CHAPTER 1

Introduction

Overview

Although it has not always been the case, psychologists, psychiatrists, and other mental health professionals seeking guidance on how to conduct forensic evaluations now have an abundance of published resources available to them (see, e.g., Drogin, Datillio, Sadoff, & Gutheil, 2011; Jackson, 2008; Melton et al., 2007; Otto, 2013; Weiner & Otto, 2014), and continuing education opportunities abound as well (see, e.g., workshops referenced at www.aafp.ws). Quite rightly, the bulk of these resources focus on the legal contours, ethical challenges, and evaluation procedures and practices relevant to conducting forensic mental health assessments. Considerably less attention has been devoted to how forensic mental health professionals can best communicate to legal decision makers what they have done, learned, and concluded.

Some commentators have discussed strategies for educating legal decision makers by way of sworn testimony (see, e.g., Brodsky, 1991, 1999, 2013; Hess, 2006; Kambam & Benedek, 2010; Kwartner & Boccaccini, 2008; Otto, Kaye, & Hess, 2014) or the challenges of report writing in forensic contexts (see., e.g., Buchanan & Norko, 2011; DeMier, 2013; Gagliardi & Miller, 2008; Greenfield & Gottschalk, 2009; Kambam & Benedek, 2010; Karson & Nadkarni, 2013; Weiner, 2014). But these authors typically treat report writing and testimony individually or, at best, separately. We view report writing and testimony as inherently interconnected insofar as both are mechanisms for communicating one's work and findings to decision makers.

This volume is devoted to effective report writing *and* testimony designed to communicate the work and opinions of psychologists, psychiatrists, and other mental health professionals who conduct forensic

evaluations. If the examining mental health professional cannot effectively communicate what he or she did (i.e., the techniques employed, the records reviewed), learned (i.e., important data that were provided, uncovered, or generated), and concluded (i.e., expert opinions formed) by way of reports, affidavits, or testimony, then it does not matter how qualified he or she is, or how good the evaluation was. The expert will not educate or persuade the attorneys or decision maker(s). Accordingly, the purpose of this book is to convey principles of effective report writing, affidavit preparation, and testimony. We do not discuss how to conduct various types of forensic mental health evaluations. There are now plenty of resources that provide such guidance. We acknowledge, however, that we sometimes encroach upon this issue as we discuss how to communicate with the legal decision maker. We also do not specifically discuss presentation of "social framework" or "social authority" testimony (Monahan & Walker, 1987), which is non-case-specific testimony about research that sheds light on some matter before the court (e.g., general testimony about eyewitness identification, juveniles' development, or the suggestibility of children when being questioned). We believe, however, that some of our comments may be helpful to witnesses who find themselves in court to share this type of information.

Organization of the Volume

We begin with a discussion of the functions of forensic reports in Chapter Two. We discuss the rationales for writing reports and how report requirements may be shaped by law and local customs. In Chapters Three and Four we discuss the content of forensic reports, with special attention to the underlying principles of sound report writing. Consideration of these principles—particularly when they can be anchored in relevant laws, rules, ethical precepts, or professional guidelines—provides an idea of what the standard of care should be. Chapter Five focuses on the structure, mechanics, and logistics of report writing, including a discussion of how to present data and opinions in the various sections of forensic reports. Chapter Six features a discussion of how to develop other forms of written communication, including interrogatories, affidavits, declarations, demonstrative exhibits, and demonstrative aids. Historically, these activities have received little attention from commentators compared to

report writing and testifying. However, they all are common and important vehicles for communicating one's work as an expert.

We then turn our attention to testimony. In Chapter Seven, we review the "4 Cs" of effective communication: credibility, clarity, clinical knowledge, and certainty. These provide the backdrop for our discussion of more specific principles and practices. Chapters Eight and Nine are devoted to testimony in a variety of pretrial proceedings. Chapter Ten then focuses on how to prepare for court and various logistical issues, ranging from meeting with retaining counsel to pretrial reconnaissance. Chapter Eleven is concerned with direct examination techniques and strategies, and Chapter Twelve addresses the special challenges of cross-examination. Two appendices are included: Appendix A contains sample reports, and Appendix B contains sample affidavits and a sample declaration. Documents in the appendices are accompanied by commentary designed to demonstrate and reinforce some of the principles emphasized in this book.

Whenever possible, we anchor our recommendations in relevant research, laws, rules, ethics, or practice guidelines. When such authority is not available, we provide what we think are reasonable explanations or justifications for our perspectives. We also review findings from relevant research studies, when available, to help evaluators better understand how their reports and testimony may be received by others.

RESEARCH POINTS: REPORT WRITING AND TESTIMONY RESEARCH

In 1954, Judge David Bazelon issued a ruling in the landmark case *Durham v. United States*. That decision redefined the federal standard for insanity. The change reflected Bazelon's desire for the increased participation of mental health professionals in courtroom proceedings (Bazelon, 1974). In the intervening 60 years, mental health professionals have written millions of reports summarizing their evaluations of litigants (Melton et al., 2007) and testified in millions of cases. It is therefore rather surprising that so little research has focused on the task of report writing. Forensic report writing has a scant literature, given its prevalence in today's legal system.

Report writing and expert testimony describing forensic evaluations are not tasks that lend themselves easily to experimental manipulation. Instead, researchers are forced to study reports and testimony after the fact. For example, the professional literature comprises several types of articles about forensic reports and how to write them. Some of the first articles were conceptually driven pieces that focused on flaws inherent in the reports summarizing forensic evaluations. Other publications were mildly empirical, insofar as they at least counted some things or surveyed mental health professionals about their report writing ideas and practices. Naturally, these studies vary considerably in quality. Although few studies employed a rigorous empirical analysis of the quality of forensic writing, there are some notable exceptions (e.g., Skeem, Golding, Cohn, & Berge, 1998).

Heilbrun and Collins (1995) identified "a period of 25 years in the absence of virtually any published empirical data on the characteristics of forensic mental health assessments" (p. 61). Only 10 years later, however, Wettstein (2005) noted that topics in published research included "contents of actual forensic reports, desired contents of forensic reports, perceived deficiencies of reports and evaluations, and prevalence of the use of diagnostic tests" (p. 161). Of course, this difference could reflect different thresholds for considering a work "empirical."

Although there has been some research examining the report-writing practices of mental health professionals who conduct forensic examinations, there has been even less research addressing the testimony they deliver in courts. This is presumably because of the difficulty in accessing an adequate number of transcripts documenting this testimony. This has led testimony researchers to rely on mock jury designs for identifying characteristics of credible experts and persuasive courtroom testimony. Research participants in these studies assume the role of jurors and make decisions in hypothetical cases. There are now more than 60 of these investigations, many of which provide useful information about effective courtroom communication (Kwartner & Boccaccini, 2008). Findings from these studies become even more compelling when coupled with postverdict surveys of jurors who heard testimony from experts in real cases (e.g., Boccaccini, Turner, Murrie, Henderson, & Chevalier, 2013).

The empirical literature on report writing and testimony has increased steadily since forensic psychology and forensic psychiatry have grown as recognized specialties, which is encouraging. Throughout this volume, we reference the work of researchers who have employed a variety of approaches to critically analyze forensic reports and testimony. This research is important because it provides some indication of the standard of practice, as well as an understanding of what practitioners are doing well and what they could do better.

The Importance of Knowing Local Laws, Rules, and Customs

Forensic mental health professionals with even a modicum of experience know that the laws and rules that shape their work vary across and within jurisdictions. Referencing the relevant laws and rules for all jurisdictions in all circumstances is not feasible in this book. When making points about rules of evidence, we typically reference the Federal Rules of Evidence, versions of which have been adopted by many states. *It is important, however, that readers consider the contents of this book with the understanding that they must know and comply with the laws, rules, and customs of the jurisdictions in which they practice*, and meet professional ethical obligations as well. In some instances, the laws or rules of a particular jurisdiction are referenced in order to make a specific point.

Also, remember that there is no substitute for good judgment. Although we are sometimes quite adamant about the best course of action, circumstances do vary; forensic mental health professionals should never leave their own good judgment at the examining room door or courthouse steps.

Report Writing and Testimony in Context

Before discussing report writing and testimony, it is important to understand the contexts in which mental health professionals write reports and testify. There is a subset of legal cases in which there is some question or dispute about someone's emotional, behavioral, or cognitive functioning. Although the person whose mental state is at issue is typically a litigant, this is not always the case. For example, a witness may be examined when questions are raised about her capacity to testify, and the mental state of a testator at the time he executed a will may be the focus of a legal dispute between his heirs long after his death.

In these cases, attorneys or the court sometimes seek the assistance of mental health professionals. This consultation is based on the assumption that, because of their specialized knowledge, psychologists and psychiatrists may be able to help the fact finder understand the complicated matters involved and reach more informed, and presumably more accurate, decisions. The expert's role is perhaps most clearly reflected in Federal Rule of Evidence 702:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or

> otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

So this is where we start, with a mental health professional who has relevant specialized knowledge having examined someone whose mental state is at issue in a legal proceeding using valid assessment methods, who wants to effectively communicate what was done, considered, learned, and concluded. In this way, the legal decision maker will come to understand the complicated matters and make a more informed and presumably more accurate decision.

Points and Avenues of Communication in the Litigation Process

Once the evaluation has been conducted, there are numerous points at which the examiner will communicate his or her activities, findings, observations, and opinions. Assuming the examiner has been retained by an attorney to conduct the evaluation (typically the attorney representing the examinee or opposing counsel), it is critical that the examiner share his or her findings with the retaining attorney upon completing the examination. This allows the attorney to make informed decisions about the next steps in the legal process (e.g., seek a settlement or plea agreement, direct that an affidavit be executed, direct that a report be written, disclose the expert as a witness and make plans for trial, consider retaining one or more additional experts, seek necessary additional information). If the examiner has not been retained by an attorney but has some other type of involvement (e.g., court retention), then such contact is not appropriate; the next step for the examiner is likely provided in the document by which the appointment occurred (e.g., in the order appointing the professional to conduct the evaluation).

The retaining attorney may disclose the expert as a witness and direct him or her to execute an affidavit. As described in Chapter Six, *affidavits* are sworn statements in which experts typically chronicle their background, expertise, work in the case, and opinions. The retaining attorney

may disclose the expert as a witness and direct him or her to write a report summarizing his or her work in the case and opinions (although the Federal Rules of Civil Procedure impose additional requirements of the expert when writing a report; see Chapter Two for more details).

Once notified of the expert's involvement, opposing counsel may serve the expert with interrogatories. As described in Chapter Six, an *interrogatory* contains a list of written questions developed by a party that must be answered under oath by an adversary witness in order to clarify and identify facts that may be presented at trial.

The expert may also be deposed. As described in Chapter Eight, a *deposition* involves sworn testimony, the focus of which is typically the expert's background and work in the case. Although testifying at a deposition is similar to testifying at a trial or hearing insofar as both involve sworn testimony, there are some important differences. Most importantly, depositions are typically "taken" by the nonretaining attorney. After all, all the retaining attorney needs to do in order to ascertain what his or her expert did or concluded is make a phone call. In cases in which the expert is retained or appointed by the court, the deposition is likely to be initiated by the attorney whose legal argument the expert's findings and opinions do not support. Another significant difference between testimony offered at depositions and testimony offered at a hearing or trial is that questioning by the retaining attorney is often kept to a minimum, for the reason cited previously. Although depositions are typically less formal than testimony offered in the courtroom, the witness should not be lulled into a false sense of security by what may be a more relaxed process.

Finally, the expert may testify at a hearing or trial in order to inform the legal decision maker about what he or she did, considered, learned, and concluded. Direct examination is almost always conducted by the retaining attorney, followed by cross-examination by opposing counsel. When the expert is retained or appointed by the court, direct examination is conducted by the attorney whose legal argument the expert's opinions most support, followed by cross-examination by opposing counsel. In rare cases, the expert undergoes cross-examination by retaining counsel, after being called to testify and undergoing direct examination by opposing counsel (e.g., when a prosecution-retained expert forms opinions that are most helpful to the defense and is not called as a witness

by the prosecutor as a result). Testifying at a trial or hearing may be the most challenging and anxiety-arousing of all of the activities we address.

Ultimately, our intention is to provide readers with the background and information they need to communicate effectively at each stage in this process. Our goals are to inform readers about these processes and to assist them in developing communication methods or strategies that are effective for their own forensic work.