Presented:
Innovations-Breaking Boundaries in Custody Litigation

January 19-20, 2012
Houston, Texas

Confronting Mental Health Evidence: A Practical Guide to Reliability and Experts in Family Law

Written by:
John A. Zervopoulos, Ph.D, J.D.,

Author contact information:
John A. Zervopoulos, Ph.D, J.D.
PsychologyLaw Partners
Dallas, TX
972.458.8007
jzerv@psychologylawpartners.com

CHAPTER 3

The Legal Perspective

After recognizing key emotional dynamics of divorce, family lawyers must consider the legal perspective—the second of three critical perspectives—when they evaluate the reports and testimony of MHPs. The legal perspective centers on determining the reliability and admissibility of MHPs' conclusions and expert opinions. The practical four-step model presented in this chapter will help family lawyers gauge the clarity and potential usefulness of the mental health materials and testimony they consider in their cases and organize their admissibility arguments.

In most jurisdictions, the rules of evidence allow an expert witness to offer opinions in court if the expert is qualified to offer those opinions and if those opinions "will assist the trier of fact to understand the evidence or to determine a fact in issue."[1] Some jurisdictions still impose the older, more stringent standard that the knowledge imparted by the expert be "beyond the ken" of an ordinary person.[2] One principle recognized consistently is that expert testimony must be reliable to assist the trier of fact. The two seminal cases giving rise to the standards for evaluating expert testimony are *Frye v. United States*[3] and *Daubert v. Merrell Dow Pharmaceuticals*.[4] Legal reliability refers to the "trustworthiness" of the evidence.[5] In his influential 1980 review of *Frye*, Professor Paul Giannelli asserted that "the probative value of scientific evidence is connected inextricably to its reliability: if the technique is not reliable, evidence derived from the technique cannot be relevant."[6]

What standard, then, should the court use to ensure the reliability and, thus, the admissibility of the evidence or testimony? While courts in the nineteenth and early twentieth centuries relied primarily on the expert's qualifications to decide whether to admit that expert's testimony, today's state courts, as mentioned earlier, look to variants of two tests to gauge that testimony's evidentiary reliability and admissibility: the *Frye* test and the *Daubert* test. In this chapter, we will look at each test and then draw on shared principles to build a practical four-step model for addressing the legal quality of mental health reports and testimony. While developing the model's steps, we will also examine how MHPs' practice guidelines, ethics codes, and prevailing practices provide rich sources with which to measure the quality and reliability of MHPs' expert testimony.

THE *FRYE* TEST

Introduction and Concerns

The *Frye* test arose in a 1923 federal D.C. Circuit case to address the admissibility of evidence derived from a crude precursor to the polygraph machine. The question was this: How should the court determine whether novel scientific techniques are reliable enough to be admitted into evidence? In a frequently quoted phrase, the *Frye* court wrote: "[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle of discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[7] *Frye*, in contrast to the prior approach that required only qualified experts to support expert testimony, held that expert opinions must be generally accepted by the relevant scientific community—a standard beyond initial experimentation.[8] The *Frye* test assumed that an accepted scientific technique would have undergone extensive testing in the relevant scientific community.[9] In sum, *Frye* established a method to ensure the reliability of scientific evidence by directing "that those most qualified to assess the general validity of a scientific method will have the determinative voice."[10] In other words, the scientific community would act as a kind of technical jury.[11]

But while *Frye* brought definition—beyond just the expert's qualifications—to the task of gauging the admissibility of expert testimony based on novel scientific techniques, the standard itself raised other questions. These questions continue to provide bases for examining scientific expert testimony in *Frye* jurisdictions or in *Daubert* courts when experts seek to invoke the *Daubert* factor of "whether the theory or technique has been generally accepted as valid by the relevant scientific community."[12] Namely:

- In what relevant scientific community is the novel technique accepted? That is, a more general group of experts or a more select group within the general group?
- What percentage of those in the relevant scientific community must accept the technique for the technique to be generally accepted?[13]
- May a single witness alone sufficiently represent, or attest to, the views of an entire scientific community regarding the reliability of the new technique or principle?[14]
- How much empirical research—if any—supporting the technique is sufficient to be deemed accepted by the relevant scientific community?[15]
- Courts have often cited legal and scientific publications to satisfy the general acceptance standard—"a type of judicial notice."[16] But courts using these publications are not judicially noticing the validity of a technique; rather, they are taking judicial notice of articles, texts, and other publications, both legal and scientific, in attempting to determine whether general acceptance has been achieved.[17] How valid, or "trustworthy," are these publications? And have all the relevant articles been presented to the court, including those that question the validity of the novel technique?[18]
- Because the *Frye* test is intended to gauge the admissibility of novel scientific evidence, how much extrapolation to untested situations should be permitted and still allow the technique to be admitted into evidence?
- What must be accepted: the underlying scientific principle, the technique applying it, or both?[19]

Also available as part of the eCourse
Custody Litigation, Part 3: Trial Strategies

First appeared as part of the conference materials for the
2012 Innovations - Breaking Boundaries in Custody Litigation session
"Trial Strategies"