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Public Defender Services

e-Mitigation News VOLUME 1, Issue 3

By Stephanne Thornton, Criminal Justice Specialist, Public Defender Corporation Resource Center

The Perfect Expert?

In a child pornography case, Chester Kwitowski is an impressive expert witness. His resume shows he holds a master's degree in computer science and engineering from the University of South Florida and held secret as well as top secret clearance with the federal government. He served as an officer in the Air Force and holds computer forensics certifications from various companies. He also has testified in federal and state courts on more than 50 occasions across Florida. His nickname in law enforcement circles is "Chester who defends molesters." On paper, Mr. Kwitowski seems to be able to offer expert testimony regarding forensic computer evidence in a child pornography case. Would you consider him in a case given his background and credentials?

Hopefully not. On September 22, 2016, Mr. Kwitowski was arrested, and currently faces legal charges for fabricating his resume and lying under oath about his education and certifications (see story here Tampa CEO charged with lying about his background when testifying as expert witness). In addition to the current charges, he has three previous arrests since 2001 for domestic violence, battery with a deadly weapon, and false reporting of a crime.

Clearly, the extreme degree to which Mr. Kwitowski's fabrications were allowed to affect the criminal justice system is an outlier. The fact remains that many expert witnesses do not receive thorough vetting prior to their testimony on the stand. A simple Google search or license review can help avoid embarrassing or unethical situations involving an expert. Reviewing how to identify, vet, and prepare an expert witness is critical when using an important, specialized, and often expensive resource. This issue of the *e*-mitigation news will consider these issues, and the next newsletter will offer a case study that applies the West Virginia Rules.

The Juror's Assistant

Tess Neal and Margaret Kovera (from the 2015 American Bar Association Section Annual Conference) shared that "expert testimony is intended to assist jurors with their task of evaluating trial evidence by providing them with information that is not commonly known by laypeople" but is relevant to making a decision as a jury. This echoes West Virginia's Rule of Evidence 702 and serves as a reminder that a positive jury outcome is one of the reasons for an expert. Experts are "essentially communicating information to the jury with the intent of influencing their decision in a case." [Bank, S. C. & Poythress, N. G. (1982). The elements of persuasion in expert testimony. The Journal of Psychiatry & Law, 10, pages 173-204].

Testifying persuasively to influence the decision a jury makes is the task for experts. Jurors judge persuasiveness in different ways, and your expert's persuasiveness must be prepared and harnessed in advance of the trial. The elements of persuasion in expert testimony have been evaluated through research on mock jurors. Different kinds of testimony have been studied and clinical opinions can prove more persuasive over actuarial assessments like risk, percentages, or testing outcomes. These findings may seem counterintuitive, believing that facts are more persuasive because they are substantive. Yet, the opinion, especially as delivered compellingly by the expert, proves more persuasive. Therefore, experts are not only a tool for communicating information to the jury, but in order to be persuasive they must also offer clinical opinion and an emotional appeal on behalf of the defendant in order to influence the trial outcome. Because expert opinions can be so persuasive in influencing a jury's decision, picking the best expert for a specific case is critical.

One Size Does Not Fit All

Because West Virginia has few populous areas, it is understandable that identifying an array of experts in different disciplines with a variety of skills is difficult. Knowing a psychiatrist or psychologist in the region who typically does the competency or sex offender evaluations may meet the needs of many clients.

Importantly, not all experts, as not all cases, are the same. Expert witness is not the title: it is the role. The knowledge an expert witness possesses is specialized based on skill, education, and experience in a specific practice area.

I have read many sex offender evaluations produced by true experts, and they are certainly not "one size fits all." Different expert evaluators have preferences in which

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assessments they use, how thorough they are in reviewing the client's records, or how comprehensive they are in interviewing the client for psychosocial history. In some instances, you may first need to consult with an expert to help you determine which sex offender or competency evaluator to use with your particular client.

While time consuming, consultation in advance not only aids the defense counsel's scope of knowledge but also may help to identify the proper expert for the client's case. Consultation with an expert in advance of getting the court order for evaluation signed allows you to discuss the client's particular issues, the anticipated evaluation process, and the types of assessments the expert will use.

For example, if you have a female client accused of child sexual abuse and think you have identified the evaluator, ask the evaluator what his or her process is and which evaluations he or she plans to use. The Abel Assessment, for example, is a commonly accepted sex offender assessment that measures visual reaction times based on sexual interest. Much of the research on the Abel Assessment has been done by the creator, Gene Abel, himself (https://www.themarshallproject.org/2015/07/09/the-sex-offender-test). There is validated research using the Abel Assessment on some offender groups, but females are not one of them. Other assessments have greater validity for females accused of child sexual abuse. Therefore, if your expert suggests using the Abel Assessment on your female client, you need to explore what the rationale and science is to support this and ask for research to document this approach (and determine the benefits of using this approach). If the expert's rationale does not support work with this client, choose a different expert evaluator based on your client's unique needs.

Background Check

Choosing an expert to potentially give testimony is no less vigorous a process. Again, you may benefit by consulting with your expert and seeking their skill, knowledge, and discipline-area expertise in advance of contracting on the case. The expert can provide you information and insights to make you a better defender. The expert may also help you shape your defense strategy. The expert can help outline the good and the bad of your client's circumstances. Ensure, though, that your expert's practice is above reproach.

The prosecution's challenge to your expert's credibility and knowledge may come from a variety of areas. Obviously, do not ignore the gaps in your case because your expert is not obligated to you. While simplistic, there have been many times a defense attorney interacted with an expert prior to trial solely considering the defense's case, only to be surprised when the expert answered affirmatively to the prosecutor's questions. Anticipate the prosecutor's potential challenges in order to prepare your expert for trial and counter any challenges as they come up at trial. Additionally, use similar challenges in an effort to discredit the prosecution's expert.

In a training found online presented by local prosecutors, they note they will prepare for their cross of a defense expert by doing a basic Google search. The American Bar Association Standards for Prosecutors also support a prosecutor's research and investigation of an expert's background (even more than a Google search). A Google search is how the story of Mr. Kwitowski emerged, and if that is representative, then the sordid news will show up first.

Do not limit your review of your expert to the first few search results. Search news sources, social media, and Topix or YouTube. Ask colleagues for their experiences with experts. Talk to other offices or inquire about content-area experts in other states through the National Association for Public Defense, National Association of Criminal Defense Lawyers, or other professional organizations that have "listservs."

Check an expert's reputation, but also check their background. For most experts, this means looking up their license and their licensure standing. Almost all of the licensing boards provide online licensure information that describes the kind of license, level of license, year licensed, and, in most instances, if there are any sanctions or grievances filed against the individual's license. In circumstances where a grievance has been filed, contact the licensing board to obtain a copy of the complaint and resolution. A list of websites for commonly used licensing boards follows in the "Resources" section of the newsletter.

Use the information available on the licensing board's website to see what your expert can and cannot do within the profession. For example, there are four levels of social work licensure as well as provisional, temporary, and emeritus status. Each level has a defined scope of practice as described in the West Virginia Code. A LSW (licensed social worker) is a Bachelor's level social worker who has graduated from an accredited social work program and passed the basic level state social work exam. An individual who has also graduated with a Bachelor's degree in Social Work but has not taken the state social work exam is not able to apply social work theory, knowledge, methods, or perform community organizing as a LSW is permitted to do.

There can be a difference between a degree, work experience, and approved levels of practice based on licensure. These differences and knowing how they relate to your expert is important. You want to distinguish between your expert's credentials and what your expert is allowed to do within their scope of practice, and then determine what makes your expert uniquely qualified to testify in your case.

Facts and Figures

Licensure or credentialing in a specialty area of practice alone does not serve as the bright line rule for expert testimony in West Virginia. An expert may elucidate a "novel scientific theory, principle, methodology, or procedure" if facts and data and reliable principles and methods support the

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testimony. Therefore, ensure your expert has the research and data to support their claims.

I recall a case when I was qualified as an expert, but was not prepared to provide the statistics related to recidivism. My lack of having that information with me not only undermined my credibility, but it also allowed the focus of my testimony to shift away from the issues of the client to a statistical number I was not prepared to discuss. Had I properly brought all data and statistics (and relevant studies) with me to court then I would have had an answer to the prosecutor's derailing question. Preparation by your expert ensures the testimony remains about the client and the client's issues. Alternatively, take the opportunity to challenge the absence of facts, scientific method, and supporting data in testimony from the prosecutor's expert when these are not forthcoming in the testimony.

Experts do possess special knowledge, skills, and training and must be able to convey information to the jury based on valid and tested data that relates to the facts of a case. This summarizes what an expert is and what they are able to do.

Background Work: Your Preparation

After looking up your expert's credentials and any news stories or commentary through a general search, look at your expert's curriculum vitae or resume. If a list of cases in which the expert has testified is not included on the expert's resume, obtain that list from the expert. In each instance, determine which cases are relevant to and bolster the expert's anticipated argument in your case. Gather helpful details from your expert about how the expert's testimony was produced, received, crossed, and the resulting case outcome. Also, identify what arguments the prosecutor could have made in these similar cases to undermine the expert's testimony. More broadly, look at the kinds of cases (criminal, child abuse, civil, etc.) and if the expert has testified more for the defense or more for the prosecution.

Additional background preparation comes in the form of reading the entire report generated by the expert. Granted, this is an elemental point of preparation, yet one that still is overlooked. It is easy to skip to the back of an expert's evaluation report to look only for the findings, conclusions, and recommendations. However, skipping to the end overlooks potentially valuable information collected by the expert about your client. An evaluation will typically include your client's report of (version of) the offense which may be different from what the client reported to you. The evaluation will also likely include an assessment of the client's intellectual functioning, personality traits, and issues of attention in the client's life (social history) that may help preparation of mitigation or defense theory. Most experts narrate a theme of the client's life based on the client's self-report and the supporting records received, all of which can be helpful in continuing that theme at trial or sentencing.

Direct Communication: Practice is the Key to Preparation

An expert may be an expert in the field, but that does not make her or him an expert at testifying. Most expert witnesses' professional duties comprise their full-time job – expert testimony is ancillary. In fact, in studies with mock jurors, experts who have their own practice of treating patients had more credibility.

Yet, in spite of the somewhat obvious realization that testifying is not the primary duty of most experts, I have observed many cases where the defense attorney expressed disappointment with how the expert witness performed on the stand. Expert witness preparation does not come from Monday morning quarterbacking, or last-minute prep. It is likely the expert will review your case shortly before coming to court. They are busy, so a more in-depth look at the case may not happen unless you initiate this. It is critical to set up an appointment – or several appointments – to talk with your expert in advance of them testifying in court. Expert witness preparation helps the expert communicate their specific knowledge in an effective, confident, credible manner. Preparation also helps defense counsel learn where an expert may be tripped up, if there are paths to avoid in questioning, or how the expert may respond to a battering cross-examination.

Provide your expert with information about the kind of court case he or she will give testimony in, the players (if there is a jury or not), and the "climate" of the courtroom including any sentiment surrounding the case and the related temperament of the judge and prosecutor. Thoroughly review your expert's report or evaluation produced about the defendant, and if there are questions you have or statements made that are ambiguous, discuss these with the expert.

Ask your expert if there is additional information he or she needs related to the case, and what information may exist that would alter the expert's findings and opinion. Tell your expert your defense strategy and the way in which the expert's testimony will aid in explaining this strategy. Talk to your expert about the prosecution's strategy and ask the expert if there is any way in which the expert could come to the same conclusion as the prosecution. Talk with the expert about your concerns and thoughts and listen to their concerns and thoughts. Determine with your expert relevant points that need to come out in testimony as well as possible questions or challenges the prosecutor might make. Role-play with your expert, from both the defense side and the prosecution side, if necessary.

If your expert is referring to scientific evidence or studies, be sure the expert has the data to back up this information (the expert may be required to disclose the data on cross-examination or for the court). Make sure your expert is

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prepared with statistics, percentages, and research articles if necessary.

Do not exceed the scope of your expert's expertise and knowledge base (there is little worse for credibility than asking your expert, a licensed psychologist, medical questions and having the prosecution point out your expert is not a medical doctor and cannot testify about degrees of medical certainty). This means you need to know the scope of your expert's knowledge, their range of practice, their credentials, and how their credentials translate into specialized knowledge and training.

Research supports that experts who are less credible are less persuasive to jurors; they come across as less knowledgeable or trustworthy (see http://www.jaapl.org/content/37/1/63.full.pdf+html). In studies examining the credibility of experts and the impact of testimony, researchers found that expert witnesses were more believable when they were from the same community as the study participants, if they provided psychotherapy to clients (were also in private therapy practice, in other words), and had experience testifying for the prosecution as well as the defense. Also helpful was the expert who adjusted his or her language to the level of the jury's understanding, experts who used visual aids (like charts or pictures), and experts who avoided criticism of opposing experts. Experts who demonstrated self-assuredness (strong voice tone, good posture, varying eye contact, referencing the client by name) had fewer distracting behaviors and were more credible before mock jurors in the study (http://www.jaapl.org/content/37/1/63.full.pdf+html). Consider these research findings in relation to your chosen expert and evaluate how your expert will present to the jury. If your expert can link private practice work to his testimony, slow down his rate of speech, or bring in visual aids to boost credibility, then talk with your expert about ways to incorporate these touches into their testimony.

Ensure that you take the time in advance to work with your expert on preparation in the knowledge area to which he or she is going to testify. Additionally, work with your expert on the fundamentals of being a witness such as truthfulness, listening carefully to questions and pausing before answering, avoiding rote answers to anticipated questions, providing information in a comprehensible manner, only answering the question asked, speaking clearly and slowly, and avoiding distracting nonverbal behavior. Your expert needs to come across as honest, compelling, likable, knowledgeable, and direct. For more detail, Tess Neal summarizes the science and preparation of experts in "Expert Witness Preparation: What Does the Literature Tell Us?" (retrieved from http://www.thejuryexpert.com/2009/03/expert-witness-preparation-what-does-the-literature-tell-us/).

Finally: What You Need to Know

The bottom line is that defense counsel is an expert on the law. There is no direct link between knowing the law and knowing psychology or neurobiology or any other specialty area. Defense counsel must admit the need for additional education and resource development to understand these specialized fields. Particularly when the prosecution chooses to move forward with their own expert, defense counsel must diligently prepare their own case using (or consulting with) a knowledgeable expert of their own.

Experts provide an opportunity to educate and enhance defense counsel's approach to unique defendant issues. Experts may consult, educate, evaluate, and/or testify – within limits. Experts may not address credibility of witnesses or ascribe guilt to defendants. Choosing the right expert for your case is critical. It is important to look at expertise, but also important to look at how the expert conducts himself or herself. A knowledgeable research-based expert may not be as persuasive as the knowledgeable but gregarious and clinically opining expert. Experts are human, and court testimony is typically not their primary job function. Therefore, preparing your expert for testimony related to your case can help improve the expert's credibility and knowledge in front of the jury. A prepared, credible, and knowledgeable expert is more likely to result in a better trial outcome.

If you are unsure of what kind of expert you need, or which expert to use in a particular case, please contact me at the PDCRC. With your client's case in mind, I will look at the merits of a particular expert's skills and knowledge to determine with you if the expert's offerings are helpful to the case. Additionally, if you have an expert who performs certain testing or treatment protocols, I am here to assist you in looking at the background and research related to those tests and treatments. I will also review expert reports to assist you in generating questions and follow up in advance of your meeting with your expert.

Resources:

WV Board of Social Work:

http://www.wvsocialworkboard.org/Licensure/LicenseVerification.aspx

WV Board of Examiners of Psychologists:

http://www.wvpsychbd.org/license_verification.htm

American Board of Psychiatry and Neurology (search by specialty and city, or state – state provides most information):

https://application.abpn.com/verifycert/verifyCert.asp?a=4

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American Board of Medical Specialties (different medical boards):

http://www.abms.org/member-boards/contact-an-abms-member-board/

National Clearinghouse for the Defense of Battered Women:

http://www.ncdbw.org/index.htm

Bureau for Behavioral Health and Health Facilities – WV Forensic Services list of approved evaluators for West Virginia:

http://www.dhhr.wv.gov/bhhf/sections/operations/StatewideForensic/Pages/default.aspx

MyGideon - NAPD's Library of Defense. In the Psychology and Criminal Law section on witnesses, specific information addressing child witnesses, memory, and interviewing techniques which will be helpful to provide a background of ideas to ask an expert in prepping a case, particularly for child suggestibility and memory (competency of child). Found at: https://www.mygideon.org/1Psychology_and_Criminal_Law/Witnesses/Child_Witnesses_(capacity_for_truth%2C_memory%2C_suggestibility)

For a scale measuring witness confidence, likeability, trustworthiness, and knowledge see http://clp.praguesummerschools.org/images/clp/readings/2014/Brodsky_Griffin__Cramer_2010.pdf.

NREPP (National Registry of Evidence-based Programs and Practices) is a searchable online database of over 350 substance abuse and mental health interventions. Interventions on this list have been tested, evaluated, and found to be valid, rigorous, and effective:

http://nrepp.samhsa.gov/AdvancedSearch.aspx

For more information on this and any mitigation topic, please contact Stephanne Thornton, Criminal Justice Specialist, at the Public Defender Corporation Resource Center (304) 558-3905 stephanne.c.thornton@wv.gov

SUGGESTED BACKGROUND QUESTIONS FOR EXPERT WITNESSES

- In what area or areas is the expert's educational degree?
- What specialized training does the expert have?
- What is the expert's scope and areas of practice and what are the limitations?
- Has the expert given professional presentations on any specific topics?
- What kind of time and specialization is required in the expert's field? Time and specialization for licensure?
- Does the expert belong to any professional organizations, and what describes the kind and function of these organizations?
- How many years has your expert worked in the field?
- How many times has the expert testified for the defense versus the prosecution?
- Did your expert have an opportunity to meet with the client?
- Where and how did the expert meet with the client (in person? In the expert's office)?
- How many meetings were conducted, what was the length of the meeting, who else was involved, and was the time spent on this client congruent with the time spent on other court-involved clients?
- If a shorter or longer than average meeting time with the client, then why?
- Did your expert consult any records on the client, speak to collateral contacts about the client, or perform testing on the client?
- What tests, examinations, evaluations, research, and studies did the expert use to formulate an opinion? Why these and not others?
- What was the nature of the testing performed and why were certain tests used with this particular client?
- Was there anything the expert would have liked to have accomplished in evaluating the client that was not done or not possible? What are the consequences of these limitations?