The BULLETIN
THE • ONTARIO • BOARD • OF • EXAMINERS • IN • PSYCHOLOGY

SPECIALTY DESIGNATION:
Request from Working Party for Preliminary Input

Status of Specialty Designation under RHPA and Memorandum of Agreement: Under RHPA, the College of Psychologists is charged with developing, establishing and maintaining standards of qualification, practice, ethics and continuing competence for members of the profession, and is able to designate specialties under which Psychologists and Psychological Associates may practice. In addition, the College is bound by a Memorandum of Agreement, signed jointly by OBEP, OPA and the Ontario Association of Consultants, Counsellors, Psychometrists and Psychotherapists (OACCPP), which states that

> "…. persons entering regulation with either doctoral level or master's level preparation shall have the right to attempt the prescribed specialty designation examinations and testing procedures when they are established."

Terms of Reference of the Working Party on Specialty Designation: Under these general directions, a Working Party on Specialty Designation has been formed by the Transitional Council of the College and charged with examining various models and criteria for specialty designation, along with various means of assessing and evaluating competence, credentials and experience, with a goal of exploring all possible processes by which specialty designation can be accomplished. The Working Party will make a preliminary report to the Transitional Council in the late Fall. This report will be widely circulated within the profession in the form of a discussion paper for comment and suggestion as part of a broad consultation process. The task of selecting a model for eventual implementation will be left to the elected Council of the College, which will take office following proclamation of RHPA, sometime in 1993.

Membership of the Working Party: Maggie Mamen (Chair), Harvey Brooker, Anne Caron, Henry Edwards, Gary Snow and Bea Wickett. Patrick Wesley (Registrar) provides staff support.

General Background: In 1984 the Canadian Psychological Association, in collaboration with the Council of Provincial Associations of Psychologists, formed a task force to investigate specialty designation. In December 1989, this task force produced a comprehensive and valuable report which provides a basis for discussion within the current Working Party. In addition, information is being gathered from a wide range of organizations, both within and outside the profession of psychology.

Basic Criteria for Specialty Designation Models: While the mandate of the Working Party is to present a broad picture of the various models, processes and structures that could be possible routes to specialty designation, it has already become obvious that there are a few general "rules of thumb" to be followed.

1. Protection of the public must at all times remain the prime objective in the regulatory function of the College. Thus, designation of specialties must be useful and meaningful for the public. It is critical that both members of the profession and the public understand the difference between restricted area of competence (as in *"practice limited to ...."*) or proficiency (as in *"qualified to practise in the area of ...."*), both of which will be dealt with through the registration process, and specialty - to be earned by professionals in the pursuit of recognition of advanced expertise in a specific area.
2. Specialty designation should thus be **recognition of advanced expertise**, as opposed to a minimal competence level already in place in terms of registration. It is thus an earned designation, involving additional credentials, competence and experience well beyond the level required for initial admission to the profession.
3. Specialty designation should be **voluntary and non-exclusionary**. In other words, those professionals who choose not to pursue specialty designation would not be precluded from practising in the area covered by a particular specialty. For example, persons who had not achieved specialty designation in clinical psychology would be able to practice in the general area, but would not be able to hold themselves out as a "specialist" in that area.
4. As discussed previously, regardless of the model or approach finally adopted, Psychological Associates must not be barred from attempting to earn specialty designation.
5. There will need to be an **infrastructure in place to ensure accessibility to courses and training programs** to allow members of the College to upgrade their knowledge, competence and skills. This will require close liaison with universities and training programs, not only to facilitate the recognition by the College of any advanced qualifications presented for assessment in the specialty designation process, but

also to encourage universities and internship facilities to provide training opportunities.

6. The costs of setting up procedures for the evaluation of credentials and competence are potentially very great. There is thus an issue of whether to adopt an existing procedure or adaptation thereof (e.g., the diplomate process of the American Board of Professional Psychology) or whether to establish a new system involving a consortium of provincial and/or state organisations, or a national body.

Request for Preliminary Comments and Suggestions: There are a number of complex issues to be incorporated in even an initial draft of a report to the profession. At this stage, the Working Party is soliciting comments on any of the issues outlined above - or on any other aspects of specialty designation that registrants or potential registrants feel need to be considered and that will help the working party in its drafting.

Bearing in mind the terms of reference of the Working Party, the following questions could form the basis for comments:

(a) Are you aware of any particular models of specialty designation that might be considered to be particularly appropriate in meeting the criteria as set out above?
(b) What criteria do you feel could be used in order to delineate specialties? What areas of practice do you feel could be designated?
(c) What issues need to be taken into account as part of the specialty designation process in terms of the criteria for assessing competence, credentials and experience?
(d) Do you have suggestions or general comments regarding accessibility to continuing education courses, training programs, and/or other means of professional upgrading to enable members to acquire the knowledge and expertise required for becoming a specialist?
(e) Are there other issues not mentioned here that you think should be considered by the Working Party?

In view of the work schedule laid out by the Working Party, please send comments in writing by September 11th, 1992, to:

Dr. Maggie Mamen
Chair, Working Party on Specialty Designation
301 - 39 Robertson Road
NEPEAN, Ontario, K2H 8R2

For further information, please call Dr. Mamen (613) 726-0218 or Dr. Wesley (416) 961-8817. ■

ETHICAL ISSUES IN MEDICOLEGAL PRACTICE

Michèle S. Macartney-Filgate, Ph.D., (C.Psych.)

This article is based on a presentation given by the author at the first annual Barbara Wand Symposium on Professional Practice, February 26, 1992. It is published for the interest of registrants. The views expressed are those of the author, and do not necessarily represent official Board positions on these matters.

Providing services to patients who have sustained traumatic physical injuries requires a high level of clinical expertise, a readiness to have work scrutinized by other professionals, and ongoing critical attention to ethical issues. Failure to maintain high standards in this area of practice not only may not be in the best psychological interests of the patient, but also may result in significant legal and economic losses to the patient.

Many of the ethical problems encountered in medicolegal cases arise because of conflicts or differences between our standards of practice and those of other professions that may be involved, such as lawyers, insurance claims representatives, rehabilitation consultants, and physicians. When psychologists are retained by lawyers, there may be pressure to operate according to the norms of the legal profession rather than our own, and to advocate for a particular point of view. A basic but perhaps too easily forgotten point is that the psychologist's responsibility is to provide an independent, objective opinion, not to join the adversarial system. Misunderstandings and confusion may occur because of differing definitions of who is the client. For the lawyer, the client is typically the person or organization retaining them, for example the insurer. Psychologists, on the other hand, differentiate between the client (the direct recipient of services) and the user, who may be the same as the client, or may be a third party purchaser of the services (such as the insurer).

In some cases the psychologist is asked to review documents or clinical records, for example to specifically assist in developing a line of defence or cross examination, and never has direct contact with the injured person. In this situation, the lawyer, or the party for whom the lawyer acts (the insurer), would be defined as both the client and the user. A clear understanding of the difference between client and user is important in such issues as consent to release information.

The insurer or defense lawyer could properly request release of a report of an expert opinion, based only on records, a situation in which they would be the client: in contrast, it would be unethical to release the results of an actual defence assessment without permission of the patient (client), the direct recipient of the service. In plaintiff cases the interests of the patient (client) typically coincide with those of the lawyer. It is defence cases, where the patient (client) and user (insurer or defence lawyer) may have quite different interests and goals, that hold the greatest

Continued on page 15

BOARD NOTICES

THE • ONTARIO • BOARD • OF • EXAMINERS • IN • PSYCHOLOGY

DISCIPLINARY HEARING I

A hearing of a Discipline Tribunal of The Ontario Board of Examiners in Psychology convened on December 13, and 14, 1990 and January 10 and 23, 1991 to hear allegations against Dr. Allan Goebel, a registered psychologist.

The Allegations. It was alleged that Dr. Goebel was guilty of professional misconduct under the Psychologists Registration Act, in that he failed to maintain the standards of practice of the profession in connection with the service he provided to Mr. A, and his children B, C and D.

The Particulars. In particular it was alleged that:

1. Dr. Goebel saw the A children without the consent of Mrs. A who was the custodial parent.
2. He failed to identify himself to the children as a psychologist.
3. He refused to provide information concerning his sessions with the children when properly requested to do so by Mrs. A's lawyer, Mr. F.
4. In his report of October 17, 1989 he drew conclusions about Mr. A's relationship with the children that were based on an inadequate assessment of the situation given:
   (i) that he knew or ought to have known that the assessment and report would be used with respect to a hearing disputing custody of the children;
   (ii) the fact that allegations had been made that Mr. A had been physically abusive towards the children.

The Plea. Dr. Goebel's lawyer, on behalf of Dr. Goebel, entered a plea of not guilty to all charges.

The Decision. The Tribunal found Dr. Goebel guilty of professional misconduct, under the Psychologists Registration Act, R.S.O. 1980, in that he failed to maintain the standards of practice of the profession in connection with the service he provided to Mr. A and his children. The Tribunal found Dr. Goebel guilty on all counts specified as set forth in the Notice of Hearing.

Standard of Proof. The Tribunal based its decision on:

1. the Agreed Statement of Facts signed by Dr. Goebel and by counsel for the Board on behalf of the Ontario Board of Examiners in Psychology;
2. the evidence presented by witnesses at the Hearing;
3. the documents listed below;

   PROFESSIONAL GUIDELINES & STANDARDS: Standards of Professional Conduct (Rev. December 1986); Standards for Providers of Psychological Services (1977); Ethical Standards of Psychologists (1977); Custody/Access Assessment Guidelines: Report of The Interdisciplinary Committee for Custody/Access Assessments (1988);
   STATUTORY MATERIALS: Psychologists Registration Act, Regulation 825; Children's Law Reform Act, Sections 19 and 20;
   PUBLICATIONS: The April, 1988, December, 1988, July, 1989 and July, 1990, issues of the BULLETIN of the Ontario Board of Examiners in Psychology;
4. the case law cited by counsel for the Board and counsel for Dr. Goebel in their arguments.

The Evidence. Evidence was presented to the Tribunal that Dr. Goebel was asked in early September 1989 by a colleague to assess Mr. A's relationship with his three children. B (aged 6), C (aged 5) and D (aged 2). The request originated from Mr. A's lawyer. At the time Mr. and Mrs. A had been separated since June, 1989.

There had been an earlier Family Court decision in relation to custody and access. At the time of Dr. Goebel's interaction with Mr. A and his children there had been no final determination of custody although interim custody had been awarded to Mrs. A. There was, therefore, further litigation to be heard in relation to custody and access. In the Agreed Statement of Facts presented to the Tribunal, Dr. Goebel acknowledged that he was aware that further litigation was pending, although at the Hearing he indicated that he had not discussed custody and access with Mr. A and had assumed the issue was settled.

According to the terms of the separation agreement between Mr. and Mrs. A, Mr. A had access to his children every second weekend. Because Dr. Goebel's colleague was unavailable on weekends he requested Dr. Goebel to do the assessment of the relationship between Mr. A and his children. This colleague indicated to the Tribunal that he had himself proposed to do an individual assessment of Mr. A personally. This assessment was never completed. According to his further testimony, at the time that Mr. A's lawyer contacted him on the telephone, mention was made of some allegations of physical abuse (in the form of excessive discipline) by Mr. A in connection with one child of the marriage.

Dr. Goebel met twice with Mr. A and the children to observe them in an informal setting. He also interviewed the two older children in his office on October 14, 1989. Three days later he prepared a report of his findings in the form of a letter to Mr. A's lawyer. On October 19, 1989, Dr. Goebel

received a call from Mr. F, Mrs. A's lawyer, which was followed up by a letter on October 23, and by a second letter on November 9. These letters requested that Dr. Goebel provide immediately his report and any test data relating to the children to Mr. F. Dr. Goebel was also advised not to have any further contact with the A children without consent from Mrs. A. The letters also indicated that the children were being assessed by another psychologist for the purpose of treatment to ease their anxieties about the separation. Dr. Goebel indicated that he had wished to release the report but that he required Mr. A's consent to do so. On his lawyer's advice, Mr. A. withheld his consent. Dr. Goebel replied on November 17, 1989, and gave the reasons for not complying with Mr. F's request.

Further correspondence to Dr. Goebel on November 21 from Mr. F reiterated his request for Dr. Goebel's report and also indicated that Mrs. A was initiating a complaint about Dr. Goebel's behaviour to the OBEP. In the meantime Mrs. A launched further proceedings against her husband who responded with a cross-motion. As a part of the cross-motion, which was for greater access privileges for Mr. A, Mr A's lawyer provided a copy of Dr. Goebel's report. An additional letter of December 28 indicated that Mrs. A was prepared to meet with Dr. Goebel to discuss his findings. The letter also informed Dr. Goebel that a complaint had been laid with OBEP. Each of the charges in the Notice of Hearing is considered separately below.

Reasons for the Decision

Allegation 1:

The issue of Dr. Goebel's failure to obtain the consent of the custodial parent is addressed in the Standards of Professional Conduct (rev. 1986) Principle 5.5, and in the Children's Law Reform Act (1982), Section 20. The Tribunal heard evidence that Dr. Goebel had interacted with the A children and had made some recommendations in respect to them. On the basis of this evidence and the additional evidence of Dr. Goebel's conduct vis a vis the children, referred to later in this decision, the Tribunal concluded that Dr. Goebel had offered psychological services to the A children, not just to Mr. A. Since Mr. A was not the custodial parent, it was incumbent on him to obtain the consent of the custodial parent, Mrs. A. The consent of the custodial parent was essential regardless of the reasons that had been given for the assessment.

Dr. E, an expert witness called by counsel for the Board noted that the Assumptions laid out under section B (pages 1 and 2) of the Custody/Access Guidelines were relevant. He observed that Dr. Goebel had provided comment on the behaviour of one child but his comments would only be helpful if the information was shared with both parents. Dr. E stated that the effectiveness of a psychological assessment is limited if advice is offered based on information from one parent only and if recommendations and advice are offered only to one parent. He noted also that Dr. Goebel's assessment could never have been considered a confidential assessment if abuse allegations were being investigated.

Dr. Goebel's counsel advanced the argument that because Dr. Goebel's assessment was not a custody and access assessment, there was no obligation on his part to obtain the consent of the custodial parent.

The Tribunal found that Dr. Goebel should have been aware that though his report was not intended as a custody and access assessment it might be used for custody and access purposes by parents involved in litigation; the Custody/Access Guidelines therefore apply. In any event, the Tribunal found that the purposes which the assessment was to serve were irrelevant to the issues of consent. The permission of the custodial parent is essential in all circumstances in which psychological services are provided to the children and the Tribunal found that Dr. Goebel should have been aware of this necessity.

Allegation 2:

Section 1(y) of Regulation 825 of the Psychologists Registration Act states:

> Professional misconduct means ..... failure to identify himself or herself as a psychologist in the course of employment or when providing a psychological service.

Evidence was introduced that Mr. A had presented Dr. Goebel to his children as "a friend". This introduction took place in the context of an observational assessment of Mr. A with his children at Mr. A's sister's home (where Mr. A was living at the time), on September 30, 1989. A second observation took place the following day on the street outside when the children were playing. Dr. Goebel did not correct Mr. A when he was introduced as "a friend". Dr. Goebel indicated in evidence that he had previously identified himself to Mr. A as a psychologist and that he considered Mr. A, not the children, to be his client. In addition to viewing the interaction of the children with their father on these two occasions, Dr. Goebel also interviewed individually the two older children in his office on October 14, 1989.

Further, in his letter to Mr. A's lawyer, Dr. Goebel stated that he found B, the eldest son, to be "withdrawing" and commented that he appeared "to be having the hardest time of the three being apart from his father". Dr. Goebel also gave advice in his letter about the manner in which the negative relationship between the parents was adversely affecting the children's well-being.

Argument was offered by counsel for the Board and counsel for Dr. Goebel about who in fact was the client. As discussed above, the Tribunal accepted arguments made by counsel for the Board that Dr. Goebel provided psychological services to both Mr. A and to the children and therefore needed to identify himself correctly to all four parties.

Although the Tribunal found that the term "psychologist" might not be meaningful to very young children without further explana-

tion, it also found that it was misleading and improper of Dr. Goebel to have accepted, without correction, Mr. A's definition of his role as "a friend" when his relationship with the children was in fact a professional one. The Tribunal suggested that psychologists when providing service to children of a young age should use a self description such as : "I am a psychologist - that is the name for a special kind of doctor - not a medical doctor - a doctor who talks about worries".

Allegation 3:

The Tribunal found that Dr. Goebel had an obligation to provide a copy of his report to either Mrs. A or to her legal counsel under the Children's Law Reform Act Section 20 which identifies the rights of the custodial parent, and under the Standards of Professional Conduct (rev. 1986) Principle 5.5 which states:

> To the extent advisable and not contraindicated, a psychologist shall properly inform a person who has undergone a psychological assessment or his/her legal representative of the conclusions, opinions and advice issuing from the assessment within a reasonable time.

As already stated under the reasons for the findings on Charge 1, the Tribunal found on the evidence that Dr. Goebel, in assessing the relationship between Mr. A and his children was in fact assessing all four parties. Mrs A was the custodial parent of the children for consent purposes. She was also the legal representative as cited above.

Dr. E noted that Mrs. A should have been considered by Dr. Goebel to be his "eventual client" and thus entitled to receive a copy of his report. Dr. Goebel stated in evidence that he had always expected that Mrs. A would have a copy of his report, and otherwise he would not have commented on his concern in regard to B or given advice about the nature of future parental interaction. However, in Dr. Goebel's view, because it was not a custody and access assessment he believed he had no obligation to interact with the custodial parent although he still had an obligation to provide both parents with a report of his assessment. Dr. Goebel indicated that he was unaware of on-going litigation when he assessed Mr. A and his children. He knew that Mrs. A had custody and Mr. A had access. He did not enquire further as to whether that was by an interim agreement or a permanent agreement.

Dr. Goebel indicated in his testimony that he had tried to persuade Mr. A's lawyer to release the material after he had received Mr. F's letter of October 23, 1989. When asked in cross examination why he did not mail a copy of his report to Mrs. A he stated he had not been able to obtain his client's consent to do so. After Dr. Goebel's receipt of Mr. F's letter of October 23, Mr. A continued to defer to the opinion of his lawyer who continued to claim client-solicitor confidentiality in the matter of release of the report. The Tribunal found that Dr. Goebel sincerely tried to persuade Mr. A's lawyer to release the material to Mrs. A or her lawyer.

The Tribunal was advised that a Court Order was eventually obtained to have an assessment that had been done by other psychologists and the assessment by Dr. Goebel delivered to the Court. On the basis of these assessments it was agreed that a third assessment would take place involving both parties as well as the children.

The Tribunal agreed with submissions made by counsel for the Board that Dr. Goebel was caught on the horns of a dilemma. He had become aware that he had behaved improperly in assessing Mr. A's relationship with his children without the consent of the custodial parent but when he tried to release his report to Mr. F a legal barrier was placed in his path by Mr. A's lawyer. The Tribunal noted that Dr. Goebel saw himself as helpless in this situation and did not personally take any initiative to provide his report to Mrs. A or to her lawyer. The Tribunal found him to have acted improperly in not independently providing the custodial parent with the results of his assessment.

Client-solicitor confidentiality is not applicable in this situation because Mrs. A was the custodial parent and as such had the right to any assessment reports concerning her children. Dr. Goebel's counsel argued that Section 20 (5) of the Children's Law Reform Act provides access parents with the right to initiate psychological services for the children without the consent of the custodial parent. Section 20 (5) provides for the non-custodial parent:

> to make inquiries and to be given information as to the health, education and welfare of the child. The entitlement to access to a child includes the right to visit with and be visited by the child and the same right as a parent to make enquiries and to be given information as to the health, education and welfare of the child.

The Tribunal rejected this argument and was of the opinion that Section 20 (5) did not allow Mr. A to initiate a procedure by requesting an assessment from a health service provider such as a psychologist, it merely entitled him to receive any information or reports pertaining to such an assessment. As it happened the children were later assessed by other psychologists. As Dr. E indicated, in circumstances where there are two separate and conflicting assessments the judge has no alternative but to request a third assessment. This procedure is costly in terms of both professional time and money. It also creates unnecessary additional emotional distress for the subjects of the assessment and does not contribute positively to their welfare.

Allegation 4:

In relation to this charge the Tribunal makes reference to the Custody/Access Assessment Guidelines (published by the Ontario Psychological Foundation in 1988) #B.3 and footnote 5 already quoted under Charge 1.

Although the Tribunal accepted the evidence of Dr. Goebel that his

assessment was not intended as a complete custody and access assessment, it found that Dr. Goebel should have been alert to the fact that it could be and in fact was used in court as an instrument for attempting to change custody or access arrangements. That Dr. Goebel initially claimed ignorance of the fact that litigation was still ongoing and later accepted that client-solicitor privilege was a ground for withholding his report from Mrs. A and her lawyer, indicates that he found himself in a position of conflict. Dr. Goebel was caught up, in the words of his own lawyer, in the consequences of "an error of judgement".

In addition, as the case referral originally came from Mr. A's lawyer, the Tribunal found that Dr. Goebel should have made further enquiries as to the purpose of the assessment before accepting the case. The Tribunal noted that the reports and/or comments of psychologists may well be used by lawyers to achieve goals the psychologist has never contemplated. Dr. E asserted, and the Tribunal agreed, that it is a psychologist's responsibility to be alert to the purpose of an assessment and to clarify at the outset exactly who is the client. Dr. Goebel said he believed litigation in regard to custody and access had been concluded. Even had this been the situation, it is always possible for one parent or the other in custody and access disputes to re-open a court decision based on new evidence. Dr. E noted the presence of many factors which should have acted as a deterrent to Dr. Goebel's involvement in this case. These should have served as warning signals, in Dr. E's view, a view with which the Tribunal agreed.

The allegations in regard to Mr. A's physical abusiveness to one of his children are puzzling. No evidence was presented during the hearing to enable the Tribunal members to form an opinion as to whether or not Mr. A was an abusive parent. The Tribunal accepted Dr. E's evidence that the absence of any discussion on this issue in Dr. Goebel's report was due to Dr. Goebel's failure to raise the issue either with Mr. A or his children. The Tribunal found Dr. Goebel to have failed to have maintained the standards of the profession in this regard. The effect of omitting mention of the allegations, and of referring only to "a warm and comfortable relationship between Mr. A and his children" effectively exonerated Mr. A from these allegations without investigation. In evidence Dr. Goebel stated that he had noted the absence of physical signs of abuse and also the absence of characteristic behaviour in the children which might indicate that abuse had occurred in the past. If allegations of abuse have been made a psychologist has a responsibility to seek out other sources of information to see whether or not there is evidence of such abuse.

There was also evidence in a letter from Dr. Goebel to the Registrar of OBEP on January 8, 1990, that there was a need for doing the assessment quickly "since there seemed to be some urgency to the situation". This "urgency" might have been interpreted to be a consequence of abuse allegations, but in evidence Dr. Goebel stated that the urgency related to the impending change of lawyers on the part of Mr. A. The Tribunal found that the issue of abuse allegations with an implication of urgency in the context of a request to assess a father's relationship to his children was a further red flag which should have alerted Dr. Goebel to the fact that this assessment would in all likelihood form a part of an ongoing custody and access dispute.

For all of these reasons the Tribunal found that Dr. Goebel's report fell far below the accepted standards of practice and was not a useful professional contribution.

The Penalty. The Tribunal decided on the following penalty with regard to Dr. Goebel:

1. It was ordered that his registration be suspended for a period of two consecutive months,
2. It was further ordered that the suspension be completed no later than August 31, 1991,
3. It was further ordered that the facts of the case together with Dr. Goebel's name be published in the BULLETIN of the Ontario Board of Examiners in Psychology.

Reasons for Penalty. In determining penalty the Tribunal took into account that its decision should act as both a specific and a general deterrent. It should be specific to cause Dr. Goebel to think more carefully in future before accepting a retainer from a parent in a family where separation or divorce has recently occurred. In situations where a referral is made by a lawyer, psychologists need to take particular care because there is a possibility that custody and access issues may not have been fully resolved. It should also be a general deterrent to serve as a reminder to psychologists that it would be in their best professional interests to question requests made of them by lawyers who may not be totally forthcoming at the time of referral about the end purpose of the assessment.

The Tribunal also took into account, in determining penalty, arguments made by counsel for Dr. Goebel that Dr. Goebel had been in practice for 13 years in which no prior complaints had been made against him. Dr. Goebel had testified that custody and access assessments made up only a small part of his practice. The Tribunal recognized that his employer and more particularly his clients would suffer from the deprivation of his services should his registration be suspended for a prolonged period of time.

Further Developments. The Tribunal's Decision was appealed by Dr. Goebel. In a Decision dated May 29, 1992, the Divisional Court dismissed Dr. Goebel's appeal and ordered Dr. Goebel to serve his two month suspension by August 31, 1992. ■

DISCIPLINARY HEARING II

A hearing of a Discipline Tribunal of the Ontario Board of Examiners in Psychology (hereinafter referred to as the "Tribunal") convened on June 12, 13, 14, 24, 25, 26, July 2, 3, 4, 5, 8, 9 and 10, 1991 to hear allegations against Dr. Carl Bartashunas, a registered psychologist.

The charges of professional misconduct and conduct unbecoming a psychologist included allegations of sexual impropriety involving two female clients of Dr. Bartashunas. Throughout the decision and the reasons, therefore, the clients are referred to as Ms. X and Ms. Y. The Notice of Hearing charged Dr. Bartashunas with professional misconduct and conduct unbecoming a psychologist under the Psychologists Registration Act, R.S.O. 1980, c.404 (the "Act"), in that he:

(a) engaged in sexual impropriety with his client, Ms. X and

(b) failed to maintain the standards of practice of the profession in his treatment of and relationship with his client, Ms. X;

(c) engaged in conduct relevant to the practice of psychology with his client, Ms. X, that, having regard to all of the circumstances, would reasonably be regarded as disgraceful, dishonourable or unprofessional;

(d) engaged in sexual impropriety with his client, Ms. Y.

(e) failed to maintain the standards of practice of the profession in his treatment of Ms. Y.

(f) engaged in conduct relevant to the practice of psychology with his client, Ms. Y, that, having regard to all of the circumstances would reasonably be regarded as disgraceful, dishonourable or unprofessional.

Particulars of the Allegations. The Notice of Hearing set out the following particulars to the allegations against Dr. Bartashunas:

1. He entered into a sexual relationship with Ms. X while she was his client and while she was subject to his continuing professional influence commencing in or about the month of April, 1988 and continuing until in or about the month of November, 1989. The particulars of the sexual impropriety include, but are not limited to, the following:

   (a) from in or about February, 1988, he made sexually suggestive comments to Ms. X during the course of her therapy sessions in an attempt to encourage her to enter into a sexual relationship with him;

   (b) he carried on a sexual relationship, including intercourse, fellatio, and other sexual acts with Ms. X in his office, during some therapy sessions and in some evenings from in or about April, 1988 until in or about October, 1988. He also engaged in sexual intercourse with Ms. X at her home in or about April and May, 1988;

   (c) he carried on a sexual relationship with Ms. X during his therapy sessions with her in his office at another location, in or about September and October, 1988;

   (d) from in or about November, 1988 to in or about April, 1989, he carried on a sexual relationship with Ms. X in his office at another location, both during some of her therapy sessions and during the evenings following these sessions;

   (e) from in or about May, 1989, until in or about October, 1989, he carried on a sexual relationship with Ms. X in his office at another location;

   (f) from in or about September, 1989 to in or about November, 1989, he carried on a sexual relationship during Ms. X's therapy sessions and in the evenings in his office at another location;

   (g) he attempted to pressure Ms. X to remain sexually involved with him by threatening to withdraw or discontinue therapy should she refuse to continue the sexual relationship, in or about November, 1989;

2. He served alcohol to Ms. X and drank alcohol himself at most therapy sessions with Ms. X commencing in our about February, 1988 until in or about November, 1989.

3. He terminated therapy sessions early on several occasions including on or about November 3, 1989, and advised Ms. X that he would make up the lost time when she came back in the evening for the purpose of resuming the sexual relationship.

4. He attempted to take advantage of his professional and personal relationship by urging Ms. X to enter into a business contract to sell her car to him in or about March, 1988.

5. He had inappropriate discussions with Ms. X about his own personal and family problems and thereby blurred the boundaries of his professional relationship with her.

6. He minimized Ms. X's problems by comparison with his own.

7. He conducted personal business during therapy sessions with Ms. X.

8. He discussed with and in the presence of Ms. X the problems of other clients including revealing their names to Ms. X and made inappropriate comments about them and their problems.

9. Between September 1, 1990 and April 11, 1991 he made inappropriate comments of a sexual nature to his client, Ms. Y.

10. In or about the month of December, 1990 or January, 1991, he indicated to Ms. Y when she requested that he provide her with a car ride home from her appointment, that he would only give her a ride if she performed fellatio on him.

Procedural Matters. Much of the time of the hearing on June 12, 13, and 14, 1991 was spent hearing submissions from counsel concerning procedural matters. One of the procedural matters concerned the introduction of similar fact evidence.

Similar Fact Evidence. The Tribunal was asked to decide if the complaints concerning Ms. X and Ms. Y could be heard at the same hearing.

Counsel for the Board and counsel for Dr. Bartashunas presented submissions and court authorities on whether or not the matters concerning Ms. Y should be received by the Tribunal as similar fact evidence in the hearing concerning Ms. X. The Tribunal was told that the evidence involving Ms. Y was inadmissible in the hearing involving Ms. X unless the Tribunal was convinced that the probative value of this evidence clearly outweighed its prejudicial effect.

Counsel for the defence argued that there should a striking similarity for the evidence from the two complainants to be considered probative. Counsel for the Board noted the following similarity in the evidence which would be presented concerning Ms. X and Ms. Y:

(a) in both cases, a psychologist/client relationship was established;

(b) both clients were apparently asked by Dr. Bartashunas to discuss their sex life, although both had come to him for help in matters not relating to their sex lives;

(c) both complainants would present testimony to suggest that Dr. Bartashunas made sexual advances to them;

(d) both complainants would present testimony to suggest that Dr. Bartashunas breached confidentiality in their presence, concerning other patients;

(e) both complainants would testify that Dr. Bartashunas discussed his own personal life with them.

In their submissions concerning the issue of similar fact evidence in this case, there was no suggestion by counsel that Ms. Y or Ms. X had colluded in their complaints or that they even knew one another. The Tribunal was satisfied that the probative value of the evidence to be presented concerning Ms. Y would clearly outweigh any prejudicial effect to Dr. Bartashunas. In particular, it was felt that the testimony of Ms. Y might help in determining the credibility of the testimony to be presented by Ms. X, as it appeared that Dr. Bartashunas took the position that the events alleged in both instances involving these two female clients simply did not occur.

The Plea. Dr. Carl Bartashunas entered a plea of not guilty to the charges of professional misconduct and conduct unbecoming a psychologist under the Act. The Tribunal agreed that the hearing would be held in camera, due to the sensitive nature of the evidence to be heard and in order to protect the identity of the witnesses.

The Decision. The Tribunal found the evidence against Dr. Bartashunas to be clear, cogent and convincing. The Tribunal found him to be guilty of professional misconduct and conduct unbecoming a psychologist, contrary to the Act. In particular, the Tribunal found that he had a lengthy sexual relationship with his client, Ms. X and that he had proposed a sexual act to his teenage client, Ms. Y, all of which constitutes conduct that is disgraceful, dishonourable, and unprofessional. In addition, the Tribunal found many of the other particulars of professional misconduct and conduct unbecoming a psychologist to be proved. The Reasons of the Tribunal were set out in a lengthy Decision. Extracts of the Reasons are provided below.

Reasons for the Decision. In arriving at the decision, the Tribunal was aware of the very serious nature of the charges against Dr. Bartashunas and the possible consequences to him of a finding of professional misconduct and conduct unbecoming a psychologist. The Tribunal deliberated at great length on the evidence that was presented and had lengthy discussions about the credibility of each of the witnesses that appeared before the Tribunal. The Tribunal was particularly aware that its decision concerning the charges faced by Dr. Bartashunas very much depended upon an assessment of the credibility of the witnesses before the Tribunal, especially the two complainants and Dr. Bartashunas.

In its review of the particulars of the charges in its Reasons, the Tribunal set out the basis for its findings that led it to the conclusion that the complainant, Ms. X was a credible witness, and that Dr. Bartashunas was not credible. At times, Dr. Bartashunas offered conflicting, false and vague testimony, especially under cross-examination by Board counsel.

In assessing the credibility of Ms. X, the Tribunal was convinced by her manner and demeanour as a witness, and by the appropriateness of her emotions when confronted by counsel for Dr. Bartashunas in cross examination. The Tribunal was also convinced by corroborative evidence which is referred to in its Reasons, and which included the evidence from four witnesses provided by the prosecution, that sexual liaisons between Dr. Bartashunas and Ms. X occurred at about the time detailed in Ms. X's testimony. There was a consistency in the corroborative evidence that assisted the Tribunal in confirming the credibility of Ms. X.

The Tribunal was impressed by the detail with which Ms. X could remember the furnishings and the other details of the two offices in Brockville and the two offices in Kingston. The evidence presented by Ms. X was remarkable in its detail, particularly given the fact that the alleged events occurred three years ago and lasted over a period of one and a half years.

There were 15 points of evidence that particularly persuaded the Tribunal to reach its decision to find Dr. Bartashunas guilty.

These ranged from Ms X's knowledge of intimate details of Dr. Bartashunas' physical characteristics, details of the layout and contents of one of Dr. Bartashunas' offices where no professional appointments had taken place, details of early morning wake-up calls at one of these offices where sexual activity took place and details of telephone calls made and received by Dr. Bartashunas and corroborated by telephone company records.

Dr. Bartashunas kept only 1 and 1/3 pages of notes for 38 therapy sessions, which the Tribunal found completely unacceptable, and which suggested to the Tribunal that these "therapy" sessions involved little proper psychotherapy.

The Tribunal did not find Dr. Bartashunas to be credible in his testimony, especially in cross-examination. The Tribunal was particularly concerned about his explanation of his previous conviction by the Board of Examiners in Psychology, where he changed his account on several occasions, and his testimony became vague.

In summary, the Tribunal was persuaded, based on all of the evidence, that a clear, convincing and cogent case had been made out that Ms. X had had a sexual relationship with Dr. Bartashunas while she was his client beginning in about April, 1988 until early November, 1989, a period of approximately one and a half years. Based upon all of the evidence, and in particular the evidence of Ms. X, whom the Tribunal found to be a credible witness, the Tribunal concluded that the specifics of the allegations in paragraphs 1 (a), (b), (c), (d), (e), and (f) of the Particulars contained in the Notice of Hearing dated May 27, 1991 had been proved. Insufficient evidence was presented to find Dr. Bartashunas guilty as alleged in paragraph 1 (g) of the Particulars in the Notice of Hearing.

The Tribunal found that, as alleged in paragraph 2 of the Notice of Hearing, Ms. X and Dr. Bartashunas drank alcohol at most of the therapy sessions commencing in or about February, 1988 until approximately November, 1989. The evidence that Ms. X knew the location of the alcohol in his various offices and residence, and that she knew the type of drink that Dr. Bartashunas preferred, was compelling.

With respect to the allegation in paragraph 3 of the Particulars set out in the Notice of Hearing, the Tribunal felt that insufficient evidence was presented to find Dr. Bartashunas guilty on this point. Similarly, there was insufficient evidence to find him guilty of the allegations in paragraph 4 of the Particulars.

As for the allegations in paragraph 5 of the Particulars, the Tribunal found these to have been proved. Ample evidence was presented by Ms. X that she knew personal and family matters concerning Dr. Bartashunas to a far greater extent than any other witnesses presented by the defence, including secretaries and clients.

The Tribunal was not satisfied that it had heard sufficient evidence to find Dr. Bartashunas guilty with respect to the allegation in paragraph 6 of the Particulars.

The Tribunal was convinced on the evidence presented by Ms. X and corroborated somewhat by the secretaries appearing for Dr. Bartashunas, that Dr. Bartashunas accepted telephone calls and conducted personal business during scheduled therapy sessions with Ms. X as alleged in paragraph 7 of the Particulars.

As for the allegation in paragraph 8, the Tribunal found Dr. Bartashunas to be guilty of breaching confidentiality of his clients by revealing clients' names and discussing their problems with Ms. X.

The allegations in paragraphs 9 and 10 of the Particulars concern Dr. Bartashunas' teenage client, Ms. Y. Ms. Y testified that Dr. Bartashunas crossed the boundaries of their client/psychologist relationship. She testified that Dr. Bartashunas told her that he would only give her a ride home one winter evening in 1990, or January, 1991, if she would give him "the world's greatest blow job".

The Tribunal rejected Dr. Bartashunas' explanation that Ms. Y actually offered him [fellatio] if he would give her a ride home, and that she was making up the story about him because she wanted to avoid continuing therapy sessions so as not to involve her parents in therapy with Dr. Bartashunas. It would be extraordinary for a psychologist to receive an invitation from a teenage client such as Ms. Y to give him a "blow job" and he neither reported it in his notes at the time nor reported it immediately to either of the other two professionals who were responsible for Ms. Y's care. However, Dr. Bartashunas made no such reports.

The Penalty. The Tribunal imposed the following penalty:

1. The revocation of Dr. Bartashunas' Certificate as a registered Psychologist in the Province of Ontario.
2. The cancellation of his registration was ordered to commence on December 1, 1991 to allow time for Dr. Bartashunas to transfer his clients and conclude his professional affairs.
3. The publication of Dr. Bartashunas' name, the charges, the plea and the penalty in the Ontario Board of Examiners in Psychology BULLETIN, and in any other newspaper or other publications as determined by the Board. The names of clients shall not be used in these publications.

Reasons for the Penalty. The Tribunal heard submissions from both counsel concerning the appropriate penalty for Dr. Bartashunas. Counsel for the Board summarized the evidence that he requested the Tribunal to consider in determining the penalty. He pointed out that Dr. Bartashunas had received a 30 day suspension by the Board on April 22, 1988 for violating the confidentiality of his clients and for conducting personal business during therapy. It was submitted that this previous conviction did not deter Dr. Bartashunas, since he has now been found guilty of

similar charges by the present Tribunal.

Counsel for the Board called Mr. Gary Schoener as a witness to show the effects that Dr. Bartashunas' behaviour could have had on his clients Ms. X and Ms. Y. Mr. Schoener is well known to the Board as an expert in the matter of assessing and treating clients who have been sexually involved with their therapists, and in the assessment and rehabilitation of therapist abusers.

Mr. Schoener testified that when sex begins in a therapeutic relationship, true psychotherapy stops. He had reviewed the evidence before this Tribunal and concluded that the effects on Ms. X and Ms. Y of the sexualizing of their therapeutic relationship with Dr. Bartashunas was potentially very harmful. Counsel for the Board reminded the Tribunal that several witnesses had testified that Ms. X was troubled, distraught, depressed, agitated and confused during the time of her relationship with Dr. Bartashunas.

A letter from the psychologist who is presently counselling Ms. X, showed further the troubled emotional state of Ms. X while in therapy with Dr. Bartashunas.

Mr. Schoener testified he had considerable experience in assessing and rehabilitating therapist abusers, and that such abusers fell into six main categories. The category of "healthy offender" had the greatest potential for rehabilitation. Mr. Schoener testified that, in his view, Dr. Bartashunas was not in the "healthy offender" category, and that his potential for rehabilitation was low.

Counsel for the Board urged the Tribunal to cancel Dr. Bartashunas' Certificate of Registration as a specific deterrent, a general deterrent, and for the protection of the public.

Defence counsel presented letters from nine lawyers, a social worker, a medical doctor, and a rehabilitation counsellor, all testifying that Dr. Bartashunas was providing an excellent and greatly needed service in the Kingston-Brockville area. Especially noted was his ability to establish good relationships with his clients. Board counsel pointed out that none of these letters were from psychologists, but from persons who are not very well qualified to judge the quality of psychological services.

Defence counsel stated that the process of these hearings had a deterrent effect on his client and that Dr. Bartashunas had been "almost destroyed" by the effects of these proceedings. He argued that a general deterrent effect had already occurred since it was universally known in the Kingston-Brockville area that Dr. Bartashunas was facing serious charges by the Board.

Concerning the protection of the public, he urged the Tribunal to reject the "band wagon" syndrome in relation to sexual abuse and harassment, and to reject current publicity in these matters. He argued that the pendulum has swung to the extreme and will eventually find a middle ground.

The Tribunal was not impressed with the arguments made by counsel for the defence. The matters for which Dr. Bartashunas had been found guilty are very serious, and there are not any mitigating factors that would recommend a penalty other than one that reflects the very serious nature of the misconduct committed by Dr. Bartashunas. There has been no indication by him of any remorse for the potentially harmful effects of his behaviour on his clients. There is no indication of any potential for rehabilitation of Dr. Bartashunas.

The Tribunal was aware that Dr. Bartashunas' failure to admit his guilt was not to be taken as a factor to increase what would otherwise be the appropriate penalty. On the other hand, his failure to acknowledge his wrongdoing and the absence of any other mitigating factors leads the Tribunal to the conclusion that it could not ameliorate what is otherwise the appropriate penalty in these very serious matters.

Further Developments. Dr. Bartashunas immediately appealed the Decision of the Tribunal which under the Statutory Powers Procedure Act resulted in a stay of penalty. Dr. Bartashunas continued to practise, pending the appeal.

On February 25, 1992 the Board sought an injunction from the Divisional Court to suspend Dr. Bartashunas from practise until his appeal had been heard. In a Decision dated February 25, 1992 the Court denied the injunction, but ordered that the appeal be heard on June 16, 1992.

In a decision dated June 22, 1992, the Divisional Court dismissed Dr. Bartashunas' appeal and the revocation of his Certificate took effect immediately. Some salient points of the Court's decision are extracted here.

In considering the similar fact evidence the Court stated in part:

> "We are persuaded in particular by the decisions of the Supreme Court of Canada in R. v. C.R.B., supra, and R. v. Robertson, supra, that the applicant's conduct toward [Ms. Y] constitutes evidence of discreditable conduct especially in the context of a psychologist/client relationship and may be viewed by a reasonable trier of fact not only as thoroughly unprofessional and inconsistent with a legitimate therapeutic purpose but rather as part and parcel of a technique of seduction. This conduct in our view is similar to the applicant's conduct toward [Ms. X]."

Further,

> "The applicant's similar conduct toward both female clients constitutes evidence of a misuse of the applicant's position as a psychologist to obtain sexual gratification and as such is probative evidence which demonstrates a pattern or system or design of similar behaviour suggesting the story of [Ms. X] is true."

In reviewing the evidence against Dr. Bartashunas, the Court stated that, in its opinion, Ms. X's detailed knowledge of aspects of the applicant's intimate anatomy could only have come from the intimate observations she made during the course of the sexual activity she described. The Court further stated that, "This piece of evidence alone would be conclusive."

Cont'd

The Court concluded its 11 page decision by considering the penalty of revocation imposed by the Tribunal. The Court stated in part:

"The Board clearly appreciated that it could not increase an otherwise appropriate penalty because the appellant had not admitted his guilt. It simply denied the mitigation that he might otherwise have obtained by a plea of guilty."

"There are few things more harmful to the public interest in the integrity of the profession than a psychologist's abuse of power through sexual misconduct with a vulnerable patient who goes to him for help." ■

New Board Member

The Board is pleased to announce that the Lieutenant Governor in Council has appointed Dr. David Lumsden of Downsview as a new public Board member to replace Ms Muriel Rothschild of Willowdale, whose term expired earlier this year.

Dr. Lumsden is an Associate Professor of Social Anthropology and Sociology in the Faculty of Graduate Studies at York University. He received his undergraduate and Masters degrees at the University of Toronto, and a Ph.D. from Cambridge University in Britain.

Dr. Lumsden has academic interests in the field of comparative approaches to mental health in different cultures. He is also active in a number of community organisations including as a member of the board of a community health clinic in Downsview.

The Examination for Professional Practice in Psychology was administered on April 8, 1992 in London, Ottawa, Sault Ste. Marie, Sudbury, Montreal and Toronto. The Board appreciates the assistance of Dr. Thomas Allaway, Professor David Bernhardt, Dora Kaiser, Connie Learn, Dr. Rod Martin, and Dr. Joseph Persi who served as proctors.

COMPLAINTS AGAINST PSYCHOLOGISTS IN ONTARIO BY SUBJECT OF COMPLAINT, JUNE 1, 1991 TO MAY 31, 1992

SUBJECT OF COMPLAINT	NUMBER
PERSONAL CONDUCT	
Sexual Impropriety	5
Dual relationship, conflict of interest	0
PROVISION OF SERVICES	
Inadequate handling of termination	0
Assessments for:	
Custody and Access	11
Sexual abuse	1
Employment	0
Other	3
Confidentiality	4
Practising outside the area of competence	0
Insensitive treatment of clients	4
Fitness to practice, competence	0
Failure to respond to a request in a timely manner	5
Failure to obtain informed consent	0
Failure to provide services sought	2
CONDUCT IN PROFESSIONAL RELATIONS	
Supervision of personnel	2
Conduct toward a colleague	1
Conduct toward an employee	0
MANAGEMENT OF PRIVATE PRACTICE	
Advertising and announcements	1
Fees and billing	0
Complaint unclear	2
TOTAL	41

DISPOSITION OF COMPLAINTS RECEIVED AGAINST PSYCHOLOGISTS OR OF VIOLATIONS NOTED, JUNE 1, 1991 TO MAY 31, 1992

DISPOSITION OF COMPLAINT	NUMBER
MATTER CLOSED	
Complaint withdrawn	9
Complaint dismissed	3
Letter of concern	10
Invitation held or recommended	2
No jurisdiction	1
Charges laid or recommended	1
Hearing held	0
Registration or renewal refused	2
CASE ACTIVE	
In process of investigation	13
TOTAL	41

Oral examinations were held in Toronto on May 27 and 28, 1992. Assisting the Board in conducting these examinations were the following psychologists:

JAMES ALCOCK, PH.D.,Professor, Glendon College, York University
JAMES R. BAMBRICK, PH.D., Staff Psychologist, Child and Family Centre, Kitchener-Waterloo Hospital
ELSPETH BAUGH, PH.D., Dean of Women, Queen's University
RUTH BERMAN, PH.D., Executive Director, Ontario Psychological Association
THOMAS BONIFERRO, PH.D., Consulting and Counselling Psychologist, Board of Education for the City of London
HARVEY BROOKER, PH.D., Senior Psychologist, Clarke Institute of Psychiatry
RAYMOND BRUNETTE, PH.D., Psychologist, Private Practice, Orléans
BRIAN DOAN, PH.D., Coordinator, Psychology Services to Oncology, Sunnybrook Health Science Center
DAVID DUNCAN, PH.D., Directory of Psychology, Peel Memorial Hospital
HENRY EDWARDS, PH.D., Dean, Faculty of Social Sciences, University of Ottawa
BRIAN JONES, PH.D., Kingston Psychiatric Hospital; Director - Regional Forensic Service Assoc.
NINA JOSEFOWITZ, PH.D., Consultant, Atkinson Counselling Centre, York University
BRUCE QUARRINGTON, PH.D., Professor Emeritus, Department of Psychology, York University
JUNE ROGERS, PH.D., Consulting Psychologist in private practice, Ottawa
RALPH SHEDLETSKY, PH.D., Partner, Geller, Shedletsky and Weiss, Toronto.
ESTER WAGNER, PH.D., Psychologist, North York General Hospital

As was reported in the "Board Notices" section of the BULLETIN, volume 18, number 3 (April, 1992), the Board offered for the guidance of registrants some wording about, and a form for the obtaining of, informed consent to the disclosure, transmittal, or examination of a psychological record.

The model form offered for guidance regrettably contained small typographical errors. The form is reprinted overleaf with corrections.

A number of registrants have commented on the form and on the wording of the advice offered. The Board welcomes further comments. It is intended that when sufficient comments have been received the Board will consider any necessary changes in the material it is putting forward as a guide in this area for registrants.

Consent to the Disclosure, Transmittal, or Examination of a Psychological Record

I(We)_____
(PRINT FULL NAME)

of _____
(Address)

hereby consent to the disclosure or transmittal to, or examination by:

_____
(Name of person, agency, or institution)

of _____
(Identify material: clinical record, report, file, etc.)

compiled/prepared by: _____
(Name or names as appropriate)

in respect of _____
(Name of client(s), or "Myself")

for the purpose of _____

Nature of the information to be released _____

_____

_____ _____
(Signature) (Witness)*

_____
(If other than client, state relationship to client)

Dated the _____ day of _____, 19_____.

Expiry Date** _____

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* In the absence of other convenient witnesses the psychologist may serve as witness.

****The client may rescind or amend this authorization in writing at any time prior to the expiry date, except where action has been taken in reliance on the authorization.**

continued from page 2

potential for conflict between the adversarial legal system and the client oriented health care system.

It is also important for psychologists to be aware of other professions' ethical obligations, such as in the areas of solicitor-client and litigation privilege. For instance, our standards state that we should not provide service when the patient is receiving services of a related nature from another professional without notifying that other party. However, in personal injury litigation the plaintiff lawyer may have the right not to provide certain communications and documents. For the psychologist to make contact with the other professional, who may be retained by the opposite side, would violate privilege and thereby abrogate the patient's legal rights.

The following is a discussion of specific ethical problems that are commonly encountered in medicolegal cases, presented from the perspective of the assessment process.

Accepting the Referral

A useful guideline in assessing the limits of professional competence in medicolegal cases is to evaluate whether you have the skills, knowledge and experience necessary to render an opinion in court, or whether the patient's interests might best be represented by referral to a psychologist who specializes in the area.

Before accepting a case, the psychologist must also consider whether there is any potential conflict of interest or dual relationship. For example, if the patient is being seen in treatment, and the lawyer requests an evaluation report specifically for use in litigation, you may wish to refer the client to another practitioner for the assessment, to avoid the potential conflict between the roles of expert witness and therapist. Conversely, if a patient is seen for medicolegal assessment, and treatment is recommended, it may be advisable to refer to another practitioner for this service. Questions may be asked about the objectivity of assessment if the psychologist stands to benefit financially from finding a patient impaired or in need of treatment.

It is important to make a written request for all pertinent background material and records, if these are not received at the time of referral. In plaintiff cases, the lawyer could withhold information that is pertinent but not necessarily helpful to the case. In defence cases, the lawyer may not possess all pertinent records, but may be able to gain access by bringing a motion for production of records, based on the psychologist's request. It is therefore the psychologist's responsibility to make the request for all records necessary to conduct an adequate assessment. Without full background information, the psychologist may at least risk suffering a loss of credibility in court if previously unknown information contrary to the expert opinion comes to light. At the worst there may be a major disservice to the client and/or user, such as would be the case where the additional information would have resulted in a different opinion, and perhaps consequently a different course in litigation.

Informed Consent and Limits of Confidentiality

Prior to commencing the assessment, the limits of confidentiality should be fully discussed with the patient, and both informed and written consent obtained to undertake the assessment and release the results. It is unwise to assume that the nature and purpose of the examination will have been previously explained. It is particularly important that the patient understand that, because they are engaged in litigation, any material that comes to light during the examination may become subject to production and examination, including interview responses as well as specific test data and responses. Many patients assume that, because they are seeing a psychologist, some issues will remain confidential; they need to be forewarned that there are no "off-the-record" remarks, as the communications between psychologist and patient are not protected by privilege. Concerns have been expressed about possibly biasing patient responses and test results by fully informing them of the limits of confidentiality, but this must be weighed against the potential damage to the patient - psychologically, economically, and legally - of not informing them of the limitations. It may be advisable to observe similar precautions in patients who present for treatment under the no-fault auto insurance benefits, as, if they decide to commence legal action, all records may become subject to examination.

Before obtaining informed consent, some attempt should be made to determine if the patient is competent to give such consent. In traumatic injury cases, particularly ones involving a question of head injury, this can result in the paradoxical situation of having to make some determination of competence to consent to assessment, before conducting the examination that will actually provide information about competence. It is helpful to review records prior to seeing the patient, to evaluate whether there may be significant cognitive compromise. If there is a legal guardian, consent should be obtained from this agent, although it is also appropriate to involve the patient in the process.

Conducting the Assessment

In cases where the patient has recently been assessed by another psychologist, a decision must be made about how much of the other assessment to repeat, keeping possible practice effects in mind, but also the necessity of undertaking an adequate evaluation. In some cases the psychologist may be asked to render an opinion based solely on reports or another psychologist's data. If anything more than an informal verbal opinion is requested, it is advisable to have at least some direct contact with the client, or there could be a question of whether an acceptable standard of service has been provided.

Preparation of the Report

Because psychological reports may be widely circulated to individuals (including the patient) who do not have the expertise to interpret psychological data, it may not be in the patient's best interests to record actual test scores, such as IQ scores,

in the report. Any test data in a report should be presented in a manner that is not subject to misinterpretation. One option is to give ranges of performance (for example average or low average) or percentile equivalents along with an explanation of their practical meaning. Because of concerns about responses to individual test items also being subject to misinterpretation (such as computer scored MMPI profiles with a listing of the critical items), psychologists may wish to include a comment on the methods of test construction, and a warning about the limitations in interpretation of individual items, as part of the narrative report.

It is not inappropriate to verbally discuss findings and conclusions with the referring agent prior to submitting a written report. There may occasionally be a request to not proceed with a formal report, but conclusions still need to be documented in the clinical file. At times lawyers will request a preliminary written draft of a report for review, but the psychologist who lets a lawyer edit or otherwise alter conclusions or the contents of a report is abdicating his or her professional responsibilities. This is a different situation than when written clarification of issues in a report is requested because the original opinion was unclear, or certain details not addressed. There should be no difficulty in providing written addenda in the latter case.

In submitting private practice reports, psychologists should not use institutional letterhead unless the assessment has been conducted under the auspices of the employing organization. Similarly, it is inappropriate to use a title or designation that is unrelated to the nature of services provided or the setting in which they are provided. Thus, a title that pertains to an employment setting should not be used in medicolegal assessments conducted in private practice.

Psychologists have a responsibility to inform patients of their findings and opinions, and it is usually in the best interests of the client for the psychologist at least to offer direct feedback about assessment results, rather than relying on a third party such as a lawyer or physician.

Transmission of Information and Data

Transmission of information and data is probably the area that raises most ethical concerns. A psychologist should not voluntarily release another practitioner's report. Consent to release of that information rests not only with the patient but also with the professional or expert who generated the data. A subpoena for complete clinical notes, records, reports and all test data could potentially include another expert's records that might be contained in the clinical file, but in practice it is only the psychologist's own data that are required. Correspondence from lawyers is protected and does not need to be released.

Perhaps the most frequently encountered problem is when a lawyer requests copies of all clinical records, including clinical notes and test data. Because of the possibility of misinterpretation and possible harm to the client, many psychologists are uncomfortable complying with such a request, as the material then becomes part of the widely circulated medical brief. Our professional standards do not specifically forbid release of such information (see Principle 7.3 and 7.9), but the primary concern is whether such release is in the best interests of the client.

At present, the psychologist is obligated to release data if a court order is obtained. Contesting a motion for release is both costly and time consuming for the psychologist. In many cases the issue may satisfactorily be resolved for all parties by offering to send the data directly to a designated psychologist, and giving a brief explanation of why this is preferable to releasing it to the lawyer. Most frequently a request for raw or original test data is made when the lawyer has undertaken to produce records for the other side in the litigation, so they can obtain an independent opinion from another psychologist. Some psychologists elect to send the data to the lawyer, but with a covering letter outlining the concerns, including the potential for harm to the patient. Copies of test manuals or booklets should not be included in released data; they do not properly constitute part of the clinical record, and duplication violates both copyright and test security.

Appropriate requests for release should be responded to within a reasonable time frame. The psychologist may be asked to send data or reports by facsimile, in order to speed the process, but there are concerns about the security of these transmissions (for example, wrong numbers), and about who may have access to the data at the receiving end.

Conclusion

As in all areas of professional practice, consideration of ethical issues is a dynamic, not a static process. New questions and dilemmas constantly emerge. Unfortunately, our standards of professional practice do not always provide clear direction, and there are situations in which they cannot be legally enforced. Consultation with colleagues is invaluable in resolving ethical problems, and adopting an educational approach with other professions may defuse many potential difficulties. It may also be helpful to remember that your standard of conduct and practice ethics affect not just the patient and your individual reputation, but also the reputation and best interests of our profession as a whole. ■

the BULLETIN
THE · ONTARIO · BOARD · OF · EXAMINERS · IN · PSYCHOLOGY

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