



Civil Forensic Evaluation in Psychological Injury and Law: Legal, Professional, and Ethical Considerations

William E. Foote¹ · Jane Goodman-Delahunty² · Gerald Young³

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Abstract

Psychologists who work as therapists or administrators, or who engage in forensic practice in criminal justice settings, find it daunting to transition into practice in civil cases involving personal injury, namely psychological injury from the psychological perspective. In civil cases, psychological injury arises from allegedly deliberate or negligent acts of the defendant(s) that the plaintiff contends caused psychological conditions to appear. These alleged acts are disputed in courts and other tribunals. Conditions considered in psychological injury cases include posttraumatic stress disorder, depression, chronic pain conditions, and sequelae of traumatic brain injury. This article outlines a detailed case sequence from referral through the end of expert testimony to guide the practitioner to work effectively in this field of practice. It addresses the rules and regulations that govern admissibility of expert evidence in court. The article provides ethical and professional guidance throughout, including best practices in assessment and testing, and emphasizes evidence-based forensic practice.

Keywords Forensic assessment · Litigation · Civil rights · Tort cases · Ethics · Professional issues

This article introduces to psychologists the topic of psychological injury and law, concentrating on the legal features of the practice, while giving evidence-based and best practice guidelines for functioning successfully in this domain in accordance with current practice and ethical guidelines. In addition, the article serves as a detailed tutorial for practitioners at all levels of experience in the field, and not just psychologists who are considering or just entering forensic practice in civil cases. The majority of forensic practitioners work in prisons, court clinics, or private practices that center on criminal and related cases involving issues such as competency, sanity, or sentencing (Douglas, Otto, Desmarais, & Borum, 2013; Packer & Borum, 2013), and they might occasionally consult on cases involving psychological injuries, but without sufficient background and experience. Furthermore, the area of psychological injury and law is growing, integrating, and attracting new practitioners to the field, as indexed by the increasing number of recent books and journal articles on

the topic (e.g., Rogers & Bender, 2018; Young, 2014) and the articles in this journal *Psychological Injury and Law*, including those that are legally oriented, e.g., Kohutis & McCall, 2020) Although procedures in the assessment of defendants might differ in federal or state court and related settings, the parameters of those types of evaluations have been well-delineated (e.g., Drogin, Dattilio, Sadoff, & Gutheil, 2011; Melton et al., 2018). In contrast, although psychologists and other mental health practitioners have been consulting and testifying in civil cases for many years, it is only recently that mental health professionals have published guidance on the provision of these services, including guidance on assessment and testing (Foote, 2020; Foote & Goodman-Delahunty, *in press*; Foote & Lareau, 2013; Gold, 2004; Gold & Stejskal, 2011; Goodman-Delahunty, 1999; Goodman-Delahunty & Foote, 2013; Kane & Dvoskin, 2011; Rogers & Bender, 2018; Young, 2008; Young, 2014a; Young, 2016a; Young & Drogin, 2014). Other articles in the field are specific to particular psychological injuries in court and related legal settings, e.g., PTSD (see Young, 2016b, 2017a, 2017b, and Kerig, Mozley, & Mendez, 2020) or forensic and court-related themes, such as causality (Young, 2015), malingering, and malingering detection (e.g., Sherman, Slick, & Iverson, 2020; Slick, Sherman, & Iverson, 1999; Young, 2015a). Young (2015b, 2019a) deals with the forensically complex topic of malingering, options in test interpretation when tests

✉ William E. Foote
forNpsych@aol.com

¹ University of New Mexico, Albuquerque, USA

² Charles Sturt University, Manly, Australia

³ Glendon College, York University, Toronto, Canada

results point toward its possibility, and the prevalence rate that is evident for it upon careful review of the extant literature.

Introduction

The focus of this article is to inform practitioners of available professional, legal, and ethical resources that provide a comprehensive, introductory account of the legal practices and procedures related to psychological injury and law so that practitioners entering this field or needing a brush-up have state-of-the-art information required. This resource also discusses additional resources that can assist the clinical psychologist or forensic psychologist in moving into practice in civil settings, such as psychological injury, and to meet related professional and ethical obligations and guidelines.

Working in forensic and related assessments in the area of psychological injury and law entails more than legal knowledge because the assessment process requires that the practitioner meet standards that are different and more exacting than those typically required in psychological practice. Moreover, the legal knowledge required of the procedures followed introduces complexities that novices, in particular, should anticipate.

The forensic evaluation process involves a sequence of events that occur in a relatively orderly fashion that are determined by legal or procedural requirements and the practicalities of the situation. The psychologist involved is not contacted by the patient, the family physician, or any usual referral source. Rather, the process begins with the retention of the psychologist by a lawyer involved in the case at hand and ends when the case is resolved by the court, or tribunal, or by settlement between the parties.

In this article, we examine the legal, ethical, and professional issues relevant to each step in the process of dealing with psychological injury cases. In these regards, we use as guidance the American Psychological Association (APA) Ethical Principles and Professional Code of Conduct (EPPCC) (APA, 2017) and the Specialty Guidelines for Forensic Psychology (SGFP) (APA, 2013), which are sources that provide not only fundamental ethical standards as they apply to forensic work, but also specific guidance about how those principles should be applied in psychology and law settings, including those in the area of psychological injury and law (Borkosky, 2014; Pirelli, Beattay, & Zapf, 2017; Young, 2014a, 2016a; Young & Drogin, 2014). The SGFP is an aspirational document designed to provide a measure of “best practices” for forensic practitioners. Here, we advocate strongly for its use in the field of psychological injury and law. That said, it was not written to be enforceable.

By comparison, the EPPCC is most relevant to American Psychological Association members and it is enforceable. The EPPCC has also been adopted by many jurisdictions as a

component or supplement to the state or provincial code of conduct (Bush, Connell, & Denney, 2020; Younggren & Harris, 2008). The EPPCC is in revision (American Psychological Association, 2020), and workers have suggested how that can be accomplished (Young, 2017a, 2019b, 2020a), but its present version stands as the one to which psychologists must adhere, where applicable. In practice, the forensic worker should first address the more local ethical standards of conduct, guidelines, and rulings that relate to ethical practice within their state or provincial jurisdictions, in that these may be more specific or narrow than the general sources of guidance that we are describing and citing.

As for the legal knowledge that must be accrued in the area of psychological injury and law, at the outset, we maintain that it is critical for the forensic practitioner to have a working knowledge of the statutes, rules, and case law that apply to the specific jurisdictional setting in which the case at hand is presented to court or a related legal tribunal or is tried, as per extant settings in the practitioner’s state or province. In the USA, federal statutes, case law, and rules of evidence apply to cases brought under federal laws (e.g., for civil rights, Title VII of the Civil Rights Act of 1964; 42 U. S. Code Section 1983). Federally, admissibility of evidence generally follows either the *Daubert* trilogy on reliable evidence and methods, or follows more general standards of acceptance in a field, as discussed later in the paper. In state and provincial courts, the statutes, case law, and rules of evidence of the more local jurisdiction apply in these regards, with many states adopting *Daubert* equivalents, and others, standards of general acceptance in the field (Young, Kane, & Nicholson, 2007).

Critical Topics in the Law in Psychological Injury and Law

The next section of the article presents the critical topics of knowledge that both novice and seasoned practitioners need to be aware of to function effectively in cases heading to court or related legal tribunals. The first topic is standard in any work in psychological or mental health work practice, on privacy, confidentiality, and privileged information. In our review, we examine this topic from a legal perspective. Next, in turn, we discuss the topics of retention by legal counsel, financial arrangements, topics related to roles, competence, timelines/deadlines, evaluations (the most extensive section), discovery, expert testimony, and concluding the case.

As we proceed with each topic in this central portion of the article, at times, we offer cautionary statements and identify pitfalls to avoid. But, essentially, they involve being knowledgeable about the applicable standards, guidelines, rules, and regulations; being impartial; scientifically informed, and comprehensive in one’s work, covering all angles to the satisfaction of the court (or related tribunal). Also, as we will remind

readers throughout, for the psychologist/mental health professional working forensically, the client in any case at hand is always the court or tribunal, rather than the referral source or other stakeholders in the case (Young, 2014; Young & Drogin, 2014).

Work in the field of psychological injury and law is marked by the adversarial divide. This means that plaintiff and defense are adversaries and the psychologist or mental health worker is exposed to either subtle or not so subtle influences to proffer testimony or reports to the court or tribunal of fact that buttress the theory of the case for the referring party (Young, 2014). Lawyers exerting that pressure are acting in accordance with their responsibility to provide diligent representation for their clients. In contrast, psychologists and other mental health workers in this field are required to adhere to legal, ethical, and professional practice standards to function without bias in a case at hand and to consider the finders of fact in the court or tribunal as the client more than other stakeholders in a case, especially the referring party.

Privacy, Confidentiality, and Privileged Information

This topic covers the nature of the communication between the parties in a case at hand and what remains private, confidential, and privy only to the attorney in a case. That is, the psychologist involved in forensic work most always must address three related issues: privacy, confidentiality, and privilege. Privacy refers to the general right that individuals have to keep to themselves aspects of their lives private from legal scrutiny. For example, courts have long recognized the right of individual to privacy concerning medical procedures (*Roe v. Wade*, 1973). The American Health Insurance Portability and Accountability Act (HIPAA, 1996) codified these privacy rights in relation to medical and mental health information.

Confidentiality is another critical topic in the field of psychological injury and law, specifically, and of forensic work, generally: it is a duty owed to the client or patient by health care providers. For psychologists, this duty has been a product of clinical experience showing that individuals who are afforded confidentiality engage more effectively in therapy. At the ethical level, the obligation of psychologists to keep confidential information obtained about or from their patients or clients is codified in the APA Ethics Code (American Psychological Association, 2002), as well as in the APA SGFP, state/provincial licensing laws and regulations, and in common law pertaining to malpractice. As for privilege, it refers to the right “owned” by the client or patient to prevent the psychologist or other health care provider from disclosing confidential information in court, tribunals, or related legal proceedings (Donner, VandeCreek, Gonsiorek, & Fisher, 2008).

Privilege is usually recognized and applied by rules of evidence of a particular jurisdiction. Almost all states and provinces have rules of evidence dealing with psychotherapist-patient, as well as attorney-client, clergy-penitent, and spousal privileges (DeBell & Jones, 1997; Drogin, 2019a, 2019b; Glick, Berdahl, & Alonso, 2018; Shuman & Foote, 1999; Winick, 1996). The U.S. Supreme Court has acknowledged a psychotherapist-patient privilege in cases brought before federal courts (*Jaffee v. Redmond*, 1996). In general, the owner of the privilege is the client or patient, and the custodian of the privilege is the psychologist or mental health worker assigned to a particular case. That means that, in the absence of a written release of information, when in court or a tribunal to which privilege applies, a psychologist/mental health worker is obligated to assert privilege on behalf of the patient or client. However, to the contrary, once a patient or client executes a release, privilege is waived and the psychologist or mental health worker is compelled to release records, provide in-court testimony, and so on, as the case may require (APA, Committee on Legal Issues, 1996). Courts and tribunals often set aside privilege when they operate to keep relevant facts from consideration by the trier of fact (Shuman & Foote, 1999).

Privacy, confidentiality, and privilege constitute primary legal standards when dealing with any type of patient or client in court and other tribunals in which they apply. These are the first topics we address in relation to legal features of the field of psychological injury and law because of the complexities involved and the frequency with which lapses occur in this regard, leading to complaints against practitioners. We maintain that novices entering the field of psychological injury and law might tend to let their guard down on these matters because they are familiar, universal standards in all areas of psychological practice. However, doing so in order to concentrate on less familiar aspects of practice in the field might lead to inadvertent mistakes that could be critical for one’s career. More seasoned practitioners addressing legal and assessment complexities of a case might let down their guard on these matters which could also lead to lax procedures regarding these topics.

Retention by Legal Counsel

In most civil cases, an attorney involved in the case will hire the forensic psychologist or mental health professional. The attorney will be working for either the plaintiff or the defendant(s). Sometimes, a forensic expert will be approached directly by the person who will be evaluated. The expert would do well to refuse to take the case. In almost every case, it is preferable for the psychologist to be hired by the attorney who is representing the party and not directly by the party. When the professional is hired directly by the party, the

confidentiality of the relationship is protected only by psychotherapist-patient privilege, which has proved a weak shield to court demands for testimony or records (Foote & Shuman, 2006). When the attorney engages the expert, there are advantages for both. This creates a legal relationship of agency in which the expert becomes the agent of the attorney. Within the parameters of of this relationship, the lawyer's work-product privilege provides a much stronger shield for clinical material. This is especially important in contexts in which the findings of a psychological evaluation or consultation prove unhelpful to the plaintiff. In addition, lines of duty are well established.

The retention of an expert by an attorney may be on behalf of single or multiple parties in the case, or, on rare occasions, the expert may be appointed by the court or relevant tribunal. For example, the hiring attorney may be representing either a named party (a plaintiff, a defendant, an employer company, a CEO, or a supervisor) or a number of plaintiffs or defendants, each of whom is usually represented by separate legal counsel.

In general, in another cautionary note to both novices and seasoned workers in the field, experts should avoid dual loyalties—it is ethically undesirable for the expert to be hired to evaluate more than one party, especially on the defense side in a case, because the case may evolve such that the interests of the parties diverge and the psychologist's work may be central to those differences.

How does the retention of the expert proceed? The conduct of the initial retention phone communication is important not only because of the expert's desire to gather information concerning the case, but also to set the tone of balance and fairness that should mark the psychologist's conduct in the entire case (Shuman & Greenberg, 2003; APA, 2013). The expert should realize that the initial contact with the referring party sets the tone for the whole case in terms of the expected ethical balance, or its absence, that they should adopt. Many attorneys use this opportunity to advocate for their party's position and to channel the expert toward adopting the party's theory of the case related to the person or entity whom they represent. If the attorney referral source adopts this one-sided approach on initial contact, the expert should inquire about the other side's perspective on the case. This first contact with the referral source is part of the record of the case. When the case reaches the court, the expert might be questioned on the contact in depositions or in open court itself, so that the particulars of that first contact should be clearly noted in written form. This record should reflect the expert's desire to adopt a neutral stance about the case and its facts, and hear both sides of the case, whether plaintiff or defense.

The proviso about avoiding forensically evaluating multiple defendants in a case because of a potential or perceived conflict of interest does not apply equivalently to the plaintiff side of a case. When hired by the attorney for the defense, the psychologist or mental health worker might be hired to

evaluate multiple plaintiffs in the same cause of action, such as a class-action lawsuit, or in separate causes of action springing from the same or related events (Foote, 2016; Lawson & Fitzgerald, 2016; Wright & Fitzgerald, 2009). This could happen when it is alleged, for example, that one or more supervisors or coworkers had harassed more than one individual at work or that multiple workers had been traumatized by events in the workplace. In situations in which the expert is hired by the plaintiff's attorney, these concerns about possible conflicts of interest are of less consequence.

Below, we examine one type of situation in psychological injury and law cases in which the expert might be hired for multiple evaluations. There are financial reasons that this might happen. In some cases, evaluation of multiple plaintiffs by one expert instead of several can generate financial savings, for example, savings in time and money because the evaluations are undertaken in volume. This would apply in cases of harassment at the workplace in which there are commonalities across cases. For example, acquiring knowledge of the corporate climate, the identities and activities of supervisory personnel, and events that had been experienced or observed by many parties at the site can save expert time and fees over multiple assessments. Just as important for the referral source, the evaluation of multiple plaintiffs by one expert might provide differing perspectives that illuminate central issues that are inherent in all the cases for all involved, from the referral source to the expert and later to the court or related legal setting, and corroborate the *modus operandi* of the alleged harasser. In cases such as these in which the defendant harasser has acted against multiple plaintiffs, the expert can profit from elucidating significant commonalities in the behavior of the harasser and experiences and responses of the multiple plaintiffs in the one location involved.

On the negative side of accepting engagement in multiple evaluations of this type in one worksite, the presence of multiple plaintiffs may provide an artificial consensus concerning the occurrence of discrimination or traumatic events, which might act to falsely lend greater credibility to all the stories. An expert hearing similar accounts from separate plaintiffs involved in a case at one location must keep in mind that the plaintiffs share information, develop similar stories, or worse, for example, even engage in deliberate collusion among themselves toward seeking undeserved compensation in court. Or more subtly, there might be unintentional discussion among the witnesses or plaintiffs that takes place. Alternatively, the expert might have to account for their shared but unreported experience. These possibilities highlight some of the dangers inherent in these types of cases for the naïve assessor. An individualized, comprehensive balanced approach is needed for the evaluation of each plaintiff, with little cross-contamination of information between plaintiffs, despite the advantages of working on their common case. When a single expert evaluates multiple plaintiffs in such cases, without

proper precautions, the expert's credibility may be negatively affected. If the findings and conclusions in multiple similar cases coincide and do not reflect the idiographic approach required for court and related purposes, these tribunals might perceive that the expert has approached the evaluations with a *cookie cutter* attitude and had prejudged the outcome of the cases at the sacrifice of the required balance.

A psychologist/mental health professional is retained to address specific referral questions, with a specific brief or purpose. In most cases dealing with psychological injury, the task of the examining psychologist is to determine the nature and extent of the complainant's psychological injury in terms of the plaintiff's claim for compensation and damages arising from the injuries; the defendant's negligent, reckless, or intentional conduct; or the effects of discriminatory conduct in the workplace, if any. Cases might also involve the effects of alleged police brutality, medical malpractice, etc. In a case of a sexually hostile workplace, for example, the evaluator might be retained to evaluate not only the impact of alleged sexual harassment experiences in terms of psychological consequences but also functional ones, e.g., inability to attend the workplace (Baker et al., 2013; Goodman-Delahunty & Foote, 1995; Lawson & Fitzgerald, 2016; Reed, Collinsworth, Lawson, & Fitzgerald, 2016). Other sexual harassment cases might require the expert to ascertain for purposes of testimony the plaintiff's behavior in the workplace in response to the alleged harasser, etc. For example, the behavior might not be straightforward, and psychological explanations might be required. The psychologist might be asked to explain the reasons for the plaintiff's failure to report recurring sexual harassment (Fitzgerald, Gelfand, & Drasgow, 1995). The latter function of an assessor comprises *scientific framework* testimony, which is designed to assist the trier of fact by providing educative specialized knowledge gleaned from psychological research (Faigman, Monahan, & Slobogin, 2014; Faust, Grimm, Ahern, & Sokolik, 2010; Goodman & Croyle, 1989).

No matter who hires experts, their role relative to the hiring party is referred to as one of *agency* (Rogers, 1987; Shuman, 2000). Granted, the expert is working for the attorney who is representing a party in the case and the expert expects to be paid by that attorney. In turn, the latter expects an effort from the expert that is consistent with prevailing legal, ethical, and professional standards. In that sense, the existence of an agency relationship between the attorney and the expert does not abrogate the expert's professional responsibilities of maintaining objectivity, fairness, and truthfulness in the case (APA, 2013, 2017). Even if the expert stands in an agency relationship with the hiring attorney, this type of agency relationship cannot be reduced to the simple purchase of the expert's services. That is, as discussed above, a primary duty of the expert even as an agent of the retaining attorney is that he or she owes a legal duty to the attorney to keep private all communications or materials related to the case at hand until circumstances

(report, deposition, or testimony) require specific facts in the case to become public in the legal arena (Atwood, 2011; Dostart, 2006; Knapp, 2016; Lareau, 2015; Melton et al., 2018; Shuman, 2000).

In this regard, the issue of privilege is important in psychological injury cases, as mentioned above. To elaborate further, first, this is a circumstance in which the party's expectation of privacy or confidentiality pertaining to the evaluation that had been undertaken is usually severely curtailed or absent because the evaluation is acknowledged at the outset as being for court purposes or actions in related legal proceedings. In these forensic proceedings, the aggrieved party wishes to obtain monetary compensation for psychological damages and exposes their condition to court by participating in assessments that will lead to testimony/reports proffered in court. Therefore, the plaintiff has most often placed their mental condition into controversy by claiming emotional injury, and the complainant can expect at least one plaintiff and one defense forensic assessment of the claimed injury. Although the Federal Rules of Evidence (Federal Rules of Evidence, 2000) do not include a psychotherapist-patient privilege, a U.S. Supreme Court (SCOTUS) decision in the federal case of *Jaffee v. Redmond* (1996) effectively established the privilege (Mitrevski & Chamberlain, 2006; Shuman & Foote, 1999).

However, this decision on privilege, and the rules of evidence in most other jurisdictions, contains an explicit waiver of the psychotherapist-patient privilege once the patient pursues a civil claim for damages in a psychological injury case. Accordingly, the relationship between the examining expert and the complainant is not a therapeutic or treating relationship, but one for forensic evaluation. As such, the complainant can rarely (see the discussion that follows) expect that confidentiality or privacy applies to the case at hand.

Since the implementation of the rules and regulations of HIPAA (45 C.F.R. sections 160 and 164), non-forensic clinicians are required to notify patients/clients about the parameters of confidentiality in the case. Although HIPAA essentially exempts forensic evaluations from coverage under the act (Connell & Koocher, 2003), experts who are assessing individuals in forensic settings for court and related purposes should take documented steps to clearly notify the evaluatee that the forensic assessment does not fall under the purview of HIPAA. In addition, any requests for information or releases of information in the case should correspond with formats that are mandated by HIPAA.

Often, experts will find that the relationship of the expert and the person being represented by the attorney in the context of agency is such that the attorney-client privilege will apply (Shuman, 2000). The courts have long recognized that the attorney-client privilege is critical in the legal arena (Atwood, 2011; Dostart, 2006); when the attorney provides appropriate representation to the person, the attorney must be in a position to obtain and review information that may be

harmful to the person or to that person's case. This situation might obtain if the plaintiff's attorney hires the expert to provide a preliminary evaluation of psychological injury for the purpose of determining the monetary value of the case or whether the case has sufficient likelihood of prevailing in later litigation. If the attorney decides not to have this expert testify in court, the work of the expert is considered to function as a consultancy and that work generally is excluded from potential disclosure in that it falls squarely under the protection of the "attorney work product" (Shuman, 2000).

Whatever the arrangement concerning confidentiality or privilege, it is often advantageous for the expert and attorney to have a written retention agreement. The agreement might itemize the purposes for which the expert is hired and the attorney's expectations concerning privilege and confidentiality. This written agreement might also include details of the financial arrangements made for the expert by the attorney. Of note, it is possible for the expert to partake in or fully draft the said agreement. Professionals should keep in mind that any such document is subject to disclosure to opposing counsel in the course of litigation and insure that the document does not contain any language that would communicate that the expert's obligation to avoid bias is somehow compromised.

Financial Arrangements

The legal concept of agency that we are discussing in the relationship between the expert and the retaining attorney implies a financial relationship between them. In the SGFP, Guideline 5.02 indicates that psychologists are expected to clarify financial arrangements early in the professional relationship with the attorney (APA, 2013). The Guideline further specifies that discussion should be part of the retention process and should be recorded in a written retention agreement. Even in cases in which the person represented by the attorney might ultimately pay for the psychologist's services from their own funds, it is advisable for all financial arrangements in the case to be made through the represented person's attorney in order to preserve the agency relationship and to keep distinct the assumed independent role of the psychologist in the case.

Some psychologists prefer to receive a deposit or retainer at the outset in a case. The psychologist is well-advised to create a separate account to handle fees provided in advance of work and to transfer funds to the business account as the work proceeds. This arrangement allows the psychologist to initiate work on a case without concern that professional fees will not be paid. Once fees consume the deposit amount, the psychologist should have some arrangement that allows for additional deposits as the case progresses. The psychologist, having been cautious by setting up an in-trust account to place these deposits additionally ensures that any amount not consumed by professional fees in the case is returned to the retaining lawyer.

This *pay as you go* arrangement substantiates the perspective to the court that the psychologist has not placed themselves in a work-product relationship in which the psychologist's fees were contingent on the results of the evaluation.

Contingency fee arrangements are discouraged by SGFP 5.02, and psychologists should avoid any circumstances functionally equivalent to a financial arrangement such as this. For example, a psychologist should not work under a *letter of protection* in which the retaining lawyer guarantees that the psychologist's fees will be paid from the potential proceeds of the case. Such arrangements are often made in cases in which the attorney indicates to persons being represented that they do not have to pay unless the attorney "wins" the case. In financial arrangements of this nature with the person represented, it is more than likely that the psychologist will not be paid if the plaintiff does not settle at a sufficient financial level or if the case does not prevail in court. An arrangement such as this gives the psychologist a direct financial interest in the outcome of the case, precisely what the contingency fee prohibition in the Guidelines aims to deter.

Clarification of Roles

The psychologist might be asked to serve in one of several roles in civil cases. Three distinct roles are distinguished: (a) the diagnostic clinical or treating psychotherapist, (b) the diagnostic examining expert or social framework expert, and (c) the consultant. With some limited exceptions, it is critical for the psychologist to avoid undertaking more than one of these roles in the same case. In this section, we offer a short discussion of these issues. For a more detailed discussion, the reader should refer to the following: Drogin (2019a, b); Greenberg and Shuman (1997); Hellkamp and Lewis (1995); Shuman et al. (1998); Spizzirri (2017); Williger (1995); and Wygant and Lareau (2015).

Treating Psychotherapist

Plaintiffs in many civil cases might be in the position of having a history of or current involvement in a psychotherapy relationship related or unrelated to the alleged case events. It is appropriate to engage the psychologist in a forensic case in such circumstances because of the psychologist's knowledge of the impact of traumatic events, discrimination, or other actionable events on the complainant. Because the treating psychotherapist will have knowledge concerning the emotional condition of the plaintiff, the hiring attorney might call the professional into court in order to testify about the impact of the case-related events on the plaintiff.

When the psychotherapist enters into legal proceedings in this manner, it generates ethical issues in the form of dual-role concerns. APA EPPCC Standards warn against assuming

more than one role in a professional relationship when the ensuing multiple relationship appears reasonably likely to interfere with the psychologist's work or carries the risk of exploitation or harm. Specifically, APA EPPCC Standard 3.05 states the following:

- (a) A multiple relationship occurs when a psychologist is in a professional role with a person and (1) at the same time is in another role with the same person, (2) at the same time is in a relationship with a person closely associated with or related to the person with whom the psychologist has the professional relationship, or (3) promises to enter into another relationship in the future with the person or a person closely associated with or related to the person. A psychologist refrains from entering into a multiple relationship if the multiple relationship could reasonably be expected to impair the psychologist's objectivity, competence, or effectiveness in performing their functions as a psychologist, or otherwise risks exploitation or harm to the person with whom the professional relationship exists. (APA, 2017, p. 6)

Forensic Guidelines 4.02.01-02 also provide guidance on this issue. Taken together, these sources advise the psychologist to heed the dangers of being exposed in court or a related legal setting for having entered into a dual relationship against all professional advice, not to mention possible consequences of disciplinary action by the psychologist's regulatory professional body.

Although these standards allow some degree of discretion concerning the assumption of more than one professional role in a forensic case, multiple viewpoints (Bush et al., 2020; Drogin, 2019a, b; Greenberg & Shuman, 1997; Gutheil, 1998; Shuman et al., 1998) maintain that the role of a treating psychotherapist in court should be very limited. Specifically, the treating psychotherapist should provide testimony only about behavioral observations that were made, the (working) diagnoses that were used, and the substance and process of the therapy. The plaintiff's needs for future treatment that the psychologist had contemplated when the plaintiff was their patient may also come within these boundaries. However, the psychotherapist should probably avoid offering testimony concerning ultimate issues, such as proximate cause, or other critical psycholegal issues in the case.

The rationale for this type of limitation springs from dual-role conflicts to working in both the psychotherapy and the expert roles. The therapy relationship with the patient should be the primary commitment of the psychotherapist. In assuming the role of expert or consultant beyond that of the therapeutic role, the psychotherapist risks negatively impacting the therapeutic relationship, and in consequence, harming the psychotherapy client. In the expert role, the psychotherapist will not have undertaken the comprehensive assessment required

at the forensic level at the outset of the relationship and so runs the risk of working from an inadequate database (only what the client or patient tells the therapist). In the eyes of the court or a related tribunal, this type of assessment has inherent weaknesses and will appear to be biased in favor of the client.

Expert

When psychologists serve as experts, their primary duty is to the court. They do not owe allegiance to the referral source, any third party, and so on, but should aim to offer testimony or a report to the court or tribunal that is more probative (helpful) than prejudicial. This means that the evidence that the expert provides assists the trier of fact (the judge and jury) in deciding the case by providing facts and relevant opinions rather than attempting to produce positive or negative feelings about the plaintiff or defendant. Federal Rule of Evidence (FRE) 702 (and similar state rules of evidence) provides the basis for admissibility of expert testimony. Experts need to adhere to this rule. In general, non-experts who testify to court are lay or percipient witnesses (those who describe what they saw, felt, or heard). They are precluded from offering opinions to the court. Legally, opinions refer to conclusions, interpretations, and recommendations that go beyond the (putative) facts of the case. However, a witness whom the court has qualified to testify as an expert is expected to offer opinion testimony. FRE 702 states the following:

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 otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts in the case. (Federal Rules of Evidence, 2000, p. 45)

This FRE embodies changes that followed the U.S. Supreme Court decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), *General Electric Co. v. Joiner* (1997), and *Kumho Tire Co. v. Carmichael* (1999). These three SCOTUS decisions, collectively, are referred to as the *Daubert* trilogy. They designate the scientific basis for psychological and related mental health work testimony that culminates in expert opinions. The courts that subscribe to the *Daubert* trilogy principles expect reliable opinions that go beyond the standard of general acceptance, as held in *Frye* (1923). The courts contend that reliable expert opinion results from careful application of reliable (valid) methods that contribute to the "facts" of a case. Note that FRE 702 does not refer to interpretations and conclusions based on the facts gathered in the case. That process

depends on the skills of the expert witness in arriving at her or his opinion in the case at hand based on the gathered facts. This is why the differing interpretations and conclusions of plaintiff and defense experts can both be accepted in court or related tribunals as reliable opinions for court purposes. Once submitted, the opinions, interpretations, conclusions, and recommendations will be adjudicated by the trier of fact (judge, arbitrator, jury), who will attribute their own interpretations and conclusions about the opinions offered to them, and the legal weight that they merit in arriving at their own decisions.

In discrimination or other civil claims filed in federal courts, two Federal Rules of Civil Procedure (FRCP) apply. The first, Rule 26(b), relates to the expert employed by the plaintiff to conduct a forensic evaluation for the purpose of trial court testimony. This expert must produce a report based on the evaluation conducted. FRCP 26(b) dictates the following:

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 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. (FRCP 26 [b] 2001)

In addition, the rule permits the opposing party (usually the defendant) to take the deposition of the expert. This rule denotes the challenges facing forensic experts in court or related tribunals, and underscores the extensive preparation that the expert must undertake before court participation begins. Beyond that, importantly, any opinion offered must be justified carefully. In the field of psychological injury and law, it is understood that competing opinions, interpretations, conclusions, and recommendations must be considered in the report, and the best one of all the possible opinions and their contents justified, with explanations as to why the alternatives are not the best choice in the case at hand, and so on. Experts should consider the dictum to leave no stone unturned, or else, proverbially, they might be subject to a rockslide.

The other relevant federal rule applicable to these types of testimony is FCRP 35. This rule allows one party, most typically the defendant, to compel the other party, most typically the plaintiff, to undergo a forensic evaluation. This type of imposed evaluation is performed under court order. The place, duration, and scope of the evaluation might be specified by the order if the adversarial parties cannot reach an agreement on these matters. The rule explicitly states the following:

When the mental or physical condition ... 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. The order may be made only on motion for good cause shown. (FRCP, Rule 35, 2001)

A Rule 35 evaluation is triggered when “the mental or physical condition of a party” is “in controversy.” The term unclear in this rule is the meaning of “controversy.” As we have described extensively above, the forensic examiner’s report must be based on all the (reliable) facts gathered in the case, and therefore include the results of all the testing conducted in the case. The report must justify any diagnoses, interpretations, or conclusions determined by the evaluation (Shuman, 2000a). The U.S. Supreme Court held that “good cause” and “in controversy” require the showing of more than mere relevance to the case at hand (*Schlagenhauf v. Holder*, 1964), but the court provided little guidance on factors that warrant a forensic psychiatric or psychological examination. Typically, an allegation of emotional distress by itself is not enough to trigger a Rule 35 forensic examination. However, a claim for emotional distress in conjunction with one of five additional conditions might be sufficient to trigger the examination:

(a) Plaintiff claims intentional or negligent infliction of emotional distress; (b) plaintiff alleges a specific mental or psychiatric injury; (c) plaintiff claims unusually severe emotional distress; (d) plaintiff plans to offer expert testimony to support the emotional distress claim; or (e) plaintiff concedes their mental condition is in controversy for purposes of Rule 35 (*Turner v. Imperial Stores*, 1995).

Simply, these conditions feed into the question of the viability of the claim and the intention to pursue it in court. But there are more than legal conditions that apply to forensic work by experts. In one way or another, they are governed by professional and ethical practice guidelines, rules, and regulations.

As mentioned, in general, a psychologist retained as an expert in a civil case operates under the APA “Ethical Principles of Psychologists and Code of Conduct” (APA, 2017) and the SGFP. These codes and guidelines require not only knowledge and functioning within the confines of the law in taking on the role of a forensic expert but also that exceptional skills are involved compared to those required of a typical clinician. In this sense, the FRE and FRCP require a high level of professional skill and performance.

Consultant in a Non-testifying Role

Consultants are valuable adjuncts to the hiring attorney. In this role, the psychologist assists the attorney with

particular aspects of the case at hand, such as helping with expert witness selection and preparation; strategy in trial; approaches to jury selection; reviews of testing and interview data acquired from the opposing experts; preparation of questions for the cross-examination of the opposing experts; reviews of documents relevant to the case in order to determine how they should be used; informing/educating/training the attorney in some aspect of their knowledge about psychology, psychopathology, or testing; preparing exhibits for the trial; or explaining why the opposing party, such as the defendant, is behaving in a particular way (Shuman, 2000). Although some of these functions might be performed by experts who appear in court to testify, in contrast to the psychotherapist or testifying expert, the consultant working exclusively in that role functions under the cover of the attorney work product so that none of the consultant's work is discoverable in court (Shuman, 2000).

However, both the retaining attorney and the expert must take care to maintain the confidentiality of this relationship. FRCP 26, which governs some aspects of discovery related to expert witnesses, specifies that an expert retained “in anticipation of litigation or preparation for trial and who is not expected to be called as a witness in trial” is not subject to discovery, absent a showing of “exceptional circumstances under which it is impracticable for a party seeking discovery to obtain facts or opinions on the same subject by other means” (FRCP 26 [b] [4] [B]). Shuman (2000) has noted that the bar set for discovery of consulting experts is high and has rarely been applied to mental health experts. The exceptions specified by the courts are ones in which the consulting expert has in his possession or control evidence that is not available through other sources (e.g., *Baki v. B.F. Diamond Constr. Co.*, 1976).

The most prudent professional practice relating to the consulting role is that the psychologist avoids serving both as a consultant and a testifying expert in the same case in order to circumvent practical as well as ethical conflicts when both roles are undertaken. However, the shift from consultant to expert in a particular case might arise in some circumstances. For example, in some cases, a consultant ends up as a testifying expert by simply beginning work in a consulting role, for example, by reviewing records or evaluating other evidence to determine if a full-scale forensic psychological evaluation would be appropriate. This might eventuate when the retaining attorney is unsure whether a face-to-face evaluation of the plaintiff would be helpful to the case.

In the initial consulting role in these transitional cases to a testifying expert role, a preliminary review of the existing documentation, which may include other experts' reports, can provide sufficient information for the retaining attorney to determine whether an in-depth forensic evaluation would be helpful. In addition, the consultant would assist in

determining the parameters of that proposed evaluation. For example, suppose a case reveals a history of closed head traumatic brain injury in addition to allegations of having experienced a psychological injury, discrimination, or traumatic exposure. This history might require an evaluation by a neuropsychologist to rule out a neuropsychological basis that underlies the presenting condition of the plaintiff's complaints.

The shift from this kind of file review in the consultant role to that of a testifying expert is relatively uncomplicated as long as several precautions are considered. First, the retaining attorney should not provide attorney work-product information to the expert, because this information would be discoverable following the forensic expert evaluation. Second, the expert should avoid engaging in consulting activities that would be considered inconsistent with the testifying expert's role. For example, the expert should avoid discussing trial strategy or tactics with the attorney, the strengths and weaknesses of the plaintiffs or defendant's case, or anything else that would strike the court as an appearance of bias or partisanship.

There are other confounds to the consultant role that should be avoided. Should the expert be asked to shift from a testifying expert to a consultant role, sometimes this poses problems for the expert. Primary among these problems is the discoverability of the expert's work following the disclosure to the court and the opposing party of that expert. Even activities that are strictly advisory or consultative in nature might be subject to discovery under FRCP 26 when the expert is designated to testify.

Conflict of Interest Check

Before accepting the case, experts must ensure that they have no conflicts of interest that would interfere with undertaking their professional responsibilities (see SGFP 4.02). Conflicts would occur, for example, when the potential expert has had prior contact with the person represented. Conflict of interest does not exist simply because the expert is working with the same attorney or law firm on more than one case, unless these cases are connected in one way or another. However, if the psychologist has had past or current psychotherapy relationships with any of the attorneys on the case, the potential role as an independent expert is compromised. This result obtains because the psychologist who has had conducted psychotherapeutic work with a member of the legal counsel team (or even their families) no longer is independent; such relationships constitute a conflicting dual relationship. If the expert in such circumstances were asked in deposition or court whether there had existed a prior relationship with any of the counsel or their families, they might be obliged to disclose the existence of a previous confidential relationship.

Determination of Competence to Fulfill Role

Issues germane to a forensic psychologist's competence to fulfill their assigned role relate to the complexity of knowledge required in the forensic expert role. An important step to consider is the extent of one's skills in relation to the requested forensic services (Heilbrun, 2001; Olley, 2014). There are five topics with which a psychologist anticipating practice in a particular area should have familiarity, according to Melton et al. (2018).

First, in psychological injury and law, the expert should be aware of the relevant laws pertinent to the particularities of the area of legal dispute involved. Knowing how to read laws and to translate them into terms applicable to psychological, assessment, report writing, and legal opinions, is a daunting task. As applied to personal injury or tort cases, the potential expert should have some understanding of the elements of causation and the standards for psychological damages in the expert's jurisdiction. Notably, legal causation is different from what the psychologist knows about causality in the sciences and in medicine. For the law in psychological injury cases, causation refers to whether the event at issue has contributed to the evaluatee's psychological presentation in an undisputed fashion beyond a *de minimus* range. The critical question is whether the event at issue was a substantial or material contributing factor to the person's presentation? Does the person's pre-existing psychological vulnerability or psychopathology, if any, explain in part or in full the presenting condition? (Young, 2014, 2020b)?

In these regards, the legal test for causality is often paraphrased as the "but-for" test; that is, absent the index event, would the person's current presenting condition have been the same? The situation is complicated in cases of multiple causalities. For example, what if the person has a medical event simultaneously with being struck by a motor vehicle? How can the joint causality be disaggregated? These types of examples illustrate the complexity in the causality determinations that attorneys and the court need to confront legally. The expert is asked to translate these questions into psychological terms in order to answer the referral questions. The expert's task is not only to identify any diagnoses and functional impairments that might apply, but also to specify the exact causal linkages (or chains therein) that they might have with the event (or with events) at issue, and also to possible confounds, such as pre-existing psychological status.

Further, in terms of the competence issue, for example, as applied to sexual harassment cases, potential experts must first consider whether they have a working knowledge of the Equal Employment Opportunity Commission or Fair Employment Practice Act procedures in which the case originated, whether the case is filed in federal or state court, and the rules of evidence that apply to psychological testimony in that forum. Different jurisdictions in which these types of cases are

brought to court might also have local applicable rules which the psychologist needs to know. It does not behoove the psychologist to try to figure out their requirements for court preparation and participation on the fly.

Second, in addition, the psychologist should have working knowledge of appropriate assessment forensic instruments. This is critical in forensic assessments, and markedly distinguishes forensic workers from other types of practitioners. Psychometric forensic tools differ from clinical tools in several major ways: (a) They might have specialized norms or different cutoff scores. (b) They should have respondent validity scales that help determine the extent of negative or positive response bias. In the field of psychological injury and law, the question of negative response bias is more important. For example, the psychologist must assess whether the respondent is significantly exaggerating symptoms? (c) In psychological injury cases, the reasons for extensive symptom exaggeration could include malingering, and the forensic expert must have the skills to rule malingering in or out. This includes knowing which psychometric tests to use for the matter (Young, 2014; Young & Drogin, 2014).

In the field of psychological injury and law, workplace discrimination, and tort cases, there are few specialized assessment instruments compared to the array of tests that can be used clinically. Nonetheless, the potential expert should have knowledge of those tools (described below). These tools include broad-band tests of psychopathology and personality that include scales designed to address the issues of symptom exaggeration and possible malingering. There are multiple other tests the forensic assessor could use, which are referred to as respondent "validity" tests. These can be stand-alone or embedded in other test instruments. Note that respondent validity is not the same as test score reliability and validity. The former include measures on the degree of positive effort, lack of symptom exaggeration, malingering, and so on, that the evaluatee brings to the testing situation. The latter refer to whether any test that is administered to the respondent is measuring what it is supposed to be measuring and that matter applies equally to the respondent validity components of a test and its clinical validity components.

Third, the psychologist should have a grasp of the relevant legal principles that apply in a particular case. For example, in a civil rights case, the potential expert should understand the relevance of whether it is a Title VII case, an Age Discrimination in Employment case, an Americans with Disabilities Act case, or one filed under the state's civil rights legislation, or whether it is being tried as state or federal statutes related to torts. All of these types of cases might differ on key issues, such as the elements necessary to establish a cause of action or defend it in the setting in which the case is filed.

Fourth, the psychologist should have knowledge of the phenomena of discrimination and reactions to adverse events that are commonly the basis for tort or civil rights cases. This

background knowledge will assist the expert in determining how the particular case in which they are involved either conforms with or differs from the cases reported in the relevant literature. In the forensic context, the psychologist should be familiar with the nomological, or population-level research and knowledge about matters such as normative reactions to traumatic events, discrimination, types of possible diagnoses, their prevalence in the contexts at issue, and so on, along with expected symptoms, their duration, frequency, and intensity, and their functional impacts, if any, including pertaining to disability. Further, the expert needs to conduct a full-scale comprehensive forensic assessment that meets the bars expected by courts and related tribunals and must acquire information, data, and knowledge about the particular evaluatee as they present to the examiner. This is referred to as the idiographic level of the assessment. The expert needs to be able to navigate both the nomothetic and idiographic aspects of a case in order to arrive at insightful and sagacious opinions, interpretations, conclusions, and recommendations in the case at hand.

Finally, potential experts should be able to assure the court that, if called as testifying experts, they will meet all requirements to as an admissible expert and be qualified as such. The first contact with court is not about the testimony to come but is about the qualifications of the expert. The novice would do well to meet the minimum requirements of competence expected in the field and by the court for the case and the matter at hand. The more seasoned forensic experts might think that they have an advantage over newly minted professionals on the opposing side; however, competency includes knowledge of the changing assessment procedures in the field, the psychometric statistics about the tests used in assessments, the scientific literature pertaining to all aspects of the case, including those psychometric instruments, etc. It is likely that newly graduated, highly educated young professionals will have surpassed the knowledge base in these regards of overly self-assured senior experts.

There is also the issue of acquiring competence in a new area of practice, for example, one tangentially related to a practitioner's existing competence. In general, the psychologist who has done other forensic work and wishes to begin working in the field of personal injury, civil rights, or tort cases should consider consultation with an experienced colleague as a learning tool to start the competency process, and should engage in the full range of activities listed above as a basis for ensuring competence in the case for which professional services are requested.

Consideration of all these factors among others that assure the requisite competency—such as education, training, upgrading, continuing education, attending conferences and workshops, reading, publishing, teaching, and the like—the expert should dispel any reluctance of the court to allow the expert to testify in the case at hand on the matters at issue.

Timelines and Deadlines

Although it may seem mundane after consideration of the complexities of multiple roles, competencies, and the like, the psychologist's next task is to ascertain the timelines and deadline requirements for the work product. The most critical question for the expert to ascertain is the date of discovery cutoff, in that date is the one on which the expert's report must be submitted. That deadline might also include the date for the completion of the potential expert's deposition. Examinations conducted under FRCP 26 or 35 may be on a shorter timeline than is mandated by these rules. In order to compute whether the time available is sufficient, the potential expert should consider other ongoing commitments and should inquire about the nature and extent of available documents that need to be reviewed, and whether they are time-consuming.

In most cases, the expert will want to review available records before the evaluation of the represented person begins in the office (or by remote tele-assessment means in these times, as described below). The documents in many civil cases might be extensive and arrive at the office in multiple folders, files, and even boxes, or similarly by electronic means, such as secure document services. These might require considerable time to review, annotate, and digest. A prudent forensic practitioner will allocate twice the time anticipated for completing these document reviews. At the same time, the evaluator should not have preconceived notions about the person being evaluated that are based on the document review that may have been conducted before the evaluation. Each person deserves a fair interview process and testing procedure on their own merits, and not to be channeled to opinions, conclusions, and so on, simply based on pre-existing information and data in the file.

Evaluation Standards

In this section, we consider standards of evaluation. The first question is whether a paper review or the like will stand up forensically in court. In general, experts asked to diagnose a person in the field of psychological injury and the law should not render opinions in these regards about people whom they have not evaluated directly. According to APA Ethical Standard 9.01b (APA, 2017), the information used by an expert must have a sufficient basis. In some cases, the psychologist may not be able to examine directly the person and will rely on psychological testing that had been undertaken by another psychologist or on sworn statements and depositions. In these less than optimal circumstances, the forensic expert must take the responsibility of advising the finder of fact of the impact of the limitations of information that had been gathered on the reliability and validity of the report and testimony. In addition, the expert must limit the scope of the conclusions or

recommendations to the information at hand (Heilbrun, 2001; Heilbrun et al., 2014).

As a general rule, these restrictions do not limit the provision of scientific framework expert testimony (Goodman & Croyle, 1989) that relates the scientific research on a topic to the case before the court or related tribunal. In general in these types of cases, the expert avoids rendering an opinion about the parties in the case. However, the said expert may respond to hypothetical questions that relate to the case. Even in those instances, the expert should be prudent and clarify the limitations or applications of such research on the question in the case (Faigman et al., 2014).

Preparation for the Evaluation

The psychologist's preparation for the evaluation depends on the issues central to the case (LaDuke, 2017). These are framed by the plaintiff's complaint, which details the plaintiff's case, and the defendant's response, which outlines the defense perspective on the matter. More often than not, the psychologist will find the specific requests of the retaining party and the issues that are relevant to the case within those documents. The psychologist should not deviate in the subsequent evaluation from the referral question provided by the retaining attorney and, as noted in the consultation of the specific plaintiff and defendant, documents that might provide added necessary specifics. The psychologist should confine the evaluation to all relevant issues, and only them, even enumerating them in the beginning of the report and responding to each one at the conclusion of the report. Needless deviation in these regards from what had been requested of the expert risks invalidating the report in terms of its admissibility might needlessly invade the right to privacy of the represented person and inject complicating information into the case (SGFP 10.01). For example, the adversarial parties may agree on the facts in a particular case of the case-related events. If this obtains, for example, there is no reason for the psychologist to assess the degree to which the plaintiff accurately evaluated those events as one might in an assessment of liability. In short, the psychologist's first step is to determine the issues relevant to the case and focus the evaluation only on those matters.

Record Review

We addressed this issue in the competency section above. Here, we add more pertinent information on the topic. A critical component of the psychologist's preparation in a personal injury or tort case is to review relevant records (Foote & Lareau, 2013; Goodman-Delahunty and Foote, 2013; Karson & Nadkarni, 2013). Although the records available in civil cases, such as workplace discrimination cases, are

often voluminous, the psychologist does not have to review all available documents, because some might be tangential to the question at hand. At a minimum, the psychologist should review legal documents that frame the key legal elements as explicated by the litigants. The first to consider in these regards concerns the claim or complaint offered by the plaintiff. This statement will lay out the factual and legal basis for the lawsuit that is at issue. This provides a statement of what the plaintiff will argue in court, with the expectation that they can win the case on the grounds therein. In the claim, the plaintiff's attorney might widen the net and include more potential defendants and name more of the defendants' acts or omissions than will be ultimately proven in court. The plaintiff statement constitutes a necessary basis for initiating the case; it might be amended as the case develops, for example, by reducing or adding events or elements.

The second critical document in any case is the defendant's rebuttal, answer, or response to the plaintiff's complaint. This document clarifies which of the plaintiff's claims the defendant maintains will not be supported by evidence. The question to ask is how much these documents, prepared in the adversarial divide, are worthy sources in a case, beyond the information gathered according to the usual subjective and objective means in a forensic assessment. For the expert psychologist in a case, the plaintiff's claim and the defense response should be viewed as partisan documents that may or may not be supported by the expert evaluation or other evidence that is applicable to the case at hand.

Attorneys often address written interrogatories to the parties as part of the formal investigative process in the discovery proceedings of the case. Interrogatories constitute a series of questions that focus on critical but relatively routine issues in the matter at hand, such as the identifying information concerning the plaintiff (e.g., the full name, social security number, and address). More pertinent, frequently, the job history, residential history, reported medical history, and the like, as well as a list of the plaintiff's health care providers, including for mental health care, are included. In most jurisdictions, the represented person's attorney reviews the answers to the questions in the interrogatories, and the represented person is required to swear to court that the statements that had been made are factually true.

Depositions involve sworn testimony taken pursuant to a court subpoena. The difference between depositions and in-court testimony is that, in the case of depositions, they are taken in a private setting, such as an attorney's office or a professional's office, and in the presence of the parties, their counsel, and a court reporter. Deposition transcripts might be used in later proceedings should a witness not be able to appear in court in order to provide *viva voce* (live, in court) testimony, or as a basis for motions to the court, or even for impeachment of that witness at trial. An attorney can also submit either

deposition excerpts or full deposition transcripts into evidence in a trial.

The expert psychologist should review the deposition testimony of the plaintiff and of any medical or mental health professionals who had evaluated or had treated the plaintiff. The defendant(s)'s deposition should also be reviewed, as well as depositions of anyone relevant to the case at hand, such as anyone who might have witnessed the events that had given rise to the index lawsuit. If family members of the plaintiff were deposed, their deposition records could be useful in corroborating the represented person's self-report in the evaluation. Similarly, the depositions of any significant others or collateral informants might be useful, such as the represented person's friends or coworkers, who may have witnessed changes in the plaintiff's functioning over time, especially in relation to the events at issue. These sources, relatively independent parties to the case at hand, can assist the evaluating practitioner to document and compare pre-event in relation to post-event psychological effects and their course over time to the present. Depositions of other experts may also be helpful, such as experts who had conducted other psychiatric/psychological/ mental health evaluations. Indeed, a review of the deposition of the cumulative opposing mental health experts in a case is critical in preparation for evaluation. However, depending on the timing of the evaluation, the other expert's report may not be available. The forensic assessor should always be prepared to alter their professional opinion in a case should new information arrive in depositions, reports, or from other sources that provide disconfirmatory evidence for the opinions that might have been offered. For example, in a case involving a disability claim subsequent to a tortious motor vehicle accident, one author (G.Y.) was asked by the opposing attorney in cross-examination whether the opinion offered to court would remain the same if video surveillance clearly showed that the plaintiff had been working, despite denials to the contrary. This indicated that evidence that could affect opinions might even be submitted in court, hypothetically, as the close of trial was approaching.

The forensic psychological expert should review the plaintiff's medical records when available, especially those of a mental health nature. As described previously, the causation question is critical to the case legally, and the expert might be asked to opine on it. This does not address ultimate issues in a way that contravenes court requirements, because, for example, in the case of posttraumatic stress disorder, assignment of the disorder depends on an analysis of causation of the traumatic event that might have taken place. Psychologists have to be skilled in these diagnostic causal matters.

In addition, to determine causation of a psychological injury, the expert psychologist must determine which psychological vulnerabilities, conditions, and psychopathologies had preexisted the purported case-related trigger event. A review of these medical and mental health records can provide a basis

for that determination of pre-existing factors that might be involved in explaining in part, or even in full, the represented person's mental health condition as diagnosed in an assessment. Therefore, hopefully, these available records would span the plaintiff's whole life and include material from all providers, not just mental health practitioners. For example, the notes of primary care physicians often include records of mental health complaints over the lifespan. Most importantly, mental health records are critical, including results of testing gathered in the course of prior psychological evaluations (Heilbrun et al., 2014).

Because of state laws, regulations, or HIPAA, it may be necessary for the plaintiff to sign a separate release for test data, and those data should be forwarded directly from the examining psychologist to the forensic psychologist (APA Committee on Legal Issues, 1996) in order to avoid ethical concerns on the part of the releasing psychologist about disclosure to those not trained to review the material (Ethical Standard 9.04, APA, 2017). In addition, it is often helpful to review the plaintiff's school records, from grade school through college/university or trade school, when available. This information might help in establishing the presence of early behavioral problems, such as attention-deficit/hyperactivity disorder or conduct disorder. These types of findings will be critical toward establishing the extent of preinjury contributions to the current psychological presenting condition. Other records of note involve the military. Does the plaintiff have a military history marked by judicial or non-judicial punishment, or was the veteran separated from the service with a less-than-honorable discharge? Work records might be critical, as well. What have performance reviews indicated before the event at claim? Pharmacy records are critical, too. What medications were being consumed beforehand and why, and are prescribed medications since the event at claim being taken, demonstrating efforts to mitigate losses?

In cases of workplace discrimination, employment records from the job that the plaintiff had been performing at the time of the lawsuit and, also from earlier employment, are useful. These performance reviews, and related promotion or transfer records, might offer pertinent clues about the employee's workplace functioning and how the employer considered the worker's performance. If the plaintiff is serving in the military, service records can provide a picture of how the plaintiff had been functioning in assigned roles and consistent with rank within the constraints of the structure and discipline of that environment.

After conducting the document review, the expert psychologist should consider organizing the obtained information and consolidate it into a more accessible format with people, professionals, and timelines indicated. The listing of people and professionals involved in the case and their roles, alleged critical incidents, and comprehensive timelines can help the expert organize the material efficiently. This type of organization

will help experts to reconstruct their work, particularly when a long interval transpires between their initial work on a case and the time a deposition or court testimony becomes necessary. Similarly, summaries made of depositions and other summaries of medical and mental health records will be useful. The expert psychologist needs to keep in mind that although these summaries aid in recalling and organizing the facts of a case that are pertinent to the forensic evaluation, their notes are discoverable by the opposing party.

Research Review

Experts in mental health are admitted to court based on their competency, education, training, and experience in the field at issue. This includes their knowledge base, such as is contained in the relevant scientific literature. Experts might be asked to bring to court the scientific peer-reviewed articles that they had been reading and digested during the time frame of the forensic evaluation that had helped in formulating their opinions, interpretations, conclusions, and recommendations in the case at hand. The examining psychologist will almost always want to review and apply the research literature in the area in which she or he is conducting the evaluation. The necessity of a review might be conditioned on the psychologist's familiarity with the extant research in the area and the time since the last review of that literature. Best practices would include keeping up to date on a weekly basis on the topics involved in ongoing assessment for court and related purposes. For example, suppose a meta-analysis is published on test cutoffs for a commonly used test, and the recommended modified cutoff score is not applied to the case at hand due to negligence in keeping up with the newly emerging literature? If it has been more than a year, if not a month, it is probably critical to review the most recent literature to ensure sufficient knowledge of the research and to ensure that the assessment procedures the psychologist anticipates using are up-to-date and accurate.

The expert psychologist should be knowledgeable about legal topics pertaining to the case at hand. It may be necessary to review the legal cases and legal publications, such as law review articles, on those topics. In the era of the *Daubert* trilogy, the admissibility of testimony using the particular evaluation procedures that constitute the psychologist's testing battery administered to the represented person might be a critical issue to address before the evaluation. The expert might have only one opportunity to evaluate a given represented person. Administering tests that do not meet *Daubert* standards in jurisdictions subscribing to them, or their equivalents, as is required in the majority of jurisdictions in the states and provinces, will be considered remiss of expected standards.

Moreover, an understanding of the elements of proof for a particular cause of action may be helpful (e.g., Foote & Goodman-Delahunty, [in press](#) on sexual harassment; Foote & Lareau, 2013, for tort cases;; Goodman-Delahunty, 2000 on discrimination because of disability; Goodman-Delahunty & Foote, 2011 on workplace discrimination; and Lareau, 2016 on workplace discrimination). Standards of proof in civil cases typically involve the balance of probabilities' threshold. That is, the expert testifies that on the balance of probabilities, more likely than not, the proffered responses to the referral questions are in the indicated direction of the opinions. The civil case arena differs from the criminal one, in which the threshold for determinations is stricter and involves proof beyond a reasonable doubt (Young, 2016a).

Notification and Appointment Setting

Once arrangements have been made for the represented person to participate in the evaluation, the next step for the expert often involves communicating with the party. When the psychologist has been hired by the defendant, it is sensible to send the letter and enclosures to the attorney involved, who will then pass them to the party. That way, if the lawyer has any concerns or objections to the contents, they could be addressed prior to the evaluation taking place. For example, if the examiner plans to audiotape the interview portion of the evaluation, the consent form for audiotaping should be made known to the party and included. The party's attorney might object to the recording, as another record of the party's account could be used to impeach prior testimony. It must be emphasized that in the changing confidentiality environment and the continuous violations of privacy and confidentiality that are reported to the public, laws pertaining to confidentiality and privacy might be passed in one's jurisdiction and govern behavior on these matters for experts. It behooves them to know these laws and constraints as the laws are released.

The enclosures sent to the party should include a number of elements that are fairly standard across jurisdictions: (a) a cordial but businesslike greeting and notification of the date, time, location, and anticipated duration of the evaluation; (b) a map to the location to assist the party to find the testing site; (c) a brief description of the anticipated procedures (e.g., paper-and-pencil testing, cognitive testing, and clinical interview); (d) a consent for evaluation; (e) any releases of information that the examiner wants the party to sign; and (f) an optional personal history questionnaire as a means of speeding up the later interview and systematizing the information-gathering process (Greenberg et al., 2003).

Use of a questionnaire provided in advance to the party is a matter of differing practice among qualified forensic psychologists. The question arises about the degree to which they are

helpful to the assessment process by acquiring useful information from a party. Drawbacks to consider include the following: whether someone other than the party could have contributed to the answers to the questions, and whether the use of a questionnaire might deprive the clinical interview of spontaneity. However, the provision of a questionnaire also provides a source of information that was created by the evaluatee so that any later controversy about that information may be settled by this document.

The Evaluation Appointment

When the party arrives at the office for the evaluation, the psychologist must check the party's identification. This verifies that the person being evaluated is the one referred. If the personal information form had not been completed in advance, the psychologist should have the party complete it in the office. This enables the psychologist to contact the party after the evaluation, if necessary. Early in the evaluation sequence (or even before that date), it is critical to determine if the party has been tested before, such as for intellectual testing. Recent testing for some types of testing may preclude using that same instrument because of a test-retest effect (Matarazzo, 1987).

Informed Consent

In almost every forensic case, it is ethically and legally necessary to obtain written informed consent from the party prior to initiation of the evaluation procedures (APA Ethical Standard 3.10). The SGFP provides what should be included in an informed consent for evaluation:

Such information may include the purpose, nature, and anticipated use of the examination; who will have access to the information; associated limitations on privacy, confidentiality, and privilege including who is authorized to release or access the information contained in the forensic practitioner's records; the voluntary or involuntary nature of participation, including potential consequences of participation or nonparticipation, if known; and, if the cost of the service is the responsibility of the examinee, the anticipated cost. (SGFP 12-13).

Informed consent should include, at the minimum, the following components: (a) a notification of the party for whom the psychologist is working, (b) a brief general summary of the issues to be addressed in the evaluation, and (c) the circumstances of confidentiality. If the evaluation is one conducted under the protection of attorney work product, then the party must be advised of that protection (Melton et al., 2018). If the professional develops a form that is used in most civil cases, it

is most appropriate to advise the evaluatee that both sides of the case may eventually have access to the information generated in the case. This is particularly true if it is an FRCP 35 evaluation mandated through a court order by the defendant.

The confidentiality portion of the consent form provides an opportune time to advise the party of conditional disclosures (Shuman & Foote, 1999). In many jurisdictions, these include the legally mandated disclosures, such as report of child abuse and elder or disabled-person abuse (Greene, 2011; Hall, 2007; Kalichman, 1993; Kapoor & Zonana, 2010; Lareau, 2015; Levine & Doueck, 1995). In some jurisdictions, the evaluator should advise the party of a legal duty to protect others, often called *Tarasoff* (*Tarasoff v. Regents of the University of California*, 1976) notifications (Appelbaum, 1985; Bersoff, 2014; Monahan, 1993; Treadway, 1990; Wulsin et al., 1983) or notifications related to concern about suicide. To trigger notification, the latter should include intent and a plan beyond any reported suicidal ideation. In addition, the consent form should advise the party of the evaluation procedures, usually an interview and psychological testing, as well as a document review.

The party should be notified regarding the venues in which the results of the evaluation may be presented, which is usually in a written report or in sworn testimony given in deposition in court or by affidavit. The party should be told that they will not receive a copy of any report and that copies might be available from their attorney. They should also be advised that they are allowed to terminate the evaluation at any time without prejudice or negative feedback from the expert toward the party and that they will have an opportunity to contact their attorney at any time. However, the form should further advise the party that there might be negative consequences for unilaterally terminating the evaluation with respect to the legal side of matters. Finally, the consent form should include an expectation that the party will be cooperative and truthful, for example, neither exaggerating nor minimizing either in report to the expert or in testing, and so on.

The psychologist should discuss the informed consent form with the party and make sure that the party understands all of the important aspects before signing (Glassman, 1998). Informed consent should be the result of full explanations at the level of understanding of the party and provided voluntarily. In this sense, the party must be competent to sign the consent form (Melton et al., 2018). If the person is not deemed competent for the purposes of the assessment to be undertaken, a psychologist must obtain written permission from the party's guardian or counsel or may conduct an evaluation under court order.

Assessment Procedures

Testing Psychological testing constitutes a critical component of any forensic assessment in a civil case (Archer & Wheeler, 2013). Tests are aimed at obtaining test responses the

summary scores of which for the evaluatee are compared to the normative populations on which the tests have been standardized. The initial consideration in testing is toward obtaining representative responses. For example, if the party is experiencing pain or has a concentration problem, the examiner might consider scheduling tests over series of sessions. In general, the psychologist administers tests specific to the referral question. Testing can be arduous, and administering supplemental tests that address issues beyond the referral question could tax the respondent's resources in session. The selected test instruments should strike a balance between assessing deficits and providing fair procedures in the circumstances. Most psychologists have a group of tests with which they are familiar and feel comfortable in using in assessments. However, in the forensic evaluation, other criteria may need to be considered in the test selection. Heilbrun (1992) suggested that each test selected in these regards should meet seven criteria: (a) The test should be commercially available with sufficient documentation and supportive research on it both in its own manuals and in independent publications; (b) the test should be reliable, with a reliability coefficient greater than .80; (c) the test should be relevant to the legal issue at hand or the underlying psychological construct that is involved; (d) the psychologist should use tests having standard administration procedures for the instrument; (e) any test chosen for use in testing should be applied because the individual being assessed is consistent with the populations on which the test was normatively constructed and is being used for the same purposes for which the test had been designed. These considerations should guide both the initial selection of the test and then the interpretation of the test results obtained with the instrument; (f) in general, objective tests and actuarial data are preferable compared to clinical judgment, assuming appropriate research data exist for the test; and (g) response style, which we referred to as positive or negative impression management in the above, should be assessed in the context of the evaluation in order to determine the extent of malingering or defensiveness, or related impacting response styles.

In determining a test battery for use with a particular party, the psychologist uses a multi-trait multi-method approach, in which it is appropriate to use redundant measures. These should include at least two paper-and-pencil broad-band self-report personality and psychopathology measures that include respondent validity/negative impression management scales, which are so crucial to the forensic assessment in psychological injury cases. The Minnesota Multiphasic Personality Inventory-2 (MMPI-2; Butcher et al., 2015; Green, 2011; Hersch & Alexander, 1990; Pope et al., 2006) and related instruments are used so universally that one would almost have to be prepared to explain why one of them was not used for a case at hand. Its progeny, the Minnesota Multiphasic Personality Inventory-2 Restructured Form

(MMPI-2 RF; Ben-Porath & Tellegen, 2008; Tellegen et al., 2003) is an established alternative to the MMPI-2. Other paper-and-pencil measures, such as the Personality Assessment Inventory (PAI; Morey, 2007), can provide comparable data that confirm or generate hypotheses concerning the immediate and long-term sequelae of injurious experiences. Given the burden of asking the evaluatee to complete over 800 questions in collections of tests such as these, the examiner should have a good rationale for administering any measures used. Because many tort cases involve trauma, we recommend the PAI along with the MMPI-2 or one of its progeny, such as the MMPI-2-RF and the soon to-be-released MMPI-3. Like the MMPI-2, the PAI has effective measures of exaggeration and minimization, and the PAI has a well-validated trauma scale, while the MMPI-2 does not (Adkins et al., 2008; Brand et al., 2017; Scheibe et al., 2001; Stadnik et al., 2013; Wooley & Rogers, 2015).

See Fokas and Brovko (2020) for an up-to-date review of the MMPI-2-RF and the PAI. Using a civil forensic sample, Tylicki et al. (2020) have compared directly the cognitive-related client validity scales of the MMPI-2-RF and the PAI. The MMPI-3 (Minnesota Multiphasic Personality Inventory-3; Ben-Porath & Tellegen, 2020a, b, c) is a revised version of the MMPI-2-RF. Its respondent validity scales are almost the same as or equivalent to those in the MMPI-2-RF. Whitman et al. (2020) addressed the reliability, validity, and clinical utility of the instrument with a neuropsychological sample. It appears a promising test forensically.

To assess the impact of emotional disorders on cognitive functioning, the Wechsler Adult Intelligence Scale-IV (Wechsler, 2008) can provide a picture of the pattern of skills and impairments that may be related to depression or anxiety (Flaks et al., 2014; Gass & Gutierrez, 2017). Better yet, there are dedicated scales for evaluating trauma reactions, such as the Trauma Symptom Checklist-2 (Briere, 2010). This TSI-2 test may provide a metric of the impact of traumatic experiences on the party. Moreover, it has a scale concerning client validity.

Other measures may assess issues directly related to a particular type of civil case. For example, the Sexual Experiences Questionnaire (Fitzgerald et al., 1988, 1995, 1999a, b) was developed by Fitzgerald and her colleagues in order to provide a standardized method for recording the experiences of people in the workplace and the impact of those experiences on a range of functioning related to workplace sexual harassment.

In addition, as indicated by Heilbrun (1992), the psychologist should use measures of malingering (Rogers, 2018; Rogers & Bender, 2018; Rogers et al., 1994). Subscales to assess malingering and related motivations are built into the already cited broad-band paper-and-pencil tests, such as the MMPI-2, MMPI-2-RF, and PAI. If there is concern that the party is attempting to simulate a psychosis or depression, the structured interview series initiated with the Structured

Interview of Reported Symptoms (SIRS; Rogers, 1992, Rogers et al., 2010; Rogers et al., 2020) has proved to be an effective means of detecting such strategies. Rogers (2020) has defended the use of the second edition of the SIRS in this journal. Rogers et al. (2020) has defended the use of the second edition of the SIRS in this article (Rogers et al., 2010).

The scales on these personality inventories are referred to as symptom validity tests (SVTs). In the neuropsychological arena, measures to test for evaluatee effort are referred to as performance validity tests (PVTs). There are both embedded PVTs and stand-alone ones. In this regard, in addition to any other tests administered, if the examiner has concerns about the party expending sufficient effort in the evaluation, measures such as the Test of Memory Malingering (TOMM; Tombaugh, 1996) or the Validity Indicator Profile (VIP; Frederick, 1997) may be used.

Although it is unusual to encounter such a response set in cases of workplace discrimination, such as sexual harassment litigation, it is possible that plaintiffs may want to portray themselves as virtuous and fault free (Rogers, 2018). Although few specific tests exist to assess defensiveness, the MMPI-2, MMPI-2-RF, and PAI contain measures of a *fake good* set. These, combined with interview data, can illuminate this pattern of responding.

The expert must keep in mind that test results cannot be interpreted by themselves in arriving at professional opinions. They must be combined with multiple sources of information, as mentioned. Even for the issue of malingering, a test result might indicate this determination, but absent compelling evidence, malingering should not be the preferred interpretation (see Fokas and Brovko, 2020 and Young, 2020b for further elaboration of this issue). However, if malingering is evident, the professional may want to address the issue in the report or testimony by discussing how the evaluatee's response style has made it more difficult to arrive at supported conclusions because the response style rendered test data uninterpretable.

Standardized Interviews Interview formats that follow a strict sequence or use a branching strategy can often add to the validity and reliability of the evaluation (Rogers, 2018). In cases in which posttraumatic stress disorder (PTSD) is an issue, a measure such as the Clinician Administered PTSD Interview for DSM-5 (CAPS-5; Weathers et al., 2018) provides a standardized methodology for assessment of both current and lifetime PTSD. In addition, this scale provides a measure of the intensity of symptoms, and the time frame in which the symptom is assessed. Other measures that assess general psychopathology in the context of DSM-5 (American Psychiatric Association, DSM-5 Task Force, 2013), including related to DSM Axis I disorders, include the Structured Clinical Interview for DSM Disorders (SCID; First et al., 2015; Lobbstaël et al., 2011). In addition, the Structured Interview for DSM-IV Personality Disorders (SIDP-IV;

Pfohl et al., 1982; Pfohl et al., 1989) or the more recent Structured Clinical Interview for DSM-5® Personality Disorders (SCID-5-PD) (First et al., 2016) is a useful measure for fleshing out personality disorders.

Structured Interviews In addition to psychometrically sound standardized interviews, structured histories or interviews offer two main advantages for the evaluating psychologist (Rogers, 1997). First, the instruments of this nature standardize both (a) the form and sequence of clinical inquiries and (b) the quantification of symptoms that are endorsed (Rogers, 1997, p. 306). In addition, from a practical forensic standpoint, a standardized interview will obligate the assessor to pose questions (e.g., do you like to spend your time by yourself or with others?) that might otherwise not be asked. Also, if the assessor determines that an emotional or personality disorder exists, it is easier to provide the court with the specific statements made by the party in these types of interviews that support that diagnosis.

Clinical Interviews The psychological expert will almost always conduct an open-ended or semi-structured clinical interview with the party. A record of the interview must capture with clear accuracy what had taken place in the session(s) of the interview (SGFP 10.06). Toward this end, handwritten or contemporaneous notes taken on a computer are most often employed. However, the psychologist must bear in mind that those notes may later become evidence in the case, and therefore, they should be careful to ensure the legibility and accuracy of the record.

Even before the coronavirus pandemic, psychologists were considering the use of telehealth or videoconferencing for the provision of clinical services (American Psychological Association, 2013; Turvey et al., 2013) and non-forensic evaluation interviews (Brearly et al., 2017; Luxton et al., 2006, 2019, 2015). More to the issue of forensic evaluation, a number of writers had considered the use of videoconferencing for a range of applications (Halphen et al., 2020; Luxton and Lexcen, 2018; Manguno-Mire et al., 2007; Sales et al., 2018, 2019; Young, 2020c).

In a recent paper, Drogin (2020) considered a number of aspects of Forensic Mental Telehealth Assessment (FMTA). Noting that the courts are just beginning to determine whether FMTA provides sufficient and reliable evidence for adjudication purposes, Drogin observed we should expect that lawyers may attempt “to overturn or seek redress for decisions seen as unfavorable to the parties being represented” (p. 2). Although the main focus of the paper was the evaluation of residents in institutional settings, Drogin highlighted other issues that might apply to any FMTA. The presence of a third party in the room with the party being assessed would likely pose difficulties for validity, as would any consultation by the party of a

smartphone, tablet, or other electronic assistance in framing their responses.

Available data indicate that FMTA can “provide clinical information similar to that obtained by in-person interviews” (Lexcen et al., 2006, p. 713). When circumstances obviate face-to-face clinical interviews, FMTA becomes the only alternative for forensic evaluation in civil cases. As in any FMTA, the examiner should take care to ensure the identity of the evaluatee, the privacy of the evaluation location, and the presence of others in the room from which the evaluatee is speaking.

In this, and other contexts, the examiner may consider recording the interactions for later review and to preserve the contents and manner of the evaluation. This, of course, requires the permission of the party (see Ethical Standard 4.03, APA, 2017), and, as was mentioned above, the examiner may also want to obtain the permission of the party’s counsel before using recording techniques.

In deciding whether to record the interview electronically, the examiner may consider several issues. If the party is paranoid and distrustful, as are some litigants who believe that they are victims of retaliation or reprisal, the plaintiff may insist on recording the session as a measure of self-protection. Under those circumstances, the examiner should record the session to avoid being dependent on the party for the record.

A related circumstance for recording the interview may arise if the party expresses a concern about the intrusiveness of the evaluation procedures. An electronic record can capture the tone of the examiner’s questions. The examiner may want to record the session to demonstrate that the examiner has been fair and has not badgered or otherwise mistreated the party. Another reason to record the interview may be triggered by concerns that the party might demonstrate qualitative aspects of conduct, such as in an overtly psychotic presentation, that may be difficult to capture in written notes. Concerns that the party is made uncomfortable or guarded by the technique, or that the mechanics of the recording interfere with the pace of the evaluation, may prompt the examiner to avoid making a recording.

In conducting the interview, the psychologist should demonstrate the same balanced and fair approach taken throughout the process. A professional tone should be maintained in the interview and the orientation should be one of gathering facts that will later serve as a partial basis for the proffering of professional opinions (Jensvold, 1993).

Because many psychologists who do forensic work were trained as clinical psychologists, they may be tempted to use clinical techniques to establish and enhance rapport with the plaintiff. Although some degree of rapport is necessary for effective interviewing, psychologists should be wary of using therapeutic techniques in the forensic interview. Not only does this blur the distinction between the therapist role and forensic role (Greenberg & Shuman, 1996), but also it may be later

seen as an unfair method designed to take advantage of the plaintiff’s emotional vulnerability.

Collateral Interviews Interviews with significant others and other parties who know the represented person, usually family, friends, and coworkers, are recommended by a number of authorities (Fennig et al., 1994; Fuller, Lee, & Gordis, 1988; Gladsjo et al., 1992; Heilbrun, 1990; Heilbrun et al., 1994; Melton et al., 2018; Paetzold & Willborn, 1994). The purposes of these interviews include extending the findings from other sources, such as records and clinical interviews, and corroborating or contradicting facts provided by the party. Such interviews are governed by the SGFP 6.04, which states:

Forensic practitioners disclose to potential collateral sources information that might reasonably be expected to inform their decisions about participating that may include, but may not be limited to, who has retained the forensic practitioner; the nature, purpose, and intended use of the examination or other procedure; the nature of and any limits on privacy, confidentiality, and privilege; and whether their participation is voluntary (EPPCC Standard 3.10) (SGFP, p. 13)

Greenberg (2004) suggested obtaining written consent to contact informants from the client at the time of the evaluation. Although these conversations are most often conducted over the telephone, under Standard 4.02 in the APA Ethics Code, it may be appropriate to advise the collateral source about how the material will be used and the lack of confidentiality regarding what the collateral says.

When considering with whom to conduct collateral interviews, some obvious persons are the spouse, lover, roommate, coworkers, friends, clergy, and neighbors. The examiner should attempt to talk to one or two people who are not involved directly or indirectly in the lawsuit. In many cases, the cast of informants is likely to be polarized according to whether they believe the plaintiff or the defendant. In these cases, it is useful to talk to people from both camps in order to strike a balance and avoid an appearance of bias.

In some instances, it is not possible to obtain permission to interview collaterals. As this permission is at the party’s discretion, plaintiff’s counsel may determine that such interviews are unlikely to further the interests of their client and may forbid such contacts. Parties who do not want their involvement in litigation known to friends and family may not provide permission. In such instances, the psychologist may ask retaining counsel to subpoena collaterals for deposition. In this setting, the questions that would ordinarily be asked in the brief telephone calls will be gathered under oath and will be part of the official record of the case. In this instance, it may be

appropriate for the psychologist to provide a list of questions or information to be gathered to the examining counsel so that essential information will be obtained. Care should be taken to provide questions only for essential information gathering and not for strategic reasons so that the examining psychologist does not veer into the role of a trial consultant.

Additional Record Collection In the course of the clinical interview, the examiner may become aware of other documentary sources that can illuminate the client's case. These may include prior evaluations. Given that the psychologist's work may span many months, it is appropriate to review any other medical, legal, or psychological records generated in the interval between the initial retention in the case and the time a report is prepared.

Collation and Interpretation of Data In interpreting the data generated in the evaluation, the examiner should give appropriate weight to data gathered from all sources and entertain a wide range of hypotheses. In order to do this, the examiner may want to use a method designed to help the examiner determine both causation and the extent of damages, the Five-Stage Model (Foote, 2020; Foote & Goodman-Delahunty, *in press*; Foote & Lareau, 2013; Goodman-Delahunty & Foote, 2011). The most recent application of this model to a sexual harassment claim (Foote & Goodman-Delahunty, *in press*) provides a detailed example of the use of this method to illuminate sources of injury and the severity of damages.

Based on this review, as mentioned, the psychologist has sufficient information to develop general conclusions. Once these are fixed, the expert may review the data in order to examine the best case for the contrary position from that adopted. For example, if the data are supportive of the plaintiff's claim, the psychologist can examine all the data that support the defense claim and determine why those data do not guide the final conclusions (Greenberg, 2004). Next, the psychologist must decide the extent to which the test data are critical for the conclusions. Because the interpretation of test data is always undertaken in the context of data from other sources, these data should not be the sole basis for major conclusions but should support them. The examiner should also decide how to deal with data contradicting the conclusions.

In reviewing the data from an evaluation, as mentioned, the psychologist should weigh both ideographic and nomothetic data (Heilbrun, 2001, Heilbrun et al., 2014). Ideographic data are case specific because they characterize the party as a distinct and unique individual. Attention to these data ensures accuracy in the analysis through the cross-checking of an individual's information from multiple sources. Nomothetic data are gathered in research with defined groups. These scientific data anchor the assessment to a body of research that adds

considerably to the accuracy and validity of the expert's conclusions. Nomothetic data can be used to validate ideographic information and as a basis for predictions concerning the plaintiff. In workplace discrimination cases, these predictions most likely pertain to the long-term impact of the alleged discrimination or harassment.

Social Media With the advent of Facebook, Twitter, Snapchat, and other social media platforms, forensic practitioners have considered the use of this information in the context of a forensic evaluation. The potential of gathering information from a source that may be untainted by attempts of parties to advance their cases is attractive, and forensic psychiatrists have already given some thought to the issue and developed guidelines for the use of social media in forensic psychiatric evaluations (Glancy et al., 2015; Metzner & Ash, 2010; Neimark et al., 2006; Recupero, 2008, 2010). Although psychology has begun to deal with this issue in the context of psychotherapy (Lannin & Scott, 2013), because social media are a relatively new technology, existing psychological guidelines and ethical standards have not been developed, debated, codified, and promulgated to deal with the use of this information in forensic evaluation.

One group of professionals (Pirelli et al., 2016) has begun work on the topic. Based upon their analysis of various ethical codes, guidelines, practice standards, and professional literature, Pirelli et al. offered five considerations for forensic practitioners. First, forensic practitioners who utilize Internet data should conceptualize them as a type of collateral information. In the same way that a forensic psychologist would evaluate the statements of collaterals about a party, the expert should not consider this information as self-report data. In addition, the expert should consider the context in which the entries were posted. These data should be weighed with respect to their level of utility—do they inform the practitioner about the referral question and does this information converge with the other available data?

Second, although searching for and using Internet-based data is not prohibited by the EPPCC or Forensic Practice Guidelines, forensic practitioners should consider conducting Internet searches in evaluations on a case-by-case basis, weighing the potential utility versus the potentially prejudicial effects of such data. At this time, psychologists conducting forensic evaluations lack psychological ethical guidance about this topic. This would prompt the very cautious practitioner to avoid seeking this information. However, the legal system and forensic evaluations generally benefit from having more valid information, so even the prudent evaluator might consider this source of data.

As Recupero (2010) observed, social media information may assist in the evaluation by confirming or corroborating or elaborating information gathered from other sources. Indeed, such information may refute data gathered from the

client or other sources and reflect on the credibility of the party. However, as Metzner and Ash (2010) observed, the expert should take into account that there are generational differences in how social media are used. Abbreviations and other coded language in social media posts may have meanings that only the original sender and recipients understand. People may present themselves differently on social media in a way that does not match their in-person presentation.

Third, with rare exceptions, forensic practitioners who gather and/or rely on Internet-based data should discuss this practice during the retention and informed-consent processes. Such informed consent is required by both the SGFP and APA Ethical Standards and is consistent with the transparency necessary to conduct a forensic evaluation. The psychologist may also want to inform the retaining and opposing counsel about gathering these data.

Fourth, with rare exceptions, forensic practitioners should provide examinees with data gathered via the Internet and allow them to address them. This is similar to the common practice of providing collateral information to a party in cases in which those data are inconsistent with the party's own statements. This step ensures that social media postings that were not written by the party can be clarified prior to using these data in the evaluation.

Fifth, forensic practitioners should be explicit about their use of and reliance upon any data gathered via the Internet in their reports and testimony. In any written report or testimony, the forensic professional should identify any internet information that was considered and if the party was given an opportunity to respond to those data.

In the context of the forensic evaluation, the examiner should take all five of these considerations into account. At this time, there is no requirement for the expert to gather these data (see Pirelli et al., 2017). Some of these considerations could be side-stepped by the expert utilizing information gathered by others in the process of discovery. Of course, any social media data gathered by others would be subject to many of the concerns that we have discussed.

Discussion with Retaining Counsel

Before committing the results of the evaluation to print, the psychologist will often have an oral discussion of the results with retaining counsel. In Rule 26 evaluations, this discussion may allow the retaining attorney to make a decision about whether it is advisable to have the psychologist testify. In settings in which a report is mandated, the discussion gives counsel an idea of what to expect in the final product. In conversations with counsel, it is critical for the psychologist to make it clear that their conclusions from the evaluation will not be shaped by the discussion with the attorney.

At this point, as in the whole process, balance and fairness are the rule. The psychologist may consider the option of providing a draft of the written report to retaining counsel. Recent changes in FRCP rule 26 (FRCP rule 26 (a) (4)(B)) allow the expert to share draft reports with retaining counsel. This option would allow counsel to correct any mistakes of fact in the report and will ensure that the report addresses appropriate legal issues.

Report Preparation

As noted previously, a written report is mandated by FRCP Rules 26 (a) and 35. However, a report will also be essential in almost any setting in which the retaining attorney considers calling the examining psychologist as a witness in trial (see Goodman-Delahanty and Dhimi, 2013 for discussion).

For a report to be congruent with professional standards, it should contain a number of elements (Heilbrun, 2001; Heilbrun et al., 2014). First, the writer should appropriately attribute information to the sources from which it was gathered. This attribution not only sharpens the thinking processes of the expert psychologist but also allows opposing counsel and the court to appropriately evaluate the reliability of and reasoning behind the expert's conclusions. Second, the report should avoid the use of technical jargon. Because many of those reviewing the psychologist's reports have little or no mental health training, the use of jargon has the potential to create confusion. By avoiding jargon and using lay terms to capture the psychologist's observations and opinions, the expert is using a language common to all potential readers. Third, the report should be written in sections that enhance clarity and assist the reader to understand the writer's conclusions. This kind of organization allows the report to stand alone as a document and to add to the presentation of oral testimony in deposition or trial.

The report should address what procedures were employed, upon what information the expert had based opinions and, of course, the opinions themselves. This discussion should be followed with a statement concerning causation, which links the actions of defendant persons or organizations with the reactions of the plaintiff. In general, the report should be sent to the retaining counsel and that party should be allowed to distribute copies to opposing counsel and the court.

The evaluation report should demonstrate the psychologist's balanced and objective approach to the case (DeMier, 2013; Otto et al., 2014; DeMier & Otto, 2017; Karson & Nadkarni, 2013; Otto, Weiner, 2014). The report should present the information for the reader in such a way as to show no bias toward either the defendant or plaintiff. Instead, an exploration of the data in a way that illuminates both the strengths and weaknesses of the case is desirable no matter in which direction fall the final opinions. Some writers (Greenberg,

2004) advocate inclusion of a section in the report that looks at the data from the perspective of the non-hiring party.

If the psychologist is hired by the plaintiff in the case, at least one part of the report should highlight aspects of the data indicating that injuries may not have been attributable to the alleged harassment or that the injuries may not be serious or long lasting. By taking a balanced approach to the data, the examining psychologist not only fulfills the ethical obligation for accuracy and fairness but also is likely to fare better in later phases.

Discovery

Legal Basis

In the context of expert testimony, discovery is designed to accomplish two purposes for the side seeking discovery (Shuman, 2000): to allow for effective “challenge or response to an opponent’s expert, and it may identify potential expert witnesses” (Shuman, 2000, pp. 6–19). In other words, the other party has a right in most cases to know what the psychologist is going to say and the basis for the psychologist’s opinion. Because of the pivotal role of discovery in the legal process, the law provides the courts with tools to compel compliance. These differ according to the discovery procedure and are detailed in the following sections.

Subpoena

A subpoena is a request for the expert’s testimony or documents under the expert’s control (APA, Committee on Legal Issues, 2016). A subpoena is usually issued following a formal request to the court and is usually in one of two forms: a *subpoena*, which is a written request for a person’s appearance at a specific time and place, or a *subpoena duces tecum*, which is a written request for the witness to appear and produce specific items, usually documents, notes, or other records. In most jurisdictions, the court rules require written notice of at least five working days between issuance of subpoena and date of compliance. Subpoenas have other formal requirements and may be invalid if not in proper form.

Court Order

A court order is issued by a judge or magistrate and may be pursuant to an agreement between parties, or *ex parte* (one party seeks an order from the judge without the other party’s knowledge or permission). The latter are unusual in civil cases. In general, the psychologist, under pain of a contempt citation, fines, or even being placed in jail, must comply with a court order.

Sworn Statement or Affidavit

An affidavit is a sworn statement usually appended to a pleading or brief by a party. For example, if the defendant wishes to have a psychological evaluation of the plaintiff, it may be necessary to file a motion to show that the evaluation is necessary in light of the facts of the case. An affidavit from the retained psychologist may be appended to support such a motion. The affidavit is no different from sworn in-person testimony, and the psychologist should verify the accuracy of the written statements.

Deposition

As noted previously, a deposition is a sworn testimony before a court reporter. From the psychological expert’s perspective, the deposition of the examining psychologist is often the most important record created in the case. It is the chance for the opposing counsel to ascertain the bases for the psychologist’s testimony, including the database used, main findings, and any limitations on the expert’s opinions. Depositions also provide a record that serves as material for later cross-examination and impeachment. If the expert changes an opinion between the time of the deposition and the trial, the party taking the deposition may have a basis for impeachment. If facts relied on by the expert are contrary to other facts in the case, this may also comprise a basis for impeachment.

Depositions are usually scheduled and taken by the opposing counsel. The goal of that lawyer in asking deposition questions is to gain information and to further the case for that lawyer’s client(s). This can be done by gaining concessions from the expert, causing the expert to undermine their own testimony or the testimony of other experts or to admit to the better qualifications or expertise of the opposing expert (Brodsky & Gutheil, 2016). Before the deposition, the expert should review all the relevant case data to clarify the data and the conclusions. During the deposition, the psychologist should keep in mind that a deposition transcript is a written document, not a spoken one. The emphasis of a point through tone or gesture may be lost on the finder of fact who may read it.

Review of Other Expert’s Data and Report

The psychologist should always ask for all the data used by the other expert. These should be reviewed with an eye on accuracy, appropriateness, and completeness. If both experts use similar or identical instruments, comparisons may be made. A review of these data should allow the expert to determine if the information from those sources alters already formed opinions in the case. If so, the psychologist should advise retaining counsel immediately.

Testimony

Preparation

The psychologist should begin preparing for trial weeks before the trial date (Young & Brodsky, 2016). This preparation begins with a review of all the case materials generated in the psychologist's office. The psychologist should pay specific attention to those data on which professional opinions are based. The professional should also review the material that contradicts the final opinion. Then, the expert should review the documents in the case. If practical, about a month before trial, the psychologist should call or meet with the retaining lawyer. In this discussion, it is critical to ensure that the expert has all the necessary documents and depositions and to obtain up-to-date legal proceedings and issues in order to determine if anything has emerged that could possibly alter the final opinions. In that deadlines for exhibit production are usually some weeks before trial, this discussion should address whether the expert wishes to use charts or graphs as demonstrative evidence.

The expert may want to prepare exhibits for the jury to illustrate critical points. These may include test profiles, timelines, sequences, or DSM-5 criteria. It is usually appropriate to meet with the lawyer for whom the expert is going to testify several weeks before trial. This is the occasion to outline the testimony sequence for the upcoming trial. Also, the time available for testimony may be limited, and decisions concerning the detail of the testimony may have to be made. Many courtrooms now provide facilities for PowerPoint presentations. Although forensic experts vary in their adoption of this technology, some research suggests that in the context of an already persuasive argument, use of video technology can enhance the expert's credibility (Binder, 2007).

In structuring testimony, it is important to deal both with the strengths and weaknesses of the retaining party's case. Not only will frank discussions of the data provide the court or jury with an awareness of the expert's fairness and balance in the proceedings, but also they will allow for discussion of that material in a controlled situation that will make later cross-examination on the same material less effective. This testimony will also frame the material in a way that is congruent with the testifying expert's conclusions in the case.

On the Day of the Testimony

When planning for testifying, the expert should attend to what is taken to the courtroom (Daley, 1996). The expert needs enough material to refresh their memory but may exclude extraneous material. The main duty is to teach the fact finder about their findings in the case. It is critical to use lay language to discuss results and to avoid jargon (Williger, 1995). The skilled expert will make use of a number of other strategies

(Brodsky, 1991, 1999; Brodsky & Gutheil, 2016) in order to enhance communication and clarity.

Concluding the Case

After the in-court testimony, it is beneficial to discuss the testimony with retaining counsel as a learning experience for the expert. In some cases, counsel may poll the jury to determine the basis for their decisions and may include questions about the expert. This can be an excellent source of feedback (see, e.g., Freckelton et al., 2016).

Records of the evaluation, including test protocols and interview notes, should be kept for at least 7 years and may be maintained longer, depending on the laws and rules in the expert's jurisdiction (APA, 2007; Drogin et al., 2010). Many forensic psychologists keep copies of files for an indefinite period, using methods of record reduction, such as microfilming or transcription onto electronic format. Records not generated by the expert may be destroyed or returned to retaining counsel. If the case is appealed, it is good practice to keep the entire file until the appeals are resolved.

Summary

From the time of the initial retention phone call to the exhaustion of appeals, the psychologist is required to conduct professional work at the highest standards. Keeping accurate records, attending to the rights of the party and others involved in the case, and maintaining appropriate professional roles are required. Attention to fairness and balance will not only ensure the quality of the psychologist's work but also help the psychologist to develop a respected professional identity.

The legal system is a demanding venue for psychological services. Not only are the stakes high but also the translation of legal demands into psychological terms and of psychological terms into legally useful products requires a solid grasp of clinical and legal issues. This article has informed workers in the field of psychological injury about the steps required to function effectively in court and the quagmires that may attend them when they do not. The rest is up to each worker in the field.

Compliance with Ethical Standards

Conflict of Interest The authors declare that they have no conflict of interest.

Informed Consent All procedures followed were in accordance with the ethical standards of the responsible committee on human experimentation (national and institutional). Informed consent was obtained from all individual subjects participating in the study.

Animal Rights No animal studies were carried out by the authors for this article.

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