

Specialized Topics in Ethical Forensic Practice, Part 1: Restructured Forensic Reports

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Objectives

1. Articulate the rationale for restructuring forensic evaluation reports
2. Identify principles to guide the restructuring process
3. Articulate sources of authority for guiding principles
4. Describe models for restructured reports that meet professional standards and legal needs

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Guiding Principles

1. Innovation
2. Efficiency
3. Clarity
4. Relevancy

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PRINCIPLE #1: INNOVATION

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Principle #1: Innovation

- **Question: If it aint' broke, why fix it?**
- **Answer: To make it better.**
- Definition of innovation: a significant positive change

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PRINCIPLE #2: EFFICIENCY

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Principle #2: Efficiency

- **Definition:** the ability to accomplish something with the least waste of time and effort in a competent manner
- Restructured reports do not take as long to prepare as a traditionally structured forensic report
- Less report preparation time means that on most cases, the Court will get our reports sooner and have more time to consider them

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PRINCIPLE #3: CLARITY

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Principle #3: Clarity

- **Definition:** clearness or lucidity as to perception or understanding; freedom from indistinctness or ambiguity
- Revised structures can make it crystal clear what the opinion is and on what evidence it rests. If done well, there is no wondering how the examiner got to the conclusion
- Revised structure should allow for simpler direct and cross examination without any need to dig into a long narrative to determine evidentiary basis for our inferences

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PRINCIPLE #4: RELEVANCY

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Principle #4: Relevancy

- Definition: pertinent connection with the matter in hand
- Traditionally structured report structure allows for and may encourage a good deal of irrelevant, non-probative data, some of which may be sensitive in nature
- The best practices literature in forensic psychology strongly encourages data relevancy, and any restructuring should maximize it
- “Relevance” to us is like “probative” to the Court

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Relevancy in Court

- Our legal system controls what gets introduced as evidence in a court of law in order to:
 1. Avoid wasting of time and resources
 2. Providing undue advantage or disadvantage to one side or another
 3. Avoid the sense of impropriety or imbalance in our justice system
- Relevancy is the primary sifting tool used to determine whether or not a piece of information should be brought into the courtroom during a case

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Principle #4: Relevancy

- Relevancy is not a characteristic of types of evidence
 - ✓ You would never be able to properly say, "This type of evidence is always relevant."
- Relevancy is contextual
 - ✓ A characteristic of any given piece of evidence that depends upon the relationship between that piece of evidence and a matter to be proved in that particular case

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ETHICAL AND CONCEPTUAL FOUNDATIONS FOR RESTRUCTURING

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Sources of Authority

1. Federal Rules of Evidence
2. Specialty Guidelines for Forensic Psychology
3. Ethical Principles of Psychologists and Code of Conduct
4. AAPL Ethics Guidelines
5. AAPL Practice Guideline for Forensic Assessment (2015)
6. Heilbrun: Principles of Forensic Mental Health Assessment (2011)
7. ABA Criminal Justice Mental Health Standards
8. Grisso: Competence to Stand Trial Evaluations - Just the Basics (2014)

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Balancing Relevancy & Sufficiency

1. FRE 702: examiner's opinion must be based on "sufficient facts or data"
2. FRE 703: "If experts in the particular field reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data that would otherwise be inadmissible, the **proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.**"

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FRE 403: Probative vs. Prejudicial

- The Court has to weigh each piece of evidence to determine if that evidence has more probative value than prejudicial effect
- In other words, is this piece of evidence more useful to ascertaining the truth in this case than it is prejudicial to the side opposing it?
- **Probative** = evidence that tends to prove something - more

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Balancing Relevancy & Sufficiency

3. Specialty Guideline 9.01: examine the issue "from all reasonable perspectives and seek information that will differentially **test plausible rival hypotheses.**"
4. Specialty Guideline 11.04: practitioners should limit discussion of historical data "that does not bear directly upon the legal purpose..." and **avoid information "that is irrelevant and does not provide a substantial basis of support for their opinions** except when required by law."

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Balancing Relevancy & Sufficiency

- 5. AAPL Ethics Guidelines: enhance honesty and objectivity by basing “forensic opinions, forensic reports and forensic testimony on **all available data**”
- 6. AAPL Practice Guideline for Forensic Assessment (2015): **the word “relevant” is used 46 times**
 - ✓ “The evaluator can first ask for a full, uninterrupted account of the events in question, followed by a secondary review with questions probing for detail, consistencies, contradictions, and relevant facts.”

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Balancing Relevancy & Sufficiency

- 7. Principles of Forensic Mental Health Assessment (Heilbrun) – **relevancy noted in 6 separate principles**
 - a. Principle #3: Be familiar with the relevant legal, ethical, scientific, and practice literature in FMHA
 - b. Principle #8: Identify relevant forensic issues
 - c. Principle #18: Use relevance & reliability (validity) for seeking information and selecting data sources
 - d. Principle#19: Obtain relevant historical information
 - e. Principle#20: Assess clinical characteristics in relevant, reliable, and valid ways
 - f. Principle #21: Assess legally relevant behavior

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Balancing Relevancy & Sufficiency

- 8. ABA Criminal Justice Mental Health Standards: “...evidence relevant to mens rea may often come in the form of expert testimony. The **only limitation on such testimony should be relevance** and the normal requirements for expert opinion.”

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Balancing Relevancy & Sufficiency

9. Grisso (2014):

- ✓ Reports should be written with “*enough detail to establish important facts and track essential inferences, yet in a style of a digest rather than a meticulous thesis.*”
- ✓ “*The more detail you include, the greater the risk that the message will get lost in the words.*” (p.100)

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Admissibility of Evidence

Karson & Nadkarni (2013)

LEGAL

1. Material: has to do with one of the case elements
2. Relevant: probative = tends to prove a proposition, no matter how small the step
3. Competent: not excluded by a rule (e.g., hearsay)

FORENSIC

1. Material: what does the data have to do with the capacity in question?
2. Relevant: data must make an inference more or less likely
3. Competent: not excluded by professional standards

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Federal Rules of Evidence

- **Rule 401. Test for Relevant Evidence**
- Evidence is relevant if:
 - a) it has any tendency to make a fact more or less probable than it would be without the evidence; **and**
 - b) the fact is of consequence in determining the action
- The standard of probability: “more probable than it would be without the evidence”

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A BRIEF HISTORY OF FORENSIC REPORTS

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The Traditional Forensic Report

- History
 - ✓ In clinical settings, referrals for psychiatric and psychological evaluations
 - ✓ Wide variety of referral questions
 - ✓ A broad net encompassing history, mental status, clinical interview, and psychological test results
- Forensic evaluation reports adopted this structure from clinical assessments
- Reid Meloy, PhD – applying this model to forensic assessments is like putting a square peg in a round hole

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The Traditional Forensic Report

1. Reason for Evaluation
2. Confidentiality Limitations
3. Evaluation Procedure
4. Sources of Information
5. History (social, educational, occupational, military, medical, mental health, substance use, legal)
6. Collateral
7. Mental Status
8. Forensic Issue (e.g., CST, Sanity)
9. Opinion

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Levels of Filtering

- **Question: Why should we filter data?**
 - **Answer: We already do!**
1. We don't write down everything a defendant says
 2. We don't record every behavioral observation we make
 3. We don't simply transcribe our notes and put everything from them into our report
 4. We don't include in our report every thought, musing etc. we have about a defendant

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The Core Ideas of Restructured Reports

1. Same evaluation process, different report
2. Report guided by core principles
3. An extension of the filtering that is already happening
4. Traditional "stand alone" sections on History, Mental Status, and Psychological testing are now integrated rather than presented separately

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Handouts

1. Sample Cover Letter
2. Sample Report #1 – High Structure
3. Sample Report #2 – Low Structure

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The Biggest Threat

- **Confirmation Bias**
 1. Since only relevant data are presented, there may be a tendency to restrict reported data points to those that support your opinion
 - ✓ disconfirmatory ≠ irrelevant
 2. A reader who does not like your opinion does not have the option of scouring the report for data that do not support your opinion or could be interpreted differently **unless**
 3. **Report data that do not support your opinion**

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Settings: Resources and Challenges

<u>Outpatient</u>	<u>Inpatient</u>
1. Competency	1. Competency restoration
2. 30 day time limit	2. Longer timelines
3. Often more limited collateral	3. More access to collateral
4. Typically (but not always) one bite of the apple	4. The evaluator can interview numerous times, and include data from others

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THE RPH EXPERIENCE WITH RESTRUCTURED REPORTS

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The RPH Experience with Restructured Reports: NBH

- Why restructure reports?
 - ✓ Retain Efficiency, Clarity, and Relevance
- Focus on:
 - ✓ Including only relevant information
 - ✓ Improving relevancy of information
 - Documentation checklist

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The RPH Experience with Restructured Reports: TVBH

- How do we decide what is relevant?
 1. There are no hard-and-fast rules for writing forensic reports
 2. Stay within the scope of the referral question
 3. Minimize any infringement on the privacy of others
 4. Focus on the psycho-legal question(s)
 5. Current versus retrospective reconstruction of functioning
 6. Do we only include data that speaks to aspects of the defendant's presentation that is not within normal limits?
 7. What are the most relevant pieces of data in a defendant's background history?

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RPHs: Different Standards?

1. In state psychiatric hospitals do psychiatrists and psychologists conceptualize what is relevant differently?
2. Low profile versus High profile cases

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**THE NETCARE EXPERIENCE WITH
RESTRUCTURED REPORTS**

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Staff Preparation

1. Data from completed evaluations of 2014 adult competency indicated a wide range of average time to complete a case
2. Initial focus on CST evaluations, which account for the majority of our forensic evaluations
3. Began discussing ways to increase efficiency that would still meet statutory requirements and professional standards - **more**

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**Statutory Requirements: Competency
to Stand Trial**

1. Current mental condition
2. An opinion about serious mental illness
3. An opinion about mental retardation (intellectual disability)
4. An opinion about capacity to understand the nature and objectives of the legal proceedings
5. An opinion about capacity to assist counsel
6. An overall opinion about competency or an explanation given about why one cannot offer an opinion
7. If the opinion is IST:
 - a. Whether there is a substantial likelihood that the defendant could be restored within the timeframe required by law if provided with treatment
 - b. If restorable, least restrictive environment consistent with clinical need and public safety

- "The facts in **reasonable detail** on which the findings are based"

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Staff Preparation

- 4. In January and February 2015 staff meetings began sharing ideas about what worked, what didn't
 - ✓ Active discussion and debate
- 5. Notified courts (see next slide)

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Letters to Common Pleas Judges In Our 11 County Region

- *"I am writing to notify you that in the weeks ahead, you may notice some changes in the format and style of some of our reports of court-ordered evaluations."*
- *"Although we have not made final decisions, we are actively exploring new ways to structure our reports to maximize both efficiency and data relevancy."*

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Letters to Common Pleas Judges In Our 11 County Region

- *"It is important to note that our approach to the evaluations themselves is not changing. That is, we will continue to gather a personal history, conduct a mental status examination, engage the defendant in a clinical interview, do psychological testing as needed, and both obtain & review relevant collateral data."*
- *"Our goal in making these changes is to produce a better product. Please rest assured that we will continue to strive to produce reports that are of the highest quality. As a primary "customer" for our reports, I look forward to your feedback."*

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Testimony

- To date I have testified on one restructured report
- Asked more questions about the report format than the content
- I clarified that the evaluation process (i.e., taking a history, clinical interview, mental status, review of collateral, psychological testing) was unchanged, and that traditional "stand alone" sections on History, Mental Status, and Psychological testing were now integrated rather than presented separately

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Testimony

- Very positive feedback from the prosecuting attorney:
 1. Restructured report easy to follow
 2. Clear evidentiary basis for inferences
 3. No wasted words - there was nothing he felt he did not need to read
 4. Liked that the restructured report was written more like a legal brief, with a conclusion up front followed by the evidence relevant to the conclusion

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Feedback from Judges

- To date, much less feedback than expected
- No negative feedback
- From one Juvenile Court Magistrate: doesn't like to read all of the history and clinical background in the competency phase for fear he might develop a bias. Rather, he looks at that only after the youth is found competent. For that reason, our format works quite well for him

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Feedback from Judges

- Happy with the new format
- Likes the fact that the format focuses on the question being answered rather than a lot of background material
- Format could be streamlined even further, specifically, the information regarding confidentiality and informed participation belonged "somewhere in the back" of the report because he didn't regard that information to be important to the Court

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The Bottom Line

"A well written report may obviate court testimony, while a poorly written report, in the hands of a skillful attorney, is an instrument to discredit and embarrass the author."

~ Melton et al. (2007)

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QUESTIONS?

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