Appeals erred in their reasoning when concluding that the "treating physicians' testimony on the standard of care" (*McDaniel*, p 1002) violated the One-Expert Rule.

Ruling and Reasoning

The Supreme Court of Arizona referenced prior case law and examined the committee deliberations while the rule was being written, in addition to reviewing the changes to the rule since its inception. The Arizona Supreme Court determined that an "independent expert" is someone who "will offer opinion evidence [and] who is retained for testimonial purposes" (*McDaniel*, p 1003). This definition, used earlier in a lower Arizona court, was later incorporated into the Arizona Civil Code's relevant rules on expert testimony. The newest version of the One-Expert Rule indicates that each side is entitled to call "only one retained or specifically employed expert to testify on an issue" (Ariz. R. Civ. Proc. 26(b)(4)(F)(i) (2018)). The court further noted that "a fact witness may also offer expert opinion testimony without violating the One-Expert Rule when the witness' testimony is based on personal observations and actions" (*McDaniel*, p 1003).

The court agreed with the trial court that the treating physicians were fact witnesses, and that the questions they answered concerning the CRP test and its result were "clearly in the context of explaining the treatment they personally provided and did not constitute impermissible expert testimony" (*McDaniel*, p 1004). The court further pointed to case precedents in which defendant treating physicians answered hypothetical questions to demonstrate their knowledge of the relevant area and to support their testimony that they met the standard of care. The court stated that Mr. Haught's physicians testified regarding the standard of care, but that their testimony was based on "personal observations and personal participation in [Mr.] Haught's treatment" (*McDaniel*, p 1004); therefore, the court concluded that the defendant physicians did not violate the One-Expert Rule.

Additional consideration was given to whether the treating physicians provided a "deluge" of cumulative testimony and therefore disadvantaged the plaintiff. In this case, the defense counsel argued that "thirteen doctors testified that the standard of care was met compared with just one expert presenting the countervailing conclusion for the plaintiff" (*McDaniel*, p 1004). But, by referencing the committee deliberations during the authorship of the rule, the court concluded that the purpose of the One-Expert Rule was not to limit cumulative testimony, but instead to "limit the cost of the presentation of multiple retained experts" (*McDaniel*, p 1004). The court pointed to Arizona Rule of Evidence 403 to discuss the presentation of cumulative evidence, which permits a trial court to exclude evidence if "its probative value is substantially outweighed by a danger of . . . needlessly presenting cumulative evidence" (*McDaniel*, p 1004).

Discussion

Many jurisdictions use rules like Arizona's to limit each side to one independent expert per subject. The term "independent expert" is a term of art, and its definition varies between jurisdictions. In Arizona, an "independent expert" is someone who is specifically retained for expert opinion testimony. Because forensic psychiatrists are typically retained as independent expert witnesses on a topic, the court is unlikely to allow their retaining attorney to have additional forensic psychiatric experts testify on the same matter.

Additional expert opinions do not necessarily provide the trier of fact with substantially different evidence. On the other hand, courts may make an exception to One-Expert Rules if additional experts offer meaningfully different opinion evidence with probative value.

Application of One-Expert Rules can be problematic, especially when they are misinterpreted because of vague language distinguishing fact witnesses from expert witnesses. This is especially true in medical malpractice cases in which treating physicians may be expected to answer hypothetical questions to demonstrate that they met the standard of care. As *McDaniel* establishes that treating physicians are not considered "retained or specially employed experts," physicians in Arizona can answer hypothetical questions to defend themselves without violating the state's One-Expert Rule.

Pretrial Request for Mental Health Diversion

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Request for Mental Health Pretrial Diversion Must Be Made before Attachment of Jeopardy at Trial or Entry of a Guilty or No Contest Plea

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Key words: mental health diversion; pretrial; defendants with mental illness; adjudication; recidivism

In *People v. Braden*, 529 P.3d 1116 (Cal. 2023), the Supreme Court of California considered whether a competent defendant may request mental health diversion after the trial begins and before an entry of judgment. The court held that a defendant must request a pretrial mental health diversion under Cal. Penal Code (CPC) § 1001.36 (2018) before attachment of jeopardy at trial or the entry of a guilty or no contest plea, whichever occurs first.

Facts of the Case

On April 25, 2018, Cory Braden Jr. was involved in a physical altercation with his mother. His sister called 911 and a uniformed sheriff's deputy responded. The deputy was told by dispatch that Mr. Braden had a diagnosis of schizophrenia and a history of violence. During a pat-down search, Mr. Braden turned and punched the deputy several times. Mr. Braden "charged" at the deputy, and they exchanged punches. He resisted the deputy until additional deputies arrived and were able to restrain him. Mr. Braden was subsequently charged with resisting an executive officer with force or violence and having two prior qualifying felony convictions under the "Three Strikes" law.

Mr. Braden represented himself at trial, and the jury convicted him on one felony count of resisting a police officer. Before sentencing, Mr. Braden requested and received appointed counsel who moved to have him considered for mental health diversion under CPC § 1001.36. This 2018 statute authorizes pretrial diversion for defendants with qualifying mental health disorders. The prosecution opposed the motion, and the trial court denied it, finding the motion both "untimely and moot." The court sentenced Mr. Braden to four years in state prison.

The appellate court affirmed, holding that Mr. Braden was ineligible for pretrial diversion because his request was not made before trial began. In making this decision, the appellate court explicitly disagreed with two previous appellate court holdings. In *People v. Curry*, 276 Cal. Rptr. 3d 406 (Cal. Ct. App. 2021), the appeals court held that "a defendant may ask the trial court for mental health diversion until sentencing and entry of judgment" (*Braden*, p 1119, citing *Curry* p 414). In *People v. Graham*, 279 Cal. Rptr. 3d 255 (Cal. Ct. App. 2021), another appeals court held that "a defendant may request pretrial diversion up until the verdicts are returned or the defendant enters a plea of guilty or no contest" (*Braden*, p 1119).

The California Supreme Court granted review to resolve the conflict in the Courts of Appeal.

Ruling and Reasoning

The Supreme Court of California affirmed the judgment of the appellate court, ruling that the request for mental health diversion under CPC § 1001.36 must be made before the commencement of trial or entry of a plea of guilt or no contest; thus, upholding the denial of Mr. Braden's request for diversion after the jury had returned its verdict. The court referenced a previous case, *People v. Frahs*, 466 P.3d 844 (Cal. 2020), which interpreted the language of CPC § 1001.36 to indicate diversion could be applied "at any point in the judicial process . . . until adjudication." In *Frahs*, the California Supreme Court held that pretrial diversion could be applied retroactively to cases in which judgment was not yet final on appeal when the statute went into effect, but the court did not have occasion to interpret the phrase "until adjudication" for future proceedings.

The court reasoned that holdings of the appellate courts may reflect a variance in interpretation of the phrase "until adjudication." Therefore, the court offered until adjudication to mean either "(1) the process of resolving criminal charges by trial or entry of plea or (2) the conclusion of all trial proceedings by an entry of judgment" (*Braden*, p 1121). Then, the court reasoned both the precise meaning and framework for the phrase.

First, the court noted that CPC § 1001.36 refers to the diversion it provides as "pretrial" eight times. The court observed that the statute uses a definition of pretrial diversion that has been consistent since 1977, "the procedure of postponing prosecution. . . " (*Braden*, p 1122, quoting former CPC § 1001.1), and understood by appellate courts as "contemplating a request for diversion before trial begins." Next, the court said that if the legislature had intended mental health diversion to be available until the

attachment of judgment, then it could have stated so explicitly, as it has in using the phrase "prior to judgment" for inquiries into the defendant's mental health competence under CPC § 1368(a). The court additionally commented that the statute makes no mention of a diversion grant following "conviction," nor any mention of setting aside a plea or trial result, suggesting that this diversion was not intended to be granted after adjudication of guilt by trial or plea.

The court remarked that CPC § 1001.36(c)(2) requires that the competent defendant "consents to diversion and waives the defendant's right to a speedy trial. . . " in a manner similar to a prior case *Morse v. Municipal Court,* 529 P.2d 46 (Cal. 1974). Further, the California Supreme Court considered that the statute sets forth no procedure for granting a mistrial or waiving jeopardy. The court ascertained this "lack of any elaboration of the rules" indicated that the legislature did not mean to authorize a procedure (*Braden*, p 1124).

Because both Mr. Braden and the dissent pointed to the legislature's amending CPC § 1370 to authorize trial courts to find a mentally incompetent defendant appropriate for diversion up until sentencing, the court reviewed CPC § 1001.36 and statues governing incompetence to stand trial. The court agreed that incompetent defendants cannot stand trial, and further emphasized the diversion statute only supported competent individuals who are "capable of, and required to, request diversion, consent to it, demonstrate their eligibility, waive the right to a speedy trial, and agree to comply with treatment" (*Braden,* p 1128, quoting CPC § 1001.36(c)(2) & (3)).

The court agreed with Mr. Braden and the dissent that "it would be unusual for defense counsel to become aware only during trial that the defendant has a mental health disorder that factored significantly in the commission of the offense" (*Braden*, p 1131). The court concluded their holding did not limit or change who is eligible for diversion, but instead resolved when qualifying defendants must request diversion. Accordingly, the court indicated that the legislature intended to incentivize pretrial mental health diversion as a means to expedite intervention and at the most "burdensome" point of the criminal process.

Dissent

The dissent focused on a plain interpretation of the statute's language. Rather than to "[inject] an unnecessary timing requirement for requesting diversion" (*Braden*, p 1144), the dissent advocated that the legislature enacted CPC § 1001.36 to provide trial courts a means to broadly divert qualifying people away from recidivism and toward necessary mental health treatment. According to the dissent, the majority lacks insight into how competent, qualified, defendants may still be less capable of making a timely request for diversion. The dissent pointed to Mr. Braden's own midtrial request and denied diversion as an example of the program being underutilized. The dissent concluded, "while earlier diversion consideration is better, later is still good" (*Braden*, p 1144).

Discussion

The legislature enacted CPC § 1001.36 in 2018 to serve the many defendants with mental illness who cycle through the criminal justice system. The purpose for the statute was to encourage qualifying people to petition the court to divert adjudication of their criminal case and to enter a regimented treatment program, as ordered by the court. Pretrial diversion programs serve many purposes, including allowing defendants who are mentally ill to undergo treatment and avoid court costs and potential incarceration. More broadly, diversion can help to lower court costs, advance public safety, and potentially decrease recidivism.

In the *Frahs* decision, the court concluded that "'the Legislature intended the mental health diversion program to apply as broadly as possible' so that defendants like [Mr.] Frahs, whose cases were not final on appeal, could take advantage of the new enactment" (*Braden*, p 1130, quoting *Frahs*, p 851). By limiting the eligibility of mental health diversion to the pretrial period, the decision in *Braden* contributes to the ongoing underutilization of the mental health diversion by effectively limiting the number of people who could benefit from diversion programs.

With lack of insight being a core symptom for mental illnesses such as schizophrenia, pretrial requests are not always realistic. Allowing mental health diversion after commencement of trial would still potentially allow for decreased incarceration costs, decreased court costs, lower recidivism rates, and more timely rehabilitative interventions.

Despite the stated goals in CPC § 1001.36, Mr. Braden, a man with an established diagnosis of schizophrenia, was ultimately sentenced to a prison term rather than given a chance to enter a mental health diversion program because of the timeliness of his

diversion request. The *Braden* decision highlights the intricacies of interpreting CPC § 1001.36 and sets important implications for upcoming cases involving mental health diversion. It is important for forensic psychiatrists to be aware of ongoing interpretations of this statute to help advocate for patients with severe mental illnesses, both in individual cases, as well on a systemic level.

Legal Rights and Responsibilities of Healthcare Administrators and Insurers

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Court Considers Regulation of Health Care Plan Administrator's Denial of Coverage despite Treatment Being within Generally Accepted Standards of Care

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In *Wit v. United Behavioral Health,* 58 F.4th 1080 (9th Cir. 2023), the Ninth Circuit Court of Appeals considered an appeal by United Behavioral Health (UBH) after the district court found that it failed to comply with terms of its health care plans and that it was liable to a class of plaintiffs for breaching fiduciary duty and wrongful denial of benefits. On appeal, the Ninth Circuit affirmed in part and reversed in part the district's court's class certification order. The appeals court reversed the plaintiffs' judgment on their denial of benefits claim and the breach of fiduciary duty claim to the extent that it was based on erroneous interpretation of the health care plans.

Facts of the Case

The plaintiffs are beneficiaries of health benefit plans administered by UBH. The plaintiffs sought a class action lawsuit against UBH for breach of fiduciary duty pursuant to 29 U.S.C. § 1132(a)(1)(B) (1997) and improper denial of benefits under 29 U.S.C. §§ 1132(a)(1)(B) and (a)(3)(B) (1997).

These two claims were based on the allegation that UBH improperly developed and applied internal guidelines that were inconsistent with individuals' benefit plans or with state-mandated criteria for determining coverage. There were eleven individually named plaintiffs in the case who sought action on behalf of three classes who had been denied coverage for services ranging from residential, inpatient, or outpatient care for mental illness or substance use disorders (SUD) after UBH applied their internally developed guidelines to determine eligibility for coverage. The classes were generally divided into the types of services denied and whether their plans were governed by the Employment Retirement Income Security Act of 1974 (ERISA) or both ERISA and state-mandated level-of-care criteria. The plaintiffs asserted that the suit was brought not to determine whether they were actually entitled to the benefits denied, but rather that the guidelines used by UBH were inconsistent with the class members' plans and with state-mandated criteria.

ERISA was established to regulate most retirement and health plans and protect contractually defined benefits. It does not mandate that employers offer employee benefits, nor does it mandate what benefits must be provided. ERISA was written to protect beneficiaries of employer-sponsored health care plans while not being so restrictive as to discourage employers from providing health care benefits. ERISA focuses on the written terms of the plans; its primary function is to protect contractually defined benefits.

UBH is one of the largest managed behavioral health care organizations in the nation and is responsible for managing the claims and coverage for behavioral health and substance use disorders for numerous commercial health care insurance plans. UBH was the administrator for all of the plaintiffs' benefits plans and, in some cases, UBH served as both the administrator and insurer.

The plaintiffs claimed that UBH acted in its own financial interests by creating guidelines that narrowed the scope of coverage and were inconsistent with generally accepted standards of care (GASC), state mandate, and the plans themselves, thereby breaching its fiduciary duty to plan members. The plaintiffs also claimed that UBH violated ERISA