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October 5, 2018

Supreme Court Clerk's Office
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Carson City, Nevada 89701

ADLT 0522

FILED

OCT 09 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

RE: Proposed Amendment to Nevada Civil Procedure Rule 35 (Physical and Mental Examinations)

I am a licensed psychologist in the state of Nevada. As part of my practice I administer psychological and neuropsychological measures to individuals. I am well versed in the standards and practices for the administration of such examinations.

I have additionally studied and trained in the administration of psychological and neuropsychological measures in civil forensic contexts for nearly 20 years, and my doctoral dissertation (Forrest, 2006) focused specifically on the influence of instruction set and test format on the detection of malingerers.

I have offered independent psychological and neuropsychological services since 2010 in cases in venues including the Clark County District Court, United States District Court for Nevada, and the Superior Court of the State of California, County of Riverside.

I stand in strong opposition to the proposed amendment to Nevada Civil Procedure Rule 35, which would permit third-party observation and/or recording of psychological and neuropsychological evaluations, and in solidarity with my psychologist colleagues and state psychological organizations, including the Nevada Psychological Association (NPA) and the Nevada State Board of Psychological Examiners (NBOP), who also oppose the proposed amendment.

NPA and NBOP have already submitted position statements that provide excellent overviews of the many possible deleterious effects of the proposed amendment, if adopted, which include decreased patient disclosure, compromises to test validity, aberrations in and invalidity of test performance as a result of social facilitation and observer effects, and long-term risks to test security and the public.

Additionally, the National Academy of Neuropsychology has published Official Statements regarding the presence of third party observers during neuropsychological testing (NAN, 2000) and test security (NAN, 2000; updated in 2003 to address the 2002 revision of the 1992 APA Ethical Principles of Psychologists and Code of Conduct). The American Academy of Clinical Neuropsychology has also published a policy statement on the presence of third party observers in neuropsychological assessments (AACN, 2001). All of these papers discuss the myriad threats posed to the utility of our measures by third party observation and reflect the consensus in our profession that "neuropsychologists should strive to minimize all influences that may compromise accuracy of assessment and should make every effort to exclude observers from the evaluation" (NAN, 2000).

I would like to speak in more depth to one specific possible deleterious effect of this proposed amendment – the risks of exposing confidential testing and assessment procedures to non-psychologists who are not trained in or experienced with administration of neuropsychological and psychological tests. Such exposure will ultimately harm the public, not just in Nevada but throughout the United States, by undermining the future validity and utility of these tests.

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ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

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As an example, the increasing frequency in which individuals engage in civil litigation, and in that context undergo neuropsychological evaluation, also increases the possibility that plaintiffs may receive trade-secret test information from their attorneys prior to evaluation in order to maximize their ability to appear injured. My own doctoral research (Forrest, 2006) examined the performance of individuals with brain damage (via archival data), normal control participants, and individuals sorted into three groups on two common neuropsychological measures. These three groups differed as to the extent of prior coaching they were given specifically regarding the nature, content, and requirements of one of those measures.

My results suggested that individuals given the most explicit coaching about that measure were able to produce more believable performances indicative of brain injury than individuals in the other groups and that a priori knowledge about neuropsychological measures may be able to bolster an individual's ability to produce such believable performance indicative of brain injury. I also found that explicitness of coaching generalized from one test to the other, such that individuals given explicit instruction on one test performed better than other groups on the second test, although they were given no explicit instruction regarding the second test.

I noted that my findings suggested that "with the aid of a neuropsychologically sophisticated attorney, litigants may be coached on... potentially any... neuropsychological or psychological measure... to the extent that they are able to perform more like truly brain-damaged individuals for the purpose of receiving the remuneration they seek. These findings suggest that neuropsychologists should be aware that examinees presenting to them in the context of civil litigation may not be truly impaired but may have been thoroughly coached on symptoms and tests ahead of time. These findings also suggest that psychologists should renew or enhance efforts to protect trade-secret psychological testing information not only from attorneys, but from laypersons in general." This research represents only a single demonstration of how readily the validity and utility of our tests and measures may be significantly compromised by an individuals' prior exposure to them.

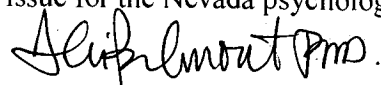
The sum of the canon of ethics for our profession obligates me to refuse to perform an examination that would be observed or recorded. Recording under the proposed amendment would violate these standards, and I am ethically bound to protect the security of testing materials and methods.

If asked or ordered to conduct a psychological or neuropsychological examination that would be observed and/or recorded by a third party, I will be obligated to decline to perform the examination at all or else perform an examination that does not include administration of standardized psychological or neuropsychological tests. It is my understanding that other reputable Nevada psychologists would act similarly. In this sense, requiring that a psychological or neuropsychological examination be observed and/or recorded by a third party would eliminate all psychologists from participating in judicial matters due to these ethical and test security concerns. This would have a deleterious effect on the courts' ability to adequately adjudicate cases involving claims of cognitive and emotional damages.

In sum, the proposed amendment to Rule 35, if adopted, would serve to decimate our profession, likely across the entire United States, by compromising the validity and utility of the psychological and neuropsychological measures we share with all of our colleagues and rely upon to make valid, informed assessments of our clients and patients.

Please find attached a list of relevant references, as well as complete copies of the most relevant position and consensus statements.

I thank you for your time spent in reviewing this letter and your careful consideration in this extremely significant issue for the Nevada psychological community.



Teri F. Belmont, Ph.D.
Licensed Psychologist

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STATE OF NEVADA
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Patrick M. Ghezzi, Ph.D., BCBA-D, LBA
Board Member, Reno

October 1, 2018
Governor

Elizabeth Brown
Clerk of the Supreme Court
201 South Carson Street
Carson City, NV, 89701.

Dear Ms. Brown:

Please see below the Licensing Board's position on third-party observers in psychological evaluations. This statement has been provided to the Nevada State Supreme Court as public comment regarding the proposed changes to Rule 35 of Nevada Civil Procedure.

In the interest of protecting the needs of the public, it is the position of the Nevada Board of Psychological Examiners that allowing third-party observers, monitors, and/or electronic recording equipment during psychological and neuropsychological evaluations poses a significant threat to public safety. Observation, monitoring, and recording can significantly alter the credibility and validity of results obtained during psychological and neuropsychological medical evaluations, as well as forensic evaluations completed for judicial proceedings. Research indicates that the presence of observers, monitors and recorders during patient clinical interviews and evaluations directly impacts patient behavior and performance such that patients may avoid disclosing crucial information essential to diagnosis and clinical recommendations. Additionally, (neuro)psychological tests and measures are developed and standardized under highly controlled conditions. Observation, monitoring, and recording of these tests is not part of the standardization. Observation, monitoring, and recording of psychological assessment components (i.e., testing) of evaluations may distort patient task performance, such that patient weaknesses and strengths are exaggerated, yielding inaccurate or invalid test data. Furthermore, research highlights that this impact on performance is independent of method of observation. In other words, there is no "good" or "safe" way to observe, monitor, or record such (neuro)psychological evaluations without impacting and potentially invalidating the evaluation. Ultimately, deviations from standardized administration procedures compromise the validity of the data collected and compromise the psychologist's ability to compare test results to normative data. This increases the potential for inaccurate test results and erroneous diagnostic conclusions, thus impacting reliability of results and future treatment for the patient. In addition, the risk of secured testing and assessment procedures being released to non-Psychologists poses risk to the public in that exposure of the test and assessment confidentiality can undermine their future validity and utility.

Sincerely
for the Board of Psychological Examiners

Morgan Gleich
Executive Director

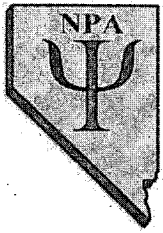
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Nevada
Psychological
Association

Advocating for Psychologists in Nevada
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Supreme Court Clerk's Office
201 South Carson Street
Carson City, Nevada 89701

September 25, 2018

**RE: THE MATTER OF CREATING A COMMITTEE TO UPDATE AND REVISE THE NEVADA
RULES OF CIVIL PROCEDURE**

The Executive Board of the Nevada Psychological Association **opposes** third party observation of the administration of standardized measures during psychological and/or neuropsychological independent medical evaluations (IMEs). Our organization opposes this proposed revision to the Nevada Rules of Civil Procedure for the following reasons. Additionally, no licensed psychologist in the State of Nevada would be able to conduct psychological and/or neuropsychological IMEs under the conditions of observation and recording proposed for these same reasons:

1. **Decreased Patient Disclosure:** Observation, monitoring, and recording can directly impact the behavior of the patient during psychological clinical interview such that the patient may avoid disclosing crucial information essential to diagnosis and clinical recommendations. The patient may also avoid disclosing critical information related to their safety or the safety of another person (e.g., child abuse or abuse of a vulnerable adult).
2. **Test Standardization & Compromised Validity:** The clear and well-established standard of practice is that standardized psychological and neuropsychological tests must be administered under standardized conditions (i.e., conditions that closely replicate the conditions under which the tests were standardized during the test development process). The standardization process does not include third party observation, monitoring, or recording. Deviations from standardized administration procedures compromise the validity of the data collected. When the validity of testing data are compromised, the accuracy of the diagnosis is compromised.
3. **Social Facilitation and Observer Effects & Compromised Validity:** Research consistently demonstrates that patient performance can be impacted (negatively or positively) by the presence of an observer (including live observation, remote observation, or recorded observation). Observation, monitoring, and recording can artificially strengthen or weaken the patient's performance on psychological and neuropsychological test, thus compromising the validity of the data and the accuracy of diagnostic conclusions.
4. **Test Security & Social Harm:** Psychologists have a legal and ethical requirement to maintain the "integrity and security" of tests and other assessment techniques. Permitting individuals who are not licensed psychologists to observe a psychological examination, either live or via recording, compromises test security. Dissemination of psychological and neuropsychological test materials when test security is breached carries a risk for significant social harm. Future

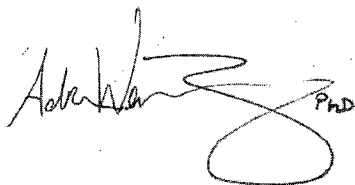
patients can be coached or (inappropriately) prepared for IMEs. Additionally, the tests used in psychological and neuropsychological IMEs are the same tests used across a wide range of evaluations. These include, but are not limited to, determinations of fitness or competency to: (a) parent; (b) pilot an airplane; (c) practice medicine or surgery; (d) stand trial; (e) work in law enforcement or at a nuclear power facility, etc. The Court might also be interested to know that these same tests are used to determine if an applicant is eligible to receive special accommodations when taking the Bar Exam.

As stated by the National Academy of Neuropsychology in 2003, "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."

In summary, the proposed changes which would allow third party observation, monitoring, or recording in IMEs would have a profound deleterious impact on the ability of licensed psychologists to appropriately conduct valid psychological and neuropsychological IMEs.

We have enclosed a list of references, as well as complete copies of the most relevant position and consensus statements. Please do not hesitate to reach out with any questions.

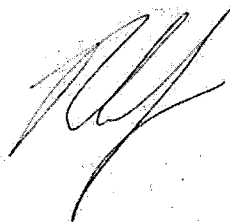
Respectfully,



Adrianna Wechsler Zimring, PhD
Past President 2018/2019
Nevada Psychological Association



Sarah Ahmad, PsyD
President 2018/2019
Nevada Psychological Association



Noelle Lefforge, PhD
President-Elect 2018/2019
Nevada Psychological Association



PII S0887-6177(00)00055-X

Test Security

Official Position Statement of the National Academy of Neuropsychology

Approved 10/5/99

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 upon 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 Ethical Principles of Psychologists and Code of Conduct (American Psychological Association, 1992; Principle 2.1, 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 Principles 2.01, 2.06, Unqualified Persons).

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 audiotaping a psychological or neuropsychological evaluation for release to a non-psychologist violates the Ethical Principles of Psychologists and Code of Conduct (APA, 1992), by placing confidential test procedures in the public domain (APA Principle 2.10), and by making tests available to persons unqualified to interpret them (APA Principles 2.02, 2.06). 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 manipulation of test performance. 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. Formal research (Coleman, Rapport, Millis, Ricker, & Farchione, 1998; Wetter & Corri-

gan, 1995; Youngjohn, 1995; Youngjohn, Lees-Haley, & Binder, 1999) 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. 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 (e.g., 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 most widely-used 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 cases). 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 too long, could serve as a major disincentive to prospective test developers and publishers, and greatly inhibit new scientific and clinical advances.

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 and will seek to obtain the data for themselves. 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.

The NAN Policy and Planning Committee

Bradley Axelrod, Ph.D.

Robert Heilbronner, Ph.D.

Jeffrey Barth, Ph.D., Chair

Glenn Larrabee, Ph.D.

David Faust, Ph.D.

Neil Pliskin, Ph.D., Vice Chair

Jerid Fisher, Ph.D.

Cheryl Silver, Ph.D.

REFERENCES

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APPENDIX: HANDLING REQUESTS TO RELEASE TEST DATA, RECORDING AND/OR REPRODUCTIONS OF TEST DATA

Please note that these are general guidelines that may not apply to your specific jurisdiction. It is recommended that all psychologists seek advice from personal counsel to determine if these guidelines are appropriate for their specific jurisdiction.

1. Is the request in written form?
If **yes**, go on to 2.
If **no**, ask that the request be placed in written format.
2. Do you have a signed release from a competent patient?
If **yes**, go on to 3.
If **no**, obtain a signed release from the patient or, if the patient is not competent, from his or her legal guardian. (If competency is uncertain, e.g., the patient has deteriorated or competency has not been determined, an alternate course of action will be necessitated, e.g., contact the person who made the request and indicate you are not certain if the patient meets requirements to sign a release.)
3. Is the material to be released to a professional qualified to interpret the test data?
If **yes**, go to 4.
If **no**, go to 5.
4. Has the request included an assurance that test security will be maintained?
If **yes**, release the material.
If **no**, especially in certain circumstances (e.g., the psychologist is not known to you, litigation is ongoing), it may be prudent to ask for written assurance that test security will be maintained. The statement might indicate something like the following, "I agree to protect the test materials in accordance with the principles set forth in the APA Ethical Principles."
5. Is the request in the form of a subpoena (*not* a court order)?
If **yes**, respond in a timely fashion by indicating that complying with the request to release test data under these circumstances places the psychologist in conflict with professional practice guides and ethical principles and places him/her at risk for serious professional sanctions due to the need to maintain test security. Sections of the "APA Ethical Principles" and/or of the NAN Test Security Position Statement can be provided. The need to protect test security can be explained, and proposed solutions can be presented such as release to a qualified professional who agrees to maintain test security. If this is not satisfactory, alternative arrangements can be proposed; for example, all parties given access to test data

can assent to enter into a written agreement that contains the elements for protection of test materials. Alternatively, the suggestion can be made that a court order be issued containing these elements, at which time the data will be released.

If **no**, go on to 6.

6. Is the request in the form of a *court order* (i.e., signed by a judge)?

If **yes**, go to 7.

If **no**, the request should fall under one of the previously listed categories (e.g., an informal request, a subpoena), and the reader should consult that section.

7. Does the court order contain adequate provisions for maintaining test security?

If **yes**, release the material

If **no**, go to 8.

8. Does the court order require release to an unqualified individual?

If **yes**, go to 9.

If **no**, go to 10.

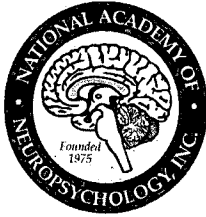
9. Court orders are expected to be obeyed in a timely fashion and failure to do so can place the professional in direct conflict with the law and at risk for serious penalties (e.g., award of attorney fees, contempt orders). If the court order does not appear to maintain adequate test security because it instructs release to a non-psychologist, possible options include:

- a. Respond to the court by immediately releasing the data, but at the same time request that appropriate safeguards be put in place to maintain test security. For example, the need to maintain test security might be, briefly described, the NAN Statement and/or sections of the APA Ethical Principles might be provided, and the following arrangements requested:

“I would ask that the test materials not be circulated beyond those directly involved in the case, that no unauthorized copies or reproductions be made, that the presentation of the test materials in the courtroom be minimized to the extent possible, that exhibits and courtroom records containing test materials be protected or sealed, and that all test materials be destroyed or returned upon the completion of the case”.

- b. Seek personal counsel immediately from an attorney licensed within your jurisdiction, and, if counsel deems it appropriate, inform the court that the request to release test data creates a potential problem. A solution to the problem can be proposed as in 9.a. above.

10. Court orders are expected to be obeyed in a timely fashion and failure to do so can place the professional in direct conflict with the law and at risk for serious penalties (e.g., award of attorney fees, contempt orders). If the court order commands release to a qualified professional and contains adequate provisions for maintaining test security, release the material. If adequate provisions are not contained the same type of suggestions described under 9.a. or 9.b. can be presented. It is not recommended that you disobey a court order without seeking advice of personal counsel licensed within your jurisdiction.



Test Security: An Update

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

Introduction

The National Academy of Neuropsychology's first official position statement on *Test Security* 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 *Test Security* 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 *Test Security* 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 *Test Security*

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).

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

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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Presence of Third Party Observers During Neuropsychological Testing

Official Statement of the National Academy of Neuropsychology

Approved 5/15/99

Forensic neuropsychological evaluations are often constrained by the demand that a third party observer be present during the course of interview and formal testing. This demand may originate from counsel's desire to ensure that the neuropsychologist does not interrogate or unfairly question the plaintiff with respect to issues of liability and to ascertain if test procedures are accurately administered. In general, neuropsychologists should have the right to carry out their examination in a manner that will not in any way jeopardize, influence or unduly pressure their normal practice.

The presence of a third party observer during the administration of formal test procedures is inconsistent with recommendations promulgated in *The Standards for Educational and Psychological Testing* (APA, 1985) and Anastasi (1988), that the psychological testing environment be distraction free. More recently, standardized test manuals (for example, *The WAIS-III, WMS-III Technical Manual*; The Psychological Corporation, 1997) have specifically stated that third party observers should be excluded from the examination room to keep it free from distraction. The presence of a third party observer in the testing room is also inconsistent with the requirements for standardized test administration as set forth in the APA's *Ethical Principles Of Psychologists and Code Of Conduct* (APA, 1992) in that it creates the potential for distraction and/or interruption of the examination (McSweeney et al., 1998).

A second issue that relates to the potential influence of the presence of a third party observer is the reliance upon normative data. Neuropsychological test measures have not been standardized in the presence of an observer. In fact, neuropsychological test measures have been standardized under a specific set of highly controlled circumstances that did not include the presence of a third party observer. The presence of a third party observer introduces an unknown variable into the testing environment which may prevent the examinee's performance from being compared to established norms and potentially precludes valid interpretation of the test results (McCaffrey, Fisher, Gold, & Lynch, 1996). Observer effects can be such that performance on more complex tasks declines, in contrast to enhanced performance on overlearned tasks, leading to a spuriously magnified picture of neuropsychological deficit (McCaffrey et al., 1996). Likewise, observation of an examination being conducted for a second opinion may fundamentally alter the test session, in comparison to the initial examination that the patient has already undergone, potentially creating an adversarial atmosphere, and increasing the risk of motivational effects related to secondary gain. Observer effects can be magnified by the presence of involved parties who have a significant relationship with the patient (e.g.

legal representatives who have a stake in the outcome of the examination; cf. Binder and Johnson-Greene, 1995). Thus, the presence of a third party observer during formal testing may represent a threat to the validity and reliability of the data generated by an examination conducted under these circumstances, and may compromise the valid use of normative data in interpreting test scores. Observer effects also extend to situations such as court reporters, attorneys, attorney representatives, viewing from behind one-way mirrors and to electronic means of observation, such as the presence of a camera which can be a significant distraction (McCaffrey et al., 1996). Electronic recording and other observation also raises test security considerations that are detailed in the National Academy of Neuropsychology's position statement on Test Security.

It should be noted that there are circumstances that support the presence of a neutral, non-involved party in nonforensic settings. One situation might be when students or other professionals in psychology observe testing as part of their formal education. These trainees have sufficient instruction and supervision in standardized measurement and clinical procedures, such that their presence would not interfere with the assessment process. Other situations might include a parent's calming presence during an evaluation of a child.

The weight of accumulated scientific and clinical literature with respect to the issue of third party observers in the forensic examination provides clear support for the official position of the National Academy of Neuropsychology that neuropsychologists should strive to minimize all influences that may compromise accuracy of assessment and should make every effort to exclude observers from the evaluation.

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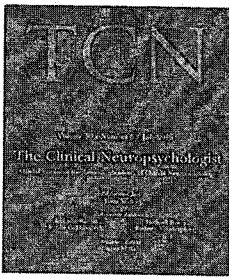
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Policy Statement on the Presence of Third Party Observers in Neuropsychological Assessments

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SPECIAL PRESENTATION

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 hemi-

paresis), 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 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.

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 plain-

tiff 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.

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 - III, 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 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

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 procedure 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 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

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*:

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

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 con-

fidentiality 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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