

GETTING IT RIGHT:
LIFE HISTORY INVESTIGATION AS THE
FOUNDATION FOR A RELIABLE MENTAL
HEALTH ASSESSMENT

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The difference between the almost-right word & the right word
is . . . the difference between the lightning-bug & the lightning.

– Mark Twain¹

I. INTRODUCTION

Over the last thirty years, the scope and admissibility of mitigating evidence in death penalty cases has been litigated at all levels of our courts and at all stages of capital proceedings. Over time, the direction of the courts has been to affirm the right of capital defendants to present,² and the requirement for jurors to consider,³ evidence of their character,⁴ upbringing,⁵ and various human frailties⁶ and capacities⁷ that may lead to a sentence other than death.

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The authors recognize that not all counsel, capital defendants, mental health experts, or mitigation specialists, are male. They choose the male pronoun to avoid the awkward s/he and the need to alternate pronouns.

1. R. KENT RASMUSSEN, MARK TWAIN: HIS WORDS, WIT AND WISDOM 300 (2001).
2. *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (plurality opinion).
3. *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982).
4. *Roper v. Simmons*, 543 U.S. 551, 568 (2005).
5. *Eddings*, 455 U.S. at 116.

More recently, the United States Supreme Court decided that defense counsel in capital cases rendered ineffective representation to capital defendants because they failed to conduct an investigation that would have revealed a nightmarish childhood,⁸ failed to conduct an adequate social history,⁹ and failed to investigate and rebut the prosecutor's case for death.¹⁰ Thus, evolving constitutional law and the 2003 revision of the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*¹¹ have formally recognized the established standard practice that the defense team must include a qualified mitigation specialist at the onset of representation.¹² This is particularly significant to capital defendants because, as John Blume pointed out, "The jurisprudential shift is now evident and established. Lower courts must consider the ABA Guidelines and other national standards to determine the reasonableness of counsel's behavior in light of prevailing professional norms as part of the ineffective assistance of counsel analysis."¹³ After years of mitigation specialists demonstrating their importance to capital defense teams,¹⁴ prevailing national norms now recognize the role and contributions of mitigation specialists in an effective capital defense.¹⁵

For decades, a capital defendant in the United States has had a due process right to an independent psychiatrist or psychologist whenever his sanity or future dangerousness is legitimately at issue and the state has conducted its own evaluation.¹⁶ This right, defined by the Court as

6. *Caldwell v. Mississippi*, 472 U.S. 320, 330-31 (1985).

7. *Eddings*, 455 U.S. at 115 n.11.

8. *Williams v. Taylor*, 529 U.S. 362, 395 (2000).

9. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

10. *Rompilla v. Beard*, 545 U.S. 374, 383-84 (2005).

11. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), in 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES]. The ABA GUIDELINES are also available online at <http://www.abanet.org/deathpenalty/resources/docs/2003Guidelines.pdf>.

12. *Id.* at Guideline 10.4(C)(a); see Russell Stetler, *Capital Cases: Mitigation Investigation: A Duty That Demands Expert Help But Can't Be Delegated*, CHAMPION, Mar. 2007, at 62, 63.

13. John H. Blume & Stacey D. Neumann, "It's Like Déjà Vu All Over Again:" *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard* and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel, 35 AM. J. CRIM. L. (forthcoming Mar. 2008).

14. Pamela Blume Leonard, *A New Profession for an Old Need: Why a Mitigation Specialist Must Be Included on the Capital Defense Team*, 31 HOFSTRA L. REV. 1143, 1144-45 (2003); Russell Stetler, *Why Capital Cases Require Mitigation Specialists* at 2, available at <http://www.nlada.org/DMS/Documents/998934720.005> (last modified Dec. 9, 2002).

15. SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, Introduction, in 36 HOFSTRA L. REV. 677 (2008) [hereinafter SUPPLEMENTARY GUIDELINES]; ABA GUIDELINES, *supra* note 11, at Guideline 4.1, commentary.

16. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985).

the right to “the ‘basic tools of an adequate defense,’”¹⁷ has been extended to guarantee a capital defendant reasonably necessary expert assistance.¹⁸ Consequently, one or more mental health experts are commonly called by defense counsel in capital cases to explain their client’s mental state as it applies to various phases of the criminal justice process.

Similarly, when the state chooses to seek the death penalty, it puts the defendant’s background and character in issue,¹⁹ and the mitigation specialist is a “basic tool of an adequate defense” required as a matter of due process. With the addition of mitigation specialists to capital defense teams, counsel and mental health experts have an additional resource to investigate the life history of capital defendants; gather mental health evaluation and treatment records confirming symptoms of mental illness, significant emotional distress and dysfunction; explicate the influences and patterns in the client’s life and conduct; help them understand how these factors affected a client’s life and the crime; and translate theories of defense and diagnoses of mental illness into everyday language that fact finders can understand.

In this Article, we discuss some of the ways that mitigation specialists work with mental health experts and other members of the legal team to enhance defense counsel’s capacity to present a credible, consistent, comprehensive, and comprehensible defense through reliable mental health assessments.²⁰ It remains the role of the core defense team, in the person of counsel, to integrate all of the facts and circumstances of the defendant’s life and the crime and present a persuasive narrative of the events that encourages values of accountability over retribution, grace over vengeance, and life over death.²¹

17. *Id.* at 77 (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)).

18. *See* 18 U.S.C.A. § 3599(a)(1) (2007) (stating the defendant “shall be entitled to the appointment of one or more attorneys and the furnishings of such other services in accordance with subsections (b) through (f)”); *see also* *Cowley v. Stricklin*, 929 F.2d 640, 643 (11th Cir. 1991); *Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1990) (en banc); *Smith v. McCormick*, 914 F.2d 1153, 1159 (9th Cir. 1990); *Blake v. Kemp*, 758 F.2d 523, 530-31 (11th Cir. 1985). Because jurors do listen to, are influenced by, and will rely upon the testimony of such experts, a trial may be fundamentally unfair when a party is left without expert assistance. *Ake*, 470 U.S. at 82.

19. *Lockett v. Ohio*, 438 U.S. 586, 594 (1978); *see Ake*, 470 U.S. at 81.

20. John H. Blume & Pamela Blume Leonard, *Capital Cases: Principles of Developing and Presenting Mental Health Evidence in Criminal Cases*, CHAMPION, Nov. 2000, at 63.

21. The theory and skills of effective storytelling can be helpful to defense teams as they build their case narrative. For information and resources regarding storytelling, see the website for the International Storytelling Center at <http://www.storytellingfoundation.net>.

II. ROLE OF MITIGATION SPECIALISTS

The fundamental duty of a mitigation specialist is to conduct a comprehensive life history investigation of the client and identify all relevant mitigation issues,²² including facts and circumstances to rebut the prosecution's case in aggravation.²³ The process of gathering, organizing, and analyzing life history data often leads to the identification of mental health issues requiring assessments by mental health experts who potentially will testify regarding their findings.²⁴ When this occurs, and often it does, the mitigation specialist gathers extensive information about the mental health issue at hand, works with the defense team to identify and select a qualified expert, assists counsel in preparing the client and his family for the assessment process, and provides any additional information the mental health expert needs to conduct a reliable mental health assessment. The first step in this process is to conduct a life history investigation.

A. Comprehensive Life History Investigation

A comprehensive life history investigation²⁵ requires the collection, organization, and analysis of data concerning the life history of the defendant.²⁶ This includes gathering all existing life history records about the defendant and conducting interviews with the defendant as well as all persons who had a significant role in his life and development.²⁷ When there are signs of mental health issues, the investigation must reach back at least three generations to document

22. Leonard, *supra* note 14, at 1144 & n.12 (citing ABA GUIDELINES, *supra* note 11, at Guideline 4.1, commentary).

23. SUPPLEMENTARY GUIDELINES, *supra* note 15, at Guideline 10.11(F).

24. Leonard, *supra* note 14, at 1149.

25. Conducting an accurate and reliable life history investigation requires that the mitigation specialist have access to a range of resources and publications. Some, but not all of those resources are: Access to comprehensive databases of social science, medical, and legal publications; access to essential publications (including all editions of AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS and AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS); major texts regarding psychological testing; major texts regarding child maltreatment; major texts regarding trauma; major texts regarding clinical psychiatry.

26. A helpful reference for grasping the process, tools, and outcome of a social history inquiry is ARLENE BOWERS ANDREWS, SOCIAL HISTORY ASSESSMENT (2007).

27. ABA GUIDELINES, *supra* note 11, at Guideline 10.7, commentary (noting defense counsel's duties under the "Guilt/Innocence" and "Penalty" subsections of the commentary); Blume & Leonard, *supra* note 20, at 65; Blume & Neumann, *supra* note 13; Stetler, *supra* note 12, at 62.

genetic history, patterns and effects of familial medical conditions,²⁸ and vulnerability to mental illness as well as exposure to substance abuse, poverty,²⁹ environmental toxins³⁰ and other factors that may have negatively influenced the health of the defendant and his family.³¹

Mitigation specialists must be familiar with the signs and symptoms of various mental illnesses, they must be vigilant in identifying specific signs and symptoms of mental illness(es) in a particular client, and they must bring this information to the attention of counsel in order to identify problems that need further exploration by a mental health expert.

Compiling a life history includes understanding the broader environment that affects the client and this requires gathering records and asking questions regarding culture,³² class, race and ethnicity, national origin, gender identity, sexuality, spirituality, and other factors that affect the client's individual identity and group allegiances. This is not a tangential inquiry. Rather, how a person perceives himself and his place in the world affects his motivation and understanding of his own conduct, status, interpersonal relationships, safety, honor, and obligations.³³ Identity profoundly affects how medical and mental illnesses are described and experienced by an individual and his community.³⁴ It is necessary to understand what the client, his family,

28. Daniel J. Wattendorf & Donald W. Hadley, *Family History: The Three-Generation Pedigree*, 72 AM. FAM. PHYSICIAN 441, 447 (2005).

29. See J. Lawrence Aber, Neil G. Bennett, Dalton C. Conley & Jiali Li, *The Effects of Poverty on Child Health and Development*, 18 ANN. REV. PUB. HEALTH 463, 478 (1997).

30. For information about toxic substances and their effects, see the website for the U.S. Department of Health and Human Services, Agency for Toxic Substances and Disease Registry, at <http://www.atsdr.cdc.gov>.

31. For articles on the topic of conducting comprehensive life history investigations in capital cases, see Leonard, *supra* note 14, at 1145-50; Leonard & Blume, *supra* note 20, at 64-65, and Stetler, *supra* note 14, at 1-4.

32. See Scharlette Holdman & Christopher Seeds, *Cultural Competence in Capital Mitigation*, 36 HOFSTRA L. REV. 883 *passim* (2008); see also Sean D. O'Brien, *When Life Depends On It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 753-55 (2008). Too often, "culture" is simplified and mistakenly "located in patterns of action and customs" rather than appreciated as a complex and ever-changing force. Elizabeth A. Carpenter-Song, Megan Nordquest Schwallie & Jeffrey Longhofer, *Cultural Competence Reexamined: Critique and Directions for the Future*, 58 PSYCHIATRIC SERVS. 1362, 1364 (2007). Rather, culture is "a dynamic process of shared meanings, located in and emerging from interactions between individuals." *Id.*

33. For a helpful theoretical discussion about the significance and components of identity, see VERN NEUFELD REDEKOP, *FROM VIOLENCE TO BLESSING* 31-60 (2002).

34. For a thorough explanation of how medical conditions are perceived in the Hmong culture and insight into misunderstanding of non-mainstream belief systems by American institutions, see ANNE FADIMAN, *THE SPIRIT CATCHES YOU AND YOU FALL DOWN: A HMONG CHILD, HER AMERICAN DOCTORS, AND THE COLLISION OF TWO CULTURES* (1997).

and his community considers behavioral norms in order to accurately interpret data that is gathered through observation, records, and interviews.³⁵ How others perceive an individual and his place in the world adds an additional layer of complexity to understanding the nature and magnitude of psychosocial stressors he encounters. The failure of mental health systems to accommodate cultural needs and responses helps explain why many capital clients have medical and mental conditions that were not identified prior to their arrest. As Dr. David Satcher, the Surgeon General of the United States, said in 2001: “Cultural misunderstandings between patient and clinician, clinician bias, and the fragmentation of mental health services deter minorities from accessing and utilizing care and prevent them from receiving appropriate care.”³⁶

1. Conducting Life History Interviews

The purposes of life history interviews are to collect data, establish a relationship, and develop an understanding of the client and his milieu.³⁷ Preparation is the most important factor that determines whether a life history interview is productive. Reviewing relevant documents, communicating with the defense team, and determining the purpose of an interview are critical steps in preparing for an interview. During an interview, it is important to be fully attentive—to put aside your personal worries, assumptions, and biases—and to listen deeply to the person being interviewed.³⁸ Judging and placating are also barriers to deep listening and establishing a relationship with life history witnesses. Most often, general, clearly worded and open-ended questions render the most valuable information in a life history investigation, but narrow

35. The importance of culture in diagnosing and treating mental health issues is widely recognized among healthcare providers. For a discussion of cultural competence in mental health care, see Carpenter-Song et al., *supra* note 32, at 1362-64.

36. U.S. DEP'T OF HEALTH & HUM. SERVS., MENTAL HEALTH: CULTURE, RACE, AND ETHNICITY—A SUPPLEMENT TO MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 25 (2001), available at <http://www.surgeongeneral.gov/library/mentalhealth/cre/sma-01-3613.pdf>.

37. The growing study of life histories uses research methods that overlap with the basic skills needed for life history interviews in the context of mitigation. See, e.g., Foley Center for the Study of Lives at Northwestern University, <http://www.sesp.northwestern.edu/foley> (last visited Mar. 27, 2008); Center for the Study of Lives at the University of Southern Maine, <http://www.usm.maine.edu/cehd/csl/index.htm> (last visited Mar. 27, 2008); Henry A. Murray Archive: A Center for the Study of Lives, <http://www.murray.harvard.edu/frontpage> (last visited Mar. 27, 2008).

38. For a discussion of deep listening, see Listening Generously, The Medicine of Rachel Naomi Remen, <http://speakingoffaith.publicradio.org/programs/listeninggenerously/index.shtml> (last visited Mar. 27, 2008).

questions are sometimes needed to pinpoint life history information (for example, place of birth, names of schools, contact information for relatives). Often, follow-up questions are needed to clarify the content and meaning of information derived from interviews and records.

A mitigation specialist conducts a series of in-depth interviews with the defendant. This allows the mitigation specialist to observe, over time, the defendant's gait, mental state, affect regulation, memory, comprehension of writing and speech, adaptation to incarceration, capacity to form interpersonal relationships, and remorse.³⁹ Such insight is invaluable to the defense team, and it provides data that is significant to the assessments of the mental health experts. Further, if a defendant's mental illness presents difficulties between the defense team and the client, observations, data, and insight acquired by the mitigation specialist will inform mental health experts, who are then able to provide practical advice that allows the defense team to work constructively with the defendant, while understanding the limitations the mental health issue places on his ability to assist them.⁴⁰

It is common for family members to emphasize positive information about the defendant. Often, they do not understand why it is necessary to delve into painful aspects of their lives or look at their family's history three generations back. They need the time and respect of the mitigation specialist if they are to comprehend the process of a capital trial and the critical nature of life history information. It is common for physical, emotional, and/or sexual trauma in the lives of the client and his family members to come to light during life history investigations. Revealing trauma can be re-traumatizing and this process must not be rushed or minimized.⁴¹

Mitigation specialists typically conduct multiple interviews of the defendants' immediate family members, both in individual and group settings, and establish trusting relationships with them. These

39. Ethnographic techniques of observation are useful to the mitigation specialists. For a description of these techniques, see JAMES P. SPRADLEY, *PARTICIPANT OBSERVATION* (1980), and JAMES P. SPRADLEY, *THE ETHNOGRAPHIC INTERVIEW* (1979).

40. For additional guidance in working with persons suffering from serious mental illness, see XAVIER AMADOR, *I AM NOT SICK I DON'T NEED HELP!* (2000). For advice on working with persons with intellectual and developmental disabilities, see AM. ASS'N ON MENTAL RETARDATION, *MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS* 145-68 (10th ed. 2002). For guidance regarding interviewing persons with mental illness, see SHAWN CHRISTOPHER SHEA, *PSYCHIATRIC INTERVIEWING: THE ART OF UNDERSTANDING* (2d ed. 1998).

41. For a more thorough understanding of the nature and course of trauma, see JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* (2d ed. 1997). For information and resources regarding trauma, see International Society for Traumatic Stress Studies, <http://www.istss.org/index.cfm> (last visited Mar. 27, 2008).

relationships provide a deeper understanding of a client's family milieu, as well as facilitate access to vital family history information.⁴² Special care should be taken to identify family members whose mental illness is or was similar to that of the defendant and alert the mental health expert, who will likely want to talk to these family members and carefully review their mental health records himself.

It takes time for family members to understand the nature of a sentencing phase in a capital trial and the important role they may have in developing mitigating evidence, including meeting with mental health experts.⁴³ Due to their close association to an accused murderer, numerous family members of capital clients report psychological and social consequences such as shame, shunning by co-workers, alienation from their support systems and religious community, debilitating depression, and Post-Traumatic Stress Disorder ("PTSD") -like symptoms.⁴⁴ This tumult can cause family members to miss work or perhaps even become unable to work and spiral into financial distress. As a result, the mental, emotional, cognitive, and financial abilities of family members to work with the defense team may be hampered. This is especially true in cases of intra-family murder, when family members are grieving the loss of loved ones to sudden, traumatic death and at the same time dealing with their profoundly conflicted feelings toward the accused.⁴⁵

Important knowledge and insight into the defendant, his family members, and their setting can come from neighbors, teachers, spiritual leaders, medical and counseling service providers, social workers, former attorneys, probation officers, and employers. It is necessary to locate and interview all people who have interacted with the defendant over time or at a critical time in the course of his life.⁴⁶ They hold

42. The work of oral historians can be instructive for mitigation specialists. They combine interview techniques with analysis and storytelling. For an excellent example of oral history techniques used to tell the story of a Southern black family, see DIANNE SWANN-WRIGHT, *A WAY OUT OF NO WAY: CLAIMING FAMILY AND FREEDOM IN THE NEW SOUTH* 107-26 (2002).

43. Sarah Elizabeth Richards, *How to Humanize a Killer*, SALON, June 7, 2006, http://www.salon.com/mwt/feature/2006/06/07/mitigation_specialists/.

44. Elizabeth Beck, Brenda Sims Blackwell, Pamela Blume Leonard & Michael Mears, *Seeking Sanctuary: Interviews with Family Members of Capital Defendants*, 88 CORNELL L. REV. 382, 405-13 (2003); see ELIZABETH BECK, SARAH BRITTO & ARLENE ANDREWS, *IN THE SHADOW OF DEATH: RESTORATIVE JUSTICE AND DEATH ROW FAMILIES* 114-35 (2007).

45. For an understanding of the many challenges to persons faced with sudden, multiple, or traumatic death, see THERESE A. RANDO, *TREATMENT OF COMPLICATED MOURNING* 553-610 (1993).

46. For an example of how non-family witnesses provide mitigating evidence, see Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES MAG., July 6, 2003, at 32, 37, 38, 46 (describing

firsthand information about the defendant as well as knowledge of adverse environmental conditions such as lead poisoning, toxic farm or industrial substances, or other serious health risks; for example, sub-standard housing that resulted in respiratory problems, insects or vermin that created medical problems, or major safety hazards that resulted in physical injuries.

It is necessary to find people who are aware of harmful psychosocial stressors in the community such as violence, drugs, specific crises such as riots or other traumatic events in the community, sub-standard schools and inadequate health services, migration and immigration issues, and how these stressors affected the well-being of the neighborhood.⁴⁷

Life history interviews provide first hand accounts of the client's life and anecdotal insight into the people and circumstances that influenced him, both negatively and positively. Interviews make it possible for the defense team, defense experts, and, ultimately, the fact-finder, to see the defendant through the lens of people who know him as a person rather than solely as a criminal.⁴⁸

2. Acquiring Life History Records

The mitigation specialist is required to seek and analyze copies of every record related to mitigating circumstances and rebutting the prosecution's case in aggravation. This means gathering all documents, including photographs, videos, and memorabilia, related to the defendant. While there is no checklist, this includes records related to births and deaths in the family, school (particularly special education), religious training, participation in sports and recreation, medical and mental health history and treatment, substance abuse history and treatment, psychological evaluations and treatment, social services, juvenile and adult criminal charges, military service, incarceration, immigration, and toxic environmental factors. Collection and analysis of life history records often confirm the recollections of witnesses as well as point to additional witnesses to interview.

mitigation efforts by defense attorneys who, in addition to family members, called teachers and foster parents of the defendant, and the high school coach of the defendant's stepbrother, to testify).

47. For an understanding of how community well-being affects individuals, see NAT'L RES. COUNCIL & INST. OF MED., FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 328-36 (Jack P. Shonkoff & Deborah A. Phillips eds., 2000).

48. John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1040 (2008); William J. Bowers, *The Capital Jury Project: Rationale, Design and Preview of Early Findings*, 70 IND. L.J. 1043 (1995).

In cases where medical or mental health or substance abuse issues are present or suspected, it is necessary to review records related to the defendant's siblings, parents, and grandparents, and even farther back until no additional records can be located or no useful information is found. As the net is deepened, it must also be widened to include cousins, aunts, and uncles with substance abuse or medical or mental health problems.⁴⁹

Numerous medical conditions affect behavior and there is a wide range of general medical conditions with mental symptoms that are the direct physiological consequence of the general medical condition. These are described and summarized in the current *Diagnostic and Statistical Manual of Mental Disorders* in the section titled "Mental Disorders Due to a General Medical Condition."⁵⁰ This is yet another reason why it is imperative to gather records about the physical health history of the client and his biologically related family members. In many cases, it will be necessary to have a physician examine the client as well as engage an additional evaluator who is trained to identify mental symptoms that arise due to a general medical condition.

B. Organizing and Interpreting Life History Information for Use by Mental Health Experts

Just as observation, gathering records, and conducting interviews are ongoing activities, organizing and interpreting this data are continuous processes. A strong caution is needed regarding documentation. Mitigation specialists are expected to have a good understanding of the law regarding attorney-client privilege prior to producing any document. However, it is the duty of counsel to have a keen awareness of the relevant law. With one eye on preserving the attorney-client privilege and the other on insuring that any work product material created within the defense camp retains its confidentiality unless deliberately waived, counsel is responsible for determining what analytical tools should be utilized by the defense team.

49. For discussions about the importance and process of gathering life history records, see Blume & Leonard, *supra* note 20, at 64-65, John H. Blume & Pamela Blume Leonard, *Part 1: Principles of Developing and Presenting Evidence of Mental Retardation*, CHAMPION, May 2002, at 58, 60-61 (May 2002), and ANDREWS, *supra* note 26, at 73-94.

50. AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 181-90 (4th rev. ed. 2000) [hereinafter DSM-IV-TR]. This section of the DSM-IV is not exhaustive and there are many more medical conditions and medications that affect behavior. *See id.* at 13-26.

Often the most basic organizing tool is a life history chronology, which contains brief references to all significant documented events in the life of the client and his family, going back at least three generations.⁵¹ During the construction of a life history chronology, trends, patterns of behavior, causal factors, behavior that lies outside the developmental, social, and cultural norms for his age, and onset of mental, medical, and developmental vulnerabilities will emerge. For example, records indicating that the client's mother drank alcohol during her early teenage years would lead the mitigation specialist to question the mother, her family, and friends regarding her history of alcohol use, particularly whether she drank during pregnancy. To test and corroborate the responses, the mitigation specialist would gather the mother's school records, medical records, especially pre-natal and post-natal health care records, all mental health and substance abuse treatment records, the client's birth records, pediatric records (which may reflect slow growth and development of the client during childhood), school records (which may indicate social and academic problems as well as psychological evaluations), and social service or child protection agency records (which may contain references to the mother's drinking). Additional interviews would follow, focusing on family members, neighbors, co-workers, caregivers of the mother and the client who might have information about the mother's use of alcohol during pregnancy and the effects this had on the client. All of this information might give rise to a theory that the client suffers from Fetal Alcohol Syndrome,⁵² which, in turn, would lead to further evaluation by an appropriate mental health expert. All these steps are absolutely necessary for an accurate and reliable diagnosis by the expert evaluator.

Mitigation specialists compile various lists and charts summarizing the data they collect. Typical tabulations related to the clients and his family might include medications and hospitalizations, references to mother's pre-natal consumption of alcohol or other toxins, family disruptions and re-locations, periods of client stability and productivity, employment, significant anniversaries of loss, results of psychological evaluations, positive friends and influences, triggers for extreme emotional reactions, and disciplinary reports while incarcerated.

51. Wattendorf & Hadley, *supra* note 28, at 441.

52. See FETAL ALCOHOL SYNDROME: DIAGNOSIS, EPIDEMIOLOGY, PREVENTION, AND TREATMENT 63-81 (Kathleen Stratton, Cynthia Howe & Frederick Battaglia eds., 1996); *cf.* Schriro v. Landrigan, 127 S. Ct. 1933, 1943-44 (2007).

Useful graphic tools are genograms (often called “family trees”) and ecological charts (“ecomaps”).⁵³ Genograms are especially useful in introducing clients’ intergenerational family history to mental health experts. Ecological charts map forces in the broader environment, such as neighborhood, institutions, and societal conditions that affected the client’s relationships and social resources.⁵⁴ While genograms and ecomaps have long been used by social workers, they are gaining traction in medical care and medical care research. When used together, these tools enhance researchers’ understanding of personal, family, and social relationships.⁵⁵

Mitigation specialists remain in frequent contact with defense counsel, use good judgment and initiative in independently following investigative leads, and work closely with other members of the defense team in thoroughly exploring the client’s life history. The defense team—particularly the mitigation specialist—anticipates that mental health experts, once they have begun the assessment process, will identify further records and interviews for mitigation specialists to pursue and suggest additional methods of organizing the accumulating life history data.

III. THE ROLE OF MENTAL HEALTH EXPERTS IN CAPITAL LITIGATION

As in all criminal proceedings, decisions about whether and when to engage a mental health expert are in the hands of counsel, who must consider the client’s mental state at every stage of the criminal proceedings.⁵⁶ As a general rule, it is never appropriate to expect a mental health expert to deliver a comprehensive mental health

53. ANDREWS, *supra* note 26, at 160-67; RITA DEMARIA, GERALD WEEKS & LARRY HOF, FOCUSED GENOGRAMS: INTERGENERATIONAL ASSESSMENT OF INDIVIDUALS, COUPLES, AND FAMILIES 3-23 (1999); MONICA MCGOLDRICK, RANDY GERSON & SYLVIA SHELLENBERGER, GENOGRAMS: ASSESSMENT AND INTERVENTION 13-61 (2d ed. 1999). Numerous websites offer free trials for computer-generated programs to make genograms. For assistance in creating ecological charts illustrating the broader setting of the client in family, neighborhood, small groups, organization, community, and society, see ANDREWS, *supra* note 26, at 179-81.

54. ANDREWS, *supra* note 26, at 102-03.

55. Gwen R. Rempel, Anne Neufeld & Kaysi Eastlick Kushner, *Interactive Use of Genograms and Ecomaps in Family Caregiving Research*, 13 J. FAM. NURSING 403, 408 (2007). See generally *Wiggins v. Smith*, 539 U.S. 510, 516, 524 (2003) (finding trial counsel performed inadequately at mitigation phase on consideration of the “elaborate social history report” presented in post-conviction proceedings by an expert social worker who “chronicled petitioner’s bleak life history” through the integrated use of “state social services, medical, and school records, as well as interviews with petitioner and numerous family members”).

56. ABA GUIDELINES, *supra* note 11, at Guideline 10.1, commentary; see also *id.* at Guideline 4.1, commentary.

assessment of the client until the life history investigation is complete. However, questions about competency to stand trial or to waive any rights, criminal responsibility, and insanity depend upon the mental state of the client at a specific time and the input of mental health experts may be needed to resolve these issues. Further, it is often valuable for a mental health expert to assess a client who is clearly exhibiting signs and symptoms of psychosis. Psychotic episodes are just that—episodic—and the severity of symptoms therefore wax and wane. The mental health expert's direct observation of a client in the throes of a florid psychotic episode or other acute deteriorated mental state can be invaluable in establishing mental health conditions.⁵⁷ But such an assessment would only represent a part of the data to be gathered for mitigation. Addressing an acute circumstance and formulating a mitigation narrative are different endeavors. For example, if, when he is arrested, the client suffers from mental illness so serious that it interferes with the ability of counsel to defend him, it would be prudent to engage a mental health expert to make preliminary observations and assist counsel to understand the condition. Then, after the life history investigation is complete, the expert would return to conclude a comprehensive assessment of the client. Proceeding in this fashion allows the mitigation specialist to help counsel frame the referral questions for the expert.

All too often, defense teams permit premature and inappropriate mental health evaluations to take place. Sometimes this includes needless and potentially harmful psychological testing. For example, unless the client has, or may have, a mental condition that relies on intelligence test scores, it is unnecessary to engage an expert to conduct such testing. Counsel should never allow a mental health assessment to take the place of a comprehensive life history investigation. Like brain imaging, psychological testing of any kind must always be approached with caution—never unless needed, always with full knowledge of its limitations, and in any event only after the mental health professional who has been carefully selected by counsel to do the testing has been thoroughly prepared with the background information necessary to make the testing meaningful.

In capital litigation, an accurate and reliable life history investigation is the foundation for developing and presenting pivotal mental health issues. Research has shown repeatedly that well-documented and effectively presented mental health evidence has a

57. Some examples of acute deteriorated mental states are an acute toxin-related organic brain syndrome, an acute episode of amnesia, and a post-traumatic almost catatonic state.

positive impact on capital jurors.⁵⁸ Therefore, the qualifications, experience, and credibility of mental health experts are critically important when selecting an expert. Competent mitigation specialists are versed in various specialties of mental health, and they assist attorneys in identifying the area(s) of mental health expertise needed in a particular case as well as advise counsel regarding the suitability of a specific mental health expert.

It is up to counsel to define the purpose of a mental health evaluation, discuss the purpose and scope of the assessment with the expert, explore biases and vulnerabilities of the expert, and conclude that the expert is suited to the case before engaging him.⁵⁹ Given the potentially infinite breadth of evidence admissible in mitigation, counsel must define the purpose of the evaluation. In addition to areas of inquiry such as competency, insanity, mental retardation, and statutory mitigating factors, counsel may ask the expert to address what impact a particular trauma had on the client's everyday functioning, what mental disabilities run in the family, or what forces shaped the client in his developmental years. Issues of fees, terms of payment, and expert availability should also be raised by counsel before hiring an expert of any sort.

Testifying mental health experts, counsel, and the mitigation specialist work together to ensure that the expert's findings are supported by credible evidence, the testimony is comprehensible to the fact finder, everything the expert writes and says is integrated with other evidence presented by the defense, and all of their opinions and testimony relate to the comprehensive mitigation themes put forward by the defense.⁶⁰ This way, the development of mitigation themes is substantiated by a variety of evidence, including the findings of the mental health experts, rather than counsel seeking an expert to support the theories and themes of defense. Further, a social history which uncovers compelling first-hand or documentary evidence of the client's symptoms which predates the offense can enable the defense team to persuasively counter charges of malingering or recent fabrication of mental illness.

58. Blume et al., *supra* note 48, at 1038; Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1561-66 (1998).

59. It is critical for counsel and the mitigation specialist to investigate current standards of practice in any specialty or sub-specialty relevant to developing and presenting mitigating evidence.

60. For advice on how to accomplish these goals, see Blume & Leonard, *supra* note 20, at 69-70.

The mitigation specialist monitors and correlates life history data and keeps the defense team and mental health experts aware of information that supports, conflicts, or appears to conflict with emerging mitigation themes. For example, it is not unusual for persons with mental retardation to have a GED, hold a job, or marry. Therefore, a defense mental health expert in the assessment of adaptive skills of persons with mental retardation needs to be prepared to show that these ordinary acts do not rule out a diagnosis of mental retardation.⁶¹

Expert witnesses for the defense face an uphill battle in gaining the trust of jurors,⁶² so counsel, with assistance from the mitigation specialist, must make certain that mental health experts engage jurors by using language that is understood by everyday people. Every document relied upon by the expert must be scrutinized by counsel. Most importantly, when mental health issues are raised in mitigation, the expert must be able to credibly explain to jurors and fact-finders how mental health issues relate to their difficult task of determining an appropriate punishment in the wake of a terrible crime. Further, if the defense has a copy of a report prepared by a prosecution mental health expert, it should be provided to the mental health expert for the defense, along with any underlying data and documents on which the prosecution expert relied. In addition, counsel must consult with mental health experts regarding likely attacks the prosecution will make on the defense mental health expert through cross-examination or testimony of opposing experts.⁶³ No expert witness for the defense wants to be surprised on the stand by information defense counsel withheld or failed to provide. Such an omission wrecks the credibility of the defense as well as that of the witness.

A. *Qualifications of Mental Health Experts*

Most often, capital defense teams seek mental health experts who have experience in courtroom settings where, unlike in clinical practice, the prosecutor, jurors, judge, and media will scrutinize their findings and opinions. However, counsel must not rely solely on an expert's prior forensic experience when selecting a mental health expert. Experts who work solely in the forensic setting may keep their composure during

61. For an excellent documentary film that illuminates the strengths as well as vulnerabilities of Larry Selman, an adult man with mental retardation, see *THE COLLECTOR OF BEDFORD STREET* (Welcome Change Productions 2002). Information about Larry Selman and the film is available online at <http://thecollectorofbedfordstreet.com>. See also *infra* note 73 and accompanying text.

62. See Blume et al., *supra* note 48, at 1042.

63. ABA GUIDELINES, *supra* note 11, at Guideline 1.1, commentary.

testimony but they may risk losing clinical sharpness in their field. Forensic specialists tend to focus on narrow legal questions, such as competency and insanity, and are trained to be suspicious of malingering inmates or civil litigants who stand to gain financially from demonstrating disability. Clinicians, on the other hand, are healers who embrace empathy in order to build therapeutic alliances with their patients. As a result, many of the most appropriate experts in capital cases are experts who have the empathy and understanding of clinicians plus the communication skills of teachers. Defense teams need to look at an expert's clinical training, current experience, and earned expertise in his field.⁶⁴

An important qualification of mental health experts in capital trials is ethno-cultural competence. Institutions in general, and the field of mental health in particular, have been slow to recognize the needs and perspectives of non-white, non-mainstream patients.⁶⁵ Research shows that race and culture come into play when jurors decide a capital defendant's sentence,⁶⁶ so capital defense teams cannot afford to make this mistake. The defense team needs to consider the following factors when determining whether the expert is ethno-culturally competent to evaluate the defendant:

- Does he understand the ethno-cultural context of the information gathered?
- Can the expert effectively engage, communicate with, and form a working-relationship with a person of the defendant's ethno-cultural group and sub-groups to which the client may relate such as religious denomination, sexual orientation, gang, or drug culture?
- Does he have the capacity to integrate what we know about the impact of ethnicity and culture on human behavior into what we know about the behavioral sciences?
- Does the expert employ ethno-culturally appropriate theories and empirical data when rendering opinions?

64. Holdman & Seeds, *supra* note 32, at 902-03.

65. U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 36, at 9.

66. Blume et al., *supra* note 48, at 1056-57.

Sometimes the fruits of a comprehensive life history investigation are best understood and conveyed by two or more experts. The nature and causes of the defendant's mental health difficulties might require the use of multiple or non-traditional experts. Anyone who has been hospitalized or has experienced a major illness in the last decade recognizes that assembling a team of correlated specialists is the norm in medical practice. This is also true in a number of mental health disorders.

For example, when mental retardation is at issue, the needed experts might include, among others, a neuropsychologist who specializes in administering intelligence testing to people with mental retardation, a social worker who is qualified to assess adaptive skills, a school psychologist who is an expert in special education, a pediatrician who specializes in developmental disorders, and a toxicologist who specializes in the effects of lead poisoning.⁶⁷

It is particularly important to seek out medical and mental health care providers who evaluated the defendant prior to his entry into the criminal justice system. A common tactic of the state is to attack defense mental health issues as fabricated excuses for the client's criminal behavior. Therefore, mental health conditions that pre-existed his crime are more credible than newly diagnosed conditions. Life history documents and lay witnesses provide additional depth of understanding about the pre-existing condition and add to the credibility of the claim.

It is common for defense teams to call upon pediatricians; neuropsychologists; school psychologists; social workers; psychopharmacologists; endocrinologists, who understand the effects of medical disorders on behavior; geneticists, who can assess the physical traits of Fetal Alcohol Syndrome; neurologists and neurosurgeons, who understand the effects of nerve and brain diseases; and radiologists or other experts in the interpretation of various types of scans and images,⁶⁸ experts in child neglect, child sexual abuse and other types of childhood psychological or physical trauma, the impact of environmental factors on childhood growth and development, or substance abuse.

67. AM. ASS'N ON MENTAL RETARDATION, *supra* note 40, at 51-96.

68. See Blume et al., *supra* note 48, at 1042-43 (discussing the use of neuroimaging by the defense team). As indicated in the text, *supra*, counsel should be cautious about requesting any kind of testing or imaging regarding brain function. Many mental illnesses are not apparent in brain scans, images, or tests. Counsel who are behaving in accordance with professional standards will go forward only after consulting with experts who are specifically knowledgeable about structural and functional abnormalities of the brain and who have been fully briefed with the background information necessary to make a reasoned decision.

Mitigation specialists must be familiar with all these areas of expertise, have access to resource materials on these subjects, and be prepared to assist counsel and expert witnesses in these areas. Further, they must be familiar with the potential contributions of experts such as culture brokers,⁶⁹ anthropologists, public health officials, sociologists and criminologists, and community leaders who can support the testimony of mental health experts and contribute to the strength of the mitigation case.

B. The Mental Health Assessment Process

The mental health assessment process involves at least four steps and often the various steps must be repeated to incorporate newly found information.

1. Gather Accurate and Reliable Data

In any mental health assessment, the expert's direct examination of the client is a primary source of information. Forensic evaluations rely upon multiple sources of information, some of which are provided to the expert by the parties, both defense and prosecution. Therefore, it is absolutely necessary for all forensic mental health experts to insure the accuracy of all the information upon which they rely. This is especially true in light of the adversarial nature of litigation and the necessary concerns about the defendant faking mental health symptoms or malingering regarding mental health matters. Another concern is the possibility that the defendant's mental health issues may distort his reporting. For example, it is well documented that persons with mental retardation often try to hide their cognitive deficits⁷⁰ and, by definition, persons with fixed delusions will have a distorted perception of events related to those delusional beliefs. Moreover, persons with serious mental health disorders often have little insight into their illness and inmates may hide their symptoms because mental illness increases the vulnerability of incarceration.⁷¹

69. A culture broker is a service provider who is able to advocate for the needs of persons from other cultures. *What Is a Culture Broker? Providing Culturally Competent Services to Foreign-Born Persons with Disabilities*, DISABILITY WORLD, Mar.-Apr. 2001, http://www.disabilityworld.org/03-04_01_news/culture.shtml.

70. Blume & Leonard, *supra* note 49, at 61; James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 430-31 (1985).

71. ROBERT B. EDGERTON, *THE CLOAK OF COMPETENCE: STIGMA IN THE LIVES OF THE MENTALLY RETARDED* 145-71 (1967).

Further, it is necessary for the mental health expert to assure the completeness of the information he relies upon. For example, the defendant often cannot remember important events from his early childhood and he may be unable to recall subsequent traumatic experiences. It is customary for the mental health expert to rely upon the mitigation specialist to provide additional sources of life history data gathered from records and interviews and it is imperative that the expert corroborate this information independently before he relies on it. For example, consider a client who has suffered the trauma of sexual abuse as a child but is unwilling or unable to recall the sexual abuse⁷² although another relative, who was sexually abused by the same person at the same time, reported that they were both sexually abused. In this example, the mitigation specialist would have conducted interviews and reviewed documents related to the sexual abuse, alerted counsel and the mental health expert, and worked to provide safety and respect for the client during these inquiries.

The expert will need to review documents related to the crime and investigation, including crime scene reports, confessions on paper and film, statements by witnesses who observed the defendant before, during, and after the crime, media reports pertaining to the demeanor of the defendant before and after arrest, and relevant investigative reports because the nature or quality or both of the person's behavior might be indicative of mental illness. For example, during the course of the crime the client might be saying things that are clearly paranoid and even consistent with other paranoid writings left by the client and paranoid beliefs shared with others long before the crime. Conversely, the nature and quality of the person's behavior might appear to be inconsistent with the findings of the mental health expert, who should be familiar with such reports and address the apparent inconsistency. For example, fact finders may erroneously assume that persons with mental retardation do not marry, have a family or meaningful relationships, or work.⁷³

72. For a more thorough understanding of the effects of trauma on a life history investigation, see Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923 (2008).

73. See *supra* note 61 and accompanying text. The documentary film LIFESTYLES OF THE POOR AND UNKNOWN: INSIDE THE HEARTS AND MINDS OF A DEVELOPMENTALLY DISABLED COUPLE (Nanson Productions 2003), offers insight into the complex lives of Marni and Kris Jamieson. Information about the film is available online at <http://www.nansonproductions.com/lifestyles.asp>. The story of Donna and Ricardo Thornton's struggle to marry and have a child was aired on *60 Minutes: The Unusual Parents* (CBS television broadcast Feb. 16, 1986). Information about *The Unusual Parents* is available at <http://www.cbsnews.com/stories/1999/09/21/60I/main63082.shtml>. Their story was the basis for a movie titled *Profoundly Normal* (CBS television broadcast Feb. 9, 2003). For insight into spiritual

2. Determine the Meaning of Data

Mental health experts determine the meaning of the data they have acquired by applying their clinical knowledge and skills combined with their ethno-cultural competency to analyze the context in which significant events occurred in the defendant's life as well as how the client's thoughts, feelings and behaviors were evidenced. Analysis would include asking and answering questions about all aspects of the defendant's life history. Here are some examples of the kinds of questions mental health clinicians frequently pose as they determine the meaning of data they have acquired:

- Were the defendant's childhood experiences normal experiences of childhood for similarly placed children?
- Did he experience more frequent or more severe stressful or traumatic events than other children growing up in similar situations?
- Were the thoughts, feelings, and behaviors of the defendant following the death of his brother evidence of a normal grieving process, complicated bereavement, or were they an episode of depression and, if so, how severe was the depression?
- Is the defendant expressing a commonly held belief of similarly placed individuals, an unusually strongly held belief, or a delusional belief?

A reliable life history investigation is an invaluable resource in addressing questions about the significance and meaning of data acquired by the mental health expert. The mitigation specialist should expect to be called on to locate additional records, witnesses, or research regarding particular ethno-cultural influences and societal conditions that influenced the defendant in order to insure the reliability of the expert's analysis of life history data.

lives of people with mental retardation, see the website for L'Arche, a worldwide network of faith-based communities where people with and without mental disabilities live, which is available at <http://www.larcheusa.org>. Audio files of *L'Arche: A Community of Brokenness and Beauty* (PBS radio broadcast Aug. 2, 2007) are available at <http://speakingoffaith.publicradio.org/programs/larche/index.shtml>.

The mental health expert must consider the defendant's behavior against an appropriate "norm" for similarly placed individuals. Therefore, part of the mitigation specialist's work is to establish the boundaries of normative behaviors, beliefs, and levels of functioning for individuals from the same background as the defendant; learn whether family members and others considered the defendant to be like other similarly placed individuals; ask how those outside of the defendant's family regarded the family's level of functioning; and gather observations from a variety of people in the defendant's sphere about the nature and causes of watershed events that may have had a significant impact on the defendant.

3. Render an Expert Opinion

The mental health expert must determine how to best describe the defendant and express his opinion using methods that are commonly accepted and terms that are commonly understood within his profession.

In clinical practice settings, mental health professionals are often required to render a diagnosis based on whether the person exhibits symptoms that correlate to listed symptoms for a mental disorder in the current Diagnostic and Statistical Manual of Mental Disorders.⁷⁴ Such a diagnosis is most useful as a means for one mental health professional to indicate to another mental health professional that a patient is exhibiting a particular cluster of symptoms. While handy as shorthand between colleagues, this method offers little insight into the cause of the diagnosed condition or the lived experience of the person who is diagnosed, including capital defendants.⁷⁵

A deeper understanding of the subject is rendered through a psychodynamic formulation, which takes into account influences in a subject's life that contributed to his mental state, considers how environmental and personality factors are relevant to analyzing the subject's symptoms, and considers how all these influences interacted with the person's genetic, temperamental, and biological makeup.⁷⁶ For example, using attachment theory, a commonly accepted theory of human behavior, a mental health expert might describe the long-term

74. See DSM-IV-TR, *supra* note 50, at 13-26.

75. A further limitation of the DSM is that few people actually receive mental health care and many people only receive primary medical care where physicians generally do not use the DSM. David A. Katerndahl, Anne C. Larme, Raymond F. Palmer & Nancy Amodei, *Reflections on DSM Classification and Its Utility in Primary Care: Case Studies in "Mental Disorders,"* 7 PRIMARY CARE COMPANION J. CLINICAL PSYCHIATRY 91, 97-98 (2005).

76. COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 9, 255 (Harold I. Kaplan & Benjamin J. Sadock eds., 5th ed. 1989).

consequences of being raised by a parent who was psychologically and emotionally unavailable to the defendant as a result of the parent's severe depression or drug addiction. A mental health expert might also employ research on the impact of various factors on human growth and development to explain how certain traumatic injuries to the defendant's brain, or exposure to certain chemical toxins, or certain chronic medical conditions resulted in cognitive deficits or behavioral difficulties. In another case, a mental health expert might use research that has clearly demonstrated the effects of a particular drug of abuse on human behavior to explain the behavior of a defendant who was addicted to the drug, or had ingested large quantities of the drug, or both. Conversely, a mental health expert might explain how a defendant's inability to comply with a prescribed medication regimen resulted in a recurrence of the hallucinations, delusions and/or other thought process difficulties that led to his criminal behavior.

The work of the mitigation specialist is a critical support to the mental health expert who must accurately diagnose and explain the defendant's behavior using accepted empirical data and/or theories of human behavior. To reach a reliable and credible opinion, it is critical to select appropriate research that is based on a cohort of people who are most like the defendant. Therefore, considerable information about the defendant is required in order to match him with the cohort of people studied; or equally important, to differentiate him from the cohort of people studied. The mental health expert should be aware of, and prepared to counter, data that is mismatched to the defendant, because an opposing expert may rely on it.

Until the life history investigation is complete, the mental health expert can render only a preliminary diagnosis or a differential diagnosis based on the incomplete information available to him. When life history information is incomplete, the mental health expert must request further life history investigation to gather the information necessary to reach a credible and firm diagnosis.

4. Render an Opinion on the Legal Question Presented to the Expert

Rendering a diagnosis or a psychodynamic formulation is virtually never a sufficient response to the legal question(s) presented to a mental health expert who testifies. Although supplemental experts might only be asked to render or confirm a specific diagnosis, at least one of the mental health experts will need to then link that diagnosis to the legal questions posed. To render an opinion on the legal question, mental

health experts apply their clinical knowledge and skills as well as research commonly accepted in their field to address a variety of legal questions. Some examples of legal questions commonly confronting mental health experts in capital proceedings are:

- How does this type of mental health difficulty explain or contribute to the behavior of this defendant, especially as it relates to the crime?
- What is the course of this type of mental health difficulty? How do we know that the defendant was affected by the difficulty at the time of the crime?
- How do the defendant's multiple mental health difficulties interact with each other to result in the type of behavior evidenced by the defendant?
- Does the defendant suffer from mental health difficulties that the decision-maker might find mitigating even though they did not directly lead to the defendant's criminal behavior?
- Why was the defendant not treated for these mental health conditions before he was charged with this crime?
- If the defendant was never successfully treated for his mental health difficulties, does he still require, and is he still likely to benefit from treatment? And if so, is appropriate treatment available in a prison setting?
- How will the defendant's mental illness impact his ability to adjust to life in prison, including whether he is at risk of harming himself or others, and will treatment improve his ability to adjust to life in prison?

IV. INTEGRATING THE MENTAL HEALTH EXPERT INTO THE WORK OF THE LEGAL TEAM

Mental health experts rely heavily on mitigation specialists to provide accurate and comprehensive research and life history data about the defendant. However, throughout the preparation of the case, a

consulting expert (who in most cases should be a different individual than the one who will eventually testify) should confer with the entire defense team, especially counsel. This interaction serves to keep the attorneys abreast of developing theories in regard to mental health issues and affords the opportunity for the mental health expert to educate the entire defense team about emerging diagnoses and theories, alert them about still-needed investigation, and advise them about effectively communicating with a mentally ill defendant.

There are two extremely important functions of the mitigation specialist during this stage. The first is to guide counsel and the expert away from infatuation with and reliance on a diagnosis. An effective case for life gives fact finders an overall narrative that takes into account the crime, the defendant's broad life history, and how his frailties and experiences are related to the crime. A diagnosis does none of these things but it does offer the state an opportunity for cross-examination that steers the fact finder away from the comprehensive defense theory of mitigation. Second, the mitigation specialist makes certain that counsel and the mental health expert are fully familiar with the life history records. It is common for defense experts to be cross examined on details of the life history, particularly how a certain record seems to conflict with the expert's conclusion. Such damage to the defense presentation can be avoided by a thorough analysis of the records by the mitigation specialist, counsel, and the expert, discussions among them about any potentially problematic records, and a strategy to account for those records on direct and cross-examination.

During this process, it is essential for all mental health experts, whether they are consulting or testifying or doing both, to build a relationship with the attorney who will conduct the direct examination of the testifying expert and, potentially, the cross-examination of an opposing expert. This relationship is vital to the testifying expert's capacity to understand the client comprehensively, persuasively convey his findings to the fact finder, effectively answer legal questions posed to him in regard to his findings, and adequately respond to challenges during cross examination.⁷⁷

It is counsel's responsibility to establish clearly the terms of the relationship between the defense team and the mental health expert(s), including fees, discovery issues, and the form in which information is conveyed between the various members of the defense team. Even

77. See SUPPLEMENTARY GUIDELINES, *supra* note 15, at Guideline 5.1(D); ABA GUIDELINES, *supra* note 11, at Guideline 1.1, commentary.

though the mental health expert will also do so, counsel must convey to the defendant that the mental health expert is not there to treat the defendant and the usual confidentiality between doctor and patient does not apply.⁷⁸ This is important because the mental health expert is ethically required to disclose this information to the client who, if he hears it first from the expert, is likely to feel inhibited in his responses.

Counsel is responsible for informing the expert(s) of all of the relevant legal issues and questions related to both phases of the trial. It is also the attorney's responsibility to develop the legal strategy in which the expert's opinions will be presented. This includes decisions about whether to present mental health evidence during the first phase of the trial, hold all testimony regarding mental health issues until the punishment phase, or begin to introduce evidence to support mental health findings during the guilt phase as an introduction to the mitigation phase.⁷⁹ It is also up to the attorneys to be certain that any evidence they have uncovered that conflicts with the opinion or intended testimony of the expert, or that might be used to impeach his findings, be revealed to the expert. After all, the ultimate responsibility for developing and presenting an effective defense always lies with counsel.⁸⁰

V. CONCLUSION

The history of mental health experts in the courtroom parallels the efforts of lay, legal, and scientific minds to comprehend human frailty. At least since 1505, courts have considered mental derangement a defense and doctors have testified on behalf of mad patients when they were charged in a criminal offense.⁸¹ Historian Nigel Walker traces the first occurrence of a medical expert witness in an English courtroom to the murder trial of Earl Ferrers in 1760.⁸² It was common to support a defendant's mental derangement defense by showing the same such

78. See GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 93-95 (3d ed. 2007) (although this book specifically addresses the role of psychologists, it is applicable generally to mental health experts).

79. See ABA GUIDELINES, *supra* note 11, at Guideline 10.11, commentary.

80. SUPPLEMENTARY GUIDELINES, *supra* note 15, at Introduction ("The duty to investigate, develop and pursue avenues relevant to mitigation of the offense or penalty, and to effectively communicate the fruits of those efforts to the decision-makers, rests upon defense counsel."); ABA GUIDELINES, *supra* note 11, at Guideline 10.4(B); Stetler, *supra* note 12, at 63.

81. Joel Peter Eigen, *Lesion of the Will: Medical Resolve and Criminal Responsibility in Victorian Insanity Trials*, 33 *LAW & SOC'Y REV.* 425, 427 (1999).

82. *Id.* (citing 1 NIGEL WALKER, *CRIME AND INSANITY IN ENGLAND: THE HISTORICAL PERSPECTIVE* 25 (1968)).

defect in a relative. Dr. John Monro, physician to Bethlem Hospital, was called to recount that he had seen the Earl's mad uncle, who was confined at Bethlem, twice a week for years. In an unusual departure, Dr. Monro's testimony expanded beyond his observations of the defendant's uncle to comments on the nature of lunacy and how a hypothetical lunatic might behave.⁸³ By 1843, when Dr. Edward Thomas Monro—the fourth generation Monro to serve at Bethlem Hospital⁸⁴—testified on behalf of Daniel M'Naughten, it was not unusual for a detached medical expert to opine regarding the criminal responsibility of a defendant he had not attended and had interviewed only briefly.⁸⁵ Unfortunately, cursory “drive-by” evaluations of the sort acceptable in Victorian England still occur, but never on a case where counsel is effective, the mitigation specialist is diligent, and the expert is competent.

Before and after expert medical witnesses became commonplace in courtrooms, family members and other people who associated with a defendant who had a mental defect were called to recount the aberrations they had witnessed. As historian Michael MacDonald wrote, “insanity has been defined by experts but discovered by laymen.”⁸⁶ And, we would add, suffered by defendants and their victims.

The primary duty of a mitigation specialist is to discover the lived experience of a defendant and the people who knew him, then organize the information into a life history that defense counsel, courts, expert witnesses, jurors, and, ultimately, the client's life will depend upon. Mental health experts have the responsibility of identifying and explaining the client's mental state and how that affected his behavior. When the fruits of an accurate and reliable life history investigation are married with the knowledge and skill of competent mental health experts, defense counsel is equipped to present an effective case in mitigation and defend it against attacks from the prosecution.

83. Frank R. Freemon, *The Origin of the Medical Expert Witness: The Insanity of Edward Oxford*, 22 J. LEGAL MED. 349, 355-56 (2001).

84. *Id.* at 372.

85. *Id.* at 373.

86. MICHAEL MACDONALD, *MYSTICAL BEDLAM: MADNESS, ANXIETY, AND HEALING IN SEVENTEENTH-CENTURY ENGLAND* 113 (1983); Eigen, *supra* note 81, at 428.