REPORT WRITING AND TESTIMONY

Mary Alice Conroy

Sam Houston State University

WRITING THE FORENSIC REPORT

Numerous psychiatrists and psychologists have contributed to the literature regarding the composition of a good forensic report (Borum & Grisso, 1996; Heilbrun, 2001; Heilbrun & Collins, 1995; Gutheil, 1998; Nicolson & Norwood, 2000; Rogers & Shuman, 2000; Weiner, 1999). Some texts even include an extensive array of sample reports (Melton, Petrila, Poythress, & Slobogin, 1997; Shapiro, 1999). However, style and format still remain flexible and can be individualized to the author's patterns of analysis. Forensic reports should also be "user-friendly" and geared to the needs of the targeted audience and the particular questions posed or standards referenced. That said, there are still some general principles of report writing that represent the standard in the field, along with specific jurisdictional requirements.

Legal Requirements for Criminal Forensic Reports in Texas

The best way of determining what is legally required for inclusion in a specific type of report is to read the statute. Given that statutes are subject to change each time the state legislature convenes, it is important to read the most current version. Instructions relative to commonly requested assessments may be found in the following references:

- For competence to stand trial reports: Texas Code of Criminal Procedure , Art. 46B

Correspondence concerning this article should be addressed to Mary Alice Conroy, Ph.D., Sam Houston State University, Department of Psychology, P.O. Box 2210, Huntsville, TX 77341-2210; Email: maconroy@shsu.edu

- For insanity evaluations: Texas Code of Criminal Procedure, Art. 46C
- For Sentencing determinations: Texas Code of Criminal Procedure, Art. 42.12, Art.9
- For competence for execution evaluations: Texas Code of Criminal Procedure, Art.46.05
- For Sexually Violent Predator assessments: Texas Health & Safety Code, Chapter 841

A review of relevant statutes can also provide the evaluator with the exact standard the trier of fact will be considering:

- For competence to stand trial: Texas Code of Criminal Procedure, Art. 46B
- For insanity: Texas Penal Code, Art. 801
- For the death penalty: Texas Code of Criminal Procedure, Art. 37.071
- For competence for execution: Texas Code of Criminal Procedure, Art. 46.05
- For Sexually Violent Predator civil commitment: Texas Health & Safety Code, Art. 841.003

If there are no statutory criteria or standards prescribed, the evaluator's best resources for guidance would be a careful reading of the court order and consultation with the attorney involved.

PROFESSIONAL STANDARDS REGARDING WHAT A FORENSIC REPORT SHOULD INCLUDE

Identification of the exact charge and reason for referral

This information is often placed at the beginning of a report. It lets the legal consumer know that the evaluator understands the exact nature of the issues under scrutiny. Confusion may arise when a defendant has multiple charges. Charges may be active in more than one jurisdiction (e.g., state and federal) or an individual may have a number of charges pending but prosecution is being pursued selectively. It is not uncommon for some charges to be dropped, reduced, or otherwise altered. It

is, therefore, essential that the forensic evaluator address the specific charge or charges that are currently of concern to the trier of fact. It is equally important that the evaluator be clear as to the psycholegal opinion being sought. For example, if the question is sanity at the time of a particular offense, it should be clear that the evaluator understands the parameters of the issue and is applying the appropriate standard.

Documentation of the confidentiality warning

Forensic evaluations that are neither court ordered nor mandated by statute will generally require informed consent from the person being evaluated. However, although an evaluation that is court ordered does not require consent, it is nonetheless incumbent upon the evaluator to disclose to the person being assessed the nature of the evaluation, the limits of confidentiality, the procedures that will be involved, the uses to which the evaluation will be put, and who will have access to the results. Even in the case of a grossly incompetent defendant, an evaluator is obligated to make all reasonable efforts to explain the process in terms the individual can comprehend. This process needs to be officially documented in the report.

Sources of collateral information

A primary difference between a forensic evaluation and a general clinical report is the obligation of the forensic evaluator to seek out collateral information. Collateral information reviewed should be specified in the final report. This would include a list of any documents the professional relies upon in formulating an opinion - mental health records, arrest reports, victim impact statements, criminal history records, etc. It would also include documentation of interviews (in person or by telephone) of collateral sources and the dates these were conducted. In seeking essential collateral information, evaluators are cautioned to be cognizant of the rules of discovery in the case. Some documents may be viewed by evaluators but not shared with one or another of the parties. In such cases the review of the document must still be noted in the report, but not its contents. Attorneys should be consulted for the specific rules of discovery followed in a particular jurisdiction.

Procedures followed

This includes a listing of clinical interviews with the defendant, as well as a listing of any psychological tests, actuarial devices, or structured interviews employed. Number and duration of interviews is often of interest to attorneys. If anything unusual transpired, it should also be reported. For example, if the defendant was unable or unwilling to participate in an interview, the evaluator may still be able to reach an opinion or provide useful input, but the limitations of the procedures need to be specified.

Evidence and reasoning leading to the forensic conclusions

Reports that only provide cursory psycholegal opinions or those that leap from a diagnosis to a psycholegal opinion no longer meet the standard in the field. The trier of fact is expected to reach an opinion on the issue in question with the assistance of the expert's report and not simply endorse the expert's findings without question. That means that the evaluator needs to explain the step by step process of how he or she reached specific clinical findings and how these findings led to the particular psycholegal opinions. For example, if, in the opinion of the forensic evaluator, the defendant is not currently competent to stand trial, there needs to be an explanation of the essential abilities the person lacks and how these deficits are related to the individual's mental condition.

Evidence that would appear to contradict the evaluator's opinion

The forensic evaluator's primary obligation is to render assistance to the trier of fact. (This is distinct from the role played by a trial consultant to one of the attorneys.) As such, the expectation is that the evaluator will examine the evidence, test various hypotheses, and come to an unbiased conclusion. Given that the trier of fact is the ultimate decision-maker, it is the duty of the evaluator to present and explain any evidence uncovered that may seem to contradict the conclusions reached. The evaluator would do well to explain what might appear relevant, but ruled out, along with the conclusions reached. If the evaluator disagrees with previous professional opinions, it may be helpful to explain the reasoning process.

PROFESSIONAL STANDARDS REGARDING WHAT A FORENSIC REPORT SHOULD OMIT

Professional jargon

A forensic evaluator is well advised to remember who the audience is – generally the legal community and not another clinician. Many terms common to clinical conversations are foreign to the judiciary and the bar. A proliferation of undecipherable technical terms does not enhance credibility; rather, it is confusing and aggravating. Commonly used phraseology from a mental status evaluation may convey little useful information to the audience (e.g., "His memory was confabulated, his associations loose, and thinking tangential.") Clinical diagnoses, in particular, require careful explanation. Even relatively common terms, such as "depression," may take on additional meaning when applied in the clinical context.

Details not directly relevant to the issue at hand

A forensic evaluation is not an in-depth exploration of the defendant's psyche, nor is it a lengthy account of all available details of the person's social history. It is an investigation of a specific psycholegal question and should be confined to that issue. Ethical codes warn against the unnecessary compromising of an individual's Fifth Amendment rights (Committee on Ethical Guidelines for Forensic Psychologists, 1991). Including any details revealed by the defendant regarding the circumstances of the offense with which she or he is currently charged may do this. Although in a report on sanity some of these details may be essential, they should be avoided in reports devoted to competence to stand trial. Although the defendant is informed that the usual confidentiality does not exist in the forensic context, evaluators should nonetheless avoid unnecessary invasions of privacy. Personal details about the defendant or other persons that are not directly relevant to the questions to be addressed should be omitted.

Biased language

Special care should be taken in a forensic report to assure that language remains pristinely professional. Neither pejorative

phrases nor language that appears overly sympathetic are appropriate. Particular care should be taken in the selection of adjectives and adverbs.

Issues that are more prejudicial than probative

Courts are tasked with seeking evidence that is considered probative; that is, evidence that tends to prove or disprove some fact at issue. However, courts may exclude even relevant evidence if its probative value is outweighed by the risk it will create unfair prejudice. In submitting a forensic report – a report that will frequently be shared with all parties – an evaluator must consider the issue of unfair prejudice when deciding what to include. For example, facts regarding a defendant's previous sexual promiscuity may have some diagnostic relevance, but may also be seen as prejudicial, and the need for such an inclusion should be carefully considered.

The "Ultimate Issue" Issue

The "ultimate issue" is the final, most central point that the trier of fact needs to decide. For example, if a hearing is held on competence to stand trial the ultimate issue is whether the defendant currently meets the legal standard for competence to stand trial. As noted by Otto, elsewhere in this Issue, there has been a long debate in the field as to whether mental health professionals should give opinions on the ultimate issue. A plethora of arguments for (Shapiro, 1999) and against (Melton et al., 1997) doing so can be found in the literature. In Texas there is no legal prohibition against the provision of ultimate issue opinions. Judges and attorneys generally expect such opinions from experts (Redding, Floyd, & Hawk, 2001). State statutes on competence to stand trial and sanity call for an ultimate issue opinion or an explanation why it could not be reached. Professionals must decide for themselves whether they can formulate such an opinion with a reasonable degree of clinical certainty and whether that opinion lies within the boundaries of their expertise.

TESTIFYING AS AN EXPERT WITNESS

Legal Issues Concerning Expert Testimony

Texas Rule of Evidence 702

One of the primary differences between a witness of fact and an expert witness is that the expert may testify to an opinion. In order to be qualified as an expert the rule requires demonstration of specialized "knowledge, skill, experience, training, or education."

Texas Rule of Evidence 703

A person qualified as an expert is allowed to base an opinion on data or facts that would not otherwise be deemed admissible – also known as "hearsay." That is true, provided it is "of a type reasonably relied upon by experts in the particular field." For example, an expert would probably be allowed to reference reports prepared by other clinicians.

Texas Rule of Evidence 705

This allows for an examination of an expert witness, prior to testifying before the jury, regarding the underlying facts or data on which an opinion is based. This is sometimes referred to as "voir dire" of the witness. If the court does not determine there is sufficient basis for the expert's opinion, the testimony may be ruled inadmissible.

Texas Rule of Evidence 403

This rule allows the court to exclude evidence presented by an expert if there is a determination that the probative value "is substantially outweighed by the danger of unfair prejudice."

Case law

The U. S. Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals* (1993) ruled that the trial judge was to act as a gatekeeper to assure the appropriate quality of evidence presented by experts. The justices suggested that judges examine whether the theory or evidence has been scientifically tested, whether it has been published and peer reviewed, whether there is an established

error rate, and whether it is accepted in the relevant professional field. These concepts were followed closely by Texas courts in *Dupont v. Robinson* (1995) and *Nenno v. State* (1998).

Texas Criminal Code of Criminal Procedure, Art. 46B & Art. 46C

Texas statute has outlined some specific qualifications for the "disinterested experts" the courts appoint. These include licensure requirements and specific training in the conduct of forensic evaluations.

PREPARATION WITH ATTORNEYS

Problems with lack of preparation

Serious problems may arise due to the failure to prepare appropriately for court testimony with the attorney who will conduct the direct examination. Most attorneys do not have in-depth expertise regarding mental health law. Unless it is their area of specialty, attorneys often have little experience with mental health cases and some have never had to utilize an expert witness of any kind. Most courts insist on the question and answer format; a common complaint by experts who are not properly prepared is "He asked me all the wrong questions!" An attorney must thoroughly understand the evidence and expertise the clinician brings to a case to conduct effective direct and re-direct examinations.

The pretrial meeting

It is an ethical obligation of the mental health expert to present testimony in the most clear and helpful fashion possible (Committee for Ethical Guidelines for Forensic Psychologists, 1991). Given that the order, organization, and clarity of testimony are heavily dependent upon the questions posed to the expert, coordination is critical. Unless the case is uncontested and the expert is appearing in the courtroom simply to stipulate to the report entered into evidence, a pretrial meeting with the attorney who will conduct the direct examination is strongly recommended (Hess, 1999). This is true whether the expert was initially contracted by the attorney or independently appointed by the court. The purpose is to allow both the attorney and the expert to

thoroughly understand the testimony that can be presented and to discuss the most effective strategy for doing so. It is standard practice and very much in keeping with ethical standards. If asked by the opposing attorney whether such a meeting occurred, the expert should readily acknowledge that the customary pretrial preparation took place.

Preparing for the attorney meeting

Several steps can be taken by the mental health professional prior to the meeting to assure that it is productive.

- Consider preparing an outline of exactly how you would explain your findings to a lay person. Your report may not be sufficient, as information is often presented differently in oral form.
- Make a list of the questions you consider the most critical for the trier of fact to understand.
- Flag those aspects of your findings/opinions that may be the most difficult for the layperson to understand or the most open to misinterpretation.
- Select examples that most definitively illustrate your major points. Prepare to discuss the courtroom setting and any physical props you are planning to bring to the stand. Any visual aids, charts, graphs, or pictures should be planned carefully to be effective. It is often best to keep notes taken to the witness stand to a minimum (or avoid them altogether,) as they can be distracting and reduce the expert's credibility. Some attorneys prefer to hand the expert an officially marked copy of the report or other necessary documents after the person reaches the stand.
- Come prepared with any questions you may have about the conduct of the proceedings. For example, what is the opposing attorney's style of cross examination? Is the judge likely to ask questions from the bench? What issues are likely to be raised most prominently? Are there specific things a witness may not say during testimony?

Avoid succumbing to undue influence

Even though the expert will be working with an attorney in preparing for testimony, it is still essential to avoid succumbing to undue influence. This issue is discussed in greater detail by Kalmbach and Lyons elsewhere in this Issue. The clinician's first obligation is to the integrity of her or his professional work and findings, not to the individual who was evaluated nor to the attorney's case. Regardless of who is responsible for the expert's fee, it should be made clear that payment is for time and expertise – not any particular opinion.

PRESENTING CREDENTIALS IN COURT

In criminal courts in the state of Texas, the trial judge officially functions as the gatekeeper to determine whether a proffered expert has the requisite knowledge, skills, training, education, or experience and that "the expert's testimony is relevant to the issues in the case and is based upon a reliable foundation" (*Dupont v. Robinson*, 1995, p. 556). This does not require that the individual have an advanced degree, a license, be board certified, or be a leading researcher in the field. Rather, the judge must be satisfied that the testimony will assist the trier of fact to understand the important issues. Judges generally have very broad discretion in this regard.

The curriculum vitae

Each mental health professional should present an accurate, up-to-date curriculum vitae. Some routinely attach a CV to their reports. Absolute accuracy is critical, because it is apt to be entered into evidence and the expert is likely to be asked to testify under oath to its veracity. Non-professional interests and activities (e.g., sky diving, comic book collecting) are best omitted.

Beware of "vanity boards"

There is no requirement in the state of Texas that someone testifying as an expert be board certified or hold Diplomate status. Board certification may, however, be a valuable credential and can attest to the expert's education and training, provided it is meaningful. The most widely recognized credentialing agencies in

this regard are the American Board of Psychiatry and Neurology (for physicians) and the American Board of Professional Psychology (for psychologists). Both boards acknowledge a variety of subspecialties. Both require credential verification, extensive examinations, and the submission of work samples. Other organizations offering board certification should be carefully vouchered to assure that a rigorous examination process is in place. In recent years, a variety of entities have purported to offer board certification and the conferring of diplomate status without any formal examination process (Hansen, 2000; Packer & Borum, 2003). These have been referred to in the literature as "vanity boards," indicating they may present an impressive façade but are lacking in substance. Attorneys have become increasingly aware that these organizations do not offer a meaningful credential, and an expert claiming one of them could be subject to embarrassing cross examination. It is wise to avoid board certifications that can be obtained simply by completing a form and submitting a check.

Case relevance

The attorneys in a given case may agree to stipulate to the expert's credentials, eliminating the need for testimony in this regard. If credentials are to be presented orally to the trier of fact, however, the entire CV probably cannot be reviewed. If a specific qualification is required for testimony (e.g., licensure) it should be addressed. Beyond that, the knowledge, training, skills, education, and experience most relevant to the case at hand should be selected for emphasis. For example, if one has evaluated a juvenile suspected of having mental retardation, a book written about psychosomatic disorders in geriatric patients would likely have less relevance than the experience of working at a school for developmentally disabled adolescents. The expert may wish to highlight unique experiences not included in the formal CV. If it is a jury trial, the expert may also wish to consider what would have most relevance to the jury.

Questioning credentials

Particularly in a highly contested case, mental health professionals should be aware that they may be cross examined regarding their qualifications. They should also be aware that the

opposing attorney may have pre-vouchered them (reading their published materials, or reviewing testimony they provided in previous cases).

THE DIRECT EXAMINATION

Mental health professionals are often most concerned about coping with cross examination. A well prepared, thorough direct examination is, however, the best defense against difficulties during cross examination. Just how detailed a direct examination needs to be should be discussed with the attorney who is to conduct it and will depend upon the complexities of the case. Several specific strategies can be helpful regarding things to include.

Consider the jury

Experts do not "win" or "lose" cases; rather, they are effective if they have provided assistance to the trier of fact in understanding some issue or issues critical to the case. It is essential that the way in which material is organized and the vocabulary that is used in presenting it facilitates understanding among jurors. Scientific data can present particular challenges in this regard. If complex data will be discussed, the mental health professional should spend ample time in preparation to be certain it is understandable and its relevance is clear.

Take the opportunity to educate

Judges and jurors frequently come to the courtroom with little understanding of mental health issues. They also may come with misinformation in abundance and with numerous (often unconscious) prejudices against much of what psychiatrists or psychologists may have to explain. It is important to consider any myths or items of misinformation likely to be present in regard to a particular case and take time to address them. Common myths might be things such as:

- Most mental illness is simply malingering.
- Schizophrenia is the same thing as legal insanity.

- Insanity defenses are raised all of the time and with great success
- Anyone with a mental illness is at high risk for violence.
- Anyone with mental retardation is incompetent.
- Psychotropic medication usually causes confusion and extreme drowsiness.

Describe the scope of the evaluation

Forensic evaluations often involve much more than simply interviewing the defendant. The trier of fact should be made aware of additional procedures undertaken. This may include reviewing a wide variety of records, interviewing collateral data sources (e.g., witnesses, family members, hospital staff, jail personnel, or correctional officers), conducting or reviewing psychological tests, and behavioral observations (if the evaluation is in a hospital setting, these may be 24-hour a day observations). This may assist in immunizing the witness from a cross examiner who implies that the time spent interviewing the individual was the entire evaluation.

Explain any special or unusual circumstances

If the evaluation is conducted with the assistance of an interpreter, this should be acknowledged. If important records were unavailable, the court should be informed.

If there are well-recognized standard procedures for conducting some aspect of the assessment, but these are not utilized, direct examination gives an opportunity to explain this apparent discrepancy. For example, suppose an evaluator offers the opinion that a defendant has mental retardation without conducting any formal psychological testing. This could be because no appropriate tests are available for the particular defendant, say a recent immigrant, or because the defendant refused to participate.

Defendants who will not or cannot cooperate present a special challenge. If, for whatever reason, the defendant is not

interviewed, it may still be possible to formulate an opinion on the psycholegal issue with a reasonable degree of clinical certainty. Even if the examiner cannot reach an opinion, he/she may be able to provide valuable information to the trier of fact. The reason no interview was conducted, however, and the limitation this may present should be carefully explained. If an interview was conducted via teleconferencing, this circumstance should be stated. Finally, it should be noted if a defendant agrees to be interviewed, but refuses to discuss critical questions.

Use examples

Examples directly from the defendant are often powerful with a jury. They present concrete evidence of how he or she reasons or views the world. Psychotic thought processes may be much more convincingly presented using quotations - "I broke the window to get outside – to the other side – because God is on my side" - than clinical labels such as, loose associations, or flight of ideas. Examples of a defendant's reasoning can be very effective in arguing whether the person has a "rational understanding." When choosing examples to be used in court, the expert should be certain not to select those that would be unduly prejudicial.

Address rule-outs

Mental health evaluation is the process of forming various hypotheses and then ruling them in or ruling them out. The reasons various possibilities are ruled out may be important to the trier of fact. For example, if there is some suspicion that a defendant is malingering, but the evaluator opines the person has a bona fide mental disorder, the reasons malingering was ruled out should probably be presented. On the other hand, if the individual has historically been diagnosed with a particular disorder and the evaluator disagrees, the reasoning and evidence should be discussed. This can go a long way towards immunizing the witness against difficult cross examination questions.

Address contrary evidence

It would be very unusual for a mental health professional to be called to court to testify regarding a case that is totally clear cut and on which the evidence is completely consistent. Rather,

experts are likely to be called to explain ambiguities beyond the understanding of the trier of fact. Therefore, there will be evidence that appears to run contrary to the clinician's findings. Direct examination allows the expert an opportunity to explain these seeming inconsistencies. Such explanations are important because:

- The mental health professional has an ethical obligation to provide an objective account in order to provide maximum assistance to the trier of fact in reaching a decision.
- Ignoring the inconsistencies leaves the witness open to difficult challenges from a well-prepared cross-examiner.

THINGS TO AVOID

Professional jargon

Terms and phrases that are not understood or potentially misunderstood by jurors are not helpful in the courtroom. Jurors can also become annoyed by an expert who appears arrogant or seems to be talking down to them. Any term that one would not use in a high school classroom should probably be avoided or defined. Diagnoses and common mental status terms may be particularly difficult.

Theoretical or psychodynamic formulations

There are many competing theoretical schools within the mental health field. No one school has gained absolute ascendancy. To base one's opinion on a particular school of thought – psychoanalytic, behavioral, etc. – will only create confusion if other experts are not using the same theoretical framework. It also opens the door to questions such as: "Do the majority of psychiatrists/psychologists endorse the such and such theory?"

Psychodynamic formulations are apt to vary widely among examiners and there is unlikely to be scientific data available to demonstrate their validity or reliability. It is often difficult to link them to the psycholegal questions posed. Such explanations can

often lead to the implication that an individual's actions are not the product of free choice – a conclusion the witness may not intend.

Loaded terminology

An expert witness does not want to create the impression of being prejudiced for or against a defendant. Blatantly pejorative or blatantly sympathetic language should be avoided.

Personal opinions

As noted above, unlike a witness of fact, an individual qualified to testify as an expert is allowed to testify in the form of opinions. Opinions expressed by an expert witness are, however, expected to be based upon the specialized knowledge, skill, training, education, and experience possessed by the individual. Such opinions should be based upon evidence carefully gathered from multiple sources and integrated in ways generally accepted by the particular discipline. Psychiatry and psychology are scientifically based, and scientific principles should underlie any opinion expressed. Personal opinions – those based upon personal preference and "gut feelings" – should not be confused with expert opinions. If the mental health practitioner has no professionally derived opinion about an issue or if the person has not done the investigation necessary to establish such an opinion, it is appropriate to say one has no professional opinion on the question raised.

THE CROSS EXAMINATION

If the direct examination has been thorough and well presented, the cross examination should not be a major obstacle. Under both circumstances, the witness's purpose remains the same: to provide expertise to assist the trier of fact in better understanding the issues at hand. Lengthy treatises are available to provide extensive advice (Barsky & Gould, 2002; Blau, 1998; Brodsky, 1991, 1999; Lubet, 1998; Ziskin & Faust, 1995.) However, a few key points may be helpful to remember as important things to do.

Speak directly to the trier of fact

It is the judge and/or jury who must understand and process what the expert is saying. The opposing attorney is unlikely to be convinced or enlightened. Making eye contact with the judge or jury can often provide the witness with non-verbal clues as to their level of attention or comprehension. The professional is cautioned, however, against constant or overly intense eye contact. It is also unwise to avoid directly looking at the attorney while he or she is posing questions.

Consider where the questions are leading

An effective cross examiner often presents questions in a well-planned sequence designed to elicit brief (often one-word) responses from the witness. The strategy is to lead the judge or jury to a conclusion that may be quite different from that supported by the expert. An awareness of the direction pursued by the questioner allows the witness the opportunity to avoid the trap.

If something is read by the attorney, you may wish to ask to see it in context

Judges are generally supportive of such a request. The context may shed a whole new light on the passage quoted.

Ask for clarification if you do not understand the question

Answering an unclear question may result in providing a response that is simply wrong or does not reflect your thinking. Asking for clarification also allows the witness time to consider a response.

Admit to things you do not recall

It is important to be thoroughly prepared when taking the witness stand, thus demonstrating to the trier of fact that one is knowledgeable and conversant with all aspects of the issues to be considered. No one is expected to have perfect recall, though, particularly when asked about minor details that have only tangential relevance. If you are uncertain, admit it. Do not attempt to bluff or to guess under oath.

Admit to imperfections – both in yourself and in the discipline you represent

It is the rare forensic evaluation that cannot be improved in some way. Admitting limitations in a calm and straightforward fashion can enhance credibility. For example, some records may have been unavailable or the defendant's cooperation or circumstances may have made certain procedures difficult or impossible. Although clearly the scientific base on which the mental health professions rest can provide valuable information and insights, predictions are far from perfect, diagnoses are not 100% reliable, and there are always exceptions to established principles.

Be consistent when questions are repeated

When an attorney keeps repeating the same question or the same question is asked in slightly different ways, it may suggest a different answer is sought. But, this might simply be for the purpose of exploring how certain or consistent the witness is.

Agree to examine new evidence

A favorite question in cross examination is: "What if I were to tell you…?" Almost any conceivable opinion relating to mental health could change in the face of new evidence, and this should be readily admitted. If previously unknown and relevant evidence is available, the clinician should agree to review and consider it. To do otherwise is to suggest that one is rigid and biased in endorsing an opinion.

Note obvious ways in which hypotheticals differ from the case at hand

The use of hypothetical questions has often been the subject of litigation. If relevant, courts have generally allowed them. It is important to listen carefully to the hypothetical question and note ways it may be different from the current case and, therefore, misleading. If a discrepancy is clear, the witness may want to structure a response that begins by pointing this out. For example, "Unlike Mr. Jones, whose mental illness is in adequate remission on medication, if an individual were to be in an acute

psychotic state..." By placing the qualifier first, the witness avoids being cutoff once the answer is provided.

Elaborate very carefully

Attorneys often advise expert witnesses to answer cross examination questions as parsimoniously as possible. One reason for solid pre-trial preparation with the attorney conducting the direct is so that he or she is ready to explore questions in more detail in re-direct, if needed. Waxing eloquent and providing extensive information in response to a cross examination question may risk opening issues for discussion that are, at best, misleading. On the other hand, a response may be confusing in its brevity. The witness should keep in mind that the purpose of expert testimony is to render assistance to the trier of fact and, to do so, requires that testimony be clear.

In a legal system designed to be adversarial, cross examination does have its pitfalls.

THINGS TO AVOID

Restricting answers to yes or no, when neither is correct

A favorite ploy of attorneys conducting cross examination is to insist that a question be answered simply "yes or no." If a witness wishes to qualify a yes or no response, it is important to keep the qualifier as brief as possible and to place it at the beginning of the response. If the witness begins the response with "Yes, but that was because…," or "No, except that the circumstances were… ," it is likely the attorney will cut the answer short once the key word has been uttered. It is good to practice putting the definitive answer after the qualifier. For example, one might say, "Given that there was no evidence of neurological abnormalities, no, I did not request a neuropsychological test battery."

The witness is under oath, and answers must be truthful. Therefore, if responding either yes or no would actually be a falsehood, it would be appropriate to say so. If pushed for a single word response that would not be untrue, however, the best

alternative is a well-prepared attorney who will return to the issue for explanation on re-direct.

Qualifying other experts

During cross examination, an attorney may ask the witness about some authority figure in the field. For example, a line of questioning might be: "Dr., are you familiar with the work of Dr. Paul Appelbaum? Would you agree that he is one of the most respected forensic psychiatrists in the country?" The witness should honestly describe his or her familiarity with the proffered authority figure. It is very risky, however, to give an unqualified, ringing endorsement of the person's expertise. Doing so leaves the witness open to a list of pronouncements by the person praised that would seem opposed to the witness's procedure or opinions. It is generally possible to recognize that someone has written widely regarding a certain topic while acknowledging that there is disagreement in the field and some of the writings remain controversial.

Qualifying "learned treatises"

In this case, the witness is asked to qualify some published material rather than a single authority figure. Questioning of this nature might be: "Isn't it true, Dr., that the DSM is considered to be the Bible for psychiatric diagnosticians?" To agree that a particular source contains the definitive word on the topic at hand puts the witness in the potentially defensive position of being in some disagreement with its pronouncements. It is unlikely a cross examining attorney is putting forth a publication for the purpose of further substantiating the witness's opinion. Materials within any published book or article generally contain opinion, as well as fact, and are written from the point of view of the author or authors. In the case of the DSM, for example, it is well to point out that the book itself is presented as a guide for clinicians and not to provide rigid prescriptions for diagnoses.

Answering a question you do not fully understand

In attempting to be of maximum assistance to the trier of fact and in an effort to enhance their professional credibility, witnesses too often jump quickly to answering a question without

considering its full intent. At best this may cause confusion; at worst it can mislead. If a question is not clear, it is incumbent upon the witness to request clarification. The request may need to be repeated, even if it appears to frustrate the attorney. If something is read to the expert as part of a question, it may be necessary to ask to see it in context.

Agreeing to misquotes

If the examining attorney quotes or paraphrases previous testimony, the witness must be certain of the accuracy before re-affirming the statement. Problems often arise when the attorney asks the witness to attest to an abbreviated summary of some complex testimony. Consider the following:

> Attorney: So in other words, Dr., am I correct that you are saying Mr. Jones is a dangerous man?
>
> Expert: No, I said that when he stops taking his medication, his delusions become intense and he begins to fear that his former brother-in-law is trying to kill him. Under those circumstances, he could try to hurt this particular person, if given the opportunity.

Answering questions beyond your professional expertise

Attorneys are sometimes unaware of the boundaries of professional expertise. However, when an individual is credentialed to provide expert testimony, that person is expected to provide information and opinions based upon his or her specialized skills, knowledge, training, education, or experience. If a question is asked that the expert cannot answer from his or her professional expertise, this should be explained. Examples of such questions commonly posed to mental health professionals include:

- In your professional opinion, was that witness lying?
- In your professional opinion, did the alleged sexual abuse really occur?
- In your professional opinion, is this the type of person who could have committed such a crime?

- Can you say beyond a reasonable doubt that this person will re-offend if released?

Speculating on studies that one has not conducted

The judicial system is often unaware of the complexity of forensic work. It may seem to an attorney that if a psychiatrist or psychologist has evaluated someone, the clinician should be able to answer any and all questions relating to the person's mental condition. For example, if an evaluator has assessed an individual for competence to stand trial, an attorney may wish to ask whether the person knew what he or she was doing at the time of the crime – not realizing that sanity is a whole different issue. When one specific competency has been assessed attorneys may assume the evaluator has explored all possible competencies. For example, following an evaluation of competence to stand trial, a lawyer might ask: "Does that mean he was competent when his confession was taken six months ago?" Professional opinions on future risk are often unexpectedly requested following assessments regarding other forensic issues. If the expert has not conducted a particular type of assessment, it is appropriate to say so. If the issue has not been properly assessed, the expert cannot have a professional opinion regarding it.

CONCLUSIONS

Before preparing a forensic report or preparing for testimony the psychiatrist or psychologist should be thoroughly conversant with the legal, as well as clinical, issues involved. This would include an understanding of specific statutes relevant to the issue, the rules of evidence, and the civil rights of the participants. The communication should be prepared specifically for the intended audience and focused on the question to be addressed. It is helpful to keep in mind that expert witnesses do not win or lose cases. Experts have fulfilled their mission if they have provided information and explained complex issues such as to assist the trier of fact in coming to a decision.

REFERENCES

Barsky, A. E., & Gould, J. W. (2002). *Clinicians in court: A guide to subpoenas, depositions, testifying, and everything else you need to know.* NY: Guilford.

Blau, T. (Ed.) (1998). *The psychologist as expert witness*. NY: John Wiley & Sons.

Borum, R., & Grisso, T. (1996). Establishing standards for criminal forensic reports: An empirical analysis. *Bulletin of the American Academy of Psychiatry and the Law*, *24*, 297-317.

Brodsky, S. L. (1991). *Testifying in court: Guidelines and maxims for the expert witness*. Washington, DC: American Psychological Association.

Brodsky, S. L. (1999). *The expert expert witness: More maxims and guidelines for testifying in court*. Washington, DC: American Psychological Association.

Committee on Ethical Guidelines for Forensic Psychologists. (1991). Specialty guidelines for forensic psychologists. *Law and Human Behavior*, *15*, 655-665.

Daubert v. Merrill Dow Pharmaceuticals, Inc., U. S. 113 S. Ct. 2786 (1993).

E. I. Dupont de Nemours & Co. v. Robinson, 923 S.W. 2d 549 (1995).

Hansen, M. (2000). Expertise to go. *ABA Journal*, *86*, 44-52.

Heilbrun, K. (2001). *Principles of forensic mental health assessment*. New York: Kluwer Academic/Plenum Publishers.

Heilbrun, K., & Collins, S. (1995). Evaluations of trial competency and mental state at the time of offense: Report characteristics. *Professional Psychology: Research and Practice*, *26*, 61-67.

Hess, A. K. (1999). Serving as an expert witness. In A. K. Hess & I. B. Weiner (Eds.), *The Handbook of Forensic Psychology* (2nd ed.) (pp. 521-555). New York: John Wiley & Sons.

Lubet, S. (1998). *Expert testimony: A guide for expert witnesses and the lawyers who examine them*. Notre Dame, IN: National Institute for Trial Advocacy.

Melton, G. B., Petrila, J., Poythress, N. G., & Slobogin, C. (1997). *Psychological evaluations for the courts: A handbook for mental health professionals and lawyers* (2nd ed.). New York, NY: Guilford.

Nenno v. State, 970 S.W. 2d 549 (1998).

Nicholson, R. A., & Norwood, S. (2000). The quality of forensic psychological assessments, reports, and testimony: Acknowledging the gap between promise and practice. *Law and Human Behavior*, *24*, 9-44.

Packer, I. K., & Borum, R. (2003). Forensic training and practice. In A. M. Goldstein (Ed.). *Handbook of Psychology: Forensic Psychology* (pp. 21-32). New York: John Wiley & Sons.

Redding, R. E., Floyd, M. Y., & Hawk, G. L. (2001). What judges and lawyers think About the testimony of mental health experts: A survey of the courts and bar. *Behavioral Sciences and the Law*, *19*, 583-594.

Rogers, R., & Shuman, D. W. (2000). *Conducting insanity evaluations* (2nd ed.). New York: Guilford Press.

Shapiro, D. L. (1999). *Criminal responsibility evaluations: A manual for practice*. Sarasota, FL: Professional Resource Press.

Weiner, I. B. (1999). Writing forensic reports. In A. K. Hess & I. B. Weiner (Eds.), *The handbook of forensic psychology* (2nd ed.) (pp. 501-520). New York; John Wiley & Sons.

Ziskin, J., & Faust, D. (1995). *Coping with psychiatric and psychological testimony* (5th ed., Vol. 1-3). Beverly Hills, CA: Law and Psychology Press.

Received: March 2006
Accepted: June 2006

Suggested Citation:

Conroy, M.A. (2006). Report Writing and Testimony [Electronic Version]. *Applied Psychology in Criminal Justice*,*2*(3), 237-260.