MMPI-2 test

Disclosure of Psychological Test Data and Materials

Arguments made by custody evaluators for not complying with discovery. Why their arguments are wrong. PDF

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Psych argument: ***I cannot release these materials because am ethically required by the APA "to make reasonable efforts to maintain the integrity and security of tests and other assessment techniques consistent with law, contractual obligations, and in a manner that permits compliance with the APA Ethics code" (Standard 9.11, Maintaining Test Security).***

> The APA Ethics Code, Standard 9.11, Maintaining Test Security (Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association http://www.apa.org/ethics/code2002.html).

Wrong. By its own language, the APA ethics code, an extra-legal code of ethics of a private trade association, requires compliance "consistent with law". See the "Specialty Guidelines for Forensic Psychology" adopted by the APA Council of Representatives August 3, 2011.

In the law, there is a hierarchy of authority. Higher authorities control lesser authorities. At the top is the U.S. Constitution, and the case law interpreting it, recognizing fundamental rights of fairness, due process, and cross-examination. Below that are federal statutes that supersede state laws. Below that come state laws: constitutional and statutory, and their case law. Below that come administrative regulations. At the very bottom is the law of private contract, such as the APA regulations -- or the contracts of nonparties who, with advance knowledge of those contracts, voluntarily, and for profit, have injected themselves, their data, and the purported conflict of interest they create into other persons' issues and litigation.

But that was "purported conflict". There actually is no "conflict". Lower authorities that refer to exceptions "otherwise required by law" are indicating that they must be interpreted consistent with that higher legal authority, and that their mandates are subordinate to it. Thus, **it is neither "reasonable" nor "consistent with law" to posture that a private contract might supersede the requirements of the constitution.** Doing so repeatedly, as some psychologists do in case after case, speciously pretending to ignorance and confusion, is frivolous, unsupportable, sanctionable conduct.

Psych argument: ***The APA ethics code is not merely private, because in this case it is***

incorporated into state law, either statutory, or in the regulations governing psychologists' conduct, so it's also the law. I have to be governed by it. I understand your argument, but I want a court order. I don't want an ethics complaint that I have to defend, even if I ultimately prevail. For this reason, I cannot respond to a subpoena -- even one that is considered to have the force of law, but must [resist discovery and waste other people's time and money to] ***get a judicial ruling to resolve my*** [self-created] ***conflict.***

> The APA ethics language is repeated in multiple states' psychology regulations, e.g. in Florida's Administrative Code 64B19-18.004.

Wrong. The Administrative Code regulating psychology, albeit a step up from private contract, **cannot be interpreted by a thinking individual as law that competes with, conflicts with, or modifies higher legal authority or more compelling constitutional rights**. The lower authority rules still must be interpreted in a manner that is consistent with those constitutional rights and superseding law. In the United States of America, we do not permit Court of Star Chamber proceedings, in which the underlying data upon which expert opinions are based, gets to be kept secret from the litigants. Since that's not an option, **there's nothing for a court properly to decide**.

The claim of having to defend a board complaint is spurious (and who is going to file it?). The likelihood of a board complaint being prompted by response of a forensic witness to a subpoena issued in litigation is less than miniscule. Additionally, if a frivolous board complaint is going to be filed, no court order will prevent it, and it still will have to be defended (easily). Finally, the psychology trade lobbies have pushed for all kinds of malpractice immunities to hinder litigants from lodging even valid complaints in connection with family law cases, so the protestation is ridiculous on multiple grounds.

> (In part, these codes and industry regulation schemes are self-serving trade promotion and protection. For example, see Tana Dineen: "Psychological Illusions: Professionalism and the Abuse of Power" Presented at the Symposium: (Ab)Using Power: The Canadian Experience. Vancouver, B.C. May 8, 1998. A revised version of this paper is available in (Ab)Using Power: The Canadian Experience. Boyd, Susan C., Chunn, Dorothy E. and Menzies, Robert (Eds). Halifax, NS: Fernwood Publ. 2001. Available at http://tanadineen.com/writer/writings/index.htm)
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> See additional discussion below on the Florida code.

Psych argument: ***The APA Ethical Code prohibits psychologists from distributing test data and other assessment records to people untrained to use them, "to protect a client / patient or others from substantial harm, or misuse, or misinterpretation of the data or the test" (Standard 9.04a)***

Wrong. This is a two-part assertion, and both parts are wrong. First, the APA ethics code does not control higher legal authority. If and to the extent it is incorporated into psychology regulations, it still does not control over higher legal authority. And, with regard to the presumed prohibition on delivering this material to litigants and their lawyers, the APA Code does no such thing.

> See Are Psychologists Hiding Evidence?

Second, laying aside that the APA guidelines primarily address clinical practice, there is **no research evidence *anywhere* establishing generally that preventing the release of forensic psychology test data and other assessment records to "people untrained to use them" will protect anyone, or ever has protected anyone**, or, conversely, that the release of such records in general has harmed or will harm anyone. While this all sounds plausible, and it is possible creatively to imagine situations in which such harm theoretically could result, it is simply not established as a general rule. (And there is nothing in psych evals that is worse than what comes into the public court records otherwise in these cases.) On the other hand, it is axiomatic in the law that **deprivation of due process and the right of cross examination is a fundamental harm**. In addition, misuse and misinterpretation of test data by psychologists themselves, the lack of validity of many of the tests, the lack of interrater reliability, and high controversy over the efficacy and use of many of these tests also is well-known.

> See, e.g. Misuse of Psychological Tests in Forensic Settings: Some Horrible Examples Ralph Underwager and

Hollida Wakefield, available at http://deltabravo.net/custody/misuse.php and http://www.ipt-forensics.com/library/special_problems13.htm

Psych argument: ***The National Academy of Neuropsychology (another professional psychology association) agrees with the APA position, which gives this position even more weight. The Specialty Guidelines for Forensic Psychologists and the Standards for Educational and Psychological Testing (SEPT) also agree.***

http://www.nanonline.org/NAN/ResearchPublications/PositionPapers.aspx
http://www.apls.org/links/currentforensicguidelines.pdf

Wrong. The psychologist's attempted "appeal to authority" is an error of both logical reasoning and legal reasoning. The National Academy of Neuropsychology is not a legal authority. The Specialty Guidelines for Forensic Psychologists is not law, and its authors are not legal authorities. A dozen more me-toos from psychology trade organizations would add not a whit of weight.

All these arguments stand as evidence that psychologists by reason of their training do not know what constitutes legal authority, do not understand or appreciate the justice system, and do not belong in courts of law. See Child Custody Evaluations: Reevaluating the Evaluators

Psych argument: ***The Specialty Guidelines for Forensic Psychologists and the Standards for Educational and Psychological Testing (SEPT) developed jointly by the American Educational Research Association, American Psychological Association and The National Council on Measurement in Education, "acknowledge the importance of maintaining test security and ensuring that only those qualified to interpret raw test scores be afforded the opportunity to do so, for the purpose of preventing harm".***

Wrong. More appeal to (non)authority. And repeating the speculative assertion of prospective harm does not make it more correct. There is no research evidence *anywhere* establishing that preventing the release of forensic psychology test data and other assessment records actually protects or ever has protected anyone other than those with an interest in making money from selling or using these instruments.

(**To the extent that the trade promotion interests of a third party are in conflict with the fundamental due process rights of the actual litigants in a court case, it should be remembered that the third party voluntarily injected itself into the proceedings, knowing in advance what its interests were, and thus implicitly waived those** interests in deference to the litigants' higher interests in due process and fundamental fairness.)

Psych argument: ***Failure to protect test security from unqualified users harms the integrity of tests because the tests can become invalidated through their placement in the public domain, thus depriving the public of effective test instruments.***

Wrong. This argument confounds copyright interests ("public domain"), which are specific persons' and groups' profit-motivated interests, with generalized public harm from, presumably, the public's need to be able to take psychological tests.

No research has established that any harm will come to the public if psychological testing were not available. While it is plausible as an hypothesis, no evidence establishes this. Indeed, the public managed very well for hundreds of years without psychological testing and there is no evidence (unlike in the fields of medicine or dentistry) that the public is better off, more well adjusted, healthier, or happier, because of the availability of psychological tests.

The allusion to the copyright issue indicates more truthfully whose and what interests are of

concern to the trade organizations and the test publishers. (THERE IS NO COPYRIGHT ISSUE! The use falls squarely within the "Fair Use Doctrine" of copyright law!)

Additionally, the argument raises the question of how it could be that these tests -- if presumably so reliable that they can and should be used in a forensic setting -- could be so lacking in robustness and so easily corrupted that they would no longer be useful if a member of the public, determined to respond honestly in order to obtain therapy, happened to see the test materials at some prior time because the materials were in a court file, instead of a college library, where any undergraduate psychology major might peruse them.

The argument begs the question of what all the people who DO have knowledge of these tests do if these tests are presumably so needed by the public. Don't psychologists ever require therapy? How about other mental health professionals, school personnel, test publisher employees, researchers, judges and lawyers who deal with forensic experts, and every person who at some point in the past already took one of the tests? The argument is nonsense. The real interest at stake, the real motive for the forensic psychologist's recalcitrance, has nothing to do with concern for public welfare (and very likely not even so much concern for complying with test publishers' admonitions as interest in protecting the individual psychologist from scrutiny).

> (Also note the difference from the standpoint of a test taker between a test administered in a forensic setting and one administered for the purpose of receiving therapy.)

Psych argument: ***For example, the Law School Admission Test (LSAT) would be invalid if the answers to the LSAT were released and placed in the public domain.***

Similarly, psychological tests cannot be made public without invalidating the tests, just as examinations are invalid if the questions are published in advance.

Wrong. **The LSAT and other similar standardized tests are not analogous.** First, they have sufficient validity that test questions can be changed from administration to administration without devastating the test. In other words, they are real tests, testing real things, with actual right and wrong answers. Second, the test protocols, scoring methods, past test questions, and practice questions routinely are distributed by the test publishers to future test takers, with no great hue and cry about public harm occurring because some people practice for them and others do not. And, even if the exact questions on the test about to be taken are not given out, the substance of what will be asked in the questions is -- and is expected to be studied.

Psych argument: ***It is not in the interests of non-psychologists to become familiar with test protocols and test items because they may eventually need to be tested, for example, if early dementia is suspected or if they develop a brain tumor, or have* other possible needs that may arise for future testing such as a disciplinary proceeding before the State Bar*. When people have previously seen the tests, they themselves cannot be tested in a valid way.***

Wrong. **What do psychologists, other mental health professionals, school personnel, test publisher employees, researchers, judges and lawyers who deal with forensic experts, and every other person who at some point in the past took one of these tests do "if dementia is suspected or if they develop a brain tumor"?** The argument is nonsense -- and would be even if persons with brain tumors or dementia were clever enough to recall and set about cheating on psych tests (and wanted to), and even if there also were not actual medical tests for these things.

> (The hypothesis of lawyer regulators possibly requiring a lawyer in the future to take a psychological test is not only fantasy, but a transparent attempt to align himself on a superior peer-level with the judge versus the attorneys in the case, hoping in this way to persuade him to quash the subpoena by planting the suggestion that the lawyers are seeking discovery for unethical reasons, not for the purpose of adequately representing their clients. If a psychologist makes this argument, it's a bell ringer that he's a slick willy, further supporting the need for full, unfettered discovery.)

Psych argument: ***SEPT standard 11.15 addressing the potential for misinterpretation of test data states that "Test users should be alert to potential misinterpretation of test scores and to possible unintended consequences of test use; users should take steps to minimize or avoid foreseeable misinterpretation and unintended negative consequences".*** [So we have to withhold them from litigants and their lawyers who would like to twist around my words and cross-x me on my conclusions.]

Wrong. **Misinterpretation of test scores and unintended consequences of test usage is exactly why full and unfettered discovery of ALL underlying data and testing materials is mandatory whenever these things are used in a forensic setting. Because virtually always, that misinterpretation is by psychologists, not by litigants.** [UPDATE 11/01/11: This lawyer now has also has seen a case in which a corrupt custody evaluator changed litigants' raw test scores before sending them off for computerized "analysis".]

No research has established any harm befalling the general public from lay persons misinterpreting these tests (or the handy computer printouts of suggested diagnoses). On the other hand, psychological tests routinely have been manipulated and misused by forensic opiners in court cases -- and elsewhere -- to make specious arguments that have harmed many persons. The integrity of the court system takes so much priority over the asserted need for integrity of these dubious psychological instruments that this argument should be a nonstarter for any judge worth his salt.

Psych argument: ***The rationale for test security protection as a public policy issue to prevent harm was upheld in Detroit Edison v. NLRB, 440, U. S. 301 (1979), where-in the United States Supreme Court ruled that test security pre-empted the release of test results in the form of data and records to someone other than a qualified professional.***

Wrong. **The case isn't close to on-point.** It involved an employer with a testing program who rejected certain applicants, and who was sued by the union. The employer refused to disclose the test data of employees who had been promised confidentiality. The material implicated employee privacy concerns and was trade secret of the actual defendant in the case. It was not prepared by a forensic expert in anticipation of being used as part of the foundation of his paid opinion in a court case.

Compare: "On Oct. 24, 1995, in the case of Sharon L. and Warren E. Campbell v. Barry A. Mashek (Iowa District Court Consolidated Law Case No. 65070), the Fifth Judicial District of Iowa found the section of the Iowa code restricting release of test data to be unconstitutional under both federal and state law. In that case, several experts, including the renowned testing expert Dr. Paul Meehl, testified by affidavit that, 'Allowing a psychologist to offer opinions at trial, which are not subject to full and fair examination, based on the underlying test data, is repugnant to the basic principles of science and would fundamentally hinder any neutral body, such as a jury, in trying to arrive at valid conclusions about the condition of an individual who has put their psychological condition at issue by bringing a lawsuit.'" -- Paul R. Lees-Haley, Ph.D., and John C. Courtney, Psy.D. in Are Psychologists Hiding Evidence?

Psych argument: ***SEPT standard 11.8 states that test users have the responsibility to respect test copyrights. When purchasing psychological tests, psychologists agree to uphold copyright laws.***

Wrong. **It is not a violation of copyright to turn over materials in response to a subpoena for discovery, or to make photocopies of the materials for use in connection with litigation. Period.** This falls squarely within the fair use exceptions.

If and to the extent the test publisher markets its products for its own profit for intended use in court, it also has knowingly, and in advance, thereby agreed to any publication that foreseeably ensues in connection with those court proceedings, because those proceedings ordinarily should be expected to comport with due process.

There is an easy solution if the test publisher or the forensic psychologist doesn't like this. Don't use these instruments for forensic work. It is validly argued that by doing so, the psychologist deliberately, and for his own financial gain and self-aggrandizement, cavalierly set in motion a contract violation of his own doing. He cannot, after doing so, and after setting up a [purported] conflict of interest -- a dilemma of his own making -- now place the burden of rectifying that malfeasance on other people's time, money, and fundamental rights. A subpoena quash or protective order is an equitable remedy -- and

the psychologist and the test publisher have dirty hands and cannot come into court midstream, changing their tune and begging for protection at others' expense and detriment.

(Compare the psychologists' concerns with articles copyright. Not. http://www.thelizlibrary.org/liz/custody-evaluator-quotes.html#muchconcern)

Psych argument: ***Not to expose test materials to unauthorized non-qualified users, is part of my contractual obligation with the publishers, Psychological Assessment Resources (PAR) and Pearson Assessments, of all tests used in the present case.***

Wrong. One: Private contracts of unrelated third parties who are not in privity with court litigants do not change these other people's constitutional rights.

Two: Litigants and lawyers are not "unqualified users" in connection with a court case. (See Lees-Haley and Courtney, above).

And three: If and to the extent the test publisher markets its products for its own profit for intended use in court, then it has knowingly, and in advance, thereby agreed to any publication that foreseeably ensues in connection with those court proceedings, because they may be expected to comport with due process. (If *arguendo* it has not done so, that means that the psychologist deliberately, knowingly, in advance, and for his own financial gain, breached his own contract. He thus has dirty hands and cannot obtain equitable relief from the consequences of his own wrongdoing at innocent others' expense and detriment.)

Psych argument: ***I have a*** [conveniently self-serving] ***letter here from the test publisher... the import of the publisher's position is that these materials are trade secrets.***

Wrong. Material that is readily sold, that is available to competitors, that is in the publicly-accessible files of the Library of Congress, that is discussed in articles and published in books that also are available to the public, and that is not kept by the test publisher from tens of thousands of psychologists and others is not a trade secret. While test publishers individually indeed may have various trade secrets, they do not include material in the possession of competitors and industry-wide third party users. Trade secret law is utterly inapplicable, because its purpose is to protect competition -- to protect one business from its competitors. Once material is shared within the industry, trade secret law no longer applies. Interestingly, *psychologists here have the same issues that magicians do*, in that they attempt to keep material secret from the public but the material is well-known in and among the industry competitors.

(As an aside, it also is not an argument to prevent discovery to claim that publications are available elsewhere. Even when they are, the specific materials within the particular possession of the psychologist remain discoverable to ascertain whether they have been altered, written on, contain notes, are complete, are up-to-date copies, and so forth.)

Psych argument: ***Ken Pope's website says that Pearson says that HIPAA says that disclosure "may be denied if the protected health information was compiled in reasonable anticipation of, or for use in a civil, criminal, or administrative action or proceeding"!*** [45 C.F.R. 164.524(a)(1)(ii)]

The test publisher is self-serving up a line of legal B.S. A forensic evaluator in this context is not functioning as a "covered entity" or "health care provider" under HIPAA, and the psychological "health" information being newly generated by the forensic for the specific purpose of creating data to form the basis of his opinion in court is **not "protected health information"**. (Ken Pope's website has somewhat** more appropriate opinions in the O'Connell-Koocher article at http://www.kspope.com/ethics/hipaa.php)

These HIPAA provisions were intended to address such things as the gathering and holding of

(usually multiple) clients' health records by personal injury lawyers on their computer systems, or of medical malpractice lawyers and insurers who have collected patient records and summaries in connection with their preparing for litigation involving the hospital. Moreover, the forensic should not be getting access to -- and thus should not be in possession of -- litigants' individual private medical or therapy records absent a prior court order or the litigant's own submission of these materials for consideration (which by definition, constitutes consent for their use in the litigation).

(Note to the really deeply confused forensic psychs playing lawyer *(See Borkosky, infra)*, who are arguing that disclosure does or doesn't apply because of HIPAA, etc. etc.: stop it. Either way you are making the argument, you are wrong. If you are a court-appointed testifying witness, then HIPAA does not apply because due process and the integrity of evidence in the justice system derives from higher law than HIPAA.)

> [** The multifarious consents, contracts, and CYA "understandings" -- informational, methodological, and financial -- routinely demanded by many psychologists to be signed by litigants who are *court-ordered* (this includes "agreed orders") to submit to evaluations (or therapy) are not necessary or appropriate, and constitute legal overreaching. Individuals under the duress of a court order to "cooperate" cannot consent (or "assent" -- same thing) to anything as to which they cannot withhold consent without suffering negative repercussions. Court-mandated psychologists also have no business requiring signed receipts of "notices" about procedures, or confidentiality (or giving any other kinds of legal advice). All of these documents, no matter how innocuous you may think them, in fact alter litigants' legal obligations and/or positions (why the psychologist is wanting a signature), but since it's *involuntary* on the part of the litigant, it belongs in the court order or not at all. Have procedural info? Give a handout, no signing.
>
> (Note: Obtaining informed consent prior to doing a one-sided litigant- or attorney-instigated (*i.e.* voluntary, not court-ordered) assessment in preparation for trial (privileged work product unless and until it -- again voluntarily -- later may or may not become disclosable in court in connection with the same litigant's proffered expert testimony) is a very different creature. A psychologist who does not understand the difference has, at a minimum, demonstrated himself to be incompetent to assess or treat issues involving domestic violence, duress or coercive control.)]

Psych argument: ***The materials under consideration can and will be released only to a qualified professional designated by the attorney.***

Wrong. Neither the lawyer nor the self-represented litigant are obligated to breach attorney work product and disclose their consulting expert to the psychologist in order to obtain discovery. Nor are they obligated to expend yet more money and hire yet another psychologist, if they have not already done so, in order to obtain discovery. Moreover, even if they happen to agree with this demand, because it costs them nothing, because a consulting psychologist already is on the case and at the ready, the contortions of turning the material over to a member of the lawyer's litigation team, a contractor or employee working under and reporting to the lawyer, are inane and pointless. All of these persons, including the lawyer, are working for and paid by the client; they will be sitting 'round the table, discussing, copying, sharing the material, and consulting with each other in preparation for trial.

(Lees-Haley and Courtney, supra, also argue that there is no actual definition of a "qualified professional" and that for purposes of litigation, the litigant and his lawyer are it.)

Psych argument: ***Should the Court decline the current motion to quash, it is requested that the Court issue a protective order requiring Dr. Yaddayadda's file first to be subject to in-camera review.***

Wrong. This is a violation of the parties' due process rights. Discovery of these materials was a foreseeable event when the psychologist voluntarily, and for a fee, injected them into other people's court proceeding. The situation is not akin to necessary proceedings that might ensue when a patient's records are subpoena'd from a therapist. Here, **there is no valid reason for the materials to be reviewed in advance *in camera*. Such a review implies a possible need to cull materials that might not be discoverable.**

In the latter case, the potential harm to the discovering litigant is balanced against the rights of an unwitting, involuntary person who actually may have trade secrets or privacy issues, but has had them unexpectedly subpoena'd. It is an effort of last resort that **risks biasing the fact finder** (the judge, in a

custody case) with out-of-court material that has not been introduced into the proceedings by the parties. This risk makes it a procedure that is neither fitting nor appropriate under forensic circumstances, over and above it being a pointless drain on the court's and everyone else's time and resources. (That a court-appointed evaluator would request this indicates either deliberate recalcitrance or ignorance of a degree that calls into question the rest of his judgment.)

Psych argument: ***Should the Court decline the current motion to quash, it is requested that the Court issue a protective order that the file be distributed only to the attorneys representing each party in the current litigation, and that they be ordered not to disseminate it to anyone else.***

Wrong. **Lawyers are their clients' agents, not their handlers. The client is the principal, i.e. the boss.** A lawyer not only is under an ethical obligation to communicate with his client, but as a practical matter, cannot adequately prepare his client's case without doing so. Moreover, the lawyer not only needs to disseminate the material to his client, but both need time to contemplate the material, review it multiple times as necessary, refer to it in deposition, and possibly consult with other lawyers or mental health professionals about it. It is the client's, not the lawyer's case.

In addition, the client may wish to consult with another lawyer for a second opinion, who may not be disclosed to his attorney of record, or to discharge his lawyer of record and proceed with another lawyer, or on his own. This is nobody else's business.

A lawyer may not enter into agreements that hamper his client in this way, or prevent his client from obtaining alternate counsel in this way, or which place the lawyer into a contractual conflict of interest with his own client, in favor of the psychologist or some test publishing company to whom the psychologist alleges he is beholden. Nor can a judge validly restrict the attorney-client relationship in this way, or countermand the attorney-client representation or rules of ethics that come from higher legal authorities.

Finally, no one else is entitled to know -- or to receive assurances or explanation -- of the communications that will transpire between the lawyer and client, or the procedure they will follow in connection with preparing the case. These are matters that are absolutely privileged, and may not be encroached upon by a court (or any third party) as a favor to the psychologist in lieu of compelling him to fork over the materials or else be held in contempt or barred from testifying.

The psychologist in essence is claiming that he has deliberately set upon a course of action moving toward his own foreseeable breach of asserted obligations to third parties, and now -- with his dirty hands -- comes to the court for equitable relief on other people's dime and time. And to their detriment. (So much for the great professed concern for public welfare.)

It is true that some courts grant these requests. Not infrequently they are doing so as a gratuitous concession to the psychologist, posturing as if there were some actual issue to resolve, because this permits them to not have to impose mandatory discovery sanctions against the ignorant losing party (the psychologist). This is wrong and indicates bias in favor of the forensic, who should know better, and who should be held to higher standards and required to pay the costs of the proceeding.

Frequently too, because psychologists' reports are turned in at the eleventh hour, things are in a mad rush to trial, and the parties' lawyers do not have sufficient time or manpower (or funds) to dork around having hearings and appeals on these issues (let alone antagonize the court-appointee psychologist who already is wielding unwarranted power with the judge), so in the triage of trial preparation, they choose their battles and relent. None of it is evidence that the psychologist, now emboldened by his lack of understanding of what has been transpiring (rather than being grateful -- as he should be -- to not have to be footing the bill for his recalcitrance), was correct, not even a little.

(See Ethical Problems: Why Therapeutic Jurisprudence Must Be Eliminated From Our Family Courts

Psych argument: ***Should the Court decline the current motion to quash, it is requested that the Court issue a protective order that the attorneys may not keep copies of the file, and must return it after Dr. Yaddayadda's reported evaluation has been examined and cross-examined.***

Wrong. **It's evidence in the case** (and the litigant paid for the copying charges). The material provides

the foundation for evidence that may be introduced into the record in one way or another. It thus may be needed at a rehearing, at subsequent hearings, or on appeal. It is evidence upon which decisions may be made that thereafter will be the law of the case. Some courts, after the fact at some ostensibly safe point in time, may agree to seal a court record, but this is utterly inappropriate in any case in which a child's custody remains open for continued redetermination. It also unwarrantedly hinders litigants from filing justifiable board complaints where necessary for malfeasance.

Psych argument: ***Noted authorities on ethical principles of psychologists have stated that "Psychologists may ask the Court for*** [i.e. expect the court to give them] ***a protective order to prevent the inappropriate disclosure of confidential information or suggest that the information be submitted to another psychologist for qualified review"*** [Here's the proud psychologist's sample motion]

> C.B. Fisher, The National Psychologist, Test data standard most notable change in new APA ethics code (January/February 2003) , p 12, citing Ethical Practice in Forensic Psychology: A Systematic Model for Decision Making, by Bush, Connell, & Denny, APA Books, pp 106 (2006)

Wrong. On all counts. These are not authorities at law -- they are psychologists with various self-interested motives. This is not "confidential information". And the third-party receiving psychologist doesn't apply in the forensic context.

> Interestingly, one of the rationales psychologists used back when lobbying for increased forensic evaluations in the family courts was that these would protect litigants' confidential therapy records. The public stupidly went along with this reasoning, as if psychologists have objective ways of knowing the invisible, as if they are similar to physicians who might do a blood test and diagnose a condition.

The APA ethics code also requires psychologists to adhere to certain guidelines and procedures in administering and interpreting tests. Without permitting the lawyer access to all the information required to enable him to investigate whether this was done and to cross-examine the psychologist, there is no way to establish compliance with these other ethical guidelines. Discovery is necessary to verify the psychologist's compliance with the ethical requirement that "Psychologists only use tests in appropriate ways" (such as when the use is empirically validated by research). Discovery is necessary to ascertain whether "Assessment results have been interpreted in light of the limitations inherent in such procedures." And, among other things, discovery is necessary to ferret out bias, corruption, and incompetence -- which are rampant among psychologists in family court.

> See 1987 Grisso, "The Economic and Scientific Future of Forensic Psychological Assessment, American Psychologist:

"There is almost no empirical information concerning how to use parents' Wechsler or MMPI results to make inferences about their abilities to perform specific parenting functions."

> See 1993 Brodzinsky, "On The Use and Misuse of Psychological Testing in Child Custody Evaluations," Professional Psychology: Research and Practice:

"Many lawyers and judges have **an unrealistic view of what psychological testing can accomplish."**

"There is often **an assumption, sometimes expressed overtly, that testing provides a scientific foundation for the forensic evaluation.** In other words, it allows the evaluator to go beyond the subjective nature of 'clinical impression' or 'clinical judgment' that is inherent in interviews and observations."

"There is **a view that psychological tests allow the evaluator to be truly objective and therefore unbiased.** This assumption is, of course, **naive."**

> See 1997 Melton, Petrilla, Poythress, and Slobogin, Psychological Evaluations for the Courts, 2d ed.:

"It is our contention that such **tests are often used inappropriately.** Tests of intellectual capacity, achievement, personality style, and psychopathology are linked only indirectly, at best, to the key issues

concerning custody and visitation."

"Apparent practices notwithstanding, we recommend the use of traditional psychological tests only when specific problems or issues that these tests were designed to measure appear salient in the case."

FLORIDA LAW (similar to a number of other states): Florida Administrative Code, 64B19-18.004 Use of Test Instruments... **There are three exceptions to the prohibition against the release of test data.** What are they, what do they mean, why are they there, and when do they apply:

> "A psychologist who uses test instruments may not release test data, such as test protocols, test questions, assessment-related notes, or written answer sheets, except
>
> 1) to a licensed psychologist or school psychologist...

To the extent not superseded by federal medical privacy law, **the first exception above is what you do with records requested by a patient or his representative, when you are the therapist and there is no court proceeding.**

> 2) after complying with the procedures set forth in Rule 64B19-19.005, F.A.C., and obtaining an order from a court or other tribunal of competent jurisdiction or

The second exception is what you do when your or your patient's confidential therapy records are subpoena'd in litigation that otherwise has nothing to do with you and in which you were not planning to testify.

> 3) when the release of the material is otherwise required by law.

Item #3 is not redundant, and doesn't mean the same thing as #2, "get a court order." **The third exception is for what you do when you are a forensic witness in a court case, and receive a subpoena. FORK IT OVER.**

Maintaining the transparent, fundamentally fair operation of our justice system is not merely the law; it's a precept upon which the United States of America was founded.

Psych argument: ***I have this 2009 article here by Paul Kaufman in which he claims that some trial courts, including in Florida, have agreed that the psychologist doesn't have to produce test materials or data, Lees-Haley and Courtney is outdated, there are new laws...***

Psych argument: ***I have a 2012 article by Borkosky in which he proves that HIPAA applies, so I can't disclose...***

> Paul Kaufman, *Protecting Raw Data and Psychological Tests from Wrongful Disclosure: a primer on the law and other persuasive strategies*, 23 The Clinical Neuropsychologist 1130 (2009).
>
> Borkosky, B. G., & Pellett, J. (2013). *Can forensic evaluators refuse to release records to evaluees because the records are "information compiled in reasonable anticipation" of litigation (as defined by HIPAA)?*. American Journal of Forensic Psychology, 31(3). P. 21-40. http://www.forensicpsychology.org
>
> Borkosky, B. G., Pellett, J., & Thomas, M. (2013). *Are Forensic Evaluations "Healthcare" and are they Regulated by HIPAA?* Psychological Injury and the Law, (published online). doi: 10.1007/s12207-013-9158-7
>
> Borkosky, B. G. (2012). *Why forensic records are no longer "owned" by the referral source: Requirements for psychologists to permit patient access and release of records*. Florida Psychologist, 63(1), 8-9, 22-23. http://www.flapsych.com/.

Wrong. The magician did not pull a rabbit out of the hat just because someone fell for the trick. There are no new arguments or applicable law. More lawyers prevail on these issues than do not. More and more also are demanding advance resolution of discovery issues prior to allowing a forensic evaluation to proceed, so as not to set in motion a pointless waste of time and money that will only

culminate in the psych being barred from testifying, the psych's report not being entered, or a miscarriage of justice that harms people before it can be rectified by an appellate court. The public is starting to understand that **there is little reliable science in psychology, and nothing about being licensed in it that renders the individual a repository of truth or a fiduciary of the court system**. (And their too-frequent crappy cognitive processing or bias-laden synapse misfiring analytical skills -- the psych arguments on this web page being the prima facie case in point -- makes discovery of the basis of their opinings all the more crucial.)

> January 5, 2014, note from Dr. Borkosky: "[T]he following is a misquote of all my articles: ***I have a 2012 article by Borkosky in which he proves that HIPAA applies.*** I have stated, in every article, that **HIPAA does NOT regulate disclosures pursuant to discovery or psychotherapist-patient privilege**... HIPAA specifically and freely permits disclosures to the legal system, so it has no practical effect, even if the court were to consult it."

Psych argument: ***This judge... that court... this lawyer... that judge... this court... said, commented, did, didn't, agreed, understood, cooperated, granted, gave, told, exalted, praised... me-me, me me, meme... blah-blah, blah yadda, blah-blah...***

Wrong. Judges sometimes are. That's why we have appellate courts. Lawyers too. That's why I've written this. And psychs? Count on it. It's time to get the psychologists out of the family courts.

-- liz

This webpage is: http://www.thelizlibrary.org/therapeutic-jurisprudence/custody-evaluator-testing/index.html
More at:http://www.thelizlibrary.org/therapeutic-jurisprudence/custody-evaluator-testing/forensic-mmpi2.html and at:http://www.thelizlibrary.org/therapeutic-jurisprudence/custody-evaluator-testing/rorschach.html

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A Cadet will not lie, cheat, steal, or tolerate those who do.

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