

FORENSIC AUDIOLOGY

A GUIDE FOR THE EXPERT WITNESS

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Foreword

Audiology is rapidly advancing as an integral and influential part of health care. As audiologists take on advanced and higher-level functions in the health care arena, the field inevitably divides into specialties that require advanced training and preparation. One emerging area of practice is that of forensic audiology. There have been few audiologists in the past who have been successful in functioning in a forensic capacity. As the field evolves, the improving stature of audiology will no doubt involve increased recognition of the diagnostic and forensic abilities of more audiologists.

Forensic audiology entails the practicing of the whole profession, from the foundation of the field on through the expanding structure of knowledge. It also does not hurt to have a bit of knowledge of several additional fields—engineering, acoustics, medicine, pharmacy, physics, and business. While few audiologists are this well versed, it would be best if all forensic situations involving audiologists would involve clinicians who were well rounded in the total field. That is not to say that practice in a forensic manner in any of the “subfields” of audiology will not be fruitful.

Any time one purchases a textbook, there are several expectations. One hopes that the text will provide information and direction that will be useful. One also hopes that the book will not just sit on a shelf but will be valuable in the future. One hopes that the text will be relevant. Enter this Traynor and Traynor text.

A good place to start a foreword to this book is to quote a person who should be well known to anyone reading this text. After pondering this for a bit, I chose to quote someone who needs no reference. Clint Eastwood’s Dirty Harry movie character stated, “A man needs to know his limitations.”

Expert knowledge rests upon a foundation that provides scientific data support for specific structures. Forensic science in all its

aspects is no exception and in addition requires the partitioner not only to be proficient in the basics but also to be able to integrate several aspects of other fields into their specific area of expertise. To that end, I think this text is best appreciated by separating it into divisions—the legal system in general and the practical chapters pertaining to the structure of forensic audiology practice.

The “Foundation” Chapters

Chapter 1—Introduction to Forensic Audiology

Chapter 2—The Rules of Expert Testimony

Chapter 3—The United States Court System

The Structural Chapters

Chapter 4—The Structure of Criminal Cases

A lengthy discussion of criminal and civil case structure is somewhat overwhelming but there are elements of such information that will aid in understanding, apply to many legal issues, and contribute to the necessary foundation in forensics. Pieces of this discussion can be found sometimes on the evening news but not in such an easy-to-understand and audiology-specific manner.

Chapter 5—The Structure of Civil Cases

This chapter presents definitions and examples of the types of legal matters that would likely employ input from an audiologist. The side-bars nicely and relevantly connect with the structural concepts.

Chapter 6—The Legal Report

This chapter is the beginning of the methods of investigating and managing forensic matters and outlines insights into the successful services of an audiologist in a legal setting. Having set the stage in the foundation chapters, this explanation of the elements of the forensic report details the specifics of such a report.

Chapter 7—Discovery—Deposition—Trial

In this chapter, perhaps the most important statement is, “The more the expert studies the legal techniques and procedures used for deposition and trial, the greater their chance to win the confrontational dialogue battle with the cross-examination attorney.” While it is inconceivable that any expert’s testimony will prevail in all circumstances, the rules, suggestions, examples, and discussions in this chapter will educate even the most experienced forensic professional.

Chapter 8—Forensic Audiology Practice Development

Developing a forensic practice is outlined in reasonably complete and general detail. This chapter contains suggestions and methods that will promote forensic practice.

Chapter 9—The Ethics of Expert Witnessing

Discussions on ethics is almost always appropriate as requirements for practicing ethically are constantly undergoing investigation. This chapter describes the potential areas for overlap and conflict between the professional (audiology) ethics and involvement in forensic (legal) pursuits.

Those audiologists who have acted in forensic situations in the past could have benefited immensely from this text had it been

available. Mark Twain is credited with “Good decisions come from experience. Experience comes from making bad decisions.” Paraphrased: “*Competence comes through experience, and experience comes through mistakes.*” This text cannot compensate for experience, but it could help to eliminate professional mistakes.

Michael J. Metz, PhD
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Preface

Drs. Mark Kramer and Dr. Joan Armbruster were the editors of the first text titled *Forensic Audiology*, published in 1982. They brought together the collective expertise of audiologists, otologists, and attorneys to discuss the role of audiology in the litigation process. Their volume was published well before the Doctor of Audiology degree, prior to the large increase in audiology private practitioners, and before many audiological procedures that were only imagined at that time. The publication was decades ahead of the profession that audiology would become, but since this innovative volume, there has been a void of audiology publications for those seeking to become expert witnesses.

Nothing in an audiology education prepares clinicians, professors, or researchers for the rigors of writing legal reports or providing testimony at deposition or the courtroom. These legal procedures are a form of combat unfamiliar to those who have spent careers assisting their audiovestibular-impaired patients. While audiologists may feel that their training, experience, and specialization prepare them to become a legal expert witness, *nothing could be further from the truth*. It takes more than simply knowing your profession to survive as an expert witness as there are special processes, customs, etiquette, and tactics involved in the legal profession.

As we struggled to learn the principles of expert witnessing, we found a multitude of references available from other disciplines. While these publications provided some of the expert witness basics, they were oriented toward other professions. After some searching, we found an expert witness training program where we learned the basics of preparing an impressive curriculum vitae, interacting with attorneys, the process of being retained, the customs and procedures used within the legal profession, legal report writing, deposition and trial testimony techniques, and fee schedules. *Forensic*

Audiology offers a new venture for audiologists to explore. We are excited to share what we have learned and experienced since entering the legal arena.



1 Introduction to Forensic Audiology

Defining Forensic Audiology

Presiding judges indicate that the current legal system could not function without experts in the courtroom, as juries are made up of average individuals who may or may not have expertise in the topic areas being considered by the court. Mangraviti et al. (2018) state that the role of the legal expert witness is to assist the “triers of fact.” The triers of fact may be either the judge and/or the jury depending upon the circumstances in the case. A long-time forensic audiologist defined forensic audiology as simply “the application of audiological knowledge to questions of law” (Kramer, 1982).

Dictionaries define the adjective *forensic* as “belonging to, used in, or suitable to courts of judicature or to public discussion and debate.” Specifically, the word itself comes from the Latin word *forensis*, meaning “in open court” or “public.” In our current culture, the term *forensic* also describes the use of scientific methods used to investigate crimes, especially with the advent of DNA and other recent technologies. If a case requires *forensic* evidence, expert witnesses within their areas of expertise use their scientific knowledge, experience, and research skills to find proof (evidence) that will assist in solving civil or criminal legal cases. Although applying audiological knowledge to questions of law is what professionals as forensic audiologists do, there is more to it than simply providing audiological

knowledge and expertise. As in any new professional specialization, forensic audiology involves entry into the legal community with its own set of cultural rules, concepts, procedures, customs, and ethics that must be studied, understood, and applied to be a successful expert witness. Thus, the definition of *forensic audiology is the use of audiologic training, experience, and specialized certification that produce skills to assist attorneys, judges, and jurors in understanding audiovestibular subject matter for use in obtaining a just settlement in criminal and civil litigation* (Traynor & Colucci, 2022).

Defining the Expert Witness

Lopez (2022) describes the *expert witness* as a witness who has special expertise in a particular field that is an issue in a case. For instance, in a vehicular homicide case, an expert in accident reconstruction may be recognized as an expert witness to determine the cause of the accident. Or an audiology application might be a wrongful death train accident case where the verdict rests on if the driver heard the train horn. Expert witnesses are usually individuals with education, experience, licenses, and certifications within the field of interest to the court and must be approved by the attorneys and the judge as an expert in their field. Lopez continues the definition by stating that just because a person is considered an expert by the court or by the lawyers does not guarantee that a jury must accept their opinion. Experts are paid substantial sums of money by the party calling them as a witness, and thus it is not uncommon for the expert from the defense to contradict the expert for the plaintiff/prosecution. While the goal of a good expert witness is to objectively present the facts in the case and assist the triers of fact in their deliberations, an experienced attorney can effectively demonstrate through cross-examination if the expert is following the rules of objectivity, exaggerating the truth, or lying.

Swick and Goldstein (2021) point out that expert witnesses have various jobs in a case. They can assist with:

- Assessing the value of a case
- Formulating claims, counterclaims, and defenses
- Drafting discovery requests and responses
- Reviewing documents
- Challenging the other side's expert witnesses
- Developing and refining case strategy
- Identifying, evaluating, and calculating damages
- Evaluating and responding to opposing claims and theories
- Aiding the triers of fact through trial testimony

While experts have many possible uses, Curtis and Kirk (2010) state that well credentialed experts not only have the expertise to counsel on topics within their field but also are well qualified to testify. Under the Federal Rule of Civil Procedure (2023) Rule 26 (a) (2) and (b) (4), experts fall into two general categories: *consulting experts* and *testifying experts*. Experts are hired by the defense, the plaintiff counsel, or the prosecution based upon their expertise within a professional area that qualifies them as a discipline specific expert. These individuals may be physicians, surgeons, psychologists, tree surgeons, accountants, business experts, malpractice experts, and virtually any area of expertise useful in the explanation of the issues before the court or the jury (the triers of fact), *including audiologists*. The individual often recognized as an expert is someone familiar with the specific injuries in the case and is proficient in their ability to offer an adept opinion as to how the actual injury occurred, its specifics, severity, and the present and future concerns of the injury.

Funk (2022) differentiates the two types of legal experts. A *consulting expert's* responsibility is to assist the attorney in the preparation of their case. They begin by reviewing the case data, and using their expertise, the forensic audiologist provides the attorney with an analysis of the data with opinions on the case and, where applicable, examination of the conclusions of the expert for the opposing party. Forensic audiologists retained as consulting experts can point counsel

to studies published in peer-reviewed journals that may establish that a theory has been discredited or to literature establishing a more efficient method. Based on their involvement in the audiology community, the consulting forensic audiologist may also have insight regarding some professional missteps of the opposing expert that would be grounds for impeachment. The consulting expert can also serve to keep the opposing expert honest and/or provide assistance to the attorney for unexpected answers to questions during testimony.

A consulting expert typically does not write reports or testify in either civil or criminal cases, but if the consulting expert has useful information and support for the case, counsel may decide to change their status into a *testifying expert*. When this change occurs, federal law requires certain legal forms of disclosure. If, however, counsel decides not to have the expert testify, federal law does not require disclosure before trial in either civil or criminal cases. Even though a consulting expert *does not testify*, they can still be of great assistance to counsel as they prepare their case by finding fault with the other side's theory and methods, and thus assist in developing a strategy to challenge the opposite side's expert.

When the forensic audiologist is retained as or becomes a *testifying expert*, there are specific rules that must be followed according to the Federal Rules of Evidence (2023) and the Federal Rules of Civil Procedure (2023). In federal court for civil cases, the timeline for disclosing the expert to the court and the opposing side is addressed in Federal Rule of Civil Procedure Rule 26, *Duty to Disclose*. While state courts may have different rules about what, when, and how information should be disclosed, in federal courts, testifying expert witnesses must be disclosed 90 days before the trial date, unless the judge has set an alternative timeline.

Rule 26 states that the federal civil rules protect the work product of testifying experts, including the experts' report drafts as well as oral and written communications between the attorney and the expert. Although there are a few exceptions to this rule, conversations about compensation are always discoverable and must be disclosed. Additionally, the facts and circumstances of the case, which the attor-

ney provided to the expert to formulate an opinion on, must also be disclosed as well as any assumptions the attorney provided that the expert relied upon in drawing their conclusion. This approach allows an attorney to have meaningful discussions with an expert, exploring all possible theories of the case, without fear that some undisclosed information may be exploited by attorneys for the other side to the detriment of the client. Simultaneously, by disclosing a detailed list of the information the expert relied on in drawing their conclusions, the other side is afforded a clear understanding of what the expert did (or, in some cases, did not do) to consider the case variables. While these are the rules for federal court, the rules may be quite different in state courts, and therefore experts should always check with retaining counsel regarding the possible discovery of draft reports, emails, and oral communications that are discoverable by the opposing side.

Rule 702 of the Federal Rules of Evidence (2023) presents what the court and the retaining attorney expect from all expert witnesses. The rule states that a testifying expert witness is qualified as an expert by knowledge, skill, experience, training, and/or education and may testify in the form of an opinion or otherwise if:

- The expert's scientific, technical, or other specialized knowledge will help the trier of fact understand the evidence or determine a fact in issue.
- The testimony is based on sufficient facts or data.
- The testimony is the product of reliable principles and methods.
- The expert has reliably applied the principles and methods to the facts of the case.

Forensic audiology thus is the evaluation, investigation, and review of either civil or criminal legal cases for either the plaintiff or the defense regarding audiovestibular issues within a legal case. They may be involved in the clinical assessment of the victim or injured person, or they may simply be called to opine on hearing evaluations, medical records, police reports, causation, and implications.