

## ULTIMATE ISSUE OPINIONS

When expressing one's professional opinion, the examiner should refer to it as a "clinical opinion," not a "finding." A "finding" is a legal conclusion made by a court and no one else. For example, mental health professionals may write that they have formed a clinical opinion that the defendant "has significant deficits in abilities related to competence to stand trial," or "is incompetent to stand trial." But they should not write that they "*find* the defendant incompetent to stand trial."

Concerning a related question, there is considerable disagreement among forensic mental health professionals as to whether clinicians should even offer an opinion that uses the words that define the legal concept itself, e.g.:

- "It is my clinical opinion that the defendant is **incompetent to stand trial.**"
- "In my opinion, the defendant's capacity **to conform his conduct to the requirements of the Law was substantially impaired**" or "**In my opinion, the defendant was not criminally responsible at the time of the alleged offense.**"

Such testimony is referred to as an opinion on the "ultimate legal question." Some forensic clinicians argue that offering ultimate issue opinions is beyond the scope of mental health professionals and invades the province of the trier of fact. For example, they note that the legal standards typically include language such as "*sufficient present ability*" (CST standard) or "*lacks substantial capacity*" (CR standard), and that it is up to the judge or jury to determine the degree of ability or impairment that is required in order to reach the threshold of capacity or incapacity. Proponents of this position recommend using language such as: "**in my opinion the defendant did not demonstrate impairments in those capacities typically associated with competence to stand trial;**" or "**as a result of mental illness the defendant's capacity to appreciate the wrongfulness of her conduct was significantly impaired**" (noting the substitution of the word "significant" as opposed to the term "substantial" in the legal standard). For a fuller discussion of this position, see: Tillbrook, C., Mumley, D., & Grisso, T. (2003). Avoiding expert opinions on the ultimate legal question: The case for integrity. *Journal of Forensic Psychology Practice, 3*, 77–87.

According to the opposing view, using the language of the legal standard is clearer and more useful to the trier of fact, as long as the clinician fully articulates: (a) what the relevant deficits are, (b) what logic connects those deficits to the legal standard, and (c) why the examiner believes that those deficits were "*substantial*" (for instance). Proponents of this position argue that when the evaluator provides a clear opinion in this form, the judge or jury may make up their own minds, independent of the examiner's conclusion as to whether the evidence meets the legal standard. They also argue that the alternative formulations proposed may obfuscate the evaluator's data and opinions (for example, making it more difficult for the evaluator to convey when the data point strongly in one direction, versus a more ambiguous case). In addition, they argue that substitution of wording such as "*lacked significant capacity*" for "*lacked substantial capacity*" is just a semantic difference with no real meaning, and the distinction is not likely to be understood by jurors. For a fuller discussion of this position, see: Rogers, R., & Ewing C. P (2003). The prohibition of ultimate opinions: A misguided enterprise. *Journal of Forensic Psychology Practice, 3*, 65–75.

As there are legitimate differences of opinion regarding this issue, and the differences can involve a weighing of competing ethical values and principles for which there may not be one correct answer, forensic evaluators should become thoroughly familiar with the arguments that have been made in the

professional literature for and against the practice of offering ultimate issue opinions, and decide which form they prefer to use. However, it should be noted that there is consensus within the professional community on two issues:

1. Whatever form of opinion statement is used, it is *essential* for the examiner to delineate clearly the data on which one's opinion is based, and the logical inferences that link one's data to one's opinion.

2. In criminal responsibility reports, forensic evaluators *should not* testify that in their opinion: "the defendant should (should not) be found **criminally responsible** for the alleged offense." Use of this language is similar to opining that a defendant is "guilty" or "not guilty," which is beyond the realm of clinical expertise and improperly places the clinician in the role of the trier of fact.