

**Forensic Sexology: An Analysis of Evidence Receivability,
Confidentiality, Privilege and Privacy**

by

Jacques C. Babin

A dissertation submitted to the faculty of the American Academy of Clinical Sexologists
in partial fulfillment of the requirements of the degree of Doctor of Philosophy

Orlando, Florida
March 2007

© Copyright by Jacques C. Babin 2007

DISSERTATION APPROVAL

This dissertation submitted by Jacques Babin has been read and approved by three faculty members of the American Academy of Clinical Sexologists.

The final copies have been examined by the Dissertation Committee and the signatures which appear here verify the fact that any necessary changes have been incorporated and that the dissertation is now given the final approval with reference to content, form and mechanical accuracy.

The dissertation is therefore accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy.

Signature

Date

James O. Walker, Ph.D., FAACS
Committee Chair

William A. Granzig, Ph.D., M.P.H., FAACS
Professor, Dean and Committee Member

Sally Valentine, Ph.D., LCSW, FAACS
Committee Member

ACKNOWLEDGEMENTS

I wish to thank the following individuals for their support, encouragement, and assistance throughout the research, writing and revision of my dissertation: Dr. William Granzig, Dr. James Walker, and Dr. Sally Valentine, my committee members, for their guidance and advice; my partner, Nicole Simoneau, for her patience, understanding and steadfastness throughout the entire dissertation process; my friend, Cid Michaud, for his words of encouragement, and sincere interest in my work; all those who participated in my survey, for their invaluable contribution to my research; and finally, my friend, Hervé LePirrès, whose wise advice and constructive criticism were of enormous help to me.

I also wish to express my gratitude to the American Academy of Clinical Sexologists for the high-quality course programming offered and the opportunity to acquire a Ph.D. via distance learning.

ABSTRACT

More and more sexologists are being asked to testify in court as expert or lay witnesses. With the ever increasing number of court cases, it is highly likely that sexologists will, at one point or another, be dragged into the courtroom, some willingly, others unwillingly. This begs the question as to whether they are adequately prepared to provide testimony.

The purpose of this dissertation is to determine exactly what amount of knowledge sexologists have about the legal system, and more specifically, regarding the admissibility of testimony. The issues relating to the admissibility of confidential matters and the privileges that attach thereto is of particular interest. The answers to such a query were gathered with the use of a survey which was completed by several sexologist respondents.

On another note, the latter part of the dissertation will be of value to any sexologist who will be required to provide testimony. Among many topics covered, the federal and state court systems, including the steps involved in criminal and civil cases, are explained. That said, the primary focus will be on civil cases, given that these are the more likely setting for a sexologist serving as a witness.

Further useful information is provided in the form of practical and helpful tips, not to mention the possible pitfalls to avoid.

TABLE OF CONTENTS

Title Page	i
Dissertation Approval	ii
Acknowledgements.....	iii
Abstract.....	iv
Table of Contents.....	v
List of Tables and Figures.....	viii
INTRODUCTION	1
Statement of the Study	1
Rationale / Purpose of the Study.....	2
Definition of Terms.....	3
Limitations of Scope.....	3
REVIEW OF LITERATURE	4
Sexology as a Science.....	4
The Judicial System and Witnesses	10
METHODOLOGY	15
RESULTS AND DATA ANALYSIS	21
THE EVOLUTION OF EXPERT TESTIMONY IN THE COURTROOM	38
History.....	38
From Skilled Witnesses to Use of Expert Witnesses.....	39
Science Meets Law	41
<i>Frye v. United States</i>	42
The Invasion of <i>Junk Science</i>	44
Changes Regarding Expert Witnesses	46
Reaction to the <i>Daubert</i> Decision.....	50
More Questions than Answers.....	53
What about Sexology as a Science?.....	53
The Standard Is Made Clear	55
Standard Used in Florida State Courts.....	60
Sexology Defined as a Science	63

The Sexologist as a <i>Lay Witness</i>	69
Matters of Confidentiality	71
The Supreme Court Finally Recognizes the Confidentiality Privilege	73
Where Do Sexologists Fit in?	78
Who Is Covered by Florida's Privileges?	79
Ethical Codes Must Be Heeded	90
PRACTICAL TIPS FOR THE SEXOLOGIST WHO TESTIFIES	94
Federal vs. State Courts	94
District Courts – Geographical Distribution	95
Steps in a Civil Case	98
Steps in a Criminal Case	99
The Expert	100
The <i>Lay Witness</i>	101
The Expert-Lawyer Relationship	103
Ethical Questions	104
Compensation	105
Termination of the Relationship	107
The Report	108
Discovery	109
The Sexologist Who Receives a Subpoena	113
The Unfolding of a Deposition	114
The Trial	116
Direct Examination	117
The Cross-Examination	121
CONCLUSION	124
Appendix A: Survey Invitation (E-mail message content)	126
Appendix A (cont.): Survey Invitation (listserv message posting)	127
Appendix B: Survey Questionnaire	128
Appendix C: Privileges in Other States	132
Appendix D: Selected Codes of Ethics	138
Ethics Statement from the Society for the Scientific Study of Sexuality	138
American Psychoanalytic Association	138
American Psychological Association	139
National Association of Social Workers	141
American Association for Marriage and Family Therapists	143

American Psychiatric Association	144
American Association of Sex Educators, Counselors and Therapists	146
American Counseling Association.....	149
Appendix E: Rules Regarding Disclosure	155
Appendix F: Engagement Letter for the Expert Witness	167
Appendix G: Consulting Agreement for the Expert Witness	169
REFERENCE LIST	173

LIST OF TABLES AND FIGURES

Results and Analysis

Geographical Distribution.....	23
Age of Respondents	23
Education	24
Years of Practice	24
Professional Designation	25
Professional Memberships	26
Knowledge of Legal System.....	27
Knowledge of Civil Court Case Procedure	28
Knowledge of Criminal Court Case Procedure	28
Difference Between <i>Lay</i> and <i>Expert</i> Witnesses	29
Experience as a Witness in Sex-Related Field of Practice	29
Types of Witnesses	30
Types of Cases	30
Preparation Acquired as a Witness	33
Adequacy of Preparation.....	34
Understanding of Testimonial Privilege with Respect to Confidentiality	36
Application of <i>Daubert</i>	60
District Courts – Geographical Distribution	95
Florida Court Structure	97

INTRODUCTION

Statement of the Study

The field of sexology has evolved a great deal over the past fifty years. With the state of the legal system as it currently exists in the United States, many experts are being called upon to provide assistance to the courts in sharing their knowledge, experience and professional opinions. Sexologists, however, have only been ushered into the legal arena in recent years, as the recognition of their expertise by the courts has been a slow process. It therefore only stands to reason that sexologists are now, too, being dragged into the courtroom in order to participate and contribute to legal proceedings in many capacities, including as *expert* and *lay* witnesses. Not only is this new phenomenon placing more importance on the role of the sexologist within the legal system, but also on the entire discipline of sexology, which until very recently was viewed by many with skepticism.

When the worlds of the sexologist and the courtroom collide (as inevitably they will from time to time), it is imperative for the sexologist to be well-prepared to take on the role of a witness. That said, a preliminary research seems to indicate that courses or seminars dealing with witness preparation for sexologists are quite far and few between, which leads to the belief that it is, at best, challenging, if not altogether difficult, for a sexologist to become adequately prepared to serve as a witness in a court proceeding.

The hypothesis behind the study presented in this dissertation is three-pronged: it first seeks to determine whether sexologists have adequate knowledge of the legal system and its workings; secondly, to confirm a lack of preparation to testify in court; and

thirdly, to ascertain the level of understanding of confidentiality and privacy issues as these apply to testimony provided by sexologists regarding their patients or clients.

Rationale / Purpose of the Study

The purpose of this study is to determine what requirements are necessary (if any), to allow sexologists to better prepare themselves to serve as witnesses. The survey used as the primary data research tool for this study easily allows us to determine what knowledge is already acquired (or deemed to be) by the sexologists themselves. The results of the survey might be useful in the development of further resources (e.g. training courses, seminars, etc.) for the sexologist clientele facing courtroom testimony. Specific needs will be identified in the preparation required for sexologists in the courtroom.

It should also be noted that, not only will the content of this paper confirm or negate the hypothesis presented above, but it will take one step further in providing a clear explanation of the legal and court systems, thus already enhancing the reader's knowledge (sexologist or other) of the role he may play within the justice system. Given the evident nonexistence of courses available to address training issues, especially those pertaining to confidentiality and privacy matters between sexologist and patient or client, this work also can serve as an invaluable reference to any sexologist wanting to familiarize himself with the court system and to better prepare himself as a witness (expert or other).

Definition of Terms

The term *sexologist* as used in this paper is wide and encompassing. This is primarily due to the multidisciplinary nature of the field of sexology. The author's reference to *sexologists* may include, but is not limited to the following: sex therapists, sex counselors, sex educators, psychiatrists, psychologists, psychotherapists, family and marriage therapists, social workers, etc. In fact, many of these fields are evidenced by the nature of the respondents who participated in the survey for this study.

It should be noted that the use of the masculine gender is privileged in this paper, for the sole purpose of enhancing the readability of the text. Nonetheless, the masculine gender is intended to include both genders in all instances.

Limitations of Scope

All information presented herein that deals with the federal courts is applicable to any sexologist from any state who is called upon to testify in a federal court proceeding. It should be noted, however, that when discussing state court requirements, the contents of this paper principally address those pertaining to the state of Florida. To include relevant information or requirements from all fifty states, as well as the District of Columbia, would simply have been too prohibitive. That said, there is nonetheless some material presented in the appendices that will be of particular interest to sexologists outside of Florida.

REVIEW OF LITERATURE

Sexology as a Science

Literature concerning the study of human sexuality has changed greatly since the Greek philosophers and physicians observed sexual dysfunctions, responses, abortion, contraception, etc. The Greeks had theories for many of the phenomena they observed. Erwin J. Haeberle, in the text entitled *The Birth of Sexology: A Brief History in Documents*, explains that sex research was initiated by the Greeks; then the Romans “advanced and systematized ancient sexual knowledge” (The Kinsey Institute 2006). They were then followed by Islamic scholars. These studies were later translated from Arabic and brought to Europe. Anatomical study was popular from the 16th to the 18th centuries. Next came sex education, the classification of deviant sexual behavior, the role of religion, the increasing population, among other things.

Before identifying some of the literature that deals with the study of sexuality, it is important to establish exactly when the study of sexuality became a recognized discipline in its own right. The significance of this detail will become obvious when determining which sexologists, as defined in the introduction to this dissertation, may testify as expert witnesses. It would not be an overstatement to say that in order for sexologists to testify in this role, they must be trained in a recognizable and credible science. Although sexuality had been observed for centuries, it had always been part of other disciplines, most notably, the field of medicine. With the increasing number of disciplines (other than medicine) being involved in sexuality, it was just a matter of time before someone proposed the creation of a scientific discipline in which sex would be the central research subject. The man responsible for this shift was Iwan Bloch, a German dermatologist. In

1907, he came up with the term *sexualwissenschaft*, which some translated as the science of sexuality and is today known as sexology. The same year, he penned *The Sexual Life of Our Time* (1908), in which he states that he is:

... convinced that the purely medical consideration of the sexual life, although it must always constitute the nucleus of sexual science, is yet incapable of doing full justice to the many-sided relationships between the sexual and all the other provinces of human life. To do justice to the whole importance of love in the life of the individual and in that of society, and in relation to the evolution of human civilization, this particular branch of inquiry must be treated in its proper subordination as a part of the general “science of mankind”, which is constituted by a union of all other sciences – of general biology, anthropology and ethnology, philosophy and psychology, the history of literature, and the entire history of civilization, a complete encyclopedia of the sexual sciences in their relation to modern civilization. (The Kinsey Institute 2006)

Bloch used the studies of history and anthropology to expand the field related to sexuality. He was a prolific writer and contributed immensely to the new field of sexology. He was not alone. A colleague of his and medical doctor, Magnus Hirschfeld, as well as others, helped organize this new science. Hirschfeld and Bloch co-edited the first *Journal for Sexology* (*Zeitschrift Fur Sexualwissenschaft*). This marked the beginning of sexology as an academic scientific discipline. Unfortunately, this academic journal was published only twelve times in 1908 before becoming part of another less specialized journal. Some of the articles in these issues covered psychoanalysis and forensic sexology, among many other subjects. This first journal was revived in 1914 and survived until 1932.

Before the coining of the term *sexology* and the publication of the journal, few books were published. Some articles also appeared in medical journals. Afterwards, many books and articles emerged. Many disciplines joined the field of sexology and their

members contributed to sex research. By pinpointing some of these books, one can see the change in direction the scientific study of sexuality has taken.

Albert Moll, a German doctor, was the third person to complete the trio of German pioneers in the field of sexology. Moll wrote many books on the subject of sexuality. Three of his most important publications were *Contrary Sexual Feeling (Die Conträre Sexualempindung)* published in 1891, *Investigations Concerning the Libido Sexualis (Untersuchungen Über Die Libido Sexualis)* in 1897, and the first book ever published on the sexuality of children, *The Sexual Life of the Child (Das Sexuelleben Des Kindes)* in 1909 (Humboldt-Universität zu Berlin. (n.d.)). It should be noted that Moll had little admiration for Freud or Magnus Hirschfeld. He did not consider these two men to be serious scientists.

Havelock Ellis, a British doctor who did not practice medicine, had an interest in the scientific study of sex. This subject would be his lifelong passion. He wrote many books on the subject, but is best known for his collected works on sex entitled *Studies in the Psychology of Sex*. The first six volumes were completed between 1897 and 1910, and the seventh appeared in 1928. Complete editions of these seven volumes have been reprinted several times over the years. Ellis studied sexual relations by using both cultural and biological perspectives. He was interested in the sexual behavior of humans. In combination with Bloch's work, sexology was finally recognized as a legitimate science. Others would soon follow in their footsteps.

One such example was Richard Krafft-Ebing, an Austro-German psychiatrist who specialized in sexual psychopathology. He was both an educator and a researcher. Krafft-Ebing wrote and published in Germany *Psychopathia Sexualis* in 1886. It was translated

in different languages. The book was intended as a forensic reference for judges, lawyers and physicians, and it dealt with the state of mind of sexual offenders. It also became a popular read with the public at large. In this book, he described sexual perversity and deviances. Krafft-Ebing coined the terms *sadism* and *masochism*. He was one of the first scientists to conclude that homosexuals were not suffering from a mental illness and that homosexuality, per se, was not a perversion. He also studied the female orgasm, particularly the sexual pleasure a woman experienced with clitoral stimulation.

Another significant contributor who cannot be ignored when discussing sexual research is Sigmund Freud. Although he is known as the founder of psychoanalysis, his contributions are important to the field of sexology. In 1905, he wrote *Three Essays on the Theory of Sexuality*, which discussed sexuality, and more specifically, sexuality as it relates to someone's childhood. In these essays, as well as in his book *The Interpretation of Dreams*, first published in 1899, Freud argued that, by looking back at someone's childhood experiences, one could identify that individual's personality in adulthood. Sexual and bodily pleasures are an important part of a child's life (e.g. thumb sucking (oral stage), the act of defecation (anal stage), an interest in sexual organs (phallic stage), and a certain attraction to the opposite-sex parent and hatred of the same-sex parent (Oedipus complex)). At puberty, the child would derive sexual pleasure by concentrating on the genital area. Some other concepts put forth by Freud were *penis envy* and *castration anxiety*. Freud believed that if a child did not resolve the conflicts in his life during childhood, mental illness might result. Certain defining events in a child's life could also contribute to this.

For his part, Vern Bullough has written the most comprehensive book on the history of sex research. In his book, entitled *Science in the Bedroom* (1994), he describes in great detail the evolution of sex research and how it has become multidisciplinary. Bullough combines scientific studies and biographies of key players in the field in order to facilitate the understanding of the evolution of sexology. In *The Sex Researchers*, Edward M. Brecher also deals with select noteworthy researchers whom he believes have made significant contributions to the field of sexology (1979).

Perhaps one of the researchers who has played the largest role in our understanding of sexology is E.J. Haeberle (1971, 1976, 1978, 1982, 1983, 1984, 1995). It goes without saying that Alfred Kinsey's surveys on sexual behavior (1948, 1953) created a major impact. He was a trained scientist and he thought of sexology as a scientific discipline which should be taken seriously. Others would later follow suit, such as Shere Hite (1981, 1982).

William Masters and Virginia Johnson's contributions to sexology are important because they truly initiated a new profession, that of the sex therapist (1966, 1970). They had conducted an in-depth study of the physiological aspect of the sex act, which led to the description of the sexual response cycle and its four phases. Sexual dysfunctions were identified and they developed a program to help their patients. They believed that a couple should be treated together during an intensive period of time. Their work opened the door to people who were interested in becoming sex therapists, but were not medical doctors. This being said, Masters and Johnson's work had a direct impact on the evolution of sexology. Along with an increase in the academic study of sexuality, which directly relates to the acceptance of sexologists as expert witnesses, what appeared is a

long list of self-help guides and sex manuals. An example, among many, is John Gray's *Mars and Venus in the Bedroom* (1995). In addition, various professional organizations and professional journals relating to sexuality emerged, thus further legitimizing the field of sexology.

It should be noted that Helen Singer Kaplan also wrote about sex therapy (1974, 1979). Contrary to Masters and Johnson, she did not feel the need to have two therapists working with a couple, and her therapy was more of a psychosexual nature.

Kinsey and Masters and Johnson led the way for various other fields to become involved in the study of sex. For example, gender issues and cross-gender behavior became the focus of much inquiry (Money 1986). John Money was directly responsible for involving both social and behavioral scientists in the study of sex.

Paul Abramson would argue that sexology may be a recognized science, but it is not rigorous enough. According to him,

[what] is missing, however, given the significance of human sexual behavior, is a scientifically respectable (and recognized) apparatus (e.g., academic departments, institutes, etc.), drawn from a collection of disciplines (psychology, statistics, sociology, public health, mathematics, operations research, anthropology, urology, etc.) which is devoted to: 1) the observation and measurement of human sexual behavior; 2) the discovery of the mechanisms which underlie human sexual expression; and, 3) the development of working models for the prediction of human sexuality. (Abramson 1990, 150)

In order for sexology to be more seriously considered, better questionnaires answered by a representative population that is properly sampled would eliminate what he identifies as a science with a "dubious search record" (Abramson 1990, 151).

Donald L. Mosher assumes that scientists who study sexuality use methods and theories similar to those of other scientists (1989). Both Abramson and Mosher provide strategies in advancing sexology as a serious, albeit soft science. Mosher views these

strategies as implemented by various professional organizations. As for Abramson, he believes that such strategies should be left to the individual sexologists insofar as they “utilize methods which are consistent with the objectives of basic science” (1990, 156). Objectivity may therefore be difficult to achieve in social sciences, including the field of sexology.

The Judicial System and Witnesses

A review of the literature indicates that no specific writings exist on the topic of sexologists as witnesses. However, Barton E. Bernstein, an attorney and licensed social worker, and Thomas L. Hartsell (also an attorney) have written a very practical book entitled *The Portable Guide to Testifying in Court* (2005). This book is aimed at mental health professionals. Many sexologists are, in fact, mental health professionals, and this book is written in accessible, reader-friendly language that can easily be understood by them. Unfortunately, most of the examples used by the authors do not pertain to the sexual field. On the other hand, the effective use of case studies enhances the reader’s comprehension.

A second book by the same authors entitled *The Portable Ethicist for Mental Health Professionals*, which deals with health professionals and ethical matters, is also very useful (Bernstein and Hartsell 2000). As will be seen when the subject of confidentiality is discussed later in the dissertation, the vast majority of professionals, who are sexologists, are subject to a code of ethics. Excerpts from various codes of ethics related to sexologists are included in this paper. There is also one other book that discusses the mastery of expert testimony for mental health professionals: *Mastering Expert Testimony* (Tsushima and Anderson 1996). It should, however, be noted that not

all sexologists are mental health professionals, and there is far less literature pertaining specifically to sexologists. Nonetheless, the books mentioned above are pertinent and helpful.

A certain amount of literature is available regarding *expert* witnesses. There is literature related to the history of expert witnessing (Landsman 1995; Hand 1901). Although not addressing directly the reality of sexologists, most of the books and articles on the subject are informative and could be of use to any sexologist who is thinking of becoming an *expert* witness, or is actually called to testify as a *expert* witness. Some of the more interesting writings explain what is an *expert* witness (Brodsky 1999) and how to become one (Merenbach 1993). That said, they are aimed at an audience that would consist mostly of psychologists. There are excellent how-to books that not only define an *expert*, but also describe the steps involved in a civil and/or criminal case (Matson 1999; Matson, Daou, and Soper 2004; Poynter 2005). These books do not use excessive legal jargon and are reader-friendly. Some authors choose to concentrate on one aspect of a lawsuit, for example, the deposition (Johnson 2001; Lathan 1995). Any sexologist would be better prepared by perusing these resources.

Ironically, one of the most practical books is written for experts in a computer-related field (Smith and Bace 2003). This, however, should not deter the sexologist since the quality and the examples provided are excellent.

Some authors devote their study to jury members during a trial and the role and perception of *expert* witnesses from a psychological perspective (Waites 2002; Mieg 2001; Vidmar and Diamond 2001). It's fascinating to learn that most jurors better understand an expert witness when his testimony is told in a storytelling or narrative

manner (Hastie 1999). In order to be effective as a witness, *expert* or other, one should understand how the judge or jury perceives the testimony. Thus, the sexologist who is testifying may better prepare himself and avoid making mistakes that could discredit him.

The person most responsible for the change in the admissibility of scientific evidence is Peter Huber, a former law clerk with the United States Supreme Court (Huber 1993). Although he tends to exaggerate somewhat, his book on *junk science* influenced Supreme Court judges in the *Daubert* case (1993). Following this opinion by the U.S. Supreme Court, more than one hundred articles were written on the subject, many of which dealt with the role of *expert* witnesses, their acceptance as such, and the admissibility of scientific evidence (Dixon and Gill 2001; Feigman, Kaye, Saks, and Sanders 1999-2000; Groscup, Penrod, Studebaker, Huss, and O'Neill 2002). The reference list at the end of this dissertation includes many of the complete references for these articles. As will be seen in the dissertation, the acceptance or refusal of sexology as a science, and more particularly, the recognition of sexology as a serious academic scientific discipline becomes critical. As was the case with literature on sexologists as witnesses, very few articles refer to or discuss sexology as a science, per se.

The Federal Judicial Center, responding to the importance of the *Daubert* decision, published a voluminous *Reference Manual* dealing solely with the admissibility of scientific evidence (2000). Although aimed at judges, it is full of pertinent information. Any sexologist expecting to testify as an expert witness should read this book, particularly if they will be appearing in a federal court. In the same vein, the article describing a national survey of judges about *expert* witnessing may help the sexologist

who will be called as a witness in a federal court (Gatowski, Richardson, Ginsburg, Merlino, and Dahir 2001).

One particular law professor, Edward J. Imwinkelried, is fascinated by the *Daubert* case and has written a great deal on evidence law and, more specifically, on the admission of scientific evidence (1993, 1994, 1997, 1999; Giannelli and Imwinkelried 1999). The Supreme Court has often referred to this author when rendering its decisions. If one wishes to understand how the law and science are now intertwined, Sheila Jasanoff's book, *Science at the Bar*, may well prove to be an interesting read (1997).

Other articles on the two other cases (*Joiner and Kumho Tire*), in what is considered the trilogy of cases relating to expert witnesses, also make for captivating reading. They discuss, among other things, whether the opinion of the Supreme Court sufficiently explains how the *Daubert* criteria should be applied to softer sciences, such as behavioral sciences (e.g. sexology) (Faigman, Kaye, Saks, and Sanders 1999-2000; Risinger, Saks, Thompson, and Rosenthal 2002).

Moreover, confidentiality is an important issue that is directly related to a sexologist who becomes a voluntary or involuntary witness. Each state has statutes and/or codes that outline which professions are given a testimonial privilege, allowing the sexologist (if qualified, depending on the state in question) to not testify about what was said/written relating to the sexologist-client relationship. These codes and statutes are identified in the dissertation. Bernstein and Hartsell (1998, 2000, 2005) also discuss confidentiality in their books. As is the case with *expert* witnesses, knowledge of the history of psychotherapist-client privilege proves useful in understanding the evolution of this privilege (Mosher 1999). Most of the articles written on the subject deal with the

confidential relationship between a psychotherapist and his client (Dubbelday 1985; Winick 1996; Winslade and Wilson 1985), liability issues with respect to confidentiality breaches (Eger 1976; Grabois 1997), and the limits of the privilege (Nelken 2000). Meanwhile, there are other authors who indicate that the *Jaffee v. Redmond* (1996) opinion raises certain doubts (Archer 1997; Poulin 1998).

METHODOLOGY

In order to gauge the knowledge of sexologists relating to the judicial system and their experiences, a survey was developed. The goal of this survey was to collect data from a sample which represented part of this population and would be representative. Before deciding upon what method to use to administer this survey, the research in question had to be identified as quantitative or qualitative in nature. It was decided that a quantitative research survey was the more appropriate tool to test the hypothesis related to the legal knowledge of sexologists pertaining to testifying in court. By using a quantitative research survey, it would be easy to classify and tabulate the data. It would facilitate the analysis of the results and give a good indication of sexologists' knowledge. In order to avoid missing information that could have been revealed using a qualitative research survey, some open-ended questions were included. This allowed the sexologist answering the survey to give detailed information to certain questions instead of being interviewed.

In order to collect the information, the Internet became the vehicle through which members of the sample group would be contacted and answer the survey. Why choose the Internet? The World Wide Web has become very popular as a medium in recent years. It permits a researcher to do things more rapidly than in the past. Furthermore, sexologists are educated professionals and studies indicate that "... half of all Internet users are professionals or managers and nearly two-thirds possess college degrees" (Stanton 1998, 711). Stanton also adds that the more education a person has received, the less anxious she or he will be to answer a Web-based survey (1998).

Moreover, one of the Reports by the Department of Commerce released by the National Telecommunications and Information Administration in July 1999 indicated that: “Those with college degrees or higher are nearly sixteen times as likely to have Internet access” (Couper 2000, 471). Most, if not all, sexologists have college degrees. Judging by the number of sexologists who have e-mail addresses or Web pages, it became evident that many of them are computer literate and either have access to the Internet at home or at work. There were also many other advantages. One was the cost issue. A Web-survey has a very low cost as compared to mailed surveys, or even telephone surveys. A Web-based survey is self-administered and does not require any interview. The respondent may choose to answer the survey at any time of the day. All responses are submitted electronically and the person who sent out the survey can keep track of the number of responses as well as the response details on a daily or hourly basis. Yun and Trumbo call this a “dynamic survey” (2000). It “reduces data entry requirements [and] eliminates the possibility of transcription or data entry errors, and greatly accelerates survey administration” (Alvarez and Van Beselaere n.d.).

The sending of the survey itself and the return of the completed survey takes very little time. Geography is no longer a concern since the Internet allows people living anywhere in the world to participate. For people living in remote places, it is the ideal tool (Bachmann et al. 1996; Mehta and Sivadas 1995; Kiesler and Sproull 1986; Sproull 1986). It may be easier to use a Web-based survey than the usual pen-and-paper type of survey. It “can be designed to appear nearly the same on all screens and due to their interactive nature, may be easier for people to navigate” (Dillman and Tortora 1998). Further, “the Web enables researchers to utilize complex question formats and skip

patterns while making the survey appear simple to the respondent” (Schaeffer and Dillman 1998, 392).

Although Web-based surveys have many advantages, there may also be problems. Stanton identifies three possible problems: sampling, response consistency, and participation motivation (1998, 711). Alvarez and Van Beselaere also mention that there may be three areas which could be problematic. The first one is “coverage error”. That said, “if we are interested in sampling from a population for whom we have e-mail addresses there is no coverage error because we can use the list of e-mail addresses as the sampling frame” (Alvarez and Van Beselaere n.d., 6). Obviously the target population that was the focus of our research consisted of sexologists as defined in the introduction. In order to narrow it down, a sampling frame had to be identified. This sampling frame consisted of those sexologists who were, at the time of the survey, members of the American Board of Sexology (hereinafter identified as ABS) and who had e-mail addresses that were posted on the ABS web site, or had yet to be posted, but were nonetheless found on the Internet. Another component of the sampling frame was the listserv administered by the American Association of Sexuality Educators, Counselors and Therapists (hereinafter identified as AASECT). In order to participate in the AASECT listserv, one has to be a member of that professional association and must be approved to participate as well as have access to the Internet. It should be noted that not all members of AASECT wish to use the listserv. Sampling error was therefore significantly reduced by surveying those with e-mail addresses (ABS members) and those with access to the listserv (AASECT members). With our sampling frame, the population from whom we wished to receive responses was known with certainty. The members

surveyed were all part of the target population known as members of ABS and AASECT. Furthermore, by surveying members of ABS and AASECT, responses could be received from many types of sexologists such as therapists, counselors, educators, social workers, etc. The important question was whether the sexologists surveyed were representative of the population known as *sexologists*. The author of this dissertation believes so. In fact, it is stated that a sample of any size may be found to be representative (Witte, Amoroso, and Howard 2000).

The second possible problem that may occur deals with sampling. Sampling can take two forms. It may be based on probability or non-probability. Non-probability surveys are, however, deemed less accurate. “Probability approaches involve the researcher identifying the population, developing a sampling frame and using the sample frame to generate a random research sample”, as was done with this survey (Alvarez and Van Beselaere n.d., 7). Mick Couper, an authority on Web-based surveys, describes these approaches for recruiting respondents as acceptable in a probability survey (2000). Alvarez and Van Beselaere also agree by indicating that these methods can “minimize sampling and coverage error” (n.d., 10-11).

The third problem raised by Alvarez and Van Beselaere is the one they call the “non-response bias”. Even if members of the sampling frame have been contacted by e-mail (ABS) or have read a posted message on a listserv (AASECT), there may still be reasons why a sexologist would not want to or be able to respond to the survey. For instance, there may be technological reasons such as a slow Internet connection, a lack of knowledge as to getting to the survey, or even an incompatible browser (Alvarez and Van

Beselaere n.d., 9). It should be noted that not all respondents necessarily advise the person inviting them to participate in the survey that they are having such problems.

Perhaps the biggest flaw with a Web-based survey is that it is almost impossible to determine the exact response rate. With the AASECT listserv, there were unforeseen problems. The AASECT listserv used the Yahoo platform, however, some members were having difficulty signing on to the listserv. At that time, there were over 500 AASECT members who had registered to this listserv. This being said, the number of active participants (i.e. posting and responding to messages) was very small. AASECT decided to transfer its listserv to the Topica platform. At the time members were invited to participate in the survey via a posting, less than half of the AASECT members registered with the Yahoo listserv group had actually transferred to Topica. It was therefore decided upon to post the message at both Yahoo and Topica. Numbers fluctuated continually during the period the survey was open. It was impossible to say with accuracy how many members of AASECT received the message posted or had even read the said message. Couper recognizes this difficulty: "... if an open invitation is issued on a Web portal to participate in a survey, the denominator of those eligible to participate is typically not known, and therefore the non-response rate is unknowable" (2000, 473). Once the target population was identified, an e-mail was sent to the targeted members of ABS. The content of the personalized e-mail sent to ABS members as well as the message posted to the AASECT listserv are both included in *Appendix A* at the end of this document.

As can be seen, members of both ABS and AASECT, two professional associations with the largest membership lists representing many sexologists, were invited to use the link which would bring them to the survey itself. This survey was

hosted by the *www.surveymonkey.com* Web site. A respondent was allowed to answer the survey once, thus avoiding multiple responses from the same person.

The questionnaire was divided into two parts. The first dealt with background information whereby data was collected relating to the respondent's geographical region, age, highest level of education completed, years of experience in a sex-related field, professional designation and membership in any professional organizations. The second part asked questions pertaining to the respondent's knowledge and experience with the legal system as well as the issues of confidentiality and privilege. Specifically, the respondent was asked about his knowledge of court procedures, whether it were criminal or civil. Also asked was whether the respondent knew the difference between the two types of witnesses and whether he had testified previously. If so, did he testify in a federal court and/or state court? The respondent was queried about his knowledge concerning the standard used by the courts to admit expert testimony. The issue of preparedness for those who had previously testified was also addressed as was the source of their preparation and their level of satisfaction. The survey's purpose was to confirm or deny the original hypothesis concerning knowledge or lack of knowledge of sexologists with respect to testifying in a court of law.

The next part of this dissertation will present the results. The entire survey questionnaire may be consulted in *Appendix B*.

RESULTS AND DATA ANALYSIS

Sampling and Response Rate

A 22-question survey was made available online via Survey Monkey, a Web-based online survey service. Invitations were issued to 483 potential respondents. As a result, 61 survey responses were collected, thus representing a response return rate of 12.6%. Considering the narrow ties of the target audience to a sex-related field of practice, this response rate is deemed to be very good.

The survey sampling used targeted two of the most prominent professional associations for sexologists, namely the American Association of Sex Educators, Counselors and Therapists (AASECT) and the American Board of Sexology (ABS).

Personalized e-mail invitations were sent to 369 members of ABS between November 15 and December 5, 2006. Of these, 91 messages (24.7%) were returned as undeliverable (in all likelihood, this was due to obsolete e-mail addresses published at the ABS website or inactive e-mail accounts and/or servers). The ABS sampling rate was therefore 278 members. From this number of invitations issued, and presumably received by the target recipients, 42 respondents identified themselves as ABS members representing 68.9% of the total 61 respondents.

With respect to the AASECT membership, a potential 205 listserv members had access to the invitation to participate in the survey by way of a message posted to the listserv in mid-November 2006. Thirty-seven (37) respondents identified themselves as AASECT members (60.7% of total respondents). That said, it is impossible to determine the exact distribution for each respective group given that several respondents indicated

that they were members of both ABS and AASECT, and they had been specifically instructed to only answer the survey once in the event that they received a duplicate invitation.

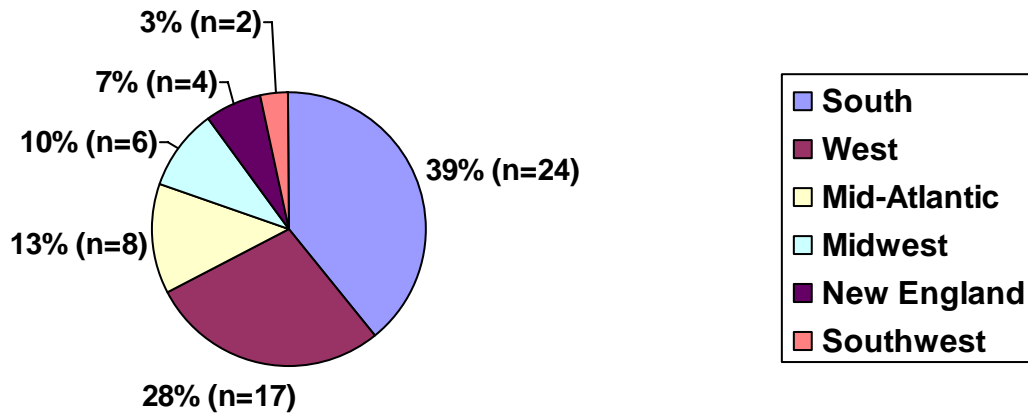
It should also be noted that not all respondents answered all of the questions provided in the survey. As such, there may be some fluctuation in the total responses indicated per question (e.g. $n = 60$ vs. $n = 61$).

The following is a breakdown of the results obtained for each survey question. An analysis of each result is also provided.

DEMOGRAPHICS: RESPONDENTS' BACKGROUND INFORMATION

Geographical Distribution

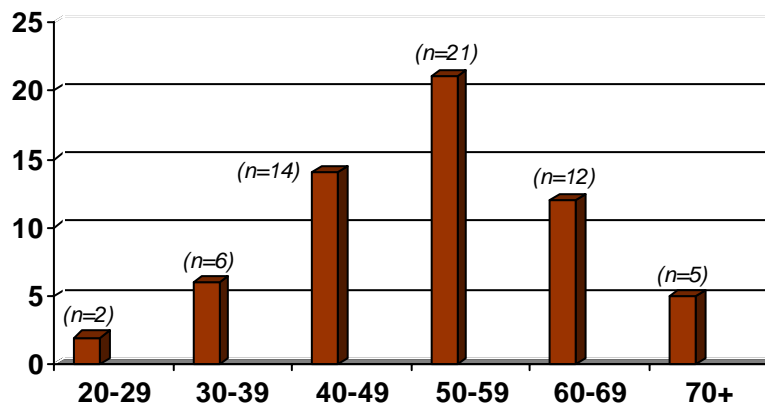
Question: Where do you currently reside? (Check applicable region.)



According to these results, there appears to be an equitable geographical distribution of respondents based on the proportionate number of sexologists per region. Most notably, the states of Florida and California contribute to the two most widely represented regions (i.e. the South and West regions), and they are also home to the majority of members from ABS and AASECT.

Age of Respondents

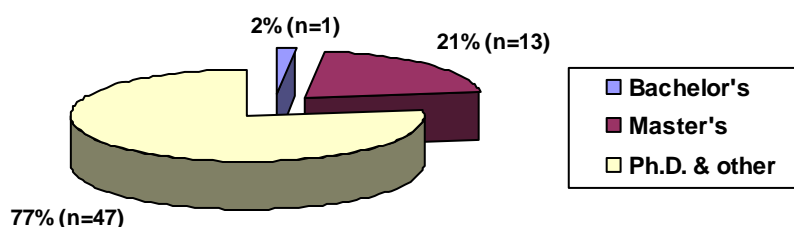
Question: How old are you?



Respondents covered an age range from 23 to 80 years. The average age was 52 years while the mean was 54 years. As well, slightly more than a third of the respondents fell into the 50 to 59 year age range while nearly one-quarter fell into the 40 to 49 year range. This seems to indicate that the majority of respondents have been practicing in a sex-related field for several years and therefore have substantial experience in their respective disciplines. This is also confirmed in *Question 4*, which pertains to the number of years of practice.

Education

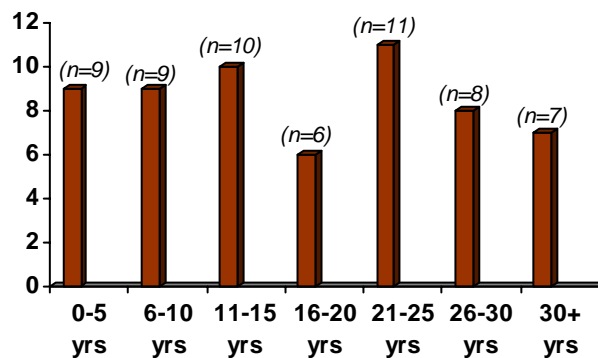
Question: What is your highest level of education attained?



The majority of respondents held a Ph.D. or other doctoral degree, including two with a D.H.S., two with an Ed.D., one with a D.Min., and one other with an unspecified post-graduate certificate.

Years of Practice

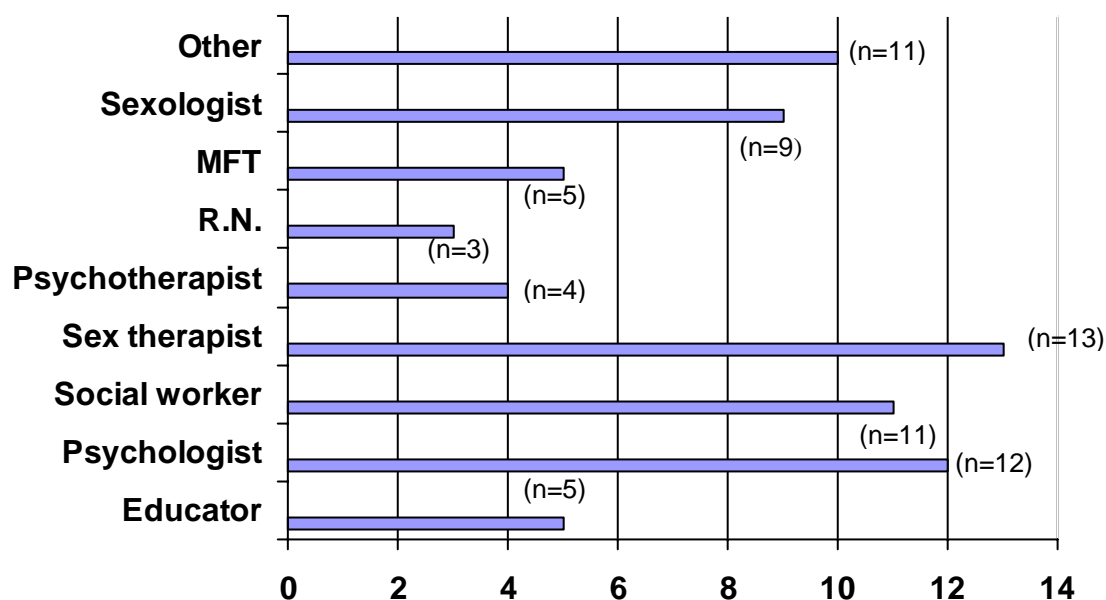
Question: How many years have you been working in a sex-related field?



The years of practice for respondents ranged from 0 to 35 years, with the average being 18.3 years. Nearly half of the respondents had practiced more than 20 years.

Professional Designation (title)

Question: What is your professional designation?



Two-thirds of the respondents fell under one or several of the following professional designations: sex therapist, psychologist, social worker, or sexologist. The three most common fields are those in which one might expect to be called to serve as a witness at some point throughout his career life. This sampling is therefore considered very useful to the scope of the study at hand given that the respondents represent the sexologist as defined in the introduction of this paper.

The *other* category included undefined counselors (some licensed, in mental health), one physician, one student, one unspecified Ph.D. and one respondent who indicated that the question was not understood.

Professional Memberships

Question: Which professional organization(s) do you belong to?

In light of the two target groups selected to participate in the survey (ABS and AASECT), it is a foregone conclusion that the respondents belong to either association or, in many cases, they are members of both. In fact, 68.9% identified themselves as ABS members, whereas 60.7% did so as AASECT members.

The next largest membership belongs to the Society for the Scientific Study of Sexuality (SSSS) with 32.8%. Equal numbers of respondents (24.6%) belong to the National Association of Social Workers (NASW) and the American Psychiatric Association (APA).

The associations listed with respect to membership are (in order of priority):

Association Name	% of respondent members	# of respondent members
American Board of Sexology (ABS)	68.9%	(n=42)
American Association of Sex Educators, Therapists and Counselors (AASECT)	60.7%	(n=37)
Other	36.1%	(n=22)
Society for the Scientific Study of Sexuality (SSSS)	32.8%	(n=20)
National Association of Social Workers (NASW)	24.6%	(n=15)
American Psychological Association (APA)	24.6%	(n=15)
American Association for Marriage and Family Therapy (AAMFT)	14.8%	(n=9)
American College of Sexologists (ACS)	13.1%	(n=8)
American Psychoanalytic Association (APSAA)	3.3%	(n=2)
none	1.6%	(n=1)

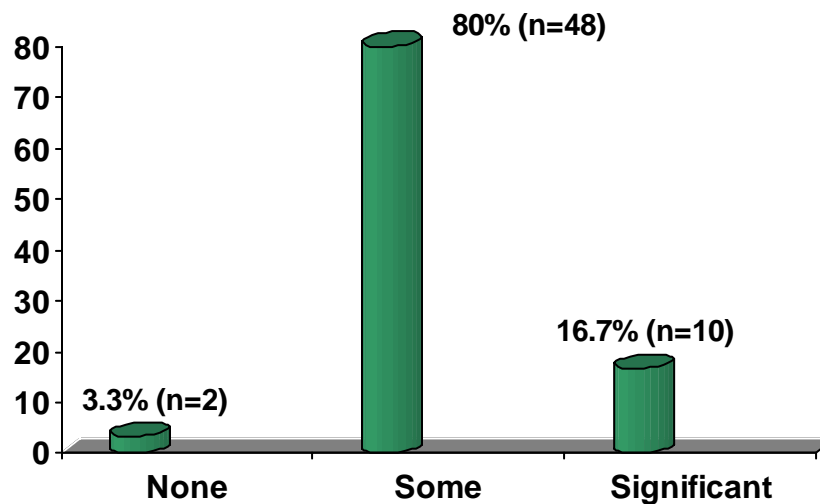
Under the “Other” membership category, the following associations were named :
various state psychological associations, NAADAC American College of Forensic

Examiners, Association of Certified Sexological Bodyworkers, California Association of Marriage and Family Therapists (CAMFT), American Counseling Association, and Society for Sex Therapy and Research (SSTAR).

KNOWLEDGE AND EXPERIENCE

Knowledge of Legal System

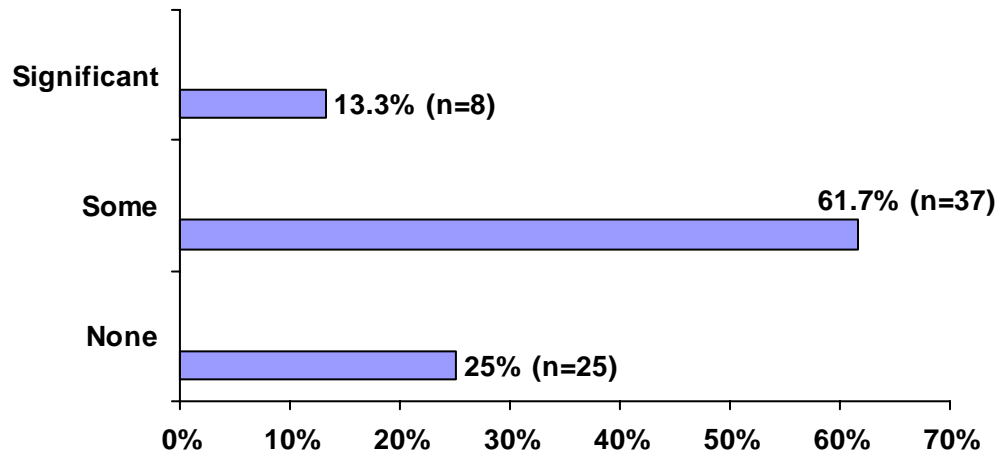
Question: How would you rate your knowledge of the legal system?



The overwhelming majority of respondents have admitted to having some knowledge of the legal system, while only two indicated they had no knowledge whatsoever in this area.

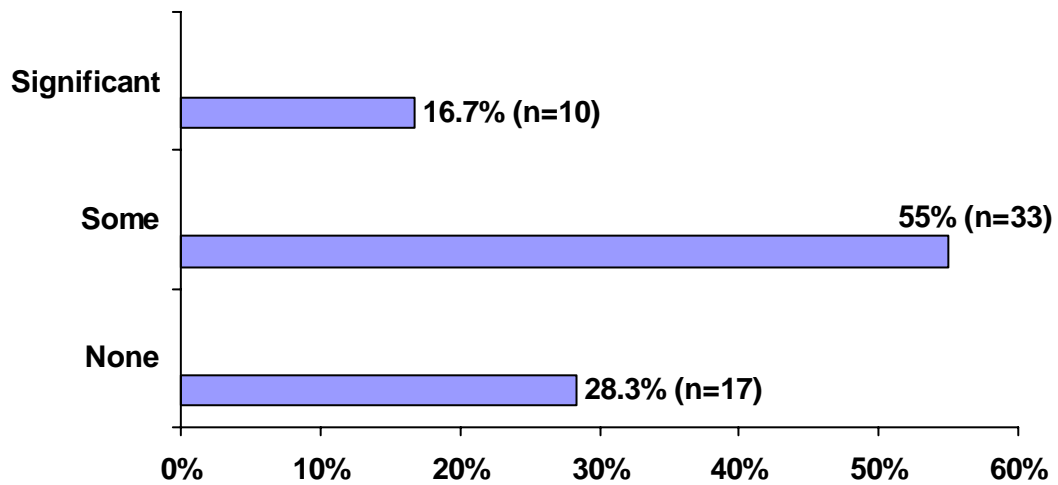
Knowledge of Civil Court Case Procedure

Question: How would you rate your knowledge of the steps involved in a civil court case?



Knowledge of Criminal Court Case Procedure

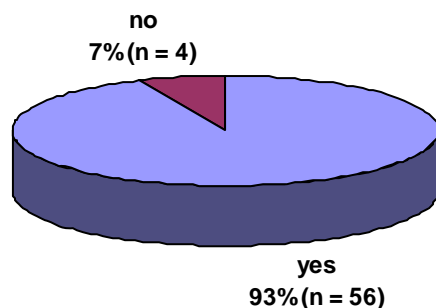
Question: How would you rate your knowledge of the steps involved in a criminal court case?



The results with respect to both questions about knowledge of civil or criminal court procedure were quite similar leading to believe that those who had *some* knowledge of civil court procedure also had *some* knowledge of criminal court procedure and vice versa.

Difference Between Lay and Expert Witness

Question: Do you know the difference between a lay witness and an expert witness?

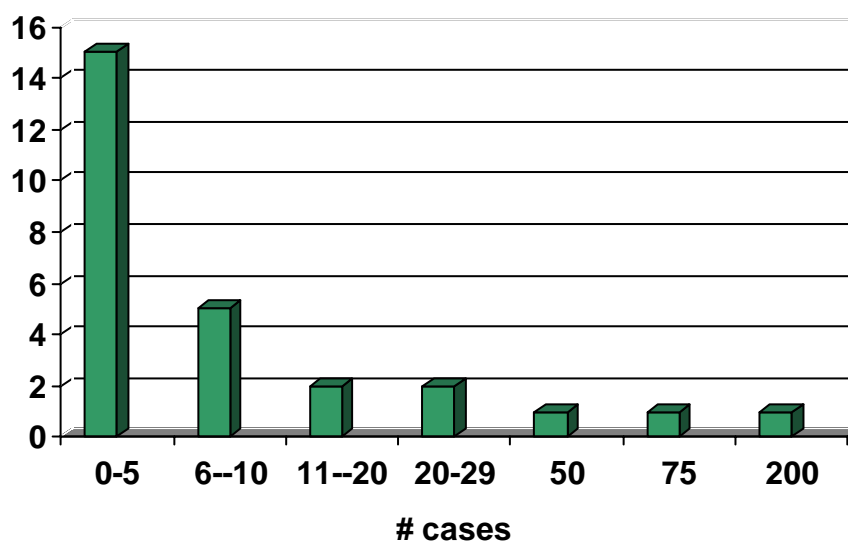


The vast majority (93.3%) of respondents claim to understand the difference between what constitutes a *lay* witness and an *expert* witness.

Experience as a Witness in Sex-Related Field or Practice

Question: Have you ever served as a witness in a court case within the context of your sex-related field or practice? If yes, in how many cases did you testify?

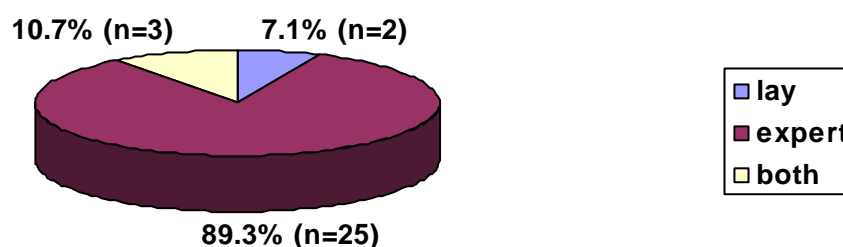
Slightly fewer than half of the respondents (46.7%; n=28) indicated they had had experience serving as a witness in a sex-related field or within their scope of practice.



Among these respondents, there was a wide range (1 to 200 cases) with respect to the number of cases they had participated in as a witness. The majority indicated their involvement as witnesses in one to five cases. One respondent only indicated “many” as a response, and therefore was omitted from these findings due to the subjectivity of the response provided.

Types of Witnesses

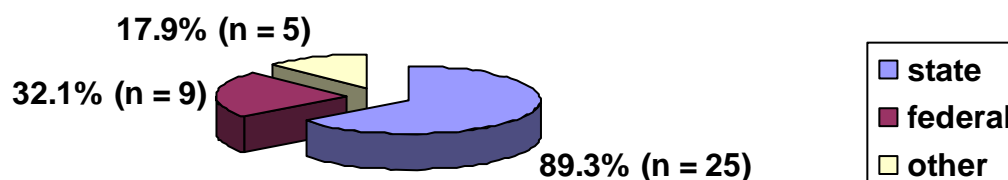
Question: If you served as a witness, what type of witness were you?



The majority (89.3%) of those who had indeed served as a witness in a court case did so in an *expert witness* capacity, and an additional 7.1% served as both *lay* and *expert* witnesses.

Types of Cases

Question: What type of case did you testify in?



More often than not, the respondents participated as witnesses in state cases (89.3%). It should be noted that some indicated participation in both *state* and *federal* (8 respondents, representing 28.6% of these respondents, including one who indicated all three categories) cases. Another two respondents indicated having participated in both *state* and *other* courts. The five respondents who indicated “other” referred to district court (1), family court (2), juvenile court (1), and Canada (1) to specify the type of case they had served in.

Other Professional Experience Within the Legal System (Other Than Testifying)

Question: Have you had any other professional experience within the legal system (other than testifying)?

33.3% (n=20) of the total number of respondents indicated that they had some other professional experience within the legal system (apart from serving as witnesses). These included:

- writing progress reports for sex offenders and communicating with probation officers
- conducting psychosexual evaluations for criminal defense cases
- court-appointed mediator
- legal therapy counseling (for attorneys, usually involved in high-conflict cases such as divorce or custody proceedings)
- court-ordered evaluations (e.g. competency/sanity, family/custody, juvenile and dependency, personal injury, harassment evaluations)
- consultation in civil cases involving victimization, child custody cases involving sexual abuse
- serving as executive director for a Court Appointed Special Advocate program (CASA)

- training attorneys in preparation of background reports; attorney consultant
- providing deposition statements
- adult drug court counselor
- court-appointed expert re: custodial guardianship
- former profession as a parole officer
- child welfare worker
- victims counseling
- consultant to licensing boards in professional sexual misconduct cases
- prison psychologist

Familiarity with Criteria Used by Courts to Identify Expert Witnesses

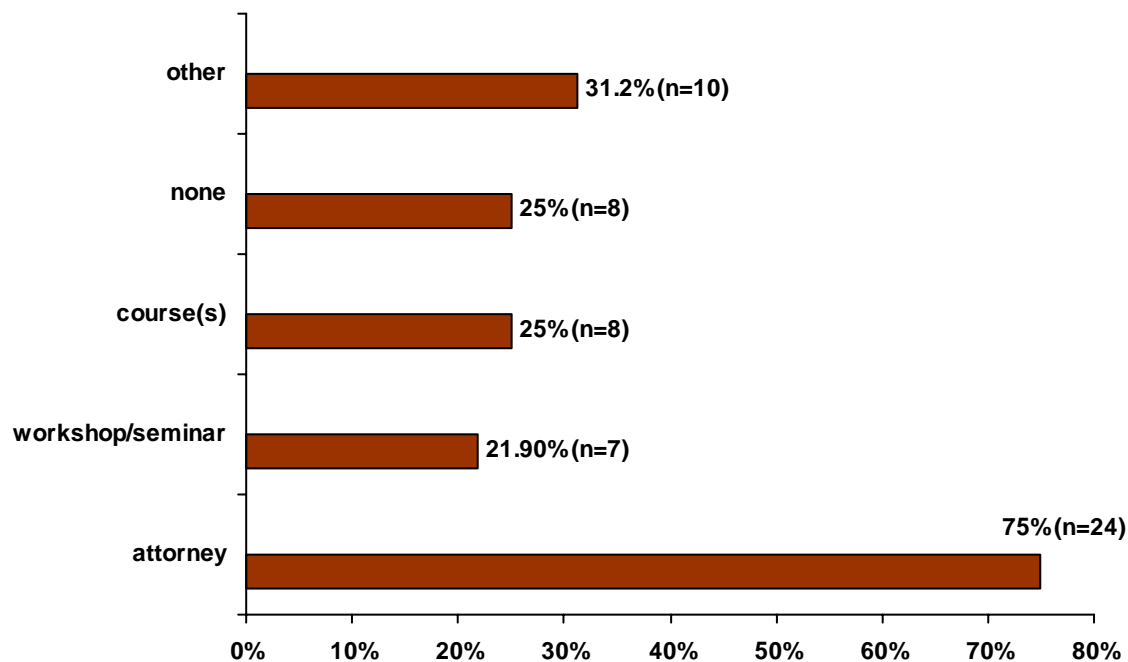
Question: Are you familiar with the criteria used by the courts for admissibility of expert witnesses?

40% (n=24) of the respondents indicated familiarity with expert witness criteria.

Of these respondents, all were familiar with *state* court criteria, however, a mere 37.5% (n=9) were similarly familiar with *federal* court criteria. This may also indicate that most are unfamiliar with said criteria in states where both *state* and *federal* criteria apply (e.g. Florida).

Preparation as a Witness

Question: If you've ever testified in a court case, how was your preparation as a witness acquired?



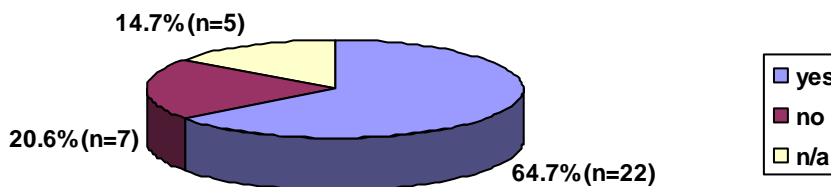
Three-quarters of the respondents who were familiar with *expert witness* criteria stated that their preparation for such a role was obtained from an attorney. Nearly one-quarter also indicated they had received training via a workshop, seminar or course(s). It is therefore safe to assume that such training was received in conjunction with preparation from an attorney in light of the fact that one full quarter of these same respondents indicated having received no training or preparation whatsoever. Those who indicated an “other” source of preparation (31.2%; n=10) cited such sources as:

- consulting with an experienced colleague, other professionals or other expert witnesses
- certification course for legal therapy counseling
- post-doctoral training (unspecified)

- independent reading
- clinical training in human sexuality
- international organizations (e.g. International Association for the Treatment of Sex Offenders)
- supervisors

Adequacy of Preparation

Question: Was the knowledge that you acquired adequate?



Nearly two-thirds of the respondents indicated that they had received adequate preparation to serve as witnesses while 20.6% stated the contrary. Comments provided to explain the absence or inadequacy of preparation included:

- too little time spent with attorney for preparation
- duration of seminar was insufficient
- minimal information provided by attorney (info provided not useful)
- no one can prepare an expert witness for the emotional impact of being questioned and having his or her positions attacked
- there was only one class in Forensic Sexology in the ABS program (not enough)
- the only requirement was to testify and be honest about his/her knowledge
- “stupid” attorney

It should also be noted that there were 34 respondents to this question instead of the 28 who had indicated having served as witnesses in sex-related cases. This increase in responses for this question may indicate that some respondents have testified in “other” types of cases, albeit not sex-related.

Preparedness as a Witness

Question: Do you currently feel prepared to serve as a witness in court?

44.1% (n=26) of the respondents indicated that they felt prepared to serve as a witness in court while 55.9% (n=33) stated that they felt unprepared. Reasons for feeling unprepared included:

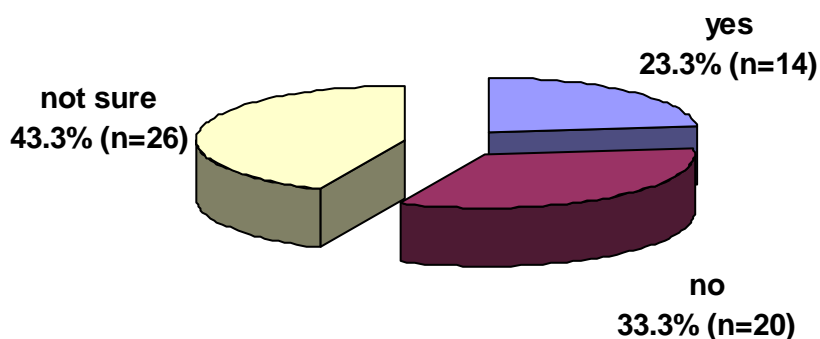
- minimal knowledge of the court system
- need for seminar or course
- absence of any training for such
- fear of the court system
- not knowing where to start or what to do in order to prepare
- unpleasant experience (not expecting to have reputation attacked); traumatizing experience
- insufficient experience as a witness
- fear of being called upon to testify
- lack of motivation for such high-stress situations or environments (courtroom)
- one course in Forensic Sexology is insufficient
- misplaced assumption that the lawyer would provide adequate preparation
- too few years’ experience as a practitioner to serve as a witness (inexperience)
- different skill set required in order to provide expert testimony and be subject to cross-examination

- no interest in serving as a witness
- field of specialty does not require participation in legal proceedings
- after reading all of the questions in the survey, no longer feel as prepared as first thought
- depends on the nature of the case and circumstances
- more training in forensics required
- lack of information
- no preparation has ever taken place
- not comfortable testifying (“no stomach for it”)
- retired and no longer see clients

Understanding of Testimonial Privilege with Respect to Confidentiality

Question: With respect to testimony, do you understand “testimonial privilege” as it relates to confidentiality issues between sexologists and their clients/patients?

Responses were divided as to whether respondents understood the notion of testimonial privilege as it pertains to issues of confidentiality.



There is evident confusion surrounding the notion of *testimonial privilege*. This result is noteworthy in light of the fact that most sexologists must adhere to a professional

code of ethics as prescribed by their respective professions, and most of these codes do include provisions dealing with matters of confidentiality between sexologist and client. It should however be noted that, generally speaking, codes of ethics do not address *testimonial privilege*, per se.

THE EVOLUTION OF EXPERT TESTIMONY IN THE COURTROOM

History

Peter Huber once wrote: “Never before have so many lawyers grown so wealthy peddling such ambitious reports of the science of things that aren’t so” (1995, 4). He was referring to the use of expert witnesses by lawyers and, in particular, the evolution that had occurred in the last century or so. One cannot help but be sympathetic to such a broad statement. Lawyers and expert witnesses appear to be everywhere. This has not always been the case. The trial, as we know it, whether it is criminal or civil in nature, has slowly evolved through the centuries. In order to better understand the present system, it is useful to look back at this evolving process. We must therefore look to England, the forefather of our legal system.

Medieval criminal courts used the ordeals and oaths in order to determine whether a person was guilty. The trial was held without any witnesses. It was the court that decided which ordeal test was appropriate for the crime. If the accused passed the said test, he was declared not guilty; however, if he failed, this was a sign of his guilt (Landsman 1985, 133). God played an important role in these trials. If you failed, it was due to God’s will. This system of using oaths and ordeals would endure until approximately 1215, at which time “trial by jury replaced in-court testing as the chief means of resolving disputes” (Landsman 1985, 134). From this point forward, the juries would be self-informed. We can credit King Henry II for this system. Problems with inheritances and land disputes led to the reorganization of the legal system in order to address such issues. This system would include juries (often called panels of *free and*

lawful men) made up of men from the neighborhood. Henry II also changed the procedures for criminal trials. The men who became jurors had skills, qualifications or experiences that would help them better decide which side should win. At that time, they were used primarily in trade disputes (Hand 1901). Therefore, most jurors were either merchants or members of a trade or guild. After hearing each side, they were to decide who should receive a favorable judgment, based on their own knowledge. They were the designated experts. This is contrary to the present situation where the experts testify before a jury. It should be noted that even the judges were laymen at that time.

The courts applied a second approach which was in use as early as the fourteenth century. Experts were sometimes called in to advise them if the courts deemed there was a lack of knowledge involved (Hand 1901). The most popular experts were doctors.

From Skilled Witnesses to Use of Expert Witnesses

During the fifteenth century, the jury, which had until this point been self-informing, was transformed into a jury that heard witnesses, including expert witnesses, and decided upon the facts of the case. “Through the end of the eighteenth century, witnesses of special skill, including physicians and engineers, were called by the court to present their opinions and conclusions to the jury” (Kaye, Bernstein, and Mnookin 2004, 332). Some judges placed more value on the testimony of *lay* witnesses than that of *expert* witnesses (Hand 1901). The jury decided if the opinions of the expert witness were credible. At that time, there was very little cross-examination of the *expert* witness. After all, the witness had been called by the court, and should therefore be considered reliable.

During the eighteenth century, this system changed. Lawyers had slowly begun to play a more active role. They began presenting evidence in court. Cases became much more adversarial, and lawyers now began to call their own witnesses who had special skills. Although these witnesses were called by one party, they were, for the most part, *non-partisan* (Kaye, Bernstein, and Mnookin 2004). This non-partisanship would be transformed and many *expert* witnesses would now become partisans and biased. With all these changes came the development and adoption of various rules of evidence, some of which are still in use today. According to some authors, the word *expert* did not appear until the nineteenth century. The word *expert* replaced the word *skilled* (Kaye, Bernstein, and Mnookin 2004).

All was not perfect. The lack of minimal cross-examination which had previously existed was now replaced by sharper cross-examination where the reputation and credibility of the witness was questioned. Doctors, who had enjoyed a fairly good relationship with lawyers (until now, that is), did not particularly like to have their competences challenged or doubted. Not only were they being cross-examined, but other doctors would be called by the opposing party, and the latter witnesses would often provide their opinion as to the competency of other *expert* witnesses. *Expert* witnesses were “attacked for routinely contradicting one another, accused of confusing rather than aiding juries, and lambasted for being ‘hired guns’ paid by, and thus, partial to one party or the other” (Kaye, Bernstein, and Mnookin 2004, 334).

One must remember that medical negligence lawsuits began appearing in various courts at that time. Doctors did not particularly appreciate such cases. The way doctors conducted their practice was largely influenced by what was happening in the courts.

This would have an impact on research and, to this day, still influences the way a sexologist or any health professional testifies as an expert in court. Landsman summarizes the changes in the health profession in the following manner:

Legal and public reaction to the spectacle of partisan expert clashes in court led to the most forward thinking medical journals to call for changes in the way medical knowledge was amassed as well as reported upon in court. Interestingly, it was not just lawyers who were blamed for the problems that had arisen but the techniques and tendencies of the medical profession as well. There were calls for greater circumspection by expert witnesses along with greater emphasis on experiment observation and treatment. (1995, 140)

Also, credentials became very important. Not only did they denote a certain status in society, but they also constituted the most important factor in the admissibility of expert testimony during the nineteenth century.

Science Meets Law

Scientific inquiry and legal inquiry seemed to be incompatible. Courts in England and the United States would struggle with this problem while trying to reasonably accommodate both disciplines. A review of the compromise adopted by the courts will be discussed in the following pages. One thing is certain, the courts have come to realize that when there is a scientific question that is at issue in a trial, scientists must be part of the process. An example of this dates back to 1554 in the *Buckley v. Rice Thomas* case heard in the Court of Common Pleas (in England) where Justice Saunders stated: “If matters arise in our laws which concern other sciences and faculties, we commonly call for the aid of that science or faculty which it concerns, which is an honorable and commendable thing. For thereby it appears that we do not despise all other sciences but our own, but we approve them and encourage them” (1554, 192). The Supreme Court

would emphasize this on more than one occasion during the twentieth century. This being said, this court, as well as others, would struggle with the proper criteria to use in the admission of scientific *expert* testimony. A 1923 decision, short on wording, would establish a standard that would last 70 years and create a great deal of controversy, not to mention much confusion.

Frye v. United States (1923)

In 1923, the Court of Appeals of the District of Columbia rendered a decision that is still applied today in certain states and that was used in federal courts for over 70 years. The main issue in this case was whether the court would permit an expert witness to testify for the accused as to the results of a systolic blood pressure test which was considered novel scientific evidence. This test was a precursor to the test we commonly refer to as a lie detector or polygraph. The expert's testimony was denied by the trial judge and this decision was affirmed by the Court of Appeals. The written judgment was less than two pages long. However, Justice Van Orsdel would see a new change in the admission of *expert* testimony with the following words:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs (*Frye* 1014).

Few people thought this decision would have a major impact on the admission of evidence. Experts, by way of consensus among the scientific community, would now decide what could be presented to a court. The words *scientific community* are used here

because of the *Frye* case which dealt with a scientific matter. Also, most of the cases where the *Frye* standard was followed or rejected involved scientific testimony from one or more experts. The experts would, in theory, determine what evidence would be considered reliable. Others hoped there would be a convergence between the legal and scientific outlooks (Huber 1991, 14).

In a 1980 article, a law professor named Paul Giannelli explained how the new standard was to work. Before being admitted, the scientific technique would go through stages of evolution. The first stage would be *experimental* in nature. This is where a technique would be scrutinized and tested by the scientific community related to the subject at hand. The next step would be to ensure that the technique was *demonstrable*. The technique would only be admissible in court if it received the approval of the said scientific community (Giannelli 1980, 1205). In other words, any technique could be rejected by a court if it was not accepted by the scientific community, even if it was an excellent technique.

One question often posed was: “What is a scientific community?” It often refers to such sciences as engineering or medicine where scientific communities exist and regularly scrutinize new techniques. In the case of sexology, as will shortly be discussed, the concept of a *scientific community* is not obvious, therefore placing this field at a clear disadvantage. Others thought that the general acceptance was too inflexible and rigid, and that it sometimes excluded evidence which was relevant (Leesfield and Sylvester 2000). One of the primary concerns with the *Frye* decision was the lack of guidance regarding the amount of consensus required and by whom (Jasanoff 1997, 62). This led to some inconsistency in the rulings. Giannelli argues that, although *Frye* had merit, it was

unworkable. He outlines other reasons for this thinking. For instance, it must be decided who must accept the procedure, what must be accepted, by what percentage, and what is the appropriate field in which to do so. An excellent point he makes is by indicating that some techniques do not belong to one “single academic discipline or professional field” (Giannelli 1980, 1208, 1211, 1250). Sexology certainly falls into this category.

What if a new technique were developed but the scientific community had not yet given its approval? A professional called to testify about this technique would not qualify as an *expert* witness. Perhaps this expert was able to disprove a prior accepted technique but had not had time to publish his theory so that it may be read and scrutinized by his peers. What if there existed only a few or even just one expert in the particular field? It would be rather difficult to establish a *scientific community* with so few experts. To further confound matters, few courts would explain the reasons behind their decisions, which inevitably led to some confusion in the rulings.

The Invasion of *Junk Science*

Around the time the *Federal Rules of Evidence* were adopted in 1975, some courts began to explain the rationale behind their decisions. These rules did not mention the *Frye* standard. Many states adopted these rules in various forms. Confusion persisted since the courts were divided as to the inclusion or exclusion of the *Frye* standard under the new rules. Peter Huber would chime in by stating that this period in American judicial history also marked the beginning of the *let-it-all-in* philosophy. It would mark, according to Huber, the invasion of *junk science* (1991). Giannelli had been prophetic about this issue. By having a judge defer scientific questions to an expert, it was possible

(in some cases) that expert testimony would be admissible based on the techniques of one sole expert (Giannelli 1980, 1250).

Notwithstanding the so-called invasion of *junk science* and the confusion regarding the *Frye* standard, the new *Federal Rules* would contribute to yet a new standard put forth by the Supreme Court which would affect, among many others, sexologists. This standard would revolutionize the world of *expert* witnesses and, at the same time, be scrutinized, criticized, welcomed, misunderstood, etc. The case in question was the infamous *Daubert* court case. Science and the law would be on a collision course and would meet head on in this case. Why were they on a collision course? One author explained this by stating that “scientific and technological progress ... have brought the institutions of science and technology into turbulent confrontations with the legal system...” (Jasanoff 1997, 1). Justice Alan G. Gless of Nebraska thinks that trial judges and scientists are very much alike since they are both fact finders. However, he adds this caveat: “The nature of legal fact finding and the nature of scientific fact finding do not present agreeable cohorts except that both involve the exercise of judgment in finding claims to be facts” (Gless 1995, 264). Indeed, science and the law do not share the same traditions and methodology. Almost poetically, Sheila Jasanoff compares science and the law in the following fashion: “[Science] seeks the truth, while the law does justice; science is descriptive, but the law is prescriptive; science emphasizes progress, whereas the law emphasizes process” (Jasanoff 1997, 7).

Perhaps one of the biggest differences between science and the law is the approach taken with respect to time. In law, the end of a case arrives when there is no longer any evidence to be presented. If there is further research to be done on the subject

of litigation, the Court cannot wait for further evidence.

According to David Caudill, there appears to be a stalemate. "... the jurisdiction of law is limited, and despite law's complex regulatory framework, law cannot control the scientific enterprise; likewise, despite a traditional deference to scientific knowledge, science does not control law." (1999, 550).

Changes Regarding Expert Witnesses

Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993)

This 1993 Supreme Court decision is considered a benchmark case as it pertains to *expert* witnesses, including sexologists. The *Daubert* case spawned hundreds of articles and is discussed in numerous books and publications. Most professional organizations and associations have, at one time or another, written about or discussed it. Scientists, philosophers, lawyers and others have commented on this important case.

The facts of the case may not pertain to sexology, but it is nevertheless important to summarize them. Doing so will help in the understanding of how the majority of the justices of the Court reached their decision as to the admission of *expert scientific* testimony. The case summary follows.

The parents of two children sued Merrell Dow Pharmaceuticals, Inc. because of their children's birth defects. It was alleged that the drug Bendectin, which the mother was taking during pregnancy, had caused the birth defects. An affidavit by the physician, Steven H. Lamm, was submitted by the drug company. The latter's attorneys sought a summary judgment. Dr. Lamm indicated that, after reviewing all the studies on the drug in question, he had found that it was not risky for a woman to take this drug during the

first three months of her pregnancy. The parents did not contest the finding of these studies, however, they answered with eight experts of their own who arrived at a different conclusion. These experts, relying on animal studies, indicated that Bendectin could be responsible for the birth defects.

After reviewing the experts' positions, the District Court granted a summary judgment to Merrell Dow. The court felt that the scientific evidence presented by the parents was not "sufficiently established to have general acceptance in the field to which it belongs" (*Daubert* 1989, 572). This decision was appealed and the United States Court of Appeals for the Ninth Circuit affirmed the trial court's decision. The Court of Appeals based its decision on the *Frye* standard. Therefore, a *scientific* technique or theory must be *generally accepted* by a scientific community relevant to the subject. Also, the scientific evidence advanced by the parents was "unpublished, not subjected to the normal peer review process and generated solely for use in litigation" (*Daubert* 1991, 1129-1131).

The Supreme Court decided to hear the case because of the inconsistency in the admissibility of scientific evidence by various courts. What would come out of the *Daubert* case is a new standard. The *Frye* standard and its different variations had now existed for 70 years. Since that time, new *Federal Rules of Evidence* had been adopted in 1975. U.S. Supreme Court Justice Blackmun rendered the majority opinion. He noted that *Rule 702* applied to *expert* witnesses. The wording of the rule was as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, expertise, training, or education, may testify thereto

in the form of an opinion or otherwise.

He noted that *Rule 702* did not mention *general acceptance*, which would therefore seem to eliminate the *Frye* standard. *Rule 702* thus supersedes *Frye*. Justice Blackmun states unequivocally “under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable” (*Daubert* 1993).

The word *scientific* in *Rule 702* “implies a grounding in the methods and procedures of science” and the word *knowledge* connotes more than subjective belief or unsupported speculation. This being said, there are “no certainties in science” (*Daubert* 1993). How does *scientific knowledge* qualify? Once more, Justice Blackmun sets the new directive.

... in order to qualify as “scientific knowledge,” an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation-*i.e.*, “good grounds,” based on what is known. In short, the requirement that an expert’s testimony pertain to “scientific knowledge establishes a standard of evidentiary reliability” (*Daubert* 1993).

The second component of the two-prong approach put forth by the Supreme Court is *relevance*.

The Supreme Court adopted what Heidi Li Feldman calls a “revised empiricism” approach (1995). In fact, Justice Blackmun explains that today’s scientific approach is to start off with a theory or hypothesis, and then test it in order to see if the said theory or hypothesis can be falsified. The Supreme Court indicates that it is influenced by the philosophers Karl Popper and Carl Hempel (*Daubert* 1993).

As for the procedure in admitting scientific evidence, the Supreme Court explains that from the start, a trial judge must look at *Federal Rule 104(a)* which states:

Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Thus, the trial judge must decide “whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue” (*Daubert* 1993).

A trial judge who, in essence, will act as an *evidentiary gatekeeper*, must use a flexible approach. The Supreme Court mentions four factors that should be taken into consideration, namely: “whether the theory or technique has been tested,” “whether the theory or technique has been subjected to peer review and publication,” “the known or potential rate of error,” and “general acceptance” by a scientific community. It should be noted that, according to the Supreme Court, these factors are not exhaustive.

Interestingly, in its comments on the second factor – the one pertaining to peer review and publication – the Supreme Court indicates that “publication is not *sine qua non* of admissibility; it does not necessarily correlate with reliability ... and in some instances well-grounded but innovative theories will not have been published...” This is followed by these comments: “The fact of publication (or lack thereof) in a peer reviewed journal will be relevant” (*Daubert* 1993). When dealing with the admissibility of *scientific* testimony, the trial judge should closely examine the methodology used, and not only the conclusions (*Daubert* 1993).

A trial judge should also be conscious of *Rule 403*. This specific rule allows the judge to exclude evidence, even if it is relevant, “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...” While Justice Blackmun felt confident that federal judges could make the

appropriate decisions relating to the proffered scientific evidence and its admissibility, Chief Justice Rehnquist was not of the same opinion. Judge Gless commented on this:

Judges, trial and appellate, generally are not from within the ranks of behavioral research scientists. They tend to have little formal, post-secondary, science education, behavioral or otherwise, beyond the introductory courses required by their undergraduate programs, except such as provided in statistical analysis as it relates to scientific research, unless they worked through doctoral programs in science before making the career switch to law. (Gless 1995, 262-263)

This concern has partially been addressed with the *Reference Manual on Scientific Evidence* published by the Federal Judicial Center. This manual serves to assist federal judges.

Should suspect evidence be admitted, the Supreme Court thought that it could be dealt with during the trial by using the adversarial system. “Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence” (*Daubert* 1993).

Reaction to the *Daubert* decision

One author described the reaction to the *Daubert* decision as being greeted by “quite a hullabaloo” (Beecher-Monas 1998, 55). Many comments were written regarding the new standard, and words such as “revolutionary” (Underwager and Wakefield 1993), the opening of “a veritable Pandora’s box”, “an odd choice for the model of good science” (O’Connor 1995, 276), “quite a maelstrom”, an “improvement” (Beecher-Monas, 1998), and “misunderstanding” (Schwartz 1997) were used. Some supported Chief Justice Rehnquist’s position and further added that it was “impossible for judges, or anyone else outside the scientific community, to rationally decide whether science is

being done” (Schwartz 1997, 155). Some of the criticism was aimed at the Supreme Court’s interpretation of what constitutes good science. Many recognized the influence of Karl Popper’s philosophy of falsification, which reiterated what Justice Blackmun stated in the *Daubert* decision. This being said, one law professor put forth the idea that the Supreme Court used an epistemological approach based on the philosopher John Locke’s writings in order to arrive at a certain number of factors (Imwinkelried 1994).

A great deal was written about these factors. Adina Schwartz wrote that only one factor mentioned by the Supreme Court is “plausible”, the one dealing with falsifiability. She also mentions that when dealing with *scientific* matters, conclusive falsification is not possible (1997). Randolph Jonakait does not agree with the Supreme Court, particularly with what he regards as one set of guidelines pertaining to science. In his opinion, there may be more than one way to achieve things and still maintain good science (Jonakait 1997). With respect to error rate, one must wonder what exactly the error rate needs to be in order to determine the admissibility or inadmissibility of scientific evidence. Others added: “the question is not whether error rates are important, but rather how to determine whether they are valid” (Giannelli and Imwinkelried 1999, 40). The same type of questioning applies to the “general acceptance” factor. If the trial judge identifies the relevant field dealing with the matter before him, he must then determine whether the theory or technique has been *generally accepted* by other members in this field. The Supreme Court did not specify the required percentage of members who would have to accept the theory or technique in order for it to be considered *generally accepted*, nor did it indicate how wide this field would have to be (Giannelli and Imwinkelried 1999).

There might also be problems with peer review. Peer review, publication and general acceptance are part of the empiricist philosophical approach, which became very popular at the end of the last century (Feldman 1995). Giannelli and Imwinkelried give an example by indicating that an *amici brief* filed by scientists Daryl E. Chubin, Edward J. Hackett, David Michael Ozonoff and Richard W. Chapp, and submitted in the *Daubert* case, “questioned the peer review system, even going so far as to argue that cross-examination may be as rigorous and reliable a method of truth-determination as peer review” (1999, 39). Randolph Jonakait, when looking at the peer review and publication factors, notes that articles appearing in a scientific publication could just have been read. What guarantees that the scientific methods utilized or described are the appropriate ones? It’s what follows the publication that matters (Junakait 1997). Some would undoubtedly argue that absence of response to a published article or book would indicate acceptance by the scientific community. That is not the case, according to Junakait, who argues that “the absence of reaction probably indicates instead that the work was seen as so trivial or obviously suspect that it would have been a waste of effort to challenge it or incorporate it in another’s research agenda” (1997, 334).

It should be noted that courts have added other factors to the ones stipulated by the Supreme Court in order to help the trial judge to determine if the *expert* testimony is admissible. *Daubert* was referred back to the 9th Circuit Court and Justice Kozinski added one more factor, that being whether experts are “proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying” (*Daubert* 1995, 1317).

More Questions Than Answers

In the *Daubert* case, the Supreme Court established the new standard for the admissibility of scientific evidence through one or more experts. The question dealt with the testimony of the experts pertaining to a specific drug. Science is divided into what some call *hard science* and *soft science*. *Daubert* dealt with *hard science*. Following the release of the decision, many were left wondering if the new standard applied to all sciences or only to *hard science*. If it only applied to *hard science*, what would happen to sciences such as psychology, sociology, anthropology, sexology, among others? Sexologists would, in all likelihood, fall into the *soft science* category. If the new *Daubert* standard did not apply to *soft science*, were judges to return to the *Frye* standard, which had been discarded by *Daubert*? Or, was *soft science* simply inadmissible under the *Daubert* standard? Yet again, could it fall under the categories of *technical or other specialized knowledge*, also mentioned in *Rule 702* of the *Federal Rules of Evidence*.

What About Sexology as a Science?

If the *Daubert* standard applied to *all* sciences, there would be complications. Would it be possible for a *soft science* expert to meet all the factors that a trial judge must consider before admitting *scientific evidence*? It quickly becomes obvious that there are particular challenges when dealing with psychologists, psychiatrists, and social workers. “Unfortunately, many psychologists themselves have little understanding of falsifiability. This may be even more true of psychiatrists and social workers, few of whom will understand this principle and how it changes the rules of the game” (Underwager and Wakefield 1993). It is very difficult to falsify Freudian concepts, and if the falsifiability

factor cannot be met, a trial judge may exclude the expert's testimony. According to Underwager and Wakefield, "whenever Freudian theory has been subjected to empirical tests, it has either failed or, at least been inconclusive as predictor of healing behavior" (1993). A sexologist listens to a patient or client and helps the latter deal with emotional issues. This cannot be tested or falsified. In sex therapy, we do not try to determine whether a technique is wrong. Quite the opposite usually applies. The sexologist tries to confirm that his technique actually works. The social sciences "rely predominantly on retrospective observational studies rather than controlled experimentation and do not necessarily meet the *Daubert* standard of falsifiability" (O'Connor 1995). A Nebraska judge recognizes that opinions by clinicians are not empirically based. What he writes could easily apply to clinical sexologists. He supports what Thomas H. Horner wrote by stating that "clinical opinions develop through a process called 'clinical inference'". In psychological practice, "clinical inference is neither an inductive nor deductive logical process. It is an intuitive process informed by accumulated experience" (Gless 1995, 274). Some authors express little sympathy for clinicians and call their opinions *educated guesses*, adding that their *clinical judgments* should not qualify as science, unless of course they are backed up by empirical studies (Faigman, Parker, and Saks 1994).

Immediately following the *Daubert* decision, it became evident that there was confusion relating to the *soft sciences*, particularly relating to human behavior and sexual matters. Some questioned what would happen to experts testifying about child sexual abuse, whether it be repressed or in the form of accommodation syndrome (Underwager and Wakefield 1993). According to Mark Brodin, many health professionals testify as to certain syndromes. He calls this "syndrome theory". Brodin says this should not be

allowed unless “in order to establish the clinical reliability of a syndrome identification, it would have to be shown first, that its particular symptoms are distinguishable from those found associated with other syndromes or disorders, and second, that different clinicians would agree on a diagnosis for the same patient” (Brodin 2004, 10). He also points out that many of these same health professionals rely on DSM-IV, which according to him, does not identify any syndromes.

General Electric Company, et al. v. Robert K. Joiner (1997) was the second case heard dealing with expert evidence by the Supreme Court. Briefly stated, the Supreme Court was asked to declare what type of standard an appellate court should use when looking at a trial court’s exclusion or admission of expert testimony. Its answer was that an appellate court should use the abuse of discretion standard.

The Standard Is Made Clear

The third case heard by the Supreme Court in the *expert witness trilogy* is *Kumho Tire Co. Ltd. et al. v. Carmichael et al.* (1999). This case involved a tire blowing up, whereby one passenger was killed and others were severely injured when the motor vehicle overturned. The plaintiffs alleged that the tire in question was defective. During the depositions, a tire failure analyst named Dennis Carlson, Jr., stated that he thought the accident was caused by a defective tire, and not by abuse. The defendants asked the District Court judge, by way of motion, to exclude this expert’s testimony and award a summary judgment. The basis of their motion was that the methodology used by the expert did not satisfy *Federal Rule 702*. The Court granted this motion and gave the defendants a summary judgment. The expert’s testimony was not heard. The Court

reiterated the trial judge's role as a gatekeeper as stipulated in the *Daubert* case. Also, it looked at the four factors previously mentioned and found that when applying said factors, the expert's methodology was unreliable.

The plaintiffs asked the Court for reconsideration of its decision, which it granted. The Court noted the fact that a flexible approach was to be used when dealing with these factors and that a judge could use other factors if these helped in the admissibility of the evidence. This being said, the Court affirmed its previous decision by stating that it still did not think that the evidence presented by the expert was reliable, and more specifically, its methodology. On appeal, the Eleventh Circuit Court reversed the District Court's decision, thereby excluding the evidence in question. The District Court had not correctly applied *Daubert* because the latter case dealt only with scientific evidence. Thus, the *Daubert* factors should not apply to Carlson's testimony, which was based on skill or experience. The Supreme Court decided to hear this case in order to clarify, once and for all, the confusion regarding *scientific, technical or other specialized* knowledge.

The Eleventh Circuit Court's decision was reversed by the Supreme Court, who agreed with the exclusion of Carlson's evidence. Justice Breyer rendered the majority decision and stated that *Daubert's* reliability requirement applied to *all expert* testimony. He further provided four reasons to justify his decision, which recognized that *Rule 702* does not distinguish between *scientific, technical, or other specialized* knowledge. *Daubert* only applied to *scientific knowledge* because that was the issue to be decided upon in that particular case. *Federal Rules of Evidence 702 and 703* allow an expert to give his opinion, which is a *latitude* that other witnesses do not have. This opinion must be reliable and be related to his experience and knowledge in his field. The Supreme

Court also added that it would be very difficult to administer the admissibility of evidence if there were different standards between scientific experts and other experts.

Relevancy was also still very important. Reliability and relevancy are critically important in order “to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field” (*Kumho Tire* 1999). It should be noted that, in the *Notes of the Advisory Committee on Proposed Rule Changes* in 2000, the subject of *opinion* relating to *Rule 702* was dealt with in the following manner: “Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts”. Therefore, an expert may testify without providing an opinion on the subject at hand.

While discussing the *Daubert* factors, Justice Breyer seemed to advance an even more flexible approach:

We also conclude that a trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is “flexible”, and *Daubert* 's list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination. (*Kumho Tire* 1999)

While there had been a certain confusion as to whether all four factors applied in cases where a trial judge was asked to admit scientific testimony (or in some cases, other types of testimony), the Supreme Court addressed this situation by categorically stating that *not* all four factors apply in all cases, even when dealing with scientific evidence (*Kumho*

Tire 1999). It offered the following example: “It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist” (*Kumho Tire* 1999).

Once the *Kumho* decision came out, it clarified certain aspects related to admissibility. What was its impact on sexologists who may become expert witnesses relating to their *scientific, technical, or specialized* knowledge? It certainly became clearer that not all four *Daubert* factors would have to be met. Also, many sexologists could now testify based on their *specialized* knowledge, instead of their *scientific* knowledge. The Courts would have to interpret *Rules 702 and 703* in a broad manner in light of the amended *Rule 702*, which now stated :

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by *knowledge, skill, experience, training, or education*, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 703. Bases of Opinion Testimony by Experts

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 (US Code Title 28).

The above-noted advisory committee added these words when commentating on the revised *Rule 702* which is of particular interest to sexologists:

The fields of knowledge which may be drawn upon are not limited merely to the “scientific” and “technical” but extend to all “specialized” knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by “knowledge, skill, experience, training or education.” Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g. physicians, physicists, and architects, but also the large group sometimes called “skilled” witnesses, such as bankers or landowners testifying to land values. (Advisory Committee on Proposed Rule Changes 2000)

Although the Committee did not specify sexologists, per se, professionals would nonetheless be able to testify as experts if they could convince trial judges that their evidence was reliable and relevant to the cases at hand. Also, it is very important that trial judges recognize that sexologists are part of a recognized field which involves a large professional community, and that this community agrees with the opinions of the testifying sexologists, whether it is about theories or techniques.

It is important to note that the *Daubert*, *Joiner*, and *Kumho Tire* decisions apply to cases heard by federal courts and are not binding to state courts. This means that state courts may choose to use the *Daubert* standard or continue to apply the *Frye* test, which many have been using for over eighty years. Other states use a derivative of *Daubert* and/or *Frye* or their own customized standard. The following table outlines which states are currently applying these various standards. There is, however, a caveat to consider: these standards may evolve or change from time to time as future court decisions are eventually put forth.

Application of *Daubert*

Adopted <i>Daubert</i>	Willing to consider <i>Daubert</i>	Rejected <i>Daubert</i>	Alternative state standard	Modified <i>Daubert</i> (combination <i>Frye/Daubert</i>)
Alaska Arkansas Connecticut Delaware Georgia Idaho Indiana Iowa Kentucky Louisiana Maine Massachusetts Mississippi Montana Nebraska New Hampshire North Carolina Ohio Oklahoma Oregon Rhode Island South Dakota Texas Vermont West Virginia Wyoming	Illinois Minnesota New Jersey Washington	Arizona California Florida Kansas Maryland Michigan Missouri New York North Dakota Pennsylvania	Colorado District of Columbia Hawaii New Mexico South Carolina Utah Wisconsin	Alabama Nevada Tennessee Virginia

(Huron Consulting Group 2004)

Standard Used in Florida State Courts

Over forty states have adopted *Rules of Evidence* similar to the *Federal Rules of Evidence*. For instance, the State of Florida also enacted its new rules of evidence in 1975. The wording of *Rule 90.702* is almost identical to that of *Federal Rule 702* (which was slightly amended in 2000). *Rule 90.702* reads as follows:

Florida Rule 90.702

If *scientific, technical, or other specialized knowledge* will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by *knowledge, skill, experience, training, or education* may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

After the *Daubert* decision was handed down, it did not take long for Florida courts to decide whether they would apply or reject it. In *Flanagan v. State* (1993), *Daubert* along with its relevancy and reliability standard were rejected, and *Frye* was confirmed as the standard to be used in Florida state courts. In other words, Florida's position is opposite to the one adopted by the Supreme Court, which stated that *Rule 702* superseded *Frye*. In Florida, *Rule 90.702* does not exclude *Frye*. The Supreme Court of Florida once more reiterated this position in 1997 in the case of *Brim v. State* by stating: "We start by emphasizing again that the *Frye* test utilized in Florida to guarantee the reliability of new or novel scientific evidence ... Despite the federal adoption of a more lenient standard in *Daubert*...we have maintained the higher standard of reliability as dictated by *Frye*" (271-272). Some would undoubtedly argue that the *Daubert* test has a higher standard since it has four factors that must be taken into consideration, although they are of a flexible nature.

Attorney Stephen Mahle argues that although Florida has chosen to go with the *Frye* test, the state courts are "applying *Frye* in ways that make Florida's *Frye* standard look very much like the federal *Daubert* standard." The basis of his argument is the use of the four *Daubert* factors by the state courts (Mahle 2006). In 1995, the Supreme Court of Florida described the procedure to be followed in order to admit scientific evidence. The case in question was *Ramirez v. State* (1995).

First, the trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact at issue.

Second, the trial judge must decide whether the expert's testimony is based on a scientific principle or discovery that is “sufficiently established to have gained general acceptance in the particular field in which it belongs.”

[Third] ... is for the trial judge to determine whether a particular witness is qualified as an expert to present opinion testimony on the subject at issue.

... Fourth, the judge may then allow the expert to render an opinion on the subject of his or her expertise, and then it is up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject. (*Ramirez* 1995, 1167)

Therefore, a sexologist who is called upon or invited to testify in Florida should be prepared to deal with different standards of admissibility regarding scientific evidence. If testifying in a Federal Court, the trial judge will be using the factors enunciated by the Supreme Court in *Daubert*. If testifying in a Florida state court, *Frye* will be applied by the trial judge. Therefore, the test used will be that of *general standard*, as previously discussed. Particularly important is what the Supreme Court of Florida stated in the *Brim* case regarding this test. On page 272, the Court wrote: “Of course, the trial courts, in determining the general acceptance issue, must consider the quality, as well as the quantity of the evidence supporting or opposing a new scientific technique” (1997).

The results of the formerly discussed survey indicate that the vast majority of sexologists who participated had previously testified in a state court. It is very important for any sexologist testifying in said state court to know what standard will be used in order to better prepare himself.

Also, Mahle reminds any potential expert of the three steps to the admissibility of expert testimony in Florida by a trial judge: “Determine if the expert is qualified to offer the opinion, determine if the testimony is relevant, and determine whether the testimony is reliable” (Mahle 2006). A fourth step is the admissibility of testimony.

Of course, what complicates matters even more is whether sexology is deemed a true science or not. It certainly seems at once to be a *hard science* and a *soft science*. If this is truly the case, the *Daubert* standard applies at the federal level and in the state courts where *Daubert* is followed. Otherwise, *Frye* is used wherever state courts have confirmed this as being the test relating to the admissibility of scientific evidence.

Sexology Defined as a Science

The *Oxford English Dictionary* provides the following definition for the word *sexology*: “the scientific study of sex and of the relations between the sexes”. It also describes the history of this word, indicating that it was first officially adopted into the English language in 1902 based on W.H. Walling’s use of it in a publication title. Therefore, there seems to be little doubt that sexology is indeed a science. Sex, and particularly sexual reproduction, has been studied for centuries beginning with the observation of animals. During the seventeenth century, the anatomy of human beings was also being studied. In the nineteenth century, doctors were responsible for the field of sexology and used biological concepts to explain various perversions. The person responsible for advancing the idea of a “sexual science” (*sexualwissenschaft*) is Iwan Bloch. Bloch was very interested in civilization and came up with this concept at the beginning of the twentieth century. He wrote about the history of civilization and about love in one’s life as well as in society, something he referred to as the *science of mankind*. *Science of mankind* was a generalized term; in other words, it involved other sciences such as anthropology, biology, ethnology, psychology, and philosophy. It also included the history of literature and, as previously mentioned, the history of civilization

(Bloch 1908). His concept discouraged the use of only one discipline as the dominant one. All approaches had to be multidisciplinary. Sexology had always been identified as a branch of other sciences. For instance, in the nineteenth century, when doctors appropriated themselves with the study of sex, and anything associated with it, this was considered a part of medicine. The beginning of the twentieth century marked the forefront of scientific sex research. Bloch was not alone. Others, such as Magnus Hirschfeld, Havelock Ellis, and Sigmund Freud contributed to the field. The latter's contribution to the field of sexology is immeasurable. This psychiatrist's use of psychoanalysis in the treatment of patients with various sexual ailments had a major impact in North America, and many of his theories and techniques were adopted and are still being used by many sexologists to this day. Magnus Hirschfeld thought it important to conduct scientific study of homosexuality. Truth be told, he actually served as an expert witness in numerous sex trials (Kinsey Institute 2006).

In addition, Richard Krafft-Ebing also acted as a forensic *expert* witness in Vienna. He agreed with Bloch that the study of sexuality as a science was extremely important. In 1908, he identified research tools that could scientifically help in the study of sexuality.

... all tools and methods of the natural sciences, from the measuring tape to scales, from the knife to the microscope to chemical analysis; "psychoanalytic exploration" by means of an extensive questionnaire; autobiography and biography; statistical studies; historical study; ethnographic studies; and philological studies. (Cutler n.d.)

A journal of sexology, the first of its kind, was published. Books were also published and conferences took place where those interested in studying the subject participated. This fact is an important one when the *Daubert* and *Frye* standards come

into play as to whether a sexologist expert will be able to testify. We will recall that *Frye*, with its *general acceptance* standard, stated in no uncertain terms that a theory or technique must be accepted by a scientific community related to the area of testimony. *Daubert* kept this standard and added others, one of which is the peer review and publication. One could argue that with the publication of the first journal of sexology, peer review would follow. Also, with the advent of such a journal would come a scientific community. In Berlin, the Institute of Sexual Science was established.

Prior to World War II, most of the research relating to sexuality was taking place in Europe, particularly in Germany. Unfortunately, most of the records and the Institute itself were destroyed by the Nazis. At this time, the research on the subject shifted to the United States. It should be noted that after World War I, people with Ph.D.s slowly began replacing medical doctors in the research field. This would be important since these learned people were trained in research methodology and they wanted to publish their research studies and results in journals that could be read by their peers (Bullough 1994). Some of these include: *Annual Review of Sex Research*, *Archives of Sexual Behavior*, *Canadian Journal of Human Sexuality*, *Culture, Health & Sexuality*, *Current Sexual Health Reports*, *International Journal of Transgenderism*, *Journal of Homosexuality*, *Journal of Lesbian Studies*, *Journal of Psychology & Human Sexuality*, *Journal of Sex and Marital Therapy*, *Journal of Sex Research*, *Journal of Sexual Medicine*, *Journal of the History of Sexuality*, *The Electronic Journal of Human Sexuality*. The study of sexuality was truly multidisciplinary, including but not limiting itself to such fields as biology, anthropology, history, sociology, biology, law, nursing, etc. Bloch's dream was eventually coming true.

The one researcher who proved that it was possible to use science in order to analyze the sexual behavior of humans was Alfred Kinsey (Kinsey 1948, 1953). Vern Bullough describes the importance of his work by writing that it is "... most significant because of his attempt to treat the study of sex as a scientific discipline, compiling and examining the data and drawing conclusions from them without moralizing" (Bullough 1994, 173).

Masters and Johnson further added evidence that the study of sexuality is indeed a science. They studied the physiological aspect of the sex act and identified the phases of the sexual response cycle – excitement, plateau, orgasm, and resolution. In addition, Masters and Johnson created a new profession, that of the sex therapist. In other words, it created a new expert. It gave the sexologist greater credibility in society as well as in the courts. No longer was the psychoanalytical element controlled by psychiatrists alone. Helen Singer Kaplan, a psychiatrist, may have argued otherwise. She preferred the *psychosexual therapy* method (Kaplan 1974).

It seems quite clear that the study of sexuality is scientific in nature. This being said, how is sexual science viewed today? Professor Paul Abramson writes:

I define sexual science as the characterization and explanation of human sexual behavior. Characterization requires pursuit of valid and reliable data on human sexual functioning, while explanation mandates the foundation and empirical validation of new theories. Thus, the intent of sexual science is to obtain careful observations (or measurements) of sexual phenomena, which in turn, are expounded in a theoretical structure. Predictions, anew are deduced from these theories, which once again are measured against observations of sexual behavior. Finally, progress in sexual science is facilitated by the inflating database and the continually reformulated theories. (1990, 152)

In other words, Abramson proposes the use of standard scientific research methods but applied to sexuality theories/hypotheses. Donald L. Mosher agrees with this and states

that, even though those studying sexuality come from diverse disciplines, they apply “scientific methods and theories ... in a manner similar to other recognized scientists” (1989, 2). Although Mosher seems to embrace empirical studies, he does admit that not all questions about sexuality can be answered with scientific methods. This is important for a sexologist who wishes to testify based on experience. Mosher also adds that it is unfortunate that sexual science is so invisible. Perhaps it is because there is little research being done by tenured professors (Abramson 1990). Or perhaps, it is because there are not enough “better trained sexual scientists” (Mosher 1989). Mosher investigated this phenomenon and concluded, in 1989, that only about 10% out of over a thousand members of the Society for the Scientific Study of Sex published research and that the “median publication rate is one.” The same researchers were publishing most of the research material (Mosher 1989, 3).

There are reasons why sexology is not as respected as other sciences. When dealing with sexology, emotional responses often play an important role, thus affecting how this scientific area is perceived. Abramson is not kind when referring to the past scientific study of sexuality by adding that:

Sexual science has a dubious research record. Although exceptions certainly exist, the sexuality literature is replete with vague questions (and questionnaires) applied to captive (i.e., non-random, non-representative, etc.) populations, made up of students in introductory psychology or human sexuality classes. Furthermore, the publication of such research has obviously not strengthened the recognition nor status of sexual science. (Abramson 1990, 151)

What makes it difficult is that some things are very difficult to measure. How does one measure guilt or sexual attraction?

A sexologist reading this might think that it would be very difficult to be accepted as an expert witness, especially if he had not done any empirical research and had

basically only worked in a clinical setting. One must remember that there are more sexual clinicians than sexual researchers. Scientific sexual research does not “demean clinical services related to human sexuality, nor is it to devalue education in sexuality; instead, it is to advance the foundations of education and clinical services in sexuality” (Mosher 1989, 10). Thanks to the *Kumho Tire* decision, it is much easier to testify based on experience. One has to remember that the last thirty years have seen the creation of many new professional organizations that are comprised of many sexologists. This being said, Vern Bullough wrote, in 1994, that he saw a problem with sexologist certification. He believed that associations such as the American Association of Sexuality Educators, Counselors and Therapists (AASECT) would fail when trying to impose their own certification upon sexologists because most professionals are already certified by their own governing bodies. If true, this could be a problem for a sexologist wishing to be recognized as an *expert* witness (Bullough 1994). Bullough seemed to be wrong about this. Although not all sexologists are certified by sexuality-related organizations, AASECT has hundreds of members who are already or will soon be certified. In addition, as of November 2006, the American Board of Sexology (ABS) had over 1600 certified members. As well, the American College of Sexologists (ACS) also has many certified members. These are only three examples attesting to the professional status of sexologists. In the past, there were no graduate schools offering a Ph.D. in sexology, which left a sexologist at a certain disadvantage when compared with a psychologist who had received a Ph.D. in clinical psychology. Trial judges have allowed psychologists to testify as experts for many years. However, times have changed, and sexologists are now rightfully being recognized for their academic achievements and their knowledge

pertaining to sexual matters. One may receive a Ph.D. in Clinical Sexology from the American Academy of Clinical Sexologists or a Ph.D. in Human Sexuality, one of many degrees relating to sexuality, offered by the Institute for the Advanced Study of Human Sexuality. Dissertations relating to all aspects of human sexuality, as well as the field sexologists, are part of the requirements of these programs. Thus, a great deal of scholarly research is now available.

According to the ABS website, there are now Diplomates in twenty-six countries. “Approximately 98% hold doctoral degrees – including Ph.D.s, M.D.s, Ed.D.s, Psy.D.s and D.S.W.s, as well as others”. Most of AASECT, ABS and ACS’s members are not researchers. There are nonetheless academies and many societies which include many researchers. Among them are the International Academy of Sex Research (IASR) and the Society for the Scientific Study of Sex (SSSS).

The Sexologist as a *Lay Witness*

A sexologist who testifies in court does not always do so as an expert. If such is the case, he testifies as a *lay* witness. Basically, any witness who does not testify as an *expert* testifies as a *lay* witness. This is defined in the following manner in the *Federal Rules of Evidence*:

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of *Rule 702*.

It should be noted that Florida has a similar rule (*Rule 90.701*) in the *Florida Evidence Code*.

When might a sexologist then be called as a *lay* witness instead of an *expert* witness? There are many types of cases where such a professional may be called to testify; for instance, if one of the sexologist's patients or clients is going through a divorce and the spouse would like to know what was discussed during therapeutic sessions; or, if one parent wishes to seek custody of a child and wishes to prove in court that the sexologist's patient or client is not fit to have custody. A patient or client may have been sexually harassed at work causing serious implications in his sex life. If there is a lawsuit against the person accused of harassment, the patient or client may want the sexologist to testify as to what was said during the sessions. A sexologist who testifies as a *lay* witness may do so voluntarily, but more often than not, does so because he is legally obligated to testify at a deposition and/or a trial. In such cases, one often receives a subpoena. This is usually a delicate situation since it involves confidential matters.

As was the case with *expert* witnesses, there have also been major changes regarding what is admissible as evidence and what can be excluded. Such changes have occurred recently and concern anyone involved in some form of psychotherapy or other. These changes even affect various counselors. Therefore, admissibility of evidence is of particular interest to sexologists. As was the case with *expert* witnesses, we will first look at the federal courts, followed by state courts. It will not surprise the reader to learn that standards may vary from one to the other.

Matters of Confidentiality

Before discussing what the Supreme Court had to say on the matter of confidentiality, it would be wise to explain the difference between the concepts of privacy and confidentiality. Privacy may simply refer to something that a person owns. For instance, it may be information whereas in the case of confidentiality, there exists a level of trust between the person who shares something with another. Thus, there are two or more people involved in a confidential matter. It should also be understood that the person who shares the information remains the owner of this information, even though it is shared. In other words, a patient/client shares private information with a sexologist and trusts that the sexologist will keep this information confidential. This is very important to the patient/client since the information disclosed is often something that would not be related to anyone else and would remain forever private. Some authors describe the type of information discussed between the sexologist (although they were referring to psychotherapists) as being “sensitive, harmful, or embarrassing” (Winslade and Ross 1985, 595). Winslade and Ross further state: “Confidentiality flows not simply from the character of the information but from the context of the disclosure and from the nature of the relationship between the discloser and the recipient of the information” (1985, 595). One clearly sees how there is a dilemma when a sexologist is called to testify about something that he has been told in confidence by a client/patient. We live in a legal world where the law is always trying to get to the truth. This is done by the court hearing all the evidence that is available and admissible. Our judicial system believes that “... it is fundamental to our system of justice that *no person has the right to withhold any evidence from a court*” (Mosher 1999). On the other hand, a client/patient trusts the

sexologist not to divulge such evidence.

As an exception to the above-noted principle, privileges were created. Kathleen Cerveny and Marian Kent, quoting from Wright and Graham's *Federal and Procedure Guide*, explain the definition of privilege: "A testimonial privilege is a "rule that gives a person a right to refuse to disclose information to a tribunal that would otherwise be entitled to demand and make use of the information in performing its assigned function" (1984, 793). Therefore, their right to withhold information does exist. In the past, the *common law*, which was inherited by the United States from England, very rarely granted privileges. If not done by the courts, the states would have to grant privileges. They did so for certain categories of people. For instance, a privilege was created pertaining to conversations between spouses. The most noted one would be applied to discussions held between an attorney and his client. Two types of privileges were created either by legislation or by the courts. A *conditional privilege* is one based on a *balancing test* and is decided on a case-by-case basis. In a balancing test, the court weighs the interests of the person claiming the privilege against the interests of society in absence of such a privilege. The other type of privilege is *absolute*, which means it is automatically applied. Why do such privileges exist? It is "... because a greater value is placed on the particular relationship which is protected by the privilege" (Mosher 1999). The sanctity of a confidential relationship is thus recognized. It should however be noted that privileges are not created for all types of confidential relationships.

The first testimonial privilege for a physician-patient relationship came to be in 1828 when the State of New York adopted a statute to that effect (Gellman 1984). This type of privilege was not created by *common law* because the courts did not feel the need

to have one. Most of what was said by a patient to a doctor could be repeated in court given that it usually concerned ailments. The same didn't hold true for psychiatrists, although it took much longer to recognize a privilege. The first time the psychiatrist-patient privilege was recognized in court was in 1952 in the case of *Binder v. Ruvell* (1952). The first psychiatrist-patient privilege created by a state was in Connecticut in 1962 (Goldstein and Katz 1962).

Historically speaking, during the 1950s and 1960s, psychiatrists were those primarily involved in psychotherapy. Nowadays, not only are psychotherapists practicing in this field, but also marriage and family therapists, social workers, psychologists, counselors, and, of course, sexologists. In the 1950s, the type of therapy applied, was, for the most part, psychoanalytical. Although this approach is still being used today, there are many more techniques utilized by differently trained people. Until Masters and Johnson, there were no sex therapists, per se. With changes in psychotherapy came the creation of various privileges in different states. Call it adapting to a changing society.

The Supreme Court Finally Recognizes the Confidentiality Privilege

Before proceeding with the states' privileges, let's examine the federal level. No privilege existed for psychotherapists at the federal level, that is until 1996, when a landmark case brought about change. The case in question was *Jaffee v. Redmond* (1996). The question the Supreme Court was asked to decide upon was whether it was appropriate for federal courts to recognize a psychotherapist-client privilege under *Rule 501* of the *Federal Rules of Evidence*. Here is the Rule discussed by the Supreme Court:

Rule 501

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Prior to the adoption of the *Federal Rules of Evidence* in 1975, it was recommended by the Rules Advisory Committee that a psychotherapist-patient privilege be created.

Congress categorically rejected this proposition of a specific privilege, opting instead for a general privilege rule which basically gave federal courts the right to recognize a privilege. Congress's reasoning was that it was better to have a flexible approach than a rigid one. Therefore, the standard to be used would be the balancing test and it was to be decided on a case-by-case basis by federal trial judges *in the light of reason and experience*.

Briefly, here are the facts of the case. A police officer killed a man while on patrol. After the shooting incident, the police officer sought and received extensive counseling (over fifty sessions) from a licensed clinical social worker. The social worker was licensed by the State of Illinois and had over 12,000 hours of psychotherapy experience. The estate of the deceased sued because it believed the police officer had violated the deceased's constitutional rights by using what they alleged to be excessive force. The estate of the deceased wanted to have access to the social worker's notes; she claimed through her lawyer, however, the existence of a psychotherapist-patient privilege and refused to give the opposing party her notes during the depositions and the trial. At trial, the judge told the jury that he could find no legal justification for her refusal to

provide the other party with her notes and he advised the members of the jury that they could consider the notes to be unfavorable to the police officer. The jury awarded the estate of the deceased \$545,000.00. The Court of Appeals for the Seventh Circuit (*Jaffee* 1995) reversed this decision and sent the case back for a new trial. Of note, it recognized the right to the psychotherapist-patient privilege. The reasoning behind this decision was based on the type of relationship that existed. The Court of Appeals resolved that a psychotherapist and his patient should be able to communicate freely. It also added that this privilege, which applied to psychiatrists and psychologists, should also be extended to social workers (*Jaffee* 1995). Justice Stevens rendered the opinion for the majority of the Supreme Court. The Supreme Court acknowledged that there did not seem to be any uniformity amongst the various appeals courts. It reviewed *Rule 501* of the *Federal Rules of Evidence* and considered the possibility of granting a psychotherapist-patient privilege. It did make note that some form of privilege existed in all fifty states, as well as the District of Columbia. Thus, some uniformity was evident in the state courts. The absence of such privilege in the federal courts could lead to some confusion. For instance, a party might move a case from state court to federal court simply in order to force a psychotherapist to divulge confidential information.

The Supreme Court recognized the type of relationship that exists between a psychotherapist and a patient:

Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. (*Jaffee* 1996)

It also explained the importance of having such a privilege and what would happen if none existed.

The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance. ... If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. (*Jaffee 1996*)

Justice Stevens noted that social workers “provide a significant amount of mental health treatment” and they are often the ones who help the poor who cannot afford to pay psychologists and psychiatrists. The Court was less interested in the licensed social worker’s credentials than with what she did to help people. The word *licensed* was not defined. The Supreme Court decided on the creation of an absolute or unconditional privilege for licensed psychologists, licensed psychiatrists, and licensed social workers. However, it did apply certain limitations to this privilege. One important exception to the privilege given to psychotherapists is the one mentioned in footnote 19 of the Supreme Court’s opinion. It stated that the exception would exist “if it is the only means to avert a serious threat or harm to the patient or others” (*Jaffee 1996*).

This case generated a great deal of interest. Many *amicus curiae* briefs were submitted to the Supreme Court for its perusal. Here is a sample of some of the professional associations who did so: the National Association of Social Workers, the American Counseling Association and the American Psychoanalytic Association.

Words such as “powerful decision” (Mosher 1999), “practical” and “symbolic”, as well as “striking” (Nelken 2000) were used to describe this decision. With this important case, in order for communication to be protected under the privilege in federal courts, it

must be confidential, communicated to a licensed psychologist, psychiatrist or social worker, and finally, it must be communicated in the course of a diagnosis or treatment (Nelken 2000).

As with the *Daubert* case, the *Jaffee v. Redmond* case received a great deal of criticism and left some questions unanswered. One author was upfront and stated clearly that there should be no privilege for psychotherapists who make use of behavioral therapy “[...] since they explicitly disavow the importance of the unconscious, childhood experience, and uncovering of lost memories” (Mosher 1999). Another author asked how far the privilege extended and explained that the term *psychotherapy* is unclear as it relates to privilege. This same author suggests that perhaps the privilege should extend to anyone who “perform[s] psychotherapy, irrespective of professional affiliation” (Archer 1997, 361). The Supreme Court did not clearly define the parameters and requirements of the privilege which meant that the lower (federal) courts would have to define these (Poulin 1998). The reason for this lies in the fact that the privilege created was of a *common law* nature (created by a court), and not a statutory one. Obviously, by letting the lower courts decide if other professionals should be included, the privilege could be extended to them. This, according to Paul Mosher, could see “an expansion of the privilege to unacceptable bounds” (1999). For example, one federal court has already extended the privilege to a rape crisis counselor (*United States v. Lowe* 1996). In that case, the counselor was not licensed, but had received thirty hours of training. On the other hand, a privilege was not extended to Alcoholics Anonymous volunteers who worked a hotline given that there was no psychotherapy involved, they were not

counselors, and they were not contacted for counseling reasons (*United States v. Schwensow* 1996).

Where Do Sexologists Fit in?

The *Jaffee v. Redmond* case created somewhat of a grey zone for sexologists at the *federal court* level. There is no question that a sexologist, who is a licensed psychologist, psychiatrist or social worker is covered under the privilege. That said, what about other sexologists who do not fall under one of these designations? Let's say a sexologist is a nurse, a counselor, an unlicensed social worker, or even an educator, and talks to a patient or client about private issues. The patient or client trusts this sexologist and communicates things of a very personal nature expecting that all will remain confidential. Until federal courts decide that the privilege extends to these professionals, there is no guarantee that the information shared with them will remain confidential. For a federal court to be able to decide whether the privilege could apply, some form of evidence of psychotherapy would need to exist. Only then might the privilege be applied. If so, the privilege might apply. This being said, what if a sex counselor or therapist does not use psychotherapy? Is there any way that such a practitioner might be covered by the privilege? Many have ideas about some of these questions. As an example, Anne Bowen Poulin believes that "the privilege should not apply ... when the course of therapy is carried out by a non-professional who is not conducting the therapy as part of a supervised training program, whether or not the non-professional is supervised by a professional" (1998, 1362). Whether a sexologist feels that the privilege applies or not, he should nevertheless discuss the situation with his attorney before turning over any session notes.

There is no doubt that by extending the privilege to all sexologists, there would be a benefit for society as a whole. The benefits of sexual health, which is part of mental and physical health, outweigh any evidentiary issue.

The different states predated Congress and the federal courts with respect to privilege. As stated in the *Jaffee* case, all fifty states have recognized, through statutes, some sort of privilege. This being said, it should be noted that there is no uniformity amongst the fifty states as to their definition of the type of professional that falls under the category of psychotherapist. For instance, some states include licensed social workers because of their higher level of education, but not social workers. Other states recognize rape counselors and pastoral counselors, and even substance abuse counselors (Archer 1997, 364-366).

Including descriptions of all the privileges from all the states, as well as the District of Columbia would be far too lengthy. This dissertation will concentrate on the privileges available in the State of Florida. Privileges for other states can be found in *Appendix C*.

Who Is Covered by Florida's Privileges?

Florida has many privileges and continues to add others as warranted. For instance, the latest addition is a privilege for nurse practitioners. Before a sexologist may be called to testify in a state court in Florida, the trial judge must decide whether there is a privilege for that particular sexologist. What follows is found under *Title VII Evidence*, and more specifically, in Chapter 90, which is the *Evidence Code*.

90.105 Preliminary questions.

(1) Except as provided in subsection (2), the court shall determine preliminary questions concerning the qualification of a person to be a witness, the existence of a *privilege*, or the admissibility of evidence.

(2) When the relevancy of evidence depends upon the existence of a preliminary fact, the court shall admit the proffered evidence when there is prima facie evidence sufficient to support a finding of the preliminary fact. If prima facie evidence is not introduced to support a finding of the preliminary fact, the court may admit the proffered evidence subject to the subsequent introduction of prima facie evidence of the preliminary fact.

(3) Hearings on the admissibility of confessions shall be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be similarly conducted when the interests of justice require or when an accused is a witness, if he or she so requests.

If a sexologist is not covered by a privilege, the only evidence that will be admitted is *relevant* evidence. Therefore, if the sexologist's notes are not *relevant* to the case at hand, they will not be admissible.

90.401 Definition of relevant evidence.

Relevant evidence is evidence tending to prove or disprove a material fact.

Here is the pertinent information concerning privileges and who they apply to. Note that all witnesses must testify but privileges are an exception to this rule. Additionally, the State of Florida is very thorough by adding who can waive a privilege.

90.501 Privileges recognized only as provided.

Except as otherwise provided by this chapter, any other statute, or the Constitution of the United States or of the State of Florida, no person in a legal proceeding has a privilege to:

- (1) Refuse to be a witness.
- (2) Refuse to disclose any matter.
- (3) Refuse to produce any object or writing.
- (4) Prevent another from being a witness, from disclosing any matter, or from producing any object or writing.

90.403 Exclusion on grounds of prejudice or confusion.

Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible.

90.503 Psychotherapist-patient privilege.--

(1) For purposes of this section:

(a) A "psychotherapist" is:

1. A person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, who is engaged in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction;

2. A person licensed or certified as a psychologist under the laws of any state or nation, who is engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction;

3. A person licensed or certified as a clinical social worker, marriage and family therapist, or mental health counselor under the laws of this state, who is engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction;

4. Treatment personnel of facilities licensed by the state pursuant to chapter 394, chapter 395, or chapter 397, of facilities designated by the Department of Children and Family Services pursuant to chapter 394 as treatment facilities, or of facilities defined as community mental health centers pursuant to s. 394.907(1), who are engaged primarily in the diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction; or

5. An advanced registered nurse practitioner certified under s. 464.012, whose primary scope of practice is the diagnosis or treatment of mental or emotional conditions, including chemical abuse, and limited only to actions performed in accordance with part I of chapter 464.

(b) A "patient" is a person who consults, or is interviewed by, a psychotherapist for purposes of diagnosis or treatment of a mental or emotional condition, including alcoholism and other drug addiction.

(c) A communication between psychotherapist and patient is "confidential" if it is not intended to be disclosed to third persons other than:

1. Those persons present to further the interest of the patient in the consultation, examination, or interview.
2. Those persons necessary for the transmission of the communication.
3. Those persons who are participating in the diagnosis and treatment under the direction of the psychotherapist.

(2) A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.

(3) The privilege may be claimed by:

- (a) The patient or the patient's attorney on the patient's behalf.
- (b) A guardian or conservator of the patient.
- (c) The personal representative of a deceased patient.
- (d) The psychotherapist, but only on behalf of the patient. The authority of a psychotherapist to claim the privilege is presumed in the absence of evidence to the contrary.

(4) There is no privilege under this section:

(a) For communications relevant to an issue in proceedings to compel hospitalization of a patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has reasonable cause to believe the patient is in need of hospitalization.

(b) For communications made in the course of a court-ordered examination of the mental or emotional condition of the patient.

(c) For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

90.5035 Sexual assault counselor-victim privilege.

(1) For purposes of this section:

(a) A "rape crisis center" is any public or private agency that offers assistance to victims of sexual assault or sexual battery and their families.

(b) A "sexual assault counselor" is any employee of a rape crisis center whose primary purpose is the rendering of advice, counseling, or assistance to victims of sexual assault or sexual battery.

(c) A "trained volunteer" is a person who volunteers at a rape crisis center, has completed 30 hours of training in assisting victims of sexual violence and related topics provided by the rape crisis center, is supervised by members of the staff of the rape crisis center, and is included on a list of volunteers that is maintained by the rape crisis center.

(d) A "victim" is a person who consults a sexual assault counselor or a trained volunteer for the purpose of securing advice, counseling, or assistance concerning a mental, physical, or emotional condition caused by a sexual assault or sexual battery, an alleged sexual assault or sexual battery, or an attempted sexual assault or sexual battery.

(e) A communication between a sexual assault counselor or trained volunteer and a victim is "confidential" if it is not intended to be disclosed to third persons other than:

1. Those persons present to further the interest of the victim in the consultation, examination, or interview.
2. Those persons necessary for the transmission of the communication.
3. Those persons to whom disclosure is reasonably necessary to accomplish the purposes for which the sexual assault counselor or the trained volunteer is consulted.

(2) A victim has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made by the victim to a sexual assault counselor or trained volunteer or any record made in the course of advising, counseling, or assisting the victim. Such confidential communication or record may be disclosed only with the prior written consent of the victim. This privilege includes any advice given by the sexual assault counselor or trained volunteer in the course of that relationship.

(3) The privilege may be claimed by:

- (a) The victim or the victim's attorney on his or her behalf.
- (b) A guardian or conservator of the victim.
- (c) The personal representative of a deceased victim.
- (d) The sexual assault counselor or trained volunteer, but only on behalf of the victim. The authority of a sexual assault counselor or trained volunteer to claim the privilege is presumed in the absence of evidence to the contrary.

90.5036 Domestic violence advocate-victim privilege.

(1) For purposes of this section:

(a) A "domestic violence center" is any public or private agency that offers assistance to victims of domestic violence, as defined in s. 741.28, and their families.

(b) A "domestic violence advocate" means any employee or volunteer who has 30 hours of training in assisting victims of domestic violence and is an employee of or volunteer for a program for victims of domestic violence whose primary purpose is the rendering of advice, counseling, or assistance to victims of domestic violence.

(c) A "victim" is a person who consults a domestic violence advocate for the purpose of securing advice, counseling, or assistance concerning a mental, physical, or emotional condition caused by an act of domestic violence, an alleged act of domestic violence, or an attempted act of domestic violence.

(d) A communication between a domestic violence advocate and a victim is "confidential" if it relates to the incident of domestic violence for which the victim is seeking assistance and if it is not intended to be disclosed to third persons other than:

1. Those persons present to further the interest of the victim in the consultation, assessment, or interview.
2. Those persons to whom disclosure is reasonably necessary to accomplish the purpose for which the domestic violence advocate is consulted.

(2) A victim has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made by the victim to a domestic violence advocate or any record made in the course of advising, counseling, or assisting the victim. The privilege applies to confidential communications made between the victim and the domestic violence advocate and to records of those communications only if the advocate is registered under s. 39.905 at the time the communication is made. This privilege includes any advice given by the domestic violence advocate in the course of that relationship.

(3) The privilege may be claimed by:

- (a) The victim or the victim's attorney on behalf of the victim.
- (b) A guardian or conservator of the victim.
- (c) The personal representative of a deceased victim.

(d) The domestic violence advocate, but only on behalf of the victim. The authority of a domestic violence advocate to claim the privilege is presumed in the absence of evidence to the contrary.

90.507 Waiver of privilege by voluntary disclosure.

A person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person, or the person's predecessor while holder of the privilege, voluntarily discloses or makes the communication when he or she does not have a reasonable expectation of privacy, or consents to disclosure of, any significant part of the matter or communication. This section is not applicable when the disclosure is itself a privileged communication.

90.508 Privileged matter disclosed under compulsion or without opportunity to claim privilege.

Evidence of a statement or other disclosure of privileged matter is inadmissible against the holder of the privilege if the statement or disclosure was compelled erroneously by the court or made without opportunity to claim the privilege.

90.509 Application of privileged communication.

Nothing in this act shall abrogate a privilege for any communication which was made prior to July 1, 1979, if such communication was privileged at the time it was made.

90.510 Privileged communication necessary to adverse party.

In any civil case or proceeding in which a party claims a privilege as to a communication necessary to an adverse party, the court, upon motion, may dismiss the claim for relief or the affirmative defense to which the privileged testimony would relate. In making its determination, the court may engage in an in camera inquiry into the privilege.

90.604 Lack of personal knowledge.

Except as otherwise provided in s. 90.702, a witness may not testify to a matter unless evidence is introduced which is sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may be given by the witness's own testimony.

These privileges apply only when one is testifying in a *state* court, not in a *federal* court. It is obvious that the State of Florida recognizes the importance of confidential

matters shared by professionals and their patients/clients. There are nonetheless exceptions to such privileges; that is to say that occasionally, even though a privilege exists, a sexologist may still be obligated to testify. A sexologist should always advise a patient or client that, under certain circumstances, he may be forced to divulge certain confidential information. In Florida, such an example is found under *Title V* in Chapter 39 concerning the reporting of child abuse.

39.201 Mandatory reports of child abuse, abandonment, or neglect; mandatory reports of death; central abuse hotline.

(1)(a) Any person who knows, or has reasonable cause to suspect, that a child is abused, abandoned, or neglected by a parent, legal custodian, caregiver, or other person responsible for the child's welfare, as defined in this chapter, or that a child is in need of supervision and care and has no parent, legal custodian, or responsible adult relative immediately known and available to provide supervision and care shall report such knowledge or suspicion to the department in the manner prescribed in subsection (2).

(b) Reporters in the following occupation categories are required to provide their names to the hotline staff:

1. Physician, osteopathic physician, medical examiner, chiropractic physician, nurse, or hospital personnel engaged in the admission, examination, care, or treatment of persons;
2. Health or mental health professional other than one listed in subparagraph 1.;
3. Practitioner who relies solely on spiritual means for healing;
4. School teacher or other school official or personnel;
5. Social worker, day care center worker, or other professional child care, foster care, residential, or institutional worker;
6. Law enforcement officer; or
7. Judge.

...

39.204 Abrogation of privileged communications in cases involving child abuse, abandonment, or neglect.

The privileged quality of communication between husband and wife and between any professional person and his or her patient or client, and any other privileged communication except that between attorney and client or the privilege provided in s. 90.505, as such communication relates both to the competency of the witness and to the exclusion of confidential communications, shall not apply to any communication involving the perpetrator or alleged perpetrator in any situation involving known or suspected child abuse, abandonment, or neglect and

shall not constitute grounds for failure to report as required by s. 39.201 regardless of the source of the information requiring the report, failure to cooperate with law enforcement or the department in its activities pursuant to this chapter, or failure to give evidence in any judicial proceeding relating to child abuse, abandonment, or neglect.

The welfare of children will always take precedence over any privacy argument relating to an absolute privilege between a psychotherapist and his patient or client. Protecting children is, above all, a societal concern.

It should be clearly understood that an exception to a privilege is different from a waiver, which is done voluntarily. The sexologist has no choice in the case of an exception. An exception equally exists for psychiatrists who are also sexologists. Under *Title XXXII*, Chapter 456 discusses threats.

456.059 Communications confidential; exceptions.

Communications between a patient and a psychiatrist, as defined in s. 394.455, shall be held confidential and shall not be disclosed except upon the request of the patient or the patient's legal representative. Provision of psychiatric records and reports shall be governed by s. 456.057. Notwithstanding any other provision of this section or s. 90.503, where:

- (1) A patient is engaged in a treatment relationship with a psychiatrist;
- (2) Such patient has made an actual threat to physically harm an identifiable victim or victims; and
- (3) The treating psychiatrist makes a clinical judgment that the patient has the apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out that threat, the psychiatrist may disclose patient communications to the extent necessary to warn any potential victim or to communicate the threat to a law enforcement agency. No civil or criminal action shall be instituted, and there shall be no liability on account of disclosure of otherwise confidential communications by a psychiatrist in disclosing a threat pursuant to this section.

As well there is an exception for other sexologists who are not psychiatrists, such as licensed social workers and licensed psychologists. This exception is found in *Title XXXII*, Chapter 490.

490.0147 Confidentiality and privileged communications.

Any communication between any person licensed under this chapter and her or his patient or client shall be confidential. This privilege may be waived under the following conditions:

- (1) When the person licensed under this chapter is a party defendant to a civil, criminal, or disciplinary action arising from a complaint filed by the patient or client, in which case the waiver shall be limited to that action.
- (2) When the patient or client agrees to the waiver, in writing, or when more than one person in a family is receiving therapy, when each family member agrees to the waiver, in writing.
- (3) When there is a clear and immediate probability of physical harm to the patient or client, to other individuals, or to society and the person licensed under this chapter communicates the information only to the potential victim, appropriate family member, or law enforcement or other appropriate authorities.

If a patient or client decides to sue another party and wishes to call upon his own mental or emotional condition, a court may decide that by doing so, the privilege is hereby waived. For example, a patient or client sees a sexologist for sex-related issues, and the sexologist discovers that the problem may be caused by sexual harassment that the patient or client has described as happening in his workplace. If the patient or client sues the other party for this harassment, the sexologist will likely have to testify, especially if the emotional condition is central to the patient or client's case. Once again, such a possibility should always be discussed with the patient or client during the first session. Barton E. Bernstein, a licensed social worker and attorney, and fellow attorney Thomas L. Hartsell indicate that "a therapist cannot represent to a client that the record or the therapeutic session that created the record will never be disclosed" (2000, 42).

Ethically speaking, a sexologist should inform the patient or client of any possibilities that could jeopardize the relationship and its confidential nature. This should be documented and the patient or client should sign a document indicating that he has been informed of this. The patient or client should exhibit full capacity to do so, meaning that he should not be under the influence of alcohol or drugs and must have the mental capacity to attest to the understanding of such a document.

As stated in the *Evidence Code* for the State of Florida, a patient or client can waive his right to confidential communication. Since he owns the privilege, he, of course, may waive it. If waived voluntarily, the sexologist can testify. However, complications may arise when a third party is involved, such as an insurance company. If the patient or client is covered by an insurance policy for the sexologist's services, the insurance company may want details regarding the nature of the problem and the services rendered. If this information is not shared with the insurance company, there may be no payment. It could be argued that the patient or client waived all of his rights to confidentiality by agreeing to disclose the above-noted information. There is a certain inconsistency on this point from various courts.

“Some courts view the communication of any information to any party outside the privileged relationship as contrary to notions of confidentiality. The better approach is to view the patient's concept to submit for reimbursement as a limited waiver permitting use of the information for reimbursement only” (Poulin 1998, 1394).

What happens if another party involved in a lawsuit seeks to look at the record of a sexologist's patient or client, and the latter refuses to hand over the documentation in question? The sexologist's attorney must file a motion asking to assert the privilege

preventing the information from being admitted during the court proceedings. It should be noted that the privilege continues to exist, even in the event of the patient or client's death.

There are certain situations where a sexologist should be careful. A word of caution is warranted, for instance, in a group therapy situation where "confidentiality should be of the utmost concern for therapists and their clients" (Bernstein and Hartsell 2000, 239). Bernstein and Hartsell recommend that a psychotherapist (sexologist) discuss any issue related to confidentiality with each member of the group (2000). Whenever there is more than one patient or client, such as with groups, families and couples, they "need special sensitivity. Each person in the system has individual rights" (Bernstein and Hartsell 2000, 40). If the sexologist has a private practice, he has greater control over files. This is not the case when one works in an institutional setting where many people may have access to the files, and thus, confidential material. Of great importance is the possibility of gossiping on the part of the sexologist (or anyone else that has access to such files) about confidential information. It goes without saying that this is unethical and should never occur or be tolerated.

Ethical Codes Must be Heeded

Confidentiality is so important that it is mentioned in most codes of ethics. Unfortunately, many professionals know of these codes but never bother familiarizing themselves with the details contained therein. Sexologists come from various disciplines and usually adhere to a code related directly to their profession. No two codes utilize exactly the same language, yet they are unequivocally clear when it comes to

confidentiality issues, e.g. being forthright with the client regarding responsibilities, record keeping, etc. Relevant excerpts from various codes of ethics used by sexologists can be consulted in *Appendix D*.

There are some authors who suggest that ethical codes indicate that a therapist has two roles. “First, the therapist serves as a mediator between the patient and others, who for various reasons, want access to information about the patient. ... Second, the therapist decides where the patient’s best interests lie...” (Winslade and Ross 1985, 618). A sexologist may also face what one author dubs a *cruel trilemma*.

Psychotherapists faced with ethical, legal, and personal concerns will be confronted with what one commentator referred to as the “cruel trilemma”. Under the trilemma, psychotherapists are forced to choose from one of three undesirable results: 1) to violate the extraordinary trust imposed upon them by their patients and their profession; 2) to lie and thereby commit perjury; or 3) to refuse to testify, and thereby be held in contempt of court (Hayden 1989, 84).

There may be a conflict between a sexologist’s code of ethics and his legal obligation to testify if no privilege exists. In such circumstances, the sexologist must decide which takes precedence. His attorney should be consulted and the professional association contacted for advice.

Although a therapeutic relationship between a therapist and a patient or client is one that, in theory, is equal, such is not always the case according to certain authors. The relationship that exists is fiduciary in nature (Winslade and Ross 1985). This means that the parties are unequal in terms of power. The patient or client places his trust in the sexologist, and expects that what is discussed during the sessions will not be divulged. The sexologist has more power than the patient or client. This being the case, it is very important for the patient or client to know what exactly constitutes the boundaries. This allows the patient or client to decide the extent to which he will divulge confidential

information. Each of the codes of ethics mentioned in this dissertation advise the members to do this. Perhaps one of the reasons for doing so is that sexologists “are likely to maximize the benefit of the psychotherapist-patient privilege, combining awareness of the privilege with their professional obligation of confidentiality to enhance the trust and open communication component of therapy” (Poulin 1998, 1349).

What are the consequences if a sexologist does not respect his professional obligations pertaining to confidentiality? One obvious consequence is that the sexologist may have his professional membership or certification revoked. Legally speaking, he may be sued. Divulging confidential information is a breach of confidentiality and therefore is actionable. If a document has been signed outlining the duties of the sexologist and more specifically, pertaining to confidential matters, and the sexologist divulges all or any part of this information, he may be sued for breach of contract. Some of the damages that may be claimed by the patient or client as a result of such a breach of contract are for mental or emotional distress. Should there be no written document regarding confidential matters, confidentiality may be implied by the type of relationship that exists between the parties (Eger 1976).

In light of such, members of the American Psychoanalytic Association are even discouraged from keeping a written record during sessions (Mosher 1999).

A sexologist should never forget his duty to protect a third party from harm at the hands of a patient or client. In the case of *Tarasoff v. Regents of University of California* (1976), it is clearly stated that a psychotherapist may be held liable if he fails to do so.

As stated previously, in Florida, there is an exception to evidentiary privilege when a party asks that confidential information be admitted into court. By waiving his

right to privilege, the patient or client must know exactly what it means to do so. This should be clearly explained to him as well as the concept of privilege and the exceptions that may apply.

The next part of the dissertation may serve as a reference tool to any sexologist wanting to know more about how to prepare to act as a witness. Practical tools are provided, including a consulting agreement and letter of engagement that may be used by the sexologist.

PRACTICAL TIPS FOR THE SEXOLOGIST WHO TESTIFIES

The purpose of this section of the dissertation is to assist any sexologist who may wish to testify as an *expert* witness or be called as a *lay* or fact witness. A brief description of the legal system will be provided. Note that the U.S. Supreme Court will not be discussed in this part and appeals courts will only briefly be mentioned. The material presented here will primarily focus on trial courts, where sexologists are more likely to testify. This will be followed by the different steps of civil and criminal cases in order help the sexologist familiarize himself with the procedure. Not only will the role of an *expert* witness be closely examined, but also the role of a *lay* witness. More and more professionals, including sexologists, are being called to testify in matters relating to their clients. For this reason, ethical and legal matters will be emphasized, as will the appropriate rules relating to procedure.

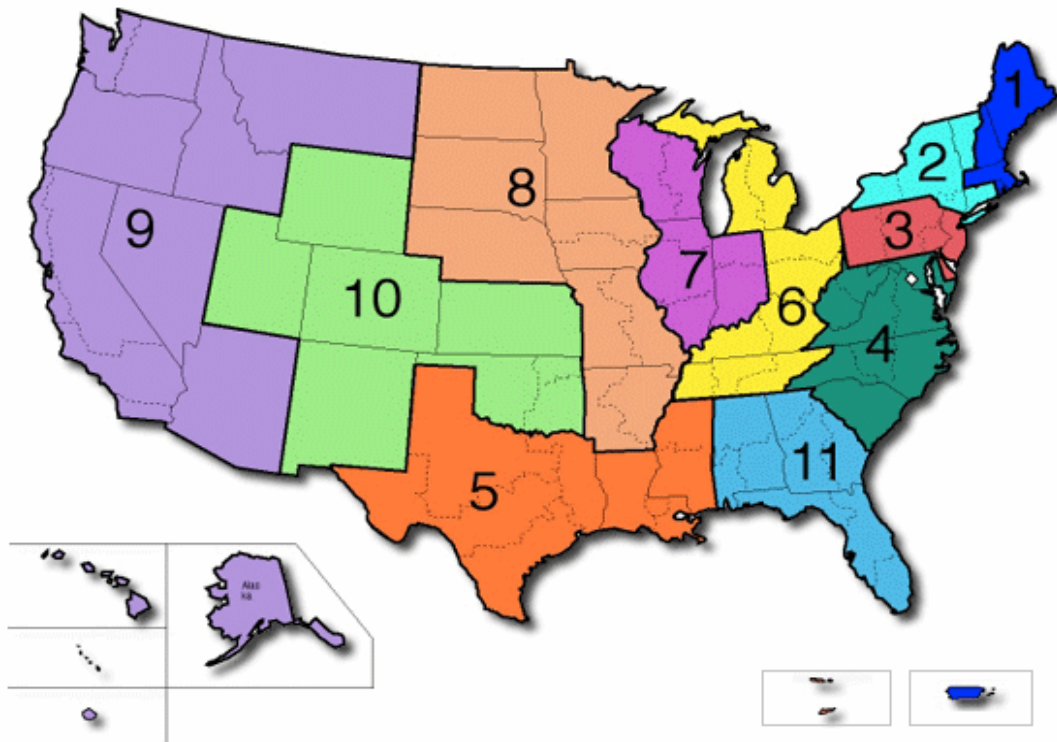
Federal vs. State Courts

One question that is often asked is “how is it determined whether a *federal* court or a *state* court will hear a case?” The answer boils down to one single matter: jurisdiction. Generally speaking, *federal* courts hear cases that involve the United States Constitution, the United States Government, or any federal law. Also, it may hear cases where there is an established “diversity jurisdiction”. This means that if the potential damages exceed \$75,000.00 and the parties live in different states, a *state* court can also hear the case. A *federal* court also hears cases related to bankruptcy, patents, copyrights, and trademarks, etc. It should be noted that some of the cases mentioned fall under the

“concurrent state/federal jurisdiction”. For example, a lawsuit for any amount of money between parties from different states, or questions about the federal constitution and federal laws can be heard by either a *state* court or a *federal* court.

District Courts – Geographical Distribution

One often hears the term *district court*. A *district court* is a trial court within the federal court system. It can hear both criminal and civil matters. Presently, there are 94 federal judicial districts across all states, the District of Columbia, the Virgin Islands, Guam and Northern Mariana Islands (Federal Judicial Center n.d.). There are 12 regional circuits which contain the 94 U.S. judicial districts. Each Circuit has a United States Court of Appeals. This Court hears appeals from the *district courts* and federal administrative agencies, among others. The circuits are divided as follows:



(Federal Judicial Center n.d.)

As Bernstein and Hartsell state when discussing mental health professionals and testifying:

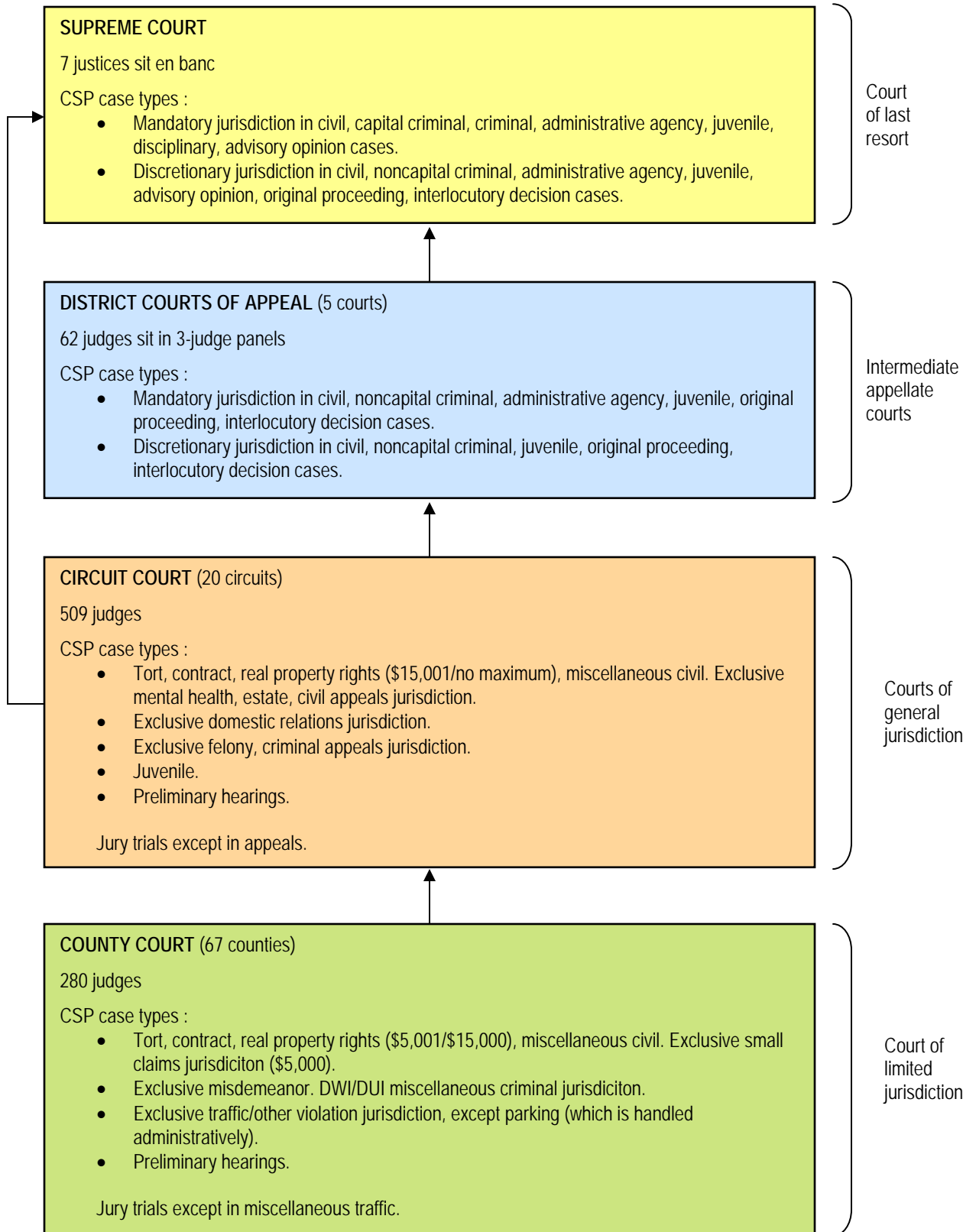
The sheer number of courts and the volume of litigation in our country ensures that a practicing mental health professional will be involved with some clients' legal proceedings at least once, if not many times, while actively engaged in practice and even into retirement. (2005, 17)

Although they were referring specifically to mental health professionals, this could easily apply to any professional who has chosen to be a sexologist.

Sexologists will mostly testify at the *state* court level. This being said, it is interesting to look at a document entitled *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, published by the Federal Judicial Center in 2002. A survey of federal judges, in 1998, confirmed that 42.5% of the expert witnesses came from the medical/mental health field. This was by far the most represented category (Krafla, Dunn, Johnson, Ceci, and Mileticch 2002). There is no reason to believe the situation would be otherwise in 2007 in the *federal* courts. In a 1991 survey, the medical/mental health field also led the way. At the *state* level, one strongly suspects that these rates would be comparable.

As stated previously, this dissertation concentrates on the *federal* courts and the *state* courts in Florida. The *state* courts of Florida hear cases that are not in the *federal* courts' jurisdiction and those that can be heard at both levels. What follows is a flow chart indicating the different courts and their respective jurisdictions. It is self-explanatory.

FLORIDA COURT STRUCTURE



(National Center for State Courts n.d.)

Steps in a Civil Case

These steps apply to cases heard by a *federal* court or a *state* court. Some states may use different words, however the procedure is the same.

Step 1: Document filing

In the case of a civil lawsuit, it starts with one party known as the plaintiff filing a complaint or petition (Florida uses both words in RULE 1.050) with a court that can hear the case. In this document, one will find the names of the parties, the subject matter of the dispute, the facts of the case and what damages the party is seeking. Once this document is filed, the other party (known as the defendant or respondent), will be served with the complaint or petition personally (unless otherwise permitted). The defendant must file an answer within a certain delay (usually 20 days) whereby he defends the complaint or petition by telling his side of the story. Not only can the defendant defend the complaint or petition, but he may also counterclaim the plaintiff. If a complaint or petition is not defended with an answer, a default judgment may be entered against the defendant. Such documents are called pleadings.

Step 2: Discovery

The next step is one called discovery. The word says it all. It allows both parties to discover more about the each other's case before going to trial. Its "goal is to avoid "trial by ambush"... (Bernstein and Hartsell 2005, 5). Discovery may take more than one form. For instance, it can be a deposition where one party is orally examined; it can also be a written interrogatory or a request for a party to produce documents related to the

case. A deposition usually takes place in an attorney's office and the questions and answers are recorded by a court reporter. Each party's attorney may ask questions. A person who answers questions is under oath. On some occasions, a deposition is videotaped. We will see later on that *expert* witnesses and *lay* witnesses are often asked to participate at a deposition. A party may wish to ask a witness to answer some questions in writing. The answers must be notarized and the person who is asked to do so must do so within a certain delay. Also, as indicated above, a person may be asked to produce records that are in his possession. An example of such documentation are files belonging to a sexologist. The discovery step will further be discussed along with issues of confidentiality which should be of particular interest to sexologists.

Once the discoveries have taken place, and the parties have yet not settled, a trial will follow. The trial will be carried out before a single judge or before a judge and jury. Upon termination of the case, the judge will render a court order. If indeed there is a trial, the sexologist as a witness, whether it be as an *expert* or *lay* witness, will inevitably play an important key role.

It should also be noted that, throughout the civil action procedure, either party may make motions (requests presented to a judge). Moreover, the judgment rendered may be appealed following the trial.

Steps in a Criminal Case

Briefly, here are the steps involved in a criminal case. They are the arrest, booking, bail hearing (if necessary), arraignment, preliminary hearing, pretrial motions (if necessary), the trial, sentencing (if necessary), and finally, the appeals (if there are

any). Few details will be given here regarding witnesses in criminal cases since what follows deals mostly with the role of a sexologist as a witness in civil cases, which includes civil torts and family matters, two subjects that are far more relevant to the sexologist.

The Expert

What are the different types of experts? Contrary to popular belief, a sexologist who is an expert will not have to testify in all cases for which his services are retained.

He may, however, serve in various other capacities. As some authors have written:

It's important to realize the diversity of expert roles and furthermore where to draw the boundaries between these roles since the behavioral constraints associated with different roles for experts vary according to the roles they serve. Remember, these constraints are defined by the rules of procedure and evidence...as well as court decisions clarifying the rules. This means that it is critical that you clearly understand from the outset of the expert witness assignment what role or roles you are to play and the kinds of conditions that may cause those clearly delineated roles to change during the course of the engagement (Smith and Bace 2003, 95-96).

This is particularly important with respect to discovery. The role played by an expert is directly correlated to what records and documents must be shown to the other party.

For example, a sexologist may be a *consulting* expert. This type of expert advises the attorney and the designation is based on the sexologist's training, education, experience, etc. The sexologist may also help the attorney in assessing experts working or testifying for the other party. An expert can also be appointed to work for the court whereby his primary role is to help the trial judge with technical matters. Although less often called upon in sexual matters, this is nonetheless a possibility for the sexologist.

Last but not least, there is the expert who testifies. In our legal system, experts are persons “who have a body of focused language about a particular subject not possessed by the ordinary layman, and the general purpose of their testimony is to educate the judge or jury in areas that might be otherwise difficult to comprehend” (Bernstein and Hartsell 2005, 19). Also, an *expert* witness may impart his professional opinion and answer hypothetical questions (meaning assumed facts). In the following pages, we will more closely examine the expert in the context of this role.

The *Lay* Witness

A *lay witness* may not express an opinion, not even if he is a sexologist. A *lay witness* is a witness to fact. He may only testify as to what was personally observed or experienced. Of course, this does not mean that, upon taking the stand, the sexologist is no longer a professional. It simply means that there are certain limits as to what may be said, unless the sexologist is called as a *lay witness*, but recognized by the trial judge as an *expert*. A *lay witness* may testify voluntarily (e.g. for a client) or may be forced to testify if he has received a subpoena. Bernstein and Hartsell refer to this type of witness as a “reluctant witness” (2005). Such circumstances usually involve a patient/client or former patient/client who is suing (or being sued) and the sexologist is dragged into the case because one of the parties wants to know what was said by the patient/client, and details surrounding the issue or problem and the treatment plan. Nothing can prevent a sexologist from becoming embroiled in a legal matter that is taken to court. Even if a patient/client were to sign a document indicating that the sexologist will not be called to testify or participate in a court case, there is no 100% guarantee for this because a lawsuit

or court case most often involves other parties who are not privy to the agreement between the sexologist and his patient/client.

A sexologist who testifies as an *expert* expects to be compensated for the work being done to help the attorney and his client. An agreement will usually cover the issues relating to fees and work to be done (see *Appendices F* and *G* for samples of an engagement letter and a consulting agreement). In the case of a sexologist who is called to testify, or even volunteers to testify for a client, compensation rarely occurs unless the client signs an agreement whereby the sexologist will be paid if he is deposed or if he testifies. Bernstein and Hartsell recommend that such an agreement be included in the initial intake and consent form (2005). This is the informed consent document whereby a sexologist presents his credentials, the confidentiality issues discussed previously, the goals, the risks, the treatment plan, payment schedule, etc. These issues should be discussed as early as possible in the sexologist-patient/client relationship, preferably during the first session. All information discussed must be provided in writing and the client should receive a copy. If the sexologist is working with a group, every member should sign the agreement, particularly given the fact that an oral agreement rarely stands up in court.

Fred Chris Smith and Rebecca Gurley Bace have wise advice for professionals “... it is far better ... to prepare to be a witness (expert or otherwise) as a basic part of your professional duties and skills than to continue to deny that your day is coming and then become bitter about the results when you are finally called to the stand” (2003, 32).

The Expert-Lawyer Relationship

Now that we have distinguished between an *expert* and a *lay* witness, let us examine the relationship between an *expert* and a lawyer. When appropriate, references will be made with respect to *lay* witness as well.

In order to serve as an *expert* witness, one must be able to investigate, evaluate, educate, communicate verbally and in written form, testify, and be credible (Poynter 2005, 17-19). Also, the expert must remain objective, honest, forthright and unbiased (Smith and Bace 2003, 194). What is brought to the witness stand is experience and various skills. These are most, if not all, of the qualities an attorney is looking for in an *expert*.

A sexologist who is an *expert* will be initially contacted by an attorney. Either the attorney has heard about him or has read his advertisement, if such exists, or has received a reference to contact him. The attorney often considers the sexologist's educational background, checks whether he is a licensed sexologist or member of any professional organizations, the number of years the sexologist has worked in the field and the knowledge acquired by him, the number of publications published (if any), and whether the *expert* has testified previously.

A resumé will often provide answers for all of these queries. Before deciding to work with an attorney, an expert would be well-advised to do some research on the attorney in question, look at the problem for which he has been contacted, ask if it feels right, determine whether a conflict of interest might exist, and finally, whether there is sufficient time to do a good job (Crawford 2001).

Ethical Questions

In order to be a proper *expert* involved in a civil or criminal case, there must exist a relationship between the sexologist and the retaining attorney. This relationship cannot be underestimated. This relationship has been referred to as an *independent art form* (Smith and Bace 2003, 107). It is a relationship whereby the attorney will be teaching the sexologist certain things, mostly relating to legal procedure and ethical guidelines. In order for this relationship to work, the participants must recognize each other as equals and must understand each other. As well, the expert must be told, in clear, unambiguous terms, what exactly is expected of him.

Ethically speaking, there may be clashes between the attorney and the sexologist. There are two or more codes of ethics involved. The attorney's code of ethics dictates that he must represent his client to the best of his ability, that he must follow the objectives of the client, and that he cannot tell a witness what to say. The sexologist cannot compromise his code of ethics, even if he has been retained by the attorney (for the client).

... the rules governing the conduct of attorneys and experts are not isolated from each other. In fact, from time to time, the expert will have to deal with the fact that these rules are often at odds with each other. Furthermore, these rules will interact in competing and occasionally antagonistic or even contradictory ways" (Smith and Bace 2003, 175-176).

A sexologist should never forsake his ethics in order to accommodate the demands of an attorney. Serious consequences could result from such a gesture. If the sexologist does not feel completely comfortable, or has any doubt about ethical or other issues, he should desist.

One ethical rule that both the attorney and sexologist share is the one dealing with confidentiality. The attorney-client privilege has long been recognized. As seen in the previous part of this dissertation, states now recognize a privilege regarding confidentiality for certain categories of professionals. The U.S. Supreme Court has also recognized a privilege for licensed psychiatrists, psychologists, and social workers. Does the *work product* provided by an *expert* for an attorney who hired him fall under the attorney-client privilege? The simple answer is no, neither in a *federal* court or a Florida *state* court. An expert should always bear in mind that all documentation or communications, whether in writing or verbal, may at some point be subject to discovery. However, if the work was done and information recorded *prior to* being hired, such material is usually not discoverable and falls under “attorney work product” since it is considered part of the attorney’s research (Poynter 2005). This affects whether the sexologist *expert* shifts from a consultant role to a witness role. At this time, any of the sexologist’s documentation relating to the case is discoverable.

Compensation

Once the sexologist feels comfortable working with the attorney and thinks that he can play an important role as an expert, either acting as a consultant or witness, he must make sure that compensation will be appropriate for the work. The best way to protect oneself is to have a contract (see *Appendix G*). This is a relatively easy concept; that said, it must be decided who will be the other party to the contract. Will it be the attorney who wishes to retain the sexologist’s services, or his client? It should be made very clear, from the onset of the relationship, who will be responsible for paying the sexologist for

services rendered. A sexologist should never work for free, unless of course, he chooses to do so. Bernstein and Hartsell indicate that an expert should be paid for performing the following duties and that these should be clearly outlined in the contract:

- Time spent conducting an investigation of the client and/or surrounding circumstances.
- All courtroom preparation including reading and reviewing the file, reviewing actual and potential examination and cross-examination questions, including role-playing the potential testimony and counsel, and getting reacquainted with the rules of evidence as they pertain to the introduction of admissible mental health testimony.
- Checking the latest statutory and case law in this area of litigation and in this jurisdiction.
- Out-of-pocket expenses for incidentals such as mileage and copying documents.
- Court time including travel time, parking, waiting for the trial to begin, or waiting to be called as a witness.
- Telephone calls, computer time, lawyer conference, and conferences with colleagues which may be necessary from time to time.
- Establishing, keeping, and maintaining professional service logs for all time dedicated to this particular case.
- Review of current literature or literature search concerning the subject of the suit.
- Any other time when the therapist is obligated to devote time and energy to this litigation instead of other pursuits

(Bernstein and Hartsell 2005, 167)

How should the sexologist be paid? The terms of payment should also be included within the contract. A *retainer* (or engagement fee) should be requested of the other party whether it be the attorney or his client. A *retainer* is an amount of money paid to the sexologist to retain his services. It is a form of down payment paid in trust and it is to be applied to work done by the sexologist as an expert. This *retainer* may be refundable or non-refundable. An hourly rate, not less than what the sexologist charges clients, should be included along with details as to payment method. Billing should be done when the work is completed, allowing for a short period for payment. It should clearly be indicated that should the sexologist not receive payment, he will cease to act as expert for the attorney and his client. Should the sexologist not feel comfortable with this approach, he may choose the *retainer* option. Instead of billing as the services are rendered, he can decide to have a *top-up fund*. This way, the sexologist can establish a minimum balance required in the trust account and include such detail in the contract. Whenever the balance drops below the agreed upon amount, the attorney must pay to the sexologist an amount of money that will restore the balance to the predetermined amount. The sexologist would then be paid from this trust account after providing proof of services rendered (e.g. time sheets) to the attorney.

Termination of the Relationship

A key part of a contract is a section dealing with the termination of the relationship, such as the notice period required and the circumstances for termination. Once the parties agree on the terms of the contract and sign it, the expert will usually thoroughly investigate the litigious question for which he was hired. At some point, the

expert will prepare a report, especially if the attorney plans on calling this expert to the witness stand. It is expected that an expert will write a report explaining the investigation and include his opinion on the subject for which he has special skills. “In the eyes of the law, the expert’s testimony is allowed by the court only to the extent that the expert adequately documents the basis for it in a report and makes it available to the opposing party before the trial” (Smith and Bace 2003, 199).

The Report

When preparing a report, the sexologist must remember that it is being written for the person who hired him and also anyone else who may be interested in the said document. This report will be examined during the deposition phase as well as by a judge and possibly a jury. Thus, it must be written in a language that can be easily understood. One all-too common error is to write the report in a jargon utilized by sexologists. The sexologist would be well advised to imagine himself in the place of a judge or jury who has very little knowledge in his particular area of expertise. “Words, therefore, must be carefully chosen to convey their exact meaning. The information presented must be so worded that the facts and resulting conclusions will be understood in their proper context” (Crawford 2001, 54).

There is no set form for preparing a report. The report should be thorough enough, yet not overly long. It should contain only pertinent information. Some attorneys ask experts to put in writing their findings and opinions *only* when they are satisfied with the final draft, whereby the document and the expert are subject to the disclosure and discovery rules (Smith and Bace 2003). A mistake that must be avoided concerns

authorship of the report. It must be written by the expert and not a colleague, employee, or even the attorney. It must also remain objective at all times. If, during the discovery process, it is obvious that the report is poorly written or not entirely written by the expert, there will evidently be consequences with respect to the expert's reputation. In conclusion, the preparation and writing of a report is a serious endeavor that should not be taken lightly. One must have enough time to draft a proper report.

A sexologist, when acting as an expert, represents all members of his profession. If sexologists are to be taken seriously by the judicial system, all documentation prepared and submitted must reflect the professionalism of all who work for the sexual well-being of members of society.

Discovery

A sexologist who is an expert must familiarize himself with *Rule 26* of the *Federal Rules of Civil Procedure* and *Rule 1.280* of the *Florida Rules of Civil Procedure*. Excerpts from these rules are included in *Appendix E* in order to help any sexologist who is an expert or who wishes to become an expert in the future. These rules relate to the *discovery* procedure. *Discovery* allows the other party's attorney to *discover* what information a sexologist has relating to the case such as a report, opinions, etc. as well as the credentials of the sex expert. The reader will recall that, according to the *Daubert* standard, the trial judge is now the gatekeeper who decides if an expert is qualified to testify. The *discovery* phase of the lawsuit gives the other lawyer the chance to size up the sexologist as an expert and, following said discovery, he may make a *motion in limine* to the trial judge to exclude the sexologist as an expert witness. *Daubert* factors such as

relevancy and reliability and the other factors mentioned by the Supreme Court would be taken into consideration if the trial is to take place in federal court. If the trial is held in a Florida state court, however, the previous *Frye* standard will be utilized by the trial judge.

Firstly, let us briefly look at the two rules mentioned above and then we will look at what happens during a deposition, the most popular form of discovery. Please note that a *non-voluntary* sexologist who is asked to testify is also included in these rules as well as the sexologist who voluntarily wishes to testify as an expert. Both are *discoverable*. If a sexologist is only a consultant to the attorney, for instance, to see if a legal matter should be pursued, he will not be discoverable. If, however, there is the possibility that the sexologist will testify as an expert (and a lay person in the case of the *non-voluntary witness*), then his name must be submitted to the other party.

Under *Federal Civil Procedure Rule 26*, a party to a lawsuit must divulge the name of anyone who may have discoverable information (e.g. a sexologist), the type of information and the location or source of said information. Therefore, the name of any sexologist acting as an expert witness must be given to the other party as well as all copies of any reports prepared or used.

The Rule is very specific about what the report should contain.

... The **report** shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years (Rule 26(a) (2B)).

Not only must the above information be communicated to the other party, so must the names of all the witnesses expected to testify.

A sexologist acting as an *expert* witness or a *lay* witness may be *discovered* via verbal questioning or by answering written questions. The scope of discovery tends to be quite large.

(1) In General

Parties may obtain discovery regarding any matter, **not privileged**, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(2) Limitations.

(A) By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c) (Rule 26(b)(1)(2)).

The opinion of an expert witness is often sought out during discovery. Any *documents and tangible things* that are *prepared in anticipation of litigation for trial* are also *discoverable*. If, at any time, a sexologist is to claim a privilege, he must state so clearly and describe the types of documents, communications, or things utilized without revealing their contents. This, however, will most commonly occur if the sexologist is called as a *lay* witness.

One factor that is of the utmost importance, and that must be respected without exception, pertains to time delays. Such prescribed delays in court proceedings are truly *sacred* and require the attention of everyone involved in the case, including the sexologist serving as a witness. This may prove troublesome at times for the sexologist, particularly he who operates his own independent practice and enjoys the benefits of flexible hours and setting his own timelines with his clients. Where it may be acceptable to put off a session to a later time or date with a client for any number of reasons, the same cannot be said for deadlines set by the courts. To the contrary, these are most inflexible, and it is most unacceptable to disregard or pay little heed to them. The Florida rule relating to *discovery* (1.280) is very similar to the *federal* rule. It is imperative that any sexologist who intends to testify in a *state* court thoroughly read this rule in order to become familiar with its content (see *Appendix E* for both *federal* and *state* rules).

One author described depositions as “minor skirmishes or major battlefields” (Matson 1999, 35). As previously stated, *discovery* is the third step in a legal action. Obviously, if a sexologist has been retained by an attorney, he can expect to be asked to be deposed. This may be done via a plain or general subpoena or a *subpoena duces tecum*, which means that the sexologist expert must bring his identified records/files, etc.

The attorney will invariably advise the sexologist if a deposition is to take place. Here is the usual content of a *subpoena duces tecum*:

- All clinical records, psychotherapy notes, memoranda, letters, communications, telephone logs, or other documents that in any way pertain to the client, together with all billing records, records of payments, correspondence, or other communications.
- All tests, test records, photographs, letters received, copies of letters sent, and memoranda of conferences with any individual who has knowledge of the case or with any consultants used or conferred with in connection with the case.
- Medical records used for consideration when making the diagnosis or treatment plan and any correspondence concerning the physical health of the party to the litigation.
- All items that will be submitted as evidence in the trial as either direct evidence or as anticipated rebuttal evidence
(Bernstein and Hartsell 2005, 92).

The Sexologist Who Receives a Subpoena

A *reluctant witness* may be surprised to receive this type of subpoena asking him to disclose the content of a file. As discussed previously, the relationship between a sexologist and his client is of a confidential nature and anything disclosed within this relationship should not be divulged unless there are exceptions to the privilege which

applies. Therefore, what is a sexologist to do if he receives a subpoena? The first thing to do is to contact an attorney. Bernstein and Hartsell remind us that the sexologist should attend the deposition but state more than once, if necessary: “The general rule is that a subpoena in and of itself does not permit disclosure of confidential information except if the subpoena is issued directly by a court or administrative tribunal” (2005, 81). Of course, if the client provides consent in writing to such disclosure, the sexologist should disclose the contents of the file. Without a consent or a court-issued subpoena, the only option for the other party is to obtain a court order requiring the sexologist to disclose. If this is accomplished, then the sexologist cannot refuse to disclose. Until the sexologist obtains the consent or receives a copy of the court order, he is to respond in the following way: “I am sorry, but without client consent or court order, I am not in a position to respond to these types of questions” (Bernstein and Hartsell 2005, 86). If the sexologist’s attorney feels justified, he may make a motion asking a judge to quash the subpoena.

The Unfolding of a Deposition

A deposition usually takes place in one of the attorney’s offices with both attorneys in attendance. There is also a court reporter present. All witnesses are sworn prior to answering questions. That said, the setting is not as formal as that of being in court. Lawyers ask the questions and everything is recorded by the court reporter. On occasion, the deposition is videotaped. A sexologist will be asked about his credentials, work experience, experience as a witness, etc. The attorney who asks the questions will be gauging the sexologist to see what type of witness he will be. In the case of a sexologist acting as an expert, questions will be asked about his *education and training*,

professional work experience, and opinions, conclusions, and recommendations

(Crawford 2001, 88-89). A lawyer named John F. Romano says he uses “five silver-bullet questions” when he is deposing an opposing *expert* witness and they always give him information that helps his case. Sexologists who will be deposed can learn from these questions.

- 1) What do you perceive as your purpose and function in this case?
- 2) Assume your opinion is wrong or invalid. What steps would you go through to analyze and assess the opinion to find your error?
- 3) What further work do you intend to do and what further work have you been asked to do for this case?
- 4) Do you have any criticism of the police or of my expert(s) in this case in terms of their methodology or techniques? (*Delete the word “police” if not applicable.*)
- 5) Have you had any credibility judgments as part of your analysis in this case?

(Zevitas 1999)

Anything said in the deposition can be used during the trial. It is very important for the sexologist, whether he is a *lay* or *expert* witness, to meticulously read the transcript prepared by the court reporter. Any and all corrections should be made before signing. If there is a discrepancy between the deposition transcript and what is testified to at trial, the opposing attorney will assuredly use any inconsistency to attack the credibility of the sexologist.

The deposition is often the first time a sexologist comes face to face with the judicial system. Even if the sexologist knows the content of the patient/client’s file, it should not be taken for granted. A thorough review should be made of the file shortly before the deposition and the contents of the file photocopied. This way, if the other attorney wishes to receive a copy, it is ready. The sexologist always keeps the original documentation.

In preparing for the deposition, there is no better way than practice. The attorney and the sexologist should rehearse what will likely happen during the deposition. The attorney's ethical code forbids him from telling the sexologist what to say. Nonetheless, he may go through the types of questions that may be asked and explain what to expect, how to take one's time before answering, how to be truthful, etc. Further in this pre-deposition conference, techniques will be identified to help a sexologist become a better witness. These techniques can also easily be used at trial.

The Trial

The next step following discovery is the trial. At the start of a trial, in the case of a sexologist acting as an expert, the other party may ask for his disqualification. If this is the case after a hearing, in essence, the participation of the sexologist is terminated unless the attorney retains him to assist during the trial. It should be noted that the trial judge may decide to render his decision later in the trial, or he may allow only a portion of the expert's proffered testimony.

Prior to the trial, the sexologist should read the deposition transcript carefully and go through the file to ensure it is indexed. If acting as an expert, review of the other side's depositions is an equally good idea. It is highly recommended that he meet with the attorney and go through a simulation in order to avoid any surprises. He should also pay particular attention to what the attorney says about cross-examinations where many cases are won and lost. The sexologist is in control of the situation when meeting with his patient/client in his office. This, however, is not the case in the courtroom where the judge and lawyers control what goes on and how things are done. It is indeed another

world. A good attorney will attempt to prepare the sexologist for such a change. Just as a sexologist and patient/client set goals to work toward, so should the attorney and the sexologist. Team work and collaboration are key. A visit to the courtroom should take place prior to the beginning of the trial in order to become familiar with the surroundings.

Direct Examination

At trial, the sexologist who is testifying as an *expert* or as a *lay* witness will face a direct examination by the attorney for whom he is testifying voluntarily or involuntarily. Also, the sexologist will be cross-examined by the opposing attorney. What follows is a brief description of what will happen during these two steps in the trial. There will also be suggestions consisting of do's and don'ts in order for the sexologist to be an effective witness. Some of these things may seem logical, but are often forgotten. Whenever the procedure is different for an *expert* witness, it will be pointed out. Also, a trial held before a judge and jury will be discussed. If there is no jury, what follows applies if testifying in front of a sole judge. The term *fact finder* will be used to identify a sole judge hearing the case, and *fact finders* to indicate a judge and jury.

The direct examination has been called "the heart of the case" (Matson, Daou and Soper 2004, 73). What a trial attorney is trying to do by using a sexologist as an *expert* witness or *lay* witness is to educate or assist the fact finders about the facts of the case. In the case of an *expert* witness, the purpose is to help explain "parts of the case that are not normally part of everyday experience" (Waites 2002, 431). The lawyer will be asking many open-ended questions while directing the witness in a manner that will help establish a story. He will be friendly and very supportive. Hopefully, the sexologist will

have rehearsed with the attorney via role playing before the trial. Richard C. Waites suggests that the attorney invite the witness to participate and help in the development of the testimony (2002).

If the sexologist is testifying as an *expert*, the first series of questions that will be asked by the retaining attorney will concern the expert's qualifications before proceeding to the issues and opinions. These qualifications must clearly be established again, even though they might have been discussed at length in the *Daubert/Frye* hearing related to the admissibility of the expert's testimony. It is a time to substantiate the *expert* as being credible in the eyes of the jury. It is helpful to keep in mind what Waites has discovered through research.

The first question(s) in a direct examination will be the most important question(s). We know from our discussion about primacy and recency that the first statement and the last statement in any part of a discourse will be most vividly remembered by the fact finder (Waites 2002, 417).

In order to establish credibility, the witness should dress appropriately and be well-groomed. Appearance is an important factor for the fact finders. Moreover, the last thing a juror wants to hear is a boring story. The witness must make his speech interesting, all the while remaining consistent. The story should not be complicated or convoluted. Simplicity is the key word. The quality and tone of the voice play important roles in the presentation of the story during the direct examination. In addition to the voice are gestures and facial expression.

Smith and Bace write of Albert Mahrabian's research whereby he:

found that over 50 percent of the material that a listener uses to determine credibility comes from the listener's observations of the speaker's facial gestures, including the eyes, and body language. Almost 40 percent of the credibility factors a listener uses comes from the appreciation or lack thereof of the speaker's voice in speaking or remaining silent during the communication. In other words,

90 percent of a speaker's credibility is determined by the delivery of the message and less than 10 percent of the credibility is determined by the words spoken (2003, 357).

The witness must use a language that is plain and doesn't go over the head of fact finders. Even when the witness is not answering questions, there are nonverbal messages and cues. Thus, communication exists. The sexologist should make eye contact with the fact finders when answering questions and look directly at the attorney when he asks the questions. Directing one's eyes at the fact finders demonstrates sincerity. When answering questions, the sexologist should be calm and courteous. He must remain centered while concentrating on the goal discussed with the attorney and on breathing properly. The sexologist *expert* must be certain that the communication used is appropriate. "If the expert witness does not carefully and slowly take fact finders through a journey of understanding the expert's opinions in the case, he ... runs the risk of leaving jurors behind mentally and, worst of all, causing them to feel stupid and resentful" (Waites 2002, 436).

The sexologist *expert* must imagine himself teaching a class. "The expert first teaches the retaining attorney, then at trial, he teaches the fact finders. The teaching takes place in two well-defined phases" (Gutheil and Simon 2002). Perhaps this is the reason that university professors are, for the most part, so well-liked as *expert* witnesses. The only exceptions are those who are arrogant, speak a language that the fact finders do not understand, or attempt to tell them everything they know, whether it is relevant or not. One party may have as an expert a young, slick, intelligent young person who does not connect with the fact finders. Waites thinks that fact finders tend to be less sympathetic toward *expert* witnesses than with *lay* or fact witnesses. This being said, they still tend to

admire professors who have spent so much time doing research and teaching (Waites 2002). It is important that they connect with what is being presented and the manner in which it is put forth. Smith and Bace remind us that: “As lecturer to his or her peers, the expert assumes that the attendees are already experts. In a trial the expert needs to make the opposite assumption” (Smith and Bace 2003, 278). We will recall that the role of an expert is to facilitate the understanding of certain concepts by the fact finders. One should never lose sight of this purpose.

Fact finders bring to the courtroom different values, belief systems, life experiences, and educational background. A witness must connect with the life experiences of the fact finders. “Fact finders are usually impressed when a witness takes the initiative to say something that would ordinarily be against his or her interest” (Waites 2002, 401). Often, a witness can accomplish this with the use of common analogies that fact finders can relate to in their ordinary lives.

Fact finders live in a very visual and technological world. The majority of them get their news by using the Internet, and most have played or play video games. They expect to be entertained when listening to a witness, especially if he is a sexologist. Visual aids should therefore be used, whenever possible, during testimony. Not only do they help in recalling what was said by the witness, they add credibility to the witness. “Research indicates that words and pictures presented together outperform words presented before pictures in the learning and creative problem-solving process” (Waites 2002, 360). By far, the most popular visual aid is computer-generated slides (i.e. PowerPoint presentation software) which can be presented by using a laptop computer connected to a liquid crystal display projector (LCD). However, the witness

should not solely rely on visual aids. A variety of methods should be used in order to convey information and testimony.

The Cross-Examination

The most stressful part of a trial is the cross-examination by the opposing attorney. During the cross-examination, the sexologist will be subjected to rigorous questioning by the opposing counsel. The latter will try to destroy his credibility or try to impeach the sexologist. Contrary to direct examination, leading questions are permitted during cross-examination. Leading questions usually suggest or imply an answer. Often, the questions will ask for a yes or no answer. Cross-examining attorneys often end their questions with interrogative phrases such as: “Would it be fair to state that?” or “Is that a fair statement?”. In such cases, the witness does not have the possibility to qualify his answer. The sexologist must remain calm and avoid arguing with the attorney. Demeanor is very important for credibility purposes. Many tactics are utilized during cross-examination. Trial lawyers relish the opportunity to attack a witness, particularly an expert witness. They use all sorts of tricks such as being aggressive and grilling with questions one after another in rapid succession. Although a sexologist may be an expert in the field of sexuality, it may be possible for an attorney to make him look like an incompetent. Walter R. Lancaster, a trial attorney, has a simple philosophy. He thinks that every expert has an *Achilles heel*, and a good lawyer will find it. One should not be intimidated by an expert (Lancaster 1998). He has come up with certain rules for attorneys who will cross-examine. By becoming familiar with these rules, a sexologist can better prepare for cross-examination. Here are three of the seven rules in question:

1) know your prey; 2) the only way to beat an expert is to be a better expert; and 3) don't plan to ask, plan to attack (Lancaster 1998).

The American Bar Association Center for Continuing Legal Education published an article entitled *Nine Ways to Cross-Examine an Expert*. Among other things, it encourages attorneys to attack the expert's field, which, for a sexologist, would mean the field of sexology. In the past, sexology has not been treated on an equal footing as other sciences. Mocking sexology and sexologists in general is a distinct possibility and a sexologist should therefore be on guard. The article also underscores, as many have previously done, the importance of attacking qualifications, especially "if the witness literally asks for it...". What is meant by "asking for it"? According to the American Bar Association, the attorney can simply look at the expert's resumé and he should find something that may be attacked. Also, the witness' bias should be exposed, and if possible, the witness should be impeached with an article or a book from another authority that disagrees with the witness (ABA 1998). The sexologist should never venture outside his area of expertise. If this is done, an attorney will make it an issue and, inevitably, use it to his client's advantage.

Raymond Paul Johnson, a Los Angeles attorney writes that "the key to cross-examination" is control. That is to say an *expert* (or *lay*) witness must be in control as long as the cross-examination lasts (Johnson 1998). A witness should never get into an intellectual contest with the attorney asking questions nor, at any time, be or appear arrogant.

Often, an expert will be asked if he is being paid for testifying. The correct answer to this question is that the sexologist is not being paid for his opinions, but is receiving

compensation/payment for information provided to the attorneys, judge and jury.

Sexologists, just as any other professionals, are entitled to fair compensation for services rendered, be they providing services in the capacity of a witness, consultant, or otherwise.

CONCLUSION

The material presented in this dissertation is deemed an indispensable tool for sexologists, especially in light of the fact that there is little available by way of training options (courses, seminars, etc.) to address the evident need for knowledge regarding testifying, and more specifically, the need for *know-how* on behalf of sexologists. Indeed, as clearly indicated by the survey results, there is a void to be filled with respect to preparation of witnesses among the sexologist clientele.

It seems an obvious conclusion that, by acquiring a sound understanding of how the use of *expert* witnesses eventually became a critical aspect of the legal system, one is better positioned to appreciate the importance of such a role within a court proceeding. As time goes on, it is safe to assume that sexologists will, more and more frequently, be called upon to provide testimony, either by clients or patients, or by attorneys and the courts. This being the case, irrespective of whether sexologists act as *lay* or *expert* witnesses, they must be prepared to undertake such a task to the best of their ability. By using the information provided herein, not to mention the practical tools provided in the appendices, the sexologist's skill set is enhanced, and he is in a better position to know what to expect from such an experience and to fulfill his obligations with self-assurance and confidence.

In all likelihood, most sexologists will never (or at the very least, seldom) be called to serve as *expert witnesses* in a court case. That said, in the age of litigation we currently live in, it is far more likely (and, in fact, should be expected) that a sexologist be required to provide *lay witness* testimony at one time or another during the span of his career. For this reason alone, it should be imperative for higher learning institutions to

provide adequate training with respect to the legal arena and its procedures, and more importantly, to the potential witness experience in the courtroom.

APPENDIX A – Survey Invitation (E-mail message content)

Dear _____,

I am currently conducting research as part of my dissertation requirements for the Ph.D. program in Clinical Sexology at Maimonides University under the supervision of Dr. William Granzig, dean of the program.

In order to contribute to this research, you are invited to participate in an online survey entitled “The Sex Practitioner as a Witness”. Your valuable input will assist in determining how well prepared sexologists are to participate in the legal system.

It should take no longer than 15-20 minutes to complete. In the event that you have received more than one invitation to participate, please only complete the survey once. You are asked to complete the survey no later than November 20th, 2006 .

In addition, should you be interested in receiving a summary of the findings, I will be happy to send a copy to you upon request.

Rest assured that your participation in this survey will remain anonymous and that all responses will be kept confidential.

Allow me to thank you in advance for your significant contribution to my research. Should you have any further questions, please do not hesitate to e-mail me.

To access the online survey, simply click on the link provided below to proceed.

<http://www.surveymonkey.com/s.asp?u=632452618078>

Sincerely,

Jacques Babin, Esq., M.A.

APPENDIX A (cont.) – Survey Invitation (listserv message posting)

The following message was posted on the AASECT listserv at Yahoo and Topica:

Greetings AASECT members,

My name is Jacques Babin. In addition to being a sex counselor and educator, I am also an attorney, and I am currently completing research for my doctoral dissertation at Maimonides University. My research topic involves the sexologist as a witness in a court proceeding.

As a member of the AASECT listserv for the past 18 months, I have followed with great interest the postings. One of the things that I've most appreciated is the evident collaboration that exists between members of the AASECT community and the interest that members have in lending support to their AASECT counterparts. I've also noticed a high level of participation in requests for information or assistance, and therefore, I am hopeful that you may provide me with an invaluable data set to help validate my research by participating in a survey for my research.

In order to contribute, you are invited to participate in an online survey entitled "The Sex Practitioner as a Witness". Your valuable input will assist in determining how well prepared sexologists are to participate in the legal system.

It should take no longer than 15-20 minutes to complete. You are asked to complete the survey no later than November 25th, 2006. Rest assured that your participation in this survey will remain anonymous and that all responses will be kept confidential. In addition, should you be interested in receiving a summary of the findings, I will be happy to send a copy to you upon request.

Allow me to thank you in advance for your significant contribution to my research. Should you have any further questions, please do not hesitate to e-mail me.

To access the online survey, simply click on the following link to proceed:

<http://www.surveymonkey.com/s.asp?u=632452618078>

Jacques Babin, Esq., M.A.

APPENDIX B – Survey Questionnaire

The Sex Practitioner as a Witness: Survey

Background Information

1. Where do you currently reside? (Check applicable region.)

- New England
- Mid-Atlantic
- South
- Midwest
- Southwest
- West
- Outside of U.S. (please specify) _____

2. How old are you? _____

3. What is your highest level of education attained?

- Bachelor's degree
- Master's degree
- Ph.D.
- Other (please specify) _____

4. How many years have you been working in a sex-related field? _____

5. What is your professional designation? (Check all that apply.)

- clinical sexologist
- clinical social worker
- counselor
- educator
- medical doctor
- nurse practitioner
- psychiatrist
- psychologist
- registered nurse
- social worker
- therapist
- (please qualify, e.g. sex, family, psychotherapist, etc.: _____)
- other (please specify) _____

6. Which professional organization(s) do you belong to?
(Please check all applicable boxes.)

- American Academy of Clinical Sexologists (AACS)
- American Association for Marriage and Family Therapy (AAMFT)
- American Association of Sexuality Educators, Counselors and Therapists (AASECT)
- American Board of Sexology (ABS)
- American Psychiatric Association (APA)
- American Psychoanalytic Association (APSAA)
- American Psychological Association (APA)
- National Association of Social Workers (NASW)
- Society for the Scientific Study of Sexuality (SSSS)
- none
- Other (please specify) _____

Knowledge and Experience

7. How would you rate your knowledge of the legal system?

- no knowledge
- some knowledge
- significant knowledge

8. How would you rate your knowledge of the steps involved in a civil court case?

- no knowledge
- some knowledge
- significant knowledge

9. How would you rate your knowledge of the steps involved in a criminal court case?

- no knowledge
- some knowledge
- significant knowledge

10. Do you know the difference between a **lay witness** and an **expert witness**?

- yes
- no

11. Have you ever served as a witness in a court case within the context of your sex-related field or practice? (If no, please skip to question 15.)

- yes
- no

12. If you answered yes to question #11, in how many cases did you testify? _____
13. If you answered yes to question #11, what type of witness were you?
- lay witness
 - expert witness
 - both
 - don't know
14. If you answered yes to question #11, what type of court case did you testify in?
- State
 - Federal
 - Other (please specify) _____
15. Have you had any other professional experience within the legal system (other than testifying)? (If no, skip to question #17.)
- yes no
16. If you answered yes to question #15, please describe the details of your work within the legal system.
17. Are you familiar with the criteria used by the courts for admissibility of expert witnesses? (If no, skip to question #19.)
18. If you answered yes to question #17, check all that apply.
- State Court
 - Federal Court
19. If you've ever testified in a court case, how was your preparation as a witness acquired?
(Check all that apply. If you've never been a witness, skip to question #21.)
20. Was the knowledge that you acquired adequate?
- n/a
 - yes
 - no (please explain)
21. Do you currently feel prepared to serve as a witness in court?
- yes
 - no (please explain)

22. With respect to testimony, do you understand **testimonial privilege** as it relates to confidentiality issues between sexologists and their clients/patients?

- yes
- no
- not sure

Thank you for your participation!

Thank you for taking the time to contribute to my Ph.D. dissertation research.

If you are interested in receiving the results of this survey, please e-mail me at renaissancearts@gmail.com and I will gladly forward them to you.

Jacques Babin

APPENDIX C: Privileges in Other States

Here are the privileges that concern sexologists for the other forty-nine states. As is the case with the state of Florida, there are situations where a sexologist cannot use this privilege. State statutes should be reviewed prior to testifying.

Alabama

Ala. Code §§ 34-26-2 (psychologist/psychiatrist – patient); §§ 34-8A-21 (licensed counsel or patient); §§ 15-23-42 (victim counselor). It should be noted that Alabama does not recognize a physician-patient privilege.

Alaska

Alaska R. Evid. 504; Alaska Stat. § 09.25.400 (physician, psychotherapist, psychologist, marital and family therapist, professional counsel or and sexual assault/domestic violence counselor).

Arizona

Ariz. Rev. Stat. §§ 12-2235 (physician-patient); §§ 13-4430 (crime victim counselor-victim); §§ 32-2085 (psychologist-patient); §§ 32-3283 (behavioral health professional-client).

Arkansas

Ark. Rules of Evidence 503 (physician and psychotherapist-patient); Ark. Code Ann. §§ 17-27-311 (marriage and family therapist-client); §§ 17-406-107 (social worker-client); §§ 17-97-105 (psychologist-patient).

California

Cal. Evid. Code §§ 990-§§ 1037.7 (physician, psychotherapist, psychologist, social worker, nurse, sexual assault counselor, domestic abuse counselor-patient/client)

Colorado

Colo. Stat. Ann. § 13-90-107 (d) (physician – patient; Colo. Stat. Ann. § 13-90-107(g) (licensed psychologist, professional counselor, marriage and family therapist, social worker and psychotherapist – client).

Connecticut

Conn. Gen. Stat. §§ 52-146c (psychologist-patient); §§ 52-146d- §§ 52-146j (psychiatrist-patient); §§ 52-146k (battered women's or sexual assault counselor-victim); §§ 52-146o (physician-patient); §§ 52-146p (marital and family therapist); §§ 52-146(q) (social worker); §§ 52-146(s) (professional counselor).]

Delaware

Del. Code Ann. Tit. 24, § 3019 (mental health counselor-client); § 3913 (licensed clinical social worker-client); Del. Uniform Rules of Evidence, Rule 503 (physician, psychotherapist-patient).

District of Columbia

D.C. Code Ann. §§ 7-1201.01 (psychiatrist, psychologist, social worker, and others - patient/client).; 14-307.]

Georgia

Ga. Code Ann. § 24-9-21 (psychiatrist, licensed psychologist, licensed clinical social worker, licensed marriage counselor and others who render psychotherapy-patient/client) Georgia does not recognize the physician-patient privilege.

Hawaii

Haw. Rev. Stat. § 626-1, Rules of Evidence R. 504 (physician-patient); Haw. Rev. Stat. § 626-1, Rule 504.1 (psychologist-client); Haw. Rev. Stat. § 626-1, Rule 505.5 (counselor of sexual assault and domestic violence-client).

Idaho

Idaho Code §§ 9-203(4) (physician-patient); §§ 9-203(6) (school counselor-student); §§ 54-2314 (psychologist-client); §§ 54-3410 (professional counselor-client).]

Illinois

735 Ill. Comp. Stat. 5/8-802 (physician, psychologist, mental health worker, therapist and others).

Indiana

Ind. Code Ann. §§ 25-23.6-6-1 (social worker-client); §§ 25-33-1-17 (psychologist-client); §§ 35-37-6-9 (victim counselor-client); §§ 34-46-3-1 (physician-patient).

Iowa

Code § 622.10 (physician, counselor, advanced registered nurse practitioners, mental health professional-patient/client).

Kansas

Kan. Stat. Ann. §§ 60-427 (physician-patient); §§ 65-5601-§§ 65-5603 (mental health treatment personnel-patient); §§ 65-581 (professional counselor-client); §§ 74-5323 (psychologist-patient); §§ 74-5372 (psychotherapist-patient).

Kentucky

Ky. Rules of Evidence 506 (counselor-client, encompassing school counselor, sexual assault counselor, certified art therapist, member of a crisis response team and others); Rule 507 (psychotherapist-patient, encompassing psychiatrist, psychologist, licensed clinical social worker, and registered nurse who practices mental health nursing); Kentucky does not recognize a physician-patient privilege.

Louisiana

La. Code of Evidence Art. 510(A); La. Rev. Stat. Ann. § 13:3734(A)(1) (physician, psychotherapist, pharmacists, social worker, rape crisis counselor, and others-patient/client).

Maine

Me. R. Evid. R. 503 (physician and psychotherapist-patient/client); Me. Rev. Stat. Ann. Tit 32 at § 7005 (social worker-client); § 13862 (marriage/family therapist-client); Me. Rev. Stat. Ann. Tit 16 § 53B (domestic or family violence victim's advocate).

Maryland

Maryland does not recognize the physician-patient privilege. Md. Code Ann., Cts & Jud. Pro. § 9-109 (psychiatrist or psychologist-patient); § 9-109.1 (psychiatric mental health nursing specialist-patient); § 9-121 (licensed clinical social worker-client).] Maryland does not recognize the physician-patient privilege.

Massachusetts

Mass Gen. Laws Ch. 233, § 20B (psychiatrists, psychologists, and certified psychiatric nurse mental health clinical specialists and their respective patients); Mass Gen. Laws ch.112, § 135B; Ch. 233, § 20J licensed social workers and sexual assault counselors-clients). Massachusetts does not recognize the physician-patient privilege.

Michigan

Mich. Comp. Laws §§ 600.2157 (physicians-patients); §§ 330.1750 (psychiatrists or psychologists); §§ 333.18117 (licensed professional counselors-clients); §§333.18237 (psychologists-clients).

Minnesota

Minn. Stat. § 595.02 (1)(d)(g)(k)(physician, nurse, psychologists, licensed social worker, sexual assault counselors-patient/client).

Mississippi

Miss. Code Ann. § 73-31-29, Miss. Rules of Evid. R. 503 (physician, psychotherapist, psychologist-patient/client).

Missouri

Mo. Rev. Stat. §§ 491.060 (physicians, licensed psychologists); Mo. Rev. Stat. §§ 337.055 (psychologist); §§ 337.540 (professional counselor); §§ 337.636 (social worker); §§ 337.736 (marital and family counselor).

Montana

Mont. Code Ann. § 26-1-805 (physician); Mont. Code Ann. § 26-1-807 (psychologist-client, school counselor); Mont. Code Ann. § 26-1-809 (nurse-student).

Nebraska

Neb. Rev. Stat. § 27-504 (Rule 504) (physician, psychologist and professional counselor-patient/client)

Nevada

Nev. Rev. Stat. §§ 49.209 (psychologist); §§ 49.225 (physician, and psychiatric social worker); §§ 49.247 (marriage and family therapist); §§ 49.252 (social worker).

New Hampshire

N.H. Rules of Evid., Rule 503 (physician-patient and psychologist-client); N.H. Rev. Stat. § 329:26 (physician-patient); 326-B:30 (nurse-patient); § 330-A:32 (mental health practitioner-client).

New Jersey

N.J. Stat. Ann. §§ 2A:84A-22.1; 2A:84A-22.2; N.J. Rule of Evid. Rule 506 (patient-physician); 45:14B-28 (psychologist-client); 45:8B-29 (marriage/family therapist-client).

New Mexico

N.M.R. of Evid. R.11-504 (physician and psychotherapist); N.M.R. of Evid. R.11-509 (social services worker); N.M. Stat. Ann. §§ 31-25-3 (victim counselor).

New York

N.Y. C.P.L.R. 4504 (physicians, nurses, including registered nurses and licensed practical nurses); N.Y. C.P.L.R. 4507 (psychologist-patient); N.Y. C.P.L.R. 4508 (social worker-client); N.Y. C. P. L. R. 4510 (rape crisis counselor-client).

North Carolina

N.C. Gen. Stat. §§ 8-53 (physician-patient); §§ 8-53.3 (psychologist-client); §§ 8-53.4 (school counselor-student); §§ 8-53.5 (marital and family therapist-client); §§ 8-53.7 (social worker-client); §§ 8-53.8 (professional counselor-client).

North Dakota

N.D. Rules of Evidence, Rule 503 (physician and psychotherapist-patient); N.D. Cent. Code §§ 31-01-06.1 (qualified school counselor-student); §§ 31-01-06.3 (addiction counselor-client); §§ 43-47-09 (licensed professional counselor-client).

Ohio

Oh. Rev. Code § 2317.02(B)(1) (physicians); Oh. Rev. Code § 2317.02(G)(1) (school guidance counselors, professional counselors, licensed social workers); Oh. Rev. Code § 4732.19 (psychologists).

Oklahoma

Okla. Stat. Tit.12, § 2503 (physician and psychotherapist-patient); Okla. Stat. Tit. 59, § 1272.1 (social worker-client); Okla. Stat. Tit. 59, § 1376 (psychologist-client); Okla. Stat. Tit. 59, § 1910 (licensed professional counselor-client); Okla. Stat. Tit. 59, § 1925.11 (family therapist-client).

Oregon

Or. Rev. Stat. §§ 40.230 (psychotherapist-patient); §§ 40.235 (physician-patient); §§ 40.240 (nurse-patient); §§ 40.250 (clinical social worker-client); §§ 40.262 (counselor-client).

Pennsylvania

42 Pa. Cons. Stat. Ann. §§ 5944 (psychiatrist/psychologist-client); §§ 5945 (guidance counselor, school nurse, home and school visitor, and school psychologist-student); 42 Pa. Cons. Stat. Ann. § 5929 (very narrow physician-patient privilege)

Rhode Island (à verifier)

R.I. Gen. Laws §§ 5-37.3-6; §5-37.3-6.2 (health care provider-patient).

South Carolina

S.C. Code § 44-22-90 (physician, psychiatrist, psychologist, social worker, psychotherapist).

South Dakota

S.D. Codified Laws §§ 19-13-6; §§ 19-13-7 (physician/psychotherapist-patient); §§ 36-27A-38 (psychologist-patient); §§ 36-26-30 (social worker-client); §§ 36-32-27 (professional counselor-patient).

Tennessee

Tenn. Code Ann. §§ 24-1-207 (psychiatrist-patient); §§ 63-11-213 (psychologist-client); §§ 63-22-114 (marital and family therapist-client); §§ 63-23-107 (social worker-client); §§ 63-7-125 (registered nurses that specialize in psychiatric and mental health-client). Tennessee does not recognize a physician-patient privilege.

Texas

Tex. R. Evid. 509, 510 (physician-patient); Tex. Health and Safety Code §§ 611.002 (mental health professional-patient).

Utah

Utah Code Ann. § 78-24-8(4); Utah Rules of Evidence, Rule 506 (physicians); Utah Rules of Evidence, Rule 506; Utah Code Ann. § 58-60-113 (psychologists, clinical or certified social workers, and other professional counselors and patient/client).

Vermont

12 Vt. Stat. Ann. § 1612; 18 Vt. Stat. Ann. § 7101(13) (definition of mental health professional); Vt. Rules of Evidence, Rule 503 (psychologists, social workers, mental health counselors and nurses-patient/client)

Virginia

Va. Code Ann. §§ 8.01-399 (physician and other “licensed practitioner of the healing arts”-patient); §§ 8.01-400.2 (licensed professional counselor, clinical social worker or psychologist-client).

Washington

Wash. Rev. Code Ann. § 5.60.060 (physician); Wash. Rev. Code Ann. §18.83.110 (psychologist-client)

West Virginia

W.V. Code § 27-3-1 Any information that is obtained during an evaluation or treatment of a mental health client/patient is confidential. There is no physician-patient privilege in West Virginia.

Wisconsin

Wis. Stat. Ann. § 905.04 (physicians, registered nurses, psychologists, social workers, marriage and family therapists, professional counselors and their respective patients/clients).

Wyoming

Wyo. Stat. Ann. §§ 1-12-101 (physician-patient); §§ 33-27-123 (psychologist-client).

APPENDIX D – Selected Codes of Ethics

ETHICS STATEMENT FROM THE SOCIETY FOR THE SCIENTIFIC STUDY OF SEXUALITY

Recognizing the responsibilities of a professional organization to society and in accordance with its own Mission Statement, The Society for the Scientific Study of Sexuality has adopted the following statement regarding professional ethics. This statement applies to all members, regardless of membership category, in their pursuit of professional activities.

All members of the Society are expected to abide by the ethical guidelines or codes of ethics of their respective disciplines, professional organizations, places of work, or educational institutions. Further, the Society strives to support the dignity of every person. (Society for the Scientific Study of Sexuality 2006)

AMERICAN PSYCHANALYTIC ASSOCIATION

IV. Confidentiality

1. All information about the specifics of a patient's life is confidential, including the name of the patient and the fact of treatment. The psychoanalyst should resist disclosing confidential information to the full extent permitted by law. Furthermore, it is ethical, though not required, for a psychoanalyst to refuse legal, civil or administrative demands for such confidential information even in the face of the patient's informed consent and accept instead the legal consequences of such a refusal.
2. The psychoanalyst should never share confidential information about a patient with non-clinical third-parties (e.g., insurance companies) without the patient's or, in the case of a minor patient, the parent's or guardian's informed consent. For the purpose of claims review or utilization management, it is not a violation of confidentiality for a psychoanalyst to disclose confidential information to a consultant psychoanalyst, provided the consultant is also bound by the confidentiality standards of these Principles and the informed consent of the patient or parent or guardian of a minor patient has first been obtained. If a third-party payer or a patient or parent or guardian of a minor patient demands that the psychoanalyst act contrary to these Principles, it is ethical for the psychoanalyst to refuse such demands, even with the patient's or, in the case of a minor patient, the parent's or guardian's informed consent.
3. The psychoanalyst of a minor patient must seek to preserve the patient's confidentiality, while keeping parents or guardians informed of the course of treatment in ways appropriate to the age and stage of development of the patient, the clinical situation and these Principles.

4. The psychoanalyst should take particular care that patient records and other documents are handled so as to protect patient confidentiality. A psychoanalyst may direct an executor to destroy such records and documents after his or her death.

5. It is not a violation of confidentiality for a psychoanalyst to disclose confidential information about a patient in a formal consultation or supervision in which the consultant or supervisor is also bound by the confidentiality requirements of these Principles. On seeking consultation, the psychoanalyst should first ascertain that the consultant or supervisor is aware of and accepts the requirements of the Confidentiality standard.

6. If the psychoanalyst uses confidential case material in clinical presentations or in scientific or educational exchanges with colleagues, either the case material must be disguised sufficiently to prevent identification of the patient, or the patient's informed consent must first be obtained. If the latter, the psychoanalyst should discuss the purpose(s) of such presentations, the possible risks and benefits to the patient's treatment and the patient's right to withhold or withdraw consent. In the case of a minor patient, parent(s) or guardian(s) should be consulted and, depending on the age and developmental stage, the matter may be discussed with the patient as well.

7. Supervisors, peer consultants and participants in clinical and educational exchanges have an ethical duty to maintain the confidentiality of patient information conveyed for purposes of consultative or case presentations or scientific discussions.

8. Candidate psychoanalysts-in-training are strongly urged to consider obtaining the patient's informed consent before beginning treatment, pertaining to disclosures of confidential information in groups or written reports required by the candidate's training. Where the patient is a minor, the candidate is strongly urged to consider obtaining informed consent from the parent(s) or guardian(s); age and stage of development will assist the candidate in determining if the patient should also be informed. (American Psychanalytic Association 2005)

AMERICAN PSYCHOLOGICAL ASSOCIATION

4. Privacy And Confidentiality

4.01 Maintaining Confidentiality

Psychologists have a primary obligation and take reasonable precautions to protect confidential information obtained through or stored in any medium, recognizing that the extent and limits of confidentiality may be regulated by law or established by institutional rules or professional or scientific relationship. (See also Standard 2.05, Delegation of Work to Others.)

4.02 Discussing the Limits of Confidentiality

(a) Psychologists discuss with persons (including, to the extent feasible, persons who are legally incapable of giving informed consent and their legal representatives) and

organizations with whom they establish a scientific or professional relationship (1) the relevant limits of confidentiality and (2) the foreseeable uses of the information generated through their psychological activities. (See also Standard 3.10, Informed Consent.)

(b) Unless it is not feasible or is contraindicated, the discussion of confidentiality occurs at the outset of the relationship and thereafter as new circumstances may warrant.

(c) Psychologists who offer services, products, or information via electronic transmission inform clients/patients of the risks to privacy and limits of confidentiality.

4.03 Recording

Before recording the voices or images of individuals to whom they provide services, psychologists obtain permission from all such persons or their legal representatives. (See also Standards 8.03, Informed Consent for Recording Voices and Images in Research; 8.05, Dispensing With Informed Consent for Research; and 8.07, Deception in Research.)

4.04 Minimizing Intrusions on Privacy

(a) Psychologists include in written and oral reports and consultations, only information germane to the purpose for which the communication is made.

(b) Psychologists discuss confidential information obtained in their work only for appropriate scientific or professional purposes and only with persons clearly concerned with such matters.

4.05 Disclosures

(a) Psychologists may disclose confidential information with the appropriate consent of the organizational client, the individual client/patient, or another legally authorized person on behalf of the client/patient unless prohibited by law.

(b) Psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose such as to (1) provide needed professional services; (2) obtain appropriate professional consultations; (3) protect the client/patient, psychologist, or others from harm; or (4) obtain payment for services from a client/patient, in which instance disclosure is limited to the minimum that is necessary to achieve the purpose. (See also Standard 6.04e, Fees and Financial Arrangements.)

4.06 Consultations

When consulting with colleagues, (1) psychologists do not disclose confidential information that reasonably could lead to the identification of a client/patient, research participant, or other person or organization with whom they have a confidential relationship unless they have obtained the prior consent of the person or organization or the disclosure cannot be avoided, and (2) they disclose information only to the extent necessary to achieve the purposes of the consultation. (See also Standard 4.01, Maintaining Confidentiality.)

4.07 Use of Confidential Information for Didactic or Other Purposes

Psychologists do not disclose in their writings, lectures, or other public media, confidential, personally identifiable information concerning their clients/patients, students, research participants, organizational clients, or other recipients of their services that they obtained during the course of their work, unless (1) they take reasonable steps to disguise the person or organization, (2) the person or organization has consented in writing, or (3) there is legal authorization for doing so. (American Psychological Association 2003)

NATIONAL ASSOCIATION OF SOCIAL WORKERS

1.07 Privacy and Confidentiality

(a) Social workers should respect clients' right to privacy. Social workers should not solicit private information from clients unless it is essential to providing services or conducting social work evaluation or research. Once private information is shared, standards of confidentiality apply.

(b) Social workers may disclose confidential information when appropriate with valid consent from a client or a person legally authorized to consent on behalf of a client.

(c) Social workers should protect the confidentiality of all information obtained in the course of professional service, except for compelling professional reasons. The general expectation that social workers will keep information confidential does not apply when disclosure is necessary to prevent serious, foreseeable, and imminent harm to a client or other identifiable person. In all instances, social workers should disclose the least amount of confidential information necessary to achieve the desired purpose; only information that is directly relevant to the purpose for which the disclosure is made should be revealed.

(d) Social workers should inform clients, to the extent possible, about the disclosure of confidential information and the potential consequences, when feasible before the disclosure is made. This applies whether social workers disclose confidential information on the basis of a legal requirement or client consent.

(e) Social workers should discuss with clients and other interested parties the nature of confidentiality and limitations of clients' right to confidentiality. Social workers should review with clients circumstances where confidential information may be requested and where disclosure of confidential information may be legally required. This discussion should occur as soon as possible in the social worker-client relationship and as needed throughout the course of the relationship.

(f) When social workers provide counseling services to families, couples, or groups, social workers should seek agreement among the parties involved concerning each individual's right to confidentiality and obligation to preserve the confidentiality of

information shared by others. Social workers should inform participants in family, couples, or group counseling that social workers cannot guarantee that all participants will honor such agreements.

(g) Social workers should inform clients involved in family, couples, marital, or group counseling of the social worker's, employer's, and agency's policy concerning the social worker's disclosure of confidential information among the parties involved in the counseling.

(h) Social workers should not disclose confidential information to third-party payers unless clients have authorized such disclosure.

(i) Social workers should not discuss confidential information in any setting unless privacy can be ensured. Social workers should not discuss confidential information in public or semipublic areas such as hallways, waiting rooms, elevators, and restaurants.

(j) Social workers should protect the confidentiality of clients during legal proceedings to the extent permitted by law. When a court of law or other legally authorized body orders social workers to disclose confidential or privileged information without a client's consent and such disclosure could cause harm to the client, social workers should request that the court withdraw the order or limit the order as narrowly as possible or maintain the records under seal, unavailable for public inspection.

(k) Social workers should protect the confidentiality of clients when responding to requests from members of the media.

(l) Social workers should protect the confidentiality of clients' written and electronic records and other sensitive information. Social workers should take reasonable steps to ensure that clients' records are stored in a secure location and that clients' records are not available to others who are not authorized to have access.

(m) Social workers should take precautions to ensure and maintain the confidentiality of information transmitted to other parties through the use of computers, electronic mail, facsimile machines, telephones and telephone answering machines, and other electronic or computer technology. Disclosure of identifying information should be avoided whenever possible.

(n) Social workers should transfer or dispose of clients' records in a manner that protects clients' confidentiality and is consistent with state statutes governing records and social work licensure.

(o) Social workers should take reasonable precautions to protect client confidentiality in the event of the social worker's termination of practice, incapacitation, or death.

(p) Social workers should not disclose identifying information when discussing clients for teaching or training purposes unless the client has consented to disclosure of confidential information.

(q) Social workers should not disclose identifying information when discussing clients with consultants unless the client has consented to disclosure of confidential information or there is a compelling need for such disclosure.

(r) Social workers should protect the confidentiality of deceased clients consistent with the preceding standards. (National Association Of Social Workers 1999)

AMERICAN ASSOCIATION FOR MARRIAGE AND FAMILY THERAPY

Principle II - Confidentiality

Marriage and family therapists have unique confidentiality concerns because the client in a therapeutic relationship may be more than one person. Therapists respect and guard the confidences of each individual client.

2.1 Marriage and family therapists disclose to clients and other interested parties, as early as feasible in their professional contacts, the nature of confidentiality and possible limitations of the clients' right to confidentiality. Therapists review with clients the circumstances where confidential information may be requested and where disclosure of confidential information may be legally required. Circumstances may necessitate repeated disclosures.

2.2 Marriage and family therapists do not disclose client confidences except by written authorization or waiver, or where mandated or permitted by law. Verbal authorization will not be sufficient except in emergency situations, unless prohibited by law. When providing couple, family or group treatment, the therapist does not disclose information outside the treatment context without a written authorization from each individual competent to execute a waiver. In the context of couple, family or group treatment, the therapist may not reveal any individual's confidences to others in the client unit without the prior written permission of that individual.

2.3 Marriage and family therapists use client and/or clinical materials in teaching, writing, consulting, research, and public presentations only if a written waiver has been obtained in accordance with Subprinciple 2.2, or when appropriate steps have been taken to protect client identity and confidentiality.

2.4 Marriage and family therapists store, safeguard, and dispose of client records in ways that maintain confidentiality and in accord with applicable laws and professional standards.

2.5 Subsequent to the therapist moving from the area, closing the practice, or upon the death of the therapist, a marriage and family therapist arranges for the storage, transfer, or disposal of client records in ways that maintain confidentiality and safeguard the welfare of clients.

2.6 Marriage and family therapists, when consulting with colleagues or referral sources, do not share confidential information that could reasonably lead to the identification of a client, research participant, supervisee, or other person with whom they have a confidential relationship unless they have obtained the prior written consent of the client, research participant, supervisee, or other person with whom they have a confidential relationship. Information may be shared only to the extent necessary to achieve the purposes of the consultation. (American Association For Marriage And Family Therapy 2001)

AMERICAN PSYCHIATRIC ASSOCIATION

Section 4

A physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of the law.

1. Psychiatric records, including even the identification of a person as a patient, must be protected with extreme care. Confidentiality is essential to psychiatric treatment. This is based in part on the special nature of psychiatric therapy as well as on the traditional ethical relationship between physician and patient. Growing concern regarding the civil rights of patients and the possible adverse effects of computerization, duplication equipment, and data banks makes the dissemination of confidential information an increasing hazard. Because of the sensitive and private nature of the information with which the psychiatrist deals, he or she must be circumspect in the information that he or she chooses to disclose to others about a patient. The welfare of the patient must be a continuing consideration.
2. A psychiatrist may release confidential information only with the authorization of the patient or under proper legal compulsion. The continuing duty of the psychiatrist to protect the patient includes fully apprising him/her of the connotations of waiving the privilege of privacy. This may become an issue when the patient is being investigated by a government agency, is applying for a position, or is involved in legal action. The same principles apply to the release of information concerning treatment to medical departments of government agencies, business organizations, labor unions, and insurance companies. Information gained in confidence about patients seen in student health services should not be released without the students' explicit permission.
3. Clinical and other materials used in teaching and writing must be adequately disguised in order to preserve the anonymity of the individuals involved.
4. The ethical responsibility of maintaining confidentiality holds equally for the

consultations in which the patient may not have been present and in which the consultee was not a physician. In such instances, the physician consultant should alert the consultee to his or her duty of confidentiality.

5. Ethically, the psychiatrist may disclose only that information which is relevant to a given situation. He or she should avoid offering speculation as fact. Sensitive information such as an individual's sexual orientation or fantasy material is usually unnecessary.

6. Psychiatrists are often asked to examine individuals for security purposes, to determine suitability for various jobs, and to determine legal competence. The psychiatrist must fully describe the nature and purpose and lack of confidentiality of the examination to the examinee at the beginning of the examination.

7. Careful judgment must be exercised by the psychiatrist in order to include, when appropriate, the parents or guardian in the treatment of a minor. At the same time, the psychiatrist must assure the minor proper confidentiality.

8. When, in the clinical judgment of the treating psychiatrist, the risk of danger is deemed to be significant, the psychiatrist may reveal confidential information disclosed by the patient."

9. When the psychiatrist is ordered by the court to reveal the confidences entrusted to him/her by patients, he or she may comply or he/ she may ethically hold the right to dissent within the framework of the law. When the psychiatrist is in doubt, the right of the patient to confidentiality and, by extension, to unimpaired treatment should be given priority. The psychiatrist should reserve the right to raise the question of adequate need for disclosure. In the event that the necessity for legal disclosure is demonstrated by the court, the psychiatrist may request the right to disclosure of only that information which is relevant to the legal question at hand.

10. With regard for the person's dignity and privacy and with truly informed consent, it is ethical to present a patient to a scientific gathering if the confidentiality of the presentation is understood and accepted by the audience.

11. It is ethical to present a patient or former patient to a public gathering or to the news media only if the patient is fully informed of enduring loss of confidentiality, is competent, and consents in writing without coercion.

12. When involved in funded research, the ethical psychiatrist will advise human subjects of the funding source, retain his or her freedom to reveal data and results, and follow all appropriate and current guidelines relative to human subject protection.

13. Ethical considerations in medical practice preclude the psychiatric evaluation of any person charged with criminal acts prior to access to, or availability of, legal counsel. The only exception is the rendering of care to the person for the sole purpose of medical treatment.

14. Sexual involvement between a faculty member or supervisor and a trainee or student, in those situations in which an abuse of power can occur, often takes advantage of inequalities in the working relationship and may be unethical because:

- a. Any treatment of a patient being supervised may be deleteriously affected.
- b. It may damage the trust relationship between teacher and student.
- c. Teachers are important professional role models for their trainees and affect their trainees' future professional behavior.

(American Psychiatric Association 2006)

AMERICAN ASSOCIATION OF SEX EDUCATORS, COUNSELORS AND THERAPISTS

Principle Three: Welfare of the Consumer

The AASECT member shall accept that the consumer is in a unique position of vulnerability in respect to services related to sex education, counseling, therapy, research, and supervision, and shall constantly be mindful of the responsibility for protection of the consumer's welfare, rights and best interests and for the rigorous maintenance of the trust implicit in the educational, counseling or therapeutic alliance.

(A) The member shall, from the onset of professional contact with a consumer or a potential consumer, clarify;

- (1) Professional training, experiences and competencies;
- (2) The nature of the professional services available to the consumer (with an explanation of mutual roles and duties);
- (3) The limits of intervention effectiveness.
- (4) Personal values or professional preferences that reflect biases rather than being responsive to the needs and well-being of the consumer;
- (5) Any exceptions to confidentiality and privileged communications (e.g. duty to warn, mandatory reporting, etc.); and
- (6) Any financial issues, especially the payment obligations of the consumers

(B) The member shall treat all information received about a consumer as confidential, even if some portions of the information appear trivial, irrelevant or not to require confidentiality; even the existence of an educational counseling or therapeutic relationship with the consumer is confidential. Where required by law, the AASECT provider will design a HIPPA policy and follow all legal requirements protecting consumer privacy.

(C) The member shall advocate the consumer's privileged communication, *as* granted by the laws of the jurisdiction applicable to the consumer and/or the member in the event that there is uncertainty about the effectiveness or validity of the consumer's consent to release information that is potentially confidential and/or privileged, the member shall obtain appropriate legal determination.

(D) The member shall divulge information received from a consumer or prospective consumer to the extent required only in the following circumstances

(1) When the consumer provides written and informed consent, which indicates:

- (a) The type and nature of information to be released;
- (b) Knowledge of the purpose for which the information will be used;
- (c) Designation of the source that will receive the information;
- (d) That the consent is given voluntarily and with competency; and
- (e) The consumer's name and the date on which the consent is given.

(2) When there is clear and imminent danger of bodily harm or to the life or safety of the consumer or another person disclosure shall be made in accord with the laws of the jurisdiction in which the member practices.

(3) When applicable law declares that such information may be released.

(E) The member shall obtain the consumers' written informed consent for using any identifiable information about the consumer for purposes of education, training, research or publication.

(F) The member shall reveal a consumer's confidential information to a professional source with a limited right to know, such as (but not limited to) a supervisor or consultant in an appropriate manner; it is the member's responsibility to take reasonable steps to assure that the other professional source will properly treat the information in a confidential manner.

(G) The member shall keep meaningful records relevant to the professional services provided to and contacts (of any nature) with the consumer and shall have a secure system for the preservation of records with the minimal contents and duration of retention being in accord with the laws that are applicable to the jurisdiction in which the member practices: at a minimum:

(1) A full record shall be retained intact for no less than three (3) years after completion of the last date of professional services or contact.

(2) A full record or meaningful summary of the record shall be maintained for no less than twelve (12) additional years.

(H) The member shall have a formal (written) arrangement for the preservation of consumer records upon his/her ceasing of practice, death or incapacity. This arrangement must be in accord with the laws of the jurisdiction in which the member practices.

(I) The member shall, when providing professional services in a group context or to a couple or family make a reasonable effort to promote safeguarding of confidentiality on the part of each consumer in the group, couple or family.

(J) The member shall orient the minor consumer to the limits of confidentiality pertaining to a parent's right to know as defined by the laws of the jurisdiction in which the member practices.

(K) The member shall, regardless of the reasons for which the consumer sought professional services and regardless of the theory or technique being used by the member, predicate every sex counseling or therapy intervention upon diagnosis and meaningful consumer(s) treatment plan, which shall be consistently documented in writing, justified academically, evaluated for effectiveness, monitored for strengths and weaknesses and modified accordingly.

(L) The member shall as needed to protect the best interest of the consumer, seek consultation and/or supervision with special reference to the treatment plan and to the personal elements of the therapeutic relationship.

(M) The member shall not engage in any dual relationship, regardless of nature or circumstances, with a consumer or with persons who have a primary relationship with a consumer served by the member if such dual relationship could potentially be detrimental to or jeopardize the well-being of a consumer. A dual relationship occurs when a member is in a professional role with a person and (1) at the same time is in another role with the same person, and/or (2) at the same time is in a relationship with a person closely associated with or related to the person with whom the member has the professional relationship, and/or (3) promises to enter into another relationship in the future with the person or a person closely associated with or related to the consumer.

(N) The member practicing counseling or therapy shall not engage, attempt to engage or offer to engage a consumer in sexual behavior whether the consumer consents to such behavior or not. Sexual misconduct includes kissing, sexual intercourse and/or the touching by either the member or the consumer of the other's breasts or genitals. Members do not engage in such sexual misconduct with current consumers. Members do not engage in sexual intimacies with individuals they know to be close relatives, guardians, or significant others of a current consumer. Sexual misconduct is also sexual solicitation, physical advances, or verbal or nonverbal conduct that is sexual in nature, that occurs in connection with the member's activities or roles as a counselor or therapist, and that either (1) is unwelcome, is offensive, or creates a hostile workplace or educational environment, and the member knows or is told this or (2) is sufficiently severe or intense to be abusive to a reasonable person in the context. Sexual misconduct can consist of a single intense or severe act, or of multiple persistent or pervasive acts. For purposes of determining the existence of sexual misconduct, the counseling or therapeutic relationship is deemed to continue in perpetuity.

(O) The member shall terminate professional services to the consumer when it is reasonably evident or should be evident that the consumer is not obtaining benefits sufficient to justify continued intervention. Upon termination the member shall make referral to another professional source and/or offer reasonable follow-up to further the best

interests of the consumer. (American Association Of Sex Educators, Counselors And Therapists 2004)

AMERICAN COUNSELING ASSOCIATION

Section B

Confidentiality, Privileged Communication, and Privacy

Introduction

Counselors recognize that trust is a cornerstone of the counseling relationship. Counselors aspire to earn the trust of clients by creating an ongoing partnership, establishing and upholding appropriate boundaries, and maintaining confidentiality. Counselors communicate the parameters of confidentiality in a culturally competent manner.

B.1. Respecting Client Rights

B.1.a. Multicultural/Diversity

Considerations

Counselors maintain awareness and sensitivity regarding cultural meanings of confidentiality and privacy. Counselors respect differing views toward disclosure of information. Counselors hold ongoing discussions with clients as to how, when, and with whom information is to be shared.

B.1.b. Respect for Privacy

Counselors respect client rights to privacy. Counselors solicit private information from clients only when it is beneficial to the counseling process.

B.1.c. Respect for Confidentiality

Counselors do not share confidential information without client consent or without sound legal or ethical justification.

B.1.d. Explanation of Limitations

At initiation and throughout the counseling process, counselors inform clients of the limitations of confidentiality and seek to identify foreseeable situations in which confidentiality must be breached. (*See A.2.b.*)

B.2. Exceptions

B.2.a. Danger and Legal Requirements

The general requirement that counselors keep information confidential does not apply when disclosure is required to protect clients or identified others from serious and foreseeable harm or when legal requirements demand that confidential information must be revealed. Counselors consult with other professionals when in doubt as to the validity of an exception. Additional considerations apply when addressing end-of-life issues. (*See A.9.c.*)

B.2.b. Contagious, Life-Threatening Diseases

When clients disclose that they have a disease commonly known to be both communicable and life threatening, counselors may be justified in disclosing information to identifiable third parties, if they are known to be at demonstrable and high risk of contracting the disease. Prior to making a disclosure, counselors confirm that there is such a diagnosis and assess the intent of clients to inform the third parties about their disease or to engage in any behaviors that may be harmful to an identifiable third party.

B.2.c. Court-Ordered Disclosure

When subpoenaed to release confidential or privileged information without a client's permission, counselors obtain written, informed consent from the client or take steps to prohibit the disclosure or have it limited as narrowly as possible due to potential harm to the client or counseling relationship.

B.2.d. Minimal Disclosure

To the extent possible, clients are informed before confidential information is disclosed and are involved in the disclosure decision-making process. When circumstances require the disclosure of confidential information, only essential information is revealed.

B.3. Information Shared With Others

B.3.a. Subordinates

Counselors make every effort to ensure that privacy and confidentiality of clients are maintained by subordinates, including employees, supervisees, students, clerical assistants, and volunteers. (*See F.I.c.*)

7. Strive to provide translation capabilities for clients who have a different primary language while also addressing the imperfect nature of such translations.

8. Assist clients in determining the validity and reliability of information found on the World Wide Web and other technology applications. Section B

Confidentiality, Privileged Communication, and Privacy Introduction

Counselors recognize that trust is a cornerstone of the counseling relationship.

Counselors aspire to earn the trust of clients by creating an ongoing partnership, establishing and upholding appropriate boundaries, and maintaining confidentiality.

Counselors communicate the parameters of confidentiality in a culturally competent manner.

B.1. Respecting Client Rights

B.1.a. Multicultural/Diversity Considerations

Counselors maintain awareness and sensitivity regarding cultural meanings of confidentiality and privacy. Counselors respect differing views toward disclosure of information. Counselors hold ongoing discussions with clients as to how, when, and with whom information is to be shared.

B.1.b. Respect for Privacy

Counselors respect client rights to privacy. Counselors solicit private information from clients only when it is beneficial to the counseling process.

B.1.c. Respect for Confidentiality

Counselors do not share confidential information without client consent or without sound legal or ethical justification.

B.1.d. Explanation of Limitations

At initiation and throughout the counseling process, counselors inform clients of the limitations of confidentiality and seek to identify foreseeable situations in which confidentiality must be breached. (*See A.2.b.*)

B.3.b. Treatment Teams

When client treatment involves a continued review or participation by a treatment team, the client will be informed of the team's existence and composition, information being shared, and the purposes of sharing such information.

B.3.c. Confidential Settings

Counselors discuss confidential information only in settings in which they can reasonably ensure client privacy.

B.3.d. Third-Party Payers

Counselors disclose information to third-party payers only when clients have authorized such disclosure.

B.3.e. Transmitting Confidential Information

Counselors take precautions to ensure the confidentiality of information transmitted through the use of computers, electronic mail, facsimile machines, telephones, voicemail, answering machines, and other electronic or computer technology. (*See A.12.g.*)

B.3.f. Deceased Clients

Counselors protect the confidentiality of deceased clients, consistent with legal requirements and agency or setting policies.

B.4. Groups and Families**B.4.a. Group Work**

In group work, counselors clearly explain the importance and parameters of confidentiality for the specific group being entered.

B.4.b. Couples and Family Counseling

In couples and family counseling, counselors clearly define who is considered "the client" and discuss expectations and limitations of confidentiality. Counselors seek agreement and document in writing such agreement among all involved parties having capacity to give consent concerning each individual's right to confidentiality and any obligation to preserve the confidentiality of information known.

B.5. Clients Lacking Capacity to Give Informed Consent**B.5.a. Responsibility to Clients**

When counseling minor clients or adult clients who lack the capacity to give voluntary, informed consent, counselors protect the confidentiality of information received in the counseling relationship as specified by federal and state laws, written policies, and applicable ethical standards.

B.5.b. Responsibility to Parents and Legal Guardians

Counselors inform parents and legal guardians about the role of counselors and the confidential nature of the counseling relationship. Counselors are sensitive to the cultural diversity of families and respect the inherent rights and responsibilities of parents/guardians over the welfare of their children/charges according to law. Counselors work to establish, as appropriate, collaborative relationships with parents/guardians to best serve clients.

B.5.c. Release of Confidential Information

When counseling minor clients or adult clients who lack the capacity to give voluntary consent to release confidential information, counselors seek permission from an appropriate third party to disclose information. In such instances, counselors inform clients consistent with their level of understanding and take culturally appropriate measures to safeguard client confidentiality.

B.6. Records**B.6.a. Confidentiality of Records**

Counselors ensure that records are kept in a secure location and that only authorized persons have access to records.

B.6.b. Permission to Record

Counselors obtain permission from clients prior to recording sessions through electronic or other means.

B.6.c. Permission to Observe

Counselors obtain permission from clients prior to observing counseling sessions, reviewing session transcripts, or viewing recordings of sessions with supervisors, faculty, peers, or others within the training environment.

B.6.d. Client Access

Counselors provide reasonable access to records and copies of records when requested by competent clients. Counselors limit the access of clients to their records, or portions of their records, only when there is compelling evidence that such access would cause harm to the client. Counselors document the request of clients and the rationale for withholding some or all of the record in the files of clients. In situations involving multiple clients, counselors provide individual clients with only those parts of records that related directly to them and do not include confidential information related to any other client.

B.6.e. Assistance With Records

When clients request access to their records, counselors provide assistance and consultation in interpreting counseling records.

B.6.f. Disclosure or Transfer

Unless exceptions to confidentiality exist, counselors obtain written permission from clients to disclose or transfer records to legitimate third parties. Steps are taken to ensure that receivers of counseling records are sensitive to their confidential nature. *(See A.3.E.4.)*

B.6.g. Storage and Disposal After Termination

Counselors store records following termination of services to ensure reasonable future access, maintain records in accordance with state and federal statutes governing records, and dispose of client records and other sensitive materials in a manner that protects client confidentiality. When records are of an artistic nature, counselors obtain client (or guardian) consent with regard to handling of such records or documents. *(See A.1.b.)*

B.6.h. Reasonable Precautions

Counselors take reasonable precautions to protect client confidentiality in the event of the counselor's termination of practice, incapacity, or death. *(See C.2.h.)*

B.7. Research and Training**B.7.a. Institutional Approval**

When institutional approval is required, counselors provide accurate information about their research proposals and obtain approval prior to conducting their research. They conduct research in accordance with the approved research protocol.

B.7.b. Adherence to Guidelines

Counselors are responsible for understanding and adhering to state, federal, agency, or institutional policies or applicable guidelines regarding confidentiality in their research practices.

B.7.c. Confidentiality of Information Obtained in Research

Violations of participant privacy and confidentiality are risks of participation in research involving human participants. Investigators maintain all research records in a secure manner. They explain to participants the risks of violations of privacy and confidentiality and disclose to participants any limits of confidentiality that reasonably can be expected. Regardless of the degree to which confidentiality will be maintained, investigators must disclose to participants any limits of confidentiality that reasonably can be expected. *(See G.2.e.)*

B.7.d. Disclosure of Research Information

Counselors do not disclose confidential information that reasonably could lead to the identification of a research participant unless they have obtained the prior consent of the person. Use of data derived from counseling relationships for purposes

of training, research, or publication is confined to content that is disguised to ensure the anonymity of the individuals involved. (*See G.2.a., G.2.d.*)

B.7.e. Agreement for Identification

Identification of clients, students, or supervisees in a presentation or publication is permissible only when they have reviewed the material and agreed to its presentation or publication. (*See G.4.d.*)

B.8. Consultation

B.8.a. Agreements

When acting as consultants, counselors seek agreements among all parties involved concerning each individual's rights to confidentiality, the obligation of each individual to preserve confidential information, and the limits of confidentiality of information shared by others.

B.8.b. Respect for Privacy

Information obtained in a consulting relationship is discussed for professional purposes only with persons directly involved with the case. Written and oral reports present only data germane to the purposes of the consultation, and every effort is made to protect client identity and to avoid undue invasion of privacy.

B.8.c. Disclosure of Confidential Information

When consulting with colleagues, counselors do not disclose confidential information that reasonably could lead to the identification of a client or other person or organization with whom they have a confidential relationship unless they have obtained the prior consent of the person or organization or the disclosure cannot be avoided. They disclose

information only to the extent necessary to achieve the purposes of the consultation. (*See D.2.d.*) (American Counseling Association 2005)

APPENDIX E: Rules Regarding Disclosure

Federal Rules of Civil Procedure

Rule 26 General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures.

Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

...

These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. In ruling on the objection, the court must determine what disclosures - if any - are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The **report** shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) Pretrial Disclosures.

In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and promptly file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under Rule 26(a)(3)(C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, are waived unless excused by the court for good cause.

(4) Form of Disclosures; Filing.

Unless the court orders otherwise, all disclosures under Rules 26(a)(1) through (3) must be made in writing, signed, and served.

(5) Methods to Discover Additional Matter.

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits.

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General.

Parties may obtain discovery regarding any matter, **not privileged**, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(2) Limitations.

(A) By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

(3) Trial Preparation: Materials.

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as **an expert whose opinions may be presented at trial**. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials.

(A) Information Withheld.

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial -preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) Information Produced.

If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) that the disclosure or discovery not be had;
- (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court;
- (6) that a deposition, after being sealed, be opened only by order of the court;
- (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and
- (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery.

Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses.

A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Conference of Parties; Planning for Discovery.

Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) any issues relating to claims of privilege or of protection as trial-preparation material, including - if the parties agree on a procedure to assert such claims after production - whether to ask the court to include their agreement in an order;

(5) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(6) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court may order that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Florida Rules of Civil Procedure

RULE 1.280 GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise and under subdivision (c) of this rule, the frequency of use of these methods is not limited, except as provided in rule 1.200 and rule 1.340.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Indemnity Agreements. A party may obtain discovery of the existence and contents of an agreement under which any person may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or to reimburse a party for payments

made to satisfy the judgment. Information concerning the agreement is not admissible in evidence at trial by reason of disclosure.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative, including that party's attorney, consultant, surety, indemnitor, insurer, or agent, only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. Without the required showing a party may obtain a copy of a statement concerning the action or its subject matter previously made by that party. Upon request without the required showing a person not a party may obtain a copy of a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for an order to obtain a copy. The provisions of rule 1.380(a)(4) apply to the award of expenses incurred as a result of making the motion.

For purposes of this paragraph, a statement previously made is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording or transcription of it that is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, **may be obtained only as follows:**

(A)(i) By interrogatories a party may require any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial may be deposed in accordance with rule 1.390 without motion or order of court.

(iii) A party **may obtain** the following discovery regarding any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial:

1. The scope of employment in the pending case and the compensation for such service.

2. The expert's general litigation experience, including the percentage of work performed for plaintiffs and defendants.

3. The identity of other cases, within a reasonable time period, in which the expert has testified by deposition or at trial.

4. An approximation of the portion of the expert's involvement as an expert witness, which may be based on the number of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness; however, the expert shall not be required to disclose his or her earnings as an expert witness or income derived from other services. An expert may be required to produce financial and business records only under the most unusual or compelling circumstances and may not be compelled to compile or produce nonexistent documents. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and other provisions pursuant to subdivision (b)(4)(C) of this rule concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in rule 1,360(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A) and (b)(4)(B) of this rule; and concerning discovery from an expert obtained under subdivision (b)(4)(A) of this rule the court may require, and concerning discovery obtained under subdivision (b)(4)(B) of this rule shall require, the party seeking discovery to pay the other party a fair part of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(D) As used in these rules an expert shall be an expert witness as defined in rule 1.390(a).

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one or more of the following: (1) that

the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 1.380(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery. Except as provided in subdivision (b)(4) or unless the court upon motion for the convenience of parties and witnesses and in the interest of justice orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not delay any other party's discovery.

(e) Supplementing of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired.

APPENDIX F: Engagement Letter for the Expert Witness

SAMPLE RETAINING OR ENGAGEMENT LETTER

Name of sexologist

Address

Date

Name of retaining attorney

Address

Dear _____ ,

This letter confirms that you have retained my services to represent your client (*indicate name of client*) with the following matter:

(Identify name of Court case and the court who is hearing the matter.)

Pursuant to our agreement, I will provide services to you as an independent professional sexologist (*or if you prefer, clinical sexologist, sex therapist, sex counselor, etc.*) You acknowledge that I am qualified to perform the services discussed previously and described in this contract. It is understood that payment shall be solely for my services. It is also understood that payment is not related any of my findings and to the outcome of any legal action, whether it be settled by hearing, arbitration, mediation, or other means.

I will report to you and not to your client. There is no explicit or implied contract between your client and I. All payments shall be made by you, regardless of what agreement you have with your client.

My fees are the following and you agree to pay :

1. A non-refundable fee (*also referred to as an engagement fee*) in the amount of \$ (*indicate fee*) which indicates the engagement of my services. This sum shall be sent with this signed document. You may identify me as an expert witness **only** when the signed document and payment is received by me. It is only when this letter and payment are received by me that future invoices for services performed or expenses incurred shall be charged against this engagement fee until such time as it is exhausted.

2. Fees for my services: I shall be paid by you at the hourly rate of \$___ (*N.B. the amount should not be less than what you charge clients*) for all tasks performed under this agreement, including but not limited to research, analysis, preparation of reports, preparation of graphics and exhibits, conclusions, trial preparation, and necessary travel time. These fees will be billed by the tenth of an hour. For testimony at deposition or trial, I shall be paid at the hourly rate of \$___ (*or a daily flat fee of \$___*). It is understood

that this hourly rate shall be paid for the time I wait before testifying, whether in court or elsewhere. I shall also be paid for any breaks in the proceedings.

3. Expenses

You agree to reimburse me for expenses as follows:

- Expenses associated with reproduction of documents whether printed, photocopied or otherwise, preparation of exhibits, postage, and other reasonable expenditures shall be reimbursed at market rates.
- Travel by car: (*indicate amount*) cents per mile;
- Car rental: In the event of travel beyond (identify regional area), I shall be reimbursed for the cost of a mid-sized rental car (*or other type of vehicle agreed upon by the parties*) and any associated expenses with said rental,
- Travel by air or train: the actual cost of the round-trip ticket and any meals during travel.
- Lodging: For any travel of more than (*usually 60 to 90*) miles from my office, I shall be reimbursed for the cost of meals and lodging.

(N.B. Some experts add a handling fee for many of the expenses. This handling fee can be waived if the client/attorney pays for these expenses (i.e. air ticket) instead of the expert who is then reimbursed.)

Billing will be done on a monthly basis unless otherwise agreed upon. Invoice payments are due upon receipt, and shall be considered delinquent if unpaid more than (*indicate number of days*) after the date of issuance. Interest shall accrue to any delinquent balance at the maximum rate permitted by law, not to exceed (*indicate interest rate*) per cent per month. In the event that an invoice remains unpaid for (*indicate number of days*) or more days after the date of issuance, I have the right to terminate this agreement and cease delivering services to you.

This agreement shall be interpreted under the laws of the State of _____. Any litigation under this agreement shall be resolved in the trial courts of _____ County, State of _____.

By signing this document, you agree with the terms included in said document. You are to return a duly executed copy of this letter to my office, along with the required engagement fee.

Sincerely,

(Your name)

I accept the terms of this agreement:

Client/Attorney: _____

Date: _____

APPENDIX G: Consulting Agreement for the Expert Witness

SAMPLE CONSULTING AGREEMENT

This agreement dated (*include date*) is between _____ (hereinafter referred to as the "Consultant") and _____ (hereinafter referred to as the "Client").

THEREFORE, in consideration of the mutual promises contained herein, and for other good and valuable consideration, it is agreed that:

1. RETENTION OF CONSULTANT'S SERVICES

- 1.1 The Consultant agrees to commence work for the Client in the legal action entitled (*indicate name of parties*) which will be heard in (*indicate applicable court*) upon receipt of a retainer specified in paragraph 4.1 below.
- 1.2 Upon payment of said retainer and signature of Consulting Agreement, the Consultant agrees not to work for any other person or party involved in this case or matters relating to this case.
- 1.3 The Consultant and Client agree that the Consultant shall work solely for the Client and shall answer to the latter and no one else.
- 1.4 The Client states that the Consultant is qualified to perform the services needed in this matter.

2. SERVICES TO BE PERFORMED

- 2.1 The Consultant agrees to perform consulting and/or expert witness services as requested by the Client. Such services performed under this agreement, shall include and not be limited to research, document review, analysis, preparation of reports, preparation of graphics and exhibits, conclusions, and trial preparation.
- 2.2 The Consultant's work will be determined by the Client and Consultant according to the Client's needs. At all times, the Consultant shall remain unbiased and objective in all tasks asked of him (or her).
- 2.3 The Client may ask the Consultant for estimates relating to costs and time needed to perform certain tasks. Upon such request, the Consultant will provide to the Client said estimates. If the Consultant notices that the estimates will be exceeded, the Client will be notified and given new estimates. Until the Client agrees to the revised estimates, the Consultant shall not proceed with the services or tasks related to these estimates.

3. CONFIDENTIALITY

- 3.1 The Consultant agrees not to release or discuss any information related to the services and tasks unless the Consultant has obtained the prior written consent of the Client or is otherwise legally obligated to do so by rules of civil procedure, rules of evidence, a Court or government.
- 3.2 The Client shall advise the Consultant as to what information is to be released.

- 3.3 The Consultant and the Client acknowledge that a solicitor-client privilege may not be recognized by a Court and any written communication between the Consultant and the Client relating to the legal action for which the Consultant's services have been retained may be subpoenaed by the opposite party in this legal action.

4. COMPENSATION

- 4.1 The Client agrees to pay a non-reimbursable retainer of (*indicate amount that should not be less than \$1,000.00*). Invoices for services and tasks performed or expenses incurred will be charged against the retainer until such time as it is exhausted. The parties agree that the Consultant has the right to require advances for anticipated work and expenses. In such a case, the Consultant will advise the Client in writing. The Client may not use the Consultant's name as an expert until the retainer has been paid and the Consulting Agreement is signed by both parties.
- 4.2 The Consultant's fees are to be billed to the Client by the tenth of an hour.
- 4.3 Fees
(*A different fee can be charged depending on the service or task or the same hourly rate can be used for all services and tasks. In either case, the hourly rate should not be less than the hourly rate the sexologist charges his or her clients. Some experts have a different fee schedule for testimony/deposition time (during and waiting for), travel time, preparation of reports, research, etc.) If this method is used, all services and tasks must be identified. Often, experts insist on being paid more for testifying at trial or participating at a deposition.*)

5. TRAVEL AND MISCELLANEOUS EXPENSES

- 5.1 Travel shall be charged at cost. Travel by car shall be at the rate of (*indicate amount*) per mile.
- 5.2 Travel will be performed by the most economical means compatible with the Client's time constraints except that first-class air travel accommodations may be used for all flights of more than five hours' duration, including cumulative time where connecting flights are required.
- 5.3 Expenses associated with reproduction of documents whether printed, photocopied or otherwise, preparation of exhibits, postage, and other reasonable expenditures shall be reimbursed at market rates.
- 5.4 Long-distance telephone calls shall be charged at cost.
- 5.5 In the event of travel beyond (*identify regional area*), the Consultant shall be reimbursed by the Client for the cost of a mid-sized rental car (*or any other vehicle agreed upon by the parties*) and any associated expenses with said rental.
- 5.6 If the Consultant must travel by Air or Train, the actual cost of the round-trip ticket and any meals during travel shall be paid by the Client.
- 5.7 For any travel of more than (*usually 60 to 90*) miles from the Consultant's office, the Client shall reimburse the Consultant for the cost of meals and lodging.

[IMPORTANT: If the Consultant intends to charge a handling fee for any reason, it should be clearly indicated in the agreement where appropriate.]

6. INVOICES AND PAYMENTS

- 6.1 A detailed and itemized invoice will be tendered by the Consultant to the Client on the last day of each month unless otherwise agreed upon by the parties. Payment by the Client will be due (*indicate number – usually 30*) days after the invoice date and must be paid by (*indicate accepted method of payment*). Late charges at the rate of (*indicate interest rate in percentage*) per month will be added to invoices not paid within (*indicate number*) days.
- 6.2 The payment of all fees and expenses is the responsibility of the Client, notwithstanding the Client's relationship with third parties.

7. TERMINATION

- 7.1 This Agreement may be terminated in writing by the Client upon (*indicate appropriate number*) days for any reason. Upon termination of the Consultant's services by the Client, the Client shall immediately pay all fees and expenses incurred by the Consultant, after receipt of an updated invoice.
- 7.2 If the Client does not pay an invoice in the time specified in said invoice, the Consultant may terminate this Agreement by giving the Client a written notice of (*indicate appropriate number*) days. By terminating the Agreement, the Consultant has the right to cease delivering services to the Client. The termination of this Agreement by the Consultant does not relieve Client from payment for services rendered or expenses incurred.

8. DISPUTE RESOLUTION AND ATTORNEY'S FEES

- 8.1 The parties agree that a legal action may be brought by either party to enforce the terms of this Agreement.
- 8.2 In the event that a suit should be brought to enforce the terms of this Agreement, or for any sum due hereunder, by either party, the prevailing party shall be entitled to all costs incurred in connection with such action, including a reasonable attorney's fee and collection costs.

9. GOVERNING LAW

- 9.1 All actions arising out of the performance of this Agreement shall be governed by the laws of the State of (*indicate applicable state*).

10. ENTIRE AGREEMENT

The foregoing constitutes the entire agreement between the parties and may be modified only in writing signed by both parties.

Signed this ____ day of _____, 200__.

Consultant: _____

Client: _____

REFERENCE LIST

Case Law

- Binder v. Russell*, (Civil Docket 52 C 25 35, Circuit Court of Cook County, Ill., 24 June 1952).
- Brim v. State*, 695 So.2d 268 (Fla. 1997).
- Buckley v. Rice Thomas*, 75 ER 182 (1554).
- Daubert v. Merrell Dow Pharmaceuticals*, 727 F. Supp. 570 (SD Cal. 1989).
- Daubert v. Merrell Dow Pharmaceuticals*, 951 F. 2d 1128 (1991).
- Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Available from the Cornell University Law School web site: <http://supct.law.cornell.edu/supct/html/92-102.ZS.html>. Accessed 20 May 2006.
- Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311(9th Cir. 1995).
- Flanagan v. State*, 625 So.2d 827 (Fla. 1993).
- Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
- General Electric Co. v. Joiner*, 522 U.S. 136 (1997). Available from the Cornell University Law School web site: <http://www.law.cornell.edu/supct/html/96-188.ZO.html>. Accessed 22 May 2006.
- Jaffee v. Redmond*, 51F. 3d 1346 (1995).
- Jaffee v. Redmond*, 518 U.S. 1 (1996).
- Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Available from the Cornell University Law School web site: <http://supct.law.cornell.edu/supct/html/97-1709.ZO.html>. Accessed 24 May 2006.
- Ramirez v. State*, 651 So. 2d 1164 (Fla. 1995).
- Tarasoff v. Regents of University of California*, (17 Ca13d425, 551 P2d 334 (1976).
- United States v. Lowe*, 948 F. Supp. 971 (D. Mass. 1996).
- United States v. Schwensow*, 942 F. Supp. 402 (E.D. Wis. 1996).

***Daubert, Joiner and Kumho* cases and the new standard relating to the admission of scientific and non-scientific evidence**

- Allen, Ronald J. 1994. Expertise and the *Daubert* decision. *The Journal of Criminal Law and Criminology* 84 (January): 1157-1175.
- Aveline, Mark. 2005. Clinical case studies: Their place in evidence-based practice. *Psychodynamic Practice* 11, no. 2: 133-152.
- Beecher-Monas, Erica. 1998. Blinded by science: How judges avoid the science in scientific evidence. *Temple Law Review* 71, no. 1: 55-102.
- Berger, Margaret A. 1994. Procedural paradigms for applying the *Daubert* test. *Minnesota Law Review* 78, no. 6: 1345-1386.
- Berger, Margaret A. 2000. The Supreme Court's trilogy on the admissibility of expert testimony. In *Reference Manual on Scientific Evidence*, ed. Federal Judicial Center. Washington, DC: Federal Judicial Center.
- Beyea, Jan, and Daniel Berger. 2001. Scientific misconceptions among *Daubert* gatekeepers: The need for reform of expert review procedures. *Law and Contemporary Problems* 64, no. 3: 327-372.
- Brodin, Mark S. 2004. *Behavioral science evidence in the age of Daubert: Reflections of a skeptic*. Available from The Berkeley Electronic Press web site: <http://law.bepress.com>. Accessed 6 July 2006.
- Capra, Daniel J. 1998. The *Daubert* Puzzle. *Georgia Law Review* 32 no. 3: 699-782.
- Caudill, David S., and Richard E. Redding. 2000. Junk philosophy of science? The paradox of expertise and interdisciplinarity in federal courts. *Washington and Lee Law Review* 57 no. 3: 685-766.
- Caudill, David S. 1999. Scientific knowledge vs. legal representations of science: Competing narratives in court. *Southern Illinois University Law Journal* 23 no. 3: 545-554.
- Dixon, Lloyd, and Brian Gill. 2001. *Changes in the standards for admitting expert evidence in federal civil cases since the Daubert decision*. Santa Monica, CA: Rand Institute for Social Justice.
- Dreyfuss, Rochelle Cooper. 1995. Is science a special case? The admissibility of scientific evidence after *Daubert v. Merrell Dow*. *Texas Law Review* 73 no. 7: 1779-1864.

- Dror, Itiel E., and David Charlton. 2006. Why experts make errors. *Journal of Forensic Identification* 56 no. 4: 600-616.
- Faigman, David L., et al. 1994. Check your crystal ball at the courthouse door, please: Exploring the past, understanding the present, and worrying about the future of scientific evidence. *Cardozo Law Review* 15 no. 6: 1799-1835.
- Faigman, David L. 1995. The evidentiary status of social science under Daubert: Is it “scientific”, “technical”, or “other” knowledge? *Psychology Public Policy and Law* 1 no. 4: 960-979.
- Faigman, David L. 1995. Mapping the labyrinth of scientific evidence. *Hastings Law Journal* 46 no. 2: 555-579.
- Faigman, David L. 1996. Making the law safe for science: A proposed rule for the admission of expert testimony. *Washburn Law Journal* 35 no. 3: 401-430.
- Faigman, David L. 1999. *Legal alchemy: The use and misuse of science in the law*. New York: W.H. Freeman and Co.
- Faigman, David L., David H. Kaye, Michael J. Saks, and Joseph Sanders. 1999-2000. How good is good enough? Expert evidence under Daubert and Kumho. *Case Western Reserve Law Review* 50 no. 3: 645-667.
- Faigman, David L. 2000. The law's scientific revolution: Reflections and ruminations on the law's use of experts in year seven of the revolution. *Washington and Lee Law Review* 57 no. 3: 661-684.
- Faigman, David L. 2002. *Modern scientific evidence: The law and science of expert testimony*. St. Paul, MN: West Group.
- Faigman, David L., Kaye, Michael J. Saks, and Joseph Sanders. 2002. *Science in the law: Forensic science issues*. St. Paul, MN: West Group.
- Faigman, David L., Michael J. Saks, David H. Kaye, and Joseph Sanders. 2002, Supp. 2003. *Modern scientific evidence: The law and science of expert testimony*. Vols. 1-4, St. Paul: West Group.
- Faigman, David L., Michael J. Saks, David H. Kaye, and Joseph Sanders. 2005-2006. *Modern scientific evidence*. Vols. 1-4, St. Paul: Thomson/West.
- Faigman, David L., Michael J. Saks, David H. Kaye, and Joseph Sanders. 2006. *Annotated reference manual on scientific evidence*. St. Paul: Thomson/West.

- Farrell, Margaret G. 1994. *Daubert v. Merrell Dow pharmaceuticals, Inc.*: Epistemology and legal process. *Cardozo Law Review* 15 no. 6: 2183-2217.
- Federal Judicial Center. 2000. *Reference manual on scientific evidence*. Available from <http://air.fjc.gov/public/fjcweb.nsf/pages/16>. Accessed 30 April 2006.
- Feldman, Heidi L. 1995. Science and uncertainty in mass exposure litigation. *Texas Law Review* 74 no. 1: 1-47.
- Gatowski, Sophia I., Shirley A. Dobbin, James T. Richardson, Gerald P. Ginsburg, Mara L. Merlino, and Veronica Dahir. 2001. Asking the gatekeepers: A national survey of judges' expert evidence in a post-*Daubert* world. *Law and Human Behavior* 25 no. 5: 433-458.
- Giannelli, Paul C., and Edward J. Imwinkelried. 1999. *Scientific Evidence*. Charlottesville, VA: Lexis Law Publishing.
- Gless, Alan G. 1995. Some post-*Daubert* trial tribulations of a simple country judge: Behavioral science evidence in trial courts. *Behavioral Sciences and the Law* 13 no. 2: 261-291.
- Golanski, Alani. 2001. Why legal scholars get *Daubert* wrong: A contextualist explanation of law's epistemology. *Whittier Law Review* 22 no. 2: 653-721.
- Groscup, Jennifer L., Steven D. Penrod, Christina A. Studebaker, Matthew T. Huss, and Kevin M. O'Neil. 2002. The effects of *Daubert* on the admissibility of expert testimony in state and federal criminal cases. *Psychology Public Policy and Law* 8 no. 4: 339-372.
- Gross, Samuel R., and Jennifer L. Mnookin. 2003. Expert information and expert evidence: A preliminary taxonomy. *Seton Hall Law Review* 34 no. 1: 141-189.
- Haack, Susan. 2005. Disentangling *Daubert*: An epistemological study in theory and practice. *The Journal of Philosophy, Science & Law* 5:1-11. Available from <http://www.psljournal.com/archives/all/haackpaper.cfm>. Accessed 26 September 2006.
- Huron Consulting Group. 2004. *States that follow Daubert*. Available from http://www.huronconsultinggroup.com/uploadedFiles/daubert_states4.pdf. Accessed 15 April 2006.
- Imwinkelried, Edward J. 1994. The next step after *Daubert*: Developing a similarly epistemological approach to ensuring the reliability of nonscientific expert testimony. *Cardozo Law Review* 15 no. 6: 2271-2294.

- Imwinkelried, Edward J. 1997. *Methods of attacking scientific evidence* (3rd ed.). Charlottesville, VA: Lexis Law Publishing.
- Imwinkelried, Edward J., and Paul C. Giannelli. 1999. *Scientific evidence* (3rd ed.). Charlottesville, VA: Lexis Law Publishing, 2 volumes.
- Jasanoff, Sheila. 1995. *Science at the bar: Law, science, and technology in America*. Cambridge, MA: Harvard University Press.
- Jonakait, Randolph N. 1997. The assessment of expertise: Transcending construction. *Santa Clara Law Review* 37 no. 2: 301-347.
- Johnson, Molly Treadway, Carol Krafka, and Joe S. Cecil. 2000. *Expert testimony in federal civil trials: A preliminary analysis*. Washington, DC: Federal Judicial Center.
- Kaufman, H. H. 2001. The expert witness. Neither Frye nor Daubert solved the problem. What can be done? *International Review of Law, Computers & Technologies* 15 no. 1: 79-101.
- Kaye, David H., David E. Bernstein, Jennifer L. Mnookin, and Richard D. Friedman. 2004. *The new Wigmore: A treatise on evidence-expert evidence*. New York: Aspen Publishers.
- Leesfield, Ira H., and Mark A. Silvester. 2000. *The Evolution of Daubert and the admissibility of expert witnesses*. Available from Leesfield Leighton and Partners Law Firm web site: <http://www.leesfield.com/articles/trialmagazine1.htm>. Accessed 30 August 2006.
- Loftus, Elizabeth F. 2001. When scientific evidence is the enemy. *Skeptical Inquirer* 25: 14-15.
- Mahle, Stephen. 2006. *Florida Overview*. Available from http://www.daubertontheweb.com/florida_overview.htm. Accessed 26 September 2006.
- Majmudar, Kaushal B. 1993. *Daubert v. Merrell Dow: A flexible approach to the admissibility of novel scientific evidence*. *Harvard Journal of Law & Technology* 7 no. 1: 187-205.
- O'Connor, Steven. 1995. The Supreme Court's philosophy of science: Will the real Karl Popper please stand up? *Jurimetrics* 35 no. 3: 263-276.
- Patterson, Mark R. 1998-1999. Conflicts of interest in scientific expert testimony. *William and Mary Law Review* 40 no. 4: 1313-1394.

- Prager, Irving, and Kevin S. Marshall. 2005. Examination of prior expert qualification and/or disqualification (questionable questions under the rules of evidence). *The Review of Litigation* 24 no. 3: 559-580.
- Redmayne, Mike. 1997. Expert and scientific disagreement. *University of California Davis Law Review* 30 no. 4: 1027-1080.
- Rice, Paul R. 2000. *Expert overhaul needed*. Available from George Mason University School of Law web site: <http://www.law.gmu.edu/innofcourt/pubs/expert.html>. Accessed 10 September 2006.
- Risinger, D. Michael, Mark P. Denbeaux, and Michael J. Saks. 1998. Brave new “post-*Daubert* world” – A reply to Professor Moenssens. *Seton Hall Law Review* 29 no. 2: 405-490.
- Risinger, D. Michael, Michael J. Saks, William C. Thompson, and Robert Rosenthal. 2002. The *Daubert/Kumho* implications of observer effects in forensic science: Hidden problems of expectation and suggestion. *California Law Review* 90 no. 1: 1-56.
- Saks, Michael J. 2000. The aftermath of *Daubert*: An evolving jurisprudence of expert evidence. *Jurimetrics* 40 no. 2: 229-241.
- Schwartz, Adina. 1996-1997. A “dogma of empiricism” revisited: *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and the need to resurrect the philosophical insight of *Frye v. United States*. *Harvard Journal of Law & Technology* 10 no. 2: 149-237.
- Sanders, Joseph. 1993-1994. Scientific validity and mass torts after *Daubert*. *Minnesota Law Review* 78 no. 6: 1387-1441.
- Sanders, Joseph, Shari S. Diamond, and Neil Vidmar. 2002. Legal perceptions of science and expert knowledge. *Psychology Public Policy and Law* 8 no. 2: 139-153.
- Shuman, Daniel W., and Bruce D. Sales. 1999. The impact of *Daubert* and its progeny on the admissibility of behavioral and social science evidence. *Psychology, Public Policy and Law* 5 no. 1: 3-15.
- Tomkins, Alan J. 1995. Behavioral science evidence in the wake of *Daubert*. *Behavioral Sciences and the Law* 13 no. 1: 127-130.
- Underwager, Ralph, and Hollida Wakefield. 1993. A paradigm shift for expert witnesses. *Institute for Psychological Therapies* 5. Available from http://www.ipt-forensics.com/journal/volume5/j5_3_2.htm. Accessed 28 September 2006.
- Walker, Laurens, and John Monahan. 1996. *Daubert* and the reference manual: An essay on the future of science in law. *Virginia Law Review* 82 no. 5: 837-857.

Walsh, Joseph T. 1999. *The evolving role of the judiciary in admitting scientific evidence*. Available from Institute for Psychological Therapies web site: http://www.ornl.gov/sci/techresources/Human_Genome/publicat/judicature/article8.html. Accessed 10 October 2006.

Ethics Including Privilege, Privacy and Confidentiality Issues

American Association for Marriage and Family Therapy. 2001. *AAMFT Code of Ethics*. Available from <http://www.aamft.org>. Accessed 10 September 2006.

American Association of Sexuality Educators, Counselors and Therapists. 2004. *Code of Ethics*. Available from <http://www.aasect.org>. Accessed 12 September 2006.

American Counseling Association. 2005. *Ethics*. Available from <http://www.counseling.org/Resources/CodeOfEthics/TP/Home/CT2.aspx>. Accessed 15 September 2006.

American Psychanalytic Association. 2005. *Principles and standards of ethics for psychoanalysts*. Available from <http://www.apsa.org>. Accessed 12 September 2006.

American Psychiatric Association. 2006. *The principles of medical ethics with annotations especially applicable to psychiatry*. Available from http://www.psych.org/psych_pract/ethics/ppaethics.cfm. Accessed 12 September 2006.

American Psychological Association. 2003. *Ethical principles of psychologists and code of conduct*. Available from <http://www.apa.org/ethics/code2002.html>. Accessed 12 September 2006.

Archer, Merrily S. 1997. All aboard the bandwagon! The uncertain scope of the federal psychotherapist-client privilege in the aftermath of *Jaffee v. Redmond*. *Journal of Urban and Contemporary Law* 52: 355-373.

Beyer, Karen. 2000. First Person: *Jaffee v. Redmond* Therapist Speaks. *The American Psychoanalyst*. Available from <http://jaffeedmond.org/articles/beyer.htm>. Accessed 4 July 2006.

Bernstein, Barton E., and Thomas L. Hartsell. 1998. *The portable lawyer for mental health professions: An A-Z guide to protecting your clients, your practice, and yourself*. New York: John Wiley & Sons, Inc.

- Bernstein, Barton E., and Thomas L. Hartsell. 2000. *The portable ethicist for mental health professionals*. New York: John Wiley & Sons, Inc.
- Carson, David and Ray Bull. eds. 2003. *Handbook of psychology in legal contexts*. New York: J. Wiley.
- Cerveney, Kathleen L., and Marian J. Kent. 1984. Evidence law-The psychotherapist-patient privilege in federal courts. *Notre Dame Law Review* 59 no. 3: 791-816.
- Dubbelday, Catharina J. H. 1985. The psychotherapist-client testimonial privilege: Defining the professional involved. *Emory Law Journal* 34 no. 3: 777-826.
- Eger, Charles L. 1976. Psychotherapists' liability for extrajudicial breaches of confidentiality. *Arizona Law Review* 18 no. 4: 1061-1094.
- Faughnan, Brian S. 1997. *Jaffee v. Redmond: Jaffee v. Redmond*: Extending the "psychotherapist-patient privilege" under Rule 501 of Federal Rules of Evidence. *University of Memphis Law Review* 27 no. 3: 703-722.
- Gellman, Robert M. 1984. Prescribing privacy: The uncertain role of the physician in the protection of patient privacy. *North Carolina Law Review* 62 no. 2: 255-294.
- Goldstein, Abraham S., and Jay Katz. 1962. Psychiatrist-patient privilege: The GAP proposal and the Connecticut statute. *American Journal of Psychiatry* 118 no. 8: 733-739.
- Grabois, Ellen W. 1997. The liability of psychotherapists for breach of confidentiality. *Journal of Law and Health* 12 no. 1: 39-84.
- Hague, William Whitmore. 1982-1983. The psychotherapist-patient privilege in Washington: Extending the privilege to community mental health clinics. *Washington Law Review* 58 no. 3: 565-586.
- Hanson, Mark. 2000. Experts are liable, too. *American Bar Association Journal* (November): 17-18.
- Hayden, David. 1989. Should there be a psychotherapist privilege in military courts-martial? *Military Law Review* 123: 31-107.
- Mosher, Paul W. 1999. Psychotherapist-patient privilege the history and significance of the U.S. Supreme Court's decision in the case of *Jaffee v. Redmond*. Available from <http://jaffee-redmond.org/articles/mosher.htm>. Accessed 15 July 2006.
- National Association of Social Workers*. 1999. Available from National Association of Social Workers web site: <http://www.socialworkers.org>. Accessed 12 September 2006.

Nelken, Melissa L. 2000. The limits of privilege: The developing scope of federal psychotherapist-patient privilege law. *The Review of Litigation* 20 no. 1: 1-43.

Poulin, Anne Bowen. 1998. The Psychotherapist-privilege after *Jaffee v. Redmond*: Where do we go from here? *Washington University Law Quarterly* 76 no. 4: 1341-1409.

Shuman, Daniel W., and Stuart A. Greenberg. 1998. *The role of ethical norms in the admissibility of expert testimony*. Available from George Mason University School of Law web site: <http://www.law.gmu.edu/innofcourt/pubs/expert.html>. Accessed 10 September 2006.

Society for the Scientific Study of Sexuality. 2006. *Ethics Statement*. Available from http://www.sexscience.org/about/index.php?category_id=162. Accessed 15 September 2006.

Stone, Melanie Stephens. 1997. *Jaffee v. Redmond*: The Supreme Court adopts a federal psychotherapist-patient privilege and extends the scope to encompass licensed social workers. *Mercer Law Review* 48 no. 3: 1283-1296.

Warren, S. D., and L. D. Brandeis. 1890. The right to privacy. *Harvard Law Review* 4 no. 5: 193-220.

Winslade, William J., and Judith Wilson Ross. 1985. Privacy, confidentiality and autonomy in psychotherapy. *Nebraska Law Review* 64 no. 4: 578-636.

Federal Rules of Evidence and State Rules

Federal Judicial Center. (n.d.). Available from: <http://www.fjc.gov/federal/courts.nsf>. Accessed 10 August 2006.

Federal Rules of Civil Procedure. 2006. Available from Cornell Law School web site: <http://www.law.cornell.edu/rules/frcp/>. Accessed 10 August 2006.

Federal Rules of Evidence. 2006. Available from Cornell Law School web site: <http://www.law.cornell.edu/rules/fre/>. Accessed 10 August 2006.

National Center for State Courts. (n.d.). Available from: http://www.ncsconline.org/D_Research/Ct_Struct/FL.htm. Accessed 10 August 2006.

The 2006 Florida Statutes. 2006. Florida Rules of Civil Procedure. Available from Online Sunshine web site: <http://www.leg.state.fl.us/Statutes>. Accessed 10 August 2006.

The 2006 Florida Statutes. 2006. Florida Rules of Evidence. Available from Online Sunshine web site: <http://www.leg.state.fl.us/Statutes>. Accessed 10 August 2006.

U.S. Courts. (n.d.). Available from the Federal Judiciary web site: <http://www.uscourts.gov/districtcourts.html>. Accessed 10 August 2006.

The Frye Standard

Black, Bert. 1988. A unified theory of scientific evidence. *Fordham Law Review* 56 no. 4: 595-696.

Chesebro, Kenneth J. 1993. Galileo's retort: Peter Huber's junk scholarship. *American University Law Review* 42 no. 4: 1637-1726.

Giannelli, Paul C. 1980. The admissibility of novel scientific evidence: *Frye v. United States*, a half century later. *Columbia Law Review* 80 no. 6: 1197-1250.

Hanson, Roger H. 1989. James Alphonzo Frye is sixty-five years old; should he retire?. *Washington State University Law Review* 16 no. 192: 372-390.

Huber, Peter. 1991. *Junk science in the courtroom*. New York: Basic Books.

Huber, Peter W. 1993. *Galileo's revenge: Junk science in the courtroom*. New York: Basic Books.

Jonakait, Randolph N. 1991. Stories, forensic, and improved verdicts. *Cardozo Law Review* 13 nos. 2-3: 343-352.

History of Lay and Expert Witnesses

Hand, Learned. 1901. Historical and practical considerations regarding expert testimony. *Harvard Law Review*, 15 no. 1: 40-58.

Ivkovic, Sanja, and Valerie Hans. 2003. Jurors' evaluations of expert testimony: Judging the messenger and the message. *Law and Social Inquiry* 28 no. 6: 441-482.

Landsman, Stephan. 1995. Of witches, madmen, and products liability: An historical survey of the use of expert testimony. *Behavioral Science & Law* 13 no. 2: 131-157.

Macnair, Mike. 1999. Vicinage and the antecedents of the jury. *Law and History Review* 17 no. 3: 537-590.

Internet Social Research Methodology

- Alvarez, R. Michael, and Carla VanBeselaere. (n.d.). *Web-based surveys*. Available from <http://survey.caltech.edu/encyclopedia.pdf>. Accessed 15 September 2006.
- Andrews, Dorine, Blair Nonnecke, and Jennifer Preece. 2003. Electronic survey methodology: A case study in reaching hard-to-involve internet users. *International Journal of Human-Computer Interaction* 16 no. 2: 185-210.
- Bachmann, Duane P., John Elfrink, and Gary Vazzana. 1996. Tracking the progress of e-mail versus snail-mail. *Marketing Research* 8 no. 2: 31-35.
- Bälter, Katarina Augustsson, Olle Bälter, Elinor Fondell, and Ylva Trolle Lagerros. 2005. Web-based and mailed questionnaires: A comparison of response rates and compliance. *Epidemiology* 16 no. 4: 577-579.
- Bandilla, Wolfgang. 2002. Web surveys: An appropriate mode of data collection for the social sciences? In *Online social sciences*, eds. Bernad, Ulf-Deitrich Reips and Michael Bosnjak, 1-6. Seattle, WA: Hogrefe & Huber.
- Barnes, Susan B. 2003. Issues of attribution and identification in online social research. In *Online social research*, eds. Mark D. Johns., Shing-Ling Sarina Chen, and G. Jon Hall, 203-222. New York: Peter Lang.
- Bassett, E. H., and Kathleen O’Riordan. 2002. Ethics of Internet research: Contesting the human subjects research model. *Ethics and Information Technology* 4: 233-247.
- Baym, Nancy K. 2005. Introduction: Internet research as it isn’t, is, could be, and should be. *The Information Society* 21: 229-239.
- Best, Samuel J., Brian Krueger, Clark Hubbard, and Andrew Smith. 2001. An assessment of the generalizability of Internet surveys. *Social Science Computer Review* 19: 131-145.
- Bosnjak, Michael, and Bernad Batinic. 2002. Understanding the willingness to participate in online surveys - The case of e-mail questionnaires. In *Online social sciences*, eds. Bernad Batinic, Ulf-Deitrich Reips and Michael Bosnjak, 81-92. Seattle, WA: Hogrefe & Huber.
- Bruckman, Amy. S. 2003. Introduction: Opportunities and challenges in methodology and ethics. In *Online social research*, eds. Mark D. Johns, Shing-Ling Sarina Chen, and G. Jon Hall, 101-104. New Work: Peter Lang.
- Coomber, Ross. 1997. Using the Internet for survey research. *Sociological Research Online*, 2 (2). Available from <http://www.socresonline.org.uk/soresonline/2/22.html>. Accessed 30 August 2006.

- Cho, Hyunyi, and Robert LaRose. 1999. Privacy issues in Internet surveys. *Social Science Comparative Review* 17 no. 4: 421-434.
- Couper, Mick P. 2000. Web surveys. *Public Opinion Quarterly* 64 no. 4: 464-494.
- Couper, Mick P., Michael W. Traugott, and Mark J. Lamias. 2001. Web survey design and administration. *Public Opinion Quarterly* 65 no. 2: 230-253.
- Couper, Mick P., Roger Tourangeau, Frederick G. Conrad, and Scott D. Crawford. 2004. What they see is what we get: Response options for Web surveys. *Social Science Computer Review* 22 no. 1: 111-127.
- Couper, Mick P. 2005. Technology trends in survey data collection. *Social Science Computer Review* 23 no. 4: 486-501.
- Crawford, Scott. 2002. Evaluation of Web survey data collection systems. *Field Methods* 14 no. 3: 307-321.
- Daley, Ellen M., Robert J. McDermott, Kelli R. McCormack Brown, and Mark J. Kittleson. 2003. Conducting Web-based survey research: A lesson in internet designs. *American Journal of Health Behavior* 27 no. 2: 116-124.
- Dillman, Don A., and Dennis Bowker. (n.d.). *The web questionnaire challenge to survey methodologies. Principles of constructing web surveys*. Available from Social and Economic Sciences Research Center Washington State University web site: http://www.sesrc.wsu.edu/dillman/zuma_paper_dillman_bowker.pdf. Accessed 5 September 2006.
- Dillman, Don A., Robert D. Tortora, and Dennis Bowker. 1998. *Influence of plain vs fancy design on response rates for web surveys*. Available from Social and Economic Sciences Research Center Washington State University web site: <http://www.sesrc.wsu.edu/dillman/papers/asa98ppr.pdf>. Accessed 5 September 2006.
- Dillman, Donald A., Robert D. Tortora, and Dennis Bowker. 1998. *Principles of constructing web surveys*. Available from Social and Economic Sciences Research Center Washington State University web site: <http://www.sesrc.wsu.edu/dillman/papers/websurveyppr.pdf>. Accessed 5 September 2006.
- Elgesem, Dag. 2002. What is special about the ethical issues in online research? *Ethics and Information Technology* 4 no. 4: 195-203.
- Gosling, Samuel D., Simine Vazire, Sanjay Srivastava, and Oliver P. John. 2004. Should we trust Web-based studies? *American Psychologist* 59 no. 2: 93-104.

- Kiernan, Nancy Ellen, Michaela Kiernan, Mary Ann Oyler, and Carolyn Gilles. 2005. Is a Web survey as effective as a mail survey? A field experiment among computer users. *American Journal of Evaluation* 26 no. 2: 245-252.
- Kiesler, Sara, and Lee S. Sproull. 1986. Response effects in the electronic survey. *Public Opinion Quarterly* 50 no. 3: 402-413.
- King Fricker, Ronald D., and Matthias Schonlau. 2002. Advantages and disadvantages of Internet research surveys: Evidence from the literature. *Field Methods* 14 no. 4: 347-367.
- Mehta, Raj, and Eugene Sivades. 1995. Comparing response rates and response content in mail versus electronic mail surveys. *Journal of the Market Research Society* 37 no. 4: 429-440.
- Norman, Kent L., Zachary Friedman, Kirk Norman, and Rod Stevenson. 2001. Navigational issues in the design of online self-administered questionnaires. *Behavior & Information Technology* 20 no. 1: 37-45.
- Pereira, Jose, and Eduardo Bruera. 2001. Palliative care on the net: An online of health care professionals. *Journal of Palliative Care* 17 no. 1: 41-46.
- Ranchhod, Ashok, and Fan Zou. 2001. Comparing respondents of e-mail and mail surveys: Understanding the implications of technology. *Marketing Intelligence & Planning* 19 no. 4: 254-262.
- Schaefer, David R., and Don A. Dillman. 1998. Development of a standard e-mail methodology. *Public Opinion Quarterly* 62 no. 3: 378-397.
- Seymour, Wendy S. 2001. In the flesh or online? Exploring qualitative research methodologies. *Qualitative Research Copyright* 1:147-168.
- Sheehan, Kim. 2001. E-mail survey response rates: A review. *Journal of Computer-Mediated Communication* 6 no. 2. Available from <http://jcmc.indiana.edu/vol6/issue2/sheehan.html>. Accessed 8 September 2006.
- Smith, Christine B. 1997. Casting the net: Surveying an Internet population. *Journal of Computer-Mediated Communication*, 3 no. 1. Available from EbscoHost online database (Directory of Open Access Journals). Accessed 25 October 2006.
- Sproull, Lee S. 1986. Using electronic mail for data collection in organizational research. *Academy of Management Journal* 29 no. 1: 159-169.
- Stanton, Jeffrey M. 1998. An empirical assessment of data collection using the Internet. *Personnel Psychology* 51 no. 3: 709-725.

- Taylor, Humphrey. 1999-2000. Does Internet work? *International Journal of Market Research* 42 no. 1: 51-63.
- Truell, Allen D. 2003. Use of Internet tools for survey research. *Information Technology, Learning, and Performance Journal* 21 no. 1: 31-37.
- Weible, Rick, and John J. Wallace. 1998. Cyber research: The impact of the Internet on data collection. *Marketing Research* 10 no. 3: 19-31.
- Witte, James C., Lisa M. Amoroso, and Philip E. N. Howard. 2000. Method and representation in internet based survey goals: Mobility, community, and cultural identity in Survey 2000. *Social Science Computer Review* 18 no. 2: 179-195.
- Yun, Gi Woong, and Craig W. Trumbo. 2000. Comparative response to a survey executed by post, e-mail, & web form. *Journal of Computer-Mediated Communication* 6 (1). Available from <http://jcmc.indiana.edu/vol6/issue1/yun.html>. Accessed 8 September 2006.
- Zevitas, Christa. 1999. *Five 'silver bullet' questions for opposing experts*. Available from George Mason University School of Law web site: <http://www.law.gmu.edu/innofcourt/pubs/expert.html>. Accessed 10 September 2006.

Sexology as a Science

- Abramson, Paul R. 1990. Sexual science: Emerging discipline or oxymoron? *The Journal of Sex Research* 27 no. 3: 147-156.
- Bland, Lucy, and Laura Doan, eds. 1998. *Sexology uncensored*. Cambridge, UK: Polity Press.
- Bloch, Iwan. 1908. *The sexual life of our time in its relations to modern civilization*. London: William Heinemann (Medical Books Ltd).
- Brecher, Edward M. 1979. *The sex researchers*. San Francisco: Specific Press.
- Bullough, Vern. 1994. *Science in the bedroom*. New York: Basic Books.
- Cutler, Bert. (n.d.). *Sexology*. Available from Arizona Power Exchange web site: <http://www.arizonapowerexchange.org/academia/Sexology.pdf>. Accessed 30 April 2006.
- Ellis, Havelock. 1937. *Studies in the psychology of sex*. Kingsport, TN: Kingsport Press.
- Foucault, Michel. 1978. *The history of sexuality*. New York: Pantheon Books.

- Freud, Sigmund. 1962. *Three essays on the theory of sexuality*. New York: Basic Books.
- Freud, Sigmund. 2004. *The interpretation of dreams*. Whitefish: MT. (Original work published in 1899).
- Giannelli, Paul C., and Edward J. Imwinkelried. 1999. *Scientific evidence*. Charlottesville, VA: Lexis Law Publishing.
- Gray, John. 1998. *Mars and Venus in the bedroom: Guide to lasting romance and passion*. New York: HarperCollins Publishers.
- Haeberle, Erwin J., and Martin Goldstein. 1971. *The sex book*. New York: Herder & Herder.
- Haeberle, Erwin J., and Vern L. Bullough. 1976. *Sexual variance in society and history*. Chicago: University of Chicago Press.
- Haeberle, Erwin J. 1978. *The sex atlas*. New York: The Seabury Press.
- Haeberle, Erwin J. 1982. The Jewish contribution to the development of sexology. *Journal of Sex Research* 18 no. 4: 305-323.
- Haeberle, Erwin J. 1983. *The birth of sexology: A brief history in documents*. Available from The Kinsey Institute for Research in Sex, Gender and Reproduction web site: <http://www.indiana.edu/~kinsey/resources/sexology.html>. Accessed 4 May 2006.
- Haeberle, Erwin J. 1983. *History of sexology*. Available from Archive for Sexology web site: http://www2.hu-berlin.de/sexology/Entrance_Page/History_of_Sexology/history_of_sexology.htm. Accessed 4 May 2006.
- Haeberle, Erwin J., and R. Taylor Segraves. 1984. Sexology - Conception, birth and growth of science. *Emerging Dimensions of Sexology* 1: 9-28.
- Haeberle, Erwin J. 1995. Le futur de la sexologie en Europe. *Sexologies: European Journal of Medical Sexology* 4 no. 15: 1-3.
- Hite, Shere. 1981. *The Hite report: A national study of female sexuality*. New York: Dell Publishing Co., Inc.
- Hite, Shere. 1982. *The Hite report on male sexuality*. New York: Ballantine Books.
- Humboldt-Universität zu Berlin. (n.d). *Archive for sexology*. Available from Magnus Hirschfeld Archive for Sexology web site: <http://www2.hu-berlin.de/sexology/GESUND/ARCHIV/MOLL1.HTM>. Accessed 28 April 2006.

- Kaplan, Helen Singer. 1974. *The new sex therapy*. New York: Brunner/Mazel.
- Kaplan, Helen Singer. 1979. *Disorders of sexual desire*. New York: Simon and Schuster.
- Kinsey, Alfred E., Wardell B. Pomeroy, and Clyde E. Martin. 1948. *Sexual behavior in the human male*. Philadelphia: W. B. Saunders Company.
- Kinsey, Alfred E., Wardell E. Pomeroy, Clyde E. Martin, and Paul H. Gebhard. 1953. *Sexual behavior in the human female*. Philadelphia: Saunders.
- Kinsey Institute for Research in Sex, Gender and Reproduction 2006. Available from web site: <http://www.indiana.edu/~kinsey/resources/sexology.html>. Accessed 28 April 2006.
- Krafft-Ebing, Richard. 1931. *Psychopathias sexualis*. Chicago: Login Brothers.
- Krivacska, James, and John Money, eds. 1994. *The handbook of forensic sexology: Biomedical & criminological perspectives*. Amherst, NY: Prometheus.
- Masters, William H., and Virginia E. Johnson. 1966. *Human sexual response*. Boston: Little, Brown and Company.
- Masters, William H., and Virginia E. Johnson. 1970. *Human sexual inadequacy*. Boston: Little, Brown and Company.
- Michael, Robert T., John H. Gagnon, Edward O. Laumann, and Gina Kolata. 1994. *Sex in America: A definitive survey*. Boston: Little, Brown & Co.
- Money, John. 1986. *Love maps: Clinical concepts of sexual/erotic health and pathology, paraphilia, and gender transposition in childhood, adolescence, and maturity*. New York: Prometheus Books.
- Mosher, Donald L. 1989. Advancing sexual science: Strategic analysis and planning. *The Journal of Sex Research* 26 no. 1: 1-14.
- Walling, William H. 1904. *Sexology*. Philadelphia: Puritan Publishing Company.
- Winick, Bruce J. 1996. The psychotherapist-patient privilege: A therapeutic jurisprudence view. *University of Miami Law Review* 50 no. 2: 249-266.

Testifying in Court

- Babitsky, Steven, and James J. Jr. Mangraviti. 2002. *Writing and defending your expert report*. Falmouth, MA: SEAK.
- Babitsky, Steven, and James J. Jr. Mangraviti. 2003. *Cross-examination: The comprehensive guide for experts*. Falmouth, MA: SEAK.
- Baker, Thomas O. 1983. *Deposition practice and practicality in state and federal court – an operator's manual for a witness chair*. Milwaukee: Defense Research Institute.
- Bernstein, Barton E., and Thomas L. Hartsell. 2005. *The portable guide to testifying in court for mental health professionals*. Hoboken, NJ: John Wiley & Sons, Inc.
- Bongiorno, Anthony A., and James J. Marcellino. 2000. *Techniques for cross examining*. Available from George Mason University School of Law web site: <http://www.law.gmu.edu/innofcourt/pubs/expert.html>. Accessed 10 September 2006.
- Brodsky, Stanley L. 1999. *The expert witness*. Washington, DC: American Psychological Association.
- Champagne, Anthony, Daniel Shuman, and Elizabeth Whitaker. 1992. Expert witnesses in the courts: An empirical examination. *Judicature* 76 no. 1: 5-10.
- Coniglio, John P. 2002. The expert witness: A primer on your activities. *American Society of Safety Engineers* (January): 34-39.
- Crawford, Robert J. 2001. *The expert witness: A manual for experts*. Bloomington, IN: Authorhouse Publishing Company.
- Dorram, Peter B. 1982. *The expert witness*. Washington, DC: Planners Press.
- Freedman, Allan M. 2001. Being a plaintiff in a negligence suit. *Journal of Canadian Chiropractic Association* 45 no. 4: 256-257.
- Gross, Samuel R. 1991. Expert Witness. *Wisconsin Law Review* 1991 no. 6: 1113-1232.
- Gutheil, Thomas G., and Robert I. Simon. 2002. *Mastering forensic psychiatric practice*. Washington, DC: American Psychiatric Publishing Inc.
- Hastie, Reid. 1999. The role of “stories” in civil jury judgments. *University of Michigan Journal of Law Reform* 32 no. 2: 227-239.
- Holmgren, Brian. 2002. The expert witness. *New England Law Review* 36 no. 3: 593-600.

- Johnson, Larry G. 2001. *The deposition guide: A practical handbook for witnesses*. Seattle: Law Forum Press.
- Johnson, Raymond Paul. 2000. *Preparing for the moment of truth: Your expert's direct and cross-examination*. Available from George Mason University School of Law web site: <http://www.law.gmu.edu/innofcourt/pubs/expert.html>. Accessed 10 September 2006.
- Krafka, Carol, Meghan A. Dunn, Molly Treadway Johnson, Joe S. Cecil, and Deal Miletich. 2002. *Judge and attorney experiences, practices, and concerns regarding expert testimony in federal civil trials*. Available from Federal Judicial Center web site: <http://www.fjc.gov/library>. Accessed 15 August 2006.
- Lancaster, Walter R. 1998. *Preparing to destroy any expert every time*. Available from George Mason University School of Law web site: <http://www.law.gmu.edu/innofcourt/pubs/expert.html>. Accessed 10 September 2006.
- Lathan, Virginia A. 1995. *The deposition handbook*. Sacramento, CA: Curry-Co Publications.
- Lilly, Graham C. 1987. *An introduction to the law of evidence*. St. Paul: West Publishing Company.
- Lubet, Steven. 1999. *Expert testimony: A guide for expert witnesses and the lawyers who examine them*. Notre Dame, IN: National Institute for Trial Advocacy.
- Lubet, Steven. 1999. *Expert witnesses: Ethics and professionalism*. Available from George Mason University School of Law web site: <http://www.law.gmu.edu/innofcourt/pubs/expert.html>. Accessed 10 September 2006.
- Matson, Jack V. 1999. *Effective expert witnessing*. Boca Raton, FL: CRC Press.
- Matson, Jack V, Suha F. Daou, and Jeffrey G. Soper. 2004. *Effective expert witnessing practices for the 21st century*. Boca Raton, FL: CRC Press.
- Merenbach, Dennis G., and Anthony Stephen. 1993. *How to be an expert witness*. McKinleyville, CA: Fithian Press.
- Mieg, Harald A. 2001. *The social psychology of expertise: Case studies in research, professional domains, and expert roles*. Mahwah, NJ: Lawrence Erlbaum Associates.
- Notes of the Advisory Committee on Proposed Rule Changes in 2000*. Available from the Cornell University Law School web site: <http://www.law.cornell.edu/rules/fre/ACRule702.htm>. Accessed 14 July 2006.

- Poynter, Dan. 2005. *Expert witness handbook*. Santa Barbara, CA: Para Publishing.
- Prager, Irving, and Kevin S. Marshall. 2005. Examination of prior expert qualification and/or disqualification – (questionable questions under the rules of evidence). *The Review of Litigation* 24 no. 3: 559-580.
- Scoptur, Paul J. 2000. *Explosive and dynamic cross-examinations of expert witnesses*. Available from George Mason University School of Law web site: <http://www.law.gmu.edu/innofcourt/pubs/expert.html>. Accessed 10 September 2006.
- Smith, Fred Chris, and Rebecca Gurley Bace. 2003. *A guide to forensic testimony*. Boston: Addison-Wesley.
- Tsushima, William T., and Robert M. Anderson, Jr. 1996. *Mastering expert testimony: A courtroom handbook for mental health professionals*. Mahwah, NJ: Lawrence Erlbaum Associates.
- Vidmar, Neil, and Shari S. Diamond. 2001. Juries and expert evidence. *Brooklyn Law Review* 66 no. 4: 1121-1180.
- Vogelsang, Janet. 2001. *Witness stand: Guide for clinical social workers in the courtroom*. New York: Haworth Press.
- Vouras, Maria, Ken Falkenstein, Liz Homoki, Larry Lewis, and Jeffrey M. Summers. 2000. *Examination of expert witnesses*. Available from George Mason University School of Law web site: <http://www.law.gmu.edu/innofcourt/pubs/expert.html>. Accessed 10 September 2006.
- Waites, Richard C. 2002. *Courtroom psychology and trial advocacy*. New York: ALM Publishing.