

THE WETC PSYCHOLOGY NEWSLETTER

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"Find the Truth, Tell the Story"

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July, 2021
Volume 1, Issue 150

The Disruptive Role of Clinical Judgment in Psych Injury Litigation

Whether you're involved in litigation alleging a psychiatric or psychological injury in workers' compensation, personal injury or social security, or an issue in child custody or criminal psychology some basic principles apply to all cases in all jurisdictions.

One thing that doesn't change is the importance of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM), with the most widely respected and legally accepted version being the DSM-IV-TR. The beauty of that volume is that it operationally or clearly defines the criteria for all of the truly innumerable disorders that can befall a human. Without doubt, if the individual does not meet the criteria found in "the book" they do not have the disorder diagnosed by the doctor. Since a diagnosis is almost always a critical issue, regardless of the jurisdiction of the case, the DSM-IV-TR is the most useful tool in deciding if the individual has the disorder the doctor diagnosed. This is critical since in my over 30 years of practice I have reviewed between 30,000 and 50,000 psych evaluation reports and found the vast majority of them to be substantially flawed. In fact, the attorneys and associated personnel can "smell out" a flawed report but lacking training in psychology and psychiatry they typically cannot localize the problem and come up

with a strategy to expose those flaws when cross-examining the doctor during a deposition or trial or when writing a brief for the court. That's where I come in as I write reports that help the attorneys plan and execute their critiques of the doctor's diagnosis and conclusions. ApricotsTM are what I call those reports but the name is irrelevant.

One of the most important points for attorneys, and all other collateral personnel to understand is that many of the issues they deal with in court proceedings are based on intangibles. Those issues must be avoided at all cost because if you try to deal with intangibles you cannot win!

Here's an example. Let's start by assuming that you are the defense attorney for a personal injury case stemming from an automobile accident or you're the same attorney dealing with the same situation in a workers' compensation venue. Let's assume that the plaintiff or applicant is clinically depressed and the doctor for the claimant diagnosed a Major Depressive Disorder. For the sake of discussion, let's also assume that the diagnosis is correct. Let's further imagine that in researching the case you discover that the claimant has been clinically depressed for many years and has received treatment in the form of both medication and counseling. Let's also assume that the doctor who is testifying on the claimant's side is aware of those medical reports. Now comes the biggy!

Despite that history of a pre-existing depression the doctor maintains that the accident in question is the major cause of the claimant's current clinical depression. How do you handle that?

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Assuming that the doctor is not a complete dunce, you can't! No matter what you say or ask, the doctor will simply say something like, "In my clinical judgment, based on my thirty years of practice in evaluating and treating patients, it is my judgment that despite the pre-existing depression the claimant's current depression has been predominantly caused by the accident in question."

Oh, you can beat around the bush and look for records that demonstrate that the claimant was almost as, or perhaps even more depressed before the accident than afterwards, but you're swimming upstream against a major current. No matter what the records show, unless the doctor is really the above-referred to dunce they can find a way to assure you that the records are incomplete or inaccurate or do not fully portray the claimant's true psychological condition. The issue will ALWAYS get back to the current doctor's "clinical judgment" and they will say a variety of things all beginning with, "In my clinical judgment....." You'll have no way out to show that the doctor's judgment is flawed.

Now contrast that scenario with one in which you pull out the DSM-IV-TR and question the doctor asking them where in their report the history they took from the patient, the results of their Mental Status Examination and the findings of an objective psychological test battery show that the patient has a Major Depressive Disorder. Essentially, you wave the DSM-IV-TR criteria in their face knowing that it is an extremely rare psychiatrist or psychologist who will take the time and make the effort to fully document the existence of the disorder as it is defined in the diagnostic manual.

Trust me, I've read 30,000 to 50,000 psych reports and it is extremely rare to find that doctor. I know. I've made a very nice career by understanding and using this fact after a prior career as a Professor of Psychology who brought academic standards to forensic psychology.

So, if you're trying to attack the doctor on the extent of the claimant's disability or loss, the apportionment of that loss or disability to pre-existing or concurrent factors, the need to compensate the treating physicians, or the need to pay for past and future treatment you're always going to run into the same brick wall....."In my clinical judgment....." As we used to say many years ago, "Go fight City Hall." You're stuck!

Finally, I would like to suggest to you that if you have a case and you're not quite sure if it's one of the rare ones where the doctor has done their homework, or if it is one like almost every other where there are fatal flaws in their reporting, you can send me a copy of their report and I'll tell you what's wrong in a free telephone consult at 844-444-8898. Or email me at DrLeckart@DrLeckartWETC.com. At that point you can decide if you want me to write an Apricot™ or go it alone based on the information I gave you. If you decide on the latter you can go to my website at DrLeckartWETC.com and download a free copy of my book, Psychological Evaluations in Litigation: A Practical Guide for Attorneys and Insurance Adjusters and use some other resources found at my website to plan out your strategy. Or, you can ask me to write a report that includes a complete analysis of the flaws with supporting data and professional literature citations as well as a full set of questions that will dismantle the doctor's testimony during cross-examination. Either way, I'm here to help.

This is the one hundred fiftieth of a series of monthly newsletters aimed at providing information about pre-deposition/pre-trial consultations, psychological evaluations and treatment that may be of interest to attorneys and insurance adjusters working in the areas of workers' compensation and personal injury. If you have not received some or all of our past newsletters, and would like copies, send us an email requesting the newsletter(s) that you would like forwarded to you.