkundiges slaag en om sielkundiges te waarsku oor etiese probleme wat mag lei tot eise teen hulle, bied hierdie artikel inligting oor belangrike kwessies in die konteks van forensiese sielkunde, naamlik etiese besluitneming en beginsels, professionele etiek, die regulering van die sielkundeprofessie, die Etiese Kode waaraan sielkundiges moet voldoen, aspekte en kwessies met betrekking tot forensiese sielkunde in die algemeen, sommige etiese kwessies met betrekking tot kindersielkunde, opsommende riglyne vir etiese besluitneming en stappe om te volg om etiese besluitneming te verseker.

1. Ethical decision-making in forensic psychology

Although psychologists want to believe that ethical issues can be viewed in black and white, they mostly come in shades of gray. That is why the practice of psychology requires an ongoing examination and discussion of both long-standing and evolving practical issues as well as the ethical, legal and professional resources on which they rely to guide their professional conduct. There are many factors that can contribute to ethically questionable conduct or clear misconduct on the part of the psychologist, some of which is intentional and some of which is unintentional. In an attempt to prevent such claims from succeeding and to alert psychologists to the concurrent ethical problems that may lead to malpractice suits, this article offers material on some important issues in context of forensic psychology such as ethical decision-making and principles, professional ethics, the regulation of psychology as a profession, the Ethical Code of Professional Conduct to which a psychologist should adhere, ethical aspects and issues pertaining to forensic psychology in general; some ethical issues pertaining to child forensic psychology, summary guidelines for ethical decision-making and some steps to follow to ensure sound ethical decision-making. The scope of this article does not allow for the provision of a detailed, in-depth

ethical framework. It merely attempts to highlight some of the relevant ethical issues in the field of forensic psychology, but these issues – and additional topics – should be addressed in a more comprehensive survey.

2. Ethical decision-making and principles in forensic psychology

Making ethical or moral decisions, like any other decision in health care, is not a precise art but a learned skill. *What* decision is ultimately made and *how* that decision is made has always been the topic of intense debate. In making ethical decisions three important factors need to be taken into account. Firstly, psychologists always have choices they can select from as they make decisions. Secondly, in making these decisions the consequences of these choices have to be taken into account. Lastly, the context or setting of the ethical dilemma will affect the decision to be made and this must be accounted too.

In clinical and forensic practice, situations often arise in which there is no right answer or right course of action. The psychologist is then guided by a set of ethical principles that lay different emphases on different components of the problem, for example utilitarian ethics focuses on the consequences of actions. Virtue-based ethics considers what a fictional “good man or woman” might do in the same circumstances. Liberal individualism sets store by the right of the individual, in contrast to the position of ubuntu in South Africa, focuses more on what is good for the community. The ethics of care, on the other hand, emphasises the duty to care in clinical and forensic practice and advocates decision-making based on the facts of the case. Principle-based ethics proposes that moral decisions arise from consideration of four principles, namely autonomy, beneficence, non-maleficence and justice. Brim (1965:1184) states that

[a]bsolute rules do not offer useful solutions to conflicts in values. What is needed is wisdom and restraint, compromise and tolerance, and as wholesome a respect for the dignity of the individual as the respect accorded the dignity of science.

3. Professional ethics

3.1 Psychology as a profession

The term *professional* is hard to define. Definitions can be framed around criteria such as the number of years of preparation required,

whether or not the professional engages in private or institutional practice, whether or not the profession is represented by formal groups or associations and other similarly superficial considerations. However, according to Biggs and Blocher (1987:29) professions arise out of public trust. This trust defines the profession and permits the members of the professional group to function in professional ways. The public trust that creates and sustains any profession stems from three sets of beliefs that are widely held about the profession and its members, namely competence, maintenance of standards and altruistic values. Public trust begins with a perception of competence. Professionals are seen to have special expertise and competence not readily found in the general public. In some situations professionals may even have to demonstrate continuing competence through periodic re-examination, continuing professional education or other means. The second perception that sustains public trust in a professional group, is the belief that such groups regulate themselves and are further regulated by society in a way that serves the public interest. An important part of this perception is faith in the codification of professional behaviour. Another aspect is the belief that members of the profession will organise and work to uphold prescribed standards of professional conduct by applying their Code of Ethics and maintaining its standard of practice. The final perception is that members of a profession are motivated to serve the people with whom they work. Ethical questions are rooted in the public trust that defines any profession. Whenever the perceptions of the public are changed by the unethical, unprofessional or irresponsible behaviour of a member of the profession, all other members are harmed and indeed their ability to function in professional ways is diminished or impaired.

3.2 The regulation of psychology as a profession

3.2.1 Background

In the strict sense, apart from certain supreme provisions in the Constitution of the Republic of South Africa (South Africa, 1996) and the applicable national common law principles, which may generally impact on the medical profession in South Africa, the practice of the psychology profession in the country is primarily regulated by statute. Pivotal to all the statutory enactments governing the profession is The Health Professions Act (South Africa, 1974).² This act is of

2 The long title of Act 56 of 1974, as amended by section 13 of Act 18 of 1995 and section 66 of Act 89 of 1997, reads:

particular importance as it establishes the Health Professions Council of South Africa (HPCSA), a statutory body that is the main regulator together with twelve Professional Boards that operate under its jurisdiction, to inter alia promote the health of the South African population, determine standards of professional education and training, and set and maintain fair standards for professional practice. The Professional Board for Psychology also operates under the jurisdiction of the HPCSA (section 15 of the Health Professions Act).

3.2.2 The Ethical Code of Professional Conduct to which psychologists should adhere in order to avoid disciplinary being taken against them

In order to promote ethical conduct within the medical profession, the HPCSA, in consultation with professional boards, has drawn up a code of conduct for psychologists in terms of the Health Professions Act. It is to be noted that as recent as August 2006, the Minister of Health approved new regulations³ containing the latest version of the applicable ethical rules. As to the legal status of the ethical rules, it can be stated that although courts of law are evidently not bound by medico-legal codes of conduct, the ethical rules and prevailing practices of the psychology profession will undoubtedly be an important consideration in ascertaining what constitutes psychological malpractice. In this regard the Ethical Rules of Conduct are pivotal to determine whether “unprofessional conduct” (in the generic sense of the word) on the part of a psychologist, warrants the institution of disciplinary proceedings.

3.2.3 The forensic psychologist

Forensic evaluations do not usually occur within the context of the normal doctor-patient relationship in which there has to be concern that the assessed individual’s autonomy is respected, that no harm

To establish the Health Professions Council of South Africa; to provide for control over training, registration and practices of practitioners of health professions; and to provide for matter incidental thereto.

It should be noted that the discussion of the provisions of the Act *infra* will be done in the same chronological order as discussed in the Act itself.

- 3 As per Government Notice 7 of 4 August 2006 (GG No. 29079) whereby the Rules specifying the acts or omissions in respect of which disciplinary steps may be taken by a Professional Board and the Council, published under Government Notice 2278 of 3 December 1976 and Government Notice R1379 of 12 August 1994, as amended by Government Notice R1405 of 22 December 2000, are repealed.

befalls him/her or that his/her best interests are served. Professional boundaries in psycho-legal practice are intended to maintain a professional distance and respect between the patient and the forensic psychologist. It is possible that the psychologist might feel sympathy for the client and as such recommend a particularly lenient sentence or award custody unfairly. Therefore, the boundaries of psycho-legal relationships should be regarded as more strict and formal than in most other clinical relationships.

4. Ethical practice in forensic psychology

4.1 Ethical aspects and issues pertaining to forensic psychology in general

The following section explains the ethical aspects and issues related to the psychiatric and psychological professions. Focus is placed on guidelines and different ethical rules. Although ethical rules do not constitute law, they are still legally relevant.

4.1.1 Professional competence and scope of practice for a psychologist to act as a forensic expert in court

Unfortunately, some professionals in South Africa who conduct psycho-legal assessment⁴ and testify in court do not have the requisite qualifications or expertise to do so. Many allege that they have a vast amount of experience (in order to claim legitimacy) without conceding that they might be practising incorrectly and continue to do so. Psycho-legal work is commonly performed by either psychiatrists or psychologists (mental health practitioners)⁵ in private practice or professional staff in large psychiatric institutions that do evaluations as part of their general duties, and in fulfilment of their institution's obligations in this regard. There are no formal training programmes or examinations for forensic mental health in South Africa. Therefore, according to Kaliski (2006:6) a mental

4 All psycho-legal assessments have the following three components in common: the determination of a diagnosis, an appreciation of the functional demands contained within the relevant legal and juridical briefs, and the strength of the causal connection between the first and the second requirements.

5 The Mental Health Care Act 17 of 2002 (South Africa, 2002) (hereafter referred to as the Mental Health Care Act) defines a mental health practitioner as "... a psychiatrist, registered medical practitioner, nurse, clinical psychologist, occupational therapist, or social worker who has been trained to provide prescribed mental health care, treatment and rehabilitation services". (See section 1.)

health practitioner – to be an acknowledged forensic expert – should at least have worked in an academic forensic facility for an appreciable period and be convincingly experienced. It seems as if a formal postgraduate course will be introduced in the near future. Haas (1993:251) concedes that mere possession of generic professional credentials cannot be used as validation of the necessary and sufficient skills to perform in a forensic capacity. Case examples are used in his article to illustrate problems of both competence and quality that sometimes accompany psychological expert witnesses to the witness stand.

One of the major concerns in criminal forensic psychology is stated by Harris (2007).⁶ He says:

What amazes me is that in any trial I've ever heard of, the defense psychiatrist [psychologist] always says the accused is insane, and the prosecuting psychiatrist [psychologist] always says he's sane. This happened invariably in 100% of the cases, thus far exceeding the laws of chance. You have to ask yourself, 'What is going on here?'

The answer is that some experts have earned the label of hired-guns, because they are prepared to express the opinion requested by the lawyer irrespective of whether that is objectively the correct opinion. As it is the lawyer's ethical duty to present their client's case in the most positive way, it is almost inevitable that the information that they give to the expert will be specifically selected and presented in order to strengthen a particular viewpoint, which almost certainly amounts to incomplete information. Experts should examine information critically and must make sure that such material does not only support the view of the instructing lawyer. Another factor that leads to the impression of bias is that some experts receive financial incentives and tend to work exclusively for certain legal firms or specific groups such as defendants in civil cases, which can contribute to the unethical conduct of the forensic psychologist. It is of the utmost importance that experts must be impartial and honest. An awareness of these common ethical challenges in forensic psychology can help psychologists to examine their own practices and the practices of their colleagues.

6 Jeffrey Harris, Executive Director US Attorney General's Task Force on Violent Crime.

The obvious but essential starting point to avoid the impairment of the objectivity of the forensic expert is to have a thorough clinical assessment (with accepted diagnosis) precede any consideration of the legal or juridical issues. It is important that clinicians base their diagnoses on the criteria listed in the DSM-IV or ICD-10 or well defined criteria from academic literature. According to Kaliski (2006:7) the rationale behind this approach is that modern psycho-legal practice can no longer tolerate assessments in which the expert provides an opinion based solely on “my experience”. Opinions have to be objective and based on good evidence.

It is worth noting that the role of the forensic psychological expert is to guide the court to a correct decision on questions falling within the expert’s specialised field and not to pass judgement in court. In one of South Africa’s leading cases *Van Wyk v Lewis*, C.J. Innes, J ruled explicitly: “The testimony of experienced members of the profession is of the greatest value ... [The court] will pay high regard to the views of the profession, but is not bound to adopt them.” Therefore, the probative value of expert evidence is dependant upon the qualifications, skill and level of experience (competency rule) of the expert and the ability of the court to assess this testimony.

4.1.2 Professional competence and training in the use of standardised tests

If a psychologist is instructed by an attorney to conduct an assessment to determine whether a defendant was insane at the time he/she committed a specific crime, the psychologist must be able to recognise that this is in fact a forensic assessment and not a clinical assessment. The psychologist must then determine whether his/her specific graduate training program and internship provided an adequate foundation for conducting this type of assessment. Psychologists who conduct forensic assessments on a regular basis may be vulnerable to a specific occupational hazard. Having assembled a standard battery of tests with which they are comfortable, they may use that battery without evaluating whether the tests are appropriate for the specific assessment task at hand. Tests conducted should also be appropriate for the individual. Even if the tests have been carefully selected on the basis of validity in addressing the tasks at hand, there are significant factors that can affect whether the tests are appropriate for a specific individual. For example factors that need to be considered are the passage of time, geographic and educational representatives and the need to avoid ethnic and racial bias. It is further important for standardised tests to be used in a

standardised manner. The power and effectiveness, as well as the validity and reliability of standardised instruments, are assured only by using standardised procedures for administration, scoring and interpretation. Shortcuts are tempting to many psychologists in the light of busy schedules and pressure from lawyers. By departing from the standardised method of administration, scoring and interpretation the vital link between the test and the validating research from which the test draws its strength, is cut.

In addition, computers should be used in an appropriate manner for forensic assessment. Some crucial considerations include that the psychologist must be confident that there are no bugs in the scoring program; adequate evidence that the computer transforms raw scores into interpretive statements; and determination of the degree to which the interpretive statements in the computer generated report actually apply to the individual who is being assessed. Factors that can influence the test data and their meaning, for example distractions while a client is taking a test or a client taking a test while heavily medicated should be taken into account and included in the forensic testimony as well as the forensic report.

4.1.3 Culture, language and race

In a country that has eleven official languages and a multitude of cultures and races, it is likely that many psycho-legal examiners will derive from backgrounds very different from that of their examinees. Many forensic psychologists in this country have little knowledge and understanding of the various local African cultures, although training programmes usually include seminars on transcultural psychiatry. At least there is an awareness of, and empathy for ethnic, religious and cultural diversity. According to Tseng and Streltzer (2004:18) cultural competence requires the attainment of several qualities: firstly, cultural sensitivity which refers to recognition of the diversity of viewpoints, attitudes and lifestyles among human beings; secondly, basic cultural knowledge about humankind as a whole with which to put the particular client and family into perspective; thirdly, cultural empathy for the client, which entails an intellectual understanding as well as the ability to feel and understand the client's own cultural perspectives on an emotional level; lastly, an understanding of the importance of culturally relevant interactions, for example an appreciation of gender interactions, what causes embarrassment and shame; and ultimately how the psycho-legal assessment process itself may be biased according to the examinee's beliefs about authority figures.

4.1.4 Conflict of interest and multiple relationships

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. A psychologist should refrain 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/her functions as a psychologist or otherwise risks exploitation or harm to the person with whom the professional relationship exists. Psychologists should minimise harm where it is foreseeable and unavoidable. By mixing valuation and treatment services the psychologist, if not careful to maintain boundaries, is at risk of violating ethical standards of practice by combining clinical and forensic roles. Forensic examiners as well as clinical examiners must maintain objectivity in all aspects of the examination process and critically assess the information and data obtained.⁷

4.1.5 Confidentiality, privilege and privacy

It is imperative that the psychologist understands the nature of the respective relationships with the client and the lawyer. This has a significant influence on confidentiality. The psychologist must inform the client that a forensic relationship does not carry a confidentiality clause and that all clinical and other information can be communicated to the court and to the lawyers in a written report. The client should be aware that this report may be presented in the public domain. Nevertheless, the psychologist still has a duty not to disclose information or material that is not relevant to the parameters of the evaluation.

4.1.6 The release of "raw" psychological data to non-experts

Psychologists are often requested to provide "raw" psychological data for example scores, test stimuli, client or patient responses to non-experts, especially in personal injury litigation cases in which

7 For example a young man is referred to a neuropsychologist by his neurologist for evaluation and treatment following a motor vehicle accident. The neuropsychologist performs the evaluation and begins treatment, at which point she receives a request from the patient's attorney (third party claim) for copies of her reports and notes. After one year of treatment the neuropsychologist determines that a second neuropsychological evaluation is needed to assess progress since the initial evaluation and to update her treatment plan. She conducts the second evaluation and modifies the treatment plan to address persisting deficits.

there may be a court order or subpoena for such information. Requests from judges and lawyers frequently place the psychologist in a position in which legal and ethical considerations point in different directions. The release of raw data creates numerous possibilities for misuse. Laypersons for example lack an appreciation of the context in which psychological test stimuli are administered and may reach wrong conclusions about the meaning of individual answers. When this occurs, for instance in a courtroom by lawyers and judges the ramifications of the errors may be great. A viable course of action if a layperson should request raw data from a psychologist would be to advise the person to engage the consultation of another psychologist who is qualified by virtue of licensure, training and experience to receive the data. This psychologist can then interpret the data to the layperson. It is important that the psychologist explains the reasons for not releasing the data, for example that psychologists cannot afford to have test stimuli circulated in the public domain and that raw data is difficult or impossible for a non-expert to interpret.

4.1.7 Facilitating informed consent

Respect for autonomy demands that informed consent should always be obtained before a procedure or examination is contemplated. In many forensic settings, such as court ordered evaluations of an accused's competence, an assessment can proceed without the examinee's consent. The psychologist should at least attempt at obtaining informed consent. Further the psychologist might also specifically required to assess an individual's ability to provide informed consent in the following situations:

- A mentally ill person refuses to be admitted to hospital and an involuntary admission is being contemplated;
- there is doubt whether a person is able to provide consent for a medical or legal procedure;
- a retrospective analysis is needed of whether an individual who was subjected to a procedure or intervention, actually did provide informed consent; and
- to establish whether a person who has been referred for a psychological assessment, for instance for determination of child custody, provided informed consent.

It is generally accepted that to achieve informed consent the conditions of willingness, competency, disclosure of information and the dynamic nature of the process have to be fulfilled.

4.1.8 The forensic report

Where it is certain that the opinions of the forensic expert will not be seriously challenged it may be sufficient if the report simply describes (in general terms) the nature and conclusion of the investigations. Nevertheless, in most cases forensic experts are required to testify and give an accurate account of the investigation that they carried out and to substantiate their conclusions. Reports should be clear and accurate enough to ensure that decision-makers make appropriate decisions. While nothing prevents a lawyer from settling or finalising the report of an expert, Lord Wilberforce made it clear in *Whitehouse v Jordan* [1890] that:

... it is necessary that expert evidence presented to the court should be and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies (requirements) of litigation.

The danger that counsel's influence holds for the integrity of the report is further highlighted in the case (*Whitehouse v Jordan and Another* [1981]) where M.R. Denning states:

In the first place, their joint report suffers to my mind of the way it was prepared. It was the result of long conference between the two professors [experts] and counsel ... and was actually settled by counsel.

In short it wears the colour of special pleading rather than an impartial report. Whenever counsel 'settles' a document, we know how it goes. 'We had better put this in', 'We had better leave this out', and so forth. A striking instance is the way in which ... [the] report was 'doctored'.

Where an expert makes an obvious error or was misinformed corrections are called for. Even here, it would be advisable to leave the original report intact and to write an addendum explaining the reason for identifying the particular instance as an error and the need to correct it.

5. Ethical issues in child forensic psychology

5.1 Child neuropsychology

Woody (1997:719) suggests that the growing recognition of the speciality of child neuropsychology has increased the potential for legal liability by virtue of the speciality being part of the health care industry. He provides the following four reasons:

- Firstly, neuropsychologists do not possess a well-defined role. Qualifications for the title “neuropsychologist” have yet to be specified in an universally accepted manner, especially as far as the title “clinical child neuropsychologist” is concerned. When compared to other clinical specialities the quality of training in clinical forensic neuropsychology is not assured. There is considerable dispute over, and contradictory results from research that addresses neuropsychological theories and procedures.
- Secondly, the increased identity as a psychologist in a medical context increases the risk for legal action. The medical context combined with the brain-based focus of neuropsychology may produce additional risk of legal action against the clinical and forensic neuropsychologist.
- Thirdly, the principle of vicarious liability can apply to any member of a health care team, including the neuropsychologist, despite the absence of a direct claim of fault against the neuropsychologist.
- Lastly, neuropsychology (by virtue of its focus on brain-related issues) has the potential to increase the basis of legal action claims.

The foundation of ethical practice in forensic child neuropsychology is professional competence. Without the knowledge and skills needed to appropriately address referral questions and serve the consumers of neuropsychological services, the remaining ethical requirements are largely irrelevant. Bush (2007:37) states it more simply when he says that:

If we do not know what we are doing, we should not be engaging in professional activities. For example, in the absence of competence to provide neuropsychological services, issues such as test selection, informed consent, and confidentiality should not come into play because we should not be engaging in neuropsychological activities in the first place. Again practising in accordance with other ethical standards is

essential for competence. For example one must understand and apply appropriate methods of test selection, informed consent, and confidentiality to provide competent services.

Psychologists increasingly find themselves providing evaluation services involving children to lawyers and to the courts, which has potentially serious consequences to the children, their families and the evaluators themselves. Special competence is required for forensic assessments in child neuropsychology such as training in specialised knowledge of developmental psychology, family dynamics, neuropsychology, child psychology and specialised assessment instruments. This training is important when, for example the psychologist has to make a diagnosis. Unfortunately, current diagnostic systems leave neuropsychologists struggling to select a correct diagnosis from among alternatives and this contributes to the concern about the ability of neuropsychologists to use tests reliably and the relevance of testing for the child's functional adaptation.

Additional factors that the neuropsychologist must consider and should have knowledge of, include languages spoken by the family and child, cultural background, educational background and socio-economic status, each of which has been shown to influence performance on psychometric testing. Given the multi-ethnic, multicultural nature of South Africa, a certain percentage of children referred to neuropsychologists for testing, might not properly speak the language of the psychologist – such children present a challenge for the neuropsychologist who must decide how to conduct the assessment to maximise its chances of being meaningful and useful. Cultural background may also influence test results through such variables as attitude toward education, experience with the concepts and skills being tested, response to time pressure on timed tasks and comfort with being the sole focus of a professional adult's attention.

5.2 Child custody disputes

The assessment of children during custody disputes between two divorcing parents most frequently evokes the accusation of “hired guns”. It is here that the confluence of incompetence, multiple relationships, role conflicts and biased advocacy is most prominent. These evaluations are among the most difficult as they involve, at a minimum, the evaluation of two adults and one child, the review of legal documents, contact with family, review of medical records, review of school records and so forth. Unless the disputes are settled on a friendly basis it is inevitable that some parents will feel

aggrieved by the decision of the court. Right or wrong, such parents are increasingly filing ethics complaints against assessors. Common points of criticism levied against psychologists' work in child custody cases include deficiencies and abuses in professional practice; inadequate familiarity with the legal system, and applicable legal and ethical standards; inappropriate application of psychological assessment techniques' presentation of opinions based on partial or irrelevant data' overreaching by exceeding the limits of psychological knowledge of expert testimony; offering opinions on matters of law; loss of objectivity through inappropriate engagement in the adversary process; failure to recognise the boundaries and parameters of confidentiality in the custody context; and giving written or oral evidence about the psychological characteristics of particular individuals (for example one of the parents) when they have not had an opportunity to conduct an examination of the individual adequate to the scope of the statements, opinions or conclusions to be issued. It does not serve the "best interest of the child" if the psychologist appears to be a "hired gun" and even the most ethical psychologist may feel some pressure to shade the results of a custody evaluation in the direction of the parent who is paying the bill. Even the fact of merely being employed by one side or the other will create a tendency toward bias or somewhat diminished objectivity – sometimes even without awareness on the part of the expert that such a tendency is in effect. To avoid instances of bias, Shapiro (1991:99) states that: "Under no circumstances should a report on child custody be rendered to the court, based on the evaluation of only one party to the conflict."

Furthermore, forensic psychologists must avoid improper and potentially harmful multiple relationships. They must avoid situations wherein loyalty is owed to more than one person or institution or that may otherwise compromise the quality of the psychologist's judgment by involving a conflict of interest. In a custody case loyalty is primarily owed to the "best interests of the child", but loyalty is also owed to the psychologist's other clients, namely the court, each person evaluated and, unless the psychologist is court-appointed, one or more attorneys. The psychologist is therefore required to abide by ethical obligations regarding informed consent for those assessed, confidentiality, clarification of any matters related to fees and so forth. Evaluators have a responsibility to the person who retained them, and if not one and the same, a separate responsibility to the individual or individuals being evaluated. They have responsibilities to their codes of ethics, which may be in conflict with statutes, case law and rulings by judges in the specific

case. They also have responsibilities to those who may be harmed by the person being evaluated.⁸

There are also many reasons why a psychologist should not be retained or appointed as an expert to evaluate his/her own patient or client. If the evaluation favours the patient the psychologist could be accused of favouritism. If it does not, the therapeutic relationship could be seriously harmed and the therapy accomplished up to that point may become relatively worthless. In addition, in therapy, an individual has a right to expect confidentiality, to expect the psychologist to do only what is in the person's best interest (beneficence) and to avoid doing anything harmful (non-maleficence) except in a "duty to warn or protect" situation. The only significant exception may be in rural areas where the psychologist is the only expert available to provide the necessary forensic services.

Taking into consideration the massive amount of information that must be considered, it is necessary to have a model that will foster the gathering and interpretation of information, and communication of its relevance to, and impact upon the ultimate decision of the

8 In the case of *Tarasoff v Regents of the University of California*, 1974 the California Supreme Court indicated that when a doctor or psychotherapist in the exercise of his professional skill and knowledge, determines, or should determine, that a warning is essential to avert danger arising from the medical or psychological condition of his patient, he incurs a legal obligation to give that warning. In a second case in 1976, the California Supreme Court went further ruling that the therapist must not only warn – he/she must also protect:

When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending on the nature of the case. Thus it may call for him to warn the intended victim or other likely to apprise the victim of the danger, to notify the police, or take whatever other steps are reasonably necessary under the circumstances. [W]hen the avoidance of foreseeable harm requires a defendant to control the conduct of another person, or to warn of such conduct, the common law has traditionally imposed liability only if the defendant bears some special relationship to the dangerous person or to the potential victim ... [T]he relationship between a therapist and his patient satisfied this requirement ... We recognise the difficulty that a therapist encounters in attempting to forecast whether a patient presents a serious danger of violence. Obviously, we do not require that the therapist, in making that determination, render a perfect performance; the therapist need only exercise that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by member of [that professional specialty] under similar circumstances ... The protective privilege ends where the public peril begins. (*Tarasoff v Regents of the University of California*, 1976)

court. Martindale and Gould (2004:15) provide a proposed model termed: “The Forensic Model” in which they indicate that the evaluator must

- be familiar with relevant forensic interviewing techniques and requirements and forensic use of psychological tests and other instruments;
- have sufficient experience with child custody evaluations to clearly understand the process and the requirements of the law and be familiar with the laws relevant to child custody evaluations, including any statutory or case law definitions with regard to “the best interest of the child”. Further, a psychologist who claims to have special expertise should have achieved it through education, training, supervised experience, consultation, study or professional experience;
- as the forensic expert, conceptualise him-/herself as an extension of the court, contributing to a mindset centred on objectivity and impartiality;
- use tests and other instruments that validly and reliably assess functional abilities relevant to the question before the court;
- in using either structured or unstructured interviews, make provision for questions that address information or issues that arise during the evaluation;
- actively seek corroborating information including documents from collateral sources like teachers and physicians;
- include in the forensic reports both information that supports the evaluator’s conclusions and information that is not supportive and specify why he/she came to these conclusions in spite of the non-supportive information;
- obtain informed consent from all adult participants and, as appropriate, inform child participants of the purpose, nature and method of evaluation, who has requested the psychologist’s services, and who will be paying the fees. The psychologist must further inform about the nature of the assessment instruments and techniques and must inform the participants in question about the possible disposition of data collected. The psychologist should also provide this information to children to the extent that they are able to understand and consent.

Regardless of the model proposed, the key element is that the expert should accumulate enough evidence to be able to support his/her conclusions, including a strong empirical database that includes information about each parent and all children as well as the scientific literature to support any conclusions made.

5.3 Forensic evaluation of child perpetrators

Psychologists may be called upon to assist child offenders in a number of ways, namely by assessing the competence to stand trial of a young accused person, by giving expert testimony on the mental capacity of a young witness, or by providing preparation and support for a young victim or witness who is required to give evidence in court. The first applicable principle is that the assessment should be performed by a psychologist who does not have a prior privileged relationship with the child or his/her parents. It will be unethical of the psychologist to use information previously gained under a presumption of confidentiality to the later detriment of a patient. Obtaining information for a forensic assessment has to be carried out with the child's knowledge of the use to which that information may be put. A child's therapist may, and is often asked, for previously acquired clinical information in a report with the consent of the child's guardian and the assent, where appropriate, of the child, and may then be called as a witness for the defence. Again, the psychologist making such an assessment should be qualified to do so. No child should proceed to trial without a competent assessment of their general health, their intellectual capacity, their mental health state and their developmental history. A thorough assessment of the child's family and social context is also mandatory and usually carried out by a social worker.

6. A proposed model of ethical decision-making in forensic psychology

Determining a course of professional behaviour that not only avoids ethical misconduct according to an ethics code, but also adheres to high standards, requires a commitment to ethical ideals. Bush *et al.* (2006:28-34) propose an eight-step model that was designed to provide forensic psychologists with a means to resolve ethical challenges. The steps of the forensic psychology ethical decision-making model are as follows:

- *Identify the problem:* forensic psychologists must keep in mind that a wide range of potential behaviour may be appropriate when considering courses of action and when reviewing the work of

colleagues. A distinction may need to be made between *ethical, legal, moral* and *professional perspectives*. These overlapping concepts may need to be parsed out to clarify the ethical problem or dilemma.

- *Consider the significance of the context and setting:* psychologists work in widely varying settings and contexts. Professional activities that are appropriate in one forensic setting or context may be inappropriate in others. Consequently, some ethical rules that are relevant in one setting or context may be less relevant in other situations. For example, a forensic psychologist's fee structure may differ, quite appropriately depending on the nature of the services provided. To the extent that the fee structure may compromise objectivity, the distinction made regarding context is of ethical importance.
- *Identify and use ethical and legal resources:* this step may be the most challenging in the ethical decision-making process. This method involves applying a general rule to a specific case. Firstly, assess the foundational values, for instance general bioethical principles. Examples of South African values would include the right to self-determination and the right to adequate health care. These values underlie general bioethical and constitutional principles such as respect for a client's autonomy and the need to "do no harm" to the parties served by the psychologist. Determining the values underlying a given ethical standard or law will help to clarify the spirit behind the letter of the standard or law, and by extension, will help to clarify the appropriate course of action. However, dilemmas emerge or increase in complexity in situations in which one value is pitted against another. For example from an ethical perspective, releasing raw test data to a patient may, depending on the context, be consistent with respecting the patient's autonomy, but it may also result in psychological harm to the patient and harm to society at large depending on the uses to which the data is put. Weighing the relative importance of the principles involved and attempting to strike a balance that satisfies the greater good, is the task of the forensic psychologist. Such determinations need not and often should not be made in isolation. Secondly, psychologists must be familiar with the relevant Code of Ethics for psychologists and also with the laws that regulate the profession.
- *Consider personal beliefs and values:* to the extent possible, psychologists should attempt to understand their biases and the potential impact that their values and biases have on their profes-

sional and ethical decision-making. Psychologists sometimes rely on personal values other than those reflected in a model of professional ethics, such as their religion or cultural background. It is critically important that psychologists attempt to understand the potential influences of these personal beliefs on their professional behaviour.

- *Develop possible solutions to the problem:* consider, for example, the release of raw data. When provided with an appropriate client release, there are a variety of options that the forensic psychologist should consider. Some of these options include: immediately releasing the data, refusing to release the data on the basis of published professional guidelines, offering to release the data to a psychologist retained by the opposing attorney, or to the opposing attorney, requesting a court order to release the data, and/or requesting a protective order from the court.
- *Consider the potential consequences of various solutions:* forensic psychologists must consider potential positive and negative consequences, weigh their options, and pursue the best ethical option available.
- *Choose and implement a course of action:* the timing of the chosen course of action may be critical to its success. Consultation with colleagues may be particularly valuable in weighing the best time to respond to situations in which timing must be taken into account.
- *Assess the outcome and implement changes as needed:* with many difficult ethical decisions the chosen action will likely be unsatisfactory to one or more of the parties involved. The forensic psychologist should be prepared to receive and respond to feedback about the decisions made and actions taken. Also, the psychologist must evaluate the effectiveness of his/her decision or action and implement changes as needed.

7. Conclusion

Taking the above into consideration, it is clear that psychological expert testimony in forensic settings is an integral part of the legal system. Despite the context in which they function, practitioners acting as expert witnesses, have a duty not only to the court, but also to their respective disciplines or professions. Sound ethical decision-making is based on a process that involves multiple steps, some of which are preventative and taken in advance, and some of

which are taken at the time the ethical dilemma presents itself. Canter (1996:3) summarises these steps as follows:

- Knowledge of the Code of Ethics is important. It is also important to be alert to any revisions that may occur in parts of the Code of Ethics over time.
- Psychologists must be well informed about current legislative provisions and should keep up to date with changes that may occur at times. This is important in matters such as confidentiality, record keeping, testing and assessment, consent to treatment, et cetera.
- Psychologists must identify potential ethical problems and address these problems. At times, psychologists engaged in ethical dilemmas or decision-making for a particular set of circumstances may find insufficient guidance from either the Code of Ethics or legislative provisions. In these cases it is best to consult with a senior psychologist experienced in ethics. When implementing these steps, psychologists should bear in mind that sound ethical behaviour is ultimately based on a solid knowledge of ethical codes and regulations, sharpened by a clear understanding of the consequences of one's actions.

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Key concepts:

confidentiality
culture
ethical decision-making
forensic psychology
informed consent
neuropsychology
privacy
professional ethics

Kernbegrippe:

etiese besluitneming
forensiese sielkunde
ingeligte toestemming
konfidensialiteit
kultuur
neurosielkunde
privaatheid
professionele etiek