The DSM in Litigation and Legislation

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The caveat in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR),[1] advises that it is intended for use in clinical, educational, and research findings, not for forensic purposes. It warns that when the Manual is used for forensic purposes, there are significant risks that the information will be misused or misunderstood. These dangers arise, it states, because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis (Ref. 1, p xxxii).

The caveat notwithstanding, the Manual is used forensically. After all, the Manual is deemed the bible of psychiatry, albeit a bible that is often changed. In general, the inclusion of a caveat is intended as a safeguard against liability.

In the intersection of law and psychiatry, the Manual enters the picture. It is cited in court opinions over 5,500 times, but deference is the exception; and in legislation, it is cited more than 320 times.

In the paragraph after the caveat, there is a turnabout:

> When used appropriately, diagnoses and diagnostic information can assist decision makers in their determinations. For example, when the presence of a mental disorder is the predicate for a subsequent legal determination (e.g., involuntary civil commitment), the use of an established system of diagnosis enhances the value and reliability of the determination. By providing a compendium based on a review of the pertinent clinical and research literature, DSM-IV may facilitate the legal decision makers' understanding of the relevant characteristics of mental disorders. The literature related to diagnoses also serves as a check on ungrounded speculation about mental disorders and about the functioning of a particular individual. Finally, diagnostic information regarding longitudinal course may improve decision making when the legal issue concerns an individual's mental functioning at a past or future point in time [Ref. 1, p. xxxiii].

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Criminal Responsibility

In *Clark v. Arizona*,[2] the U.S. Supreme Court noted the changes in the DSM—"the professional ferment"—and issued a general caution about treating the classifications as predicates for excusing otherwise criminal conduct. Indeed, the Court observed, the classifications may be misleading: "[T]his kind of evidence [suggests] that a defendant suffering from a recognized mental disease lacks cognitive, moral, volitional, or other capacity, when that may not be a sound conclusion at all."

On the other hand, in *State v. Lockhart*,[3] the Supreme Court of Appeals of West Virginia ruled that the trial court wrongly excluded expert testimony on dissociative identity disorder (DID) in connection with the assertion of the insanity defense. Over the state's objection to the admissibility of the evidence based on the cautionary statement, the court found that the inclusion of DID in the DSM reflects a consensus of current formulations of evolving knowledge in the field; that is, it is generally accepted in the scientific community as required in the rules of evidence.

In *Commonwealth v. Montanez*,[4] the defendant offered expert testimony to show that he suffered from dissociative trance disorder (DTD) at the time he stabbed the victim. The Appeals Court of Massachusetts stated that even though DTD is not a specific diagnostic disorder in the DSM, it is a research category in the DSM and has been the subject of peer-reviewed literature. Therefore, the court ruled, the testimony was admissible. The court commented, "That the condition is not codified as a specific diag-

nostic category in [the DSM] does not mean that it is not a recognized disorder" (Ref. 4, p 796).

Diminished Capacity

In *State v. Galloway*,[5] the New Jersey Supreme Court observed:

> Forms of psychopathology other than clinically-defined mental disease or defect may affect the mental processes and diminish cognitive capacity, and therefore may be regarded as a mental disease or defect in the statutory or legal sense. . . . [T]he label suggested by the DSM [does not] determine whether defendant's mental state constitutes a mental defect or disease under the diminished-capacity defense.

The court, while citing the cautionary statement and finding that psychiatric classifications do not fit precisely into legal concepts of criminal responsibility, ruled that evidence of borderline personality disorder is appropriate in establishing diminished capacity.

In *United States v. Williams*,[6] expert testimony addressed a condition not included in the DSM: borderline intellectual functioning. The U.S. District Court for the District of Hawaii used the cautionary statement to allow the testimony of the expert witnesses.

Civil Commitment

Statutes on civil commitment require proof of mental illness or mental disorder as a predicate for commitment. Typical statutes tend not to define mental illness, or they define it tautologically (e.g., a mentally ill person is a "person whose mental health is substantially impaired"). In *Dodd v. Hughes*,[7] the petitioner challenged his commitment, arguing that mental illness in the legislation meant psychotic reactions as classified in the DSM. The petitioner had been diagnosed as a sociopath. His appeal was denied. The Supreme Court of Nevada said:

> [T]he record reflects that psychiatrists in general are at war over the propriety of the classifications of psychosis as specified by the American Psychiatric Association. We seriously doubt that the legislature ever intended medical classifications to be the sole guide for judicial commitment. The judicial inquiry is not to be limited so as to exclude the totality of circumstances involved in the particular case before the court. Recidivism, repeated acts of violence, the failure to respond to conventional penal and rehabilitative measures, and public safety, are additional and relevant considerations for the court in deciding whether a person is mentally ill. The assistance of medical examination and opinion is a necessary concomitant of the court hearing, but the court alone is invested with the power of decision. That power is to be exercised within the permissible limits of judicial discretion.

Sexually Violent Predator

In sexually violent predator evaluations, a DSM diagnosis is neither necessary nor sufficient. The courts have made it clear that a mental disorder need not be drawn from the DSM. In *Kansas v. Hendricks*,[8] the U.S. Supreme Court observed:

> [W]e have traditionally left to legislators the task of defining terms of a medical nature that have legal significance. As a consequence, the States have, over the years, developed numerous specialized terms to define mental health concepts. Often those definitions do not fit precisely with the definitions employed by the medical community. The legal definitions of "insanity" and "competency," for example, vary substantially from their psychiatric counterparts. Legal definitions, however, which must take into account such issues as individual responsibility. . .and competency, need not mirror those advanced by the medical profession.

Posttraumatic Stress Disorder

In the aftermath of the Vietnam War, in a much publicized criminal case in Louisiana, Charles Heads, a Marine Corps combat veteran, was twice tried for the shooting death of his brother-in law. For 10 years after his return from Vietnam, he suffered from nightmares, depressions, and flashbacks. Then one day, he claimed, he relived combat. Armed with a rifle, he stormed his brother-in-law's house as if it were an enemy position and shot him. In the first trial, in 1978, the jury rejected his plea of insanity. In effect, the jury accepted the prosecution's characterization of the shooting as domestic violence. Heads was sentenced to imprisonment for life, but he obtained a new trial when the U.S. Supreme Court ruled that the trial judge had made an error in instructing the jury. At the second trial, in 1981, the jury found him not guilty of murder because of temporary insanity stemming from his war experience, the first time PTSD was used successfully in a capital case. After reading in 1980 that the American Psychiatric Association had classified the phenomenon such as that presented by Charles Heads as a mental disorder, Jack Wellborn, his defense lawyer, pursued it as a basis for the insanity defense.

The case illustrates that the DSM influences (but does not control) the definition of mental disorder in the test of criminal responsibility.[9]

What may be considered a subcategory of PTSD is the battered-woman syndrome which is usually admissible evidence that the woman was acting in self-defense at the time of committing a homicide. The syndrome is not listed in the DSM, although several forensic experts argue that it should be.

In *Discepolo v. Gorgone*,[10] the plaintiff alleged symptoms of PTSD caused by sexual abuse. The defendant pointed to the cautionary statement in the DSM. In a footnote, the court distinguished the warning as based on determinations of criminal culpability and not civil liability. The U.S. District Court for the District of Connecticut noted that expert testimony concerning PTSD may assist the jury in the determination of liability. The caveat in the DSM is nonapplicable in these types of cases, the court said.

Death Penalty

Of all cases, deference to the DSM is most pronounced in death penalty cases. For example, in *Harris v. Vasquez*,[11] the Ninth Circuit looked to the DSM in determining whether remorse is an element in the diagnosis of personality disorder. The defendant had not shown remorse. The court said:

> An examination of DSM-II, DSM-III, and DSM-III-R demonstrates that the different diagnoses may be the product of the evolution of the inexact science of psychiatry. With regard to an antisocial person's ability to feel remorse or learn from punishment, DSM-II, on which the expert relied, states that such persons are unable to feel guilt or to learn from experience or punishment. DSM-III does not address the issue. DSM-III-R states that people with Antisocial Personality Disorder generally have no remorse about the effects of their behavior on others; they may even feel justified in having hurt or mistreated others. . . . The expert's testimony is clearly consistent with DSM-II and does not conflict with DSM-III-R.

In *United States v. Davis*,[12] the government sought the death penalty for robbery and murder. The defendant claimed he was mentally retarded and therefore the imposition of the death penalty should be barred. The U.S. District Court for the District of Maryland set out an elaborate discussion of DSM criteria for mental retardation and ultimately found that because the defendant met the criteria for the diagnosis, he was mentally retarded and ineligible for the death penalty under the Death Penalty Act.

Termination of Parental Rights

Faced with a petition to terminate parental rights based on the mother's mental illness, the court in *Commitment of Timothy Maurice B.*[13] found no legal distinction among the terms mental illness, mental disease, and mental disability as used in New York's Social Services Law § 384-b and that the terms are synonymous with the term mental disorder, as used in the DSM. The court also found that this determination comports with the DSM's cautionary statement, because something more than the DSM diagnosis, such as information about functional impairments, is necessary. Along with a showing of a DSM diagnosis, the state must also show that the condition creates a danger to the child in the parent's care and that the condition will continue beyond the foreseeable future.

Disability Determination

For workers' compensation, the New Jersey statute does not define "demonstrable objective medical evidence." In *Saunderlin v. E.I. Du Pont Co.*,[14] the Supreme Court of New Jersey said that the DSM is not a panacea for determining the definition, but it does provide a framework. Psychiatric expert testimony concerning diagnostic criteria constitutes demonstrable objective medical evidence.

In *Rosenthal v. Mutual Life Ins. Co.*,[15] which involved an insurance contract that limited the coverage of mental disorders, the plaintiff attempted to define bipolar affective disorder as a physical illness. Florida's statute requires optional coverage for mental and nervous disorders "as defined in the standard nomenclature of the American Psychological Association." The U.S. District Court for the Southern District of Florida found that the section does not in its language specifically refer to the DSM. By its definition, the court said, the DSM is merely a diagnostic tool, as evidenced by the caveat. Because the court does not simply rely on the DSM, there is a genuine issue of fact.

In *Special Disability Trust Fund, Dept. of Labor & Employment Security v. P.B. Newspaper/United Self Insured*,[16] the District Court of Appeals of Florida, for a disability determination, remanded because there was no evidence that the mental disorder constituted a defect. The court looked to how the DSM defined mental disorder. As it does not use the legal term mental defect, the court declined to find the two terms synonymous.

In *Miller v. Barnhart*,[17] the use of the DSM alone, the U.S. District Court for the Eastern District of Pennsylvania said, is not sufficient to find substance abuse disorder. Therefore, it did not give rise to eligibility for Social Security Disability Benefits.

In *Nutter v. Barnhart*,[18] involving a claim for Social Security benefits, the U.S. District Court for the Southern District of Iowa in a footnote quotes at length the cautionary statement and reiterates the

caveat of potential misuse of diagnostic criteria in forensic settings. However, one of the judges sets out an admonition that lawyers and judges should not play doctor and make independent medical findings. The court indicates that judges should rely on expert testimony regarding mental health issues.

In *Fuller v. J.P. Morgan Chase & Co.*,[19] the plaintiff sought to use language from the DSM that says that there is much physical in mental disorders and much mental in physical disorders, to establish that bipolar disorder is a physical disorder, which would have created eligibility for disability benefits. The U.S. District Court for the Eastern District of New York found that this was insufficient to establish physical condition. Although doctors may make such a connection one day, the court said, there is not a sufficient basis at this time.

Impeachment of Expert Witnesses

When an attorney seeks to discredit an expert on cross-examination by referring to the DSM, the reply is that the DSM is not authoritative and is continually being changed. In *State v. Tirado*,[20] the prosecution sought to impeach the expert by questions about the cautionary statement. However, the Appellate Division of the Superior Court of New Jersey said trial courts should continue to monitor the use of the Manual, providing limiting instructions if necessary.

Illustrations of Legislation Citing the DSM

The various state legislatures are more receptive than the courts to the DSM. Some illustrations are noted.

Arkansas

Ark. Code Ann. §5-2-305 (West 2010) provides for a forensic examination of defendants that must include "[a] substantiated diagnosis in the terminology of the American Psychiatric Association's current edition of the Diagnostic and Statistical Manual."

Arizona

Ariz. Rev. Stat. Ann. § 20-826.04 (West 2010) defines "autism spectrum disorder" as "one of the three following disorders as defined in the most recent edition of the DSM of the American Psychiatric Association: (a) Autistic disorder. (b) Asperger's syndrome. (c) Pervasive developmental disorder—not otherwise specified" in the context of insurance coverage.

California

Cal. Bus. & Prof. Code § 4999.32 (West 2010) requires at least three semester units of graduate study in the principles of diagnostic process and use of current diagnostic tools, such as "the current edition of the Diagnostic and Statistical Manual" for state licensure of professional clinical counselors.

Connecticut

Conn. Gen. Stat. Ann. § 4a-60 (West 2010) defines in affirmative action statute "mental disability" as "one or more mental disorders, as defined in the most recent edition of the American Psychiatric Association's 'DSM,' or a record of or regarding a person as having one or more such disorders."

District of Columbia

D.C. Code § 3-1201.02 (2010) defines "practice of professional counseling" as including "[t]he processes of conducting interviews, tests, and other forms of assessment for the purpose of diagnosing individuals, families, and groups, as outlined in the Diagnostic and Statistical Manual of [Mental] Disorders or other appropriate classification schemes, and determining treatment goals and objectives."

Hawaii

Haw. Rev. Stat. Ann. § 353-66 (West 2010) provides parole authorities power to require paroled prisoners to "[b]e assessed by a certified substance abuse counselor for substance abuse dependency or abuse under the applicable Diagnostic and Statistical Manual and Addiction Severity Index."

Haw. Rev. Stat. Ann. § 431M-1 (West 2010) defines "mental illness" as "a syndrome of clinically significant psychological, biological, or behavioral abnormalities that results in personal distress or suffering, impairment of capacity for functioning, or both. For the purposes of this chapter, the terms 'mental disorder' and 'mental illness' shall be used interchangeably and shall include the definitions identified in the most recent publications of the Diagnostic and Statistical Manual of the American Psychiatric Association or International Classification of Disease and excluding epilepsy, senility, mental retardation, or other developmental disabilities or addictions when by themselves." The statute also defines "serious mental illness" as "a mental disorder consisting of at least one of the following: schizophrenia, schizoaffective disorder, bipolar types I and

II, obsessive compulsive disorder, dissociative disorder, delusional disorder, and major depression, as defined in the most recent version of the Diagnostic and Statistical Manual of the American Psychiatric Association and which is of sufficient severity to result in substantial interference with the activities of daily living."

Haw. Rev. Stat. Ann. § 451J-1 (West 2010) defines "[p]ractice of mental health counseling" as including "[t]he assessment, diagnosis, and treatment of, and counseling for, substance abuse and conduct disorders as defined in the approved diagnostic and statistical manual for mental disorders [*sic*]."

Illinois

20 Ill. Comp. Stat. Ann. 505/5 (West 2010) defines "pervasive developmental disorder" as "a neurological condition, including but not limited to, Asperger's Syndrome and autism, as defined in the most recent edition of the DSM of the American Psychiatric Association" in the context of direct child welfare services.

Kentucky

Ky. Rev. Stat. Ann. § 194A.620 (West 2010) defines "autism spectrum disorders" or "ASD" as "the same meaning as 'pervasive developmental disorders' in the DSM, Fourth Edition (DSM-IV), including autistic disorder, Asperger's disorder, pervasive disorder not otherwise specified, Rett's disorder, and childhood disintegrative disorder."

Ky. Rev. Stat. Ann. § 205.642 (West 2010) uses DSM-IV to define pervasive developmental disorders.

Ky. Rev. Stat. Ann. § 335.330 (West 2010) requires that an applicant for licensure as a marriage and family therapist show the board that the application has, among other requirements, a stipulation that his or her "degree or equivalent course study" "contain[ed] specific coursework on psychopathology and the Diagnostic and Statistical Manual."

Louisiana

La. Rev. Stat. Ann. § 23:1021 (West 2010) provides workers' compensation benefits only to those mental injuries or illnesses that "[are] diagnosed by a licensed psychiatrist or psychologist and the diagnosis of the condition meets the criteria as established in the most current issue of the DSM presented by the American Psychiatric Association."

La. Rev. Stat. Ann. § 24:932 (West 2010) defines "sex offender" as a person who "[e]xperiences or evidences a paraphiliac disorder as defined by the Revised Diagnostic and Statistical Manual."

La. Rev. Stat. Ann. § 37:1360.52 (West 2010) defines "mental, nervous, emotional behavioral, substance abuse and cognitive disorders" as "those disorders, illnesses or diseases listed in the most recent edition of the DSM published by the American Psychiatric Association" or those listed in the International Classification of Diseases.

New Hampshire

N.H. Rev. Stat. Ann. § 126-P:1 (2010) defines "mental condition" as "mental disorders as defined in the most recent edition of the DSM published by the American Psychiatric Association (DSM), excluding those disorders designated by a 'V Code' in the DSM."

New York

N.Y. Correct. Law § 137 (McKinney 2010) provides that an inmate has a serious mental illness when a mental health clinician finds that the inmate "has a current diagnosis of, or is diagnosed at the initial or any subsequent assessment conducted during the inmate's segregated confinement with, one or more of the following types of Axis I diagnoses, as described in the most recent edition of the DSM," including schizophrenia, delusional disorder, schizophreniform disorder, schizoaffective disorder, brief psychotic disorder, substance-induced psychotic disorder (excluding intoxication and withdrawal), psychotic disorder not otherwise specified, major depressive disorder, or bipolar disorder I and II.

N.Y. Crim. Proc. Law § 216.00 (McKinney 2010) defines "alcohol and substance abuse evaluation" as a written assessment that includes, among other requirements "an evaluation as to whether the defendant has a history of alcohol or substance abuse or alcohol or substance dependence, as such terms are defined in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, and a co-occurring mental disorder or mental illness and the relationship between such abuse or dependence and mental disorder or mental illness, if any."

Ohio

Ohio Rev. Code Ann. § 1751.01 (West 2010) defines "biologically based mental illnesses" as

"schizophrenia, schizoaffective disorder, major depressive disorder, bipolar disorder, paranoia and other psychotic disorders, obsessive-compulsive disorder, and panic disorder, as these terms are defined in the most recent edition of the diagnostic and statistical manual of mental disorders [*sic*] published by the American Psychiatric Association" in context of Health Insuring Corporations law.

Oklahoma

Okla. Stat. Ann. tit. 10 § 1414.1 (West 2010) provides requirements for admission to Greer Center Facility including "clinical evidence of behavioral or emotional problems pursuant to a formal, written evaluation by a psychologist, psychiatrist or physician describing the nature of the problem, the frequency of occurrence of the problem, any prior treatment efforts and reasons why the applicant cannot receive appropriate treatment in the applicant's current environment and a secondary diagnosis of mental illness in accordance with the DSM, as revised and published by the American Psychiatric Association."

Pennsylvania

40 Pa. Stat. Ann. § 764g (West 2010) provides definition of "serious mental illness" as "any of the following mental illnesses as defined by the American Psychiatric Association in the most recent edition of the Diagnostic and Statistical Manual: schizophrenia, bipolar disorder, obsessive-compulsive disorder, major depressive disorder, panic disorder, anorexia nervosa, bulimia nervosa, schizoaffective disorder and delusional disorder" in context of health and accident insurance mental illness coverage.

40 Pa. Stat. Ann. § 764h (West 2010) defines "autism spectrum disorder" as "any of the pervasive developmental disorders defined by the most recent edition of the DSM (DSM), or its successor, including autistic disorder, Asperger's disorder and pervasive developmental disorder not otherwise specified."

Rhode Island

R.I. Gen. Laws § 5-34-24.1 (West 2010) provides a nondisciplinary alternative for nurses in situations involving alcohol and drug abuse or "any mental illness as listed in the most recent revised publications or the most updated volume of either the Diagnostic and Statistical Manual of Mental Disorders (DSM) published by the American Psychiatric Association" or ICD.

West Virginia

W.Va. Code Ann. § 5-16-7 (West 2010) defines "serious mental illness" as "an illness included in the American Psychiatric Association's diagnostic and statistical manual of mental disorders [*sic*]as periodically revised, under the diagnostic categories or subclassifications of: (i) Schizophrenia and other psychotic disorders; (ii) bipolar disorders; (iii) depressive disorders; (iv) substance-related disorders with the exception of caffeine-related disorders and nicotine-related disorders; (v) anxiety disorders; and (vi) anorexia and bulimia." The statute also includes "attention deficit hyperactivity disorder, separation anxiety and conduct disorder" for individual[s] who [have] not yet attained the age of nineteen years.

Conclusions

Thus, as illustrated, notwithstanding the caveat, the DSM has played a role in many court decisions and in legislation. As a consequence, there is justification in making that a concern in the inclusion or exclusion of a diagnosis in the DSM.

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