

# Ethics in Forensic Neuropsychology: Lessons Learned

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06/11/07

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# Criminal Evaluations

- In criminal evaluations at WSH, patients are court-ordered to an inpatient stay.
- This usually falls under one of three categories: 1) evaluation of competency to stand trial, 2) ability to be restored to competency, and 3) treatment of NGRI patients.
- The time usually ranges from 15 days to 90 days to the length of the NGRI sentence.

# Main Consideration

- There are many ethical pitfalls in forensic work, but keep this mind:
- Be consistent in your methodology between forensic and clinical cases.
- Don't do things different just because it is a forensic case.
  - What are some examples that might raise ethical questions?

# Consistency

- Even though your assessment methodology should be consistent, there are many other aspects that are different.
- Some of those differences will be reviewed.

# Different Purposes

- In clinical cases, advocating for the patient is often desirable.
- In forensic cases, a neutral stance is desirable.
- Don't forget who the client is – the patient, the attorney, or the court.
- This can impact not only the referral question, but your conclusions and recommendations.
- You're job is not to win the case, but to provide the most accurate information you can. Let the attorney's battle it out and the jury decide.

# Keep it Professional

- Clinical assessments are not greatly scrutinized.
- Forensic assessments will often be scrutinized by attorneys, judges, the jury, and other expert witnesses.
- Even if you find yourself in a situation where others are trying to discredit you personally, keeping it professional will do wonders for your credibility.
- If you let yourself become personally involved or personally upset, then you risk acting in an unprofessional manner and discrediting yourself.
- As long as you act within accepted professional standards, you can withstand personal attacks.

# Scrutiny

- The type and amount of data in a forensic case will probably be different. Use this to your advantage, but don't use it indiscriminately.
- My evaluations are always read by the psychiatrist and psychologist, and later perhaps by attorney's, judges, etc., so I write for a wider audience.
- Since you know that the evaluation will come under scrutiny, ask for any all records, including those that may not immediately seem relevant.
- The information you ask for, and don't get, can sometimes be a major clue to your investigation.

# Ethical Dilemma

- Do you request volumes of records for your clinical cases?
- It is ethical to request more documents and data than you would for a clinical case?
- Are you short-changing your clinical cases?
- Are you doing things different because of need or because someone else is scrutinizing it?

# Psychometricians

- Is it ethical to have a psychometrician perform the testing in a forensic case?
- Short answer is yes.
- If you change your practice for forensic cases, you open yourself up to additional scrutiny.
  - “Doctor, why did you test my client yourself when your normal practice is to have a technician do it?”

# Psychometricians

- NAN policy – 2 main points:
- “The use of technicians contributes to the standardized and accurate assessment of neurocognitive functions.”
- Psychometric standards are uniformly applied and all tests are administered in a standardized manner. Therefore, the administration of the tests does not vary between technicians and licensed neuropsychologists.”
- [http://nanonline.org/paio/test\\_tech.shtm](http://nanonline.org/paio/test_tech.shtm)

# Trainees

- What are the ethical considerations for using trainees in a forensic setting? Is it unethical?
- This is certainly ethical, but much more of a personal preference.
- After all, how would we train future forensic psychologists if they couldn't be involved in the evaluations?

# Ethics of Trainees

- I have known many people who would never let trainees be involved in a forensic case.
- 1) Consider the impact to the trainee and 2) consider the impact on standardized assessment.
- Trainees may need to be supervised more closely than techs, depending on their level (e.g., interns vs. post-docs).
- Personally, I allow trainees to perform the tests, but I am always present when they do so to ensure standardized administration.
- Going back to consistency, I also do this for clinical cases when I think it's necessary.

# Setting

- In forensics, you may be asked to evaluate patients in different settings. What are some of these?
- What sort of ethical dilemmas might arise from this?
  - Hotel room.
- Know where the trial is taking place. It may be a different legal system.

# Third-Party Observations

- It may seem that having an attorney present in the room is noxious, but it's not the only reason to carefully consider third-party observations.
- The NAN position statement indicates that such observers may represent a threat to the validity and reliability of the assessment.
- Thus it is our ethical responsibility to monitor this to avoid flawed evaluations or conclusions based on errant data.
- What about trainees in the room?
- <http://nanonline.org/paio/thirdparty.shtm>

# Staff Observers

- Being in a criminal psychiatric setting, there are security and staffing needs.
- I ask that security and staff remain just outside the door.
- If they need to be present in the room, I ask them to sit behind the patient.
- I will also spend a few moments discussing the need to remain silent and not touch anything.
- I also ask them not to divulge any test information that they see or hear, and that should they ever need this type of evaluation, they should let the provider know that they have observed it in the past.

# What to Do?

- You can initially refuse an observer and probably should.
- The court can always order you to allow an observer.
- At this point you can withdraw from the case or continue.
- You can try a compromise with an observer only during the interview or ask for video taping only.
- Observers always degrade, never improve, the evaluation, including a videotape.

# Alternative Hypotheses

- Norms were not collected under these circumstances nor were the instruments validated in this manner.
- The attorney that requested the observer has introduced a plausible alternative hypothesis for poor scores (if present) and that's his/her problem in court, not yours.
- Just make sure you have documented it and included the ramifications in your report.

# Prevailing Opinion

- Try to relax and take it step by step.
- There are several position statements against observers during evaluations.
- The judicial system is also generally against this practice.
- Refer to *Ragge v. MCA/Universal Studios*, 165 F.R.D. 605.
- Case of *Muci v. State Farm*

# Limits of Confidentiality

- Confidentiality changes with forensic work.
- This should be made clear up front with the referring source and the patient.
- You are not the patient's doctor and will not be providing treatment.
- How could this become problematic?

# My Unique Role

- I do not work for the courts, I work for the hospital.
- As such, requests for evaluations come from the treating psychiatrist and/or inpatient evaluator for further clarification of neurological issues.
- Thus, the evaluation is voluntary on the part of the patient.
- Although I am putting a report in the medical chart and do not send one to the court, it is highly probable that one of the evaluators will refer to it in their documents to the court.
- The courts also may request records from their stay.

# Disclosure in Court

- Many things that would probably not be considered in a clinical case may show up in court.
- This includes notes you take, emails you send, and conversations that you have.
- This also includes your CV, articles and presentations, and affiliations.
- Watch what you say and to whom you say it.

# Choosing the Case

- In a treating role, we have an ethical obligation to care for the patient or find an appropriate service to do so.
- In forensics, you don't have to see a case.
- Screen the case before you decide to take it.
- Are there potential pitfalls? Can you stomach the outcome (insults, threats, blame)?
- What is your discomfort? Could you become the target?

# Maintaining Impartiality

- In my position, my responsibility is to evaluate these patients based on clinical need.
- As such, I generally do not have a choice.
- What I struggle with is remaining neutral.
- I have feelings of fear, shock, disgust, or disbelief.
- How would you cope with this to remain level-headed during the evaluation and as impartial as possible during the write-up?

# Counteracting Bias

- Be aware.
- Remain open to revising your opinion in light of new facts.
- Check, recheck, and cross-check.
- Identify conflicts ahead of time.
- Look for alternatives and argue against them.
- Avoid working on contingency.
- Consult with colleagues.

# Think Dynamically

- Cognition changes, sometimes in the span of hours.
- Consider not only the current presentation, but the history as well.
- It's easy to be drawn off track by personal interests. Remember the referral question.
  - Is this person competent to stand trial now is a very different question than whether this person was competent at the time of the offense.

# Plaintiff & Defense Work

- Get involved with both sides of forensic work to broaden your perspective.
- Then work towards the side of work that is more comfortable.
- It would be unusual to get 50/50 from each referral source, unless you were catering your opinions to both sides.

# Different Stakes

- In psychiatric criminal cases, the stakes are different.
- Obviously, public safety becomes an issue.
- The safety of other patients is also an issue.
- Misidentifying antisocial dissimulators as brain injured or neurologically impaired puts them in an environment with vulnerable patients.
- In these cases, the relative importance of false positives and false negative has to be reevaluated.

# Symptom Validity

- This is critical!
- Hopefully you all include some type of SVT in your regular clinical work.
- There are all kinds of reasons, some of them puzzling, why people provide invalid performances.
- Sometimes it's because the patient misunderstands your role (e.g., this doc will discharge me).
- Your clinical intuition will never pick up on some of them.

# Is it Unethical?

- Is it an ethical question whether to use SVTs or not?
- I think so. To draw conclusions based on data that may be invalid means we are providing inadequate care.
- In forensics, you also do a disservice to the courts, community, and other patients.
- How much of an issue is this?

# Reporting Invalid Results

- In clinical cases, you might do your best to describe all details of invalid symptoms, inconsistencies with anatomical correlates, or failure to report common symptoms of a particular disease.
- You also might describe step-by-step how and why you came to a particular conclusion and other possibilities that were ruled out.
- This can present a problem in forensic work. How much do you report? What's the risk?

# Requests for Raw Data

- There is a lot of controversy about this.
- You should do your best to protect trade secrets (test protocols), but the scores are not protected.
- Refer to the APA ethics code, as well as the NAN position paper.
  - <http://nanonline.org/paio/security.shtm>
- You can also refer to the policies from the major test publishers.

# Test Security

- Ask that the raw data be sent to a psychologist.
- Ask for an order of protection and that all materials be returned to you at the end of trial.
- Realistically, though, you may not have to time to file and wait for such an order.
- If it ends up being court ordered, remember that you are in the arena of the court.
- The judge has final say. Don't go putting your neck out there.
- Many of the test materials are published in books or on the internet and someone may get it anyway.

# Unethical Behavior

- What should be done if you discover that a psychologist for the opposing side is behaving unethically?

# Final Thoughts

- Be consistent in your practice.
- Be prudent in your instrument selection.
- Be your own toughest critic and anticipate cross-examination and peer-review.
- Be aware of your areas of expertise and review those that are unfamiliar.
- Be familiar with the Specialty Guidelines for Forensic Psychologists.
  - Committee on Ethical Guidelines for Forensic Psychologists. (1990). Specialty guidelines for forensic psychologists. *Law and Human Behavior*, 15, 655-665.

# Suggested Readings

- Larrabee, G. J. (2005). *Forensic Neuropsychology*. New York: Oxford University Press.
- Martelli, M. F., Zasler, N. D., & Garyon, R. (1999). Ethical considerations in medicolegal evaluation of neurologic injury and impairment following acquired brain injury. *Neurorehabilitation*, 13, 45-66.
- <http://nanonline.org/paio/IME.shtm>