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## TECHNICAL NETWORK CONSULTING SERVICE®

### FORENSIC PSYCHOLOGICAL EVALUATION

#### THE FORENSIC PSYCHOLOGICAL EVALUATION: WHAT EVERY ATTORNEY SHOULD KNOW Psychologist from Florida

You've referred your client for a psychological evaluation or your client has been ordered to undergo such an evaluation. What do you need to know and what should you tell your client? A forensic psychological evaluation may be ordered in either civil or criminal cases. The most common indications for a psych evaluation in the civil law setting include civil competencies to enter into a contract, handle finances, make medical decisions, or make a will. In family court, psych evals may enter into custody decisions. In personal injury and disability cases, a neuropsychological evaluation may be requested to determine the nature and extent of cognitive impairment following a brain injury, or a psychological examination may be ordered to determine the degree of psychological injury following a traumatizing experience, as in posttraumatic stress disorder. A preexisting or coexisting mental disorder may be used to refute the claim of psychological injury from a given event or, alternatively, to argue for even greater damages because the claimant was predisposed to injury – a "thin eggshell."

In the criminal justice system, psychological evaluations can serve to establish criminal competencies, such as competency to be arrested, to waive Miranda rights, to be charged, to stand trial, to be sentenced, to consent to treatment, and to be executed. Depending on the state or federal statute, a client's mental status at the time of the offense can form the basis of a finding of not guilty by reason of mental disease or defect, or not guilty by reason of insanity (NGRI) – the "insanity defense" – which is actually invoked extremely rarely. More common is the use of psychological findings to establish mitigating (or, less commonly, aggravating) factors at sentencing. Relatedly, decisions regarding sentencing, probation, parole, or release from therapeutic confinement are often based on determinations of future dangerousness which, in turn, rely heavily on psychological data.

There are a few major differences between a forensic examination for legal purposes and a clinical exam for treatment purposes. If your client goes to a psychologist for help, the fiduciary relationship that exists is between himself and his doctor, and the purpose of any formal evaluation is to diagnose and effectively treat his disorder or help him with his problem. The content of the examination and any additional treatment records are confidential, and he is free to terminate the evaluation or treatment process at any time.

In the forensic setting, the fiduciary relationship exists between the psychologist and whoever referred or ordered the client to undergo the evaluation. These parties effectively "own" the results of that evaluation. The client is technically free to decline the exam, but there may be repercussions for the case. The purpose of the exam is to assess aspects of the client's mental status that are relevant to the case in question, not necessarily to help treat his problem, although the examining psychologist may make treatment recommendations as part of her conclusions. The results of the exam typically go to the court or attorney who ordered it, although other parties of the case will usually be sent copies or opposing counsel may subpoena the report as part of discovery. (Continued on page 2)

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An exception to the latter is when an attorney retains a psychological expert to perform an evaluation, may or may not ask for a written report, and does not intend to introduce the findings as evidence, in which case the exam results become an attorney work product and are not usually subject to discovery.

Frequently, subjects who have been criminally charged, or who become involved in lawsuits as either plaintiffs or defendants, will have been seeing a psychotherapist for clinical treatment or have had clinical psychological or neuropsychological evaluations done in the past, e.g. for assessment of postconcussion effects following a car accident, possible learning disabilities in an academic setting, posttraumatic stress effects resulting from a sexual assault, or personality testing for job qualification or treatment recommendation. In civil cases, plaintiffs who put their mental state at issue may have their psych records subpoenaed by defense counsel, and plaintiff's attorneys should be thoroughly familiar with this material at the start of the case.

Most people are surprised to learn that, when it comes to privacy of medical and psychological records, more protection is actually afforded to criminal defendants than civil plaintiffs. Other than psych evals that are directly court-mandated (see above), there usually has to be a compelling reason for a judge in a criminal case to order release of private past or present psychological records from a treating clinician. In the criminal justice system, this request is usually made by defense counsel to create grounds for NGRJ at trial or mitigation at sentencing. In rare cases, the treating clinician may be called to testify, although courts are generally reluctant to violate doctor-patient confidentiality, except in extreme cases.

Most forensic psychological evaluations and court testimony, however, will be carried out by specially trained forensic psychologists who are usually also expert witnesses. The exact procedures and measures utilized in the psychological exam will depend of the specific referral question. Virtually all forensic psychological exams begin with the doctor reviewing relevant records of the case, to provide a background for the examination. A good portion of the exam will involve your client sitting face-to-face with the psychologist, while she asks a set of questions relating to the circumstances of the present case, your client's medical, academic, and employment history, any current signs and symptoms he may be experiencing, and

a set of mental status exam questions to assess his orientation, memory, reasoning, and emotional state.

Depending on the nature of the exam, your client may be administered a set of psychological tests, some requiring direct interaction with the examiner, others consisting of questionnaires and checklists. This can range from only a few, short, standardized measures in a child custody case or workplace fitness-for-duty evaluation, to an extensive, hours-long battery of cognitive tests in a neuropsychological evaluation for personal injury or criminal responsibility determinations. The complete psychological examination may therefore take a couple of hours, or extend over several days.

What's the best advice you can give to your client prior to a forensic psychological evaluation? "Be honest and do your best." This applies to answering all spoken or written questions, as well as performing to the best of his ability on psychological tests. In my experience, nothing – I mean nothing – poisons a case more than the suspicion that your client may be lying, malingering, or trying to manipulate the exam results. Many standardized psychological tests contain controls for lying and response manipulation, and studies have shown that even trained psychologists have a hard time beating these measures. As one attorney so delicately put it to me: "It only takes a crumb of bullshit on your shoe to stink up the whole room." Finally, even in an adversarial forensic setting, your client has the right to be treated with reasonable respect and courtesy. No psychological examination should ever be conducted in a needlessly offensive or hostile atmosphere. Clients who feel they have been treated too brusquely should report this to their attorney, as it may affect the interpretation of the examination results.

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