

The Role of the Neuropsychologist as an Expert Witness
Elaine D. Hanson, Psy.D., J.D.

In these litigious times it becomes necessary for the clinical neuropsychologist in private, group or an institutional practice to be informed of certain of the legal developments that impact and, at times, hinder the practice of the clinical neuropsychology. No matter how hard we try to limit our practices to areas that do not interface with the legal system, we are inevitably confronted by demands placed upon us by that system. For example, we conduct neuropsychological evaluations for clients who choose to pursue civil cases to obtain damages for neurological injuries. More recently, neuropsychologists have become involved in criminal cases when they are called to testify about legal issues such as competency, insanity and premeditation that inherently involve an investigation of an individual's cognitive functioning.

The neuropsychologist called to testify as an expert in either court or in a deposition faces a daunting task. We are asked, either willingly or unwillingly, to immerse ourselves in a system that is by its very structure adversarial and, at times, downright unpleasant. Despite our level of education, training and clinical expertise, our credentials are attacked as is the very basis of the practice of neuropsychology. We are forced to defend our profession and our professional reputation at every step of the process, which can be simultaneously intellectually stimulating and personally frustrating.

NAN, and most recently the newly formed committee to address professional practice issues, seeks to support its members when they face questions, concerns and often uncertainty in meeting the demands of the legal system. Previously, NAN provided guidelines for responding to subpoenas and requests to produce raw test data to its members. The present article continues that tradition and provides a discussion of issues regarding expert testimony and reviews developments in the courts surrounding the expertise of neuropsychologists to testify about the causation of traumatic brain injury.

Over the past ten years or so, courts of various states have confronted challenges to the qualifications of neuropsychologists to testify as to the *cause* of traumatic brain injury. The case of Huntoon v. TCI Cablevision of Colorado, Inc. (969 P.2d 681, 1998) is an example of a decision that had great potential to limit the practice of neuropsychology in the forensic arena. A defense against the attack on neuropsychologists was successfully fought by a coalition of representatives from NAN, APA, the Colorado Neuropsychological Society and the Colorado Psychological Association. It serves as an example of the challenges and fights that have been fought and that will continue to be fought in other state courts.

In Huntoon the pertinent issue was whether a neuropsychologist was properly qualified as an expert to testify regarding *causation of traumatic brain injury* under the applicable rules of evidence. Rule 702 of the Colorado Rules of Evidence, which is similar to the applicable rule in the federal courts, provides that expert testimony is admissible if the "proffered testimony will assist the jury." The expert must possess some special knowledge, above and beyond that generally known to the average or layperson that will help the members of the jury decide the issue in the case. The rule has been liberally applied and it is at the sole discretion of the trial judge to determine whether or not to qualify someone as an expert. The judge will decide

whether a witness may qualify as an expert following a line of questioning regarding the witnesses' credentials. The attorneys for both sides will generally get a chance to ask the proffered expert about their education, training, prior testimony, publications and other relevant professional experience prior to the trial judge's ruling. The period of questioning by the attorneys for both sides is generally brief but can be quite lengthy in a highly contested case. It is only after the judge has ruled that the witness qualifies as an expert under the rules of evidence that the expert is allowed to testify about the particulars of the case being litigated.

The plaintiff, Huntoon, was injured in an automobile/truck accident and consequently was evaluated by a neuropsychologist. At trial, the neuropsychologist testified that the plaintiff suffered from an organic brain injury sustained in and caused by the accident. The jury found for the plaintiff. The case was appealed to the Colorado Court of Appeals, which held that the admission of neuropsychological testimony on causation of physical injuries was *always* an error because a clinical neuropsychologist lacks the title of "medical doctor." (Amicus Curiae Brief filed on behalf of APA, NAN, Colorado Psychological Association and the Colorado Neuropsychological Society, page 2.) The appellate court held that neuropsychologists, *as a class*, were not qualified to testify about the physical causation of organic brain injury.

The Colorado Supreme Court reversed the ruling of the appellate court and held that neuropsychologists should not be excluded as experts *as a class* to offer opinions about the etiology of traumatic brain injury. Rather, the Supreme Court held that the qualifications of each expert presented by a party in court must be reviewed *individually* as provided by the rules of evidence. It is the responsibility of the judge hearing the evidence at trial to decide the adequacy of the qualifications of an expert to testify regarding causation. In making such a decision, the judge is instructed to consider 1) whether the testimony of the expert will be helpful to the jury in understanding the evidence or an issue in a case and 2) whether the qualifications of the expert is sufficient training for the opinion offered. The trial judge reviews the qualifications including knowledge, skill, experience, training or education of the neuropsychologist. The court cited the rule of law that a witness is not required to hold a specific degree, have specified training, membership in particular professional organizations, etc. in order to testify regarding a specific issue. The court stated, "We therefore join the majority of states that have resisted the creation of artificial barriers to the admission of expert testimony by drawing lines between the various professions" In addition, the court went on to reiterate that a trial judge's decision whether or not to qualify a witness as an expert will not be disrupted "without a clear showing of an abuse of discretion" on the part of the judge. An abuse of discretion is found only if, in the context of that particular case, the ruling was manifestly arbitrary, unreasonable or unfair.

Other states have faced similar challenges to the expertise of neuropsychologists. The Supreme Court of North Carolina was reluctant to decide the issue as presented in the case of *Martin v. Benson and Industrial Electric, Inc.* (1998). The North Carolina court did not decide the issue but rather refused to address it finding that the attorneys opposing the admission of the neuropsychologists' testimony refused, as a matter of law, to adequately take the steps necessary to preserve the issue for appeal. Georgia reached an arguably different result from Colorado in the case of *Chandler Exterminators, Inc. v. Morris* (262 Ga. 257, 416 S.E. 277 (1992)). In *Chandler* the court refused to allow a neuropsychologist to offer an opinion about the etiology of a brain injury. In that case the trial judge refused to qualify a neuropsychologist as an expert to testify about the cause of brain injury involving exposure to the chemical, Aldrin. The trial judge

stated that neuropsychologist was not competent to testify about causation without medical knowledge of significant toxicity levels. The Georgia Supreme Court held that the admission of expert testimony is within the sound discretion of the trial judge and in the circumstances present in Chandler, the trial court did not abuse its discretion by excluding the testimony of the neuropsychologist. Other courts in other states have allowed neuropsychologists to testify regarding the causation of organic brain injury.

Where does this issue stand at the present time and what are the implications for neuropsychologists called as expert witnesses? The only certainty to be taken away from these decisions is that a trial judge will be allowed great latitude in determining the qualifications of an expert neuropsychological witness to testify regarding the causation of organic brain injury in a particular case. The appellate courts are very reluctant to overturn the discretion of the trial judge regarding the admission of expert testimony. Decisions will only be reversed on appeal if it can be established that there was an abuse of discretion. What qualifies as an abuse of discretion is dependent on the facts in a specific case and great deference is afforded the trial judge.

One can posit that trial judges are less likely to admit the testimony of a neuropsychologist when the issues involve cases which present more complex, and perhaps less litigated, issues of causation of brain injury, such as chemically caused neurocognitive deficits. However, we cannot begin to predict the outcome of these cases.

If you are called as an expert witness in a traumatic brain injury case be familiar with the status of the court decisions in your state, if any, addressing this issue. Be aware that the decision regarding your ability to testify regarding the issues in a specific case lies within the discretion of the trial judge. It is he or she who must decide whether the jury can hear what you have to say. Once that decision is made, and you are allowed to testify, it is the job of the jury to decide the ultimate issues in a case. The factors upon which a jury makes its decision are the topic for another day. When called, be prepared and be professional. If possible, know the judge who will preside over the trial. Be familiar with the facts of the case, the research regarding the issues in the case, as well as the work and opinion of the opposing expert. Do not extend your opinions beyond your professional expertise no matter how hard the attorneys push. Only offer opinions that you are professionally qualified to render. Be prepared for an adversarial process that can be challenging and, at times, unpleasant. Prepare for attacks on the practice of clinical neuropsychology, your expertise, your opinions, your degrees and your reputation. Most of all, know the strengths and weakness of the opinions that you offer. If we are prepared, as a profession, to work within the legal system when called, the practice of neuropsychology will benefit as a whole and we will continue to be viewed with the professionalism that we have worked so hard to obtain.

Elaine D. Hanson, Psy.D., J.D. is an Assistant Professor at the University of Denver Graduate School of Professional Psychology who teaches Forensic Psychology and Mental Health Law. She is also a clinical neuropsychologist with a private practice in Boulder, Colorado, and a practicing attorney who specializes in the representation of mental health professionals in a variety of legal contexts.