

“Shrinks” on the Couch: Deposing Mental Health Professionals

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**INTRODUCTION BY
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GENERAL TOPICS TO COVER FOR EXPERT DEPOSITIONS

- Qualifications?
- Compensation?
- Expert's Experience including % plaintiff vs. % defense?
- What was assignment?
- What work done to fulfill assignment?
 - Reviewing Expert's File Material
- Opinions formed?
- Basis for each opinion?
- Additional work, if any?
- Whether changing particular facts would change opinions?

SPECIAL CONSIDERATIONS FOR DEPOSITION OF MENTAL HEALTH EXPERTS

- A. Confidentiality
- B. Qualifications
 - 1. Psychologists
 - 2. Psychiatrists
- C. Preparing for Daubert
Motions Practice
- D. Questions Regarding the
Mental Health Exam

FIVE KEY TAKE-AWAY POINTS

#1 KEY TAKE-AWAY POINT

1. What Constitutes Professional Expert Opinion
vs.
Speculation?

#2 KEY TAKE-AWAY POINT

2. Establishing Professional Qualifications and Areas of Expertise

#3 KEY TAKE-AWAY POINT

3. One Suggestion of How to
Lead an Expert Out On a Limb

#4 KEY TAKE-AWAY POINT

4. One Way to Know When and How to Cut It Off

#5 KEY TAKE-AWAY POINT

5. The Difference Between
Experts Who Base Their
Opinions on Objective Clinical
Evidence

VS....

Those Who Base Their
Opinions Substantially On Their
Own "Authority"

**1. WHAT CONSTITUTES
PROFESSIONAL EXPERT
OPINION
VS.
SPECULATION?**

WHO IS AN EXPERT?

- One with specialized:
 - Education
 - Training
 - Formal – Psychiatric Residence/Post-Doctoral
 - Practical - Supervision
 - Experience

2. ESTABLISHING PROFESSIONAL QUALIFICATIONS AND AREAS OF EXPERTISE

QUALIFICATIONS FOR A FORENSIC PSYCHIATRIC EXPERT?

- American Board of Psychiatry and Neurology (ABPN) Certification in Forensic Psychiatry Requirements:
 - Completion of 3 year full time residency in Psychiatry
 - ABPN Diplomate in General Psychiatry
 - Completion of 1 year full time approved Fellowship in Forensic Psychiatry
 - Passing a comprehensive, half-day, ABPN administered written examination in Forensic Psychiatry

QUALIFICATIONS FOR A FORENSIC PSYCHOLOGICAL EXPERT?

- Education, Training & Experience or
- Board Certification by the American Board of Professional Psychology (ABPP) and the American College of Law and Psychology
- To be eligible to apply for board certification in Forensic Psychology:
 - 100 hours in formal education, direct supervision or continuing education
 - 1000 hours of experience
 - Post-Doctoral Training Program
 - Post-Doctoral Experience
 - Work Sample Submission (written test)
 - Oral Examination

COMPETENCY BOUNDARY PROBLEMS

- Practicing outside one's field(s) of expertise as established by
 - Education
 - Training
 - Experience
 - Supervision

ADVANCED CREDENTIALS: PSYCHIATRY

- ABPN Diplomates (Board Certification) in General Psychiatry and/or Child Psychiatry
- APA Fellows and Distinguished Fellows (recognizing special contributions to the field)
- Membership in Professional Organizations
 - American Psychiatric Association
 - American Academy of Psychiatry and the Law

ADVANCED CREDENTIALS: PSYCHOLOGY

- Diplomates (ABPP & Other Psych Board Certification)
- Fellows (special contribution to the field)
- Membership in Professional Organizations
 - Society for Personality Assessment (SPA)
 - National Academy of Neuropsychology (NAN)
 - American Academy of Law and Psychology
 - American Board of Professional Psychology (ABPP)
 - National Register of Health Providers in Psychology

THE PROBLEM OF "VANITY" BOARDS

LEGAL STANDARDS OF PROOF VS. EXPERT'S STANDARD OF PROOF

STANDARD OF PROOF FOR EXPERTS

- Medical and Psychological Standards *differ* from legal standards
- Opinions must be given: To a Reasonable Degree of Medical/Psychological Certainty (and/or Probability)
- 51+ % level of confidence
- No other standards from a medical or psychological perspective

SPECULATION, ADVOCACY & OTHER PROBLEMS WITH EXPERT TESTIMONY

- Whenever an expert can not give an opinion consistent with the standard of proof
- Whenever an expert gives an opinion beyond the standard of proof in their field
- Whenever an expert tries to give a legal opinion
- Whenever there is not objective evidence to support one's opinion
- When scientific data is inconsistent with one's opinion

ADVOCACY

1. Often Medical Experts Confuse Their Roles as Treeters with Their Roles As Experts, Leading to...

THE PROBLEM OF WEARING
TWO HATS

THE PROBLEM OF WEARING TWO HATS

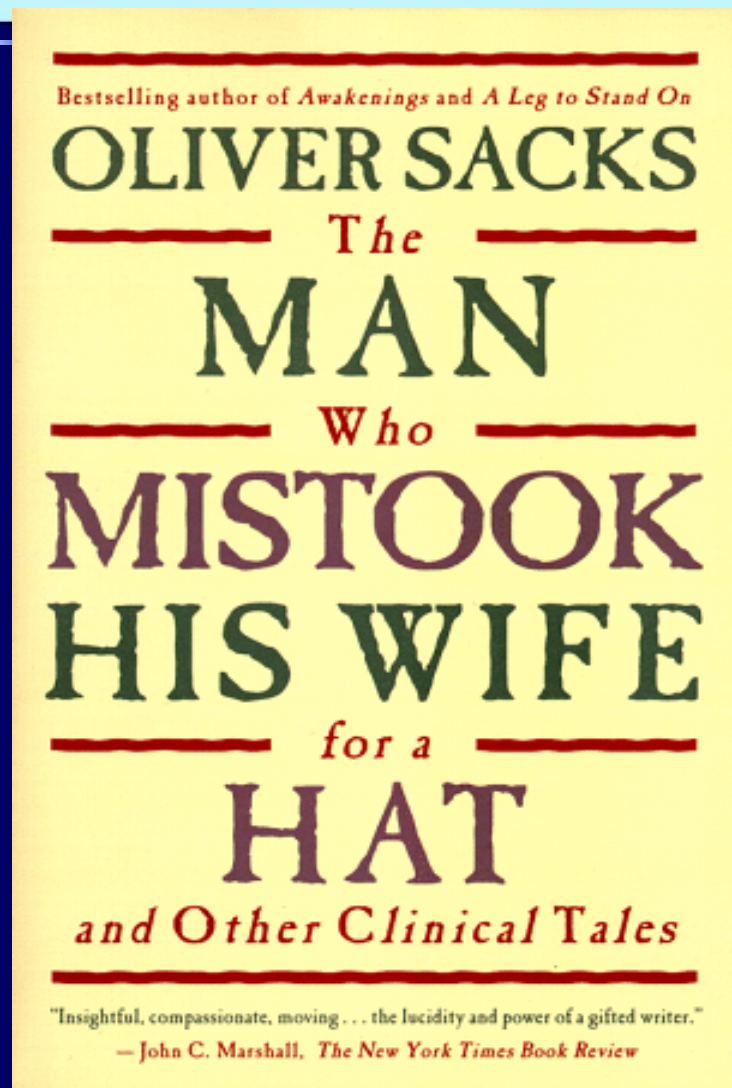


THE PROBLEM OF “DUAL AGENCY”



**THE PROBLEM WITH
WEARING TWO HATS
IS...**

...ROLE CONFUSION!



THE LAWYER
WHO
MISTOOK
HIS TREATER
FOR AN
INDEPENDENT
EXPERT

Role Confusion: The Expert as "Advocate"



EXPERT VS. ADVOCATE

2. Although It Is Appropriate for Treating Clinicians to be Advocates for Their Patients...
3. ...Independent Experts Should Not Be Advocates for Either the Plaintiff or the Defendant.
4. Independent Experts Should *Only* Advocate for Their Evidence-Based Opinions – Nothing More, Nothing Less.

3. ONE WAY TO PUT AN EXPERT OUT ON A LIMB?



ONE WAY TO PUT AN EXPERT OUT ON A LIMB?

- Ask about his specific training to do particular tasks and/or procedures:
 - Some psychiatrists administer psychological tests (MMPI-2, MCMI-III)
 - Almost all psychiatrists who do this have no specific training in either the administration of tests and/or the interpretation of psychological test data, as required by the test publishers and as clearly stated in their specific testing manuals.

ONE WAY TO PUT AN EXPERT OUT ON A LIMB?

Ask, "How many of your prior cases,
Doctor, are plaintiff vs. defense?"

Then ask to see a total case list for all
cases during the past 4 years (required
under FRCP Rule 26a).

A MUCH BETTER QUESTION TO ASSESS AN EXPERT'S INTEGRITY IS...

“Doctor, what % of the cases that come to you do you either refuse to take because you don't feel that you can be helpful to the inquiring attorney, or you offer a preliminary opinion that is not supportive of the inquiring attorney's litigation theory?”

ONE WAY TO PUT AN EXPERT OUT ON A LIMB?

- Flattery will get you everywhere
- Size (of Medical Egos) Does Matter.

4. ONE GOOD WAY TO CUT IT OFF



ONE GOOD WAY TO CUT IT OFF

Try this...

Compliment the Expert on his extensive CV and considerable experience

Invite the Expert to opine generally about medical aspects of your case: "Doctor, someone with your extensive training and experience must have seen and perhaps treated many patients with mental symptoms similar to those Mr. Jones."

Narrow down the open ended question with particular medical questions that are tangential to his expertise; ask the expert to "explain" medical phenomena that are issues in the case.

Then ask him a specific medical question that is clearly outside of his specialty training and expertise.

Surprisingly, sometimes even experienced Experts will fall prey to their own hubris and opine broadly, drifting into....

PUFFERY



ONE GOOD WAY TO CUT IT OFF

If the expert foolishly follows your lead and SURGES into opinions well outside of his expertise, realizing his error, he may become embarrassed and defensively speak in medical jargon to to obscure his wide excursion into opinion beyond his expertise...

Then ask him exactly what is his formal training gives him the authority to opine on an issue that is clearly outside of his scope of practice and expertise...?

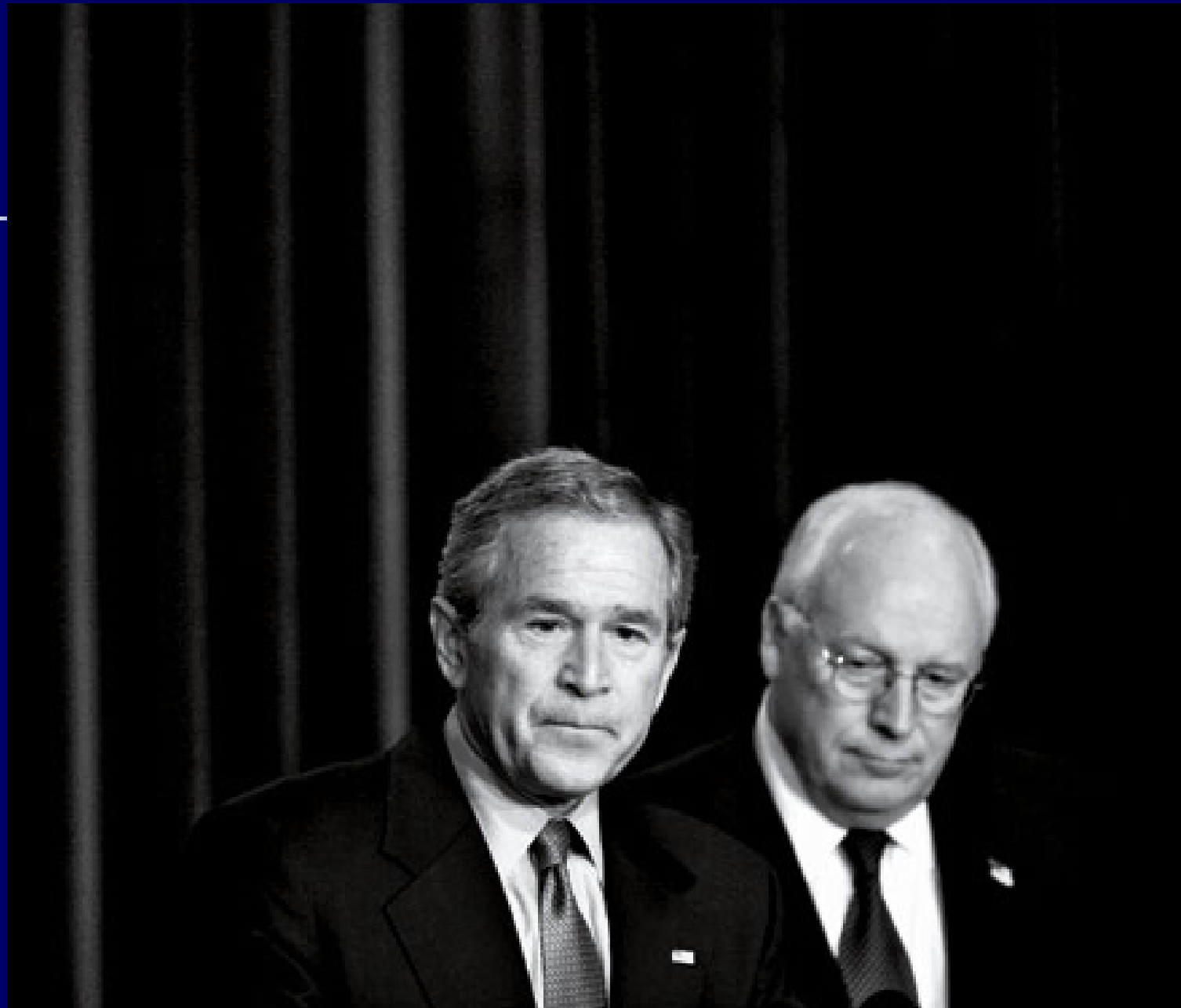
e.g., “Q. Doctor, what in your background and training qualify you to administer the MCMI-III?”

“... I think that psychiatrists and neurologists can put lead boots on and give the certain examination that they were taught by certain teachers, *or they may attempt to explore a variety of things that are at the limits, at the periphery, of what they have been trained.*”

**THE “EXPERT” HAS JUST
ACKNOWLEDGED THAT HE IS
WORKING “AT THE PERIPHERY”
OR BEYOND THE LIMITS OF HIS
TRAINING & ABILITIES!**

**RESTATE HIS CONFESSION FOR
THE RECORD...**

**THEN
OBSERVE HIS EXPRESSION
CLOSELY...**





**5. THE DIFFERENCE
BETWEEN EXPERTS WHO
BASE THEIR EXPERT
OPINIONS ON CLINICAL
EVIDENCE**

VS.

**EXPERTS WHO BASE THEIR
OPINIONS SUBSTANTIALLY
UPON THEIR "AUTHORITY"**

e.g. THE “NARCISSISTIC” EXPERT

**(AKA “IT’S TRUE
BECAUSE I SAY SO”)**



SIGNS AND SYMPTOMS OF THE NARCISSISTIC EXPERT:

NAME DROPPING FROM "THE LITERATURE"

During deposition, the Expert will try to "blow smoke" by repeatedly quoting "authorities" and "the literature" in his field with which he assumes you are unfamiliar.

Remedy:

Stay with him and...

NAME DROPPING FROM "THE LITERATURE"

Relentlessly pursue detailed SPECIFIC questions *and* request copies of the SPECIFIC documents (books and journal articles) to which he loosely and repeatedly refers.

Ask him what are the SPECIFIC points from these articles by named national authorities that the Expert believes support his own opinions in the case at hand and why?

Have your own expert review the referenced literature.

Often the actual journal and article names are not remembered by the expert, or the authorities' opinions are tortuously misapplied to the actual case.

***AD HOMINEM* DISPARAGING OF THE OPPOSING EXPERTS**

"And if one is naive and stupid enough to administer a test such as the Rorschach to a person in the context of a defense IME, one needs one's head examined, because the Rorschach is akin to asking a patient to disrobe..."

...that is a source of concern that I have had not only in this matter but with Dr. Ronald Roberts who seems to now be in affiliation with Dr. Levy in the group of forensic psychiatrists based in Mill Valley. I think it's a use and a misuse and abuse of psychological testing...."

PRACTICE BEYOND THEIR SCOPE OF COMPETENCE

e.g., Forensic Psychiatrists who operate beyond their scope of training and competence often administer and interpret (or simply quote in an IME report the computer-generated analysis) psychological tests, rather than relying on other Forensic Psychologist experts to administer and interpret the tests for them and analyze the psychological test data thus produced.

**WHAT CONSTITUTES
PROFESSIONAL OPINION
VS.
SPECULATION?**

PROFESSIONAL OPINION = EVIDENCE-BASED MEDICINE



SHOW ME THE MONEY!

WHAT IS CLINICAL "EVIDENCE?"

Start with the basics:

Recognized patterns of
human behavior

What's in the records and the
history

WHAT IS CLINICAL "EVIDENCE?"

Diagnoses that by definition imply a
"natural course" of the illness, not a
proximate cause of symptoms:

e.g., Pre-existing conditions:

- Multiple sclerosis
- Chronic back pain
- Personality disorders
- Chronic Depression

WHAT IS CLINICAL "EVIDENCE?"

- Predictable behavior patterns noted within medical records
- Pre-morbid emotional problems may be indicated by a background of physical symptoms

WHAT IS CLINICAL "EVIDENCE?"

Behavior observed during the clinical examination:

- Flattened affect
- Physical tremulousness
- Exaggerated "startle" reflex
- Impaired attention and concentration

WHAT IS CLINICAL “EVIDENCE?”

Psychometric Test Data:

- “Endorsement” Tests, e.g. MMPI-2, PAI, MCMI-III
- Intelligence Tests, e.g. WAIS
- Projective tests, e.g. Rorschach Inkblot Test
- Neurocognitive Tests, including tests of “effort” and malingering, e.g. the Test of Memory Malingering (TOMM)

HOW CAN TESTING HELP?

- Psychological testing is a powerful tool to obtain important information about a plaintiff's state of mind
- It is a primary means to obtain objective information about the examinee's emotional and cognitive functioning
- It is one of the best means available to assess malingering

PERSONALITY ASSESSMENT

- Personality testing is used to evaluate the presence or absence of severe emotional problems or psychopathology
- It mainly gives information about one's current mental state
- It also gives information about long standing or chronic problems
- It can provide evidence regarding exaggeration

COMMONLY USED PERSONALITY TESTS

- SELF REPORT PERSONALITY TESTS:
 - Minnesota Multiphasic Personality Inventory, 2nd edition (MMPI-2)
 - Personality Assessment Inventory (PAI)
 - Millon Clinical Multiphasic Personality Inventory, 3rd edition (MCMI-III)
 - Problems with bias
- PROJECTIVE TEST
 - Rorschach Psychodiagnostic Test
 - Helps assess bias (= psychological x-ray)
 - As Reliable as any other personality test

VALIDITY & RELIABILITY OF THE RORSCHACH

The Society of Personality Assessment's Endorsement of the Rorschach, Published in the Journal of Personality Assessment, 85(2), 219-237, 1985.

This statement is intended for psychologists, other mental health professionals, educators, attorneys, judges, and administrators. Its purpose is to present a summary of the issues and evidence concerning the Rorschach.

This statement affirms that **the Rorschach possesses reliability and validity similar to that of other generally accepted personality assessment instruments and its responsible use in personality assessment is appropriate and justified.**

NEUROPSYCHOLOGICAL TESTS

- Wechsler Adult Intelligence Scale-III (WAIS-III)
- Wechsler Memory Scale – III (WMS-III)
- Numerous specialized tests:
 - Executive functioning (logical & goal oriented behavior)
 - Aphasia (language)
 - Motor functioning
 - Visual-Spatial functioning
 - Halstead-Reitan Neuropsychological Battery
 - Luria-Nebraska Neuropsychological Battery

SYMPTOM VALIDITY TESTS

- Malingering tests
 - Personality testing
 - MMPI-2
 - PAI
 - MCMI-III
 - Memory/Neuropsychological
 - Test of Memory Malingering (TOMM)
 - Word Memory Test (WMT)
 - Victoria Symptom Validity Test (VSVT)
 - Validity Indicator Profile (VIP)
 - Structured Interview of Reported Symptoms (SIRS)

ARE THE TESTS ANY GOOD?

- Any test is only as good as it is reliable and valid
- "Reliable" simply means the test finding is replicable if the same test is given again or when the findings are consistent with other tests
- The greater the reliability, the greater the validity
- "Validity" means the test is able form an accurate measurement or appraisal of a problem
- The more the test results are consistent with the life history, the more likely they are to be valid

STANDARDIZED SCORES

- Good tests have “standardized scores”
- If the same test is scored by a different person, the results should be the same
- Objective scores are used to achieve a higher level of confidence about the findings
- Tests without standardized scores are largely subjective in nature:
 - They are not reliable
 - Their validity may be in question
 - Their usefulness in court is questionable
 - Their results may easily be biased

WHEN NON-STANDARDIZED TESTS ARE USED

- Ask if there are standardized tests available to measure the areas of concern (emotional, cognitive, etc.)
- Ask if they were used, were they relied upon.
- If they were not used, ask why not
- Ask if they demonstrated a reliable pattern of findings or not
- Ask if they are routinely used and relied upon by psychologists in court
- If not, ask why they are not routinely used and relied upon by psychologists in court
 - And if they do not know, why not?

PROFESSIONAL ETHICS

Committee on Ethical Guidelines for Forensic Psychologists

- Obligation to provide services in a manner consistent with the highest standards of their profession.
- Do not provided services on the basis of "contingent fees"
- Have an obligation to document and be prepared to make available all data which form the basis for their opinions
- Must provide documentation in a manner which is subject to reasonable judicial scrutiny
- Must recognize that the standard for documentation is higher than for general clinical practice
- Must provide the best documentation available under the circumstances

STANDARD PROCEDURES & DISMISSAL OF EVIDENCE

American Psychological Association

- “Test Administrators should follow carefully the standardized procedures for administration and scoring specified by the test publisher”
 - **Standards for Educational and Psychological Testing of the American Psychological Association**
- Failure to follow standardized procedures may constitute an ethical violation (unless there is a compelling reason to do so)
- Daubert Finding

STIPULATED PROTECTIVE ORDER

- Stipulates test data may be turned over to the other side and will not be kept as part of the public record (or will be sealed); they may not be used for any other purpose apart from the present litigation; and they will not be copied or distributed in any form outside the present litigation.
- Best way to get access to test data
- Protects psychologists from ethical concerns
- Avoids conflicts between attorneys and psychologists

ALWAYS DEMAND “RAW TEST DATA” FROM OPPOSING PSYCHOLOGIST & PSYCHIATRIST

- Do not accept opposing experts reports without “raw data” when psychological tests were administered and summarized
- Have “raw data” analyzed by your own psychological expert and re-scored if needed
- Opposing experts may underplay or completely omit highly significant psychological test data from their reports

STANDARDS FOR TESTIMONY

- Forensic Psychologists have an obligation to present their findings in a fair manner
 - They do not misrepresent evidence by omission or commission of data
 - They must not participate in partisan attempts to avoid, deny, or subvert evidence contrary to their own position
 - They may make a forceful presentation of their data and their reasoning upon which their opinions are based

SUMMARY OF FIVE KEY POINTS

1. **What Constitutes Professional Expert Opinion vs. Speculation?** Ans. Evidence-Based Opinion
2. **Establishing Professional Qualifications and Areas of Expertise** – credentials, training & experience
3. **How to Lead an Expert Out On a Limb**
 - Determine if opinions exceed the scope of expert's training and practice
 - Request evidence for claimed % ratio of plaintiff:defense civil cases
 - Flattery
4. **How and When to Cut It Off:**
 - Elicit puffery
 - Elicit exaggerated, overly broad, speculative opinions
 - Clarify expert's scope of practice and competence to opine, based upon specific formal scientific training
5. **The Difference Between Experts Who Base Their Opinions on Objective Clinical Evidence vs. Those Who Base Their Opinions Substantially On Their Own "Authority": Ego and Narcissism (i.e., grandiosity)**

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