

Neuropsychological Tests: Direct and Cross Examination By Plaintiff's Counsel

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Direct Examination

1) Preparation for Direct Examination

- a) Careful work-up is essential to effective direct examination (and to minimize risks for cross examination)
 - i) How referral is handled
 - ii) Need thorough and complete factual predicate
 - (1) Comprehensiveness of records provided
 - (2) Need for care in supplying additional factual data
 - iii) Referral questions
 - (1) Ultimate opinion v. consistent with neuropsychological impairment
- b) Need to protect against disclosure of privileged and/or confidential information
- c) Do the right thing: make sure your neuropsychologist's report is carefully reviewed with the caregiver, and routed to the school/ treating physician where appropriate
 - i) Schedule follow-up if necessary
- d) Selection of trial exhibits well in advance of trial
- e) Discussion of key literature for use at trial

2) Considerations on literature

- a) Standard Treatises in the area are important:
 - i) Muriel Deutsch Lezak, Neuropsychological Assessment (Third Edition, 1995)
 - ii) Gerald Goldstein and Michel Hersen, editors, Handbook of Psychological Assessment (1984)
 - iii) David E. Hartman, Neuropsychological Toxicology, Identification and Assessment of Human Neurotoxic Syndromes (Second Edition, 1995)

- iv) Michael D. Franzen, Reliability and Validity in Neuropsychological Assessment (1989)
- b) Consensus statements, meta-analysis
- c) Avoiding literature centered debate

3) Key issues to consider when preparing examination

- a) Consistency with “facts beyond change”
 - i) Grades held back
 - ii) School performance and school testing results
- b) Medical history and source of possible confounders
- c) Will you be offering causation testimony from this witness (legal and strategic concerns?)
- d) Understand your expert’s selection of instruments (fixed v. flexible battery)
- e) Deflating the “apple-does-not-fall-far-from-the-tree” argument
 - i) See Kaufman article
- f) Proving pre-morbidity
 - i) How far to go with normative data
 - ii) Method of best performance
 - iii) Abnormal Scatter
 - iv) Areas of brain sensitive to neuropsychological injury v. functional areas that are relatively immune.
- g) Addressing likely areas of cross examination
 - i) Always consider leaving for cross
 - ii) Bias issues
- h) Prognosis

- i) Careful preparation on appropriate standard for admissibility, and impact of "speculation."
- ii) Consider holistic person
- i) Future costs
 - i) Is there plasticity? What good would therapy be?

4) Elements of successful direct

- a) Qualifications
 - i) Emphasize clinical practice and referral sources
- b) Opinions
 - i) Consider starting opinions with a request to tell jury the results of his assessment.
 - (1) Get heart of opinion on table quickly
 - (2) They will use key terms (brain function, abnormality, etc.) that give natural lead-ins to a conversational education session for the jury.
 - (3) Once framework and definitions are established, can move (backward) to how did you reach that opinion
 - (a) Describes overall testing procedures
 - (b) Use a single test (with robust data) to describe test administration, scoring and interpretation.
 - (c) Use visually impressive raw data as a demonstrative.
 - (d) Stress importance of the individual test.
 - (4) Do not cover each test excessively: find a theme to tie multiple test scores together to drive home the point. Look for consistency among test results which touch upon the same or similar functional areas.
 - (5) Prognosis and future interventions that are advisable.

Cross-examination

1) General concerns

- a) Theme and tone of cross-examination: do not adopt a more aggressive tone than is warranted by your material, and validated by your observations of the jury. Is this expert lying (for money) or just honestly mistaken.
 - i) Important factors to consider here are bias, and how high child's lead levels were.
- b) Obtain concessions on validity or neuropsychology methodology.

2) Pre-trial discovery needed for effective cross examination

- a) Comprehensive listing of all materials reviewed and relied upon by expert.
- b) Copies of raw data, questionnaires, normative data utilized, etc., as part of your client's DME.
- c) Careful collection and review of previous trial transcripts and depositions.
- d) Deposition in your case.
 - i) Use deposition to finalize your theme and theory for cross.
 - ii) Use careful cross-examination technique to have crisp deposition transcript for trial: it is (nearly) impossible to cross from a prior inconsistent 5 page answer.
 - iii) Strive to be fact based.
 - iv) Avoid questions that start with "Explain, How, What do you mean by..."

3) Examination at trial

- a) Set up your cross during your opening statement.
- b) Cross-examine consistent with your theme and the dominant emotion of the cross
 - i) Starting with cross-examination on bias is not necessarily the best strategy.

- c) Use of authoritative journals, publications:
 - i) Spend time setting up the importance of the journal or statement.
 - ii) Select short, key passages (don't be too ambitious with content as it is easy to bore a jury.)
 - iii) Do not argue: better to establish that the witness either agrees or disagrees with the statement, and move on, saving the argument for argument.

- d) Top 10 flaws to exploit:
 - i) Expert underestimates how well you know the case and stretches into area with prime impeachment material.
 - ii) Expert overestimates how well you know the case (usually after having been punished by number i above)
 - iii) Experts who cannot take the heat of trial cross and fold.
 - iv) Experts not qualified for the specific assignment.
 - v) Uninformed of key facts/issues by defense counsel
 - vi) Misinformed from summaries provided from lawyers.
 - vii) Won't come down from Olympus.
 - viii) Can't come down from Olympus.
 - ix) Overly forthright
 - x) Dishonest/extraordinary bias