

Position Statement Regarding the Use of Third Part Observers (TPO) During Forensic Psychological/Neuropsychological Assessments

Clinical Neuropsychologists/Clinical Psychologists rely in part on administration of tests to assist the trier of fact in reaching a well-informed decision on medical diagnoses and causation in instances of presumptive neurobehavioral dysfunction. Neuropsychological tests have been shown to be reliable and valid measures when administered in a standardized fashion. The undersigned chose to issue this position statement in order to emphasize the importance that the administration of the neuropsychological measures remain consistent with this standardization procedure. We are aware that there have been instances when attorneys have requested that a third-party observer be present in the examination room when neuropsychological tests are administered to a litigant. The Courts of Virginia have been asked to rule Ordering TPO in Civil Court Matters involving Psychological / Neuropsychological Evaluations. [Note: This issue is not germane to training situations or matters involving “anxious” minor children, and/or the use of interpreters.]

We are in support of the Position Statement(s) by the American Academy of Clinical Neuropsychology (2001) and the National Academy of Neuropsychology (1999), as well as updated and more recent Interorganizational Position Statements by the National Academy of Neuropsychology (2021), the American Academy of Clinical Neuropsychology (2021) and the American Academy of Professional neuropsychology (2021 on the presence of observers during neuropsychological testing and confirming the organizations’ opposition to third party observer (TPO).

Psychological/Neuropsychological test measures have not been standardized in the presence of an observer. Rather, neuropsychological test administration has been standardized using a rigorous set of controlled conditions, which did not include the presence of a third party. In addition, the presence of a third party observer and/or the videotaping the administration of formal test procedures is inconsistent with positions set forth in American Psychological Association (APA). Manuals for a number of common standardized tests (for example, the WAIS III, WMS-III, and others) specifically state that third party observers should be excluded from the examination room to keep it free from distraction.

The primary rule governing the admissibility of expert testimony in Virginia is Federal Rule of Evidence (FRE) 702 which states: “A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

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The Virginia Academy of Clinical Psychology (VACP) is of the opinion that the presence of a third party observer (which includes but is not limited to attorney's, their representatives, the use of one-way mirrors or other electronic means such as video/audio taping), during the formal forensic psychological and/or neuropsychological testing significantly jeopardizes the validity of the generated data, scientific opinions and admissibility of said opinions which are subsequently generated. There are NO PUBLISHED OR ACCEPTED NORMS for our standardized tests being administered in a TPO environment. This violation in test administration standardization will significantly jeopardize the neuropsychologist's ability to provide admissible testimony as well as testimony which assists the trier of fact.

Since American Psychological Association ethics require psychologists to state any possible limitations of their findings, in legal proceedings it would appear that psychologists would essentially need to indicate that their findings and interpretations may be impacted in known and unknown ways if a TPO is used during Standardized Test administration and they would have to acknowledge they would therefore be less certain about results when standardization is violated in this manner, than if the testing was conducted in a standardized manner without observers or recording. In essence, the testifying Psychologist would not be able to offer an opinion "Beyond a Reasonable Professional Certainty".

There is conflict between those who advocate for an open process, with the "protection" afforded by observation and recording versus those who are committed to the science and mathematics of reliability and validity of the measurements taken. For many psychologists, such third party observation is akin to "contaminating the evidence".

Our professional opinion is that the use of a third party observer during a forensic psychological and/or neuropsychological evaluation does not meet an acceptable standard of practice in this geographic region and is not permissible under current professional and ethical standards. To participate in such an evaluation may well constitute a violation of the ethical standard of practice for the profession of licensed clinical psychologists.

To the Licensed Psychologist reader of this document: If you AGREE, please send an email Dr. Ted Peck at epeckphd@gmail.com with the subject line "2023 TPO Position Statement. In the message section, just say "I agree with the stated Position Statement regarding TPO ... AND place your name, that you are licensed in Virginia and your geographic location. Example: Ted Peck, Clinical Psychologist, Richmond Virginia. Dr. Peck will add your name to the VACP Position Statement. Some may have signed this Position Statement as early as 2006, when it was first created under VACP authority. Please feel free to sign again!

Signed,

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[Folks – for those of you who like references beyond the National Academy of Clinical Neuropsychology, APA Div 40 and other organization’s (and inter-organizational position statements, these current (as recent as 2021) and recent past articles provide a great deal of background information which supports the above position.

1. Archives of Clinical Neuropsychology 00 (2021) 1–7

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Update on Third Party Observers in Neuropsychological Evaluation: An Interorganizational Position Paper

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Received 8 March 2021; revised 2 March 2020; Accepted 9 March 2021

Abstract

Objective: The National Academy of Neuropsychology (NAN), the American Academy of Clinical Neuropsychology (AACN), and the American College of Professional Neuropsychology (ACPN) collaborated to publish an update to their original position statements, confirming the organizations' opposition to third party observer (TPO).

Method: A review of literature addressing TPO effects, ethical standards, professional organization position statements, test publisher policies and new telemedicine developments was completed to obtain consensus on relevant issues in TPO and recording of neuropsychological evaluations.

Results: TPO has been shown to impact the cognitive functions most often assessed in forensic or medicolegal settings. Third party observation, whether in person, recorded or electronic, remains a potential threat to the validity and reliability of evaluation results, and violates test security guidelines, ethical principles and standards of conduct in the field. Demands for TPO in the context of medicolegal or forensic settings have become a tactic designed to limit the ability of the consulting neuropsychologist to perform assessment and provide information to the trier of fact.

Conclusion: The field of neuropsychology opposes the presence of TPO in the setting of medicolegal or forensic neuropsychological evaluations.

Keywords: Assessment; Forensic neuropsychology; Professional issues

2. The Clinical Neuropsychologist 2022, VOL. 36, NO. 3, 523–545 Official position of the American Academy of Clinical Neuropsychology on test security

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ABSTRACT Objective: To provide education regarding the critical importance of test security for neuropsychological and psychological tests, and to establish recommendations for best practices for maintaining test security in forensic, clinical, teaching, and research settings. Previous test security guidelines were not adequately specified. **Method:** Neuropsychologists practicing in a broad range of settings collaborated to develop detailed and specific guidance regarding test security to best ensure continued viability of neuropsychological and psychological tests. Implications of failing to maintain test security for both the practice of neuropsychology and for society at large were identified. Types of test data that can be safely disclosed to nonpsychologists are described. **Results:** Specific procedures can be followed that will minimize risk of invalidating future use of neuropsychological and psychological measures. **Conclusion:** Clinical neuropsychologists must commit to protecting sensitive neuropsychological and psychological test information from exposure to nonpsychologists, and now have specific recommendations that will guide that endeavor.

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Closing comments: Establishing and maintaining policies and procedures that protect psychological and neuropsychological tests from inappropriate disclosure to nonpsychologists is essential, and such guidelines likely require regular updating, given rapid development in technology and emerging legal precedents. Otherwise, there is a clear risk that the future use of such tests will not produce valid results. The range of academic/training, clinical, and forensic scenarios in which there is risk of improper disclosure of test information is broad. When related to academic/training and clinical scenarios, access to test information is primarily under the control of the psychologist examiner, with the exception of testing for educational accommodations. It is primarily within forensic scenarios that practitioners may encounter energetic opposition to maintaining test security from attorney advocates. This latter scenario requires special consideration, in order to balance the legal perspective of a 'level playing field' among individuals with opposing legal interests versus the need to guard against the invalidation of the very tools that test developers and publishers spend considerable time and money creating, and without which psychologists who provide testing services cannot practice. With regard to respecting the rights of all interested parties in forensic scenarios, practitioners consider the best means of maximizing test security concerns, while facilitating legal and appropriate access to test information. Maintaining psychological and neuropsychological test security is essential for protecting the profession's ability to serve the needs and safety of society. The Clinical Neuropsychologist 541 Executive summary Psychological and neuropsychological test security is a critical issue which, without meticulous adherence by practitioners, threatens the entire enterprise of

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psychological and neuropsychological testing. If test questions and stimuli, instructions, scoring methods, and other sensitive information become available to non-psychologists, test result accuracy will be sacrificed, at considerable risk and cost to society, as well as to the viability of clinical neuropsychology as a specialty. Objective psychological and neuropsychological testing requires that examinees have no access to test questions and answers in advance of their examination. Unfortunately, despite previous position papers in neuropsychology and psychology on test security, exact procedures to be followed to maintain test security have largely not been specified. In addition, the evolving digitization of information can provide for ready uploading of test materials, leading to mounting threats to test security. Requests and, indeed demands, which are particularly problematic for neuropsychologists include: allowing observers at neuropsychological examinations; allowing test takers and/or their legal counsel to record by audio or video the entire examination, including test administration procedures; and providing test item responses and test materials from neuropsychological exams to non-psychologists (e.g., attorneys, physicians, examinees), who do not have adequate training in interpretation of neuropsychological testing and are under no ethical obligations regarding test security. With regard to respecting the rights of all interested parties in forensic scenarios, practitioners consider the best means of maximizing test security concerns, while facilitating legal and appropriate access to relevant test information. This AACN position paper provides comprehensive guidelines to maximize test security in all venues in which neuropsychologists and psychologists are involved, such as forensic, educational, and clinical assessments; teaching and training settings; and research.

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Appendix 1. State of Maine test protection statute Whereas, current law does not protect from disclosure neuropsychological and psychological testing materials; and Whereas, disclosure of neuropsychological and psychological testing materials and distribution to even just one person who is the subject of testing or to many persons who may be the subjects of the testing will compromise and invalidate such testing; and Whereas, maintaining the integrity of the testing materials is critical to test results and to the functioning of the system of neuropsychological and psychological testing in this State and requires the immediate action of the Legislature; and Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore, Be it enacted by the People of the State of Maine as follows: A. Except as provided in paragraph B, neuropsychological or psychological test materials and neuropsychological or psychological test data, the disclosure of which would compromise the objectivity or fairness of the evaluation methods or process, may not be disclosed to anyone, including the person who is the subject of the test, and are not subject to disclosure in any administrative, judicial or legislative proceeding. B. A person who is the subject of a neuropsychological evaluation or psychological evaluation is entitled to have all records relating to that evaluation, including neuropsychological or psychological test materials and neuropsychological or psychological test data, disclosed to any neuropsychologist or psychologist who is

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qualified to evaluate the test results and who is designated by the person. A neuropsychologist or psychologist designated to receive records under this paragraph may not disclose the neuropsychological or psychological test materials and neuropsychological or psychological test data to another person. Additional information can be found at the following web site: http://www.mainelegislature.org/legis/bills/bills_126th/chapters/PUBLIC353.asp Appendix 2. American Psychological Association (2002) ethical principles of psychologists and code of conduct, standards 9.04 versus 9.11 9.04 Release of Test Data. (a) The term test data refer to raw and scaled scores, client/ patient responses to test questions or stimuli, and psychologists' notes and recordings concerning client/patient statements and behavior during an examination. Those portions of test materials that include client/patient responses are included in the definition of test data. Pursuant to a client/patient release, psychologists provide test data to the client/ patient or other persons identified in the release. Psychologists may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances is regulated by law. (See also Standard 9.11, Maintaining Test Security.) (b) In the absence of a client/patient release, psychologists provide test data only as required by law or court order. 9.11 Maintaining Test Security. The term test materials refers to manuals, instruments, protocols and test questions or stimuli and does not include test data as defined in Standard 9.04, Release of Test Data. 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.

Journal of Forensic Neuropsychology

CONTENTS (Vol 4, No. 2) 2008

3. **Third Party Observers: Why All the Fuss**

Page Range: 1 - 15

DOI: 10.1300/J151v04n02_01

Robert J. McCaffrey PhD, Julie K. Lynch, Christine L. Yantz

Following a brief discussion of the emergence of third party observation as an issue in neuropsychology, this article reviews the social psychological theory of social facilitation. Social facilitation refers to the impact of another person, whether as an observer or a performer of the same activity, on an individual's performance. Both performance enhancements and impairments can be caused by this phenomenon. The article concludes with a review of the empirical studies that have demonstrated that a third party observer significantly impacts an individual's performance on

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some neuropsychological tests.

Keywords: social facilitation, third party observer, forensic, standardized test administration

4. Effect of a Third Party Observer on Neuropsychological Test Performance Following Closed Head Injury

Page Range: 17 – 25 2008

DOI: 10.1300/J151v,04n02_02

Julie K. Lynch PhD

The effect of a third party observer on neuropsychological test performance was examined within the framework of social facilitation. Social facilitation refers to the influence of an observer's presence on human behavior. Previous studies of social facilitation have demonstrated that an observer improves performance on easy or welllearned tasks and diminishes performance on complex or novel tasks. To examine social facilitation effects on neuropsychological testing, the Trail Making Test, Verbal Paired Associates subtest from the Wechsler Memory Scale-Revised (WMS-R), Finger Tapping Test, Grip Strength, and the Grooved Pegboard were administered to 60 individuals with a self-reported history of mild to severe closed head injury. Half of the participants received a standard test administration, and the other half were tested in the presence of a third party observer. A statistically significant difference between groups was found on the Verbal Paired Associates delayed recall from the WMS-R with the observed group recalling fewer word pairs than the unobserved group.

Keywords: forensic, third party observer, social facilitation, standardized test administration

5. Effects of a Supervisor's Observation on Memory Test Performance of the Examinee: Third Party Observer Effect Confirmed

Page Range: 27 – 38, 2008

DOI: 10.1300/J151v04n02_03

Christine L. Yantz, Robert J. McCaffrey

Studies showing impairing third party observation effects on neuropsychological testing led to the National Academy of Neuropsychology's policy statement recommending that third party observers, other than supervisors for training purposes, should be excluded during neuropsychological test sessions. The current study was designed to determine if the presence of the examiner's supervisor during testing had similar impairing effects on memory performance as did other forms of third party observers. This study examined the effects of supervisory observation on the Memory Assessment Scales performance of 45 undergraduates. The results showed that the Global and Verbal Memory summary scores were significantly lower in the observed group than the unobserved group. The presence of an evaluator's supervisor negatively impacted an examinee's memory test performance, even when the examinee was informed that the presence of the supervisor was to observe the examiner's administration of the test and not the examinee's performance.

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Keywords: third party observer, Memory Assessment Scales, supervision, neuropsychological training

6. Effects of a Third Party Observer During Neuropsychological Assessment: When the Observer is a Video Camera

Page Range: 39 – 48, 2008

DOI: 10.1300/J151v04n02_04

Marios Constantinou, Lee Ashendorf, Robert J. McCaffrey PhD

Several studies have reported that the presence of a third party observer during neuropsychological assessment negatively affects the test performance of the examinee. A previous study (Constantinou, Ashendorf, & McCaffrey, 2002) demonstrated that the presence of an audio recorder as the third party observer during neuropsychological assessment also has a negative effect on the performance. The present study was designed to investigate whether or not a video recorder as the third party observer affects neuropsychological test performance. Results showed that the presence of a video recorder had a negative impact on memory test scores. This study confirms findings from the social facilitation literature that the presence of a video camera impacts task performance, and also replicates our earlier work with an audio recorder as third party observer.

Keywords: Third party observer, video recorder, audio recorder, neuropsychological evaluation, standardized test administration

7. Third Party Observers: The Effect Size is Greater Than You Might Think

Page Range: 49 – 64, 2008

DOI: 10.1300/J151v04n02_05

Brandon E. Gavett, Julie K. Lynch PhD, Robert J. McCaffrey PhD

Third party observers have been found to significantly impair neuropsychological test performance on measures of attention, verbal memory, verbal fluency, and cognitive symptom validity. One measure of the importance of a research-based finding for clinical practice is effect size. Effect sizes were calculated for selected social facilitation literature and empirical studies of the impact of a third party observer on formal neuropsychological measures. The average effect size estimate found for the social facilitation research was large. Effect size estimates associated with findings from the third party observer research were, on average, medium for memory measures and small for motor and attention/ executive measures. These findings indicate that the presence of an observer during a neuropsychological evaluation should be expected to have a clinically meaningful impact on an examinee's test performance, with memory measures particularly vulnerable.

Keywords: third party observer, effect size, social facilitation

8. Ethical Dilemmas with Third Party Observers

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Page Range: 65 – 82, 2008
 DOI: 10.1300/J151v04n02_06
 Kevin Duff PhD, Jerid M. Fisher

The practice of forensic neuropsychology can lead to many potential ethical dilemmas, including the request that a third party observer be present during an examination. Following a case example, we review relevant Ethical Standards from the recent revision of the American Psychological Association's Ethics Code (APA, 2002), as well as policy statements by the National Academy of Neuropsychology (NAN, 2000) and the American Academy of Clinical Neuropsychology (AACN, 2001) that should be considered when confronted with the request for observation by a third party. As many ethical dilemmas are rarely clear-cut, their answers will likely generate additional questions for the individual practitioner and the profession. Finally, we provide some suggested courses of action when presented with similar requests.

Keywords: ethical standards, forensic, neuropsychological evaluation, third party observer

9. Some Final Thoughts and Comments Regarding the Issues of Third Party Observers

Page Range: 83 – 91, 2008
 DOI: 10.1300/J151v04n02_07
 Robert J. McCaffrey

Clinical Neuropsychologists/Clinical Psychologists need to be aware of the issues associated with requests for third party observers to be present during an evaluation and be prepared to address these issues before they arise. While the literature to date has focused upon the impact of the third party observer on the examinee's test performance, the issue of examiner reactivity to the presence of an observer remains largely unstudied. The data from an evaluation conducted with a third party observer present cannot be deemed to be either a reliable or valid indication of the examinee's current neuropsychological status. As such, any data obtained in the presence of a third party observer may be considered as unreliable and any opinion testimony based upon those data inadmissible.

Keywords: third party observer, forensic neuropsychology, examiner reactivity, clinical training

10. National Academy Of Neuropsychology

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Test Security: An Update

*Official Statement of the National Academy of Neuropsychology
Approved by the NAN Board of Directors 10/13/2003*

The National Academy of Neuropsychology's first official position statement on TPO was approved on October 5, 1999 and published in the Archives of Clinical Neuropsychology in 2000 (Volume 15, Number 5, pp. 383-386). Although this position statement has apparently served its intended purposes, questions have arisen regarding the potential impact of the 2002 revision of the APA Ethics Code (APA Ethical Principles of Psychologists and Code of Conduct, 2002) on the original position statement, which was based upon the 1992 APA Ethical Principles of Psychologists and Code of Conduct. The 2002 revised APA Ethics Code seems to necessitate no basic changes in the principles and procedures contained in the original paper, and requires only some alterations and clarification in wording. Specifically, the 2002 revised APA Ethics Code distinguishes between test data and test materials. According to Code 9.04:

Test data "refers to raw and scaled scores, client/patient responses to test questions or stimuli, and psychologists' notes and recordings concerning client/patient statements and behavior during the examination. Those portions of test materials that include client/patient responses are included in the definition of test data."

According to Code 9.11:

Test materials "refers to manuals, instruments, protocols, and test questions or stimuli and does not include test data" (as defined above).

Psychologists are instructed to release test data pursuant to a client/patient release unless harm, misuse, or misrepresentation of the materials may result, while being mindful of laws regulating release of confidential materials. Absent client/patient release, test data are to be provided only as required by law or court order. In contrast, psychologists are instructed to make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with such factors as law and contractual obligations.

The distinction between test data and test materials increases conceptual clarity, and thus this language has been incorporated into the updated position statement that follows. Beyond this change, we do not believe that the 2002 revision of the APA Ethics Code calls for additional changes in the guidelines contained in the original

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paper. That is, if a request is made for test materials, the guidelines in the original position paper remain fully applicable. Further, despite the intended distinction between test materials and test data and the differing obligations attached to each, a request for test data still appears to necessitate the safeguards described in the original position statement in most circumstances in which neuropsychologists practice. The release pursuant to client/patient consent alone is still likely to conflict not only with the NAN original Test Security position statement, but also with one or both of 2002 revised APA Ethics Codes 9.04 and 9.11. This is because release of test responses without the associated test materials often has the potential to mislead (and is also often impractical given the manner in which test responses are often embedded in test materials). Further, in many cases, test data and test materials overlap, given the current state of many neuropsychological test forms, and thus to release the test data is to release the test materials. In other cases, test materials might easily be inferred from test data, and although release of the data might not technically violate the 2002 revised APA Ethics Code 9.11, it may well violate the intent of the guideline. Thus, even if requirements are met under 9.04, such test release may well still conflict with the procedures or principles articulated in 9.11.

Thus, requests not only for release of test materials (manuals, protocols, and test questions, etc.), but also for certain test data (test scores or responses where test questions are embedded or can be easily inferred) will typically fall under the guides and cautions contained in the original and restated Test Security position papers. True raw test scores or calculated test scores that do not reveal test questions, do not require such test security protection. It is unfortunate that the new 2002 revised APA Ethics Code, while clearly attempting, and for the most part achieving, clarity in endorsing the release of raw and scaled test scores, test answers, and patient responses, does not address the very practical problem of releasing data which imply or reveal test questions. This is not a trivial concern when state licensure board ethics committees may be forced to investigate charges that relate to such ambiguities. Until such clarifications are offered by APA, we suggest a conservative approach that protects these imbedded and inferred questions, and treating them as one would test materials as proffered by the NAN Revised Test Security Paper below. Further revisions of the NAN Test Security guidelines will follow any clarifications by APA of the Ethics Code.

Revised Test Security Paper

A major practice activity of neuropsychologists is the evaluation of behavior with neuropsychological test procedures. Many tests, for example, those of memory or ability to solve novel problems, depend to varying degrees on a lack of familiarity with the test items. Hence, there is a need to maintain test security to protect the uniqueness of these instruments. This is recognized in the 1992 and 2002 Ethical Principles of Psychologists and Code of Conduct (APA, 1992; Code 2.1, and APA, 2002; Code 9.11, Maintaining Test Security), which specify that these procedures are to be used only by psychologists trained in the use and interpretation of test instruments (APA, 1992; Codes 2.01, 2.06; Unqualified Persons; and APA, 2002; Code 9.04; Release of Test Data).

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In the course of the practice of psychological and neuropsychological assessment, neuropsychologists may receive requests from attorneys for copies of test protocols, and/or requests to audio or videotape testing sessions. Copying test protocols, video and/or audio taping a psychological or neuropsychological evaluation for release to a non-psychologist potentially violates the Ethical Principles of Psychologists and Code of Conduct (APA, 1992; APA, 2002), by placing confidential test procedures in the public domain 2.10), and by making tests available to persons unqualified to interpret them (APA, 1992; Codes 2.02, 2.06 and 2.10; APA, 2002; Codes 9.04 and 9.11). Recording an examination can additionally affect the validity of test performance (see NAN position paper on Third Party Observers). Such requests can also place the psychologist in potential conflict with state laws regulating the practice of psychology. Maintaining test security is critical, because of the harm that can result from public dissemination of novel test procedures. Audio- or video recording a neuropsychological examination results in a product that can be disseminated without regard to the need to maintain test security. The potential disclosure of test instructions, questions, and items by replaying recorded examinations can enable individuals to determine or alter their responses in advance of actual examination. Thus, a likely and foreseeable consequence of uncontrolled test release is widespread circulation, leading to the opportunity to determine answers in advance, and to manipulate test performances. This is analogous to the situation in which a student gains access to test items and the answer key for a final examination prior to taking the test.

Threats to test security by release of test data to non-psychologists are significant. Research confirms what is seemingly already evident: individuals who gain access to test content can and do manipulate tests and coach others to manipulate results, and they are also more likely to circumvent methods for detecting test manipulation (Coleman, Rapport, Millis, Ricker and Farchione, 1998; Wetter and Corrigan, 1995; Youngjohn, 1995; Youngjohn, Lees-Haley & Binder, 1999). Consequently, uncontrolled release of test procedures to non-psychologists, via stenographic, audio or visual recording potentially jeopardizes the validity of these procedures for future use. This is critical in a number of respects. First, there is potential for great public harm (For example, a genuinely impaired airline pilot, required to undergo examination, obtains a videotape of a neuropsychological evaluation, and produces spuriously normal scores; a genuinely non-impaired criminal defendant obtains a recorded examination, and convincingly alters performance to appear motivated on tests of malingering, and impaired on measures of memory and executive function). Second, should a test become invalidated through exposure to the public domain, redevelopment of a replacement is a costly and time consuming endeavor (note: restandardization of the many measures of intelligence and memory, the WAIS-III and WMS-III, cost several million dollars, took over five years to complete, and required testing of over 5000 individuals). This can harm copyright and intellectual property interests of test authors and publishers, and deprive the public of effective test instruments. Invalidation of tests through public exposure, and the prospect that efforts to develop replacements may fail or, even if successful, might themselves have to be replaced before

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too long, could serve as a major disincentive to prospective test developers and publishers, and greatly inhibit scientific and clinical advances.

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If a request to release test data or a recorded examination places the psychologist or neuropsychologist in possible conflict with ethical principles and directives, the professional should take reasonable steps to maintain test security and thereby fulfill his or her professional obligations. Different solutions for problematic requests for the release of test material are possible. For example, the neuropsychologist may respond by offering to send the material to another qualified neuropsychologist, once assurances are obtained that the material will be properly protected by that professional as well. The individual making the original request for test data (e.g., the attorney) will often be satisfied by this proposed solution, although others will not. Other potential resolutions involve protective arrangements or protective orders from the court. (See the attached addendum for general guidelines for responding to requests).

In summary, the National Academy of Neuropsychology fully endorses the need to maintain test security, views the duty to do so as a basic professional and ethical obligation, strongly discourages the release of materials when requests do not contain appropriate safeguards, and, when indicated, urges the neuropsychologist to take appropriate and reasonable steps to arrange conditions for release that ensure adequate safeguards.

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The Clinical Neuropsychologist
2001, Vol. 15, No. 4, pp. 433+439

1385-4046/01/1504-
Swets & Zeitlinger

SPECIAL PRESENTATION

11. Policy Statement on the Presence of Third Party Observers in Neuropsychological Assessments*

American Academy of Clinical Neuropsychology

Purpose

The purpose of this policy is to clarify what is the appropriate response of a clinical neuropsychologist when a request is received for the presence of a third party during a medicolegal consultation and patient examination.

Definitions

For the purposes of this policy, two classes of third party observers are recognized, viz., involved and uninvolved parties.

Involved third parties are those who, directly or indirectly, have some stake in the outcome of an examination of a particular plaintiff in civil litigation. This stake may derive from a legal, financial, family, social, or other relationship or benefit. Involved parties may or may not be known or familiar to the plaintiff patient. For example, an unfamiliar agent of the plaintiff's attorney would be deemed an involved party for the purposes of this policy.

Uninvolved third parties have no stake in the outcome of a plaintiff patient's examination, directly or indirectly. Instead, uninvolved third parties do have an interest in the behavior of the examiner or in the examination process or in the behavior of the patient during the assessment as an exemplar of such relevant entities as a disease (e.g., cerebrovascular disease, closed-head injury), a condition (e.g., dementia, aphasia), or a

phenomenon (e.g., visual neglect, right hemiparesis), or others (e.g., malingering, manifestations of personality disorders). An uninvolved third party does not have an interest in the particular individual who serves as the exemplar. The purpose of the presence of uninvolved parties generally is to learn about or practice the administration of neuropsychological tests, procedures, interviews, and so forth, and to observe how patients respond to the administration of such tests or to receive critical feedback concerning their performance in the role of an examiner. Uninvolved parties include health-care professionals and student professionals, for example, student neuropsychologists, other student psychologists, student psychometrists, and cognate professionals or technical personnel.

Medicolegal Consultations

Scope of Application

The context for this policy pertains to medicolegal consultations in which the consulting clinical neuropsychologist is being asked to formulate professional opinions about a patient's condition within their area of expertise in the specialty of clinical neuropsychology in relation to tort litigation, or related insurance benefits involving third parties. This policy is not intended for application to clinical (medical) consultations in which the

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clinical neuropsychologist has direct responsibility for the assessment, diagnosis, or treatment of

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the patient. Likewise, this policy is not intended for application to criminal forensic consultations that involve issues of criminal liability or culpability because the right to legal representation and a third party observer is absolute in criminal matters.

Policy

It is not permissible for involved third parties to be physically or electronically present during the course of an evaluation assessment of a plaintiff patient with the exception of those situations specified below.

Exceptions

In the case of toddlers and young children, when their physical separation from the parental or caretaker figure results in, or is known to result in, a behavioral reaction (e.g., disruptive behavior, dysphoric state, social withdrawal) such as to invalidate the outcome of a neuropsychological or neurobehavioral assessment, it may be permissible to allow the caretaker (e.g., parent) to be physically present, at least initially until rapport is established, if this exception results in the cessation or mollification of the behavioral reaction or otherwise allows more useful assessment data to be obtained. For example, it might be facilitative to allow a family member, who may otherwise have a distorting influence, to be present in the testing room when a child simply will not stay in the examination room without that family member.

Likewise, so long as the latter principle obtains, viz., it would allow more useful assessment data to be obtained in the professional opinion of the clinical neuropsychologist, this exception may be extended to certain cases involving older children and adult patients with extreme behavioral disturbances, for example, severe mental illness, delirium.

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When the circumstances are such that the presence of an involved third party may have both a potentially distorting and a potentially facilitating influence on the collection of assessment data, it shall be the sole responsibility of the clinical neuropsychologist employing their best clinical judgment to determine whether or not to proceed with the assessment of the plaintiff patient on the particular occasion. As always, it remains incumbent upon the clinical neuropsychologist to make known any limitation regarding the reliability and validity of their conclusions and other professional opinions.

Fundamental Issue

The fundamental issue with which this policy is concerned is the validity of the results obtained from a clinical neuropsychological assessment process. As a general principle, it is important that the clinical neuropsychologist not deviate from their ordinary clinical practices when called upon to do the same in the execution of an evaluation or in their treatment of a plaintiff patient. The greatest degree of validity is understood to be obtained when the patient is motivated to cooperate with the examiner by performing in an optimal fashion in compliance with instructions, and in a candid or unbiased fashion, and that this occurs in the context of a controlled environment simulating or comporting with psychological laboratory conditions.

The presence of an involved third party observer potentially introduces a distortion of the patient's motivation, behavioral self-selection, and rapport with the examiner(s). For example, the patient's rapport may be more attached to, and their behavior at least somewhat directed toward, the involved third party. This introduces threats to the validity of the neuropsychological evaluation in ways potentially unknown to, and perhaps not perceptible by, the examiner.

Because the surreptitious eavesdropping on a patient during an examination or treatment is ethically proscribed, the mere displacement of the involved third party from the examination room to a remote site does neither necessarily eliminate

nor lessen the above described threats to the validity of the obtained psychometric or other evaluation data upon which the clinical neuropsychologist will rely in formulating their professional opinions. That is, a stealthy presence via such mechanisms as a one-way mirror, audio monitoring, video monitoring, or audiovisual monitoring, does not constitute a tolerable exception to the above-stated policy.

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DOCUMENTARY SUPPORT

Observer Adverse Effects

The presence of an involved third party observer during the neuropsychological examination may distract the examinee or distort patient motivation which could adversely affect test performance.

The distraction effect can come in different forms, that is, as an external distraction or an internal distraction, or some combination thereof. External distractions refer to stimuli that arise external to the patient and are potentially observable. These include, for example, sights and sounds. Under sights, the distracting stimuli could be simple physical movements, such as the involved third party observer turning their head in anticipation of a cough or sneeze. Also, the distracting visual stimuli could be more complex, such as postures ('body language') or facial expressions. Although it would be a wholly unsatisfactory solution, as discussed below, removal of the involved third party from the examination room may greatly reduce the source of external distractions. Internal distractions, on the other hand, generally are not directly observable as they arise from within the patient. These involve such stimuli as perceptions, attitudes, and social expectations on the part of the patient. For example, given that it appears that the financial rewards of a lawsuit may increase in some proportion to the severity of subjective complaints or claimed disabilities on the part of the patient, and knowing they are being observed by a representative of their own attorney, a patient may behave during the period of involved third party observation (by whatever means, including remotely) in such a way as they perceive would please this involved observer. Or the patient may suffer internal distraction from simply wondering how the involved third party observer is evaluating their behavior and test performance rather than being fully focused on the task at hand, (e.g., if an involved third party observer were to insist on access to such observation, it would be reasonable for the patient to assume that how they behaved during

observation was particularly important to the involved third party). In regard to internal distractions, the use of remote observation by audio or visual monitoring or videotaping does not greatly reduce the source of this type of distraction.

Psychologists are obligated to create a testing environment relatively free of distractions. Standard 15.2 of the Standards for Educational and Psychological Testing (American Educational Research Association, 1985) states, "The testing environment should be one of reasonable comfort and with minimal distractions" (p. 83).

The Standards for Educational and Psychological Testing also direct psychologists to follow the procedures for administration specified by the publisher in the test manual: "In typical situations, test administrators should follow carefully the standardized procedures for administration and scoring specified by the test publisher" (Standard 15.1, p. 83). The Wechsler Adult Intelligence Scale ± II, Administration and Scoring Manual (Wechsler, 1997) specifically states that involved third parties should be excluded from the testing area:

As a rule, no one other than you and the examinee should be in the room during the testing. Attorneys who represent plaintiffs sometimes ask to observe but typically withdraw this request when informed of the potential effect of the presence of a third person. (p. 29)

An almost identical statement against the presence of an involved third person is presented on page 30 of the Wechsler Memory Scale ± III, Administration and Scoring Manual (Wechsler, 1997).

In her authoritative work, Neuropsychological Assessment, Third Edition, (1995) Lezak notes that distractions in the testing environment adversely affect performance, and thus, jeopardize the validity of a neuropsychological assessment. She states:

It is not difficult to get a patient to do poorly on a psychological examination. This is

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especially true of brain damaged patients, for the quality of their performance can be exceedingly vulnerable to external influences or changes in their internal states. All an examiner need do is make these patients

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tired or anxious, or subject them to any one of a number of distractions most people ordinarily do not even notice, and their test scores will plummet. . .

Eliciting the patient's maximum output is necessary for a valid behavioral assessment. Interpretation of test scores and of test behavior is predicated on the assumption that the demonstrated behavior is a representative sample of the patient's true capacity in that area. (pp. 139±140)

Binder and Johnson-Greene (1995) demonstrated the negative effect that an involved observer had on test performance in a single case study. McSweeney, Becker, Naugle, Snow, Binder, and Thompson (in press) have detailed many of the ethical implications of the use of third party observers. Some of the adverse effects of observers on test performance have been systematically investigated in a body of literature that has come to be known as social facilitation research. McCaffrey, Fisher, Gold, and Lynch (1996) summarized the recent literature on social facilitation in their article on the presence of third party observers during neuropsychological evaluations. The social facilitation literature provides empirical evidence that the presence of a third party observer can alter cognitive and motor test performance whether or not the patient has a brain injury or disease.

The social facilitation effect causes examinees to perform better than usual on tests of simple or overlearned skills and poorer on tasks that are more difficult for them (McCaffrey et al., 1996). These adverse effects have been shown to occur even when the observer is behind a one-way mirror. Although there are no studies at present that demonstrate a social facilitation effect during video or audio taping, these alternatives to the physical presence of an observer in the room raise other important ethical and professional concerns (such as, problems involving test security, allowing testing materials to become part of the public domain, or potential misuse of assessment results

by third parties for purposes unrelated to the current case).

Test Administration and Interpretation

Psychological and neuropsychological tests have not been standardized in the presence of involved third party observers, and thus, it is inappropriate to compare the examinee's results to the normative results from the standardization sample. Departure from a standardized testing procedures may diminish the utility of the normative data. Thus, any factor that compromises the standard administration of a neuropsychological test may jeopardize the validity and reliability of the test's findings.

In a highly regarded book on the nature and use of psychological and neuropsychological tests, Anastasi (1988) stresses the importance of test standardization, "Standardization implies uniformity of procedure in administering and scoring the test. If the scores obtained by different persons are to be comparable, testing conditions must obviously be the same for all. Such a requirement is only a special application of the need for controlled conditions in all scientific observations. In a test situation, the single independent variable is often the individual being tested." (p. X).

The Standards for Educational and Psychological Testing (American Educational Research Association, 1985) stress the importance of following standardized procedures in Standard 15.1,

In typical applications, test administrators should follow carefully the standardized procedures for administration and scoring specified by the test publisher. Specifications regarding instructions to test takers, time limits, the form of item presentation or response, and test materials or equipment should be strictly observed. Exceptions should be made only on the basis of carefully considered professional judgment, primarily in clinical applications. (p. 83)

In the American Psychological Association's ethical principles of psychologists (American Psychological Association, 1992), ethical standard 2.04(c) Use of Assessment in General with

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Special Populations states in part, "Psychologists attempt to identify situations in which particular interpretations or assessment techniques or norms may not be applicable or may require adjustment

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in administration or interpretation because of factors such as..." Because no norms exist for testing in the presence of involved third parties, misinterpretation of test results may be common, and psychologists should be aware of the potential ethical difficulties involved in interpretation of test results under these circumstances.

If an involved third party were present during a neuropsychological examination, neuropsychologists should include in their report any concerns regarding limitations that this places on interpretation. This is made clear in ethical standard 2.05, Interpreting Assessment Results:

When interpreting assessment results, including automated interpretations, psychologists take into account the various test factors and characteristics of the person being assessed that might affect psychologists' judgements or reduce the accuracy of their interpretations. They indicate any significant reservations they have about the accuracy or limitations of their interpretations.

Ethical principle 2.02 (a), Competence and Appropriate Use of Assessments and Interventions, states, "Psychologists who develop, administer, score, interpret, or use psychological assessment techniques, interviews, tests, or instruments do so in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques." Thus, psychologists should be aware that the presence of an involved third party may alter the validity of test results and either refuse to administer tests under these circumstances or alter their interpretations if an observer has been present. The presence of an involved third party may especially impact on determinations made about the integrity of brain function, change over time intervals, and effects of treatment in individuals prone to easy disruption of function such as those with neurological conditions.

Test Security

Involved third party observers may undermine the neuropsychologist's ethical responsibility to maintain test security. This ethical principle is most clearly presented in Ethical Standard 2.10, Maintaining Test Security (American Psychological Association, 1992):

Psychologists make reasonable efforts to maintain the integrity and security of tests and other assessment techniques consistent with law, contractual obligations, and in a manner that permits compliance with the requirements of this code.

The same principle is also delineated in the Standards for Educational and Psychological Testing (1985). Standard 15.7 states that, "Test users should protect the security of test materials." These standards would be applicable whether the observation occurred in the testing room, behind a one-way mirror, or through audio or video monitoring or recording.

Test Misuse

The neuropsychologist has little or no control over how an involved third party observer will use the content of testing in the present or future cases. This lack of control over the data generated during a neuropsychological assessment may be incompatible with our ethical responsibilities. The American Psychological Association's (1992), Ethical Standard, 1.16, Misuse of Psychologists' Work states, "Psychologists do not participate in activities in which it appears likely that their skills or data will be misused by others, unless corrective mechanisms are available."

Involved third party observers could take notes and record specific test questions and answers to be used in preparing or coaching future litigants with neuropsychological claims. Moreover, poor performances could be misinterpreted by the third party resulting in incorrect conclusions. All these difficulties which could arise from the presence of an involved observer could result in a potential conflict with Ethical Standard, 2.02 (b), Competence and Appropriate Use of Assessments and Interventions:

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Psychologists refrain from misuse of assessment techniques, interventions, results, and interpretations and take reasonable steps to

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prevent others from misusing the information these techniques provide. This includes refraining from releasing raw test results or raw data to persons, other than to patients or clients as appropriate, who are not qualified to use such information.

As with the problem of test security, potential test misuse may occur regardless of the method of observation (i.e., actual presence in the same room, behind a one-way mirror, or audio or video monitoring/recording).

Responsibility in Forensic Situations

Because the presence of an involved third party observer is most commonly requested within a medicolegal context, several ethical principles may help to guide neuropsychologist's decisions regarding this issue. Ethical standard, 7.06, Compliance with Law and Rules, appears to indicate that it is the responsibility of the neuropsychologist to inform lawyers, judges, and others that the presence of an involved third party observer represents a potential ethical conflict. Ethical standard, 7.06, Compliance with Law and Rules, states:

In performing forensic roles, psychologists are reasonably familiar with the rules governing their roles. Psychologists are aware of the occasionally competing demands placed upon them by these principles and the requirements of the court system, and attempt to resolve these conflicts by making known their commitment to this Ethics Code and taking steps to resolve the conflict in a responsible manner.

In a similar vein, Ethical Standard, 1.02, Relationship of Ethics and Law, explicitly explains that, "If psychologists' ethical responsibilities conflict with law, psychologists make known their commitment to the Ethics Code and take steps to resolve the conflict in a responsible manner."

Confidentiality may also encompass the issue of involved third party observers. Ethical standard, 5.02, Maintaining Confidentiality, states that

"psychologists have a primary obligation and take reasonable precautions to respect the confidentiality rights of those with whom they work or consult..." Neuropsychologists need to communicate the potential limitations to confidentiality with all parties involved but especially with the patient.

Ethical standard, 7.01, Professionalism, informs the psychologist that the APA Ethics Code applies to the atypical professional activities that take place within the forensic context. Standard 7.01 states in part, "Psychologists who perform forensic functions, such as assessments, interviews, consultations, reports, or expert testimony, must comply with all other provisions of this Ethics Code to the extent that they apply to such work activities." This ethical standard makes clear that all ethical issues raised by the presence of an involved third party are applicable whether or not the neuropsychological assessment occurs in a forensic setting.

Ethical standard, 7.04, Truthfulness and Candor, emphasizes the need to communicate the bases for conclusions as well as any threats to the validity of an examination when an involved third party has been an observer.

7.04 (a) "In forensic testimony and reports, psychologists testify truthfully, honestly, and candidly and, consistent with applicable legal procedures, describe fairly the bases for their testimony and conclusions."

7.04 (b) "Whenever necessary to avoid misleading, psychologists acknowledge the limits of their data or conclusions."

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Position Statement Regarding the Use of Third Part Observers (TPO) During Forensic Psychological/Neuropsychological Assessments

11-12. Policy statement of the American Board of Professional Neuropsychology regarding third party observation and the recording of psychological test administration in neuropsychological evaluations

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GENERAL

Neuropsychologists are frequently presented with requests from parents, attorneys, nurse case managers, insurance representatives, school personnel, allied health professionals, family members or other interested parties who have some type of relationship with a patient or client examinee to directly observe or record the administration of psychological tests. Consequently, a number of practice concerns have been raised that include, but are not limited to, the effects on the examinee's performance and the psychologist administering the assessment, violations of testing guidelines, the impact on standardization procedures, the appropriateness of applying test findings to normative samples established under standardized circumstances, and test security. These requests can become even more problematic and complicated when the request occurs within the adversarial process associated with the legal system, such as competency hearings, custody evaluations, divorce proceedings, civil litigation, and criminal investigations (McSweeney et al., 1998; Sweet, Grote, & Van Gorp, 2002; Duff & Fisher, 2005; McCaffrey, Fisher, Gold, & Lynch, 2005; Howe & McCaffrey, 2010).

DEFINITION OF THIRD PARTY OBSERVATION

Third Party Observation (TPO) is defined in this practice guideline as the direct or indirect presence of an individual other than the patient or client and the psychologist or their technician administering a published psychological test in order to obtain objective data under standardized conditions for clinical, counseling, or forensic purposes in order to render clinical conclusions, opinions, interpretations, or recommendations based on the data collected. Direct presence means a person(s) physically present in the room other than the psychologist or his/her technician and the examinee. Indirect presence means viewing through a window, two-way mirror, use of any camera, or audio or video recording device, or any electronic or communication device. The act of recording includes the on-site transcription by a court recorder or reporter during an examination by either direct or indirect involvement (McCaffrey, Fisher, Gold, & Lynch, 1996; Constantinou, Ashendorf, & McCaffrey, 2002; Constantinou, Ashendorf, & McCaffrey, 2005; Barth, 2007; Eastvold, Belanger, & Vanderploeg, 2012).

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ETHICAL CONSIDERATIONS

The Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association (hereafter called the Ethics Code) helps guide the thinking and behavior of psychologists, and provides direction with regard to clinical practice standards. Relevant to TPO in the Ethics Code are both the General Principles and a number of the Ethical Standards.

Within the Ethics Code a series of General Principles are outlined with the intent of guiding psychologists to practice at the highest professional level. Relevant to TPO are General Principle: A (Beneficence and Nonmaleficence), B: (Fidelity and Responsibility), C (Integrity), and D (Justice).

In contrast to the General Principles, the Ethics Code offers specific standards that represent obligations to which psychologists are bound, and consequently form the basis for ethical violations and consequently the basis for sanctions. Most relevant to TPO are Ethical Standards 2 (Competence) and 9 (Assessment). (American Psychological Association, 2010).

Principle A: Beneficence and Nonmaleficence

Principle A is applicable and is described as follows: "Psychologists strive to benefit those with whom they work and take care to do no harm. In their professional actions, psychologists seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons, and the welfare of animal subjects of research. When conflicts occur among psychologists' obligations or concerns, they attempt to resolve these conflicts in a responsible fashion that avoids or minimizes harm. Because psychologists' scientific and professional judgments and actions may affect the lives of others, they are alert to and guard against personal, financial, social, organizational, or political factors that might lead to misuse of their influence. Psychologists strive to be aware of the possible effect of their own physical and mental health on their ability to help those with whom they work."

It is incumbent on psychologists to be vigilant about the impact of their professional opinion on others, particularly with regard to diagnostic testing. Psychologists' scientific and professional judgments and conclusions should be based on data from psychological assessments gathered in a standardized manner, and therefore without the influence of extraneous factors that might influence the collection of behavior samples. Psychologists must always be mindful that their verbal and written opinions affect the medical, social, and legal lives of others, and therefore must safeguard those with whom they interact professionally to do no harm.

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Principle B: Fidelity and Responsibility

Principle B is applicable and is described as follows. “Psychologists establish relationships of trust with those with whom they work. They are aware of their professional and scientific responsibilities to society and to the specific communities in which they work. Psychologists uphold professional standards of conduct, clarify their professional roles and obligations, accept appropriate responsibility for their behavior, and seek to manage conflicts of interest that could lead to exploitation or harm. Psychologists consult with, refer to, or cooperate with other professionals and institutions to the extent needed to serve the best interests of those with whom they work. They are concerned about the ethical compliance of their colleagues’ scientific and professional conduct. Psychologists strive to contribute a portion of their professional time for little or no compensation or personal advantage.”

It is the responsibility of all psychologists who elect to perform diagnostic testing, to do so within the established parameters of the instrument(s) they employ and therefore in a standardized manner. Whether or not a psychologist is engaged in a patient-doctor relationship, acting as an independent clinician, a clinician for an institution, state or federal agency, or an independent examiner for an insurance carrier or legal counsel, a professional obligation exists to uphold standards for the delivery of scientific work commensurate with the responsibilities to the profession, community and society in general.

Principle C: Integrity

Principle C is applicable and is described as follows. “Psychologists seek to promote accuracy, honesty, and truthfulness in the science, teaching, and practice of psychology. In these activities psychologists do not steal, cheat, or engage in fraud, subterfuge, or intentional misrepresentation of fact. Psychologists strive to keep their promises and to avoid unwise or unclear commitments. In situations in which deception may be ethically justifiable to maximize benefits and minimize harm, psychologists have a serious obligation to consider the need for, the possible consequences of, and their responsibility to correct any resulting mistrust or other harmful effects that arise from the use of such techniques.”

The practice and promotion of clinical assessment requires that psychologist present themselves and their work to others in an accurate and honest manner, and to avoid any misrepresentation of their findings. TPO alters the accuracy of test findings, and to ignore the considerable body of evidence supporting this fact, results in conscious misrepresentation.

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Principle D: Justice

Principle D is applicable and is described as follows. “Psychologists recognize that fairness and justice entitle all persons to access to and benefit from the contributions of psychology and to equal quality in the processes, procedures, and services being conducted by psychologists. Psychologists exercise reasonable judgment and take precautions to ensure that their potential biases, the boundaries of their competence, and the limitations of their expertise do not lead to or condone unjust practices.”

In an attempt to provide fair and just treatment to all patients and clients, psychologists do not modify assessment procedures or alter their work on the basis of personal opinion or professional bias, nor do they neglect to maintain an awareness of their competency level and the limitations of their expertise. To this end, APA and neuropsychology specialty organizations provide multiple continuing education opportunities for psychologists to learn, maintain, and improve their professional expertise, and avoid practices that are irregular or not commensurate with accepted clinical practice. Given the body of literature that exists regarding the negative effects of TPO, it is incumbent on psychologists who provide assessment services to not avoid this practice, but make clear to patients, families, and co-professionals that they do not condone the use of TPO.

Ethical Standard 2: Competence

Ethical Standard 2 is applicable to TPO and the recording of test administration. Section 2.04, Bases for scientific and Professional Judgments describes the following: Psychologists’ work is based upon established scientific and professional knowledge of the discipline. (See also Standards 2.01e, Boundaries of Competence).”

Ethical Standard 2.04. Ethical Standard 2.04 requires psychologists to conduct their practice within the boundaries of scientific knowledge. Texts on psychological testing have long cited the need to conduct testing in a distraction-free environment (Anastasia and Urbina, 1997). With the publication of the Wechsler Adult Intelligence Scale-Third Revision (WAIS-III) the Wechsler manuals have since stipulated “no one other than you and the examinee should be in the room during the testing session.” Administration further states, “Attorneys who represent plaintiffs sometimes ask to observe but typically withdraw this request when informed of the potential effect of the presence of a third person.” (WASI, WASI-II, WAIS-III, WISC-III, WMS-III, WAIS-IV, WMS-IV). Some test manuals indicate that the testing room should be quiet and distraction free limited to “A table or desk and two chairs, one for the examiner and one for the subject.”(WCST) Similarly, the manual for the California Verbal Learning Test- Second Edition (CVLT-II) states “as a rule, no one other than you and the examinee should be in the room during testing.”

Ethical Standard 9: Assessment

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Ethical Standard 9 is applicable to TPO and recording. In Section 9.01, Bases for Assessments, the code notes “(a) Psychologists base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings. (See also Standard 2.04, Bases for Scientific and Professional Judgments.)”

Test results generated in nonstandard methods that negatively impact the validity of the findings are insufficient. In forensic settings, psychologists are often required to use their findings in comparison with other evaluations. The ability to compare separate data sets, when one evaluation was conducted following proper testing procedures and the other evaluation had inherent threats to validity such as a third party observer is dubious. Under 9.01 (a) the psychologist cannot provide opinions or evaluative statements because TPO presence yields the evaluation of questionable validity.

(b) Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions or recommendations. (See also Standards 2.01, Boundaries of Competence, and 9.06, Interpreting Assessment Results.)

(c) When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations.”

Section 9.02: Use of Assessments. Section 9.02 describes the following: “(a) Psychologists administer, adapt, score, interpret, or use assessment techniques, interviews, tests, or instruments in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques. (b) Psychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established, psychologists describe the strengths and limitations of test results and interpretation. (c) Psychologists use assessment methods that are appropriate to an individual’s language preference and competence, unless the use of an alternative language is relevant to the assessment issues.”

Section 9.02 (a) indicates that test or instruments used in a manner inconsistent with the standardization of the measure and contrary to the test manual violate this standard. As such, TPO is contrary to this standard.

Section 9.06: Interpreting Assessment Results. Section 9.06 describes the following: “When interpreting assessment results, including automated interpretations,

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psychologists take into account the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences, that might affect psychologists' judgments or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations. (See also Standards 2.01b and c, Boundaries of Competence)."

Many authors and organizations (Anastasi and Urbina, 1997; National Academy of Neuropsychology, 2000; Oregon Psychological Association, 2012) emphasize that during test development, procedures are standardized without the presence of an observer and subsequently that data obtained outside the parameters of those procedures lack validity and affect interpretation.

Section 9.11: Maintaining Test Security. Section 9.11 raises the importance of maintaining test security. "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." Test security is a critical issue, as it addresses the prevention of unnecessary exposure of psychometric materials that would result in diminishing a test to accurately distinguish between normal and abnormal performance.

Several professional organizations have offered an opinion with regard to maintaining test security to include the APA. The APA describes test security as an important issue in the practice of psychology and states that it incumbent on psychologists to protect the integrity of psychological test materials (APA, 1999).

Other state and national psychological organizations as well as a number of authors have raised concerns about the potential for testing material to be used inappropriately by attorneys or become part of public domain where anyone could access this information (Wetter & Corrigan, 1995; McCaffrey et al., 1996; National Academy of Neuropsychology, 1999; American Psychological Association, 1999; American Academy of Clinical Neuropsychology, 2001; Essig, Mittenberg, Petersen, Strauman, & Cooper, 2001; Victor & Abeles, 2004; Kaufman, 2005; Kaufman, 2009; Morel, 2009; Oregon Psychological Association, 2012). Public accessibility would allow clients involved in litigation to be coached on how to perform on certain measures or give patients the opportunity to learn test material prior to an assessment, both of which would invalidate the results of a psychological assessment. As a result, several psychological organizations have taken a formal position against the presence of TPO during assessment.

The National Academy of Neuropsychology (Axelrod et al., 2000) advises that TPO is inconsistent with psychological guidelines and practices and as a result threatens the validity, reliability, and interpretation of test scores. The position of the National Academy of Neuropsychology is that TPO should be avoided whenever possible outside of necessary situations involving a non-forensic setting where the observer is both neutral and non-involved.

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The American Academy of Clinical Neuropsychology (AACN) has taken the position that “it is not permissible for involved third parties to be physically or electronically present during the course of an evaluation assessment of a plaintiff patient with the exception of those situations specified below” (page 434). Exceptions are described as including young children who require the presence of a family member, etc.

The executive committee of the Oregon Psychological Association (2012) adopted a clear and unequivocal policy that the observation of a third party compromises test validity and security and therefore advises against the presence of TPO during assessment. Similarly, the Michigan Psychological Association Ethics Committee has advised against TPO for the same reasons.

RESEARCH EVIDENCE

In addition to national, local and professional standards of ethical practice, a significant body of research evidence supports the negative impact of TPO. A review of the pertinent literature overwhelmingly supports that both direct and indirect TPO and recording affect the behavior of both the examiner and the examinee, and subsequently the validity of findings obtained in a psychological assessment with by limiting data interpretation and conclusions.

It is self evident that psychological evaluations *must* be conducted in a standardized fashion consistent with the publisher’s directives to ensure valid and reliable results. The consensus among reasonable psychologists is that any attempt by an examiner to modify test procedures or alter administration to accommodate observation or recording compromises test standardization. As a result, findings are likely to be invalid and cannot be determined to reflect a reasonable degree of certainty or fall within an accepted range of probability, as there is no basis for validating an assessment under these (observed or recorded) conditions. Test results therefore lack the normal and accepted parameters of validity and more importantly, do not reflect normal standards of psychological care. Not surprisingly, most publishers of psychological tests have cautioned against TPO in their instruction manuals and national organizations have advised against TPO (National Academy of Neuropsychology, 2000; Committee on Psychological Tests and Assessment, 2007).

The issue of TPO has been investigated by numerous researchers beginning with a case study by Binder and Johnson-Greene (1995). A substantial amount of research supports that the presence of an observer negatively affects the data obtained during an assessment, and these significant negative effects on test results have been consistently reproduced in all studies. More specifically, research has shown a significant impact on test performance on measures involving areas of executive functioning (Horowitz & McCaffrey, 2008), attention and processing speed (Binder & Johnson-Greene 1995; Kerher, Sanchez, Habif, Rosenbaum, & Townes, 2000), and memory/recall of information (Gavett, Lynch, & McCaffrey 2005; Lynch, 2005; Yantz & McCaffrey, 2005;

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Eastvold et al., 2012). Eastvold, Belanger and Vanderploeg' s (2012) meta analysis found negative effects on multiple cognitive measures and that attention, learning and memory (delayed recall) were most adversely impacted by the presence of an observer.

EXCEPTIONS TO TPO

Third Party Assistant (TPA)

In selected circumstances, the presence of a third party may be necessary to proceed with or complete a psychological assessment. In these cases rather than an involved third party observing or monitoring the behavior of the test administrator or examinee, the third party holds a neutral position and acts in an indirect manner to assist or expedite the completion of the assessment. Given this significant difference of purpose, we suggest that the presence of an additional party during an evaluation in these circumstances is more accurately identified as a third party assistant (TPA).

A TPA may be deemed appropriate in clinical examinations in which the examiner is acting as a clinical treater with an established patient-doctor relationship, as opposed to an independent psychological examination for an insurance companies or a forensic assessment in civil or criminal proceedings. A TPA may be appropriate in a testing situation in which the presence of a parent, family member or family friend is necessary, and without whose presence the examination could not proceed because of a variety of mental disabilities that require accommodations. Examples include patients diagnosed with autism or developmental disorders affecting intelligence, confirmed brain injury that precludes independent living, children who are either too young or too anxious to be left alone, elderly adults with compromised cognition who are unwilling to participate without the presence of a trusted family member or friend, patient's who have a thought disorder impacting reality testing, etc.

Alternatively, there are cases in which a language barrier precludes valid test administration. While the preference is for the examination to be conducted in the examinee's native language, in some these cases an interpreter may necessary because a native speaking psychological examiner is not available or within a practical distance. To avoid conflicts, the interpreter should have no relationship (such as family member) to the person being examined.

Similarly, if an examinee is deaf or hearing impaired an individual versed in American Sign Language (ASL) or a member of the deaf community would be necessary to complete an examination. Absent a qualified examiner fluent in sign language, a certified specialist may be necessary.

Student training presents another situation in which a TPA is considered appropriate. Not unlike the training of medical students in procedures, psychology students require direct observation and practice in the administration of psychological test procedures.

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In the above cases, the examiner is ethically required to document in the procedures section of the psychological report of any deviations of standardization or modifications in test administration. Clear note must be made of the limitations of normative data with subsequent impact on the generalization of findings.

FORENSIC EXAMINATIONS, INDEPENDENT MEDICAL EXAMINATIONS, AND ACTING AS AN EXPERT WITNESS

Psychologists who chose to perform forensic assessments are ethically required to act in a proactive manner and be aware of the pertinent specialty guidelines pertinent to this area of expertise. In forensic situations when retained as an expert witness and in which TPO is requested by opposing counsel or directed by the court, the psychologist should educate the court as to the Ethical Principles of Psychologists and Code of Conduct of the APA and the scientific basis for the negative effects (invalid data) of these intrusions. If counsel or the court insists the psychologists should terminate test administration, and if necessary, seek legal counsel.

It is recognized that often in forensic situations psychological ethics and the adversarial nature of the legal system may not coincide. If directed by the court to proceed with TPO, the psychologist should remove himself/herself from the assessment. Psychologists who regularly provide forensic consultations are expected to inform referral sources ahead of time that if TPO or recording develops as an issue during legal proceedings, they are ethically required to remove themselves from the assessment.

In the very rare exception that the psychologist is *compelled* by the Court to evaluate with a TPO, or if the psychologist is in a situation wherein withdrawing will bring clear and substantial harm to the examinee, the psychologist should explicitly document the manner in which the validity of results may be compromised and following existing recommended guidelines for protecting test security including requesting that the test material and intellectual property be provided only to another licensed psychologist who would be bound by the same duty to protect. Alternatively, with a protective order, the psychologist should request an agreement specifically prohibiting either party from copying test material or intellectual property, using them for any other purpose than the matter at hand, and requiring that they be destroyed at the close of the matter.

CONCLUSION

TPO and/or any recording of psychological tests or their administration has the potential to influence or compromise the behavior of the examinee and the administrator, the validity of the data obtained under these conditions, and consequently any and all subsequent clinical conclusions, opinions, interpretations, or recommendations. Ethical standards of practice require that psychologists do not engage in or conduct assessments complicated by TPO or recording unless justified by the exceptions described above.

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Psychological testing involving TPO should be avoided. A psychologist who allows TPO and/or any recording of the administration of psychological tests compromises the behavior of the examinee and the administrator, the validity of the data obtained under these conditions and consequently, any and all subsequent clinical conclusions, opinions, interpretations, or recommendations. Ethical standards of practice require that psychologists do not engage in, endorse, or conduct assessments complicated by TPO or recording of any kind. In contrast, TPA is acceptable but only under exceptions involving the most extreme or rare circumstances that require, and can be justified only by clinical (not forensic) exception.

In the case of TPA, the psychologist must clarify in the report the rationale for use of TPA, what procedures and standards have been modified, how, and to what degree, and the impact of the findings, results, and conclusions. This should include limitations in the generalization of the diagnostic data and the impact on assessment's findings.

It is the recommendation of the American Board of Professional Neuropsychology that neuropsychologists who find themselves in a position in which TPO is requested or advocated, should decline the request and educate the referral source as to the ethical and validity implications. If a referral source or interested party insists on TPO or recording, such as in legal matters, psychologists should extricate themselves from the situation and document the reason for termination.

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