Assessing The Truth:
How Forensic Psychiatrists and Psychologists Evaluate Litigants

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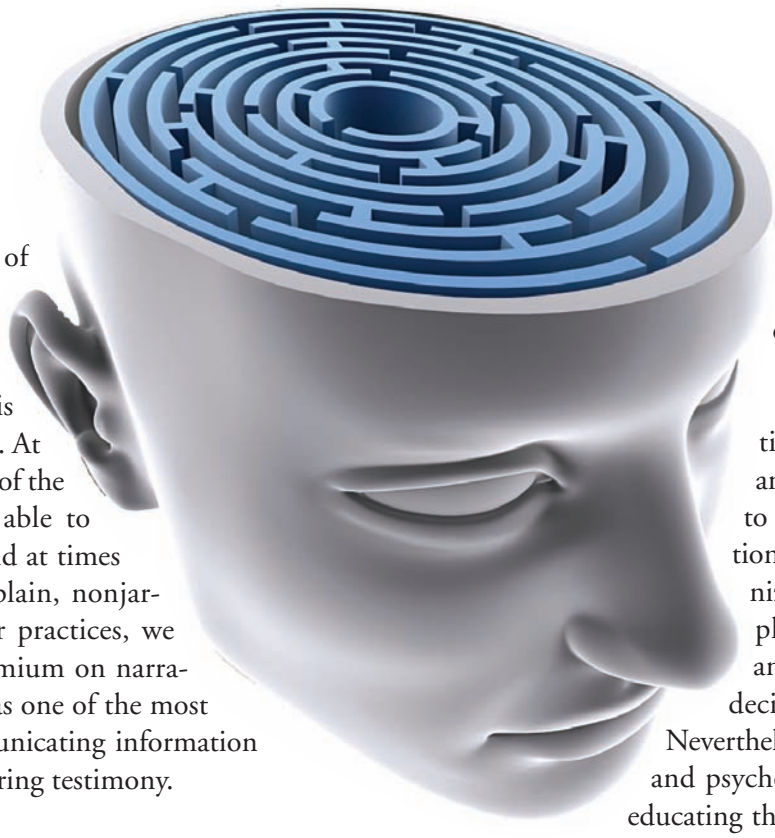


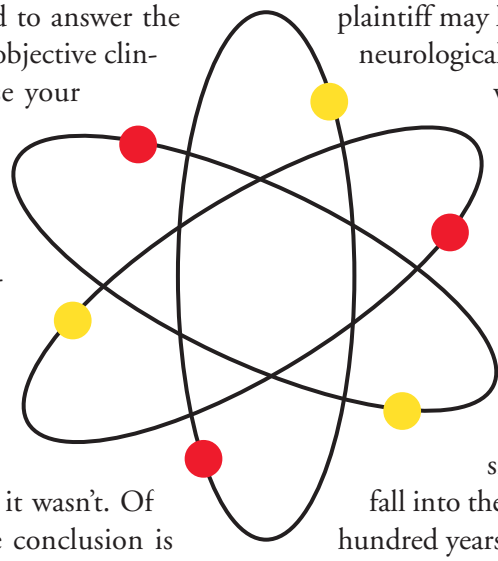
The practice of forensic psychiatry and psychology, like the rest of medicine, is as much art as it is science. At the end of the day, the job of the forensic expert is to be able to communicate complex and at times abstract information in plain, nonjargonized language. In our practices, we have always placed a premium on narrative, that is, storytelling, as one of the most effective means of communicating information to attorneys and juries during testimony.

Forensic psychiatrists and psychologists are mental health professionals who have undergone additional training and have obtained advanced credentials in forensic psychiatry and psychology from their respective professional certifying boards. Their practice, like the practice of law, is divided into broad criminal and civil areas. In the criminal arena, forensic psychiatric and psychological experts are usually asked to opine about questions of capacity and sometimes, during sentencing, on mitigation. In the civil arena, forensic practice is broader, covering, as The Bar Association of San Francisco does, many individual sections of legal practice, from probate to personal injury to family to employment law.

Invariably, in civil litigation, forensic psychiatrists and psychologists are asked to offer opinions on causation and damages. We recognize that the truthfulness of plaintiffs and witnesses is an *ultimate* question to be decided by the fact finder. Nevertheless, a forensic psychiatrist and psychologist can be helpful in educating the fact finder about issues that bear directly upon questions of truthfulness.

Unlike a treating clinician whose mission is to alleviate suffering and, thus, who is, when called to testify, appropriately an advocate for his patient, the forensic psychiatrist and psychologist have a different mission: our task is to determine as accurately as possible what is objectively true with regard to diagnosis, the medical course, treatment, and prognosis, based upon clinical evidence. Accurate diagnosis is all important. The other opinions such as course, prognosis, and treatment flow from this.

Modern medicine is evidence-based and so too is modern forensic psychiatry. It is no longer enough for an expert simply to rely upon his or her authority and say, in effect, "I have been in practice for thirty plus years and have earned this and that degree and credential and honor; therefore, what I say is true, is true because *I* say so." Today, an expert must be prepared to answer the underlying question, "Upon what objective clinical evidence, Doctor, do you base your opinions and conclusions?"



Evidence

The gold bullion standard of evidence-based opinion for forensic psychiatric and psychological experts is the ballistics expert who can say with reasonable "ballistic certainty" that a particular shell was fired from a particular gun . . . or it wasn't. Of course, arriving at such a definite conclusion is more difficult in the behavioral sciences. However, with careful assessment of all available evidence, doing so is not only possible, it is probable.

The evidence that a forensic psychiatrist sifts through consists of medical, psychiatric, and psychological records from periods of time both prior to, during, and after the time when the incident or circumstance that was alleged to have emotionally or neurocognitively damaged the plaintiff occurred. These records can be both difficult to obtain and extensive, but once obtained and reviewed they are usually highly revelatory. Sometimes it is also helpful to obtain childhood medical records, even when evaluating adult plaintiffs. These records may help answer the question of whether this particular plaintiff is a person who, as a result of earlier emotional trauma, was particularly fragile when the event in dispute purportedly caused him or her to be damaged or, in contrast, whether the plaintiff is a highly resilient individual. Alternatively, the plaintiff may have a chronic mental condition (like the neurological disorder multiple sclerosis) with its own waxing and waning natural course that is relatively independent of external events. If so, it is likely that such a condition would have produced emotional symptoms following the disputed events, whether or not the incident was actually damaging or had even occurred.

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With regard to causation, the forensic expert must always be on guard not to fall into the trap described so artfully more than two hundred years ago by a great physician and man of letters, Samuel Johnson: "It is incident to physicians, I am afraid, beyond all other men, to mistake subsequence for consequence." In other words, just because B follows A does not mean that A *caused* B.

In addition to reviewing medical (and sometimes military, employment, and academic) records as well as legal documents such as the complaint and deposition transcripts, the forensic psychiatric evaluator examines the plaintiff himself, usually for several hours, inquiring about his or her personal, developmental, social, family, marital, medical, drug, educational, employment, academic, and legal histories. This interview takes a long time because hearing someone's life story takes time; there are no shortcuts to extracting this kind of essential narrative.

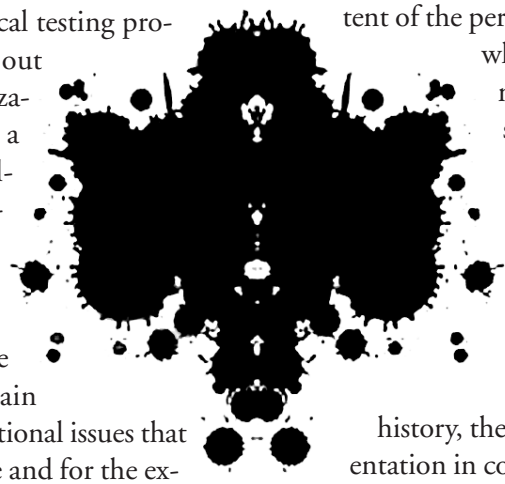
However, after reviewing all of the documents and carefully interviewing the examinee and inquiring in great detail into his or her life story as well as the examinee's version of the events pertinent to the complaint, the forensic psychiatrist (like any other medical specialist) refers the examinee for testing that is carefully administered, scored, and interpreted by an experienced forensic psychologist or

neuropsychologist—a highly trained subspecialist. Correctly interpreted test data independently confirms (and occasionally contradicts) the forensic evaluator's differential diagnosis (that is, working hypotheses).

The power of psychological testing often exceeds that of even a detailed, careful clinical interview by a sophisticated clinician who is assessing validity, exaggeration, and malingering. After all, even the best of us can sometimes be fooled—in either direction! For example, we have evaluated plaintiffs whose upbringing and cultural values caused them to inhibit the expression of their suffering and present themselves as though everything in their emotional life was fine—when it wasn't. In these instances, the careful administration and interpretation of a battery of psychological tests revealed that beneath the plaintiffs' calm exteriors of understated or denied distress, there lurked immense emotional suffering and severe turmoil that profoundly affected their daily functioning, interfering with their ability to work and to love and sometimes even their ability to think!

Psychological and Neuropsychological Testing

Psychological and neuropsychological testing provides an objective means of sorting out how much embellishment or minimization of symptoms may exist. From a psychological perspective, there is always a concern in personal injury litigation and criminal litigation as to the extent complainants may be exaggerating their symptoms. In divorce and custody proceedings, the opposite may be true. Whenever brain injury is at issue, there may be motivational issues that are difficult for plaintiffs to overcome and for the examiner to assess.



A competent psychologist has to try to sort these issues out. How much is the underlying personality structure affecting the symptom presentation? How much (or little) of a brain injury has really occurred?

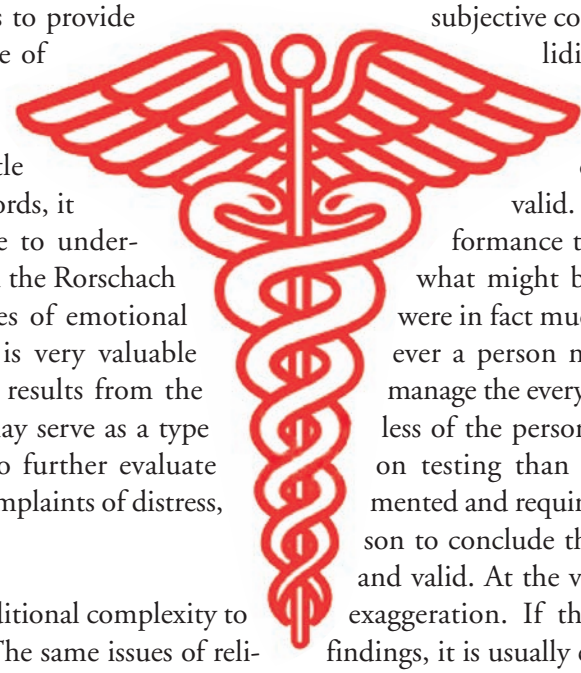
In civil litigation, the administration of reliable and valid "self-report" personality tests, such as the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) and Personality Assessment Inventory (PAI), and the Rorschach Inkblot Test (Rorschach) is the best way to find out what is going on. Testing is in fact an attempt to answer a "membership" question: to which group of independently diagnosed individuals in the database does the examinee belong, based upon his or her pattern of test responses?

> The Rorschach has been found to be as reliable and valid as any of the personality tests that are routinely used.

The results from the MMPI-2 and PAI usually bear a great resemblance to what a person has to say. Problems may arise, however, whenever a person "protests too much." In such circumstances, the tests may be said to be "invalid."

Invalid test results from the MMPI-2 or PAI are a set of statistical findings that indicate that the nature and extent of the person's self-report is significantly beyond what might reasonably be expected. This may not necessarily mean that the person is malingering, but there is usually a discernible pattern of exaggeration. In turn, it is the responsibility of the psychologist to determine whether there is a legitimate correlation between the endorsements on the test and the actual symptoms of the patient. Psychologists must examine the history, the medical records, and the clinical presentation in conjunction with the test results and determine whether there is a correlation or not. In addition, whenever there is a concern about potential exaggeration or the influence of preexisting problems, the administration of the Rorschach will often help clarify the uncertainty.

The Rorschach has been found to be as reliable and valid as any of the personality tests that are routinely used, according to a white paper published by the Society for Personality Assessment.[1] That means it is a tool designed to assess the nature and extent of a person's emotional distress or lack thereof, as well as to provide insight into the underlying cause of the problems. It is also the only reliable and valid personality assessment tool that has very little influence due to bias. In other words, it is very difficult for an examinee to understand how his or her responses on the Rorschach might correlate to different types of emotional distress. Hence, the Rorschach is very valuable as a means to cross-validate the results from the MMPI-2 and PAI. At times it may serve as a type of informal "lie detector test" to further evaluate the consistency of the patient's complaints of distress, or lack thereof.



Brain injury complaints add additional complexity to the forensic assessment process. The same issues of reliability and validity must be addressed, but from a neuropsychological perspective. Are the nature and extent of the patient's complaints reliable and valid? Are the nature and extent of the patient's complaints consistent with expected outcomes from similar types of injuries? Are there concerns that the patient is "protesting too much"? Do the patient's complaints exceed what might be reasonable under the circumstances?

Neuropsychology has developed a special means to assess the presence or absence of reliable and valid brain injury and related cognitive dysfunction. The process is known as symptom validity testing. As with the personality testing, it is statistically based. It is a function of assessing the reasonableness of someone's cognitive complaints. As does personality testing, it examines the probability that the patient is "protesting too much"—or is not.

Symptom validity tests such as the Test of Memory Malingering (TOMM) and the Word Memory Test (WMT) have been demonstrated to be reliable and valid measures of assessing the reasonableness of the correlation between one's performance on neurocognitive testing and his or her subjective complaints. Some of the symptom validity tests operate on the statistical principle that the further a person's performance deviates from pure chance, the more likely it is to be invalid. In other cases it is a matter of performance that is so poor that it is worse than what might be expected if the person's injuries were in fact much more severe. For example, whenever a person maintains the ability to reasonably manage the everyday aspects of his or her life (regardless of the person's complaints) but performs worse on testing than someone who is significantly demented and requires institutionalized care, there is reason to conclude that such results may not be reliable and valid. At the very least they will probably suggest exaggeration. If there is an overall pattern of such findings, it is usually evidence of conscious malingering.

Thus, the task of separating truthful responses to forensic psychiatric and psychological assessment from exaggerated or understated or malingered ones is at times a challenging assignment. However, by carefully reviewing all of the documentary evidence, examining the plaintiff in considerable detail, and having him or her tested by a skilled forensic psychologist, the expert can usual reach a conclusion about the veracity of the plaintiff's complaints with reasonable medical (or psychological) probability.

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1 "The Society for Personality Assessment's Endorsement of the Rorschach," published in *Journal of Personality Assessment*, 85(2), 219–237, 2005.