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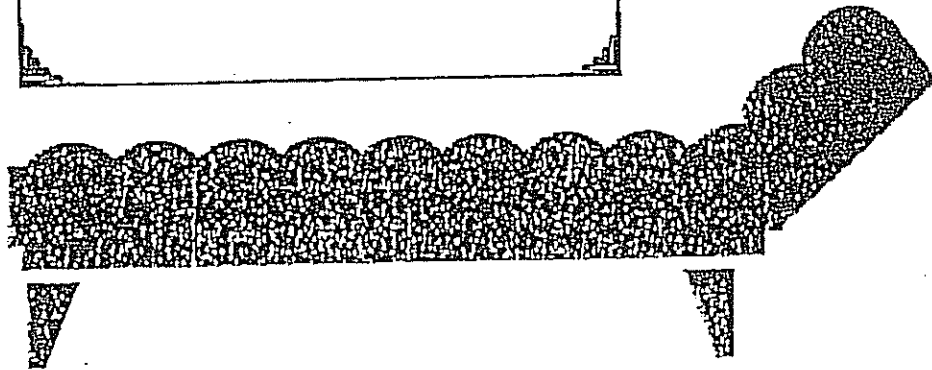
How and Why To Use a Forensic Psychiatrist

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How and Why To Use a Forensic Psychiatrist

Michael K. Spodak, M.D.

When you need an expert witness who can tie together the subtleties of many disciplines—and make the case more comprehensible for the factfinder—the forensic psychiatrist is an excellent choice.



FIRST CONTACT WITH a forensic psychiatric expert may seem like heading into uncharted waters. Forensic psychiatry is probably one of the least understood of the medical and psychiatric subspecialties. Forensic psychiatry is commonly described as the branch of psychiatry dealing

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with legal issues, related to mental disorders; however, that is an oversimplification of a complex subspecialty. See Jane E. Edgerton, Robert J. Campbell (editors), *American Psychiatric Glossary*, p. 86 (7th ed., 1994). This article reviews what you need to know to determine when the services of a forensic psychiatrist may be helpful, how to assess the consultant, and what to reasonably expect from a forensic psychiatrist.

PSYCHIATRIC QUALIFICATIONS • Forensic psychiatry is a subspecialty of psychiatry which is a subspecialty of medicine. Psychiatry is defined as the medical science that deals with the origin, diagnosis, prevention and treatment of mental disorders. *Id.* at 170.

Basic Training and Certification

A psychiatrist is a physician whose training encompasses a medical degree and four years or more of post-medical school training, usually including an internship and at least three years of residency training in psychiatry. At that point, the psychiatrist is eligible to take the specialty board in psychiatry endorsed by The American Board of Psychiatry and Neurology. That examination is one-third neurology and two-thirds psychiatry. Upon successfully completing the written examination followed by an oral examination, the psychiatrist is then considered "board certified."

Essential Skills

Training also includes how to take a comprehensive history which explores medical, social, emotional, educational, occupational, interpersonal, and other areas. Psychiatrists are specially trained in making mental status observations especially related to general appearance, speech, mood and affect, content and thought processing, and an assessment of cognitive limitations, if any. Psychiatrists are trained to be in touch with their own blind spots, so that they can obtain an objective and untainted basis upon which to make certain assessments, observations, and opinions.

The Forensic Psychiatric Subspecialty

During residency training or following the completion of traditional residency training, a psychiatrist may receive additional specialized training in forensic psychiatry. In recent years, the American Board of Psychiatry and Neurology ("Board") has established a subspecialty examination in forensic psychiatry. The Board grants an additional certification in Forensic Psychiatry by the American Board of Psychiatry and Neurology after the applicant passes the examination.

Enhanced Integrative Function

Being grounded and trained in the medical sciences, a psychiatrist is able to integrate information with the overall medical condition of an individual. The recent increase in scien-

tific articles about the neurochemical origins of many mental illnesses and the neurochemical explanations of the way psychopharmacologic medications work has brought psychiatry much closer to the other medical sciences. Forensic psychiatry goes one step further in terms of attempting to apply and interrelate mental disorders with legal issues. Training in psychiatry includes identifying, diagnosing and treating mental disorders.

HOW THE FORENSIC PSYCHIATRIST CAN HELP YOU • Since there is an enormous amount of overlap among medical conditions, orthopedic injuries, neurological difficulties and mental disorders, it is often helpful to look at the total picture. If a diabetic plaintiff on antidepressant medication slips and falls on the ice in front of your client's store after having a fight with her husband, one might consider any or all of the following scenarios:

- She got dizzy because her blood sugar and insulin were out of balance;
- She was dizzy because of a side effect of her antidepressant medication;
- She was attempting to place herself in the victim role to be taken care of by her rejecting husband; or
- It was a simple accidental slip-and-fall on the ice.

Even if a good forensic psychiatrist cannot answer those questions, he or she ought to, at least, be able to raise

your suspicion, concern, and give thought to those issues so that further investigation can be made.

Likely Cases for Evaluation

Forensic psychiatry has a natural demarcation between criminal and civil issues. Criminal forensic psychiatry usually involves the standardized evaluation for competency to stand trial, criminal responsibility, ability to form specific intent, diminished capacity, and mitigation, to name a few. The scope of civil forensic psychiatry is growing by leaps and bounds. Although evaluations in traumatic personal injury, such as automobile accidents or work-related events are probably the most common areas of involvement, expertise has been called upon in the following areas—and this list is by no means exclusive:

- Fitness for duty;
- Evaluation of chronic pain;
- Evaluation of stress-related issues;
- Medical malpractice;
- Competency to enter into a contract;
- Competency to testify;
- Testamentary capacity;
- Hiring and promotion issues;
- Americans with Disabilities Act issues;
- Issues of harassment in the workplace;

- Violence in the workplace;
- Lead intoxication in children;
- Parental fitness;
- Custody/visitation issues;
- Civil commitment;
- Evaluation of violence and dangerousness;
- Child sexual abuse evaluations;
- Repressed memory evaluations; and
- Emotional impact of toxic exposure.

THE PARTICIPANTS • The types of professionals participating in the legal process is diverse and growing. The most common participants are probably psychiatrists and psychologists; however, there is a growing list of other individuals who play some role in the litigation process, including social workers, nurses, marriage counselors, addiction counselors, psychotherapists and others. Although the requirements for licensure for non-physicians may vary from state to state, one can be fairly certain that a board certified psychiatrist anywhere in the country has probably been through a fairly standardized course of training and has met a fairly consistent set of basic criteria.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993) which has superseded *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), in many jurisdictions, stated in part that

expert testimony can be presented "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," quoting Fed. R. Evid. 702.

Although this test usually permits many "experts" to testify, and their expertise goes to weight, one might want to take a hard look at whether the witness is "qualified as an expert" (a person with a high degree of skill or knowledge of a certain subject) and whether the opinions to be expressed are based on "scientific knowledge" in an attempt to determine whether the testimony should be admitted at all.

Getting To Know the Expert

Once you have decided that consultation with a forensic psychiatrist might be of value, it is important to determine if you are dealing with the genuine article or a pretender. Here are some things to look for:

- The individual's general experience in forensic psychiatry is a useful guide and, while one need not do forensic psychiatry full time, having that as a significant component of one's practice is important. In many instances, the combination of doing forensic psychiatric evaluations and having an active treatment component of a practice affords a more rounded and

diverse professional experience, as well as offering the combined benefit of treatment experience and forensic evaluation expertise;

- If the individual that you contact spends a fair amount of the initial discussion attempting to clarify the issues and the type of opinions you might be seeking, you are probably off to a good start;
- If the individual attempts to clarify the fee arrangement and is able to state an hourly fee without hemming, hawing, or stuttering and can generally estimate the amount of time involved in a particular type of evaluation, this is further evidence that you are heading in the right direction; and
- If the individual is able to mention or reference a few recent case decisions, lets you know that he understands the appellate process, and may even understand the distinction between federal court and state court, you are probably still heading in the right direction. An experienced forensic psychiatrist can probably offer a few case citations in the area you are exploring, and may even have testified in some cases that have formed the basis for appellate decisions.

Why To Think Twice About Treating Therapists

If a client is or has been under professional mental health care there is a temptation to enlist the treating therapist or psychiatrist in the litigation process. This can be somewhat risky.

You may be dealing with a professional who has never been involved with the litigation process and who is frightened by it. Some therapists are not acquainted with the deposition process or the scrutiny that one undergoes during cross-examination. Some therapists may be so anxious to help the patient that they may offer opinions which are difficult to support and defend, thus undermining their credibility. Some therapists may not be able to offer a realistic assessment of the strengths and weaknesses of their opinions from a mental health perspective, which may catch the attorney off guard down the road.

THE EVALUATION • The old adage of "garbage in garbage out" is probably applicable in the area of forensic psychiatry. You can analogize a forensic psychiatric opinion to a stool, which gets its integrity from the number and strength of its legs. Each of the following is one of the legs:

- History;
- Background;
- Mental status examination;
- Psychological testing;
- Review of outside records;
- Interview with other individuals;
- Laboratory testing including x-rays, blood work, EEGs, and the like;
- Diagnosis; and
- Functional assessment.

The more of these legs that you can establish, and the more information you have to make each of them stronger, the more support there is for the overall opinion—and the less likely it will be to collapse if some of the legs are pulled out by contradictory or conflicting information.

THE HISTORY • The single most important component of a forensic psychiatric evaluation is taking a detailed, comprehensive history and exploring many background areas. There are few areas in an individual's historic background which may not bear some relevance to the current emotional condition, and how a particular event may have affected him or her.

The Individual Before the Event. . .

In doing an evaluation for the effect of a traumatic event it is important to have a clear sense of the individual's symptomatic picture and functional level before the event. This can be described by offering information about an individual's day-to-day activities, home life, work life where applicable, the nature of personal relationships and what type of prior difficulties have been experienced and how they were handled. A description of the event itself is often important, particularly in exploring an individual's perception of that event. For example, it is important to know whether the individual believed that the event might cause serious injury

or death. Or did the event lead the individual to fear that he or she would become helpless, dependent, and abandoned? Or, alternatively, that he or she might be rescued and taken care of?

. . . And After the Event

Next, it is important to obtain information of how the individual has adjusted following the injury and whether his or her life course has been detoured or continues to progress in the direction it was taking before the injury. Information about current symptomatology and functioning is of particular importance, particularly how the individual is currently spending day-to-day time, what collateral stresses might be factors, and what attempts have been made to return to the prior level of function.

DIAGNOSIS • The standard diagnostic guide in psychiatry is the latest edition of *The Diagnostic and Statistical Manual* ("DSM") of the American Psychiatric Association. We are currently using DSM-IV, which is actually the fifth in the series going back to 1952. Although a diagnosis may be a necessary component in certain causes of action, in many instances the emphasis on diagnosis is overstated.

What a Diagnosis Doesn't Tell You

The presence or absence of a diagnostic condition does not offer any information about severity and very lit-

tle about duration, permanence, or functional limitations. Since many mental health conditions have a genetic and familial component as well, a diagnosis often does not offer much, if any, information on the issue of causation with perhaps the one exception being post-traumatic stress disorder ("PTSD"). Most jurors, are probably far more interested in what, if any, emotional impact a particular event had on an individual than on the specific name of the mental disorder which might have been attributable to that event.

What Jurors Look for

For the most part, juries seem to have a remarkable degree of common sense when they approach mental health issues, either in causation or damages. Especially in the area of damages, if an individual suffers from severe symptoms of some mental or emotional process, one would expect some functional limitations in the individual's day-to-day life reflecting the effect that the symptoms are having. If you have many symptoms but no functional limitation, you probably have the psychiatric equivalent of a soft tissue injury without orthopedic findings. If you have a catastrophic, psychiatric response to a fairly trivial traumatic experience, you probably need to explore whether someone is malingering. If you have many of the same symptoms and findings following the traumatic incident that were there before, then you

may be dealing with "false attribution" with legitimate findings but potential problems in the area of causation. Although there are undoubtedly many physically and emotionally traumatic experiences which lead to genuine mental and emotional difficulties, it is often difficult to clearly demonstrate and explain the issues, or establish causation with anything other than an argument of post hoc ergo proctor hoc.

On the other side, it may be equally difficult to disprove the subjective complaints of an individual if the main "evidence" is the individual's statements that they have those subjective complaints.

DIRECT EXAMINATION • Psychiatric experts take a variety of paths to arrive at their conclusions and opinions. In some cases, the expert's basis for stating the existence of a causal connection may be nothing more than the plaintiff's comment that "when I got into my car, I started feeling really anxious and could not drive which was the result of my having that really bad automobile accident a couple of years ago." In another case, the expert may base his or her opinion on a great deal of substantive information with a fairly solid foundation. Before the forensic psychiatrist testifies, you should clarify the legal issues in the case, and discuss how the opinion advances them.

Stay In Touch with Your Expert

As trial approaches, it is important to maintain contact with your expert. Some are more flexible than others about scheduling court time and last minute changes. The amount of pre-trial preparation may vary considerably. Most forensic psychiatrists appreciate the importance of thorough preparation and knowledge of the facts and the information contained in the records. If the expert's testimony will be through deposition, take the time to meet in advance to discuss the expert's opinion and the records. In addition to his own deposition, the expert you retain may be a valuable resource to offer suggestions and areas to explore with the expert or experts from the opposing side.

How the Testimony Will Come Out

The direct testimony usually follows one of two styles, either the waterfall or ping-pong style. The waterfall style involves asking a question and getting an outpouring of information. The ping-pong style usually involves a great deal of back-and-forth questions and answers between the attorney and the witness. If the witness is experienced, comfortable testifying, knowledgeable about his topic and well prepared, the waterfall style is probably more effective. With that style, the direct examination would probably consist of the following few questions:

- "Doctor, what is your educational background?"
- "Doctor, what professional experience have you had since you went into practice?"
- "Doctor, what is the current nature of your practice and your organizational memberships?"
- "What special contributions or experience have you had with regard to the specifics of this case?"
- "What procedures did you employ in performing your evaluation in the instant case?"
- "As a result of the evaluation, did you form an opinion to a reasonable degree of medical probability or certainty regarding whether . . ." (Here you must fill in the blank and hope that the answer is "yes");
- "Doctor, would you please state your opinion and the basis for that opinion?" (At which point, you hold your breath and hope that the expert is able to spend the next 10 or 15 minutes or longer explaining in a clear, concise, organized, logical, common-sense way, what the opinion is — with all of the legs in the opinion stool intact).

So Now What?

After the expert states the opinion, you may consider one of two options. The first is to say "thank you" and sit down. The second is to anticipate many of the likely cross-examination questions and areas of possible weak-

ness in the case and then ask your expert, perhaps even in a challenging way, what consideration he gave to each of those particular areas. This approach takes more preparation time, but often affords the expert the opportunity of explaining those areas, demonstrating that they were taken into consideration, and defusing them ahead of time.

Avoid the Ping-Pong Approach

If one employs the second style or "ping pong" approach of asking questions and getting short answers, one may find that this does not easily lend itself to testimony about most mental health issues which involve some degree of explanation. That type of approach can be stifling to an experienced expert who is able to take on a teaching role in front of a judge or jury. But it is probably helpful for someone not used to testifying, who may not be well prepared, and may not have a good command of the relevant facts and issues.

CROSS-EXAMINATION • So now your opponent's psychiatric expert has testified. Were the opinions expressed by the expert logical and consistent with the facts of the case? Did they reflect commonly held mental health and psychiatric principles? Did they comport with common sense? If so, there isn't much to ask on cross-examination.

Don't Sink Your Own Ship

An ineffective cross-examination will only make the testimony look stronger to the jury. When an experienced forensic psychiatrist gives good testimony for your opponent, you should follow that well-established legal advice about avoiding the temptation to ask that one question too many which gives the expert an opportunity to restate the entire direct examination. And an experienced expert might have encountered some version of the cross-examination question that you have in mind, and know just how to respond. If your opponent's expert gave strong testimony, you might want to pose a few questions designed to elicit yes-or-no answers about some lapses in the expert's technique such as not interviewing certain witnesses or reviewing certain records. Beyond that, one of your expert's important responsibilities is to be able to rebut contradictory testimony and opinions. In most cases, as the attorney, you will probably be better served by having your expert critique another's testimony than trying to discredit it yourself through cross-examination. If you have the expectation that the other side's expert will crumble and recant under a grilling cross-examination you may be setting yourself up for disappointment, especially if the expert has done an adequate job.

Causation and Correlation

One area fruitful area for cross-examination is the distinction between causation and correlation. If the expert has confidently stated the existence of causation, and you can get him or her to admit that the relationship between the facts is merely a correlation, you have scored a direct hit. It will be next to impossible for your opponent to rehabilitate the causation opinion, and this will rip a gash in the expert's overall credibility. This is probably as far as you can get on cross-examination. Also remember that a plausible explanation of cause and effect that might pass muster at a cocktail party is not a substitute for a causation opinion based on science, and should go to admissibility

Prior Opinions: Inconsistent and Just Plain Lousy

If you can demonstrate that the opponent's expert has expressed prior opinions that conflict with the one now being offered to the jury, you have another fertile area for cross-examination. The same goes for prior opinions that seem counter-intuitive or poorly supported by any solid foundation. The recent expansion of computer data collection has enabled the retrieval of many examples of a witness's prior testimony. Those experts who have attempted to be inde-

pendent and objective and would likely arrive at the same opinion given the same facts, regardless of who retained them, are the least vulnerable to being confronted with prior inconsistent statements. But if the opponent's expert has come to different opinions over the years, despite dealing with similar facts, you should know about this ahead of time. Exposing a hired gun is fun — and juries love it.

CONCLUSION • The inclusion of a forensic psychiatric expert may be useful and, in some cases, necessary, regardless of whether you represent the plaintiff or defendant. From the plaintiff's perspective, carefully assess the downside before putting the client's mental state at issue. From the defense perspective, the psychiatric expert may add legitimacy to a complaint which could be understood as the reasonable and expected emotional consequence of a particular event. Once you decide to retain a psychiatric expert, it is important to consider that, in the mental health field, forensic psychiatry is a well-established subspecialty with well-trained practitioners who are experienced in evaluating litigants, who are knowledgeable about the interaction between law and mental health, and who are often effective communicators.

PRACTICE CHECKLIST FOR How and Why To Use a Forensic Psychiatrist

With the right professional, engaging a forensic psychiatric expert can be a very rewarding experience, helping to provide an objective assessment of a litigant, evaluating the strengths and weaknesses of a case from a mental health perspective and helping to clarify and focus the issues.

• Here are the points to consider in choosing and using a forensic psychiatrist:

- Does the expert understand the issue clearly?
- Does the expert know the applicable legal test?
- In taking a history, did the expert ask relevant questions?
- Does the expert understand the distinction between subjective information and objective information?
- Is the expert organized?
- In supporting the opinion, is the expert balanced?
- Did the expert approach the evaluation and assessment with unquestionable belief and naivete, cynical suspicion and disbelief, or healthy skepticism?
- Did the expert consider and have a reasonable basis to exclude alternative diagnoses and explanations?
- Did the expert merely restate the history as the basis for an opinion or expand on the history using his own knowledge of mental health issues?
- Did the expert use appropriate testing resources?
- Was collateral and corroborative information reviewed and used appropriately?
- Was the expert an objective assistant or an advocate?
- Did the expert simplify or complicate the case?
- On cross-examination, were the opinions defended appropriately?
- Were concessions made when that seemed reasonable and appropriate?
- Did the expert become argumentative?
- Did the expert remain a medical scientist throughout?
- Did the opinions expressed defy common sense?