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Court Review

Volume 51, Issue 1

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Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION
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EDITOR'S NOTE

This issue provides two articles and a book review dealing with expert witnesses and their interactions with courts and judges.

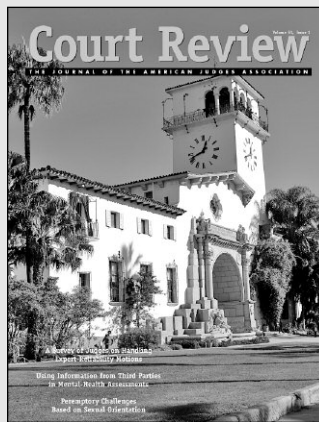
Our lead article, from Professor Andrew Jurs, reviews the results of surveys he conducted with judges in six states. Jurs wanted to compare how judges handled expert-witness issues in states using the traditional admissibility test of *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923) (adopting the general-acceptance standard), and in states using the factor test announced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). As judges, we often are unaware of whether we are in the mainstream among judges or are outliers. If you sometimes decide whether an expert's testimony is admissible under the standards applicable in your jurisdiction, we think you'll find of interest how judges are applying both the *Frye* and *Daubert* standards today.

Next, a group of researchers in the Department of Psychology at Drexel University reviews the use of information from third parties in psychological or psychiatric evaluations. Such information may be used by experts in child-custody evaluations, evaluations of competence to stand trial, risk assessments, civil-commitment proceedings, and other cases. The researchers discuss limitations that experts should recognize in their use of this information as well as the legal standards judges must apply. To the extent that admissibility is determined by practice in the field, the researchers conclude that the use of third-party information in forensic mental-health evaluations is "strongly supported within the fields of forensic psychology and forensic psychiatry."

For those interested in a detailed review of forensic mental-health assessments in legal proceedings, Judge John W. Brown and attorney Benjamin K. Hoover review the book *Forensic Assessments in Criminal and Civil Law*. The review specifically examines this book as a resource for judges.

Our issue concludes with consideration of the use of peremptory challenges to eliminate potential jurors based on their sexual orientation. Law student Colin Saltry considers how the standards of *Batson v. Kentucky*, 476 U.S. 79 (1986), which prohibits race-based peremptory challenges, might be applied in this context.

This is the first issue with my new coeditor, Eve Brank. Eve and I welcome your suggestions for future issues. Feel free to correspond with either or both of us by email (sleben56@gmail.com; ebrank2@unl.edu).—SL



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 46 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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Cover photo, Mary S. Watkins (maryswatkins@mac.com). The cover photo is the Santa Barbara (Calif.) Courthouse, home of the Santa Barbara Superior Court. The courthouse was built between 1926 and 1929, with construction finished four months before the stock-market crash. The building was listed on the National Register of Historic Places in 1982 and was designated a National Historic Landmark in 2005. For more information about the building, see <http://goo.gl/AU9Kxf>.

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President's Column

JUDICIAL STRESS

Brian MacKenzie

I stopped working as a sitting judge in December. Two weeks later, I visited my doctor, who told me my blood pressure had dropped 30 points. After some discussion, he suggested that I no longer needed to take blood-pressure medication. The reason it fell so quickly was, of course, that I had stopped the day-to-day work of a sitting judge. Don't mistake me, I loved my job and miss it. But no matter how much you love sitting as a judge, being one is demanding, isolating, and stressful. In fact, a judge's profession is so stressful that New Zealand has placed judges in the high-risk job category. This level of stress can have very negative effects on the health of judges and their families.

A recent study in 2010 identified 12 significant causes of judicial stress.¹ These are (1) workload; (2) high information and documentation requirements; (3) awareness of the possible consequences of judicial error; (4) inadequate lighting; (5) near-vision stress from excessive reading; (6) high responsibility; (7) awareness of self-insecurity due to function and role; (8) time pressure; (9) high demands on quality of work; (10) insufficient technical and material equipment; (11) required pace of work; (12) insufficient work areas. Additionally, between 10 and 25% of the judges in the study also mentioned excessive computer work and working beyond a normal 8-hour day.

In spite of all of the studies showing the high level of stress, judges as a group tend to be in denial. As Judge Robert L. Childers wrote in his article *Even Judges Get the Blues*: "Because of the weight of public expectation, judges generally feel that they should be perfect. Not only do they feel that they should be fair, impartial, and make the right decision 100 percent of the time, but the public expects this of judges as well, as do the lawyers who practice before them. This can create undue pressure for judges and, consciously or unconsciously, keep judges from admitting or recognizing the signs of debilitating disease."² These different stressors impact both the judge's job and home life. In smaller jurisdictions, judges have no privacy. Everything the judge does at work and at home is the subject of local gossip, so when a judge experiences work or family conflicts, those

conflicts are often revealed to the entire community.

In larger jurisdictions, the media are often interested in using a judge's behavior or family problems to drive readership or viewers. For example, many judges have experienced the effect of a negative press reaction to a judicial decision. And still others have read about a spouse or child on the front page of the local paper merely because the person is a member of the judge's family.

Recognizing the health risk of judicial stress is only the first step. A judge needs to develop ways to combat stress. A noted expert on judicial stress, Dr. Isaiah M. Zimmerman, has suggested this can include (1) maintaining a close support circle of relatives and friends who are not competitive or envious and with whom you can engage in robust and honest mutual appraisal and dialogue; (2) taking initiative to engage in activities totally removed from the legal and judicial world and to form friendships with some of the people you will meet in this way; (3) learning the basics of stress-management techniques so that you can work efficiently but not pay too high a price for it; and (4)

periodically serving as a mentor to a new judge, so that you can teach by example most of these points. Stress is an inherent part of the position judges hold. But it can be understood, and its impact can be managed to reduce health and family problems.³

As part of the AJA's efforts at Making Better Judges®, our entire educational program at the midyear meeting on April 24, 2015, will focus on judicial stress and its impact on judges and their families. These education sessions will delve into the causes of judicial stress and ways to reduce it. Please think about joining your fellow judges in Fort Meyers, Florida, and learning how you can manage your stress and make yourself a better judge. And once you understand how helpful the AJA's educational conferences can be, perhaps you will also join us October 4-7 at the Sheraton hotel in downtown Seattle, Washington, for our annual conference.

Once again, thank you for taking the time to read this column, and I hope you enjoy the rest of the articles in this issue of *Court Review*.



Footnotes

1. Monica Silvia Ciocoiu, Mirela Cojocaru & S.V. Ciocoiu, *Implications of Levels of Stress Factors in the Magistrate's Activity*, 15 ROMANIAN BIOTECHNOLOGICAL LETTERS 126 (2010), available at <http://www.rombio.eu/rbl3vol15Supplement/18.Ciocoiu%20Monica.pdf>.
2. Robert L. Childers, *Even Judges Get the Blues*, HIGHLIGHTS (ABA

Commission on Lawyer Assistance Programs), Summer 2009, at 2, available at <http://goo.gl/LcLH87>.

3. See generally Isaiah M. Zimmerman, *Helping Judges in Distress*, 90 JUDICATURE 10 (2006); Isaiah M. Zimmerman, *Isolation in the Judicial Career*, CT. REV., Winter 2009, at 10; Isaiah M. Zimmerman, *Stress: What It Does and How It Can Be Lessened*, JUDGES' J., Summer 1981, at 4.



A Psycholegal Deskbook for Bench and Bar:

Book Review of *Forensic Assessments in Criminal and Civil Law*

John W. Brown & Benjamin K. Hoover

RONALD ROESCH AND PATRICIA A. ZAPF, EDs., *FORENSIC ASSESSMENTS IN CRIMINAL AND CIVIL LAW: A HANDBOOK FOR LAWYERS*, Oxford University Press, 2012, 312 pp. \$100.00.

The role of the modern trial judge maintains basically a managerial character,¹ but the tools at the judge's disposal are continually evolving. To perform effectively, the judge must draw upon an array of legal and technical resources. To this end, *Forensic Assessments in Criminal and Civil Law* provides valuable insight regarding forensic mental-health assessments from a technical, scientific perspective. Numerous contributors submit overviews and analyses of the various ways in which forensic mental-health assessments are employed by the court system. This review examines *Forensic Assessments in Criminal and Civil Law* as a resource for the bench.

Overall, the book is well edited, with each chapter following the structure of (1) Legal Context; (2) Forensic Mental Health Concepts; (3) Empirical Foundations and Limits; (4) The Evaluation; and (5) Report Writing and Testimony, making the work congruent and easily referenced, despite the overall density of the volume. The work is best utilized as a reference material, not to be digested in one sitting.

The book begins by setting forth the foundations of forensic mental-health assessments, helpfully defining them “as a

domain of assessments of individuals intended to assist legal decision makers in decisions about the application of laws requiring consideration of individuals' mental conditions, abilities, and behaviors.” The “best practices” discussion is valuable and instructive regarding the role of courts in determining who is a qualified forensic mental-health expert and what constitutes admissible expert testimony. Although the focus of this chapter lies in summarizing standards of psychiatric and psychological practice for attorneys and judges, it provides a broad-ranging introduction to the topic and generally aids in refreshing the reader's familiarity with psychological concepts pertaining to the law before the volume addresses the specifics of forensic mental-health assessments.

“Part I: Criminal” contains eight chapters covering the various applications of forensic mental-health assessments in all aspects of criminal cases, from jury selection to capital sentencing. Of particular note and interest to the bench are the chapters in this section regarding competency evaluations, sex-offender evaluations, and capital sentencing—areas in which science and the law are co-evolving.² This part additionally provides a unique perspective regarding familiar criteria applicable in criminal matters, for instance, the requirement that a waiver of *Miranda* be knowing and intelligent³ and the cognitive and volitional aspects of insanity defenses.⁴

Footnotes

1. See generally, e.g., Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261 (2010).
2. See, e.g., *Indiana v. Edwards*, 554 U.S. 164, 176–77 (2008) (“[I]nsofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial.”); *Panetti v. Quarterman*, 551 U.S. 930, 960 (2007) (“Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose. It is therefore error to derive from *Ford*, and the substantive standard for incompetency its opinions broadly identify, a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted.”); *Kansas v. Hendricks*, 521 U.S. 346, 352, 360 (1997) (holding that state statute allowing indefinite commitment of sexually violent predators upon a finding of “mental abnormality”—a “congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses to the degree that such person is a menace to the health and safety of others”—did not violate the due-process clause).
3. *Moran v. Burbine*, 475 U.S. 412, 421 (1986); Richard Rogers et al., *Knowing and Intelligent: A Study of Miranda Warnings in Mentally Disordered Defendants*, 31 LAW & HUM. BEHAV. 401, 416 (2007) (“Defense attorneys may assume that criminal defendants have sufficient understanding of the *Miranda* rights and waivers based on their educational level and extensive contacts with the criminal justice system (Rogers, 2006). The current findings question these assumptions, at least in the case of mentally disordered defendants. On average, defendants with the poorest understanding had completed the 10th grade and had 10 prior arrests.”).
4. *Clark v. Arizona*, 548 U.S. 735, 752 (2006) (“[I]t is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice. Indeed, the legitimacy of such choice is the more obvious when one considers the interplay of legal concepts of mental illness or deficiency required for an insanity defense, with the medical concepts of mental abnormality that influence the expert opinion testimony by psychologists and psychiatrists commonly introduced to support or contest insanity claims. For medical definitions devised to justify treatment, like legal ones devised to excuse from conventional criminal responsibility, are subject to flux and disagreement.”).

“Part II: Civil” comprises five chapters that cover the more limited application of forensic mental-health assessments in relatively common civil matters. The chapters addressing guardianship evaluations and civil commitments may be of particular interest to practitioners and judges alike. Petitions for the appointment of a guardian over a person suffering under a disability and a conservator over that person’s estate are common on the dockets of many state courts.⁵ There is significant variation in such proceedings across jurisdictions,⁶ as the authors of the devoted chapter recognize, but there are best practices nevertheless applicable under the sundry statutory constructs. The chapter lists several areas in which a guardianship/conservatorship respondent may be impaired (i.e., testamentary capacity, voting, marriage, automobile driving, financial transactions, independent living, and medical care) and sets forth diagnostic measures applicable to these areas.

“Part III: Juvenile and Family” concludes the volume with five chapters addressing forensic mental-health assessments in civil and criminal juvenile and family proceedings. The chapter addressing child-custody evaluations gives an overview of these procedures, insight regarding the relevant mental-health concepts, and analysis of some ethical challenges faced by mental-health professionals conducting these assessments. The conceptualization of reports on forensic child-custody evaluations delineates both the intended and unintended functions that these reports serve for the parties and the court. Again, although practices vary across jurisdictions, the materials in this section are worthwhile in providing an overview of best practices and a broad understanding of these areas from beyond the simple legal perspective.

The authors of *Forensic Assessments in Criminal and Civil Law* admirably recite the limitations of forensic mental-health assessments with respect to various legal concepts, while nevertheless emphasizing the utility of such assessments to various facets of the legal system. Were the reviewers to note potential improvements for a subsequent edition, the inclusion of proper legal citations to the cases referenced would top the list, as the volume is written for legal professionals. This would help to temper the strong clinical bent of the book. In a similar vein, caselaw citations would be of more use to attorneys as a primary reference, as opposed to the numerous academic

studies supporting many of the propositions in the text. Most attorneys and judges would not pull and critique studies but would quickly analyze cases cited for application. References to the DSM-5 may also prove beneficial. Finally, a glossary of standard psychological tests and terms (forensic instruments), as well as the uses and acceptance thereof, would be helpful for many in the legal profession.

In sum, *Forensic Assessments in Criminal and Civil Law* is a worthwhile volume, addressing psycholegal concepts as related to forensic mental-health assessments. The ambitious scope of the book does not detract from the detailed information regarding the numerous areas of law to which forensic mental-health assessments are applied, and its value lies as a solid background and reference volume.



John W. Brown is a judge on the Circuit Court of the City of Chesapeake, First Judicial Circuit of Virginia. He graduated cum laude from Methodist University, received his J.D. from the Wake Forest University School of Law, and earned an LL.M. in taxation from the William & Mary School of Law. Beginning in 1974, Judge Brown engaged in the practice of law in Chesapeake, serving as a Commonwealth’s Attorney and private practitioner, until he assumed the bench in 2008. He is a member of the Executive Committee of the American Bar Association’s National Conference of State Trial Judges.



Benjamin K. Hoover is a staff attorney for the Circuit Court of the City of Chesapeake, First Judicial Circuit of Virginia. He graduated from the Pennsylvania State University with distinction in 2007. He attended the University of Richmond School of Law, where he served as Lead Articles Editor on the Executive Board of the Law Review and graduated magna cum laude as a member of the Order of the Coif. Following graduation, he clerked for the Circuit Court of the City of Chesapeake and the Supreme Court of Virginia.

5. See Brenda K. Uekert & Richard Van Duizend, *Adult Guardianships: A “Best Guess” National Estimate and the Momentum for*

Reform, in *FUTURE TRENDS IN STATE COURTS* 107–09 (2011).
6. See *id.*

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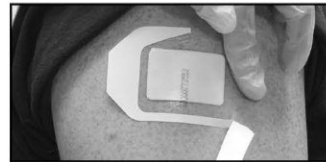


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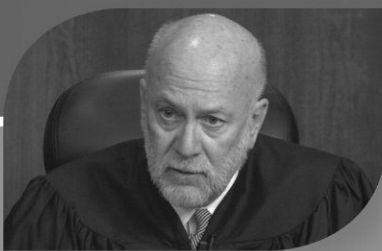
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The Gatekeeper's Toolbox:

A Survey on Judicial Handling of Expert-Reliability Motions

Andrew W. Jurs

In the *Daubert* decision of 1993, the Supreme Court directed federal judges to screen expert evidence for reliability before admission, rejecting the “general acceptance” standard of *Frye v. United States*.¹ To ensure the appropriate level of reliability to admit expert testimony, the Court suggested a series of substantive factors for judges to analyze, such as peer review and the *Frye* “general acceptance” standard. Several years later in *General Electric v. Joiner*, Justice Breyer also suggested procedures judges could use to decide gatekeeping questions.²

In the years after *Daubert*, researchers began to evaluate how judges perform this Rule 702 reliability screening. One group of studies considered the frequency of expert-reliability challenges, finding that litigants raised reliability issues more often after *Daubert* than before. Other studies considered the methodology of expert gatekeeping by analyzing the procedures used by judges in deciding reliability questions. Others chose to focus on the substantive factors that judges consider when gatekeeping expert testimony, finding that some of the *Daubert* factors were more useful than others.

Together these studies provide some baseline data on *Daubert*'s effect, but as useful as they are, they leave significant questions unanswered. They also rely on data from the 1990s, so they may reflect courtroom standards that have changed.³

The survey discussed here is intended to address those concerns by broadly analyzing how judges perform gatekeeping. The survey was designed to answer the following questions:

- How often did judges see motions challenging the reliability of expert testimony, and how often did they grant them?
- What procedural methodologies did they use in facing reliability motions?
- What substantive factors are helpful in deciding reliability motions?
- Considering the guidance they had on how to perform gatekeeping, were they comfortable doing so?

By asking judges these questions, the survey would not only shed light on whether judges have sufficient guidance for their gatekeeping role but could also inform judges how other judges screen expert testimony in their courtrooms. Finally,

the survey would provide updated baseline data on the gatekeeping role, which could inform the debate on whether policy changes are in order.

This article will examine these issues in detail by explaining the prior research in the area, examining the methodology and results of the judicial survey, and then finishing with some thoughts on the importance of the survey's findings. By measuring the practices of judges handling reliability challenges, this survey provides significant insight into the reality of expert gatekeeping and whether the Supreme Court's guidance matches the reality in courtrooms today.

PRIOR RESEARCH ON MECHANICS AND FREQUENCY OF GATEKEEPING

In the years surrounding the *Daubert* trilogy,⁴ researchers began to explore fundamental questions about what reliability screening meant and how it was to be done. These studies were critically important in understanding the initial impact of *Daubert* by measuring the frequency of, procedures for, and substantive factors judges used to decide expert-reliability challenges.

Prior Studies Analyzing the Frequency of Daubert or Reliability Challenges

In the first decade after *Daubert*, three separate studies touched on the issue of how frequently reliability challenges occur. In only one, however, did the researchers address the absolute rate of challenges. That study, performed by Lloyd Dixon and Brian Gill and published in 2001, evaluated the rate of reliability challenges both before and after *Daubert* by examining a computerized database of reported case opinions.⁵ They found that in the four years before *Daubert*, the likelihood of a reliability issue arising was between 68 and 71% but that it had risen to between 76 and 89% in the four years after *Daubert*.⁶ The data also showed a similar increase in the likelihood of a judge finding the expert unreliable. They concluded that these increases suggest that under *Daubert*, reliability standards had tightened, which encouraged litigants to file more challenges to opponents' experts.⁷

This article is an abridged and revised version of a report of the author's survey originally published as *Gatekeeper with a Gavel: A Survey on Judicial Management of Challenges to Expert Reliability and Their Relationship to Summary Judgment*, 83 Miss. L.J. 325 (2014).

Footnotes

1. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 593-95 (1993); see *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923).
2. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 147 (1997) (Breyer, J., concurring).
3. One major reason to believe courtroom standards may have changed since these prior studies is that many states, evaluating

their state evidentiary standards, switched from *Frye* to *Daubert* in the mid to late 1990s. So during the data-collection periods of several of the prior studies, some states adhered to *Frye* but have changed to *Daubert* since. For more on this issue, see *infra* Part II.d and text accompanying notes 22-25.

4. The trilogy comprises *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), *Joiner*, 522 U.S. at 136, and *Daubert*, 509 U.S. at 579.
5. LLOYD DIXON & BRIAN GILL, RAND INSTITUTE FOR CIVIL JUSTICE, CHANGES IN THE STANDARDS FOR ADMITTING EXPERT EVIDENCE IN FEDERAL CIVIL CASES SINCE THE DAUBERT DECISION (2001).
6. *Id.* at Table 4.1.
7. *Id.* at 29.

The next year saw another database study of *Daubert* by a group of researchers led by Jennifer Groscup.⁸ As with Dixon & Gill, their study evaluated reported case opinions from a computerized database in the years surrounding *Daubert*, except in this study, the researchers were examining criminal rather than civil cases. Yet the study only measured the frequency of admitting experts at the trial and appellate levels rather than the absolute rate of challenges. They found that more than 74% of experts had been admitted at trial and that the rate on appeal remained above 69%, although the admission rate varied dramatically between prosecution and defense experts.⁹

Beyond those two database studies, Carol Krafska and her colleagues published a survey in 2002 also touching on the issue of frequency of reliability challenges.¹⁰ Relying on surveys of state court judges from 1991 and 1998, the Krafska study found that litigants raised reliability challenges in a motion *in limine* at much higher rates after *Daubert* than before.¹¹ The authors noted, however, that their survey did not and could not address the general frequency of reliability challenges.¹²

Prior Studies Analyzing the Procedures Judges Use to Decide Reliability Motions

As with the studies addressing frequency of reliability challenges, the most recent data on the procedural methodology of gatekeeping had also been collected in the late 1990s. The Krafska study, relying on surveys of federal judges performed in 1991 and 1998, specifically asked judges what procedures they used in all cases involving experts as well as what procedures they used in complex expert cases. Her survey found that some methods, like pretrial conferences or hearings on reliability, were commonly used in all cases with experts, while others, such as independent experts or special masters, were reserved for cases with complex expert issues.¹³ The Krafska study provided a comprehensive snapshot of the methodologies used by federal judges to resolve *Daubert* challenges in the years surrounding *Daubert*.

Shirley Dobbin and her colleagues performed a survey of both federal and state court judges in 1999, which also asked about strategies for handling expert evidence.¹⁴ As with Krafska's study, the researchers asked which methodologies were used in all cases with experts and which were only for more complex or difficult cases. The Dobbin study found that state court judges were less likely than their federal counterparts to ask questions from the bench under Rule 614 or to ask the parties for instruction or education on the area of expertise.¹⁵ On the other hand, state court judges were more likely than federal judges to use an independent expert under Rule 706.¹⁶

Prior Studies Analyzing the Substantive Factors Judges Consider on Reliability

Finally, several of these studies also touched upon the substantive factors judges used to determine reliability motions, both by database analysis and by survey methodologies. Two studies—Dixon & Gill's and Groscup's—analyzed how often certain terms, the “*Daubert* factors” from the original *Daubert* opinion, appeared in reported cases during the 1990s. Dixon & Gill analyzed these terms in reported decisions of civil cases and found that judges most commonly analyzed general acceptance and peer review in making reliability choices.¹⁷ Groscup's findings are quite similar in this area. Her study found that when examining the appearance of the “*Daubert* factors” in criminal cases, judges were most likely to analyze general acceptance and peer review, although she is careful to note that all of these terms appear less frequently than more general terms such as relevance, reliability, or qualifications.¹⁸

In addition to the computerized database analysis, one published study addressed the substantive factors in gatekeeping using a survey methodology. Relying on surveys collected in 1999, Sophia Gatowski and her colleagues published a study in 2001 regarding how judges decide gatekeeping motions.¹⁹ As with the database analysis, Gatowski et al. found that judges were most likely to consider general acceptance and peer review in assessing reliability challenges, with 93% and 92% answering each factor was useful, respectively.²⁰

Conclusion Regarding Prior Research into Judicial Gatekeeping

In each of these areas—frequency, procedures, and substance—research in the first decade after *Daubert* established some baseline data about judicial gatekeeping. Why, then, is further research needed? Several important considerations lead to the conclusion that updating prior work in this area is necessary.

First, the surveys and gatekeeping databases for these studies are from the 1990s, which partially explains their import in the years right after *Daubert*. Yet the date of data collection suffers from a major weakness: The three decisions of the “*Daubert* trilogy” had not all been finalized when the data was collected. Since the last decision—*Kumho Tire* in 1999—expanded the gatekeeping role to non-scientific technical expertise, judges may have had to rethink their gatekeeping approaches after that decision.²¹

Second, when the survey involves state court judges, the *Daubert* case may not be the correct starting point anyway. For federal judges, *Daubert* had rejected the *Frye* standard for gate-

8. Jennifer Groscup et al., *The Effects of Daubert on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 PSYCHOL. PUB. POL'Y & L. 339 (2002).

9. *Id.* at 345-46.

10. Carol Krafska et al., *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 PSYCHOL. PUB. POL'Y & L. 309 (2002).

11. *Id.* at 321.

12. *Id.*

13. *Id.* at Table 5.

14. Shirley A. Dobbin et al., *Federal and State Trial Judges on the Prof-*

fer and Presentation of Expert Evidence, 28 JUST. SYS. J. 1 (2007).

15. *Id.* at Tables 2 & 3.

16. *Id.*

17. DIXON & GILL, *supra* note 5, at 39.

18. Groscup et al., *supra* note 8, at Table 5.

19. Sophia I. Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 LAW & HUM. BEHAV. 433 (2001).

20. *Id.* at 447.

21. 526 U.S. at 147.

keeping in favor of a reliability approach. But in the states, judges had to wait until their own state supreme courts decided whether *Frye*'s "general acceptance" test or *Daubert*'s reliability standard would remain the state gatekeeping standard. In the 1990s, many states adopted a *Daubert*-like reliability standard,²² but others did not, choosing to remain with *Frye*.²³ Since the survey data had been collected during this transition period, a follow-up survey could capture the more stable current environment.

Third, while the prior studies evaluated many aspects of gatekeeping, they didn't and couldn't cover them all. The survey could therefore be designed to update prior survey findings and expand into additional areas not covered before.

Finally, research since *Daubert* has suggested that judges might be having difficulty with the gatekeeping role, particularly with new or cutting-edge science.²⁴ Whether or not this is true, an accounting of the methodology of gatekeeping in modern courtrooms could establish which tools are in use and which are not, informing the policy debate surrounding *Daubert*.

SURVEY DESIGN

So to establish baseline data about gatekeeping methodologies and update prior work in the area, I began to design a survey tool as well as think about which judges should answer it. The survey required three main design choices, as follows:

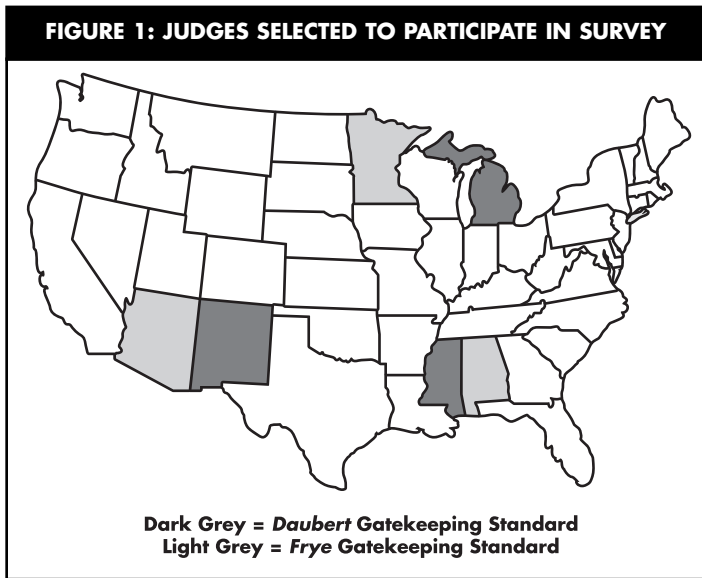
- Which judges should be involved?
- Which states should the judges come from? and
- What specific questions should be asked regarding gatekeeping?

With detailed front-side planning, I could maximize the scope and impact of the findings by making deliberate and judicious choices about who to involve and what to ask them.

Selecting the judges was the first issue to finalize, and so it became necessary to decide which judges would be "in" and which would be "out" and to have a principled reason for this distinction. After considering the alternatives, I ultimately decided to involve only the state court judges who sat on the bench of the "highest" trial court in their state. These judges are often (but not always) the most experienced, so they would be likely to be familiar with the procedures in the study. Even more importantly, they would also have the jurisdiction to hear the most complex civil cases, in which expert-reliability challenges would likely arise.

Once the judges were selected, the next step was to decide where to find them. The selection of states offered an opportu-

nity to perform a natural experiment. By selecting states from different regions of the United States as well as states that had different admissibility standards for expert gatekeeping, the study could examine whether regional culture or the home-state reliability standard has an effect on the way judges analyze reliability. To evaluate those considerations, the study would involve several different regions of the U.S., and in each region there would be one state with *Frye* as the home-state standard and one with *Daubert* as the standard. Furthermore, the underlying rules of civil procedure would have to be as broadly compatible as possible.²⁵ Considering these factors, the study incorporates three regions of the U.S.—West, Midwest, and South, as follows:



Limiting participation to these six states and only those judges previously mentioned, the survey began with a total of 996 eligible participants. Each judge received a mailed letter asking him or her to participate in an online survey and an additional reminder after several months.

Finally, to broadly evaluate the methodology of gatekeeping, I needed to decide specifically what questions to ask. To establish the frequency with which judges handle these motions, the survey asked them how often they see reliability motions, how often they rule on them, and how often they grant them. To see the methodologies of handling reliability motions, the survey asked the judges about the procedures they used to decide them as well as which substantive factors

22. For a list of states that have adopted a *Daubert*-type analysis, see Alice B. Lustre, *Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R. 5th 453 (2001). See also DAVID H. KAYE, DAVID E. BERNSTEIN & JENNIFER L. MNOOKIN, *THE NEW WIGMORE: EXPERT EVIDENCE* § 6.4.2.a n.16 (2d ed. 2004).

23. For a list of *Frye* states, see KAYE ET AL., *supra* note 22, at § 6.4.2.a n.17; Lustre, *supra* note 22, at 453.

24. See, e.g., Andrew W. Jurs, *Balancing Legal Process with Scientific Expertise: A Comparative Assessment of Expert Witness Methodology in Five Nations, and Suggestions for Reform of Post-Daubert U.S.*

Reliability Determinations, 95 MARQ. L. REV. 1329 (2012); Andrew W. Jurs, *Judicial Analysis of Complex & Cutting-Edge Science in the Daubert Era: Epidemiologic Risk Assessment as Test Case for Reform Strategies*, 42 CONN. L. REV. 49 (2009); Gatowski et al., *supra* note 19, at 442 (judges split on whether they believe they have the necessary background to handle scientific evidence in their courtroom).

25. For a detailed explanation of this consideration, please see the complete study, *Gatekeeper with a Gavel: A Survey on Judicial Management of Challenges to Expert Reliability and Their Relationship to Summary Judgment*, 83 MISS. L.J. 325, 341 n. 101 (2014).

were most helpful in guiding those decisions. Judges were also asked how comfortable they were with reliability motions as a way to distill their thoughts about the motions to one basic concept. Finally, to have a point of comparison, I also decided to ask the judges about a different type of motion—the summary-judgment motion.

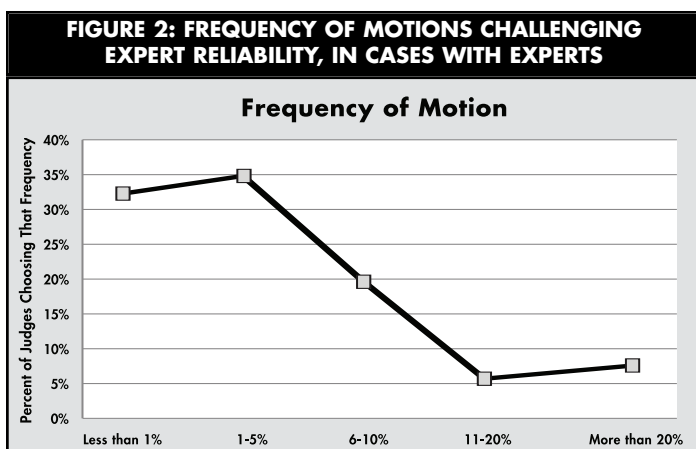
Once the design was complete, the survey went to the pre-selected eligible judges, resulting in 158 complete responses to all questions.²⁶ These responses form a unique dataset, providing a great deal of information about judicial gatekeeping in courtrooms today.

RESULTS

In providing the results, I will start by exploring the judicial responses to questions about handling expert-reliability motions. I will then compare those responses to the responses on summary-judgment motions and compare responses between different groups of judges.

Expert-Reliability Motions

The survey first addressed the frequency of expert-reliability motions. I asked the judges how often they see a motion challenging the reliability of an expert in cases with experts. The judges overwhelmingly believed this was an uncommon occurrence, with 32% answering that it occurred in less than 1% of cases with experts and an additional 35% answering that it occurred between 1% and 5% of the time. The responses to this question can be seen in Figure 2.



I next asked the judges about how they decide reliability motions, including questions on the substantive factors that guide those decisions and the procedures they have used in making those choices. On the issue of substantive factors, I provided judges with a list of the “*Daubert* factors” and asked them to choose any factors that they believed are helpful in deciding reliability motions. The responses indicate that general acceptance is the most helpful substantive factor in deciding reliability motions, with over 96% of judges selecting it. On the other hand, judges were least likely to choose error rate as a helpful factor for them, with only 70% choosing it from the list. The responses to this question appear below, as Figure 3.

FIGURE 3: SUBSTANTIVE FACTORS JUDGES BELIEVE ARE HELPFUL IN DECIDING RELIABILITY MOTIONS

	NUMBER WHO BELIEVE THE FACTOR IS HELPFUL	PERCENTAGE
Technique Can and Has Been Tested	143	90.5
Subjected to Peer Review/Publication	139	87.8
Known or Potential Rate of Error	111	70.2
Existence of Standards Controlling the Technique	128	81.0
General Acceptance	152	96.2
Other	8	5.1
	Total = 158	

To find which procedures judges use to decide reliability motions, I decided to ask only those judges who had ruled on this type of motion before so that the responses would reflect those procedures actually used, not those judges might use. As with the question about substantive factors, I provided judges with a list of potential procedures and asked them to select any option that they used. As with the previous question, these factors were not selected out of thin air but instead were those procedures that Justice Breyer suggested for reliability analysis in his concurrence in *General Electric v. Joiner*.²⁷ In reviewing responses, an overwhelming majority of judges had used a hearing with testimony presented to decide a reliability motion, while a slim majority of judges used a hearing without testimony or questioning a witness from the bench. On the other hand, it was very rare for a judge to use a special master or independent expert to decide a reliability motion. These responses are displayed in Figure 4.

FIGURE 4: PROCEDURAL METHODS USED BY JUDGES TO DECIDE RELIABILITY MOTIONS

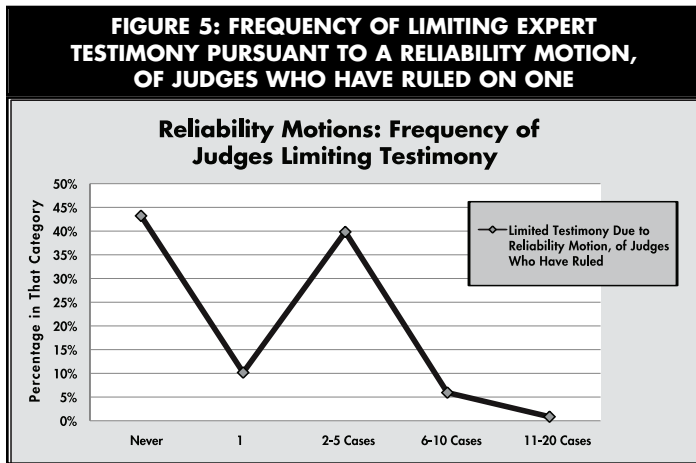
	NUMBER WHO HAVE USED THE TECHNIQUE	PERCENTAGE
Hearing With Testimony Presented	101	85.6
Hearing Without Testimony Presented	63	53.4
Questioning a Witness from the Bench	64	54.2
Independent Expert	9	7.6
Special Master	4	3.4
Other	10	8.4
	Total = 118	

So having found what factors judges consider and what procedures judges use to decide reliability motions, I then asked the judges how often they granted a motion to limit expert testimony. As with the question regarding procedures, this question was asked only of those judges who had ever ruled on a reliability motion. The responses indicate that limiting testi-

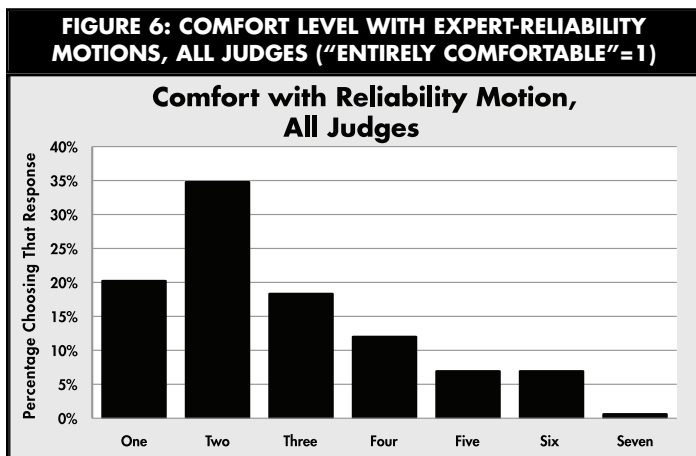
26. Thank you to all judges who took the time to participate.

27. 522 U.S. at 147 (Breyer, J., concurring).

mony is quite rare. Of the judges who had ruled on a reliability motion, 43% had never granted that motion and limited expert testimony. For the remainder who had limited expert testimony, almost all of them had done so five or fewer times, with only 7% of the judges who had ruled on this motion having limited testimony six or more times. These responses appear in Figure 5 below.



Finally, I wanted to ask judges whether, considering the procedures at their disposal and the factors they must consider, they are comfortable with expert-reliability motions. Each of these questions involved quantifying their comfort level with the motion on a seven-point scale, with one representing “entirely comfortable” and seven representing “not comfortable.” I first asked all judges how comfortable they were with expert-reliability motions, and in response, judges’ answers were quite varied. Only 20% of judges indicated they were “entirely comfortable” with the motion (category one), with an additional 35% of judges answering they were mostly comfortable (category two). On the other hand, 45% of judges responded to this question by choosing categories three to seven. These responses appear below, as Figure 6.



28. In addition to allowing a comparison of the motions, the other reason for this choice was a lingering question in the literature about the relationship between reliability challenges and suffi-

I also asked a second question to those judges who had granted a motion challenging expert reliability—about their comfort level in limiting expert testimony. As compared to the group of all judges, these responses were slightly more favorable, with 65% of judges answering in categories one or two, as opposed to 55% of all judges. In addition, no judge answered “not comfortable” in response to this question, so the remaining 35% all appeared in categories three through six. The comfort-level responses to this question appear as Figure 7.



The combined responses to the questions about expert-reliability motions contained in Figures 2 through 7 establish some baseline data about the frequency of expert-reliability challenges, how judges decide them, and how often they are granted. But I decided, when designing the study, that the results would not be as useful as possible when standing alone. Instead, I also asked about a different type of motion—summary judgment—as a point of comparison.²⁸ With the judges’ responses to these questions, I could compare the motions in many areas.

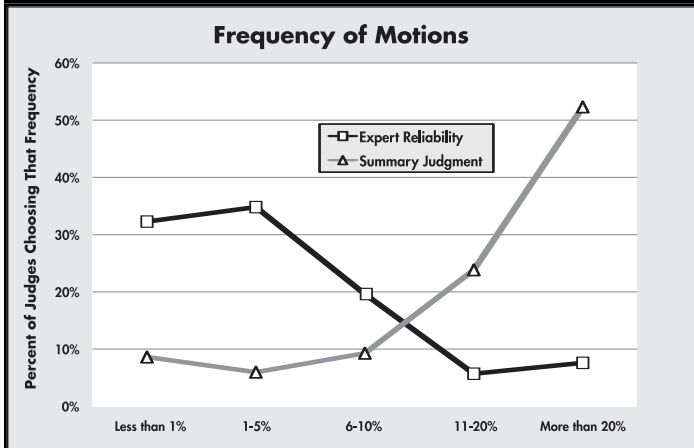
Comparing Expert-Reliability to Summary-Judgment Motions

In examining the frequency of the two types of motions, one can immediately determine that summary judgment is a much more common issue for judges to handle. When I asked the judges in what percentage of civil cases they saw a contested motion for summary judgment, a majority (52%) indicated this happened in over 20% of all civil cases, and an additional 24% indicated between 11 and 20% of all civil cases. Unquestionably, the pattern for summary judgment is different than expert reliability, as displayed in Figure 8.

Next I decided to ask judges about the methodology of deciding summary-judgment motions, to compare those responses to expert-reliability motions. The responses indicate significant differences in how judges handle these motions: for summary judgment, only 28% of judges use a hearing with testimony (86% for reliability) and 6.2% question a witness from the bench (54% for reliability). On the other hand, independent experts and special masters remain rare in both instances. The responses can be compared using the chart in Figure 9.

ciency challenges (summary judgment). For a detailed explanation of this issue, please see the complete study, *supra* note 25, at 335-39.

FIGURE 8: FREQUENCY OF EXPERT-RELIABILITY AND SUMMARY-JUDGMENT MOTIONS



Responses about the judges' comfort level with both motions provides a final point of comparison between the motions. When asked about expert-reliability motions, only 55% of judges answered they were entirely or mostly comfortable with the motion (categories one and two).²⁹ Judges were much more comfortable with summary-judgment motions. When I asked all judges to rate their comfort level with these motions on the seven-point scale, 57% answered they were entirely comfortable, and an additional 28% answered mostly comfortable, for a total of 85% in categories one and two. The judges' responses to the question about their comfort level with both motions appear graphically as Figure 11.

FIGURE 9: PROCEDURAL METHODS USED BY JUDGES TO DECIDE MOTIONS

	NUMBER WHO HAVE USED THE TECHNIQUE (EXPERT RELIABILITY)	PERCENTAGE	NUMBER WHO HAVE USED THE TECHNIQUE (SUMMARY JUDGMENT)	PERCENTAGE
Hearing With Testimony	101	85.6	40	27.6
Hearing Without Testimony	63	53.4	123	84.8
Questioning a Witness from the Bench	64	54.2	9	6.2
Independent Expert	9	7.6	5	3.4
Special Master	4	3.4	5	3.4
Other	10	8.4	20	13.8
	Total = 118		Total = 145	

The next comparison deals with the likelihood of a judge granting the motion. I asked judges how often they have granted a contested motion for summary judgment in whole or in part. As with reliability motions, this question was only for those judges who have ruled on this type of motion. In response, over 44% of judges indicated they had granted summary judgment in over 20 cases, while only a very few judges (4%) had ruled on such a motion but never granted it. When examined graphically, the distinction in the responses between these motions is clear:

FIGURE 10: FREQUENCY OF GRANTING EITHER EXPERT-RELIABILITY OR SUMMARY-JUDGMENT MOTION

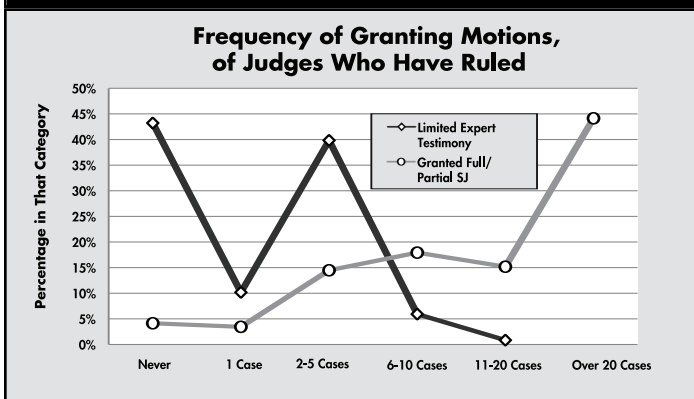
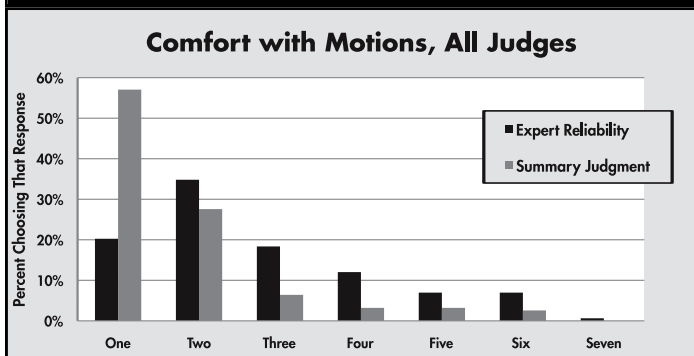


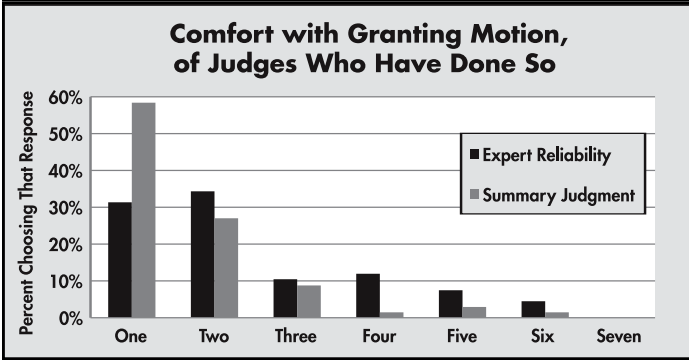
FIGURE 11: COMFORT LEVEL WITH EACH MOTION, ALL JUDGES ("ENTIRELY COMFORTABLE"=1)



The same pattern is true for the comfort level with granting the motions. For expert-reliability motions, 65% of judges answered they were entirely or mostly comfortable with granting the motion. As with summary judgment generally, the comfort level for granting summary judgment significantly exceeded the reliability number. Just as with the general comfort with summary judgment, 85% of the judges responded they were entirely or mostly comfortable with granting summary judgment, in categories one or two. The judges' responses to these questions appear below in Figure 12.

29. *Supra* Figure 6.

FIGURE 12: COMFORT LEVEL WITH GRANTING EACH MOTION, OF JUDGES WHO HAVE DONE SO



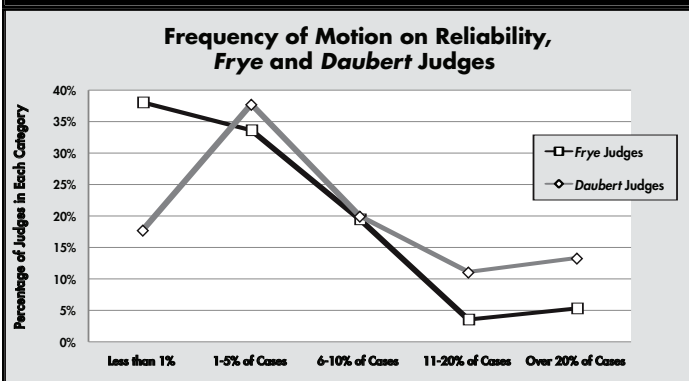
Comparison of Responses by Judges’ Backgrounds

When I designed the survey, I had been very careful in choosing which states would participate so that I could perform several natural experiments. In selecting the six states I used, I could split the responses I received into different groups and then re-examine them based on state, region, and also the home-state expert admissibility standard. I also asked judges about their backgrounds, with questions about their years of experience on the bench, years in practice, and training or comfort level with math and science.

When I evaluated these different groupings, what surprised me most was how few differences existed between categories of judges. While a smattering of differences arose, the main category where judges answered questions differently involved the home-state gatekeeping standard. These differences arose in response to two questions.

The first deals with the frequency of facing reliability motions, a question discussed above and reported in Figure 2. When the complete set of judicial responses was split, however, between judges from *Daubert* states and judges from *Frye* states, the result does show a clear difference: *Daubert* judges face more reliability motions. In Figure 13, the responses from both groups are reported, and the responses indicate *Daubert* judges are more likely to believe reliability motions happen in 11% or more of their cases and less likely to believe that expert-reliability motions occur in a very small percentage (less than 1%) of their cases.

FIGURE 13: FREQUENCY OF EXPERT-RELIABILITY MOTIONS, BY HOME-STATE GATEKEEPING STANDARD



The frequency question provided one difference between *Frye* and *Daubert* judges, and the other difference occurred in response to a final question in which I asked directly: “Which standard is the stricter one for reliability of scientific evidence—*Frye* or *Daubert*?” When I asked *Frye* judges this question, they were evenly split, with 50.4% answering *Daubert* and 49.6% answering *Frye*. The *Daubert* judges’ responses were quite different, however. An overwhelming majority of those judges—87%—believed the *Daubert* standard was stricter than *Frye*. These responses appear in Figure 14.

FIGURE 14: FRYE OR DAUBERT AS A STRICTER TEST, BY HOME-STATE GATEKEEPING STANDARD

		HOME-STATE GATEKEEPING STANDARD	
		Frye	Daubert
WHICH IS STRICTER?	Frye	50.4%	87%
	Daubert	49.6%	13%

DISCUSSION AND CONCLUSION

The survey responses discussed above provide baseline data on the frequency and handling of expert-reliability motions in courtrooms today as well as insight into judicial attitudes about such motions. Having reviewed the response data, I would like to highlight those results of the study that were most interesting.

The intent of the study was to both update and expand prior research in the area of expert gatekeeping. The data do seem remarkably consistent with the prior studies in the area to the extent they have measured these issues. For example, all three research studies from the 1990s that measured substantive factors for gatekeeping found that the most important substantive factors in deciding an expert-reliability motion were general acceptance and peer review.³⁰ Judges responding to this survey found general acceptance the most helpful substantive factor and peer review the third most helpful (behind testing). Beyond substantive factors, the results also are broadly similar to prior studies on procedures too. Prior studies showed judges were unlikely to use an independent expert in their courtrooms, and this survey confirms that finding, with only 7.6% of judges using that technique for a reliability motion.

Beyond confirming prior research, however, the study here does branch into new areas. It provides baseline data on the frequency of expert-reliability motions and also on how frequently they are granted. The study also had judges distill their opinions about expert-reliability motions into one basic concept—“comfort level”—and it shows judges are somewhat comfortable with reliability motions but not “entirely comfortable” either.

The survey is also useful in being able to compare responses about reliability motions, like the “comfort level” answers, with another common type of motion, summary judgment. By comparing the two, the survey shows us that judges are significantly less comfortable with motions about reliability than

30. DIXON & GILL, *supra* note 5, at 39; Groscup et al., *supra* note 8, at Table 5; Gatowski et al., *supra* note 19, at 445-47.

with summary judgment. The responses also show judges face many more motions for summary judgment in their courtrooms than reliability challenges and are more likely to have granted a motion for summary judgment as well.

Finally, the survey results can be split into subgroups, and by comparing the groups, we can see differences in the answers between home-state *Daubert* judges and home-state *Frye* judges. The judges from *Daubert* states reported a higher frequency of expert-reliability challenges than their *Frye* counterparts. When asked to compare the two standards, *Daubert* judges believed their own standard was stricter, while *Frye* judges were evenly split between the two standards. These responses indicate that if a judge has used the *Daubert* standard, that judge is more likely to believe it is stricter.³¹

By asking judges about their handling of expert-reliability motions, this study provides baseline data about how judges decide these motions and how often they see them; in doing so, it informs the policy debate about whether the current tools at their disposal are appropriate to the task.



Andrew Jurs is an Associate Professor of Law at Drake University Law School in Des Moines, Iowa. His research focuses on judicial handling of complex scientific evidence, including the empirical analysis of the methodology of gatekeeping and its effect within the judicial system. He teaches Evidence and Scientific & Expert Evidence in his field of research, as well as Criminal Law and Criminal Procedure, which build upon his experience as a Deputy District Attorney in Colorado. Professor Jurs received his law degree from the University of California and his undergraduate degree from Stanford University. E-mail: andrew.jurs@drake.edu.






31. In addition to studying this question with surveys, a co-author and I have been studying which standard is stricter using a statistical approach. In those studies, we found that—using a database of millions of real cases—civil litigants act in ways demonstrating that *Daubert* is a stricter standard. Andrew W. Jurs & Scott DeVito,

Et Tu, Plaintiffs? An Empirical Analysis of Daubert's Effect on Plaintiffs, and Why Gatekeeping Standards Matter (a Lot), 66 ARK. L. REV. 975 (2013); Andrew W. Jurs & Scott DeVito, *The Stricter Standard: An Empirical Assessment of Daubert's Effect on Civil Defendants*, 62 CATH. U. L. REV. 675 (2013).

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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

- GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS vii (3d ed. 2007).
- 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).
- Id.* at 1-3.
- KIRK HEILBRUN, PRINCIPLES OF FORENSIC MENTAL HEALTH ASSESSMENT (2001).

- KIRK HEILBRUN ET AL., FOUNDATIONS OF FORENSIC MENTAL HEALTH ASSESSMENT (2009).
- See *infra* Table 2 for a summary of these principles.
- 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

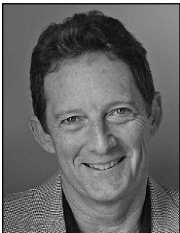
JURISDICTION	CATEGORY	RELEVANT RULE OR CASE	TEXT OF RELEVANT RULE OR CASE
New Mexico	Substantively similar to post-amendment FRE 703	N.M.R. Evid. 11-703	An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular 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	People v. Sugden, 35 N.Y.2d 453 (1974); People v. Goldstein, 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.



Kirk Heilbrun, Ph.D., is a professor in the Department of Psychology at Drexel University. His research and practice interests include forensic mental-health assessment, risk assessment and the treatment of justice-involved individuals with behavioral-health disorders, and diversion. He can be reached via email at kh33@drexel.edu.



Christopher King, M.S., J.D., is a doctoral candidate in the J.D./Ph.D. program in Law and Psychology at Drexel University. He is licensed to practice law in Pennsylvania. His clinical and research interests include forensic mental-health assessment, recidivism-risk assessment and reduction, and law and public policy as they pertain to different types of offenders.



Amanda NeMoyer, M.S., is completing the J.D./Ph.D. program in Law and Psychology at Drexel University. Her research and professional interests include investigating the unique needs of justice-involved youth, evaluating current juvenile-justice practices, and identifying areas in need of evidence-based reform. She can be reached via e-mail at anemoyer@gmail.com.



Meghann Galloway, M.S., is currently completing Drexel University's J.D./Ph.D. program in Law and Clinical Psychology. Her primary research and professional interests include public policy, trauma-informed practices, gender-based violence, and risk assessment.

What's (Who You) Love Got to Do with It?*

Should Sexual Orientation Be a Permissible Basis for Peremptory Challenges?

Colin P. Saltry

Friday mornings in the Philadelphia Court of Common Pleas are unofficially designated as civil-jury days. The vast majority of jury panels leaving the Juanita Kidd Stout Center for Criminal Justice and heading over to City Hall on Friday mornings are listed for civil cases—anything from motor-vehicle accidents and contract disputes to complex medical-malpractice and products-liability cases. These panelists—not always bright-eyed and bushy-tailed, though more often than not awake and attentive—are Philadelphians of all stripes. They come from all corners of the city and are, for the most part, pleasant folks. My job as judge's tipstaff¹ is to work with these jurors by assisting the court and the litigants selecting juries and managing the courtroom. In my time at City Hall, I have empanelled nearly 100 civil juries and as a result can occasionally predict which side will strike which juror in which order. This rarely happens, but after a few automobile-accident cases, you get a feel for the types of experience or beliefs that might bias a juror to a particular set of facts. As prospective jurors answer the court's questions, one may reasonably characterize their answers as proxies for bias, and they include such things as familiarity with claims investigation, prior lawsuits, personal feelings regarding money-damage awards, and the like. Using a juror's stated experiences or beliefs as a proxy for bias are permissible bases for excusing that juror from serving on the jury by exercising a peremptory challenge.

But should litigants be permitted to exercise peremptory challenges to prevent otherwise qualified people from serving on a jury solely because of their sexual orientation?² While many argue that sexual orientation should never be a proxy for bias, the law has yet to align itself with this view. A juror's right to serve free of discrimination based upon sexual orientation is a developing concept, and while courts have rushed to secure equal protection to same-sex couples seeking civil marriage following the landmark *U.S. v. Windsor*³ decision, courts have

been less fleet-footed in securing similar protection for lesbian, gay, bisexual, and transgender (LGBT) jurors. As of this writing, the Supreme Court has yet to decide on a standard of review for evaluating equal-protection claims based on sexual orientation, let alone the permissibility of exercising peremptory challenges on that basis.

This paper discusses aspects of both the civil and criminal court systems beginning in part I, which describes the voir dire process generally—its background, purpose, and scope—as well as an overview of the mechanics governing the process. Part II highlights what limitations exist on the use of peremptory challenges to exclude jurors based on their race and gender. Part III covers current law regarding issues of sexual orientation and peremptory challenges. Part IV discusses some of the practical considerations at play regarding issues of sexual orientation that manifest during voir dire as well as evaluating several alternatives to the use of peremptory challenges. The paper concludes by asking whether sexual orientation should be protected under the line of cases stemming from *Batson v. Kentucky*, arguing that sexual orientation deserves the protections of heightened scrutiny and the protections afforded under *Batson*.⁴ Throughout the paper, intermingled with traditional citations, I have provided personal anecdotes that may offer insight into the practical effects of the legal and policy issues described. This commentary is not offered as expert knowledge, and it is included solely for the benefit and entertainment of the reader.

I. VOIR DIRE: THE PROCESS

The jury system originated in England sometime in the twelfth century.⁵ Beginning as a rubberstamp for the king's wishes, juries gradually developed independence in decision making over the succeeding centuries.⁶ The jury-selection process known as “voir dire”—from the French words “to see” and “to say,”⁷ often translated to mean “to speak the truth”⁸—

* TINA TURNER, *What's Love Got to Do with It?*, on PRIVATE DANCER (Capitol Records 1984).

Footnotes

Editor's Note: This article was initially submitted as part of a writing competition for law students sponsored by the International Association of LGBT Judges. Saltry's entry won first place and was then submitted to *Court Review* for publication consideration.

1. “[T]ipstaff. A court crier. The name derives from the crier's former practice of holding a staff tipped with silver as a badge of office.” BLACK'S LAW DICTIONARY (9th ed. 2009).
2. Much of the analysis in this paper is geared toward sexual orien-

tation. While issues surrounding gender identity and jury service would make for equally important reading, that discussion is omitted here.

3. 133 S. Ct. 2675 (2013).
4. 476 U.S. 79 (1986).
5. STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 8 (1988).
6. See *In Penn's Case*, 6 Howell's St. Trials 951 (1670); *id.* at 9-10. See also *In Bushell's Case*, 124 Eng. Rep. 1006 (C. P. 1671).
7. Google Translate, <https://translate.google.com/#en/fr/See>, <https://translate.google.com/#en/fr/Say>.
8. 47 AM. JUR. 2D *Jury* § 195 (1969).

saw its first American iteration as part of the Massachusetts Jury Selection Law of 1760.⁹ That law allowed the questioning of potential jurors until their names were formally printed as part of the sheriff's jury list.¹⁰ As voir dire spread from New England to the rest of the colonies and eventually the United States, the process developed more structure. But two centuries of common-law development created disparities in voir dire practices and procedures between jurisdictions. So much so that in 1968, Congress mandated uniform procedures for the federal courts as part of the Jury Selection and Service Act.¹¹ The JSSA provides in part that "all citizens shall have the opportunity to serve as jurors" and that "no citizen shall be excluded from service as a grand or petit juror . . . on account of race, color, religion, sex, national origin, or economic status."¹²

Contemporary voir dire is mostly a question-and-answer session conducted by the court.¹³ The process is conducted exclusively by the trial judge or court personnel, by the trial judge with varying levels of participation from the attorneys, or entirely by the attorneys. The trial judge has wide discretion in how voir dire is conducted.¹⁴ Generally speaking, the process begins when the venire is brought into the courtroom, where it receives a formal welcome from the judge,¹⁵ an introduction of the parties, lawyers, and potential witnesses, a brief overview of the process, and a description of the case to be decided.¹⁶ The jurors take an oath to tell the truth, and the questioning begins.¹⁷ Questioning is usually, but not always, directed at the venire rather than individual jurors, though at times the process may include both methods of questioning.¹⁸

Questions asked first are of a general nature, usually about personal information like age; background; marital, family, and employment status; area of residence; education level; prior jury service; experience with a lawsuit; and ability to be fair and impartial.¹⁹ As the questions progress, they tend to focus more on the specific circumstances of the case in question, provided that each question is limited in scope to elicit whether a juror could be fair and impartial.²⁰

Once questioning is completed, the parties then have an opportunity to exercise challenges for cause and peremptory challenges. A challenge for cause may be asserted by either party to exclude biased²¹ or incompetent jurors.²² Parties challenging a juror for cause must articulate their reason for the challenge. The trial judge has wide discretion in deciding challenges for cause, and such challenges are theoretically unlimited in number.²³ Peremptory challenges are exercised by the parties once all challenges for cause have been resolved and the court is nearly ready to seat the jury. In most circumstances, parties exercising them need not articulate a reason for the challenge, and as creatures of statute, they are limited in number.²⁴ Once all challenges have been exercised, the remaining jurors are seated in the jury box, they are sworn in, and the

[T]wo centuries of common-law development created disparities in voir dire practices and procedures between jurisdictions.

9. VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 22-23 (1986).

10. *Id.* at 21-44.

11. 28 U.S.C. § 1861 (1968).

12. *Id.* at §§ 1861-62.

13. Dean A. Stowers, Note, *Juror Bias Undiscovered During Voir Dire: Legal Standards for Reviewing Claims of a Denial of the Constitutional Rights to an Impartial Jury*, 39 *DRAKE L. REV.* 201, 202 (1989-90).

14. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991) ("The trial judge exercises substantial control over voir dire in the federal system. . . . The judge determines the range of information that may be discovered about a prospective juror, and so affects the exercise of both challenges for cause and peremptory challenges. . . . The judge oversees the exclusion of jurors for cause, in this way determining which jurors remain eligible for the exercise of peremptory strikes.").

15. See Pa. SSJI (Civ), § 1.10 (2013) ("Jury service is an important responsibility of citizenship, fundamental to our entire system of justice. The courts cannot function unless citizens serve as jurors. Thanks to jurors, our society resolves its disputes in a civilized manner, in a courtroom where citizens decide upon a verdict. . . . Thank you for serving your country in this most important role. We are about to select [insert number] jurors and [insert number] alternate jurors to try a civil case.").

16. *Id.* at § 1.40.

17. *Id.* at § 1.50.

18. *Mu'Min v. Virginia*, 111 S. Ct. 1899, 1908 (1991) (holding that the questioning of potential jurors in groups of four does not violate Sixth Amendment right to a fair jury).

19. Pa. SSJI (Civ), § 1.10 (2013).

20. Paul N. Luvera, *Truth or Consequences—Is Voir Dire Really a Waste of Time?*, 43 *WASH. ST. B. NEWS.*, May 1989, at 11.

21. Nancy L. Alvarez, Comment, *Racial Bias and the Right to an Impartial Jury: A Standard for Allowing Voir Dire Inquiry*, 33 *HASTINGS L.J.* 959, 961 (1982) ("A challenge for cause may be exercised when counsel has reason to believe that a prospective juror will not be able to view the evidence at trial in an impartial manner due to some previous experience or some fixed attitude, such as an admitted bias.").

22. See *Peters v. Kiff*, 407 U.S. 493, 501 (1972) ("[T]he Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict") and MICHAEL T. NIETZEL & RONALD C. DILLEHAY, *PSYCHOLOGICAL CONSULTATION IN THE COURTROOM* 17-18 (1986) (providing examples of incompetency to serve, including inability to speak or understand English, physical or mental disability, certain types of felony convictions, and lack of U.S. citizenship or residence in the court's jurisdiction).

23. See 28 U.S.C. § 1870 (2006) (not specifying a limit: "[a]ll challenges for cause . . . shall be determined by the court").

24. See FED. R. CRIM. P. 24(b) (setting the number of peremptory challenges available in a criminal case at 20 for capital cases, 6 for the government with 10 for the defendant(s) in any other felony case with a term of imprisonment longer than one year, and 3 per side in a misdemeanor case where the crime is punishable by fine, one year or less imprisonment, or both), FED. R. CIV. P. 47(b), and 28 U.S.C. § 1870 (2006) (granting three peremptory challenges for each side in civil case).

The Court articulated a three-part test to determine whether a peremptory strike was motivated by a racially discriminatory purpose.

trial begins.²⁵ Part II discusses the limitations placed on the use of peremptory challenges in greater detail.

II. LIMITATIONS ON THE USE OF PEREMPTORIES

The Constitution mandates that all criminal defendants receive a public trial by an impartial jury²⁶ and that all civil litigants receive the same right to a jury trial.²⁷ The Supreme Court described an impartial jury as having both individual and group components. On the individual level, the Court

stated that “a juror is impartial only if he can lay aside his opinion and render a verdict based on the evidence presented in court”²⁸ and that the juror “will conscientiously apply the law and find the facts.”²⁹ On the group level, the Supreme Court has determined that an impartial jury venire consists of a fair cross-section of the community.³⁰ This fair-cross-section requirement adheres only to the composition of jury venires and does not mandate the composition of petit juries.³¹

In 1986, the U.S. Supreme Court sought to end the practice of peremptory challenges exercised to discriminate against jurors on the basis of race. In the landmark case *Batson v. Kentucky*, the Court found that a prosecutor’s use of peremptory challenges to strike black jurors violated the equal-protection rights of those jurors excluded from the jury on the basis of race.³² The Court articulated a three-part test to determine whether a peremptory strike was motivated by a racially discriminatory purpose. *Batson*’s first step requires a defendant raising a challenge to make a prima facie showing that the government exercised its strikes in a pattern of discrimination. A

defendant may do this by demonstrating that they are “a member of a cognizable racial group,” “that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant’s race,” that the exercise was discriminatory, and that “all of the relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.”³³ If a defendant establishes this prima facie case, step two shifts the burden to the government, which must “come forward with a neutral explanation for challenging black jurors.”³⁴ The government does not, however, need to meet the same burden necessary for establishing a challenge for cause.³⁵ Step three rests with the trial judge, who must consider all the relevant circumstances and then “determine if the defendant has established purposeful discrimination.”³⁶ The analysis articulated in *Batson* marked a historic departure from the traditionally “anything goes” nature of the peremptory challenge.

Following the *Batson* decision, the Court augmented its reasoning to include members of one racial group to raise third-party equal-protection claims on behalf of members of a different racial group. In *Powers v. Ohio*,³⁷ the Supreme Court allowed a white defendant to assert the rights of black venirepersons struck from the jury panel.³⁸ *Powers* held that the reverse of *Batson* is also true, that a prosecutor’s use of discriminatory peremptory strikes raises the same due-process claims for white and non-white defendants.³⁹ Additionally, *Georgia v. McCollum*⁴⁰ required that criminal defendants receive the same treatment regarding their discriminatory use of peremptory challenges as their prosecutorial counterparts.⁴¹ Finally, in *J.E.B. v. Alabama ex rel. T.B.*,⁴² the Supreme Court extended the *Batson* inquiry to prevent gender discrimination.⁴³

Expanding upon *Batson* and *Powers*, the Court extended its equal-protection arguments to civil cases.⁴⁴ In *Edmonson*, the Court found that a private litigant exercising a peremptory

25. Pa. SSJI (Civ), § 1.90, 1.110, 1.130 (2013).

26. U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed”).

27. U.S. Const. amend. VII (“In Suits at common law . . . the right of trial by jury shall be preserved”).

28. Patton v. Yount, 467 U.S. 1025, 1037 n.12 (1984).

29. Wainwright v. Witt, 469 U.S. 412, 423 (1985).

30. See Taylor v. Louisiana, 419 U.S. 522, 527 (1975) (“[T]he Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community.”); see also 28 U.S.C. § 1861 (1968) (“[A]ll litigants in Federal courts entitled to trial by jury shall have the right to . . . petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.”)

31. Taylor, 419 U.S. at 538 (“[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, . . . but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive

groups in the community and thereby fail to be reasonably representative thereof.”)

32. *Id.*

33. *Id.* at 94.

34. *Id.* at 97.

35. *Id.*

36. *Id.*

37. 499 U.S. 400 (1991).

38. *Id.* at 415 (“We conclude that a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race.”).

39. *Id.* at 415 (“[T]o say that the race of the defendant may be relevant to discerning bias in some cases does not mean that it will be a factor in others, for race prejudice stems from various causes and may manifest itself in different forms.”).

40. 505 U.S. 42 (1992).

41. *Id.* at 59 (“We hold that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges.”)

42. 511 U.S. 127 (1994).

43. *Id.* at 129 (“[G]ender, like race, is an unconstitutional proxy for juror competence and impartiality.”).

44. *Edmonson*, 500 U.S. at 622.

strike on the basis of race was impermissible under the Equal Protection Clause.⁴⁵ In reaching that conclusion, the Court had to determine whether private litigants in a civil case could be considered state actors for the purposes of equal-protection analysis. In a six-to-three decision, the Court found that a party's right to exercise peremptory challenges emanated from state authority—in this case, congressional statute—and that without the material assistance of the government—"reliance on governmental assistance and benefits, performing a traditional governmental function, and the injury caused was aggravated by the incidents of governmental authority"⁴⁶—a civil litigant's use of peremptory strikes constituted state action. The Court in *Edmonson*, as it has throughout the *Batson* line of cases, emphasized how the gravity of the harm done by excluding jurors based upon their race is magnified by the court system's material participation.⁴⁷

While it appears that groups and classes of individuals subject to heightened degrees of scrutiny—religion, national origin, etc.—would eventually receive the protections of the *Batson* analysis, the Supreme Court has declined to extend *Batson*'s protections beyond race and gender. Lower courts have issued differing rulings on these subjects,⁴⁸ and it remains to be seen whether the Supreme Court will extend the *Batson* analysis to other groups subject to heightened scrutiny. In light of this, should sexual orientation—which is technically not subjected to heightened-scrutiny review⁴⁹—receive actual heightened scrutiny and with it the added protections afforded under *Batson*? Part III makes the case for heightened scrutiny and analyzes current law with respect to sexual orientation and peremptory challenges.

III. SEXUAL ORIENTATION & PEREMPTORY CHALLENGES

There can be no question that members of the LGBT community have long suffered discrimination in our society—either passively through lost opportunities in employment and housing or actively through violence and intimidation.⁵⁰ As such, classifying the LGBT community as a "cognizable group" for purposes of a Sixth Amendment fair-cross-section claim can be assumed accurate. However, identifying the extent of LGBT representation in a given population and their subse-

quent representation on jury venires is all but impossible given the complexities of identifying members of the community absent their "coming out" to the court.⁵¹ Because of this, Sixth Amendment claims are likely doomed to fail.⁵² Thus, the only practical opportunity to protect members of the LGBT community from being systematically excluded from jury service exists during the peremptory-challenge phase of voir dire.

While the *Batson* inquiry is essentially the same, the Supreme Court began strengthening the protections afforded under *Batson* in 2005 by altering steps one and three of the *Batson* test. Step one requires a party challenging a peremptory strike to make a prima facie case that the strike was motivated by racial prejudice. Step two shifts the burden to the striking party to articulate a non-discriminatory reason for the strike. Step three requires the court to determine whether the party challenging the strike has shown deliberate discrimination based on the record and the totality of the circumstances.⁵³ Following the 2005 decision in *Johnson v. California*,⁵⁴ the party in step one need only raise an inference of discrimination.⁵⁵ The preponderance-of-the-evidence standard required pre-*Johnson* was inappropriate because it forced the party to persuade the court in step one that there was impermissible discrimination present based upon a preponderance of the circumstances; essentially confusing steps one and three of the analysis. The court's review in step three was vastly expanded by *Miller-El v. Dretke* (*Miller-El II*).⁵⁶ In *Miller-El II*, the Supreme Court acknowledged the difficulty of determining a discriminatory purpose based on the exercise of peremptory strikes from the perspective of trial courts. The Court also listed a series of factors helpful in "ferretting out"⁵⁷ discriminatory peremptory challenges, including conducting statistical analysis of stricken jurors, conducting comparative analysis of all jurors, noting any contrasting questions between jurors of different racial backgrounds, any use of a "jury shuffle" by a trial court, and whether the particular court or juris-

[T]he Supreme Court began strengthening the protections afforded under *Batson* in 2005 by altering steps one and three of the *Batson* test.

45. *Id.*

46. *Id.* at 621-22.

47. *Id.* at 624 ("When a lawyer exercises a peremptory challenge, the judge advises the juror he or she has been excused The government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination. . . . By enforcing a discriminatory peremptory challenge, the court 'has not only made itself a party to the [biased act], but has elected to place its power, property and prestige being the [alleged] discrimination.' *Burton v. Wilmington Parking Authority*, 365 U.S., at 725, 81 S. Ct., at 862. In so doing, the government has 'create[d] the legal framework governing the [challenged] conduct,' *National Collegiate Athletic Assn.*, 488 U.S., at 192, 109 S. Ct., at 462, and in a significant way has involved itself with invidious discrimination.").

48. See *State v. Davis*, 504 N.W.2d 767 (Minn. 1993), *but see* *U.S. v. Greer*, 939 F.2d 1076 (5th Cir. 1991).

49. See *Windsor*, *supra* note 3.

50. OUT OF THE PAST: THE STRUGGLE FOR GAY AND LESBIAN RIGHTS IN AMERICA (Jeffrey Dupre 1998).

51. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 813 (2002).

52. Paul R. Lynd, Comment, *Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause, and Peremptories*, 46 UCLA L. REV. 231, 245 (1998).

53. *SmithKline Beecham Corporation v. Abbott Laboratories*, 740 F.3d 471, 476 (9th Cir. 2014).

54. 545 U.S. 162 (2005).

55. *Id.* at 170 ("A defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.").

56. 545 U.S. 231 (2005) (reversing the Fifth Circuit's denial of a *Batson* challenge on the merits).

57. *Id.* at 240-66.

Ambiguity reigns among the lower courts as well, as is best illustrated in the contrasting views of the Eighth and Ninth Circuit Courts of Appeal.

diction has a history of systematically excluding jurors for racially discriminatory reasons.⁵⁸ Finally, the Supreme Court held that appellate courts need not defer to the trial court's credibility determinations where the record fails to offer evidence of credibility.⁵⁹ In other words, trial courts are only accorded deference in their step-three determinations when evi-

dence of credibility exists in the record. The combined effect of these decisions has resulted in an overall strengthening of the *Batson* analysis.

Despite these improvements, a juror's right to serve free of discrimination based upon sexual orientation is still a developing concept. The Supreme Court has yet to decide on a standard of review for evaluating equal-protection claims based on sexual orientation,⁶⁰ let alone the permissibility of exercising peremptory challenges against people because of their sexual orientation. Ambiguity reigns among the lower courts as well, as is best illustrated in the contrasting views of the Eighth and Ninth Circuit Courts of Appeal.

A. *United States v. Blaylock*⁶¹

Eugene Blaylock—a gay man—and five other defendants were indicted on federal drug-trafficking charges stemming from a routine traffic stop in 2002. During jury selection, Blaylock raised a *Batson* challenge following one of the government's peremptory strikes, asserting that the juror was improperly struck because of his sexual orientation.⁶² At the time, the district court denied the challenge, suggesting that *Batson* was not applicable to sexual orientation and that even if it was, Blaylock had not made a *prima facie* showing of intentional discrimination.⁶³ Following trial, the jury acquitted Blaylock on several charges but found him guilty of "aiding and abetting possession with intent to distribute methamphetamine,"⁶⁴ a judgment that carried a mandatory minimum sentence of 120 months in prison plus five years' supervised release.⁶⁵ On

appeal, Blaylock again raised a *Batson* challenge to the government's peremptory strike. In a unanimous panel decision, the Court of Appeals held that the Eighth Circuit did not recognize sexual orientation as a *Batson* classification and went on to question the constitutionality of extending *Batson* to sexual orientation.⁶⁶ Further, the court reasoned that even if *Batson* covered sexual orientation, Blaylock's challenge would have failed because the government's stated reason for the challenge went beyond mere pretextual language.⁶⁷ In other words, Blaylock's challenge failed to satisfy *Batson*'s first step in raising an inference of impermissible discrimination.

B. *SmithKline Beecham Corp. v. Abbott Laboratories*⁶⁸

Following the U.S. Supreme Court's decision in *Windsor*, the Ninth Circuit held that heightened-scrutiny review applied to equal-protection claims involving sexual orientation.⁶⁹ This case involved a contract dispute between two pharmaceutical companies—SmithKline Beecham Corp. (GSK) and Abbott Laboratories (Abbott)—regarding the licensing and pricing of HIV medication. During jury selection, under questioning from the federal district court judge, one of the jurors—"Juror B"—revealed that he had friends with HIV, that he was taking either a GSK or Abbott medication, and, through the repeated use of masculine pronouns, that he had a male partner. The trial judge also used masculine pronouns when inquiring about Juror B's partner. Abbott's attorney asked Juror B a total of five questions regarding the types of medication at issue in the case. Once individual voir dire was completed, Abbott exercised its first peremptory challenge against Juror B. GSK immediately raised a *Batson* challenge. In the ensuing discussion between the court and counsel, the judge raised three issues with GSK's motion, including (1) whether *Batson* applies to civil cases; (2) whether *Batson* ever applies to sexual orientation; and (3) how the court would practically identify those members of the venire who might be gay.⁷⁰ In response, Abbott's attorney stated that he had "no idea whether [Juror B] is gay or not."⁷¹ Subsequently, the judge allowed the strike.⁷²

On appeal, the Ninth Circuit conducted a *Batson* analysis of GSK's claim that Abbott improperly excluded Juror B because of his sexual orientation. The court found that GSK had estab-

58. *Id.*

59. See *Snyder v. Louisiana*, 522 U.S. 472 (2008) (reversing the trial court's refusal to grant a *Batson* challenge because the trial record showed no evidence that the trial court ever conducted a credibility analysis of the striking party's proffered neutral reason); and *Rice v. Collins*, 546 U.S. 333 (2006) (holding that the attempt to set aside the trial court's conclusion that the prosecutor did not strike a juror for racially discriminatory purposes did not satisfy the requirements for granting a writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act).

60. Compare *Romer v. Evans*, 517 U.S. 620 (1996), with *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Windsor*, *supra* note 3.

61. 421 F.3d 758 (2005), *cert. denied* 546 U.S. 1126 (2006).

62. *Id.* at 769.

63. *Id.*

64. *Id.* at 765.

65. *Id.* at 766.

66. *Id.* at 769.

67. *Id.* at 770.

68. *Supra* note 53.

69. *Id.* at 483 ("Windsor requires that when state action discriminates on the basis of sexual orientation, we must examine its actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status. In short, Windsor requires heightened scrutiny. Our earlier cases applying rational basis review to classifications based on sexual orientation cannot be reconciled with Windsor. (Citation omitted.) Because we are bound by controlling, higher authority, we now hold that Windsor's heightened scrutiny applies to classifications based on sexual orientation.")

70. *Id.* at 475 ("[H]ow [would] we know—I mean, the evil of *Batson* is not that one person of a given group is excluded, but that everyone is. And there is no way for us to know who is gay and who isn't here, unless somebody happens to say something. There would be no real way to analyze it.")

71. *Id.*

72. *Id.*

lished a prima facie case of discrimination,⁷³ concluded that “the record persuasively demonstrate[d] that Juror B was struck because of his sexual orientation,”⁷⁴ and found that Abbott’s proffered neutral explanations were a pretext for purposeful discrimination.⁷⁵ Having concluded that GSK met the burden for sustaining a *Batson* challenge, the court had to decide whether *Batson* itself prohibited strikes based on sexual orientation.⁷⁶ Based on an earlier Ninth Circuit case interpreting the decision in *Lawrence*,⁷⁷ the court held that *Windsor* required application of heightened scrutiny to equal-protection claims based upon sexual orientation.⁷⁸ Upon these conclusions, the court established that *Batson* applies to peremptory strikes based on sexual orientation⁷⁹ then reversed and remanded the case for a new trial.⁸⁰

The divergent approaches taken to *Batson* challenges by the Eighth and Ninth Circuits demonstrate the ambiguity among the lower courts. As more and more individuals decide to come out and publicly acknowledge their sexuality, the more issues of sexual orientation will appear in court, either for litigants, their attorneys, or jurors hearing their cases. Part IV discusses some practical considerations at play when sexual orientation is an issue in the courtroom as well as alternate approaches to the current peremptory regime.

IV. PRACTICAL CONSIDERATIONS AND ALTERNATE APPROACHES IN EXERCISING PEREMPTORIES

A. Practical Considerations

In cases where sexual orientation becomes an issue, it seems natural to inquire about prospective jurors’ attitudes toward gays and lesbians, their experiences with the LGBT community, and possibly even their sexual orientations in the interests of empanelling an impartial jury. As the judge in *SmithKline* succinctly asked, “[h]ow [would] we know . . . who’s gay and

who isn’t here, unless somebody happens to say something.”⁸¹ Setting aside the juror’s privacy considerations, the most obvious solution—directly asking jurors their sexual orientation—might also yield the worst results. First, asking a direct question does not guarantee a direct answer. Any would-be inquisitors would have to deal with the challenge of gay covering,⁸² and even if that could be overcome thanks to a juror’s presentation, there would be no way to affirmatively identify jury panelists as LGBT short of a “friend of Dorothy” T-shirt, secret decoder ring, or similar foolishness.

Imagine, for a moment, a situation in which a juror’s sexual orientation is in dispute for purposes of a *Batson* challenge. A plaintiff’s attorney may raise a challenge following the peremptory strike of a juror who “seemed to be gay.” In the ensuing colloquy, the attorneys argue—presumably based on appearance (stereotypes)—over the prospective juror’s sexual orientation. The judge would then have to determine whether the juror was actually gay or if the totality of the circumstances raised an inference that the juror might be gay. Imagine that the judge granted a *Batson* challenge on the juror suspected of being gay, only to offend the juror who disclosed that he was happily married to a woman. In seeking to determine a prospective juror’s sexual orientation without offending that juror, a basic level of interpersonal intelligence could yield the intended result.⁸³ Asking indirect questions, such as

Setting aside the juror’s privacy considerations, the most obvious solution—directly asking jurors their sexual orientation—might also yield the worst results.

73. *Id.* at 478-79. First, the court noted that Juror B was the only venireperson to publicly identify himself as gay. Second, relying on the language in *Powers*, the court believed that because of the high level of concern in the gay community about price increases of HIV drugs, the “potential for relying on impermissible stereotypes in the process of selecting jurors was ‘particularly acute’ in this case.” *Id.* at 476-77 (quoting *J.E.B.*, 511 U.S. at 140). Third, the attorney for Abbott either did not or could not articulate a justification for the strike when given an opportunity by the court. Finally, the court found that the explanations offered on appeal were “pretextual.”

74. *Id.* at 479.

75. *Id.* at 478-79.

76. *Id.* at 479.

77. *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008) (articulating a three-factor analysis for interpreting the *Lawrence* decision: first, that *Lawrence* “did not consider the possible rational bases for the law in question as required for rational basis review”; second, that it “required that a legitimate state interest justify the harm imposed by the Texas law”; and third, that it “must have applied heightened scrutiny because it cited and relied on heightened scrutiny cases”).

78. *SmithKline*, *supra* note 53, at 483-84 (“*Witt* tells us how to interpret *Windsor*. Under that analysis, we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection. . . . Thus, there can no longer be any question that gays and lesbians are no longer a

‘group or class of individuals normally subject to “rational basis” review’” (quoting *J.E.B.*, 511 U.S. at 143).

79. *Id.* at 486 (“As illustrated by this case, permitting a strike based on sexual orientation would send the false message that gays and lesbians could not be trusted to reason fairly on issues of great import to the community or the nation. Strikes based on preconceived notions of the identities, preferences, and biases of gays and lesbians reinforce and perpetuate these stereotypes. . . . The history of exclusion of gays and lesbians from democratic institutions and the pervasiveness of stereotypes about the group leads us to conclude that *Batson* applies to peremptory strikes based on sexual orientation.”).

80. *Id.* at 489.

81. *Id.* at 475.

82. Yoshino, *supra* note 51, at 837.

83. Personal Anecdote: During voir dire in a relatively simple motor-vehicle-accident case having nothing to do with sexual orientation, plaintiff’s counsel engaged in a painfully tone-deaf display of questioning. A male juror who presented as gay arrived in judge’s chambers for questioning during individual voir dire. After informing the court that he was engaged to another male, plaintiff’s counsel continually used feminine pronouns when referring to the juror’s fiancé despite the juror’s disclosure that his partner was male. The juror was later selected to serve and ended up being chosen as foreperson of the jury, which unanimously found in favor of the defendant. Whether the two facts are related is unclear; however, it is interesting to note the coincidence.

[R]equiring parties to disclose their reasons for exercising peremptories would go a long way in eliminating all types of impermissible discrimination

whether the particular juror has any gay friends or relatives, is active in any LGBT advocacy groups, has a roommate and what that roommate's occupation is (phrased as "his or her") might elicit enough information for an interested party to draw an inference that the prospective juror identifies as LGBT.⁸⁴ It remains unclear whether such questioning would be permissible, and even if it were, a reviewing court

might very well find a pretextual motive for a party's peremptory strike based on a cold record. These considerations demonstrate the difficulty in inquiring about jurors' sexual orientation and further demonstrate why using sexual orientation as a proxy for bias is an inappropriate use of the peremptory challenge.

B. Alternate Approaches

Restricting or Banning the Use of Peremptory Challenges

Legislatures give and legislatures take away, and what statute creates, statute may destroy. In an article chronicling the shortcomings of voir dire,⁸⁵ Kathryn Young discusses three alternatives that possess their own appeal. The first finds its basis in Justice Marshall's concurrence in *Batson*, which calls for a total elimination of the peremptory challenge⁸⁶ by arguing that peremptories are often based on an attorney's hunch or gut feeling and that "a thin line exists between a stereotype and a hunch."⁸⁷ Further, echoing the Marshall concurrence, the essential hurdle for an attorney exercising a racially motivated peremptory strike is the creative hurdle necessary to articulate a racially neutral basis for the strike. Justice Marshall's concern may be somewhat lessened by the more recent developments in the law curtailing a trial-court's iron-clad discretion in making credibility determinations; however, the door remains open for discriminatory use. Another argument for eliminating peremptories suggests that peremptories are superfluous if the system regulating challenges for cause works as intended.⁸⁸ For-cause challenges work as intended when they exclude jurors incapable of impartiality or fairness, thereby rendering the peremptory challenge unnecessary. Despite these concerns, a total elimination of the peremptory seems unlikely. Besides the difficulty in getting Congress and

the state legislatures to reverse centuries of legal precedent, there is a fairness argument to be made for peremptories. "Empirical evidence indicates that people are most likely to perceive that a system is fair when they believe that the procedures it follows are fair,"⁸⁹ and the peremptory-challenge system creates (at least the illusion of) fairness.

Young proposes two additional methods of curtailing the use of peremptories for discriminatory purposes by further restricting the number of challenges allotted and by requiring parties to give a reason for each peremptory challenge they exercise.⁹⁰ Her argument essentially suggests that a limited number of peremptories would force the court to exercise more for-cause challenges. This approach seems like a shortcut to totally eliminating the peremptory altogether. For example, the federal civil system permits parties only three strikes per side. To reduce that number to one or two seems arbitrary when the same level of resource commitment could completely end the problem by completely ending peremptories. Her second proposal has merit. By forcing the parties to articulate a reason for each of their peremptory strikes, Young's proposal short-circuits the *Batson* challenge by assuming steps one and two *sua sponte* and jumping right to step three (sort of):

An example of the way this proposal might operate is illustrated in the New York case *People v. Green*.⁹¹ There, an attorney used a peremptory challenge against a deaf juror. The trial judge asked about the reason for the strike, and the attorney replied that it was because of the juror's deafness, not because of any doubt that the juror would be able to communicate through a translator. The court held that the peremptory challenge violated the juror's Fourteenth Amendment equal protection rights. Even though people with disabilities are not a suspect class, they receive rational [basis] review, and a person's disability bears no rational relation to her abilities to serve as a juror.⁹²

While every trial court might not react in the same way as the one in *Green*, requiring parties to disclose their reasons for exercising peremptories would go a long way in eliminating all types of impermissible discrimination, including sexual orientation.

Bifurcated Voir Dire

As was previously discussed, the Sixth Amendment requires speedy, fair, and publicly accessible trials; therefore, all court proceedings including voir dire need to be publicly accessible. An effective way to remain within the letter and spirit of the

84. See *People v. White*, 172 Cal. Rptr. 612, 613-15 (Ct. App. 1981) (wherein the trial judge rejected defense counsel's request to ask jurors directly about their sexual orientations; all examples provided are actual questions used by White's attorneys).

85. Kathryn M. Young, *Outing Batson: How the Case of Gay Jurors Reveals the Shortcomings of Modern Voir Dire*, 48 WILLAMETTE L. REV. 243 (2011).

86. "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges

entirely." *Batson v. Kentucky*, 476 U.S. 79, 102-03 (1986) (Marshall, J., concurring).

87. Young, *supra* note 85, at 264.

88. Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1182 (1995).

89. *Id.* at 267.

90. Young, *supra* note 85, at 268.

91. *People v. Green*, 561 N.Y.S.2d 130 (N.Y. Co. Ct. 1990).

92. Young, *supra* note 85, at 269.

law is to split voir dire into two components: general and individual voir dire. During general voir dire, the court or attorneys ask a series of yes-or-no questions in open court in the presence of the venire. Each juror has an opportunity to answer without fear of revealing any deeply personal or private information so publicly.⁹³ Any personal or more probing questions requiring more than a yes or no are conducted *in camera* in a more private setting with only the judge, attorneys, and court reporter present. Proceedings conducted *in camera*, while secluded, are still part of the public record and thus susceptible to public scrutiny, thereby fulfilling the dual goals of juror privacy and public openness. Further, proceedings conducted *in camera* provide the court an opportunity to preserve some level of confidentiality in jurors' responses by referring to them by their juror number, initials, or a letter.⁹⁴

Some have suggested an alternative method of soliciting private information from jurors through the use of Supplemental Jury Questionnaires (SJQs). While these devices are attractive in the abstract, they present their own set of challenges. First, jurors have to understand the questions being asked. It is easy to overlook the level of familiarity legal practitioners have with the mechanics of trial process. The questions asked, while reflective of and sensitive to the law, are often times too complex for a layperson's understanding. Even those jurors with the dubious benefit of having seen a police or legal procedural television show are left puzzled by the questions presented on the standard jury questionnaire created by an impartial court, let alone those questions submitted by zealous advocates for their clients.⁹⁵

The Implicit Association Test

One scholar argues for the inclusion of a test that measures prospective jurors' cognitive responses to stimuli during the jury-selection process. Attorney Dale Larsen, in a 2010 law review article,⁹⁶ asserted the novelty of including the Implicit Association Test (IAT) during voir dire to measure the degree to which potential jurors might be racially biased. Developed in the late 1990s, the IAT measures a person's response time to certain stimuli, which its proponents claim measures the implicit attitude (or implicit stereotype) of the subject. For example, the test subject is asked to associate two pairings, often a black face and a white face, with words like "good" and "bad." The IAT then measures how long—usually in milliseconds—it takes the test subject to pair the words with the visual stimuli. The thinking

goes that the shorter the response time, the lesser the degree of bias. Larsen provides an excellent explanation: "If an examinee associates white faces with positive words more quickly than black faces, then that examinee likely has a closer implicit attitudinal association between whites and positive thoughts than blacks and positive thoughts, thus, indicating an implicit bias in favor of whites."⁹⁷

While this option seems relatively attractive given its quantitative measurements, research into IAT's applicability outside of the racial context remains unproven despite over 250 IAT-related studies since 2006.⁹⁸ The heaviest considerations weighing against adoption of IAT—aside from non-racial applicability—are those presented by IAT's detractors, which include the test's cost and various equity considerations. First, they assert that the test uses measurements with little real-world value. The argument goes that the millisecond offers virtually no indication of "actual attitudinal preference"⁹⁹ and that it is "dangerous . . . to examine a person's IAT score and 'imbue [those] values with meaning' about the individual's implicit cognition."¹⁰⁰

Second, administering the IAT requires a significant investment of financial and professional resources in ensuring the test is conducted properly and measuring jurors' responses accurately. To maintain impartiality in the proceedings, one assumes that the court system must bear the burden of administering the test.¹⁰¹ Given the ever-present threat of budget cuts and the pressing needs already thrust upon an overburdened court system, it is highly unlikely that courts will squander scarce resources on a system with limited applicability and questionable accuracy in determining whether jurors are implicitly biased on account of race, particularly when the existing jury-selection process provides opportunities to ferret out such bias.

The Group-Dynamics Model

Juries are groups of 8 to 12 people who, over the course of a trial, become intimate (metaphorically) with each other and then deliberate in secret. Voir dire is an individual examination

**While
[Supplemental Jury
Questionnaires]
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93. Personal Anecdote: In my courtroom, the general/individual voir dire process is simply a matter of respecting the privacy of the venirepersons. Based on my experience, most people presenting themselves for jury duty strive to be as truthful as possible (especially about not wanting to be there). For example, the judge usually explains that the questions are of a general nature so that the court and the parties can get an idea of what the panel's ideas are on particular issues. This way, the court is not asking jurors to reveal any personal information in the presence of total strangers.

94. As was the case with Juror B in *SmithKline*.

95. Personal Anecdote: In my experiences, jurors—when not wholly confused—will answer the question they think is being asked. The best example is one of analogy: where a question might ask

"would you mind if I borrowed your pencil?" the juror might answer "yes," meaning "you can borrow my pencil." These discrepancies between a juror's answer and intended answer are almost always resolved during individual voir dire.

96. Dale Larsen, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. FOR SOC. JUST. 139 (2010).

97. *Id.* at 159.

98. *Id.*

99. *Id.* at 160.

100. *Id.* (quoting Hart Blanton & James Jaccard, *Arbitrary Metrics in Psychology*, 61 AM. PSYCHOL. 27, 32 (2006)).

101. Larsen's article omits this consideration.

of total strangers in open court designed to elicit bias from jury venirepersons. While these considerations are of paramount importance during voir dire, juries—once selected—complete their deliberations as a group in secret. Thus, considerations into how the jury will operate—the jury’s group dynamics—should factor into the selection process. One author¹⁰² summarized the limitations of voir dire and the importance of seeing group dynamics this way:

First, there is a difficulty in predicting the way in which the jurors will react to one another. This may be stated as an inquiry into the group’s basic assumptions. The voir dire examination simply cannot provide enough of the information necessary to assess jurors’ attitudes outside of the scope of the issues at trial. The second dilemma is the difficulty in predicting the power structure of the jury—what roles each individual will play. This includes determining who will be leaders, who will be strong dissenters, and who will sit idly by, contributing little to the deliberations. The effect of this inability to predict either the basic assumptions or the group power structure is that the lawyers have little control over the work group—the aspect of deliberations focusing on arriving at a verdict. The inevitability of this result suggests that an extensive voir dire will not provide significantly more insight into jury dynamics than a shorter, more tailored inquiry. Belaboring the jury selection process, therefore, has a high economic cost with few social benefits.¹⁰³

The Group Dynamics Approach offers a promising, innovative approach to the jury-selection process; however, to date, inquiries into how jurors may act in a group setting are either prohibited¹⁰⁴ or limited in scope.¹⁰⁵ Ultimately, voir dire should be strictly limited to discerning which jurors are incapable of being impartial. Trying to win a given case during voir dire is a fool’s errand,¹⁰⁶ resulting in discriminatory behavior that denies citizens their rights to serve as jurors.

CONCLUSION

Sexual-orientation discrimination deserves heightened-scrutiny analysis by the judiciary, and *Batson* should be extended to sexual orientation where peremptory strikes are exercised on that basis. First, staying true to the principles and purpose of voir dire requires that litigants impanel fair and impartial juries. Their use of peremptory challenges should reflect legitimate concerns based on stated bases for bias—not using stereotypes as proxies for that bias. The test articulated in *Batson* provides an adequate net to ensnare the improper use of stereotypes and innuendo as proxies for bias, and its protections should be extended to cover discrimination based upon sexual orientation. Given the history of discrimination and violence perpetrated against LGBT individuals, the community warrants the protections afforded under *Batson*. While practical considerations may weigh against the inclusion of sexual orientation as a protected characteristic under *Batson*, the resulting harm would leave gays and lesbians excluded from this country’s most cherished public institution: service on the petit jury. The ruling in *SmithKline Beecham Corp. v. Abbott Laboratories* is a promising development in this area, and one hopes that the Supreme Court resolves the discrepancy among the circuits in favor of a more perfect, more inclusive union. Until then, courts must strive to improve their voir dire procedures to protect the rights of all who enter their courtrooms—regardless of who they are or who they love.



Colin Saltry is a part-time evening law student at Temple University’s James E. Beasley School of Law. He previously graduated from Temple’s Fox School of Business with a bachelor’s degree in economics. He is employed by the First Judicial District of Pennsylvania and hopes to pursue a career as a civil litigator upon graduating in 2016.

102. Tracy L. Treger, *One Jury Indivisible: A Group Dynamics Approach to Voir Dire*, 68 CHI.-KENT L. REV. 549 (1992).

103. *Id.* at 575-76.

104. See *Walks v. State*, 167 So. 523, 524 (Fla. 1936); *McGuire v. Richard Guthmann Transfer Co.*, 84 N.E. 723 (Ill. 1908).

105. *Temperly v. Sarrington’s Admin.*, 293 S.W.2d 863, 868 (Ky. 1956); *State v. Boyer*, 112 S.W.2d 575, 579 (Mo. 1938); *State v. Morgan*, 73 P.2d 745, 747 (Wash. 1937).

106. *Luvera*, *supra* note 20, at 11.

The image shows the cover of the 'LS/CMI User Manual'. The title 'LS/CMI' is prominently displayed at the top. Below it, the subtitle reads 'Level of Service / Case Management Inventory: An Offender Assessment System'. At the bottom of the cover, there is a small bar chart with three vertical bars of increasing height. The text 'User's Manual' and 'MHS' are visible at the bottom of the cover.

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The Resource Page



NEW BOOKS

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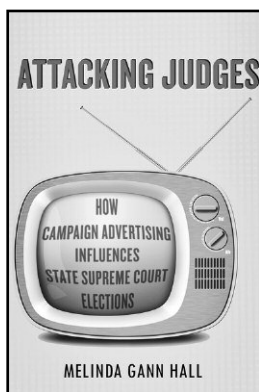
Two long-time National Center for State Courts executives have set out their recommendations for redesigning and improving courts in *Reimagining Courts*. The authors are Victor E. Flango, who recently retired as Executive Director of Program Resource Development, and Thomas M. Clarke, the Vice President for Research and Technology.

Flango and Clarke identify three key themes that tie their suggested reforms together: (1) a strong customer focus; (2) increased access to justice; and (3) more efficient delivery of services to litigants and other court stakeholders. They argue for such things as “building court services around the needs of court customers by using measurable standards to ensure that those services actually improve.” One way to implement such a goal is through the National Center’s “High Performance Court Framework” (see <http://goo.gl/WfjttE>). They also note that greater focus on court customers has a valuable payoff in treating parties with respect and dignity, a key ingredient in procedural justice.

The bulk of the book is devoted to a discussion of how cases are processed through courts and the different functions courts play—adjudicating adversarial disputes, expeditiously disposing of cases that must be resolved quickly, administrative resolution of cases with largely undisputed facts, and individualized (or problem-solving) justice where a person’s treatment needs predominate. The authors suggest that cases proceed in different ways through the court system depending upon whether the main need is for an adversarial trial or something else. Whether one agrees with every proposal or not, Flango and Clarke provide an overview of how things are done today

and how courts might change in ways that could provide better results, better service, and better customer satisfaction. The book also includes a comprehensive bibliography; anyone interested in court improvement would be well served by reading the book and then following up with further readings from those cited in the bibliography.

MELINDA GANN HALL, *ATTACKING JUDGES: HOW CAMPAIGN ADVERTISING INFLUENCES STATE SUPREME COURT ELECTIONS*. Stanford University Press, 2014. 264 pp. (\$27.95).



Modern political campaigning is examined with a judicial twist in the new book by Michigan State University political science professor Melinda Gann Hall. Hall presents findings from a study investigating the effect of television advertising on both the votes garnered by state supreme court justices and the overall likelihood that voters will cast ballots. Her historical review of state supreme court elections targets the increasing power of state supreme courts, the unique American nature of judicial elections, and the general negativity and attack advertising that is endemic in modern political campaigns. These three forces robustly combine to make this book an absorbing and important read for anyone interested in the courts, advertising, or political campaigns.

Hall relies on two data sources for her empirical enquiry: state supreme court election data for a 20-year period and storyboards for the campaign advertisements. There are plenty of details about the data for those interested in seeing

behind the statistics and plenty of clearly delineated explanations for those not as interested in the math behind her findings. Empirically contradicting some of the conventional beliefs about attack advertising and campaigns, Hall’s work should calm concerns about our modern judicial-selection process and provide solutions to some relevant issues.



WEBSITES OF INTEREST

Special Issue on Judicial Evaluation
Oñati Socio-Legal Series
<http://goo.gl/cf00xi>

In 2013, the International Institute for the Sociology of Law brought 22 judges, academics, and social scientists together for a workshop on how best to evaluate judicial performance. That has now resulted in a special journal issue with 12 articles offering international perspectives on evaluating judges. The articles (a) consider conceptual and methodological issues basic to judicial evaluations, (b) describe the experiences of senior judges in Australia, Germany, Sweden, and the U.S. as evaluators and subjects of evaluation, and (c) report new research related to the judicial-evaluation process.

We would note two articles of special interest. National Center for State Courts researcher David Rottman and Yale law professor Tom Tyler review in detail the data confirming that the public places the greatest importance on whether a judge meets public expectations of procedural fairness. They examine how that may best be made part of judicial evaluations. Rottman and another National Center for State Courts Researcher, Jennifer Elek, look at the problem of bias in judicial-performance evaluations. They cite research confirming that some survey methods are systematically biased and discuss ways to mitigate against bias. Any judge who wants to evaluate his or her own performance could benefit from thinking through the issues discussed in these articles.