

# Toward the Development of Guidelines for the Conduct of Forensic Psychiatric Examinations

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**Guidelines for conducting forensic psychiatric consultations and evaluations have not been clearly established. The authors offer and discuss such guidelines, which are based upon the boundary guidelines in general psychiatric practice, ethics principles in general psychiatry, ethics principles in forensic psychiatry, and the relevant case and statutory law. These guidelines are intended to assist the psychiatrist in appropriately conducting forensic evaluations whether in litigation or administrative proceedings.**

Guidelines for the conduct of independent forensic psychiatric examinations of adults have not been firmly established. Ethics statements published by the American Academy of Psychiatry and the Law (AAPL) and the American Psychiatric Association (APA) touch on various aspects of the examination of third parties generally or litigants in particular but do not set forth specific guidelines.<sup>1-4</sup> Clinical guidelines from the treatment context influence the conduct of forensic psychiatric examinations, although their direct

applicability to the litigation setting is often problematic. Moreover, the forensic psychiatrist cannot adopt the ethics principles of attorneys, which are predicated upon vigorous advocacy. Attorney's ethics and procedures, nevertheless, frequently impinge upon or directly influence the conduct of the independent forensic psychiatric consultation and examination.

Forensic examination guidelines are shaped strongly by how the psychiatrist perceives his or her role in the legal or administrative context. Appelbaum<sup>5</sup> asserted that the forensic psychiatrist acts not as a healer but as a provider of testimony in court to advance the general interests of justice. In his view, no physician-patient relationship, with its attendant duty of care, is established. The

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**Table 1**  
**Sources of Guidelines in Forensic Psychiatric Examinations**

Guidelines	Sources <sup>a</sup>
Maintain examiner objectivity and neutrality	1,2
Respect examinee autonomy	1,2
Protect confidentiality	1,2,3
Obtain informed consent	2,3
Interact verbally	1,2
Ensure no previous, current or future personal relationship with the examinee	1,2
Avoid sexual contact	1,2,3
Preserve relative anonymity	1
Establish a clear fee policy	1,2
Provide a suitable examination setting	1
Define time and length of examination	1

<sup>a</sup>1 = Clinical practice; 2 = ethics principles (general psychiatry, forensic psychiatry); 3 = case law, statute, or both.

medical ethics principles of beneficence and nonmaleficence take a secondary place in forensic consultations and evaluations, even if, for example, the evaluator recommends treatment and avoids gratuitous harm by maintaining the confidentiality of embarrassing or irrelevant information. Weinstock and colleagues,<sup>6</sup> on the other hand, contend that Hippocratic medical values should be retained in forensic evaluations, even though the forensic psychiatrist's primary obligations are to truth and justice. Weinstock *et al.* state that "... forensic psychiatrists still introduce themselves as physicians with the title 'doctor,' despite any subsequent disclaimers about their current role." Stone<sup>7,8</sup> finds Appelbaum's standard of truth and justice more an appealing abstraction than a useful guide to ethical conduct in the forensic setting. Stone believes that ethical behaviors derived from the principles of serving truth and justice do not effectively deal with forensic psychiatry's ethical dilemma, raised by the seductive power of the forensic

psychiatrist to induce inappropriate trust in an evaluatee. In giving the needs of social justice primacy over helping patients and doing no harm, Stone has argued that forensic psychiatrists lose their ethical compass.

In this article, guidelines are proposed that maintain the integrity of the forensic psychiatric consultation and examination. These guidelines are based upon clinical practice, ethics principles in general psychiatry, ethics principles in forensic psychiatry, and the relevant case and statutory law<sup>9-11</sup> (see Table 1). The guidelines proposed for forensic psychiatric consultation and examination are based on the fundamental premise that the forensic psychiatrist provides clinical knowledge and expertise in the context of litigation, with honesty and striving for objectivity, not acting as a therapist allied with a patient. The forensic psychiatric consultation and/or examination is the basic method for developing medical and psychological data that ultimately serves some legal or administrative purpose.

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Nevertheless, the forensic examination requires many of the same psychiatric skills and the expertise utilized in the clinical setting. Examination guidelines, however, are susceptible to being bent and breached by the pressures of litigation. By adhering to medical ethics principles to the extent possible in the litigation context, forensic psychiatrists are less likely to lose their professional bearings and wander into the thicket of legal advocacy.

Finally, the article focuses on the forensic evaluation, especially the interview. It does not address the many other ethical and legal issues in forensic psychiatry such as forensic judgment and decision making, standards of mental health evidence, and court testimony, which have been discussed widely elsewhere.<sup>12-14</sup> Reference is made to the evaluation of litigants at the request of attorneys, but it should be understood that the forensic psychiatrist's client may be not only an attorney but an agency, business, or court. Unless otherwise specified, the use of the term client refers to the party retaining the psychiatrist.

### Discussion of Proposed Guidelines

***Maintain Examiner Objectivity and Neutrality*** The Ethics Guidelines of the American Academy of Psychiatry and the Law require honesty and the striving for objectivity (Section IV).<sup>1</sup> The forensic psychiatrist should endeavor to be aware of his or her personal biases while, at the same time, making the appropriate correction for these biases. He or she must

not attempt to influence the examinee, use coercive interviewing techniques, or manipulate the examinee by creating the illusion of a treatment relationship.<sup>15</sup> The forensic psychiatrist may not disregard data or fail to probe for data in the evaluation that may be adverse to the client who retained him or her.<sup>3, 16</sup> The forensic psychiatrist's role is to conduct an independent, objective consultation and examination, without regard for the import of the examination findings upon the outcome of any litigation or administrative action. He or she adopts the same demeanor and attitude whether examining the litigant for the retaining client or for the opposing side.

Psychiatrists who venture into the forensic arena need to be aware of the fundamentally different roles that exist between a treating psychiatrist and the forensic evaluator.<sup>17</sup> Simultaneous or sequential treatment and evaluation roles by the same psychiatrist typically result in irreconcilable conflict, jeopardizing both the patient's treatment and the evaluation for litigation (see, e.g., AAPL Ethics Guidelines, Section IV).<sup>1, 18-20</sup>

Unlike the orthopedic surgeon who presents objective information such as the x-ray of a broken limb to demonstrate orthopedic damages in court, the treating psychiatrist must rely heavily upon the subjective reporting of the patient. In the clinical context, psychiatrists are interested primarily in the patient's perception of difficulties, not necessarily in objective reality. As a consequence, most treating psychiatrists do not routinely interview third parties to gain information about patients or corroborate their statements.

The law, however, is interested only in what can be established reasonably as fact. Uncorroborated, subjective patient data are frequently attacked in court as being speculative, self-serving, and unreliable. The treating psychiatrist usually is not well equipped to counter these charges, because she or he is an ally of the patient, with attendant biases. Opposing counsel may attempt to portray the treating psychiatrist as a subjective mouthpiece for the plaintiff, which may or may not be correct.

Court testimony by the treating psychiatrist about the patient's legal or forensic issues, as opposed to the psychiatrist testifying as a fact witness (e.g., the patient's symptoms, signs, diagnosis, prognosis) is likely to jeopardize the therapeutic relationship. Such testimony may involve the release of formerly confidential information that is not legally privileged, but nonetheless is perceived by the patient as private and confidential. This disclosure by the formerly trusted therapist is likely to cause psychological damage to the therapeutic relationship.<sup>21</sup> In addition, treating psychiatrists must be careful to inform patients about the consequences of releasing treatment information, particularly in legal matters. Section 4, Annotation 2, of *The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry* states:

The continuing duty of the psychiatrist to protect the patient includes fully apprising him/her of the connotations of waiving the privilege of privacy. This may become an issue when the patient is being investigated by a government agency, is applying for a position, or is involved in legal action.<sup>2</sup>

Finally, when the treating psychiatrist testifies concerning the need for further treatment, a conflict of interest is readily apparent. In making such treatment prognostications, the therapist stands to benefit economically from further treatment. Although this may not be the intention of the psychiatrist whatsoever, opposing counsel is sure to point out that the psychiatrist has a financial interest in the case.

The forensic expert, on the other hand, is usually free of these encumbrances. No physician-patient treatment relationship, with its treatment biases toward the patient, is created during forensic evaluation. The evaluator can review a variety of records and interview those who know the litigant. Furthermore, the forensic evaluator is not as easily distracted from considering distortion or malingering, because of a clear appreciation of the litigation context and the absence of treatment bias. Finally, the forensic evaluator is not placed in a conflict of interest position of recommending treatment from which the treating psychiatrist would necessarily personally benefit. On the other hand, the forensic evaluator could be considered a "hired gun" if she or he abandons the ethics principle of honesty and striving for objectivity. The forensic psychiatrist must be careful not to cross the line between evaluator and treater by giving advice, making interpretations, and prescribing treatments for the evaluatee. Discussions in the forensic report concerning treatments that the evaluatee has received or other treatments that might prove efficacious are perfectly appropriate. The examinee, however, should not

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become a patient of the forensic examiner at any point. The examinee who is considered a prospective patient of the examiner may bias the forensic psychiatrist because of a potential clinical and economic interest in the case.

Forensic psychiatrists who perform custody examinations in domestic relations cases should be fully aware of the necessity to maintain objectivity by examining all parties whenever possible. Comparative opinions as to the litigants' respective parenting capacities should not be offered when only one side has been examined.

Another guideline issue concerns the rendering of an opinion by the forensic evaluator without conducting a psychiatric examination. The ethics requirements of honesty and striving for objectivity require that the forensic psychiatrist make an earnest effort to personally examine the litigant in civil actions and the defendant in criminal cases. In some instances, an examination may not be required or feasible. If an examination is not possible, then it is necessary to qualify in reports or during testimony that the opinion expressed is limited. Rappeport<sup>22</sup> recommends the "rule of three," whereby the forensic evaluator states at the beginning, again when providing the diagnosis or clinical impression, and at the end of a report that no examination was performed and that the examiner's forensic opinion is limited by that fact. He also recommends that when no examination was performed, the forensic psychiatrist should reveal this fact in court during direct rather than cross-examination.

The "Goldwater Rule," promulgated by

the APA, has been misunderstood by some psychiatrists when conducting forensic examinations. The *Opinions of the Ethics Committee on the Principles of Medical Ethics*<sup>23</sup> clarifies the issue as follows:

*Question:* A psychiatrist testifies for the state in a criminal case about the competency of the defendant. He based his testimony upon medical records and did not examine the defendant nor have his approval to render an opinion. Was this ethical?

*Answer:* Yes. See Section 7, Annotation 3 (APA): "On occasion psychiatrists are asked for an opinion about an individual who is in the light of public attention, or who has disclosed information about himself through public media. It is unethical for a psychiatrist to offer a professional opinion unless he/she has conducted an examination and has been granted proper authorization for such a statement."

Confusion has arisen by taking the second sentence above and not connecting it to the first sentence as was intended. It is common for forensic experts to offer opinions as was done according to the question. Further, it would be too great an extension of the Goldwater Rule to say that a person, by being a defendant in court, has entered into "... the light of public attention." This annotation was developed to protect public figures from psychiatric speculation that harms the reputation of the profession of psychiatry and of the unsuspecting public figure [September 1983].

Controversy exists concerning whether the attorney or other client should review a draft report of the psychiatrist's evaluation. On the one hand, comments from the attorney may create the impression that the attorney has influenced the report, tainting the examiner's opinions and conclusions. On the other hand, the report may have addressed the wrong issues, used inappropriate language, or contained factual errors, or the examiner may

have misunderstood the legal issues. Other reasons for an attorney to review draft reports include a change in the fact pattern or in the legal rulings governing the case. Rather than show a draft of the report to the attorney, another solution might be to include an addendum to the final report if any changes are required. Attorneys may request short reports, long reports, or no reports. In these circumstances, the overriding task is to insure the honesty and objectivity of the report. It is well accepted that evaluators may not change their forensic opinions, or even the examinee's diagnosis, at the attorney's request (AAPL Committee on Ethics, Opinion 16).<sup>4</sup>

**Respect Examinee Autonomy** The ethics principle of respect for patient autonomy and self-determination should be extended to the forensic examination. Such an attitude toward the examinee helps foster a task-specific working relationships between examiner and examinee. The forensic evaluator should allow the examinee to contact counsel anytime during the examination, if that becomes necessary. The examinee should be free to take breaks or terminate the interview at any time, limited only by an order of court

The "Opinions of the American Academy of Psychiatry and the Law's Committee on Ethics"<sup>4</sup> addresses the issue of coercive forensic psychiatric examinations in the following manner:

*Question:* Is it ethical for a forensic psychiatrist performing an evaluation to use bullying tactics, to be rude, use name calling, and press a plaintiff to drop the case?

*Answer:* Most relevant is the APA and AMA Principles of Medical Ethics, Section 1, "A physician shall be dedicated to providing competent medical service with compassion and respect for human dignity." Also relevant is [the] AAPL Ethical Guidelines Section IV on honesty and striving for objectivity. The use of bullying tactics and deliberate rudeness are disrespectful of human dignity and therefore are unethical as are pressuring a plaintiff to settle and failing to be objective. However, the special role of a forensic psychiatrist also needs to be considered. A psychiatrist retained by the defense in a civil suit is obtaining information for the side opposing the plaintiff. What may appear to a plaintiff to constitute bullying tactics may merely be appropriate skepticism to disbelieve the plaintiff or to press for inconsistencies to try to determine if there is malinger-ing. Unlike a therapeutic interview that involves helping the evaluatee as the primary purpose, a forensic evaluation may necessitate exploration of areas that a plaintiff prefers to avoid and finds upsetting. In addition, a negative evaluation by a forensic psychiatrist may motivate a desire to retaliate by filing an ethics complaint. Each case should be evaluated by exploring the forensic psychiatrist's reasons for his/her behavior. Differences in interviewing style do not necessarily involve ethical infractions. However, deliberate rudeness, pressure to settle, and lack of respect for human dignity are not justified [Opinion 2].

The forensic psychiatrist must examine litigants and criminal defendants with tact and consideration. The medical ethics principles of compassion and respect for human dignity fundamentally underlie both clinical and forensic boundaries.

**Protect Confidentiality** The forensic psychiatrist should protect the evaluatee's privacy and confidentiality to the maximal extent possible, given the limitations and restrictions imposed by the legal context (AAPL Ethics Guidelines, Section II).<sup>1</sup> It is incorrect for the forensic evaluator to believe or act as though he or she

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has no confidentiality obligations simply because the evaluation is for litigation rather than treatment.<sup>24</sup> The forensic evaluator needs to be especially sensitive to confidentiality issues.

The limits of confidentiality should be pointed out to the examinee before the examination begins, after the evaluator has clarified this with the client, whether that be an attorney, court, or agency. The evaluator should inform the evaluatee and third-party informants as to who will receive information generated from the interview, to the extent that this is known. The fact of, or the results of, the forensic psychiatric examination may be privileged as an attorney-client work product, depending upon how the attorney intends to use this information.

Requests by the evaluatee to maintain the confidentiality of some parts of the evaluation should be thoroughly discussed by the examiner with the client. If the examiner intends to publish information learned from a forensic examination, complex ethical and legal issues arise.<sup>25</sup> Control over and release of any information obtained in the forensic evaluation are the ultimate responsibility of the client. Evaluators may not have contact with any other attorneys involved in the case or any experts retained by the opposing side without the client's consent.

Beyond informing the evaluatee as to the nature and purpose of the forensic evaluation and the limitations of its confidentiality, there may be ethical and legal obligations to provide a Miranda-type warning to examinees. Such a warning would additionally indicate that the disclosure by the evaluatee of information

may be adverse to the evaluatee's legal interests. In such cases, the evaluator can clarify with the evaluatee that the examiner is not a law-enforcement official (even when carrying out an examination on behalf of the prosecution), that the evaluatee (especially if a criminal defendant) already has an attorney, and that the examiner is to testify as to mental condition and not the facts of the case. Such a Miranda-type warning can help counter allegations that the defendant was "seduced into believing that the examiner was there to treat him rather than examine him for purposes of trial."<sup>26</sup>

Examinees may reveal during the course of a forensic examination reportable information such as child abuse or an intention to harm someone. Unlike the treatment context, the psychiatrist retained by the attorney for forensic examination is acting as a representative of the attorney and is governed by the attorney-client privilege and confidentiality rules.<sup>27, 28</sup> Confidential communications involving child abuse or threats of future violence made to an attorney or someone retained to assist the attorney may not obligate him or her to report such information, which would otherwise be required. Few states, for example, consider attorneys to be mandated child abuse reporters, while attorneys in most states are permitted or required to report future serious criminal acts.<sup>27</sup> Since mandatory or discretionary disclosure is state and fact specific, the forensic evaluator needs to consult with the client when these issues arise during the forensic psychiatric examination. If the evaluator is retained solely by the examinee who does not have

an attorney, the evaluator's personal attorney should be consulted.

**Obtain Informed Consent** The forensic evaluator should inform the examinee of the nature and purpose of the examination at the outset (see AAPL Ethics Guidelines, Section III).<sup>1,2</sup> The forensic examiner should obtain the examinee's, as well as his or her attorney's, consent to proceed unless the examination is properly legally compelled. Court-ordered evaluations for the determination of competency to stand trial or for involuntary hospitalization do not require consent. The evaluatee informs the examinee that a physician-patient relationship does not exist and no treatment will be rendered except in an emergency, although treatment recommendations are permissible. The examinee should also be told that the confidentiality that exists in a physician-patient relationship does not exist in the forensic examination. In most cases, consent from the evaluatee and his or her attorney should be obtained before contacting other sources of information. Explicit consent, preferably in writing, should be obtained both from the examinee and the client before the use of special procedures such as audio- or visual monitoring of the examination.

Consent requirements for forensic examinations vary according to jurisdiction. A forensic examination should not be performed on a legally competent examinee over that person's objection without proper legal compulsion. An incompetent assenting or nonassenting examinee should not be examined without proper legal compulsion, the presence of the examinee's attorney, or the written consent

of a legally designated substitute decision maker.<sup>29</sup> A forensic examination must not be performed upon a person charged with a criminal act before she or he has had an opportunity to retain and consult with an attorney, except for the sole purpose of providing medical treatment (see Refs. 1 and 2 (Section 4, Annotation 13)). The attorney may not want his or her client to speak to anyone, including the examining psychiatrist, about the case. The potential for abuse is great if the defendant reveals incriminating evidence to the examiner. Ethically, the examiner cannot obtain informed consent to conduct an examination under these circumstances. In an emergency in which treatment is required, the emergency exception for treatment consent would likely exist.

**Interact Verbally** The forensic psychiatrist's primary mode of evaluation is by talking with and observing the examinee and others. If the forensic evaluator intends to perform a physical examination of the examinee or employ special procedures such as an amobarbital interview, hypnosis, or a polygraph, explicit informed consent of the examinee and his or her attorney or other client should be obtained, preferably in writing. Other than a friendly handshake or while conducting a medical procedure, evaluators should avoid touching the examinee during the course of a forensic psychiatric examination. In many instances, even a handshake is undesirable at the beginning of an evaluation. Unwelcome physical contact with the examiner may be of particular concern to some plaintiffs who have alleged sexual harassment or sexual misconduct by a professional. It is pref-

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erable for the examiner to take his or her lead from the examinee before extending one's hand. In some cases, the adversarial nature of the examination may preclude social niceties that could be experienced as offensive by the examinee. A correct but friendly professional demeanor needs to be maintained throughout the forensic examination.

***Ensure No Previous, Current, or Future Personal Relationship with the Examinee*** The forensic evaluator must be able to perform a credible, objective examination free of the bias that may derive from a previous personal relationship with an examinee. The examiner's objectivity also may be strained by a personal relationship with the examinee's immediate family, even if the examinee is relatively unknown to the examiner. Attorneys are usually sensitive to conflict of interest issues. They should be informed immediately when the examiner becomes aware of conflicts that may interfere with the striving for objectivity. The existence of any dual relationship may vitiate the forensic evaluation and may be used to discredit the forensic psychiatrist by opposing counsel. The prospect of a future personal relationship with the examinee poses similar problems.

***Avoid Romantic or Sexual Contact*** No romantic or sexual relationship should be undertaken by the forensic psychiatrist with an examinee, a member of the examinee's immediate family, any other party to the litigation or administrative action, or any attorney involved in the litigation. Although no physician-patient treatment relationship technically exists between the forensic evaluator and the

examinee, the application of psychiatric ethics and competent professional practice precludes such a sexual relationship (Opinion 1).<sup>4</sup> The goal of maintaining examiner objectivity and neutrality certainly would be lost if an examiner-examinee romantic relationship existed. Forensic psychiatrists are aware that powerful feelings develop among all parties, their experts, and attorneys during the course of litigation. High personal stakes, good and bad splitting promoted by vigorous advocacy, and the various uncertainties and fears engendered by litigation can promote intense, regressive transference reactions in an examinee, which become focused on the evaluator. Moreover, an examinee's positive transference feelings that have developed toward the attorney may be displaced upon the examiner who is viewed as essential to the outcome of litigation. Powerful transference and countertransference feelings may persist for both examiner and examinee long after the case is concluded, perhaps reinforced by a positive outcome in the litigation.

The question arises whether sexual contact with an examinee, or a member of the examinee's immediate family, is ethical after litigation, including appeals and retrials, has been concluded. Sexual involvement with an examinee or family member after litigation is concluded is highly problematic. A sexual relationship with an opposing party examinee appears much less likely because of the inherent adversarial nature of the interaction. Holding open the possibility of a sexual relationship with the examinee after litigation is concluded could influence the

examiner's current opinions or findings. It is difficult to imagine a situation in which a forensic psychiatrist who has a sexual relationship with a former examinee did not have sexual feelings or even sexual intentions at the time of the initial examination. The explanation that the forensic psychiatrist's sexual feelings toward a former examinee arose *de novo* months or years later lacks credibility. Thus, a sexual relationship with a former examinee gives the appearance that the examiner failed to maintain a posture of objectivity and neutrality during the initial examination.

**Preserve Relative Anonymity** In many cases, before being examined, the examinee is provided information about the background of the forensic evaluator by the attorney. Sometimes, the examinee has read the examiner's curriculum vitae or publications, reviewed media accounts of the evaluator's previous work, or viewed him or her on television or seen his or her forensic psychiatric home page on the World Wide Web. Any additional disclosures may well be excessive. Personal self-disclosures by the forensic psychiatrist may induce the examinee to reveal potentially self-incriminating information that he or she was not prepared to divulge.

The forensic psychiatrist should not presume any familiarity with the examinee. The deliberate use of empathy to manipulate the examinee or third-party informants with the goal of extracting information is unprofessional and unethical.<sup>15</sup> Forensic psychiatrists who have developed heightened empathic skills from their psychotherapeutic practices

must be particularly careful not to misuse this ability in the forensic setting.

**Establish a Clear Fee Policy** Arrangements for the payment of fees for the time spent in conducting a forensic evaluation need to be clearly established in advance, preferably in writing, with both the evaluatee and the retaining attorney or other client. A retainer agreement and fee clarifies the financial arrangements between the forensic psychiatrist and client, promoting the goal of striving for objectivity. The client, not the evaluatee, should be responsible to the forensic psychiatrist for all fees and expenses incurred by the evaluator during the case.

The forensic psychiatrist should not accept a contingency fee arrangement with an attorney or client, including an expert witness locator agency. The striving for objectivity and honesty is vitiated when the examiner's fee is dependent upon the successful outcome of a trial or administrative proceeding. According to the American Medical Association Opinions of the Council on Ethical and Judicial Affairs, contingency fees are unethical.<sup>30</sup> However, Section 8.10 of the Opinions states that a lien may be filed as a means of assuring payment in states that have lien laws, providing the fee is fixed in amount and not contingent upon the amount of the patient's settlement against a third party. However, a lien arrangement may become the equivalent of a contingency fee.

The forensic psychiatrist needs to give serious consideration to not undertaking an evaluation when insufficient funds or resources exist for the conduct of a competent consultation or examination. Nev-

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ertheless, if the forensic psychiatrist performs a *pro bono* examination, it must be done with the same quality and care as fully compensated examinations. Any limitations on the forensic psychiatrist's examination and opinions due to financial reasons must be stated openly. Neither justice nor the ethical principles of honesty and striving for objectivity are well served by an inadequate forensic examination, even if well intentioned. It is improper to submit a claim for payment for the forensic evaluation to a third-party payer such as an insurance company under the guise of a clinical evaluation.

***Provide a Suitable Examination Setting*** The forensic examination should be conducted in a private, reasonably comfortable setting that is free of interruptions and noisy distractions. Generally, and whenever feasible, the examinee should be seen in the examiner's office. In some cases, however, it may be preferable (e.g., evaluations of civil capacity and guardianship) to conduct the evaluation in the evaluatee's home. Adequate examining facilities may not be available in correctional facilities and other public institutions. Nevertheless, every effort should be made to secure the privacy and confidentiality of the interview itself when conducted outside the examiner's office, including obtaining a court order, if necessary. The presence during the examination of third parties should be approved by all parties to the litigation or administrative action.

The forensic psychiatrist needs to be aware of the skewing effect on the examination when third parties are present.<sup>31</sup> For example, the presence of the attorney

representing the examinee may impart an added adversarial tone and chill the examination, inflaming the examinee and making it more difficult for the forensic psychiatrist to develop the appropriate examination alliance with the examinee. Consequently, the examinee may appear more symptomatic than he or she might be otherwise. If the attorney must be present during the evaluation, the attorney should sit directly behind the evaluatee to minimize intrusiveness. On the other hand, the presence during the examination of the examinee's family members, the examinee's psychotherapist, or the examinee's forensic expert may provide added psychological support, causing the examinee to appear less symptomatic than he or she might be otherwise.

The Sixth Amendment provides that the criminal defendant must have the "assistance of counsel for his defense." A minority of states have analogized the pretrial forensic examination with various stages of the criminal process where the Sixth Amendment guarantee applies, such as at a postindictment lineup, probable cause hearing, and arraignment.<sup>32</sup> However, most courts have held that a criminal defendant does not have the right to have an attorney present during the forensic examination.<sup>33</sup> The Supreme Court in *Estelle v. Smith*<sup>34</sup> agreed with the majority position. The Court did require the state to inform the defendant's attorney about any examination that was planned. However, the Court cited with approval a lower court's opinion that the actual presence of an attorney during the forensic psychiatric examination "could contribute little and might seriously dis-

rupt the examination".<sup>35</sup> In litigation, some jurisdictions allow attorneys to be present during the forensic psychiatric examination in both civil and criminal cases, although the stipulation usually exists that they must not interfere with its conduct.<sup>36</sup> A compromise may be reached that permits audio- or videotaping of the examination. However, the examinee may attempt to manipulate the presence of recording devices to "build a case" rather than forthrightly submitting to the examination.

Arbitrary limits placed upon the conduct of the forensic examination by opposing counsel need to be resisted. The forensic psychiatrist must be able to perform a thorough examination.<sup>37</sup> Attorneys have attempted, sometimes armed with a court order, to prevent examiner's inquiry into such vital areas as the examinee's past psychiatric history or the nature of the alleged trauma and the examinee's psychological response. Whenever legal procedural or evidentiary issues substantially interfere with the performance of a thorough forensic psychiatric examination, the examination should not be attempted or, if done, the resulting limitations on the examiner's opinion need to be disclosed. Ground rules concerning an attorney's presence and activities during the forensic psychiatric examination should be firmly established and communicated before the examination begins.

***Define Time and Length of Examination*** The forensic evaluation must be scheduled well in advance, whenever possible, so as to provide the forensic psychiatrist sufficient time to adequately

review the materials in the case. The examinee should not be put through excessively long or fatiguing interviews without adequate justification. If possible, it is helpful to provide the examinee with some advance estimate of the time to be anticipated for the conduct of the forensic evaluation. Sometimes it is preferable to examine the litigant over the course of several days rather than attempt a marathon interview in one day.

Sufficient time must be provided to conduct a thorough examination to pursue all of the relevant forensic issues in the case. Insufficient time for the examination contravenes the forensic psychiatrist's ethical duty of honesty and striving for objectivity. If the evaluatee's counsel sets an artificial time limit or other constraint on the examination that does not permit the opportunity to perform an adequate forensic examination, the evaluator should contact the client to challenge that constraint with the responsible judge or administrative authority. It may, in fact, be necessary for the evaluator to refuse to conduct the examination at all, or if attempted, the consequent limitations on the examiner's opinion should be disclosed.

## Conclusion

These proposed guidelines for the conduct of forensic psychiatric examinations in legal or administrative proceedings are not meant to be proscriptive. The purpose of the guidelines is to facilitate the performance of competent forensic examinations and the examiners' striving for honesty and objectivity. This article presents an initial effort at establishing guidelines

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for forensic psychiatric examination. It is hoped that the proposed guidelines will stimulate further discussion and additional suggestions.

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