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WORKING WITH MENTAL HEALTH EXPERTS ON WORKPLACE CLAIMS: SOME PRACTICAL ADVICE

by

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"Emotions are intangible, but they are none the less perceptible. The hurt done to feelings and to reputation by an invasion of constitutional rights is no less real and no less compensable than the cost of repairing a broken window pane or a damaged lock. Wounded psyche and soul are to be salved by damages as much as the property that can be replaced at the local hardware store."
Baskin v. Parker, 602 F.2d 1205, 1209 (5th Cir. 1979).

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Introduction

Prior to the passage of the latest wave of employment discrimination laws, plaintiffs were obtaining substantial judgments awarding emotional distress[1] damages in employment cases.[2]

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[1] The Restatement (Second) of Torts defines "emotional distress" as encompassing "all unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, chagrin, disappointment, worry, and nausea." Restatement (Second) of Torts § 46.

[2] The court in Lilley v. BTM Corp., 58 FEP Cases (BNA) 498, 505 (6th Cir. 1992), upheld a $350,000 award for mental anguish damages wherein the plaintiff's proof consisted of the following:

- plaintiff's testimony regarding feelings of anguish and embarrassment following his discharge;

With the passage of the Civil Rights Act of 1991 which broadens the relief available under Title VII of the Civil Rights Act of 1964 ("Title VII") and the Americans with Disabilities Act ("ADA") to include compensatory and punitive damages, the prevalence of claims of mental anguish has been expected to rise dramatically in workplace disputes. A substantial number of the claims being filed under the Americans With Disabilities Act are predicated on alleged mental disabilities ranging from learning disability (LD) cases[3] to emotional disturbances[4] that claimants assert are covered disabilities.[5] And, if the Age Discrimination in Employment Act ("ADEA") is amended to track the Civil Rights Act of 1991's remedial scheme, mental anguish claims will increase even more. Workplace violence is on the rise and sometimes counsel will be working with mental health practitioners (MHPs) in prevention, assessment, and/or litigation arising out of an incidence of violence.[6] Employers have been permitted to terminate employees with an emotional order when that disorder causes the employee to engage in violent conduct.[7]

- his wife's corroborative testimony;
- the fact that plaintiff underwent treatment with a psychiatrist;
- evidence that there was an adverse effect on his marriage;
- evidence that the plaintiff lost weight; and
- evidence that the plaintiff had difficulty sleeping.

See, e.g., Kientzy v. McDonnell Douglas, 990 F.2d 1051 (8th Cir. 1993) ($125,000 award for mental anguish, $25,000 for future mental anguish); Lilley, 58 FEP Cases (BNA) at 505 ($350,000 award); Moody v. Pepsi-Cola Metro. Bottling Co., 915 F.2d 201 (6th Cir. 1990) ($150,000 award); Wilson v. GMC, 454 N.W.2d 405, 415, 54 FEP Cases (BNA) 680 (1990) ($375,000 award); Jenkins v. American Red Cross, 369 N.W.2d 223, 230, 43 FEP Cases (BNA) 1145 (1985) ($500,000 award).

[3] See, e.g., Pazer v. New York State Bd. of Law Examiners, 849 F.Supp. 284 (S.D.N.Y. 1994) (bar examination applicant failed to show that he suffered from a learning disability (dysgraphia) under ADA).

[4] *See*, Schumacher v. Souderton Area School Dist., 2000 WL 72047 (E.D. Pa. 2000) (Attention Deficit Hyperactivity Disorder is "unquestionably" a mental impairment); McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999) (panic disorders may be mental illnesses under the ADA); Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998) (depression sometimes constitutes a disability under the ADA); Bultmeyer v. Ft. Wayne Cmty. Schools, 100 F.3d 1281 (7th Cir. 1996) (bipolar and paranoid schizophrenia may be mental illnesses under the ADA).

[5] Great uncertainty surrounds the definition of a mental impairment under the ADA. *See, e.g.*, Edwards, "The ADA and the Employment of Individuals with Mental Disabilities," 18 Employee Rel.L.J. No. 3, 347 (Winter 1992-93); Payton, "Psychiatric Disabilities in the Workplace," Employment Law Counselor (January 2004); Wolkinson, "Mental Fitness for Duty Examinations Under the ADA," Employee Rel.L.J. No. 29, 1 (Summer 2003); McDonald & Kulick, "Mental and Emotional Injuries in Employment Litigation (Bureau of National Affairs, Washington, D.C. 2001).

[6] S.L. Smith, "Violence in the Workplace: A Cry for Help," Occupational Hazards (October 1993); O.M. Kurland, "Workplace Violence," Risk Management (June 1993); "Violence in the Workplace Survey Results," Society for Human Resource Management, December, 1993; G. Milite, "Workplace Violence: You're Not Alone," Supervisory Management (September 1993);

[7] Levin, "Workplace Violence: Navigating through the Minefield of Legal Liability," 11 The Labor Lawyer 171 (Summer 1995).

Many employers have enhanced their employee assistance programs (EAPs) in recent years, and some have MHPs on staff or refer employees to MHPs. Counsel for employers sometimes in such circumstances have to advise clients regarding the use of a MHP by an EAP and counsel for employees have to advise on privacy concerns among others. The federal, state and local family and medical leave acts sometimes involve MHPs as, for example, in determining whether an emotional problems is a Aserious health condition@ under the federal statute. Stress-related workers compensation claims continue to increase dramatically as the courts expand the scope of workers compensation to cover stress-related claims. Finally, a colorable claim of emotional distress may be important for tax reasons. After the Court's 1995 decision in C.I.R. v. Schleier,[8] all other damage claims under the civil rights laws may give rise to taxable income, leaving emotional distress damages as the only possible source of non-taxable recovery. There is considerable doubt whether emotional distress will be found under the Code as non-taxable as well as legislative efforts to make it explicitly taxable.[9]

Over the past 37 years, the author has worked with experts in various mental health disciplines, including psychiatrists, clinical psychologists, psychiatric social workers, and holistic counselors in workplace disputes. The emphasis of this article is on options potentially available to counsel in working with mental health records, reports and testimony of mental health practitioners. Every effort has been made to suggest cost effective options.

[8] 515 U.S. 323, 67 FEP Cases (BNA) 1745 (1995).

[9] See Thomas F. Joyce and Raymond C. Fay, A*The Aftermath and Implications of the Schleier Decision: Are Civil Rights Settlements and Verdicts Totally Taxable?*,@ presented at a luncheon co-sponsored by the D.C. Bar and the Metropolitan Washington Employment Lawyers Association (1995).

Civil Rules

Prior to December 1, 1993, testimonial experts in some jurisdictions did not have to submit a written report. One advantage of no report is obvious: the absence of a written report denied a fixed target for the other side to shoot at. In addition, the old Federal Rule of Civil Procedure Rule 26(b)(4) many times allowed counsel to be less specific than the reports have to be under the amended rule. No written reports also arguably lowered litigation costs. The absence of a written report to use in settlement negotiations, however, could be a significant detriment to settling the case.

The current federal rule, Fed. R. Civ. Pro. 26(a)(2)(B), dramatically changed the inconsistency in this area of practice by requiring that:

> *Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support of the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.*

Thus, under the current version of Fed. R. Civ. Pro. 26(a)(2)(B), the testimonial expert (sometimes referred to as "the forensic") is required to prepare a written report which sets forth all opinions and an identifies everything considered in forming those opinions, not just that upon which the expert *actually* relied. Counsel is also cautioned to be sensitive to the time limits under the current rule within which to identify testimonial experts.[10] Additionally, the current rule requires the proponent of a putative expert to identify all cases in which the so-called expert has testified in the last four years and all articles authored by the individual in the last ten years. See Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure.

[10] Rule 26(a)(2)(C) states that disclosure shall be made in the sequence directed by the court. In the absence of other directions from the court, the disclosures shall be made at least 90 days before the trial date.

Under the current rule, the defense forensic, unless otherwise stipulated or ordered, will have to prepare a written report just like the claimant's forensic. As stated, there are specific time limits in the rule and a substantial amount of detailed information that must be provided by the expert to the other side. Accordingly, there is an increasing need for counsel to work with mental health testimony, reports, and the so-called experts.

Daubert Decision

In Daubert v. Merrell Dow Pharmaceuticals, Inc.,[11] a rare unanimous opinion, the Supreme Court held that the so-called Frye rule of evidence had been superseded by the Federal Rules of Evidence. The Frye rule, arising out of a venerable opinion of the District of Columbia Circuit some 70 years earlier had held that expert evidence was not admissible if it was not generally accepted in the field.[12] In Daubert, the Court rejected this "generally accepted" standard, saying:

> Nothing in the text of this [r]ule [702] establishes `general acceptance' as an absolute prerequisite to admissibility. Nor does respondent present any clear indication that [r]ule 702 or the [r]ules as a whole were intended to incorporate a `general acceptance' standard. The drafting history makes no mention of Frye, and a rigid `general acceptance' requirement would be at odds with the "liberal thrust" of the [f]ederal [r]ules and their "general approach of relaxing the traditional barriers to `opinion' testimony." Given the [r]ules' permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention "general acceptance," the assertion that the [r]ules somehow assimilated Frye is unconvincing. Frye made "general acceptance" the exclusive test for admitting expert scientific testimony. That austere standard, absent from and incompatible with the Federal Rules of Evidence, should not be applied in federal trials.[13]

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[11] 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[12] Frye v. United States, 54 U.S. App. D.C. 46, 293 F.2d. 1013, 1014 (1923).

[13] See Edward J. Imwinkelried, "The Daubert Decision: Frye is Dead, Long Live the Federal Rules of Evidence," Vol. 29, No. 9, p. 60 (Trial, September 1993); James W. McElhaney, "Fixing the Expert Mess," Vol. 20, No. 1, p. 53

Also, in Daubert, the Supreme Court emphasized that Fed. R. Evid. 702 governs the admission of expert scientific testimony. That rule provides:

> 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.

The District Court of the Virgin Islands succinctly summarized the holding in Daubert as follows:

> In deciding whether this novel scientific evidence is admissible at trial, the court must determine whether "the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact issue." (*Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 592, 113 S.Ct.2786, 2796, 125 L.Ed.2d 469 (1993); Fed.R.Evid. 402, 702.)
>
> The first requirement, "scientific knowledge," is "an inference or assertion [that is] derived by the scientific method." (*Daubert,* 509 U.S. at 590, 113 S.Ct. at 2795.) To reflect "scientific knowledge," the expert's testimony "must be supported by appropriate validation--i.e., "good grounds," based on what is known." (*Id.*) The Court warned, however, that "it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science." (Daubert, 509 U.S. at 590, 113 S.Ct. at 2795.) The "scientific knowledge" requirement, if met, "establishes a standard of evidentiary reliability." (*Id.*) The focus of this requirement is on the technique or theory that produces the result, not the result itself. (*See Daubert*, 509 U.S. at 593, 113 S.Ct. at 2797.)
>
> To determine reliability, the court must consider: (1) whether the proffered "theory or technique...can be (and has been) tested," (*Id.*), (2) "whether the theory or technique has been subjected to peer review and publication," (*Id.*), (3) if a "particular scientific technique" is the subject of the expert's testimony,

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(Litigation, Fall 1993). See also Edward J. Imwinkelried, "The `Bases' of Expert Testimony: The Syllogistic Structure of Scientific Testimony," 67 N.C.L.Rev. passim (1988).

"the court should consider the known or potential rate of error, (*Id.*) citing *United States v. Smith,* 869 F.2d 348, 353-354 (7th Cir.1989), [as well as] the existence and maintenance of standards controlling the technique's operation," (*Id.* 509 U.S. at 594, 113 S.Ct. at 2797 (citing *United States v. Williams,* 583 F.2d 1194, 1198 (2d Cir. 1978), and lastly (4) the degree to which the theory or technique is accepted by a "`relevant scientific community,'" (*Id.* (quoting *United States v. Downing,* 753 F.2d 1224, 1238 (3d Cir.1985)).

The second requirement, that the evidence must assist the trier of fact, "goes primarily to relevance." (*Daubert*, 509 U.S. at 591, 113 S.Ct. at 2795.) Here, the court must determine "`whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'" (*Id.* (quoting *United States v. Downing,* 753 F.2d 1224, 1242 (3d Cir.1985))).

In short, when deciding whether to admit scientific evidence at trial, the court must assess "whether the reasoning or methodology underlying the testimony is scientifically valid and ... whether that reasoning or methodology properly can be applied to the facts in issue." (Daubert, 509 U.S. at 592, 113 S.Ct. at 2796.)

This analysis must be done within the framework of the applicable evidentiary rules. Expert opinions based on otherwise inadmissible data are admissible "only if the facts or data are `of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.'" (*Daubert,* 509 U.S. at 595, 113 S.Ct. at 2798 quoting FED.R.EVID. 703.) Further relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." (*Id.* quoting FED.R.EVID. 403.)[14]

After overturning the Frye rule, the Daubert Court, by a strong 7-2 vote, set forth the Court's "general observations" on some criteria that the trial courts can consider in evaluating the qualifications and reliability of an expert and his/her opinions. Among the criteria mentioned by the Court are the following:

- Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested.

- Scientific methodology today is based on generating hypotheses and testing them to

[14] Government of Virgin Islands v. Penn, 838 F.Supp. 1054, 1056-57 (D.VI 1993).

see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.

- Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication.

- 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.

- The fact of publication (or lack thereof) in a peer reviewed journal will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.

- Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error.

The Court emphasized that its list of criteria was not exhaustive, but rather illustrative.

Two Justices dissented from the portion of the opinion setting forth the Court's "general observations" and in doing so said:

> "Questions arise simply from reading this part of the Court's opinion, and countless more questions will surely arise when hundreds of district judges try to apply its teaching to particular offers of expert testimony. Does all of this dicta apply to an expert seeking to testify on the basis of "technical or other specialized knowledge" -- the other types of expert knowledge to which Rule 702 applies -- or are the "general observations" limited only to "scientific knowledge"? What is the difference between scientific knowledge and technical knowledge? Does Rule 702 actually contemplate that the phrase "scientific, technical, or other specialized knowledge' be broken down into numerous subspecies of expertise, or did its authors simply pick general descriptive language covering the sort of expert testimony which courts have customarily received?"

After Daubert's invitation to the trial courts to be "gatekeepers" on expert testimony, the trial courts began to receive motions in limine designed to exclude expert testimony essentially on the ground that it does not adhere to industry standard and some summary judgments began to hinge on the "reliability" of the expert's written report.

Six years after Daubert was decided, the Supreme Court again revisited the issue of expert witness testimony in Kumho Tire Company, LTD v. Carmichael[15]. In that case, the Court extended Daubert=s Agatekeeping@ obligation, not only to scientific testimony, but to all expert testimony.

After Daubert and Kumho Tire, the defense will more carefully review the qualifications of the putative expert and the reliability of the opinions of the so-called expert the proponent wishes to put into evidence, and trial courts have begun to more clearly scrutinize psychological experts.[16] In addition, given the federal civil rules which require experts to disclose much more information on their opinions and their background, the defense will have more information at its disposal to plan an attack.

Retaining A Testimonial Expert

It is important to determine whether a potential expert possesses the proper clinical training, clinical experience, and will follow the standard diagnostic principles in formulating his/her opinion.[17] Otherwise, the expert's testimony may be inadmissible. Amongst the questions and information that practitioners might solicit from potential testimonial experts in order to assess qualifications are the following:

- A list of references to lawyers with whom the expert has worked in the recent past.
- Employment law experience -- for example, we have found that we had to recycle the economists that we use in employment cases because their experience was entirely in personal injury cases and they were not sensitive to some of the peculiar economic issues that arise in employment cases.
- Does the individual have significant testimonial experience before juries?
- A listing and copy of all writings authored by the individual during at least the past 10 years, as the new federal civil rule 26(a)(2)(B) requires such information.
- Is the expert's testimony confined to one side that is plaintiff only or defendant only?
- If the expert testifies for both sides, is there a positional conflict that can be found in past reports and testimony?

[15] 526 U.S. 137 (1999)

[16] *See, e.g.,* Gier By and Through Gier v. Educ. Serv. Unit No. 16, 66 F.3d 940 (8th Cir. 1995).

[17] McDonald, James J. Jr. and Lees-Haley, Paul R., "Avoiding 'Junk Science' in Sexual Harassment Litigation," 21 Employee Rel.L.J. 51 (Autumn 1995).

- Copies of all depositions transcribed in cases during at least the past four years, as the new civil rule 26(a)(2)(B) requires that all such depositions be identified.

- A list of all depositions that have not been transcribed with the identity of the attorney and, if known, the court reporter.

- A listing of all such depositions with the names of the lawyers on both sides -- also try to get the reports that they have written for other lawyers.

- All trial testimony during the last four years and the names of the lawyers on both sides.

- The expert's case load.

- The staffing in the expert's office.

- The expert's rates

- The expert's reliance upon computer programs to generate reports -- be careful of cookie cutter reports from an expert -- you want to emphasize that the report should be customized to the peculiar facts and circumstances of your case. This may affect price also.

- Does the expert do forensic work only or, for example, in the case of a mental health practitioner, does the expert act as a treating doctor also?

- Does the expert have an academic orientation? Does he or she teach? Some academics can be deadly in front of juries if they are pedantic.

- Can the expert speak in plain English and convey complicated concepts in word pictures that juries can understand?

- Has the expert been sanctioned by his or her profession for ethical violations?

- Has the expert been sanctioned by a court or seen his or her testimony excluded by a court?

- Has the expert been referred to by name in any court opinion?

- Is the expert readily available by telephone?

- What does the expert consider to be the industry standard as the basis for his or her opinion and what will it cost to get an opinion that adheres to industry standard?

- Does the expert have a personality that may cause the jury to react negatively?

Consulting Experts

It can be expected that oftentimes claimants will have at least one treating mental health practitioner (MHP), and, in a lesser number of cases, an actual forensic expert on mental anguish. A plaintiff is not required to retain an expert witness to prove emotional distress.[18] Normally, the treating practitioner will limit his/her testimony to facts, leaving it to the trier of fact (and the forensic expert) to assess causation. The treating practitioner typically does not want to testify about causation for a variety of reasons. Unlike an orthopedic specialist who deals with x-rays, for example, the treater relies on soft data provided primarily by the patient. Also, the treater is concerned with the patient's "perception" of reality rather than the actual reality that a forensic would be concerned with. Further, the treater is appropriately an ally of the patient and thus is biased, particularly if he or she stands to benefit financially through a patient-litigant's continued treatment. Additionally, the ethical guidelines of the American Academy of Psychiatry and the Law discourage treaters from becoming experts. (American Academy of Psychiatry and the Law Ethical Guidelines for the Practice of Forensic Psychiatry. Adopted May 1987 - Revised October, 1989 and 1991, Baltimore, MD.) Finally, there is the problem of confidentiality. Once on the stand the treater may be asked to divulge all sorts of information disclosed in sessions that was probably best left unsaid.

The forensic's involvement may be marginal (e.g., a one hour consultation) or it may be substantial. Obviously, an increase in forensic claims will result in greatly increased transactional expenses on account of the new civil rules and the Supreme Court's Daubert decision.

Counsel oftentimes will need to consult with an expert[19] to interpret the records, notes, and reports of the treating practitioner and/or the forensic. Assistance may also be needed from a consulting expert in discovery.

Limits on Expert Testimony

When experts attempt to opine on the psychological or psychiatric veracity of the plaintiff, they are said to act as a "polygraph." This type of testimony is impermissible,[20] as only

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[18] *See, e.g.,* Williams v. Trader Publ'g Co., 218 F.3d 481 (5th Cir. 2000); Biggs v. Village of Dupo, 892 F.2d 1298 (7th Cir. 1990); Rakovich v. Wade, 819 F.2d 1393 (7th Cir. 1987); Spence v. Board of Educ. of Christina Sch. Dist., 806 F.2d 1198 (3rd Cir. 1986); Chalmers v. City of Los Angeles, 762 F.2d 753 (9th Cir. 1985); Cohen v. Bd. of Ed., Smithtown Central Sch. Dist., 728 F.2d 160 (2nd Cir. 1984); Marable v. Walker, 704 F.2d 1219 (11th Cir. 1983); Williams v. Trans World Airlines, Inc., 660 F.2d 1267 (8th Cir. 1981).

[19] For a thorough discussion of expert witnesses, *See* Hallahan, Tim, "Everything you Need to Know about Expert Witnesses," 8 The Practical Litigator 41 (September 1997).

[20] *See, e.g.,* Nichols v. American Nat'l Ins. Co., 154 F.3d 875 (8th Cir. 1998), United States v. Scop, 846 F.2d 135

the jury may judge the plaintiff's credibility.

Psychological Terms - Babble or Bible?

- Adjustment Disorder
- Affective Disorders
- Antisocial
- Borderline
- Clinical Psychologist
- Clinical Social Worker
- Dependent
- DSM III-R and DSM IV
- Histrionic
- Holistic Counselor
- Learning Disability
- Malingering
- Mood Disorders
- Narcissistic
- Neuroses
- Non-Organic or Functional
- Obsessive-Compulsive
- Organic
- Paranoid
- Personality Disorder

(2nd Cir. 1988). *See also*, Gittes and Harris, "Experts in Sexual Harassment Cases: The Plaintiff's Perspective," The Employee Advocate (Spring/Summer 2005).

- Post Traumatic Stress Disorder[21]
- Primary Gain
- Psychiatrists
- Psychoanalyst
- Psychoses
- Psychotherapy
- Secondary Gain
- Social Worker
- Stressor
- Thought Disorders

See Attachment A hereto for definitions.

Diagnostic and Statistical Manual[22]

Attorneys (both plaintiff and defense) should become familiar with the multi-axial diagnostic system of DSM-IV[23], all the while being aware of the caveats included in the manual about its use in litigation:

Axis I — Major Psychiatric Disorders - do the alleged symptoms meet DSM-IV criteria for the diagnosis?

Axis II — Personality Disorders Early Onset - Lifelong maladaptive personality traits. If present, what are they and how do they influence the current

[21] Shepard v. American Broadcasting Corp., Inc., 862 F. Supp. 486 (D.D.C. 1994) (discussion of PTSD under DSM-III-R).

[22] For an in-depth discussion on DSM-IV, *See* Smith, "Understanding How to Apply the DSM-IV to a Case under the ADA," 17 The Labor Lawyer 449 (2002).

[23] Kutchins & Kirk, "Making Us Crazy: DSM: The Psychiatric Bible and the Creation of Mental Disorders" (Freepress, 2004); see review by Mim Udovitch, "I'm O.K., You're 300.02" (New York Times Book Review); see also Alix Spiegel, "The Dictionary of Disorder", The New Yorker (January 3, 2005).

clinical picture? Antisocial personality present?

Axis III — Pertinent Medical Disorders - How do they affect psychiatric diagnosis? Did they pre-exist? Influence of medications?

Axis IV — Psychosocial Stressors - Few psychiatric conditions have a single cause. This is the causation axis for attorneys. What are the various stressors currently operating in the litigant's life. Is a superseding intervening psychological stressor present that breaks the chain of causation?

Axis V — Global Assessment of Functioning - Score on scale should be determined. Axis V assessment of functional impairment should be combined with the psychiatric assessment format in the Guides to the Evaluation of Permanent Impairment (see references). Remember - diagnosis by itself is practically meaningless in determining damages. It is the level of functional impairment that counts.

Mental Disability Cases

The scope of mental problems that amount to a covered disability is extremely unclear. Some, for example, have posited that the diagnosis of Learning Disability (LD) must come from a psychiatrist and must be a diagnosis listed in the official diagnostic manual (DSM-III-R, now DSM-IV). Not surprisingly, it is being argued that a stress diagnosis listed in DSM-IV is a disability. Counsel will be mining Social Security disability cases, FELA cases, Veterans Administration disability cases, workers compensation stress cases, and long term disability (LTD) insurance cases under state contract law and the Employee Retirement Income Security Act (ERISA) to support their respective viewpoints on stress.[24]

The newest version of the "Diagnostic and Statistic Manual of Mental Disorders" from the American Psychiatric Association has arrived. Interestingly, the manual lists bad writing as a mental disorder. D.S.M.-IV Code 315.2 refers to a "Disorder of Written Expression" which the manual characterizes as poor use of grammar or punctuation, sloppy paragraph organization,

[24] See, e.g., Hogarth v. Thornburgh, 2 AD Cases (BNA) 1777 (S.D.N.Y. 1993) (court, in holding that FBI could not reasonably accommodate a clerk with a bipolar personality disorder, relied on psychiatric testing that lithium therapy is not a guarantee against recurrence of bipolar disorder); Cass v. Shalala, 8 F.3d 552 (7th Cir. 1993) (court affirmed ALJ's finding that a Social Security claimant suffering from a Somatoform Pain Disorder, a physiological malady where a patient complains of numerous pains for which there is no physiological explanation or symptoms in excess of physiologic findings, was not disabled); Hunter v. Sullivan, 993 F.2d 31, 35, n.3 (4th Cir. 1992) (a Social Security disability case where court emphasized the following criteria in assessing mental impairment: a) marked restriction of activities of daily living; marked difficulties in maintaining social functioning; frequent deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere); and repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors)).

awful spelling and bad handwriting![25]

Learning Disability

A learning disability is a disorder in one or more of the basic processes involved in using spoken or written language in the presence of normal or above average intelligence. In adults, learning disabilities may be manifested in academic deficits in spelling, written expression, reading comprehension, mathematics computation, and sometimes in problems in organizational skills, time management, and social problem solving. A learning disability is not mental retardation or an emotional disorder. Learning disabled people have difficulty receiving information through their senses. There are many types of learning disabilities, and they vary from mild to severe. Types of learning disabilities include visual, auditory, motor, tactile, and academic.

With respect to job placement, a person's strengths and the work to be performed must be compatible. Learning disabled individuals should not do tasks in which their disabilities would play too large a role. Many of them go into positions that require creativity, because their particular perception of the world provides a different way of looking at the world.

While many individuals with learning disabilities require no accommodations, there are also many people with learning disabilities who require differing degrees of support, because the accommodations will vary according to the need.[26]

Look Before You Leap

Before pleading emotional distress and placing the plaintiff's mental condition in issue[27], counsel for plaintiff should research carefully the plaintiff's background, investigate other stressors, and confer with any treating mental health practitioner. An intake questionnaire ought to identify the pertinent information that counsel needs. Any such questionnaire ought to include

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[25] Cf. Mohamed v. Marriott International, Inc., 1996 U.S. Dist. LEXIS 2788 (S.D.N.Y. 1996) (finding that language skills constitute a mental condition and granting plaintiff=s motion to compel language evaluation of person under the legal control of the defendant employer).

[26] See, e.g., University Interscholastic League v. Buchanan, 848 S.W.2d 298 (Texas 1993) (learning disabled high school athletes sought to permanently enjoin an organization from enforcing a rule precluding participation by athletes over nineteen years old; court held that athletes were "disabled" under the Rehabilitation Act and that the organization failed to reasonably accommodate the athletes by not allowing exceptions to the rule).

[27] If the plaintiff pleads mental anguish, the courts hold that plaintiff has placed his/her mental condition in controversy and opened the door to discovery relating to his/her mental condition. See, e.g., Tomlin v. Holeck, 150 F.R.D. 628 (D. Minn. 1993); Cody v. Marriott Corp., 103 F.R.D. 421 (D.Mass. 1984).

the following:

- If you suffered physical or emotional harm as a result of your employer's adverse action, please identify whether you suffered any of the following symptoms. For each symptom you identify as having suffered, give some indication, if possible, of the extent to which you suffered (for example, lost 10 pounds, severe headaches, occasional chest pain, etc.).

    - Increased Irritability
    - Diminished Interest
    - Weight Loss
    - Weight Gain
    - Insomnia
    - Feelings of Agitation
    - Fatigue and Loss of Energy
    - Difficulty Concentrating
    - Headaches
    - Body Pain
    - Shortness of Breath
    - Dizziness
    - Palpitations of the Heart
    - Trembling or Shakiness
    - Sweating
    - Choking
    - Nausea, Abdominal Distress
    - Chest Pain
    - Feeling Out of Control
    - Did you seek medical attention (including psychologists and/or psychiatrists)? If so, please explain.[28]

Warn the Client of the Consequences

Repeatedly, counsel should warn the plaintiff of the consequences of pleading emotional distress and evaluate whether the case is worth it.[29] The prospective plaintiff needs to be warned that pleading emotional distress may very well lead to, inter alia:

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[28] See Fitzpatrick "A Damages Questionnaire for Wrongful Termination Cases" (Practical Lawyer, March 1993; 40 Employment Law Counselor 2, December 15, 1993; Lane's Goldstein Litigation Forms published by Clark Boardman Callaghan; and Business Law, Inc.'s Checklists for Corporate Counsel (September, 1994 Supplement).

[29] Plaintiff must understand that if treater becomes involved as an expert witness, the therapy is invariably adversely affected. The treater will be forced to divulge information revealed in the privacy of the clinician's office. Few therapies survive. Strasburger, "Crudely, Without Any Finesse; The Defendant Hears His Psychiatric Evaluation." Bulletin, American Academy Psychiatry Law 15:229-233, 1987.

- Depositions of her/his treating mental health practitioners[30]
- Production of notes of counseling sessions
- A Rule 35 mental examination.[31]
- Plaintiff's history of counseling in the past and the subjects discussed with counselors in the past may be fair game for the plaintiff's opponent.
- Discovery of treatment for drug and alcohol problems[32]
- That the defense will get an instruction that the jury may take into account the fact that the plaintiff had other problems that might account for the stress in whole or in part.
- Incurring substantial fees of an expert if a state evidentiary rule or federal discrimination case law requires expert testimony on mental anguish.[33]
- Depositions of individuals with personal relationships to the plaintiff[34]

Checklist

In assessing whether to proceed with a mental health claim, the practitioner needs to consider a host of questions. Among them are the following:

- Was the conduct such that major trauma logically follows? Will this make sense to a jury? Will the jury be able to relate to it? Is the plaintiff trivializing the overall case

[30] Although the federal common law psycho-therapist-patient privilege protects confidential communications between a patient and her psychotherapist made for the purpose of diagnosis, the privilege fails to shield information relevant to a patient's mental state where the patient's mental state is at issue. *See, e.g.,* In re Grand Jury Subpoena, 710 F.Supp. 999 (D.N.J.) (interpreting privilege under federal law), *aff'd sub nom*. 879 F.2d 861 (3d Cir. 1989); Topol v. Trustees of Univ. of Pa., 160 F.R.D. 476 (E.D.Pa. 1995) (plaintiff waived any applicable psychotherapy-patient privilege by alleging defendant's conduct caused her to become "depressed, anxious and fearful.

[31] See, e.g., McCarthy v. Southeastern Penn. Transportation Auth., 93 WL 409858 (E.D. Pa. October 13, 1993) (employer entitled to medical records when plaintiff puts mental stress in issue). Contra: Bigoni v. Pay 'N Pak Stores, 48 FEP Cases (BNA) 732, 733 (D.Or. 1988) (court held that plaintiff had waived privilege relating to conversations with psychologist even though plaintiff filed an action alleging emotional distress).

[32] *See, e.g.,* Mulholland v. Dietz Co., 896 F.Supp. 179 (E.D. Pa. 1994).

[33] See, e.g., Bolden v. Southeastern Pennsylvania Transp. Authority, 21 F.3rd 29 (3rd Cir. 1994).

[34] *See, e.g.,* Gladfelter v. Wal-Mart Stores, Inc., 162 F.R.D. 589 (D.Neb. 1995) (deposition of girlfriend permitted where expert testified that a significant cause of emotional distress was the deterioration of the plaintiff's relationship with his girlfriend).

by making mental anguish a major issue?

- Consider community standards - Is there some fact that might prejudice the case and it cannot be assumed you can keep out of evidence? How will it fly before jury? Be cautious.

- Do not overblow the value of emotion. Wise people will understand distress without having to force it down the jury's throat.

- Was plaintiff a solid person and able to function well before the workplace dispute arose?

- Did the claimant have significant psychological problems in the past?

- Does the plaintiff have a history of mental, physical, or sexual abuse which could be argued as an alternative cause of the emotional distress?[35]

- Will it be necessary to present an "eggshell" plaintiff theory to the jury?[36] Will that sell?

- Have you looked at the before and the after?

- Does the plaintiff have nightmares or flashbacks? Is the plaintiff afraid to be alone? Has the claimant's social patterns changed dramatically?

- Does plaintiff suffer from loss of appetite or sleep, etc.? Has the plaintiff resumed smoking, drinking to excess, etc.?

- Can plaintiff describe the trauma? How will jury react to tears?

- Can the distress be proven collaterally? Are there prior evaluations, prior supervisors, or a vocational counselor, who can help present the claim?

- What is the plaintiff's educational background? Was plaintiff a well functioning individual? Any military background? Awards & honors?

- Duration of marriage? Relationship with spouse? Relationship with family? Before and after?

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[35] See, e.g., McCleland v. Montgomery Ward & Co., 1995 WL 571324 (N.D. Ill. 1995) (admitting evidence of plaintiff's being a victim of childhood sexual abuse); Delaney v. City of Hampton, 999 F.Supp. 794 (4th Cir. 1998) (same).

[36] See, e.g., Cole v. Snow, 586 F.Supp. 655 (D. Mass. 1984) (plaintiff was awarded compensatory damages as a result of a strip search even though plaintiff suffered from psychological sensitivities as a result of developing early and being sexually molested by her father).

- Plaintiff's household activities? Dress? Neat or sloppy? Family photographs?

- Consequences for the spouse? Is the plaintiff no longer "available" to the spouse?

- Is there a loss of consortium claim? In sexual matters, you ought to approach with some trepidation. Use words like friendship, romance, affection, availability, etc. You don't have to use the "f" word.

- Is there gastrointestinal evidence of stress? How about blood pressure?

- Does plaintiff need a forensic expert? Can plaintiff prove mental anguish through the treating MHP? Oftentimes, a strong argument can be made to go just with treating's testimony.

Sex Harassment Cases - Mental Condition of the Harasser

Looking before you leap may have application to defense counsel in these cases also. Increasingly, plaintiff's counsel are suggesting that in certain circumstances the plaintiff can take discovery on the mental condition of the defendant or even a non-party witness in the case. For example, can the plaintiff take a Rule 35 examination of the alleged harasser in a sex harassment case? If the alleged harasser defends in essence by saying "I'm not the sort of man who would do such a thing," the plaintiff's bar may then argue that the alleged harasser has placed his mental condition in controversy, and consequently must submit to a Rule 35 mental examination. Unfortunately, the phraseology of Rule 35 is such that it seems critical that the harasser be named as a party defendant; thereby increasing the complexity and cost of workplace litigation.

Representation Agreement: The "Perfect" Retainer

Plaintiff's counsel should make sure that the retainer agreement is:

- Staggered with limited commitments as you continually evaluate the case before making a commitment to litigation.

- A clause that allows you to withdraw in the event of a material misrepresentation of fact by the plaintiff.

- A clause which provides that, if the fee arrangement is contingent, you will receive the value of your services (quantum meruit) if the case collapses on account of a material misrepresentation.

- In light of the spate of after acquired evidence cases, specifically advising the

client that disinformation/ misinformation (or lies) on an intake form is a material misrepresentation and the basis for automatic withdrawal. This may help with after acquired evidence, devastating information from the medical and/or mental health records and interviews that were not revealed by the plaintiff during the intake process.

- The client is ultimately responsible for litigation expenses. Not only is this rule based in the ethical codes, it makes sound economic sense. The proverbial "perfect retainer" ought to state the plaintiff is responsible for expert fees.

- The client has been advised at the outset of the potential expenses associated with the mental health issues. You do not want a surprised client when the bills come in for psycho-babble.

Treating Mental Health Practitioner (MHP)

Discuss plaintiff's condition with his/her treating psychiatrist, psychologist, or some other mental health practitioner. If possible and cost-effective, meet the treating clinician face-to-face. Make an assessment of the clinician as a witness, both in light of Daubert and at a practical jury-appeal level. Have a checklist to pursue with the treating.

- Has anything come out in counseling that could be embarrassing and therefore harmful to the case?

- Are the counseling sessions dominated by discussion of matters other than stress on the job or stress on account of job loss?

- Have marital problems dominated the discussion?

- Does the counselor have notes or tapes?

- Will the jury be turned off by the psychiatrist's demeanor?

- Will a "holistic counselor" qualify under Evidence Rule 702 after Daubert?

- Does the treating appear to be a stable, credible person?

Examine, if there are any, the treating's notes or audio tapes. The treating will want you to agree not to share her/his notes with the client/patient. A more troubling problem in litigation is having to share the notes with defense counsel. Copy all notes, "Bates Stamp" all, retain originals, return a stamped set to the MHP, verifying that the set is a duplicate of his/her original notes, records, and correspondence.

If you intend to use the treater for opinion testimony, you need to obtain the information that you will have to disclose under new Rule 26. Thus, obtain and read before you plead if time permits. For a while, requests for this information are going to be a shock to forensic expert witnesses. Ask questions that defense counsel may be allowed to ask. The limits of inquiry are not clear. Better to know the good, the bad and the ugly at the outset, than after many hours and much money have been put into the case. Among the questions to ask are:

- What are the major topics that have been discussed with the clinician?
- How intensive was the treatment?
- What has been the frequency of visits?
- Group and/or individual therapy?
- Is there a consistency to treatment?
- Does it make common sense?
- What drugs have been prescribed? Learn the reactions and inter-reactions, especially with alcohol.
- Are there notes that the treating has kept?
- Does the treating tape sessions?
- To which "school" of psychotherapy does the treating "subscribe"? You need to familiarize yourself with the various theories that these professionals posit. For a good overview of the various schools, see Morton Hunt's The Story of Psychology (1993).

Appropriate Level of Workup - Psychological Testing

As stated, the psychiatrist normally will refer the client to a clinical psychologist for testing and evaluation.[37] A consulting expert's report is considered normally to be confidential work product, thereby making it non-discoverable under the Federal Civil Rules.[38] If you are giving serious consideration to pleading a mental health issue in the case, then before you plead,

[37] Referral for psychological testing should not be automatic. Psychological testing that is incomplete will raise questions about credibility. For example, not properly assessing Axis II personality disorder possibilities is a common plaintiff's expert's error. If an antisocial personality is discovered, the issues of malingering will arise.

[38] Crockett v. Virginia Folding Box Co., 61 F.R.D. 312 (E.D. Va. 1974); Fed.R.Civ.P. 26(b)(4).

get a report from a consulting that you can cloak in work product privilege.

Psychological Testing

Allow the clinical psychologist appropriate professional judgment in selecting testing instruments, but monitor the type of tests used. Among the tests are:

- Intelligence tests
  - Wechsler Intelligence Scale-Revised (WAIS-R)
  - Stanford Binet
- Personality Tests
  - Objective Tests
  - Minnesota Multiphasic Personality Inventory (MMPI)[39]
  - Bernreuter Personality Inventory
  - Humm-Wadsworth Temperament Scale
  - Guilford-Martin Personnel Inventory
  - Myers-Briggs Type Indicator
  - PDI Employment Inventory
  - Employee Reliability Inventory
  - Sixteen Personality Factor Questionnaire
  - California Psychological Inventory
  - Millon Clinical Multiaxial Inventory
  - Projective Tests[40]
  - Rorschach Inkblot Technique
  - Thematic Apperception Test (TAT)
  - Sentence Completion Test
  - Draw-A-Person (DAP) Test
  - Personality Assessment Inventory (PAI)

In Usher v. Lakewood Engineering & Mfg. Co.,[41] the plaintiff sought a protective order to prevent the defendant from conducting a battery of psychological tests on the plaintiff. The all-day testing would have included the MMPI, the Rorschach test, the Thematic Apperception Test (TAT), the Shipley Institute for Living Scale, and the Sixteen Personality Factors Inventory. Judge Shadur held that a protective order was appropriate, barring the administration of these tests. The court relied on the possibility of an invasion of privacy.

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[39] See, e.g., Kenneth S. Pope, Ph.D., James N. Butcher, Ph.D., and Joyce Seelen, Esq., The MMPI, MMPI-2, and MMPI-A In Court: Assessment, Testimony, and Cross-Examination for Expert Witnesses and Attorneys (American Psychological Association).

[40] For a historical discussion of projective tests see Morton Hunt's "The Story of Psychology" (Anchor Books 1993, p. 323-326).

[41] 158 F.R.D. 411 (N.D. Ill. 1994).

Interviews with Fact Witnesses

The conventional "wisdom" in a case involving a person pleading mental anguish is that a portion of the case should be proven largely through witnesses other than the person. Therefore, if you deem it appropriate, determine whether there are good lay witnesses to corroborate stress? Some of the possibilities are listed below:

- Consider a spouse if there is one, a former spouse, children, friends, neighbors, and co-workers?

- If and when you engage a forensic, consider whether it is appropriate for the forensic to meet with some of these lay witnesses before giving deposition or trial testimony.

- If so, the written report now required by the new rules must reference all of those interviews as having been "considered".

Medical Release

Medical records are expensive; can take an inordinate amount of time to obtain, especially if you don't know what you are doing; sometime require extensive interpretation; are written in jargon, codes, shorthand, and in some of the world's worst chicken scratch. The quality of the copies received by counsel from the MHP varies. Suffice it to say that obtaining these records and extracting same is a very labor intensive task, requiring paralegal/paramedical skills. To assist whomever will obtain the records and extract the records, you need to obtain a formal written release as early as possible. That release should address specific problems that recur in these cases.

The release used by plaintiff's counsel with his/her client ought to emphasize that the MHP is instructed to make herself/himself and staff available to consult with counsel and his/her staff (or named independent contractor). This will assure hopefully that indecipherable notes can be interpreted, and there can be a free and open discussion about the plaintiff's treatment. If appropriate in your jurisdiction, plaintiff's counsel should emphasize with the MHP that he/she is not authorized to confer with anyone other than plaintiff's counsel and counsel's authorized staff or other representative, otherwise the MHP may engage in *ex parte* communications with the other side. Written authorization is often demanded by the MHP. Some defendants will fight for a release that allows defense counsel to communicate with the treating on an ex parte basis. The defendant will request releases to be signed by plaintiff so that it can obtain records ex parte and communicate ex parte with doctors. Plaintiff should resist this tactic.[42]

[42] See Morris v. Consolidation Coal Co., 446 S.E.2d 648 (W.Va. 1994) (a fiduciary relationship exists between a treating physician and a claimant in a workers' compensation proceeding such that unauthorized oral ex parte communications are prohibited and the patient would have a cause of action against the treating physician); Harlan v. Lewis, 982 F.2d 1255 (8th Cir. 1993), cert. denied, Hall v. Harlan, 114 S.Ct. 94 (8th Cir. 1993) (the court, in a non-employment case, affirmed the Federal court's sanctions against defendant lawyer for their ex parte

So, get releases early on to obtain medical and mental health records so you can determine if there is disastrous material in these records. Sometimes a plaintiff's attorney may want to insist that the client pay for the records up front, as they can be expensive. Bates stamp and extract those records upon receipt. This work can be contracted out on an independent contractor basis or you can do it in-house with trained paralegals.

Records to Gather

Before filing a case, plaintiff's counsel ought to obtain and review the records of all MHPs, hospitals and clinics so that, hopefully, there are no surprises. Immediately after the case is filed, the defense should demand that the plaintiff execute appropriate releases that will facilitate the defendant's efforts to obtain records relevant to the case, many of which will be

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unauthorized communications with plaintiff's treating physicians); Horner v. Rowan Companies, Inc., 153 F.R.D. 597 (S.D. Tex. 1994) (the court held that defense attorneys may not conduct private *ex parte* interviews with a plaintiff's treating physician unless, with advance notice thereof, the plaintiff specifically and unconditionally authorizes same); Duquette v. Superior Court, 778 P.2d 634 (Ct. App. Ariz. 1989) (in medical malpractice context, defense attorneys are not permitted to communicate ex parte without plaintiff=s consent; without plaintiff=s consent, defendants limited to formal discovery procedures under Arizona Rules of Civil Procedure); Williams v. Rene, 886 F.Supp. 1214, 1226-1227 (D.VI 1995) (even though defendants had procured a broadly-worded release from plaintiff to communicate ex parte with plaintiff=s doctors, the defendant was still required to follow local law which required (1) reasonable notice of ex parte contact, (2) notification to the doctor of the scope of the ex parte interview, and (3) communication to the plaintiff=s doctor that participation is on a completely voluntary basis); Garner v. Ford Motor Co., 61 F.R.D. 22 (D.Alaska 1973) (court condemned ex parte conferences with plaintiff's treating physicians); Weaver v. Mann, 90 F.R.D. 443 (D.N.D. 1981)(court found Federal Civil Rules prohibit such ex parte conferences); Bohrer v. Merrill-Dow Pharmaceutical, Inc., 122 F.R.D. 217 (D.N.D. 1987) (motion to compel plaintiff to authorize defendant to engage in ex parte interviews with plaintiff's treating physician was denied); Alston v. Greater Southeast Community Hosp., 107 F.R.D. 35 (D.D.C. 1985) (same); Gobuty v. Kananagh, 795 F.Supp. 281 (D.Minn. 1992) (court refused to permit ex parte interviews); Miles v. Farrell, 549 F.Supp. 82 (N.D.Ill. 1982) (court held that Federal Civil Rules do not permit ex parte interviews of plaintiff's treating physician); Neal v. Boulder, 142 F.R.D. 325 (D.Colo. 1992) (court refused to compel plaintiff to sign releases and authorizations for ex parte communications with treating physicians); Acosta v. Richter, 671 So.2d 149 (Fla. 1996) (state statute providing exception to rule of confidentiality in medical negligence action when a health care provider is or reasonably expects to be named as a defendant creates only a limited exception to the physician-patient privilege); Contra: Cote v. Georgia-Pacific Corp., Civ. #93-0184-B (D.Me. April 11, 1994) (court approved *ex parte* interviews); Filz v. Mayo Foundation, 136 F.R.D. 163 (D.Minn. 1991) (court, despite a state statute to the contrary, held that ex parte interviews are permissible under federal civil rules); Felder v. Wyman, 139 F.R.D. 85 (D.S.C. 1991) (holding ex parte conferences are permissible); Clark v. Homrighous, 136 F.R.D. 186 (D.Kan. 1991) (court granted defendant's motion to allow informal private interviews of plaintiff's treating physicians); Bryant v. Hilst, 136 F.R.D. 487 (D.Kan. 1991) (court denied plaintiff's motion for a protective order to prevent defendant from communicating ex parte with plaintiff's treating physician); Doe v. Eli Lilly & Co., Inc., 99 F.R.D. 126 (D.D.C. 1983) (plaintiff was ordered to sign an authorization allowing his treating physicians, at their option, to engage in ex parte interviews); Sklagen v. Greater Southeast Community Hospital, 625 F.Supp. 991 (D.D.C. 1984) (plaintiff compelled to authorize her physicians, at their discretion, to disclose information about plaintiff in informal ex parte interviews); MacDonald v. United States, 767 F.Supp. 1295 (M.D.Pa. 1991), aff'd., 983 F.2d 1051 (3d Cir. 1992) (court denied plaintiff's motion to strike the testimony of a treating physician who had been interviewed ex parte); King v. Ahrens, 798 F.Supp. 1371 (W.D.Ark. 1992) (court held it had no authority to prohibit such ex parte interviews).

considered and relied upon by experts on both sides.

Among the records that may be helpful in these cases are the following:

- The records of former employers of the plaintiff that may include earning records, sick leave records, employee assistance records, records from the insurance department and worker compensation claim records.

- The records of insurance carriers, including former employer's worker compensation carriers.

- Military records, including medical and psychiatric records -- a lot of times one can find records of clinical psychological testing.

- Any records pertaining to an application for social security disability benefits -- the subpoena ought to go to the social security attorney and to the social security administration along with a release.

- The records at the state workers' compensation commission regarding any claim and the records and depositions and trial testimony in the possession of counsel in any workers' compensation matter.
- If there was a claim for long term disability benefits with the defendant or a previous employer, those records can be obtained from the previous employer and/or the LTD carrier.

- With subpoenas to all prospective employers that the plaintiff identifies as having been a part of his/her job search.

- Records, including audio tapes of the hearing, from the state unemployment compensation commission.

- Records, x-rays, MRIs, etc. from doctors, hospitals and clinics.

- Records reflecting the frequency of doctor visits and the failure of plaintiff to consistently seek treatment.

- Records and notes of psychiatrists, psychologists, counselors, social workers and other mental health practitioners who have treated the plaintiff.

- Insurance records that will reflect medications, doctor records that reflect medications prescribed, pharmacy records that reflect medications purchased.

- Plaintiff's diary, if one exists -- plaintiffs tend to talk to themselves a lot.

Extracting Records

Extracting will allow you to identify a vast number of matters that may assist in prosecution and/or defense.

- The sequence of events.
- Any drug treatment or drug therapy, references to other stressors.
- Prior clinical psychological testing.
- The frequency of visits.
- Whether the plaintiff failed to obey any advice from his/her doctor(s).
- Whether plaintiff has been seeing medical doctors for gastrointestinal disorders or other medical problems commonly associated with stress.
- Record when counseling/therapy started.
- If some treatment preceded the onset of the workplace dispute which allegedly caused the distress, explore in depth whether there is a bright line that can be shown to the jury between other stressor(s) that led to that counseling and the counseling regarding workplace disputes, typically termination. Typically, the plaintiff wants to separate the treatment into two treatments -- one which is either over or ongoing, and the other which started with (and as a result of) the workplace dispute and the defense wants to suggest that the bulk (if not all) of the stress is "caused" by stressors other than the workplace dispute.

Pleading Emotional Distress - EEOC Charge

Remember to plead emotional distress in the EEOC charge. The failure to do so may jeopardize the plaintiff's ability to plead it in court proceedings given the long line of scope of the charge decisions. Certainly, if the courts are going to hold the plaintiff to this standard and return us to what a judge long ago called "common law pleading niceties," the EEOC must have a procedure to systematically assist charging parties to properly plead damages, including emotional distress, in charges.

Retention of the Forensic Expert

What are you as counsel looking for in an expert witness? The expert must be qualified and must not have any bombshells lying in the closet so to speak. In light of Daubert,

practitioners can anticipate an increase in motions in limine to exclude experts. Thus, counsel for the proponent should obtain routinely such information from an expert with whom counsel has no prior relationship before retaining the expert's services. The expert, not counsel and their clients, should have to bear the expense of gathering and preparing this information as part of the price of doing business.

The expert's report should include the following:

- ll information considered
- Causal Connection
- Damages
- Diagnosis
- Prognosis
- The rationale for conclusions

The forensic should be familiar with:

- Plaintiff's answers to interrogatories.
- Any of defendant's discovery answers that may bear on the case.
- The defense theory of the facts.
- The defense deposition of plaintiff.
- Plaintiff's work records, and the strengths of defendant's case.

The forensic should not be surprised at deposition or in trial on cross. In sum, the forensic should not be hearing facts or being shown documents for the first time at deposition conducted by defense counsel. You might consider having the forensic attend the deposition of plaintiff's "tormenter," i.e., the alleged "black hat" of the drama.

The expert must present well to judge and jury. Many people are very biased against the psychiatric profession. The witness should be friendly and have a ready smile. A sense of humor and a strain of humanity/compassion helps. It is imperative that a forensic expert be ready to defend his/her diagnosis, prognosis and other opinions with vigor. The forensic witness must be unequivocal. In my firm, we have a rule that no wafflers need apply -- the jury normally wants a credible "fighter," not some academic up in the clouds.

Ensure that your forensic has psychological testing performed, especially so-called objective tests, as the jury may give greater weight to what they perceive as an objective test as compared to projective psychological tests, like Rorschach ink blots.

Make sure the forensic has all records that you can obtain at a reasonable costs. You would be surprised at the volume of records that you could obtain if you act with dispatch. Among the records are:

- treating records
- medical records
- military records
- school records
- police records, if any

You want these records in the hands of the forensic before a diagnosis is made. Try to have the forensic interview family members also. Without interfering with proper methodology and the reliability of the forensic's opinions, confer with the forensic and advise that a diagnosis should be withheld until the forensic has been able to review the totality of the information reasonably available. You need to discuss with the forensic how he/she responds to the predictable questions from opposing counsel regarding any "working diagnosis" before the "final diagnosis."

Encourage (require) communication between treating and forensic expert to avoid the disaster of them working off different sets of "facts" and even worse arriving at seemingly conflicting diagnoses.

Defendant's Discovery to Plaintiff

Defendants, especially if they hit the ground running, can gather substantial documentary and other information on the plaintiff through both formal and informal discovery. This section reviews the formal mechanisms to obtain discovery from the plaintiff and non-parties bearing on mental health issues.

Releases

Plaintiff can expect the defense to request formally that plaintiff execute releases, including releases for medical and psychiatric records. To the extent that documents are not within the actual possession of a party but are in the possession of a non-party, the courts have authority to compel the party to execute documents authorizing release from the non-party.[43]

[43] See, e.g., Turick by Turick v. Yamaha Motor Corp. U.S.A., 121 F.R.D. 32, 36 (S.D.N.Y. 1988) (party compelled to execute release for medical records); Urseth v. City of Dayton, Ohio, 653 F. Supp. 1057, 1066 (S.D. Ohio 1986) (party compelled to execute release for medical records); Cross v. General Motors Corp., 40 FEP Cases (BNA) 415

Indeed, it may be said that records which a party can obtain by executing a release are within the party's "control" even if not within the party's possession or custody. A subsidiary issue is whether the party who has obtained a consent to release of medical records can communicate ex parte with the other party's mental health care provider.[44]

Interrogatories

Interrogatories to anticipate will focus on identifying all mental health practitioners that plaintiff has ever seen. Start early to gather this information, especially the more recent treatment by a MHP as this is more likely to be discoverable by the other side. Train paralegals on how to obtain, how to control the document flow and follow up on requests for medical records. Plaintiff's counsel oftentimes will try to control the flow of documents to the defense by refusing to provide an ex parte release. Plaintiff's counsel may insist that counsel for plaintiff obtain all records, and insure that they are being produced under a strict privacy-sensitive protective order. The documents should be numerically coded before production to the defense.

Document Requests

Document requests that plaintiff can anticipate receiving from the defense will focus on:

- Plaintiff's medical records, including records of the plaintiff's treating physician(s) and psychotherapist(s), hospital records, and records of prior mental health treatments (it can take months to get all the records in some cases).
- Notes
- Audio tapes
- Insurance records (one side or the other may want to show how low or high the "specials" are)
- Bills (get the insurance code numbers keyed to DSM-IV)
- Records of dates and times of visits (this can be good evidence to show that the frequency of visits is keyed to litigation)

(E.D. Mo. 1982) (party compelled to execute release for tax records).

[44] *See, e.g.*, Kitzmiller v. Henning, 437 N.E.2d 452 (1993) (consent to release of records does not imply a patient's consent to have his physician discuss confidential medical information with opposing counsel in informal interviews without the patient's consent).

- All clinical notes of the treating and the forensic
- Court records from previous cases involving the plaintiff (i.e. divorce, child custody, etc.)
- All patient telephone messages in the possession of the treating and forensic
- The plaintiff's health insurance claim forms and records of health insurance carrier in the possession of plaintiff
- Plaintiff's current and prior employers and the insurance companies that provided coverage while the Plaintiff was employed, including any COBRA extension period
- The plaintiff's Social Security disability application form
- The patient's writings and correspondence to the doctor
- Lab report
- Other medical records from, for example, gastroenterologists
- The plaintiff's psychological test records, including answer sheets
- Any employee assistance program (EAP) records from former employer
- Any workers' compensation records
- The plaintiff's diary
- The plaintiff's prescription records
- Insurance Claim Forms - these forms will have the five digit code number, indicating the DSM-IV diagnosis
- Treating's notes
- Treating's records of dates of visits
- Any client diary/notes describing his/her distress
- Records of medication
- Medical records, especially records reflecting physical manifestations of stress (gastrointestinal) -- there are services that you can contract out to extract records

or you can have it done by paralegals.

- Records of former employers for personality tests
- Records of employers to whom plaintiff applied for work in mitigation. Personality tests might have been administered
- Prior employers' records, including plaintiff's personnel file
- Insurance carrier records
- Workers' compensation commission records
- State vocational rehabilitation agency records
- LTD carrier records
- Social Security disability records
- High school and college transcripts and disciplinary records
- Criminal records

Any requests for medical records unrelated to the case should be challenged, as courts have held that only the relevant records can be compelled due to privacy interests.[45] In addition, courts have held, on numerous occasions that "garden variety" emotional distress claims do not establish a waiver of the medical records privilege.[46] Quite recently, the Missouri Supreme Court held that where "garden variety" emotional distress is pleaded and where the plaintiff does not intend to offer evidence of treatment for emotional distress, the plaintiff's medical records regarding prior treatment of emotional problems are not discoverable.[47]

[45] *See, e.g.,* Alcon v. Spicer, 113 P.3d 735 (Colo. 2005); Vansconcellos v. Cybex Int'l, Inc., 962 F.Supp. 701 (D. My. 1997); Burrel v. Crown Central Petroleum, Inc., 177 F.R.D. 376 (E.D. Tex. 1997); Gatewood v. Stone Container Corp., 170 F.R.D. 455 (S.D. Iowa 1996); Bottomly v. Leucadia National, 163 F.R.D. 617 (D. Ut. 1995); Keplinger v. Virginia Electric & Power Co., 208 W. Va. 11 (2000).

[46] *See, e.g.,* Fritsch v. City of Chula Vista, 187 F.R.D. 614 (C.D. Cal. 1999); Ford v. Contra Costa County, 179 F.R.D. 579 (N.D. Cal. 1998); EEOC v. Old Western Furniture Corp., 173 F.R.D. 444 (W.D. Tex. 1996); Neal v. Siegel-Robert, Inc., 171 F.R.D. 264 (E.D. Mo. 1996); Vanderbilt v. Town of Chilmark, 174 F.R.D. 225 (D.Mass. 1997).

[47] Dean v. Cunningham, 2006 Mo. LEXIS 8 (Mo. 2006).

Discovery to Forensic MHP

Interrogatories and requests for production[48] to the expert might include:

- Any written evaluations the expert may have prepared;
- The expert's billing and time records;
- The identification of any texts of articles relied upon by the expert in formulating any opinion;
- A listing of articles written by the expert;
- The identification of prior trial or deposition testimony given by the expert;
- The identification of all information and data reviewed by the expert in formulating any opinions; and
- The expert's curriculum vitae.

It is always important to determine if any attorney in your firm has encountered the expert before. If the expert has either been retained by your firm or deposed by a member of your firm on a previous occasion, you should know that fact prior to the expert's deposition. It is of significant assistance to review prior testimony before deposing an expert. If you intend to question the credentials of an expert at trial, it can be embarrassing to learn on redirect that this expert has been retained by your law firm in the past. Once all pertinent information is obtained, it is then helpful to meet with your expert consultant to prepare a strategy for the taking of the expert's deposition.

[48] In some jurisdictions, it may be necessary to issue a subpoena.

Defense Deposition of Plaintiff

Among the topics covered during the deposition of the plaintiff would be the following:

- Education
- Employment history
- Military service
- Childhood medical history
- Pre-injury adult medical history
- Alcohol history
- Drug history
- Post-termination ("workplace trauma") medical history (non-psychiatric)
- Family medical history
- General family information
- Marital history
- Interpersonal history
- Sexual history
- Recreational/Social
- Criminal legal history
- Pre-injury psychological treatment
- Post-injury psychological treatment
- Developmental history
- Current psychological problems
- Life stressors

The Mental Exam[49]

Defense counsel also may have his/her forensic (normally a psychiatrist) conduct a Rule 35 mental examination (ME) and prepare a written report. Rule 35(a) provides, in pertinent part, as follows:

> [w]hen the mental or physical condition (including blood group) *of a party* or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown....

The Supreme Court addressed the requirements of Rule 35 in Schlagenhauf v. Holder[50] as follows:

> Rule 35, therefore, requires discriminating application by the trial judge, who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the Rule's requirements of "in controversy" and "good cause," which requirements...are necessarily related....[These requirements] mean[] ... that the movant must produce sufficient information, by whatever means, so that the district judge can fulfill his function mandated by the Rule.[51]

In Schlagenhauf, the Court stated that the "in controversy" and "good cause" requirements cannot be met by "mere conclusory allegations of the pleadings," nor by "mere relevance to the case."[52] Rather, "the movant must show that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for

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[49] The EEOC defines a medical examination under the ADA as a "procedure or test that seeks information about an individual's physical or mental impairments or health." U.S. Equal Employment Opportunity Commission, "Enforcement Guidance on Disability-Related Inquiries and Medical Examinations under the ADA, July 26, 2000, FEPM 405: 7701, 7705 (Bureau of National Affairs, 2000).

[50] 379 U.S. 104, 118-119, 85 S.Ct. 234, 242-43, 13 L.Ed.2d 152 (1964) (citations omitted).

[51] See also Acosta v. Tenneco Oil Co., 913 F.2d 205, 208 (5th Cir. 1990) (quoting Schlagenhauf); Notes of Advisory Committee, 1970 Amendment (stating that subsequent amendment had no effect on the stress placed on these requirements by Schlagenhauf); Brown v. Ringstad, 142 F.R.D. 461, 463 (S.D.Iowa 1992) (good cause requirement).

[52] Schlagenhauf, supra, 379 U.S. at 118-19, 85 S.Ct. at 242-43.

ordering each particular examination."[53] Courts have also held that Rule 35 invests broad discretion in the trial judge, thus even upon a showing of "in controversy" and "good cause," the judge may still refuse to order the examination.[54] Courts have considered, for example, whether unnecessary health risks[55] or "serious inconvenience"[56] would occur to the plaintiff in the event an examination is ordered,

There are situations where the pleadings alone are sufficient to meet these requirements. A plaintiff in a negligence action who asserts mental or physical injury places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury.

Courts have been known to order a Rule 35 examination when the case involves, in addition to a claim of emotional distress, one or more of the following: "1) a cause of action for intentional or negligent infliction of emotional distress[57]; 2) an allegation of a specific mental or psychiatric injury or disorder; 3) a claim of unusually severe emotional distress; 4) plaintiff's offer of expert testimony to support a claim of emotional distress; and/or 5) plaintiff's concession

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[53] Id.; Ricks v. Abbott Laboratories, 98 F.R.D. 647 (D.Md. 2001) (stating that the burden on the party moving for the Rule 35 examination is "substantial"); EEOC v. Old Western Furniture Corp., 173 F.R.D. 444 (D.C. Tex 1996) (holding the plaintiff did not place her mental condition in controversy by seeking compensation for mental anguish); Bridges v. Eastman Kodak Co., 850 F.Supp. 216, 221 (S.D.N.Y. 1994) (request for order to compel Rule 35 examination denied where plaintiffs did not allege a separate tort for emotional distress, made no allegation of ongoing severe mental injury, and did not claim that they ever suffered from a psychiatric disorder); O'Quinn v. New York Univ. Med. Ctr., 163 F.R.D. 226 (S.D.N.Y. 1995) (denying a motion for an order to compel a Rule 35 examination where the complaint did not contain an independent claim for emotional distress nor an allegation of severe emotional distress); Jackson v. Entergy Operations, 1998 U.S. Dist. LEXIS 752 (E.D. La. 1998) (requirements in the rule that the moving party show "good cause" and that the condition to be examined is "in controversy" . . . are plainly expressed limitations on the use of the rule rather than "a mere formality"); Usher v. Lakewood Eng=g & Mfg. Co., 158 F.R.D. 411, 412 (E.D.Ill. 1994) (opportunity to conduct a mental examination and the methodology used during the course of said examination are two distinct issues; citing Daubert plaintiff=s motion for protective order was granted); Hardy v. ESSROC Materials, 1998 U.S. Dist. LEXIS 2390 (E.D.Pa. 1998) (allegations that plaintiff felt anxious and had trouble sleeping as a result of the alleged discrimination were not so severe as to warrant an order compelling a mental examination); Neal v. Siegel-Robert, Inc., 171 F.R.D. 264 (E.D. Mo. 1996) (plaintiff's motion for a mental examination denied where plaintiff was not complaining of any definable psychological symptoms, but rather suffered from basic complaints that were within the understanding of the jury). *See also*, Bales, Richard A. and Ray, Priscilla, "The Availability of Rule 35 Mental Examinations in Employment Discrimination Cases," 16 Rev. Litig. 1 (Winter 1997).

[54] Coca-Cola Bottling Co. of Puerto Rico v. Negron Torres, 255 F.2d 149 (1st Cir. 1958); Bucher v. Krause, 200 F.2d 576 (7th Cir. 1952), *cert denied*, 345 U.S. 997 (1953); Hardy v. Riuser, 309 F.Supp. 1234 (N.D.Miss. 1970); Neuman v. Neuman, 377 A.2d 393 (1977); Grimm v. Gargis, 303 S.W.2d 43 (Mo. 1957); Martin v. Tindell, 98 So.2d 473 (Fla. 1957).

[55] *See, e.g.,* Stasiak v. Illinois Valley Cmty Hosp., 590 N.E.2d 974 (Ill. Ct. App. 1992); McQuillen v. City of Sioux City, 306 N.W.2d 789, 791 (Iowa 1981).

[56] Duprey v. Wagner, 451 A.2d 416, 419 (N.J. Super. Ct. 1982).

[57] *See*, Lahr v. Fulbright & Jaworski, L.L.P., 164 F.R.D. 204 (N.D. Tex. 1996) (stating that a claim for intentional infliction of emotional distress automatically places the plaintiff's mental condition in controversy).

that his or her mental condition is "in controversy" within the meaning of Rule 35(a)." [58] A plaintiff's mental condition may also be placed "in controversy" by substantial claims for compensatory damages for "serious and ongoing" mental distress.[59]

[58] Turner v. Imperial Stores, 161 F.R.D. 89 (S.D. Cal. 1995).

[59] *See*, Large v. Our Lady of Mercy Medical Ctr., 1998 U.S. Dist. LEXIS 1702 (S.D.N.Y. 1998).

Preparation for a Rule 35 Exam

The ME normally is conducted after a clinical psychologist (who typically is not an M.D.) administers psychological tests. The choice of tests, the choice of examiner, and who should be permitted to be present at the examination should be explored in discovery.[60] Rule 35 examinations may become the norm in these cases, increasing everyone's transactional costs and feeding a cottage industry of forensics. The courts increasingly interpret the "in controversy" requirement of Rule 35 to preclude an examination where the plaintiff has merely pled so-called "garden variety" emotional distress.[61] Additionally, there is an automatic waiver of the psycho-therapist-patient privilege in claims for negligent infliction of mental distress because of the necessity of medical proof.[62] Thus, counsel's focus should be on the conditions that should be placed on the exam. In a proper case, plaintiff would insist that counsel be present, that a psychiatrist engaged by plaintiff be present, and that the examination be tape recorded.[63] Rule 35 is silent on whether a third party may be present at a mental examination. Although the matter is not without controversy,[64] courts have ordered such conditions.[65] In addition, plaintiff should attempt to limit the breadth of questioning permitted at the examination. However, courts seem reluctant to place such limits upon the questioning.[66] Needless to say, defendants' attempt to expand a simple claim of emotional distress would escalate plaintiff's bill to an extraordinary degree.[67] Plaintiff's should routinely contend:

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[60] For a discussion on "initial considerations" in a Rule 35 examination situation, *See* Platt, "Preparing for Trial: What do I Need to Know?," The Employee Advocate (Spring/Summer 2005).

[61] See, e.g., Ruhlmann v. Ulster County Dep't of Social Servs., 194 F.R.D. 445 (N.D.N.Y. 2000) (a "garden variety" claim of emotional distress does not place a plaintiff's mental condition "in controversy") (provides a detailed discussion of the cases on both sides of this issue); O'Sullivan v. State of Minnesota, 176 F.R.D. 325 (D.Minn. 1997); Smith v. J.I. Case Corp., 163 F.R.D. 229 (E.D. Pa. 1995) (court held that a psychiatric examination in "your basic garden variety tort quest for damages, to include pain and suffering" should be the exception not the rule); Turner v. Imperial Stores, 161 F.R.D. 89 (S.D. Cal. 1995); Ali v. Wang Laboratories, Inc., 162 F.R.D. 165 (M.D. Fla. 1995); Curtis v. Express, Inc., 868 F.Supp. 467 (N.D.N.Y. 1994) (the court held that even if good cause for a mental examination was shown, the court, exercising its discretion, could preclude the examination as the plaintiff presented a "garden variety" claim for emotional distress and made no claim of ongoing severe mental injury, and therefore a mental examination was not needed); Bridges v. Eastman Kodak Co., 850 F.Supp. 216 (S.D.N.Y. 1994); Sabree v. United Brotherhood of Carpenters & Joiners of America, 126 F.R.D. 422 (D.Mass 1989); Robinson v. Jacksonville Shipyards, Inc., 118 F.R.D. 525 (N.D. Fla. 1988); Broderick v. Shad, 117 F.R.D. 306 (D.D.C. 1987); Cody v. Marriott Corp., 103 F.R.D. 421 (D.Mass. 1984). *But See*, Jansen v. Packaging Corp. of America, 158 F.R.D. 409 (N.D. Ill. 1994); Smedley v. Capps, Staples, Ward, Hastings & Dodson, 820 F.Supp. 1227 (N.D. Cal. 1993).

[62] Bass v. Nooney, 646 S.W.2d 765 (Mo. Banc 1983).

[63] For a discussion on the presence of third parties at mental examinations, *See, e.g.,* Wyatt and Bales, "The Presence of Third Parties at Rule 35 Examinations," 71 Temple L. Rev. 103 (Spring 1998); Fleming, Thomas, "Right of Party to have Attorney or Physician Present During Physical or Mental Examination at Instance of Opposing Party," 84 A.L.R. 4th 558 (1991).

[64]Generally, the defense will argue that when the litigant's attorney or expert is present during an adversarial examination, the psychological condition of the litigant is exacerbated by the heightened, adversarial atmosphere. In

- Counsel should be present
- The proceedings tape recorded

Baba-Ali v. City of New York, 1995 WL 753904 (S.D.N.Y. 1995), the court noted "Underlying the reasoning of those courts that have rejected requests for the presence of third parties at examinations are the following considerations: 1) the special nature of a psychiatric examination requires direct and unimpeded one-on-one communications, without external interference or intrusion; 2) in contrast to depositions and other forms of discovery, Rule 35 expert examinations are not intended to be adversarial; 3) fairness dictates that if defense counsel cannot be present when a plaintiff is interviewed by a psychiatrist who will testify at the trial on his behalf, then plaintiff's counsel cannot be present when plaintiff is examined by defendants' expert psychiatrist; and 4) any concerns with distortions or inaccuracies by the examining psychiatrist can be addressed through traditional methods of impeachment and cross-examination."

[65] See, e.g., Zabkowicz v. West Bend Co., 585 F.Supp. 635 (E.D. Wis. 1984) (a third party, including counsel or a recording device was permitted to be present during examination); Beasley v. National Rifle Assoc. of America, et al., Civ. Action No. 89-11277 (D.C. Superior Ct., July 19, 1990) (vonKann, J.) (counsel, psychiatrist and tape recorder may be present during examination); Tietjern v. Department of Labor, 13 Wash. App. 86, 534 P.2d 151 (1975) (counsel present during psychiatric examination); Kelley v. Smith & Oby Co., 70 Ohio L. Abs. 202, 129 N.E. 2d 106 (1954) (same) B.D. v. Carley, 704 A.2d 979 (N.J.Super.A.D. 1998) (plaintiff was permitted to employe "unobtrusive" audio recording device during examination); Milam v. Mitchell, 274 N.Y.S.2d. 326 (N.Y. Gen. Term 1966) (stenographer could record examination but had to be stationed outside of the examining room, or in such a position so as not to interfere with conducting the examination). Contra. Tomlin v. Holecek, 150 F.R.D. 628, 630 (D.Minn. 1993) (finding tape recording to be inconsistent with the underlying purposes of Rule 35 examinations; Apsychological examinations necessitate an unimpeded, one-on-one exchange between the doctor and the patient@); Tirado v. Erosa, 158 F.R.D. 294 (S.D. N.Y. 1994) (plaintiff not entitled to have attorney and stenographer present at examination by defendant's psychiatrist); Di Bari v. Incaica Cia Armadora, 126 F.R.D. 12 (E.D.N.Y. 1989) (plaintiff allowed to have court reporter, but not counsel, present during a psychiatric exam); Hirschheimer v. Associated Minerals & Minerals Corp., 1995 U.S. Dist. LEXIS 18378 (S.D.N.Y. Dec. 12, 1995) (outside of special circumstances, plaintiff cannot tape record medical examination with opposing party=s psychologist or have plaintiff=s attorney attend the exam); Abdulwali v. Washington Metro Area Transit Authority, 193 F.R.D. 10 (D.D.C. 2000) (counsel was not permitted to be present during examination because plaintiff failed to show a "compelling need."); Shirsat v. Mutual Pharmaceutical Co., Inc., 169 F.R.D. 68 (E.D. Pa. 1996) (denying plaintiff's request to have an observer present because it would constitute a distraction and diminish the accuracy of the exam); Ragge v. MCA/Universal Studios, 165 F.R.D. 605 (C.D. Cal. 1995) (refusing to require clinical psychologist to disclose specific tests to be administered and denying request for a third party observer); Murray v. Specialty Chemicals Co., 100 Misc. 2d 658, 418 N.Y.S.2d 748 (1979); Whitfield v. Superior Court, 246 Cal. App. 2d 81, 54 Cal. Rptr. 505 (1966); State v. Szatmari, 163 N.J. Super. 418, 394 A.2d 1254 (1978) (examinee's psychiatrist present); Reese v. Batesville Casket Co., Civil Action No. 79-1645 (D.D.C., May 13, 1980) (same).

[66] *See, e.g.,* Ferrell v. Shell Oil Co., 1995 WL 688795 (E.D. La. 1995) (refusing to limit the scope of questioning); Bethel v. Dixie Homecrafters, Inc., 192 F.R.D. 320 (N.D. Ga. 2000) (same); Morton v. Haskell Co., 5 AD Cases 272 (M.D. Fla. 1995) (same); Hertenstein v. Kimberly Home Health Care, Inc., 189 F.R.D. 620 (D. Kan. 1999) (permitting questioning regarding plaintiff's sexual history).

[67] Cf. Chaparro v. IBP, Inc., 1994 U.S. Dist. LEXIS 18438 (D.Kan. 1994) (a party seeking a Rule 35 examination is not permitted to unilaterally impose unnecessary or avoidable expenses upon the party to be examined).

- Plaintiff's expert should be present; if there is no forensic, then argue that the treating or the spouse (to provide emotional support) be present. Physicians are more likely to be permitted to be present at the examination as they are less likely to disrupt the exam. The bottom line goal for plaintiff is to get a deposition-type record of the Rule 35 exam.

The questioning at a Rule 35 examination can be anticipated. There is a vast body of literature on the questions that will be asked. For example, counsel needs to be aware of the manner in which an examination will be conducted to prepare the client for what realistically is an adversarial proceeding. In Jakubowski v. Lengen,[68] the Court recognized that "[a] physician selected by defendant to examine plaintiff is not necessarily a disinterested, impartial medical expert, indifferent to the conflicting interests of the parties."[69] The Court went on to state that "[t]he possible adversary status of the examining doctor for the defense is, under ordinary circumstances, a compelling reason to permit plaintiff's counsel to be present..." and "[t]he presence of plaintiff's attorney at such examination may well be as important as his presence at an oral deposition."[70]

In Robin v. Assoc. Indemnity Co.,[71] the Court readily recognized the "partisan nature" of an examination by a physician selected by an adverse party.[72] In Jansen v. Packaging Corp. of America,[73] Judge Shadur dealt with the "great dangers of intrusiveness" and the need to "provide a level playing field" and appointed an independent expert.[74] While many lament this reality, the Court must premise its decision upon it. AUnder present procedure, where the medical testimony comes from no objective or necessarily qualified source, and only through the hirelings of the parties, partisan experts, medical mouthpieces, the jury is more apt to be confused than enlightened by what it hears. It hears black from one expert, white from the other, a maximizing or minimizing of injuries in accordance with the interest of the source of payment for the testimony."[75] The Advisory Committee on the Federal Rules of Evidence has noted the

[68] 86 A.D. 2d 398, 450 N.Y.S. 2d 612 (1982).

[69] 614 N.Y.S. 2d at 614.

[70] Id.

[71] 297 So.2d 427, 430 (La. 1973).

[72] 297 So.2d at 430. See also Di Bari.

[73] 158 F.R.D. 409 (N.D. Ill. 1994).

[74] See also Durst v. Superior Court, 222 Cal. App. 2d 447, 35 Cal. Rptr. 143, 7 A.L.R. 3d 9874, 877-78 (1963), where the Court recognized that an examination, under the California statute comparable to Rule 35, "might be considered an adversary proceeding."

[75] Hon. D. Peck, Impartial Medical Testimony, 22 F.R.D. 21, 22 (1958). See also Hon. F. VanDusen, A United States District Judge's View of the Impartial Medical Expert System, 32 F.R.D. 498, 500 (1962) (Experience shows that opposing parties still search until they find experts whose testimony supports their positions).

"practice of shopping for experts."[76] "An attorney will use great care in choosing his expert and in preparing for trial. He will not necessarily seek the expert who is most qualified. Instead, he will probably choose the expert who will best support his client's cause, and, perhaps, conceal its weaknesses."[77]

Among the areas discussed during a mental examination are:

- History of the problem
- Patient's statement of the problem
- Background, social history
- Previous treatment, including hospitalizations and medications
- Correct social situation
- Mental status
- General appearance
    - attitude towards examiner
    - mood

Situs of Mental Examination

It is advantageous for plaintiff to hold the mental examination in the defendant's forensic office. The theory behind this premise is that plaintiff's counsel is likely to learn something about the forensic's soft underbelly by getting into his/her lair for a couple of hours. In sum, you are there to protect your client, but also to size up the other side's forensic and his environment.

Rule 35 and Vocational Assessment

In Storms v. Lowe=s Home Centers, Inc.[78], the court declined to permit a Rule 35 examination of plaintiff for the purposes of a vocational assessment. Several courts have found that vocational examinations may be ordered under Rule 35.[79] The Storms court declined to do

[76] Advisory Committee's Notes on Rule 706, Fed. R. Evid., 28 USCA at 517.

[77] Kraft, "Using Experts in Civil Cases" at 57 (PLI 1977).

[78] 211 F.R.D. 296 (W.D. Va. 2002)

[79] See, e.g., Fischer v. Coastal Towing Incorporated, 168 F.R.D. 199 (E.D.Tex. 1996) (finding that a vocational rehabilitation expert is a Asuitably licensed or certified examiner@ under Rule 35, but failing to address whether a

so, on the ground that such an assessment was not connected with any physical or mental examination. The court also found that Agood cause@ had not been shown as the information was available by other means.

Additional Considerations for the Rule 35 Exam

- A time limit may be placed on the examination.[80]
- A plaintiff's out-of-pocket expenses can generally be reimbursed.[81]
- The choice of examiner may be challenged.[82]
- The court may intervene as to the scope of discovery, if no agreement can be reached between the parties.[83]
- The Rule 35 examination may include the administration of psychological tests, typically by a clinical psychologist and a party can insist that any tests to be administered be specified in the order directing the examination.[84]

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vocation exam is a Aphysical or mental examination@); Olcott v. LaFiandra, 793 F.Supp. 487 (D.Vt. 1992)(finding that a vocational rehabilitation expert is a Asuitably licensed or certified examiner@ after evaluating the expert=s credentials, but also specifically finding that expert qualified to render a Aphysical examination@); Jefferys v. LRP Publicaions, Inc., 184 F.R.D. 262 (E.D. Pa. 1999)(finding that a vocational rehabilitation counselor is a Asuitably licensed or certified examiner@ and finding without explanation that a pure vocational evaluation is a Aphysical or mental examination@ within the spirit and letter of the rule as currently written).

[80] See, e.g., Barnes v. American Tobacco, Co., 1997 US Dist Lexis 10550 (E.D. Pa. 1997) (limiting psychiatric examination to three hours); Jackson v. Entergy Operations, 1998 U.S. Dist. Lexis 752 (E.D. La. 1998) (limiting psychiatric examination to four hours); Henry v. City of Tallahassee, 2000 U.S. Dist. Lexis 20469 (N.D. Fla. 2000) (limiting examination to 3 hours absent good cause for a longer interview); Hertenstein v. Kimberly Home Health Care Inc., 189 F.R.D. 620 (D. Kan. 1999) (examination limited to two hours). *But see,* Greenhorn v. Marriott Int'l, Inc., 216 F.R.D. 649 (D. Kan. 2003) (declining to limit examination to two hours).

[81] See e.g., Lemon v. Klibert, 1998 U.S. Dist. Lexis 18174 (E.D. La 1998); Duncan v. UpJohn Co., 155 F.R.D. 23 (D. Conn. 1994) (defendant directed to reimburse plaintiff=s necessary expenses and to provide limousine transportation and to furnish meals); Ewing v. Ayres Corp.,. 129 F.R.D. 137 (N.D. Miss. 1989) (defendant to reimburse reasonable transportation costs and other incidental expenses).

[82] See e.g., Duncan v. UpJohn Co., 155 F.R.D. 23 (D. Conn. 1994); Powell v. U.S., 149 F.R.D. 122 (E.D. Va. 1993). See also, Looney v. National R.R. Corp., 142 F.R.D. 264 (D.Mass. 1992) (questions of bias regarding defendant=s expert left for exploration at trial, not in disqualifying expert from Rule 35 exam).

[83] See Sullivan v. Helene Curtis, Inc., 135 F.R.D.166 (N.D.Ill. 1991) (limits on employment-related counseling records, although not confidential; after court in camera review irrelevant portions orders redacted).

[84] *See e.g.*, Hirschheimer v. Associated Metals & Minerals Corp., 1995 U.S. Dist. Lexis 18378 (S.D.N.Y. 1995) (tests to be given must be identified).

- The court may, however, determine whether psychological testing is appropriate and, if so, may question the choice of tests made by the defense.[85]

Resistance to Discovery of Treating MHP

In most jurisdictions, the patient's communications with a psychotherapist are privileged. While the privilege is generally waived when a patient-litigant puts his or her mental condition at issue in a lawsuit, what constitutes "putting a mental condition at issue" varies from state to state. In some states, waiver of the privilege occurs when the mental condition of a patient-litigant is the basis for a claim.[86] Other cases have held that waiver of the privilege does not occur until the psychotherapist is called to testify at trial.[87]

Plaintiff's Discovery to Defendant

After a mental examination, and if requested by counsel for the examinee, counsel is entitled to a copy of the report. Also, the defense under rule 26 will have to reveal the qualifying information about the forensic if he/she is going to serve as an expert in the case, as well as submit him/her to deposition. In such cases, the report must include all opinions and everything considered by the expert in arriving at his/her opinion. Presumably, cases like Dominquez v. Syntex Laboratories, Inc.,[88] are a thing of the past.

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[85] See, e.g., Usher v. Lakewood Eng. & Mfg. Co., 158 F.R.D. 411 (N.D.Ill. 1994) (denying request for psychological testing). See Mark E. Weinstein, ARights of Plaintiff When an Independent Medical Examination is Ordered,@ Vol. X, Employment Law Strategist 1 (Oct. 2002).

[86] Clark v. District Court, 668 P.2d 3, 10 (Colo. 1983); Soybel v. Gruber, 132 Misc. 2d 343, 345-46, 504 N.Y.S.2d 354, 356 (1986); Cal. Evid. Code ' 1016(a) (West 1966); Ill. Ann. Stat. Ch. 912, & 810(1) (Smith-Hurd 1987); Or. Rev. Stat. Ann. ' 40.230(4)(b) (1985); Tex. R. Civ. Evid. ' 510(d)(5), see Annotation, Privilege, in Judicial or Quasi-Judicial Proceedings, Arising From Relationship Between Psychiatrist or Psychologist and Patient, 44 A.L.R.3d 24, 50-52 (1972 & Supp. 1987).

[87] E.g., Fields v. State, 221 Ga. 307, 308-09, 144 S.E.2d 339, 342 (1965); Eberle v. Savon Food Stores, Inc., 30 Mich. App. 496, 500, 186 N.W.2d 837, 839 (1971).

[88] 149 F.R.D. 158 (D. Ind., February 12, 1993) (although the testifying expert read the information prepared by the non-testifying expert, the testifying expert never considered it).

Deposition of Forensic

There is an abundance of material available on the subject.[89] The tips that pertain to depositions of experts in general apply in the case of mental health practitioners. In other words, adhere to the following rules if you are taking the depositions:

- Allow the expert to speak at length; you learn more through his/her words than yours;
- Do not cross-examine the witness; that educates him/her for trial and may encourage the selection of another expert;
- Ask the witness to produce all reports and drafts and if they have been destroyed (to test the witness's preliminary thinking) find out when and on whose instructions;
- Find out if anyone assisted the expert to test his or her feel for underlying data;
- Obtain a copy of the expert's retainer; and

[89] See, e.g., The Defense Deposition Atlas by Peter B. Silvain (The Med/Psych Press Inc.).

- Ask who the expert regards as expert in the field.[90]

And the following if you are defending:

- The expert deposition is too late to prepare or defend your case; instead the deposition should be viewed as damage control, designed not to score points, but to prevent points being scored;

- Try to have your expert work on computer since that is harder to produce than documents;

- Assume any documents sent to your expert may be discoverable;

- Assume your expert may not receive the benefit of any testimonial privileges;

- Insure your expert's opinions are final before testifying, otherwise they may be precluded later as unformed, or the deposition might be adjourned until they are formed;

- If an opinion is not formed before the deposition, then witness preparation may be discoverable;

- Protect the expert's credibility by giving up honest points even if adverse, in order to enhance credibility; and

[90] Daniel Beller, "On Taking the Expert's Deposition" (unpublished).

- Object to questions early on so that points you truly care about are not your first objection.[91]

Common Defense Lines of Attack

Among the areas for examination at deposition should be the following:

- Qualifications
  - Educational background and all degree(s) obtained
  - Membership in any professional societies
  - Employment history and experience including faculty appointments, teaching experience (graduate v. undergraduate) and research
  - Nature of practice, type and mix of patients
  - Publications authored
  - Previous experience as an expert
    - Number of times retained by plaintiff's counsel in past
    - Number of times retained by plaintiffs
    - Number of times retained by defendants (identify defense counsel)
    - Number of times testified via deposition (obtain names of cases, counsel, etc.)
    - Number of times testified at trial (obtain names of cases, counsel, etc.)
    - Percentage of time devoted to being an expert

[91] Gandolfo V. DiLasi, "On Defending the Expert Deposition" (unpublished).

- Previous experience as an expert in cases identical to the pending matter (i.e., sex harassment, breach of contract, etc.)

- Fees

    - Hourly basis of fee (testifying v. review)

    - Fee to date in present case (ask to see billing records)

    - Obtain retainer letter, if any, and determine if fee is dependent upon outcome

    - Percentage of annual income derived from legal consultation

- Identification of Expert's Mission

    - Ask the expert to articulate his "mission" (always obtain a copy of the expert's entire file, including any correspondence to and from plaintiff's counsel)

    - Determine if the mission has been completed and, if so, when

    - Ask for a clear statement of all opinions he has formulated in completing his mission

    - Specifically have the expert identify all information he relied upon in completing the mission. Determine if the expert relied upon the following:

        - Depositions;

        - Answers to Interrogatories or other discovery;

        - Interviews of plaintiff or any family members;

        - Psychological testing of the plaintiff;

        - Information related to plaintiff's counsel either in writing or orally

- Determine if the expert has requested any information which has not been provided or if additional information would have been desirable in the completion of his mission.

The defense may challenge the diagnosis on the basis of the following:

- pre-existing clinical mental disorder;
- pre-existing personality disorder;
- pre-existing medical illness;
- other life stressors; and
- malingering.

On malingering, counsel needs to be aware of patterns on the objective tests that one looks for to detect malingering. Also, counsel should be aware of the clinical criteria for malingering according to DSM IV. There is excellent defense literature on malingering issues.[92] Clinical psychologists, for example, maintain that a so-called wide scatter on the WAIS-R scores on the F minus K scales of MMPI indicate malingering.

The defense should consider whether a "non-invasive" investigative service is appropriate. Oftentimes, the tried and true private investigator is worth his/her weight in gold. Juries love day-time television, and private investigator videotapes can be devastating to a malingerer. There obviously are litigation rights (e.g. privacy clauses and potentially a jury's adverse reaction) to assess before engaging a private investigator.

In anticipation of a "other life stressors" defense, review the Traumatic Event and Social Stressor Checklists. Be prepared for the Holmes-Rake Social Readjustment Rating Scale which ranks and gives a numerical value to the 25 most stressful life events (#1 is death of spouse (100 points), and the 8th is being fired from your job (47 points)).

Oftentimes, the defense will argue that plaintiff's anxiety and depression are transient side-effects of medication. Certain frequently prescribed medications have been reported to cause anxiety (e.g., Elavil) and/or depression (e.g., Demerol). Counsel for plaintiff should consider this, if possible, at intake.

Where to Find Records

Plaintiff and his/her counsel may not have, by any stretch of the imagination, all of the

[92] See, e.g., Tancredi, "Malingering: A Psychiatric Dilemma," (Insurance/ Defense Review, Fall 1992); King, "Malingering: Detection by Clinical Observation and Psychological Tests," (Insurance/Defense Review, Fall 1992); Smith, "Faking Believable Defects on Neuropsychological Testing," (Insurance/Defense Review, Fall 1992); Price, "Case Review: Malingering," (Insurance/Defense Review, Fall 1992); Resnick, "The Detection of Malingered Mental Illness," (1984).

records relevant to the issue of mental anguish. The defense should be aware that there are many other places to get relevant records, including former employers, the military, as well as doctors, hospitals, and clinics. The defense needs to get appropriate releases from the plaintiff as early as possible and, where met with resistance, get court orders or a motion to compel directing the plaintiff to sign an appropriate form of release when the plaintiff has placed his/her mental condition in controversy.

Trial Presentation

If you use an expert, the individual ought to be on direct for a maximum of 30 minutes. The principal reasons the expert is there is to validate common sense and to create a record where court evidentiary rulings dictate that an expert testify. Here are some additional suggestions:

- The expert must talk in real talk on direct. Save the psycho-babble for academia.
- Deflate the "whiner" defense by putting the evidence on through others, not the plaintiff.
- Deflate the other stressor defense by testimony on the separateness of the two and the relative magnitude of the job stress as opposed to the other.
- Use lay witnesses to paint the plaintiff's case on mental anguish.
- Train witness to end with strong sound bites on cross examination.
- Forensic witness should be engagingly aggressive on cross, should avoid psycho-babble, speak in plain English, and use sound bites to emphasize plaintiff's themes.
- Consider sending plaintiff out of the courtroom during the testimony of the mental health practitioner or during the spouse's testimony on mental anguish.
- Never refer to the other side's expert as the Independent Medical Examiner (IME). Rather, challenge any suggestion he/she is independent by, for example, asking: Are you independent? Did the Judge appoint you? Did the defense lawyer hire you? Doesn't that make you the defense medical expert?

Defense Attacks on Expert

After Daubert, the defense will more carefully review the qualifications of the putative expert and the reliability of the opinions of the so-called expert the proponent wishes to put into

evidence. Given the new federal civil rules which require experts to disclose much more information on their opinions and their background, the defense will have more information at its disposal to plan an attack.

Substantive Attacks[93]

Over and above Daubert thrusts and parries, the defense will pursue some of the time-honored avenues of attack on such testing used in personal injury litigation. Among the lines of attack are:

- Subjectivity and bias
- Susceptibility to malingerers
- Reliance upon patient's history
- Conflicting scientific literature
- Attack on credentials
- Relationship with plaintiff or counsel
- Failure to conduct psychological testing
- Failure to obtain an adequate history of the patient
- Failure to use the accepted diagnostic system
- Failure to consider other, non-proximately caused stressors
- Failure to supervise the plaintiff's medications
- Failure to rule out the transient side-effects of the plaintiff's medications
- Failure to report the plaintiff's life-long personality disorders

[93] "Challenging the Plaintiff's Diagnosis of Psychological Injury," The Personal Injury Law Defense Bulletin (No. 6, May 1989).

- Inadequate symptoms for the diagnosis of a proximately caused mental illness
- Failure to obtain the plaintiff's past medical records
- Failure to communicate with other treating specialist
- Bias in reporting because of: 1) economic considerations [e.g., the plaintiff owes the doctor money]; 2) the therapist-patient alliance
- Failure to conduct an adequate differential diagnosis and rule out other mental or physical illnesses that are causing the plaintiff's symptoms.
- Failure to rule out malingerer
- Failure to conduct an adequate treatment protocol and allowing the patient to come in on a periodic basis for litigation file building purposes.

Tips to Reduce Costs

Everyone is striving to reduce transactional costs. Thus, counsel's interface with the mental health issues must be focused and cost effective. At the outset establish deadlines to obtain records. If you are prepared,

- The amount of material that can be obtained within the shortened time periods of the new civil rules can be awesome.
- Counsel must be able to obtain, extract, and utilize such evidence expeditiously and on a much more cost effective basis than heretofore clients have tolerated.
- Training paraprofessionals is one key to success on this score.
- Certainly, familiarizing yourself with the vast literature in the field will help to reduce your client's transactional costs. See short bibliography of representative readings in the field attached hereto as Attachment B.

Conclusion

While one needs to approach mental anguish with trepidation, adequate preparation can be of immense value not only on damages, but also on liability. Jurors' attitudes about damages can spill over and color their judgment about liability. I hope this article helps the reader to better prepare to deal with mental health issues in workplace cases.

Good luck.

ATTACHMENT A

PSYCHOLOGICAL TERMS DEFINED

Adjustment Disorder - maladaptive reactions to one or more identifiable psychosocial stressors; they occur within three months after onset of a stressor, and persist for no longer than six months.

Affective Disorder - a disorder of mood, usually resulting in depression, but sometimes in mania; three groups of affective disorders appear in DSM-III: major affective disorder, other specific affective disorders; and atypical affective disorders.

Antisocial – not social and can be hostile and disruptive.

Attention Deficit Disorder - the adult with ADD is a mass of unfinished tasks, broken promises, and unfulfilled potential, subject to uncontrollable temper outbursts, fidgeting, resistance to being touched, and a tendency toward drug and alcohol abuse or other compulsive behavior. Behavior both creates and expresses a deep frustration and confusion, and a fearful sense of not being in control of his life.

Borderline – a person affected by this disorder may act sexually inappropriate or seductively, and if rejected may claim harassment.

Clinical Psychologist - individual has a doctoral degree in psychology, the science of mental processes and behavior.

Clinical Social Worker - individual has a master's or doctoral degree in social work, and special training to practice psychotherapy.

Dependent – a dependent individual in the workplace will endure abuse and fail to report harassment and discrimination.

Functional Overlay - complaints are partly psychosomatic or have a psychological genesis. Unlike malingerers, the plaintiff with functional overlay is honest and sincere in stating his or her complaints; it is simply that the causes are not totally organic. The injuries are just as disabling, whether organic or psychosomatic in origin.

Histrionic – excitable, flirtatious; may dress provocatively; may complain of harassment if flirtatious advances are rejected

Holistic Counselor - practitioner who maintains the view that an organic or integrated whole has a reality independent of and greater than the sum of its parts

Learning Disability - disorder in one or more of the basic processes involved in using spoken or written language in the presence of normal or above-average intelligence (Supervising Adults with Learning Disabilities, p. 1); identifiable and delimited problems with reading, arithmetic, language, or combinations of these which are usually diagnosed by psychological testing

Malingering - plaintiff is consciously deceptive: the plaintiff lies. This is different from secondary gain, where the mechanics are unconscious. The malingering soldier would consciously fabricate an injury or lie about a condition in order to be removed from the front lines. The malingerer knows that 2 + 2 = 4, but swears that the answer is 5. The malingerer is a faker.

Mood Disorders - include elevated mood (mania) as well as depressed mood (depression), or a combination of both (bipolar disorder or cyclothymic disorder, if not as severe).

Narcissistic – self-centered, imperious; may react with rage or violence to career changes.

Neuroses - describes conditions involving an emotional disturbance arising from an inability to cope with anxieties and conflicts; it is characterized by the exaggerated, pathological use of avoidance behavior and defense mechanisms. The feelings and manifestations of anxiety or the method of adaptation (defenses) to it constitute the symptoms of neurosis. A client with a neurotic condition is generally capable of functioning, but usually feels guilt, shame, and inadequacy; he or she knows 2 + 2 = 4, but is terribly worried about it.

Obsessive Compulsive – perfectionists; may not interact well with peers or subordinates.

Paranoid – may see malevolence in innocuous actions; likely to spread rumors.

Personality Disorder - Mental disorder characterized by maladaptive patterns of adjustment to life. There is no subjective anxiety, as seen in neurosis, and no disturbance in the capacity to recognize reality, as seen in psychosis. The types of personality disorders include passive-aggressive, antisocial, schizoid, hysterical, paranoid, cyclothymic, explosive, obsessive-compulsive, asthenic, and inadequate.

Post Traumatic Stress Disorder - an anxiety disorder following a psychologically distressing event (such as a serious threat to one's life or destruction of one's home), with symptoms such as experiencing the traumatic event, avoidance of associated stimuli, or increased arousal.

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Primary Gain - people achieve primary gain by developing physical symptoms to block

awareness of internal conflicts or needs. Example: blindness may develop to avoid acknowledging the witnessing of a traumatic event.

Psychiatrists - an M.D. who specializes in the medical study, diagnosis, treatment and prevention of mental illness.

Psychoanalyst - individual has advanced training in the analytic technique originated by Sigmund Freud that uses free association, dream interpretation, and analysis of resistance and transference to examine mental processes.

Psychoses - the loss of contact with reality accompanied by personality disintegration (Psychiatric and Psychological Evidence, p. 30); the dysfunctional stage beyond neurosis. The psychotic who is symptomatic cannot function and is removed from reality. You may not meet the psychotic in your office as a prospective client. The first interview could be in jail or in the hospital. One with a psychosis knows that 2 + 2 = 5.

Psychologist - one who studies or is versed in psychology.

Psychotherapy - the application of various forms of mental treatment, as hypnosis, suggestion, psychoanalysis, etc. to nervous and mental disorders.

Organic Personality Syndrome - characterized by changes in personality as a result of toxic or traumatic injury to the brain.

Secondary Gain - people achieve secondary gain by developing physical symptoms to control their environment. Secondary gains are the tangible, but unconscious, benefits that people realize from being sick. For example, an individual may develop paralysis to avoid returning from a work injury to a detested job. These are the psychological benefits (fulfilled needs and rewards) that the plaintiff gains from his or her neurosis. The benefit may be money or other compensation, peer and familial attention, sympathy, or social allowance for or removal from stressful situations; an unconscious symptom-fixing mechanism which helps maintain the primary gain symptoms or condition because of the rewards or "gains" which the symptoms afford. The plaintiff is not consciously aware of his or her true motivations when secondary gain mechanisms are present.

Social Worker, Psychiatric - a skilled professional, trained in social work, who works with psychiatrists, usually in an institutional setting. The social worker evaluates family,

environmental, and social factors in the patient's illness, may work in intake and reception with new patients, and may follow up and counsel after discharge. All of the aforementioned are

incorporated in the technique of case work. Psychiatric social workers also carry out individual, family, and group psychotherapy as well as participate in community organizations.

Stressor - a stimulus that affects a patient's ability to respond; frequently plays a precipitating role in a disorder, it may also be a consequence of the person's psychopathology - e.g., alcohol dependence may lead to marital problems and divorce, which then become stressors contributing to the development of a Major Depressive Episode.

Thought Process Disorders - a symptom of schizophrenia that involves the intellectual functions. It is manifested by irrelevance and incoherence of the patient's verbal productions. It ranges from simple blocking and mild circumstantiality to total loosening of associations, as in word salad.

ATTACHMENT B

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