

TSBEP Newsletter

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Forensic Services and Related Rules Amended

Rule changes adopted at the October 30, 2008 Board meeting clarify the language and meaning of Board rules pertaining to forensic psychological services.

Previously, the rules did not reflect that a person who is the subject of forensic services is not a “patient” as that word is defined in the rules, and is not the recipient of mental health treatment.

The Board has now modified the definitions of “forensic psychology” and “patient” in Board rule 465.1 and by amending rule 465.18 pertaining to forensic services and rule 465.37 pertaining to compliance with all applicable laws. The complete text of the rules as amended is published in this newsletter and in the Texas Register.

465.1 Definitions

The definition of “forensic services” clarifies that the subject of forensic evaluation is not a patient and mental health treatment is not the purpose of a forensic evaluation. The definition further states that the purpose of forensic evaluation is to assist a court, an administrative body or an attorney in addressing a forensic referral question.

465.18 Forensic Services

The forensic services rule as amended requires licensees to document in writing that they have provided the subjects of forensic evaluations with certain information. Nine separate paragraphs describe the information that licensees are to provide, based on one lengthy paragraph in the previous version of the rule.

A new section was added to the rule with respect to forensic opinions regarding child visitation. The Board has received complaints in which a parent whose visitation is modified in a negative way raises issues regarding the substantiation of a forensic psychologist’s recommendation. The rule as amended requires that forensic opinions regarding visitation and parenting arrangements must be supported by forensic evaluations. The rule further contains a reminder that a treating psychologist may only offer opinion as to the progress of treatment and may not render an opinion about child visitation or parenting arrangements, unless required to do so by court order.

465.37 Compliance with all Applicable Laws

The amendment to rule 465.37 calls attention to a provision in the Texas Code of Criminal Procedure that defines how forensic psychological evaluation reports are to be distributed in cases relating to insanity defense.

Please Note:

- A licensee need not be engaged as a forensic evaluator to be a provider of forensic psychological services. Any licensee who learns that a patient is involved in a legal action is obliged to comply with the Board rules concerning forensic services.
- The best time to discuss confidentiality, access to records, and fees with a patient is before you receive a subpoena.

- Licensees who are engaged as therapists at a time when their patients are not engaged in litigation may find themselves drawn into court after psychological services commence. In these cases, as soon as the licensee becomes aware that patients are going to court, a review of the forensic services rule is in order. At such time, an update to the informed consent documentation is required.
- A licensee anticipating the prospect of being hailed into court must advise the patient as to the limits of the licensee's ability to testify, limits to confidentiality, fees the licensee must charge when asked to leave a practice for a day to attend a court hearing, and other information as required by the amended rule.
- Psychological opinions offered must be based on sufficient information and techniques to provide appropriate substantiation for each finding.
- The limitations described in Board rule 465.16(c) must be stated clearly in written reports and in verbal testimony.
- Licensees may not rely on cross-examination to bring out the limitations to any opinions offered in a court or administrative hearing.

465.1. Definitions. The following terms have the following meanings:

- (1) "Client" has the same meaning as "patient."
- (2) "Dual Relationship" means a situation where a licensee and another individual have both a professional relationship and a non-professional relationship. Dual relationships include, but are not limited to, personal friendships, business or financial interactions, mutual club or social group activities, family or marital ties, or sexual relationships.
- (3) "Forensic psychology" is the provision of psychological services involving a court of law or the legal system. The provision of forensic psychological services includes any and all preliminary and exploratory services, testing, assessments, evaluations, interviews, examinations, depositions, oral or written reports, live or recorded testimony, or any psychological service provided by a licensee concerning a current or potential legal case at the request of a party or potential party, an attorney for a party, or a court, or any other individual or entity, regardless of whether the licensee ultimately provides a report or testimony that is utilized in a legal proceeding. A person who is the subject of forensic evaluation is not considered to be a patient under these rules. "Forensic evaluation" is an evaluation conducted, not for the purpose of providing mental health treatment, but rather at the request of a court, an attorney, or an administrative body to assist in addressing a forensic referral question.
- (4) "Informed Consent" means the written documented consent of the patient, client and other recipients of psychological services only after the patient, client or other recipient has been made aware of the purpose and nature of the services to be provided, including but not limited to: the specific goals of the services; the procedures to be utilized to deliver the services; possible side effects of the services, if applicable; alternate choices to the services, if applicable; the possible duration of the services; the confidentiality of and relevant limits thereto; all financial policies, including the cost and methods of payment; and any provisions for cancellation of and payments for missed appointments; and right of access of the patient, client or other recipient to the records of the services.
- (5) "Licensee" means a licensed psychologist, provisionally licensed psychologist, licensed psychological associate, licensed specialist in school psychology, applicants to the Board, and any other individual whom the Board has the authority to discipline under these Rules.
- (6) "Multiple Relationship" means any relationship between a licensee and another individual involving a professional relationship and more than one non-professional relationship.
- (7) "Patient" means a person who consults or is interviewed by a licensee for a diagnosis, evaluation, or treatment of any mental or emotional condition or disorder of that person regardless of whether the patient or some other individual or entity paid for the consultation or interview except as identified in paragraph (3) of this section, where the subject of forensic evaluation is not considered to be a patient.
- (8) "Professional relationship" is any relationship between a licensee and another individual, group or organization in which the licensee delivers psychological services to the individual, group, or organization.
- (9) "Professional standards" are determined by the Board through its rules, regulations, policies and any other sources adopted by the Board.
- (10) "Provision of psychological services" means any use by a licensee of his or her education or training in psychology in the context of a professional relationship. Psychological services include, but are not limited to, therapy, diagnosis, testing, assessments, evaluation, treatment, counseling, supervision, consultation, providing forensic opinions, rendering a professional opinion, performing research, or teaching to an individual, group, or organization.
- (11) "Recognized member of the clergy," as used in Section 501.004(a)(4) of the Act, means a member in good standing of and accountable to a denomination, church, sect or religious organization legally recognized under the Internal Revenue Code, Section 501(c)(3).

(12) "Records" are any information, regardless of the format in which it is maintained, that can be used to document the delivery, progress or results of any psychological services including, but not limited to, data identifying a recipient of services, dates of services, types of services, informed consents, fees and fee schedules, assessments, treatment plans, consultations, session notes, test results, reports, release forms obtained from a client or patient or any other individual or entity, and records concerning a patient or client obtained by the licensee from other sources.

(13) "Report" includes any written or oral assessment, recommendation, psychological diagnostic or evaluative statement containing the professional judgment or opinion of a licensee.

(14) "Test data" refers to testing materials, test booklets, test forms, test protocols and answer sheets used in psychological testing to generate test results and test reports.

465.18. Forensic Services.

(a) In General.

(1) A licensee who provides services concerning a matter which the licensee knows or should know will be utilized in a legal proceeding, such as a child custody determination or a divorce, must comply with all applicable Board rules concerning forensic services regardless of whether the licensee is acting as a factual witness or an expert.

(2) Licensees who engage in forensic services must have demonstrated appropriate knowledge of and competence in all underlying areas of psychology about which they provide such services.

(3) All forensic opinions, reports, assessments, and recommendations rendered by a licensee must be based on information and techniques sufficient to provide appropriate substantiation for each finding.

(4) A licensee who provides forensic services must comply with all other applicable Board rules and state and federal law relating to the underlying areas of psychology relating to those services.

(b) Limitation on Services.

(1) A licensee who is asked to provide an opinion concerning an area or matter about which the licensee does not have the appropriate knowledge and competency to render a professional opinion shall decline to render that opinion.

(2) A licensee who is asked to provide an opinion concerning a specific matter for which the licensee lacks sufficient information to render a professional opinion shall decline to render that opinion unless the required information is provided.

(3) A licensee shall not render a written or oral opinion about the psychological characteristics of an individual without conducting an examination of the individual unless the opinion contains a statement that the licensee did not conduct an examination of the individual.

(4) A written or oral opinion about the psychological characteristics of an individual rendered by a licensee who did not conduct an examination of that individual must contain clarification of the extent to which this limits the reliability and validity of the opinion and the conclusions and recommendations of the licensee.

(5) When seeking or receiving court appointment for a forensic evaluation ~~assessment~~, a licensee specifically avoids accepting ~~both~~ appointment or engagement for both evaluation and therapeutic intervention for the same case. A licensee provides services in one but not both capacities in the same case.

(c) Describing the Nature of Services. A licensee must document in writing that subject(s) of forensic evaluations or their parents or legal representative have been informed of the following: Licensees who interview or examine an individual for purposes of providing forensic services must first inform the individual of the specific purpose of the interview or examination, the party on whose behalf they are performing the services, the use to which the information gathered will be put and who will have access to the results. If there are multiple parties, the psychologist must obtain written informed consent from all adult participants unless informed consent is precluded by court order. All participants must be made aware of the purpose and scope of the evaluation, who has requested the service, and who will be paying fees. Psychologists also inform parties on limits to confidentiality where the engagement involves testimony.

(1) The nature of the anticipated services (procedures);

(2) The specific purpose and scope of the evaluation;

- (3) The identity of the party who requested the psychologist's services;
 - (4) The identity of the party who will pay the psychologist's fees and if any portion of the fees is to be paid by the subject, the estimated amount of the fees;
 - (5) The type of information sought and the uses for information gathered;
 - (6) The people or entities who will have access to the psychological records;
 - (7) The approximate length of time required to produce any reports or written results;
 - (8) Applicable limits on confidentiality; and access to psychological records; and
 - (9) Whether the psychologist has been or may be engaged to provide testimony based on the report or written results of forensic psychological services in a legal proceeding.
- (d) Child Custody Evaluations.

(1) The primary consideration in a child custody evaluation is to assess the individual and family factors that affect the best psychological interests of the child, ~~who is the client~~. Other factors or specific factors may also be addressed given a specific forensic services engagement.

(2) Child custody evaluations generally involve an assessment of the adults' capacity for parenting, an assessment of the psychological functioning, developmental needs, and wishes of the child, and the functional ability of each parent to meet such needs. Other socioeconomic factors, family, collateral and community resources may also be taken into secondary consideration.

(3) The role of the psychologist in a child custody forensic engagement is one of a professional expert. The psychologist cannot function as an advocate and must retain impartiality and objectivity, regardless of whether retained by the court or a party to the divorce. The psychologist must not perform an evaluation where there has been a prior therapeutic relationship with the child or the child's immediate family members, unless required to do so by court order.

(4) The scope of the evaluation is determined by the psychologist based on the referral question(s). Licensees must comprehensively perform the evaluation based on the scope of the referral, but not exceed the scope of the referral.

(e) Child Visitation. Forensic opinions as to child visitation and parenting arrangements must be supported by forensic evaluations.

(1) Licensees may provide treatment or evaluation, but not both in the same case.

(2) A treating psychologist may express an opinion as to the progress of treatment, but shall refrain from rendering an opinion about child visitation or parenting arrangements, unless required to do so by court order.

465.37. Compliance with All Applicable Laws. Licensees

comply with all applicable state and federal laws affecting the practice of psychology including, but not limited to:

- (1) Texas Health and Safety Code, Chapter 611, Mental Health Record;
- (2) Texas Family Code
 - (A) Chapter 32, Consent to Medical, Dental, Psychological and Surgical Treatment,
 - (B) Chapter 153, Rights to Parents and Other Conservators to Consent to Treatment and Access to Child's Records, and
 - (C) Chapter 261, Duty to Report Child Abuse and Neglect;
- (3) Texas Human Resource Code, Chapter 48, Duty to Report Elder Abuse and Neglect;
- (4) Texas Civil Practice and Remedy Code, Chapter 81, Duty to Report Sexual Exploitation of a Patient by a Mental Health Services Provider; and

(5) Texas Insurance Code as it relates to submission of billing and third-party payments for mental health services provided by a licensee.

(6) Texas Code of Criminal Procedure Chapter 46B, Incompetency to Stand Trial, and Chapter 46C Insanity Defense, provisions relating to distribution of forensic psychological evaluation reports. ~~Articles 46B and 46C as they relate to the access and distribution of forensic evaluations.~~

**Disciplinary Actions:
October 2008 Board Meeting**

Thomas H. Brittain, Ph.D, Licensed Psychologist (Ore City)

Complaint: Respondent failed to maintain control of psychological records.

Sanction: Respondent was assessed an administrative penalty of \$1,500.00.

Daniel C. Corley, Ph.D., Licensed Psychologist (McKinney)

Complaint: Respondent was arrested and failed to report this legal action.

Sanction: Respondent was assessed an administrative penalty of \$450.00.

**Roman Garcia de Alba, Ph.D., Licensed Specialist in
School Psychology** (Brownsville)

Complaint: Respondent failed to properly identify himself as a supervisee and failed to identify his supervisor in public statements.

Sanction: Respondent was assessed an administrative penalty of \$1,500.00 and must obtain six (6) hours of continuing education in ethics.

Charles Gutierrez, Ph.D., Licensed Psychologist (San Antonio)

Complaint: Respondent practiced psychology at a time when his license was in delinquent status.

Sanction: Respondent's license was suspended with probation for six months and he was assessed an administrative penalty of \$3,000.00.

Richard M. Krusen, Ph.D., Licensed Psychologist (Temple)

Complaint: Respondent was arrested and failed to report this legal action.

Sanction: Respondent was assessed an administrative penalty of \$750.00.

**Roy Franklin Morgan, M.A., Licensed Psychological Associate and (Lawton OK)
Licensed Specialist in School Psychology**

Complaint: Respondent was arrested and failed to report this legal action.

Sanction: Respondent was assessed an administrative penalty of \$1,250.00.

Terry P. Overton, Ed.D., Licensed Specialist in School Psychology (McAllen)

Complaint: Respondent provided supervision to a person without adequate documentation, and did not ensure that the supervisee identified himself as such.

Sanction: Respondent was assessed an administrative penalty of \$1,500.00 and must obtain six (6) hours of continuing education in ethics.

Resignation in Lieu of Adjudication (Continuing Education Complaints)

- Jack E. Bentham, Ph.D. (Georgetown)