Test Security in Medicolegal Cases: Proposed Guidelines for Attorneys Utilizing Neuropsychology Practice

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Abstract

In the context of forensic neuropsychological assessments, the professional interaction of law and psychology is viewed primarily as one where the retaining attorney or court dictates its needs to psychologists when resolving legal disputes. While this perspective is conceptually accurate, the positive and practical collaboration of law and psychology also relies on attorneys adhering to basic protections of sensitive psychological assessment procedures and tests. Objective testing is undermined when a practitioner of law engages in actions prior to, during, or following a neuropsychological examination in a manner that threatens the test security. An appreciation among practitioners of law and psychology regarding the necessity of test security is essential. This article reviews attorney actions that can affect test security, proposes a distinction by psychology between appropriate and problematic client preparation for a neuropsychological examination, integrates the available legal precedent regarding test security, and suggests productive measures to protect test security in medicolegal settings.

Keywords: Test security; Neuropsychological assessment; Medicolegal; Attorney coaching; Guidelines

Introduction

The assessment of brain dysfunction is among the most important diagnostic evaluations in medicolegal cases. Because diagnostic techniques utilized by neurologists, emergency care physicians, and primary care providers may not detect behavioral manifestations of brain injury, the professional services of neuropsychologists are often retained to assess plaintiffs or criminal defendants suspected of having central nervous system (CNS) dysfunction. The main diagnostic tool utilized by neuropsychologists is psychometric testing. Research suggests that psychometric testing is the best scientific method available to determine particular behavioral manifestations of brain injury (Bigler, 2007; Kaufmann, 2005; Larrabee, 2000; McKinzie, 2001; Meyer et al., 2001; Stern, 2001). In fact, the American Academy of Neurology (AAN, 1996) stated, “Neuropsychological evaluations have the advantage of being objective, safe, portable, and relevant to the functional integrity of the brain” (p. 493; see also Cunningham v. Montgomery, 1996; Simmons v. Mullins, 1975; Amendment to Chapter 490, Florida Statutes, the Psychological Services Act). The viability of applied neuropsychology, however, requires a reasonable level of security pertaining to psychometric tests, which the National Academy of Neuropsychology (NAN) declared in an official position statement (Axelrod, Heilbronner, et al., 2000).

With increasing interactions between practitioners of law and those of psychology and the increasing frequency with which sensitive aspects of psychometric tests are disseminated to interested parties, maintaining good test security has become progressively more challenging. Potential breaches of test security in medicolegal cases by attorneys can have an enormous impact on the outcome of litigation and can also harm the “field of psychology, individual practitioners, test publishers and developers, the plaintiff, and the legal system itself” (Howe, 2006, p. 3). Despite this, the science of applied neuropsychology has not...
offered guidelines concerning attorney–client interactions relevant to test security. For that reason, maintaining appropriate and requisite practices to protect test security in medicolegal cases is not always understood and followed by attorneys. In effect, many practitioners of law are unaware of how their actions can affect test security and the validity of neuropsychological examinations.

The diagnosis of CNS dysfunction requires the neuropsychologist to assimilate and interpret data obtained from several sources, such as clinical interviews, psychometric testing, as well as medical, vocational, and educational records. In order to interpret the information, the neuropsychologist needs to determine the reliability and validity of the collected data. Therefore, it is important that patients are forthright and reasonably accurate in recalling pertinent information relevant to their case. In addition, to make medically sound opinions regarding the presence, extent, and etiology of brain injury, prescribed standardized conditions for testing are necessary to interpret the derived test data. (It should be noted that, at the sole discretion of the clinician, test procedures may be modified to accommodate examinees that cannot use their writing hand, have extremely low intellectual functioning, blindness, or other characteristics that prohibit standardized testing methods.) A test score is not evocative in isolation. It is only by comparing an obtained test score to appropriate normative data, along with other information gathered about the examinee, that psychometric testing is useful. To be comparable to normative data, the examinee should be unfamiliar with the specific content of tests and their objectives. Despite that, Rüsseler, Brett, Klaue, Sailer, and Münte (2008) state, “Lawyers involved in brain injury litigation cases routinely coach their clients how to approach neuropsychological testing to their advantage” (p. 1; see also Essig, Mittenberg, Petersen, Strauman, & Cooper, 2001; Wetter & Corrigan, 1995). This serious issue needs to be addressed. Abeles (2001) suggested that psychologists provide “information to attorneys and others, which will assist them in advocating for clients without contaminating scientific data” (p. 5).

In view of the rising utilization of neuropsychology in medicolegal cases, it is in the courts and public interest that test security be maintained so that testing is objective, reliable, valid, and unbiased. In Detroit Edison Co. v. National Labor Relations Board (1979), the U.S. Supreme Court recognized the importance of test security consistent with the American Psychological Association’s (APA’s) amicus brief, which argued that test security is necessary to protect the validity of psychometric tests. To limit potential violations by attorneys that could cause misleading expert opinions, psychologists as qualified, licensed professionals to interpret test data have a professional stewardship to offer clear and consistent guidelines for practitioners of law regarding test security. In fact, practitioners of law at the highest level have indicated a receptivity to input from scientific professionals. Indeed, in the Reference Manual on Scientific Evidence, Stephen Breyer, Associate Justice of the U.S. Supreme Court, stated, “In this age of science, we must build legal foundations that are sound in science as well as in law. Scientists have offered their help. We in the legal community should accept that offer” (Federal Judicial Center, 2000, p. 8).

The purpose of this paper is to present a set of guidelines for practitioners of law, derived from the discipline of psychology, on appropriate and problematic client preparation for a neuropsychological examination that takes into account scientific support of standardized and accepted testing practices, ethical ideals of the American Bar Association (ABA), and the forensic and clinical consequences of valid versus invalid test data. The goal of this effort is to maintain the validity of neuropsychology practice and the integrity of the practice of law by suggesting productive measures to protect test security in medicolegal settings (e.g., Gutheil, 2003).

Background Issues

Understanding Test Security

Test security refers to preventing exposure of psychometric tests in any setting that would adversely affect the function of the tests to accurately distinguish individual mental differences. Neuropsychologists utilize psychometric tests as diagnostic tools to assess brain-behavior, and more specifically, brain dysfunction. If an attorney provides their client directly or indirectly with information on tests and their objectives prior to testing, this can reduce the efficacy of neuropsychological examinations and negatively “affect the criminal and civil justice systems” (Prohaska & Martin, 2007, p. 223). In Ragge v. MCA/Universal Studios (1995), the federal court ruled that in order to maintain test security the names of specific tests likely to be administered during the evaluation should not be disclosed to the examinee beforehand. Commenting on this point, the APA’s Committee on Psychological Tests and Assessment (CPTA; 1994a) stated, “It should be recognized that certain tests used by psychologists and related professionals may suffer irreparable harm to their validity if their items, scoring keys or protocols, and other materials are publicly disclosed.” (retrieved February 13, 2008, from http://www.apa.org/science/securetests.html).

The importance of test security to applied psychology is reflected in official statements on standards regarding this issue by the APA (1999, 2002), British Psychological Association (BPA, 2007), American Academy of Clinical Neuropsychology (AACN, 2007), American Educational Research Association (1999), Committee on Ethical Guidelines for Forensic

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Psychologists (1991), and the National Council on Measurement in Education (Schmeiser, Geisinger, Johnson-Lewis, Roeber, & Schafer, 1995). Each of these professional organizations has stated the need to restrict disclosure of test items to the public to protect the uniqueness and usefulness of tests. Indeed, under the APA’s (2002) Ethical Principles of Psychologist and Code of Conduct, members are obligated to make reasonable efforts to maintain the integrity and security of tests and other assessment techniques.

The profession of psychology is not the sole proprietor of the concept of test security, however. In many fields, the security of confidential test information is deemed essential. For example, the Law School Admissions Council (LSAC) takes measures to protect sensitive test information regarding the Law School Admission Test (LSAT) from unauthorized disclosure and unsecured access by the general public. In addition, test questions from current state bar examination are protected. This is in keeping with the ABA’s ethical guidelines. The Preface to the ABA’s Model Rules of Professional Conduct (2002) states, “For more than eighty years, the American Bar Association has provided leadership in legal ethics and professional responsibility through the adoption of professional standards which serve as models of the regulatory law governing the legal profession.” Nevertheless, in medicolegal settings, “There are no specific ethical guidelines requiring attorneys to maintain test security even though they have access to tests” (Howe, 2006, p. 19).

Dual Relationships and Dilemmas in Maintaining Test Security

The challenge for practitioners of law and those of psychology working together in medicolegal cases is the synthesis of multifaceted relationships (Greiffenstein & Cohen, 2005). Attorneys have an obligation to the judicial system as an officer of the court and a duty to their client as the fiduciary representative (Henning, 2006). Psychologists, who may be retained by either side in a legal dispute or criminal proceeding, have an obligation to render expert opinions about potential psychiatric or cognitive disorders in plaintiffs or criminal defendants (Bush, Barth, et al., 2005). Ethical complications can arise as a consequence of the neuropsychologist being hired by a third party (e.g., Greenberg & Shuman, 1997, 2007). Specifically, Bigler (2007) noted that in medicolegal cases, practitioners of law and those of psychology could have conflicting objectives:

In the legal arena, the attorney is given the charge of representing his or her client and their side of the case, with all of the resources they can bring to bear with the purpose to prevail for their client and side of the legal argument (i.e., to win) – a very different purpose than that of a clinical specialty within psychology. (p. 48)

That is, from the perspective of psychology, the purpose of an examination is to “determine the examinee’s neuropsychological status as accurately as possible whether or not the conclusions advance or compromise the examinee’s interests” (Bush, Barth, et al., 2005, p. 999). One effect of conflicting objectives is that practitioners of law may perceive their role only as zealous advocates for their client and that ensuring security of test procedures is principally a function of psychologists. When test security is compromised, however, ethical dilemmas and diagnostic uncertainty arise.

Attorney Practices That Threaten Test Security

Coaching

Victor and Abeles (2004) defined coaching as, “any attempt to alter the results of psychological or neuropsychological tests in such a way that distorts the true representation of the examinee’s cognitive, emotional, or behavioral status or hinders an accurate assessment of such attributes” (p. 374). This includes situations where an attorney solicits and retains third party firms or professionals that specialize in questionable preparation of litigants for a neuropsychological examination, which is, in effect, coaching by proxy. Both inadvertent and purposeful coaching subverts the validity of psychometric tests and can adversely compromise the accuracy of neuropsychologists’ expert opinion (Lees-Haley, 1997a), which, in many cases, is essential (Jenkins v. U.S., 1962). Andberg (2004) reiterated this point at the annual APA convention as follows:

When the client has knowledge of the content or the underlying constructs, and/or perhaps the responses, that person is no longer comparable to a naïve normative group. As a result, decisions, and diagnostic and treatment recommendations for this patient may no longer be valid when based on the normative distribution. (p. 6)

In other words, examinee familiarity with psychometric tests beforehand diminishes their value as empirically grounded objective sources of information regarding probable diagnoses and in determining potential etiologies. In cases when reevaluations or serial testing is necessary, the client will have been exposed to test materials. In these circumstances, the neuropsychologist will need to use their clinical judgment as to the potential practice effect on performances across various tests. In some circumstances, alternate forms of particular tests may be available.
One method that psychologists have employed to determine whether or not an examinee’s effort is credible is with the use of symptom validity testing (Bush & Lees-Haley, 2005; Bush, Ruff, et al., 2005; Green, 2006; Green, Lees-Haley, & Allen, 2002; Green, Rohling, Lees-Haley, & Allen, 2001). The problem with this approach is that attorneys can also influence a client’s performance on these measures as well (Rüsseler et al., 2008).

**Implications of Attorney Coaching on Test Security**

Client preparation by an attorney for a neuropsychological examination greatly varies. It can range from simply informing the client of the need and general process of the evaluation to the questionable practice of informing and/or instructing a client about what to say and what not to say during the assessment process, and more problematically, about specific sensitive aspects of various tests that may be administered to the client (Youngjohn, 1995). This leads to an examinee’s ability to alter their presentation on those measures. This latter approach to client preparation is considered problematic and is often referred to as attorney coaching.

A review of relevant studies reveals that some attorneys do counsel clients about how to conduct themselves during mental health examinations. This includes how to respond on testing, what to emphasize during clinical interview, and what information to hold back (Lees-Haley, 1997a). For example, a study by Wetter and Corrigan (1995) revealed that nearly half of the attorneys surveyed felt obligated to provide their clients with specific information about which tests or scales were used to differentiate valid from questionable response patterns. Similarly, Essig and colleagues (2001) reported that some attorneys “typically spend up to an hour preparing their clients for neuropsychological evaluations and commonly cover test content, detection of malingering, and brain injury symptoms” (p. 271). In one case, the attorney counseled the plaintiff to prolong responding in an attempt to leave little time for the clinician to conduct a thorough examination (Lees-Haley, 1997b). This attorney tactic can potentially invalidate test results. For example, “The trial court must determine whether in a particular case the expert spent sufficient time with the defendant to provide the basis for a meaningful opinion” (California v. James, 1989, p. 665).

Another potential implication of attorney coaching is losing one’s license to practice. State boards have issued rulings regarding professionals who violate test security by coaching examinees. In two recent cases, a state board of examiners issued orders of revocation for professionals who were found to have coached examinees beforehand about specific aspects of standardized tests (i.e., State Board of Examiners, 2008a, 2008b).

**Influences of Third Party Observers on Neuropsychological Examinations**

Other problematic situations involve attorneys insisting on being present during testing (see AACN, 2001; Axelrod, Barth, et al., 2000; Cramer & Brodsky, 2007) or using electronic devices to record the examination. The examinee’s attorneys should not consider themselves objective observers during testing. Bursztajn, Paul, Reiss, and Hamm (2003) warned that the presence of nonobjective individuals can turn any “examination from an objective evaluation into a de facto attorney coaching session, a rehearsal, or a setting-driven repeat of a deposition or a narrative previously given to the attorney” (p. 397). For example, in Bacallao v. Westchester General Hospital, Inc. (2007), a neuropsychologist reported that the examinee’s attorney, who was present during the examination, continually objected to the examiner’s questions and also instructed the examinee not to answer particular questions. Due to the attorney’s behavior during the clinical examination, the neuropsychologist deemed the assessment of the client invalid. In effect, the attorney’s presence negatively affected the validity of the neuropsychological examination.

Both state and federal courts have noted that an attorney’s presence during testing can negatively impact the validity of the examination. In fact, the Texas Supreme Court held that in examinations to assess mental disorders “the presence of a third party in a legal or non-medical capacity would severely limit the efficacy of the examination” (Bennett v. State, 1989; see also Lagrone v. State, 1997). Furthermore, the U.S. Supreme Court, in Estelle v. Smith (1981), indicated that the physical presence of an attorney during an examination “could contribute little and might seriously disrupt the examination” (see also Howe, Rice, & Hoes, 2007). Finally, regardless of the rationale or behavior of a third party observer during testing, their mere presence can significantly influence an examinee’s performance on a variety of neuropsychological tests (Gavett, Lynch, & McCaffrey, 2005; McCaffrey, Lynch, & Yantz, 2005). A similar effect occurs when electronic recording devices are used during testing (Constantinou, Ashendorf, & McCaffery, 2002, 2005).
Pretrial Discovery

Attorneys who insist on pretrial discovery of test materials and/or admitting them into evidence contribute to an environment in which those “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” (APA, 1999, p. 1078). Kaufmann (2005) contends that release of test materials under the precept of the public’s right to every man’s evidence does not enhance the court’s truth-seeking function, but rather, can impede it. NAN’s official position warns that “individuals who gain access to test content can and do manipulate tests and coach others to manipulate results, and they are more likely to circumvent methods for detecting test manipulation” (Axelrod, Heilbronner, et al., 2000, p. 384).

Impact of Breaches in Test Security

Costs Due to Loss of Test Security

The impact of a loss of test security in any single medicolegal case reaches well beyond the case itself. This includes but is not limited to: (a) severely reducing the efficacy of the scientific tools that neuropsychologists use to make clinical decisions (e.g., Bauer & McCaffrey, 2006; Gervais, Green, Allen, & Iverson, 2001; Rogers, 2004), (b) increasing the financial costs to consumers since new tests have to be developed to replace tests that have been compromised by unauthorized or unintended disclosure to the general public, (c) “stagnation of scientific discovery and scientific advances” as test developers become discouraged and choose other professional pursuits rather than test construction (Howe et al., 2007, p. 28), and (d) obstructing the court’s truth-seeking function by reducing the usefulness of the best scientific “technology available for evaluating certain legal claims” (Kaufmann, 2005, p. 96).

Therefore, it is vital for practitioners of law to understand the role they play in maintaining test security. Foremost, unjust and inequitable settlements may result when attorneys engage in problematic coaching of litigants. This includes individuals with actual acquired brain dysfunction who may not be able to get an objective examination to elucidate true impairment if they are coached prior to their neuropsychological examination. A related point is cases where a client is influenced by their attorney to falsely impugn their perceived psychological and/or cognitive dysfunction to a particular etiology that is, in fact, not the causal factor. This can occur in naïve clients who may be prone to attribute a normal range of cognitive functioning (e.g., forgetting where you placed your car keys, trouble recalling names, etc.) or psychological experiences (e.g., adjustment to a common but stressful life event) to a mistaken origin (e.g., motor vehicle accident). In effect, reasons other than brain injury can cause impaired cognitive functioning, such as poor quality sleep, transient depression, side effects of medication, and so forth. Other clients may feign a mental disorder for secondary gain (e.g., monetary settlement, disability pension, avoiding criminal responsibility, etc.). The yearly medical and legal expenditures for fraudulent claims of cognitive dysfunction and psychological distress in the United States reach $5 billion (Ford, 1983; Gouvier, Lees-Haley, & Hammer, 2003).

Likewise, test publishers stand to lose potential income if unauthorized disclosure of their products results in diminished validity of the tests and, thereby, reduce their commercial viability (Chadda & Stein, 2005). It takes substantial expenditure of time and monies to develop standardized psychometric tests that are based on applicable scientific theories and knowledge (Koocher & Keith-Spiegel, 2008). Attorney Randy Reaves pointed out that the loss of test security of one particular test a decade earlier cost over $100,000 to replace with an equivalent test (Holloway, 2004). In discussing the issue of test security, Foster (2000) stated that security efforts constitute the bulk of the cost to develop and maintain tests.

Avoiding Harm to the Public

As previously stated, a loss of test security violates ethical mandates by mental health practitioners to protect patients and the general public from harm (e.g., Kaufmann, 2005; Rogers, 2004; Tarasoff v. Board of Regents of the University of California, 1976). Tilson and Sewick (2002) maintain that it is in the public’s interest to protect test security. A loss of test security would affect several key uses of psychometric tests, such as, “(a) surgical decisions by neurosurgeons, (b) choices of medication, (c) academic placement of students, (d) who qualifies for disability status, (e) competency to stand trial, (f), evaluation of insanity defenses, and (g) child custody decisions” (Tilson & Sewick, 2002, p. 47). Similarly, the APA (1994b) made the following statement about unauthorized disclosure of tests:

Such release imposes very concrete harm to the general public—loss of effective assessment tools. Because there are a limited number of standardized psychological tests considered appropriate for a given purpose (in some instances only a single instrument), they cannot easily be
replaced or substituted if an individual obtains prior knowledge of item content or the security of the test is otherwise compromised. Retrieved from http://www.apa.org/science/disclosu.html.

For example, an individual who may have sustained a neurologic insult (e.g., head trauma, cerebral vascular accident, etc.) may be required to undergo a neuropsychological examination to determine their competency to return to work, especially if their chosen profession involves the safety of the public (e.g., pharmacist, surgeon, airline pilot, etc.). If such individuals had access to test materials prior to an examination, they may be able to conceal genuine impairments that would otherwise cause serious concern. This scenario was acknowledged in an official position paper by NAN, stating, “The potential disclosure of test instructions, questions, and items can enable individuals to determine or alter their responses in advance of actual examination” (Axelrod, Heilbronner, et al., 2000, p. 383).

Equally important are legal venues in which a criminal defendant or civil litigant uses prior knowledge of tests to manipulate their responses during a neuropsychological examination in order to appear more impaired than they really are or falsely attribute their deficits to a specific cause. In fact, the Tennessee Supreme Court (2004) stated in its Rules of Professional Conduct on the practice of law, “The public has a right to know about threats to its safety and measures aimed at assuring its security” (p. 97). In discussing the need to maintain test security and balance ethical obligations, Bush and Martin (2006) contend, “In general, preventing harm and potential disservice to many outweighs the restricted autonomy to one” (p. 117).

**Guidance for Law and Psychology Practitioners**

**Professional and Legal Guiding Principles**

Coaching a client subtly or not, regarding various aspects of a neuropsychological examination, could be considered a violation of ABA’s (2004) Model Code of Professional Responsibility, Rules 3.3 (Candor Toward the Tribunal) and 3.4 (Fairness to the Opposing Party) as it may be considered unethcal witness preparation. Although attorneys are duty-bound to represent their clients with zeal, an attorney can still violate the ABA’s ethics codes if such representation includes efforts to deceive. Specifically, Rule 1.9 (d) states, “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.” Similarly, the Tennessee Supreme Court (2004) stated in Rule 8.4, “it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation” (p. 148).

Furthermore, the Utah Supreme Court prohibits coaching a client during deposition by any means, including objections to questions, “designed to coach a witness” (Durrant, 2003, p. 11). While it is possible for an astute attorney to influence a client’s behavior on testing without the client’s full awareness of even being coached, this is not in accordance with the standards of ethical conduct for the profession of law (see ABA DR 7-102 A 4 and 6), which societies rely on to maintain a sense of fairness and justice. Although attempts to deceive through artful manipulation is unethical, University of Pennsylvania law professor Geoffrey Hazard, a member of the ABA’s Ethics 2000 Commission, stated “But the fact of the matter is, lawyers do tell their clients what to do, indirectly” (cited in Dolan, 1994, p. A17). Abraham Lincoln, renowned as an honest trial lawyer, was the attorney of record on six cases brought before the U.S. Supreme Court (Dirck, 2007). His advice to those in the law profession was to, “be honest at all events” (Frank, 1961, p. 4.).

**Recommendations by Test Distributers**

In medicolegal cases utilizing neuropsychology practice, law and psychology professionals occasionally find themselves debating on how test materials or specific information about or derived from tests should be handled. The official policy of Pearson, a major distributor of psychological tests, can be helpful in these types of legal proceedings. It states that (a) copyrighted and confidential test material should not be released to individuals who are not professionally qualified to obtain them, (b) if non-psychologists are granted access to test materials in litigation, then a protective order should be made to prohibit parties, including counsel, from making copies of proprietary test materials, (c) copyrighted test materials should not be publicly available in the records of any court case, (d) any testimony that could potentially threaten test security should be sealed and not included in the record, (e) every effort should be made to exclude specific references to test content and responses in pleadings and court documents as well as portions of documents that include references to test items that should be sealed, and (f) any test item description, specific questions, or responses to items should be excluded from the judge’s final opinion, including both findings of fact and conclusions of law (retrieved February 25, 2008, from http://harcourtassessment.com/haiweb/Cultures/en-US/Harcourt/ general/LegalPolicies.htm).

Though behavioral science experts generally accept the procedures stated above, many attorneys may still see it as a simple matter to obtain the raw test data necessary for cross examination or other useful legal actions. Even so, the disclosure of either
test data or test materials to nonpsychologists can compromise test security (Chadda & Stein, 2005). It may be well for the attorney to consider the opinion of Prohaska and Martin (2007) as cited in The Alabama Lawyer, the official journal of the Alabama State Bar association:

It is unreasonable for attorneys or decision-makers to assume that individuals with improper training or no training may be able to utilize raw neuropsychological test data in a proper manner. Production of raw test data directly to an attorney who is not a trained neuropsychologist or to other untrained professionals falls short of the protection relevant to the verification or cross-examination process. The best course of action is for the production of the raw test data to take place between neuropsychologists. (p. 223)

Moreover, although physicians may have knowledge of neurologic injuries, if they do not have accredited training in neuropsychology they should defer to licensed psychologists with such training. In Downs v. Perstorp Components, Inc., 126 F. Supp. 2d 1090 (E. D. Tenn. 1999), the court held that neuropsychological evaluations fall under the scope of psychologists with professional training and expertise in neuropsychology. The court excluded the testimony of a physician, who had administered neuropsychological tests to the plaintiff, because the physician did not meet Daubert standards as an expert witness (see also brief of APA as amicus curiae to the Georgia Supreme Court in Chandler v. Morris, S91C1591, June 1992).

Trade Secrets and Copyright Law

Attorneys whose actions diminish test security may violate copyright and trade secret laws. Test publishers, such as Pearson, consider its secured tests to be trade secrets. The executive officer and general counsel for the Association of State and Provincial Psychology Boards (ASPPB), Randy Reaves, states that threats to test security undermine the validity of tests and violate federal copyright laws (Holloway, 2004). The International Public Management Association for Human Resources specifically states that any acts that compromise the integrity of their testing products and procedures could provoke possible litigation. Similarly, Yvette Beeman (cited in Association of Test Publishers, 2003), an attorney for Harcourt Assessment (now owned by Pearson), warned that making test materials available to individuals who are not licensed to administer and interpret them can reduce the validity of those tests and may be in violation of copyright laws (see also Holloway, 2004). Moreover, Richard Campanelli, the Director of the Office of Civil Rights at the U.S. Department of Health and Human Services (HHS), the federal office answerable for enforcement of the Health Insurance Portability and Accountability Act (HIPPA; HHS, 2003), indicated that the disclosure requirements of HIPPA’s Privacy Rule do not supersede Trade Secrets law (cited in Andberg, 2004; see Section 1172(e) of HIPAA, Protection of Trade Secrets). Prohaska and Martin (2007) commented on this point when they stated, “The claimant’s right to his records should not extend to the neuropsychologist’s tools in his or her trade” (p. 223).

As previously stated, violations of test security can also reduce the commercial value of the tests. NAN states that a loss of test security “can harm copyright and intellectual property rights of test authors and publishers” (Axelrod, Heilbronner, et al., 2000, p. 384). The problematic disclosure of test materials and related proprietary information is further complicated by the potential widespread dissemination of confidential test information via the Internet (Rogers, 2004). The Tennessee Psychological Association (TPA) recommends the filing of a federal civil lawsuit in cases of copyright violations of psychological tests (Erickson, 2008).

States also recognize the importance of protecting the proprietary interest of test developers. For instance, the State of Michigan issued court rules MCR 2.302(8) regarding Protective Orders, which states “a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way,” and MCR 2.313(A)(5) provides for an award of expenses incurred if a motion for a protective order is denied in whole or in part (retrieved March 30, 2008, from http://www.ediscoverylaw.com/uploads/file/MI2_302.pdf).

Case Law and Truth-Seeking Function of the Courts

In Tehan v. Shott (1966), the U.S. Supreme Court concisely affirmed, “The basic purpose of a trial is the determination of the truth.” Courts in the U.S. legal system serve the public by resolving legal disputes in a manner that promotes ethics, justice, and truth (Howe et al., 2007). Providing the trier of fact with the truth about an issue does this. In many cases, the truth-seeking function of the courts is enhanced by psychologist’s expert testimony based on data obtained from psychometric tests. In fact, neurologists have formally stated the benefit of testimony from neuropsychologists as follows, “Courts have become increasingly oriented toward expert testimony, and standardized information and neuropsychological data have a distinct advantage in this setting” (AAN, 1996, p. 295). Sweet (1999) noted, “No other healthcare field is better able, because of the strong connection between science and practice, to meet the consensual professional demands of the Daubert decision than clinical neuropsychology” (p. 469). For these reasons, expert scientific testimony derived, in part, from psychometric testing can be used to

The importance of truth seeking is reflected in the Preamble to the Standards of Professionalism and Civility approved by the Utah Supreme Court (Durrant, 2003) as follows:

In fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. (p. 6)

**Proposed Guidelines for Attorneys Utilizing Neuropsychology Practice**

When a client in a medicolegal case is suspected of compromised brain functioning, threats to test security are a problem that should be of mutual concern to practitioners of law and those of psychology. However, the legal community has not provided any specific ethical guidelines requiring attorneys to maintain test security (Howe, 2006). In particular, Victor and Abeles (2004) pointed out that the ABA’s professional code of conduct for attorneys does not make a “clear statement about what is acceptable or unacceptable” client preparation for a neuropsychological examination (p. 376; see also Gershman, 2002). The guidelines presented in Tables 1 and 2 are framed to provide assistance in this area. They are intended to complement rather than to substitute for any of the ABA’s policies on professional conduct. Over time, implementation of guidelines could have a positive impact by reducing inadvertent problematic client preparation in medicolegal cases by practitioners of law. Intentional actions by practitioners of law to alter the assessment of their client’s true neurobehavioral functioning may be abated as the courts, reducing inadvertent problematic client preparation in medicolegal cases by practitioners of law. The guidelines establish helpful parameters for attorneys in preparing their clients for a neuropsychological examination. Although helpful, it is not requisite that attorneys follow the suggestions in Table 1 because neuropsychologists will usually inform the client themselves prior to the examination.

Table 1 clarifies attorney actions that can undermine the validity of psychometric testing, if not, entirely diminish the worth of the neuropsychological examination. These threats to test security include actions taken before the examination. If an attorney does not proactively avoid the problematic practices as outlined in Table 2, in many cases, the best clinical judgment of the neuropsychologist is that the results do not actually represent the examinee’s true functioning. Indeed, in any medicolegal case where violations of the guidelines described in Table 2 occur, the Court should recognize that such attorney actions might interfere with the trier of fact’s ability to deduce the truth and administer justice. This may be in violation of the ABA’s (2002)

**Table 1.** Appropriate attorney preparation of a client for a neuropsychological examination

<table>
<thead>
<tr>
<th>The attorney should inform the client:</th>
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<tbody>
<tr>
<td>They are being referred for a neuropsychological examination to evaluate the existence and extent of any</td>
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<td>compromise of brain functioning (e.g., cognitive and/or behavioral dysfunction)</td>
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<tr>
<td>That no invasive procedures will be done (e.g., no needle sticks) and that the examination simply involves</td>
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<tr>
<td>answering questions and taking paper and pencil type tasks and possibly using a computer, which the</td>
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<tr>
<td>examiner will show the client how to use</td>
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<tr>
<td>Whether or not their participation is voluntary or compulsory, and any limits of confidentiality</td>
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<td>concerning the results of the examination</td>
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<td>Of the date, time, and place of the examination</td>
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<tr>
<td>Of the time it may take to complete the examination</td>
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<tr>
<td>To bring with them any eyeglasses or hearing aids that they normally use</td>
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<tr>
<td>To bring with them all relevant medical records, including copies of all previous neuropsychological,</td>
</tr>
<tr>
<td>neurological, neuroimaging (e.g., CT, DOI, EROS, MRI, fMRI, MEG, PET, and SPECT), psychological,</td>
</tr>
<tr>
<td>psychiatric, orthopedic, and rheumatologic reports</td>
</tr>
<tr>
<td>To respond honestly during the entire examination process, including the clinical interview and testing</td>
</tr>
<tr>
<td>To get a good nights rest (generally 7–9 hours of restful sleep) for at least two consecutive nights</td>
</tr>
<tr>
<td>just prior to the examination</td>
</tr>
<tr>
<td>To take all of their medications to the examination or have a written record of all of the medications</td>
</tr>
<tr>
<td>that they are currently taking</td>
</tr>
<tr>
<td>To notify the neuropsychologist prior to the examination if they are taking prescription medication that</td>
</tr>
<tr>
<td>is potentially sedatinga</td>
</tr>
<tr>
<td>Not to drink alcohol or take street drugs (or prescription medications not prescribed for the client)</td>
</tr>
<tr>
<td>for at least 48-hr prior to the examination and to disclose to the neuropsychologist if they are</td>
</tr>
<tr>
<td>currently using or have used alcohol or street drugs in the past</td>
</tr>
</tbody>
</table>

**Table 2.** Attorneys’ actions that can undermine the validity of psychometric testing

<table>
<thead>
<tr>
<th>The attorney should inform the client:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do not advise the client to drink alcohol or take street drugs (or prescription medications not</td>
</tr>
<tr>
<td>prescribed for the client) for at least 48-hr prior to the examination and to disclose to the</td>
</tr>
<tr>
<td>neuropsychologist if they are currently using or have used alcohol or street drugs in the past</td>
</tr>
</tbody>
</table>

**Notes:** CT = computed axial tomography; DOI = diffuse optical imaging; EROS = event related optical signal; MRI = magnetic resonance imaging; fMRI = functional magnetic resonance imaging; MEG = magneto encephalography; PET = positron emission tomography; and SPECT = single photon emission computed tomography.

aThe decision to provisionally discontinue any medication on the day of the examination should only be made with the express approval of the prescribing physician in consultation with the patient. At no time should the referring attorney communicate to their client any action or inaction regarding prescription medications that would jeopardize the health and well being of their client.
Table 2. Examples of attorney preparation of a client that may reduce the validity of the neuropsychological examination and raise ethical questions

<table>
<thead>
<tr>
<th>Open and known coaching:</th>
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<tbody>
<tr>
<td>Counseling a client to provide inaccurate, incomplete (omitting relevant facts), or misleading statements</td>
</tr>
<tr>
<td>Telling the client to prolong their answers, resulting in insufficient time for a full assessment</td>
</tr>
<tr>
<td>Persuading the client to either ingest medication or discontinue medication for the express purpose of suppressing true abilities</td>
</tr>
<tr>
<td>Informing a client on how to beat tests designed to detect deception, malingering, or symptom validity</td>
</tr>
<tr>
<td>Coaching, training, or educating the client on what symptoms to report and/or how to appear impaired on testing</td>
</tr>
<tr>
<td>Utilizing electronic devices clandestinely to eavesdrop and/or coach a client during a neuropsychological examination</td>
</tr>
<tr>
<td>Any other overt communication or act that would hinder the accurate assessment of the client’s true neurobehavioral functioning</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Covert coaching:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prepping a client on symptoms of cognitive or psychiatric disorders</td>
</tr>
<tr>
<td>Giving a client medical advice or a diagnosis to convince the client they have a mental disorder attributable to a specific cause</td>
</tr>
<tr>
<td>Providing the client with access to test materials, questions, or answers prior to a neuropsychological examination</td>
</tr>
<tr>
<td>Communicating with the client about methods to find out about specific tests</td>
</tr>
<tr>
<td>Sitting in and directing the patient how to respond during a neuropsychological examination</td>
</tr>
<tr>
<td>Directly or subtly persuading a client about what to accentuate or what to minimize during the clinical interview and testing</td>
</tr>
<tr>
<td>Knowingly utilizing the services of, or referring a client to, a neuropsychologist that does not assess for effort</td>
</tr>
<tr>
<td>Having a third party prep a client in a manner that may affect the validity of the subsequent neuropsychological examination</td>
</tr>
<tr>
<td>Informing the client about the content (test items), test answers, underlying constructs or objectives of specific tests</td>
</tr>
<tr>
<td>Providing to the client the names of specific psychometric tests prior to the neuropsychological examination</td>
</tr>
<tr>
<td>Informing the client about specific scales, tests, interviewing techniques, or other procedures to detect response validity</td>
</tr>
<tr>
<td>Any other covert act or communication that would compromise the integrity of any test and the valid interpretation thereof</td>
</tr>
</tbody>
</table>

Unknowingly coaching a client in a manner that threatens test security: |
- Use of media materials (e.g., articles, books, brochures, videos), test materials, or presentations for client education or instruction |
- Other threats to test security: |
  - If the attorney is the referring party, then communicating to the neuropsychologist the nature of the referral and the specific referral question or questions to be answered is appropriate but the attorney should not instruct the clinician in what manner to perform the examination |
  - Participating in, directing, aiding, counseling, assisting, encouraging, or failing to report to proper authorities any of the actions outlined in this guideline

Note: Other threats to the validity of neuropsychological assessments in medicolegal cases include: (a) the selection of tests to be administered, (b) degree to which standardized procedures are followed, (c) level of credible effort exerted by the examinee [Bush & Lees-Haley, 2005], and (d) qualifications, objectivity, and conduct of the expert scientific witness.

**Model Rules of Professional Conduct**, which is designed to present a context for the ethical practice of law. For guidance on test security subsequent to testing, the reader should refer to the *Recommendations by Test Distributors* section presented earlier in this paper.

**Summary**

The interaction between practitioners of law and psychology in medicolegal cases can lead to differences of opinions regarding the importance of maintaining test security. Reasonably formulated guidelines that take into account scientific support of standardized and accepted testing practices, ethical ideals of the ABA, and the forensic and clinical consequences of valid versus invalid test data could exert a positive agreement on the necessity of test security in medicolegal practice. In spite of this, persons with significant economic and political interests that are affected by guidelines to protect test security may object. Practitioners of law with a genuine appreciation of valid expert opinions regarding brain-behavior should recognize that the guidelines are not intended to conflict with representing their clients but rather to assist the truth-seeking function of our legal system.

Moreover, this paper offers an opportunity within the professional specialty of neuropsychology to establish a consensus about guidelines to remedy threats to test security by attorneys in medicolegal cases, which is typically necessary for acceptance by courts as embodying standard practice. It is also an opportunity to seek greater input by practitioners involved in medicolegal cases into practices affecting their profession. One proposed solution is to have an interdisciplinary panel of members of the APA and ABA, “develop appropriate procedures for disclosure of test data in legal proceedings, and to address the important issue of attorney coaching” (Barth, 2000, p. 179). Chief Judge McClellan (2006), stated “The need for a constant dialogue between the lawyer and the psychologist is apparent. Our objective must be, wherever possible, to ensure that the perceived truth is the real truth” (p. 10).

**Conflict of Interest**

None declared.
References


