



Jon Davidi

PANISH | SHEA | RAVIPUDI LLP



Andrew Gianelli

PANISH | SHEA | RAVIPUDI LLP

Maximizing non-economic damages with neuropsychology experts

GATHER ALL DATA FROM THE DEFENSE EXAM TO PROTECT YOUR CLIENT

Neuropsychologists can play a crucial role in personal-injury lawsuits, particularly when the injury involves potential brain damage, cognitive impairments, or emotional distress. Neuropsychologists are trained to evaluate and diagnose cognitive, emotional, and psychological effects of brain injuries. They conduct comprehensive assessments to gauge the extent of cognitive deficits, such as memory loss, difficulty concentrating, and changes in behavior. These assessments provide a clear, objective view of how the injury has affected the individual's mental function.

They are valuable in helping the jury understand the extent of the plaintiff's non-economic damages. Their detailed evaluations and testimony will help explain in clear, understandable terms the nature of the brain injury, and how the injury is affecting the plaintiff's life. A neuropsychologist's expert opinion can be the deciding factor in establishing the severity and long-term consequences of an injury.

In many of our cases, defendants may argue that the plaintiff's symptoms were pre-existing or unrelated to the injury. Neuropsychologists help to differentiate between pre-existing cognitive issues and new impairments resulting from the injury. Through careful testing, neuropsychologists can establish whether the injury worsened existing conditions or introduced new challenges. This helps ensure the plaintiff is compensated accurately for the impact of the injury on their cognitive functioning.

In addition to cognitive impairments, neuropsychologists can assess emotional and psychological damage caused by traumatic events. Our cases often involve psychological conditions such as anxiety, depression, post-traumatic stress disorder (PTSD), or other mood

disorders resulting from the injury. Neuropsychologists use a variety of tools, including interviews and psychological testing, to assess these effects, which may not always be apparent through physical examinations alone. Their findings can substantiate emotional-distress claims and ensure proper compensation for psychological harm.

Finally, neuropsychologists can play a key role in determining the rehabilitation needs of individuals after an injury. Their evaluations help outline what type of therapies or treatments might be necessary to aid recovery and to improve the plaintiff's quality of life. They can also provide a detailed plan for rehabilitation, which can be used in the lawsuit to advocate for additional financial support.

Commonly, both the plaintiff and defense will retain a neuropsychologist and each will have their expert perform a mental examination of the plaintiff. But in a world where two doctors are hired to conduct the same tests with opposing outcomes, this testing can result in more questions than answers.

Protecting your client at the defense expert's examination

A neuropsychological examination generally involves a thorough assessment of the patient's cognitive, behavioral, and emotional functioning. This may include a sequence of tests aimed at evaluating the patient's memory, attention, executive function, problem-solving, emotional regulation, and other cognitive domains. The results from these tests can provide critical data points in proving the extent of your client's cognitive deficits and justifying the need for future treatment and care.

However, too often the defense's neuropsychological examination will

result in either claiming your client is perfectly fine, or even worse, that your brain-injured client is malingering or lying. How can two examinations, supposedly based on objective science, result in such opposite conclusions?

The root of this issue is the lack of transparency surrounding how these tests are being administered and scored and how the results are ultimately interpreted. These examinations often involve testing where the questions, grading scales, and raw data are not disclosed to the opposing party's counsel. Although there is some truth to the idea that the symptoms of neuropsychological injury can be subjective or difficult to measure, this issue is magnified by experts who are able to hide behind their findings and conceal information.

The dispute surrounding the transmission of neuropsychological-testing data and materials largely stems from the idea that disseminating this information to lawyers and their expert consultants will compromise the validity of the testing. In practice, preventing lawyers from accessing how the testing is being conducted creates a giant void of information in determining the reliability of the testing, the supposed results, and the foundation for the expert's findings. Defense experts thrive in this empty space. Thus, if you are agreeing or are compelled to have your client undergo a neuropsychological examination, it is critical that you take steps to protect your client from the potential misrepresentations and litigation tactics which can result from this testing.

Get the list of tests

Prior to agreeing to a defense neuropsychological examination, you should demand the defense provide a list of the specific tests they seek to

perform on your client. Defendants typically begin this process by serving a notice for a neuropsychological mental examination. The specifics of the examination should be clearly outlined in the notice and specify the time, place, manner, conditions, scope, and nature of the examination and a specific list of the diagnostic tests and procedures to be used. (Code Civ. Proc., § 2032.320; *Carpenter v. Superior Ct.* (2006) 141 Cal.App.4th 249.) This includes listing each and every test the examiner intends to administer. (*Carpenter*, 141 Cal.App.4th at 260.)

Record the entire examination

Under Code of Civil Procedure section 2032.530, both the examiner and the examinee are entitled to audio-record a mental examination. This includes recording the entire examination. The Court in *Golfland Entm't Centers, Inc. v. Superior Court* (2003) 108 Cal.App.4th 739, 745-46, addressed this very issue, establishing that recording only the examinee's responses would defeat the main purposes of the audiotaping, which are to ensure that the examiner does not overstep the bounds set by the court for the mental examination, that the context of the responses can be judged for purposes of trial, that the examinee's interests are protected, and that any evidence of abuse can be presented to the court. The results of the testing can easily be skewed and misinterpreted if the test is improperly administered or the grading is incorrectly scored. Thus, it is important that you specify the entire examination be recorded, including the interview, test instructions, and the testing.

Insist the raw data and recording be produced to you directly

The raw data from the neuropsychological examination can include the raw and scaled scores, the test questions administered, your client's responses to test questions or stimuli, and the examiner's notes and recording concerning your client's statements and behaviors during the examination. Often

the defense will propose a stipulation that the raw data and audio recording only be transmitted to the plaintiff's neuropsychology expert, and not with counsel. Two concerns are often presented in opposing the transmission of this information (1) the security and integrity of the testing materials and data and (2) professional ethical obligations. However, it can be a worthwhile fight to have the raw data and audio recording shared directly with counsel and all consultants.

Randy's Trucking v. Superior Court (2023) 91 Cal.App.5th 818, established that trial courts have the discretion to order the transmission of the raw data and audio recording to lawyers subject to a protective order. There, the court reasoned that the legislature has not codified an expert-to-expert limitation of the transmission of data, and the transmission to counsel was justified based on the plaintiff's need for the materials and the adequacy of a protective order in addressing any concerns about test security. Since this 2023 ruling, trial courts across the state have wavered in choosing whether to exercise their discretion in ordering the transmission of raw data and audio recordings to counsel.

Ultimately an expert's opinion is only as reliable as the foundation it's built on, and it may be difficult to test that foundation without this information. As a general rule, pursuant to California Evidence Code section 721, subdivision (a) a plaintiff has a right to take discovery and cross-examine an expert witness, including the right to fully cross-examine the matter upon which the expert's opinion is based and the reasons for that opinion. Indeed, the court in *Randy's Trucking* recognized why transmission only to the plaintiff's expert was insufficient, "[w]ithout the raw data and audio recording, plaintiffs cannot effectively scrutinize the way the data was collected, determine if there are discrepancies, and cross-examine the neuropsychologist on the basis and reasons for the neuropsychologist's opinion." (*Randy's Trucking*, 91

Cal.App.5th at 838.) It added that "disclosure of these materials may help to protect against abuse and disputes over what transpired during the examination." (*Ibid.*) The court also agreed that it was insufficient to only submit the raw data and audio recordings to plaintiffs' retained expert because "[plaintiffs] should not be forced to retain an expert to gain access to these materials and even if they do retain one, that expert can only assist the attorney in preparing for cross-examination; to prepare and conduct an effective cross examination, 'the attorney must themselves possess more than a second-hand understanding of the information being scrutinized.'" (*Ibid.*)

The protective order

Similar to the arguments presented in *Randy's Trucking*, there is often pushback that protective orders are insufficient to protect the contents of the proprietary, copyrighted test materials and data without compromising their validity. The law and common sense reject this assertion. Courts have utilized court-imposed protective orders for decades to safeguard the most sensitive materials imaginable in all varieties of litigation. Nearly 20 years ago the Court in *Carpenter* determined that a protective order is adequate to protect against copyright concerns in relation to providing copies of neuropsychological tests. (*Carpenter, supra*, 141 Cal.App.4th at 274.)

When drafting your protective order, make sure it includes language permitting the disclosure of raw data, test materials and other medically private information obtained during the examination to all counsel and all experts, consultants, and employees of their respective firms. The protective order should also require the parties to destroy the materials at the cessation of the case, prohibit any use, disclosure, or dissemination of the materials to any other parties for any purpose other than in connection with the litigation, and that all counsel, experts, and consultants maintain the security of the materials and data and

take all reasonable steps to maintain the confidentiality of the materials.

“Sorry, but it’s an ethical violation”

Another common argument against the transmission of test data and materials to lawyers is that doing so would constitute a professional ethical violation for neuropsychologists. However, the American Psychological Association’s (APA) ethical principles expressly mandate that psychologists provide test data if required by court order. In fact, ethical standard 9.04, which governs the release of test data, specifically permits that “[p]ursuant to a client/patient release, psychologists provide test data to the client/patient or other persons identified in the release” and “[i]n the absence of a client/patient release, psychologists provide test data only as required by law or court order.”

With respect to test materials, APA ethical standard 9.11 only requires psychologists “make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations, and in a manner that permits adherence to this Ethics Code.”

These professional ethical standards have accounted for the fact that

psychologists are not above the law, and it is ethical to comply with court orders to produce this information so long as reasonable efforts to maintain its security are taken (such as court-imposed protective orders ensuring such security).

Obtain the report and have your expert review it

Under Code of Civil Procedure section 2032.610, a party can demand a copy of a detailed written report within 30 days, setting out the history, examinations, and findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner. It is important to keep in mind that demanding the report also triggers your obligation to provide reports from any physician, psychologist, or licensed health care practitioner who has examined your client and waives any associated work product protections for these reports. (Code Civ. Proc., § 2032.630.)

It is important to ensure the tests performed were correctly administered, scored, and reported. Upon receipt of the raw data and audio recording, ask your expert to review these materials. Have your expert compare the recording and raw data with the defense report. These reports can contain false information,

misrepresentations, and omissions of critical information designed to hurt your client.

Conclusion

Hiring a neuropsychologist may be the best decision to maximize your client’s damages in a case with a brain injury. Having an expert testify about the way your client’s life is ruined will be impactful and can certainly help you achieve a just verdict. However, you must stay vigilant and take the necessary steps to ensure your client is not hurt by the other side’s use, or misuse, of this testing.

Andrew Gianelli is a trial attorney with Panish | Shea | Ravipudi LLP. Mr. Gianelli focuses his practice on litigating catastrophic personal injury and wrongful death cases throughout California and Arizona. He may be contacted at agianelli@panish.law.

Jon Davidi is a trial attorney at Panish | Shea | Ravipudi LLP focusing on catastrophic personal injury, wrongful death, and product defect cases. He may be contacted via email at jdavidi@panish.law.

