

WAR STORIES FROM THE FRONT LINES...LEARNING TOGETHER TO FLOURISH IN YOUR FORENSIC PRACTICE

Maria A. Babinetz, MS, CRC, CCM, CDMS, ABVE/D, LPC-PA, LRC-NJ
Michelle McBroom Weiss, MA, CRC, CCM, NCC, MSCC, ABVE/D, IJEC

1

Learning Objectives

- How to deal with difficult situations in your practice, evaluations, and testimony.
- Ethical considerations in various complicated case/trial situations.
- Discussion of various Codes of Ethics in relation to forensic practices.
- How to have longevity in forensic work.
- Recommendations for effective forensic practice management and balance.

2

Vocational Evaluation and Testing

- Audio recording in a vocational evaluation?
- Who can be present for the vocational evaluation?
- Videotaping of the vocational evaluation?
- Who can be present for the vocational testing?
- Know your testing company policies on releasing testing or having individuals present, etc.
- Releasing Testing Data in a Deposition.

3

Vocational Evaluation and Testing

- Using Current Testing
 - Examples given from other expert reports.
 - Using dated testing opens an expert to a Motion in Limine and a complaint to certifying bodies.

4

Vocational Evaluation and Testing

- CRCC
 - G.4.b. "APPROPRIATE USE. Rehabilitation counselors are responsible for the appropriate applications, scoring, interpretations, and use of tests/instruments relevant to the needs of clients, whether they score and interpret the tests/instruments themselves or use technology or other services. Generally, new tests/instruments are used within one year of publication, unless rehabilitation counselors document a valid reason why the previous versions are more applicable to their clients."

5

Vocational Evaluation and Testing

- Pearson also outlines:
 - " In rare high stakes legal evaluations with a valid court order mandating the audio or video recording of an evaluation for review only by other qualified examiners, the examiner and reviewers have the responsibility to determine if this variant testing condition has or had a material impact on the examinees test performance considering issues such as distractions, rapport, and effort. We request that any such recordings should be made the subject of a protective order to ensure the security of the test items and content. Please refer to the section herein titled **Litigation** which describes what should be included in a protective order."

6

Vocational Evaluation and Testing

Continued:

"Additionally, recordings should not be allowed in any setting where the security of the recording cannot be adequately protected. Additionally, an audio or video recording of an administration where any test materials are recorded is a reproduction under federal copyright law. If done without our written permission, such acts may be an infringement of the assessment's copyright."

7

Vocational Evaluation and Testing

• Pearson's position on reproduction of tests in a litigation test:

"Pearson does not wish to impede the progress of legal proceedings; however, we are equally unwilling to jeopardize the security and integrity of our test instruments by consenting to the release of copyrighted and confidential material to those not professionally qualified to obtain them. Should litigation in which a psychologist is involved reach the stage where a court considers ordering the release of proprietary test materials to non-professionals such as counsel, we request that the court issue a protective order prohibiting parties from making copies of the materials; requiring that the materials be returned to the professional at the conclusion of the proceeding; and requiring that the materials not be publicly available as part of the record of the case, whether this is done by sealing part of the record or by not including the materials in the record at all."

8

Vocational Evaluation and Testing

• Testimony related to testing. Pearson's position is noted:

"In addition, testimony regarding the items, particularly that which makes clear the content of the items, should be sealed and again not be included in the record. Pleadings and other documents filed by the parties should not, unless absolutely necessary, make specific reference to the content of or responses to any item, and any portion of any document that does should be sealed. Finally, we ask that the judge's opinion, including both findings of fact and conclusions of law, not include descriptions or quotations of the items or responses. We think this is the minimum requirement to protect our copyright and other proprietary rights to the test, as well as the security and integrity of the test."

9

Vocational Evaluation and Testing

- There is a provision for variant testing conditions such as audio or video recording. Caution is given as cited:
"It is Pearson's opinion that audio or video recording or other non-standard conditions may invalidate the use of norm-referenced scores."

10

Vocational Evaluation and Testing

- NBCC
 #34. "NCCs shall protect the confidentiality and security of tests or assessments, reports, data and any transmissions of information in any form."

11

Codes of Ethics

Be familiar on all Code of Ethics for your certifications:

- Code of Professional Ethics for Rehabilitation Counselors (CRCC)
https://www.crcertification.com/Files/ndf/ethics/CodeofEthics_01-01-2017.pdf
- Code of Ethics for National Board of Certified Counselors (NCC)
<http://www.nbcc.org/Assets/Ethics/NBCCCodeofEthics.pdf>
- Code of Ethics for American Board of Vocational Experts (ABVE)
www.abve.net/Assets/ABVE_Code_of_Ethics_2007_cover.pdf
- Code of Ethics, Standards of Practice and Competencies for International Association of Rehabilitation Professionals (IARP)
<https://cdn.yaws.com/rehabpro.org/resource/resmgr/Files/RehabProIARP-Code-of-Ethics.pdf>

12

Codes of Ethics

- CRCC Code of Ethics
 "G.2. b. RELEASE OF RAW DATA TO QUALIFIED PROFESSIONALS. Rehabilitation counselors release raw data in which clients are identified only with the consent of clients or their legal representatives, or by court order. Such raw data is released only to professionals recognized as qualified to interpret the data."

13

- Example from Pearson Assessments:
<https://www.pearsonassessments.com/footer/legal-policies.html>

14

State Court v. Federal Court

- In non-federal court cases, know your local rules.
- Federal Code of Civil Procedure, Rule 26
- *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B)
- Protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

15

Federal Court discussion continued

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

16

- Be familiar on all Code of Ethics for your certifications

17

- Case example: Attorneys wanting to edit a report.

18

Never Trust an Attorney.....

Examples:

- Fee Agreements
- Never Plan Anything the Day of Trial (IARP 2018)

19

- Releasing Testing Data in a Deposition.

20

Decide which type of Expert Witness you want to be

- Identify the target market
- Primary income source or secondary career
- Availability is key
- Know who may hire you...conduct your own due diligence
- Establish clear boundaries...it is OK to say "no"

21

Protocols

- Keep CV accurate and up to date
- Use a Retention Contract for every case
- Consider establishing a Retainer policy
 - Review and update annually at a minimum
- Obtain executed Retention Contract and retainer in every case
- Develop consistent methodology and implement same whether a plaintiff expert or defense expert
- Establish protocol for response to Subpoenas

22

Office Procedures and Practices

- Develop business structure and plans for your practice
- Follow consistent protocol for accepting cases
- Develop protocol for document retention, storage, and disposal
- Awareness of HIPPA considerations
- Track referral sources
- Maintain professional liability insurance and an umbrella policy
- Track types of cases

23

Records and Document Management

- Establish a preferred method for receiving documents
- Define what documents are germane for your opinion
- Identify / leverage of attorney support staff
- Be consistent about creating file material...do not sanitize files
- Create a tracking system
- Identify custodian of records
- Touch every page of the file

24

Scheduling

- Do not overschedule
- Keep a calendar of report due dates
- Determine if deadlines are negotiable for flexibility to accept a case

25

Dealing with Retaining Counsel

- Understand you are in a service business
- Educate attorney in your area of expertise
- Tell the attorney what you need to be effective in this case
- Be truthful when you cannot provide an expert opinion...relay to retaining attorney as soon as possible
- Be easy to work with but not a pushover

26

Dealing with Retaining Counsel continued

- Be prepared
- Good attitude
- Demonstrate objectivity
- Be aware of biases
- Exceed expectations
- Timeliness to attorney inquiries

27

Report Writing

- Express opinions with confidence and to a reasonable degree of professional certainty
- Address all areas requested by retaining counsel
 - Do not put anything in writing unless advised by retaining counsel
- No character assassination of opposing expert
- Be aware of metadata in reports
- Format report appropriately
- Avoid canned language
- Proofread carefully

28

Dealing with Unexpected Development and Emergencies

- Do not panic
- Remain flexible
- Proactively remain in contact with retaining counsel regarding deadlines
- Remember you are there to solve problems and not create them for retaining counsel

29

Marketing Strategies



REASONABLY
DIVERSIFY YOUR
RANGE OF SERVICES



DEVELOP A NICHE
AREA



BUILD
COLLABORATIVE
RELATIONSHIPS



ADVERTISE



NETWORKING



PROFESSIONAL
ASSOCIATIONS



SPEAKING /
WRITING

30

Ethical Conundrums

- Stay calm and think carefully before reacting
- Define possible courses of action
- Reach out to colleagues, not competitors, for advice
- Utilize your own personal/business attorney, not retaining attorney, for consultation matters
- Be aware of ethical standards of practice in one's area of expertise

31

How to Avoid Costly Mistakes

- Expect the unexpected
- Do not deviate from your professional standards of practice
- Organizational skills
- Preparation cannot be overstated
- Remain objective and trustworthy
- Be smart and selective in use of social media
- Establish clear professional boundaries
- Engage in work-life balance

32

Building One's Brand



- Your reputation precedes you
- Carefully craft your image...tangibles and intangibles
- Knowledge
- Integrity
- Credibility
- Information on the Internet is forever
- Know your bandwidth

33

Key Takeaways

- Confidence is key
- Know your limitations
- Always keep learning
- Reach out to colleagues for input in challenging circumstances
- Keep your word
- Get paid
- Protect your reputation at all costs...it is continually evolving

34

Questions?
Thank You!

35



Maria A. Babinetz, MS, CRC, CCM, CDMS
 Board Certified Vocational Expert – Diplomate (ABVE / D)
 Licensed Professional Counselor – PA
 Licensed Rehabilitation Counselor – NJ

Signature
 Rehabilitation Services, LLC

500 Office Center Drive
 Suite 400
 Fort Washington, PA 19034
 Phone: (215) 860-5320
 Cell: (215) 480-4871
 Email: maria.babinetz@signaturerehab.com
 www.signaturerehab.com

36



Michelle McBroom Weiss, MA, CRC, CCM, NCC, MSCC, ABVE/D, IPEC
Vocational Consultant

5543 Edmondson Pike, Suite 128
Nashville, TN 37211
Phone: (615) 834-0186
Cell: (615) 308-6395
mcbroomweiss@mbroomweiss.com

37
