# Meeting The Court's Expectations of Mental Health Professionals

Judge Ronald Owen Kaye, Los Angeles Mental Health Court

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# COVERAGE IN THIS PRESENTATION

- **A Judge's Expectations.**
- **Brief Outline of the Law that Directs Both Judges and Experts.**
- **What is the Judge Looking for in an Expert's Report?**
- **What is a Judge Looking for in an Expert's Opinion Testmony?**
- **How Concerned is the Judge to Understand Placement Options and Related Recommendations?**

# APPLICATION TO SPECIFIC FORENSIC PSYCHIATRIC / PSYCHOLOGICAL OPINIONS

- **Competency**
- **Grave Disability**
  - **WIC §5250 – Petition for Writ of Habeas Corpus**
  - **WIC §5008(h)(1)(A) LPS Conservatorship**
- **Capacity for Involuntary Medication Order**
- **Civil Commitments: Substantial Risk of Physical Harm to Others**

**Using a practical approach, some experts prepare themselves by referencing *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).**

- **Is there a methodology consistent with the scientific process?**
- **Has the method been tested or can it be tested?**
- **Is there a known or potential error rate?**
- **Has the method been subject to peer review?**
- **Is the method generally accepted within the relevant scientific community?**

# What are the Common Problems of Forensic Mental Health Expert Reports or Testimony which Impact the Court?

- **Avoid Demonstrating Bias**
  - **E.g., Over-emphasis of the underlying offense – tendency to find people competent for more serious crimes.**
- **Failure to explore malingering sufficiently / applying a cursory analysis.**
- **Avoid broad conclusions that lack specific evidence supporting the ultimate opinion –**
  - **E.g., Use of patient statements enhances presentation.**
- **Over-relying on hearsay – *See People v. Sanchez 53 Cal.4th 80 (Cal. 2011)*( California Supreme Court limits expert's ability to testify as to case specific statements made by other declarants.)**
- **Obvious Use of Template Conclusions.**

# How Might a Judge View a Stipulation That the Court Accept A Flawed Report?

- It happens frequently that the parties in a criminal case will agree—or ‘stipulate’—that a report should be accepted by the Judge. This is bound to happen given the 2025 modifications of Penal Code Section(s) 1369 and 1370.
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- What factors might influence a Judge to let the parties know that a stipulation may not dispose of the matter?

# What Is It About an Expert's Demeanor / Presentation In Court That Makes A Positive Impression?

- **Unbiased – not overly embroiled in the outcome of the hearing.**
- **Unemotional on cross-examination - avoid confrontation with attorneys.**
- **Avoid being overly speculative – although as an expert you are permitted to propose future scenarios where the patient may destabilize.**
- **Embrace the fact that a question may be beyond expertise – don't be afraid of saying "I don't know."**
- **Don't be reluctant to seek out your notes / report to refresh recollection / But *DON'T* Read from your report when testifying.**

# Expectations of the Court of Particular Expert Opinions

**•<u>Competency</u> – Penal Code §1368**

- **Applying the *Preponderance of the Evidence Standard with the Burden on the Defense***

- ***Dusky vs. United States*, 362 US 402 (1960),**

1. **Whether the defendant understands the nature and purpose of his/her role in the proceedings;**

2. **Whether the defendant can assist counsel in his/her defense in a rational manner;**

**•Rationally Assist Counsel is *much* more important prong, as rote training on the criminal justice proceedings causes prong #1 to be a much more superficial analysis.**

# Grave Disability

- **Used in Both - LPS Conservatorship, WIC section 5008(h)(1)(A)– *Beyond Reasonable Doubt***
- **& Writ of Habeas Corpus Welfare and Institutions Code WIC §5250 – *Preponderance of the Evidence***
  - **A person who, as a result of a mental disorder or impairment by chronic alcoholism, is unable to provide for his or her basic personal needs for food, clothing, or shelter. Welf. & Inst. ▪ 5008.**
  - **In considering whether a defendant is gravely disabled, the judge *may not* consider the likelihood of future deterioration or relapse of a condition. *Conservatorship of Jones*, 208 Cal. App. 3d 292, 302 (1989). Considering the likelihood of relapse "could deprive the liberty of persons who will not suffer such a relapse solely because of the pessimistic statistical odds."**

- **Be concrete why the patient's mental illness likely interfering with the "basic personal needs for food, clothing, or shelter."**
- Opinions pertaining to the likely failure of the patient to continue voluntary treatment *must* result in likely deprivation of food, clothing or shelter.
- Experts often err by simply conflating the presence of severe psychiatric symptoms and the need for treatment with being gravely disabled.

## Capacity for Involuntary Medication Order – *Clear and convincing Evidence*

- Capacity to give or refuse informed consent:
  - Does the patient understand the risks, benefits and alternatives to the proposed treatment?
  - Is the patient able to understand and knowingly and intelligently evaluate the information that is required to be given when informed consent is sought and to otherwise use rational thought processes to participate in the treatment decision?
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  - What are the patient's reasons for refusing medication – is it rational?

# Dangerousness

**(Required in Murphy Conservatorship WIC section 5008(h)(1)(A); Mentally Disordered Offender PC §2970; NGI Extension PC §1026.5) Civil Commitment Petitions – *Beyond a Reasonable Doubt***

- **Respondent, has a severe mental disorder, that is not in remission [or cannot be kept in remission if treatment is not continued], and, by reason of a severe mental disorder, represents a substantial danger of physical harm to others;**

- **While "'substantial danger of physical harm" does not require proof of a recent overt act'" for purposes of commitment as an MDO ( *In re Qawi* (2004) 32 Cal.4th 1, 24, quoting Sec. 2962, subd. (g)), that does not negate the statutory requirement of proof beyond a reasonable doubt that the person currently poses a substantial danger of physical harm to others;**

- **But - beyond the charged offense, were there any acts of aggression or violence during the petition period?**
  - **If not, what causes the substantial danger of physical harm to others?**

# Dangerousness--2

- “Certainly [the Respondent] suffers from serious and ongoing mental health issues. Certainly she would benefit from continued medication and treatment. Certainly she will face serious challenges when she is discharged from Patton State Hospital. Although serious and concerning, those realities, without more, are insufficient to support a finding of substantial danger to others beyond a reasonable doubt. As the Johnson court noted, ‘[t]he court was understandably concerned about appellant's ability to function and keep himself safe if he were to stop taking his medication and decompensate after being released from the hospital. However, appellant's risk of danger to others, not his own welfare, is what was at issue at his MDO recommitment trial.’” *People v. Jenkins*, (2023)95 Cal.App.5th 142, 155; quoting (*People v. Johnson*, (2020) 55 Cal.App.5th at p. 110, 269 Cal.Rptr.3d 253.)

***THANK YOU***