

**HOW LAWYERS CAN PROMOTE RESPONSIBLE USE
OF MEDICAL EXPERTS IN *AMERICANS WITH DISABILITIES ACT*
LITIGATION**

by

**ROBERT B. FITZPATRICK, ESQ.
ROBERT B. FITZPATRICK, PLLC**

Suite 660

Universal Building North

1875 Connecticut Avenue, N.W.

Washington, D.C. 20009-5728

(202) 588-5300 (telephone)

(202) 588-5023 (fax)

Fitzpatrick.law@verizon.net (e-mail)

<http://www.robertbfitzpatrick.com> (website)

TABLE OF CONTENTS

	<u>Page</u>
Introduction.....	1
Physical and Mental Disabilities Under the ADA	2
The Civil Rules	5
“Daubert” Considerations.....	6
Retaining A Testimonial Expert	7
The Expert’s Report	9
Special Considerations in Mental Disability Cases	9
Diagnostic and Statistical Manual	9
Case Law.....	9
Learning Disabilities	13
Physical/Mental Condition in Issue	13
Warn the Client of the Consequences	13
The Rule 35 Exam	13
Preparation for Rule 35 Exam	14
Appropriate Level of Workup - Psychological Testing	16
Medical Releases	17
Records to Gather	19
Extracting Records	20
Defendant’s Discovery to Plaintiff	21
Releases	21
Interrogatories	21
Document Requests	22

TABLE OF CONTENTS (CONTINUED)

	<u>Page</u>
Treating Mental Health Practitioners.....	23
Discovery to Forensic Experts.....	24
Plaintiff's Discovery to Defendant	24
Deposition of Forensic	25
Common Defense Lines of Attack	25
Where to Find Records	27
Trial Presentation	28
Defense Attacks on Expert	28
Substantive Attacks	28
Conclusion	29
Postscript	31

**HOW LAWYERS CAN PROMOTE RESPONSIBLE USE
OF MEDICAL EXPERTS IN AMERICANS WITH DISABILITIES ACT
LITIGATION**

by

ROBERT B. FITZPATRICK, ESQ.
ROBERT B. FITZPATRICK, PPLC
Suite 660

Universal Building North
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009-5728
(202) 588-5300 (telephone)
(202) 588-5023 (fax)

fitzpatrick.law@verizon.net (e-mail)
<http://www.robertbfitzpatrick.com> (website)

INTRODUCTION

Prior to the passage of the Americans with Disabilities Act (“ADA”) in 1990, the use of medical expert testimony was already prevalent in employment litigation, particularly to support plaintiffs’ claims of emotional distress resulting from employment discrimination. *See, e.g., Kientzy v. McDonnell Douglas*, 990 F.2d 1051 (8th Cir. 1993) (\$125,000 in mental anguish damages awarded); *Lilley v. BTM Corp.*, 958 F.2d 746 (6th Cir. 1992) (\$350,000 in emotional distress damages awarded); and *Moody v. Pepsi-Cola Metro. Bottling Co.*, 915 F.2d 201 (6th Cir. 1990) (emotional distress damages of \$150,000 awarded).

Under the ADA, the role of the medical expert is significantly broader. Expert testimony may now be needed, not only to assist the jury in assessing any claimed emotional distress arising from a disputed employment action,¹ but also in assessing the claimed physical and/or mental disability of the plaintiff. It is also noted that more and more claims being filed under the ADA are predicated on alleged mental disabilities, ranging from learning disability (LD) cases to emotional disturbances (e.g. PTSD) that plaintiffs assert are covered disabilities. *See* Smith, “Understanding

¹The 1991 Civil Rights Act permits plaintiffs to seek so-called hedonic damages in addition to emotional distress. Hedonic damages include the loss of enjoyment of life, the loss of the ability to participate in enjoyable daily tasks, and the loss of other pleasurable things that are lacking as a result of the defendant’s alleged illegal conduct. *See, e.g. Sherrod v. Berry*, 629 F. Supp. 159 (N.D.Ill. 1985), *aff’d*, 827 F.2d. 195 (7th Cir. 1987).

How to Apply the DSM-IV to a Case under the ADA,” 17 The Labor Lawyer 449 (2002). These developments, and specifically the responsible use of medical experts in the context of ADA litigation, is the focus of this paper.

PHYSICAL AND MENTAL DISABILITIES UNDER THE ADA

The ADA defines a “disability” as a “physical or mental impairment that substantially limits one or more of the major life activities of such individual,” as well as being “regarded as” having such an impairment, or “having a record of” such an impairment. 42 U.S.C. §§ 12102(2)(A), (B) and (C). The existence of an “impairment” is generally not contested in most ADA litigation. Rather, what is contested is whether the impairment rises to the level of a “disability.” That is, whether it substantially limits the plaintiff in one or more major life activities.

According to the EEOC’s interpretive regulations, “major life activities” include such things as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, sitting, standing, lifting, reaching, breathing, learning and working. 29 C.F.R. § 1630.2(i). Also, in the case of the major life activity of “working,”² the impairment must substantially limit the plaintiff’s ability to perform either a class of jobs or a broad range of jobs in various classes. 29 C.F.R. §1630.2(j).

Of course, the case law is ever refining the definition of “major life activities.” For example, in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), the Supreme Court held that major life activities are activities that “are of central importance to most people’s daily lives.” In addition, the impairment’s impact must be “permanent or long-term.”

It is easy to see how critical the medical expert’s testimony is in the context of ADA litigation. Not only is it crucial to assist the jury in assessing the *existence* of a claimed physical/mental impairment, but also its anticipated duration and the impact it has, or may be expected to have, on one or more of the major life activities of the plaintiff. Also of crucial importance is the expert’s testimony on the issues of reasonable accommodation and direct threat (if that is an issue in a particular case).

² It should be noted that the U.S. Supreme Court has questioned whether “working” should even be considered a major life activity. In Sutton v. United Air Lines, Inc., 527 U.S. 471, 119 S.Ct. 2139, 2151 (1999), the Court said: “We note, however, that there may be some conceptual difficulty in defining ‘major life activities’ to include work, for it seems ‘to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you’re asking is, whether the exclusion itself is by reason of handicap.”

As noted above, the ADA's definition of a disability also includes "mental impairments" that substantially limit one or more major life activities, as well as being regarded as having such an impairment and/or having a record of such an impairment. 42 U.S.C. §12102(2); 29 C.F.R. §1630.2(g). With that in mind, the Equal Employment Opportunity Commission ("EEOC"), on March 25, 1997, issued its *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, EEOC Notice, No. 915.002 (March 25, 1997), available at <http://www.eeoc.gov/docs/psych.html>.³ According to the *Guidance*, emotional or mental illnesses which may constitute ADA-covered disabilities include: major depression, bipolar disorder, anxiety disorders (including panic disorder, obsessive compulsive disorder and post-traumatic stress disorder), schizophrenia, and personality disorders. According to EEOC, most mental disorders recognized by the American Psychiatric Association's latest edition of the *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-IV") may qualify as ADA-covered disabilities.⁴ Here, too, expert testimony is critical in assessing claims of alleged mental disabilities.

According to the EEOC's *Guidance*, mental impairments may substantially restrict major life activities such as learning, thinking, concentrating, interacting with others, caring for oneself, speaking, performing manual tasks, sleeping and working. *Guidance* at p. 5. Interestingly, however, the *Guidance* specifically states that "[e]xpert testimony about substantial limitation is not necessarily required." *Guidance* at p. 6. Courts may or may not agree with this opinion, however. Accordingly, counsel will be well advised to seriously consider the pros and cons of having an expert offer an opinion on this issue.

³ According to EEOC statistics, between July 26, 1992 and September 30, 1996, approximately 12.7% of all charges filed with the agency alleged some form of discriminatory or retaliatory conduct based on the claimant's alleged emotional or psychiatric impairment. These included charges based on anxiety disorders, depression, bipolar disorder (manic depression) and schizophrenia. *Guidance* at p. 1.

⁴ Of course, both the ADA and interpretive regulations specifically **exclude** the following conditions from the ADA's coverage: various sexual behavior disorders, compulsive gambling, kleptomania, pyromania and psychoactive substance abuse disorders resulting from current illegal use of drugs. 42 U.S.C. §12211(b), 29 C.F.R. §1630.3(d).

THE CIVIL RULES

Prior to December 1, 1993, testimonial experts in some jurisdictions did not have to submit a written report. One advantage of no written report was obvious: the absence of a written report denied a fixed target to the other side to shoot at. In addition, the old Federal Rule of Civil Procedure 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 therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for 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 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.⁵

⁵ Rule 26(a)(2)(C) states that disclosure shall be made as by the court, but, in the absence of a specific directive to the contrary, the disclosures shall be made at least 90 days prior to trial.

“DAUBERT” CONSIDERATIONS

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), 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. Frye v. United States, 54 U.S. App. D.C. 46, 293 F. 1013, 1014 (D.C. Cir. 1923). 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.

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.

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 scientific opinions. Among the criteria specifically 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 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.

Six years after Daubert was decided, the Supreme Court again revisited the issue of expert witness testimony in Kumho Tire Company, LTD v. Carmichael, 526 U.S. 137 (1999). In that case, the Court extended Daubert's "gatekeeping" obligation, not only to scientific testimony, but to all expert testimony.

RETAINING A TESTIMONIAL EXPERT

What are you as counsel looking for in an expert witness? Obviously, in the ADA context, you want to be sure that the expert is well acquainted with the statute, its interpretive regulations, and any significant case law. He/she should also be comfortable with, *and use*, ADA "buzz words," such as "major life activities," "substantially limited," "reasonable accommodation," and "direct threat."

It goes without saying that an expert must be qualified and not have any embarrassing "skeletons" in his/her closet. In light of Daubert and Kumho Tire, practitioners can anticipate an increase in motions in limine to exclude experts.

Some information practitioners may wish to solicit from potential testimonial experts are the following:

- A list of lawyers with whom the expert has worked in the recent past, especially in cases where the same alleged impairment/disability was at issue;
- Information concerning the experience of other attorneys in your firm with the expert;
- General employment law experience, as well as experience in ADA cases;
- Does the individual have significant testimonial experience before juries?

- A listing and copies of all writings authored by the individual during the past 10 years (as required by Fed. R. Civ. Pro. 26(a)(2)(b));
- Is the expert's testimony confined to one side -- that is, plaintiff only or defense only? You may find that an expert who has testified on behalf of both plaintiffs and defendants has more credibility with juries, as they do not appear to be biased in favor of a particular side.
- That having been said, if the expert does testify for both sides, is there a positional conflict that can be found in past reports and testimony?
- Copies of all depositions transcribed in cases during at least the past four years, as required by Fed. R. Civ. Pro. 26(a)(2)(b);
- A list of all depositions that have not been transcribed with the identity of the attorney and, if known, the court reporter;
- Trial testimony from the last four years, especially in ADA cases, and the names of the lawyers on both sides;
- The expert's case load, office staffing and rates/fees;
- The expert's reliance upon computer programs to generate reports -- be careful to avoid "cookie cutter" reports from an expert. You will want to emphasize that the report he/she provides to you must be customized to the peculiar facts and circumstances of your case;
- Does the expert do forensic work only or is he/she a treating physician also?
- Does the expert have an academic orientation? Some academics can be deadly in front of juries if they are pedantic;
- Can the expert speak in "plain English" and convey complicated medical concepts in such a way that juries can readily understand?
- Has the expert been sanctioned by his or her profession for ethical violations or has his/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, e-mail, fax, etc.? and
- What does the expert consider to be the industry standard as the basis for his/her opinion and what will it cost to get an opinion that adheres to industry standard?

Also, if the claimed major life activity is "working," counsel may wish to consider retaining a vocational rehabilitation expert, as well. Such an expert can give his/her opinion on (a) the types and classes of jobs that the plaintiff is capable of performing (or with training would be capable of performing) from a recognized vocational standpoint; (b) the number and types of jobs within those classes in the geographical areas contiguous to where the plaintiff resides; and (c) a general range of wage rates for the jobs identified by the expert.⁶

⁶In Storms v. Lowe's Home Centers, Inc., 211 F.R.D. 296 (W.D. Va. 2002), 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. 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 "suitably licensed or certified examiner" under Rule 35, but failing to address whether a vocation exam is a "physical or mental examination"); Olcott v. LaFiandra, 793 F.Supp. 487 (D.Vt. 1992)(finding that a vocational rehabilitation expert is a "suitably licensed or certified examiner" after evaluating the expert's

The Expert's Report

The expert should generally be familiar with:

- The complaint, and plaintiff's discovery responses, including answers to interrogatories.
- The deposition(s) of plaintiff's treating doctors.
- The medical/mental health records of the plaintiff.
- Any of defendant's discovery responses that may bear on the case.
- The defense deposition of plaintiff and any pertinent depositions of defense witnesses taken by plaintiff's counsel.
- Any pertinent employment records for plaintiff.

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 opposing counsel.

The expert must also present well to judge and jury, and should be friendly, with a ready smile. A sense of humor and a strain of humanity/compassion is also helpful. 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. A good rule of thumb is that "no wafflers need apply" -- the jury normally wants a credible "fighter," not some academic up in the clouds.

Ensure that your forensic considers whether psychological testing should be 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 cost. You would be surprised at the volume of records that you could obtain if you act with dispatch. Among the records are (i) treating records; (ii) medical records; (iii) military records; (iv) school records; and (v) police records, if any. You want these records in the hands of the forensic before a diagnosis is

credentials, but also specifically finding that expert qualified to render a "physical examination"); Jefferys v. LRP Publications, Inc., 184 F.R.D. 262 (E.D. Pa. 1999)(finding that a vocational rehabilitation counselor is a "suitably licensed or certified examiner" and finding without explanation that a pure vocational evaluation is a "physical or mental examination" within the spirit and letter of the rule as currently written) . The Storms court declined to do so on the ground that such an assessment was not connected with any physical or mental examination. The court also found that "good cause" had not been shown as the information was available by other means.

made. You may also want to have the forensic interview family members if appropriate to do so. 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."

If you are representing the plaintiff, you will want to encourage (or even require) communication between your client's primary treating physician and your forensic expert, to avoid the disaster of them working off different sets of "facts" or, even worse, arriving at seemingly conflicting diagnoses.

SPECIAL CONSIDERATIONS IN MENTAL DISABILITY CASES

As suggested in the Introduction, the precise scope of mental impairments that may constitute ADA-covered disabilities is extremely unclear. The ADA defines "mental impairment" as including "[a]ny mental or psychological disorder, such as . . . emotional or mental illness." 29 C.F.R. §1630.2(a)(2). Examples of "emotional or mental illness[es]" include, not only mental retardation, organic brain syndrome and specific learning disabilities, but also major depression, bipolar disorders, anxiety disorders (including panic disorders, obsessive compulsive disorders, and post-traumatic stress disorder), schizophrenia, and personality disorders. Of course, after the Supreme Court's decision in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), whether or not a particular mental impairment constitutes a disability under the ADA will depend on whether the condition can be controlled or corrected with medication or some other measure. In addition, with respect to learning disabilities, some 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.

Diagnostic And Statistical Manual

Both plaintiff and defense counsel who handle ADA cases involving alleged mental impairments/disabilities are well advised to familiarize themselves with the multi-axial diagnostic system of DSM-IV.⁷

⁷ The DSM-IV has been recognized as an important reference by courts handling cases involving alleged mental/psychiatric disabilities. *See, e.g., Boldini v. Postmaster Gen.*, 928 F.Supp. 125, 130 (D.N.H. 1995) ("in circumstances of mental impairment, a court may give weight to a diagnosis of mental impairment which is denoted in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association . . .").

Case Law

Some interesting ADA cases to date which involve alleged mental disabilities include the following: Humphrey v. Memorial Hospitals Association, 239 F.3d 1128 (9th Cir. 2001), cert. denied, 122 S.Ct. 28 (2002) (summary judgment for employer reversed in case where plaintiff's claimed disability was obsessive compulsive disorder); Doyal v. Oklahoma Heart, Inc., 213 F.3d 492 (10th Cir. 2000) (granting summary judgment for employer where plaintiff failed to show that her major depression and anxiety attacks substantially limited her ability to learn, sleep, think and interact with others); Schneiker v. Fortis Insurance Co., 200 F.3d 1055 (7th Cir. 2000) (plaintiff's major depression did not substantially limit her ability to work; accordingly, she was not disabled and summary judgment was properly granted for employer); McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999) (summary judgment for employer reversed where plaintiff alleged his anxiety, panic and somatoform disorders substantially limited his ability to engage in sexual relations, sleep, and interacting with others); Taylor v. Phoenixville School District, 184 F.3d 296 (3rd Cir. 1999) (plaintiff with bipolar disorder, which she claimed, in medicated state, substantially limited her ability to think, was allowed to proceed with her claim); and Lanci v. Arthur Anderson, LLP, 2000 WL 329226 (S.D.N.Y. 2000) (plaintiff with Tourette's syndrome, obsessive compulsive disorder, panic attacks, trouble socializing and depression allowed to go forward with his ADA claim).

Not surprisingly, it is also being argued that a stress diagnosis, as listed in DSM-IV, may constitute a disability. With respect to the specific diagnosis of "stress" (including work-related stress and post-traumatic stress disorder), counsel may find not only ADA cases, but also Social Security disability cases, FEOLA 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) helpful in supporting their respective viewpoints on whether such a condition constitutes a disability. *See, e.g., Williams v. Motorola, Inc.*, 303 F.3d 1284 (11th Cir. 2002) (holding that "[a]n employee's ability to handle reasonably necessary stress and work reasonably well with others are essential functions of any position;" accordingly, plaintiff, who lacked this ability, but not "otherwise qualified" under the ADA); Wiseman v. County of Washoe, 44 Fed. Appx. 776, 2002 WL 1837957 (9th Cir. 2002)(unpublished)(rejecting plaintiff's ADA claim based on diagnosis of post-traumatic stress disorder because he failed to show that condition substantially limited him in any major life activity); Carroll v. Xerox Corporation, 294 F.3d 231 (1st Cir. 2002) (rejecting sales manager's claimed impairment of anxiety disorder and job-related stress, where conditions did not substantially limit him in any major life activity); Snead v. Metropolitan Property & Casualty Ins. Co., 237 F.3d 1080 (9th Cir. 2001) (holding that stress and depression can be considered mental impairments rendering a person disabled under the ADA); Mack v. State Farm Mutual Automobile Ins. Co., 2000 U.S. App. LEXIS 1012 (7th Cir. 2000)(unpublished)(holding that employee with obsessive compulsive disorder was not entitled to requested accommodation that supervisor "leave him alone" and allow him to "remain at his desk without interaction with management until he reaches retirement age"); Cannice v. Norwest Bank Iowa N.A., 189 F.3d 723 (8th Cir. 1999) (employee who informed human resources representative that he had a "stress syndrome" had alerted employer to existence of possible disability); Hogarth v. Thornburgh, 833 F.Supp. 1077(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: 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 decomposition 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)).

LEARNING DISABILITIES

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. The DSM-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, awful spelling and bad handwriting!

Courts analyze learning disabilities, as other impairments, on a case-by-case basis for purposes of determining whether or not they constitute an ADA disability. *See, e.g., Palotai v. University of Maryland at College Park*, 38 Fed. Appx. 946, 2002 WL 1379969 (4th Cir. 2002)(unpublished)(holding that alleged learning disabilities of agricultural technician did not substantially limit his ability to work; hence, he was not disabled under the ADA); Vollmert v. Wisconsin Department of Transportation, 197 F.3d 293 (7th Cir. 1999)(holding that employee with learning disability that interfered with her ability to learn employer's new computer system was disabled, and employer failed to reasonably accommodate her learning disability); and Betts v. University of Virginia, 191 F.3d 447, 1999 WL 739415 (4th Cir. 1999)(unpublished)(holding that "[a]s an initial matter, we note that an individual diagnosed with a 'learning disability' is not necessarily 'disabled' for purposes of the ADA.").

PHYSICAL/MENTAL CONDITION IN ISSUE

Obviously, ADA claims which are based on alleged physical and/or mental impairments will place the plaintiff's physical and/or mental condition in issue. Accordingly, counsel for plaintiff would be well advised to carefully research the plaintiff's background, investigate other stressors, and confer with any treating physicians prior to filing suit.

Warn the Client of the Consequences

Again, because bringing an ADA claim based on an alleged physical and/or mental impairment may place the plaintiff's physical/mental condition in issue (as may a claim of emotional distress resulting from an employment decision), plaintiff's counsel should warn his/her client of the consequences of maintaining such a claim, including, *inter alia*: (i) deposition(s) of his/her treating physician(s); (ii) production of notes of appointments/counseling sessions in discovery; (iii) a Rule 35 physical/mental examination; (iv) that his/her physical/mental condition will be fair game for opposing counsel; and (v) that the defense may get an instruction that the jury may consider the fact that the plaintiff had other problems/life stressors that might account his/her claimed emotional distress in whole or in part.

The Rule 35 Exam

The Supreme Court addressed the requirements of Rule 35 in Schlagenhauf v. Holder, 379 U.S. 104, 118-119, 85 S.Ct. 234, 242-43, 13 L.Ed.2d 152 (1964) (citations omitted) 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.

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). 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." Schlagenhauf, *supra*, 379 U.S. at 118-19, 85 S.Ct. at 242-43. 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 ordering each particular examination." *Id.*

Clearly, the above requirements are met when a plaintiff brings an ADA action in which he/she alleges the existence of a physical or mental impairment/disability.

Preparation For Rule 35 Exam

If Rule 35 examinations were to become the norm in these cases, everyone's transactional costs will increase dramatically, 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. *See, e.g., 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); *Curtis v. Express, Inc.*, 868 F.Supp. 467 (N.D.N.Y. 1994) (the court held that even if good cause of 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 a mental examination was not needed).

Increasingly, the courts have recognized that an accurate record of the examination should be prepared. *Metropolitan Property & Casualty Ins. Co. v. Overstreet*, 103 S.W. 3d. 31 (Ky. 2003). In a proper case, plaintiff would insist that counsel be present, that a psychiatrist engaged by plaintiff be present, and/or that the examination be recorded. Although the matter is not without controversy, courts have ordered such conditions. *See, e.g., Metropolitan Property & Casualty Ins. Co. v. Overstreet*, 103 S.W. 3d. 31 (Ky. 2003) (collects cases); *Jefferys v. LRP Publications, Inc.*, 184 F.R.D. 262 (E.D. Pa. 1999) (permitting plaintiff's attorney or other representative to be present); *Showell v. Trump Taj Mahal Casino*, 2000 U.S. Dist. Lexis 14736 (E.D. Pa. 2000) (counsel for plaintiff, in general, should be permitted to attend a medical examination that takes place in an adversarial context; counsel warned not under any circumstances to interrupt; counsel may not be visible to plaintiff during examination.); *Lowe v. Philadelphia Newspapers Inc.*, 101 F.R.D. 296 (E.D. Pa. 1983) (medical expert or psychiatrist may be present at examination to observe only, but counsel may not attend); *Pearson v. City of Austin*, 2000 U.S. Dist. Lexis 20622 (W.D. Tx. 2000) (noting that nothing in the rule or the case law requires the mental or physical examination to take place outside the presence of the plaintiff's attorney); *Moore v. Washington Hospital Ctr., Inc.* Civ Action No. CA 798-95 (D.C. Superior Ct., August 6, 1996) (Kennedy, J.) (court permitted recording of the examination, but did not permit plaintiff's nurse to be present); *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); *Tietjen v. Department of Labor*, 13 Wash. App. 86, 534 P.2d 151 (1975) (counsel present during psychiatric examination); *Kelley v. Smith & Oby Co.*, 129 N.E. 2d 106; 70 Ohio L. Abs. 202 (Ohio C.P.1954) (same). *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) (Gasch, J.) (same); *Contra 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); *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).

Needless to say, defendants' attempt to expand a simple claim of emotional distress would escalate plaintiff's bill to an extraordinary degree. Plaintiff should consider whether: (i) counsel should be present; (ii) the proceeding should be recorded; and (iii) his/her expert (or treating physician, if there is no forensic expert) should be present; 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 one is conducted to prepare the client for what realistically is an adversarial proceeding. In Jakubowski v. Lengen, 86 A.D. 2d 398, 450 N.Y.S. 2d 612 (1982), 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." 614 N.Y.S. 2d at 614. 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." Id.

In Robin v. Assoc. Indemnity Co., 297 So.2d 427, 430 (La. 1973), the Court readily recognized the "partisan nature" of an examination by a physician selected by an adverse party. 297 So.2d at 430. In Jansen v. Packaging Corp. of America, 158 F.R.D. 409 (N.D. Ill. 1994), Judge Shadur dealt with the "great dangers of intrusiveness" and the need to "provide a level playing field" and appointed an independent expert. 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." While many lament this reality, the Court must premise its decision upon it. "Under 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." 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.). The Advisory Committee on the Federal Rules of Evidence has noted the "practice of shopping for experts." Advisory Committee's Notes on Rule 706, Fed.R.Evid., 28 USCA at 517. "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. Kraft, "Using Experts in Civil Cases" at 57 (PLI 1977).

Plaintiff should consider insisting that a time limit be placed on the examination. 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). Plaintiff should also insist that his/her out-of-pocket expenses, e.g., transportation be reimbursed. 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). If appropriate, plaintiff should challenge the defendant's choice of examiner. 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). Plaintiff should seek agreement on the scope of the examination and discovery, and if necessary, seek court intervention. See Sullivan v. Helene Curits, 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). The Rule 35 may include the administration of psychological tests, typically by a clinical psychologist. Plaintiff should insist that any tests to be administered be specified in the order directing the examination. 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). In addition, plaintiff may question whether psychological testing is appropriate and, if so, may question the choice of tests made by the defense. 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, "Rights of Plaintiff When an Independent Medical Examination is Ordered," Vol. X, Employment Law Strategist 1 (Oct. 2002).

Appropriate Level of Workup - Psychological Testing

In cases involving a claimed mental disability, the plaintiff's treating psychiatrist may suggest referring him/her to a clinical psychologist for testing and evaluation.⁸ In addition, in ADA cases where the claimed major life activity is working, counsel for both sides will probably want to retain a vocational rehabilitation expert, and defense counsel's expert will generally administer various clinical tests, as discussed below.

A consulting expert's report is considered normally to be confidential work product, thereby making it non-discoverable under the Federal Civil Rules. Crockett v. Virginia

⁸ 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.

Folding Box Co., 61 F.R.D. 312 (E.D. Va. 1974); Fed.R.Civ.P. 26(b)(4). If you are giving serious consideration to pleading a mental health issue in the case (whether as a claimed impairment or in the form of emotional distress), before doing so, it is strongly suggested that you get a report from a consulting expert that you can cloak in work product privilege.

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

- Intelligence tests (*i.e.* Wechsler Intelligence Scale-Revised (WAIS-R) and Stanford Binet)
- Personality Tests
 - Objective Tests
 - Minnesota Multiphasic Personality Inventory (MMPI)⁹
 - 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 (*i.e.* Rorschach Inkblot Technique, Thematic Apperception Test (TAT) and Sentence Completion Test).
-

MEDICAL RELEASES

Medical records are expensive, can take an inordinate amount of time to obtain (especially if you don't know what you are doing), and oftentimes require extensive interpretation (as they are generally written in jargon, codes, shorthand and some of the worlds' worst chicken scratch). Additionally, the quality of the copies received from treating physicians 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.

After April 14, 2003, such releases must also comply with the requirements of the Health Insurance Portability and Accountability Act ("HIPAA") Privacy Regulations. 45 C.F.R. §164.508. Briefly, a HIPAA-compliant release requires the following:

⁹ 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).

- The name of the hospital, practice group, or other covered entity.
- The name of the requesting party (i.e. the name of the law firm and the attorney on the case).
- Description of the desired information. This must be sufficiently specific so the entity can determine the scope of the request.
- Description of the purpose of the disclosure (ex. Ms. Smith's personal injury litigation against our client, X Corporation, arising out of a motor vehicle accident on March 10, 2001).
- An expiration date or event.
- A statement that the expiration date has not passed, or that the expiration event has not occurred.
- Statement that the individual has the right to revoke the authorization in writing, including any exceptions to this right.
- Instructions on how the individual can revoke the authorization.
- Statement that the covered entity may not condition treatment or payment on whether the individual signs the authorization.
- Warning that the information disclosed under the authorization may be subject to re-disclosure and no longer protected by privacy regulations.
- Signature of the individual and the date.
- If a personal representative signs the form, he/she must include a description of his/her authority.
- You can obtain a patient's mental health, chemical dependency and HIV-related records by specifically asking for them in a regular authorization.
- Psychotherapy notes: Because psychotherapy notes are maintained separately from the patient's medical records, you must have another authorization asking only for psychotherapy notes.

The release used by plaintiff's counsel with his/her client ought to emphasize that the treating physician 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 also emphasize with treating physicians that he/she is not authorized to confer with anyone other than plaintiff's counsel and counsel's authorized staff or other representative, otherwise some jurisdictions hold that the treating physician may engage in *ex parte* communications with the other side. Written authorization is often demanded by the treating physician. 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. Ideally, this should be done together by counsel for all interested parties under a strict protective order. See, e.g. 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* 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); 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); and Gobuty v. Kavanagh, 795 F.Supp. 281 (D.Minn. 1992) (court refused to permit *ex parte* interviews).

Get releases early on to obtain medical/mental health records so you can determine from the outset if there is disastrous material in these records. Sometimes plaintiff's counsel 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 treating physicians, 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 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, LTD, and group health 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, a subpoena should be served on the previous employer and/or the LTD carrier.
- The records of 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 visits to doctors and mental health practitioner 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, as well as references to other life 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 of when counseling/therapy started.
- In cases involving claims of emotional distress, whether some treatment preceded the workplace dispute which allegedly caused the emotional distress; in such instances, counsel should 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.

DEFENDANT'S DISCOVERY TO PLAINTIFF

Releases

Plaintiff can expect the defense to request formally that plaintiff execute releases, including releases for medical and psychiatric records.¹⁰ 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. *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) and *Urseth v. City of Dayton, Ohio*, 653 F. Supp. 1057, 1066 (S.D. Ohio 1986) (party compelled to execute release for medical records). 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. *See, e.g., Kitzmiller v. Henning*, 437 S.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).

Interrogatories

Interrogatories plaintiff's counsel should 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 defense. 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.

¹⁰ Again, such releases must be HIPAA compliant.

Document Requests

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

- Plaintiff's psychological/medical records, including any tape recordings made by treating physicians (it can take months to get all the records in some cases);
- Notes, diaries, etc. maintained by the plaintiff during his/her employment;
- Audio tapes, interview notes of potential witnesses, etc. made by plaintiff;
- Insurance records (one side or the other may want to show how low or high the "specials" are);
- Medical 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);
- All clinical notes of the treating and the forensic;
- 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 patient's writings and correspondence to the doctor;
- Lab reports;
- 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 employer-maintained workers' compensation records;
- The plaintiff's prescription records and any other records of medication;
- Insurance Claim Forms - these forms will have the five digit code number, indicating the DSM-IV diagnosis;
- 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;
- Insurance carrier records;
- Workers' compensation commission records;
- State vocational rehabilitation agency records;
- LTD carrier records; and
- Social Security disability records.

TREATING MENTAL HEALTH PRACTITIONERS

Oftentimes, disputes arise regarding the status of plaintiff's treating mental health practitioner. When called to deposition, the treater expects to be compensated at his/her normal professional rate rather than the statutory rate for a fact deposition witness. Most courts have held that a treater who is not identified pursuant to Rule 26 as a potential expert witness is only entitled to the statutory witness fee. See, e.g., Baker v. Taco Bell, Corp., 163 F.R.D. 348 (D.Colo. 1995). Plaintiff's counsel needs to discuss with the plaintiff whether to offer to pay the difference between the treater's professional rate and the statutory rate. Courts have approved such arrangements. See, e.g., Fisher v. Ford Motor Co., 178 F.R.D. 195 (N.D. Ohio 1998). Otherwise, plaintiff has a very unhappy treater.

Oftentimes plaintiff's counsel lists the treater as though he/she is mere fact witness and does not submit a Rule 26 report with regard to the treater. The courts have not drawn a bright line in this situation. Obviously, if the treater during the course of treatment formulated opinions, e.g., an opinion regarding causation, a DSM-IV diagnosis, the expected duration of the alleged of the disability, a Rule 26 report might not be required. See, e.g., Elgas v. Colorado Belle Corp., 1998 U.S. Dist. Lexis 7205 (D. Nev. 1998); Piper v. Harnischfeger, Corp., 170 F.R.D. 173 (D. Nev 1997); Mangla v. The University of Rochester, 168 F.R.D. 137 (W.D.N.Y. 1996); Buscher v. Gainey Transp. Serv. of Ind., Inc., 167 F.R.D. 387 (N.D.Pa. 1996); Widhelm v. Wal-Mart Stores, Inc., 162 F.R.D. 591 (D.Neb. 1995). On the other hand, if counsel in essence is attempting to convert the treater into an opinion witness on issues as to which the treater during treatment did not formulate the opinions that are now to be offered at trial, a rule 26 report may well be required. See, e.g., Hall v. Sykes, 164 F.R.D. 46 (E.D.Va. 1995) (the court notes that "when an attorney selects the physician for treatment as well as testimony it is presumed that the physician was selected for expert testimony."); Wreath v. U.S., 161 F.R.D. 448 (D.Kan. 1995). Counsel should be mindful that this area is fraught with controversy, and risk of exclusion for plaintiff's counsel and surprise for defense counsel.

DISCOVERY TO FORENSIC EXPERTS

Interrogatories and requests for production¹¹ to forensic experts might include:

- Any written evaluations the expert may have prepared;
- The expert's billing and time records;
- The identification of any texts or 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.

PLAINTIFF'S DISCOVERY TO DEFENDANT

Following a Rule 35 mental examination, and if requested by counsel for the examinee, counsel is entitled to a copy of the report. Also, the defense under CR 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 opinions.

Deposition of Forensic

There is an abundance of material available on the subject. *See, e.g., The Defense Deposition Atlas by Peter B. Silvain (The Med/Psych Press Inc.)*. The tips that pertain to

¹¹ In some jurisdictions, it may be necessary to issue a subpoena in order to obtain these records. However, in accordance with FED. R. CIV. PRO. 26(a)(2)(B), much of this information will be included with a copy of the expert's written report.

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
- Ask who the expert regards as expert in the field.

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

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
- 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 object 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. *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 of 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). 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 "non-invasive" investigative service is appropriate. Oftentimes, the tried and true private investigatory is worth his/her weight in gold. Juries love daytime 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 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 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. 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 Attacks¹²

Over and above Daubert and Kumho Tire considerations, defense counsel can be expected to 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

¹² “Challenging the Plaintiff’s Diagnosis of Psychological Injury,” The Personal Injury Law Defense Bulletin (No. 6, May 1989).

- 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 causes 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
- Inadequate symptoms fo the diagnosis of a proximately causes 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

CONCLUSION

Clearly, there is much to consider regarding opinion testimony in ADA cases, and the costs, both in dollars and in legal gamesmanship, can be substantial. Discovery related to opinion testimony can substantially escalate costs, sometime prohibitively, particularly if the parties and their counsel act irresponsibly. On the other hand, as we hope we have demonstrated, responsible decisions regarding opinion testimony can fulfill the vision of the federal civil rules, that is, Civil Rule 1's admonition that the rules are to be implemented to assure that he parties receive a swift and just disposition.

While we have set forth hosts of consideration and possibilities, cooperation between counsel ought in most instances to lead to agreements on the central issues and the details thereof, *e.g.*, whether a party's physical or mental condition is "in controversy"; if so, whether exploration of that question needs to be fully or only partially pursued in the initial phase; whether, indeed, such discovery can be deferred entirely; the terms, conditions, and restrictions to govern discovery and any Rule 35 examination; and so on. We hope that the reader will apply the considerations set forth herein responsibly. For if they do so, we will have achieved what we set out to do, that is, to make a contribution to the enhancement of our profession and the laws that it serves.

Thank you.

POSTSCRIPT BY ROBERT B. FITZPATRICK

I wish to acknowledge the contributions that literally hundreds of individuals have made over the years to the development of my thinking on opinion testimony in employment cases. First and foremost, I would like to thank a just and practical judge, Hon. Robert R. Merhige, former United States District Judge for the Eastern District of Virginia; the late Hon. Charles R. Richey of my court, United States District Court for the District of Columbia, who pioneered in the field of employment discrimination law and Rule 1's requirement of swift justice; and Hon. Sol Schreiber, former Magistrate Judge for the United States District Court for the Southern District of New York, another pioneer in the development of the Civil Rules.

I would also like to thank Dr. Robert Simon of the Georgetown University Medical School Faculty who was kind enough to review a prior version of this paper from his perspective as a psychiatrist.

Thanks is due to the many other lawyers, whose writings on this topic have been thought provoking and have helped to define the real fault lines between the parties and the vast territory that can be bridged if counsel act responsibly. Among them are: Sandra R. McCandless, Mark I. Schickman, William J. Smith, Phyllis Barker, William J. Holloway, Karen Kaplowitz, Melvin M. Richtel, Judith P. Vladeck, Mark S. Dichter, Lynn A. Collins, Wayne N. Outten, James J. McDonald, Jr., Paul R. Lees-Haley, Darlene A. Vorachek, Lynne Bernabei, Maria Morocco, Mark S. Rudy, Steven G. Zieff, Jules L. Smith, Marc E. Weinstein. My sincere apologies to anyone whom I have omitted.

I want to thank a host of individuals, employed my firm, who over the years have made contributions to prior versions of this paper, including Ivy Bailey, Marlissa Briggett, Esq., Deborah Hawkins, Kathleen Kim, Esq., Mark Laponsky, Esq., Lisa A. Morelli, Esq., Patrice Shannon, France Staudenmann, and Jonathan R. Topazian, Esq. Thanks also to Sara Towles who assisted in the preparation of this version fo the paper.

Other papers on this subject which I have authored can be found as follows: published by University Publications of America in its publication Employment Testing: Law and Policy Report as "Advancing Employees' Mental Health Claims, Part 1: Where to Begin" (Vol. 3, No. 3, 1994) and "Advancing Employees' Mental Health Claims, Part 2: Preparing for Trial" (Vol. 3, No. 3, 1994), published in the course materials of the ALI-ABA video telecast program in June 1994 entitled "How to Present and Challenge Experts in Employment Cases" and August 1994 in the course materials of a program sponsored by the Torts and Insurance Practice Section of the ABA at the Annual Convention entitled "Stress and other Workplace Illness: The Interrelationship between Compensation, ERISA and the New Healthcare Legislation", and in the course materials for the ALI-ABA program in July 1994 entitled "Current Developments in Employment Law".

A revised version of this article can be found on our website at <http://www.robertbfitzpatrick.com>. Comments and suggestions are welcome, as well as cases, briefs, and most especially forms and checklists.

ROBERT B. FITZPATRICK, ESQ.
ROBERT B. FITZPATRICK, PLLC
Suite 660

Universal Building North
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009-5728

(202) 588-5300 (telephone)

(202) 588-5023 (fax)

fitzpatrick.law@verizon.net (e-mail)

<http://www.robertbfitzpatrick.com> (website)