

SANITY EVALUATIONS AND CRIMINAL RESPONSIBILITY¹

William H. Reid

University of Texas Health Science Center

Why do the courts let so many dangerous, violent people off on the insanity defense? If they kill somebody, shouldn't they pay like anyone else? Is the insanity defense really necessary? Every big case on television and in the papers ends up as a battle of the shrinks, and some axe murderer goes to a cushy hospital instead of the Graybar Hilton he deserves.

-- J. Q. Public

Contrary to popular belief, the insanity defense is rarely used; it is tough to win; the Constitution probably requires that it be available to qualified defendants, and defendants found not guilty by reason of insanity (NGRI, NGI, NRRI) may spend more time in mental hospitals than they would have spent incarcerated had they been found guilty. The purpose of the insanity defense is related to a very old, well-tested requirement for finding defendants guilty: the prosecution must prove not only that the alleged act was committed, but that the act was committed in a criminal way. "Taking" is not the same as "stealing"; "killing" is not the same as "murder." In general, for a crime to be committed, the actor must intend to commit a crime.

Correspondence concerning this article should be addressed to William H. Reid, M.D., M.P.H., P.O. Box 4015, Horseshoe Bay, TX 78657; Email: reidw@reidpsychiatry.com

¹This chapter contains general forensic and clinical-forensic information which should not be construed as any form of legal advice.

Insanity defense statutes address people with a mental disease or defect who are not able to intend criminal behavior at the time they commit potentially criminal acts. Those persons may be found NGRI. In some U.S. states and federal jurisdictions, the statutory requirements are relatively broad, providing for more or less exculpatory influence from the pressures of certain hallucinations, for example. In Texas, that allowance is fairly narrow, being largely limited to whether or not the disease or defect rendered the defendant unable to know what he was doing, or that it was wrong (see below). In all U.S. jurisdictions with an insanity defense², there must be (1) a mental deficit, which (2) causes a problem in perception or behavior which is (3) severe enough to interfere with criminal intent (4) at the time of the allegedly criminal act. Further, (5) the disease or defect cannot be defined solely by criminal or antisocial behavior.

That's difficult for the defense to show in most cases. To suggest that a defendant did not intend an act is to admit committing it; all that is left for the jury is to decide that it was a criminal act. Second, even when one can be shown to have been quite mentally disordered or deficient, it is very difficult to convince entire juries that (as Texas requires) he really didn't know what he was doing, or didn't know it was wrong. Third, when violent crimes are alleged, jurors are often frightened by the apparent dangerousness of the mental disorder and make decisions based on what they believe (often wrongly) is necessary to protect society (rather than on the evidence alone). All of this creates a defense situation in which the insanity defense is rarely chosen unless the evidence of legal insanity is strong, the punishment alternative is substantial, and resources are available to fund expert consultation and evaluation.

²Four states have recently "abolished" the insanity defense; however, all four still require that the defendant "intend" the allegedly criminal act (i.e., have the constitutionally-demanded *mens rea*), and include the possibility that mental illness may prevent that intent. The Nevada legislature abolished the insanity defense only to have it reinstated by their Supreme Court.

In relatively minor criminal allegations, lawyers and defendants often forego an insanity defense for reasons more related to practicality than deservedness. The great majority of charges against mentally ill and mentally retarded persons would not lead to significant incarceration if the person were found guilty, especially after plea and sentencing negotiations. Even without a formal insanity plea, the prosecution may consider civil treatment to have advantages over a criminal trial and possible incarceration (not always the case).

Isn't the insanity defense biased against poor and minority defendants?

No more so than other aspects of the criminal justice system. Every jurisdiction has a way to provide indigent defendants with expertise for evaluating and pursuing an insanity defense. On the other hand, some jurisdictions are reluctant to spend large portions of their expert budgets on psychiatrists and psychologists. Forensic professionals may not accept court appointment if they don't think they will be paid (or paid the agreed-upon fee).

Can't we find "insane" defendants guilty, then deal with them after they get to prison?

Several states have experimented with a "guilty but mentally ill" (GBMI) option. It sounds like a great approach: humane and treatment-oriented for the mentally ill, while getting a conviction and prison time to satisfy the law-and-order crowd. Unfortunately, it rarely works that way, for two main reasons. First, the Constitution says that if a person really can't form criminal intent, he or she can't be found "guilty," even by adding "but mentally ill." Second, prison treatment for mental illness is uniformly poor, and passing laws that create a "guilty but mentally ill" class of inmates hasn't changed that.

What do juries consider when presented with an insanity defense?

It would be nice if jurors considered only the evidence presented. Many other factors, however, influence their decisions. Characteristics of the alleged crime are important, with violence (particularly heinous or "senseless" violence) pressing for guilt (and incarceration) rather than NGRI. Defendants who were very ill at the time of their acts but who appear calm or non-psychotic at the time of

trial find it hard to convince jurors that they were insane a few months before. Conversely, those who appear paranoid or dangerously unpredictable at trial may frighten jurors into wanting to incarcerate them. Defendants who become insane because of some arguably voluntary act, such as chronic drug abuse or refusing their antipsychotic medications, are often viewed as contributing to their allegedly illegal behavior.

The point is that jurors often seek a way to come to the verdict they “want.” If fear or outrage guides that process, the insanity defense is much more difficult. Well-educated juries are no exception.

Important Definitions

The vocabulary of forensic evaluation and other aspects of the law is often different from that of the clinical professions, and may be specific to a particular statute. Evaluators must accept the law’s definitions.

- Affirmative Defense - One that the defense has the responsibility for introducing or raising rather than being automatically considered by the trier.
- Expert - In testimony, a person allowed to render opinions to be considered by the trier of fact. Evaluators are chosen or appointed, in part, because they can qualify as expert witnesses, and thus offer expert opinions on matters such as insanity.
- Insanity - A legal state, not a clinical one, which is defined by law, not clinical diagnosis. Do not confuse legal or statutory insanity with clinical diagnosis or symptoms per se.
- Know - In the Texas insanity statute, generally narrowly interpreted as a concrete awareness (as contrasted with an abstract one; see below).
- Mental Defect - In insanity defense statutes, generally

intended to imply mental retardation or structural brain deficit.

- Mental Disease - In insanity defense statutes, roughly the same as a serious mental condition and sometimes assumed to be an Axis I DSM disorder (although that is not part of the legal definition). In practice, often an acutely psychotic condition.
- Mitigation - Influence to help or hinder. “Mitigating factors” decrease the legal seriousness of a crime (as contrasted with “aggravating” factors).
- Opinion - In testimony, a contrast with “fact.” Fact testimony is limited to what one observes or experiences. Opinion testimony may offer (e.g., “expert”) interpretation.
- Reasonable Medical (psychiatric, psychological) Certainty - In Texas and most other jurisdictions, “more probable than not.” Do not confuse it with higher levels of certainty, nor with the degrees of confidence necessary for clinical diagnosis or treatment decisions.
- Trier of Fact - In trials, the party that decides which side’s argument is the more convincing. If there is a jury, the trier of fact is the jury. If not, it is the judge (a “bench” trial).
- Trier of Law - In trials, the judge. In this role, the judge is responsible for deciding how the law is applied, but is not concerned with which factual argument is more convincing.
- Wrong - In the Texas insanity statute, often (but not always) interpreted as legal wrongfulness or illegality, sometimes contrasted with moral or philosophical wrong (see below).

STATUTES

Current Texas Insanity Defense Statute

Chapter 8.01 of the Texas Penal Code states (in relevant part)

- (a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong. (Underlining added)

- (b) The term “mental disease or defect” does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

Current Texas Statute Regarding Qualifications of Sanity Evaluators

Subchapter 46C, Article 46C.102 of the Texas Code of Criminal Procedure (summarized in relevant part) states that the court may appoint qualified psychiatrists or psychologists as experts in insanity defense matters provided that (note the exception at the end of the detailed requirements)

- 1. He or she must hold a Texas license as a physician or doctoral-level psychologist;

and

- 2. have certification, experience, or training which includes
 - (A) Certification either by the American Board of Psychiatry and Neurology with Special Qualifications in forensic psychiatry or by the American Board of Professional Psychology in forensic psychology;

 - or

 - (B) Experience or training consisting of
 - (I) at least 24 hours of specialized forensic training related to competency or sanity

120 SANITY EVALUATIONS

evaluations, or

(ii) at least five years of experience performing criminal forensic evaluations for courts, and at least eight hours of continuing education relating to forensic evaluations during the prior 12 months;

and

. . . have completed at least six hours of continuing education in forensic psychiatry or psychology during the prior 24 months.

A court may appoint an expert psychiatrist or psychologist who does not meet the above criteria if “exigent circumstances” require “specialized expertise” not ordinarily possessed by persons who do meet them.

Current Texas Statutory Requirements For a Determination of NGRI

Subchapter 46C, Article 46C.153 (formerly Art. 46.03, summarized in relevant part) provides two ways to arrive at a verdict of NGRI, which have equal judicial effect:

A. As the result of a trial proceeding in which

1. The prosecution must first establish beyond a reasonable doubt that the alleged conduct constituting the offense was actually committed by the defendant.

and

2. The defense then establishes by a preponderance of the evidence that the defendant was insane at the time of the alleged conduct (using the definition of “insanity” in Section 8.01, above).

or

B. As the result of an agreement by the prosecution and the defense, approved by the judge, that the indictment should be dismissed on the

ground of insanity, with entry of a judgment of dismissal due to the defendant's insanity.

Expert testimony is not required for a trier of fact to find a defendant NGRI.

There is nothing in Texas statute that requires a jury (or judge in a bench proceeding) to consider expert testimony in sanity proceedings. This statement does not refer to a defendant's right to expert assistance if such assistance is wanted (see *Ake v. Oklahoma*, below).

Juries may not be told the consequences of an NGRI acquittal.

Article 46C.154 forbids both the prosecution and the defense from informing any juror or prospective juror about what could happen to the defendant (e.g., commitment, hospitalization, likely duration of hospital confinement). The jury's task during the trial phase of the proceeding is solely to weigh the evidence for guilt and/or insanity; it is inappropriate for them to consider post-trial issues.

Statutes are subject to change each time the legislature meets.

Before beginning an evaluation of sanity, it is important for the evaluator to review the most recent relevant Texas statutes. Evaluators must also be aware that state statutes apply only to state cases. Persons conducting evaluations for the federal courts should consult relevant federal law or rules.

CASE LAW

“Case law” refers to decisions reached in appellate cases which affect the jurisdiction of that appeals or Supreme court. The highest such court is the U.S. Supreme Court, which supercedes all other interpretations of Constitution or law. Federal circuit courts of appeals have jurisdiction over several states each. Federal courts address issues of federal and Constitutional law. Every state has one or more levels of appeals courts whose decisions affect those states alone. In Texas, the highest criminal court is the Texas Court of Criminal Appeals.

122 SANITY EVALUATIONS

Two court decisions relating to the insanity defense are frequently referenced in regard to evaluations of legal insanity in Texas. One was decided by the U. S. Supreme Court, the other by the Texas Court of Criminal Appeals.

Ake v. Oklahoma (1985)

The issue addressed in this case was the right of an indigent defendant to the assistance of a mental health professional in mounting an insanity defense. Glen Burton Ake, a defendant charged with capital murder, entered a plea of insanity, but was unable to afford professional assistance. He was convicted and sentenced to death. The U. S. Supreme Court reversed and remanded the case, saying that, in instances where mental state was a significant element of an individual's defense, denial of expert assistance constituted denial of due process. Therefore, defendants who are indigent are entitled to the services of an expert at state expense to assist in preparation of the defense. A motion by the defense for such assistance is commonly referred to as an "Ake motion." This process is probably the most common way for defense experts to be retained. Although sometimes "court appointed" and court-funded, such evaluators routinely work on behalf of the defense attorney rather than the court itself.

Bigby v. State (1994)

This is the Texas state case most frequently referenced as addressing the meaning of the term "wrong," as it is used in the insanity standard. The jury found that the defendant did not meet the standard for legal insanity and was guilty of murder, and that verdict was upheld by the Texas Court of Criminal Appeals. One reason given by the Court for affirming the jury's decision was that, although Mr. Bigby may have been suffering from psychotic delusions at the time of the crime, he readily acknowledged he knew his actions were illegal. The court went on to explain that such an acknowledgment was significant because the defendant at least understood that other people would believe his actions were wrong. This case is frequently cited by prosecutors to say all that is needed for sanity is the knowledge that an act is illegal.

The difference between simply “knowing” that something is wrong and understanding or appreciating its wrongfulness in a given situation is often a crucial point in sanity determinations. Some states address that difference in statute; Texas does not. Evaluators should carefully assess, insofar as is feasible, the defendant’s thinking at the time of the alleged crime and be prepared to explain its relevance to the jury (see below for specific reference to Texas cases).

Other Important Aspects of “Criminal Insanity” in Texas

The burden of proof. The burden for proving insanity is on the defense, which must prove it to the trier of fact (usually a jury) by a preponderance of the evidence. As always, the burden of proving *guilt*, beyond reasonable doubt, is on the prosecution.

Two words in the statute bear special attention by the evaluator. Their definitions in Texas State courts narrow the application of the insanity defense in those jurisdictions and make it harder to apply successfully.

The meaning of “know.” Texas courts generally use a narrow interpretation of the word “know” in the statute. While some states make it clear that “know” means having some significant level of *appreciation or understanding* of the nature and wrongfulness of one’s acts (and many use “appreciate” instead of “know” in their statutes), most Texas decisions limit the definition to concrete, not abstract, awareness. *That does not mean that the jury cannot consider whether or not the “knowing” is in a context of psychosis or another condition that may affect criminal intent.*

The meaning of “wrong.” Texas courts often interpret the word “wrong” in the statute as referring to a legal or behavioral wrong, not a moral one. Thus evidence that a person knows an act is illegal (as suggested by, for example, avoiding apprehension, knowingly denying the act, or saying he knew it was illegal) is often highlighted by the prosecution, even though the defendant may have been responding to a delusional or hallucinated “higher” calling (such as saving the victim from hell or carrying out an irresistible command

from God). *Once again, the jury is allowed to consider the mental context of the “knowing.”*

Voluntary intoxication. Voluntary intoxication (from alcohol or another drug) is not “insanity” (Texas Penal Code, Section 8.04). Evidence of “temporary insanity” caused by intoxication may be introduced as a factor to mitigate punishment, but not guilt. The defense of “duress” or “compulsion” (Section 8.05), although not originally intended to include *internal mental* compulsion, may be relevant for defendants with delusions or hallucinations. Age *per se* is irrelevant (except with regard to the death penalty), provided the person is eligible for adult prosecution.

EVALUATION PRINCIPLES

One overriding principle of insanity defense evaluations is that the *relevant behaviors occurred in the past, not the present*. These are not competency evaluations. Present condition is of only peripheral interest, although it may suggest symptoms that might have been present at the time of the incident being investigated. That makes sanity evaluations both more difficult and more complex than competency assessments. Past medical/psychological condition, clinical events, functioning, behavior, and circumstances are much harder to evaluate than current symptoms and abilities.

Diagnosis is relevant to some extent, but the real point is *ability to function (form criminal intent) at the time of the allegedly criminal act*. There are few, if any, mental diseases that create continuous insanity. Virtually all people with schizophrenia or bipolar disorder, for example, know right from wrong most of the time and can usually comport their behavior to the law. It is inaccurate, and a misunderstanding of sanity evaluations, to say that any diagnosis *per se* defines whether or not a person is responsible for his acts (although some that are static and disabling, such as significant multi-infarct dementia or substantial mental retardation, suggest continuous rather than fluctuating deficits).

The “adversary system” that guides the rules of criminal procedure allows expert evaluators to be retained by, or on behalf of, one side or the other of the criminal action. When a defendant is indigent, a judge or court may approve a defense request for an evaluation, appoint an expert suggested by the attorney, and fund the evaluation process. That expert’s work is on behalf of the defense, not the court that pays the bills. In other cases, a court may order an institutional evaluation, which may be supplemented by private ones. The prosecution may employ or retain its own experts, with or without being notified by the defense that an insanity defense is contemplated. The judge may also retain experts, whose findings are then available to both the prosecution and the defense, and who may be called by either to testify.

Individual experts (e.g., those not salaried by a public agency or facility) should obtain an agreement which clearly outlines the attorney’s and/or court’s expectations, duties to the parties involved, rate and method of payment, and the party responsible for the charges incurred. This principle applies whether one is retained privately by an attorney, hired by a prosecutor, or receives the case through a court order. When there is a court order for assessment, evaluators should carefully review the Texas criminal insanity statute (currently Tex. Crim. Proc. Ann., Subchapter 46C) for procedural and reporting requirements.

A forensic expert who is expected to testify or otherwise render opinions (e.g., by report) should not be retained by, nor have direct allegiance to, the defendant himself, and should not have had any clinical relationship with the defendant. Defendants or their families occasionally retain independent experts of their own; however, most expert consultation (including evaluation) should be within a consultative lawyer-expert or court-expert relationship. Any more direct relationship with either side (including any treatment relationship) interferes with real and perceived objectivity, and may raise challenges to one’s credibility at trial.

Duties of the Evaluating Expert

The expert’s primary duty is to the retaining lawyer or

prosecutor (or to the court, if specifically retained for the court), to perform as a knowledgeable and competent consultant and be able to convey one's opinions to the trier of fact. Objectivity and honesty are critical to any forensic evaluation. There is a duty to be truthful and assist the court in its search for the truth. If one is retained for the defense, there is a duty of competent and vigorous service to the defendant through his or her lawyer (but not a duty of direct advocacy, which is the attorney's job). Participation in legal strategy is acceptable to a point, but may sometimes interfere with objectivity or credibility if one is asked to testify at trial.

Expert Qualifications

Clinicians who do sanity evaluations must be well-trained and experienced in both clinical and forensic matters. They must have a reasonable understanding of the evaluation exercise, the procedures required, the rules that govern them, the applicable insanity defense statute, and the principles of testimony. The comments below should be considered in addition to the Texas statutory requirements summarized earlier in this chapter.

Professional/Disciplinary requirements.

The attorney's (and court's) primary consideration with regard to expert qualifications must be depth of knowledge and experience, both clinical and forensic, in the areas which are relevant to the particular defendant. Many, perhaps most, defendants base their insanity defenses on the presence of a severe mental condition for which one or more "medical" issues is important (e.g., medication response, adverse effects, or absence), emotional effects of a medical condition, or biological effects of drugs or toxins). In such cases, it is reasonable to expect the primary expert to be a physician, usually a psychiatrist. In others, appropriately trained and experienced persons of other disciplines -- usually doctoral-level clinical psychologists -- may be primary as well. It is often best to involve more than one expert or discipline in complex cases, each having important elements to contribute.

Forensic evaluators who lack a doctoral degree, or at least a "terminal degree" in their discipline (such as a Master of Social Work

[MSW] or Master of Science in Nursing [MSN]) are at a disadvantage of training, credentials, and/or testimonial credibility. They are not chosen as primary experts in most insanity defense cases. Such professionals can, however, be valuable members of an assessment team.

The evaluator's education and training should first reflect the clinical skills of his or her discipline. Additional forensic training is helpful. Relevant experience, at least partially under the aegis of seasoned forensic professionals, is very important. Accepting an evaluation for which one is not qualified is unethical and may incur liability for fraud, misrepresentation, incompetence, or even malfeasance.

Forensic and (especially) clinical certification is influential in some cases, and suggests that the expert is serious about the field and has met certain requirements for it. Some certifications (e.g., American Board of Psychiatry and Neurology Special Qualifications in Forensic Psychiatry, American Board of Professional Psychology forensic diplomate status) are more convincing than others. Certificates from organizations that "certify" examiners or evaluators for a mere fee and perhaps a few weeks of classes or independent study often crumble under vigorous cross examination.

As a practical matter, lawyers who retain or employ experts must also consider jurors' impressions and perceptions of credibility. Things such as medical background, communication skills, language and accent, and even physical appearance may affect the attorney's choice.

Be a doctor who understands the legal situation, not a quasi-lawyer

Forensic evaluators should not act as if they are lawyers. The court and the retaining attorney need professionals whose expertise lies in broad clinical knowledge and its application to criminal (sanity) matters, not pseudo-attorneys.

Be reasonably free of bias

Evaluators *should not* be treating clinicians for defendants or

their family members. A treatment relationship creates an unacceptable conflict of interest. If one has treated the defendant, he or she should decline the evaluation. If the defendant later requires clinical care, it should be carried out by someone other than the forensic consultant or evaluator. *Note that treating clinicians are often called to testify about what they have seen and done, as “fact” rather than “expert” witnesses.*

Be able to tolerate attacks on your findings and opinions

Understand that accepting the evaluation task means that you may be asked to testify about your findings. The opposing attorney is likely to try to discredit your work, and may try to discredit you in the process. It's not personal, but it is public, and can be uncomfortable and even embarrassing.

Be credible

The trier of fact (usually a jury) is charged with determining which side's "facts" are closest to the truth. Part of the job of any testifying expert is to present his or her opinions in a clearly understandable, believable way. If the expert is not credible, the opinions will have little impact on the case.

That means that evaluators (since they are potential expert witnesses) should be able to present their findings skillfully and articulately, and must not be unduly vulnerable to attacks on their backgrounds or reputations. This concept is separate from the personal tolerance mentioned a few paragraphs above; it refers to whether or not the expert's findings receive the attention they deserve. Evaluators who have significant controversy in their backgrounds (e.g., have been sued often for malpractice, been arrested, been censured by a professional organization or licensing body, have education or training limitations, or have limitations in communication to others) should consider seriously the effect those may have on their duties in the case. At the least, the evaluator should reveal such things to the retaining attorney at the beginning of the consulting relationship.

Evaluators Must Do a Complete Evaluation

Ours is not a perfect world, and it is tempting to cut corners here and there. There are always realistic limitations on science and information availability, and often practical limitations on time and cost. Nevertheless, one should always remember that a defendant's liberty and society's right to protection and redress are at stake. The law takes great care to avoid incarcerating people who don't deserve it. Be serious about doing a complete, competent evaluation.

Demand an opportunity to do the best evaluation feasible under the circumstances

Sanity evaluations are complex. Do not allow yourself to be pressured into fast or slipshod work, for example by accepting unreasonable financial limitations or deadlines.

Costs

One of the first obstacles to completeness is cost. The prosecutor or defense attorney should discuss this with the potential evaluator early and openly. The evaluator should be sure the lawyer understands that the evaluation process is likely to be complex, and that a couple of hours of record review and examination are rarely sufficient for final opinions. Comprehensive review and corroboration, discussions with family members or potential witnesses, thorough personal examination, subspecialty consultations, psychological or neuropsychological testing, protocols to assess for potential malingering, visits to relevant sites, attorney conferences, and/or reports may be important to the validity and reliability of the evaluation (though not all are necessary or possible in every case).

It is generally insufficient to rely on brief, cost-cutting evaluations (sometimes encouraged by sparse agency budgets or flat-rate contracts with courts or agencies). Judges (and lawyers) sometimes compare sanity evaluations to those done for trial competency -- a much more straightforward task -- and rankle at the costs and complexity of the former. They are not comparable.

It is often important to establish a written understanding of the time and resources available for the evaluation, corroborative

activities, related conferences and reports, and possible testimony. Evaluators may choose to continue evaluations when compensation is unlikely (promises of payment, even from courts, may not be kept); however, they should know the situation in advance and be aware of conscious and unconscious impulses to cut corners when the evaluation is less remunerative than they expect.

Attorney restrictions

Be certain that you tell the retaining lawyer or court authority what you need in order to do a good job. Be prepared to reaffirm those needs if the attorney balks for some reason (such as inconvenience, unavailability of records, concerns that exploring certain records or interviews may damage the case, or wanting to keep certain evidence away from you). In addition to the questionable ethics of proceeding with the occasional attorney who wants to unfairly shape what the expert sees or says, one is likely to be asked at trial whether or not there was access to everything needed.

Legal rules & restrictions

Sometimes one must contend with laws or court rules that impede the evaluation. If the impediment is significant, one may ask for it to be removed; however, there is often no recourse. It is usually sufficient to make any adverse influence on the evaluation clear to the attorney or court and then proceed as feasible, later providing disclaimers as appropriate. If the restriction has a substantial effect on your ability to do a valid or reliable job, consider abandoning the evaluation.

Provide clear disclaimers and caveats when important components are missing from the evaluation

The jury deserves to know about things that affect the validity and reliability of your findings. If, for example, you are unable to examine the accused personally, past psychiatric or counseling records are incomplete, arrest reports are missing or redacted, or the defendant refused to cooperate with part of the assessment, bring that information to the lawyer's and court's attention and explain its significance. This is a matter of both law and forensic ethics; don't

wait to be asked.

Personal Issues That Interfere With Professional Evaluations

Some forensic experts enter cases with a preconceived idea of what the law should do rather than what the facts and law require. Almost everyone has a personal view about, for example, sex offenses, the death penalty, “law and order,” or how mentally ill or minority defendants may be treated in the criminal justice system. Courts rely, however, on the expert’s professionalism and maturity to keep those views under control when carrying out an evaluation or testifying about the results. Those whose personal views are likely to interfere with their work and testimony in a particular case should strongly consider declining the evaluation.

EVALUATION PROCEDURES

Information Gathering and Review

The first task is information gathering and review. Some lawyers ask for an immediate examination, but review of at least some of the arrest record and other history is strongly recommended prior to seeing the defendant (see below for an exception when the defendant can be interviewed just after the alleged crime).

Sources

Important data may come from many sources. One should place particular priority on material likely to shed light on the allegedly criminal act itself: such things as arrest reports, witness statements, crime scene records and descriptions, and physical evidence. Information about the defendant’s appearance and behavior just prior to, during, and just after the event is very important, including that obtained from drug tests and medical examinations (which may, for example, have been performed if the defendant was injured in the incident).

Clinical information relevant to the period being considered is also a high priority. Available psychiatric, neurological, and other medical and mental health records; psychological and neuropsychological testing; laboratory, neuroimaging, and other

diagnostic procedures; drug screens; medication records, and other clinical resources that may help describe or explain the defendant's condition, appearance, behavior, and motivation around the time of the incident should be studied.

Records of behavior and condition after arrest are important as well, and may include video records of the booking or other procedures, clinical screenings or treatment in jail, response to such treatment, behavioral records from both clinical and custody staff, and the like. Information from times long before the event should be reviewed as well, while remembering that the most important evidence is that directly applicable to the defendant's condition at the time of the event.

Social and vocational information is very useful, whether from records or interviews. Substance abuse history, job and/or school behavior, prior arrests, relationships, friends' and relatives' comments, and a variety of other topics and resources should be considered. The potential sources of information and corroboration vary widely.

In private evaluations, records and authorization to contact external sources should generally come through the retaining attorney or prosecutor, as appropriate, who should be kept informed of the evaluator's activities and progress. If outside parties wish to provide materials to the evaluator (such as letters, drawings, or photos), they should first be sent to the retaining attorney or prosecutor and then transmitted to the expert.

In institutional evaluations, one may often assume that permission for collateral contacts has been granted; however, it may be wise to verify this with the court. Institutional evaluations often suffer from a lack of collateral material; the evaluator should be free to seek out or request material that could be important to his or her understanding of the matter at hand.

It is often important to gather information from the defendant's friends and family. Such contacts should be with the

attorney's (not necessarily the defendant's) authorization. Each person should be told who you are, for whom you are working, the lack of confidentiality involved, and the uses to which the information revealed may be put. Do not promise confidentiality. Written consents are often unnecessary, but whether or not one chooses to use them, it is important to document disclosures and disclaimers (e.g., about confidentiality, the context of the interview, and the absence of any doctor-patient relationship). Some evaluators audiotape collateral interviews; others simply take notes.

Corroboration

Without corroboration, much of what the evaluator hears from the defendant or attorney has limited value. Independent and/or disinterested corroboration is extremely valuable to the evaluator's ability to come to valid and reliable opinions; its absence is detrimental to that task. In particular, many of the things "learned" in a defendant interview or a statement from family or friends should largely be considered unreliable without supporting evidence from disinterested observers, video- or audiotapes, records created before the incident, objective tests, laboratory findings, etc. Information which comes solely from an attorney may be biased or misleading. Do not hesitate to use collateral sources; demand them if they are withheld; and be suspicious of opinions reached without them.

Communication with the lawyer, prosecutor, or court

If you have been retained by an attorney or prosecutor (even if court-funded), be sure to give him or her both positive and negative information as it unfolds. Good (and ethical) lawyers do not hire experts solely to have them say things they think will help win the case. They need accurate information in order to assess the case and make strategic decisions.

Reserve final opinions until you have all necessary information

If you don't receive enough information, don't render an opinion at all. Don't jump to conclusions based on first impressions or a few records. Never offer an opinion, even informally, after hearing only an attorney's version of the "story."

It is not unusual for the retaining lawyer or prosecutor to pressure an expert to think, write, or testify in a certain way. Stick to the data and whatever professional opinions may legitimately be derived from it with “reasonable medical (clinical, psychological) certainty.”

Defendant Examination

The examination is sort of the kidney of sanity evaluation. Some experts would say it is the heart, but there are rare times when the evaluator must get along without one. If, for some reason, you are truly prevented from examining the defendant (e.g., because he or she refuses, or will not cooperate during an interview), carefully consider whether or not you have enough information to come to any opinion. If you choose to express one, volunteer the appropriate disclaimers and caveats discussed elsewhere in this article as you do so.

When should the examination take place?

When possible, it is important to interview and examine the defendant immediately after the incident. Seeing firsthand how the defendant appears within minutes or hours of the incident helps greatly as one tries to recreate his state of mind during the event. For those arrested at the scene, an immediate, preliminary examination may be feasible. One often gets a call from the attorney soon after the arrest but days after the alleged crime. Even more often, the defendant spends weeks or months awaiting trial before a psychiatrist or psychologist is asked to do a forensic evaluation.

One must not, however, perform a forensic evaluation before defense counsel is appointed and it is legally appropriate to do so (i.e., the defendant’s rights against self-incrimination are protected).³

³Clinical examination and treatment of an arrestee may be carried out as needed, but should not be confused with forensic evaluation, especially for the prosecution. One should be careful not to examine a defendant for forensic purposes in the name of meeting clinical needs.

The results of clinically-intended examinations, and utterances during them, are usually available to the defense, but can sometimes be kept from the prosecution. Any trial-related forensic evaluation performed should be at the behest of an attorney (prosecution or defense) or court, not at the request of a law enforcement official.

It is almost always helpful to perform more than one examination, and sometimes to separate them by days or weeks. Many mental conditions are unstable, and may improve or worsen in response to a number of factors. Seeing a defendant only once, in only one setting (and not the setting of the alleged crime), can be similar to being one of the blind men examining an elephant in the old fable.

Location and setting

Some defendants are referred to a secure hospital setting for evaluation. Such facilities are usually accustomed to providing the evaluation setting necessary for safe and adequate assessment. Many defendants, particularly those seen by private forensic consultants, are evaluated in jails. There, the examination setting is largely dictated by security (both the jail's and the evaluator's). An infirmary office setting is sometimes feasible and safe, but most jails use either an interview room or a visiting area. If the defendant is in the community, a clinical office is usually the best location; lawyers' offices are generally inappropriate. Many evaluators prefer not to see defendants in their patient-care offices, since the required security measures (e.g., deputies accompanying the defendant to the office, handcuffs, or shackles) may disrupt other work.

Discuss your physical requirements with the attorney in advance, especially if the defendant is to be assessed in a correctional setting. The lawyer may be able to arrange an environment that is conducive to a good interview and at the same time safe and secure. When working for the defense, it may be helpful for the attorney to accompany the evaluator to the first interview, introduce him or her, spend a few minutes acclimating the evaluatee to the situation, and then withdraw.

Safety is a significant consideration

Wherever the assessment takes place, *be aware of potential danger and take appropriate precautions*. Secure hospitals are likely to have special evaluation settings and rules. Be aware of them, and don't defeat their purpose. Jails are concerned with both safety and security. Thus one may encounter evaluation rooms with thick wire screens or clear partitions between the parties, locked doors (with or without a window to the outside), and/or shackles. Sometimes guards must be present, either in the room or just outside. Jails' attorney-client conference rooms are good interview settings. They are fairly comfortable, often with a large window and perhaps a guard outside (but not within earshot). The defendant should face away from the window. One should carefully consider whether or not to proceed if custody staff cannot see into the room or are so far away that they cannot respond to an emergency. It is often helpful to ask if the defendant is satisfied that he or she cannot be overheard.

It is rarely appropriate to examine defendants with a guard in the room, even several yards away, nor should one ordinarily perform an examination through a glass or plastic window by intercom. Thick screens are a problem because they interfere with one's ability to observe an evaluatee's appearance, behavior, and physical responses. Teleconferencing, a technology rapidly becoming available in clinical and judicial settings, is not a good substitute for in-person forensic assessment.

Unless safety is a major factor, there should be a way for the defendant to receive and read written materials and perform simple tests (such as neurological or psychological tests). Be sure to tell the staff if you plan to give the defendant anything to keep (such as an information sheet or a test).

Very occasionally, jail staff purposely intimidate either the defendant (e.g., by using more than the necessary shackling) or the evaluator (particularly female evaluators, e.g., by locating the interview in a dark or isolated area). One should not tolerate this, should terminate the examination if not comfortable with the arrangements, and should not hesitate to report such behavior to the

retaining attorney.

Attorney observation or participation

Some lawyers want to be present during the examination. If one is doing an evaluation for the prosecution, the defense attorney may demand to sit in. Although a court may order access by an attorney (*Estelle v. Smith*, 1981), it is not an absolute right. The author very rarely allows the retaining lawyer to observe his examinations, and has never allowed the opposing attorney to do so. If the opposing lawyer appears without warning, one should stop, be polite, and contact the retaining attorney. If the defendant refuses to proceed without his or her lawyer, explain the circumstances, and if he or she still refuses, one should abort the interview and contact the retaining attorney.

Recording the examination

It is very important that an accurate, contemporaneous record of the interview(s) be made, and preserved. Many experienced forensic psychiatrists and psychologists, including the author, recommend videotaping (or at least audiotaping) forensic interviews whenever feasible. This obviates many reasons for the opposing attorney's presence and creates an excellent record. Lawyers aren't always enthusiastic about recordings, no doubt fearing that material harmful to their cases will become available to the other side. The retaining attorney's and defendant's preferences should be respected. A few professionals are reluctant to record their assessments. Nevertheless, it is clear that recording has more advantages than disadvantages, and tends to favor good evaluators. It is not yet the "standard" for forensic work.

Interview/Examination procedure

Forensic evaluations are not mere extensions of clinical ones. There are similarities, of course, but we have already discussed many differences from clinical procedures. The examination itself is no exception.

First, the *examiner's purpose* is very different. The evaluator is not a clinical resource for the defendant, and is not trying to help

him in any medical or psychological way (cf., the many references to “defendant” and “evaluee” in this article, rather than to “patient”). Second, the defendant’s purpose is very different. In most cases, he or she is well aware of the charges and possible outcomes of the trial. Many defendants want to be found NGRI; others do not, perhaps proclaiming their innocence or not wishing to be viewed as severely mentally ill. In any event, their comments and behaviors should not all be assumed genuine. Third, the *examination context* in some ways detracts from the cause of accuracy (cf., examining a person in a jail), but is also part of a comprehensive process which is likely to be more accurate than ordinary clinical analysis.

At the beginning of the interviews, one should make every effort to apprise the defendant of the examiner’s role and purpose. Unless the examination is court-ordered, if an evaluatee cannot understand your role and purpose, his or her lawyer must accept the procedure for him (to the extent allowable by the relevant statute; sometimes the “acceptance” is accomplished by the court order). One may provide brief written information in the form of notifications and disclaimers, including a comment that the examiner’s purpose does not include substantial delving into the defendant’s legal strategy (as that is between lawyer and client). Many forensic professionals offer a “Miranda”-style warning about self incrimination. Some believe it is legally or ethically necessary to obtain additional, written consent for the interview. That is rarely the case.

Defendants often ask questions. If the lawyer is not present (e.g., for the introduction mentioned above), one may answer simple ones directly, politely decline to answer others (e.g., personal queries), or refer them to the defendant’s lawyer. One generally should not discuss the defense process or the attorney’s methods in detail.

Most experienced forensic evaluators (though not all) recommend against sharing the results of the evaluation with the defendant. The evaluation is not yet complete; a lawyer is the appropriate person to communicate such things; and the evaluator’s

role and relationship with the defendant is that of consultant to a lawyer or court, not to the defendant himself.

Most defendants can endure rather long interviews, and are available for additional ones as needed. Two to four hours is not unusual, with appropriate breaks. Longer interviews not only elicit more information, but also promote a relationship that can increase the usefulness of that information, decrease the effectiveness of guarding or efforts to malingering, and test the evaluatee's physical and emotional tolerance.

Scheduling additional interviews provides opportunities to observe and examine the evaluatee under different conditions of time, rest, and day-to-day activity. Interviews that are separated by weeks or months allow one to see the effects of continued incarceration, treatment for mental disorders or other conditions, and increased length of time since the alleged crime.

Examination details

The details of the examination should be fairly standardized and preserved in some format that is routine for the examiner. It is common to begin with identifying and administrative information, including name, attorney's name, demographics, referral information, purpose, setting, persons present, notifications and disclaimers provided, whether or not they were understood, problems (or lack thereof) of language or understanding, sources of corroborating history and information, type of litigation, number of sessions, time spent, and breaks taken.

One should ask for the defendant's rendition of the incident and related events. This portion of the interview is quite open-ended, although one should ask for clarification and keep the defendant on topic as necessary.

At some point, more specific questions should be asked about both the incident and the history relevant to it. I usually listen first for information relevant to the NGRI statutory requirements, and later ask questions about perceptions, motivations, impulses, and other

indices of the defendant's state of mind just before, during, and after the allegedly criminal act. Questions about the defendant's experience in jail are often helpful. It is important to include standard clinical topics as well, such as presence or absence of specific Axis One and Axis Two symptoms and diagnoses, medications and other treatments, additional psychiatric history, substance abuse, social and vocational history, family history, and a detailed general medical history.

One should not rely on memory alone for interview questions and topics. It is best to use a structured, but flexible, written format. The assessment procedure is not a "checklist." It is consistent, but each response represents a unique "branch point" that guides the experienced examiner to other questions or topics, or simply to listen further.

A complete, formal, detailed mental status examination (MSE) should be performed, including at least brief oral testing for neurological deficit (a rote "mini-mental status" exam may be insufficient for this part of the assessment). Mental status information gleaned continuously from the defendant's responses, behavior, and demeanor during the entire interview augment the formal MSE procedure. Such things as agitation, tears, dissociation, decompensation, and other relevant observations should be documented as they occur during the interview.

Additional examination and testing

Interviews may be only part of the examination. Psychological and/or neuropsychological testing, neurological or other medical workup, and other measures are commonly indicated. The record review completed before the interview(s) may suggest consultation with an expert in some other specialty or subspecialty. It is often useful to have testing results before the interview. Conversely, the interview findings may themselves suggest further consultation.

Assessing the possibility of malingering

It is difficult to establish either the presence or the absence of

malingering, and to separate simple exaggeration from lying for personal gain. Clinicians who say they can usually tell when an evaluatee is lying are, at best, woefully misinformed. Corroboration of history and interview findings, using independent sources and objective tests for example, is very helpful (and sometimes required) to increase evaluation accuracy and usefulness. There are a number of fairly well validated testing instruments for exposing malingered dementia, mental retardation, amnesia or dissociation, and (to some extent) psychosis. Tests for other kinds of deception and malingering are not so well developed. Malingering is discussed in more detail elsewhere in this issue.

REPORTING FINDINGS AND OPINIONS

One should communicate progress and final opinions only to the retaining attorney, unless instructed otherwise by the attorney or the court. Reports should not be prepared unless they are requested by the attorney or court. Procedures for reporting findings of court-ordered evaluations are detailed in Texas statute (Tex. Crim. Proc. Code Ann. Subchapter 46C, formerly Article 46.03). Other requests for information should be forwarded to the retaining attorney or court.

There are two broad schools of thought about the structure of forensic reports. In one, often preferred when consulting to an attorney, the issues or opinions are expressed quite briefly, the expert's comments are concise and to the point, and explanatory text is kept to the minimum allowed. In the other, experts prepare lengthy treatises which often communicate more than is necessary and may inadvertently obfuscate more relevant topics and/or harm the case. Many clinicians (who may also be academicians) are accustomed to writing, explaining, and discussing all sides of a topic or argument; that style is often counter-productive in the forensic, adversarial arena but may be preferred when one is working for the judge or court rather than for one side or the other. Report writing is discussed in more detail elsewhere in this issue.

TESTIMONY

The most important kind of communication one offers is testimony at a hearing or trial. Testimony is discussed in some detail elsewhere in this issue. Nevertheless, here are several general points about conveying one's findings and opinions to the jury or judge who must make decisions about a defendant's sanity.

- *Be prepared.* Having completed a thorough evaluation, review your findings carefully and know what you are likely to be asked in court.
- *Have a pre-trial conference with the attorney.* Only a foolish lawyer allows an expert to take the stand without preparation, and knowing what he or she is likely to say.
- *Be available.* Understand that once you accept the role of evaluator, you must adjust your schedule to that of the court. Trials and hearings are carefully orchestrated and involve many people. There is little time for prima donnas.
- *Be clear and concise.* Jurors and judges are not interested in lengthy speeches, professional jargon, or fuzzy psychodynamic theory. They value clarity and directness, and remember accurate "sound bites" far better than extensive explanations.
- *Be respectful.* Your role as a doctor and expert speaks for itself; do not detract from it with arrogance or sarcasm.
- *Be assertive.* Do not hesitate to pursue your points and opinions vigorously, while being clear, concise, accurate, and respectful.
- *Advocate for your opinion, not a litigant.* Your value to the legal process is related to your objectivity and expertise. Your credibility rests largely on your dedication to the forensic task, and is often damaged when you appear too

focused on the defendant or prosecution itself.

- “Teach” only when asked. The attorney conducting the “direct” examination (generally the one who retained and called you to testify) may ask you to educate the jury or judge. One should usually refrain from doing so during “cross examination” (questioning by the other side’s lawyer).
- *Speak to the trier of fact.* The person asking you questions (a lawyer) is not one of those who are listening for the answers and are empowered to make decisions about the defendant’s sanity (usually jurors). Speak to the latter.
- *Offer disclaimers as required.* All opinions are based on the information obtained and reviewed. Say so. If important sources of information are missing, say so. If there is not enough information to come to a reasonable and certain opinion, say so.
- *Be absolutely honest.*

PROFESSIONAL STANDARDS FOR FORENSIC EVALUATIONS

Attorneys may retain, and courts may appoint and approve, almost any appropriately trained and experienced clinician for forensic evaluations or testimony. Legal guidelines such as the decisions in *Daubert*, *Kumho*, and *Frye* (see Bibliography below) apply in many jurisdictions, but they leave opportunity for poorly qualified (and occasionally irresponsible or unethical) professionals to mislead juries and judges. A few states (including Texas as of 2005; see above) have statutory requirements for qualifying experts on criminal insanity.

A general professional standard for forensic evaluations has been established by qualified practitioners, professional organization guidelines and ethics, and (to some extent) case law. The topic

cannot be adequately discussed here, but is worth pursuing when one encounters so-called “experts” whose unscrupulous behaviors and/or limited qualifications threaten legitimate forensic pursuits.

CONCLUSION

There are circumstances in which evidence and the law favor the prosecution in an insanity defense case, and others in which they mitigate toward the defense. The evaluator’s role is not to find evidence when none is there, but to look hard for information which may be useful to the attorney or court that retained him or her, assess its validity and reliability, help develop its role in the legal matter, and place it before the trier of fact articulately and convincingly. One should be willing to work with either the prosecution or the defense (not, of course, in the same case) with equal vigor and professionalism.

REFERENCES

Ake v. Oklahoma, 470 U.S. 68 (USSC, 1985)

American Academy of Psychiatry and the Law (2002). Practice guideline on forensic psychiatry evaluation of defendants raising the insanity defense. *Journal of the American Academy of Psychiatry and the Law* 30(2) (Supplement).

Bigby v. State, 892 S.W. 2d 864 (TX Crim. Ct. of App., 1994)

Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993). An influential case, not completely accepted in Texas case law, in which the U. S. Supreme Court held that federal Rule 702 imposes a special obligation upon a trial judge to ensure that scientific testimony is not only relevant, but reliable. It largely supplanted the earlier standard (Frye, below) in an effort to decrease the introduction of unreliable “junk science.” Daubert discusses four factors which are appropriate for a judge to consider in deciding the admissibility of expert testimony: testing of the expert’s theories and opinions, peer review, error rates, and acceptability in the relevant scientific community.

Estelle v. Smith, 451 U.S. 454 (USSC, 1981)

Frye v U.S., 293 F 1013 (DC Ct. App. 1923). An early federal case about the admissibility of expert testimony which is still influential in some jurisdictions, including Texas. It states generally that when the question before a court involves matters outside the range of common experience or knowledge, experts are needed, and

that the factors that lead to an expert opinion must be sufficiently established to have gained general acceptance in that field.

Kumho Tire Company Ltd. v. Patrick Carmichael, 119 S.Ct. 1167 (1999). A U.S. Supreme Court decision that extended the concept of “knowledge” in Daubert (above) and decreased judicial flexibility by requiring that trial court judges “with some latitude, ensure the reliability and relevance of all expert testimony, not just that which purports to use ‘science.’ “

Reid, W. H. (2006). *Psychiatry and Law Updates*, An education and communication service for forensic, legal and judicial professionals. Website at www.psychandlaw.org.

Texas Department of Health Services (2005). *Texas Laws Relating to Mental Health, 15th Ed.* Statutes relevant to criminal, civil, and administrative mental health matters, including changes passed by the 2005 79th Texas Legislature in 2005.

Received: February 2006

Accepted: June 2006

Suggested Citation:

Reid, W. H. (2006). Sanity Evaluations and Criminal Responsibility [Electronic Version]. *Applied Psychology in Criminal Justice*, 2(3), 114-146.

APPENDIX

SANITY

Rogers Criminal Responsibility Assessment Scales (R-CRAS)

This instrument was developed by Richard Rogers in 1984. It presents a series of items which the examiner is to rate based upon all information available. It has been of primary value to persons conducting sanity evaluations under the ALI standard.

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

Source: Psychological Assessment Resources, Inc.
P. O. Box 998
Odessa, FL 33556