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PSYCHIATRY ■ PSYCHOTHERAPY ■ FORENSIC PSYCHIATRY ■ INDEPENDENT MEDICAL EXAMINATION

DIRECT AND CROSS-EXAMINATION OF A PSYCHIATRIST OR PSYCHOLOGIST EXPERT WITNESS

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In order for a medical opinion to be admissible as evidence in civil, criminal and administrative cases, the basis of the opinion must fulfill either the *Daubert* Standard or the *Frye* Standard. The effect of *Daubert* has been to limit expert testimony to opinions which are based on a scientific foundation. *Daubert* specifies that adequate scientific support and method and a known error rate must exist. The testimony of a mental health expert rendering an opinion using criteria which does not meet *Daubert* standards is weakened by the implication that it is not based on "sound science." In some instances, for example, a mental health expert uses an approach where there are no peer-reviewed studies or methods, such as when psychologists compose their own neuropsychological test batteries. In most cases where an attorney is considering a "*Daubert* challenge," a contemporaneous and up-to-date literature search is indicated. Also, extensive case law presently exists as to specific issues. Being familiar with the *Daubert* criteria enhances effectiveness in challenging a mental health expert's opinion, whether on voir dire or cross examination. On direct examination, the strengths of an opinion reached under *Daubert* criteria become a "teaching moment" for the trier of fact, because it will be founded on the science of mental health assessment.

BACKGROUND:

As a general background, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the U.S. Supreme Court held that the *Frye* "general acceptance" test was superseded by adoption in the Federal Rules of Evidence and that admission of scientific testimony is governed by Federal Rule of Evidence 702. In short, the *Daubert* criteria requires that the expert's opinion be reached by use of "scientific methodology," essentially formulating hypotheses and conducting experiments to prove or falsify the hypothesis. To establish the validity of the conclusion it is necessary to use empirical testing, that the method be (or has been) subjected to peer review and publication, and that it have a known or potential error rate. Further, there must exist maintained standards and controls concerning the operation of that method (e.g., how a psychological test is administered, scored, tested and interpreted). Validity is further established by the degree to which the theory and technique is generally accepted by a relevant scientific community.

In 2000, Rule 702 was amended and now includes the additional provisions which state that a witness may only testify 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.

The determination whether or not testimony meets the *Daubert* criteria is at the sole discretion of the Judge.

SCIENTIFIC METHODOLOGY:

With the adoption of *Daubert*, the court defined “scientific methodology” as the process of formulating hypotheses and then conducting an experiment(s) to prove or disprove (falsify) the hypothesis. To be admissible, a theory or technique must be falsifiable, refutable and testable. Also, it must be peer reviewed, published, and have a known or potential error rate. There must be the existence and maintenance of standards and controls concerning its operations. The theory and technique is generally accepted by the relevant scientific community. The testimony is based on sufficient facts or data. The testimony is the product of reliable principles and methods. And, the witness has applied the principles and methods reliably to the facts of the case.

The American Psychological Association then addressed the *Daubert* ruling within the context of psychological testing and expressed four (4) guidelines to apply to *Daubert*:

1. Use theoretically and psychometrically adequate data gathering instruments.
2. Draw conclusions using scientifically validated theoretical positions.
3. Weigh and qualify testimony on the basis of the adequacy of theory and empirical research on the questions being addressed.
4. Be prepared to defend the scientific status of your data-gathering methods during the process of qualifications as an expert witness.

The *Frye* standard is the alternative basis for the court permitting an expert opinion to be admitted into evidence. The *Frye* standard is applicable in certain jurisdictions. Admissibility of scientific evidence under *Frye* states novel scientific evidence is admissible if it has “gained general acceptance in the particular field in which it belongs.” The Court keeps pseudo-science out of evidence by deferring to those in the field.

REASONABLE MEDICAL PROBABILITY:

A line of questioning I have suggested to attorneys regarding “reasonable medical probability” of a medical opinion is the degree of certainty expressed by the expert based upon all of the evidence reviewed. This line of questioning will tend to uncover whether or not an expert is biased for the side he is testifying for and whether the expert has considered contradictory testimony. In order for a medical opinion to be admissible in a civil court, criminal court or other legal venue, the conclusion must be reached with a “reasonable medical probability or reasonable medical certainty,” which means the opinion is “more likely than not” true. In most contested cases, there is a “battle of the experts,” whereby contradictory opinions are expressed based upon evidence which is weighed differently by the various experts. If an expert has an opinion of which he is only 51% certain, then this must mean that there is 49% of contradictory data available which has to be countered. It is worth exploring which of the data are contradictory to the expert’s opinion; doing so may reflect a bias. Inquiry may also reveal a lack of understanding by the expert about what constitutes an admissible medical opinion. Many experts do not understand the legal basis for expressing a medical opinion. Instead, they believe that if a medical condition is “possible” then they can testify to it as a medical opinion. They also do not understand the *Daubert* criteria (or the *Kelly/Frye* criteria in applicable jurisdictions) and thus are not able to forensically weigh the medical evidence. On cross examination, revealing this ignorance in the expert is clearly beneficial. Also, revealing the expert’s ignorance about these guidelines may enable the attorney to have the expert’s opinion disregarded or rejected by the court as not being applicable, relevant or admissible.

CHALLENGING THE ADEQUACY OF THE CLINICAL EVALUATION:

The *Diagnostic and Statistical Manual of Mental Disorders, 5th Edition* (DSM-5) generally is accepted as the standard for identifying the necessary clinical criteria for various psychiatric disorders. In November 1995, the *American Journal of Psychiatry*, Volume 152 Supplement, provided detailed guidelines for an adult psychiatric evaluation titled “Practice Guidelines for Psychiatric Evaluation of Adults.” A sufficient mental status examination is the equivalent of a physical examination by a “regular” doctor; i.e., non-mental health professional. The Mental Status Exam is a description of the various mental functionings or their manifestation at the time the examination is conducted. The mental status examination should include the following elements:

- General appearance, including dress, gait, posture, facial expression, cooperativeness, accessibility, alertness, tenseness, restlessness, friendliness, tidiness, disorderedness, broodiness, agitation, negativism, indifference, stupor, or stereotypic behavior.

- General activities, such as normal, compulsive, bizarre, or retarded movements, pressured activity, hand wringing, pacing or crying.
- Disorders in speech, such as scanning, hesitating, slurring or stuttering as well as an inability to identify objects.
- Disorders of thinking, such as whether the thinking is interrupted. Thought production, including flow of thought, acceleration, or retardation and distractibility. Thought continuity, such as clearness of thought, coherence, relevance, whether the thoughts ramble, whether they are not specific to the topic at hand, whether or not perseveration occurs (i.e., the individual stays on the same topic even though the examiner moves to another topic), flight of ideas, whereby the examinee's ideas flit from topic to topic without completion, or blocking, whereby thoughts are not completed.
- Thought content includes the evaluatee's formation of concepts, handling of ideas, anxieties, fears, obsession, phobias, hypochondriacal preoccupations, body image concerns, autistic thinking, ideas of reference or ideas of influence (paranoid-type thinking), self-depreciation, suicidal ideas, somatic delusions, other systematized delusions, self-referential thinking, hallucinations (abnormal sensory experiences), apprehensive expectation (anticipating bad things happening), fears of abandonment, or feelings of estrangement.
- Emotional state should indicate how well emotions are regulated, mood swings, control of emotions, anxieties, feelings of unreality, perplexity, agitation, irritability, depression, apathy, elation, restlessness, or emotional numbing.
- Somatic functioning can include headaches, pains, or other medical system abnormalities. This can include, but is not limited to, disturbances of sleep, eating, appetite, weight, bowel regularity, sex, alcohol or drug abuse, or excessive smoking.
- Mental grasp should be assessed regarding the person's understanding of his or her current situation, attention, concentration, memory, ability to calculate, engage in abstract reasoning, and the quality of their judgment. An absence of an adequate mental status assessment may constitute a defective psychiatric or psychological evaluation and permit a challenge as to the adequacy of the expert's opinion.