

# Daubert Considerations in Forensic Evaluations by Telepsychiatry

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The COVID-19 pandemic has increased demand for telepsychiatric services. Forensic psychiatrists can expect to receive more requests for assessments conducted via videoconferencing technology in the years to come. Under current rules of evidence in the United States, the testimony of expert witnesses is introduced as a form of scientific evidence and may be challenged by opposing counsel through *Daubert* hearings. In a *Daubert* challenge, courts may evaluate proposed expert testimony through four criteria relating to scientific reliability and validity: whether the testimony is based on methods that emerge from a testable hypothesis, whether the method has been subjected to peer review, the known or potential rate of error associated with the method, and whether the method has achieved general acceptance in the relevant scientific community. To date, courts have not addressed whether testimony based on a telepsychiatric assessment would meet standards of reliability and validity for admission into evidence, as applied in a typical *Daubert* hearing. This article explores the *Daubert* standards and other potential objections to telepsychiatry as they may apply to forensic psychiatric examinations conducted via videoconferencing technology. The discussion also provides suggestions to evaluators to increase the likelihood of such testimony surviving a *Daubert* challenge.

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During the first half of 2020, the use of telemedicine expanded dramatically within the United States, as the health care sector struggled to provide care without exposing patients and health workers to undue risk from the SARS-CoV-2 (COVID-19) pandemic. Demand for telepsychiatry grew exponentially,<sup>1</sup> and payers such as private insurers and the Centers for Medicare and Medicaid Services (CMS) rapidly moved to facilitate reimbursement for services provided via videoconferencing technology (VCT).<sup>2</sup> Interest in virtual forensic evaluations also increased in response to the pandemic.<sup>3,4,5</sup> Forensic telepsychiatry had been in use for well over a decade in the United Kingdom,<sup>6,7</sup> Australia,<sup>8,9</sup> and the United States,<sup>10</sup> and its use was increasing prior to the pandemic.<sup>4,11,12,13</sup> The shift toward more VCT-based forensic assessments during COVID-19 may lead to lasting changes in the way

that forensic psychiatrists practice in the future.<sup>14</sup> With more assessments being conducted remotely, scholars have speculated that it is only a matter of time before legal challenges to VCT-based forensic psychiatric assessments begin to arise.<sup>4,14</sup> One potential approach to challenging expert psychiatric evidence is the *Daubert* challenge. This article discusses the elements of a *Daubert* admissibility challenge in formal legal proceedings and how they might be applied to evidence obtained through telepsychiatric assessment.

## Admissibility of Expert Witness Testimony

In a trial or hearing, testimony by forensic psychiatrists is typically offered as a form of expert witness testimony. It is thus subject to the rules governing the admissibility of scientific, technical, or specialized knowledge-based evidence. Courts may apply several sets of guidelines to determine whether testimony should be allowed or excluded, including the Federal Rules of Evidence, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and analogous sets of rules adopted at the state level. Rule 702 of the Federal Rules of Evidence

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sets forth the standards for the admissibility of testimony by experts as follows:

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 (a) the testimony is based upon sufficient facts or data, (b) the testimony is the product of reliable principles and methods, and (c) the witness has applied the principles and methods reliably to the facts of the case.<sup>15</sup>

Prior to *Daubert* and the Federal Rules of Evidence, most courts applied a test from the case of *Frye v. United States*<sup>16</sup> to evaluate the admissibility of scientific evidence, while others applied a standard based on the expert's qualifications and the relevance of the evidence.<sup>17</sup> The *Frye* standard is sometimes referred to as the "general acceptance" test: if novel scientific evidence were "generally accepted" by the applicable scientific community, it would be admissible. By the 1990s, however, courts had begun to question whether *Frye's* general acceptance standard was appropriate for determining the admissibility of novel scientific evidence at trial (Ref. 18, p 585).

In 1993, parties in a birth-defect lawsuit against Merrell Dow Pharmaceuticals challenged the application of the general acceptance test for determining the admissibility of expert witness testimony, arguing that the "the Frye test was superseded by the adoption of the Federal Rules of Evidence" (Ref. 18, p 587), which had been introduced in 1975 and later adopted at the state level by many lower courts.<sup>19,20</sup> In *Daubert*, the U.S. Supreme Court noted that Rule 702 does not proffer "general acceptance" as a prerequisite to admissibility in federal courts (Ref. 18, p 588). *Daubert* essentially clarified that federal court judges should function as gatekeepers to determine the admissibility of expert testimony.<sup>17,19,20-23</sup> "General acceptance" remains relevant as one criterion among four that could be applied to determine the admissibility of expert testimony in federal hearings. Today, most states have adopted the Federal Rules of Evidence and apply the *Daubert* criteria; very few courts still apply the *Frye* rule.<sup>24</sup>

In *Daubert*, the Supreme Court set forth criteria to judge whether proffered scientific testimony should be admitted into evidence. In the later cases of *General Electric v. Joiner*<sup>25</sup> and *Kumho Tire v. Carmichael*,<sup>26</sup> the Supreme Court further clarified the implications of *Daubert* for the admissibility of expert witness testimony.<sup>23,27</sup> The Federal Rules of Evidence (including

Rule 702) were revised in 2000 to officially incorporate the *Daubert* criteria as well as the opinions in *General Electric*<sup>25</sup> and *Kumho Tire*.<sup>26,28</sup> Under the new Rule 702, expert testimony must be based on reliable principles and methods, as applied to the particular facts of each individual case.<sup>15</sup> The *Daubert* criteria could be used to support findings under Rule 702.

Several trends have followed the adoption of *Daubert* standards and the new Federal Rules of Evidence. First, courts began applying more rigorous standards for the admissibility of expert scientific evidence.<sup>17,29,30,31</sup> Second, the case and the standards have given rise to so-called "*Daubert* hearings": pre-trial proceedings in which opposing counsel may challenge the admissibility of a proffered expert's testimony. Some forensic psychiatrists have raised the concern that attorneys may abuse *Daubert* hearings to exclude, on the basis of technicalities, testimony that should be admitted into evidence.<sup>32</sup> This article explores the application of the *Daubert* standards to testimony based on a forensic examination conducted via telepsychiatry.

## Daubert Criteria and Telepsychiatry

The Court in *Daubert* set forth four criteria for evaluating scientific evidence:

- "whether [the theory or technique] can be (and has been) tested" (Ref. 18, p 593);
- "whether the theory or technique has been subjected to peer review and publication" (Ref. 18, p 593);
- "the known or potential rate of error . . . and the existence and maintenance of standards controlling the technique's operation" (Ref. 18, p 594); and
- "whether the theory or technique has achieved 'general acceptance' in the relevant scientific community" (Ref. 18, p 594).

By filing a motion *in limine*, attorneys may challenge opposing counsel's proffered expert testimony, typically attempting to exclude such evidence on the grounds that it fails to meet the requisite standards for scientific reliability and validity.<sup>19,32</sup> To be deemed admissible, testimony need not satisfy all four prongs; judges retain discretion in the application of the criteria.<sup>22</sup> To determine whether testimony based on a forensic evaluation conducted via VCT could survive a *Daubert* hearing, one can review each of the four *Daubert* criteria as applied to telepsychiatry.

## Testable Hypothesis

In a *Daubert* analysis, the inquiry as to whether a hypothesis is testable relates to the scientific concept

of falsifiability.<sup>21,22,33</sup> As Shapiro and colleagues explain, this prong of a *Daubert* analysis poorly fits the work that forensic mental health professionals perform: “what is the testable hypothesis . . . in a child custody evaluation?—that the tests used by the evaluator can really measure ‘parenting capacity?’” (Ref. 33, p 150). Supposing a court does attempt to evaluate testimony based on telepsychiatric evaluation under the falsifiability prong, the testable hypothesis may concern the diagnostic reliability of psychiatric evaluations performed via VCT (i.e., whether telepsychiatric assessments achieve results equivalent to those obtained through traditional, face-to-face evaluations, and, if so, whether forensic evaluations achieve the same results). Unfortunately, there are few scientific studies specifically investigating the reliability and validity of forensic telepsychiatry. Furthermore, the studies that do address reliability in teleforensic assessments are focused on specific questions (such as competency to stand trial), have small sample sizes, and may be relevant to only individual factors within a specific subset of forensic cases. Although forensic psychiatric evaluations (conducted for the purpose of informing a legal question) and clinical psychiatric assessments (conducted for the purpose of diagnosis and treatment planning) are different, empirical evidence supporting clinical telepsychiatry may be relevant to the court’s inquiry in a hypothetical *Daubert* challenge, given the dearth of empirical research on forensic telepsychiatry.

Clinical telepsychiatry is one of the oldest and best studied forms of telemedicine.<sup>34,35</sup> Numerous research studies, including several meta-analyses, have shown clinical telepsychiatry to be a valid, reliable, and well-accepted method for psychiatric diagnosis and treatment, with results comparable with those of in-person practice.<sup>34,36–41</sup> The research base on the feasibility and efficacy of telepsychiatry or telemental health is supported by high-quality randomized controlled trials.<sup>34</sup> Compared with other forms of telemedicine, telepsychiatry enjoys a stronger empirical research base.<sup>42</sup>

While the research supporting the use of telepsychiatry for forensic evaluations and hearings is not quite as extensive as that supporting its use for clinical applications,<sup>4,42,43</sup> there are some encouraging findings to note. In a randomized controlled study, Manguno-Mire and colleagues found high levels of agreement between live, in-person forensic evaluations and

remote, telepsychiatry-based assessments for competency to stand trial.<sup>44</sup> Using the Georgia Court Competency test<sup>45</sup> and two Board-certified forensic psychiatrists, evaluations were conducted on 21 forensic inpatients in a maximum-security forensic hospital. The researchers found that while providers were generally more satisfied with live interviews, evaluatees had no preference between the two types of assessment, and ultimate scores and findings were generally consistent between face-to-face and telepsychiatry-based evaluations. Thus, telepsychiatric assessments of competency to stand trial do appear to achieve results equivalent to traditional, in-person evaluations applying the same procedures.

In another study, Lexcen and colleagues tested the Brief Psychiatric Rating Scale—Anchored Version<sup>46</sup> and the MacArthur Competence Assessment Tool—Criminal Adjudication<sup>47</sup> in forensic evaluations of 72 forensic inpatients.<sup>48</sup> They found “good to excellent” interrater reliability between three interview conditions: in one group, an in-person evaluator administered the scales, which were then observed and scored remotely; in a second group, scales were administered by a remote evaluator, with in-person observation; in the third group, the interviewer and observer were both present in person with the evaluatee. They concluded that “providers can expect remote interviews to provide clinical information similar to that obtained by in-person interviews” (Ref. 48, p 715). Here, again, telepsychiatric assessments appear to achieve results equivalent to in-person evaluations within a forensic context.

Bayne and colleagues found that “telephonic psychiatric evaluations produce comparable results to in-person evaluations” in forensic assessments for asylum seekers (Ref. 49, p 1). Their study found a “small, but not statistically significant” (Ref. 49, p 2) difference in the quality of affidavits based on the telephonic versus in-person evaluations. This difference appears to be related primarily to the absence of visual data for appearance and motor-activity assessments in the mental status examination, as the telephonic evaluations were not conducted via VCT. The fact that these assessments with auditory data alone produced results comparable with in-person assessments lends further support to the validity of VCT-based assessments, which would provide even more data (i.e., visual information) in the psychiatric interview.

How a judge might apply a *Daubert*-based analysis of falsifiability to testimony based on forensic

assessment conducted through telepsychiatry will likely depend upon numerous factors, including the level of the court (e.g., federal versus state, trial versus appellate), the judge's training and experience, and specific variables in the case at hand. In a national survey regarding *Daubert* and its applicability to judicial gatekeeping responsibilities for expert witness testimony, Gatowski and colleagues found that few judges understood the scientific meaning of falsifiability despite stating that it is "a useful guideline for determining the merits of proffered scientific evidence" (Ref. 22, p 444). One testable hypothesis for forensic telepsychiatry is that VCT-based assessments achieve results roughly equivalent to those of traditional, face-to-face modalities, assuming the same tests and procedures are applied in both conditions. For evaluating competency to stand trial, VCT does appear to achieve results comparable with in-person assessments, and preliminary data suggest the likelihood of similar findings for evaluating asylum eligibility.

#### Peer Review and Publication

The Supreme Court in *Daubert* noted that "Publication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability" (Ref. 18, p 593). The Court noted the importance of publication as a forum for peer review, however: "submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected" (Ref. 18, p 593). Unfortunately, forensic telepsychiatry remains an under-researched area, with few peer-reviewed studies and publications compared with those supporting clinical telepsychiatry.<sup>50</sup> Courts may therefore inquire as to whether clinical telepsychiatry has been subjected to peer review and publication.

One of the reasons scientific studies are published in academic journals is so that their results can be validated (replicated) or, alternatively, falsified, by other researchers. The publication of numerous studies showing the reliability and efficacy of clinical telepsychiatry for both diagnosis and treatment in well-regarded, peer-reviewed medical journals lends strong support to the statement that the videoconferencing-based psychiatric evaluation for clinical purposes has been subjected to extensive peer review.<sup>34,36-41</sup> In fact, early studies did bring

substantive flaws to light, such as the inability to detect movement, subtle facial expressions, and other appearance-related concerns when using poor connection speeds (e.g., 128 kbps or less).<sup>41</sup> Anecdotal data suggest that the use of high-bandwidth services produces superior results,<sup>51</sup> although even relatively low-bandwidth telepsychiatry was found nearly equivalent to face-to-face, in-person psychiatric assessments in one meta-analysis.<sup>38</sup> Recent years have shown a steady refinement and improvement in the techniques of both clinical and forensic telepsychiatry. Telepsychiatry has been subject to expert consensus as clinical practice and has been subject to peer review in clinical publications. In a typical forensic evaluation, the essential element of the face-to-face psychiatric assessment is the examiner's observation of the evaluatee, posing questions to the evaluatee, and observing responses. These are common aspects of psychiatric assessment and examination regardless of whether the purpose is clinical or forensic.

#### Known or Potential Rate of Error

In evaluating scientific testimony, the Court in *Daubert* directed judges to consider "the known or potential rate of error" as well as "the existence and maintenance of standards controlling the technique's operation" (Ref. 18, p 594). With respect to forensic psychiatry in general, the potential rate of error may relate to the likelihood of agreement between forensic experts. Unfortunately, there are few empirical studies investigating the reliability and validity of forensic psychiatric assessments in general and even fewer studies demonstrating the reliability and validity of VCT-based forensic evaluations.<sup>12</sup> As with falsifiability, the scientific concept of "error rate" is poorly suited to analysis of forensic mental health evaluations,<sup>33</sup> and the majority of judges in a national survey showed an understanding of the concept that was "questionable at best" (Ref. 22, p 447). Furthermore, "[t]he Court [in *Daubert*] did not give any indication as to what rate of error would be unacceptably high, although courts almost uniformly have found that error rates of 50 percent or more reflect a lack of reliability" (Ref. 52, p 30). Numerous variables may affect the potential for error in forensic telepsychiatry, most of which are present regardless of whether the clinical interview is conducted in person or through VCT.

One potential concern is the absence of some sensory data that may be available in an in-person



psychiatric examination. These data may include smell (e.g., an odor of alcohol on the evaluatee's breath or foul body odor which can signify poor hygiene), subtle visual cues (e.g., slight tremor, bruises or swelling on body parts not shown on camera, jaundice that is not apparent due to color distortion or correction in the video transmission), and auditory information (e.g., if the audio quality is poor, the psychiatrist may not be able to hear a shaking voice or labored breathing).<sup>13,14,53</sup> Additionally, technology-specific variables may interact with the evaluatee's symptoms (e.g., disorganized thought processes or delusions about technology).<sup>13</sup> In a study of VCT for competency evaluations, several examiners reported communication difficulties with defendants caused by technical problems such as poor bandwidth and audio delay.<sup>53</sup> Adjorlolo and Chan have suggested that administering a test via VCT that was normed in an in-person setting may compromise the test's reliability and validity,<sup>50</sup> but there are data supporting the reliability and validity of remote administration of numerous standardized tests.<sup>54</sup>

Authentication of the patient or evaluatee can be a concern in telepsychiatry and may require some careful attention on the part of the evaluating psychiatrist. For example, it may be difficult to know or ensure that the person viewed via VCT or webcam is, in fact, the intended evaluatee and not, for example, his brother. Furthermore, the psychiatrist may not know whether the evaluatee is responding independently to the examiner's questions, being coached by an unseen third party, or conducting internet-based research simultaneously.<sup>4</sup> The examiner can take steps to address these concerns, such as requesting a photograph of the evaluatee beforehand or taking a screenshot or video recording during the interview. Anticipating potential risks and taking corrective steps may further decrease the potential rate of error, thereby increasing the likelihood of one's testimony withstanding a challenge on these grounds.

The existence and adoption of Clinical Practice Guidelines (CPGs) to regulate and guide critical aspects of telepsychiatry demonstrate that there are standards controlling its application. In addition to the CPGs that guide traditional forensic psychiatric evaluations, the specialist who conducts an examination via VCT should follow the recommendations of organizations like the American Telemedicine Association (see Table 1). When an evaluation follows these practice guidelines and is

based upon techniques shown to be valid and reliable, a court would have difficulty excluding such testimony on the basis of error rate or lack of standardization merely because the examination had been conducted remotely rather than in person. Peer-reviewed literature demonstrates that the potential rate of error associated with telepsychiatry is similar to that of traditional, face-to-face psychiatric practice.

### General Acceptance

The *Daubert* Court noted that: “[w]idespread acceptance [of a theory or technique] can be an important factor in ruling particular evidence admissible” (Ref. 18, p 594). Some states still apply only the general acceptance standard for the admissibility of expert witness testimony.<sup>20</sup> Furthermore, general acceptance, as one of the four criteria, remains relevant in jurisdictions that apply the *Daubert* standard; there is some indication that judges in state-level courts have continued to focus on general acceptance even after the adoption of rules based on the Federal Rules of Evidence<sup>22</sup> and that the importance of general acceptance may have increased after the *Daubert* decision.<sup>17</sup> Endorsement of a method by a professional scientific organization is an important indicator of the technique's acceptance by the medical profession. The APA has publicly acknowledged the value of forensic telepsychiatry since the late 1990s:

Telepsychiatry is appropriate for a variety of forensic uses, including patient assessment for involuntary commitment . . . and for conducting commitment hearings. Indeed, in the latter case it may enable family members to give testimony and emotional support who might be unable to attend otherwise (Ref. 55, p 3).

Despite its early adoption by some, telepsychiatry's growth was initially slow, largely due to cost.<sup>35</sup> Computer and telecommunications systems sophisticated enough to allow high-speed and high-quality information exchange were quite expensive in the early days of the internet. Several federal legislation packages, such as the American Recovery & Reinvestment Act,<sup>56</sup> allocated funds to support improvements in broadband internet access and telemedicine. As the cost of high technology decreased, telepsychiatry's use grew correspondingly.<sup>57</sup> From 2010 to 2017, the use of VCT by mental health facilities in the United States nearly doubled.<sup>58</sup> In recent years, telepsychiatry has gained more widespread acceptance for clinical and forensic purposes.<sup>7,50,59</sup>

## Daubert and Forensic Evaluations by Telepsychiatry

**Table 1** Clinical Practice Guidelines and Resource Documents Relating to Telepsychiatry

Guideline	Source	Availability
Core Guidelines for Telehealth Services Involving Provider-Patient Interactions <sup>60</sup>	American Telemedicine Association, 2014	Available from: <a href="http://www.americantelemed.org/docs/default-source/standards/core-operational-guidelines-for-telehealth-services.pdf">http://www.americantelemed.org/docs/default-source/standards/core-operational-guidelines-for-telehealth-services.pdf</a>
Practice Guidelines for Telemental Health with Children and Adolescents <sup>61</sup>	American Telemedicine Association, 2018	Available from: <a href="https://www.americantelemed.org/resources/practice-guidelines-for-telemental-health-with-children-and-adolescents/">https://www.americantelemed.org/resources/practice-guidelines-for-telemental-health-with-children-and-adolescents/</a>
A Lexicon of Assessment and Outcome Measures for Telemental Health <sup>62</sup>	American Telemedicine Association, 2014	Available from: <a href="https://www.liebertpub.com/doi/10.1089/tmj.2013.0357">https://www.liebertpub.com/doi/10.1089/tmj.2013.0357</a>
Practice Guidelines for Video-Based Online Mental Health Services <sup>63</sup>	American Telemedicine Association, 2013	Available from: <a href="https://www.liebertpub.com/doi/abs/10.1089/tmj.2013.9989">https://www.liebertpub.com/doi/abs/10.1089/tmj.2013.9989</a>
Evidence-Based Practice for Telemental Health <sup>64</sup>	American Telemedicine Association, 2009	Available from: <a href="https://www.liebertpub.com/doi/10.1089/tmj.2010.0158">https://www.liebertpub.com/doi/10.1089/tmj.2010.0158</a>
Practice Guidelines for Videoconferencing-Based Telemental Health <sup>65</sup>	American Telemedicine Association, 2009	Available from: <a href="https://www.liebertpub.com/doi/10.1089/tmj.2010.0148">https://www.liebertpub.com/doi/10.1089/tmj.2010.0148</a>
Best Practices in Videoconferencing-Based Telemental Health <sup>66</sup>	American Telemedicine Association and American Psychiatric Association, 2018	Available from: <a href="https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/Telepsychiatry/APA-ATA-Best-Practices-in-Videoconferencing-Based-Telemental-Health.pdf">https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/Telepsychiatry/APA-ATA-Best-Practices-in-Videoconferencing-Based-Telemental-Health.pdf</a>
Telepsychiatry Toolkit	American Psychiatric Association (current)	Available from: <a href="https://www.psychiatry.org/psychiatrists/practice/telepsychiatry/telepsychiatry-toolkit-home">https://www.psychiatry.org/psychiatrists/practice/telepsychiatry/telepsychiatry-toolkit-home</a>
Telemedicine: Synchronous Videoconferencing in Psychiatry <sup>67</sup>	American Psychiatric Association, 2017	Available from: <a href="https://www.psychiatry.org/File%20Library/Psychiatrists/Directories/Library-and-Archive/resource_documents/resource-document-telemedicine-synchronous-video-conferencing-in-psychiatry-2017.pdf">https://www.psychiatry.org/File%20Library/Psychiatrists/Directories/Library-and-Archive/resource_documents/resource-document-telemedicine-synchronous-video-conferencing-in-psychiatry-2017.pdf</a>
Telepsychiatry and Related Technologies in Clinical Psychiatry <sup>68</sup>	American Psychiatric Association, 2014	Available from: <a href="https://www.psychiatry.org/File%20Library/Psychiatrists/Directories/Library-and-Archive/resource_documents/Resource-2014-Telepsychiatry-Clinical-Psychiatry.pdf">https://www.psychiatry.org/File%20Library/Psychiatrists/Directories/Library-and-Archive/resource_documents/Resource-2014-Telepsychiatry-Clinical-Psychiatry.pdf</a>
Telepsychiatry via Videoconferencing <sup>55</sup>	American Psychiatric Association, 1998	Available from: <a href="https://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=497A867241BD9FA8A14B5F7665423D0C?doi=10.1.1.173.2939&amp;rep=rep1&amp;type=pdf">https://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=497A867241BD9FA8A14B5F7665423D0C?doi=10.1.1.173.2939&amp;rep=rep1&amp;type=pdf</a>
The Internet in Clinical Psychiatry <sup>69</sup>	American Psychiatric Association, 2009	Available from: <a href="https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/Practice-Management/Practice-Management-Guides/GeneralIssues-ResourceDoc-Internet.pdf">https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/Practice-Management/Practice-Management-Guides/GeneralIssues-ResourceDoc-Internet.pdf</a>
Practice Parameter for Telepsychiatry with Children and Adolescents <sup>70</sup>	American Academy of Child and Adolescent Psychiatry, 2008	Available from: <a href="http://www.jaacap.com/article/S0890-8567.(08)60154-9/pdf">http://www.jaacap.com/article/S0890-8567.(08)60154-9/pdf</a>
Guidelines for the Practice of Telepsychology <sup>71</sup>	American Psychological Association, 2013	Available from: <a href="https://www.apa.org/practice/guidelines/telepsychology">https://www.apa.org/practice/guidelines/telepsychology</a>
Model Guidelines for the Appropriate Use of the Internet in Medical Practice <sup>72</sup>	Federation of State Medical Boards, 2002	Available from: <a href="http://library.fsmb.org/pdf/2002_grpol_Use_of_Internet.pdf">http://library.fsmb.org/pdf/2002_grpol_Use_of_Internet.pdf</a>

General acceptance may also be indicated by the adoption and dissemination of CPGs, as noted above. There are today several sets of CPGs regarding the use of telemedicine or telepsychiatry, some of which are listed in Table 1, above. Another indication that telemedicine and videoconferencing have achieved general acceptance in psychiatry is the American Psychiatric Association’s Position Statement on Telemedicine in Psychiatry, which states that “[t]elemedicine in psychiatry, using video conferencing, is a validated and effective practice of medicine” (Ref. 73, p 1).

Increasing reimbursement of telemedicine and telemental health by CMS and private insurers is another important proxy for its general acceptance. Notably, CMS authorized reimbursement for clinical telepsychiatry<sup>74</sup> and actively encouraged its increased use to address the opioid crisis through Medicaid programs<sup>75</sup> well before the COVID-19 outbreak. Since March 2020, a broad swath of requirements and limitations on reimbursement have been lifted to encourage more providers to offer remote services. Furthermore, several bills pending in Congress would further lift restrictions on telepsychiatry or

make temporary COVID-19 allowances permanent.<sup>76</sup> These trends illustrate that the use of clinical telepsychiatry has indeed achieved general acceptance within the scientific community. It bears noting, however, that these developments, such as CMS reimbursement of telepsychiatry, may not apply to forensic psychiatric evaluations.

In studies of judicial gatekeeping post *Daubert*, researchers have found that judges tend to focus on two prongs of the *Daubert* criteria in particular: peer review and publication, and general acceptance.<sup>17,22,30</sup> Falsifiability (testable hypothesis) and known or potential rate of error are rarely mentioned.<sup>33</sup> Of the four criteria, judges appear to be focusing most on general acceptance,<sup>17,30</sup> an inquiry which has an established history in case law through the *Frye* standard. Focusing on general acceptance rather than falsifiability or error rate, particularly for disciplines like forensic psychiatry, is an application of *Daubert* that is consistent with the Supreme Court's reasoning.<sup>33</sup> Evidence supporting the notion that VCT has achieved general acceptance among forensic psychiatrists may therefore lessen the likelihood of a successful *Daubert* challenge based solely on the psychiatrist's use of VCT as a modality to conduct the forensic interview.

Of particular importance to this article was a finding by Shapiro and colleagues "that if an expert did not conduct an in-person interview of the defendant or plaintiff, the testimony is more likely to be excluded due to reliability" (Ref. 33, p 152). In interpreting their results, one should note that their review spanned cases dating back to the late 1990s, a time when the necessary technology for high-quality telepsychiatry was prohibitively expensive for many, if not most, mental health professionals. Technological advancements since that time have led to more widespread adoption of telepsychiatry and its growing acceptance as a valid modality for diagnosis and treatment in both clinical and forensic contexts, as evidenced by the growing body of literature in peer-reviewed journals as well as the proliferation of CPGs and similar publications regarding its use. With increasing adoption of telepsychiatry in the context of the COVID-19 pandemic, judges may be more inclined to recognize VCT-based psychiatric evaluations as relevant and consistent with generally accepted practice among forensic professionals.

Furthermore, even more important than general acceptance is the question of whether the proffered

testimony is likely to assist the trier of fact.<sup>21,33,77</sup> In a detailed review of published civil and criminal cases involving challenges to the admissibility of expert witness testimony, the most common determinative factors controlling admission or exclusion of testimony were whether it would assist the trier of fact, reliability, relevance, and the expert's qualifications.<sup>33</sup> The Federal Rules of Evidence were cited more often in these determinations than were the *Daubert* criteria.<sup>33</sup> In an analysis that discusses the relevance of several Rules of Evidence as well as *Daubert*, Faust and colleagues noted: "if there is a mantra that judges repeat when deciding admissibility of expert testimony, it is that the evidence must 'fit' and be 'relevant' to the issues in the case, 'reliable' as outlined in *Daubert/Kumho Tire* and Rule 702, and 'helpful' to the jury" (Ref. 21, p 56).

### Other Potential Legal Hurdles

Assuming that testimony from forensic telepsychiatry could survive a *Daubert* challenge, several other potential objections to the use of telemedicine in legal contexts are worth noting. These include the complex system of jurisdiction, licensure, and regulation of medical practice,<sup>57</sup> as well as state-specific laws regarding telemedicine or telemental health.<sup>35,68,78</sup> The Center for Connected Health Policy (CCHP) regularly publishes a report that reviews state-by-state variations in telehealth laws and reimbursement; these reports, as well as interactive information tools are freely available on the CCHP website (<http://www.cchpca.org/>).<sup>78</sup> The Federation of State Medical Boards (FSMB) also maintains a regularly-updated, state-by-state listing of COVID-19-related telehealth policies and requirement waivers on its website (<http://www.fsmb.org/>).<sup>79</sup> Confrontation-clause concerns could arise in the context of criminal cases.<sup>80</sup> Opposing counsel may challenge the admissibility of telepsychiatry-based testimony on the grounds that the psychiatrist who conducted the evaluation did not adequately understand the technology and therefore might not have applied the appropriate safeguards, such as obtaining the evaluatee's informed consent.

### Recommendations

If a *Daubert* challenge seems likely, the forensic evaluator should discuss these concerns with the retaining attorney prior to conducting the evaluation.<sup>81</sup> Sageman<sup>82</sup> and Gutheil and Bursztajn<sup>23</sup> have

offered general advice for improving the likelihood that one's testimony will survive a *Daubert* hearing. Taking steps to ensure the quality of the forensic assessment is essential.<sup>14,50</sup> Perhaps more importantly, however, the evaluator should attend to the relevance of the psychiatric opinion to the particular facts of the case and the legal question at hand.<sup>21,77</sup> In reality, "courts rarely use the four scientific criteria enumerated in *Daubert* as a basis for excluding expert testimony in the behavioral sciences. The important issue, recognized by many courts, is whether the proposed testimony will assist the trier of fact" (Ref. 33, p 149).

The examiner should use the highest-quality technology that is practical, including high bandwidth to increase diagnostic reliability, and secure transmission practices.<sup>50,66,81</sup> While the performance of the examination via VCT may remove several minor data points, the psychiatrist can take steps to minimize these differences, such as ordering additional laboratory testing, just as psychiatrists in traditional forensic examinations might prescribe additional outside lab work.<sup>13</sup> In addition, in some cases the examiner may utilize facilities specifically designed for high-quality telemedicine if, for example, the evaluatee's home or attorney's office does not have sufficient bandwidth for detailed and speedy data transmission. The retaining attorney can assist in arranging the use of such a location for the technology. Other technical and technological considerations for telepsychiatry include the video gaze angle, lighting, and framing of the speaker<sup>83</sup> and whether the examiner can control the camera's angle and focus.<sup>50</sup> The examining psychiatrist should consider what procedures should be in place to protect the evaluatee's safety prior to beginning the evaluation.<sup>66</sup> The retaining attorney can assist in ensuring that resources are available if a crisis arises (e.g., acute suicidal ideation). Heilbrun *et al.* note that obtaining more detailed collateral data may be appropriate when subtle cues to behavioral nuances are limited due to the videoconferencing modality.<sup>14</sup> Luxton and colleagues offer additional suggestions for best practices.<sup>12,13,84</sup>

In some forensic cases, the limitations associated with VCT-based assessment may be a more significant factor, and the forensic psychiatrist can develop a strategy to overcome or compensate for these limitations. For example, one symptom cluster that may not manifest well via VCT interview is a change in

behavior or symptoms based on physical proximity to the psychiatrist or travel to the psychiatrist's office, such as social phobia or agoraphobia. The evaluatee with a severe anxiety disorder could be expected to exhibit physical symptoms (such as sweating, trembling, and rapid heartbeat) in a traditional, face-to-face interview in person but might be significantly more relaxed in a videoconferencing-based discussion. When an anxiety disorder plays a significant role in the reason for the forensic evaluation (e.g., a person applying for disability benefits), it may be appropriate to collaborate with someone at the evaluatee's location to enable problematic symptoms to emerge. Similarly, if the evaluation concerns phenomena or patterns tied to certain times of day (e.g., sundowning in dementia), the psychiatrist should consider the evaluatee's time zone when scheduling the appointment.

Adjorlolo and Chan offer suggestions for increasing the likelihood that VCT-based forensic assessment reports will pass muster when viewed with an eye toward reliability and validity in the context of adversarial courtroom proceedings.<sup>50</sup> They suggest adding a section to the forensic report that specifically addresses VCT-specific concerns, including why VCT was used, details about the technology employed and its potential effect on the evaluation, safeguards that were taken, and whether using VCT might have influenced the results of the assessment.<sup>50</sup> If an assessment had to be performed via telepsychiatry when a face-to-face evaluation would have been preferable, the psychiatrist may disclose limitations and caveats within any written reports. Levin, Gold, and Onorato describe a case in which forensic psychiatrists had to rely upon telephone interviews and email communication in place of standard in-person assessments.<sup>85</sup> In their opinion:

[T]he use of telephone interviews required a deviation from standard language in expressing opinions. Where based on phone interviews, opinions were rated as 'highly probable' whereas opinions based on personal interviews were rated as having a 'reasonable degree of medical certainty.' For the two plaintiffs who could not be reached in person or by phone, reports provided narratives but did not offer opinions (Ref 85, p 319).

Similar modifications can be made to reports or testimony derived from telepsychiatric interviews when, in the psychiatrist's opinion, the VCT modality may have adversely affected the reliability or validity of the evaluation.



Medical data breaches represent a growing threat to the use of information and communications technology in health care, and security is an important consideration for the performance of forensic psychiatric evaluations. With patients or evaluatees who are incarcerated, a lack of privacy is a common problem for telepsychiatry in correctional settings.<sup>42</sup> Although enforcement of HIPAA has been suspended during the COVID-19 public health emergency,<sup>86</sup> choosing HIPAA-compliant software and ensuring that a business-associate agreement is in place can help to lessen risk.<sup>51</sup>

Telepsychiatry has been lauded for its potential to increase safety.<sup>13,83</sup> In cases involving evaluatees with a high risk for violent behavior or during times of pandemics, the use of telemedicine may carry a lower overall risk of harm. Furthermore, forensic telepsychiatry can help to address a growing backlog of cases of pretrial defendants held in jail pending competency evaluations<sup>13,53</sup> as well as asylum seekers held in immigration detention facilities.<sup>49,87</sup> Gordon has argued that states should expand access to telemental health as a means of improving the neutrality and objectivity of forensic psychiatric assessments.<sup>88</sup> Telepsychiatry therefore could provide access to a third-party expert whose opinions may be more objective than those of the patient's or evaluatee's treating clinician.<sup>88</sup> Furthermore, VCT may facilitate the retention of forensic specialists whose expertise is more directly relevant to the case at hand, thereby increasing the likelihood of such testimony withstanding a *Daubert* challenge.

Attorney pressures on forensic psychiatrists commonly pose ethics dilemmas, and pressure from an attorney to conduct an evaluation via VCT, when the psychiatrist feels that an in-person evaluation is more appropriate, should be addressed directly. Similarly, the attorney may pressure the psychiatrist to conduct an evaluation in person (perhaps in the hope that this will increase its likelihood of withstanding a *Daubert* challenge) when the psychiatrist feels that remote assessment would be preferable because of safety concerns or time constraints and case backlogs. In either of these situations, the forensic psychiatrist should endeavor to remain objective and to comply with AAPL's Ethics Guidelines.<sup>89</sup>

As with any forensic evaluation, it is important to obtain the evaluatee's informed consent to the assessment. The psychiatrist should include the usual warnings, clarifying the context of the appointment

and its potential legal consequences, reiterating that the psychiatrist is not providing psychotherapy or medical treatment to the evaluatee.<sup>68</sup> In addition, the informed consent process for forensic telepsychiatry may involve disclosure and discussion of risks associated with the use of technology, such as known and unknown risks to the evaluatee's confidentiality or privacy.<sup>50</sup>

## Concluding Points

To date, no known cases have involved a successful *Daubert* challenge to expert witness testimony based on a telepsychiatric evaluation. In light of judges' continuing focus on generally accepted practices and the body of empirical evidence and CPGs supporting the reliability and validity of clinical telepsychiatry, there should be few cases in which a qualified forensic psychiatrist's testimony would be excluded merely because it was based on an assessment conducted through telepsychiatry. Still, where the drawbacks to the videoconferencing modality do not render such testimony inadmissible, they may have implications for the weight that such testimony carries. Empirical research has found that judges evaluating proffered mental health expert testimony tend to focus on the question of the weight such testimony should be afforded rather than its admissibility.<sup>33</sup> Forensic psychiatric assessment is an imperfect science, and agreement between psychiatric experts is rarely 100 percent, regardless of whether VCT is involved. Most drawbacks to telepsychiatry-based evidence are similar to those of testimonial evidence based on assessments conducted in person. Given the large and growing body of studies finding telepsychiatry comparable with traditional psychiatry in terms of reliability and validity for clinical purposes, it seems likely that a carefully performed teleforensic evaluation by a qualified forensic specialist could withstand a *Daubert* challenge, assuming the psychiatrist's opinions will assist the trier of fact.

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