

**THE INTERSECTION
COURTS AND PSYCHOLOGY
OCTOBER 22, 2011**

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- USE OF PSYCHOLOGISTS IN COURT
- JURY SELECTION CONSULTANTS
- CRIMINAL SENTENCING
- CRIMINAL RESPONSIBILITY
- CUSTODY AND DIVORCE
- DAMAGES
- LIABILITY IN EMPLOYMENT CASES

- EMPLOYEE DISCIPLINE CASES
- INTERNAL INVESTIGATIONS
- HIRING AND EMPLOYEE EVALUATIONS
- CONSERVATORSHIP/GUARDIANSHIP
- DISABILITY DETERMINATIONS
- TESTAMENTARY CAPACITY
- TREATMENT NEEDS
- RELIABILITY OF EYEWITNESS IDENTIFICATIONS?

SOME THOUGHTS

- THE TESTIMONY OF AN EXPERT IS NOTHING MORE THAN AN ORDINARY GUEST IN EVENING CLOTHES (PENNSYLVANIA COURT)
- THERE IS SOMETHING FASCINATING ABOUT SCIENCE, ONE GETS SUCH WHOLESOME RETURNS OF CONJECTURE OUT OF SUCH A TRIFLING INVESTMENT OF FACT (MARK TWAIN, LIFE ON THE MISSISSIPPI)

SOME MORE THOUGHTS

- IF HE WAS AN INDEPENDENT EXPERT I WOULD HAVE NEVER HIRED HIM (MELVIN BELLI)
- PREDICTIONS ARE TRICKY ESPECIALLY ABOUT THE FUTURE (YOGI BERRA)
- TRUST BUT VERIFY (RONALD REGAN)
- PSYCHOLOGY IS NOT AN ART FORM DESPITE CLASSIFICATION AS SUCH BY COLLEGES AND UNIVERSITIES (DR. BARBRA MATTHEWS)

THE SUPREME COURT PARADIGM SHIFT – THE TRILOGY

- DAUBERT V. MERRILL DOW CHEMICAL (1993)
 - GENERAL ELECTRIC V. JOYNER (1997)
 - KUMHO TIRE V. CHARMICHAEL (1999)
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- KUMHO EXTENDED THE REACH OF GENERAL ELECTRIC AND DAUBERT TO ALL EXPERT WITNESSES REGARDLESS OF THEIR PROFESSION

SUSPICIONS ARE NOT ALL IN THE MIND

- FRAUD IN MASS TORT CASES
- CRIMINAL PROSECUTIONS OF LAWYERS AND DOCTORS
- MANUFACTURE AND INFLATION OF PERSONAL INJURY CLAIMS
- MEDICAL MILLS –LAWYERS REFERRALS
- EXPERT ADVERTISING
- EXPERT FINANCIAL SPONSORSHIP
- EXPERT WITNESS REFERRAL SERVICES
- PROFESSIONAL EXPERT WITNESSES

THE RESULT OF THE TRILOGY

- JUDGES AND EXPERT WITNESSES MUST BE SKEPTICS
- WE MUST KEEP AN OPEN MIND BUT DEMAND PROPER EVIDENCE
- WE DO NOT TAKE ANYTHING FOR GRANTED
- WE MUST PUT EVERY PROPOSITION TO THE TEST
- WE MAY NOT BLINDLY DEFER TO ANOTHER'S INTERPRETATION

SOME DEFINITIONS

- FORENSIC PSYCHOLOGY: THAT BRANCH OF PSYCHOLOGY DEALING WITH DISEASES AND DISORDERS OF THE MIND IN RELATION TO LEGAL PRINCIPLES AND CASES
- ANALYST: A PERSON WHO EXAMINES THE COMPONENT PARTS OF A WHOLE, ITS ELEMENTS, AND THEIR RELATIONSHIP USING ACCEPTABLE METHODS
- DIFFERENTIAL DIAGNOSIS: METHODOLOGY BY WHICH THE CAUSE OF A PROBLEM IS IDENTIFIED CONSIDERING AND THEN RULING OUT POTENTIAL CAUSES UNTIL THE MOST PROBABLE CAUSE REMAINS

SOME MORE DEFINITIONS

- EMOTIONALLY DISTURBED PERSON IS A GENERIC TERM USED BY CRIMINAL JUSTICE AND LAW ENFORCEMENT PERSONNEL TO DESCRIBE A PERSON WITH BEHAVIORAL DISTURBANCES WHICH MAY BE CAUSED BY A MENTAL DISORDER, DISEASE, OR A CHEMICALLY INDUCED STATE
- FORENSIC PSYCHOLOGISTS ARE INTERPRETERS OF PSYCHOLOGICAL FINDINGS INTO LANGUAGE WHICH JUDGES ATTORNEYS AND THE COMMON MAN (JURIES) CAN UNDERSTAND AND TO WHICH THEY CAN APPLY THEIR RULES (NORBERT NAPOLI 2009)

WHAT HATH THE SUPREME COURT WROUGHT ?

- IS THE SUBJECT MATTER OF THE PROFERRED EXPERT TESTIMONY SOMETHING OUTSIDE THE KNOWLEDGE OF ORDINARY PEOPLE
- WILL THE TESTIMONY SOUGHT TO BE ADMITTED BE OF MATERIAL ASSISTANCE TO THE JURY IN DECIDING SOME ISSUE IN THE CASE
- THE JUDGE IS NOW THE EVIDENTIARY FILTER THROUGH WHICH ALL EXPERT OPINIONS MUST PASS
- YOU CANNOT GAIN ADMISSION OF THE OPINION BY QUALIFYING THE EXPERT
- THE JUDGE HAS A JOB TO KEEP JUNK SCIENCE OUT OF THE COURTROOM

A WARNING

- IF THE WITNESS IS RELYING SOLELY OR PRIMARILY ON EXPERIENCE THEN THE WITNESS MUST EXPLAIN HOW THAT EXPERIENCE LEADS TO THE CONCLUSION REACHED, WHY THAT EXPERIENCE IS A SUFFICIENT BASIS FOR THE OPINION, AND HOW THAT EXPERIENCE IS RELIABLY APPLIED TO THE FACTS. THE TRIAL COURTS GATEKEEPING FUNCTION REQUIRES MORE THAN SIMPLY TAKING THE EXPERT'S WORD FOR IT. (COMMITTEE NOTE TO FEDERAL RULE OF EVIDENCE 702)

CHALLENGING THE PSYCHOLOGIST

- THE CV BATTLE – VERY EASY TO RESEARCH
- ANY ACTUAL CLINICAL PRACTICE – HOW MUCH TIME
- PRIOR TESTIMONY
- PAYMENT AND INCOME
- POSSIBLE CONFLICTS
- ACTIVE SUPERVISION AND TEACHING OF OTHERS INCLUDING GRADUATE STUDENTS
- LICENSES
- SPECIALITY BOARDS AND ORGANIZATIONS
- TIME SPENT IN FORENSIC ACTIVITY AS OPPOSED TO CLINICAL EXPERIENCE AND TEACHING
- EDUCATION/TRAINING/EXPERIENCE
- MEDICAL ISSUES – QUALIFIED TO GIVE AN OPINION ?

WEASEL WORDS FROM DSM IV

- CAUTIONARY STATEMENT (XXXVII)
- USE OF CLINICAL JUDGMENT (XXXII)
- USE OF DSM IN FORENSIC SETTINGS (XXXII)
- PROVISIONAL DIAGNOSIS (3)
- NOS (NOT OTHERWISE SPECIFIED) WHAT DOES THAT MEAN?

THE SKEPTIC

- NO MAN EVER QUITE BELIEVES IN ANY OTHER MAN. ONE MAY BELIEVE IN AN IDEA ABSOLUTELY BUT NOT IN THE MAN. IN THE HIGHEST CONFIDENCE THERE IS ALWAYS A FLAVOR OF DOUBT – A FEELING HALF INSTINCTIVE AND HALF LOGICAL THAT AFTER ALL THE SCOUNDREL MAY HAVE SOMETHING UP HIS SLEEVE (H.L. MENCKEN. PREJUDICES THIRD SERIES)

OTHER QUESTIONABLE EXAMPLES

- PSYCHOLOGICAL TESTING
- GLOBAL ASSESSMENT OF FUNCTIONING
- GENERALIZED DISORDER BY SELF-REPORT
- THE CLINICAL INTERVIEW PROBLEM
- RULING IN OR OUT
- MEDICAL VS. BEHAVIORAL
- PERSONALITY PROFILING