PRACTICAL APPLICATIONS OF DAUBERT

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Chapter I

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PRACTICAL APPLICATIONS OF DAUBERT_

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. SCOPE OF ARTICLE. This article discusses practical applications of the Daubert concept of reliability of methodology and relevance of expert witness evidence. The article distinguishes an expert's qualifications from the reliability of an expert's methodology, and the relevance of expert evidence to the question at hand. The article also discusses the trial court's little-discussed Rule 705(c) gatekeeping function regarding the facts or data underlying an expert's opinion, and the procedural vehicles used to raise Daubert issues.

The article examines the admissibility of polygraph results around the country. It also examines Daubert rulings on the admissibility of expert medical opinions based on clinical experience. The article discusses medical malpractice expert witnesses in Texas, and the application of Daubert principles to medical malpractice experts. The article discusses the admissibility under Daubert and Gammill of DSM-IV mental disorder diagnoses, and compares mental disorders to psychological syndromes. One mental health issue analyzed in particular is recovered memory.

[FRE = Federal Rules of Evidence; TRE = Texas Rules of Evidence]

II. 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,[1] 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.[2] This involves the expert's "qualifications." The party offering the testimony bears the burden to prove that the witness is qualified under Rule 702.[3] 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.[4]

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.[5]

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.[6] 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.[7] Stated differently, the offering party must demonstrate that the witness possesses "special knowledge as to the very matter on which he proposes to given an opinion."[8]

III. RELIABILITY OF EXPERT'S METHOD-
OLOGY; 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 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, __ U.S. __, 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 special ization, 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 (5th Cir. 1998) (en banc). That issue is discussed in Section VIII below.

IV. 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. Daube rt 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 (3rd 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 (3rd 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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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 dism'd) (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 adopted 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, 1999 WL 958950 (Tex. App.-Texarkana Oct. 21, 1999, no pet. h.), 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 that 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.
* * *
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 (9 th 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.

See 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).

V. 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 deter mines 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.

VI. DAUBERT AND THE POLYGRAPH. The "general acceptance test" of Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923), involved a crude predecessor of the modern polygraph test. In Frye,

the appellate court upheld the trial court's exclusion of lie detector results, saying "[w]e think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made." Frye, 293 F. at 1014. The Frye court was seen as adopting a "general acceptance" test for the admissibility of scientific evidence. After Frye, most courts applied a per se exclusion to evidence of polygraph results.

The United States Supreme Court recently considered the scientific reliability of the polygraph, in U.S. v. Scheffer, 523 U.S. 303 (1998). The court held that Military Rule of Evidence 707, which contains a per se ban against polygraph evidence, did not unconstitutionally abridge a defendant's right to present a defense. The court's opinion says that "there is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques. . . . . Some studies have concluded that polygraph tests overall are accurate and reliable. . . . Others have found that polygraph tests assess truthfulness significantly less accurately - that scientific field studies suggest the accuracy rate of the 'control question technique' polygraph is 'little better than could be obtained by the toss of a coin,' that is, 50 percent." Scheffer, Id. at 1265. The amicus curiae brief of the Committee of Concerned Social Scientists, in support of admitting polygraph results, was available on the WWW in December of 1998, but can no longer be found. The same is true of the amicus curiae brief of the National Association of Criminal Defense Lawyers, which argued to overturn the per se exclusion of polygraph results. [Such is the evanescent nature of the www.]

140 ALR Fed. 525 (1997) contains an annotation on Admissibility in Federal Criminal Case of Results of Polygraph (Lie Detector) Test-Post-Daubert Cases. The annotation contains an overview of federal case law in the area.

A panel of the Fourth Circuit Court of Appeals recently declined to overturn the court's prior per se rule of exclusion of polygraph evidence, saying that it did not have the authority to overturn prior decisions of other panels of the court. U.S. v. Ruhe, 1999 WL 674758 (4th Cir. Aug. 31, 1999).

A panel of the Fifth Circuit Court of Appeals, in U. S. v. Posado, 57 F.3d 2023 (5th Cir. 1995), overturned the previously-existing per se ban against polygraph evidence in the Fifth Circuit. The court noted some relaxation of the per se exclusion in legal proceedings, such as permitting magistrates to consider polygraph evidence in issuing arrest warrants, and permitting the defendant in a criminal case to see polygraph results of witnesses. Id. at 433. The panel noted that, in 1980, twelve judges of the Fifth Circuit agreed that whether the polygraph was generally accepted would have to be reconsidered as time passed. Id. at 433. The court also noted that many employers and government agencies use the polygraph. Id. at 434. Thus, the panel removed the per se bar against admitting polygraph results, without holding that the polygraph is or is not scientifically valid. Id. at 434.

The Sixth Circuit Court of Appeals recently said that it has never adopted a per se exclusion of polygraph evidence, U.S. v. Thomas, 167 F.3d 299 (6th Cir. 1999), although some of its cases

appear to do just that. The Sixth Circuit did admit that it generally disfavors admission-what it terms an "aversion." The Sixth Circuit has recognized the admissibility of polygraph results for purposes other than establishing the truth or falsity of a disputed fact. See Barnier v. Szentmiklosi, 810 F.2d 594 (6th Cir. 1986) (rejecting contention that results were admissible on issue of damages); Murphy v. Cincinnati Ins. Co., 772 F.2d 273 (6th Cir. 1985) (insured's willingness to take polygraph admissible for limited purpose of showing insurer's bad faith in denying insured's claim).

The Eighth Circuit Court of Appeals affirmed the exclusion of polygraph results under FRE 403, on the grounds that the particular questions asked were more prejudicial than probative. U.S. v. Williams, 95 F.3d 723 (8th Cir. 1996).

The Ninth Circuit Court of Appeals has overturned its prior per se exclusion of polygraph results, and directed that trial courts conduct a flexible inquiry into the relevance and reliability of the polygraph on a case-by-case basis. U.S. v. Cordoba, 104 F.3d 225 (9th Cir. 1997).

The Tenth Circuit Court of Appeals has overturned its per se exclusion of polygraph results, in light of Daubert's overruling of Frye. See U.S. v. Call, 129 F.3d 1402 (10th Cir. 1997).

The Eleventh Circuit Court of Appeals has overturned its per se exclusion of polygraph results, saying: " Because of the advances that have been achieved in the field which have led to the greater use of polygraph examination, coupled with a lack of evidence that juries are unduly swayed by polygraph evidence, we agree with those courts which have found that a per se rule disallowing polygraph evidence is no longer warranted ...." U.S. v. Piccinonna, 885 F.2d 1529 (11th Cir. 1989 (en banc).

Chief Judge Black, in Houston, in one case refused to admit polygraph results due to lack of reliability and under FRE 403. U.S. v. Cortez, 1995 WL 918083 (S.D. Tex. 1995). A federal district judge in the Western District of Louisiana ruled polygraph results admissible in a civil proceeding. Ulmer v. State Farm Fire & Cas. Co., 897 F. Supp. 299 (W.D. La. 1995). A federal district judge in Arizona also ruled polygraph results admissible. U.S. v. Crumby, 895 F. Supp. 1354 (D. Ariz., 1995). A federal district judge in New Mexico ruled polygraph results admissible. U.S. v. Galbreth, 908 F. Supp. 877 (D. N.M. 1995). In U.S. v. Lech, 895 F. Supp. 582 (S.D. N.Y. 1995), polygraph results were excluded under FRE 403. Polygraph results were excluded in U.S. v. Saldar riaga, 179 F.R.D. 140 (S.D. N.Y. 1998), where the test was taken by the defendant without notice to the government. In U.S. v. Black, 831 F. Supp. 120 (E.D. N.Y. 1993), polygraph results were excluded as being unreliable. Polygraph results were excluded as being unreliable in Meyers v. Arcudi, 947 F. Supp. 581 (D. Conn. 1996). In that case polygraph results were also excluded under FRE 403, probative value outweighed by danger of prejudice.

A number of states continue their per se exclusion of polygraph results: Pulakis v. State, 476 P.2d 474 (Alaska 1970); State v. Rodriguez, 921 P.2d 643 (Ariz. 1996); State v. Duntz, 613 A.2d 224 (Conn. 1994); Davis v. State, 250 So.2d 572 (Fla. 1988); State v. Fodge, 824 P.2d 123 (Idaho 1992); Wine v. State, 637 N.E.2d 1369 (Ind. App. 4 Dist. 1994); People v. Gard, 632 N.E.2d 1026 (Ill. 1994); People v. Baynes, 430 N.E.2d 225 (Ill. 1981) (giving history of

admissibility of polygraph in Illinois and reviewing holdings from other states); State v. Womack, 592 So.2d 872 (La. App. 2 Cir 1991); State v. Ledger, 444 A.2d 404 (Maine 1982); Patrick v. State, 617 A.2d 215 (Md. 1992); Commonwealth v. Tanso, 583 N.E.2d 1247 (Mass. 1992) (Massachusetts effectively presumes non-reliability of the polygraph); Commonwealth v. Lanigan, 419 Mass. 15 (1994) (adopting Daubert); People v. Barbara, 255 N.W.2d 171 (Mich. 1977) (ruling polygraph inadmissible, but extensively discussing the state of the art at the time); State v. Opsahl, 513 N.W.2d 249 (Minn. 1994); State v. Woods, 639 S.W.2d 818 (Mo. 1982); State v. Rowe, 589 N.E.2d 394 (Oh. App. 10 Dist. 1990); Paxton v. State, 867 P.2d 1309 (Okl. Cr. 1993); Commonwealth v. Camm, 277 A.2d 325 (Pa. 1971); In re Odell;, 672 A.2d 457 (R.I. 1996); State v. Juarez, 570 A.2d 1118 (R.I. 1988); Moon v. State, 856 S.W.2d 276 (Tex. App.-Fort Worth 1993, pet. ref'd); State v. Beard, 461 S.E.2d 486 (W.Va. 1995). [The foregoing list is not exhaustive.] Wisconsin permits polygraph results in criminal cases upon stipulation by the parties. State v. Dean, 307 N.W.2d 628 (Wis. 1981).

California has Evidence Code Section 351.1 that prohibits the admission of polygraph evidence in a criminal trial, except by stipulation of the parties. See People v. Fudge, 875 P.2d 36 (Cal. 1994) (to make a constitutional attack on the rule of evidence, the defendant must proffer evidence that the polygraph is reliable). But the California Supreme Court rejected a per se exclusion of polygraph evidence as a judicially-imposed rule, back in 1982. Witherspoon v. Superior Court, 133 Cal. App.3d 24, 183 Cal. Rptr. 615 (Cal. 1982) ("It appears to us that the arguments for and against the use of the polygraph examination in evidence are simply matters of proof to be developed by the opposing sides"). Accord, People v. Harris, 767 P.2d 619 (Cal. 1989) ("[O]n a proper showing defendants must from time to time be permitted to demonstrate that advancement in a scientific technique has enhanced its reliability and acceptance in the scientific community, and to establish that the advances warrant admission of a previously excluded category of scientific evidence").

The Supreme Judicial Court of Massachusetts presents a confusing array of cases that appear to assume inadmissibility of polygraph results in criminal cases, Commonwealth v. Tanso, 583 N.E.2d 1247 (Mass. 1992); Commonwealth v. Mendes, 406 Mass. 201 (1989) (polygraph inadmissible in criminal proceedings); subject to proof in individual cases that reliability requirements are met. Commonwealth v. Stewart, 422 Mass. 385 (1996); Commonwealth v. A Juvenile, 313 N.E.2d 120 (Mass. 1974). A Massachusetts ruling on the admissibility of polygraphs in civil proceedings was not found.

In Texas, polygraph results are not admissible in criminal trials, Tennard v. State, 802 S.W.2d 678, 683 (Tex. Crim. App. 1990), cert. denied, 501 U.S. 1259 (1991), but polygraphs have been approved as a condition for probation. Ex parte Renfro, 999 S.W.2d 557 (Tex. App- Houston [14th Dist.] 1999, pet. filed). In a recent case, the Court of Criminal Appeals refused to revisit its per se exclusion of polygraphs, over the dissent of two Judges. Landrum v. State, 977 S.W.2d 586 (Tex. Crim. App. 1998) (Meyers, J., dissenting to refusal of discretionary review).

Two Texas cases have held that polygraph evidence, which was erroneously admitted at trial, "opened the door" to further inadmissible evidence regarding the polygraph results. See Lucas v. State, 479 S.W.2d 314, 315 (Tex. Crim. App.1972); Patteson v. State, 633 S.W.2d 549, 552

(Tex. App.-Houston [14th Dist.] 1982, no pet.). However, another case held that this rule applies only if the polygraph evidence was erroneously admitted over objection. Long v. State, 1999 WL 987383, *7 (Tex. App.-Texarkana Nov. 2, 1999, no pet. history).

No Texas cases were found addressing admissibility of polygraph results in civil trials.

A separate issue exists for expert opinion on credibility of other witnesses. Courts generally have held that no person is an expert on credibility. Experts are therefore not allowed to testify that in their opinion a witness is or is not telling the truth. See U.S. v. Charley, 189 F.3d 1251, 1267 (10th Cir. 1999) ("[E]xpert testimony which does nothing but vouch for the credibility of another witness encroaches upon the jury's vital and exclusive function to make credibility determinations, and therefore does not 'assist the trier of fact' as required by Rule 702"); Ochs v. Martinez, 789 S.W.2d 949 (Tex. App.--S an Antonio 1990, writ denied) (op. on reh'g); Miller v. State, 757 S.W.2d 880, 883 (Tex. App.--Dallas 1988, pet. ref'd); Black v. State, 634 S.W.2d 356, 358 (Tex. App.--Dallas 1982, no pet.). As the Court of Criminal Appeals said in Schutz v. State, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997): "Expert testimony does not assist the jury if it constitutes 'a direct opinion on the truthfulness' of a child complainant's allegations." This issue of experts commenting on the credibility of another witness is sometimes a factor in court's explaining their per se exclusion of polygraph evidence.

VII. MEDICAL MALPRACTICE EXPERTS.

A. LOCALITY RULE. Texas traditionally recognized a "locality rule" in malpractice cases. Generally stated, a plaintiff seeking to hold a physician liable for negligence at common law must prove by expert testimony that the defendant failed to act as a reasonable and prudent physician practicing in the same or similar community would have acted. Hickson v. Martinez, 707 S.W.2d 919, 925 (Tex. App.--Dallas 1985), writ ref'd n.r.e. per curiam, 716 S.W.2d 449 (Tex. 1986). This allows local physicians to set the standards against which their conduct will be measured in malpractice cases. Greene v. Thiet, 846 S.W.2d 26, 30 (Tex. App.--San Antonio 1992, writ denied). However, that rule has been altered by statute in some instances. Id., at 30-31 (in suits against physicians for failure to disclose risks of medical procedure, the locality rule has been displaced by the "reasonable person" rule of Tex. Rev. Civ. Stat. Ann. art. 4590i, § 6.02, which focuses on the disclosures which would influence a reasonable person in deciding for or against medical treatment). This statutory standard focuses on a theoretical reasonable patient, whereas the common law rule focuses on the doctor. Price v. Hurt, 711 S.W.2d 84, 87 (Tex. App.--Dallas 1986, no writ).

In Birchfield v. Texarkana Memorial Hosp., 747 S.W.2d 361, 366 (Tex. 1987), the Supreme Court said:

The purpose of the locality rule is to prevent unrealistic comparisons between the standards of practice in communities where resources and facilities might vastly differ.

The Supreme Court found that instructing the jury that negligence required comparison of a physician acting in the "same or similar circumstances" adequately set out the locality rule.

When an expert is testifying to negligence, it is not necessary to couch the opinion in terms of the locality of the defendant. Wheeler v. Aldama-Luebbert, 707 S.W.2d 213, 217 (Tex. App.--Houston [1st Dist.] 1986, no writ) (although the standard of care used by the expert is not defined in terms of "locality" or "same school," it exemplified the modern trend away from such defined standard of care). And out-of-state experts can testify to negligence. Goodwin v. Camp, 852 S.W.2d 698, 699 (Tex. App.--Amarillo 1993, no writ) (permissible for out-of-state chiropractor to testify to negligence); Hart v. Van Zandt, 399 S.W.2d 791, 798 (Tex. 1965) (trial court erred in excluding the deposition testimony of a Pennsylvania medical doctor); Johnson v. Hermann Hosp., 659 S.W.2d 124, 126 (Tex. App.--Houston [14th Dist.] 1983, writ ref'd n.r.e.) ("Doctors are no longer required to be from the same city, state, or school of practice in order to testify so long as they are equally familiar with the subject of inquiry . . .").

B. REASONABLE MEDICAL PROBABILITY. A medical expert's opinion must be based on reasonable medical probability. Whether it is, or not, must be determined by the substance and context of the opinion, not by the presence or absence of a particular term or phrase. Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497 (Tex. 1995).

C. REQUIRES EXPERTISE REGARDING SPECIFIC ISSUE. In Broders v. Heise, 924 S.W.2d 148, 153 (Tex. 1996), the Supreme Court held that an medical malpractice expert had to have "knowledge, skill, experience, training or education" regarding the specific issue before the court, in order to give expert opinion testimony. In Broders, it was held proper to exclude the testimony of an emergency room physician that calling in a neurosurgeon would have saved the patient's life. However, the Supreme Court recognized that when "a subject is substantially developed in more than one field, testimony can come from a qualified expert in any of those fields." Id. at 154. A plaintiff successfully overcame a motion for summary judgment, by using an affidavit from an orthopedic surgeon saying that a radiologist committed negligence, in Silvas v. Ghiatas, 954 S.W.2d 50 (Tex. App.--San Antonio 1997, writ denied). The court of appeals characterized the Supreme Court's holding in Broders as follows:

As our Texas Supreme Court recently held, the plaintiff's controverting expert need not be a specialist in the particular area in which the defendant-physician practices so long as his affidavit demonstrates that by virtue of his knowledge, skill, experience, training, or education regarding the specific issue before the court, his testimony would assist the jury in determining the fact issues of negligence and/or causation.

Silvas v. Ghiatas, 954 S.W.2d at 53.

D. PRETRIAL OBJECTION. In medical malpractice cases, special note must be taken of Medical Liability and Insurance Improvement Act Sec. 14.01(e), which provides that a pretrial objection to the qualifications of an expert witness on medical malpractice must be made not later than the later of the 21st day after the date the objecting party receives a copy of the witnesses' c.v. or the date of the witness's deposition. The court is supposed to rule on such objections before trial. Is "qualifications" as used in the statute different from reliability as used in Robinson and Gammill.

E. DAUBERT AND DOCTORS. The Tyler Court of Appeals rejected a Daubert attack in a medical malpractice case, in Harris v. Belue, 974 S.W.2d 386 (Tex. App.-Tyler 1998, pet. denied). The issue was whether a surgeon was negligent in allowing a staple to penetrate the bowel and cause complications. The Tyler Court of Appeals rejected a Daubert challenge on the plaintiff's expert, saying that the fact that the staple was in the wrong place "does not involve junk science using new scientific methodology to reach its conclusion. It involves logical deduction." Harris, 974 S.W.2d at 393.

VIII. CLINICAL EXPERIENCE VS. RESEARCH.

There is a developing controversy over the adequacy of clinical techniques as a basis for expert testimony. The Daubert and Robinson cases involved the kinds of observations and measurements that are somewhat demonstrable, in an experimental sense. The Daubert and Robinson factors for determining reliability are research and publication-oriented. The vast bulk of physicians and mental health professionals are practicing their art, not conducting research. These professionals survive professionally based upon the community's perception of their professional judgment and skill, and not based upon any measurement of their rate of error or the falsifiability of their theories. Admittedly the better practitioners read publications and attend conferences to stay abreast of developments, but they themselves usually conduct no organized research and publish nothing.

In Moore v. Ashland Chemical, Inc., 151 F.3d 269 (5th Cir. 1998), the Court of Appeals sitting en banc held that a treating physician's opinion on the cause of his patient's lung illness, which was not supported by research findings, was not admissible under Daubert. A spirited dissenting opinion argued that a "clinical medical expert, correctly using and applying generally accepted clinical medical methodology," should be able to express expert opinions on the cause of illness. Moore, 151 F.3d at 281. The dissenting opinion criticized the majority opinion as "adopt[ing] a mechanistic interpretation of the Daubert factors that threatens to require the exclusion from evidence of vast numbers of clinical medical opinions, although they are generally accepted as trustworthy by physicians practicing in their fields . . . . " Moore, 151 F.3d at 286.

The Second Circuit Court of Appeals affirmed a decision permitting a physician to testify to causation based on a differential etiology method and the temporal connection between a drug overdose and onset of a disease in Zuchowicz v. U.S., 140 F.3d 381 (2nd Cir. 1998). In this instance, no studies existed of persons taking high levels of the drug in question, since high doses were frequently fatal.

The Third Circuit Court of Appeals arrived at a similar conclusion in Heller v. Shaw Industries, Inc., 167 F.3d 146 (3rd Cir. 1998), saying that a differential diagnosis by the treating physician, and a close temporal relationship between exposure to a chemical and sickness, could support causation testimony. The court noted the advisory committee's note to FRE 703:

[A] physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety . . . . The physician makes life-and-death decisions in reliance on them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.

Heller, 167 F.3d at 155-156. The court specifically criticized the trial court as being "too restrictive in requiring [Plaintiff's] medical expert to rely on published studies in linking [Plaintiff's] illness with [Defendant's] product . . . . Heller, 167 F.3d at 149.

The Fourth Circuit Court of Appeals evaluated this dispute, in Westberry v. Gislaved Gummi AB, 1999 WL 317535 (4th Cir. March 3, 1999). The court, writing after the U.S. Supreme Court had decided Kuhmo Tire Co., held that a treating physician using a conventional differential diagnoses technique should be permitted to testify to the cause of a patient's aggravated sinus condition. The Court observed:

Differential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated . . . . A reliable differential diagnosis typically, though not invariably, is performed after "physical examinations, the taking of medical histories, and the review of clinical tests, including laboratory tests," and generally is accomplished by determining the possible causes for the patient's symptoms and then eliminating each of these potential causes until reaching one that cannot be ruled out or determining which of those that cannot be excluded is the most likely.

Westberry, 1999 WL 317535 at *4. The court noted that differential diagnosis has widespread acceptance and has been peer reviewed. Id. At *4. The court notes, however, that a poorly done differential diagnosis would not support the admission of an expert opinion.

IX. DSM-IV DIAGNOSES. The DSM-IV is the American Psychiatric Association's manual of mental disorders. It sets up a scheme for diagnosing mental disorders that is used in America.

A. SUBJECTIVITY OF MENTAL HEALTH OPINIONS. The following passage is taken from Section 3-3.05 of the Expert Witness Manual published in August 1999 by the Family Law Section of the State Bar of Texas. Copies of the Manual can be purchased by calling 1-800-283-8099. See http://www.expert-witness-manual.com.

Many forms of human health are susceptible to concrete diagnosis,[9] etiology,[10] and prognosis.[11] 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.[12] 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.[13] 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. ADMISSIBILITY OF DSM DIAGNOSES. The following text is taken from the Expert Witness Manual, Chapter 3-9.

3-9:3(4) Legal Reliability

Evaluating the legal reliability of DSM-IV diagnoses involves three issues: (1) the legitimacy of the mental disorder classification in question, with its diagnostic criteria; (2) the legitimacy of the diagnostic method of information gathering and analysis through which the clinician is supposed to reach the diagnosis of a mental disorder; (3) whether the clinician correctly followed the diagnostic method in the particular case. If these three methodology issues are resolved favorably, the correctness of the diagnosis is issue for the finder of fact, not an admissibility question for the court.[14]

3-9:4 DSM-IV's Scheme of Mental Disorders

3-9:4(1) General Acceptance

DSM-IV has been generally accepted for clinical and research purposes. Health insurance companies require a DSM diagnosis before paying for mental health care, so mental health practitioners develop a DSM diagnoses in every case involving insurance.[15] The U.S. Department of Veterans Affairs has adopted the DSM-IV nomenclature as the basis for rating disabilities.[16]

Despite DSM-IV's wide acceptance, some mental health professionals have stated concerns about the validity of the DSM approach to mental health. Theodore Millon has criticized the "use of categorical taxa," which he says contribute to "the fallacious belief that psychopathological processes constitute discrete entities, even medical diseases, when in fact they are merely concepts that help focus and coordinate our observations."[17] Millon also expressed his concern that "categories often fail to identify or include significant aspects of behavior because

of the decision to narrow their list to a set of predetermined characteristics."[18] Millon also noted problems in assigning many patients to the limited categories available, and indicated that clinicians often say that the more they know about a patient, the harder it is to fit the patient into a diagnostic category.[19]

R. Carson has suggested that DSM's popularity is due to its sponsorship by the medical community and that psychiatry "may have much to lose by conceding that disorders of behavior, with rare exceptions, bear very little relation to diseases."[20]

Marc Ackerman calls mental health diagnoses "explanatory fictions," which are used to permit meaningful discussion but which lack the specificity or accuracy "one would hope to have."[21] Ackerman suggests "it is rarely possible to make a highly specific, highly reliable, highly valid diagnosis using the manual."[22] One side-effect of this situation is that mental health professionals who are comparing diagnostic conclusions "may come to different diagnostic conclusions."[23] Ackerman also notes criticism by others that DSM-IV was produced too quickly and too soon.[24]

Clinician Mary Margaret Hart made some interesting observations about the DSM-IV approach.[25] Hart noted that mental health professionals are trained to relate patients to the body of professional knowledge through use of diagnostic categories. These categories were developed to help identify patterns of behavior, emotions, and thinking, which indicate identifiable and distinct problems that can be linked to appropriate treatment plans. By agreeing upon a diagnostic framework, mental health professionals can share information about human problems and treatment using a common language. To produce order in all the complexity it was necessary for the authors to designate what information is significant and what questions are relevant. In making these decisions, information that was not included was rendered insignificant. This exclusion of information usually operated by default, without deliberate or explicit rejection. This leads to "blind spots" in professional thinking, where relevant information is unknowingly disregarded.[26]

Hart noted that DSM-IV provides a set of "commonly agreed-upon criteria for conditions which can be recognized with consistency and are clearly distinguished from one another." She notes the assumption that if a condition can be accurately identified, the professional will be better able to apply treatment. The common criteria also facilitate research.[27]

Admitting that the DSM categories provide a useful reference point for defining areas of agreement and disagreement, Hart notes criticism of the schematic classification. The categories and diagnostic criteria were largely the product of a particular subgroup within the mental health field (i.e., psychiatrists), which subscribes to a medical view of mental functioning. While more non-medical people were involved in the creation of DSM-IV than in earlier versions of the Manual, Hart contends that the further these professional groups were away from the traditional medical model, the less voice they had.[28] This limited the final product by restricting the information used to create it to a universe of information which psychiatry as a whole considered relevant and with which it was comfortable. The Manual views human suffering in terms of diseases and disorders of the individual. Diagnostic categories were not, for example, organized

in terms of "disordered relationship patterns" (such as "shame-based disorders" or "disorders relating to the abuse of power"), or painful individual consequences of social and cultural norms (such as "social class related disorders" or "bias and discrimination related disorders"). According to Hart, such alternative categories, while not necessarily improvements, would lead to consideration of information less relevant to a medical perspective but more relevant to life experiences.[29]

Hart also noted that the diagnostic criteria in DSM-IV are "not even an objective reflection of a unified medical perspective." The mental health field includes a multitude of theoretical perspectives, so that DSM-IV was a compromise, a framework that was inclusive and allowed for common definitions across the different doctrines. DSM-IV was also influenced by factors which Hart describes as being "outside the realm of professional discourse and which are not acknowledged openly in either the categories or the official discussion of the development of the conceptual framework . . . .[30]

Hart also challenged the role of "cultural variation," which the Introduction to DSM-IV said should be "taken into account," but without suggestion on how to do so. Hart suggests that DSM-IV minimizes the cultural limits of the diagnostic system by excluding cultural variations from the diagnostic categories and criteria, and relegating them to an appendix.[31]

The DSM-IV Guidebook addresses criticisms of the DSM approach in a section entitled "Why Classify Mental Disorders?" It acknowledges that some have argued that psychiatric classification is misguided, or even that classification is more detrimental to the patient that it is worth. Some of the criticism is dismissed as antipsychiatric grumbling. The Guidebook lists four "reasonable concerns" that: (1) being assigned a psychiatric label can stigmatize the person; (2) a person who receives such a label may act in accord with it; (3) the label "stresses a reductionist commonality at the expense of a broader and more humanistic appreciation of individual differences"; and (4) the diagnostic system is overbroad and labels normal behavior and moral failings.[32] The Guidebook acknowledges and "embraces" each of these concerns, but concludes that on balance, the classification scheme's "enormous benefits" outweigh these negatives.[33] The DSM-IV Guidebook notes, however:

There has been an unfortunate tendency, especially in the popular press, to label DSM-IV as the "bible" of psychiatry. Although DSM-IV is extremely useful, we should not be too wedded to the current diagnostic system. Bibles are meant to embody an absolute truth that transcends the generations. In contrast, DSM-IV represents a way of organizing psychiatric knowledge circa 1994. The manual was prepared with the full hope and expectation that it contains the tools for generating the new knowledge that will render it obsolete.[34]

Despite general acceptance of the DSM-IV scheme of classifying mental disorders, certain disorders in DSM-IV are more controversial, and the decision not to include certain diagnoses in DSM-IV is controversial.

Appendix B to DSM-IV is a sort of mid-ground for diagnoses which lacked sufficient information to be included as "official" diagnostic categories in the DSM-IV.[35] These criteria

sets were included in the Appendix to stimulate research and thus, hopefully produce "refinement of the criteria sets."[36]

Kenneth Fuller, who wrote a book review of DSM-IV and its companion volumes for the New England Journal of Medicine, pointed out that DSM-IV is not a bible of psychiatric classification. He mused that psychiatric classification was in its "toddlerhood," and that "[g]uided by published and reproducible standards, psychiatric classification can regroup in its adolescence, reach a solid basis, and be on par with the rest of medicine."[37]

A possible problem of overinclusiveness of DSM has arisen. Two major studies of large numbers of Americans, conducted from 1980-1985 and in the 1990's reflected a surprisingly high degree of what the DSM would categorize as "psychopathology" in our society. In the first study (ECA),[38] figures reflected that 28% of the representative sample reported symptoms within the prior year that met the diagnostic criteria for mental disorders, and 44% reported symptoms warranting a mental disorder diagnosis at some time in their lives.[39] In the second study (NCS),[40] figures reflected that 29% met the criteria for some mental disorder in the prior year, while 48% reflected a mental disorder at some time in their lives.[41] One group of authors noted that "[t]he high estimates of lifetime disorders that have recently emerged from the NCS and from the . . . ECA raise questions about the clinical significance of all these disorders in such a large proportion of the population." They go on to note: "In the current U.S. climate of determining the medical necessity for care in managed health care plans, it is doubtful that 28% or 29% of the population would be judged to need mental health treatment in a year."[42] The authors hypothesize that many of the persons in these studies who met the diagnostic criteria for mental disorders were manifesting "transient homeostatic responses to internal or external stimuli that do not represent true psychopathologic disorders"[43]--meaning that they were reacting in an appropriate way to problems in their lives.[44] The authors suggest that DSM-IV diagnostic criteria should be changed to include "additional severity, impairment, comorbidity, and duration criteria," to define a narrower group of people who need psychotherapy.[45]

3-9:4(6) DSM-IV Reliability Summary[46]

It is very difficult, even for the scholarly clinician, to know what reliability studies have and have not been conducted on different DSM-IV criteria. These reliability studies are sparse and randomly scattered throughout professional literature. For example, if a clinician in a forensic setting found that a patient meet the diagnostic criteria of a "Bizarre Delusion" she or he would then need to review the Sourcebook and social science literature to research the reliability and validity of this criteria set. Using this example, the clinician would find a few scattered articles, one of which would be an empirical study indicating that the reliability ratings using this category have been found to be "less than satisfactory for clinical practice."[47] The clinician would then have to judge whether to proceed with the diagnosis or do so with a precautionary warning that the diagnosis had a weak foundation.

3-9:4(7) Statistical Analysis for Reliability[48]

It should be noted that the statistical analysis (kappa) for determining reliability in the DSM has been criticized. A kappa coefficient measures the proportion of agreement above that

which would have occurred by chance.[49] This statistical analysis is purported to be particularly vulnerable to low base rates; thus it may over or under estimated true rates of agreement for conditions which occur infrequently (low base rate). When interpreting reliability studies, a kappa of "0" would indicate chance agreement. On this continuum, a kappa of ".40" is considered poor agreement, ".70" is considered good agreement, and "+1.00" is perfect agreement.[50]

3-9:4(9) Use in Courts

DSM-I (1952) made no reference to use of the manual in court proceedings.[51] DSM-II (1968) noted that the manual would be used "in consultations to courts."[52] DSM-III (1980) warned that use of the manual "for non-clinical purposes, such as determinations of legal responsibility, competency or insanity, or justification for third-party payment, must be critically examined in each instance within the appropriate institutional context."[53] In DSM-III-R (1987), the manual warned that inclusion of a diagnostic category in the manual

does not imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder, or mental disability. The clinical and scientific considerations involved in categorization of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as responsibility, disability, determination, and competency.[54]

DSM-IV (1994) was even more cautionary:

When the DSM-IV categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis.[55]

This DSM-IV warning was cited by the Texas Supreme Court in S.V. v. R.V.,[56] while rejecting the use of a PTSD diagnosis to prove that a woman was sexually abused as a child. One Texas court nonetheless equated a statutory term, "incurable insanity," with DSM-IV's Brief Psychotic Disorder.[57]

Diagnoses of DSM-IV mental disorders are routinely accepted in litigation involving Veterans Administration disability, since the Department of Veterans Affairs has adopted the DSM-IV nomenclature as the basis for rating disabilities.[58]

On occasion, appellate courts have taken judicial notice of the diagnostic standards in DSM.[59] The Ninth Circuit Court of Appeals accepted the DSM-III's mental disorders as being capable given the facts, of constituting "reduced mental capacity" for federal sentencing purposes.[60]

One Texas court, in America West Airlines, Inc. v. Tope,[61] rejected on reliability grounds a PTSD[62] diagnosis made by a mental health practitioner based upon DSM-III criteria, where the diagnosis was based on the patient's report of symptoms and was unsupported by psychological testing.[63] The court noted that, when asked how the diagnosis could be verified

or tested, the psychotherapist said only that you could ask the patient if he was suffering the indicated symptoms.[64] The implications of Tope are profound, in that the reason the court found the diagnosis unreliable goes to the very core of diagnosing under DSM. The diagnoses in DSM are all based upon patient reports of symptoms, with no prescription for psychological testing.[65] If self-reported symptoms cannot support a diagnosis, then in many instances a DSM diagnosis will not be suitable for courtroom use.[66] The court in Tope also noted that, when asked about peer review of her methods, the psychotherapist could suggest only acceptance of her DSM-III diagnoses by insurance companies.[67] The court recognized the general acceptance of DSM-III diagnostic methods by the psychological community, but said this was for the non-judicial purpose of therapy. The appellate court, in the last analysis, rejected the diagnosis as being "subjective, based upon Tope's statements, and could be tested only by asking him again about his symptoms."[68] Note that the reliability issue that was fatal in Tope involved the diagnostic process, and not the diagnostic category.

Under FRE 704(b) an expert witness cannot state an opinion or inference as to whether the defendant had the mental state or condition constituting the element of the crime, or a defense.[69] In one case, the Second Circuit Court of Appeals refused to permit an expert to testify that a defendant had Dependent Personality Disorder with narcissistic features, offered to make more plausible the defendant's testimony that she did not know certain computer equipment was stolen by her boyfriend.[70] In another case, psychological testimony was admitted as to the defendant's motive, as distinguished from his intent to commit the crime.[71]

One federal district court, in considering a Daubert challenge that a social worker misdiagnosed a party under DSM-IV, ruled that the challenge attacked the expert's conclusions, not the underlying methodology (i.e., the diagnostic criteria and diagnostic method of DSM-IV), and thus was a question of credibility and not admissibility.[72]

X. PSYCHOLOGICAL SYNDROMES. The following passages are taken from Chapter 3-29 of the Expert Witness Manual.

3-29:1 What is a Syndrome?

As mentioned in Chapter 3-5, a syndrome is a collection of related symptoms, cluster of traits, or behavior patterns.[73] Over the past few decades, certain psychological syndromes have emerged that are said to be associated with specific events or mental conditions. Experts who use this type of syndrome evidence[74] in a forensic setting usually assert that specific symptoms, findings, and/or patterns of responses are associated with specific traumatic events. They say that the presence or absence of these indicators of syndromes support or oppose a claim of injury or abuse, or help to explain confusing or illogical behaviors exhibited by a person claiming injury.

3-29:2 Sources of Authority

The DSM-IV does not include any of these psychological syndromes. Some experts nonetheless claim reliance on the DSM-IV by attempting "to fit" the syndrome testimony within the diagnostic criteria of Anxiety Disorders,[75] Dissociative Disorders,[76] or even Adjustment

Disorders.[77]. When syndrome evidence and DSM-IV diagnostic labels are combined to support a conclusion that specific syndromes are caused by specific past events, caution is indicated. This may be an effort to "borrow" legitimacy for the syndrome from the DSM-IV. Additionally, a DSM-IV diagnosis is descriptive and most of the descriptive diagnoses do not support or suggest a cause.[78]

To determine the legal reliability of syndrome testimony, one must examine the legitimacy of the syndrome itself, as well as the decision to find that a syndrome exists in a particular case, and the legitimacy of inferences that can be drawn from that determination. One must have knowledge of the research underpinnings of the syndrome in order to correctly gauge the probative value of such evidence. And there is always a question as to the relevance of the syndrome testimony to the matters at issue in the case.

The following chapters review several syndromes that commonly arise in expert testimony involving criminal, family law, and tort litigation. A general description and history of the syndrome is provided. The syndrome is then critically reviewed, followed by a synopsis of relevant case law and ideas on seeking and opposing admission of evidence about the syndrome.

XI. RECOVERED MEMORY. Courts are increas-
ingly faced with testimony of witnesses about their recollection of events that has been enhanced or "recovered" through hypnosis. In Borawick v. Shay, 68 F.3d 597 (2nd Cir. 1995), cert. denied, 116 S. Ct. 1869, 134 L.Ed.3d 966 (1996), the court held that it was not error to exclude "recovered memory" testimony of a 38-year old woman regarding her recollection of being sexually abused 30 years before by her aunt and uncle. The court considered the hypnotherapist's lack of qualifications, and failure to keep audiotapes or videotapes that could demonstrate whether the hypnotherapist had been suggestive in his approach. The Court adopted a "totality-of-the-circumstances" approach, as had the Eighth and Fourth Circuit Courts of Appeals. The Texas Supreme Court considered the "recovered memory" technique in connection with the discovery rule, in S.V. v. R.V., 933 S.W.2d 1 (Tex. 1996). In that case, the majority of the Court held that the discovery rule did not apply to allegedly recovered memories of childhood sex abuse, because expert opinions, and the victim's testimony based upon recovered memory, were not objectively verifiable. Justice Gonzalez concurred, saying that the expert testimony regarding repressed memories did not meet the guidelines for admissibility of scientific expert opinions set out in DuPont v. Robinson. Justice Cornyn, in his concurring opinion, agreed with Justice Gonzalez, saying that Robinson will result in the exclusion of all uncorroborated repressed memories of childhood sexual abuse.

Repressed and recovered memories were the subject of two hour a telephone CLE event held at noon on October 21, 1999. The topic was Psychological Syndromes: Substance or Smoke Screen? Discussing Battered Woman Syndrome, Child Sexual Abuse Accommodation Syndrome; Repressed Memory Syndrome; False Memory Syndrome. The panelists were Moderator, attorney Richard R. Orsinger, San Antonio; psychologist Jan Marie DeLipsey, Ph.D., Dallas; psychologist and attorney R. Christopher Barden, North Salt Lake, Utah; attorney Georganna Simpson, Dallas; and Judge Bonnie Hellums, 247th Dist. Court, Harris County. Copies of this two hour broadcast can be purchased for $50.00 from KRM Information Services, Inc., P.O. Box 1187, Eau Claire, WI 54702, (800) 775-7654 (Telephone), (800) 676-0734 (Telefax).

The topic will be revisited on 2/17/2000, from noon to 2:00pm, in connection with a State Bar of Texas Expert Witness telephone CLE entitled, Recovered Memory/False Memory: Valid or Voodoo? Panelists will be Moderator, Richard R. Orsinger, Attorney at Law, San Antonio; psychologist Jan Marie DeLipsey, Ph.D., Dallas; a nationally-recognized authority yet to be named, and Judge Dean Rucker, 318th Dist. Ct., Midland County, Texas.

A copy of the schedule of the 13-part series on expert witnesses is attached to this article.

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 [tape available]

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 [tape available]

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, San Antonio
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 12/16/99 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 1/20/00 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
Duke Hooten, TDPRS, Boerne
Jan Marie DeLipsey, Ph.D., Dallas

Ed Silverman, Ph.D., Houston
_____, [Nationally-Recognized Authority]

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
_____ [Nationally-Recognized Authority]
Hon. Dean Rucker, 318th Dist. Ct., Midland County

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. Jim Squire, 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
Stewart Gagnon, Attorney at Law, Houston
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, Munchaussen Syndrome by Proxy, etc.

Panelists: Moderator: Duke Hooten, TDPRS,
Boerne
Nancy Kellog, MD, San Antonio
_____, Criminal Defense Attor-
ney, _____
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, Attor
ney at Law, San Antonio
Dan Hanke, CPA, San Antonio
Doug Fejer, CPA, Dallas
Hon. Jim Squire, 312th Dist. Ct., Harris
County

[1] Fed. R. Evid. 702; Tex. R. Evid. 702.
[2] Broders v. Heise, 924 S.W.2d 148, 149 (Tex. 1996).
[3] Broders v. Heise, 924 S.W.2d 148, 151 (Tex. 1996).
[4] Broders v. Heise, 924 S.W.2d 148, 151 (Tex. 1996).
[5] 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 HOULR 797].
[6] Broders v. Heise, 924 S.W.2d 148, 153 (Tex. 1996), citing Christopherson v. Allied Signal Corp., 939 F.2d 1106, 1112-1113 (5thCir.), cert. denied, 503 U.S. 912, 112 S. Ct. 1280, 117 L.Ed.2d 506 (1992).
[7] Broders v. Heise, 924 S.W.2d 148, 153 (Tex. 1996).
[8] 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].
[9] "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 (2nd Ed. 1989).
[10] "Etiology" means the study of the cause of a condition.
[11] "Prognosis" is the prediction of the course or outcome of a disease or condition.
[12] See Jenson v. Evelth Taconite Co., No. 5-88-163 (D.C. Minn. March 28, 1996) [1996 U.S. Dist. LEXIS 17978, p. 36].
[13] 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.
[14] However, even a legally reliable diagnosis is admissible only if it is relevant to an issue in the case. Because of the poor correlation between mental disorders, and legal issues (e.g., insanity, severe emotional distress, etc.), even legally reliable diagnoses may not be relevant.
[15] DSM-IV is used by more than 500,000 mental health professionals in the United States. Peter E. Nathan, In the Final Analysis, It's the Data that Counts, 4 Clin. Psychol.: Sc. & Pract. 282 (1997). But is it used for therapy, or for purposes of reimbursement?
[16] 38 CFR §§ 4.125 & 4.130 (7-1-97 Ed.). The Regulation did not, however, expressly adopt DSM-IV's diagnostic criteria, or the multi-axial diagnostic concept, or the diagnostic process endorsed by the DSM-IV Casebook.
[17] Theodore Millon, Classification in Psychopathology: Rationale, Alternatives, and Standards, 100 J. Abnormal Psychol. 245, 255 (1991), quoted in Ackerman & Kane, Psychological Experts in Divorce Actions 802 (3d ed. 1998).
[18] Theodore Millon, Classification in Psychopathology: Rationale, Alternatives, and Standards, 100 J. Abnormal Psychol. 245, 255 (1991), quoted in Ackerman & Kane, Psychological Experts in Divorce Actions 802 (3d ed. 1998).
[19] Theodore Millon, Classification in Psychopathology: Rationale, Alternatives, and Standards, 100 J. Abnormal Psychol. 245, 255 (1991), quoted in Ackerman & Kane, Psychological Experts in Divorce Actions 802 (3d ed. 1998).
[20] R. Carson, Dilemmas in the Pathway of the DSM- IV, 100 J. Abnormal Psychol. 302-03 (1991), quoted in Ackerman & Kane, Psychological Experts in Divorce Actions 802 (3d ed. 1998).
[21] Ackerman & Kane, Psychological Experts in Divorce Actions 803 (3d ed. 1998).
[22] Ackerman & Kane, Psychological Experts in Divorce Actions 803 (3d ed. 1998).
[23] Ackerman & Kane, Psychological Experts in Divorce Actions 803 (3d ed. 1998).
[24] Ackerman & Kane, Psychological Experts in Divorce Actions 802 (3d ed. 1998).
[25] Mary Margaret Hart, "Clinical Perspective: Thinking Beyond the Office," in Student Material to Victim Empowerment: Bridging the Systems Mental Health and Victim Service Providers, <http://www.ojp.usdoj.gov/ovc/infores/student> [11-21-98].
[26] Mary Margaret Hart, "Clinical Perspective: Thinking Beyond the Office," p. 1, in Student Material to Victim Empowerment: Bridging the Systems Mental Health and Victim Service Providers, <http://www.ojp.usdoj.gov/ovc/infores/student> [11-21-98].
[27] Mary Margaret Hart, "Clinical Perspective: Thinking Beyond the Office," p. 2-3, in Student Material to Victim Empowerment: Bridging the Systems Mental Health and Victim Service Providers, <http://www.ojp.usdoj.gov/ovc/infores/student> [11-21-98].
[28] "For instance, social workers have not had the influence that clinical psychologists have

had, and voices from outside the recognized mental health professions (such as victim service advocates or community advocates) have only had an impact on the process indirectly, and only to the extent that they have been heard by and have affected the 'insider' participants in the development process." Mary Margaret Hart, "Clinical Perspective: Thinking Beyond the Office," p. 3, in Student Material to Victim Empowerment: Bridging the Systems Mental Health and Victim Service Providers, <http://www.ojp.usdoj.gov/ovc/infores/student> [11-21-98].

[29] Mary Margaret Hart, "Clinical Perspective: Thinking Beyond the Office," p. 3, in Student Material to Victim Empowerment: Bridging the Systems Mental Health and Victim Service Providers, <http://www.ojp.usdoj.gov/ovc/infores/student> [11-21-98].

[30] Mary Margaret Hart, "Clinical Perspective: Thinking Beyond the Office," in Student Material to Victim Empowerment: Bridging the Systems Mental Health and Victim Service Providers, <http://www.ojp.usdoj.gov/ovc/infores/student> [11-21-98]. Hart included in unspoken influences the "social and economic interests of the different mental health professions, and the class and power differences between professionals and patients." Id. at 3.

[31] Mary Margaret Hart, "Clinical Perspective: Thinking Beyond the Office,"p. 2, in Student Material to Victim Empowerment: Bridging the Systems Mental Health and Victim Service Providers, <http://www.ojp.usdoj.gov/ovc/infores/student> [11-21-98].

[32] DSM-IV Guidebook 23.

[33] DSM-IV Guidebook 23.

[34] DSM-IV Guidebook 476.

[35] DSM-IV 703.

[36] DSM-IV 703.

[37] A. Kenneth Fuller (MD), Book Review, 331 New England Journal of Medicine (Oct. 27, 1994) [http://www.nejm.org/content/1994/0331/0017/1163 OæAâAæA http://www.expert-witness-manual.com.

[38] The Epidemiologic Catchment Area (ECA) study is discussed in Chapter 3-6.

[39] Darrel A. Regier (MD, MPH), Charles T. Kaelber (MD, DrPH), Donald S. Rae (MA), Mary E. Farmer (MD, MPh), Barbel Knauper, PhD, Ronald C. Kessler (PhD), Grayson S. Norquist (MD, MSPH), Limitations of Diagnostic Criteria and Assessment Instruments for Mental Disorders, 55 Archives of General Psychiatry 109-115 (Feb. 1998) [http://www.ama-assn.org/sci-pubs/journals/archive/psyc/vol_55/no_2/ynv6145a.htm] [7-11-99].

[40] The National Comorbidity Survey (NCS) is discussed in Chapter 3-6.

[41] Darrel A. Regier (MD, MPH), Charles T. Kaelber (MD, DrPH), Donald S. Rae (MA), Mary E. Farmer (MD, MPh), Barbel Knauper, PhD, Ronald C. Kessler (PhD), Grayson S. Norquist (MD, MSPH), Limitations of Diagnostic Criteria and Assessment Instruments for Mental Disorders, 55 Archives of General Psychiatry 109-115 (Feb. 1998) [http://www.ama-assn.org/sci-pubs/journals/archive/psyc/vol_55/no_2/ynv6145a.htm] [7-11-99].

[42] Darrel A. Regier (MD, MPH), Charles T. Kaelber (MD, DrPH), Donald S. Rae (MA), Mary E. Farmer (MD, MPh), Barbel Knauper, PhD, Ronald C. Kessler (PhD), Grayson S. Norquist (MD, MSPH), Limitations of Diagnostic Criteria and Assessment Instruments for Mental Disorders, 55 Archives of General Psychiatry 109-115 (Feb. 1998) [http://www.ama-assn.org/sci-pubs/journals/archive/psyc/vol_55/no_2/ynv6145a.htm] [7-11-99].

[43] Darrel A. Regier (MD, MPH), Charles T. Kaelber (MD, DrPH), Donald S. Rae (MA), Mary E. Farmer (MD, MPh), Barbel Knauper, PhD, Ronald C. Kessler (PhD), Grayson S. Norquist (MD, MSPH), Limitations of Diagnostic Criteria and Assessment Instruments for

Mental Disorders, 55 Archives of General Psychiatry 109-115 (Feb. 1998) [http://www.ama-assn.org/sci-pubs/journals/archive/psyc/vol_55/no_2/ynv6145a.htm] [7-11-99].
[44] Darrel A. Regier (MD, MPH), Charles T. Kaelber (MD, DrPH), Donald S. Rae (MA), Mary E. Farmer (MD, MPh), Barbel Knauper, PhD, Ronald C. Kessler (PhD), Grayson S. Norquist (MD, MSPH), Limitations of Diagnostic Criteria and Assessment Instruments for Mental Disorders, 55 Archives of General Psychiatry 109-115 (Feb. 1998) [http://www.ama-assn.org/sci-pubs/journals/archive/psyc/vol_55/no_2/ynv6145a.htm] [7-11-99].
[45] Darrel A. Regier (MD, MPH), Charles T. Kaelber (MD, DrPH), Donald S. Rae (MA), Mary E. Farmer (MD, MPh), Barbel Knauper, PhD, Ronald C. Kessler (PhD), Grayson S. Norquist (MD, MSPH), Limitations of Diagnostic Criteria and Assessment Instruments for Mental Disorders, 55 Archives of General Psychiatry 109-115 (Feb. 1998) [http://www.ama-assn.org/sci-pubs/journals/archive/psyc/vol_55/no_2/ynv6145a.htm] [7-11-99]
[46] Author: Jan Marie DeLipsey, Ph.D., 4514 Travis Street, Suite 211, Dallas, Texas 75205.
[47] Robert Nicholson, Interrater Reliability of Ratings of Delusions and Bizarre Delusions, 152 American Journal of Psychiatry 1804 (1995).
[48] Author: Jan Marie DeLipsey, Ph.D., 4514 Travis Street, Suite 211, Dallas, Texas 75205.
[49] Thomas Oltmanns & Robert Emery, Abnormal psychology 121 (Prentice-Hall 1995).
[50] Thomas Oltmanns & Robert Emery, Abnormal psychology 121 (Prentice-Hall 1995).
[51] Daniel W. Shuman, The Diagnostic and Statistical Manual of Mental Disorders in the Courts, 17 Bull. Am. Acad. Psychiatry Law 25 (1989).
[52] Daniel W. Shuman, The Diagnostic and Statistical Manual of Mental Disorders in the Courts, 17 Bull. Am. Acad. Psychiatry Law 25 (1989).
[53] Daniel W. Shuman, The Diagnostic and Statistical Manual of Mental Disorders in the Courts, 17 Bull. Am. Acad. Psychiatry Law 25 (1989).
[54] Daniel W. Shuman, The Diagnostic and Statistical Manual of Mental Disorders in the Courts, 17 Bull. Am. Acad. Psychiatry Law 25, 25-26 (1989).
[55] DSM-IV xxiii.
[56] S.V. v. R.V., 933 S.W.2d 1, 18-19 (Tex. 1996).
[57] National Union Fire Ins. Co. v. Burnett, 968 S.W.2d 950, 954 (Tex. App.--Texarkana 1998, no writ) (citing to DSM-IV p. 304). Why the court focused upon Brief Psychotic Disorder (which lasts at least 1 day but not more than 1 month), instead of other longer-lasting psychotic disorders, as the measure of "incurable insanity" is not explained. The case reflects a need for lawyers and courts to have a more sophisticated understanding of mental health theory and terminology before equating them to legal concepts.
[58] 38 CFR §§ 4.125 & 4.130 (7-1-97 Ed.). The Regulation did not, however, expressly adopt the multi-axial diagnostic approach, or DSM-IV's diagnostic criteria.
[59] U.S. v. Johnson, 979 F.2d 396, 401 (6th Cir. 1992); U.S. v. Cantu, 12 F.3d 1506, 1509 n.1 (9th Cir. 1993); U.S. v. Murdoch, 98 F.3d 472, 479 (9th Cir. 1996) (concurring Justice took judicial notice of DSM-IV).
[60] U.S. v. Cantu, 12 F.3d 1506, 1512-13 (9th Cir. 1993) (involving PTSD).
[61] America West Airlines, Inc. v. Tope, 935 S.W.2d 908 (Tex. App.--El Paso 1996, no writ).
[62] "PTSD" is Posttraumatic Stress Disorder. The subject is discussed in Chapter 3-19.
[63] America West Airlines, Inc. v. Tope, 935 S.W.2d 908, 917-18 (Tex. App.--El Paso 1996, no writ). The court also noted that the psychotherapist did not take notes during sessions, and did not ascribe to a particular school of thought regarding treatment for PTSD.

[64] This, of course, is true in most psychotherapy encounters. The psychotherapist could have suggested an investigation of the patient's daily life, through interviews with others who might be able to attest to the symptoms. This type of investigation goes beyond the scope of normal psychotherapy. If Tope is correct, then this type of corroborating evidence may be needed to buttress an expert's diagnosis.
[65] This may not be surprising, since DSM is written by physicians, who practice psychotherapy based on patients' report of symptoms and not based on psychological testing, which most physicians are not qualified to conduct. It should be noted that psychological testing is itself little stronger, if any, than patient reporting of symptoms, from a Daubert-reliability point-of-view. Also, there is no psychological litmus test to diagnose PTSD.
[66] Such an approach could also lead to the exclusion of so-called "objective" psychological tests, which are in essence a self-reporting of the patient's views of his or her personality. However, a diagnosis based primarily upon clinical interview could be buttressed by other evidence of the patient's symptoms or behavior which supports the self-reporting.
[67] America West Airlines, Inc. v. Tope, 935 S.W.2d 908, 917-18 (Tex. App.--El Paso 1996, no writ). It appears that the appellate court fused into one inquiry peer-review support for the psychotherapist's methods of diagnosing conditions and peer-review support for her methods of treatment. The latter are independent from the former, and deficiencies in treatment techniques should not affect the admissibility of the underlying diagnosis.
[68] America West Airlines, Inc. v. Tope, 935 S.W.2d 908, 919 (Tex. App.--El Paso 1996, no writ). The court further listed the fact that peer review of the psychotherapist's method was limited, she had not published, and the rate of error of her diagnosis was wholly unexplored. Id. The holding in Tope was that the trial court did not abuse its discretion in excluding the testimony. One cannot tell whether admitting the evidence on these facts would have been an abuse of discretion.
[69] Civil litigants do not suffer the same disability, making criminal cases somewhat distinguishable from civil cases on this issue.
[70] U.S. v. DiDomenico, 985 F.2d 1159, 1161 (2nd Cir. 1993).
[71] U.S. v. Towns, 19 F. Supp.2d 67, 72 (W.D.N.Y. 1998).
[72] Sims v. Medical Center of Baton Rouge, Inc., No. Civ. A. 96-3371 (U.S. Dist. Ct. E.D. La. Aug. 22, 1997) [1997 WL 527330].
[73] James P. Chaplin, Dictionary of Psychology 458 (Dell: New York) (1985). The DSM-IV Guidebook defines "syndrome" as "a group or pattern of symptoms, affects, thoughts, and behaviors that tend to appear together in clinical presentations." See also the DSM-IV Guidebook 16-17.
[74] E.g., child sexual abuse accommodation syndrome, and battered woman's syndrome.
[75] According to the DSM-IV, "Posttraumatic Stress Disorder is characterized by re-experiencing of an extremely traumatic event accompanied by symptoms of increased arousal and by avoidance of stimuli associated with the trauma." DSM-IV 393. "Acute Stress Disorder is characterized by symptoms similar to those of Posttraumatic Stress Disorder that occur immediately in the aftermath of an extremely traumatic event." DSM-IV 393.
[76] Dissociative Disorders involve "a disruption in the usually integrated functions of consciousness, memory, identity, or perception of the environment." DSM-IV 477.
[77] According to the DSM-IV, "[t]he essential feature of an Adjustment Disorder is the development of clinically significant emotional or behavioral symptoms in response to an

identifiable psycho social stressor or stressors." DSM-IV 623.

[78] "Nonclinical decision makers should also be cautioned that a diagnosis does not carry any necessary implications regarding the causes of the individual's mental disorder or its associated impairments." DSM-IV xxiii.