PROGRAM MATERIALS
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Rethinking Harm in Civil Litigation: Psychosocial Evaluations in Personal Injury and Negligence

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Rethinking Harm in Civil Litigation:

Psychosocial Evaluations in Personal Injury and Negligence

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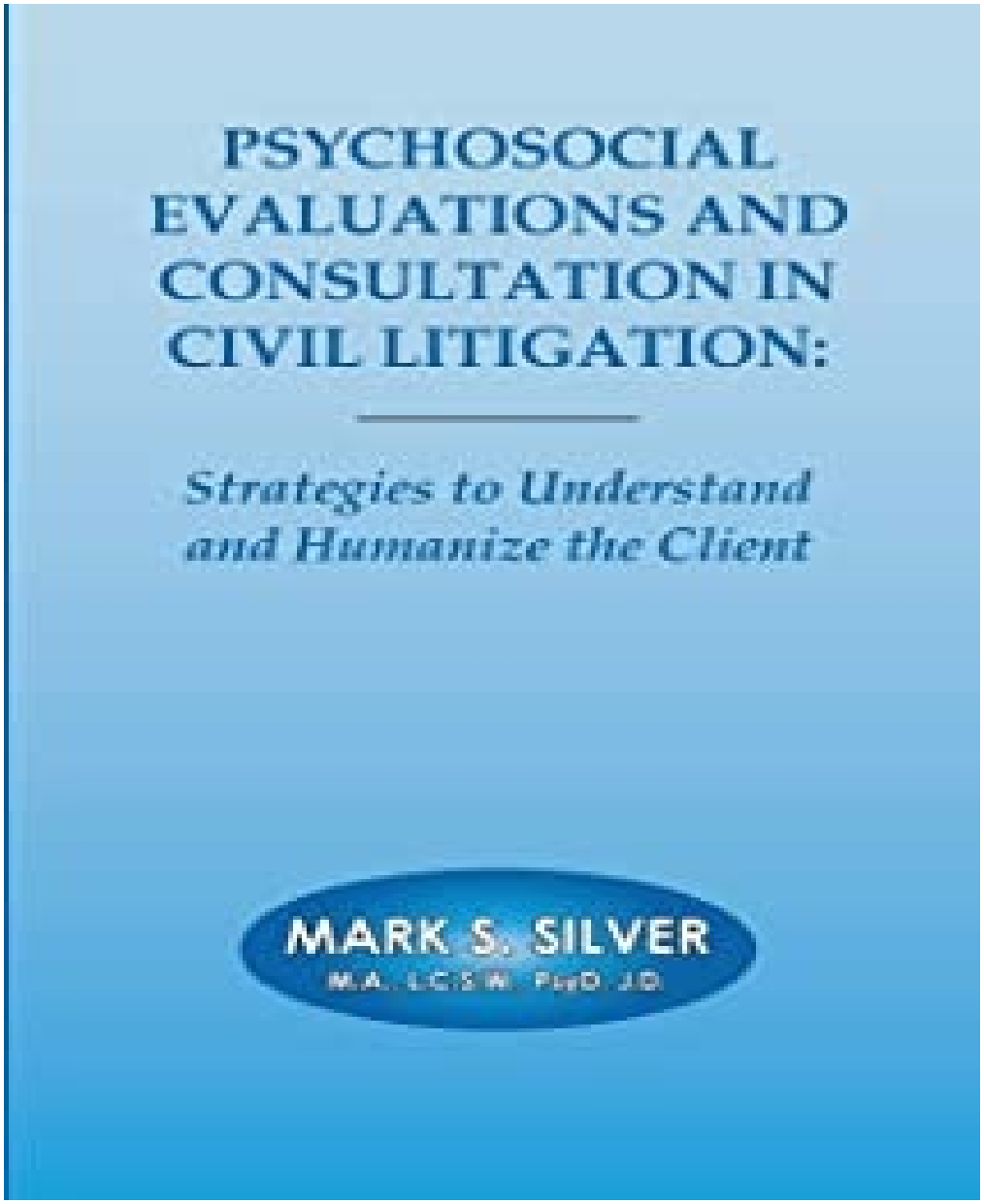
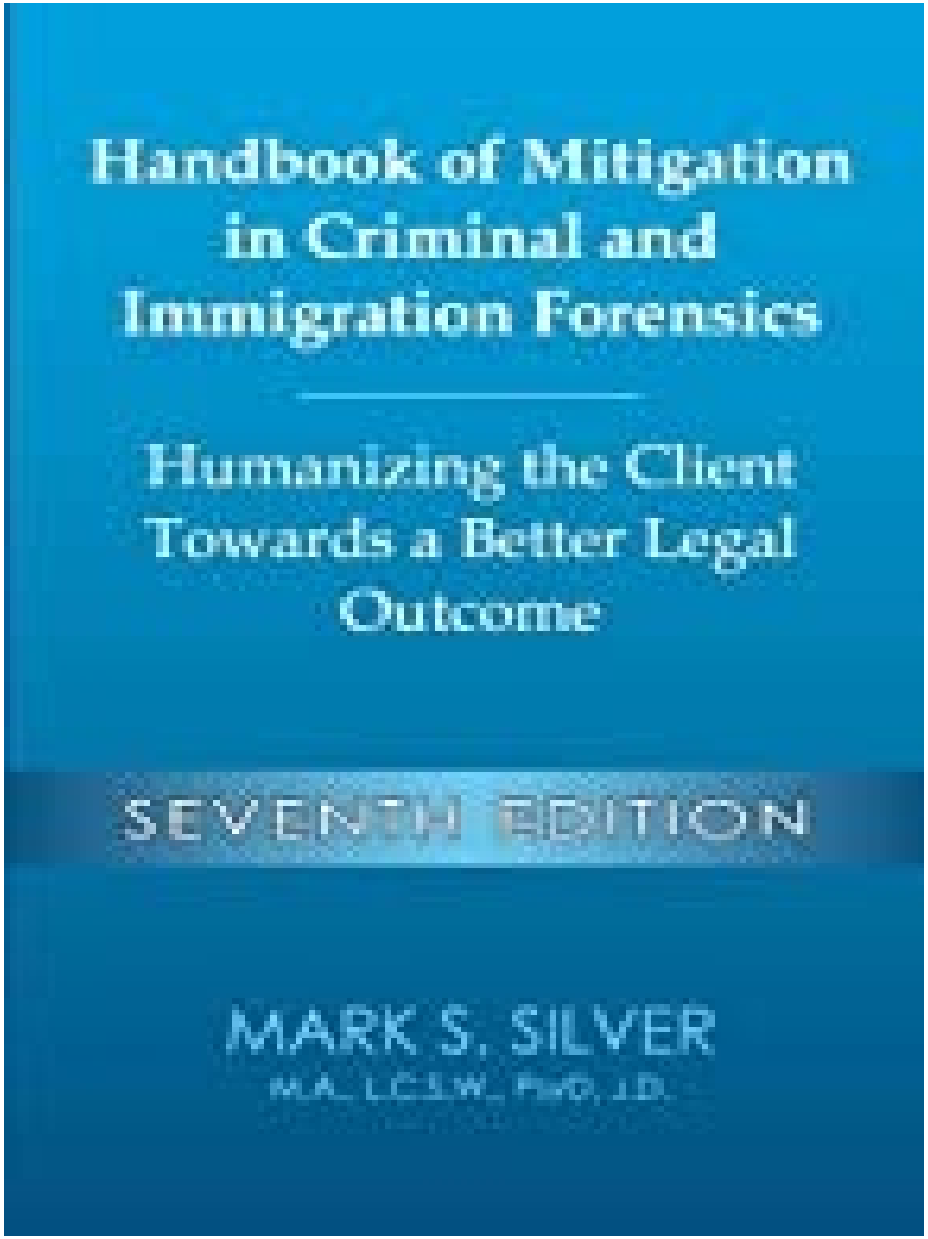

PSYCHOSOCIAL EVALUATIONS AND CONSULTATION IN CIVIL LITIGATION:
Strategies to Understand and Humanize the Client
MARK S. SILVER
M.A., L.C.S.W., Ph.D., J.D.


Handbook of Mitigation in Criminal and Immigration Forensics
Humanizing the Client Towards a Better Legal Outcome
SEVENTH EDITION
MARK S. SILVER
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My Background

- 2000 cases: Forensics / Consultations
- Harm analysis: U visas, Spousal Abuse, Asylum
- Law school teaches black letter law
- **Humanize** the client

Who Will Benefit from the CLE

- Criminal lawyers
- Personal injury / med mal lawyers
- Employee
- Healthcare
- Family law
- Defense lawyers trying to understand the extent of harm psychological and emotional injury, and if it is real

Services Provider Requirement

In 2012, the American Bar Association (ABA) House of Delegates adopted resolution 107C, which "formally urges criminal defense attorneys to address clients' civil legal and nonlegal problems to linkages with other service providers." The report accompanying the resolution "makes it clear that all defense lawyers are required to provide comprehensive representation," including using "other service providers," like social workers, when appropriate.

Seminar Outline

I. Psychosocial Evaluations
II. Conceptualizing Harms
III. Psychiatric Issues

I. Psychosocial Evaluation

Definition

The bio-psychosocial evaluation is conducted to determine if there are any factors that would explain how the client has come to be in his current position with particular consideration for:

- childhood experiences (strengths / vulnerabilities / resilience)
- quality of relationships to family members (family dynamics)
- adult development (development is a life-span phenomena)
- perception of self and other through experiences and interpersonal functioning (identity and self-esteem)
- influences (environment, religion, culture, and values)
- community interaction (education, employment, socialization, and interests)
- medical and psychiatric issues
- stressors, traumas, loss, shame, resentment, fear, anger, guilt, jealousy or challenges (frustrations or disappointments)
- core needs, hopes, dreams, and trust

Psychosocial Evaluation Issues

- Family-Systems Analysis
- Childhood Development
- Social Skills & Peer Rejection
- Sexual Development
- Hobbies & Interests
- Community Ties, Friends
- Education & Employment
- Finances & Poverty
- Military Service
- Self-care (ADL's)
- Drug & Alcohol History
- Violence, Abuses, Trauma, War
- Volunteer Community & Charity
- Arrests & Criminal History
- Languages - spoken/written
- Role & Communication
- Legal Issues
- Religious Devotion
- Support System/Caregivers
- Cultural Issues & Role Models
- Mental (DSM) & Medical Health
- Racism & Prejudice

Psychosocial History

- psychosocial histories should be garnered with consideration for the client's context, ie, family, culture, and community

- get to know the person before asking about the harm and injury because it helps to normalize the process

- it can be quite helpful to begin with pleasant memories from childhood when the individual may have enjoyed love and care in her family of origin.

- the client may have experienced abuses or harms even in her family of origin

Strategic Tool

- The psychosocial history of the client will illuminate the client's systems elucidating for the lawyer unknown facts

- In turn, the lawyer may develop strategic avenues not yet considered

- Plaintiff and defense lawyers need a tool for strategic purposes to understand what they are up against and to break down arguments of opposing counsel

Purpose

- Professional expression can replace self-expression
- Not just a mental health report
- Single document theory
- Disabuse parties of bias and prejudice
- Dispel nonexistent patterns
- Conceptual / strategic consult

Create a Narrative

- Create a written narrative
- Videographer
- Story-telling from a clinical perspective

Goal

- Humanize the client through a sympathetic understanding of the harms the client suffered informed by his psychosocial history
- Sense of security, safety, stability that the client has lost as a result of the harm or injury
- Maximize advocacy
- Maximize just compensation

Who Should Evaluate?

- Forensic experts – psychiatric social workers
- Psychological evaluations may be too narrow
- General mental health practitioners may not have the sensitivity or training
- A forensic evaluation is not therapy and must aggressively target areas of possible harm

Psychodynamics

The interrelation of the unconscious and conscious mental and emotional forces that determine personality and motivation.

- Sense of self and other
- Self-esteem
- Loyalty / trust
- Shame / humiliation
- Approval
- Coping / ego defenses
- Fears, sadness, anxieties, jealousy, fantasy, frustrations, confusion, vulnerabilities, hopes, ideals, values, loses, traumas, disappointments, instabilities, uncertainties

Over and Under Exaggeration

- Client may over exaggerate narratives in an effort to bolster a weak claim and under exaggerate a narrative because he fears the truth is simply too terrible to relate or to be believed
- Correcting for one or both will make the narrative clearer, particularly as extraneous material tends to denigrate the underlying narrative of the petitioner's claim

Detailed Memories of Harm

1. Outrageous: an occurrence that is exceptionally out of the ordinary
2. Qualified: qualified by the shame or guilt that the client feels
3. Impossible to forget: retaining a scar due to violence

II. Conceptualizing Harm

Conceptualize Harm Broadly

- Harm to self - dignity, identity, and self-worth
- Quality of life issues – sense of security, safety, stability
- Deficits / losses in everyday activities, such as work
- Loss of hobbies, activities, interests
- Cognitive loss – memory and processing information
- ADL'S (activities of daily living) – crucial to personal dignity
- Interpersonal friction, such as marital dissolution
- Lifestyle changes – the little things matter
- Community loss / isolation
- Privations / withholding
- Socialization loss
- Change of residence

Types of Harms

- Physical - direct (hitting), sequestering, objects
- Psychological - control, coercion, mental harm
- Emotional - feelings, reaction
- Verbal - racial slurs, threats, expletives
- Sexual - unwanted sexual touching, withholding
- Financial – loss, direct or indirect
- Privations / withholding
- Religious –
- Technology –

Functioning Over Narrative

- It is very useful to look at the client's functioning (before and after), as a means to gain insight into the client's daily life.
- In general, mental health is often conceptualized as healthy functioning and demonstrating how the client's functioning is markedly different from others in his community, through restrictions or self-imposed prohibitions

Reasons for the Harm

- A pattern may not exist
- Defendant may act without reason
- Arbitrary
- Blind hatred
- Psychopathy
- Absence of patterns leads to greater psychological harm

Egg Shell Rule

- “Take your plaintiff as you find him” and the psychosocial evaluation is the tool to “how you find him”
- In what ways has the harm exacerbated or informed client’s previous issues?
- Predisposition to mental health issues due to past trauma (perceived or real)
- Vulnerabilities: why and in what ways is the client fragile?

Unrecognized Harms

- Client may have suffered various harms as a result of the injury that he is not aware of
- Similar to physical injuries that are only revealed after radiographic assessment

Relationship to Defendant

- Professional or personal or both (employer?)
- Betrayal of trust (synagogue example)
- How does client understand or perceive his relationship and connection to the defendant

Causation of Harm: How attenuated can it be?

- Cause-in-fact is determined by the "but for" test
- Proximate cause is a legal limitation of cause-in-fact. Proximate cause is an event sufficiently related to a legally recognizable injury to be held to be the cause of that injury
- Foreseeability - determines if the harm resulting from an action could reasonably have been predicted
- Something may look attenuated but may in fact be directly related
- Is it better or worse to wait for an evaluation

Harm Suffered to Family Members

- Direct or indirect
- Children's issues: school, academic, socialization, interests, community
- Assess the whole family
- Marital perspective is often best source of material
- Get parallel interviews. nothing better!

CAVEATS

- Severity of a single incident can be systemically damaging
- Micro-aggressions can add up to systemically damaging harm
- People perceive and are effected by harm in idiosyncratic ways
- Resilience: individual's ability to overcome adversity
- Intergenerational Trauma: client's harm and also client's parents (and grandparents) and caregivers (think Holocaust survivors)
- Cumulative effects of harm that are hard to quantify
- Trauma causes system (systemic) break down
- Single (car accident) vs. Sustained (spousal abuse) vs. Complex Trauma (ACES)

III. Psychiatric Issues

PTSD

Criterion A: stressor

The person was exposed to: death, threatened death, actual or threatened serious injury, or actual or threatened sexual violence, as follows: (1 required)

- Direct exposure.
- Witnessing, in person.
- Indirectly, by learning that a close relative or close friend was exposed to trauma. If the event involved actual or threatened death, it must have been violent or accidental.
- Repeated or extreme indirect exposure to aversive details of the event(s), usually in the course of professional duties (e.g., first responders, collecting body parts; professionals repeatedly exposed to details of child abuse. This does not include indirect non-professional exposure through electronic media, television, movies, or pictures.

PTSD Con't

Criterion B: intrusion symptoms

The traumatic event is persistently re-experienced in the following way(s): (1 required)

- Recurrent, involuntary, and intrusive memories. Note: Children older than 6 may express this symptom in repetitive play.
- Traumatic nightmares. Note: Children may have frightening dreams without content related to the trauma(s).
- Dissociative reactions (e.g., flashbacks) which may occur on a continuum from brief episodes to complete loss of consciousness. Note: Children may reenact the event in play.
- Intense or prolonged distress after exposure to traumatic reminders.
- Marked physiologic reactivity after exposure to trauma-related stimuli.

PTSD Con't

Criterion C: avoidance

Persistent effortful avoidance of distressing trauma-related stimuli after the event: (1 required)

- Trauma-related thoughts or feelings.
- Trauma-related external reminders (e.g., people, places, conversations, activities, objects, or situations).

PTSD Con't

Criterion D: negative alterations in cognitions and mood

Negative alterations in cognitions and mood that began or worsened after the traumatic event: (2 required)

- Inability to recall key features of the traumatic event (usually dissociative amnesia; not due to head injury, alcohol or drugs).
- Persistent (and often distorted) negative beliefs and expectations about oneself or the world (e.g., "I am bad," "The world is completely dangerous.").
- Persistent distorted blame of self or others for causing the traumatic event or for resulting consequences.
- Persistent negative trauma-related emotions (e.g., fear, horror, anger, guilt or shame).
- Markedly diminished interest in (pre-traumatic) significant activities.
- Feeling alienated from others (e.g., detachment or estrangement).
- Constricted affect: persistent inability to experience positive emotions.

PTSD Con't

Criterion E: alterations in arousal and reactivity

Trauma-related alterations in arousal and reactivity that began or worsened after the traumatic event: (2 required)

- Irritable or aggressive behavior
- Self-destructive or reckless behavior
- Hypervigilance
- Exaggerated startle response
- Problems in concentration
- Sleep disturbance

Complex Trauma?

- Unlikely, but perhaps.
- Repeated harm, seen in children who are victims of abuse and neglect

Depression

depressed mood nearly every day, as indicated by subjective feelings of sadness and emptiness and crying

- hopelessness / helplessness
- low energy
- anhedonia (crucial)
- low self-esteem
- psychomotor retardation / agitation
- fatigue or loss of energy

Depression Con't

- feelings of worthlessness or excessive or inappropriate guilt (which may be delusional)
- poor or erratic appetite
- significant difficulty staying or falling asleep / nightmares
- diminished ability to think or concentrate, or indecisiveness

Suicidality

Overwhelming psychological pain and helpless feelings of deep despair

- Active suicidality occurs when the person has a plan to end her own life, such as by the ingestion of medications. Active suicidality most often is characterized by deep psychological pain or despair and a hopeless belief that nothing in the person's life can improve in any meaningful way.

- Passive suicidality concerns thoughts of death or dying and may include the person stating that they wonder what it would be like never having to wake up so that their pain would vanish. Passive suicidality is usually more ideational, while active suicidality is often accompanied by a thought out plan that may or may not be realistic or even coherent.
- Self-hatred, useless burden, lack of reciprocal connection
- habituated w pain

Panic Attacks - recurring and unexpected

- Palpitations, pounding heart, or accelerated heart rate
- Sweating
- Trembling or shaking
- Sensations of shortness of breath or smothering
- A feeling of choking
- Chest pain or discomfort
- Nausea or abdominal distress
- Feeling dizzy, unsteady, lightheaded, or faint
- Feelings of unreality (derealization) or being detached from oneself (depersonalization)
- Fear of losing control or going crazy
- Fear of dying
- Numbness or tingling sensations (paresthesias)
- Chills or hot flushes

Somatization / Conversion Disorder

Chronic psychological issues that cause bodily symptoms, including pain. The symptoms can't be traced back to any physical cause and not the result of substance abuse or another mental illness.

- One or more physical symptoms that are distressing or cause disruption in daily life
- Excessive thoughts, feelings or behaviors related to the physical symptoms or health concerns with at least one of the following:
  - Ongoing thoughts that are out of proportion with the seriousness of symptoms
  - Ongoing high level of anxiety about health or symptoms
  - Excessive time and energy spent on the symptoms or health concerns

People with somatoform disorders are not faking their symptoms.

Conversion Disorder is a functional neurological symptom disorder

Learned Helplessness

A condition in which a person suffers from a sense of powerlessness, arising from a traumatic event or persistent failure to succeed. It is thought to be one of the underlying causes of depression.

- Shame / humiliation
- worthless and unloved
- Self-blame
- Guilt
- Concern for other family members

Psychosis

- Hallucinations (False perceptions): auditory and visual hallucinations. Rooted in hypersensitivity to real or perceived dangers of the surrounding environment. Auditory (the client may hear his name being called and when he turns around no one is there). Others include: olfactory, visual, tactile, gustatory

- Delusion (False belief): Adaptive paranoia for self-protection (PPD). Person is guarded, suspicious, or has low trust in others.

Dissociative Disorder

When flight or fight are not available then the only option is to psychologically / emotionally remove yourself from that situation and place your self somewhere else. (versus fawning and freezing).

Dissociative disorders are conditions that involve disruptions or breakdowns of memory, awareness, identity, or perception. People with dissociative disorders use dissociation as a defense mechanism, pathologically and involuntarily.

Alcohol / Drug History

- Use
- Abuse
- Addiction
- Non-traditional substances (house hold products)

Factitious Disorder

- A condition in which a person acts as if he or she has an illness by deliberately producing, feigning, or exaggerating symptoms for PSYCHOLOGICAL / EMOTIONAL GAIN. (This is not malingering).
- makes up or causes an illness or injury or symptoms of someone in his or her care. (Munchausen syndrome by proxy). This is a form of child abuse.

Sub-Clinical Issues

- Sub-clinical Issues
- Atypical Presentation
- Cultural sensitivity

Failure to Seek Mental Health Assistance

- Ignorance
- Shame
- Lack of financial resources
- Feelings of depression and anxiety that prohibit the client from accessing proper healthcare
- May feel that people who did not experience what they did simply would not understand or believe the experiences
- It may be the first time that the client has spoken about his experiences
- Anathema / stigma to cultural background

THANK YOU !