



THE PRESENCE OF THIRD PARTY OBSERVERS IN FORENSIC & NEUROPSYCHOLOGICAL EXAMINATIONS

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Increasingly, psychologists are receiving requests that an observer be present during a forensic psychological or neuropsychological examination. There has been opposition by certain professional organizations and professionals' regarding the presence of third party observers in psychological examinations and the subject has resulted in much controversy, generated position papers and statements from national organizations and testing publishers, and has generated increased research related to "social facilitation" and effects of observers on standardized testing. Additionally, the subject has been

the focus of legal decisions in the State of Florida which are relevant to the psychologist who is conducting forensic and neuropsychological examinations. Psychologists need to be aware of relevant law and ethics codes, research related to the effects of observers on standardized testing, recent legal opinions, and options related to the management of a request for the presence of a third party observer during a forensic examination.

Ethics and Law Relevant to Third Party Observers

Section 9 of the APA Ethics Code addresses the validity of opinions based on psychological examination and indicates that any opinions that are made are based on appropriate "information and techniques" that are "adequate to support" such opinions. Essentially, psychologists are required to ensure the reliability and validity of their methods. If the validity of the examination is compromised by disruptions from a third party observer, an inability to provide standardized assessment or develop appropriate rapport with the examinee, or if the third party influences the examinees performance on cognitive or psychological measures, then the psychologist may not have an adequate basis to form an appropriate opinion.

The presence of an observer that is not a trained psychologist also compromises the integrity of the tests used in psychological and neuropsychological examinations. According to the APA Ethics Code, "psychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations." Allowing non-psychologists access to "raw test data" which would occur with a third party observer also places the psychologist in conflict with Florida law which clearly indicates that raw test data are not to be released to those that are not qualified to interpret them or unless requested via court order (Florida Administrative Code, Rule 64B19-18.004[3],[6]). Additionally, contractual obligations with test companies also mandate that psychologists using purchased tests protect possible misuse of tests, in part due to copyright restrictions. More recently, standardized test manuals have specifically stated that third party observers should be excluded from the examination. Additionally, creating a retrievable record of test items via an audiotaped or videotaped examination would certainly compromise test security if the record were made available to non-psychologists.

Maintaining test security is essential, because of the harm that can result from public dissemination of test questions or procedures which would negate the utility of certain tests, particularly those that rely on lack of familiarity regarding what is being assessed (i.e., effort testing or malingering) or which rely on solving novel problems or assessing memory. Any dissemination of tests can result in an individual's ability to manipulate their test performances or receive coaching on how to respond to certain tests essentially invalidating the utility and uniqueness of the test instruments available to psychologists to provide opinions related to an individual's cognitive and emotional functioning. Additionally, the psychologist is required to document observations and possible limitations related to the validity or conclusions of the examination when a psychologist permits third party participation according to Standard 9.06 of the APA Ethical Principles and Code of Ethics.

Research related to the Effect of Third Party Observers on Standardized Testing

Published studies have indicated that the mere presence of a third party during standardized testing can result in both facilitative and inhibitory effects on different types of cognitive tasks. Initial studies indicated that the presence of a third party may enhance performance on simpler over learned tasks and decrease performances on more complex tasks. More recent studies have suggested that performance on testing is more complicated and may vary as a function of the identity of the observer, the purpose of the examination, the manner of observation (i.e., how intrusive), the assessment instruments being used and a multitude of other factors which need to be considered by the psychologist. Further, self-disclosure may be inhibited or symptoms could be exaggerated with the presence of a third party. Of additional consideration is that under certain circumstances, the presence of a third party could facilitate a more appropriate and valid assessment of the patient (presence of a parent in a child with separation anxiety or the use of an interpreter to facilitate communication between the examinee and the psychologist). The reader is referred to the attached references for research related to the effect of observers on standardized testing such that the psychologist can appropriately consider such factors and become aware of and document any effects related to a specific examination and obtained test results.

Recent Case Law and Legal Decisions Affecting the use of Third Party Observers

In general several states including Florida and New York allow examinees to bring in observers for forensic psychological and neuropsychological examination to ensure the accuracy of the examination. Currently, Florida case law does not differentiate between medical and psychological examinations. While judges do have discretion, and have at times precluded the presence of a third party observer during psychological or neuropsychological examinations, such exceptions to the law require very specific criteria. Specifically, under Florida law, a party seeking to exclude a third party observer from a compulsory medical examination must (1) provide a case-specific reason why their presence would disrupt the examination and (2) prove at an evidentiary hearing that no other qualified physician (psychologist) can be located in the area who would be willing to perform the examination under such circumstances (Birkhold vs. Grooms, (1994), 953 So 2d at 626). More recently in Bacallao vs. Dauphin (2007) (Third District Court of Appeal) the appellate court upheld the presence of a third party even though the attorney had been disruptive in a previous neuropsychological examination as there were psychologists in the area who would allow the presence of third parties. The court however did affirm that "a third party's presence, particularly an attorney's presence, is premised on the requirement that the third party not interfere with the examination. In the event such interference occurs, the trial court may take appropriate steps..." to ensure that a reasonable examination can be conducted. Additionally, in a number of other cases, Florida courts have found that a neuropsychologist's testimony involving standards of practice, references to texts, position statements or opinions that a third party's presence would render an examination invalid did not constitute case-specific reasons to exclude a third party, from a medical examination or provide a basis for prohibiting a video or audio recording of an examination. Florida case law also has opined that it is the burden of the party seeking to exclude a third party observer to provide case-specific reasons why a trial court should deny the presence of a third party.

Options for Psychologists When Faced with Requests for a Third Party Observer

1. **Recommend that the Request for the Presence of a Third Party Observer be Withdrawn:** Preparation of an Affidavit, court testimony or providing the judge with a packet of information in which the concerns related to how a third party would disrupt the examination or compromise the validity of the examination. In some cases, the request could be withdrawn by the other party or specific guidelines to address issues of test security and validity could be ordered by the judge.

2. **Minimize the Negative Impact of a Third Party Observer:** The psychologist may choose to conduct the examination in a way that minimizes the presence of a third party. For instance, conducting the examination through a one-way mirror as opposed to having the observer (i.e., attorney, or videographer) being present in the room to minimize the direct effect of a third party on the examination. Additionally, insisting that the observer be prohibited from taking notes related to the examination (i.e., writing down test questions) and refusing to have a court reporter present in part addresses concerns related to test security. When video or audio recordings are being made, the psychologist has ethical and professional responsibilities to take steps to limit the availability of such recordings to non-psychologists and the general public. Requests for a protective order from the judge obligating all parties to maintain test security and destroying the recordings at the conclusion of the legal proceedings is an option.

In my practice, I have viewed the recordings as “raw test data” and take possession of the recordings immediately after the examination. I will then only release the recordings to another psychologist qualified to evaluate the data. These guidelines need to be agreed upon before the onset of the examination to avoid the possibility that a court order would later require the release or dissemination of audio or video recordings or that an attorney insist that they or the videographer are present in the testing room. Such an approach can balance the examinee’s rights to have their attorney present and ensure that an adequate examination is being conducted, while also minimizing the negative impact of others being present.

3. **Utilize Assessment Measures Less Affected by a Third Party Observer:** Having the patient complete written questionnaires regarding their emotional functioning rather than having them provide verbal responses may address concerns related to sharing of personal information. However, when assessing cognitive functioning and relying on psychometrically sound tests and normative data, there may be no equivalent test or procedure that can adequately assess an examinee’s functioning that could be less affected by observation.

4. **Decline to Perform the Examination with the Presence of a Third Party Observer:** If a psychologist cannot resolve concerns related to test integrity, misuse of tests, and the validity and fairness of an examination, declining to conduct the assessment may prove to be the only way to resolve the situation. If there is not another psychologist in the area who is willing to conduct the examination with the presence of a third party, the request for a third party may be withdrawn or modified with acceptable guidelines to the psychologist.

Summary

The inclusion of a third party in psychological examination is a controversial issue that raises complex issues which must be considered by the psychologist in proceeding with such examinations. Outside of forensic settings, the inclusion of third parties for training purposes or to enhance the validity or assessment (i.e., parent involvement or use of an interpreter) has been more acceptable, raising paradoxical issues when arguments are made regarding the negative effect the mere presence a third party may have on test validity. Of greater significance is the safeguarding of tests, procedures and the possibility of test misuse which raises unique concerns related to the presence of third party observers in a forensic setting. Several organizations including APA, NAN, and ABCN have provided statements and position papers regarding the presence of Third Party Observers which can provide the reader with additional information related to ethics, research, and other factors which need to be considered to help the psychologist in addressing this issue. Clearly, the overall goal of any psychological or neuropsychological examination is to obtain the most valid and appropriate assessment of a patient to provide accurate opinions and conclusions regardless of the purpose or context of an examination, and this primary goal needs to guide the psychologist in making appropriate decisions regarding the presence of third party observers during a psychological examination.

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