A Walk-Through from Referral to Testimony: Methodology & Admissibility

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Abstract

The focus of this paper is to address the issue of rehabilitation professionals having their credibility and the admissibility of their opinions challenged when called to testify in litigation matters, and how rehabilitation professionals should adhere to proper methodology that reflects their day-to-day clinical work. The objectives of this paper are to identify what qualifies rehabilitation professionals to provide opinions to the court, to discuss subjects of credibility often raised in a deposition and at trial, and how to address these subjects from various perspectives. Beginning at the point of referral and moving through the full spectrum of an assessment (i.e. clinical interview, testing, research, consultations, and report writing), the authors discuss effectively defending the relevance and admissibility of their opinions in a deposition and at trial. This paper covers the following topics: clinical practice, methodology, court rules, and the line between professional style, professional preference, and admissible practices.

Keywords: admissibility, methodology, clinical judgment, testing, specialized knowledge, training, education, court rules

The main factors that qualify rehabilitation professionals to serve as subject matter experts in legal proceedings are knowledge, skills, experience, training, and education. When a rehabilitation professional's opinions are challenged due to admissibility, these core factors are what can be called upon to establish expertise and admissibility. This paper delves into the specifics of the rules of evidence, potential lines of challenging the admissibility or qualifications of an expert and their opinions, key concepts and phrases to rely upon when testifying

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at trial and in depositions, and how to respond to a motion in limine.

Literature Review

Admissibility

According to Field and Choppa (2005), what qualifies a rehabilitation professional in their day-to-day clinical work is what qualifies them as experts and ultimately establishes their admissibility as an expert in the court. The main factors relied upon to establish subject matter expertise are knowledge, skills, experience, training, and education. These are the primary factors rehabilitation professionals call upon to qualify the admissibility of their opinions. Additionally, demonstrated compliance with proper peer-reviewed methodology, use of valid and reliable information and data, and remaining within one's scope of practice are essential to maintaining admissibility. Field and Choppa (2005)recommended:

> The reliance on reliable and relevant principles and methods are critical to the work of the qualified expert who will be distinguished by such credentialing factors as knowledge, skill, experience, training, or education. Equally important is to develop an opinion predicated on valid, reliable, and relevant information which will be consistent with the facts of the case.

The stare decisis set by two precedent setting cases have established rules of admissibility. The first case is *Frye v. United States* (1923) which found that "[t]he thing from which a deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Frye reemphasized the importance of adhering to established, peer-reviewed methodology, and acting within one's scope of practice.

The second case is *Daubert v. Merrell Dow Pharmaceuticals* (1993). The decision in this case hinged on chemistry, a hard science, and so resulted in criteria that addressed hard science processes. According to Field and Choppa (2005), Daubert made clear that "the inquiry [on methodology] is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions they generate." The inquiry is "intended to evaluate testimony related to scientific method, not to serve as criteria for all testimony, including soft sciences."

The results of *Daubert* place emphasis on the four basic criteria for testimony that align with the scientific process: Can the theory be tested? Has the theory or technique been subjected to peer review and publications? What is the known error rate of the particular scientific method? Is there an explicit identification and acceptance of the theory and technique by a relevant scientific community?

While application of these criteria may be straightforward for hard sciences, the same is not true for soft sciences, making it an important point of consideration for rehabilitation professionals when defending the admissibility of their opinions. Rehabilitation professionals work with the nature of the human condition; every individual is unique, and the results of findings are not necessarily reproducible in a lab. *Daubert* applies differently to the work of rehabilitation professionals as there is no standard error of measurement. Rehabilitation professionals are assessing evaluees, as such an N of 1, therefore there is no standard error of measurement. However, there are peer-reviewed and generally accepted methodologies that must be adhered to in both clinical and expert settings.

The *Daubert* case had rippling impacts, such as depositions colloquially referred to as "Daubert deps" which are depositions that set out to ask questions for the purpose of later attempting to disqualify an expert. These deposition questions are not always obvious, and so attention to language is essential. Queries that are seemingly innocuous may be crafted to discredit the admissibility of an opinion, or the expert altogether.

The *Daubert* case connects to the admissibility of the rehabilitation professional's expert opinions through Federal Rule of Evidence (FRE) 702, which states:

> If scientific, technical, or other specialized knowledge will assist the Trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FRE 702 identifies areas of scientific, technical, and specialized knowledge as legitimate domains for testimony that do not necessarily conflict with the *Daubert* factors. Experts can be qualified based on knowledge, skill, experience, training, and education, and these are the core tenets of expertise for rehabilitation professionals to remember when qualifying themselves as an expert in a deposition or at trial. Specialized knowledge is more specifically a combination of the aforementioned tenets, with emphasis placed on recent and past clinical work and education experience, and how these are essential elements that inform the rehabilitation professional's opinions as an expert and distinguish them from laypersons.

Number of years of experience can be a factor in establishing one's expertise, but it is unclear as to the minimum necessary quantity. Years of experience bears less weight, and so there is no concrete answer because it depends on the individual expert and their ability to articulate why they are qualified. Qualification as an expert includes the core tenets of expertise, as well as an ability to articulate these tenets with proper terminology, membership and participation in professional associations, adherence to a code of ethics, continuation of education and training, and a history of specific professional experience. The actual quantity of years has variable relevance in the face of these other factors.

The concept of specialized knowledge includes qualitative and quantitative information for triangulating data and formulating valid opinions. This is analogous to diagnostic imaging: the imaging provides quantitative data, while the qualitative data is the radiologist's impression of the imaging. Both types of data are relevant and necessary for arriving at a conclusion.

Pertaining to the question of how rehabilitation professionals do what they do, given the background that they have, the following quotes by Grimes (2002) apply:

> "The accuracy of the analysis is primarily based upon the three factors of methodology, clinical expertise and accurate application of the available researched data."
> "The [vocational expert] (VE) is vulnerable to error in the decision-making process when they lack the experience in evaluating a case and are overly reliant upon the data."

> "The experienced VE is prone to analysis error if they are overly reliant upon their experience and ignore the data or fail to evaluate how the data applies to a specific individual."

Grimes (2002) implies that there is a balance between exercising expertise and clinical judgment, just as there is a balance between the qualitative and quantitative data utilized for arriving at an objective opinion, such as the radiologist relies on diagnostic imaging to inform their opinions.

There are several relevant cases that explain how The Court's rules apply to expert opinions, and have further fine tuned the rules to explain why experts are needed by courts.

General Electric Co. v. Joiner (1997) defined the judge as the "gatekeeper" with regard to determining the admissibility of evidence, thus positioning the trier of fact as possessing discretion to admit or exclude testimony by an expert. Ultimately, it is the judge who decides whether an expert's testimony is admissible or not.

McKendall v. Crown Control Corp. (1997) directed the Court to first "determine whether the expert has specialized knowledge that will assist the trier of fact to understand the evidence" (Field & Choppa, 2005). The *McKendall* decision connects back to *Daubert*: "*Daubert* factors are confined to the evaluation of scientific knowledge, and ruled that an expert may be qualified to testify by knowledge, skill, experience, training, and education" (Field 2000).

"Kumho Tire Co. v. Carmichael" (1999) further clarified the role of the gatekeeper by allowing judges considerable leeway in scrutinizing the testimony of an expert in the context of technical and specialized knowledge. The court would now have leeway to admit testimony that might not meet one or more of the *Daubert* factors.

Although memorization of the aforementioned cases is unnecessary, the importance of understanding the implications of these and other decisions, as they pertain to rehabilitation professionals relying on their clinical qualifications and experience as the basis of their expertise cannot be overstated. Understanding the context of these rulings allows rehabilitation professionals to adequately assess the underlying purpose of questions related to their credibility and expertise. Questions regarding the standard of measurement for rehabilitation assessments relate to this issue and are appropriately addressed with responses that explain that rehabilitation professionals deal with individual evaluees (n of 1) and rely on a mixture of quantitative and qualitative data and specialized knowledge, not standard measurement per se.

In a deposition or trial setting, it is necessary to be able to use precise language that accurately articulates the scope of professional practice. Again, rehabilitation professionals must operate within the scope of their practice, adhere to a code of ethics, utilize generally accepted published and peer-reviewed methodologies, and rely on data that is both valid and reliable. The primary tenets of being an expert rehabilitation professional are: be properly credentialed, offer services and testimony within one's area of expertise, rely on valid and customary foundations for information and data, and be clear on selected methodologies that have been generally accepted and peer reviewed.

Skills

Case Conceptualization, Clinical Judgment, and Methodology

Regarding case conceptualization and clinical judgment, articulating the utilized methodology is not only a function of knowing what has been done, but why it has been done. Chapter 3 of Dr. Rick Robinson's (2014) book *Foundations for Forensic Vocational Rehabilitation* emphasized the importance of understanding the methodology utilized for arriving at an opinion and being able to articulate the underpinnings of the methodology (Choppa et al., 2014). Dr. Robinson's book reviews over 25 methodologies and is a valuable resource for understanding and articulating methodology utilized by rehabilitation professionals.

Case conceptualization is the process of developing an understanding of the facts of a case and formulating opinions while adhering to proper methodology to remain within the parameters of admissibility (Choppa et al., 2014). The process serves not only to understand the larger picture of an evaluee's circumstances, but to also assist in identifying any gaps in information that may be needed for an evaluation. This information is typically obtained, or identified as needed, during the evaluation of records, intake interview process, and consultations. Specialized knowledge is applied to the case conceptualization process and outlines the characteristics for what distinguishes an expert from a layperson. The expert's specialized knowledge informs the identification of relevant questions toward obtaining relevant and reliable information for arriving at valid opinions.

Clinical judgment acts in conjunction with case conceptualization. Dr. Robinson's (2014) text is referenced for its focus on case conceptualization and how Opinion Validity© is achieved through the lens of clinical judgment: as the application of relevant information requires clinical judgment. Clinical judgment ties back to admissibility factors in that clinical judgment uses experience and understanding of methodology to properly opine on and apply relevant and reliable information. Choppa et al. (2014) recommended,

> Clinical judgment requires that the final opinion be predicated on valid, reliable and relevant foundation information and data that are scientifically established through theory and technique building which has been tested, peer reviewed, and published, with known error rates, and is generally accepted within the professional community. (p. 135).

Clinical judgment is defined as experience understood (Choppa et al., 2005); the application of clinical judgment is used in conjunction with generally accepted, published, peer-reviewed methodology. Clinical judgment ideally strikes a balance between the expert's experience and education as suggested by Grimes (2002).

Case conceptualization occurs throughout the assessment process, (i.e. during the review of records, interviews, consultations, and while researching) and in tandem with the rehabilitation professional's application of specialized knowledge and clinical judgment to formulate opinions. Case conceptualization plays an essential role in the preparation of a report, and when given an opportunity, during review of an opposing expert's report.

"Can you spell the methodology you use?" is an idiom that stresses the importance of understanding case conceptualization and methodology. Specifically, it references a recent federal court case where a gentleman was injured; records were reviewed, interviews and testing were done, and residual functional capacity determined that he would not be able to

do the work he did pre-injury. The plaintiff expert utilized the RAPEL method, looking at the evaluee's vocational rehabilitation and life care plan, access to the labor market, placeability, earnings capacity, and labor force participation. An opposing expert wrote in their report that the plaintiff's expert "used RAPHEL testing to determine. . . vocational aptitudes." It was clear the opposing expert was not familiar with this generally accepted and peer reviewed methodology and mistakes it for a test instrument. The expert could have indicated they were unfamiliar with RAPEL, but instead left themselves vulnerable to issues of admissibility.

The main takeaway being, reliance-upon methodologies that are generally accepted and peer-reviewed is the standard; and experts should be able to adeptly articulate the relied upon methodology in a written report or when testifying in a deposition or at trial. In addition to peer reviewed and accepted methodology, articulating the case conceptualization process and clinical judgments relied upon for arriving at an opinion, in a way that others will understand, is necessary to ensuring the admissibility of rehabilitation professional's opinions.

Referral

There are multiple phases in a case, beginning with receiving a new referral, and within each phase are elements that often intersect with factors of admissibility. Conflict checks are essential to avoid unnecessary problems, which can be accomplished by obtaining the name of the parties involved (e.g. plaintiff, defendant, referring, and opposing attorneys) along with the date and nature of the injury. The scope and description of assignment is also important to obtain at the onset of referral, which includes determination of case needs, communication of background and limitations, and establishment of jurisdiction. It is recommended to obtain case schedules and deadlines for expert reports, discovery cutoff dates, mediation dates, and trial dates, keeping in mind any potential scheduling conflicts. Deadlines are vital to meet; if a deadline for a report or the actual testimony is missed, it is almost guaranteed that an expert's opinion will be excluded. While this is not related to methodology, it is a matter of professional practice.

It is also important to discuss and be transparent about fees and retainers from the start of a referral. Having a clear rate sheet sent to the referral source that defines billing rates and invoicing practices is recommended and required in some venues. If there are variations in what is charged, the reasons for those variations should be understandable. Most important is being clear about billing and invoicing practices and policy upfront for the sake of setting reasonable expectations. Billing, and when to do so, is often a subject targeted in depositions. Actual billing is often less relevant than being clear and consistent about billing practices. It is important to note that experts are paid for their professional time, not their testimony or opinions per se. Additionally, rates do not change based on the outcome of a case as there are ethical considerations that disallow rehabilitation professionals from billing based on contingency. Keeping a record of time worked is incredibly helpful for addressing questions related to billing as well as demonstrating the amount of time spent on the case, which in turn can help validate the rigors of arriving at an opinion.

At its core, the above elements are tools to ensure a mutual understanding that the nature of the assignment is within the expert's scope of practice and to ensure that there are no conflicts. Clarification of the scope of work early helps to negate any potential confusion of expectations between the rehabilitation professional and referral source. Case conflicts

bear their own implications, and addressing these key subjects from the start is critical to avoiding any potential misunderstandings.

The process of documentation from the very beginning and adhering to generally accepted and peer reviewed methodology are standard actions that help to support the admissibility and validity of an opinion. Part of this is distinguishing between one's own expert opinions versus that of the referral source's opinion. For example, a referral source may describe a client as "totally disabled" upon referral but that may not be the opinion of the rehabilitation professional assessing the case. The proper response to this situation is to use caution, making sure to attribute any opinions belonging to the referral source as theirs alone, and that the rehabilitation professional's opinion is independent and the result of the utilization of peer reviewed and accepted methodology.

Obtaining relevant records is necessary to having the information needed in order to build foundational knowledge on data customarily relied upon. When acquiring records, it helps to consider the record review process to decipher what records are actually needed. There are a variety of records generally relied upon for arriving at an opinion. There are instances when it may seem unclear which records to request, or when a referral source is reluctant to provide the requested records. While each case is distinct, generally speaking, it is advisable to make note and keep a record of what was reviewed, and whether information was requested and if it was denied or not. Ultimately, a rehabilitation professional can only formulate an opinion using the materials that are made accessible to them; when a referral source is reluctant to share or withholds information that is a reflection on them, not on the rehabilitation professional and their ability to reach an opinion. In addition to record reviews, there are also uncertainties about whether a rehabilitation professional can rely on a medical chronology or summary authored by another professional.

On one hand, medical summaries created by other professionals may be helpful for conceptualizing the whole picture and reinforcing an understanding of a client while delving more deeply into the details of their history and situation. On the other hand, rehabilitation professionals are encouraged to confirm and verify the information they rely upon. Alternatives for summarizing the information and pulling excerpts verbatim as a synthesis are acceptable so long as they are accurate; direct quotes are helpful in ensuring specificity and accuracy of language. Both methods are acceptable so long as they are accurate. Additionally, having documentation relied upon in summary during a deposition may be helpful as attorneys are apt to pose questions regarding those documents or records. It is key to be able to demonstrate that while records are not memorized, there is in fact a way of showing the records were reviewed by having key documents or quotations readily available when being questioned. The types of records reviewed and the time spent reviewing them are a means for establishing that the work was thorough and reliable.

Intake Interview

Specialized knowledge serves as a means for curating reliable information, being able to digest it, and being able to determine how to apply it. The information used must be relevant and reliable. Relevant and reliable information is often obtained in several ways, but most immediately through records, intake interviews and testing.

There are instances in which conducting an intake interview is not possible, not permitted, or simply does not happen. For example, when the evaluee is deceased or is a child,

or in cases involving cognitive impairments, when access to an evaluee is denied, it is recommended to make note of that so that; should the issue arise in a deposition or trial, there is then a record that an attempt was made to coordinate an interview or testing. When an interview simply is not possible, it is important to consider methodology and use clinical experience/knowledge, training, and case conceptualization to assess the information and determine whether a sound opinion can be provided or additional information is needed. Then, how to obtain the information somewhere else, such as parents, friends, or family members should be considered. Alternatives such as sitting in on live depositions or a doctor's evaluation of an evaluee, which may be helpful for obtaining the information.

When it comes to conducting and memorializing a clinical interview, there are multiple approaches and practices, but all must be considered through the lens of proper methodology, which leads to admissibility. Documentation is a matter of professional style, but must have sound reasoning; for example, notes can be hand-written or typed, notes may be destroyed as some professionals choose to do, or there may be no notes at all.

Questions may arise as to the validity and reliability of an assessment when access to an evaluee is denied. However, according to published peer-reviewed journals, a valid and reliable assessment can be conducted without access, so long as the resulting conclusions are based on sound clinical judgment, though it must be stated when there was no access, followed by what information was relied upon. Again, it is specialized knowledge, experience, and clinical judgment that make rehabilitation professionals qualified experts, able to assess the information provided and draw a reliable conclusion.

Questions from previous depositions provide examples of what a rehabilitation professional may face regarding the intake interview process, admissibility, and methodology. The following deposition questions were detail-oriented, highlighting the importance of focusing on such details throughout the progression of a case: When was the evaluee interviewed? Was the meeting in person? How long was the interview? How rehabilitation professionals address these questions relates back to case conceptualization, adherence to methodology, and using clinical judgment. Each interview question hits on one piece of the puzzle and rehabilitation professionals use their specialized knowledge to assess the need for additional information, or whether to perform testing for aptitude, interest, or achievement. The process for determining what is needed for any given assessment, when conducting an intake interview, provides the correct response for the questions a rehabilitation professional can expect to hear when in a deposition or trial regarding this topic.

Training

Conflicting Medical Opinions

It is not uncommon to encounter conflicting medical opinions. Approaching these conflicts is often a matter of proper application of peer-reviewed methodology. The rehabilitation professional is not typically a trained or licensed medical provider and cannot judge, for example, two orthopedists with differing opinions, to determine which is most accurate. However, the rehabilitation professional has the ability to address such conflicts within the context of their analysis. Other times, the expert is simply asked to rely upon one medical opinion or another for their analysis. Ultimately, this is left to the judge or jury.

Research & Data

Admissibility factors regarding use of research and data include not sourcing irrelevant or unreliable data. Generally speaking, state and federal data have historically been considered reliable. Use of research and data must include genuine analysis of materials and involves a proper assessment of the reliability and validity of those materials. Some sources have an undisclosed agenda or purpose, or only include only limited aspects of a larger topic that may be the subject of the research; knowing these things is important to ensure that an opinion is truly and properly informed. Similar to testing, rehabilitation professionals must be able to articulate what is being relied upon and the underpinnings of the source and data. Ultimately, emphasis is placed on being knowledgeable and informed about what is being used to arrive at an opinion. Rehabilitation professionals should be able to speak to what has been included in a report, and at times, include a disclaimer that it is not the intent of a report to summarize all the records and data relied upon but to reflect the relevancy of specific data and sources relied upon. Additionally, when it comes to writing the report, it may be helpful to make a statement that, should additional information become available, the report will be updated as necessary.

Experience

Testing

Questions of admissibility may be raised at all phases, including testing. Testing involves instruments that have standard errors of measurement, and there are some considerations to being able to articulate the use of testing and how the testing is then applied back to the individual evaluee. Conducting testing as rehabilitation professional is a practice in the qualitative-quantitative synthesis of the individual. When it comes to testing, there are important elements to consider: the tests being administered, where the tests are being administered, and how important it is to be familiar with the test's validity and reliability. Questions related to these elements point back to *Daubert*; specifically, regarding whether a theory or technique has been subjected to peer review and publication, whether there is a known error rate of the particular scientific method, and whether there is an explicit identification and acceptance of the theory and technique by a relevant scientific community.

Rehabilitation professionals use instruments and techniques that are generally accepted. An expert who administers a spelling test in which the expert determined the words for the test, for example, is unacceptable. The standard methodology includes using a wide range of peer reviewed and accepted achievement tests for scholastic assessment, not self-designed tests. Similarly, if an expert administers a test unfamiliar to another rehabilitation professional, albeit obscure, that does not necessarily make the test inappropriate. However, it is generally advisable to stay abreast of testing and stay within proper methodology.

When assessing whether an instrument is acceptable to use, it is advisable to consider the following questions: Is the instrument or test generally accepted and used in the field? Is it the same type of instrument or test relied on in other settings? Are the strengths and limitations of the instrument understandable and relatable to others? While this information does not necessarily need to be memorized, rehabilitation professionals should be able to articulate and define what is being used as part of their specialized knowledge and methodology. It is not uncommon to be unable to remember everything read and assessed,

and when being deposed or questioned, that may open the door to questions of admissibility. To avoid being vulnerable to a motion in limine when questioned about such details, it is important to provide a full and complete answer that explains that although the information may not be accessible at the moment, the information can be obtained and provided. The main point for rehabilitation professionals to remember is that the outcomes of testing administered have been applied to the assessment as part of synthesizing qualitative and quantitative data for arriving at an opinion. These are standard methodological approaches that are utilized in clinical practice. The standard error of measurements for testing does not need to be memorized. Rather, rehabilitation professionals need to know the tests that are being used and be able to articulate that testing relies on peer-reviewed and accepted test instruments that are generally used in the field of rehabilitation. There should be no change in the method or instruments used clinically when evaluating individuals forensically. The rehabilitation professional is looking at the data derived from the testing and applying the data to their assessment, while synthesizing qualitative and quantitative measures. These daily clinical practices, what we do, deem rehabilitation professionals' assessments relevant and their opinions admissible.

The following examples are actual past deposition questions intended to address admissibility: "You administered several assessments to [the evaluee] during your interview. . . what is the sum and substance of that test?" and "Do you think [the evaluee] is smart?" Regarding the first question, as a matter of admissibility, the data derived from testing (quantitative) are evaluated with the other data points discussed, e.g., interviews (qualitative) and are applied to the assessment (synthesis). Regarding the second, the question itself should prompt a response that clarifies that rehabilitation professionals engage with academic skills, aptitude levels, experience, and academic achievement levels, not personal opinions about if someone is "smart."

Consultations

Utilization of consultations during the assessment process is common. Consultations are collaborative discussions between professionals and are used when additional information is needed but exists outside the scope of one's own practice. Given a rehabilitation professional's specialized knowledge and training in the medical, psychiatric, and social aspects of disabilities, rehabilitation professionals are uniquely qualified to consult with the appropriate health care professionals to help define the nature and extent of impairment and its application to all areas of an evaluee's life. Rehabilitation professionals then interpret what the nature and extent of those impairments are and how they apply in the world of work or independent living. It is of the utmost importance to stay within one's own scope of practice and know when to seek external consultation to gather the necessary information and foundation for reliable opinions. This remains the same when others seek consultation with rehabilitation professionals.

With regard to memorializing consultations, documentation is valuable, and it is recommended to do so in writing when appropriate. After a consultation, it is useful to send confirmation restating the recommendations, which does two things: it creates a record of the consultation and what was covered, and it establishes that the information and opinions discussed were correctly understood. In clinical work, a follow-up letter is not always necessary due to the ongoing nature of the work, but it is often utilized by the presenters in their

clinical practices for documentation and relationship-building. With forensic consultations, however, there is often a trial deadline and ongoing work does not continue into the future, like it typically does in a clinical setting. Memorializing the consultation clearly documents who was met, what was discussed, and allows the details of the consultation to be revisited throughout the case conceptualization process, in addition to providing a record for often busy physicians who may not recall what was discussed during the consultation.

Depositions

Depositions require active and careful listening, because language is precise and meanings are easily distorted when improper language is being used by the questioner, or by the rehabilitation professional, though the distinctions are often subtle. The types of inquiry that rehabilitation professionals may routinely face in deposition or at trial can be remembered by the idiom "Yours, Mine, and Ours." A rehabilitation professional may receive an inquiry about "your" attorney in the case. It is important to remember that rehabilitation professionals are retained experts and do not have an attorney present representing their interests in a deposition or at trial. Rehabilitation professionals may encounter a question similar to, "What percentage of time, if any, do you represent the defendant or plaintiff in civil litigation?" The key word in this question is "represent" as rehabilitation professionals do not represent anyone in these matters. Another example is, "Talk to me about "your" methodology?" Rehabilitation professionals rely on peer-reviewed and generally accepted methodologies published in professional journals. These methodologies do not belong to any individual rehabilitation professional.

These kinds of questions in a deposition or in trial are rarely innocent, and it is important to correct an attorney when questions misstate key nuances in order to avoid potential downstream admissibility issues. Glas (2020) published a list of deposition and trial questions regarding a rehabilitation professional's qualifications as examples of what might be encountered by rehabilitation professionals to encourage that they be comfortable with questions and know themselves and their expertise, as the answers to these questions are often what qualify or disqualify a rehabilitation professional as an expert:

> "What is your primary field of practice?"
> "Are you licensed or certified?"
> "Are your certifications private or non-profit, do you know?"
> "Do you actually provide vocational rehabilitation?"
> "Do you hold an active membership in a professional association?"
> "Do you adhere to a code of ethics, and have you ever been excluded or rejected as an expert?"

Similarly, rehabilitation professionals can expect to be asked about the methodology that was utilized to arrive at an opinion:

> utilized to arrive at an opinion:
> "Did you conduct an in-person interview?"
> "Do you charge by the hour or flat fee?"
> "What do you charge for your opinion?"
> "Do you have a duty to maintain records of research and supporting documentation?"

These questions more often than not harbor ulterior motives and can be meant to lead to a line of questioning regarding the methodology followed when arriving at an opinion.

Deposition questions may be asked that seek to simplify an opinion, and while they may seem straightforward on face value, they often pose issues of admissibility after the deposition is complete. For example, a question that begins with, "Do you just mean. . . " is one that immediately needs to be addressed. The response may be, "No," along with what was meant so as to take control of the narrative and make sure opinions and testimony are not being misinterpreted or manipulated, whether accidentally or intentionally. Rarely is there an innocent question in a deposition or at trial.

The *Hanford* (*In re Hanford Nuclear Reservation Litigation*, 1991) case is an example of a case that resulted in a significant motion in limine intended to exclude the admissibility of a qualified rehabilitation professional. Questions that were posed during a Hanford deposition were crafted to challenge the admissibility of a rehabilitation professional's opinion, predicated on the assumption that the rehabilitation professional, for example, was unable to describe their profession, the methodology that was utilized, or the different factors and value that a rehabilitation professional adds to the fact finding process and the credence of their opinions. Using the key terms listed throughout this paper, rehabilitation professionals are able to answer these challenging questions because they know their expertise, which consists of specialized knowledge, experience, education, and clinical background.

Motions in Limine

The motion in limine (MIL) is a written document from an opposing counsel that may cite excerpts from an expert report, a deposition, case law, and at times, may mischaracterize opinions and responses to deposition questions and reports. The MIL is specifically written to challenge the admissibility of an expert based on two key facets: Is the expert qualified to render the opinion, and did the expert rely on proper methodology? The expert's knowledge, skills, training, experience, and ability to articulate these factors are all important to withstanding an MIL, as well as understanding the rules and language of the venue.

The sequencing of addressing a MIL includes reviewing the motion when filed, responding to the MIL point by point through a deceleration, and listing qualifications and methodology relied upon as the foundation for the rehabilitation professionals' opinions (A. Choppa et al., 2005). Responding to a MIL begins by preparing a declaration relying on specialized knowledge, articulating expertise and qualifications, and cogently addressing any argument in the MIL that asserts a lack of qualifications.

After the declaration and response to a MIL is filed, the party that filed the MIL has an opportunity to reply before there is a hearing and ruling from the trier of fact. Rulings are typically made at a hearing in advance of, or at the time of trial. More often than not, the subject expert of the MIL is not present at the hearing, but there are times they may be asked to participate.

Responding to an MIL should include special attention being given to the nuance of the MIL and comparing the original deposition testimony against how testimony was quoted or misquoted or taken out of context.

For example, the MIL filed in the Hanford case after the expert's deposition referenced above, many of the responses addressed inaccuracies and misstatements contained within the MIL. Every assertion in the MIL was meticulously addressed point by point, with

emphasis again given to the importance of being able to articulate the rehabilitation process, methodology relied upon, and qualifications to do so. However, there are scenarios where a MIL is filed against a retained expert and the retaining referral source does not inform the expert. This is a dangerous situation for the rehabilitation professional, because the retaining attorney may believe they know how to respond, but can only respond as attorneys, not as a rehabilitation professional. One possible solution is to consider stipulating in a retainer agreement would include a statement such as, "should there be a MIL filed, the retained expert will be made aware and given an opportunity to participate in the response."

An example of an MIL to exclude an expert based on lack of qualifications and improper methodology, where the expert was excluded, is *Goldstine v. Federal Express* (2021). In this case a Certified Public Accountant, did not practice within the scope of their practice, adopted the opinions of a vocational expert (VE) not disclosed in the matter, rendered their own vocational opinions outside their area of expertise, and was excluded for improper methodology. The court ruled that even if the undisclosed VE that the CPA relied upon had been called to testify, his methodology was flawed. The Court stated, stating, "It is unclear whether Defendant intends to call [VE] to testify as a vocational expert. In any event, the Court does not find that [VE's] vocational opinions survive a Daubert analysis" (*Goldstine v. Federal Express*, 2021). The judge stated of the VE,

> His conflation of "local" jobs available in [Plaintiff's] geographic area with the "local" truck driving that is [Plaintiff's] job requirement, combined with his use of local driving jobs and long-haul driving jobs in his data demonstrate a singular lack of understanding about the nature of the work performed by [Plaintiff]. His opinion fails for lack of reliable data based on a mischaracterization of what would constitute "equivalent" work for [Mr. Plaintiff]. Plaintiff's motion to exclude [VE's] opinions, either as a basis for [CPA's] testimony or for the testimony of [VE] himself, is granted.

The excluded expert did not possess the proper credentials and was not qualified to render vocational opinions, and therefore was practicing outside of their scope of practice. The undisclosed VE did not follow proper methodology and would not have survive a Daubert analysis.

In another MIL filed against a rehabilitation professional and their economic damage expert colleague, it was clear that the motion was filed because the opposing counsel simply did not like the expert's opinions. The matter involved the wrongful death of a young woman where the rehabilitation professional provided vocational analysis and their colleague provided economic damage calculations. Neither of the experts was deposed, and a MIL was filed against both experts to exclude their opinions, solely relying on the opposing counsel's rebuttal expert's assertion that the opinions were flawed and therefore inadmissible. Both experts read the rebuttal expert's reports, read the MILs, worked on the declarations in response to the MILs, articulated their qualifications, and responded point by point to assertions attempting to undermine their qualifications and methodology. The following is from the declaration in response to the MIL:

> [VE] is a Vocational Rehabilitation Counselor and Case Manager, who has worked in the field for over 33 years. She opined that J.K. would have a "pre-death earning capacity" equivalent to "that of an Associate's degree. She noted that certain

> statistics reported an upward trend of educational attainment since 1940. She concluded that based on J.K.'s family background and research, she believed J.K. would have had the capacity to get an associate degree and would possess the ability to earn an income compatible with the average for this level of education for full time year around employment. She relied on the U.S. Census Bureau, Current Population Survey, 2019 Annual Social and Economic Supplement that indicates the year-round earnings for persons completing some college to an associate degree is between $60,806 to $65,490 annually.
>
> [Economic Damages Calculations expert]has over six years of experience in Economic Damages Calculations and over 39 years in the fields of Rehabilitation counseling, vocational rehabilitation, and case management. He relied on National Vital Statistics to conclude the mean age of mothers at first birth was 26.9, and the projection of a second birth involves lots of factors. He used 30 for the age that J.K. would have her second child. In computing her marital partners' income, he concluded her spouse would possess an associate degree and make about the same amount of money. He also computed her consumption. His final calculation was that a reduction to present value for J.K.'s wage earning capacity will range from $2,266,443.42 to $3,235,807.85.

Ultimately the court ruled the experts did in fact possess the knowledge, training, and experience to render opinions using established methodology and specialized knowledge, and allowed both experts to proceed in the matter. The following is from Court's ruling:

> The Court finds that Plaintiff has met his burden of showing that the [experts'] testimonies are relevant, reliable, and could be helpful to the jury, and thus they meet Fed. R. Evid. 702 requirements for admissibility. Both experts provided economic damages calculations in a manner consistent with established methodology, using specialized knowledge, relying on sufficient fact and data and reliably applying principles and methods of economic damage calculations.

Central to success is relying on peer-reviewed, generally accepted methodology, and specialized knowledge.

Trial

While professional style may vary, there are some best practices offered by the authors that they have implemented when proceeding to trial. It is encouraged to discuss the proceedings to date with the retaining attorney the day before scheduled testimony to understand any MIL decisions to be considered. For example, an injured person with a significant substance abuse problem 15 years ago. The plaintiffs moved to exclude discussion of this history, which was granted. It is important to know this to avoid accidentally broaching a subject that has been excluded from testimony.

Also, getting a sense from the retaining attorney of who has already testified is important. Knowing if doctors have testified is helpful to understand what foundation has been presented to the jury. Knowing who the jury has heard from regarding the nature and extent of the impairment is important because there is a good chance the expert's opinion will not

make sense to the jury if the medical foundation has not been laid out by the various medical professionals who are addressing the nature and extent of impairment.

There are also instances where physicians have testified at trial and said something different than what was discussed with the expert. Knowing what if any changes have occurred in medical treatment, medical opinions, or work status is essential, since this may require adapting opinions to reflect the changes. The expert must know that the facts and data that they have relied upon for their opinions are still the facts and data being presented at trial. If the facts change, that likely has nothing to do with the expert, but may require a modification of opinion.

Conclusions and Recommendations

While much of what has been discussed can be broadly applied, there are specific instances and nuances when clinical rehabilitation professionals are asked to provide their opinions in matters involving litigation. Rehabilitation professionals must adhere to standards of practice, codes of ethics, and relied upon methodologies that are peer reviewed and accepted. When the credibility and the admissibility of their opinions are challenged when called to testify in litigation matters, rehabilitation professionals must be able to articulate that their opinions reflects adherence to the same standards followed in their day-to-day clinical work. The qualifications that a rehabilitation professional has to provide clinical services are often discussed as a matter of credibility in a deposition and at trial. The rehabilitation professional is advised to know how the methodologies they rely upon in their day-to-day clinical work inform their opinions and is the basis of their expertise. Rehabilitation professionals are encouraged to remain aware of the admissibility factors that occur from the inception of a new referral through the full spectrum of an assessment (i.e. clinical interview, testing, research, consultations, and report writing). Effectively defending the relevance and admissibility of opinions in a deposition and at trial is directly correlated to the rehabilitation professionals' clinical practice, methodology, understanding the Court's rules, and the difference between professional style, professional preference, and admissible practices.

In conclusion, all aspects from referral to testimony should follow valid and reliable, generally accepted, peer-reviewed methodology to ensure admissibility. Additionally, rehabilitation professionals should be aware of and knowledgeable about their specialized knowledge, skills, experience, training, and education since these key facets are the basis for establishing expertise and therefore admissibility.

References

Choppa, A., Field, T., & Johnson, C. (2005). *The daubert challenge: From case referral to trial*. Elliott & Fitzpatrick Inc.

Choppa, Johnson, C., Fountaine, J., Shafer, K., Jayne, K., Grimes, J., & Field, T. (2005). The efficacy of professional clinical judgment: Developing expert testimony in cases involving vocational rehabilitation and care planning issues. *Journal of Life Care Planning*, *3*(3), 131–150.

Choppa, Johnson, C. B., & Neulicht, A. T. (2014). Foundations of forensic vocational rehabilitation. In R. Robinson (Ed.). Springer.

Daubert v. Merrell Dow Pharmaceuticals. (1993). 509 u.s. 579. https://supreme.justia.com/cases/federal/us/509/579/

Field, T., & Choppa, A. (2005). *Admissible testimony: A content analysis of selected cases involving vocational experts with revised clinical model for developing opinion*. Elliott & Fitzpatrick Inc.

Frye v. United States. (1923).

General Electric Co. v. Joiner. (1997).

Glas, J. J. (2020). 200 deposition questions to ask a plaintiff's life care planner. http://media.straffordpub.com/products/life-care-plans-in-traumatic-brain-injury-cases-presenting-or-challenging-future-damages-calculations-2020-09-16/reference-materials.pdf

Goldstine v. Federal Express. (2021). C18-1164.

Grimes, J. W. (2002). *The balance of experience and data in developing expert testimony*.

In re Hanford Nuclear Reservation Litigation. (1991). No. cy-91-3015-wfm, united states district court for the eastern district of washington at spokane.

Kumho tire co. v. carmichael. (1999).

McKendall v. Crown Control Corp. (1997).