DEVELOPING THE EXPERT/ATTORNEY RELATIONSHIP
TO HELP THE CLIENT: AN 8 STEP PROCESS;
AN INTEGRATING THE EXPERT INTO THE CASE
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Outline

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Attorneys often given little attention to the process of developing the expert-attorney relationship. They neglect this relationship at their client’s peril. Service to the client supported by the attorney’s development of a nurturing relationship with the expert will necessarily be of a higher quality. There is a common sense, straightforward, standard process for full development by the attorney of the relationship with the expert. As common sense as it is, the process is often not common practice. Although time consuming, it is an investment which regularly pays substantial dividends for the client and the attorney. There are 8 significant steps in the relationship process.

Step 1: Assess Mental Health or Other Expertise Needs of the Case

Good decision making begins with accurate assessments of the needs of the case. Will the case be enhanced with the assistance of a consulting or testifying expert? Will an expert’s involvement be to the benefit of the client? If yes, then an attorney is legally and ethically bound to obtain the help of an expert.

In order to make this assessment, it is essential for the attorney and other members on the defense team to brainstorm the case and arrive at potential theories of the case. Those decisions plus an analysis of the issues in the case will reveal whether an expert’s help will benefit the client.

There are obvious examples of cases needing experts. A defense of insanity with an expert testifying to the opinion of insanity is more likely to help factfinders understand the client’s behavior and persuade factfinders of his ability to know whether something is wrong or conform his conduct to the law.

There are less obvious examples. A defense of extreme emotional disturbance can be successfully launched without an expert’s testimony in support of it. However, it is more likely that the client will benefit from an expert's opinion on the extent of the emotional disturbance, its development and its influence on this particular client's behavior. The subjective experience of the client is a paramount perspective for the factfinders to understand in considering whether there is a reasonable justification for this particular defendant's behavior. Mental health professionals are experts at identifying a client's subjective experience.

There are obscure examples. An expert can persuasively communicate why facts which appear to have a depraved origin in fact have a sympathetic explanation. For instance, your client is charged with axing to death an elderly husband and wife with 14 blows to their head. What readily appears to be aggravating facts supporting a high level of intentionality can be viewed, with the help of an expert's opinion, as consistent with demonstrating the depth of the emotion the defendant felt as he feared for his life when the couple argued with him, threatened him and pulled a gun on him.

Role. In assessing our need for an expert, we must ask ourselves: What role do we need the expert to play? A consulting jury expert can help us select the best juror on the defense to the crime or for mitigation of the penalty. A consulting mental health expert can help us decide on the mental health dimensions in the case and which mental health experts to employ to evaluate and testify. A testifying expert can affirmatively set out matters which are elements of the defense, or can rebut prosecution evidence.

Selection. After understanding the needs of our case, it is necessary to select the type of expert(s) who will most advance our theory of defense or theory of mitigation. For instance, if your case merits mental health assistance, the type of mental health expert you select is an essential decision as each expert offers different advantages and disadvantages.

Consulting Expert. When the case has mental health dimensions it is enormously helpful to use a consulting mental health expert to help think about the case needs in a thorough, unrestricted, critical way. Clark, Veltkamp, Monahan, *The Fiend Unmasked: The Mental Health Dimensions of the Defense*, Criminal Justice, Vol. 8, No. 2 (1993) at 22. Desirable characteristics for a mental health consultant include:

1. Expertise in the area of family theory and a biopsychosocial systems orientation. (George L.

2. Expertise in detecting childhood trauma and a clinical understanding of how it affects persons later in life.

3. In-depth background in human development research and theory, along with a practical knowledge of psychopathology and the ability to "translate" this specialized knowledge for layperson.

4. Understands human behavior as purposeful and sees even violent behavior as often an attempt to meet crises and to solve problems.

5. An interdisciplinary orientation and an understanding of the expertise of mental health professionals from disciplines other than his/her own.

6. Enjoys working with attorneys, investigators, and paralegals, and understands and appreciates legal ethics as well as the criminal justice system's valuing of the adversarial process.

7. *Perhaps most critical:* Sees the client as a human being who is ultimately comprehensible and deserving of the best mental health assistance and advocacy possible.

*Id.* at 61.

**Social workers.** They are skilled at collecting social histories through highly effective interviews and development of relationships which yield intimate information. Generally, social workers are willing to spend more time with a person than other mental health professionals. Social workers pride themselves on their thoroughness in investigating and communicating the client's story. "The social worker as expert witness informs the sentencer about the defendant's social history and social functioning and the social context of the crime. He or she interprets this information, using social research and theory, to explain the defendant's behavior." Arlene Bowers Andrews, *Social Work Expert Testimony Regarding Mitigation in Capital Sentencing Proceedings*, Social Work Vol. 36, No. 5 (Sept. 1991) at 441. Social workers identify, document and testify to social behavior themes such as:

- deprivation;
- absence of consistent social supports;
- absent or conflicted bonding;
- lack of supervision;
- maternal deprivation;
- paternal absence or deprivation;
- untreated learning, mental, physical needs;
- malnutrition;
- inadequate moral development;
- early exposure to violence;
- childhood physical, emotional, sexual abuse and neglect;
- head injuries;
- poverty, homelessness, transience;
- dysfunctional family;
- attachment disturbances;
- fetal alcohol or drug syndrome;
- survivor trauma;
- rehabilitative prognosis.

*Id.* at 442.

Social workers are especially skilled at methods of developing relationships and obtaining information from persons whose experience and makeup present adaptive and nonadaptive and conscious or unconscious defense mechanisms to revealing information.

A comprehensive social history is an essential first step in any mental health evaluation. "Many forensic evaluations are unreliable because the history upon which they are based is erroneous, inadequate or incomplete. All too often, the medical and social history relied upon by mental health professionals is cursory at best and comes exclusively from the client or possibly from
the client and discussions with one or two family members.

This can result in a fundamentally skewed view of the relevant history because often the client, and even their family members, are very poor historians and may fail to relate significant events which are critical to a proper determination of an individual's mental state at the time of the offense." John Blume, Mental Health Issues in Criminal Cases: The Elements of a Competent and Reliable Mental Health Evaluation, The Advocate, Vol. 17, No. 4 (Aug. 1995) at 7.

Genograms, timelines, and social behavior themes are used by social workers to organize and communicate the voluminous relevant information in understandable and persuasive ways. Social workers are more connected with the language and concepts of lay jurors and have the advantage of communicating in common sense ways that maximize understanding and persuasion. They are the most economical to employ. On the other hand, social workers may not be viewed by some as real experts.

Psychologists. They base their opinions on both subjective (e.g., the clinical interview) and objective (current and past psychological tests) information. In using psychologists, we can emphasize the objective nature of much of what they rely on to provide a foundation for their work - their testing. Standard tests include the MMPI and the WAIS-R. Their opinions and conclusions are based in concrete foundations, not just speculation or opinion. A clinical psychologist is not focused on the behavioral consequences caused by physical brain damage. Psychologists can be viewed as persons who are not real doctors.

Psychiatrists. "Behavior is at the core of clinical psychiatry. Behavior can be studied physiologically, psychologically, or socially. Ideally, it should be studied in every way possible, so that the efforts of professionals to understand human behavior may capture something of the complexity and richness of the phenomena they observe. If anything differentiates the training of the psychiatrist from other mental health professionals, it is the ability to live in several of these domains simultaneously." Kaplan, MD & Sadock, MD, Comprehensive Textbook of Psychiatry/IV(1985), Forward.

They have the advantage of being medical doctors - a profession that generally commands widespread respect from lay people. Many lay persons view psychiatrists as operating on a very high level with much competence. However, psychiatrists often talk in terms that are difficult for the layperson to understand, sometimes they are too focused on a diagnosis from the DSM-IV. The primary data of their opinion, the client interview, can be viewed as highly subjective. They often are willing to spend only a limited time with the client. They are the most expensive.

In Ake v. Oklahoma, 470 U.S. 68, 80-81 (1985) the United States Supreme Court observed that psychiatrists "gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, Solesbee v. Balkcom, 339 U.S. 9, 12, 70 S.Ct. 457, 458, 94 L.Ed. 604 (1950), and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense."


Neurologists. They are specifically skilled at detecting physical damage to the brain. The identification of physical injury does not address how the damage influences behavior.

Neuropsychologists. These psychologists have special training in the nature of brain injury and its effects on a person's conduct. They test for dysfunction in the way the brain receives and
processes information and how those functions influence behavior. They focus on the behavioral consequences of the brain damage. They use a series of test batteries to assess damage and its location in the temporal lobe, limbic system, frontal lobe. See Marilyn M. Wagner, Ph.D., Neuropsychological Evidence in Criminal Defense: Rationale and Guidelines for Enlisting an Expert, The Advocate, Vol. 17, No. 3 (June 1995) at 8.

Step 2: Finding and Evaluating Experts

Once the mental health theory of the case is revealed, the search begins for an expert to evaluate and testify. Before looking for an expert, it is necessary for the attorney to prepare. The attorney has to have enough understanding of the expertise to dialogue meaningfully with the expert and to know whether this expert is best for this client and this case.

Locating a useful and competent expert who is willing to work as a defense expert under often difficult payment conditions and the inefficient criminal justice system is hard work. Often, it means substantial time must be spent finding out who the possible experts are and substantial time evaluating them.

Evaluating whether a particular expert is the right fit for the needs of your client and your case is a critical process. Most likely, you will want to meet with a prospective defense expert, and talk to him or her to judge whether they meet your client and case needs. At a minimum, some dialogue must take place on the phone or in writing. Preparing an agenda for your communication with the expert will force you to focus on what you and the expert need to accomplish; it will use the limited time with the expert efficiently, and it will communicate your professionalism to the expert. An agenda for a first meeting with an expert who you have not worked with before might be:

1. **Your Needs.** What information you need to know to determine if this expert is the correct fit for your client, your case;
2. **Expert's Needs.** What the expert needs to know to determine if the expert wants to commit to you to work on this case;
3. **Money.** Financial arrangements: rate, total amount, in-court and out-of-court rates, timing of payments;
4. **Next Steps.** If an agreement is reached, what are the next steps in the process.

Information you, as the attorney, may want to know in this initial meeting with the expert could include:

1. the expert's education and experience obtain a resume;
2. the methodology the expert will employ, how the expert views the methodology used in light of national practice and standards;
3. the core values of the mental health discipline of the expert;
4. why the expert believes people commit criminal acts;
5. how the expert views culpability and responsibility;
6. the expert's understanding of mitigation;
7. whether they are willing to see the client more than once;
8. whether they are willing to see and interview more than just the defendant in making their evaluation, e.g., the family of the defendant, prosecution witnesses;
9. whether they are willing to review materials you provide them;
10. what testing they do;
11. how they come to form their opinions;
12. their fees;
13. their world view;
14. how they view people operating in the world;
15. how a person and his personality comes to be formed;
16. the importance of self-image and what influence others can have on a defendant;
17. whether the expert is willing to spend time with you preparing his direct testimony and for cross-examination;
18. are they willing to help you prepare cross-examination of the prosecution’s mental health expert;
19. ethical issues, including confidentiality and whether there are any conflicts with the expert and you, your client, the case, the office or firm you work with;
20. whether criminal defendants are amenable to treatment, rehabilitation;
21. report writing: should there be a report; can a draft report be obtained; what will the report focus on;
22. timelines: when can the expert do the evaluation and report writing; when can you give the expert the necessary information;
23. does the expert have anything you need to worry about on cross-examination, e.g., academic difficulties, license problems, board certification, personal matters;
24. what work has he done on other civil, criminal cases; how often has he testified; has he ever worked or testified for the prosecution; is he currently working on any cases that will present any conflict;
25. after generally indicating your case, ask what the expert thinks the case presents, obtain the expert's reaction.

In exercising your judgment, solicit the information and advice of other attorneys and experts on the expert you are considering using.

Remember, good experts will be simultaneously assessing both the case and the attorney as a person with whom to work. Experts have substantial needs. They want to look professional; be protected; be a part of an effort that has meaning. They do not want to be manipulated, blindsided, or misused. It is likely that the expert will have questions for the attorney. They might include:
1. Money. Payment timing & guarantees;
2. Control. Who is in charge of decisions in the case;
3. Trust. Are you trustworthy;
4. Communication. Will the attorney fully & accurately communicate the relevant good and bad information;
5. Goals. Will the attorney try to obtain an unfairly lenient resolution of the case?
6. Focus. Is there a clear theory of the case and a focus for the expert's involvement?

We have to not only locate and evaluate experts but also develop their interest in the criminal process in this case and their willingness to commit themselves to being our defense expert.

Step 3: Retaining the Expert

Good. competent. caring experts are busy. They can pick and choose how to spend their time. To interest a quality expert in assisting, it may be necessary to sell the merits of the case and the meaningfulness of working for this client to the expert. This involves having some understanding of what motivates experts and, in particular, what causes this expert to become involved in an effort.

In deciding, the expert will assess the client, the crime and the attorney. Market your case, your client, and yourself. Sell the case's importance, its interesting and challenging aspects. Ask for help from the expert. Some experts want a challenge, an interesting case with difficult assessment issues. Certain experts want to help present the humanity of the client. Others want to insure fair and just results.

Praise the expert. Market the timely, professional, reliable support you will provide. Create an atmosphere of safety and support. In retaining the expert, it is to your advantage to communicate that you are presenting the expert with a set of developed material, you will spend the time necessary to make sure the expert is prepared in a way to maximize a successful, persuasive testifying experience. The expert needs to know that this will be a safe voyage through the constant white water of the criminal justice process because you, as the attorney, will be competently captainsing the ship with full communication to the expert.

Above all, communicate your commitment to your client, and the real need your client has
for the involvement of this expert.
Communicate precisely what you expect from the expert, including his role of consulting or testifying and the exact areas of focus and obtain the expert's explicit commitment to you, the case and the client.
The process of employing the expert can culminate in a formal letter of understanding, agreement or contract which sets out:
1. what the attorney will do;
2. what the expert will do;
3. the issues to be addressed by the expert;
4. the timetable for the attorney's work and the expert's work;
5. payment; and,
6. legal and ethical working principles.
A sample agreement could look like this:

**CONFIDENTIAL: Attorney/Client Privilege & Work Product**

**AGREEMENT FOR EXPERT ASSISTANCE**

1. On behalf of John Smith, Ed Solomon, John Smith’s attorney, agrees to retain Jill Jones, MSW, as an expert in the case of *Smith v. State*, Indictment No. 94-1-MR, a capital murder case with the aggravating factor of first degree rape.

2. Jill Jones will do the following:
   a. Interview, assess and evaluate John Smith on two separate days for at least 2 hours each day;
   b. Interview John Smith’s mother, father, brother at their home;
   c. Review all records and materials supplied to her;
   d. Provide a preliminary oral report by __________;
   e. Provide a draft of a written report by _______;
   f. Provide a final written report by __________;
   g. Meet with Ed Solomon and review the report & prepare for testifying;
   h. Testify as needed prior to trial, at trial or at sentencing;

3. Jill Jones will investigate, evaluate and report on the following:
   a. Who John Smith is;
   b. What traumas and assaults he suffered and their impact on him;
   c. What kind of family did he come from and how did it influence who John is;
   d. How John perceived reality;
   e. What explains his periods of no memory;
   f. An analysis of the treatment John received, what treatment would have been appropriate for him in the past, and whether he is amenable to treatment today;
   g. What role anger plays with John;
   h. Why he raped and killed; what was the purpose of his behavior.

4. The payment to Jill Jones will be at the following rate/amounts ___________; and payment will be made at the following time: ______.

5. Jill Jones understands that since this expert assistance is being performed at the request of the attorney for Mr. Smith, it is confidential within the legal and ethical attorney-client and work product privileges, which can only be waived by the client. I will not divulge to the court, the prosecutor, or any other person confidential information without the approval of the attorney for Mr. Smith.

6. Jill Jones will maintain the confidentiality of the communications and materials I receive.

7. Jill Jones agrees that all communication and materials received by me and all of my work are the property of Mr. Smith.

Date:_________________________________ _________________________________

JILL JONES
A sample letter could look like this:

CONFIDENTIAL: Attorney/Client Privilege and Work Product

DATE:

RE: John Smith

Dear Expert Psychologist,

I am representing John Smith. I would like you to do a psychological evaluation of John Smith.

John Smith is charged with murdering and raping a twelve-year-old girl. He is in the county jail.

He appears to me to be severely mentally ill. He has a significant mental illness history.

The case is now in the pretrial process before his county’s circuit court. We need a preliminary report and any recommendations for further evaluations by you or other experts by ________, and a final written report by __________.

I have spoken with the client and he is agreeable to your evaluation of him. He understands you will be evaluating him on __________ at __________ p.m. I will be present at that time. While I have generally explained the testing to him, I think it appropriate that you give him more details about your methodology.

The issues we would like you to address are:

1. Is John Smith mentally retarded, mentally ill?
2. Does he meet the criteria of KRS 532.013 (no death penalty if mentally retarded)?
3. If he is mentally ill/mentally retarded, how would John’s mental retardation, mental illness affect
   a. Competency to stand trial;
   b. Confessing crime to police.
4. What was his mental state at the time of the killing?
   a. Intentional;
   b. Extreme emotional disturbance; what was the trigger.
   c. Duress, domination.
5. What are John’s interpretations, perception of and processing information from the victim, inmates?
6. How does mental retardation affect John’s ability to communicate?
7. What is the relationship between behavior of John under stress, anger, provocation?
8. The relationship between mental illness (psychosis) and mental retardation.
9. What are the causes of John’s mental problems?
10. Does polio, poverty, neglect, abuse, race contribute to mental retardation?
11. What are the treatment possibilities for John?
13. What are the reasons for fluctuations of John’s I.Q. scores?
14. Is John sorry?
15. Why did John kill the victim and attempt to kill the inmate? How did this come to happen?
16. Is this killing a crime about sex or something else?
17. What is the relationship between mental illness or retardation and impulsivity?
18. What other areas should we be focusing on?

Your fee of $______ and expenses will be paid for in the following manner:

Enclosed are the records and mental health reports that we have on Mr. Smith and other materials relevant to this case.

I appreciate your help. As this consultation is being performed at the request of Mr. Smith's defense attorney, it is confidential within the legal and ethical attorney-client and work product privileges, which only the client can waive upon advice of his counsel.

What additional do I need to provide you with?

* * *

**Step 4: Preparing the Expert for Evaluating**

It is important for an expert to have as much information and context as possible about the client and the case before the expert assesses the client. An expert must, therefore, understand the defense attorney's desires and needs, the theory of the case, the facts, the focus for the evaluation and the necessity for confidentiality.

A busy and costly expert must be provided the case information and background material in a form that can be easily digested, and a form that will in fact be used by the expert in the evaluation process.

For instance, if the expert is a psychologist you will want to present the expert with the social history of your client in both narrative and chart form, prior school records, relevant prison records, relevant mental health, medical and military records, prior mental health test results, work records, the relevant good and bad facts of the case. This should be organized, identified and indexed for easy use and retention. A sample table of contents for a capital case could look like this:

<table>
<thead>
<tr>
<th>TAB #</th>
<th>ITEM</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>A fact timeline.</td>
</tr>
<tr>
<td>5.</td>
<td>1984 hospital records.</td>
</tr>
<tr>
<td>6.</td>
<td>1984 Mental Health Center records.</td>
</tr>
<tr>
<td>7.</td>
<td>1989-90 work records.</td>
</tr>
<tr>
<td>8.</td>
<td>1990 Middletown Hospital records.</td>
</tr>
<tr>
<td>9.</td>
<td>1990 psychiatric evaluation</td>
</tr>
<tr>
<td>10.</td>
<td>1991 State Hospital records</td>
</tr>
<tr>
<td>11.</td>
<td>1992 prison records</td>
</tr>
<tr>
<td>12.</td>
<td>Military records</td>
</tr>
<tr>
<td>13.</td>
<td>Police records in this case</td>
</tr>
</tbody>
</table>

The expert must be fully informed of all the good and the bad that the prosecution is likely to know about so that the expert's opinions are completely accurate and not subject to being undermined on cross-examination.

Provide the expert all relevant information in a way that recognizes the prosecution’s entitlement to reciprocal discovery.
If you are preparing a forensic lab expert, you should provide all the reports and examiner notes of the state expert to your expert, as well as information you receive from your interview of the state lab expert.

Inform your expert what your defense is, what the mitigating factors are, what direction you are going. Educate your penalty experts well on the expensive nature of mitigation in capital cases. Inform the expert who else he/she must interview, and make sure those interviews take place. An opinion must be based on all relevant evidence. Preempt cross-examination to undermine your expert's opinion by demonstrating that he had incomplete information or that the expert's opinion is only based on the self-serving interview with the defendant.

Make sure the expert knows that he/she will have to do things that may not be required by their professional discipline in order to increase the chances of persuading the triers of fact and reducing damaging cross, e.g., talking to defendant more than once, talking to more than just the defendant, being fully informed of all facts and prior history of defendant, basing their opinion on as much objective information as possible; supporting their opinion with concrete facts and examples, presenting their conclusions in more persuasive ways.

**Step 5: The Direct Examination of Your Expert: Telling the Story Well**

Communicating the reality of the client through the direct examination of the expert pretrial, at trial or in the penalty phase of a case is pivotal to persuasion. A persuasive direct examination is structured in a manner that increases its digestibility, comprehension, and retention by the triers of fact. Commonly accepted working principles for effective communication of the client's story through the direct examination of an expert witness include the following:

1. **Maximize the Persuasion: Telling the Client's Story; Revealing the Client's Humanity**
   A. Primacy & Recency: start and end with the most important, the most persuasive, or what the factfinders are most interested in.
   B. Create our Persuasive Images, Themes.
   C. Emphasize the heart of the matter.
   D. Confront & explain the bad to preempt it, or convert it to be consistent with your theory.
   E. Consider the audience: use language they will understand, answer the questions they likely have, dialogue with them, do not talk down to them.
   F. Witness is the star; communicate the identity and the credentials of your expert.
   G. Redirect.

2. **Attorney's Leading of the Learning; The Listening**
   A. Do not lead except...
   B. Looping
   C. Stretch Out
   D. Narrative Tone, Tell the Story of the Client
   E. Chapter Headings: organization for emphasis & persuasion

3. **Preparation by Attorney and Expert**
   A. Thinking
   B. Writing
   C. Revising
   D. Consulting
   E. Practicing

4. **Organization Based on Plan to Propel the Theory of the Case, Tell the Client's Story, Reveal the Humanity of the Client**
   A. Art of persuasion
   B. Power of communicating centered on understanding who the audience is in this case

Do a thorough direct examination, one that recognizes the bad facts and the limitations of the
expertise but also one that emphasizes the good facts and conclusions. Anticipate cross-examination and preempt the prosecution from revealing bad aspects. Dealing with the obvious hurtful facts on direct can minimize their harm. Do not let the expert overstate information, opinions or conclusions.

Put the expert's information and conclusions in a context which will increase persuasion. For instance, when a psychiatrist testifies, a persuasive context might be:

1. BASIS. The scientific basis for a psychiatrist's expertise,
2. QUALIFICATIONS. The qualifications of the psychiatrist,
3. WHAT WAS DONE IN THIS CASE. What the expert considered and did in the evaluation process,
4. FACTORS OF CONCLUSION. The basis of the conclusion,
5. THE BAD and how the bad facts are understood in the case in a way that lessens their damage.

It is important for the expert to explain the basis for the conclusion, and to explain the nature of the methodology used to arrive at conclusions. For instance, if your psychiatrist has concluded a personality disorder, it is important for the expert to explain the context for this decision to give full meaning to lay jurors:

1. what a personality is,
2. how it develops,
3. how a person operates in the world, etc.

If your psychologist is presenting a test result, present the context that make the results more meaningful:

1. what the test is,
2. how it was developed,
3. how it was administered,
4. the rationale of the test,
5. its results,
6. how subjective/objective it is,
7. its degree of confidence,
8. how widely it is used, etc.

One of the most useful things an expert can do for you in direct is to explain the meaning of the constellation of facts lay witnesses cannot explain... to offer their expert opinion. An expert can explain how facts, which on the surface appear to be only bad, are consistent with the defense or the mitigation theory.

For instance, if intentionality is an issue in a case where mental retardation is the defense, an expert can talk about why the defendant's throwing his bloodstained pants away or why his refusal to talk to his interrogators after the crime do not show intentionality or premeditation as much as it is an expected manifestation of the confusion, fear and subjective experience of this mentally retarded defendant.

If drugs are the basis for an intoxication defense, an expert can explain the client's heavy use of them by talking about why many people turn to drugs, why your client turned to them, why his use escalated, why he had difficulty in controlling his increasing use of them, what influence the drugs had in his actions, whether persons can kick serious drug problems, how drug problems are analogous to alcohol problems that may be more understandable to middle class jurors. An expert can explain that your client did not continue to take drugs to get high, but rather, to avoid the vicious pain of withdrawal. The client steals to get money for drugs not so he can get high, but to keep from getting sick.

Experts can explain the reality of what was going on with your client in common terms of control, stress, and anger. What are these emotions, where do they originate, how do they develop, how do they explain your client and his acts.

If your client's demeanor or affect seems aggravating, an expert can mitigate that superficial negative view of him by talking about why he appears as he does.

Use the expert's direct testimony to emphasize the guts of your case. One way to do this through
direct is to:
1. set up the basis for the conclusions (experience, qualifications, testing, interviewing);
2. have the conclusions stated,
3. then emphasize aspects of the conclusion (e.g., stress, anger, control, understanding of himself, affect);
4. and restate the expert's findings.

Work to have the expert's opinions surrounded by persuasive witnesses. Have a context for your expert's testimony which is supported and corroborated with facts and conclusions of lay witnesses. For instance, in an extreme emotional disturbance case, you need lay witnesses to relate the stressors on your client and how these influenced him, so the expert opinion that your client was extremely emotionally disturbed rings true.

In presenting testimony from the expert, you have to struggle to do it in a way that common folks operating in the real world understand and relate to without losing them in scientific jargon.

If the expert is testifying about the client, you have to work to present the conclusions in a way that jurors do not fear the defendant if they believe the conclusions. Putting the information in a full context, and talking about it in terms that jurors can connect themselves to assist in this effort.

Anticipate any evidentiary difficulties with the expert's testimony, reciprocal discovery, admissibility of underlying facts, expression of opinion on ultimate facts. Prepare the defense expert on the potential evidentiary difficulties with his testimony and the manner to proceed if prosecution objections are successful.

Obtain transcripts of your expert's previous testimony and be prepared to deal with any prior opinions.

**Step 6:**
Preparation of Defense Expert for Cross-Examination & Improving Cross-Examination Answers

Anticipate what the state could cross your expert on. Find out what cross the prosecutor has previously used on similar experts. Familiarize yourself with the three volume work by Ziskin and Faust, *Coping with Psychiatric and Psychological Testimony*, Law and Psychology Press, (5th Ed. 1995), and the two volume work by Faust, Ziskin & Hiers, *Brain Damage Claims: Coping with Neuropsychological Evidence* (1991).

Like a good wine, the best experts become better over time on cross-examination. The client’s story is told all the more effectively. The expert turns what appears to be a damaging or inconsistent fact into yet another reason which supports the expert's analysis.

Often, this process of anticipating particular cross will lead you to alter your direct. Ask your expert what areas present vulnerabilities. You will want to ask your expert how he/she will respond to possible areas of cross, and talk with the expert about those responses.

**Step 7: Revise Direct Examination**

Based upon a mock cross-examination of the expert or a dialogue with the expert on what he or she would say, you will want to reflect what you learn from the expert's practice answers by revising the direct examination.

**Step 8: Develop Demonstrative Evidence**

Use demonstrative evidence to increase the understanding and retention of your expert's information, especially on the most important three points. For example, you can blow up or have an overhead of the MMPI results to emphasize the concreteness, the objectivity of a basis of your expert's conclusions. You can put the client's genogram life timeline or social history themes on overheads to emphasize critical family relationships, and the timing and order of critical life events.

**INTEGRATING EXPERT INTO THE CASE**
We would not be using an expert unless the expert substantially contributed to the case. Therefore, we must be disciplined in fully integrating the "expert's benefit" throughout the case. Some examples:

A. **Motions.** Pretrial motions allow us to shape issues around the expert's testimony at trial. If a prosecutor has previously cross-examined the expert about a matter that you believe improper, a motion in limine to prohibit that cross is appropriate. If the judge has previously prohibited testimony of an expert in an area you want to address, a motion in limine to permit the testimony is appropriate.

B. **Voir Dire.** It is essential to determine such things as if the prospective jurors are interested in hearing from experts; believe experts are qualified to render opinions; and are open to being persuaded by the opinion of an expert. You want jurors who are eager to hear from and rely on the opinion of experts.

C. **Opening.** The opening argument is our opportunity to continue to persuade by preconditioning the selected jurors to the importance of the expert's opinions on the issues critical to the jurors' decision making. "What does being raped as a 9 year old do to a kid? You will hear what the effects childhood physical and sexual abuse had on John from an expert who has looked at hundreds of physically and sexually abused persons."

D. **Cross-Examination** of state witnesses. Our expert's opinions will not prevail alone. They must be supported by our providing a basis for them through eliciting supporting information on cross-examination from prosecution witnesses or undermining contrary information or opinions from prosecution experts via our cross-examination.

E. **Direct Examination.** Persuasion is incremental and contextual. The direct examination of our expert must be crafted to maximize the favorable conclusions. We must corroborate our expert's conclusions through the direct testimony of our witnesses.

F. **Closing.** With some intensity, we must focus jurors on how credible and persuasive our expert's analysis is to understanding this case, the client, the client's behavior.

G. **Media.** Whether we like it or not, the public renders the first and final verdict. The public must understand that the expertise in this case is that the defense is the truth. You can be in control of communicating your client’s story by following a 5-step common sense plan:

1. Anticipate the media moment.
2. Prepare: have a plan to influence ethically and effectively:
   a) Brainstorm possibilities
   b) Assess possibilities & decide on best
   c) Do a quick draft of what you will say in writing: best phrasing, concise, catchy
   d) Focus on 1-3 points: advance your client's persuasive themes, values, story
   e) Practice what you will say, receive feedback, improve it
3. Do not improvise any comments.
4. Regardless of the questions asked, deliver your 1-3 points.
5. Say only what you want to hear or see. You are in complete control of your mouth.

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