

# **FOCUS ON EXPERTS: CLOSE-UP INTERVIEWS ON PROCEDURE, MENTAL HEALTH AND FINANCIAL EXPERTS**

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**THIRD THURSDAY CLE  
EXPERT WITNESSES**

*Sponsored by the Family Law Section and  
the Professional Development Department  
of the State Bar of Texas*

**Thur 7/15/99 Noon-2:00pm Expert Witness telephone CLE**

**Topic:** **The New Legal Reliability Standards Under *Daubert, Kuhmo, Robinson, Gammill, Kelly v. State, & Nenno v. State* (“Toto... I have a feeling we're not in Kansas anymore”)**

**Panelists:** Moderator, Richard R. Orsinger, Attorney at Law, San Antonio  
Professor Dan Shuman, SMU School of Law, Dallas  
Judge Paul Womack, Texas Court of Criminal Appeals  
Justice Deborah Hankinson, Texas Supreme Court

**Thur 8/19/99 Noon-2:00pm Expert Witness telephone CLE**

**Topic:** **Can DSM-IV Diagnoses and Psychological Evaluations Meet *Robinson/Gammill* Reliability Standards?**

**Panelists:** Moderator, Richard R. Orsinger, Attorney at Law, San Antonio  
Professor Dan Shuman, SMU School of Law, Dallas  
Jan Marie DeLipsey, Ph.D., Dallas  
John Zervopoulos, Ph.D., J.D., Dallas  
Hon. John Specia, 225th Dist. Ct., Bexar County

**Thur 9/16/99 Noon-2:00pm Expert Witness telephone CLE**

**Topic:** **Business Valuation: Assets & Liabilities Approach Compared to the Capitalization of Income Approach and Discounted Future Cash Flows Approach**

**Panelists:** Moderator, Stewart Gagnon, Attorney at Law, Houston  
Patrice Ferguson, CPA, JD, Houston  
Scott Turner, CPA, Corpus Christi  
Hon. Tom Stansbury, 328th Dist. Ct., Fort Bend County

**Thur 10/21/99 Noon-2:00pm Expert Witness telephone CLE**

**Topic:** **Psychological Syndromes: Substance or Smoke Screen? Discussing Battered Woman Syndrome, Child Sexual Abuse Accommodation Syndrome; Repressed Memory Syndrome; False Memory Syndrome**

**Panelists:** Moderator, Richard R. Orsinger, Attorney at Law, San Antonio  
Jan Marie DeLipsey, Ph.D., Dallas  
Georganna Simpson, Attorney at Law, Dallas  
Hon. Bonnie Hellums, 247th Dist. Ct., Harris County

**Thur 11/18/99 Noon-2:00pm Expert Witness telephone CLE**

**Topic: Tracing Commingled Marital Property**

**Panelists:** Moderator, Stewart Gagnon, Attorney at Law, Houston  
Doug Fejer, CPA, Dallas  
Robert Cocanower, CPA, Fort Worth  
Hon. Frank Sullivan, 322nd Dist. Ct., Tarrant County

**Thur 1/20/00 Noon-2:00pm Expert Witness telephone CLE**

**Topic: Business Valuation: Adjustments for Control Premium, Minority Discount, Marketability Discount, and Blockage Discount; Restricted Stock; Classes of Stock; Buy-Sell Restrictions**

**Panelists:** Moderator: Cheryl Wilson, Attorney at Law, San Antonio  
Dan Hanke, CPA, San Antonio  
Robert Cocanower, CPA, Fort Worth  
Hon. Susan Rankin, 301st Dist. Ct., Dallas County

**Thur 2/17/00 Noon-2:00pm Expert Witness telephone CLE**

**Topic: Recovered Memory/False Memory: Valid or Voodoo?**

**Panelists:** Moderator, Richard R. Orsinger, Attorney at Law, San Antonio  
Jan Marie DeLipsey, Ph.D., Dallas  
Hon. Dean Rucker, 318th Dist. Ct., Midland County  
Richard Ofshe, Ph.D., Berkley, CA

**Thur 3/16/00 Noon-2:00pm Expert Witness telephone CLE**

**Topic: Character and Value of Employment Benefits**

**Panelists:** Moderator: Joan Jenkins, Attorney at Law, Houston  
Bill Clifton, Attorney at Law, Dallas  
Mary Jo McCurley, Attorney at Law, Dallas  
Hon. James Squier, 312th Dist. Ct., Harris County

**Thur 4/20/00 Noon-2:00pm Expert Witness telephone CLE**

**Topic: Relocation of Children: Legal Issues and Mental Health Evidence**

**Panelists:** Moderator: Hon. Ann Crawford McClure, 8th Court of Appeals, El Paso

Leslie Ellen Shear, Attorney at Law, California  
Richard Warshak, PhD, Dallas  
Hon. Susan Rankin, 301st Dist. Ct., Dallas County

**Thur 5/18/00 Noon-2:00pm Expert Witness telephone CLE**

**Topic: Proving the Value of Real Property**

**Panelists:** Moderator: Wally Mahoney, Attorney at Law, Pasadena  
\_\_\_\_\_, Real Estate Appraiser, \_\_\_\_\_  
Robert Montgomery, Attorney at Law, Houston  
Hon. Craig Fowler, 255th Dist. Court, Dallas County

**Thur 6/15/00 Noon-2:00pm Expert Witness telephone CLE**

**Topic: Abuse and Neglect of Children: Battered Child Syndrome, Fetal Alcohol Syndrome, Shaken Baby Syndrome, Munchausen Syndrome by Proxy, etc.**

**Panelists:** Moderator: Duke Hooten, TDPRS, Boerne  
Nancy Kellog, MD, San Antonio  
\_\_\_\_\_, Criminal Defense Attorney, \_\_\_\_\_  
Hon. Randy Catterton; 231st Dist. Ct., Tarrant County

**Thur 7/20/00 Noon-2:00pm Expert Witness telephone CLE**

**Topic: Proving Tax Considerations in Divorce**

**Panelists:** Moderator: Richard R. Orsinger, Attorney at Law, San Antonio  
Dan Hanke, CPA, San Antonio  
Doug Fejer, CPA, Dallas  
Hon. James Squier, 312th Dist. Ct., Harris County

**Thur 8/17/00 Noon-2:00pm Expert Witness telephone CLE**

**Topic: The Child as Witness: Competency, Custody Cases, Sex Abuse Cases**

**Panelists:** Moderator: Richard R. Orsinger, Attorney at Law, San Antonio  
Sarah Guidry, TDPRS, Boerne  
Jan Marie DeLipsey, Ph.D., Dallas  
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**CURRICULUM VITAE OF RICHARD R. ORSINGER**

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Family Law (1980) and Civil Appellate Law (1987)

**Memberships:**

Chair, Family Law Section, SBOT (1999-2000)  
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Member, Supreme Court Advisory Comm. on Rules of Civil Procedure (1994-2002); Chair, Subcommittee on Rules 16-165a  
Associate, American Board of Trial Advocates  
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas  
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Tx. Bd. of Legal Specialization, Family Law Advisory Commission (1987-1993)  
Appointed Member, Supreme Court Task Force on Jury Charges (1992-93)  
Appointed Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)  
Past-President, Texas Academy of Family Law Specialists (1990-91)  
Past-President, San Antonio Family Lawyers Association (1989-90)  
Fellow, American Academy of Matrimonial Lawyers  
Director, San Antonio Bar Association (1997-98)  
Director, Texas Legal Resource Center for Child Abuse and Neglect (1991-93)  
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State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* 1996  
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, & June 1997  
Listed in the BEST LAWYERS IN AMERICA (1987-to date)  
Editor - Texas Academy of Family Law Specialists' Family Law Forum (1988-89)  
Associate Editor - State Bar Appellate Section's Appellate Advocate (1988-92)

**Continuing Legal Education:**

Course Director, State Bar of Texas 1999 Impact of the New Rules of Discovery  
Course Director, State Bar of Texas 1998 Advanced Civil Appellate Practice Course  
Director, Computer Workshop at Advanced Family Law Course (1990-94)

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 Course Director, State Bar of Texas 1991 Advanced Evidence and Discovery Course  
 Course Director, State Bar of Texas 1987 Advanced Family Law Course  
 Course Director, Texas Academy of Family Law Specialists First Annual Trial  
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Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (1999) (2 Volume Set)

Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (1125 pages)

*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994)

Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)

*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage that Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)

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#### State Bar's Advanced Family Law Course

Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999)

#### State Bar's Marriage Dissolution Course

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#### SMU's Specialists' Symposium on Family Law

Practitioner's Guide to Interstate Custody Disputes (1984); Dealing with the Family Home on Divorce (1986); Conflict of Law: Full Faith and Credit, Comity and Judgments (1988); Criminal Aspects of Family Law Cases (1991)

#### UT School of Law

Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998)

#### State Bar's Advanced Evidence & Discovery Course

Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999)

#### State Bar's Advanced Appellate Course

Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998)

#### South Texas College of Law

Interstate Jurisdictional Problems in Family Law Matters (1986-87); Drafting of Decrees and Agreements Incident to Divorce (1988); Election of Remedies, Domestic Torts Course (1989); The Scope and Method of Mandamus Problems (1989); The New Texas Pattern Jury Charges (Vol. 3) (Products, Premises, Professional Malpractice and Damages (1990); UCCJA, PKPA, Child Abduction: What Does It All Mean? (1990); Enforcing the Judgment, Including While on Appeal (1997); Panel Discussion: Oral and Written Advocacy in the Courts of Appeals (1997)

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#### State Bar's Annual Meeting

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**INSERT JAN DELIPSEY'S  
C.V.**

## Focus on Experts: Close-Up Interviews on Procedure, Mental Health and Financial Experts

by

Richard R. Orsinger  
Board Certified in  
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by the Texas Board of Legal Specialization

**I. QUALIFICATIONS OF EXPERTS.** The following text is taken from Chapter 3-2 of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL. See <http://www.expert-witness-manual.com>.

### Qualifications of Experts

Under Rule 702,<sup>1</sup> a person may testify as an expert only if (s)he has knowledge, skill, experience, training or education that would assist the trier of fact in deciding an issue in the case.<sup>2</sup> This involves the expert's "qualifications." The party offering the testimony bears the burden to prove that the witness is qualified under Rule 702.<sup>3</sup> The decision of whether an expert witness is qualified to testify is within the trial court's discretion, and will be reviewed on appeal only if the ruling is an abuse of discretion, meaning that the trial court acted without reference to any guiding rules or principles.<sup>4</sup>

Whether an expert is qualified to testify under Rule 702 involves two factors: (1) whether the expert has knowledge, skill, etc.; and (2) whether that expertise will assist the trier of fact to decide an issue in the case.

Courts sometimes evaluate the first prong, of adequate knowledge, skill, etc., by asking whether the expert possesses knowledge and skill not possessed by people generally.<sup>5</sup>

The second prong, assisting the trier of fact, requires that the witness's expertise go to the very matter on which the expert is to give an opinion.<sup>6</sup> The test then for qualifications is whether the expert has knowledge, skill, experience, training or education regarding the specific issue before the court which would qualify the expert to give an opinion on the particular subject.<sup>7</sup> Stated differently, the offering party must demonstrate that the witness possesses "special knowledge as to the very matter on which he proposes to give an opinion."<sup>8</sup>

### II. RELIABILITY OF EXPERT'S METHODOLOGY; RELEVANCY.

**A. Federal.** In the case of *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 FRE 702 overturned earlier case law requiring that expert scientific testimony must be based upon principles which have "general acceptance" in the field to which they belong. See *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923) (establishing the "general acceptance" test for scientific expert

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App. 1990) ("The use of expert testimony must be limited to situations in which the issues are beyond that of an average juror"); John F. Sutton, Jr., *Article VII: Opinions and Expert Testimony*, 30 HOUS. L.REV. 797, 818 (1993) [Westlaw cite 30 HOULR 797].

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<sup>1</sup> FED. R. EVID. 702; TEX. R. EVID. 702.

<sup>2</sup> *Broders v. Heise*, 924 S.W.2d 148, 149 (Tex. 1996).

<sup>3</sup> *Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996).

<sup>4</sup> *Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996).

<sup>5</sup> *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). See *Duckett v. State*, 797 S.W.2d 906, 914 (Tex. Crim.

<sup>6</sup> *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996), citing *Christopherson v. Allied Signal Corp.*, 939 F.2d 1106, 1112-1113 (5th Cir.), cert. denied, 503 U.S. 912, 112 S. Ct. 1280, 117 L.Ed.2d 506 (1992).

<sup>7</sup> *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996).

<sup>8</sup> *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 718 (Tex. 1998). See *United Blood Services v. Longoria*, 938 S.W.2d 29 (Tex. 1997); Linda Addison, *Recent Developments in Qualifications of Expert Witnesses*, 61 TEX. B.J. 41 (Jan. 1998) [Westlaw cite: 61 TXBJ 41].

testimony). Under Rule 702, the expert's opinion must be based on "scientific knowledge," which requires that it be derived by the scientific method, meaning the formulation of hypotheses which are verified by experimentation or observation. The Court used the word "reliability" to describe this necessary quality.

In *Kumho Tire Co. v. Carmichael*, 526 U.S.137, 11 S. Ct. 1167, 143 L.Ed.2d 238 (1999) (ruling below: 131 F.3d 1433 (11th Cir. 1997)), the Supreme Court said that the reliability and relevancy principles of *Daubert* apply to all experts, not just scientists, and where objection is made the court must determine whether the evidence has "a reliable basis in the knowledge and experience of [the relevant] discipline." The trial court has broad discretion in determining how to test the expert's reliability. *Id.*

**B. Texas Civil Proceedings.** The Texas Supreme Court adopted the *Daubert* analysis for TRE 702, requiring that the expert's underlying scientific technique or principle be reliable and relevant. *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995). The Texas Supreme Court listed factors for the trial court to consider regarding reliability: (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique. *Robinson*, 923 S.W.2d at 557. See *America West Airline Inc. v. Tope*, 935 S.W.2d 908 (Tex. App.--El Paso 1996, no writ) (somewhat unorthodox methods of mental health worker in arriving at DSM-III-R diagnosis did not meet the admissibility requirements of *Robinson*). The burden is on the party offering the evidence to establish the reliability underlying such scientific evidence. *Du Pont*, at 557.

In *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998), the Texas Supreme Court announced that the reliability and relevance (discussed below) requirements of *Robinson* apply to all types of expert testimony, whether or not it is based on science. In *Gammill* a unanimous Supreme Court said:

We conclude that whether an expert's testimony is based on "scientific, technical or other specialized knowledge," *Daubert* and Rule 702 demand that the district court evaluate the methods, analysis, and principles relied upon in reaching the opinion. The court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it "will have a reliable basis in the knowledge and experience of [the] discipline." [FN47]

We agree with the Fifth, Sixth, Ninth, and Eleventh Circuits that Rule 702's fundamental requirements of reliability and relevance are applicable to all expert testimony offered under that rule. Nothing in the language of the rule suggests that opinions based on scientific knowledge should be treated any differently than opinions based on technical or other specialized knowledge. It would be an odd rule of evidence that insisted that some expert opinions be reliable but not others. All expert testimony should be shown to be reliable before it is admitted. [FN48]

*Gammill*, 972 S.W.2d at 725-26.

After noting that the reliability and relevancy criteria listed in *Daubert* may not apply to experts in particular fields, the Texas Supreme Court noted that nonetheless there are reliability criteria of some kind that must be applied.

The Court said:

[E]ven if the specific factors set out in *Daubert* for assessing the reliability and relevance of scientific testimony do not fit other expert testimony, the court is not relieved of its responsibility to evaluate the reliability of the testimony in determining its admissibility.

*Gammill*, 972 S.W.2d at 724.

**C. Texas Criminal Proceedings.** The Texas Court of Criminal Appeals, which established a reliability requirement even before the U.S. Supreme Court decided *Daubert* (see *Kelly v. State*, 824 S.W.2d 568 (Tex.. Crim.. App. 1992)), has extended reliability requirements to *all* scientific testimony, not just novel science. See *Hartman v.*

*State*, 946 S.W.2d 60 (Tex. Crim. App. 1997) (applying *Kelly*-reliability standards to DWI intoxilyzer). In the case of *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998), the Court extended the *Kelly*-reliability standards to mental health experts, but indicated that the *Daubert* list of factors did not apply. Instead, the Court of Criminal Appeals suggested the following factors be applied to fields of study outside of the hard sciences (such as social science or fields relying on experience and training as opposed to the scientific method): (1) whether the field of expertise is a legitimate one; (2) whether the subject matter of the expert's testimony is within the scope of that field; (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field. *Nenno*, 970 S.W.2d at 561.

**D. Relevance.** *Daubert* and *Robinson* contain a relevancy requirement, to be applied to expert evidence. As explained in *Gammill v. Jack Williams*, 972 S.W.2d 713, 720 (Tex.1998):

The requirement that the proposed testimony be relevant incorporates traditional relevancy analysis under Rules 401 and 402 of the Texas Rules of Civil Evidence. To be relevant, the proposed testimony must be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." Evidence that has no relationship to any of the issues in the case is irrelevant and does not satisfy Rule 702's requirement that the testimony be of assistance to the jury. It is thus inadmissible under Rule 702 as well as under Rules 401 and 402.

Some courts and commentators call this connection the "fit" between the evidence and the issues involved in the case.

**E. Recap.** Due to increasing complexity and specialization, a person who is degreed or licensed in a particular field is not necessarily qualified to give expert testimony regarding all areas of that field. Federal courts in Texas, and Texas courts in both civil and criminal cases, must determine the appropriate criteria of reliability and relevancy for all experts who testify, and as a preliminary matter must determine that those criteria are met before the expert is permitted to testify.

The reliability and relevancy requirement for expert testimony has become one of the most controversial

evidentiary issues, nationwide. Virtually every week some court in the USA makes a ruling on *Daubert* or *Robinson*-like issues. One important area is expert testimony from treating physicians, based upon differential diagnosis and not large-scale research. The Fifth Circuit Court of Appeals issued an en banc opinion saying that the *Daubert* reliability factors precluded a clinical physician from testifying to the cause of a patient's condition. *See Moore v. Ashland Chemical Co., Inc.*, 151 F.2d 269 (5<sup>th</sup> Cir. 1998) (en banc). That issue is discussed in Section VIII below.

**III. MAKING AND PRESERVING ERROR ON A DAUBERT CHALLENGE.** It is a fundamental rule of evidence law that a party wishing to exclude evidence offered by another party must make a timely objection. Otherwise the evidence is admitted and no right to complain on appeal has been preserved. *See* TRE 103; TRAP 33. How, then, can a *Daubert*, *Robinson*-type of objection be raised, and error preserved?

**A. Preliminary Questions of Admissibility under TRE 104.** FRE 104 and TRE 104 provide that the court shall determine preliminary questions concerning the qualification of a person to be a witness, or the admissibility of evidence. In making its determination, the trial court is not bound by the rules of evidence other than with respect to privileges. FRE 104(a), TRE 104(a). Such a preliminary proceeding must be conducted out of the hearing of the jury, "when the interests of justice so require." FRE 104(c), TRE 104(c).

Although trial courts often conduct pre-trial *Daubert* hearings without reference to the specific procedural rule they are relying upon, the procedure for pretrial determination of the admissibility of evidence is Rule of Evidence 104. The *Daubert* case itself says this. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 ("[T]he trial judge must determine at the outset, pursuant to Rule 104(a), 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.") The Third Circuit has specifically suggested that a Rule 104 hearing be the vehicle to determine a *Daubert* objection. *U.S. v. Downing*, 753 F.2d 1224, 1241 (3<sup>rd</sup> Cir. 1985). And the Third Circuit points out that the obligation of the trial court to offer the parties an adequate opportunity to be heard may require a hearing at which the proper showing



can be made, if possible. *See Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412 417-18 (3<sup>rd</sup> Cir. 1999) (reversing a summary judgment granted because the plaintiff's expert did not meet *Daubert* criteria, saying that the trial court should have conducted a FRE 104 hearing, with an opportunity for the plaintiff to develop a record).

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**The U.S. Supreme Court has ruled that preliminary determinations of admissibility are made by the trial court on a preponderance of the evidence standard, as opposed to a prima facie showing, or in a criminal case, proof beyond a reasonable doubt. *See Bourjaily v. U.S.*, 483 U.S. 171, 175 (1987).**

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The Texas Court of Criminal Appeals held, in *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992), that the preliminary showing of reliability of expert testimony must be made by clear and convincing evidence, in a criminal case.

In some instances, the trial court may take judicial notice of matters going to the reliability of an expert's technique. This occurs when any fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Emerson v. State*, 880 S.W.2d 759, 764 (Tex. Crim. App. 1994). If the court takes judicial notice or some component of the reliability requirement, the proponent of the evidence is relieved of the burden to prove the judicially noticed fact. *Id.* at 764.

**B. Motion in Limine.** A motion in limine alone is not an adequate vehicle to pursue a *Daubert* challenge. Texas appellate cases have made it clear that a ruling on a motion in limine cannot itself be reversible error. In *Hartford Accident & Indemnity Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963), the Supreme Court said:

If a motion in limine is overruled, a judgment will not be reversed unless the questions or evidence were in fact asked or offered. If they were in fact asked or offered, an objection made at that time is necessary to preserve the right to complain on appeal . . . .

*Id.* at 335. Nor can the granting of a motion in limine be claimed as error on appeal. *Keene Corp.*

*v. Kirk*, 870 S.W.2d 573, 581 (Tex. App.--Dallas 1993, no writ) (after motion in limine was sustained as to certain evidence, counsel conducted the balance of his examination of the witness without ever eliciting the excluded evidence; error was therefore waived); *Waldon v. City of Longview*, 855 S.W.2d 875, 880 (Tex. App.--Tyler 1993, no writ) (fact that motion in limine was sustained, and proponent offered exhibit on informal bill of exceptions, did not preserve error, since it was incumbent upon the proponent to tender the evidence offered in the bill and secure a ruling on its admission).

If a motion in limine is granted and the evidence is nonetheless offered, or comment of counsel made, in violation of the order in limine, an objection to the offending evidence or argument is prerequisite to raising a complaint on appeal at the violation of the order. If the objection is sustained, then the aggrieved party should move that the jury be instructed to disregard the improper evidence or argument. If the instruction is denied, complaint can be premised on the denial. If the instruction is granted, it will cure harm, except for incurable argument, such as an appeal to racial prejudice. In criminal cases, the aggrieved party who timely objects and receives a curative instruction, but who is still not satisfied, must push further and secure an adverse ruling on a motion for a mistrial, in order to preserve appellate complaint. Immediately pushing for a mistrial should not be necessary in a civil proceeding, for the following reason. If the harm is curable, then by necessity a curative instruction will cure the harm. If the harm is incurable, then an instruction will not cure the harm, and the only relief is a new trial. However, a new trial is not necessary if the aggrieved party wins. Judicial economy suggests that the aggrieved party should be able to raise incurable error after the results of the trial are known, rather than having civil litigants moving for mistrial in a case that they otherwise might have won. TRCP 324(b)(5) specifically permits incurable jury argument to be raised by motion for new trial, even if it was not objected to at the time the argument was made. *See generally In re W.G.W.*, 812 S.W.2d 409, 416 (Tex. App.--Houston [1st Dist.] 1991, no writ) (insinuation that cervical cancer was caused by immoral conduct was incurable error). Counsel's violation of a motion in limine exposes the lawyer to a contempt citation.

Thus, if a motion in limine is used to bring a *Daubert* challenge, and the challenge is upheld, the proposing party will have to approach the court during trial and indicate a desire to offer the evidence, and if that request is denied, then an offer of proof or bill of exception must be made outside the presence of the jury. (It is probable, but not guaranteed, that any proof offered at the motion in limine hearing will suffice as an offer of proof for appellate purposes. But if all that is offered at the hearing on motion in limine is attorney argument, that is merely inadequate. Also, if the motion in limine is ruled on in chambers with no court reporter present, a separate offer of proof must be made.) If the motion in limine based on *Daubert* is overruled, the opposing party will have to assert an objection when the evidence is offered during trial.

**C. Ruling Outside Presence of Jury.** TRE 103(b) provides that "[w]hen the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections." *Accord*, FRE 103(b). If the objection is made in connection with presenting a motion in limine, does Rule 103(b) obviate the need to object in the presence of the jury?

This question was considered in *Rawlings v. State*, 874 S.W.2d 740, 742-43 (Tex. App.--Fort Worth 1994, no pet.), in connection with old Rule 52(b), now Rule 103(b). In determining whether counsel's objection was a motion in limine or an objection outside the presence of a jury, the appellate court disregarded the label used by counsel and the trial judge, and looked instead to the substance of the objection or motion. The court made the following observations:

[A] motion in limine characteristically includes: (1) an objection to a general category of evidence; and (2) a request for an instruction that the proponent of that evidence approach the bench for a hearing on its admissibility before offering it. Conspicuously absent from a motion in limine is a request for a ruling on the actual admissibility of specific evidence.

In contrast, Rule 52(b) seems to require both specific objections and a ruling on the admissibility of contested evidence. In fact, we question whether

Rule 52(b) comes into play until specific evidence is actually offered for admission. Rule 52(b) only provides that complaints about the admission of evidence are preserved when the court hears objections to offered evidence and rules that such evidence shall be admitted.

The court concluded that in that case the request was a motion in limine that did not preserve error.

*See K-Mart No. 4195 v. Judge*, 515 S.W.2d 148, 152 (Tex. Civ. App.--Beaumont 1974, writ dismissed) (even if trial objection was seen as incorporating objections set out in motion in limine, still the objection was a general objection). Restating the objection made outside the presence of the jury was held not to be necessary in *Klekar v. Southern Pacific Transp. Co.*, 874 S.W.2d 818, 824-25 (Tex. App.--Houston [1st Dist.] 1994, no writ).

**D. Objection During Trial.** It is proper and sufficient to make a *Daubert* objection during trial. However, a court could adopt a local rule or scheduling order in a particular case requiring that *Daubert* objections be raised before trial or they are precluded. In *Scherl v. State*, 7 S.W.3d 650 (Tex. App.--Texarkana 1999, pet. rev. filed), the Texas appellate court ruled that TRE 702 is not a sufficiently precise objection to preserve appellate complaint. The court's language is worth reading:

Scherl objected to the intoxilyzer evidence when it was offered at trial on the basis that it was inadmissible under Rule 702, *Daubert*, *Kelly*, and *Hartman*. However, to preserve error an objection to the admission of evidence must state the specific grounds for the objection, if the specific grounds are not apparent from the context. Tex.R. Evid. 103(a); Tex.R. App. P. 33.1; *Bird v. State*, 692 S.W.2d 65, 70 (Tex. Crim. App. 1985). An objection to an improper predicate that fails to inform the trial court exactly how the predicate is deficient will not preserve error. *Bird*, 692 S.W.2d at 70; *Mutz v. State*, 862 S.W.2d 24, 30 (Tex.App.-Beaumont 1993, pet. ref'd). Rule 702, *Daubert*, *Kelly*, and *Hartman* cover numerous requirements and guidelines for the admission of expert testimony. An objection based on Rule 702 and these cases alone is effectively a general objection to an improper predicate and is by no means specific. [FN3] Scherl's objection, without more specificity, did not adequately inform the trial court of any complaint upon which it might rule. Therefore, we conclude

that no specific complaint about the reliability of the evidence was preserved for appellate review.

[FN 3] Based on the objection made, how was the trial judge to know if Scherl was objecting because: (1) the judge failed to conduct a hearing outside the presence of the jury, or (2) the witness was not "qualified as an expert by knowledge, skill, experience, training, or education," or (3) the witness's testimony would not "assist the trier of fact to understand the evidence or to determine a fact in issue" and therefore was not relevant, or (4) the witness's testimony was not reliable because (a) the underlying scientific theory is not valid, or (b) the technique applying the theory is not valid, or (c) the technique was not properly applied on the occasion in question? See Texas Rule of Evidence 702, *Daubert*, *Kelly*, and *Hartman*.

Litigators are cautioned to consider how detailed they should be in asserting a *Daubert* or *Robinson* objection.

A party objecting based on *Daubert* should also object based on Rule of Evidence 403, arguing that probative value is outweighed by charges or prejudice or confusion. This is an independent basis to exclude the evidence.

**E. "NO EVIDENCE" CHALLENGE.** A party in a Texas civil proceeding can attack the sufficiency of the evidence on appeal, on the ground that the expert testimony admitted into evidence did not meet the necessary standards of reliability and relevance. *Merrill Dow Pharmaceuticals v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997), *cert. denied*, 523 U.S. 1119, 118 S.Ct. 1799, 140 L.Ed.2d 939 (1998). However, this complaint cannot be raised for the first time after trial. In the case of *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406-07 (Tex.), *cert. denied*, \_\_\_ U.S. \_\_\_, 119 S.Ct. 541, 142 L.Ed.2d 450 (1998), the Texas Supreme Court said:

Under *Havner*, a party may complain on appeal that scientific evidence is unreliable and thus, no evidence to support a judgment. See *Havner*, 953 S.W.2d 706. *Havner* recognizes that a no evidence complaint may be sustained when the record shows one of the following: (a) a complete absence of a vital fact; (b) the reviewing court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (c) the

evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence establishes conclusively the opposite of the vital fact. See *Havner*, 953 S.W.2d at 711 (citing Robert W. Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 TEX. L.REV. 361, 362-63 (1960)). Here, like in *Havner*, *Maritime* contends that because *Ellis*'s scientific evidence "is not reliable, it is not evidence," and the court of appeals and this Court are "barred by rules of law or of evidence from giving weight" to *Ellis*'s experts' testimony. See *Havner*, 953 S.W.2d at 711, 713.

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To preserve a complaint that scientific evidence is unreliable and thus, no evidence, a party must object to the evidence before trial or when the evidence is offered. See *Robinson*, 923 S.W.2d at 557; see also *Havner*, 953 S.W.2d at 713 ("If the expert's scientific testimony is not reliable, it is not evidence."). Without requiring a timely objection to the reliability of the scientific evidence, the offering party is not given an opportunity to cure any defect that may exist, and will be subject to trial and appeal by ambush. See *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066-67 (9th Cir. 1996), *cert. denied*, \_\_\_ U.S. \_\_\_, 117 S.Ct. 942, 136 L.Ed.2d 831 (1997); *Sumitomo Bank v. Product Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983). Reviewing courts may not exclude expert scientific evidence after trial to render a judgment against the offering party because that party relied on the fact that the evidence was admitted. *Babbitt*, 83 F.3d at 1067. To hold otherwise is simply "unfair." *Babbitt*, 83 F.3d at 1067. As the *Babbitt* court explained:

[P]ermitting [a party] to challenge on appeal the reliability of [the opposing party's] scientific evidence under *Daubert*, in the guise of an insufficiency-of-the-evidence argument, would give [appellant] an unfair advantage. [Appellant] would be 'free to gamble on a favorable judgment before the trial court, knowing that [it could] seek reversal on appeal [despite its] failure to [object at trial].'

*Babbitt*, 83 F.3d at 1067 (citations omitted). Thus, to prevent trial or appeal by ambush, we hold that the complaining party must object to the reliability of scientific evidence before trial or when the evidence is offered.

*Ellis*, 971 S.W.2d at 409-10.

Accord, *General Motors Corp. V. Sanchez*, 997 S.W.2d 584, 590 (Tex. 1999); *Melendez v. Exxon Corp.*, 998 S.W.2d 266, 282 (Tex. App.–Houston [14<sup>th</sup> Dist.] 1999, no pet.); *Harris v. Belue*, 974 S.W.2d 386, 393 (Tex. App.–Tyler 1998, pet. denied) (party, who did not object to admission of expert testimony on *Daubert* grounds until after plaintiff rested and in connection with motion for instructed verdict, waived *Daubert* attack).

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**IMPORTANT DEVELOPMENT**

**On February 22, 2000, the U.S. Supreme Court decided *Weisgram v. Marley Co.*, No. 99-161 (Feb. 22, 2000). In that case the Court unanimously held that, where a federal district court admitted expert testimony over objection, and the federal court of appeals determined that the evidence was not admissible under *Daubert*, the appellate court can, if it finds the remaining evidence insufficient to support a favorable verdict, reverse and render judgment for the opposing party, or the appellate court can reverse and remand for a new trial, or the appellate court can send the case back to the trial court to determine whether to enter judgment for the opposing party or to order a new trial.**

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**IV. FACTS OR DATA UNDERLYING EXPERT OPINION.** TRE 705 reads as follows. Pay particular attention to TRE 705(c), new to Texas civil litigation, establishing a gatekeeper function for the trial judge concerning the facts or data supporting an expert’s opinion.

**RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION**

(a) **Disclosure of Facts or Data.** The expert may testify in terms of opinion or inference and give the expert’s reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.

(b) **Voir dire.** Prior to the expert giving the expert’s opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be permitted to conduct a *voir dire* examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.

(c) **Admissibility of opinion.** If the court determines that the *underlying facts or data do not provide a sufficient basis for the expert’s opinion under Rule 702 or 703*, the opinion is inadmissible. [Emphasis added]

(d) **Balancing test; limiting instructions.** When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert’s opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

**Notes and Comments**

Comment to 1998 change: Paragraphs (b), (c), and (d) are based on the former Criminal Rule and are made applicable to civil cases. This rule does not preclude a party in any case from conducting a *voir dire* examination into the qualifications of an expert.

It can be seen that new TRE 705(b) offers a right to voir dire the expert about the underlying facts or data outside the presence of the jury. TRE 705(c) permits the trial court to reject expert testimony if the court determines that the expert doesn't have a sufficient basis for his opinion. And TRE 705(d) establishes a balancing test for underlying facts or data that are inadmissible except to support the expert's opinion: the court should exclude the inadmissible underlying information if the danger of misuse outweighs the value as explanation or support for the expert opinion.

**V. QUALIFICATIONS OF MENTAL HEALTH EXPERTS** The following is taken from Chapter 3-2 of the Expert Witness Manual.<sup>9</sup>

Under Rule 702,<sup>10</sup> a person may testify as an expert only if (s)he has knowledge, skill, experience, training or education that would assist the trier of fact in deciding an issue in the case.<sup>11</sup> This involves the expert's "qualifications." The party offering the testimony bears the burden to prove that the witness is qualified under Rule 702.<sup>12</sup> The decision of whether an expert witness is qualified to testify is within the trial court's discretion, and will be reviewed on appeal only if the ruling is an abuse of discretion, meaning that the trial court acted without reference to any guiding rules or principles.<sup>13</sup>

Whether an expert is qualified to testify under Rule 702 involves two factors: (1) whether the expert has knowledge, skill, etc.; and (2) whether that expertise will assist the trier of fact to decide an issue in the case.

Courts sometimes evaluate the first prong, of adequate knowledge, skill, etc., by asking whether the expert possesses knowledge and skill not possessed by people generally.<sup>14</sup>

The second prong, assisting the trier of fact, requires that the witness's expertise go to the very matter on

which the expert is to give an opinion.<sup>15</sup> The test then for qualifications is whether the expert has knowledge, skill, experience, training or education regarding the specific issue before the court which would qualify the expert to give an opinion on the particular subject.<sup>16</sup> Stated differently, the offering party must demonstrate that the witness possesses "special knowledge as to the very matter on which he proposes to give an opinion."<sup>17</sup>

There are a variety of potential mental health experts, including medical doctors, Doctors of Philosophy, Doctors of Education, Doctors of Psychology, Doctor of Social Work, Masters level psychologists and social workers, licensed professional counselors, social workers, marriage and family therapists, etc. Educational and licensing aspects of these professionals are discussed in Chapter 3-35 of this Manual. The Texas Family Code prescribes minimum qualifications for a person doing a court-ordered social study in a suit affecting the parent-child relationship.<sup>18</sup>

In determining the qualifications of an expert to give specific recommendations regarding the best interest of a child, remember that being qualified in some aspects of mental health does not necessarily mean that the witness is qualified to give recommendations on specific parent-child issues. Just as there is no validity "to the notion that every licensed medical doctor should be automatically qualified to testify as an expert on every medical question,"<sup>19</sup> so is there no validity to the notion that

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<sup>9</sup> Author: Richard R. Orsinger, Attorney at Law, San Antonio.

<sup>10</sup> FED. R. EVID. 702; TEX. R. EVID. 702.

<sup>11</sup> *Broders v. Heise*, 924 S.W.2d 148, 149 (Tex. 1996).

<sup>12</sup> *Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996).

<sup>13</sup> *Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996).

<sup>14</sup> *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). See *Duckett v. State*, 797 S.W.2d 906, 914 (Tex. Crim. App. 1990) ("The use of expert testimony must be limited to situations in which the issues are beyond that of an average juror"); John F. Sutton, Jr., *Article VII: Opinions and Expert Testimony*, 30 HOUS. L.REV. 797, 818 (1993) [Westlaw cite 30 HOURLR 797].

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<sup>15</sup> *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996), citing *Christopherson v. Allied Signal Corp.*, 939 F.2d 1106, 1112-1113 (5th Cir.), cert. denied, 503 U.S. 912, 112 S. Ct. 1280, 117 L.Ed.2d 506 (1992).

<sup>16</sup> *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996).

<sup>17</sup> *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 718 (Tex. 1998). See *United Blood Services v. Longoria*, 938 S.W.2d 29 (Tex. 1997); Linda Addison, *Recent Developments in Qualifications of Expert Witnesses*, 61 TEX. B.J. 41 (Jan. 1998) [Westlaw cite: 61 TXBJ 41].

<sup>18</sup> TEX. FAM. CODE ANN. § 107.052(a) (Vernon 1996); see Chapter 3-81].

<sup>19</sup> *Broders v. Heise*, 924 S.W.2d 148, 152 (Tex. 1996).

every degreed or licensed mental health expert is qualified to testify on every mental health question, including every aspect of parent-child relations. To be qualified, the witness's expertise must go to the very matter on which the expert is to give an opinion.

**VI. ISSUES ARISING IN MENTAL HEALTH EXPERT TESTIMONY** The following is taken from Chapter 3-03 of the Expert Witness Manual.

**A. Mental Health Determinations Are Subjective** Many forms of human health are susceptible to concrete diagnosis,<sup>20</sup> etiology,<sup>21</sup> and prognosis.<sup>22</sup> This is not true of mental health. Although new scientific techniques are quantifying more and more aspects of human psychology, most areas of mental health are still dominated by subjective evaluations made using abstract concepts.<sup>23</sup> Mental health professionals deal with conscious and unconscious thoughts, emotions, and behaviors. The physical processes associated with thoughts, emotions, and behaviors are only dimly understood.<sup>24</sup> The prevailing scheme of mental disorders is constantly changing, and the current version is admittedly transitional. Theories of cause-and-effect are based on personal conviction

more than established fact. Things are in a state of flux.

When mental health professionals make determinations for legal purposes, there are even greater difficulties. Mental health terminology does not equate to legal definitions. For example, the legal concept of "insanity" can vary from state-to-state, and mental health theory doesn't recognize "insanity" as a particularly meaningful concept. There is no mental health equivalent for "mental anguish" or "best interest of a child." The mental health expert who opines on legal issues is leaving behind the greater part of mental health scientific support and is entering an area where personal observation and personal opinion dominate over the collective scientific process.

In considering the scientific underpinning of psychological opinions, it is important to recognize that the mental health community speaks not with unanimity but with a thousand different voices. There are many studies, but they usually involve a small number of people as subjects, and the way they were selected can skew the results. There are many articles in many different journals, but there is disagreement among them, and forceful conclusions draw equally forceful criticisms. Additionally, the expert witnesses who appear in Texas courts are not research scientists but rather clinical practitioners, most of whom have conducted no studies since graduate school but who may have accumulated a wealth of practical experience dealing with real people in real-life situations. An important question arises as to how the generic information generated in small-scale experiments or large scale studies in other parts of the country should be weighed against practical clinical experience when answering questions involving particular people with a unique set of problems.

**B. Normal People With Normal Problems vs. People Who Are Ill** Everyone has problems in their lives that can have negative effects on mental health. Many mental health problems are no more than normal people reacting in normal ways to the problems in their lives. Under the prevailing view, however, some mental conditions are sufficiently abnormal to be rated as "mental disorders," which constitute formal mental illnesses.

Similarly, everyone has a personality, and personalities are different--some are very different.

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<sup>20</sup> "Diagnosis" is the identification of a disease or other condition by evaluating the patient's appearance, symptoms, and history, by examination, and if needed, by testing. ROTHENBERG & CHAPMAN, *DICTIONARY OF MEDICAL TERMS*, p. 125 (2<sup>nd</sup> Ed. 1989).

<sup>21</sup> "Etiology" means the study of the cause of a condition.

<sup>22</sup> "Prognosis" is the prediction of the course or outcome of a disease or condition.

<sup>23</sup> See *Jenson v. Evelth Taconite Co.*, No. 5-88-163 (D.C. Minn. March 28, 1996) [1996 U.S. Dist. LEXIS 17978, p. 36].

<sup>24</sup> Neuroscience, the study of the brain and nervous system (i.e., brain, spinal cord, and nerve network), has developed reliable theories about many aspects of the way humans operate, but we are only beginning to understand the physical counterparts of thoughts, emotions, and behaviors. Scientists have established correlations between certain physical states and some mental disorders. The field is in its infancy.

When an individual's personality is inflexible and over a period of time deviates markedly from the expectations of our culture, resulting in distress or impairment of functioning, then the individual is said to suffer from a "personality disorder."

Due to the biological<sup>25</sup> and cultural<sup>26</sup> diversity of people in America, it is difficult to define what is psychologically normal. The mental health field therefore declares as abnormal those mental conditions that significantly impair the individual's functioning. American psychiatrists have organized the more frequent types of impairments into categories, and have listed criteria that, if met, lead to a diagnosis of a mental disorder.

**C. Diagnosis, Causation, and Prognosis** In the United States at the present time, the prevalent approach to conceptualizing ill mental health is biopsychosocial, which considers the biological, psychological, and social influences that contribute to a person's condition.<sup>27</sup> This view is reflected in the DSM-IV's<sup>28</sup> use of multiaxial assessment,<sup>29</sup> in which Axes I and II covers mental disorders, Axis

III covers general medical conditions, and Axis IV covers psychosocial and environmental problems.<sup>30</sup>

The degree to which biological, psychological, and social factors contribute to mental conditions varies from person to person, and from mental condition to mental condition. An older person may have memory problems associated with Alzheimer's disease, a biological condition. Another person might have memory problems that arise from a mental disorder involving multiple personalities. And another person might have memory problems associated with too many pressures at work. Current thinking is that schizophrenia and depression are caused by biological conditions. On the other hand, obsessive-compulsive behavior is seen as being more psychologically-based. And oppositional defiant behavior in an adolescent male may in some instances be attributed to the negative effects of poverty, unfair prejudice, or bad influences in the home or among friends.

When the forum in which these issues are considered changes from field research or clinical practice to the courtroom, new issues come to the fore. Many legal doctrines relating to human psychology originated in now-outmoded models of human behavior, and were developed slowly over long periods of time by judges and legislators untrained in the social sciences. In contrast, the currently prevailing views in the mental health field are of recent origin, and are constantly changing. The mental health vocabulary does not translate easily into the language of the law.

In personal injury and criminal litigation, mental health experts will often be testifying to three aspects of a person's mental condition: (1) diagnosis; (2) causation; or (3) prognosis.<sup>31</sup> Since the three areas are different, albeit interrelated, the role of the mental health expert in each area must be analyzed separately. Family law litigation can involve the same three elements, but more frequently involves issues of fault in the break-up of the marriage and the best interest of children.

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<sup>25</sup> In recent years, political considerations have not given much weight to biological diversity as a cause of psychological differences. However, gender-based distinctions are increasingly unavoidable and genetic differences will become increasingly important as the genetic ties to mental conditions become better understood.

<sup>26</sup> DSM-IV recognizes cultural variations in several ways. For example, DSM-IV's Appendix I is an "Outline for Cultural Formulation and Glossary of Culture-Bound Syndromes." DSM-IV 843-849. See DSM-IV xxiv-xxv.

<sup>27</sup> P.J. Fink, *Response to the Presidential Address: Is "Biopsychosocial" the Psychiatric Shibboleth?*, 145 ARCHIVES OF GENERAL PSYCHIATRY 1061-67 (1988), cited in ALAN STOUDEMIRE, CLINICAL PSYCHIATRY FOR MEDICAL STUDENTS 1 (1994, J.B. Lippincott Co. Philadelphia, Pa.).

<sup>28</sup> See Chapters 3-8 and 3-9.

<sup>29</sup> Under DSM-IV, a mental health diagnosis involves five axes. Each axis "refers to a different domain of information that may help the clinician plan treatment and predict outcome." DSM-IV 25. See Chapter 3-9.

<sup>30</sup> Axis V measures the severity of Axis I - III assessments.

<sup>31</sup> See *Jenson v. Evelth Taconite Co.*, No. 5-88-163 (D.C. Minn. March 28, 1996) [1996 U.D. Dist. LEXIS 17978, p. 36].

**(1) Diagnosis** The way mental health is practiced in the United States today, the diagnosis of an undesirable mental condition is a subjective evaluation based largely upon symptoms reported by the person being examined.<sup>32</sup> The mental health practitioner relates the symptoms reported by the patient to criteria for labeling particular mental conditions that have been published in a copyrighted manual, by a private organization of psychiatrists.<sup>33</sup> The manual is changed in important respects every ten to fifteen years.<sup>34</sup> Psychological tests have been developed, and are used to measure different aspects of the mind and personality.<sup>35</sup> Many of these tests were devised under a now-outmoded diagnostic scheme. What can be concluded from these tests remains controversial. Interestingly, the results of psychological testing are not listed in the psychiatrists' diagnostic manual as a factor to be considered in making a mental health diagnosis.

Legitimacy of a diagnosis turns on the validity of the diagnostic scheme, the reliability of the diagnostic method, and the accuracy of the diagnosis. If any of these three aspects fail, then the diagnosis should not be admitted into evidence. But even a bona fide mental health diagnosis may still be inadmissible because it is not relevant to the matters at issue in the case,<sup>36</sup> or because its probative value is outweighed by a danger of confusion or unfair prejudice.<sup>37</sup>

**(2) Causation** Once a patient's undesirable mental condition has been diagnosed, the mental health

practitioner looks for causes of the condition. If the causes can be identified, and ameliorated, then the condition can be improved or eliminated. Theories of causation of mental conditions are widely divergent<sup>38</sup> and are sometimes pursued with almost religious zeal. The fact that mental health professionals use similar therapies with some success, despite widely divergent theories of causation, suggests that the connection between cause and effect is not as well-understood and perhaps not as important in mental health as in physical sciences. In fact, some therapies work without any clear understanding as to why, but for those patients the lack of understanding is not that important. Behavioral science generally, however, needs to understand the causal relationships giving rise to mental conditions and the mechanisms at work when therapy leads to improvement.

In personal injury and criminal proceedings, the law sometimes requires the fact finder to consider what condition a person suffers from, and what has caused the condition. This requires the legal system to evaluate the legitimacy of both the diagnosis and the suggested etiology of the mental condition in issue. While diagnoses can be controversial, etiologies are even more controversial. The proponents of the prevailing scheme for diagnosing mental disorders say that a diagnosis does not suggest the cause of the condition.<sup>39</sup> However, even though the science underlying the taxonomy of mental disorders does not support assigning causes to conditions, there is substantial independent study of what causes mental disorders. Whether these independent sources of authority justify admitting an opinion into evidence is an issue yet to be resolved.

**(3) Prognosis** "Prognosis" is a "prediction of the probable outcome of a disease, based on what is known about the usual course of the disease and on

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<sup>32</sup> *Jenson v. Evelth Taconite Co.*, No. 5-88-163 (D.C. Minn. March 28, 1996) [1996 U.D. Dist. LEXIS 17978, p. 36].

<sup>33</sup> See DSM-IV, discussed in Chapters 3-8 and 3-9.

<sup>34</sup> See Chapters 3-8 and 3-9.

<sup>35</sup> See Chapter 3-35. It is important to note that mental health practitioners sometimes use testing instruments in a manner not intended by the test maker, so that the studies supporting the tests' reliability and validity may not apply to the particular use.

<sup>36</sup> See TEX. R. EVID. 702.

<sup>37</sup> See TEX. R. EVID. 403 & 705(d).

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<sup>38</sup> DSM-IV, which contains the prevailing scheme of mental disorders, is constructed to avoid subscribing to a theory of causation of most mental disorders. This is accomplished by defining and grouping disorders based on symptoms, and not causation. Thus, DSM-IV is used by people whose conceptions of human psychology can vary widely.

<sup>39</sup> DSM-IV xxii.



the age and general health of the patient.”<sup>40</sup> In a famous book,<sup>41</sup> clinical psychologist Paul Meehl suggested that prediction of the future course of mental illness using clinical skills is inferior to using statistical or actuarial calculations.<sup>42</sup> This view suggests that clinical assessment of an individual’s prognosis is less reliable than determining what statistical category the individual falls within and then looking to statistics to project the future.

#### **VII. TESTING GUIDELINES FOR MENTAL HEALTH PROFESSIONALS: STANDARDS AND ETHICS** The following is taken from Chapter 3-35 of the Expert Witness Manual.

In Texas, no mental health care can be provided without a state issued license. Exemptions such as pastoral counseling are included in licensing rules for psychologists. Separate licensing and sets of guidelines and rules for the State of Texas are promulgated for each discipline. There are five separate disciplines of mental health which are licensed to practice in Texas, each of which has its own licensing authority: Psychiatrists (Texas State Board of Medical Examiners; with rules of ethics by the American Medical Association and the American Psychiatric Association), Psychologists (Texas State Board of Examiners of Psychologists), Licensed Professional Counselors (Texas State Board of Examiners of Professional Counselors), Social Workers (Texas State Board of Social Work Examiners), and Marriage and Family Therapists (Texas State Board of Examiners of Marriage and Family Therapists). The Texas Department of Health serves as an umbrella agency of the Licensed Professional Counselors, Social Workers, and Marriage and Family Therapists. The Boards for Psychologists and Psychiatrists stand as independent Texas Governmental agencies.

Each separate mental health discipline has a statutory code of ethics and/or of practice. In addition the separate disciplines may have State or

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<sup>40</sup> ROTHENBERG & CHAPMAN, *DICTIONARY OF MEDICAL TERMS* 368 (2<sup>nd</sup> Ed. 1989).

<sup>41</sup> PAUL E. MEEHL, *CLINICAL VERSUS STATISTICAL PREDICTION: A THEORETICAL ANALYSIS AND A REVIEW OF THE EVIDENCE* (Jason Aronson, Inc. 1996).

<sup>42</sup> See Chapter 3-10.

National ethical codes to which the professional must adhere. Therefore, in most cases, when scrutinizing the practice of a member of any of the specific disciplines (e.g. LPC), the attorney should look to the statutory codes of that particular discipline and in some instances, additional State or National guidelines that inform the referral question the professional is evaluating.

Following is a brief review of the salient guidelines of the separate mental health disciplines, relating to assessment and testing. For the purpose of this section, it is assumed that the mental health professional has sufficient qualifications and experience to administer and interpret testing instruments. In fact, some test publishers require proof of training before allowing a test to be purchased.

**A. Psychologists** The clearest standards addressing psychological testing are issued by the American Psychological Association. “The Standards for Educational and Psychological Testing” address a myriad of issues including assessment procedures and test construction.<sup>43</sup> These “Standards” “reflect the current level of consensus of recognized experts.”<sup>44</sup>

In addition, Division 41 (Psychology and the Law) of the American Psychological Association has issued guidelines for the practice of psychology in the legal arena and specifically for forensic assessment. While these guidelines were developed by an APA committee, they do not represent an official statement of the APA. Nevertheless, the

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<sup>43</sup> AMERICAN EDUCATIONAL RESEARCH ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, AND NATIONAL COUNCIL ON MEASUREMENT IN EDUCATION, *STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING* (1985)<<http://www.apa.org/books/4260010>> [6-27-99].

<sup>44</sup> AMERICAN EDUCATIONAL RESEARCH ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, AND NATIONAL COUNCIL ON MEASUREMENT IN EDUCATION, *STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING* V(1985) <<http://www.apa.org/books/4260010>> [6-27-99].

guidelines provide an aspirational model of desirable forensic practice by psychologists.<sup>45</sup>

Finally, the American Psychological Association has issued “Ethical Principles of Psychologists and Code of Conduct” which addressed the standards of practice for conducting psychological assessments.<sup>46</sup> The statutory rules of the Texas State Board of Psychologist Examiners detail the Ethical Principles as well.<sup>47</sup>

**B. Social Workers** According to the rules of the Texas State Board of Social Work Examiners, “Professional social work practice involves the disciplined application of social work values, principles, and methods, including psychotherapy, marriage and family therapy, couples therapy, group therapy, counseling, *assessment and evaluation* (emphasis added).”<sup>48</sup> The inclusion of assessment and evaluation would seem to imply the ability to use structured (objective) testing in the practice of social work. It should be recognized that these guidelines for testing and assessment are general and subsumed within the broader category of ethical practice.

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<sup>45</sup> Committee on Ethical Guidelines for Forensic Psychologists, *Specialty Guidelines for Forensic Psychologists*, 15 LAW AND HUMAN BEHAVIOR 655 (1991).

<sup>46</sup> American Psychological Association *Ethical Principles of Psychologists and Code of Conduct* (Effective December 1, 1992) <<http://www.apa.org/ethics/code.html>> [6-27-99].

<sup>47</sup> Texas State Board of Examiners of Psychologists, *Psychologist’s Licencing Act and Rules and Regulations of the Texas State Board of Examiners of Psychologists* (Changes through November 1, 1998).

<sup>48</sup> Texas State Board of Social Work Examiners, *Chapter 50 of the Human Resources Code, Title 22 of Texas Administrative Code, Chapter 781, (Rules of the Texas State Board of Social Work Examiners)*, Subchapter A. General Provisions. Paragraph 781.102(30) <<http://www.sos.state.tx.us/tac/22/XXXIV/781/D/index.html>> [6-27-99].

**C. Licensed Professional Counselors** The statutory code of ethics<sup>49</sup> which also incorporates the rules for licensed professional counselors is general and represents their minimum standards of practice.<sup>50</sup> The licensed professional counselor, given sufficient training and experience, may perform certain tests excluding unstructured (projective) test. There is no language in the LPC code of ethics or rules which indicate that the LPC is allowed to perform this duty; rather, it is assumed that the duty can be performed. The exclusion relating to unstructured (projective) testing being not available to non-psychologists is found in the licensing act for psychologists.

Section “s” relates to evaluation or mental assessment. This section cautions the counselor from evaluating a mental condition without personally interviewing the client except if the evaluator discloses the lack of personal interview is disclosed.

**D. Marriage and Family Therapists** According to the Texas State Board of Examiners of Marriage and Family Therapists, “Marriage and Family Therapy” involves providing professional therapy services to individuals, families, and couples, through the professional application of family systems theories and techniques. Delivering such services may include the *evaluation* (emphasis added) of cognitive, affective, behavioral, or relational dysfunction within the context of a marriage or family system.<sup>51</sup>

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<sup>49</sup> Texas State Board of Examiners for Licensed Professional Counselors, *Article 4512g, Texas Civil Statutes, Title 22, Texas Administrative Code 681,( Professional Counselors Code of Ethics, General Ethical Requirements)*, Chapter § 681.32 <<http://www.sos.state.tx.us/tac/22/XXXV/801/C/index.html>> [6-27-99].

<sup>50</sup> Personal Communication, 4-7-99, John Luther, Executive Director, Texas State Board of Examiners of Licensed Professional Counselors.

<sup>51</sup> Texas State Board of Examiners of Marriage and Family Therapists, *Article 4512c-1, Texas Civil Statues, Title 22, Texas Administrative Code, Chapter 801 (Marriage and Family Therapy Board Rules)* Texas Administrative Code, Chapter 801 <<http://www.sos.state.tx.us/tac/22/XXXV/801/C/index>

With respect to testing, the rules of the Board provide:

(a) A therapist shall make known to clients the purposes and explicit use to be made of any testing done as part of a professional relationship.

(b) A therapist shall not appropriate, produce, or modify published tests or parts thereof without the acknowledgment and permission of the publisher.

(c) A therapist shall not administer any test without the appropriate training and experience to administer the test.

(d) A therapist must observe the necessary precautions to maintain the security of any test administered by the therapist or under the therapist's supervision.<sup>52</sup>

**E. Psychiatrists** Ethical codes for the practice of psychiatry are incorporated into those of the American Medical Association. Presumably psychiatrists have no scope of limitations in evaluation. In the area of forensics, the American Academy of Psychiatry and the Law has published "Ethics Guidelines for the practice of forensic psychiatry."<sup>53</sup>

## VIII. RELIABILITY AND VALIDITY<sup>54</sup>

**A. Definitions.** Reliability refers to measurement consistency only. By definition, reliability of a test score does not relate to what is actually being measured. For example, one might have good

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<sup>52</sup> Texas State Board of Examiners of Marriage and Family Therapists, *Article 4512c-1, Texas Civil Statutes, Title 22, Texas Administrative Code, Chapter 801 (Marriage and Family Therapy Board Rules)* Texas Administrative Code, Chapter 801.46(d) <<http://www.sos.state.tx.us/tac/22/XXXV/801/C/801.46.html>> [6-27-99].

<sup>53</sup> American Academy of Psychiatry and the Law, *Ethics Guidelines for the Practice of Forensic Psychiatry* (1995) <<http://www.aapl.org/ethics.htm>> [6-27-99].

<sup>54</sup> Primary author: Jan DeLipsey, Ph.D.

reliability data on a test, which means the test is producing consistent results; however, this does not indicate the actual construct that the test is measuring. "Validity" addresses the question of what is measured. Validity cannot stand without a foundation of reliability. If reliability is poor, validity will also be poor. This equation does not "flip" because reliability is the predicate for validity - a test can have excellent reliability and still have poor validity.<sup>55</sup>

**B. Reliability** Reliability generally refers to the consistency of measurement results or test scores (measurement precision).<sup>56</sup> If a test is reliable, then over time the test will provide consistent results. The more reliable the test is, the more consistent the results will be.

Of course, with any measurement, there will be error. Therefore, it is important to know what part of a test score or performance is related to the true score and what is due to other factors, or to error. Since reliability has to do with consistency, it also relates to measurement error. In classical test theory, an obtained test score can be thought of as a sum of a true component and an error component.<sup>57</sup> In a perfect world with a perfect test and perfect testing conditions, there would only be a true score. Since perfect tests and/or testing conditions are never obtained, some error will always enter into a test performance score.

**C. Calculating Reliability** Reliability is established through a calculation called a "reliability coefficient" and is often symbolized by "*r*". A reliability coefficient value ranges from 0.0 (no reliability) to +1.0 (perfect reliability).<sup>58</sup> Note that

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<sup>55</sup> HENRY GLEITMAN, *PSYCHOLOGY 633* (W.W. Norton & Co.1991).

<sup>56</sup> ELAZAR PEDHAZUR AND LIORA PEDHAZUR SCHMELKIN, *MEASUREMENT, DESIGN, AND ANALYSIS: AN INTEGRATED APPROACH 81* (Lawrence Erlbaum 1991).

<sup>57</sup> ELAZAR PEDHAZUR AND LIORA PEDHAZUR SCHMELKIN, *MEASUREMENT, DESIGN, AND ANALYSIS: AN INTEGRATED APPROACH 83* (Lawrence Erlbaum 1991).

<sup>58</sup> ELAZAR PEDHAZUR AND LIORA PEDHAZUR SCHMELKIN, *MEASUREMENT, DESIGN, AND ANALYSIS: AN INTEGRATED APPROACH 85-86* (1991). The reader should note that

a reliability coefficient never has a negative value. For example, if the reliability coefficient is equal to .90, that indicates that 90% of the variance<sup>59</sup> of the total score is reliable (systematic) variance rather than error variance. Obviously, higher reliability is always better.

**D. Validity** Validity refers to whether a test truly measures what it purports to measure.<sup>60</sup> When a test is constructed, the validity is established through one or more means. For many tests, there are multiple validity indices. Validity can also apply to diagnostic categories, such as the diagnostic scheme of DSM-IV.

**IX. CPAs.** Certified Public Accountants (CPAs) are licensed professionals in the broad field of accounting. After passing a uniform national CPA examination, CPAs are licensed and governed by state (and related U.S. jurisdictions such as the District of Columbia, etc.) Boards of Accountancy that set forth their own education, experience and other requirements. These State Boards are given broad powers to adopt regulations, promulgate rules of conduct for the proper administration of the law, and ensure that the public is served by qualified professional accountants. They are generally made up of practicing CPAs plus attorneys, economists, state officials and public members among others. The State Boards of Accountancy are generally guided by their respective governments, the American Institute of Certified Public Accountants (AICPA), and to a lesser extent the Securities and Exchange Commission (SEC).<sup>61</sup>

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there are rare occasions when, because of the scatter of scores, a correlation coefficient will be misleading; however, in this day and age, this type of problem occurrence is rare and usually noticed and addressed by the test constructors.

<sup>59</sup> Variance can be thought of as a measure of variability in a sample of scores on a given test. Use of variability is essential to statistically analyzing a group of scores.

<sup>60</sup> HENRY GLEITMAN, *PSYCHOLOGY 633* (W.W. Norton & Co.1991).

<sup>61</sup> Authorized Edition of The AICPA's Uniform CPA Exam – 1991; Information for CPA candidates section, page xiii.

The Texas State Board of Public Accountancy has been given the legal authority to govern the practice of public accountancy in Texas. The Board has adopted many of the AICPA professional standards as their own professional conduct rules.

A complete copy of the Rules may be obtained from:

Texas State Board of Public Accountancy  
333 Guadalupe, Tower III, Suite 900  
Austin, Texas 78701-3900

Litigation services are rendered by a CPA using accounting and consulting skills to assist a client in a matter that involves pending or potential litigation or dispute resolution proceedings with a trier of fact. These services may include fact-finding (including assistance in the discovery and analysis of data), damage calculations, document management, expert testimony, and other professional services required by the client or counsel.<sup>62</sup>

#### General Standards

The AICPA classifies litigation services as one of six types of consulting services and is therefore subject to the general standards of the AICPA Code of Professional Conduct. The general standards cover professional competence, due professional care, planning and supervision, and sufficient relevant data.

#### Consulting Standards

In addition to the general standards, specific consulting standards apply to the consulting process and are established by the Statement on Standards for Consulting Services (SSCS) under Rule 202 of the AICPA Code of Professional Conduct. These standards concern serving the client's interest, entering into an understanding with the client, and communicating with the client.

The Texas Board of Public Accountancy has determined that the SSCS set the professional

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<sup>62</sup> Application of AICPA Professional Standards in the Performance of Litigation Services, AICPA Consulting Services Special Report 93-1, 1993

standards for practice in the consulting area and thus Texas CPAs are bound under the Board's Rules to these AICPA standards.

The general standards are concerned with the quality of the performance of any professional service. The consulting standards apply specifically to the consulting process to guide practitioners in their relationships with consulting clients.

**X. PRINCIPLES OF ACCOUNTING** The main set of principles of CPA accounting are called GAAP. There are other comprehensive bases of accounting that are recognized by the accounting profession, beside GAA

**A. Generally Accepted Accounting Principles** Generally Accepted Accounting Principles (GAAP) include the measurement and disclosure principles that apply to all financial statements (except those prepared on an other comprehensive basis of accounting). They govern the recognition (that is the timing and amounts) of transactions and dictate the numbers and other information that must be presented in financial statements.

The following is the hierarchy of sources for GAAP of nongovernmental entities:

- A. Pronouncements of an authoritative body designated by the American Institute of Certified Public Accountants (AICPA) Council to establish accounting principles pursuant to Rule 203 of the AICPA Code of Professional Conduct, including the Financial Accounting Standards Board (FASB) Statements of Financial Accounting Standards, FASB Interpretations; Accounting Principles Board (APB) Opinions, and AICPA Accounting Research Bulletins;
- B. Pronouncements of groups of expert accountants that deliberate accounting issues in public forums and have been exposed for public comment for the purpose of establishing accounting principles or describing existing accounting practices that are generally accepted;
- C. Pronouncements of groups of expert accountants organized by an authoritative body that deliberates accounting issues in

public forums but have not been exposed for public comment for the purpose of interpreting or establishing accounting principles or describing existing accounting practices that are generally accepted;

- D. Practice or pronouncements that are widely recognized as being generally accepted because they represent prevalent practice in a particular industry;
- E. Other accounting literature including, but not limited to, AICPA Issues Papers and Technical Practice Aids, FASB Statements of Financial Accounting Concepts, etc.<sup>63</sup>

The U.S. Supreme Court noted that GAAP are far from being a canonical set of rules that insure identical accounting treatment of similar transactions.<sup>64</sup> Instead, GAAP tolerates a range of reasonable treatments, leaving the choice among the alternatives to company management.<sup>65</sup>

**B. Cash Method of Accounting** Cash basis mostly has been replaced by accrual basis accounting, but cash basis accounting is still used by some businesses and by most individuals. There are no promulgated standards for cash basis accounting. Sources of authority for cash basis accounting are undergraduate accounting textbooks, some non-authoritative literature, and technical practice aids. Under SAR<sup>66</sup> standards an accountant can issue cash basis or modified cash basis financial statements.

**C. Accounting Principles for Tax Purposes** Tax accounting is different from ordinary accounting. The sources of authority for tax reporting principles is the IRC, RRs, and court rulings. Tax laws are promulgated for purposes of federal revenue and not

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<sup>63</sup> AICPA Professional Standards Vol. 1 AU§411.05.

<sup>64</sup> *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522 (1979).

<sup>65</sup> *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522, 544 (1979).

<sup>66</sup> Standards of Accounting and Review (a senior technical committee of AICPA). That is the authoritative literature that permits a CPA to issue a cash basis financial statement.

to make an accurate measure of the income and resources of a business.

**XI. TYPES OF FINANCIAL STATEMENT ENGAGEMENTS** The four types of financial statement engagements in order from most assurance to least:

(1) Audited - The objective of the ordinary audit of financial statements by the independent auditor is the expression of an opinion on the fairness with which they present, in all material respects, financial position, results of operations, and its cash flows in conformity with GAAP. The auditor has a responsibility to plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud. Because of the nature of audit evidence and the characteristics of fraud, the auditor is able to obtain reasonable, but not absolute, assurance that material misstatements are detected.

(2) Reviewed - The objective of the review is to perform inquiry and analytical procedures that provide the accountant with a reasonable basis to express limited assurance that there are no material modifications that should be made to the statements in order for them to be in conformity with GAAP or, if applicable, an OCBOA. A review differs from the audit in that a review does not provide the basis for the expression of an opinion because a review does not require the obtaining of an understanding of the internal control structure or assessing control risk, tests of accounting records and responses to inquiries by obtaining corroborating evidential matter through inspection, observation or confirmation, and certain other procedures ordinarily performed during an audit.<sup>67</sup>

(3) Compiled - The objective of the compilation is to present in the form of financial statements information that is the representation of management without undertaking to express any assurance on the statements. A compilation differs from the review in that a review should provide the accountant with a reasonable basis for expressing limited assurance that there are no material modifications that should be made to the financial

statements. No expression of assurance is contemplated in a compilation.<sup>68</sup>

(4) Internally generated - The objective of the internally generated financial statement is to provide information to the client's management for use in its internal operations. The accountant may not report on financial statements that include one or more periods of client-prepared financial statements that have not been audited, reviewed, or compiled by the accountant.

## **XII. BUSINESS VALUATION PROFESSION**

The business valuation profession traces its history back to 1919, with the publication of capitalization rates for corporate net income. There is no authoritative organization that promulgates standards for valuing business interests. Those involved in speaking with authority in this area are the Internal Revenue Service (IRS), the Appraisal Standards Board (ASB), the American Institute of Certified Public Accountants Business Valuations and Appraisals Subcommittee (AICPA – BVAS), the American Society of Appraisers Business Valuation Committee (ASA – BVC), the Institute of Business Appraisers (IBA), and the National Association of Certified Valuation Analysts (NACVA).

## **XIII. PRINCIPAL AUTHORITIES ON VALUING BUSINESSES**

**A. The Appraisal Foundation** The Appraisal Foundation was formed in 1987 consisting of nine major professional U.S. appraisal organizations, all exclusively real estate except ASA, which is multi-disciplinary. The Foundation is governed by a 32-member Board of Trustees, including appointees of member appraisal organizations, certain government bodies, other sponsor organizations and trustees-at-large. Funding is provided by member and sponsor organizations and the federal government under Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). The chairman of the Board of Trustees appoints a nominating subcommittee, which appoints the Appraisal Standards Board and the Appraiser Qualifications Board.

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<sup>67</sup> Ibid., AR§100.04.

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<sup>68</sup> Ibid., AR§100.04.

**B. Appraisal Standards Board** The ASB issues Uniform Standards of Professional Appraisal Practice (USPAP)<sup>69</sup> which is updated annually and is usually available in November. General provisions, Standards, and Statements on Standards formerly were mandatory for appraisals by members of member appraisal organizations. With the 1999 edition of USPAP conformity in appraisals is applied only when required by law or by agreement with the client. Various federal and state regulatory agencies have adopted guidelines that require adherence to USPAP. However, because the AICPA is not a member of the ASB or the Foundation, its members are not subject to the USPAP. Additionally, the Internal Revenue Service has not adopted USPAP.

Standards 9 and 10 of USPAP relate specifically to business appraisals and it is anticipated that major revisions to these sections will be coming in 2000 or 2001. The forward to each edition of USPAP provides a good summary of the history and subject matter of this document.

Some litigants in real property litigation have attempted to exclude expert valuation testimony that violated some aspect of USPAP. Since USPAP is not in and of itself a rule of law, these challenges are sometimes based upon the state's legislation regulating real property appraisers. This legislation varies from state to state, so that generalizing is difficult. It appears, however, that the courts recognize that USPAP is not a rule of evidence, and decline to refuse to admit expert testimony or expert reports solely because USPAP was violated.

**C. Appraiser Qualifications Board** The Board has set minimum qualifications for real estate appraisers and is studying qualifications for personal property and business appraisers.

**D. Internal Revenue Service** While the IRS has not adopted USPAP, they have stated their requirements for acceptable appraisals in the following releases:

**(1) Revenue Ruling 59-60, CB. 1959-1,237** Revenue Ruling 59-60, on valuing stock of closely held corporations, shows considerable insight and wisdom on valuing businesses and business interests, and is often quoted even for valuations for non-tax purposes.

Note that Revenue Ruling 59-60 pertains specifically to value under the definition of fair market value contained in the U.S. Tax Code. If referring to revenue rulings when performing valuations for other purposes, one must be cognizant of how differences in the definition of value being sought may affect the methodology and procedures.

**(2) Revenue Ruling 65-192** Revenue Ruling 65-192 states that the general approach, methods and factors outlined in Revenue Ruling 59-60, for use in valuing closely held corporate stocks for estate and gift tax purposes are equally applicable to valuations thereof for income and other tax purposes and also in determinations of the fair market values of business interests of any type and of intangible assets for all tax purposes.

The Ruling expands the application of Rev. Rul. 59-60 for valuations for all tax purposes by stating that:

The general approach, methods, and factors outlined in Rev. Rul. 59-60 are equally applicable to valuations of corporate stocks for income and other tax purposes as well as for estate and gift tax purposes. They apply also to problems involving the determination of the fair market value of business interests of any type, including partnerships, proprietorships, etc., and of intangible assets for all tax purposes.

**(3) Rev. Proc. 66-49** Rev. Proc. 66-49 is a procedure to be used as a guideline by all persons making appraisals of donated property for federal income tax purposes. The purpose of this procedure is to provide information and guidelines for taxpayers, individual appraisers, and valuation groups relative to appraisals of contributed property for federal income tax purposes. The procedures outlined are applicable to all types of non-cash property for which an appraisal is required such as real property, tangible or intangible personal property, and securities. These procedures are also appropriate for unique properties such as art

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<sup>69</sup> These standards apply to appraising real property, personal property, and business interests. The Texas legislature has enacted conforming legislation pertaining to real property appraisals.

objects, literary manuscripts, antiques, etc., with respect to which the determination of value often is more difficult.

The appropriate definition of value is fair market value (FMV) within an expanded definition of FMV for charitable contributions.

If the contribution is made in property of a type which the taxpayer sells in the course of his business, the fair market value is the price which the taxpayer would have received if he had sold the contributed property in the lowest usual market in which he customarily sells, at the time and place of contribution (and in the case of a contribution of goods in quantity, in the quantity contributed).

Rev. Proc. 66-49 provides additional guidance on determining FMV – Actual selling price within reasonable time before or after valuation date can provide evidence of FMV.

According to Rev. Proc. 66-49, generally an appraisal report should include at least:

- 1) Summary of the appraiser's qualifications.
- 2) Statement of the value and the appraiser's definition of the value he has obtained.
- 3) Bases upon which the appraisal was made, including any restrictions, understandings, or covenants limiting the use or disposition of the property.
- 4) Date as of which the property was valued.
- 5) Signature of the appraiser and the date the appraisal was made.

**(4) IRS Publication 561** IRS Publication 561 provides information which should be included in qualified appraisals. A qualified appraisal must include the following information:

- 1) A description of the property in sufficient detail for a person who is not generally familiar with the type of property to determine that the property appraised is the property that was (or will be) contributed,
- 2) The physical condition of any tangible property,

- 3) The date (or expected date) of contribution,
- 4) The terms of any agreement or understanding entered into (or expected to be entered into) by or on behalf of the donor that relates to the use, sale, or other disposition of the donated property,
- 5) The name, address, and taxpayer identification number of the qualified appraiser and, if the appraiser is a partner, an employee, or an independent contractor engaged by a person other than the donor, the name, address, and taxpayer identification number of the partnership or the person who employs or engages the appraiser,
- 6) The qualifications of the qualified appraiser who signs the appraisal, including the appraiser's background, experience, education, and any membership in professional appraisal associations
- 7) A statement that the appraisal was prepared for income tax purposes,
- 8) The date (or dates) on which the property was valued,
- 9) The appraised FMV on the date (or expected date) of contribution,
- 10) The method of valuation used to determine FMV, such as the income approach, the comparable sales or market data approach, or the replacement cost less depreciation approach, and
- 11) The specific basis for the valuation, such as any specific comparable sales transaction.

Additionally, IRS Publication 561 addresses the qualifications of an appraiser as an individual who declares on the appraisal summary that he or she:

- Holds himself or herself out to the public as an appraiser or performs appraisals on a regular basis,
- Is qualified to make appraisals of the type of property being valued because of his or her qualifications described in the appraisal,
- Is not an excluded individual (see below), and



- Understands that an intentionally false overstatement of the value of property may subject him or her to the penalty for aiding and abetting an understatement of tax liability.

Excluded individuals. The following persons cannot be qualified appraisers with respect to particular property:

- 1) The donor of the property, or the taxpayer who claims the deduction.
- 2) The donee of the property.
- 3) A party to the transaction in which the donor acquired the property being appraised, unless the property is donated within 2 months of the date of acquisition and its appraised value does not exceed its acquisition price. This applies to the person who sold, exchanged, or gave the property to the donor, or any person who acted as an agent for the transferor or donor in the transaction.
- 4) Any person employed by, married to, or related under section 267(b) of the Internal Revenue Code, to any of the above persons. For example, if the donor acquired a painting from an art dealer, neither the dealer nor persons employed by the dealer can be qualified appraisers for that painting.
- 5) An appraiser who appraises regularly for a person in (1), (2), or (3), and who does not perform a majority of his or her appraisals made during his or her tax year for other persons.

In addition, a person is not a qualified appraiser for a particular donation if the donor had knowledge of facts that would cause a reasonable person to expect the appraiser to falsely overstate the value of the donated property. For example, if the donor and the appraiser make an agreement concerning the amount at which the property will be valued, and the donor knows that such amount exceeds the FMV of the property, the appraiser is not a qualified appraiser for the donation.

Penalties: Any appraiser who falsely or fraudulently overstates the value of property described in a qualified appraisal or an appraisal summary that the appraiser has signed may be subject to a civil penalty for aiding and abetting an

understatement of tax liability, and may have his or her appraisal disregarded.

**E. The American Society of Appraisers** The American Society of Appraisers (ASA) was formed in 1936 and is an appraisal certifying organization representing all major disciplines of appraisal specialists, including those who specialize in business valuation. In order to ensure that professional appraisers adhere to high technical and ethical standards in performing valuation projects, ASA has prepared a comprehensive set of *Principles of Appraisal Practice and Code of Ethics* for its members. These principles are appropriate for business valuation specialists as well as appraisers for other valuation disciplines within the ASA membership. Among topics addressed by the principles are the following major issues:

Objectivity

Obligations to the client

Obligations to other appraisers

Guidance on the application of various methods and practices

Unethical and unprofessional practices.

Guidance on the appraisal report.

Beyond the preceding general standards, the Business Valuation Committee of the ASA has adopted standards that relate specifically to business valuation engagements. These standards currently include eight Business Valuations Standards, Definitions, a Statement of Business Valuation Standards, and one Advisory Opinion.

**F. The Institute of Business Appraisers** The Institute of Business Appraisers (IBA) is a certifying organization for appraisers who perform valuations of small closely held businesses. Formed in 1978, the IBA has over 3,000 members, half of whom are CPAs.

**G. The National Association of Certified Valuation Analysts** The National Association of Certified Valuation Analysts (NACVA) was formed in 1991, is an association focused on training, accrediting, and serving business valuation and

litigation support professionals. Current membership exceeds 3,300 and is open to interested professionals.

#### **H. The International Business Brokers Association**

The International Business Brokers Association (IBBA) has established authoritative principles for conducting business brokerage activities. The IBBA Standards provide a minimum standard of methodology for business brokers when dealing with customers, clients, and other business brokers. In addition to six standards a glossary is included in the standards for terms that are unique to the business brokerage industry.

#### **I. The American Institute of Certified Public Accountants**

The American Institute of Certified Public Accountants (AICPA) has established a Code of Professional Conduct that applies to all services provided by CPAs. Additionally, the AICPA *Consulting Services Standards* relate to business valuation engagements.

-- Standards That Apply to Consulting Services including Valuation Engagements.

-- Maintaining integrity and objectivity while serving the client.

-- Establishing an understanding with the client.

-- Communication with the client.

-- General Standards of the Code of Professional Conduct which all apply to Valuation Engagements.

-- Professional Competence.

-- Due Professional Care.

-- Planning and Supervision.

-- Sufficient Relevant Data.

In October 1996, the AICPA Council approved the creation of an accreditation in business valuation, which resulted in a new ABV (Accredited in Business Valuation) designation. To qualify for the designation, a CPA must pass a written examination. In addition, a CPA must meet the following requirements to be eligible to take the examination:

-- Be a member in good standing with the AICPA.

-- Provide evidence of performing ten business valuation engagements to demonstrate substantial experience and competence.

To maintain the ABV accreditation, a CPA must:

-- Demonstrate substantial involvement in at least five new business valuation engagements every three years.

-- Complete 60 hours of related CPE during the same three-year period.

#### **J. FIRREA**

The Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) requires that each state establish a licensing or certification for real estate appraisers. This Act would not appear to be relevant to business valuers; however, the laws enacted by several states are so broad that a valuation of a business that owns real estate would require the involvement of a state-licensed real estate appraiser. The ASA is taking an active role by urging states that have adopted licensing rules that appear to have gone beyond the original intent of FIRREA to amend those rules to exclude business valuations.