

FORENSIC EVALUATIONS, ADVICE, AND CONSULTING: MANGAGING THE WORKING RELATIONSHIP WITH THE ATTORNEY

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Introduction

- I. Role of the Neuropsychologist in Criminal Cases
 - A. Hired by the prosecutor, defense counsel, or the court.
 - B. To evaluate a client's present or past mental state or condition against a specific legal standard, to consult, and/or to advise. Includes reviewing medical and other records, obtaining a social history from the client and collateral sources, and discussing with defense counsel the legal standards applicable to the evaluation and the goals of the person who has hired you to do the evaluation.
 - C. If hired by the prosecution or the defense, becomes part of the adversary process. Must reconcile independence and professional standards with the adversary system. *See* "The Expert Witness, the Adversary System, and the Voice of Reason: Reconciling Impartiality and Advocacy" (S.A. Greenberg & D.W. Shuman 2003) (Appendix A) and "Specialty Guidelines for Forensic Psychology, American Psychological Association" (American Psychologist January 2013) (Appendix B).
 1. Tension when counsel pressures the expert to testify beyond their professional standards, and tension from counsel's perspective when the expert views her role as completely independent and seeks to offer opinions or views that go beyond the narrow legal question presented.

2. Attorneys are ethically required to be diligent advocates for their clients, including the presentation of expert testimony; such testimony should further the goal of diligent advocacy and not disinterested neutrality.
3. As a psychologist, you have an obligation to be impartial. That does not mean you are free to opine or give information to the court or the other side on issues which are beyond the legal question presented to you for analysis.

D. Strategies for reconciling these tensions.

1. Ensuring that the lawyer provides you with (a) the specific issue he or she wishes explored; (b) necessary records to conduct the evaluation; (c) a social history; (d) the facts of the case from both the perspective of the defense and the prosecution; and (e) any reports generated by the “other side.”
2. Conducting a preliminary review of records and social history, and having a discussion with counsel before conducting an interview.
3. In some cases the only solution is to limit your role to that of an advisor or consultant and not a testifying expert. You remain in the background and help the attorney plan cross examination of the opponent’s experts, provide advice on investigation to be conducted, conduct testing that might be useful to the defense’s case, and perhaps suggest another expert with a more relevant expertise on the issue being investigated.

E. Practical concerns related to the attorney-client privilege.

1. The engagement letter (Appendix C).
2. What to do if contacted directly by the other side either by phone call or by subpoena to you or for your records.
3. Your work on the case, and your interview of the client, may or may not be discoverable by the other side. However, the lawyer who retained you is the person who should respond to, and if necessary litigate, any requests for such information.

Example: *State v. Pawlyk*, 800 P.2d 457 (1990). Double homicide. We asserted an insanity defense and retained a psychiatrist to interview the client. We chose not to use him in presenting our defense and retained another psychiatrist who we endorsed as our witness for trial.

When the State was informed of the insanity defense, it contacted Dr. Harris as a prospective witness and learned that he had interviewed defendant. The State moved to discover Dr. Harris's written reports of his interview of the defendant and to interview Dr. Harris concerning his findings and the basis for his conclusions. The State also moved to discover the results of "any and all psychological testing that may have been performed on the defendant by anyone." Further, the State moved for copies of reports by any other psychiatrist, psychologist, or expert in the field of forensic medicine who examined the defendant either before or after Dr. Tanay (the defense testifying expert) examined him. The State served Dr. Harris with a subpoena to testify and a subpoena duces tecum for his reports. The State maintained that it wanted Dr. Harris as its expert witness, perhaps its only expert witness. The defense moved to quash the subpoenas.

The Court, in a 6-to-3 decision, upheld the order compelling discovery and permitting the State to call Dr. Harris as a witness. The defendant was permitted to request an in camera examination of Dr. Harris's reports if he believed they described work product—i.e., communications between defense counsel and Dr. Harris that should be protected—and the trial court should protect such work product from discovery should it be found in the reports. The Court emphasized that the information provided to the State pursuant to the order was to be utilized at trial only if expert testimony of a psychiatrist in support of an insanity defense was presented before the jury, and only for the purpose of rebutting the insanity defense.

The *Pawlyk* case illustrates the complexity of confidentiality and privilege issues in the forensic context, and why the expert should not be the person making these determinations.

II. The Psychologist as Both Therapist and Evaluator.

- A. A thorny area. Courts will generally allow a treating therapist to testify as an expert. However, the psychology literature cautions against a psychologist playing both roles. See "When Worlds Collide: Therapeutic and Forensic Roles" (S.A. Greenberg and D.W. Shuman 2007) (Appendix D). In practice most lawyers try to avoid using the same person for both purposes, but at times it is the treating psychologist who will have the most in-depth knowledge about the client and the client's prognosis, which may be highly relevant to some issues in the criminal case.

Hypothetical: As a therapist you are treating a patient for compulsive use of pornography. Over the course of your treatment, you have worked with the patient and developed therapeutic techniques for him to control this compulsion.

Based on your evaluation of what he has reported to you and your experience in treating this condition, you believe the treatment has been successful. You then receive a phone call from the patient's criminal defense attorney informing you that this patient was recently indicted for possession of child pornography based on a sting that revealed he had downloaded child pornography to his computer three years earlier. The computer was seized and searched within the last six months, but the forensic evaluator is unable to determine if and when the child pornography files had been accessed over the past two and half years. He has been your patient for two years, and has self-disclosed his obsession with pornography and its effect on his marriage and family life. The patient never disclosed that he had downloaded or viewed child pornography, and you cannot recall ever asking that specific question.

(1) The lawyer wants you to provide a letter or testimony concerning your treatment, your view of whether the treatment has been successful, and what steps the client needs to take in the future to maintain his ability to avoid pornography.

(2) The lawyer also wants you to give an opinion on the client's likelihood of success in maintaining abstinence from both child and adult pornography, and the bases for that opinion; and whether the client presents a future danger of sexual misbehavior with children

III. Examples of Criminal Cases in Which a Psychological and Neuropsychological Evaluation Is Useful.

- A. Competency to stand trial: whether the client can understand the nature of the proceedings, and whether the client has the ability to work with defense counsel.
- B. Insanity, diminished capacity: centers around the mental state of the client at the time of the offense.

C. Other trial-related uses of psychological testimony:

1. In a fraud case on the issue of mens rea. *United States v. Finley*, 301 F.3d 1000 (9th Cir. 2002). The defendant, Mr. Finley, attended a seminar in which he was counselled by Mr. Schweitzer on how to use bogus documents to obtain funding for his business plan to open some bookstores. Despite being told by the government that his commercial instruments were fraudulent, he persisted and publicly took the position that the government was wrong and acting maliciously. Once Mr. Schweitzer, the person who advised him on this scheme, was arrested and charged, Mr. Finley stopped attempting to cash these commercial instruments.

A psychologist who evaluated Mr. Finley was offered as an expert to testify that Mr. Finley suffered from an atypical belief system or delusion which impacted Mr. Finley's ability to form a criminal intent for the crimes he was charged with. (Copy at Appendix E).

2. Voluntariness and reliability of a confession in *United States v. Redlightning*.
3. Admissibility of neuropsychological testimony: the *Daubert* test in federal court. See Order in *Redlightning* (Appendix F).

D. Sentencing

Every sentencing presents the following question that the defense attorney needs to answer: Why did the client commit the crime and what is the plan for the client to not commit such a crime in the future?

1. Explaining the behavior (examples).
 - (a) Compulsive behaviors, e.g., Aspergers's;
 - (b) Easily led or manipulated by others, e.g., low intellectual functioning;
 - (c) Delusions or belief systems that do not excuse the crime but that mitigate the offense;
 - (d) Fetal alcohol syndrome;
 - (e) Behavioral changes, including increased tendency to violence related to head injuries;
2. Why this behavior will not likely repeat itself.
 - (a) Traits or strengths the client possesses;
 - (b) What treatment can offer;
 - (c) Other tools available to the client or family to mitigate the risk of such future behavior.

3. Example of sentencing cases.

Case example #1: A 49-year-old A.A. male charged with possession with intent to distribute heroin who was facing a career-offender enhancement in federal court with guideline range of 151 to 188 months. Had history of presumptive paralytic poliomyelitis and possible cerebral palsy; wheelchair-bound. Evidence of significant learning problems: at age 12 his reading and math ranged from early 2nd grade to early 4th grade level. He dropped out of high school in 10th grade. He never worked, was homeless for a period, and never lived alone. He had heavy alcohol use, and ER visits for falls. His medical history was significant for MI; unresponsive with no pulse for more than 15 minutes. CT scan of head in 1997 indicates mild swelling in brain, possible ischemic injury (inadequate blood flow) to deep brain nerve cells.

Behavioral observations: neatly groomed, looked older than stated age; alert and oriented; friendly and soft-spoken; good effort and attention; poor long-term memory: could not recall when he left high school, who was the previous president; poor language comprehension: needed slower pace, repetition, and clarification.

Neuropsychological test findings: full scale IQ of 65 (1st percentile for age); functional academics: well below average (reading in 8th percentile, arithmetic in 5th percentile); extremely slow processing and fine motor speed; significant impairments in memory, and immediate recall of word list ranged from 6-25%: no memory after 20-minute delay.

Diagnoses: mild mental retardation and amnesic disorder, not otherwise specified.

Transcript review of previous plea agreements: unrepresented when came to court, opportunity to meet with attorney for only a few minutes, given lengthy and nuanced instructions regarding the plea.

Behavior consistent with observed deficits: did not understand consequences of giving up right to jury (asked 3 times), answered yes to an open-ended question, concrete in his responses: "older."

Outcome: Conviction vacated, guidelines reduced in federal court.

Case example #2: Child porn case with a neuropsychological evaluation for a client with multiple sclerosis. The evaluation linked disinhibition and compulsive behavior that is symptomatic of advanced MS with her online behavior.

IV. Some Areas of Exploration

- Intelligence testing
- Learning disabilities
- History of head injury
- Suspected or known neurological disease (e.g., stroke, seizure, tumor)
- Suspicion of dementia vs. normal aging
- Cognitive effects of medication or illicit use of drugs.

V. Who Is Responsible for the Investigation?

No hard and fast rules. In most cases you should expect the lawyer to gather records relevant to your evaluation, including school records and relevant medical records.

VI. Guiding the Lawyer Through Your Evaluation Process.

A lawyer calls you and asks you to evaluate the client for one of the issues set forth above, but provides no records and no relevant background on the client, has conducted no collateral interviews, and does not set forth the legal standard relevant to the evaluation. It is reasonable for you to expect and ask the lawyer to obtain and provide the records, provide you with a reasonably thorough social history, and to articulate the specific applicable legal standard that is the focus of the evaluation.

VII. Guiding the Psychologist Through the Legal Process.

It is reasonable for the lawyer to expect the forensic expert to identify information significant to conduct the evaluation, to identify what additional investigation should be conducted, and to ask for additional records that should be obtained. The expert should advise the lawyer about the tests that will be conducted in the evaluation process, the purpose of those tests as they relate to the question presented, and any dangers presented by the use of particular testing.

VIII. Conclusion

If you are interested in doing forensic work in criminal cases, please send me your CV and a summary of any specialties you possess that could be useful in certain cases. Since we are court-appointed counsel, we are limited on how much we can pay our experts. For psychologists, the present presumptive range is \$150 to \$300 per hour, and for neuropsychologists it is \$200 to \$350 per hour. It can be exceeded in extraordinary cases, such as cases involving unusual complexity or the uniqueness of the particular expert's specialty. If retained by a CJA attorney, such requests need to be approved by the Chief Judge of the Ninth Circuit. If it is a request made by one of my attorneys, then I make the approval.