

# Consent, Disclosure, and Waiver for the Forensic Psychological Evaluation: Rethinking the Roles of Psychologist and Lawyer

William E. Foote

University of New Mexico School of Medicine

Daniel W. Shuman

Southern Methodist University Dedman School of Law

The duty to obtain consent from a litigant before beginning a forensic evaluation has fallen to the forensic psychologist. Guidelines, ethical standards, and commentators have made this assumed duty mandatory. Unfortunately, psychologists are not able to provide accurate and detailed legal information concerning the forensic evaluation. Only a person trained in the law would be qualified, and the litigant's lawyer has the legal duty to properly inform the litigant about the legal parameters of the forensic evaluation. This article discusses the psychological and legal aspects of consent for forensic evaluation and proposes a model in which both the lawyer and the psychologist collaborate in a process initiated by the psychologist to inform the litigant about the evaluation.

**Keywords:** informed consent, disclosure for evaluation, waiver of rights, forensic psychological evaluation

Forensic psychologists are often asked to conduct psychological evaluations of civil and criminal litigants.<sup>1</sup> Litigants may come to psychological evaluations on three different paths. Some are sent by their lawyers for an assessment of their mental or emotional state relevant to a potential claim or defense. For example, a criminal defendant may be sent for an evaluation of his or her mental state relative to an insanity defense. Litigants may also be referred for evaluation by a court order. The order may be based upon a motion of a party or the court. For example, the prosecutor may move for an order to assess the defendant's competence to stand trial or the court may do so on its own motion, following a defendant's display of grossly inappropriate behavior in the courtroom. In a civil case when the plaintiff seeks damages for mental or emotional harm, under the authority of the Federal Rules of Civil Procedure 35, the defendant may move for an order to compel an evaluation of the plaintiff's mental condition. In child custody cases, parents are often ordered by the court to undergo evaluation

(see Connell, 2006). In a third context, the parties may agree to have a litigant evaluated in the absence of a court order. For example, in many civil and criminal cases, the parties understand that the opposing side is entitled to have an evaluation conducted by their own experts and informally agree to do so. A litigant's approach to participation in the evaluation has important legal as well as psychological consequences and should therefore be the result of an informed choice (Knapp & VandeCreek, 2001; Rogers, 1987).

Commentators have delineated three ways of thinking about the litigant's choice to participate in a forensic examination: disclosure, waiver, and informed consent. Some argue that when forensic evaluations are compelled by court order, consent of the litigant is not required. In these circumstances, they contend, the psychologist's only responsibility is to disclose to the litigant information about what will happen in the evaluation (Greenburg, 2005; Heilbrun, 2001).

Others contend that the decision to put forward a particular civil claim or criminal defense results in a waiver of the litigant's right to refuse to participate in a forensic evaluation (Melton, Petrila, Poythress, & Slobogin, 1997). They point out that, if, after consultation with counsel, a criminal defendant decides to mount an insanity defense, he or she has waived the right to refuse to participate in a prosecution-initiated forensic evaluation.

We respectfully disagree that these different models resolve the ethical quandary facing the psychologist conducting a forensic evaluation. We reject the notion that the principles of fidelity and autonomy and the psychologist's obligation to respect them do not retain equal relevance in each context. We posit that in all of these examinations ethical considerations require the litigant's consent to participate, especially when the consequences of refusing to participate are significant. Even when the evaluation is court ordered or when the litigant has waived the right of refusal, respect for the litigant's autonomy requires that the psychologist recognize

---

*Editor's Note.* Mary Beth Kenkel served as action editor for this article.—MBK

---

WILLIAM E. FOOTE received his PhD in psychology from the University of New Mexico. He is an adjunct professor with the Department of Psychiatry and the Department of Family Medicine of the University of New Mexico School of Medicine. He is a past president of the American Board of Forensic Psychology.

DANIEL W. SHUMAN received his JD from the University of Arizona. He is a professor of law at Southern Methodist University Dedman School of Law; an adjunct professor of psychiatry at the University of Texas, Southwestern Medical School; and an adjunct professor of psychology at the University of North Texas. He received the American Psychiatric Association's Manfred S. Guttmacher Award in 1988 and the American Academy of Forensic Psychology's Lifetime Achievement Award for 2005.

CORRESPONDENCE CONCERNING THIS ARTICLE should be addressed to William E. Foote, 215 Gold, Southwest, Suite 202, Albuquerque, NM 87102. E-mail: fornpsych@aol.com

---

<sup>1</sup> For purposes of generality and simplicity in this article, we will refer to criminal defendants, child custody respondents and complainants, and civil plaintiffs as *litigants*.

that the litigant has a choice whether to comply with that order, in spite of severe legal consequences. Contrary to some commentators (e.g., Heilbrun, 2001), we argue that psychologists should respect this choice.

In this article, we examine the role of the psychologist and the lawyer in informing a litigant's decision to participate in forensic psychological evaluations. We conclude that, in light of the specialized psychological and legal aspects of the evaluation, neither lawyer or psychologist separately can adequately inform the party to be evaluated, and we urge the adoption of a conjoint model in which lawyer and psychologist share the responsibility to inform the litigant.

For both professions, obligations to ensure that the litigant's choice to proceed with the evaluation meets the requirements of obtaining consent arise from a number of sources. We first examine the origins of these obligations.

### Necessity for Psychologists to Obtain Consent

For psychologists, the conduct of the forensic evaluation is governed, in part, by ethical principles and ethics standards. Most ethics codes and psycholegal commentators assume that a consent requirement applies and that the burden of securing consent falls on the evaluator (American Psychological Association [APA], 1992, 2002; Bernet, 1997; Committee on Ethical Guidelines for Forensic Psychologists [Committee on Ethical Guidelines], 1991; Heilbrun, 2001; Knapp & VandeCreek, 2001; Lande, 2001; Martelli, Zasler, & Grayson, 1999; Melton et al., 1997; Ogloff, 1999; Ornish, Mills, & Ornish, 1996; Rogers, 1987; Simon & Wettstein, 1997). These assumptions are reflected in the Specialty Guidelines for Forensic Psychologists (Committee on Ethical Guidelines, 1991) and the APA Ethical Principles of Psychologists and Code of Conduct (APA, 2002).

The APA's ethical principles and standards reflect an assumption that psychologists must obtain consent before initiating an evaluation. Two principles bear mention, as they provide the ethical underpinning for practice. First, Principle B, Fidelity and Responsibility, states in part, "Psychologists establish relationships of trust with those with whom they work" (APA, 2002, p. 1062). This principle supports the psychologist's efforts to truthfully disclose critical aspects of the evaluation process. Second, Principle E, Respect for People's Rights and Dignity, states in part, "Psychologists respect the dignity and worth of all people, and the rights of individuals to privacy, confidentiality and self-determination" (APA, 2002, p. 1063). This principle, which deals with the litigant's autonomy, focuses on the individual's right to make his or her decisions in a context free of coercion.

Two standards found in the Ethical Principles of Psychologists and Code of Conduct (APA, 2002) are relevant to this process. The first is found in a general section on informed consent. Standard 3.10 provides specific guidance about what is expected of the psychologist in various settings, including a forensic evaluation. First, it states that, as a general rule, unless otherwise excepted, informed consent must be obtained from individuals who are competent to consent. Second, it develops the idea of "informed assent" (Heilbrun, 2001) for individuals who are not competent to provide informed consent. Informed assent consists of the provision of as much information as the individual can understand about the services to be provided, along with a less formalized approval to proceed, taking into consideration the person's preferences and

best interests and the use of substitute consent. Another variation of consent is addressed in the case of a court-ordered evaluation in which the dynamics of consent are constrained by the court order for the examination. Notwithstanding the court order, the litigant can refuse to participate in the evaluation, although the consequences may be dire. In this context, the obligation described in Standard 3.10 is to inform the litigant of the anticipated services, the nature of the court's requirements, and limits on confidentiality. Finally, the procedure is to be documented. Some commentators (e.g., Foote & Goodman-Delahunty, 2005) argue that this documentation should be embodied in a signed consent form.

Another standard in the Ethical Principles of Psychologists and Code of Conduct addresses informed consent more specifically in the context of psychological assessment. Standard 9.03 provides for exceptions to the necessity for informed consent outlined in Standard 3.10. Exceptions are provided in cases in which the assessment is mandated by law, in contexts in which the client's consent is implied, as in a routine job-related assessment, or in situations in which the litigant's decisional capacity is the question to be evaluated. The concept of informed assent is repeated and applied to legally mandated testing or situations in which the litigant's decisional capacity is in question.

Building on ethical standards, the Specialty Guidelines for Forensic Psychology (Committee on Ethical Guidelines, 1991) describe the informational requirements for proceeding with a forensic evaluation, in broad brushstrokes, as follows:

Forensic psychologists have an obligation to ensure that prospective clients are informed of their legal rights with respect to the anticipated forensic service, of the purposes of any evaluation, of the nature of procedures to be employed, of the intended uses of any product of their services, and of the party who has employed the forensic psychologist. (p. 659)

A review of these ethical principles as well as the forensic guidelines indicates an obligation for the forensic psychologist to have a discussion with every litigant about the evaluation. The standards suggest that the discussion should be tailored to the specific circumstances of each evaluation. Each of these discussions must be documented in either a note from the evaluator or a signed consent form (Heilbrun, 2001).

Some commentators have suggested combining ethical standards with legal concerns to provide a listing of all the issues that should be addressed at the time of the forensic evaluation (Melton et al., 1997). This listing reflects an attempt to be comprehensive and includes notification by the psychologist to the litigant of a number of strictly legal issues. Melton et al. (1997) suggested that during the clinical evaluation, the psychologist should take these "steps to ensure ethical evaluation procedures":

- A. Notify the person of all legal issues to be addressed in the evaluation.
- B. In those few situations in which a right to remain silent pertains, inform person using *Miranda* language.
- C. Advise the person of the limited confidentiality afforded.
  1. Identify persons or agencies to whom reports may be sent.
  2. Identify legal proceedings in which testimony is anticipated.
  3. Advise the person of other uses of the clinical report.
  4. (Optional) Administer *Tarasoff* warnings.

- D. Make clear evaluative role; dispel notions that you are a therapist.
- E. Request the person's participation and advise of any sanctions if participation is declined. (p. 93)

Other commentators (Heilbrun, 2001; Knapp & VandeCreek, 2001) have suggested similar professional standards. In all these proposals, the psychologist is expected to provide information to the litigant about legal issues.

### Lawyers' Concerns About Consent for Forensic Evaluation

The adversary system expects lawyers to be zealous advocates for their clients. It might be assumed that, consequentially, most lawyers' concerns about informed consent have utilitarian roots. Indeed, forensic evaluations often play a critical role in litigation that has high stakes, including imposition of the death penalty, lengthy imprisonment, substantial gain or loss of money, and loss or gain of access to children. Lawyers play a central role in ensuring that constitutional rights (e.g., due process, effective assistance of counsel) intended to protect these high stakes are effectuated. Nonconstitutional considerations are also intended to ensure that the individual's right to make informed decisions is protected. For example, case law (*Canterbury v. Spence*, 1972) has delineated the elements of informed consent growing out of the law of torts. Beginning with the assumption that "every human being of adult years and sound mind has a right to determine what shall be done with his own body" (*Schloendorff v. Soc'y of N.Y. Hosp.*, 1914, p. 215), tort law has evolved to require that consent for an intrusion by a health care professional be informed by knowledge of the risks, benefits, and alternatives of the procedure or process.

The ethical standards that govern the behavior of lawyers have also endorsed an informed consent model to structure lawyer-client interactions (American Bar Association, 2002):

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. (§ 5, Section e)

A client's decision to pursue a "proposed course of action" (e.g., seek child custody and trigger a custody evaluation or assert a claim for special damage claim for mental distress and trigger a defense-initiated psychological examination) requires the lawyer to communicate to the client "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct" (§ 5, Section e).

As a starting point, the lawyer must provide the client with a description of the proposed course of action—seeking custody, asserting an insanity defense, or asserting a claim for emotional injuries. What right, claim, or tactic is proposed and what does it seek to accomplish? Interrelated to explaining this course of action, and its risks and alternatives, is a description of how the litigation would proceed if this course of action were not taken (e.g., no psychological evaluation would be sought) and how it will likely proceed if this course of action were taken (e.g., a psychological evaluation will be sought to address the following issues). Explaining the risks of this course of action and its alternatives is more complex than an assessment of the likelihood of winning or

losing or how it may affect the time or expense of the litigation. For example, in a personal injury case, asserting a special damage claim (Federal Rules of Civil Procedure 9 [g]) for the unique mental and emotional loss suffered by the plaintiff not only increases the potential recovery and the likelihood that the claimant will be asked to submit to a psychological or psychiatric examination, but it may also result in the opponent's discovery of information that is otherwise unlikely to be discovered that may have a negative impact on the determination of liability. A full exploration of the alternative to this claim for relief would involve consideration of a general damage claim (for the mental or emotional loss that any plaintiff would be expected to experience from the defendant's conduct) that limits the defendant's discovery and simultaneously limits the potential recovery.

### The Dilemma

Consent for a psychological evaluation demands expertise from two professional realms. However well intentioned the psychologist or lawyer may be, there are limits on the ability of either to address all of the issues relevant to the litigant's knowledgeable choices in relation to the evaluation. Although psychologists are assumed to be competent to convey information about the psychological aspects of the evaluation process in which they participate (Heilbrun, 2001; Knapp & VandeCreek, 2001; Ogloff, 1999), contrary to the contention of some commentators (e.g., Melton et al., 1997), psychologists cannot be expected to be competent to communicate a complete constellation of legal information relevant to the evaluation.

For example, in an evaluation of the plaintiff's damages in a personal injury case, a defense-retained psychologist may ask the plaintiff questions concerning her sexual history. If she refuses to answer those questions, does the psychologist possess sufficient knowledge to describe the legal relevance of such an issue and explain to the plaintiff the legal consequences of that refusal, if it is wrongful? Will the case be dismissed; will the mental or emotional damage claim be denied but the plaintiff be permitted to maintain her claim for physical injuries; will the plaintiff be permitted to present all her damage claims but be prevented from introducing her own mental health experts; or will the plaintiff be found in contempt (Kovera & Cass, 2002)? Although the psychologist could tell the litigant to call her lawyer to discuss these ramifications, the resolution of this issue prior to the beginning of the evaluation can make for a less frustrating process for all involved.

Although lawyers may be competent to advise their clients about the legal consequences of a refusal to respond in whole or in part to a psychological evaluation, lawyers are not competent to discuss psychological test procedures, the content of psychological interviews, or other psychological evaluative procedures. A lawyer is not competent to inform the litigant about the emotional impact of interview procedures, which require discussion of traumatic life events.

If the purpose of obtaining consent is to allow the litigant to make a meaningful choice (Ogloff, 1999), consent is perfunctory if the information necessary to make the choice is erroneous or incomplete. Neither profession is able to provide all essential information. Neither the extant legal rules nor ethical principles answer how the professionals' roles should be fulfilled to yield an

informed consent. Because neither lawyer nor forensic examiner alone possesses the information necessary to fully inform the litigant, we propose a conjoint model that imposes a shared responsibility on the forensic examiner and the lawyer for the litigant. We explain how we arrived at this solution and how it should be implemented.

#### *What Information About the Evaluation Should the Lawyer Provide?*

The lawyer is ethically responsible and best suited to convey information regarding the legal aspects of the evaluation, including its purpose, its potential use or admissibility, and how evidence from the evaluation may advance or frustrate the litigant's case. The lawyer is also best suited to inform the litigant about who will be privy to the results of the evaluation (e.g., the judge, the lawyers, other parties, jurors, the public).

Under what set of circumstances, if any, will the confidentiality of information revealed in the examination be limited (Chowdhury, 1996) or abrogated (e.g., legal duty of examiner to disclose information revealing child or elder abuse; Kalichman, 1993)? Should the litigant expect that the opposing counsel will be provided with a copy of the evaluation and that it may be shared with the civil defendant as well? Should a litigant in a sexual harassment case, for example, expect that anything said in the evaluation would be communicated to the alleged harassing employer? The answers to these questions are the domain of the lawyer.

The lawyer is also best situated to advise the litigant about the consequences of refusing to participate in part or all of the evaluation procedures and the likelihood that they will be imposed (compare *Schoffstall v. Henderson*, 2000, with *Garcia-Vazquez v. Frito Lay Snacks Caribbean, Inc.*, 2001). Because the purpose of the evaluation is to provide specialized information about the litigant, the consequences of the litigant's agreement or refusal to participate in an evaluation may be considerable (Miller, 2001; Radelet & Barnard, 1986). The lawyer is best suited to provide an explanation of these consequences and to answer the litigant's questions in a way that would allow the litigant to make decisions with sufficient information.

#### *What Information About the Evaluation Should the Psychologist Provide?*

Even if the lawyer tells the litigant everything the lawyer knows about the evaluation, the litigant's picture will still be incomplete because the lawyer is not competent to provide specialized psychological information. Some issues are exclusively in the domain of the psychologist; others are best addressed by both the lawyer and psychologist. For example, our model expects that both the lawyer and psychologist will inform the litigant about who will receive the results of the evaluation. Although the lawyer may be best situated to provide information about the relevant law and court orders governing distribution of the evaluation, the examiner's reiteration of this information serves as a second warning to the litigant about the parameters of confidentiality and the duty to report abuse. The reason for the overlap goes beyond the importance of reinforcing the information to the litigant; it helps to clarify the examiner-litigant role for both parties. Table 1 shows the division of tasks between lawyer and psychologist.

Table 1  
*Division of Informed Consent Tasks Between Lawyer and Psychologist*

Consent question	Lawyer	Psychologist
What is the purpose of the evaluation?	X	
What are the potential uses of the information?	X	
Will the information be admissible in court?	X	
How will information advance or frustrate litigant's case?	X	
Who will be privy to results?	X	X
What are the limitations on confidentiality?	X	X
Will opposing counsel see evaluation results?	X	X
What form will results take?		X
Will a report be completed?		X
Will litigant be able to review report?		X
Will litigant be provided with feedback about the report?	X	X
Who will have control over the data after the evaluation is completed?	X	X
What are the legal consequences of terminating the evaluation?	X	
How may litigant exercise right to terminate evaluation at any time?		X
How will untimely evaluation termination affect test validity?		X
How will untimely evaluation termination affect scheduling?		X
Who is told about decision to terminate?		X
How may litigant exercise right to consult counsel?		X
What are the evaluation procedures?		X
Does psychologist have litigant's permission to interview collaterals?		X
What are the potential emotional harms from evaluation procedures?		X
What is the role of the evaluator?	X	X

The second issue about which the psychologist should inform the litigant relates to the role of the evaluator (Greenberg & Shuman, 1997; Heilbrun, 2001; Melton et al., 1997). Because the litigant may have had prior exposure to treating psychologists and other mental health practitioners, he or she may misunderstand the role of the forensic psychologist. The litigant may have only dealt with treating mental health professionals and may harbor a belief that the examining psychologist is providing treatment or is an advocate for the litigant (Shuman & Foote, 2000). In fact, the examining psychologist may have been hired by the lawyer representing the opposing party or may have been designated by the court as a "neutral" expert. Whether the examining psychologist is retained or appointed, his or her role differs from that of a therapist, because the goal of the evaluation is not therapeutic and is not designed to further the welfare of the litigant (Shuman, Greenberg, Heilbrun, & Foote, 1998). Rather, the evaluation is designed to provide information for legal fact finding. Undue trust in the examiner may unfairly cause the litigant to misunderstand the process and disclose information that would otherwise not be volunteered (Shuman, 1993). The belief that this is a therapeutic enterprise may mislead the litigant about the possible adverse consequences of the evaluation and may have antitherapeutic consequences for the litigant's mental health care. This informa-



tion is best conveyed by the examiner as a reminder of these roles to both examiner and litigant.

The third issue for the psychologist to discuss concerns the form that the results of the evaluation will take and to what extent those results will be made available for review or revision. Will the psychologist simply call the retaining counsel and discuss the results on the phone? Will the psychologist write a report? Will the litigant have the opportunity to review a written report before a final version is submitted? The psychologist has unique knowledge of his or her standard practice and how it will be applied in this case.

The fourth issue for the psychologist to discuss with the litigant concerns the litigant's ongoing consent to participate in the examination (Knapp & VandeCreek, 2001). As long as the evaluation questions and procedures are pleasant and nonstressful, the litigant's ability to terminate the evaluation is less relevant. In less than optimal circumstances, the litigant needs to know that there is a "back door" from the evaluation that may be used if he or she chooses, and the key to that door may be the information about this option that the psychologist gives the litigant at critical stages of the evaluation. Unlike the lawyer's discussion of the legal impact of terminating the evaluation, the psychologist should discuss only the logistics of withdrawal.

Correlatively, the psychologist is best situated to notify the litigant of the psychology-related consequences of untimely termination of the evaluation (Rogers, 1987). For example, the psychologist should inform the litigant that if he or she terminates the evaluation prior to its completion, it may adversely affect the validity of the testing instruments if the litigant later agrees to resume the evaluation. This may delay the process and add to the cost of an examination. The psychologist should also inform the litigant about who would be told of the litigant's decision to abort the evaluation. This information is of a practical and not a legal nature. For example, is the psychologist obligated to inform the judge or just the lawyer who retained the expert? The psychologist is not in a position to inform the litigant of the legal consequences of aborting the evaluation; that is the province of the litigant's lawyer (see earlier discussion).

The fifth issue is similar: How can the litigant exercise other rights within the constraints of the evaluation? Information about the existence of these rights is best conveyed by the party's lawyer. How those rights may be exercised in that particular context is information best conveyed by the psychologist. For example, in some contexts, such as an evaluation of a criminal defendant by a psychologist hired by the prosecution, the defendant may have the right to call or consult with defense counsel at any time in the evaluation to protect the defendant's Fifth Amendment rights. Knowledge of this right may allow the psychologist to protect those rights and the litigant to appropriately exercise them. For example, the psychologist may inform the defendant that he or she can contact the lawyer at any time, and a telephone in a private place will be provided.

The sixth issue that the psychologist is uniquely situated to convey deals with the provision of information about procedures the litigant can expect to undergo. This discussion should include general information about the nature and timing of psychometric testing as well as information about the planned interviews. At this time, the litigant may also be notified of the need to gather information from collateral sources and the need to review written

records as part of the evaluation sequence (Heilbrun, 2001). When discussing evaluative procedures, the litigant should be advised that some information concerning the purpose of test or interview procedures may not be provided, even if the litigant asks a direct question, because knowledge of the purpose of the procedure may alter its results.

The matter of the information that should be disclosed regarding the tests and procedures to be used in an evaluation presents a stark tension between test validity and litigant autonomy. Test validity demands limited disclosure of information to avoid the compromise of a test. In the age of the Internet, knowledge of which tests will be given in an evaluation provides the opportunity for the litigant to quickly glean test questions and response coding, invalidating the test results. Conversely, the exercise of the litigant's autonomy that is advanced by the consent process calls for the disclosure of information about the test or procedure. The adoption of either extreme, which negates the other, is troubling as both goals are essential to the process; thus the correct answer lies somewhere in between the two. We struggle to find a middle ground.

Should psychologists provide different specific information for each test or procedure or should they provide generic disclosures for all related tests or procedures? Again, greater specificity increases the litigant's opportunity to exercise autonomy; generic disclosures provide greater practicability. We are persuaded that different disclosures for each test or procedure would be difficult to develop or enforce, and therefore we find generic disclosures to be the most practicable response that will encourage routine disclosure.

The seventh issue for the psychologist to discuss with the litigant is the potential psychological harm that may result from evaluation procedures. For example, many trauma survivors report that the recounting of their traumatic experiences is itself retraumatizing (Gutheil, Bursztajn, Brodsky, & Strasburger, 2000; Haller, 2002; Wenzel, 2002). The litigant needs to know when traumatic experiences, as well as otherwise personal and sensitive material, will be the focus of the evaluation. Because psychologists often inquire into the details of the litigant's childhood and sexual history, the psychological evaluation may be the first time that the litigant has discussed painful life events with anyone. The psychologist is in a unique position to perceive the risk and to inform the litigant that these discussions may be disturbing. In some cases, the evaluation may produce sufficient disruption that a fragile individual may need to seek the services of another mental health professional after the forensic interview. The potential exists for the evaluation to trigger a reversal of the litigant's progress in a treatment regime, especially if the treatment was focused upon helping the litigant contextualize specific life events.

### Coordinating the Legal and Psychological Roles

Having concluded that both the psychologist and lawyer must participate in the process to obtain the litigant's consent for a forensic evaluation, we next address three alternative models for coordinating these responsibilities. The first (Model I) is one in which the litigant, the litigant's lawyer, and the psychologist meet in person or in a conference call. In this meeting, the lawyer and psychologist jointly provide the necessary information. The advantage of this model is that all three participants jointly discuss

the issues. Questions from the litigant may be directly and consistently addressed. This model makes the consent process transparent.

One disadvantage of this model is logistical. The coordination of the schedules of a busy lawyer and a busy psychologist together with the litigant presents difficulties. This kind of live or telephonic meeting may also be time consuming, especially if all the areas of potential concern are addressed. This process also requires a degree of amity among the individuals in the meeting. In situations in which the psychological evaluation is compelled, the litigant's lawyer may view the psychologist as an adversary and be reluctant to work with the psychologist or opposing counsel may demand to be present, turning this into an adversary proceeding rather than a collaborative session to inform the litigant about the examination. The relationship between the psychologist and the lawyer may have a history that does not include amicable contacts. Also, if the participants can only speak by telephone, the psychologist cannot assess the nonverbal cues of the litigant that can provide important information about the litigant's understanding.

As a final consideration, the lawyer may want to inform the litigant of some things that would otherwise fall under attorney-client confidentiality. In this context, a full explication of the consequences of failure to cooperate with the evaluation procedures may include information that is best kept between lawyer and litigant.

Model I is logistically cumbersome and contains the risk of an adversary proceeding spiraling out of control. The concerns of confidentiality and privilege also make this three-way conversation problematical.

Model II expects both professionals to perform their informed consent responsibilities independently. In this model, the lawyer meets with the litigant prior to the scheduled forensic evaluation to discuss the legal aspects of the scheduled evaluations. Then, the psychologist informs the litigant about those matters that fall within the scope of the psychologist's sphere of expertise. This model conforms to the default expectations under the current approach to these issues.

The advantages of this model are logistical: There is no need for the psychologist and lawyer to coordinate their schedules, and the procedures are not unduly time consuming. The disadvantages are that the professionals may fail to perform their part of the informed consent procedures. When both professionals share equal responsibility for initiating the informed consent process, as is the case now, there is a risk that no one will be in charge. This disadvantage outweighs any advantage the parallel consent model offers, because the solution does nothing to integrate the psychological and legal components. Also, because the professionals do not know what each other will say, there is no mechanism in place to ensure that the litigant has received complete information.

In Model III, the psychologist initiates the process, after the evaluation is set, by sending a letter (see Appendix A) to the litigant's lawyer that details what the psychologist intends to include in the psychologist's disclosure to the party (see Appendix B) and requests that the lawyer inform his or her client about the legal purpose of the evaluation and the associated legal risks and alternatives. There are multiple advantages to this approach. It ensures that someone is responsible for initiating the process. In this case, the psychologist is uniquely capable of telling the lawyer what the psychological evaluation is about. The psychologist's letter to the lawyer is intended to trigger a fuller discussion of the upcoming evaluation than would otherwise occur. For example,

information about how the evaluation could potentially harm the litigant may not be something a plaintiff's lawyer would want to tell a client who was otherwise not predisposed to consent to the evaluation. There are also disadvantages to this alternative. First, placing the responsibility for the initiation of the process on the psychologist may be unduly burdensome and unnecessary. The initiation of the process could just as easily begin with the lawyer. It is our position that asking the lawyer to start the process does nothing to satisfy the psychologist's ethical responsibility. It is the psychologist who performs the forensic evaluation and the psychologist who possesses unique information that the lawyer does not, which is critical for the litigant to make an informed choice about the forensic evaluation. The psychologist is bound by the duty to respect the litigant's autonomy. It is our position that the psychologist is required to enlist the assistance of another professional to execute this responsibility. In this case, that professional is the litigant's counsel.

The second disadvantage is that the psychologist's initiation of the process may engender resentment in some lawyers. Some attorneys may not appreciate what may be perceived as an invasion of their turf. A third disadvantage is that this procedure requires the psychologist and lawyer to collaborate in the process. For situations in which the evaluation is compelled, as by the use of Federal Rules of Civil Procedure 35, and the psychologist is retained by opposing counsel, the litigant's lawyer may not be predisposed to cooperate with the psychologist in this procedure and may even be concerned that the psychologist's letter is somehow intended to further the case of the lawyer who hired the psychologist. The fourth disadvantage is more practical. The psychologist must write the letter to the lawyer not long after the evaluation is scheduled in order for the lawyer to have sufficient time to execute the legal portion of the informed consent. In some situations in which the evaluation is scheduled on short notice, there may be insufficient time for the lawyer to meet with the litigant before the evaluation is scheduled. Especially in situations of short notice, a fifth disadvantage becomes more evident. The psychologist may not be able to anticipate all of the nuances of the evaluation prior to actually meeting the litigant. For that reason, the letter to the lawyer may be more generic than the psychologist would prefer.

We conclude that the advantages of this psychologist-initiated procedure outweigh the disadvantages. Although this approach cannot ensure the tasks will be done, it allocates responsibility to one person for initiating the process and providing sufficient information so that the other professional can complete it. Second, this model allocates the informed consent responsibilities to persons who are most qualified to execute them. Lawyers inform about the law, and psychologists inform about psychology. Third, in the same sense, this model allows the litigant to ask questions of the professional most capable of answering them. Fourth, this model encourages integration of tasks: The lawyer knows what the psychologist is going to say, and the psychologist will have a basis for knowing the kind of information that the lawyer will convey to the litigant.

## Conclusion

Separately and collectively, professional, ethical, and legal standards require that psychologists obtain consent from litigants prior to the initiation of forensic psychological evaluations. Psycholo-

gists have assumed this responsibility but may not have examined their professional capacity to fulfill this obligation. Psychologists lack the necessary legal training to fully inform the litigant of many legal ramifications of the psychological evaluation process. Even psychologists who are well informed in legal matters are not in a position to provide legal advice to litigants. Lawyers have also had the responsibility of preparing their clients for forensic psychological evaluations, and they may be hampered in this duty by a lack of understanding of psychological testing and interview procedures, psychological ethics, and the details of forensic evaluations.

In this article, we have explicated the rationale for a joint procedure for informing the litigant about the psychological evaluation. The procedure differs from those discussed elsewhere (e.g., Heilbrun, 2001; Knapp & VandeCreek, 2001; Melton et al., 1997; Ogloff, 1999; Rogers, 1987) in that it requires the psychologist to contact the litigant's counsel to accomplish two goals: (a) to trigger the lawyer's discussion of relevant legal information concerning the evaluation with the litigant and (b) to advise the litigant and lawyer of the issues that will be discussed in the evaluation.

Although this joint procedure requires psychologists to add another step to the procedures associated with scheduling and completing a forensic evaluation, it will provide compensating advantages. First, psychologists are not forced to enter into a role for which they are not competent, which is providing legal advice. Second, psychologists may devote more of the time at the beginning of an evaluation to discussing those things about which they are conversant and that may be relevant to the litigant at this stressful time. For lawyers, these procedures also require adding a new step in the process of scheduling and completing an evaluation. This extra effort should pay off in higher client satisfaction and in reduced stress for the litigant.

## References

- American Bar Association. (2002). *Model rules of professional conduct: Rule 1.0 terminology*. Retrieved April 20, 2006, from [http://www.abanet.org/cpr/mrpc/rule\\_1\\_0.html](http://www.abanet.org/cpr/mrpc/rule_1_0.html)
- American Psychological Association. (1992). Ethical principles of psychologists and code of conduct. *American Psychologist*, 47, 1597–1611.
- American Psychological Association. (2002). Ethical principles of psychologists and code of conduct. *American Psychologist*, 57, 1060–1073.
- Bernet, W. M. D. (1997). Practice parameters for the forensic evaluation of children and adolescents who may have been physically or sexually abused. *Journal of the American Academy of Child & Adolescent Psychiatry*, 3, 423–442.
- Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972).
- Chowdhury, A. N. (1996). No confidentiality in forensic psychiatry: A debate. *Journal of Personality and Clinical Studies*, 22(1–2), 13–15.
- Committee on Ethical Guidelines for Forensic Psychologists. (1991). Specialty guidelines for forensic psychologists. *Law and Human Behavior*, 15, 655–665.
- Connell, M. (2006). Notification of purpose in custody evaluations: Informing the parties and their counsel. *Professional Psychology: Research and Practice*, 37, 446–451.
- FED. R. CIV. P. 35.
- FED. R. CIV. P. 9(g).
- Foote, W. E., & Goodman-Delahunty, J. (2005). *Evaluating sexual harassment: Psychological, social and legal considerations in forensic examinations*. Washington, DC: American Psychological Association.
- Garcia-Vazquez v. Frito Lay Snacks Caribbean, Inc.*, No. 97-CV-1313, 2001 U.S. Dist. LEXIS 1699 (D.P.R. Feb. 16, 2001).
- Greenberg, S. (2005, August). *Psychologists in the courtroom: Possibilities and pitfalls*. Invited Plenary Address at the 113th Annual Convention of the American Psychological Association, Washington, DC.
- Greenberg, S. A., & Shuman, D. W. (1997). Irreconcilable conflict between therapeutic and forensic roles. *Professional Psychology: Research and Practice*, 28, 50–57.
- Gutheil, T. G., Bursztajn, H., Brodsky, A., & Strasburger, L. H. (2000). Preventing "critogenic" harms: Minimizing emotional injury from civil litigation. *Journal of Psychiatry & Law*, 28, 5–18.
- Haller, L. H. (2002). The forensic evaluation and court testimony. *Child and Adolescent Psychiatric Clinics*, 11, 689–704.
- Heilbrun, K. (2001). *Principles of forensic mental health assessment*. New York: Plenum Press.
- Kalichman, S. C. (1993). *Mandated reporting of suspected child abuse: Ethics, law, & policy*. Washington, DC: American Psychological Association.
- Knapp, S., & VandeCreek, L. (2001). Ethical issues in personality assessment in forensic psychology. *Journal of Personality Assessment*, 77, 242–254.
- Kovera, M. B., & Cass, S. A. (2002). Compelled mental health examinations, liability decisions, and damage awards in sexual harassment cases: Issues for jury research. *Psychology, Public Policy, and Law*, 8, 96–114.
- Lande, R. G. (2001). Videotaping, informed consent and forensic psychiatry. *The Journal of Psychiatry & Law*, 29, 53–64.
- Martelli, M. F., Zasler, N. D., & Grayson, R. (1999). Ethical considerations in medicolegal evaluation of neurologic injury and impairment following acquired brain injury. *NeuroRehabilitation*, 13, 45–66.
- Melton, G. B., Petrila, J., Poythress, N. G., & Slobogin, C. (1997). *Psychological evaluations for the courts: A handbook for mental health professionals and lawyers* (2nd ed.). New York: Guilford Press.
- Miller, R. D. (2001). The D.A. made me do it—Compulsory capital sentencing evaluations. *Journal of Psychiatry & Law*, 29, 409–431.
- Ogloff, J. R. P. (1999). Ethical and legal contours of forensic psychology. In R. Roesch, S. D. Hart, & J. R. P. Ogloff (Eds.), *Psychology and law: State of the discipline* (pp. 405–420). New York: Kluwer.
- Ornish, S. A., Mills, M. J., & Ornish, M. C. (1996). Prearrestment forensic evaluations: Toward a new policy. *Bulletin of the American Academy of Psychiatry Law*, 24, 453–470.
- Radelet, M. L., & Barnard, G. W. (1986). Ethics and the psychiatric determination of competency to be executed. *Bulletin of the American Academy of Psychiatry Law*, 14, 37–53.
- Rogers, R. (1987). Ethical dilemmas in forensic evaluations. *Behavioral Sciences & the Law*, 5, 149–160.
- Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914).
- Schoffstall v. Henderson*, 223 F.3d 818 (8th Cir. 2000).
- Shuman, D. (1993). The use of empathy in forensic examinations. *Ethics & Behavior* 3(3–4), 289–302.
- Shuman, D., & Foote, W. E. (2000). *Jaffee v. Redmond's* impact: Life after the supreme court's recognition of a psychotherapist–patient privilege. *Professional Psychology: Research and Practice*, 30, 479–487.
- Shuman, D. W., Greenberg, S., Heilbrun, K., & Foote, W. E. (1998). An immodest proposal: Is it time to bar treating mental health professionals from the courtroom? *Behavioral Sciences & the Law*, 16, 509–523.
- Simon, R. I., & Wettstein, R. M. (1997). Toward the development of guidelines for the conduct of forensic psychiatric examinations. *Journal of the American Academy of Psychiatry and the Law*, 25(1), 17–30.
- Wenzel, T. (2002). Forensic evaluation of sequels to torture. *Current Opinion in Psychiatry*, 15, 611–615.

## Appendix A

## Prototype Letter to Lawyer

Re:

Dear

As you are aware, I will be conducting a psychological evaluation with your client, \_\_\_\_\_, on \_\_\_\_\_. We will begin our work on both those days at \_\_\_\_\_, and will complete it by \_\_\_\_\_, with \_\_\_\_\_ break for lunch.

In order for \_\_\_\_\_ to be fully informed about the psychological evaluation, it is necessary for you, as his/her counsel to advise him/her about critical aspects of this evaluation. This note is in no way intended to suggest that you would not advise him/her about these issues in due course as part of your work with him/her, but to insure that all of the critical information about the evaluation is provided prior to the beginning of the evaluation on \_\_\_\_\_. As a psychologist and a non-lawyer, I am not qualified to advise your client of these critical legal issues. Your discussion of these issues will leave some issues related to the psychological aspects of the evaluation, which I intend to discuss with him/her. Those issues are covered in the attached Consent for Forensic Evaluation form that I will ask him/her to sign before we begin our work on \_\_\_\_\_.

In addition, in order for your client to be fully informed about the evaluation, it would be helpful if you could discuss the following questions with him/her:

1. What is the role of the evaluator?

2. What is/are the purpose(s) of the evaluation?
3. What are the potential uses of the information?
4. Will the information from the evaluation be admissible in the current lawsuit?
5. How will the information from the evaluation advance or frustrate the litigant's case?
6. Who will be privy to the results of the evaluation?
7. What are the limits of confidentiality?
8. Will opposing counsel see evaluation results?
9. What form will results take?
10. Will a report be completed?
11. Will litigant be able to review report?
12. What are the legal consequences of terminating the evaluation?
13. Who will have control over the data after the evaluation is completed?

14. Will litigant be provided with feedback about the report?

Thank you very much for attending to these issues. I would like for your client to be able to make a fully informed decision about the evaluation prior to coming to my office on \_\_\_\_\_.

Sincerely,

(Psychologist Signature)

## Appendix B

## Prototype Informed Consent Form for Client

Mr./Ms. \_\_\_\_\_ Date \_\_\_\_\_,

You have been referred by psychological evaluation by \_\_\_\_\_. Before you came to this session, I wrote a letter to your lawyer and asked that person to talk with you about the legal aspects of this psychological evaluation. I trust that if you had any questions about those things, you asked your lawyer and are now clear about why you are here, how this evaluation fits into your case, and who will see the results of the evaluation. Your lawyer should have also talked with you about what could happen if you do not cooperate with the evaluation procedures.

Before we start today, I want to discuss some things about the evaluation with you. These are things having to do specifically with the evaluation itself and with my work with you. First, I want to repeat what your lawyer told you about what will happen to the information from the evaluation. In this case, I will/will not write a report. That report will be given to \_\_\_\_\_. [OPTIONAL. In other words, this is not a private or confidential evaluation. What you say and do here may be discussed in public documents, like depositions, or in open court.] You will/will not have an opportunity to review the report once it is completed. You will/will not have the opportunity to review the report and ask for corrections of any mistakes.

Even though you came here because [your lawyer sent you, the judge sent you, the prosecutor told you to come, etc.], it is up to you whether you want to continue this evaluation. At any time, you may just tell me that you want to stop the evaluation, and you will be allowed to leave. Your lawyer discussed with you what would happen if you decide to stop the evaluation. I need to tell you that if you stop the evaluation, [about scheduling]. Also,

if you quit the testing before it is completed, it may affect how we can use information from those tests.

You have certain rights in the evaluation. I will do what I can to help you do the things you are legally allowed to do. For example, you are allowed to call your lawyer at any time. I will make a telephone available to you so you can call your lawyer, if you feel the need. If you and your lawyer have decided that you will not answer certain questions, just tell me. I will not push you to answer those questions, but I will have to make a notation about what happened.

The evaluation will include my oral/spoken questions and your answers to them, as well as my observations of your behavior, to aid me in assessing your mental/ emotional state on the issue of \_\_\_\_\_. It is therefore important that you respond honestly to the questions and do your best at all times. Although some of the questions do not appear to be related to your case, these are all parts of the evaluation that will help me get a clear picture of you.

The evaluation will also include some testing that will help me to learn about your mental or emotional state on the issue of \_\_\_\_\_, or to determine how \_\_\_\_\_ affected you. It is really important that you are honest when you answer questions and for you to do your best at all times.

When we go through the tests and interview, you may be asked questions about things that happened to you in the past that were upsetting. I am not asking these questions to upset you, but because it is important for me to know how different events in your life have affected you. If you need time to compose yourself during this evaluation, please tell me, and we will take time out from the questions or testing. If you are concerned that our



discussion of these upsetting events will be too much for you, please arrange for a chance to talk with someone you trust about these things after we finish our work.

One reason that you may want to arrange for a talk with someone you trust is because I am not here to be your therapist. In this case, I was hired by \_\_\_\_\_ to do this evaluation for \_\_\_\_\_. This means that I am not your therapist, and I am not going to give you advice or provide treatment for you. My job is to get information about you in connection with issue of \_\_\_\_\_.

I have read the above and have asked Dr. \_\_\_\_\_ any questions that I have about this evaluation.

\_\_\_\_\_  
(Litigant Signature)

Received September 9, 2005  
Revision received February 6, 2006  
Accepted February 27, 2006 ■



## AMERICAN PSYCHOLOGICAL ASSOCIATION SUBSCRIPTION CLAIMS INFORMATION

Today's Date: \_\_\_\_\_

We provide this form to assist members, institutions, and nonmember individuals with any subscription problems. With the appropriate information we can begin a resolution. If you use the services of an agent, please do **NOT** duplicate claims through them and directly to us. **PLEASE PRINT CLEARLY AND IN INK IF POSSIBLE.**

PRINT FULL NAME OR KEY NAME OF INSTITUTION \_\_\_\_\_

MEMBER OR CUSTOMER NUMBER (MAY BE FOUND ON ANY PAST ISSUE LABEL) \_\_\_\_\_

ADDRESS \_\_\_\_\_

DATE YOUR ORDER WAS MAILED (OR PHONED) \_\_\_\_\_

CITY \_\_\_\_\_

STATE/COUNTRY \_\_\_\_\_

ZIP \_\_\_\_\_

\_\_\_\_ PREPAID \_\_\_\_ CHECK \_\_\_\_ CHARGE

CHECK/CARD CLEARED DATE: \_\_\_\_\_

YOUR NAME AND PHONE NUMBER \_\_\_\_\_

(If possible, send a copy, front and back, of your cancelled check to help us in our research of your claim.)

ISSUES: \_\_\_\_ MISSING \_\_\_\_ DAMAGED

TITLE \_\_\_\_\_

VOLUME OR YEAR \_\_\_\_\_

NUMBER OR MONTH \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*Thank you. Once a claim is received and resolved, delivery of replacement issues routinely takes 4-6 weeks.*

(TO BE FILLED OUT BY APA STAFF)

DATE RECEIVED: \_\_\_\_\_

DATE OF ACTION: \_\_\_\_\_

ACTION TAKEN: \_\_\_\_\_

INV. NO. & DATE: \_\_\_\_\_

STAFF NAME: \_\_\_\_\_

LABEL NO. & DATE: \_\_\_\_\_

Send this form to APA Subscription Claims, 750 First Street, NE, Washington, DC 20002-4242

**PLEASE DO NOT REMOVE. A PHOTOCOPY MAY BE USED.**