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Cover Page Footnote

The author is a lawyer and clinical psychologist. He is an adjunct professor in the department of psychology, at The University of Texas at Arlington, and an adjunct professor at The Texas Wesleyan School of Law. He is a member of the Juvenile Justice Committee of the American Bar Association, and serves as a consultant to a number of juvenile and judicial organizations. Mr. Lindsey is also the President of Nestor Consultants, Inc., located in Dallas, Texas.

ETHICAL ISSUES IN INTERVIEWING, COUNSELING, AND THE USE OF PSYCHOLOGICAL DATA WITH CHILD AND ADOLESCENT CLIENTS

Michael L. Lindsey*

INTRODUCTION

THE Fordham Conference on Ethical Issues in the Legal Representation of Children brought together professionals with diverse experiences related to the legal representation of children to engage in discussions and develop recommendations to enhance lawyers' knowledge of ethical issues in the representation of child clients. Lawyers provide services to children in a number of different contexts, including civil matters, family law issues, delinquency proceedings, status offenses (e.g., runaways, truancy, incorrigibility), property matters, and mental health inquiries. The Conference organizers assigned the participants to working groups to discuss one of seven issues that lawyers who serve children are likely to encounter.¹ I was assigned to the Working Group on Interviewing and Counseling.

Our Working Group leader identified four questions to guide our initial discussions: How does a lawyer explain? How does the interview of a child compare with the interview of an adult? How does counseling a child compare with counseling an adult? And, how do issues of race, gender, language, disability, sexual orientation, and class influence interviewing and counseling? Discussions from our Working Group, and comments made during the plenary sessions, motivated me to share the following thoughts on ethical issues in the uses and limitations of psychological data when lawyers interview and counsel child and adolescent clients.

Lawyers can incorporate the clinical competencies of interviewing and counseling clients as a means of obtaining more reliable information. As the attorney-client relationship is enhanced, the child client not only shares more, but may actually remember more useful facts.²

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1. The seven working groups were divided as follows: "Allocation of Decision Making," "Determining the Child's Capacity to Make Decisions," "Determining Best Interests of the Child," "Interviewing and Counseling," "Confidentiality," "Conflicts of Interest," and "Judicial Role."

2. Ray Bull, *Innovative Techniques for the Questioning of Child Witnesses, Especially Those Who are Young and Those with Learning Disabilities*, in 1 Memory and

Therefore, lawyers should establish good interviewing and counseling skills to enhance interactions with their clients. Furthermore, lawyers must know what questions to ask, and how to ask specific questions about when, where, and by whom psychological data is obtained,³ and how that data is converted into the information shared in reports.

I. GRADUATE TRAINING IN LAW AND PSYCHOLOGY

Law students learn a great deal about many very specific areas of law. Most law schools devote two semesters to the subjects of property, contracts, torts, and civil procedure. Other courses provide opportunities for in-depth specialization, such as contract and will drafting, corporations, patents and trademarks, and commercial paper. Although law school provides many useful legal tools, very few of the skills needed in a successful practice of law are gained during law school. Attorneys do learn applied skills; however, they tend to get such experience after graduation rather than during law school.

Graduate schools of clinical psychology, on the other hand, are more analogous to traditional apprenticeships. Specifically, the psychology student learns theory and then is expected to use that theory with an actual client.⁴ Thus, during graduate school, the psychology student learns what he does well, and where he needs more practice or supervision. Also, these practical applications help the student decide which areas of the field truly hold his interest, and in what other areas in the field of psychology he should concentrate in order to be a more effective practitioner. For example, the student who plans to do research will likely take more classes in statistics and research design; the student who plans to establish a private practice will elect more practicum experience; and the student who expects to teach may align

Testimony in the Child Witness 182-83 (Maria S. Zaragoza et al. eds., 1995) (discussing how rapport with a young child will relax him and break down his inhibitions against speaking to a stranger). For anyone who questions the value of counseling skills in other than the traditional fields of psychology, social work, or education, think of a patient's concern over a physician's "bed side" manner. Not only do patients want to know how they are doing in terms they understand, they actually get better, and get better sooner when the physician builds rapport during patient visits. See, e.g., Andrea Boroff Eagan, *The Return of Bedside Manner*, 19 *Health* 25 (1987) (explaining the healing power of compassion).

3. Jay Ziskin, 2 *Coping with Psychiatric and Psychological Testimony* 12-22 (3d ed. 1981) (discussing how one should analyze a clinician's report).

4. For example, clinical psychologists administer tests that assess intellectual and personality functioning. After a course that explains the development, construction, normitization, reliability, validity, appropriate uses and limitations of these tests, the graduate clinical psychology students must begin to practice the use of the instruments with actual clients. Under supervision, the tests are administered, scored, interpreted, reports written, and verbal feedback shared. A similar process is completed in the understanding and practice of psychotherapy, i.e., a series of classes, and then actual therapeutic sessions with clients referred for a mental health problem. Under supervision, clients are seen, treatment plans are developed, progress notes are recorded, and relationships are either terminated or transferred.

herself with professors as a graduate assistant to gain more teaching and class management experience.

It takes three years to earn a law degree, but nearly six years to earn a doctorate in psychology.⁵ Unquestionably, graduate psychology students have more time to develop their applied skills. This Response will consider what an effective lawyer should know about interviewing and counseling.⁶

II. WHAT CULTURAL ISSUES ARE IMPORTANT FOR LAWYERS TO KNOW AND UNDERSTAND

When the issue of cultural diversity was first considered a relevant factor in relationship building, the focus was on race and gender. Since that time, the issues have expanded to reflect more accurately the broader dimensions of diversity. For example, assume that an attorney's cultural background is one other than Spanish-speaking. It certainly would not be unreasonable to suggest that before working with a Spanish-speaking client, the attorney must understand some of the differences between his culture and that of his client. But what does "understanding cultural differences" mean? Although language is an obvious difference, what other differences are important? Whatever thoughts come to mind, now ask—"How common are those differences based on the client's *country* of origin?" For example, what is different, or similar, about the Spanish-speaking cultures of individuals native to Argentina, Columbia, Cuba, the Dominican Republic, Mexico, Nicaragua, Puerto Rico, or Spain? In another example, assume the client is Asian, and the attorney is not of Asian decent. What does having an Asian client mean to the attorney? How does the attorney interact differently with the client who is from East Asia,⁷ South Asia,⁸ Southeast Asia,⁹ or the Middle East?¹⁰ So often, and so confidently we say, "Oh, the client is Asian." What, if anything, has been communicated?

Beyond race, gender, and language, individuals have many ethnic, family, cultural, and regional nuances. Additionally, a person's socio-economic status may result in shared experiences with another of sim-

5. The first four years consist of course work and practice; the fifth year is an internship year; and at least one year is reserved to research, write, and defend the doctoral dissertation.

6. We must leave to another forum the question of how law schools can incorporate these curriculum changes. Encouragingly, a number of law schools already have significantly increased their clinical programs.

7. East Asian countries include China, Fiji, Indonesia, Japan, Korea, and Polynesia.

8. South Asian countries include Bangladesh, India, Pakistan, and Sri Lanka.

9. Southeast Asian countries include Burma, Cambodia, the Philippines, Laos, Thailand, Malaysia, and Vietnam.

10. Middle Eastern countries include Afghanistan, Armenia, Egypt, Iran, Iraq, Turkey, Lebanon, Jordan, Palestine, and Syria.

ilar means, more so than another of similar race, gender, language, or family tradition. Awareness of these differences, and a facility in managing conversations across these unique cultural aspects, influences the amount, the quality, and the quickness with which the attorney can gain the information from the client that is necessary to be an effective advocate. Although the world is not sufficiently culturally literate to charge an attorney with malpractice for failing to know, understand, and use culturally relevant information, I believe that day will come. At present, we can certainly say that it is unethical to represent a client with whom a lawyer cannot communicate because of a language barrier.¹¹ The attorney must be aware that each client brings with him disparate cultural distinctions. Armed with this knowledge, and enhanced by skilled interviewing and counseling, the attorney can better know, and therefore, more effectively represent his client.

III. WHAT DO WE KNOW ABOUT CHILD DEVELOPMENTAL ISSUES THAT AFFECT HOW LAWYERS INTERVIEW AND COUNSEL?

Children are not little adults. In the child client context, the lawyer-client relationship is significantly affected because the differences between children and adults are not only formative, but also substantive. The pioneering theorists in psychology have given us some important related, yet distinct, considerations of childhood development that affect what, why, and how we, as attorneys, communicate with children.

Sigmund Freud describes the emergence of childhood stages where either character or pathological traits are learned as the child's psychological defensive structure or "life-coping" system matures.¹² Erik Erikson describes child development in terms of ego (or cognitive) tasks that are mastered.¹³ Margaret Mahler's perspectives on child

11. See, e.g., Model Rules of Professional Conduct Rule 1.1 (1983) (requiring that lawyer provide competent representation); *Id.* Rule 1.4 (providing that a lawyer must keep his clients informed and explain all matters "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

12. ORAL: (0-16 months) where the child learns to give and receive from others without excessive dependence, and learns to rely on others with a sense of trust; ANAL: (16-36 months) personal autonomy develops, the child learns the capacity to take initiative, and the capacity to cooperate develops; PHALLIC: (36 months-5-1/2 years) foundations for the emerging sense of self, sexual identification, and the regulation of drive impulses; LATENCY: (5-1/2 years-10 years) greater competency with adaptive functioning, relationships with others, peer group formation, experimentation with skills needed for successful adult work and play; and PRE-PUBERTY/PUBERTY: (10-16 years) resolution and integration of competencies from earlier stages, full genitality sets stage for fully mature satisfying sexual relationships, further development of concepts of love and work. See Winifred F. Hill, *Psychology: Principles and Problems* 443-44 (1970).

13. BASIC TRUST vs. MISTRUST: (0-2 years), trusts self, develops confidence; AUTONOMY vs. SHAME or DOUBT: (2-4 years), learns self control, language development, play and fantasy; INITIATIVE vs. GUILT: (5-7 years), develops sex role identification, develops foundations of moral thinking, participates in group play; INDUSTRY vs. INFERIORITY: (8-12 years), learns interactional skills, teamwork,

development focus on the child's competencies in relating with others, and concentrates on the first 2-1/2 years of life.¹⁴ Finally, Jean Piaget's theories on child development assess the intellectual capacities associated with critical stages of human development.¹⁵ Understanding what psychologists have discovered about the distinct stages of childhood development can help attorneys better communicate with the children they represent.

While much of child developmental theory is helpful, and can influence the way that lawyers interact with child and adolescent clients, such information presented alone requires that the attorney actually understand the material before such data can be useful. Several undesirable results may occur from this process. For example, lawyers do not view their job as involving knowledge about or use of this information, thus they often ignore it. The attorney may decide that it is too complicated and may not have the time to devote to understanding the material. Also, the attorney may view this primarily as common sense information, and with brief perusal of the theory, interpret the meaning for their practice in their own terms. These approaches, however, will potentially do more harm than good. And, if the right thing is done by happenstance, the likelihood of repeating the success is marginalized because the attorney does not systematically know why a certain result was obtained, and therefore may be unable to obtain a similar result with a different client.

and leadership; IDENTITY vs. IDENTITY DIFFUSION: (13-21 years), acquires social status, makes career choices, develops secondary identity (outside family), internalizes morality; and COMMITMENT v. ISOLATION: (older than 21), searches for values, social action. See James M. Sawrey & Charles W. Telford, *Educational Psychology* 192-205 (4th ed. 1973).

14. NORMAL AUTISTIC PHASE: (0-3 months), self absorbed, no distinction between mother and self; SEPARATION - INDIVIDUATION including the following: HATCHING: (6-10 months), begins to distinguish familiar and new faces, cries around strangers; PRACTICING: (10-15 months), able to be physically separated from primary caregiver without experiencing undue stress/discomfort; RAP-PROCHEMENT: (18-24 months), renewed need for closeness with primary caregiver, experiences separation anxiety; and OBJECT CONSTANCY: (24-30 months), able to maintain basically positive feelings toward self and others in spite of temporary changes in mood, i.e., good people do not become bad because they must leave for temporary periods, good people do not become bad because they must say no. See Margaret S. Mahler et al., *The Psychological Birth of the Human Infant* 39-122 (1975).

15. SENSORIMOTOR STAGE: (0-24 months), repetition of experiences, gradual differentiation between self and the world; PRÉ-OPERATIONAL STAGE: (24 months-7 years), language and socialization of behavior, thinking without general rules of logic, bound by what they can see; CONCRETE OPERATIONS: (7-11 years), cognitive acts not isolated, can see contradictions, can engage in logical thinking (conservation, reciprocity, negation, reversibility, serialization); FORMAL OPERATIONS: (11-15 years), hypothetical thinking no longer confined to familiar objects, can see relationship between two propositions/ideas. See Sawrey & Telford, *supra* note 13, at 175-83.

In the next section I will discuss strategies for working with children and adolescents given what we know about developmental differences. The following information does not represent absolutes. Any parent, brother, sister, aunt, uncle, cousin, neighbor, or youth volunteer can provide multiple vignettes about the fluid nature of human development. What one child does at age 1-1/2, another does at age two. One child may master a task with little obvious conscious involvement, while others need constant coaching and support. It is within those parameters of caution that the following suggestions are provided.

IV. INTERVIEWING SKILLS AND STRATEGIES WITH CHILDREN AND ADOLESCENTS

James Green and James Leigh describe three approaches to the interviewing process that increase the amount and quality of information shared by the interviewee.¹⁶ The authors describe the inquiry as a tool of "ethnic competence," i.e., the provider's ability to learn about the cultural context of a problem and to integrate that knowledge into a professional assessment.¹⁷ They state that to access the words and phrases that are windows into the reality known and experienced by other persons, "social workers are taught three specific skills: preparing and asking global questions; identifying cover terms in the answers they hear; and eliciting descriptors for the terms they choose to explore."¹⁸ Green and Leigh define "global questions," "cover terms," and "descriptors" in the following statement:

Global questions are general, open-ended questions about some aspect of the interviewee's life, something personally or professionally puzzling to the worker and potentially salient to the presenting problem. . . .

Cover terms are words and phrases that identify some important aspect of the individual's experience. They are verbal expressions that . . . identify important thematic information in the individual's background. . . .[and]

Descriptors are simply blocks of descriptive information, systematically collected, used to build a composite portrait of selected cultural characteristics more or less shared by a set of clients.¹⁹

Armed with the above skills encompassing the use of global questions, cover terms, and descriptors, social workers and attorneys can most effectively interview child clients.

A host of additional considerations are noted by various authors on the important elements of an effective interview. Some observe the

16. James W. Green & James W. Leigh, *Teaching Ethnographic Methods to Social Service Workers*, 11 *Prac. Anthropology* 5, 5-11 (1989).

17. *Id.* at 6.

18. *Id.*

19. *Id.* at 6, 8, 9 (emphasis added).

importance of time and environmental factors, such as how long to take, what questions to ask, what information you expect the client to convey, and how to create an environment that allows the client as much control as possible.²⁰ The attorney should also discuss with the child client the note-taking process, and provide continuous opportunities to respond to client questions. Robert Royal and Steven Schutt include the following among what they view to be important interview considerations: The *mechanics of questioning* (language or speech; words and expressions; conduct or appearance; attitude and ability to influence; characteristics of good questions; types of questions), *preparatory work* (interviewing; use of confidential sources and informants; auxiliary information—e.g., written materials; location of interview), and *pre-interview* considerations (establishing rapport; demeanor of the client—shy, formal, hostile; and image of the interviewer—personable; sympathetic; sincere; objective; firm).²¹

While lawyers rely heavily on the field of clinical psychology to provide guidance on the skills, competencies, and strategies they should consider to competently interview children and adolescents, psychology and psychiatry continue to improve their sensitivities to a changing client population. In 1994, the American Psychiatric Association published the fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*.²² This work has been a significant resource to aid professionals in making informed and accurate diagnoses. Despite formidable benefits, much work remains to be done. Consider the following statement by Spero Manson, Ph.D., of the *DSM-IV* steering Committee, in *The Monitor*: "For the first time, in a very significant way, the *DSM* explicitly addresses the importance of culture in all aspects of psychiatric diagnosis. Finally, there is empirical recognition of the way, shape and form culture influences the pres-

20. James Morrison, *The First Interview: Revised for DSM-IV 7-11* (1995).

21. Robert F. Royal & Steven R. Schutt, *The Gentle Art of Interviewing and Interrogation: A Professional Manual and Guide 29-69* (1981).

22. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994). The introduction to the *DSM-IV* states:

The utility and credibility of *DSM-IV* require that it focus on its clinical, research, and educational purposes and be supported by an extensive empirical foundation. . . . An official nomenclature must be applicable in a wide diversity of contexts. *DSM-IV* is used by clinicians and researchers of many different orientations (e.g., biological, psychodynamic, cognitive, behavioral, interpersonal, family/systems). It is used by psychiatrists, other physicians, psychologists, social workers, nurses, occupational and rehabilitation therapists, counselors, and other health and mental health professionals. *DSM-IV* must be usable across settings—inpatient, outpatient, partial hospital, consultation-liaison, clinic, private practice, and primary care, and with community populations. It is also a necessary tool for collecting and communicating accurate public health statistics. Fortunately, all these many uses are compatible with one another.

Id. at xv.

ence and nature of psychiatric illness."²³ Thus, the journey towards effective interviewing by lawyers is similar to the clinicians' journey towards competently understanding how culture influences assessment, diagnosis, and intervention.

V. THE USES AND LIMITATIONS OF PSYCHOLOGICAL TESTS

There is no paucity of tests available to assess, measure, and evaluate all sorts of human attributes. The most definitive source, *Tests in Print*,²⁴ lists more than 3000 entries that cover, inter alia, achievement tests (91 tests), educational tests (128), intelligence tests/scholastic aptitude measures (233), personality tests (669), and assessments of vocational interests and skills (568).²⁵ *Tests in Print* provides "descriptive listings of reference to commercially published tests that are in print and available for purchase and use."²⁶ Lawyers are most likely to see reports written on child and adolescent functioning that assess intelligence,²⁷ infant development,²⁸ academic achievement,²⁹ visual-motor perception, auditory skills, motor proficiency,³⁰ and personality.³¹

In the previous section briefly discussing law students' graduate school experiences,³² I pointed out that there are insufficient opportunities to apply the skills the students will need to begin the practice of law. In this section, where I explore the uses and limitations of psychological tests, it is important to reiterate that the training that clinical psychology graduate students receive does not necessarily pre-

23. Tori DeAngelis, *Ethnic-Minority Issues Recognized in DSM-IV*, *The Monitor*, Nov. 1994, at 36.

24. *Tests in Print IV: An Index to Tests, Test Reviews, and the Literature on Specific Tests* (Linda L. Murphy et al. eds., 1994).

25. *Id.* at x.

26. *Id.* at ix.

27. Wechsler Preschool and Primary Scale of Intelligence (WPPSI); Wechsler Intelligence Scale for Children-III (WISC-III); Kaufman Assessment Battery for Children; Slosson Intelligence Test.

28. McCarthy Scales of Children's Abilities; Leiter International Performance Scale; Bayley Scales of Infant Development.

29. Wide Range Achievement Test-Revised (WRAT-R); Peabody Individual Achievement Test; Kaufman test of Educational Achievement; Woodcock—Johnson Psycho-Educational Battery; Boehm Test of basic Concepts; Peabody Picture Vocabulary Test - Revised; Denver Developmental Screening Test-Revised.

30. Bender Visual Motor Gestalt Test; Developmental Test of Visual-Motor Integration; Auditory Discrimination Test; Goodman-Fristoe-Woodcock Test of Auditory Discrimination.

31. The House-Tree-Person Test; the Children's Apperception Test; the Thematic Apperception Test; the Minnesota Multiphasic Personality Inventory (adolescents and older); the Rorschach; Sentence Completion Tests. *See, e.g.*, Jerome M. Sattler, *Assessment of Children 85-115* (3d ed. 1988) (discussing the various methods to test children). For a comprehensive list and analysis of all types of tests, see *Handbook of Psychological and Educational Assessment of Children: Intelligence and Achievement* (Cecil R. Reynolds & Randy W. Kamphaus eds., 1990); and *Handbook of Psychological and Educational Assessment of Children: Personality, Behavior, and Context* (Cecil R. Reynolds & Randy W. Kamphaus eds., 1990).

32. *See supra* part I.

pare them to understand the cultural differences of children and adolescents to whom they administer intellectual, educational, personality, and achievement tests. The implications of such a lack of adequate preparation are startling. The tests were originally validated primarily on Caucasian children and adolescents.³³ Therefore, we do not know whether ethnic minority youth would give similar responses to the test protocol. If responses by the ethnic minority populations are significantly different, then the scores generated will mean different things for those groups (e.g., what intelligence level is achieved).

Of particular concern, due to the homogeneous original test population, is clinicians' ability to decide what is considered deviant conduct. Results that may be described as sociopathic or psychopathic based on tests that were administered to Caucasian youths may simply indicate that culturally different clients' answers differ from the standard responses—not that those responses prove an individual is a sociopath. There are also significant implications depending on how clinicians interpret these responses. Psychologists, juvenile justice practitioners, and judges who use test data to make placement decisions tend to institutionalize for longer periods of time juveniles diagnosed as having an antisocial personality disorder.³⁴ Furthermore, juveniles receiving this diagnosis are less likely to be placed in intensive treatment programs because sociopaths or psychopaths are viewed as less likely to benefit from treatment.

If psychology students are not taught these cultural perspectives, how much confidence can we have in the reports they write? Richard Dana, expresses his concerns in the following manner:

During the past 20 years, I have found little enthusiasm among graduate students . . . or professional psychology programs at the prospect of providing services to multicultural populations. This insensitivity is a result of unexamined biases, incorrect assumptions, and insufficient information about persons who differ in their cultural identities. . . . However, learning about other cultures is a lifelong task that is part and parcel of learning about oneself in a context with other persons who all differ in some degree. *It is not sufficient to invite multicultural clients into a collaborative assessment relationship that provides education for the service provider. Although this argument may be based on good will, sincerity, and openness on the part of service providers, it minimizes the extent of*

33. Most of the widely used tests have been normed on Caucasian populations. Inferences for other ethnic groups must be generalized. See Sattler, *supra* note 31, at 566 ("Arguments Against the Use of Intelligence Tests in Assessing Ethnic Minority Children").

34. Disorder characterized by an inability to get along with other members of society and by repeated conflicts with individual persons and groups; common attributes include impulsiveness, egocentricity, hedonism, low frustration tolerance, irresponsibility, inadequate conscience development, exploitation of others, and rejection of authority and discipline.

world-view differences and the amount of training and experience required to provide culturally competent services . . .

*Cultural competence is now one part of the fabric of general clinical competence.*³⁵

Psychologists and psychology students are bound by the Ethical Principles of Psychologists and Code of Conduct ("Ethics Code").³⁶ The Ethics Code contains enforceable standards that require psychologists and psychology students to adapt their work to various cultural perspectives. Thus, to comply with their standards, the psychologist must understand and respect cultural differences. The enforceable conduct requirements include: General Principles, Boundaries of Competence,³⁷ Maintaining Expertise,³⁸ Human Differences, Respecting Others, Nondiscrimination, and Evaluation, Assessment, or Intervention generally.

The Ethics Code notwithstanding, graduate psychology students commenting on their graduate education continue to report less than favorable experiences regarding the inclusion of culturally diverse training perspectives in their curriculum.³⁹ The American Psychological Association Graduate Students' Committee on Ethnic Minority Affairs created a six-page survey of recruitment, retention, curriculum, and training to document the education related experiences of ethnic minority students pursuing graduate degrees in psychology. "The survey points to a significant dissatisfaction among ethnic minorities with many portions of their training and institutions. [The report found that] 'the training students are getting is less than optimal in satisfying students and in providing a diverse training for these psychologists of the 21st century. . . . Students are most satisfied with course coverage of white Americans and are about equally dissatisfied with course coverage of ethnic minority groups.'"⁴⁰

If ethnic minority students in 1995 report such dissatisfaction with the failure of graduate psychology programs to prepare them to appreciate multiculturalism, nonethnic minority graduate students may not even be aware of the limitations of their education, or the potential harm they may impose on their clients. The next section demon-

35. Richard H. Dana, *Multicultural Assessment Perspectives for Professional Psychology* vii (1993) (emphasis added).

36. American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct*, 47 *Am. Psychol.* 1597, 1597-1611 (1992).

37. Psychologists must work, teach, and conduct research within the boundaries of their competence, or study, receive training, or consultation from other persons competent in those areas, and where new areas emerge without existing standards, the psychologist must take reasonable steps to protect clients.

38. Psychologists should maintain a reasonable level of awareness of current scientific and professional information in their fields of activity, and maintain competence.

39. Results of APAGS Ethnic Minority Survey Presented in New York, *Newsl. of Am. Ass'n of Graduate Students (APAGS, Wash. D.C.)*, Fall 1995, at 1.

40. *Id.*

strates how erroneous assumptions regarding psychology negatively impact the justice system.

VI. CULTURAL INCOMPETENCE: WAIVER, TRANSFER, AND CERTIFICATION OF JUVENILES AS ADULTS

All fifty states, including my resident state of Texas, allow juveniles to be tried as adults in criminal courts. The transfer to criminal court can occur in one of three ways: judicial waiver, prosecutorial discretion, or statutory exclusion. In Texas, "[a]lthough only a very small percentage of all juvenile cases result in transfer proceedings, (fewer than two percent of felony referrals of fifteen and sixteen year olds) they represent extremely important cases for the community and the respondent, since they almost invariably involve extraordinarily serious offenses."⁴¹ The Department of Justice provided the following data in a 1995 press release:

During the year preceding June 30, 1995, prison populations increased by at least 10 percent in 23 states. Texas reported the largest growth (nearly 27 percent). . . .

The incarceration rate of state and federal prisoners sentenced to more than a year reached 403 per 100,000 U.S. residents on June 30, 1995. Texas led the nation with 659 sentenced prisoners per 100,000 state residents. . . .

During the last decade the number of black inmates in state, federal and local jails and prisons has grown at a faster pace than the number of white inmates. Although the number of black and white inmates was almost equal in 1994, the incarceration rate for blacks was much higher.⁴²

With each legislative session, more statutes are passed increasing the penalties for violent, repeat, gang, and drug offenders. Therefore, all currently available data are outdated underestimations of the actual figures.

In Texas, before a juvenile can be tried as an adult, a "complete diagnostic study" must be conducted. "Prior to the hearing, the juvenile court *shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense.*"⁴³ It may come as no surprise that neither the statute, nor the legislative history, define the critical phrase "complete diagnostic study." As a clinical psychologist, that phrase suggests the following minimal considerations: an evaluation by a psychologist, psychiatrist, social worker, juvenile detention worker, probation officer, or neglect and abuse department employee.

41. Robert O. Dawson, Texas Juvenile Law 83 (3d ed. 1992).

42. Department of Justice, State and Federal Prisons Report Record Growth During Last 12 Months 2-4 (Dec. 3, 1995) (press release).

43. Tex. Fam. Code Ann. § 54.02(d) (West 1986) (emphasis added).

Of the disciplines suggested above, only psychologists use tests, from which data are obtained and interpretations made for specific recommendations. Psychiatrists generally conduct mental status examinations based on interviews, and then prepare reports (including a *DSM-IV* diagnosis). The diagnosis, and the reports, are based on clinical impressions, and are not the result of test data collected by the psychiatrist. Social workers add an important dimension to the diagnostic process. Social workers, after comprehensive and detailed interviews with the juvenile offender and his or her family, provide information about the family, household, siblings, supervision, physical health, quality of life, education experiences, as well as a profile of the youth within these social contexts. As with the psychiatrist, social workers do not use clinical instruments that *diagnose* the emotional, personality, intellectual, or academic attributes of the youth. Finally, reports written by detention, probation, or neglect and abuse staff tend to be driven by information already known about the juvenile, i.e., what was done, who was there, what the impact was, whether this has been done before, what previous contingencies/consequences have been associated with previous conduct, and similar "updates." Thus, a *complete diagnostic study* cannot be diagnostic without having the element of diagnosis—and diagnostics are the tools of trade of psychologists.

Texas courts, however, are limiting the need for psychologists to conduct a psychological evaluation as part of *the complete diagnostic study*.⁴⁴ One may argue that a psychological examination by a psychologist is not what the legislature intended. It is imperative for psychologists to help judges, legislators, and other practitioners know and understand that "complete diagnostic study" is a term of art that requires very specific acts by clinicians, and to do less is an ethical breach of conduct that might (or should) be considered malpractice. Let us take a look at how a Texas court has ruled on the requirement of a complete diagnostic study prior to deciding if a juvenile offender will be tried as an adult.

Consider the following facts from *R.E.M. v. State*.⁴⁵ A psychiatrist and psychologist attempted to conduct a component of the diagnostic study; however, the youth refused to cooperate with them. He refused to take psychometric tests, or to answer questions other than his

44. See *L.M. v. State*, 618 S.W.2d 808, 812 (Tex. Civ. App. 1981) (holding that even if the judge did not consider the psychologist's report, it would not be reversible error); *I.L. v. State*, 577 S.W.2d 375, 376 (Tex. Civ. App. 1979) (holding that a complete diagnostic study was made even though no psychologist's examination was made); see also J. Ray Hays & Kenneth S. Solway, *The Role of Psychological Evaluation in Certification of Juveniles for Trial as Adults*, 9 Hous. L. Rev. 709, 709-15 (1972) (suggesting the elements necessary for a complete diagnostic study are examinations by a psychiatrist or psychologist, and an evaluation by a probation department caseworker).

45. 541 S.W.2d 841 (Tex. Civ. App. 1976).

name, age, height, weight, and place of birth.⁴⁶ On appeal, the appellant argued that the observations made by the psychiatrist and psychologist did not constitute a complete diagnostic study. The court responded:

[A]ttempts were in fact made to effect a diagnostic study, and . . . the limited nature of the study was due solely to appellant's refusal to cooperate. Under these circumstances, we conclude that the reports . . . constitute as complete and adequate a "diagnostic study" as was possible under the circumstances, and that a bona fide effort was made to comply with the statute. We are not inclined to hold that the statute requires the accomplishment of that which is impossible due to appellant's attitude.⁴⁷

One can only wonder why the juvenile did not cooperate. He was a juvenile about to be tried as an adult, with the possibility of spending time in an adult prison. The issue of establishing rapport under these circumstances would be more challenging than under most assessment circumstances. How did the psychiatrist and psychologist appear to the youth? Were they of the same race as the youth? Did they share any cultural traits? At what level could the youth identify with either of them? Did the psychologist or psychiatrist offer to come back at a later time, or another day to complete the evaluation? Did either consider having someone with whom the youth could identify (family member, teacher, mentor, juvenile staff member, clinician with similar ethnic/racial background) discuss the assessment process and encourage him to cooperate?

The language of the judge in *R.E.M.* is troublesome. He states that the diagnostic study was adequate under the circumstances. The circumstances seemed to be for the convenience of the state, however, and little accommodation was made for the juvenile's concerns. Also, the judge said that a bona fide effort was made to comply with the statute. If the defendant could have spoken honestly, and freely, without duress, and outside of the juvenile criminal justice system, it would be interesting to hear whether he felt that the psychiatrist and psychologist made a *bona fide effort* to evaluate him. Although we are in the realm of hypotheticals, we do know that the culture of the client and clinician have an impact on the outcome of the assessment process.⁴⁸ We can only speculate how the exigencies of being tried as an

46. *R.E.M.*, 541 S.W.2d at 842.

47. *Id.* at 845.

48. See David Baskin et al., *Ethnicity and Psychiatric Diagnosis*, 37 *J. Clinical Psychol.* 529, 529-37 (1981); Hector Betancourt & Steven Rogers López, *The Study of Culture, Ethnicity, and Race in American Psychology*, 48 *Am. Psychol.* 629, 629-37 (1993); David Burn, *Ethical Implications in Cross-Cultural Counseling and Training*, 70 *J. Counseling & Dev.* 578, 578-83 (1992); Glorisa J. Canino et al., *Reliability of Child Diagnosis in a Hispanic Sample*, 26 *Am. Acad. Child & Adolescent Psychiatry* 560, 560-65 (1987); Susan E. Cayleff, *Ethical Issues in Counseling Gender, Race, and Culturally Distinct Groups*, 64 *J. Counseling & Dev.* 345, 345-52 (1986); Richard H.

adult, and the ability to establish rapport with the clinicians affected the outcome of the defendant's diagnostic study. We must begin to ask whether having legislators, judges, and attorneys decide what constitutes a "complete diagnostic study" is irresponsible. In this regard, consider the increasing number of juveniles who have very little in common with the legislators, judges, and attorneys who are affected by the legislation, and how it is interpreted and applied.⁴⁹

Because mandatory statutory provisions control the disposition of increasingly more juvenile cases and there is less discretionary advocacy, lawyers representing these youths must be vigilant to ensure that every right is protected. The rights of child clients regarding their attorney's competencies are not settled under the law. Therefore, the lawyer should develop relationships with a diverse array of professionally and culturally competent clinical practitioners who can assist the lawyer in evaluating the quality of services that affect the lawyer's clients.

VII. BACK TO BASICS

While there are many possible factors a lawyer should consider, it may be helpful to revisit at least some of the basic issues associated with reviewing psychological data, and general guidelines to keep in mind when interviewing and counseling children and adolescents. If the lawyer wants feedback on his style and skills, but has not had a clinician in a session with him and the child client, the lawyer should consider audio or video taping the session and requesting a critique from a professionally and culturally competent mental health professional.⁵⁰ Additionally the attorney should consider the following:

Dana, *Culturally Diverse Groups and MMPI Interpretation*, 19 *Prof. Psychol.: Res. & Prac.* 490, 490-95 (1988); Enrico E. Jones & Avril Thorne, *Rediscovery of the Subject: Intercultural Approaches to Clinical Assessment*, 55 *J. Counseling & Clinical Psychol.* 488, 488-95 (1987); Laurence J. Kirmayer, *The Place of Culture in Psychiatric Nosology: Taijin Kyofusho and DSM-III-R*, 179 *J. Nervous & Mental Disease* 19, 19-28 (1991); Penelope Garrison Krener & Charlene Sabin, *Indochinese Immigrant Children: Problems in Psychiatric Diagnosis*, 24 *J. Am. Acad. of Child Psychiatry* 453, 453-58 (1985); Steven López & Joseph A. Núñez, *Cultural Factors Considered in Selected Diagnostic Criteria and Interview Schedules*, 6 *J. of Abnormal Psychol.* 270, 270-72 (1987); Jeffrey Scott Mio & Gayle Iwamasa, *To Do, or Not To Do: That is the Question for White Cross-Cultural Researchers*, 21 *Counseling Psychol.* 629, 629-37 (1993); Paul B. Pedersen & Anthony J. Marsella, *The Ethical Crisis for Cross-Cultural Counseling and Therapy*, 13 *Prof. Psychol.* 492, 492-500 (1982); David Sue & Stanley Sue, *Cultural Factors in the Clinical Assessment of Asian-Americans*, 55 *J. Consulting & Clinical Psychol.* 479, 479-87 (1987); Derald Wing Sue et al., *Multicultural Counseling Competencies and Standards: A Call to the Profession*, 20 *J. Multicultural Counseling & Dev.* 64, 64-88 (1992); Ronald G. Tharp, *Cultural Diversity and Treatment of Children*, 59 *J. Consulting & Clinical Psychol.* 799, 799-812 (1991).

49. See Marc Mauer & Tracy Huling, *Young Black Americans and the Criminal Justice System: Five Years Later* (1995).

50. When videotaping, of course, we must be mindful of protecting all data under the attorney-client privilege.

Questions to ask about tests the psychologist selected

- What tests did you select? Why?
- How much experience have you had with those tests?
- What are the reliability and validity indices for the tests you selected?
- When were the most recent reliability and validation studies completed? By whom?
- What other tests assess similar functions?
- Why were those tests not chosen?
- What was the normative population for the tests?

What you need to know about the examiner

- Are you a clinical psychologist?
- Are you a licensed psychologist?
- In which professional organizations are you a member?
- To which professional journals do you subscribe?
- Have you published articles, chapters, or books?
- Have you presented recently at a workshop, conference, or symposium?
- Do you maintain a private practice?
- How long have you administered psychological evaluations?
- To what populations have you administered psychological evaluations?
- Where did you receive your training?
- Where were your practicums?
- Who were your supervisors?
- What are their credentials?
- With what population are you most experienced as a psychometrician?
- With what population are you least experienced as a psychometrician?
- Describe your typical client?
- Do you work with diverse racial, ethnic, gender, and socio-economic status clients?
- Describe the professional training that prepared you to work with these groups?
- What do you do by way of continuing education to learn more about working with diverse clients?
- How do you modify your assessment protocol based upon the diversity of the client?
- What tests are appropriate for working with diverse client populations?
- Which ethnic/racial/gender specific tests do you use? Which are available?
- Do you modify the administration of any tests for use with ethnic minorities? If so, how? Which minorities? Why?
- Review samples of previous psychological reports.

Ask to see a copy of previous psychological reports written by the clinician.⁵¹

Request a copy of a report on a client who has characteristics of your client. Request a copy of a report on a client who does not resemble your client.

Review a report on a private paying client.

Review a report where the "state" or "government" paid for the report.

Ask that no reports submitted for your review be more than three years old.

How was rapport established with the client?

Who referred the client to you? Why?

Did you (or an associate) see, and administer the tests with the client?

When was the first time you saw the client?

How long was the first visit?

What was accomplished during the first visit?

How much time was spent talking with the client before any testing began?

How much time was spent with the client after the testing was completed?

Describe the time you spent with the client.

Describe the client.

Did you meet with anyone else (parent, guardian, relative, social worker, counselor, probation officer, correctional staff member, etc.)?

Did you interview anyone else related to or who knows the client?

Was the language used in the interview the primary language of the interviewee and the interviewer?

What was the client's response to the interview session?

What was the client's response to the interviewer?

VIII. WHEN THE ATTORNEY INTERVIEWS OR COUNSELS

Lawyers are professional interviewers. This Response serves to remind lawyers, however, that there are additional issues to be addressed when interviewing clients on nonlegal issues. Lawyers are trained to obtain relevant facts from *adult* clients or experts. Special care must be exercised, however, when the client is a child. Developing rapport with a child client requires more time, planning, and possibly the assistance of other adults who know the child. In some cases it may be useful to have a mental health professional advise the attorney on how to interview the child, or to be present with the attorney when the interview takes place. This is particularly true where the child has

51. Those reports should be edited to protect the confidentiality of the client.

experienced some type of trauma, e.g., physical injury, emotional abuse, psychological trauma, parental divorce, sexual abuse, abandonment, or the death of a significant other.

Also, simply because parties to a conversation speak the same language, there is no guarantee that they are actually communicating. Words, intonations, and context may mean different things in different cultures. Suppose the attorney speaks English as his first language. He is interested in becoming fluent in Spanish, and plans to represent Spanish-speaking clients. The challenge is knowing when he is indeed "fluent" in Spanish so that he can confidently say that he understands his clients well enough in their native language to represent their legal interests professionally, competently, and ethically.⁵² The attorney may assume fluency when he can do most of the following with at least ninety percent accuracy: understand a film in Spanish, read a newspaper in Spanish, attend a family reunion of a Spanish family, and communicate with all of the family members there. Knowing another language is not merely knowing sentence structure, conjugation of verbs, and vocabulary. Few clients will come to you speaking the "King's English." Rather, regionalisms, colloquialisms, and street language are what the attorney is likely to hear and must understand. Such knowledge equals fluency in another language, and is the rudiment of professional, competent, and ethical ability to interview and represent a client who speaks a language different from the primary language of the attorney.

Counseling is not simply the sharing of information. Counseling represents the willingness of another to accept the information he hears from someone he trusts. For children to trust lawyers they must feel understood by the lawyer. This Response has covered the issues of children's emotional, cognitive, intellectual, and linguistic development and how such development impacts whether children understand what an adult is saying. This Response has also considered how cultural differences influence the ability of the child to comprehend the message (and the messenger). The lawyer who has reviewed this material, hopefully, can ask additional questions about psychological testing and psychological reports to increase his confidence in the results obtained. This leaves two additional suggestions for the lawyer when counseling children or adolescents. First, do not assume that matching like race, ethnicity, or gender will accomplish the outcomes that are necessary when counseling the child. Specifically, asking an African American psychologist or social worker to counsel an African American child or adolescent is not an end, though under the right

52. For purposes of this hypothetical we will assume most of the lawyer's clients country of origin is either Cuba, Mexico, or Puerto Rico. We must limit the client population geographically because being fluent in the language of one of the three client groups does not ensure that the attorney will be fluent in any of the other two client groups.

circumstances, such a selection may be a means towards effective counseling. Second, if there is *one* recommendation to make in helping the lawyer decide what is an optimal approach to counseling, the lawyer should try to match the counselor according to the socio-economic level of the client. In America, what people have most in common are the experiences they share based on what resources they have available to them. People whose incomes are near and below the poverty level have urban or rural lives that are quite different from Americans whose income places them in the middle class. Those families whose income bracket places them in the upper class have cultural experiences unique unto themselves. Thus, socioeconomics is probably the most common "counseling" barometer.⁵³

CONCLUSION

Just as a lawyer needs the expert advice of a physician in medical cases, or engineers and architects in construction cases, the lawyer needs a mental health expert where complex human interactions are at issue. The developmental concerns of children and adolescents are sufficiently complex to require expert consultation when the attorney must interview and counsel, or use psychiatric or psychological data. When administered, interpreted, and reported with appropriate safeguards, psychological data and information are helpful adjuncts to understanding human behavior. Increasingly we know more about which tests to administer, who should administer them, and how and to whom they should be administered in order to increase our confidence in the information obtained from the data. But, without careful attention to each detail along the way we are only laying seeds that will ripen into facts sufficient to sustain charges of willful or negligent culturally incompetent conduct.

53. Realistically, it is not the *current* socioeconomic status of the counselor that is dispositive. Rather, it is the socioeconomic status of the counselor's upbringing.