

By M. Frank Greiffenstein

Selecting a Neuropsychologist as an Expert Witness

Neuropsychologists may provide expert testimony in civil and criminal matters where the physical state of the brain is at issue.¹ Neuropsychology is defined as the evaluation of thinking and memory in individuals with suspected or confirmed brain damage. Attorneys, however, may be unfamiliar with how to select potential neuropsychology experts. State licensing statutes only regulate the restricted term “psychologist.” Otherwise, there is no specialty licensure, except in Louisiana and Virginia. Michigan licensing statutes do address the issue of psychologist’s specialization but require only a belief in one’s own specialty skills. But a simple self-declaration of neuropsychology expertise is not sufficient grounds on which an attorney can base selection. Because the attorney cannot simply rely on self-representation, I propose a method for grading the qualifications of prospective neuropsychology experts.

Definitions

The method I propose looks for “objective correlates” of the psychologist’s subjective claims for practicing neuropsychology. The term objective correlates refers to evidence for external monitoring of a psychologist’s work product in settings of competent jurisdiction. The three levels of evidence are “best evidence,” “good evidence,” and “insufficient evidence.” Best evidence means the neuropsychology work product has been evaluated over a long period of time by more than one evaluator. Good evidence means work product has undergone some external scrutiny but with limitations. Insufficient evidence means there has been no clear monitoring or mentoring, the only evidence is self-report. In this scheme, insufficient evidence does not mean that a neuropsychologist is unqualified or of

poor quality. It only means that there has been no documented external review of neuropsychology work product. Following are ways of applying these evidentiary levels to four categories of professional achievement: education, board certification, experience, and scientific activity. The specific examples I offer are for purposes of illustration, not of exclusion.

Education

There is no such thing as a doctorate in neuropsychology. Neuropsychologists typically attend doctoral programs in clinical psychology, during which time they may choose to specialize in clinical neuropsychology. Clinical psychology programs differ greatly in their offerings of neuropsychology coursework. Some programs are known for their academic neuropsychology programs (Wayne State University, for example), others do not offer any neuropsychology course. Best evidence for academic training is graduation from a clinical psychology program with a neuropsychology “track.” This track includes courses in neuropsychological test instrumentation, clinical neuropsychological evaluation, neuroanatomy, and neurological disorders. Good evidence would be university level coursework in biological psychology sources such as physiological psychology, psychopharmacology, and animal behavior. Insufficient evidence would be graduation from a “remote education” facility (e.g., Fielding Institute) that requires only home-based study, or neuropsychology training limited to

a day-long or weekend workshop. Neuropsychology workshops have educational benefits, but there is no external review of how much the attendee learned.

Board Certification

There are many boards that certify neuropsychologists. The best evidence is certification through the American Board of Clinical Neuropsychology (ABCN).² The ABCN is overseen by an umbrella organization, the American Board of Professional Psychology (ABPP), a nationally recognized organization well-known to attorneys. The ABCN certification process is very similar to medical board certification and it entails a four-step process taking place over two years. The steps are an in-depth educational background check, a proctored formal written examination, an intense panel review of two submitted casebooks, and a final four-hour oral examination.

Good evidence is certification through the American Board of Professional Neuropsychology (ABPN). This is a free-standing organization that also requires submission of two casebooks to a panel and a final oral examination. They place less emphasis on academic background, and there is no on-site formal written examination.

Insufficient evidence is no certification or certification by a so-called “vanity board.” Vanity boards require little more than a personal attestation of expertise and a check. For example, the American College of Forensic Examiners website provides an electronic form where you supply your name, address, degree, and method of payment.³ Again, membership in the ACFE (or the absence of any certification) does not disqualify an expert; it only means that there is no evidence for qualifications beyond self-representation.

“Trial Practice” appears regularly in the *Michigan Bar Journal*. This column is designed to provide advice and guidance on how to effectively prepare for and conduct trials.

Experience

Neuropsychologists, like physicians, need training experiences with a diverse population of patients. The best neuropsychology experts have evaluated cognitive changes associated with many brain disorders including progressive dementia, stroke, brain tumors, closed head injury, multiple sclerosis, and alcoholism. Evidence for such broad experience is best indicated by an expert's history of formal clinical training. The best evidence is at least one year of full-time internship or residency in an organized neurology or rehabilitation health care setting. This usually means neuropsychological evaluations are supervised by neuropsychologists and neurologists at teaching hospitals. An internship approved by the American Psychological Association is an added plus. Younger neuropsychologists are currently expected to attend two years of residency in a neurology setting.⁴ Good evidence for substantive experience is a temporary rotation (usually three months) through a neuropsychology consultation service as part of an approved clinical psychology internship. Insufficient evidence is self-teaching of neuropsychological testing in a generalist practice or an entire career devoted to testing just one type of patient, such as closed head injury claims.

Scientific Activity

Most clinical psychology programs in this country adhere to an ideal termed the "scientist-practitioner" model. This means clinical psychology students receive education in both clinical skills and research design.⁵ In reality, most neuropsychologists go into clinical practice after graduation and it is rare that someone works in both roles simultaneously. However, neuropsychologists should be expected to demonstrate research skills during some time in their training or career. Best evidence for scientific activity is publication of articles in peer-reviewed scientific journals. Some psychology journals have rejection rates as high as 85 percent, so publication is definite evidence of research competence.

Good evidence is acceptance of poster presentations at national conventions. These are usually published as one-page abstracts in

special journal issues. Such submissions are peer-reviewed but with a lower level of scrutiny than full-length articles. Insufficient evidence is no publications or the publication of commentary articles only (such as the one you are reading now). Neuropsychologists without publications may still have excellent capacity for intelligently digesting and applying scientific articles to an issue before the court.

Concluding Remarks

My evaluative guidelines offer a way to weigh evidence for a neuropsychology expert's qualifications. These guidelines do not guarantee quality, nor does the absence of evidence mean the absence of expertise. There may be neuropsychologists with nontraditional training or experience who are qualified to testify. But some courts usually require more than just a claim of expertise. *D'Aubert v Merrill Dow Pharmaceuticals, Inc.*⁶ requires that judges consider multiple factors in the admission of expert testimony. These guidelines may help gain the court's acceptance or overcome an aggressive voir dire. ◆

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FOOTNOTES

1. M. F. Greiffenstein, "The Neuropsychological Autopsy." *Michigan Bar Journal*, 1996, May, pp 424-426.
2. L. A. Bieliauskas, Linas A. and C. G. Matthews. American Board of Clinical Neuropsychology, 1996 update: Facts, data, and information for potential candidates. *The Clinical Neuropsychologist*, 1997, Vol 11, pp 222-226.
3. The URL for the American College of Forensic Examiners is www.acfe.com/. Then click on the link to the American Board of Psychological Specialties application form.
4. H. J. Hannay, L. A. Bieliauskas, B. A. Crosson, T. A. Hammeke, K. deS. Hamsher, and S. P. Koffler (1998). Proceedings: The Houston Conference on Specialty Education and Training in Clinical Neuropsychology. *Archives of Clinical Neuropsychology*, 13: 157-249.
5. C. D. Belar and N. W. Perry. "National Conference on Scientist-Practitioner Education and Training for the Professional Practice of Psychology." *American Psychologist*, 1992, Vol 47, pp 71-75.
6. *D'Aubert v Merrill Dow Pharmaceuticals, Inc*, 113 S Ct 2786 (1993).

Protective Orders Should be Issued for Neuropsychological Test Instruments

By Lee Tilson and Bradley G. Sewick

Attorneys representing brain injured plaintiffs often hire neuropsychologists to evaluate their clients' cognitive deficits with test instruments, consisting largely of batteries of questions. Defense attorneys may request the results of such tests as they would the results of medical tests. Unlike medical tests, neuropsychology test instruments lose validity once they become public. An internet posting or a late night comedian's ridiculing a question may enable patients to answer some questions from memory. An editorial explains:

Often, testing psychologists are asked to disclose test materials to lawyers and other individuals who are not ethically or legally obligated to keep these materials confidential. Sometimes these materials will be admitted into evidence as part of the public record. These actions slowly erode the validity and reliability of the instruments as the test items become more widely available to anyone trying to obtain access to them. American Psychologist, Vol. 54, No. 12, p. 1078 (Dec 1999).

Why Protect Testing Instruments

Three interests mandate protection of the testing instruments.

1. The Public Interest

An important means of assessing brain function, the tests can determine:

- Surgical decisions by neurosurgeons
- Choices of medication
- Academic placement of students
- Who qualifies for disability status
- Competency to stand trial
- Evaluation of insanity defenses
- Child custody decisions

The public's enormous interest in protecting the validity of these tests would be compromised by public disclosure.

2. Psychologists' Professional Duty

The APA Code of Conduct (1992) requires that

Psychologists refrain from misuse of assessment techniques, interventions, results, and interpretations and take reasonable steps to prevent others from misusing the information these techniques provide. This includes refraining from releasing raw test results or raw data to persons, other than to patients or clients as appropriate, who are not qualified to use such information.

Principle 2.02(b)

Psychologists make reasonable efforts to maintain the integrity and security of tests and other assessment techniques consis-

tent with law, contractual obligations, and in a manner that permits compliance with the Ethics Code. (Emphasis added.)

Principle 2.10

3. Proprietary Interest of Test Developers

Testing companies invest enormous sums developing and validating testing instruments. Understandably, they assert legal protection of this intellectual property, a protection specifically envisioned by MCR 2.302(C)(8).

Protective Orders Protect Everyone

A court can allow discovery without sacrificing the public interest, the testing companies, or the psychologist's obligations by issuing a protective order under MCR 2.302(C).

The best protection for the test is for the psychologist whose test records are subpoenaed, or otherwise requested. . . to ask the court to allow delivery of secure material only to psychologists or other professionals who are bound by the same duty to protect them. If delivery to non-qualified individuals, such as legal counsel, is mandated, a further way to seek to protect the materials is to request that a protective order be issued prohibiting parties from making copies of the materials, requiring that the materials be returned to the psychologists at the close of litigation, and ordering that the record be sealed if test questions or answers are admitted as part of the public record. (Emphasis added.) *American Psychologist*, Vol. 54, No. 12, p. 1078 (Dec 1999).

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