

## **Clinical vs. Forensic Evaluations:**

### *The Critical Differences to Consider when Civil Litigation is Imminent or Pending*

The critical differences to consider when deciding if you or your client need a clinical or forensic evaluation when civil litigation is imminent or pending include (1) purpose, (2) scope, (3) professional relationship, and (4) fees.

It is certainly reasonable and feasible that a client may be referred for a clinical evaluation by his/her medical professional and also be involved in civil litigation. It is noteworthy, however, that the client, by way of referral from their medical provider, is engaging strictly in a clinical evaluation regardless of their involvement in litigation. While the client may choose to share the evaluation report with their attorney, who may then choose to “use” it in the context of litigation, the clinical evaluation rarely will cover all bases required for litigation purposes.

(1) **PURPOSE.** The purpose of a forensic evaluation is ultimately to offer expert opinion to be used specifically for litigation purposes. A forensic evaluation may be necessary when the attorney is seeking an evaluation for the primary purpose of providing evidence of “damages” suffered in the context of litigation or refuting such. The referring provider is typically an attorney representing an individual, an insurance company, or a business in a lawsuit or potential lawsuit.

The purpose of a clinical evaluation is typically to address diagnostic clarity of a patient and to provide that patient with treatment recommendations. Clinical evaluations are often shared with the referring medical provider (e.g., therapist, psychologist, psychiatrist, physician, neurologist) and the patient.

While there may be some overlapping conclusions reached in either type of evaluation about the extent of one’s cognitive and/or psychological impairment subsequent to an injury, the documentation required to support expert opinion to be used in litigation is far beyond that documented in a clinical evaluation. In essence, while a psychologist relies on their “expertise” to formulate conclusions in a clinical evaluation, this does not always equate to formal expert opinion that can be offered in Court in the context of litigation. If a psychologist is hired for clinical purposes, the psychologist can only offer fact witness testimony (if called upon to do so) in the context of litigation, *not expert witness testimony*. While a fact witness merely presents the facts (e.g., dates of service, means of assessment, diagnosis, results as written – no additional opinion), recommendations as written – no additional opinion), etc., an expert witness is able to provide opinion during expert testimony (e.g., opinion about causation or direct linking of impairment to injuries, opinion about prognosis or recovery, etc.).

(2) **SCOPE.** The scope of a forensic evaluation involves a greater amount of time spent interviewing the client and collateral sources, reviewing extensive records, administering a more extensive test battery with greater consideration of validity, time consulting with attorneys and other experts, time spent researching, etc. The standard and scope for a forensic evaluation is above and beyond an evaluation performed purely for clinical purposes. Hence, the time required to complete a forensic evaluation is typically much greater, so it is best to plan as far in advance as possible and make the referral well in advance of any pending deadlines.

The scope of a clinical evaluation is typically narrower. It often does not include extensive record review (in lieu of a summary and/or patient report), collateral interviews, and may include a more abbreviated test battery. The scope may often be dictated by financial constraints including what insurance will cover or what the patient is able to afford. This may limit the time to complete the evaluation and may limit the documentation of findings to a briefer summary report.

(3) PROFESSIONAL RELATIONSHIP. The professional relationship in a forensic evaluation is typically between the forensic expert and the attorney of a client involved in civil litigation. The client consenting to a forensic evaluation must be made aware that his/her confidentiality may be waived if he/she consents to use the evaluation in the litigation context. The professional relationship in a clinical evaluation is typically between the psychologist and the patient. In clinical evaluations confidentiality is maintained between the psychologist and the patient (and other medical professionals involved as indicated by HIPAA). Clinical evaluations and forensic evaluations shall not overlap, as professionals are ill-advised by ethical standards to engage in dual roles. A clinical evaluator will often serve in an advocacy role for their client, while the role of a forensic evaluator must always be objective and, on occasion, may even be adversarial. When a forensic evaluation is necessary, it is best to be clear up front; the forensic expert should be retained by the attorney at the outset, as the relationship may not be easily redefined “along the way.”

(4) FEES. In a forensic evaluation, services are typically billed at an hourly rate, not a flat rate. A financial agreement as outlined in a fee schedule must be agreed upon and a financial retainer must be secured prior to any work commencing. The client’s medical insurance will not be billed for any portions of a forensic evaluation, as it is unethical to bill medical insurance companies for forensic services or expert services for the purposes of litigation.

Insurance companies *may* cover some or all services related to a clinical evaluation, however. Insurance companies have set (often significantly reduced) rates and will only authorize a limited number of hours for clinical evaluations to be completed. Essentially, this is why it is termed “managed care.” Insurance companies pay only for what is deemed medically necessary, and litigation is not deemed medically necessary.

*The following illustrations are purely examples provided to enhance clarity.*

*Example A. The clinical neuropsychological evaluation.* A person, who was recently involved in a car accident, visits a neurologist with complaints including poor concentration, poor memory, headaches, moodiness, and difficulty multitasking. The neurologist refers the patient for a neuropsychological evaluation to determine how to best treat them. This referral defines that the neuropsychologist is now in a clinical role. As such, the neuropsychologist performs the evaluation, provides feedback to the patient directly, and shares the report with the neurologist, who then treats and/or refers accordingly. In this clinical role, the neuropsychologist may have also adopted an advocacy role. The neuropsychologist may take the patient’s word about their suffering, coordinate treatment efforts on their behalf, consult with the neurologist about the best course of care, etc. The neuropsychologist does not typically question other parties or consult records for the purposes of validating the patient’s complaints and may adopt an abbreviated test battery due to limited financial means or insurance coverage. The primary goal of this clinical evaluation is to support the patient in their treatment.

At some point, the patient's attorney learns of the neuropsychological evaluation and believes it may be helpful in negotiations for their client, so they share the report with the opposing attorney to support a financial demand. The opposing attorney then chooses to depose the neuropsychologist to learn more about the findings and how it impacts the case. Any involvement the neuropsychologist has in the case at this time is limited to a fact witness role, similar to when a treating therapist is called upon to discuss a client's therapy in a civil case. The testimony is limited to the facts only, and the fact witness cannot be asked to offer expert opinion in the context of litigation.

*Example B. The forensic neuropsychological evaluation.* Mr. Unfortunate is involved in a motor vehicle accident and hires an attorney, Mr. Max, to sue the insurance company with the goal of obtaining financial damages for pain and suffering, to pay medical bills, cover lost wages, etc. Mr. Max attempts to prove that Mr. Unfortunate has suffered a head injury as a result of the accident, which now limits his independent functioning (e.g., ability to work, drive, live alone) and results in cognitive impairment believed to be somewhat permanent (e.g., memory loss, confusion, insomnia, depression). Mr. Max retains an expert witness in the field of neuropsychology, Dr. Competent, for the purpose of attempting to prove such losses. Dr. Competent deems Mr. Max the client in this case (not Mr. Unfortunate, who is now deemed a plaintiff in a lawsuit). Dr. Competent is purely in an objective role and as such may conclude with findings that are valuable or helpful to Mr. Unfortunate's case or she may find information that is not helpful, or in some instances even harmful, to the case. Only in the case where Dr. Competent can provide evidence in support of the litigation, she may then be called upon to testify in a deposition and/or at trial; hence, the information shared by Mr. Unfortunate is no longer confidential. Dr. Competent is allowed (if qualified) to provide *expert opinion*, that may include conclusions about causation (e.g., head injury caused loss of function and permanent impairment). These conclusions are based on an in depth forensic neuropsychological evaluation that involves extensive interviews with Mr. Unfortunate, collateral interviews with others who know him well, extensive record review, extensive testing including validity testing, consultation with other parties, etc. – an evaluation that rises to the standard of the law.

While Mr. Unfortunate may also wish to use his forensic neuropsychological evaluation to guide his treatment, as after all, he did participate in an evaluation that documents his degree of suffering, treatment recommendations are not always a part of a forensic evaluation. The scope of the forensic evaluation including the format with which the findings are documented may not meet the needs for a medical provider to determine or guide treatment. It is not the role of Dr. Competent to collaborate with medical providers or guide treatment in any manner, as now she is engaging in ill-advised dual roles.

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The Bottom Line. If your client requires a forensic evaluation to introduce evidence in support of damages in a civil lawsuit, it is most prudent to avoid any short cuts to reduce costs or rely on insurance as payment. You may very well not end up with the product you or your client require, and you may also lose the opportunity to rely on an expert witness. If you are truly and *solely* seeking what is best for your client to ensure that he/she receives the treatment necessary following a tragic accident, then a referral from a medical provider for a clinical evaluation is absolutely appropriate.