Memorandum to Co-Counsel on Orthomolecular Psychiatry

James K. Feldman[1]

I have been consulted by a number of lawyers regarding the application of Orthomolecular psychiatric testimony or the admission of Orthomolecular evidence into court in cases they have been involved with; accordingly, I have prepared this memorandum for their guidance in this field. The need to employ orthomolecular technology may arise in various types of cases, such as where the issue of lack of guilt during the commission of a crime due to insanity leads counsel for the defense to enter a plea of not guilty by reason of insanity. If the accused is still insane when the time for his trial arrives, Orthomolecular evidence could be introduced to prove this fact, thereby delaying the trial until he should become sane enough to recognize that he was ill, to comprehend what his trial was all about, and to assist his attorneys in his defense. The issue of insanity may come up regarding a client's being considered as having testamentary capacity to make a will, or being ill enough to be committed to a hospital, or being well enough for military service, or having a sane mind which would enable his testimony in court as a witness to be free from risk of attack on grounds of insanity by the other side, and in many other ways. So it would be well for any lawyer involved in a case where sanity or insanity is an issue to be well-versed in the field of Orthomolecular psychiatry.

There are two types of psychological tests used in the Orthomolecular field, the HOD test, also known as the Hoffer-Osmond Diagnostic Test, which contains 145 questions, and the EWI test, also known as the Experiential World Inventory, which is more complex and thorough, and contains 400 questions. The questions are answered by the client as either true or false, depending on whether they apply to his condition or not. The questions concern themselves over what the patient is perceiving about his environment and his body and how he looks out upon the outside world. Client must be cautioned to answer questions which may apply to his condition and told that the results of the test will be used by his lawyer to help him. Very often a client has learned to distrust people who deal with him due to the prevalent nefarious standards in mental health care, so he might try to "cheat" on the test if he believes that the

1 Attorney at Law. 813 Centran Bldg., Akron, Ohio 44308.

results might be used to lock him up again. The lawyer must then work closely with the psychologist to interpret the results of the tests and to see how they can be used in the judicial process.

There are several schools of thought in the field of Orthomolecular psychiatry as to what form of treatment regimen of pills to use to treat mental illness. This probably has confused many people in the mental health field, but it has permitted much experimentation and innovation in the development of continually improving modalities of therapy. The founders of the school of orthomolecular psychiatry were Dr. Abram Hoffer, formerly of Saskatoon, Canada, and Dr. Humphry Osmond, of Tuscaloosa, Alabama. Their book, entitled **How to Live with Schizophrenia,** is an excellent introduction into the field. Dr. Carl C. Pfeiffer has written **The Schizophrenias—Yours and Mine,** another excellent work. Dr. Pfeiffer is the director of the Brain Bio Center, in Princeton, New Jersey, where he has an excellent medical laboratory which can perform tests of levels of certain chemicals in the human body which are indicators of the presence or absence of good mental health.

Other tests of body chemistry levels are done by Dr. W. D. Currier, of Pasadena, California, who follows the theories of Dr. George Watson. Dr. Watson's book, **Nutrition and the Mind,** is one more excellent book to read for persons interested in Orthomolecular psychiatry. The Human Ecology Research Foundation, 720 North Michigan Avenue, Chicago, Illinois 60611, has a number of pamphlets on the effect of allergies upon the human mind, a phenomenon which can be tested for and is used routinely in court, by Judge Alphonso Sepe, of Miami, Florida. He utilizes the services of Dr. Hobart Feldman, also of Miami.

All of the doctors heretofore mentioned routinely use their tests to diagnose the presence and cause of the patient's mental disorder, and then proceed to bring the illness under control by correcting the aberrant levels of their body chemistry by vitamins and minerals, diets, and supplementary psychotropic drugs. To utilize the theory and practice of Orthomolecular psychiatry in a jurisdiction, an attorney might best find a local doctor who would be willing to study up on the field, so he could treat the attorney's client and then testify in court as to how he diagnosed the patient and corrected his disorder. It would be difficult to get any of the doctors mentioned herein to testify, due to their enormous workloads, but they might be able to refer the attorney who contacts them to an expert who could take the time to appear in court as an expert witness. The Orthomolecular psychiatrists have a medical manual, called **Orthomolecular Psychiatry,** edited by Dr. David Hawkins, of Manhasset, Long Island, New York, and Dr. Linus Pauling, the renowned Nobel prize-winner, and this would be a good place to start for a doctor just getting into the field. The **Journal of Orthomolecular Psychiatry** presents continuing developments in the field.

Although I have not found any cases reported yet which have specifically allowed the admission of Orthomolecular psychiatric evidence in cases where the mental health of a party was in issue, I have found what I believe to be ample precedent to support its admission, from decisions regarding the admission of other kinds of new scientific technology. The ground rules were laid down as far back as 1923, in the case of **Frye v. U.S.,** 54 App. D.C. 46, 293 F. 1013, 34 A.L.R. 145: "Just when a scientific principle of discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in the twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."

In 1970, here in Ohio, a defendant was

convicted of the mail bomb murder of his girl friend's other suitor, based on evidence from neutron activation analysis, where the nature or particles remaining from the explosion was matched to material found in the defendant's apartment or purchased by him, in a process very similar to the way in which hair and blood are analyzed by the Brain Bio Center. The Federal courts sustained the use of this evidence, broadening the **Frye** doctrine, and saying,". . . neither newness nor lack of absolute certainty in a test suffices to render it inadmissible in court. Every useful new development must have its first day in court. And court records are full of the conflicting opinions of doctors, engineers, and accountants, to name just a few of the legions of expert witnesses." **U.S. v. Stifel,** 433 F 2d 431; cert. den. 401 U.S. 994, 91 S. Ct. 1232, 28 L. Ed. 531.

When Orthomolecular technology has its first day in court, counsel proffering its finding will be able to draw upon such a legion of expert witnesses as were mentioned in **Stifel.** There is a large organization of doctors interested in this field known as the **Academy of Orthomolecular Psychiatry,** located at 1691 Northern Blvd., Manhasset, N.Y. 11030. A number of these members are devoting their careers to the practice of the discipline, and a lawyer interested in proffering Orthomolecular testimony would do well to contact their Academy for assistance. There is also a nationwide organization of laymen who have relatives treated by the technique, who are in process of proselytizing its use, known as the **Huxley Institute for Biosocial Research,** 1114 First Avenue, New York City, New York 10021. This organization has Chapters across the country in most states, and a lawyer should contact the national organization for the address of the Chapter in his locality. Such a Chapter could provide him with witnesses whose successful treatment by Orthomolecular psychiatry could be offered as proof of its efficacy and as proof that the discipline of medicine has arrived at the point of its being established as a medical treatment in the locality. Such widespread acceptance will be very helpful in getting Orthomolecular evidence admitted, if your courts follow the **Jones** test cited in a case well known to the bar nationally, in which a Dr. Coppolino murdered his wife with a toxic dose of an anaesthetic called succinyl-choline. After her body was exhumed, a Dr. Umberger, of the New York City Medical Examiner's Office, was brought to Florida, and he performed some newly developed chemical tests on it to determine the presence of the residue of the substance used to kill her. Her husband's counsel, the eminent F. Lee Bailey, objected, but Florida's highest court sustained the use of the test. **Coppolino v. State,** 223 So. 2d 68, cert, den. 399 U.S. 927, 90 S. Ct. 2242, 26 L. Ed. 2d 794. Citing **Jones on Evidence,** sec. 457 (5th Ed., 1958), the court quoted, "Where the evidence is based solely upon scientific tests and experiments, it is essential that the reliability of the tests and results thereof shall be recognized and accepted by scientists or that the demonstration shall have passed from the stage of experimentation and uncertainty to that of reasonable demon-strability." In considering the test before it for acceptance, the court said, "In this case, unlike those involving lie detector tests or intoxication tests, there is a dearth of literature and specific case law to guide the trial and appellate courts. The trial court listened to the testimony of the expert witnesses and in an exercise of his discretion ruled that the tests in question were sufficiently reliable to justify their admission."

This case, I believe, provides a valuable precedent for support of admission of Orthomolecular evidence. The first criterion it presented was that of general acceptance by scientists. This was not met. Then it was willing to admit the evidence if the technology could be shown to hold water. This was accomplished. In the event that a court would not consider Orthomolecular technology widely enough accepted, counsel can always fall back on proof of its being able to hold water and to stand on its own

feet. Moreover, in the field of ortho-molecular psychiatry, there is a plethora of literature for the counsel to proffer in evidence to support it.

One thing to keep in mind is that Orthomolecular technology need not be accepted by the entire medical profession, or even the entire psychiatric profession, to be considered to be "generally accepted" by the courts. In the case of **People v. Williams,** 164 Cal. Ap. 2d Supp. 858, 331 P.2d 251 (1958), the Naline test for use of narcotics was sustained while not yet widely known, "Each of the People's experts did admit on cross-examination that the medical profession generally is unfamiliar with the use of Naline and therefore it cannot be truthfully said that the Naline test has met with general acceptance by the medical profession as a whole, general acceptance being at present limited to those few in a specialized area who deal with the problem. Should this fact render the testimony inadmissible? We believe not. All of the medical testimony points to the reliability of the test. It has been generally accepted by those who would be familiar with its use. In this age of specialization, more< should not be required." Certainly, if we have a large group of doctors united in an **Academy of Orthomolecular Psychiatry** to support their technology, this would pass the **Williams** test—those practitioners who specialize in the field accept the reliability of its tests.

In the case of **People v. Bobyczyk,** 343 **III.** App, 504, 99 N.E. 2d 567 (1957), the court also considered the broadness of the "general acceptability" doctrine and brought up the idea of the acceptability of new technology affecting more its weight when considered as evidence rather than simply its admissibility as evidence:

"Defendant argues that there is a lack of unanimity in the medical profession as to whether intoxication can be determined by breath. Even so, we think this objection goes to the weight of the testimony and does not destroy its admissibility. The evidence in this case shows that the experts called by the State are eminently qualified in the field in question."

The most recent leading case which has been decided on the issue of admissibility of new technology as evidence, **U.S. v. Ridling,** E.D. Mich., 350 F. Supp. 90 (1972) says,

"The historical process of developing the admissibility of opinions interpreting scientific evidence is a simple one. Someone has an idea and a theory, e.g., that no two fingerprints are the same and that fingerprints can be analyzed, measured, and catalogued; that alcohol in blood can be used to determine intoxication; that voices can be recorded, charted, and analyzed to provide a means of comparison for the purpose of identification; that the principles of radar can be used to measure the speed of vehicles. This and other persons develop the idea and theory until it has some acceptance.

"When opinions interpreting the results are first offered in court, the underlying premises require a great deal of proof, as well as does the proper use of these premises, the necessary controls used in the specific cases, and the appropriate qualifications of the expert. On proper proof, the evidence becomes admissible. The attention of the Courts at this point seems to be directed at the proper qualifications of an expert witness, including testimony, establishing the underlying theory.

"Finally, the underlying principles and premises become so well established and known that the only real issues for determination in connection with the reception of the evidence is the proper use of the principles, premises, and theories and their use of adequate controls in the specific case to assure good results. In other words, at this stage the Courts judicially notice the basic theories and premises. They no longer need to be proved. This is true today in the area of fingerprints, identifications, ballistics identifications, blood tests for intoxication, radar, and many others."

This case goes on to cite many of the cases previously cited in this memorandum, such as **Coppolino v. State,**

People v. Bobczyk, People v. Williams, and **Frye v. U.S.,** and cites **McCormick on Evidence** and **Wigmore on Evidence** as well. **McCormick,** 2d Ed. (1972), p. 491, par. 203, says, "General scientific acceptance is a proper condition for taking judicial notice of scientific facts, but not a criterion for the admissibility of evidence. Any relevant conclusions which are supported by a qualified expert should be received . . ."; and Wigmore, Vol. 3A, p. 922, par. 990, says, "As the science of psychology progresses, broadening its scope and enlarging its discoveries of precise truths and methods, it will make copious contributions in this particular field of knowledge. Judicial practice should liberally make use of such methods. All that should be required as a condition is the preliminary testimony of a scientist that the proposed test is an accepted one in his profession and that it has reasonable measure of precision in its indications." Certainly the new Orthomolecular technology which deals with how the chemical make-up of one's system affects the psychology of his mind would fall squarely within Wigmore's parameters. And articles continue to be written on how to introduce new technology into evidence, such as Maletskos and Speilman, "Introduction of New Scientific Methods in Court", 1 **Law Enforcement, Science and Technology 957** (1967).

Over and above the procedural issues of acceptance and admissibility of the new technology, however, rise two critical, substantive issues derived from the Fourteenth Amendment, equal protection, and due process. Where a criminal matter is involved, the present tendency of the courts nationally has been to be especially solicitous of the defendant's rights. If new tests were admitted to help convict defendants as is regularly being done all the time, surely they should be admitted to support an insanity plea, or perhaps earlier in the criminal process to support an order of hospitalization until the defendant is competent to stand trial. If defendants with functional mental illness are permitted to have psychiatric testimony to explain their handicaps to the court, it would only be just to give a defendant with a biochemical mental illness equal protection of the law, by permitting expert Orthomolecular testimony appropriate to his illness. Moreover, if the offender afflicted with such an illness were not permitted to have the latest and most advanced technology brought to bear to assist in his defense, he would be afforded far less than that due process of law to which he should be entitled.

Counsel are invited to contact the writer for any further advice or assistance which they may require in handling any matter in which they wish to employ Orthomolecular technology.