

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 THE ESTATE OF MICHAEL WILSON,
12 by and through its successor-in-interest
13 PHYLLIS JACKSON, and PHYLLIS
14 JACKSON,

14 Plaintiff,

15 v.

16 COUNTY OF SAN DIEGO, et al.,

17 Defendants.

Case No.: 3:20-cv-00457-RBM-DEB

**ORDER DENYING COUNTY
DEFENDANTS' MOTION TO
DISQUALIFY PLAINTIFF'S
EXPERT DR. HOMER VENTERS
AND/OR TO EXCLUDE HIS
OPINIONS AT TRIAL**

[Doc. 98]

18
19 On June 13, 2023, the County Defendants filed a motion to disqualify the Estate of
20 Michael Wilson's ("Plaintiff") expert witness Dr. Homer Venters and/or to exclude his
21 opinions at trial ("Motion"). (Doc. 98.) In their Motion, the County Defendants argue Dr.
22 Venters is disqualified due to a conflict of interest and lacks foundation for his opinion that
23 the County failing to have policies, procedure, or training concerning missed medications.
24 (*Id.* at 4–10.)¹ Plaintiff filed a brief in opposition to Defendant's Motion on August 2, 2023
25 ("Opposition") (Doc. 112), and the County Defendants filed a reply on August 30, 2023
26

27
28 ¹ The Court cites the page number displayed on the docketed document, not the CM/ECF
pagination, unless otherwise noted.

1 (“Reply”) (Doc. 127).

2 For the reasons discussed below, the County Defendants’ Motion is **DENIED**.

3 **I. RELEVANT BACKGROUND**

4 **A. Dr. Venters’ Experience and Report**

5 Plaintiff designated Dr. Homer Venters as an expert in correctional medicine who
6 will provide testimony concerning “the standard of medical care in correctional facilities;
7 the level and appropriateness of care provided to decedent Michael Wilson within the San
8 Diego County Central Jail; policies and procedures pertaining to medical care; medical
9 charting and electronic health records; the administration of medication; and oversight of
10 medical care providers.” (Doc. 96-2 (Ex. Q) at 1.) Dr. Venters is a physician, internist,
11 and epidemiologist with over a decade of experience in health care services for incarcerated
12 persons. (Doc. 98-2 (Ex. B), Dr. Homer Venters’ Expert Report (“Venters Report”) at 1.)
13 In preparing his expert report, Dr. Venters listed that he reviewed Critical Incident Review
14 Board (“CIRB”) documents and a California State Auditor’s Report. (*Id.* at 3–4.) Dr.
15 Venters confirmed that he reviewed CIRB documents in his deposition as well. (Doc. 98-
16 2 (Ex. A), Deposition of Dr. Homer Venters (“Venters Dep.”) 19:18–24.) Dr. Venters
17 understood that the CIRB records were subject to a protective order but did not recall
18 signing an agreement before receiving those records. (*Id.* at 61:18–62:6.) Dr. Venters did
19 not recall the amount of CIRB records he reviewed, or which documents he reviewed. (*Id.*
20 at 19:18-24, 65:1–6.) Dr. Venters was not sure whether he relied on the California State
21 Auditor’s Report in forming his opinions in this case. (*Id.* at 20:8-17.)

22 **B. COCHS Best Practices Review**

23 Between December 2018 and April 2020, Dr. Venters served as a Senior Health
24 Fellow and President of the Community Oriented Correctional Health Services
25 (“COCHS”), a nonprofit promoting evidence-based improvements to correctional practices
26 in the United States. (Venters Report at 2.) In his deposition, Dr. Venters stated that, while
27 he was either a Senior Health Fellow or President of COCHS, COCHS conducted a best
28 practices review for the County of San Diego. (Venters Dep. 53:10–22.) Dr. Venters did

1 not recall the best practices review beyond that it had to do with “big picture policies”
2 concerning how people come to be in jail and managing their care on the way through and
3 out of jail. (*Id.* at 53:23–54:5.) Dr. Venters was listed as an author of the best practices
4 review. (*Id.* at 54:6–8.) Dr. Venters did not recall looking at the profiling of medications,
5 medication records, or medication administration records (“MARs”) for the best practices
6 review, but he believed COCHS may have talked to staff at a policy level about how they
7 get medications and if some medications are hard to acquire. (*Id.* at 54:10–55:8.)

8 When asked whether Dr. Venters was told COCHS’ contract with the County of San
9 Diego contained certain confidentiality provisions, Dr. Venters stated “I don’t recall
10 looking at the contract. But so yes, I just don’t recall looking at that.” (*Id.* at 57:14–18.)
11 When asked if the information Dr. Venters learned from the best practices review
12 influenced his opinions in this case, he stated “[a]bsolutely not” and characterized the
13 review as high-level policy review that does not bear on this case or similar cases where
14 he has been retained to look at specific medical records. (*Id.* at 58:11–19.) When asked
15 whether there was no policy in place regarding continuation of medication, Dr. Venters
16 stated that, based on what he saw in this case, if there was such a policy, it was not effective
17 or being followed. (*Id.* at 69:11–21.) Dr. Venters explained that he did not review any
18 written policy regarding continuation of medication for admitted inmates and was not sure
19 whether the deficiencies he observed were the result of policy, practice, or training, or some
20 combination of the three. (*Id.* at 69:22–70:13.) When Dr. Venters was asked if his opinion
21 was that no training was provided to nursing staff on how to pass out medication and
22 document it on the MAR, he explained that it was not but rather his opinion was that there
23 was some deficiency in policy, practice, or training leading the system to not function. (*Id.*
24 at 77:1–15.)

25 In a declaration, Dr. Venters recalled that, as part of the best practices review, the
26 County explicitly declined to provide medical records of any patients or any other patient-
27 specific information. (Doc. 112-5, Declaration of Dr. Homer Venters (“Venters Decl.”)
28 ¶ 22.) Dr. Venters recalled talking to jail staff during a walkthrough where he was shown

1 a PowerPoint presentation concerning an overview of the jail and how it worked; he also
2 recalled meeting leadership of the jail, touring different parts of the facility including the
3 medical area and housing units, and not discussing specific patients or cases. (*Id.* at ¶ 23.)

4 The COCHS best practices review involved a two-day series of meetings and process
5 reviews, including observing several areas of two current jail facilities in San Diego. (Doc.
6 112-3 (Ex. B), COCHS Best Practices Review at 2.) Dr. Venters emailed the best practices
7 review to the Chief Operating Officer of the Officer of Public Safety for San Diego County
8 on March 30, 2020, but it is not clear when the meetings, process reviews, or facility
9 observations occurred. (*Id.* at 1–27.) The COCHS best practices review report has a
10 section on medication management, but that section makes no mention of any policy or
11 procedure of the San Diego County jail. (Venters Decl. ¶ 24; COCHS Best Practices
12 Review at 14–16.) The COCHS best practices review report also notes that “[t]he scope
13 of COCHS Engagement did not enable us to determine which model is actually operational
14 in the jail nor to determine the extent to which the procedures and processes were
15 conforming to policies that had been implicitly or explicitly selected by either the board or
16 the San Diego County Sheriff.” (COCHS Best Practices Review at 21.)

17 II. LEGAL STANDARD

18 A. Conflict of Interest

19 “Federal courts have the inherent power to disqualify expert witnesses to protect the
20 integrity of the adversary process, protect privileges that otherwise may be breached, and
21 promote public confidence in the legal system.” *Hewlett-Packard Co. v. EMC Corp.*, 330
22 F. Supp. 2d 1087, 1092 (N.D. Cal. 2004). “However, disqualification is a drastic measure
23 that courts should impose only hesitantly, reluctantly, and rarely.” *Id.* “[D]isqualification
24 of an expert is warranted based on a prior relationship with an adversary if (1) the adversary
25 had a confidential relationship with the expert and (2) the adversary disclosed confidential
26 information to the expert that is relevant to the current litigation.” *Id.* at 1192–93. “[I]f
27 only one of the two factors is present, disqualification likely is inappropriate.” *Id.* at 1093.
28 “In addition to these two factors, the Court also should consider whether disqualification

1 would be fair to the affected party and would promote the integrity of the legal process.”
2 *Id.* The party moving to disqualify bears the burden of proof on these issues. *Hayward*
3 *Prop., LLC v. Commonwealth Land Title Ins. Co.*, Case No. 17-cv-06177 SBA, 2021 WL
4 4923379, at *2 (N.D. Cal. Aug. 31, 2021) (citing *Hewlett-Packard*, 330 F. Supp. 2d at
5 1096).

6 In evaluating whether a confidential relationship with an expert existed, courts
7 consider: (1) whether the relationship was long standing and involved frequent contacts,
8 (2) whether the expert is to be called as a witness in the underlying case, (3) whether alleged
9 confidential communications were from the expert to the party or vice-versa, (4) whether
10 the moving party funded or directed the formation of the opinion to be offered at trial, (5)
11 whether the expert and party entered into a formal confidentiality agreement, (6) whether
12 the expert was retained to assist in the litigation, (7) the number of meetings that took place,
13 (8) whether work product or documents were discussed or provided to the expert, (9)
14 whether the expert received a fee, (9) whether the expert was asked not to discuss the case
15 with opposing parties and counsel, and (10) whether the expert derived any of his specific
16 ideas from work done under the direction of the party. *Hewlett-Packard*, 330 F. Supp. 2d
17 at 1093 (citing *Stencel v. Fairchild Corp.*, 174 F. Supp. 2d 1080, 1083 (C.D. Cal. 2001);
18 *Mayer v. Dell*, 139 F.R.D. 1, 2–3 (D.D.C. 1991); *Paul By & Through Paul v. Rawlings*
19 *Sporting Goods Co.*, 123 F.R.D. 271, 280 (S.D. Ohio 1988)).

20 Confidential information is information “of either particular significance or [that]
21 which can be readily identified as either attorney work product or within the scope of the
22 attorney-client privilege.” *Hewlett-Packard*, 330 F. Supp. 2d at 1094 (quoting *Rawling*
23 *Sporting Goods Co.*, 123 F.R.D. at 279). It may include “discussions of the party’s
24 litigation strategy, its view of the strengths and weaknesses of each side, the role of each
25 party’s experts and anticipated defenses” and at least one court has concluded that
26 “[c]ommunication based upon technical information as opposed to legal advice is not
27 considered privileged.” *Hayward Prop., LLC*, 2021 WL 4923379, at *4 (citing *Hewlett-*
28 *Packard*, 330 F. Supp. 2d at 1094 (citations omitted)). “Because the burden is on the party

1 seeking to disqualify the expert, that party should point to specific and unambiguous
2 disclosures that if revealed would prejudice the party.” *Hewlett-Packard*, 330 F. Supp. 2d
3 at 1094.

4 B. Expert Qualification

5 Federal Rule of Evidence (“Rule”) 702 governs the admissibility of expert
6 testimony. Rule 702 provides:

7 A witness who is qualified as an expert by knowledge, skill, experience,
8 training, or education may testify in the form of an opinion or otherwise if: (a)
9 the expert’s scientific, technical, or other specialized knowledge will help the
10 trier of fact to understand the evidence or to determine a fact in issue; (b) the
11 testimony is based on sufficient facts or data; (c) the testimony is the product
of reliable principles and methods; and (d) the expert has reliably applied the
principles and methods to the facts of the case.

12 Fed. R. Evid. 702. “The party offering expert testimony has the burden of establishing its
13 admissibility.” *Bldg. Indus. Ass’n of Washington v. Washington State Bldg. Code Council*,
14 683 F.3d 1144, 1154 (9th Cir. 2012).

15 Before finding expert testimony admissible, the trial court must make a “preliminary
16 assessment of whether the reasoning or methodology underlying the testimony is
17 scientifically valid and of whether that reasoning or methodology properly can be applied
18 to the facts in issue.” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–93 (1993).
19 “Under *Daubert*, the trial court must act as a ‘gatekeeper’ to exclude junk science that does
20 not meet Federal Rule of Evidence 702’s reliability standards by making a preliminary
21 determination that the expert’s testimony is reliable.” *Ellis v. Costco Wholesale Corp.*, 657
22 F.3d 970, 982 (9th Cir. 2011) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 145,
23 147–49 (1999)).

24 The Court must find “that any and all scientific testimony or evidence admitted is
25 not only relevant, but reliable.” *Daubert*, 509 U.S. at 590. “Expert opinion testimony is
26 relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And
27 it is reliable if the knowledge underlying it has a reliable basis in the knowledge and
28

1 experience of the relevant discipline.” *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir.
2 2010). “[T]he court must assess [an expert’s] reasoning or methodology, using as
3 appropriate such criteria as testability, publication in peer reviewed literature, and general
4 acceptance.” *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969 (9th
5 Cir. 2013) (quoting *Primiano*, 598 F.3d at 564). “Reliable expert testimony need only be
6 relevant, and need not establish every element that the plaintiff must prove, in order to be
7 admissible.” *Id.* (citing *Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1192 (9th Cir.
8 2007)).

9 The inquiry required by Rule 702 “is a flexible one.” *Daubert*, 509 U.S. at 594; *see*
10 *also City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1043 (9th Cir. 2014) (citing
11 *Alaska Rent-A-Car, Inc.*, 738 F.3d at 969). “In evaluating proffered expert testimony, the
12 trial court is ‘a gatekeeper, not a fact finder.’” *City of Pomona*, 750 F.3d at 1043 (quoting
13 *Primiano*, 598 F.3d at 565). “Challenges that go to the weight of the evidence are within
14 the province of a fact finder, not a trial court judge. A district court should not make
15 credibility determinations that are reserved for the jury.” *Id.* at 1044. “Shaky but
16 admissible evidence is to be attacked by cross examination, contrary evidence, and
17 attention to the burden of proof, not exclusion.” *Primiano*, 598 F.3d at 564 (citing *Daubert*,
18 509 U.S. at 596).

19 III. DISCUSSION

20 A. Disqualification for Conflict of Interest

21 The County Defendants argue Dr. Venters had a “position of trust” with the Sheriff’s
22 Department where he received confidential information, at least from interviews with jail
23 staff about medication management. (*See* Doc. 98-1 at 5–6.) The County Defendants
24 assert Dr. Venters must be disqualified because he is now testifying as an expert adverse
25 to the County on the same subject matter that he previously authored a confidential policy
26 report for the County on and that covered the relevant period. (*See id.* at 6.) The County
27 Defendants claim that best practices reviews *may* involve the County disclosing
28 confidential information to organizations such as COCHS. (*See id.* at 1.) Plaintiff responds

1 that the County Defendants have failed to meet their burden in that they (1) do not submit
2 a contract with Dr. Venters, (2) point to any confidentiality provision, or (3) submit proof
3 of any confidential information provided. (*See* Doc. 112 at 5.) The County Defendants
4 respond that Dr. Venters testified that he was told the contract contained confidentiality
5 provisions and that Dr. Venters’ access to the facility, staff, and leadership amounts to
6 confidential disclosures. (*See* Doc. 127 at 1.) The County Defendants also respond that
7 Dr. Venters’ opinions in this case are related to the best practices review in that he cites
8 National Commission on Correctional Health Care (“NCCHC”) standards and how the
9 County’s actions fell below those standards. (*See id.* at 1–2.)

10 **i. Confidential Relationship**

11 The County Defendants have failed to meet their burden of proving a confidential
12 relationship between Dr. Venters and the County. *See Hewlett-Packard*, 330 F. Supp. 2d
13 at 1093. The County Defendants have put forth insufficient evidence concerning the length
14 and frequency of Dr. Venters’ interaction with the County as part of the best practices
15 review, whether work product or documents were discussed or provided to Dr. Venters,
16 whether Dr. Venters received a fee for his services, whether he was told not to discuss the
17 best practices review with opposing parties, and whether Dr. Venters derived specific ideas
18 for his opinions in this case from that work. *See id.* Additionally, while it appears Dr.
19 Venters emailed the best practices review to the County on March 30, 2020, it is unclear
20 whether the two days of meetings, process reviews, and observation of some areas of two
21 facilities occurred before, during, or after the incident in this case. (*See* COCHS Best
22 Practices Review at 1–27.)

23 The Court is not persuaded by Dr. Venters’ equivocal statement during his
24 deposition, including not recalling reviewing a COCHS contract with the County, that such
25 a contract contained confidentiality provisions. (*See* Venters Dep. 57:14-18.) The County
26 Defendants have not presented evidence of such confidentiality provisions or their terms.
27 It appears Dr. Venters was personally part of a single site visit at some unknown time
28 where, during a walkthrough, he talked with jail staff and leadership. (*See* COCHS Best

1 Practices Review at 1; Venters Decl. ¶¶ 23–24.) Such a limited interaction does not
2 transform his association with the County into a confidential relationship.

3 **ii. Confidential Information**

4 Even assuming Dr. Venters had a confidential relationship with the County, the
5 County Defendants have failed to point to any confidential information provided to Dr.
6 Venters that is relevant and would prejudice the County Defendants in this action. *See*
7 *Hewlett-Packard*, 330 F. Supp. 2d at 1094. The County Defendants have not pointed to
8 any attorney work product or information within the scope of the attorney-client privilege
9 that Dr. Venters was provided. *See id.* Dr. Venters did not review any medical records or
10 patient-specific information. The best practices review itself makes no mention of the
11 policies or procedures of the San Diego County jail, in fact, it specifically explains
12 COCHS’ engagement with the County did not allow COCHS to determine which
13 procedures and processes the County uses. (*See* COCHS Best Practices Review at 21.)
14 And whether the best practices review cites NCCHC standards has nothing to do with
15 whether Dr. Venters received confidential information from the County. The County
16 Defendants assert mere access to the facility and the ability to interview staff and leadership
17 amounts to confidential disclosure. That is incorrect. The County Defendants have failed
18 to point to “specific and unambiguous” disclosures to Dr. Venters that would prejudice the
19 County Defendants in this action. *See Hewlett-Packard*, 330 F. Supp. 2d at 1094.

20 **B. Expert Qualification**

21 The County Defendants argue Dr. Venters has no foundational basis for his opinions
22 concerning the County’s failing to have policies, practices or training sufficient to address
23 missed medications when his report did not include review of any such policies, practices,
24 or training. (*See* Doc. 98-1 at 6–7.) The County Defendants also contend that Dr. Venters
25 review of CIRB documents violated the protective order in *Greer v. County of San Diego*,
26 19-cv-0378-JO-DEB and the California State Auditor’s Report may underlie his opinions
27 as to the County’s procedures, policies, or training. (*See id.* at 7–10.) The County
28 Defendants contend that because Dr. Venters has not reviewed any specific policies,

1 procedures or trainings, his opinion that the County had inadequate policies, procedures or
2 trainings is speculative and lacks foundation. (*See id.* at 10.)

3 Plaintiff responds that Dr. Venters’ specialized knowledge and experience provide
4 adequate foundation for his opinions in this case. (*See* Doc. 112 at 8–10.) Plaintiff
5 contends that Dr. Venters can opine, based on records and the testimony of County
6 employees, on the failure of the County to have policies, procedures, or training to verify
7 that inmates were receiving their medications and/or the *de facto* custom and practice of
8 the County’s medical staff in failing to ensure proper administration of medications. (*See*
9 *id.* at 11–15.) Plaintiff also responds that the only CIRB materials Dr. Venters reviewed
10 for this case were those publicly available in a summary judgment order in *Greer* and that
11 there was no violation of the protective order in that case. (*See id.* at 16.) The County
12 Defendants respond that Dr. Venters cannot opine as to mechanisms in place at the jail
13 concerning missed medications because he failed to review any of the jail’s policies,
14 procedures, or training and so his opinions lack foundation. (*See* Doc. 127 at 3–6.)

15 The parties appear to agree that Dr. Venters has the requisite medical training and
16 education to render opinions on correctional medicine. (*See* Doc. 112 at 8–11; Doc. 127
17 at 5.) However, the County Defendants contend that Dr. Venters lacks foundational
18 knowledge regarding the County’s policies, procedures, and trainings to reach the opinions
19 he put forth in his expert report. (*See id.*)²

20 The Court has reviewed Dr. Venters expert report and the portions of Dr. Venters’
21 deposition that the parties rely on in their *Daubert* briefing. The County Defendants are
22 correct that Dr. Venters has not reviewed the County’s official policies, procedures, or
23

24
25 ² The County Defendants attempt to distinguish Plaintiff’s use of the word “mechanism”
26 in his Opposition from “procedure” in arguing that there were mechanisms in place to
27 check for missed medications. (*See* Doc. 127 at 3–4.) However, Dr. Venters’ deposition
28 testimony is focused on an alleged lack of effective policy, procedure, or training evidenced
by the County Defendants’ depositions. Plaintiff’s use of the word “mechanism” in his
Opposition does not alter that fact.

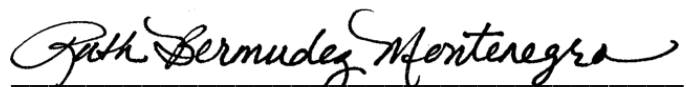
1 training. However, Dr. Venters’ opinions regarding deficiencies in policies, procedures,
2 or training are based on his review of deposition testimony from County employees in this
3 case and inferences drawn therefrom. Such opinions are helpful to the jury in evaluating
4 Plaintiff’s claims that the County had a custom and practice of failing to ensure the proper
5 administration of medication to inmates, regardless of any formal policies, procedures, or
6 training. The fact that Dr. Venters did not review the County’s policies, procedures, or
7 training is more properly addressed on cross-examination. *See Primiano*, 598 F.3d at 564
8 (“Shaky but admissible evidence is to be attacked by cross examination, contrary evidence,
9 and attention to the burden of proof, not exclusion.”). Similarly, the extent to which Dr.
10 Venters’ opinions are based on his review of publicly available information from the
11 summary judgment order in *Greer* and the California State Auditor’s Report is more
12 properly addressed on cross-examination.

13 **IV. CONCLUSION**

14 For the reasons discussed above, the County Defendants’ Motion (Doc. 98) is
15 **DENIED**. However, the Court cautions Plaintiff that the Court’s ruling does not mean that
16 Dr. Venters can opine on formal policies, procedures, or training that he did not review in
17 preparation of his expert report.

18 **IT IS SO ORDERED.**

19 DATE: December 1, 2023

20 
21 _____
22 HON. RUTH BERMUDEZ MONTENEGRO
23 UNITED STATES DISTRICT JUDGE
24
25
26
27
28