

Benchbook in the Behavioral Sciences

Benchbook in the Behavioral Sciences

Psychiatry—Psychology—Social Work

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*To those judges perceptive enough to comprehend complex issues,
and courageous enough to act accordingly.*

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Preface

Thousands of experts testify in American court proceedings every day. On any given day, most of those experts are testifying about the behavioral sciences: psychiatry, psychology or social work. With reliability, validity and the scientific method becoming the touchstone of expert admissibility, the courts' gatekeeping responsibilities are being taxed as never before. Unfortunately, the national survey research discussed in Chapter One makes it clear that attorneys and court personnel are unfamiliar with the principles and methodology of the behavioral sciences. Preliminary findings from research being conducted by psychlaw.net and Professor Layman Allen of the University of Michigan Law School, indicate that attorneys and court personnel are getting little or no help in this important endeavor. These are the reasons we wrote this Benchbook.

Is psychology really a science? Is psychiatry still mired in dream analysis and lobotomy? Does social work have anything to contribute beyond food stamps and foster care? We hear these questions all the time. We've built this Benchbook to address these and other important questions about the proper place of the behavioral sciences in evidentiary law. We admit our prejudices at the outset.

Dr. Lorandos at the New School for Social Research and Dr. Campbell at the University of Maryland were steeped in the scientist-practitioner model for behavioral scientists. We both have published original research in the peer reviewed journals of the behavioral sciences and believe that the empiricism of the scientist-practitioner model separates the "junk" from the real, and thereby admissible, science.

In undertaking these tasks, we've begun with a discussion of the *Daubert* trilogy and a description of how the behavioral sciences are used in our courts. We've abbreviated the key concepts in *Daubert*, *Joiner* and *Kumho* to sketch out the parameters of the new gatekeeping responsibilities. In Chapter Two we reprise the key concepts of the trilogy and outline the quagmire of differing ideas and decision matrixes used in the various State and Federal courts.

Unfortunately, too often inconsistency too often prevails when gatekeepers attempt to decide relevance, adequacy, expert qualification, validity of methodology and the reliability of proffered opinions. We've worked to give readers, science and case law examples for concepts like testability, peer review, error rate analysis and general acceptance. Chapter Two provides a template for gatekeepers and court personnel broken into action steps for sound and scholarly decisions on admissibility. We illustrate decision making with two junk science conundrums: the Child Sexual Abuse Accommodation Syndrome and *Rorschach* ink blots.

In Chapter Three we deal directly with what the survey research demonstrates is sadly lacking in basic and continuing education for court personnel: The need for a primer on the principles and methodology of the behavioral sciences. We begin this task with an overview of key concepts in the scientific method such as parsimony, reliability, validity, probability and statistical analysis. We provide a sketch of the basic history and systems of psychiatry, psychology and social work to aid the gatekeeper in assessing the knowledge base of any proffered expert. The days of experts being qualified to give opinion testimony on merely the possession of a license, or on their *ipse dixit*, are at an end. We provide the gatekeeper with descriptions of history, protocol and fact which should be part of any expert's knowledge base. We close the first part of this Benchbook with an illustration from case law demonstrating seriously flawed admissibility decisions and their impact on the court, litigants and behavioral science.

Part II of this Benchbook is designed to address the facts and case law in the most prevalent kinds of expert testimony from behavioral scientists. We begin with the problem of reliability and validity in diagnosis. Often we hear attorneys refer to the *Diagnostic and Statistical Manual* of the American Psychiatric Association as "the Bible" of assessment and diagnosis. We provide a window into the constant revision and reliability failures of the DSM. Next, we build on the work in our chapter on diagnosis to deal directly with competency and sanity determinations. After a discussion of historical perspectives on these important determinations we discuss checklists and assessment instruments and their range of error. We attempt to draw the reader's attention to a new area of competency determination, that of the interaction of competence and personal knowledge. The literature on the manipulation of child witnesses' memory is reviewed.

Dangerousness and assessments of the likelihood of recidivism have become quite controversial of late. We survey the literature on Federal and State processes in this important area following the Supreme Court's *Hendricks* de-

cision. The datum of the behavioral sciences in this area is reviewed. We work to illustrate the base rate problem and the conflict between assessment approaches based on clinical judgment and actuarial research. We close with a review of the commonly used recidivism assessment instruments.

In the last four chapters we use the research literature and the case law to describe the value of the behavioral sciences in child neglect and custody determinations; psychological injury claims; standard of care issues and sexual harassment litigation. Concerning child abuse, neglect and custody issues, we reprise the literature on child witness manipulation. Both of us have been called upon to testify as experts across this nation concerning children, interviewing and the adulteration of child witness memory. We have worked to illustrate a great deal of this literature so that gatekeepers can assess the knowledge base of proffered experts in their courts.

Psychological injury claims are broken down into brain syndrome claims and allegations of emotional harm. The literature on the medical, neurological and psychological assessment of psychological injury claims is reviewed. We illustrate with the intersection of psychological injury claims and sentencing enhancement litigation. This has immediate relevance to the arguments which will be placed before juries following the Supreme Court's *Blakely*, *Booker* and *Fanfan* decisions.

The standard of care in the behavioral sciences and sexual harassment claims are hotly litigated in civil jurisprudence. We have both been called upon to consult and to testify as experts in these areas; one of us has litigated a number of these claims as well. The changing nature of decision making in standard of care and hostile environment claims occupies the final two chapters of this Benchbook. We have worked to provide an overview of the case law and science in informed consent, patient suicide and improper treatment litigation. We advocate using the research literature to set the proper sense of minimal competence in standard of care claims. We illustrate using research literature in our analysis of Title VII and EEOC claims. We discuss the PIASH effect and its impact in *quid pro quo* and hostile environment litigation.

Finally, we have drawn upon a number of recognized texts in the behavioral sciences to assemble a glossary for this Benchbook. This glossary easily lends itself to the development of questions a gatekeeper may pose to a proffered expert to test the expert's grasp of the datum of his discipline. We recommend this approach because we have seen far too many less than well qualified "experts" pontificating from the witness stand on subjects like repressed memories, ink blot personality tests and child abuse accommodation syndromes. We have watched as families have been torn apart by the fanciful and

subjective testimony of these less than well qualified “experts”. Not only have litigants been damaged by the scientifically untenable positions offered, but the behavioral sciences have been sullied as well. This is why we recommend a testing of proffered experts by our gatekeepers. Just as attorneys and judges had to demonstrate knowledge of the datum of their discipline with bar examination content areas such as contract, real property and torts; experts and the testimony they propose to offer, must be grounded in the principles and methodology of science, and the datum of their discipline as well. We have written this Bench book to aid gatekeepers and court personnel to allow in only the empirically best the behavioral sciences has to offer. Nothing less will satisfy the demands of modern evidence law and due process.

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