

September/October Newsletter

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Special Issue on Informed Consent

WHAT CONSTITUTES AN ADEQUATE LEVEL OF CONSENT FOR A PSYCHOLOGICAL CHILD PROTECTION EVALUATION ?

James J. Connolly, PhD and Stephen Humphrey, PhD

Several issues at the interface between law and psychology have emerged during the last few years in Connecticut during which the Judicial Department has undertaken focused seminars on psychological child protection evaluations. One effect on the two psychologists who have contributed to this working paper is feeling the need to pay closer attention to the issue of examinee consent in these evaluations. We have started to use the term "canvassing" for the process by which a psychologist determines whether there is an adequate level of consent for proceeding with the evaluation in such cases, because the process seems to be similar to the way a judge will canvass the level of understanding and voluntariness of decisions of a litigant in a

civil or criminal trial at the point where the litigant is undertaking a crucial decision that may seriously compromise legal rights and privileges. The ideas described here are provided to provoke discussion. We do not imagine that they constitute a full solution to the issues at hand. Sometimes, however, having an initial effort at defining issues on a complicated and controversial issue is a good start for discussion regardless of how partial or even erroneous that effort might be.

Distinguishing Adequate Consent from Competence to Stand Trial

The issues that determine whether examinees in a psychological child protection evaluation are able to give adequate consent need to be rigorously distinguished from the larger issue of competence to stand trial (CST) in a child protection case. The latter, of course, consists of a determination of whether litigants understand the nature of the abuse and neglect issues facing them in the Juvenile Court child protection proceeding and the general ability to assist counsel in the defense. The issue of giving consent for the psychological evaluation is in an important sense secondary to the determination of competence to stand trial in a child protection case. Of course, there is the possibility that some individuals will appear for child protection psychological evaluations who are actually not competent to stand trial in a child protection case. The lack of competence can arise from gross emotional and/or cognitive impairments, and in some cases, this lack of competence has not been identified prior to the appearance of the litigant for the child protection evaluation.

Detecting a possible lack of competence to stand trial is, of course, a kind of default or threshold obligation for the psychological examiner in child protection cases. In such cases (and they are unusual, which is fortunate), the appropriate action for the psychologist is to put the child protection evaluation on hold and inform the court that in his or her professional opinion, there is a substantial likelihood of a lack of competence of the litigant to proceed with respect to the child protection case as a whole, let alone being able to consent for the child protection evaluation. The presumed outcome of such a referral back to the court would typically be the court ordering a competence to stand trial evaluation. Cases in which a lack of competence to stand trial in child protection matters have not been identified before the individual is referred to a psychological child protection evaluation appear to be very rare, but they have occurred. Attempting to combine the threshold determination of competence to stand trial in a case with a substantive evaluation such as that in a psychological child protection evaluation would appear to have serious potential for creating psychological and legal confusion. At the present time, litigants in child protection cases in Connecticut who are suspected to be possibly not competent to undergo proceedings are usually referred by the juvenile courts for competence evaluations by a forensic psychiatrist, but there would appear to be no legal or professional constraint to these evaluations being performed by licensed psychologists. Indeed, in most other states

CST evaluations in both criminal and civil cases are routinely performed by licensed psychologists.

Merely Signing a Consent Form Is Not Sufficient for Obtaining Consent

Working on the assumption that the litigant who appears for a court-ordered child protection evaluation fulfills the standards of CST competence, what are the components of an adequate consent for proceeding with the psychological evaluation? It is tempting for psychologists to conceive of adequate consent as a rough understanding of certain basic elements of the psychological evaluation process, and most psychologists have embodied these elements in consent forms that they routinely use in child protection cases. It should be clear, however, that the signing of a consent form by a litigant in a child protection case does not in itself constitute adequate consent to proceed with a psychological evaluation. Although it is desirable (indeed, necessary) to memorialize certain portions of the consent process in a written and signed document, the actual determination of consent should be seen not as a formal signing ceremony but rather as the reaching of a rough understanding about the nature of the psychological evaluation and its psychological and legal significance between the examiner and the examinee. Without the process of canvassing and the reaching of this rough mutual understanding, there is at least some possibility that the relationship between examiner and examinee in these cases has moved into being impermissible and inequitable.

There are at least five reasons why the simple signing of a consent form should not be considered sufficient proof of consent to proceed with the evaluation and why a real substantive understanding between the examiner and examinee is a necessity. The first reason is the intrinsically unequal relationship between the examining psychologist and the examinee. (This comes about primarily as a result of the educational level and professional training of the psychologist vis-à-vis the litigant.) The second reason is that participation in a court-ordered psychological evaluation has intrinsically coercive components to which the examining psychologist as well as all the responsible persons involved in child protection cases should be sensitive. The third reason is the generally less privileged social backgrounds of many, and perhaps most, litigants in child protection cases. (This involves their generally lower SES with its attendant limitations regarding education and social sophistication.) The fourth reason is the high incidence among these litigants of significant clinical issues that affect judgment and decision-making. (These include learning disabilities, cognitive limitations, substance abuse problems, and psychiatric difficulties.) The fifth reason is that some participants have pre-existing misunderstandings or misinterpretations about the reason for the evaluation. An examinee might believe that "You want to see how my child acts with me," and has thus been misinformed about the purpose of the evaluation, or might have a decidedly negative perspective, such as the following: "This is just a fishing

expedition for DCF.” These perceptions have to be corrected during the first phase of the evaluation process. It is imperative that the examinee understand both the nature of the process and the objectivity in the evaluator’s role, including the absence of an allegiance to any party. Not correcting erroneous assumptions at the start can change the tenor and trajectory of the entire evaluation.

For these reasons, there hangs in the air the possibility that the unfolding relationship between the psychological examiner and the litigant being evaluated may be so unequal and so imbalanced that the examiner may be reasonably seen as somehow prevailing on the examinee in an impermissible fashion. Only the first of the sources of the inequality and misunderstanding just described between the examining psychologist and litigant examinee should be seen as relatively straightforward and unproblematic. The psychologists evaluating these cases may be assumed to be highly trained professionals, who by reason of formal education, specialized experience under supervision and ongoing honing of their expertise are able to provide objective assessments of the litigant’s psychological status and parenting ability that in itself represents an intrinsic inequality between the examiner and examinee. The courts value the expertise. There is, however, the possibility of the transformation of this desired and desirable intrinsic difference based on expertise between examiner and examinee into an undesirable and impermissible inequality that in its more extreme forms might be considered to be an actual inequity. Defining this boundary between the permissible intrinsic inequality and the impermissible inequity is the heart of the problem of adequate consent for a child protection evaluation.

The process of the examining psychologist canvassing the examined litigant prior to proceeding with the child protection evaluation should be seen as a rough but important way of determining that the inequality in the examiner–examinee relationship does not constitute an impermissible inequity. The essential function of the canvassing is to determine whether the examined litigant has sufficient understanding and decision-making ability that an inequity is not being practiced under the guise of a professional service. Even the intrinsic inequality between examiner and examinee stemming from the professional education and training of the examiner has the potential for abuse, especially if the examinee does not have some understanding of its nature. The other sources of the unequal relationship between the psychologist and the examined litigant (the intrinsic coerciveness of a court-ordered evaluation, differences in SES, education and social sophistication, and the presence of potentially judgment-impairing conditions) make the canvassing of the examinee even more important.

What we are describing here is a determination of a basic sort of conceptual understanding of the purpose of the evaluation. Of course, the examinee’s lack of sophistication and impaired judgment is in some ways inextricably woven together with

the factors that initially resulted in child protection involvement. In one case evaluated by one of the writers of this paper, the father defended the use of corporal punishment by saying, "My aunt once threw me through a plate glass window, and I turned out OK!") The question is not whether the examinee has a perfect understanding of child protection issues but whether their limitations of understanding reach the threshold that would preclude proceeding with the evaluation. A clear understanding of the parameters of the evaluation, the purpose of the evaluation, the limits of confidentiality, and the role of the examiner related to the parties (court, DCF, parents, child) is essential. Even when such an understanding is expressed, however, examinees will sometimes say or do things that appear, on the surface, to contradict this expressed understanding.

The Real Purposes of Obtaining Consent

The canvassing process and the signing of a written consent form may be thought of as working together to effect three important purposes: 1.) Establishing a rough working understanding between examiner and examinee about the nature of the evaluation that meets basic standards of legal fairness; 2.) Providing the examinee with an informed opportunity to give meaningful assent to the conduct of the evaluation; and 3.) Providing evidence to the court, the parties and their representatives that the previous elements (the working understanding and the meaningful assent) have been achieved. The aim here is not to establish an additional paper chase that will add a lengthy preliminary step to court-ordered child protection evaluation but rather to clarify the way in which these three interrelated preliminary matters may be handled in a straightforward and sufficient manner.

It is important to highlight here the distinction that has been made in professional psychological standards between full consent and adequate assent in a psychological evaluation. Given the fact that a court-ordered psychological evaluation in a child protection case involves an element of legal coercion (that is, from the court itself) the litigants under court order to participate in such cannot be considered to be fully consenting but rather assenting in a manner which is meaningful within the constraints of the court's order to participate in the evaluation. This is an important distinction that is at the heart of how the canvassing of the examinee proceeds. The consent of the examinee in a child protection evaluation is an inherently circumscribed and rather limited form of consent. It should be noted, however, that the Juvenile Courts in Connecticut frequently ask in child protection cases for the involvement of individuals on a more voluntary basis in psychological evaluations involving several family members. These interested individuals often include grandparents and others whose parental rights are not formally at stake in the child protection proceedings. Most of what is being said in this paper about the issue of consent for court-ordered evaluation participants applies to these more voluntary participants as well, but the canvassing of

these participants must necessarily involve distinguishing the fact that their participation is more voluntary in nature. Interestingly, the thorny issues being discussed here about understanding and assent to the evaluation process typically appear to be present to a much less serious extent among these more voluntary participants, perhaps because of the joint operation of the voluntary nature of their participation and the fact that their parental rights are typically not at stake.

For the psychologist conducting a canvassing procedure prior to proceeding with a child protection evaluation, there are at least three major types of information and discussion that will be important. These are 1.) The aspects of understanding of the process of the evaluation and assent to the process that the examinee brings to the evaluation; 2.) The aspects of understanding of the process of evaluation and assent to the process that the examinee develops in conjunction with the psychological examiner as a result of their discussions of consent; and 3.) The giving by the examinee of assent to proceed with the evaluation. It is useful to divide the discussion between the examiner and the examinee into these three components and to proceed in this order (*prior understanding, understanding from mutual discussion, and giving assent*). Sometimes the examinees themselves wish to barrel through the discussion of these issues, and it is important in such cases that their desire to handle these issues in a peremptory fashion does not short-circuit an orderly process.

Indeed, if the psychologist proceeds with these three basic steps in mind, an orderly treatment of the important issues can typically proceed within a discussion of no more than five or ten minutes in duration. They are, however, an important five or ten minutes that should not be treated as mere window dressing or as a perfunctory preliminary matter engaged in simply to please observers and dispense with irritating legal formality. The discussion should be undertaken in a serious and substantive fashion. Indeed, if the discussion is undertaken in a sufficiently serious and respectful fashion, it can be an important element in the building of rapport between the examiner and examinee. I would go so far as to say that the preliminary discussions related to the nature of the psychological evaluation and the examinee's assent to proceed are an indispensable component in the building of sufficient rapport for the conduct of child protection evaluations.

Discussing the Understanding the Examinee Brings to the Evaluation

Turning to the first portion of the canvassing process, there is the discussion of the aspects of the understanding of the process of the evaluation and assent to the process that examinees bring with them to the evaluation. There is certainly no fixed or single proper way of proceeding with this matter, but some of the information that should probably be discussed in most of these cases are whether an examinee is aware of the fact that there is a legal dispute with DCF, examinee awareness of the

fact of having a lawyer in the child protection proceedings, examinee knowledge of the name of the attorney, the number of times that the examinee has discussed the child protection case with the lawyer, whether the examinee has specifically discussed the court-ordered psychological evaluation with the lawyer, and whether (on the basis of the discussion that the examinee has had with the attorney concerning the psychological evaluation) the examinee has formed an opinion as to whether to proceed with the psychological evaluation. Three matters are important to note in this immediate context. The first is that if an examinee after consultation with counsel has decided not to assent, the evaluation must be brought to a full stop. The second is that discussion with the attorney about understanding the process and assenting to it are not the same thing as understanding the process and assenting to it. The third is that although it is helpful, it is by no means sufficient or necessary that examinees have specifically discussed the psychological evaluation with the attorney they have in their child protection cases.

The understanding of the evaluation process and the propensity to assent to it that the examinee brings "in the door" at the start of the evaluation process is just one component of the canvassing process, and it cannot be allowed to short-circuit the larger canvassing process. Ultimately, both the examinee's understanding of the evaluation process and the examinee's assent to the process are matters that develop out of the interaction between the examiner and the examinee. In my experience, a majority of court-ordered participants in child protection psychological evaluations have had some specific discussion of the psychological evaluation with the attorneys representing them in the child protection case, but many have not. Among those who have not, the great majority are capable of coming to an understanding of the process and giving meaningful assent to the conduct of the process. A matter as important as undergoing a court-ordered psychological evaluation should be discussed by every attorney representing a litigant in a child protection case, but the circumstances of these cases are complex, and understanding and giving meaningful assent to the evaluation process is fundamentally the responsibility of the examiner and cannot be deferred to any other professionals.

The process of asking generally about the legal representation of the examinee is a useful way of starting a discussion of the legal context of the psychological evaluation. It is important, of course, that any discussion of the examinee's legal strategy or the substance of consultations with attorneys apart from information about the psychological evaluation and assenting to it should be avoided, because those matters are privileged material between attorney and client. The important issue here is meaningful understanding that the examinee has of the interface of the psychological evaluation with the child protection case. It is not necessary that the examinee know the name of their legal representative or express satisfaction with the nature of the

representation. The essential issue here is that the examinee understand the evaluation is taking place within the context of a legal dispute regarding child protection matters.

Other matters that may also be part of the discussion of the understanding of the evaluation and the issue of assenting to it that are part of what the examinee brings "in the door" include whether or not the examinee has undergone psychological or psychiatric evaluations in the past. In this respect, it is important not to have lengthy discussions about the outcomes of these prior evaluations, because such discussions would be inappropriate prior to the giving of meaningful assent, but the discussion of prior mental health evaluations could provide information which can be a basis for important clarification of the context and purpose of the court-ordered child protection psychological evaluation immediately facing the examinee.

A more detailed discussion of the nature of the court-ordered evaluation and its specific focus on parenting issues can result from a brief initial discussion of prior mental health evaluations. Another important matter related to the "in the door" understanding of the examinee about the child protection evaluation is the distinction between treatment and evaluation. It is often important that the examinee be made aware of the fact that the court-ordered psychological evaluation is very different in nature from other mental health consultations related to treatment that they may have undergone in the past. Such discussions can be an important segue into the needed discussion of the examiner's basic responsibilities in the child protection evaluation, which are to the court and the children in the case rather than the examinee.

Discussion of Role and Procedures

The discussion of the context of the psychological evaluation within the examinee's child protection case and the examinee's history (or lack of history) of prior mental health evaluations will necessarily lead to the second part of the canvassing process, which is the understanding of the process of evaluation and assent to the process that the examinee develops in conjunction with the psychological examiner as a result of their initial discussion. Although it is important that the examinee understand the different types of activities that will take place in the child protection psychological evaluation, such as the clinical interview, psychological testing, collateral consultations, and parent-child observations, the most important part of the major preliminary discussion between examiner and examinee in these cases is the rigorous and thorough clarification of where the professional responsibilities of the examiner reside.

It is essential that examinees understand that the examiner is very different from mental health personnel who may have provided treatment for them in the past. They must understand that the examiner has a fundamental responsibility to the court and

not to either examinees or DCF. They must understand that all of the information they are providing will be going into a report that will be sent to the court and shared by the legal representatives of all of the parties in the case. They must also understand that the primary professional responsibility of the examiner is to the wellbeing of the children rather than any of the adults involved in the case. It may sometimes be useful to explain that this focus on the wellbeing of the child is required by ethical standards in the examiner’s roles both as a psychologist and as participant in the legal context of the SCJM. That is, both simultaneously impinging roles require the examiner operate under a “best interest of the child” standard.

These are absolutely core issues, and they will need to be explicitly discussed between the examiner and examinee in practically all child protection cases. It is sometimes worthwhile to have the examinee read the detailed consent form clause by clause with respect to these very important matters related to the fundamental legal and professional responsibilities of the examiner. It is also sometimes very worthwhile for examinees to be able to paraphrase their understanding of the fundamental function of the evaluation. If this technique is used, it is important that the examinee understand that the evaluation relates to mental and emotional processes and behavior and social relationships as they concern the ability to parent children. The psychologist may also add the explanation that in this regard, his or her role is to try to form a solid understanding of all of these areas and then convey that understanding to the Court in a manner that will assist in furthering the best interest of the child(ren). The psychological expert is trying to help others without this expertise to obtain a nuanced and balanced understanding of the family and its functioning.

If the examinee has a basic understanding the psychological examiner’s responsibility is to the court and the children in the case, that the focus of the evaluation is on parenting abilities, and that all the information they provide to the examiner will be going into a report to the court which is then to be shared with the representatives of the parties in the case, it can probably be said that an adequate understanding of the evaluation process has been achieved. Of course, discussion of many other aspects of the evaluation process could be useful, but these appear to be the most important elements that will allow the examiner and examinee to form a permissible cooperative unit for the purposes of the evaluation in a legally responsible fashion. The psychological examiner will also be able to make a rough determination of the overall

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discussion of these issues, the examiner should start to keep in mind the possibility that the examinee will not be giving assent to the evaluation. It is important that the examiner take an objective approach to the evaluation process. It is not a professional obligation to complete the evaluation at all costs. The psychologist’s professional

obligation to proceed with the evaluation if (after a serious discussion of the evaluation process) the examinee gives clear assent to proceeding with the conduct of the evaluation.

Giving Assent

This brings us to the third and ultimate element of the preliminary discussion between the examiner and the examinee in a child protection psychological evaluation, the giving or withholding by the examinee of assent for proceeding with the evaluation. This is the true heart of the canvassing process and the heart of the issue of whether or not consent has been given in a sufficient fashion. It is essential that the examinee make an unambiguous statement of a wish to proceed with the psychological evaluation for the requirement of assent to be met. This can usually be done most conveniently after the discussion between the examiner and examinee about the nature of the evaluation and the examiner's responsibilities. In the best organized situations, the examiner is able to come to an end of the discussion about the nature of the evaluation and ask if the examinee wishes to proceed with the evaluation and to signify that intent by signing the consent form. It is important to remember that it is the understanding and meaningful assent that is important here, not the mere signing of the form by an examinee who is still uninformed.

If the reader has formed the impression that this canvassing process can always be performed in an orderly 1-2-3 fashion, this is now the time to acknowledge that such is not always the case. Some examinees insist on signing the form before there has been a principled discussion of the nature of the evaluation and an actual informed assent to proceed. In such cases, the mere signing of the form is a precipitate act and does not replace a serious discussion of the process and giving the examiner a meaningful indication of a wish to proceed. Sometimes the issue of meaningful assent presses forward before what I have described as the two earlier aspects of the process, what the examinee brings "in the door" in terms of understanding the evaluation and the assent to it, and the more or less orderly discussion of these subjects between the examiner and examinee.

There is a significant minority of child protection examinees who very early in the process manifest, verbally or otherwise, a reluctance to participate in the evaluation. The examiner needs always to take this reluctance with the utmost seriousness. These are the examinees about whom the issue of assent to the evaluation is most important. A frank discussion with examinees of their reluctance to be present for the evaluation can sometimes lead to a clarification of their understanding of the evaluation process and their disposition to assent to it. This type of examinee will sometimes explain that they have a good deal of fear associated with being evaluated. This is a very sensitive juncture in the process of conducting this type of evaluation. In some

cases, the litigant examinees will describe both their reluctance to participate in the evaluation, but (at more or less the same time) there is a clear understanding on their parts that the evaluation has been ordered by the court and is a legal requirement of their child protection cases. If the litigant to be examined indicates a desire for more time to discuss the psychological evaluation with the attorney who represents them in the child protection case, this should be respected, and it may result in delay, rescheduling or permanent canceling of the evaluation.

The examining psychologist should not undertake to give the examinee legal advice in such situations, but the professional guidelines on forensic psychological evaluations make it clear that certain basic types of legal information can be provided by the examiner to the examinee upon the inquiry of the examinee. This would likely include an honest answer to the question of whether or not there might be legal consequences to not assenting to proceeding with the evaluation. Simply answering such a question honestly in the affirmative should certainly not include any attempt by the examiner to characterize the ultimate legal effect of such an action or decision on the part of the examinee. Sometimes examinees will need to be explicitly told by the examiner that if legal advice is needed, they should consult with the attorney in the child protection case. The examiner may honestly explain that failure to assent could have ramifications, but that there is no way to determine what those might be. The examiner may note that he or she will be explaining in writing to the Court that the examinee chose not to proceed.

An important observation here is that for most of the reluctant examinees, the general discussion of their understanding of the process of the psychological evaluation and the fact that they have a right to assent or not to the conduct of the evaluation reduces the level of anxiety sufficiently that examinees eventually give assent both verbally and in writing. The process of coming to an understanding of the evaluation and of deciding to assent or not to its conduct needs to be appreciated as an active and interactive process involving a real decision made by the examinee and a real interaction between the examinee and the examiner. Just as the examinee who grabs the consent form and precipitately signs the form still needs to engage in a reasonable discussion of the process and verbally confirm the assent to proceed, the litigant who expresses some initial reluctance to proceed with the evaluation may after some reflection and discussion decide to proceed.

If at any point during the initial discussions between the psychological evaluator and the litigant examinee, the latter indicates a clear and considered reluctance to proceed with the evaluation, this must be respected as the examinee's decision, and the evaluation must be stopped. In fact, in any situation where the examinee does not make a clear statement of assenting to the evaluation, the process must stop. The

evaluator's attitude as to the issue of assenting to the evaluation must be respectful and definite. Assent is either given or withheld, and the decision of the examinee to withhold assent is a full stop for the evaluation process. The soundness of the reasons for not assenting should not be discussed with the examinee. Most of these reasons will seem idiosyncratic, poorly considered and ungrounded to the examiner, but in this area the examiner needs to function as a rigorous gatekeeper in a legal proceeding. Assent is an all-or-none matter and it is a decision to be made by the examinee without material influence by the examiner.

An important matter here is the fact that the assent to proceed has to be effectively unqualified. Negotiation by the examiner with the examinee as to the circumstances and procedures of the psychological evaluation is almost never in order, and the examiner is proceeding in a perilous direction in giving any sort of characterization of the likely results of the evaluation as a way of inducing the examinee to participate. There is a special circumstance, however, in those situations in which the examinee has been charged with crimes related to treatment of children in the examinee's care or to other matters that might arise in the psychological evaluation and which have not yet been resolved in the criminal courts. For instance, it is unusual (but not unheard of) for some examinees in child protection cases to explain that (typically on the advice of counsel) they will not be open to answering any questions that are substantively related to criminal charges that they are or may be facing. Examiners may proceed with the evaluation under these strictures if they believe that it will not seriously impede the evaluation process or have an impact on their ability to discharge their professional responsibilities.

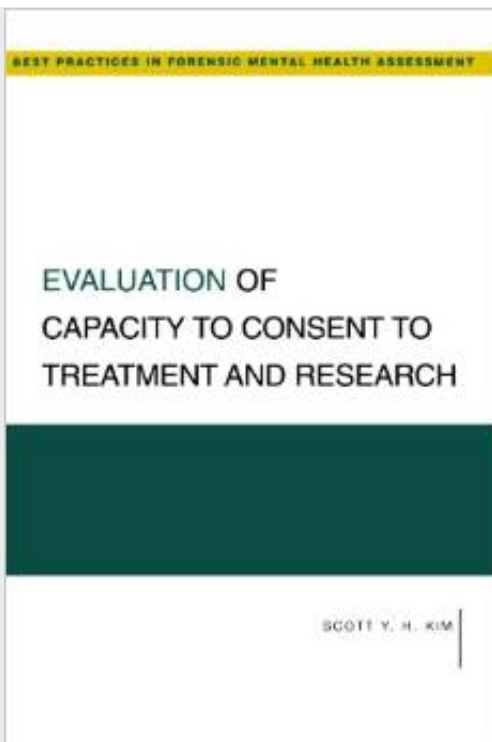


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Connecticut's CE law will go into effect on October 1, 2014. As of next month, psychologists will be required to meet yearly continuing education requirements, joining every other mental health professional in the state with this requirement, and nearly every other state in the nation.

- The CE period will be triggered for you the first time you renew your license after September 30, 2014 – The clock starts ticking on your renewal date. For example:
 - o If you renew in October, clock starts ticking in October 2014
 - o If you renew in September, clock starts ticking in September 2015

You will have 1 year to complete your CE requirements. If your license renewal date is in October, you will have until October 2015 to complete your first year of CE requirements. If your license renewal date is in September, you will have until September 2016 to complete your first year of CE requirements.

You will be required to complete 10 hours of CE credits per year. The following are acceptable providers of CEU's: 1. the American Psychological Association; 2. a regionally accredited higher education institution graduate program; 3. a state or regional psychological association; 4. a postdoctoral training center; 5. a nationally recognized continuing education seminar provider; 6. a professionally or scientifically recognized behavioral science organization.

You may meet 5 hours of CE requirements through online courses or presentations at conferences.

You will need to keep track of your completed CEUs and completion certificates. Each year, you will note on your license renewal whether you have completed the CE requirement. The Department of Public Health may audit you at any time and ask for proof of completion of the CE requirement.

Traci Cipriano, J.D., Ph.D.

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