

# The Expert Witness, the Adversary System, and the Voice of Reason: Reconciling Impartiality and Advocacy

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The legal system and the profession of psychology have differing expectations that cause psychologists who serve as expert witnesses to face fundamental conflicts. The rules of evidence demand that experts assist the trier of fact, the adversary system demands that experts serve the parties who retain them, and the ethical codes and guidelines demand that experts impartially assist the court, only in their area of competence. Psychological experts are left to sort out the competing demands, as well as their potential liability, while recognizing the importance of being persuasive. This article addresses the competing tensions expert witnesses face and offers an approach to reconciling these tensions that relies on competence, relevance, perspective, balance, and candor.

The ethical codes that guide psychologists' behavior in the courtroom seek to ensure that psychologists are impartial providers of reliable information to the courts in their field of competence. The rules of evidence that determine the admission of expert testimony seek to ensure that expert testimony assists the judge or jury in its decision making. The adversary system, and more particularly the attorneys who shape its operation, demand that the experts whom they retain assist them in their obligation to provide diligent representation to their clients. Partisanship is often an implicit condition of expert employment, and it may also result unintentionally from empathy or identification with a party or litigation team loyalty.

Although the evidentiary and ethical codes are both intended to result in the presentation of reliable evidence that assists in ascertaining truth, they exert competing tensions when applied within the adversary system. In perhaps the most common of such conflicts, experts complain that they are pressured by the attorneys who retain them to support the attorney's advocacy by testifying

beyond their professional standards. The courts provide little direct assistance to experts desiring to resist this pressure and rarely consider ethical standards in judging the admissibility of expert testimony (Shuman & Greenberg, 1998). Even when a judge overrules an objection grounded in the violation of an ethical rule and permits experts to testify, that does not exempt experts from professional discipline for behaving in a judicially acceptable but an ethically problematic manner. Nor does a judge's failure to exclude expert testimony exempt experts from malpractice suits by parties harmed by ethically problematic testimony. These disparities leave experts vulnerable to ethical sanctions and malpractice actions, even when the behavior did not result in the court's exclusion of the problematic testimony.

Experts perceive that they are often trapped between discordant ethical and legal concerns. Consequentially, experts may perceive that they must choose between integrity and advocacy. This article explains why pitting integrity against advocacy is a false choice. It reviews the possible malpractice and ethical complaint consequences that experts may face for compromising integrity and describes an alternative, integrated approach to advocacy that permits experts to be concurrently ethical, persuasive, impartial, and helpful.

## The Rules of the Courts and the Professions

The legal system has adopted a series of rules that govern the qualifications, reliability, basis, and form of expert testimony. These rules impose preconditions for the admissibility of expert testimony, superimposed on civil and criminal liability schemes designed to deter testimony that frustrates the interests of the legal system. The core legal rule that governs the admissibility of expert testimony in most jurisdictions in the United States is expressed in Federal Rule of Evidence (Fed. R. Evid.) 702 and its state equivalents. The federal rule provides that "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue [italics added], a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion

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or otherwise.” It is this language that cases like *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) have interpreted in order to consider the evidentiary reliability proffered experts must achieve to be admitted. Thus, in the first instance, the admissibility of expert testimony turns on the assistance that experts may provide to the judge or jury.

Similarly, the professional system of regulation of the conduct of psychologists, as well as psychiatrists and other mental health professionals, creates a detailed system of ethical norms that governs their behavior as experts. These ethical norms govern the methods and procedures to be used in providing a forensic opinion to the legal system. The core ethical principle for psychological expert witnesses requires that “psychologists refrain from taking on a professional role when personal, scientific, professional, legal, financial, or other interests or relationships could reasonably be expected to (1) impair their objectivity, competence, or effectiveness in performing their functions as psychologists” (American Psychological Association [APA], 2002, Standard 3.06). This principle is embellished in the Specialty Guidelines for Forensic Psychologists (APA, Committee on Ethical Guidelines for Forensic Psychologists, 1991, Section VII B): “Forensic psychologists realize that their public role as ‘expert to the court’ or as ‘expert representing the profession’ confers upon them a *special responsibility for fairness and accuracy* [italics added].”

The legal rules and ethical norms express the compatible and comparable intent of encouraging expert witness reliability. However, the evidentiary rules are applied through the adversary system. This system delegates to the parties the decision to invoke or waive the rules of evidence and to judges the authority to admit challenged evidence, leaving to the jury the weight to afford it. Thus, if a party chooses not to object to the testimony of an unqualified witness, neither the witness nor the judge is ordinarily constrained to do so. Unlike the legal system’s rules, however, the application of ethical norms is not bounded by the adversary system. For example, at least when it is possible to do so, “psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions” (APA, 2002, Standard 9.01[b]). The decision of an opposing attorney not to object to an unfounded opinion in the absence of an examination waives the legal objection but not the malpractice liability of the psychologist or the ethical complaint for the psychologist doing so. Neither does the judge’s overruling such an objection.

Ethical guides (e.g., the Ethical Guidelines for the Practice of Forensic Psychiatry [American Academy of Psychiatry and the Law, 1996]; the Ethical Principles of Psychologists and Code of Conduct [APA, 2002]) suggest that forensic experts approach their role in a neutral, impartial manner, even when they are retained by one party. Psychologists may refuse the request of the attorneys who retained them to offer unfounded opinions. However, experts who do not respond to the adversarial needs of the parties who retain them risk their ire, risk not being retained again, and risk developing a reputation for uncooperativeness in the legal community. Experts face other risks if they succumb to the pressure or temptation of advocacy and go beyond what is adequately supported. Although a judge may rule that such overzealous testimony is admissible, experts may nevertheless be subject to civil liability and ethical complaints. Expert witnesses who offer inadequately

reliable testimony may find themselves in a precarious legal and ethical position.

### The Roles That Experts Play

Tension in the roles that experts are expected to play is fundamental to the way in which experts are used in the legal system. Yet their use has become routine and, in some cases, almost unavoidable: “Expert testimony often adds an aura of reliability to a party’s theories and claims. Many cases could not be tried without expert witnesses to testify as to the applicable standard of care, the reconstruction of accidents, or the value of a plaintiff’s damages” (Richmond, 2000, p. 909).

It is often assumed that the major role problem presented by expert testimony is the conflict between serving therapeutic and forensic functions for the same client (Greenberg & Shuman, 1997; Heilbrun, 1995; Simon, 1995; Strasburger et al., 1997). It is easy to ignore the problems of intrarole conflicts and assume that each role is clear and manageable in its own right. However, the forensic expert is beholden to multiple masters. Integrating the demands of these masters is inherently complex. This requires reconciliation of a system of mental health professional regulation that demands impartiality and a system of legal dispute resolution that demands partisanship.

Attorneys are ethically required to be diligent advocates for their clients. Implicitly, all aspects of an attorney’s conduct, including the presentation of experts, should further that role of diligent advocacy rather than disinterested neutrality. Most attorneys “would go into a lawsuit with an objective uncommitted independent expert about as willingly as [they] would occupy a foxhole with a couple of noncombatant soldiers” (Jensen, 1993, p. 192).

This concern is all the more powerful for those who work full time as forensic experts. Experts are aware that they are retained to assist in partisan advocacy that their ethics appear to prohibit. Experts are also aware that those who criticize the use of partisan experts complain that, for the right price, it is almost always possible to retain an expert to testify favorably in a case, regardless of the consensus of professional opinion on an issue.

Is there a role dictated by the “voice of reason” for the retained expert who responds to the demands of the adversary system yet still fulfills the expert’s obligations to the court to be neutral? How can a retained testifying expert, operating within the constraints of these tensions, satisfy the adversarial imperatives, avoid malpractice liability, provide testimony that meets the highest standards of the profession, and be regularly employed?

### Licensure and Ethical Jeopardy

Psychologists’ behavior while providing expert testimony is governed by their professional ethical rules and guidelines. Violations of these rules and guidelines may result in exclusion of their testimony or a breach of contract or malpractice action (*Murphy v. A. A. Mathews*, 1992). However, experts are often granted immunity from civil claims for their conduct as experts. Nonetheless, no state extends that immunity to proceedings before state licensing boards or professional ethics committees (*Budwin v. American Psychological Association*, 1994). In two cases of first impression, Washington and Pennsylvania courts declined to extend immunity to ethical complaints lodged with state licensing

boards for the actions of health care professionals while serving as expert witnesses. The Washington Supreme Court refused to extend the broad grant of immunity it recognized for expert witnesses from civil liability to disciplinary proceedings (*Deatherage v. Examining Board of Psychology*, 1997). The court reasoned that the threat of professional discipline is an important check on the conduct of professionals who are otherwise immune from civil liability. In *Huhta v. State Board of Medicine* (1998), a Pennsylvania appellate court also held that immunity from civil liability for expert witnesses is not a defense in disciplinary proceedings before the State Board of Medicine because it would hamper the licensing board's fulfilling its responsibility to ensure the competence and fitness of physicians to practice medicine (Trimmer, 1999).

The grant of immunity from civil liability while retaining liability for professional disciplinary actions leaves experts subject to substantial risk. The necessity of defending oneself before a licensing board or ethics committee carries dire consequences for experts that are similar to those involved in the defense of a civil suit. Prevailing in either forum may nonetheless leave the expert's reputation tainted. Experts can and should carry insurance against a licensing board complaint in addition to insurance against a civil claim for damages arising out of their forensic activities. However, the economic costs of legal and professional sanctions are borne by the licensee. Lost income as the result of the suspension or revocation of a license or the harm to reputation suffered with a tort malpractice judgment remains a cost to be borne by the professional.

### Tort Jeopardy

Not long ago expert witnesses were considered to be friends of the court, people whose willingness to take time out of their busy professional lives and participate in the judicial process entitled them to absolute immunity from civil liability for anything they said on the witness stand. "Lawsuits against so-called friendly experts, while still relatively rare, are multiplying. And those efforts have been meeting with increasing success" (Hansen, 2000, p. 17). The reasons for this increase parallel a host of other changes in the legal arena: In part, greater concern with the economic bottom line has encouraged litigants not to accept litigation losses as unavoidable; in part, a failure of long-term loyalties and alliances in legal and business communities have spilled over into litigant-expert relationships; in part, legal recognition of more claims for mental and emotional harm have increased the number of cases in which expert psychological and psychiatric testimony is presented; and, in part, an influx of forensically untrained professionals seeking to supplement falling incomes has resulted in significant variations in the quality of expert testimony.

Most recent civil claims against experts have been grounded in negligence. Parties retain "friendly" experts who may consult and testify or who may only consult with but not testify. Much of the upsurge in recent negligence claims against experts has been against friendly experts (i.e., claims by the parties who retained the experts) who provided consultation or testimony. In the case of retained consulting experts, some courts have had no difficulty recognizing that experts owe a duty of care to the parties who retain them (*Mattco Forge v. Arthur Young & Co.*, 1997; *Murphy v. A. A. Mathews*, 1992).

### Beyond Competency: Impartiality as the Best Advocacy

Expert witnesses face evidentiary demands imposed by courts, ethical demands imposed by professional licensing agencies, liability demands imposed by disgruntled litigants, and economic demands imposed by the attorneys who employ them. How should experts respond to these demands, which seem to ask them to play both neutral and partisan roles? Our proposal, *impartiality as the best advocacy*, does not ask experts to choose between these roles but offers guidance on how to fulfill both roles simultaneously. The crucial assumption that guides this proposal is that an expert's credibility is an essential component of being an effective advocate and that credibility derives from the expert's impartiality. An expert's absence of impartiality is fatal not only for its impact on neutrality but also for its impact on advocacy.

In the sections that follow, we address the question of how to reconcile these demands. Our message is that properly understood, these different forces can be harmonized to arrive at a consistent set of behaviors to guide the expert's behavior. We suggest the application of five principles to integrate these demands: competence, relevance, perspective, balance, and candor. Our principles are not an attempt to supplant or modify the Ethical Principles of Psychologists and Code of Conduct or the Specialty Guidelines for Forensic Psychologists. We begin where they end.

### Competence

The application of the Ethical Principles of Psychologists and Code of Conduct (APA, 2002) and the Specialty Guidelines for Forensic Psychologists (APA, 1991) in a world that seems hostile to them emphasizes what we regard as their core concern: "Forensic psychologists [should] provide services only in areas of psychology in which they have specialized knowledge, skill, experience, and education" (APA, 1991, p. 658). Unlike the clinical setting in which the psychologist's competence may be an issue that forms a part of the process of informed consent, forensic psychological services are imposed on individuals who do not necessarily consent or accede to the psychologist's competence. The competence of psychologists to provide forensic services is issue specific and contextual. Experts are pressured by advocates to offer opinions beyond the bounds of their competence. The tensions of the context, however, are never a basis for experts to offer opinions on subjects about which they are not competent. For example, notwithstanding the tensions that exist in child sexual abuse prosecutions, no expert should offer an opinion that abuse did occur because of the presence of behavioral indicators or that it did not occur because of the presence of suggestive questioning of the child. The state of the knowledge that would serve as the basis for such professional expertise is such that it does not provide answers to either of these questions to an adequate degree of certainty.

Experts should first identify each legal question on which their opinion is being sought and then determine if and how their competence permits them to offer an expert opinion to assist in the resolution of these legal questions. This may entail an initial conversation with the retaining attorney about the issues on which they might testify, followed up with a retaining letter from the attorney documenting the issues that the attorney anticipates will be addressed by the forensic examination. As the research or

examination proceeds, the task of experts is to anticipate, as much as possible, the opinions about which they are likely to offer testimony and to identify all of the evidence that is relevant to those opinions.

### Relevance

The rules of evidence define relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence” (Fed. R. Evid. 401). We speak here of a narrower concept of relevance to the opinion that the expert has been asked to address that is more tailored to Rule 705, which addresses the disclosure of the “facts or data underlying expert opinion” (Fed. R. Evid. 705). This principle applies to any evidence that has any tendency to add or subtract weight from the expert’s opinion.

When testifying, experts should attempt to disclose to the parties all information relevant to their proffered opinion testimony on those questions, even when the issues change during the course of trial. Conversely, although they must answer all questions asked fully and truthfully, we maintain that experts have no obligation to attempt to disclose information that is not relevant to the issues questioned, whether that information or those opinions might be relevant to other legal issues in the case or not. We suggest that this careful selection and omission of opinion testimony by the attorney and the retained expert is both a legitimate and an effective means of advocacy. Although experts may be compelled by the court to disclose nonprivileged information that is relevant to the case whether or not they were initially requested to address that issue, we maintain that to integrate the role of neutrality and advocacy, the expert’s unilateral obligation of disclosure only applies to information relevant to issues on which the expert’s opinions have been sought.

The obligation of the retained expert to the party who retained the expert provides the starkest contrast between the demands of impartiality and partisanship. The obligation of the witness’ oath to tell the truth, the whole truth, and nothing but the truth does not obligate the expert to offer opinions about which the expert is not asked at trial. Consider a fairly common question that arises with retained experts: May a retained testifying expert advise an attorney how to examine the expert to avoid disclosure of information that casts a negative light on the client/party? Certainly a litigant will appreciate being informed before the trial that “if you ask me X, this is how I would answer. Of course if you asked the question somewhat differently, I would not answer it in that fashion.” The retaining attorney may be more likely to retain the expert in the future and be less likely to sue or file an ethics complaint if provided such an advance warning (see *Panitz v. Behrend*, 1993).

Applying the principle of relevance to this situation, we suggest that the retained expert may not participate with the retaining attorney in efforts to shield evidence that is relevant to the expert’s opinion. It is, however, appropriate for experts to participate with the attorney in shielding information that is not relevant to the expert’s opinion. For example, if the expert is called to testify in a personal injury case solely on the issue of damages, the expert may not shield information that bears on the expert’s opinion about damages. In the course of the examination in which the expert has also acquired information about a breach of the standard of care,

we suggest there is no limitation on the expert’s suggesting that a question be rephrased to avoid disclosure of information that is not relevant to the expert’s opinion on damages. Of course, if the expert is asked about information that the expert considers irrelevant to the opinion being offered but the court concludes is relevant and not privileged, the expert must provide all information that is relevant to the opinion.

Consider the implications of this approach in terms of the various roles of the expert and the tensions that the expert must face. In terms of the risk of a malpractice complaint, an ethics complaint, or future retention by this attorney, assisting in avoiding the disclosure of information that is irrelevant furthers the interest of the attorney and the expert. It also furthers the expert’s neutral role. We have discovered no reported opinions in which an expert was found liable or disciplined for disclosing nonprivileged information relevant to the expert’s opinion.

The decision about how experts should behave is based on a neutral principle that turns on the expert’s opinion about an issue, not on who will benefit from it. It does not compromise advocacy through neutrality, nor does it compromise neutrality through advocacy. Honesty about information relevant to the expert’s opinion is an effective tool for attorney advocacy. It casts the expert in a more neutral role in the eyes of the fact finder, giving experts greater credibility; it forces the attorney to address the disclosure of information that will invariably come out anyway; and it serves the interests of the court in helping to achieve accurate fact finding.

### Perspective

To integrate neutrality and advocacy effectively, experts have an obligation to test their opinions on the issues they have been asked to address from the perspective of the parties’ competing versions of the case, without insulation from opposing views. Any case has at least two conflicting perspectives on some relevant question or it would have been resolved. To be effective, experts must require the attorneys who retain them to provide, at minimum, the pleadings and legal memorandums describing the competing versions of the case, as well as all reports of other experts. Balancing the demands of lawyers, litigants, judges, and licensing boards requires that forensic experts maintain a realistic appreciation of the adversarial context in which forensic examinations occur. This realistic perspective requires experts to identify the evidence that might support or refute each party’s perspective. An expert witness who is uninformed of the parties’ differing perspectives can hardly be expected to be a credible witness.

Consider a wrongful termination case in which the plaintiff has retained an expert to assess damages. The expert is made aware that the plaintiff experienced an episode of depression that was treated with psychotherapy and medication 5 years earlier. The plaintiff’s claim is that the clinical depression from which she now suffers was caused by the recent job termination. In contrast, the defendant’s perspective is that if the defendant caused the plaintiff any harm, it was minimal. Although no longer in treatment, the plaintiff may still be depressed at the time of termination. The plaintiff’s expert has violated the principle of perspective if, in assessing the cause of the current depression, the expert only considers that the plaintiff was employed immediately prior to the time of the termination. The plaintiff’s expert must acknowledge

that people are capable of employment while being depressed to be credible regarding any exacerbation in the impairment caused by the defendant's actions.

Consider the implications of this approach for the competing tensions on the expert. Maintaining perspective plays an important role in the presentation of testimony that is candid and forthright, furthering the court's interest in the fact-finding process. Although some attorneys may at first balk at the expert's attempt to maintain perspective, it not only assists in presenting more persuasive expert testimony but also forces the attorney to consider plausible alternate theories of the case. This perspective also reduces the risk of tort and ethical complaints against the expert, as well as increases prospects for future retention, because testimony that accounts for competing perspectives is more persuasive and assists in the attorney's advocacy.

### *Balance*

Having identified each perspective, the expert has an obligation to assign a fair weight to each, not to engage in confirmatory or hindsight bias, and not to allow the inherent pressures of the situation to influence this decision making. The expert's approach to the litigants' differing perspectives on the relevance issue is critical to integrating neutrality and advocacy effectively. Experts who fail to balance the parties' perspectives fairly are unlikely to help the fact finder reach accurate conclusions on the issues they have been asked to address, and the fact finder is unlikely to perceive them as credible. Looking at issues disproportionately from the perspective of the litigant who hired the expert violates this principle because this absence of balance renders the expert an ineffective advocate for whatever opinions the expert reaches.

Experts are obligated to weigh all perspectives fairly. By this we mean that they must consider the rival hypotheses in an evenhanded manner. Experts and attorneys are familiar with the tendency to invoke a bunker mentality in which their side's perspective is given greater weight and the other side's perspective is minimized. Failing to provide appropriate weight to the perspective of each litigant violates this principle.

One factor that threatens the expert's ability to balance all litigants' perspectives fairly is the psychologist's role conflicts. In addition, these conflicts may increase the risk of a complaint by a disgruntled patient-litigant. A psychologist who develops a therapeutic alliance with a patient is less likely to be able to consider fairly a perspective that rejects the accuracy of the facts that the patient and psychologist developed in the course of their therapeutic work together. Additionally, the therapist is unlikely to have unfettered access to all of the parties' perspectives and to be able to balance them fairly (Greenberg & Shuman, 1997).

In a child custody case in which one parent seeks a divorce after discovering that the other parent is bisexual, there is a risk that the expert may focus unduly on sexual orientation and fail to consider adequately other issues related to parenting. Acting in a balanced manner in this situation not only assists the expert in being more persuasive and more credible, and in gaining the trust of the fact finder, it also encourages the party who retained the expert to address these issues more fully in its presentation. Drawing attention to these issues during the pretrial phase of the case also avoids the surprises and disappointments that often trigger tort and ethical

complaints against the expert or that result in limiting the expert's future forensic opportunities.

### *Candor*

By *candor* we refer to the forthrightness with which psychological experts present their analysis. Experts who selectively disclose relevant information about an opinion to aid or disadvantage a party frustrate the search for accuracy and impair their own credibility. Thus, having identified the issues they have been asked to address and having considered them fairly from the perspective of all parties, experts have an obligation to present all perspectives considered candidly and explain the weight assigned to each in presenting their findings.

In our discussions of the first four principles, we considered the way in which experts should go about reaching an opinion. But in any legal proceeding there is much filtering of the facts and opinions. Aside from the well-recognized phenomenon of "wood shedding," or, more politely phrased, "negotiating opinions" (Gutheil, 2001), attorneys formulate questions to which experts have no legal right to object or demand that supplemental questions be asked. Nonetheless, experts have certain latitude in responding to the questioning process (Brodsky, 1991). We contend that experts should, to the maximum extent provided by law, candidly present the results of their fact finding and analysis, as described previously. The role of the expert is not to deliver favorable testimony as a matter of contract. The obligation is to render services at the relevant professional standard of care (*Panitz v. Behrend*, 1993). One clear benefit of this approach is that it is exactly what courts expect of witnesses—candid and forthright testimony.

Without doubt, this principle may present the hardest case to defend to the retaining attorney in that it might appear to risk disappointment, increasing the risk of tort and ethical complaints, and reducing chances for reemployment. For many attorneys, the benefits achieved by this approach in terms of the enhanced credibility of the expert with the fact finder are consistent with the attorney's litigation strategy. For other attorneys, this candor seems a betrayal of the partisan loyalty that attorneys expect of experts. We recognize that for work with those attorneys, our suggestion may not result in harmonizing all of the competing tensions and may even conflict with the attorney's brand of advocacy. For some experts, this may require that a decision be made regarding with which attorneys they wish to work. For the attorney who demands a "combatant" as his expert, the expert may choose to seek employment elsewhere. Similarly, attorneys with a combatant style are likely to seek experts who employ a similar approach. Yet even these experts must face their ethical obligations as experts and the risk that experts failing to meet these obligations may be held accountable by their licensing board. Even in jurisdictions granting absolute immunity for expert witnessing, the complaint to a licensing board or an ethics body that an opinion was not based on adequate scientific foundation looms large for experts who have shaded their testimony in a partisan manner.

### Conclusion

What is the value of our principles in resolving these potential conflicts? Although the APA Ethics Code addresses forensic is-

sues and describes ethical standards that govern the behavior of psychologists when testifying, our principles explain how psychologists can integrate the idealistic Ethics Code in the rough-and-tumble adversary system. The APA Ethics Code and the Specialty Guidelines for Forensic Psychologists appear to direct psychologists to a standard of behavior that is destined to collide with the reality of the judicial world. Attorneys are ethically obligated to advocate for their clients while experts are ethically obligated to examine issues objectively and advocate accordingly. Our principles reconcile these conflicts and offer psychologists a path that is both ethical and practicable to provide assistance to the courts.

To whom do these principles apply? Well-established forensic practitioners might perceive no incentive to change their methods or attitudes, and less well-established forensic practitioners may fear that adoption of these principles will prevent them from ever becoming established. A reputation for independence benefits all forensic practitioners, casting their testimony in a more persuasive framework and reducing their risk of malpractice and ethical complaints. These principles benefit both the profession of psychology and the legal system.

Even if there were no Ethics Code or similar guidelines, our principles would still express the voice of reason. Forensic experts are beholden to the judicial system, its participants, and to their profession. The principles describe how to reconcile the competing obligations experts face in a professional and effective manner.

If the testimony of mental health experts is not based on the principles of competence, relevance, perspective, balance, and candor, it is unlikely to be trustworthy. If the testimony of mental health experts is not trustworthy, it is unlikely to be beneficial to the courts, the professions, or the litigants who retain them. If the testimony of mental health experts is not trustworthy, it is unlikely to help mental health experts to shed the characterization of "hired gun."

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# Specialty Guidelines for Forensic Psychology

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American Psychological Association

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In the past 50 years forensic psychological practice has expanded dramatically. The American Psychological Association (APA) has a division devoted to matters of law and psychology (APA Division 41, the American Psychology–Law Society), a number of scientific journals devoted to interactions between psychology and the law exist (e.g., *Law and Human Behavior*; *Psychology, Public Policy, and Law*; *Behavioral Sciences & the Law*), and a number of key texts have been published and undergone multiple revisions (e.g., Grisso, 1986, 2003; Melton, Petrila, Poythress, & Slobogin, 1987, 1997, 2007; Rogers, 1988, 1997, 2008). In addition, training in forensic psychology is available in predoctoral, internship, and postdoctoral settings, and APA recognized forensic psychology as a specialty in 2001, with subsequent recertification in 2008.

Because the practice of forensic psychology differs in important ways from more traditional practice areas (Mohan, 1980) the “Specialty Guidelines for Forensic Psychologists” were developed and published in 1991 (Committee on Ethical Guidelines for Forensic Psychologists, 1991). Because of continued developments in the field in the ensuing 20 years, forensic practitioners’ ongoing need for guidance, and policy requirements of APA, the 1991 “Specialty Guidelines for Forensic Psychologists” were revised, with the intent of benefiting forensic practitioners and recipients of their services alike.

The goals of these Specialty Guidelines for Forensic Psychology (“the Guidelines”) are to improve the quality of forensic psychological services; enhance the practice and facilitate the systematic development of forensic psychology; encourage a high level of quality in professional practice; and encourage forensic practitioners to acknowledge and respect the rights of those they serve. These Guidelines are intended for use by psychologists when engaged in the practice of forensic psychology as described below and may also provide guidance on professional conduct to the legal system and other organizations and professions.

For the purposes of these Guidelines, *forensic psychology* refers to professional practice by any psychologist working within any subdiscipline of psychology (e.g., clinical, developmental, social, cognitive) when applying the scientific, technical, or specialized knowledge of psychology to the law to assist in addressing legal, contractual, and administrative matters. Application of the Guidelines does not depend on the practitioner’s typical areas of practice or expertise, but rather, on the service provided in the case at hand. These Guidelines apply in all matters in which psychologists provide expertise to judicial, administrative, and

educational systems including, but not limited to, examining or treating persons in anticipation of or subsequent to legal, contractual, or administrative proceedings; offering expert opinion about psychological issues in the form of amicus briefs or testimony to judicial, legislative, or administrative bodies; acting in an adjudicative capacity; serving as a trial consultant or otherwise offering expertise to attorneys, the courts, or others; conducting research in connection with, or in the anticipation of, litigation; or involvement in educational activities of a forensic nature.

Psychological practice is not considered forensic solely because the conduct takes place in, or the product is presented in, a tribunal or other judicial, legislative, or administrative forum. For example, when a party (such as a civilly or criminally detained individual) or another individual (such as a child whose parents are involved in divorce proceedings) is ordered into treatment with a practitioner, that treatment is not necessarily the practice of forensic psychology. In addition, psychological testimony that is solely based on the provision of psychotherapy and does not include psycholegal opinions is not ordinarily considered forensic practice.

For the purposes of these Guidelines, *forensic practitioner* refers to a psychologist when engaged in the practice of forensic psychology as described above. Such professional conduct is considered forensic from the time the practitioner reasonably expects to, agrees to, or is legally mandated to provide expertise on an explicitly psycholegal issue.

The provision of forensic services may include a wide variety of psycholegal roles and functions. For example, as

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These Specialty Guidelines for Forensic Psychology were developed by the American Psychology–Law Society (Division 41 of the American Psychological Association [APA]) and the American Academy of Forensic Psychology. They were adopted by the APA Council of Representatives on August 3, 2011.

The previous version of the Guidelines (“Specialty Guidelines for Forensic Psychologists”; Committee on Ethical Guidelines for Forensic Psychologists, 1991) was approved by the American Psychology–Law Society (Division 41 of APA) and the American Academy of Forensic Psychology in 1991. The current revision, now called the “Specialty Guidelines for Forensic Psychology” (referred to as “the Guidelines” throughout this document), replaces the 1991 “Specialty Guidelines for Forensic Psychologists.”

These guidelines are scheduled to expire August 3, 2021. After this date, users are encouraged to contact the American Psychological Association Practice Directorate to confirm that this document remains in effect.

Correspondence concerning these guidelines should be addressed to the Practice Directorate, American Psychological Association, 750 First Street, NE, Washington, DC 20002-4242.

researchers, forensic practitioners may participate in the collection and dissemination of data that are relevant to various legal issues. As advisors, forensic practitioners may provide an attorney with an informed understanding of the role that psychology can play in the case at hand. As consultants, forensic practitioners may explain the practical implications of relevant research, examination findings, and the opinions of other psycholegal experts. As examiners, forensic practitioners may assess an individual's functioning and report findings and opinions to the attorney, a legal tribunal, an employer, an insurer, or others (APA, 2010b, 2011a). As treatment providers, forensic practitioners may provide therapeutic services tailored to the issues and context of a legal proceeding. As mediators or negotiators, forensic practitioners may serve in a third-party neutral role and assist parties in resolving disputes. As arbiters, special masters, or case managers with decision-making authority, forensic practitioners may serve parties, attorneys, and the courts (APA, 2011b).

These Guidelines are informed by APA's "Ethical Principles of Psychologists and Code of Conduct" (hereinafter referred to as the EPPCC; APA, 2010a). The term *guidelines* refers to statements that suggest or recommend specific professional behavior, endeavors, or conduct for psychologists. Guidelines differ from standards in that standards are mandatory and may be accompanied by an enforcement mechanism. Guidelines are aspirational in intent. They are intended to facilitate the continued systematic development of the profession and facilitate a high level of practice by psychologists. Guidelines are not intended to be mandatory or exhaustive and may not be applicable to every professional situation. They are not definitive, and they are not intended to take precedence over the judgment of psychologists.

As such, the Guidelines are advisory in areas in which the forensic practitioner has discretion to exercise professional judgment that is not prohibited or mandated by the EPPCC or applicable law, rules, or regulations. The Guidelines neither add obligations to nor eliminate obligations from the EPPCC but provide additional guidance for psychologists. The modifiers used in the Guidelines (e.g., *reasonably*, *appropriate*, *potentially*) are included in recognition of the need for professional judgment on the part of forensic practitioners; ensure applicability across the broad range of activities conducted by forensic practitioners; and reduce the likelihood of enacting an inflexible set of guidelines that might be inapplicable as forensic practice evolves. The use of these modifiers, and the recognition of the role of professional discretion and judgment, also reflects that forensic practitioners are likely to encounter facts and circumstances not anticipated by the Guidelines and they may have to act upon uncertain or incomplete evidence. The Guidelines may provide general or conceptual guidance in such circumstances. The Guidelines do not, however, exhaust the legal, professional, moral, and ethical considerations that inform forensic practitioners, for no complex activity can be completely defined by legal rules, codes of conduct, and aspirational guidelines.

The Guidelines are not intended to serve as a basis for disciplinary action or civil or criminal liability. The standard of care is established by a competent authority, not by the Guidelines. No ethical, licensure, or other administrative action or remedy, nor any other cause of action, should be taken *solely* on the basis of a forensic practitioner acting in a manner consistent or inconsistent with these Guidelines.

In cases in which a competent authority references the Guidelines when formulating standards, the authority should consider that the Guidelines attempt to identify a high level of quality in forensic practice. Competent practice is defined as the conduct of a reasonably prudent forensic practitioner engaged in similar activities in similar circumstances. Professional conduct evolves and may be viewed along a continuum of adequacy, and "minimally competent" and "best possible" are usually different points along that continuum.

The Guidelines are designed to be national in scope and are intended to be consistent with state and federal law. In cases in which a conflict between legal and professional obligations occurs, forensic practitioners make known their commitment to the EPPCC and the Guidelines and take steps to achieve an appropriate resolution consistent with the EPPCC and the Guidelines.

The format of the Guidelines is different from most other practice guidelines developed under the auspices of APA. This reflects the history of the Guidelines as well as the fact that the Guidelines are considerably broader in scope than any other APA-developed guidelines. Indeed, these are the only APA-approved guidelines that address a complete specialty practice area. Despite this difference in format, the Guidelines function as all other APA guideline documents.

This document replaces the 1991 "Specialty Guidelines for Forensic Psychologists," which were approved by the American Psychology–Law Society (Division 41 of APA) and the American Board of Forensic Psychology. The current revision has also been approved by the Council of Representatives of APA. Appendix A includes a discussion of the revision process, enactment, and current status of these Guidelines. Appendix B includes definitions and terminology as used for the purposes of these Guidelines.

## 1. Responsibilities

### **Guideline 1.01: Integrity**

Forensic practitioners strive for accuracy, honesty, and truthfulness in the science, teaching, and practice of forensic psychology and they strive to resist partisan pressures to provide services in any ways that might tend to be misleading or inaccurate.

### **Guideline 1.02: Impartiality and Fairness**

When offering expert opinion to be relied upon by a decision maker, providing forensic therapeutic services, or teaching or conducting research, forensic practitioners strive for accuracy, impartiality, fairness, and independence (EPPCC Standard 2.01). Forensic practitioners rec-



ognize the adversarial nature of the legal system and strive to treat all participants and weigh all data, opinions, and rival hypotheses impartially.

When conducting forensic examinations, forensic practitioners strive to be unbiased and impartial, and avoid partisan presentation of unrepresentative, incomplete, or inaccurate evidence that might mislead finders of fact. This guideline does not preclude forceful presentation of the data and reasoning upon which a conclusion or professional product is based.

When providing educational services, forensic practitioners seek to represent alternative perspectives, including data, studies, or evidence on both sides of the question, in an accurate, fair and professional manner, and strive to weigh and present all views, facts, or opinions impartially.

When conducting research, forensic practitioners seek to represent results in a fair and impartial manner. Forensic practitioners strive to utilize research designs and scientific methods that adequately and fairly test the questions at hand, and they attempt to resist partisan pressures to develop designs or report results in ways that might be misleading or unfairly bias the results of a test, study, or evaluation.

### **Guideline 1.03: Avoiding Conflicts of Interest**

Forensic practitioners refrain from taking on a professional role when personal, scientific, professional, legal, financial, or other interests or relationships could reasonably be expected to impair their impartiality, competence, or effectiveness, or expose others with whom a professional relationship exists to harm (EPPCC Standard 3.06).

Forensic practitioners are encouraged to identify, make known, and address real or apparent conflicts of interest in an attempt to maintain the public confidence and trust, discharge professional obligations, and maintain responsibility, impartiality, and accountability (EPPCC Standard 3.06). Whenever possible, such conflicts are revealed to all parties as soon as they become known to the psychologist. Forensic practitioners consider whether a prudent and competent forensic practitioner engaged in similar circumstances would determine that the ability to make a proper decision is likely to become impaired under the immediate circumstances.

When a conflict of interest is determined to be manageable, continuing services are provided and documented in a way to manage the conflict, maintain accountability, and preserve the trust of relevant others (also see Guideline 4.02 below).

## **2. Competence**

### **Guideline 2.01: Scope of Competence**

When determining one's competence to provide services in a particular matter, forensic practitioners may consider a variety of factors including the relative complexity and specialized nature of the service, relevant training and experience, the preparation and study they are able to devote to the matter, and the opportunity for consultation with a professional of established competence in the sub-

ject matter in question. Even with regard to subjects in which they are expert, forensic practitioners may choose to consult with colleagues.

### **Guideline 2.02: Gaining and Maintaining Competence**

Competence can be acquired through various combinations of education, training, supervised experience, consultation, study, and professional experience. Forensic practitioners planning to provide services, teach, or conduct research involving populations, areas, techniques, or technologies that are new to them are encouraged to undertake relevant education, training, supervised experience, consultation, or study.

Forensic practitioners make ongoing efforts to develop and maintain their competencies (EPPCC Standard 2.03). To maintain the requisite knowledge and skill, forensic practitioners keep abreast of developments in the fields of psychology and the law.

### **Guideline 2.03: Representing Competencies**

Consistent with the EPPCC, forensic practitioners adequately and accurately inform all recipients of their services (e.g., attorneys, tribunals) about relevant aspects of the nature and extent of their experience, training, credentials, and qualifications, and how they were obtained (EPPCC Standard 5.01).

### **Guideline 2.04: Knowledge of the Legal System and the Legal Rights of Individuals**

Forensic practitioners recognize the importance of obtaining a fundamental and reasonable level of knowledge and understanding of the legal and professional standards, laws, rules, and precedents that govern their participation in legal proceedings and that guide the impact of their services on service recipients (EPPCC Standard 2.01).

Forensic practitioners aspire to manage their professional conduct in a manner that does not threaten or impair the rights of affected individuals. They may consult with, and refer others to, legal counsel on matters of law. Although they do not provide formal legal advice or opinions, forensic practitioners may provide information about the legal process to others based on their knowledge and experience. They strive to distinguish this from legal opinions, however, and encourage consultation with attorneys as appropriate.

### **Guideline 2.05: Knowledge of the Scientific Foundation for Opinions and Testimony**

Forensic practitioners seek to provide opinions and testimony that are sufficiently based upon adequate scientific foundation, and reliable and valid principles and methods that have been applied appropriately to the facts of the case.

When providing opinions and testimony that are based on novel or emerging principles and methods, forensic practitioners seek to make known the status and limitations of these principles and methods.

### **Guideline 2.06: Knowledge of the Scientific Foundation for Teaching and Research**

Forensic practitioners engage in teaching and research activities in which they have adequate knowledge, experience, and education (EPPCC Standard 2.01), and they acknowledge relevant limitations and caveats inherent in procedures and conclusions (EPPCC Standard 5.01).

### **Guideline 2.07: Considering the Impact of Personal Beliefs and Experience**

Forensic practitioners recognize that their own cultures, attitudes, values, beliefs, opinions, or biases may affect their ability to practice in a competent and impartial manner. When such factors may diminish their ability to practice in a competent and impartial manner, forensic practitioners may take steps to correct or limit such effects, decline participation in the matter, or limit their participation in a manner that is consistent with professional obligations.

### **Guideline 2.08: Appreciation of Individual and Group Differences**

When scientific or professional knowledge in the discipline of psychology establishes that an understanding of factors associated with age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, socioeconomic status, or other relevant individual and cultural differences affects implementation or use of their services or research, forensic practitioners consider the boundaries of their expertise, make an appropriate referral if indicated, or gain the necessary training, experience, consultation, or supervision (EPPCC Standard 2.01; APA, 2003, 2004, 2011c, 2011d, 2011e).

Forensic practitioners strive to understand how factors associated with age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, socioeconomic status, or other relevant individual and cultural differences may affect and be related to the basis for people's contact and involvement with the legal system.

Forensic practitioners do not engage in unfair discrimination based on such factors or on any basis proscribed by law (EPPCC Standard 3.01). They strive to take steps to correct or limit the effects of such factors on their work, decline participation in the matter, or limit their participation in a manner that is consistent with professional obligations.

### **Guideline 2.09: Appropriate Use of Services and Products**

Forensic practitioners are encouraged to make reasonable efforts to guard against misuse of their services and exercise professional discretion in addressing such misuses.

## **3. Diligence**

### **Guideline 3.01: Provision of Services**

Forensic practitioners are encouraged to seek explicit agreements that define the scope of, time-frame of, and

compensation for their services. In the event that a client breaches the contract or acts in a way that would require the practitioner to violate ethical, legal or professional obligations, the forensic practitioner may terminate the relationship.

Forensic practitioners strive to act with reasonable diligence and promptness in providing agreed-upon and reasonably anticipated services. Forensic practitioners are not bound, however, to provide services not reasonably anticipated when retained, nor to provide every possible aspect or variation of service. Instead, forensic practitioners may exercise professional discretion in determining the extent and means by which services are provided and agreements are fulfilled.

### **Guideline 3.02: Responsiveness**

Forensic practitioners seek to manage their workloads so that services can be provided thoroughly, competently, and promptly. They recognize that acting with reasonable promptness, however, does not require the forensic practitioner to acquiesce to service demands not reasonably anticipated at the time the service was requested, nor does it require the forensic practitioner to provide services if the client has not acted in a manner consistent with existing agreements, including payment of fees.

### **Guideline 3.03: Communication**

Forensic practitioners strive to keep their clients reasonably informed about the status of their services, comply with their clients' reasonable requests for information, and consult with their clients about any substantial limitation on their conduct or performance that may arise when they reasonably believe that their clients expect a service that is not consistent with their professional obligations. Forensic practitioners attempt to keep their clients reasonably informed regarding new facts, opinions, or other potential evidence that may be relevant and applicable.

### **Guideline 3.04: Termination of Services**

The forensic practitioner seeks to carry through to conclusion all matters undertaken for a client unless the forensic practitioner–client relationship is terminated. When a forensic practitioner's employment is limited to a specific matter, the relationship may terminate when the matter has been resolved, anticipated services have been completed, or the agreement has been violated.

## **4. Relationships**

Whether a forensic practitioner–client relationship exists depends on the circumstances and is determined by a number of factors which may include the information exchanged between the potential client and the forensic practitioner prior to, or at the initiation of, any contact or service, the nature of the interaction, and the purpose of the interaction.

In their work, forensic practitioners recognize that relationships are established with those who retain their services (e.g., retaining parties, employers, insurers, the

court) and those with whom they interact (e.g., examinees, collateral contacts, research participants, students). Forensic practitioners recognize that associated obligations and duties vary as a function of the nature of the relationship.

#### **Guideline 4.01: Responsibilities to Retaining Parties**

Most responsibilities to the retaining party attach only after the retaining party has requested and the forensic practitioner has agreed to render professional services and an agreement regarding compensation has been reached. Forensic practitioners are aware that there are some responsibilities, such as privacy, confidentiality, and privilege, that may attach when the forensic practitioner agrees to consider whether a forensic practitioner–retaining party relationship shall be established. Forensic practitioners, prior to entering into a contract, may direct the potential retaining party not to reveal any confidential or privileged information as a way of protecting the retaining party’s interest in case a conflict exists as a result of pre-existing relationships.

At the initiation of any request for service, forensic practitioners seek to clarify the nature of the relationship and the services to be provided including the role of the forensic practitioner (e.g., trial consultant, forensic examiner, treatment provider, expert witness, research consultant); which person or entity is the client; the probable uses of the services provided or information obtained; and any limitations to privacy, confidentiality, or privilege.

#### **Guideline 4.02: Multiple Relationships**

A multiple relationship occurs when a forensic practitioner is in a professional role with a person and, at the same time or at a subsequent time, is in a different role with the same person; is involved in a personal, fiscal, or other relationship with an adverse party; at the same time is in a relationship with a person closely associated with or related to the person with whom the forensic practitioner has the professional relationship; or offers or agrees to enter into another relationship in the future with the person or a person closely associated with or related to the person (EPPCC Standard 3.05).

Forensic practitioners strive to recognize the potential conflicts of interest and threats to objectivity inherent in multiple relationships. Forensic practitioners are encouraged to recognize that some personal and professional relationships may interfere with their ability to practice in a competent and impartial manner and they seek to minimize any detrimental effects by avoiding involvement in such matters whenever feasible or limiting their assistance in a manner that is consistent with professional obligations.

#### **Guideline 4.02.01: Therapeutic–Forensic Role Conflicts**

Providing forensic and therapeutic psychological services to the same individual or closely related individuals involves multiple relationships that may impair objectivity and/or cause exploitation or other harm. Therefore, when requested or ordered to provide either concurrent or se-

quential forensic and therapeutic services, forensic practitioners are encouraged to disclose the potential risk and make reasonable efforts to refer the request to another qualified provider. If referral is not possible, the forensic practitioner is encouraged to consider the risks and benefits to all parties and to the legal system or entity likely to be impacted, the possibility of separating each service widely in time, seeking judicial review and direction, and consulting with knowledgeable colleagues. When providing both forensic and therapeutic services, forensic practitioners seek to minimize the potential negative effects of this circumstance (EPPCC Standard 3.05).

#### **Guideline 4.02.02: Expert Testimony by Practitioners Providing Therapeutic Services**

Providing expert testimony about a patient who is a participant in a legal matter does not necessarily involve the practice of forensic psychology even when that testimony is relevant to a psycholegal issue before the decision maker. For example, providing testimony on matters such as a patient’s reported history or other statements, mental status, diagnosis, progress, prognosis, and treatment would not ordinarily be considered forensic practice even when the testimony is related to a psycholegal issue before the decision maker. In contrast, rendering opinions and providing testimony about a person on psycholegal issues (e.g., criminal responsibility, legal causation, proximate cause, trial competence, testamentary capacity, the relative merits of parenting arrangements) would ordinarily be considered the practice of forensic psychology.

Consistent with their ethical obligations to base their opinions on information and techniques sufficient to substantiate their findings (EPPCC Standards 2.04, 9.01), forensic practitioners are encouraged to provide testimony only on those issues for which they have adequate foundation and only when a reasonable forensic practitioner engaged in similar circumstances would determine that the ability to make a proper decision is unlikely to be impaired. As with testimony regarding forensic examinees, the forensic practitioner strives to identify any substantive limitations that may affect the reliability and validity of the facts or opinions offered, and communicates these to the decision maker.

#### **Guideline 4.02.03: Provision of Forensic Therapeutic Services**

Although some therapeutic services can be considered forensic in nature, the fact that therapeutic services are ordered by the court does not necessarily make them forensic.

In determining whether a therapeutic service should be considered the practice of forensic psychology, psychologists are encouraged to consider the potential impact of the legal context on treatment, the potential for treatment to impact the psycholegal issues involved in the case, and whether another reasonable psychologist in a similar position would consider the service to be forensic and these Guidelines to be applicable.

Therapeutic services can have significant effects on current or future legal proceedings. Forensic practitioners

are encouraged to consider these effects and minimize any unintended or negative effects on such proceedings or therapy when they provide therapeutic services in forensic contexts.

#### **Guideline 4.03: Provision of Emergency Mental Health Services to Forensic Examinees**

When providing forensic examination services an emergency may arise that requires the practitioner to provide short-term therapeutic services to the examinee in order to prevent imminent harm to the examinee or others. In such cases the forensic practitioner is encouraged to limit disclosure of information and inform the retaining attorney, legal representative, or the court in an appropriate manner. Upon providing emergency treatment to examinees, forensic practitioners consider whether they can continue in a forensic role with that individual so that potential for harm to the recipient of services is avoided (EPPCC Standard 3.04).

### **5. Fees**

#### **Guideline 5.01: Determining Fees**

When determining fees forensic practitioners may consider salient factors such as their experience providing the service, the time and labor required, the novelty and difficulty of the questions involved, the skill required to perform the service, the fee customarily charged for similar forensic services, the likelihood that the acceptance of the particular employment will preclude other employment, the time limitations imposed by the client or circumstances, the nature and length of the professional relationship with the client, the client's ability to pay for the service, and any legal requirements.

#### **Guideline 5.02: Fee Arrangements**

Forensic practitioners are encouraged to make clear to the client the likely cost of services whenever it is feasible, and make appropriate provisions in those cases in which the costs of services is greater than anticipated or the client's ability to pay for services changes in some way.

Forensic practitioners seek to avoid undue influence that might result from financial compensation or other gains. Because of the threat to impartiality presented by the acceptance of contingent fees and associated legal prohibitions, forensic practitioners strive to avoid providing professional services on the basis of contingent fees. Letters of protection, financial guarantees, and other security for payment of fees in the future are not considered contingent fees unless payment is dependent on the outcome of the matter.

#### **Guideline 5.03: Pro Bono Services**

Forensic psychologists recognize that some persons may have limited access to legal services as a function of financial disadvantage and strive to contribute a portion of their professional time for little or no compensation or personal advantage (EPPCC Principle E).

## **6. Informed Consent, Notification, and Assent**

Because substantial rights, liberties, and properties are often at risk in forensic matters, and because the methods and procedures of forensic practitioners are complex and may not be accurately anticipated by the recipients of forensic services, forensic practitioners strive to inform service recipients about the nature and parameters of the services to be provided (EPPCC Standards 3.04, 3.10).

#### **Guideline 6.01: Timing and Substance**

Forensic practitioners strive to inform clients, examinees, and others who are the recipients of forensic services as soon as is feasible about the nature and extent of reasonably anticipated forensic services.

In determining what information to impart, forensic practitioners are encouraged to consider a variety of factors including the person's experience or training in psychological and legal matters of the type involved and whether the person is represented by counsel. When questions or uncertainties remain after they have made the effort to explain the necessary information, forensic practitioners may recommend that the person seek legal advice.

#### **Guideline 6.02: Communication With Those Seeking to Retain a Forensic Practitioner**

As part of the initial process of being retained, or as soon thereafter as previously unknown information becomes available, forensic practitioners strive to disclose to the retaining party information that would reasonably be anticipated to affect a decision to retain or continue the services of the forensic practitioner.

This disclosure may include, but is not limited to, the fee structure for anticipated services; prior and current personal or professional activities, obligations, and relationships that would reasonably lead to the fact or the appearance of a conflict of interest; the forensic practitioner's knowledge, skill, experience, and education relevant to the forensic services being considered, including any significant limitations; and the scientific bases and limitations of the methods and procedures which are expected to be employed.

#### **Guideline 6.03: Communication With Forensic Examinees**

Forensic practitioners inform examinees about the nature and purpose of the examination (EPPCC Standard 9.03; American Educational Research Association, American Psychological Association, & National Council on Measurement in Education [AERA, APA, & NCME], in press). Such information may include the purpose, nature, and anticipated use of the examination; who will have access to the information; associated limitations on privacy, confidentiality, and privilege including who is authorized to release or access the information contained in the forensic practitioner's records; the voluntary or involuntary nature of participation, including potential consequences of par-

ticipation or nonparticipation, if known; and, if the cost of the service is the responsibility of the examinee, the anticipated cost.

**Guideline 6.03.01: Persons Not Ordered or Mandated to Undergo Examination**

If the examinee is not ordered by the court to participate in a forensic examination, the forensic practitioner seeks his or her informed consent (EPPCC Standards 3.10, 9.03). If the examinee declines to proceed after being notified of the nature and purpose of the forensic examination, the forensic practitioner may consider postponing the examination, advising the examinee to contact his or her attorney, and notifying the retaining party about the examinee's unwillingness to proceed.

**Guideline 6.03.02: Persons Ordered or Mandated to Undergo Examination or Treatment**

If the examinee is ordered by the court to participate, the forensic practitioner can conduct the examination over the objection, and without the consent, of the examinee (EPPCC Standards 3.10, 9.03). If the examinee declines to proceed after being notified of the nature and purpose of the forensic examination, the forensic practitioner may consider a variety of options including postponing the examination, advising the examinee to contact his or her attorney, and notifying the retaining party about the examinee's unwillingness to proceed.

When an individual is ordered to undergo treatment but the goals of treatment are determined by a legal authority rather than the individual receiving services, the forensic practitioner informs the service recipient of the nature and purpose of treatment, and any limitations on confidentiality and privilege (EPPCC Standards 3.10, 10.01).

**Guideline 6.03.03: Persons Lacking Capacity to Provide Informed Consent**

Forensic practitioners appreciate that the very conditions that precipitate psychological examination of individuals involved in legal proceedings can impair their functioning in a variety of important ways, including their ability to understand and consent to the evaluation process.

For examinees adjudicated or presumed by law to lack the capacity to provide informed consent for the anticipated forensic service, the forensic practitioner nevertheless provides an appropriate explanation, seeks the examinee's assent, and obtains appropriate permission from a legally authorized person, as permitted or required by law (EPPCC Standards 3.10, 9.03).

For examinees whom the forensic practitioner has concluded lack capacity to provide informed consent to a proposed, non-court-ordered service, but who have not been adjudicated as lacking such capacity, the forensic practitioner strives to take reasonable steps to protect their rights and welfare (EPPCC Standard 3.10). In such cases, the forensic practitioner may consider suspending the pro-

posed service or notifying the examinee's attorney or the retaining party.

**Guideline 6.03.04: Evaluation of Persons Not Represented by Counsel**

Because of the significant rights that may be at issue in a legal proceeding, forensic practitioners carefully consider the appropriateness of conducting a forensic evaluation of an individual who is not represented by counsel. Forensic practitioners may consider conducting such evaluations or delaying the evaluation so as to provide the examinee with the opportunity to consult with counsel.

**Guideline 6.04: Communication With Collateral Sources of Information**

Forensic practitioners disclose to potential collateral sources information that might reasonably be expected to inform their decisions about participating that may include, but may not be limited to, who has retained the forensic practitioner; the nature, purpose, and intended use of the examination or other procedure; the nature of and any limits on privacy, confidentiality, and privilege; and whether their participation is voluntary (EPPCC Standard 3.10).

**Guideline 6.05: Communication in Research Contexts**

When engaging in research or scholarly activities conducted as a service to a client in a legal proceeding, forensic practitioners attempt to clarify any anticipated use of the research or scholarly product, disclose their role in the resulting research or scholarly products, and obtain whatever consent or agreement is required.

In advance of any scientific study, forensic practitioners seek to negotiate with the client the circumstances under and manner in which the results may be made known to others. Forensic practitioners strive to balance the potentially competing rights and interests of the retaining party with the inappropriateness of suppressing data, for example, by agreeing to report the data without identifying the jurisdiction in which the study took place. Forensic practitioners represent the results of research in an accurate manner (EPPCC Standard 5.01).

## 7. Conflicts in Practice

In forensic psychology practice, conflicting responsibilities and demands may be encountered. When conflicts occur, forensic practitioners seek to make the conflict known to the relevant parties or agencies, and consider the rights and interests of the relevant parties or agencies in their attempts to resolve the conflict.

**Guideline 7.01: Conflicts With Legal Authority**

When their responsibilities conflict with law, regulations, or other governing legal authority, forensic practitioners make known their commitment to the EPPCC, and take steps to resolve the conflict. In situations in which the

EPPCC or the Guidelines are in conflict with the law, attempts to resolve the conflict are made in accordance with the EPPCC (EPPCC Standard 1.02).

When the conflict cannot be resolved by such means, forensic practitioners may adhere to the requirements of the law, regulations, or other governing legal authority, but only to the extent required and not in any way that violates a person's human rights (EPPCC Standard 1.03).

Forensic practitioners are encouraged to consider the appropriateness of complying with court orders when such compliance creates potential conflicts with professional standards of practice.

### **Guideline 7.02: Conflicts With Organizational Demands**

When the demands of an organization with which they are affiliated or for whom they are working conflict with their professional responsibilities and obligations, forensic practitioners strive to clarify the nature of the conflict and, to the extent feasible, resolve the conflict in a way consistent with professional obligations and responsibilities (EPPCC Standard 1.03).

### **Guideline 7.03: Resolving Ethical Issues With Fellow Professionals**

When an apparent or potential ethical violation has caused, or is likely to cause, substantial harm, forensic practitioners are encouraged to take action appropriate to the situation and consider a number of factors including the nature and the immediacy of the potential harm; applicable privacy, confidentiality, and privilege; how the rights of the relevant parties may be affected by a particular course of action; and any other legal or ethical obligations (EPPCC Standard 1.04). Steps to resolve perceived ethical conflicts may include, but are not limited to, obtaining the consultation of knowledgeable colleagues, obtaining the advice of independent counsel, and conferring directly with the client.

When forensic practitioners believe there may have been an ethical violation by another professional, an attempt is made to resolve the issue by bringing it to the attention of that individual, if that attempt does not violate any rights or privileges that may be involved, and if an informal resolution appears appropriate (EPPCC Standard 1.04). If this does not result in a satisfactory resolution, the forensic practitioner may have to take further action appropriate to the situation, including making a report to third parties of the perceived ethical violation (EPPCC Standard 1.05). In most instances, in order to minimize unforeseen risks to the party's rights in the legal matter, forensic practitioners consider consulting with the client before attempting to resolve a perceived ethical violation with another professional.

## **8. Privacy, Confidentiality, and Privilege**

Forensic practitioners recognize their ethical obligations to maintain the confidentiality of information relating to a client or retaining party, except insofar as disclosure is

consented to by the client or retaining party, or required or permitted by law (EPPCC Standard 4.01).

### **Guideline 8.01: Release of Information**

Forensic practitioners are encouraged to recognize the importance of complying with properly noticed and served subpoenas or court orders directing release of information, or other legally proper consent from duly authorized persons, unless there is a legally valid reason to offer an objection. When in doubt about an appropriate response or course of action, forensic practitioners may seek assistance from the retaining client, retain and seek legal advice from their own attorney, or formally notify the drafter of the subpoena or order of their uncertainty.

### **Guideline 8.02: Access to Information**

If requested, forensic practitioners seek to provide the retaining party access to, and a meaningful explanation of, all information that is in their records for the matter at hand, consistent with the relevant law, applicable codes of ethics and professional standards, and institutional rules and regulations. Forensic examinees typically are not provided access to the forensic practitioner's records without the consent of the retaining party. Access to records by anyone other than the retaining party is governed by legal process, usually subpoena or court order, or by explicit consent of the retaining party. Forensic practitioners may charge a reasonable fee for the costs associated with the storage, reproduction, review, and provision of records.

### **Guideline 8.03: Acquiring Collateral and Third Party Information**

Forensic practitioners strive to access information or records from collateral sources with the consent of the relevant attorney or the relevant party, or when otherwise authorized by law or court order.

### **Guideline 8.04: Use of Case Materials in Teaching, Continuing Education, and Other Scholarly Activities**

Forensic practitioners using case materials for purposes of teaching, training, or research strive to present such information in a fair, balanced, and respectful manner. They attempt to protect the privacy of persons by disguising the confidential, personally identifiable information of all persons and entities who would reasonably claim a privacy interest; using only those aspects of the case available in the public domain; or obtaining consent from the relevant clients, parties, participants, and organizations to use the materials for such purposes (EPPCC Standard 4.07; also see Guidelines 11.06 and 11.07 of these Guidelines).

## **9. Methods and Procedures**

### **Guideline 9.01: Use of Appropriate Methods**

Forensic practitioners strive to utilize appropriate methods and procedures in their work. When performing examinations, treatment, consultation, educational activities, or scholarly investigations, forensic practitioners seek to

maintain integrity by examining the issue or problem at hand from all reasonable perspectives and seek information that will differentially test plausible rival hypotheses.

### **Guideline 9.02: Use of Multiple Sources of Information**

Forensic practitioners ordinarily avoid relying solely on one source of data, and corroborate important data whenever feasible (AERA, APA, & NCME, in press). When relying upon data that have not been corroborated, forensic practitioners seek to make known the uncorroborated status of the data, any associated strengths and limitations, and the reasons for relying upon the data.

### **Guideline 9.03: Opinions Regarding Persons Not Examined**

Forensic practitioners recognize their obligations to only provide written or oral evidence about the psychological characteristics of particular individuals when they have sufficient information or data to form an adequate foundation for those opinions or to substantiate their findings (EPPCC Standard 9.01). Forensic practitioners seek to make reasonable efforts to obtain such information or data, and they document their efforts to obtain it. When it is not possible or feasible to examine individuals about whom they are offering an opinion, forensic practitioners strive to make clear the impact of such limitations on the reliability and validity of their professional products, opinions, or testimony.

When conducting a record review or providing consultation or supervision that does not warrant an individual examination, forensic practitioners seek to identify the sources of information on which they are basing their opinions and recommendations, including any substantial limitations to their opinions and recommendations.

## **10. Assessment**

### **Guideline 10.01: Focus on Legally Relevant Factors**

Forensic examiners seek to assist the trier of fact to understand evidence or determine a fact in issue, and they provide information that is most relevant to the psycholegal issue. In reports and testimony, forensic practitioners typically provide information about examinees' functional abilities, capacities, knowledge, and beliefs, and address their opinions and recommendations to the identified psycholegal issues (American Bar Association & American Psychological Association, 2008; Grisso, 1986, 2003; Heilbrun, Marczyk, DeMatteo, & Mack-Allen, 2007).

Forensic practitioners are encouraged to consider the problems that may arise by using a clinical diagnosis in some forensic contexts, and consider and qualify their opinions and testimony appropriately.

### **Guideline 10.02: Selection and Use of Assessment Procedures**

Forensic practitioners use assessment procedures in the manner and for the purposes that are appropriate in light of

the research on or evidence of their usefulness and proper application (EPPCC Standard 9.02; AERA, APA, & NCME, in press). This includes assessment techniques, interviews, tests, instruments, and other procedures and their administration, adaptation, scoring, and interpretation, including computerized scoring and interpretation systems.

Forensic practitioners use assessment instruments whose validity and reliability have been established for use with members of the population assessed. When such validity and reliability have not been established, forensic practitioners consider and describe the strengths and limitations of their findings. Forensic practitioners use assessment methods that are appropriate to an examinee's language preference and competence, unless the use of an alternative language is relevant to the assessment issues (EPPCC Standard 9.02).

Assessment in forensic contexts differs from assessment in therapeutic contexts in important ways that forensic practitioners strive to take into account when conducting forensic examinations. Forensic practitioners seek to consider the strengths and limitations of employing traditional assessment procedures in forensic examinations (AERA, APA, & NCME, in press). Given the stakes involved in forensic contexts, forensic practitioners strive to ensure the integrity and security of test materials and results (AERA, APA, & NCME, in press).

When the validity of an assessment technique has not been established in the forensic context or setting in which it is being used, the forensic practitioner seeks to describe the strengths and limitations of any test results and explain the extrapolation of these data to the forensic context. Because of the many differences between forensic and therapeutic contexts, forensic practitioners consider and seek to make known that some examination results may warrant substantially different interpretation when administered in forensic contexts (AERA, APA, & NCME, in press).

Forensic practitioners consider and seek to make known that forensic examination results can be affected by factors unique to, or differentially present in, forensic contexts including response style, voluntariness of participation, and situational stress associated with involvement in forensic or legal matters (AERA, APA, & NCME, in press).

### **Guideline 10.03: Appreciation of Individual Differences**

When interpreting assessment results, forensic practitioners consider the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences that might affect their judgments or reduce the accuracy of their interpretations (EPPCC Standard 9.06). Forensic practitioners strive to identify any significant strengths and limitations of their procedures and interpretations.

Forensic practitioners are encouraged to consider how the assessment process may be impacted by any disability an examinee is experiencing, make accommodations as

possible, and consider such when interpreting and communicating the results of the assessment (APA, 2011d).

#### **Guideline 10.04: Consideration of Assessment Settings**

In order to maximize the validity of assessment results, forensic practitioners strive to conduct evaluations in settings that provide adequate comfort, safety, and privacy.

#### **Guideline 10.05: Provision of Assessment Feedback**

Forensic practitioners take reasonable steps to explain assessment results to the examinee or a designated representative in language they can understand (EPPCC Standard 9.10). In those circumstances in which communication about assessment results is precluded, the forensic practitioner explains this to the examinee in advance (EPPCC Standard 9.10).

Forensic practitioners seek to provide information about professional work in a manner consistent with professional and legal standards for the disclosure of test data or results, interpretation of data, and the factual bases for conclusions.

#### **Guideline 10.06: Documentation and Compilation of Data Considered**

Forensic practitioners are encouraged to recognize the importance of documenting all data they consider with enough detail and quality to allow for reasonable judicial scrutiny and adequate discovery by all parties. This documentation includes, but is not limited to, letters and consultations; notes, recordings, and transcriptions; assessment and test data, scoring reports and interpretations; and all other records in any form or medium that were created or exchanged in connection with a matter.

When contemplating third party observation or audio/video-recording of examinations, forensic practitioners strive to consider any law that may control such matters, the need for transparency and documentation, and the potential impact of observation or recording on the validity of the examination and test security (Committee on Psychological Tests and Assessment, American Psychological Association, 2007).

#### **Guideline 10.07: Provision of Documentation**

Pursuant to proper subpoenas or court orders, or other legally proper consent from authorized persons, forensic practitioners seek to make available all documentation described in Guideline 10.05, all financial records related to the matter, and any other records including reports (and draft reports if they have been provided to a party, attorney, or other entity for review), that might reasonably be related to the opinions to be expressed.

#### **Guideline 10.08: Record Keeping**

Forensic practitioners establish and maintain a system of record keeping and professional communication (EPPCC Standard 6.01; APA, 2007), and attend to relevant laws and rules. When indicated by the extent of the rights, liberties,

and properties that may be at risk, the complexity of the case, the amount and legal significance of unique evidence in the care and control of the forensic practitioner, and the likelihood of future appeal, forensic practitioners strive to inform the retaining party of the limits of record keeping times. If requested to do so, forensic practitioners consider maintaining such records until notified that all appeals in the matter have been exhausted, or sending a copy of any unique components/aspects of the record in their care and control to the retaining party before destruction of the record.

## **11. Professional and Other Public Communications**

#### **Guideline 11.01: Accuracy, Fairness, and Avoidance of Deception**

Forensic practitioners make reasonable efforts to ensure that the products of their services, as well as their own public statements and professional reports and testimony, are communicated in ways that promote understanding and avoid deception (EPPCC Standard 5.01).

When in their role as expert to the court or other tribunals, the role of forensic practitioners is to facilitate understanding of the evidence or dispute. Consistent with legal and ethical requirements, forensic practitioners do not distort or withhold relevant evidence or opinion in reports or testimony. When responding to discovery requests and providing sworn testimony, forensic practitioners strive to have readily available for inspection all data which they considered, regardless of whether the data supports their opinion, subject to and consistent with court order, relevant rules of evidence, test security issues, and professional standards (AERA, APA, & NCME, in press; Committee on Legal Issues, American Psychological Association, 2006; Bank & Packer, 2007; Golding, 1990).

When providing reports and other sworn statements or testimony in any form, forensic practitioners strive to present their conclusions, evidence, opinions, or other professional products in a fair manner. Forensic practitioners do not, by either commission or omission, participate in misrepresentation of their evidence, nor do they participate in partisan attempts to avoid, deny, or subvert the presentation of evidence contrary to their own position or opinion (EPPCC Standard 5.01). This does not preclude forensic practitioners from forcefully presenting the data and reasoning upon which a conclusion or professional product is based.

#### **Guideline 11.02: Differentiating Observations, Inferences, and Conclusions**

In their communications, forensic practitioners strive to distinguish observations, inferences, and conclusions. Forensic practitioners are encouraged to explain the relationship between their expert opinions and the legal issues and facts of the case at hand.



### **Guideline 11.03: Disclosing Sources of Information and Bases of Opinions**

Forensic practitioners are encouraged to disclose all sources of information obtained in the course of their professional services, and to identify the source of each piece of information that was considered and relied upon in formulating a particular conclusion, opinion, or other professional product.

### **Guideline 11.04: Comprehensive and Accurate Presentation of Opinions in Reports and Testimony**

Consistent with relevant law and rules of evidence, when providing professional reports and other sworn statements or testimony, forensic practitioners strive to offer a complete statement of all relevant opinions that they formed within the scope of their work on the case, the basis and reasoning underlying the opinions, the salient data or other information that was considered in forming the opinions, and an indication of any additional evidence that may be used in support of the opinions to be offered. The specific substance of forensic reports is determined by the type of psycholegal issue at hand as well as relevant laws or rules in the jurisdiction in which the work is completed.

Forensic practitioners are encouraged to limit discussion of background information that does not bear directly upon the legal purpose of the examination or consultation. Forensic practitioners avoid offering information that is irrelevant and that does not provide a substantial basis of support for their opinions, except when required by law (EPPCC Standard 4.04).

### **Guideline 11.05: Commenting Upon Other Professionals and Participants in Legal Proceedings**

When evaluating or commenting upon the work or qualifications of other professionals involved in legal proceedings, forensic practitioners seek to represent their disagreements in a professional and respectful tone, and base them on a fair examination of the data, theories, standards, and opinions of the other expert or party.

When describing or commenting upon clients, examinees, or other participants in legal proceedings, forensic practitioners strive to do so in a fair and impartial manner.

Forensic practitioners strive to report the representations, opinions, and statements of clients, examinees, or other participants in a fair and impartial manner.

### **Guideline 11.06: Out of Court Statements**

Ordinarily, forensic practitioners seek to avoid making detailed public (out-of-court) statements about legal proceedings in which they have been involved. However, sometimes public statements may serve important goals such as educating the public about the role of forensic practitioners in the legal system, the appropriate practice of forensic psychology, and psychological and legal issues that are relevant to the matter at hand. When making public statements, forensic practitioners refrain from releasing

private, confidential, or privileged information, and attempt to protect persons from harm, misuse, or misrepresentation as a result of their statements (EPPCC Standard 4.05).

### **Guideline 11.07: Commenting Upon Legal Proceedings**

Forensic practitioners strive to address particular legal proceedings in publications or communications only to the extent that the information relied upon is part of a public record, or when consent for that use has been properly obtained from any party holding any relevant privilege (also see Guideline 8.04).

When offering public statements about specific cases in which they have not been involved, forensic practitioners offer opinions for which there is sufficient information or data and make clear the limitations of their statements and opinions resulting from having had no direct knowledge of or involvement with the case (EPPCC Standard 9.01).

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## Appendix A

### Revision Process of the Guidelines

This revision of the Guidelines was coordinated by the Committee for the Revision of the Specialty Guidelines for Forensic Psychology (“the Revisions Committee”), which was established by the American Academy of Forensic Psychology and the American Psychology–Law Society (Division 41 of the American Psychological Association [APA]) in 2002 and which operated through 2011. This committee consisted of two representatives from each organization (Solomon Fulero, PhD, JD; Stephen Golding, PhD, ABPP; Lisa Piechowski, PhD, ABPP; Christina Studebaker, PhD), a chairperson (Randy Otto, PhD, ABPP), and a liaison from Division 42 (Psychologists in Independent Practice) of APA (Jeffrey Younggren, PhD, ABPP).

This document was revised in accordance with APA Rule 30.08 and the APA policy document “Criteria for Practice Guideline Development and Evaluation” (APA, 2002). The Revisions Committee posted announcements regarding the revision process to relevant electronic discussion lists and professional publications (i.e., the Psy-Law-L e-mail listserv of the American Psychology–Law Society, the American Academy of Forensic Psychology listserv, the American Psychology–Law Society Newslet-

ter). In addition, an electronic discussion list devoted solely to issues concerning revision of the Guidelines was operated between December 2002 and July 2007, followed by establishment of an e-mail address in February 2008 (sgfp@yahoo.com). Individuals were invited to provide input and commentary on the existing Guidelines and proposed revisions via these means. In addition, two public meetings were held throughout the revision process at biennial meetings of the American Psychology–Law Society.

Upon development of a draft that the Revisions Committee deemed suitable, the revised Guidelines were submitted for review to the Executive Committee of the American Psychology–Law Society (Division 41 of APA) and the American Board of Forensic Psychology. Once the revised Guidelines were approved by these two organizations, they were submitted to APA for review, commentary, and acceptance, consistent with APA’s “Criteria for Practice Guideline Development and Evaluation” (APA, 2002) and APA Rule 30-8. They were subsequently revised by the Revisions Committee and were adopted by the APA Council of Representatives on August 3, 2011.

(Appendices continue)

## Appendix B

### Definitions and Terminology

For the purposes of these Guidelines:

**Appropriate**, when used in relation to conduct by a forensic practitioner means that, according to the prevailing professional judgment of competent forensic practitioners, the conduct is apt and pertinent and is considered befitting, suitable, and proper for a particular person, place, condition, or function. **Inappropriate** means that, according to the prevailing professional judgment of competent forensic practitioners, the conduct is not suitable, desirable, or properly timed for a particular person, occasion, or purpose; and may also denote improper conduct, improprieties, or conduct that is discrepant for the circumstances.

**Agreement** refers to the objective and mutual understanding between the forensic practitioner and the person or persons seeking the professional service and/or agreeing to participate in the service. See also Assent, Consent, and Informed Consent.

**Assent** refers to the agreement, approval, or permission, especially regarding verbal or nonverbal conduct, that is reasonably intended and interpreted as expressing willingness, even in the absence of unmistakable consent. Forensic practitioners attempt to secure assent when consent and informed consent cannot be obtained or when, because of mental state, the examinee may not be able to consent.

**Consent** refers to agreement, approval, or permission as to some act or purpose.

**Client** refers to the attorney, law firm, court, agency, entity, party, or other person who has retained, and who has a contractual relationship with, the forensic practitioner to provide services.

**Conflict of Interest** refers to a situation or circumstance in which the forensic practitioner's objectivity, impartiality, or judgment may be jeopardized due to a relationship, financial, or any other interest that would reasonably be expected to substantially affect a forensic practitioner's professional judgment, impartiality, or decision making.

**Decision Maker** refers to the person or entity with the authority to make a judicial decision, agency determination, arbitration award, or other contractual determination after consideration of the facts and the law.

**Examinee** refers to a person who is the subject of a forensic examination for the purpose of informing a decision maker or attorney about the psychological functioning of that examinee.

**Forensic Examiner** refers to a psychologist who examines the psychological condition of a person whose psychological condition is in controversy or at issue.

**Forensic Practice** refers to the application of the scientific, technical, or specialized knowledge of psychol-

ogy to the law and the use of that knowledge to assist in resolving legal, contractual, and administrative disputes.

**Forensic Practitioner** refers to a psychologist when engaged in forensic practice.

**Forensic Psychology** refers to all forensic practice by any psychologist working within any subdiscipline of psychology (e.g., clinical, developmental, social, cognitive).

**Informed Consent** denotes the knowledgeable, voluntary, and competent agreement by a person to a proposed course of conduct after the forensic practitioner has communicated adequate information and explanation about the material risks and benefits of, and reasonably available alternatives to, the proposed course of conduct.

**Legal Representative** refers to a person who has the legal authority to act on behalf of another.

**Party** refers to a person or entity named in litigation, or who is involved in, or is witness to, an activity or relationship that may be reasonably anticipated to result in litigation.

**Reasonable** or **Reasonably**, when used in relation to conduct by a forensic practitioner, denotes the conduct of a prudent and competent forensic practitioner who is engaged in similar activities in similar circumstances.

**Record** or **Written Record** refers to all notes, records, documents, memorializations, and recordings of considerations and communications, be they in any form or on any media, tangible, electronic, handwritten, or mechanical, that are contained in, or are specifically related to, the forensic matter in question or the forensic service provided.

**Retaining Party** refers to the attorney, law firm, court, agency, entity, party, or other person who has retained, and who has a contractual relationship with, the forensic practitioner to provide services.

**Tribunal** denotes a court or an arbitrator in an arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of legal argument or evidence by a party or parties, renders a judgment directly affecting a party's interests in a particular matter.

**Trier of Fact** refers to a court or an arbitrator in an arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of legal argument or evidence by a party or parties, renders a judgment directly affecting a party's interests in a particular matter.

**FEDERAL PUBLIC DEFENDER  
Western District of Washington**

January 9, 2017

**VIA EMAIL:**

Re: U.S. v., Case No. CR

Dear :

This letter confirms that you agree to be retained by our office in connection with the above-captioned matter. Per our agreement, you will complete the statement of work outlined in the enclosed Judiciary Procurement Program's Expert Services Contract unless otherwise notified by Assistant Federal Defender X, counsel for Z. The contract only covers the agreed upon amount. **Anything over the \$ limit requires approval in advance and the issuance of a supplemental contract.**

As part of your employment with our office, all communication between you and the client, attorney, and/or other FPD employees must remain confidential and should only be made for the purpose of assisting our office. Without prior authorization from AFD X, you may not disclose to anyone outside of our office the content or nature of any communication received or information gained in the course of performing this contract. Should you receive a request for disclosure, please inform AFD X immediately.

All correspondence, papers, records, and other documents, regardless of their nature or source, must remain confidential and be protected by you from inadvertent disclosure. Considered attorney-client work product, such documents will be held by your solely for our convenience and will be subject to our unqualified right to instruction you regarding their possession.

By signing the contract, you accept the terms of this retainer and agree to act as our agent and employee for the purpose of attorney-client privilege. Please sign the contract, complete and sign the enclosed AO-213 vendor tax ID form, and send both documents to Madeline Scarp by email ([madeline\\_scarp@fd.org](mailto:madeline_scarp@fd.org)) or fax, whichever is most expeditious. Both parties must sign the contract before any invoices can be processed. Send invoices to the attention of Madeline Scarp at the below address. Should you have any questions about the nature, scope, or terms of this agreement, please do not hesitate to contact AFD X or me.

On behalf of our client and this office, thank you in advance for your assistance in this matter. We look forward to working with you.

Respectfully,



Cynthia Simmons  
Contracting Officer Level 2  
[cynthia\\_n\\_simmons@fd.org](mailto:cynthia_n_simmons@fd.org)

## When Worlds Collide: Therapeutic and Forensic Roles

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Daniel W. Shuman  
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The goal of the article “Irreconcilable Conflict Between Therapeutic and Forensic Roles” (S. A. Greenberg & D. W. Shuman, 1997) was to help chart a course for the profession that would raise the quality of assistance provided by psychologists both to courts and to patient–litigants, without compromising the quality of either forensic examinations or therapeutic relationships. One solution was conceptually simple: Do not attempt to fulfill both roles for the same person. Although an individual psychologist might be competent in both the provision of therapy and conduct of forensic examination, this does not justify a psychologist providing both services to the same patient–litigant. Knowledge is necessary to provide both types of service. Wisdom is necessary to choose not to provide both services to the same person.

*Keywords:* conflicts, ethics, forensic, roles, standards, therapists

We appreciate this opportunity to revisit our 1997 article “Irreconcilable Conflict Between Therapeutic and Forensic Roles” (Greenberg & Shuman, 1997) and to reexamine its rationale.<sup>1</sup> Our article conceptualized the emerging concerns of the field at that time. Coincident with its publication and, without any collaboration between the various authors, Strasberger, Gutheil, and Brodsky (1997) won the Guttmacher Award for Outstanding Contribution to the Literature on Forensic Psychiatry for their article “On Wearing Two Hats: Role Conflict in Serving as Both Psychotherapist and Expert Witness,” simultaneously reaching the same conclusion about the irreconcilability of therapeutic and forensic roles.

### General Acceptance

The article by Strasberger et al. (1997) and ours were not alone in these observations. Both articles and others of their kind were cited and reproduced in large numbers and across many related contexts and professions. For example, “Irreconcilable Conflict . . .” has been cited with approval well over 1,000 times overall, including more than 70 peer-reviewed journals and contexts as different as office policy statements, professional practice guidelines, ethics education courses, and graduate school syllabi.<sup>2</sup> The

irreconcilability of therapeutic and forensic roles resonated across the mental health professions and across specific contexts, confirming the experiences of many professionals. For example, citing our work, the American Psychological Association Committee on Professional Practice and Standards (1998) *Guidelines for Psychological Evaluations in Child Protection Matters* caution psychologists to avoid serving in a therapeutic role when they are conducting psychological evaluations in child protection matters because of threats to objectivity.

### Competence

Just because a psychologist whose primary professional identity is that of “therapist” is also competent at providing forensic examinations, and, conversely, just because a psychologist whose primary professional identity is that of “forensic examiner” is also competent at providing therapy, does not lead to the conclusion that he or she should provide both services to the same individual. Each role requires asking substantially differing questions, and each requires an approach that is fundamentally in conflict with, and interferes with, performance of the other task.

### The Fabric of the Lawsuit

We note an argument that we had not identified previously for separating these roles. As reflected in the discovery provisions of the Federal Rules of Civil Procedure, the law makes important distinctions between treating and retained (forensic) experts and the obligations that apply to them. More stringent discovery disclosure requirements apply to experts who are retained (forensic) to provide expert testimony. Unlike treating experts who must simply be identified by the parties, forensic experts must present a detailed written report.

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<sup>1</sup> This reply responds to the article by Heltzel (in press).

<sup>2</sup> In June 2006, we conducted searches of Google; Science Citation Index Expanded, 1965–present; Social Sciences Citation Index, 1975–present; and Arts & Humanities Citation Index, 1975–present.

To further the goal of helping the parties to more efficiently prepare for trial, the written report required by Rule 26(a)(2)(B) must contain a complete statement of all opinions to be expressed and the basis and reasons therefore, the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or support for the opinions, the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years, the compensation to be paid for the study and testimony, and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. Fed.R.Civ.P. 26(a)(2)(B). (*Gonzales v. Executive Airlines, Inc.*, 2006, at 30)

### Why Treat These Witnesses Differently?

The distinction drawn here [between a treating and a retained expert] is subtle but important. . . . The difference [between the types of expert witnesses] lies in the nature of the witness's involvement in the case. . . . [T]he psychiatrist who allegedly has been treating Plaintiff . . . has functioned as a direct participant in the events at issue. His role can be best characterized [as] . . . an actor with regards to the occurrences from which the tapestry of the lawsuit was woven. (*Gonzales v. Executive Airlines, Inc.*, 2006, at 30)

This distinction is also important in appreciating the professional role conflict. When a therapist also serves as a forensic expert, the therapist is part of the fabric of the case, in part evaluating the impact of his or her own participation. Only by not being a person whose actions influence the mental status or condition of the litigant can the forensic expert offer an independent opinion regarding the litigant's mental status or condition.

### Informed Consent

To view the problem from an additional perspective, consider the issue of *informed consent*. Informed consent is necessary to therapeutic and to forensic practice. The differences between the requirements of informed consent in each context offer a fresh perspective on the irreconcilability of therapeutic and forensic roles. One of the central considerations that shape the content of an informed consent is the requirement that a psychologist act with beneficence and nonmaleficence (American Psychological Association, 2002). In the case of therapy, this duty and the concomitant disclosure to the patient are focused almost entirely on the patient's welfare. Whatever therapeutic technique is employed should be chosen and implemented for the benefit of the patient. Like other witnesses, the oath expert witnesses take before testifying obligates them to give wholly truthful testimony not for the patient's welfare but instead without regard to the harm it may cause a patient–litigant. In acquiring informed consent for the concurrent performance of both a therapeutic and forensic procedure and ultimately such truthful testimony, the patient would therefore be consenting to, and the psychologist would be agreeing to, fundamentally inconsistent positions.

### The “Diagnostic” Question

We do not suggest that therapists are inadequate diagnosticians but rather that they ask and answer different questions than do forensic experts. All assessment questions are not alike. A competent clinical assessment for the purposes of treatment is unlikely

to be adequate for forensic purposes as well. The tasks address different questions. For example, clinical diagnosis or some comparable assessment process is typically the diagnostic goal for determining how to best treat, that is, be beneficent to, this individual. In dramatic contrast, the law determines the issues to be addressed in the forensic examination, rarely putting more than secondary consideration on the best modality of therapy. The issue for the forensic examiner is defined by substantive law and is most often competence or capacity: parental capacity, testamentary or contractual capacity, competence to stand trial or to be executed, or capacity for criminal responsibility.

### Verification and Corroboration

The approach to acquiring and verifying information also varies considerably in therapeutic and forensic practice. Forensic experts cannot assume the veracity of any information on which they rely, and accordingly they use multiple sources and methods to gather information. Although veracity is also an issue for therapists, the incentives for litigants are more pervasive and profound. How many therapists routinely question their patient's family, friends, employers, or do collateral interviews or read deposition transcripts to verify what their patients claim in therapy? What would be the consequence for confidentiality and for the therapeutic alliance if they did? What would happen to forensic psychologists and psychiatrists on cross-examination, and the claims or defenses they seek to explain, if they did not also seek information from other sources?

### Professional Role Choices

Experts considering this issue should note that, regrettably, the courts do not ordinarily prevent therapists from testifying about their patients on relevant issues for which they have an adequate foundation that is not barred by privilege (Shuman & Greenberg, 1998). Role conflict is a professional issue. Those who would tolerate dual roles should think long and hard about a world reflected in a trial court's ruling in a sexual harassment case in which the plaintiff's expert was her sister, a psychologist who had been treating her (*Baskerville v. Culligan*, 1994, reversed on other grounds):

Culligan moves to exclude the expert testimony of Gale J. Bell, Ph.D. Dr. Bell is Baskerville's treating psychologist and her proposed expert witness regarding her psychological condition, treatment, and prognosis. Dr. Bell is also Baskerville's sister. Culligan does not dispute that Dr. Bell is a licensed psychologist or that Dr. Bell is qualified to render expert psychological testimony. However, Culligan maintains that it would be improper for Dr. Bell to render expert opinions regarding her sister's psychological condition. Culligan asserts that Dr. Bell's expert testimony would violate the American Psychology Association (APA)'s ethical code. Under the APA's code of ethical principles, psychologists must refrain “from entering into [a] personal, scientific, professional, financial, or other relationship . . . if it appears likely that such a relationship reasonably might impair the psychologist's objectivity” (Motion, Ex. D at P 1.17). Culligan maintains that Dr. Bell's professional relationship with Baskerville is unethical because they are sisters. Culligan reasons that the court must disqualify Dr. Bell and preclude her expert testimony in order “to preserve the public confidence in the fairness and integrity of the judicial proceedings” (Motion at 4). If at trial the court determines that Dr. Bell may

testify as an expert, the court would not be sponsoring her testimony or vouching for its objectivity. Rather, it would be the jury's function to assess the credibility of Dr. Bell's opinions and to determine the weight to be given her testimony. Culligan shows that Dr. Bell's professional relationship with Baskerville is unorthodox and raises serious questions regarding Dr. Bell's objectivity. However, these are appropriate subjects for Culligan's cross-examination of Dr. Bell. The testimony is not excluded on the motion in limine. (at \*10-11)

Dr. Bell might well have had the skills to be a competent therapist and expert witness. The court, as is typical of most courts, did not exclude her testimony on the basis of the defense's claim that Dr. Bell violated APA's code of ethical principles due to a role conflict. The trial court relied instead on cross-examination to inform the jury regarding how much weight, if any, they should give Dr. Bell's testimony.<sup>3</sup> We argue that professional norms should have led Dr. Bell to not provide the role-conflicting services in the first place, long before her doing so became an issue for the court.

### Mutually Exclusive Choices

As discussed above, the decision to provide therapeutic services and forensic services requires mutually exclusive professional choices. Providing each service requires the expert to establish a mutually exclusive choice of priorities between that of patient welfare and assistance to the court. Providing each service requires a mutually exclusive choice between a relationship with the patient–litigant based on trust and empathy or one based on doubt and distance. Providing each service also requires a mutually exclusive level of involvement in the fabric of the patient–litigant's mental health, either trying to better it or dispassionately evaluating it for the court.

### Conclusion

The 10 differences that make forensic and therapeutic roles irreconcilable are no less critical today than when originally published 10 years ago (Greenberg & Shuman, 1997). Those differences reflect that the patient–litigant has two roles: one as therapy patient and another as plaintiff in the legal process. The patient–litigant is the client of the therapist for the purposes of treatment and the client of the attorney for the purposes of representation through the legal system. The forensic examiner is retained by the attorney (or occasionally the court) for the purposes of litigation. The legal protection against compelled disclosure of the contents of a therapist–patient relationship is governed by the therapist–patient privilege and can usually only be waived by the patient or by court order; legal protection against compelled disclosure of the contents of the forensic examiner–litigant relationship is governed by the attorney–client and attorney–work-product privileges. The forensic examiner, having been retained by the attorney, is acting as an agent of the attorney in examining the party or parties in the legal matter.

The therapist is a care provider and usually is supportive, accepting, and empathic; the forensic examiner is an assessor and is usually neutral, objective, and detached as to the forensic issues.

To perform his or her evaluative task, a therapist must be competent in the clinical assessment and treatment of the patient's impairment; a forensic examiner must be competent in forensic

evaluation procedures and psycholegal issues relevant to the case. The forensic examiner must know the basic law as it relates to the assessment of the particular impairment claimed.

Therapists use their expertise to test rival diagnostic hypotheses to ascertain which therapeutic intervention is most likely to be effective; forensic examiners use their expertise to test rival psycholegal hypotheses that are generated by the elements of the law applicable to the legal case being adjudicated. The degree of scrutiny to which information from the patient–litigant is subjected is different, and historical truth plays a different role in each relationship. Therapeutic evaluation is relatively less structured than is forensic evaluation. The psychotherapeutic process is rarely adversarial in the attempt to reveal information. Forensic evaluation, although not necessarily unfriendly or hostile, is nonetheless adversarial in that the forensic examiner seeks information that both supports and refutes the litigant's legal assertions.

Therapy is intended to aid the person being treated. A therapist–patient relationship is predicated on principles of beneficence and nonmaleficence—doing good and avoiding harm. A therapist attempts to intervene in a way that will improve or enhance the quality of the person's life. Effective treatment for a patient is the reason and the principal defining force for the therapeutic relationship. This outcome for the patient is not a goal of forensic examination, and its impact is often the opposite of enhancing the quality of the person's life. A forensic examiner is obligated to be neutral, independent, and candid, without becoming invested in the legal outcome. A forensic examiner advocates for the findings of the evaluation, whatever those findings turn out to be. The role of a forensic examiner is to assess, judge, and report that finding to a third party (attorney, judge, or jury) who will use that information in an adversarial setting.

The therapist is intimately involved in the success or failure of the patient's therapy; the forensic examiner does not intervene therapeutically and attempts to not become part of the fabric of the patient–litigant's therapeutic outcome. The examiner's role is not one of avoiding to offer otherwise accurate testimony because the offering of that testimony might damage the patient–litigant's progress in therapy.

To perform a competent forensic examination, the expert must not only possess the requisite skills and expertise to perform the tasks of the examination, the expert must also exercise the untainted and unbiased judgment that is likely to become impaired when one provides both therapeutic and forensic services to the same individual. As to the argument that such taint and bias inherent in such dual roles can be avoided by expertise and mental resolve, one need only to be familiar with writings such as Fischhoff (1982), Koriat, Lichtenstein, and Fischhoff (1980), Slovic and Fischhoff (1977), and Gilovich, Griffin, and Kahneman (2002) to appreciate that one's attempts to argue with oneself against being biased are not adequate antidotes to that bias.

The provision of therapeutic services and forensic services involves a specialized set of tasks, each asks substantially different questions, and each requires a substantially different area of competency. The same person can possess both sets of expertise. The

<sup>3</sup> Curious readers might be interested to know that Baskerville, the plaintiff, prevailed in her claim at the trial court level, and the case was overturned on appeal for reasons unrelated to Dr. Bell's testimony.

core problem in role conflicts is not a lack of expertise. Most therapists are competent diagnosticians for therapeutic purposes, and many may also possess the skill and expertise to examine a patient–litigant for forensic purposes. Therapists (and for that matter, forensic examiners) may also possess the skill and expertise, and be appropriately licensed, to drive a motorcycle, give massages, style hair, broker real estate, and sell their own artistic creations. Possessing that competency and licensure does not argue that therapists should provide therapy to their patients on motorcycles, give them massages, style their hair, or sell them homes or art. This is not because they are not competent to do so. This is because, professionally, the tasks are irreconcilably mutually exclusive. No matter how dually competent, a professional cannot ethically and adequately accomplish both sets of tasks with the same patient–litigant. Possessing the dual competencies necessary to provide both therapy and examination services to the same individual does not explain why a psychologist should provide both services to the same individual. In our humble opinion, prudent psychologists will not.

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Declined to Extend by [U.S. v. Garcia](#), C.D.Cal., July 30, 2010

301 F.3d 1000

United States Court of Appeals,  
Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Richard Joseph FINLEY, Defendant–Appellant.

No. 01–10087.

|  
Argued and Submitted Dec. 3, 2001.

|  
Filed Aug. 20, 2002.

Defendant was convicted by a jury in the United States District Court for the Eastern District of California, [William B. Shubb](#), Chief District Judge, of making a false claim against the United States, attempting to interfere with the administration of the Internal Revenue Service (IRS), and two counts of bank fraud. Defendant appealed. The Court of Appeals, [Bright](#), Senior Circuit Judge sitting by designation, held that: (1) expert witness's testimony was not unreliable; (2) expert witness's testimony was relevant; and (3) defense did not fail to give required notice as to expert witness's testimony.

Reversed and remanded.

West Headnotes (15)

[1] **Criminal Law**  
 [Competency of evidence](#)

Court of Appeals reviews for abuse of discretion a district court's decision to admit or exclude scientific evidence.

[3 Cases that cite this headnote](#)

[2] **Courts**  
 [Abuse of discretion in general](#)

A court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous view of the facts.

[4 Cases that cite this headnote](#)

[3] **Criminal Law**  
 [Discretion of Lower Court](#)

Under the abuse of discretion standard, Court of Appeals reverses where it has a definite and firm conviction that the district court committed a clear error of judgment.

[10 Cases that cite this headnote](#)

[4] **Criminal Law**  
 [Discretion](#)

A trial court has broad discretion in assessing the relevance and reliability of expert testimony.

[11 Cases that cite this headnote](#)

[5] **Criminal Law**  
 [Review De Novo](#)

Court of Appeals reviews the interpretation of a discovery rule's meaning de novo.

[1 Cases that cite this headnote](#)

[6] **Criminal Law**  
 [Preliminary proceedings](#)

Court of Appeals reviews for abuse of discretion the propriety of excluding evidence as a sanction when a discovery rule has been violated.

[Cases that cite this headnote](#)

[7] **Criminal Law**  
 [Subjects of Expert Testimony](#)

Evidence rule governing admissibility of expert opinion testimony requires that (1) subject matter at issue be beyond the common **knowledge** of the average layman, (2) the witness have sufficient expertise, and (3) the state of the pertinent art or scientific **knowledge** permits the assertion of a reasonable opinion. [Fed.Rules Evid.Rule 702](#), [28 U.S.C.A.](#)

28 Cases that cite this headnote

[8] **Criminal Law**

🔑 Aid to jury

Expert testimony assists the trier of fact when it provides information beyond the common **knowledge** of the trier of fact.

19 Cases that cite this headnote

[9] **Criminal Law**

🔑 Mental condition

Trial court erred, in prosecution in which defense sought to introduce evidence that defendant suffered from an atypical belief system, by excluding testimony of expert witness, a **psychologist**, as unreliable; expert based his diagnosis on proper psychological methodology and reasoning, by relying on accepted psychological tests from which he drew sound inferences, taking a thorough patient history, interviewing defendant and his family, reviewing medical factors, and applying his experience. [Fed.Rules Evid.Rule 702, 28 U.S.C.A.](#)

9 Cases that cite this headnote

[10] **Criminal Law**

🔑 Mental condition or capacity

Trial court abused its discretion, in prosecution in which defense sought to introduce evidence that defendant suffered from an atypical belief system, by excluding testimony of expert witness, a **psychologist**, as irrelevant; expert's opinions on defendant's mental condition assisted jury inasmuch as they were based on factors beyond the **knowledge** of an average layperson and on observations of defendant that were beyond jury's ability to make and interpret, and opinions did not compel jury to conclude that defendant lacked the necessary **intent**. [Fed.Rules Evid.Rule 704\(b\), 28 U.S.C.A.](#)

17 Cases that cite this headnote

[11] **Criminal Law**

🔑 Intent

Expert testimony that compels the jury to conclude that the defendant did or did not possess the requisite mens rea does not assist the trier of fact because such testimony encroaches on the jury's vital and exclusive function to make credibility determinations. [Fed.Rules Evid.Rules 702, 704\(b\), 28 U.S.C.A.](#)

9 Cases that cite this headnote

[12] **Criminal Law**

🔑 Matters Directly in Issue;Ultimate Issues

**Criminal Law**

🔑 Mental condition or capacity

The rationale for precluding ultimate opinion testimony applies to any ultimate mental state of the defendant that is relevant to the legal conclusion sought to be proven, but expert testimony on a defendant's mental state is permitted so long as the expert does not draw the ultimate inference or conclusion for the jury. [Fed.Rules Evid.Rule 704\(b\), 28 U.S.C.A.](#)

6 Cases that cite this headnote

[13] **Criminal Law**

🔑 Expert witnesses

**Criminal Law**

🔑 Expert witnesses

Testimony of expert witness, a **psychologist**, was improperly excluded, on basis of alleged failure to give proper notice, in prosecution in which defense sought to introduce evidence that defendant suffered from an atypical belief system; disclosure met minimum requirements by alerting government of a mental condition bearing upon the issue of guilt, government failed to request a more definite statement, and expert's testimony did not contradict his disclosure. [Fed.Rules Cr.Proc.Rules 12.2, 16\(b\)\(1\)\(C\), 18 U.S.C.A.](#)

4 Cases that cite this headnote

[14] **Criminal Law**

🔑 Expert witnesses

Even if disclosure violation occurred, on basis of alleged failure to give proper notice, in prosecution in which defense sought to introduce evidence that defendant suffered from an atypical belief system, exclusion of entire testimony of expert witness, a **psychologist**, imposed a too harsh remedy; any omission was not willfully done to gain a tactical advantage, inasmuch as basis of expert's testimony was disclosed and government failed to seek further clarification, and expert's testimony was essential to the defense. [Fed.Rules Cr.Proc.Rule 16\(d\)\(2\)](#), 18 U.S.C.A.

10 Cases that cite this headnote

[15] **Criminal Law**

🔑 Failure to produce information

Exclusion is an appropriate remedy for a discovery rule violation only where the omission was willful and motivated by a desire to obtain a tactical advantage.

16 Cases that cite this headnote

**Attorneys and Law Firms**

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**John K. Vincent**, United States Attorney, **Norman Wong**, Assistant United States Attorney, **Thomas E. Flynn**, Assistant United States Attorney, and **Mark J. McKeon**, Assistant United States Attorney, Sacramento, CA, for the appellee.

Appeal from the United States District Court for the Eastern District of California; **William B. Shubb**, District Judge, Presiding. D.C. No. CR-98-00460-WBS.

Before: **BRIGHT**,\* **B. FLETCHER**, and **FISHER**, Circuit Judges.

**Opinion**

**BRIGHT**, Circuit Judge.

On July 9, 1999, the government filed a second superseding indictment against Richard Joseph Finley charging him with one count of making a false claim against the United States in violation of [18 U.S.C. § 287](#), one count of attempting to interfere with the administration of the Internal Revenue Service in violation of [26 U.S.C. § 7212\(a\)](#), and three counts of bank fraud in violation of [18 U.S.C. § 1344](#).

A jury trial began on December 21, 1999. In the middle of the defendant's presentation of his expert psychological witness, the government objected to the witness' testimony and requested that the testimony be struck as a sanction for the defendant's violation of [Federal Rule of Criminal Procedure 16\(b\)\(1\)\(C\)](#). After lengthy discussions outside the presence of the jury and after the district court conducted a hearing pursuant to *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the district court excluded the entirety of defense expert's testimony as a sanction for violation of [Rule 16](#) and as unreliable and irrelevant under [Federal Rule of Evidence 702](#).

On January 5, 2000, the jury returned guilty verdicts on all but one bank fraud count. The court dismissed the one remaining bank fraud count based upon the jury's inability to reach a verdict.

Finley appeals his conviction and forty-eight-month sentence of imprisonment. Finley raises the sole issue of whether the trial court abused its discretion by excluding the entirety of his psychological expert's testimony.

We REVERSE and REMAND on this record determining that the trial court erred in striking all expert testimony presented by Finley that corroborated his defense.

**I. BACKGROUND**

**A. Facts**

Finley owned a law bookstore and ran a bar review course for students of non-accredited law schools. In 1992, Finley began looking for investors to assist him in opening a chain of approximately twenty bookstores across the

United States. Finley could not obtain traditional bank financing because of a dispute he had with the IRS over a large tax claim.

In November 1995, a customer mentioned that he had attended an investment seminar in Montana run by Leroy Schweitzer.<sup>1</sup> Inspired by this suggestion, on December 22, 1995, Finley went to Schweitzer's farmhouse in rural Montana to attend the so-called investment seminar. Schweitzer explained that he possessed recorded \*1003 liens against Norwest Bank of Montana, other banks, and individuals, and that he could draw on these accounts by issuing negotiable instruments.

At the conclusion of the seminar, each attendee received a five-minute audience with Schweitzer to explain the attendee's needs. When he met with Schweitzer, Finley explained his business plan to open a chain of bookstores. Finley also told Schweitzer that he owed the IRS about \$180,000 and that he owed a mortgage on his condominium with Great Western Bank.

Schweitzer gave Finley several documents that looked like financial instruments and were entitled, "Comptroller's Warrants" and "Certified Banker's Checks." Schweitzer made one document payable to Finley and the Bank of America for \$6,125,000, Finley's estimate of the cost of starting his bookstore chain. Schweitzer made the second document out to Finley and Great Western Bank for \$150,000, or about twice the remaining amount Finley owed on his mortgage. The third instrument named the IRS and Finley as payees for \$360,000, twice the amount Finley owed in taxes. Although nothing existed in writing, Finley understood that Schweitzer would receive thirty-five percent of the profits from the bookstores.

Finley returned to Sacramento, California with the documents and prepared to open his new bookstores. He attempted to deposit the \$6 million document with the Bank of America in late December 1995 and again in August 1996. Finley gave the Bank of America document to an officer who had handled Finley's business accounts for several years. The bank began processing the instrument, but it was returned marked "fictitious check" with a separate notice that indicated "please resubmit when corrections are made." (Appellant's Br. 6) The bank also contacted the post office and received a "fraud alert" addressing similar instruments from Schweitzer. The bank gave a copy of the alert to Finley. Nonetheless, Finley

attempted to negotiate the instrument a second time in August 1996. This time Finley told the bank to send it to a designated address, but the item came back unpaid again.

Similarly, on January 2, 1996, Finley attempted to use the \$152,000 document to pay off his real estate mortgage with Great Western Bank. Finley included a note indicating the failure to refund the excess amount would constitute criminal conversion. Great Western did not negotiate the instrument because the bank had prior **knowledge** of fraud alerts regarding Schweitzer's instruments.<sup>2</sup>

On January 5, 1996, the chief of the fraud section of the Office of the Comptroller of the Currency wrote Finley stating that the Schweitzer document was "not a valid obligation of the federal government; the special account number is not an account for redemption of payment of such an instrument; the format is not one used by the federal government" and advised Finley to contact the FBI. (Appellant's Br. 8).

Undeterred by this information, Finley mailed the \$360,000 document to the IRS Center in Ogden, Utah on January 17, 1996. Finley included a letter requesting "immediate refund for overpayment" in the amount of \$180,000. The IRS did \*1004 not credit the amount to Finley's balance because of its prior **knowledge** of Schweitzer's instruments. The IRS had received more than two hundred requests for refunds totaling \$64,000,000 and IRS workers knew that no refunds should be issued.<sup>3</sup> Finley submitted the IRS document on a total of three separate occasions.

After determining that the IRS and the banks would not honor his documents, Finley embarked on an eight-month quest to learn why the government agencies would not honor what he believed to be valid financial instruments. Finley contacted in person or via mail, facsimile, or telephone several state and federal agencies in an attempt to learn how to negotiate the instruments. Every response indicated that the instruments were the subject of a fraud alert, deemed without value, and should not be honored.

In mid-1996, Finley prepared a "media packet" detailing his efforts to cash the instruments. He entitled the document "Robin Hood and the 9 Hoods" and portrayed various government officials as "bad guys" for not cashing the documents. (Appellant's Br. 9). He distributed this

packet to numerous network news programs and national newspapers. No media responded to his packets.

In April 1996, the FBI arrested Schweitzer and others, but not Finley, on multiple charges of fraud based on Schweitzer's seminars and instruments. Around this time, Finley ceased his pursuit to have the instruments honored.

In June 1998, Finley testified at Schweitzer's trial in Montana. In his testimony he stated that the government had not prosecuted him for attempting to cash the instruments. This trial resulted in a hung jury. Prior to his testifying in the second trial of Schweitzer in October 1998, the government notified Finley that it would indict him. A grand jury formally indicted Finley on November 6, 1998.

### B. Trial Proceedings

On August 18, 1999, Finley's counsel filed a notice under [Fed.R.Crim.P. 12.2\(b\)](#), informing the government that it intended to introduce testimony “relating to a mental disease or defect or any other mental condition” relevant to guilt. The government made a discovery request for information about the expert testimony. In response, on October 1, 1999, Finley's attorney sent a letter to the government summarizing the expert opinions of Dr. John J. Wicks. Dr. Wicks, a licensed clinical **psychologist** in California, had examined Finley. This letter represented that Finley “has an atypical belief system, a system which is very rigid.” The letter also stated, “While Mr. Finley presents some indications of [Shared Psychotic Disorder \(Folie a Deux\)](#), Dr. Wicks does not at present make that diagnosis. Mr. Finley is not suffering under any mental condition which is reported in the DSM–IV.”<sup>4</sup>

**\*1005** In a second letter dated October 25, 1999, Finley's counsel once again represented their **intent** to call Dr. Wicks at trial. In pertinent part, that letter reads:

Mr. Finley's mental condition, as set forth by Dr. Wicks, will be presented at trial to show that Mr. Finley did not have the **intent** to defraud, the requisite mens rea for the crime. The case of [United States v. Rahm](#), [ ] 993 F.2d 1405 (9th Cir.1993) contains a very similar fact pattern and is legal authority for the admission of the

evidence. I have attached a copy of the opinion for your convenience.

Thereafter, the prosecution moved under [Fed.R.Evid. 704](#),<sup>5</sup> to preclude Finley from relying on expert mental health testimony at the trial. At the hearing on the motion, neither party sought an examination of the **psychologist** to qualify that testimony under the *Daubert*<sup>6</sup>/*Kumho Tire*<sup>7</sup> requirements. The government's contention was that [Fed.R.Evid. 704\(b\)](#) barred the testimony because it addressed an honestly-held “value system.”

The court ruled that Dr. Wicks' testimony would be admissible and expressed its understanding that Dr. Wicks could not testify about any element of the crime charged. The court then advised counsel:

Then I think the way to handle it is to be careful on examination and to make appropriate objections, Mr. McKeon [the prosecutor]. If a question is asked that you feel calls for Dr. Wicks to express an opinion about Mr. Finley's actual belief or the sincerity of those beliefs, you may object. And then if he blurts it out, move to strike, and I'll strike it.

Additionally, the court instructed Finley's counsel to meet with Dr. Wicks to “make it clear to him the areas that he's not supposed to go into ... [s]o he has to stay within the bounds of the Court's ruling on what's relevant.”

The parties proceeded to trial and the defense called Dr. Wicks. Dr. Wicks explained his thirty years of experience in psychology including his extensive experience in conducting psychological evaluations of patients. He stated that he spent two days with Finley, including administering a battery of psychological tests and interviewing him. As a result of the tests and examination, Dr. Wicks testified that Finley has an atypical belief system. Dr. Wicks explained that most people have an open belief system which is subject to change, but some people have closed belief systems. Closed belief systems are more abnormal because they are fixed and rigid.

**\*1006** Dr. Wicks then testified how an atypical belief system operates. Dr. Wicks testified:

It's a closed belief system in which practical—or information from the real world that comes in is so grossly distorted that the person ends up with a belief system that the average person in the culture just simply would sit back and say, “Huh? How can you believe that?” If X, Y, and Z doesn't fit with that, they would then come up with an explanation how X, Y, and Z fit just fine with their belief system.

Dr. Wicks explained that a delusion is another psychological term for an atypical belief system and he stated there are three major categories of delusions. Dr. Wicks opined that Finley was vulnerable to a delusional disorder in December 1995, stating: “He tends to hear what he wants to hear and believe what he wants to believe about someone. So this had happened even prior to 1995.” The doctor concluded that Mr. Finley suffered from a delusional disorder from a minimum of 1995 until the present. He elaborated that a person with a delusional disorder can be dissuaded from the delusion “[o]nly with tremendous, tremendous difficulty.”

At this point, the government objected to Dr. Wicks' testimony and moved to strike it as a discovery violation. After extensive discussion with counsel for both parties, the court expressed the view that defense counsel had sandbagged the prosecutor and the court. Then the court decided to conduct a *Daubert* hearing that afternoon before proceeding with trial.

At that hearing, Dr. Wicks explained his methodology and stated the psychological community accepted the methodology he used. That methodology included a history of the patient, consisting of family, vocational, educational, medical and legal histories, the observation of the patient's behavior, and the administration of standard psychological tests. He stated he did not diagnose Finley as having a delusional disorder, although Finley's symptoms did fit within many of its criteria. He explained his fear that such a diagnosis might have suggested that Finley was legally incompetent, whereas Dr. Wicks believed Finley could assist counsel and understood his legal proceedings. This left Dr. Wicks with a diagnosis of an atypical belief system.

Dr. Wicks indicated that Finley's psychological tests were consistent with a diagnosis of a delusional disorder. Dr. Wicks explained that Finley's Million Clinical Multiaxial Inventory indicated that he had a high level of [narcissism](#),

a trait of a delusional person. The test also showed an elevated anxiety scale and a mild level of depression. Dr. Wicks explained how he used these tests to rule out other psychological disorders including [schizophrenia](#), [manic depression](#), and [psychosis](#).

At the conclusion of the *Daubert* hearing, the district court ruled from the bench. The court excluded the testimony on two grounds. It indicated that either ground was sufficient to exclude the testimony. First, under [Fed.R.Evid. 702](#)<sup>8</sup> the court ruled that “the testimony would not be helpful to the jury.” The court indicated that the jury could independently determine \*1007 Finley's credibility. The second ground for excluding the evidence struck the testimony as a sanction for a [Fed.R.Crim.P. 16\(b\)\(1\)\(C\)](#)<sup>9</sup> violation.

## II. STANDARD OF REVIEW

[1] [2] [3] [4] We review for abuse of discretion a district court's decision to admit or exclude scientific evidence. [General Elec. Co. v. Joiner](#), 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). A court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous view of the facts. [United States v. Morales](#), 108 F.3d 1031, 1035 (9th Cir.1997) (en banc). Under the abuse of discretion standard, we reverse where we have “a definite and firm conviction that the district court committed a clear error of judgment.” [United States v. Benavidez–Benavidez](#), 217 F.3d 720, 723 (9th Cir.2000). However, a trial court has “broad discretion” in assessing the relevance and reliability of expert testimony. [United States v. Murillo](#), 255 F.3d 1169, 1178 (9th Cir.2001).

[5] [6] We review the interpretation of a discovery rule's meaning *de novo*. See [United States v. Peters](#), 937 F.2d 1422, 1424 (9th Cir.1991). We review for abuse of discretion the propriety of excluding the evidence as a sanction when the rule has been violated. *Id.*

## III. DISCUSSION

The district court excluded Dr. Wicks' testimony as inadmissible under [Fed.R.Evid. 702](#) and as a sanction under [Fed.R.Crim.P. 16\(b\)\(1\)\(C\)](#). The court indicated that it believed either ground was sufficient to exclude the testimony. Therefore, we must evaluate the admissibility of the proffered evidence under both rules.<sup>10</sup> We will

first consider the reliability and relevance of Dr. Wicks' expert testimony under **Rules 702** and **704(b)**, then we will consider the trial court's exclusion of the testimony as a **Rule 16** sanction.

#### A. Exclusion of Dr. Wicks' Expert Testimony as Unreliable and Irrelevant

[7] **Federal Rule of Evidence 702** governs the admissibility of expert opinion testimony. The rule consists of three distinct but related requirements: (1) the subject matter at issue must be beyond the common **knowledge** of the average layman; (2) the witness must have sufficient expertise; and (3) the state of the pertinent art or scientific **knowledge** permits the assertion of a reasonable opinion. *Morales*, 108 F.3d at 1038.

[8] Our **Rule 702** analysis is guided by relevant Supreme Court precedent. See *Benavidez–Benavidez*, 217 F.3d at 724 (explaining how the *Daubert* Court set out factors to be reviewed when applying **Rule 702**). In *Daubert*, the Supreme Court \*1008 charged trial judges with the responsibility of acting as gate-keepers to “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” 509 U.S. at 589. The Court articulated a two-step inquiry for determining whether scientific evidence or testimony is admissible. First, the trial court must make a “preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” *Id.* at 592–93. The Court cautioned that the trial court must focus “on [the] principles and methodology, not on the conclusions that they generate.” *Id.* at 595. Second, the court must ensure that the proposed expert testimony is relevant and will serve to aid the trier of fact. *Id.* at 592–93. Expert testimony assists the trier of fact when it provides information beyond the common **knowledge** of the trier of fact. *Id.* at 591. The Court, in *Kumho Tire*, clarified that the district court's gatekeeper function applies to all expert testimony, not just testimony based in science. See 526 U.S. at 147.

The government does not contest that Dr. Wicks possesses the qualifications to testify as an expert under **Rule 702**. The district court acknowledged that Dr. Wicks qualifies as an expert in his field. The main issues of contention between the parties center on whether Dr. Wicks' methodology is reliable and whether his testimony will assist the jury. In resolving this issue we will rely on

the pertinent Federal Rules of Evidence, *Daubert*, *Kumho Tire*, and this circuit's case law.

#### 1. Reliability: Dr. Wicks' Methodology

At the conclusion of the *Daubert* hearing, the district court made several observations about Dr. Wicks' reasoning and methodology. Initially, it concluded:

Dr. Wicks' methodology is itself nothing unusual. The methodology itself is the form that is used by medical doctors uniformly. He considers the history given by the patient, his observations clinically of the patient's behavior, and any psychological testing .... I have no doubt that his psychological tests are well established tests that are widely accepted in the medical and psychological community.

However after making these general observations, the court went on to identify what it considered to be several problems with the reliability of Dr. Wicks' opinion. The court seemed troubled by the fact that the psychological tests did not reveal a conclusive diagnosis. The court recognized that Dr. Wicks' diagnosis was not inconsistent with the psychological tests, but said, the results are “not inconsistent with a lot of other things.” The court also asserted that Dr. Wicks based his opinion on his belief that Finley was not faking or being deceptive:

When you strip his opinion down to what it really seems to be based on, Mr. McKeon is correct. It's based on the assumption that what he's saying in his history and what he tells to Dr. Wicks is true. It relies upon the assumption that he is being truthful when he says what his views are.<sup>11</sup>

In its brief, the government extrapolates from the district court's position and argues that Dr. Wicks' opinion is not reliable because it “depends entirely on the doctor's subjective assessment of Finley's truthfulness.” (Appellee's Br. 12). The government also contends that Dr. Wicks' methodology is deficient under **Rule 702** \*1009 because he based his conclusions on facts that were

merely “commonsensical”<sup>12</sup> or beyond the scope of his expertise.<sup>13</sup>

It appears from the record before us that Dr. Wicks based his diagnosis on proper psychological methodology and reasoning. He relied on accepted psychological tests, from which he drew sound inferences, and he took a thorough patient history, including meeting with Finley's wife and observing Finley's behavior. Dr. Wicks did not base his conclusions solely on Finley's statements; rather, he used his many years of experience and training to diagnose Finley's mental condition. Finally, Dr. Wicks did not use any experimental techniques in his evaluation of Finley and he did not deviate in any way from his normal practice of conducting psychological evaluations. Thus, we reject the government's argument.

The government argues Dr. Wicks' diagnosis is unreliable because it is based on the fact that Dr. Wicks believed that Finley was not deceiving him. The government cites several out-of-circuit cases that it alleges support the argument that Dr. Wicks' opinion is founded on accepting Finley's truthfulness rather than on sound psychological methodology. See *United States v. Charley*, 189 F.3d 1251 (10th Cir.1999); *United States v. Whitted*, 11 F.3d 782, 785 (8th Cir.1993); *United States v. Benson*, 941 F.2d 598, 604–05(7th Cir.1991); and *Viterbo v. Dow Chem. Co.*, 826 F.2d 420 (5th Cir.1987). None of these cases is apposite.

Neither *Charley* nor *Whitted* supports the government's position because both cases involve a medical doctor's testimony about the truth of a child victim's report of sexual abuse. In both cases, the truth of the victim's report was the very substance of the doctor's testimony. The government acknowledges in its brief that Finley's truthfulness is not the substance of Dr. Wicks' opinion. (Appellee's Br. 13). The government instead contends that Dr. Wicks “founded” his opinion on Finley's truthfulness. Again, however, the facts of this case and the case law offered do not support the government's position.

In *Charley* and *Whitted*, medical doctors called as experts testified to their opinions that children were abused based primarily on the statements of the children that they were abused. *Charley*, 189 F.3d at 1267(describing opinions as based “largely” on witness statements); *Whitted*, 11 F.3d at 786 (describing opinions as based “solely” on witness statements). Thus, in each of those cases, the expert was merely reciting the allegation of the alleged victim “in the

guise of a medical opinion,” *Whitted*, 11 F.3d at 785–86, which “does nothing but vouch for the credibility of another witness ..., and therefore does not ‘assist the trier of fact’ as required by **Rule 702.**” *Charley*, 189 F.3d at 1267. In addition, each court noted that the fact of whether the alleged abuse occurred was for the jury to decide and therefore the expert's testimony was usurping the role of the jury as the ultimate fact finder. See *Charley*, 189 F.3d at 1270; *Whitted*, 11 F.3d at 787.

Unlike the experts in *Charley* and *Whitted*, Dr. Wicks did not merely recite Finley's statements to the jury in the guise of a medical opinion. Dr. Wicks did not base his diagnosis of Finley on Finley's own conclusion that he had a **mental impairment** the way the doctors in *Charley* and *Whitted* based their diagnosis of the existence \*1010 of abuse on the witnesses' statements that they were abused.

Nor did Dr. Wicks' diagnosis of Finley usurp the role of the jury with regard to an ultimate issue of fact. The jury needed to decide whether Finley knew the financial instruments were fake, not whether he had a **mental impairment** that might inhibit him from reaching the conclusion that the instruments were fake. The jury could accept Dr. Wicks' diagnosis and still find that Finley knew the instruments to be fraudulent. Neither *Whitted* nor *Charley* stands for the proposition the government would have it support: that a **psychologist** cannot provide expert testimony about his diagnosis of a mental disorder based on a variety of factors, including the statements made by the defendant to the **psychologist** in the course of his examination.

Likewise, *Benson*, 941 F.2d 598, and *Viterbo*, 826 F.2d 420, do not support the government's argument and are inapplicable to the facts of this case. In *Benson*, the Seventh Circuit found an abuse of discretion where the trial court allowed the government to introduce the testimony of an Internal Revenue Service agent whose purpose was to summarize the government's case and give his expert opinion on whether the defendant was required to file income tax returns. The court concluded that much of the agent's testimony consisted of “nothing more than drawing inferences from the evidence that he was no more qualified than the jury to draw” and the agent relied on testimony from other witnesses whose “credibility was vigorously attacked” by the defendant. 941 F.2d at 604. Specifically, the court noted that the agent had no “special skill or **knowledge**” that would allow him



to credit the truthfulness of the other witnesses. *Id.* As we have outlined, Dr. Wicks based his psychological analysis of Finley on more than a summary of Finley's statements, and he was eminently more qualified than a layperson on the jury to assess the significance of facts such as Finley's adamant refusal to accept, or even consider, the government's plea offer.<sup>14</sup>

*Viterbo* also is distinguishable from the present case. In *Viterbo*, the Fifth Circuit upheld the exclusion of the expert opinion of a medical doctor as lacking a reliable foundation because the doctor did not perform a proper medical history of the patient prior to developing his opinion. There, the medical expert sought to attribute the plaintiff's depression and other ailments to his exposure to a chemical based only on the plaintiff's statements that he experienced the symptoms and exposure to the chemical "was the only possible cause." 826 F.2d at 424. The Fifth Circuit upheld the exclusion of that testimony because the doctor "was not aware that *Viterbo* had a family history of depression and hypertension" that could have explained the source of the symptoms. *Id.* at 423 (concluding that the failure to take into account this history "seriously weakens" the reliability of the patient's oral history as a foundation for the doctor's expert opinion). It is not clear that Dr. Wicks made a similar error in diagnosing Finley. The trial record reveals that Dr. Wicks' opinion is based on more than simply crediting Finley's statements. Dr. Wicks administered psychological tests to rule out serious mental disorders, he took a case history and interviewed Finley's spouse to ascertain additional information, and he observed Finley's \*1011 physical movements and conducted a physical exam to determine if there was a possible physiological problem. The government has not argued that Dr. Wicks' opinion is based on an inaccurate history or is lacking in any specific facts.

We also reject the government's argument because Dr. Wicks provided articulable reasons why he believed Finley was not being deceptive or faking. At the *Daubert* hearing, Dr. Wicks explained that "there was no indication that he [Finley] was being deceitful on what probably amounted to four or five hours of testing." Dr. Wicks had previously explained how the psychological tests were specifically designed to detect someone who is trying to fake a mental illness. In addition, Dr. Wicks noted that Finley's responses were internally consistent, and Dr. Wicks had not identified any defensiveness in Finley or any indication that he was over-representing his symptoms.

Based on his clinical experience and these facts, Dr. Wicks concluded that Finley was not faking or lying.<sup>15</sup>

A belief, supported by sound reasoning, that the patient is not faking or lying is sufficient to support the reliability of a mental health diagnosis. In a different factual context, we have stated that "the law does not require every expert who testifies to be an expert in detecting deceit." *United States v. Morales*, 108 F.3d 1031, 1039 (9th Cir.1997) (reversing a district court's exclusion of defendant's bookkeeping expert who the district court excluded because the defendant "may have intentionally deceived" the expert about her true knowledge of bookkeeping principles). Analogously, we refuse to require that mental health experts prove themselves infallible lie detectors before accepting their psychological diagnoses.

The government next seeks to convince us that Dr. Wicks' diagnosis is unreliable because he based his conclusions on matters beyond his expertise. The doctor was initially hesitant to apply the delusional disorder terminology of the DSM-IV based on his fear that using certain terms would cause the court to question Finley's legal competence.<sup>16</sup>

In testimony before the jury prior to the government's objection, Dr. Wicks explained that a closed belief system, which distorts or rejects information that does not comport with certain beliefs, is called "atypical belief system." This system can also be referred to by the term "delusion."<sup>17</sup> Dr. Wicks then explained that there are three major categories of delusions: (1) bizarre delusions held by schizophrenics; (2) atypical delusions held by \*1012 people who "function very normally in everyday life unless you touch their delusions"; and (3) shared delusional systems known as *folie a deux*. Dr. Wicks did not classify Finley in any of these categories. He was interrupted by the government's objection shortly after presenting these three categories.

At the *Daubert* hearing, Dr. Wicks elaborated on how he diagnosed Finley as having an atypical belief system. He admitted that it was "an extremely gray diagnosis" and he "could have easily given him a diagnosis of a delusional disorder [but] that would have raised the question as to his competency in federal court" when Dr. Wicks believed that Finley was capable of assisting his attorney and understanding the court proceedings. Dr. Wicks explained

his choice of terminology by saying that an “atypical belief system” is a “personality description, not a DSM–IV diagnosis.” Nonetheless, Dr. Wicks believed that Finley's mental condition could fit the criteria for a delusional disorder under the DSM–IV.

We determine that Dr. Wicks' diagnosis should not be deemed unreliable based on his choice of terminology to describe the diagnosis. Dr. Wicks adequately explained his method of diagnosis to overcome any doubt that he was misdiagnosing Finley or **intentionally** misleading the government or the court. According to Dr. Wicks' testimony, the symptoms Finley exhibited could be described as either a delusional disorder or atypical belief system. Dr. Wicks simply chose the term, in his view, with the least potential for confusion. We have recognized that concepts of mental disorders are “constantly-evolving conception[s]” about which “the psychological and psychiatric community is far from unanimous” and a “district court may not exclude proffered expert psychological testimony simply because the defendant's condition does not fit within the expert's— or the district court's own—concept of mental ‘disorder.’” *United States v. Rahm*, 993 F.2d 1405, 1411 (9th Cir.1993) (reversing the district court's exclusion of expert testimony that the defendant had perceptual difficulties making it impossible for her to recognize counterfeit currency).

[9] We conclude that the district court erred in assessing the reliability of Dr. Wicks' testimony. Dr. Wicks did not base his opinions solely on the truthfulness of Finley's statement nor does the record before us demonstrate that the diagnosis was reached through unsound methodology or reasoning. It appears from the record that Dr. Wicks' diagnosis incorporates testing, case history, interviews with the patient and family, medical factors and expert experience applying the information contained in the DSM–IV and other mental health publications. Dr. Wicks' experience with evaluating “thousands” of people should not be undervalued.

## 2. Relevance: Assist the Trier of Fact

[10] The district court concluded that Dr. Wicks' testimony was not relevant because (1) the jury could make its own determination about the sincerity and veracity of Finley's beliefs, (2) the jury could also make the same observations Dr. Wicks made, and, (3) the government could not “effectively cross-examine” the

expert diagnosis.<sup>18</sup> The government makes a similar argument to this court, contending that Dr. Wicks' testimony does not assist the trier of fact because it does not exceed the common **knowledge** of the trier of fact and crediting Dr. Wicks' testimony precludes \*1013 the jury from finding that Finley possessed the necessary *mens rea* for the crime.<sup>19</sup>

### a. Common **Knowledge** of the Trier of Fact

We reject the government's first argument and hold that the district court abused its discretion when it found that Dr. Wicks' expert opinion did not exceed the common **knowledge** of the average layperson.

We must be cautious not to overstate the scope of the average juror's common understanding and **knowledge**. As the Seventh Circuit has recognized, it is “precisely because juries are unlikely to know that social scientists and **psychologists** have identified [such a personality disorder] ... that the testimony would have assisted the jury in making its decision.” *United States v. Hall*, 93 F.3d 1337, 1345(7th Cir.1996).

Jurors are unlikely to know that **psychologists** have identified a personality disorder that explains why a seemingly normal person could reject or distort certain overwhelmingly true information. Dr. Wicks' testimony would have offered an explanation as to how an otherwise normal man could believe that these financial instruments were valid and reject all evidence to the contrary. While Finley could and did testify about how and why he believed the instruments were valid, only a trained mental health expert could provide a counterweight to the government's allegations against Finley. On the basis of the record before us, Finley was entitled to present Dr. Wicks' testimony to support his defense theory.

Our case law recognizes the importance of expert testimony when an issue appears to be within the parameters of a layperson's common sense, but in actuality, is beyond their **knowledge**. In *United States v. Vallejo*, 237 F.3d 1008, 1019–20 (9th Cir.2001), we reversed a trial court's decision to exclude a school **psychologist's** testimony that special education students whose first language is not English have difficulties communicating in English in high pressure situations. Even though this testimony was seemingly based on common sense, we stated that the expert testimony

was necessary to explain how the defendant and an interrogating officer “could have very different perceptions of what occurred during the interrogation, yet could both be correct from a communications standpoint.” 237 F.3d at 1019. In *Vallejo*, we relied on the logic of a First Circuit case in which the court explained: “[T]he expert testimony was needed to explain why the defendant would make ‘false statements even though they were inconsistent with his apparent self-interest’ when ‘[c]ommon understanding conforms to the notion that a person ordinarily does not make untruthful inculpatory statements.’ ” *Id.* at 1020 (quoting *United States v. Shay*, 57 F.3d 126, 133(1st Cir.1995)) (concluding that the defendant should have been allowed to present expert testimony that he suffered from a mental disorder which caused him to tell grandiose, self-incriminating lies). The First Circuit reformulated the proper **Rule 702** inquiry to be: “[w]hether the untrained layman would be qualified to determine intelligently and to the best degree, the particular issue without enlightenment from those having a specialized understanding of the subject matter involved.” *Shay*, 57 F.3d at 132 (citations omitted). In the instant case, the average layperson was not qualified to assess Finley's mental \*1014 condition without the assistance of an expert's specialized understanding.

The district court also concluded that several factors in Dr. Wicks' diagnosis, including the elevated levels of narcissism and Dr. Wicks' observations of Finley's physical conduct, are the kinds of observations a jury is supposed to make. We reject the notion that the jury could make the same observations as Dr. Wicks about Finley's physical demeanor and his psychological test scores. First, we note the obvious distinction between a mental health professional examining a patient in private and a jury observing a defendant testifying on the witness stand. Second, while the jury members might have been able to visually identify Finley's demeanor, they were not trained to interpret and assess those observations.<sup>20</sup> The government describes these as “commonsensical observations” about Finley's demeanor, but Dr. Wicks was able to carefully detail his expert ability to recognize certain symptoms based on his training and years of experience.<sup>21</sup> We doubt the members of the jury possess such an ability. Finally, as Dr. Wicks explained, interpreting psychological testing scores requires years of experience and training. Providing the jury with this raw information would simply not have been enough.

The court also excluded Dr. Wicks' opinion because “there's nothing that anybody can get their teeth into if you want to cross-examine him.” Contrary to this position and as previously mentioned in note 18 of this opinion, all of the weaknesses the district court noted in Dr. Wicks' testimony, including the subjectivity of his conclusions and his reliance on the veracity of Finley's statements, can be properly addressed by the government on cross-examination. See e.g., *Rahm*, 993 F.2d at 1413 (“Any deficits in[the **psychologist's**] qualifications beyond her professional training go to the weight of her testimony rather than to its admissibility.”). “Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” *Daubert*, 509 U.S. at 596. We note that even with the short notice the government effectively cross-examined Dr. Wicks during the *Daubert* hearing.

#### b. **Rule 704(b)** and the Necessary Compulsion Test

[11] [12] Expert testimony that compels the jury to conclude that the defendant did or did not possess the requisite *mens rea* \*1015 does not “assist the trier of fact” under **Rule 702** because such testimony encroaches on the jury's vital and exclusive function to make credibility determinations. Specifically, **Rule 704(b)** “limits the expert's testimony by prohibiting him from testifying as to whether the defendant had the mental state or condition that constitutes an element of the crime charged.” *Morales*, 108 F.3d at 1035. The “rationale for precluding ultimate opinion testimony applies ... ‘to any ultimate mental state of the defendant that is relevant to the legal conclusion sought to be proven.’ ” *United States v. Campos*, 217 F.3d 707, 711 (9th Cir.2000) (quoting *S. Rep. 98-225* at 231). However, **Rule 704(b)** allows expert testimony on a defendant's mental state so long as the expert does not draw the ultimate inference or conclusion for the jury. *Morales*, 108 F.3d at 1037–38. It is, therefore, essential that we distinguish between expert opinions that “necessarily compel” a conclusion about the defendant's *mens rea* and those that do not.

In *Morales*, we concluded that the district court erred in barring expert testimony under **Rule 704(b)** because the expert's testimony did not compel the conclusion that *Morales* lacked the *mens rea* of the crime. *Morales*, charged with willfully making false bookkeeping entries, wanted an accounting expert to testify that her

“understanding of accounting principles” was “weak.” *Id.* at 1037. We stated:

Even if the jury believed [the] expert testimony that Morales had a weak grasp of bookkeeping **knowledge** (and there was evidence to the contrary), the jury would still have had to draw its own inference from that predicate testimony to answer the ultimate factual question—whether Morales willfully made false entries. Morales could have had a weak grasp of bookkeeping principles and still knowingly made false entries.

*Id.* at 1037.

In *Morales*, we also cited with approval *United States v. Rahm*, in which we reversed the district court's exclusion of a defense expert who was going to testify that Rahm had poor visual perception and consistently overlooked important visual details. *Morales*, 108 F.3d at 1038. In *Rahm*, we drew a distinction between the ultimate issue—whether Rahm knew the bills were counterfeit—and the proffered testimony of the defendant's poor vision, from which the jury could, but was not compelled, to infer that she did not know the bills were counterfeit. *Id.* (citing *Rahm*, 993 F.2d at 1411–12).

On the other hand, we have applied [Rule 704\(b\)](#) to prohibit certain testimony that does compel a conclusion about *mens rea*. In *Campos*, we upheld a district court's exclusion of a polygraph expert from testifying that the defendant was truthful when she stated she did not know she was transporting marijuana. 217 F.3d at 711. We determined that the testimony compelled the conclusion that the defendant did not possess the requisite **knowledge** to commit the crime because polygraph test results offer an implicit opinion about whether the accused is being deceptive about the very matters at issue in the trial. *Id.* at 712.

Dr. Wicks' expert diagnosis that Finley has an atypical belief system falls into the *Morales / Rahm* line of reasoning and can be distinguished from *Campos*. The jury could have accepted the atypical belief diagnosis and still concluded that Finley knowingly defrauded the banks. If credited, Dr. Wicks' testimony established only

that Finley's beliefs were rigid and he would distort or disregard information that ran counter to those beliefs. Dr. Wicks did not, and would not be allowed to, testify about Finley's specific beliefs with regard to the financial instruments. The jury was free to conclude that Finley knew the notes were fraudulent, despite the rigidity of his belief system. Just as in *Morales* and *Rahm*, the defense was entitled to present evidence so that the jury could infer from the expert's testimony that the defendant lacked the necessary **intent** to defraud, but such a conclusion was not necessarily compelled by the diagnosis. A psychological diagnosis, unlike a lie detector test, does not automatically entail an opinion on the truth of a patient's statements. Furthermore, the psychological diagnosis can be limited such that it in no way touches upon the specific issues of fact to be resolved by the jury.<sup>22</sup>

We also observe that a jury is free to reject Dr. Wicks' testimony. A jury might decide that Finley was untruthful with Dr. Wicks, as the government so strenuously argues in its brief to this court. *See Vallejo*, 237 F.3d at 1020 (“allowing the expert testimony would not displace the role of the jury because, after hearing the expert testimony, the jury was free to decide that the reason for the discrepancy was Vallejo's lack of credibility—not his communications disorder”).

### B. Exclusion of Dr. Wicks'

#### Testimony as a [Rule 16](#) Sanction

The district court also excluded Dr. Wicks' testimony as a sanction for Finley's failure to give proper notice under [Fed.R.Crim.P. 16\(b\)\(1\)\(C\)](#). Finley asserts that his notice complied with the requirements of [Rule 16](#) and he should not be faulted for the government's failure to request additional discovery about Dr. Wicks' testimony as the Rule requires. Further, Finley contends that even if a discovery violation existed, the court erroneously excluded the entire testimony. We agree.

[Rule 16\(b\)\(1\)\(C\)](#) allows the government to obtain information regarding a defendant's expert witness. “At the government's request,” [Rule 16](#) requires the defendant to disclose a summary consisting of the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications. [Fed.R.Crim.P. 16\(b\)\(1\)\(C\)](#).

Finley's counsel notified the government of their **intent** to present expert testimony on Finley's mental condition. In a letter dated October 1, 1999, counsel explicitly stated: "He [Finley] also has an atypical belief system, a system which is very rigid." In a second letter, dated October 25, 1999, the defense made clear: "Mr. Finley's mental condition, as set forth by Dr. Wicks, will be presented at trial to show that Mr. Finley did not have the **intent** to defraud, the requisite mens rea for the crime." Finley's counsel also supplemented the October 1 and October 25 letters with the psychological tests Dr. Wicks administered to Finley and provided the government with Dr. Wicks' resume disclosing his qualifications. The government did not make a motion for further disclosure of Dr. Wicks' opinion.

Later at the pretrial hearing, Finley's counsel orally explained the basic nature of Dr. Wicks' opinions. Additionally, in his written motion, Finley indicated that the testimony would support his defense theory that he did not have the required **intent** to commit the crimes. The motion also indicated that "[t]he testimony that Mr. Finley suffers from a very rigid 'atypical belief system' is directly relevant to Mr. Finley's attempts to ascertain the legitimacy \*1017 of the warrants and his claim that he believed them to be valid." Finally, Finley asserted that Dr. Wicks "will merely be telling the jury his determination that Mr. Finley suffers from a character disorder that is directly relevant to his defense of lack of **intent**." The government suggested its **intent** to file a motion under [Rule 12.2](#) for a more definite statement, but the government never filed such a motion. The record does not reveal any further inquiries from the government about the nature or scope of the proposed testimony prior to Dr. Wicks taking the stand.

[13] We do not believe a violation occurred here. The disclosure may not have been as full and complete as it could have been or as the government would have liked. However, the disclosure met the minimum requirements of [Rule 16\(b\)\(1\)\(C\)](#). We believe that the information Finley provided to the government supplied the government with sufficient notice of the general nature of Dr. Wicks' testimony. In addition, the government does not argue that Finley failed to provide the basic information concerning Dr. Wicks' proposed testimony.

Instead, the government maintains that Finley's disclosure is deficient because it was diametrically opposed to the

actual testimony at trial. The government argues that the district court properly excluded Dr. Wicks' testimony because Finley's counsel deliberately led it to believe that Finley did not have any mental disorders. We reject this argument.

Both the prosecutor and the trial judge assumed that Finley's [Rule 16](#) disclosure limited the nature of Dr. Wicks' testimony to the precise language in the defendant's reports without further explanation. This was a misunderstanding and was not based on any deception or effort to mislead on the part of Finley's counsel. The trial court stated:

I was thinking when I ruled on his motion under [Rule 704](#)—don't interrupt me—when I ruled on this motion under [Rule 704](#), I was thinking, what's Mr. McKeon's [sic] so worked up about? Here's somebody that's just going to come in and say that Mr. Finley has beliefs that are not typical, but he's going to say he has no mental disorder that is recognizable in the definitive book.

The court admitted that neither he nor the prosecutor understood that an "atypical belief system" was a "term of art" rather than "a lay term that doesn't amount to anything." In fact, the prosecutor explained that he interpreted the October 1 letter to indicate that Dr. Wicks would testify only that "Mr. Finley was stubborn but he wasn't mentally sick."

Nothing in this court's reading of the October 1 or October 25 letters directly supports the assumptions made by the prosecutor or the trial court about the nature of Dr. Wicks' testimony. Nothing indicates that "atypical belief system" is used as a lay term rather than a term of art. The letters stated that Dr. Wicks would testify Finley had an atypical belief system, which is exactly how he testified. In his testimony at the *Daubert* hearing, Dr. Wicks explained the nuances between applying the personality description, "atypical belief system" and making a diagnosis under the DSM-IV. Considering Dr. Wicks' testimony and the [Rule 16](#) disclosure in their entirety, it is clear they are not in contradiction. Finally, we note the implausibility of believing that Finley would choose to present a defense theory based on expert testimony that "doesn't amount to anything" and relies on the idea that he is "stubborn rather

than mentally sick.” After all, the entire purpose behind the [Rule 16](#) disclosure and the [Rule 12.2](#) notice is to alert opposing counsel of a \*1018 mental condition bearing upon the issue of guilt.

[14] Even were we to assume a violation occurred, the district court, by excluding the entire testimony, imposed a too harsh remedy for the violation. [Rule 16](#) allows the district court to “order [a violating party] to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.” [Fed.R.Crim.P. 16\(d\)\(2\)](#).

[15] Exclusion is an appropriate remedy for a discovery rule violation only where “the omission was willful and motivated by a desire to obtain a tactical advantage.” [Taylor v. Illinois](#), 484 U.S. 400, 415, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) (upholding trial court's exclusion of witness where defendant deliberately failed to identify witness prior to trial) (emphasis added); see also [United States v. Peters](#), 937 F.2d 1422, 1426 (9th Cir.1991) (holding district court erred in excluding testimony of forensic pathologist because no willful or blatant discovery violation occurred).

In this case, assuming there was an omission of some sort, it was not willfully done to gain a tactical advantage. Finley's counsel disclosed the basis of Dr. Wicks' testimony. Even at the pretrial hearing, the government did not seek a further clarification of the scope of Dr. Wicks' testimony.<sup>23</sup> In [Taylor](#), the Supreme Court suggested that even for direct discovery violations, a sanction other than preclusion would be “adequate and appropriate in most cases.” 484 U.S. at 413. The severe sanction of total exclusion of the testimony was disproportionate to the alleged harm suffered by the government.

Because the Supreme Court has recognized that “[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense,” [Taylor](#), 484 U.S. at 408, courts should use particular caution in applying the drastic remedy of excluding a witness altogether. In assessing the choice of sanctions, this circuit has instructed that the “decisive value” of the evidence be considered.

[United States v. Duran](#), 41 F.3d 540, 545 (9th Cir.1994) (examining whether the evidence was of “decisive value” or if the exclusion was “disproportionate to the conduct of counsel”). In [United States v. Scholl](#), 166 F.3d 964 (9th Cir.1999), we determined that the exclusion of evidence, namely nine cashier's checks, was an appropriate sanction for a discovery rule violation. *Id.* at 972. Scholl's counsel possessed the cashier's checks for sometime, but only disclosed them after the start of trial. We allowed the exclusion, in part, because we determined that the checks did not have decisive value as the information contained in the checks was presented to the jury through testimony. *Id.*

Here, Dr. Wicks' testimony is essential to the defense. Dr. Wicks presented the only evidence of Finley's diagnosed mental disorder, and the court excluded the entire testimony. Finley's counsel did not have any other way of explaining the possibility that Finley suffered from a mental disorder. For this reason, we determine that the prejudice resulting from the error cannot be construed as harmless. See [Peters](#), 937 F.2d at 1426 (explaining the applicability of harmless error rests upon determining \*1019 that the prejudice resulting from the error was more probably than not harmless).

#### IV. CONCLUSION

We offer some comments on remand. The government may offer evidence to challenge Dr. Wicks' opinion that Finley suffered from any form of delusion. The government may also request another *Daubert* hearing prior to trial and call its own witnesses.

Finley was entitled to present his defense to the jury with the use of expert testimony that meets the standards of relevance and reliability expressed in this opinion. Accordingly, we REVERSE and REMAND for proceedings consistent with this opinion.

#### All Citations

301 F.3d 1000, 90 A.F.T.R.2d 2002-5940, 59 Fed. R. Evid. Serv. 477, 02 Cal. Daily Op. Serv. 7574, 2002 Daily Journal D.A.R. 9543

#### Footnotes

- \* The Honorable [Myron H. Bright](#), Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.
- 1 Schweitzer led a group of people calling themselves the “Montana Freeman.” Among other things, Schweitzer gave seminars on his version of the “common law.” At the conclusion of these seminars, Schweitzer gave participants, such as Finley, fraudulent monetary instruments. The United States has prosecuted and convicted Schweitzer of various crimes.
- 2 Numerous alerts existed regarding the Schweitzer instruments including: (1) a Postal Bulletin Fraud Alert dated December 7, 1995; (2) an Office of the Comptroller of the Currency (OCC) fraud alert dated September 8, 1995; (3) an OCC fraud alert dated November 20, 1995; (4) a California State Banking Department weekly bulletin dated November 11, 1995, addressing Schweitzer's instruments; and (5) an OCC fraud alert dated February 8, 1996.
- 3 The evidence indicated that certain persons who previously presented Schweitzer's instruments to the IRS had received about \$17,000 in refunds.
- 4 The full letter reads as follows:  
Yesterday I spoke with John Wicks, Ph.D. on the subject matter of his evaluation of Mr. Finley. Dr. Wicks will not be preparing a report at this time, but gave me the following oral statement of his opinions on Mr. Finley's present mental status. This oral statement is all that I have at this time and is all that I will have in writing of the evaluation at present. Dr. Wicks made the following observations of Mr. Finley:  
Mr. Finley is in acceptable physical condition, suffering from some physical ailments and some anxiety and minimal depression. He also has an atypical belief system, a system which is very rigid. Mr. Finley has some self destructive qualities and as a result it is hard to find an authority or source available which would satisfy him **on the issue** of the validity of the liens and warrants involved in this case. While Mr. Finley presents some indications of Shared Psychotic Disorder (Folie a Deux), Dr. Wicks does not at present make that diagnosis. Mr. Finley is not suffering under any mental condition which is reported in the DSM–IV.  
Thank you again for your courtesy and cooperation, and please do not hesitate to contact me at anytime to discuss this case.  
DSM–IV is entitled “The Diagnostic and Statistical Manual of Mental Disorders,” 4th Ed., 1994 (American Psychiatric Association).
- 5 **Federal Rule of Evidence 704** provides:  
(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.  
(b) No expert witness testifying with respect to the mental state or condition of a defendant in a **criminal case** may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.
- 6 [Daubert v. Merrell Dow Pharm., Inc.](#), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).
- 7 [Kumho Tire Co. v. Carmichael](#), 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).
- 8 At the time of the district court's ruling, the language of **Federal Rule of Evidence 702** read:  
If scientific, technical, or other specialized **knowledge** will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by **knowledge**, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.  
We note that in the 2000 Amendments to the **Federal Rules of Evidence**, **Rule 702** was amended in response to *Daubert*. Those changes do not affect our analysis in this case.
- 9 **Federal Rule of Criminal Procedure 16(b)(1)(C)** provides:  
Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under **Rules 702, 703, or 705 of the Federal Rules of Evidence** as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under **Rule 12.2(b)** of an **intent** to present expert testimony on the defendant's mental condition. This summary shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.
- 10 In reaching its conclusions about the relevance and reliability of Dr. Wicks' testimony, the district court mentions only **Rule 702** explicitly. Nonetheless, it is clear that considerations falling under **Rule 704(b)** are implicated as well. **Rule 702** and **Rule 704(b)** are the two relevant federal rules which govern the admissibility of expert testimony. *Morales*, 108 F.3d at 1035.
- 11 The court later complained, “there are no standards that we can put our fingers on for how you tell medically or scientifically whether somebody is telling the truth.”

- 12 These commonsensical matters include Dr. Wicks' observation of Finley's physical manifestations, such as facial flushing, hand trembling and stammering.
- 13 These matters include Finley's refusal to accept the plea bargain and the possibility of his diagnosis being misconstrued as supporting a finding of legal incompetency.
- 14 The government argues that Dr. Wicks was not qualified to assess the quality of a plea offer in a **criminal case** because he is not an attorney. While this may be true, Dr. Wicks can certainly assess the mode of reasoning that Finley employed to consider the plea offer and draw conclusions about Finley's apparent refusal to compromise or negotiate.
- 15 To be clear, Dr. Wicks' conclusions that Finley was not faking a mental disorder are *not* the same as conclusions that he was being truthful about not knowing that Schweitzer's financial instruments were fake. The validity of Dr. Wicks' diagnosis does not implicate this type of factual matter, which is for a jury to resolve.
- 16 The district court also commented on this fact in making its ruling to exclude Dr. Wicks' testimony:  
It is troublesome to the Court that he admitted he makes his diagnosis based on what the consequences are. That confirms the Court's fears about what these so-called experts are doing in these cases. He is an expert in his field. But it concerns the Court what he's using his expertise for.
- 17 The following exchange occurred between Finley's counsel and Dr. Wicks:  
Q. Now, is there another psychological term for atypical belief system?  
A. A term that is used is a delusion.  
Q. And can you explain what a delusion is?  
A. It's a closed belief system in which practical—or information from the real world that comes in is so grossly distorted that the person ends up with a belief system that the average person in the culture just simply would sit back and say, "Huh? How can you believe that?"
- 18 Indeed, the prosecution could show on cross-examination and in argument to the jury that if the jury did not credit Finley's beliefs as testified by him and as stated to Dr. Wicks, that would be a sound basis upon which to reject Dr. Wicks' diagnosis.
- 19 According to the government's brief, the *mens rea* for the crime of bank fraud is "to 'knowingly' defraud various financial institutions." (Appellee's Br. 19). This is the government's [Rule 704\(b\)](#) argument and we will address it as such, *infra* section III.A.2.b.
- 20 During the *Daubert* hearing, the prosecutor asked Dr. Wicks if a jury of twelve random people would be able to determine as well as he whether Finley's beliefs were atypical. Dr. Wicks responded:  
I would have to slightly disagree with that, because after 29 years of listening to psychotic, nonpsychotic, delusional, non-delusional patients, I think I have a slightly better understanding than the average jurist. I think the average jurist is very capable of making these decisions if given all the information, but I have access to some information that I am aware that they will not have access to.
- 21 Dr. Wicks explained how he conducts a clinical observation of a patient during an interview:  
You're looking for indications of distractibility[sic], indications of anxiety, somebody sitting there does this (indicating) through the whole interview, tapping their hands. You look for those kinds of signs. As to more basic, when they walk through the door you look at their walk to make sure their gait is normal. If you're looking for neurological problems, sometimes you look for hand tremors. You want to determine if those hand tremors are related to his just being nervous or if this, again, is some sort of neurological impairment. So the clinical interview starts long before you even start talking to the patient.
- 22 Indeed, upon remand, we refer the trial court back to its own pre-trial ruling on the [Rule 704\(b\)](#) issue, where the court advised the government, "If a question is asked that you feel calls for Dr. Wicks to express an opinion about Mr. Finley's actual belief or the sincerity of those beliefs, you may object."
- 23 We observe that the government does not come into this argument without some discovery failures of its own. Prior to trial, the district court criticized the government for failing to disclose its expert witness. The court postponed the trial until Finley's counsel deposed the government's expert. While we do not condone such tactics, we note that both sides may have failed to give the opponent full and complete information relating to an expert's proposed testimony.



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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

HENRY KEELER REDLIGHTNING,

Defendant.

CASE NO. CR07-358JLR

ORDER ON *DAUBERT*  
MOTIONS

Before the court is the government’s motion to exclude expert opinion evidence, motion for *Daubert* hearing, and memorandum in support (Dkt. # 117). The government seeks to exclude expert testimony from two of Defendant’s witnesses, Dr. Richard Leo and Dr. Alan Breen. On September 5, 2008, the court held a *Daubert* hearing and heard testimony from Defendant’s witness, Dr. Leo. The Defendant chose not to present testimony from Dr. Breen at the hearing. On September 9, 2008, Defendant filed a written proffer of expected testimony by Dr. Breen (Dkt. # 155). At the request of the court, the government filed its response and objections to the written proffer of the testimony by Dr. Breen (Dkt. # 171). The court has reviewed the materials submitted in support and in opposition of the motion and for the reasons stated below GRANTS in part and DENIES in part the motion (Dkt. # 117).

**BACKGROUND AND ANALYSIS**

Defendant seeks to introduce two experts, Dr. Leo and Dr. Breen, both of whom would opine on Defendant’s susceptibility to giving a false confession on October 2 and

1 3, 2007. The government objects to Dr. Leo's and Dr. Breen's testimony pursuant to  
2 *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993), and Federal Rule of Evidence  
3 702. (Gov't Mot. at 2.)

4 Federal Rule of Evidence 702 governs the admissibility of expert opinion  
5 testimony. Rule 702 states: "If scientific, technical, or other specialized knowledge will  
6 assist the trier of fact to understand the evidence or to determine a fact in issue, a witness  
7 qualified as an expert by knowledge, skill, experience, training, or education, may testify  
8 thereto in the form of an opinion or otherwise, if (1) the testimony is based upon  
9 sufficient facts or data, (2) the testimony is the product of reliable principles and  
10 methods, and (3) the witness has applied the principles and methods reliably to the facts  
11 of the case." In *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), the Supreme  
12 Court created a gatekeeping role for trial judges as to the admissibility of scientific expert  
13 testimony. The Supreme Court established a two-prong test for the admissibility of  
14 expert testimony under Rule 702: (1) whether the proffered testimony is relevant to an  
15 issue in dispute; and (2) whether the proffered testimony constitutes reliable scientific  
16 knowledge. *Id.* at 589-91.

18 **I. Dr. Richard Leo**

19 Defendant offers the testimony of Dr. Leo, an associate professor of law at the  
20 University of San Francisco and self-proclaimed expert on police interrogation techniques  
21 and false confessions. At the *Daubert* hearing on this motion Dr. Leo explained that his  
22 area of specialization was in police interrogation. (Tr. 120-21.) Defendant requests that  
23 Dr. Leo be permitted to testify regarding the following topics:

- 24 (1) the techniques used in the interrogation of the defendant on October 2,  
25 2007 "which are consistent with techniques commonly used by law  
26 enforcement officials which can lead to false confessions;"
- 27 (2) Special Agent Ray Lauer's interrogation techniques and training, "and  
28 how those techniques could have resulted in Mr. Redlightning  
'confessing' to killing Ms. Disangh, even though that may not be true;"

- 1 (3) how the techniques, methods, and strategies of psychological  
2 interrogation are intended to affect a suspect's perceptions and  
3 decision-making in order to overcome his anticipated resistance and  
4 move him from denial to admission;
- 5 (4) what we know from social science research about the phenomenon of  
6 law enforcement induced false confessions;
- 7 (5) how and why psychological interrogation methods can, and sometimes  
8 do, cause innocent suspects to make false confessions;
- 9 (6) which police techniques create a higher risk of eliciting false confessions  
10 and why;
- 11 (7) which groups or types of individuals are more vulnerable to making false  
12 confessions; and
- 13 (8) how the facts of a confession, once obtained, affects and/or biases  
14 subsequent police investigation.

15 *See* Letter from Timonthy Lohraff to William Redkey, dated August 4, 2008 (Dkt. # 83).

16 The government objects to Dr. Leo's testimony on the basis that it is unreliable  
17 testimony because expert testimony related to false confessions lacks general acceptance  
18 in the scientific community, lacks a tested, acceptable rate of error, and lacks a uniform,  
19 objective standard for evaluating false confessions. (Mot. at 2.) Moreover, the  
20 government contends that this type of testimony is not outside the knowledge of the  
21 average juror. *Id.* At the *Daubert* hearing regarding Dr. Leo's testimony, the court  
22 learned from Dr. Leo that there was nothing in the record at this point to support his  
23 theory that the interrogation techniques used in this case raised the risk of a false  
24 confession. (Tr. at 132-33.) Dr. Leo's opinion regarding Defendant's confession in this  
25 case is based solely on conversations Dr. Leo had with defense counsel wherein defense  
26 counsel informed Dr. Leo that Defendant had been promised leniency if he confessed.

27 (*Id.*)

28 The court is mindful that Federal Rule of Evidence 703 allows an expert to form  
opinions based on inadmissible evidence. There must, however, be limits to this grant of  
permission. The court intends to use as its "touchstone" the notion that the "fact" relied

1 on must exist and meet Rule 703's limitation that it be of the type reasonably relied upon  
2 by experts in a particular field.<sup>1</sup> See *United States v. W.R. Grace*, 504 F.3d 745, 761 (9th  
3 Cir. 2007). The court is not convinced that even Dr. Leo would agree that learning  
4 pivotal information third hand from defense counsel would support any reasonable  
5 opinion on the veracity of Defendant's confession. Dr. Leo testified that as a social  
6 scientist he is "driven by empirical research," which includes "experiments, surveys,  
7 interviews, filed observations, and analysis of documents." (Tr. at 74.) In this case, Dr.  
8 Leo only analyzed the pleadings and police documents in forming his opinions. Dr. Leo  
9 did not interview Defendant regarding the interrogation but relied only on general  
10 statements from defense counsel even though Dr. Leo testified that "that interviewing  
11 subjects if you're a social science is a form of empirical data gathering." (*Id.* at 74-75  
12 (also testifying that defense counsel told him "there were some implied threats made"  
13 during the interrogation).)

14  
15 The critical factor for admissibility of opinion testimony pursuant to Rule 702 is  
16 that the testimony is based upon sufficient facts or data and that the expert witness has  
17 applied the principles and methods reliably to the facts of the case. Fed. R. of Evid. 702.  
18 Here, the court, as gatekeeper, cannot permit Dr. Leo to testify regarding the possibility  
19 of a false confession due to police interrogation techniques when he can point to no  
20 evidence in the record that any of these techniques are present in this case.  
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24 <sup>1</sup> Federal Rule of Evidence 703 provides that "[t]he facts or data in the particular case  
25 upon which an expert bases an opinion or inference may be those perceived by or made known to  
26 the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular  
27 field in forming opinions or inferences upon the subject, the facts or data need not be admissible in  
28 evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise  
inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless  
the court determines that their probative value in assisting the jury to evaluate the expert's opinion  
substantially outweighs their prejudicial effect."

1 Defendant also suggests that Dr. Leo can opine on whether there are certain groups  
2 or types of individuals that are more vulnerable to making false confessions. According  
3 to Dr. Leo, however, his “specialization” is in false confessions based on police  
4 interrogation techniques. (Tr. at 121.) Based on Dr. Leo’s own testimony, the court does  
5 not find Dr. Leo qualified to opine on Defendant’s vulnerability to making false  
6 confessions and until such time as there is evidence before the court to support Dr. Leo’s  
7 theory regarding police interrogation techniques in this case, the court will also exclude  
8 Dr. Leo’s testimony on that topic. The court GRANTS — without prejudice to  
9 Defendant’s ability to lay a proper foundation for Dr. Leo’s testimony — the  
10 government’s motion to exclude Dr. Leo’s testimony (Dkt. # 117).

## 11 **II. Dr. Alan Breen**

12 Defendant also offers the testimony of Dr. Alan Breen, a neuropsychologist, to  
13 assist the jury in understanding Defendant’s biological, physical and mental state during  
14 the course of the interrogation sessions, including Defendant’s Post Traumatic Stress  
15 Disorder (“PTSD”), his visual limitations, his biological condition based on his diabetes  
16 and other factors. (Proffer at 2.) Specifically, Defendant requests that Dr. Breen be  
17 permitted to opine on “how these factors would affect Mr. Redlightning’s mental state  
18 during the interrogation sessions.” (*Id.* at 3.) The government does not object to the  
19 entirety of Dr. Breen’s testimony. The government objects to the following general  
20 categories of Dr. Breen’s testimony:  
21

- 22 1. Any opinion which extrapolates from the defendant’s baseline  
23 psychological and mental status, to reach a conclusion on the effects of  
24 the interview procedures on October 2 and 3, 2007 on that status;
- 25 2. Any opinion that the defendant is particularly susceptible to providing  
26 false or untrue information in a police interview setting;
- 27 3. Any opinion on the connection between the defendant’s PTSD and his  
28 cognitive function, stress or anxiety level on October 2 and 3, 2007;

- 1 4. Any opinion on the connection between the defendant's vision problems  
2 and his cognitive function, stress or anxiety level on October 2 and 3,  
3 2007; and
- 4 5. Any opinion on the connection between the defendant's diabetes and his  
5 cognitive function, stress or anxiety level on October 2 and 3, 2007.

6 (Gov't's Resp. to Proffer at 3 (Dkt. # 171).)

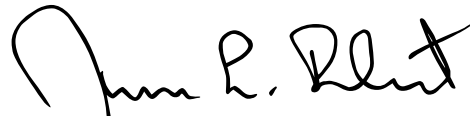
7 Dr. Breen, as a trained neuropsychologist, does not appear to have any expertise in  
8 the fields of diabetes management, ophthalmology, the effects of police interviews on  
9 individuals with PTSD or other psychological characteristics, false confessions, police  
10 procedures, or police interviewing techniques. Yet, Defendant seeks to introduce Dr.  
11 Breen's testimony on these very topics. The court starts its analysis recognizing that a  
12 confession is not voluntary if it is made by a person whose "mental condition at the time  
13 was such that 'the confession most probably was not the product of any meaningful act of  
14 volition.'" *United States v. Smith*, 638 F.2d 131, 133 (9th Cir. 1981) (quoting *United*  
15 *States v. Silva*, 418 F.2d 328, 330 (2d Cir. 1969)). Dr. Breen may testify as to  
16 Defendant's mental condition on October 2 and 3, 2007, and how that may affect the  
17 weight to be given to the confession. *Smith*, 638 F.2d at 330. The court is not satisfied,  
18 however, that anything about Dr. Breen's knowledge, skill, experience, training, or  
19 education qualifies him to opine as to Defendant's susceptibility to giving a false  
20 confession during the police interrogation on October 2 and 3, 2007.

21 Dr. Breen may not testify as to "[a]ny opinion which extrapolates from the  
22 defendant's baseline psychological and mental status, to reach a conclusion on the effects  
23 of the interview procedures on October 2 and 3, 2007 on that status" or "[a]ny opinion  
24 that the defendant is particularly susceptible to providing false or untrue information in a  
25 police interview setting." The court will similarly exclude Dr. Breen's testimony  
26 regarding the affects of Defendant's diabetes and vision problems during the interrogation  
27 on October 2 and 3, 2007, given that Dr. Breen is not qualified as an expert in these  
28 areas. The court will permit Dr. Breen's opinion testimony regarding the connection

1 between the defendant's PTSD and his cognitive function, stress or anxiety level on  
2 October 2 and 3, 2007, with the limitation that he not opine as to whether Defendant's  
3 PTSD made him susceptible to a false confession.

4 The court GRANTS in part and DENIES in part the government's motion to  
5 exclude Dr. Breen's testimony regarding the general topics identified above (Dkt. # 117).

6 Dated this 16th day of September, 2008.

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10 JAMES L. ROBART  
11 United States District Judge  
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