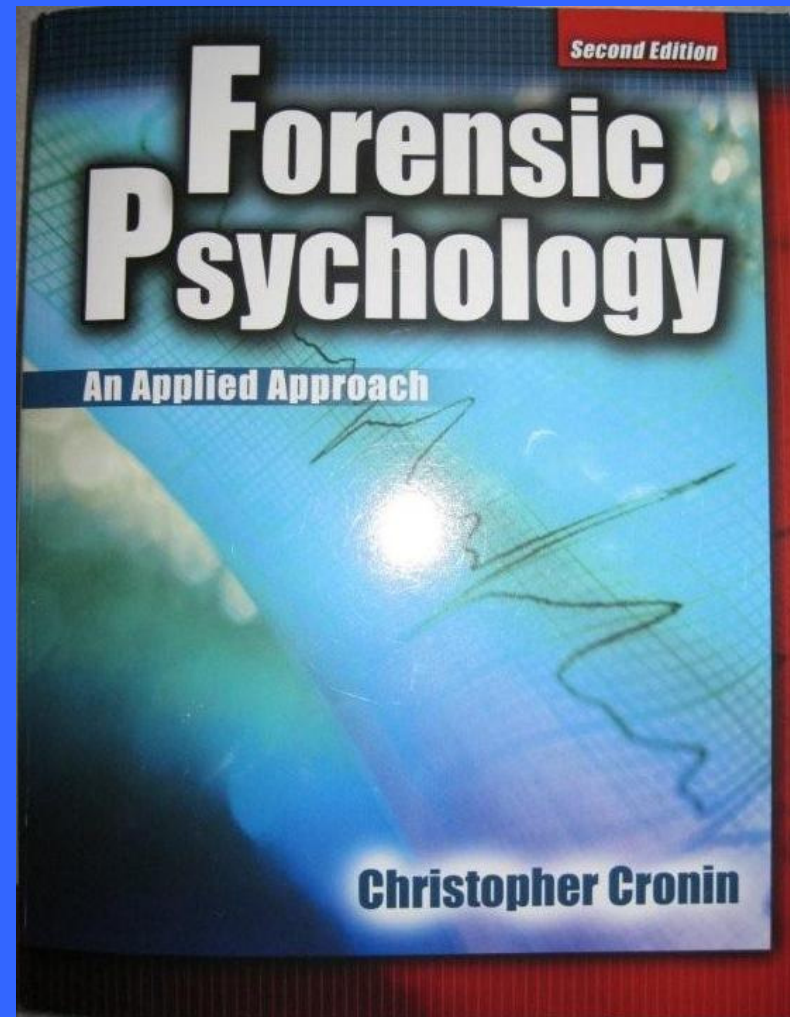


Ethical Issues Related to the Practice of Forensic Psychology



Importance of Ethical Standards in the Practice of Psychology, Forensic Psychology and Law

- *Whores of the Court: The Fraud of Psychiatric Testimony and the Rape of American Justice* (Hagen, 1997).
- Margaret Hagen, an experimental psychologist, is critical of psychologists, psychiatrists and social workers who “mislead” judges and juries chasing the “almighty dollar.”

APA Ethical Principles of Psychologists and Code of Conduct

- Membership in APA requires adherence to the Principles; some state laws may require adherence, and a violation may result in a complaint to the licensing board, but, the ethical principles are not the law and are at times in conflict with the law (i.e. sexual contact with former clients).

Specialty Guidelines for Forensic Psychologists

- Developed by Division 41 of APA and American Psychology-Law Society and are endorsed by the American Academy of Forensic psychology
- “The primary goal of the SGFP is to improve the quality of forensic psychological services by providing guidance to psychologists delivering services to courts, members of the bar, litigants, and persons housed in forensic, delinquency, or correctional facilities.” (Otto & Heilbrun, 2002, p.7).

APA Guidelines for Particular Activities

- Guidelines are described as aspirational, neither mandatory or exhaustive: psychologists are strongly encouraged - but not required – to abide by them.
- However, with “good faith” immunity laws (FL and W. VA), psychologists may recognize the value of adhering to the guidelines

Guidelines for Child Custody Evaluations in Divorce Proceedings

- Goal is to “promote proficiency in using psychological expertise in child custody evaluations” (APA, 1994, p. 677)

Guidelines for Psychological Evaluations in Child Protection Matters

- Goal is to “facilitate the continued systematic development of the professional and help to assure a high level of practice by psychologists” (APACOPP, 1998, p.2).

Who is an Expert Witness?

- Fairly low standard as to who can serve as an ‘expert’
- Decision is left to the discretion of the trial judge
- Courts are generally lenient in determining whether a witness qualifies as an expert

Ethical Conflicts between Psychology and Law: An Adversarial System

- Lawyer's ethical guidelines: District of Columbia Bar Association: Rules of Professional Conduct
- Rule 1.3 Diligence and Zeal: A lawyer shall represent a client *zealously* and diligently within the bounds of the law

Law: An Adversarial System based on Precedence

Lawyers argue their case before the judge, citing previously decided cases to confirm precedence.



Resolving Ethical Dilemmas

- Eight-step decision making process
 - Identify the problem
 - Develop possible solutions to the problem
 - Consider the potential consequences of various solutions
 - Choose and implement a course of action
 - Assess the outcome and implement changes as needed

Resolving Ethical Dilemmas

- Three additional steps for forensic psychologists
 - Consider the significance of the context and the setting
 - Identify and use ethical and legal resources
 - Consider personal beliefs and values

Expert Witness Testimony

- *Expert* witness versus *fact* witness
 - Fact witness (lay witness) –can testify only to events that they have seen or heard first hand (hearsay)
- Federal Rule of Evidence 701

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

(a) rationally based on the perception of the witness
and

(b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Fact Witness

- A *fact witness* may testify about things they know or have perceived, or about opinions that do not need special expertise.



Advisory Committee of Congress that enacted the Standard:

“The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the “scientific” or “technical” but extend to all “specialized” knowledge. Similarly, the expert is viewed, not in the narrow sense, but as a persona qualified by “knowledge, skill, experience, training or education.” Thus, within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called ‘skilled’ witnesses, such as bankers or landowners testifying to land values.”

Admissibility of Expert Testimony

- Although a low standard to be qualified as an expert, the admissibility of expert testimony is different and must meet certain standards.
- Judges have discretion in deciding what is the proper subject for expert testimony.
- Judges have case law as guidance in making these decisions.
- A review of case law regarding expert testimony follows.

Frye v. United States (1923) District of Columbia Court of Appeals

- Established a general acceptance test for the admissibility of scientific testimony ... *general acceptance rule* – expert's testimony must be based on scientific techniques that have reached a general acceptance in the scientific field

Federal Rules of Evidence (1975)

- The judge must determine if the scientific evidence is
 - relevant
 - reliable (valid)
 - likely to assist the trier of fact (FRE 702)

Daubert v. Merrell Dow Pharmaceuticals (1993)

- Trial judges may, *but are not required to*, consider the following factors in deciding whether to admit expert testimony with a purported scientific basis
 - Whether the principles and methodology underlying the testimony have been or can be tested.
 - Whether they have been subjected to peer review and publication.
 - Whether the known or potential error rate is acceptable.
 - Whether the underlying principles have gain general acceptance in the scientific community.

Two additional cases regarding expert testimony

- *General Electric Co. v. Joiner* (1997)
 - U.S. Supreme Court ruled that a trial judge's decision to allow or reject expert testimony under Rule 702 may not be overturned on appeal unless the judge's ruling constituted a clear abuse of discretion – a very difficult standard to meet (Ewing, 2003).

- *Kumho Tire Co. v. Carmichael* (1999)
 - Extended the Daubert ruling to nonscientific expert witnesses who claimed a specialized knowledge

Ultimate Issue Testimony

- *Ultimate issue* – the final question that must be decided by the court (e.g. insane at the time of the crime, or, was the individual raped.. as in cases of testifying regarding rape trauma syndrome)
- Duty of the *trier of fact* –judge and/or jury to decide the ultimate issue

Pros and Cons Regarding Ultimate Issue Testimony

- Cons
 - Concerns about the accuracy of the opinion
 - Expert's opinion on ultimate issue may have too much influence on trier of fact
 - Research suggests that juries are not overwhelmed by expert's opinion
 - Though does influence judge's decision in pretrial competency hearing
- Pros
 - Judges and prosecutors depend on it and request it
 - Can be controlled through cross-examination
- APA does not take a position on whether psychologists should give ultimate issue testimony

Roles the Psychologist can play as an Expert Witness

- Conduit-Educator:
Educate the trier of fact regarding psychological knowledge
- Philosopher-ruler/Advocate:
Taking a legal-adversary approach; arguing for only one side
- Hired Gun:
APA's *ethical* guidelines clearly prohibit this stance (not illegal and very difficult to charge an expert with incompetence)

Possible Pitfalls as an Expert Witness

- Promising too much
- Substituting advocacy for scientific objectivity
- Letting values overcome empirically based findings
- Doing a cursory job
- Maintaining dual relationships and competing roles

Approaches to Decision Making

- Legal System: *Stare decisis*
 - to stand by past decisions; doctrine of precedence in law, use case law to guide decisions; courts must adhere to prior law and precedent
- Science: *Empiricism*
 - the view that knowledge comes from experience and observation
- Goals of the legal system and goals of psychology are at times in conflict

Examples of issues on which psychologists testify

- Insanity defense
- Mitigating or aggravating circumstances in death penalty sentencing
- Competence to stand trial
- Competence to confess
- Competence to waive Miranda rights
- Competence to be executed
- Civil commitment
- Civil competence – guardianship and conservatorship
- Child custody
- Termination of parental rights
- Psychological damages in civil suits (mental and neuropsychological)
- Trademark litigation
- Eyewitness testimony
- Impact of pretrial publicity
- Assessing the risk to the community of releasing convicted sex offenders
- Social issues (i.e. pornography, same-sex parental adoption, etc.)

Web Sites

- Specialty Guidelines for the Practice of Forensic Psychology
 - www.ap-ls.org/links/currentforensicguidelines.pdf
- Most recent draft of revised Specialty Guidelines
 - www.apls.org/links/professionalsgfp.html
- APA Ethical Principles and Code of Conduct
 - www.apa.org/ethics/code2002.html
- APA Practice Guidelines
 - www.apa.org/practice/prof.html

Web Sites

- Federal Rules of Evidence
 - www.law.cornell.edu/rules/fre/rules.htm
- American Bar Association Code of Professional Conduct
 - www.abanet.org/cpr/mrpc/mrpc_toc.html