MITIGATION: UTILIZING THE FORENSIC MENTAL HEALTH PROFESSIONAL

A substantially similar version of this article will appear in "Representing People with Mental Disabilities: A Practical Guide for Criminal Defense Lawyers," Elizabeth Kelley, ed., to be published by the ABA in 2018.

The intention of this article is to provide defense counsel with strategies that will enable them to more effectively educate the Court about the client whose mental and emotional functioning may have contributed to the commission of the offense.

Earlier this year, I interviewed Elliot Atkins, Ed.D., a noted forensic psychologist.

ELLIS: Dr. Atkins, you were asked to join me in the process of preparing this article[1] because of your experience with sentencings, in general, and the preparation of mitigation, in particular. Could you provide us with a brief overview of that experience?

ATKINS: As part of my forensic psychological practice over the past 35 years, I have had the opportunity to consult with criminal defense attorneys on several thousand occasions regarding sentencing/mitigation-related issues. On most of those occasions, the consultation process culminated in my preparing a report that the attorney could utilize in preparation for, and at the time of, sentencing. On several hundred occasions, the consultation process culminated in my testifying at the sentencing hearing. Over the years, I have provided CE and CLE workshops on mitigation and have co-authored several book chapters and have authored several journal articles on this topic.

ELLIS: Why would an attorney seek the services of a forensic mental health professional for sentencing/mitigation?

ATKINS: We may be asked to participate in the sentencing process to ensure that various factors are considered – factors which could influence the defendant's ultimate sentence, such as mental illness or risk of future dangerousness. At the sentencing hearing, the prosecutor is in the position to present aggravating factors, such as ongoing dangerousness or lack of remorse, to demonstrate that the defendant deserves the maximum sentence allowable under the law. In opposition, defense counsel presents mitigating factors to humanize the defendant and/or offer explanations for the defendant's behavior in an effort to obtain leniency.

[1] This article is adapted from "Representing People with Mental Disabilities: A Practical Guide for Criminal Defense Lawyers" by Elizabeth Kelley of Spokane, Washington, a prominent attorney with an expertise in mental health and the criminal law to be published by the ABA in early 2018.

ELLIS: Are there various roles that the mental health professional might play in this regard?

ATKINS: Most typically, we're asked to evaluate the defendant to ascertain if mitigating factors are present. Often, we're asked to serve as a consultant to counsel, working as part of a team to develop the most effective sentencing/mitigation strategy. In either of these roles, our primary mission would be to identify which, if any, mental health issues may present in the defendant. Secondarily, our objective would be to gain an understanding of the role that these issues may have played in the defendant's life prior to the offense, as well as the extent to which they may have influenced the criminal act.

ELLIS: Could you give me some examples of some of those issues?

ATKINS: The commonly-cited predisposing factors for criminal behavior include psychiatric conditions (i.e., Bipolar Disorder, Schizophrenia, etc.) low IQ, learning disabilities, criminal modeling by a parent, peer rejection and/or bullying, marital conflict, physical, emotional or sexual victimization, family history of mental illness, parental absence and/or neglect, etc. Various biological factors have also been associated with future criminal behavior, including genetic factors, malnutrition, parental substance abuse, nutritional deficiencies, head trauma, serious injuries, etc.

ELLIS: Are there other aspects to your role as a consultant?

ATKINS: The knowledge that we gain about the defendant can be utilized to assist counsel in shaping and developing the attorney-client relationship. For example, knowledge that the defendant shows signs of a condition that has the potential to negatively impact the attorney-client relationship (i.e., Borderline, Paranoid or Narcissistic personality disorders, Autism Spectrum disorders, etc.) can enable defense counsel to better interact with that client. In this role, the mental health professional may also serve as a facilitator between counsel and defendant by helping to develop communication strategies in light of the defendant's mental health diagnosis. The forensic mental health professional may also participate in the process of assisting the defendant in his/her comprehension of the legal implications of his/her case. In addition, we have the information-gathering skills, as well as the training, most lawyers simply don't have. We are able to elicit sensitive, embarrassing and often humiliating evidence that the defendant may have never disclosed. We also have the clinical skills to recognize such things as congenital or neurological conditions and to understand how these conditions may have affected the defendant's behavior – not only at the time of the offense, but during the time of trial and/or sentencing preparation. To be effective, the forensic mental health professional must remain cognizant of the defendant's potential resistance to providing information and/or making decisions in their best interest. For example, mitigation evidence may be viewed skeptically, or even hostilely, by the defendant. Many defendants are severely

impaired in ways that make affective communication difficult; they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal.

ELLIS: You mentioned the concept of mental health conditions affecting the defendant's behavior. Are you talking about an insanity or diminished capacity defense?

ATKINS: Often, defense counsel reaches out to me prior to the determination of guilt. Sometimes, it is for the purposes of getting an early start in developing mitigation for sentencing. Sometimes, it is for utilizing information regarding a defendant's mental health conditions at the time of plea negotiations. Other times, it is for exploring the possibility of an affirmative defense, such as insanity or diminished capacity. As such defenses are extremely rare, the initial objective of that exploration process often morphs into the objective of developing mitigation. Other forensic mental health professionals may disagree with me, but in my experience, an attorney who waits until after the determination of guilt to reach out for this kind of consultation is very likely to be too late.

ELLIS: I assume that would be because it would not leave sufficient time to conduct your evaluation and prepare effectively for sentencing.

ATKINS: That is right. But there's also another reason. Information regarding a defendant's life and mental health histories would very likely be helpful throughout the legal process. As I mentioned earlier, such information could play a significant role during plea negotiations. This would likely be the very first opportunity for counsel to provide the prosecution with humanizing information about the defendant – information that distinguishes his/her client from the prosecutor's preconceived perceptions of the offender. In fact, mental health information could play an even more important role if it is introduced during the trial. This is often referred to as "frontloading" the mitigation. The jury could be apprised of this information through various witnesses or through the utilization of an affirmative defense, even in situations where the success of such a defense is unlikely. This would be particularly relevant in death penalty cases, where typically the same jury is utilized at the penalty phase of the trial. In either case, whether it is the jury or the judge, the impact of an earlier exposure to potentially humanizing and compelling information about the defendant is likely to be greater.

ELLIS: So, mental health information is relevant even if it does not fully explain the defendant's offense behavior?

ATKINS: Often, such a nexus between a defendant's crime and his/her psychopathology would be difficult to establish. Psychological/psychiatric evidence regarding the presence of these factors and their role in the defendant's life would, nevertheless, be relevant at the time of

sentencing. Depression, anxiety disorders, autism spectrum disorders, psychotic disorders, neuropsychological problems, etc. are conditions that may be present in the defendant's life to a degree that makes his/her situation compelling, even if all those conditions did not have a direct bearing on the actual commission of the offense.

ELLIS: Are there any limitations as to the type of information that can be provided at sentencing?

ATKINS: The trial court must give defense counsel an adequate opportunity to present whatever information counsel feels is relevant. (In the Federal system, for example, 18 U.S.C. 3661 makes it clear that there can be no limitation as to what a judge may consider at sentencing.) Even though, as an expert witness, the psychologist may not be subject to strict hearsay evidence rules, and may therefore be permitted to repeat the substance of corroborating interviews, judges are more likely to accept conclusions if they are supported by independent evidence, such as a corroborating source. Also, keep in mind the fact that the judge is in the position to be the "gatekeeper" regarding the reliability of expert testimony. In considering the evidence, the Court must determine whether the facts alleged in mitigation are supported by the evidence. Consequently, the importance of a thorough, scientifically-grounded evaluation cannot be overstated.

ELLIS: In terms of the evaluation, are there certain things that you would like from the attorney?

ATKINS: It is critical that the forensic mental health professional consult with the retaining attorney prior to examining the defendant. Such consultation will apprise the expert of all aspects of the events leading to, and surrounding, the offense. The attorney will also be able to communicate to the expert his/her view of the potential aggravating or mitigating factors. If the expert is satisfied that he/she is qualified to address the relevant issues, he/she should ask the attorney for all available records necessary to formulate his/her opinion. The expert may need to guide the attorney in the acquisition of the required records, as well as the fact that requests for additional records are likely to be forthcoming as the evaluation progresses. Such records are often extensive and some may require a subpoena. In addition, the expert should also convey the importance of personally interviewing collateral sources of information, such as family members, previous employers, teachers, and others who may shed light on the defendant's personal characteristics, as well as their observation of his/her social and emotional functioning.

ELLIS: What is the purpose of requesting so many records?

ATKINS: Such a record review should yield information that will enable the examiner to piece together factors that may have influenced the criminal behavior or that may indicate the

likelihood of successful rehabilitation. Personal historical information, including events in early childhood, may also serve to impact perceptions of the defendant's level of culpability and, potentially, the ultimate sentence. We do not want to forget that such information is also required to counterbalance any proposed aggravating factors, such as the egregiousness of the crime.

ELLIS: Are there any other records that you would want from the attorney?

ATKINS: In addition to school records, medical records, mental health treatment records, employment records, military records, etc., I would want to have a complete set of the criminal investigation reports, witness statements, the defendant's statement, the indictment, presentence investigation reports, sentencing memoranda, the defendant's juvenile and adult criminal history, case files related to previous convictions, jail records – for both the current and prior periods of incarceration, records of any prior court-ordered mental health evaluations, etc.

ELLIS: With all those records, why would you need to conduct collateral interviews?

ATKINS: It would be extremely rare for all of the significant events in a defendant's life to have been fully documented and available for review. The importance of independent supporting evidence cannot be overstated. In both the forensic mental health professionals' written report and in their testimony, the inclusion of such evidence will support their findings while reducing the Court's skepticism regarding expert witnesses, in general, and your expert's findings and opinions, in particular.

ELLIS: Would the attorney need to be involved in this process?

ATKINS: Definitely. The attorney would need to prepare the defendant, as well as his family and other potential interviewees, for these interviews. The attorney would need to stress the importance of openness and full disclosure of all aspects of the defendant's life, regardless of what they might feel is embarrassing or what they might perceive to be the negative implications of that information. The interviewees need to be prepared to discuss information that may have previously been considered "family secrets" and will now have the potential to be discussed openly in the courtroom. Both the attorney and the mental health professional need to be cognizant of the likelihood that there will be resistance to disclosing historical information (i.e., physical and sexual abuse; mental illness; substance abuse; etc.) that might be considered indirectly responsible for the defendant's offense -related behaviors. By being an active and empathic listener, the attorney will be in the best position to identify and address these resistances.

ELLIS: Wouldn't these same issues be involved in preparing the defendant to be evaluated?

ATKINS: What I just described applies equally to the defendant and the collateral interviewees. The defendant will also need to fully appreciate the purpose of the evaluation as well as the limits of confidentiality.

ELLIS: Shouldn't the consultation with the attorney also address the physical setting within which the evaluation is to take place?

ATKINS: Most of these evaluations will take place within a correctional setting, so scheduling will often require coordination with the retaining attorney to obtain the court's authorization to permit the expert to examine the defendant within the correctional facility. Regardless of the location, the setting should allow for unimpeded dialogue in a (relatively) quiet environment with minimal distractions. It goes without saying that adequate measures need to be considered in order to ensure the safety of the mental health professional during the evaluation.

ELLIS: Do you have a preference as to how your initial interview with the defendant should be set up?

ATKINS: If it can be arranged, my preference would be to have the attorney there to introduce me to the defendant. Ideally, the defendant will have already been apprised of the purpose of the evaluation and the fact that a mental health professional will be involved in the process.

ELLIS: How long should the attorney remain at that interview?

ATKINS: I do not have a rule of thumb for this, but I have found that the participants in this process usually have an instinctive feel for whether, and for how long, the attorney should remain at that first meeting.

ELLIS: Is there anything else that should be addressed while the attorney is still present at that first meeting?

ATKINS: In some cases, the issue of the defendant's competency will need to be considered. The forensic mental health professional's observations of the interaction between the attorney and the defendant has the potential to provide an invaluable window into competency – related factors and dynamics, most notably, the defendant's ability to work collaboratively with counsel.

ELLIS: Earlier, you spoke of the importance of gathering objective evidence. How do you know whether the defendant is telling you the truth?

ATKINS: In every forensic mental health assessment, the evaluator must address the motivation of the defendant to malinger symptoms, omit inculpatory or damaging information and/or

distort historical claims. To some extent, the reliability of the information provided by the defendant can be ascertained through collateral interviews and a review of his/her records. These steps are frequently supplemented by the utilization of objective psychological testing instruments constructed for assessing an individual's tendencies, both conscious and unconscious, to openly and honestly answer questions and present information.

ELLIS: You spoke earlier about the need for pre-evaluation consultation between the attorney and the forensic mental health practitioner. What about after you have completed your evaluation?

ATKINS: I feel that it is a good idea to discuss my findings with the attorney prior to preparing a written report. At this point, consultation would likely center around the attorney's perception of the overall sentencing strategy and the way in which my findings and conclusions interface with that strategy. The attorney would also be able to help me couch my opinions within the relevant statutory and/or non-statutory guidelines and circumstances. The attorney could be in the position to apprise me of the various ways that the prosecution might use my findings to support the concept that the mental health issues should be considered aggravating, as opposed to mitigating, factors. With such information in mind, my written report could include information that would serve to preemptively take such vulnerabilities into consideration. Of course, it would be at the time of the post-evaluation consultation that an important question must be addressed: Should there even be a written report?

ELLIS: In your experience, is there a timeline or particular deadline for the completion of your report?

ATKINS: As I said earlier, it is often useful for the attorney to have my report – or at least a preliminary report – in hand for the plea negotiation. Following a conviction or guilty plea, it is often useful to share my report with whomever might be preparing a court-ordered presentence investigation. Certainly, defense counsel would want my report in hand as he/she develops and prepares his/her presentence memorandum. Typically, my report is incorporated within, or attached to, the memorandum.

ELLIS: From our discussion so far, it appears that there would typically be an ongoing dialogue between the attorney and the forensic mental health professional. I assume such consultation would also take place prior to your testifying at the sentencing hearing.

ATKINS: Collaboration at that juncture would be essential. Together, attorney and expert could develop and prepare the expert's testimony on direct. They could also address the issues likely to be encountered on cross. If the prosecution elects to utilize a rebuttal witness, the mental health professional is in the position to play a critical role in developing and preparing the cross-

examination of that witness. Another issue that might need to be addressed is whether the defense expert should testify on sur-rebuttal.

ELLIS: In your experience, have prosecutors usually utilized rebuttal witnesses?

ATKINS: Much less often at sentencing than at trial. Forensic mental health trial testimony regarding an affirmative defense is invariably countered by testimony from a prosecution expert. At sentencing, rebuttal testimony is more likely to be encountered when addressing issues such as recidivism or future dangerousness. Whenever the defendant is being evaluated by a prosecution mental health professional, I request the opportunity to be present during that evaluation. And, following that evaluation, I review that expert's report along with the underlying data. Through consultation with counsel, the issue as to whether I should write a supplemental report should be explored.

ELLIS: What do you do when the prosecution expert comes back with the opinion that the defendant is a sociopath?

ATKINS: Sociopathy (or Antisocial Personality Disorder) could very well be a component of the defendant's overall mental health profile. If that was the only issue that emerged during my evaluation of the defendant, it is very unlikely that I would have prepared a report for the purpose of mitigation. That is very rarely the case, however. More often, antisocial traits or characteristics coexist within a constellation of clinical and/or personality disorders. One of the reasons that I feel it is important to be present at the prosecution expert's examination of the defendant – and one of the reasons I ask to review their underlying data – is the possibility that the prosecution expert will ignore everything but the sociopathy. With this in mind, it is important that the defense mental health expert include in his/her report all of their diagnostic findings, even the ones with potentially negative implications.

ELLIS: It sounds as though you may have crossed paths with mental health practitioners who were basically "hired guns" for the prosecution.

ATKINS: I have. And it is for that reason that I just referenced the need for the defense expert to include in his/her report their negative, as well as their positive, findings regarding the defendant. It is through the process of conducting a thorough, objective and broad-based assessment of the defendant and through the process of providing a documented foundation for his/her opinions that the defense mental health professional will be in the position to avoid being perceived by the judge as the defendant's "hired gun."

ELLIS: Are there certain questions the sentencing court might have that would need to be answered at the hearing?

ATKINS: To what extent did the identified background and psychological information serve to collectively influence the defendant's behavior? Why did he do it? Is he likely to commit a similar criminal act in the future? Is he amenable to treatment? Is there a treatment plan being recommended? What is the likelihood of rehabilitation? Hopefully, much of this information will have already been provided to the Court prior to the sentencing hearing through the sentencing memorandum and the attached expert report.

ELLIS: Should the Court also hear from the treating mental health professional?

ATKINS: In my opinion, very rarely. First, I will have reviewed and referenced in my report not only the doctor's records, but the information I received during any consultation I would have had with him or her. Secondly, attorneys have apprised me of the extent to which many judges are susceptible to experiencing "testimony overload" at sentencing hearings. On the other hand, there could be situations in which the treating mental health professional is in the position to provide the Court with a compelling account of their own personal experience working with the defendant as well as information regarding future treatment.

ELLIS: Do you always testify at the sentencing hearing?

ATKINS: No. As the sentencing judge likely will have received my report – either directly or through defense counsel's sentencing memorandum – it may be unnecessary or unwise to subject the Court to testimony regarding my findings. At the minimum, however, defense counsel should make the Court aware of the fact that I am in the courtroom as well as the fact that I am available to answer any questions that either the Court or the prosecution may have for me. Through consultation with counsel, however, it may be decided that there is some additional or supplemental information that I might be able to provide to the Court. Also, in situations where the sentencing judge may not have had prior access to my report, full testimony regarding my findings would very likely be in order. On the other hand**, t**here have been situations where, after hearing the prosecution's argument and/or any comments from the judge, I am called as an expert witness to address issues that were raised**.** This is a why it is important that I be in the courtroom.

CONCLUSION

As a defense attorney, I am often asked how soon a forensic mental health professional should be brought into the case. The answer is the same as to when a lawyer should begin preparing for sentencing. "As soon as the check clears."

I have been working with mental health professionals since 1969 when I first met the late forensic psychiatrist Robert Sadoff, M.D., one of the pioneers in the forensic mental health field and author of the book "Psychiatry and the Law." One of my early articles on mental illness and

disorders and sentencing mitigation, "Let Judges Be Judges: Downward Departure for Diminished Capacity," was published by the American Bar Association's *Criminal Justice* magazine in 1999.

I have been interviewing judges across the country for a Law360 series entitled "Views from the Bench: Effective Sentencing Representation" for the past two years. Several told me that they often view both prosecution and defense forensic mental health experts as "hired guns." Some prefer to hear from the treating mental health professional who they don't view as being paid for the case and has known the defendant for some time.

To avoid a "battle of the experts," I often ask the prosecution who they use and suggest that I might want to retain that person or agree upon an independent expert or ask the court to appoint one from ones we both propose.

Finally, to avoid the court being annoyed when we want to call the expert to testify, asking, "What more does he have to add. I've already read his report," I generally don't submit the entire report, but rather a one or two paragraph summary as a "teaser." This often results in the judge wanting to hear more from the expert at the sentencing hearing and engaging him or her in conversation.