

Professional Experience vs. Scientific Testimony

Applying *Daubert* to Michigan Mental Health Experts

By Robert Henley Woody



For a variety of legal issues, there is reliance on expert testimony from mental health professionals such as psychologists, psychiatrists, mental health counselors, clinical social workers, and marriage and family therapists. The unique nature of mental health services necessitates that attorneys be mindful of distinctive caselaw and strategies for effective use of mental health testimony. This article traces the legal standards derived from appellate cases and offers practical suggestions for qualifying or impeaching Michigan mental health professionals for providing expert testimony.

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Fast Facts

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ethics, practice guidelines, and position statements promulgated by mental health professional associations are commonly supported by regulatory agencies (e.g., when a state licensing board responds to a complaint from a service user or consumer). Among other things, mental health practitioners should avoid multiple roles, such as providing clinical services to clients or patients while also providing expert testimony or consultation to an attorney. Put simply, practitioners should have a singular, well-defined role for involvement in legal proceedings. As will be justified in the appellate cases referred to subsequently, contemporary use of mental health professionals is, for all practical purposes, framed as being a “behavioral science educator,” although offering opinions derived from scholarly information such as research may be appropriate.

Professional experience

Historically, professional experience was the *sine qua non* to qualify as an expert witness on mental health. It was common to give emphasis to the witness having provided clinical services relevant to the psychological characteristics of the parties in the particular legal case. For example, during voir dire, the potential witness might be asked the number of patients to whom he or she had provided clinical services and how many times he or she had testified in court about a particular clinical diagnosis. In other words, clinical experience was valued in the rendering of professional opinions.

This approach to expert testimony was not based on the concept of statistical reliability and validity.

For decades, the admissibility of expert testimony had to satisfy the standard from *Frye v United States*.¹ The *Frye* test essentially required that the information in the expert testimony had “general acceptance” in the particular area of professed expertise. Further, in accord with the *Frye* standard, Prosser² supported the witness having “good standing” in a profession—a vague term that potentially accommodates average or lower competency (and might not actually connect to competency). Criticism of the *Frye* standard ranged from an alleged lack of adequate objectivity to being too conservative. Three United States Supreme Court cases have reduced the use of the *Frye* test, although it can, to some extent, still be considered judicially, depending on the jurisdiction.

As Bob Dylan sang, “The times they are a-changin’.” Ackerman and Gould say, “Gone are the days when experts may opine on issues for which there is no scientific foundation.”³

Scientific testimony

Consider the three primary Supreme Court cases relevant to scientific standards for expert testimony. First, *Daubert v Merrell Dow Pharmaceuticals, Incorporated*⁴ held that the judge should determine “whether the evidence was based on a process that was scientifically respectable (i.e., testable, tested, subject to peer review, published, having a known or potentially known error rate, and having existing standards controlling its functions).”⁵ Second, *General Electric Company v Joiner*⁶ dealt with the degree of judicial error in its decision-making that would be required for an appellate court to overturn a trial court’s decision. Third, *Kumho Tire Company, Limited v Carmichael*⁷ extended the legal principles beyond scientific information per se to include scientific, technical, and other specialized information that could be relied on in expert testimony.

The relevance of scientific standards has been further elaborated. Presently, Federal Rules of Evidence 702–706 provide the framework for a judicial determination for admissibility of mental health testimony. For Michigan, the fundamental legal directive is Michigan Rule of Evidence 702:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Accordingly, the Michigan legal system has adopted the essence of the *Daubert* standard.⁸ However, judicial discretion

still allows use of the so-called *Davis-Frye* test adopted in *People v Davis*.⁹ In other words, Michigan applies a hybrid test that combines the *Frye* and *Daubert* tests for purposes of determining the admissibility of testimony. *Clerc v Chippewa County War Memorial Hospital*¹⁰ specified that “the court ‘shall’ consider all of the [*Daubert*] factors listed in MCL 600.2955(1).”¹¹

The Michigan legislative authority for scientific expert testimony is stated in MCL 600.2955:

Sec. 2955. Scientific or expert opinion or evidence; admissibility.

- (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
 - (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
 - (b) Whether the opinion and its basis have been subjected to peer review publication.
 - (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
 - (d) The known or potential error rate of the opinion and its basis.
 - (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, “relevant expert community” means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
 - (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
 - (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.
- (2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.
- (3) In an action alleging medical malpractice, the provisions of this section are in addition to, and do not otherwise affect, the criteria for expert testimony provided in section 2169.

There lies the statutory provision for the hybrid framework that elaborates on scientific standards while also embracing more than science alone.



Qualifying mental health professionals

The following are suggestions for qualifying mental health professionals for expert testimony. Often, it is judicious for attorneys to obtain the wisdom of another mental health professional—one with considerable knowledge or qualification in the particular discipline—to help formulate background investigations and voir dire questions.

Consider professional ethics and standards

In Michigan, the Department of Licensing and Regulatory Affairs licenses mental health professionals. As mentioned earlier, whether codified by statute or not, it has been observed that certain attorneys and board members show deference to codes of ethics, practice guidelines, and position statements promulgated by mental health professional sources, such as the national association for the practitioner’s discipline. Since members of a professional association could potentially be subjected to criticism (e.g., through an ethics complaint) from the organization and a state regulatory agency as well as legal liability, qualifying mental health professionals for expert testimony should include identifying the potential expert’s memberships and familiarity with relevant authoritative sources. A lack of relevant knowledge could lead to disqualification as an expert.

Determine professionalism in general

In general, “[e]ligibility to testify as an expert witness is based on a person’s special skills or knowledge as judged by the court.”¹² Logically, appropriate licensure would seem to be a prerequisite for qualifying as an expert witness on mental health issues. However, professional licensure may not be the only avenue for qualification. For example, a professor specializing in mental health services could potentially

provide expert testimony. Scholarly knowledge about, say, psychometrics relevant to assessment methods or published research studies on an array of human factors should be helpful to the court.

With memories of Prosser's framing expert testimony in the context of the contemporary mental health professions, testimony for a "novel methodology or form of scientific evidence" may or may not be compatible with *Daubert*. In any instance, the testimony must satisfy the requirement of MCL 600.2955(2); that is, the court must find that there is "general acceptance" for the proffered methodology or alleged scientific evidence among relevant impartial and disinterested experts in the field.

Expect mental health practitioners to explain and justify preferred intervention theories and strategies

It seems common for mental health practitioners to have difficulty defining and justifying the theory underlying a clinical intervention. I have witnessed numerous examples of a professed humanistic approach leading to stammering and groping for scholarly substance. And despite public awareness of psychoanalysis, services of that ilk may seem antiquated and lacking a modern evidence basis. Attorneys should seek to verify practitioners' knowledge and competency relevant to theoretical concepts, the range of mental health interventions, and research documenting efficacy; for example, cognitive-behavioral theory and strategies that have strong research support.

On the downside, accommodating unique testimony can open the door to controversy in the courtroom, which could lead to the often-disdained "battle of the experts."¹³ If this occurs, it will then be—as with comparable issues pertaining to admissibility—for the trier of fact (e.g., judge) to decide whether the potential expert's testimony is adequate for the standards contained in MCL 600.2955(2).

Are licensure and experience assuredly adequate for qualifying as a mental health expert? Absolutely not. Experts must be knowledgeable about the empirical or evidence-based reasons for chosen professional services.

Validate credentials

Unfortunately, this is an era in which dubious and bogus credentials abound.¹⁴ Indeed, in Michigan, personal encounters confirm that some practitioners hold mental health licenses and have qualifying degrees from pseudo-professional training institutes that were not accredited (at the time) by prevailing regional or national standards. One practitioner confronted with the fact that his or her doctorate was from an unaccredited commercial source, responded: "I just want to call myself doctor." Yes, even unaccredited doctoral degrees have been submitted with licensing applications or are held out to attract consumers.

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Some licensed practitioners have been known to present quasi-scholarly accomplishments to unsuspecting attorneys and judges. Beyond paper credentials per se, MCL 600.2955 and legal cases support validating documentary evidence of a proposed expert's status among relevant professionals. This should be a relatively easy task through an Internet search.

Perhaps because of a quest for opportunities in the marketplace, there is, with too many mental health practitioners, a propensity for purchasing credentials that bestow titles such as "Diplomate," "Certification," or "Fellow." In fact, the alleged credential may have little or no professional respectability; that is, it may have been purchased with no true peer review. As a rule of thumb, attorneys should investigate whether each credential was, in fact, subjected to both basic qualifications (e.g., an accredited degree or experience) and peer examination or review, preferably a face-to-face oral examination based on work-sample documents.

Evaluate scholarship

In professional circles, publications that receive peer review are most respected. Benner and Carlson believe that *Daubert* requires opinions be based on published research: "courts are becoming increasingly likely to rule that a professional's background, alone, is an insufficient basis for his or her courtroom opinions. The point is especially pertinent when counsel calls an expert to testify regarding novel theories or in 'nonstandard' areas of a technical specialty."¹⁵ Though there can be overreliance on peer-reviewed published research, the potential expert's scholarly publication record remains an important indicator of—some might opine it is a prerequisite to—qualifying to provide mental health testimony.¹⁶

Much like clinical services having general acceptance, assessment tools such as psychological tests require that the practitioner have training. In one licensing complaint case,

the licensed practitioner claimed to specialize in assessment, yet scrutiny of university transcripts revealed no formal training in testing or assessment. Other cases have revealed a lack of adequate training for such topics as neuropsychology, sex therapy, hypnosis, and so forth. A state-issued license notwithstanding, ill-prepared licensees are vulnerable to impeachment of testimony.

To restate, a possible solution is for attorneys of record to seek confirmation of adequacy and legitimacy of professional credentials, such as through review by an impeccably qualified mental health consultant like a professor from a high-status university who is well versed in these issues, perhaps through publication of scholarly articles and books.

Explore depth and breadth of contemporary scholarly knowledge

All professionals are vulnerable to becoming closed-minded, and attorneys are no exception. Mental health practitioners may be locked in the past, relying on information received during their early years of training. By definition, “professionalism” embraces advancing knowledge for the discipline.

From experience, precious few mental health practitioners regularly read professional journals, with too many adhering instead to concepts gained in early training. Personal subscriptions to journals published by the American Psychological Association tend to be declining. In this age of ready access via electronic databases, it seems that competency for expert testimony should include assiduous effort to advance professional knowledge. Failure to do so opens the door to possible impeachment.

Personal foibles

No one is perfect, but some personal conduct is undeniably relevant and material for qualifying to provide mental health expert testimony. Using background checks limited to criminal convictions or licensing complaints is inadequate. Looking back on cases with which I have dealt, there should be investigations of the number of divorces, arrests (but perhaps not convictions that would appear in a perfunctory background check), bankruptcies, romantic involvement with service users, or other actions that would seemingly reflect poor judgment or lack of impulse control. Certainly, documents for and information about complaints to a licensing agency, including beyond Michigan, should be retrieved.

Conclusion

Given Michigan laws, it seems that determination of admissibility of expert testimony on mental health should

accord less weight to good standing or general acceptance of professional knowledge than to scientific standards for testimony, though the latter can include opinions that include reference to professional status and clinical experience. Any reliance on the latter deserves scrutiny regarding general acceptance or scholarly status. Attorneys and judges must be able to critique the quality of testimony proffered by proposed experts as well as the veracity of information contained in a professional résumé. ■



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ENDNOTES

1. *Frye v United States*, 54 App DC 46; 293 F 1013 (1923).
2. See Prosser, *Handbook of the Law of Torts* (4th ed).
3. Ackerman & Gould, *Child Custody and Access* in *APA Handbook of Forensic Psychology: Individual and Situational Influences in Criminal and Civil Contexts* (Cutler & Zapf eds, vol 1), ch 13, pp 425–469, 426.
4. *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).
5. Heilbrun & LaDuke, *Foundational aspects of forensic mental health assessment* in *APA Handbook of Forensic Psychology: Individual and Situational Influences in Criminal and Civil Contexts* (Cutler & Zapf eds, vol 1), ch 1, pp 3–18, 7.
6. *Gen Electric Co v Joiner*, 522 US 136; 118 S Ct 512; 139 L Ed 2d 508 (1997).
7. *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999).
8. See *Gilbert v DaimlerChrysler Corp.*, 470 Mich 749; 685 NW2d 391 (2004).
9. *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955).
10. *Clerc v Chippewa Co War Mem'l Hosp*, 477 Mich 1067; 729 NW2d 221 (2007).
11. *Id.* at 1068.
12. VandenBos, ed, *APA Dictionary of Psychology* (2d ed) (Washington, DC: American Psychological Association, 2015), p 398.
13. See, e.g., *Edry v Adelman*, 486 Mich 634; 786 NW2d 567 (2010).
14. Woody, *Dubious and bogus credentials in mental health practice* in *Ethics & Behavior* (vol 1), pp 337–345.
15. Benner & Carlson, *The Literary Arm of Michigan's Daubert Rule*, 91 Mich B J 25 (May 2012), available at <<http://www.michbar.org/file/barjournal/article/documents/pdf4article2021.pdf>> (accessed June 7, 2016).
16. See *Edry*, 486 Mich 634; *Pages-Ramirez v Ramirez-Gonzalez*, 605 F3d 109, 116 (CA 1, 2010).