



### **F38 To Disclose or Not To Disclose: How Outcome-Based Case Theory Guides Information Gathering in Mental Health Evaluations**

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**Learning Overview:** After attending this presentation, attendees will understand how trial attorneys have conflicting views about whether to gather certain types of mental health data related to a defendant and whether unhelpful information is required to be disclosed to an expert witness working on the case.

**Impact on the Forensic Science Community:** This presentation will impact the forensic science community by showing that expert witnesses rely on attorneys and their teams to provide comprehensive and accurate information about defendants when conducting mental health evaluations, and how attorneys may intentionally fail to acquire certain records or fail to disclose to their expert records that they deem unhelpful to the ultimate outcome they are seeking. The quality of a forensic expert's opinion is limited by the quality of information that forms the basis of that opinion. When an expert's conclusion is based on incomplete or inaccurate information, their opinion is subject to exclusion or attack on cross-examination.

Court-ordered mental health evaluations are legally significant in the context of competency to stand trial and criminal responsibility. Typically, when a court orders an evaluation, the attorneys from the government or the defense are responsible for acquiring information or mental health records to be used by the expert in forming their opinion. Attorneys may strategically choose to sacrifice a comprehensive record in order to obtain their desired result.

**Do They Have Time?** In state court prosecutions for cases not considered high profile, judges and attorneys are under constant pressure to resolve cases quickly and without unnecessary delay. Even if an assertion of incompetency to stand trial or lack of criminal responsibility is alleged, the court pressures the parties to resolve the case. The government and the defense may temper their efforts to obtain records in the name of efficiency, especially if they know those results may be harmful to the outcome they desire.

**Do They Have To Worry About the Opposing Party?** Attorneys on both sides of a mental health evaluation consider not only the forensic evaluator, but also opposing counsel and the assigned judge. If one party does not believe the other side will put forth efforts to uncover the missing or incomplete information, a calculated decision to purposefully withhold certain records could still produce the desired result. A detailed attorney thoroughly working up the case poses more of a threat to the unprepared expert.

**Do They Have to Disclose the Records?** Ethical rules for attorneys do not directly address disclosure of records to an expert witness, especially when the disclosure of those records is harmful to the interests of a defendant. While the prosecution may have a heightened responsibility to seek justice, if either side could access harmful information, a defense attorney may be acting against the interests of the defendant by providing certain information to an expert witness.

Mental health evaluations pose a unique challenge in seeking the truth because the information used to base those opinions is not consistent from case to case. As long as attorneys remain the gatekeepers to what information is given to and used by mental health evaluators, attorneys will continue to shape the results of those evaluations to each side's respective theory.

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#### **Mental Health, Disclosure, Attorney Ethics**