

MRE 412/513 and the Expert Witness



In 1995, New Mexico state senator Duncan Scott was getting aggravated by the number of psychologists and psychiatrists being used as expert witnesses in legal trials. To protest this perceived overuse of psychiatric professionals, Scott tacked the following protest amendment onto a bill:

"When a psychologist or psychiatrist testifies during a defendant's competency hearing, the psychologist or psychiatrist shall wear a cone-shaped hat that is not less than two feet tall. The surface of the hat shall be imprinted with stars and lightning bolts. Additionally, a psychologist or psychiatrist shall be required to don a white beard that is not less than 18 inches in length, and shall punctuate crucial elements of his testimony by stabbing the air with a wand. Whenever a psychologist or psychiatrist provides expert testimony regarding a defendant's competency, the bailiff shall contemporaneously dim the courtroom lights and administer two strikes to a Chinese gong [...]"

The amendment passed unanimously in the Senate but was ultimately excised before the House vote.

Scenario: Defense brings in a psych expert witness. The expert has made an informal diagnosis of your client and the defense now wants one or all of the following:

- 1) Access to your client to make a formal diagnosis
- 2) Access to your client's psych records to bolster the diagnosis
- 3) The ability to discuss your client's past sexual history as part of the diagnosis

EXPERT ACCESS TO CLIENT:

NOT HAPPENING!!!

Most psych experts won't be willing to make a formal diagnosis without a clinical interview.

U.S. v. Owen, 24 M.J. 390 (C.M.A. 1987).

“No such authorization is cited for compelling victims/witnesses to undergo psychological examinations in sex cases. Without statutory or regulatory authority, it is doubtful that either a civilian or military physician would examine a patient without the patient's consent. We are therefore convinced that the military judge does not have the ‘inherent power’ to compel a victim/witness to undergo a nonconsensual psychiatric or physical examination, and we do not distinguish between male and female victims in so holding.”

U.S. v. Nesselth, 2000 CCA LEXIS 151 (A.F.C.C.A.
May 30, 2000)

“We disagree and find no error by the military judge. The parents were in court and emphatically stated in front of the military judge that they would not let the defense examine or interview their daughter. The judge was able to observe their demeanor and evaluate the strength of their commitment to their stated position.”

ACCESS TO CLIENT'S PSYCH RECORDS:

- 1) DC has to meet new standards in MRE 513.
- 2) What is the expert trying to prove?

A witness's mental disorder is relevant if it relates to the ability to perceive and remember. Or if there is a "real and direct nexus" between the witness's disorder and the facts of the case. *United States v. Sullivan*, 70 M.J. 110, 114 (C.A.A.F. 2011).

BORDERLINE PERSONALITY DISORDER:

DEFENSE EXPERT'S FAVORITE DEFAULT DIAGNOSIS

Borderline Personality Disorder (BPD) is a Cluster “B” personality disorder. “B” disorders are characterized by dramatic, overly emotional or unpredictable thinking or behavior. Many SA victims will show some of the diagnostic criteria listed. But it takes at least 5 in order to make a diagnosis. An expert may testify that they think your client may be BPD because they meet 2 or 3 of the criteria and need more information, i.e. your client’s psych records.

To meet a diagnosis of Borderline Personality Disorder under the *DSM-V*, you must show “a pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity, beginning in early adulthood and present in a variety of contexts, as indicated by five (or more) of the following”:

- 1) Frantic efforts to avoid real or imagined abandonment
- 2) A pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation
- 3) Identity disturbance: markedly and persistently unstable self-image or sense of self
- 4) Impulsivity in at least two areas that are potentially self-damaging (e.g., substance abuse, binge eating, and reckless driving)
- 5) Recurrent suicidal behavior, gestures, or threats, or self-mutilating behavior
- 6) Affective instability due to a marked reactivity of mood (e.g., intense episodic dysphoria, irritability, or anxiety usually lasting a few hours and only rarely more than a few days)
- 7) Chronic feelings of emptiness
- 8) Inappropriate, intense anger or difficulty controlling anger (e.g., frequent displays of temper, constant anger, recurrent physical fights)
- 9) Transient, stress-related paranoid ideation or severe dissociative symptoms

Response: Even if the client has BPD (or other mental disorder), so what? What is the logical nexus to the facts in the case?

U.S. v. Dimberio, 56 M.J. 20 (C.A.A.F. 2001).

CAAF: Nor was there a sufficient proffer under Rules 401-405 and the 700 series. We normally think of these traits as traits that are relevant to the offense charged, that is honesty in a larceny case or law-abidingness in any case. However, the defense in this case seeks to introduce evidence, App. Ex. XXXV, as a mental disorder under the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)(4th ed. 1994). **This evidence may very well be relevant if the defense establishes that individuals with certain diagnoses confronted with certain situations may respond in a similar consistent way. While circumstantial proof of conduct may very well be relevant, it has more complex inferential problems that require a sufficient basis in a first instance.**

U.S. v. Smith, 2012 CCA LEXIS 367 (N-M.C.C.A. Sept. 28, 2012)

The appellant's proffer on this issue consisted of the records themselves and Dr. Kennedy's explanation of BPD. Although Dr. Kennedy opined that NW suffered from BPD, her opinion did not establish a nexus between the specific contents of the medical records and some fact or issue in the case. In fact, her explanation of how BPD operates highlights the absence of a nexus in this case. When asked whether there was "[a] trigger inside of an individual with Borderline that can be flipped," she described a BPD patient's "need to be loved," which can cause them to "do whatever they can to get that attention back" if it is lost. Record at 913. The "if" in Dr. Kennedy's testimony sets up the possible nexus. But neither her testimony nor any other evidence established that NW ever acted on any such impulse.

U.S. v. Butt, 955 F.2d 77, 82-82 (1st Cir. Mass. 1992)

For over forty years, federal courts have permitted the impeachment of government witnesses based on their mental condition at the time of the events testified to. See *United States v. Hiss*, 88 F. Supp. 559 at 559-60 (S.D.N.Y. 1950). Evidence about a prior condition of mental instability that "provides some significant help to the jury in its efforts to evaluate the witness's ability to perceive or to recall events or to testify accurately" is relevant. *United States v. Moore*, 923 F.2d 910 at 913 (1st Cir. 1991). "The readily apparent principle is that the jury should, within reason, be informed of all matters affecting a witness's credibility" *United States v. Partin*, 493 F.2d 750 at 762 (5th Cir. 1974). See also *United States v. Lindstrom*, 698 F.2d 1154 at 1165-66 (11th Cir. 1983).

Despite this precedent, we are aware of no court to have found relevant an informally diagnosed depression or personality defect. **Rather, federal courts appear to have found mental instability relevant to credibility only where, during the time-frame of the events testified to, the witness exhibited a pronounced disposition to lie or hallucinate, or suffered from a severe illness, such as schizophrenia, that dramatically impaired her ability to perceive and tell the truth.**

U.S. v. Butt, 955 F.2d at 82-83

Quite apart from the fact that the expert testimony bore no relation to Kevorkian, personally, is the necessarily tentative nature of its conclusions. It defines psychological terms as a medical textbook might, listing a group of characteristics suggestive of "borderline personality disorder" and sketching for the layman a profile of the typical hysteroid dysphoric person inclined toward "splitting." The testimony describes tendencies only, cataloging a range of behavior that one so diagnosed might or might not, sometimes, exhibit.

The bearing of these generalizations upon Kevorkian, personally, is questionable, in the extreme. The risk of their injecting collateral and confusing questions into the proceedings and subverting the jury's credibility determination, on the other hand, was considerable. In addition, to the extent that the testimony was, in effect, little more than a verbal rendition of the disclosed portions of the 1987 hospitalization record, it, too, was excludable on relevancy grounds.

SOURCE MONITORING ERROR

***U.S. v. Thomas*, 2015 CCA LEXIS 220 (N-M.C.C.A. May 27, 2015).**

Defense expert testified that source monitoring error is a form of memory distortion between two events that causes "confusion about different sources of information so that when you are recalling or trying to retrieve a particular memory, you may be incorporating aspects of another memory." The defense wanted the expert to testify about a past rape in the victim's history which, in expert's opinion, she possibly confused with consensual sex with the accused.

***U.S. v. Thomas*, 2015 CCA LEXIS 220 at 5-6.**

Expert testified that certain factors increase the likelihood for source monitoring error to occur, such as: (1) the perceived similarity between two events; (2) perceptual, visual, and emotional similarities between events; (3) gaps in memory; and (4) age. In his opinion, it was possible that source monitoring error impacted the accuracy victim's recall of the incident with the accused.

***U.S. v. Thomas*, 2015 CCA LEXIS 220 at 7.**

DC argued that the emotional and physical similarities between the past incident and interactions with the appellant could have infiltrated victim's recollection, and that testimony on source monitoring error was "an integral theory as a part of the defense of [SPC DS's] fabrication of the allegations."

***U.S. v. Thomas*, 2015 CCA LEXIS 220 at 8-9.**

MJ found the expert was qualified and this theory met *Daubert* standards.

MJ identified several dissimilarities he found between the prior SA in SPC and the incident with the accused , from which he concluded that "the commonalities between the [two incidents] . . . are not consistent with examples where source monitoring error more likely occur [sic]" — a finding in direct contradiction to the expert's opinion. The MJ determined that the expert's testimony lacked probative value because it would "provide to the trier of fact only that a possibility of source monitoring error occurred." Additionally, he cited the fact that there was no evidence presented that the victim had any "history showing episodes of source monitoring error or any other psychotic condition" as a reason the expert testimony was irrelevant - a fact never addressed by the expert as relevant or necessary to source monitoring error. The MJ denied the appellant's motion to admit expert testimony on source monitoring error based on MIL R. EVID. 401 and 403.

Cross Examining Expert Witness

Standing: *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013)

“In *United States v. Stamper*, the district court went further and, in a pretrial evidentiary hearing, allowed counsel for ‘all three parties,’ including the prosecution, defense, and victim's counsel, to examine witnesses, including the victim. 766 F. Supp. 1396, 1396 (W.D.N.C. 1991).

Kastenberg at 370.

Daubert v. Merrell Dow Pharmaceuticals,
509 U.S. 579 (1993).

- (1) whether a method can or has been tested;
- (2) the known or potential rate of error;
- (3) whether the methods have been subjected to peer review;
- (4) whether there are standards controlling the technique's operation; and
- (5) the general acceptance of the method within the relevant community.

Daubert at 593-595.

Questions:

Where did you read this theory?

Where was it published?

Was it subject to peer review?

How did they test this theory?

Was there a control group?

How many cases of this have actually been documented?

Where was this documentation published?

Google is your special friend 😊

Learn as much as possible beforehand about whatever personality/mental disorder or theory that the expert will be testifying about.

It is fun to watch the little beads of sweat break out on the expert's forehead when you catch him/her in making things up.

Any Questions?

