



Journal of Arts & Humanities

When Can Forensic Psychologists Comment on the Credibility of Criminal Defendants?

Roberto Flores de Apodaca¹, Lauren P. Stevens², Brendon T. Blake³

ABSTRACT

Forensic psychological examiners are often confronted with assessments in the *guilt* phase of criminal cases in which a Defendant denies his/her charged conduct, but the existing evidence clearly contradicts their account. This happens often in cases involving charges of violence, sex offending and or substance abuse (Langton, Barbaree, Harkins, Arenovich, McNamee & Peacock, 2008). What is the proper role of the examiner in such instances?; granting the benefit of the doubt and accepting the Defendant's account, using the one contained in the differing evidence, or making an independent judgment about which is more likely to be true? Does accepting any version mean the expert is offering an opinion on the Ultimate Issue in the case, and encroaching on the role of the Trier of Fact? The Federal Rules of Evidence (FREE) dictate that judgments about Ultimate Issues belong solely to the Trier of Fact, yet the DSM-5 Manual (APA, 2013) instructs us to consider Malingering in every forensic situation; i.e. is the Defendant being honest about his mental state, and by implication, his/her credibility?

¹ Professor of Psychology, Concordia University Irvine, United States, Email: roberto.flores@cui.edu.

² Department of Psychology, Concordia University Irvine, United States, Email: lauren.stevens@eagles.cui.edu.

³ Department of Psychology, Concordia University Irvine, United States, Email: brendon.blake@eagles.cui.edu.

Our recommendation is that examiners offer no opinions about which conflicting version in a criminal case is the more credible during the guilt phase, and instead, offer “if, then” assessments about a Defendant’s propensity for violence or sexual offending; i.e. *if the charges are true, then s/he poses certain levels of risk going forward, for reasons detailed in the report.* Such a stance avoids experts “taking sides” during the guilt phase of a case and allows them to fully inform the adversarial, legal process as it deliberates on possible Plea Bargains or Sentencing decisions. We argue that this impartial approach serves a useful function in legal proceedings while adhering to our Ethical Guidelines (APA, 2010).

Keywords: Commenting on Credibility, forensic, evaluation.

Available Online: 25th June, 2015.

This is an open access article under Creative Commons Attribution 4.0 License, 2015.

1.0 Introduction

Forensic psychological examiners in criminal cases are often confronted with assessments in the *guilt* phase of a case, in which a Defendant / evaluatee denies their alleged misconduct, but the evidence contained in the attending records appears to clearly contradict the Defendant’s account. This conflict occurs perhaps most often in cases where the evaluatee is being charged with sexual, violence and / or substance abuse offenses (Langton, Barbaree, Harkins, Arenovich, McNamee & Peacock, 2008). What is the proper role of the examiner in such instances? Does the examiner systematically accept the Defendant’s account, extend him / her the benefit of the doubt, assume instead that the accounts of victims, Police or other official reports are true (and the Defendant is lying, denying or minimizing personal responsibility), or make an independent judgment about which of the conflicting accounts is most likely to be true in order to formulate opinions about the Defendant? Does accepting either version suggest that the examiner is offering an opinion on an Ultimate Issue in the case; i.e. are the charges true? This essay addresses this dilemma and offers a strategy for resolving this thorny and important forensic and ethical challenge.

To be clear, this dilemma does not exist in the *sentencing* phase of a case when there has already been a determination by the Trier of Fact (Judge or Jury) about exactly what happened and what, if anything, the Defendant has been found guilty of. In that instance, there are no remaining questions about the “truth” of what the Defendant accepts or denies; the Trier of Fact has issued a verdict and the forensic examiner has a settled, legally adjudicated account of what took place. The examiner can then make a determination about the degree of forthrightness or denial on the Defendant’s account relative to the verdict that has been rendered. This essay focuses exclusively in cases where the examiner is called in to offer an opinion about a Defendant *prior* to a legal determination. We offer suggestions on how to resolve conflicts in the guilt phase between what a Defendant says and what official records indicate, while maintaining a proper, ethical role that does not encroach on the Trier of Fact’s unique responsibility to decide the Ultimate Issue in a case.

2.0 Nature of the conflict

The very act of inferring that an evaluatee is “in denial” or “minimizing” their personal responsibility for the charges against them, to any degree, means logically that the examiner does not accept the evaluatee’s account of their case. In such a case, the forensic examiner is, instead, accepting the validity of the charges, the weight of the evidence against the Defendant, or is working with some other (more credible) account of the events of the matter for which the evaluatee was arrested. For

example, if a Defendant tells an examiner that he did not commit an act of sexual molestation for which s/he is being charged, but there are victim accounts, multiple witnesses and forensic evidence to the contrary in the official records the examiner has, the examiner has a choice to either: 1- Believe the Defendant, and assume that he is not in denial and is being forthright, or 2- Accept the weight of the evidence and infer that the Defendant is to some degree in unconscious, psychological denial to assuage his distress, or 3- The defendant is purposively not telling the truth in effort to avoid prosecution. In this context, to draw an inference about denial / minimization, in effect, casts the examiner in the role of the 13th juror who is reaching an opinion about the Ultimate Issue in this case: Did the Defendant commit the acts that he is accused of doing?

The other side of the dilemma in sex and violence cases (in particular) is that the examiner has to draw some conclusions about the Defendant's history in order to make judgments about possible deviant tendencies and the Defendant's proneness to illegal acts of violence or sexuality. How can that be done without considering the very behavior that brought the Defendant to the examiner's attention? This is particular vexing in the common instance that an evaluation is being conducted for an evaluatee's first arrest, without a prior history of offending.

In the guilt-phase of a criminal case, where a Defendant is presumed innocent, is the forensic examiner inferring that the crime he is being charged with is more likely than not to have occurred, when the examiner concludes that the Defendant is "in denial"? After all, what is the Defendant denying, if not his culpability for the underlying charges? Can such an inference on the part of the examiner be used to help convict the Defendant, in addition to drawing judgments about his psychological make-up?

In our judgment, in many types of cases (discussed below), this sets up an ethical dilemma for forensic examiners hired to give their opinions in sex, violence and drug cases (in particular) where the inferred level of denial is presumed to be high (Richards & Pai, 2003). The issue can be framed as most succinctly concerning the matter of a Defendant's credibility, and just when a forensic examiner can ethically comment on it. Are examiners always required to render some judgment about an evaluatee's credibility, as we are seemingly exhorted to do by the DSM-5 Manual (APA, 2013), or are examiners to follow the Federal Rules of Evidence (FRE, 2014; Saltzburg, Martin & Capra, 1998), which state unequivocally that inferences about a Defendant's credibility are to be reserved exclusively for the Trier of Fact; Judge or Jury?

The forensic psychology literature is replete with work focusing on how psychologists as expert witnesses can assess and report on the credibility of criminal Defendants, and others they evaluate (Granhag & Stromwall, 2004). Making a determination about an evaluatee's credibility as a historian is a fundamental step in establishing the facts that will be used in formulating a forensic opinion. Before an examiner can draw inferences about a Defendant's propensity for violence or amenability to treatment, the examiner has to have a coherent history to work with.

The issue of malingering, in particular, has generated an extensive amount of work on when it is to be suspected and how it can be assessed (Rogers, 2008). A diagnosis of Malingering can be thought of as a determination that a person is consciously lying and lacks credibility on the issue of their mental status. The DSM-5 Manual instructs clinicians and forensic examiners that this is to be suspected and accounted for in legal instances where the incentives for a particular perspective on testimony exists (APA, 2013); which would be in *all* forensic cases. It would seem from this sizable body of work that a determination of an evaluatee's credibility is part of what a forensic psychologist

does routinely, in criminal and other legal cases where they are asked to render expert opinions. But does this practice not run into direct conflict with the Federal Rules of Evidence (Saltzburg et al., 1998), as noted above?

There is another aspect to this dilemma. Character Evidence (CE) testimony on the part of experts about personality traits and prior acts that reflect on a Defendant's credibility has similarly been steeped in legal controversy as to who is able to offer such opinions and when (Anderson, 2012; Hunt & Budesheim, 2004). Do the FRE pertain to all cases a psychological expert gets to testify or, or does it only pertain to certain circumstances or types of cases? There appear to be some inconsistencies or dilemmas on these questions in a variety of criminal cases.

The risk that this discrepancy might come up and impeach the credibility of a Defendant has led many Defense Attorneys to instruct their clients to not discuss the details of their charged offense with psychological evaluators, in the guilt phase of the case (Slovenko, 2004). This is, of course, their legal prerogative and a tactical decision made on the relative, probative value of: 1- Discussing their case with the forensic examiner and possibly "incriminating" themselves in the evaluator's judgment, or 2- Not discussing the facts and risk coming across as evasive or having something to hide. In either case, the anchor or standard against which the Defendant's credibility is judged is an understanding of what actually happened in the charged offense.

3.0 Arguments against expert testimony on a defendant's credibility

It is generally understood that only the Trier of Fact can comment on the Ultimate Issue in a case; typically, whether Defendants are Guilty of the charges against them. Experts are prohibited from making statements that encroach, one way or the other, on the Ultimate Issues in a case. Experts are unlikely to say explicitly whether a Defendant is Guilty or Innocent, but do so indirectly when they conclude a Defendant is in denial or minimizing responsibility in a given crime before the charges have been brought to a legal resolution. Although their opinions may be excluded by a Judge if they go that far, it diminishes the weight of their opinions if such statements are included in their reports.

The FRE's explicit language makes it clear that the role of determining the credibility of a witness or Defendant falls exclusively within the purview of the Trier of Fact; Judge or Jury. A number of commentators and clinical authors have similarly pointed out that forensic examiners are prohibited from commenting on the credibility of a Defendant, unless explicitly mandated by the Court or allowed to by the Orders inherent in the assignment to evaluate a particular Defendant (Meixner, 2012; Rickert, 2010).

Related to this admonition is the understanding that Character Evidence (CE) may well include the implication that by virtue of his past actions, a Defendant may or may not have proven himself truthful, trustworthy, law-abiding and, by logical extension, credible in his account of his actions in the case at hand (Sanchirico, 2001). The only party which can introduce CE is the Defense, leaving the prosecution the opportunity to cross-examine a witness (including the Defendant) in effort to impeach their credibility on the very subjects raised by Defense in their introducing CE.

It would appear, then, that expert examiners would be similarly constrained in their use of CE (including credibility), to instances where it is first raised by the Defense (Slovenko, 2004). This "opening the door" to CE would constitute a clear instance of where the examiner would be free to

comment on the issue of a Defendant's credibility, but doing so, somehow, without assigning weight in either direction, pointing toward guilt or innocence.

4.0 Exceptions to the federal rules of evidence

There are some criminal cases in which determining Defendant's credibility and offering an opinion on the Ultimate Issue is often at the forefront of the Expert's task (Packer & Grisso, 2011). For example, in Insanity and Competency evaluations, the first order of work is to determine whether the Defendant suffers from a diagnosable disorder or is possibly feigning in order to evade criminal responsibility. It would appear impossible to rule in the existence of a clinical diagnosis in either of these instances without also being able to rule out the possibility of Malingering, and indirectly, reporting an opinion on the Defendant's credibility.

It is also understood in Competency evaluations that the expert's opinions, and the underlying facts used as foundation by that expert, can only go toward establishing a defendant's psychological state and ability to participate in a trial proceeding. Nothing the Defendant says to an expert in the course of such evaluations can be used for or against the Defendant in proving the underlying charges (Packer & Grisso, 2011).

The last three versions of the DSM Manual have instructed clinicians and forensic examiners to affirmatively consider the possibility of Malingering in all legal contexts, where it is assumed the influences of secondary gain, escaping criminal responsibility and other such distorting motivators are possibly, if not likely, skewing an evaluatee's testimony (APA, 2013). How can the forensic examiner consider the possibility of Malingering without commenting on the credibility of the symptoms and history the Defendant is reporting?

CE testimony has been the frequent subject of legal scholars, but far less so of psychological researchers (Bryden & Park, 1994; Hunt & Budesheim, 2004). Defendants can introduce evidence of their good character through a variety of witnesses (most often personal confidants or relatives of the Defendant), with the Prosecution relegated to countering only those areas within which the Defense has offered testimony. The Prosecution's job becomes the impeachment of such character witnesses, to the ends of furthering their case that the Defendant is guilty and not to be believed when he contends that he is not guilty. In these instances, the forensic examiner does not have to accept CE testimony uncritically and can weigh it against other sources of fact to form an objective opinion about the Defendant.

5.0 Credibility of expert witnesses

The issue of Expert witness credibility has been studied extensively and commented upon by a number of empirical researchers and essayists (Brodsky, Griffin, & Cramer, 2010; Neal, Guadagno, Eno, & Brodsky, 2012). While various characteristics of credible expert witnesses have been proposed by various authors, competence, trustworthiness and goodwill appear to be the qualities most often mentioned (Neal et. al, 2012). An expert's persuasiveness is going to be enhanced to the extent that they demonstrate these characteristics. A key way in which an expert can promote their credibility is by an ethical resolution of the types of dilemmas we have been considering this essay; i.e. how the expert resolves the conflict between what a Defendant says and what the records show.

Of these, challenging inconsistencies in a Defendant's account of the case they are being charged in would seem to reflect on the trustworthiness of the Expert. It would be expected that an expert somehow reconciles the varying accounts before him / her, when the Police reports and the account of the Defendant are at odds.

Numerous researchers and essayists have studied the characteristics of credible expert witnesses (Brodsky, Griffin, & Cramer, 2010; Neal et. al, 2012). While various characteristics have been proposed, competence, trustworthiness and goodwill appear to be the qualities most often cited (Neal et. al, 2012). An expert's persuasiveness is going to be enhanced to the extent that they demonstrate these characteristics. A key way in which an expert can promote their credibility is by an ethical resolution of the types of dilemmas we have been considering this essay; i.e. how the expert resolves the conflict between what a Defendant says and what the records show. Does the expert "choose sides" in a way that shows partisanship / bias, or is the dilemma resolved in an ethical, intellectually honest manner? Resolving inconsistencies in a Defendant's account of the case would seem to reflect principally on the trustworthiness of the Expert, as defined the literature (Brodsky et al., 2010).

This attribute appears to be most influential in determining the credibility of experts (Brodsky et al., 2010). The trustworthiness of an expert is determined by a few factors including impartiality and the methodology followed in any particular case. Gutheil & Simon (2004) noted that an expert witness' credibility could be tarnished by a lack of impartiality in their work brought about by a number of internal and external factors. Some internal reasons included a narcissistic attitude or a gender bias, whereas external reasons may include entrepreneurial incentives for future referrals or extra-forensic relationships with the referral source.

One of the most influential features of trustworthiness was the expert witness' methodology (Brodsky et al., 2010). An important component of this was, how did the expert reconcile any existing contradictions between what the Defendant said during evaluation with what had been noted by others about his behavior during the crime in question.

6.0 How to resolve the dilemma

The approach we recommend is for experts to simply not "take sides" when there is a conflict of the sort we have been discussing. In our view, the expert does not need to and should not conclude either that Defendants are to be believed or that they are "in denial" of the underlying behavior that they have been accused of. The proper role for the expert, in our judgment, is to be agnostic of what actually happened, and to defer entirely to the Trier of Fact in such instances. Regardless of how seemingly probable either the Defendant's or the conflicting records' account seems, the expert's credibility is best served by adopting neither point of view and deferring entirely to the Trier of Fact on what actually happened.

The expert can offer opinions on the nature of a Defendant's propensity for violence or sexual offending contingent on the underlying charges being true. The reasoning can take the form of "if, then" propositions; i.e. *if* the underlying charges are true, *then* the Defendant represents certain characteristics, is being forthright, is in denial, etc. That way, the expert neither ignores nor resolves the conflict between accounts s/he is confronted with. The expert can offer his best judgment about a Defendant's psychological make-up, motivation for the underlying crime, extent of denial or

minimization, propensity for re-offending, etc. *without* taking a position on what actually happened during the crime for which the Defendant is being tried.

Such a stance, in our judgment, enhances an expert's trustworthiness in the eyes of the Trier of Fact, in ways that any other approach does not (Neal et. al, 2012). The "agnostic" position does not align experts with either Defense or Prosecution in a criminal case, regardless of the referral source, yet allows them full reign to inform the Trier of Fact on the psychological characteristics of the Defendant that are relevant to the underlying case being adjudicated.

The approach we are recommending is likely to not satisfy a referral source that would like the examiner to "lean" a certain way, consistent with their goals in a case and their legal strategy. Defense and Prosecution both have a duty as advocates to pursue a certain outcome in every case and having an expert "on their team" who is supportive of their point of view may well fit into their strategy. As experts, however, our allegiance is to the legal process, the integrity of our knowledge base and practice; not to the referral source who hired us.

Our considered judgment is that we best serve our professional role by not commenting on the Ultimate Issue directly (unless specifically required to do so, as in Competency cases), or indirectly by commenting on the credibility of Defendants. Instead, we argue for the adoption of the "if, then", agnostic position described above. The formulations we offer under such conditions should not be used to help determine the Ultimate Issue in a case, during the guilt phase. If our opinions help inform negotiations in potential Plea Bargains and Sentencing decisions, we will have provided a valuable service to the legal process, without compromising our ethical guidelines (APA, 2013), or encroaching on the Ultimate Issue-purview of the Trier of Fact.

References

- American Psychological Association. (2010). Ethical principles of psychologists and code of conduct. *American Psychological Association*, 1-15.
- American Psychological Association. (2013). Specialty guidelines for forensic psychology. *American Psychologist*, 68(1), 7-19.
- Anderson, B. J. (2012). Recognizing character: A new perspective on character evidence. *Yale Law Journal*, 121(7), 1912-1968.
- Brodsky, S. L., Griffin, M. P., & Cramer, R. J. (2010). The witness credibility scale: An outcome measure for expert witness research. *Behavioral Sciences & The Law*, 28(6), 892-907.
- Bryden, D. P. & Park, R. C. (1994). "Other crimes" evidence in sex offense cases. *Minnesota Law Review*, 78, 529-583.
- Federal Rules of Evidence. (2014). Federal rules of evidence; 702 & 703. *Federal Evidence Review*.
- Granhag, P. A., & Stromwall L. A. (2004). *The detection of deception in forensic contexts*. New York, NY: Cambridge University Press.
- Gutheil, T. G., & Simon, R. I. (2004). Avoiding bias in expert testimony: The general practice clinician stepping into the arena of forensic psychiatry must take care to maintain objectivity. *Psychiatric Annals*, 34(4), 260-270.
- Hunt, J. S., & Budesheim, T. L. (2004). How jurors use and misuse character evidence. *Journal of Applied Psychology*. Vol. 89, No. 2, 347-371.

- Langton, C., Barbaree, H., Harkins, L., Arenovich, T., McNamee, J. & Peacock, E. (2008). Denial and minimization among sexual offenders: Post treatment presentation and associated with sexual recidivism. *Criminal Justice and Behavior*, 35, 69–98.
- Meixner, J. B. (2012). Liar, liar, jury's the trier? The future of neuroscience-based credibility assessment in the court. *Northwestern University Law Review*, 106(3), 1451-1488.
- Neal, T. S., Guadagno, R. E., Eno, C. A., & Brodsky, S. L. (2012). Warmth and competence on the witness stand: Implications for the credibility of male and female expert witnesses. *Journal of the American Academy of Psychiatry and the Law*, 40(4), 488-497.
- Packer, I. K., & Grisso, T. (2011). *Specialty competencies in forensic psychology*. New York, NY, US: Oxford University Press
- Richards, H.J., & Pai, S. (2003). Deception in prison assessment of substance abuse. *Journal of Substance Abuse and Treatment*, (24), 121–128.
- Rickert, J. T. (2010). Denying Defendants the benefit of a reasonable doubt: Federal rule of evidence 609 and past sex crime convictions. *Journal of Criminal Law & Criminology*, 100(1), 213-241.
- Rogers, R. (2008). *Clinical assessment of malingering and deception* (3rd ed.). New York, NY: The Guilford Press.
- Saltzburg, S. A., Martin, M. M., & Capra, D. J. (1998). *Federal Rules of Evidence manual* (7th Edition, Volume 1), Charlottesville, VA: LEXIS Law Publishing.
- Sanchirico, C. (2001). Character evidence and the object of trial. *Columbia Law Review*, 101(6), 1227.
- Slovenko, R. (2004). Testimony on credibility: A case analysis. *Journal of Psychiatry & Law*, 32(2), 243-268.