Outline of Workshop

Objectives of workshop: Concepts and principles to improve the scientific and communicative quality of forensic reports.

• Literature1: the report quality literature (reference: Wettstein, 2005)
• Literature2: Acklin et al., quality instrument and studies
• Standards: Rules of Evidence as quality guidelines, practice guidelines, admissibility tests
• Methods1: Stricker model: the local clinical scientist, the local forensic behavioral science
• Methods2: Use of Clinical and Forensic Assessment Instruments (Grisso, 1986; Otto & Heilbrun, 2002)
• Analysis: the psycholegal rationale: Grisso model (reference: Grisso, Otto & Heilbrun)
• Opinions: form and sufficiency of the forensic opinion and ultimate opinion testimony
• Quality Improvement: miscellaneous Babitsky suggestions for report improvement
• Praxis: work product review of forensic reports—coding report quality using the Forensic Report Quality Assessment Measure (FRQAM).
• Workshop evaluation

Conceptual Structure for Forensic Report Writing

• Standards
• Methods
• Data
• Analysis
• Opinions
• Limitations
• Communication

Wettstein, 2005: Deficiencies in Forensic Evaluations and Reports

- Lack of training and expertise in the psycholegal content area
- Advocacy, impartiality, lack of objectivity (e.g., therapist evaluator)
- Other forensic boundary crossing or violations
- Inadequate database of documents
- Over-reliance on litigant self-report
- Lack of assessment of litigant response bias
- Inadequate collateral information
- Failure to use validated forensic assessment instruments appropriately
- Failure to support clinical diagnoses
- Psychopathology not linked to expert opinions
- Psychological test results not linked to expert opinions
- Inadequate support and explanation for expert opinions

Wettstein, 2005: Raising the Quality of Forensic Evaluations

- Forensic service credentialing and certification by law or policy
- Incentivize quality and quality improvement, with quality bonus
- Establish quality guidelines and standards
- Define, test, and operationalize quality performance measures and tools
- Collaboration of generalists with forensic specialists
- Audiotape or videotape forensic interviews
- Use of specific checklists and contracts by referral sources
- Education of referral sources about evaluation guidelines, and sharpening of referral questions
- Model excellence of forensic evaluations to attorneys and courts
- Peer review of evaluations, reports, and testimony
- Encourage cross-examination regarding participation in QA activities
Evidence-Based Approach to Forensic Report Writing
Marvin W. Acklin, PhD, ABAP, ABPP
Society for Personality Assessment
San Diego, California
March 20, 2013

- Mandatory forensic continuing medical education on quality of evaluations
- Maintenance of forensic board certification predicated on quality improvement activity


Abstract: This study employed a national sample of forensic reports that had been critiqued by a panel of advanced forensic mental-health practitioners serving as reviewers for the American Board of Forensic Psychology. The study describes all of the discrete types of faults that reviewers encountered in the reports, and then converts them to prescriptive statements to guide forensic report writing. The study also identifies the most frequent report-writing problems in this sample. The results were not intended to describe the quality of forensic reports in the U.S., but rather to offer guidance for improving the quality of forensic reports.

Sample
The study used 62 forensic reports written by 36 forensic mental-health professionals.

Each professional was a candidate in the national evaluation process for becoming a diplomate (equivalent to board certification) in forensic psychology through the American Board of Forensic Psychology (ABFP). Part of this process (discussed later) required them to submit two forensic reports as “practice samples” for review. The 62 reports in the present sample constituted all of the reports that were (a) reviewed by ABFP during January 2007 through June 2009 and (b) were not approved for use in the final step of candidacy, the oral examination. Some candidates had two reports disapproved, and some had one approved and one disapproved. Reports that were approved for use in the examination were not included in the sample. The 36 candidates whose reports were not approved constituted 39% of the candidates whose samples were reviewed during the study period. (That does not constitute a final “fail” rate for the ABFP practice sample review process, because many of these candidates later submitted new samples that were approved to proceed to oral examination.)

Forensic referral questions in these reports included both criminal and civil forensic issues. Criminal forensic questions included adjudicative competence (25% of the total sample), criminal responsibility (19%), general or sexual risk of violence/recidivism (18%), sentencing and amenability to rehabilitation (7%), and capacity to waive Miranda rights (4%). Civil forensic questions included child custody and abuse cases (8% of the total sample), evaluations for personal injury, disability, workers’ compensation, fitness for duty (14%), and other civil issues (5%). The candidates were from throughout the U.S.
Grisso, 2010: Factors Mentioned in Reviewers’ Critiques of Forensic Reports

Introductory Material

- Provide accurate information on the examinee’s identity and dates of evaluation.
- Describe the manner in which the examinee was informed of the purpose of the evaluation and limits of confidentiality.
- List all sources of data for the evaluation.
- Clearly state the legal standard that defines the forensic purpose of the evaluation, including the specific questions the examiner was asked to address.

Organization and Style

- Organize the report in a manner that is logical and assists the reader’s understanding.
- Report only data, not inferences, in one data-based section of the report.
- Report inferences and opinions in another section, which uses the earlier data but offers no new data.
- Use language that minimizes the potential for bias or the appearance of gratuitous evaluative judgments.
- Use language that will be understood by non-clinicians, taking care to simplify complex concepts and professional technical terms.
- Attend to professional appearance of the document, avoiding typographical errors, incomplete sentences, and colloquialisms.

Data Reporting

- Obtain and report all data that would be important when addressing the referral question.
- Report only those data that are relevant for the forensic referral question.
- Clearly identify the sources of various data as the data are described.
- Avoid inclusion of self-incriminating data in pre-trial reports of evaluations involving defendants with open criminal charges.
- Include multiple sources of data, whenever possible, when describing events, behaviors, and examinee attributes.
- Report efforts to obtain data that ultimately were not obtained and may have been relevant for the case.
Psychological Test Reporting (Data and Interpretations)

• When psychological test data are obtained from past records, report only those data that will be relevant for addressing the clinical or forensic questions in the case.
• Employ psychological tests based on appropriateness for addressing the forensic and clinical referral questions.
• When reporting test data, identify scores and offer explanations of their normative meaning, but do not describe them as attributes of the examinee.
• Offer interpretations of tests only when the test is appropriate for the circumstances (e.g., examinee age and race; validity demonstrated in the forensic context in question).
• Score and interpret psychological tests accurately and consistent with their empirical limits and values.

Interpretations and Opinions

• Address the forensic question that was asked in the referral process.
• Address only the clinical and forensic questions that were asked in the referral process.
• Provide a clear explanation for every important opinion or conclusion that you offer, summarizing the relevant data and how they logically support the opinion.
• Identify alternative interpretations that might be considered, and explain how the data were used to weigh these interpretations against the opinion you are offering.
• Describe any important ways in which one’s data or interpretations leave room for error or alternative interpretations.
• Produce interpretations and opinions that are logical and internally consistent (not contradictory).
• Use multiple sources of data to seek support for a hypothesis.
• When opinions or recommendations require specialized knowledge (e.g., medical conditions or their treatment), express opinions only on matters for which you are qualified and competent.
• When using examinee self-reported data as a basis for an opinion, offer the opinion only when other reasonably reliable sources of data offer corroborative or logically consistent support.

Table 2 identifies the faults most frequently mentioned by the practice sample reviewers, as well as the percent of reports for which they were mentioned. Two of them (“Opinions Without Sufficient Explanations” and “Forensic Purpose Unclear”) were identified in more than one-half of the non-approved reports. Another three faults arose in about one-third of the reports.
1. Opinions without sufficient explanations (56%)
   Major interpretations or opinions were stated without sufficiently explaining their basis in data or logic (regardless of whether the report’s data could have sustained the opinion)

2. Forensic purpose unclear (53%)
   The legal standard, legal question, or forensic purpose was not stated, not clear, inaccurate, or inappropriate

3. Organization problems (36%)
   Information was presented in disorganized manner (usually without a reasonable logic for its sequence)

4. Irrelevant data or opinions (31%)
   Data and/or some opinions included in the report were not relevant for the forensic or clinical referral questions

5. Failure to consider alternative hypotheses (30%)
   Data allowed for alternative interpretations, while report did not offer explanations concerning why they were ruled out (often response style/malingering alternative, sometimes diagnostic)

6. Inadequate data (28%)
   The referral question, case circumstances, or final opinion required additional types of data that were not obtained or were not reported, and for which absence was not explained in report

7. Data and interpretation mixed (26%)
   Data and interpretations frequently appeared together in section that reports data

8. Over-reliance on single source of data (22%)
   An important interpretation/opinion relied wholly on one source of data when corroborating information from multiple sources was needed (often over-reliance on examinee’s self-report)

9. Language problems (19%)
   Multiple instances of jargon, biased phrases, pejorative terms, or gratuitous comments

10. Improper test uses (15%)
    Test data were used in inappropriate ways when interpreted and applied to the case, or tests were not appropriate for the case itself
Evidence-Based Approach to Forensic Report Writing  
Marvin W. Acklin, PhD, ABAP, ABPP  
Society for Personality Assessment  
San Diego, California  
March 20, 2013


Quality Scores for Report and Elements for Competency to Stand Trial, Penal Responsibility and Conditional Release (N = 450) Reports

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>Legal/</th>
<th>Assessment/</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Protocol</td>
<td>ID</td>
<td>Ethical</td>
</tr>
<tr>
<td>CST</td>
<td>Mean</td>
<td>68.95</td>
<td></td>
</tr>
<tr>
<td></td>
<td>SD</td>
<td>15.21</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Median</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Max</td>
<td>100</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Min</td>
<td>21.7</td>
<td></td>
</tr>
<tr>
<td>PR</td>
<td>Mean</td>
<td>60.67</td>
<td>84.39</td>
</tr>
<tr>
<td></td>
<td>SD</td>
<td>9.11</td>
<td>12.59</td>
</tr>
<tr>
<td></td>
<td>Median</td>
<td>61.47</td>
<td>83.33</td>
</tr>
<tr>
<td></td>
<td>Max</td>
<td>85</td>
<td>100</td>
</tr>
<tr>
<td></td>
<td>Min</td>
<td>41</td>
<td>33</td>
</tr>
<tr>
<td>CR</td>
<td>Mean</td>
<td>53.22</td>
<td>82.87</td>
</tr>
<tr>
<td></td>
<td>SD</td>
<td>8.35</td>
<td>9.15</td>
</tr>
<tr>
<td></td>
<td>Median</td>
<td>52.94</td>
<td>80.00</td>
</tr>
<tr>
<td></td>
<td>Max</td>
<td>75.68</td>
<td>100.00</td>
</tr>
<tr>
<td></td>
<td>Min</td>
<td>32.35</td>
<td>60.00</td>
</tr>
</tbody>
</table>

N = 450 reports; CST = Competency to Stand Trial (n = 150); PR = Penal Responsibility (n = 150); CR = Conditional Release (n = 150).

**ID** = Items with basic identifying information for the defendant and author of report. For example: date of birth of defendant, defendant’s name, date of report, and date of evaluation are Identification elements.

**Legal/Ethical** = Items that by statute or ethics code should be in reports. For example, documentation of informed consent, statement of independence, use of multiple sources of data and identification of collateral sources are Legal/Ethical elements.

**Historical** = Items that describe the defendant’s relevant history. For example: psychiatric history, substance abuse history, criminal history, history of violence, school/work history, etc…

**Assessment/Diagnostic** = Items that deal with clinical assessment and clinical diagnosis. For example, diagnosis provided, clinical assessment measures used and documented, risk
assessment or other forensic relevant instruments used, and was a mental status exam described are examples of the Assessment/Diagnosis elements.

**Psycholegal** = Items that specifically address the legal question, following ethical and statute requirements. For example, did the examiner provide an opinion as to the competency/penal responsibility/dangerousness of the defendant, did they provide a rationale for their opinion, did they address the specific statute requirements.

**Practical** = Items that are concerned with readability and communication. For example, was the report in sections, were there headings, was clinical jargon used, and presentation of information in an impartial manner.

**Standards:** Federal Rules on Evidence, 701-704. Federal Rules or Evidence and Admissibility tests--

**RULE 701. OPINION TESTIMONY BY LAY WITNESSES**

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness’s perception;
(b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and
(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

**RULE 702. TESTIMONY BY EXPERT WITNESSES**

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.
NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the experts to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts. See Rules 703 to 705.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. “There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.” Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 418 (1952). When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 Wigmore §1918.

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the “scientific” and “technical” but extend to all “specialized” knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by “knowledge, skill, experience, training or education.” Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called “skilled” witnesses, such as bankers or landowners testifying to land values.

COMMITTEE NOTES ON RULES—2000 AMENDMENT

Rule 702 has been amended in response to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and to the many cases applying Daubert, including Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167 (1999). In Daubert the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in Kumho clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. See also Kumho, 119 S.Ct. at 1178 (citing the Committee Note to the proposed amendment to Rule 702, which had been released for public comment before the date of the Kumho decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of
proffered expert testimony. Consistently with Kumho, the Rule as amended provides that all
types of expert testimony present questions of admissibility for the trial court in deciding
whether the evidence is reliable and helpful. Consequently, the admissibility of all expert
testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the
burden of establishing that the pertinent admissibility requirements are met by a preponderance

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability
of scientific expert testimony. The specific factors explicated by the Daubert Court are (1) whether
the expert's technique or theory can be or has been tested—that is, whether the expert's theory
can be challenged in some objective sense, or whether it is instead simply a subjective,
conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique
or theory has been subject to peer review and publication; (3) the known or potential rate of error
of the technique or theory when applied; (4) the existence and maintenance of standards and
controls; and (5) whether the technique or theory has been generally accepted in the scientific
community. The Court in Kumho held that these factors might also be applicable in assessing the
reliability of nonscientific expert testimony, depending upon “the particular circumstances of the
particular case at issue.” 119 S.Ct. at 1175.

No attempt has been made to “codify” these specific factors. Daubert itself emphasized that
the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the
specific Daubert factors can apply to every type of expert testimony. In addition to Kumho, 119
S.Ct. at 1175, see Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996) (noting that
the factors mentioned by the Court in Daubert do not neatly apply to expert testimony from a
sociologist). See also Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 809 (3d Cir. 1997)
(holding that lack of peer review or publication was not dispositive where the expert's opinion
was supported by “widely accepted scientific knowledge”). The standards set forth in the
amendment are broad enough to require consideration of any or all of the
specific Daubert factors where appropriate.

Courts both before and after Daubert have found other factors relevant in determining whether
expert testimony is sufficiently reliable to be considered by the trier of fact. These factors
include:

1. Whether experts are “proposing to testify about matters growing naturally and directly out
   of research they have conducted independent of the litigation, or whether they have developed
   their opinions expressly for purposes of testifying.” Daubert v. Merrell Dow Pharmaceuticals,
   Inc., 43 F.3d 1311, 1317 (9th Cir. 1995).

2. Whether the expert has unjustifiably extrapolated from an accepted premise to an
some cases a trial court “may conclude that there is simply too great an analytical gap between the data and the opinion proffered”).

(3) Whether the expert has adequately accounted for obvious alternative explanations. See Claar v. Burlington N.R.R., 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). Compare Ambrosini v. Labarraque, 101 F.3d 129 (D.C.Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

(4) Whether the expert “is being as careful as he would be in his regular professional work outside his paid litigation consulting.” Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997). See Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167, 1176 (1999) (Daubert requires the trial court to assure itself that the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field”).

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. See Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167, 1175 (1999) (Daubert's general acceptance factor does not “help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.”); Moore v. Ashland Chemical, Inc., 151 F.3d 269 (5th Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on “clinical ecology” as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be relevant. See Kumho, 119 S.Ct. 1167, 1176 (“[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.”). Yet no single factor is necessarily dispositive of the reliability of a particular expert's testimony. See, e.g., Heller v. Shaw Industries, Inc., 167 F.3d 146, 155 (3d Cir. 1999) (“not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules.”); Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317, n.5 (9th Cir. 1995) (noting that some expert disciplines “have the courtroom as a principal theatre of operations” and as to these disciplines “the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.”).

A review of the caselaw after Daubert shows that the rejection of expert testimony is the exception rather than the rule. Daubert did not work a “seachange over federal evidence law,”
and “the trial court’s role as gatekeeper is not intended to serve as a replacement for the adversary system.” United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi, 80 F.3d 1074, 1078 (5th Cir. 1996). As the Court in Daubert stated: “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.” 509 U.S. at 595. Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert. See Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167, 1176 (1999) (noting that the trial judge has the discretion “both to avoid unnecessary ‘reliability’ proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.”).

When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. See, e.g., Heller v. Shaw Industries, Inc., 167 F.3d 146, 160 (3d Cir. 1999) (expert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 744 (3d Cir. 1994), proponents “do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness.” See also Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1318 (9th Cir. 1995) (scientific experts might be permitted to testify if they could show that the methods they used were also employed by “a recognized minority of scientists in their field.”); Ruiz-Troche v. Pepsi Cola, 161 F.3d 77, 85 (1st Cir. 1998) (“ Daubert neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.”).

The Court in Daubert declared that the “focus, of course, must be solely on principles and methodology, not on the conclusions they generate.” 509 U.S. at 595. Yet as the Court later recognized, “conclusions and methodology are not entirely distinct from one another.” General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997). Under the amendment, as under Daubert, when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. See Lust v. Merrell Dow Pharmaceuticals, Inc., 89 F.3d 594, 598 (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 745 (3d Cir. 1994),
any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.”

If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony “fit” the facts of the case.

As stated earlier, the amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert. See Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167, 1171 (1999) (“We conclude that Daubert's general holding—setting forth the trial judge's general ‘gatekeeping’ obligation—applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.”). While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. See Watkins v. Telsmith, Inc., 121 F.3d 984, 991 (5th Cir. 1997) (“[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique.”). Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. See, e.g., American College of Trial Lawyers, Standards and Procedures for Determining the Admissibility of Expert Testimony after Daubert, 157 F.R.D. 571, 579 (1994) (“[W]ether the testimony concerns economic principles,
accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the ‘knowledge and experience’ of that particular field.”).

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms “principles” and “methods” may convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

Nothing in this amendment is intended to suggest that experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. See, e.g., United States v. Jones, 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail); Tassin v. Sears Roebuck, 946 F.Supp. 1241, 1248 (M.D.La. 1996) (design engineer's testimony can be admissible when the expert's opinions “are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches”). See also Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167, 1178 (1999) (stating that “no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.”).

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply “taking the expert's word for it.”See Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1319 (9th Cir. 1995) (“We've been presented with only the experts’ qualifications, their conclusions and their assurances of reliability. Under Daubert, that's not enough.”). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. See O'Conner v. Commonwealth Edison Co., 13 F. 3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded).See also Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167, 1176 (1999) (“[I]t will at times be useful to ask even of a witness whose expertise is based purely on experience,
say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.”).

Subpart (1) of Rule 702 calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying “facts or data.” The term “data” is intended to encompass the reliable opinions of other experts. See the original Advisory Committee Note to Rule 703. The language “facts or data” is broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence. Id.

When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on “sufficient facts or data” is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event.

Limitation (a) is the familiar requirement of first-hand knowledge or observation.

Limitation (b) is phrased in terms of requiring testimony to be helpful in resolving issues. Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion. While the courts have made concessions in certain recurring situations, necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. McCormick §11. Moreover, the practical impossibility of determining by rule what is a “fact,” demonstrated by a century of litigation of the question of what is a fact for purposes of pleading under the Field Code, extends into evidence also. 7 Wigmore §1919. The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. See Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 415–417 (1952). If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.

RULE 703. BASES OF AN EXPERT’S OPINION TESTIMONY

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
NOTES


NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources. The first is the firsthand observation of the witness, with opinions based thereon traditionally allowed. A treating physician affords an example. Rheingold, The Basis of Medical Testimony, 15 Vand.L.Rev. 473, 489 (1962). Whether he must first relate his observations is treated in Rule 705. The second source, presentation at the trial, also reflects existing practice. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts. Problems of determining what testimony the expert relied upon, when the latter technique is employed and the testimony is in conflict, may be resolved by resort to Rule 705. The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes. Rheingold, supra, at 531; McCormick §15. A similar provision is California Evidence Code §801(b).


If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data “be of a type reasonably relied upon by experts in the particular field.” The language would not warrant admitting in evidence the opinion of an “accidentologist” as to the point of impact in an

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendment is technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2000 AMENDMENT

Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted. Courts have reached different results on how to treat inadmissible information when it is reasonably relied upon by an expert in forming an opinion or drawing an inference. Compare United States v. Rollins, 862 F.2d 1282 (7th Cir. 1988) (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the hearsay statements of an informant), with United States v. 0.59 Acres of Land, 109 F.3d 1493 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion, without a limiting instruction). Commentators have also taken differing views. See, e.g., Ronald Carlson, Policing the Bases of Modern Expert Testimony, 39 Vand.L.Rev. 577 (1986) (advocating limits on the jury's consideration of otherwise inadmissible evidence used as the basis for an expert opinion); Paul Rice, Inadmissible Evidence as a Basis for Expert Testimony: A Response to Professor Carlson, 40 Vand.L.Rev. 583 (1987) (advocating unrestricted use of information reasonably relied upon by an expert).

When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes. See Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances.

The amendment governs only the disclosure to the jury of information that is reasonably relied on by an expert, when that information is not admissible for substantive purposes. It is not intended to affect the admissibility of an expert's testimony. Nor does the amendment prevent an expert from relying on information that is inadmissible for substantive purposes.
Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party. See Rule 705. Of course, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment. Moreover, in some circumstances the proponent might wish to disclose information that is relied upon by the expert in order to “remove the sting” from the opponent's anticipated attack, and thereby prevent the jury from drawing an unfair negative inference. The trial court should take this consideration into account in applying the balancing test provided by this amendment.

This amendment covers facts or data that cannot be admitted for any purpose other than to assist the jury to evaluate the expert's opinion. The balancing test provided in this amendment is not applicable to facts or data that are admissible for any other purpose but have not yet been offered for such a purpose at the time the expert testifies.

The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert. In a multi-party case, where one party proffers an expert whose testimony is also beneficial to other parties, each such party should be deemed a “proponent” within the meaning of the amendment.

RULE 704. OPINION ON AN ULTIMATE ISSUE
(a) In General — Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

NOTES

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES
The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called “ultimate issue” rule is specifically abolished by the instant rule.

The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful
information. 7 Wigmore §§1920, 1921; McCormick §12. The basis usually assigned for the rule, to prevent the witness from “usurping the province of the jury,” is aptly characterized as “empty rhetoric.” 7 Wigmore §1920, p. 17. Efforts to meet the felt needs of particular situations led to odd verbal circumlocutions which were said not to violate the rule. Thus a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standard. And in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of “might or could,” rather than “did,” though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict. In other instances the rule was simply disregarded, and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible.

Many modern decisions illustrate the trend to abandon the rule completely. People v. Wilson, 25 Cal.2d 341, 153 P.2d 720 (1944), whether abortion necessary to save life of patient; Clifford-Jacobs Forging Co. v. Industrial Comm., 19 Ill.2d 236, 166 N.E.2d 582 (1960), medical causation; Dowling v. L. H. Shattuck, Inc., 91 N.H. 234, 17 A.2d 529 (1941), proper method of shoring ditch; Schweiger v. Solbeck, 191 Or. 454, 230 P.2d 195 (1951), cause of landslide. In each instance the opinion was allowed.

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, “Did T have capacity to make a will?” would be excluded, while the question, “Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?” would be allowed. McCormick §12.

For similar provisions see Uniform Rule 56(4); California Evidence Code §805; Kansas Code of Civil Procedures §60–456(d); New Jersey Evidence Rule 56(3).

AMENDMENT BY PUBLIC LAW

1984 —Pub. L. 98–473 designated existing provisions as subd. (a), inserted “Except as provided in subdivision (b)”, and added subd. (b).

COMMITTEE NOTES ON RULES—2011 AMENDMENT

The language of Rule 704 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent
throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an “inference” on the grounds that the deletion made the Rule flow better and easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Other Standards: SGFP, APA Ethical Principles and Code of Conduct, APA practice guidelines. APA Guidelines relating to psychological testing.

https://www.ap-ls.org/publications/newsletters/Winter2013.pdf--APLS News letters has an encyclopedic index of standards, cites, etc.


The Local Clinical [Forensic Behavioral] Scientist-- The ideal model for clinical practice would be one in which practice is strictly an applied scientific activity, with praxis dictated by a sound body of scientific knowledge (McFall, 1991). Unfortunately, that model has not been realized in psychological practice and arguably never can be realized, just as it has not been realized by any other profession. Beutler, Williams, Wakefield, and Entwistle (1995) describe several examples of tension between science and practice in fields other than psychology. D. R. Peterson (1991) regards the direct linear application of science to practice, so that practice is limited by the bounds of science, as having originated in the pre-professional phase of the development of the field. It has been carried forward to some extent by many scientist-practitioner programs and neglects the contextual factors that make application so complex. The clinician rarely has the professional knowledge and the technical skill base that are completely adequate to the clinical task at hand. In fact, because the generalizations that contribute to this knowledge and skill base usually decay and it is often unclear how generalizations coordinate with specific clinical observations (Cronbach, 1975, 1982), it is likely that the practitioner always will be required to go beyond firm and available scientific knowledge.

Skills in local thinking and problem solving assume unusual importance for the clinician, as was noted previously by Cronbach (1975), who endorsed intensive local observation, and by Shakow (1976), who also cited the importance of observation. All empirical scientific work rests on observational skills. Shakow described four specific observational skills that are essential for good psychologists, whether we describe them as scientist-professionals, as thinking clinicians, or as local clinical scientists. These types of observation are objective observation (observation from the outside), participant observation (including an understanding of the reciprocal effects of
the observer and the observed), subjective observation (empathic observation or intuition), and self-observation (self-examination). It is the breadth and depth of these skills, addressed to immediate clinical problems but imbued with the scientific approach and attitude, that constitute the heart of the activity of the local clinical scientist.

The curriculum conference of the National Council of Schools of Professional Psychology (Peterson et al., 1991) defined psychological science as “a systematic mode of inquiry involving problem identification and the acquisition, organization, and interpretation of information pertaining to psychological phenomena. It strives to make that information consensually verifiable, replicable, and universally communicable” (Trierweiler & Stricker, 1991, p. 103).

At this point, we should note that the local clinical scientist model encourages critical, scientific thinking and the application of scientific knowledge to clinical issues, but the model also is consistent with conducting research. The clinician has a clear obligation to contribute to a public body of knowledge, as it is through this body of disciplinary knowledge that the real link between science and practice exists (Stricker, 1992). We do not reject laboratory research as an activity for the local clinical scientist: We see it as one among many methodologies that can add measurably to disciplinary knowledge.

Methods: Grisso, 1986; Otto & Heilbrun; Use of Clinical and Forensic Assessment Instruments (FAIs).

"Forensic Assessment Instruments may improve our ability to conceptualize the relations between legal definitions of abilities and psychological constructs associated with human capacities." (1986, p. 33).

"Traditionally, mental health professionals have employed general psychological theories and constructs (such as intelligence, reality testing, defense mechanisms, or psychiatric symptomatology) as the conceptual basis for their assessments related to legal competencies. These clinical constructs, represented in B in figure 1, often are defined operationally by clinical assessment instruments or methods designated B’ prime, which are designed to assess the clinical and personality attributes. Yet mental health professionals frequently have been able to establish only a vague conceptual link between psychological theories (B) or data (B’) on the one hand, and legal competency constructs (A) on the other. Thus clinical data about psychological traits and states, no matter how reliable and valid, have been difficult to employee when relating findings to the questions of legal competencies" (p.33).
A forensic assessment instrument (C’) is an operational definition of a legally relevant functional ability concept (C) P therefore, FAIs are intended to provide data they can manage the conceptual gap between legal constructs and psychological constructs. ... These relations provide a database for making causal inferences relating psychological constructs (B) to legally relevant functional abilities (C)” (page 34).

"FAIs offer several logical benefits for forensic assessments. First, they provide structure for the examiner. From the outset, forensic assessment instruments make it clear to the examiner what it is that the law wants to know about human capacities, because these capacities are part of the structure of the FAI itself. Thus they can assist the examiner in arriving logically at data and inferences consistent with the purposes of forensic assessments. Second, FAIs may improve communication in legal settings. FAI in expert data testimony could clarify for the judge and jury the relation between functional abilities and the legal competency constructs. Dated that are "face valid" in relation to the competency construct would require less complex inferential processes than when one attempts to relate psychiatric symptoms or general personality traits to the legal competency construct. Therefore, expert testimony may be perceived as more understandable and useful. Judge and jury might find it possible to participate in the process of inference, rather than relying solely on the expert to manage esoteric and speculative relations between general psychological constructs (B) and legal competency criteria (A). Finally, FAI's make possible empirical research on the associations between legally relevant functional abilities (operationally defined by FAIs) and the constructs of psychiatry and psychology (operationally defined by more traditional clinical instruments). These research findings could produce an empirical basis for mental health professionals to employ when interpreting individual cases, thereby decreasing the necessity to rely on theory and speculation alone" (pages 35-36).


Types of assessment instruments used in forensic settings: Heilbrun, Rogers, and Otto (in press) proposed a typology of assessment instruments used in forensic evaluation. As first defined and conceptualized by Grisso (1986), forensic assessment instruments are measures that are directly relevant to a specific legal standard and reflect and focus on specific capacities, abilities, or knowledge that are embodied by the law. Tests designed to assess a criminal defendant’s competence to stand trial or an older person’s ability to manage legal, financial, and health care matters are examples of such instruments. Problems in operationalizing the law that are related to psycholegal capacities, changes in the law over time, and jurisdictional variations in the law can make developing such instruments difficult (Douglas, Otto, & Borum, in press).
Forensically relevant instruments can be distinguished from forensic assessment instruments in that they do not assess or focus on specific legal standards and the associated functional capacities of the examinee, but, rather, they address clinical constructs that are often pertinent to evaluating persons in the legal system. Because these instruments are used to assess clinical constructs rather than legal constructs, problems with definitional ambiguity and idiographic influences are minimized. Examples of these instruments and techniques include those used to assess malingering and response style more generally, recidivism or violence risk, and psychopathy. Well-validated, forensically relevant instruments provide a good balance between clinical confidence and legal relevance; the constructs they assess can be rigorously tested; and their applicability and relevance to forensic assessment and decision making can also be examined.

Most commonly used in forensic evaluations are clinical measures and assessment techniques. These are the psychological tests and measures developed for assessment, diagnosis, and treatment planning with clinical populations in therapeutic contexts. Examples include instruments used to assess psychopathology, intelligence, personality, and academic achievement. Many clinical measures are the product of careful development, benefit from a considerable research base, and have been well validated. Although these instruments may assist in understanding the examinee in the context of a particular legal issue, they typically assess constructs (e.g., intelligence, depression, academic abilities, anxiety level) that are considerably removed from the specific question before the legal decision maker (Heilbrun et al., in press). As such, they require the examiner to exercise a greater level of inference to move from the construct assessed to the issue before the court (Otto, Edens, & Barcus, 2000). Related to this, Rogers (1987b) observed the peculiar circumstance in which psychologists conducting forensic evaluations find themselves: The best-validated assessment instruments are often those which are least relevant to the legal issue(s).

FAIs—there has been a proliferation of FAIs in the past decade for

- Malingering—SIRS, SIRS-2, MFAST, SIMS
- Miranda Warnings--SAMA
- Competency to Stand Trial—MacCat-CA, ECST-R
- Criminal Responsibility--RCRAS
- Functional Civil Capacities—MacCat – T
- Violence Risk Assessment—HCR-20, VRAG, SORAG, etc.
Analysis: A Conceptual Model for methods, data analysis, and integration.
Grisso's conceptual model for the legally relevant assessment for legal capacities: functional, contextual, causal, interactive, judgmental, and dispositional.

1. **Functional**-- "legal competency constructs focus on an individual's functional abilities, behaviors, or capacities. As used here, the term functional abilities refers to that which an individual can do or accomplish, as well as to the specific knowledge, understanding, or believes that may be necessary for the accomplishment. (p. 17).

2. **Contextual**--"Each legal competency construct refers to a general environmental context, which establishes the parameters for defining the relevance of particular functional abilities for the legal competency construct.... The term general environmental context refers to some class of external situations to which a person must respond. Various legal competencies examined in this book specify widely differing contexts: for example, criminal proceedings (trials), police interrogations, home life, and hospitals. Each context is presumed to require certain types of functional abilities in order to manage one's role within that context." (p. 18).

3. **Causal**-- (legal competency construct require causal inferences to explain an individual's functional abilities or deficits related to a legal competency. That is, they require ascriptions of the deficits cause, future consequences, and other meetings." (p. 20).

4. **Interactive**--"Legal competency constructs focus on person-context interactions. A legal competency question does not merely ask the degree of functional ability or deficit that a person manifests. It asks further, "does this person's level of ability meet the demands of the specific situation with which the person will be (was) faced?" Defined more formally, a decision between legal competency is in part a statement about congruency are in congruency between (1) the extent of a person's functional ability and (2) the degree of performance demand that is made by the specific instance of the context in that case. Thus an interaction between individual ability and situational demand, not an absolute level of ability, is of special significance for legal competency decisions" (p. 23).

5. **Judgmental**-- "Legal competency constructs require a judgment that a person-context and congruency is of a sufficient magnitude to warrant a finding of legal in competency and is dispositional consequences" (p. 26).

6. **Dispositional**-- In his second addition of Evaluating Competencies, Grisso collapses the dispositional and judgmental. "Therefore, the judgment and dispositional characteristics identify the question, how much in congruency is enough, as an interpretation of justice, in light of the instant circumstances and the dispositional consequences that will accrue for both the individual and society."
Quality Improvement: Communication of Findings—the report format, style, including form and sufficiency of forensic opinions.


Rule 26: Although rule 26 comes from the Federal Rules of Civil Procedure, it provides an exceptional set of guidelines for forensic reports. Reports that fail to satisfy the requirements of Rule 26 are stricken “with regularity.” “… With respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall 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 informing 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 10 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.”

Opinions should be stated clearly, explicitly, and with confidence. When expressing the opinion use the magic words “based on a reasonable degree of psychological certainty.” Avoid words like “it seems,” “I think,” and “I believe” when expressing opinions. State the reasons that justify the opinion in concise bullet point or narrative format. Avoid expressing bare conclusions without supporting justification. State all of the opinions the expert expects to express at trial. Document a detailed and reliable methodology so the report will not be challenged under Daubert or other admissibility tests.

Using terms such as “could” or “possibly” fails to establish sufficient proof. Avoid overly vague opinions, “it would seem to me,” “I do not think,” “I do not believe,” “the following conclusions can be made,” or “it can be argued,” language. Reports that are insufficiently detailed and definite may be stricken by the court. The expert report should provide all opinions to which the expert will testify. Conclusory determinations in the absence of detailed justification for the opinion are insufficient under Rule 26. The documentation of a reliable methodology is a requirement as a foundation for the expert opinion. As noted above, the judge will consider (1) whether the theory or technique used by the expert can be, and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of the method used, and (4) the degree of the methods or conclusions acceptance within the relevant scientific community.” If the experts report does not meet these criteria, their testimony may be barred.
Form and Sufficiency of Forensic Opinion—standards of proof (preponderance, clear and convincing, beyond a reasonable doubt) and statement of forensic opinion: “To a reasonable degree of psychological certainty, Mr. Smith’s volitional capacities were substantially impaired at the time of the offence due to a physical or mental disease, disorder, or defect, namely schizophrenia.”

Limitations on Opinions—“The findings and opinions proffered here are based on the forensic database cited above and may subject to change in light of new information.”

Quality Improvement: Factors which enhance quality and accuracy of forensic reports (Acklin & Bakeman, manuscript in preparation).

- Training in coding system (legal statutes/standards)
- Use of structured report format
- Use of checklists (http://www.abfp.com/pdfs/certification/ForensicReportChecklist.pdf)
- Self-monitoring
- Work product/peer review
- The Ultimate Test: the crucible of trial: voir dire and cross-examination

Praxis: work product review of forensic reports—coding report quality using the Forensic Report Quality Assessment Measure (FRQAM). Using the FRQM in small groups, we will code two or three reports, and calculate report quality coefficients.