

# On Improving Expert Testimony



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## Agenda

- Problems with data gathering, opinion formation and communication in forensic examination contexts
- Problems with objectivity
- Recommendations for improvement



## Making Sense of What Forensic Examiners Do and Think



## 1991 Specialty Guidelines for Forensic Psychologists VI.F. and VII.F.



- Forensic psychologists attempt to corroborate critical data that form the basis for their opinions
- Forensic psychologists are prepared to explain the relationship between their expert testimony and the legal issues and facts of an instant case

## Making Sense of What Forensic Examiners Do and Think



- Surveys of practice\*
- Review of reports\*\*
- Review of recorded practice\*\*\*
- Review of sworn testimony\*\*\*

## Kids' CST Reports



- Christy, Otto, et al., *Prof Psych*, 2004
- 1357 community based evaluations of 674 kids adjudicated ITP in Florida
  - Average of 2.01 reports per juvenile (Range = 1-6)
  - 74% of reports completed by psychologists
  - 15% completed by psychiatrists
  - 5% completed by masters level providers

## Kids' CST Reports



- Location of assessment was discernible in only 52% of reports
- Page length ranged from .5 to 15 pages (M = 5.38)

## Kids' CST Reports



<u>Source of Information</u>	<u>% of Reports</u>
Interview/observation juvenile	94%
Interview w/family members	54%
Mental health records	40%
Arrest reports	38%
School records	12%
Interview with MHPs	9%
Interview with "jail" med staff	2%
Interview with "jail" officers	2%
Review of depositions	1%

## Kids' CST Reports



<u>Mental State Descriptions</u>	<u>% of Reports</u>
Delusions/Hallucinations	64%
Orientation	62%
Response Style	62%
Mood/Affect	61%
Speech	57%
Memory	44%
Attention/Concentration	39%

## Kids' CST Reports



<u>Mental State Descriptions</u>	<u>% of Reports</u>
Judgment/Reasoning	37%
Intellectual Functioning	36%
Thought Form	34%
Motor Functioning	29%
Impulsivity	25%
Thought Content (non-psy)	22%
Auditory Comprehension	10%
Reading Comprehension	6%

## Kids' CST Reports



<u>Competence Capacities</u>	<u>% of Reports</u>
Charges/Allegations	89%
Sanctions/Penalties	88%
Legal Process & System	91%
Consult with Attorney	89%
Manifest Appropriate Behav	85%
Testify Relevantly	84%

## Kids' CST Reports



<u>Opinions Offered on Legal Issues</u>	<u>% of Reports</u>
Competent/Incompetent	96%
Restorability	84%
Length of Time to Restore	84%
Residential/Non-Residential	84%
Identify Cause of Incapacity	62%
Commitment Criteria	32%

## CST/MSO Reports



- Heilbrun et al., *Prof Psych*, 1995
- 277 evaluations of Florida defendants admitted to forensic hospital as ITP or NGRI
- Reports completed by community or hospital professionals
  - Community evaluators (52% doctoral psychologists)
  - Hospital evaluators (62% doctoral psychologists)

## CST Reports



<u>Issue Addressed by Evaluators</u>	
Cited court order	91%
Cited notification/informed consent	30%
Addressed/discussed competence abilities	61+%
Offered opinion on legal issue	95%
Report length: Range 1-14, Mean = 3.9	

## CST Reports



- Skeem et al., *Prof Psych*, 1998
- 100 CST evaluations of 50 Utah defendants completed by community evaluators
  - 80% completed by psychologists
  - 14% completed by psychiatrists
  - All examiners had minimal, state sponsored training on criminal forensic evaluation issues

## CST Reports, Skeem et al.



<u>Issue Addressed</u>	
Appreciation of charges, penalties, and adversarial process	70+%
Ability to reason about legal options	39%
Understanding of guilty plea and implications	12%
Impact of medication on competence ability	18%
Identified symptoms supporting diagnosis	71%
Considered ability in terms of case demands	12%

## Custody Reports



- Bow, *Family Court Review*, 2002
- 52 reports submitted by examiners around the United States upon request by authors
- Reports ranged in length from 5 to 63 pages (Mean = 24, median = 18)

## Custody Reports



<u>Issue</u>	
Referenced consent/notification	50%
Listed sources of information	64%
Included explicit physical custody recommendations	92%
Included specific legal custody recommendations	85%
Included specific visitation recommendations	80%

## Custody Reports



- Horvath et al., *Prof Psych*, 2002
- 102 custody evaluation reports submitted to a Kentucky circuit court by doctoral-level and masters-level professionals

## Custody Reports



<u>Issue</u>	
Described parents' parenting skills	87%
Described kids' psychological and developmental needs	80%
Described parents' abilities to meet kids' needs	73%
Offered recommendations regarding custody	90%

## Dependency Reports



- Budd et al., *LHB, 2001*
- 190 parent evaluations submitted to Cook County court (Psychologists-54%, Psychiatrists-15%, Masters level-21%, Unknown-8%)
- Three evaluation types
  - Bonding/parenting evaluations
  - Psychiatric/psychological evaluations
  - Substance abuse evaluations

## Dependency Reports

<u>Issue</u>	<u>Psych</u>	<u>Bond</u>	<u>SA</u>
Notification referenced	17%	10%	7%
“Believability” referenced	71%	24%	93%
Opinion limitations cited	31%	14%	13%
Describe parents’ strengths	33%	76%	7%
Describe parents’ weakness	54%	47%	7%
Describe + P-C rel	5%	86%	0%
Describe – of P-C rel	6%	52%	0%



## Practice Problems Suggested By Report Reviews

- Inadequate data bases, in some cases
- Overly anchored in the law, in some cases
- Not particularly psychological, in some cases
- Failure to provide a factual basis for opinions, in some cases



## Possible Responses



- In training, encourage (require?) psychologists to consider explicitly the connection between clinical factors and psycholegal issues in dispute
- Encourage (require?) psychologists to access collateral data sources

## September 2008 SGFP Draft



- 11.02
  - Forensic practitioners ordinarily avoid relying solely on one source of data and corroborate important data whenever feasible
  - When relying on data that have not been corroborated forensic practitioners make known the uncorroborated status of the data, any associated strengths and limitations, and the reasons for relying up in

## Objectivity and Bias in Forensic Examination and Expert Opinion Formation



“Gentlemen of the jury, there are  
three kids of liars—the common  
liar, the damned liar, and the  
scientific expert”



Cited by Foster (1897), a quote attributed to an unidentified trial lawyer who began his closing argument with this statement after the unsuccessful cross examination of an opposing expert witness



“I would go into a lawsuit with an objective, uncommitted, independent expert about as willingly as I would occupy a foxhole with a couple of noncombatant soldiers.”

Blake Fleetwood, former president of the American Bar Association, quoting another former president of the American Bar Association, John C. Shephard, in  
 From the People Who Brought You the Twinkie  
 Defense: The Rise of the Expert Witness Industry  
**Washington Monthly, June 1987, at 33**



## 1991 Specialty Guidelines for Forensic Psychologists, VII.D

- Forensic psychologists
  - have a responsibility to all parties to present their findings, conclusions, and evidence in a fair manner
  - do not engage in partisan distortion or misrepresentation
  - do not participate in partisan attempts to deny, avoid, or subvert presentation of evidence contrary to their own position

## Buffalo Creek Disaster



- February 26, 1972
- Four days after being declared safe by a federal mine inspector, a coal slurry dam burst and sent 132,000,000 gallons of black water in currents of up to 30 feet high into 16 towns with a total population of 5000 in Buffalo Creek Hollow, West Virginia

## Buffalo Creek Disaster



- 551 homes were destroyed
- 4000 were left homeless

## Buffalo Creek Disaster



- 1121 persons were injured
- 125 persons were killed

## Buffalo Creek Disaster



- Two lawsuits filed against the Pittston Coal Company on behalf of 973 adult and child survivors were settled for \$18,300,000
- (\$18,807.81 per plaintiff)
- *The Buffalo Creek Disaster* (G. Stern)

## Potential Impact of “Forensic Identification”



- Zusman & Simon, 1983, *AJP*
  - Compared the psychiatric and psychological evaluations of 42 Buffalo Creek child plaintiffs prepared by plaintiff and defense experts
  - When compared to defense-retained experts, plaintiffs’ experts reported
    - Higher rates and greater severity of psychiatric symptoms
    - A higher proportion of examinees with significant impairment and no improvement

## Potential Impact of Forensic Identification



- Defense retained experts focused more on observable symptoms, plaintiff-retained experts focused more on psychodynamic functioning
- Plaintiff-retained experts who conducted evaluations in examinees’ homes reported greater rates of impairment than those who conducted evaluations in offices

## Potential Impact of Forensic Identification



- Otto, 1989, *Beh Sci and the Law*
  - 32 clinical psychology graduate students reviewed a criminal and civil case and formed opinions about the litigants' functioning
    - “Prosecution retained” Ss were more likely to form opinions about the defendant’s mental state supporting a guilty verdict whereas “Defense retained” Ss were more likely to offer opinions about the defendant supporting an NGI verdict
    - “Plaintiff retained” and “Defense retained” Ss showed no differences in opinions

## Potential Impact of Forensic Identification



- Beckham et al., 1989, *Law and Human Beh*
- 100 MHPs reviewed a hypothetical insanity case (murder) and formed opinions about the defendant’s functioning
  - Respondents’ opinions about criminal responsibility or symptoms did not vary as a function of side of retention (prosecution, defense, court)
  - Psychologists perceived the defendant as more impaired than psychiatrists did, and the two groups relied on different types of information

## Reliability of PCL-R Ratings



- Murrie et al., 2007, *Law and Human Beh*
  - Examined 23 Texas SVP cases in which experts for both the state and respondent reported PCL-R scores
  - In 19 of 23 cases the state experts offered higher scores
  - The average score difference was 7.81 (25.86 v. 18.04,  $p < .001$ )

## Reliability of PCL-R Ratings



- Boccaccini et al., 2009, APLS
  - Calculated mean PCL-R scorings of 20 examiners who evaluated 321 potential SVPs in Texas
  - Examiner A: 31.8
  - Examiner B: 27.1
  - Examiner C: 25.1
  - Examiner D: 20.8
  - Examiner E: 17.1
- 34% of score variance attributable to evaluators

## Reliability of SVP Risk Ratings



- Levenson, 2004, *Law & Human Beh*
  - Compared risk instrument scorings of MHPs who had been retained by and examined the same respondents
  - Raters' scores were highly correlated
    - Static-99 (N = 281), ICC = .85
    - MnSOST-R (N = 224), ICC = .85
    - PCL-R (N = 69), ICC = .84

## Reliability of SVP Risk Ratings



- Murrie et al., 2009, *PPPL*
  - Compared risk instrument scorings conducted by MHPs who had examined the same respondents
  - State-retained examiners consistently calculated higher scores on all tools including the MnSOST-R, Static-99, and PCL-R

## Reliability of SVP Risk Ratings



- 19% to 30% of MnSOST-R scoring variance was attributable to case affiliation
- 3% to 5% of Static-99 scoring variance was attributable to case affiliation
- 18% to 25% of PCL-R scoring variance was attributable to case affiliation

## Reliability of CST Judgments



- Murrie, 2008, *PPPL*
- Examined over 7000 CST evaluations conducted by 60 clinicians in VA and AL
- Examiners' rates of recommended adjudication as IST ranged from 0% to 60%

## Reliability of CST Judgments



- Rates also varied as a function of discipline, among VA professionals...
  - MSWs = 40% recommended as IST
  - PhDs = 20% recommended as IST
  - MDs = 6% recommended as IST

## Practice Problems Suggested By Report Reviews



- Experts' behavior--including data collection techniques, case reasoning, and opinion formulation--may be impacted in significant ways by non-case factors, some of which may be conscious/intentional and some of which may be unconscious/unintentional

## Possible Responses



- Stated preference for court appointment
- Encourage or impose obligations upon psychologists to proactively identify
  - Sources of information
  - Factual basis of opinions
  - All data that are contrary to offered opinions

## September 2008 SGFP Draft



- 13.01
  - Forensic practitioners do not...participate in misrepresentation of their evidence, nor do they participate in partisan attempts to avoid, deny or subvert the presentation of evidence contrary to their own position or opinion

## September 2008 SGFP Draft

- 11.01
  - Forensic practitioners maintain integrity by examining the issue at hand from all reasonable perspectives and seek information that will differentially test plausible rival hypotheses



## Questions

