

# Tips for Serving as an Expert Witness

Joel P. Wiesen, Ph.D.

[jwiesen@appliedpersonnelresearch.com](mailto:jwiesen@appliedpersonnelresearch.com)

IPAC 2010 Conference

Newport Beach, CA

July 20, 2010

# Introduction

- Meant for new experts
- These tips are not exhaustive
- Major tip #1: Be honest and thorough
- Major tip #2: Listen to your attorney

# Overview

1. Your “opinion”
2. Interacting with lawyers
3. Report writing tips
4. Deposition tips
5. Courtroom testimony tips
6. Some free resources for experts

# These Tips

- Lessons learned from the trenches
- Not exhaustive
- Not in priority order

# 1. Your Opinion

- Objective
- Thorough
- Grounded in good science
- Clear/understandable
- Not wishy-washy

# Objective

- To a reasonable degree of scientific certainty
- Honest and forthright
- Not biased in favor of client

# Thorough

- Read every page of material you are given
- Ask for more information as needed
- Review literature as needed
- Check and re-check all your work
- Proofread carefully

# Grounded in Good Science

- Opinions must be grounded in generally (well) accepted scientific findings
- Avoid unsupported theories
- Your own professional experiences may not be accepted as scientific findings

# Clear/Understandable

- Use jargon sparingly
- Speak for an intelligent lay audience
- Be organized

# Not Wishy-Washy

- If you don't believe it, why should court?
- “It maybe that...” can be phrased as:
  - “It is my professional opinion that...”
  - “The facts just described indicate...”
- Avoid superlatives like very, extremely, unless they are clearly warranted

## 2. Interacting with Lawyers

- Clarify case
- Educate attorneys
- Suggest areas where you can help
- Clarify/create structure/timelines
- Keep attorney informed
- Ask obvious questions

# Clarify Case

- Get copy of the Complaint and read it
- Ask attorney for other background material

# Educate Attorneys

- Relevant Title VII cases
- Relevant psychometric issues
- Attorney will examine opposing experts

# Suggest Areas Where You Can Help

- Provide list/copies of publications of opposing expert, with comments
- Suggest areas/questions for interrogatories
- Suggest areas/questions for deposition of opposing expert

# Clarify/Create Structure/Timelines

- Some attorneys are disorganized
- Ask for timetable for case, especially your involvement
- Be clear on what you can do and how long it will take

# Keep Attorney Informed

- Your opinions/publications that might be hurtful to the case
- Possible delays
- Vacation plans
- Hours worked

# Ask Questions

- What are the legally important questions that I should address?
- Which of the topics I have raised are not legally important?

# Ask Even Obvious Questions

- Is there a format you prefer for reports?
- May I send you email or should I call?
- By when do you want this?
- How long a report do you envision?

## 3. Report Writing Tips

- Types of reports
- Length of report
- Content of report
- Format

# Types of Reports

- Affidavit
- Plaintiff's expert report
- Defendant's expert report
- Supplemental report

# Affidavits

- Usually narrow in focus
- May be asked to write more than one
- May be used in connection with a motion
  - e.g., motion for summary judgment

# Plaintiff's Expert Report

- Usually wide ranging
- Define issues
  - Set forth all the shortcomings

# Defendant's Expert Report

- Usually focused on rebutting plaintiff's expert
  - Address all issues raised by opposing expert

# Supplemental Report

- Sometimes allowed
- “I reserve the right to supplement my report if and when additional hiring data become available.”

# Length of Report

- Ask attorney for guidance
- I prefer detailed (long) reports
- Some attorneys want only general topics
- Range: 1 to 300 pages, with attachments

# Content of Report

- Legally mandated content
- Background
- Your analysis
- Your opinion
- Format/style
- Attachments as needed
- Sample outline and opinion

# Legally Mandated Content

- Check with your attorney
- Professional qualifications
- Publications
- Past legal involvement
- Rate of pay
- What you reviewed
- Basis for your opinion

# Background

- Clarify case for Judge
  - Test components
  - Ranked eligible list
  - Selection rules (e.g.,  $2N+1$ )
- Professional standards
  - “APA” Standards
  - SIOP Principles
  - UGESP

# Your Analysis

- What you set out to evaluate
- Your general approach
- Details of your efforts
- Your findings

# Your Opinion

- Be clear
- Little jargon
  - Only jargon explained earlier in report
- Not wishy-washy

# Format/Style

- Ask attorney for format/style guidance
- Write/speak for an intelligent lay audience
- Use a table of contents for longer reports
- Can use footnotes
- Number sections, perhaps even paragraphs
- Expert report is not a scientific paper

# Attachments as Needed

- Make it easy for court to read relevant material
- Document your statements

# Sample Outline and Opinion

Expert Report on Adverse Impact, Validity and Fairness of Four Promotional  
Examinations for Police Sergeant Administered Pursuant to MGL Chapter 31

Joel P. Wiesen, Ph.D.  
October 3, 2008 (errata corrected October 6, 2008)

Table of Contents

Section One: Overview .....	Page 1
1. The Topics of This Report .....	Page 1
2. Summary of My Opinions .....	Page 1
A. The Sergeant Exams Show Adverse Impact on Minority Applicants .....	Page 1
B. The Sergeant Exams Do Not Meet Professional Standards for Validation .....	Page 1
C. Alternative, Valid Examining Methods with Less Adverse Impact Not Used ..	Page 2
3. Documents and Computer Files Reviewed .....	Page 2
A. Written Materials .....	Page 2
B. Computer Files .....	Page 2
4. My Professional Background and Some Related Information .....	Page 3
A. Education, Professional Experience and Qualifications .....	Page 3
B. Publications and Papers .....	Page 4
C. Compensation .....	Page 4
D. Court Appearances and Depositions .....	Page 4
Section Two: Evaluation of Adverse Impact .....	Page 5
1. Definition of Adverse Impact .....	Page 5
2. Understanding the Statistics of Adverse Impact Analyses .....	Page 5
<SNIP>	
3. An Overview of the Hiring Process for Sergeants .....	Page 8
4. Overview of the Adverse Impact Analyses Reported Below .....	Page 9
5. Overall Adverse Impact in Hiring For All Sergeant Exams, 2003-2007 .....	Page 10
A. Number of Promotions: All Exams 2003-2007 .....	Page 10
B. Adverse Impact Ratio for Promotions by Ethnic Group: 2003-2007 .....	Page 11
C. Probability and Statistical Significance of Promotions: Exams 2003-2007 ..	Page 12

D. Practical Import of Promotions: Exams 2003-2007 .....	Page 13
E. Opinion on Promotions: Exams 2003-2007 .....	Page 13
<SNIP>	
15. Summary of Adverse Impact Analysis In Hiring .....	Page 27
<SNIP>	
26. Summary of Adverse Impact Analysis In Passing the Written Test .....	Page 43
27. Other Adverse Impact Statistical Analyses .....	Page 43
Section Three: Evaluation of Test Validity .....	Page 43
1. Standards for Evaluating the Validity and Fairness of a Test .....	Page 43
A. Government and Professional Testing Guidelines, Standards, and Principles .....	Page 44
B. Accepted Approaches to Validating a Test .....	Page 45
C. Content Validation .....	Page 46
2. HRD Did Not Provide A Professionally Acceptable Content Validation Study .....	Page 46
A. 1991 Validation Report is a Brief Summary, Devoid of Substantive Details .....	Page 46
B. Job Analysis on Which the 1991 Report Apparently Relies is Undocumented .....	Page 47
C. Other Documents Produced are Similarly Inadequate .....	Page 47
<SNIP>	
7. Other Indications of Poor Quality Test Development .....	Page 52
A. Large Number of Changes to the 2007 Answer Key .....	Page 52
B. Unnecessarily Difficult/Academic Words in the Test Questions .....	Page 52
C. Closed Book Questions On Material That Could Be Looked-Up .....	Page 53
D. Poorly Worded Questions .....	Page 53
E. Grammatical Errors in Exam Questions .....	Page 54
F. Questions Not Appropriate for Sergeant .....	Page 54
<SNIP>	
Section Four: Fairness and Alternative Selection Procedures and Approaches .....	Page 54
1. Examples of Alternative Selection Procedures .....	Page 54
A. Alternatives are Practical .....	Page 55
2. Examples of Alternative Use of Test Scores .....	Page 55

3. Alternative Selection Procedure Envisioned by the State Legislature ..... Page 55

<SNIP>

Section Five: Summary of My Opinions ..... Page 55

Attachment A: Resume of Joel P. Wiesen, Ph.D. .... Page 57

Attachment B: List of Papers and Publications ..... Page 58

Attachment C: Confidential Test Material ..... Page 61

Section Five: Summary of My Opinions

The HRD exams resulted in severe and statistically significant adverse impact in hiring ...  
<SNIP>... on average.

As an experienced test developer who realizes that there is no such thing as a perfect test, I opine that the HRD Sergeant exams are without even barely adequate validation support. The documentation of the HRD validation efforts is grossly incomplete.

There are major, serious flaws in the design and implementation of major aspects of the challenged exams, including but not limited to the following:

- A. The HRD exams are too narrow in focus, leaving out important abilities.
- B. Test questions were poorly constructed, heightening test anxiety and over-emphasizing reading ability.
- C. The passing score bears no relationship to job performance.
- D. Absent professionally acceptable validation support for the written tests or the E&E, there is no professionally sound reason to conclude that people higher on an Eligible List will do the job better than people lower on the list.

Based on a detailed review of materials provided by HRD, it is my professional opinion that the Defendant has not provided any professionally acceptable support for the validity of the exams for promotion to Sergeant.

Alternative selection procedures are available that could increase validity and decrease adverse impact of the exam for Sergeants. Many jurisdictions nationwide use such procedures in their exams for Police Sergeant.

# 4. Deposition Tips

- Your deposition
- Deposition of opposing expert

# Your Deposition

- Topics
- Preparation
- On the day of the deposition
- After the deposition - proofread
- Billing

# General Depo Topics

- Opposing attorney can ask almost anything
- Your education/experience
- Questions to clarify your report
- Questions to learn the basics of testing
- Hypothetical questions to make a point

# Preparation for Depo

- Be prepared
- May not be able to testify in court to facts/opinions not raised in your report or depo
  - You have little control over topics of your depo

# On the Day of the Deposition

- Arrive early
- Speak up; speak clearly
- Ask for break, if needed
- May not be allowed to talk w attorney during breaks
- Bring sucking candy, Tylenol, band aids
- No “private” notes allowed!

# On the Day of the Deposition

- Lunch is often late (1 pm or later)
- Answer questions, but talk w our attorney in advance about whether to answer more than asked, or how much more

# After the Deposition: Proofread

- Correct transcription errors
- Correct substantive errors

# Deposition of Opposing Expert

- Help attorney prepare
  - Suggest topics for depo
  - Suggest questions for depo
- Ask to be present at depo
  - Real time help framing follow-up questions
  - Help you understand position of opposing expert

# 5. Courtroom Testimony Tips

- Direct examination
- Cross examination
- Redirect

# Direct Examination

- No “private” notes allowed!
- Prepare with attorney who hired you
- No tricky questions
- May get unclear questions
  - Ask for clarification
- NOT talk w your attorney during breaks
- Conservative dress (on east coast only?)

# Cross Examination

- No “private” notes allowed!
- Be prepared for tricky questions
  - Misquoting one of your previous answers
  - Subtle shift in noun (“You said ...”
  - Complex/compound/confusing questions.
- Pause a second before answering
  - Gives your attorney time to object

# Redirect

- No notes!
- Your attorney will follow up on some topics

# General Courtroom Tips

- Answer the question asked
- Leave a moment for your attorney to object
- Don't leave a false impression
- Answer yes or no only when appropriate
  - “It depends on several factors.”
  - “It is more complex than that.”
- Ask for breaks as needed

## 6. Some Free Resources for Experts

- Linked-In
- Various free sites for court decisions
  - Official (maintained by a court)
  - Third party
- [expertcommunications.com](http://expertcommunications.com) (Meredith)
- Wiesen (2007) on IPAC website

# Some Free Resources for Experts

- <http://vimeo.com/12202711>
  - One of a number of TASA presentations for experts
  - Other videos in menu at right of page
- <http://www.tasanet.com/knowledgecenter.aspx>
  - Copies of past expert oriented webinars
  - Each about 1 hour long

# Q & A's

- Questions/comments from the attendees

# Closing

- Meant for new experts
- These tips are not exhaustive
- Feedback and other tips welcome

# Best of luck as expert witnesses!

Copies of this presentation are available at  
<http://ipacweb.org> and from the author at [jpw@aprpsych.com](mailto:jpw@aprpsych.com)