Defense medical exams in brain-injury cases

Use motion practice to stop defense experts from abusing the MMPI2 and other testing in brain-injury cases

By Alan Van Gelder

When the defense cites to confidentiality and ethics prohibitions to prevent you from seeing the raw data for their defense mental-exam tests, they are shielding the expert's work from effective and complete cross-examination. When this happens, the defense cannot then use those same tests as a sword against your client. By raising this sword and shield argument during motion practice over the scope of a defense mental exam, you can potentially force the defense to reveal their raw data, withdraw the tests, or get a court order precluding the use of the tests.

Consider the following scenario: Your client suffers a blow to the head and orthopedic injuries. More than six months post-injury your client is still reporting and showing problems with concentration, memory, multi-tasking, processing speed, energy level, and emotional regulation. Friends, family, and former co-workers say your client is not the same. You have experts who say your client has a traumatic brain injury. You proceed with the lawsuit.

Eventually the defense demands a defense mental exam. As part of the examination they must spell out the tests their neuropsychologist wants to run on your client. One of the tests is the Minnesota Multi-Phasic Personality Inventory 2 (MMPI2). Within the MMPI2 they are going to be using the Fake Bake Scale (FBS) and the Response Bias Scale. (RBS). They also want to use the Green Word Memory Test. (WMT).

The basics on the tests

The MMPI2 (and in particular the FBS-r and RBS scales) are personality-test questions. Allegedly, these questions are supposed to determine if someone is credibly reporting symptoms, is a symptom exaggerator, or suffers from somatization. (Somatoform disorder essentially is a mental illness in which the patient falsely believes he or she has medical problems and that this mental illness is causing their mind to create or enhance problems that have no organic cause.)

The WMT is allegedly a test designed to sniff out whether someone is pretending to have memory problems. The WMT allegedly has questions that are designed to test memory and that the questions are so easy and foolproof that only someone who has credibility problems would fail the test.

Your client takes the defense medical examination, which includes these two tests. Then you depose the defense expert.

The expert testifies, "Your client's cognitive and memory problems are not from a brain injury. The MMPI2 and the WMT show that your client is imagining symptoms, your client's emotional state is driving the symptoms, and your client is improperly magnifying the symptoms. The objective test data I have collected about your client from these peer-reviewed tests causes me to question your client's credibility. I am not saying your client is intentionally lying. I am only saying that the jury should not believe anything that comes out of your client's mouth. You can trust me because I have some fancy degrees and I relied on these peer-reviewed objective tests."

Don't panic.

There is considerable controversy connected with using the WMT, the MMPI2, and the FBS-r and RBS in a situation where a person has a traumatic brain injury. For example, there is considerable debate as to whether the questions on the WMT are truly "foolproof" and whether a person suffering legitimate memory and concentration problems from a brain injury will be able to pass the test. There are arguments that the WMT is known to have a high "false positive rate" when specifically used on patients with concentration and distraction problems associated with a brain injury.

There is also considerable controversy surrounding the use of the FBS-r and RBS scales. The MMPI-2RF is a series of true/false questions asking about the patient's subjective state of mind and belief system. The underlying concept behind the scales is that "normal" and "credible" people answer the questions a certain way and people who are exaggerating and not credible answer the questions a different way.

If the patient answers too many questions the "wrong way" (meaning not according to the profile set by the authors of the FBS-r and RBS scales), the patient gets a bad score and a red flag. The problem with using the FBS-r and RBS

scales is that a person legitimately suffering from the symptoms of a brain injury and orthopedic injury will be required to give "wrong answers" to specific questions that will cause the patient to get a bad score or a red flag on the FBS-r and RBS.

May we see the questions and answers, please?

Given the controversies attached to these tests, it is only natural for you to ask the defense expert to show you the questions and answers the expert relied upon to reach his conclusions. The expert refuses and states that the tests are copywritten and in order to protect the integrity of the tests from unscrupulous trial lawyers, the expert is ethically forbidden from revealing the questions or answers to any attorney, judge, and juror. "You'll just have to trust me," the expert says, "these tests are great, they are peer reviewed, lots of smart people use them all the time, the tests are really good at identifying the people who truly have traumatic brain injuries. A lot of thought and care went into creating these great test questions. Frankly I don't think an attorney, a court, or a jury would fully understand the brilliance of these test questions simply by looking at them."

At this point no one would blame you if steam started shooting out of your ears. Imagine if your expert was claiming that he or she had imaging that showed evidence of a brain bleed but responded, "I won't show you the imaging, you'll have to trust me the evidence is clearly on the imaging," the defense lawyer would lose his or her mind and go running into court to get the imaging in question.

Even Donald Trump passed a cognitive test

In an interview with Chris Wallace, President Donald Trump showed how questions and answers to a mental examination can potentially be used as an effective tool for cross-examination. In the interview, Mr. Trump touted his extraordinary mental abilities because he passed a cognitive test given to him at Walter Reed Medical Center. Mr. Wallace then showed the viewers that the questions on the test appeared to be quite easy. (He pointed out that one of the questions asked Mr. Trump to correctly identify a picture of an elephant.) The exchange severely undermined Mr. Trump's claims that he was amazing for passing the cognitive test. (See USA Today Article of July 20, 2020, "*What We Know About the Cognitive Test Trump Says He Aced*," by Jeanine Santucci).

Your objections to the tests

So, how do you go about getting the test questions and answers from the defense expert? One place to start is when you receive the defense mental examination and see these tests appear on the list of proposed tests. Object and give the defense two choices:

> Option 1: The defense expert agrees that after the examination is over he or she turns over all of the test questions and answers to plaintiff's counsel and agrees that he can be cross-examined about the questions and answers in front of attorneys, the court, and the jury.
>
> Option 2: The defense expert is not permitted to give any tests that he or she is not willing/able to reveal the questions and answers to as part of deposition and cross-examination.

The defense likely will refuse either option on the grounds that the expert is ethically precluded from sharing the data. At that point the defense will move to compel the examination. Oppose the motion and ask the Court for an order seeking that the examination be done under Option 1 or Option 2. Here is the law and argument that I have recently used to successfully win this motion. (The ruling required the expert to go with Option 2.)

First, the defense motion will need to be supported by a declaration from the defense expert. Without such a declaration the defense motion is unsupported argument from counsel. Pay attention to the declaration. It is highly unlikely you will see this phrase in the declaration, "I am unable to conduct the examination or form my opinions in this case unless I am able to give the plaintiff these particular tests." (Because the tests are not a necessary or required part of a mental examination.) As such, the defense is already starting from "behind the eight ball."

You should emphasize in the opposition that you are not asking the court to rule on whether the MMPI2 or the WMT are valid or admissible. All you are asking is that you be provided all the tools, (in this case the questions and answers) needed to effectively cross-examine the expert. If the defense expert is refusing to be fully cross-examined on the tests, the tests are not admissible, and the tests are an undue burden and a waste of time. (You also have the option of bringing a motion in limine after the expert refuses to answer questions in deposition. The motion will look similar to what you would use in an opposition to a motion to compel.)

Privilege and copyright can be overridden by court order

In the opposition it is important to dispel the myth that the doctor is ethically precluded from disclosing the questions and answers. If the doctor-patient privilege and the doctor-psychologist privilege can be overridden by a court order, so can a claim about copyright and test integrity. Furthermore, the authors of the MMPI2 on their website acknowledge that testing questions and answers can be produced with a court order. Below is a link to the MMPI2 author website that discusses conditions in which they would prefer the disclosure to take place. They include a court order and a protective order. (See https://www.pearsonassessments.com/footer/legal-policies.html#litigation)

In *Carpenter v. Superior Court* (2006) 141 Cal.App.4th 249, 272 a dispute erupted over a defense mental exam. Part of the dispute concerned whether the test questions and answers could, as

a condition of the examination, be ordered to be turned over to plaintiff's counsel. In *Carpenter*, the court rejected claims that the written questions and answers were precluded from discovery due to copyright. The court also rejected the argument that the materials could not be produced to plaintiff's counsel in a manner that could protect the integrity of the tests. (*Id*. at 271-274. [Because the ethics question had not been briefed at the lower court level, the court declined to rule on the ethics objections.].)

The Los Angeles County Superior Court in *Ruffin v. United States Telepacific Corp*., 2018 Cal. Super. LEXIS 4028, *7, relying on *Carpenter*, ordered that the questions and answers be turned over to plaintiff's counsel. "Whether Plaintiff ought to receive such written materials is within the discretion of the court. (*Carpenter v. Superior Court* (2006) 141 Cal.App.4th 249, 272.) The court believes that, given the spirit of discovery to facilitate the open exchange of information between parties, Plaintiff ought to receive the written materials she requests after the execution and consonance of a protective order." (*Ibid.*)

In *State v. Jones* (2004) 358 N.C. 330, 357, during direct examination, the defendant's expert testified that he had an ethical responsibility to ensure the MMPI2 materials were not released to untrained, unqualified individuals. On cross-examination, the prosecution specifically went through multiple questions and statements from the MMPI2 that had been presented to the defendant and reviewed the questions/answers with the defense expert. These questions were read aloud to the jury. (*Ibid.*) For example, "Dr. Noble testified that one of the statements on the MMPI2 was 'I'll do something desperate to prevent a person I love from abandoning me' and the defendant's response was 'True.'" (*Ibid.*) The North Carolina Supreme Court permitted a sampling of MMPI2 questions to be read to the jury because the question, answer, and inference made therefrom by the expert spoke to the expert's credibility, which is a question for the jury. (*Id.* at 358.)

The inclusion of the MMPI2 and the WMT greatly lengthens the time of a defense medical examination. A typical brain-injury plaintiff's ability to answer questions and recall begins to drop as the day progresses. Inclusion of the MMPI2 and the WMT during the defense medical exam will likely turn the examination into an all-day event and may require multiple sessions of the examination. (Or answers that are frankly meaningless.) If the defense expert cannot provide testimony about the MMPI2 and WMT results without revealing the questions in cross-examination, the tests are a waste of time, pose an undue burden on plaintiff, and run the risk of extending this case out further.

Cross-exam of the defense witness

Under Evidence Code section 721, subdivision (a), an expert may be cross-examined to the same extent as any other witness and, in addition**,** may be fully cross-examined as to his or her qualifications, the subject to which their expert testimony relates, and the matter upon which their opinion is based and the reasons for their opinion. If the expert is testifying in the form of an opinion – which would include the interpretation of psychological test results – they can be cross-examined regarding the content of any scientific, technical, or professional text, treatise, journal, or similar publication if any of the following: 1) The witness referred to, considered, or relied upon such publication in arriving at or forming his or her opinion; 2) The publication has been admitted in evidence; 3) The publication has been established as reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice." (Evid. Code, § 721, subd. (b).) At that point, relevant portions of the publication may be read into evidence. (Evid. Code, § 721.)

An offer by the defense to have the questions and answers sent to a plaintiff neuropsychologist does not solve the problem. First, the defense will not agree to transmit the data unless the expert for the plaintiff is precluded from sharing the information with counsel, the court, and the jury. Also, if we have a defense expert and a plaintiff's expert battling over whether the test is appropriate, the questions and answers would help tip the battle of the experts in favor of plaintiff. Not allowing the defense expert to be cross-examined on the test improperly puts that expert on unequal footing with plaintiff's experts. Finally, why should plaintiff have to spend thousands of dollars to hire an expert to read the test questions and answers and not be able to have a conversation with that expert about the questions and answers?

Plaintiff is entitled to cross-examine the defense expert as to the content of each test, including all of the test questions and Plaintiff's responses for her individual administration. The Law Revision Commission Comments for section 721 state that an expert's reliance on a particular publication to form an opinion makes it necessary to permit cross-examination in regard to that publication in order to show whether the expert correctly read, interpreted, and applied the portions they relied on. Experts are allowed to be subjected to the "most rigid cross-examination" concerning their opinion and its sources. (*People v. Henriquez* (2018) 4 Cal.5th 1, 26.) Psychologists and psychiatrists are not immune from this rigorous cross-examination. (*Ibid.; People v. Rodriguez* (2014) 58 Cal.4th 587.) If the source of an opinion is a psychological test, then the expert rendering that opinion is subject to cross-examination concerning the source test.

Furthermore, the questions the defense expert asks Plaintiff and his answers are admissible under the rule of completeness in Evidence Code section

356. "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." If the defense doctor wants to say that Plaintiff answered a test question improperly, under Evidence Code section 356, Plaintiff should have the complete question and answer and be able to introduce them into evidence.

Invoking privilege during discovery, later waiving it

A defendant cannot invoke a privilege during discovery to prevent discovery and then suddenly waive privilege during the trial (or seek to somehow profit from it) when it suddenly suits him. Among the myriad purposes of the civil discovery statutes is to safeguard against surprise and gamesmanship, and to prevent delay. It would be "manifestly unfair" to plaintiff if defendants' expert was to invoke privilege and later elect to waive that privilege and testify at trial about the same matters. "*A litigant cannot be permitted to blow hot and cold in this manner.*" (*Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 306.) Neither can a litigant's expert.

In *Steiny & Co., Inc. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285, several parties refused to produce information on the grounds that the information was protected by the trade secret privilege. The parties even obtained a protective order on the subject. However, when the matter came to trial, the objecting parties tried to introduce evidence that was related to the evidence that the parties refused to produce based on privilege. (*Id.* at 289-291.) The court granted an in limine motion precluding such evidence. In upholding the ruling, the Court of Appeal wrote, "Where a plaintiff's proper invocation of the trade secrets privilege prevents a defendant from examining the basis for the plaintiff's damage claim, the trial court may properly bar the plaintiff's damage evidence at trial." (*Id.* at 288.) In explaining its rationale for upholding the motion in limine, the court wrote at 292:

> It is true that Hughes and Morley did not misuse a discovery procedure or violate a discovery order. But the trial court did not purport to find that there had been a discovery abuse or violation of a discovery order. *Rather, the court excluded the damage evidence, as explained above, because Morley's assertion of the privilege, though proper, deprived Steiny of the ability to test the reasonableness of the Hughes-Morley settlement.*

(Emphasis added).

In *Dalitz v. Penthouse Int'l* (1985) 168 Cal.App.3d 468, 477, the court stated that while a newspaper had a privilege to protect its sources in a defamation lawsuit, the newspaper lost the privilege when it attempted to cross-complain with its own action. ("It is the news publisher who cross-complained in a matter which arose because of the reports by its own agents and news sources. The shield of privilege cannot be used as a sword.")

In *Green v. Superior Court of San Joaquin* (1963) 220 Cal.App.2d 121, the issue concerned various claims of privilege during a divorce case. The father wanted to contest the fitness of the mother to raise the children. The mother wanted to use various privileges to shield the discovery. In rejecting the wife's claim, the court wrote at 127, "the wife here seeks to use the privilege not as a shield but as a sword. By bringing this action in which the welfare of the children of the marriage is a vital factor, *the wife has placed her fitness as a custodial parent on the line*. In fact her position in invoking the privilege is really this: I assert that the welfare of the children will be best served by placing them with me because I am a normal, well and stable parent fit to have them, but the court, nevertheless, cannot be allowed to test these assertions by examining my doctors (or their agents, the pharmacists) as witnesses, notwithstanding that they are the persons best able to confirm my fitness!" (Emphasis in original).

"Trust me..."

We are in a similar situation with the defense expert. He is basically going to say, "I am basing my opinions on these tests. You'll have to trust me when I say these tests are good tests. Am I going to let you see the test questions themselves so you can decide if these are good tests? Sorry I can't show them to you. Just take my word for them. The tests are good."

The situation here is no different than a party who asserts attorney-client privilege or claims trade secret protection to block discovery. The party may have every right to block discovery on the issue, but the trade-off is that such a claim hampers their ability to present evidence at trial. A party would gain an unfair advantage by intentionally and selectively producing favorable privileged evidence while simultaneously seeking to protect damaging evidence on the same subject. (*Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 793.) Here, the doctor would attempt to present what he hopes is a favorable-to-the-defense opinion regarding Plaintiff's psychological state, while simultaneously using privilege to protect from disclosure the data that would damage his credibility and testimony on the same psychological state. Privilege cannot be used as both a sword and a shield.

Similarly, when an expert has relied on privileged material to formulate an opinion (i.e., the privileged trade secret of psychological testing materials), *the court may exclude their testimony or report as necessary to enforce the privilege*. (*Fox v. Kramer* (2000) 22 Cal.4th 531, 541.)

The only way to enforce the trade secret privilege and afford Plaintiff a fair

trial is to exclude any testimony or opinion rendered by an expert relying on the tests.

Seeing is believing

The old saying goes that "seeing is believing." If the expert wants to render opinions that your client does not have a brain injury, the expert needs to "show his or her work" to the lawyers, the court, and ultimately the jury. If the expert is reluctant to do so (either for ethical reasons or because the expert will look bad during cross-examination) then the expert has the option of not offering those tests. Proper use of motion practice will permit for a full-throated cross-examination or cause the expert to withdraw the tests he or she is afraid to defend in open court.

Alan Van Gelder is a partner at the law firm of Greene Broillet & Wheeler LLP *in Santa Monica, California. He is a graduate of Southwestern University School of Law (2002) and California State University Northridge (1999). Since 2002 Mr. Van Gelder has been representing plaintiffs in cases involving severe personal injury, wrongful death, dangerous conditions, product liability, business litigation, and legal malpractice.*

Van Gelder