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THIRD PARTY OBSERVATION DURING NEUROPSYCHOLOGICAL EVALUATION: AN UPDATE ON THE LITERATURE, PRACTICAL ADVICE FOR PRACTITIONERS, AND FUTURE DIRECTIONS

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A clash between neuropsychology and the law may exist when a demand is made for third party observation during forensic neuropsychological evaluation. Third party observation includes any person or observational process present during a neuropsychological evaluation aside from the psychologist and the examinee, including electronic devices (e.g., video and audio recordings). The goal of this paper includes succinctly providing to practitioners the scientific, ethical, and pragmatic (i.e., test security and coaching) reasons to not allow third party observation. Practitioners at the individual level need to be aware of the reasoning and be willing and able to advocate protecting the boundaries of neuropsychological practice and test security. We present practitioners with options when confronted with a request, provide a list of resources to educate the legal system and submit with motions, provide responses for some of the more common myths/reasoning used to support a request for a TPO, and encourage more global solutions such as state-by-state legislation.

Keywords: Neuropsychology; Advocacy; Third Party Observer.

INTRODUCTION

When two distinct professional systems meet, the possibility for misunderstandings and clashes exists. This dynamic is evident when a member of any profession enters the legal system as an expert. The law has many rules and a set structure and procedure with which many professionals are not familiar. It is important for the neuropsychologist who becomes involved in the legal system to understand the legal culture (Greiffenstein & Cohen, 2005). Greiffenstein and Cohen (2005) identified three basic conflicts between neuropsychological and legal methods, which include conflicting agendas, conflicting methods, and conflicting relationships. These conflicts are due to core ways in which each discipline is structured and cannot be changed in any significant manner, and thus must be

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adjusted to (Greiffenstein & Cohen, 2005) as outlined in the APA Ethical Principles of Psychologists and Code of Conduct (Section 1.02 Conflicts Between Ethics and Law, Regulations, or Other Governing Legal Authority) (APA, 2002).

In contrast, however, there are other situations where neuropsychology and the law conflict but the individual clinical neuropsychological practitioner may have input into how he or she proceeds in a specific situation. Importantly, how the individual practitioner proceeds will impact the resolution of the initial conflict and the potential final outcome. For example, when requested to produce raw data practitioners may engage in several different behaviors, outlined in other papers and position statements (e.g., Barth et al., 2003; Kaufmann, 2009), which would lead to the data being turned over without any stipulations, or to the data being inspected "in camera", or the most extreme solution wherein the data are not released at all in some situations. In each scenario, how the individual clinical neuropsychological practitioner decides to proceed may significantly impact the specific outcome (e.g., what happens with the raw data), how the field of neuropsychology is impacted (e.g., legal precedence may be created), and perception of the field by the legal community (e.g., increased or decreased understanding of issues particular to neuropsychology). Familiarity with potential options and informed decisions on how to proceed is a form of advocacy for the field of neuropsychology as well as a professional responsibility if one chooses to enter into the forensic realm (APA Ethical Principles of Psychologists and Code of Conduct, 2002, 2.01 Boundaries of Competence).

A clash between neuropsychology and the law may exist when a demand is made for a third party observer (TPO) during a forensic neuropsychological evaluation. A TPO is any person or observational process that is present during a neuropsychological evaluation aside from the psychologist and the examinee, and includes electronic devices (e.g., video and audio recordings). Attorneys, most often plaintiff attorneys, sometimes demand to be present during a client's neuropsychological evaluation. These demands range from having another psychologist present (the ethical issues with this option will be described in detail later), or the attorney themselves (creating a situation in which counsel may be called as a witness at the time of trial), a paralegal, a court stenographer, or a videographer present to having the interaction monitored by extenders or any combination of the aforementioned.

While TPOs are excluded in federal courts from being present during psychiatric, psychological, and neuropsychological evaluations, there are some jurisdictions such as New York and Florida that have statutes and case law (cf. Broyles v. Reilly, 1997) permitting attorneys to attend independent medical evaluations (IMEs) or compulsory medical evaluations (CMEs), absent a good showing that they should be excluded from the evaluation. The research literature with regard to neuropsychological evaluations and TPOs has consistently demonstrated that third party observation adversely impacts the validity of the obtained neuropsychological data, which in turn impacts the usefulness and reliability of the evaluation. In addition, the presence of TPOs raises ethical considerations as well as pragmatic concerns regarding test security and coaching. TPOs is an area in which the individual practitioner has some control over the resolution of the dispute. How the practitioner responds to the request will impact the field and the legal system's understanding of neuropsychology.

Decreased Validity of Obtained Results Due to Social Facilitation and Inhibition

The fundamental reason TPOs should not be present during neuropsychological evaluations is the inherent impact on the validity of standardized psychological tests. The foundation of neuropsychological practice is extensive training to understand brain–behavior relationships, which results in an ability to understand brain–behavior relationships when viewing obtained data. When the data are obtained in non-standardized conditions it is sometimes not clear how much the data's reliability has been impacted. Most psychological/neuropsychological tests are developed under standardized conditions that include an assumption that only the examiner and the examinee are present during the evaluation, which is stated specifically in some manuals (e.g., *Wechsler Adult Intelligence Scale – Third edition manual*, Wechsler, 1997; *Wechsler Memory Scale – Third Edition manual*, Wechsler, 1997).

Every departure from standardized conditions has the potential to render the normative data no longer applicable and to decrease the validity of the test measures (cf. Lee, Reynolds, & Willson, 2003). Alterations that significantly impact the obtained data in unpredictable ways result in data from which clear and confident conclusions often cannot be made. The research literature has consistently demonstrated that the presence of TPOs results in changes to the obtained data. With regard to TPOs, the phenomenon of social facilitation is what impacts the data collected. More precisely, based on the effects shown, the term used to describe the dynamic should be social facilitation and inhibition. In general, social facilitation and inhibition causes individuals to perform better on tasks requiring over-learned or simple skills, while performing more poorly on novel or more difficult tasks (McCaffrey, Fisher, Gold, & Lynch, 1996). With regard to memory tasks, the average effect size has been shown to be approximately three-quarters of a standard deviation but can be as large as one and a half standard deviations (Gavett, Lynch, & McCaffrey, 2005). Therefore the social facilitation effect could diminish an average memory score of 90 ($M = 100$, $SD = 15$) to an impaired memory score of 75 or less.

Changes in performance due to factors not associated with brain dysfunction make the data difficult to interpret and conclusions have to be hedged with one or more caveats. One of the skills of a neuropsychologist is knowing what circumstances may impact neuropsychological test performance that are not directly related to the patient's brain functioning (e.g., effort, an open door, anxiety) and then trying to minimize those influences. The presence of TPOs is a factor that impacts the data, and can be controlled by not allowing a TPO.

One of the most important impacts when the reliability and validity of a neuropsychological evaluation is compromised due to a TPO is that the individual examinee was denied the opportunity for the best measurement of their cognitive functioning (Kaufmann, 2005) due to factors that could easily have been controlled by not allowing a TPO. The areas of cognitive performance most impacted by the presence of a TPO are attention, sustained concentration, verbal fluency, learning, and memory (Gavett et al., 2005). Studies have demonstrated that the mere presence of a TPO effects performance even if the TPO does not subjectively appear to be

disruptive (e.g., observers sitting quietly in the room and out of sight). The effects of social facilitation and inhibition even exist when the TPO is an electronic device such as an audio recorder (Constantinou, Ashendorf, & McCaffrey, 2002) or a video recorder (Constantinou, Ashendorf, & McCaffrey, 2005). Social facilitation and inhibition effects extend to when the observer is a significant other (Kehrer, Sanchez, Habif, Rosenbaum, & Townes, 2000), or someone posing as the examiner's supervisor (Yantz & McCaffrey, 2005). A more in-depth review of the social facilitation literature can be found in other articles (e.g., McCaffrey et al., 1996; McCaffrey, Lynch, & Yantz, 2005). Appendix A lists relevant scientific studies regarding TPOs and neuropsychology, position and policy statements from organizations, and commentaries and other sources that discuss the TPO issue and would be helpful to submit with motions to quash a request for a TPO.

A second important impact is that the field of neuropsychology is placed in a position that compromises its ability to function as well as it can and contribute on a level it should be able to when aiding the court. In addition, it presents a situation where the field on a larger level can be negatively impacted through violations of test security that can result in coaching and a diminishment of the usefulness of assessment measures.

Test Security

TPOs result in a breach of test security that may lead to misuse of materials and increase the potential for public access to test items. Many neuropsychological tests depend on an examinee's unfamiliarity with the items, which necessitates protecting the test items from general circulation to preserve their uniqueness and usefulness (Axelrod et al., 2000b). Psychologists are bound by their ethics to protect psychological materials and they often have to sign purchasing agreements when obtaining materials, stating they will uphold test security. When non-psychologists have access to testing materials no similar restraints are placed on the individuals, which places the test materials in a vulnerable position. Test development and standardization is a lengthy and expensive process. For example, re-standardization of the WAIS-III and WMS-III took over 5 years and cost several million dollars (Axelrod et al., 2000b). Additionally, even though retesting was expected to cost the school system hundreds of thousands of dollars, Michigan's Department of Education in 2007 made thousands of fifth and sixth graders retake part of the state's standardized writing test due to a breach in test security—caused by a newspaper publishing a brief article about the test that revealed the topics for two of the questions and could have resulted in an unfair advantage for some students (Bunkley, 2007). Knowing questions contained on neuropsychological assessment measures ahead of time likewise creates an unfair advantage that can impact scores and interpretation.

Coaching

Breaches in test security may lead to the coaching of examinees, which describes when examinees are given information about psychological tests that could lead to their being able to alter their presentation to appear a certain way.

Wetter and Corrigan (1995) surveyed 70 practicing attorneys and 150 law students, and found that 22% of students and 42% of attorneys responded that an attorney should provide as much specific information as possible about psychological assessment. This is concerning, since coaching can impact assessment procedures. For example, providing detailed information on the validity scales was shown to enable a third of examinees to successfully elevate their responses on the MMPI-2 clinical scales but not the validity scales (Rogers, Bagby, & Chakraborty, 1993). In real life, coaching does occur. Youngjohn (1995) reported a case in which an attorney admitted that he deliberately coached his client before testing. For a recent review of the coaching literature, see Suhr and Gunstad (2007). Additional helpful references regarding coaching are listed in Appendix A (cf. Abeles, 2001; Victor & Abeles, 2004; Wydick, 1995).

Ethical Conflicts

Most psychologists in the United States are bound by the Ethical Principles of Psychologists and Code of Conduct (APA, 2002). Allowing TPOs during assessments may conflict with several psychological ethical code sections. Psychologists are encouraged to adhere to standardized procedures and utilize test materials in a manner appropriate based on the current research (APA at ES 9.02. Use of Assessments). As shown, the state of the current research shows that TPOs impact performance levels, in addition to some tests making explicit recommendations to not have TPOs during evaluations. The *Standards for Educational and Psychological Testing* [AERA] (1999) state ''test users have the responsibility of protecting the security of test materials at all times'' (AERA at St. 5.7) which includes making ''reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations'' (APA at ES 9.11 Maintaining Test Security). Additionally, ''psychologists do not promote the use of psychological assessment techniques by unqualified persons'' (APA at ES 9.07 Assessment by unqualified persons) and they must protect against misuse and misrepresentation of their work (APA at ES 1.01 Misuse of Psychologists' Work). Each of these may occur when unqualified individuals observe psychological examinations. Neuropsychologists obtain extensive training in brain–behavior relationships, which is necessary to understand, integrate, and correctly interpret behavior that occurs during an evaluation. Someone without such expertise may misinterpret the examinee's performance, not placing it in the context of clinical history, which may lead to incorrect attributions for test results. Finally, ''psychologists take reasonable steps to avoid harming their clients/patients ... and others with whom they work, and to minimize harm where it is foreseeable and unavoidable'' (APA at ES 3.04 Avoiding Harm).

Due to the importance of this issue within the field of neuropsychology and the potentially far-ranging negative impacts, the National Academy of Neuropsychology and the American Academy of Clinical Neuropsychology have each published official statements on the topic of TPOs (Axelrod et al., 2000a; Hamsher, Lee, & Baron, 2001).

FOCUSED GOALS

The goal of this paper includes succinctly providing to practitioners the scientific, ethical, and pragmatic (i.e., test security and coaching) reasons not to allow third party observation during forensic neuropsychological evaluation. Practitioners at the individual level need to be aware of the reasoning, and be willing and able to advocate protecting the boundaries of neuropsychological practice and test security. We present practitioners with options they can utilize when confronted with a request for a TPO and provide a list of resources that practitioners can use to educate the legal system and submit with motions. In addition we provide responses for some of the more common myths used to support a request for a TPO during a forensic neuropsychological evaluation. Lastly we encourage more global solutions to the TPO problem such as state-by-state legislation.

PREVIOUS AND CONTINUING EFFORTS

It is important to note that, regardless of ethical, scientific, and pragmatic concerns associated with TPOs, state and federal statutes and case law dictate how the legal system will resolve the dilemma when it arises. Jurisdictional law supercedes professional ethics. This is one reason why it is crucial to educate the legal system because, when gaps in information exist, laws may be created and perpetuated that contradict developing and established science. State statutes and case law regarding TPOs are variable between jurisdictions. The individual practitioner must be aware of the rules in the jurisdiction in which he/she practices. For example, Texas and the federal courts do not allow TPOs during neuropsychological evaluation (Bennett v. State, 1989; see also Lagrone v. State, 1997). In contrast, in Florida no distinction is currently made between psychological and medical evaluation. Florida courts apply a two-part test to determine if an involved TPO should be excluded during a medical legal evaluation. The party seeking to prevent the TPO's presence must demonstrate with case-specific facts why a TPO will be disruptive to the evaluation, AND that no other qualified provider in the area would be willing to conduct the evaluation with a TPO (Broyles v. Reilly, 1997).

In jurisdictions that do not prohibit TPOs, the previous and continuing efforts are for the most part engaged in on a case-by-case basis by the individual clinician. Some practitioners may allow a TPO because they are not familiar with the adverse effects, while others object and present the technical and ethical concerns, but then accept the judge's final ruling and either withdraw from the case or conduct the evaluation and add caveats to the report regarding the presence of a TPO. More globally, some state and national professional organizations have written policy and position statements regarding TPOs (Axelrod et al., 2000a; Colorado Neuropsychological Society, 2008; Hamsher et al., 2001). While these statements function to educate psychologists and the legal system and create professional standards, they do not create enforceable legal dictats. In 2007 some individuals in

Florida advocated having their state psychological association support legislation that would prohibit TPOs in civil forensic neuropsychological evaluations. However, this goal was not adopted by the Florida Psychological Association at that time.

FUTURE EFFORTS

Individual practitioners need to be aware of the scientific, ethical, and pragmatic reasons not to allow TPOs. We present steps practitioners can take when confronted with a request for a TPO, and also specific responses to counter reasons people sometimes use for why a TPO should be permitted during a forensic neuropsychological evaluation. We then present more global strategies that can be utilized in jurisdictions that permit TPOs. Practitioners should always check the applicable rules that govern in their specific jurisdiction, as some of the advice given may not be applicable.

Steps for the individual practitioner

Foremost, education of all parties is crucial. Individual practitioners must be aware of the problems inherent in allowing TPOs during forensic neuropsychological evaluations, and be able to present the arguments in an articulate way to other practitioners, the retaining attorney, the opposing attorney, and the court itself. When confronted with a request for a TPO, the practitioner should explain the reasons for opposition. If educative efforts are not sufficient, an affidavit explaining the negative effects of TPOs should be presented to the court along with the relevant articles and position statements. Affidavits from colleagues can bolster one's persuasive power. Since some states (e.g., Florida) may require case-specific reasons why a TPO should not be permitted, affidavits should also contain case-specific reasons why a TPO will negatively impact this particular examination. For example, if the examinee has complained of attention difficulties, neuropsychological literature stating that individuals with attention difficulties should be assessed in an area as free from distraction as possible should be included in the affidavit. Appendix A lists the relevant neuropsychological TPO articles. If the court orders that a TPO is permissible, the practitioner may choose to withdraw from the case, or continue and allow a TPO. If the practitioner determines to allow a court-ordered TPO after exhausting all potential appeals, then the practitioner should require a protective order. The report should indicate a TPO was present and indicate how this may have impacted the data.

Specific responses to counter assertions that TPOs should be permitted

Regardless of the particular state's specific legal stance on TPOs, practitioners have an obligation to be informed regarding the effects of TPOs and be familiar with the arguments for and against them. To help practitioners articulate clear

responses to reasons often given for requesting them, below are some of the common arguments for TPOs and the corresponding response arguments.

Transparency. Transparency has been stated as a reason to permit TPOs during forensic evaluations (cf. Witt, 2003). Due to potentially life-changing and significant outcomes that can occur in the legal system, the idea exists that procedures should be open and accountable to full scrutiny to aid investigation and questioning. Additionally, some argue the field and individual practitioners should be held up for scrutiny. It has been suggested this keeps the process honest; however, interestingly this standard is only applied to the defense evaluation and not the plaintiff evaluation.

Response. The authors agree that important rights are at stake in the legal environment and professionals should be held to high standards. However, the route to ensuring high standards should not be at the expense of destroying or significantly diminishing the evidence. There comes a point where providing protections destroys the very evidence that is being sought. The film-developing analogy illustrates why transparency is not a good reason to allow TPOs. The presence of TPOs when collecting neuropsychological data is akin to having the lights on when developing film. Imagine that a roll of film exists which has crucial information that will help to resolve a legal issue. Since so much hinges on what is on the film, one lawyer wants to ensure it is developed properly with standardized procedures and nothing out of the ordinary occurs during development. The other lawyer asks to have the lights on when the film is developed so the process will be transparent. Against advice that the lights may negatively impact the quality of the film, the judge orders that the lights be kept on when the film is developed. All procedures are strictly followed with regard to the film developing and nothing unusual happened during the process, which pleases all sides to the controversy. When the final images are investigated, however, the film is ruined and there are no useful images. Allowing a TPO during a neuropsychological evaluation is akin to developing film with the lights on. All can see the procedure, but the cost is high.

Other procedures, such as having an expert review the obtained data, deposition, and cross-examination, are in place to allow review of the neuropsychologist's work product. Either side can also request a separate evaluation by an opposing expert. If there is a concern regarding a specific examiner, and that specific examiner is thought to be unethical or incompetent, that concern should be pursued via other routes, since TPOs decrease neuropsychology's ability to clearly articulate the examinee's true level of performance; which limits its usefulness in consultations.

The risk of "coaching" is balanced against the right of the attorney to have a reviewable record of the evaluation. It has been proposed that the risk of future coaching should be balanced against the right of the attorney to have a permanent record of the evaluation for cross-examination and review by an opposing expert (Witt, 2003).

Response. This reasoning posits two items that cannot be directly compared, and begins with the faulty premise that coaching is the only concern. This argument

ignores the diminished validity of the obtained data, which is the crux of the matter for neuropsychology. Additionally, requiring a retrievable record of the neuropsychological evaluation implies that the retained experts who perform the evaluation may be untrustworthy. An opposing expert can review the obtained data and the conclusions of the expert in the report and deposition, which allows an ample foundation of data. When an examinee gets an x-ray or MRI, the opposing expert reviews the obtained films and reviews the report of the other expert. The opposing expert does not view a videotape of the person preparing for and then getting the MRI or x-rays.

No consensus exists on the topic and there is not that much evidence showing the detrimental impacts. Some sources have stated that no consensus exists on the topic of TPOs and that there is not that much evidence showing the detrimental impacts (Witt, 2003) or that additional evidence is needed to draw conclusions (Otto & Krause, 2009).

Response. Although there may not be a consensus in the overarching field of forensic psychology, there is a majority consensus within the field of forensic neuropsychology that TPOs should not be permitted during forensic neuropsychological evaluations, and that when they are the quality of the data obtained is diminished (cf. Axelrod et al., 2000a; Hamsher et al., 2001). Additionally, numerous studies specific to neuropsychology have been published within the last 10 years that amply demonstrate the negative impacts of TPOs on neuropsychological evaluation with healthy controls and also diagnostic populations (e.g., brain-injury survivors and a patient with seizures) in many different situations. The introduction describes the various research studies, and Appendix A lists the citations for research studies investigating the effects of TPO.

Since some policy statements allow some observers but disallow others, all should be allowed. Otto and Krause (2009) argued it was problematic that the NAN and AACN position statements appeared to allow some observers, such as trainees, and disallow other observers such as attorneys. Although the authors did not directly state that this meant all observers should be allowed, they infer this conclusion.

Response. The fact that the policy statements did not disallow all observers does not negate findings that TPOs negatively impact neuropsychological assessment.

Many factors can impact the psychological evaluation process, so TPOs should not be singled out and prohibited. Otto and Krause (2009) stated it was ''odd to single out third party presence as a prohibitive threat to psychological assessment when more serious threats to the examinee's responses are tolerated'' (p. 367). Initially they refer to items such as race, sex, and SES as also having an impact on the assessment process.

Response. This argument appears to be using the logic that if something is problematic with a situation then it is acceptable to add additional problematic elements. In contrast, it is a psychologist's duty to be attentive to elements that may

negatively impact the interaction with and assessment of an individual. It is prudent psychological practice to minimize factors that negatively impact one's ability to fulfill one's professional responsibilities.

Neuropsychological and psychological instruments have not been normed with individuals involved in legal proceedings, so practitioners cannot say they are obtaining valid data anyway. Otto and Krause (2009) stated they believed psychological and neuropsychological measures not being normed on those involved in a legal proceeding was likely the most important factor that limited the applicability of norms to the obtained data, rather than TPOs. According to Otto and Krause (2009), due to the fact that individuals in legal proceedings are more likely to malinger, feign symptoms, or display an altered response style, and that the impact of TPOs is allegedly less documented and the effect size of TPOs may be less than the legal context itself, the arguments against TPOs are faulty.

Response. Neuropsychology readily accepts that malingering, altered response style, and feigning and embellishment of symptoms occurs in most populations and likely with a greater frequency in a forensic situation. Many papers have documented this finding (for overview see AACN consensus conference statement; Heilbronner et al., 2009). Otto and Krause's (2009) argument ignores the development and utilization of symptom validity measures in neuropsychology to assess response style and malingering. Practitioners have methods to aid the determination of when examinees are performing abnormally due to embellishment or decreased task engagement. Often, when examinees are determined to be malingering or embellishing symptoms, the obtained data are considered invalid and unrepresentative of the examinee's true cognitive abilities. Also, the impact of TPOs being less well documented than the impact of malingering is irrelevant to whether TPOs introduce a negative aspect into the assessment that can be controlled for to increase the validity of the evaluation. Additionally, as reviewed in a section below, the impact of a TPO cannot be systematically controlled for since the impact is variable. The two situations—a patient malingering for secondary gain (the patient purposely introducing error into the assessment) and a patient being assessed in the presence of a TPO (the examination situation introducing error into the assessment)—are not comparable.

The TPO is for the patient's benefit to protect them and to ensure a valid assessment. Some argue a TPO is needed to protect the patient and to ensure a valid assessment. This is similar to the transparency argument. However, this argument focuses on making sure proper assessment procedures are followed and that the examinee is not confronted with inappropriate procedures. Some have suggested the interfering impacts of a TPO can minimized by establishing ground rules prior to the examination, such as having the TPO sit outside of the examinee's line of vision (cf. Otto & Krause, 2009).

Response. First, the majority of lawyers are not trained in brain–behavior relationships and would not know if deviations from standard procedure

are occurring. Additional queries and alternative phrasing of questions are sometimes part of a standard administration based on specific answers a patient gives, or patient factors. Information could be easily misperceived and not understood by an observer who is not familiar with the nuances of the assessment process. The observer may not understand why questions are rephrased, and interpret the situation as badgering the patient or asking the question multiple times and multiple ways in an effort to inflate a score. Attempting to protect the examinee may interfere with and ruin standard administration if the attorney interrupts the examination. An alternative means of protecting the examinee's civil rights is for the attorney to meet with the examinee before the examination and advise their client regarding the limits of what the psychologist may reasonably request during the evaluation. It is also acceptable to have the examinee's legal representative remain on site in the waiting room.

Additionally, it must be considered that TPOs intended to ensure standardized assessment procedures are followed are actually breaking with standardized administration. Reducing the validity of an examination negatively impacts all concerned, especially the examinee. Performances due to factors not associated with brain dysfunction render the test findings difficult if not impossible to interpret, and conclusions have to be hedged with one or more caveats. The presence of test scores outside of the normal range could be due to true brain pathology, or simply the effects of the TPO. Examinees are denied an assessment clearly showing their strengths and weaknesses by the individuals claiming to want to help and protect them. Forensic neuropsychological evaluation may involve individuals who are claiming some type of brain injury. Since a common symptom of brain injury is distractibility, it has been suggested that when testing individuals with potential brain injury the assessment should be conducted in an environment as free from distraction as possible, to maximize the individual's attention and therefore obtain data that are a better indicator of the brain–behavior relationship under examination (Lezak, Howieson, & Loring, 2004). Since attention is the foundation for learning, and is required for all other abilities such as learning and memory, the testing environment must minimize distractions as much as possible. Additionally, scientific studies have demonstrated that the mere presence of a TPO affects performance even if the TPO does not subjectively appear to impact the testing environment (supervisor in the room; significant other). For these reasons, having a TPO does not function to protect the examinee.

Trained TPOs eliminate the problematic nature of TPOs. Some argue the reasons for not allowing a TPO are eliminated when it is a trained TPO, such as another neuropsychologist or a trained technician, since they are familiar with standardized procedures and protocol (cf. Blase, 2008) and a trained TPO eliminates the concern regarding test security (Otto & Krause, 2009).

Response. This line of reasoning ignores the fact that mere presence of a third party in the room has been demonstrated in studies to impact the examinee's performance, even if the TPO is not engaged in any disruptive behavior(s) (significant other; supervisor). The standardization of the testing environment is

important, and manuals of some of the more well-known test batteries (e.g., The WAIS-III, WMS-III administration manuals, 1997) specifically state TPOs should be excluded from the examination room to keep it free from distraction. Many sources review the importance of standardized administration (e.g., Anastasi & Urbina, 1997). Also eliminating or reducing concerns regarding test security will not eliminate the problematic psychometric aspects of TPOs.

Based on early social facilitation literature, the effect stems from the first additional person, so having two people shouldn't make a difference. Blase (2008) opined that, since the early social facilitation literature demonstrated that the effect stems from the first additional person (beyond the person being alone), having two people (the examiner and the TPO) in the room with the examinee should not make a difference.

Response. This viewpoint may be restated as: Why does a third party have an impact on neuropsychological testing, yet the examiner does not? Since neuropsychological tests are standardized with the examiner and examinee present, according to Howe, Rice, and Hoese (2008, p. 21):

> . . . any impact caused by the examiner, if present, is accounted for during the standardization process. This process systematically accounts for and controls for the presence of the examiner. Conversely, the impact of a third party is not systematically accounted for during standardization procedures. Studies comparing situations that have the examiner and examinee present and then the examiner, examinee, and a TPO present have repeatedly shown that adding a TPO causes increased performance on some measures (over learned and easy) and decreased performance on others (novel and more difficult). This is the crux of the matter as it pertains to neuropsychology.

Psychologists can determine a way to systematically control for the impacts of a TPO and apply a formula. It has been proposed that psychologists can determine a way to systematically control for the impacts of a TPO and apply a formula after the fact which would eliminate the detrimental impacts of TPOs.

Response. Based on relevant studies, the extent to which a given test is impacted by a TPO and the direction of change (e.g., higher obtained score vs lower obtained score) are variable (Gavett et al., 2005). There is no way to control systematically for the impact of a TPO on the neuropsychological data (Howe et al., 2008). "TPOs will introduce an unknown and uncontrollable change into a system in which degree of change is crucial," (Howe et al., 2008, p. 21).

A solution is to norm some tests with TPOs present. Some have argued that a simple solution would be to norm tests with a TPO present, so the concerns on each side of the debate are satisfied.

Response. This would unduly restrain the trade of neuropsychology. It takes much time, expense, and resources to norm tests. Additionally, if some tests were normed with a TPO and some were not, the researchers who normed the tests would decide what assessment procedures were used in the forensic realm and not the neuropsychologist. Test selection would not be based on clinical judgment but solely on what tests happened to get normed with a TPO present.

Attorneys assert that psychological evaluation should be treated the same as a medical evaluation when the state statute does not specify psychological evaluation. If the state's legislation and/or case law permits TPOs but does not distinguish between psychological and medical evaluation, the attorney may advocate that psychological evaluation should be treated the same as a medical evaluation.

Response. When the statute allows TPOs at medical evaluation but does not specify psychological evaluation, the practitioner should provide arguments for why a psychological evaluation should not be considered under the same rule as a medical evaluation, as well as providing information regarding why the particular evaluation is an exception to the medical observer rule. Approaching the problem from both ways allows the court to rule on either issue (e.g., psychological evaluations should be considered differently from medical evaluations, or this particular evaluation should not fall under the rule for case-specific reasons). The court may not be comfortable creating case law that states a psychological evaluation is different from a medical evaluation, but the court may be willing to disallow a TPO in the particular case.

From a conceptual viewpoint, there are many reasons why medical and psychological evaluation should be treated differently based on reasons inherent to each situation. Foremost, the environment required to facilitate a meaningful psychological evaluation differs significantly from what is required to obtain a meaningful physical medical evaluation. Physicians conduct procedures and evaluate responses that for the most part are not influenced by surrounding circumstances. For example, the examinee's reflexes and how their bones will look on an x-ray are not contingent on how the examinee feels about the examining doctor or how many people are in the room. In contrast, environmental conditions directly impact data collection during neuropsychological evaluation. Neuropsychological evaluation are utilized to measure the examinee's cognitive, emotional, personality, and/or adaptive functioning, which rely on observing behavior and interpreting responses to estimate the examinee's thoughts, feelings, understandings, and cognitive processes.

The APA Statement on Third Party Observers in Psychological Testing and Assessment: A Framework for Decision Making may be used to suggest TPOs are not barred from neuropsychological evaluations. The APA released an informational statement regarding TPOs (APA, 2007). When requesting TPOs not be allowed, practitioners may be confronted with the *APA Statement on Third Party Observers in Psychological Testing and Assessment: A Framework for Decision Making*, and the assertion that the Statement as well as the 2002 Ethical Standards do not explicitly bar third parties from attending evaluation, nor explicitly bar recordings of evaluation. The Statement may be used incorrectly as an authoritative stance of the APA. Several arguments are presented below for when practitioners are confronted with this informational statement.

Response. First, the informational statement is not an official policy. The Statement begins (p. 2) with: "This Statement does not constitute an official policy of the American Psychological Association (APA), does not purport to dispense legal advice, and is not intended to establish standards or guidelines for conduct

by practitioners. The statement may prove useful in analyzing and responding to situations in which third parties request to be present, either in person or by electronic proxy, at the time that psychological evaluations are conducted.'' The statement clearly states it is not an official policy of the American Psychological Association. Practitioners should correct any assertions by attorneys or other psychologists that infer the Statement is an official policy, since it explicitly states it is not. It also explicitly states it is not a guideline or standard. The document by its very nature (i.e., informational) would not be able to explicitly bar or allow TPOs or recordings. *Attorneys cannot argue that since it does not disallow them it allows them, since it is not a policy*. Second, an informational statement or policy cannot negate substantial research findings. As demonstrated above, the mere presence of a TPO impacts the validity (e.g., supervisor study).

Global Solutions

Presenting research articles and organizational position papers allows practitioners to act on an individual basis, but these actions are time consuming and costly (Howe, Rice, & Hoese, 2007). Each time the TPO issue is appealed to an appellate level, there is the risk that a ruling will have a negative impact on neuropsychology (Howe et al., 2007). Therefore actions that are more preventative and global versus reactive and case specific would be beneficial. First, preventative education is needed. By routinely including a statement in every report, both clinical and forensic, regarding TPOs, practitioners are raising awareness of TPOs and educating referral sources by bringing it to their attention (e.g., MDs, attorneys, and the general public). For example, consider the following statement: ''There were no third party observers present during formal neuropsychological testing, and as such the results of the current evaluation do not need to be interpreted in light of this known confounding factor.'' Practitioners can also volunteer to give talks at legal venues and conferences. In addition, practitioners can proactively educate legal referral sources by giving them articles such as this one, in case the issue arises in their practice.

The most effective way to handle the issue, however, is to write, gain support for, and pass legislation at the individual state level (sample legislation is included in Appendix B). This legislation should exclude TPOs during civil neuropsychological evaluations, except in cases with extenuating circumstances that lead the neuropsychological expert to determine that a TPO should be present based on their clinical judgment and expertise. This legislation would shift the burden of proof to the party requesting a TPO to show good cause for why one should be present based on the particular circumstances.

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APPENDIX A: TPO RELATED RESOURCES

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APPENDIX B: SAMPLE LEGISLATION

Third Party Observation Bill

A bill to be entitled

An act related to the presence of involved third party observers; creating hb/sb. governing the presence of involved third party observers in psychological evaluations; providing a definition; specifying the circumstances under which involved third party observers may be present in psychological evaluations; requiring the Board of Psychology to adopt rules and establish specific criteria for psychologists to admit third party observers into psychological evaluations and to provide an effective date.

Be It Enacted by the Legislature of the State of X

Section 1. Section X.XXXX State Statutes is created to read:
X.XXXX Presence of Involved Third Party Observers

(1) Definitions:

A. As used in this section, involved third party observers are defined as those who in the context of civil litigation, directly or indirectly, have an interest in the specific outcome of a particular plaintiff's evaluation. This interest may arise from any relationship or benefit including yet not limited to the legal, financial, family, and social domain and is irrespective of the level and/or absence of familiarity that the observer has with the party being examined. An employee or agent of the participating attorney is considered an involved third party observer under this condition.

B. As used in this section, uninvolved third party observers have no direct or indirect interest in the specific outcome of the particular plaintiff's examination and instead are concerned with one of more of the following; the behavior of the examiner, the examination process, or the behavior of the examinee as a teaching illustration. For all intents and purposes it is irrelevant to the uninvolved third party who the particular individual is that serves as an exemplar. An example of an uninvolved third party observer is a student or assistant, in training, to a licensed psychologist.

(2) The board shall adopt rules relating to the presence of third party observers and the exceptions by which each is permitted.

(3) Scope

A. The scope of this law applies to psychologists who conduct psychological examinations in a medico-legal context.

B. This law pertains to psychological examinations conducted for the purpose of civil litigation including but not limited to tort litigation and associated insurance matters related to third parties.

C. This law does not include criminal forensic consultations.
D. The scope of this law does not include clinical/medical consultations that are not currently within the civil litigation domain.

(4) This law accepts the presence of involved third party observers only under the following circumstances:

A. In the case of children or adults when physical and/or emotional separation from a caretaker results in dysfunctional behavior that may invalidate assessment results, it is permissible to allow a parent or other caretaker to be present until rapport is established and behavior stabilized so the evaluation may be undertaken.
B. Other extenuating circumstances are to be judged on a case-by-case basis where the psychologist involved makes a clinical decision based on their training and expertise that the harm involved in allowing the presence of the third party observer is outweighed in this particular situation by the need for the involved third parties presence to conduct the examination. The presence of the third party observer in these situations must be limited to the shortest time clinically indicated.

(5) Involved third party observers may not be present in the room physically or by extenders. Extenders include, yet are not limited to, items such as electronic or recording devices, agents, and observation through one-way mirrors.
(6) When involved third party observers are present during a psychological examination, the psychologist must note such presence in their evaluation report and that the attendance of third party observers may have impacted the validity of the test results.

Section 2. This act shall take effect on Date.