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Admissibility of Psychological Evidence: The power of a *Daubert* challenge?

Psychological evidence can differ from psychiatric evidence in the following way: Both psychologists and psychiatrists rely on history and clinical material, but psychologists are trained in the research, administration, and interpretation of objective, scientifically standardized psychological tests. Since psychiatrists only rarely undergo such training, they typically lack knowledge and expertise of these objective, scientific instruments and therefore, they rarely use psychological tests. When various psychological tests are used in combination with detailed forensic interviews, history, and a careful review of discovery, psychological tests can greatly enhance evaluations, often finding information that is not available from clinical interviews. Such testing can offer significant support for one's findings by adding objective scientific data, including support that a claim is genuine, exaggerated, or falsified. It can undermine the opinion of an opposing expert when the data contradicts or does not support that expert's opinion. Importantly, it can also affect the admissibility of the psychological data; at times, an opposing expert's entire testimony.

For example, there are tests of current symptoms such as Depression, Anxiety, or Posttraumatic Stress Disorder, tests of long-term personality traits, tests of cognitive status (including brain damage), and specific tests of symptom exaggeration and feigning (of cognitive and neuropsychological disorders and emotional or psychiatric disorders). While many of these tests are well researched and quite valid, there are large numbers of psychological tests that do not meet the scientific standards required by *Daubert*. There are new psychological tests being developed, researched, and published every year, making their scientific status questionable at best. Therefore it can be important for an attorney to have an expert who can address the reliability, validity, and scientific status of specific psychological tests, either those used by the expert retained by the attorney or by opposing counsel, as many psychological tests would not fare well in a *Daubert* challenge.

In many forms of litigation involving claims psychological damage or distress, referrals to psychologists ask similar questions: Are there scientific reasons to doubt or support the veracity of such claims. In these types of cases, the use of psychological tests can become very important, as ways

to assess various claims, and the veracity of the claim is central to successful litigation. The Minnesota Multiphasic Personality Inventory- 2nd Edition, more commonly known as the MMPI-2, is the most researched and most widely used of all psychological tests, and for forensic psychological purposes, it is considered particularly valuable because of the tremendous amount of research on its “validity scales,” scales which measure the likelihood of a litigant to be responding in an accurate manner. The test’s validity scales provide insight into the likely veracity of the plaintiff’s claims, including the likelihood of symptom exaggeration or malingering. These validity scales, coupled with the test’s clinical scales, give an excellent snap-shot into the likelihood that a claim is genuine. The MMPI-2, and other tests, are also valuable in finding legally-relevant personality characteristics, including the presence or absence of disorders of the personality. Cognitive and neuropsychological testing can offer a window into the cognitive functioning of an individual. Cognitive tests can be invaluable for determinations of an aging person’s testamentary capacity and capacity to make legally important decisions. There are also specific tests designed to measure symptom exaggeration and malingering of personality factors and brain dysfunction. Tests designed to measure specific syndromes, such as the presence of Posttraumatic Stress Disorder (PTSD), can also prove quite helpful. However, as previously stated, all tests are not equal in scientific status, and they do not lend equal credibility to an expert’s opinion. Some tests would have a poor likelihood of withstanding a Daubert challenge. For these reasons, an attorney needs a psychological expert who is well versed in the psychological status of various tests—before the psychologist chooses which tests to administer, as well as when evaluating tests given by other psychologists.