Neuropsychologist Experts and Civil Capacity Evaluations: 
Representative Cases

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Abstract

Clinical neuropsychologists accept more forensic referrals now and spend more time in forensic consulting than ever before. Recent surveys show weekly hours devoted to forensic consulting increased 97% in the past decade. During the same time period, the number of board certified neuropsychologists more than doubled. Under recently published Specialty Guidelines for Forensic Psychology, clinical neuropsychologists practice forensic psychology when applying scientific, technical, or specialized knowledge of neuropsychology to the law to assist in addressing legal, contractual, or administrative matters. Among those increasingly varied forensic referrals, clinical neuropsychologists are conducting more civil competency and capacity evaluations. Representative cases from three jurisdictions demonstrate how neuropsychologists provide expertise in matters involving testamentary capacity, contractual capacity, business judgments, and job capacity. Case presentations illustrate some of the strengths and weaknesses of neuropsychological evaluation of civil capacities. The article concludes with a “battle of experts” case involving five neuropsychologists with opposing opinions recently heard in a Federal Appellate court. Implications for neuropsychology training and forensic competencies are considered. In offering quality services to the legal profession, neuropsychologists support the truth-seeking function of the judiciary, promote justice, protect the profession, and serve public policy.

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Noting the dramatic expansion of forensic psychology practice, the American Psychological Association (APA) published new Specialty Guidelines for Forensic Psychology (2013). Those guidelines define forensic psychology as a professional psychology practice operating in any subdiscipline of psychology, when applying scientific, technical, or specialized knowledge of psychology to the law to assist in addressing legal, contractual, or administrative matters. In this regard, neuropsychologists who engage in forensic consulting are practicing forensic psychology (Sweet, Kaufmann, Ecklund–Johnson & Malina, in press). Lawyers seek neuropsychological consultation on an expanding set of legal issues, in part, because clinical neuropsychologists apply a scientific approach (Larrabee, 2012) that meets judicial standards for expert testimony (Kaufmann, 2012) and also because expert neuropsychologist opinions can assist the trier of fact (Fed. R. Evid. 702, [2016]).

The growth of forensic consulting in neuropsychology is well documented (Heilbroner, 2004; Kaufmann, 2009, Kaufmann & Greiffenstein, 2013; Sweet, King, Malina, Bergman & Simmons, 2002), including pediatric populations (Sherman & Brooks, 2012). Braun et al. (2011) noted a 6% average rate of annual growth in Lexis cases referencing neuropsychology from 2005 to 2009, and an unprecedented 20% increase in 2010. Figure 1 shows recently updated frequencies of legal cases using neuropsychological terms during the past 35 years with projections for the next 15 years. See Fig. 1 for updated comparisons of related disciplines through 2015.

Sequential neuropsychologist practice surveys (Sweet, Benson, Nelson & Moberg, 2015; Sweet, Meyer, Nelson & Moberg, 2011; Sweet, Nelson & Moberg, 2006) show increasing professional time committed to forensic referrals. Sweet and his colleagues (2015) noted that two thirds of ABCN neuropsychologists provide forensic consulting services. That group reported that weekly hours devoted to forensic consulting increased about 97% in the past decade. During the same time period, the number of board certified neuropsychologists more than doubled. Although forensic consulting revenue accounts
for an increasing portion of higher incomes for many neuropsychologists, some practitioners express ambivalence about this rapidly growing subspecialty practice (Kaufmann & Greiffenstein, 2013).

Some practitioners are uncomfortable with the adversarial nature of forensic consulting. Most formal neuropsychology training models (AACN Board of Directors, 2007; Hannay, Bieliauskas, Crosson, Hammeke, Hansher & Kofler, 1998) essentially ignore this rapidly growing practice area. Postdoctoral fellows gain forensic experience only if a supervising neuropsychologist accepts forensic referrals – as a growing number of them do. Sweet and colleagues (2015) reported that 46% of postdoctoral fellows received some forensic training. Some practitioners first encounter forensic work after receiving a subpoena for records, often generated from clinical work involving accident survivors with traumatic brain injury (Carone & Bush, 2013). Many neuropsychologists are unprepared to deal with lawyers or to engage in forensic practice. National neuropsychology organizations have responded to this growing need by developing more forensic continuing education workshops and publishers delivered new textbooks. Greiffenstein and Kaufmann (2012) also provided some helpful suggestions about how to enhance productive attorney-neuropsychologist relations in order to develop a forensic practice. Further, Demakis (2012) provided guidance specific to attorney needs in competency and capacity evaluations, see also Kolva and Rosenfeld (2012) and Benson and Romano (2012).

Demakis (2013a) described best practices in conducting civil competency and capacity evaluations, noting the importance of careful attention to statutory and case law requirements in the relevant jurisdiction (Demakis, 2013b). Quickel and Demakis (2013) highlight the key role neuropsychological findings play in making recommendations in civil competency and capacity cases. Not surprisingly, such cases have contributed to the aforementioned growth in forensic neuropsychology referrals. Forensic practitioners, in fact, have an ethical obligation (under APA standard 2.01f) to be reasonably familiar with relevant law before accepting cases (American Psychological Association, 2002). It is critical for forensic practitioners to know specific and current state statutes and jurisdictional case law – that evolve over time – in order to render expert opinions to the court. For a review and comparison of statutes and case law from all fifty states, the interested reader is directed to Demakis (2013b) with the caution that law may have changed since that publication. An updated legal analysis of this fifty state survey is beyond the scope of this article. Rather, the purpose of this article is to illustrate how neuropsychologists are brought into these matters and the types of issues they confront.

This article presents three cases from different jurisdictions, to highlight the importance of neuropsychological findings in civil capacity evaluations and to illustrate how facts and circumstances, in addition to laws, vary tremendously from one case to another. In re Protective Proceedings of Vernon H. (2014) demonstrates how a psychiatric interview contributed to a guardianship dispute between siblings regarding decisions under a durable power of attorney. In this Alaska Supreme Court case, a neuropsychological evaluation and expert opinion subsequently helped resolve the matter. Deroy v. Estate of Baron (2012)
illustrates how testamentary capacity differs from contract capacity and reasonably prudent business judgment. Here, a Connecticut state court misapplied a neuropsychological evaluation to an unstated legal standard to invalidate a will. The decision was overturned on appeal. Finally, Michael v City of Troy Police Dep’t and City Troy (2014, 2015, 2016) presents a “battle of the experts” among opposing neuropsychologists regarding the capacity of a police officer to return to work after brain tumor resection. This U.S. District Court case from Michigan reminds neuropsychologists to be mindful of the ecological validity and the limitations of our techniques in developing opinions about competencies to perform specific jobs. Each case illustrates how neuropsychologists are called upon to practice forensic psychology, that is, to apply specialized knowledge of psychology to the law to assist in addressing legal, contractual, or administrative matters.

Case Illustrations

Vernon H. was heard in Alaska, where an elderly father was hospitalized for tests due to confusion related to cancer treatment, sometime after granting a durable power of attorney to his eldest daughter. Vernon had been living with his youngest daughter for nine years. A son became concerned about his father’s capacity to manage his own affairs and initiated a guardianship and conservatorship proceeding after visiting his father, noting that he was “out of it,” and reviewing impressions from a psychiatric interview. During his visit, Vernon mistakenly “complained his children were not coming to see him.” Among other things, the guardianship petition alleged that the eldest and youngest daughters were not looking after their father’s best interests. Although it is difficult to understand all the historic factors that may give rise to a dispute about eldercare among siblings, a decision by the eldest daughter seems to have been a trigger. Here, sibling disputes seem rather likely because Vernon had 15 children.

Vernon was discharged and went to see his primary care physician, who observed that Vernon “was not very alert or himself at all” and recommended additional testing to the eldest daughter. Exercising her durable power of attorney, she declined additional tests claiming her dad was a “very spiritual person, and felt like his problem had actually gotten better or gone away.” On December 19, 2011, Alaska’s Adult Protective Services agency received an anonymous report about the time that several siblings visited Vernon. The report alleged that Vernon was “mentally incapacitated” and that the two daughter’s managing his care had “refused contact with family and disregarded physician care and advice.” The petition also raised concern about “possible financial exploitation.” The son had tried to persuade his father to move to a different residence. Vernon declined. The eldest daughter delayed treatment until his physician informed her Vernon would “likely DIE within a few days if she did not take him back to the hospital ASAP.”

Vernon was readmitted to the hospital on January 20, 2012. Records noted he was “pleasantly confused” as he underwent chemotherapy. At one point, the eldest daughter physically pushed a nurse who was attempting to administer morphine to Vernon. Vernon had to verbally intervened to request the medication, but the shoving incident prompted the hospital to file notice of harm with Adult Protective Services. The eldest daughter also attempted to limit her siblings from visiting Vernon. The son and a number of other siblings attempted to get Vernon to sign a new durable power of attorney, claiming that Vernon asked him to work with his attorney to help manage and distribute some financial assets. Vernon executed a will while still in the hospital. The son noted that Vernon was sluggish and required several minutes to write his name. He was not wearing his hearing aides or glasses, and had to be coached on the spelling of his name. The signing was videotaped. Vernon refused to give a copy of the will to his son.

On January 30, 2012, a nurse practitioner performed a psychiatric interview and found that Vernon’s mental state “varied somewhat since admission, with some definite clearing.” However, the eldest daughter reported that Vernon deteriorated a day before the nurse began her interview. The nurse noted that Vernon was “displaying a significantly fluctuating span of attention, an inability to encode and recall information, and general cognitive disorganization.” The nurse practitioner concluded “at this time the patient is not able to demonstrate that he can retain and weigh the risks and benefits of any information, and actually does not demonstrate capacity regarding the potential consequences of pain management on an acute basis” due to symptoms “very consistent with delirium.” These conclusions were cosigned by a physicians and were affirmed by the observations of other doctors and hospital staff over the next few days. However, the report noted Vernon’s delirium was acute and subject to change, and the nurse practitioner was “certainly not encouraging seeking guardianship at this time, based on the description of high functioning prior to delirium.”

Two days later, the son filed emergency and long-term petitions for guardianship over Vernon and for conservatorship. The petition mischaracterized the psychiatric interview as a “neuropsych evaluation” that determined that Vernon “is not competent to make treatment or financial decisions.” The son further alleged that the eldest daughter was attempting to remove Vernon from the hospital against his wishes and against medical advice. Vernon, through his private attorney, moved to dismiss the petition, stating the Vernon was lucid and competent, and that he wanted his eldest daughter to remain durable power of attorney.
Vernon retained a board-certified clinical neuropsychologist, who conducted two lengthy interviews and administered a battery of tests. The neuropsychologist concluded that Vernon was “unequivocally competent” and met “all criteria for being his own guardian, making his own decisions, and making informed choices about his own health care.” The neuropsychologist concurred with an opinion expressed by one of Vernon’s physicians on February 21, 2012 in his medical record, writing that Vernon “is fully competent to carry out complex decision making. He is cognizant of the risks/benefits and has good insight into what is happening to him medically and psychologically.” The neuropsychologist added that Vernon was suffering “emotional distress” due to his son’s petition, and further noted that Vernon was happy with the services provided by his two daughters and that he had no interest in relocating. One day before the trial, the son withdrew his petition. Although the sibling dispute continued, eventually prompting the Alaska Supreme Court to clarify statutes governing attorney fees, this case illustrates the value of a thorough neuropsychological evaluation and expert opinion in resolving disputes and avoiding unnecessary litigation. Here, a cogent expert opinion based on objective data from a neuropsychological evaluation clarified matters sufficiently to prompt the son to withdraw the petition before trial. Many elements of the legal dispute could have been avoided, had a comprehensive neuropsychological evaluation been completed before the family discord escalated. It was this discord that caused additional legal fees to accrue.

Deroy was a dispute involving competing wills and testamentary capacity, arising in Connecticut. The decedent, Baron, died on July 20, 2006, and was survived by three children. Two documents were submitted to the Probate Court purporting to be the last will and testament. The first will, dated February 12, 2002, devised the entire estate, including an 86 acre farm, to all three siblings in equal shares. The second will, dated July 3, 2002, gave the farm to the third sibling, while the remainder of the estate was distributed equally among all three children. Obviously, the second will gave the third child much more than the first will. The other two children contested the admission of the second will, claiming the decedent lacked testamentary capacity on July 3, 2002. The Probate Court disagreed, admitted the second will, and the two siblings appealed the judgment of the Probate Court.

On November 3, 2010, a court revisited the question of testamentary capacity and a two day trial commenced. The court issued a brief oral decision concluding that the decedent was “incompetent” to execute a will on July 3, 2002. The court explained that on June 10, 2002, at the request of the Baron’s attorney, a neuropsychological evaluation was conducted to determine whether the she was competent to make her own legal decisions. The neuropsychologist concluded, “Given her cognitive impairments, it is unlikely that she would be able to make fully informed thoughtful judgments regarding complex financial issues.” The neuropsychologist concluded that she was not only incompetent during the June 10, 2002, examination, but also opined that she remained incompetent to execute a new will some three weeks later. The presumption of continued incompetence was based on the neuropsychologist’s understanding of natural course of severe dementia. The neuropsychologist opined that Baron needed a conservator, which the court took as further evidence that he felt she was incompetent. Based on the foregoing, “the court finds that the decedent was incompetent on July 3, 2002, when she executed the will.” The trial court relied on the neuropsychological findings, but failed to articulate the legal standard used to evaluate those findings in its brief oral decision. On appeal, the two children who lost the farm claimed that the trial court applied an incorrect legal standard to the question of testamentary capacity.

In a 2 to 1 split decision, the appellate court reversed the trial court, finding that it relied excessively on the neuropsychologist expert opinion without applying a legal standard, concluding that it applied the incorrect legal standard. To make a valid will in Connecticut, the person needs a “mind and memory sound enough to know and understand the business upon which she was engaged, that of the execution of a will, and the very time she executed it.” State law also requires that an individual may possess the mental capacity to make a will, while being incapable of transacting other business. The minimum level of mental capacity required to make a will is less than that necessary to execute a contract or deed. The majority opinion claimed that the trial court wrongfully premised the finding of incompetency “entirely” on the neuropsychological evaluation and opinion. The majority believed the trial court relied solely on the neuropsychologist’s opinion that she was “unable to make an informed, thoughtful judgments regarding complex financial issues” and the recommendation for a conservator. Testamentary capacity law does not require the ability to comprehend “complex” financial transactions.

The dissent argued that the record was so brief that it was not clear what standard was used by the trial court and the majority should show greater deference to the trial court judge. The dissent indicated that the trial court simply noted some elements of the neuropsychologist’s testimony in finding that the decedent lacked testamentary capacity. Reporting testimony does not mean that it did not consider the remainder of the testimony, nor does it imply that it did not apply the proper testamentary capacity standard. More facts were included in the dissent, noting that the neuropsychologist found Baron was suffering severe dementia. For example, Baron did not know it was impossible to dispose of her property evenly while giving one daughter the largest asset. Moreover, the will signing was suspended when a question of her capacity arose. There is no evidence in the record that the trial court did not consider this information, even if it was not referenced in the brief oral decision. The dissent felt the majority had no basis to presume the trial judge did not consider all the evidence presented and apply the proper standard.
Dissenting opinions commonly rely on presenting alternative facts from trial testimony—facts the majority did not cite—in order to justify opposing the decision. At trial, the neuropsychologist also indicated that Baron was confused about the distribution of her estate. Specifically, the neuropsychologist asked “what her plans were regarding her bounty” or assets. She reported that all three of her children were to share assets equally, but that one child would get the farm. The farm was her most substantial asset. Then, the neuropsychologist asked and Baron answered that her farm was her biggest asset. When the neuropsychologist asked how will all assets be shared equally, if one child gets the biggest asset? Baron failed to appreciate this impossibility and could not understand the incompatibility of her statements. The neuropsychologist opined that the dementia was so advanced that little day-to-day variability would be observed in her mental tracking. The neuropsychologist concluded, “she would not have been able to fully understand the implications of what she was doing in terms of signing something like a will.”

Finally, the attorney present at the July 3, 2002, execution of the second will also testified that he stopped the signing “because I had the impression that there was some confusion on [her] part.” The attorney was so uncertain that he called to voice his concerns and to confer with a senior colleague. A second attorney questioned Baron and elected to proceed with the signing. The neuropsychologist’s observation about the incompatibility of her desire to distribute her assets equally while also giving one child her largest asset, and the attorney uncertainty about her confusion, were the additional facts that formed the basis for the dissenting opinion.

Deroy instructs neuropsychologists about the significance and permanence of words, phrases, and formulations contained in evaluation reports. Here, a neuropsychological evaluation and expert testimony played a pivotal role in the outcome of a trial conducted more than eight years later and an appeal heard ten years after the evaluation. Remarkably, the appellate judges’ differing views of the neuropsychologist’s expert testimony gave rise to a split decision. Dissenting opinions always draw upon additional facts to justify opposition and these facts are telling. While the interested reader may wonder who got it right, clearly this case was a close call.

Deroy also reminds neuropsychologists to be mindful of key state statutes and that all states have a higher burden for contract capacity than testamentary capacity. Indeed, changing a will may only require a few lucid moments (as observed by disinterested parties) and individuals with dementia may meet that standard. Contract capacity requires more sustained and complex mentation and the neuropsychologist’s reference to “thoughtful judgements regarding complex financial issues” introduced language that complicated this case. Psychologists are not trained in legal terms of art and that discussion is beyond the scope of this article, but this phrase may invoke an even higher standard associated with the business judgment rule for corporations.

Michael involves a “battle of the experts” among four neuropsychological evaluations addressing whether a police officer is capable of performing his duties after brain tumor resection. This case involves a neuropsychological evaluation required by the Police Department (POL), a second evaluation conducted for the plaintiff officer (PLA); a third conducted by the City under the collective bargaining agreement (CITY), and a fourth at the behest of the Troy Police Officers Association (TPOA). Although his case involves fitness for duty questions, it is used here to illustrate the key role of neuropsychological evaluations in capacity to return to work and perform job-related tasks.

In 1987, Michael was hired as a police officer. He was diagnosed with a nonmalignant recurring brain tumor in March 2000 and underwent a craniotomy to remove the tumor. A second craniotomy was performed in 2002, and a third in March, 2009. As the result of observed changes in behavior from 2007 to 2009, the Police Department required Michael to undergo his first neuropsychological evaluation (POL) in December, 2009. The City Human Resources Department contracted with a large private vendor for fitness for duty evaluations, which, in turn, subcontracted with a private neuropsychologist for this specialized evaluation. On December 7, the POL neuropsychologist interviewed Michael and administered tests for more than seven hours. In preparing a report, the POL neuropsychologist reviewed results in light of the job description for a police officer.

POL results showed “several cognitive losses which are directly related to deteriorating brain functions... difficulties switching mental set,... visual memory, tactile perception, problem-solving, and new learning.” On December 18, 2009, the Police Department learned that the neuropsychologist concluded “there is convincing evidence that Officer Michael is not competent to handle his duties as a police officer.” In a letter dated December 29, 2009, Michael’s treating physician wrote, “Michael’s medical condition in no way effects his ability to properly and adequately care for his children, and in no way effects his judgment or temperament.” Although this letter was part of the record sought to evaluate his capacity to work, it is unclear when the Police Department received this letter. On January 20, 2010, Michael was placed on unpaid administrative leave.

On February 1, 2010, Michael retained a neuropsychologist for a second evaluation (PLA) and opinion. The PLA neuropsychologist reviewed the results from the POL evaluation, then interviewed Michael and administered additional neuropsychological tests. However, the PLA neuropsychologist did not have the job description for a police officer. Although PLA
results were consistent with POL findings, the PLA neuropsychologist concluded his findings “do not indicate any functional incapacity or incompetency” and “do not indicate any basis for Mr. Michael not to return to duty as a police officer in the capacity in which he was serving premorbidly.” The PLA report recommended no restrictions.

A neurologist reviewed the results from the POL and PLA neuropsychological evaluations on behalf of the City’s long-term disability insurance carrier. The neurologist declared Michael was fit for duty, “Based on the claimant’s essentially normal neurological examinations, his excellent seizure control with no recurrence since April 2009, and his most recent normal neuropsychological evaluation, there is no evidence of any active limitation that would preclude the claimant from performing his duties as a police officer.” The neurologist opined that the POL report contained several erroneous statements about impairments that were not based on the claimant’s actual test performance. Essentially, the POL and PLA formulation became the basis for a “battle of experts.”

Under the collective bargaining agreement the City requested another review and Michael obtained a third neuropsychological evaluation (CITY) on August 11, 2010. The board certified neuropsychologist conducted an interview and reviewed the POL and PLA results in light of the job description for the police officer. The CITY neuropsychologist reported that he could not “in good conscience indicate that he can safely return to full duties.” The CITY neuropsychologist opined that Michael had problems with “unstructured constructional capacities, motor problem-solving, cognitive set-shifting capacities, compromised upper extremity sensory-motor functions that can adversely impact job functions.” An addendum to the report described the impact of these deficits on high-speed defensive driving, split-second decision making, and hand-to-hand application of force, up to and including deadly force. The CITY neuropsychologist concluded that these problems would pose a safety risk to himself and others under certain circumstances.

Finally, TPOA advised Michael to have another neuropsychological evaluation performed for yet another independent opinion. Another board certified neuropsychologist conducted an evaluation on September 15, 2010, after reviewing the POL, PLA, and CITY results. The TPOA evaluation noted that Michael was functioning within normal limits in most areas “measured except executive functions – a relative weakness associated with brain injury to the frontal lobe.” The TPOA neuropsychologist concluded,

“I cannot recommend that the patient return to full patrol duties as a police officer, a job description that requires quick planning, judgment, and alteration of behavior in response to circumstances. Safety with use of weapons and high speed driving would be in question. In all other respects, however, the patient is intact and desk duty as a police officer, including duties which require organization, attention, and concentration would be appropriate.”

All four neuropsychological evaluations, formulations, and expert opinions were reviewed by yet another neuropsychologist for the City’s insurance company. This reviewer disagreed with the POL evaluation, finding the neuropsychologist’s impressions baffling because the report noted neuropsychological deficits where none existed. In that protocol, for example, this fifth neuropsychologist opined that a slightly slower score on Trails B would not be considered a deficit. The reviewer considered the interpretation of the PLA evaluation to be most accurate. The data from the PLA evaluation “notes all scores and domains tested to be within the average to high average range, which would not be indicative of any restrictions or limitations in regard to the claimant’s work capacity as a police officer.” This insurance company reviewer also opined that “the neuropsychological data does not reach a level of significance as to preclude [Michael] from his work capacity as Police Officer.”

Interestingly, Michael asked to meet with the TPOA neuropsychologist on December 7, 2011. After that meeting, the TPOA neuropsychologist issued an addendum recommending that the Police Department directly evaluate Michael’s executive functioning in high-speed driving and “search and shoot” tests. The TPOA neuropsychologist suggested that a passing score would confirm the capacity to perform duties of a police officer despite identified cognitive weaknesses on the neuropsychological evaluation.

In contrast to the previous cases about testamentary capacity, contract capacity, and business judgment, Michael illustrates how important it is to understand the job requirements when asked to offer opinions about work capacity. Neuropsychologists cannot simply administer traditional tests from a common battery and draw conclusions without reviewing job descriptions and considering specific duties. In matters of testamentary and contract capacity, neuropsychologists have a number of relevant, well validated measures (e.g. Independent Living Scales). However, few neuropsychological measures are uniquely adapted to specific employment settings, an arena more familiar to industrial organizational psychologists.

Here, the reader is left to sort through substantial amounts of data from four neuropsychological evaluations that took place in less than nine months and two separate insurance reviews. Ecological validity is the underlying issue and it is notable that an additional year past before a neuropsychologist offered an evaluation solution based in specific job-related behavioral competencies. That is, why not just directly test his ability to perform in high speed driving and “search and shoot” scenarios to determine whether he has the capacity to return to work as a police officer? In essence, the neuropsychological evaluations
highlighted some difficulties with executive functions, but one cannot directly predict the ability to perform specific jobs unless those skills are directly evaluated.

The District Court ruled in favor of the City’s decision not to return Michael to active duty. Michael appealed, claiming the Police Department discriminated against him. While portions of this litigation are not relevant to this article, the appeal was heard by a three judge panel in the Sixth Circuit Michael v City of Troy Police Dep’t and City Troy (2015). In a 2 to 1 split decision, the majority affirmed the District Court ruling that the City’s decision was “objectively reasonable.” In a comparatively lengthy dissenting opinion, one judge presents the neuropsychological evaluations and reviews, claiming that the majority did not properly consider all of the facts before it. The dissent noted,

“irony (and likely bias) in the fact the two doctors selected by the City to evaluate Michael found him unfit for duty, whereas the two doctors selected by the City’s insurance carrier found just the opposite, thus denying Michael disability benefits despite Michael’s alleged inability to perform his job duties.”

Here, the City cannot have it both ways in this battle of the experts. At the very least, the neuropsychologists’ opinions call into question the reasonableness of other neuropsychologists’ opinions and cannot be dismissed and ignored. In the end, Michael’s request for reconsideration en banc (by the entire Sixth Circuit) was denied Michael v City of Troy Police Dep’t and City Troy (2016).

Conclusion

Figure 1 extends previous work showing the steady long-term trend toward increasing use of neuropsychologist experts in legal matters involving brain – mental state – behavior relations. Practicing neuropsychologists are spending 97% more time engaged in forensic consulting activities than they did ten years ago, even as the total number of board certified neuropsychologists has more than doubled during that time period. It is clear that the current number of neuropsychologists will be unable to meet this growing demand for forensic consulting services. Further, it is time to revisit training requirements for neuropsychologists in order to build competency to address this expanding market demand, because there is no evidence that it will decline. If neuropsychologists do not meet this growing demand, other para-professional consultants with inferior methods will attempt to fill the need.

This article highlighted neuropsychological consultation in civil capacity cases as an emerging area of expertise for practicing neuropsychologists. Those who choose to engage in this area need to understand the unique legal requirements applied to variable fact patterns as presented in detail in this article. Vernon demonstrated how a neuropsychological evaluation tailored to the presenting problem can diffuse a sibling dispute about power of attorney decision making and avoid costly litigation. The facts in Deroy illustrated a very common legal distinction between testamentary capacity and contractual capacity, while alluding to standards for reasonable business judgement about complex financial matters. Deroy also highlighted how uninformed words and phrases in a neuropsychological evaluation can take on new legal meaning a decade later. Finally, Michael presents the “battle of experts” that often occurs when four neuropsychological evaluations take place in nine months. Further, testamentary and contractual capacity are much different that capacity to do a job – the latter requires a job description review and an appreciation of specific job duties. Michael also revealed how some traditional neuropsychological evaluations may suffer limitations in ecological validity when used to answer questions about jobs in specific employment settings. Indeed, more relevant and practical evaluations tools may answer questions about competency to perform a job.

As forensic consulting opportunities continue to expand, neuropsychologists who develop forensic skills may avail themselves to practice forensic psychology. That is, they may apply scientific, technical, or specialized knowledge of psychology to the law to assist in addressing legal, contractual, or administrative matters. Brodsky and Robey (1973) first coined the term “courtroom familiarity” as a minimal competence required for forensic consulting. Greiffenstein and Kaufmann (2012) provided five basic principles of effective neuropsychologist-attorney interactions:

- Understand legal bases
- Practice competent neuropsychology
- Support board certification
- Adhere to ethical principles
- Be courtroom familiar

Poor courtroom familiarity and misunderstanding the legal bases of role requirements are the most common challenges for neuropsychologists who accept forensic referrals. However, if those neuropsychologists follow suggestions provided in
workshops and textbooks, they will find that forensic consulting is a rewarding way to diversify practice and develop a new revenue stream. In offering quality – relevant and reliable – services to the legal profession, neuropsychology supports the truth-seeking function of the judiciary, promotes justice, protects the profession, and serves public policy.

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