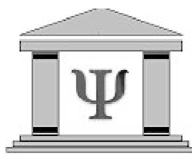

International Journal of Forensic Psychology
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Volume 1, No. 2 SEPTEMBER 2004 pp. 14-20

Ethical Considerations in Private Practice Psychology Forensic Work: An Australian Perspective

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Abstract

This paper is intended as a provocative discussion of ethics in psychology with particular reference to the medico-legal or forensic context. This last context is one in which in many countries the role of expert witness is well established or developing, and the adversarial nature of this context seen to generate some tensions. The provocativeness of the paper arises from the fact that the discussion is further particularized to the private practice of psychology in the medico-legal domain. It is intended to generate reflection on what are raised as fundamental tensions that emerge when a caring profession is placed into a different milieu where adversarial relations prevail and, in many cases, economic considerations predominate.

Keywords: Ethics; Forensic Psychology

ETHICS IN PHILOSOPHY AND PSYCHOLOGY

The interest of the professions in ethical matters has grown considerably in recent years as professional conduct has come under increasing scrutiny. Seldom, though, is this the type of enquiry that attends the philosopher's work in the domain of Ethics, even though, in fact, some significant professional philosophers have argued that their philosophical work (Russell 1951), philosophy in general (Passmore, 1985), and ethics in particular (Anderson, 1962), had little to say for practical life. Perhaps - although this is unlikely the reason - this is why Wheeler's (1998) survey of clinical psychology course providers in the United Kingdom found only two of twenty-three courses focussed on the philosophical basis of ethics. Yet, as Wheeler (1998) concludes, unless there is a grounding in philosophical ethics, "the practical ethical judgements and actions of psychologists are reduced to the status of blind 'conventionalism' or lucky guesses" (p. 28).

This is the theoretical ground or domain of our deliberations here and while we will move to more commonplace matters it is useful to keep it in mind.

The more commonplace matter under attention in this paper concerns assessments and reports for the legal process, done by psychologists, psychiatrists

A version of this paper was delivered as part of Symposium and Forum, *Psycho-legal Private Practice: 'Issues, Challenges and Solutions'* at Australia's 1st Forensic Psychology Conference, February 7-11, 2001, Wentworth Hotel, Sydney, Australia. +Address for correspondence: Associate Professor Bill Warren, Faculty of Education and Arts, School of Education, University of Newcastle, University Drive, Callaghan, NSW, 2308, Australia. Ph +61-02-4920-9926; Email: William.warren@newcastle.edu.au

and others in private practice. To precise this construal of the task a bit more, the question can be framed as: Does the medico-legal or psycho-legal context add any particular ethical hazards and does 'private practice' amplify these?

These questions are not answered here in any complete fashion, but a number of issues are raised that hopefully will provoke some critical thinking about them.

WHAT IS 'PRIVATE PRACTICE'?

While a distinction between private and public might appear at first sight to be straightforward, it is not quite so easy a distinction to make. We might think that if one is in receipt of a salary or wage, then that is *not* private practice, or that if one is an employee then one is *not* in private practice. Yet, in various contexts this thinking proves too narrow. In the field of labour law, for example, it is not at all straightforward as to who is an employee and who a so-called 'independent contractor'. One can draw the equivalent of salary and pay tax on it as a member of a professional partnership, yet not be, strictly, an employee. Indeed, for the purposes of taxation, the only income distinction made is between receipts which arise from the 'ordinary concepts and usages of mankind', and that which is conceptualised into existence by specific provisions of income tax assessment statutes.

As indicated, this matter crystallizes most clearly in labour law in the distinction between a private contractor and an employee, and in this area of law a number of principles have been enunciated. The chief principle is that of whether one has *control* over the work one does, regardless of what one is called, *employee* or *independent contractor*. However, control is itself not unequivocal. In a recent case in Australia before the NSW Industrial Relations Commission (IRC), for example, the principle of control was elaborated into considerations of such matters as the method of payment, the hours of work, the supply of tools and equipment, the possibility of the individual delegating tasks to others, the means of collecting taxation on the income (Leggett and Anor v Aardvark Security Services Pty Ltd 2000). Thus emerged a concept of 'authority to control', which was distinguished from 'actual control', and sufficient to lead to the conclusion that the individual was not an independent contractor despite having been retained as such and called such. This example may seem far away from our topic, but one of the points noted by the Commission was that the individual concerned did so much work for the company that contracted him, there was insufficient time to work for anyone else. This point may have significance for a medico or psycho-legal context in which a legal practitioner sends all of his or her work to one particular practitioner, a matter that has its own array of difficulties in the legal domain because of the significance of objectivity in opinions framed for the courts.

Receipt of money for services (employee) rather than receipt of money for a service (private practice) is sufficient a distinction for the present discussion, providing a working concept of 'private practice', with the caveat generated by the above IRC case.

ETHICS IN PRIVATE PRACTICE

The Codes

In relation to psychology, the Codes of Ethics or Conduct of the different professional Societies, such as the Australian Psychological Society (APS), the New Zealand Psychological Society (NZPS), and the American Psychological Association (APA), contain no specific provisions concerning private practice *per se*, but a number of clauses are likely to apply more clearly to that area. The British Psychological Society (BPS), in contrast to these other three, has made specific observations on the charging of fees directly to clients. As this paper is written from the Australian context, the matter is most effectively illustrated from the APS Code, but some reference to other countries is instructive.

The longest section of the APS Code, Section B, concerns relationships with clients and covers privacy and the communication of assessment data and consent (B1), non 'seeding' of private practice with clients entitled to your services in the public sector (B13), not actively soliciting those last clients (B16), not receiving or paying fees for referrals (B17), and appropriate modes of communicating about clients with other professionals (B21). Section H is specific to relationships with other professionals, including other psychologists, requiring that we not solicit another psychologist's clients (H3, H4), and refrain from intemperate criticism of colleagues (H5). The

General Principles also may have a special relevance for private practice psychologists; Principle I goes to responsibility for the reasonably foreseeable consequences of professional decisions and the ultimate responsibility to the highest standards of the profession. Principle II turns on skill and competence, including that we not work in areas beyond our competence. Further, Principle III places the welfare of clients, the public, and the profession above self-interest, which would include financial and material interest.

These observations made in relation to a domain with which the author is more familiar, the provisions of other Codes can be noted. The APA Code addresses the matter of conflict of interest in a fashion which relates to the present discussion in that such a conflict can be financial or arise from other, non-professional interests the psychologist might have, and this is to be avoided. Similarly, the situation when there are third party requests for a service is also covered and the requirement for clarification of such matters as limits to confidentiality, are laid down. Financial issue arises again in relation to the efforts needed to be made when termination of a therapeutic relationship is based on a client's financial circumstances. The NZPS Code also considers conflicts of interest and illustrates with the practical implication that psychologists will have regard to, amongst other things, their own financial interests. Again, under a value statement going to accountability, standards and ethical practice, a practical implication given is that in relation to entering into agreements or contracts psychologists will enter into only those contracts which allow them to act in accordance with the Code.

As noted, the BPS has addressed the topic of private practice more directly, and in a Guideline from their Professional Affairs Board, which is appended to their Code, indicates: "The Society adopts a neutral position on the quasi-political issue of the desirability or otherwise of members working in private practice and thus charging clients directly for the psychological services provided". The Guideline goes on to note that the BPS cannot by law give advice on the level of fees to be charged, but also, that in the face of complaints concerning overcharging or clients having been charged for reports they did not need, there was a significant responsibility to be clear about fees from the outset.

In terms of registration of psychologists, the registration Acts in those countries or states which have registration generally frame these matters in terms of *professional misconduct*, which notion may flow from that of *unsatisfactory professional conduct*. In turn, notions of misconduct and unsatisfactory professional conduct will be judged significantly in terms of Code provisions. There is by now also in place a significant body of material in determinations of Tribunals and Ethics Committees, as well as case law growing out of the more formal court process, that is available to guide these judgements. Case law involving other professions will also be relevant, such as Solicitors, Nurses and Medical Practitioners. It was in the context of the practice of medicine that a significant relevant principle was enunciated. That is, whether one's conduct was reprehensible in the eyes of colleagues of good standing and repute in one's own profession?

Elaborating the Codes

In relation to specifics, there are a number of obvious matters which raise ethical concerns. These can be seen as lying on a scale of collegial disapprobation (as focussed on in legal cases), and on a scale of intentionality (which goes also to a notion of *impairment*). For example:

- The writing of assessment reports to suit the client - either 'actual' client or legal practitioner client.
- The altering of a report on request of a client or his or her legal representative because it does not quite suit or fit a claim.
- Accepting a person for therapy, after one has performed an assessment and written a report on that person; particularly, perhaps, when there is a recommendation for therapy in the report (and more-so when the author of the report specifically highlights his or her own special competencies for providing such therapy which may itself also be offensive to particular Codes).
- 'Seeding' one's private practice from insured patients first encountered in the public system.
- Criticizing a professional colleague of the same 'tribe', or of a different tribe, in a forensic report.

The first of these examples is serious and offends most Codes, certainly the first Principle of the APS Code, that is, of having ultimate regard for the highest standards of the profession. The last example is perhaps less serious and part of the 'rough and tumble' of professional practice.

Nonetheless, the so called 'hired gun' of the forensic arena, someone who lampoons colleagues and other professionals for their assessments likely becomes a figure of fun in that arena and is soon discredited in it. As Perlin (2003) notes, among other factors that will likely influence a judge or jury is whether a psychologist works only for >one side= or splits their time= between prosecution and defence, plaintiff and defendant.

While it is a salutary lesson even to merely state these things, it is useful and hopefully more challenging to get past these last matters to three more general matters. These are no doubt related to these more obvious matters, and they affect all of us not only the so-called 'bad apples' (Gabbard, 1997). As Gabbard has pointed out, at least in relation to breaches of boundaries, no one is immune and possibly the older, more experienced practitioner more likely to transgress than is the neophyte!

THREE ETHICALLY RICHER MATTERS

Who is the Client and Why Does it Matter?

When recruited by a legal practitioner to provide an assessment and report, here primarily in relation to a civil matter, the health practitioner becomes part of an adversarial system, and in the capacity of a so called 'expert witness' whose opinion is accepted on a matter as an exception to the old rule of evidence barring 'hearsay'; though this is now significantly affected in Australia, for example, by the new federal *Evidence Act*. The practitioner lines up on the side of one or other of the parties, even though his or her primary duty is to the court.

The Codes of Ethics to which most Psychologists are bound construe 'client' quite broadly. The Australian Psychological Society (APS) Code recognizes 'multiple clients' and indicates that it might subsume an individual being assessed, parents, students, research participants, supervisees, referral agencies. The NSW Psychologists Registration Board issued a Code which is less specific, but clearly covers those who seek assistance with problems or difficulties ('patients' or 'clients'), students, supervisees, and research participants.

The medico-legal context imports a special problem here. It is an individual's legal representative who commissions an assessment and report for the court, who sets out the questions requiring answer, is the person to whom the report is addressed - a report marked 'confidential' when the individual concerned may never himself or herself see it (or understand it). The legal representative is the client and herein lies potential for significant ethical hazards in a profession like psychology centered on a notion of *care*.

An interesting analogy here, one that takes us not too far from the forensic context and which is most illustrative of the problem, is with the growing field of Employee Assistance Programs (EAPs) where a concept has been introduced that highlights at least part of the problem. Kutek, (1999) has referred to the "triangulation of therapy" and in his discussion of Kutek's ideas Arthur (2001) observes:

> The effects of triangulation on treatment, Kutek notes, result ‘in a corporatized mental health delivery system’ that favours ‘a technology of service delivery geared towards the quick adjustment of individuals and families to the demands of daily life’, conflicts with 'the aims of psychotherapy, which promote well-being, empowerment and human potential', and encroaches on the time allowed for therapy, ‘a rationalization of time itself under conditions of capitalism’. (p. 8).

Arthur (2001), still following Kutek (1999), goes on to implicate corporatization and triangulation in the alienation and deskilling of practitioners. This is illustrated in the control exercised by non-clinicians, and in their focus on symptom-oriented and goal-oriented therapy which issues in 'treatment packages' that are bought as a 'service'. Interestingly, Arthur (2001) challenges clinical psychologists, in particular, to take a more interventionist approach within the EPA field; if organizational practices and work organization are the root cause of the individual's problem, then agitation of Management to effect changes becomes ethically demanded.

When a Psychologist works under an employee assistance program, or as a provider for such organizations as a Department of Veterans Affairs, Vietnam Veterans Counseling Service, or State Victim Compensation Tribunal, a third party relationship comes into play. This raises new ethical issues concerning trust, privacy, confidentiality, and the reasonably foreseeable

consequences of our actions. Forensic assessment introduces a similar blurring.

Diagnosis

In relation to diagnosis of, there is a more fundamental matter aside from the now hopefully resolved matter of who is competent to make a formal diagnosis in terms of systems of classification such as DSM-IV and ICD-10. This is the issue of diagnosis *per se*, and the ethical, as well as scientific, philosophical and ideological questions diagnosis raises.

From the beginning, psychologists have been skeptical concerning diagnosis. One of the early critics was the originator of personal construct psychology, George Kelly (1955/1991; 1965). Kelly (1965b/1979) devoted a specific discussion to classification in psychology considering it an obstacle to theory development, that is, to enlarging our *understanding*. He noted that it was too easily overlooked how what we 'impose' when we classify so easily comes to be seen as what we 'find' in the phenomena of we investigate. Thus do we impose restraints in terms of diagnostic categories, restraints that are extremely difficult to overcome; "dogmatism, the moat that surrounds all bastions of classical ignorance, is characteristically categorical in its logical form" (1965/1979: 295). Twenty years later, Eysenck, Wakefield, and Friedman (1983) were arguing vigorously that the DSM-III was based on such insecure foundations, and was so lacking in both scientific support and well-established facts that psychologists who were forced to use it should not let the social pressure behind that force blind them to its fundamental weakness. Pertinent to our focus, they concluded also that the DSM-III included many behaviours which had little or no medical relevance and belonged properly within the province of the psychologists rather than psychiatrists; such issues as gambling, malingering, antisocial behaviour, academic and occupational problems and "the curious 'substance use disorders', which apparently would bring almost any kind of behaviour within the compass of psychiatry" (p. 189). While the editors of DSM-IV expressly acknowledge its character as a ‘best effort’ rather than a final document, and it does go some way to meet the foregoing criticisms, the conceptual issue of diagnosis remains however.

These are earlier examples of a contemporary debate, one that finds psychologists in the UK adamant that *formulation* should replace *diagnosis*. Pilgrim (2000) argues a very cogent case against diagnosis, one that those of us trained in psychology will easily recognize and one that he puts so forcefully that the journal carrying his paper felt moved to ask the Professional Affairs Board of the British Psychological Society to make a statement in reply. That statement acknowledged the significance of dimensional, against classifactory, models of human functioning, but accepted that as the discourse of the law requires classification in tersm of a diagnosis, then a pragmatic approach is called for and "as psychologists are able to recognise, understand and when appropriate use discourses other than their own" (p. 305), they can do so.

Thus the question: Is it unethical to use, or to blindly use *diagnosis* when Psychology suggests strongly that we ought be far more circumspect about such an exercise and opt rather for a *formulation* of a plaintiff's or of a victim's functioning following some tortious or criminal act?

Money

> “They that will be rich fall into temptation and a snare, and into many foolish and hurtful lusts... For the love of money is the root of all evil.” (*I Timothy, 6: 9-10*).

In a significant challenge to the these practices, Howard (1996) argues that counselling and psychotherapy are different from any other form of service provision. This is because of the peculiarity of the offer of *care* made by counsellors and psychotherapists. But therein lies a fundamental contradiction that goes so centrally to the activity of counselling and psychotherapy as such. For Howard, these last fields perpetrate a tragic hoax because care is offered in a context saturated with commercialism and consumerism. What is promised is care, but *up to a point* and for *money*; which transaction perverts the relationship in its very core. Thereby, fundamentally unethical conduct on the part of the therapist may be being expressed in the very act of counselling and psychotherapy.

The practice of counselling and psychotherapy is *inherently* ethically rich, but, at the same time if Howard is correct, inherently unethical in practice:

> When, via taxation, insurance, or directly, we pay others to listen to us and to support us [to assess us to our advantage], we change the nature of our relationship. We are not just two human beings trying to make sense of the world [post injury]. We are purchasers and provider, client and professional, consumer and salesperson (Howard, 1996, p. 23; my additions in parentheses).

If there are such problems for those of us who, albeit for money, are merely trying to help, then what greater problems when the very landscape on which we operate is based on, and in, economic imperatives? To be sure, recent developments such as therapeutic jurisprudence and ecological legal theory, may provide a valuable corrective, albeit they impact more in the criminal domain (and, in any case, have their own controversies and dilemmas to resolve).

DIRECTIONS FOR MINIMISING THE ETHICAL DIFFICULTIES?

In England and Wales developments going back a number of years have seen changes in the legal landscape that impact on expert witness testimony and which, while they may have had efficiency and lowered cost as their chief motive, go some way to minimizing ethical pitfalls. There is a Society of Expert Witnesses in the UK which holds annual conferences and the growth in popularity of alternative dispute resolution may see specialist accreditation providing another level of vetting. Such conferences serve a consciousness-raising function for good practice in both senses of that expression; that is, *effective*, and *ethically good*.

Similar changes occurred in NSW, Australia, effective March, 2000 and a Code of Conduct for expert witnesses was framed under the Supreme Court Rules. This outlines the nature of the task of the expert witness, the general duty of the expert to the Court, and the format of reports, and it provides for communication between experts and the construction of a joint report in some situations.

Equally, the NSW Victims Compensation tribunal and the NSW Motor Accidents Authority have moved in the same direction of establishing panels of approved assessors who, amongst other things, have had their 'character checked' and rechecked annually, and their commitment to ongoing professional development appraised. In turn, the quality control processes of these bodies allow monitoring of approved assessors, and on both competence and ethical (or at least *character*) dimensions. It is likely that similar provisions exist in other countries.

A number of specific suggestions arise from these developments and appear in the literature from time to time. For example: appointment direct by Court or Tribunal and reports to Court or Tribunal?; panels of accredited experts?; experts sitting with judges in technical matters?; more vigorous ethics education - either (or both) *pragmatic* and/or *philosophical?*

While these developments may take out some of the dangers, not everyone would agree with the procedure of just one expert writing a report for 'both sides', as proposed out of the new procedures in England and Wales. Powell (2000), for example, suggests that "adversarial debate sharpens thinking on very difficult issues" (p. 31). Yet, this being so, what ethical issues does such an adversarial context raise for individual practitioners, especially where legal practitioners themselves may have a higher duty to the court and to the law than to their clients?

BY WAY OF CONCLUSION

Both private practice in psychology, and legal practice and the legal process itself (for example, monetary penalties), are centrally concerned with *money*; either as a simple matter of fact, or as a common observation that certain clients can afford better legal assistance, or can afford fuller psychological assessments and reports. Money imports all of the imperatives of capitalist society. Those imperatives are arguably inimical to good professional practice in the helping professions. Medico-legal or psycho-legal work attracts the pressures that those imperatives impose. Moves to have professionals 'work for' the courts directly, as in the example of the NSW Victims Compensation Tribunal, or the recent changes in England and Wales, may alleviate some of these problems. However, they will unlikely remove the problems altogether, especially while legal practitioners can nominate particular assessors or expert witnesses.

To be sure, it can be argued that the three matters raised above are as much theoretical as ethical ones. However, they are clearly construable as ethical ones, and ethical issues one-removed from the more commonplace level where we ought be much

clearer. That is, the commonplace level at which we 'just know' that we should not do certain things. That is, we should not write reports that are partisan and favor a particular person's case, that we should not collude with legal practitioners to produce reports that suit their needs, that we should not change a report other than by an addendum or supplementary report that makes reference to a previous report, should not proceed to assessment and report without an individual's written consent, and so on. But, the commercial context and the legal context in which questionable categorical discourse is favored, may give rise to deeper ethical issues for those of us trained under a notion of 'the scientist-practitioner', or, even the 'practitioner-scientist' (Warren, 2002), and generate far richer ethical pitfalls. That context is all embracing and cannot be ignored, and a succinct conclusion from Howard (1996) provides an appropriate conclusion to the present discussion:

> Capitalist consumerism reigns supreme at present. It is part of the air we breathe, so its smell and pressure is difficult to detect. It permeates everything we do, feel, believe, and hope for. It constructs and constrains almost every form of counselling and psychotherapy. It has changed counsellors and therapists far more than they realize and far more than counselling has managed to change consumerism (p. 169).

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