Experts, Examinations and Ethics – A Guide to Mental Health Experts – Direct and Cross, Attacking and Defending Recommendations, *Daubert* Challenges and Practical Approaches

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Innovations – Breaking Boundaries in Custody Litigation

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EXAMINING EXPERTS EFFECTIVELY

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Examining Experts Effectively

I. Introduction

In any complex custody case, the Court's will often be tasked with addressing dueling psychological experts. It is the job of the lawyer handling such a case to ensure that their expert's testimony is admissible, and the opposing expert's opinions never sees the light of day, if possible. This paper is broken into several sections that address the standards for the admissibility of expert witness testimony under both the Texas Rules of Evidence as well as the relevant case law. The lines between the two areas are inexorably intertwined. However the authors have attempted to differentiate the same where possible. The first sections of this paper will cover *Daubert v. Merrill Dow* and the Federal and Texas case that followed from it. The paper will then address Texas Rules of Evidence that govern expert testimony, 702 - 705, and the case that helped to further define those rules. We will then address the differing standards for Hard and Soft Sciences with a specific focus on mental health experts and the testing they employ. Lastly, the paper will cover the practical use of Daubert Challenges.

II. Federal - *Daubert, Joiner, and Kumho*: Setting forth the foundational basics for admitting or excluding expert testimony under federal law:

A. The Seminal Case of *Daubert v. Merrell Dow Pharm., Inc. 509 U.S. 579, 585, 113 S. Ct. 2786, 2792, 125 L. Ed. 2d 469 (1993).*

1. Federal Rules supercede Frye *v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)*

Prior to the enactment of the Federal Rules of Evidence, the dominant standard for admitting expert testimony was the "general acceptance" test. This test originated from *Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)*, a famous case that predated the federal rules by half a century. *Frye* provided that scientific evidence is admissible only if the principle upon which it is based is sufficiently established to have **general acceptance** in the field to which it belongs. *Id.* When the Federal Rules of Evidence were adopted, federal courts disagreed as to whether the federal rules had taken the place of the general acceptance test. In 1993, the Supreme Court resolved the disagreement in the seminal case of *Daubert v. Merrell Dow Pharm., Inc. 509 U.S. 579, 585, 113 S. Ct. 2786, 2792, 125 L. Ed. 2d 469 (1993).* The *Daubert* Court unanimously held that the federal rules superseded the *Frye* test – Justice Blackmun stated:

> *Frye* made 'general acceptance: the exclusive test for admitting expert scientific testimony. That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied

in federal trial.'

Id. at 589.

2. Trial Judge as Gatekeeper must ensure evidence is both reliable and relevant:

The *Daubert* Court continued by finding that although the *Frye* test was displaced by the federal rules, it did not mean that the rules themselves placed no limits on the admissibility of purportedly scientific evidence. *Id.* The trial judge still had an absolute duty to screen such evidence. *Id.* Indeed, under the federal rules, this meant that the trial judge must ensure that all scientific evidence or testimony admitted is not only ***relevant, but reliable***. *Id.* The requirement of reliability was established through the standard proffered by Federal Rule 702 that required that the subject of an expert's testimony must be "scientific knowledge". *Id*. at 590. The requirement of relevance was established through the standard that all of the evidence and/or testimony must assist the trier of fact to understand the evidence or to determine a fact in issue. *Id*. at 590. The Court stated:

> Expert testimony which does not relate to any issue in the case is not relevant, and ergo, non-helpful . . . . The consideration has been aptly described by Judge Becker as one of 'fit.' (citations omitted). 'Fit' is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.

Id. at 590, 591.

As such, the new *Daubert* standard required that when a trial judge is faced with potential expert scientific testimony, the trial judge must determine, pursuant to Federal Rule 104, (1) if the expert is attempting to testify to scientific knowledge and (2) whether the testimony will assist the trier of fact to understand or determine a fact in issue. *Id*. at 592.

3. The Daubert Observations:

In making this preliminary assessment, the *Daubert* Court emphasized that it requires the trial judge to look beyond the testimony and observe the methodology and reasoning underlying it. *Id.* at 592-593. Although confident in a judge's ability to make such an assessment, the *Daubert* Court provided a non-exclusive set of general observations for a trial judge to consider[1]:

1. Can the theory or technique be tested or has it been tested (The Court noted that this was a "key" question. *Id*. at 593. It further stated that "[s]cientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." *Id*.;

2. Whether the theory or technique has been subjected to peer review or publication (the Supreme Court notes that publication does not equate to reliability. *Id*. at 593-594. Indeed, "in some instances well-grounded innovative theories will not have been published". *Id*. Additionally, "[s]ome propositions, moreover, are too particular, too new, or of too limited interest to be published. *Id*. But submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the

[1] The Supreme Court make it clear that "Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test." *Id*. at 593.

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