The role of the expert witness in this case may have been placed under increased scrutiny because of the mixed civil and criminal status of the MDO hearing, which combines "rules of criminal discovery, as well as civil discovery" to "reduce costs" (Cal. Penal Code § 2966(b) (2015). Although it is a civil commitment procedure, the higher standard of proof of beyond a reasonable doubt is required. In *Addington v. Texas*, 441 U.S. 418, 429 (1979), the Supreme Court determined that the minimum standard for civil commitment should be clear and convincing evidence, but expressed reservations that a higher standard of beyond a reasonable doubt might be difficult to prove, given the uncertainties of psychiatric medicine. In regard to the mixed criminal/civil nature of the current case, some scholars have opined that, in general, expert witnesses in civil cases undergo more scrutiny than those in criminal cases (Dwyer D: (Why) Are civil and criminal expert evidence different. *Tulsa L Rev* 43:381, 2007). The pressure of having to provide evidence beyond a reasonable doubt, as well as the potential increased scrutiny of being in a mixed criminal/civil process, may place additive pressure on mental health expert witnesses in Californian MDO hearings.

Overall, cases concerning the limitation of expert witness testimony highlight the ambivalence of courts toward expert witnesses. On the one hand, the expert witness serves the essential function of educating the court on topics outside the typical range of knowledge of the layperson. On the other hand, those who wield expert knowledge might be seen to hold undue sway over the opinions of jurors.

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# Threatening Statements and the Therapist-Client Privilege

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## There Is No "Threats Exception" in Minnesota that Allows a Therapist to Testify Regarding a Client's Threatening Statements Without His Consent

In *State v. Expose*, 872 N.W.2d 252 (Minn. 2015), Jerry Expose, Jr., was sentenced to 28 months in prison after being found guilty of making terroristic threats. The threats were made during an anger management therapy session and reported by his therapist. She was later called as a witness at his trial. Mr. Expose objected on the grounds that therapist–client privilege prohibited her testimony, and the district court overruled. Mr. Expose appealed his conviction, and the Court of Appeals of Minnesota agreed that the therapist's testimony was inadmissible and reversed Mr. Expose's conviction (*State v. Expose*, 849 N.W.2d 427 (Minn. Ct. App. 2014)). The Supreme Court of Minnesota affirmed, concluding that the court of appeals correctly applied the statute codifying therapist–client privilege when reviewing Mr. Expose's appeal.

### *Facts of the Case*

Mr. Expose was on probation for a child protection case involving his children. His probation required him to attend anger management therapy sessions. During one of these sessions, he became upset and made threatening statements to his therapist about a case manager involved in his child protection case. The therapist believed that the comments rose to the level of mandatory reporting due to being serious threats aimed at an identified person. She reported the threats to her supervisor, the identified case manager, and the police. Mr. Expose was then charged with one count of making terroristic threats.

At trial his therapist was called as a witness by the state and Mr. Expose objected to her testimony, arguing that since he had not consented, she could not break therapist–client privilege. His objection was denied, as the district court concluded that statements of imminent threat are an exception to the therapist–client privilege. Mr. Expose also objected to his case manager's testifying about what his therapist had reported to her, stating that it was inadmissible hearsay. This objection was also overruled and Mr. Expose was found guilty and sentenced to 28 months in prison.

Mr. Expose appealed his conviction on the grounds that the therapist–client privilege rendered his therapist's testimony inadmissible. The court of appeals agreed with Mr. Expose and reversed his conviction. They spoke to three matters, including whether Mr. Expose had made a timely objection,

whether therapist–client privilege prohibited his therapist's testimony, and whether the therapist–client privilege extended to the testimony of a third party, his case manager. The Supreme Court of Minnesota then granted review of these questions.

### *Ruling and Reasoning*

The Supreme Court of Minnesota first reviewed whether Mr. Expose objected to the testimony of his therapist at the appropriate time. The prosecution argued that according to Minnesota statute, Mr. Expose forfeited his objection by not making it before trial:

> [d]efenses, objections, issues, or requests that can be determined without trial on the merits must be made before trial by a motion to dismiss or to grant appropriate relief. The motion must include all defenses, objections, issues, and requests then available. Failure to include any of them in the motion constitutes waiver. (Minn. R. Crim. P. § 10.01(2) (2015)).

The court had applied Rule 10.01 to cases in the past, but not to cases with this type of objection. The nature of therapist–client privilege requires assessment of the testimony to decide whether it is admissible. The court ruled that Mr. Expose did not forfeit his objection by failing to raise it before the trial.

The next, and main, question of this case is whether the Minnesota statutes allow therapists to testify against a client if that client makes a serious threat. The Minnesota statute that discusses therapist–client privilege states that every person may testify in any case except as follows:

> A registered nurse, psychologist, consulting psychologist, or licensed social worker engaged in a psychological or social assessment or treatment of an individual at the individual's request shall not, without the consent of the professional's client, be allowed to disclose any information or opinion based thereon which the professional has acquired in attending the client in a professional capacity, and which was necessary to enable the professional to act in that capacity (Minn. Stat. § 595.02, (1)(g) (2015)).

There are two exceptions included in the statute that allow testimony in cases involving the mistreatment of a child or vulnerable adult.

Although there is no specific mention of threatening statements in this statute, the prosecution argued that another Minnesota statute allows the duty to warn as an exception to therapist–client privilege. The prosecution argued that the court should use this information to create a new, implied exception. Subdivision 2 of that statute states:

> [a duty to warn] arises only when a client or other person has communicated to the licensee a specific, serious threat of physical violence against a specific, clearly identified or identifiable potential victim. If a duty to warn arises, the duty is discharged by the licensee if reasonable efforts. . .are made to communicate the threat (Minn. Stat. § 148.975, (2) (2015)).

The court held that the duty-to-warn statute does not apply to the therapist–client privilege statute, because specific exceptions had already been made, and if the legislature had wanted to make this situation an exception, it would have. It also stated that the two statutes stand alone and that there is no implied exception. The duty-to-warn statute allows a therapist to break confidentiality until the duty to warn is discharged by reporting the threat to the intended victim and law enforcement. The therapist–client privilege statute addresses when and about what therapists are allowed to testify, which excludes information gathered in a professional capacity with the client unless the client provides consent. Thus, the two statutes are not contradictory and apply to two different situations.

### *Discussion*

The holdings in *State v. Expose* highlight the differences between exceptions to therapist–client privilege in duty-to-warn and testimonial situations. The prominent case addressing a clinician's duty to warn third parties is *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976), where Justice Tobriner memorably declared that "The protective privilege ends where the public peril begins" (*Tarasoff*, p 347).

Following the holdings in *Tarasoff* that mental health professionals have a duty, not only to warn but also to protect third parties who are being threatened by a client, most states have enacted duty-to-warn laws. *State v. Expose* upholds that duty, but specifies that once that duty is discharged there is no additional breach of confidentiality allowed.

*Jaffee v. Redmond*, 518 U.S. 1 (1996), addressed the importance of therapist–client privilege. In this case, therapy records were deemed privileged information in a wrongful death case. The assurance of privacy that is necessary to foster a therapeutic relationship and perform effective psychotherapy was contrasted with Justice Scalia's concern of the potential for the "injustice" of excluding truthful evidence from court.

There have been other state and federal cases that uphold this same delineation between breaching of confidentiality to warn a third party and breaching of confidentiality to testify in court. These cases have held that clients must give consent for their mental health providers to testify, even if they are testifying about a client's threat to harm another person. One

such case was the United States Court of Appeals for the Ninth Circuit's decision in *United States v. Chase*, 340 F.3d 978 (9th Cir. 2003). Similar to *State v. Expose*, the defendant made threats during a therapeutic session that the provider reported and subsequently testified about in trial court. The court of appeals ruled the district court erred in admitting the provider's testimony, finding there is no "dangerous person" exception to testimonial privilege.

At face value, these cases raise the question of how one would potentially prosecute someone who makes a protected threat in therapy. In accordance with the letter of the Minnesota decision, therapists can warn a potential victim but not testify against a client seen in treatment if the violence is carried out. The aforementioned Minnesota statute on patient confidentiality does not mention physicians, suggesting that psychiatrists engaged in therapy might not be forbidden to testify against dangerous clients. One could argue that threats made in the context of protected therapy dyads are seldom carried out and that these protected forums may well decrease actual violence. In addition, therapists have long argued against mandatory reporting for fear that it can damage the therapeutic relationship by making patients reluctant to openly express their thoughts and feelings. Indeed, it is almost expected that an individual undergoing anger management treatment may have an angry outburst or use threatening language. This problem remains a contentious one, and there are likely to be similar cases in the future where courts weigh the right to privacy and confidentiality against the greater good of protecting others.

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# Post-*Atkins* Determination of Intellectual Disability in a Death Penalty Case in Oregon

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## State Supreme Court Rules that DSM-5 Criteria for Intellectual Disability Should be Used in Evaluating an Individual Facing the Death Penalty

Following *Atkins v. Virginia*, 536 U.S. 304 (2002), which exempts persons with intellectual disability from the death penalty, states are determining how to apply this ruling in their courts. Their challenges include setting criteria and developing procedures to determine whether a defendant has an intellectual disability. The Oregon Supreme Court ruled in *Oregon v. Agee,* 364 P.3d 971(Or.,2015)) that Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5) criteria for intellectual disability should be used in evaluating a defendant facing the death penalty. Moving away from IQ scores and toward using adaptive functioning for diagnosis further provides defendants with intellectual disability protection from the death penalty.

### *Facts of the Case*

Isaac Agee was sentenced to the Oregon State Penitentiary to serve a 40-year sentence for attempted murder and other offenses. It was alleged that in February 2008, Mr. Agee, along with James Davenport, killed a fellow inmate. Both were charged with aggravated murder for intentional homicide. The state sought the death penalty for the offense. Mr. Agee moved the trial court to declare him intellectually disabled and therefore to be ineligible for the death penalty under *Atkins v. Virgina*. The trial court did not grant Mr. Agee's motion.

Oregon did not have specific procedural guidelines to determine when a defendant is ineligible for the death penalty under *Atkins*. Therefore, the trial court conducted a pretrial hearing at which Mr. Agee had the burden of proof to establish by a preponderance of the evidence that he was intellectually disabled.

During the pretrial hearing in April 2011, the court heard testimony from psychologists and psychiatrists regarding Mr. Agee's diagnosis and intellectual abilities. The trial court concluded Mr. Agee had partial fetal alcohol syndrome, but did not find that he had established intellectual disability that would exclude him from the death penalty on a constitutional basis. A jury was empaneled for a guilt-phase trial in May 2011, after which Mr. Agee was found guilty of aggravated murder.

The standard used to establish intellectual disability in the pretrial hearing was based on the DSM, 4th