

Resource Document on Peer Review of Expert Testimony

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The American legal system seeks justice through the adversarial process. The adversarial process, by its very nature, tends to highly polarize ideas. At times psychiatrists who testify as expert witnesses in court or similar settings have been perceived in the popular, legal and medical literature as either deficient in knowledge or to have knowingly behaved in an unethical manner to advance the cause of the party who hired them.(1-6) Sometimes these perceptions are not accurate. Other times they are true. This paper attempts to outline the problem and discuss possible solutions.

In an initial report on peer review of forensic testimony (7), the American Psychiatric Association's Council on Psychiatry and Law made the following observations:

1. Critiques of forensic psychiatric testimony focus on two issues: The lack of competence of the expert (failing to understand legal issues or deficiencies in knowledge or communication skills), and unethical conduct. The first issue can be remedied by education and training, the second might require punitive sanctions.
2. The legal system alone cannot evaluate the quality of psychiatry testimony, particularly its content. Self-regulation by forensic psychiatrists could be more effective.
3. Peer review of psychiatry testimony is a promising approach to improving its quality. The experience of the Council members in actually doing peer review has convinced them of its value.
4. The primary goal of peer review is the education of the person reviewed.

5. Consensus is possible among reviewers, and even if there is no consensus, the reviewers' deliberations have educative value for the person reviewed.
6. Only completed cases, in which all records are in the public domain, should be considered.
7. If unethical conduct is noted, procedures will, in the future, have to be developed to deal with it.
8. A number of organizations, including departments of psychiatry, district branches of the APA, and licensing organizations, may wish to do peer review.
9. The initial focus should be on voluntary, not mandatory review. Issues of possible liability of reviewers, protecting confidentiality and cost, will have to be considered in future discussions.

The Council has appointed this task force on peer review of expert testimony to expand on some of the issues it raised, and to focus on the development of standards to guide the peer review process.

A. Voluntary vs. Mandatory Peer Review

Voluntary review, in which the experts agree to present themselves to a panel of reviewers, mainly addresses the expert's actual performance in a given case. It is an educational process designed to provide feedback to psychiatrists to help them become more knowledgeable and effective forensic practitioners. Voluntary peer review is not, however, a mechanism to eliminate egregious forensic psychiatric consultation and testimony, since few such practitioners are likely to seek peer review. Voluntary peer review is also not a system for sanctioning forensic psychiatrists whose conduct deviates from an expected standard of professional behavior. In the long run, voluntary peer review should serve the public interest by improving the quality of psychiatric consultation and testimony for the majority of psychiatrists.

Those who volunteer for evaluation of their performance as expert witnesses are unlikely to perceive their behavior as unethical. There is some possibility, however, that the review process might discover unethical behavior of which the expert seeking review is unaware. Once the expert in a voluntary peer review informed about possible unethical behavior, the expert may take correction action in future cases, and the public interest would again be served.

Mandatory peer review, in which psychiatrists are required to undergo peer review prospectively or retrospectively as a condition of eligibility to practice in a

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legal setting, can in theory deal with both performance and unethical behavior. However, the Task Force believes that, given the present state of development of peer review, psychiatry is still not ready to initiate a system of mandatory review of expert testimony. This Task Force report is based on the assumption that the present phase of peer review will be on a voluntary basis. Some of the problems inherent in a system of mandatory review, however, will be briefly mentioned later.

B. General Issues in the Voluntary Peer Review Process

1. Assessment Protocol

Peer review of expert testimony requires assessment of a variety of factors from the accuracy and thoroughness of the content of the expert's presentation to the effectiveness with which that content is communicated. This requires the availability of an assessment protocol, which reminds the reviewers to consider all relevant areas in every case. It is unlikely that an expert will perform consistently in all of the areas evaluated. Deficiencies and, certainly, less than perfect performances, are to be anticipated in every case. A scale for grading each performance area must be part of any assessment form. Ultimately, the expert will be presented with a profile assessment of performance on a list of specific tasks rather than an overall rating.

When peer review is voluntary and performed for educational purposes, reviewers can be spared the difficult task of determining what combination of deficiencies in the qualities evaluated falls below some threshold level. Rather, it is only necessary to inform the expert of strengths and weaknesses of performance in specific domains. If peer review were mandatory and had consequences with regard to licensure or membership in organizations, a standard of adequate performance would have to be defined. The development of such a standard would be facilitated by the collective experience of many examiners.

2. What Material Should Be Reviewed?

The most likely source of review material is the deposition or trial testimony of the expert, either in videotaped or written form. Written reports to attorneys and courts, including reports on psychiatric assessments of litigants, may also be reviewed. Given the usual volume of the primary documents in litigation (i.e., depositions of litigants and lay witnesses, police and investigation reports), peer review committees would likely be unable or unwilling to review such material. When peer review is based on the expert's testimony at trial, that testimony will be contested through the adversarial process. Using testimonial material

increases the likelihood that the reviewed material will deal with the issues that were unsettled, complex and disputed. The weaknesses of trial testimony will generally be much more apparent than weaknesses in written reports or case summaries. This means that reviewers of testimony must begin their work with the "mind-set" that acknowledges that the expert's weaknesses may well be exaggerated.

3. Limits of the Assessment Process

Another issue is how the nature of the psychiatrist's interaction with attorneys might influence a final written or videotaped depiction of the expert's testimony. Expert testimony is created not solely by one party, the psychiatrist, but by the interaction of the expert and, at least, two other individuals, the defense attorney and the prosecution or plaintiff attorney. If the attorney who has hired the psychiatrist has not helped the psychiatrist to bring out all the information which the expert might usefully provide, the testimony will be less effective than it might have been. If the opposing attorney does a particularly good or particularly poor job in cross-examination, the nature of the expert's testimony will be influenced so that it appears better or worse. Interaction between two opposing attorneys and the psychiatrist expert undoubtedly influences the final testimonial product. It can be such a powerful factor in producing a variable product as to create a serious problem in judging the quality of any expert's work on the basis of a single transcript or tape. To the extent that a peer review includes two or more of the reviewed person's cases it is likely to be more representative of the expert's work. Time constraints may necessitate reviewing only a single case at a time but the limitations of this methodology should be recognized.

4. Reliability

Another critical issue establishing the usefulness of a peer review is the level of agreement between different reviewers and the consistency of agreement if there is a second or third evaluation. Reliability will be increased to the extent that reviewers examine similar issues and adhere to the same format. The Task Force has appended a detailed form for peer review of expert testimony, which covers both issues of content, and how that content is presented. Adherence to this form will insure a consistent focus on which issues will be assessed.

Reliability will also be influenced by the quality of communication among reviewers. Here it is essential that peer reviewers define the precise aspect of forensic reports and testimony that are being used as a basis for that judgment. Any agreement or disagreement between reviewers is most valid and reliable, when the reviewers are dealing with the same data.

C. What Areas of Performance Should Be Reviewed?

As noted above the focus of the peer review evaluation is on both the content of the expert's testimony and its presentation. While the major concern is with the content, certain issues with regard to the manner and style of presentation are also crucial. The clarity of the expert's communication can be readily estimated from the available material. The organization of the material and absence of jargon are related to issues that can be directly evaluated. The expert's objectivity can be assessed when the expert is confronted with alternative explanations for the data. Other more stylistic issues such as the expert's demeanor and credibility may be difficult to assess. One critical stylistic issue is the expert's handling of questions that are intended to show weakness in his testimony, to avoid defensiveness, and to maintain objectivity will be important factors.

Peer review requires that the reviewers judge the technical accuracy of the testimony and the extent to which the expert has utilized available scientific knowledge in presenting information. Here, reviewers will either have to be familiar with the scientific data related to the case or be able to familiarize themselves with that data. Another content issue is the evaluation of the quality of clinical reports describing evaluations of litigants. Here, the reviewers will, perhaps indirectly, evaluate the expert's clinical skills, and the expert's capacity to translate clinical findings into legally relevant information. In order to do this; the reviewers themselves must be skilled forensic clinicians.

Finally, it is especially important to determine how effectively the expert connects psychiatric findings to the pertinent legal issues (within the appropriate limitation of evidentiary rules regarding ultimate issue testimony. Here, experience in actual forensic practice will allow reviewers to make such assessments.

As noted above, an appendix to this report includes a sample peer review evaluation form which peer review committees can use or modify as appropriate for their own particular purposes. Sample instructions to use the form are also included, and can similarly be modified as needed.

While the focus here is on the expert's performance rather than on the ethics of practice, forensic psychiatrists have an unrelenting concern for ethical issues. In addition to the ethical problems of dishonesty, which can sometimes be ascertained from examining the content of testimony or reports, there are more subtle ethical problems that arise in the practice of forensic psychiatry. Some of these relate to the manner in which the practitioner becomes involved in a case and works with attorneys. Others are determined by the manner in which the expert deals with the personal biases and motivation.

Still others arise when the expert interviews and evaluates plaintiffs or defendants involved in a litigation process. A series of questions dealing with ethical issues have been included on the peer review form. It should be clear that the negative responses to these questions only raise a possibility of unethical conduct. Given the limited information available in peer review, the purpose here is primarily educative, that is, to help the reviewer think about ethical issues.

D. Who Should Serve as Peer Reviewers

After the Supreme Court's decision in *Daubert vs. Merrell Dow Pharmaceuticals* (8), legal commentators have begun to rethink the question of what scientific evidence is, or should be, admissible in court (9-11). *Federal Rule of Evidence 702* indicates that expert witnesses, unlike lay witnesses, have access to relevant information not possessed by the trier of fact, and enjoy the authority to give opinion evidence. These two qualities suggest distinct functions for the psychiatric expert across the following four different roles:

1. *The psychiatrist as expert on scientific knowledge.*—The psychiatrist may be asked to present an opinion about scientific data, methodology, and the limitations of either, with regard to a particular data set or in a general field of clinical or scientific inquiry.
2. *The psychiatrist as expert on medical practice.*—The psychiatric expert may be asked to present an opinion on specialized knowledge which may not necessarily be scientific but which is related to the everyday practice of psychiatric medicine.
3. *The psychiatrist as expert on the mental condition and behavior of particular individuals.*—One of the key roles of the forensic psychiatrist is to be an expert opinion concerning the psychological questioning of particular persons at some times in the past, present, or future. To do this the expert must be capable of translating research knowledge and the intricacies of clinical judgment for the lay audience. Evaluation of that translation requires intimate knowledge of the legal questions at issue and of the different interest of advocates and triers of fact. Further, it requires an understanding of the persuasive power of different styles of presentation.
4. *The psychiatrist as expert advisor.*—The psychiatrist can be viewed as advisor when advice in pre-trial phase may lead to resolution of a case without a trial. The psychiatrist may also provide advice to companies or other organizations about the possible medico-legal consequences of certain practices or policies. The role presupposes a level of interdisciplinary acumen in psychiatry, law, and social policy.

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The above considerations suggest that a pool of participants available for service on peer review committees should include psychiatrists who are proficient in these various roles. Attorneys may be essential members of a peer review committee.

When the committee is viewed as standing rather than an ad hoc committee, it is essential that it be of adequate size with sufficient expertise to review a wide variety of cases. The standing committee should have the ability to invite ad hoc members, including non-psychiatrists, who could bring a special expertise to an individual case, particularly when the case involves a technical or scientific question and the committee members do not possess such expertise.

The pool of potential reviewers should also include psychiatrists trained in various clinical sub-specialties including adult, adolescent and child, and geriatric psychiatry. At least some members of the committee should have had sufficient experience in forensic psychiatry to be familiar with the wide variety of forensic issues that will be brought to the committee's attention. Ideally, however, the committee should not be composed solely of forensic psychiatrists who may not have the necessary scientific or clinical expertise to properly assess an expert's work. Finally, some of the standing psychiatric members of the committee must be experienced clinicians, capable of evaluating the quality of psychiatric reports or the descriptions of patients in court testimony. Given the significant jurisdictional differences in legal standards and procedures, it may be occasionally necessary to have an ad hoc committee member from the same jurisdiction as the case brought before the committee. Worker's compensation regulations, for example, vary from state to state, and testimony from a given jurisdiction may not be fully understood by reviewers from another jurisdiction. Particularly in reviewing the work of practitioners new to the field of forensic psychiatry, it may also be useful to include as committee members those who have served as faculty in forensic psychiatric training programs.

E. Conflict of Interest and Confidentiality

The process of peer review, at times, creates information, which, if made public, could influence the expert's reputation and participation in subsequent cases. This information could also, in theory, be used by peer reviewers in a manner that benefits them, but is detrimental to the expert who is reviewed. Conflicts between reviewers and the reviewed expert might, in some instances eventually lead to litigation.

The task force report proposes some guidelines, which if followed, should minimize the possibility of conflict or litigation. It should be clear, however, that we have limited

experience with this type of peer review, and that depending on the jurisdiction, conflicts between reviewers and reviewed could lead to litigation. It is important that review committees be aware of this possibility and try to be familiar with relevant state and federal law. In addition to relying on an attorney who may be a member of the review committee should also have access to other sources of legal advice such as state attorneys general or counsel for professional organizations and local hospitals.

1. Confidentiality of the Process

In a voluntary peer review format, the only relevant data for the expert is how peers have judged the expert's performance. The only goal is educational, and there is no need to share the results with anyone else. The peer review committee should determine at the onset of a particular peer review or peer reviews how it wished its work to be subsequently used, if at all, by the expert. If consistent with state law, the committee may wish to contract with the expert that no further use be made of the peer review, or even that the fact of its existence may not be subsequently disclosed. The committee may decide to delete all identifying information from completed peer reviews or it may, in fact, decide to discard all previously reviewed documents from its files to further preserve the expert's or the committee's privacy.

Confidentiality is a critical element in peer review. The extent of confidentiality will necessarily vary with the type, sponsor, and format of the review. One approach is to delete as much identifying information as possible from all peer review materials. The fact that one participates in a peer review as a reviewer should not be subsequently disclosed to anyone. Only the expert reviewed has the right to reveal the fact of having been reviewed to others. Discussing the case outside of the review structure might result in loss of immunity for the reviewers and compromise the expert's right to confidentiality. No document submitted for peer review should be shown or discussed with others. Reviewers should not retain notes, records or files of the reviewed case or expert. They should return all documents and tapes to the committee chair or other designated persons. The fact that an expert peer reviewed a case should not be subsequently disclosed in any legal or administrative proceedings without proper consent or court order. It may be desirable for participants to sign a written agreement that spells out the legal and ethical confidentiality rules of the peer review process.

2. Conflict of Interest

The peer review committee should articulate a policy dealing with situations in which a member of the committee could subsequently disclose or benefit from the

knowledge of a review. These may be difficult issues when there are limited number of experts in a given community who could be involved in a particular case. The committee should be sensitive to issues such as competition, economic survival of experts in a community, and anti-trust. These issues are especially important in a system of mandatory peer review, but also apply to some degree in voluntary peer review.

Committee members should avoid participating in a particular review if they have any professional or business relationship with the expert or have any knowledge of the expert, which might bias their judgement. Peer reviewers should also recuse themselves from participating in the process when they have previously been involved in the evaluation, treatment or litigation of the case presented to the committee by the expert. At each meeting of the committee, the chair can ask each member of the committee if any conflicts of interest exist with any case or expert under review and thus exclude any member from discussion of any case in which such conflict exists. Each peer reviewer should exercise discretion as to whether or not to participate in a particular peer review.

After participating in peer review of an expert, reviewers may recuse themselves from participating in any subsequent litigation or proceeding which involves that expert when the peer reviewers believe that their participation will be unethical or unfair to the litigants.

F. Who Will Sponsor Voluntary Peer Review?

Whether voluntary or mandatory, peer review could serve the educational, certification, membership, licensure, or disciplinary needs of a wide variety of organizations including:

- American Psychiatric Association, National
- American Psychiatric Association, District Branch or Local Chapter
- American Academy of Psychiatry and the Law, National
- American Academy of Psychiatry and the Law, Local Chapters
- Forensic Psychiatry Fellowships
- American Medical Association, National
- State Medical Societies
- University Departments of Psychiatry
- Hospital Medical Staffs
- State Medical Licensure Boards
- Sub-specialty Board, Forensic Psychiatry
- Private, Fee for Service Groups

These organizations can set aside time at local or national meetings for peer review committees to meet. Initially, there would be no cost to the experts seeking peer review, and committee members would serve on a pro bono basis. After a while, however, the organization might arrange for the expert to pay a fee, some of which might be

used to reimburse examiners for their time and effort, as well as the administrative cost of the peer review. The sponsors might also offer a certificate or CME credit to participating experts and examiners to encourage participation.

G. How Should Committee Members Be Trained?

Each sponsor of the peer review program should provide resources to train its committee members to do peer review. This could include providing articles and reports from the existing literature, and developing a peer review manual. Committees might wish to develop videotapes to train committee members. These might include tapes of an actual or mock peer review session. Once committees have been established, the major aspect of training would be informal. New members would learn by observing more experienced members perform peer review, or by undergoing formal training themselves.

H. How Should the Peer Review Be Conducted?

1. What Are the Duties of the Chair of a Review Committee?

Each review committee should appoint a chair whose obligations are to communicate with the expert who wishes to be reviewed, determine what committee members will be involved in a particular review, supervise distribution and then return of the expert's documents, facilitate all discussions, and determine how feedback will be provided to the expert. A major responsibility of the chair should be to ascertain that the case to be reviewed is no longer in litigation and that all documents are in the public domain, or have been cleared by the litigants' attorneys for the purpose of peer review. The chair must also ascertain that each member of the committee is free of conflicts of interest with regard to reviewing a particular expert. The chair assumes ultimate responsibility for collecting all material reviewed and assuring that it is either destroyed or kept in a safe place. Finally, the chair is responsible for all informed consent issues with regard to peer review.

2. Must the Subject Being Evaluated Be Present?

The Task Force considers it almost essential that the expert be present at least for part of the peer review meeting itself. It is possible, of course, to obtain a peer review by correspondence when there are geographical or other limitations in arranging a peer review meeting in a

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centralized location. It is likely, however, that the value of such a peer review will be relatively limited in comparison to having a meeting with the subject present.

3. Should the Report to the Expert Be Oral or Written?

The nature and purpose of the peer review will determine whether or not the report to the subject will be oral, written, or both. A peer review by correspondence will necessarily result in a written peer review to the subject. When there is a peer review committee meeting, however, a written peer review report following an oral peer review report could serve to summarize the committee's feedback to the expert and focus the expert on future areas of self-study. Time limitations of the committee meeting may also make it necessary to have a written peer review report to the expert.

Related to the decision about the format of the report to the expert is the type and extent, if any, of the committee's documentation of the peer review. In a voluntary peer review, the committee may decide not to have any written documentation of the peer review meeting at all, except to justify any administrative expenses.

I. What Issues Will Arise for Mandatory Peer Review?

While this report contemplates only voluntary peer review at the present time, some have expressed interest in a system of mandatory peer review. Mandatory review may be initiated by a variety of agencies, including professional organizations, hospitals and universities, forensic training programs and licensing boards. Peer Review could be used as one criterion for granting certification or status or to remove or deny access to certification or status. Presumably, the focus of mandatory review would be whether the expert's performance was unethical or fell below a defined standard of adequacy.

Mandatory review significantly changes obligations of the review committee. The responsibility of the committee shifts from a sole concern with the needs of the reviewed person to additional concern with the needs of the agency that requested review. The sponsoring agency must assure that the expert has complete familiarity with the purpose of the review process and knows how information gained in the process will be used. Possible harms to the reviewed person and the limits of confidentiality must also be clearly understood by the expert.

Some procedural issues, which would arise with the mandatory review, include how referrals would be accepted, what time frame would be allowed between the initiation of the review and the report to an agency, and how the report would be presented. It might also be

necessary to devise procedures that allow the expert to modify, disagree with, or appeal the committee's report.

New issues of liability and immunity would be raised by a mandatory peer review. In a regulatory model of peer review, the committee is exposed to a greater threat of liability for negligence, for having failed to properly review the expert who is negligent in subsequent forensic work. The committee may wish to develop a written contract that makes it clear that the peer review committee is not the supervisor of the expert. In addition, the organizational sponsor of the peer reviews should determine whether any liability insurance coverage it may have would cover peer review activity. Clearly, the committee will need to consider methods of documenting its activities and decisions.

It would be expected that some dissatisfied experts would seek legal redress against the peer review committee. State peer review immunity statutes may or may not protect the peer review committee in a given case. There will be obvious jurisdiction problems given that the committee members, the expert being reviewed and even the case under review may all come from different locales. Written policy statements would have to be drafted in consultation with knowledgeable attorneys to anticipate such legal contingencies.

Conclusion

The Task Force has attempted to raise and briefly discuss some of the any substantive and procedural issues involved in the peer review of expert psychiatric testimony, especially on a voluntary basis solely for educational and self-improvement purposes. While organizational sponsors, and peer review committees, should find this information to be helpful, no doubt each committee once established, will encounter additional problems not considered here. Each sponsor and committee will additionally need to decide how to resolve the many difficult issues and conflicts raised in this report, preferably in advance of conducting peer review. Sponsors and committees should identify appropriate psychiatric and legal consultants to assist with these difficult decisions.

This report has focused upon voluntary peer, rather than mandatory peer review, which could be used for sanctioning or credentialing purposes. Considerably more experience with voluntary peer review is needed before any consensus can be developed about the threshold standards or norms for psychiatric testimony, which is a precondition for conducting mandatory peer reviews.

Recent experience with peer review of expert psychiatric testimony indicates the greatest barrier to peer review is professional acceptance of the process. Organizational sponsors and individuals need to devote

resources to attracting psychiatrists willing to be peer reviewed, and to develop the necessary incentives to promote this important activity.

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5. Melton GB: Expert opinions: Not for cosmic understanding, In B.D. Sales & G.R. VandenBos (eds.), *Psychology in Litigation and Legislation* (pp.55-100). American Psychological Association, Washington, D.C., 1994.
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7. *Bulletin of the American Academy of Psychiatry and the Law* 20:343-352, 1992.
8. 113 S.Ct. 2785 (1993)
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11. 108 *Harvard Law Review*, number 7, 1995

APA Official Actions

PEER REVIEW FORM EVALUATION OF EXPERT TESTIMONY

Name of Expert:

Case:

Type of Case:

Expert hired by:

Material reviewed: trial transcript, deposition, report, videotape, other

Reviewer: ID _____ **Date reviewed:** _____

Please circle each of the following ratings and provide detailed comments.

A. CONTENT

Credentials/expertise	Poor	Fair	Good	Excellent	N/A
Comments: (strengths, weaknesses, needs improvement)					

Database/information sources	Poor	Fair	Good	Excellent	N/A
Comments: (strengths, weaknesses, needs improvement)					

Support for opinions	Poor	Fair	Good	Excellent	N/A
Comments: (strengths, weaknesses, needs improvement)					

Understanding of medical-legal issues	Poor	Fair	Good	Excellent	N/A
Comments: (strengths, weaknesses, needs improvement)					

Scientific accuracy	Poor	Fair	Good	Excellent	N/A
Comments: (strengths, weaknesses, needs improvement)					

Reasonableness of conclusions	Poor	Fair	Good	Excellent	N/A
Comments: (strengths, weaknesses, needs improvement)					

B. PROCESS

Clarity	Poor	Fair	Good	Excellent	N/A
Comments: (strengths, weaknesses, needs improvement)					

Use of Jargon	Poor	Fair	Good	Excellent	N/A
Comments: (strengths, weaknesses, needs improvement)					

Credibility	Poor	Fair	Good	Excellent	N/A
Comments: (strengths, weaknesses, needs improvement)					

	Poor	Fair	Good	Excellent	N/A
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PSYCHIATRIC VIOLENCE RISK ASSESSMENT

Organization

Comments: (strengths, weaknesses, needs improvement)

Demeanor

Comments: (strengths, weaknesses, needs improvement)

Poor Fair Good Excellent N/A

Collaboration with attorney

Comments: (strengths, weaknesses, needs improvement)

Poor Fair Good Excellent N/A

Attitude towards opposing experts

Comments: (strengths, weaknesses, needs improvement)

Poor Fair Good Excellent N/A

Understanding of role

Comments: (strengths, weaknesses, needs improvement)

Poor Fair Good Excellent N/A

Objectivity

Comments: (strengths, weaknesses, needs improvement)

Poor Fair Good Excellent N/A

Defensiveness

Comments: (strengths, weaknesses, needs improvement)

Poor Fair Good Excellent N/A

Performance under stress

Comments: (strengths, weaknesses, needs improvement)

Poor Fair Good Excellent N/A

Changes to ratings following the committee meeting: