



## Forensic neuropsychology and expert witness testimony: An overview of forensic practice



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### ABSTRACT

Neuropsychologists are frequently asked to serve as expert witnesses in an increasing number of legal contexts for civil and criminal proceedings. The skills required to practice forensic neuropsychology expand upon the knowledge, skills, and abilities developed by clinical neuropsychologists. Forensic neuropsychologists acquire expertise in understanding the roles and various functions of the legal system, as well as their role in addressing psycholegal questions to assist fact finders in making legal decisions. The required skills and the unique circumstances for clinical neuropsychologists pursuing forensic work are reviewed.

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With increasing frequency, neuropsychologists are asked to provide assessments in a broad range of forensic contexts in civil and criminal proceedings. Neuropsychology, briefly defined, is the study of the relationship between the brain and behavior, while forensic neuropsychology employs neuropsychological assessment and methodology to questions occurring within the legal system. Forensic neuropsychologists serve several roles regarding the types of evaluations performed and the setting in which they provide clinical services from fact to expert witnesses in tort cases, different criminal areas and civil matters, such as guardianships, fitness for duty evaluations, child custody, and educational proceedings.

Neuropsychologists have specialized training in evaluating brain-behavior relationships focusing on comprehensive assessment of a broad range of cognitive domains including intelligence, memory, perception, emotion and personality, motor skills, executive function, academic achievement, and effort testing. Little attention is paid to forensic training in most neuropsychology residency programs, leaving interested individuals to acquire additional skills on-the-job or through workshops. The American Academy of Forensic Psychology (AAFP) offers regularly scheduled workshops for basic and advanced forensic training. The American Board of Forensic Psychology (ABFP) offers a path to board certification for neuropsychologists who want to become certified in forensic psychology. At this time, there is no board specialization in forensic neuropsychology offered by the American Board of Professional Psychology (ABPP).

Becoming proficient in practicing forensic neuropsychology takes time and requires additional study. Training in the business of establishing and maintaining a forensic practice and skills, such as how to prepare for testimony, can be obtained privately through educational

training organizations. There is an expanding role for neuropsychologists who wish to specialize in forensic settings.

The recent increase in rampage shootings in the United States has raised concerns about the role of mental illness in violent crimes. Forensic neuropsychologists are in a strong position to contribute to improving the understanding of the development of psychopathy in individuals who have committed violent crimes with a history of atypical development. Advanced techniques, such as functional magnetic resonance imaging (fMRI), are being used to assess violence risk and decision making (Buckholtz, 2012; Kiehl, 2014). Although these procedures are not currently in general clinical use, the data obtained from preliminary studies are advancing knowledge of psychopathology.

On the civil side, neuropsychologists are consulted for concussive, sports-related injuries. The increased attention of mild and moderate brain trauma occurring from single or multiple concussions is a current topic of interest, in part, because of the recognition of chronic traumatic encephalopathy in professional football players (Breslow, 2013). In fact, the Obama administration recently made sports-related concussions in professional and youth athletes a topic of national interest and research (Eilperin, 2014). In the latest edition of the *Diagnostic and Statistical Manual of Mental Disorders*, the DSM-5, neuropsychological data are listed among the supporting criteria for diagnosing major and mild neurocognitive disorders, including traumatic brain injury (American Psychiatric Association, 2013). This article will explore some of the challenges neuropsychologists face if they desire to practice in civil and criminal arenas as the science continues to grow.

The rapid expansion of research in cognitive neuroscience has advanced new opportunities for neuropsychologists to investigate cognitive functions, such as decision making, impulsivity, and aggression, that are not well-evaluated with traditional psychometric instruments (Raine, 2013; Kiehl, 2014). Neurodiagnostic procedures employing functional magnetic resonance imaging (fMRI) are emerging as new methods

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to study active brain regions untapped by traditional clinical methods. These procedures offer the potential to enhance understanding of brain function but may not be sufficiently developed to be admitted under the *Daubert* criteria for expert testimony (*Daubert v. Merrell Dow Pharmaceuticals*, 1993). This is likely to change as the science advances.

### 1. Professional roles in clinical and forensic neuropsychology

The roles of clinical neuropsychologists and forensic neuropsychologists are very different. Clinical neuropsychologists seek to understand a disease process contributing to cognitive dysfunction with the goal of treating a specific mental disorder or condition. Forensic neuropsychologists use basic neuropsychological principles to help inform legal decision making in an adversarial system where diagnosis and treatment considerations are secondary to informing the fact finder about a psycholegal question of interest. This is accomplished through applying some of the same neuropsychological principles used in traditional practice but also involves comprehensive understanding of how the legal system operates and how decisions are reached based on evidentiary review, as opposed to primary reliance on clinical data.

Forensic neuropsychology requires additional skills beyond the clinical practice of most neuropsychologists. Additional training is necessary to understand legal proceedings, the method in which courts operate, and how an expert relates to the legal system. Minimally, neuropsychologists working in forensic settings should have knowledge of the court system, an understanding of the differences between court procedures in state and federal jurisdictions, and a basic familiarity with seminal cases involving mental health law.

In civil and criminal proceedings, the questions that neuropsychologists address will be very different from issues in a typical clinical neuropsychology practice. One major distinction between clinical and forensic neuropsychology is the practitioner's role. In clinical practice, patients or colleagues seek neuropsychological consultation to determine whether an individual has a condition that affects specific cognitive and/or behavioral functions for which they are seeking care. To answer that question, the neuropsychologist obtains information through clinical interviews, record review, and performs a battery of tests in different cognitive and behavioral domains to render an opinion, usually in the form of a diagnosis. The neuropsychologist's primary responsibility is to the individual seeking care. The principal role for clinical neuropsychologists involves assessing cognitive function to establish a diagnosis where neurocognitive functions may be impaired in response to a diagnostic question. In clinical settings, the neuropsychologist provides care to a patient to whom there is a duty that minimally involves privilege and confidentiality.

In forensic settings, neuropsychologists are retained by an attorney, court, or other public or private entities, such as insurance companies or school districts. The role of the forensic neuropsychologist is to conduct an unbiased examination of an individual's neurocognitive function based on assessment, collateral data, and review of evidence to provide an informed opinion for the trier of fact to use in legal decision making. Forensic neuropsychologists are retained by plaintiff or defense counsel in civil cases or the prosecution or defense in criminal cases. Regardless of who retains the forensic neuropsychologist, their role is the same: to present an unbiased assessment of the examinee's cognitive function in a manner addressing the psycholegal question of interest to assist the court in its adjudicative process.

Forensic neuropsychologists do not have any allegiance or responsibility to the individual who presents for assessment and are retained to answer a specific psycholegal question. Their primary responsibility is to the retaining attorney, court, or entity. They may perform the same battery of tests that a neuropsychologist would use in a clinical setting, but the objective is to answer the psycholegal question that they are being asked to address. There is no individual duty to the patient, unlike in clinical settings. In fact, no psychologist–patient relationship is assumed to exist in most forensic work. Forensic neuropsychologists

apply their skills and knowledge to help answer questions of primary interest to the legal system.

Consider how the same injury was evaluated under three different scenarios:

**Scenario 1.** *A man shoveling his driveway after a snowstorm slips on black ice and strikes his head on the pavement sustaining a subdural hematoma requiring operative evacuation. He has residual cognitive, memory, and language impairment. His neurologist refers him to a clinical neuropsychologist to determine the severity of his impairment and the type of treatment recommended to address his cognitive deficits.*

**Scenario 2.** *A man is grocery shopping and slips on liquid resulting from a spill that occurred forty minutes before his fall that had never been cleaned up, even though the store manager had requested that the spill be immediately wiped up. He hits his head on the floor and sustains a subdural hematoma with the same level of severity and residual deficits as in Scenario 1. He retains an attorney who wishes to pursue a tort claim for a traumatic brain injury. The psycholegal question is whether the injured individual has compensable damages under tort law. To answer that specific question, the forensic neuropsychologist may well choose to administer the identical test battery as in Scenario 1, but a different question is being asked.*

**Scenario 3.** *A man in custody in ABC City jail is charged with narcotics trafficking. He has not been sentenced when he gets into a fight with another inmate, is assaulted and falls, striking his head on the floor. He sustains a subdural hematoma with the same physical findings and residual deficits as in the previous cases. The court orders a neuropsychological evaluation to determine the severity of his deficits. The psycholegal question to be addressed relates to the inmate's competency to stand trial. The trial judge wants to know whether this man can understand courtroom proceedings and provide effective assistance to his counsel as a felony defendant. The forensic neuropsychologist might administer the same battery, but again, the question of interest is different.*

Forensic neuropsychologists serve predominately as evaluators, with secondary attention given to treatment recommendations across the lifespan. In the criminal justice setting, forensic neuropsychologists will predominately evaluate adults, and not as many adolescents or juveniles. In civil proceedings, forensic neuropsychologists evaluate individuals of various ages from preschool children to elderly adults. The scope of civil forensic neuropsychological services can be quite broad. Different skills are required to assess parenting capacity in divorce cases, the ability to manage personal affairs in demented clients requiring guardianship, fitness for duty evaluations, and disability assessments. As in other areas of psychology, forensic neuropsychologists should restrict their work to areas where they have appropriate training. For example, in tort cases involving pediatric brain injury, necessary skills would include knowledge of normal and abnormal growth and development in childhood, as well as familiarity with the range of rehabilitative and educational services that brain-injured children require to achieve optimal functioning during their school years and as disabled adults. This knowledge is essential to assist attorneys proposing compensation in pediatric brain injury tort cases where damages need to be calculated to account for lifetime disablement.

Different skills are required to make informed recommendations regarding sentencing in juvenile and adolescent criminal cases. For example, juveniles committing capital murder can be prosecuted as adults in many jurisdictions. However, a juvenile cannot receive the death penalty or be executed (*Roper v. Simons*, 2005). Because of the heinous nature of some capital crimes, prosecutors have the option of petitioning for a transfer of a juvenile to adult court. The prison culture for adults is radically different, with fewer services available than in juvenile detention. The forensic neuropsychologist consulting with the juvenile justice system is in a good position to offer guidance to the court regarding mitigating sentencing factors that can afford a juvenile opportunities for peer interaction, counseling, and educational and vocational

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