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Using Third-Party Information in Forensic Mental-Health Assessment: A Critical Review

Kirk Heilbrun, Amanda NeMoyer, Chris King & Meghann Galloway

The use of psychological and psychiatric evaluations for the courts has grown considerably in the last three decades.¹ For the purposes of this article, we will refer to such an evaluation as a forensic mental-health assessment (FMHA). There are two important components to the definition of FMHA. First, such activity involves evaluations conducted in the context of criminal or civil proceedings.² Second, it includes certain kinds of tasks—such as reconstructing a past mental state and linking it with the functional-legal capacities specified in a given legal test (such as insanity at the time of the offense) or evaluating a current mental state and appraising the extent to which it affects such functional legal capacities (such as those described in competence-to-stand-trial evaluations).³

We begin by discussing FMHA in greater detail. This discussion includes broad foundational principles applicable to all such evaluations, as well as a brief description of 17 commonly evaluated types of FMHA. In this context, we then turn to the use of third-party information, or TPI (collateral interviews, records, and other documents or digital evidence), in FMHA. This discussion will address the importance, the value and limitations, and the current legal and professional status of TPI in forensic assessment.

NATURE AND TYPES OF FMHA

There are certain broad, foundational principles that are applicable to all FMHA, even that conducted in response to different legal questions, in different domains (civil vs. criminal vs. juvenile/family), and with different populations. These principles have been derived, described,⁴ and subsequently modified.⁵ They are presented sequentially (in the order in which they apply when conducting FMHA).⁶

One reflection of the progress of forensic psychology and forensic psychiatry as specialty disciplines is the recent completion of a book series devoted to best practices in FMHA. The series includes 17 books,⁷ the first describing foundational

TABLE 1
TITLES IN OXFORD UNIVERSITY PRESS SERIES: BEST PRACTICES IN FORENSIC MENTAL HEALTH ASSESSMENT

Criminal Titles
<i>Evaluation of Competence to Stand Trial</i>
<i>Evaluation of Criminal Responsibility</i>
<i>Evaluation of Capacity to Waive Miranda Rights</i>
<i>Evaluation of Sexually Violent Predators</i>
<i>Evaluation for Risk of Violence in Adults</i>
<i>Evaluation for Capital Sentencing</i>
Civil Titles
<i>Evaluation of Capacity to Consent to Treatment and Research</i>
<i>Evaluation for Guardianship</i>
<i>Evaluation for Civil Commitment</i>
<i>Evaluation for Personal Injury Claims</i>
<i>Evaluation for Workplace Discrimination and Harassment</i>
<i>Evaluation of Workplace Disability</i>
Juvenile and Family Titles
<i>Evaluation for Child Custody</i>
<i>Evaluation of Juveniles' Competence to Stand Trial</i>
<i>Evaluation for Risk of Violence in Juveniles</i>
<i>Evaluation for Parenting Capacity in Child Protection</i>

Adapted with permission from KIRK HEILBRUN ET AL., FOUNDATIONS OF FORENSIC MENTAL HEALTH ASSESSMENT 148 (2009).

Footnotes

1. GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS vii (3d ed. 2007).
2. Kirk Heilbrun et al., *Foundations of Forensic Mental Health Assessment*, in FORENSIC ASSESSMENTS IN CRIMINAL AND CIVIL LAW 1-3 (Ronald Roesch & Patricia Zapf eds., 2013).
3. *Id.* at 1-3.
4. KIRK HEILBRUN, PRINCIPLES OF FORENSIC MENTAL HEALTH ASSESSMENT (2001).

5. KIRK HEILBRUN ET AL., FOUNDATIONS OF FORENSIC MENTAL HEALTH ASSESSMENT (2009).
6. See *infra* Table 2 for a summary of these principles.
7. A book on the assessment of juvenile commitment and juvenile transfer was originally planned as part of this series but ultimately (for reasons unrelated to the topic) not published. The series also includes a book on eyewitness identification and another on jury selection. These topics are outside the scope of questions routinely addressed by mental-health professionals, however, and therefore are not discussed in this article.

principles of FMHA⁸ and the remainder each devoted to a particular legal question for which FMHA may be useful in providing relevant evaluative information and opinions to the court.⁹ The FMHA principles were derived to distinguish forensic evaluation from other forms of psychological and psychiatric assessment (done primarily for the purposes of diagnosis and treatment planning) and are supported by sources of authority that include law, science, ethics, and practice;¹⁰ they were subsequently expanded to include additional material developed between 2001 and 2009.¹¹ Since this range of topics was selected to encompass the kinds of evaluations most often requested by courts and attorneys, it seems reasonable to consider these 16 specific topics as encompassing nearly the entire range of topics that are addressed with any frequency by FMHA.

Competence to Stand Trial. This legal question concerns whether a juvenile¹² or criminal defendant¹³ is fit to proceed with disposition of charges. The applicable legal test is whether the individual “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.”¹⁴

Criminal Responsibility. Unlike competence to stand trial, there is no single legal standard for criminal responsibility. The *M’Naghten* standard is used in a number of U.S. jurisdictions:

To establish a defense on the ground of insanity, it must be proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or if he did know it, that he did not know he was doing what was wrong.¹⁵

The American Law Institute’s Model Penal Code proposed in 1962 that a defendant be acquitted by reason of insanity if “as a result of mental illness or mental defect he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law,”¹⁶ a standard which was adopted in a number of states and the federal jurisdiction and amended in some jurisdictions post-*Hinckley* to drop the “volitional prong” (“conform con-

duct to the requirements of the law”). Four states have abolished the insanity defense; New Hampshire continues to use the product standard¹⁷ that would acquit a defendant by reason of insanity if the criminal behavior was the “product of mental disease or defect.”¹⁸

Capacity to Waive Miranda Rights. Juvenile or criminal suspects undergoing custodial interrogation have Fifth and Sixth Amendment rights.¹⁹ Defendants who choose to waive these rights must do so in a knowing, intelligent, and voluntary fashion in order for any inculpatory statement to be admissible.²⁰ FMHA on this topic can assist the court in determining whether a defendant in custody had the requisite capacities to make a knowing, intelligent, and voluntary waiver.²¹

Sexual Offenders: Sentencing, Registration/Community Notification, and Post-Sentence Commitment. There are different legal questions that pertain to convicted sexual offenders. These include whether the convicted offender meets criteria for an enhanced sentence, whether an offender living in or returning to the community meets criteria for registration or community notification, and whether offenders meet specialized civil-commitment criteria²² following completion of a criminal sentence. Since these criteria vary somewhat, it is important that FMHA focus on the particular legal question and the specific capacities associated with it.²³

Risk of Violence in Adults and Juveniles. The field has advanced considerably in the last 25 years in providing empirically supported appraisal of the risk of future violence or other offending.²⁴ Such risk assessment, when accompanied by the appraisal of needs and responsivity,²⁵ is typically not a legal question in the same respect as other legal questions noted in this section. Rather, risk assessment is a component of a variety of criminal and civil questions for adults²⁶ and juveniles.²⁷

Capital Sentencing: Aggravation and Mitigation. Under *Furman v. Georgia*,²⁸ capital punishment as it was then practiced in the United States was held to be unconstitutional by the United States Supreme Court. An individualized consideration of the aggravating and mitigating factors for each defendant provides a framework that satisfies constitutional demands.²⁹ Accordingly, FMHA conducted in the context of capital sen-

8. HEILBRUN, *supra* note 5.

9. See *supra* Table 1 for a list of titles in this series.

10. HEILBRUN, *supra* note 4.

11. HEILBRUN, *supra* note 5.

12. IVAN KRUH & THOMAS GRISSO, EVALUATIONS OF JUVENILES’ COMPETENCE TO STAND TRIAL (2008).

13. PATRICIA ZAPF & RONALD ROESCH, EVALUATION OF COMPETENCE TO STAND TRIAL (2009).

14. *Dusky v. United States*, 362 U.S. 402 (1960).

15. *M’Naghten case*, 8 English Reporter 718 (1843).

16. AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND ANNOTATIONS (1985).

17. *Durham v. U.S.*, 214 F.2d 864, 865 (1954).

18. IRA PACKER, EVALUATION OF CRIMINAL RESPONSIBILITY (2009).

19. *Miranda v. Arizona*, 384 U.S. 436 (1966).

20. *Id.* at 444.

21. ALAN GOLDSTEIN & NAOMI E.S. GOLDSTEIN, EVALUATION OF CAPACITY TO WAIVE MIRANDA RIGHTS (2010) (noting in Chapter 2 that the

constructs of “knowing” and “intelligent” are more straightforward to assess than the construct of “voluntary.” As a result, they are the primary foci of FMHA on this question.)

22. *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Kansas v. Crane*, 534 U.S. 407 (2002).

23. PHILIP H. WITT & MARY ALICE CONROY, EVALUATION OF SEXUALLY VIOLENT PREDATORS (2009).

24. See generally HANDBOOK OF VIOLENCE RISK ASSESSMENT (Randy K. Otto & Kevin Douglas eds., 2010).

25. D.A. ANDREW & JAMES BONTA, THE PSYCHOLOGY OF CRIMINAL CONDUCT (5th ed.) (2010).

26. KIRK HEILBRUN, EVALUATION FOR RISK OF VIOLENCE IN ADULTS (2009).

27. ROBERT D. HOGE & D.A. ANDREWS, EVALUATION FOR RISK OF VIOLENCE IN JUVENILES (2010).

28. 408 U.S. 238 (1972).

29. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

tencing provides information regarding the statutorily enumerated aggravating and mitigating factors—and other information not specifically cited in statutes that may be relevant to the court’s or jury’s determination of whether a capital sentence should be imposed.³⁰

Capacity to Consent to Treatment and Research. Turning from criminal to civil legal questions, the question may arise regarding whether an individual has the requisite capacities to consent to various kinds of treatments or to participate in a research study. The construct of *informed consent* is essential in gauging whether an individual has such capacity. The contemporary “patient-centered standard”³¹ for such informed consent was enumerated in *Canterbury v. Spence*,³² involving the focus on the patient’s understanding rather than the doctor’s professional discretion in determining what information should be conveyed as part of obtaining such consent. FMHA regarding such capacity has been guided by the work of investigators who have identified four relevant components: understanding, appreciating, reasoning, and communicating a choice.³³

Guardianship. This is a legal process in which an individual, possibly unable to manage his or her personal or financial affairs, is reviewed by the court, which appoints a substituted decision maker if that person is incompetent for such functions.³⁴ Tasks such as making a will, voting, marrying, driving a car, making financial transactions, and other aspects of independent living are included among the areas covered in guardianship proceedings. In the absence of relevant Supreme Court caselaw, the legal standards vary by jurisdiction, with capacities such as understanding, reasoning, and communication among those important in FMHA evaluations of this kind of competence.³⁵

Civil Commitment. The question of whether an individual with a mental disorder should be involuntarily committed to a hospital is answered somewhat differently across different states. Generally, commitment criteria contain a prong reflecting the presence of such a mental disorder and a second prong on the question of whether the individual, as a result of the symptoms of such a disorder, would be a danger to others or self (either through active self-harm or grave disability). FMHA provides information both about the nature of the mental disorder and the risk of harm to self or others that results.³⁶

Personal Injury. The applicability of FMHA in personal-injury litigation is generally limited to cases in which it is alleged that the defendant, owing a duty to the plaintiff but

breaching that duty, proximately caused the plaintiff to suffer mental/emotional harm, sometimes in combination with physical harm.³⁷ The forensic mental-health evaluations in this area consequently focus on the nature and genuineness of the plaintiff’s reported symptoms and the extent to which they were caused by the alleged conduct of the defendant.

Workplace Discrimination and Harassment. This is a particular form of personal injury that is governed by the Civil Rights Act of 1964 (Title VII), which prohibits discrimination based on race, color, national origin, or gender in the workplace.³⁸ The considerations for FMHA evaluation in this area are similar to those in personal injury more generally: whether the plaintiff has suffered mental/emotional injury resulting from the defendant’s alleged behavior.

Workplace Disability. The other major workplace issue that can be addressed through FMHA involves whether an individual is disabled from working. This is not necessarily a legal matter, as workplace disability decisions may relate to the applicability of private disability insurance. The more clearly legal components in this domain encompass matters such as eligibility for Social Security Disability Income or cases involving workers compensation.³⁹ Relevant FMHA focuses on the nature of the mental disorder and its impact on the functional capacities that are important in the workplace.

Child Custody. Determining the custodial arrangement that will serve the best interest of a child whose parents divorce can be complex and sometimes contentious. Within the umbrella of this “best interest” standard are the components of the Uniform Marriage and Divorce Act, which have been adopted directly by a number of states, including parental wishes; child’s wishes; relationship of the child with any persons who may significantly affect the best interest; the child’s adjustment to home, school, and community; and the mental and physical health of all involved.⁴⁰ FMHA in this area can be comparably complex, as it is important to provide evaluative information regarding each parent, each child, and the relationships of the children with important others.

Parenting Capacity in Child Protection. The final domain covered in the Oxford best-practices series involves the question of when a child should be removed from the custody of a parent due to incapacity. Parenting rights have been recognized as fundamental⁴¹ although not absolute⁴²—and legal authorities are understandably reluctant to terminate parental rights without compelling reason.⁴³ Evaluations conducted by foren-

30. MARK D. CUNNINGHAM, EVALUATION FOR CAPITAL SENTENCING (2010).

31. SCOTT Y.H. KIM, EVALUATION OF CAPACITY TO CONSENT TO TREATMENT AND RESEARCH 8 (2009).

32. 464 F.2d 772 (D.C. Cir. 1972).

33. Paul Appelbaum & Thomas Grisso, *Assessing Patients’ Capacities to Consent to Treatment*, 319 NEW ENG. J. MED. 1635 (1998); THOMAS GRISSO & PAUL APPELBAUM, *ASSESSING COMPETENCE TO CONSENT TO TREATMENT: A GUIDE FOR PHYSICIANS AND OTHER HEALTH PROFESSIONALS* (1998).

34. ERIC Y. DROGIN & CURTIS L. BARRETT, EVALUATION FOR GUARDIANSHIP (2010).

35. *Id.* at 31-42.

36. *See generally* DEBRA A. PINALS & DOUGLAS MOSSMAN, EVALUATION

FOR CIVIL COMMITMENT (2011).

37. ANDREW W. KANE & JOEL A. DVOSKIN, EVALUATION FOR PERSONAL INJURY CLAIMS 7-10 (2011).

38. JANE GOODMAN-DELAHUNTY & WILLIAM E. FOOTE, EVALUATION FOR WORKPLACE DISCRIMINATION AND HARASSMENT 6 (2010).

39. LISA DRAGO PIECHOWSKI, EVALUATION FOR WORKPLACE DISABILITY 7-12 (2011).

40. GERI S.W. FUHRMANN & ROBERT A. ZIBBELL, EVALUATION FOR CHILD CUSTODY 15 (2011).

41. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

42. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

43. *See generally* KAREN S. BUDD ET AL., EVALUATION FOR PARENTING CAPACITY IN CHILD PROTECTION (2011).

TABLE 2 PRINCIPLES OF FORENSIC MENTAL-HEALTH ASSESSMENT	
GENERALLY	
1.	Be aware of the important differences between clinical and forensic domains.
2.	Obtain appropriate education, training, and experience in one's area of forensic specialization.
3.	Be familiar with the relevant legal, ethical, scientific, and practice literatures pertaining to FMHA.
4.	Be guided by honesty and striving for impartiality, actively disclosing the limitations on as well as the support for one's opinions.
5.	Control potential evaluator bias in general through monitoring case selection, continuing education, and consultation with knowledgeable colleagues.
6.	Be familiar with specific aspects of the legal system, particularly communication, discovery, deposition, and testimony.
7.	Do not become adversarial, but present and defend your opinions effectively.
IN SPECIFIC CASES	
Preparation	
8.	Identify relevant forensic issues.
9.	Accept referrals only within area of expertise.
10.	Decline the referral when evaluator impartiality is unlikely.
11.	Clarify the evaluator's role with the attorney.
12.	Clarify financial arrangements.
13.	Obtain appropriate authorization.
14.	Avoid playing the dual roles of therapist and forensic evaluator.
15.	Determine the particular role to be played within forensic assessment if the referral is accepted.
16.	Select the most appropriate model to guide data gathering, interpretation, and communication.
Data Collection	
17.	Use multiple sources of information for each area being assessed. Review the available background information and actively seek important missing elements.
18.	Use relevance and reliability (validity) as guides for seeking information and selecting data sources.
19.	Obtain relevant historical information.
20.	Assess clinical characteristics in relevant, reliable, and valid ways.
21.	Assess legally relevant behavior.
22.	Ensure that conditions for evaluations are quiet, private, and distraction-free.
23.	Provide appropriate notification of purpose and/or obtain appropriate authorization before beginning.
24.	Determine whether the individual understands the purpose of the evaluation and the associated limits on confidentiality.

TABLE 2 (continued) PRINCIPLES OF FORENSIC MENTAL-HEALTH ASSESSMENT	
Data Interpretation	
25.	Use third-party information in assessing response style.
26.	Use testing when indicated in assessing response style.
27.	Use case-specific (idiographic) evidence in assessing clinical condition, functional abilities, and causal connection.
28.	Use nomothetic evidence in assessing clinical condition, functional abilities, and causal connection.
29.	Use scientific reasoning in assessing causal connection between clinical condition and functional abilities.
30.	Carefully consider whether to answer the ultimate legal question. If it is answered, it should be in the context of a thorough evaluation clearly describing data and reasoning and with the clear recognition that this question is in the domain of the legal decision maker.
31.	Describe findings and limits so that they need change little under cross-examination.
Written Communication	
32.	Attribute information to sources.
33.	Use plain language; avoid technical jargon.
34.	Write report in sections, according to model and procedures.
Testimony	
35.	Base testimony on the results of the properly performed FMHA.
36.	Prepare.
37.	Communicate effectively.
38.	Control the message. Strive to obtain, retain, and regain control over the meaning and impact of what is presented in expert testimony.
Used with permission from KIRK HEILBRUN ET AL., FOUNDATIONS OF FORENSIC MENTAL HEALTH ASSESSMENT 135-37 (2009).	

sic clinicians can help the court make decisions involving conditions of access, with a specific focus on the harm that may occur and the parent's role in exacerbating (or minimizing) such risk of harm.⁴⁴

USING TPI IN FMHA

Third-party information in FMHA refers to information obtained directly from parties who are not litigants; it also encompasses records that are relevant to the litigant's history (whether they are yet part of the evidentiary record). Such records are considered broadly to encompass letters, diaries, e-mail and text messages, postings on social-media sites, and other sources of information that may have originated with the litigant but now exist in archival form.

In addressing the value of TPI for FMHA, it is useful to ground this discussion in the FMHA principles discussed

44. *Id.* at 41.

above and in Table 2 and to consider the various forms of FMHA that must incorporate such TPI.

THE IMPORTANCE AND VALUE OF TPI

Forensic clinicians widely recognize the importance and value of TPI, whether in the form of documents and records, third-party interviews, or scientific data produced by researchers. This is true both for FMHA in general⁴⁵ and for specific types of FMHA.⁴⁶ In the section that follows, we discuss the advantages of TPI from the perspective of forensic evaluators in three stages of the FMHA process: data collection, data interpretation, and written communication.⁴⁷

For several reasons, clinicians conducting FMHA typically place less faith in and reliance on an examinee's self-report than do evaluators conducting traditional clinical assessments.⁴⁸ First, the purposes of the two types of assessment differ. The purpose of the forensic mental-health evaluation is to assist the trier of fact, not necessarily to help individual examinees—whether in defending their cases or in treating their behavioral-health needs.⁴⁹ As a result, FMHA includes more concern for how an examinee approaches an evaluation, both in ability and in motivation to accurately report information.⁵⁰ This approach comprises an examinee's *response style*.⁵¹ In addition, many forensic questions are retrospective (e.g., mental state at the time of the offense, *Miranda* waiver, prior testamentary capacity). As a result, examinees may forget some or much about relevant past events. Information recorded closer

in time to such events, or that is consistent across or distinctively recalled by collateral informants, can thus improve the accuracy of a reconstructed history.⁵²

The task of a forensic clinician has been compared to that of an investigative journalist.⁵³ During the data-collection process, TPI is collected to seek a fuller picture of the examinee—his or her background, behavioral-health symptoms and functioning, functional legal capacities, and response style—through a review of information not fully provided by other sources of data such as self-report and evaluator observations. Compiling increasing amounts of information using a multi-method and multi-source approach allows potential explanations to be tested with case-specific details.⁵⁴ Forensic clinicians can also use TPI to help focus the report of an examinee or collateral informant, taking care not to influence this account by providing leading information.⁵⁵

TPI is also important at the data-interpretation stage, where it can be compared to information obtained directly from the evaluatee to assess the consistency of information across sources.⁵⁶ Such a comparison is particularly useful in reaching a conclusion about an individual's response style—whether the individual is deliberately distorting the description of mental-health symptoms or intellectual functioning. TPI can also fill in inadvertent gaps in self-report information. As such, TPI increases the perceived reliability of FMHA by addressing concerns about examinee omissions or misreporting.⁵⁷ Some psychological tests actually require TPI for test scoring or interpretation.⁵⁸

45. American Psychological Association, *Specialty Guidelines for Forensic Psychology*, 68 AM. PSYCHOLOGIST 7, 14 (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."); KIRK HEILBRUN ET AL., *supra* note 5. See also *supra* Table 2, principles 17-21, 23-25, 27-28, 32.

46. FORENSIC ASSESSMENTS IN CRIMINAL AND CIVIL LAW (Ronald Roesch & Patricia A. Zapf eds., 2013). The importance and value of collecting and considering TPI is repeatedly cited as a best practice in specific types of FMHA. For example, a review of the titles in the Oxford University Press series on best practices in FMHA, see *supra* Table 1, reveals that experts in specific types of criminal or delinquency FMHA recommended or referenced TPI for the following evaluation topics: capacity to waive *Miranda* rights, competence to stand trial, criminal responsibility, capital sentencing, sex-offender issues, violence risk, general recidivism risk and treatment needs, and juvenile disposition and transfer. *Id.* The same is true for most civil types of FMHAs, including civil commitment, guardianship, child custody, parental capacity and child protection, personal injury, harassment and discrimination, and workplace disability. *Id.* Multiple surveys of FMHA professional practices—and reviews of FMHA reports—indicate that the majority of FMHA professionals utilize TPI. Kark Kirkland et al., *Use of Collateral Contacts in Child Custody Evaluations*, 2 J. CHILD CUSTODY 95 (2005); Janet I. Warren et al., *Opinion Formation in Evaluating the Adjudicative Competence and Restorability of Criminal Defendants: A Review of 8,000 Evaluations*, 24 BEHAV. SCI. & L. 113 (2006); Janet I. Warren et al., *Opinion Formation in Evaluating Sanity at the Time of the Offense: An Examination of 5175 Pre-Trial Evaluations*, 22 BEHAV. SCI. & L. 171 (2004); Amanda Dovidio Zelechowski, *The Content of Child Custody Evaluation Reports: A*

Forensic Assessment Principles-Based Analysis (May 2009) (unpublished Ph.D. dissertation, Drexel University), https://idea.library.drexel.edu/xmlui/bitstream/handle/1860/3025/Zelechowski_Amanda.pdf?sequence=1; but see Tammy D. Lander & Kirk Heilbrun, *The Content and Quality of Forensic Mental Health Assessment: Validation of a Principles-Based Approach*, 8 INT'L J. FORENSIC MENTAL HEALTH 115 (2008) (finding only a minority of their sample of 125 FMHA reports included multiple sources of information for each area assessed or TPI for assessing response style). For additional, older studies, see sources cited in Kirk Heilbrun et al., *Third Party Information in Forensic Assessment*, in HANDBOOK OF PSYCHOLOGY: VOLUME 11 FORENSIC PSYCHOLOGY 69, 72-75 (Alan M. Goldstein ed., 2003); Randy K. Otto et al., *Legal and Ethical Issues in Accessing and Utilizing Third-Party Information*, in FORENSIC PSYCHOLOGY: EMERGING TOPICS AND EXPANDING ROLES 191, 191 (Alan M. Goldstein ed., 2007).

47. See *supra* Table 2.

48. Heilbrun et al., *supra* note 46, at 69-70.

49. *Id.* at 70; HEILBRUN ET AL., *supra* note 5, at 98.

50. Heilbrun et al., *supra* note 46, at 70-71.

51. *Id.*; see also CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION (Richard Rogers ed., 3rd ed. 2012).

52. Heilbrun et al., *supra* note 46, at 70.

53. *Id.* at 71, 81-82.

54. *Id.* at 71.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 71-72; see also FORENSIC USES OF CLINICAL ASSESSMENT INSTRUMENTS (Robert P. Archer & Elizabeth M. A. Wheeler eds., 2nd ed. 2013); HANDBOOK OF VIOLENCE RISK ASSESSMENT (Randy K. Otto & Kevin S. Douglas eds., 2010).

In communicating TPI results, it is important to identify the source; the reader must be informed what information was collected from whom, when, and how.⁵⁹ This attribution enables the reader to determine whether information is consistent across sources; when there is a question about the veracity of specific TPI, such attribution also allows a judgment about how relying on this TPI might affect the broader conclusions. Plain-language TPI is also helpful to quote.⁶⁰ Synthesizing TPI and other sources of information thus facilitates report writing and testimony that is logical, data driven, and communicated in a manner easily understood by legal professionals.⁶¹ The forensic clinician's opinions will have more credibility, and legal decision making will be improved because the evaluator's reasoning, as well as the limitations of his or her knowledge, will be clearer.⁶² A testifying expert whose report cites all TPI that was requested, obtained, and not obtained can more effectively respond to challenges on cross-examination that his or her opinion is biased or deficient due to an inadequate review of the available evidence.⁶³ In addition, experts who attribute information to sources throughout their reports and who use frequent quotations will be better able to describe the specific details of their evaluations if they are later called to testify.⁶⁴

LIMITATIONS OF TPI AND APPROACHES TO DEALING WITH SUCH CHALLENGES

Despite the importance of TPI in FMHA, there are numerous challenges to its use. Potential difficulties include practical and legal barriers to accessing records and problems interviewing collateral informants—including difficulty establishing contact or refusal to participate.⁶⁵ Once records are obtained or willing collateral informants are reached, numerous additional influences may limit TPI reliability. Issues such as bias, incomplete knowledge and limited memory, lack of understanding about

what is important, and suggestibility may all limit the accuracy of TPI.⁶⁶ Illegibility is an additional potential problem with physical records and documents.⁶⁷ Scientific research findings (almost always in the form of “nomothetic” or group data), which a forensic clinician may incorporate in his or her evaluation, are limited to some extent in their relevance or applicability.⁶⁸ The rationale, methods, and interpretation of research can always be critiqued for relevance, applicability, or design.⁶⁹ Additionally, data from scientific studies—or from technical manuals that accompany psychological tests—are rarely included in FMHA reports, although the forensic clinician does consider this information in reaching opinions.

DOCUMENTARY EVIDENCE

In recognition of professional confidentiality and legal-privilege considerations, forensic evaluators generally request all relevant TPI through the retaining or appointing party, typically the attorney or the court.⁷⁰ If retained, forensic clinicians ask the appropriate attorney to use appropriate legal procedures to obtain requested TPI (e.g., legal authorizations for release, depositions, interrogatories, requests for production, court orders, protective orders, permissions to contact collateral informants) and to handle any legal disputes that may arise over access issues.⁷¹ Evaluators appointed by court order typically have more discretion to obtain TPI on their own initiative, particularly when obtaining such TPI is specified in the court order. Still, there are times when it will be prudent for a court-appointed forensic clinician to notify the attorneys in the case about the TPI to be collected.⁷²

Familiarity with the records commonly available for review in various types of FMHA (e.g., police, court, probation, school, medical, and mental-health records) helps forensic evaluators identify what might be available and recognize

59. FORENSIC MENTAL HEALTH ASSESSMENT: A CASEBOOK 49-50, 77-78 (Kirk Heilbrun et al., eds., 2014).

60. *See id.* at 70.

61. Heilbrun et al., *supra* note 46, at 71.

62. *Id.* at 71-72; FORENSIC MENTAL HEALTH ASSESSMENT: A CASEBOOK, *supra* note 59, at 50; Otto et al., *supra* note 46, at 191. There are two studies that support the idea that the inclusion of TPI increased the credibility of FMHA. One found that the use of multiple sources of information for each area being assessed was significantly associated with higher expert ratings of an FMHA report's relevance, helpfulness, and quality. Lander & Heilbrun, *supra* note 46, at 119. Use of TPI to assess response style, in particular, was found to be significantly associated with higher quality ratings only (not relevance or helpfulness). *Id.* Another study using mock jurors looked at TPI that either supported or countered a mock expert's opinion as to a mock defendant's mental state at the time of the offense. Eric P. Green & Diane R. Follingstad, *Third-Party Information in Retrospective Assessment of NGRI: Impact of Source and Supportive Versus Contradictory Content*, 9 J. FORENSIC PRAC. 35 (2009). The pattern of results suggested that when mock jurors initially agreed with an expert's opinion, they tended to continue to agree with that opinion regardless of whether TPI was consistent or inconsistent with the opinion. *Id.* at 52-54. However, for those who initially disagreed with the expert's opinion, the majority tended to make their final decisions consistent with the TPI that was presented, regardless of

their initial stance. *Id.* If the TPI was consistent with the expert's opinion, most initially disagreeing mock jurors switched their vote to be in line with the expert's opinion; if the TPI was inconsistent, few switched to agree with the expert's opinion. *Id.*

63. Heilbrun et al., *supra* note 46, at 71.

64. HEILBRUN ET AL., *supra* note 5, at 114-15.

65. Heilbrun et al., *supra* note 46, at 82-83; Jennifer R. Clark et al., *Evaluation of Parenting Capacity in Child Protection Matters*, in FORENSIC ASSESSMENTS IN CRIMINAL AND CIVIL LAW, *supra* note 46, at 274.

66. Heilbrun et al., *supra* note 46, at 82-83; Clark et al., *supra* note 65, at 274.

67. Clark et al., *supra* note 65, at 274.

68. *See* David Faigman et al., *Group to Individual (G2i) Inference in Scientific Expert Testimony*, in 81 UNI. CHI. L. REV. 421 (2014); GEOFFREY MARCZYK ET AL., *ESSENTIALS OF RESEARCH DESIGN AND METHODOLOGY* (2005); Arthur M. Nezu & Christine Maguth Nezu, *The “Devil Is in the Details”: Recognizing and Dealing with Threats to Validity in Randomized Controlled Trials*, in EVIDENCE-BASED OUTCOME RESEARCH: A PRACTICAL GUIDE TO CONDUCTING RANDOMIZED CONTROLLED TRIALS FOR PSYCHOSOCIAL INTERVENTIONS 3 (Arthur M. Nezu & Christine Maguth Nezu eds., 2008).

69. Nezu & Nezu, *supra* note 68.

70. Otto et al., *supra* note 46, at 195-98.

71. *Id.* at 198-200.

72. *Id.* at 195-99.

when certain records may be missing. When a retaining examinee or counsel blocks access to records, he or she should be advised that the validity of the FMHA is correspondingly limited.⁷³ If the withholding is significant, the forensic clinician may need to withdraw from the assignment due to his or her inability to complete an adequate evaluation without the undisclosed information.⁷⁴

Best practices dictate that forensic evaluators consider the source and quality of all obtained records, noting when documents include illegible, incomplete, or possibly biased or otherwise inaccurate information, and communicating anything relevant to the integrity of reviewed materials.⁷⁵ Forensic clinicians then incorporate documentary data carefully in their reports, including relevant information from such sources and summarizing such content in a systematic, impartial, and comprehensible manner. This is accomplished in part by listing all information that was requested and which sources actually were obtained and reviewed, attributing all data to its source(s) and noting consistent and inconsistent information across sources, quoting sources verbatim, and aiming for conciseness.⁷⁶

In third-party interviews, forensic evaluators address potential problems by being persistent, open, respectful, flexible, inquisitive, and judicious. When retained by one party, forensic psychologists do not seek to contact the opposing party or his or her counsel without the appropriate permission.⁷⁷ To increase the chances of establishing contact with a collateral informant, forensic clinicians can ask retaining counsel, the examinee, and other collateral informants for as much contact information as is known about this third party (e.g., phone numbers, e-mail addresses) and for advice about how best to reach the collateral informant (e.g., what day of the week, what time of the day).

If multiple attempts to contact a third party prove unsuccessful, forensic evaluators must decide whether to make continued efforts. If the collateral informant is expected to have important and relevant information about the examinee, a forensic clinician can report the problem to the retaining attorney or appointing judge and request that the legal professional try to make contact with the third party to explain the importance of the interview, schedule an informal interview, or obtain or issue a subpoena or court order. If other obtained collateral sources of information make the specific third-party interview less critical, however, the forensic evaluator might simply document in the report that contact efforts were unsuccessful and note how the missing information was wholly or partially offset by other available data. Similarly, when apprehensive third parties decline to be interviewed after the forensic clinician makes the request and provides a notification of

purpose, that decision should be respected.⁷⁸ They should not attempt to persuade potential collateral informants—particularly since reluctance may stem from a wish to avoid being specifically identified, and descriptions of collateral interviews must identify informants and attribute their information to them specifically.⁷⁹ Instead, forensic clinicians again should document refusals in the report and indicate any resultant caution readers should exercise in making judgments based on the report. Experts should also note in their reports that appropriate notification procedures were utilized.⁸⁰

Even if third parties can be reached, their schedules may make it difficult for them to be interviewed at all, for more than a brief period of time, or without interruption. This may require the forensic evaluator to conduct a more limited interview than would be ideal, to divide the interview into multiple sessions, or to conduct the interview under less than optimal circumstances (e.g., while the third party is within hearing distance of dependents or other persons). Forensic clinicians dealing with such challenges should prioritize their questions to collect the most essential information from the time-limited informant. They should break up the interview into different time periods when necessary and when convenient for the informant (including during early mornings, later evenings, and weekends). They must consider whether the circumstances (including distractions or the presence of other parties) would invalidate any attempted interview or risk the unauthorized disclosure of sensitive information. When any interview is conducted, the evaluator must subsequently decide whether it was of sufficient quality, relevance, and trustworthiness to be considered and reported. Interview conditions should be noted in the evaluator's report.

Forensic clinicians remain alert for bias, limited knowledge, or irrelevance among collateral informants.⁸¹ Family members, friends, and victims, among those frequently interviewed, might tend to selectively or inaccurately report, omit, or characterize information in an attempt to benefit or harm the examinee or his or her case. Collateral informants might have had limited contact with the examinee or only had contact in certain contexts. As such, they may only have partial or incomplete knowledge about an examinee's present or past behavior, relationships, and other relevant domains.

Forensic evaluators use follow-up questioning to appraise the quality of a collateral informant's familiarity with the examinee: their closeness, the nature of their contact, and the presence of limitations such as bias or memory loss.⁸² Eliciting the collateral informant's perceptions about the examinee's situation and circumstances, particularly through asking how the third party would like to see the case concluded, can yield clues about bias.⁸³ Comparing the consistency of information

73. *Id.* at 198.

74. *Id.*

75. Clark et al., *supra* note 65, at 274.

76. Heilbrun et al., *supra* note 46, at 70; Otto et al., *supra* note 46, at 202.

77. Otto et al., *supra* note 46, at 198.

78. Heilbrun et al., *supra* note 46, at 82; Otto et al., *supra* note 46, at 200-01, 203-04.

79. See Heilbrun et al., *supra* note 46, at 82-83.

80. Otto et al., *supra* note 46, at 201.

81. Heilbrun et al., *supra* note 46, at 82-83; Otto et al., *supra* note 46, at 202.

82. Heilbrun et al., *supra* note 46, at 82-83; Otto et al., *supra* note 46, at 202.

83. Heilbrun et al., *supra* note 46, at 82; Otto et al., *supra* note 46, at 203-04.

from a collateral informant with information obtained from other sources provides another potential indicator of accuracy.⁸⁴ Accordingly, recommended practice involves interviewing multiple collateral informants and highlighting trends across interviewees rather than information reported solely by a single informant.⁸⁵ Selection of third-party informants promotes optimal information when subsequent informants are chosen because they know the most about domains for which earlier informants knew least.⁸⁶ Forensic clinicians report information from third-party informants as they report records, including clarifying uncorroborated information, to facilitate the reader's own assessment of the quality of the informational sources.⁸⁷

In addition to potential bias or lack of recent close contact, collateral informants should not convey conclusions.⁸⁸ Their observations, rather than judgments or conclusions, are needed.⁸⁹ To focus collateral informants, forensic evaluators can use guided questioning, moving from the general to the specific, while refraining from overly suggestive questioning. Avoiding suggestion is particularly important with collateral informants who do not provide detailed responses to initial questions and hence need more specific follow-up inquiries.⁹⁰

Earlier descriptions in response to general and broad questions can be compared against later responses to more specific questions.⁹¹ The level of detail in response to an evaluator's questions is one indication of a collateral informant's relevant knowledge.⁹² A forensic clinician can follow up with a third party if subsequently collected information yields discrepancies; such an iterative evaluation process reflects how different sources of data add to the picture compiled over time. In deciding how to convey information obtained from collateral informants, forensic evaluators consider the sensitive nature of much of this information, describing it as much as possible without hyperbole and in a style designed to limit unnecessary inflammatory impact.

A collateral informant's own cognitive and mental-health functioning (e.g., apparent or reported low intelligence, acknowledged or documented memory impairment, interpersonal anxiety, substance intoxication) might affect the nature of the information that is provided and may require the forensic clinician to adjust the interviewing style.⁹³ Forensic evaluators are especially careful about avoiding suggestion when interviewing third parties with some form of impairment or who have witnessed events under circumstances that may have

affected the accuracy of their perception or encoding of the event (e.g., extreme and distressing events, cross-racial observations).⁹⁴ The style and substance of questioning should be adapted to the collateral informant's personal characteristics.⁹⁵ Forensic clinicians can utilize differing levels of concreteness or abstraction in their questions or disclose non-sensitive details (e.g., alleged date and time, documented weather conditions—but not behavior that is part of the alleged offense) to help an interviewee focus on the time in question.⁹⁶ Regarding the substance of questioning, forensic clinicians may opt to only question a collateral informant about topics with which the collateral informant is well informed. Any adjustments made to an interview based on personal characteristics of a collateral informant should be noted in the forensic evaluator's report.

LEGAL STATUS OF TPI

Although forensic clinicians may recognize the importance of TPI, legal professionals will recognize that TPI often constitutes hearsay evidence, which is generally inadmissible.⁹⁷ Thus, legal professionals may have concerns about using TPI, given the law's preference for evidence that can be subjected to accuracy-testing procedures such as cross-examination; that is collected via generally accepted techniques; and that was originally obtained consistent with Fourth, Fifth, and Sixth Amendment requirements.⁹⁸ The fields of forensic psychology and forensic psychiatry are clear, however, that TPI "enhanc[es] the integrity of the process, the impartiality of the evaluator, and the weight given the results by the trier of fact."⁹⁹ This view is consistent with that of the Advisory Committee on the Federal Rules of Evidence:

The rationale . . . is that the expert is fully capable of judging for himself what is, or is not, a reliable basis for his opinion . . . [b]ecause of his professional background, knowledge, and experience. . . . [T]he expert [knows how] to separate the wheat from the chaff and to use only those sources and kinds of information which are of a type reasonably relied upon by similar experts in arriving at sound opinions on the subject. . . . Upon admission of such evidence . . . the court . . . [will] instruct the jury that the hearsay evidence [and other inadmissible evidence] is to be considered solely as a basis for the expert opinion and not as substantive evidence.¹⁰⁰

84. Heilbrun et al., *supra* note 46, at 82-83; Otto et al., *supra* note 46, at 202.

85. Heilbrun et al., *supra* note 46, at 82-83.

86. Helena C. Kraemer et al., *A New Approach to Integrating Data from Multiple Informants in Psychiatric Assessment and Research: Missing and Matching Contexts and Perspectives*, 160 AM. J. PSYCHIATRY 1566 (2003).

87. See *supra* note 77 and accompanying text.

88. Heilbrun et al., *supra* note 46, at 82-83.

89. *Id.*

90. *Id.*; Otto et al., *supra* note 46, at 201-02.

91. Heilbrun et al., *supra* note 46, at 82; Otto et al., *supra* note 46, at 201, 203-04.

92. FORENSIC MENTAL HEALTH ASSESSMENT: A CASEBOOK, *supra* note 59, at 144-45.

93. Heilbrun et al., *supra* note 46, at 82-83; Otto et al., *supra* note 46, at 201-02.

94. Heilbrun et al., *supra* note 46, at 82-83.

95. *Id.*

96. *Id.*

97. CHRISTOPHER SLOBOGIN ET AL., LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 528-29 (5th ed. 2009); FED. R. EVID. 802 ("The Rule Against Hearsay").

98. SLOBOGIN ET AL., *supra* note 97, at 531-33.

99. Heilbrun et al., *supra* note 46, at 72.

100. United States v. Sims, 514 F.2d 147, 149 (1975); see also FED. R. EVID. 703 advisory committee's note; Otto et al., *supra* note 46, at 191-93 (noting other pro-admission rationales courts have used, including (1) for the sake of efficiency and (2) that the evidence is being admitted not for its truth but to evaluate the

The relevant federal and state standards will be described in the following sections. These standards are summarized in Table 3.

LEGAL STATUS IN THE FEDERAL JURISDICTION

Experts providing testimony in federal court are governed by the Federal Rules of Evidence. Rule 703 allows experts to present opinions based on information of which they have “been made aware” before trial—for example, via third parties.¹⁰¹ In this way, expert witnesses are distinguished from lay witnesses, who are typically restricted to testifying about their personal observations to avoid conveying out-of-court information in violation of hearsay rules.¹⁰² According to this Rule, expert opinions based on such out-of-court information may be admitted, even if those facts or data underlying the opinion would be inadmissible, as long as other experts in the field would reasonably rely on the same type of information.¹⁰³ This aspect of Rule 703 has not changed substantially since the development of the Federal Rules of Evidence 40 years ago, at a time when common-law rules of evidence were far more limiting to experts.¹⁰⁴ Developers of Federal Rule 703 sought to allow for experts to engage in their standard practices, most notably the practice of relying on outside information to make informed conclusions, without burdening courts by requiring that all such information be admitted into evidence.¹⁰⁵

Following the creation of Rule 703, expert-opinion testimony could no longer be excluded from federal court solely because it was based on inadmissible evidence (e.g., third-party information and other hearsay). Instead, judges would first need to determine whether other experts in the relevant

field would reasonably rely on the same kind of facts and data.¹⁰⁶ Some scholars described reasonable reliance as a “low threshold,”¹⁰⁷ with many courts inclined to accept an expert’s assertion that such information was reasonably relied upon.¹⁰⁸ However, several other courts interpreted the rule as requiring judges to evaluate the “trustworthiness” of the underlying facts or data before deciding if it was reasonably relied upon.¹⁰⁹ If a judge determined that the expert relied on untrustworthy information to form his or her opinion, that reliance became inherently unreasonable, and the expert’s opinion would be excluded under Rule 703.¹¹⁰ In this way, judges used the added trustworthiness component to avoid entirely abdicating their gatekeeper role to experts—and provide additional protection against lawyers using experts to bypass evidentiary restrictions.¹¹¹

Although the original version of Rule 703 indicated that experts may share their opinions—even if they are based on inadmissible evidence—through testimony, experts are also expected to describe how they formed their opinions and what information they considered in reaching them.¹¹² However, the initial iteration of Rule 703 did not indicate what restrictions should apply to an expert’s testimonial discussion of the inadmissible facts or data underlying an opinion. As a result, scholarly debates emerged and circuits split.¹¹³ Few courts interpreted Rule 703 as allowing the effectively unrestricted admission of such inadmissible information via expert testimony because of its use as the basis for an opinion, often viewing the rule as another hearsay exception.¹¹⁴ More commonly, federal courts permitted the introduction of inadmissible background information for the limited purpose of explaining how an expert formulated his or her opinion, *not* as statements of

expert’s opinion). This approach is contrasted with “[t]he traditional rule . . . that an expert opinion is inadmissible if it is based upon information obtained out of court from third parties.” *Sims*, 514 F.2d at 149. For further discussion, including coverage of recent Confrontation Clause issues and the force of exclusionary rules and TPI in non-criminal contexts, see Heilbrun et al., *supra* note 46, at 76-77; Otto et al., *supra* note 46, at 191-95; SLOBOGIN ET AL., *supra* note 97, at 531-33.

101. FED. R. EVID. 703.

102. *See* FED. R. EVID. 701, 801-07.

103. FED. R. EVID. 703.

104. PL. 93-595 (HR 5463), PL. 93-595, January 2, 1975, 88 Stat. 1926; 3 Federal Evidence § 7:16 (4th ed.). Although under common law experts were able to utilize their background knowledge to formulate opinions, they were only permitted to use case-specific information from personal observation or from presentation in court—including in the form of a hypothetical question—to do so. *See* Ian Volek, *Federal Rule of Evidence 703: The Back Door and the Confrontation Clause, Ten Years Later*, 80 FORDHAM L. REV. 959, 965-66 (2011). The few exceptions to this rule included allowing a treating physician to base an opinion upon a patient’s description of his or her condition. *Id.* at 966.

105. FED. R. EVID. 703 advisory committee’s note.

106. Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577, 578, 582-83 (1986).

107. Daniel D. Blinka, “Practical Inconvenience” or Conceptual Confusion: The Common-Law Genesis of Federal Rule of Evidence 703, 20 AM. J. TRIAL ADVOC. 467, 552 (1997).

108. *See, e.g., Greenwood Utilities Comm’n v. Mississippi Power Co.*, 751 F.2d 1484, 1495 (5th Cir. 1985) (“[D]eference ought to be accorded to the expert’s view that experts in his field reasonably rely on such sources of information”); *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1432 (5th Cir. 1989) (“[T]he trial court should defer to the expert’s opinion of what data they find reasonably reliable.”).

109. *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1223, 1245 (E.D.N.Y. 1985) (“If the underlying data are so lacking in probative force and reliability that no reasonable expert could base an opinion on them, an opinion which rests entirely upon them must be excluded.”), *aff’d sub nom.* *In re Agent Orange Prod. Liab. Litig.* MDL No. 381, 818 F.2d 187 (2d Cir. 1987).

110. *See, e.g., Toys R Us, Inc. v. Canarsie Kiddie Shop, Inc.*, 559 F. Supp. 1189, 1205 (E.D.N.Y. 1983) (excluding expert opinion based solely on a survey that lacked “sufficient indicia of trustworthiness”).

111. *See Agent Orange*, 611 F. Supp. at 1245 (“[T]he court may not abdicate its independent responsibilities to decide if the bases meet minimum standards of reliability as a condition of admissibility.”).

112. *See* FED. R. CIV. P. 26(2); FED. R. CRIM. P. 16.

113. Compare Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577 (1986), with Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion: A Response to Professor Carlson*, 40 VAND. L. REV. 583 (1987).

114. *See* Blinka, *supra* note 107, at 544.

**TABLE 3
FEDERAL AND STATE RULES RELATED TO THIRD-PARTY INFORMATION RELIED UPON BY EXPERT WITNESSES**

JURISDICTION	CATEGORY	RELEVANT RULE OR CASE	TEXT OF RELEVANT RULE OR CASE
Federal Rule	Post-amendment FRE	Fed. R. Evid. 703	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.
Alabama	Substantively similar to post-amendment FRE 703	Ala. R. Evid. 703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in 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.
Alaska	Substantively similar to post-amendment FRE 703	Alaska R. Evid. 703; 705(c)	703: The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Facts or data need not be admissible in evidence, but must be of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. 705(c): When the underlying facts or data would be inadmissible in evidence for any purpose other than to explain or support the expert's opinion or inference, the court shall exclude the underlying facts or data if the danger that they will be used for an improper purpose outweighs their value as support for the expert's opinion. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.
Arizona	Substantively similar to post-amendment FRE 703	Ariz. R. Evid. 703	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.
Arkansas	Substantively similar to pre-amendment FRE 703	Ark. R. Evid. 703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
California	Differs from FRE 703: Other	Cal. Evid. Code §§ 801, 804	801: If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion. 804: (a) If a witness testifying as an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called and examined by any adverse party as if under cross-examination concerning the opinion or statement. (b) This section is not applicable if the person upon whose opinion or statement the expert witness has relied is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776, or (3) a witness who has testified in the action concerning the subject matter of the opinion or statement upon which the expert witness has relied. (c) Nothing in this section makes admissible an expert opinion that is inadmissible because it is based in whole or in part on the opinion or statement of another person. (d) An expert opinion otherwise admissible is not made inadmissible by this section because it is based on the opinion or statement of a person who is unavailable for examination pursuant to this section.

fact.¹¹⁵ Often such opinions suggested that judges should instruct jurors that otherwise inadmissible information should be used solely to help them evaluate the expert's opinion and not as substantive evidence in the case.¹¹⁶ Finally, other courts explicitly recognized that whereas an expert's testimony about the bases of his or her opinions might be admissible under Rule 703, such admission might still conflict with other evidentiary and constitutional rules—and therefore should be prohibited.¹¹⁷

In response to the circuits' split over whether experts should be allowed to disclose the underlying bases for their opinions if they include inadmissible evidence, Rule 703 was amended in 2000.¹¹⁸ The amended rule seemed to align with those circuits that explicitly referenced the potential for Rule 703 to be superseded by Rule 403, mandating that inadmissible information not be disclosed to the jury unless the court finds that its probative value in helping the factfinder evaluate the expert's opinion substantially outweighs its prejudicial effect.¹¹⁹

Since the 2000 amendment to Rule 703, there have been several noteworthy U.S. Supreme Court decisions relevant to the introduction of third-party information. In *Crawford v. Washington*,¹²⁰ the United States Supreme Court held that any testimonial out-of-court statements are barred unless the witness is currently unavailable but had previously been available for the defendant to cross-examine. The Court related this requirement to the Sixth Amendment's Confrontation Clause, granting defendants the right to confront their accusers regardless of whether the court deemed the information reliable. This interpretation was a departure from the previous Supreme Court decision in *Ohio v. Roberts*,¹²¹ which described several exceptions to the hearsay clause that were eschewed under *Crawford*.

One of the residual questions not addressed in *Crawford* was the nature of "testimonial" evidence. This was addressed by the Court in *Bullcoming v. New Mexico*,¹²² where the Court defined a document developed for evidentiary purposes, in this case a blood-alcohol-analysis report, as "testimonial" under the meaning of the Confrontation Clause. The document was therefore excluded, despite the Court's recognition of its reliability. However, Rule 703 itself did not seem to change in response to these Supreme Court rulings; other than a slight modification in con-

junction with a rules-wide restyling in 2011, it has remained substantively the same since the addition of the balancing test weighing probative value and prejudicial effect.¹²³

Most recently, the Supreme Court addressed this issue in *Williams v. Illinois*,¹²⁴ holding that testimony need not be accusatory—and can even be impartial and scientific—to be covered under the *Crawford* reading of the Confrontation Clause.¹²⁵ The Court added that the Confrontation Clause does not prohibit irrelevant evidence from being admitted as part of expert testimony, identifying testimonial statements that are unavailable for cross-examination as the central issue of previous cases.¹²⁶ The Court instructed trial judges to consider the purpose that a reasonable person would attribute to the statement in question to determine whether facts or data underlying an expert's opinion are prohibited by the Confrontation Clause.¹²⁷

In *Williams*, the Court noted that the DNA profile in question was used to apprehend a suspect but not to obtain evidence against a defendant; therefore, the profile did not violate the Confrontation Clause.¹²⁸ Justice Thomas concurred in judgment, stating that "[i]t is no answer to say that 'safeguards' in the rules of evidence will prevent the abuse of basis testimony" and that the "balancing test is no substitute for a constitutional provision that has already struck the balance in favor of the accused."¹²⁹ Justice Thomas also observed that reputable experts within the mental-health field frequently rely upon third-party information that would qualify as hearsay.¹³⁰

LEGAL STATUS IN STATE JURISDICTIONS

State jurisdictions can create their own rules regarding third-party information. Many have implemented—via statute or caselaw—rules similar to a previous or current version of Federal Rule 703, while others have created their own rules governing this type of evidence.¹³¹

STATE RULES SIMILAR TO PRE-AMENDMENT VERSION OF FRE 703

Statutes or caselaw from 19 states appear to apply a TPI-related rule that is substantively similar to the original iteration of Federal Rule 703 (before the amendment in 2000 that added

115. See, e.g., *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir. 1984) (admitting reports described as hearsay solely to explain how an expert reached an opinion, not to show the truth of the information within the reports); *Bauman v. Centex Corp.*, 611 F.2d 1115, 1120 (5th Cir. 1980); *United States v. Hill*, 655 F.2d 512, 516 (3d Cir. 1981) (finding error with trial court's decision to exclude psychological testimony until after defendant had testified "because there is no requirement that the opinion be based on the evidence at trial").

116. See, e.g., *Paddack*, 745 F.2d at 1262.

117. Such rules include the balancing test in FED. R. EVID. 403 and the Confrontation Clause of the U.S. Const. amend. 6. See *Barrel of Fun, Inc. v. State Farm Fire & Cas. Co.*, 739 F.2d 1028, 1033 (5th Cir. 1984); *Engbretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 728-29 (6th Cir. 1994); *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1270 (7th Cir. 1988); *United States v.*

Lawson, 653 F.2d 299, 302 (7th Cir. 1981).

118. See FED. R. EVID. 703 advisory committee's note.

119. *Id.*

120. 541 U.S. 36 (2004).

121. 448 U.S. 56 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 3 (2004).

122. 131 S. Ct. 2705 (2011).

123. FED. R. EVID. 703 advisory committee's note.

124. 132 S. Ct. 2221 (2012).

125. *Id.* at 2228.

126. *Id.* at 2238.

127. *Id.* at 2243.

128. *Id.*

129. *Id.* at 2259.

130. *Id.*

131. See *infra* Table 3 for a list of relevant state statutes and caselaw.

TABLE 3 (continued)
FEDERAL AND STATE RULES RELATED TO THIRD-PARTY INFORMATION RELIED UPON BY EXPERT WITNESSES

JURISDICTION	CATEGORY	RELEVANT RULE OR CASE	TEXT OF RELEVANT RULE OR CASE
Colorado	Substantively similar to post-amendment FRE 703	Colo. R. Evid. 703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in 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.
Connecticut	Differs from FRE 703: Other	Conn. Code Evid. § 7-4(b)	(b) Bases of opinion testimony by experts. The facts in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the proceeding. The facts need not be admissible in evidence if of a type customarily relied on by experts in the particular field in forming opinions on the subject. The facts relied on pursuant to this subsection are not substantive evidence, unless otherwise admissible as such evidence.
Delaware	Substantively similar to post-amendment FRE 703 (however, Delaware requires party who wants to exclude expert-basis information from the jury to raise the issue by objection)	Del. R. Evid. 703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Upon objection, 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.
Florida	Substantively similar to post-amendment FRE 703	Fla. Stat. Ann. § 90.704	The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may 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.
Georgia	Substantively similar to post-amendment FRE 703	Ga. Code Ann. § 24-7-703	The facts or data in the particular proceeding upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, such facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Such 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.
Hawaii	Differs from FRE 703: Adds trustworthiness component	Haw. R. Evid. 703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court may, however, disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.
Idaho	Substantively similar to post-amendment FRE 703	Idaho R. Evid. 703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in 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.

the “probative value vs. prejudicial effect” balancing test).¹³² Some of these states may have simply failed to update their statutes in accordance with the changing federal rule, but others appear to have intentionally implemented a rule that omits the balancing test. For example, the Pennsylvania rule’s advisory-committee notes indicate that the state deliberately did not include such a balancing test in its statute because it conflicts with another rule of evidence in Pennsylvania, requiring that facts and data underlying an expert’s opinion be disclosed to the trier of fact.¹³³ However, the omission of a balancing test that instructs judges how to decide whether to admit testimony about inadmissible evidence underlying an expert’s opinion necessarily results in some ambiguity regarding how to resolve such a question. As a result, many of these states apply their relevant evidentiary rules in a manner similar to the federal jurisdiction—before the amendment of Rule 703—that permitted an expert to testify regarding inadmissible background information for the limited purpose of explaining how he or she formulated an opinion, and *not* as a statement of fact.¹³⁴

For example, an Arkansas Court of Appeals case affirmed the decision to allow a social worker to present information disclosed to her during her treatment of children involved in a custody dispute that, if true, reflected negatively on one of the parties.¹³⁵ The court explained its decision, reasoning that the children’s statements to the social worker contributed to the formation of her expert opinion and that “an expert must be allowed to disclose to the trier of fact the basis of facts for his opinion, as otherwise the opinion is left unsupported in midair with little if any means for evaluating its correctness.”¹³⁶ Additionally, the Nebraska Supreme Court has held that, during commitment proceedings, mental-health professionals may include the results of interviews and examinations performed by others—in addition to other forms of TPI—in their reports when such information provides the basis for an expert’s opin-

ion.¹³⁷ By extension, the court has also prohibited the inclusion of such inadmissible information when submitted to prove the truth of the matter asserted.¹³⁸

STATE RULE SIMILAR TO POST-AMENDMENT VERSION OF FRE 703

Several states have rules of evidence that are substantively similar to the current version of FRE 703. It appears that 18 states have such rules: Alabama, Alaska, Arizona, Colorado, Delaware, Florida, Georgia, Idaho, Kansas, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, Vermont, West Virginia, and Wisconsin. Although these state statutes vary slightly in their wording, the requirements and restrictions on otherwise inadmissible facts or data are similar to the post-amended version of FRE 703. For example, Alabama’s¹³⁹ and New Mexico’s¹⁴⁰ relevant rules of evidence prohibit otherwise inadmissible evidence unless the court determines that the probative value in assisting the fact-finder to evaluate the expert’s opinion substantially outweighs any prejudicial effect of the evidence. After decades of steadfastly adhering to the common-law standard, Alabama’s statute was recently changed to mirror the post-amendment version of Federal Rule 703. A brief review of the relevant caselaw indicates that Arizona permits experts to testify as to previous reports or medical opinions that contributed to the formulating of their own opinions.¹⁴¹ Florida has also held that experts are entitled to rely on hearsay evidence when forming their opinions on issues relevant to a case.¹⁴²

Some states include all of the relevant parts of FRE 703 but add additional qualifiers or requirements. For example, Delaware requires an objection to invoke the prevention of inadmissible evidence as outlined in FRE 703.¹⁴³ Additionally, the relevant statute in Kansas was recently amended to add the restrictions for otherwise inadmissible evidence.¹⁴⁴ These amendments are effective as of July 1, 2014. It should be noted

132. These states include Arkansas, Illinois, Indiana, Iowa, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Oregon, Pennsylvania, South Carolina, Washington, and Wyoming. Of note, Louisiana maintains different standards for the civil and criminal context; although the civil-court rule mimics the pre-amendment version of Rule 703 verbatim, the state’s criminal courts only allow an expert to discuss inadmissible information during cross-examination. See LA. CODE EVID. ANN. art. 705.

133. FED. R. EVID. 703, 705. Illinois and Indiana serve as other, somewhat less concrete examples, as both states created/amended their relevant rules after the 2011 restyling of the federal rules and still chose not to include the balancing test. See ILL. R. EVID. 703; IND. R. EVID. 703.

134. See *supra* p. 24, 26 for a discussion of this distinction.

135. *Meins v. Meins*, 93 Ark. App. 292, 301, 218 S.W.3d 366, 368, 371 (2005).

136. *Id.* (quoting *Lawhon v. Ayres Corp.*, 67 Ark. App. 66, 992 S.W.2d 162 (1999)). See also *Miller v. State*, 2010 Ark. 1, 27, 362 S.W.3d 264, 281-82 (2010) (permissible for trial court to allow psychologist to testify as to defendant’s prior acts of violence to explain “critical” background information used during his forensic evaluation of defendant). *But see Bowen v. State*, 322

Ark. 483, 514-15, 911 S.W.2d 555, 570-71 (1995) (permissible for trial court to deny expert reading a psychosocial history of defendant based on interviews with third parties because the “only purpose for offering the statements . . . was for the truth of the matter asserted”).

137. See *State v. Hayden*, 233 Neb. 211, 215, 444 N.W.2d 317, 321 (1989) (“We conclude that the statements complained of were admitted as foundation for Dr. Woytassek’s diagnosis and opinion that defendant was mentally ill and dangerous.”); *State v. Simants*, 248 Neb. 581, 586, 537 N.W.2d 346, 350 (1995) (“Because the State’s exhibits were not offered for the truth of the matter asserted therein, but instead were relied upon to provide a basis for expert testimony pursuant to rule 703, the district court did not err by admitting the exhibits into evidence.”).

138. See *State v. Hayden*, 237 Neb. 286, 466 N.W.2d 66 (1991).

139. ALA R. EVID. 703.

140. N.M.R. EVID. 11-703.

141. *E.g.*, *State v. Smith*, 215 Ariz. 221, 159 P.3d 531 (2007); *State v. Lundstrom*, 161 Ariz. 141, 776 P.2d 1067 (1989).

142. *Vega v. State Farm Mut. Auto.*, 45 So. 3d 43 (Fla. Dist. Ct. App. 2010).

143. DEL. R. EVID. 703.

144. KAN. STAT. ANN. § 60-458.

TABLE 3 (continued)
FEDERAL AND STATE RULES RELATED TO THIRD-PARTY INFORMATION RELIED UPON BY EXPERT WITNESSES

JURISDICTION	CATEGORY	RELEVANT RULE OR CASE	TEXT OF RELEVANT RULE OR CASE
Illinois	Substantively similar to pre-amendment FRE 703	Ill. R. Evid. 703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Indiana	Substantively similar to pre-amendment FRE 703	Ind. R. Evid. 703	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field.
Iowa	Substantively similar to pre-amendment FRE 703	Iowa Code Ann. R. 5.703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the trial or hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Kansas	Substantively similar to post-amendment FRE 703	Kan. Stat. Ann. § 60-458	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible into 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 the probative value of such facts or data in assisting the jury to evaluate the expert's opinion substantially outweighs any prejudicial effect.
Kentucky	Differs from FRE 703: Adds trustworthiness component	Ky. R. Evid. 703	(a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. (b) If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data relied upon by an expert pursuant to subdivision (a) may at the discretion of the court be disclosed to the jury even though such facts or data are not admissible in evidence. Upon request the court shall admonish the jury to use such facts or data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.
Louisiana	Substantively similar to pre-amendment FRE 703	La. Code Evid. Ann. art. 703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Maine	Substantively similar to pre-amendment FRE 703	Me. R. Evid. 703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Maryland	Differs from FRE 703: Adds trustworthiness component	Md. R. Evid. 5-703	(a) In General. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. (b) Disclosure to Jury. If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data reasonably relied upon by an expert pursuant to section (a) may, in the discretion of the court, be disclosed to the jury even if those facts and data are not admissible in evidence. Upon request, the court shall instruct the jury to use those facts and data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.
Massachusetts	Differs from FRE 703: Experts can only rely on admissible evidence	Com. v. Markvart, 437 Mass. 331, 337, 771 N.E.2d 778, 783 (2002)	Qualified examiners, as expert witnesses, may base their opinions on (1) facts personally observed; (2) evidence already in the records or which the parties represent will be admitted during the course of the proceedings, assumed to be true in questions put to the expert witnesses; and (3) "facts or data not in evidence if the facts or data are independently admissible and are a permissible basis for an expert to consider in formulating an opinion."

that one of the rules of evidence that strongly resembles the FRE is that in Oklahoma.¹⁴⁵

STATE RULE DISTINCT FROM FRE: ADDING TRUSTWORTHINESS COMPONENT

Four states have explicitly included some form of a trustworthiness component in their versions of the evidentiary rule.¹⁴⁶ Specifically, rules in Hawaii¹⁴⁷ and Tennessee¹⁴⁸ note that a court has the power to prohibit opinion testimony “if the underlying facts or data indicate lack of trustworthiness.”¹⁴⁹ Additionally, relevant rules from both Kentucky¹⁵⁰ and Maryland¹⁵¹ require that typically inadmissible underlying facts be “trustworthy, necessary to illuminate testimony, and unprivileged” before experts can disclose them to the jury.¹⁵² Indicating how a court might identify untrustworthy supporting data, the Tennessee Supreme Court noted:

A foundation built upon facts contrary to known undisputed facts, facts that do not adequately support the conclusion, or assumptions that neither reasonably arise from an expert’s expertise or inferences that can reasonably be drawn from the evidence are examples of failings that would render the facts relied upon by an expert insufficiently trustworthy.¹⁵³

Additionally, application of the trustworthiness component of Kentucky’s rule resulted in that state’s supreme court overturning a murder conviction, holding that the trial court should not have allowed an expert to read from inadmissible medical records without first addressing the three factual determinations required by the state evidentiary rule.¹⁵⁴

STATE RULE DISTINCT FROM FRE: EXPERTS CAN ONLY RELY ON ADMITTED OR ADMISSIBLE EVIDENCE

Harkening back to the days before the Federal Rules of Evi-

dence, three states utilize statutes or caselaw prohibiting opinions based on inadmissible and/or non-admitted evidence altogether.¹⁵⁵ Specifically, Ohio limits the basis of expert testimony to include only those facts and data that the expert personally perceived or are admitted into evidence.¹⁵⁶ However, Ohio courts seem to apply a somewhat liberal definition of “personally perceived,” allowing experts to base their opinions on background knowledge (*i.e.*, via professional articles) and documents like police reports and medical records despite the fact that they are not admitted into evidence.¹⁵⁷ Similarly, Michigan prohibits experts from basing their opinions on any facts or data that are not, or will not be, admitted into evidence.¹⁵⁸ Finally, although Massachusetts has not codified its rules of evidence, its caselaw indicates that expert witnesses may only base their opinions on personal observations; evidence that has been, or will be, admitted; and “facts or data not in evidence if the facts or data are independently admissible and are a permissible basis for an expert to consider in formulating an opinion.”¹⁵⁹ Massachusetts also limits discussion of these underlying facts to cross-examination, rather than allowing presentation during the expert’s direct examination.¹⁶⁰

STATE RULE DISTINCT FROM FRE: OTHER

There are six states that appear to depart significantly from the standards articulated in FRE 703: California, Connecticut, Minnesota, New York, Rhode Island, and Virginia. California’s statute includes both the information found in FRE 702, which describes the relevant requirements of expert testimony, and that which is found in FRE 703.¹⁶¹ Notably, the California rule differs substantially from both FRE 703 and other states’ evidence rules in stating that although otherwise admissible expert opinions are not made inadmissible because they are based on hearsay evidence, nothing in the section makes an expert opinion admissible where it would be inadmissible

145. The Oklahoma statute was briefly invalidated for violation of the Oklahoma Constitution’s single-subject bill. *See Douglas v. Cox Retirement Properties, Inc.*, 302 P.3d 789 (Okla. 2013). But the Oklahoma Legislature reenacted the provision, 12 Okla. Stat. Ann. § 2703, later in 2013. *See* 2013 Okla. Sess. Laws, 1st Extraordinary Sess., chapter 15, §§ 5, 6.

146. Those states include Hawaii, Kentucky, Maryland, and Tennessee.

147. HAW. R. EVID. 703.

148. TENN. R. EVID. 703.

149. HAW. R. EVID. 703; TENN. R. EVID. 703. However, Hawaii’s statute indicates that a judge *may* disallow such testimony, while Tennessee’s statute notes that a judge *shall* disallow such testimony. *Id.*

150. KY. R. EVID. 703.

151. MD. R. EVID. 5-703.

152. KY. R. EVID. 703.; MD. R. EVID. 5-703.

153. *State v. Scott*, 275 S.W.3d 395, 409-10 (Tenn. 2009).

154. *Rabovsky v. Com.*, 973 S.W.2d 6, 11 (Ky. 1998). As discussed *supra*, judges in Kentucky state courts may only allow experts to disclose inadmissible facts or data underlying their opinions if those data are “determined to be trustworthy, necessary to illuminate testimony, and unprivileged.” KY. R. EVID. 703.

155. These states include Massachusetts, Michigan, and Ohio. Additionally, as discussed *infra*, Virginia limits the bases of expert

opinions in criminal cases to “facts personally known or observed by the expert, or based upon facts in evidence.” VA. SUP. CT. R. 2:703(b). In civil cases, however, the applicable rule tracks the pre-2000-amendment version of Federal Rule 703. VA. SUP. CT. R. 2:703(a).

156. OHIO R. EVID. 703.

157. *State v. Solomon*, 59 Ohio St. 3d 124, 126, 570 N.E.2d 1118, 1120 (1991) (holding that mental-health professionals may review non-admitted police reports and hospital records when formulating their opinions and still testify in accordance with Rule 703); *see also Beard v. Meridia Huron Hosp.*, 2005-Ohio-4787, 106 Ohio St. 3d 237, 240, 834 N.E.2d 323, 327 (“we have acknowledged that information that would not be admissible at trial may serve as a basis for an expert’s background knowledge without violating Evid.R. 703.”).

158. MICH. R. EVID. 703. For example, the Supreme Court of Michigan noted that a trial court could properly exclude a psychologist’s testimony that was based, in large part, on inadmissible hearsay statements from the defendant. *People v. Yost*, 483 Mich. 856, 759 N.W.2d 196 (2009).

159. *Com. v. Markvart*, 437 Mass. 331, 337, 771 N.E.2d 778, 783 (2002).

160. *See Com. v. Jaime*, 433 Mass. 575, 577, 745 N.E.2d 320, 322 (2001).

161. CAL. EVID. CODE §§ 801, 804.

TABLE 3 (continued)
FEDERAL AND STATE RULES RELATED TO THIRD-PARTY INFORMATION RELIED UPON BY EXPERT WITNESSES

JURISDICTION	CATEGORY	RELEVANT RULE OR CASE	TEXT OF RELEVANT RULE OR CASE
Michigan	Differs from FRE 703: Experts can only rely on admissible evidence	Mich. R. Evid. 703	The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence hereafter.
Minnesota	Differs from FRE 703: Other	Minn. R. Evid. 703	(a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. (b) Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying expert data when inquired into on cross-examination.
Mississippi	Substantively similar to pre-amendment FRE 703	Miss. R. Evid. 703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Missouri	Substantively similar to pre-amendment FRE 703	State v. Woodworth, 941 S.W.2d 679 (Mo. Ct. App. W.D. 1997)	"An expert witness is entitled to rely on hearsay evidence to support an opinion so long as that evidence is of the type reasonably relied upon by other experts in that field, and such evidence need not be independently admissible. Any expert witness represents the distillation of the total of his personal experiences, readings, studies and learning in his field of expertise, and he may rely on that background, hearsay or not, as basis for his opinion" (internal citations and quotations omitted).
Montana	Substantively similar to pre-amendment FRE 703	Mont. R. Evid. 703	The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Nebraska	Substantively similar to pre-amendment FRE 703	Neb. Rev. Stat. § 27-703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Nevada	Substantively similar to pre-amendment FRE 703	Nev. Rev. Stat. § 50.285	1. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. 2. If of a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
New Hampshire	Substantively similar to pre-amendment FRE 703	N.H.R. Evid. 5-703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
New Jersey	Substantively similar to pre-amendment FRE 703	N.J.R. Evid. 703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

because it is based in whole or in part on the opinion or statement of another person. Based on existing caselaw, it appears that reliability of the inadmissible evidence is a significant factor in determining whether the expert testimony using it is admissible.¹⁶²

Connecticut requires that the facts underlying an expert's opinion be a type customarily relied on by experts in a particular field in order to be introduced when otherwise inadmissible.¹⁶³ Connecticut additionally distinguishes between those facts relied upon for expert testimony and substantive evidence unless that information relied upon may also be admissible. Unlike FRE 703, Connecticut's statute does not include a balancing test weighing the prejudicial impact of the evidence against its probative value. Similar to California caselaw, Connecticut courts have interpreted the statute to require that experts disclose the facts underlying their opinions before they may render the opinion itself.¹⁶⁴

Minnesota's statute closely resembles the pre-2000 FRE 703 but differs in distinguishing information admissible on direct examination versus cross-examination.¹⁶⁵ While underlying expert data must be admissible on its own to be introduced on direct examination, the statute explicitly states that the rule does not restrict the admissibility of underlying data when this information is challenged on cross-examination. If the expert can show the underlying information to be particularly trustworthy, then the rule does permit evidence to be introduced for a limited purpose. The issue of trustworthiness is left to the presiding judge, who must be satisfied that the information relied upon by the expert is sufficiently reliable to ensure the validity of the expert's opinion.¹⁶⁶

Unlike other states, New York does not have a particular statute addressing the issue of third-party information in expert testimony. The state also diverges from other states in its strict adherence to Confrontation Clause principles and its holding that even when hearsay evidence is reliable, it remains inadmissible when the defendant is denied the opportunity to cross-examine the declarant.¹⁶⁷ This holding does not appear to prohibit experts from relying on third-party information but only from relaying that information to the court—based upon established precedent permitting this reliance.¹⁶⁸ However, it should be noted that *Goldstein* was decided after the United States Supreme Court's landmark case of *Crawford v. Washington*. Therefore, *Goldstein* may be considered the progeny of *Crawford* and may reflect a revised approach to third-party information in the context of expert evidence.

Under Rhode Island's rules of evidence, any facts or data reasonably and customarily relied upon by experts are admissible even without testimony from the declarant.¹⁶⁹ Although the rule itself does not require a balancing test, some state cases have nonetheless examined the probative value versus the prej-

udicial impact of the evidence.¹⁷⁰ This appears to be particularly applicable when the expert relied upon an alleged victim's reports—and the expert's reliance upon the victim may be interpreted as an implicit affirmation of the victim's credibility.¹⁷¹

Although most state rules of evidence have language applicable to both criminal and civil law, Virginia explicitly distinguishes between the two.¹⁷² While the Virginia statute notes that evidence of a type typically relied upon by other experts in a particular field need not be admissible on its own in civil contexts, it does not have parallel language in criminal cases. Rather, evidence relied upon in a criminal case should be either personally known or observed by the expert or independently introduced into evidence. Virginia also has a statute related specifically to disclosure of facts or data utilized in expert testimony, and this rule also distinguishes between the requirements in civil cases versus criminal cases.¹⁷³ Although the statute requires that facts relied upon by the expert be disclosed in a criminal case, there is no such requirement in the civil context unless specifically ordered by the court or elicited upon cross-examination.¹⁷⁴

CONCLUSION

The use of third-party information in FMHA appears strongly supported within the fields of forensic psychology and forensic psychiatry. Among other contributions, the incorporation of third-party information helps to promote overall accuracy, detect bias from other sources, enhance impartiality, and increase credibility. But the relevant law on the admissibility of such third-party information as part of expert evaluations on criminal, civil, and family-law matters varies considerably. Before the revision of the Federal Rules of Evidence in 2000, the rules allowed the admission of TPI for the purpose of contributing to the expert's opinion—although not for adding to evidence on matters that are not part of this opinion. Some 19 states currently have TPI-admissibility rules that are substantively similar to the pre-revision version of the Federal Rules of Evidence. The 2000 FRE revision added a “prejudicial versus probative” test in considering whether TPI should be admitted as part of expert evaluations; this is the current federal standard, which has also been adopted by 18 states. Three states allow TPI to be admitted only when it is a part of evidence that has already been admitted or would otherwise be admissible. Four states have applied a “trustworthiness” criterion to the TPI-admissibility question, and the remaining six states have rules that are distinct from all of these categories. Courts and practitioners should be aware of both the importance of third-party information and the relevant law regarding its admissibility in their jurisdiction to observe the indicated balancing test for the appropriate use of this important source of information in forensic mental-health assessment.

162. *Korsak v. Atlas Hotels, Inc.*, 2 Cal. App. 4th 1516, 3 Cal. Rptr. 2d 833 (1992); *People v. Geier*, 41 Cal. 4th 555, 161 P.3d 104 (2007).

163. CONN. CODE EVID. § 7-4(b).

164. *Borkowski v. Borkowski*, 228 Conn. 729, 638 A.2d 1060 (1994).

165. MINN. R. EVID. 703.

166. MINN. R. EVID. 703, Supreme Court Advisory Notes.

167. *People v. Goldstein*, 6 N.Y.3d 119, 843 N.E.2d 727 (2005).

168. *People v. Sugden*, 35 N.Y.2d 453, 323 N.E.2d 169 (1974).

169. R.I. R. EVID. 703.

170. *E.g.*, *State v. Brown*, 88 A.3d 1101 (R.I. 2014).

171. *See State v. Huffman*, 68 A.3d 558 (R.I. 2013).

172. VA. SUP. CT. R. 2:703.

173. VA. SUP. CT. R. 2:705(a).

174. *Id.*

TABLE 3 (continued)
FEDERAL AND STATE RULES RELATED TO THIRD-PARTY INFORMATION RELIED UPON BY EXPERT WITNESSES

JURISDICTION	CATEGORY	RELEVANT RULE OR CASE	TEXT OF RELEVANT RULE OR CASE
New Mexico	Substantively similar to post-amendment FRE 703	N.M.R. Evid. 11-703	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.
New York	Differs from FRE 703: Other	<i>People v. Sugden</i> , 35 N.Y.2d 453 (1974); <i>People v. Goldstein</i> , 6 N.Y.3d 119 (2005)	Expert may provide opinions based on hearsay information “if it is of a kind accepted in the profession as reliable in forming a professional opinion” (<i>People v. Sugden</i>). But, experts may not relay statements from third parties to jury when those third parties cannot be cross-examined; doing so would be a violation of the Sixth Amendment’s Confrontation Clause (<i>People v. Goldstein</i>).
North Carolina	Substantively similar to pre-amendment FRE 703	N.C.R. Evid. 703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
North Dakota	Substantively similar to post-amendment FRE 703	N.D.R. Evid. 703	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.
Ohio	Differs from FRE 703: Experts can only rely on admissible or admitted evidence	Ohio R. Evid. 703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing.
Oklahoma	Substantively similar to post-amendment FRE 703	12 Okl. St. Ann. § 2703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in 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.
Oregon	Substantively similar to pre-amendment FRE 703	Or. Rev. Stat. Ann. § 40.415	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
Pennsylvania	Substantively similar to pre-amendment FRE 703	Pa. R. Evid. 703	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.
Rhode Island	Differs from FRE 703: Other	R.I.R. Evid. 703	An expert’s opinion may be based on a hypothetical question, facts or data perceived by the expert at or before the hearing, or facts or data in evidence. If of a type reasonably and customarily relied upon by experts in the particular field in forming opinions upon the subject, the underlying facts or data shall be admissible without testimony from the primary source.

TABLE 3 (continued)
FEDERAL AND STATE RULES RELATED TO THIRD-PARTY INFORMATION RELIED UPON BY EXPERT WITNESSES

JURISDICTION	CATEGORY	RELEVANT RULE OR CASE	TEXT OF RELEVANT RULE OR CASE
South Carolina	Substantively similar to pre-amendment FRE 703	S.C.R. Evid. 703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
South Dakota	Substantively similar to post-amendment FRE 703	S.D. Codified Laws § 19-15-3	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in 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.
Tennessee	Differs from FRE 703: Adds trustworthiness component	Tenn. R. Evid. 703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. 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. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.
Texas	Substantively similar to post-amendment FRE 703	Tex. R. Evid. 703; 705(d)	703: The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. 705(d): When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.
Utah	Substantively similar to post-amendment FRE 703	Utah R. Evid. 703	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.
Vermont	Substantively similar to post-amendment FRE 703	Vt. R. Evid. 703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in 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.
Virginia	Differs from FRE 703: Other	Va. Sup. Ct. R. 2:703	(a) Civil cases. In a civil action an expert witness may give testimony and render an opinion or draw inferences from facts, circumstances, or data made known to or perceived by such witness at or before the hearing or trial during which the witness is called upon to testify. The facts, circumstances, or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence. (b) Criminal cases. In criminal cases, the opinion of an expert is generally admissible if it is based upon facts personally known or observed by the expert, or based upon facts in evidence.

TABLE 3 (continued)
FEDERAL AND STATE RULES RELATED TO THIRD-PARTY INFORMATION RELIED UPON BY EXPERT WITNESSES

JURISDICTION	CATEGORY	RELEVANT RULE OR CASE	TEXT OF RELEVANT RULE OR CASE
Washington	Substantively similar to pre-amendment FRE 703	Wash. R. Evid. 703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
West Virginia	Substantively similar to post-amendment FRE 703	W. Va. R. Evid. 703	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.
Wisconsin	Substantively similar to post-amendment FRE 703	Wis. Stat. Ann. 907.03	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible may 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 or inference substantially outweighs their prejudicial effect.
Wyoming	Substantively similar to pre-amendment FRE 703	Wyo. R. Evid. 703	The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.



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