

The Expert Witness: Insulating Against Bias

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Abstract. Credentialing bodies in the field of mental health have tried to create ethical standards that would guide those that conduct forensic work to remain unbiased and produce neutral work. Unlike traditional vocational rehabilitation counseling, forensic rehabilitation counselors produce work that may affect legal proceedings. In these cases, the contracting party may have specific opinions that they want to defend or promote, which may put direct or indirect pressure on the Forensic Rehabilitation Counselor (FRC) to validate the contracting party's position. This paper explores several biases that can occur when a partisan party contracts an expert witness, and how the FRC can insulate against these biases.

Forensic Rehabilitation Counseling is performed in a highly adversarial environment, where the opinion of the Forensic Rehabilitation Counselor (FRC) affects the outcome of high stake arbitrations and court cases. Unlike lay witnesses, who can only testify on what they see, the Expert Witness can offer opinions based on their "knowledge, skill, experience, training, or education" (Robinson, 2014, p. 303). However, forensic rehabilitation counseling is not an exact science, and opposing FRC may come to a completely different opinion based on the same data set. "Variability in opinion and methodology is particularly problematic in legal/forensic settings where vocational consultants are retained by opposing parties routinely evaluate the same data and apply peer-reviewed methods yet arrive at incongruent or contradictory opinions" (Robinson, 2014, p. 57). In order to maintain credibility and an ethical practice in accordance with the CRCC code of ethics, the FRC should be aware of potential bias that can arise from fees (financial gains), selection bias, adversarial (conscious and unconscious) bias, and confirmatory hypothesis testing, and take steps to ensure that the FVE remains neutral and their opinion is both reliable and valid.

One area that may cause ethical conflicts for the expert witness is their desire to provide quality service to their client. In traditional vocational rehabilitation counseling, the client is typically the individual with a disability that wants to reach an employment outcome; however in private forensic practice, the client is not as clearly defined. In Section F.1.C of the CRCC Code of Professional Ethics, the CRCC states, "In a forensic setting, rehabilitation counselors who are engaged as expert witnesses have no clients" (CRCC, 2010, p. 15). The goal of this ethical structure is that the FRC will produce unbiased, neutral work without

any thought towards a specific client, and therefore the FRC will act as a neutral party and produce neutral opinions. However, the CRCC created an ethical framework that may be challenging to apply in a business where an expert is being contracted. In discussing the variety of FRC opinions in forensic work, "Grimes suggests that, in part the variability in expert opinions may be related to the application of vocational rehabilitation theory in adversarial settings where parties have competing interests" (Robinson, 2014, p. 57). Therefore in personal injury, product liability, or divorce cases, it is clear that the forensic expert must take care to evaluate their own opinion to ensure that they are reaching logical conclusions from the data reviewed, rather than giving an opinion that confirms the position of the contracting party.

In forensic work with the Social Security Administration (SSA), the vocational expert is contracted by the SSA, is paid by the SSA, and is questioned primarily by the administrative law judge that oversees the trial. In this setting, it remains relatively easy to remain neutral, because the administrative law judge has no personal stake or vested interest in one outcome or another. Additionally, the FRC is paid by the SSA and scheduled for more trials regardless of their testimony, as long as they produce quality work. While an expert witness can be cross-examined by an attorney and/or another expert witness, the general trend of these proceedings is non-adversarial. The goal of the expert in this setting is to produce evidence that a claimant can or cannot achieve substantial gainful activity. However, as opposed to the work with the SSA and in state VR, the forensic work that occurs in product liability cases, personal injury cases, and divorce cases is generally more adversarial. While the position of the CRCC Code of Ethics is clear, there is a

potential for the FRC to view referring attorneys, insurance companies, or claimants as clients.

Because contracting parties have a vested interest in supporting specific positions, the FRC may feel obliged to provide an opinion that is favorable to the person(s) paying for evaluations. The legal profession has recognized this bias in expert witnesses and tried to exploit this relationship. For example, opposing attorneys often examine fee schedules to discredit opposing expert witnesses. In their article entitled, "Money Talks: Exposing Bias Using Expert Witness Fee Arrangements", Kuppens & Goodfellow (2012) encourage attorneys to examine fee schedules for contingency fee arrangements. They state that compensation that is based on contingencies of winning the trial would be inherently biased. They encouraged opposing counsels to examine the expert witness's financial stake in litigation outcomes (Kuppens, et. al 2010). Aware of the ethical issues with contingency payments, the CRCC addresses this issue with section F.4.A section on payments and outcomes, "Rehabilitation counselors do not enter into financial commitments that may compromise the quality of their services or otherwise raise questions as to their credibility. Rehabilitation counselors neither give nor receive commissions, rebates, contingency or referral fees, gifts, or any other form of remuneration when accepting cases or referring evaluatees for professional services. While liens should be avoided, they are sometimes standard practice in particular trial settings. Payment is never contingent on outcome or awards" (CRCC, 2010, p. 17). However, even when a counselor is not being paid on a contingency basis, there may be other financial factors that come with running a successful business, such as the desire for repeat business, that may contribute to a biased opinion.

A possible solution for this ethical conflict related to rendering an opinion that would not be favorable to the contracting attorney is that a forensic vocational expert should take measures to ensure that they are only taking cases with merit. Blackwell, Field, Johnson, Kelsay, and Neulicht (2005) state that prior to accepting a case, a review of the cases merits should be made, and a FRC should try to determine if the contracting attorney is trying to push the FRC towards a favorable conclusion. According to the CRCC Code of Ethics (2010), "While all rehabilitation counselors have the discretionary right to accept retention in any case or proceed within their area(s) of expertise, they decline involvement in any case when asked to take or support predetermined positions, assume invalid representation of facts, alter their methodology or process without foundation or compelling reasons, or where there are ethical concerns about the nature of the requested assignments" (p. 17). A FRC should remain in contact with the referral sources, and after their initial evaluation, if the FRC cannot support the attor-

ney's position, they should contact the attorney and recommend that they stop working on the case (Blackwell et al., 2005, p. 29). Therefore, in order to maintain neutrality and avoid ethical quandaries, a FRC should decline cases without merits based on their initial file review, and should discontinue working on cases after they have finished their evaluation, if their opinion will not support the contract attorney's position.

Because of the marketing and business aspect of running a consulting business, forensic counselors may develop business relationships overtime. These business relationships may inherently carry risk of pressuring experts to skew their opinions so that the expert can retain a positive business relationship. In their research Edens et. al. (2012, p. 259) stated that "Although in principle the legal system expects and professional ethics demand that expert witnesses be unbiased and objective in their forensic evaluations, anecdotal evidence suggests that accusations of financial bias, partisanship, and other forms of non-objectivity are common." Edens et al. document that there is an overall theme of distrust of forensic experts by those in the legal field, because a biased party pays experts for their work.

Another factor that may put additional pressure on an FRC towards forming a biased expert opinion is the selection process. Attorneys and insurance companies are going to seek out expert opinions that will favor their position. Slovenko (2010, p. 35) in his research states, "Selection bias means that the experts retained by a party will not represent a random sampling of expert opinions. Rather, they will represent the perspective the attorney wants to present at trial," and that experts are chosen because of their predisposed opinions. As a result, "the court does "not get fair professional opinion" from each party's experts, but an exceptional opinion" from each side." (Slovenko, 2004, p. 35) While a FRC may seek to produce work that is fair, evidence based, and neutral, they may have been chosen specifically because their reputation and/or methodologies favor a specific type of opinion. According to the CCRC it is up to the individual counselor to examine his own biases and to "decline involvement in any case when asked to take or support a predetermined position" (CRCC, 2010, p. 17). When an expert is chosen for a methodology or reputation for calculating losses in a specific way, the FRC may feel pressured to produce those same type of opinions or they may feel hesitant to change methodologies based on the nature of a case or the current research in the field. While this may be the case, "Deutsch advised that there should be no difference in either the methodology for evaluating the client or the manner for which conclusions are drawn, despite referral of the case from the plaintiff versus the defense viewpoint" (Robinson, 2014, p. 335). While the FRC may have been chosen for a particular methodology or

reputation, the FRC should continue utilize widely accepted methodologies for evaluating clients in order to remain neutral. There is no easy solution to section bias, however the FRC should take into consideration alternative views of the data sets to determine if these opinions have validity. According to Robinson, vocational experts should identify the alternative opinions, and “adequately account for obvious alternative explanations” (Robinson, 2014, p. 309). Therefore the Forensic Rehabilitation Counselor should look for and acknowledge opposing or differentiations in interpretation. For this reason the FRC may need to obtain additional training in scientific reasoning to allow them to “view all assumptions as tentative, problematic, and subject to revision as their observations fails to conform to initial expectations” (Robinson, 2014, p. 268).

Once an expert witness accepts a case, attorneys may pressure the FRC to “fight” for their clients. “In procuring the assistance of an expert, the attorney typically talks in terms of “if you take the stand,” reviewing the topics and the facts of the case. Once the expert agrees to serve, the attorney expects them to take on the role, in effect, of an advocate-to make the best case they can for the lawyer’s client” (Slovenko, 2004, p. 34). Attorneys are retained to argue a specific point and win for their clients, as noted previously in this paper, their lack of neutrality may put pressure on the FRC to produce results that would lead to an attorney to continue utilizing their services. Bernstein (2008) refers to this as conscious bias, “the problem of conscious bias arises when “hired guns” adapt their opinions to the needs of the attorney who hires them” (Bernstein, 2008, p. 454). In his article, “The Biased Expert Witness in Louisiana Tort Law”, Alford (2000) stated, “Because the ‘universe of experts is defined only by the virtually infinite variety of fact questions in the trial courts,’ the ranks of professional experts are ever increasing. This proliferation has resulted in the creation of the expert-advocate who, lured by the prospect of a substantial fee, testifies in conformity with the needs of the principal who engages him” (p. 181). Because there is a tendency in industries that have an abundance of experts, there may be additional pressure on the FRC to be “the hired gun” for their clients so that their referral sources will not move on to a more agreeable expert.

The FRC is conducting business in the competitive market place; attorneys and insurance companies are looking for expert witnesses that will consistently render opinions that are consistent with their goals. To this end, some insurance companies retain in-house forensic rehabilitation experts. As noted, in case of personal injury or divorce cases, attorneys may have long standing working relationships with experts that are inclined to give specific types of opinions. But even if a FRC sets out to be neutral, there may be an unconscious bias that affects their work. Bernstein (2008)

stated, “Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you” (p. 455). Unconscious bias exists across various categories of expertise, but because of the external pressures of fees and selection, and the desire to retain business, the expert witness may naturally identify with their employer. A forensic expert’s unconscious bias can easily affect his conclusions, especially when these conclusions necessarily rely, on subjective judgments (Bernstein, 2008). Murrie, Boccaccini, Guarnera, & Rufino (2013) found that forensic psychiatrists and psychologists swayed their expert testimony and scoring of “objective” tests depending on who they thought was paying them. In their study, Murrie et al. note that most experts try to be objective, but the findings suggest that the side that retained them swayed some of the experts. As previously discussed, as a business person, the forensic counselor/expert witness may rely on “reviews” by attorneys and claims managers to obtain additional business. “In light of the pressure felt by many experts to ensure future demand for their services by way of zealous advocacy for their clients, the concern that the present method for use of experts in court does not exert sufficient quality control on their opinions” Alford (2000, p. 203). So even when they may not be asked to take a specific side or support a predetermined position, the FRC may feel inclined by the nature of their relationship to the contracting party to skew their opinion in their “employers” direction.

Because of court decisions in *Daubert*, *Joiner*, and *Kumho* over the last few decades, FRC have sought the solution for ethical dilemmas through engaging in more scientific protocols, and utilize more scientific research that would meet court standard for expert testimony. For example, under *Daubert* the courts follow a four-part test for measuring the reliability of expert testimony offered in court, which included the following:

1. Whether the theory or technique on which the testimony is based can be tested;
2. Whether the theory or technique has been subjected to publication and peer review;
3. Whether there is a known or potential rate of error for the theory or technique; and
4. Whether the theory or technique has attained a level of general acceptance in the particular discipline (Younger, 2005).

Yet it is clear that forensic rehabilitation counseling is not a hard science conducted in the same scientific manner as chemistry (or the likes), courts have given some leeway to the *Daubert* standard, (in *Kumho v Carmichael*) to allow the trier of fact to admit evidence that does not meet all four *Daubert* standards (Robinson, 2014, p. 308). Fruchter (2014, p.1) in his blog writes “the Ninth Circuit held that pop culture could

substitute for scientific methodology in special circumstances where an expert could reliably apply widely accepted cultural norms to the facts of a case. As the Ninth Circuit explained: "The Advisory Committee Notes to Rule 702 of the Federal Rules of Evidence recognize that some types of expert testimony will not rely on anything like a scientific method, and in certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. In our esteemed view and humble opinion, pop culture is no less reliable than professional experience as the basis for expert testimony. That is not to say that all pop cultural references will survive scrutiny. Instead, an expert relying on pop culture must explain how the cultural reference leads to the conclusions reached, why the cultural reference is a sufficient basis for the opinion, and how the cultural reference is reliably applied to the facts." While a FVC can provide testimony on their opinion and experience with the work "culture", it is not acceptable to ignore data. "It is important to first consider science-based information (Daubert), and then rely on other factors when necessary . . . Daubert factors does not preclude other factors such as clinical judgment. Both domains, scientific evidence and clinical impression may be equally important in offering to the court sufficient and adequate opinions and expert testimony that will assist the Trier of Fact in reaching a fair judgment" (Robinson, 2014, p. 274).

Because of pressure to be biased, a FRC may engage in confirmation bias. Wright et al (2013, p. 4) describes confirmation bias as "search for formation that is consistent with the hypothesis and by lack of attention to information that is inconsistent with, would discredit, the hypothesis." Wright goes on to state that the rehabilitation counselor develops hypothesis throughout the counseling relationship and use their clinical judgment to make inferences regarding client functioning. These inferences assist the counselor with case formulation and recommendations for case planning. However the FRC through confirmation bias can lead an individual to "search for formation that is consistent with the hypothesis and by lack of attention to information that is inconsistent with, would discredit, the hypothesis" (Wright et al., 2013, p. 7). Recognizing this difficulty the CRCC states that it is the duty of the FRC to confirm information (CRCC, 2010). However as previously discussed, part of the issue with confirming information is that if there is an unconscious bias towards a certain opinion, the FRC may not be fully aware they are engaging in this type of bias.

Therefore as part of their work, the forensic rehabilitation counselor should attempt to utilize decision-making models to help formulate an opinion that is neutral, valid, and reliable. "Just as a scientist would want to duplicate the outcome when evaluating a colleague's claim that he had developed a technique

for cold fusion, a vocational rehabilitation counselor would want to test the underlying hypotheses and review the standards controlling the technique's operation in an attempt to reproduce the results originally generated. If such testing did not generate consistent results, [the expert's] method would be exposed as unreliable because it is subjective and irreproducible" (Barros-Bailey & Neulicht, 2012, p. 12). Barros-Bailey and Neulicht (2012, p. 12) recommend using a decision-making rubric to integrate qualitative and quantitative measures and obtain an opinion that would be valid; in what they term *Opinion Validity* they combine "internal and external qualitative and quantitative validity research methods to arrive at a defensible opinion that is more probable than not." Utilization of an opinion rubric such as Opinion Validity may assist the FRC in maintaining neutrality and creating an opinion that is more probable.

Practitioners in forensic rehabilitation counseling faces multiple ethical challenges in conducting work as expert witnesses when compared to work within public vocational rehabilitation systems. While the SSA contracts with Vocational Experts this work tends to be more neutral because it is contracted and funded by a neutral party. While bias is a recognized issue in forensic work in different fields, there is no simple solution to overcoming these biases. In his research, Slovenko (2004) noted that in most other countries, the court appoints expert witnesses. This allows the expert to be completely unencumbered by the business of FRC, and it would allow the expert to operate in a manner similar to that of the FRC in a Social Security hearing. But this type of change would require a legislative change and significant funding from both the federal and state government.

From the research reviewed it is challenging for the FRC to remain neutral in the competitive market place, when they may be hired to defend a specific position. In this adversarial environment, the expert witness may feel pressure from potential financial gains, selection bias, both conscious and unconscious bias, and confirmation bias to produce a certain standard or opinion. Because this is a recognized challenge, the CRCC has created guidelines for FRC to help guide their ethical decision-making. Prescreening cases, use of self-examination, and utilization of decision-making matrixes such as Opinion Validity can assist the Forensic Rehabilitation Counselor to produce work that is ethical and bias free and that is defensible in a court of law.

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