

## A Memorandum for Resolving Role Conflicts<sup>1</sup>

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### Abstract

Forensic psychologists may be requested to perform multiple roles in a single case. In some cases, a request to perform an additional role might arise after the psychologist has already agreed to work on the case, or even after the psychologist has begun some work on the case. A forensic psychologist needs to consider whether multiple roles conflict in a given case and, if so, take steps to resolve the conflict. Here, one forensic psychologist describes how multiple, conflicting roles arose in a recent case. A Memorandum for Resolving Role Conflicts is presented. Other forensic psychologists are encouraged to use and modify this Memorandum to fit the needs of other cases (as with a Brodsky letter; see Brodsky & McKinzey, 2002).

**Keywords:** forensic psychology, expert witness, expert consultant, ethics, multiple roles, role conflicts, Brodsky letter, allegiance effect

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I was recently contacted via email by a paralegal employed by a U. S. government agency. She asked whether I was available to provide forensic psychological services during a particular week in the following month. I contacted her by telephone and told her that I was available, and over the next few days I was hired to work on a forensic case. As it turned out, I was hired for the entire week, beginning with travel and a meeting with the attorneys on the Sunday of that week. During that Sunday meeting, which was my first contact with the attorneys working on the case, I realized that I was being asked to perform multiple, conflicting roles. I had already accepted the mission and traveled to the area where the trial would be held, beginning the next day. It would be too late for the attorneys to hire someone else to do all the tasks they wanted, or to hire an additional forensic psychologist to do some tasks so that I would not have to perform multiple, conflicting roles. During that Sunday meeting, I informed the attorneys that there might be a role conflict. We agreed that I would seek consultation that evening and clarify my role with the attorneys on the following morning.

This brief article describes the role conflict, how I dealt with it, and the response of the attorneys. The article concludes with a memorandum that, if adapted to one's particular

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<sup>1</sup> Associate Editor's Note: This manuscript was submitted by the journal's editor and publisher. I supervised peer review, which was conducted by independent reviewers who were "blind" to the authorship of the article.

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circumstances, could be useful for forensic psychologists who find themselves in situations where they are asked to perform multiple, competing roles.

### **Multiple, Conflicting Roles**

The broad outline of my roles was specified in a Memorandum and a Memorandum of Agreement, both of which appeared to have been generated from boilerplate forms, which were sent to me via email for my signature. These are reproduced below, with some details excluded:

date

MEMORANDUM FOR DR. \_\_\_\_

FROM:

SUBJECT: Expert Consultant for the Government – *U.S. v. \_\_\_\_*

1. Pursuant to the authority granted to me by \_\_\_\_, I have appointed you as an expert consultant in the court-martial case of *U.S. v. \_\_\_\_*.
2. In your capacity as an expert consultant, you are a “lawyer’s representative” for purpose of Military Rule of Evidence (M.R.E.) 502(a). As an expert consultant, you are a member of the prosecution team. Any assistance you provide trial counsel in the preparation of the case falls within the scope of the attorney-client privilege. You may receive confidential communications. Statements or information provided to you as an expert consultant are privileged to the extent of the attorney-client privilege.
3. If, however, you should be called as a witness for the government, defense counsel may properly interview you about matters to which you will testify. Finally, M.R.E. 705 requires an expert who offers a testimonial opinion to disclose, upon request of a party opponent, the underlying facts or data on cross-examination.

My reading of the above is that it clearly sets up multiple roles, that of expert consultant and that of expert witness. In the role of expert consultant, I would engage in confidential communications with the prosecuting attorneys. Then, if called as a witness, I would follow the rules of evidence—as instructed by the judge and the attorneys—regarding disclosure of those confidential communications. In considering whether the multiple roles would be conflicting roles, I thought the key might be what was expected of me as “a member of the prosecution team.” I learned more from a

Memorandum of Agreement with the same date as the above Memorandum, and from my initial meeting with the prosecuting attorneys on that Sunday.

The Memorandum of Agreement is reproduced below, with some details excluded:

MEMORANDUM OF AGREEMENT FOR  
CIVILIAN EXPERT CONSULTANT FOR GOVERNMENT

1. Dr. \_\_\_ is hereby retained as an expert consultant to provide review, analysis, and consultation in the court-martial case of United States v. \_\_\_, on behalf of the GOVERNMENT.
2. The expert consultant agrees to provide the following pre-trial services:
  - a. To review all documentation relevant to the area of expertise which pertains to the guilt or innocence of the accused.
  - b. To act as an expert technical consultant for the GOVERNMENT.
  - c. To assist the GOVERNMENT to formulate potential pretrial and cross-examination questions, particularly for any opposing expert witnesses.
  - d. To provide a copy of the expert's resume or *curriculum vitae* to the trial counsel.
  - e. To submit a Government travel voucher for payment, following the instructions provided, and accompanied by required documentation for expenses.
  - f. To certify that the fee charged for expert services is no greater than the expert's normal professional rate.
3. The Government agrees to pay the expert consultant/witness as follows: to pay a fee of \_\_\_ per day for a maximum of 5 days in order to travel to and from \_\_\_, to assist the government prepare its case as well as to provide testimony in findings if required.

Prior to my Sunday meeting with the prosecuting attorneys, then, I was aware of a potential for role conflict, depending on what was asked of me as “a member of the prosecution team,” since I might also be called as an expert witness at trial.

In the Sunday meeting, the prosecutors laid out the details of the case and talked freely about what would be expected of me. Copies of documents were provided for my review. One of the tasks they mentioned was that of trial consultant as prospective Members of the Court (in many, but not all, ways similar to juries in civilian criminal courts) were interviewed. At that point, it was clear to me that I was being asked to perform multiple, conflicting roles in this case. If, as a member of the prosecution team, I attempted to help the prosecuting attorneys decide which Members to try to exclude from the case, I would clearly be doing so in order to help them win the case. Any role that involved trying to help one side win the case would conflict with the subsequent role of expert witness; an expert witness should provide neutral, objective facts and opinions.

During that Sunday meeting, I explained what I saw as likely conflicting roles, and I briefly described the situation as a potential ethical violation. We decided that after that meeting I would review ethical guidelines and seek consultation from a trusted colleague. In the meantime, the prosecuting attorneys provided me with copies of materials that had already been provided to the defense.

### **Resolution of the Conflict**

I reviewed ethical guidelines, consulted with a trusted colleague, and prepared the following Memorandum. Because it would be of interest to the prosecutors with whom I would be working and to the judge advocate who appointed me, I addressed the memorandum “To Whom it May Concern” and asked that it be provided to the prosecuting attorneys.

Re: U.S. v. \_\_\_\_  
To Whom it May Concern  
Subject: Expert Consultant for Government  
Date:

As I discussed with the prosecution team on [date], I perceive a potential conflict in my roles as described in the Memorandum of Agreement for Civilian Expert Consultant for Government and the Memorandum for Dr. \_\_\_, both dated [date]. The potential conflict of interest is that, as “a member of the prosecution team,” a psychologist might be expected to help the team win, but as an expert witness a psychologist should provide objective testimony.

I have reviewed the Ethical Principles of Psychologists and Code of Conduct<sup>1</sup> and the Specialty Guidelines for Forensic Psychologists,<sup>2</sup> and I have consulted with a colleague, \_\_\_, Ph.D. After review and consultation, I am satisfied that I can ethically serve as an expert technical consultant for the Government and retain my objectivity as a potential expert witness, but only if I maintain objectivity throughout the entire process. I agree to perform the role of expert technical consultant, and I agree that I will perform the role of expert witness if called upon to do so. In my role as expert technical consultant, I agree to assist the Government in understanding facts and opinions, not with a goal of helping the Government team win, but in an objective, nonpartisan fashion.

I agree to all other terms of the Memorandum of Agreement for Civilian Expert Consultant for Government and the Memorandum for Dr. \_\_\_, both dated [date], including those terms involving confidentiality and privilege.

[signature]

<sup>1</sup> <http://www.apa.org/ethics/code2002.html>

<sup>2</sup> *Law and Human Behavior*, 15(6), 1991, 655-665.

<http://www.bing.com/search?cp=1250&FORM=FREESS&q=guidelines+for+forensic+psychologists&q1=site%3Awww.ap-ls.org>

In preparing the above Memorandum, I was particularly guided by [Ethical Principles 3.05 Multiple Relationships and 3.07 Third-Party Requests for Services](#)<sup>3</sup> and by [Specialty Guidelines IV. D, IV. G, and VII. F](#).<sup>4</sup>

### **Outcome and Recommendations**

In this case, with these prosecuting attorneys, this worked. One of the prosecuting attorneys commented to me, “I have a license, too, and I would not want to do anything to jeopardize it.” I reviewed documents and observed the entire court proceedings, and the prosecuting attorneys consulted with me as needed to enhance their understanding of facts and others’ opinions in the case. We planned that, if the forensic psychologist who was working with the defense was called upon to testify, I would assist the prosecuting attorneys in understanding his testimony, and I would be available as a rebuttal witness.

Now, having reviewed ethical guidelines, consulted with a trusted colleague, set parameters regarding my roles, and participated in the trial process, I continue to see a lack of real conflict in performing a role as a member of a prosecution [or defense] team (so that such conversations would be confidential if I did not testify) and still being available to testify as a neutral, objective, expert witness. In this case, I consider the key to be clarifying that the psychologist would perform as a neutral, objective professional throughout the process, never in the role of attempting to help one side win.

As a general rule, forensic psychologists who anticipate that they may testify in a particular case should not accept, explicitly or implicitly, a role that involves helping one side win. One interesting aspect of this case is that the request for the expert to perform dual roles was explicit: The Memorandum referred to both the role of “an expert consultant . . . a member of the treatment team” and the anticipated possible role of being “called as a witness.” Even after the expert responds explicitly that he or she will perform the role of expert consultant, but not to help one side win, one can expect an implicit pull to affiliate with the attorneys: “The pull to affiliate with attorneys likely will be present [in some forensic cases] and needs to be monitored so that experts remain objective and impartial” (Brodsky & Galloway, 2003, p. 3). This can lead to an allegiance effect in which not only the experts’ opinions, but even such facts as instrument scores, line up with the interests of the attorney who calls the expert to testify (see, e.g., Murrie, Boccaccini, Turner, Meeks, & Woods, 2009). Murrie et al. (2009, p. 43) remind us of “cautions about objectivity that authorities offer (Brodsky, 1991; Rogers, 1987; Shuman & Greenberg, 2003) and underscore the need for clinicians to use practical self-monitoring approaches to reduce the influence of adversarial

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<sup>3</sup> at <http://www.apa.org/ETHICS/code2002.html>

<sup>4</sup> at <http://www.bing.com/search?cp=1250&FORM=FREESS&q=guidelines+for+forensic+psychologists&q1=site%3Awww.ap-Is.org>

allegiance (Borum, Otto, & Golding, 1993; Murrie & Warren, 2005).” They also recommend an “excellent review” of proposed solutions (Mnoonkin, 2008). Murrie et al. (2009, p. 43) conclude, “Evaluators who are cautious about adversarial allegiance need not be reluctant to vigorously advocate for their opinions and need not ‘preclude forceful representation of the data and reasoning upon which a conclusion . . . is based’ (Committee on Ethical Guidelines for Forensic Psychologists, 1991, p. 664). Evaluators, however, do need to examine closely for the degree to which their opinions—even routine instrument scoring decisions—may have been subtly influenced by adversarial allegiance. Opposing attorneys will do the same.”

Although the roles of psychotherapist and expert witness are likely to conflict (see, e.g., Strasburger, Gutheil, & Brodsky, 1997), the roles of expert consultant and expert witness need not. Mental-health professionals in the dual roles of expert consultant and expert witness can benefit from considering how other scientists, scientist-practitioners, and analysts maintain objectivity. For example, “From their first workday, [Central Intelligence Agency] intelligence officers are told never to suggest policy. They are not policy makers and policy is not their concern. . . . All are made to understand their job is to present the best intelligence in a clear, concise, and unbiased manner” (Anonymous, 2004). “The job of a CIA intelligence officer includes presentation of relevant data *and analysis of those data* to policy makers. Similarly, the role of an evaluator does not stop at presentation of data, but rightly should include analysis: “In this role, psychiatrists [and psychologists] gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant’s mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant’s mental condition might [affect] his behavior. . . . Further, where permitted by evidentiary rules, psychiatrists [and psychologists] can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists [and psychologists] ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant” (DeClue, 2005, pp. 195-196, quoting *Ake v. Oklahoma*, 1985).

Mental-health professionals who serve dual roles of expert consultant and expert witness on the same case may be able to reduce role conflict if we endeavor to communicate as a consultant much as we do in our written reports and oral testimony. As expert consultants, we should eschew making recommendations about prosecution or defense strategy. Our focus should be to present facts and opinions in a clear, concise, and unbiased manner, and in doing so, “It is essential to distinguish between our opinions and the factual bases for those opinions” (DeClue, 2005, p. 195).

In the role of expert consultant, it may help to reduce the pull to affiliate with the prosecution or defense team if we remind ourselves to do the opposite of what would be recommended in a book like “How to Win Friends and Influence People” (Carnegie, D.,

2009). When serving as an expert consultant on a case in which you may be called as an expert witness, do not utilize:

- the six ways to make people like you,
- the twelve ways to win people to your way of thinking, or
- the nine ways to change people without arousing resentment.

Embrace your inner professor. This is a good time to be stodgy and pedantic.

I encourage other forensic mental-health professionals to use and modify the above Memorandum to fit the needs of other cases.

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