

# **Psychology & the Law**

## **Hard Science Tools for Cross-Examining Soft Science Experts**

### **A Handbook for Litigation Lawyers**

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## Introduction

Since my first experience as an expert witness in 1988, I have found that whereas most cross-examining lawyers are impressively effective in what they do, in cases involving psychology/psychiatry, more than a few under utilize or ineffectively utilize opportunities to challenge flawed psychological evidence. This litigator handbook will help you identify these opportunities and demonstrate for you how to effectively utilize them in your cases.

When you retain a psychologist or psychiatrist to conduct an Independent Medical Examination, to critique an IME conducted by another health professional or to provide testimony on a key psychology/psychiatry construct, you will want to know that the expert has the necessary knowledge to effectively withstand the rigours of a cross-examination that is hard science focused and conducted by a well-informed litigator.

Conversely, when you are cross-examining a psychologist, psychiatrist or other health professional, you will be much more effective when you are able to focus your examination on the hard science aspects of the expert's testimony. The trier-of-fact, judge or jury, may well be more familiar with the inaccurate and misleading but popular version of the psychology concept at issue.

To illustrate the strategic value of skilfully introducing psychology/psychiatry hard science into the court proceedings, I call upon a recent high-profile case in which the defendant was diagnosed with Narcissistic Personality Disorder and Histrionic Personality Disorder. As the opposing lawyer, you will first have your expert confirm the validity of the diagnosis, which in this case consisted of over twelve hours of structured clinical interviews. Then, when you know that you are on solid ground, your primary goal will be to ensure that the trier-of-fact is fully informed about the meaning and significance of a diagnosis such as this. The jury and/or the judge will not be aware of the research on Personality Disorders and without your input, probably via the pre-planned testimony of your expert, they could easily underestimate the importance of this diagnosis. They need to know that any testimony given by a person authentically diagnosed with a Personality Disorder is unreliable in the extreme. Citing the DSM-5-TR, pages 760-764 and pages 757-760, the psychologist or psychiatrist that you have retained can, with your skillful guidance, inform the court on the following features of Narcissistic and Histrionic Personality Disorders:

1. Like the other Personality Disorders, Narcissistic and Histrionic Personality Disorders are, from adolescence to old age, enduring and thematically resilient. No treatment model has been shown to be meaningfully effective for these disorders. (DSM-5-TR, pp.733 and 757-764).
2. The NPD individual believes that he or she is special, superior and brilliant and therefore believes that his or her perception of the truth is irrefutably, the indisputable truth, e.g. "Every word of the testimony I gave is the truth." Conflicting evidence or even the implication of a challenge to this "truth" is usually very upsetting as it is experienced as a challenge to the individual's specialness thereby activating a histrionic reaction. (DSM-5-TR, pp.757-760)

3. Because he or she has an unshakable sense of superiority, he or she has a strong sense of entitlement and an expectation of automatic compliance with his or her views. Empathy is non-existent and alternative perspectives are viewed with contempt. (DSM-5-TR, p.760).

It should now be apparent to the trier-of-fact that Narcissistic and Histrionic Personality Disorders are not the same as the label of narcissist that is often tossed out in social settings. However, you don't want to leave this conclusion to chance. This is where you call upon your most effective court room communication skills to anchor the point that any testimony given by a person with a valid diagnosis of Narcissistic Personality Disorder, or of any other Personality Disorder, must be considered unreliable, distorted and even dishonest.

This example is presented here to illustrate how you can, with the cooperation of your expert witness, use cited hard science psychology to protect your clients from detrimental judicial decisions that were all or partly based upon flawed but commonly accepted psychology principles.

In Chapters One and Two, you will find the hard science concerning psychological assessments and assessment measures. You may be surprised to learn that the majority of current psychological assessment measures are not standardized and therefore lack psychometric validity. You may also be surprised to learn that the Structured Clinical Interview used in most psychiatric and many psychological Independent Medical Examinations (IME), is only semi-structured and is very much influenced by the perspectives of the health professional conducting the interview. Hence, the quite common phenomenon of differing diagnoses of the same person in the same time frame by different assessors.

Chapter Three outlines the somewhat malleable nature of psychology research. This reality allows you and your expert, to point out the practical limitations of this research. Psychology research is conducted with subjects who are subjective perceiving beings rather than the objective entities found in most other types of research. This creative factor very much influences the reliability of the conclusions and generalizations drawn in realms such as behavioral profiling, parental alienation and stereotyping. Hard science challenges that expose the pseudo-research supporting flawed entities such as these.

Chapter Four looks at the "medicalization" of psychotherapy via the term treatment. In medicine the term treatment is often appropriate. Surgery, antibiotics and other interventions are provided for patients and the benefits occur without the active involvement of the patient. Psychotherapy is different. As your expert can point out for the court, the psychotherapist provides information, tools and support but the patient/client must internalize the information and effectively utilize the tools. US and UK research shows that only one person in three does so. Court imposed conditions, especially in family law, often include compulsory therapy as if therapy and treatment are synonymous. They are not.

Chapter Five covers the Personality Disorders. From a strictly psychological perspective, there remains, from the DSM-5, some disagreement about categorization but from a law perspective the fundamentals remain unchanged. As is demonstrated in the celebrity case presented earlier,

testimony from a person with a valid diagnosis of any of the Personality Disorders is highly unreliable. You and your expert can emphasize for the court this reality.

Chapter Six focuses on Posttraumatic Stress Disorder primarily because it plays a role in many legal proceedings and its definition boundaries, which are quite clear in the DSM-5-TR, are often compromised. Simple trauma usually doesn't bring the same damages package that a PTSD diagnosis brings. As your expert will point out for the court, a diagnosis of PTSD requires the fear of death to self or loved ones. This particular symptom is frequently overlooked.

Chapter Seven covers the current research on human memory. As your expert will cite in his/her testimony, human memory is a malleable phenomenon and, without corroboration, memory evidence is very unreliable. Chapter Seven provides the cited research that you and your expert can draw upon.

Chapter Eight covers the highly contentious realm of witness credibility and the many unverified claims made for accuracy in personal and technical truth assessment. As your expert will point out for the court, "lie detector" tests do not have a standardizing base and therefore their results are totally determined by the person administering the "test." In the realm of nonverbal cues, your expert, drawing upon the literature presented in Chapter Eight, can inform the court that whereas nonverbal cues are real, their meaning can and does vary dramatically depending upon personal and situational variables. In a nutshell, the literature cited in Chapter Eight demonstrates that nobody does better than chance at judging whether another person is telling the truth.

Chapter Nine provides a cited overview of what is commonly referred to as junk psychology. Basically, junk psychology consists of unverified claims of extraordinary positive outcomes derived from unexplained interventions. These interventions are frequently attributed to "special" but unclarified attributes of the often flamboyant "therapist." Whereas it may appear to be a simple matter of demonstrating for the court the glaring lack of hard science support for these junk claims, thoroughness and clarity on the part of your expert are important as so many people, including many health professionals, want to believe that such outcomes are possible.

Chapter Ten is different from the other Chapters. As you know well, the practice of law requires highly refined and sustainable concentration skills. This chapter gives you the tools to clarify your desired outcome, to identify the necessary steps to achieve that outcome and then, to rehearse in a fully absorbed state, "doing it the way you want to do it, feeling the way you want to feel as you do it." This skill, familiar to all high-performance athletes, requires considerable practice. It is easy to do when you don't need it but when you do need it, your ability to "remember what you need to remember and remember to forget what you need to forget" is crucial. Mastering it will make you more successful lawyer.

The practice of law, like that of psychology, is usually conducted in shades of grey rather than black or white because both professions have human beings as clients. As you will see in this book, psychology involves the application of hard science principles to soft science phenomenon. This unavoidable situation creates fertile ground for enduring myths and misinformation. Much of this mythology goes unchallenged because most people, including attorneys, witnesses, judges and jury members do not have the necessary information to

recognize and effectively challenge the unverified X means Y statements that are common in testimony on law-related psychology. This book gives you current and practical clarification of these myths and misunderstandings thereby giving you an edge in your witness selection, the preparation of your witnesses and the focus of your cross-examinations.

You may assume that all psychologists and psychiatrists received law-related training in the hard science aspects of psychology and psychiatry and are consequently able to effectively respond to validity challenges during a cross-examination. It is a mistake to make this assumption. Forensic psychology is still a relatively new field of study and it is a comparatively small number of graduate students who choose this field. In recognition of these realities, the Association of State and Provincial Psychology Boards (ASPPB) is currently working on a second component to its Examination for Professional Psychology. This component, when ready, is meant to assess professional competency in the themes that presented in this book. Up to now, many of the psychologists and psychiatrists that you retain and that you cross-examine have limited practical knowledge of common law-related themes such as: how the psychometric validity of assessment measures is determined; how hard science constructs are differentiated from soft science traits; how the weaknesses in psychology research designs are identified and how these weaknesses contribute to the fact that most psychotherapy studies can't be replicated; how to identify psychotherapy models that are overly mechanistic and how to identify the common tendency to attribute construct status to what are actually psychological metaphors.

Most graduate programs, journals, conferences and continuing education programs in psychology place far greater emphasis on psychological theory and practice than on the hard science validation of these theories and practices. It can be helpful to keep this in mind when you cross-examine and when you retain your witnesses. As you no doubt know, health professionals who are less court-experienced often underestimate the importance of hard science evidence to support their theories, therapies and concepts. Like many of their counterparts in primary care medicine, they do not actively seek involvement in legal proceedings and are therefore less attentive to issues of verification. This reality benefits you as the cross-examining lawyer but when preparing your retained witnesses, you will need to help them appreciate the need for verifiable support for their testimony.

This book gives you an informed sense of the frequently soft foundations upon which experts in psychology and psychiatry give their expert opinions. When you know how the science of psychology differs from other forms of science, you are in a better position to represent your clients in cases where a psychological assessment, diagnosis, prognosis or professional opinion could have significant impact on the life and well-being of your client.

Whereas psychology is a science, it is unlike other sciences in that the subjects studied and assessed are not objective entities. They are human beings and we human beings are subjective in many ways. We creatively construct our sense of self and we give meaning to the world around us. We imagine; we assume; we generalize; we attribute meaning to ambiguities; we remember creatively; we formulate our values and our beliefs through the screen of our culture; we selectively attend to that which confirms our biases and attitudes; we mind-read with excessive confidence; we project our perceived realities onto other people and situations; we are sometimes honest and sometimes deceptive; we are rational and sometimes irrational; we are

consciously motivated and sometimes unconsciously motivated and yet, we believe that our perceived realities are in fact reality.

Within the justice system we, as lawyers, judges, juries, psychologists and psychiatrists are charged with finding truth and reality from within this labyrinth of human complexity. This search for truth can be made a little less daunting when we can distinguish the valid and valuable aspects of psychology from the popular misconceptions, myths and inaccuracies that are often attributed to this profession.

This book is based upon my CLE seminar which is accredited by the New York State Continuing Education Board. It begins with psychological assessments, reports and the testimony arising from these assessments which often play a role in the Independent Medical Examinations (IME's) in Family Law, Criminal Law, Personal Injury Law and Employment Law. Traditionally, the psychology assessment methodology employed for medical-legal reports has been ineffectively addressed in cross-examinations. The focus of these cross-examinations has usually been upon the opinions and recommendations of the expert with little or no informed examination of the methodology and assessment measures used to formulate these opinions and recommendations. In this opening segment you will learn what constitutes test validity and why test validity is more important than test reliability. You will also learn how to quickly determine whether an assessment instrument has psychometric validity. You learn that among the many psychological assessment instruments available, only a few have proven psychometric validity yet important decisions are frequently made from invalid assessment information. You will also find that many psychologists and psychiatrists incorrectly see colloquial validity as synonymous with psychometric validity. My paper on preparing your psychology/psychiatry witnesses, published in the November/December, 2016 edition of *the Journal of the New York State Bar Association*, will be helpful in this realm. Your awareness of the nature and importance of psychometric validity will shield you from challenges to the psychological assessments that you commission and will arm you in any challenge that you make concerning the validity of assessments commissioned by opposing counsel.

As part of the segment on psychological assessments, you will be introduced to the key concepts of three frequently used psychological assessment instruments. These instruments, the MMPI-2, the MMPI-2-RC and the PAI will be summarised for you and their psychometric validity will be discussed. Only two of these instruments have acceptable psychometric validity.

The second segment of the book is devoted to the research model that gives rise to the psychological disorders described in the newly-revised DSM-5-TR. These are the disorders and symptom clusters that are assessed by the psychological assessment instruments described in segment one. This research model also generates the various efficacy-based psychotherapy models designed for these DSM disorders. Because some forms of psychotherapy, such as anger management, or addiction therapy may be included in the court-ordered conditions imposed on clients of yours, you will learn how the effectiveness of psychotherapy models is determined. Of particular interest to attorneys are the current criteria for Posttraumatic Stress Disorder, Somatic Symptom Disorder, the Adjustment Disorders and the Personality Disorders since these updated criteria will influence case law precedents that were derived from the now replaced DSM-5.

In segment three you are given a summary of the two versions of the Personality Disorders as they appear in the DSM-5-TR. These two versions create many new questions about the research supporting these redefined disorders and about the validity, complexity and reliability of future PD assessments. The knowledge about psychological assessments and research design that you gained in the first two segments of the book/seminar will help you recognize some of the legal issues that will surely arise in cases where it is alleged that the actions of your client or of the opposing counsel's client may be attributed to a PD.

In segment four, you are given a summary of the DSM-5-TR diagnostic criteria for Posttraumatic Stress Disorder. Recent research demonstrates that PTSD can arise from a wider range of real and perceived threats to one's life or limbs than was recognized in the earlier versions of the DSM. You will see from this new information that the determination of damages for your client will be influenced by a wider range of questions than were possible under the DSM-5 criteria. These questions will include: Who determines what constitutes a real threat and what constitutes a perceived threat? Does it matter? On what basis will these determinations be made and who will make them? Will it be you, your client, a psychologist, a primary care physician or, will it be your client's insurance company?

PTSD is no longer listed as one of the Anxiety Disorders but it certainly is a type of anxiety. All types of anxiety arise from the individual's mental images of an anticipated negative outcome and because we are creative beings, anxiety tends to leak across the designated boundaries that differentiate the different anxiety types. Attorneys practicing personal injury law, employment law, criminal law, health law and family law will see that damages need not be solely determined by a PTSD symptom list.

Segment five is devoted to the implications of the most recent research on the reliability of unsubstantiated memory. Attention will be given to the numerous factors that can contaminate memory in general and the memory of witnesses in particular. You will also learn the results from the most recent research on various forms of "memory enhancement." Whereas this segment of the book will be of interest to all lawyers, it has real and practical value for new and less experienced lawyers.

The sixth segment concerns the realm of witness credibility. The legal system is a quest for truth through the compilation of evidence that either confirms or disconfirms an alleged truth of some kind. However, this compilation includes both factual evidence and opinion evidence. Many pitfalls reside in the realm of opinion evidence, which includes expert evidence that wanders, through inference, into the realm of opinion evidence. The pitfalls covered in this segment include: the overconfidence of the truth assessor, bias, meaning attribution, selective attending, mistaking intense emotion for an indicator of truth and placing unsubstantiated trust in truth-assessment devices, techniques and pharmaceutical products. Readers usually find the current research on witness credibility informative, sometimes surprising and in some cases, even amusing.

The seventh segment is a brief description, with illustrations, of fringe psychology. Fringe psychology is sometimes known as pop psychology, novel psychology, new age psychology or even, cutting edge psychology. The proponents of fringe psychology promise improbable

positive outcomes using vaguely defined concepts and treatments. Fringe psychology, under any name, is pseudo-psychology and the pseudo-psychologies all lack the research support that would free them from the term pseudo. You will learn the correct questions to ask when it seems that your client could be detrimentally affected by some unchallenged aspect of fringe psychology. The title of the seminar version of this book - *Psychology and the law: What we know and what we know that isn't so* – truly applies in this segment. The Frye test for the admissibility of evidence is “general acceptance” by professionals in the field and is clearly insufficient for assessing the validity of the fringe psychologies.

Successful attorneys, like successful people in professional sports, appreciate the importance of preparedness and like successful athletes, attorneys can improve their verbal and written performances by utilizing situation-specific rehearsal imagery. The closing segment of the book consists of a performance-enhancement imagery activity that is designed to enhance your success by rehearsing, “doing it the way you want to do it feeling the way you want to feel as you do it.”