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978-0-521-13184-1 — The Psychiatric Report: Principles and Practice of Forensic Writing

Edited by Alec Buchanan , Michael A. Norko

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## Principles and Practice of Forensic Writing

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CAMBRIDGE  
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University Printing House, Cambridge CB2 8BS, United Kingdom  
One Liberty Plaza, 20th Floor, New York, NY 10006, USA  
477 Williamstown Road, Port Melbourne, VIC 3207, Australia  
314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi - 110025, India  
103 Penang Road, #05-06/07, Visioncrest Commercial, Singapore 238467

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[www.cambridge.org](http://www.cambridge.org)  
Information on this title: [www.cambridge.org/9780521131841](http://www.cambridge.org/9780521131841)

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First published 2011

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloging in Publication data*

The psychiatric report : principles and practice of forensic writing / [edited by] Alec Buchanan, Michael A. Norko.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-521-13184-1 (pbk.)

1. Evidence, Expert. 2. Forensic psychiatry. 3. Report writing. 4. Medical writing.

I. Buchanan, Alec. II. Norko, Michael A. III. Title.

RA1056.P79 2011

808'.066614--dc22

2011011261

ISBN 978-0-521-13184-1 Paperback

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To Aidan (A. B.) and Albert and Anne Norko (M. N.)

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## Foreword

Paul S. Appelbaum

Asked what forensic psychiatrists do, laypeople – and indeed, most psychiatrists – are likely to respond, “Testify in court.” The prototypical image of the forensic psychiatrist is the expert in the witness box, and little wonder given the attention to this role by print and broadcast journalists, in cases involving the insanity defense, will contests, and other contentious disputes. Complementing this nearly exclusive focus in the popular media has been a similar concentration of the scholarly and professional literature on expert testimony and its vicissitudes, including debates on what psychiatric experts have to contribute in different types of cases, the legal rules that govern their testimony, and the ethical considerations guiding their behavior.

Forensic psychiatrists are well aware, however, that only a small percentage of cases, whether civil or criminal, ever get to trial, and many “expert witnesses” stay quite busy while only occasionally setting foot in a courtroom. That is because a written report of a psychiatric evaluation of a party to the case or of relevant documentation serves as the basis for settlement, plea bargaining, or other disposition far more frequently than testimony is required. Indeed, one might fairly claim that, despite its near absence from the popular media and its neglect in the professional literature, the *sine qua non* of the function of a forensic expert is the production of a written report embodying his or her findings. And formulating and writing reports turns out to be every bit as challenging a task as ultimately taking the stand.

As the reader prepares to explore this volume with its unique, in-depth look at the forensic psychiatric report, it might be helpful to reflect on some of the ethical principles and their practical consequences that should shape that product. This is not the place for an exhaustive discussion of forensic ethics, and fortunately my views on that topic are well known and available elsewhere. Nor is it an attempt to preempt the more rigorous ethical explorations of the chapters that follow. Rather, I offer some reflections on the overarching ethical considerations that often do and I believe should guide the work of the forensic psychiatrist as he or she crafts the expert’s report.

The role of any witness – expert or lay – begins with the presumption that the witness will be truthful, hence the solemn oaths that uniformly precede testimony and the affirmations frequently required on affidavits and other written submissions. Thus, the Ethics Guidelines of the American Academy of Psychiatry and the Law (AAPL), the leading organization of forensic psychiatrists in the United States, suggest that “honesty and striving for objectivity” is one of the hallmarks of an ethical forensic psychiatrist. When examined closely, however, the assertion that an expert should be honest, a seemingly uncontroversial proposition, turns out to contain unexpected complexities. Telling the truth is not as simple a task as it may seem.

We might, to begin with, think about two classes of truth-telling, subjective and objective. *Subjective truth-telling* resembles the common view of honesty, i.e., saying what one believes. A subjectively truthful person does not hold one opinion but express another because doing so will bring financial gain, avoid embarrassment, or win admiration. But truth-telling has another component as well that is captured by the witness’s oath “to tell the truth, the whole

truth ...” I call this *objective truth-telling* and by that I mean placing the conclusions of a report in a sufficient context that the reader is not misled into believing something that is likely untrue. Objective truth-telling might be thought of as a proactive duty to avoid a sin of omission by volunteering information that allows one’s data and conclusions to be more accurately interpreted. This includes noting the limitations of one’s evaluation (e.g., lack of sufficient time, absence of important records, uncooperativeness of the evaluatee, one’s own inexperience) and their consequences for the certainty with which one can state one’s opinion. It also encompasses limitations on scientific knowledge that may preclude definitive answers to a question or make even the best assessments inherently tentative. When an expert draws a conclusion that stands in opposition to the weight of the existing literature, that circumstance and its justification ought to be made clear as well.

All this may seem unobjectionable in the abstract, but in formulating a report the forensic psychiatrist faces a variety of temptations and pressures, if not to lie, then at least to “fudge” on both objective and subjective truthfulness. Attorneys are the source of much of this pressure, but some may derive from the people being evaluated and many temptations are endogenous, i.e., their source is forensic psychiatrists themselves.

Attorneys’ interests in an expert’s report are generally self-evident: they want a document that will provide the maximum assistance possible in winning the case. Hence, attorneys will often ask to see a draft of a report or to discuss the psychiatrist’s conclusions prior to the report being written. Typically what follows is an extended negotiation over content and tone. As supportive as a report may seem to a psychiatric expert who genuinely believes that the attorney has a strong case, few legal advocates fail to spot ways in which it could be even better. They may ask for an adjective to be replaced, an inconvenient fact to be omitted, or qualifiers that appear to weaken the conclusion to be dropped. If the expert indicates an intention to write an unfavorable report, the attorney may ask what evidence it would take to change the psychiatrist’s mind and then try to persuade the expert that such evidence exists but may have been overlooked.

Sometimes, of course, attorneys are right. Information in a report may be factually incorrect, adjectives can be freighted with unintended meanings, and much information that would ordinarily go into a clinical anamnesis is simply irrelevant to a forensic report. Thus, it is only the overly rigid (and maybe a bit self-righteous) expert, as opposed to the wise one, who says, “I never change my drafts, regardless of what the attorney says.” Complicating the assessment of when to respond positively to attorneys’ requests are some of the other pressures at play on the forensic psychiatrist. Good attorneys woo their experts, making them feel like valued members of a team that is working together toward a common purpose: a legal victory for the client. The intrinsically human tendency to identify with the group of which one is a part may, in all but imperceptible ways, make it difficult for the expert to judge when to resist an attorney’s blandishments. Here is where it may help to recall that the experts’ duty of truth-telling is not homologous with the attorney’s commitment to zealous advocacy. The “team” metaphor goes just so far in the forensic setting.

The person being evaluated can also be the source of pressure on the forensic psychiatrist to compromise, maybe just a bit, on the truthfulness of the written evaluation. An evaluatee may plead for assistance from the psychiatrist or confide that all of his or her hopes for a better life rest on the outcome of the examination. Whether deliberately or not, evaluatees can evoke powerful feelings of empathy and pity – perhaps even fantasies of rescue – in the forensic expert. These feelings may be especially potent when the person being evaluated is also the psychiatrist’s patient and thus someone to whose well-being the psychiatrist is

committed. There are many reasons why it is best to avoid combining forensic and therapeutic roles (though sometimes – as with Social Security Disability evaluations – that may be impossible, since the Social Security Administration insists on a report from the treating psychiatrist), but this is one of the strongest. It is difficult to put aside loyalties that have become firmly embedded in a relationship with another person, and indeed, in that context, are praiseworthy. Yet, that is precisely what the therapist turned forensic expert must do to produce a truthful report. Certain temptations are best avoided.

Not all threats to the truthfulness of a forensic report are external. A variety of practical and emotional considerations can play on the mind of a forensic expert and influence the shape of the report. At the most basic level, forensic psychiatrists make (or supplement) their livings by working for attorneys, who like any other kind of customer, may well turn elsewhere if not satisfied with the product they receive. Thus, failure to deliver a report that the attorney thinks is maximally useful may not only truncate the expert's engagement in the case at hand, but may – or so the expert may fear – foreclose the possibility of future employment by the attorney and his or her firm. It takes a certain degree of courage to resist the temptation to change a problematic word, shade a conclusion, or drop an offending passage. An old adage, but a true one, suggests that the expert who cannot afford to walk away from any case is the one at greatest risk of having his or her integrity compromised. At a time like that, it is worth recalling that every experienced forensic psychiatrist has at least one story of having told an attorney of an unfavorable conclusion with trepidation, only to hear, "That's what I thought. But I owed it to my client to find out for sure." Indeed, I once had an attorney call to ask if I would be willing to do another case precisely because I had returned an unfavorable evaluation in a previous outing and thus, "I know I can trust you."

Marx notwithstanding, money is not the only motivating factor, nor necessarily the most important one, when it comes to influencing a psychiatric report. Most forensic experts covet the big case, with a high-profile defendant or plaintiff, extensive media coverage, and the prospect of impacting a significant verdict. It is immensely gratifying to think of oneself not just as a good forensic psychiatrist, but an important one. But staying in a case like that means being prepared to offer an opinion that assists the party that is employing the psychiatrist, and that is not always possible to do without shading the truth. The temptation to do so may be even more pronounced when the psychiatrist has strong views, most often political or moral, about the favored outcome of the case. Whether it is the belief that big business is always trying to take advantage of the average working person or that psychiatric facilities should never use physical restraint to control disruptive patients, the chance to promote one's causes and support one's prejudices can be a potent influence on behavior. It may be impractical to suggest avoiding such cases, but at the least participation calls for a degree of caution.

Critical to understanding the impact of these pressures and temptations to veer from adherence to subjective and objective truth is the recognition that very few forensic psychiatrists consciously "sell-out." No one says to himself or herself any of the following: "I can't let my attorney and the defense team down"; "Gee, I feel so badly for this poor guy, the least I can do is to say that he couldn't form a criminal intent"; or "With two kids in college next year, I've got to find some way to increase my income, and if I say what they want in this case, this law firm could be a gold mine of referrals." These forces almost always act below the level of conscious awareness, making the attorney's arguments for altering a report seem just a bit more plausible and the possibility of producing a supportive conclusion well within the range of reasonable inferences from the evidence. Thus, the expert who says, "I could never

be corrupted,” has missed the point. Few experts can be bought – at least overtly. But we are all susceptible to more potent forces that act on us without our awareness, their surreptitious character offering us “cover” – plausible deniability, if you will – from charges that we were less than truthful.

How then does a forensic expert who wants to perform with integrity resist the effect of pressures that are often unseen? No perfect approach has yet been devised, but such experts are not without stratagems of their own. A good place to start is with awareness of one’s vulnerability to these pressures and their potential impact on one’s performance. During the report drafting process, a self-aware psychiatrist might ask whether the evidence warrants this favorable turn of phrase or the certainty with which a conclusion is stated, or whether the desire to please the attorney or to be of help to the client is at play. Since we are far from the best judges of our own behavior, it sometimes helps to consult an experienced colleague, who can offer an outside perspective. There are good reasons why lawyers are reluctant to permit their experts to talk about cases with others prior to offering their testimony – such discussions may be discoverable – but there often are ways of presenting issues to another forensic psychiatrist and getting useful feedback without talking about a case per se. Certainly there is usually no reason after the termination of a case why reports cannot be shared – albeit with some redaction to protect the privacy of the parties – to obtain input on one’s performance. Formal peer review of forensic reports and testimony may also be available through academic departments, professional associations (such as AAPL), or groups of colleagues.

Truthfulness is a necessary but not sufficient guideline for forensic practice, including in the forensic report. Respect for the people whose cases we are evaluating – what ethicists call simply *respect for persons* – is equally important. Our respect for the humanity of the evaluatee in front of us is manifest by making clear our purpose, the party for whom we are working, and the disposition of the information that we obtain in the course of the evaluation. All that, however, precedes the crafting of a report. As the forensic psychiatrist sits at the computer, respecting the evaluatee means protecting his or her privacy by excluding irrelevancies from the report. Many staples of a clinical assessment have no place in a forensic evaluation. Although the scope of appropriate information will vary depending on the purpose at hand, early developmental history (e.g., “The defendant wet his bed until he was 7 years old”) is unlikely to be relevant to an assessment of a defendant’s competence to stand trial and a plaintiff’s sexual history (e.g., “She first had intercourse with her boyfriend at age 15”) will have little to add to an evaluation of work-related disability. The greater the potential that data have for embarrassing the evaluatee, the higher should be the threshold of pertinence for their inclusion. We owe to all persons, wherever we encounter them, the obligation to avoid gratuitous harm, including in the forensic setting.

Once a report is written and, when called for, testimony has been given, the forensic expert’s role in a case may be at an end. However, I would suggest that even then the expert has residual obligations to the evaluatee that fall under the rubric of respect for their personhood. Not every forensic psychiatrist will agree on the dimensions of those obligations, but I suggest that they extend to ongoing efforts to protect evaluatees’ privacy, even after the conclusion of the case. As the AAPL Ethics Guidelines frame this, “The psychiatrist maintains confidentiality to the extent possible given the legal context.” On its face, this obligation may seem puzzling, especially when a case has been heavily covered in the media. Why should an expert not feel free to discuss it with a reporter, share details with family members, and answer questions from inquisitive friends at social gatherings? The answer, I believe, is that

implicit in the interaction with the evaluatee is an agreement that he or she will disclose certain information to the examiner for a specific purpose: formulation of an opinion, writing of a report, and testimony in court. Few forensic psychiatrists have failed to be impressed by the general level of openness and the personal details revealed by many subjects of forensic evaluations. Were these evaluatees anticipating the forensic psychiatrist taking what he or she learned to Court TV or the local 6 o'clock news, they might not be nearly as forthcoming. Moreover, the frequent retort that after one has testified all the information is already in the public domain is rarely true. There is much that a forensic psychiatrist learns that is not embodied in the report or revealed on the witness stand. Perhaps there is some justification for discussing just that information and no more – but in the heat of a television interview or under a reporter's probing it is not easy to remember what is already in evidence, and hence publicly available, and what is not. As flattering as the attentions of the press may be, they are more safely avoided if one is not to needlessly infringe the evaluatee's privacy, even if he or she is now someone who is a very public person.

Surely, there is much more that could be said about forensic psychiatric ethics as they apply to the forensic report. And ethics, of course, are just one of the considerations for the expert as an evaluation is formulated and put on paper. But thinking through the ethics of the process may not be a bad place to start one's exploration of the report writing process, as well as a good place to return from time to time. More practical considerations have a way of forcing themselves to the front of one's mind; ethics often seem theoretical and hence remote from everyday forensic work. Psychiatrists retain their value to the justice system, however, by virtue of their integrity; allow that integrity to be undermined and the contributions of forensic psychiatry quickly unravel. The ethics of our field are central to the entire forensic process, including the writing of the forensic report. As for everything else one needs to know, the chapters that follow are an ideal place to start.

## Editors' preface

**Alec Buchanan and Michael A. Norko**

As the list of contributors indicates, this is a largely American book. Much of the recent literature on report writing comes from the United States. An international literature informs the content of the chapters, however, and the principles underlying successful writing do not respect national boundaries. While the psychiatric report has to acknowledge local needs and conditions, therefore, we have sought to ensure that the ideas presented here are not limited in their application to any particular jurisdiction.