Mary Barros-Bailey **February 17, 2023**
ESM Comments & Review

1. **PRIMARY DATA** (what the practitioner collects with respect to the analysis)

a) ***Interview***: This is for ALL interviews, not just of the evaluee, and could include collateral interviews such as physicians, therapists, family members, etc. In other words, it's using the interview as part of the data collection method to obtain the primary data for the analysis.

b) ***Observation***: This could be in many forms. It could be using all senses (sight: how the person presents to the interview), smell (Is there something about their presentation that might be a barrier, such as BO?), touch (How did the person's handshake come across — confident, hesitant, refusal?), etc. to detect different behaviors about the evaluee. Testing is an observation; it's all the kinds of informal or formal testing we do such as aptitude, interest, work values, cognitive, achievement, etc. tests, checklists, etc. to take a sample of someone's behavior in a variety of areas we are measuring. Observation can also come in the form of research. For example, in our field, we use survey research methods to take a small sample of the requirements of work activity in a certain geographical area. That's called labor market survey. Here's another example. I once read a deposition of a accident deconstructionist who used a pig's arm to apply certain kinds of pressure to determine if the edge of a LED light could cause the cut into an artist's arm resulting in the injury he received. That experiment, or research, is an observation and would fit under this category, so would the experiments other kinds of experts use to test theories such as ballistics. This type of data collection is an example of the etic part of research data collection.

c) ***Participant-Observation***: There is no consensus whether this type of observation is on its own or as part of "b" above. Robert Yin listed it separately in case study research, so I replicated what he did. This is much like "b". However, the difference is that in "b" we are not engaging in the activity as part of the data collection process, but in participant-observation we are. In our field, this is how it manifests itself: If I go out and do a JA and just take all the measurements, use our senses for observation (including interviews of incumbents and supervisors), this type of data would be Observation as in "b." However, if as part of the data collection process for the JA, I need to have more intimate understanding of what the work activity requires, how it is done, and actually participate in the activity to gather information, that is called Participant-Observation: I'm gathering data There's not too much of this kind of participant-observation in our particular field. But, there is in other fields. For example, the art therapist typically also participates to some extent in the article while engaging with the individual in data collection. Same with the music therapists, or other more hands-on disciplines. This type of data collection is an example of the emic part of research data collection.

Here's a short website that describes the difference between "b" and "c" that might be useful: https://programs.online.american.edu/msme/masters-in-measurement-and-evaluation/resources/observation

2. **SECONDARY DATA** (what was provided to the practitioner that was collected by someone else, or even collected by the practitioner (e.g., LMS, JA), but for another case and applied to the case at hand)

a) ***Documents***: These are the single-most used type of data in any discipline. In fact, sometimes it's the only thing we use in an analysis, such as if we're on the defense doing a peer review of another expert's work. This type of data is the most extensive. It includes all the regular medical, mental, legal, vocational, educational, and other documents we're used to getting with our referrals (transcripts, treatment records, social service records, reports from other experts, depositions, etc.). And, it also includes things like peer-reviewed articles, books, government statutes, case laws, or anything else that someone else developed, wrote, or published in any other area based on their review, evaluation, conclusion about the facts or raw data, opinions, etc.

b) *Vital Records*: Data from Vital Records are a very important part of the secondary data category. It is different from "a" in very important forms. It is the pure data or records in their raw form before someone took them and interpreted them in some way. Therefore, they are things like vital records (birth or marriage certificates), databases with raw data (e.g., Bureau of Labor Statistics), bills of charges, the Social Security earnings statement, etc. Here's an example. Let's saw that I do a labor market survey and collect all the data into a database. At that point, it's just a bunch of data collected through the survey research method that doesn't mean anything until I start analyzing it and arrive at a conclusion. The database itself is vital records. Once I start analyzing the data and applying meaning to it and putting it into a report, it becomes a document ("a"). The same thing can occur with a many other things we see in our file, such as billing records. In their raw form, they are just a collection of charges with CPT codes. If someone took those bills and interpreted that the treatment resulted in X amount of PT visits that either increased or declined over time, arrived at a conclusion about those trends, that would be a document based on data from vital records. Using the same

source of bills, say that a VE took all the CPT codes from the bills of a physician over a 5-year period to demonstrate that physician spent most of her clinical time performing a particular part of the occupation, those bills are vital records; the interpretation of those vital records into a conclusion and a report becomes a document ("a"). That is why peer-review articles, chapters, books, or other publications are considered "a" (documents) and not anything else because the author is interpreting information through their own analysis and coming up with a conclusion. The raw data itself without interpretation tied to it would be vital records. It's important to distinguish this kind of data separate from Documents "a." Both are very important to the analysis because the VE could use both and vital records are not part of documents but a separate category that when interpreted by others or even the VE become part of the evidence of the case analysis.

c) ***Physical Artifacts***: This is likely the easiest type of data to explain because it's so tangible — the wheelchair, the scuffing along the hallway from the wheelchair, the cane the evaluee walked in with, the saddle they made, the garden they grew, the art piece they finished, the Day in the Life Video, the surveillance video, the pictures of the accident scene, the audio of the 911 call, etc.

When I talked with Robert Yin about his evidence chapter, he indicated that these categories were all-inclusive. I tested that analysis. I took all the 21 published models of LOEC (e.g., VRAM, RAPEL, Boyd-Toppino) and coded all the evidence mentioned in those models by this structure. There was no data or evidence mentioned in those models that did not fall into one of these six categories. Also, I did the same thing with the Federal Rules of Evidence. I did a content analysis to see if all the types of evidence mentioned within the entire FRE

fall into these six categories. They did. I cannot think of a single type of evidence that doesn't fit into one of these six categories.

On clinical judgment, not very well known in the forensic rehabilitation arena is the clinical judgment research and publications of Dr. Bryan Austin who did his dissertation on CJ within VR when he graduated from MSU's doctoral RC program about a decade ago. I worked with him at the University of Idaho. I've attached some articles from him regarding CJ that might be helpful to your analysis as well as a couple of others that might be interesting to you.

As requested by Tim, I also include a copy of the chapter he wrote for the upcoming 5th edition of the *Life Care Planning and Case Management Across the Lifespan* (Rutherford-Owen, Barros-Bailey, & Weed) that is in press. Of particular interest is Dr. Field's discussion of the changes to the Federal Rules of Evidence that are upcoming at the end of 2023 and should upstage *Daubert* in some regards. I think he does the best review and interpretation I've read regarding these impacts to VEs than anyone else I've read. The upcoming changes is something that people haven't started talking about and it could become a really big issue to the people who somehow use "clinical judgment" terminology but with a ipse dixit explanation.

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