

ARE ATTORNEYS ENTITLED TO PSYCHOLOGICAL TEST DATA?

Cite as: Martindale, D. A. (2008). Are attorneys entitled to psychological test data? *The Matrimonial Strategist*, 26, 1-6.

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Yes, except where statutes state otherwise. Though articles in *The Matrimonial Strategist* tend to be brief, six words do not constitute an article, so perhaps I should amplify.

Standard 2.02 (b) of the now-obsolete 1992 Psychologists' Ethics Code (formally, the *Ethical Principles of Psychologists and Code of Conduct*) informed psychologists that they must "refrain from the misuse of assessment techniques . . . and take reasonable steps to prevent others from misusing the information these techniques provide." "This includes refraining from releasing raw test results or raw data to persons . . . who are not qualified to use such information." The prohibition on data release was removed during the creation of the 2002 Code and the pertinent section of Standard 9.04 (a) reads as follows: "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 others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances is regulated by law."

During the discussions that accompanied the creation of the 2002 Ethics Code and, more specifically, the debate concerning the hotly contested issue of releasing test data to "persons . . . who are not qualified", I wrote to the Ethics Code Task Force and offered the observations that follow. (1) When we endeavor to keep test data out of the hands of allegedly unqualified people we force litigants to challenge us and when they do they usually prevail. We should infer from this that most judges believe us to be on the wrong side in this skirmish. (2) Complex medical data are turned over without a fuss. When psychologists put up a fuss, we are viewed as prima donnas (in the informal sense -- temperamental, vain, arrogant). Our critics portray us as an erudite but silly group, clinging to the notion that we have secret ways of delving into people's minds and trying to protect our secrets from legitimate scrutiny.

Forensic Psychology has been formally recognized by the American Psychological Association as a specialty. Psychologists who have elected to offer forensic psychological services are obligated to recognize that operating within the legal system demands a mind-set modification and an awareness of the discovery process. Attorneys have certain obligations that psychologists must appreciate. The attorney representing a client who wishes to challenge an evaluator's findings, must have full access to the evaluator's file in order to plan an effective cross examination. A psychologist who administers tests is obligated to make the test data available to an attorney who wishes to explore the psychologist's decision-making process. Though some test data cannot be understood without specialized education and training, not all data require expertise to decipher.

Any psychologist who functions within the legal arena must recognize the role of *unidentified* experts. Attorneys have the right to retain consultants; not identify those consultants; and, under the terms of work product privilege, protect from disclosure all input from their consultants. For example, an attorney has the right to hear – privately – from his/her consultant that the test data weaken the attorney's case. The attorney also has the right to see if a different expert has a different perspective on the test data. Psychologists interfere with traditional trial preparation procedures when they insist on releasing data only to *identified* psychological consultants.

Is Litigant Authorization Required?

I urge judges to include in their orders clear language addressing the thorny issue of what is to be released to whom. If this were to be done, no authorization from litigants would be required. Additionally, evaluators opposed to releasing test data to attorneys would either decline assignments or would communicate their problems with the terms of the court orders at the outset of the process instead of creating log jams at the conclusion of the process. Ethical Standard 9.04 (b) reminds psychologists that “[i]n the absence of a client/patient release, psychologists provide test data only as required by law or court order.”

Psychologists wishing to play *Hide the Data* will argue that when they have not been directed by court order to release data, their hands are tied. They tend not to acknowledge that they have supplied the rope. Any psychologist with knowledge of the Ethics Code and a modicum of foresight obtains any necessary authorizations for the release of data *at the outset* of the evaluation.

Ethical standard 4.02 (a) places upon evaluators an obligation to inform litigants of the reasonably “foreseeable uses of the information generated through their psychological activities.” The reasonably foreseeable uses of psychological test data include their review by attorneys representing clients who wish to challenge psychologists’ findings. When court orders do not address what shall be released to whom and when evaluators neglect to secure signed authorizations from both parents, obtaining the needed authorizations at the conclusion of the evaluation can be difficult and obtaining a Court Order can subject the litigants to the needless expense of court appearances by both attorneys.

When one litigant is dissatisfied with the evaluator’s work, that litigant is likely to seek a thorough examination the evaluator’s methodology, data, and the nexus between the data gathered and the opinions expressed. I submit that – even if only for economic reasons – that litigant is entitled to have counsel conduct the initial review of the file and call upon a psychological consultant only if doing so is necessary. Those of us who perform review services are not always needed. The litigant who wants the evaluator’s work scrutinized will sign any authorization form that is presented by the evaluator. The litigant who is pleased with the evaluator’s expressed opinions is motivated to obstruct any examination of the evaluator’s work and, as a result, may decline to sign a statement authorizing the release of the entire file. Thus, by failing to secure authorizations from both parties in advance, the evaluator often creates a knot the untangling of which can be both time consuming and expensive.

Do HIPPA Provisions Apply?

When information is gathered and tests are administered for the express purpose of enabling a designated expert to prepare a report for use in civil, criminal, or

administrative actions or proceedings, neither the test data obtained nor the information gathered is related in any way to the provision by the expert of health services, even if the expert is a health service provider. For this reason, HIPPA and related privacy rules are not applicable to such assessments. The only possible exception involves the receipt by the forensic expert of *protected health information* provided to the forensic expert by a health services provider.

Psychology and Law

Psychologists who glibly assert that it's not their job to know law have not read the job description as it appears in their Ethics Code, in the APA's custody guidelines, in the Association of Family and Conciliation Courts' *Model Standards for Child Custody Evaluation*, or in the *Specialty Guidelines for Forensic Psychologists*. In each of these documents, reference is made to our obligation to be familiar with the laws that govern our work in the forensic arena.

The APA Ethics Code, Standard 2.01 (f), places upon psychologists "assuming forensic roles . . . [the obligation to] become reasonably familiar with the judicial or administrative rules governing their roles." Guideline 5 of the APA custody guidelines urges psychologists to "become familiar with applicable legal standards and procedures. . . ."

Model Standard 2.1 (b) of the AFCC's *Model Standards* requires that evaluators "have a fundamental and reasonable level of knowledge and understanding of the legal and professional standards, laws, and rules that govern their participation as experts. . . ." Model Standard 2.2 requires that evaluators "have an understanding of the fundamental legal rights of those who are part of the evaluation process and . . . conduct themselves in such a manner as to not violate or diminish those rights." Model Standard 3.2 (a) declares that "evaluators shall presume that their records are created, maintained, and preserved in anticipation of their review by others who are legally entitled to possess them and/or to review them."

Guideline III. C. of the *Specialty Guidelines for Forensic Psychologists* reminds forensic psychologists that they are "responsible for a fundamental and reasonable level of knowledge and understanding of the legal and professional standards that govern their participation as experts in legal proceedings." Guideline III. D. reminds forensic psychologists that they have "an obligation to understand the civil rights of parties in legal proceedings in which they participate, and manage their professional conduct in a manner that does not diminish or threaten those rights." Evaluators are diminishing litigants' due process rights when the evaluators resist lawful requests by attorneys for information reasonably needed by them in order to effectively represent their clients.

Contracts and Copyright Laws

The goal-line stand of psychologists resisting the disclosure of test data is the citing of contracts with publishers and the offering of vague references to copyright law. [Translation: When all else fails, psychologists wishing to protect their data from disclosure proclaim that they are motivated by a respect for the law.] In discussing this position with Timothy Tippins (an attorney member of *The Matrimonial Strategist's* editorial board), he has pointed out (1) that evaluators are obligated to be familiar with FRE 705 and similar state rules requiring disclosure of the bases for opinions and (2) that evaluators should not utilize instruments yielding data that the evaluators view as not discoverable because of copyright laws or contractual obligations.

The Opposing View

It will come as no surprise that there is an opposing view and that some of those who believe that psychologists should not disclose test data are among the respected members of our profession. In e-mail exchanges with Andrew W. Kane, co-author with Mark J. Ackerman of *Psychological Experts in Divorce Actions*, Kane has opined that (1) the goals of our justice system are not well served when those without appropriate training endeavor to interpret psychological test data; (2) for this reason attorneys should retain licensed psychologists in order to help the attorneys and litigants understand the data; and, (3) the psychological tests upon which we depend will become virtually useless if they are frequently dissected in our courts, thereby enabling large numbers of people to develop a familiarity with them. Notwithstanding my great respect for Kane (whose position has been dramatically summarized here with his permission), it remains my position that justice is better served when litigants and their attorneys *are* able to delve into the ways in which experts have interpreted various test data.

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