Forensic Briefs

Episode 32 Mike Chavetz – Recommendations for Forensic Record Reviews

Dr. Michael Chafetz, a board-certified clinical neuropsychologist, explores the role of record reviews in forensic neuropsychology. He discusses how a Daubert challenge inspired him to coauthor an AACN best practices article on the topic. The conversation highlights the importance of scientific rigor when conducting evaluations without direct examination, and how such practices can withstand legal scrutiny. Dr. Chafetz also shares his experience in Social Security disability, FAA, and licensing board evaluations.

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Dr. Guyton Welcome to Forensic Briefs, everybody. Alex, will you tell us who we are speaking with today?

Dr. Millkey Absolutely. Today we're talking to Doctor Michael Chafetz. Doctor Chafetz is a board certified clinical neuropsychologist and independent practice in New Orleans. Big easy. His research interests have focused on the validity of Social Security disability examinations, where he has sought to understand how validity testing operates in low functioning clients. This research led to an initiative to help the social security system produce more accurate assessments.

Dr. Millkey His practice provides second neuropsychological expertise on litigated matters and is frequently court appointed. He also engaged in FAA evaluations for pilots and air traffic control specialists, and he does licensing board evaluations.

Dr. Guyton And we are here to talk with Doctor Chafetz about a paper that he and some colleagues wrote entitled Neuropsychological Review of Records and Forensic Cases: An AACN Best Practices Paper with International Perspectives. And we're only speaking with Doctor Chafetz today, but we wanted to also recognize the colleagues that he co-wrote the article with. And these include the following people Jeri Sweet, Kyle Boone, Darcy Cox, Vicki Hall, Michael Kirkwood, Jose La Foss, Thomas Merton, and Kristian Oldenburg.

Dr. Thank you so much for joining us today, Michael.

Millkey

Dr. Thank you very much for inviting me here.

Chafetz

Dr. Can you tell us a little bit about your professional background and how you got Guyton to be in your present position?

Dr. Chafetz

Well, in Louisiana, I'm licensed as a clinical psychologist and clinical neuropsychologist. In Texas, I'm a licensed psychologist. I actually re-specialized in neuropsychology. I was trained as a neuroscientist in the psychology departments, but I went to school for and re-specialized in clinical psychology and clinical neuropsychology. I am board certified in clinical neuropsychology through ABAP, and here I am.

Dr. Millkey And I'm interested in not just how you came to this field, but how you came to this topic. I have a feeling that there might be a good story about how you came to become interested in record reviews and forensic cases. Is there a story you can tell us?

Dr.

There is a story. I mean, I don't think there was much emphasis on review of **Chafetz** records in my training. And, we always just sought to provide the basic facts on the records. And it didn't strike me as to the importance of that beyond a simply good account of what's going on until I was involved in a legal case in which I could not do an evaluation.

Dr. Chafetz

So they asked me to do a review of records, and at some point down the line, I got Dauberted. There was a motion to exclude me based upon only a records review, and I went what? I could not believe this. But then it occurred to me that, well, yes, I had been pretty detailed in the records review, and it had potentially compromised the case on the other side.

Dr.

And they wanted to exclude me. So I had to go to court for, to defend a records **Chafetz** review and ultimately turned out to be really not much me doing anything in court. I got not excluded. I got passed in court. But it dawned on me that the records review itself had to stand on its own, whether within an evaluation or by itself.

Dr. Chafetz

It had to be legally defensible. It had to be able to withstand a scientific challenge at the level of a Daubert challenge. And that's what got me started on this.

Dr. Do you remember what the specific issues were, or was it more general when **Guyton** your record review was challenged in that particular case?

Dr. Well, it had to do with, both malingering and traumatic brain injury, where I took my usual deep dive into the mild traumatic brain injury guidelines and was very careful with that, whereas the neuropsychologist on the other side had not done that. And I took my usual deep dive into the validity of the case and showed how the neuropsychologist had passed things by avoiding certain validity issues.

Dr. And, when I applied the guidelines for mild traumatic brain injury and forChafetz validity, it turned out that, yes, they were malingering and no, they had not even sustained the criteria for a mild traumatic brain injury.

Dr. And so in your careful records review, was it just that the other side was disappointed with with your results, and decided to challenge it or was there - I mean, I hear you saying that I began to think about this needs to be legally defensible throughout the process. Did the court or the lawyers have any such concerns about your report?

Well, obviously I can't read their minds. Lawyers do things to protect their cases.
 Chafetz And so, this I mean, my only conclusion was that this disturbed their case.
 Things were going well for them until this. And it seems to me that was the motivation. Motivation to try to exclude me.

Dr. Well, I think Alex and I are no strangers to challenges to what we have to say that maybe are not based in full fact. So maybe we could get to some foundational things. A little bit, like you said, you know, record review was not something that was really covered in your training. It certainly wasn't covered in mine unless it was sort of part of an evaluation that included interview and testing.

Dr. So can you talk a little bit about a referral for a records review? What that is?Guyton You know, how maybe that's different than a typical evaluation that doesn't involve face to face interaction with an examinee?

Chafetz There are many reasons that you might get referred for a records review, or just actually asked to do only a record review, because it's intolerable otherwise. For example, if the requirement is that you have to video record your exam, that would provide both a test security problem and a third party observation problem, where if the examinee is being observed, they tend to perform differently and say different things than if they're not being observed.

Dr. Chafetz

So it invalidates the exam. So if it's court defined and required, I would not do that kind of exam. And I may default to a records review. That doesn't happen often to me, but it's what I would do. And it does happen to others. They would default to a record review in certain states in which test security is compromised by the courts.

Dr. Chafetz

But as we're talking about the record review within an exam has to be just as sharp scientifically. And also, if you think about it, you don't even need an exam to determine traumatic brain injury, because this is in a forensic case. This is two years after the fact. You're not even close at hand to the sentence being presented.

Dr. Chafetz

So you have to go from records and you're not in the records for a traumatic brain injury. The most objective records are in what I call the holy trinity of records: the crash report, the EMS report, and the emergency department report because they will have trauma professionals looking at this individual and knowing exactly what they're seeing. So, that's gold.

Dr. And it's far better than actually an exam.

Chafetz

Dr. Guyton

So when you're trying to establish, did this person have a traumatic brain injury as a result of whatever they experienced? You're really focused on what happened at the time of, you know, the crash or whatever it is. And maybe later information doesn't matter as much unless they are - I mean, I guess I would assume that in some cases people are say, oh, I am still experiencing x, y, and z symptoms or functional deficits as a result of that traumatic brain injury.

Dr. How do you, how do you account for that?

Guyton

Well, that's that's like a perfect question.

Chafetz

Dr.

Dr. Thank you.

Guyton

Dr. Chafetz

Because two years later, three years later, four years later, you've got problems with the malleability of memory. People do not remember exactly what happened. And bystander eyewitness memory is practically useless. You can have you see all these studies of eyewitness memory where you're giving them a multiple choice test after there's mayhem in a classroom that occurs and 200

students in the classroom can't even agree on the basic, simple facts of what just happened five minutes ago.

Dr. Chafetz

So two, three years down the line, when, you know, there's been suggestions by the lawyer and there's been a lot of things that enter into memory recall is practically useless compared to the objective records on the scene or in the emergency department.

Dr. Millkey

The guidelines that you talk about in your article and that we'll talk about today, do you contemplate these as primarily being applicable when you're producing a work product based solely on record review, or do you consider this as applicable to a record review done as a part of an evaluation, where you would meet with the person face to face and do testing?

Dr.

Well, once again, for a mild traumatic brain injury, you know, the records are the **Chafetz** gold here. The records are the most objective things that you can use. So what happens during the exam and the things that are told to you on exam are not really as important. Now in terms of the validity of the exam, you really do need an exam to look at validity apart from what the other neuropsychologist had done in the case.

Dr.

Or apart from what else has been done in a case. Notwithstanding that, records **Chafetz** give you whether or not there's a marked discrepancy, so that for example, if the examinee said that, oh, I lost consciousness for 30 minutes and said that to every provider on the way after the legal case started, but to the trauma professionals said, no, no, I didn't have a loss consciousness, I was fine.

Dr. Chafetz

That's a marked discrepancy on the records and actually goes to criterion C and the validity guidelines in the malingering guidelines in terms of marked discrepancies.

Dr. Guyton

And so would you say that you formulate these records or reviews in the context of determining whether there was TBI or not, is really just a focus on understanding what was in those records. And then maybe there is another component to the evaluation of, well, two years later, this person is still experiencing some functional impairment as a result of the TBI.

Dr. Guyton

And that's where the evaluation with testing and interview might come in.

Dr. Chafetz

Well, let's be clear. A mild traumatic brain injury, which is currently called a concussion, that's the older name for it, is cognitively healed within 1 to 3 months. The vast majority of the literature shows that a mild traumatic brain injury, you can find no meaningful cognitive deficits after 1 to 3 months. And you see this in football players, where they get a pretty significant concussion, and they're back on the field within 1 to 2 weeks.

Dr. And you know professional football is a highly mental game too. **Chafetz**

Dr. Millkey

As a former high school football player I'm glad to hear that - I, I've often wondered, you know, I would be a lot smarter if I hadn't played football, is what I thought. But this is comforting. You mentioned Michael, the holy trinity of records to consider: EMS, ED reports and crash reports. How can you determine what other records are relevant?

Dr. Chafetz

The most relevant records are that Holy Trinity, the crash report, EMS report in the emergency department report. But other relevant records include other neuropsychological reports. Any other kind of mental health record is useful. I also like physical therapy and rehab reports, although those can go on for quite a length of time. There are certain useful things that you can pull out of them, like what they're saying to rehab professionals, whether they're getting well, whether rehab professionals use a functional capacity evaluation to look at the physical validity in the records.

Dr. Chafetz

And, you know, orthopedic records are good, especially when there's a forensic orthopedist involved who can really study the person. Not from the point of view of a patient, but from an objective examination. So, yes, the provider records are good in addition to the three kinds of records and, and also, other kinds of records to give you an idea of what their background is.

Dr. Chafetz

So if there are school records that can tell you a little bit about their intellectual and cognitive capacities prior to the accident, in their development. And if there are prior accident records that will show you issues related to potentially the current accident, that would be important, various medical records to show medical conditions that might have an applicability to cognition are important.

Dr. Chafetz

So, for example, in an older individual, hypertension, hyperlipidemia, high lipid levels, high cholesterol can give you a sense of whether there's cognitive risk factors that are involved. So for predictions of what they're going to be like later, well, you know, they're of a certain age and are cognitive risk factors. These are things that have to be taken to account that aren't always taken into account.

Dr. Guyton

And so if I can bring you over into our world a little bit, Alex and I are not neuropsychologists. But we do assessments where you are looking at the impact of maybe a psychological stressor, right? And somebodies emotional

reactions to that. And whether there may be some functional impairment related to, you know, experiencing an adverse event where, you know, your brain is fine.

Dr. Guyton

No. No physical injuries. How do you think about these principles that you're describing and how those might relate or not into sort of that more forensic mental health aspect of record reviews?

Dr. Chafetz

Also a great question. I mean, there's very much a need to look at PTSD if that's an issue in the case. But also pre accident depression, pre accident anxiousness, all that's a factor as to how they relate to providers. That's a factor in how they relate to their physical injuries and is often they're - the length of time they're dealing with pain and other kinds of physical healing is often predicted by how anxious they are about that physical healing and about their pain and how they grew up with pain, how they were taught about pain.

Dr. Chafetz

If you were growing up where your family was, oh, well, you'll get over it fairly soon and you'll heal. And I had this bad accident a while ago, and I'm fine now. That tends to be the model about how you get well. Whereas if you grow up with a somatizer family and you tend to think of everything as pain, all your psychic discomfort, as pain, as some kind of pain, then you will react to the index accident very differently.

Dr. Chafetz

And some of that is not only just pain complaints, but psychic pain and fear about cognitive problems. And that fear gets applied to, oh my gosh, I've got real cognitive problems here. When in fact, you had an event that may not even have been a concussion.

Dr. Guyton

And so, you know, you in your article talk about your colleague Thomas Merton's heuristics for how to consider divergent information with respect to credibility, right. So when there are these discrepancies between sources of data. I'm wondering if you could maybe help us walk through those. I found them incredibly useful to think about in terms of my work in the area of thinking about credibility issues.

Dr.

Yes. It was so wonderful to have Professor Merton, Doctor Merton as a **Chafetz** colleague and a co-author on this. He had published this in German in 2020. So he translated it for this article.

Dr. Guyton

Oh, wow. Well, no wonder I hadn't seen it before. I try not regularly reading German academic articles.

Dr. You speak German, Michelle? What?

Millkey

Dr. Not that well, not that well.

Guyton

Dr. As I had been since we were writing the article. I mean, the article took a while, **Chafetz** and so I had been citing Merton's 2020 article and my reports translated. It's really quite wonderful that he thought this through. And it's funny because he just put it down. What people have been thinking about for a while, where objective data from records are more credible than subjective reports.

Dr. Everybody knows this, but now it's down into our heuristic framework.
Chafetz Information collected near or at the time of the accident is generally more credible than reports later in time. Once you're lawyered up, the information changes, reports from third parties who are not really interested in the result of this legal case. So if you've got a cousin who lives with you, that's going to be a very different third party statement.

Then if you've got, you know, someone who was not really involved with your
 Chafetz life at all and has no nothing vested in this and is just but has known you for a while and, you know, and this guy's given an interesting statement, these these were very helpful things that Doctor Merton did.

Yeah. And I'm going to actually just because I did find it to be helpful. And I think you're right, it is - there are principles that I think many of us practice with. But it was nice to see them all written down in one place by someone as weighty as Doctor Merton. And so, I'm not going to read you the German title.

Dr. Nobody needs that. But it is called Symptom and Performance Validity
 Guyton Assessment in Independent Psychological and Medical Examinations, which was published in 2020 in a German journal. So people should look that up if they would like to to learn more from Professor Martin on that.

Dr. I feel like I've missed the opportunity to hear you, hear you speak German, **Milkey** Michelle. That's disappointing for me.

Dr. I. I hope you will live with your disappointment, Alex. **Guyton**

Dr. I will, I, somehow I'll survive. Michael, you mentioned in your article the importance of looking at academic records in a thoughtful, not uncritical way. Would would you mind elaborating on those thoughts a little?

Dr. Chafetz

Sure. They can be critically useful at times when there are claims that I was just fine. The good old days claims where before this accident everything was just fine. My intellectual abilities were just fine. I did great. I am so smart before this accident and now I'm not. But you know, in school you made Cs and Ds and, you never went to college after high school, and, or maybe didn't graduate high school.

Dr. Chafetz

And there were all kinds of learning impediments along the way. You might have had extra classes or had to repeat a grade, these are all potentially probative or potentially very illuminative of of what your cognitions might have been like before. If you can get, like, an ACT or an SAT scores where these are standardized tests and you can actually get a percentile of where you were beforehand compared to a national standard.

Dr. Chafetz

Oh, well, I did great in math, and now I'm just terrible at math. Well, you can get from those your math abilities prior to and these are these can be enormously helpful as objective records that can either substantiate or contradict a person's statement.

Dr. Guyton

I'm now worried about people going back and finding my SAT scores. But, I am not claiming brain injury, so maybe I'm safe. I, I chuckled a little bit, when I was reading the article and also when you were talking now about somebody saying, oh, my intellectual ability is terrible, but I was great before.

Dr. Guyton

And you, you have a fun. You know, I think there's so many biases, it's hard for me to keep track of all of them, but you describe in your paper the good old days bias, which I think is maybe what you were discussing, but can you talk about that just a little bit more in detail?

Dr. Chafetz

This is actually not just a litigation sort of thing. I think a lot of guys report to their wives that, you know, 20 years ago I was great at fill in the blank. I suspect it would be a horrible day when the spouses get objective records from what they were really like 20 years ago.

Dr.

It's it's a common human bias.

Chafetz

Dr. Guyton

Yeah. And it sounds like there's like some kind of anchoring thing, like something happens, like, in our context at least, something happens, usually the claim, the adverse event in the claim, and that sort of is the demarcation point.

And I agree with you. I see this in the IMEs that I'm involved with sometimes is, you know, oh, prior to that, I was good.

Dr. Guyton

Like, I never experienced anxiety or depression, which may or may not be substantiated by the records. But then there's sort of this, this demarcation and functional and, and emotional differences. And I feel like I get a little bit suspicious, when somebody presents it that way. But maybe it's just also part of being human is to reflect, somewhat inaccurately, on our past when we are, you know, well past it.

Dr. Is that. What is that what you're saying? **Guyton**

Dr. Chafetz

Yes. You raise a really valid point. Yes, it is a normal human bias. But in a forensic context, when there is an external incentive applied, then it gets seen potentially within the guidelines for malingering so that it can lead to a marked discrepancy in the records. You're now saying this but the records say that. And so yes, in a forensic context it can be viewed very differently than some kind of innocent statement that happens to everybody.

Dr. Guyton

And kind of related to that, do you in the context of a of a non record review. So you've done a record review and now you're interviewing an examinee. Do you talk to them about these potential discrepancies? So if they say oh I never had depression or anxiety or cognitive deficits prior to and you have some information from the records that maybe they did, do you ask them about that in the context of the evaluation?

Dr. Chafetz

If I do, I never give a single indication of what my motives are. And actually my motives are really just to collect information. But there is reasoning involved. But none of that is transparent to the examinee. And that's how you do a good forensic examination. And actually, when it gets right down to it, I wouldn't do a clinical examination any differently.

Dr. And so how do you how do you fold that in? **Guyton**

Dr. Chafetz

I don't want them to know what I'm asking about, particularly because people react and try to act on what they think you're trying to ask. So if you're very neutral in that and if you're very clinically, I mean, you just have to be respectful, but you are just simply asking neutrally so that there's no bias in the question and you don't lead the witness, then you're getting a better answer.

Dr. Guyton

And so I guess, to be explicit, do you think that you would if somebody said, oh, I, you know, never experienced any of this prior to the event and you have some records that suggest that maybe they did. Do you ever ask them about those records and say, well, did you talk to Doctor So-and-so about experiencing these problems back in 20, whatever?

Dr. Guyton

Or do you kind of just ask more generally about it?

Dr. Chafetz

That would be a game day decision. Depending upon the case, the individual and what's going on in the interview. If you can see them really trying to gain information from the examiner in order to apply it to their case, then they won't get anything from me. If you can see them a little more innocent, perhaps inquisitive about what they're saying and whether they've got it right, you might go back in and say, well, you know, you do remember that your records show this.

Dr.

Or you do recall talking to that doctor, don't you? So it's really a game day **Chafetz** decision.

Dr. Millkey

We talked some about, you know, there's sources of distortion that can come from the examinee. There's bias that can come from the examinee. I have heard that there can be concern from time to time about the examiners having issues with bias. Do you have advice for examiners to avoid bias in a records based assessment?

Dr.

Yes, we talk about that extensively in the article. It gets down to something fairly **Chafetz** simple like are you actually leaning toward the retaining side, or are you writing and reviewing accurately? So when you're going over your report, I find it useful to have like a kind of invisible little, actually attorney who's watching me right going well Doctor Chafetz, what are you saying about my client here?

Dr. Chafetz

And just to have a little awareness of what you're writing and how you're looking at these records as to whether you're leaning too much is very important. So it's we've written a lot about that in here, but it gets down to a very simple proposition that you should not be leaning. You should be as objective as you possibly can and find out what there is to find.

Dr. Guyton

Yeah. I think three of the questions that you included in the article, and I wrote them out because I want to remember them also. But the three questions are, doctor, why did you say that about my client? Doctor, does the science support this phrase? And doctor, if you were on the other side, would you have said this the same way?

Dr. Guyton

And I really appreciate that. You know, I talk about it, maybe a more psychodynamic perspective of like my object of like, you know, nasty opposing counsel and that I've made up in my mind to be very scary. And I think about, like, when I'm writing my report, you know, how are they going to read this? How is it going to, you know, is it understandable, number one.

Dr. Guyton

But like, is this fair? If I'm asked about this statement on the stand, how will I be able to explain it? Do I have the evidence behind it to explain it in a way that would be satisfactory to the court and to my own standards? And I think that is to me, it's one of the things that really distinguishes forensic practice from more general practice is this, this carefulness, which I see kind of, you know, and how you and your colleagues are writing about these record reviews, you know, the care and precision and details and how to deal with discrepancies.

Dr. Guyton

All of that really does need to, you know, go into these evaluations in a, with a level of clarity, precision and forethought that is not required when one writes therapy notes or, maybe does assessment in a more clinical context. And so I really sort of appreciate this article, really bringing some of these, some of these aspects to light and, and highlighting them for those of us who are in, in forensic practice.

Dr. That wasn't a question. I was just saying I liked your, I liked your article a lot. **Guyton** Sorry.

Dr. Millkey

I, I, I actually have another non question question for you Michael. I and and by the way, when you were talking about the, the little, the little opposing counsel sitting on your shoulder, I thought about that as an intentionally internalized aggressor. So I think we're coming out from the same place. Michael, in your in the article that you and your colleagues wrote, you have something that I found to be very useful.

Dr. Millkey

I think other people will find it to be very useful, which is an example engagement letter that lays out the groundwork for retaining counsel regarding your neutrality and a sort of, as I might have said to my children at one point a "you get what you get and you don't get upset" perspective. And on the one hand, I could see somebody looking at that and saying, well, this is kind of a performative virtue sort of thing, but I don't think it is, because I have often, when being retained by an attorney for the first time, had a discussion with them where I'll say, well, look, you know, there's different kinds of experts.

Dr. Millkey

I'm the kind that is going to tell you what I think, irrespective of whether that's congenial to your case. And I have found that for me, it manages their

expectations and on some level gives me permission to be blunt about about things that are not helpful for the attorney. Again, this is a non-question question. I do want to say that I really like it, and I'd love to just open the door in a general way for you to talk more about that engagement letter, because I think it's useful and a real gem in this article that people can take and use.

Dr. Chafetz

So thank you for that non-question question. I will attempt to answer it. No it's what you're saying is extremely important, both of you that and it's important to point out that your anti biasing starts from a very first phone call. In that phone call, you want to mention that you're not going to lean into what the attorney's asking you, what the attorney's thoughts about the case might be.

Dr. Chafetz

And some attorneys who are very experienced will not tell you their thoughts about the case. They're very good at not biasing the expert to get the expert in a pickle. And you hope when you say this that the attorney will say, well, good. You know, I don't want an expert who does that thing because I want to know the truth in court.

Dr.

But our paper actually carries this forward into the letter of engagement so that you put this in the letter of engagement and you carry it forward all the way. You carry it forward in your career. So when you're giving workshops to attorneys, you tell them both sides of what happens. You get if you're giving a case, you show them what could have happened with the case on the other side.

Dr.

You show them what could have happened if the brain injury would have been **Chafetz** more severe. And there are certain kinds of cases that are really complicated where there's loss of cate, loss of consciousness, but no brain injury, loss of consciousness due to neurogenic spinal shock or loss of consciousness due to a vasovagal reaction because there was no brain injury or there's post traumatic injury, a post traumatic amnesia due to sedation on the scene.

Dr. Chafetz

You know, where it's not actually, or, you know, a narcotic given for a major injury on the scene, and it causes post-traumatic amnesia even though they're awake and alert. So you don't want to get into that as if it's evidence of a brain injury when the guidelines are very clear on this, that there are other reasons the brain might not be functioning at full capacity other than a brain injury.

Dr. Chafetz

But then you want to also look at this like, well, what is it? Could it have been a brain injury instead of something else? So you have to be very careful at every step on the way. When you're giving workshops. I often even talk about expert anti-biasing in workshops to attorneys and show them exactly how that works so that I can go into court as unbiased as possible.

Dr. Chafetz

And you also have to keep in mind that the science doesn't always actively support both sides of a case. The science itself may support one side or another. The famous example of this is Elizabeth Loftus, the unreliability of eyewitness memory. Do you think she was invited to court by the prosecution? No, she was not. She was invited to court by the defense because it absolutely does not support the prosecution's use of an eyewitness to the murder.

Dr. Chafetz

When attorneys try to shake you down, that you're biased and it's their prerogative, and it's important for them to try to do that because they've got to shake out whether or not you're biased. So one of the important things about biasing is that you can feel very comfortable at the court knowing you're going to get ragged on for bias, because that's the attorney's absolute right and responsibility to protect their client, to try to rag you out for bias.

Dr.

So, you know, it's it's part of the professional scene and court, and you've got to **Chafetz** do everything you can to stay unbiased.

Dr.

Oh thank you. The interviews and the summary were fantastic and really helped **Chafetz** me along.

Dr. Guyton

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